No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

JERRY N. BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

I. Should a certificate of appealability be issued to determine whether a predicate conviction that requires merely "physical force that overcomes reasonable resistance" satisfies the force clause of the ACCA?

II. Should a certificate of appealability be issued to determine whether a Missouri burglary conviction from 1969 is a violent felony because, like the contemporary Missouri burglary statute, it is a fatally overbroad and indivisible statute?

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Petitioner, Jerry N. Brown, respectfully requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 12, 2017, denying a certificate of appealability.

OPINION BELOW

The Eighth Circuit's judgement denying a certificate of appealability is included in Appendix A. A copy of the order denying rehearing is included in Appendix B. The district court's order denying a certificate of appealability is included in Appendix C.

JURISDICTION

On June 12, 2017, the judgment of the Court of Appeals denied a certificate of appealability, dismissing his appeal, and subsequently entered its order denying rehearing on July 20, 2017. In accordance with Supreme Court Rule 13.3, this Petition for Writ of Certiorari is filed within ninety days of the date on which the Court of Appeals entered its final order. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254, 28 U.S.C. § 2253 and Sup. Ct. R. 13.3 and 13.5.

CONSTITUTIONAL PROVISION INVOKED

The Fifth Amendment to the United States Constitution states that: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."."

STATEMENT OF THE CASE

A. Original Jurisdiction

Jurisdiction in the United States District Court for the Western District of Missouri was pursuant to 28 U.S.C. § 2255.

Mr. Brown sought a certificate of appealability from the United States Court of Appeals for the Eighth Circuit. Jurisdiction in that court was established by 28 U.S.C. § 1291 and 28 U.S.C. § 2253.

B. Facts and Proceedings Below

On August 28, 2007, Mr. Brown pled guilty to one count of being a felon in possession of a firearm. (Case No. 6:2005-cr-03166) On December 18, 2007, the district court sentenced Mr. Brown to 180 months' imprisonment. (Crim. DCD 68).

On June 26, 2015, the Supreme Court decided *Johnson v. United States*, 135 S.Ct. 2551 (2015), in which the Court held that increasing a defendant's sentence under the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), violates due process because the residual clause is void for vagueness.

On May 13, 2016, Mr. Brown filed a Motion to Correct Sentence under 28 U.S.C. § 2255 on the basis that, in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015), he was no longer an armed career criminal. (Case No. 6:2016-cv-03187) (Civ. DCD 1). The government filed its response in opposition on June 29, 2016. (Civ. DCD 9). On July 18, 2016, Mr. Brown filed his reply. (Civ. DCD 10). Subsequently, the district court entered an order on August 11, 2016, denying Mr. Brown's post-conviction relief motion, and denying the issuance of a certificate of

appealability. (Civ. DCD 11; Crim. DCD 79).

Mr. Brown sought an application for a certificate of appealability before the Eighth Circuit, but it issued its Judgment denying the certificate of appealability, and dismissed the appeal. *See* June 12, 2017 Judgment (Appendix A). Mr. Brown filed a petition for rehearing, but the Eighth Circuit denied that, too. *See* July 20, 2017 Order (Appendix B).

ARGUMENT

The constitutional issue that will be presented on appeal is whether Mr. Brown's ACCA sentence is unconstitutional based on *Johnson v. United States*, 135 S.Ct. 2551 (2015), because he no longer has three qualifying "violent felony" convictions. Below, the government conceded that Mr. Brown had only three convictions that could possibly qualify as a "violent felony", and that Mr. Brown's post-conviction relief motion raised a proper constitutional claim based on the void ACCA residual clause. *See In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016). Thus, if any one of the three predicate convictions is not a "violent felony", it necessarily follows that Mr. Brown is entitled to post-conviction relief. *See Johnson v. United States*, 135 S.Ct. 2551, 2560 (2015)(emphasis added) (holding that an improper ACCA sentence was unconstitutional because "*condemn[ing] someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process*.").

I. Missouri sexual assault is not a violent felony because "physical force that overcomes reasonable resistance" does not satisfy the ACCA's force clause.

A. Legal standards for a certificate of appealability.

A certificate of appealability ("COA") must issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.'" *Welch v. United States*, 136 S.Ct. 1257, 1263–64, 194 L. Ed. 2d 387 (2016)(quoting *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)). Obtaining a certificate of appealability "does not require a showing that the appeal will succeed," and "a court of appeals should not decline the application merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 1263-64 (quoting *Miller–El v. Cockrell,* 537 U.S. 322, 337, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)).

B. Why a COA should issue to Mr. Brown on this issue.

Mr. Brown's prior conviction for Missouri sexual abuse in the first degree, §566.100 RSMo, is not a "violent felony" under the ACCA. Thus, Mr. Brown is entitled to a COA.

Under § 924(e) of the ACCA, a prior offense qualifies as a "violent felony" if it satisfies the following definition:

> (B) The term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that –

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.*

18 U.S.C. § 924(e)(2).

The above italicized portion of the statute—known as the residual clause or "otherwise clause"—was found to be unconstitutionally vague in *Johnson v. United States*, 135 S.Ct. 2551 (2015). This Court made the new substantive rule announced in *Johnson* retroactive to cases on collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016).

Missouri sexual abuse in the first degree is not an enumerated offense in 18 U.S.C. § 924(e), nor does it have as an element the use, threatened use, or attempted use of violent physical force against the person of another based on *Johnson v. United States*, 559 U.S. 133 (2010) ("*Johnson I*"). In that case, the Supreme Court provided guidance regarding the meaning of "violent felony," and the level of force required to meet the definition of that type of offense. *Id*. *Johnson I* elevated the necessary quantum of force from de minimis to violent. *See United States v. Castleman*, 134 S.Ct. 1405, 1410-11 (2014).

Before the district court, it was undisputed that the *Shepard* documents in Mr. Brown's underlying Missouri sexual assault case charged that he subjected the victim to sexual contact without her consent by the use of "forcible compulsion." *See* Exhibit 1, Civ DCD 5-1; *see also* §566.100 RSMo. At the time of his conviction,

Missouri defined forcible compulsion at §556.061(27), RSMo, as the following:

> "Forcible compulsion" either:
> (a) Physical force that overcomes reasonable resistance, or
> (b) A threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of such person or another person.

Id.

The charging document did not specify in what way under the statute Mr. Brown exercised forcible compulsion. The rule of lenity dictates that the Court assume it was in the least culpable way permitted by the definitional statute. *See United States v. Bell*, 840 F.3d 963, 966 (8th Cir. 2016)("[W]hen our focus is on the generic elements of the offense—as is the case here—rather than a specific defendant's conduct, we must consider the lowest level of conduct that may support a conviction under the statute.").

On direct appeal, a panel of the Eighth Circuit concluded that Mr. Brown's conviction for Missouri sexual assault satisfied the force clause of the ACCA. *United States v. Brown,* 323 Fed.Appx. 479, *2 (8th Cir. 2009) (unpublished).[1] In so concluding, the panel issued a one sentence analysis to conclude that Mr. Brown's sexual abuse conviction was a "violent felony", and did not even turn to the definition of "forcible compulsion." *Id*. It is respectfully submitted that this is a red flag that this decision was wrongly decided, especially since this Court did not have *Johnson I* as guidance.

[1] For the reasons highlighted below, the law of the case doctrine is not a bar to post-conviction relief. *See infra*, pg. 10-12.

"Physical force that overcomes resistance" under §556.061(27)(a) is not the violent, physical force required by the Supreme Court in *Johnson I* for a violent felony. 559 U.S. at 138. Sexual abuse in the first degree can only be a crime of violence under the force clause if it has, as an element, the use, threatened use, or attempted use of physical force against the person of another. *Id*. Although the definition of forcible compulsion in §556.061(27)(a) includes "physical force that overcomes reasonable resistance," the inquiry does not end there.

When determining whether a statute "requires the level of violent force described in *Johnson*, we must consider not just the language of the state statute involved, but also the Missouri courts' interpretation of the elements of [the statutory crime]." *United States v. Bell*, 840 F.3d 963, 965–66 (8th Cir. 2016)(citing *Johnson I,* at 138)("We are ... bound by the [state] Supreme Court's interpretation of state law, including its determination of the elements of [the state statute.]")

Thus, this Court must examine and be bound by the Missouri courts' interpretation of its statute. If the element of "forcible compulsion" defined as "[p]hysical force that overcomes resistance" under §556.061(27)(a) RSMo, may be satisfied by conduct under Missouri caselaw that does not satisfy the Supreme Court's definition of "physical force," then sexual abuse in the first degree is not a "violent felony". *Johnson I*, 559 U.S. at 140 ("physical force" means "violent force—that is, force capable of causing physical pain or injury to another person"). Stated another way, the touchstone issue is whether the Missouri courts have held that "forcible compulsion" can be accomplished with anything less than the violent force

necessary to meet the force clause. They have.

In *State v. Brummell*, 731 S.W.2d 354 (Mo. App. 1987) the Missouri Court of Appeals found that sufficient force had been proven by the State when the defendant twice grabbed the victim's hand and placed it on defendant's penis for sexual gratification, and then the defendant ran away when the victim pushed him away. *Id*. at 355-56. The Court required no evidence of pain, potential pain, or injury for a conviction under §566.100 RSMo. *Id*.

Likewise, the Missouri Supreme Court did not require violent, physical force to sustain a conviction under §566.100 RSMo in *State v. Vandevere*, 175 S.W.3d 107 (Mo. banc 2005). The facts of *Vandevere* are that prior to the sexual acts, the defendant took the victim to his hotel room, sat on the bed, grasped her hand and jerked her arm to bring her toward him. *Id*. at 109. There was no mention of pain, potential pain, or injury. *Id*. In response to the defendant's claim that there was insufficient evidence of forcible compulsion, the court held that "physical force" as used in the definition of forcible compulsion, is "simply force applied to the body" and "calculated to overcome resistance." *Id*. The victim's resistance was not physical, but instead amounted to crying during the sexual acts that indicated "she was under duress." *Id*. This evidence, while sufficient for a conviction under the Missouri statute, does not amount to violent physical force under *Johnson I*.

Finally, in *State v. Niederstadt*, 66 S.W.3d 12 (Mo. banc 2002), the Missouri Supreme Court listed factors that could be considered in determining whether the force applied was sufficient to overcome resistance. *Id*. at 15. The factors include the

age difference between the defendant and the victim, and whether the defendant had any authority over the victim. *Id*. But none of these factors analyze whether violent force was used, as required by *Johnson I.* Notably, the difference in age is a factor which the Eighth Circuit cited when holding that Missouri statutory rape is a violent felony under the void *residual clause* of the ACCA. *See United States v. Mincks*, 409 F3d 898, 900 (8th Cir. 2005)(holding that "physical injury is a serious potential risk" from the crime).[2]

For all of these reasons a COA should be issued to Mr. Brown to appeal whether Missouri sexual assault is a "violent felony" because reasonable jurists could and should debate the resolution of this issue as a matter of law.

C. Mr. Brown is otherwise entitled to a COA to appeal whether Missouri sexual assault satisfies the force clause of the ACCA.

Because the Eighth Circuit did not elaborate on its reasoning for denying Mr. Brown's application for a COA, it should be highlighted that there are no other meritorious grounds to deny the COA. In denying Mr. Brown's § 2255 motion and

[2] Additionally, a Missouri sexual assault conviction may be sustained if it involved "forcible compulsion" under a "threat, express or implied, that places a person in reasonable fear of death, serious physical injury or **kidnapping** of such person or another person." §556.061(27)(b)(emphasis added). The Tenth Circuit has concluded that Missouri kidnapping does not satisfy the force clause. *United States v. Phelps*, 17 F.3d 1334 (10th Cir. 1994)(finding that a Missouri kidnapping statute was instead a violent felony under the now void ACCA residual clause). This is relevant to Missouri sexual assault because the crime may be committed under the second prong of the "forcible compulsion" definition, by a mere threat that places another in fear of being kidnapped under §566.100. Again, this does not satisfy the force clause for the aforementioned reasons.

application for COA, the district court held that the law of the case doctrine prevented the court from reaching the merits of Mr. Brown's post-conviction. (Crim. DCD 79, pg. 3). This is incorrect.

Appellate courts have identified no less than two exceptions to the law of the case doctrine within the specific context of § 2255 motions, which makes sense because by its very nature a § 2255 motion seeks to re-examine and correct the prior proceedings. *First*, the law of the case doctrine does not preclude disturbing a prior ruling if there is "an intervening change in controlling authority." *Baranski v. United States,* 515 F.3d 857, 861 (8th Cir. 2008). *Second*, the law of the case doctrine does not preclude courts from reconsidering and correcting an erroneous decision to prevent a manifest injustice. *United States v. Serpa,* 930 F.2d 639, 640 (8th Cir. 1991). For the reasons articulated herein, this Court should reach the merits of Mr. Brown's § 2255 motion based on both exceptions to the law of the case doctrine because there has been an intervening change in controlling authority on the substantive issues, and also because a manifest injustice would result in Mr. Brown serving an illegal and unconstitutional sentence.

The district court refused to reach the merits of Mr. Brown's claim that his prior conviction for Missouri sexual assault in the first degree is not a violent felony because it concluded that he was "prohibited from relitigating the issue in a motion to vacate." (Crim. DCD 79, pg. 3). Although the district court was correct that Mr. Brown's challenge to that prior conviction was unsuccessful on direct appeal in *United States v. Brown*, 323 Fed. Appx. 479 (8th Cir. 2009), that does not dispose of

the issue of whether the law of the case doctrine is applicable to Mr. Brown's post-conviction relief proceeding.

Critically, Mr. Brown's direct appeal was final before the Supreme Court's decision in *Johnson v. United States*, 559 U.S. 133 (2010) ("*Johnson I*"). In that case, the Supreme Court provided guidance regarding the meaning of "violent felony," and the level of force required to meet the definition of that type of offense. *Id.* "Johnson [I] elevated the necessary quantum of force from de minimis to 'violent, . . . *and thereby casts sufficient doubt on the reasoning of some pre-Johnson holdings regarding crimes of violence*." *United States v. Eason*, 829 F.3d 633, 641 (8th Cir. 2016)(emphasis added). The prior decision in Mr. Brown's case, *United States v. Brown*, 323 Fed. Appx. 479 (8th Cir. 2009), is therefore subject to challenge based on the Supreme Court's intervening decision of *Johnson I.*

Additionally, for the reasons highlighted above, Missouri sexual assault is not a violent felony under the force clause of the ACCA after *Johnson I*, and thus the panel decision in *Brown* from 2009 is no longer controlling authority. It would constitute a manifest injustice to conclude to the contrary after this Court's holding in *Johnson I.* Stated another way, *Brown* does not preclude or prevent a COA being issued by this Court as a matter of law.

II. Mr. Brown's burglary conviction from a 1969 Missouri statute is not a violent felony because, like the contemporary Missouri burglary statute, it is a fatally overbroad and indivisible statute.

In denying post-conviction relief, the district court concluded that Mr. Brown's Missouri burglary conviction from a 1969 Missouri statute was a violent felony. It is respectfully submitted that this conclusion was, *at a minimum*, one that reasonable jurists could debate because the district court relied heavily on a panel decision in *United States v. Sykes*, 844 F.3d 712 (8th Cir. 2016), to reach its conclusion. *Id*. The validity of *Sykes* is currently being reconsidered *en banc* by the Eighth Circuit, in *United States v. Charles Naylor*, 16-2047. This on-going debate in the Eighth Circuit highlights precisely why a COA should issue to Mr. Brown on this issue.

In *Naylor,* the Eighth Circuit will reconsider whether Missouri burglary is a categorically overbroad and indivisible statute, and therefore is not a "violent felony." *En banc* oral argument were just recently held in *Naylor* on September 19, 2017. As will be illustrated below, it cannot be disputed that the district court's analysis, denying Mr. Brown's post-conviction relief motion, hinges on *Sykes*. Thus, if *Sykes* is overruled by *Naylor,* it would follow that Mr. Brown is entitled to post-conviction relief.

A. Missouri's 1969 burglary statute is overbroad and indivisible for similar reasons why the contemporary Missouri statute is overbroad and indivisible.

Section 560.070 RSMo (1969) prohibited the breaking and entering of "any building, the breaking and entering of which shall not be declared by any statutes of

this state to be burglary in the first degree, or any booth or tent, or any boat or vessel, or railroad car."

Pursuant to the categorical analysis recently outlined by the Supreme Court in *Mathis v. United States*, 136 S.Ct. 2243 (2016), the district court properly concluded that this burglary statute, §560.070, was overbroad because "burglary that includes the unlawful entry of a booth, tent, boat, vessel, or railroad car likely does not constitute generic burglary." (Civ. DCD 27, pg. 5). Thus, it was undisputed by both the district court and the government that if § 560.070 were indivisible, Mr. Brown's burglary conviction would not constitute a "violent felony." *Id*.

Relying on *Sykes*, the district court concluded that §560.070 was divisible because the "predecessor burglary statute, at issue here, is similar" to the current burglary statute analyzed in *Sykes*. (Civ. DCD 27, pg. 5). *Sykes* was wrongly decided, and may be imminently overturned by the Eight Circuit in *Naylor*.

B. Why *Sykes* was wrongly decided, and should be overturned by the Eighth Circuit in *Naylor*.

Because the district court relied on *Sykes* to deny Mr. Brown's § 2255 motion, its critical to understand why that holding was wrongly decided. These are the reasons why *Sykes* may be imminently overturned by the Eighth Circuit in *Naylor*.

In *United States v. Sykes*, 809 F.3d 435, 438 (8th Cir. 2016), Mr. Sykes was convicted of being a felon in possession of numerous firearms and was sentenced as an armed career criminal based, in part, on two prior convictions for Missouri second-degree burglary. A panel of the Eighth Circuit concluded that Missouri

burglary largely conformed to the generic definition of burglary, but acknowledged Mr. Sykes' argument that it was overbroad since the term "inhabitable structure" included things such as a ship, trailer, and sleeping car. *Id*.

Without addressing whether Missouri second-degree burglary was a divisible statute—even though *Descamps v. United States* had been decided years earlier—the panel jumped to modified categorical analysis and considered unobjected-to factual information contained in the PSR, which said that Mr. Sykes had unlawfully entered commercial buildings. *Id*. The panel noted that this Court's decision in *Johnson* did not affect the result, since *Johnson* only invalidated the residual clause of the ACCA. *Id*. at 439. The panel concluded, saying, "Sykes's prior second-degree burglary convictions fit within the generic definition of 'burglary' for purposes of the ACCA and each constitutes a violent felony under 924(e)." *Id*.

Mr. Sykes filed a petition for certiorari, and this Court granted the petition, vacated the judgment, and remanded to the Eighth Circuit for further consideration in light of *Mathis*, which had been decided after the panel's decision. *Sykes v. United States*, 137 S.Ct. 124 (2016). On remand, the same panel affirmed Mr. Sykes' sentence under the ACCA. *United States v. Sykes*, 844 F.3d 712, 714 (8th Cir. 2016). The panel again acknowledged Sykes' argument that the burglary statute was overly broad, but said, "the statute contains at least two alternative elements: burglary 'of a building' and burglary of 'an inhabitable structure,' separated in the text by the disjunctive 'or.' *Id*. at 715. Because the state court indictments said that Mr. Sykes had unlawfully entered buildings, the prior convictions conformed to

generic burglary and were ACCA predicates. *Id*. The panel said that because burglary of a building described an element of second-degree burglary rather than a means, its decision did not "run afoul of *Mathis*." *Id*. That was the extent of the court's analysis.

Mr. Sykes filed a petition for rehearing *en banc*. The petition was denied in a 5 to 4 decision in which the dissenting judges offered a written opinion. *United States v. Sykes*, No. 14-3139 (8th Cir. March 17, 2017). They agreed with Mr. Sykes' complaint that the panel opinion included no actual analysis pursuant to *Mathis*; indeed, the panel opinion rested entirely on the fact that the words "building" and "inhabitable structure" were phrased in the disjunctive. The dissent found the panel opinion's "one-line decision" on the issue of divisibility to be deficient and observed that the means or elements debate required, under *Mathis*, an analysis of state court decisions, the statute on its face, and possibly the record of the prior convictions. *Id*. at 3. The dissent said, "To observe that the statute is phrased in the disjunctive merely *raises* the question of means versus elements; it does not answer the question." *Id*. (emphasis in the original).

The dissent's analysis follows binding Supreme Court precedent. Simply because the word "or" appears in the statute between "building" and "inhabitable structure" does not make it a divisible statute. A list of alternative means of committing burglary would also be phrased in the disjunctive, as was the case with the Iowa burglary statute analyzed in *Mathis*. 136 S.Ct. at 2250 (quoting Iowa Code § 702.12 (2013) which defined occupied structure as "any building, structure,

appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation . . .”). By refusing to engage in the analysis mandated by *Mathis*, the panel in *Sykes* reached the wrong legal conclusion.

Sykes’ dispositive reliance on the term “or” in the Missouri burglary statute makes the opinion an outlier in the circuit courts. Other circuits have rejected this analysis, or lack thereof. The Tenth Circuit recently concluded that in conducting the means/elements test to determine divisibility *“[i]t is not enough that a statute is framed in the disjunctive*.” *United States v. Tittles*, 852 F.3d 1257, 1267 (10th Cir. 2017) (emphasis added) (concluding that Okla. Stat. tit. 1289.16 (1995) lists alternative means, not elements). “As the Court stressed in *Mathis*, the statutory phrases listed in the alternative must be elements, not means.” *Id*.

The Third, Seventh, and Ninth Circuits have all reached the same conclusion. *See United States v. Steiner*, 847 F.3d 103, 119 (3d Cir. 2017)(holding that a Pennsylvania burglary statute was indivisible after *Mathis*, even though the locational element was defined in the disjunction as “enter[ing] a building or occupied structure . . .”); *see also United States v. Edwards*, 836 F.3d 831, 836-38 (7th Cir. 2016)(holding that Wisconsin burglary was indivisible after *Mathis*, notwithstanding that the statute provides that the relevant provision in question, “building or dwelling,” is one of several disjunctively phrased lists that appear within these subsections); *see also Rendon v. Holder,* 764 F.3d 1077, 1086 (9th Cir. 2014)(“Thus, when a court encounters a statute that is written in the disjunctive

(that is, with an 'or'), *that fact alone cannot end the divisibility inquiry*.")).

No other circuit court case was located that placed dispositive reliance on the use of the word "or" in conducting the categorical analysis. To be sure, other circuits have analyzed various state burglary statutes, and concluded that they were divisible. But, in doing so, they engaged in a probing analysis of state case law and close examination of the statutes in question. *See United States v. Gundy*, 842 F.3d 1156, 1167-68 (11th Cir. 2016)(engaging in a thorough analysis of Georgia case law before concluding that burglary statute listing various locations was divisible); *United States v. Uribe*, 838 F.3d 667, 670 (5th Cir. 2016)("Unlike the state statute at issue in *Mathis* . . . the Texas burglary statute does not provide an illustrative list or outline multiple ways to satisfy a single element.").

Other circuit courts have followed *Mathis* and done what is required by this Court when distinguishing means from elements. The Eighth Circuit, on the other hand, has created a circuit split with its cursory analysis, that may be overturned by the court *en banc* in *Naylor* in the short term future.

C. Missouri state case law highlights why the Missouri 1969 burglary statute is indivisible.

Another problem with the district court's analysis is that *Mathis* found state case law dispositive to the specific issue of divisibility. *See Mathis*, 136 S.Ct. at 2256 ("Armed with such authoritative sources of state law, federal sentencing courts can readily determine the nature of an alternatively phrased list."). Here, the district court failed to cite to any of the Missouri cases relied on by the parties in their

briefs as to how the categorical analysis should be applied to § 560.070. This analysis was extensive, and illustrated that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." *Welch v. United States*, 136 S.Ct. 1257, 1263–64 (2016).

Specifically, the Missouri Court of Appeals in *State v. Scilagyi*, 579 S.W.2d 814 (Mo. App. 1979), analyzed the Missouri statute in a way which proves its indivisibility. In that case, the court found that Mr. Scilagyi's burglary conviction could stand only if the trailer he entered was a "building" within the meaning of the statute, because it failed to meet the definition of any other location listed in the statute. Refusing to expand the terms of the statute beyond the enumerated means listed, and because the trailer did not meet the definition of any of the movable structures listed in the statute, the court found Scilagyi's conviction could only be affirmed if the trailer met the definition of "building," which it did not. *Scilagyi* at 817-19. The trailer did not meet the definition of any of the means listed that could satisfy the locational element of the statute, and Scilagyi's conviction was reversed. *Id*.

Before the district court, the government cited to no Missouri case which supports the theory that § 560.070 is a divisible statute. (Civ. DCD 18). The government instead cited *Scilagyi* for its definition of "building", omitting the fact that the court attempted to fit the burglarized trailer into any of the locations listed in the statute before ultimately determining it met the definition of none of those structures. *Id. Scilagyi* mandates the conclusion that the locations listed in the

statute are one singular indivisible element.

For all of the aforementioned reasons, it is respectfully submitted that Mr. Brown should have the plenary opportunity to present these issues, fully raised before the district court, on appeal, pursuant to this Court issuing a COA.

III. This Court should issue a Certificate of Appealability.

A COA should be granted in this matter because Mr. Brown made a substantial showing of the denial of a constitutional right. *See Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000). That is, Mr. Brown has demonstrated that the issues are debatable among reasonable jurists, a court could resolve the issues differently, and/or that the issues deserve further proceedings. *Id*. Accordingly, this Court should grant a COA.

With regard to the first part of the COA standard, Mr. Brown's claim involves a denial of his constitutional right to due process because *Johnson* held that increasing a defendant's sentence under the residual clause violates due process of law. Since that is the basis for Mr. Brown's enhanced sentence, his sentence violates his constitutional right to due process. With regard to the second part of the COA standard, the substance of Mr. Brown's claim is debatable among reasonable jurists for the reasons highlighted above. Accordingly, the Court should issue a certificate of appealability to allow further proceedings in compliance with 28 U.S.C. § 2253(c)(1) and Federal Rule of Appellate Procedure 22(b).

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Brown respectfully requests that this Court grant his petition for certiorari. Mr. Brown further asks that the Court reverse the Eighth Circuit's opinion that refused to grant a certificate of appealability, vacate the judgment, and remand to the United States Court of Appeals for the Eighth Circuit to issue the certificate of appealability.

Respectfully submitted,

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APPENDIX

Appendix A - Judgement of the Eighth Circuit Court of Appeals

Appendix B – Order denying rehearing by the Eighth Circuit Court of Appeals

Appendix C – District Court's Order Denying Certificate of Appealability