No. _____

IN THE
Supreme Court of the United States

CHARLES H. CASEY, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), this Court held that a sentence enhanced under the "residual clause" of the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e)(2)(B), violated the Due Process Clause. In *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), this Court established that *Johnson*'s invalidation of the residual clause was retroactively applicable to cases on collateral review.

The question presented is:

Whether a court may grant a 28 U.S.C. § 2255 petition collaterally challenging a sentence under *Johnson* when the sentencing judge never specified—and therefore the record is silent on—whether the petitioner's original sentence was enhanced pursuant to the ACCA's now-invalidated residual clause?

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Charles H. Casey, Jr., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINION BELOW

The decision of the First Circuit (Pet. App. 1a) is reported at 881 F.3d 232 (1st Cir. 2018). The decision of the district court (Pet. App. 31a) is unreported.

JURISDICTION

The judgment of the First Circuit was entered on February 2, 2018.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

18 U.S.C. § 924(e)(1) provides, in part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]

18 U.S.C. § 924(e)(2)(B) provides, in part:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that—

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[1] The district court had jurisdiction over this case pursuant to 28 U.S.C. § 2255(a).

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

28 U.S.C. § 2255 provides:

> **(a)** A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> **(b)** Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge

the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

INTRODUCTION

The so-called "residual clause" of the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e)(2)(B), defined a "violent felony" to include "conduct that presents a serious potential risk of physical injury to another." In *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015), this Court invalidated the residual clause, finding "the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." In *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), this Court established that *Johnson*'s invalidation of the residual clause was a substantive rule "that has retroactive effect in cases on collateral review." As a result of *Johnson* and *Welch*, a clear and entrenched three-way conflict among the circuits has now arisen over what a defendant must show in order to qualify for retroactive collateral relief under *Johnson*.

In 2012, Petitioner Charles H. Casey, Jr., pled guilty to being a felon in possession of a firearm. Pet. App. 51. Because he had *inter alia* three prior convictions in Maine for burglary, the district court found Mr. Casey was covered by the ACCA, and imposed the mandatory-minimum sentence of 180 months. Absent the ACCA enhancement, Mr. Casey's maximum sentence would have been 120 months. As the Court of Appeals noted, "the record is silent as to which ACCA clause—enumerated or residual—the district court earlier relied on" in sentencing Mr. Casey. Pet. App. 11a. In June 2016, after this Court's decisions in *Johnson* and *Welch*, Mr. Casey filed a motion to correct his sentence under 28 U.S.C. § 2255, arguing that Maine burglary convictions

could have qualified as ACCA predicates under only the now-invalidated residual clause. Pet. App. 61, *see also* Pet. App. 46a. In affirming the district court's denial of Mr. Casey's motion, the First Circuit, over Judge Torruella's dissent, held that when bringing a collateral challenge to a sentence under *Johnson* "[t]he burden should fall on the petitioner to establish by a preponderance of the evidence . . . that his ACCA sentence rested on the residual clause." Pet. App. 19a. Because the sentencing judge never explained—and the record was otherwise silent on—the basis for Mr. Casey's sentence, the First Circuit found Mr. Casey had failed to demonstrate that his § 2255 motion relied on *Johnson* and *Welch*. The First Circuit thus found the petition "time-barred, [and did] . . . not reach the merits of the petitioner['s] argument that [his] predicate offense[] no longer qualif[ies] under the ACCA because *Johnson[]* voids the residual clause . . . ." Pet. App. 7a.

In so ruling, the First Circuit created a three-way circuit split between itself; the Eleventh Circuit, which found that such petitions are timely but fail on the merits, *see Beeman v. United States*, 871 F.3d 1215, 1221-22 (11th Cir. 2017); and the Fourth and Ninth Circuits, which found such petitions both timely and meritorious, *see United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017). In addition, the Tenth Circuit ruled in a manner similar, but not identical, to the Eleventh Circuit, *see United States v. Snyder*, 871 F.3d 1122, 1129 (10th Cir. 2017), *petition for cert. filed*, No. 17-7157 (U.S. Dec. 19, 2017), and the Fifth Circuit noted the confusion in the circuits but has yet to take a defined position, *see United States v. Taylor*, 873 F.3d 476, 482 (5th Cir. 2017).

If Mr. Casey's § 2255 petition had arisen in the Fourth or Ninth Circuits, it have been deemed timely, and he would have prevailed on the merits. If Mr. Casey's § 2255 petition had arisen in the Eleventh and likely Tenth Circuits, his petition would have been deemed timely, but denied on the merits. But because Mr. Casey's § 2255 petition arose in the First Circuit, it was denied as untimely and never considered on the merits. There is no reason in law or logic for functionally identical petitions to be treated differently based solely on the geographic location of the court reviewing the petition. This Court's review is needed to restore the uniform, and fair, applicability of federal habeas relief, nationwide.

The petition for certiorari should be granted.

STATEMENT OF THE CASE

A. Johnson and *Welch*

The First Circuit's holding in this case centers on two of this Court's recent decisions. A brief review of those decisions is beneficial to understanding the factual context in which Mr. Casey's case arises.

In the ACCA, Congress provided that an individual who is unlawfully in possession of a firearm in violation of 18 U.S.C. § 922(g) will receive an enhanced mandatory minimum sentence of fifteen years (as opposed to the ten-year sentence that would otherwise apply) if the individual has three or more prior convictions for a

"serious drug offense" or a "violent felony." 18 U.S.C. § 924(e)(1). The ACCA defined "violent felony" as:

> [A]ny 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;[2] or
>
> (ii) is burglary, arson, or extortion, involves use of explosives,[3] *or otherwise involves conduct that presents a serious potential risk of physical injury to another*[.]

18 U.S.C. § 924(e)(2)(B) (emphasis added). The italicized portion of the definition has been referred to as the "residual clause."

In *Johnson*, this Court held that the residual clause was unconstitutionally vague and could not serve as the basis for an enhanced sentence. 135 S. Ct. at 2557. The Court based its holding on two features of the residual clause. *First*, when applying the residual clause, judges must adopt the "categorical" approach and look at the elements of a crime of conviction, not the particular facts of the crime as committed by the defendant. *Id.* As a result, the Court found the residual clause left "grave uncertainty" as to how a judge should "estimate the risk" of physical injury posed by any particular crime, because it in essence required courts to hypothesize what type of conduct an "ordinary" instance of a particular crime would entail. *Id.* The Court found no

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[2] This clause is commonly referred to as the "force clause."

[3] This clause is commonly referred to as the "enumerated clause" or the "elements clause."

discernable guidepost existed for how judges were to make that determination. *Id.* at 2557-58. *Second*, and compounding this problem, the Court found the residual clause left unacceptable "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. The Court observed that the residual clause had left both this Court and the lower courts riven with "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." *Id.* at 2560. As such, the Court concluded "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Id.*

In *Welch*, a little less than a year after *Johnson*, this Court addressed the retroactive applicability of *Johnson*'s invalidation of the ACCA's residual clause. Applying the general framework from *Teague v. Lane*, 489 U.S. 288, 311-13 (1989), the Court recognized that while new rules of criminal *procedure* do not become applicable to cases that are already final at the time the rule is announced, new *substantive* rules generally do apply retroactively. *Welch*, 136 S. Ct. at 1264. A rule is substantive when it "alters the range of conduct or the class of persons that the law punishes." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). Applying this test, the Court concluded *Johnson* had announced a substantive rule. *Welch*, 136 S. Ct. at 1265. Prior to *Johnson*, a felon in possession of a firearm with three qualifying prior convictions, one of which was covered by only the residual clause, faced a mandatory minimum sentence of fifteen years. *Id.* After "*Johnson*, the same person engaging in the same conduct is no longer subject

to the Act and faces at most 10 years in prison." *Id.* As such, "*Johnson* changed the substantive reach" of the ACCA. *Id.* The Court thus found "*Johnson* is retroactive in cases on collateral review." *Id.* at 1268.

B. Factual Background

In 2012, petitioner Charles H. Casey, Jr., pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). During sentencing, the district court concluded that Mr. Casey qualified for an ACCA sentencing enhancement based on three prior Maine convictions for burglary in violation of 17-A M.R.S.A § 401. *See* Pet. App. 39a-40a.[4] But the sentencing judge, as was common at the time, never expressed under which clause—the force clause, the enumerated clause, or the residual clause—Mr. Casey's prior convictions qualified as violent felonies. The sentencing record is therefore silent on the issue and no evidence in fact exists.

The government noted at sentencing that at the time of his offense Mr. Casey "was struggling with some mental illness," Pet. App. 56a, and the court itself acknowledged having received "very moving letters,"

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[4] According to Mr. Casey's revised presentence report, Mr. Casey "had five prior Maine convictions that qualified, four of them involving burglary." Pet. App. 39a. As the district court noted, the government has conceded that the fifth conviction—for participation in a drug conspiracy—did not in fact qualify as an ACCA precedent. Pet. App. 39a-40a at n.10; *see also* Gov't Resp. in Opp'n to Def.'s Mot. to Correct Sentence at 2 n.1, *Casey v. United States*, 2:11-cr-00216-DBH (D. Me., Aug. 29, 2016), ECF No. 72 ("The Government concedes that two other convictions cited in the PSIR, for terrorizing and for criminal conspiracy to traffic in heroin, do not qualify as ACCA predicates.").

Pet. App. 61, concerning Mr. Casey's situation. Nonetheless, the court stated "the statute that Congress has passed means that I cannot sentence you to less than 15 years . . . . [T]hat's the sentence that Congress requires me to hand down." Pet App. 61a. Mr. Casey was thus sentenced to fifteen years imprisonment followed by five years of supervised release. Pet. App. 62a

In June 2016, after this Court decided *Welch*, Mr. Casey moved the district court to vacate and correct his sentence under 28 U.S.C. § 2255. Pet. App. 46a. In his motion, Mr. Casey argued "[u]nder the Supreme Court's decision in *Johnson[]*, made retroactive to Casey in *Welch[]*, Casey no longer meets the criteria for application of ACCA." Pet. App. 46a. Focusing specifically on the ACCA predicate convictions, Mr. Casey argued "Maine burglary convictions under 17-A M.R.S.A. § 401 are not generic burglary and while may have previously qualified under the residual clause, no longer qualify." Pet. App. 47a. Thus, because absent the Maine burglary convictions Mr. Casey would no longer qualify for an ACCA enhancement, Mr. Casey argued he should be sentenced to a term of imprisonment no longer than ten years. Pet. App. 50a.

The district court—the very same judge that had originally sentenced Mr. Casey—denied Mr. Casey's motion. Pet. App. 45a. The government argued that Mr. Casey had procedurally defaulted his *Johnson* claim by failing to object to the ACCA's residual clause as vague during his sentencing. Pet. App. 33a. Applying the familiar "cause" and "actual prejudice" standard for excusing a procedural default, Pet. App. 33a (quoting

United States v. Frady, 456 U.S. 152, 167-68 (1982)), the district court found Mr. Casey had shown cause for failing to raise his *Johnson* claim pre-*Johnson*, but that he could not show actual prejudice, Pet. App 38a-39a.

The court began by applying this Court's standard that "cause" to excuse procedural default is satisfied "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." Pet. App. 33a (quoting *Reed v. Ross*, 468 U.S. 1, 16 (1984)). That standard for "novelty" is met when "a decision of [the Supreme] Court may explicitly overrule one of our precedents." Pet. App. 34a (quoting *Reed*, 468 U.S. at 17). The district court found Mr. Casey met this standard for cause because in holding the residual clause unconstitutional in *Johnson*, this Court had overruled its prior decisions in *James v. United States*, 550 U.S. 192 (2007) and *Sykes v. United States*, 564 U.S. 1 (2011). *See* Pet. App. 35a, 38a. Thus, the court held "Casey's *Johnson* claim is a novel constitutional claim that applies retroactively, and he has therefore shown cause for his default." Pet. App. 38a.

Turning next to prejudice, the district court sought to determine whether, regardless of the invalid residual clause, "Casey's prior Maine burglary convictions still constitute predicate offenses under the ACCA's enumerated clause." Pet. App. 38a. The court observed "Casey has a strong argument that they do not," but found itself bound by First Circuit case law, necessitating Mr. Casey "to make his argument challenging that caselaw in an appeal to the First Circuit." Pet. App. 38a-39a. Specifically, in *United States v. Duquette*, 778 F.3d 314, 317-318 (1st Cir.

2015)—a case that post-dated Mr. Casey's sentencing—the First Circuit held that Maine's burglary statute qualifies as generic burglary and thus was an enumerated crime under the ACCA. Pet. App. 41a. After *Duquette*, however, this Court decided in *Mathis v. United States*, 136 S. Ct. 2243, 2250-51 (2016), that state burglary statutes covering unlawful entry into locations—like vehicles—other than permanent structures do not qualify as predicate offenses under the ACCA. The district court found that "*Mathis* has [ ] cast significant doubt on the continued vitality of *Duquette*" because the Maine burglary statute "encompasses camping vehicles, trailers, sleeper trains, and airplanes and boats with sleeping accommodations, [and therefore] seems to have a broader locational element than generic burglary." Pet. App. 43a-44a. But, the district court "le[ft] that conclusion to the First Circuit." Pet. App. 44a. Crucially, nowhere in its decision did the district court—despite having personal knowledge of the basis for Mr. Casey's sentencing—hold that Mr. Casey had suffered no prejudice because the court had sentenced Mr. Casey based on the enumerated clause, not the residual clause *Johnson* invalidated.

The First Circuit affirmed the denial of Mr. Casey's § 2255 petition on a different ground.[5] Pet. App. 11a. The Court began by recognizing that under 28 U.S.C. § 2255(f)(3), a petitioner may file a petition to set aside or correct a sentence within one year of "the date on which the right asserted was initially recognized by the

[5] Mr. Casey's case was consolidated with that of two other defendants, Richard Dimott and Wayne N. Collamore. Pet. App. 1a. This petition concerns only Mr. Casey's case.

Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Pet. App. 7a. However, the court held that for a petitioner to bring a timely § 2255 motion seeking relief under *Johnson*, "a habeas petitioner bears the burden of establishing that it is more likely than not that he was sentenced solely pursuant to ACCA's residual clause." Pet. App. 22a. Finding "the record is silent as to which ACCA clause—enumerated or residual—the district court earlier relied upon," Pet. App. 11a, the court held that Mr. Casey had not met this burden and thus could not even assert a *Johnson* claim. Pet. App. 22a.

In ruling that Mr. Casey bore the burden of showing by a preponderance of the evidence that he was sentenced pursuant to the residual clause, the First Circuit asserted that it was adopting a standard in conformance with that of the Eleventh Circuit, *see Beeman*, 871 F.3d at 1232; in conflict with that of the Fourth and Ninth Circuits, *see Geozos*, 870 F.3d at 896, *Winston*, 850 F.3d at 682; and in tension with that of the Fifth Circuit, *Taylor*, 873 F.3d at 482.

Having deemed Mr. Casey unable to bring a *Johnson* claim in his § 2255 petition, the First Circuit determined that Mr. Casey's petition could only be read to rely on *Mathis*, a case not retroactive on collateral review. For that reason, it dismissed Mr. Casey's petition as untimely. Pet. App. 22a.

Judge Torruella dissented. He first criticized the majority for not showing the district court—the same court that sentenced Mr. Casey—sufficient deference as to that court's understanding of the basis for Mr. Casey's

sentence: "Judge Hornby, also facing a silent record as to the clause under which he applied Casey's ACCA sentencing enhancement, found that Casey *did* raise a *Johnson II* claim—meaning that his sentence was enhanced pursuant to the ACCA's residual clause." Pet. App. 23a. Judge Torruella found "unpersuasive" the majority's holding that Mr. Casey had failed to satisfy his burden of proving by a preponderance of the evidence that he was sentenced pursuant to the residual clause. Indeed, Judge Torruella "fail[ed] to see what could better satisfy the majority's evidentiary requirement that petitioner was sentenced under the residual clause than a finding by the sentencing judge, who was also 'certainly present at sentencing' and far *more* knowledgeable of his own sentencing decisions. I have a difficult time thinking of what further evidence, in the face of a silent record, could be more convincing." Pet. App. 28a. Judge Torruella would thus have found "Casey has shown that he was sentenced pursuant to the residual clause and thus brought forth a timely *Johnson II* claim." Pet. App. 29a. This holding, Judge Torruella observed, would then have necessitated the panel consider whether its pre-*Mathis* (although post-Mr. Casey's conviction) holding that Maine burglary is a generic ACCA offense survived *Mathis*. Pet. App. 30a. But by ruling that Mr. Casey had failed to sustain his burden to show he was sentenced under *Johnson*, the majority evaded this "difficult issue" entirely. Pet. App. 30a.

REASONS FOR GRANTING THE WRIT

This case presents the ideal vehicle for this Court to resolve an acknowledged and entrenched conflict among

the circuits on an important and frequently recurring question of federal habeas law. If Mr. Casey's case had arisen in the Fourth or Ninth Circuits, he would have been eligible for relief on his § 2255 petition because the record was silent as to whether his ACCA enhancement was based on the residual clause. If Mr. Casey's case had arisen in the Eleventh and likely Tenth Circuits, his § 2255 petition would have been deemed timely, but then likely denied on the merits because the record was silent as to whether his ACCA enhancement was based on the residual clause. But because Mr. Casey's filed is § 2255 petition in the First Circuit, Mr. Casey bore the burden of proving by a preponderance of the evidence that his sentence was based on the residual clause merely for his petition to qualify as timely filed. Because Mr. Casey could not meet that burden, the First Circuit dismissed his petition as untimely. There is no justification for a defendant's eligibility for § 2255 relief under *Johnson* to turn on the geographic location of the Court of Appeals in which his or her case arises. Yet that is exactly the situation that exists today as a result of the existing circuit conflict.

This case is an ideal vehicle through which to resolve the split. The record is entirely silent as to which clause—enumerated or residual—the sentencing judge relied upon in finding Mr. Casey's prior convictions ACCA predicates. The very judge who sentenced Mr. Casey never indicated in later review which clause he applied. At the time of Mr. Casey's sentencing, no binding precedent in the First Circuit held that Maine burglary qualified as generic burglary under the ACCA. As a result, even the legal backdrop to Mr. Casey's sentencing provides no indication whether Mr. Casey's

burglary convictions had qualified as an enumerated offense under ACCA or under the residual clause.

Even more important, this case gives the Court the opportunity to squarely resolve the three-way circuit split, because only this case casts into relief both what a petitioner must show to assert a timely *Johnson* claim in a § 2255 petition and, concomitantly, what a petitioner must show to prevail on the merits of such a claim. Ruling on one issue without the other will only permit continued divergence on this important issue amongst the circuits.

I. THERE IS AN ACKNOWLEDGED CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

As the First Circuit openly acknowledged, in denying Mr. Casey's petition it was enlarging an existing circuit split, conflicting with the Fourth and Ninth Circuits and purportedly aligning itself with the Eleventh Circuit. Multiple courts and judges have recognized the conflict among the circuits that has arisen on the question presented. *See*, *e.g.*, *Taylor*, 873 F.3d at 480-482 (contrasting the positions of the Fourth and Ninth Circuits with that of the Tenth and Eleventh Circuits); Pet. App. 28a n.9 (Torruella, J., dissenting) ("As the majority explains, there is an emerging split amongst the circuit courts as to the burden of proof placed on petitioners facing a silent record who, through a § 2255 petition, maintain that their sentences were enhanced pursuant to the residual clause of the ACCA").

And the First Circuit's decision only serves to deepen this conflict and create a three-way split.[6]

A. The First Circuit Has Held That When The Record Is Silent As To Whether A Defendant Was Sentenced Pursuant To The Residual Clause, A § 2255 Petition Asserting A *Johnson* Claim Is Untimely.

As discussed above, the First Circuit dismissed as untimely Mr. Casey's § 2255 petition raising a *Johnson* claim. In so doing, the First Circuit held that Mr. Casey had failed to assert a *Johnson* claim because he provided no determinative evidence that the district court had relied on the residual clause when imposing the ACCA enhancement. Pet. App. 16a. As a result, according to the First Circuit, Mr. Casey's petition did not assert a *Johnson* claim, and thus Mr. Casey could not avail himself of the one-year period of limitation applicable to a § 2255 motion asserting a "right that has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." § 2255(f)(3).

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[6] In *Taylor*, 873 F.3d at 481, the Fifth Circuit held that a defendant had a valid *Johnson* claim in a petition brought under § 2255 notwithstanding that the record was silent as to the sentencing court's basis for finding a prior conviction to qualify under the ACCA. However, as the First Circuit majority noted, the Fifth Circuit declined to decide which test, from among the various approaches of the circuits, to adopt given that the defendant's "§ 2255 claim merits relief under all of them." *Id.*

B. The Tenth And Eleventh Circuits Have Held That When The Record Is Silent As To Whether A Defendant Was Sentenced Pursuant To The Residual Clause, A § 2255 Petition Asserting A *Johnson* Claim Is Timely But Fails On The Merits.

On facts materially identical to those presented by Mr. Casey's case, the Eleventh and Tenth Circuits have found § 2255 petitions raising *Johnson* claims on silent record timely—contrary to the First Circuit—but unsuccessful on the merits.

In *Beeman v. United States*, 871 F.3d 1215, 1217 (11th Cir. 2017), the defendant was sentenced pursuant to an ACCA enhancement based, in part, on a prior Georgia conviction for aggravated assault. *Id.* As the Eleventh Circuit noted, "[t]he [presentence investigation report] did not recommend whether the aggravated assault conviction should be found to be a violent felony for ACCA purposes under the elements clause or the residual clause or both, and the district court did not specify whether its finding that the conviction qualified was based on the elements clause or the residual clause or both." *Id.* at 1218.

The Eleventh Circuit found that the petitioner raised a timely § 2255 motion seeking relief under *Johnson*. By asserting that one of his predicate offenses "historically qualified as an ACCA predicate under [the ACCA's] residual clause," *id.* at 1220 (alterations in original) and filing his petition within one year of *Johnson*, "the

motion said enough to assert a *Johnson* claim." *Id.* at 1221.

But the Eleventh Circuit rejected the petitioner's *Johnson* claim on the merits, holding that "[t]o prove a *Johnson* claim, the movant must show that—more likely than not—it was use of the residual clause that led to the sentencing court's enhancement of his sentence." *Id.* at 1221-22. If the evidence can only show that "it is just as likely that the sentencing court relied on the elements or enumerated offenses clause"—such as when the record is silent—"then the movant has failed to show that his enhancement was due to [the] use of the residual clause." *Id.* at 1222. Finding that the defendant had "concede[d] that there is nothing in the record suggesting that the district court relied on only the residual clause in sentencing him," the Eleventh Circuit dismissed the § 2255 petition. *Id.* at 1224.

Only further demonstrating the need for this Court's review, the Tenth Circuit has taken a position that appears to follow the Ninth Circuit but that is in fact—as recognized by the Fifth Circuit, *see Taylor*, 873 F.3d at 480-81—much more aligned with the Eleventh Circuit. In *United States v. Snyder*, 871 F.3d 1122, 1130 (10th Cir. 2017), the Tenth Circuit denied a § 2255 petition that argued—on a silent record—that an ACCA enhancement was no longer valid post-*Johnson*. In so doing, the Tenth Circuit reversed the district court's holding that the petition was untimely. *Id.* at 1126. "Whether or not [Mr.] Snyder can ultimately prevail on his motion," the Tenth Circuit found the petitioner "*asserts* the right established in *Johnson*, to be free from a sentence purportedly authorized by the

unconstitutionally vague residual clause." *Id.* Thus, the court found the "§ 2255 motion, filed within a year of the Court's decision in *Johnson*, is timely under § 2255(f)(3)." *Id.*

On the merits, however, the Tenth Circuit looked at the "background legal environment" that existed at the time of the defendant's sentencing, and determined that under this Court's decision in *Taylor v. United States*, 495 U.S. 575 (1990), "there would have been little dispute at the time of Snyder's sentencing that his two Wyoming burglary convictions involving occupied structures fell within the scope of the ACCA's enumerated crimes clause." 871 F.3d at 1129. That analysis—although it references the "background legal environment" discussed by the Ninth Circuit in *Geozos*, 870 F.3d at 896—is critically different in that the Ninth Circuit requires, for example, "binding circuit precedent at the time of sentencing . . . that [the] crime . . . qualified as a violent felony under the force clause." *Id.* (emphasis added). The Tenth Circuit's approach in *Snyder*—looking at this Court's general precedents quite divorced from the particular state statute at issue—is essentially the same as the Eleventh Circuit's approach that places the merits burden on the defendant to show he was originally sentenced pursuant to the residual clause.

C. The Fourth And Ninth Circuits Have Held That When The Record Is Silent As To Whether A Defendant Was Sentenced Pursuant To The Residual Clause, A § 2255 Petition Asserting A *Johnson* Claim Is Timely And Meritorious.

Had Mr. Casey's § 2255 petition asserting a *Johnson* claim on a silent record arisen in the Fourth or Ninth Circuits, it would have been granted.

In *United States v. Geozos*, 870 F.3d 890, 892 (9th Cir. 2017), the defendant was sentenced to a 15-year mandatory minimum sentence under the ACCA based on five prior convictions but, as the Ninth Circuit observed, the record was silent as to whether those prior convictions "qualf[ied] under the 'residual clause' of the statute, the 'force clause,' or both." After this Court's decisions in *Johnson* and *Welch*, the defendant brought a motion under § 2255(h)(2), arguing that his sentence was no longer lawful. Reversing the district court's determination to the contrary, the Ninth Circuit ruled that the § 2255 motion was procedurally proper because the defendant's "claim does rely on *Johnson*[]."[7] *Id.* at 894. Recognizing that if at sentencing the district court had stated that the past convictions "were convictions

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[7] While the court determined that the petitioner could file a successive habeas petition because he relied on "a new [retroactively applicable] rule of constitutional law," 28 U.S.C. § 225(h)(2), such petitions must still meet the timeliness requirement of being filed within one-year of this Court newly recognizing a right retroactively applicable to cases on collateral review. 28 U.S.C. § 2255(f)(3). As such, finding that a petitioner may file a successive habeas petition also implicitly finds that the petition is timely filed.

for 'violent felonies' *only* under the residual clause . . . [w]e would know that [the d]efendant's sentence was imposed under an invalid—indeed, unconstitutional—legal theory." *Id.* at 895. By contrast, had the sentencing court "specified that a past conviction qualified as a 'violent felony' *only* under the force clause, we would know that the sentence rested on a constitutionally valid legal theory." *Id.* But, given the silence in the record on this issue, the Ninth Circuit ruled "it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory." *Id.* In this situation, the Ninth Circuit recognized the applicable principle of *Stromberg v. California*, 283 U.S. 359 (1931), that "where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that *may have* rested on that ground," *Griffin v. United States*, 502 U.S. 46, 53 (1991). It thus held, "when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in *Johnson*[]" and the petitioner is eligible for relief under *Johnson*. *Geozos*, 870 F.3d at 896.

In so holding, the Ninth Circuit acknowledged that in certain situations, "it may be possible to determine that a sentencing court did *not* rely on the residual clause—even when the sentencing record alone is unclear—by looking to the relevant background legal environment at the time of sentencing." *Id.* at 896. Thus, if "binding circuit precedent at the time of sentencing was that crime *Z* qualified as a violent felony under the force

clause, then a court's failure to invoke the force clause expressly at sentencing, when there were three predicate convictions for crime *Z*, would not render unclear the ground on which the court's ACCA determination rested." *Id.* But, absent this type of material, the Ninth Circuit held a silent record provided the basis for a meritorious *Johnson* claim.

In *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), the Fourth Circuit held similarly. In *Winston*, the defendant received a sentence with an ACCA enhancement based in part on his prior conviction for Virginia common law robbery. *Id.* at 679. The record was silent as to whether the sentencing judge "relied on the residual clause to conclude that the Virginia common law robbery conviction qualified as a violent felony." *Id.* at 682. Post-*Johnson*, the defendant filed a motion under 28 U.S.C. § 2255(h)(2), asking the district court to vacate his ACCA-enhanced sentence. *Id.* at 680. Finding the defendant could bring a § 2255 motion based on *Johnson*, the Fourth Circuit observed that despite the silent record "[w]e will not penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony. *Id.* at 682. Imposing such a burden upon movants "would result in 'selective application' of the new rule of constitutional law announced in *Johnson*[]." *Id.* The Court thus held "when an inmate's sentence may have been predicated on application of the now-void residual clause and, therefore, may be an unlawful sentence under the holding in *Johnson*[], the inmate has shown that he 'relies on' a new rule of constitutional law within the meaning of 28 U.S.C. § 2244(b)(2)(A)." *Id.* As a

result, a silent record is nevertheless sufficient basis for a meritorious *Johnson* claim.

* * *

There is thus an acknowledged, and entrenched, conflict among the circuits that is outcome-determinative on defendants' § 2255 petitions for relief under *Johnson*. As courts have recognized, post-*Johnson* and *Welch*, this question has arisen frequently because "[n]othing in the law requires a [court] to specify which clause of [the ACCA]—residual or elements clause—it relied upon in imposing a sentence." *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016), *abrogation recognized by Curry v. United States*, No. 17-10822, __ F. App'x. __, 2018 WL 1136027 (11th Cir. Mar. 2, 2018). Thus, "at many pre-*Johnson*[] sentencings, the court did not specify under which clause it found the ACCA predicate offenses to qualify." *Geozos*, 870 F.3d at 894 n.4. As such, the question of who bears the burden in showing that a defendant was sentenced pursuant to the residual clause when the record is silent is a crucial one. The circuits have divided firmly over the last two years—notwithstanding acknowledging each other's opinions—and there is no reason to believe further percolation will result in any greater degree of agreement among them. To the contrary, a delay in this Court's review will only lead to further unfair and disparate outcomes, as no more habeas petitions based on the ACCA's residual clause can be filed and these petitions are being finally adjudicated.

II. THIS CASE IS A STRONG VEHICLE TO RESOLVE THE CONFLICT AMONG THE CIRCUITS.

This case presents a strong vehicle for this Court to address the question of what a defendant must show in order to successfully bring a § 2255 motion alleging that his ACCA sentence was imposed in violation of *Johnson*.

First, the First Circuit explicitly ruled on the legal issue, finding Mr. Casey's petition untimely because Mr. Casey had failed to show by a preponderance of the evidence that he was sentenced pursuant to the residual clause. Pet. App. 21-22a. The court provided no other basis for its ruling, and all but acknowledged that were the standard in the Fourth and Ninth Circuits to apply, Mr. Casey's § 2255 petition would have been timely.

Second, precisely because it framed its analysis in terms of timeliness, this case presents the Court with an important opportunity to rule *both* that a defendant has asserted a timely *Johnson* claim when the record is silent as to the basis for an ACCA enhancement, *and* that a defendant qualifies for relief on the merits for such a claim. While the First Circuit found Mr. Casey's claim untimely—unlike any other circuit to address this issue—the district court found that Mr. Casey had asserted a timely *Johnson* claim but that First Circuit precedent post-dating his sentencing (precedent the district court urged the First Circuit to reconsider, Pet. App. 43a-44a) meant that Mr. Casey had suffered no prejudice. Pet. App. 39a. This case thus perfectly presents both the timeliness and merits issues in one vehicle. Addressing both of these issues is necessary to ensure the uniform application of the law on this

important question.[8] If this Court were to rule that the Fourth and Ninth Circuits are correct in their understanding of what a defendant must show to merit relief on a *Johnson* claim under § 2255, that ruling would necessarily establish that such petitions assert a *Johnson* claim and therefore are timely if filed within a year of *Johnson*.

Third, unlike in other cases raising this issue, the First Circuit did not hold that Mr. Casey was actually sentenced pursuant to the enumerated clause. Nor did the district judge on later review hold that he had sentenced Mr. Casey under something other than the residual clause when he had imposed his sentence, although he easily could have when reviewing the § 2255 petition. Further, when Mr. Casey was originally sentenced in 2012, the First Circuit had not held that Maine burglary qualified as "generic burglary" under the ACCA, so the legal backdrop to Mr. Casey's sentence is silent. *See* Pet. App. 40a (citing First Circuit precedent so holding, which post-dates Mr. Casey's sentencing). As such, this case presents the most straightforward facts for this Court to establish the standard of review a court should apply when

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[8] Indeed, in addition to the First Circuit, at least one judge has suggested that a § 2255 petition raising a *Johnson* claim should be deemed untimely unless the *Johnson* claim is meritorious. *See Snyder*, 871 F.3d at 1132 (McHugh, J., concurring) ("I would hold that the court may reject a petition asserted under *Johnson* as untimely where the record reveals that the petitioner is not asserting the right recognized in *Johnson*—the right not to be sentenced as an armed career criminal under the residual clause of the ACCA.").

determining whether a § 2255 petition raising *Johnson* claims on a silent record is timely and merits relief.[9]

III. THE FIRST CIRCUIT'S RULING WAS INCORRECT.

Finally, this question merits review because the First Circuit's ruling—placing the burden on the defendant in the face of a silent record—is incorrect. As the Ninth Circuit observed under the *Stromberg* principle, courts assume that if a general verdict could be based on an unconstitutional ground, that verdict is invalid. *See Geozos*, 870 F.3d at 896 (citing *Griffin*, 502 U.S. at 46.). While the fact of a prior conviction necessary to secure an ACCA enhancement need not be proven to a jury, *see Apprendi v. New Jersey*, 530 U.S. 466, 488-90 (2000), there is no justification for exempting from *Stromberg* a judge's determination—based on an unconstitutional ground—that a defendant qualifies for an enhanced sentence. Treating such a determination differently simply because it involves sentencing rather than a conviction would violate this Court's rule that any "fact increasing either end of [a sentencing] range produces a new penalty and constitutes an ingredient of the offense." *Alleyne v. United States*, 570 U.S. 99, 112 (2013).

In addition—particularly absent binding circuit precedent that would have obviated a district judge's need to specify that a sentence was pursuant to the

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[9] For this reason, if this Court believes the question presented here merits review, Mr. Casey suggests that this case be granted and that *Snyder v. United States* (No.17-7157) either be granted with this case and consolidated, or else held pending the outcome of this case.

enumerated or elements clauses—it would be irrational and unfair for a defendant's eligibility for *Johnson* relief to turn on the happenstance of what a judge may have mentioned during a sentencing years before *Johnson*. As the Fourth Circuit recognized, it would be irrational to "penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony," particularly when there was little need to specify that an offense fell within the residual clause's then-capacious bounds. *Winston*, 850 F.3d at 682, Ruling to the contrary would have the practical effect of making a defendant's eligibility for § 2255 relief turn on the "non-essential conclusions a court may or may not have articulated on the record in determining the defendant's sentence." *Id.* (citing *Chance*, 831 F.3d at 1340). In no other context does eligibility for § 2255 turn on such happenstance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

United States Court of Appeals,
First Circuit.

Richard DIMOTT; Wayne N. Collamore; Charles H. Casey, Jr.; Petitioners, Appellants,
v.
UNITED STATES, Respondent, Appellee.

Nos. 16-2289, 16-2319, 16-2368

February 2, 2018

Attorneys and Law Firms

David Beneman, Federal Public Defender, for appellants.

Julia M. Lipez, Assistant United States Attorney, with whom Richard W. Murphy, Acting United States Attorney, was on brief, for appellee.

Before Howard, Chief Judge, Torruella and Lynch, Circuit Judges.

Opinion

LYNCH, Circuit Judge.

This consolidated appeal arises from the denials of three federal post-conviction relief petitions filed under 28 U.S.C. § 2255. Richard Dimott, Wayne N. Collamore, and Charles H. Casey, Jr., each pled guilty to a federal firearm offense and had a history of Maine state burglary convictions. On collateral review, all three allege that they no longer qualify for a sentence enhancement under the Armed Career Criminal Act ("ACCA") because the ACCA's residual clause was

invalidated by *Johnson v. United States*, ––– U.S. –––, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) ("*Johnson II*").

Each petitioner filed his federal habeas petition outside of the one-year statute of limitations under 28 U.S.C. § 2255(f)(1). All three nevertheless contend on appeal that their petitions are timely under 28 U.S.C. § 2255(f)(3) because *Johnson II*, which is retroactively applicable, is the source of their claims. Specifically, Dimott, Collamore, and Casey argue that they were sentenced pursuant to the ACCA's (now-void) residual clause, so their sentences must be vacated, and they cannot be resentenced under the ACCA's enumerated clause in light of *Mathis v. United States*, ––– U.S. ––––, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016),[1] a case that is not retroactively applicable.

The district courts in all three cases dismissed the petitions on procedural grounds. We affirm the dismissals. All three petitions are untimely because they raise *Mathis*, not *Johnson II* claims, and *Mathis* does not reset the one-year statute of limitations under § 2255(f)(3). The petitioners have no *Johnson II* claims because they have not shown that their original ACCA sentences were based solely on the residual clause.

I.

We first determine, as to each petitioner, whether the district court sentenced him pursuant to the enumerated

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[1] More specifically, the petitioners argue that Mathis requires that we overrule this court's holding in *United States v. Duquette*, 778 F.3d 314, 317 (1st Cir. 2015), that a Maine burglary conviction is a violent felony under the enumerated clause, 18 U.S.C. § 924(e).

or (the separate) residual clause of the ACCA. Accordingly, we give the relevant procedural history of each case.

A. Dimott

Richard Dimott pled guilty to one count of being a felon in possession of a firearm on March 30, 2007, in violation of 18 U.S.C. §§ 922(g)(1) and 942(e). Based on his eight previous state convictions in Maine for burglary, *see* Me. Rev. Stat. Ann. tit. 17-A, § 401, the district court concluded that Dimott qualified for the sentencing enhancement under the ACCA, but did not specify under which clause—enumerated or residual—it was sentencing him. On September 6, 2007, the district judge sentenced Dimott to 150 months of imprisonment and five years of supervised release. Dimott did not appeal his sentence.

About nine years after his conviction, Dimott filed a motion to correct his sentence under 28 U.S.C. § 2255 on June 27, 2016. This was within one year of the Supreme Court's decision in *Johnson II*. Dimott argued that his convictions for Maine burglary cannot be the basis for his ACCA sentence because the Supreme Court's 2016 decision in *Mathis* made clear that Maine burglary is nongeneric and thus did not fall under the enumerated clause, and *Johnson II* invalidated sentences that were based on the ACCA's residual clause.

The district court denied Dimott's habeas petition for being untimely. The same judge who had sentenced Dimott earlier under the ACCA, rejected the petition:

> *Johnson II* is understood to be one such decision newly recognizing a right that is retroactively

> applicable.... However, Dimott was deemed eligible for an ACCA sentence based only on burglary convictions, *which qualify under ACCA's "enumerated clause*." ... Dimott's reliance on *Mathis* is also misplaced. In contrast +to *Johnson II*, *Mathis* has not been recognized as a case that announced a new substantive rule that is retroactively applicable to cases on collateral review.

Dimott v. United States, Nos. 2:06-cr-26, 2:16-cv-347, 2016 WL 6068114, at *2-3 (D. Me. Oct. 14, 2016) (emphasis added). The district court issued Dimott a certificate of appealability, and he filed this appeal on October 21, 2016.

B. Collamore

Wayne N. Collamore pled guilty on December 21, 2010, to one count of escape from the custody of the United States Bureau of Prisons, in violation of 18 U.S.C. § 751(a), and one count of being a felon in possession of a firearm. Based on, inter alia, his five previous state convictions for Maine burglary, the district court found Collamore to be an armed career criminal, again without specifying under which clause of the ACCA. On March 23, 2011, the sentencing judge imposed five years of imprisonment for the escape count, and a concurrent 210 months of imprisonment—based on the ACCA enhancement—for the firearm count. Collamore did not appeal his sentence.

More than five years after his conviction and sentencing, Collamore filed a § 2255 motion on May 19, 2016, arguing that his ACCA predicates were invalid post-*Mathis*. The reviewing judge, who was also Collamore's sentencing judge, denied Collamore's habeas petition for being untimely. That judge specifically cited the *Dimott* decision to explain the dismissal:

> This Court has recently had occasion to consider whether *Mathis* triggered a new one-year period for habeas relief under 28 U.S.C. § 2553(f)(3). In *Dimott*, this Court concluded that it did not. This Court also concluded that *Johnson II* does not provide a basis to challenge the status of convictions that were deemed to fall within ACCA's enumerated clause, as opposed to the now-invalidated residual clause.

Collamore v. United States, Nos. 2:16-cv-259, 2:10-cr-158, 2016 WL 6304668, at *2 (D. Me. Oct. 27, 2016) (internal citations omitted). The district court issued a certificate of appealability, and this appeal was docketed on October 31, 2016.

C. Casey

Charles H. Casey, Jr., pled guilty to being a felon in possession of a firearm on April 27, 2012. The district court found that Casey qualified for an ACCA sentencing enhancement based on, inter alia, his three prior convictions in Maine for burglary, without specifying which ACCA clause was involved, and sentenced Casey to 180 months of imprisonment. Casey did not appeal his sentence.

Nearly four years after his conviction and sentencing, Casey filed a § 2255 motion on June 27, 2016, collaterally attacking his sentence. The same judge who had sentenced Casey, heard the petition. Casey argued that his Maine burglary convictions did not constitute predicate offenses under the ACCA. The Government responded that Casey's petition was barred because his *Johnson II* claim was procedurally defaulted. The district court agreed with the Government and found that Casey failed to demonstrate that his procedural default would unfairly prejudice him "[b]ecause extant First Circuit caselaw holds that Casey's prior Maine burglary convictions remain qualifying *enumerated* violent felonies even after Johnson's invalidation of the residual clause."

Although the Government did not raise—and the district court did not address—either the timeliness issue or the merits of whether the Maine burglary statute was generic, the certificate of appealability, requested by Casey, touched indirectly on both:

> Casey's petition raises the following issues: (1) whether the retroactive application of *Johnson* allows any petitioner serving an ACCA sentence to have his qualifying "violent felony" convictions re-examined even if those convictions appear to fall under the ACCA's enumerated clause; and (2) if so, whether *Mathis* has effectively overruled the First Circuit's decision ... that a Maine burglary conviction ... qualifies as a violent felony under ACCA's enumerated clause.

Casey timely filed this appeal.

II.

Dimott, Collamore, and Casey argue on appeal that the district courts erred in denying their petitions because they were sentenced pursuant to the ACCA's (now-void) residual clause. We review de novo the district courts' denials of their habeas petitions on procedural grounds. *See Wood v. Spencer*, 487 F.3d 1, 3 (1st Cir. 2007) (citing *Rodriguez v. Spencer*, 412 F.3d 29, 32 (1st Cir. 2005)). Because we find all three petitions time-barred, we do not reach the merits of the petitioners' argument that their predicate offenses no longer qualify under the ACCA because *Johnson II* voids the residual clause and *Mathis* renders Maine burglary a nongeneric offense that does not qualify under the enumerated clause.

Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA) "in part to combat increasingly pervasive abuses of the federal courts' habeas jurisdiction." *Delaney v. Matesanz*, 264 F.3d 7, 10 (1st Cir. 2001) (citing *Felker v. Turpin*, 518 U.S. 651, 664, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996)). The statute imposes a one-year statute of limitations on federal prisoners for filing habeas petitions, which runs from the latest of "(1) the date on which the judgment of conviction bec[ame] final; ... [or] (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f).

More than one year had passed between the time each petitioner's conviction became final and the date on which each petitioner filed his § 2255 motion. As such, for their petitions to be timely, Dimott, Collamore, and

Casey must demonstrate that (1) their claims arise from a right that "has been newly recognized by the Supreme Court and made retroactively applicable," and that (2) they filed within one year of the Supreme Court's decision recognizing that right. *Id.* Each petitioner argues that *Johnson II*—which the Supreme Court held is retroactively applicable on collateral review, *see Welch v. United States*, ––– U.S. ––––, 136 S. Ct. 1257, 1268, 194 L. Ed. 2d 387 (2016)—is the basis of his claim, and that his petition is timely. We disagree and find all three petitions untimely because they raise *Mathis*, not *Johnson II*, challenges, and, in any event, the petitioners have no *Johnson II* claims. We first address the petitions of Dimott and Collamore, before turning to Casey.

A. Dimott and Collamore

We find it plain that Dimott's and Collamore's petitions do not raise *Johnson II* challenges because the record reflects that they were sentenced under the ACCA's enumerated clause, not the residual clause. As such, we need not delve into the merits because their petitions, at most, raise untimely *Mathis* claims.

On collateral review, the district court judge in both cases (who had also served as the sentencing judge) found that Dimott and Collamore had earlier been sentenced pursuant to the ACCA's enumerated clause. *See Collamore*, 2016 WL 6304668, at *2 ("*Johnson II* does not provide a basis to challenge the status of [Collamore's] convictions that were deemed to fall within ACCA's enumerated clause, as opposed to the now-invalidated residual clause."); *Dimott*, 2016 WL 6068114, at *2 ("Dimott was deemed eligible for an

ACCA sentence based only on burglary convictions, which qualify under ACCA's 'enumerated clause.'").

Although these findings were made during the collateral review process, and not expressly stated at the time of sentencing, we give them due weight because the habeas judge was describing *his own decisions* at sentencing. *Cf. United States v. DiCarlo*, 575 F.2d 952, 954 (1st Cir. 1978) (holding that "if the [post-conviction relief] claim is based upon facts with which the trial court, through review of the record or observation at trial, is familiar, the court may make findings without an additional hearing"); *see also United States v. Snyder*, 871 F.3d 1122, 1128 (10th Cir. 2017) (giving due weight to the district court's determination that "as a matter of historical fact, ... it did not apply the ACCA's residual clause in sentencing [the defendant] under ACCA"); *Feldman v. Perrill*, 902 F.2d 1445, 1447 (9th Cir. 1990) (crediting the district court's determination that "he had not relied on the 1976 conviction, only the underlying conduct," when the petitioner "initiated an attack on his federal sentence, arguing that it had been improperly enhanced due to the sentencing judge's reliance on an allegedly invalid state conviction"). Here, too, there is no gap in information about what happened. And the petitioners do not contend that the district court was incorrect in its characterization.

Because they were sentenced pursuant to the ACCA's enumerated clause, Dimott and Collamore are, at most, asserting a claim about *Mathis*. In fact, the linchpin of both petitioners' argument is that *Mathis* dictates that Maine burglary is a nongeneric offense, so it cannot qualify as an ACCA predicate. The Supreme Court has

indicated, though, that *Mathis* did not announce a new, retroactively applicable rule. *See* 136 S. Ct. at 2257 (noting that the case was a "straightforward" application of more than "25 years" of precedent). Thus, the precondition for the timeliness requirement under § 2255(f)(3) is not met. *Cf. Stanley v. United States*, 827 F.3d 562, 565 (7th Cir. 2016) ("*Johnson* does not have anything to do with the ... elements clause of ... the Armed Career Criminal Act, and § 2255(f)(3) therefore does not afford prisoners a new one-year period to seek collateral relief on a theory that the elements clause does not apply to a particular conviction.").

To circumvent the statute of limitations, Dimott and Collamore try to pass off their *Mathis* claims under the guise of *Johnson II* claims, but their argument is foiled by a logical misstep. In order to even arguably invoke *Johnson II*, they must first succeed in arguing—on the merits—that their ACCA enhancement relies on the residual clause because *Mathis* renders Maine burglary a nongeneric offense. That is the essence of a *Mathis* challenge. To hold otherwise would create an end run around AEDPA's statute of limitations. It would allow petitioners to clear the timeliness bar by bootstrapping their *Mathis* claims onto *Johnson II* claims, even where, as here, the merits of their case entirely depend on whether their previous convictions still qualify as ACCA predicates in light of *Mathis*. This cannot be right. The district court correctly concluded that Dimott's and Collamore's petitions depended on *Mathis*, and were thus untimely.

B. Casey

The remaining petitioner, Casey, presents a some-what different case because (1) the Government failed to assert the timeliness defense before the district court, and (2) the record is silent as to which ACCA clause—enumerated or residual—the district court earlier relied on. Regardless, Casey's petition is time-barred for the same reason as the other two petitions: it raises a *Mathis*, not a *Johnson II*, challenge.

1. Forfeiture

The Government failed to argue before the district court that Casey's petition was untimely, relying instead on another procedural bar: that Casey had defaulted his *Johnson II* claim. On appeal, Casey attempts to use the Government's omission as a shield against AEDPA's strict statute of limitations and argues that the government may no longer raise the timeliness issue on appeal.

We disagree that the Government's inadvertence is fatal to applying the timeliness bar here. The Supreme Court has repeatedly recognized the power of federal courts to raise sua sponte the timeliness of habeas petitions. *See Wood v. Milyard*, 566 U.S. 463, 473, 132 S. Ct. 1826, 182 L. Ed. 2d 733 (2012) (courts of appeals); *Day v. McDonough*, 547 U.S. 198, 209, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) (district courts).[2]

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[2] Both *Day* and *Wood* concerned federal habeas petitions brought by state prisoners under 28 U.S.C. § 2254, not by federal prisoners under § 2255. We see no reason, however, why this Court's power to raise sua sponte the timeliness defense for § 2254 cases should

The dissent asserts that appellate courts may excuse the Government's waiver only if the Government proves that the case is "exceptional." But that is a misreading of *Wood*.[3] There, the Supreme Court reaffirmed the general principle that "court[s] may consider a statute of limitations or other threshold bar the State failed to raise in answering a habeas petition," 566 U.S. at 466, 132 S. Ct. 1826 (citations omitted), and only cautioned against doing so if "the State, after expressing its clear and accurate understanding of the timeliness issue, deliberately steer[s] the District Court away from the question and towards the merits," *id.* at 474, 132 S. Ct. 1826 (citations omitted). The Court narrowly held in *Wood* that it was an abuse of discretion to raise timeliness sua sponte in that case because "the State twice informed the U.S. District Court that it 'would not challenge, but [is] not conceding, the timeliness of

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not extend to § 2255 cases. The statute of limitations provisions of both statutes mirror one another, and the considerations flagged by the Supreme Court in *Day*—"judicial efficiency," "conservation of judicial resources," and "finality," 547 U.S. at 205-06, 126 S. Ct. 1675 (quoting *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000))—apply equally in the context of federal prisoners seeking post-conviction relief.

[3] In any case, the Supreme Court found in *Day*, the predecessor to *Wood*, that inadvertent error can constitute an "extraordinary circumstance[ ]" that justifies raising the timeliness bar sua sponte. *See Wood*, 566 U.S. at 471, 132 S. Ct. 1826 (citing *Day*, 547 U.S. at 201, 203, 126 S. Ct. 1675). In *Day*, the Government erroneously informed the district court the petition was timely, due to a miscalculation. *Id.*

Wood's habeas petition,'" *id.* at 465, 132 S. Ct. 1826, thereby evincing clear gamesmanship.

That is not the situation here. Assuming arguendo that similar concerns govern federal petitioner § 2255 cases as state petitioner § 2254 cases, the Government did not "strategically withh[o]ld the [limitations] defense or cho[o]se to relinquish it" in order to reach the merits of Casey's petition. *Id.* at 472, 132 S. Ct. 1826 (alteration in original) (quoting *Day*, 547 U.S. at 210-11, 126 S. Ct. 1675). Rather, the Government argued procedural default (another procedural bar) but made no mention of the defense of untimeliness at that point. The dissent makes much ado about the fact that the same U.S. Attorney's Office raised the timeliness bar in opposition to Dimott's and Collamore's petitions. But the Government's inconsistency, if anything, demonstrates inadvertence, not stratagem—it simply had nothing to gain by only raising one procedural bar instead of two.

Moreover, unlike in *Wood*, the certificate of appealability arguably raised the timeliness issue, and the Government did brief it on appeal and argue that it did not waive the timeliness bar. In fact, the crux of the Government's position is that petitioners cannot reset the one-year statute of limitations using § 2255(f)(3) because they fail to raise *Johnson II* claims. As such, we would not be rewarding the Government for any gamesmanship before the district court if we were to bypass its failure to raise the untimeliness defense at the outset before the district judge.

There is also no issue of procedural fairness. Casey, the losing party in district court on other grounds, had ample notice of the timeliness defense—beginning with

the issues raised in the certificate of appealability—and the opportunity to actually respond, both as to briefing and during oral argument before this court, which he has done. We would, by reaching the timeliness issue, further "[t]he considerations of comity, finality, and the expeditious handling of habeas proceedings" that are at the very core of AEDPA. *Day*, 547 U.S. at 208, 126 S. Ct. 1675. Accordingly, the balance of relevant factors favors the ability of the Government to assert the timeliness defense now.[4]

Indeed, contrary to the dissent's assertion that this court "religiously" holds waiver against the Government, we—along with other courts of appeals—have upheld the discretion of federal courts to deny habeas petitions on procedural grounds in analogous contexts.[5] *See Oakes v. United States*, 400 F.3d 92, 97 (1st Cir. 2005) (finding that the district court did not err in excusing the government's failure to raise the procedural default bar); *see also Coulter v. Kelley*, 871 F.3d 612, 618 (8th Cir. 2017) (finding that the district court did not err in considering timeliness sua sponte

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[4] We do not rule on the correctness of the district court's holding that Casey's *Johnson II* claim was procedurally defaulted.

[5] And this case is clearly distinguishable from cases in which other courts of appeals have declined to act sua sponte. *See, e.g.*, *United States v. Miller*, 868 F.3d 1182, 1186 (10th Cir. 2017) (relying, in part, on the fact that the petitioner "ha[d] been afforded no opportunity to respond to the Government's new timeliness argument"); *In re Jackson*, 826 F.3d 1343, 1348 (11th Cir. 2016) (emphasizing that "[n]either the Government nor [the petitioner] ... presented a position about a limitations defense").

when the State "did not knowingly and intelligently waive its statute-of-limitations defense," and was, at most, negligent); *In re Williams*, 759 F.3d 66, 69 (D.C. Cir. 2014) (finding that the court of appeals could raise, sua sponte, the timeliness bar to deny petitioner's motion for a successive petition for post-conviction relief).

Accordingly, we proceed to consider the timeliness of Casey's petition.

2. Burden of Proof and Production on Petitioner

Casey contends that his petition is timely. He urges us to adopt a rule that, when faced with a silent record, we must assume the district court sentenced the defendant pursuant to the residual clause. Casey does not, however, assert that he was in fact sentenced under the residual clause.

In urging this rule, Casey asks us to break with our time-honored precedent. This circuit has long held that federal post-conviction petitioners bear the burden of proof and production under § 2255, and must "establish[ ] by a preponderance of the evidence that they are entitled to relief." *DiCarlo*, 575 F.2d at 954. Other circuits agree. *See, e.g.*, *Stanley*, 827 F.3d at 566 ("As the proponent of collateral review, [the petitioner] had to produce evidence demonstrating entitlement to relief." (citations omitted)); *In re Moore*, 830 F.3d 1268, 1272 (11th Cir. 2016) (aggregating cases across seven circuits that hold the same).

The Eleventh Circuit has applied this burden of proof specifically to situations where federal petitioners allege that they raise *Johnson II* claims. *See Beeman v. United*

States, 871 F.3d 1215, 1221 (11th Cir. 2017) ("We conclude and hold, that, like any other § 2255 movant, a *Johnson* § 2255 claimant must prove his claim."). In *Beeman*, the court announced a clear rule: "To prove a *Johnson II* claim, the movant must show that—more likely than not—it was the use of the residual clause that led to the sentencing court's enhancement of his sentence." *Id.* at 1221-22. A mere possibility is insufficient.[6]

This approach makes sense. Petitioners should bear the burden of proof because they were certainly present at sentencing and knowledgeable about the conditions under which they were sentenced. Furthermore, any other rule would undercut an animating principle of AEDPA: the presumption of finality. And "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

Casey fails to point to any evidence suggesting that he was sentenced under the residual clause.[7] Nevertheless, the dissent repeatedly insists that because the district judge found Casey's *Johnson II* claim procedurally

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[6] *In re Chance*, 831 F.3d 1335 (11th Cir. 2016), an Eleventh Circuit case cited by the petitioners, construed silence in the petitioner's favor. *See id.* at 1341. However, that case preceded *Beeman*. And in any event, the opinion itself acknowledged that its proposed rule lacked legal force because it was only dicta. *See id.* at 1339.

[7] Casey did not ask for remand to the district court to prove that he was in fact sentenced solely under the residual clause. He has chosen to proceed on the record as it now exists. *See Beeman*, 871 F.3d at 1221.

defaulted, he expressly found that "Casey raised a timely *Johnson II* claim." This is plainly incorrect. That the district judge could have, but did not, raise timeliness sua sponte, and instead relied on another procedural bar, is not tantamount to finding that Casey was, in fact, sentenced pursuant to the residual clause. This is especially so when procedural default was the only procedural bar the Government raised. To say otherwise would be to hold that the dismissal of a habeas petition on one ground is an express finding that the petition is otherwise valid on every other ground.

The dissent also argues that because the district court's order expressly stated that "Casey's Johnson claim is a novel constitutional claim that applies retroactively," *United States v. Casey*, Nos. 2:16-CV-346-DBH, 2:11-CR-216-DBH, 2016 WL 6581178, at *3 (D. Me. Nov. 3, 2016), it indicated "clear[ly] and unambiguous[ly]" that he was sentenced pursuant to the residual clause. Again, not so. The dissent takes this language out of context. That the district court found Casey had cause for his procedural default—because *Johnson II* created a novel, retroactively applicable right—is not equivalent to finding, on the merits, that Casey raised a valid *Johnson* claim. Otherwise, any petitioner who clears the procedural default hurdle automatically succeeds on the merits. That cannot be right.

The Eleventh Circuit decision that Casey flags, *In re Adams*, 825 F.3d 1283 (11th Cir. 2016), lends no support to the contrary. There, the court permitted the petitioner's *Johnson II* claim despite a silent record because clear Supreme Court and Eleventh Circuit precedent at the time of sentencing held that a

conviction under the Florida burglary statute was an ACCA predicate under the residual clause. *See id.* at 1285. This case presents the opposite fact pattern. Our decision in *Duquette* held that Maine burglary qualifies as a predicate offense under the ACCA's enumerated clause. See 778 F.3d at 317. Although *Duquette* was decided in 2016, the opinion describes its holding as a "straightforward" application of the 1990 Supreme Court decision in *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). *See* 778 F.3d at 317. Other district courts at the time of Casey's sentencing also treated Maine burglary as a generic offense. For instance, Dimott's and Collamore's sentences were found subject to the enumerated clause based on the petitioners' Maine state burglary convictions just a few years before.

Casey directs our attention to three cases, *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017); *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017); and *United States v. Taylor*, 873 F.3d 476 (5th Cir. 2017), that purportedly espouse his requested approach.

The Ninth Circuit in *Geozos* held that a state or federal petitioner has a valid *Johnson II* claim whenever the sentencing court "may have" relied on the residual clause. 870 F.3d at 896. The court said it did so based on an extension of the *Stromberg* principle, which prescribes that a general verdict is void if it "*may have* rested" on an unconstitutional ground. *Id.* (quoting *Griffin v. United States*, 502 U.S. 46, 53, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991)). In the Ninth Circuit's view, a post-conviction finding by a judge as to the basis for a petitioner's enhanced sentence should not be treated

"any differently than a finding made by a jury for the purpose of conviction." *Id.*

Our view is different. We think the focus must be on the fact that we are applying clear limits established by Congress for when federal post-conviction petitions may be entertained by the federal courts, an issue not implicated at all by *Stromberg*. There are also many reasons why collateral review is unique. "Chief among them is the principle that 'direct appeal is the primary avenue for review of a conviction or sentence.... When the process of direct review ... comes to an end, a presumption of finality and legality attaches to the conviction and sentence.'" *In re Moore*, 830 F.3d at 1272 (alterations in original) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)). That presumption is irreparably undermined if the Government is forced to bear the burden of proving that each *Johnson II* claimant does not have a valid *Johnson II* claim. The burden should fall on the petitioner to establish by a preponderance of the evidence a necessary element of his *Johnson II* claim—that his ACCA sentence rested on the residual clause.

The Fourth Circuit in *Winston* agreed with the Ninth Circuit as to state habeas claimants, but on different grounds. The Fourth Circuit reasoned that "imposing the burden on movants [to show they had been sentenced under the residual clause] ... would result in 'selective application' of the new rule of constitutional law announced in *Johnson II*, violating 'the principle of treating similarly situated defendants the same.'" *Winston*, 850 F.3d at 682 (quoting *In re Chance*, 831 F.3d at 1341). We think that does not follow. Requiring

habeas petitioners to establish—by a preponderance of the evidence—that they were sentenced pursuant to the residual clause does not lead to treating similarly situated defendants differently. Precisely the opposite: it is imposing a uniform rule. That the burden is less friendly to petitioners than the one put forth in *Winston* does not make it unequal.

Moreover, *Winston*'s reliance on *Teague* to justify shifting the burden of proof onto the Government is misplaced. In *Teague*, the Supreme Court held that "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral l review." 489 U.S. at 316, 109 S. Ct. 1060. Although the Court noted that "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to *all* who are similarly situated," *id.* at 300, 109 S. Ct. 1060, it never said that evenhanded justice requires the Government to bear the burden of proving that the petitioner does not have a valid claim for relief. In fact, shifting the burden would implicate one of the Supreme Court's chief concerns in *Teague*: that the "costs imposed ... by retroactive application of new rules of constitutional law on habeas corpus" would "far outweigh the benefits of this application" if "it continually forces the [Government] to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." 489 U.S. at 310, 109 S. Ct. 1060 (citations omitted).

Finally, the Fifth Circuit's decision in *Taylor* is clearly distinguishable. In that case, the court held that a federal prisoner had a valid *Johnson II* claim even though the record was silent, and the district court later declared that the "residual clause 'did not play any role in Movant's sentencing.'" *Taylor*, 873 F.3d at 481. Although the court described the approaches taken by the Fourth, Ninth, and Tenth Circuits, it did not decide "which, if any, of these standards [it would] adopt." *Id.* at 481-82. Instead, the court held that "[the petitioner's] claim merit[ed] relief" because "there was precedent suggesting that Taylor's third predicate conviction could have applied only under the residual clause." *Id.* at 482. No such precedent exists here. Rather, at the time of Casey's sentencing, many district courts did not even consider the residual clause as the basis for defendants' ACCA sentences when faced with predicate offenses under state burglary statues similar to Maine's. *See, e.g.*, *United States v. Miller*, 478 F.3d 48, 50-52 (1st Cir. 2007) (Connecticut burglary statute); *United States v. Bennett*, 469 F.3d 46, 49-50 (1st Cir. 2006) (Rhode Island burglary statute); *United States v. Mastera*, 435 F.3d 56, 60-62 (1st Cir. 2006) (Massachusetts burglary statute).

Our view is different from those taken in *Geozos*, *Winston*, and *Taylor*. Placing the burden of proof and production on habeas petitioners is in accord with our precedent and with the goals of AEDPA. *See Turner v. United States*, 699 F.3d 578, 587 (1st Cir. 2012) (noting that "AEDPA's purpose is to further finality of convictions" (citing *Duncan v. Walker*, 533 U.S. 167, 178, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001))). We hold that to successfully advance a *Johnson II* claim on collateral

review, a habeas petitioner bears the burden of establishing that it is more likely than not that he was sentenced solely pursuant to ACCA's residual clause. Casey has not met that burden. Instead, as noted, he has never argued that he was actually sentenced under the residual clause. Accordingly, we find Casey's petition, which—like those of Dimott and Collamore—relies solely on the non-retroactive decision in *Mathis*, untimely.[8]

III.

For the foregoing reasons, we *affirm* the district courts' dismissals of Dimott's, Collamore's, and Casey's § 2255 petitions.

TORRUELLA, Circuit Judge (Joining in part and Dissenting in part).

I join the majority in affirming the dismissals of Dimott's and Collamore's § 2255 petitions as untimely. However, I cannot join in the majority's disparate and inconsistent treatment of Casey's petition for habeas relief, as opposed to its treatment of the other two petitions at issue, in order to avoid what this case truly calls for: a

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[8] Casey also attempts to argue that *Mathis* is not new law, but merely "clarifies" longstanding law. This is in effect an argument that *Duquette* was wrongly decided at the outset. That again goes to the merits of his *Mathis* claim, and does not alter the fact that *Mathis* does not apply retroactively on collateral review. *Cf.* 136 S. Ct. at 2257.

re-evaluation of this Court's opinion in *Duquette* in light of the Supreme Court's decision in *Mathis*.

In the cases of Dimott and Collamore, the majority correctly gives "due weight" to the habeas judge's finding that the petitioners were sentenced according to the ACCA's enumerated clause because the habeas judge was also the sentencing judge. It is eminently reasonable that a sentencing judge is capable of determining the basis upon which he or she imposed a sentence enhancement when subsequently reviewing that sentence on a § 2255 habeas petition. *See Schriro v. Landrigan*, 550 U.S. 465, 495–96, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) (stating that a judge's memory deserves some deference provided it is based on a complete review of the case). Here, Judge Singal had the opportunity to review Dimott and Collamore's cases prior to determining that he had sentenced them under the enumerated clause. Thus, that determination deserves the deference, as the panel majority recognizes.

The same deference must be given to the habeas judge who reviewed Casey's petition, Judge Hornby, who—like Judge Singal in Dimott and Collamore's cases—was the judge that sentenced Casey. On habeas review, Judge Hornby, also facing a silent record as to the clause under which he applied Casey's ACCA sentencing enhancement, found that Casey did raise a *Johnson II* claim—meaning that his sentence was enhanced pursuant to the ACCA's residual clause. *See Casey*, 2016 WL 6581178, at *3. Judge Hornby analyzed the habeas petition accordingly. *Id.*, at *3-5. Yet, the majority

inexplicably fails to give Judge Hornby the same deference that it gives to Judge Singal.

The majority incorrectly assumes that my "insist[ence]" that the district court found that Casey raised a timely *Johnson II* claim is that the court analyzed the Government's procedural-default argument. This is wide of the mark. Rather, I so find after according Judge Hornby's words their clear and unambiguous meaning. *See id.*, at *3 ("I conclude that ... Casey's *Johnson* claim is a novel constitutional claim that applies retroactively, and he has therefore shown cause for [failing to argue that the ACCA residual clause was unconstitutional at sentencing or on appeal]."), *4 n.9 ("As I have determined above, Casey's *Johnson* claim is a novel constitutional claim with retroactive application...."). The majority rationalizes its disregard of this plain language by claiming that I "take [it] out of context." Yet, as the majority notes, should the district court have believed that Casey had been sentenced pursuant to anything but the ACCA's residual clause, it could have raised timeliness sua sponte. The district court was clearly aware that similar petitions had been decided on timeliness grounds—it even discussed *Dimott* in its decision; should it have believed such an argument appropriate, it would not have needed to reach the merits of Casey's *Johnson II* claim in order to conduct a prejudice analysis. *See id.* at *5. But, it did not raise the issue, and after finding that Casey was sentenced pursuant to the residual clause, embarked on the more onerous procedural default analysis. "Due regard for the trial court's processes and time investment is ... a

consideration appellate courts should not overlook." *Wood*, 566 U.S. at 474, 132 S. Ct. 1826.

In a further departure from this Court's guiding judicial doctrines, the majority raises sua sponte the issue of the timeliness of Casey's habeas petition, which the Government did not argue below. In doing so, the majority ignores the advice provided by the Supreme Court in *Wood* that, in situations such as this, "[a]though a court of appeals has discretion to address, sua sponte, the timeliness of a habeas petition, appellate courts should reserve that authority for use in exceptional cases." *Id.* at 473, 132 S. Ct. 1826 (finding that the appellate court abused its discretion in raising the timeliness issue sua sponte); *see also Cole v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 533 F.3d 932, 936 (8th Cir. 2008) (applying only a "narrow exception" to established preservation rule). The Government makes no argument that this is an exceptional case, and—especially in light of Judge Hornby's finding that Casey raised a timely *Johnson II* claim—this is not the appropriate case for the Court to act on its own accord. Here, as in *Wood*, where the Government forewent an argument below, we should not exercise our confined discretion to save the Government's waiver.

To justify its divergence from *Wood*'s guidance and find that the Government did not forfeit its timeliness argument, the majority speculates—in the Government's favor—as to the reason that the Government did not advance this argument. I cannot subscribe to this guesswork approach. This Court religiously finds a party's failure to raise an argument

before the district court as waived on appeal. *See*, *e.g.*, *United States v. Román-Huertas*, 848 F.3d 72, 77 (1st Cir. 2017) ("The Government did not raise [petitioner's] untimely objection before the district court, ... and so it [is] waived...."); *Sotirion v. United States*, 617 F.3d 27, 32 (1st Cir. 2010) (finding the Government's procedural default argument waived for failing to raise it as a defense in the district court to a § 2255 petition). The same waiver must apply here, and we should refrain from such "unguided speculation." *Cf. Holloway v. Arkansas*, 435 U.S. 475, 491, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) (finding a harmless-error analysis inappropriate in assessing constitutional error of joint representation); *Walsh v. TelTech Systems, Inc.*, 821 F.3d 155, 160 (1st Cir. 2016) (stating that appellate courts draw all reasonable inferences in favor of the nonmoving party but ignore unsupported speculation when reviewing an award of summary judgment).

Moreover, I have significant qualms with the effect that the majority's reasoning has on the waiver doctrine. The majority credits the Government for "brief[ing] [the timeliness issue] on appeal and argu[ing] that it did not waive the timeliness bar." Yet, this is precisely what the waiver doctrine is intended to prevent. Applying the majority's approach would allow any party that chose not to raise an argument in the district court to simply brief that issue on appeal and argue that it did not waive the issue below. In those circumstances, we would find the argument waived, as we should in this one. Further, the Government only acknowledges its failure to raise the timeliness issue in a footnote in its opening brief to this Court, providing scant explanation as to why the

claim was not raised below or why it should not be treated as waived. Instead, it states that the petitioners have briefed the issue and that this Court may raise it sua sponte. Such an undeveloped address is hardly sufficient to save the argument from waiver on appeal. *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

Instead, I would find that the Government relinquished its timeliness argument in the district court. I note that this same U.S. Attorney's Office (for the District of Maine) raised the issue of timeliness in its oppositions to both Dimott's and Collamore's § 2255 petitions, both filed within six weeks of its opposition to Casey's petition. While the majority attributes the Government's decision not to advance this argument in response to Casey's petition as inadvertence rather than strategy, I do not so conjecture. This strikes me as an appropriate basis for finding that the Government displayed its "clear and accurate understanding of the timeliness issue" and "knew that it had an arguable statute of limitations defense," but relinquished that argument. *Wood*, 566 U.S. at 474, 132 S. Ct. 1826 (internal quotation marks and citation omitted).

Finally, the majority's finding that Casey failed to satisfy his burden of proving by a preponderance of the evidence that he was sentenced under the residual clause is equally unpersuasive. The majority pronounces that, in the face of a silent record, placing the burden on a petitioner "makes sense ... because they were certainly present at sentencing and knowledgeable

about the conditions under which they were sentenced." I fail to see what could better satisfy the majority's evidentiary requirement that petitioner was sentenced under the residual clause than a finding by the sentencing judge, who was also "certainly present at sentencing" and far *more* knowledgeable of his own sentencing decisions. I have a difficult time thinking of what further evidence, in the face of a silent record, could be more convincing. The majority suggests in a footnote that Casey could have asked for a remand to the district court to prove that he was sentenced solely under the residual clause; however, such a request would have been nonsensical after the habeas judge clearly already found as much. *See Casey*, 2016 WL 6581178, at *3.

Given the deference owed to the habeas judge here, I would find that, under any of the standards announced by our sister circuits and discussed by the majority,[9]

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[9] As the majority explains, there is an emerging split amongst the circuit courts as to the burden of proof placed on petitioners facing a silent record who, through a § 2255 petition, maintain that their sentences were enhanced pursuant to the residual clause of the ACCA. The Fifth Circuit described this split well in *Taylor*, 873 F.3d at 480-81 (citing *Beeman*, 871 F.3d at 1221-22 (finding that a defendant must show that "more likely than not" he was sentenced according to the residual clause); *Snyder*, 871 F.3d 1122 (10th Cir. 2017) (stating that courts should look to the law at the time of sentencing and determine whether a defendant's convictions fell within the scope of the other ACCA clauses); *Geozos*, 870 F.3d at 895 (holding that, "when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in *Johnson II*."

Casey has shown that he was sentenced pursuant to the residual clause and thus brought forth a timely *Johnson II* claim. This Court should analyze the matter accordingly. As the district court did below, we would accordingly need to address whether Casey's claim is procedurally defaulted for failing to raise it at trial or on direct appeal. The district court found there to be cause for Casey not having raised the issue, but that, while believing that *Mathis* casts significant doubt on the vitality of *Duquette*, it was bound by this Circuit's precedent to find that Maine burglary is generic and also falls under the enumerated clause. *Casey*, 2016 WL 6581178, at *5. Accordingly, it found that Casey did not suffer any actual prejudice. *Id.* at *4.

The district court was correct in its ruling given its boundaries. However, this Court is not so constrained. *See United States v. Tavares*, 843 F.3d 1, 11 (1st Cir. 2016) (stating that the court may overturn prior panel decisions when controlling authority is subsequently announced or when, in light of new authority, the panel would likely have changed its "collective mind." (quoting *United States v. Pires*, 642 F.3d 1, 9 (1st Cir. 2011))). *Mathis* is subsequent controlling authority which calls into question the vitality of our opinion in *Duquette*. *See United States v. Whindleton*, 797 F.3d 105, 113 (1st Cir. 2015) ("An exception to the doctrine of stare decisis applies if '[a]n existing panel decision [is] undermined by controlling authority, subsequently announced, such as

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(citing *Winston*, 850 F.3d at 682)); *Winston*, 850 F.3d at 682 (finding that imposing the burden on movants would result in "selective application" of the new rule announced in *Johnson II*)).

an opinion of the Supreme Court....'" (alterations in original) (citing *United States v. Rodríguez-Pacheco*, 475 F.3d 434, 441 (1st Cir. 2007))). In *Duquette*, we found that because the Maine burglary statute contains all of the elements of generic burglary, under *Taylor*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607, it qualified as generic burglary under the ACCA's enumerated clause. However, *Mathis* has undermined this analysis, instead calling for us to determine if one (or more) of the elements of Maine burglary is broader than the corresponding element of the generic offense. If so, then Maine's burglary statute, like Iowa's burglary statute, cannot fall under the ACCA's enumerated clause.

While we have not conducted this re-analysis of *Duquette*, Casey's petition for habeas relief calls for us to do so to determine if Casey suffered actual prejudice. Addressing this more difficult issue—which the majority seeks to avoid—is necessary to decide this case.[10]

Accordingly, I join in affirming the outcome proposed by the majority in the cases of Dimott and Collamore, and respectfully dissent from the majority in regards to Casey's petition for habeas relief.

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[10] As pointed out by the district court below, *Casey*, 2016 WL 6581178, at *5 n.16, and the Government in its Rule 28(j) letter to the Court, numerous federal circuits have recently reviewed state burglary statutes in light of *Mathis* to determine whether they continue to qualify as enumerated felonies under the ACCA.

Appendix B

United States District Court,
D. Maine.

United States of America,
v.
Charles H. Casey, Jr., Defendant/Petitioner.

Criminal No. 2:11-CR-216-DBH

Civil No. 2:16-CV-346-DBH

Signed 11/03/2016

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Opinion

DECISION AND ORDER ON PETITIONER'S MOTION TO CORRECT SENTENCE UNDER 28 U.S.C. § 2255

D. Brock Hornby, United States District Judge

In 2012, Charles H. Casey, Jr. pleaded guilty to being a felon in possession of a firearm. 18 U.S.C. § 922(g)(1). At his sentencing, I determined that Casey had been convicted of three qualifying prior crimes of violence and accordingly sentenced him to 180 months under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). Judgment at 1–2 (ECF. No. 65). Without Armed Career Criminal status, Casey's maximum

sentence would have been 10 years. 18 U.S.C. § 924(a)(2).[1]

Following the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), holding the ACCA's "residual" clause unconstitutional, Casey filed a motion to correct his sentence under 28 U.S.C. § 2255. Def.'s Mot. to Correct Sentence (ECF No. 68). In response, the government argued that Casey was procedurally barred from his *Johnson* claim and that his prior Maine burglary convictions, *see* 17-A M.R.S.A. § 401, still qualify as predicates under the ACCA's "enumerated" clause. Gov't Resp. in Opp'n to Def.'s Mot. to Correct Sentence (ECF No. 72).

Because extant First Circuit caselaw holds that Casey's prior Maine burglary convictions remain qualifying *enumerated* violent felonies even after Johnson's invalidation of the residual clause, he is unable to show actual prejudice. I therefore **DENY** Casey's motion to correct his sentence.

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[1] I disagree with the government's assertion that, even without Armed Career Criminal status, Casey could have been sentenced to 180 months. Gov't Resp. in Opp'n to Def.'s Mot. to Correct Sentence at 6 (ECF No. 72). Casey pleaded guilty to and was sentenced on a single count of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1). That crime has a statutory cap of 120 months imprisonment, 18 U.S.C. § 924(a)(2), unless he was an Armed Career Criminal.

ANALYSIS

(1) Procedural Default

The government argues that Casey is not entitled to relief because he is procedurally barred from making his *Johnson* claim. It is well-settled that "[c]ollateral relief in a § 2255 proceeding is generally unavailable if the petitioner has procedurally defaulted his claim by fail[ing] to raise [the] claim in a timely manner at trial or on [direct] appeal." *Bucci v. United States*, 662 F.3d 18, 27 (1st Cir. 2011) (alteration in original) (internal quotation marks omitted). At his sentencing, Casey did not argue that the residual clause of the ACCA was unconstitutionally void for vagueness, nor did he appeal his sentence. But I can excuse Casey's procedural default if he "show [s] both (1) 'cause' for having procedurally defaulted his claim; and (2) 'actual prejudice' resulting from the alleged error." *Bucci*, 662 F.3d at 27 (quoting *United States v. Frady*, 456 U.S. 152, 167–68 (1982)).[2]

(i) Cause

According to the Supreme Court, cause is satisfied "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Reed v.*

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[2] I can also excuse Casey's procedural default if he shows "actual innocence." *Bousley v. United States*, 523 U.S. 614, 623 (1998). To establish "actual innocence," Casey must show "factual innocence, not mere legal insufficiency." *Id.* Because Casey's prior Maine burglary convictions remain qualifying felonies under the ACCA, however, I reject his argument that he is actually innocent of being an Armed Career Criminal, see Def.'s Reply on Issue of Procedural Default at 10–12 (ECF No. 76).

Ross, 468 U.S. 1, 16 (1984).[3] The Court has identified three such instances of novelty: (1) "a decision of this Court may explicitly overrule one of our precedents"; (2) "a decision may overtur[n] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved"; and (3) "a decision may disapprov[e] a practice this Court arguably has sanctioned in prior cases." 468 U.S. at 17 (alteration in original) (internal quotation marks omitted). The Court added that "[b]y definition, when a case falling into one of the first two categories is given retroactive application, there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a state court[4] to adopt the position that this Court has ultimately adopted." *Id.* In such

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[3] Although *Reed* concerned 28 U.S.C. § 2254, the First Circuit has ruled that "[t]here is no reason to think that the definition of 'cause' will vary between" section 2254 and section 2255. *Simpson v. Matesanz*, 175 F.3d 200, 211 (1st Cir. 1999).

[4] The First Circuit uses the *Reed* standard for defendants sentenced in a federal district court as well. *See, e.g.*, *Berthoff v. United States*, 308 F.3d 124, 128 & n.3 (1st Cir. 2002) (determining that a petitioner who was seeking relief under section 2255 had not shown cause because his claim was not "novel" to a federal district court under the *Reed* standard); *see also Davis v. United States*, 417 U.S. 333, 344 (1974) ("No microscopic reading of § 2255 can escape either the clear and simple language of § 2254 authorizing habeas corpus relief 'on the ground that (the prisoner) is in custody in violation of the ... laws ... of the United States' or the unambiguous legislative history showing that § 2255 was intended to mirror § 2254 in operative effect." (alteration in original)); *Simpson*, 175 F.3d at 210–12 (1st Cir. 1999).

instances, the failure of the defendant's attorney to raise the claim "is sufficiently excusable to satisfy the cause requirement." *Id.*

Casey argues that his case involves a straightforward application of *Reed*'s first prong because in *Johnson*, 135 S. Ct. at 2563, the Supreme Court held that the residual clause of the ACCA violated due process, overruling its prior decisions in *James v. United States*, 550 U.S. 192 (2007), and *Sykes v. United States*, 564 U.S. 1 (2011). The Court subsequently ruled in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), that *Johnson* announced a new substantive rule that applied retroactively to cases on collateral review.

The government contends, however, that Casey's argument regarding the unconstitutional vagueness of the residual clause was not "novel" at the time of his sentencing. Gov't Resp. in Opp'n to Def.'s Mot. to Correct Sentence at 4–5 (ECF No. 72). In support, the government cites the declaration in *Bousley v. United States* that "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" 523 U.S. 614, 623 (1998) (quoting *Engle v. Isaac*, 456 U.S. 107, 130 n.35 (1982)). But *Bousley* did not deal with a case where the Supreme Court overruled its own precedents.[5] Rather, the Court

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[5] In *Bousley*, the petitioner pleaded guilty to "using" a firearm in violation of 18 U.S.C. § 924(c)(1). *Bousley*, 523 U.S. at 616. Five years later, while his appeal was pending, the Supreme Court decided in *Bailey v. United States*, 516 U.S. 137, 144 (1995), that section 924(c)(1)'s "use" prong required the government to show "active employment of the firearm," not "mere possession." Bousley consequently sought collateral relief under 28 U.S.C.

recognized that, in the absence of controlling Supreme Court precedent "at the time of [Bousley]'s plea, the Federal Reporters were replete with cases involving challenges to the notion that 'use' is synonymous with mere 'possession.'" *Bousley*, 523 U.S. at 622. Thus, even though Bousley's sentencing argument may have been "unacceptable to that particular court at that particular time," he could not establish cause for having failed to raise it, as his argument did not match any of the three Reed criteria for novelty.[6] That is not this case.

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§ 2255, arguing that the legal basis to attack his guilty plea was not "reasonably available" at the time of his plea. But *Bailey* did not overrule precedent. *See Bousley*, 523 U.S. at 625 (Stevens, J., concurring in part and dissenting in part) ("This case does not raise any question concerning the possible retroactive application of a new rule of law, because our decision in *Bailey v. United States* did not change the law." (citations omitted)).

[6] *Bousley* controlled the First Circuit's ruling in *Brache v. United States*, 165 F.3d 99 (1st Cir. 1999). In *Brache*, the petitioner did not object to an overbroad jury instruction regarding the "use" of a firearm under section 924(c)(1) before the Supreme Court adopted a narrower definition in *Bailey*. Similar to *Bousley*, Brache argued that he had shown cause because there was "no reasonable basis in existing law" to challenge the broad definition of "use" in the jury instruction. *Brache*, 165 F.3d at 102 (internal quotation marks omitted). The First Circuit noted that "the instruction was at the time correct under First Circuit precedent," and therefore could not have been challenged successfully. Nevertheless, the court concluded that *Bousley* foreclosed a showing of cause for Brache's failure to challenge the instruction, quoting the *Bousley* language that "the Federal Reporters were replete with cases involving challenges to the notion that 'use' is synonymous with mere 'possession' at the time of the ... plea." *Brache*, 165 F.3d at 102.

The government correctly points out that prior to *Johnson*, Justice Scalia had on multiple occasions in dissent suggested that the Court hold the residual clause void for vagueness. *Derby v. United States*, 131 S. Ct. 2858, 2859–60 (2011) (Scalia, J., dissenting from denial of certiorari); *Sykes v. United States*, 564 U.S. 1, 28 (2011) (Scalia, J., dissenting), *overruled by Johnson*, 135 S. Ct. 2551 (2015); *James v. United States*, 550 U.S. 192, 230–31 (2007) (Scalia, J., dissenting), *overruled by Johnson*, 135 S. Ct. 2551 (2015). The government asserts that because Justice Scalia had explicitly raised the argument that the residual clause was unconstitutionally vague, the argument was not "novel."

This argument, however, overlooks the distinction between *Reed* and *Bousley*. In *Reed*, the Supreme Court plainly stated that a claim is "novel" when the Court "explicitly overrule[s] one of our precedents." 468 U.S. at 17. In *Bousley*, on the other hand, the Supreme Court ruled that a claim is not "novel" when it has been raised in the lower courts but not yet decided by the Supreme Court.[7] To be sure, in the wake of *Bousley*, "the First Circuit has made it clear that the fact that there are First Circuit precedents that hold against the movant's argument does not suffice to establish futility." *United States v. Dean*, 231 F. Supp. 2d 382, 386 (D. Me. 2002)

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[7] As the Supreme Court reiterated most recently, "[I]t is this Court's prerogative alone to overrule one of its precedents." *Bosse v. Oklahoma*, 192 L. Ed. 2d 1, 3 (Oct. 11, 2016) (per curiam) (alteration in original) (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001)).

(emphasis added).[8] Yet the government does not and cannot point to any authority suggesting that *Reed* does not apply when the Supreme Court expressly overrules its own prior precedent. *See Simpson v. Matesanz*, 175 F.3d 200, 211–12 (1st Cir. 1999). Nor has the Court given any indication that *Reed* no longer remains good law. *See Bousley*, 523 U.S. at 622; *cf. Hohn v. United States*, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."). I conclude that under *Reed*, Casey's *Johnson* claim is a novel constitutional claim that applies retroactively, and he has therefore shown cause for his default.

(ii) Prejudice

To show prejudice, the petitioner must demonstrate "a reasonable probability" that but for the alleged error, "the result of the proceeding would have been different." *Prou v. United States*, 199 F.3d 37, 48–49 (1st Cir. 1999) (internal quotation marks omitted). That in turn depends on whether Casey's prior Maine burglary convictions still constitute predicate offenses under the ACCA's enumerated clause. Although Casey has a strong argument that they do not, the current state of First Circuit caselaw is against him as I describe below,

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[8] The First Circuit has declared that "*Bousley* made it clear that if an issue has been decided adversely to an argument in the relevant jurisdiction, and the argument is not made for that reason, that is insufficient reason to constitute cause for a procedural default." *Simpson v. Matesanz*, 175 F.3d 200, 211 (1st Cir. 1999). Nonetheless, the First Circuit continues to treat *Reed* as good law. *Simpson*, 175 F.3d at 212, 215.

and he will have to make his argument challenging that caselaw in an appeal to the First Circuit. At this stage, he has not shown prejudice.[9]

(2) Maine Burglary Convictions

For Casey, the validity of his Armed Career Criminal sentence depends on whether at the time of sentencing he had three previous convictions for a violent felony or a serious drug offense. *See* 18 U.S.C. § 924(e)(1). According to the revised presentence report, Casey had five prior Maine convictions that qualified, four of them involving burglary.[10] The question then is whether the

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[9] I do not accept the government's argument based on *United States v. Ruiz-Garcia*, 886 F.2d 474, 476 (1st Cir. 1989). In citing that case, the government contends that Casey cannot show prejudice because he agreed in his plea agreement that the ACCA applied to him and failed to argue that the ACCA did not apply in the presentence report or on direct appeal. Gov't Resp. in Opp'n to Def.'s Mot. to Correct Sentence at 6 (ECF No. 72). Casey's plea agreement, however, expressly stated that his "waiver of his right to appeal shall not apply to appeals based on a right that has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Agreement to Plead Guilty at 2–3 (ECF No. 52). Moreover, *Ruiz-Garcia* involved a direct appeal where the appellant had not shown "any supportable basis in law or fact" to alter his sentence, 886 F.2d at 477, rather than a collateral challenge involving "a constitutional principle that had not been previously recognized but which is held to have retroactive application," *Reed v. Ross*, 468 U.S. 1, 17 (1984). As I have determined above, Casey's *Johnson* claim is a novel constitutional claim with retroactive application to cases on collateral review.

[10] The revised presentence report lists five qualifying convictions. *See* Revised Presentence Report ¶ 17. They are three burglaries, an attempted burglary, and a drug conspiracy. *Id.* at ¶¶ 26, 29, 30,

Maine burglary convictions fit the portion of the ACCA that refers to a felony that is "burglary ... or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B)(ii). The government does not contend that, after *Johnson*, Casey's prior Maine burglary convictions, *see* 17-A M.R.S.A. § 401, qualify under the so-called residual clause ("otherwise involves conduct that presents a serious potential risk of physical injury to another"). Instead, it argues that binding First Circuit precedent, *United States v. Duquette*, 778 F.3d 314, 317–18 (1st Cir.), *cert. denied*, 136 S. Ct. 262 (2015), has determined that Maine's burglary statute qualifies as "generic" burglary and that Casey's prior convictions are therefore "enumerated" convictions for purpose of the ACCA. Gov't Resp. in Opp'n to Def.'s Mot. to Correct Sentence at 7–9 (ECF No. 72).

For his part, Casey relies upon the Supreme Court's post-*Duquette* decision in *Mathis v. United States*, 136 S. Ct. 2243, 2250, 2257 (June 23, 2016), to argue that convictions under Maine's burglary statute no longer qualify.[11]

In *Duquette*, the First Circuit examined whether Maine's burglary statute contained the elements of

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32, 33. The government concedes that the drug offense does not qualify. Gov't Resp. in Opp'n to Def.'s Mot. to Correct Sentence at 2 n.1 (ECF No. 72).

[11] Unlike its argument about *Johnson*, the government has not argued that the *Mathis* analysis should not be applied to Casey's sentence. Instead, it argues that *Mathis* does not alter the *Duquette* analysis.

generic burglary identified by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990). *Duquette*, 778 F.3d at 317–18. The First Circuit determined that Maine's burglary statute did indeed "set [ ] forth the 'generic burglary' elements of (1) unlawful or unprivileged entry into, or remaining in, (2) a building or structure, with (3) intent to commit a crime." *Id.*[12] Consequently, the First Circuit concluded that a Maine burglary conviction qualifies as a violent felony under the ACCA. *Id.* at 318.

The next year in *Mathis*, the Supreme Court ruled that Iowa's burglary statute, Iowa Code § 702.12, covered more conduct than generic burglary and did not qualify as a predicate violent felony under the ACCA.[13]

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[12] Under Maine's burglary statute, an individual is guilty of burglary when she "enters or surreptitiously remains in a structure knowing that person is not licenced or privileged to do so, with the intent to commit a crime therein." 17–A M.R.S.A. § 401(1). The statute provides that "structure" means "a building or other place designed to provide protection for persons or property against weather or intrusion, but does not include vehicles and other conveyances whose primary purpose is transportation of persons or property *unless such vehicle or conveyance, or a section thereof, is also a dwelling place.*" 17-A M.R.S.A. § 2(24) (emphasis added). In turn, a "dwelling place" means "a structure that is adapted for overnight accommodation of persons, or sections of any structure similarly adapted." 17-A M.R.S.A. § 2(10).

[13] Iowa's burglary statute defined an "occupied structure" as "any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value." Iowa Code § 702.12.

Acknowledging the wide range of land, water, and air vehicles specified in Iowa's burglary statute, the Supreme Court determined that the Iowa statute "defines one crime, with one set of elements, broader than generic burglary—while specifying multiple means of fulfilling its locational element, some but not all of which (i.e., buildings and other structures, but not vehicles) satisfy the generic definition." *Mathis*, 136 S. Ct. at 2250. Because Iowa's burglary statute had a broader locational element than generic burglary, the Court held that the Mathis's prior burglary convictions could not support an ACCA sentence. *Id.* at 2257.

In the First Circuit, the "law of the circuit" doctrine makes a prior First Circuit decision "inviolate absent either the occurrence of a controlling intervening event (e.g., a Supreme Court opinion on the point; a ruling of the circuit, sitting en banc; or a statutory overruling) or, in extremely rare circumstances, where non-controlling but persuasive case law suggests such a course." *United States v. Chhien*, 266 F.3d 1, 11 (1st Cir. 2001). Thus, the question here is whether the Supreme Court's decision in *Mathis* constitutes "a controlling intervening event" such that district courts in the First Circuit should no longer follow *Duquette*'s directive that Maine burglary qualifies as a violent felony under the ACCA. *Chhien*, 266 F.3d at 11.

In dictum,[14] another judge in this District has determined that even after *Mathis*, *Duquette* remains

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[14] I say dictum because the *Dimott* court first decided that the petition there was untimely. In doing so, the court ruled that *Mathis* did not announce a new substantive rule that was retroactively

"the 'law of the circuit' and that this Court is bound by it unless and until the First Circuit decides to revisit *Duquette*." *Dimott v. United States*, No. 2:06-cr-6-GZS, 2016 WL 6068114, at *3–4 (D. Me. Oct. 14, 2016), *appeal docketed*, No. 16-2289 (1st Cir. Oct. 25, 2016). The *Dimott* court noted that, in light of *Mathis*, Maine's burglary statute could be read as "categorically reaching a broader range of places than generic burglary," but nonetheless concluded that "*Duquette* currently provides a binding answer to that question within the First Circuit." *Dimott*, 2016 WL 6068114, at *4. I follow *Dimott* and apply *Duquette*. Maine's burglary statute encompasses a narrower ranger [sic] of places than the Iowa statute in *Mathis*, which covered "any building, structure, [or] land, water, or air vehicle," Iowa Code § 702.12. By contrast, Maine burglary includes only "a building or other place designed to provide protection for persons or property against weather or intrusion" and certain "vehicles and other conveyances," 17-A M.R.S.A. § 2(24), that are "adapted for overnight accommodation of persons," 17-A M.R.S.A. § 2(10). Given the appreciable difference in locations covered by the Maine and Iowa burglary statutes, I do not consider *Mathis* ipso facto a definitive ruling that *Duquette* is wrong.

I believe that *Mathis* has, however, cast significant doubt on the continued vitality of *Duquette*.[15] In the

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applicable to cases on collateral review. *Dimott*, 2016 WL 6068114, at *3. The government has made no such argument here.

[15] *Dimott* observed that, although *Duquette* preceded both *Johnson* and *Mathis*, the Supreme Court denied certiorari in *Duquette*, 778

wake of *Mathis*, Maine's burglary statute, which encompasses camping vehicles, trailers, sleeper trains, and airplanes and boats with sleeping accommodations, seems to have a broader locational element than generic burglary.[16] But I leave that conclusion to the First Circuit.

F.3d 314 (1st Cir. 2015), *cert. denied*, 136 S. Ct. 262 (Oct. 5, 2015), a few months before deciding to review the Eighth Circuit's ruling in *Mathis*, 786 F.3d 1068 (8th Cir. 2015), *cert. granted*, 136 S. Ct. 894 (Jan. 19, 2016). *Dimott*, 2016 WL 6068114, at *4. "Given this timeline," the court determined that *Mathis* did not overrule *Duquette*. *Dimott*, 2016 WL 6068114, at *4. The Supreme Court itself, however, has "frequently said that the denial of certiorari imports no expression of opinion upon the merits of a case." *Brown v. Allen*, 344 U.S. 443, 456 (1953) (internal quotation marks omitted). Thus, I respectfully disagree that either this court or the First Circuit should infer from the Supreme Court's denial of certiorari in *Duquette*, 136 S. Ct. 262, that *Duquette* survives *Mathis*.

[16] In addition to arguing *Duquette*, the government has cited *Lussier v. United States*, No. 15-2500 (1st Cir. June 20, 2016), as a post-*Mathis* First Circuit decision that *Duquette* still governs. Gov't Resp. in Opp'n to Def.'s Mot. to Correct Sentence at 8 (ECF No. 72). *Lussier*, however, was decided before *Mathis* (June 20, 2016 vs. June 23, 2016). The government also cited *United States v. Herrold*, 813 F.3d 595 (5th Cir. Feb. 12, 2016), *cert. granted, judgment vacated*, 2016 WL 4367616 (Oct. 11, 2016). Gov't Resp. in Opp'n to Def.'s Mot. to Correct Sentence at 9–10 (ECF No. 72). That, too, was a pre-*Mathis* decision. In fact, in the wake of the Supreme Court's *Mathis* decision, other federal circuit courts have consistently applied *Mathis* to find state burglary statutes insufficient as qualifying enumerated felonies. *E.g.*, *United States v. Ritchey*, No. 15-2460, 2016 WL 6247122, at *8 (6th Cir. Oct. 26, 2016) (concluding that Michigan's breaking and entering statute was broader than generic burglary and could therefore not serve as a predicate offense under the ACCA); *United States v. White*, No.

CONCLUSION

The petitioner's motion to correct his sentence under 28 U.S.C. § 2255 is **DENIED**.

SO ORDERED.

DATED THIS 3RD DAY OF NOVEMBER, 2016.

15-4096, 2016 WL 4717943, at *7-8 (4th Cir. Sept. 9, 2016) (determining that "the West Virginia's burglary statute's reference to a dwelling house 'easily could cover' enclosures that are excluded from the generic definition of burglary, such as vehicles" and consequently did not constitute a violent felony under the ACCA (citation omitted)); *United States v. Smith*, No. 15-3033, 2016 WL 4626561, at *1 (7th Cir. Sept. 6, 2016) ("In light of *Mathis*, the government now concedes that it is unable to demonstrate that Smith's conviction for second-degree Missouri Burglary qualifies as a predicate felony under the Act."); *United States v. Door*, No. 14-30170, 2016 WL 4207977, at *1 (9th Cir. Aug. 10, 2016) (holding that, "in light of *Mathis*, Door's prior convictions for burglary in Washington are not violent felonies"); *United States v. Pledge*, No. 15-2245, 2016 WL 3644648, at *1 (8th Cir. July 8, 2016) (per curiam) (ruling that, following *Mathis*, the defendant could not be classified as an armed career criminal due to his prior conviction under Iowa's burglary statute).

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CHARLES H. CASEY, JR.,	)	
	)	
vs.	)	NO.
	)	2:11-CR-00216-DBH
UNITED STATES OF AMERICA	)	
	)	

DEFENDANT'S MOTION TO CORRECT SENTENCE UNDER 28 U.S.C. §2255

(ACCA) (ME Burglary § 401)

NOW COMES Charles H. Casey, Jr. by counsel pursuant to 28 U.S.C. § 2255 and asks the court to vacate and correct his sentence based on *Johnson v. United States*, 135 S. Ct. 2551 (June 26, 2015).

SUMMARY

Charles H. Casey, Jr. was convicted of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and sentenced based on the ACCA, §924(e)(1). Under the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (June 26, 2015) made retroactive to Casey in *Welch v. U.S.*, 136 S. Ct. 1257 (April 18, 2016), Casey no longer meets the criteria for application of ACCA. We request the Court grant this motion, vacate his current sentence, and set the matter for re-sentencing.

Maine Burglary as a ACCA Predicate

Maine burglary convictions under 17-A M.R.S.A. § 401 are not generic burglary and while may have previously qualified under the residual clause, no longer qualify. Counsel will file a more detailed supporting memorandum in the future. Non-generic burglary came previously qualified as an ACCA predicate under the residual clause, not the enumerated clause. *Taylor v. United States*, 495 U.S. 575, 598 (U.S. 1990)(the "generic" meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.); *James v. United States*, 550 U.S. 192, 212-13, 127 S. Ct. 1586, 1599-600, 167 L. Ed. 2d 532 (2007) overruled on other grounds by *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). In light of *Johnson v. United States*, 135 S. Ct. 2551 (2015); *U.S. v. Descamps*, (single indivisible set of elements) Maine burglary is no longer a categorical crime of violence under the enumerated or residual clause of the ACCA, 18 U.S.C. § (e)(2)(B)(ii); ; *Mathis v. U.S.*, 2016 U.S. LEXIS 4060 (6/23/16).

Maine burglary, 17-A M.R.S.A. §401 in relevant portion states:

1. A person is guilty of burglary if:

   A. The person enters or surreptitiously remains in a **structure** knowing that that person is not licensed or privileged to do so, with the intent to commit a crime therein. Violation of this paragraph is a Class C crime; or

   B. The person violates paragraph A and:

(1) The person is armed with a firearm, or knows that an accomplice is so armed. Violation of this subparagraph is a Class A crime;

(2) The person intentionally or recklessly inflicts or attempts to inflict bodily injury on anyone during the commission of the burglary or an attempt to commit the burglary or in immediate flight after the commission or attempt. Violation of this subparagraph is a Class B crime;

(3) The person is armed with a dangerous weapon other than a firearm or knows that an accomplice is so armed. Violation of this subparagraph is a Class B crime;

(4) The violation is against a **structure that is a dwelling place**. Violation of this subparagraph is a Class B crime; or

(5) At the time of the burglary, the person has 2 or more prior convictions for any combination of the Maine Class A, B or C offenses listed in this subparagraph or for engaging in substantially similar conduct to that of the Maine offenses listed in this subparagraph in another jurisdiction. The Maine offenses are: theft; any violation of this section or section 651, 702 or 703; or attempts to commit any of these crimes. Section 9-A governs the use of prior convictions when determining a sentence. Violation of this subparagraph is a Class B crime. 17-A M.R.S.A. § 401 (emphasis added).

"Structure" means a building or other place designed to provide protection for persons or

> property against weather or intrusion, but does not include vehicles and other conveyances whose primary purpose is transportation of persons or property **unless such vehicle or conveyance, or a section thereof, is also a dwelling place**. 17-A M.R.S.A. § 2(24) (emphasis added).
>
> **"Dwelling place"** means **a structure that is adapted for overnight accommodation of persons, or sections of any structure similarly adapted**. A dwelling place does not include garages or other structures, whether adjacent or attached to the dwelling place, that are used solely for the storage of property or structures formerly used as dwelling places that are uninhabitable. It is immaterial whether a person is actually present. 17-A M.R.S.A. § 2(10) (emphasis added).

Maine's definition of a structure includes a vehicle or conveyance used as a dwelling place. Dwelling place includes a "structure which is adapted for overnight accommodation of persons." It is "immaterial whether a person is actually present." Maine's definition of structure adds thousands of camper vans, camping trailers, motorized campers and other forms of camping vehicles as well as boats with berths and overnight accommodations, sleeper trains, an airplane with sleeping accommodations, any form of transportation (conveyance) which is adapted for overnight accommodation. This broad definition takes Maine burglary convictions outside of generic burglary, casting them under the now unconstitutional residual clause.

We recognize *U.S. v. Duquette*, 778 F.3d 314 (1st Cir. 2015) may suggest otherwise. *Duquette* was decided

before both *Johnson* and *Mathis*. Duquette argues he was not a Career Offender, yet his enhancement was under ACCA, not Career Offender. Duquette failed to argue Maine burglary is non-genric and overly broad due to the definitions of dwelling and structure in 17-A M.R.S.A. §§2(10) and 2(24). Duquette argued the court should apply the holding of *United States v. Giggey*, 551 F.3d 27 (1st Cir. 2008), a Guidelines enhancement limited to "burglary of a dwelling" §4B1.2(a)(2) to the ACCA, "is burglary" 18 U.S.C. § 924(e)(2)(B)(ii).

BASIS FOR § 2255 RELIEF

In light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), Casey is no longer subject to ACCA once his Mapine burglaries are no longer predicates having fallen under the now stricken residual clause. *Johnson v. United States*, 135 S. Ct. 2551 (June 26, 2015). The ACCA requires three qualifying predicates. §924(e)(1). Lacking three qualifying predicates ACCA does not apply and Casey should be resentenced to no more than 10 years followed by three years of supervised release on the ACCA conviction.

CONCLUSION

Casey is entitled to relief under § 2255 because, in light of *Johnson*, his sentence violates due process of law. This Court should vacate his ACCA based sentence and re-sentence him.

DATE: June 27, 2016

/s/ David Beneman
David Beneman
Attorney for Charles H.

Casey, Jr.

David Beneman, Federal Defender
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207-553-7070 ext. 101
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CERTIFICATE OF SERVICE

I, **David Beneman**, attorney for **Charles H. Casey, Jr.**, hereby certify that I have served, electronically, a copy of the **within "DEFENDANT'S MOTION TO CORRECT SENTENCE UNDER 28 U.S.C. §2255"** upon the United States Attorney's Office to counsel of record via the ECF system.

/s/ David Beneman
David Beneman

DATE: June 27, 2016

Appendix D

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA, Plaintiff	CRIMINAL ACTION Docket No: 2:11-216-DBH
-versus- CHARLES H. CASEY, JR., Defendant	

Transcript of Proceedings

Pursuant to notice, the above-entitled matter came on for **Sentencing** held before **THE HONORABLE D. BROCK HORNBY**, United States District Court Judge, in the United States District Court, Edward T. Gignoux Courthouse, 156 Federal Street, Portland, Maine, on the 4th day of September 2012 at 10:10 a.m. as follows:

Appearances:

For the Government: Darcie N. McElwee, Esquire
Assistant United States Attorney

For the Defendant: James A. Clifford, Esquire

Also Present: J. Martin Wahrer, U.S. Probation

Lori D. Dunbar, RMR, CRR
Official Court Reporter

(Prepared from manual stenography and computer aided transcription)

[2] (Open court. Defendant present.)

THE COURT: Good morning.

MS. MCELWEE: Good morning, Your Honor.

THE COURT: This is the case of United States versus Charles Casey, Jr., Criminal No. 11-216. The matter is on this morning for sentencing. Are there any victims that require notification, Ms. McElwee?

MS. MCELWEE: Yes, Your Honor, technically we considered Miss Hall a proximate victim. However, she does not consider herself a victim, I should state on the record. She is present in the courtroom.

THE COURT: Thank you.

Mr. Clifford, would you and Mr. Casey please stand?

Mr. Casey, the purpose of the hearing this morning is for me to sentence you. But before I do that I'm going to hear from the prosecutor, I'm going to hear from your lawyer, I'll hear from you if you wish to speak to me. I am going to start by asking some questions of you and your lawyer because I need to be sure that you've read and discussed with him the revised presentence report because it analyzes how the sentencing guidelines and statutes apply, and they affect how I sentence you.

And I should say, first of all, that I have [3] received and read the defendant's sentencing memorandum that Mr. Clifford prepared. I've also received and read letters that the case manager handed to me a few minutes ago, one from Jessica Casey, the defendant's

wife, one from Penny Liberty, the defendant's mother, one from Melissa -- is it Grig?

MR. CLIFFORD: I think it's King, Your Honor.

THE COURT: King, all right. And then one from the defendant's brother, Keith Liberty. Do you want those back, Mr. Clifford? Do you have copies?

MR. CLIFFORD: Melody made copies so --

THE COURT: Very good. So, Mr. Clifford, have you read and discussed with Mr. Casey the revised presentence report?

MR. CLIFFORD: I sent him a copy and discussed it with him, as well as the sentencing memorandum, Your Honor.

THE COURT: And did you have enough time to do that?

MR. CLIFFORD: I did, thank you.

THE COURT: Mr. Casey, have you used any drugs or alcohol in last 24 hours?

THE DEFENDANT: No.

THE COURT: And your lawyer has provided to me a list of prescription medications. Are these the [4] medications that you're taking?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you taking those in the prescribed amounts?

THE DEFENDANT: Yes.

THE COURT: Do they, either alone or in combination, prevent you from understanding what's happening here this morning?

THE DEFENDANT: No.

THE COURT: All right. I'll admit that as a court exhibit. Court Exhibit A will be a sealed exhibit.

Have you read the revised presentence report and discussed it with your lawyer?

THE DEFENDANT: Yes.

THE COURT: Did you have enough time to do that?

THE DEFENDANT: Yeah.

THE COURT: I met with your lawyer and the prosecutor in my office some time ago to find out what is in dispute in connection with sentencing. And as a result of that conference it's my understanding that there is no dispute about the contents of the report. I will not make a finding about the discharge of the firearm because it will not affect the sentence. But [5] otherwise there's no disagreement, and the only question for me here this morning is where within the statutory guideline range to sentence you. Is that your understanding as well?

THE DEFENDANT: Yeah.

THE COURT: All right, thank you. You can be seated. I'll hear from the lawyers; I'll hear from the prosecutor first, Ms. McElwee.

MS. MCELWEE: Thank you, Your Honor.

As the Court is aware, Your Honor, this is a case where a mandatory minimum applies, so there is

sometimes very little for the Government to say in such a case. This is a situation where Mr. Casey was in a really bad place at the time of his firearm possession. He was struggling with some mental illness. He was in what I would describe as an incredibly dangerous situation for both him and his now wife, which I'm sure is what led her to ask for help. There's no question that he was suicidal at the time.

With that said, this was a firearm that he and Miss Hall purchased together at Kittery Trading Post not that long before, and it sounded like from the presentence report some behavior between the two of them leading up to it was dangerous as well. I think we're all fortunate that Mr. Casey and Ms. Hall are [6] here.

Under the circumstances a 15-year sentence would seem excessive for a somewhat simple possession, although it's certainly reckless behavior on Mr. Casey's part in his possession and discharge of the weapon. I looked at his criminal history category, however, and it was a VI before he was identified as an armed career criminal. So the sentencing here is -- the armed career criminal statute, the mandatory minimum is only adding an additional year of what Mr. Casey's advisory guideline range would otherwise have been under the circumstances.

So in this case the Government is, of course, asking for no more than the mandatory minimum of 15 years, which is 180 months, and would ask that the maximum term of supervised release be imposed to assist him with his struggles when he gets out.

THE COURT: Thank you, Ms. McElwee.

MS. MCELWEE: Thank you.

THE COURT: Mr. Clifford, I'll hear from you for the defendant.

MR. CLIFFORD: Good morning, Your Honor.

THE COURT: Good morning.

MR. CLIFFORD: This is a very sad case and one in which there is not much choice or many options for [7] Mr. Casey. And I think it's particularly frustrating as a lawyer to realize there's not much you can do in a case like this with a sentencing and the mandatory minimum guidelines here -- I'm sorry, the mandatory sentence in light of the guidelines.

There's not much I would like to add other than what's been noted in the sentencing memo. I will say that Mr. Casey understands what's going on; he understands that there was not much we could do here. He only asks for your recommendation to one of two facilities. One is the medical facility that I've noted in the sentencing memorandum. He would like to get treatment -- to continue his treatment. He does have a serious and a number of different illnesses, including mental illness. And he would obviously prefer to be as close to his family as possible, and I know the Court isn't in a position to make a specific finding or promise anything to anybody, but I understand that the new federal prison in New Hampshire might be a possibility. He would strongly urge and request respectfully that the Court recommend he be sentenced and placed at that facility. I think it also does have a medical facility.

THE COURT: Mr. Wahrer, do you know; is that correct?

[8] PROBATION OFFICER: I'm not aware of that facility having a medical facility.

THE COURT: Not Devens.

MR. CLIFFORD: Berlin, New Hampshire.

THE COURT: I understand. I don't know, but if you've looked it up and find that there is medical --

MR. CLIFFORD: I think it does; I think they all have some medical treatment facilities. That would be his first choice, obviously, if there's anything you can do there.

And other than that I would note that Ms. Hall, now Mrs. Casey, is here. She's written you a letter, and I know that it's not going to the findings or the particulars of this case, but they are both very adamant that there was not any direct -- the gun was not pointed at her. It was really his situation where he was panicking and having an anxiety attack, and it was unfortunate that it discharged. I agree with Ms. McElwee that it is fortunate that everybody's still here. But he has asked me several times to make sure that that is clear to the Court, and I am certainly passing it along.

Other than that there's not much wiggle room here because it's mando and it's 15 years, and he [9] understands that. And we ask that you impose that with a recommendation to New Hampshire or to a medical facility if New Hampshire is not a possibility. Thank you.

THE COURT: Thank you, Mr. Clifford. Is there any victim here who would like to be heard? Ms. Casey, do you wish to be heard?

MS. CASEY: I pretty much said it in the letter, you know, I mean, other than –

THE COURT: I'm sorry, if you do want to speak I need you to come to the microphone so we can hear you.

MS. CASEY: Sorry. I think Mr. Clifford has said mostly everything. I know Berlin, New Hampshire, is a new facility, just opened, and I believe it does have medical there. I think being close to his family is very important for Charlie considering all his, you know, mental illness and addiction and, you know, other disease, whatever you want to call it. The letter I recommend the most is Keith Liberty because he's known Charlie and looks up to him. I guess that's it, really.

THE COURT: Thank you very much, Ms. Casey.

MS. CASEY: Thank you.

THE COURT: Mr. Casey, as the defendant before [10] me for sentencing you have the right to speak to me yourself. You can tell me anything you want me to know and especially anything that might lead me to be lenient with you. Please go ahead.

THE DEFENDANT: I'm kind of choked up.

THE COURT: That's all right, take your time.

THE DEFENDANT: I don't really know. I'm a mess, really, you know. I screwed up. I'd like to apologize to everybody, my family. That's it, I guess.

THE COURT: Thank you, Mr. Casey. Anything further, Mr. Clifford?

MR. CLIFFORD: Nothing further, thank you.

THE COURT: Anything further, Ms. McElwee?

MS. MCELWEE: No, thank you, Your Honor.

THE COURT: I previously read the revised presentence report, as well as all of the other materials that I described at the beginning of the hearing. And now that I've heard from the lawyers, I've heard from Ms. Casey, I've heard from the defendant himself, I make my findings of fact and conclusions of law and impose sentence.

At this time I order that the plea agreement be accepted. I find the facts as set out in the revised presentence report, with the exception of the finding concerning whether the defendant pointed the firearm in [11] the direction of Ms. Casey. That will not affect the sentence. The base offense level would be 24 under 2K2.1. But because Mr. Casey has at least three prior convictions for a violent felony or a serious drug offense, he's an armed career criminal subject to the enhanced sentence, and so his base offense level is 33, Guideline 4B1.4(b)(3)(B). He gets a three-level reduction for accepting responsibility, Guideline 3E1.1. The total offense level, therefore, is 30. His criminal history is Category VI; and, therefore, his guideline range, taking into account the mandatory statutory minimum, is 180 to 210 months. He's not eligible for probation. Supervised release must be two to five years. He's not able to pay any fine, even with the use of a reasonable installment

schedule, and there's no alternative sanction. And restitution is not an issue.

Are there any errors or omissions in the guideline findings for the Government?

MS. MCELWEE: No, Your Honor.

THE COURT: For the defense?

MR. CLIFFORD: Not from the defense.

THE COURT: Mr. Casey, as you're aware, as your lawyer has told you and is in the sentencing memorandum, the statute that Congress has passed means [12] that I cannot sentence you to less than 15 years. That's a mandatory minimum. I am going to sentence you at the minimum, which is 15 years. That's a serious sentence under anybody's calculations. I hear your lawyer's description of how this came to pass and I hear your wife's description, but it is the case that that's the sentence that Congress requires me to hand down.

It's apparent that you have some people that love you. These are very moving letters. I hope you've read them. And I hope your lawyer gives you the opportunity to have those when you do get to prison because they're pretty important descriptions of the person you can be when you're properly under your medications and not otherwise distorting reality.

And so I am going to follow the sentence with the term of supervised release with all the standard and special conditions that are described in the presentence report. I will recommend you for Berlin, New Hampshire, but as your lawyer says, that's only a recommendation, it's up to BOP what they do, but I'll

make that recommendation. And at this time the Court will impose sentence.

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned [13] for a total term of 15 years, 180 months. I recommend him for the new facility at Berlin, New Hampshire, so that he can be near his family and so that he can receive the medical treatment he requires. He will be remanded to the custody of the United States Marshal.

Upon his release from prison he shall be on supervised release for a term of five years. He shall report to the probation office in the district to which he is released within 72 hours of his release. He shall not commit another federal, state, or local crime. He shall not illegally possess a controlled substance. He shall cooperate in the collection of DNA as directed by the probation officer. He shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. He shall pay any criminal monetary penalties that remain unpaid. He shall comply with the standard conditions adopted by this Court and the following additional conditions:

One, he shall participate in mental health treatment as directed by the supervising officer until released from the program by the supervising officer. He shall pay or copay for services during such treatment to the officer's satisfaction. He shall comply with the medication program prescribed by a licensed medical practitioner.

[14] Three, he shall not use or possess any controlled substance, alcohol, or other intoxicant, and shall

participate in a program of drug and alcohol abuse therapy to the supervising officer's satisfaction. This shall include testing to determine if he's used drugs or intoxicants. e shall submit to one test within 15 days of release and at least two but no more than 120 per calendar year thereafter as directed by the supervising officer. He shall pay or copay for services during such treatment to the supervising officer's satisfaction. He shall not obstruct or tamper or try to obstruct or tamper in any way with any tests.

Four, he shall participate in an evaluation to determine if sex offender treatment is appropriate as directed by the supervising officer.

Five, he shall not own or possess any firearm or other dangerous weapon or knowingly be at any time in the company of anyone known by him to possess a firearm or other dangerous weapon.

And six, he shall at all times readily submit to a search of his residence and any other premises under his dominion and control by his supervising officer upon the officer's request when the officer has reasonable basis to believe that such a search will [15] lead to the discovery of evidence of violation of the terms of supervised release. Failure to submit to such a search may be grounds for revocation.

The criminal monetary penalties are the special assessment of $100 in Count 1. I find that he does not have the ability to pay a fine; I therefore waive the fines except for the hundred dollar special assessment, which is mandatory. Payment of the total is due in full immediately. Any amount he's unable to pay now is due

and payable during imprisonment. Upon release from prison any remaining balance shall be paid in monthly installments. The amounts will be determined initially by the supervising officer, but they're subject always to review by the sentencing judge on the request of either the defendant or the Government.

Now, Mr. Casey, you've entered into a plea agreement that gives up your right to appeal your sentence in light of the level that I just sentenced you at. Generally those agreements are enforceable. If you believe that your agreement for any reason is unenforceable, you need to present that argument to the Court of Appeals. And the way that you do that is first you have to file with the clerk of this court within 14 days from today a written notice of appeal. If you fail to do that you'll be unable to proceed any [16] farther. If you want to try to appeal your sentence and cannot get your lawyer to file that notice, you can ask for the clerk of this court to file the notice for you, and the clerk will do it but it must be within the 14 days. If you like you can ask right now out loud here in the courtroom for the clerk to file that notice and the clerk will do so. If you cannot afford to pay the costs of taking an appeal, you can ask permission to proceed without paying costs, and if you qualify financially you'll be permitted to do that.

Do you understand all that I have just told you?

THE DEFENDANT: Yeah.

THE COURT: Anything further from the Government, Ms. McElwee?

MS. MCELWEE: No, thank you, Your Honor.

THE COURT: The defendant, Mr. Clifford?

MR. CLIFFORD: No, thank you, Your Honor.

THE COURT: Thank you, counsel. Good luck to you, Mr. Casey. The Court will stand in recess.

(Time noted: 10:29 a.m.)

[17] **C E R T I F I C A T I O N**

I, Lori D. Dunbar, Registered Merit Reporter, Certified Realtime Reporter, and Official Court Reporter for the United States District Court, District of Maine, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated: February 20, 2018

/s/ Lori D. Dunbar

Official Court Reporter