No. 17-1251

In the Supreme Court of the United States

CHARLES H. CASEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOHN P. CRONAN
Acting Assistant Attorney General
WILLIAM A. GLASER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner was entitled to postconviction relief based on *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), where he failed to present any evidence or argument that he was sentenced under the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), that was invalidated in *Johnson*, as opposed to the Act's still-valid enumerated offenses clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

Statute and rule—Continued: Page

In the Supreme Court of the United States

No. 17-1251

CHARLES H. CASEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 881 F.3d 232. The opinion of the district court (Pet. App. 31a-45a) is not published in the Federal Reporter but is available at 2016 WL 6581178.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2018. The petition for a writ of certiorari was filed on March 8, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Maine, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. *Id.* at 2-3.

Petitioner did not appeal his conviction or sentence. In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. Pet. App. 46a-51a. The district court denied petitioner's motion, *id.* at 31a-45a, and granted a certificate of appealability (COA), D. Ct. Doc. 78, at 1 (Nov. 9, 2016). The court of appeals affirmed. Pet. App. 1a-30a.

1. On June 16, 2011, petitioner's girlfriend, Jessica Hall, reported to police in Saco, Maine, that petitioner had physically abused her and fired a gun inside their apartment. Presentence Investigation Report (PSR) ¶ 3. Hall told the police that petitioner had placed the gun inside his mouth during an argument and then fired a round in her direction, striking the wall. *Ibid.* Police officers detained petitioner later that day and found a .22 caliber handgun under his shirt. PSR ¶ 4.

A federal grand jury charged petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. Petitioner pleaded guilty to that offense. Plea Agreement 1.

The default sentencing range for a violation of Section 922(g)(1) is zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), prescribes a sentence of 15 years to life in prison if the defendant has at least three prior convictions for a "serious drug offense" or a "violent felony." 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as an offense punishable by more than a year in prison that

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that

> presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). Clause (i) is known as the "elements clause"; the first part of clause (ii) is known as the "enumerated offenses clause"; and the latter part of clause (ii) (beginning with "otherwise") is known as the "residual clause." See *Welch* v. *United States*, 136 S. Ct. 1257, 1261 (2016).

The Probation Office determined that petitioner was subject to an enhanced sentence under the ACCA. PSR ¶¶ 17, 58. The Probation Office noted that petitioner had four prior convictions in Maine that qualified as violent felonies, including three convictions for burglary and one for attempted burglary, as well as a Maine conviction for a serious drug offense (conspiracy to distribute heroin). PSR ¶¶ 17, 26, 29, 30, 32, 33. The Probation Office did not specify whether petitioner's burglary convictions qualified as ACCA predicate offenses under the enumerated offenses clause (which includes "burglary") or the residual clause. Petitioner acknowledged that his ACCA classification was correct. PSR Addendum.

The district court adopted the Probation Office's determination that petitioner was an armed career criminal and sentenced him to 180 months of imprisonment. Pet. App. 60a, 62a. Petitioner did not appeal.

2. In 2015, this Court held in *Johnson* v. *United States*, 135 S. Ct. 2551, that the ACCA's residual clause is unconstitutionally vague. *Id.* at 2557. The Court explained, however, that its decision invalidating the residual clause "d[id] not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the [ACCA's] definition of a violent felony." *Id.* at 2563. The Court later held in *Welch*, *supra*, that

Johnson announced a substantive rule that applies retroactively on collateral review. 136 S. Ct. at 1265.

In 2016, petitioner moved to vacate his sentence under 28 U.S.C. 2255. Pet. App. 46a-51a. Petitioner argued that Maine burglary could not qualify as a violent felony under the ACCA's residual clause following *Johnson*. *Id.* at 47a, 50a. He further argued that the enumerated offenses clause could not provide a basis for classifying his prior convictions as violent felonies because Maine's burglary statute is broader than generic "burglary" under the ACCA. *Id.* at 49a. Specifically, petitioner argued that the statute is overbroad because it includes burglaries of vehicles that are adapted for overnight accommodation. *Ibid.* Petitioner acknowledged that the First Circuit had previously held that Maine burglary categorically qualifies as generic burglary under the ACCA's enumerated offenses clause, see *United States* v. *Duquette*, 778 F.3d 314, 318, cert. denied, 136 S. Ct. 262 (2015), but he argued that *Duquette* was wrongly decided, Pet. App. 50a.

The district court denied petitioner's motion. Pet. App. 31a-45a. The court determined that, although petitioner had procedurally defaulted his *Johnson* claim by failing to raise it on direct appeal, he could show "cause" for his default because the ruling in *Johnson* was "so novel that its legal basis [was] not reasonably available to counsel" earlier. *Id.* at 33a-34a (quoting *Reed* v. *Ross*, 468 U.S. 1, 16 (1984)); see *id.* at 37a-38a. The court concluded, however, that petitioner could not demonstrate "actual prejudice" to overcome his default because, under *Duquette*, "Maine burglary convictions remain qualifying *enumerated* violent felonies even after [*Johnson*'s] invalidation of the residual clause." *Id.* at 32a; see *id.* at 40a-41a. The court registered its view

that the "continued vitality" of *Duquette* was questionable in light of *Mathis* v. *United States*, 136 S. Ct. 2243 (2016), which had held that a statute is divisible into separate offenses for purposes of classifying a prior conviction under the ACCA if it sets forth alternative elements and not alternative means of committing a single offense. Pet. App. 43a. The court recognized, however, that *Mathis* had not "definitive[ly]" abrogated *Duquette*, which did not treat Maine's burglary statute as divisible. *Ibid.* The court thus determined that petitioner's sentence was valid under the ACCA's enumerated offenses clause, *id.* at 38a-40a, 43a, and thus he was not entitled to postconviction relief based on *Johnson*'s invalidation of the residual clause, *id.* at 32a, 45a.

The district court granted petitioner a certificate of appealability. D. Ct. Doc. 78, at 1.

3. The court of appeals affirmed. Pet. App. 1a-30a.

a. The government argued for the first time on appeal that petitioner's claim was untimely because he filed his motion for postconviction relief more than one year after "the date on which the judgment of conviction bec[ame] final." 28 U.S.C. 2255(f)(1); see Gov't C.A. Br. 13-21 & n.6. It further contended that, in any event, the district court had correctly determined that petitioner failed to establish prejudice from his procedural default because Maine burglary qualifies as an ACCA predicate offense under the enumerated offenses clause. Gov't C.A. Br. 13 n.6, 23-46.

The court of appeals determined that the government's "inadvertence" in failing to assert a statute-of-limitations defense earlier did not prevent the court of appeals from considering the issue, which was encompassed within the COA. Pet. App. 11a; see *id.* at 13a-14a. The court further determined that petitioner's

claim was time-barred under Section 2255(f)(1) because his motion for postconviction relief was filed several years after his conviction became final. *Id.* at 7a.

The court of appeals rejected petitioner's reliance on the statute-of-limitations exception for motions filed within one year of the date on which a "new[]," retroactively applicable right to relief "was initially recognized by the Supreme Court." 28 U.S.C. 2255(f)(3); see Pet. App. 8a. The court determined that, "[i]n order to even arguably invoke" that exception based on the decision in *Johnson*, petitioner would have had to demonstrate that his "ACCA enhancement relies on the residual clause." Pet. App. 10a. The court disagreed with petitioner's assertion "that, when faced with a silent record, [the court] must assume the district court sentenced the defendant pursuant to the residual clause," *id.* at 15a, and with out-of-circuit decisions "that purportedly espouse [petitioner's] requested approach," *id.* at 18a. Rather, the court observed, "federal post-conviction petitioners bear the burden of proof and production under [Section] 2255," *id.* at 15a, and thus "to successfully advance a *Johnson* * * * claim on collateral review, a [Section 2255] petitioner bears the burden of establishing that it is more likely than not that he was sentenced solely pursuant to ACCA's residual clause," *id.* at 21a-22a. Because petitioner had "never argued that he was actually sentenced under the residual clause," the court determined that his claim was untimely. *Id.* at 22a; see *id.* at 16a (observing that petitioner "fail[ed] to point to any evidence suggesting that he was sentenced under the residual clause").

b. Judge Torruella dissented in relevant part. Pet. App. 22a-30a. In his view, the district court's statement that petitioner had raised a "*Johnson* claim" should be

treated as a finding that petitioner's "sentence was enhanced pursuant to the ACCA's residual clause." *Id.* at 23a-24a. Judge Torruella also disagreed with the majority's decision to consider the timeliness of petitioner's motion in light of what he perceived to be the government's "waiver" of a statute-of-limitations defense in the district court. *Id.* at 25a-27a. In the absence of a procedural bar, Judge Torruella would have addressed on the merits whether Maine burglary is broader than generic burglary under the ACCA's enumerated offenses clause, a "difficult issue" on which he expressed no definitive view. *Id.* at 30a.

ARGUMENT

Petitioner contends (Pet. 28-29) that the court of appeals erred by declining to presume, in the absence of any evidence or argument from him, that he was sentenced under the ACCA's residual clause rather than the enumerated offenses clause and that he was therefore entitled to resentencing in light of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). The court's decision is correct and does not conflict with decisions of any other court of appeals. This Court has recently denied review of similar claims in other cases. See *Westover* v. *United States*, No. 17-7607 (Apr. 30, 2018); *Snyder* v. *United States*, No. 17-7157 (Apr. 30, 2018). The same result is appropriate here.

1. A federal prisoner generally may not obtain post-conviction relief unless he establishes that his sentence was "imposed in violation of the Constitution or laws of the United States." 28 U.S.C. 2255(a). That stringent standard reflects the principle that collateral review "is an extraordinary remedy" that "'will not be allowed to do service for an appeal.'" *Bousley* v. *United States*, 523 U.S. 614, 621 (1998) (citation omitted). After the

completion of direct review in a criminal case, "a presumption of finality and legality attaches to the conviction and sentence," *Brecht* v. *Abrahamson*, 507 U.S. 619, 633 (1993) (citation omitted), and courts are "entitled to presume" that the defendant's sentence is lawful, *United States* v. *Frady*, 456 U.S. 152, 164 (1982). That "presumption of regularity * * * makes it appropriate to assign a proof burden to the defendant" on collateral review. *Parke* v. *Raley*, 506 U.S. 20, 31 (1992); see *Hawk* v. *Olson*, 326 U.S. 271, 279 (1945) (explaining that a prisoner necessarily "carries the burden in a collateral attack on a judgment").

2. a. The limitations on postconviction relief, and the prisoner's burden of proof in that context, preclude an approach that would grant relief from an ACCA sentence based on *Johnson* without requiring the prisoner to show that his sentence was actually the result of *Johnson* error. *Johnson* invalidated the ACCA's residual clause, but it "d[id] not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the [ACCA's] definition of a violent felony." 135 S. Ct. at 2563. Whether viewed as a question of timeliness, as the court of appeals did (Pet. App. 15a-22a), or as a merits question within the context of procedural default, as the district court did (*id.* at 32a), a prisoner who fails to prove that his ACCA sentence actually depended on application of the residual clause fails to carry his burden of demonstrating a constitutional violation that could support collateral relief. Because petitioner failed to make that showing—indeed, he acknowledges that he "could *not* meet th[e] burden" of "proving by a preponderance of the evidence that his sentence was based on the residual clause," Pet. 16 (emphasis added)—relief was properly denied.

Petitioner's contrary arguments upend the burden of proof on collateral review. He contends (Pet. 28-29) that because the sentencing court *might* have relied on the ACCA's residual clause to classify Maine burglary as a violent felony, he should be eligible to seek resentencing under *Johnson*. But that contention ignores the stringent limitations on postconviction relief. Petitioner cannot obtain such relief unless he proves that his sentence was "imposed in violation of the Constitution or laws of the United States." 28 U.S.C. 2255(a). He also cannot premise the timeliness of a collateral attack on a decision of this Court whose rule cannot be shown to apply. 28 U.S.C. 2255(f)(3). In the context of a *Johnson* claim, those standards require a showing that petitioner was sentenced under the unconstitutional residual clause. If he was instead sentenced under the enumerated offenses clause, which *Johnson* explicitly "d[id] not call into question," 135 S. Ct. at 2563, then he can neither rely on *Johnson* to make his claim timely nor show any fundamental error warranting collateral relief.

b. Indeed, the relevant legal background at the time of petitioner's sentencing in 2012 strongly indicates that he *was* sentenced under the ACCA's enumerated offenses clause rather than its residual clause. Petitioner's prior convictions were for burglary, which is an enumerated offense. 18 U.S.C. 924(e)(2)(B)(ii). As the pre-*Johnson* experience in this Court and the First Circuit demonstrates, the most natural basis for classifying a burglary conviction as an ACCA violent felony was to classify it as "burglary" under the enumerated offenses clause. See, *e.g.*, *Taylor* v. *United States*, 495 U.S. 575, 598-599 (1990) (reviewing classification of convictions for Missouri burglary); *United States* v. *Bennett*,

469 F.3d 46, 48-50 (1st Cir. 2006) (same for Rhode Island breaking and entering), cert. denied, 549 U.S. 1312 (2007); *United States* v. *Mastera*, 435 F.3d 56, 60-61 (1st Cir.) (same for Massachusetts burglary), cert. denied, 549 U.S. 828 (2006). Analysis under the residual clause, in contrast, required courts to consider "whether the conduct encompassed by the elements of the offense, in the ordinary case, present[ed] a serious potential risk of injury to another" that was comparable to the risk posed by the enumerated offenses (including "burglary"), *James* v. *United States*, 550 U.S. 192, 208 (2007), overruled by *Johnson*, *supra*, which were themselves "far from clear in respect to the degree of risk each poses," *Begay* v. *United States*, 553 U.S. 137, 143 (2008). See *Johnson*, 135 S. Ct. at 2557-2558 (describing problems in comparing burglary offenses to residual clause). A determination that a particular crime qualified as "burglary" under the enumerated offenses clause usually presented a far more straightforward path to applying the ACCA.

The First Circuit had, in fact, held prior to *Johnson* that the Maine burglary statute under which petitioner was convicted qualified as generic burglary under the ACCA's enumerated offenses clause. *United States* v. *Duquette*, 778 F.3d 314, 317-318, cert. denied, 136 S. Ct. 262 (2015). Although *Duquette* postdated petitioner's sentencing, the court noted that its decision was consistent with its earlier treatment of Maine burglary in *United States* v. *Giggey*, 551 F.3d 27 (1st Cir. 2008) (en banc). See *Duquette*, 778 F.3d at 318. *Giggey* held that Maine burglary did not categorically qualify as the enumerated offense of "burglary of a dwelling" in the Sentencing Guidelines. 551 F.3d at 36. The court noted,

however, that "burglary of a dwelling" under the Guidelines was "narrower" than the enumerated offense of "burglary" in the ACCA, which the court suggested was "broad enough to include both residential and nonresidential offenses" of the sort prohibited by the Maine statute. *Ibid.*

The district court would therefore have had ample reasons to treat petitioner's crime as generic ACCA burglary under the law at the time of sentencing. And petitioner has identified no authority treating Maine burglary as a residual-clause offense. Although the court of appeals in this case did not specifically "hold that [petitioner] was actually sentenced pursuant to the enumerated [offenses] clause," Pet. 27, the lack of such a finding does not logically suggest that petitioner was in fact sentenced under the residual clause.

c. Petitioner's assertion that the court of appeals' decision arbitrarily conditions relief on the "happenstance of what a judge may have mentioned during a sentencing," Pet. 29, is incorrect. As the court of appeals recognized, a prisoner can meet his burden under Section 2255 to establish that his claim properly relies on *Johnson* if precedent indicates that his relevant prior conviction was more likely than not classified as a violent felony under the ACCA's residual clause. Pet. App. 21a (quoting *United States* v. *Taylor*, 873 F.3d 476, 482 (5th Cir. 2017)). A prisoner may show, for example, that courts had classified his offense as an ACCA predicate under the residual clause, supporting an inference that the sentencing court did the same. He may also show that his offense could only have been treated as a violent felony under the residual clause because, under the law at the time, it would not have satisfied one of the other clauses. See, *e.g.*, *Sykes* v. *United States*, 564 U.S.

1, 8 (2011) (analyzing Indiana felonious vehicle flight), overruled by *Johnson*, *supra*.

It is not arbitrary to require a prisoner to satisfy the ordinary burden of proof when seeking collateral relief under *Johnson*. As the court of appeals observed, "[r]equiring 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." Pet. App. 19a-20a. "What *would* be arbitrary is to treat *Johnson* claimants differently than all other [Section] 2255 movants claiming a constitutional violation." *Beeman* v. *United States*, 871 F.3d 1215, 1224 (11th Cir. 2017) (emphasis added).

d. Petitioner further errs in contending (Pet. 23, 28) that his claim is supported by *Stromberg* v. *California*, 283 U.S. 359 (1931), which invalidated a conviction based on a general verdict where the jury was instructed on alternative theories of guilt, one of which was unconstitutional. *Id.* at 367-369. *Stromberg* involved a direct appeal from a conviction in state court, and thus did not implicate either Section 2255's statute of limitations or the burden imposed on prisoners in the collateral review context. Moreover, unlike a jury's reasons for returning a guilty verdict, which generally cannot be examined after the verdict is announced, see Fed. R. Evid. 606(b), the basis for a district court's determination that a defendant's prior conviction qualifies as a violent felony under the ACCA can be determined after the fact by reference to the judge's own recollection, the record in the case, the relevant legal background, and an examination of the statute of conviction. And in any event, even *Stromberg* errors are subject to harmless-error

review, meaning that reversal is not warranted based on the theoretical possibility that the jury relied on an improper ground. See *Hedgpeth* v. *Pulido*, 555 U.S. 57, 61-62 (2008) (per curiam) (adopting, in the collateral review context, *Brecht*'s "substantial and injurious effect" harmless-error standard for *Stromberg* errors). *Stromberg* does not support petitioner's claim that he can satisfy Section 2255's statute of limitations and obtain collateral relief based on *Johnson* without ever showing a *Johnson* error.

3. Contrary to petitioner's contention (Pet. 17-25), the court of appeals' decision does not directly conflict with decisions of other circuits.

a. Petitioner's claim of a circuit conflict relies principally on *United States* v. *Winston*, 850 F.3d 677 (4th Cir. 2017), and *United States* v. *Geozos*, 870 F.3d 890 (9th Cir. 2017), both of which involved second-or-successive motions under Section 2255. Second-or-successive motions are not available unless (*inter alia*) a prisoner makes a threshold showing that his claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2244(b)(2)(A); see 28 U.S.C. 2255(h). The courts in *Winston* and *Geozos* interpreted the phrase "relies on" to require only a showing that the prisoner's sentence "may have been predicated on application of the now-void residual clause." *Winston*, 850 F.3d at 682; see *Geozos*, 870 F.3d at 896. Because the sentencing records in those cases did not indicate "which clause of Section 924(e)(2)(B)" applied, the courts determined that the prisoners could make the threshold showing necessary to seek second-or-successive relief. *Winston*, 850 F.3d at 682; see *Geozos*, 870 F.3d at 896-897.

Neither *Winston* nor *Geozos* directly addressed the question presented in this case, which involves the timeliness of a first Section 2255 motion under a provision that requires a prisoner to establish that "the right asserted" is "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. 2255(f)(3). And any tension between the reasoning of those decisions and the decision below, see Pet. App. 21a, does not warrant review. For one thing, the rule adopted in *Winston* and *Geozos* derives from dicta in an Eleventh Circuit decision, *In re Chance*, 831 F.3d 1335 (2016), that concerned a prisoner's application for authorization to file a second-or-successive motion for relief following *Johnson*. See *Winston*, 850 F.3d at 682 (citing *Chance*, 831 F.3d at 1340); see also *Geozos*, 870 F.3d at 894-896 nn.4, 6 (citing *Winston* and *Chance*). The Eleventh Circuit has since overruled that dicta. See *Beeman*, 871 F.3d at 1228 n.3.

Furthermore, *Winston* and *Geozos* interpreted a threshold statutory requirement for obtaining second-or-successive Section 2255 relief but did not suggest that a motion for postconviction relief would necessarily succeed on the merits based solely on the possibility that a prisoner was sentenced under the residual clause. See *Geozos*, 870 F.3d at 896-897 (distinguishing between threshold inquiry and merits determination); *Winston*, 850 F.3d at 682-683 (same). Thus, contrary to petitioner's contention (Pet. 19-20), neither case directly conflicts with *Beeman*, which determined that Section 2255 relief was unavailable on the merits where the prisoner failed to show by a preponderance of the evidence that his sentence was based on the residual clause. 871 F.3d at 1225. Nor do they conflict with *United States* v. *Snyder*, 871 F.3d 1122 (10th Cir. 2017),

cert. denied, No. 17-7157 (Apr. 30, 2018), which determined that merits relief is unavailable where the record and relevant legal background at the time of sentencing established, "as a matter of historical fact, that [the district court] did not apply the ACCA's residual clause in sentencing" the prisoner. *Id.* at 1128; see *Geozos*, 870 F.3d at 896 (noting that a prisoner could not make the necessary threshold showing for second-or-successive relief if "the record before the sentencing court and the relevant background legal environment at the time of sentencing" indicate "that the sentencing court's ACCA determination did not rest on the residual clause").

Petitioner identifies no reason to apply *Winston* and *Geozos* outside the narrow circumstance at issue in those cases. Although petitioner might, on the facts presented here, have satisfied Section 2244(b)(2)(A)'s threshold procedural requirements in the Fourth and Ninth Circuits if he had filed a second-or-successive motion, he cannot show that he would necessarily be entitled to resentencing in those circuits based solely on the speculative possibility that his original sentence was imposed under the ACCA's residual clause, especially when he cannot offer any argument or evidence to that effect. No court of appeals has expressly endorsed such a reversal of the normal burden of proof on collateral review, under which constitutional error would be presumed rather than demonstrated.

b. Petitioner further contends (Pet. 19-21) that, in contrast to the court of appeals here, *Snyder* and *Beeman* held that a Section 2255 motion is timely where it asserts a *Johnson* claim, even if the claim ultimately fails on the merits because the prisoner cannot show that he was sentenced under the residual clause. That

minor disagreement regarding whether a claim like petitioner's should be dismissed on timeliness or merits grounds does not warrant review. Although petitioner's Section 2255 motion might be considered timely under *Beeman* and *Snyder*, whereas the court of appeals in this case held that it was not, the ultimate result in all three cases is consistent—a prisoner cannot obtain collateral relief without satisfying his burden of proving that he was more likely than not sentenced under the residual clause.

4. In any event, this case would be a poor vehicle for reviewing the question presented. Petitioner procedurally defaulted his claim by failing to raise it on direct appeal. See Pet. App. 33a. A prisoner may not obtain collateral review of a defaulted claim unless he shows "cause" for the default and "actual prejudice" from any error, or that he is "actually innocent." *Bousley*, 523 U.S. at 622 (citations and internal quotation marks omitted).

Petitioner cannot demonstrate "cause" for his default.[1] *Johnson* applied well-established constitutional vagueness principles, 135 S. Ct. at 2556-2557, and even before petitioner's sentencing in this case, Justice Scalia had adopted the view that the residual clause was vague. See *Sykes*, 564 U.S. at 28-35 (Scalia, J., dissenting); *James*, 550 U.S. at 230-231 & n.7 (Scalia, J., dissenting).

---

[1] On appeal, the government did not specifically challenge whether petitioner had established "cause" for his default and instead defended the district court's judgment on the ground that petitioner had failed to establish prejudice. See Gov't C.A. Br. 13 n.6. The government argued in the district court that petitioner lacked cause, however, and thus preserved the issue for this Court's review. See D. Ct. Doc. 72, at 4-5 (Aug. 29, 2016); see, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997) (respondent is entitled to defend the judgment below on any ground supported by the record).

Petitioner thus cannot show that a challenge to the residual clause based on vagueness would have been "so novel" at the time of his direct appeal "that its legal basis [was] not reasonably available" to him. *Bousley*, 523 U.S. at 622 (citation omitted). And although petitioner's challenge would not likely have succeeded in light of *Sykes*, this Court has long held that "futility cannot constitute cause." *Id.* at 623 (citation omitted).

Nor can petitioner show "actual 'prejudice'" from his default. *Bousley*, 523 U.S. at 622. Petitioner was not prejudiced because his Maine burglary convictions were properly characterized as ACCA predicate offenses. See Pet. App. 38a-39a. The same is true of the "actual innocence" exception to procedural default: even assuming that a prisoner could in some circumstances be "actually innocent" of a noncapital sentence, cf. *Dretke* v. *Haley*, 541 U.S. 386, 391-392 (2004) (declining to resolve that question), petitioner cannot make such a showing because his prior convictions are violent felonies even without the residual clause.[2]

---

[2] Petitioner's contrary argument below rested largely on the view that a burglary statute (like Maine's) that includes burglary of a nonpermanent or mobile structure adapted for overnight accommodation is categorically broader than generic burglary. See Pet. C.A. Br. 19-22. This Court has granted certiorari in *United States* v. *Stitt*, No. 17-765 (Apr. 23, 2018), and *United States* v. *Sims*, No. 17-766 (Apr. 23, 2018), to address that issue in the context of similar statutes from Arkansas and Tennessee. Petitioner has not requested that his petition be held pending a decision in those cases, however, and doing so is unnecessary. Regardless of how the Court ultimately resolves the statutory question in *Stitt* and *Sims*, it would not suggest that petitioner's sentence in 2012 was premised on constitutional error under *Johnson*. In any event, the need for petitioner to prevail on both the question presented and a separate question about the classification of Maine's burglary statute (which would require reconsideration of controlling circuit precedent, see

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOHN P. CRONAN
Acting Assistant Attorney General
WILLIAM A. GLASER
Attorney

MAY 2018

Duquette, 778 F.3d at 317-318) illustrates that this is an unsuitable vehicle for review of the question presented.