No. 17-1251

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

REPLY ON PETITION FOR CERTIORARI

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The Government provides no viable answer to Petitioner Charles Casey's argument that his 28 U.S.C. § 2255 motion would have been granted had his case arisen in either the Fourth or Ninth Circuits. The Government is simply wrong in claiming that *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017), and *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), failed to reach the merits of the § 2255 motions at issue. *See* BIO 14. That both cases addressed second, as opposed to first, § 2255 motions is irrelevant to the question presented. Indeed, applying *Geozos*, upon which Petitioner relies, the Ninth Circuit has granted a *first* § 2255 motion seeking relief under *Johnson* because it was "unclear from the record whether the sentencing court relied on the residual clause." *United States v. Donnelly*, 710 F. App'x 335, 335 (9th Cir. 2018) (quotation marks omitted). These are *exactly* the facts of Petitioner's case and *Donnelly* only further demonstrates the entrenched, and acknowledged, conflict between the circuits on the question presented.

Moreover, the very criteria the Government deems appropriate in evaluating whether a defendant was sentenced pursuant to the residual clause demonstrate why this case is the perfect vehicle to address the question presented. *See* BIO 11–12. Unlike in recently-denied cases, here the *very judge* who sentenced Petitioner originally also evaluated his § 2255 motion and *did not find* (as he easily could have) that Petitioner had been sentenced pursuant to the ACCA's enumerated, as opposed to residual, clause. Moreover, at the time Petitioner was sentenced, no governing circuit precedent established that Maine burglary fell under the ACCA's enumerated clauses; in fact, existing

law strongly suggested to the contrary. In addition, as the Government acknowledges, before the First Circuit it solely argued that Petitioner's offenses fell within the ACCA's enumerated clauses, and thus the First Circuit correctly declined to rule on procedural default. In any event, the Government's procedural default argument is without merit and can be addressed on remand.

Tellingly, the Government spends most of its brief arguing that the decision below was correct. *See* BIO 7-13. Not only is that no reason to deny certiorari in light of the circuit conflict, but the Government is wrong in any event. *See infra* 9-12.

The petition for certiorari should be granted.

I. THERE IS A CLEAR CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

As demonstrated in the petition, *see* Pet. 17-25, there is a clear circuit conflict on the question presented. *See also United States v. Taylor*, 873 F.3d 476, 480–81 (5th Cir. 2017) (surveying the conflicting standards that exist in circuits for determining whether a sentence relied upon *Johnson*). The Government makes three arguments in an attempt to minimize this conflict. None is persuasive.

First, the Government argues the rule in *Winston* and *Geozos* "derives from dicta in an Eleventh Circuit opinion" that the Eleventh Circuit overruled in *Beeman v. United States*, 871 F.3d 1215, 1228 n.3 (11th Cir. 2017). BIO 14. But the provenance of the Fourth and Ninth Circuit's decisions is irrelevant, particularly given that

courts within both circuits have approvingly cited their prior precedents *subsequent* to *Beeman*. *See, e.g.*, *Donnelly*, 710 F. App'x 335, 335; *United States v. Johnson*, No. 3:02-CR-00015, 2018 WL 834950, at *3 (W.D. Va. Feb. 12, 2018). Likely for this very reason, the Government does not suggest that further percolation may resolve this conflict, and indeed the number of cases currently in the federal courts in which § 2255 motions are governed by divergent standards only further demonstrates the urgent need for this Court's guidance. *See, e.g.*, *United States v. Washington*, No. 17-6079, __ F.3d __, 2018 WL 2208475, at *3–7 (10th Cir. May 15, 2018); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018).

Second, the Government notes that both *Winston* and *Geozos* involved second-or-successive motions under § 2255 whereas Petitioner's § 2255 motion was his first. BIO 14. For one, the Government does not argue there is any relevant difference in the legal standard that governs reliance on new rules of constitutional law for second-or-successive motions under 28 U.S.C. § 2244(b)(2)(A), as compared with first motions under § 2255(f)(3). *See* BIO 13-14. And, even were there a relevant difference, which there is not, as noted above the Ninth Circuit has now applied *Geozos* in precisely Petitioner's case—a first § 2255 motion based on *Johnson*—and held that the defendant merited relief because his "sentence may have been based on an invalid legal theory because 'it is unclear from the record whether the sentencing court relied on the residual clause.'" *Donnelly*, 710 F. App'x at 335 (quoting *Geozos*, 870 F.3d at 895). That holding, that a § 2255 petition is

timely and meritorious when the record is unclear on whether a defendant was sentenced in violation of *Johnson*, conflicts directly with the First Circuit's holding below, as well as with the holdings of the Tenth and Eleventh Circuits. *See United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2018), *cert. denied*, No. 17-7157, 2018 WL 1994823 (U.S. Apr. 30, 2018); *Beeman*, 871 F.3d at 1228. And, *Donnelly* is precisely what the Government claims does not exist: a "court of appeals . . . expressly endors[ing]" the rule Petitioner advocates. BIO 15.

Third, the Government claims that in *Winston* and *Geozos*, the courts "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." BIO 14. The Government simply misreads those cases, both of which had *already* authorized the defendants to file second-or-successive motions—the threshold determination under § 2244(b)(3)(C) and § 2255(h)(2)—and were thus considering whether to grant relief on those motions. *Geozos* is particularly explicit on this point: "We reverse the district court's order denying Defendant's § 2255 motion and remand with instructions to vacate Defendant's sentence. Because Defendant has already been in prison longer than the statutory maximum . . . the district court shall direct that Defendant be released from custody immediately." 870 F.3d at 901; *see also Winston*, 850 F.3d at 682, 686.

In sum, and as only reinforced by the Government's inability to draw any relevant distinctions, had

Petitioner's case arisen in the Fourth and Ninth Circuits it would have been found timely and meritorious. *See* Pet. 17-25. Had it arisen in the Tenth and Eleventh Circuits it would have been deemed timely but not meritorious. But, because it arose in the First Circuit, it was deemed untimely and the Court did not even reach the merits. There is no justification for this divergence in outcomes, and this Court's guidance is required.

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THIS IMPORTANT CIRCUIT CONFLICT.

As explained in the petition, this case presents the ideal vehicle for this Court to resolve the conflict over what a defendant must show to receive § 2255 relief under *Johnson*. *See* Pet. 26-28. The First Circuit's decision presents both the timeliness and merits questions within one case, it acknowledges conflicting cases in the Fourth and Ninth Circuits, and the very district court who had sentenced Petitioner originally found "[Petitioner's] *Johnson* claim is a novel constitutional claim that applies retroactively," Pet. App. 38a. The Government does not dispute any of these points, but rather raises two additional reasons to deny certiorari. Neither is valid.

First, the Government notes that this Court has "recently denied review of similar claims in other cases," citing *Snyder* and *Westover v. United States*, No. 17-7607, 2018 WL 692437 (U.S. Apr. 30, 2018). BIO 7. *Snyder* and *Westover*—and the many other cases taking

divergent positions on this same issue[1]—demonstrate how important and recurring this issue is. Because defendants could file § 2255 petitions only within a year of *Johnson*, a ruling that addresses this frequently-arising question will not generate new claims but will rather ensure that existing claims are adjudicated consistently and correctly. Moreover, Petitioner's case is unburdened by the problems that made *Snyder* and *Westover* poor vehicles to address this question.

In *Snyder*, "the district court found, as a matter of historical fact, that it did not apply the ACCA's residual clause in sentencing Snyder under the ACCA." 871 F.3d at 1128. The record was therefore clear that the district court *had not* sentenced the defendant pursuant to the residual clause. Likewise, in *Westover*, "[t]he record show[ed] that the sentencing court relied on the enumerated offenses clause to find that Mr. Westover's burglary convictions were violent felonies and qualified as predicates for an ACCA sentencing enhancement." *United States v. Westover*, 713 F. App'x 734, 737 (10th Cir. 2017), *cert. denied*, No. 17-7607, 2018 WL 692437 (U.S. Apr. 30, 2018). And, even leaving aside the facts in the record, "[t]he relevant background legal environment at the time of sentencing likewise shows

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[1] *See, e.g.*, *Potter v. United States*, 887 F.3d 785 (6th Cir. 2018); *United States v. Nelson*, No. 1:09-CR-211, 2017 WL 4648145, at *4 (M.D. Pa. Oct. 17, 2017) *appeal filed*, No. 17-3788 (3d Cir. Dec. 21, 2017); *Thrower v. United States*, 234 F. Supp. 3d 372 (E.D.N.Y. 2017).

that Mr. Westover was sentenced under the enumerated-offenses clause." *Id.* at 738.[2]

Petitioner's case succeeds where *Westover* and *Snyder* failed. For one, not only is the record silent on whether Petitioner was sentenced pursuant to the residual clause, but the very district judge that sentenced Petitioner originally determined Petitioner was raising a "*Johnson* claim." Pet. App. 38a. That finding would have been incoherent had the district court in fact sentenced Petitioner pursuant to the enumerated offenses clause. In addition, the Government acknowledges there was no First Circuit precedent at the time Petitioner was sentenced holding that Maine burglary fell within the enumerated offenses clause of the ACCA. *See* BIO 10. If anything, existing precedent at the time of Petitioner's sentencing was exactly to the contrary. *See United States v. Bishop*, 350 F. Supp. 2d 127, 131-132 (D. Me. 2004) (finding Maine burglary a "crime of violence" under the U.S. Sentencing Guidelines' residual clause, and noting "burglary would constitute a 'violent felony' within the meaning of the ACCA" because "every burglary inherently presents a serious potential risk of physical injury to another" (footnote omitted)).

Second, the Government argues that Petitioner procedurally defaulted his *Johnson* claim by failing to raise it on direct appeal prior to this Court's decision in *Johnson*. That argument fails for multiple reasons.

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[2] For this same reason, the recently-denied *United States v. Rhodes*, 721 F. App'x 780 (10th Cir. 2018), *cert. denied*, No. 17-8667, 2018 WL 1993942 (U.S. May 29, 2018), was a poor vehicle to address this issue.

Most notably, as the Government itself concedes, it "did not specifically challenge whether petitioner had established 'cause' for his default" before the First Circuit, BIO 16 n.1, and indeed the First Circuit explicitly declined to rule on the question of procedural default, *see* Pet. App. 14a n.4 ("We do not rule on the correctness of the district court's holding that Casey's *Johnson II* claim was procedurally defaulted."). The Government cannot rely now on an argument it failed to raise before the First Circuit. And, whether Petitioner is prejudiced can be addressed on remand after this Court determines if Petitioner is eligible for *Johnson* relief. In addition, the Government is wrong as a matter of law regarding procedural default, and courts have rejected its argument in the *Johnson* context even when properly preserved. *See, e.g.*, *Snyder*, 871 F.3d at 1126-27; *Beeman*, 871 F.3d at 1225 n.1 (Williams, J., dissenting) (agreeing with "the majority's implicit rejection of the Government's arguments regarding procedural default or untimeliness").[3]

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[3] The Government's assertion that Petitioner failed to show "actual prejudice" from his default is likewise meritless. BIO 17 & n.2. If Petitioner prevails in his *Johnson* claim, his case will be remanded for resentencing, and he can show (as the district court suggested) that the First Circuit's decision in *United States v. Duquette*, 778 F.3d 314 (1st Cir. 2015), is incorrect in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016) or, depending on the outcome, this Court's forthcoming decisions in *United States v. Stitt*, No. 17-765, 138 S. Ct. 1592 (cert. granted Apr. 23, 2018) and *United States v. Sims*, No. 17-766, 138 S. Ct. 1592 (cert. granted Apr. 23, 2018). That Petitioner has multiple means of arguing that the ACCA's enumerated offense clause, 18 U.S.C. § 924(e)(2)(B)(ii), should not apply to his burglary convictions demonstrates precisely how

III. THE FIRST CIRCUIT'S DECISION IS INCORRECT.

The Government devotes the majority of its brief to arguing that the First Circuit's decision was correct. BIO 7-13. Even if the Government were right on the merits, that is no reason to deny certiorari in light of the entrenched conflict among the circuits on the question presented. But, in any event, the Government is incorrect.

The Government begins by claiming that Petitioner, and by extension the Fourth and Ninth Circuits, "upend the burden of proof on collateral review" and "ignore[] the stringent limitations on postconviction relief." BIO 9. But it is the Government (and the First, Tenth, and Eleventh Circuits) that upend well-established law by following a rule whereby an individual whose sentence was "imposed in violation of the Constitution or laws of the United States," 28 U.S.C. § 2255(a), would nonetheless be ineligible for the relief Congress intended. As explained in the petition, because of the expansive and indeterminate nature of the residual clause prior to *Johnson*, district courts had no reason to explicitly reference the clause by name when sentencing defendants under ACCA. *See* Pet. 28-29. Thus, post-*Johnson*, defendants such as Petitioner might well be serving sentences imposed on a now-illegal ground—

Petitioner suffers "actual prejudice" if he is denied this meritorious opportunity for resentencing. Indeed, the Government has previously, as a policy, waived procedural default for analogous situations when a petitioner raises a *Mathis*-related challenge and seeks relief in an initial § 2255 motion. *See, e.g.*, *Traxler v. United States*, No. 16-2280, 2017 WL 4124880 (6th Cir. Mar. 7, 2017).

indeed that is the natural implication of the district court's ruling—and yet under the First, Tenth, and Eleventh Circuits' rule may not receive relief because the district court failed, pre-*Johnson*, to utter the magic words "residual clause" when imposing the sentence. There is no basis in law for such an outcome, and it is inconsistent with precisely the relief Congress provided in § 2255.

Perhaps recognizing that a magic words requirement is unsustainable, the Government suggests (albeit wrongly heightening the burden on the defendant) that various other considerations may come into play when evaluating whether a sentence was based on the now-invalidated residual clause. Specifically, the Government suggests "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." BIO 12. Notably, the First Circuit failed to evaluate any of those factors in determining that Petitioner's claim was untimely because it had not been imposed in violation of *Johnson*. Had it done so, Petitioner would have prevailed.

For one, the district "judge's own recollection" here, BIO 10, as recognized by Judge Torruella in dissent, was that Petitioner's sentence "was enhanced pursuant to the ACCA's residual clause." Pet. App. 23a. The "record in the case" does not speak to whether Petitioner was sentenced pursuant to the residual clause, and the Government does not contend otherwise. BIO 12. Thus,

the First Circuit's rule has the bizarre effect of denying § 2255 relief even when the sentencing judge himself suggests relief is merited and there is nothing in the record to the contrary.

And, contrary to the Government's claim, the "relevant legal background" at the time Petitioner was sentenced in 2012 *does not* "indicate[] that he was sentenced under the ACCA's enumerated offenses clause rather than its residual clause." BIO 9. As this Court recognized in *Taylor v. United States*, 495 U.S. 575, 580 (1990), "[t]he word 'burglary' has not been given a single accepted meaning by the state courts; the criminal codes of the States define burglary in many different ways." Thus, the Government's citation to state cases—addressing Missouri burglary, Rhode Island breaking and entering, and Massachusetts burglary—are notable for what they do not include: a case holding that Maine burglary qualifies as an enumerated offense under the ACCA. *See* BIO 9-10. The Government's failure to cite a relevant case is unsurprising. As noted above, the only relevant precedent from within the First Circuit suggests that Maine burglary fell within the *residual* clause. *See Bishop*, 350 F. Supp. 2d at 131-32.

Moreover, the Government concedes *Duquette*, 778 F.3d at 317-318, *post*-dated Petitioners' sentencing and thus could not possibly constitute the "background legal environment" during his sentencing. BIO 10. And the Government's own description of *United States v. Giggey*, 551 F.3d 27 (1st Cir. 2008) (en banc), makes clear that in that case the First Circuit "held that Maine burglary *did not* categorically qualify as the enumerated

offense of 'burglary of a dwelling' in the Sentencing Guidelines." BIO 10. As the Government's own quote demonstrates, *Giggey*, if anything, only *supports* Petitioner's argument that background law at the time of his sentencing suggested that Maine burglary could only fall within ACCA's residual, as opposed to, enumerated clause.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] Sensibly, the Government does not argue that dicta in *Giggey* regarding the comparative scope of "burglary" under the Sentencing Guidelines and the ACCA could qualify as definitive background law regarding Petitioner's sentencing, particularly when the district court did not even mention, let alone rely upon, *Giggey* either during the original sentencing or in evaluating Petitioner's § 2255 motion. *See* BIO 10–11 (discussing *Giggey*, 551 F.3d at 36).