

NO. ____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL BRADLEY WESTOVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question in this case has arisen with great frequency in the wake of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016). When a *Johnson* movant would not be an armed career criminal if sentenced today, how can he show that his sentence is infected with error under *Johnson* when the sentencing court did not specify which clause of the Armed Career Criminal Act's violent felony definition his prior convictions fell under at the time of his original sentencing?

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PETITION FOR A WRIT OF CERTIORI

Petitioner, Michael Bradley Westover, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is available in online databases at *United States v. Westover*, No. 17-8013, 2017 WL 4900449 (10th Cir. Oct. 31, 2017). The order of the district court denying Mr. Westover's motion to vacate is attached as App. B.

JURISDICTION

The Tenth Circuit entered judgment in this case on October 31, 2017. No petition for rehearing was filed. This Petition is being filed within 90 days after the entry of the judgment below, so it is timely under Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Armed Career Criminal Act provides, in pertinent part:

(e)(1) In the case of a person who ... has three previous convictions ... for a violent felony ..., such person shall be ... imprisoned not less than fifteen years (2) As used in this subsection—

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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).

STATEMENT OF THE CASE

In 2006, Mr. Westover pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). R. vol. I at 24.¹ Ordinarily, the maximum sentence for that crime is 10 years' imprisonment, 18 U.S.C. § 924(a)(2), and three years of supervised release. 18 U.S.C. §§ 3559, 3583. But under the Armed Career Criminal Act (ACCA), if the defendant “has three previous convictions . . . for a violent felony or a serious drug offense, or both,” then the defendant must be “imprisoned not less than fifteen years,” 18 U.S.C. § 924(e), and may be placed on supervised release for up to five years. 18 U.S.C. §§ 3559, 3583.

At the time of Mr. Westover's sentencing, there were three ways that a prior conviction could qualify as a violent felony: (1) the conviction was for an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another,” (the “elements clause” or the “force clause”) (2) the conviction was for “burglary, arson, or extortion, [or an offense that] involves the use of explosives,” (the “enumerated offenses clause”) or (3) the offense was for a conviction that “otherwise involves conduct that

¹ Citations to the record are to the 4-volume record on appeal filed in the court below.

presents a serious potential risk of physical injury to another” (the “residual clause”). 18 U.S.C. § 924(e)(2)(B).

Prior to Mr. Westover’s sentencing, a presentence investigation report (PSR) was generated. The PSR-writer found that Mr. Westover qualified for an increased sentence under the ACCA based on the following prior offenses: three prior burglary offenses from Wyoming, one prior attempted escape offense, one prior escape offense, and one prior delivery of a controlled substance offense. R. vol. III at 8.

Mr. Westover submitted objections to the PSR, challenging, among other things, the issue of whether one of his Wyoming burglary convictions from Laramie County, in docket number 17-193, qualified as an ACCA predicate because it did not involve a “threat of violence.” R. vol. II at 64. The PSR-writer responded that, “[i]n determining whether a prior burglary conviction qualifies as a predicate felony for an Armed Career Criminal enhancement, any generic burglary qualifies” and cited *Taylor v. United States*, 495 U.S. 575 (1990). Mr. Westover did not file objections to the other two burglary convictions.

Even under *Taylor* many offenses labeled “burglary” do not qualify as enumerated offenses. *Id.* at 592 (federal burglary definition is “independent of the labels employed by the various States’ criminal codes”). Nevertheless, at the sentencing hearing, there was no further discussion of whether Mr.

Westover's Laramie County burglary—or either of the other burglaries—fell under the residual clause or the enumerated offenses clause of the violent felony definition. Instead, the sentencing hearing focused on testimony from Mr. Westover's three sisters about their tragic upbringing. Mr. Westover was ultimately sentenced to 180 months' imprisonment as an Armed Career Criminal. The sentencing court noted that "180 months is a long, hard sentence" which he was not in favor of, but that "in this case I have no choice." R. vol. II at 37-38.

A decade after Mr. Westover's sentencing, this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual clause of the ACCA could not be applied consistently with due process. Subsequently, this Court held that *Johnson* must be applied retroactively to cases on collateral review. *See Welch v. United States*, 136 S. Ct. 1257 (2016). Following *Johnson* and *Welch*, thousands of ACCA-sentenced defendants filed post-conviction motions seeking to vacate their sentences under 28 U.S.C. § 2255. Mr. Westover filed such a motion, arguing that there was *Johnson* error in his case because the sentencing court relied on the residual clause at his sentencing.

When a movant was sentenced under the ACCA prior to *Johnson*, sentencing records were most often silent as to what clause of the ACCA violent felony definition a certain prior conviction fell under. In most circumstances, a

sentencing court could have relied on at least two ACCA clauses to hold that a conviction was a violent felony. Prior to *Johnson*, the residual clause acted as a catch-all provision, and nearly all crimes that qualified as violent felonies under the other two ACCA prongs would have also qualified under the residual clause. As a result, sentencing courts seldom showed their work or explained their thought processes at sentencing. And because crimes that would have qualified under the enumerated offenses clause or the force clause would have qualified under the residual clause as well, trial counsel had no incentive to object or clarify the record as to which clause applied when her client would have been sentenced under the ACCA in either case. Inconclusive records are thus the norm in *Johnson* litigation. Now, hundreds of movants seeking relief pursuant to *Johnson*, and hundreds of reviewing courts, are trying to make sense of ambiguous records when looking retrospectively at original sentencing proceedings.

Mr. Westover's case is an example of how ambiguity in the record can cut against a *Johnson* movant. The district court dismissed Mr. Westover's

Johnson motion. Central to its conclusion was that “Mr. Westover’s sentence was not enhanced pursuant to the ACCA’s residual clause.” R. vol. I at 186.²

Mr. Westover appealed, arguing that his case was infected with *Johnson* error because it was not clear what role the now now-void residual clause had played at his sentencing. He also argued that the error was not harmless because, after *Mathis v. United States*, 136 S. Ct. 2243 (2016), his prior burglary offenses would not be ACCA-qualifiers under any ACCA clause if he were sentenced today. But the Tenth Circuit agreed with the district court, and applied the Tenth Circuit’s precedent in *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017). Applying *Snyder*, the Tenth Circuit found that Mr. Westover had not shown *Johnson* error.

In order to establish *Johnson* error under *Snyder* the Tenth Circuit consults “both the record before the sentencing court and the relevant background legal environment at the time of sentencing’ to determine whether an ACCA sentence was based on the residual clause.” *Westover*, 2017 WL 4900449, at *2

² The district court’s conclusion ignores the plain fact that, in this case, the sentencing court would have relied on the residual clause in counting Mr. Westover’s escape-related convictions. At the time of Mr. Westover’s sentencing, escape convictions were routinely held to fall within the residual clause. *See, e.g., United States v. Moudy*, 132 F.3d 618 (10th Cir. 1998). But the district court did not reach this issue because it found that Mr. Westover’s four remaining convictions were properly counted ACCA predicates. R. vol. I at 186 n.5.

(citing *Snyder*, 871 F.3d at 1128-29). The panel in *Snyder* acknowledged that Tenth Circuit law on Wyoming burglary was abrogated by *Mathis v. United States*, 136 S. Ct. 2243 (2016). See *Snyder*, 871 F.3d at 1129 n.4. Thus, if Mr. Westover were sentenced today, he would not be an Armed Career Criminal. But even though neither the enumerated offenses nor the force clause would capture Mr. Westover’s burglary convictions under the legal environment today, *Snyder* holds that current case law is irrelevant to the question of whether a *Johnson* error occurred because “the relevant background legal environment is, so to speak, a ‘snapshot’ of what the controlling law was at the time of sentencing and does not take into account post-sentencing decisions that may have clarified or corrected pre-sentencing decisions.” *Id.* at 1130.

Applying *Snyder*, the panel in *Westover* found that the record “demonstrates that the sentencing court viewed Mr. Westover’s burglary convictions as falling squarely in the ACCA’s enumerated-offenses clause—which specifically lists ‘burglary’. . .” *Westover*, 2017 WL 4900449, at *3. The *Westover* panel noted that the PSR specified that his burglaries were of “a dwelling,” a “High School,” and “a building,” and that the residual clause was not referred to anywhere in the PSR or the sentencing record. *Id.* The Tenth Circuit declined to address how Mr. Westover’s sentence was affected by *Johnson* in relation to the escape convictions. *Westover*, 2017 WL 4900449, at *4 n.1.

The panel in *Westover* also discussed the relevant legal background at the time of Mr. Westover’s sentencing, noting that “*Taylor* said a court may examine ‘the indictment or information and jury instructions’ to ascertain whether the defendant was convicted of a generic burglary offense that would justify a sentence enhancement.” *Westover*, 2017 WL 4900449, at *4 (citing *Taylor*, 495 U.S. at 602). The Tenth Circuit thus concluded that “[i]n light of Mr. Westover’s sentencing record and the relevant legal background, we agree with the district court that Mr. Westover’s sentence was enhanced based on the ACCA’s enumerated-offenses clause, not the residual clause.” *Id.*

REASONS FOR GRANTING CERTIORARI

The Court should grant review in this case because the circuits are divided over how a movant can show *Johnson* error. This case presents a recurring issue of national importance that will likely affect hundreds of criminal defendants nationwide. This Court’s prompt review is also warranted because of the important liberty interests at stake. In many instances, *Johnson* movants are serving sentences far higher than the statutory maximum for which they are eligible because subsequent clarifying case law makes clear that their prior convictions do not qualify under any clause of the ACCA.

Finally, this case is an ideal vehicle for resolving the issue of how a movant can show *Johnson* error because the decision below cannot be affirmed on

alternate grounds. Mr. Westover would not be an armed career criminal if sentenced today, and the decision below makes clear that Mr. Westover's claim was timely and was not procedurally defaulted.

I. The Lower Courts Are In Acknowledged Conflict Over How A Movant Can Demonstrate Johnson Error.

The federal courts of appeal (and the district courts before them) have taken a variety of different approaches to resolving the question of how a movant can show *Johnson* error. *See United States v. Taylor*, 873 F.3d 476, 480 (5th Cir. 2017) (collecting cases). This Court should grant review in order to resolve the lower courts' acknowledged circuit split.

a. The Tenth Circuit's Test Directly Conflicts With The Fourth Circuit's Test.

Snyder, which was applied in the decision below, is in direct conflict with the law in the Fourth Circuit. As noted, the Tenth Circuit has held that if, based on the record and the "relevant background legal environment," a movant's sentence could have rested on a clause other than the residual clause at sentencing, a movant has not demonstrated *Johnson* error. *Snyder*, 871 F.3d at 1130.

The Fourth Circuit's test flips the inquiry. The Fourth Circuit has held that a *Johnson* movant need only show that his sentence "*may have* been predicated on application of the now-void residual clause, and therefore *may* be an

unlawful sentence” in order to demonstrate *Johnson* error. *Winston v. United States*, 850 F.3d at 682 (4th Cir. 2017). In other words, in the Fourth Circuit, an inconclusive record is sufficient to show error.

Acknowledging the common problem of ambiguous ACCA sentencing records, the *Winston* court noted that that “[n]othing in the law requires a [court] to specify which clause it relied upon in imposing a[n ACCA] sentence.” *Id.* (quoting *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016)). The Fourth Circuit thus declined 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.” *Id.*

The Fourth Circuit further cautioned that requiring a movant to show affirmative reliance on the residual clause in order to demonstrate *Johnson* error would result in “‘selective application’ of the new rule of constitutional law announced in *Johnson*,” in violation of “‘the principle of treating similarly situated defendants the same.’” *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 304 (1989)). Under the *Winston* rule, the possibility that the sentencing court relied on the residual clause is enough to establish *Johnson* error. In *Winston*, the court found that the *Johnson* error was not harmless because the movant’s prior conviction for Virginia robbery was no longer a crime of violence under the remaining clauses of the ACCA. *Winston*, 850 F.3d at 682 n.4.

The Tenth Circuit’s approach to this issue is directly at odds with the *Winston* decision. Under the *Winston* rule, Mr. Westover would prevail because the sentencing court *may have* relied on the residual clause at sentencing with respect to the two burglaries that were not objected to. And the *Johnson* error was not harmless in this case because Mr. Westover’s prior convictions do not qualify as violent felonies under the remaining ACCA clauses. Whereas the Fourth Circuit’s approach allows for the possibility of unconstitutional reliance on the residual clause where there is ambiguity in the record, the rule in *Snyder* places a far higher burden on *Johnson* movants. Unless the words “residual clause” appear in the record, a movant must use old law to show that his crimes could not have fallen under one of the narrower ACCA clauses at the time of sentencing in order to prevail.

b. Two Other Circuits Have Developed Tests That Differ From The Fourth And Tenth Circuit’s Tests.

Two other circuits have also developed tests for how a movant can show *Johnson* error. A panel of the Eleventh Circuit ruled, over dissent, 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.” *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017). Whereas in *Winston*, a *Johnson* movant had to show only that his sentence “may have been predicated on application of the now-void residual clause,”

Winston, 850 F.3d at 682, the Eleventh Circuit places a higher burden on movants. Those in the Eleventh Circuit cannot meet their burden to demonstrate *Johnson* error if “it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement.” *Id.* at 1222.

The *Beeman* dissent disagreed, urging the court to adopt a rule that *Johnson* error is demonstrated if a movant’s prior convictions could not possibly fall under any clause but the residual clause under the legal framework that exists today—making it “more likely than not” that the residual clause affected the original sentencing. *Beeman*, 871 F.3d at 1229–30. Such an approach “gives potentially eligible defendants the opportunity to prove that they are entitled to relief where, as here, the sentencing documents and record transcripts are silent.” *Id.* at 1230. Under the rule proposed by the *Beeman* dissent, the demonstration of error and the demonstration of harmlessness “coalesce into a single inquiry,” but movants must still demonstrate that their prior convictions do not fall under either of the remaining clauses in order to obtain relief. *Id.* The dissenting judge noted that this framework had been “part and parcel of many district court determinations.” *Id.* at 1226–27. And the dissent worried that “any alternative to this test—in other words, any standard under

which an unclear sentencing record precludes relief under *Johnson*—would lead to unwarranted and inequitable results.” *Id.* at 1228.

Finally, the Ninth Circuit took yet a different approach, borrowing its rule from this Court’s opinion in *Stromberg v. California*, 283 U.S. 359 (1931). Applying the *Stromberg* principle, the Ninth Circuit held that “when it is unclear from the record whether the sentencing court relied on the residual clause, it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory,” so an unclear record is sufficient for a movant to show *Johnson* error. *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017). The *Geozos* panel ultimately decided that the *Johnson* error in that case was not harmless because the movant’s prior conviction for Florida robbery was no longer a violent felony under the current legal framework in that circuit.

* * *

This Court should step in to resolve the division among the circuits over how a movant can show *Johnson* error. Delay in adjudicating this important question will only cause potentially meritorious claims to stall or be outright denied in violation of *Johnson* movants’ due process rights. “Because uniformity among federal courts is important on questions of this order,” this

Court should “grant[] certiorari to end the division of authority.” *Thompson v. Keohane*, 516 U.S. 99, 106 (1995).

II. The Tenth Circuit’s Rule Is Incorrect.

The Tenth Circuit’s rule requires a movant to show *Johnson* error by demonstrating that, under the “relevant background legal environment” at the time of sentencing, neither of the remaining violent felony clauses—the enumerated offenses clause or the force clause—would have captured the movant’s prior convictions. *Id.* at 1130. This approach is misguided.

First, the rule in *Snyder* does not reflect the reality of how ACCA sentencings were conducted in practice prior to *Johnson*. Before *Johnson*, the residual clause acted as a catch-all provision, encompassing all prior convictions that “involve[d] conduct that present[ed] a serious potential risk of physical injury to another.” § 924(e)(2)(B)(ii). As a result, sentencing judges did not need to rely on the other two clauses at sentencing. The Tenth Circuit’s rule is counterintuitive because it assumes that judges would have based ACCA sentencing determinations on narrower portions of the violent felony definition, when relying on the residual clause would have been the easier and more available route.

Second, as many circuit and district judges have cautioned, the Tenth Circuit’s rule will lead to arbitrary results: if a sentencing court happened to

state on the record that it relied on the residual clause, a movant is granted relief, but if a sentencing judge was silent as to what clause it was relying on, a movant with identical prior convictions could remain incarcerated. Such a rule is profoundly unfair.

Finally, the Tenth Circuit's approach means that movants whose prior convictions are no longer ACCA-qualifiers under today's law run the risk of spending years longer in prison than the law allows, in violation of due process.

a. The Tenth Circuit's Rule Ignores The Pre-*Johnson* Dominance Of The Residual Clause.

Before *Johnson*, if a prior conviction “involve[d] conduct that present[ed] a serious potential risk of physical injury to another,” § 924(e)(2)(B)(ii), it would necessarily have qualified under the residual clause. Accordingly, burglaries, robberies, and other crimes that may have fallen under the alternative clauses of the ACCA's violent felony definition would have also qualified as violent felonies under the residual clause.

As interpreted pre-*Johnson*, the residual clause was quite broad, encompassing crimes that were relatively minor. In the decade preceding *Johnson*, most ACCA litigation was focused on drawing the outer bounds of the residual clause. For example, this Court's pre-*Johnson* cases asked whether attempted burglary, *James v. United States*, 550 U.S. 192 (2007), driving under the influence of alcohol, *Begay v. United States*, 553 U.S. 137 (2008), failure to report,

Chambers v. United States, 555 U.S. 122 (2009) and vehicular flight, *Sykes v. United States*, 564 U.S. 1 (2011), were ACCA violent felonies. The fact that such questions were posed to this Court illustrates the breadth of the residual clause.

As a result, there would have been no need to look to the other clauses for confirmation that a far more serious crime was a qualifying ACCA violent felony. For example, if attempted burglaries involved a “serious potential risk of physical injury,” as this Court held in *James*, it stands to reason that completed burglaries would also pose a similar risk, and thus would unquestionably qualify under the residual clause. *James*, 550 U.S. at 195.

Mr. Westover’s case is a good example of how this can play out. As noted, Mr. Westover had convictions for escape and attempted escape, in addition to burglaries and one controlled substance offense. R. vol. III at 8. At the time of his sentencing, the escape offenses and the controlled substance offense, standing alone, would have meant that Mr. Westover qualified for an increased ACCA sentence. There would have been no need for the sentencing court to go further to affirmatively analyze whether the burglary convictions qualified under the enumerated clause—both because there were three qualifying convictions, and because the burglaries would have qualified under the residual clause in any event.

The Tenth Circuit’s rule presumes that a sentencing judge would have relied on a clause narrower than the residual clause just because that clause was also available to it. Where the sentencing record is inconclusive, it makes far more sense to assume that most judges relied on the expansiveness of the residual clause rather than either of the other clauses, opting for the analytical path of least resistance. The *Winston* decision, the dissent in *Beeman* and the decision in *Geozos* all allow for litigants to show *Johnson* error based on an inconclusive record, and given the mechanics of ACCA sentencing pre-*Johnson*, that result is the correct one.

b. The Tenth Circuit’s Rule Will Lead To Arbitrary Results.

Tenth Circuit’s rule will lead to arbitrary results. Early in the course of the *Johnson* litigation, the Eleventh Circuit highlighted this issue when it questioned why a court would decline to grant relief when a person’s sentence was no longer statutorily authorized—even if the “sentencing judge [had not] uttered the magic words ‘residual clause.’” *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016). The panel opined that it would be inequitable to mandate the words “residual clause” actually appear in the record because such a step was never required at sentencing. *Id.*

The panel proposed the unsettling hypothetical where two defendants received identical sentences “on the same afternoon from the exact same sentencing judge,” but in one case the sentencing judge “thought to mention that she was sentencing the defendant under” the residual clause. *Id.* Granting relief in such a circumstance “based solely on a chance remark” would result in “selective application of [*Johnson*],” in violation of “the principle of treating similarly situated defendants the same.” *Id.* at 1341 (quoting *Teague*, 489 U.S. at 304). The dissenting judge in *Beeman* echoed this sentiment, warning that adopting a contrary approach “would be unfair, but also would nullify the retroactive effect of a change in the law pronounced by the Supreme Court.” *Beeman*, 871 F.3d at 1229.

Concerns over arbitrary application of *Johnson* also animated the Fourth Circuit’s rule that a *Johnson* movant need only show that his sentence “*may have been* predicated on application of the now-void residual clause” in order to show *Johnson* error. *Winston*, 850 F.3d at 682 (emphasis added). Prior to *Johnson*, courts were not required to make specific findings, and counsel had no incentive to object, where serious crimes clearly fell within the residual clause. Accordingly, the Fourth Circuit declined to “penalize a movant for a court’s discretionary choice not to specify” which clause it relied on. *Id.* And it declined to base its decision on “non-essential conclusions a court may or may

not have articulated on the record in determining the defendant’s sentence.”
Id.

The Tenth Circuit’s rule creates yet another arbitrariness concern: The legal landscape was in constant flux in the decades prior to *Johnson*, and recreating the landscape at a particular point in time will undoubtedly prove both cumbersome and impractical. As one district judge aptly explained, “[a]ttempting to recreate the legal landscape at the time of a defendant’s conviction is difficult enough on its own. But in the context of *Johnson* claims, the inquiry is made more difficult by the complicated nature of the legal issues involved.” *United States v. Ladwig*, 192 F. Supp. 3d 1153, 1160 (E.D. Wash. 2016). It will also mean that movants who are sentenced in 2005 may be judged by a different standard for *Johnson* error than movants who were sentenced in 2010—even though their prior offenses may be the same.

The arbitrariness identified by the *Winston* panel is compounded when “decisions from the Supreme Court that were rendered since [sentencing]” can be ignored “in favor of a foray into a stale record.” *Chance*, 831 F.3d at 1340. For example, this Court in *Mathis* emphasized that “[f]or more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements.” *Id.* at 2257. Applying a correct interpretation of this Court’s precedent, even at the time of Mr. Westover’s sentencing, his prior

offenses were not generic burglaries and should only have qualified under the residual clause. Where the *Winston* court held that it was required to consider the interplay between *Johnson* and subsequent cases of this Court clarifying the scope of the violent felony definition, the *Snyder* panel applied stale and now-abrogated interpretations of this Court's precedent to the question of whether a *Johnson* error occurred. The opinion of the Tenth Circuit should be reversed in favor of the more straightforward and equitable rule that an inconclusive record demonstrates *Johnson* error, and current law applies to the question of whether the *Johnson* error was harmless.

c. The Tenth Circuit's Rule Risks An Independent Due Process Violation.

Finally, the Tenth Circuit's rule creates a separate and independent due process violation: Movants whose prior convictions are not, in fact, ACCA qualifiers are serving unconstitutional sentences, and will remain in jail, doing more time than the law allows. Such a result is untenable. *Cf. Hicks v. United States*, 137 S. Ct. 2000, 2001 (2017) (mem.) (Gorsuch, J., concurring) ("A plain legal error infects this judgment—a man was wrongly sentenced to 20 years in prison under a defunct statute...[W]ho wouldn't hold a rightly diminished view of our courts if we allowed individuals to linger longer in prison than the law requires only because we were unwilling to correct our own obvious mistakes?").

Under section 2255(a), a petitioner may challenge a sentence “imposed in violation of the Constitution or laws of the United States” and “is in excess of the maximum authorized by law.” Requiring a defendant to serve above the statutory maximum allowable sentence thus violates due process, as several circuits have noted. *See, e.g., United States v. Grier*, 475 F.3d 556, 572 (3d Cir. 2007) (Rendell, J., concurring) (“Due process requires . . . that the sentence for the crime of conviction not exceed the statutory maximum.”); *United States v. Shipp*, 589 F.3d 1084, 1091 (10th Cir. 2009) (“[w]here, as here, [a petitioner] was sentenced beyond the statutory maximum for his offense of conviction, his due process rights were violated”). For these reasons, the decision below is incorrect and should be reversed.

III. This Case Is An Ideal Vehicle For Resolving This Recurring Issue Of National Importance.

Mr. Westover’s case is an ideal vehicle to resolve the question of how a movant can show *Johnson* error on a silent record because it requires only a clear-cut analysis of that narrow question. The judgment cannot be affirmed on alternative grounds.

First, Mr. Westover’s prior convictions are no longer ACCA-qualifiers under today’s law. After *Johnson*, burglary offenses can only qualify as ACCA violent felonies if they are generic burglaries. *See, e.g., Taylor v. United States*, 495 U.S. 575 (1990) (defining generic burglary as having the basic elements of

unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime). Wyoming burglary is not a generic burglary offense because it contains the broader locational alternatives of “building, occupied structure or vehicle, or separately secured or occupied portion thereof.” Wyo. Stat. Ann. § 6-3-301. In *Mathis*, this Court explained that, “those listed locations are not alternative elements, going toward the creation of separate crimes” but are, rather, alternative means of committing a single indivisible element. 136 S. Ct. at 2250. As the *Snyder* panel acknowledged, *Mathis* abrogated Tenth Circuit law holding that Wyoming burglary can sometimes qualify as a violent felony. *See Snyder*, 871 F.3d at 1129 n.4. After *Mathis*, Mr. Westover’s prior convictions would not be ACCA-qualifiers.

Mr. Westover’s case does not present any other procedural issues. Mr. Westover’s claim is timely and is not barred by the doctrine of procedural default. *Snyder*, 871 F.3d at 1126. Thus, the only remaining question in this case is how a movant can show *Johnson* error on an inconclusive record.

This case also presents an inherently national issue, and one that is likely to recur in great numbers. As this Court is well aware, hundreds—if not thousands—of individuals sentenced under the ACCA have filed *Johnson*-based motions seeking relief. Such cases have been filed in districts throughout the country.

In some circuits, *Johnson* movants are being released if their prior convictions no longer qualify as ACCA violent felonies under today's law; in others *Johnson* movants must serve years longer in prison based solely on the procedural question presented in this case. This sort of disparity is antithetical to basic notions of fairness and justice. Under current law, Mr. Westover is not an armed career criminal, and the question of a *Johnson* movant's burden to show error was squarely presented in the case below. Finally, prompt resolution of this question in Mr. Westover's favor would have an immediate and concrete result: He would be released from prison.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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