

NO. ____

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES DEAN COUCHMAN,

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, Charles Dean Couchman, 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. Couchman*, No. 17-6018, 2018 WL 343560 (10th Cir. Jan. 10, 2018). The order of the district court denying Mr. Couchman's motion to vacate is attached as App. B.

JURISDICTION

The Tenth Circuit entered judgment in this case on January 10, 2018. 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 2008, Mr. Couchman pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). R. vol. I at 19.¹ 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. Couchman'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. Couchman’s sentencing, a presentence investigation report (PSR) was generated. The PSR-writer found that Mr. Couchman qualified for an increased sentence under the ACCA based on the following prior offenses: two prior burglary convictions from Oklahoma, a prior burglary conviction from Oregon, a conviction for burglary in Missouri, and two prior escape convictions. Supp. vol. I at 13-14.

Mr. Couchman submitted objections to the PSR, challenging the application of the ACCA in his case, and objecting to the burglary and escape convictions as ACCA predicates. He argued that two of his burglaries were of commercial storage units, and that his escape convictions were for so-called “walk-away escapes.” Supp. vol. I at 32. The PSR-writer responded that each of the prior convictions qualified as ACCA predicates. *Id.* At sentencing, the sentencing court indicated that it was unclear as to whether at least one of Mr. Couchman’s predicate burglaries qualified as an ACCA prior conviction, but that he nonetheless had “at least five” qualifying convictions “under the applicable standards,” which included both burglaries and escapes. R. vol. I at 41. The sentencing record does not state which of these burglaries the sentencing court questioned.

The sentencing court’s explanation of why Mr. Couchman’s remaining burglary convictions qualified as violent felonies mirrored the language of the ACCA’s residual clause. The sentencing court explained:

. . . As I say, the decisions don’t require that there be actual violence in particular in connection with a particular offense, but rather if the burglary, for example, involves a building or structure *that’s deemed to involve a sufficient risk of violence for the nature of it.*

R. vol. I at 41 (emphasis added). Mr. Couchman was ultimately sentenced as an Armed Career Criminal to 192 months’ imprisonment based on the five remaining violent felony convictions—two escape predicates, and three burglary predicates. R. vol. I at 46.

Mr. Couchman filed a notice of appeal and his appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). At the time of the appeal, the Supreme Court had recently determined that walkaway escape was not a proper ACCA predicate. *Chambers v. United States*, 555 U.S. 122 (2009). But the Tenth Circuit affirmed the sentencing court’s determination that Mr. Couchman was subject to the ACCA anyway, based on three remaining burglary convictions. *United States v. Couchman*, 329 F. App’x 836 (10th Cir. 2009). Neither the sentencing court nor the Tenth Circuit made any findings about which three of the four burglary convictions had failed to qualify as an ACCA predicate sentencing. Many offenses labeled “burglary” do not qualify

as enumerated offenses under the violent felony definition. *See, e.g., Taylor v. United States*, 495 U.S. 575, 592 (1990) (federal burglary definition is “independent of the labels employed by the various States’ criminal codes”). After Mr. Couchman’s direct appeal only three qualifying burglary predicates remained, but it is impossible to tell which ones were used to enhance Mr. Couchman’s ACCA sentence.

Several years after Mr. Couchman’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. Couchman 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 which clause of the ACCA’s 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: the residual clause and either the enumerated offenses clause or the force clause. Mr. Couchman's case is an example of how ambiguity in the record can cut against a *Johnson* movant. Mr. Couchman filed his *Johnson* motion *pro se*, and argued that his sentence should be vacated because the residual clause had affected his sentence. The district court denied Mr. Couchman's *Johnson* motion. The district court found that Mr. Couchman was sentenced as an Armed Career Criminal because he was "previously convicted of several counts of burglary, one of the enumerated offenses." R. vol. I at 195.

Mr. Couchman filed a notice of appeal and was appointed counsel to represent him before the Tenth Circuit. There, Mr. Couchman argued that his case was infected with *Johnson* error because it was not clear what role the 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.

Mr. Couchman's central argument on appeal was that the sentencing record was unclear as to which clause of the ACCA was used to enhance his sentence. Specifically, the sentencing court had used the language of the residual clause at sentencing, explaining that his burglaries qualified as ACCA

predicates because “if the burglary, for example, involves a building or structure that's deemed to involve a *sufficient risk of violence for the nature of it*.” R. vol. I at 41 (emphasis added). But the Tenth Circuit agreed with the district court, and applied *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017) to hold that the residual clause had no effect on Mr. Couchman’s sentence.

In order to establish *Johnson* error under *Snyder*, the Tenth Circuit consults “the sentencing record” and the “relevant background legal environment at the time of sentencing” to determine whether an ACCA sentence was based on the residual clause. *See Couchman*, 2018 WL 343560, at *3 (citing *Snyder*, 871 F.3d at 1129).

Under this rule, the *Couchman* panel concluded that that the residual clause was not in play at Mr. Couchman’s sentencing, explaining that

There is no mention of the residual clause in the sentencing record. Moreover, the enumerated-offense clause explicitly includes “burglary” as a violent felony. 18 U.S.C. § 924(e)(2)(B)(ii). The prior convictions used to enhance Couchman’s sentence under the ACCA were his “burglary” convictions.

Couchman, 2018 WL 343560, at *3. As noted, the sentencing court explained its rationale for sentencing Mr. Couchman as an Armed Career Criminal as follows: “[T]he decisions don’t require that there be actual violence in particular in connection with a particular offense, but rather if the burglary, for example, involves a building or structure that’s *deemed to involve a sufficient*

risk of violence for the nature of it.” R. vol. I at 41. But the *Couchman* panel found that this did not reference the residual clause, even though *James v. United States*, 550 U.S. 192 (2007) (holding that attempted Florida burglary was a residual clause offense) had been decided just over a year prior to Mr. Couchman’s sentencing. The panel appears to conclude that Mr. Couchman’s burglary convictions—because they were burglaries—could only have been enumerated offenses.

With regard to the background legal environment, the *Couchman* panel concluded that, at the time of Mr. Couchman’s sentencing, the burglaries would have qualified under the enumerated offenses clause because the sentencing court would have applied the modified categorical approach to Mr. Couchman’s prior convictions. *Id.* at *4. The *Couchman* panel concluded this even though the sentencing record was not clear as to which three of the four burglaries remained.

Because at least two of Mr. Couchman’s burglary convictions were of storage units—and thus on the margin of what might be considered a “building” or “structure” for purposes of generic burglary—it would have made sense for the sentencing court to rely on the catch-all residual clause rather than conducting a clear-cut enumerated clause analysis. Moreover, the sentencing court did not need to go to such lengths because, at the time of sentencing, it

determined that Mr. Couchman had at least five qualifying violent felonies and, as noted *James* had already established that even *attempted* burglaries qualified as ACCA predicates.

Nonetheless, the Tenth Circuit held that—under *Snyder*—Mr. Couchman could not prevail. The Tenth Circuit determined that “record clearly reveals that Couchman’s sentence was enhanced based on the enumerated-offense” and that, if the sentencing court had applied only *Taylor* to its analysis of the burglary offenses “there would have been little dispute’ that these convictions fell within the ACCA’s enumerated-offense clause. *Couchman*, 2018 WL 343560, at *6 (quoting *Snyder*, 871 F.3d at 1129).

Neither of Mr. Couchman’s Oklahoma burglary convictions qualify as violent felonies today. *See United States v. Eric Taylor*, 672 Fed.Appx. 860, 863 (10th Cir. 2016) (unpublished). Similarly, the Ninth Circuit has long held that Oregon’s first degree burglary statute does not fall within the ACCA’s enumerated offenses clause. *See United States v. Mayer*, 560 F.3d 948, 962 (9th Cir. 2009). Thus, if Mr. Couchman were sentenced today, he would not be an Armed Career Criminal because, at most, he would only have one prior qualifying ACCA conviction. But even though neither the enumerated offenses nor the force clause would capture Mr. Couchman’s Oklahoma and Oregon burglary convictions under the legal environment today, *Snyder* holds that current case

law is irrelevant to the question of whether a *Johnson* error occurred. Under the Tenth Circuit’s rule, “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. The Court should grant review in this case because the circuits are divided over how a movant can show *Johnson* error on an ambiguous or unclear record such as this.

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 where the sentencing record is inconclusive as to which clause of the ACCA a sentencing court relied on when enhancing a person’s section 922(g) sentence. 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. Mr. Couchman is serving a sentence far higher than the statutory maximum for which he is eligible because subsequent clarifying case law makes clear that his prior convictions are not ACCA-qualifying felonies. 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.

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.

Mr. Couchman would certainly prevail under the Fourth Circuit’s test. The sentencing court used language that mirrored the residual clause lan-

guage to conclude that Mr. Couchman’s burglary offenses were ACCA qualifiers. Although the sentencing court did not utter the magic words “residual clause,” reference to the level-of-risk analysis is as clear an indication as any that the residual clause was in the judge’s mind at the time of sentencing.

The Tenth Circuit’s approach to this issue is directly at odds with the *Winston* decision. Under the *Winston* rule, Mr. Couchman would prevail because the sentencing court *may have* relied on the residual clause at sentencing; in fact, there is some indication that it did based on the language that it used. And the *Johnson* error was not harmless in this case because Mr. Couchman’s prior convictions do not qualify as violent felonies under the remaining ACCA clauses today. 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.

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

Both the First Circuit and the Eleventh Circuit require 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, 1221-22 (11th Cir. 2017); see also *Dimott v. United States*, 881 F.3d 232, 240 (1st Cir. 2018). 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 First and Eleventh Circuits place 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.” *Beeman*, 871 F.3d at 1222. Likewise, in the First Circuit, “[a] mere possibility” that the residual clause was relied on “is insufficient.” *Dimott*, 881 F.3d at 240.

Beeman was decided over dissent. The *Beeman* dissent disagreed with the other two panel members, urging the court to instead 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.

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 coun-

terintuitive 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.

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. For example, in Mr. Couchman’s case, even though the sentencing court said that Mr. Couchman’s burglaries “involve[d] a sufficient

risk of violence for the nature of it,” R. vol. I at 41, the Tenth Circuit used contorted logic to find that the sentencing court was relying on the enumerated clause.

The Tenth Circuit characterized Mr. Couchman’s argument that the “level of risk” language used by the sentencing court mirrored the residual clause as “disingenuous.” *Couchman*, 2018 WL 343560, at *3 n.2. Instead, the *Couchman* panel speculated that the sentencing court was “reiterating the legislative history of the ACCA. *Id.* But the record does not show this. In response to defense counsel’s argument that Mr. Couchman had no truly violent offenses in his background, the sentencing court explained:

Well, I understand that. Of course, for our purposes the Armed Career Criminal Act applies based on the definitions that Congress and the higher courts have used, and it appears to me that whatever may have been the level of actual violence that may have been employed with respect to particular crimes that he may have committed, that in the circumstances here I think the cases make clear that someone who walks away from a work release type operation commits an escape for purposes of the Armed Career Criminal Act, and our Court of Appeals has made clear that any escape constitutes a qualifying prior felony.

Similarly, with respect to the prior burglary convictions, it does appear to me from the description of the burglaries here that, there is one that I couldn’t tell for certain that it involved a structure, but we’re dealing with six prior convictions that have been identified here as, by the report as qualifying felonies, and it appears to me that based on the report here that at least five of them plainly do qualify under the applicable standards.

As I say, the decisions don’t require that there be actual violence in particular in connection with a particular offense, but rather if the burglary, for example, involves a building or structure

that's deemed to involve a sufficient risk of violence for the nature of it. In any event, as I say, Congress as concluded that those offenses should be considered violent offense for purposes of the Armed Career Criminal Act.

R. vol. I at 40-41 (emphasis added). Taken in full context, the sentencing court's response could certainly be interpreted as a reference to the level of risk language in the residual clause.

It makes far more sense to assume that most judges—and indeed the sentencing court here—was relying on the expansiveness of the residual clause rather than either of the other clauses, to find that Mr. Couchman's burglaries qualified as ACCA predicates, opting for the analytical path of least resistance. Such a conclusion is further supported by the fact that neither the sentencing court nor the Tenth Circuit on direct appeal made any findings at all about which clause the burglaries qualified under—or indeed even which three of the four burglaries were used to enhance Mr. Couchman's sentence. 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*, as evidenced by this case, 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.*

And on Mr. Couchman’s record, in which the sentencing court referenced the language of the residual clause, the Tenth Circuit’s rule still requires a *Johnson* movant to show that his burglary convictions could not have been captured by the enumerated clause at the time of sentencing. In this way, the Tenth Circuit’s rule creates yet another arbitrariness concern. Because 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. Couchman’s sentencing, his prior Oklahoma and Oregon 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. This Case Is An Ideal Vehicle For Resolving This Recurring Issue Of National Importance.

Mr. Couchman'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. Couchman'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). Neither of Mr. Couchman's Oklahoma burglary convictions qualify as violent felonies. *See United States v. Eric Taylor*, 672 Fed.Appx. 860, 863 (10th Cir. 2016) (unpublished). Similarly, the Ninth Circuit has long held that Oregon's first degree burglary statute does not fall within the ACCA's enumerated offenses clause. *See United States v. Mayer*, 560 F.3d 948, 962 (9th Cir. 2009). Mr. Couchman's case does not present any other procedural issues. Mr. Couchman's claim is timely and is not barred by the doctrine of procedural default. 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 districts, *Johnson* movants were simply released if their prior convictions no longer qualified 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. Couchman 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.

III. 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 today 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”).

Although on collateral review the “[p]etitioner carries the burden in a collateral attack on a judgment,” by a preponderance of the evidence, *see, e.g., Hawk v. Olson*, 326 U.S. 271, 279 (1945), Mr. Couchman can meet this burden by showing that there has been “a deprivation of a constitutional right.” *See, e.g., United States v. Kennedy*, 225 F.3d 1187, 1196 n.6 (10th Cir. 2000). *See also, e.g. David v. United States*, 134 F.3d 470, 474 (1st Cir. 1998) (“burden is

on the petitioner to make out a case for section 2255 relief,” and he can meet this burden by showing that his sentence was “(1) was imposed in violation of the Constitution, or (2) was imposed by a court that lacked jurisdiction, or (3) exceeded the statutory maximum, or (4) was otherwise subject to collateral attack.”) (quoting *Hill v. United States*, 368 U.S. 424, 426-27 (1962) (construing statute)). This includes claims that reveal “fundamental defect[s]” which, if uncorrected, will “result[] in a complete miscarriage of justice,” or irregularities that are “inconsistent with the rudimentary demands of fair procedure.” *Hill*, 368 U.S. at 426-27. Mr. Couchman can show such a deprivation of rights—and a fundamental a miscarriage of justice—by a preponderance of the evidence precisely because his sentence now exceeds the statutory maximum if he were sentenced today. For these reasons, the decision below is incorrect and should be reversed.

CONCLUSION

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

Respectfully submitted,

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