No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

EULOS CEASAR KNIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Armed Career Criminal Act, Eulos Knight faced a potential mandatory minimum sentence of fifteen years in prison at the time of his indictment. In plea negotiations, Mr. Knight agreed to forego arguments for a below-Guidelines sentence in exchange for avoiding the ACCA mandatory minimum sentence. Subsequently, this Court held the ACCA's residual clause was unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and applied *Johnson* retroactively in *Welch v. United States*, 136 S. Ct. 1257 (2016). Based on *Johnson* and *Welch*, Mr. Knight was never eligible for ACCA treatment, so he moved for collateral relief. Although the district court denied relief, the Ninth Circuit recognized the constitutional basis for resentencing but denied relief on the merits by requiring the defendant to present evidence that the misinformation was "demonstrably made the basis for his sentence." The Circuits are split regarding the showing needed to establish that due process requires resentencing under *United States v. Tucker*, 404 U.S. 443 (1972). The questions presented are:

> Where sentencing is imposed based on misinformation of constitutional magnitude regarding the import of the defendant's criminal record, did the Ninth Circuit's deviation from this Court's standard in *Tucker*, by requiring more than evidence that the sentence "might have been different" if the judge had the correct information, result in an unconstitutionally unreliable sentence in violation of due process of law?
>
> In any event, should the Court grant the writ, vacate the denial of relief, and remand for the district court to apply the due process standard to the facts of the case because, in the absence of any explanation from the sentencing judge, the Ninth Circuit should have remanded to permit the trial court to make the missing findings in the first instance under this Court's precedent prioritizing the district court's role in making initial factual determinations and presuming prejudice from Guidelines errors?

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The petitioner, Eulos Ceasar Knight, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 7, 2019, affirming the denial of habeas corpus relief.

1. Opinions Below

The District Court denied habeas corpus relief in an unpublished opinion on August 17, 2017 (Appendix 3). The Ninth Circuit affirmed the denial of habeas corpus relief in a memorandum opinion on February 7, 2019. *United States v. Knight*, 750 Fed. Appx. 604

(9th Cir. 2018) (Appendix 1). The Ninth Circuit denied panel and en banc rehearing on April 18, 2019 (Appendix 10).

2. Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (2008).

3. Constitutional And Statutory Provisions

The Fifth Amendment to the United States Constitution provides, in relevant part, that no person shall be "deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V. The Armed Career Criminal Act states in part: "In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)." 18 U.S.C. § 924(e)(1). The ACCA in its entirety is set out at page 11 of the Appendix.

4. Statement Of The Case

On April 8, 2014, a federal grand jury returned an indictment charging Eulos Knight with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). A violation of § 922(g) ordinarily carries a maximum term of ten years in prison. 18 U.S.C. § 924(a)(2). The Armed Career Criminal Act (ACCA), however, mandates a 15-year minimum sentence and a maximum of life in prison for a felon who possesses a gun and has "three

previous convictions . . . for a violent felony or for a serious drug offense." 18 U.S.C. § 924(e)(1).

Prior to Mr. Knight's first appearance in federal court, the prosecutor raised the potential of Mr. Knight being charged under the ACCA. By email, the prosecutor stated that Mr. Knight's prior convictions for Oregon burglary, Washington felony assault, and two Washington convictions for violating a protective order would qualify as violent felonies. The email advised defense counsel that the defendant would have to "agree to stay in [custody] for the potential of a non ACC dispo to be put on the table."

Shortly after the arraignment, the prosecutor again reached out to defense counsel to seek a "mitigation packet" regarding why Mr. Knight should not be charged with the ACCA 15-year mandatory minimum, asserting: "I think it is clear that he qualifies legally with 3 prior violent felonies under ACC[.]" In a back-and-forth email exchange, the defense contended that the protective order violations would not necessarily qualify as ACCA predicates because they could involve misdemeanor rather than felony assaults. The prosecutor responded that the protection order violation itself would still be a felony and concluded, "I think it could go either way."

Ultimately, the prosecutor agreed not to allege the ACCA enhancement in exchange for the defendant's agreement not to seek a sentence below the non-ACCA Guidelines range. Upon Mr. Knight's plea of guilty to being a felon in possession of a firearm, the government expressly promised "not to bring additional charges against defendant in the District of Oregon arising out of this investigation, known to the USAO at the time of this

agreement," which included an ACCA charge. The government also promised to recommend a sentence at the low end of the Guidelines range. In return, the defense expressly agreed not to seek any variance or departure below the Guidelines range.

At sentencing, the parties followed their promises in the plea agreement and jointly recommended a sentence of 84 months, the low end of the Guidelines range prescribed by offense level 23 and criminal history category V. The Court followed the recommendation of the parties and imposed an 84-month term of imprisonment. Mr. Knight did not appeal his conviction or sentence.

In 2015, this Court in *Johnson v. United States* held that a part of the ACCA's violent felony definition known as the "residual clause" is unconstitutionally vague and that "[i]ncreasing a defendant's sentence under the [residual] clause denies due process of law." 135 S. Ct. 2551, 2557 (2015). In *Welch v. United States*, this Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. 136 S. Ct. 1257 (2016).

Within one year of the ruling in *Johnson*, Mr. Knight, through counsel, filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. He asserted that his sentence was unconstitutional under *Johnson* because the firearms guideline enhanced his punishment based on a residual clause identical to the ACCA. After this Court ruled in *Beckles v. United States*, 137 S. Ct. 886 (2017), that the advisory Guidelines are not subject to vagueness scrutiny, Mr. Knight filed a supplemental memorandum asserting that his sentence was unconstitutional on the ground that the threatened impact of the

residual clause in the ACCA influenced the terms of his plea agreement, which formed the basis for the final sentence.

The government moved to dismiss the § 2255 motion, claiming that the motion was untimely under 28 U.S.C. § 2255(f)(3) because *Johnson* had not announced the "right" that Mr. Knight sought to assert – relief from a sentence that was tainted by the risk of prosecution under the ACCA. On the merits, the government asserted that the sentencing decision was not influenced by the potential application of the ACCA. The defense responded that Mr. Knight's claim asserted the same right announced by *Johnson* for purposes of triggering the one-year period within which to file for relief because his claim relied on the invalidity of the ACCA's residual clause. Further, Mr. Knight pointed to the email exchanges that explicitly demonstrated that avoiding the ACCA was the overriding focus of Mr. Knight's plea agreement, which formed the basis for the sentence imposed.

The district court denied relief based on timeliness without specifying its reasoning on the ACCA-threat issue. Appendix 3. On Mr. Knight's appeal, the Ninth Circuit joined the case for argument with the appeal of Anthony Hill and reached the merits of the § 2255 motion. In denying relief based on Mr. Knight's failure to establish that the ACCA threat was "demonstrably made the basis for [his] sentence," the Court relied on its published decision issued the same day in the companion case of *United States v. Hill*, 915 F.3d 669 (9th Cir. 2019):

> Even assuming that Knight was ineligible for a sentencing enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), in light of *Johnson v. United States*, —— U.S. ——, 135 S. Ct. 2551, 192 L.Ed.2d

> 569 (2015), Knight failed to show that the potential for such an enhancement was "demonstrably made the basis for [his] sentence." *United States v. Hill*, 915 F.3d 669 (9th Cir. 2019) (quoting *United States v. Vanderwerfhorst*, 576 F.3d 929, 935–36 (9th Cir. 2009)). Pre-sentencing discussions between the prosecutor and defense counsel about the potential for an ACCA enhancement, and evidence that Knight considered the potential for an ACCA enhancement in entering into his plea agreement, do not make it "abundantly clear" that the district court relied on the potential ACCA enhancement as the basis for its sentence. *Hill*, —— F.3d at —— (quoting *Farrow v. United States*, 580 F.2d 1339, 1359 (9th Cir. 1978)). Because the district court did not impose a sentence based on misinformation of a constitutional magnitude, we reject Knight's claim that his due process rights were violated and conclude he is not entitled to a hearing on that claim.

Knight, 750 Fed. App'x at 605. Accordingly, the court affirmed the denial of relief and later denied rehearing en banc. This petition and the contemporaneously filed petition for certiorari in *Hill* raise the same issues that call for grant of a writ of certiorari.

5. Reasons For Granting The Writ

A court's sentencing decision cannot be founded, in any part, upon "misinformation of constitutional magnitude" regarding the import of the defendant's criminal record. *United States v. Tucker*, 404 U.S. 443, 447-48 (1972). This Court should grant the petition for a writ of certiorari because the Ninth Circuit's requirement of demonstrable, on-the-record reliance on misinformation by the trial judge is inconsistent with this Court's due process standard in *Tucker* and makes little sense because, without knowing the information was unreliable, the trial judge has no reason to articulate the degree to which the misinformation affected the sentence. The Ninth Circuit's misapplication of *Tucker* epitomizes a significant problem that is reflected in disparate approaches across the Circuits. The Courts of Appeals are divided—with some, like the Ninth Circuit, requiring

an on-the-record showing of reliance on the misinformation by the sentencing judge in order to justify resentencing, and others finding that surrounding circumstances, without such a showing, can suffice. In the latter camp, several Circuits require an affirmative showing that the sentencing judge was *not* affected in order to make resentencing unnecessary.

In addition to resolving the varying approaches to *Tucker* among the Circuits, the Court should grant certiorari to remand to the sentencing judge to apply the correct due process standard to the facts of the case in the first instance. Allowing the sentencing judge to make the necessary factual finding is consistent with this Court's expressed norm that district courts should first apply the facts to the applicable legal standard. This Court's precedent on the priority for district court findings should apply with special force in the sentencing context, where the sentencing court knows best the influence that misinformation may have had on the sentence imposed. As in this Court's Guidelines jurisprudence, doubts regarding sentencing errors should be resolved in favor of remand for the sentencing court to determine whether the same or different sentence should be imposed.

A. The Courts Of Appeals Are Divided Over How To Apply The *Tucker* "Might Have Been Different" Standard.

The Circuits are divided regarding the standard to apply to determine whether misinformation at sentencing requires remediation through resentencing. On one side of this conflict, the Second Circuit—much like the First, Third, Fourth, Fifth, Eighth, and

Tenth Circuits—holds that "actual reliance need not be shown." *United States v. Robin*, 545 F.2d 775, 779 n.12 (2d Cir. 1976). On the other side, the Ninth Circuit, along with the Sixth, Seventh, and District of Columbia Circuits, requires a demonstrated, on-the-record showing of reliance on the misinformation by the sentencing court. *Hill*, 915 F.3d at 675 (holding that the defendant must show that the misinformation was "demonstrably made the basis for his sentence"). Each Circuit that has addressed the issue applies a slightly different test.

The Second Circuit has consistently held that demonstrable reliance on the erroneous information need not be shown. *See Robin*, 545 F.2d at 779 n.12; *King v. Hoke*, 825 F.2d 720, 724 (2d Cir. 1987); *McGee v. United States*, 462 F.2d 243 (2d Cir. 1972), In fact, the *McGee* court held that "actual reliance on the erroneous information need not necessarily be shown" in applying the pre-*Tucker* rule against material false assumptions as to "any facts relevant to sentencing." 462 F.2d at 246 (citing *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948)). The Second Circuit requires only that it was "quite probable" that the sentencing judge relied on the erroneous information. *McGee*, 462 F.2d at 246. Similarly, the test imposed by the Third and Eighth Circuits is whether the misinformation "*might* have affected the judge's sentencing decision." *United States ex rel. Fletcher v. Walters*, 526 F.2d 359, 363 (3d Cir. 1975) (emphasis added); *Grant v. White*, 579 F.2d 48, 49 (8th Cir. 1978) (looking to whether the erroneous information "may have influenced the sentencing judge").

Several Circuits, including the Tenth, Fourth, and Fifth, not only have no requirement of on-the-record reliance, but require that the record affirmatively demonstrate that the court did *not* rely on the misinformation. The Tenth Circuit has stated that, even if a record is silent on the extent of reliance given to misinformation, the appellate court "cannot presume the trial court ignored [it]." *Martinez v. United States*, 464 F.2d 1289, 1291 (10th Cir. 1972) (holding that "[t]he question can be answered only by remanding for the purpose of resentencing"). The Fourth and Fifth Circuits require that, "unless it can be ascertained form the record" that the sentencing court's sentence "was *not* affected by" misinformation or an invalid conviction, "the defendant must be resentenced." *Jenkins v. United States*, 530 F.2d 1203, 1204 (5th Cir. 1976) (emphasis added); *see also Strader v. Troy*, 571 F.2d 1263, 1267 (4th Cir. 1978) ("[I]f the sentencing judge can say with certainty that the prior allegedly invalid convictions did not influence the sentence that he imposed, the case is at an end; otherwise, there must be resentencing or further proceedings to determine the validity of the prior convictions"); *cf. Saville v. United States*, 524 F.2d 654, 655 (1st Cir. 1975) (describing an approved procedure where the sentencing judge should "consider, first, whether he would have imposed a different sentence had he known" of the invalid information: "If not, the sentence may stand; if so, the judge is to . . . resentence if called for.").

By contrast, the Ninth Circuit, Sixth Circuit, and District of Columbia Circuit require an explicit showing of reliance on the misinformation before granting resentencing. *See United States v. Vanderverfhorst*, 576 F.3d 929, 935-36 (9th Cir. 2009) (holding that

the challenged information must be "demonstrably made the basis for the sentence"). In the Sixth Circuit, the reviewing court looks for a showing that the misinformation was "demonstrably relied upon by the sentencing judge." *Collins v. Buchkoe*, 493 F.2d 343, 345 (6th Cir. 1974); *see Stewart v. Erwin*, 503 F.3d 488 (6th Cir. 2007); *United States v. Barry*, 938 F.2d 1327 (D.C. Cir. 1991) (holding that resentencing was not required when the "record [did] not reflect that the district court relied on erroneous information or baseless assumptions").

Although the Seventh Circuit also requires a showing of reliance, the court has described the standard as "a low one." *United States v. Miller*, 900 F.3d 509, 513 (7th Cir. 2018) (the party must show that "false information was part of the basis for the sentence") (citations omitted). Notably, however, in the Seventh Circuit, a showing of reliance "does not require . . . that the judge would have chosen a different sentence if properly informed." *Id.*

Within the broad split among the Circuits—with some Circuits requiring demonstrable reliance on the record and others requiring probable impact without record reliance—each Circuit to address this issue does so with a somewhat different standard. This Court should resolve the long-standing disarray among the Circuits regarding the required showing under *Tucker* in order to assure equal treatment of similarly situated defendants across the Circuits. Only this Court can resolve the entrenched conflict over this recurring and important question. Given the decades since *Tucker*, no further percolation will resolve the conflicts or further ripen the applicable policy considerations.

B. The Court Should Grant Certiorari Because The Ninth Circuit Based Its Decision On Reasoning Inconsistent With This Court's Standard For Finding That Misinformation Of Constitutional Magnitude Resulted In A Sentence That "Might Have Been Different" Under *Tucker*.

Due process guarantees all defendants the right to be sentenced under an accurate understanding of the relevant sentencing considerations. *Tucker*, 404 U.S. at 447; *Townsend*, 334 U.S. at 740-41. Where the sentence is "founded at least in part upon misinformation of constitutional magnitude," the defendant should be resentenced without the improper considerations. *Tucker*, 404 U.S. at 447. In its decision denying relief, the Ninth Circuit relied on the companion case of *Hill* that correctly identified the general rule but then imposed a test requiring on-the-record reliance that departs from this Court's governing precedent in two ways.

First, this Court's *Tucker* opinion does not support the Ninth Circuit's conclusion that the sentencing judge must explicitly mention constitutionally significant misinformation for a defendant to establish that the misinformation was "demonstrably made the basis for the sentence." *Hill*, 915 F.3d at 675 (citation omitted). To the contrary, a reviewing court must examine the entire record. When misinformation is especially significant, and results in limited defense advocacy under the terms of the plea agreement, the record supports the conclusion that the misinformation sufficiently influenced a sentencing decision that "might have been different." *Tucker*, 404 U.S. at 448. Second, this Court's due process precedent does not preclude consideration of objective factors, such as qualification for the ACCA, that influenced the terms of a defendant's plea agreement

in determining whether misinformation formed the basis for the sentence. Here, the sentencing court expressly adopted the terms of the plea agreement negotiated under the unconstitutional ACCA threat when it imposed the sentence.

1. Because Of Its Severe Impact On The Statutorily-Authorized Sentencing Range, A Sentencing Judge Need Not Explicitly Mention A Defendant's Eligibility For An ACCA Enhancement In Order For A Reviewing Court To Find That It Formed Part Of The Basis For The Sentence.

This Court's due process precedent does not support the Ninth Circuit's conclusion that the sentencing judge must explicitly mention constitutionally significant misinformation for a defendant to establish that the misinformation was "demonstrably made the basis for the sentence." Appendix 2 (citing *Hill*, 915 F.3d at 674). When the misinformation is especially significant, and expressly affects sentencing advocacy, this Court considers whether the record as a whole establishes a due process violation.

In *Tucker*, this Court granted relief under 28 U.S.C. § 2255, vacating the defendant's 25-year bank robbery sentence, because the sentencing court had considered prior felony convictions rendered unconstitutional due to lack of counsel following *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Court explained that the sentence must be vacated because it was "founded at least in part upon misinformation of constitutional magnitude" and "assumptions concerning his criminal record which were materially untrue." *Tucker*, 404 U.S. at 447 (citing *Townsend*, 334 U.S. at 741). The Court in *Tucker* made clear that a minimal showing of reliance suffices, explaining that "the real question here" is whether the sentence "*might have been different* if the sentencing judge had known that at least two

of the respondent's previous convictions had been unconstitutionally obtained." *Id.* at 448 (emphasis added).

Although the opinion in *Tucker* noted that the sentencing judge "gave explicit attention" to the uncounseled prior convictions, the Court in a footnote further explained that the judge had simply asked the agent to testify with respect to those convictions. *Id.* at 444 n.1. There is no indication that the sentencing judge specifically mentioned those convictions in any other way at sentencing or referenced them to explain the sentence chosen. In concluding that the record sufficiently established reliance on misinformation, the Court in *Tucker* also relied on the significance of the misinformation:

> [I]f the trial judge in 1953 had been aware of the constitutional infirmity of two of the previous convictions, the factual circumstances of the respondent's background would have appeared in a dramatically different light at the sentencing proceeding. Instead of confronting a defendant who had been legally convicted of three previous felonies, the judge would then have been dealing with a man who, beginning at age 17, had been unconstitutionally imprisoned for more than ten years, including five and one-half years on a chain gang.

Id. at 448. Similarly, from the plea negotiations in the record, the sentencing judge in the present case lacked defense advocacy for a lower sentence due to the imperative to avoid the ACCA, with its much harsher potential punishment.

The record of reliance on the misinformation in this case differs from *Tucker* only in that the sentencing judge did not expressly reference Mr. Knight's eligibility for an ACCA enhancement at the sentencing hearing. But the judge did not need to because Mr. Knight's attorney, by agreeing to the same sentence advocated by the government,

foreordained a result for the sole purpose of avoiding the ACCA. The record leaves no doubt that the judge never considered a lower sentence due to the prosecutor's discretion to forego the ACCA enhancement, which would have potentially authorized a sentencing range of 15 years to life in prison.

Eligibility for an ACCA enhancement is an especially significant fact because of its severe impact on the statutorily authorized sentence. When the ACCA applies, the sentencing judge must apply a sentence that is, at a minimum, five years longer than the highest lawful sentence otherwise available for the same offense. Just as in *Tucker*, because of the significance of the misinformation, the record in the present case supports the conclusion that the sentencing judge relied on the parties' agreement, which was based on ACCA eligibility, when imposing sentence, even though the judge did not say so explicitly.

The Ninth Circuit, however, concluded that misinformation cannot be proven to have formed the basis for a sentence unless the sentencing judge made explicit mention of it. *See Hill*, 915 F.3d at 674 ("[T]he court must have 'made it abundantly clear that (the challenged information) was the basis for its sentence.'") (quoting *Farrow v. United States*, 580 F.2d 1339, 1359 (9th Cir. 1978) (en banc)); *id.* ("Even a district court's [passing] reference to challenged information . . . is not enough to satisfy [the due process standard].") (citing *Vanderwerfhorst*, 576 F.3d at 935-36)). Although the rule does not follow from the cited cases, the precedential statement is now Circuit law, followed in this case. The disputed information in *Farrow* and *Vanderwerfhorst* consisted of allegations of misconduct derived from hearsay and other potentially unreliable sources. The sentencing

records did not establish that the judges credited the disputed allegations as true, let alone that the judges relied on those allegations when imposing sentence.

In contrast, Mr. Knight's potential for ACCA treatment was undisputed and no other possible reason explains defense counsel's agreement not to seek a downward variance in the plea agreement, as repeated in the presentence report. The potential applicability of the ACCA is an objectively verifiable fact that is part of the background legal environment—no credibility finding is needed. And the ACCA bargain is especially significant because it goes directly to the legislatively-authorized punishment for the offense, which in turn frames the potentially applicable Guidelines range because mandatory minimum sentences under statute become the applicable Guidelines sentence under U.S.S.G. § 5G1.1(b) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.").

The Ninth Circuit's reasoning is not only inconsistent with *Tucker*, but also failed to address this Court's recent jurisprudence on the prejudice that can result from mistaken factual predicates at sentencing. This Court's Guidelines jurisprudence informs the *Tucker* analysis regarding anchoring of the exercise of sentencing discretion at a higher level, requiring remedial resentencing. This Court in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), established that Guidelines errors presumptively affect the outcome of sentencing proceedings. The issue in *Molina-Martinez* was whether "the application of an incorrect Guidelines range at sentencing affect[s] the defendant's substantial rights" when

the "ultimate sentence falls within the correct range." 136 S. Ct. at 1345. The Court held that no further showing of prejudice beyond miscalculation of the Guidelines is required because the Guidelines set "the framework for sentencing" decisions and "anchor . . . the district court's discretion." *Id.* at 1345 (citation and quotation marks omitted). "From the centrality of the Guidelines in the sentencing process," the Court reasoned that a defendant who shows Guidelines error "*should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different* had the correct range been used." *Id.* at 1346 (emphasis added).

Similarly, in *Rosales-Mireles v. United States*, this Court held again that even a relatively minor error in calculating a defendant's Guidelines range "establishes a reasonable probability that a defendant will serve a prison sentence that is more than necessary to fulfill the purposes of incarceration." 138 S. Ct. 1897, 1907 (2018) (quotation marks omitted). The Court in *Rosales-Mireles* reminded that courts must take particular care to guard against unnecessary deprivations of liberty because "[i]t is crucial in maintaining public perception of fairness and integrity in the justice system that courts exhibit regard for fundamental rights and respect for prisoners 'as people.'" *Id.* at 1907 (citation omitted). And the remedy simply provides the sentencing judge the opportunity to consider whether, with the misinformation corrected, a different sentence – or the same sentence – should be imposed. *See id.* at 1908 ("[W]hat reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in

federal prison than the law demands?" (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014) (Gorsuch, J.))).

Just as Guidelines errors presumptively cause prejudice because of the "centrality of the Guidelines in the sentencing process," *Molina-Martinez*, 136 S. Ct. at 1346, a misunderstanding regarding applicability of the ACCA presumptively impacts sentencing without the judge stating so explicitly. The fact that a defendant avoided a 15-year minimum sentence is just as "central" to sentencing as the Guidelines range. Mandatory minimums become the Guidelines sentence under U.S.S.G. § 5G1.1(b), which sets a baseline anchor for all sentencing decisions. *See Peugh v. United States*, 569 U.S. 530, 541 (2013) ("The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines[.]"); *United States v. Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J., concurring) ("When people are given an initial numerical reference, even one they know is random, they tend (perhaps unwittingly) to 'anchor' their subsequent judgments—as to someone's age, a house's worth, how many cans of soup to buy, or even what sentence a defendant deserves—to the initial number given."); Daniel M. Isaacs, Note, *Baseline Framing in Sentencing*, 121 Yale L.J. 426, 439-443 (2011) (discussing anchoring effects in federal sentencing). In this case, the ACCA charge falsely inflated the parties' and, therefore, the sentencing judge's starting points for determining a reasonable sentence.

A petitioner need not spell out with certainty the precise impact of an unlawful sentencing enhancement in order to establish prejudice. *Tucker*, 404 U.S. at 447-48. In this

case, Mr. Knight met his burden to show that the sentencing judge relied, at least in part, on misinformation about his ACCA eligibility when the judge imposed sentence. Here, although the sentencing court did not explicitly reference the ACCA at the sentencing hearing, the totality of the circumstances—the influence of the ACCA qualification in the plea bargaining process and resulting joint sentencing recommendation—suffice to establish prejudice under the *Tucker* standard. The impact of the threatened ACCA enhancement permeated the entire proceedings against Mr. Knight and produced a constitutionally infirm sentence. All Mr. Knight seeks is the *Tucker* remedy of resentencing free from that taint.

2. *When Eligibility For An ACCA Enhancement Affects The Sentencing Range Set Forth In The Plea Agreement And Adopted By The Sentencing Judge, The Indirect Effect On Sentencing Implicates the Due Process Clause.*

The Ninth Circuit's test for ascertaining a due process violation in sentencing went further astray from controlling precedent by precluding any consideration of the influence of the ACCA threat on the terms of Mr. Knight's plea agreement. Citing *Hill*, the court reasoned the evidence of the effect of the ACCA on plea negotiations did not make it "abundantly clear" that the district court relied on the ACCA as a basis for its sentence. Appendix 2. However, this Court has recognized that plea bargains are "central to the administration of the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 143 (2012). Plea negotiations play a "central role . . . in securing convictions *and determining sentences*." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (emphasis added); *see also Hughes v. United States*, 138 S. Ct. 1765, 1775-76 (2018) (sentences are generally "based on" the

Guidelines range even when the judge adopts a binding plea agreement under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure).

Here, the record makes clear that achieving dismissal of the ACCA charge was the primary aim of the defense during plea negotiations and the only reason to abandon advocacy below the Guidelines range. The ACCA mandatory minimum provides especially powerful leverage in favor of the government in plea negotiations because it increases the sentence by a minimum of five years above the otherwise applicable maximum sentence. Had the parties in this case begun with a constitutionally correct understanding that Mr. Knight was not ACCA-qualified, the defense would have been able to aim its advocacy at the broad range of factors calling for downward variance under 18 U.S.C. § 3553(a) rather than simple avoidance of the ACCA.

The sentencing judge expressly adopted the terms of the plea agreement as reasonable. The plea agreement expressly foreclosed other potential charges. Thus, the influence of the ACCA in determining the terms of the plea agreement "demonstrably" formed the basis for the ultimate sentence. *See Hughes*, 138 S. Ct. at 1776 ("in the usual case the court's acceptance of a Type-C agreement and the sentence to be imposed pursuant to that agreement are 'based on' the defendant's Guidelines range.").

C. In Any Event, The Court Should Grant The Writ, Vacate The Denial Of Relief, And Remand For The District Court To Apply The *Tucker* Due Process Standard In The First Instance.

Whether or not the Court grants the writ to resolve the disparate applications of the *Tucker* standard, the Court should grant the writ, vacate the denial of relief, and remand for

the district court to make a factual determination regarding the extent to which misinformation regarding ACCA eligibility impacted Mr. Knight's ultimate sentence. As this Court held in *Sprint/United Management Co. v. Mendelsohn*, when a district court does not reach a factual finding, "[r]ather than assess the relevance of the evidence itself and conduct its own balancing of its probative value and potential prejudicial effect, the Court of Appeals should have allowed the District Court to make these determinations in the first instance, explicitly and on the record." 552 U.S. 379, 387 (2008); *see Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) (holding that when a district court "fail[s] to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings"). The *Pullman-Standard* rule should apply with special authority in the sentencing context, where the sentencing court's own estimation of the deleterious impact of the misinformation on the determination of the sentence is at issue. *See Strader*, 571 F.2d at 1267 ("[I]f the sentencing judge can say with certainty that the prior allegedly invalid convictions did not influence the sentence that he imposed, the case is at an end; otherwise, there must be resentencing or further proceedings to determine the validity of the prior convictions"); *Saville*, 524 F.2d at 655 (approving a procedure where the sentencing judge should "consider, first, whether he would have imposed a different sentence had he known of the" invalid information) (citation omitted).

In Mr. Knight's case, the district court denied relief on procedural grounds. Appendix 3. The procedural holding cannot be interpreted to include an actual factual

finding regarding the sentencing court's reliance on the potential ACCA enhancement, as other courts have done when granting relief in similar circumstances. *See United States v. Walls*, 291 F. Supp. 3d 1194, 1200 (D. Or. 2017) (making a finding that the "threatened ACCA enhancement increased Petitioner's sentence"), *United States v. Terrell*, 217 F. Supp. 3d 1277, 1285 (E.D. Wash. 2016) (finding the that defendant's potential ACCA qualification "was the most influential factor in this court's decision to impose an upward departure within the parties' agreed sentencing range); *Pressley v. United States*, 201 F. Supp. 3d 1277, 1282 (W. D. Wash. 2016) (finding that "the original constitutional error of charging petitioner under the ACCA permeated the entire process leading to his sentencing"); *United States v. Suttle*, No. 2:14-cr-00083-SAB, 2016 WL 3448598, at *1 (E.D. Wash. June 20, 2016) (finding that "[a]lthough Defendant was not sentenced under the [ACCA] . . . it played a significant role in the ultimate resolution of this case"). From the district court's opinion and order in the present case, we cannot know whether the district court based the sentence in part on unconstitutional grounds. *See Griffin v. United States*, 502 U.S. 46, 53 (1991) ("[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." (citing *Stromberg v. California*, 283 U.S. 359 (1931))).

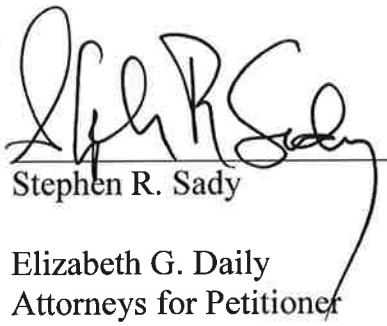
On appeal, the Ninth Circuit in the present case supplied its own factual determination that the record did not make it abundantly clear that the potential ACCA enhancement provided a basis for the sentence. Appendix 2 (citing *Hill*, 915 F.3d at 674). The Ninth Circuit concluded that "Knight failed to show that the potential for such

enhancement was demonstrably made the basis for [his] sentence." *United States v. Knight*, 750 Fed. Appx. 604, 605 (9th Cir. 2019) (citing *Hill*, 915 F.3d at 674). But the district court, the proper fact finder, never explicitly addressed the effect of the ACCA on the sentence ultimately imposed. In mistaken Guidelines cases, even when the sentence imposed was within the corrected range, this Court remands for the sentencing judge to make the ultimate determination of the appropriate sentence with the misinformation corrected, as in *Rosales-Mireles* and *Molina-Martinez*. Because the district court never explicitly applied the facts to the proper legal standard, the appropriate course would be remand to the district court. The Ninth Circuit's deviation from the *Pullman-Standard* norm should result in grant, vacation, and remand to the sentencing judge to apply the facts to the legal standard in the first instance, either as part of the remedy in resolving the Circuit split, or as an independent ground for issuance of the writ.

6. Conclusion

For the foregoing reasons, the Court should grant the writ of certiorari.

Dated this 17th day of July, 2019.



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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

EULOS CEASAR KNIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

CERTIFICATE OF SERVICE AND MAILING

I, Stephen R. Sady, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3, service has been made of the within Motion for Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari on the counsel for the respondent by depositing them in a United States Post Office Box, on July 17, 2019, an exact and full copy thereof addressed to:

Paul Maloney
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and by depositing in the United States Post Office, in Portland, Oregon on July 17, 2019, first class postage prepaid, an exact and full copy thereof addressed to:

Noel Francisco
Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Ave., N. W.
Washington, DC 20530-0001

Further, the original and ten copies were mailed to the Honorable Scott S. Harris, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on this 17th day of July, 2019, with first-class postage prepaid.

Additionally, I electronically filed the foregoing Motion for Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari by the using the Supreme Court's Electronic filing system on July 17, 2019.

Dated this 17th day of July, 2019.

Stephen R. Sady
Attorney for Petitioner

Subscribed and sworn to before me this 17th day of July, 2019.

OFFICIAL STAMP
MITZI JOANNE MILLER
NOTARY PUBLIC-OREGON
COMMISSION NO. 981876
MY COMMISSION EXPIRES DECEMBER 04 2022

Notary Public of Oregon