

No. 19-5262

IN THE SUPREME COURT OF THE UNITED STATES

EULOS CEASAR KNIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DANIEL N. LERMAN
Attorney

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

QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's claim that a mistaken belief that he would have been eligible for a sentence enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), provided the basis for a collateral attack on his non-ACCA-enhanced sentence, where the parties had agreed to request a non-ACCA sentence, the district court did not refer to the ACCA in the sentencing proceedings, and the sentence was the low-end Guidelines-range sentence that was contemplated in the plea agreement.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Ore.):

United States v. Knight, No. 14-cr-152 (Aug. 17, 2017)

United States Court of Appeals (9th Cir.):

United States v. Knight, No. 17-35708 (Feb. 7, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-5262

EULOS CEASAR KNIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 750 Fed. Appx. 604. The order of the district court (Pet. App. 3-9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2019. A petition for rehearing was denied on April 18, 2019 (Pet. App. 10). The petition for a writ of certiorari was filed on July 17, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Oregon, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 84 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. Petitioner did not appeal. Pet. App. 4. After petitioner's conviction became final, he filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Pet. App. 4-5. The district court denied the motion. Id. at 3-9. The court of appeals affirmed. Id. at 1-2.

1. In February 2014, petitioner was arrested at an apartment in Oregon on an outstanding warrant for domestic violence. Gov't C.A. Br. 1; Presentence Investigation Report (PSR) ¶ 8. After receiving consent to search the apartment, officers recovered a stolen firearm inside a bag that also contained petitioner's wallet and a plastic bag that itself contained 13 smaller bags of suspected marijuana. Gov't C.A. Br. 1; PSR ¶ 10.

A grand jury in the United States District Court for the District of Oregon charged petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. A conviction for violating Section 922(g)(1) carries a default statutory sentencing range of zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]"

that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), requires a sentence of 15 years to life of imprisonment. 18 U.S.C. 924(e) (1). The ACCA defines "violent felony" to include, among other things, "any crime punishable by imprisonment for a term exceeding one year" that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e) (2) (B) (ii). That portion of the definition of "violent felony" is commonly known as the "residual clause." Johnson v. United States, 135 S. Ct. 2551, 2555-2556 (2015).

In this case, the indictment alleged that petitioner had previously been convicted of five state crimes punishable by imprisonment for a term exceeding one year -- including burglary, assault and domestic-violence offenses -- each of which would render him eligible to be convicted of possession of a firearm by a felon under Section 922(g). Indictment 1-2. The indictment did not allege that petitioner was an armed career criminal subject to an enhanced sentence under Section 924(e) (1).

2. Petitioner pleaded guilty pursuant to a written agreement. Plea Agreement 1-3; see Pet. App. 4. The agreement stated that petitioner agreed "to plead guilty to count one of the Indictment, which charges the crime of Felon in Possession of a Firearm in violation" of Section 922(g) (1). Plea Agreement 1. The agreement further stated that the parties agreed that the base offense level under the advisory Sentencing Guidelines for

petitioner's offense was 24; that his ultimate offense level was 23; that, "pursuant to the factors listed in [18 U.S.C.] § 3553(a), [petitioner] should be sentenced to a term of confinement at the low-end of the applicable advisory range based on a [total offense level] of 23"; and that the sentencing court would not be bound by the parties' recommended sentencing range. Id. at 1-2; see Fed. R. Crim. P. 11(c)(1)(B). The plea agreement did not mention the ACCA, and it stated that the maximum term of imprisonment for petitioner's Section 922(g) offense was ten years. Plea Agreement 1. After a change-of-plea hearing, the district court found that petitioner entered into the plea agreement knowingly and voluntarily, and it accepted the plea. Plea Tr. 26.

3. The presentence report prepared by the Probation Office calculated an advisory Guidelines sentencing range of 84 to 105 months of imprisonment. PSR ¶ 69. That range was based, in part, on the Probation Office's determination that petitioner had a base offense level of 24, because he had at least two prior felony convictions for either a "crime of violence" or a "controlled substance offense," Sentencing Guidelines § 2K2.1(a)(2) (2013). See PSR ¶ 18. The presentence report made no reference to the ACCA. And it stated that the statutory maximum term of imprisonment for petitioner's offense was ten years. PSR ¶ 68.

At the sentencing hearing, the government stated that the parties agreed to request a sentence of 84 months of imprisonment, which corresponded to the "low end of the advisory guidelines

range." Sent. Tr. 2. Counsel for petitioner stated that petitioner "join[ed] in the Government and the Probation Office's recommendation of the 84-month sentence." Id. at 3. After hearing from petitioner, the district court explained the reasons for the sentence that it would impose. Id. at 10-13. The court noted that petitioner had a "significant criminal history," and that, in light of that history and the "seriousness of the situation," "[o]ne really could argue" that an 84-month sentence is "not enough." Id. at 10, 12. On the other hand, the court explained, "seven years is a very long period of time," particularly for "a man who's 38 years old." Id. at 12. The court therefore determined that an 84-month sentence would be sufficient to protect the community, but is "not too long or too harsh when taking into account all of the factors that [the court is] required to consider." Id. at 13.

The district court entered its judgment on October 28, 2014, and petitioner did not appeal his conviction. Pet. App. 4.

4. In June 2015, this Court held that the ACCA's residual clause is unconstitutionally vague, such that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." Johnson, 135 S. Ct. at 2557, 2563. Within a year of that decision, petitioner collaterally attacked his non-ACCA sentence under 28 U.S.C. 2255. See Pet. App. 4-5; see also Welch v. United States, 136 S. Ct. 1257, 1265 (2016) (holding that

Johnson is a substantive rule retroactively applicable on collateral review). Petitioner initially argued that his sentence was invalid because his Guidelines range relied in part on Sentencing Guidelines § 2K1.2(a)(2) (2013), which incorporates Section 4B1.2's definition of "crime of violence" using language similar to the ACCA's residual clause, and which petitioner argued was also unconstitutionally vague. Pet. App. 5-6. That argument was subsequently foreclosed by this Court's decision in Beckles v. United States, 137 S. Ct. 886, 890 (2017), which held that the advisory Guidelines are not subject to a vagueness challenge under the Due Process Clause. See Pet. App. 7.

Petitioner then filed a memorandum in support of his Section 2255 motion. He argued in that memorandum that he had prior convictions that constituted ACCA predicates only under the invalidated residual clause, and that while he was not charged with any ACCA violation "the potential for receiving an unlawful ACCA sentence constituted a primary factor in [his] plea negotiations and tainted his ultimate sentence." Def.'s Mem. in Support of Section 2255 Motion 5.

The district court denied petitioner's Section 2255 motion as untimely. Pet. App. 3-9. Section 2255(f) provides a one-year limitations period that runs (as applicable here) from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on

collateral review." 28 U.S.C. 2255(f)(3). The district court explained that, while petitioner filed his motion within one year of this Court's decision in Johnson, that decision is inapplicable to petitioner's claim because petitioner "was not sentenced as an armed career criminal" under the ACCA residual clause, but was instead "sentenced as a career offender pursuant to U.S.S.G. § 4B1.2." Pet. App. 7.

5. The court of appeals affirmed in an unpublished, memorandum opinion. Pet. App. 1-2. On appeal, petitioner argued, relying on United States v. Tucker, 404 U.S. 443 (1972), that he had been sentenced in violation of the Due Process Clause because he received a "sentence founded at least in part upon misinformation of constitutional magnitude." Id. at 447; see Pet. C.A. Br. 9-10, 16-17. He stated that the prosecutor suggested during plea negotiations that he could be charged under the ACCA, and that the prosecutor agreed "not to allege the ACCA enhancement in exchange for [his] agreement not to seek a sentence below the non-ACCA Guidelines range." Pet. C.A. Br. 4. Petitioner argued that the possibility of receiving an ACCA enhancement drove him to accept the prosecutor's terms, and that his "qualification as an armed career criminal, rendered invalid following Johnson," was "'misinformation of constitutional magnitude'" within the meaning of Tucker. Id. at 9.

The court of appeals rejected petitioner's contention, relying on its decision issued the same day in United States v.

Hill, 915 F.3d 669 (9th Cir. 2019), petition for cert. pending, No. 19-5274 (filed July 17, 2019). In Hill, the court explained that, to succeed on a Tucker claim, a defendant "must establish the challenged information is (1) false or unreliable, and (2) demonstrably made the basis for the sentence," Id. at 674 (citations omitted). In this case, the court determined that, even assuming that petitioner was ineligible for an ACCA enhancement in light of Johnson, he failed to show that any pre-Johnson belief about the potential for such an enhancement was "demonstrably made the basis for [his] sentence." Pet. App. 2 (citation omitted; brackets in original). The court reasoned that "[p]re-sentencing discussions between the prosecutor and defense counsel about the potential for an ACCA enhancement, and evidence that [petitioner] 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." Ibid. (quoting Hill, 915 F.3d. at 674). The court therefore determined that petitioner's sentence was not based on misinformation of constitutional magnitude, and that he was not entitled to a hearing on that claim. Ibid. Because the court concluded that petitioner's claim failed on the merits, it did not address whether his motion was timely under Section 2255(f)(3). Id. at 2 n.1.

ARGUMENT

Petitioner contends (Pet. 6-22) that his sentence is invalid on the theory that his perceived eligibility to receive an unlawful ACCA enhancement led to his "agreement not to seek a downward variance in the plea agreement." Pet. 15.¹ The court of appeals correctly rejected petitioner's challenge, and its unpublished decision does not implicate any circuit conflict that would warrant this Court's review. In any event, this case would not be a suitable vehicle for considering the question presented because petitioner's Section 2255 motion was untimely. Further review is not warranted.

1. Section 2255 authorizes federal prisoners to file a motion to vacate, set aside, or correct their sentences "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. 2255(a). Section 2255 does not, however, "encompass all claimed errors in conviction and sentencing." United States v. Addonizio, 442 U.S. 178, 185 (1979). Instead, it authorizes relief based on an error of law or fact only where the error constitutes a "fundamental defect which

¹ The pending petition for a writ of certiorari in Hill, supra, presents a similar question to the one presented here. See Hill v. United States, No. 19-5274 (filed July 17, 2019).

inherently results in a complete miscarriage of justice." Ibid. (citation omitted).

Petitioner contends (Pet. 11-19), relying on United States v. Tucker, 404 U.S. 443 (1972), that such a fundamental defect exists here because, even though he did not receive an ACCA sentence, the non-ACCA sentence he did receive was influenced by the "false" view that he was ACCA-eligible. Under the Due Process Clause, a criminal sentence may not be based on "materially false" information that the offender did not have an effective "opportunity to correct." Townsend v. Burke, 334 U.S. 736, 741 (1948). In Tucker, the district court sentenced the defendant to the statutory-maximum sentence for his crime in partial reliance on his record of prior felony convictions. 404 U.S. at 444. Unbeknownst to the court, however, two of the defendant's prior convictions had been "wholly unconstitutional under Gideon v. Wainwright, 372 U.S. 335 [(1963)]," because he had not been represented by counsel and had not intelligently waived his right to counsel. Id. at 447. This Court noted that the "record in the present case makes evident that the sentencing judge gave specific consideration" to the unconstitutional convictions "before imposing sentence upon [the defendant]," and reasoned that the sentence had been "founded at least in part upon misinformation of constitutional magnitude." Ibid. The Court also determined that "[e]rosion of the Gideon principle" could be prevented "only by

* * * remanding th[e] case to the trial court for reconsideration of the [defendant's] sentence." Id. at 449.

The Court has since explained that a defendant's entitlement to collaterally attack his sentence on the ground that the district court made an incorrect assumption about future developments does not depend on "the subjective intent of the sentencing judge." Addonizio, 442 U.S. at 187. Instead, to provide a basis for relief under Section 2255 the error must be "objectively ascertainable." Ibid.

2. The court of appeals correctly rejected petitioner's due process challenge to his sentence under Tucker.

a. As an initial matter, it is not clear that the Court's decision in Tucker applies at all to the type of alleged misinformation involved here. Unlike the defendant in Tucker, petitioner does not claim that any of the prior convictions cited in the district court were unconstitutionally obtained. Instead, petitioner claims that the false or misleading information at issue here is the allegedly mistaken view that those constitutionally valid convictions made him eligible for the ACCA's 15-year mandatory-minimum sentence -- a view that, petitioner claims, affected his decision "not to seek a downward variance in the plea agreement." Pet. 15. But the misinformation in Tucker had the far more substantial effect of making the defendant "appear[] in a dramatically different light at the sentencing proceeding" -- as someone "legally convicted of three previous felonies," rather

than someone "unconstitutionally imprisoned for more than ten years, including five and one-half years on a chain gang." Id. at 448. And the Court's decision in Tucker was based, at least in part, on the Court's determination that resentencing was necessary to prevent the "[e]rosion of the Gideon principle" "'making it unconstitutional to try a person for a felony * * * unless he had a lawyer or had validly waived one.'" Id. at 449 (citation omitted).

The Court has not extended Tucker to circumstances in which valid convictions are alleged to have improperly affected sentencing. Cf. Custis v. United States, 511 U.S. 485, 496 (1994) (noting that the "failure to appoint counsel for an indigent defendant was a unique constitutional defect" and declining to extend Tucker to authorize collateral attacks on prior convictions used for an ACCA enhancement). And the lower-court decisions cited favorably by petitioner (Pet. 7-9) overwhelmingly involve challenges to sentences allegedly based on convictions that were unconstitutional or defective. See Grant v. White, 579 F.2d 48, 49 (8th Cir. 1978) (per curiam) (prior convictions were obtained in violation of Sixth Amendment right to counsel); Strader v. Troy, 571 F.2d 1263, 1266 (4th Cir. 1978) (same); Saville v. United States, 524 F.2d 654, 655-656 (1st Cir. 1975) (per curiam) (same); United States ex rel. Fletcher v. Walters, 526 F.2d 359, 363 (3d Cir. 1975) (same); Martinez v. United States, 464 F.2d 1289, 1290-1291 (10th Cir. 1972) (same); see also Jenkins v. United States,

530 F.2d 1203, 1203-1204 (5th Cir. 1976) (prior conviction invalidated); McGee v. United States, 462 F.2d 243, 244-245 (2d Cir. 1972) (prior convictions vacated as unlawful). None involves an error of the sort alleged here, about a defendant's perceived eligibility for an ACCA enhancement.

b. In any event, even if application of then-governing statutory law to a valid conviction could be deemed "misinformation of constitutional magnitude" for purposes of Tucker, the court of appeals correctly determined (Pet. App. 1-2) that petitioner's sentence was not "founded" on it. Tucker, 404 U.S. at 447.

Petitioner contends (Pet. 18) that he "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," but the record shows otherwise. Petitioner was charged with a single count possession of a firearm by a felon, in violation of Section 922(g); the government did not allege the petitioner was an armed career criminal under Section 924(e)(1). Indictment 1-2. Petitioner was sentenced pursuant to Section 922(g) and 924(a)(2), not Section 924(e)(1). The plea agreement made no reference to the ACCA. To the contrary, it stated that the maximum sentence for petitioner's offense was ten years of imprisonment -- the statutory maximum for violations of Section 922(g) without the ACCA enhancement. Plea Agreement 1; see 18 U.S.C. 924(a)(2). Nor did the presentence report make any reference to the ACCA. It, too, stated that the maximum sentence

for petitioner's offense was the non-ACCA statutory maximum of 10 years, PSR ¶ 68, and it calculated a Guidelines sentencing range of 84 to 105 months of imprisonment without the ACCA enhancement. PSR ¶ 69. And as petitioner acknowledges (Pet. 13), the district court did not mention the ACCA when it sentenced him.

Instead of relying on any potential ACCA enhancement, the district court stated that it determined petitioner's sentence by considering petitioner's criminal history, his age, the necessary protection of the community, and the fact that the Guidelines "produce a low-end range of 84 months" of imprisonment for petitioner's offense conduct. Sent. Tr. 12; see id. at 12-13. After "taking into account all of the factors [the court was] required to consider" under Section 3553(a), id. at 13, the court imposed a sentence of 84 months of imprisonment that was within the non-ACCA Guidelines range and well below the statutory-minimum sentence that would have applied if petitioner had received the ACCA enhancement. Id. at 12-13; see 18 U.S.C. 924(a)(2). The record therefore shows that the district court sentenced petitioner as a non-ACCA defendant based on the sentencing factors set forth in Section 3553(a), not based any assumption that the government could successfully have sought an ACCA enhancement or that any such possibility warranted a higher sentence.²

² Petitioner's Guidelines offense level was based in part on having at least two prior felony convictions for either a "crime of violence" or a "controlled substance offense," Sentencing Guidelines § 2K2.1(a)(2) (2013). See PSR ¶ 18; Sentencing Guidelines § 4B1.2(a) (2013) (defining "crime of violence"). As

Contrary to petitioner's contention (Pet. 8, 11-19), the court of appeals correctly required petitioner to establish that the challenged information was "demonstrably made the basis for [his] sentence." Pet. App. 2 (citation omitted; brackets in original). That requirement flows directly from the Court's decision in Tucker, in which the Court explained that the defendant's sentence was "founded," at least in part, on misinformation of constitutional magnitude, where the "record * * * made evident that the sentencing judge gave specific consideration to the [defendant's] previous convictions before imposing sentence upon him." 404 U.S. at 447. Here, unlike in Tucker, the district court did not give "specific consideration" to the ACCA when sentencing petitioner.

c. In any event, petitioner could not prevail even if he were correct that a defendant could show that a sentence is "founded" on misinformation of constitutional magnitude without showing that the court "explicitly mention[ed]" that misinformation. Pet. 12. Not only did the district court never once refer to the ACCA during sentencing, but the record affirmatively demonstrates that petitioner's sentence was not

noted above, this Court held in Beckles v. United States, 137 S. Ct. 886 (2017), that the language in the Guidelines that is congruent with the ACCA's residual clause is not subject to a vagueness challenge. Id. at 890; see Pet. App. 7. The sentencing court therefore did not commit any error in applying Section 2K2.1(a)(2) of the Guidelines, and petitioner does not argue otherwise.

"founded" on any view as to petitioner's eligibility for an ACCA enhancement. Tucker, 404 U.S. at 447. Instead, the district court clearly explained the factors that it considered when imposing petitioner's sentence: the Guidelines range; the Section 3553(a) sentencing factors; petitioner's criminal history and age; and the community. See pp. 13-14, supra. Petitioner does not contend that the district court even knew that the prosecutor and petitioner allegedly believed that he could be eligible for an ACCA enhancement.

Petitioner also errs in contending (Pet. 19) that perceived eligibility for an ACCA enhancement "'demonstrably' formed the basis for the ultimate sentence" on the theory that it influenced "the terms of the plea agreement." Petitioner does not dispute that his sentence was within the lawful range for the crime he admitted to committing. And the plea agreement did not, as petitioner suggests (Pet. 18-19), bind the district court or preclude consideration of a lower sentence. See also Pet. 13-14 (incorrectly asserting that petitioner's counsel, "by agreeing to the same sentence advocated by the government, foreordained [the] result for the sole purpose of avoiding the ACCA"). Petitioner pleaded guilty pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B), under which the parties' sentencing recommendation "does not bind the court." Fed. R. Crim. P. 11(c)(1)(B); see Plea Agreement 2 (stating that the "Court is not bound by the recommendations of the parties or of the [presentence report]").

Thus, even if petitioner is correct that his counsel agreed not to seek a below-Guidelines sentence only because of the possibility that the prosecutor would otherwise seek an ACCA enhancement -- an argument that is itself speculative -- the district court was still required to independently determine a "sentence sufficient, but not greater than necessary, to comply with" the sentencing purposes set forth by Congress. 18 U.S.C. 3553(a). And that is what the court did here, reasoning that a sentence of 84 months of imprisonment was "sufficient[]," but not "too long" to comply with the sentencing factors. Sent. Tr. 12-13; cf. United States v. White, No. 17-3479, 2019 WL 2524358, at *2 (3d Cir. June 19, 2019) ("We have never recognized the availability of collateral review in a case like this, i.e., where a law later declared unconstitutional merely contributed to the Government's negotiating leverage in plea bargaining.").

Furthermore, any mistaken assumption that petitioner may have had about his ACCA eligibility provides no basis for a direct or indirect collateral attack on his plea agreement. Once "the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary." United States v. Broce, 488 U.S. 563, 569 (1989). Here, petitioner does not contend that his guilty plea was uncounseled or involuntary. He did not seek to vacate his plea agreement as unlawful, Pet. App. 9, and there is "no requirement

in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops * * * that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions." Brady v. United States, 397 U.S. 742, 757 (1970).

d. Petitioner also contends (Pet. 19-20) that, whether or not the Court grants plenary review, it should vacate the court of appeals' decision and "remand for the district court to make a factual determination regarding the extent to which misinformation regarding ACCA eligibility impacted [petitioner's] ultimate sentence." See Pet. 19-22. That contention lacks merit. In Tucker, this Court remanded for a determination "whether the sentence * * * might have been different if the sentencing judge had known that at least two of the [defendant's] previous convictions had been unconstitutionally obtained." 404 U.S. at 448. But it did so only after the Court concluded that the defendant's sentence was "founded at least in part upon misinformation of constitutional magnitude." Id. at 447. Here, by contrast, the record shows otherwise, and where the motion and record "conclusively show that the prisoner is entitled to no relief," he is not entitled to a hearing in the district court on his Section 2255 claim. 28 U.S.C. 2255(b).

3. Contrary to petitioner's contention (Pet. 7-10), this case does not implicate any circuit conflict that would warrant

this Court's review. Petitioner fails to identify any decision demonstrating that another circuit would have granted relief in the circumstances of his case.

Petitioner contends (Pet. 7) the circuits are divided on "the standard to apply to determine whether misinformation at sentencing requires remediation through resentencing." But, as noted, none of the cases on which petitioner relies involved a challenge to a sentence that was allegedly based on prior convictions that were -- like petitioner's prior convictions -- lawfully obtained. See pp. 12-13, supra. Petitioner thus fails to identify any division of authority on the standard for evaluating a Tucker claim in that circumstance, let alone a circumstances involving alleged consideration of a defendant's perceived eligibility for an ACCA enhancement that was never imposed.

Even putting that threshold issue to one side, this case does not implicate any division of authority on the standard for demonstrating reliance under Tucker. Petitioner relies (Pet. 8) primarily on several 30- and 40-year old decisions from the Second Circuit for the proposition that "demonstrable reliance on the erroneous information need not be shown." But those decisions make clear that what the Due Process Clause prohibits is a district court's "rely[ing] significantly upon false evidence of prior convictions or upon evidence of prior convictions which were illegally obtained," McGee, 462 F.2d at 245 (emphasis added), and

that relief is only warranted where it is "quite probable" that the misinformation influenced the sentence, id. at 246; see King v. Hoke, 825 F.2d 720, 724 (2d Cir. 1987); Pet. 8.

In accord with that principle, nearly all of the cases from other circuits cited by petitioner (Pet. 7-9) include substantial indications of reliance by the sentencing court on the alleged misinformation. In Grant v. White, supra, for example, the Eighth Circuit noted that "the transcript of the sentencing proceeding reveal[ed] that the state judge considered the juvenile adjudication prior to imposing sentence." 579 F.2d at 49. In Martinez v. United States, supra, the Tenth Circuit concluded that, although the district judge did not expressly refer to the defendant's invalid prior conviction, "the probabilities [we]re that he took it into account," where the government had advised the court that the invalid conviction triggered an enhanced sentencing range and the sentence imposed fell within the enhanced range. 464 F.2d at 1291; see id. at 1290; 26 U.S.C. 7237(b)-(c) (1964). And in United States ex rel Fletcher v. Walters, supra, the Third Circuit noted that "mere knowledge of invalid convictions by a sentencing judge does not necessitate resentencing," and granted relief only after finding numerous "indications in the record that the sentencing judge's appraisal of [the defendant's] character was influenced" by his prior convictions. 526 F.2d at 363.

As petitioner notes (Pet. 9), in Jerkins v. United States, supra, and Strader v. Troy, supra, the deciding courts did indicate that a defendant should be resentenced if the record does not "show affirmatively that [the sentencing court] did not consider the invalid conviction." Jerkins, 530 F.2d at 1204; see Strader, 571 F.2d at 1267 (asking whether the sentencing judge "can say with certainty that the prior allegedly invalid convictions did not influence the sentence"). As explained above, however, the record in this case does show that the district court did not base petitioner's sentence, even partially, on any perception that petitioner's prior felony convictions could have qualified him for sentencing under the ACCA. Again, petitioner does not even argue that the district court was aware of petitioner's perceived eligibility for ACCA enhancement. Furthermore, even if a stale conflict did exist with regard to evaluating claims of reliance on invalid convictions by a sentencing judge, it would not warrant this Court's review in a case, like this one, that does not concern such invalid convictions at all.

4. Finally, this case would be a poor vehicle to consider the question presented, because the court of appeals' decision may be affirmed on alternative grounds. Section 2255(f) provides a one-year limitations period that runs (as applicable here) from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on

collateral review." 28 U.S.C. 2255(f)(3). Petitioner contended below that his motion was timely filed within one year of this Court's decision in Johnson. Pet. C.A. Br. 8. But Johnson applied due process vagueness principles to recognize a right not to be sentenced pursuant to a vague federal enhanced-punishment statute. 135 S. Ct. at 2555, 2561. The right asserted in petitioner's claim, by contrast, is an asserted due process right not to be sentenced to a non-ACCA sentence influenced by the mistaken view that he could have been sentenced under the ACCA. Although petitioner suggests that this alleged mistake about his ACCA eligibility was identified by the Court's decision in Johnson, petitioner is not asserting a "right [that] was initially recognized" in that case. 28 U.S.C. 2255(f)(3). Accordingly, even if he were correct that the Court should extend Tucker to those circumstances, he would not be entitled to relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DANIEL N. LERMAN
Attorney