

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

ANTHONY JAMES HILL,

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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QUESTIONS PRESENTED

Under the Armed Career Criminal Act, Anthony Hill faced a mandatory minimum of fifteen years in prison at the time of his indictment. In plea negotiations, Mr. Hill agreed to limit his arguments for a lower 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. Hill was never eligible for ACCA treatment, so he moved for collateral relief. Although the district court denied relief without explanation, 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, Anthony James Hill, 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 under 28 U.S.C. § 2255 by minute order on July 25, 2017 (Appendix 15). The Ninth Circuit affirmed the denial of relief in a published opinion on February 7, 2019. *United States v. Hill*, 915 F.3d 669 (9th Cir. 2019)

(Appendix 1). The Ninth Circuit denied panel and en banc rehearing on April 18, 2019 (Appendix 16).

2. Jurisdictional Statement

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

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 (ACCA) 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 17 of the Appendix.

4. Statement Of The Case

On May 24, 2012, the government filed an indictment charging Mr. Hill with being an armed career criminal within the meaning of 18 U.S.C. § 924(e), requiring a 15-year minimum sentence for his firearm offense in place of the 10-year maximum sentence otherwise applicable for violations of 18 U.S.C. § 922(g). According to the indictment, Mr. Hill had one prior conviction for Oregon burglary in the second degree, three prior

convictions for Oregon robbery in the third degree, and two prior convictions for Oregon robbery in the second degree, among other prior offenses. Based on binding case law at the time, the ACCA applied to Mr. Hill.

To avoid the imposition of a mandatory sentence five years longer than the otherwise applicable statutory maximum, Mr. Hill engaged in plea negotiations, ultimately agreeing to waive a range of constitutional rights and to enter a plea agreement in which he was prevented from arguing for a sentence of less than 57 months. In exchange, the government proceeded solely on the unenhanced charge under 18 U.S.C. § 922(g), rendering the mandatory minimum sentence inapplicable. *See Hill*, 915 F.3d at 671 (detailing the evidence regarding the plea negotiations that produced the plea agreement). In sum, Mr. Hill's defense attorney presented the prosecutor with mitigating information about Mr. Hill's prior convictions and personal history in an effort to persuade the prosecutor to permit a plea to the unenhanced felon in possession of a firearm offense. *Id.* In response, the government agreed that, based upon the mitigation materials provided by the defense, "a non-Armed Career Criminal sentence is appropriate." *Id.* But the government's plea offer stated that it would seek a 71-month sentence "based upon the defendant's lengthy criminal history and the nature of this incident," while prohibiting the defendant from arguing for anything less than 57 months. *Id.*

The presentence report informed the sentencing court of the government's agreement to dismiss the ACCA charge: "The Indictment initially charged [Hill] under the Armed Career Criminal Statute, 18 U.S.C. § 924(e)(1); however, as part of plea

negotiations, that enhancement was stricken at the time the defendant entered his plea.” *Id.* at 672. The government then reiterated that information at sentencing, explaining that the staleness of Mr. Hill’s criminal history “was the reason the Government sort of removed the armed career criminal enhancement from the table.” *Id.* The district court imposed a 67-month sentence within the range established by the plea agreement. In the Statement of Reasons, the Court noted that it chose the sentence in reliance on the parties’ agreement, “which the court finds to be reasonable,” and after considering the defendant’s mitigating personal characteristics.

Two years later, this Court in *Johnson* held that the ACCA’s “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. at 2557. *Johnson* announced a substantive new rule regarding the scope of the ACCA and, as such, applies retroactively to cases on collateral review. *Welch*, 136 S. Ct. at 1265. Following *Johnson*, the Ninth Circuit held that, without the residual clause, neither Oregon burglary nor Oregon robbery constitute categorical violent felony predicate convictions for ACCA purposes. *United States v. Strickland*, 860 F.3d 1224, 1227 (9th Cir. 2017) (holding that Oregon Robbery III does not require violent force and so cannot qualify as a violent felony without reliance on the residual clause); *United States v. Cisneros*, 826 F.3d 1190, 1196 (9th Cir. 2016) (holding that Oregon Burglary I is overbroad and indivisible in comparison to generic burglary and so cannot qualify as a violent felony without reliance on the residual clause). Accordingly,

contrary to the undisputed law from the time of sentencing, Mr. Hill could not have constitutionally been sentenced pursuant to the ACCA.

In 2016, Mr. Hill filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, asserting that the threatened implementation of the unconstitutional ACCA enhancement tainted his sentence. The district court denied relief without explanation in a minute order. Appendix 15. On appeal, the Ninth Circuit recognized the rule that “[t]he Fifth Amendment guarantee of due process is violated when a court, in sentencing a defendant, relies on information that is materially false or unreliable.” *Hill*, 915 F.3d at 674. However, the court concluded that, assuming Mr. Hill’s apparent eligibility for an ACCA enhancement was false or unreliable information, he failed to show that it was “demonstrably made the basis for his sentence.” *Id.* at 674-75 (citing *United States v. Vanderwerfhorst*, 576 F.3d 929, 935-36 (9th Cir. 2009)). The Ninth Circuit pointed out that the ACCA charge had been dismissed prior to sentencing and that the sentencing court did not expressly mention it. *Id.* at 675. The court further concluded that any impact of the ACCA charge on the sentencing range set forth in the plea agreement was irrelevant to the question of whether the ACCA charge played a role in the district court’s formulation of the sentence. *Id.* The court affirmed the denial of relief and later denied rehearing and rehearing en banc.

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 from 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 also 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 a 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 in *Hill*, the Ninth Circuit 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 is expressly brought to the court’s attention through the presentence report, the argument of the parties, and 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.” *Hill*, 915 F.3d at 674 (citation omitted). When the misinformation is especially significant and is expressly brought to the sentencing judge’s attention, 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 presentence report and the plea negotiations in the record, the sentencing judge in the present case presumed that the ACCA applied 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. Hill's eligibility for an ACCA enhancement at the sentencing hearing. But the judge did not need to because Mr. Hill's undisputed eligibility for that enhancement had already been repeatedly conveyed to the sentencing judge—by the plea agreement, by the presentence report, and by the prosecutor at sentencing. The record leaves no doubt that the judge understood well that, but for the prosecutor's discretion to strike the ACCA enhancement, Mr. Hill's legislatively-authorized sentencing range would be 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 Mr. Hill's undisputed 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. *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. 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. Hill’s former eligibility for ACCA treatment was undisputed and explicitly included in the plea agreement and presentence report. The 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, which requires 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. 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 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. Hill 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 initial indictment charging a violation of the ACCA, the influence of the ACCA qualification in the plea bargaining process and resulting sentencing recommendation, and the explicit reference to the ACCA minimum in the plea agreement—suffice to establish prejudice under the *Tucker* standard. The impact of the threatened ACCA enhancement permeated the entire proceedings against Mr. Hill and produced a constitutionally infirm sentence. All Mr. Hill 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. Hill’s plea agreement. The court reasoned that an “indirect relationship” between ACCA eligibility and the sentence imposed does not show that the challenged information was “demonstrably” made the basis for the sentence. 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. 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. Hill was not ACCA-qualified, the defense would have been able to aim the extensive evidence regarding Mr. Hill’s childhood trauma, mental health

diagnoses, and other mitigating factors at securing a greater reduction from the Guidelines range rather than avoiding the ACCA.

The sentencing judge expressly adopted the terms of the plea agreement as reasonable. The plea agreement expressly referenced the ACCA. Thus, the influence of the ACCA in determining the terms of the plea agreement demonstrably formed the basis for the ultimate sentence, regardless of explicit reference by the sentencing judge. *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. Hill’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. Hill’s case, the district court denied relief without explanation. Appendix 15. The district court’s minute order merely stated that it “denied Mr. Hill’s Motion to Vacate or Correct Sentence,” and wrote nothing further regarding the court’s reasoning. *Id.* This terse 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 minute 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. After weighing the sentencing record, the Ninth Circuit concluded that "no ACCA-related enhancement was before the district court at sentencing." *Hill*, 915 F.3d at 675. 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*. The Ninth Circuit's deviation from this 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.



Stephen R. Sady

Elizabeth G. Daily
Attorneys for Petitioner

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY JAMES HILL,
Defendant-Appellant.

No. 17-35719

D.C. Nos.
3:16-cv-01241-MO
3:12-cr-00276-MO-1

OPINION

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, Chief Judge, Presiding

Argued and Submitted November 7, 2018
Portland, Oregon

Filed February 7, 2019

Before: Ferdinand F. Fernandez and Sandra S. Ikuta,
Circuit Judges, and William K. Sessions III,* District
Judge.

Opinion by Judge Ikuta

* The Honorable William K. Sessions III, United States District Judge
for the District of Vermont, sitting by designation.

SUMMARY**

28 U.S.C. § 2255

The panel affirmed the district court's denial of Anthony James Hill's motion to vacate his sentence under 28 U.S.C. § 2255 in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

Hill claimed that *Johnson* established that he was ineligible for a sentencing enhancement under the Armed Career Criminal Act; and that but for alleged misinformation that he was eligible for such an enhancement, he might not have entered a plea agreement stating that he should be sentenced to between 57 and 71 months imprisonment, and the district court, in turn, might have imposed a different sentence.

The panel rejected Hill's argument because he failed to show that the alleged misinformation about his ACCA eligibility was "demonstrably made the basis for the sentence." The panel wrote that Hill's potential eligibility for an ACCA enhancement was not before the sentencing court, and Hill's personal concerns and motivation for entering into the plea agreement do not suffice to establish that the district court made an error of constitutional magnitude.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Stephen R. Sady (argued), Chief Deputy Federal Public Defender; Elizabeth G. Daily, Assistant Federal Public Defender; Office of the Federal Public Defender, Portland, Oregon; for Defendant-Appellant.

Suzanne B. Miles (argued), Assistant United States Attorney; Kelly A. Zusman, Appellate Chief; Billy J. Williams, United States Attorney; United States Attorney's Office, Portland, Oregon; for Plaintiff-Appellee.

OPINION

IKUTA, Circuit Judge:

Anthony James Hill appeals the district court's denial of his motion to vacate his sentence under 28 U.S.C. § 2255 in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which (he claims) established that he was ineligible for a sentencing enhancement under the Armed Career Criminal Act (ACCA). But for the alleged misinformation that Hill was eligible for such a sentencing enhancement, Hill contends, he might not have entered a plea agreement stating that he should be sentenced to between 57 and 71 months imprisonment, and the district court, in turn, might have imposed a different sentence. We reject this argument, because Hill has failed to show that the alleged misinformation about his ACCA eligibility was “demonstrably made the basis for the sentence.” *United States v. Vanderwerfhorst*, 576 F.3d 929, 935–36 (9th Cir. 2009) (quoting *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984)). The record establishes that Hill’s potential

eligibility for an ACCA enhancement was not before the sentencing court, and Hill’s personal concerns and motivation for entering into the plea agreement do not suffice to establish that the district court made an error of constitutional magnitude. Therefore, we affirm.

I

In February 2012, Hill pointed a firearm at a woman during a drunken argument and fled before the police could arrive. After being arrested during a traffic stop a few months later, Hill was subject to a one-count indictment for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The indictment also alleged that Hill committed this offense after having previously been convicted of five felonies under Oregon law, in violation of 18 U.S.C. § 924(e)(1). Section 924(e)(1) is part of ACCA, and increases a defendant’s prison term to a minimum of 15 years if a defendant who violates § 922(g) has three previous convictions for “a violent felony or serious drug offense.” 18 U.S.C. § 924(e)(1). ACCA defines “violent felony” to include “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). This portion of the definition of “violent felony” is referred to as ACCA’s “residual clause.” *Johnson*, 135 S. Ct. at 2555–56.

A

After Hill was indicted, his counsel emailed the prosecuting attorney to discuss a plea agreement. In the email, Hill’s counsel tried to persuade the prosecutor that “this is the type of case that can plea without ACC[A].”

Hill's counsel stated he had sought the police reports for the prior offenses listed in the indictment, and according to the counsel, "the crimes are fairly stale. The last one was from 2001, two of the records from 1987 and 1989 have been destroyed, and [the Portland Police Department] could not provide one from 1992." Moreover, Hill's counsel argued: "Unlike many ACC[A] predicates I've encountered, none of the cases involve the use of weapons and those that involve threat or intimidation are comical. In one case [Hill] tried to rob a store with his finger and in another the clerk was not intimidated at all." Counsel went on to present background information that he believed mitigated Hill's criminal record. Accordingly, Hill's counsel requested that the prosecutor "dismiss the ACC[A] and allow Mr. Hill to plea to a 57 month sentence."

The prosecutor's response to this email is not in the record, but the parties agreed to a plea agreement which stated: "[p]ursuant to plea negotiations, the parties have agreed that the defendant will be permitted to plead guilty to the charge of being a felon in possession of a firearm without the Armed Career Criminal enhancement." Accordingly, "[a]t the time of the change of plea hearing, the government will ask the Court to strike the 'Armed Career Criminal' penalty provision (§ 924(e)) in Count 1." The section of the plea agreement entitled "Sentencing Recommendation after applying 3553(a) Factors" stated that, after considering those factors and the advisory sentencing guideline range, "the parties agree that the defendant should be sentenced to between 57 and 71 months imprisonment, to be followed by 3 years of supervised release." It further stated that "[t]he government believes, based upon the mitigation materials you have provided, that a non-Armed Career Criminal sentence is appropriate," but, "based upon the defendant's lengthy

criminal history and the nature of this incident,” the government nevertheless believed that “a 71 month sentence of imprisonment is warranted.” Hill was “free to seek a sentence of no less than 57 months imprisonment.” Finally, the agreement specified that it was made pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure, meaning that the Court was not bound to follow the parties’ recommended sentencing range. Fed. R. Crim. P. 11(c)(1)(B).

In the pre-sentence report (PSR), the U.S. Probation Office calculated that Hill had a total offense level of 21, a criminal history category of VI, and a resulting advisory guideline range of 77–96 months’ imprisonment. The parties agreed as to all of those conclusions. The PSR recommended a sentence of 77 months’ imprisonment, which was “within, but at the low end of the advisory guideline range, followed by a 3-year term of supervised release,” given Hill’s “significant criminal history involving firearms, violence, and a disregard for lawful court orders.” In describing the offense conduct, the PSR noted that “[t]he Indictment initially charged [Hill] under the Armed Career Criminal Statute, 18 U.S.C. § 924(e)(1); however, as part of plea negotiations, that enhancement was stricken at the time the defendant entered his plea.”

B

The district court conducted Hill’s sentencing hearing in May 2013. The prosecutor argued in favor of a 71-month sentence. He noted Hill’s criminal history and stated that “while some of it is very old, and that was the reason the Government sort of removed the armed career criminal

enhancement from the table, it doesn't disappear. It's still out there."

The district court accepted Hill's guilty plea. In providing Hill with its reasons for the sentence, the court reviewed Hill's criminal history, "which [was] very serious and lengthy," along with "the very serious nature of th[e] offense, and then the good parts of [Hill's] life and character" and his "psychological issues," including his problem with alcohol. The court accepted the PSR's calculation of the advisory sentencing guidelines range, and noted that if it "were to follow the presentence report, the low end of [Hill's] range would be 77 up to 96 months." Instead, the court "tried to consider various factors under Section 3553(a) to fashion a fair and just sentence here under [Hill's] individual circumstances." It therefore decided to impose the below-guidelines sentence of 67 months, which was within the 57- to 71-month range recommended by the parties.

After the court announced the sentence, it asked whether there were other pending charges requiring dismissal or other resolution. The prosecutor stated that there were none, and continued: "It's my understanding that when [Hill] entered his change of plea, it was at that time that the Court struck the armed career criminal enhancement, so there are no other charges to be dismissed."

Other than the prosecutor's brief references to the ACCA enhancement as being inapplicable to Hill, as noted above, there was no discussion of ACCA at the sentencing hearing. The court did not mention ACCA in its Statement of Reasons; rather, it indicated that a downward variance was appropriate given Hill's "psychological issues."

Judgment was entered on June 1, 2013. Because Hill did not file a direct appeal, that judgment became final on June 15, 2013. *See* Fed. R. App. P. 4(b)(1)(A).

C

In June 2015, the Supreme Court issued its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Court addressed ACCA's residual clause; that is, its definition of "violent felony" as a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). Because that language left "grave uncertainty" about both "how to estimate the risk posed by a crime" and "how much risk it takes for a crime to qualify as a violent felony," it created "more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2557–58. Accordingly, *Johnson* invalidated ACCA's residual clause as unconstitutionally vague and held that any sentence imposed under that clause was likewise invalid. *Id.* In a subsequent case, the Court held that *Johnson*'s new rule applied retroactively on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1264–65 (2016).

D

Within one year after *Johnson*, Hill filed a motion to vacate his sentence under 28 U.S.C. § 2255. In his motion, Hill argued that *Johnson* affected the calculation of his Guidelines range. Specifically, an applicable section of the Guidelines, U.S.S.G. § 4B1.2, defined "crime of violence" using the same language that the Court invalidated in *Johnson*. Hill argued that his sentence was unconstitutional to the extent it was affected by this unconstitutionally vague

language. This argument was quickly foreclosed by the Supreme Court’s subsequent decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), which held that the Sentencing Guidelines are not subject to vagueness challenges under the Due Process Clause. *Id.* at 890.

After *Beckles* was decided, Hill regrouped and filed a supplemental memorandum. In this memorandum, Hill argued that as a result of *Johnson*, he was not subject to the 15-year mandatory minimum ACCA sentence because his prior Oregon convictions did not qualify as violent felonies without reliance on the unconstitutional residual clause. His plea agreement and sentence were tainted, Hill contends, because the potential for receiving ACCA’s 15-year mandatory minimum enhancement was a key reason he agreed to the sentencing range in the plea agreement, and the plea agreement, in turn, influenced the sentencing judge. Because Hill’s sentencing process was impacted by an unconstitutionally vague law, Hill argues, the court should vacate his sentence as unconstitutional and remand for resentencing. Hill has not sought vacatur of his plea agreement.

On July 25, 2017, the court denied Hill’s § 2255 motion in a minute order without explanation. On October 25, 2017, it entered an additional minute order granting a certificate of appealability on the issue of “whether Mr. Hill’s sentence violated his constitutional rights under *Johnson v. United States*, 135 S. Ct. 2551 (2015), because the Armed Career Criminal Act’s mandatory minimums influenced his plea negotiations.”

In July 2017, Hill completed his 67-month prison sentence. He is presently serving his three-year term of supervised release.

II

The district court had jurisdiction over Hill’s motion under 28 U.S.C. § 2255. We have jurisdiction of Hill’s timely appeal of the denial of his motion under 28 U.S.C. §§ 1291 and 2253(a). We review de novo the district court’s denial of Hill’s § 2255 motion. *See United States v. Jones*, 877 F.3d 884, 886 (9th Cir. 2017) (per curiam).¹

A

“Section 2255 is a substitute for habeas corpus relief for federal prisoners.” *United States v. Swisher*, 811 F.3d 299, 306 (9th Cir. 2016) (en banc). It allows a federal prisoner to file a motion to “vacate, set aside or correct” the prisoner’s conviction or sentence “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.” 28 U.S.C. § 2255(a). The Fifth Amendment guarantee of due process is violated when a court, in sentencing a defendant, relies on information that is

¹ Because the government does not distinctly argue that Hill’s claim is untimely under the one-year statute of limitations in 28 U.S.C. § 2255(f), it has waived this argument and we do not address it. *See Day v. McDonough*, 547 U.S. 198, 206, 209 (2006) (holding that the analogous one-year limitations period in 28 U.S.C. § 2244(d)(1)(A) for habeas petitions brought by state prisoners is not jurisdictional so need not be considered *sua sponte*); *see also Entm’t Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997) (holding that a party waives an argument on appeal by failing to raise it distinctly).

materially false or unreliable. *See Vanderwerfhorst*, 576 F.3d at 935–36; *see also Townsend v. Burke*, 334 U.S. 736, 741 (1948) (holding that the Due Process Clause is violated when a pro se criminal defendant “was sentenced on the basis of assumptions concerning his criminal record which were materially untrue”).

To succeed on a claim that a district court violated the Due Process Clause by imposing a “sentence founded at least in part upon misinformation of constitutional magnitude,” *United States v. Tucker*, 404 U.S. 443, 447 (1972), a defendant “must establish the challenged information is (1) false or unreliable, and (2) demonstrably made the basis for the sentence,” *Vanderwerfhorst*, 576 F.3d at 935–36 (quoting *Ibarra*, 737 F.2d at 827). To satisfy the first factor, the challenged information must be “objectively ascertainable error,” *United States v. Addonizio*, 442 U.S. 178, 187 (1979); that is, an error “that does not require courts to probe the mind of the sentencing judge,” *United States v. Eakman*, 378 F.3d 294, 301 (3d Cir. 2004). For the second factor, the court must have “made it abundantly clear that (the challenged information) was the basis for its sentence.” *Farrow v. United States*, 580 F.2d 1339, 1359 (9th Cir. 1978) (internal quotation marks omitted); *see also id.* (“In the context of a § 2255 proceeding, a motion must be denied unless it affirmatively appears in the record that the court [b]ased its sentence on improper information.”). Even a district court’s reference to challenged information (for example, noting that allegations of misconduct “continue to ‘swirl around’” the defendant) is not enough to satisfy this second factor; such a passing reference is “readily distinguishable from sentencing [the defendant] based on an assumption that he in fact committed the predicate acts.” *Vanderwerfhorst*, 576 F.3d at 936.

Once a movant has established these factors, “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” 28 U.S.C. § 2255(b). After such a hearing, the movant is entitled to relief if the sentence “might have been different if the sentencing judge had” not relied on that information. *Tucker*, 404 U.S. at 448.

B

On appeal, Hill reiterates his argument that the court should have granted his § 2255 motion because his sentence was tainted by his eligibility for receiving an unlawful ACCA sentence. In order to succeed on this claim, Hill must first establish that the district court imposed a sentence founded on misinformation of a constitutional magnitude, meaning that it relied on information that is (1) false or unreliable, and (2) demonstrably made the basis for the sentence. *See Vanderwerfhorst*, 576 F.3d at 935–36.

The challenged information in this case, Hill claims, is the misinformation that Hill was eligible for an ACCA 15-year minimum sentence. Hill argues that his prior Oregon convictions do not qualify as violent felonies now that the residual clause has been struck down by *Johnson*, and therefore he was not eligible for an ACCA enhancement.

We need not resolve whether this information was false or unreliable, however, because even assuming Hill is correct, he has not shown that such information was demonstrably made the basis for his sentence. *See Vanderwerfhorst*,

576 F.3d at 935–36. Although Hill’s indictment included an ACCA charge, there is no dispute that the charge was dismissed when Hill entered his change of plea. The PSR noted that the ACCA charge had been stricken, as did the prosecutor at sentencing. Even the plea agreement was not expressly based on the potential for an ACCA enhancement; to the contrary, it stated that, based on mitigation materials provided by Hill’s counsel, a “non-Armed Career Criminal sentence is appropriate.” Accordingly, no ACCA-related enhancement was before the district court at sentencing.

During the sentencing hearing, Hill concedes, “the sentencing court did not reference the ACCA when it imposed sentence.” Rather, the court discussed Hill’s criminal history, alcoholism, psychological issues, and other factors. Further, rather than impose an enhanced sentence, the court imposed a below-Guidelines sentence that was within the sentencing range set forth in the plea agreement. In fact, there is no evidence that the court even considered whether Hill was eligible for an ACCA enhancement, let alone that the court made it the basis for Hill’s sentence.

Hill argues that there is nevertheless an indirect relationship between his supposed eligibility for an ACCA enhancement and the court’s sentence. According to Hill, the potential for a 15-year mandatory ACCA sentence was a looming presence in his plea negotiations, and affected the sentencing range set forth in the plea agreement. Because the district court considered the sentencing range in the plea agreement, Hill argues, the court was indirectly affected by the background presence of ACCA eligibility. This argument fails. A defendant must show that the challenged information was “demonstrably made the basis for the sentence”; even evidence that the district court mentioned the challenged

information in passing may not suffice. *Vanderwerfhorst*, 576 F.3d at 935–36. Given that Hill has provided no evidence that the threat of an ACCA charge played a role in the district court’s formulation of the sentence, he fails to meet the standard here.

Because Hill has not established that the challenged information was the basis of the court’s sentence, we reject Hill’s claim that his due process rights were violated, and conclude he is not entitled to a hearing on that claim.

AFFIRMED.

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U.S. District Court

District of Oregon

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Docket Text:

ORDER DENYING [33] Motion to Vacate or Correct Sentence (2255) as to Anthony James Hill

(1). Ordered by Judge Michael W. Mosman. (dls)

Civil Case 3:16-cv-01241-MO closed.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APR 18 2019

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U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ANTHONY JAMES HILL,
Defendant-Appellant.

No. 17-35719
D.C. Nos. 3:16-cv-01241-MO
3:12-cr-00276-MO-1
District of Oregon,
Portland
ORDER

Before: FERNANDEZ and IKUTA, Circuit Judges, and SESSIONS,* District Judge.

The panel has unanimously voted to deny appellant's petition for rehearing. Judge Ikuta has voted to deny the petition for rehearing en banc, and Judge Fernandez and Judge Sessions have so recommended. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

18 U.S.C.A. § 924

§ 924. Penalties

Effective: December 21, 2018

Currentness

(e)(1) 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).

(2) As used in this subsection—

(A) the term “serious drug offense” means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(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; and
- (C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

ANTHONY JAMES HILL,

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:

Scott Kerin
Assistant U.S. Attorney
1000 SW Third, Suite 600
Portland, Oregon 97204

Suzanne Miles
Assistant U.S. Attorney
1000 SW Third, Suite 600
Portland, Oregon 97204

Kelly Zusman
Assistant U.S. Attorney
1000 SW Third, Suite 600
Portland, Oregon 97204

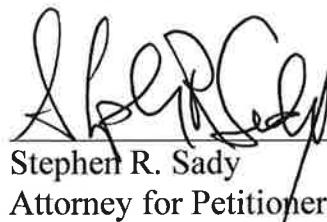
and by depositing in the United States Post Office, in Portland, Oregon on July 17, 2019, first class postage prepaid, an exact and full copy thereof addressed to:

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.

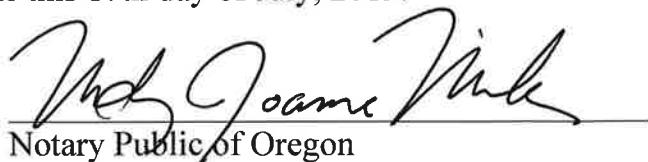
Additionally, I electronically filed the foregoing Motion for Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari by the using the Supreme Court's Electronic filing system on July 17, 2019.

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.



Mitzi Joanne Miller
Notary Public of Oregon