

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY JAMES HILL, 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 non-ACCA sentences, the district court did not refer to the ACCA in the sentencing proceedings, and the sentence was a below-Guidelines sentence within the range contemplated in the plea agreement.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Ore.):

United States v. Hill, No. 12-cr-276 (July 25, 2017)

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

United States v. Hill, No. 17-35719 (Feb. 7, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-5274

ANTHONY JAMES HILL, 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. 1-14) is reported at 915 F.3d 669.

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. 16). 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 67 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. Petitioner did not appeal. Pet. App. 8. 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. 8. The district court denied the motion. Id. at 15. The court of appeals affirmed. Id. at 1-14.

1. In February 2012, petitioner got into a drunken argument with his girlfriend's adult daughter and pointed a gun at the daughter's friend. Pet. App. 4; Presentence Investigation Report (PSR) ¶¶ 9-12. He fled the scene before the police could arrive, but was later arrested on a local warrant for that offense during a traffic stop. Pet. App. 4; PSR ¶¶ 9, 15.

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 1-3. 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 imprisonment. 18 U.S.C. 924(e)(1). In this case, the indictment alleged that petitioner violated Section 922(g)(1) after having been convicted of ten felonies under Oregon law and that he was subject to an enhanced sentence under the ACCA. Indictment 2-3.

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). At the time of petitioner's indictment, five of his prior felony convictions would have qualified as violent felonies within the meaning of the residual clause. See Pet. App. 4.

2. Petitioner pleaded guilty pursuant to a written agreement. Plea Agreement 1-4; see Pet. App. 5. The agreement stated that, "[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." Plea Agreement 2. The government agreed to "ask the Court to strike the 'Armed Career Criminal' penalty provision (§ 924(e)) in Count 1" of the indictment. Id. at 1. And it agreed that, "based upon the

mitigation materials" provided by petitioner's counsel, "a non-Armed Career Criminal sentence is appropriate." Id. at 3.

The agreement further explained that, after considering the Guidelines and the sentencing factors set forth in 18 U.S.C. 3553(a), "the parties agree[d] that the defendant should be sentenced to between 57 and 71 months imprisonment, to be followed by 3 years of supervised release." Plea Agreement 2-3 (emphasis omitted). The agreement stated that, "based upon the defendant's lengthy criminal history and the nature of this incident," the government believed that "a 71 month sentence of imprisonment is warranted." Id. at 3. But it left petitioner "free to seek a sentence of no less than 57 months imprisonment" and noted that the sentencing court would not be bound by the parties' recommended sentencing range. Ibid.; see Fed. R. Crim. P. 11(c)(1)(B). 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. D. Ct. Doc. 23, at 9 (Mar. 11, 2013).

3. The presentence report prepared by the Probation Office calculated an advisory Guidelines sentencing range of 77 to 96 months of imprisonment. Pet. App. 6. That range was based, in part, on the Probation Office's determination that petitioner had a base offense level of 20 because he had a prior conviction for a "crime of violence" under the Guidelines. PSR ¶ 20; see Sentencing Guidelines § 2K2.1(a)(4)(A) (2012). The presentence report's only reference to the ACCA was its statement that "[t]he

Indictment initially charged the defendant under the Armed Career Criminal Statute, 18 U.S.C. § 924(e)(1)," but that, "as part of plea negotiations, that enhancement was stricken at the time [petitioner] entered his plea." PSR ¶ 2. The presentence report stated that the statutory maximum term of imprisonment for petitioner's offense was ten years. PSR ¶ 75.

At the sentencing hearing, the government explained that the parties did not dispute the presentence report's determination of the Guidelines range for petitioner's offense as 77 to 96 months of imprisonment. Sent. Tr. 3. But consistent with the plea agreement, the government requested a below-Guidelines sentence of 71 months of imprisonment. Id. at 3-4. The government acknowledged that some of petitioner's criminal history "is very old, and that was the reason the Government sort of removed the armed career criminal enhancement from the table." Id. at 5. The government added that, although criminal history "doesn't disappear," petitioner's crimes were not akin to those of a "gang member." Id. at 5-6.

Petitioner's counsel requested a sentence of 57 months of imprisonment. Sent. Tr. 7. Counsel acknowledged that petitioner had previously committed a "number of crimes," some of which were "very serious," but argued that those crimes were not "the kind that we would typically see for * * * a criminal-minded defendant." Ibid. Counsel also stated that, at the time of his

offense conduct, petitioner was suffering from PTSD and psychosis, and that he has long had substance-abuse problems. Id. at 7-8.

After hearing from petitioner, the district court explained the reasons for the sentence that it would impose. Sent. Tr. 13-16. The court stated that petitioner had a "lengthy criminal history," parts of which were "serious and troubling." Id. at 14. The court explained that its task was to balance petitioner's criminal history with "the good parts of [his] life and character," as described in the letters submitted to the court in support of petitioner. Id. at 15. The court acknowledged that petitioner was an alcoholic, and that his "problem with alcohol * * * ha[d] driven [his] criminal history to a large degree." Id. at 14. And the court explained that, while it agreed that it should reduce petitioner's sentence "somewhat" to account for his mental illness and substance-abuse issues, the court did not believe "that it ought to be a lot, because" petitioner bore "responsibility for serious offenses." Id. at 16.

The court accepted the presentence report's calculation of a Guidelines range of 77 to 96 months of imprisonment. Sent. Tr. 16. It then stated, however, that after considering "various factors under Section 3553(a) to fashion a fair and just sentence here under [petitioner's] individual circumstances," it would impose a below-Guidelines sentence of 67 months of imprisonment, to be followed by three years of supervised release. Ibid.

The district court entered its judgment on June 1, 2013. Pet. App. 8. Petitioner did not appeal, and his judgment of conviction became final on June 15, 2013. Ibid.

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. 8; 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 § 4B1.2 (2012), which defined "crime of violence" using language similar to the ACCA's residual clause, and which petitioner argued was also unconstitutionally vague. See Pet. App. 8. 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. 9.

Petitioner then filed a new memorandum in support of his Section 2255 motion. See Pet. App. 9. He argued that his prior Oregon convictions did not qualify as violent felonies under the

ACCA without reliance on the invalidated residual clause, and that his plea agreement and sentence were "tainted" because they were influenced by the ACCA's 15-year mandatory sentencing enhancement. Ibid. The district court denied petitioner's Section 2255 motion in a minute order, but entered an order granting a certificate of appealability. Ibid.

5. The court of appeals affirmed. Pet. App. 1-14. 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 -- namely, his perceived eligibility for an ACCA enhancement. See Pet. App. 10-12. The court explained that to succeed on such a claim, a defendant "must establish the challenged information is (1) false or unreliable, and (2) demonstrably made the basis for the sentence." Id. at 11 (quoting United States v. Vanderwerfhorst, 576 F.3d 929, 935-936 (9th Cir. 2009)). Applying that test, the court determined that it need not resolve whether the challenged information here -- that petitioner was eligible for the ACCA's 15-year mandatory-minimum sentence -- was "false or unreliable," because even if it were, petitioner had not shown that it was "demonstrably made the basis for his sentence." Id. at 12.

The court of appeals explained that "no ACCA-related enhancement was before the district court at sentencing." Pet.

App. 13. It noted petitioner's acknowledgement that "the sentencing court did not reference the ACCA when it imposed sentence," and observed that the district court had instead "discussed [petitioner's] criminal history, alcoholism, psychological issues, and other factors." Ibid. The court of appeals found "no evidence that the [district] court even considered whether [petitioner] was eligible for an ACCA enhancement, let alone that the court made it the basis for [his] sentence." Ibid. Because the court of appeals determined that petitioner had not established that the challenged information was the basis for the sentence that he received, it further reasoned that he was not entitled to a hearing in the district court on his Section 2255 claim. Id. at 14.¹

ARGUMENT

Petitioner contends (Pet. 5-22) that even though he pleaded guilty to violating Section 922(g) without the ACCA enhancement, his sentence is invalid on the theory that it was influenced by his perceived eligibility to receive an unlawful ACCA enhancement. Petitioner's challenge to his sentence is now moot because he has been released from prison. And even assuming the case presents a live controversy, the court of appeals correctly rejected

¹ On the same day that the court of appeals issued the decision below it also issued an unpublished decision in United States v. Knight, 750 Fed. Appx. 604 (2019). The defendant in that case has also filed a petition for a writ of certiorari, presenting a similar question to the one presented here. See Knight v. United States, No. 19-5262 (filed July 17, 2019).

petitioner's challenge, and its decision does not implicate any circuit conflict that would warrant this Court's review. Further review is not warranted.

1. This case is moot because petitioner's 67-month term of imprisonment has already expired. According to the Federal Bureau of Prisons, petitioner was released on July 7, 2017. See Fed. Bureau of Prisons, Find an Inmate, <https://www.bop.gov/inmateloc> (Oct. 21, 2019) (search for register number 74389-065); see also Pet. App. 10. Because petitioner is challenging only the length of his sentence, rather than his underlying conviction, the case became moot on that date. See Lane v. Williams, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

The completion of a criminal defendant's sentence will not normally moot an appeal challenging the conviction, because criminal convictions generally have "continuing collateral consequences" beyond just the sentences imposed. Spencer v. Kemna, 523 U.S. 1, 8 (1998). But a "presumption of collateral consequences" does not extend beyond criminal convictions. Id. at 12. Therefore, when a defendant challenges only the length of his term of imprisonment, his completion of that prison term moots an appeal, unless the defendant can show that the challenged action continues to cause "collateral consequences adequate to meet Article III's injury-in-fact requirement," id. at 14, and that

those consequences are “likely to be redressed by a favorable judicial decision,” id. at 7 (citation omitted).

Petitioner has not made that showing here. The only portion of petitioner’s sentence to which he is still subject is his three-year term of supervised release. And in United States v. Johnson, 529 U.S. 53 (2000), this Court held that a prisoner who serves too long a term of incarceration is not entitled to receive credit against his term of supervised release. See id. at 54. The Court recognized that a prisoner who has been incarcerated beyond his proper term of imprisonment might be able to persuade the sentencing court to exercise its discretion to shorten the duration of the prisoner’s term of supervised release under 18 U.S.C. 3583(e)(1), which permits a court to do so “if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice.” Ibid.; see 529 U.S. at 60. But, as the Third Circuit has explained, “[t]he possibility that the sentencing court will use its discretion to modify the length of [a defendant’s] term of supervised release * * * is so speculative” that it does not suffice to present a live case or controversy. Burkey v. Marberry, 556 F.3d 142, 149, cert. denied, 558 U.S. 969 (2009).²

² Other courts of appeals, including the Ninth Circuit, have concluded that the possibility that the sentencing court would exercise its discretion to reduce a defendant’s supervised-release term is sufficient to prevent his sentencing challenge from becoming moot upon completion of his prison term. See Tablada v. Thomas, 533 F.3d 800, 802 n.1 (9th Cir. 2008), cert. denied, 560 U.S. 964 (2010); Levine v. Apker, 455 F.3d 71, 77 (2d Cir. 2006).

2. Even assuming that this case presents a live controversy, the court of appeals correctly determined that petitioner was not entitled to relief under Section 2255, and its decision does not warrant this Court's review.

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

Petitioner contends (Pet. 10-19), 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"

Those decisions, however, failed to address this Court's decision in United States v. Johnson, 529 U.S. 53 (2000).

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.

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

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 were perceived to have made him eligible for the ACCA's 15-year mandatory-minimum sentence -- a view that, petitioner claims, tainted his non-ACCA sentence. Pet. App. 12. 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 considered at 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. 7-8) 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 Jerkins 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.

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. 12-14) that petitioner's sentence was not "founded" on it. Tucker, 404 U.S. at 447.

Petitioner contends (Pet. 17) 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 pleaded guilty to violating Section 922(g) without the ACCA enhancement. Plea Agreement 1-3. The plea agreement expressly indicated that the government would ask the court to "strike" the ACCA enhancement (which it did), and further stated that the government believed that "a non-Armed Career Criminal sentence [wa]s appropriate." Id. at 1, 3. The presentence report calculated petitioner's advisory Guidelines range without the ACCA enhancement; acknowledged that the enhancement was "stricken" when petitioner pleaded guilty; and noted that the statutory maximum penalty for his offense was ten years of imprisonment -- i.e., the statutory maximum for violations of Section 922(g) without the ACCA enhancement. PSR ¶¶ 2, 20, 75; see 18 U.S.C. 924(a)(2). 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 "individual circumstances," including his criminal history, substance-abuse problems, mental illness, and personal character. Sent. Tr. 16; see id. at 14-16. After

considering those factors, along with the presentence report's determination that the Guidelines range for petitioner's offense was 77 to 96 months of imprisonment, the court imposed a 67-month sentence that was below the Guidelines range, which was itself already well below the statutory-minimum sentence that would have applied if petitioner had received the ACCA enhancement. Id. at 16; 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 on any assumption that the government could successfully have sought an ACCA enhancement or that any such possibility warranted a higher sentence.³

Contrary to petitioner's contention (Pet. 7, 10-19), the court of appeals correctly required petitioner to establish that the challenged information was "demonstrably made the basis for the sentence." Pet. App. 11 (citation omitted). That requirement flows directly from the Court's decision in Tucker, in which the Court explained that the defendant's sentence was "founded," at

³ Petitioner's Guidelines offense level was based in part on having had a prior felony conviction for a "crime of violence," Sentencing Guidelines § 2K2.1(a)(4)(A) (2012). See PSR ¶ 20; Sentencing Guidelines § 4B1.2(a) (2012) (defining "crime of violence"). As noted above, this Court held in Beckles v. United States, 137 S. Ct. 886 (2017), that the language in the Guidelines that is congruent to the ACCA's residual clause is not subject to a vagueness challenge. Id. at 890; see Pet. App. 9. The sentencing court therefore did not commit any error in applying Section 2K2.1(a)(4)(A) of the Guidelines, and petitioner does not argue otherwise.

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.

In any event, petitioner could not prevail even if he were correct (Pet. 19) that a defendant could show that a sentence is "founded" on misinformation of constitutional magnitude without showing that the court made any "explicit reference" to that misinformation. 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 "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; and the plea agreement, which itself expressly disclaimed any reliance on the ACCA enhancement and proposed a below-Guidelines sentencing range. See pp. 16-17, supra.

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 ACCA enhancement did not, as petitioner contends (Pet. 18-19), affect the sentencing range set forth in the plea agreement: The agreement expressly stated that the parties' proposed sentencing range of 57 to 71 months of imprisonment was a "non-Armed Career Criminal sentence" and that petitioner's base offense level was determined "without applying the Armed Career Criminal provisions of the guidelines." Plea Agreement 2-3; 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).

Petitioner also contends (Pet. 22) 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 p. 15, supra. Petitioner thus fails to identify any division of authority on the standard for evaluating a Tucker claim in that circumstance, let alone a circumstance 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. 7) 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. 7.

In accord with that principle, nearly all of the cases from other circuits cited by petitioner (Pet. 7-8) 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. 8), 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. 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.

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

OCTOBER 2019