No. 19-5274

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

REPLY TO BRIEF IN OPPOSITION

Stephen R. Sady
Chief Deputy Federal Public Defender
Counsel of Record
Elizabeth Daily
Assistant Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
steve_sady@fd.org
(503) 326-2123

Attorneys for Petitioner

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Introduction

This case presents a clean Circuit split on a narrow but important issue of federal law: assuming that misinformation of constitutional magnitude was before the court at sentencing, what standard determines whether a due process error requiring resentencing occurred? This Court in *United States v. Tucker* asked whether the sentence *might have been different* absent the misinformation. 404 U.S. 443, 448 (1972); *see also Townsend v. Burke*, 334 U.S. 736, 740-41 (1948). Since *Tucker* and *Townsend*, the Circuits have split regarding what a petitioner must show to establish a due process violation at sentencing,

with the Ninth Circuit limiting relief to instances when the petitioner can establish affirmative, on-the-record reliance on the erroneous information by the sentencing court, other Circuits looking to the totality of the circumstances for potential reliance, and still other Circuits denying relief only when the record negates potential reliance on the misinformation.

The government's opposition to certiorari muddies the Circuit split by confusing questions regarding the type of misinformation at issue with questions regarding the necessary showing of reliance required for *Tucker* relief. Here, the Ninth Circuit's opinion assumed that Mr. Hill's purported qualification as an armed career criminal was constitutional misinformation, but denied relief because the sentencing court did not expressly state that it relied on that misinformation when it imposed sentence. By granting the writ of certiorari in this case, along with the companion case of *United States v. Knight*, No. 19-5262 (S. Ct.), the Court can address the specific issue that has divided the Circuits—the necessary showing required for *Tucker* relief—and then remand for the lower court to address any remaining issues in the first instance. The government's mootness argument, raised for the first time in its opposition to certiorari, lacks merit because it ignores that discretionary reduction of a term of supervised release under 18 U.S.C. § 3583(e) remains available as a partial remedy for meritorious claims of over-incarceration, as this Court found in *United States v. Johnson*, 529 U.S. 53, 60 (2000).

A. This Case Is Not Moot Because Early Termination Of Supervised Release Remains Available As A Partial Remedy For Over-Incarceration.

For the first time in its opposition to certiorari, the government contends that this case is moot because Mr. Hill finished serving the challenged term of imprisonment in 2017 and is now in the community serving the term of supervised release. The reason neither the government nor the Ninth Circuit has previously mentioned mootness is that, in an unbroken line of cases, the Ninth Circuit has held that a partial remedy for over-incarceration remains available in the form of discretionary reduction of the term of supervised release "in the interest of justice" under 18 U.S.C. § 3583(e). *See, e.g.*, *Tablada v. Thomas*, 533 F.3d 800, 802 n. 1 (9th Cir. 2008); *Mujahid v. Daniels*, 413 F.3d 991, 994 (9th Cir. 2005); *Gunderson v. Hood*, 268 F.3d 1149, 1153 (9th Cir. 2001).

The Ninth Circuit's mootness rule finds firm support in this Court's precedent. First, this Court has repeatedly held that a case does not become moot when the primary remedy evaporates. *Chafin v. Chafin*, 568 U.S. 165, 177 (2013) ("Such relief would of course not be fully satisfactory, but with respect to the case as whole, even the availability of a partial remedy is sufficient to prevent a case from being moot.") (quoting *Calderon v. Moore*, 518 U.S. 149, 150 (1996), and *Church of Scientology v. United States*, 506 U.S. 9, 13 (1992)) (internal quotation marks and alterations omitted). A case becomes moot only when "it is impossible for a court to grant *any effectual relief whatever* to the prevailing party." *Chafin*, 568 U.S. at 177 (quoting *Knox v. Service Employees Int'l Union, Local 1000*, 567 U.S.

298, 307 (2012)) (emphasis added) (concluding that the vacatur of an expense order was not "so implausible that it may be disregarded on the question of jurisdiction").

Second, the availability of discretionary reduction of supervised release as a partial remedy for over-incarceration is firmly established by this Court's decision in *Johnson*, where this Court stated that "equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term." 529 U.S. at 60. The Court in *Johnson* expressly recognized that the statutory authority under § 3583(e) to reduce a term of supervised release early "provides a means to address these concerns in large part." *Id.* Here, Mr. Hill's § 2255 motion is not moot because his requested remedy is resentencing without reliance on constitutional misinformation, and, at resentencing, the district court would have the discretion to impose a reduced term of supervised release. The requested remedy—resentencing—is not merely speculative.

The government's mootness argument rests on a Third Circuit decision, *Burkey v. Marberry*, 556 F.3d 142, 149-51 (3d Cir. 2009), that rejected the reasoning of the Ninth Circuit in *Mujahid* in the context of a 28 U.S.C. § 2241 petition challenging invalid BOP action that delayed the petitioner's release. However, in that case, the § 2241 petition did not go to the lawfulness of the original sentence, nor was it presented to the sentencing court, which would have authority to reduce the term of supervision. The Third Circuit found the case moot because the likelihood of the sentencing court granting a reduced term of supervised release based on the § 2241 court's finding of BOP error was too speculative. *Burkey*, 556 F.3d at 149. Although other Circuits have disagreed with that reasoning, even

the *Burkey* court recognized that relief would not be speculative in other factual scenarios: a "sentencing court likely *would* alter the term of supervised release upon a conclusion that *the sentence it imposed was improper*." *Id.* at 151 (emphasis added). The present case falls within that factual scenario: Mr. Hill's § 2255 asks the original sentencing court to find that the sentence it imposed was constitutionally flawed and to grant resentencing to alter the term of supervised release. Thus, this case would not be deemed moot even in the Third Circuit. And, in any event, the government never challenged the Ninth Circuit's longstanding mootness precedent below. It would be inappropriate to premise denial of certiorari on an argument never raised below.

The government attempts to cast doubt on the Ninth Circuit's rule by arguing, counterfactually, that Ninth Circuit precedent "failed to address this Court's decision in *United States v. Johnson*, 529 U.S. 53 (2000)." Opposition at 11-12 n.2. Not so. In *Reynolds v. Thomas*, 603 F.3d 1144, 1148 (9th Cir. 2010), the Ninth Circuit expressly cited *Johnson* in support of its conclusion that the petitioner's claim of over-incarceration was not moot while the petitioner remained on supervised release. The dispute in *Reynolds* involved the crediting of concurrent sentence time, and the petitioner asserted that he had been over-incarcerated for sixteen months. The Ninth Circuit rejected the government's claim of mootness, because "[t]here is a possibility that [petitioner] could receive a reduction in his term of supervised release under [§ 3583(e)]." *Id.* The court explicitly relied on *Johnson*, noting that "[a] court could consider this alleged period of over-incarceration under 18

U.S.C. § 3583(e) as a factor weighing in favor of reducing the term of supervised release." *Id.* (citing *Johnson*, 529 U.S. at 60).

The Sentencing Commission has also recognized that early termination of supervision is a remedy available to courts to redress longer-than-necessary incarceration. In Application Note 7 to U.S.S.G. § 1B1.10, the Commission barred persons on supervised release from receiving a sentence reduction based on a retroactive amendment to the applicable Guidelines range. But the Application Note states that "the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1)." U.S.S.G. § 1B1.10, comment. 7(b).

This case is not moot because Mr. Hill remains on supervised release. The flexible and broad remedies under the habeas corpus statutes permit district courts to find that discretionary reduction of supervised release can partially remediate over-incarceration. *See Boumediene v. Bush*, 553 U.S. 723, 780 (2008) (Habeas is not 'a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.'") (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)); *Harris v. Nelson*, 394 U.S. 286, 291 (1969) (Habeas corpus should "be administered with the initiative and flexibility essential to insure that miscarriages of justices within its reach are surfaced and corrected."). This Court should grant the writ and reach the clean Circuit split identified in the petition for certiorari, leaving procedural claims regarding the available remedy to be considered upon remand.

B. The Government's Opposition Minimizes The Degree And Significance Of The Circuit Split Regarding The Showing Necessary To Establish The Sentencing Court's Reliance On Misinformation Of Constitutional Magnitude.

The constitutional requirement of due process protects a defendant from any error in sentencing that may cost a defendant months or years of freedom. *Tucker*, 404 U.S. at 448; *see also Lafler v. Cooper*, 566 U.S. 156, 165 (2012) ("[A]ny amount of [additional] jail time has Sixth Amendment significance.") (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001)). In *Townsend* and *Tucker*, the Court established the basic principle that sentencing decisions grounded in constitutional misinformation require resentencing to permit the sentencing judge to determine whether and to what extent the misinformation impacted the sentence.

As an initial matter, the government's reliance on *United States v. Addonizio*, 442 U.S. 178, 185 (1979), to oppose resentencing here is misplaced for two reasons. First, the government argues that the error in this case does not meet the "miscarriage of justice" standard from *Addonizio*, but a miscarriage of justice need only be established when the claimed error is statutory, not constitutional. *See* 442 U.S. at 185 ("[*U*]*nless the claim alleges a lack of jurisdiction or constitutional error*, the scope of collateral attack has remained far more limited." (emphasis added)). Here, Mr. Hill's claim rests on the constitutional due process requirement that a court must impose sentence based only on reliable information as well as the constitutional insufficiency of the residual clause in the Armed Career Criminal Act (ACCA).

Second, this case does not involve "an incorrect assumption about future developments" or "the subjective intent of the sentencing judge," as in *Addonizio*. Opposition at 13 (citing *Addonizio*, 442 U.S. at 187). In *Addonizio*, the district court judge granted resentencing under § 2255 because the Parole Commission, after the time of sentencing, changed its policies to the petitioner's detriment. On certiorari, this Court found that "[t]he claimed error here—that the judge was incorrect in his assumptions about the future course of parole proceedings—does not meet any of the established standards of collateral attack." *Id.* at 186. However, the Court distinguished circumstances when there is "a change in the substantive law" such that the conviction or sentence is no longer lawful. *Id.* at 186-87. The Court further distinguished the circumstances set forth in *Tucker*, when a sentence is imposed based on "misinformation of constitutional magnitude." *Id.* at 187. By contrast to those errors, the Parole Commission's policy change merely "affected the way in which the court's judgment and sentence would be performed but it did not affect the lawfulness of the judgment itself—then or now." *Id.*

Unlike in *Addonizio*, the error here is grounded in a fully retroactive change in the substantive law that impacts the lawfulness of the sentence, not merely how it will be carried out. At the time of sentencing, this Court had twice rejected the contention that the residual clause in the ACCA is unconstitutionally vague. *Sykes v. United States*, 564 U.S. 1, 15-16 (2011); *James v. United States*, 550 U.S. 192, 210 n.6 (2007). In *Sykes*, which was the controlling law when Mr. Hill was sentenced, the Court said that the residual clause "states an intelligible principle and provides guidance that allows a person to 'conform his

or her conduct to the law.'" 564 U.S. at 15. When the Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015), struck the residual clause as unconstitutionally vague, abrogating *Sykes* and *James*, that ruling changed the substantive law not only going forward, but retroactively as well. *See Welch v. United States*, 136 S. Ct. 1257 (2016) ("*Johnson* . . . struck down part of a criminal statute that regulates conduct and prescribes punishment. It thereby altered the range of conduct or the class of persons that the law punishes. . . . It follows that *Johnson* announced a substantive rule that has retroactive effect in cases on collateral review." (citation and internal quotation marks omitted)). "A judicial construction of a statute," as in *Johnson*, "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994).

Here, the government has never disputed that, before *Johnson*, Mr. Hill qualified as an armed career criminal under binding Supreme Court and Ninth Circuit law. Based on that law, Mr. Hill bargained away important rights and agreed to a sentencing range to avoid application of the ACCA. But pursuant to *Johnson*, Mr. Hill never had constitutionally sufficient notice of the ACCA's scope. Because of *Johnson*, the presumption that the ACCA's residual clause provided a constitutional basis for increasing the sentence Mr. Hill faced from possible probation to a mandatory minimum sentence of 15 years, was an error of "constitutional magnitude." Mr. Hill is not now, and never lawfully was, an armed career criminal.

The government next asserts that the misinformation in this case is not similar to the misinformation in *Tucker* because that case involved sentencing reliance on uncounseled prior convictions obtained in violation of the rule from *Gideon v. Wainright*, 372 U.S. 335 (1963). Opposition at 14-15. Citing *Custis v. United States*, the government contends that the complete deprivation of counsel is a "unique constitutional defect[.]" 511 U.S. 485, 496 (1994). But *Custis*'s distinction relates to the limited circumstances when a federal petitioner can collaterally challenge prior state convictions. "By challenging the previous conviction, the defendant is asking a district court to deprive the state-court judgment of its normal force and effect in a proceeding that has an independent purpose other than to overturn the prior judgment." *Custis*, 511 U.S. at 497 (internal quotation marks and alterations omitted). The distinction drawn in *Custis* is not relevant here, where Mr. Hill has no quibble with the validity of his prior state convictions. Here, the challenge involves an error in *federal* law about the sentencing law applicable to the petitioner's *federal* sentence. Section 2255 is the correct forum to correct such a constitutional error.

Moreover, contrary to the government's position, the Circuits have framed *Tucker*'s rule broadly to encompass sentencing tainted by "misinformation of constitutional magnitude," rather than solely the reliance on uncounseled prior convictions. *See United States v. Christensen*, 732 F.3d 1094, 1106 (9th Cir. 2013) ("The Due Process Clause requires that a defendant not be sentenced on the basis of 'misinformation of constitutional magnitude.'" (quoting *Tucker*, 404 U.S. at 447)); *United States v. McGowan*, 668 F.3d 601, 606 (9th Cir. 2012) (a sentence violates due process when false or unreliable information

"demonstrably [formed] the basis for the sentence"); *United States v. Vanderwerfhorst*, 576 F.3d 929, 935-36 (9th Cir. 2009) (same); *United States v. Eakman*, 378 F.3d 294, 302 (3d Cir. 2004) ("[D]ue process clearly guarantees all defendants the right to be sentenced under an accurate understanding of the law[.]").[1] In the present case, the "misinformation" was the assumption, reflected in the indictment, the plea agreement, and the sentencing colloquy, as objectively confirmed by the background legal environment, that the residual clause provided a constitutional avenue for application of the ACCA to Mr. Hill. Because the Ninth Circuit here presumed that this error would qualify as "misinformation of constitutional magnitude," the Circuit split regarding the correct *Tucker* standard is squarely presented and dispositive of the competing claims on appeal.

The government attempts to minimize the importance of the misinformation here, as compared to the misinformation in *Tucker*. But it is far from obvious that the uncounseled convictions in *Tucker* had a "far more substantial effect" at sentencing than misinformation about facts that govern the applicable statutory minimum and maximum sentence. Opposition at 14. A defendant whose lawful sentencing range should be 15 years to life "appears in a dramatically different light" than one whose statutory maximum

[1] The unpublished Third Circuit opinion in *United States v. White*, 778 F. App'x 166 (3d Cir. 2019), is not to the contrary. That case did not reach the merits of the defendant's § 2255 motion but instead applied the "miscarriage of justice" standard to uphold the defendant's collateral attack waiver. The Third Circuit also failed to recognize the retroactive impact of *Johnson*, treating the claim as based "on a favorable change in the law occurring after a plea agreement," *id.* at 169, rather than the fully retroactive rule of constitutional law that it is.

sentence cannot exceed ten years. Opposition at 14 (citing *Tucker*, 404 U.S. at 448). The characterization of Mr. Hill as an armed career criminal, subject to a minimum sentence of 15 years but for government largesse, had the potential to bear negatively on several of the relevant 18 U.S.C. § 3553(a) factors at sentencing, including the "history and characteristics of the defendant," "the seriousness of the offense," the "need to protect the public from further crimes of the defendant," and "the kinds of sentences available."

This Court should grant certiorari to hold that resentencing is necessary when, based on the totality of the circumstances, the sentence "might have been different," but for reliance on misinformation at sentencing. Beyond the words spoken at sentencing, other sources can provide solid evidence regarding the factors that influenced the court's sentencing decision—including the factors relevant to plea bargaining and the background legal environment. *See Lafler*, 566 U.S. at 170 (acknowledging that plea bargaining plays a central role in "determining sentences"); *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017) (holding that "it is possible to conclude, *using both the record before the sentencing court and the relevant background legal environment at the time of sentencing*, that the sentencing court's ACCA determination did not rest on the residual clause") (emphasis added). The Ninth Circuit's requirement of an on-the-record reference to the error elevates magic words over practical effects, and it makes little sense when there is no reason for the judge to articulate reliance or lack of reliance on information not known at the time to be wrong.

C. If Plenary Review Is Not Granted, The Court Should Grant, Vacate, And Remand For The District Court To Determine In The First Instance The Effect Of The ACCA's Unconstitutional Vagueness.

In the alternative to an order granting certiorari for plenary review on the merits, the petitioner respectfully requests that the Court enter an order granting, vacating, and remanding this case for the district court to make factual determinations in the first instance. Petition at 19-22. The sentencing judge denied relief on Mr. Hill's § 2255 motion without explanation, but granted a certificate of appealability on the question "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." Appellant's Excerpts of Record at 2. Thus, the district court either never made its own finding, or resolved the case on legal grounds while implicitly acknowledging that the Armed Career Criminal Act threat had some impact on the sentence. In either event, it was inappropriate for the Ninth Circuit to make the finding in the first instance that the ACCA threat had no effect on the sentence imposed.

The government argues that no remand is appropriate because there must first be a determination that misinformation of constitutional magnitude was before the sentencing judge. Opposition at 20. But there is more than enough information here to establish that the sentencing court was aware of the unconstitutional ACCA threat. The ACCA charge was included in the indictment, expressly referenced in the plea agreement and presentence report, and mentioned by the prosecutor in his argument at sentencing. The question decided by the Ninth Circuit—whether the court's knowledge might have

influenced the sentence imposed—is a bare factual finding that should properly be made in the first instance by the judge who imposed the sentence.

This case presents exactly the reason for the Court's rule that district courts should determine factual questions in the first instance. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982). Other district court judges have described the potential unconstitutional application of the ACCA as a critical fact requiring resentencing, even when the threat's impact was ameliorated through negotiation before the time of sentencing:

- "Without this error, the district court would never have approved the terms of Petitioner's plea agreement. The fact that the assumption appeared correct at the time of sentencing, as *Tucker* makes clear, is of no consequence given the constitutional nature of the infirmity and *Johnson*'s retroactive applicability." *United States v. Walls*, 291 F. Supp. 3d 1194, 1200 (D. Or. 2017), *reconsideration denied*, 293 F. Supp. 3d 1251 (D. Or. 2018), *appeal pending*, No. 18-35265 (9th Cir.).

- The court based its sentence on the erroneous ACCA designation where "[t]he fact that Mr. Terrell was potentially ACCA qualified and avoiding a 15-year mandatory minimum sentence was stated in the plea agreement, in the [presentence report], and in probation's sentencing recommendations to this court." *United States v. Terrell*, 217 F. Supp. 3d 1277, 1285-88 (W.D.Wash. 2016).

- Relief required because, "in this case the original constitutional error of charging petitioner under the ACCA permeated the entire process leading to his sentencing. For this reason the Court finds that the error in charging petitioner under the ACCA also resulted in actual prejudice, and that *Johnson* compels the Court to grant the petitioner relief." *Pressley v. United States*, 201 F. Supp. 3d 1277, 1282 (W.D. Wash. 2016).

- Granting relief where parties entered an agreed sentence to avoid the ACCA because "the underlying foundation upon which the resolution of Defendant's case was based has now crumbled[.]" *United States v. Suttle*,

No. 2:14-cr-00083-SAB, 2016 WL 3448598, at *4 (E.D. Wash. June 20, 2016).

If this Court does not accept plenary review, the Court should nevertheless vacate the Ninth Circuit's appellate fact-finding and require the district court to make the factual determinations in the first instance regarding whether the sentence was "founded," in any part, on the ACCA threat.

Conclusion

For the foregoing reasons and those stated in the Petition for Writ of Certiorari, the Court consolidate this case with *Knight v. United States*, No. 19-5262, and either grant plenary review or grant, vacate, and remand the case for further consideration.

Dated this 5th day of November, 2019.

Stephen R. Sady

Elizabeth G. Daily
Attorneys for Petitioner