No. 20-6054

In the Supreme Court of the United States

ALEX CORI TRIBUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE DUE PROCESS INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1958, the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a nationwide membership of many thousands of direct members, up to 40,000 with affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in this Court, and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The Due Process Institute ("DPI") is a bipartisan, nonprofit, public interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, DPI has already participated as an *amicus curiae* before this Court in many cases presenting important criminal justice issues.

This case presents an important, recurring criminal justice issue worthy of the Court's consideration:

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[1] The parties were timely notified and have consented to the filing of this brief. *See* S.Ct. R. 37.2. No party's counsel authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made any monetary contribution to its preparation or submission. *See id.* 37.6.

whether the Government may substitute new predicate convictions on collateral review to force a court to continue exceeding the otherwise applicable 10-year maximum sentence via the Armed Career Criminal Act ("ACCA") after a defendant successfully challenges one or more of the convictions that the district court relied on to impose the enhancement. Unless this issue is resolved, it will be impossible for federal courts to provide consistent resolutions for the hundreds, if not thousands of post-*Johnson* habeas petitions now pending.

SUMMARY OF ARGUMENT

When a defendant on collateral review successfully challenges one or more of his ACCA predicate convictions, can the Government resurrect an ACCA-enhanced sentence by substituting new predicate convictions without prior notice? Three circuits disagree.

The Fourth Circuit says never. *United States* v. *Hodge*, 902 F.3d 420, 430 (4th Cir. 2018). The Seventh Circuit says sometimes. *Dotson* v. *United States*, 949 F.3d 317, 321 (7th Cir. 2020). And the Eleventh Circuit says always. *Tribue* v. *United States*, 929 F.3d 1326, 1327 (11th Cir. 2019), *reh'g denied*, 958 F.3d 1148 (11th Cir. 2020). Those courts have shown no inclination to revisit their entrenched 1-1-1 split,[2] which now compels this Court's involvement.

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[2] Factually, *Hodge*, *Dotson*, and *Tribue* are virtually identical. In each, the PSR identified only three ACCA predicates while listing additional convictions in the criminal history section; the Government did not object to the PSR's list of only three ACCA predicates; *Johnson* rendered one of the three relied-upon ACCA predicates invalid; and, on collateral review, the Government sought to substitute a different conviction listed in the PSR's

This brief explores how the Eleventh Circuit's rule fails to account for significant differences between direct and collateral proceedings, including differing rights to counsel, burdens of proof, rights to appellate review, and standards of review. Additionally, this brief explains how the Eleventh Circuit's rule unfairly deprives defendants of notice, promotes judicial inefficiency and inaccuracy, and undermines the adversarial process itself. In contrast, it is only the Fourth Circuit's rule that correctly accounts for the criminal justice interests at stake.

ARGUMENT

I. The decision below ignores key differences between direct and collateral proceedings, violates due process concerns, promotes judicial inefficiency and inaccuracy, and undermines the adversarial process

1. The ACCA plays a significant role in federal sentencing. Federal law forbids convicted felons from possessing firearms. 18 U.S.C. § 922(g)(1). Ordinarily, a violator faces no more than 10 years in prison. 18 U.S.C. § 924(a)(2). But "[m]any years of prison hinge on whether a crime falls within" the ACCA's ambit. *Sykes* v. *United States*, 564 U.S. 1, 28 (2011) (Scalia, J., dissenting), *overruled by Johnson* v. *United States*, 576 U.S. 591 (2015).

Specifically, if a violator has three or more prior convictions for a "serious drug offense" or "violent felony,"[3] *id.* § 924(e)(1), the ACCA triggers a mandatory

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criminal history section but not designated an ACCA predicate at sentencing.

[3] A "serious drug offense" includes certain enumerated federal drug offenses or any state offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute,

minimum 15-year sentence. "Without those prior convictions, he would face a much lesser sentence, which could not possibly exceed 10 years." *Sykes*, 564 U.S. at 28 (Scalia, J., dissenting).

Ever since *Johnson* held the ACCA's residual clause was unconstitutionally vague, ACCA predicates based on the residual clause no longer qualify for enhanced sentences. Moreover, *Johnson* applies retroactively in cases on collateral review, like this one. *See Welch* v. *United States*, 136 S. Ct. 1257, 1265 (2016).

2. During sentencing, both the Government and the defendant have the opportunity and the responsibility to object to the presentence investigation report ("PSR"), including any ACCA enhancement.

Before sentencing, the U.S. Probation Office must prepare a convicted defendant's PSR. *See* 18 U.S.C. § 3552(a); Fed. R. Crim. P. 32. A PSR identifies all applicable sentencing guidelines, describes the defendant's criminal history, and calculates his offense level, criminal history category, and sentencing range. *See* Fed. R. Crim. P. 32(d)(1)–(2). The PSR must also "identify any factor relevant to … the appropriate kind of sentence." *Id.* 32(d)(1)(D).

PSRs must also indicate whether a defendant is subject to an ACCA enhancement, *id.* 32(d)(1)(A), which has its own sentencing guideline, U.S.S.G. § 4B1.4.

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a controlled substance" subject to a maximum term of imprisonment of 10 years or more. *Id.* § 924(e)(2)(A)(i)–(ii). A crime is a "violent felony" if it meets § 924(e)(2)(B)'s elements clause ("any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another") or enumerated-offense clause (any felony that "is burglary, arson, or extortion, [or] involves use of explosives." *Id.* § 924(e)(2)(B).

Typically, PSRs also identify the convictions that support the enhancement. *See Hodge*, 902 F.3d at 428 n.4.

In addition to Rule 32, defendants also have a constitutional due process right to receive "reasonable notice and an opportunity to be heard relative to [a] recidivist charge," such as the ACCA. *Oyler* v. *Boles*, 368 U.S. 448, 452 (1962). That is, "due process requires that a defendant have notice and an opportunity to contest the validity or applicability of the prior convictions upon which a statutory sentencing enhancement is based." *United States* v. *Moore*, 208 F.3d 411, 414 (2d Cir. 2000). Typically, sufficient notice of an ACCA enhancement is provided by specifying predicate offense in the PSR. *United States* v. *O'Neal*, 180 F.3d 115, 125–26 (4th Cir. 1999).

Probation, which is an arm of the district court (not the prosecution), *see* 18 U.S.C. § 3602(a), must give the PSR to the defendant, his attorney, and the prosecutor at least 35 days before sentencing, *see* Fed. R. Crim. P. 32(e)(2). Within 14 days after receiving the PSR, the defense and prosecution must then "state in writing any objections" to it. *Id.* 32(f)(1). The sentencing court may, however, "for good cause, allow a party to make a new objection at any time before sentence is imposed." *Id.* 32(i)(1)(D). As Rule 32 envisions, both defendants and the Government routinely object to PSRs when they disagree with them.

3. The decision below gives short shrift to the significant procedural differences between imposing or reviewing a sentence during direct proceedings and revisiting that sentence on collateral review. Those differences include starkly dissimilar rights to counsel, burdens of proof, rights to appellate review, and standards of review.

a. Right to counsel. First, the right to counsel is different. During direct felony proceedings in a district court or appellate court, indigent defendants have the right to court-appointed counsel. 18 U.S.C. § 3006A(c) (an indigent defendant "shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings"); *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963) ("any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him").

In contrast, indigent prisoners have no constitutional right to court-appointed counsel in collateral proceedings. *E.g.*, *Coleman* v. *Thompson*, 501 U.S. 722, 755 (1991) ("a criminal defendant has no right to counsel beyond his first appeal in pursuing state discretionary or collateral review"); *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987) ("the right to appointed counsel extends to the first appeal of right, and no further"); *see also* Emily G. Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 586–87 (2009) (collecting cases). Instead, federal courts merely have the discretion to appoint counsel in collateral proceedings. *See* 28 U.S.C. § 2255(g); 18 U.S.C. § 3006A(a)(2)(B).

This is a significant concern, because "state and federal habeas petitions are overwhelmingly filed *pro se*." Stephanie Roberts Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and the Piecemeal Problem in Actual Innocence Cases*, 10 STAN. J. C.R.-C.L. 56, 87 (2014). For instance, "according to a study conducted by the U.S. Department of Justice, Bureau of Justice Statistics (the "BJS"), prisoners were acting *pro se* in 93% of the sampled habeas corpus cases."

Limin Zheng, *Actual Innocence as a Gateway through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CAL. L. REV. 2101, 2128–29 (2002).

This is important because "[m]any inmates are uneducated, mentally impaired, or both"; for instance, "47% of the adult inmates in the United States had less than a high school education and only 16% had some college education." *Id.* at 2129. Thus, "[a]ccess even to the fullest law library has been described as 'a useless and meaningless gesture in terms of the great mass of prisoners' and compared to 'furnishing medical services through books like 'Brain Surgery Self-Taught,' or 'How to Remove Your Own Appendix,' along with scalpels, drills, hemostats, sponges, and sutures.'" *Id.* In contrast to *pro se* prisoners, their counsel—whether retained or court-appointed—would have the education and resources to litigate complex ACCA issues correctly and efficiently.

b. Burden of proof. Second, the burden of proof is different. During direct proceedings, it is the Government that must prove (not a defendant who must disprove) that a sentencing enhancement is applicable. *E.g.*, *United States* v. *Lee*, 586 F.3d 859, 866 (11th Cir. 2009) ("prosecution bears the burden of proving that a sentencing enhancement under the ACCA is warranted"). But on collateral review, prisoners "bear the burden to show by a preponderance of the evidence that they are entitled to relief." 2 FED. STANDARDS OF REVIEW § 13.11 (2019) (collecting cases); *accord Beeman* v. *United States*, 871 F.3d 1215, 1222 (11th Cir. 2017) (a prisoner "'bears the burden to prove the claims in his § 2255 motion'" (citation omitted)).

Again, this is a significant difference with real-world implications. The decision below "incorrectly relieves

the government of the burden of proving" a defendant "is eligible for a longer sentence under ACCA," instead "plac[ing] the burden on him to prove he's not." *Tribue*, 958 F.3d at 1150 (Martin, J., dissenting). In stressing that Mr. Tribue had admitted he had all the convictions listed in the criminal history section of his PSR and "raised no objection to [the] ACCA enhancement" at his original sentencing, *Tribue*, 929 F.3d at 1332, the Eleventh Circuit asked and answered the wrong question.

As Judge Martin pointed out, this "conflates the factual existence of [a defendant's] conviction with the question of whether it qualifies as a[n] [enhancing] offense under ACCA," which are "distinct questions with different burdens." *Tribue*, 958 F.3d at 1151–52 (Martin, J., dissenting). And "[t]here is simply no justice in faulting [a defendant] because [he] did not raise a fruitless objection to [a conviction that] was never raised at [the] sentencing hearing" as an ACCA predicate. *Id.* at 1152 (Martin, J., dissenting).

c. Right to appellate review. Third, the right to appellate review is different. In direct proceedings, although waivable, *e.g.*, *United States* v. *Segarra*, 582 F.3d 1269, 1273 (11th Cir. 2009), defendants have statutory rights to appeal their conviction, 28 U.S.C. § 1291, and sentence, 18 U.S.C. § 3742(a). In collateral proceedings, however, prisoners cannot pursue an appeal unless they first obtain a certificate of appealability. 28 U.S.C. § 2253(c)(1). The upshot is that in collateral proceedings, "'the opportunities for review ... are far more limited,' given the need to secure a certificate of appealability." *Tribue*, 958 F.3d at 1151 (Martin, J., dissenting).

d. Standard of review. Fourth, the standard of review is different. On direct appeal, defendants who

fail to object to their PSR must overcome the plain error standard of review. *E.g.*, *United States* v. *Zinn*, 321 F.3d 1084, 1088 (11th Cir. 2003) ("if a defendant fails to *clearly* articulate a specific objection during sentencing, the objection is waived on appeal and we confine our review to plain error" (emphasis in original)). But on collateral review, defendants "must clear a *significantly higher hurdle* than would exist on direct appeal" by showing both cause excusing the procedural default and actual prejudice resulting from the error about which he complains. *United States* v. *Frady*, 456 U.S. 152, 166–67 (1982) (emphasis added); *accord Cross* v. *United States*, 892 F.3d 288, 294–96 (7th Cir. 2018) (applying cause-and-prejudice standard to defendant's failure to challenge ACCA's residual clause).

4. In addition to overlooking the key distinctions between direct and collateral proceedings, the decision below gives no consideration to due process or notice concerns, judicial efficiency and accuracy, or the adversarial process itself.

a. Due process and notice. The Eleventh Circuit's threshold inquiry ignores core due process concerns. The relevant inquiry is not whether, as a purely factual matter, a defendant had more than three convictions that could have qualified as ACCA predicates at the time of sentencing. Rather, it is whether a defendant had notice that those convictions may be used as ACCA predicates before sentencing, and whether the Government's failure to comply with Rule 32 should be treated the same as a defendant's.

Notice is not meaningful unless it occurs before the event in question. *See, e.g.*, *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 533 (2004) ("the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner'"). Consistent

with this principle, this Court has held that due process requires, at a minimum, "reasonable notice and an opportunity to be heard relative to [a] recidivist charge" before sentencing (even if not before trial). *E.g.*, *Oyler*, 368 U.S. at 452; *Moore*, 208 F.3d at 414; *O'Neal*, 180 F.3d at 125–26.

Moreover, regardless whether a defendant objects, the Government, just like any defendant, is required to review the PSR and raise any objections in a timely manner. Fed. R. Crim. P. 32(f)(1). "After all, in the law, what is sauce for the goose is normally sauce for the gander." *Heffernan* v. *City of Paterson*, 136 S. Ct. 1412, 1418 (2016).

Here, for example, Mr. Tribue was allowed to raise a new challenge to his ACCA enhancement only because he had satisfied a very narrow ground to excuse his procedural default: a change in the law (*Johnson*) that rendered his prior conviction grounded in the residual clause an invalid ACCA predicate. *See, e.g.*, *Cross*, 892 F.3d at 294–96 (*Johnson*-based claims satisfy cause needed to excuse procedural default). But if the Government cannot similarly point to a change in the law that renders a previously unavailable predicate a viable replacement, it has no similar excuse for its failure to raise a timely objection to the PSR.[4]

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[4] It is irrelevant that the Government could not have anticipated *Johnson*, as the Eleventh Circuit ruled. *See Tribue*, 929 F.3d at 1332. Like a defendant, the Government should be required to show that a change in the law provides a ground for challenging the PSR that was unavailable at the time of sentencing. *Cf. Hrobowski* v. *United States*, 904 F.3d 566, 570 (7th Cir. 2018) (defendants are barred from "bring[ing] collateral attacks against his other [predicate] convictions based on theories available to him at the time he was sentenced"). Yet the Government

Judge Martin succinctly explained this aspect of the problem with the decision below:

> If the government wanted to use Mr. Tribue's 2007 cocaine conviction to support his ACCA sentence, it should have carried its burden of proving that conviction met the legal requirements at the time he was sentenced. Mr. Tribue should have had the opportunity to challenge the propriety of using the 2007 conviction at the time the sentencing court was calculating his sentence. His due process rights are violated by having the government now spring this new justification for his ACCA sentence upon him in the context of collateral review of his sentence.

Tribue, 958 F.3d at 1151 (Martin, J., dissenting).

b. Judicial efficiency and accuracy. Any concern that requiring the Government to comply with its Rule 32 obligations would result in "expansive litigation at sentencing over whether each and every prior felony in a defendant's criminal history constitutes a qualifying ACCA predicate," *Dotson*, 949 F.3d at 322, is misplaced. As *Hodge* observed, Probation "*often* designates more than three convictions as ACCA predicates." 902 F.3d at 428 n.4 (emphasis in original). And litigation over whether prior convictions qualify as ACCA predicates is routine at sentencing, so it would not drastically alter what already occurs in federal courts every day.

Indeed, addressing all ACCA predicates at the original sentencing is more efficient than doing so *seriatim* on collateral review. For starters, it ensures that

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identified no change in the law that affected the viability of the substituted convictions here.

defendants may challenge ACCA predicates at the original sentencing when they have the right to counsel, rather than on collateral review when they do not. That alone would promote judicial efficiency and accuracy. In light of the ACCA's hefty mandatory minimum, this is not too much to ask from the Government or our district courts.

Moreover, there is no serious danger that requiring the Government to identify all potential ACCA predicates would turn sentencing hearings "into full-blown, prolonged, and extraordinarily difficult exercises over questions where the answers may never matter." *Dotson*, 949 F.3d at 322. If there are any "extraordinarily difficult" (albeit academic) ACCA questions that would not affect the sentencing, district courts can always abstain from ruling on them. *See* Fed. R. Crim. P. 32(i)(3) (district courts may "determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing").

Even if a district court exercises that discretion to avoid ruling on a thorny ACCA dispute, requiring the Government to identify all potential ACCA predicates at the original sentencing still serves another vital purpose. Specifically, it ensures defendants receive notice of the convictions that may support an ACCA enhancement before sentencing, and it further ensures that they can challenge those alleged predicates with the assistance of counsel.

On the flip side, by requiring "defendants to make objections on any topic that could someday be the subject of constitutional challenges," this rule paradoxically "invites the overtaxing of our federal courts, the defense bar, and federal prosecutors." *Tribue*, 958

F.3d at 1152 (Martin, J., dissenting). Consider, for instance, the typical sentencing hearing.

Quite often, ACCA defendants have extensive criminal histories with many convictions that would qualify as ACCA predicates. Requiring a defendant, in such a mine run case, to litigate whether each of those superfluous convictions might also qualify as an ACCA predicate—even though neither Probation nor the Government had relied on them as such—would increase the time spent preparing for and litigating those hearings exponentially. Moreover, because ACCA defendants are commonly indigent and require the assistance of court-appointed counsel, much of that unnecessary work would be done at the Treasury's expense. *See* 28 U.S.C. § 3006A(d).

In contrast, it would be far more efficient to vacate such a sentence and set a resentencing hearing. The targeted expense of appointing counsel in such cases and appointing counsel to litigate whether additional convictions might count as ACCA predicates would be far less than litigating that issue in *every* ACCA case; after all, "'a remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does.'" *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1348–49 (2016) (citation omitted).

c. Adversarial process. Perhaps most significantly, the decision below "undermine[s] the adversarial process." *Hodge*, 902 F.3d at 428. It does so by dumping the onus on defendants "to object to … excluded convictions in anticipation of arguments the Government might make in a subsequent proceeding." *Hodge*, 902 F.3d at 428. That is, it "now imposes an after-the-fact duty upon federal defendants to make objections on any topic that could someday be the subject of constitutional challenges." *Tribue*, 958 F.3d at 1152

(Martin, J., dissenting). By "plac[ing] defense counsel in the precarious position of flagging potential predicates that neither Probation nor the Government had contemplated," the decision below forces defense counsel to take actions "likely to the defendant's detriment.'" *Hodge*, 902 F.3d at 428.

But ours is an adversarial judicial system, not an inquisitorial one. *Greenlaw* v. *United States*, 554 U.S. 237, 243–44 (2008). Indeed, any departure from the "party presentation principle in criminal cases" has "usually been to protect a *pro se* litigant's rights," not to undermine them. *Id.* In forcing defense counsel to place himself in his adversary's shoes and alert a prosecutor to mistakes he may have made, courts would be forcing defense counsel to risk violating ethical rules[5] or rendering ineffective assistance of counsel.

II. The question presented is important

Given the number of defendants who receive ACCA-enhanced sentences each year and the frequency with which this Court interprets § 924(e)'s definitions of serious drug offense and violent felony, the question presented has significant implications for the criminal justice system.

First, thousands of federal prisoners currently serve ACCA-enhanced sentences, with 300 to 600 new

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[5] For instance, Florida lawyers are forbidden from knowingly making or failing to correct a false statement of fact or failing to disclose a material fact to a tribunal when necessary to avoid assisting a client's criminal or fraudulent act. Fla. R. Prof'l Conduct 4-3.3(a)(1)-(2). But that does not mean that lawyers in an adversary proceeding must "present a disinterested exposition" of the facts and law. *Id.* cmt. Ultimately, lawyers "ha[ve] an obligation to present the client's case with persuasive force," *id.*, not to correct an adversary's mistakes.

defendants sentenced under the ACCA each year. *See* U.S.S.C., *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* at 6, 54 (Mar. 2018), *at* https://tinyurl.com/yc249x7u. For instance, the "number of male offenders in prison who were convicted of an offense carrying the ACCA penalty steadily increased from 986 as of September 30, 1995, to a high of 6,296 as of September 30, 2015, before decreasing to 5,474 as of September 30, 2016." *Id.* at 54. These ACCA enhancements result in many extra years of prison time.[6]

Second, given the ACCA's complexity and this Court's active ACCA docket, the question presented is likely to recur. In the past decade, the frequency of the Court's opinions interpreting the meaning of "serious drug offense" and "violent felony" under § 924(e) has only increased—with four such opinions in the past two terms alone.[7] Each new decision construing these definitions affects the universe of offenses that qualify as ACCA predicates, often prompting collateral challenges.

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[6] Additionally, those ACCA defendants tend to be "geographically concentrated in a few circuits," including the Eleventh and Fourth Circuits in particular. *Id.* at 36. Specifically, "[o]f the 304 ACCA cases in fiscal year 2016, 81 (26.6%) were from the district courts in the Eleventh Circuit, 54 (17.8%) were from the district courts in the Sixth Circuit, 54 were from district courts in the Eighth Circuit [(17.8%)]; and 44 (14.5%) were from the district courts in the Fourth Circuit." U.S.S.C., *supra*, at 36-37.

[7] *See Shular* v. *United States*, 140 S. Ct. 779 (2020); *Quarles* v. *United States*, 139 S. Ct. 1872 (2019); *Stokeling* v. *United States*, 139 S. Ct. 544 (2019); *United States* v. *Stitt*, 139 S. Ct. 399 (2018); *Mathis* v. *United States*, 136 S. Ct. 2243 (2016); *Johnson* v. *United States*, 576 U.S. 591 (2015); *Descamps* v. *United States*, 570 U.S. 254 (2013); *Sykes* v. *United States*, 564 U.S. 1 (2011); *Curtis Johnson* v. *United States*, 559 U.S. 133 (2010).

For instance, after *Johnson*, over 2,000 inmates in the Eleventh Circuit alone filed motions seeking relief. *See In re Williams*, 898 F.3d 1098, 1108 (11th Cir. 2018) (Martin, J., concurring). More recently, the Eleventh Circuit has repeatedly relied on its decision in *Tribue* to reject prisoners' ACCA challenges.[8]

Importantly, a § 2255 motion by each of those prisoners in the Eleventh Circuit would have resulted in a resentencing if they happened to have been convicted and sentenced in the Fourth Circuit (*i.e.*, Maryland, North Carolina, South Carolina, Virginia, or West Virginia), and some of them might receive resentencing if they happened to have been convicted and sentenced in the Seventh Circuit (*i.e.*, Illinois, Indiana, or Wisconsin). *See supra* note 8. It is thus imperative that this Court clarify whether and under what circumstances the Government may substitute new ACCA predicates on collateral review.

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[8] *E.g.*, *Avery* v. *United States*, 819 Fed. App'x 749, 753 n.5 (11th Cir. 2020); *Bruten* v. *United States*, 814 Fed. App'x 486, 489 (11th Cir.), *cert. denied*, 2020 WL 6701234 (2020); *Gray* v. *United States*, 796 Fed. App'x 610, 614 (11th Cir. 2019); *see also Anderson* v. *United States*, 2020 WL 7024486, at *3 (11th Cir. 2020) (remanding so district court "may do the *Beeman* and *Tribue* analyses in the first instance").

CONCLUSION

The petition should be granted.

Respectfully submitted,

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