No. 20-6054

IN THE SUPREME COURT OF THE UNITED STATES

ALEX CORI TRIBUE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the denial of petitioner's motion pursuant to 28 U.S.C. 2255 to vacate his sentence based on Johnson v. United States, 135 S. Ct. 2551 (2015), where the district court found that three prior convictions identified in petitioner's presentence report and uncontested by petitioner continued to qualify him for his sentence under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Fla.):

Tribue v. United States, No. 16-cv-976 (Dec. 15, 2017)

United States Court of Appeals (11th Cir.):

Tribue v. United States, No. 18-10579 (July 11, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 929 F.3d 1326. A subsequent order of the court of appeals (Pet. App. C) is unreported. The order of the district court (Pet. App. D) is not published in the Federal Supplement but is available at 2017 WL 11477129.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2019. A petition for rehearing was denied on May 14, 2020 (Pet. App. A). The petition for a writ of certiorari was filed on

October 6, 2020. 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 Middle District of Florida, petitioner was convicted of conspiring to distribute and possess with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. 846 and 841(a)(1), and 21 U.S.C. 841(b)(1)(B)(ii) (2012), and possessing a firearm and ammunition as a convicted felon, in violation of 18 U.S.C. 922(g)(1), 924(a)(2), and 924(e)(1). Am. Judgment 1. The district court sentenced petitioner to 170 months of imprisonment, to be followed by eight years of supervised release. Am. Judgment 2-3; see Sent. Tr. 7. Petitioner did not appeal his conviction or sentence. Pet. App. B4. In 2017, the district court denied petitioner's motion under 28 U.S.C. 2255 to vacate his sentence. 16-cv-976 D. Ct. Doc. (D. Ct. Doc.) 22, at 8 (Dec. 15, 2017). The court of appeals granted petitioner's request for a certificate of appealability, 6/4/18 C.A. Order, and then affirmed, Pet. App. B7.

1. In August and September 2012, petitioner sold cocaine to a confidential informant and undercover officer in a series of controlled purchases. Presentence Investigation Report (PSR) ¶¶ 13-19. Law enforcement subsequently executed search warrants at several residences; recovered drugs, money, a gun and ammunition; and arrested petitioner. PSR ¶¶ 21-25. A federal grand jury in the Middle District of Florida charged petitioner

with one count of conspiring to distribute and possess with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. 846, 841(a)(1), and 21 U.S.C. 841(b)(1)(B)(ii) (2012); five counts of distributing and possessing with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count each of possessing a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. 924(c); possessing with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing a gun and ammunition as a convicted felon, in violation of 18 U.S.C. 922(g)(1), 924(a)(2) and (e)(1). Indictment 1-6.

In respect to the felon-in-possession count, Count 9, conviction for violating Section 922(g) carries a default sentencing range of zero to ten years of imprisonment under 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "serious drug offense[s]" or "violent felon[ies]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. See 18 U.S.C. 924(e)(1); Custis v. United States, 511 U.S. 485, 487 (1994). The ACCA defines a "violent felony" as an offense punishable by more than a year in prison 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.

18 U.S.C. 924(e)(2)(B). Clause (i) is known as the "elements clause"; the first part of clause (ii) is known as the "enumerated offenses clause"; and the latter part of clause (ii), beginning with "otherwise," is known as the "residual clause." See Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

Count 9 of petitioner's indictment specifically alleged that petitioner had been convicted of six Florida felonies. Indictment 6. Those felonies included a 2007 conviction for soliciting the purchase of cocaine, one 2006 and two 2007 convictions for possessing a controlled substance, and one 2006 conviction for fleeing or attempting to elude the police. Ibid. And the indictment specified that he "knowingly possess[ed] a firearm and ammunition," "[a]ll in violation of [18 U.S.C.] 922(g)(1), 924(a)(2) and 924(e)(1)." Ibid.

In his plea agreement, petitioner pleaded guilty to "Counts One and Nine," acknowledging that Count 1 charged him with conspiring to distribute cocaine and Count 9 charged him with possessing "a firearm and ammunition after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1), 924(a)(2) and 924(e)(1)." Plea Agreement 1. In the agreement, petitioner also acknowledged that "Count Nine is punishable by a mandatory minimum term of imprisonment of 15 years," id. at 2, and at the plea

hearing petitioner's attorney stated that he "believe[d]" petitioner would "be scored as an armed career criminal. He has several deliveries * * * of cocaine." Plea Tr. 26. Petitioner's attorney also stated that the plea should not be seen "as a concession or abandonment of any legal challenges I may have at sentencing, especially since none of the [ACCA] predicates are mentioned in his Plea Agreement." Id. at 27. But the attorney then explained that petitioner wanted to plead guilty whether or not the ACCA enhancement applied, and reiterated his understanding that petitioner would be sentenced as a career offender. Id. at 28.

The Probation Office subsequently prepared a presentence report that classified petitioner as an armed career criminal under the ACCA. PSR ¶ 41. The report explained that the Probation Office had based its classification on petitioner's 2006 fleeing and eluding conviction (which was listed in Count 9 of the indictment), and a pair of 2003 and 2009 convictions for delivering cocaine (which were not mentioned in the indictment). Ibid. In the adult criminal history section of the presentence report, the Probation Office listed 15 total prior convictions, PSR ¶¶ 51-61, including the 2007 conviction for soliciting the purchase of cocaine that was listed in the indictment, PSR ¶ 57; Pet. App. B3, B7 n.5.

Before the sentencing hearing, petitioner objected to the use of his 2009 conviction for delivering cocaine as an ACCA predicate

offense, asserting that the conduct underlying that state conviction was relevant to the federal offense for which he was being sentenced. PSR p. 21. In response, the Probation Office observed that his 2009 conviction involved drug conduct that was entirely distinct from that underlying his federal offenses. PSR pp. 21-22.

At the sentencing hearing, petitioner's attorney stated that he no longer had any objections to the presentence report, and acknowledged that petitioner's extensive criminal history resulted in a Guidelines range that advised a sentence of at least 260 months. Sent. Tr. 3-6; see Pet. App. B3 (explaining that petitioner's "initial advisory Guidelines range was 262 to 327 months' imprisonment"). Petitioner's attorney argued, however, that the Guidelines range should be reduced to 168 to 210 months based on the government's motion for a four-level sentencing reduction for cooperation with law enforcement pursuant to Sentencing Guidelines § 5K1.1 (2012). Sent. Tr. 6. The district court accepted that argument. Id. at 7. It first "note[d] that [petitioner] had 15 prior convictions," giving him "an exposure up to 327 months." Ibid. It then granted the Section 5K1.1 motion (along with an accompanying motion under 18 U.S.C. 3553(e) for a sentence below the statutory minimum) and imposed a sentence of 170 months, ten months below ACCA's 180-month statutory minimum. Ibid.

Petitioner did not appeal his conviction or sentence. See Pet. App. B4; D. Ct. Doc. 22, at 2.

2. In 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, that the ACCA's residual clause is unconstitutionally vague. Id. at 2557. This Court subsequently held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. See Welch, 136 S. Ct. at 1268.

In 2016, petitioner moved to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. 7 (June 23, 2016). Petitioner argued that Johnson establishes that he was wrongly classified and sentenced as an armed career criminal because, in light of Johnson, his 2006 Florida conviction for fleeing and eluding no longer qualifies as a violent felony. Id. at 4; D. Ct. Doc. 19, at 2-7 (Dec. 13, 2016). In addition, petitioner contended that the government had waived reliance on any of his prior convictions that were not the specific ones listed as ACCA predicates in the presentence report. Id. at 3-7. In response, the government acknowledged that petitioner's fleeing and eluding offense no longer qualifies as an ACCA predicate, but explained that petitioner still has three qualifying ACCA predicates -- namely, his three prior convictions for Florida cocaine delivery, each of which qualifies as a conviction for a "serious drug offense." D. Ct. Doc. 20, at 8-9 (Jan. 5, 2017). The government observed that petitioner had previously acknowledged that he had two ACCA

predicates for delivery of cocaine, see ibid, and the government submitted documentation demonstrating that the 2007 conviction for soliciting the purchase of cocaine was also a conviction for delivery of cocaine. D Ct. Doc. 20-1, at 2; Shepard v. United States, 544 U.S. 13 (2005).

The district court denied petitioner's Section 2255 motion. Pet. App. D. It determined that petitioner could not "meet his burden [to show] that he no longer qualifies for an ACCA sentence" because he has three qualifying prior convictions for cocaine delivery. Id. at D7. The court explained that the government was entitled to rely on all of those convictions because they were contained in the presentence report; the sentencing court had "not expressly state[d] which prior convictions it was relying on for the ACCA"; and the government had never "waive[d] or disclaim[ed] reliance on any of [p]etitioner's prior convictions contained in the [report]." Id. at D6.

3. The court of appeals granted petitioner's request for a certificate of appealability exclusively on the question of whether the government was entitled to rely "on his third delivery of cocaine conviction for purposes of his [ACCA] enhancement." 6/4/18 C.A. Order 1. It then affirmed the district court's denial of petitioner's Section 2255 motion. Pet. App. B7.

The court of appeals explained that, after accepting the government's concession that petitioner's Florida fleeing and eluding conviction no longer qualified as an ACCA predicate under

Johnson, the district court had properly placed the burden on petitioner to establish that "there were not at least three other prior convictions that could have qualified" as ACCA predicates. Pet. App. B5 (citation omitted). And the court of appeals found that it could "decide this case easily" on that basis because petitioner clearly had three prior qualifying cocaine delivery convictions. Ibid.

The court of appeals rejected petitioner's contention that the 2007 conviction for delivery of cocaine could not serve as an ACCA predicate because the Probation Office's presentence report, while identifying that prior conviction, had not specifically listed it as an ACCA predicate. Pet. App. B5. The court explained that, at the sentencing hearing, petitioner had accepted the full account of his criminal history, meaning that the "factual existence" of the 2007 conviction was not disputed. Ibid. It additionally observed that petitioner had not challenged the sufficiency of any of the ACCA predicates or otherwise raised the void-for-vagueness challenge on which Johnson was premised, and found "no requirement that the government prospectively address whether each and every conviction listed in the criminal history section of a [presentence report] is an ACCA predicate in order to guard against potential future changes in the law." Id. at B6.

4. The court of appeals denied rehearing en banc. Pet. App. A1. Judge Martin, joined by Judge Jill Pryor, dissented, taking the view that even if petitioner still had three qualifying

prior convictions, he would be entitled to relief under Section 2255 so long as one of the three specifically identified as such in the presentence report no longer qualified. Id. at A1-A8.

ARGUMENT

Petitioner renews his contention (Pet. 10-20) that a predicate offense cannot support an ACCA enhancement on collateral review unless the offense was listed as an ACCA predicate in the initial presentence report. That contention lacks merit and does not warrant this Court's review, and this Court has recently denied petitions for certiorari raising similar issues. See Dotson v. United States, 141 S. Ct. 558 (2020) (No. 20-302), petition for reh'g pending (filed Nov. 9, 2020); McCarthan v. United States, No. 19-5391 (Dec. 9, 2019). In any event, this case does not provide a suitable vehicle for review because petitioner would remain subject to the ACCA at any resentencing.

1. The court of appeals correctly determined that petitioner's ACCA sentence remains valid because petitioner has at least three prior convictions for Florida cocaine delivery, each of which undisputedly qualifies as a "serious drug offense." Two of the qualifying convictions, the ones from 2003 and 2009, were specifically cited as ACCA predicates in the presentence report, and the third, from 2007, was alleged in the indictment and included in the report. Indictment 6; PSR ¶ 57. Petitioner argues (Pet. 16-20) that the third qualifying offense -- the 2007 conviction -- cannot be considered on collateral review because

the Probation Office did not specifically list that conviction as an ACCA predicate and instead included it as one of petitioner's 15 prior convictions in the adult criminal history section of the report, PSR ¶ 57. In petitioner's view (Pet. 16-17), that feature of the report unfairly deprived him of his "right to notice" and relieved the government of its burden to prove that he was eligible for a longer sentence. Petitioner's argument is unsound.

Petitioner was not deprived of any "right to notice." Pet. 16. His 2007 conviction was listed as part of his criminal history in his presentence report, PSR ¶ 57, and the district court made clear at sentencing that his "15 prior convictions" had exposed him to a sentence of "up to 327 months," Sent. Tr. 7. Furthermore, although the government did not raise the issue below, the 2007 conviction was expressly listed as a predicate felony in Count 9 of petitioner's indictment, to which he pleaded guilty. Indictment 6. As the court of appeals observed, the "2007 drug conviction was not disputed at the original sentence." Pet. App. B5. And to the extent that petitioner would contest whether that conviction qualifies as an ACCA predicate, he had the opportunity to do so when the government presented the relevant documentation in the collateral proceedings. D. Ct. Doc. 20-1. He did not do so. D. Ct. Doc. 21 (Jan. 19, 2017).*

* In his court of appeals reply brief (at 3), petitioner briefly asserted for the first time that the government could not rely on the 2007 conviction because the presentence report described it as a conviction for "solicitation to commit purchase

Petitioner is similarly mistaken (Pet. 17) in asserting that the government was "relieve[d]" "of the burden of proving that" petitioner was eligible for a longer sentence under the ACCA. In finding that petitioner was exposed to up to a 327-month sentence, the district court made clear that it was relying on all 15 of the undisputed prior convictions listed in the presentence report, Sent. Tr. 7, and the court did not identify any particular prior convictions as ACCA predicates. Nothing precluded the court, on collateral review, from relying on one of the undisputed prior convictions as an ACCA predicate, where the government established that it was one, D. Ct. Doc. 20-1. And as the court of appeals recognized, there is no basis for petitioner's assertion that the government was required to "prospectively address whether each and every conviction listed in the criminal history section of a [presentence report]" qualifies as an ACCA predicate "in order to guard against future changes in the law." Pet. App. B6. Precluding reliance on a third ACCA predicate in these circumstances would inappropriately upset prior convictions and grant a windfall to defendants whose ACCA sentences remain valid. Cf. Bousley v. United States, 523 U.S. 614, 623 (1998) (requiring

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of cocaine." Petitioner does not renew that argument before this Court, and for good reason. As the court of appeals recognized, the presentence report listed the correct Florida case number, and the relevant documents under Shepard v. United States, 544 U.S. 13 (2005), make clear that the conviction was for cocaine delivery. Pet. App. B4 n.5.

showing of "actual innocence" for collateral relief based on plea colloquy's misdescription of offense element).

2. Contrary to petitioner's contention (Pet. 10-16), the decision below does not conflict with the Fourth Circuit's decision in United States v. Hodge, 902 F.3d 420 (2018), or the Seventh Circuit's decision in Dotson v. United States, 949 F.3d 317, cert. denied, supra.

In Hodge, the court of appeals declined to permit the government to rely on a new ACCA predicate after one of the defendant's original predicates was invalidated by Johnson v. United States, 135 S. Ct. 2551 (2015), because, in the court's view, the government had not "provide[d] [the defendant] with sufficient notice of its intent to use th[e] conviction to support an ACCA enhancement." 902 F.3d at 427. The court based its decision in part on the presentence report's "designat[ion of] certain convictions as ACCA predicates," and listing of others in the criminal history section. Ibid. In the Fourth Circuit's view, this "apparently intentional exclusion of some convictions" from the list of ACCA predicates "tells the defendant that he need not challenge the excluded convictions." Id. at 428. But the court also emphasized that "nothing" in the defendant's "sentencing proceedings indicated otherwise" because -- among other things -- the sentencing court "never mentioned" the conviction on which the government sought to rely, and the presentence report indicated that the relevant conviction carried "zero criminal history

points," conveying the message that it "would not be used in calculating [the defendant's] criminal history category and Sentencing Guidelines range." Ibid. And with that context, the court stated that "[t]he Government cannot identify only some ACCA-qualifying convictions at sentencing -- thereby limiting the defendant's notice of which convictions to contest -- and later raise additional convictions to sustain an ACCA enhancement once the burden of proof has shifted." Id. at 430.

It is unclear that the Fourth Circuit would reach the same conclusion on the facts of this case where, unlike in Hodge, the presentence report made clear that petitioner had been awarded two criminal history points based on the 2007 conviction, PSR ¶ 57, and the sentencing court specifically indicated that his 15 prior convictions exposed petitioner to a sentence of up to 327 months, Sent. Tr. 7. Indeed, the Fourth Circuit expressly observed that its decision was in accord with a line of Eleventh Circuit precedent precluding the government from relying on a new ACCA predicate in circumstances where, in the court's view, the government should have raised the relevant predicate in the original sentencing proceeding. 902 F.3d at 430 (citing Bryant v. Warden, 738 F.3d 1253, 1256-1257 (11th Cir. 2013), overruled on other grounds by McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076 (11th Cir. 2017) (en banc), cert. denied, 138 S. Ct. 502 (2017), and United States v. Petite, 703 F.3d 1290, 1292 n.2 (11th Cir.), cert. denied, 571 U.S. 871 (2013),

abrogated on other grounds by Johnson, supra). In the decision below, the Eleventh Circuit expressly distinguished that line of precedent on the facts, which suggests that the differing outcomes in Hodge and this case may likewise reflect variations in the facts rather than a fundamentally distinct approach to the law.

The decision below is also consistent with the Seventh Circuit's decision in Dotson. In Dotson, the presentence report had specified only certain prior convictions as the defendant's ACCA predicates, but the court of appeals concluded that the government was nevertheless entitled in collateral-review proceedings to rely on a different conviction listed in the criminal history portion of the presentence report to support the ACCA enhancement after one of the specifically listed convictions no longer qualified. 949 F.3d at 321. The court explained that reliance on the other conviction was acceptable because "the indictment listed the [conviction] among other prior felonies as part of charging a violation of § 922(g) and 924(e)" and because the defendant had apparently believed that the conviction in question had been one of his ACCA predicates all along, such that the court could not conclude that any "fundamental unfairness" would "aris[e] from a lack of notice." Id. at 320-321.

Dotson's recognition that the government was entitled to rely on a different ACCA predicate is consistent with the court of appeals' denial of relief in this case. Dotson went on to suggest, however, that its reasoning differed from the reasoning of the

decision below and Hodge because -- in the Seventh Circuit's view -- it was applying a fact-sensitive approach, while the Eleventh Circuit and the Fourth Circuit had adopted competing bright-line rules. 949 F.3d at 321. But, as explained above, neither the Eleventh nor the Fourth Circuit appears to have taken an absolutist approach. See pp. 14-15, supra. Rather, like the Seventh Circuit, both courts have indicated that the particular facts of each case are relevant. Ibid.

3. In any event, this case is not a suitable vehicle for this Court's review. Even if this Court agreed with petitioner's position on the question presented, petitioner would still have three ACCA predicates for purposes of any resentencing that might follow the grant of relief under Section 2255. Petitioner does not dispute that his three Florida convictions for delivery of cocaine qualify as "serious drug offense[s]" under the ACCA, nor has he offered any other argument against the ACCA enhancement that he could set forward if he were granted a resentencing. Thus, regardless of the resolution of the question presented, petitioner would still be classified as an armed career criminal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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