No. 20-6054

IN THE
SUPREME COURT OF THE UNITED STATES

ALEX CORI TRIBUE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

---

REPLY BRIEF FOR PETITIONER

James T. Skuthan
Acting Federal Defender

Conrad Kahn, Counsel of Record
Assistant Federal Defender
201 S. Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338
Email: Conrad_Kahn@fd.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Statutes and Guidelines

Other Authorities

REPLY BRIEF FOR PETITIONER

This Court's intervention is needed. The circuits are undeniably split on an important legal question: whether a defendant has a due process right to know at sentencing all the convictions the government is relying on to establish an enhancement under the Armed Career Criminal Act (ACCA). This case presents an ideal vehicle for the Court to resolve that issue.

Still, the government opposes review, denying the existence of a circuit split and arguing Mr. Tribue is wrong on the merits. BIO at 10–16. Neither assertion is correct. The split is well acknowledged. And on the merits, a defendant has a due process right to know what predicates the government is relying on at sentencing to support an ACCA enhancement. Moreover, a ruling in the government's favor would relieve the government of its sentencing burden and shift the burden to defendants to disprove the propriety of the enhancement on collateral review, when obtaining relief is far harder. Regardless of the correct answer, however, the divergent views on this important question only underscore the need for this Court's intervention.

I. The circuits are intractably divided.

The government contends there is no circuit split, and it proposes a novel way to reconcile the three-way split on the question presented. BIO at 13–16. The lack of a split would be news to the Seventh Circuit panel in *Dotson v. United States*, 949 F.3d 317, 321 (7th Cir. 2020),[1] as well as the two judges who dissented from the denial of rehearing en banc in the court below. *See Tribue v. United States*, 958 F.3d 1148, 1155–57 (11th Cir. 2020) (Martin, J., dissenting from the denial of rehearing en banc).

The question presented on which the circuits are split is a straightforward legal question: whether, on collateral review, the government can maintain an ACCA sentencing enhancement by substituting a different conviction that it did not provide the defendant with notice of at the original sentence. Pet. at i. The published decisions in Eleventh, Fourth, and Seventh Circuits recognize that as the issue, *see* Pet. at 10–16, and subsequent unpublished decisions from the Eleventh and Fourth Circuits confirm that understanding. *See, e.g.*, *United States v. Goins*, No. 17-6136, 2021 WL 810247, at *2 (4th Cir. Mar.

[1] Then-Judge, now-Justice, Barrett was on the *Dotson* panel.

3, 2021); *Bruten v. United States*, 814 F. App'x 486, 489–90 (11th Cir. 2020); *United States v. Winbush*, 922 F.3d 227, 230–31 (4th Cir. 2019); *Gray v. United States*, 796 F. App'x 610, 614 (11th Cir. 2019); *United States v. Drummond*, 925 F.3d 681, 698 n.* (4th Cir. 2019) (Floyd, J., concurring in part and dissenting in part).

Despite this universal understanding, the government denies the split exists. BIO at 13–16. To be sure, the government acknowledges that in both *Tribue* and *United States v. Hodge*, 902 F.3d 420, 430 (4th Cir. 2018), the government-endorsed presentence reports listed three and only three convictions as ACCA predicates. *Id.* The government also acknowledges that in both cases the substituted conviction on collateral review appeared in the criminal history section of the presentence report. *Id.* The difference, claims the government, is the substituted conviction here received criminal history points for purposes of calculating Mr. Tribue's advisory Guidelines range, while the substituted conviction in *Hodge* did not. *Id.* The government is reading *Hodge* incorrectly, and its theory is also wrong as a matter of first principles.

In *Hodge*, the Fourth Circuit's holding was clear:

> We therefore hold that the Government must identify all convictions it wishes to use to support a defendant's ACCA

> sentence enhancement at the time of sentencing. The 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 to the defendant.

Hodge, 902 F.3d at 430. Even so, the government tries to mold this holding into something it is not by plucking a passing reference from a preceding section of the opinion and placing more weight on it than it can tolerate.

In that preceding section, the Fourth Circuit explained that the government must provide a defendant with notice at sentencing about the ACAA predicates it is relying on to support the sentence. *Id.* at 427. According to the Fourth Circuit, when a government-endorsed presentence report lists three, and only three, convictions in support of an ACCA enhancement, the government has not provided the defendant with notice that it is relying on other convictions. *Id.* at 428 ("Here, because the PSR designated only three convictions as ACCA predicates, Hodge did not have adequate notice that additional convictions would be used to support his ACCA sentence enhancement."). Then, in a passing reference, the Fourth Circuit buttressed its point about notice by explaining that the conviction at issue also received no criminal history

points and was not used to calculate Mr. Hodge's criminal history category and Guidelines range. *Id.* ("So not only did the PSR convey that this conviction would not be used to support an ACCA enhancement, but it also conveyed that the conviction would not be used in calculating Hodge's criminal history category and Sentencing Guidelines range."). In the very next sentence, the Fourth Circuit concluded the section by stating:

> In sum, when the Government or the sentencing court chooses to specify which of the convictions listed in the PSR it is using to support an ACCA enhancement, it thereby narrows the defendant's notice of potential ACCA predicates from all convictions listed in the PSR to those convictions specifically identified as such.

Id.

Read in context, then, the Fourth Circuit's ACCA holding did not depend on whether a conviction received criminal history points. And the Fourth Circuit's later decisions relying on *Hodge* confirm that understanding and mention nothing about criminal history points. *See, e.g.*, *Goins*, 2021 WL 810247, at *2; *Bruten*, 814 F. App'x at 489–90; *Winbush*, 922 F.3d at 230–31; *Gray*, 796 F. App'x at 614; *Drummond*, 925 F.3d at 698 n.* (Floyd, J., concurring in part and dissenting in part). Thus, contrary to the government's argument, BIO at 14, if a district

court in the Fourth Circuit heard Mr. Tribue's motion, it would have granted him § 2255 relief.

The government's theory is also wrong as a matter of first principles. The government argues that it provides a defendant with adequate notice at sentencing that it is relying on a conviction as an ACCA predicate offense simply if the conviction receives criminal history points, even if the government-endorsed presentence report specifically designates three other convictions as the only ACCA predicates. Aside from the commonsense notion that the "express identification of some convictions as ACCA predicates implies an intentional exclusion of the others," *Hodge*, 902 F.3d at 427, the criteria for scoring criminal history points differs from the criteria for determining whether a conviction is an ACCA predicate offense.

Criminal history points generally turn on when the conviction occurred and the length of the sentence. *See* USSG §§ 4A1.1, 4A1.2. ACCA predicates, on the other hand, generally depend on the elements of the prior conviction. *See* 18 U.S.C. § 924(e). Moreover, a prior conviction can qualify as an ACCA predicate offense even if it receives zero criminal history points. *See United States v. Walker*, 840 F.3d 477,

489 n.1 (8th Cir. 2016); *United States v. Johnson*, 743 F.3d 1110, 1111 (7th Cir. 2014). Thus, the mere fact that a prior conviction receives criminal history points says nothing about whether the conviction qualifies as an ACCA predicate, let alone serves as notice that the government intends to rely on the conviction to meet its burden under the ACCA. This is especially true when, as here, the government-endorsed presentence report specifically relies on three convictions to the exclusion of others. Thus, the government not only misreads *Hodge*, but its theory about when a defendant receives sufficient notice is incorrect.[2]

The government also argues that the Fourth and Eleventh Circuits are not in conflict because the Fourth Circuit relied on Eleventh Circuit precedent in coming to its holding. BIO at 14–15 (citing *Hodge*, 902 F.3d at 430); *see also Bryant v. Warden*, 738 F.3d 1253, 1256–57 (11th Cir. 2013), *overruled on other grounds by McCarthan v. Director of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (en banc); *United*

[2] The government emphasizes that the substituted conviction here also exposed Mr. Tribue to a sentence of 327 months' imprisonment. BIO at 14. Mr. Tribue does not dispute that. But the mere fact that the district court relied on a particular conviction to calculate Mr. Tribue's Guidelines range is irrelevant to the ACCA analysis and does not mean that the government provided the defendant with notice that it was relying on that conviction to support an ACCA enhancement.

States v. Petite, 703 F.3d 1290, 1292 n.2 (11th Cir. 2013); *United States v. Canty*, 570 F.3d 1251, 1256–57 (11th Cir. 2009). But the Fourth and Eleventh Circuits read those case differently. The Fourth Circuit read these cases as setting forth a bright-line rule—that the government cannot maintain an ACCA sentence on collateral review by substituting a conviction it never provided the defendant with notice of at sentencing. *Hodge*, 902 F.3d at 430. Below, however, the Eleventh Circuit read these cases narrowly as either non-binding dicta (*Petite*), as requiring a defendant to first object to his ACCA enhancement at sentencing (*Bryant* and *Canty*), or as requiring the government to expressly disclaim reliance on certain convictions (*Canty*). That the Eleventh Circuit read these decisions narrowly after the Fourth Circuit reasonably interpreted them more broadly does not support the government's argument that the Eleventh and Fourth Circuit's decisions are in harmony. Notably, Judges Martin and Jill Pryor agreed with the Fourth Circuit's reading of Eleventh Circuit precedent and rejected the Eleventh Circuit's attempt to circumscribe those decisions. *Tribue*, 958 F.3d at 1152–54 (11th Cir. 2020) (Martin, J., dissenting from the denial of rehearing en banc).

Finally, the government also argues—based on its faulty premise

about criminal history points—that the Seventh Circuit's decision in *Dotson* aligns with the decision below. BIO at 15–16. But as the government also acknowledges, in *Dotson*, the Seventh Circuit expressly recognized that (1) its fact-sensitive approach differed from the Eleventh Circuit's bright-line rule, and (2) the Eleventh and Fourth Circuits have conflicting bright-line rules. *Id.* Moreover—and the government does not acknowledge this part—the Seventh Circuit expressly disagreed with the "broader strokes" the Eleventh Circuit used below "in deciding the same question" and agreed with the Fourth Circuit's notice concerns. *Dotson*, 949 F.3d at 321. Indeed, in the order denying Mr. Tribue's petition for rehearing en banc, Judges Martin and Jill Pryor read *Hodge* and *Dotson* as rejecting the approach the Eleventh Circuit adopted in this case. *Tribue*, 958 F.3d at 1157 (Martin, J., dissenting from the denial of rehearing en banc). Simply put, the split here is firmly entrenched, and both the Seventh Circuit and the dissenting judges below have recognized it.

II. The question presented warrants this Court's review.

The government does not deny that the question presented is exceptionally important. Nor can it. The resolution of this issue carries profound significance for sentencing practices and collateral review challenges.

The ACCA is one of the most widely used sentencing enhancements in federal criminal law. In 2019, almost 40% of the ACCA sentences in the country arose in the Eleventh and Fourth Circuits. *See* U.S. Sentencing Comm'n, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways*, March 2021, at 21.[3] Thus, the resolution of this issue is particularly important because it implicates two of the circuits that most often apply this onerous enhancement.[4]

The resolution of this issue is also important so that both the

---

[3] The Commission's ACCA report is available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf?utm_medium=email&utm_source=govdelivery.

[4] In 2019, district courts in the Eleventh Circuit imposed ACCA sentences more than district courts in any other circuit in the nation. *See* U.S. Sentencing Comm'n, *supra* note 2, at 21. The Middle District of Florida, the district from which Mr. Tribue's case originates, was responsible for more ACCA sentences than any district in the country. *Id.*

government and defendants understand their obligations at sentencing. Under the Fourth Circuit's standard, the government must provide notice about all prior convictions it is relying on to justify imposing an ACCA enhancement. *See Hodge*, 902 F.3d at 430 ("We therefore hold that the Government must identify all convictions it wishes to use to support a defendant's ACCA sentence enhancement at the time of sentencing."). But in the Eleventh Circuit, to ensure the government cannot later substitute a conviction on collateral review to maintain an ACCA sentence, a defendant must preemptively object at sentencing to any predicate that could qualify, even if the government is not relying on it. *Tribue v. United States*, 929 F.3d 1326, 1332 (11th Cir. 2019) ("[W]here there is no objection by the defendant to the three convictions identified as ACCA predicates, the government bears no burden to argue or prove alternative grounds to support the ACCA enhancement."). Defendants looking down the barrel of an ACCA sentence need clarity on whether they need to preemptively flag and object to every potential predicate that the government may try to use against them in the future when the burden of proof has shifted to them.

Additionally, as explained in Mr. Tribue's petition, this Court

addresses the ACCA often, *see* Pet. at 21 n.9 (collecting cases), and each ACCA decision could prompt hundreds of collateral review proceedings. In fact, the Court has already heard one ACCA case this term, *Borden v. United States*, No. 19-5410, and it has scheduled to hear another next term. *Wooden v. United States*, No. 20-5279. Thus, the resolution of this issue may affect whether scores of prisoners impacted by these decisions have a right to relief on collateral review.

Instead of addressing these important issues, the government suggests that this Court has denied review of this question twice. BIO at 10 (citing *Dotson v. United States*, 141 S. Ct. 558 (2020) (No. 20-302), *petition for reh'g pending* (filed Nov. 9, 2019); *McCarthan v. United States*, No. 19-5391 (Dec. 9, 2019)). But the government's assertion is both wrong and misleading.

First, *McCarthan* did not present the question here because the presentence report relied on all the defendant's prior convictions to support the ACCA enhancement. *McCarthan*, No. 19-5391, BIO at 12–13. Thus, unlike Mr. Tribue, the defendant received sufficient notice. Indeed, in *McCarthan*, the government distinguished Mr. McCarthan's

case on that basis when urging this Court to deny his petition. *Id.*[5]

As for *Dotson*, Mr. Tribue explained in his initial petition that *Dotson* was a fact-intensive decision, which made it a poor vehicle for resolving this issue. Pet. at 21–22. Notably, after Mr. Tribue filed his petition with this Court, and after this Court denied Mr. Dotson's petition for a writ of certiorari, Mr. Dotson petitioned this Court for rehearing, asking the Court to hold his case pending the resolution of this case, recognizing the Court may prefer to address the issue here. *Dotson*, No. 20-302, Pet. for Reh'g at 1–3. The Court has been holding Dotson's rehearing petition since November of last year. Thus, contrary to the government's suggestion, this Court has not repeatedly denied review of this issue.

III. The case is an excellent vehicle.

In the final paragraph of its BIO, the government argues that even if there is a circuit split, and even if the question presented is exceptionally important, the Court should still deny Mr. Tribue's petition

[5] In *McCarthan*, the government properly acknowledged *Hodge*'s holding and mentioned nothing about whether the substituted convictions in either case received criminal history points. *McCarthan*, No. 19-5391, BIO at 12–13.

because his case is not a "suitable vehicle for this Court's review." BIO at 16. According to the government, Mr. Tribue would not obtain relief at a resentencing because he would still have three ACCA predicates. *Id.* But the government is incorrect for at least two reasons.

First, the question presented does not implicate whether the ACCA would still be on the table at a resentencing. The question here—and the question on which the circuits are split—is about the notice a defendant has a right to at sentencing and his right to relief on collateral review.

Second, the government is simply wrong about whether Mr. Tribue would have a right to relief. Under the bright-line rule advocated by Judges Martin and Jill Pryor, Mr. Tribue would not be subject to an ACCA sentence at resentencing. *Tribue*, 958 F.3d at 1157 (Martin, J., dissenting from the denial of rehearing en banc) ("The government should affirmatively identify the particulars of a defendant's criminal history that cause it to seek an ACCA sentence. If such a rule were enforced here, Mr. Tribue's ACCA sentence would be vacated, and he would be resentenced facing a statutory maximum of ten years for his gun charge."). The government's suggestion that Mr. Tribue would not

obtain relief at a resentencing is thus both wrong and beside the point. This case presents an excellent vehicle to resolve the question presented.

IV. The decision below is wrong.

Merits aside, the mere fact that the circuits are undeniably split on this important question underscores the need for this Court's review. But as explained in Mr. Tribue's petition, the Eleventh Circuit's decision below is wrong on the merits for two reasons. Pet. at 16–18. First, the Eleventh Circuit's bright-line rule deprives defendants of their right to notice at sentencing about the predicate offenses the government is relying on to support an ACCA enhancement. *Id.* at 17–18. Second, the Eleventh Circuit's rule "incorrectly relieves the government of the burden of proving that a defendant is eligible for a longer sentence under the ACCA and places the burden on him to prove he's not." Pet. at 17–18 (quoting *Tribue*, 958 F.3d at 1150 (Martin, J., dissenting from the denial of rehearing en banc)). The government raises several arguments to combat both points, but none hold water.

1. A defendant has a right to notice at sentencing about the ACCA predicates the government is relying on to support his sentence.

The government responds to Mr. Tribue's notice argument with four arguments of its own: (1) Mr. Tribue admitted that he had the conviction; (2) Mr. Tribue receive criminal history points for the conviction; (3) the government listed the conviction in Count 9 of the indictment; and (4) Mr. Tribue received notice, at a minimum, during the collateral review proceedings. BIO at 11. None of these arguments show that Mr. Tribue received notice during sentencing of the ACCA predicates supporting his sentence.

First, as explained in the petition, the mere fact that Mr. Tribue admitted to having this conviction does not mean he admitted it qualified as an ACCA predicate—he did not even know the government was relying on it. Pet. at 18; *see Tribue*, 958 F.3d at 1151 (Martin, J., dissenting from the denial of rehearing en banc).

Second, as explained above, the government does not provide a defendant with notice that it is relying on a particular conviction as an ACCA predicate offense simply because the conviction receives criminal history points, especially when the government-endorsed presentence

report lists only three specific convictions supporting the enhancement.

Third, the government similarly misplaces its reliance on Count Nine of the indictment. BIO at 11. In Count Nine, the government charged Mr. Tribue with possessing a gun as a felon, in violation of 18 U.S.C. § 922(g), and listed some of Mr. Tribue's prior convictions to show Mr. Tribue had previously been convicted of a felony. Most of the felonies listed in Count Nine were for non-ACCA offenses, like simple possession of a controlled substance or tampering with evidence. The government's reliance on certain convictions, including non-ACCA offenses, to establish Mr. Tribue had been convicted of a felony for purposes of § 922(g) did not provide him with notice that the government was also going to rely on those convictions for purposes of the ACCA. And in any event, the government mislabeled the substituted conviction in Count Nine as "solicitation to purchase cocaine," which is not an ACCA predicate offense. *See United States v. Hernandez*, 145 F.3d 1433, 1440 (11th Cir. 1998).[6]

Fourth, the government argues that Mr. Tribue received sufficient notice during the § 2255 proceeding. BIO at 11. But as explained in

[6] The presentence report also mislabels the conviction.

the next section, the government had the burden at sentencing to establish the applicability of the ACCA. The government's argument shifts the burden to Mr. Tribue to disprove the ACCA's applicability on collateral review, when it is far harder to obtain relief.

2. The Eleventh Circuit's bright-line rule relieves the government of its burden of proving a defendant is eligible for an ACCA sentence.

In response to Mr. Tribue's burden-shifting argument, the government raises five points: (1) the district court relied on all Mr. Tribue's convictions in determining his exposure under the Guidelines; (2) the district court did not identify any particular prior convictions as an ACCA predicate; (3) the government established the prior conviction belonged to Mr. Tribue on collateral review; (4) the government did not need to prospectively address each prior conviction at sentencing to guard against future changes in the law; and (5) granting individuals like Mr. Tribue relief would grant a windfall to ACCA eligible defendants. Again, the government's arguments miss the mark.[7]

[7] Although the government characterizes these arguments as responses to Mr. Tribue's burden-shifting point, some of these arguments are more related to Mr. Tribue's notice point. In fact, none of them directly respond to burden-shifting issue.

The government's first argument—that the district court relied on all Mr. Tribue's convictions to determine his Guidelines range—is based on a mistaken premise. Whether the district court relied on a certain conviction to calculate a defendant's Guidelines range does not mean the government provided Mr. Tribue with notice that it was relying on that conviction for ACCA purposes, especially because the ACCA depends on different criteria than the Guidelines' section on calculating criminal history points and because the presentence report specifically designated three convictions as predicates.

The government's second argument—that the district court did not rely on any specific convictions as ACCA predicates—is wrong as a matter of fact. At sentencing, and as confirmed in the Statement of Reasons, the district court adopted the presentence report without change, including that three specific convictions supported the ACCA enhancement.

The government's third argument—that it proved on collateral review that the substituted conviction belongs to Mr. Tribue—is beside the point. Mr. Tribue has never disputed the conviction is his. But, as explained, there is a difference between the factual question of whether

the conviction belongs to Mr. Tribue and whether the conviction legally qualifies as an ACCA predicate offense. Moreover, the government's argument does not change the fact that the Eleventh Circuit's bright-line rule relieves the government of its burden at sentencing to provide notice of the convictions it is relying on to support an ACCA enhancement.

Fourth, the government argues that it should not need to address every potential predicate offense to guard against changes in the law. This argument is effectively a policy argument. The government need not preemptively guard against a change in the law; it simply needs to provide defendants with the notice they are constitutionally due. And in that regard, the government severely mischaracterizes the burden it would face. Merely asking the government to identify the convictions it is relying on is not unduly burdensome. As the *Hodge* court noted, "the U.S. Probation Office *often* designates more than three convictions as ACCA predicates." *Hodge*, 902 F.3d at 428 n.4 (emphasis in original).

Finally, the government asserts that a ruling in Mr. Tribue's favor would result in a windfall for defendants. This is another misplaced policy argument. When a court affords a defendant relief from a sentence based on an unconstitutionally vague statute, the defendant is

not receiving a windfall. Nor is a defendant receiving a windfall when the government is prohibited from relying on a new conviction for the first time on collateral review. Rather, a ruling in Mr. Tribue's favor simply ensures that the government affords a defendant his constitutional right to notice at sentencing before he is allowed to be kept incarcerated for a minimum term of 15 years' imprisonment. And as explained, asking the government to comply with this constitutional requirement is not a big ask, especially when it impacts the liberty of so many people. *Tribue*, 958 F.3d at 1157 ("It doesn't seem too much to ask that inmates who receive prolonged ACCA sentences hear specifically from the government its legal basis for seeking the extended prison sentence."). Mr. Tribue respectfully requests that this Court grant his petition for a writ of certiorari.

* * *

The question here impacts the liberty of countless defendants now and into the future. Indeed, without this Court's intervention, a defendant like Mr. Tribue, who commits his crime in Augusta, Georgia, is doomed to spend at least an extra five years in prison based on an unconstitutional application of the ACCA. While a defendant who

committed his crime a couple of miles up the road in North Augusta, South Carolina would have a right to relief from a 15-year mandatory minimum sentence. Years of an individual's life should not depend on geographical happenstance.

CONCLUSION

Mr. Tribue respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

James T. Skuthan
Acting Federal Defender

/s/ Conrad Kahn
Conrad Kahn
Assistant Federal Defender
201 S. Orange Avenue, Suite 300
Orlando, FL 32801
Telephone 407-648-6338
Email: Conrad_Kahn@fd.org
Counsel of Record for Petitioner