No.

In the Supreme Court of the United States

JEFFREY A. BENTLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

DANIEL J. TYRRELL
Chiesa Shahinian & Giantomasi PC
One Boland Drive
West Orange, NJ 07052
(973) 530-2286

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
CHARLES SEIDELL
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Petitioner

QUESTION PRESENTED

It is well settled that a criminal defendant's right to due process extends to sentencing proceedings (*Beckles* v. *United States*, 137 S. Ct. 886, 896 (2017)), where the government bears the burdens of proof and persuasion (*Oyler* v. *Boles*, 368 U.S. 448, 452 (1962)). At the heart of the due process right is entitlement to notice and an opportunity to be heard. This fundamental right has particular importance in the context of mandatory sentencing enhancements. *Irizarry* v. *United States*, 553 U.S. 708, 713-714 (2008); *Oyler*, 368 U.S. at 452. In contrast, a criminal defendant collaterally challenging a previously-imposed sentence under 28 U.S.C. § 2255 bears the burdens of proof and persuasion, including of demonstrating that any error in the sentencing process was prejudicial.

Against this background, the lower courts are intractably divided on the following question:

When a defendant shows on Section 2255 collateral review that a prior conviction is no longer a valid predicate offense under the Armed Career Criminal Act (ACCA), may a district court deny resentencing on the basis of an alternative prior conviction that was not specifically identified by the government as an ACCA predicate at the original sentencing (as allowed by the Third, Seventh, and Eleventh Circuits), or must the court instead order resentencing to give the defendant an opportunity to challenge the alternative prior conviction's qualification as an ACCA predicate in a context where the government bears the burden (as held by the First and Fourth Circuits)?

STATEMENT OF RELATED PROCEEDINGS

The proceedings identified below are directly related to this case in this Court:

Collateral Review Under 28 U.S.C § 2255:

- *Bentley* v. *United States*, No. 16-518, 2020 WL 1274131 (D. Del. Mar. 17, 2020);
- *United States* v. *Bentley*, 49 F.4th 275 (3d Cir. 2022); appeal denied Sept. 14, 2022.

Criminal Judgment:

- *United States* v. *Bentley*, No. 1:05-cr-00039 (D. Del. 2006); judgment entered July 12, 2006.

TABLE OF CONTENTS

Question Presented i
Statement of Related Proceedings ii
Table of Authorities iv
Introduction 1
Opinions Below 2
Jurisdiction 2
Constitutional and Statutory Provisions Involved 2
Statement 2
A. Legal Background 2
B. Factual Background 3
C. Procedural Background 5
Reasons for Granting the Petition 6
A. The courts of appeals are openly divided 7
B. The issue is important, and this is a suitable vehicle for review 11
C. The decision below is wrong 14
Conclusion 20
Appendix A (court of appeals opinion) 1a
Appendix B (district court opinion) 29a
Appendix C (plea memorandum) 41a

TABLE OF AUTHORITIES

Cases

Apprendi v. *New Jersey*,
530 U.S. 466 (2000) 15

Beckles v. *United States*,
137 S. Ct. 886 (2017) 15

Betterman v. *Montana*,
578 U.S. 437 (2016) 15

Borden v. *United States*,
141 S. Ct. 1817 (2021) 13

Brecht v. *Abrahamson*,
507 U.S. 619 (1993) 3

Bruten v. *United States*,
814 F. App'x 486 (11th Cir. 2020) 12

Burns v. *United States*,
501 U.S. 129 (1991) 16, 18

Cameron v. *United States*,
No. 1:19-cv-00973, 2021 WL 3888066
(S.D. Ind. Aug. 19, 2021) 12

Concepcion v. *United States*,
142 S. Ct. 2389 (2022) 14

Dotson v. *United States*,
949 F.3d 317 (2020) 9, 10, 11

Gattis v. *United States*,
No. 2:02-cr-01156, 2020 WL 615291
(D.S.C. Feb. 10, 2020) 12

Gray v. *United States*,
796 F. App'x 610 (11th Cir. 2019) 12

Cases—continued

Hamdi v. *Rumsfeld*,
542 U.S. 507 (2004)..... 15

Holifield v. *United States*,
No. 2:16-CV-445, 2020 WL 1228076
(M.D. Ala. Mar. 12, 2020)..... 12

Holmes v. *United States*,
2022 WL 3641209, No. 22-10598-J
(11th Cir. July 26, 2022) 12

Holmes v. *United States*,
No. 20-cv-21589, 2022 WL 473998
(S.D. Fla. Feb. 16, 2022)..... 12

Irizarry v. *United States*,
553 U.S. 708 (2008)..... 16

Jackson v. *United States*,
Nos. 3:15-cv-75, 2021 WL 1312753
(M.D. Fla. Apr. 8, 2021)..... 12

Johnson v. *United States*,
576 U.S. 591 (2015) 1, 3, 12

Lankford v. *Idaho*,
500 U.S. 110 (1991)..... 15

Oyler v. *Boles*,
368 U.S. 448 (1962)..... 15, 18

Pepper v. *United States*,
562 U.S. 476 (2011) 14, 18

Pierce v. *United States*,
No. 1:16-cv-5107, 2020 WL 1272191
(D.N.J. Mar. 7, 2020) 12

Cases—continued

Quarles v. *United States*,
139 S. Ct. 1872 (2019) 13

Rummel v. *Estelle*,
445 U.S. 263 (1980) 20

Sessions v. *Dimaya*,
138 S. Ct. 1204 (2018) 15

Shepard v. *United States*,
544 U.S. 13 (2005) 13

Shular v. *United States*,
140 S. Ct. 779 (2020) 13

Specht v. *Patterson*,
386 U.S. 605 (1967) 15

Stokeling v. *United States*,
139 S. Ct. 544 (2019) 13

Taylor v. *United States*,
495 U.S. 575 (1990) 13

Tribue v. *United States*,
929 F.3d 1326 (11th Cir. 2019) 9, 11

Tribue v. *United States*,
958 F.3d 1148 (11th Cir. 2020) 11, 16, 18

United States v. *Al-Muwwakkil*,
983 F.3d 748 (4th Cir. 2020) 12

United States v. *Báez-Martínez*,
950 F.3d 119 (1st Cir. 2020) 8, 9, 11, 17

United States v. *Goins*,
845 F. App'x 232 (4th Cir. 2021) 12

Cases—continued

United States v. *Haynes*,
No. 19-12335, 2022 WL 3643740
(11th Cir. Aug. 24, 2022) 12

United States v. *Hodge*,
902 F.3d 420 (4th Cir. 2018) 7, 8, 13, 16
17, 18, 19

United States v. *Lee*,
818 F.2d 1052 (2d Cir. 1987) 19

United States v. *McDowell*,
888 F.2d 285 (1989) 19

United States v. *Rumley*,
952 F.3d 538 (4th Cir. 2020) 12, 13, 19

United States v. *Sharp*,
21 F.4th 1282 (11th Cir. 2021) 12

United States v. *Taylor*,
142 S. Ct. 2015 (2022) 13

United States v. *Vélez-Vargas*,
32 F.4th 12 (1st Cir. 2022) 8, 9, 18, 19

United States v. *Winbush*,
922 F.3d 227 (4th Cir. 2019) 12

Welch v. *United States*,
578 U.S. 120 (2016) 3, 5, 14

White v. *United States*,
8 F. 4th 547 (7th Cir. 2021) 10

In re Williams,
898 F.3d 1098 (11th Cir. 2018) 12

Wilson v. *United States*,
No. 3:16-CV-464 12

Cases—continued

In re Winship,
397 U.S. 358 (1970) 18

Wooden v. *United States*,
142 S. Ct. 1063 (2022) 13

Statutes

11 Del. C. § 604 (1991) 5

U.S.C. § 924(e)(2)(B) 3

18 U.S.C.
§ 922(g)(1) 2, 3
§ 924(a)(2) 2
§ 924(c)(1)(ii) 3
§ 924(e)(1) 2, 3
§ 1951 3

28 U.S.C. § 1254(1) 2

Other Authorities

U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* (Mar. 2018) 11

INTRODUCTION

When petitioner Jeffrey Bentley pleaded guilty to being a felon in possession of a firearm, he stipulated that he was subject to a sentencing enhancement under the Armed Career Criminal Act (ACCA) on the basis of three specified convictions. The government now concedes that at least one of those three prior convictions is not a valid ACCA predicate after all, following invalidation of the ACCA's residual clause in *Johnson* v. *United States*, 576 U.S. 591 (2015). But the government nonetheless argued—and the Third Circuit accepted—that Bentley should be denied a new sentencing hearing because he had other past convictions listed in the criminal history section of his presentence report, even though those convictions were not specifically identified as potential ACCA predicates and Bentley thus had no prior opportunity to challenge their status as such.

The circuits are deeply and openly divided on the propriety of that holding, each taking a different approach to the question presented. Thousands of defendants challenging their sentences following *Johnson*—and who may challenge their federal sentences under similar circumstances in the future—are thus receiving variable outcomes with respect to admittedly unlawful sentences. This Court should not tolerate such inconsistency.

The Third Circuit's approach is wrong. Defendants are entitled to notice of the basis on which the government seeks recidivist enhancements at the time of their sentencing, lest they be denied an opportunity to contest them in a context where the government bears the burden. By denying resentencing, the Third Circuit's test forces defendants like Bentley to contest the validity of the substitute predicates on collateral review instead, with limited opportunity for hearings and where the burden is flipped. That result is wrong and should be reversed.

OPINIONS BELOW

The opinion of the Third Circuit is reported at 49 F. 4th 275 and is reproduced in the appendix at 1a-28a. The opinion of the district court is unpublished but is available online at 2020 WL 1274131 and is reproduced in the appendix at 29a-40a.

JURISDICTION

The Third Circuit entered its judgment on September 14, 2022. On December 6, 2022, Justice Alito extended the time to file a petition for a writ of certiorari to January 12, 2023. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be * * * deprived of life, liberty, or property, without due process of law."

Section 924(e)(1) of Title 18 of the United States Code provides un relevant part that:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years

STATEMENT

A. Legal Background

A defendant charged with being a felon in possession of a firearm faces up to 10 years in prison. 18 U.S.C. § 924(a)(2). But under the Armed Career Criminal Act, if a defendant has three or more previous convictions for "violent felon[ies]," a 15-year mandatory minimum

sentence replaces the 10-year maximum sentence. 18 U.S.C. § 924(e)(1).

The ACCA defines a "violent felony" as a felony 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) (emphasis added). The italicized clause of paragraph (ii) is known as the "residual clause," which was notoriously difficult to interpret and apply. The Court invalidated it as unconstitutionally vague in *Johnson*. See 576 U.S. at 597. The following term, the Court ruled that *Johnson* announced a new substantive rule that applies retroactively on collateral review. *Welch* v. *United States*, 578 U.S. 120, 129-130 (2016).

Prisoners whose ACCA-enhanced sentences relied on the ACCA's residual clause were thus afforded an opportunity to challenge their original sentences under 28 U.S.C. § 2255. To succeed on such a claim, a defendant must demonstrate "actual prejudice"—that is, that the district court's reliance on the residual clause "had [a] substantial and injurious effect or influence" on the sentence originally imposed. *Brecht* v. *Abrahamson*, 507 U.S. 619, 631, 637 (1993). This inquiry typically involves a determination of which prior convictions were properly tested before the district court as potential ACCA predicates at the time of sentencing.

B. Factual Background

In 2005, Bentley was indicted for being a felon in possession of a firearm (18 U.S.C. § 922(g)(1)), robbery (18 U.S.C. § 1951), and using and carrying a firearm during a crime of violence (18 U.S.C. § 924(c)(1)(ii)). Bentley plead guilty to counts one and three. App., *infra*, 41a. The United States recommended that the district court

dismiss count two and that Bentley receive the minimum sentence: fifteen years for count one (as required by the ACCA enhancement) and seven years for count three. App., *infra*, 42a. Bentley was convicted in accordance with his plea.

The plea agreement stipulated several facts necessary to support the convictions and resulting sentence. With respect to the ACCA enhancement, Bentley admitted that he "was convicted previously [of] three felonies, each punishable by imprisonment for a term exceeding one year, committed on occasions different from one another: 1) Reckless Endangering in the First Degree in Kent County (Delaware) Superior Court on or about March 8, 1991; 2) Robbery and Use of a Firearm in the Circuit Court of the City of Richmond (Virginia) on or about December 14, 1988; and 3) Robbery and Use of a Firearm in the Circuit Court of the County of Henrico (Virginia) on or about February 14, 1989." App., *infra*, 3a (quoting paragraph 4 of the plea agreement,).

Prior to Bentley's sentencing hearing, a United States Probation Officer prepared a presentence report (PSR). The PSR affirmed the stipulations in the plea agreement, noting that Bentley admitted that he was previously convicted of three qualifying felonies on March 8, 1991; December 14, 1981; and February 14, 1989. App., *infra*, 42a-43a. The dates of these convictions align with the stipulated convictions in the plea memorandum.

The PSR did not expressly indicate that any other of petitioner's past offenses was an ACCA predicate. Concerning Sentencing Guidelines § 4B1.4, the PSR noted only that "the defendant has previously been convicted of both robbery and burglary," but without identifying any particular convictions by date or jurisdiction. App., *infra*, 4a (quoting PSR ¶ 33).

C. Procedural Background

Following *Johnson* and *Welch*, Bentley filed a timely motion to correct his sentence pursuant to 28 U.S.C. § 2255. Bentley contested all three of the ACCA predicates enumerated in the plea agreement. App., *infra*, 7a. He first argued that his Delaware conviction for reckless endangering could no longer support an ACCA enhancement. The relevant Delaware statute provides that "[a] person is guilty of reckless endangering in the first degree when he recklessly engages in conduct which creates a substantial risk of death to another person." 11 Del. C. § 604 (1991). Without the residual clause, Bentley asserted that the crime defined by this statute was neither an enumerated felony nor a qualifying crime under ACCA's force clause. Bentley further argued that his Virginia convictions for robbery (and the related use of a firearm) were not predicates under the ACCA's force clause. App., *infra*, 7a.

Following an abeyance to allow substantively related proceedings to conclude in the Fourth Circuit, the parties argued the motion. For its part, the government did not attempt to rehabilitate Bentley's Delaware conviction. App., *infra*, 31a. Instead, it asserted that Bentley's past North Carolina convictions could be substituted as ACCA predicates, despite that they had not been identified as ACCA predicates in the original sentencing proceedings. App., *infra*, 37a-39a.

The district court denied Bentley's motion without an evidentiary hearing. App., *infra*, 40a. It framed the issue as whether Bentley "continues to have three prior convictions that each qualify as a 'violent felony' without reference to the ACCA's now unconstitutional residual clause." App., *infra*, 33a. The district court concluded that Bentley's North Carolina breaking-and-entering convictions were relevant to determining whether his sen-

tence could be sustained (App. *infra*, 31a), and that the convictions were valid predicates under the ACCA's elements clause (App., *infra*, 37a-39a).

The Third Circuit granted a certificate of appealability directing the parties to address "whether the District Court erred by relying on convictions other than those identified in the plea agreement to sustain the ACCA sentence and deny Bentley's § 2255 motion." App., *infra*, 8a.

The Third Circuit affirmed. App., *infra*, 1a-28a. In doing so, the court described the "conflicting approaches" among the courts of appeals to the question of whether the government may substitute other prior convictions to sustain an ACCA enhancement after one or more predicate convictions are invalidated. App., *infra*, 12a-15a. It ultimately held that substitutions are permissible on collateral review, and that for a prior conviction to serve as a substitute predicate, the "conviction must have been reasonably on the menu of options as an ACCA predicate during the original criminal case." App., *infra*, 15a.

In coming to this conclusion, the Third Circuit expressly "disagree[d]" with the Eleventh Circuit and "reject[ed]" the approach of the Fourth Circuit, instead "chart[ing] a middle course" between the bright-line approaches of those two courts in favor of a fact-intensive inquiry like the Seventh Circuit's. App., *infra*, 15a. (citing *Dotson* v. *United States*, 949 F.3d 317 (4th Cir. 2020); *Tribue* v. *United States*, 929 F.3d 1326 (11th Cir. 2019)).

REASONS FOR GRANTING THE PETITION

The courts of appeals are divided on whether a defendant's due process right is violated when the government freely substitutes convictions on collateral review to satisfy an ACCA enhanced sentence. The conflict is frequently recurring and will persist without this Court's intervention. Because this is a suitable vehicle, the petition should be granted.

A. The courts of appeals are openly divided

The Third Circuit affirmed the denial of a resentencing hearing and upheld Bentley's ACCA-enhanced sentence based on prior convictions other than those identified by the government as qualifying predicates in the original sentencing proceedings. As the Third Circuit recognized (App., *infra*, 12a-15a), that decision deepened an acknowledged circuit split: Whereas Bentley would have received a full resentencing in the First and Fourth Circuits, he would have been denied it in the Seventh and Eleventh Circuits, as he was below.

1. The **Fourth Circuit** has held in clear terms that "the Government must identify all convictions it wishes to use to support a defendant's ACCA sentence enhancement at the time of sentencing." *United States* v. *Hodge*, 902 F.3d 420, 430 (4th Cir. 2018). There, both the defendant and the government relied exclusively on the PSR's identification of three specific prior convictions as ACCA predicates. *Id.* at 424. On later collateral review, the government recognized that one of those three predicate was not valid under *Johnson* and recommended resentencing. *Id.* at 425. But it later "reversed course" and argued that the sentence could be maintained, and resentencing denied, on the basis of another of Hodge's convictions listed in the criminal-history portion of the PSR. *Ibid.* The Fourth Circuit rejected this attempt, holding that because "[t]he Government failed to provide Hodge with sufficient notice of its intent to use this conviction to support an ACCA enhancement" at the original sentencing, it has "lost its right to use the conviction to prevent Hodge from obtaining relief now." *Id.* at 427.

That is the opposite of the outcome reached by the Third Circuit below on analytically identical facts. As in *Hodge*, the government here identified three specific predicates to support Bentley's sentencing enhancement.

As in *Hodge*, at least one of those three predicates is no longer valid. And as in *Hodge*, the government below sought to uphold Bentley's original sentence by relying on convictions listed in the criminal-history section of his PSR, despite that the PSR "did not specifically enumerate [any other] violent felonies" as ACCA predicates. App., *infra*, 16a. *Hodge* held that is not permissible. 902 F.3d at 428. The Fourth Circuit thus would have ordered a resentencing for Bentley.

The outcome here was different because the Third Circuit expressly "reject[ed] the Fourth Circuit's broad rule." App., *infra*, 15a. It characterized the Fourth Circuit as "consider[ing] only crimes that were specifically designated by the United States as ACCA predicates during sentencing." *Ibid.* There is thus no doubt that the outcome here would have been 180-degrees different if this case had arisen in the Fourth Circuit.

The **First Circuit** has creatively interpreted and aligned itself with *Hodge*. In its view, *Hodge* is best understood as reflecting "the doctrine of *expressio unius est exclusio alterius*." *United States* v. *Báez-Martínez*, 950 F.3d 119, 133 (1st Cir. 2020). Like the Fourth Circuit, the First Circuit thus limits the government in Section 2255 proceedings to reliance exclusively on prior convictions that were individually identified as ACCA predicates at sentencing. In such a case, the "law does not readily welcome the government's belated attempts to identify new qualifying predicates." *United States* v. *Vélez-Vargas*, 32 F.4th 12, 14 (1st Cir. 2022). At the same time, the First Circuit allows substitution of predicates on collateral review if "the PSR did not designate *any* particular prior conviction as an ACCA predicate," in which case the defendant is "on equal notice as to each of his convictions that they might be considered a predicate felony." *Báez-Martínez*, 950 F.3d at 133 (emphasis added).

The outcome here thus would have been different in the First Circuit, as well. The plea agreement expressly identified and relied upon just three of Bentley's particular past convictions as ACCA predicates. Under *Báez-Martínez* and *Vélez-Vargas*, the government therefore would not have been free in this case "to identify new qualifying predicates" to avoid resentencing. *Vélez-Vargas*, 32 F.4th at 14.

2. On the other end of the split, the **Eleventh Circuit** would not have found a sentencing error in this case on collateral review, reaching the same substantive outcome as the Third Circuit. See *Tribue* v. *United States*, 929 F.3d 1326, 1328 (11th Cir. 2019). In *Tribue*, the Eleventh Circuit held that "there is no requirement that the government prospectively address whether each and every conviction listed in the criminal history section of a [PSR] is an ACCA predicate in order to guard against potential future changes in the law and avoid later claims that it has waived use of those convictions as qualifying ACCA predicates." *Id.* at 1332. The government thus does "not waive reliance on other convictions in the [PSR] as ACCA predicates simply by not objecting to the [PSR] on the grounds that" a defendant has "more qualifying convictions than the three" that were "identified as supporting the ACCA enhancement." *Ibid*. In the Eleventh Circuit, there is no barrier to the government's substitution of any prior conviction to support an ACCA sentence enhancement on collateral review.

The **Seventh Circuit** expressly broke from the Fourth and Eleventh Circuits and plotted a middle course in *Dotson* v. *United States*, 949 F.3d 317, 321-322 (7th Cir. 2020). There, it concluded that, if there was evidence generally of particular past convictions before the sentencing judge at the time of sentencing, it would not offend "principles of fair notice" to invoke those convictions as ACCA predicates on later collateral review. *Id.* at 322;

accord *White* v. *United States*, 8 F. 4th 547 (7th Cir. 2021). The court repeatedly emphasized the narrowness of its holding in contrast to those of the Fourth and Eleventh Circuits. *Dotson*, 949 F.3d at 318, 321.

The **Third Circuit** charted another "middle course" below. App., *infra*, 15a. The court concluded that its analysis "aligns more closely with the Seventh Circuit's fact-bound approach," but without adopting that court's reasoning as its own. *Ibid.* Instead, the Third Circuit held that "[t]o be considered on collateral review, a prior conviction must have been reasonably on the menu of options as an ACCA predicate during the original criminal case." *Ibid.* "An ACCA predicate was reasonably on the menu of options," according to the Third Circuit, if "it was mentioned as [a possible] ACCA predicate" anywhere in the sentencing record and thus "could have reasonably been considered by the sentencing court." *Ibid.*

Although no other convictions beyond the three identified in the plea memo were "*specifically* designated by the United States as ACCA predicates" at sentencing, as would have been required by the First and Fourth Circuits (App., *infra*, 15a (emphasis added)), the Third Circuit concluded that the PSR's indistinct reference to "robbery and burglary" in Bentley's generic criminal history sufficed to put Bentley on notice, permitting substitution on collateral review. App., *infra*, 16a (citing PSR ¶ 33).

3. Against this backdrop, the circuit split is undeniable. In a case like this one, the Fourth and First Circuits would not allow the government to rely on substitute predicates in Section 2255 proceedings because they were not specifically identified as such in the original sentencing proceedings. In contrast, the Eleventh Circuit would allow substitution without limit. The Third and Seventh Circuits have taken a fact-dependent middle approach that produces different results on like facts.

The confusion among the lower courts is as stark as possible. Not a single court has yet cleanly joined the reasoning of another court. When the Eleventh Circuit declined rehearing en banc in *Tribue*, it declined an opportunity to reconcile circuit law with that of the Fourth Circuit over the dissent of two judges. *See Tribue* v. *United States*, 958 F.3d 1148, 1155-56 (11th Cir. 2020) (Martin & Pryor, JJ., dissenting from denial of rehearing en banc). When the Seventh Circuit faced the question presented, it expressly rejected the Fourth and Eleventh Circuits' approaches in favor of its own. *Dotson*, 949 F.3d at 321-322. And the First Circuit has adopted an *expressio unius* rule. *Báez-Martínez*, 950 F.3d at 133.

When presented with these four different lines of precedent, the Third Circuit below opted not to join any of them, forging a fifth path. It "reject[ed] the Fourth Circuit's broad rule." App., *infra*, 15a. It declined to join the Eleventh Circuit, holding that "[p]recedent does not allow the United States an opportunity to relitigate a sentence on collateral review by swapping old predicates for new ones." App., *infra*, 20a. And while it noted that its analysis "aligns more closely with the Seventh Circuit's fact-bound approach," it still created and adopted a new and distinct test of its own. *Id.* at 15a. The result is an intractable 1-1-1-1-1 split, which cries out for this Court's immediate review and resolution.

B. The issue is important, and this is a suitable vehicle for review

a. Review is further warranted because the question presented is extremely important. Thousands of federal prisoners are currently serving sentences enhanced by ACCA, and hundreds more receive new ACCA-enhanced sentences each year. *See* U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the*

Federal Criminal Justice System, at 6, 54 (Mar. 2018), https://perma.cc/NU57-PQ8Q.

Meanwhile, federal courts address hundreds of Section 2255 motions each year, many of which continue to seek resentencing under the ACCA after *Johnson*. The government itself has taken the position that the residual clause is implicated in a significant number of ACCA sentences. Supp. U.S. Br. at 49, *Johnson* v. *United States*, 576 U.S. 591 (2015) (noting that between 2008 and 2013, over 3,500 defendants were sentenced under ACCA and 13,500 under the identical career-offender sentencing guideline); accord *In re Williams*, 898 F.3d 1098, 1108 (11th Cir. 2018) (Martin, J., concurring) (noting that more than two thousand inmates had filed motions for relief alleging *Johnson* issues).

Indeed, in just the last three years, many courts have had to confront the question presented in this case, often reaching different outcomes on similar facts.[1] In the same

---

[1] See, *e.g.*, *United States* v. *Sharp*, 21 F.4th 1282 (11th Cir. 2021); *United States* v. *Haynes*, No. 19-12335, 2022 WL 3643740 (11th Cir. Aug. 24, 2022); *Bruten* v. *United States*, 814 F. App'x 486 (11th Cir. 2020); *Gray* v. *United States*, 796 F. App'x 610 (11th Cir. 2019); *Holmes* v. *United States*, 2022 WL 3641209, No. 22-10598-J (11th Cir. July 26, 2022); *United States* v. *Rumley*, 952 F.3d 538 (4th Cir. 2020); *United States* v. *Goins*, 845 F. App'x 232 (4th Cir. 2021); *United States* v. *Al-Muwwakkil*, 983 F.3d 748 (4th Cir. 2020); *United States* v. *Winbush*, 922 F.3d 227 (4th Cir. 2019); *Gattis* v. *United States*, No. 2:02-cr-01156, 2020 WL 615291 (D.S.C. Feb. 10, 2020); *Wilson* v. *United States*, No. 3:16-CV-464, WL 5820999 (M.D. Ala. Sept. 30, 2020); *Holmes* v. *United States*, No. 20-cv-21589, 2022 WL 473998, (S.D. Fla. Feb. 16, 2022); *Holifield* v. *United States*, No. 2:16-CV-445, 2020 WL 1228076 (M.D. Ala. Mar. 12, 2020); *Jackson* v. *United States*, Nos. 3:15-cv-75 and 3:13-cr-77, 2021 WL 1312753 (M.D. Fla. Apr. 8, 2021); *Pierce* v. *United States*, No. 1:16-cv-5107, 2020 WL 1272191 (D.N.J. Mar. 7, 2020); *Cameron* v. *United States*, No. 1:19-cv-00973, 2021 WL 3888066 (S.D. Ind. Aug. 19, 2021).

amount of time, this Court has issued at least six opinions interpreting the meaning of "serious drug offense" and "violent felony" under the ACCA.[2] Such opinions expand the universe of potentially meritorious resentencing claims and often prompt additional collateral challenges. It is thus essential that the Court clarify how lower courts are to determine when a resentencing is required—that is, when an acknowledged sentencing error may be deemed harmless on collateral review itself—once a previously identified predicate is no longer valid.

b. Variability in the lower courts' answers to the question presented is producing meaningfully different outcomes. When a defendant is granted resentencing pursuant to Section 2255, the government bears the burden of proof for each new predicate it wishes to present, and the defendant receives the full panoply of usual sentencing procedures and protections. See *Hodge*, 902 F.3d at 430; *Rumley*, 952 F.3d at 545. Defendants denied resentencing, on the other hand, are left to dispute the substitution of new predicates in the context of collateral review itself, where they bear the burden of proof and persuasion to *dis*prove the viability of each possible substitute predicate. *Hodge*, 902 F.3d at 430.

Determining whether a previous conviction qualifies as an ACCA predicate can be highly complicated, implicating the categorical approach and turning on the introduction of *Shepard* documents. *Taylor* v. *United States*, 495 U.S. 575, 602 (1990); *Shepard* v. *United States*, 544 U.S. 13, 26 (2005). Given the complexities of the required showings, which frequently touch on decades-old facts,

---

[2] *United States* v. *Taylor*, 142 S. Ct. 2015 (2022); *Wooden* v. *United States*, 142 S. Ct. 1063 (2022); *Borden* v. *United States*, 141 S. Ct. 1817 (2021); *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).

the question of which party bears the burdens of proof and production will often determine whether the prisoner remains subject to the ACCA's draconian enhancement.

And ACCA enhancements are themselves substantial. *See Welch*, 578 U.S. at 123 ("[A] person sentenced under [ACCA] will receive a prison term at least five years longer than the law otherwise would allow."). Prisoners allowed resentencing often receive vastly lower sentences, not even taking into consideration the "long" and "durable" tradition of resentencing judges' significant discretion to take into account intervening changes of law and evidence of rehabilitation. *See Concepcion* v. *United States*, 142 S. Ct. 2389, 2398-99 (2022) (quoting *Dean* v. *United States*, 581 U.S. 62, 66 (2017)); *Pepper* v. *United States*, 562 U.S. 476, 492 (2011).

c. Finally, this case presents the question with exceptional clarity. The issue raised in the petition was the only question posed by the Third Circuit in the certificate of appealability. App., *infra*, 8a. And the facts here are clean and undisputed: Bentley's plea agreement expressly enumerated just three ACCA predicates, at least one of which is no longer valid after *Johnson*. The PSR listed other prior offenses in the criminal history section, but as the Third Circuit recognized, it "did not specifically enumerate [any other] violent felonies" as ACCA predicates. App., *infra*, 16a. Yet, as the Third Circuit further recognized, "the Fourth Circuit considers only crimes that were specifically designated by the United States as ACCA predicates during sentencing." App., *infra*, 15a. There is thus no doubt that the question whether Bentley is entitled to resentencing turns entirely on proper resolution of the question presented.

C. The decision below is wrong

Review is further warranted because the Third Circuit's decision is incorrect. The government admits that

at least one of the convictions identified in the plea memorandum is not a valid ACCA predicate after *Johnson*. App., *infra*, 7a. It offends the most basic rules of due process for the government to rely on other predicate offenses, as to which Bentley was denied notice and an opportunity to be heard, as a basis to deny relief on collateral review following that concession.

1. A criminal defendant's due process rights extend to sentencing. *Beckles* v. *United States*, 137 S. Ct. 886, 896 (2017); *Betterman* v. *Montana*, 578 U.S. 437, 448 (2016). The demands of due process have "surpassing importance" in the presence of sentencing enhancements like the ACCA's. *Apprendi* v. *New Jersey*, 530 U.S. 466, 476 (2000). Such enhancements lengthen prison terms and, therefore, implicate concerns about "deprivation of liberty without 'due process of law.'" *Ibid.* (quoting U.S. Const. amend. XIV).

Of course, "the most basic of due process's customary protections is the demand of fair notice." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring); *accord Lankford* v. *Idaho*, 500 U.S. 110, 121 (1991) ("[F]air notice [is] the bedrock of any constitutionally fair procedure."). Notice is central to due process because "[p]arties whose rights are to be affected are entitled to be heard." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion) (quoting *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972)) (quotation marks omitted).

Applying these principles, the Court has held that a defendant subject to a recidivist enhancement therefore must "receive reasonable notice and an opportunity to be heard relative to the recidivist charge." *Oyler* v. *Boles*, 368 U.S. 448, 452 (1962); accord *Specht* v. *Patterson*, 386 U.S. 605, 610 (1967). In the ACCA context, due process thus "requires adequate notice of an ACCA predicate and a reasonable opportunity to dispute its use to enhance

a criminal sentence." App., *infra*, 18a; *see also Hodge*, 902 F.3d at 427. The fact that the ACCA imposes *mandatory* sentence enhancements reinforces the importance of due process protections. See *Irizarry* v. *United States*, 553 U.S. 708, 713-714 (2008) (explaining that due process concerns are even more pronounced when mandatory sentences are at issue).

By definition, notice in the ACCA context is adequate only if it affords a defendant the opportunity to contest a conviction's use as a predicate. The opportunity to be heard at an original sentencing hearing has "'little reality or worth unless one is informed' that a [particular] decision is contemplated." *Burns* v. *United States*, 501 U.S. 129, 136 (1991) (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Without notice that the government intends to rely on a specified conviction as an ACCA predicate, a defendant is denied both the "opportunity to contest the validity * * * of the prior conviction[s]" and their "applicability" as ACCA predicates. *Hodge*, 902 F.3d at 427.

It is no defense that a defendant was aware of the fact of a prior conviction, or that the conviction was simply included in the criminal history section of the PSR. Mere notice of the existence of a conviction—contrasted with notice of intent to use that conviction to support an ACCA enhancement—denies the defendant the opportunity to "dispute [the conviction's] use to enhance [his sentence]," in violation of his due process rights. App., *infra*, 8a; see also *Hodge*, 902 F.3d at 429 (quoting *Giordenello* v. *United States*, 357 U.S. 480, 488 (1958)). To say otherwise "conflates the factual existence of [a defendant's] conviction with the question of whether it qualifies as [a] [predicate] offense under ACCA." *Tribue*, 958 F.3d at 1151 (Martin, J., dissenting from denial of rehearing en banc). These are "distinct questions with different burdens." *Id.* at 1151-52.

Nor does the PSR's indistinct reference to Bentley's prior convictions for "robbery and burglary" immediately before the recitation of his criminal history suffice. App., *infra*, 4a (quoting PSR ¶ 33). The PSR's vague reference to robbery and burglary did not put Bentley on notice of which specific convictions the government might invoke to support his ACCA enhancement—not least because the North Carolina convictions the government now relies on are listed in the criminal history section of the PSR as "breaking and entering" and not "robbery and burglary." No circuit but the Eleventh would accept as adequate a PSR that said simply "Defendant is a career criminal because of his criminal history." A vague and generalized characterization in the PSR of a defendant's criminal history does not suffice if it does not specifically identify the relevant convictions. Instead, to provide a defendant with a sufficient opportunity to respond, "the Government must *identify* all convictions it wishes to use to support a defendant's ACCA sentence at the time of sentencing." *Hodge*, 902 F.3d at 430 (emphasis added).

This conclusion is reinforced in cases where, as here, the government specifically indicated an intent to rely on some, but not all, of a defendant's past convictions. The "express identification of some convictions as ACCA predicates implies an intentional exclusion of the others." *Hodge*, 902 F.3d at 427. In such a case, the government's "apparently intentional exclusion of some convictions from the group of convictions supporting an enhancement tells the defendant that he need not challenge the excluded convictions." *Id.* at 428. A "defendant's 'notice' as to the unlisted conviction" thus reasonably "drops out from the listing of other convictions." *Báez-Martínez*, 950 F.3d at 133.

The contrary approach of the Third, Seventh, and Eleventh Circuits requires a defendant to assume that *all* prior convictions are "on the menu" to support a potential

ACCA enhancement. App., *infra*, at 15a. This places "defense counsel in the precarious position of flagging" and challenging "potential predicates" that were not even contemplated by the government. *Tribue*, 958 F.3d at 1156 (Martin, J., dissenting). That expectation is both unreasonable and contrary to the adversarial testing expected of sentencing procedures. *See Burns*, 501 U.S. at 137 (noting that defense counsel "might be reluctant to suggest [grounds for a longer sentence], even for the purpose of rebutting [them]," raising the risk that a "critical sentencing determination will go untested by the adversarial process").

It is the government's responsibility, and not that of defense counsel, to identify and justify ACCA predicates. Due process requires that the government does so with sufficient clarity and specificity to provide the defendant a real opportunity to contest the conviction's use as a predicate offense. In the absence of such notice, defendants are "seriously prejudiced" by the government's attempts "to press seriatim alternative grounds for sentencing that could have been pressed simultaneously." *Vélez-Vargas*, 32 F.4th at 15.

2. Litigating under Section 2255 is no substitute for the required due process protections. History and tradition, given effect through the Fifth Amendment's guarantee of due process, place the burden of persuasion in criminal proceedings on the government. *In re Winship*, 397 U.S. 358, 364 (1970). The burden is on the government at sentencing, as well. See *Oyler*, 368 U.S. at 452. In the ACCA context, therefore, the government bears the burden of proving the validity and sufficiency of each of the previous convictions on which it seeks to rely as an ACCA predicate. *Hodge*, 902 F.3d at 430. The same is true at resentencing. *See Pepper* v. *United States*, 562 U.S. 476, 491 (2011).

Not so on collateral review. The burden in Section 2255 proceedings rests with the defendant, who, under the Third Circuit's holding below, must "prov[e] that the convictions supporting his ACCA enhancement are infirm." *Hodge*, 902 F.3d at 430. Allowing the government to introduce new predicates thus places defendants in the constitutionally untenable position of "'prov[ing] the negative' in order to avoid a stiffer sentence." *United States* v. *McDowell*, 888 F.2d 285, 291 (3d Cir.1989) (quoting *United States* v. *Lee*, 818 F.2d 1052, 1056-57 (2d Cir. 1987)). This turns standard sentencing procedures on their head and inverts the traditional due process protections to which a defendant is entitled. *Lee*, 818 F.2d at 1056 (allocation of the burden of proof at sentencing is a matter of due process because it mitigates "the risk of an erroneous deprivation of a defendant's liberty").

In addition, "opportunities for review of a habeas court's decision regarding the use of a particular conviction as an ACCA predicate are far more limited than the opportunities for review of a sentencing court's decision regarding the same." *Hodge*, 902 F.3d at 430. And allowing the government to "backfill" on collateral review creates the risk that a defendant would "serve his full sentence before he could challenge the reimposed sentence on appeal." *Vélez-Vargas*, 32 F.4th at 14-15.

Moreover, collateral review is governed by markedly different procedures. Unlike collateral review, resentencing requires a "revised presentence report," the opportunity for objection and "full presentence memoranda" regarding any newly proffered predicates, "a full sentencing hearing," including the production of evidence and judicial findings of fact, and the opportunity for review under "direct appeal standards, rather than [those] applicable to review of collateral proceedings." *Rumley*, 952 F.3d at 545.

In sum, collateral review is no substitute for an actual resentencing proceeding. See *Rummel* v. *Estelle*, 445 U.S. 263, 281 (1980) (suggesting that, in challenge to constitutionality of sentence, evidence of additional crimes relevant to recidivist status must be introduced in front of sentencing court rather than on collateral attack). Where, as here, a defendant receives no notice of the alternate predicates by the time of his original sentencing, only a full resentencing can satisfy the constitutional procedures required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

DANIEL J. TYRRELL
Chiesa Shahinian & Giantomasi PC
One Boland Drive
West Orange, NJ 07052
(973) 530-2286

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
CHARLES SEIDELL
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Petitioner

JANUARY 2023