No. 22A-___

In the Supreme Court of the United States

JEFFREY A. BENTLEY,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Jeffrey A. Bentley respectfully requests a 30-day extension of time, to and including January 12, 2023, within which to file a petition for a writ of certiorari to review the judgment of the Third Circuit in this case. The Third Circuit issued its opinion and judgment on September 14, 2022. Without extension, the time to file a petition for a writ of certiorari will expire on December 13, 2022. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). The Third Circuit's opinion is attached.

1. Bentley was charged in connection with the robbery of a liquor store in a three-count indictment. CA3 Op. 4. Count One charged Bentley with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). *Ibid.* Count Two alleged that Bentley had committed Hobbs Act robbery in violation of 18 U.S.C. § 1951. *Ibid.* Count Three charged Bentley with using and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii).

Bentley pleaded guilty to Counts One and Three of the indictment. Ordinarily, Count One would have carried a maximum penalty of ten years' imprisonment. See 18 U.S.C. § 924(a)(2). But under the Armed Career Criminal Act (ACCA), a defendant who has "three previous convictions by any court * * * for a violent felony or a serious drug offense, or both" is subject to a mandatory sentence of "not less than fifteen years." 18 U.S.C. § 924(e)(1). The factual admissions section of the plea-agreement memorandum contained an admission that Bentley "was convicted previously [of] three violent felonies," those being: "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." C.A. JA 29-30.

In preparation for the sentencing hearing, a probation officer prepared a presentencing report (PSR). The PSR provided Bentley's full criminal history, including offenses beyond the three conceded to constitute ACCA predicates. PSR ¶¶ 38-56. The PSR did not identify any specific felonies as ACCA predicates, stating only that "the defendant has previously been convicted of both robbery and burglary." PSR ¶ 33.

At sentencing, the district court "adopted" the "facts as represented in the presentence investigation report" without objection. C.A. JA 37; *see* CA3 Op. 5. The parties agreed without explanation beyond what appeared in the plea-agreement memo that Bentley was subject to ACCA's sentencing enhancement. CA3 Op. 6. The sentencing court referred to convictions from "Virginia and North Carolina," but no others. *Ibid*; *see* C.A. JA 54. The court sentenced Bentley pursuant to the ACCA to fifteen years' imprisonment on Count One.

2. In *Johnson* v. *United States*, 576 U.S. 591 (2015), this Court held that the "residual clause" of Section 924(e)(2)(B)(ii) is unconstitutionally vague, and thus void and unenforceable. The following year, the Court held that *Johnson*'s holding is retroactive, and thus applies in post-conviction challenges brought under 28 U.S.C. § 2255. See *Welch* v. *United States*, 578 U.S. 120, 135 (2016).

Shortly after this Court's decision in *Welch*, Bentley filed such a petition, arguing that his sentence was unconstitutional in the wake of *Johnson*. CA3 Op. 8. The Government conceded that Bentley's Delaware conviction for reckless endangering—one of the three identified in the factual admissions of the plea memorandum—no longer constitutes a violent felony. CA3 Op. 9. Nonetheless, it argued that that Bentley had other North Carolina convictions for breaking and entering with intent to commit larceny that would qualify him for the ACCA's sentencing enhancement. *Ibid.*

The district court denied Bentley's petition, accepting that the other burglary convictions were "relevant to deciding whether to grant relief" despite that they were not identified as ACCA predicates in the plea agreement. CA3 Op. 10 (quoting C.A. JA 3). The Third Circuit affirmed, holding that the Government can swap other prior convictions for an invalidated conviction in 2255 review if the swapped conviction was "reasonably on the menu of options as an ACCA predicate during the original criminal case." CA3 Op. 17.

3. The petition for certiorari will present the question whether a reviewing court may permissibly sustain an ACCA-enhanced sentence against a Section 2255 challenge on the basis of prior convictions that were never specifically identified as ACCA predicates in the original sentencing proceedings.

The courts of appeals are deeply and intractably divided on this question. The Fourth Circuit, for example, has held 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). Thus, where it has "identif[ied] only some ACCA-qualifying convictions" to support the enhancement, the government cannot "later raise additional convictions" on Section 2255 review, where "the burden of proof has shifted to the defendant." *Ibid.* To allow such a swap would deprive defendants of their "right to adequate notice" and "opportunity to contest the validity or applicability of the prior convictions." *Id.* at 427 (first quoting *United States v. O'Neal*, 180 F.3d 115, 125-26 (4th Cir. 1999), then quoting *United States v. Moore*, 208 F.3d 411, 414 (2d Cir. 2000)).

The Eleventh Circuit has taken the opposite approach. In that circuit, the government may defend an ACCA sentencing enhancement on the basis of any prior convictions regardless of whether they were designated as ACCA predicates in the original sentencing proceedings. *Tribue v. United States*, 929 F.3d 1326, 1332 (11th Cir. 2019) ("[T]here 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.").

The First, Seventh, and Third circuits have charted varying "middle course[s]." CA3 Op. 17. In the First Circuit, the government may substitute any predicate convictions as long as it did not specifically enumerate any predicates in the PSR, on something akin to an *expressio unius* theory. *United States v. Báez-Martínez*, 950 F.3d 119, 133 (1st Cir. 2020). The Seventh Circuit has adopted a more "narrow and limited" approach, allowing consideration of any conviction mentioned in the PSR, regardless of whether it was identified as an ACCA predicate. *Dotson v. United States*, 949 F.3d 317, 318 (7th Cir. 2020);

White v. United States, 8 F.4th 547, 552 (7th Cir. 2021). Finally, the Third Circuit below has taken a similar approach to the Seventh Circuit, requiring that "a prior conviction must have been reasonably on the menu of options as an ACCA predicate during the original criminal case." CA3 Op. 17.

The Third Circuit acknowledged both the importance of this question and the unsettled state of the law, granting a certificate of appealability to determine "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." CA3 Op. 10 (citing C.A. JA 15). And the court surveyed the deepening and acknowledged circuit split before casting its lot with the Seventh Circuit. *Ibid.*

The result of the disparity between the circuits is that a defendant's sentence after a successful *Johnson* petition will often vary based solely on geography. Such disparities in procedure cannot be tolerated for the thousands of defendants challenging their admittedly constitutionally infirm 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).

4. The decision below is wrong and the petition will show it warrants review. The demands of due process apply with special force to sentencing enhancements, like ACCA's, which require lengthened prison terms and, therefore, implicate "constitutional protections of surpassing importance," such as "the proscription of any deprivation of liberty without 'due process of law.'" *Apprendi* v. *New Jersey*, 530 U.S. 466, 476 (2000) (citation omitted). "[T]he most basic of due process's customary protections is the demand of fair notice." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1225 (Gorsuch, J., concurring); *accord Lankford* v. *Idaho*, 500 U.S. 110, 121 (1991) ("[F]air notice [is] the bedrock of any constitution-

ally fair procedure."). Thus, this Court has long held that a defendant subject to a recidivist enhancement must "receive reasonable notice and an opportunity to be heard relative to the recidivist charge." *Oyler* v. *Boles*, 368 U.S. 448, 452 (1962). In the ACCA context, permitting the Government to later rely on predicate convictions which it failed to identify as such during sentencing eviscerates this basic requirement.

4. Undersigned counsel was retained to prepare a petition in this case and has no prior familiarity with the facts. Additional time is therefore needed to review the record and conduct additional original research. Beyond that, undersigned counsel is engaged in several other matters with proximate due dates, including a motion to dismiss in *The Spruce House Partnership* v. *Cohnreznick LLP*, No. 24-C-022-004264 (C. Ct. Md.); a motion to dismiss in *Lackie Drug Store, Inc.* v. *Express Scripts*, No. 4:22-cv-1163 (E.D. Mo.); and a reply in support of a petition for certiorari due in *Ruiz* v. *Massachusetts*, No. 22-132 (S. Ct.).

For the foregoing reasons, the application for a 30-day extension of time, to and including January 12, 2023, within which to file a petition for a writ of certiorari in this case should be granted.

November 30, 2022

Respectfully submitted.

MICHAEL B. KIMBERLY
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com