No. 20-____

IN THE

Supreme Court of the United States

STEVEN DOTSON,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

If a defendant successfully challenges on collateral review one or more of the predicate convictions that the district court relied on to impose a sentence enhancement under the Armed Career Criminal Act (ACCA), may the Government substitute new predicate convictions on collateral review that it did not invoke at sentencing in order to maintain the ACCA enhancement?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Steven Dotson and Respondent United States of America. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

United States v. Steven Dotson, No. 1:11-cr-00056-WTL-DML, U.S. District Court for the Southern District of Indiana. Judgment entered Aug. 20, 2012.

United States v. Steven Dotson, No. 12-2945, U.S. Court of Appeals for the Seventh Circuit. Judgment entered Apr. 4, 2013.

Steven Dotson v. United States, No. 1:14-cv-1648-WTL-MPB, U.S. District Court for the Southern District of Indiana. Judgment entered Mar. 9, 2018.

Steven Dotson v. United States, No. 18-1701, U.S. Court of Appeals for the Seventh Circuit. Judgment entered Feb. 3, 2020.

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INTRODUCTION

This case presents an acknowledged circuit split over whether the Government may substitute new predicate convictions on collateral review to maintain a sentence enhancement under the Armed Career Criminal Act (ACCA) after a defendant successfully challenges one or more of the convictions that the district court relied on to impose the enhancement. The Fourth Circuit says no; the Eleventh Circuit says yes; and, here, the Seventh Circuit said sometimes. The question presented is outcome determinative, and the circuit courts have shown no inclination to resolve their disagreement.

OPINIONS BELOW

The Seventh Circuit's opinion (Pet.App. 1a–10a) is published at 949 F.3d 317 (2020). The District Court's opinion (Pet.App. 11a–15a) is unpublished but available at 2018 WL 1241995.

JURISDICTION

The Seventh Circuit entered judgment on February 3, 2020 (Pet.App. 1a), and denied Petitioner's petition for rehearing or rehearing *en banc* on April 7, 2020 (Pet.App. 16a). This Court's March 19, 2020 order extended the deadline for all petitions for writs of certiorari to 150 days from the date of the lower court order denying a petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The appendix contains the relevant constitutional (the Fifth Amendment) and statutory (18 U.S.C. § 922(g) and 18 U.S.C. §§ 924(a)(2), (e)) provisions.

STATEMENT

This case presents an important question concerning the Government's ability to substitute new predicate convictions on collateral review to maintain an ACCA enhancement after a defendant successfully challenges one or more of the convictions that the district court relied on to impose the enhancement.

1. Legal Background

a. Under 18 U.S.C. § 922(g)(1), it is unlawful for convicted felons to possess a firearm. Anyone who violates this prohibition ordinarily faces no more than 10 years in prison. *See* 18 U.S.C. § 924(a)(2). But the ACCA increases the penalty for § 922(g)(1) violations to a mandatory minimum of 15 years in prison if the violator has 3 or more prior convictions for a "serious drug offense" or "violent felony." *Id.* § 924(e)(1). Courts refer to such qualifying convictions as ACCA predicates.

The ACCA defines "serious drug offense" to mean certain enumerated federal drug offenses or any state offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" subject to a maximum term of imprisonment of 10 years or more. *Id.* § 924(e)(2)(A)(i)–(ii).

The ACCA defines "violent felony" in three separate clauses of § 924(e)(2)(B): (1) the elements clause covers any felony (i.e., "any crime punishable by imprisonment for a term exceeding one year") that "has as an element the use, attempted use, or threatened use of physical force against the person of another," *id.* § 924(e)(2)(B); (2) the enumerated-offense clause covers any felony that "is burglary, arson, or extortion,

[or] involves use of explosives," *id.* § 924(e)(2)(B)(ii); and (3) the residual clause once covered—before it was held unconstitutionally vague, *see Johnson v. United States*, 576 U.S. 591 (2015)—any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii).

Johnson's invalidation of the residual clause applies retroactively in cases on collateral review, like this one. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). And it means that an ACCA-enhanced sentence must rest only on convictions that qualify as ACCA predicates without regard to the residual clause.

b. Under 18 U.S.C. § 3552(a) and Rule 32 of the Federal Rules of Criminal Procedure, the U.S. Probation Office must prepare a presentence investigation report (PSR) of a convicted defendant before sentencing. Among other things, the PSR identifies all applicable Sentencing Guidelines, contains the defendant's criminal history, and calculates the defendant's offense level, criminal history category, and resulting sentencing range under the Guidelines. *See* Fed. R. Crim. P. 32(d)(1)–(2). The PSR must also "identify any factor relevant to . . . the appropriate kind of sentence." Fed. R. Crim. P. 32(d)(1)(D).

Under Rule 32, PSRs must indicate whether a defendant is subject to an enhanced sentence under the ACCA, which falls under its own Sentencing Guideline. *See* U.S.S.G. § 4B1.4. PSRs typically also identify the convictions that support the enhancement. *See* Fed. R. Crim. P. 32(d)(1); *see also, e.g.*, *Welch*, 136 S. Ct. at 1262 ("The Probation Office prepared a presentence report finding that Welch had three prior violent

felony convictions . . . ."). Rule 32 aside, defendants also have a constitutional due process right to receive "reasonable notice and an opportunity to be heard relative to [a] recidivist charge," such as the ACCA. *Oyler v. Boles*, 368 U.S. 448, 452 (1962).

The Probation Office, which is an arm of the district court (not the prosecution), *see* 18 U.S.C. § 3602(a), must give the PSR to the defendant, his or her attorney, and the prosecution at least 35 days before sentencing. *See* Fed. R. Crim. P. 32(e)(2). The defense and prosecution must then "state in writing any objections" to the PSR within 14 days after receiving it. Fed. R. Crim. P. 32(f)(1). The sentencing court may, however, "for good cause, allow a party to make a new objection at any time before sentence is imposed." Fed. R. Crim. P. 32(i)(1)(D).

As Rule 32 envisions, the Government routinely objects to PSRs when it disagrees with them. *See, e.g.*, *United States v. Span*, 789 F.3d 320, 323 (4th Cir. 2015) (noting the Government's "objection to the final PSR, arguing that Span was indeed an armed career criminal because his criminal record included four" alleged ACCA predicates); *United States v. Monus*, 128 F.3d 376, 395 (6th Cir. 1997) ("Both the government and defendant filed objections to certain enhancements in the PS[R] and argued their objections before the court during the pre-sentencing hearing.").

2. Factual background

a. On September 5, 2010, officers arrested Petitioner for brandishing a firearm during an alleged as-

sault and found a pistol on him during a search incident to arrest. CA JA 13.[1] He was later indicted for being a felon in possession of a firearm in violation of § 922(g)(1) and § 924(e) (i.e., the ACCA). CA JA 10. Petitioner's indictment identified six prior convictions (all under Indiana law) to support the charge:

- robbery;
- burglary;
- dealing in cocaine;
- marijuana possession;
- theft/receiving stolen property; and
- attempted robbery.

CA JA 10.

Before trial, the parties stipulated that Petitioner had been convicted of "several" felonies and that he had knowingly possessed the pistol. CA JA 13. The only dispute was whether the pistol was a "firearm" under 18 U.S.C. § 921(a)(3) when it could not fire without extensive repair. CA JA 14. Following a bench trial, the District Court held that the unusable pistol qualified as a "firearm" and found Petitioner guilty as charged under § 922(g)(1). CA JA 16–18.

b. Before sentencing, the Probation Office prepared a PSR for Petitioner. *See United States v. Dotson*, No. 1:11-cr-00056-WTL-DML, Dkt. 48 (S.D. Ind. Apr. 11, 2012) (filed under seal).[2] The PSR identified

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[1] CA JA refers to the joint appendix filed below. CA Dkt. 16.

[2] Petitioner has provided a courtesy copy of the PSR to the Supreme Court's Clerk's Office.

only three prior convictions as supporting an ACCA-enhanced sentence:

- robbery;
- dealing in cocaine; and
- attempted robbery.

Pet.App. 3a; *see also* PSR ¶ 24.

Based on these three (and only these three) convictions, the Probation Office determined that Petitioner was an armed career criminal under U.S.S.G. § 4B1.4 (and thus under the ACCA). Pet.App. 3a; *see also* PSR ¶ 24.

In a separate section of the PSR, the Probation Office listed Petitioner's criminal history, including other convictions not identified as ACCA predicates. Pet.App. 3a. One of these other convictions was for burglary. *Id.*; *see also* PSR ¶ 35. The PSR assigned the burglary conviction zero criminal history points, signaling that it would not be used to calculate Petitioner's Sentencing Guidelines range. PSR ¶ 35.[3]

Neither party filed written objections to the PSR. CA JA 21. And, at the sentencing hearing, neither party objected to the portion of the PSR concerning

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[3] Under the Sentencing Guidelines, the burglary conviction was not assigned criminal history points because (1) the sentence for this conviction was imposed the same day as the sentence for the dealing-in-cocaine conviction, (2) the two offenses were not separated by an intervening arrest, (3) the two sentences were concurrent, and (4) the drug offense had the longer of the two sentences (eight years versus six). *See* PSR ¶¶ 34–35; U.S.S.G. § 4A1.2(a)(2)(B). But the burglary conviction was still eligible to be a distinct ACCA predicate. *See* 18 U.S.C. § 924(e)(1) (requiring only that predicate offenses be "committed on occasions different from one another").

Petitioner's designation as an armed career criminal under § 924(e) or his criminal history. CA JA 26–27. When the District Court asked if "there [are] any other comments in regards to the presentence investigation from the Government," the prosecutor answered, "No, Your Honor." CA JA 26.

At the sentencing hearing, after amending the PSR to reflect Petitioner's acceptance of responsibility, the District Court "accept[ed] what now is the modified presentence report for the record and incorporate[d] the presentence report as a finding of fact." *Id.* The District Court next stated that Petitioner "has been determined to be an armed career criminal with felony convictions prior to his arrest on this case for armed robbery, dealing in cocaine, and an additional robbery" (referencing the attempted robbery). CA JA 27. There is no dispute that the District Court thus relied on only the three convictions identified as ACCA predicates in the PSR when it imposed Petitioner's sentence.

The District Court ultimately sentenced Petitioner to the bottom of his Guidelines range, as enhanced by the ACCA, which was 188 months (15 years 8 months), to be followed by 5 years of supervised release. CA JA 29, 46–47, 51–52. Without the ACCA enhancement, Petitioner's sentence would have been capped at 120 months. *See* 18 U.S.C. § 924(a)(2).

Petitioner appealed his conviction, but did not challenge any aspect of his sentence. The Seventh Circuit affirmed. CA JA 63; *see also United States v. Dotson*, 712 F.3d 369, 372 (7th Cir. 2013). On October 7, 2013, this Court denied Petitioner's petition for a writ of certiorari. *Dotson v. United States*, 571 U.S. 899 (2013).

3. Procedural background

a. On October 6, 2014, Petitioner timely filed a *pro se* motion under 28 U.S.C. § 2255,[4] arguing that his ACCA-enhanced sentence did not rest on three valid ACCA predicates. D.Ct. Dkt. 1. Mistakenly believing that the District Court had imposed his ACCA-enhanced sentence based on his burglary conviction, Petitioner argued that *Descamps v. United States*, 570 U.S. 254 (2013), rendered his burglary conviction an improper ACCA predicate. D.Ct. Dkt. 1 at 4.[5] In response, the Government argued that Petitioner had four—not three—ACCA predicates, such that his sentence could weather the loss of one, and that, in any event, *Descamps* did not affect whether Petitioner's burglary conviction qualified. D.Ct. Dkt. 4 at 3. Petitioner countered that the District Court found only three ACCA predicates at sentencing and that the Government could not now point to others. D.Ct. Dkt. 5 at 2–3.

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[4] *See* 28 U.S.C. § 2255(f)(1) (motion timely if filed within one year from "the date on which the judgment of conviction becomes final"). Petitioner's motion was delivered to prison authorities on October 6, 2014, and the court clerk docketed it on October 8, 2014. D.Ct. Dkt. 1 at 1, 9. Under the prison-mailbox rule, *pro se* prisoners effectuate a filing when they deliver it to prison authorities, not when the court clerk dockets it. *See, e.g.*, *Houston v. Lack*, 487 U.S. 266, 276 (1988).

[5] In *Descamps*, this Court addressed the distinction between the "categorical" and "modified categorical" approaches, which courts must use to assess the viability of enumerated offenses in § 924(e)(2)(B)(ii) (*e.g.*, burglary), and applied that analysis to California's burglary statute. *See* 570 U.S. at 257–59.

While Petitioner's § 2255 motion remained pending, this Court decided *Johnson*. Less than one month later, Petitioner invoked *Johnson* to argue that he had received an enhanced sentence under an unconstitutional provision of law. D.Ct. Dkt. 6 at 3.[6]

Soon after Petitioner raised *Johnson*, the District Court appointed counsel to represent him. Petitioner's appointed counsel and the Government jointly moved to stay the proceedings, citing the large volume of cases raising *Johnson* arguments and the hope that the parties could stipulate to relief. D.Ct. Dkt. 13 at 1.

The District Court granted a temporary stay, D.Ct. Dkt. 14, but the parties did not stipulate to any relief. Instead, the Government filed a supplemental brief arguing that *Johnson* offered Petitioner no relief and that, regardless, he still had three ACCA predicates after *Johnson*, pointing to only the following convictions:

- robbery;
- burglary; and
- attempted robbery.

D.Ct. Dkt. 18 at 3–7.

As noted, however, the District Court did *not* rely on Petitioner's burglary conviction when it imposed

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[6] Petitioner's motion was therefore also timely under § 2255(f)(3), under which a § 2255 motion is timely if filed within one year from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." *See also Welch*, 136 S. Ct. at 1265.

an ACCA-enhanced sentence, instead relying on his dealing-in-cocaine conviction as the third predicate.

After seeking eight extensions of time to file, Petitioner's appointed counsel finally filed an amended § 2255 motion that argued that Petitioner's convictions for attempted robbery and burglary were not qualifying ACCA predicates in light of *Johnson* and *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016), respectively. D.Ct. Dkt. 39. Like Petitioner's initial *pro se* motion, this filing mistakenly assumed that the District Court had imposed an ACCA-enhanced sentence based on Petitioner's burglary conviction. While Petitioner's § 2255 motion remained pending, his appointed counsel withdrew from the case. Petitioner then filed a supplemental *pro se* brief again arguing, among other things, that the Government could not rely on any prior convictions beyond "the 3 ACCA predicates relied on by the [c]ourt," as there was "a bar to substituting other convictions as urged by the United States." D.Ct. Dkt. 45 at 3.

On March 9, 2018, the District Court dismissed Petitioner's § 2255 motion with prejudice and denied a certificate of appealability under 28 U.S.C. § 2253(c). Pet.App. 11a, 14a–15a. The court held that Petitioner did not adequately challenge his dealing-in-cocaine conviction and that, regardless, his robbery, attempted robbery, and burglary convictions qualified as ACCA predicates even after *Johnson*. Pet.App. 12a–14a. The District Court did not address Petitioner's argument that the Government could not substitute new ACCA predicates on collateral review.

On March 29, 2018, Petitioner timely filed a notice of appeal. D.Ct. Dkt. 57; *see also* Fed. R. App. P. 4(a)(1). The Seventh Circuit later granted Petitioner's request

for a certificate of appealability as to whether his attempted-robbery conviction was for a "violent felony" under § 924(e)(2)(B). CA Dkt. 6 at 1.[7] The Seventh Circuit therefore had appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253. The Seventh Circuit also appointed the undersigned counsel to represent Petitioner on appeal. CA Dkt. 7.

b. On appeal, Petitioner argued that his attempted-robbery conviction did not qualify as a violent felony in light of *Johnson*, which held the residual clause is unconstitutionally vague,[8] and *United States v. D.D.B.*, 903 F.3d 684, 693 (7th Cir. 2018), which held that Indiana attempted robbery is not a crime of violence under a provision virtually identical to the ACCA's elements clause. (Nor is attempted robbery an enumerated offense under the ACCA's enumerated-offense clause.)

Without that conviction, Petitioner argued, only two of the three ACCA predicates identified in his PSR and relied on by the District Court at sentencing remained—not enough to support an ACCA enhancement. Petitioner further noted that, on indistinguishable facts, the Fourth Circuit refused to permit the Government to substitute new ACCA predicates on

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[7] The Seventh Circuit also directed the parties to address whether Petitioner's dealing-in-cocaine conviction was a "serious drug offense under § 924(e)(2)(A)(ii)." CA Dkt. 6 at 1. But the Seventh Circuit later held that it is. *See, e.g.*, *United States v. Williams*, 931 F.3d 570, 574–76 (7th Cir. 2019). Petitioner does not press this claim here.

[8] Before *Johnson*, "[m]ost earlier litigation about attempt offenses under the [ACCA]," such as Indiana attempted robbery, "ha[d] involved the residual clause." *Morris v. United States*, 827 F.3d 696, 698 n.1 (7th Cir. 2016) (Hamilton, J., concurring).

collateral review. *See United States v. Hodge*, 902 F.3d 420, 428 (4th Cir. 2018).

After briefing but before oral argument, the Eleventh Circuit decided *Tribue v. United States*, 929 F.3d 1326 (11th Cir. 2019), which—again, on facts indistinguishable from those present here (and in *Hodge*)—*did* permit the Government to substitute a new ACCA predicate on collateral review. *Id.* at 1332.

c. On February 3, 2020, the Seventh Circuit affirmed. Pet.App. 1a–10a. The court first agreed with Petitioner that, in light of *D.D.B.* (and thus *Johnson*), Indiana attempted robbery no longer qualified as a violent felony under § 924(e)(2)(B). Pet.App. 5a.

The Seventh Circuit further acknowledged that (1) Petitioner's PSR identified only three ACCA predicates (including the now-unavailable attempted robbery conviction), (2) the District Court imposed the ACCA enhancement based on those three convictions and no others, and (3) the Government did not object to the PSR. Pet.App. 3a–4a. But the Seventh Circuit nonetheless allowed the Government to substitute a new conviction (here, Petitioner's burglary conviction) as an ACCA predicate on collateral review for two reasons.

First, because Petitioner's indictment listed the burglary conviction among his six other prior felonies and referenced § 924(e), the court reasoned that the indictment adequately informed him that the Government might rely on the burglary conviction to support an ACCA enhancement—even though the PSR subsequently indicated otherwise. Pet.App. 2a, 7a–8a.

Second, because Petitioner *mistakenly* believed in his § 2255 filings (in 2014) that the District Court had

sentenced him (in 2012) based on the burglary conviction, the Seventh Circuit held no "fundamental unfairness arising from a lack of notice" resulted from permitting the Government to substitute the burglary conviction to maintain the ACCA enhancement on collateral review. Pet.App. 2a, 7a–8a, 10a.

d. The Seventh Circuit noted that the Fourth and Eleventh Circuits had expressly addressed the same question and reached directly contrary answers: The Eleventh Circuit permits the Government to substitute ACCA predicates on collateral review even if the Government failed to object to the delineation of ACCA predicates at sentencing, *see Tribue*, 929 F.3d at 1332–33, whereas the Fourth Circuit does not, *see Hodge*, 902 F.3d at 428. Pet.App. 8a–9a. The Seventh Circuit described both competing approaches as "broader" than its own and declined to follow either one. *Id.* The court thus recognized that Petitioner would have prevailed under the Fourth Circuit's "broader" approach. Pet.App. 9a.

e. On March 19, 2020, Petitioner timely filed a petition for rehearing or rehearing *en banc*, *see* CA Dkt. 44; Fed. R. App. P. 40(a)(1)(A), arguing in part that the panel's opinion created a conflict with the Fourth Circuit. The petition was denied. Pet.App. 16a.

This petition follows.

REASONS FOR GRANTING THE PETITION

There is an acknowledged circuit split over the Government's ability to substitute new ACCA predicates on collateral review, and the courts of appeals have declined to resolve the conflict. The decision below is also fundamentally wrong, as it mangles the concept of notice and relieves the Government of its

obligation to object to a PSR. Finally, the question presented is important, and this case is an excellent vehicle for deciding it: The question was clearly raised and decided below and is outcome-determinative for Petitioner.

I. The courts of appeals are split 1-1-1 on whether the Government may substitute new ACCA predicates on collateral review.

The courts of appeals are split 1-1-1 on whether the Government may substitute new ACCA predicates on collateral review, with judges of both the Seventh and Eleventh Circuits recognizing the conflict. The Seventh and Eleventh Circuits have denied petitions for *en banc* review to remedy the split, confirming that the courts of appeals are unlikely to align their approaches.

A. The Fourth Circuit does not permit the Government to substitute new ACCA predicates on collateral review.

The Fourth Circuit has held that the Government may not substitute new ACCA predicates on collateral review if the Government failed to object to the delineation of ACCA predicates at or before sentencing.

1. In *United States v. Hodge*, 902 F.3d 420, 426 (4th Cir. 2018), the Fourth Circuit addressed whether a defendant "can show that his ACCA-enhanced sentence is unlawful where the sentencing court relied on three ACCA predicate convictions, one of those three predicates is no longer valid, and the Government has pointed to yet another potential ACCA predicate conviction that was listed in [the] PSR but never designated nor relied upon as an ACCA predicate." Ruling in the defendant's favor, the Fourth Circuit concluded

that "the Government must identify all convictions it wishes to use to support a defendant's ACCA sentence enhancement at the time of sentencing." *Id.* at 430.

2. The Fourth Circuit offered two distinct reasons for its holding: (1) defendants are entitled to notice before sentencing of not only the Government's intent to seek an ACCA enhancement but also the convictions that support the enhancement; and (2) all parties must assert their objections to a PSR at or before sentencing.

a. *First*, the Fourth Circuit noted that "[d]efendants have 'a right to adequate notice of the government's plan to seek [an ACCA] enhancement and of the convictions that may support that enhancement.'" *Id.* at 427 (alteration in original) (quoting *United States v. O'Neal*, 180 F.3d 115, 125–26 (4th Cir. 1999)). "Such notice," the Fourth Circuit observed, "is necessary to give the defendant 'an opportunity to contest the validity or applicability of the prior convictions upon which [the] statutory sentencing enhancement is based.'" *Id.* (quoting *United States v. Moore*, 208 F.3d 411, 414 (2d Cir. 2000)). "This is typically done by listing the supporting convictions in the defendant's PSR." *Id.* (citing Fed. R. Crim. P. 32(d); *O'Neal*, 180 F.3d at 126).

And "[w]here the PSR specifically designates certain convictions as ACCA predicates and declines to designate others, it notifies the defendant that only the designated predicates will be used to support the ACCA enhancement." *Id.* "Indeed," the Fourth Circuit continued, "this express identification of some convictions as ACCA predicates implies an intentional exclusion of the others." *Id.* The court further expressed concern that a contrary rule would cause "defendants

to object to these excluded convictions in anticipation of arguments the Government might make in a subsequent proceeding," which "would undermine the adversarial process." *Id.* at 428.

"In sum," the Fourth Circuit concluded, "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.*

b. *Second*, the Fourth Circuit stressed that, under Rule 32, *both* parties are obliged to identify any errors in the PSR at or before the time of sentencing. *See id.* at 428–29 (citing Fed. R. Crim. P. 32(f)). This "reflects the general principle that, '[i]f a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue.'" *Id.* at 429 (alteration in original) (quoting *Puckett v. United States*, 556 U.S. 129, 134 (2009)); *see also id.* (citing *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 357 (2006) (explaining that "the basic framework of an adversary system . . . require[s] parties to present their legal claims at the appropriate time for adjudication")).

Although courts more often impose this rule against defendants, it "applies to the defense and the prosecution alike." *Id.* (quoting *United States v. Canty*, 570 F.3d 1251, 1256 (11th Cir. 2009)). Given that "a defendant's failure to challenge the PSR's designation of a particular conviction as an ACCA predicate in a timely manner bars him from raising such a challenge on collateral review," *id.* (citing *Sanchez-Llamas*, 548 U.S. at 351; *United States v. Maybeck*, 23 F.3d 888,

891 (4th Cir. 1994)), the Fourth Circuit saw "no reason to hold the Government to a different standard," *id.*

The Fourth Circuit further highlighted the unfairness in permitting the Government to substitute new convictions on collateral review. For one thing, at sentencing, the Government bears the burden of proving "that the defendant has three prior ACCA-qualifying convictions," whereas, "on collateral review[,] the defendant has the burden of proving that the convictions supporting his ACCA enhancement are infirm." *Id.* at 429–30. In addition, the court noted that "the 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." *Id.* at 430 (citing 28 U.S.C. § 2253(c)(1)).[9]

In short, the Fourth Circuit observed, "the Government 'has already been given one full and fair opportunity to offer whatever' support for [the defendant's] ACCA enhancement 'it could assemble.'" *Id.* at 429 (quoting *United States v. Parker*, 30 F.3d 542, 553 (4th Cir. 1994)). "'Having failed to seize that opportunity,' the Government 'should not be allowed to introduce' that conviction as an additional predicate for the first time on collateral review." *Id.* (quoting *Parker*, 30 F.3d at 553).

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[9] For example, federal prisoners cannot appeal the denial of a § 2255 motion without first obtaining a certificate of appealability, which requires "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1)–(2).

B. In contrast, the Eleventh Circuit permits the Government to substitute new ACCA predicates on collateral review.

Rejecting the Fourth Circuit's approach, the Eleventh Circuit has held that the Government may substitute new ACCA predicates on collateral review even if the Government failed to object to the delineation of ACCA predicates at or before sentencing.

1. In *Tribue v. United States*, 929 F.3d 1326 (11th Cir. 2019), the Eleventh Circuit addressed virtually identical facts as those present in *Hodge* (and here): The defendant's PSR identified only three ACCA predicates; the PSR listed additional convictions in the criminal history section; the Government did not object to the PSR's delineation of ACCA predicates; *Johnson* later rendered one of the three relied-upon ACCA predicates invalid; and, on collateral review, the Government sought to substitute a different conviction listed in the PSR's criminal history section but not designated an ACCA predicate. *See id.* at 1328–30. Unlike the Fourth Circuit, however, the Eleventh Circuit allowed the substitution. *See id.* at 1332–33.

2. a. The Eleventh Circuit began by holding that the defendant needed to show that "there were not at least three other prior convictions that could have qualified under [§ 924(e)(2)(B)] as a violent felony, or as a serious drug offense." *Id.* at 1331 (quoting *Beeman v. United States*, 871 F.3d 1215, 1221 (11th Cir. 2017)). Because the defendant undisputedly had another conviction that qualified as a serious drug offense, the Eleventh Circuit held that he had "not proven that there were not other convictions that could have qualified." *Id.* at 1332.

b. The Eleventh Circuit then turned to the defendant's argument "that the government effectively waived reliance on the use of any other convictions outside of the three identified as ACCA predicates in the PS[R]." *Id.* The court rejected this argument for three reasons.

First, the court observed that "the factual existence of [the defendant's substituted] conviction was not disputed at the original sentencing," because the conviction was listed elsewhere in the PSR and the defendant "admitted that he had all of the convictions listed in the PS[R]." *Id.*

Second, the court also observed that the defendant raised no objection to the ACCA enhancement at his original sentencing (even though, before *Johnson*, the enhancement's applicability could not have been disputed). *Id.*

Third, according to the Eleventh Circuit, "there is no requirement that the government prospectively address whether each and every conviction listed in the criminal history section of a PS[R] 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.* "In other words," the court continued, "where 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." *Id.* And if the defendant "had no way to anticipate *Johnson*'s invalidation of the residual clause in the ACCA, and therefore did not object, then the government equally did not either." *Id.*

c. Despite being well aware of *Hodge*—which was decided just before the Government filed its opposition brief and cited heavily in the defendant's reply—the Eleventh Circuit did not address it. Consequently, the Eleventh Circuit failed to grapple with the two distinct reasons for the Fourth Circuit's approach—notice and timely objection.

3. The Eleventh Circuit denied a petition for rehearing *en banc* over a vigorous two-judge dissent. *See Tribue v. United States*, 958 F.3d 1148 (11th Cir. 2020) (Martin, J., dissenting from the denial of rehearing *en banc*). Agreeing with the Fourth Circuit, the dissent argued that, "[w]hen a defendant is sentenced under ACCA based on specified prior convictions, and then we learn, on collateral review, that fewer than three of the relied-upon convictions are still valid, this defendant is entitled to relief." *Id.* at 1150.

The dissent further noted that the Eleventh Circuit "create[d] a split with the Fourth and Seventh Circuits, which confronted the same question presented [in *Tribue*] and came out differently." *Id.*; *see also id.* at 1155–57. The dissent observed that "[b]oth the Fourth and Seventh Circuits . . . reject the approach [the Eleventh Circuit] took in [*Tribue*]—where the first time any party mentioned the possibility of relying on a new and different conviction to justify [the] ACCA sentence was after [the defendant] filed his § 2255 petition." *Id.* at 1157.

In conclusion, the dissent argued that "[t]he government should affirmatively identify the particulars of a defendant's criminal history that cause it to seek an ACCA sentence." *Id.*

C. The Seventh Circuit permits the Government to substitute new ACCA predicates in certain circumstances.

In this case, the Seventh Circuit expressly declined to follow either the Fourth or Eleventh Circuit, holding instead that the Government may substitute new ACCA predicates on collateral review in certain circumstances—even if the Government failed to object to the delineation of ACCA predicates at or before sentencing.

1. As in *Hodge* and *Tribue*, the Seventh Circuit acknowledged that Petitioner's PSR identified only three ACCA predicates; the PSR listed additional convictions in the criminal history section; the Government did not object to the PSR's list of ACCA predicates; *Johnson* rendered one of the three relied-upon ACCA predicates invalid; and, on collateral review, the Government sought to substitute a different conviction listed in the PSR's criminal history section but not designated an ACCA predicate at sentencing. Pet.App. 3a–5a. On these identical facts, the Seventh Circuit held that the Government could substitute a different conviction to maintain an ACCA-enhanced sentence in certain circumstances, and in so holding it rejected both the Fourth and Eleventh Circuits' approaches. *See* Pet.App. 5a–10a.

2. a. The Seventh Circuit framed the inquiry as "whether fundamental unfairness arising from a lack of notice would befall [Petitioner] by allowing his 1993 Indiana burglary conviction . . . to sustain his sentence as an armed career criminal." Pet.App. 7a. The court answered this question in the negative for two reasons.

First, the Seventh Circuit stressed that Petitioner's indictment listed his burglary conviction "among [the] other prior felonies as part of charging a violation of § 922(g) *and* § 924(e)." *Id.* (emphasis in original). According to the court, even though the PSR did not list this conviction as an ACCA predicate, the older indictment nonetheless "informed [Petitioner] the government *may* rely on his burglary conviction . . . to show he had three qualifying ACCA predicates and thus would face an enhanced sentence upon a conviction." Pet.App. 8a (emphasis added).

Second, the Seventh Circuit observed that Petitioner's § 2255 filings in the District Court "reflect[ed] the belief, albeit a mistaken one, that the district court had counted the 1993 burglary conviction . . . as a qualifying ACCA predicate at the original sentencing." *Id.*

"In these circumstances," the court saw "no unfairness in leaving intact [Petitioner's] sentence." *Id.* The Seventh Circuit did not address the second of the Fourth Circuit's two rationales in *Hodge*—the Government's failure to object to the delineation of ACCA predicates at or before sentencing.

b. In reaching its conclusion, the Seventh Circuit expressly considered and rejected the Eleventh and Fourth Circuits' competing approaches.

First, the Seventh Circuit rejected the Eleventh Circuit's "broad[] strokes" rule that "the government may rely on a conviction to serve as an ACCA predicate even if the conviction was not among those listed in the PSR as, or determined at sentencing to be, a

predicate." *Id.*[10] The court saw the Eleventh Circuit's rule as raising "concerns about notice to defendants." Pet.App. 9a.

Second, the Seventh Circuit also rejected the Fourth Circuit's "broader holding" that "the government c[annot] support an ACCA enhancement with a conviction listed in the PSR but not previously designated at sentencing as a predicate." *Id.* Although the Seventh Circuit (unlike the Eleventh) shared the Fourth Circuit's notice concerns, it believed they were "not offended here" because Petitioner's § 2255 filings in the District Court indicated that he mistakenly "believed . . . the district court counted his 1993 Indiana burglary conviction . . . as an ACCA predicate at his original sentencing." Pet.App. 10a. The court did not address the fact that Petitioner's § 2255 papers were filed years after his sentencing.

The Seventh Circuit also expressed concern that the Fourth Circuit's holding "risks producing expansive litigation at sentencing over whether each and every prior felony in a defendant's criminal history constitutes a qualifying ACCA predicate." *Id.*

c. The Seventh Circuit was well aware of the conflict between the circuits on this issue but nonetheless denied rehearing or rehearing *en banc*. Pet.App. 16a.

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[10] The Seventh Circuit observed that the Tenth Circuit "seem[ed] to have reached a similar conclusion." Pet.App. 9a (citing *United States v. Garcia*, 877 F.3d 944, 956 (10th Cir. 2017)). The Tenth Circuit did not squarely address the question presented because the defendant did not contest on appeal the Government's ability to substitute.

II. The Seventh and Eleventh Circuits' approaches are incorrect.

The Fourth Circuit reached the correct result in *Hodge*, and both the Seventh and Eleventh Circuits' contrary approaches are fundamentally flawed. Although the Seventh and Eleventh Circuits committed distinct errors, both Circuits' approaches threaten to erase any requirement that defendants receive adequate notice of the convictions supporting an ACCA enhancement at or before sentencing. Both Circuits further relieve the Government of its Rule 32 obligation to timely object to a PSR at or before sentencing. Worse, both approaches shift litigation over ACCA predicates from the original sentencing to collateral proceedings where defendants bear the burden of proof, lack the right to counsel, and have limited opportunities for appellate review.

A. The Seventh Circuit committed at least three separate errors.

The Seventh Circuit's decision in this case is incorrect for at least three reasons: It (1) turns the concept of notice on its head; (2) eliminates the Government's obligation to object to a PSR's delineation of ACCA predicates; and (3) rests on ill-founded policy concerns.

1. a. Starting with notice, the Seventh Circuit believed the list of convictions in Petitioner's indictment adequately informed him that the Government "may rely on his burglary conviction . . . to show he had three qualifying ACCA predicates and thus would face an enhanced sentence upon a conviction"—even though the PSR omitted that conviction from its list of

ACCA predicates. Pet.App. 8a. But a discrepancy between an indictment's and PSR's list of ACCA predicates indicates that the Government has decided *not* to rely on the convictions omitted from the PSR's list. As the Fourth Circuit noted, the "express identification of some convictions as ACCA predicates implies an intentional exclusion of the others." *Hodge*, 902 F.3d at 427. And when the PSR intentionally excludes "some convictions . . . supporting an enhancement," that "tells the defendant that he need not challenge the excluded convictions." *Id.* at 428.

Here, the indictment listed Petitioner's burglary conviction as one of *six* prior felony convictions that the Government believed potentially made him eligible for an ACCA-enhanced sentence. CA JA 10. But the PSR omitted the burglary conviction—as well as two others (a conviction for possession of marijuana and a conviction for theft and receipt of stolen property)—from its list of *three* ACCA predicates. Pet.App. 3a. And the Government did not object to the PSR's delineation of ACCA predicates or to the District Court's recitation of those three ACCA predicates at the sentencing hearing, CA JA 21, 26, signaling that it had abandoned reliance on the omitted convictions.

Indeed, the Government no longer argues that the two other convictions listed in Petitioner's indictment but omitted from his PSR's list of ACCA predicates qualify as ACCA predicates—even though the indictment once said they qualified.

Under the panel's reasoning, however, a defendant should assume that the Government intends to rely on every conviction listed in an indictment as an ACCA predicate and presumably should raise any

available challenge to all such convictions at sentencing—even if they are omitted from a PSR's list of ACCA predicates. Indeed, defendants must raise such challenges to omitted predicates if they wish to take advantage of the assistance of counsel, the Government's burden of proof, and the right to an appeal—lest the Government seek to substitute new convictions years later on collateral review when they have no right to counsel,[11] bear the burden of proof,[12] and have limited opportunities for appellate review. Yet, as the Fourth Circuit observed, placing the onus on defendants "to object to . . . excluded convictions in anticipation of arguments the Government might make in a subsequent proceeding would undermine the adversarial process." *Hodge*, 902 F.3d at 428.

b. The Seventh Circuit similarly erred in concluding that principles of notice were "not offended" because Petitioner *mistakenly* stated in his § 2255 filings (in 2014) that his burglary conviction had served as an ACCA predicate at sentencing (in 2012). Pet.App. 10a.

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[11] Applying *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), or *Coleman v. Thompson*, 501 U.S. 722, 755 (1991), the federal courts of appeals have uniformly held there is no constitutional right to counsel in § 2255 proceedings. *See* Emily G. Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 Hastings L.J. 541, 586–87 (2009). Federal courts instead have discretion to appoint counsel. *See* 28 U.S.C. § 2255(g); 18 U.S.C. § 3006A(a)(2)(B).

[12] *See* 2 Fed. Standards of Review § 13.11 (2019) ("Prisoners advancing Section 2255 motions bear the burden to show by a preponderance of the evidence that they are entitled to relief." (collecting cases)).

The court's conclusion undermines the very point of notice: To be meaningful, notice must occur *before* the event in question. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) ("It is . . . fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)). Consistent with this principle (not to mention common sense), this Court has held that due process requires, at a minimum, "reasonable notice and an opportunity to be heard relative to [a] recidivist charge" before sentencing (even if not before trial). *Oyler*, 368 U.S. at 452; *see also Moore*, 208 F.3d at 414 ("It is settled that due process requires that a defendant have notice and an opportunity to contest the validity or applicability of the prior convictions upon which a statutory sentencing enhancement is based."); *O'Neal*, 180 F.3d at 125–26 (same). And a defendant's undisputed mistake years later cannot demonstrate that he or she received reasonable notice *before* sentencing.

2. The Seventh Circuit also ignored a second, dispositive reason barring the Government from substituting Petitioner's burglary conviction on collateral review: The Government declined to object to the PSR.

The law is clear: Both parties must raise objections to a PSR at the time of sentencing. *See* Fed. R. Crim. P. 32(f); *see also Puckett*, 556 U.S. at 134 ("If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue."). To be sure, courts more often impose this rule against criminal

defendants.[13] But this timely objection rule "applies to the defense and the prosecution alike," because there is "no reason to hold the Government to a different standard." *Hodge*, 902 F.3d at 429.[14]

The Seventh Circuit should have treated like alike: When defendants would be barred from making arguments on collateral review that were available to them at sentencing, then so, too, must the Government. *See id.*

3. The Seventh Circuit further expressed two policy concerns to justify its holding. Both are ill-founded.

First, the Seventh Circuit speculated that ruling for Petitioner may result in "expansive litigation at sentencing over whether each and every prior felony in a defendant's criminal history constitutes a qualifying ACCA predicate." Pet.App. 10a. As the Fourth Circuit observed, however, PSRs "*often* designate[]

[13] On direct appeal, defendants who fail to object to their PSR must overcome waiver or forfeiture. *See, e.g.*, *United States v. Benjamin*, 30 F.3d 196, 197 (1st Cir. 1994) ("[A] defendant may not challenge the findings in his PSR if he has failed to object to that report in the district court."); *United States v. Visman*, 919 F.2d 1390, 1394 (9th Cir. 1990) (same). But on collateral review, they "must clear a significantly higher hurdle" and "show both (1) 'cause' excusing [the] procedural default, and (2) 'actual prejudice' resulting from the error[]." *United States v. Frady*, 456 U.S. 152, 166–67 (1982); *see also, e.g.*, *Cross v. United States*, 892 F.3d 288, 294–96 (7th Cir. 2018) (applying the cause-and-prejudice standard to a defendant's failure to challenge the ACCA's residual clause).

[14] *See also, e.g.*, *United States v. Pflum*, 556 F. Supp. 2d 1254, 1256 (D. Kan. 2008) ("By agreeing that it has no unresolved objections to the PSR, the government has forfeited its chance to challenge the probation officer's recommendations in the PSR.").

more than three convictions as ACCA predicates." *Hodge*, 902 F.3d at 428 n.4 (emphasis in original). And litigation over whether prior convictions qualify as ACCA predicates is routine at sentencing, so the Fourth Circuit's approach does not drastically alter what already occurs in federal courts every day.

In addition, addressing all ACCA predicates at the original sentencing is more efficient than doing so seriatim on collateral review. It also ensures that defendants may challenge the predicates at the original sentencing when they have the right to counsel, rather than on collateral review when they do not. *Cf. Oyler*, 368 U.S. at 452 ("[I]t would have been an idle accomplishment to say that due process requires [the assistance of] counsel [to answer a recidivist charge at sentencing] but not the right to reasonable notice and [an] opportunity to be heard."). In light of the ACCA's hefty mandatory minimum, this is not too much to ask of the Government or our district courts.

Second, the Seventh Circuit expressed concern that requiring the Government to identify all potential ACCA predicates could turn sentencing hearings "into full-blown, prolonged, and extraordinarily difficult exercises over questions where the answers may never matter." Pet.App. 10a. But if there are "extraordinarily difficult" ACCA questions, the district court can choose to abstain from ruling on them if the ruling will not affect sentencing. *See* Fed. R. Crim. P. 32(i)(3) ("At sentencing, the court . . . must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is *unnecessary* either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." (emphasis added)).

Even if a district court exercises that discretion and avoids ruling on a thorny ACCA dispute that will not affect sentencing, requiring the Government to identify all potential ACCA predicates at the original sentencing still serves other vital purposes: It ensures that defendants receive notice of the convictions that may support an ACCA enhancement before sentencing, and it further ensures that they can challenge those alleged predicates with the assistance of counsel.

B. The Eleventh Circuit also committed three distinct errors.

The Eleventh Circuit's holding in *Tribue* also does not stand up to scrutiny: It (1) improperly shifts the burden of proof for an ACCA enhancement onto defendants; (2) ignores the concept of notice and Rule 32; and (3) holds criminal defendants to a higher standard than the Government.

1. At the outset of its opinion, the Eleventh Circuit emphasized that the defendant undisputedly had more than three convictions that qualified as a "serious drug offense" and so he had "not proven that there were not other convictions that could have qualified" as ACCA predicates. *Tribue*, 929 F.3d at 1332. As Judge Martin noted in dissent from the denial of rehearing *en banc*, the Eleventh Circuit's holding "incorrectly relieves the government of the burden of proving that [a defendant] is eligible for a longer sentence under ACCA and [instead] places the burden on him to prove he's not." *Tribue*, 958 F.3d at 1150 (Martin, J., dissenting from the denial of rehearing *en banc*). The holding also shifts the burden of proof onto defendants on collateral review—"a more demanding arena for inmates seeking relief" as they do not have the right to counsel and "the opportunities for review . . . are far

more limited." *Id.* at 1151 (quoting *Hodge*, 902 F.3d at 430).

2. The Eleventh Circuit's threshold inquiry also ignores core due process concerns. The relevant inquiry is not whether, as a purely factual matter, the defendant had more than three convictions that could have qualified as ACCA predicates at the time of sentencing. It is whether the defendant had notice that those convictions may be used as ACCA predicates before sentencing, and whether the Government's failure to comply with Rule 32 should be treated the same as a defendant's. *Supra* pp. 15–17; 25–28.

3. The Eleventh Circuit similarly erred in stressing that the defendant admitted he had all the convictions listed in the criminal history section of his PSR and "raised no objection to [the] ACCA enhancement" at his original sentencing. *Tribue*, 929 F.3d at 1332. As Judge Martin pointed out, this "conflates the factual existence of [a defendant's] conviction with the question of whether it qualifies as a[n] [enhancing] offense under ACCA," which are "distinct questions with different burdens." *Tribue*, 958 F.3d at 1151–52 (Martin, J., dissenting). And "[t]here is simply no justice in faulting [a defendant] because [he] did not raise a fruitless objection to [a conviction that] was never raised at [the] sentencing hearing" as an ACCA predicate. *Id.* at 1152.

What is more, irrespective of whether a defendant objects, the Government—just like a defendant—has a responsibility to review the PSR and raise any objections in a timely manner. *Supra* pp. 16–17; 27–28. "After all, in the law, what is sauce for the goose is normally sauce for the gander." *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016).

Here, for example, Petitioner could raise a new challenge to his ACCA enhancement only because he satisfied a very narrow ground to excuse his procedural default: a change in the law (*Johnson*) that rendered his attempted-robbery conviction an invalid ACCA predicate. *See, e.g.*, *Cross v. United States*, 892 F.3d 288, 294–96 (7th Cir. 2018) (explaining *Johnson*-based claims satisfy the cause needed to excuse procedural default).

But if the Government cannot similarly point to a change in the law that renders a previously unavailable predicate a viable replacement, it has no similar excuse for its failure to raise a timely objection to the PSR. It is irrelevant that the Government could not have anticipated *Johnson*, as the Eleventh Circuit opined. *See Tribue*, 929 F.3d at 1332. The Government must show—as a defendant must—that a change in the law provides a ground for challenging the PSR that was unavailable at the time of sentencing. *Cf. Hrobowski v. United States*, 904 F.3d 566, 570 (7th Cir. 2018) (holding a defendant is barred from "bring[ing] collateral attacks against his other [predicate] convictions based on theories available to him at the time he was sentenced"). Yet the Government identified no change in the law that affected the viability of the substituted convictions in *Tribue*, *Hodge*, or here.

III. The question presented is important.

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

First, there are thousands of federal prisoners currently serving ACCA-enhanced sentences, with anywhere from 300 to 600 defendants newly sentenced under the ACCA every 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://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf. For each of these defendants, the ACCA enhancement can result in many extra years of prison time.

Second, given the ACCA's complexity and this Court's active ACCA docket, the question presented is likely to recur. In the past decade, the frequency of the Court's opinions interpreting the meaning of "serious drug offense" and "violent felony" under § 924(e) has only increased—with four such opinions in the past Two terms alone. *See Shular v. United States*, 140 S. Ct. 779 (2020); *Quarles v. United States*, 139 S. Ct. 1872 (2019); *Stokeling v. United States*, 139 S. Ct. 544 (2019); *United States v. Stitt*, 139 S. Ct. 399 (2018); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Johnson v. United States*, 576 U.S. 591 (2015); *Descamps v. United States*, 570 U.S. 254 (2013); *Sykes v. United States*, 564 U.S. 1 (2011); *Curtis Johnson v. United States*, 559 U.S. 133 (2010).

Each new decision construing these definitions affects the universe of offenses that qualify as ACCA predicates, often prompting collateral challenges. *See, e.g.*, *In re Williams*, 898 F.3d 1098, 1108 (11th Cir. 2018) (Martin, J., concurring specially) (noting that over 2,000 inmates filed motions in the Eleventh Circuit "seeking relief [after] the residual clause of the

[ACCA] was invalidated in *Johnson*"). It is thus important that the Court clarify the circumstances under which the Government may substitute new predicate convictions on collateral review to maintain an ACCA enhancement.

IV. This case is an excellent vehicle.

Finally, this case is an excellent vehicle. The question presented was fully briefed before, and squarely decided by, the Seventh Circuit. The answer to the question is also outcome determinative: Had Petitioner filed his § 2255 motion in the Fourth Circuit, he would have prevailed, as the Seventh Circuit recognized when it declined to "sid[e] with the Fourth Circuit's broader holding." Pet.App. 9a.

Moreover, although the Seventh Circuit highlighted Petitioner's indictment, that document does not set this case apart from *Hodge* and *Tribue*. In both *Hodge* and *Tribue*, the defendant's indictment or related pretrial document similarly invoked ACCA (i.e., § 924(e)) and listed more potential predicates than the PSR ultimately identified, including the conviction that the Government later sought to substitute on collateral review. *See* CA Dkt. 44 at SA4, SA12. This is thus common, as Petitioner pointed out below. On this issue, then, Petitioner's circumstances are nothing special and certainly not a vehicle problem.

Petitioner's mistaken statement in the District Court proceedings—that he had been sentenced based on his burglary conviction—also does not make this case idiosyncratic. That mistake, made years after sentencing, does nothing to cure Petitioner's lack of notice before sentencing or the Government's failure to timely object to the PSR at or before sentencing—

the twin pillars of the Fourth Circuit's approach. The Seventh Circuit acknowledged as much when it declined to "sid[e] with the Fourth Circuit's broader holding," Pet.App. 9a—an assertion that makes sense only if Petitioner would have prevailed in the Fourth Circuit.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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