No. 18-6822

in the

Supreme Court

of the

United States

Term,

MARK ANTHONY BROWN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF IN OPPOSITION

DEBORAH L. WILLIAMS
Federal Public Defender Southern District of Ohio

Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
250 E. Fifth St. Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

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On Petition for a Writ of Certiorari from the
United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

None of the Government's arguments should dissuade this Court from granting certiorari review to correct the illegally imposed sentence in this case. 21 U.S.C. § 851 requires a notification to be filed with the district court. No such notification was filed in this case, and Brown's knowledge of his prior convictions is not a basis to forego this statutory requirement. Second, the holding in this case can and will be used in future cases, and thus the Government's argument that the Sixth Circuit's erroneous decision will not have impact beyond this case is mistaken. Finally, this argument is not moot despite Brown's release from incarceration, as he still faces a term of supervised release, and still suffers the collateral consequences

of a federal felony conviction.

1. The Government's Brief in Opposition (BIO) fails to address the key issue presented in this petition for certiorari – that the plain language of 21 U.S.C. § 851 *requires* that, in order to obtain an enhanced sentence under 21 U.S.C. § 801 *et seq.*, the Government file a notification seeking such enhancement "before trial." It may be that, under the facts of this particular case, following the plain language of the statute results in a benefit Petitioner Brown. That fact does not change the requirement of the statute. Applying the plain language of the statute to the facts of this case does not result in an outcome so "absurd or glaringly unjust" that it would call into question Congressional intent in promulgating 21 U.S.C. § 851. *United States v. Rodgers*, 466 U.S. 475, 484, 104 S. Ct. 1942, 1948, 80 L. Ed. 2d 492 (1984). Thus, the Government is bound by the requirements of the statute, and their failure to file a notification prevents application of the statutorily enhanced sentence.

The Government also seeks to upend the settled law on lesser-included offenses. The Government suggests that, because during the jury charge conference Brown asked for a lesser-included offense instruction, that this "present[ed] the jury with a new alternative charge." (BIO 10-11) However, it has long been settled law that "[t]he indictment need not charge the defendant with the lesser offense in order for the trial court to submit that offense to the jury." *United States v. Dhinsa*, 243 F.3d 635, 674 (2d Cir. 2001), accord *United States v. Martel*, 792 F.2d 630, 638 (7th

Cir. 1986). Given the paltry amount of drugs found at Brown's house, and the evidence of actual use, it could hardly have been a surprise that Brown would request a lesser-included simple possession offense instruction. Such request is not a "new alternative charge", and the jury's verdict was not a "windfall", but an honest assessment of the Government's case. Lastly, the Government's "surprise" at Brown's request does not excuse their failure to file the § 851 enhancement notification at any point in the ensuing months.

The Government supports the Sixth Circuit's erroneous conclusion that "harmless error" applies to the result in this case because Brown had "actual notice" of his prior conviction through its recitation in the indictment on another, unrelated charge. Brown's knowledge of his prior convictions is not at issue, but this knowledge is irrelevant to the application of 21 U.S.C. § 851. § 851 places authority solely in the hands of the United States prosecutor as to whether to seek an enhanced statutory penalty. In order to exercise this authority, the statute requires the prosecution to file a notification. The Sixth Circuit's decision in this case is directly contrary to Congressional intent. The Sixth Circuit's decision allows a prosecutor, if he or she does not obtain the conviction (or convictions) that they seek from the jury, to ratchet up the statutory ranges of the remaining charges merely by requesting such enhancement through a sentencing memorandum, after trial. This is so contrary to Congressional intent that the Sixth Circuit's error must be addressed by this Court.

2. The Government also makes the curious argument (BIO 14) that because the opinion below is "unpublished", it will not be used by other courts as precedent. The Government further states that the holding of the Sixth Circuit is "limited to the circumstances of this case." (BIO 14) While it is true that the Sixth Circuit in this case labeled the opinion as "Not Recommended for Full-Text Publication", this does not prevent the use of the decision in the future by the Sixth Circuit or any other court. Indeed, Sixth Circuit local rules state that "[t]he court permits citation of any unpublished opinion, order, judgment, or other written disposition", and that "[t]he limitations of Fed. R. App. P. 32.1(a) do not apply." *6 Cir. R. 32.1(a).* Further, almost every circuit court considers unpublished cases to be "persuasive" authority. See *United States v. Stepanian*, 570 F.3d 51, 57 (1st Cir. 2009); *United States v. Ryan*, 806 F.3d 691, 694 (2d Cir. 2015); *United States v. Carbajal*, 717 F. App'x 234, 237 (4th Cir. 2018); *United States v. Torres-Jaime*, 821 F.3d 577, 582 (5th Cir. 2016); *United States v. House*, 872 F.3d 748, 753 (6th Cir. 2017); *United States v. Engles*, 779 F.3d 1161, 1162 (10th Cir. 2015); *United States v. Rodriguez*, 751 F.3d 1244, 1251 (11th Cir. 2014).

Further, this Court routinely grants certiorari in cases where the court below has chosen not to publish the decision. See, for example, *Mont v. United States*, 17-8995; *Herrera v. Wyoming*, 17-532; *Gamble v. United States*, 17-646; *Gundy v. United States*, 17-6086 from this calendar. The fact that the Sixth Circuit chose not to publish this case is of no moment, and does not prevent its use in the future.

This dangerous precedent, which essentially holds that the filing requirements of 21 U.S.C. § 851 can be dispensed with where a jury makes a finding on a lesser-included offense, cannot be allowed to stand.

3. The Government also fails in its Opposition to address the fact that the statutory enhancement had the effect of altering the jury's verdict from a misdemeanor to a felony. As set forth in the certiorari petition, the practical effect of this, beyond the sentence imposed, is substantial: Brown loses the right to vote, to sit on a jury, and to bear firearms. It should not be glossed over that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S. Ct. 1362, 1378, 12 L. Ed. 2d 506 (1964). Brown continues to suffer serious consequences as a result of the district court and Sixth Circuit's error.

Despite Petitioner Brown's release from incarceration, this petition is not moot, as the Government contends. The "mere release of the prisoner does not mechanically foreclose consideration of the merits by this Court." *Sibron v. New York*, 392 U.S. 40, 51, 88 S. Ct. 1889, 1896, 20 L. Ed. 2d 917 (1968). First, Brown continues to serve a one-year term of supervised release. This supervised release term would be effected by a finding that the statutory enhancement does not apply; in fact, given that the offense is properly a misdemeanor, it is likely no term of supervised release would have been imposed.

Further, as outlined above, Petitioner Brown continues to suffer direct and collateral consequences as a result of the sentence imposed, including the loss of the right to vote, etc.

Finally, the Government's reliance on *Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998) is misplaced. *Spencer* involved an appeal from a post-conviction petition pursuant to 28 U.S.C. § 2254, not a direct appeal, as in this case. More importantly, the defendant in *Spencer* was only attacking the length of an already served period of incarceration; by contrast, Brown is challenging the fact that his conviction was enhanced from a misdemeanor to a felony, and the length of supervised release imposed. Therefore, this matter is not moot. This Court should grant certiorari, and overturn the Sixth Circuit's erroneous reading of 21 U.S.C. § 851.

CONCLUSION

For the foregoing reasons, as well as those presented in the Petition for Certiorari, this Court should grant certiorari review and reverse the Sixth Circuit's ruling on this matter.

Respectfully submitted,

DEBORAH L. WILLIAMS
Federal Public Defender

Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
Appellate Director
250 E. Fifth St.
Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner