

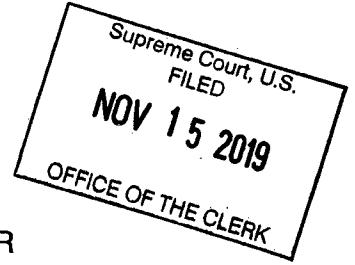
19-6791

No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

BRYAN BURNETT — PETITIONER
(Your Name)



vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

EIGHTH CIRCUIT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BRYAN BURNETT

(Your Name)

FCI Terre Haute, P.O. Box 33

(Address)

Terre Haute, IN 47808

(City, State, Zip Code)

(Phone Number)

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SUPREME COURT, U.S.

QUESTION PRESENTED

SHOULD THIS COURT GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL IN THE APPLICATION OF UNITED STATES SENTENCING GUIDELINE SECTION §2K2.1(b)(6)(B) WHERE THE EIGHTH CIRCUIT DETERMINED TO APPLY THE ENHANCEMENT FOR THE OFFENSE OF IOWA CODE SECTION § 724.4(1) CARRYING A FIREARM IN RELATION TO THE CRIME OF POSSESSION OF A FIREARM BY A FELON, 18 U.S.C. § 922(g), PURSUANT TO CIRCUIT PRECEDENT IN UNITED STATES V. WALKER, 771 F. 3d 449 (8th Cir. 2014), WHICH PRECEDENT IS IN CONFLICT WITH SIXTH CIRCUIT PRECEDENT ANNOUNCED IN UNITED STATES V. KILGORE, 749 F.3d 463 (6th Cir. 2014) FOLLOWING ITS EARLIER PRECEDENT IN UNITED STATES V. SANDERS, 162 F. 3d 396 (6th Cir. 1998)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 14, 2019.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 10, 2019, and a copy of the order denying rehearing appears at Appendix A.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On July 1, 2017, law enforcement responded to a report of a car crash on Locust Street in Davenport, Iowa. The Petitioner was driving a vehicle involved in the crash. After the crash, Petitioner hid a Ruger Modle LCR .38 caliber revolver in the bushes nearby. In an interview with law enforcement that same day, Petitioner admitted to possessing the firearm.

On August 17, 2017, Petitioner was indicted in the Southern District of Iowa with one count of being a felon in possession of a firearm, in violation of **18 U.S.C. §§922(g)(1) & 924(a)(2)**. Petitioner ultimately pled guilty to the offense, as charged, pursuant to a plea agreement. Petitioner pled guilty to possession of a firearm by a prohibited person, in violation of **18 U.S.C. §§922(g)(1) and 924(a)(2)**. Sentencing was thereafter contested over the application of a four-level enhancement for possession of a firearm in connection with another felony. The district court applied the enhancement, resulting in an advisory guidelines sentencing range of 84 to 105 months. Petitioner was then sentenced to 84 months of incarceration.

A presentence investigation report ("PSR") was created. The PSR recommended imposing a four-level enhancement under **USSG §2K2.1(b)(6)(B)** for possession of the firearm in connection with another felony. Petitioner objected to this enhancement. After the application of this enhancement, the PSR calculated Petitioner's guidelines range as 84 to 105

months, based upon a total offense level of 25 and a criminal history category of IV.

At sentencing, Petitioner maintained the objection to **USSG §2K2.1(b)(6)(B)**, but acknowledged that **United States v. Walker**, 771 F.3d 449 (8th Cir. 2014), controlled. The district court agreed that it was bound by **Walker**, and imposed the four-level enhancement. The district court accepted the guidelines range as calculated by the PSR. After hearing arguments on the ultimate disposition, the district court sentenced Petitioner to 84 months of imprisonment, the low end of the guidelines range.

Petitioner appealed, and the Eight Circuit affirmed. **United States v. Burnett**, no. 18-1989 (8th Cir. September 10, 2019).

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL IN THE APPLICATION OF UNITED STATES SENTENCING GUIDELINE SECTION §2K2.1(b)(6)(B) WHERE THE EIGHTH CIRCUIT DETERMINED TO APPLY THE ENHANCEMENT FOR THE OFFENSE OF IOWA CODE SECTION § 724.4(1) CARRYING A FIREARM IN RELATION TO THE CRIME OF POSSESSION OF A FIREARM BY A FELON, 18 U.S.C. § 922 g, PURSUANT TO CIRCUIT PRECEDENT IN UNITED STATES V. WALKER, 711 F.3D 4499 (8TH CIR. 2014), WHICH PRECEDENT IS IN CONFLICT WITH SIXTH CIRCUIT PRECEDENT ANNOUNCED IN UNITED STATES V. KILGORE, 749 F.3D 463 (6TH CIR. 2014) FOLLOWING ITS EARLIER PRECEDENT IN UNITED STATES V. SANDERS, 162 F.3D 396 (6TH CIR. 1998).

It is respectfully submitted that this Court should resolve this conflict between the Circuits, and determine with finality that possession of a firearm in violation of **Iowa Code § 724.4 (1)** does not allow an enhancement for committing another felony, **USSG § 2K2.1 (b)(6)** where the Federal Offense is for the Possession of the self same firearm in violation of **18 U.S.C. § 922 (g)** is the controlling conviction.

More plainly stated, **Iowa Code § 724.4(1)** proscribes the possession of a firearm, which is duplicative of the Federal Offense under **18 U.S.C. § 922 g.** This is not an issue of double jeopardy, but an assertion that relying on the same corpus and offense, albeit between two sovereigns, to enhance the Federal Sentence is not permissible. And therefore, the Eighth Circuit's decision in **Walker** is inapposite.

When Petitioner committed his federal firearm possession offense, he "as all but 'doomed' to violate Iowa Code § 724.4(1)" as well, **Sanford**, 813 F.3d at 717 (Bye, J., concurring). See **Iowa Code § 724.4(1)**. The **§ 2K2.1(b)(6)(B)** "other felony" enhancement appears keyed to additional conduct that is somehow aided or advanced by the defendant's firearm possession, but here it would be awkward to say that Petitioner's felon in possession offense facilitated his carrying weapons offense. The gravamen of both crimes is the act of prohibited possession.

In **United States v. Kilgore**, 749 F.3d 463 (6th Cir. 2014), the Sixth Circuit agreed with Petitioner's position that "the law requires that the 'another felony offense' language from the guideline means that the offense triggering application of the enhancement must be separate and distinct conduct from the

underlying offense." *Id.* at 464. The *Kilgore* court relied heavily upon language from its earlier decision in *United States v. Sanders*, 162 F.3d 396, 400 (6th Cir. 1998):

A logical reading of the §2K2.1(b)(5) [now §2K2.1(b)(6)] Guideline term "another felony offense" would at least require, as a condition precedent to the application of a major four level guideline enhancement, a finding of a separation of time between the offense of conviction and the other offense, or a distinction of conduct between that occurring in the offense of conviction and the other felony offense. Otherwise, the word 'another' is superfluous...."

Kilgore, 749 F.3d at 464.

The "other offense" in *Kilgore* was theft. Mr. Kilgore came into possession of two firearms by stealing them from a police evidence room. He received a two-level enhancement under USSG §2K2.1(b)(4) for possessing stolen firearms. Under Walker's reasoning, Mr. Kilgore automatically would be subjected to the §2K2.1(b)(6)(B) increase. Theft is not an element of §922(g). Because his offense occurred in the Sixth Circuit, however, Mr. Kilgore did not receive the increase.

The "other felony" enhancement is expressly limited to felonies outside or beyond "the ...firearms possession or trafficking offense[.]" USSG §2K2.1, comment. (n.14(C)). By requiring the other felony to be separate and distinct conduct from the act of acquiring and simply possessing the firearm, the Sixth Circuit insures that the enhancement's expressed

limitation will have the intended effect of avoiding double punishment for essentially the same conduct. This Court is urged to review this Circuit Split, and determine that, as **Iowa Code § 724.4 (1)** is not an inchoate offense of § 922 g, instead it is a statute that proscribes the same conduct, the enhancement is not auhtorized. And, where as here, the corpus involved in the Federal Offense is the same as that involved in the State offense, § 2K2 does not apply.

Because there exists a conflict between the Circuits, it is respectfully suggested that this Court should Grant Certiorari and determine with finality the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



BRYAN BURNETT

Date: 11/15 2019