

No. 21-6077

IN THE
SUPREME COURT OF THE UNITED STATES

TORRI McCRAY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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**PETITIONER’S REPLY BRIEF TO
RESPONDENT’S BRIEF IN OPPOSITION**

Torri McCray respectfully submits this Reply Brief in response to the respondent’s Brief in Opposition.

Mr. McCray’s prison sentence was increased two and a half years above the Guidelines range contemplated in the plea agreement with the government only having to establish petitioner’s culpability by a preponderance of the evidence. He also was not provided sufficient notice of the prohibited conduct.¹

¹ As noted in the Petition, granting the defense motion to dismiss would have removed a five-year mandatory minimum under 21 U.S.C. §

A. There is indeed a split in the Circuits as to the proper fact-finding standard for uncharged conduct under the Due Process Clause of the Fifth Amendment when a prison sentence of less than the statutory maximum term is substantially increased.

Respondent states, “[p]etitioner contends (Pet. 12-14) that several other circuits continue to use the “clear and convincing evidence” standard, but none of the post-*Booker* examples he cites has applied that standard.” Brief in Opposition (“B.O.”) at 13. The petitioner has plainly indicated that “[h]alf of the Circuit Courts of Appeals at least implicitly still follow the *McMillan* and (or) *Kikumura* Due Process-based approach.” Petition at 12. The respondent further avers that only the Ninth Circuit is not lock step in line. B.O. at 11. This is not the case, as the 1st, 5th, 10th, 11th and the District of Columbia have all left the door open to the Due Process approach should the right case come before them.²

841(b)(1)(B), as well as an increase in the lower end of the Guideline range and a longer supervised release term.

² See again, *United States v. Sandoval*, 6 F.4th 63, 115-116 (1st Cir. 2021) (incorrectly pin-cited at 106-107 in the Petition), citing *United States v. Lombard*, 72 F.3d 170, 185-187 (1st Dep’t 1995); *United States v. Simpson*, 741 F.3d 539, 558-559 (5th Cir. 2014), citing *United States v. Mergerson*, 4 F.3d 337, 343-344 (5th Cir. 1993); *United States v. Parlor*, 2 F.4th 807, 816-817 (9th Cir. 2021); *United States v. Staten*, 466 F.3d 708, 719-720 (9th Cir. 2006); *United States v. Restrepo*, 946 F.2d 654, 659-661 (9th Cir. 1991) (*en banc*); *United States v. Olsen*, 519 F.3d 1096, 1104-

The respondent, *e.g.*, at B.O. 13-14, does not convincingly rebut this proposition. *See again, Sandoval*, 6 F.4th at 115 (leaving the door opened for a Due Process challenge); *Simpson*, 741 F.3d at 558-559 (same); *Olsen*, 519 F. 3d at 1104-1105 (same); *Clay*, 483 F.3d at 744 (same). As also addressed in the Petition, only the Ninth Circuit has affirmatively accepted the clear and convincing standard.³

Respondent further states that “[c]onsistent with *Watts*, the courts of appeals have uniformly recognized that a sentencing judge may generally find facts relevant to the determination of the sentencing range under the post-*Booker* advisory federal Sentencing Guidelines by a preponderance of the evidence, so long as the judge imposes a sentence

1105 (10th Cir. 2008); *United States v. St. Julian*, 922 F.2d 563, 569 n.1 (10th Cir. 1990); *United States v. Clay*, 483 F.3d 739, 744 (11th Cir. 2007); *United States v. Lewis*, 115 F.3d 1531, 1536-1537 (11th Cir. 1997); *United States v. Long*, 328 F.3d 655, 670-671 (D.C. Cir. 2003), citing *United States v. Lam Kwong-Wah*, 966 F.2d 682, 688 (D.C. Cir. 1992).

³ *See again*, Petition at 13, citing *Parlor*, 2 F.4th at 816-817. Indeed, the petitioner brought to this Court’s attention two key facts about the status of the Third Circuit’s *Kikumura* decision: first, it was overruled by that Circuit, and second, it still lives on in other Circuits, including the Ninth. *See*, Petition at 12-14.

within the statutory range.” B.O. at 9 (emphasis added). As recognized in his Petition, Mr. McCray does not dispute this general standard for a post-*Booker* sentencing court determining facts. *See again*, Petition at 10. But as half the Circuits still leave open the possibility of a Due Process argument, this Court’s intervention is necessary to provide clarity for future litigants. *See again, McMillan v. Pennsylvania*, 477 U.S. 79, 87-92 (1986) (recognizing there may be an exception to the general rule satisfying Due Process when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction).

Though effectively conceding that a split in the Circuits exist, respondent opines that “[p]etitioner overstates the division of authority among the courts of appeals post-*Booker*, and in any event this case does not implicate any lingering disagreement.” B.O. at 10. Respondent continues that since *Booker*, “[l]ower courts have clarified that a sentencing judge may find facts that increase the defendant’s sentence by a preponderance of the evidence, provided that the sentence remains within the statutory range.” B.O. at 10 (emphasis added); *see also, id.* at 9. Petitioner respectfully disagrees on both fronts.

Contrary to the respondent's position, B.O. at 10-13, and as noted in the Petition, in the post-*Booker* era, which focuses on the reasonableness of the sentence, only half of the Circuits, including the Second Circuit, outright reject the *McMillan* / *Kikumura* standard.⁴

If nothing else, the respondent's Brief in Opposition helps demonstrate the uncertainty in the law, highlighting the Ninth Circuit's reliance on an overruled Third Circuit decision and the Second Circuit having at least an arguably intra-circuit conflict. B.O. at 10-14; Petition at 12-14.⁵ Indeed, the concerns of *McMillan v. Pennsylvania*, *supra*, *United States v. Watts*, 519 U.S. 148, 156 (1997) and the District Court in

⁴ See, e.g., *United States v. McCray*, 4 F.4th 40, 49 (2d Cir. 2021) (our case); *United States v. Gray*, 943 F.3d 627, 631 (3d Cir. 2019), citing *Fisher*, 502 F.3d at 299-300; *United States v. Grubbs*, 585 F.3d 793, 800-803 (4th Cir. 2009); *United States v. Brika*, 487 F.3d 450, 460-462 (6th Cir. 2007); *United States v. Reuter*, 463 F.3d 792, 793 (7th Cir. 2006); *United States v. Villareal-Amarillas*, 562 F.3d 892, 898 (8th Cir. 2009).

⁵ See again, e.g., *United States v. Fisher*, 502 F.3d 293, 299-300 (3d Cir. 2007) (finding *Kikumura* analysis did not survive *Booker*); *United States v. Parlor*, 2 F.4th 807, 816-817 (9th Cir. 2021) (affirming clear and convincing evidence as appropriate standard); *United States v. Staten*, 466 F.3d 708, 719-720 (9th Cir. 2006); *United States v. Restrepo*, 946 F.2d 654, 659-661 (9th Cir. 1991) (*en banc*) (full discussion of the *McMillan* tail wagging the dog principle).

our matter, have not been put to rest. *See*, Sentencing minutes (“Sent.”) at 12-14, 38 (said District Court to the prosecutor: “And he didn’t plead guilty to it. And the standard of proof with respect to the death resulting, therefore, changed from beyond a reasonable doubt to a preponderance of the evidence? ... You’re asking me to give four times that based on - - based on a finding by a preponderance of the evidence. Tell me why that’s not the tail wagging the dog.”).

Finally, the petitioner respectfully disagrees with respondent that this is not a proper vehicle for this Court’s intervention. B.O. at 15-16. The District Court characterized the thirty-month increase in Mr. McCray’s prison time as a “hefty increase,” Sent. at 38-39, while the Second Circuit called it just a “moderate enhancement.” *McCray*, 7 F. 4th at 49. Indeed, Mr. McCray lost two and half years of his life for conduct only proven through the modest civil burden of proof: a preponderance of the evidence. We say this is a profound deprivation of liberty, considering Mr. McCray was deprived of constitutional criminal procedure protections, while having to defend against U.S.S.G. §5K2.1 allegations made by a government witness with a history of larceny, who continuously lied to the police during the investigation and presented contradictory testimony.

This Court's intervention is needed to provide uniformity amongst the Circuit Courts of Appeals across the country.

B. The Second Circuit interpreted the phrases “fentanyl analogue” and “analogue of fentanyl” under the Controlled Substances Act in ways that conflict with the Due Process Clause and contravene relevant decisions of this Court.

The respondent characterizes the “controlled substances analogue” provision under 21 U.S.C. § 802(32)(C)(i) as a term of art, using the example of the rape drug provision under 21 U.S.C. § 841(g)(2)(A)(i), which includes the phrase, “gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB.” *See*, B.O. at 17. Though not addressed by respondent in its Brief, *e.g.*, at 16-19, the government's statutory interpretation requires the reader (including the unsophisticated accused) to disregard an entire clause of the statute, thus violating the canon, *verba cum effectu sunt accipienda*, which presumes each word in the law be given effect. *See*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *see also*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 26 (2012).

Indeed, the Second Circuit in our matter contravened this Court's jurisprudence recognizing that all words in a statute have

value or Congress would not have included them. *See, Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992); *Bostock v. Clayton*, __ U.S. __ , 140 S. Ct. 1731, 1749 (2020). Though the Court of Appeals claimed to not be “nullify[ing]” 21 U.S.C. § 802(32), it did. Mr. McCray could not reasonably be expected to interpret this law as the respondent proposes.

As the Second Circuit’s interpretation failed to comport with Due Process and this Court’s jurisprudence on statutory interpretation, the Court should intervene to correct these errors and clarify the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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