

21-6078 NO. 21-6078 ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES

FILED  
OCT 08 2021  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

MELVIN JACKSON — PETITIONER  
(Your Name)

vs.

UNITED STATES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Fifth Circuit Court of Appeals

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

PETITION FOR WRIT OF CERTIORARI

Melvin Jackson #33211-034  
(Your Name)  
FCI - Oakdale I  
P.O. Box 5000  
(Address)

Oakdale, LA 71463  
(City, State, Zip Code)

N/A  
(Phone Number)

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QUESTION(S) PRESENTED

1. Whether application of U.S.S.G. § 2A2.1(a)(1) requires a finding of a specific intent to kill?
2. Whether counsel rendered ineffective assistance of counsel by failing to object to application of U.S.S.G. § 2A2.1(a)(1) where the district court fails to make a finding of a specific intent to kill?

## **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**

[ ] 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[✓] is unpublished.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 \_\_\_\_\_ 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[ ] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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 July 12, 2021.

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: \_\_\_\_\_, 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. § 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

U. S. Constitution - Sixth Amendment

18 U.S.C. § 922(g)(1)

28 U.S.C. § 2255

## STATEMENT OF THE CASE

Melvin Jackson was convicted of conspiracy to distribute heroin (Count 1), firearm and ammunition possession by a convicted felon (Count 2), and possession with intent to distribute heroin (Count 3) following a two-day trial. Jackson was sentenced to 360 months of imprisonment and he appealed the district court's denial of his petition for writ of habeas corpus under 28 U.S.C. § 2255 challenging his sentence.

In 2015, after a two-day trial, the jury found Jackson guilty on the charges as set out above. In 2016, Jackson appealed his conviction and sentence and the Fifth Circuit Court of Appeals denied the majority of his claims. Of the three sentencing issues raised in his direct appeal, the Fifth Circuit denied two, holding that (1) the sentencing court properly cross-referenced the Guideline for Count 2 with the Guideline for attempted murder. See, *United States v. Jackson*, 662 Fed. Appx. 310, 317-18 (5th Cir. 2016); and (2) precedent foreclosed Jackson's argument that a sentence based on an unchanged offense violates the Constitution, *id.* at 319. However, the Fifth Circuit vacated and remanded Jackson's sentence for a redetermination of whether sufficient evidence warranted a Guidelines enhancement for victim-sustained permanent

or life-threatening bodily injury. *Id.* at 318-20.

Accordingly, in March 2017, the district court reconsidered the sentencing enhancement and re-imposed the original sentence. *United States v. Jackson*, 700 Fed. Appx. 392 (5th Cir. 2017). Jackson reasserted the precedent-foreclosed argument that his sentence was unconstitutional but ultimately this Court denied certiorari in May 2018; *Jackson v. United States*, 138 S. Ct. 1307 (2018).

Also, in May 2018, Jackson filed a pro se motion for new trial on Count 1, alleging newly discovered evidence and the district court denied that motion as untimely. In February 2019, less than one year after this Court's denial of certiorari, Jackson timely filed his pro se petition under § 2255 to Vacate, Set Aside, or Correct his sentence based on two grounds of ineffective assistance of counsel. First, he contended that his counsel was ineffective during cross-examination of a witness by eliciting hearsay testimony. Second, he asserted that his counsel was ineffective when failing to properly object to the sentencing court's application of the Guideline for attempted murder. In May 2019, the district court denied Jackson's § 2255 motion. Notice of appeal was filed by Jackson. On June 2, 2020, the Fifth Circuit granted COA as to whether the district court erred in denying Jackson's ineffective assistance claim based on counsel's failure to object to the application of USSG § 2A2.1 for lack of evidence of specific intent ~~to kill~~.

On July 12, 2021, the Fifth Circuit affirmed the district court's denial of Jackson's § 2255 petition stating that "Jackson has thus

failed to show that his counsel's performance was deficient, and we do not address whether Jackson has shown that counsel's performance prejudiced him.

## REASONS FOR GRANTING THE PETITION

Mr. Jackson contends that the appellate court's decision to affirm the district court's denial of his § 2255 motion is in conflict with this Court's two-prong test as laid out in *Strickland v. Washington*, 466 U.S. 668 (1984), and has created a circuit split amongst the lower courts regarding the application of U.S.S.G. § 2A2.1(a)(1).

Specifically, Jackson argued below that his counsel's failure to make the proper objection that before § 2A2.1 could be imposed a showing of specific intent to kill had to be shown rendered his performance deficient and was prejudicial to his sentence. In support of that argument, Jackson relied on this Court's decision in *Braxton v. United States*, 500 U.S. 344 (1991), which addressed the mens rea showing for the federal crime of attempted murder. In *Braxton*, this Court stated that the federal crime of attempted murder required a specific intent to kill. In keeping with that decision, at least three federal circuit courts have recognized that § 2A2.1(a)(1) requires a finding of specific intent to kill by the district court. See, *United States v. Stroman*, 498 Fed. Appx. 67, 68-70 (2d Cir. 2012); *United States v. Starr*, 717 Fed. Appx. 918, 921-25 (11th Cir. 2017); and *United States v. Morgan*, 687 F.3d 688, 697 (6th Cir. 2012). But see also, *United States v. Chambers*, 719 Fed. Appx. 246 (4th Cir. 2018), where that court affirmed the cross-reference for attempted murder under U.S.S.G. § 2A2.1 and concluded that to prove malice under § 1111 "the Government does not have to show an intent to kill or injure" instead "malice aforethought" may be established by "evidence of conduct which is reckless and wanton." *Chambers* at 248. Much like *Chambers*, the Fifth Circuit has stated that: (1) *Braxton* is not analogous; and (2) pursuant to the unpublished Fifth Circuit case of *United States v. Villanueva*, 541

Fed. Appx. 486 (5th Cir. 2003), § 2A2.1(a)(1) does not require a specific intent to kill, because the commentary of § 2A2.1 defines "first degree murder" as "conduct that... would constitute first degree murder under 18 U.S.C. 1111," section 1111(a) provides in relevant part: "Murder is the unlawful killing of a human being with malice aforethought," Id at 487, and malice aforethought "does not require a subjective intent to kill, but may be established by evidence of conduct which is a reckless and wanton and gross deviation from a reasonable standard of care." Villanueva at. 482.

However, Jackson highlights that the decision in Villanueva was made in reliance on the 1983 Fifth Circuit decision of United States v. Shaw, 701 F.2d 367, 392 n.20 (5th Cir. 1983), a decision that was rendered before Braxton was decided. Braxton makes clear that in order for § 2A2.1(a)(1) to apply the district court had to find a specific intent to kill. Pursuant to Strickland, to provide constitutionally adequate performance, counsel must "research relevant facts and law, or make an informed decision that certain avenues will not be fruitful." United States v. Phillips, 210 F.3d 345, 348 (5th Cir. 2000)). Counsel must also discovered and bring to the court's attention "[s]olid, meritorious arguments based on directly controlling precedent." Id.

In this case Braxton was controlling for an enhancement under § 2A2.1(a)(1) that was for attempted murder. Braxton explicitly overruled the unpublished decision that the district court relied on, and the appeal court's decision to

affirm the district court's denial of Jackson's § 2255 is contrary to Strickland and furthers the split amongst circuit courts regarding application of § 2A2.1(a)(1).

#### **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Wendy Jackson". The signature is fluid and cursive, with "Wendy" on top and "Jackson" below it, both underlined.

Date: 10.8.2021