
NO. 22-5877

IN THE

Supreme Court of the United States

ONTERRAIL REMOND ALTMAN, JR., DEMETRIUS BAILEY, LAVAN DEVON BRANDT, JR.,
TERRANCE LAMONT MASON, JR., ERIC ANTHONY MONGAN, MARIO MONTELL RIVERS,
AND AUSTIN ROCKWOOD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
PETITION FOR WRIT OF CERTIORARI	1
INTRODUCTION	1
ARGUMENT	1
I. THE TIMING ANALYSIS UNDER THE U.S. SENTENCING GUIDELINES IS IDENTICAL TO THE ARMED CAREER CRIMINAL ACT.	1
II. THE U.S. SENTENCING COMMISSION'S PROPOSED AMENDMENTS WILL NOT ADDRESS THE TIMING QUESTION PRESENTED BY THIS JOINT PETITION.....	3
CONCLUSION.....	3

TABLE OF AUTHORITIES

Federal Cases

<i>McNeill v. United States</i> , 563 U.S. 816 (2011)	1, 2
<i>United States v. Bailey</i> , 37 F.4th 467 (8th Cir. 2022)	1
<i>United States v. Bautista</i> , 989 F.3d 698 (9th Cir. 2021)	2
<i>United States v. Perez</i> , 46 F.4th 691 (8th Cir. 2022)	2

Federal Statutes

18 U.S.C. § 3553(a)(4)(A)(ii)	2
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Other

Armed Career Criminal Act	1, 2
Controlled Substances Act.....	3
U.S. Sentencing Comm’n, Proposed Amendments to the Sentencing Guidelines, Pt. 8, Circuit Conflicts (Apr. 5, 2023), <i>available at</i> https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230405_prelim-RF.pdf	3

PETITION FOR WRIT OF CERTIORARI

Petitioners Onterrail Altman, Jr., Demetrius Bailey, Lavan Brandt, Jr., Terrance Mason, Jr., Eric Mongan, Mario Rivers, and Austin Rockwood, respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Eighth Circuit.

INTRODUCTION

The government's response notes that it agrees that this Court should address the timing question in the Armed Career Criminal context. However, the government asks this Court to reject this joint petition, because it involves application of the U.S. Sentencing Guidelines. Because the analysis is identical, and the Sentencing Commission will not address this issue, this Court should grant certiorari to resolve this important circuit split that will continue to fester without this Court's intervention.

ARGUMENT

I. THE TIMING ANALYSIS UNDER THE U.S. SENTENCING GUIDELINES IS IDENTICAL TO THE ARMED CAREER CRIMINAL ACT.

First, the government asserts that this Court should not grant the joint petition for writ of certiorari because the cases involve the application of the U.S. Sentencing Guidelines. However, the question presented does not depend upon analysis of the Guidelines; it depends on the interpretation of *McNeill v. United States*, 563 U.S. 816 (2011). *United States v. Bailey*, 37 F.4th 467 (8th Cir. 2022), did

not rely upon Guideline language for its analysis. It relied upon *McNeill*, a decision analyzing whether a prior conviction qualified as an Armed Career Criminal Act predicate offense, to determine that a controlled substance offense is not limited to substances controlled at the time of a defendant's federal sentencing.

Next, the government points to a footnote in *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022), to support its position that the analysis differs under the Armed Career Criminal Act. Yet *Perez* also supports that there is no meaningful distinction in the analysis between the Guidelines and the Armed Career Criminal Act. In *Perez*, the Court held that "serious drug offenses" under the Armed Career Criminal Act are limited to convictions for substances controlled at the time of federal sentencing. 46 F.4th at 699. In doing so, the Eighth Circuit cited a Ninth Circuit Guidelines decision to support its holding:

And as the Ninth Circuit observed, "it would be illogical to conclude that federal sentencing law attaches culpability and dangerousness to an act that, at the time of [federal] sentencing, Congress has concluded is not culpable and dangerous." *United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021) (quotation omitted).

Id. *Bautista* analyzed the timing question as it applied to the definition of controlled substance offense.

Overall, the argument for the Guidelines and the ACCA is virtually identical. The focus of each argument is the proper interpretation of *McNeill*. While, in the Guidelines context, defendants also argue that the time of sentencing rule under 18 U.S.C. § 3553(a)(4)(A)(ii) supports that controlled substances offenses are limited to

convictions for substances controlled at the time of federal sentencing, this does not mean the analysis is materially different.

II. THE U.S. SENTENCING COMMISSION'S PROPOSED AMENDMENTS WILL NOT ADDRESS THE TIMING QUESTION PRESENTED BY THIS JOINT PETITION.

The government acknowledges that the U.S. Sentencing Commission has not expressed any intent to address the timing question presented by this joint petition. BIO, p. 19. The proposed amendments confirm that the Commission will not address this circuit split. *See generally*, U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines, Pt. 8, Circuit Conflicts (Apr. 5, 2023), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230405_prelim-RF.pdf. At the time the government filed its brief in opposition, the Commission was considering whether to adopt an amendment to address a separate circuit split—whether controlled substances offenses are limited to substances listed under the federal Controlled Substances Act, or whether it also includes substances controlled under state law. The final proposed amendments indicate that the Commission will not address this split either. *See id.*

Because the Commission will not address this important circuit split, this Court should grant the joint petition for writ of certiorari to address the issue.

CONCLUSION

The Joint Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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