Nos. 22-6389 and 22-6640

IN THE
Supreme Court of the United States

JUSTIN RASHAAD BROWN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

EUGENE JACKSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the
United States Courts of Appeals
for the Third and Eleventh Circuits

PETITIONERS' JOINT AND UNOPPOSED MOTION FOR DIVIDED ARGUMENT

Pursuant to Rules 21 and 28.4 of this Court, petitioner in No. 22-6389 (Justin Rashaad Brown) and petitioner No. 22-6640 (Eugene Jackson) jointly move for divided argument. The Court granted certiorari in both cases, consolidated them, and allotted one hour for argument. Petitioners have each filed separate merits briefs advancing different interpretations of the statute at issue. Division of the argument will ensure that the Court can adequately consider petitioners' distinct legal arguments. Because this motion requests that fifteen minutes of argument time be

allocated to each petitioner, division of the argument would not require an enlargement of time. The United States does not oppose this motion.

1. These cases are about the Armed Career Criminal Act (ACCA). 18 U.S.C. § 924(e). ACCA mandates a sentence of at least fifteen years in prison for those who commit certain federal firearm offenses and have three prior "violent felonies" or "serious drug offenses." At issue here is ACCA's definition of a "serious drug offense" in Section 924(e)(2)(A)(ii). Under that definition, a "serious drug offense" means "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, *a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))*, for which a maximum term of imprisonment of ten years or more is prescribed by law." (emphasis added).

Petitioners both received ACCA's fifteen-year mandatory minimum sentence because of prior state drug offenses. At the time of their prior state offenses, all of the substances covered by state law were also "controlled substances" under the federal Controlled Substances Act (CSA). However, the federal Government later removed some of those substances from the federal CSA schedules. The question presented by these cases is: what version of the federal CSA schedules does ACCA's "serious drug offense" definition incorporate?

The courts of appeals have divided three ways on that question: (1) the Eleventh Circuit has held that ACCA incorporates the CSA schedules that were in effect at the time of the prior state drug offense, *see United States v. Jackson*, 55 F.4th 846 (11th Cir. 2022); (2) three circuits have held that ACCA incorporates the CSA

schedules that were in effect at the time of the federal firearm offense exposing the defendant to ACCA's penalties, *see United States v. Brown*, 47 F.4th 147 (3d Cir. 2022); *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022); *United States v. Williams*, 61 F.4th 799 (10th Cir. 2023); and (3) the Fourth Circuit has held that ACCA incorporates the CSA schedules in effect at the time of sentencing for the federal firearm offense, *see United States v. Hope*, 28 F.4th 487, 504–05 (4th Cir. 2022).

2. The Government defends the Eleventh Circuit's time-of-prior-state-conviction position. While petitioners agree that the Government's time-of-prior-state-conviction rule is incorrect, they have each advanced a distinct affirmative position in their separate briefs on the merits. Mr. Jackson principally advances the time-of-federal-offense position adopted by three circuits. Under that rule, however, Mr. Brown would not prevail. Accordingly, Mr. Brown argues exclusively in favor of the Fourth Circuit's time-of-federal-sentencing rule.[1]

Because Mr. Jackson advances the time-of-federal-offense position and Mr. Brown advances the time-of-federal-sentencing position, the Court would benefit from a separate presentation on each position from each petitioner's counsel. Indeed, hearing from counsel for just one of the petitioners would risk an incomplete presentation of the issues and prejudice the other petitioner. Because Mr. Brown

[1] As the Government recognized in response to Mr. Jackson's certiorari petition, Mr. Jackson would also prevail under the time-of-federal-sentencing rule, and he advanced that alternative argument in his certiorari petition. *See* Jackson Pet. 38–39; Jackson U.S. Br. 12–13. In his merits brief, Mr. Jackson explains that, because Mr. Brown is now filing a full brief advancing the time-of-federal-sentencing argument, Mr. Jackson "will not create duplication here." Jackson Br. 12 n.3.

cannot advance the time-of-federal-offense position, hearing from him alone would deprive the Court of that argument and thereby prejudice Mr. Jackson. And because Mr. Jackson has focused on the time-of-federal-offense position, hearing from him alone could deprive the Court of the time-of-federal-sentencing argument and thereby prejudice Mr. Brown. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 777 (10th ed. 2013) ("Having more than one lawyer argued on a side is justifiable . . . when they represent different parties with different interests or positions.").

3. In recent years, this Court has granted divided argument in comparable situations—*i.e.*, where the Court grants review in related criminal or immigration cases; the Court consolidates the cases for argument; and the individual parties present distinct arguments. *See, e.g.*, *Pugin v. Garland*, __ S. Ct. __, 2023 WL 2744912 (2023) (mem.); *Ruan v. United States*, 142 S. Ct. 1099 (2022) (mem.); *Rosen v. Ming Dai* and *Alcaraz-Enriquez*, 141 S. Ct. 1234 (2021) (mem.). Similarly, the Court often grants motions for divided argument where separate parties with separate counsel file separate briefs emphasizing different arguments in support of the same basic legal proposition. *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 230 (2020) (mem.); *Kelly v. United States*, 140 S. Ct. 661 (2019) (mem.); *Rucho v. Common Cause*, 139 S. Ct. 1316 (2019) (mem.); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 951 (2019) (mem.); *McDonald v. City of Chicago*, 559 U.S. 902 (2010) (mem.).

Divided argument is especially appropriate here given the Court's earlier decision to grant certiorari in both cases notwithstanding the Government's contrary recommendation at the certiorari stage. *See* Jackson U.S. Br. 12–13 & n.2; Brown

U.S. Br. 9–10. Although the Government recommended that the Court grant review in *Jackson* and hold *Brown*, the Court nonetheless elected to grant both cases and consolidate them. *See Rosen v. Ming Dai* and *Alcaraz-Enriquez*, 141 S. Ct. 1234 (2021) (mem.) (granting motion for divided argument in that scenario). Thus, the Court presumably agreed with petitioners, who argued in their replies that it was necessary to hear from both of them to ensure full resolution of the three-way circuit conflict. *See* Brown Cert. Reply 1–4; Jackson Cert. Reply 1. Petitioners then briefed this case on that understanding—with Mr. Jackson advancing the time-of-federal-offense position and Mr. Brown advancing the time-of-federal-sentencing position.

* * *

In sum, division of the argument will ensure that the Court adequately considers all three positions with respect to the question presented. And it will ensure that the interests of both petitioners—who are each serving ACCA's fifteen-year mandatory-minimum prison sentence—are adequately represented.

CONCLUSION

Accordingly, petitioners respectfully request that argument be divided equally between them, with each petitioner allocated fifteen minutes of argument time.

Respectfully submitted,

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