

CASE NO. 22-7792

IN THE SUPREME COURT OF THE UNITED STATES

October 2022 Term

DIANTE TURMAN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
To the Eighth Circuit Court of Appeals

REPLY TO THE UNITED STATES' MEMORANDUM IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI

Submitted By:

David C. Hemingway
Assistant Federal Public Defender
1010 Market, Suite 200
St. Louis, MO. 63101
(314) 241-1255

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
FEDERAL STATUTORY PROVISIONS.....	4
REPLY TO THE GOVERNMENT'S MEMORANDUM IN OPPOSITION.....	5
CONCLUSION	7

TABLE OF AUTHORITIES

Supreme Court Cases

<i>Begay v. United States</i> , 553 U.S. 137 (2008)	5
<i>McNeill v. United States</i> , 563 U.S. 816 (2011)	5, 6
<i>Rita v. United States</i> , 551 U.S. 338 (2007)	5

Docketed Cases

<i>Justin Brown v. United States</i> , No. 22-6389.....	5, 6, 7
<i>Eugene Jackson v. United States</i> , No. 22-6640	5, 6, 7
<i>Devin Baker v. United States</i> , No. 22-7359	6
<i>United States v. Devin Baker</i> , No. 2:20-cr-20026-JTF (W.D. Tenn.)	6

Court of Appeals Cases

<i>Bullard v. United States</i> , 937 F.3d 654 (6th Cir. 2019).....	6
<i>Sun Bear v. United States</i> , 644 F.3d 700, 708 (8th Cir. 2011) (en banc).....	6

Federal Statutes

18 U.S.C. § 924.....	4, 5
----------------------	------

U.S. Sentencing Guidelines

U.S.S.G. § 4B1.2	4, 5
------------------------	------

FEDERAL STATUTORY PROVISIONS

18 U.S.C. §924(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) The term “serious drug offense” means—

- (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 704 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
- (ii) 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[.]

U.S.S.G. §4B1.2(b) defines a “controlled substance offense” as follows:

The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Reply to the Government's Brief in Opposition

The Government agrees this Court may properly hold this Petition pending the ruling in *Justin Brown v. United States*, No. 22-6389, and *Eugene Jackson v. United States*, No. 22-6640. Memo. at 3. It does not deny that the Circuit conflict about U.S.S.G. §4B1.2(b)'s definition of "controlled substance offenses" arises from disagreement on whether the interpretation in *McNeill v. United States*, 563 U.S. 816 (2011), of "serious drug offenses" that inflate prison terms for illegal gun possession per the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(A) dictates that the Sentencing Guidelines created in the Sentencing Reform Act of 1984 ("SRA"), 98 Stat. 1987, must ignore decriminalization of substances in laws defining prior convictions of a defendant facing a new federal sentence. Nor does the Government dispute that materially different goals motivated Congress's definition of prior "serious drug offenses" to mandate inflated sentences for later illegal gun possession in ACCA, *see* Cert. Petition at 13 (citing *Begay v. United States*, 553 U.S. 137, 146 (2008)), in contrast to the nuanced analysis of competing and evolving sentencing norms under the parsimony clause of the SRA, *id.*, at 16, 19, 20 (citing *Rita v. United States*, 551 U.S. 338, 348 (2007)).

The Government's request that this Court let the Sentencing Commission resolve this issue ignores the fact the Circuit split rests upon conflicting interpretations of this Court's decision in *McNeill*. Memo. at 2. The Sentencing Commission has already stated that the application of the Guidelines depends on the law in effect at sentencing. *See* U.S.S.G. §1B1.11 (2021). Deferring to the

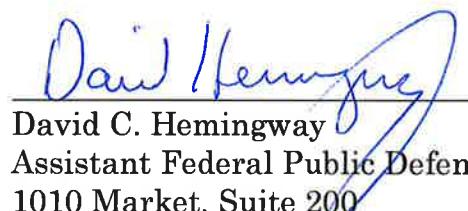
Sentencing Commission gets the issue nowhere: it has already spoken. For Petitioner and similarly situated defendants in the Eighth, Third, and Sixth Circuits whose Guidelines are now enhanced based on *McNeill* (see Petition for Certiorari at 17-18), the best solution is this Court’s determination of the issue either on their own requests for certiorari, or in the decision that will come next term in *Brown* and *Jackson*.

The Government’s request that this Court deny Petitioner and similarly situated citizens the vindication and resentencing that may follow a favorable ruling by this Court in *Brown* and *Jackson* gets no support from *Devin Baker v. United States*, No. 22-7359. Memo. at 2. By the Government’s own description of that case, Mr. Baker presented the question “in an interlocutory posture”, as he awaits resentencing from the reversal of the original sentencing imposed without the “CSO” designation. See *Devin Baker v. United States*, No. 22-7359, Memo. at 6; *United States v. Devin Baker*, No. 2:20-cr-20026-JTF, Order Continuing Resentencing Hearing (W.D. Tenn., Sept. 14, 2023). If his petition is denied, Baker may still get relief on a subsequent direct appeal after this Court decides *Brown* and *Jackson*. In contrast, Petitioner Turman will have no recourse – either from the District Court nor the Sentencing Commission, if this Court denies his petition prior to the decision in those cases. Miscalculation of the advisory Sentencing Guidelines do not constitute grounds for postconviction relief under 28 U.S.C. § 2255, see *Bullard v. United States*, 937 F.3d 654, 657 (6th Cir. 2019); *Sun Bear v. United States*, 644 F.3d 700, 708 (8th Cir. 2011) (*en banc*).

CONCLUSION

Wherefore, Petitioner requests that this Court grant his petition for a Writ of Certiorari to the Eighth Circuit. He further requests that the Court hold this petition in abeyance pending a decision in *Justin Rashaad Brown*, No. 22-6389 and *Eugene Jackson v. United States*, No. 22-6640.

Respectfully submitted,



David C. Hemingway
Assistant Federal Public Defender
1010 Market, Suite 200
Saint Louis, MO 63101
(314) 241-1255
David_Hemingway@fd.org