No. 24-__

IN THE

Supreme Court of the United States

BRANDON PHILLIPS,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2022, the citizens of Missouri adopted an amendment to the Missouri Constitution that legalizes marijuana consumption and mandates the retroactive expungement of most prior marijuana-related convictions. Although the Missouri courts have expunged and vacated Petitioner's prior marijuana convictions pursuant to the Amendment, the Eighth Circuit nevertheless affirmed a federal sentence that counted the now-expunged marijuana offenses in calculating the Sentencing Guidelines' range for a violation of 18 U.S.C. § 922(g)(1). Petitioner is subject to a Guidelines range of 41 to 51 months without counting the vacated convictions. The district court imposed a 120-month sentence. The questions presented are:

1. Whether a sentencing court, in considering whether a prior state-law conviction has been "expunged" within the meaning of Sentencing Guideline § 4A1.2(j), should apply the plain meaning of that term.

2. Whether a district court's statement that "it would impose the same sentence" regardless of the correct Guidelines range is sufficient to render any procedural error harmless, even when (1) the court did not rule on a defendant's Guidelines objection, and (2) the sentence imposed was several times greater than the applicable Guidelines range.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Brandon Phillips, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 124 F.4th 522 (8th Cir. 2024) and reproduced at App. 1a–9a. The decision of the District Court is unpublished and reproduced at App. 10a–13a.

JURISDICTION

The Eighth Circuit entered judgment on December 23, 2024 and denied rehearing en banc on January 28, 2025. By orders dated April 21, 2025 and May 19, 2025, Justice Kavanaugh extended the time for filing a petition for certiorari to and including June 18, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article XIV, § 2(1) of the Missouri Constitution, entitled "Marijuana Legalization, Regulation, and Taxation," provides in relevant part:

> The purpose of this section is to make marijuana legal under state and local law for adults twenty-one years of age or older . . . . The intent is to prevent arrest and penalty for personal possession and cultivation of limited amounts of marijuana . . . ; remove the

> commercial production and distribution of marijuana from the illicit market; . . . [and] prevent the distribution of marijuana to persons under twenty-one years of age.

Article XIV, § 2(8) of the Missouri Constitution provides in relevant part:

> (a) [T]he circuit courts of this state shall order the expungement of criminal history records for all persons no longer incarcerated or under the supervision of the department of corrections but who have completed their sentence for any felony marijuana offenses and any marijuana offenses that would no longer be a crime after the effective dates of sections 1 and 2 of this Article.
> (b) An expungement order shall be legally effective immediately and the person whose record is expunged shall be treated in all respects as if he or she had never been arrested, convicted, or sentenced for the offense, and the conviction and sentence shall be vacated as legally invalid. The court shall issue an order to expunge all records and files related to the arrest, citation, investigation, charge, adjudication of guilt, criminal proceedings, and probation related to the sentence. . . . The court shall issue the person a certificate stating that the offense for which the person was convicted has been expunged and that its effect is to annul the record of arrest, conviction, and sentence.
> (c) The effect of such expungement shall be to restore such person to the status the person

> occupied prior to such arrest, plea, or conviction and as if such event had never taken place. Such person shall not be required to acknowledge the existence of such a criminal history record or answer questions about the record in any application for employment, license, or civil right or privilege or in an appearance as a witness in any proceeding or hearing, and may deny the existence of the record . . . .

United States Sentencing Guideline (USSG) § 4A1.2(j) provides in relevant part:

> (j) Expunged Convictions
> Sentences for expunged convictions are not counted, but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

USSG § 4A1.3 provides in relevant part:

> (b)(1) Standard for Downward Departure.—If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.
>
> (c)(1) In the case of an upward departure, the [court shall provide] specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant's criminal history or the

> likelihood that the defendant will commit other crimes.

USSG § 4A1.2 Application Notes 6 and 10 provide in relevant part:

> 6. Reversed, Vacated, or Invalidated Convictions. Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted.
>
> 10. Convictions Set Aside or Defendant Pardoned. A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. § 4A1.2(j).

STATEMENT OF THE CASE

I. Sentencing Background

In 2021, Brandon Phillips pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court sentenced him to a term of 188-months imprisonment and declared him permanently ineligible for federal benefits pursuant to 21 U.S.C. § 862(a)(1)(C). App. 11a. In calculating Mr. Phillips's criminal-history score, the district court counted five prior marijuana-related convictions and, on that basis, determined he was subject to an enhanced sentencing range of 188 to 235 months under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). R. Doc. 159, at 8, 19 (Pre-Sentencing Report). [1]

Mr. Phillips appealed his sentence, arguing that the district court had erred in counting his prior marijuana convictions as predicate offenses for purposes of the ACCA. While the appeal was pending,

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[1] One of the five prior convictions actually involved another person named Brandon Phillips, with a different middle name, birthdate, and Social Security number. *See* Sealed Mot. for Judicial Notice 3–4 (May 31, 2024) (noting a 2018 conviction for Brandon *Malik* Phillips, whereas Petitioner in this case is Brandon Calvin Alexander Phillips); *id.*, Ex. 3 (Court Case Report, *State v. Phillips*, No. 2018-03138 (Mo. Mun. Ct. Nov. 21, 2023)). The remaining convictions included: two convictions for possession with intent to distribute marijuana, one in 2003 (when Mr. Phillips was 17 years old) and another in 2006; a 2008 conviction on one count of possession of marijuana, and one count of trafficking a cocaine-base substance in the second degree; and a 2015 conviction of possession with intent to distribute, deliver or manufacture marijuana.

the Eighth Circuit decided *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022). *Perez* held that, in assessing whether a prior state conviction qualifies as a predicate offense under the ACCA, courts must compare the state law at the time of a prior state offense to the federal law at the time of a subsequent federal offense. Following *Perez*, the parties filed a joint motion to remand the case to the district court for resentencing, which the Eighth Circuit granted.

On remand, the probation officer prepared a new sentencing report that removed the ACCA enhancements but did not alter the criminal history. R. Doc. 194, at 5 (Resentencing Report). The revised sentencing report calculated a Guidelines range of 110 to 120 months of imprisonment. R. Doc. 194, at 6.

Mr. Phillips raised a single objection prior to his resentencing. C.A. Add. 20–21.[2] He asked the district court to "amend" the revised sentencing report because "facts and factors important to the sentencing determination remain[ed] in dispute." C.A. Add. 20–21. Specifically, Mr. Phillips noted that the sentencing report "overstate[d] [his] criminal history" because "the State of Missouri by referendum ha[d] legalized possession of marijuana" and, therefore, "three of the marijuana convictions [that] are the basis of 9 criminal history points" improperly "elevated [him] to a Criminal History Category VI." C.A. Add. 20–21. The objection was grounded on Guideline 4A1.3, which allows for a "downward departure" if a defendant's criminal history is

[2] Appellant's Addendum was filed in the proceeding before the Eighth Circuit (Dec. 27, 2023).

"substantially over-represented." USSG § 4A1.3(b)(1). Mr. Phillips further noted at the resentencing hearing that "if the marijuana charges did not stick" and were "wiped away" from his criminal history, he would be subject to a lower sentence. *See* App. 29a (Tr.16:11–15).

The Government reframed Mr. Phillips's objection as raising an argument that "his prior convictions [were] not 'controlled[-]substance offenses' pursuant to the Sentencing Guidelines."[3] R. Doc. 196, at 1. The Government responded by arguing that Mr. Phillips did not "raise substantive objections to the Resentencing Report," and the prior convictions were controlled-substance offenses because recent Eighth Circuit decisions in *United States v. Henderson*, 11 F.4th 713 (8th Cir. 2021); *United States v. Bailey*, 37 F.4th 467 (8th Cir. 2022); and *United States v. Perez* foreclosed such a challenge to the resentencing report. R. Doc. 196, at 1–2.

The district court overruled Mr. Phillips's objection, stating that it had "no legal merit" because the "Eighth Circuit ha[d] resolved" the controlled-substance issue. App. 31a (Tr. 18:1–20). The district court resentenced Mr. Phillips to 120 months of imprisonment, and again declared him permanently ineligible for federal benefits. *See* App. 37a, 41a, 43a (Tr. 24:11–23, 28:21–23, 30:20–23).

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[3] Mr. Phillips previously raised a controlled-substance objection during the first appeal. *See* Appellant's Br. 5–7, 15, *United States v. Phillips*, No. 21-3339 (8th Cir. Mar. 9, 2022). Mr. Phillips, however, did not raise that objection in the second appeal.

In its Resentencing Order, the district court recounted the ACCA-enhancement objection from the first appeal and the remand based on *Perez*. App. 10a–13a. The court then noted that, for this appeal, "Phillips objected on grounds unrelated to the [ACCA] enhancement" and overruled the objection without addressing it or even mentioning the legalization of marijuana under the Missouri Constitution. App. 11a. Rather, the court indicated that if the Eighth Circuit had not remanded based on *Perez*, it "would have imposed the [same] sentence." App. 12a–13a; *see also* App. 41a (Tr. 28:9–18) (sentencing Mr. Phillips "at the top of the Guideline range" and indicating it "would impose the same sentence, by way of variance or otherwise").

The district court did not address the Missouri Constitutional Amendment, which was in full effect at the time of sentencing, legalized the use of marijuana in Missouri, and mandated the retroactive expungement of Mr. Phillips's prior marijuana-related convictions. *See* Mo. Const. Art. XIV, §§ 2(1), 2(8).

II. The Eighth Circuit Appeal and Decision

Mr. Phillips appealed a second time. On appeal, he invoked the Missouri Constitutional Amendment and challenged (1) the district court's 120-month sentence, which was based on a Guidelines' range calculation that included his prior marijuana-related convictions,

and (2) the lifetime ban on federal benefits. App. 1a–3a.[4]

The Government argued that even if the Missouri courts expunged Mr. Phillips's marijuana convictions, the district court could still count them for purposes of calculating the Guidelines range under *United States v. Townsend*, 408 F.3d 1020 (8th Cir. 2005), because the expungements were not "due to constitutional invalidity, innocence, or mistake of law," Gov't C.A. Br. 11–12, as provided in USSG § 4A1.2 Application Note 6. The Government further argued that the Guidelines do not define the term "expungement." Gov't C.A. Br. 11–12. The parties fully briefed and argued the merits of the marijuana expungements under the Missouri Constitution.

The Eighth Circuit affirmed Mr. Phillips's 120-month sentence. Despite Mr. Phillips's objection that facts "remain[ed] in dispute" regarding "9 criminal history points" because "three of [his] marijuana convictions" "overstate[d] [his] criminal history" following the "legaliz[ation]" of marijuana in "the State of Missouri by referendum," C.A. Add. 20–21, the Eighth Circuit questioned whether Mr. Phillips had preserved an objection based on the Missouri

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[4] Mr. Phillips also filed a motion under Fed. R. Evid. 201(b)(2) asking the Eighth Circuit to take judicial notice of three marijuana-expungement orders issued by the Missouri courts, which had "vacated as legally invalid" three of Mr. Phillips's marijuana-related convictions. *See* Mot. for Judicial Notice & Exs. 1–2 (June 3, 2024); Second Mot. for Judicial Notice & Ex. 1 (Aug. 16, 2024). The Eighth Circuit granted Mr. Phillips's requests to take judicial notice of the expungement orders. App. 3a n.1.

Constitutional Amendment.[5] App. 3a–4a. The court found it unnecessary to decide this question because it concluded that Mr. Phillips would lose under a de novo standard of review.[6] Applying de novo review, the Eighth Circuit stated that it "would *presume* that the district court was aware" that Mr. Phillips "wanted credit" for the expunged marijuana convictions "yet still decided to 'impose the same sentence' anyway." App. 5a (emphasis added).

The Eighth Circuit vacated the federal-benefits ban. App. 9a. On this issue, the appellate court held that the district court had used "a plainly inapplicable statute to pile lifelong professional and financial penalties." App. 8a. The court noted that applying

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[5] The panel characterized Mr. Phillips's objection as "asking the court to change its 'views' on marijuana" and, thus, questioned whether an objection based on the Constitutional Amendment had been preserved. App. 5a. But Mr. Phillips expressly asked the court to "amend" the RSR because "9 criminal history points" "remain[ed] in dispute" following the legalization of marijuana under the Missouri Constitution. C.A. Add. 20–21. The court further stated that Mr. Phillips had never indicated "how his sentencing range would change" if the court accepted his objection. App.. 3a. However, during the resentencing hearing, Mr. Phillips informed the district court about his understanding that the correct Guidelines range without an ACCA enhancement was "41 to 51 months." App. 29a (Tr. 16:8–10).

[6] Precedent from this Court and other courts supports the conclusion that the objection lodged in this case was sufficient to preserve the issue for de novo review. *See, e.g.*, *Yee v. City of Escondido, Cal.*, 503 U.S. 519 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); *United States v. Hope*, 28 F.4th 487, 495 (4th Cir. 2022) (reviewing de novo a defendant's claim because he merely added "a finer point to his objection raised below.")

§ 862(a)(1)(C) to Mr. Phillips would contradict the plain text of the statute and be "clearly incorrect as a matter of law." App. 6a (citation omitted). [7] The Eighth Circuit subsequently denied Mr. Phillips's petitions for rehearing. *See* App. 49a.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Split Over the Treatment of Expunged Convictions When Calculating a Defendant's Criminal History Under the Sentencing Guidelines

The courts of appeals are divided over an important and recurring issue under the Federal Sentencing Guidelines: whether expunged convictions should be counted when calculating a defendant's criminal history. In answering that question, courts have taken different approaches to defining expungement. Some circuits apply the term's plain and ordinary meaning. Other circuits have reached a different result based on the Application Notes to the Sentencing Guidelines.

A. Several Circuits Analyze Expungement Based on the USSG § 4A1.2 Application Notes

One side of the split is exemplified by the Tenth Circuit's decision in *United States v. Hines*, 133 F.3d 1360 (1998). In *Hines,* a defendant pleaded guilty to a

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[7] The Eighth Circuit also held that Mr. Phillips's as-applied, Second Amendment challenge had been waived due to his guilty plea. *See* App. 9a (citations omitted).

§ 922(g)(1) violation and had a prior state-court battery conviction that was subsequently "expunged." *Id.* at 1361. The district court counted the expunged conviction because it "concluded that, under Application Note 10 to USSG § 4A1.2," the use of the term "expunged" in the Arkansas law did not share the same meaning "as that term is used in § 4A1.2(j)." *Id.* at 1362. The court noted that expungement arose in the context of "restor[ing] civil rights . . . rather than for reasons of innocence or legal error." *Id.*; *cf.* USSG § 4A1.2(j) Application Notes 6 & 10 (indicating that vacated and set-aside convictions are not counted for purposes of the Guidelines if they concern "errors of law," "innocence," or "constitutional[] invalid[ity]").

The Tenth Circuit affirmed, reasoning that although USSG § 4A1.2(j) provides that "expunged convictions" should not count in calculating a defendant's criminal history, the Guidelines do not expressly define the term "expunged." *Hines*, 133 F.3d 1362. The court emphasized that the Arkansas legislature had adopted a unique meaning of the term "expunge," which it defined as the sealing of court records that would only be "*available to law enforcement and judicial officials*," did "*not mean the physical destruction* of any [such] records," and did "*not affect any civil rights or liberties of the defendant*." *Id.* at 1365 (quoting Arkansas law).

The Tenth Circuit held that "state terminology" was not "controlling," and that a "district court must examine the 'basis' for the expungement" in "determin[ing] whether a conviction is 'expunged' for purposes of the [Guidelines]." *Id.* at 1364. The court determined that "the primary purpose for

expungement" under the state law was "to restore a defendant's civil rights and remove any stigma attached to the conviction." *Id.* at 1365. The court further noted that "[t]he meaning of 'expunge' under [the Arkansas law was] quite different from the meaning of 'expunge' in [the Guidelines]." *Id.* Accordingly, the court held that "[a] conviction is 'expunged' for Guideline purposes only if the basis for the expungement under state law is related to 'constitutional invalidity, innocence, or errors of law.'"[8] *Id.* at 1364 (citation omitted).

The Eighth Circuit followed *Hines*'s approach in *United States v. Townsend*, 408 F.3d 1020 (2005). In *Townsend*, the defendant pleaded guilty to possessing a firearm after having previously been convicted of third-degree burglary in an Iowa state court. *Id.* at 1021–22. The Iowa court deferred judgment on the burglary conviction, which was subsequently expunged. *Id.* The district court nevertheless included the conviction in its Guidelines calculation, which resulted in a higher sentencing range. *Id.* at 1022. On appeal, the Eighth Circuit concluded that (1) the Iowa "legislature did not intend to expunge all records of a

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[8] USSG § 4A1.2 Application Note 6 provides that reversed, vacated, or invalidated convictions "are not to be counted" if they "have been ruled constitutionally invalid in a prior case." Although *Hines*, *Townsend*, and similar cases focus largely on whether an expungement involved innocence or errors of law, Mr. Phillips submits that his expunged marijuana convictions should not be counted, even under this Application Note, because they have been "vacated as legally invalid" pursuant to the Missouri Constitution in his prior state-law cases. *See* Mo. Const. Art. XIV, § 2(8)(b).

deferred judgment and did not exonerate the [defendant]"; and (2) "the statute does not mandate expunction of the state court administrator's record" and "intended the record" to still "be available to courts and county attorneys." *Id.* at 1024–25 (citation omitted). The Eighth Circuit noted that "the Guidelines do not expressly define the term 'expunged," *id.* at 1023 (citing *Hines*), and affirmed the district court's determination because the Iowa law's record-sealing provision aimed to shield "record[s] from public access," but "did not constitute expunction for purposes of [USSG] § 4A1.2(j)," *id.* at 1025.

The First Circuit also holds that expungement under the Sentencing Guidelines is determined by evaluating "whether [a] conviction was set aside because of innocence or errors of law." *United States v. Dobovsky*, 279 F.3d 5, 8 (1st Cir. 2002). *Dobovsky* affirmed a determination that the defendant's previous marijuana-related charge counted for purposes of calculating his criminal history under the Guidelines because he had admitted to facts supporting a conviction, even when the charges were subsequently dismissed without a finding under state law and sealed by a court order. *Id.* at 6–7. The court noted that the dismissal and sealing of records did not occur "to correct errors of law or vindicate innocence," the "records were not completely destroyed," and the sealing provision's "obvious purpose" was "to give [the] defendant a fresh start." *Id.* at 8, 10 (citation omitted).

Other circuits follow a similar approach. *See United States v. Stowe*, 989 F.2d 261, 263 (7th Cir.

1993) (holding that a conviction set aside under a state law "for purposes of removing the stigma associated with a criminal conviction and to restore his civil rights," rather than due to a defendant's innocence, is not an expunged conviction within the meaning of the Guidelines and, thus, should be counted in a defendant's criminal-history category); *United States v. McDonald*, 991 F.2d 866, 871–72 (D.C. Cir. 1993) (holding that a local statute requiring courts to "set aside" a conviction to fulfill the "social objective of encouraging" offender rehabilitation, does not correspond to an expungement under the Guidelines, such that the conviction would be excluded from criminal-history calculation).

B. Other Circuits Focus on the Statutory Purpose and Plain and Ordinary Meaning of Expungement

On the other side of the split is the Second Circuit's approach, set forth in *United States v. Beaulieau*, 959 F.2d 375 (2d Cir. 1992). In that case, one of the defendants pleaded guilty to a charge of cocaine distribution. *Id.* at 378. He had prior convictions for burglary and other misdemeanors, and the burglary conviction had been sealed pursuant to a Vermont law providing that a sealed juvenile conviction "shall be considered never to have occurred," and all "references thereto shall be deleted." *Id.* at 380. The statute also required "law enforcement officers and departments" to respond that "no record exists" with respect to any inquiries about a sealed conviction. *Id.* Contrary to the Vermont statute, the district court found that the sealed conviction still existed and,

thus, was properly included in calculating the defendant's criminal-history category. *Id.*

To determine whether the juvenile conviction had been expunged within the meaning of § 4A1.2(j), the Second Circuit examined the Vermont statutory text. It also noted that the Guidelines "do not define expressly the term 'expunged.'" *Id.* at 380. The court concluded that the juvenile conviction was improperly considered in calculating the defendant's criminal-history category because the Vermont legislature clearly "intended wholly to eliminate any trace of the past proceeding" and "prior conviction from Vermont's criminal records." *Id.* at 381. Accordingly, the Second Circuit reversed the district court's determination and held that the state law's record-sealing provision had "expunged" the burglary conviction from the defendant's criminal history under USSG § 4A1.2(j). *Id.* at 381.

Similarly, the Ninth Circuit has held that vacated convictions that no longer exist should not be counted for purposes of calculating a defendant's criminal-history score under the Guidelines. In *United States v. Hidalgo*, 932 F.2d 805 (9th Cir. 1991), the Ninth Circuit considered whether a conviction that has been "set aside" is an "expunged conviction" under USSG § 4A1.2(j). *Id.* at 806. The defendant in that case pleaded guilty to a charge of unarmed bank robbery and had a prior California state conviction for second-degree robbery. *Id.* The conviction had been vacated pursuant to a state law that allowed courts to set aside a guilty verdict and dismiss accusations against a juvenile who "shall thereafter be released from all penalties and disabilities resulting from the offense or

crime." *Id*. at 806 n.2 (quoting the state law). The court reasoned that "when the verdict of guilty was vacated and set aside and the information dismissed as to [the defendant's] conviction, that conviction no longer exist[ed]." *Id*. at 807. Applying this Court's precedents related to an analogous federal statute—the Federal Youth Corrections Act—the Ninth Circuit concluded that the Supreme Court "clearly understood the term 'set aside' to mean 'expunged' for purposes of the Act." *Id*. The court further considered the meaning of "expunge" under California law and concluded that both the federal and state statutes were consistent with "the clear language" of USSG § 4A1.2(j). *Id*. Because the conviction no longer existed, the court reasoned "there [was] nothing to count for purposes of calculating [the] defendant's criminal history" under the Guidelines and, thus, the conviction had been expunged. *Id*. The court therefore reversed and remanded the case for resentencing. *Id*.

The Third Circuit follows a similar approach. In *United States v. Doe*, 980 F.2d 876 (3d Cir. 1992), a divided panel considered whether the term "set aside" meant "expunged" within the meaning of the Guidelines for a defendant who was convicted of conspiracy to commit student-loan fraud and had his conviction subsequently set aside pursuant to a federal law. *Id*. at 877–78. The majority noted that the ordinary meaning of "set aside" appears to "encompass an expungement-like remedy," but that it was necessary to look to the legislative purpose. *Id*. at 878. The court then rejected the Government's argument that a set-aside provision "acts only to remove unspecified 'legal impediments' of a conviction." *Id*. at 882. Rather, the court laid out an

extensive analysis of the purpose of the statute and held that Congress intended the set-aside provision to mean "a complete expungement." *Id*.

C. The Eighth Circuit's Decision is Incorrect and This Case Is an Ideal Vehicle to Resolve a Recurring Question of Substantial Importance

1. The Term "Expunge" Has a Plain and Ordinary Meaning

"Congress has the constitutional authority for establishing and implementing sentencing goals." *Townsend*, 408 F.3d at 1023. Because "[t]he Guidelines reflect the will of Congress," *id*., courts "interpret the [Guidelines] using the ordinary tools of statutory interpretation," *United States v. Clayborn*, 951 F.3d 937, 939 (8th Cir. 2020) (citation omitted); *accord, e.g., United States v. Kirilyuk*, 29 F.4th 1128, 1137 (9th Cir. 2022); *United States v. Kobito*, 994 F.3d 696, 702 (4th Cir. 2021); *United States v. Lucidonio*, 137 F.4th 177, 182–83 (3d Cir. 2025); *United States v. Babcock*, 753 F.3d 587, 591 (6th Cir. 2014); *United States v. Reaves*, 253 F.3d 1201, 1203 (10th Cir. 2001). Therefore, "[t]he language of the [Guidelines], like the language of a statute, must be given its plain and ordinary meaning." *United States v. Fulford*, 662 F.3d 1174, 1177 (11th Cir. 2011) (citation omitted).

An inquiry into a particular term in the Guidelines "will most often begin and end with the text and structure of the Guidelines." *United States v. Martinez*, 870 F.3d 1163, 1166 (9th Cir. 2017) (citation omitted). An examination of the commentary in the Guideline Application Notes is proper only if the text

of the Guidelines remains ambiguous "[a]fter applying [the] traditional tools of statutory interpretation." *United States v. Dupree*, 57 F.4th 1269, 1277, 1279 (11th Cir. 2023) (en banc). "If uncertainty does not exist," there is "no need to consider, much less defer to, the commentary in [the] Application Note[s]." *Id.* at 1275–76, 1279.

The plain and ordinary meaning of the term "expunge" is "to strike out, obliterate, or mark for deletion; to efface completely; destroy." *Expunge*, *Merriam-Webster.com Dictionary*, https://perma.cc/KFE5-HR4U; *accord, e.g.*, *Expunge*, *Black's Law Dictionary* (11th ed. 2019) (defining "expunge" as to "remove from a record, list, or book; to erase or destroy"; "[t]o declare (a vote or other action) null and outside the record").

That plain and ordinary meaning has remained consistent since the Founding Era. *See, e.g.*, *Expunge*, 1 John Ash, *New and Complete Dictionary of the English Language* (2d ed. 1775) ("To blot out, to rub out, to efface, to annihilate."); *Expunge*, *Black's Law Dictionary* (1st ed. 1891) ("To blot out; to efface designedly; to obliterate; to strike out wholly."). Such plain and ordinary meaning dates at least as far back as the early-1600s. *See, e.g.*, *Expunge*, *Oxford English Dictionary*, https://perma.cc/4QS8-LFH9 (defining "expunge" as "[t]o strike out, blot out, erase, omit" and "[t]o wipe out, efface, annihilate, annul, destroy, put an end to" circa 1602 and 1628, respectively).

Unlike the statutes at issue in *Townsend* and *Hines*, which adopted specific definitions of the term "expunged" involving the mere sealing of court records

without their physical destruction or deletion, the Missouri Constitution and the Guidelines do not explicitly define the term in a way that departs from its well-established ordinary meaning. Accordingly, this Court should interpret "[t]he language of the Sentencing Guidelines" under its plain and ordinary meaning, *Clayborn*, 951 F.3d at 939, and reject the Government's argument that the meaning of the term differs under the Missouri Constitution and the Guidelines.

2. Even Under the Eighth Circuit's Approach, Expunged Convictions Should Not Count

The circuits analyzing expungement based on the plain meaning of the term under the Guidelines are correct. But Mr. Phillips's marijuana-related convictions should not be counted even under the approach taken by the Eighth, Tenth and other Circuits that look to the "primary purpose for expungement." *E.g.*, *Hines*, 133 F.3d 1365.

Hines, for example, explained that the Arkansas legislature had adopted a meaning that resembled the mere sealing of records because the court files were still available to the police and the judiciary. *See id* at 1365. Likewise, *Townsend* examined the intent of the legislature and determined that the Iowa statute intended court records to remain available to courts and attorneys. *See Townsend*, 408 F.3d at 1024–25.

Here, in contrast, the Missouri Constitution plainly states that its purpose is "to make marijuana legal under state and local law," so as to "prevent arrest and penalty for personal possession," and remove "marijuana from the illicit market." Mo.

Const. Art. XIV, § 2(1). The law expressly mandates "expungement of criminal history records" and "files related to the arrest, citation, investigation, charge, adjudication of guilt, criminal proceedings, and probation related to the sentence." *Id*. § 2(8). The police and members of the judiciary have no access to the records associated with an expunged conviction, and the individual whose sentence is expunged is not "required to acknowledge the existence of such a criminal history record or answer questions about the record." *Id*. Indeed, the individual may legally "deny the existence of the record." *Id*.

The Missouri Constitutional Amendment is designed to void a marijuana conviction ab initio and mandates that individuals with expunged offenses "be treated in all respects as if he or she had never been arrested, convicted, or sentenced for the offense." *Id*. The Missouri Constitution goes well beyond a mere restoration of civil rights; it retroactively mandates the destruction of all court records associated with a marijuana conviction. Accordingly, the purpose of the Missouri Constitutional Amendment clearly indicates that its use of the term "expunged" is consistent with the plain meaning of that term. There is "no need to consider, much less defer to, the commentary in [the] Application Note[s]." *Dupree*, 57 F.4th at 1279.

3. This Case Is an Ideal Vehicle to Resolve a Recurring Question of Substantial and Increasing Importance

This case presents a fully developed vehicle to resolve the question presented for review. A majority of the states have now decriminalized the use of

marijuana,[9] and many states have adopted record-sealing and expungement laws.[10] As a result, the question of whether expunged convictions should count for purposes of the federal Sentencing Guidelines is now a recurring issue in the lower courts. *See, e.g.*, *United States v. Winn*, No. 3:21-CR-103, 2024 WL 4348988 (S.D. Ohio Sept. 30, 2024) (considering whether prior marijuana convictions have been expunged under the Guidelines in view of Ohio state laws); *United States v. Boone*, No. 2:20-CR-00185-BRM-4, 2022 WL 14558235 (D.N.J. Oct. 25, 2022) (considering a defendant's request that a prior marijuana conviction should not be counted in calculating his criminal history under the Guidelines because the conviction was expunged pursuant to the recent New Jersey's Marijuana Decriminalization Law, which mandated the automatic expungement of marijuana convictions); *United States v. Payton*, No. 99-CR-40034-JPG-001, 2020 WL 7029467 (S.D. Ill. Nov. 30, 2020) (involving a defendants request to be resentenced because of recent vacatur of a prior marijuana conviction in Illinois).

The issue has percolated through the lower courts for sufficient time, and the circuits have published

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[9] "[T]hirty-one states and [the District of Columbia] have decriminalized" the use of marijuana as of October 2023. In addition, "[t]hirty-eight states and [the District of Columbia] have legalized medical marijuana, and twenty-two states and [the District of Columbia] have legalized recreational marijuana for adults." Nat'l Ass'n Crim. Def. Lawyers, *Drug Law Reform*, https://www.nacdl.org/Landing/DrugLaw.

[10] *See* Collateral Consequences Resource Center, *Marijuana Legalization and Record Clearing in 2022* (Dec. 20, 2022), https://perma.cc/D4HC-YRYZ.

thorough and fully reasoned opinions from varied angles underscoring the significance of the split. *See, e.g.*, *United States v. Dobovsky*, 279 F.3d 5, 8 (1st Cir. 2002) (acknowledging the existence of the different approaches among the circuits). Furthermore, the issue is neatly presented here because the purpose of the Missouri Constitutional Amendment is clearly outlined in the law, and the retroactive expungement process is both compulsory and automatic. An individual does not need to petition for expungement of his or her prior marijuana offenses because the obligation to vacate the convictions rests entirely with the state courts.

Lastly, the conflict among the circuits has become entrenched and is in need of this Court's resolution to avoid sentencing disparities throughout the country. *See, e.g.*, *United States v. Roberts*, No. 1:22CR00112-1 (E.D. Mo., terminated Jan. 11, 2023) (reflecting another case from the Eastern District of Missouri, in which a different district judge sentenced the defendant without taking into account prior marijuana convictions pursuant to the Missouri Constitutional Amendment, approximately one month prior to Mr. Phillips sentence). This Court should grant the Petition.

II. The Circuits Are Split Regarding the Standard for Evaluating a Procedural Error that Results in a Miscalculated Guidelines Range and a Sentence Substantially Above the Applicable Range

Rather than deciding whether the district court erred by not addressing Mr. Phillips's objection and,

thus, improperly counted prior marijuana convictions under the Guidelines, the Eighth Circuit held that any error was harmless because the district court stated that it would have "imposed the same sentence" regardless of the correct Guidelines range, App. 5a. This ruling implicates a second circuit split over whether a court's miscalculation of the Guidelines range amounts to harmless error.

A. The Majority of Circuits Require Courts to Calculate a Correct Guidelines Range Or Adequately Explain Any Alternative Sentence Outside that Range

On one side of the split is the Third Circuit's approach. In *United States v. Smalley*, a defendant robbed a bank with a knife. 517 F.3d 208, 210 (3d Cir. 2008). The district court had to decide whether it would apply a four-level enhancement for using a knife or a three-level enhancement for "brandish[ing] or possess[ing]" it. *Id.* The court erroneously applied a four-level enhancement. *Id.* Days later, it clarified that it would have imposed the same sentence, even if the three-level enhancement applied. *Id.* at 211.

The Third Circuit reversed. First, it stressed that the sentencing court never calculated the correct Guidelines range reflecting a three-level enhancement. *Id.* at 214. Second, the sentencing court failed to justify why, under the correct Guidelines range, it would still impose the same sentence. *Id.* at 215. Under the Third Circuit's approach, a sentencing court must take two steps to inoculate a Guidelines error. First, it must calculate the correct Guidelines range. Second, it must explain *why* it

would impose the same sentence even under the correct range. It is not enough for a district court to state that it would impose the same sentence. *See United States v. Raia*, 993 F.3d 185, 196 (3d Cir. 2021) ("[E]ven an explicit statement that the same sentence would be imposed under a different Guidelines range is insufficient if that alternative sentence is not also a product of the entire [post-*Booker*] sentencing process.").

The Second, Fifth, Ninth, and Tenth Circuits follow similar path. In *United States v. Seabrook*, for instance, a sentencing court erroneously applied the commercial-bribery Guideline instead of the fraud Guideline. 968 F.3d 224, 232 (2d Cir. 2020). Like the sentencing court here, the trial court in *Seabrook* stated it would have imposed the same sentence even if it was mistaken. *Id.* at 232. The Second Circuit, however, reversed, noting "that the district court cannot insulate its sentence from our review by commenting that the Guidelines range made no difference to its determination." *Id.* at 233–34. Just as the sentencing court here mistakenly cited the marijuana convictions to support its sentence, so too had the trial court in *Seabrook* made clear that the mistaken "Guidelines range" had "fram[ed] its choice of the appropriate sentence." *Id.* at 234.

The Ninth Circuit takes a similar approach. In *United States v. Munoz-Camarena*, the Ninth Circuit held that "[a] district court's mere statement that it would impose the same above-Guidelines sentence no matter what the correct calculation cannot, without more, insulate the sentence from remand, because the court's analysis did not flow from an initial

determination of the correct Guidelines range." 631 F.3d 1028, 1031 (9th Cir. 2011). The court reasoned that a sentencing "court *must explain, among other things, the reason for the extent of a variance*." *Id*. (citation omitted) (emphasis added). And it clarified that "[t]he extent necessarily is different when the range is different, so a one-size-fits-all explanation" is not enough to overcome the harmless-error standard. *Id*. Notably, the court remanded the case for resentencing based solely on the procedural error in the Guidelines calculations, and without even reaching the question of whether the district court properly considered all of the 18 U.S.C. § 3553(a) factors at the time of sentencing. *Id*.

The Tenth Circuit has similarly held that "where [a] district court offers no more than a perfunctory explanation for its alternative holding, it does not satisfy the requirement of procedural reasonableness." *United States v. Pena-Hermosillo*, 522 F.3d 1108, 1118 (10th Cir. 2008). Like here, in *Pena-Hermosillo*, the defendant had lodged a timely objection raising a disputed factual issue that "triggered the judge's fact-finding and explanatory duties." *Id*. at 1111. The Tenth Circuit remanded to the district court for resentencing because it had failed to (1) adequately articulate its alternative holding and (2) make a "*procedurally adequate*" ruling on the disputed issues raised in the defendant's objection." *Id*. at 1118 (emphasis added) (invoking the Federal Rule of Criminal Procedure 32(i)(3)(B) requirement that a district court "must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or

determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing"). The court further explained that a district court's "ruling on a disputed issue" raised in a timely objection "need not be exhaustively detailed," but "*it must be definite and clear*." *Id*. at 1111–12 (quoting *United States v. Williams*, 374 F.3d 941, 947 n.9 (10th Cir.2004)) (emphasis added).

The Fifth Circuit similarly holds a Guidelines error harmless only if (1) "the district court would have imposed the same sentence," and (2) "it would have done so for the same reasons it gave at the prior sentencing." *United States v. Ibarra-Luna*, 628 F.3d 712, 714 (5th Cir. 2010) The above precedents demonstrate that the actual reasons given by the district court to support an alternative sentence must (1) take into account, and adequately rule on, any disputed factual issues that are dispositive and (2) clearly and adequately justify the sentence had the trial court started from the correct Guidelines range.

B. A Minority of Circuits Require Only a Blanket Statement that the District Court "Would Have Imposed the Same Sentence"

Other circuits have taken a different approach. In the Seventh Circuit, the harmlessness of an error turns on the whether the sentencing court made "an unequivocal statement . . . that it would have imposed the same sentence" *United States v. Hines-Flagg*, 789 F.3d 751, 757 (7th Cir. 2015). A district court in that circuit need only state that it "would impose the same sentence" to survive an appeal.

The same is true in the Eighth and Eleventh Circuits. *See United States v. Olson*, 127 F.4th 1266, 1275 (11th Cir. 2025) ("A decision about a disputed [G]uidelines issue will not affect the outcome either way" if "the district court states it would have imposed the same sentence, even absent an alleged error . . . ." (citation omitted)); *United States v. Richardson,* 40 F.4th 858, 868 (8th Cir. 2022) ("Incorrect application of the Guidelines is harmless error where the district court specifies the resolution of a particular issue did not affect the ultimate determination of a sentence, such as when the district court indicates it would have alternatively imposed the same sentence even if a lower guideline range applied.")

C. The Majority Approach Is Correct and This Case Is the Proper Vehicle to Resolve the Split

The Supreme Court has held that "a district court should begin all sentencing proceedings by *correctly calculating* the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007) (emphasis added). "[T]he Guidelines should be the starting point and the initial benchmark" for sentencing, but only after a determination of the correct range has been made. *Id.*; *see also id.* at 51 (holding that improperly calculating the Guidelines range constitutes "significant procedural error"). When "the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the

defendant's substantial rights." *Molina-Martinez v. United States*, 578 U.S. 189, 201 (2016).

The Third Circuit's approach is correct. First, it hews more closely to this Court's cases. Trial courts "must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Peugh v. United States*, 569 U. S. 530, 541 (2013); *see also* 18 U.S.C. § 3553 (directing courts to consider the Guidelines when imposing sentences). Failure to accurately apply the Guidelines "can, and most often will, be sufficient to show a reasonable probability of a different outcome." *Molina-Martinez*, 578 U.S. at 198 (2016). Reversal is the usual remedy, even when a defendant fails to raise the issue at sentencing. *Rosales-Mireles v. United States*, 585 U.S. 129, 140 (2018) ("The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because of the role the district court plays in calculating the range and the relative ease of correcting the error.")

The Third Circuit's approach honors the central importance of the Guidelines by requiring courts to offer reasons why the same sentence would be acceptable even when a Guidelines range is not properly calculated. By contrast, courts following the minority view can effectively insulate even plain errors in a Guidelines calculation, so long as the sentencing court utters the magic words—namely, that "it would impose the same sentence." A busy district judge may be tempted to give short shrift to complex issues under the Guidelines knowing that a safe harbor shields the sentence from review.

Second, and relatedly, the minority approach stymies the development of sentencing law. On appeal, reviewing courts need only determine whether the trial court said it would impose the same sentence. They need not reach a conclusion on the merits of a dispute between the parties, even though resolving such a dispute may drastically affect an individual's liberty.

This Court should resolve this split, which arises repeatedly and can have severe consequences. "It is a '*rare case* where [courts] can be sure that an erroneous Guidelines calculation did not affect the sentencing process and the sentence ultimately imposed." *Raia*, 993 F.3d at 195 (quoting *United States v. Langford*, 516 F.3d 205, 219 (3d Cir. 2008). As this case demonstrates, a defendant can face many more months in prison as a result of a harmless-error ruling.

Here, the district court committed procedural error by failing to address the objection related to the legalization of marijuana under the Missouri Constitution. As a result, the court miscalculated Mr. Phillips's Guidelines range by including marijuana convictions that were subject to retroactive expungement and vacatur. On appeal, the Eighth Circuit did not require the district court to have calculated the correct Guidelines range if the marijuana-related convictions were omitted. Nor did it require the district court to offer reasons that would have justified a substantial variance from the applicable Guidelines range of 41 to 51 months—without counting the already expunged marijuana convictions—to the 120-month sentence it imposed.

The Eighth Circuit, however, affirmed the district court's 120-month sentence based on a "presum[ption]" that the district court would have "impose[d] the same sentence,"[11] App. 5a, regardless of the correct Guidelines range and whether the marijuana convictions had been "vacated as legally invalid" under the Missouri Constitution, *see* Mo. Const. Art. XIV, § 2(8)(b).

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[11] The Eighth Circuit stated that it had "no doubt" the district court "would have alternatively imposed the same sentence even if a lower guideline range applied," based on its reference to a charge of possession with intent to distribute fentanyl, for which Mr. Phillips was not convicted. But the court's 120-month sentence appears to be far removed from sentencing in actual fentanyl-*trafficking* (let alone the lesser offense of possession) cases, negating any presumption that the sentence can be affirmed on this basis. *See United States v. Farley*, 36 F.4th 1245, 1254 (10th Cir. 2022) (remanding for resentencing "due to the unreasonableness of the district court's methodology in determining the extent of [the] variance"); *United States v. Holmes*, 87 F.4th 910, 914 (8th Cir. 2023) (noting that district courts cannot cure Guidelines-calculation errors with "a blanket statement" and should "specifically identif[y] the *contested issue*" and explain an alternative sentence) (emphasis added) (citations omitted). According to the United States Sentencing Commission (USSC) "[t]he average sentence for fentanyl trafficking offenders was 64 months." USSC, *Quick Facts—Fentanyl Trafficking Offenses* at 1 (Fiscal Year 2022), https://perma.cc/3ZLK-L4GG. The Commission reports that 62% of fentanyl trafficking offenders were sentenced under the Guidelines, while only 38% received a variance. *Id*. at 2. Of those individuals who received a variance, 95.4% had a downward variance, and their average sentence reduction was 40.5%. *Id*. Only 4.6% of individuals who received a variance at all had an *upward* variance, and their average sentence increase was 69.4%." *Id*.

The procedural error in this case is anything but harmless. Mr. Phillips's sentence is approximately 2.4 to 3 times greater than his Guidelines range. The Eighth Circuit did not directly address the only objection in this case, which concerned the legalization of marijuana pursuant to the Missouri Constitutional Amendment. In so doing, the court calculated a Guidelines range that included marijuana convictions that were subject to retroactive expungement. There is no evidence in the record that the court made a "*procedurally adequate*" ruling pursuant to Fed. R. Crim. Proc. 32(i)(3)(B), *see Pena-Hermosillo*, 522 F.3d at 1118, on the disputed issue of the legalization of marijuana under the Missouri Constitutional Amendment. Nor does the record contain any "definite and clear" evidence, *see id.* at 1111, that the district court even understood the substance of Mr. Phillips's objection related to the legalization of marijuana.[12]

This Court has held in *Chavez-Meza v. United States* that courts "need not provide a lengthy explanation if the 'context and the record' make clear that the judge had 'a reasoned basis'" for a variance of the sentence. 585 U.S. 109, 117 (2018). That context is lacking here. It was necessary for the district court to consider the application of the Missouri Constitutional Amendment.

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[12] As explained above in the background Section, the Eighth Circuit conflated Mr. Phillips's specific objection about the legalization of marijuana in the present appeal, with an irrelevant, ACCA, controlled-substance objection that had been lodged in the first appeal. *See supra* notes 2–3 and accompanying text.

As this Court has observed, "'[t]o a prisoner,' [the] prospect of additional 'time behind bars is not some theoretical or mathematical concept.'" *Rosales-Mireles*, 585 U.S. at 139 (quoting *Barber v. Thomas*, 560 U.S. 474, 504 (2010) (Kennedy, J., dissenting)). On the contrary, any amount of additional imprisonment time "is significant" and poses "exceptionally severe consequences" for a prisoner and for our "society[,] which bears the direct and indirect costs of incarceration." *Rosales-Mireles*, 585 U.S. at 139 (citations omitted).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

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June, 18, 2025

APPENDIX

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APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No: 23-2678

United States of America

Plaintiff - Appellee

v.

Brandon Phillips

Defendant - Appellant

Appeal from United Stated District Court for the Eastern District of Missouri - St. Louis

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Submitted: September 27, 2024
Filed: December 23, 2024

Before SMITH, ERICKSON, and STRAS, Circuit Judges.

STRAS, Circuit Judge.

Brandon Phillips had several Missouri marijuana-possession convictions on his record when he pleaded guilty to a federal felon-in-possession charge. The

district court imposed a lifetime ban on federal benefits and a 120-month prison sentence, even though Missouri had legalized marijuana and announced it would expunge certain convictions. Although this development does not require resentencing, we vacate the federal-benefits ban.

I.

Phillips agreed to plead guilty to a felon-in-possession charge. *See* 18 U.S.C. § 922(g)(1). At sentencing, the presentence investigation report recommended a range that was driven, in large part, by his prior convictions. *See* U.S.S.G. § 4A1.1(a); *see also* Mo. Rev. Stat. § 195.211(1) (2016) (possession with intent to distribute a controlled substance). He objected on the ground that it "overstate[d]" his criminal history because "the State of Missouri by referendum ha[d] legalized possession of marijuana." *See* Mo. Const. art. XIV, § 2.1 ("mak[ing] marijuana legal under state and local law"). He wanted the district court, like Missouri, to "revisit[]" its "views" on marijuana.

The court overruled the objection and added that it "would [have] impose[d] the same sentence" regardless, even if it had to do so "by way of variance or otherwise." It then declared that "under 21 [U.S.C. §] 862(a)(1)(C), Mr. Phillips is permanently ineligible for federal benefits."

At the time, Phillips's marijuana convictions were still on the books, even though the referendum required "expungement of the criminal history records of all misdemeanor marijuana offenses." Mo. Const. art. XIV, § 2.10(8)(a). The last one did not come off

until roughly 18 months later.[1] Now that the process is complete, he believes the changes to his criminal history require resentencing.

II.

In most opinions, this would be the spot to discuss the standard of review. In this case, however, both possibilities lead to the same place.

The most likely alternative is plain-error review, which applies "when[ever] a party has an argument available but fails to assert it in time." *United States v. Nunez-Hernandez*, 43 F.4th 857, 859 (8th Cir. 2022); *see* Fed. R. Crim. P. 52(b). "To preserve [the expungement issue] for appellate review," Phillips had to "*clearly state* the grounds for the objection" in the district court. *United States v. Pirani*, 406 F.3d 543, 549 (8th Cir. 2005) (en banc) (emphasis added) (citation and brackets omitted).

Here, although he urged the court to "revisit[]" its "views" about marijuana, he never raised the possibility of expungement, much less how his sentencing range would change once it happened. Nor was there any mention of postponing his sentencing "pending state-court review of [his] prior convictions," which he now suggests was required. *See Holguin-Hernandez v. United States*, 589 U.S. 169, 173 (2020) (explaining that another way for a party to "bring[] [an objection] to the court's attention" is "[b]y 'informing the court' of the [alternative] 'action' he

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[1] We grant the requests to take judicial notice of the expungement orders. *See* Fed. R. Evid. 201(b)(2).

'wishes [it] to take'" (quoting Fed. R. Crim. P. 51(b))). Raising the issue for the first time on appeal is typically too late.[2] *See Nunez-Hernandez*, 43 F.4th at 859; *United States v. Filker*, 972 F.2d 240, 241–42 (8th Cir. 1992).

If it was, Phillips's burden would be high. The sentencing decision must have not just been wrong, but "*clearly* or *obviously* wrong." *Nunez-Hernandez*, 43 F.4th at 861 (emphasis added) (citation and brackets omitted). Here, however, there are no clear answers about "whether [the] conviction[s] [were] properly included." *United States v. Townsend*, 408 F.3d 1020, 1024 (8th Cir. 2005) (quoting *United States v. Hines*, 133 F.3d 1360, 1363 (10th Cir. 1998)). For one thing, the timing raises tricky questions about retroactivity. For another, *why* Missouri went down the expungement route matters. Some "expunged convictions" do "not count[]," U.S.S.G. § 4A1.2(j), like those based on "constitutional invalidity, innocence, or a mistake of law," *Townsend*, 408 F.3d at 1025. Others do, when the reason is "permit[ting] . . . a clean start . . . [or] restor[ing] some civil rights." *Id.*; *see id.* at 1024 (emphasizing that application of the Sentencing Guidelines is a matter of "[f]ederal law, not state law," so "[a] state's use of the term 'expunge' is not controlling" (quoting *Hines*, 133 F.3d at 1363)). It is not "obvious" which box Phillips's convictions fit

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[2] Although Phillips suggests that his attorney was ineffective for overlooking expungement, it is too *early* to raise an ineffective-assistance-of-counsel claim. *See United States v. Ramirez-Hernandez*, 449 F.3d 824, 827 (8th Cir. 2006). The record is not "fully developed," the answer is not "readily apparent," and delay would not cause "a plain miscarriage of justice," so the claim will have to await "a separate motion under 28 U.S.C. § 2255." *Id.*

into, meaning any forfeited error could not have been "plain." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (explaining that "reasonable dispute" precludes plain error).

Even if asking the court to change its "views" on marijuana preserved an expungement-related objection, the outcome would not change. We would presume that the district court was aware of what he wanted and why, yet still decided to "impose the same sentence" anyway based on its "evaluation of the [18 U.S.C. §] 3553(a) factors." Phillips had reoffended on parole and possessed nearly 20,000 "lethal doses" of fentanyl, so the district court thought "the aggravating factors . . . far outweigh[ed] the mitigating" ones. In short, he was too dangerous for a shorter sentence.

This explanation leaves us with no doubt that the district court "would have alternatively imposed the same sentence even if a lower guideline range applied," just as it said. *United States v. Hamilton*, 929 F.3d 943, 948 (8th Cir. 2019) (citation omitted). It also means that preserving the issue would have been of no help to Phillips. If the district court was aware that he wanted credit for the impending expungements, then it would become one of the "objections . . . lodged in this case" that was known but had no effect on the 120-month sentence he received. *See United States v. Holmes*, 87 F.4th 910, 914 (8th Cir. 2023) ("[E]ven significant procedural error can be harmless." (citation omitted)). No matter what, in other words, Phillips cannot win.

III.

The federal-benefits ban is a different story. The challenge to it also comes too late, but it is the sort of unambiguous and prejudicial mistake that plain-error review can fix. *See Robinson v. Norling*, 25 F.4th 1061, 1062 (8th Cir. 2022) (recognizing that a forfeited argument "is not always lost"). There are three mandatory requirements: "(1) [an] 'error,' (2) that is 'plain,' and (3) that 'affect[ed] substantial rights.'" *Johnson v. United States*, 520 U.S. 461, 467 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)).

The first two do not pose a problem. The federal-benefits ban covers only "individual[s] who [are] convicted of any Federal or State offense consisting of the *distribution of controlled substances*." 21 U.S.C. § 862(a)(1)(C) (emphasis added). In short, drug distributors, not gun possessors.

As far as his federal conviction is concerned, Phillips only possessed a *firearm*, not drugs. *See United States v. Coleman*, 961 F.3d 1024, 1027 (8th Cir. 2020) (listing the elements of a felon-in-possession conviction). And even his prior Missouri marijuana convictions were for possessing drugs, *not* distributing them. For those reasons, applying the statute to him "depart[ed] so far from the text that it [wa]s clearly incorrect as a matter of law." *United States v. Lachowski*, 405 F.3d 696, 698–99 (8th Cir. 2005) (noting that a "lack of [controlling] precedent" on an issue "does not prevent a finding of plain error"); *see United States v. Gardner*, 32 F.4th 504, 533 (6th Cir. 2022) (holding that the statute *requires* a conviction

with "'actual distribution[]' or a completed delivery" (quoting *United States v. Williams*, 541 F.3d 1087, 1090 (11th Cir. 2008) (per curiam))); *United States v. Silva-De Hoyos*, 702 F.3d 843, 849 (5th Cir. 2012) (agreeing that a crime that "does not contain distribution as an element . . . is not a distribution offense under § 862(a)"); *United States v. Jacobs*, 579 F.3d 1198, 1199 (10th Cir. 2009) ("[Section] 862(a)[] reaches only those crimes that include distribution as an element.").

The effect on Phillips's substantial rights is just as easy to see. *See Olano*, 507 U.S. at 734. Going forward, he cannot receive "any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States." 21 U.S.C. § 862(d)(1)(A). Except for relying on a clearly inapplicable statute, the district court had no other avenue for imposing these restrictions. *Cf. id.* § 862(a)(1)(C) (making "a third or subsequent" drug-distribution conviction the only trigger). In plain-error terms, "the outcome of the proceeding would have been different," at least as far as the ban is concerned. *Greer v. United States*, 593 U.S. 503, 508 (2021) (citation omitted).

Now we must decide whether to correct the mistake, which depends on whether it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (alteration in original) (quoting *Olano*, 507 U.S. at 732). Although not every mistake deserves fixing, *see Olano*, 507 U.S. at 737 (noting that automatic relief would make "the discretion afforded by Rule 52(b) . . . illusory"), this one does. Phillips already faces a

lengthy prison sentence. Using a plainly inapplicable statute to pile lifelong professional and financial penalties on top would undermine the "integrity [and] public reputation of judicial proceedings." *Rosales-Mireles v. United States*, 585 U.S. 129, 137 (2018) (quoting *Olano*, 507 U.S. at 736); *see id.* at 140 (suggesting that errors "based on . . . mistake[s] . . . by the Probation Office, which works on behalf of the District Court," are particularly damaging). Not to mention raise serious "fairness" concerns, *id.* at 137 (quoting *Olano*, 507 U.S. at 736), because no one else convicted of illegal firearm possession faces the same punishment, *see* 21 U.S.C. § 862(a)–(b) (covering only drug traffickers and possessors).

Similar considerations also explain why Phillips can raise this issue despite an appeal waiver in his plea agreement. Regardless of its scope, "a defendant [still] has the right to appeal an illegal sentence." *United States v. Andis*, 333 F.3d 886, 891 (8th Cir. 2003) (en banc) (explaining that "we . . . refuse to enforce" appeal waivers if "do[ing] so would result in a miscarriage of justice"). And however "narrow" the illegal-sentence exception might be, it covers a sentence "not authorized by law," like the one here. *Id.* at 892 (citation omitted).

It also makes no difference that the 120-month prison term falls within the statutory maximum. *See* 18 U.S.C. § 924(a)(2) (2018); *see also United States v. Howard*, 27 F.4th 1367, 1370 (8th Cir. 2022) (noting that a "'sentence . . . within the statutory range' is not appealable . . . 'in the face of a valid appeal waiver'" (quoting *Andis*, 333 F.3d at 892)). Just because one statute authorizes part of a defendant's sentence does

not mean the district court has free rein to impose other penalties "in excess of a[nother] statutory provision." *Andis*, 333 F.3d at 892 (citation omitted).

IV.

The final loose end is Phillips's suggestion that, as applied to him, the ban on possessing firearms as a felon violates the Second Amendment. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022). Even if circuit precedent allowed an as-applied challenge in these circumstances, *but see United States v. Jackson*, 110 F.4th 1120, 1125 (8th Cir. 2024), his waiver of the argument by pleading guilty, *see United States v. Veasley*, 98 F.4th 906, 908 (8th Cir. 2024), would still stand in the way.

V.

We accordingly vacate the federal-benefits ban, *see* 28 U.S.C. § 2106, but otherwise affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
Plaintiff(s),	)	
vs.	)	Case No. 4:19-cr-00538-SRC
BRANDON PHILLIPS	)	
Defendant(s).	)	

Order

This matter comes before the Court on the Eighth Circuit's remand pursuant to the parties' joint motion. Doc. 187. The Court held a resentencing hearing on February 9, 2023 and imposed a new sentence in light of the Eighth Circuit's recent decision in *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022). Doc. 197. The Court now vacates Phillips's original sentence and resentences Phillips to 120 months' imprisonment, followed by three years of supervised release.

Defendant Brandon Phillips previously pleaded guilty to being a Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1). Doc. 143 at pp. 1–2. As part of this plea agreement, the government moved for dismissal as to the other five counts. *Id.* Prior to sentencing, the probation officer prepared a

Presentence Investigation Report, Doc. 143, determining that Phillips was an Armed Career Criminal with a guideline range of 188 to 235 months' imprisonment, *id*. at ¶¶ 32, 76. Phillips objected to the Armed-Career-Criminal enhancement. Doc. 151 at pp. 2–3. At sentencing, the Court overruled these objections based on the law at the time and sentenced Philips to 188 months' imprisonment. Doc. 177 at pp. 29–30, 46. Phillips then appealed his sentence. Doc. 168.

While awaiting judgment, the Eighth Circuit held the appeal in abeyance pending its decision in other cases addressing the same issues. The Eighth Circuit then decided Perez, holding that, under the Armed Career Criminal Act, courts must compare the state drug schedule in effect at the time of the prior state offense to the federal drug schedule in effect at the time the defendant committed the offense. 46 F.4th at 699–700. After this holding, the parties jointly sought remand for resentencing based on Perez, and the Eighth Circuit granted the parties' motion. Doc. 187.

After remand, the Probation officer prepared a Resentencing Presentence Investigation Report, removing the Armed-Career-Criminal enhancement. Doc. 192 at ¶ 27. Under the new guideline calculation, the updated sentencing guideline was 110 to 120 months in custody. *Id.* at p. 6. Phillips objected on grounds unrelated to the Armed-Career-Criminal enhancement, Doc. 193, and the Court overruled this objection, Doc. 197. At resentencing, the Court imposed a sentence of 120 months, followed by three years of supervised release.

Federal law prohibits courts from "modify[ing] a term of imprisonment once it has been imposed except" as permitted by statute. 18 U.S.C. § 3582(b), (c). There are three ways a court can change a sentence of imprisonment after it has been entered: 1) modify pursuant to 18 U.S.C. § 3582(c); 2) correct pursuant to Federal Rule of Criminal Procedure 35 or 18 U.S.C. § 3742; 3) modify, if appealed and found outside the guideline range, pursuant 18 U.S.C. § 3742. 18 U.S.C. § 3582(b). Further, when "the court of appeals determines that the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate." *Id.* at § 3742(f)(1).

During the original sentencing hearing, the Court applied the Armed-Career-Criminal enhancement as the law at the time required. Doc. 177 at pp. 29–30. The subsequent Eighth Circuit decision in Perez led to this remand. However, in doing so, the Court remanded without stating that it was "in violation of law" or "imposed as a result of an incorrect application of the sentencing guidelines." *See* Doc. 187; 18 U.S.C. § 3742(f)(1). In fact, the sentence was not in violation of the law as it stood at the time of sentencing. Nonetheless, the Court resentenced Phillips in response to the Eighth Circuit's order to remand. Doc. 187. Pursuant to the resentencing hearing, the Court now vacates the original sentence of 188 months and imposes a 120-month sentence followed by three-years supervised release. Were the law to remain as it was at the original sentencing, the Court would have

imposed the sentence as it appeared in the vacated judgment.

So Ordered this 14th day of February 2023.

/s/ STEPHEN R. CLARK
STEPHEN R. CLARK
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

4:19-CR-538 – Resentencing – 2/9/2023 1

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION - ST. LOUIS
BEFORE THE HONORABLE STEPHEN R. CLARK
DISTRICT JUDGE

UNITED STATES OF AMERICA	)	
Government,	)	Case Number
vs.	)	4:19-cr-00538-SRC-1
BRANDON PHILLIPS	)	
Defendant.	)	

==========

- RESENTENCING HEARING -
FEBRUARY 9TH, 2023

==========

APPEARANCES

For the Government:	For the Defendant:
ennifer L. Szczucinski, AUSA	Nick A. Zotos, Esq.
J.S. ATTORNEY'S OFFICE	ATTORNEY AT LAW
11 South 10th Street	4235 Lindell Boulevard
t. Louis, MO 63102	St. Louis, MO 63108

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LINDA NICHOLS, RDR, CRR
Official Court Reporter
United States District Court
Eastern District of Missouri
111 South 10th Street, Third Floor
St. Louis, MO 63102

- RESENTENCING HEARING -
FEBRUARY 9TH, 2023
PROCEEDINGS IN OPEN COURT COMMENCED
AT 3:58 P.M.:
THE COURT: We're here on the case of The United States
of America v. Brandon Phillips, which is Number
4:19-CR-538-1-SRC.
Counsel, please state your appearances for the record.
MS. SZCZUCINSKI: Jennifer Szczucinski for the
Government, Your Honor.
MR. ZOTOS: Nick Zotos on behalf of the Defendant,
Judge. Defendant is present in-person.
THE COURT: Very good. And I see Mr. Phillips.
Good afternoon. I'm going to have you stand up and be
sworn in by our Courtroom Deputy.
(Defendant sworn.)
THE COURT: Mr. Phillips, you may be seated.
Mr. Phillips, you understand we're here for your
Resentencing. You pled guilty on June 9 of 2021. Do you
understand that?
THE DEFENDANT: Yes, I do.
THE COURT: And you are under oath and your answers are
under penalty of perjury, just as they were when you pled
guilty. Do you understand that?
THE DEFENDANT: I do.

THE COURT: And when you pled guilty, did you plead guilty because you are guilty as charged?
THE DEFENDANT: Yes.
THE COURT: All right. And so with that, we had a discussion at the last sentencing hearing, the prior sentencing hearing, about you and your counsel and I know you and your counsel haven't always seen eye-to-eye on this. But since the last sentencing in this case and leading up to today's hearing, have you had a chance to talk with your counsel about sentencing?
THE DEFENDANT: No, not exactly. I actually had no knowledge of this joint motion that was put in prior to the joint motion being written up or sent to the Court. I had no knowledge of nothing that was going on.
I noted the motion went in around November 6th, 2022.
I didn't receive anything saying anything about the motion or anything until roughly the middle of December. And a week or so later, a week and a half later, I was in transit, coming back to be resentenced.
THE COURT: Do you need a chance to talk with Mr. Zotos now? Because I'm happy to give you time to talk with Mr. Zotos if you'd like it.
THE DEFENDANT: I mean we spoke briefly on the phone after I was in Sainte Genevieve so I know what's going on as far as what he did or why he said what he did. I didn't personally

agree with it or give permission, as being the client, to do that. So I understand what he's doing but I had no knowledge of it.

THE COURT: That's not my question. I understand what you're saying but my question is, Would you like some time now to talk with Mr. Zotos? Because if you would like some time, I'm happy to give you time to talk with him now.

THE DEFENDANT: Um, that's fine.

THE COURT: Okay. Go ahead.

(Discussion off the record between Defendant and his counsel.)

MR. ZOTOS: Judge, I understand Mr. Phillips' issue because I reread the transcript from the sentencing. There was a criminal history point for a case which he indicated was not him and the Court struck that point and it did not count and it did not change him being a Category VI. But he's advising me at this time that there was another point scored. Right now I don't remember it being discussed at the sentencing, nor an objection being filed that it was not him, but I think -- I mean I don't have the original PSR with me. It's my recollection he was 15 criminal history points. If we struck the one, that would have been 14, which you did. You didn't count it. But he's suggesting there was another criminal history point which, if you threw it out, he would still be a 13 and

I think that's still a VI.
THE COURT: That's correct.
MR. ZOTOS: So it doesn't change him being a Category VI or a Category V.
THE COURT: Right. Well, and deducting one additional point from where he was, on top of a point that I did not count at the original sentencing hearing --
MR. ZOTOS: Right. So even if you knocked those --
THE COURT: Hold on.
MR. ZOTOS: I'm sorry.
THE COURT: -- it would not, would not change his Criminal History Category. He would remain a Criminal History Category VI because 13 Criminal History Category points puts him at a VI.
MR. ZOTOS: That's what I would have to agree with.
THE COURT: All right. So, Mr. Phillips, did you have enough time to talk with Mr. Zotos just then?
THE DEFENDANT: I mean as far as what we can talk about and what we can agree upon and talk about without getting in an argument or anything inside of the court, without being disrespectful to the Court, yes.
But do I agree with what's going on or what he says?
No. I didn't even know at the time on my PSI what criminal history points I had. It was never pointed out to me that I had 15 criminal history points at all, Mr. Zotos. I made multiple

arguments during by PSI to my plea attorney. He told me that he was not going to take his time to argue because that was a waste of his time.

Multiple things on my PSI. I asked for paperwork while I was in USP Lee over and over again, repeatedly. I never received my PSI paperwork. I never received -- now, he just brought this case to court and gave it to me and set it in front of me. He just brought the response of the Government, which I understand that they just responded to that objection.

THE COURT: Mr. Phillips, I'm going to stop you there, okay. So I'm going to explain a few things to you.

So, one, we had a prior sentencing hearing so we've been through a lot of the things you're talking about now before.

Number two, with respect to objections to the Presentence Report, those are decisions that the law allows the lawyer to make; not the client to make, not the defendants. Those are what the lawyers' training and skill and education and experience allow him or her to make. In this case it's Mr. Zotos.

Mr. Zotos lodged objections on your behalf before the first Sentencing hearing. He's also lodged objections on your behalf before this hearing. And he's also just raised this additional issue you're raising which, frankly, is too late to raise it but I'm going to let it be raised today, this issue of

raising this additional criminal history point that Mr. Zotos just explained. I won't take that into account, either. It doesn't change your Criminal History Category in this case. You're still a Criminal History Category VI. So with respect to objections that you believe Mr. Zotos should have made, again, the law commits those to his decision, not to yours. And with respect to this issue that you raised earlier about not knowing what was filed in the Court of Appeals, I don't know whether you did or not. I don't make any finding on that. However, I do know this. What ended up happening and what Mr. Zotos did for you in the Court of Appeals ended up with you back here for a Resentencing where, when previously your Sentencing Guidelines range was 188 months to 235 months with a statutory maximum sentence of life and a mandatory minimum sentence of 15 years, now you're back in front of me with a Sentencing Guidelines range of 120 -- 110, rather, months to 120 months, with a statutory maximum sentence of ten years and no mandatory minimum sentence. So, again, the legal decisions that Mr. Zotos made on your behalf are decisions that the law commits to him to make. And I can assure you, based on what I've just laid out for you in terms of the sentencing scope that we're here for today in terms of the statutory maximum and in terms of the Guidelines range, compared to where you were before when we had your original Sentencing hearing, it has been much to your benefit.

It puts you in a much lower Guidelines range and it caps your maximum sentence here at 120 months, whereas before I could have sentenced you up to life in prison.

So with that, I want to make sure that Mr. Zotos gets a chance to talk because when you were saying you didn't get certain records, Mr. Zotos showed me something that I want to make sure he has a chance to explain on the record.

Go ahead.

MR. ZOTOS: Judge, obviously, Mr. Phillips had the PSR while he was confined. I got a request to send the PSR to BOP.

He can't have a PSR in BOP. He was sent the Plea and Sentencing transcript, docket sheets and indictment, which is what he's allowed to have. That was sent to him, actually, twice.

But as far as to touch upon what he says, when I was representing, part of representation is not to do a collateral attack on convictions that are 15, 18 years old. That's not a part of how I was engaged to proceed as his attorney on the matter. There is no legal remedy, under Missouri Supreme Court Rules, to do a collateral attack on it because he's out of time for it. All that would be available for him is a Writ of Habeas on the matters that he is actually innocent of those offenses from 2005, 2008, 2015.

And just to make note, I represented him on at least the first two so I'd have a conflict if I attacked and challenged those convictions because I was the attorney involved

in the plea and sentencing.
THE COURT: Understood. Thank you.
So to be clear for the record, with respect to the criminal history point that in the first Sentencing hearing I did not consider, and the criminal history point that's at issue here that I'm again not considering, I'm making no finding as to the validity of those convictions or whether they were Mr. Phillips' or not. I'm simply deeming them irrelevant for purposes of sentencing because they have no effect on sentencing.
They have no effect on the Guidelines calculation and his Criminal History Category, and they also have no effect on and I will not take them into account in determining my sentence today. I didn't take the one point into account in determining my sentence the prior time, just so the record is clear on that.
And I understand what you're saying.
So that said, we're going to proceed with sentencing at this time. So with all of that, Ms. Szczucinski, were there any identifiable victims who needed to be notified?
MS. SZCZUCINSKI: No, Your Honor.
THE COURT: I've reviewed all of the materials available in the Court's CM-ECF system and considered them as is appropriate under the law for purposes of today's hearing.
For resentencing Mr. Phillips, those materials include but are not limited to: the Guilty Plea Agreement, the

Presentence Report, the Resentencing Presentence Report, the Defendant's Objections filed for this hearing, which are Docket Number 193, and the United States' response, Docket Number 196. I've considered the JSIN data available from the Sentencing Commission and I've found, looking at that as well as all the other information I looked at in this case, that the Commission's data does not take into account the dismissal of the charges that we have here, particularly the dismissal of the charge that included a 60 year mandatory minimum -- a 60 month, excuse me, mandatory minimum consecutive to any other count, so I found that data of marginal relevance in consideration of my sentencing here. I've considered, also, all the prior sentencing materials from the original sentencing hearing, including the plea and the sentencing transcript. I've considered, as well, the parties' Joint Motion to Remand and the related Court of Appeals Judgment and Mandate sending the case back to me for resentencing. With all of that, counsel, are there any further written materials for me to consider in connection with sentencing?

MR. ZOTOS: No, sir, other than our argument.

THE COURT: Understood.

MS. SZCZUCINSKI: No, Your Honor.

THE COURT: And so with that, Mr. Zotos, did you have

enough time to review the Resentencing PSR as well as any other matters relating to sentencing with Mr. Phillips?
MR. ZOTOS: Yes, sir, we've had phone conversation.
THE COURT: Understood. And then you've had some conversation here today.
MR. ZOTOS: I'm sorry, sir?
THE COURT: And you've had some conversation here today.
MR. ZOTOS: Yes, sir.
THE COURT: So with that, you've filed objections which I had noted previously, Docket Number 193. Do you have any other objections to assert?
MR. ZOTOS: No, sir.
THE COURT: We'll circle back to those.
Mr. Phillips, have you consumed any drugs or alcohol within the last 48 hours?
THE DEFENDANT: No, I have not.
THE COURT: Are you currently taking any medication?
THE DEFENDANT: No.
THE COURT: And did you read the Resentencing Presentence Report in this case?
THE DEFENDANT: I didn't understand what you said.
THE COURT: The Resentencing Presentence Report in this case?
THE DEFENDANT: The Resentencing Presentence Report?

THE COURT: Yes, sir.
THE DEFENDANT: Do I have that?
THE COURT: That's not something I would know.
THE DEFENDANT: I don't know exactly what you're speaking about.
THE COURT: I'll have Mr. Zotos talk to you.
(Document handed to Defendant by his counsel.)
THE COURT: You've seen that before?
THE DEFENDANT: Yeah, I got it in the mail but we never went over this.
THE COURT: All right. Why don't you take a moment to go over it with Mr. Phillips.
(Discussion off the record between Defendant and his counsel.)
MR. ZOTOS: There is a question, Judge, if my original advice to him as to what his Guideline range might be was correct or incorrect. I don't remember the reason or how I computed that but it's not -- what he was advised was incorrect, what his Guideline range might be.
But that was a factor of whether or not those marijuana convictions would count, or not, into his Base Offense Level and whether they would count, or not, as to criminal history points.
That was overruled by Henderson and Bailey.
THE COURT: Okay. You mean because they're marijuana convictions, right?

MR. ZOTOS: Correct.
THE COURT: Right.
MR. ZOTOS: He would not have had the criminal history
points that he did.
THE COURT: Right. But the Eighth Circuit has already
determined in Henderson and Bailey that the points should be
included because it's based on the state law in effect at the
time of convictions rather than state law in effect at any other
later time.
MR. ZOTOS: Without that criminal history, without the
enhancement from a 20 to a 24, his Guideline range would be
considerably lower than where he is right now.
THE COURT: Perhaps, but that's not the issue. The
issue is whether his Guidelines range is appropriately,
accurately calculated.
MR. ZOTOS: Well, to use his words, Judge, it's a
question of trust.
THE COURT: Okay. I understand. We'll address those
when we address the objections in a moment.
So that said, Mr. Phillips, you've just talked with
Mr. Zotos about the Resentencing Presentence Report, correct?
THE DEFENDANT: Um ...
THE COURT: That's what I just had him come talk to you
about. That's when he walked over. Is that a yes or a no?
THE DEFENDANT: I mean he walked over here and said

what he said about it. I don't necessarily agree with it.
THE COURT: It's not a question of whether you agree with it, Mr. Phillips. So I'm going to ask you again to answer --
THE DEFENDANT: I don't know how to appropriately answer that question.
THE COURT: No, Mr. Phillips. No. Don't cut me off and don't interrupt me. Do you understand?
THE DEFENDANT: Yes, I understand what you're saying.
THE COURT: Do you understand? Okay. Then don't cut me off and don't interrupt me.
Now, that said, Mr. Zotos just walked over to you and talked with you about the Resentencing Presentence Report. Yes or no?
THE DEFENDANT: He talked to me about it but I don't understand and I don't --
THE COURT: Yes or no, Mr. Phillips?
THE DEFENDANT: So I can't --
THE COURT: Mr. Phillips, yes or no?
THE DEFENDANT: He spoke to me about it but I don't understand, and I don't think that what he said was correct.
THE COURT: We'll talk about that in a minute. First answer my question yes or no.
THE DEFENDANT: Yeah, he talked about it.
THE COURT: Okay. Now, I understand you don't agree

with what you and he talked about but that's not my question.
Answer my questions, okay? Do you understand that?
THE DEFENDANT: I understand what you're saying but --
THE COURT: No. Mr. Phillips, you understand what I'm
saying. That's it. You don't get to make editorial comments
every time you speak.
That said, you have a plea agreement in this case. Is
there any other agreement that you think you have about
sentencing in this case?
THE DEFENDANT: Could you say that again?
THE COURT: Yes. You have a Guilty Plea Agreement in
this case. Do you understand that?
THE DEFENDANT: Yeah, I understand that.
THE COURT: Is there any other agreement you think you
have about sentencing in this case?
THE DEFENDANT: I think that prior to --
THE COURT: No, Mr. Phillips. Is there any other
agreement that you think you have about sentencing? Yes or no?
THE DEFENDANT: Yes, I think I had an agreement of if
I wasn't an Armed Career Criminal, that I was facing 41 to
51 months.
THE COURT: Where is that agreement, Mr. Phillips?
THE DEFENDANT: That's what --
MR. ZOTOS: It's in a letter, Judge.
THE DEFENDANT: Prior -- are you talking about –

MR. ZOTOS: I sent a letter to him of what I was estimating certain things at under certain conditions.
THE COURT: How is that an agreement?
MR. ZOTOS: Judge, I'm just saying that's where he gets it.
THE COURT: So you think you have an agreement with the prosecution that's not in your Guilty Plea Agreement?
THE DEFENDANT: Prior to my last sentencing, Mr. Zotos told me that I was facing 41 to 51 months if I did not have the ACCA on me.
We didn't have no conversation that was about if the marijuana charges did not stick. 'Cause if they was wiped away, the marijuana from my criminal history points, my Offense Level and the time that I would have been facing would have been less than 41 to 51 months.
THE COURT: Mr. Phillips --
THE DEFENDANT: I've got the Sentencing Table right in front of me.
THE COURT: Mr. Phillips, can I tell you one thing that's not happening today? We're not having an argument about your Guilty Plea Agreement. Your Guilty Plea Agreement is what it is. You've signed it, I've accepted it and you, under oath, stood here in my courtroom and you told me that you understood all of it and that you signed it freely, knowingly and voluntarily, and I made that finding already. We're not doing

that again, all right?
You don't have any other agreement than your Plea Agreement. You've already told me that. So unless there's a new agreement that somehow has occurred between the time of the last sentencing and this sentencing, you don't have any other agreement, right?
THE DEFENDANT: It was an agreement that was made on the joint motion that said that I agreed to the Perez case being -- that my criminal history points, that I never agreed to that. He agreed to that for me, without my knowledge.
THE COURT: Well, if you want me to go back and find you an Armed Career Criminal and sentence you under that, I can't, okay. But that's essentially what you're asking me to do. It's not a real smart thing and that's why the law commits to the attorneys these kind of decisions, not to you. We're not relitigating the decisions that Mr. Zotos made or gets to make as an attorney.
So with that, I'm going to proceed. I know you have filed objections, Mr. Zotos, and we've already discussed them. Is there any further discussion that we need to have with respect to the objections?
MR. ZOTOS: Not on behalf of me, Judge.
THE COURT: Ms. Szczucinski?
MS. SZCZUCINSKI: Your Honor, we'd rest on our written response.

THE COURT: Understood. I overrule the objections on the basis that under the law there's a couple of different things. For purposes of Criminal History, the Guidelines section 4B1.2(b) provision, by its text and per it looks to state law, and per the Court of Appeals in Bailey and Henderson, we look to state law in effect at the time of the state convictions to determine whether the state convictions are controlled substances offenses. And for the record, the Bailey case is United States v. Bailey, 37 F.4th 467 (8th Cir. 2022) and the Henderson case is United States v. Henderson, 11 F.4th 713 (8th Cir. 2022).

And per the Eighth Circuit in United States v. Perez, which is 46 F.4th 691 (8th Cir. 2022), for purposes of the Armed Career Criminal Act and the categorical approach, you must compare the state drug schedule in effect at the time of prior state offenses to the federal drug schedule in effect at the time of the federal offenses committed.

So I overrule the objections on the basis that this Eighth Circuit has resolved them already and that they have no legal merit.

That said, with respect to Mr. Phillips' criminal history I will, as I stated earlier, not make any findings with respect to the two criminal history points that he contests, but I will also not take those into account or consider them in connection with sentencing in this case.

So with that, we'll conduct our Local Rule 13.05 bench conference. Mr. Phillips, we're going to put headphones on you.
At that time the microphone will be cut and you will have to
give me responses by hand-signals. So a thumbs-up if your
answer is yes. Shake your head if your answer is no.
Do you understand that, Mr. Phillips?
THE DEFENDANT: (No response.)
THE COURT: Do you understand that, Mr. Phillips?
THE DEFENDANT: Yes. Am I gonna have time to speak on
matters that I have with the courts?
THE COURT: You'll have an opportunity to speak
relating to sentencing in a few minutes.
SEALED SIDEBAR PROCEEDINGS:
(Pursuant to Local Rule 13.05
a sidebar conference was held on the record
and placed under Seal.)
PROCEEDINGS RETURNED TO OPEN COURT:
THE COURT: We're back on the public record. I'll take argument and allocution.
And I'll remind Mr. Phillips you'll have an opportunity to speak with me in few minutes after I hear from Mr. Zotos.
But you might recall at your original Sentencing hearing in this
case I said that it was very questionable whether you had
accepted responsibility in this case and I said it was a
difficult finding for me to make, but I nonetheless found that

you accepted responsibility.
Based on your conduct here again today, which is similar to your conduct at the original Sentencing hearing in this case, I'm again in a position where finding acceptance of responsibility is in question. And if I find that, that will affect your Guidelines calculation in this case. So I want you to be aware of that, and I'm cautioning you that you take that into account before you make any comments to me when it is your turn to speak.
So with that, Mr. Zotos, go ahead. You may proceed.
MR. ZOTOS: Thank you, Judge.
With his Guideline range being 110 months to 120 months, let me speak to the practicality of it. If this Court decides to give him 120 months, it's a message that goes out to other defendants that there is no point in trying to work something out if I'm gonna get the max.
From the Government's point of view, from the defense point of view and from the Courts' point of view, if defendants think that they are likely to get the max or could easily get the max, then there is no incentive to plead and move the docket.
So from simply the practical point of view to protect your role, to protect the Government's role, to protect the defense's role about trying to -- I hate to just use the word -- "move" the docket, I would ask this Court to give him 110 months

on the matter.
It's a ten-month break. Right now I would guess that's pretty significant for him because that's all there is and it's his best opportunity to lessen his sentence and get back to his family as soon as possible, and I would ask you to so consider.
THE COURT: Understood. I appreciate your comments.
I don't move the docket. I do justice. That's my job.
MR. ZOTOS: I understand, Judge. Perhaps I should say it's a more private conversation.
THE COURT: Understood.
All right. Mr. Phillips, you have at this time the opportunity to address me and tell me anything you'd like to tell me in connection with sentencing. And, again, keep in mind my earlier caution about acceptance of responsibility.
I will, however, interrupt you and cut you off if you venture into things that we have already decided, already discussed and that have already been litigated and are not up for re-litigation in this case. I'll caution you in that way, as well.
With that, you may proceed.
THE DEFENDANT: One question that I have is pertaining to the time that I sat in Sainte Genevieve County Detention Center as a federal inmate, roughly about 27 months, from July 25th, 2019, to right about October, 2021. None of that time was counted towards my sentence but I was in a federal

holdover and considered a federal inmate. The whole entire time Sainte Genevieve County got paid for housing a federal inmate. So I was actually wondering why I got none of that time whatsoever. Also, as far as my lawyer representing me as far as a client/counsel -- having a client/counsel relationship, I'm supposed to have confidence in this person to be my lawyer or to represent me in these legal matters. How do I have confidence and trust in a person that curses my family members, my fiancée, for calling and asking questions about my legal matters repeatedly? That shows no respect whatsoever to me or my family members?

I hired a person to represent me in these legal matters in this court and I done had ineffective assistance of counsel. I don't believe Nick Zotos has done his job on behalf of me whatsoever. So however the Court deems to find me responsible for these charges upon my guilty plea, I accept that. But I don't agree with the actions of my lawyer or my counsel. Thank you.

THE COURT: Thank you, Mr. Phillips. In that regard I'll just note that we had a hearing in this case with respect to whether I would allow Mr. Zotos to withdraw and we addressed those matters thoroughly at that time. And nothing you've raised today changes any of the factors at play in that ruling and nothing you've raised today changes my

decision, so I incorporate by reference the hearing transcript in that and my decisions in that regard.
I also find that Mr. Zotos has -- as I did at the prior Sentencing hearing -- provided you capable and able representation and he has done things much to your benefit, sometimes in spite of you and your attempts frankly to interfere with that. But from what I've observed here in my courtroom and from the filings in this case, Mr. Zotos has done an able job.
So that said, in terms of credit for your time in Sainte Genevieve, that is determined by the Bureau of Prisons.
I do recall that you have time that you're serving on state sentences and when I earlier sentenced you, I sentenced the sentence in this case to be consecutive to the sentence in your state cases and so, therefore, certain time being served on your state cases would not count towards your federal offense even though you were being held in Sainte Genevieve on charges relating here.
But at the end of the day it's up to the Bureau of Prisons to accurately calculate your sentence and what you get credit for in accordance with any judgment that I have previously entered and, going forward, in accordance with any judgment that I enter in this case.
That said, Ms. Szczucinski, the United States' position on sentencing?
MS. SZCZUCINSKI: Your Honor, we would ask the Court to

follow the plea agreement and sentence Mr. Phillips within the Sentencing Guidelines. We laid out a number of factors in Mr. Phillips' original sentencing, including the quantity of narcotics that were seized in this case, Mr. Phillips' criminal history and his performance while on supervision in the past, and we do believe that a Guideline sentence is appropriate.

THE COURT: So I previously accepted the parties' plea agreement and, with that, we have revisions to the Guidelines calculations.

I do adopt the Advisory Guidelines calculations that are set forth in the Resentencing Final PSR, which is Docket Number 194, and those calculations are as follows. Mr. Phillips' Total Offense Level is 25, his Criminal History Category is VI, and that results in a Guidelines range of 110 to 120 months and a supervised release range of one to three years. Mr. Phillips is ineligible for probation. His fine range is $20,000 to $200,000, restitution is not applicable and the special assessment in this case is $100.

I further adopt the Resentencing Final PSR as well as the prior PSR, Docket Number 159 as modified by Docket 194, as my Findings of Fact and Conclusions of Law regarding the Advisory Guidelines.

Counsel, with that, are there any objections to these findings, conclusions or calculations for the record, or any

other errors, corrections or objections not previously made?
Mr. Zotos?
MR. ZOTOS: No, sir.
THE COURT: And Ms. Szczucinski?
MS. SZCZUCINSKI: No, Your Honor.
THE COURT: Are there any legal objections to imposing
sentence at this time?
MR. ZOTOS: No, sir.
MS. SZCZUCINSKI: No, Your Honor.
THE COURT: So with that, in addition to the Advisory Guidelines and the policy statements, I have considered the
nature and circumstances of the offense, the history and characteristics of Mr. Phillips, and the need to avoid unwanted
sentencing disparities among similarly-situated defendants as
well as the types of sentences available in this case.
And having looked at all the materials in this case,
the fact that the Guidelines range has changed and the fact that
the statutory max has changed hasn't affected in any way what
the nature and circumstances of the offense of this case are,
and it hasn't changed Mr. Phillips' history and characteristics
other than to the extent that he is no longer an Armed Career
Criminal and he is no longer facing a mandatory minimum of
15 years and a maximum of life, and no longer facing that higher
Guidelines range.
So with that, I will reiterate some of the things

I said in the prior Sentencing hearing about the nature and circumstances of the offense, and that is that this involved Mr. Phillips being in possession of various controlled substances, including 9.8 grams of fentanyl which, at 2 mgs per lethal dose, which the U.S. Attorney's Office reminds me is a lethal dose, that's 4,900 lethal doses of Fentanyl. He also possessed 1.3 grams of cocaine base. Those were on October 20 of 2018.

Additionally, following a drug trafficking investigation Mr. Phillips and his codefendant were arrested and found to be in possession of: 28.2 grams of fentanyl, which is 14,100 lethal doses of fentanyl; then 4.292 grams of heroin; 11.6 grams of heroin mixed with fentanyl which, because of the mixture, is an unknown but substantial number of lethal doses, as well; 113.4 grams of methamphetamine; and then there were three firearms, two attributable to Mr. Phillips, one attributable to his codefendant.

The firearms attributable to Mr. Phillips were a Kel-Tec nine millimeter Luger semiautomatic loaded with 15 rounds of ammunition, and a nine millimeter Ruger semiautomatic which was loaded with eight rounds of ammunition.

With respect to Mr. Phillips' criminal history, it has multiple drug distribution offenses, possession of controlled substances offenses, a disorderly conduct offense and a traffic offense.

Those sentences include, as set forth in paragraph 194 of Docket Number 159, a Possession with Intent to Distribute Marijuana, in paragraph 39, Marijuana, Possession of Marijuana and a pistol with a defaced serial number; in paragraph 40, Drug Trafficking and Possession of Marijuana and the Possession and the Drug Trafficking was crack. In that case Mr. Phillips ran from an alley carrying a rifle. He fled and resisted arrest. There were two kids in the car that he was in. He threw a gun into the car and hit one of the kids in the head. He also has a Distribution of Controlled Substance, Marijuana, offense that's set forth in paragraph 43. There are no facts as to that that are set forth in the Presentence Report. Mr. Phillips was also on parole for the offenses in paragraphs 40 and 43 when he committed the instant offense. So I've considered that.

Then Mr. Phillips' history and characteristics are something that I've considered, as well, and Mr. Phillips' history and characteristics include his upbringing. He did not have a positive male role model. He lost two cousins and a brother to gun violence before he was eight years old. He was being raised by a single mother in a family that struggled financially, often with excessive physical punishments to Mr. Phillips, and he was exposed to drug and alcohol abuse at a young age. At the age of seven he began smoking marijuana with his older brother and continues to struggle with substance abuse

issues.
I have considered all of that and taken that into account in fashioning a sentence in this case that's sufficient but not greater than necessary to comply with the purposes of all federal sentencing law, including 18 United States Code, § 3553(a). And with that I've considered the need for the sentence to reflect the four primary purposes of sentencing: retribution, deterrence, incapacitation and rehabilitation.
And notwithstanding the objections that have been lodged in this case, both today and previously, I would impose the same sentence, by way of variance or otherwise, based on my evaluation of the 3553(a) factors.
I do find that the aggravating circumstances in this case far outweigh the mitigating factors in this case, and I find that a sentence at the top of the Guideline range, based on the conduct, the criminal history and, again, the marginal acceptance of responsibility by Mr. Phillips, is warranted in this case.
So with that, I impose sentence under the Sentencing Reform Act of 1984 and the provisions of 3553(a), as follows.
It's my judgment that the Defendant, Brandon Phillips, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 120 months.
The sentence will run consecutively to the sentences that Mr. Phillips is currently serving in the State of Missouri,

Docket Number 822-CR3284-01 and 15CW-CR197-01.
And with that I impose a term of supervised release of three years, and Mr. Phillips must report in-person to the probation office in the district in which he is released from the custody of the Bureau of Prisons.
With that, do you have any requests for programming and placement in the Bureau of Prisons?
MR. ZOTOS: Well, I would ask this Court to still consider him for RDAP. Although he will not get credit for the program, I would ask you consider it.
And may I make a note? You ran the sentence consecutive. I think those matters are discharged by operation of law because my recollection from the original PSR was that his parole would be discharged within 30 days of that sentence.
So he may no longer have any state sentence due.
THE COURT: Well, I'll frame it this way. To the extent there is any state sentence due on those or still a sentence remaining, any state sentence remaining on those aforementioned state counts or charges, rather, the sentence will run consecutively to those sentences, if any. So I think that should satisfy your issue there.
MR. ZOTOS: (Nodded.)
THE COURT: So with respect to programming I will recommend the Residential Drug Abuse Program as well as mental health treatment.

And with that, to do you have any further placement request?
MR. ZOTOS: Judge, he's already in the BOP system so they've already made a determination where he should be.
THE COURT: Understood. The mandatory standard and special conditions of supervision are set forth in paragraphs 102, 103 and 104. Do you waive reading of those?
MR. ZOTOS: I'm sorry, sir?
THE COURT: Do you waive reading of those?
MR. ZOTOS: Yes, sir.
THE COURT: The special conditions, the justification for them is set forth in paragraph 104 as well as in the PSR generally.
And with that, I do find that Mr. Phillips does not have the ability to pay a fine and I therefore waive the fine in this case.
I do order that he must pay the United States a special assessment of $100, which, if it hasn't been paid, it is due and payable immediately.
I further order forfeiture of all items seized in connection with the investigation and prosecution of this case, and under 21 United States Code, Section 862(a)(1)(C), Mr. Phillips is permanently ineligible for federal benefits.
With that, Mr. Phillips, I'm going to notify you of your rights to appeal. You can appeal your conviction if you

believe that your guilty plea was somehow unlawful or involuntary or if there was some other fundamental defect in the proceedings that was not waived by your guilty plea. Under some circumstances a defendant has the right to appeal the sentence itself and may waive that right as part of the plea agreement. You've entered into a plea agreement that waives some or all of your rights to appeal the sentence itself. These waivers are generally enforceable but if you believe the waiver itself is not valid, you can present that theory to the Court of Appeals.

Any Notice of Appeal you file must be filed within 14 days of the entry of Judgment by the Court, or within 14 days of the filing of the Notice of Appeal by the United States. If you request, the Clerk of Court can and will prepare and file a Notice of Appeal on your behalf. If you cannot afford to pay the cost of an appeal or for counsel on appeal, you may apply to have costs waived and to have counsel appointed for you on appeal.

With that, Mr. Zotos, I instruct you to review with Mr. Phillips his appeal rights and promptly file the form in compliance with Local Rule 12.07.

With that, do you have any objections to this sentence for the record?

MR. ZOTOS: No, sir.

MS. SZCZUCINSKI: No, Your Honor.

MR. ZOTOS: Well, I guess I have no objections on the legal matters but he may still have an objection to the matter. By my accepting of that, I don't want to suggest that he's in any way waiving his objections that he may pursue. Do I have -- do I say that --

THE COURT: So the record is clear, I understand, Mr. Zotos, what you're saying is that you're not making any legal objections to the sentence, however, to the extent that Mr. Phillips is making objections, you're not waiving those.

MR. ZOTOS: Right.

THE COURT: I understand. The record will so reflect.

MR. ZOTOS: And, well, I'll wait until you're done and then I'll ask a question about some guidance.

THE COURT: Very good.

So with that, Mr. Phillips, just a couple of things. So when I told you before at the sentencing hearing that you should work with the folks at the BOP and you should work with your probation officer, I strongly encourage you to continue to do that and take advantage of the programs in the BOP. They will help you if you work with them and if you engage in those programs.

With that, I remand Mr. Phillips to the custody of the Bureau of Prisons under the terms and the conditions previously set by the Court -- or to the custody of the Marshal Service, rather, for delivery to the Bureau of Prisons.

With that, you had something you wished to raise?
MR. ZOTOS: Judge, pursuant to Local Rule, I mean I'm not sure if Mr. Phillips wants to appeal this. I would note that the Bailey case was actually raised on plain error so he may wish to re-litigate it.
We spoke about Henderson, that there was a writ that was filed on the issues to resolve it between the circuits. He may wish to pursue that.
I mean I'll fill out the form but if you want me to perfect a notice, I will make sure that's done.
I would raise again, as I did originally, that I would ask this Court to appoint conflict-free counsel to pursue any appeal he wishes to go forward with.
THE COURT: Well, I understand that. You need to review with him the appeal rights and fill out the form, and if he asks you to file a Notice of Appeal, you have to do what you have to do. I obviously can't give you legal advice. But at the end of the day in terms of appointing new counsel on appeal, that's up to the Eighth Circuit. They take care of that, not me.
MR. ZOTOS: Mike Ganz doesn't always answer my phone call, Judge.
THE COURT: Well, they're my bosses so I don't tell them what to do, okay.
MR. ZOTOS: Okay.

THE COURT: So that's how that works. I understand your predicament and certainly I'm sure you'll address that as is appropriate with the Court of Appeals. And we've revised that form. I think I mentioned this to you before. So hopefully it's more streamlined than in the past.
With that, anything further, Ms. Szczucinski?
MS. SZCZUCINSKI: No thank you, Your Honor.
THE COURT: All right. Thank you.
Court is adjourned and I remand Mr. Phillips to your custody, Marshals.
That you all very much, everyone here today.
- RECESS AT 4:52 P.M. -

REPORTER'S CERTIFICATE

I, Linda C. Nichols, Registered Diplomate Reporter and Certified Realtime Reporter, do hereby certify that I am a duly appointed Official Court Reporter for the United States District Court, Eastern District of Missouri, and that the foregoing is a true and accurate reproduction of the Resentencing Hearing on February 9th, 2023, in the matter of:

UNITED STATES OF AMERICA

vs.

BRANDON PHILLIPS

Number 4:19-CR-00538-SRC-1

I further certify that this transcript consists of pp. 1-34 inclusive.

Dated: July 27th, 2023.

/s/ Linda Nichols
Linda Nichols, RDR, CRR
Official Court Reporter
United States District Court
Eastern District of Missouri

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2678

United States of America

Appellee

v.

Brandon Phillips

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:19-cr-00538-SRC-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 28, 2025

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik
Maureen W. Gornik