

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CENIOUS BREWSTER,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred when it created an unprecedented “presumption of reasonableness” for “Judiciary Sentencing INformation” (“JSIN”) data from the United States Sentencing Commission?

RELATED PROCEEDINGS

United States District Court (N.D. Cal.): *United States v. Cenious Brewster*,
No. CR 22-00208 JST.

United States Court of Appeals (9th Cir.): *United States v. Cenious Brewster*,
116 F.4th 1051 (9th Cir. 2024).

PARTIES TO THE PROCEEDINGS

Petitioner is Cenious Brewster, defendant-appellant below. Respondent is the
United States of America.

There are no parties to the proceeding other than those named in the caption.

TABLE OF AUTHORITIES

Supreme Court Cases

Nelson v. United States, 555 U.S. 350, 351, 129 S. Ct. 890, 891, 172 L. Ed. 2d 719 (2009).....8

Rita v. United States, 551 U.S. 338, 127 S.Ct. 2456,
168 L.Ed.2d 203 (2007).6, 7, 8

Federal Cases

United States v. Brewster, 116 F.4th 1051 (9th Cir. 2024)*passim*

United States v. Petty, 982 F.2d 1365, 1373 (9th Cir.),
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PETITION FOR A WRIT OF CERTIORARI

Cenious Brewster respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in his case.

OPINIONS BELOW

The sentencing decision of the United States district court is not reported.

The order of the Ninth Circuit denying Mr. Brewster's appeal is published, at 116 F.4th 1051 (9th Cir. 2024). It appears at Appendix A to the petition.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 12, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 3553 of Title 18 provides, "(a) Factors to be considered in imposing a sentence. -- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy

statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.¹

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C.A. § 3553(a).

STATEMENT

Mr. Brewster's petition presents an important federal question: do the decisions and data of agencies that are creatures of the judiciary enjoy a unique "presumption of reasonableness," that is denied to other federal agencies?

This Court should grant the writ, and rule that the Sentencing Commission's JSIN data is not presumptively reasonable.

1. At roughly midnight on June 4, 2021, California Highway Patrol (CHP) officers saw a car pass their patrol car at a high rate of speed on a freeway. The officers reported that the car exceeded 100 miles per hour. The posted speed limit on this section of the highway was 50 MPH. Pet. App. A, *Brewster*, 116 F.4th at 1054.

2. The officers followed the car activated their lights. After the lights were

activated, the car pulled off of the highway and stopped on a surface street. The officers exited their vehicle and approached the car from behind. *Id.*

3. Brewster, who was driving the car, then fled the officers in his car. After a short pursuit Brewster crashed the car into a vacant building. *Id.*

5. After the crash Brewster abandoned the car and ran away. He was quickly apprehended. A search of the crashed car revealed a pistol. *Id.*

6. Brewster was charged in the Northern District of California with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He entered a guilty plea to this charge. *Id.*

7. At sentencing, the presentence report included pages of “Judiciary Sentencing Information” (“JSIN”) data, purporting to provide average lengths of imprisonment for (allegedly) similarly situated offenders. The inclusion of JSIN data sparked a number detailed objections from the defense. *Id.* at 1056-57.

8. The defense asked for an opportunity to retain a statistical expert in this appointed case, and requested an evidentiary hearing on the disputed issues relating to the JSIN data. The defense also requested access to the “raw” JSIN data to examine it for reliability. *Id.*

9. At sentencing, the District Court revealed that it not only welcomed the JSIN data in the PSR, but that this specific District Judge had expressly asked the Probation Office to include that data in Presentence Reports in the Northern District. *Id.* at 1057.

10. The District Court refused the defense request to have greater access to the

Commission’s raw data used to generate JSIN to evaluate its methodology and reporting. Instead, the court explained that it was expressly relying on JSIN data, expressly denied the defense request for access to the data underlying the JSIN reports, and expressly invited the Ninth Circuit to weigh in on the use of this data at sentencing. *Id.*

11. The district court ultimately imposed a mid-guideline sentence of 46 months. *Id.*

REASONS FOR GRANTING THE WRIT

The era of remarkable *Chevron* deference owed to the decisions and data from federal agencies is over. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2254, 219 L. Ed. 2d 832 (2024). In *Loper Bright Enterprises*, this Court acknowledged that *Chevron* deference had lead the judiciary to a strange place: “One where authorities long thought reserved for Article III are transferred to Article II, where the scales of justice are tilted systematically in favor of the most powerful, where legal demands can change with every election even though the laws do not, and where the people are left to guess about their legal rights and responsibilities. So much tension with so many foundational features of our legal order is surely one more sign that we have taken a wrong turn along the way.”) (internal quotations and citation omitted).

Flying directly in the face of this Court’s jurisprudential trajectory, the Ninth Circuit has created a new presumption of reasonableness for data from the Sentencing Commission. The appellate court held, for the first time among any court, that *JSIN data* produced by the federal Sentencing Commission is

presumptively “reasonable.” *Brewster*, 116 F.4th at 1061. In so doing the Ninth Circuit inexplicably cloaked a *judicial* bureaucratic agency with deference and presumptions that are now routinely denied to other federal agencies.

In its published decision the Ninth Circuit conceded that Brewster raised a number of timely objections to the district court’s use of the JSIN data in his sentencing. *Id.* at 1056. The District Court rejected those objections, making it “clear on the record that I have relied on the JSIN information in reaching whatever sentence I have imposed.” *Id.* at 1057.

In rejecting Brewster’s challenges to the reliability and use of the JSIN data, the Ninth Circuit concocted an unprecedented and unwarranted presumption: “[T]he JSIN tool and its resulting data *comes from a presumptively reliable source*, [which was] designed to be used by judges during sentencing” *Id.* at 1061 (emphasis added).

This presumption of reasonableness for JSIN data has not been conceded by any other federal court. Notably, the Ninth Circuit identified no authority for its remarkable new presumption.

This Court has admittedly upheld the presumption of reasonableness for an in-guideline sentence, during appellate review. *Rita v. United States*, 551 U.S. 338, 347 (2007) (“The first question is whether a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines. We conclude that it can.”)

It is unsupported leap, however, to go from the presumption of reasonableness for a *guideline* range, to the same presumption for *JSIN data*. In *Rita*, this Court took some pains to describe the (often controversial) efforts of the Sentencing Commission to apply objective rigor to the task of determining the reasonable recommended sentence. *Id.* at 350.

No such efforts go into the Commission's questionable production of JSIN data. Tellingly, the *Commission itself* does not recommend that district courts consider this data a Commission endorsement:

Does the Commission recommend that a federal judge consider information obtained from JSIN in deciding an appropriate sentence in a particular case?

The average and median sentencing data provided by JSIN *does not reflect the Commission's recommendation regarding the appropriate sentence to be imposed or represent the Commission's official position on any issue or case. Nor does the information provided reflect the Commission's position regarding the weight to be given, if any, to national average and median sentences in a court's determination of the appropriate sentence to be imposed.*

<https://www.ussc.gov/guidelines/judiciary-sentencing-information>, visited August 25, 2023 (emphasis added).

Extending the *Rita* presumption of reasonableness (if that is what the Ninth intended), to the Commission's JSIN data set, is a bridge too far. This new presumption runs contrary to the express limitations of the Sentencing Commission regarding this data, disregards this Court's increasing skepticism of deference blindly afforded to federal agencies, and raises serious Due Process concerns for

defendants who are now limited in their ability to challenge this suspect data.

United States v. Petty, 982 F.2d 1365, 1373 (9th Cir.), amended, 992 F.2d 1015 (9th Cir. 1993) (“The Due Process Clause requires that defendants not be sentenced based on “misinformation of constitutional magnitude . . . It violates due process to be sentenced on the basis of materially false or unreliable information.”)

The Ninth Circuit’s new presumption also raises serious policy concerns. This presumption – which is neither well-defined or well-founded – will cause no end of mischief during sentencing hearings in district courts. Parties and district courts will now assume that a sentence within the *JSIN*-reported data ranges is presumptively reasonable. This Court, however, has made it clear that a sentencing court cannot apply the presumption of reasonableness to an in-guideline sentence. *Nelson v. United States*, 555 U.S. 350, 352 (2009) (“Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable. In *Rita* we said as much, in fairly explicit terms: “We repeat that the presumption before us is an *appellate* court presumption.... [T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.” 551 U.S., at 351, 127 S.Ct. 2456.” *Id.*, at 50, 128 S.Ct., at 596–597.”) (emphasis in original).

If an in-guideline sentence is not presumptively reasonable for a district court, it is illogical that the much-less-rigorous *JSIN* data would somehow now enjoy that presumption.

If this Court does not nip the Ninth Circuit’s new JSIN presumption in the bud, it will soon be facing a circuit split on the impact of the new JSIN data on federal sentences and innumerable federal sentences that are tainted by unlawful presumptions. *Brewster* accordingly presents an important federal question that should be resolved with a grant of this writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN G. KALAR

December 11, 2024

/s

Kalar Law Office

CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 33.1, I certify that this brief used Century Schoolbook font, has a typeface of 12 points, and contains 2,319 words.

December 11, 2024

s/

STEVEN G. KALAR

Kalar Law Office

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I, Steven G. Kalar , do swear or declare that on this date, December 11, 2024, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D. C. 20530–0001.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 11, 2024.

STEVEN G. KALAR

/s

Kalar Law Office