

CASE NO. _____
SUPREME COURT OF THE UNITED STATES
October 2022 Term

DIANTE TURMAN,)
)
 Petitioner,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Respondent.)

APPLICATION DIRECTED TO JUSTICE KAVANAUGH FOR ADDITIONAL TIME TO
FILE PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF
APPEALS

Submitted on Behalf of Petitioner

Submitted By:

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ATTORNEY FOR PETITIONER

To Justice Brett M. Kavanaugh:

Petitioner Diante Turman, through his attorney of record, Assistant Federal Public Defender David C. Hemingway, requests an additional 60 days in which to file a petition in this Court seeking certiorari to the Eighth Circuit Court of Appeals, up through October 31, 2022. Petitioner requests this extension under Supreme Court Rule 13.5.

JURISDICTION

Petitioner requests an extension to file a petition for writ of certiorari. Petitioner is preparing to request this Court's review of the judgment issued by the Eighth Circuit Court of Appeals on December 9, 2022, affirming a 10 year prison term the District Court imposed for his conviction of possessing cocaine base with intent to distribute in violation of 21 U.S.C. § 841. Petitioner challenged the elevated Sentencing Guidelines range the district court calculated employing the career offender Sentencing Guidelines range by declaring Mr. Turman's prior Missouri state conviction for marijuana a "controlled substance offense" as defined in U.S.S.G. §4B1.2(b).

In pertinent part, the guideline defines "controlled substance offenses" to encompass felonies under state or federal law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance or possession of a controlled substance with intent to manufacture, import, export, distribute, or dispense. Petitioner's incurred his prior marijuana conviction at a time when the offense was satisfied by hemp, yet at the time of his instant cocaine offense, neither Federal Law nor Missouri law outlawed conduct involving hemp. The identification of predicate career offender offenses requires use of a categorical approach, under which a prior conviction under a statute satisfied by conduct outside the range of substances prohibited

under federal law is overbroad and cannot serve as a predicate career offender “controlled substance offense. Appendix 2-3. The Court of Appeals denied Mr. Turman’s timely motion for rehearing on January 12, 2023. Appendix at 4. The deadline for filing a petition for a writ of certiorari in this case is April 12, 2023. Petitioner files this request for additional time at least 10 days before the date the petition is currently due, in compliance with Supreme Court Rule 13.5.


REASONS FOR APPLICATION FOR EXTENSION

1. Petitioner believes that this case raises a recurrent issue of exceptional importance concerning the construction and application of the career offender Guidelines definition of “controlled substance offenses” based on prior convictions encompassing substances that both Congress and state legislatures have rejected as the basis for criminal culpability. The question has generated conflicting rulings by the Circuits, and the Eighth Circuit’s view rests on what Petitioner maintains to be a misapplication of this Court’s decision in *McNeill v. United States*, 563 U.S. 816 (2011). The *McNeill* decision construed the distinct Armed Career Criminal Act, 18 U.S.C. §924(e), which does not focus on the Guidelines definition in effect at the time of a federal defendant’s instant sentencing as Congress requires in federal sentencing pursuant to 18 U.S.C. §3553(a)(4)(A)(ii).

2. Petitioner’s counsel is an assistant federal public defender in the Eastern District of Missouri. Counsel’s appointed assignments include preparation of petitions for compassionate release and appellate briefs in the Eighth Circuit and requires additional time to properly present this complex and recurrent issue. Counsel makes this request with no dilatory purpose, but rather seeks to ensure proper presentation of the important federal questions raised in petitioner’s case while also providing effective representation in all cases to which counsel is assigned.

WHEREFORE, petitioner requests leave to file his Petition for Writ of Certiorari, up through and including June 11, 2023.

Respectfully submitted,



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Appendix to Petitioner’s Motion for More Time to File Petition for a Writ of Certiorari

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1. *United States v. Diante Turman*, No. 21-3190 (8th Cir., Dec. 9, 2022) 1 – 3

2. *United States v. Diante Turman*, No. 21-3190,
 Order denying rehearing (8th Cir., January 12, 2023) 4

United States Court of Appeals
For the Eighth Circuit

No. 21-3190

United States of America

Plaintiff - Appellee

v.

Diante Turman

Defendant - Appellant

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

Submitted: October 17, 2022

Filed: December 9, 2022

[Unpublished]

Before SMITH, Chief Judge, BENTON and SHEPHERD, Circuit Judges.

PER CURIAM.

After Diante Turman pled guilty to one count of possession of cocaine base with intent to distribute, in violation of 21 U.S.C. § 841, the district court¹ sentenced him to 120 months imprisonment, followed by 3 years of supervised release.

¹The Honorable Stephen R. Clark, United States District Judge for the Eastern District of Missouri.

Turman appeals, arguing that the district court erroneously applied the United States Sentencing Guidelines (USSG) § 4B1.1 “career offender” provision in calculating his Guidelines range. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

Turman was indicted on five separate counts arising from the discovery of significant amounts of crack cocaine, cocaine, and marijuana, as well as several firearms in his vehicle and home. Turman entered a guilty plea to one count of possession of cocaine base, and, at sentencing, the district court adopted the Presentence Investigation Report (PSR) prepared by the United States Probation Office. The PSR determined that Turman qualified as a career offender under USSG § 4B1.1(a), based on two previous convictions under Missouri law for a crime of violence and, as relevant to this appeal, a controlled substance offense: possession of marijuana with intent to distribute, in violation of Missouri Revised Statutes § 195.211 (2016). The district court ultimately calculated Turman’s total offense level at 29, with a criminal history category of VI, resulting in a Guidelines range of 151 to 188 months imprisonment. The district court then varied downward and imposed a sentence of 120 months. Finally, the district court dismissed the remaining counts against Turman.

On appeal, Turman asserts that the district court erroneously applied the career-offender provision because his previous marijuana conviction cannot qualify as the requisite controlled substance offense. Specifically, Turman argues that, at the time of his marijuana conviction, Missouri law defined marijuana to include hemp, but both Missouri and federal law have since revised the definition of marijuana to exclude hemp. According to Turman, a prior conviction must qualify as a controlled substance offense under the Guidelines in effect at the time of the federal sentencing, not at the time of the prior conviction, so his marijuana conviction is categorically overbroad and cannot qualify as a controlled substances offense. “We review *de novo* whether a prior conviction is a sentencing enhancement predicate.” United States v. Henderson, 11 F.4th 713, 716 (8th Cir. 2021), cert. denied, 142 S. Ct. 1696 (2022).

This Court has recently rejected similar claims regarding the delisting of hemp as part of the definition of marijuana under other states' statutes and federal law. In United States v. Jackson, No. 20-3684, 2022 WL 303231 (8th Cir. Feb. 2, 2022) (per curiam), cert. denied, No. 21-8127, 2022 WL 4653426 (Oct. 3, 2022), we stated the following:

We determined in Henderson that U.S.S.G. § 4B1.2(b) contains “no requirement that the particular substance underlying the state offense is also controlled under [the CSA].” Instead, we agreed with the Fourth Circuit’s interpretation that the “ordinary meaning of . . . ‘controlled substance,’ is any type of drug whose manufacture, possession, and use is regulated by law.” Jackson concedes he was convicted of delivering and possessing with intent to deliver marijuana, a drug regulated by Iowa law. Whether the statute additionally proscribed hemp within the definition of marijuana is immaterial.

Attempting to distinguish Henderson, Jackson emphasizes that Iowa, too, has removed hemp from its marijuana definition since his convictions occurred. But we may not look to “current state law to define a previous offense.” Jackson’s uncontested prior marijuana convictions under the hemp-inclusive version of Iowa Code § 124.401(1)(d) categorically qualified as controlled substance offenses for the career offender enhancement.

Id. at *1-2 (alterations in original) (citations omitted). Although Jackson was not precedential, see 8th Cir. R. 32.1A, in United States v. Bailey, 37 F.4th 467 (8th Cir. 2022), we “adopt[ed Jackson’s] reasoning” in a published, precedential opinion. Id. at 469. This reasoning is equally applicable to Turman’s claims. However Turman’s argument may be construed, he does not meaningfully distinguish it from the argument we considered and rejected in Jackson. We thus reject Turman’s claims that his previous conviction was overbroad and could not serve as a basis for application of the career offender provision.

For the foregoing reasons, we affirm the judgment of the district court.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-3190

United States of America

Appellee

v.

Diante Turman

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:18-cr-00381-SRC-1)

ORDER

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

Judge Gruender did not participate in the consideration or decision of this matter.

January 12, 2023

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

/s/ Michael E. Gans