No. 18-

IN THE

SUPREME COURT OF THE UNITED STATES

JAMAR LYNN MCMILLAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF *CERTIORARI*

HEIDI R. FREESE, ESQ.
Federal Public Defender

FREDERICK W. ULRICH, ESQ.
Assistant Federal Public defender

Middle District of Pennsylvania
100 Chestnut Street, Suite 306
Harrisburg, Pennsylvania 17101
(717) 782-2237
fritz_ulrich@fd.org

Counsel for Petitioner

August 27, 2019

QUESTIONS PRESENTED

1. Does the categorical approach apply in determining whether an offense qualifies as a predicate for the career-offender enhancement under the Sentencing Guidelines and, if so, whether Pennsylvania's controlled substance offense satisfies the Guideline definition despite including a broader range of substances and conduct?

2. Should this Honorable Court grant, vacate, and remand to the Third Circuit based on the recent ruling in *Rehaif v. United States*, 139 S. Ct. 1291 (2019)?

PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellant below, is Jamar Lynn McMillan.

The Respondent, the appellee below, is the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Guideline Provisions

PETITION FOR A WRIT OF *CERTIORARI*

The Petitioner, Jamar Lynn McMillan, petitions this Court for a writ of *certiorari* to review the final order of the Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Court of Appeals opinion is non-precedential and may be found at No. 18-3165, 2019 WL 2290233, and is reproduced in the appendix to this petition. (Petitioner's Appendix ("Pet. App.") 1a-8aa). The judgment of the district court may be found at No. 1:15-CR-00305 and is reproduced in the appendix, (Pet. App. 11a-18a).

JURISDICTION

The Court of Appeals for the Third Circuit issued its opinion on May 29, 2019. (Pet. App. 1a). This Court has jurisdiction over this timely filed petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Federal

18 U.S.C. § 922(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

21 U.S.C. § 802(6)

The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

SENTENCING GUIDELINE PROVISION

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

U.S. SENTENCING GUIDELINE MANUAL § 4B1.2(b) (U.S. SENTENCING COMM'N 2018.

Pennsylvania state statute

35 P.S. § 780-102

"Controlled substance" means a drug, substance, or immediate precursor included in Schedules I through V of this act.

"Deliver" or **"delivery"** means the actual, constructive, or attempted transfer from one person to another of a controlled substance, other drug, device or cosmetic whether or not there is an agency relationship.

INTRODUCTION

This Honorable Court recently granted *certiorari* to address "[W]hether the determination of a 'serious drug offense' under the Armed Career Criminal Act requires the same categorical approach used in the determination of a 'violent felony' under the Act?" *Shular v. United States*, No. 18-6662. This case presents a related issue under the Sentencing Guidelines and the definition of a controlled substance offense under the career-offender enhancement. As the Armed Career Criminal Act provision and the career-offender provision have similar language, authority interpreting one has generally been applied to the other. *E.g., United States v. Hopkins,* 577 F.3d 507, 511 (3d Cir. 2009). For this reason, this Court should grant *certiorari.*

And in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), this Court held in a prosecution under Sections 922(g) and 924(a) of Title 18, the Government must prove that the defendant knew he belonged in the category of persons barred form possessing a firearm. *See id.* at 2200. Here, the Government did not prove and the district court did not instruct on this element. This Court should thus grant, vacate, and remand to the Third Circuit to consider this error in the first instance.

STATEMENT OF THE CASE

A.

This appeal arises following a jury verdict, convicting Appellant, Jamar McMillan, of possession with the intent to distribute heroin, phencyclidine ("PCP"), a synthetic form of marijuana, possession a firearm in furtherance of drug trafficking, and possession of a firearm after a felony conviction. *See* (Pet. App. at 2a).

B.

In July 2015, the Harrisburg Police Vice-Unit received an internal email, advising that Mr. McMillan was one of several individuals of interest in an arson investigation, and that he had an outstanding bench warrant. *See* (Pet. App. at 2a). The email author advised that Mr. McMillan may be staying with his girlfriend and that he drives her vehicles—a Lexus and a Jeep Cherokee. *See id.* And the email conveyed that "someone close the investigation says that [Mr.] McMillan makes his living by dealing drugs[,]" and author asked for the Vice Unite to arrange some buys from Mr. McMillan so that he could face delivery charges. *See id.*

A few days later in August, a member of the Vice Unit responded to the email, noting, among other things, that Mr. McMillan's name was not familiar. *See* (Court of Appeals Appendix at 194) ("CA"). That said, on August 12 a Vice Unit detective went to the residence where Mr. McMillan was staying to conduct surveillance. *See* (CA at 348-49). While there, the detective saw observed Mr. McMillan, who was holding a bowl of cereal, exit the residence and walk near the Black Lexus. *See* (CA

at 349). Despite the existence of a bench warrant, the detective did not arrest Mr. McMillan. *See id.*

Two days later on August 14, the detective and other officers returned to Mr. McMillan's residence. *See* (Pet. App. 2a). On this occasion, the police saw Mr. McMillan come out of the residence with another man and walk to the black Lexus, which was legally parked out front. *See id.* Mr. McMillan and the other man later opened the trunk of the Lexus and removed two child seats, which the other man put inside the white Jeep Cherokee. *See* (Pet. App. 2a-3a). Mr. McMillan also removed from the trunk an air conditioner recharger. Police then observed Mr. McMillan lean inside the driver's side door, but they were unable to see what he was doing. *See id.* The police did not observe any drug transactions or see Mr. McMillan with a firearm. *See* (CA at 355).

As the police approached, the other man saw them and ran. *See* (Pet. App. 3a). Mr. McMillan waited five to ten seconds, and he too ran. *See id.* Police apprehended Mr. McMillan about 25 yards from the Lexus. During a search of his person, police found a key to a Lexus, a cellular telephone, a vial containing PCP, a small bag of marijuana, and some heroin.[1] Mr. McMillan did not, notably, have any cash on him. *See* (JA at 359).

Although the police did not observe anything illegal in the Jeep or the Lexus, they searched both vehicles. In the Jeep, police found no contraband, but recovered

[1] The heroin turned out to be fake and the synthetic marijuana weighed less than 30 grams. *See* (Pet. App. at 3a n.5).

a plastic vial like the one Mr. McMillan had. *See* (CA at 351). In the Lexus, police found synthetic marijuana in the trunk. *See* (Pet. App. at 3a). The police also searched the Lexus passenger compartment, where they retrieved a zippered Craftsman tool pouch, which they unzipped, finding a .45 caliber firearm. *See id*.

As noted, after state authorities arrested and charged Mr. McMillan, a federal grand jury returned an indictment and, later, a superseding indictment, charging drug and gun offenses. *See* (Pet. App. 4a).

C.

Mr. McMillan challenged the propriety of the search of the Lexus, arguing that the police should have obtained a search warrant and that there was no probable cause. *See* (Pet. App. at 4a). The District Court denied the motion without a hearing, holding that the automobile exception to the warrant requirement applied, as the police had probable cause to search. *See* (Pet. App. 5a). The Third Circuit affirmed, holding that there was enough probable cause to justify the search. *See* (Pet. App. 6a).

D.

Mr. McMillan proceeded to a jury trial, held on February 27 through March 1, 2018. Mr. McMillan's defense centered on the argument that he did not possess the firearm, did not possess it in furtherance of drug trafficking, and that he did not possess the drugs with the intent to distribute. *See* (CA at 422). Notably, the district court did not instruct the jury that the Government had to prove that Mr. McMillan knew of his status as a person prohibited from possessing firearms. *See* (Pet. App. at

20a-28a). The jury, however, found Mr. McMillan guilty on all counts. *See* (CA at 318-20).

E.

Before sentencing, the Probation Office prepared a presentence report, finding that Mr. McMillan should be subject to the career offender enhancement under the Guidelines. *See* (Pet. App. 6a). Mr. McMillan objected to the enhancement, arguing that his Pennsylvania controlled substance convictions did not qualify as predicates under the career offender provision. *See* (Pet. App. 7a). At sentencing, the District Court denied the objection, holding that this Court had recently ruled that Pennsylvania controlled substance offenses were permissible predicates. *See* (CA at 474).

After hearing from the parties, the District Court imposed, among other things, a 240-month term of incarceration. *See* (JA at 480). On appeal, the Third Circuit affirmed, concluding that its precedent foreclosed Mr. McMillan's argument. *See* (Pet. App. 7a).

REASONS FOR GRANTING THE PETITION

A. The method for determining whether a drug offense constitutes a proper predicate under the Armed Career Criminal Act is pending before this Court.

This Court is currently considering whether the categorical approach applies in determining a drug offense predicate under the Armed Career Criminal Act ("ACCA") in *Shular v. United States*, No. 18-6662. And authority interpreting the ACCA has generally been applied to the similar language of the career-offender provision in the Sentencing Guidelines. *See, e.g., United States v. Giggey*, 551 F.3d 27, 35 (1st Cir. 2008). Thus, this Court's decision in *Shular* would affect the analysis of Mr. McMillan's claim.

B. There is a divide among the courts of appeal over what constitutes a "controlled substance offense" for the career-offender enhancement.

Several circuits have held that a "controlled substance" offense under the Sentencing Guidelines refers solely to those substances controlled by federal law under the Controlled Substance Act ("CSA"). *See United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793-94 (5th Cir. 2015); *United States v. Leal-Vega*, 680 F.3d 1160, 1166-67 (9th Cir. 2012); *United States v. Sanchez-Garcia*, 642 F.3d 658, 661 (8th Cir. 2011). A controlled substance under the CSA is "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV or V of part B of this subchapter." 21 U.S.C. § 802(6); § 812(c) (schedules of controlled substances). Thus, Section 4B1.2 of the Guidelines requires that a controlled substance must be a federally controlled substance. *See Townsend*, 897 F.3d at 68. In Pennsylvania, a "controlled substance" is defined as "a drug,

substance, or immediate precursor included in Schedules I through V of this act." 35 P.S. § 780-102. The Pennsylvania schedules are found at 35 P.S. § 780-104.

Pennsylvania's schedule includes more than one substance that does not appear in the federal schedule under 21 U.S.C. § 812(c). As a result, the Pennsylvania Statute is broader because it penalizes more substances than that on the federal schedules. *See Rojas v. Attorney General*, 728 F.3d 203 (3d Cir. 2013) (noting Pennsylvania criminalizes substances that are not illegal under federal law); *United States v. Al-Akili*, 578 F. App'x 107, 110 (3d Cir. 2014) (non-precedential); *see also United States v. Sanchez-Fernandez*, 669 F. App'x 415 (9th Cir. 2016) (non-precedential) (reversing where prior Arizona conviction for possession of narcotics for sale was not a categorical match with the federal generic definition because it criminalizes possession for sale of certain substances that are not federally controlled). Thus, it should not qualify as a predicate controlled substance offense under 4B1.2(b). *See Townsend*, 897 F.3d 66, 74-75 (New York's criminal sale of a controlled substance is not a controlled substance offense under Section 4B1.2(b)).

C. Pennsylvania case law defining "delivery" to include conduct—such as mere offers to purchase or sell—that are not covered by federal law, the Pennsylvania crime cannot qualify as a "controlled substance offense" under the Guidelines.

The prior offenses for which Mr. McMillan was convicted— possession with the intent to deliver and delivery of a controlled substance under Pennsylvania law, cannot qualify as "controlled substance offenses" for this very reason. The state statute of conviction, 35 P.S. § 780-113(a)(30), much like the federal definition, defines "delivery" to mean "the actual, constructive, or attempted transfer from one

person to another of a controlled substance, other drug, device or cosmetic whether or not there is an agency relationship." 35 P.S. § 780-102. But despite the similar language of the two statutes, the Pennsylvania provision has been read and applied to cover a wider range of conduct—including, most notably, mere offers to buy or sell controlled substances, which are not criminalized by federal law. [2]

Pennsylvania case law confirms this point. The Superior Court of Pennsylvania upheld, in *Pennsylvania v. Donahue*, 630 A.2d 1238 (Pa. Super. Ct. 1993), convictions under the state controlled substances statute, 35 P.S. § 780-113(a)(30), based on the defendant's mere "solicitation" to purchase drugs from another individual. *See Donahue*, 630 A.2d at 1241, 1244. While *Donahue* focused on accomplice liability, *see id*. at 1244, the defendant in that case was convicted of

[2] *See, e.g., Sandoval v. Sessions*, 866 F.3d 986, 990 (9th Cir. 2017) ("offering to deliver a controlled substance does not cross the line between preparation and attempt for the purposes of the Controlled Substances Act"); *United States v. Hinkle*, 832 F.3d 569, 575-76 (5th Cir. 2016) ("[t]he Government concedes that if [the defendant] were convicted of delivering a controlled substance "by offering to sell" that substance, the crime would not come within the definition of a "controlled substance offense"); *see also United States v. Madkins*, 866 F.3d 1136, 1147-48 (10th Cir. 2017) ("a mere offer to sell" does not qualify as a federal drug offense "because a person can offer a controlled substance for sale without having the intent to actually complete the sale"); *United States v. Savage*, 542 F.3d 959, 965-66 (2d Cir. 2008) (statute criminalizing "mere offer to sell," made without possession of drugs, held to sweep more broadly than "controlled substance offense" under career offender guideline); *United States v. Price*, 516 F.3d 285, 288-89 (5th Cir. 2008) (same); *cf. United States v. Santana*, 677 F. App'x 744, 746 (3d Cir. 2017) (holding no plain error in treatment of conviction under New York statute covering "bona fide" offers of sale as predicate under career offender guideline); *United States v. Whindleton*, 797 F.3d 105, 111 (1st Cir. 2015) (an offer to sell under the New York statute, requiring the intent and the ability to proceed with a sale, qualified as a "serious drug offense" under 18 U.S.C. § 924).

both accomplice liability under Pennsylvania's accomplice liability statute, 18 Pa. C.S. § 306, and direct liability under Pennsylvania's controlled substance statute, 35 P.S. § 780-113(a)(30). *See Donahue*, 630 A.2d at 1241. The latter conviction was premised not on the co-conspirator's conduct, but on the defendant's own actions—in soliciting to purchase a controlled substance. *See* 35 P.S. § 780-113(a)(30). *Donahue* establishes that Pennsylvania courts interpret and apply the state controlled substance statute to offers to purchase or sell.

The Pennsylvania controlled substance statute thus penalizes conduct not covered by federal drug laws. So a conviction under that statute cannot be considered a predicate offense under Section 4B1.1(a) of the Guidelines. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575, 600 (1990).

D. Based on the ruling in *Rehaif*, there is now a reasonable probability of a different result in this case.

Section 922(g) of Title 18 makes it "unlawful" for certain disfavored populations to possess firearms in interstate commerce. People convicted of a prior felony are one such group. 18 U.S.C. §922(g)(l). Aliens illegally in the United States are another. 18 U.S.C. §922(g)(5).

Section 924(a) of Title 18 provides for criminal punishment to anyone who "knowingly violates subsection ... (g). In *Rehaif*, this Court held that in a prosecution under Sections 922(g) and 924(a) of Title 18, the Government must prove that the defendant knew he belonged in the category of persons barred form possessing a firearm. *See Rehaif,* 139 S. Ct. at 2200. It would be difficult if not impossible to see how a felon would violate 18 U.S.C. § 922(g) if he did not know of his felon status.

Nor is it easy to see how one would "knowingly violate" Section 922(g) without knowing that the possessed firearm that has moved in interstate commerce. It is the same phrase— "knowingly violate"—in the same clause, of the same sentence, of the same statute, that imposes the *mens rea* requirement for all of Section 922(g). The phrase cannot mean, "to act with knowledge of all facts that make the conduct criminal" in some cases, but only "to act with knowledge of the firearm" in others. *See Clark v. Martinez*, 543 U.S. 371, 382 (2005). This Court should therefore grant, vacate, and remand ("GVR") to the Third Circuit to address the *Rehaif* issue.

This Court "regularly hold(s) cases that involve the same issue as a case on which *certiorari* has been granted and plenary review is being conducted in order that (if appropriate) they may be GVR'd when the case is decided." *Lawrence v. Chater*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting). Ultimately, a GVR is appropriate where intervening developments reveal a reasonable probability that the outcome below rests on a premise that the lower court would reject if given the opportunity for further consideration. *See Lawrence*, 516 U.S. at 168. It is no barrier to relief that t

It is no barrier to relief that the issue was raised for the first time in a petition for *certiorari*. There is authority for the proposition that arguments not raised until after the opinion may be raised only in "extraordinary circumstances." *United States v. Hernandez-Gonzalez*, 405 F.3d 260 (5th Cir. 2005). And an earlier decision of the court below applies plain error to claims made by the defendant for the first time in a *certiorari* petition. *See United States v. Clinton*, 256 F.3d 311 (5th Cir. 2001). This Court has already GVR'd a several cases based on *Rehaif* where the issue had not

been preserved in the court of appeals. *E.g., Hall v. United States*, 139 S. Ct. 2771 (2019); *Reed v. United States,* 139 S. Ct. 2776 (2019); *Moody v. United States,* 139 S. Ct. 2778 (2019).

And in any event, a GVR is not a decision on the merits. *See Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001); *accord State Tax Commission v. Van Cott*, 306 U.S. 511, 515-516 (1939). As a result, procedural obstacles to reversal—such as the consequences of non-preservation—should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964) (*per curiam*) (GVR "has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent"); *Torres-Valencia v. United States*, 464 U.S. 44 (1983) (*per curiam*) (GVR used over Government's objection where error was conceded; government's harmless error argument should be presented to the Court of Appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990)(Stevens, J., dissenting) (speaking approvingly of a prior GVR in the same case, in which the Court remanded the case for reconsideration given a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161(1945) (remanding for reconsideration because of new authority that party lacked opportunity to raise because it supervened the opinion of the Court of Appeals).

CONCLUSION

For all these reasons, this Honorable Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

HEIDI R. FREESE, ESQ.
Federal Public Defender
Middle District of Pennsylvania

/s/ Frederick W. Ulrich
FREDERICK W. ULRICH, ESQ.
Assistant Federal Public Defender
Middle District of Pennsylvania
100 Chestnut Street, Suite 306
Harrisburg, Pennsylvania 17101
(717) 782-2237
fritz_ulrich@fd.org

Counsel for Petitioner

August 27, 2019