NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 20__

RUSSELL KIMBLE JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Heather Quick
FEDERAL PUBLIC DEFENDER'S OFFICE
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
(319) 363-9540

ATTORNEY FOR PETITIONER

QUESTION PRESENTED

Whether prior drug convictions inclusive of substances that have since been decontrolled can be used to impose present day federal sentencing enhancements?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Southern District of Iowa, and the United States Court of Appeals for the Eighth Circuit:

United States v. Jackson, 4:20-cr-00073-001 (S.D. Iowa) (criminal proceedings), judgment entered December 10, 2020.

United States v. Jackson, 20-3684 (8th Cir.) (direct criminal appeal), judgment entered February 2, 2022.

United States v. Jackson, 20-3684 (8th Cir.) (direct criminal appeal), Order denying petition for rehearing en banc and rehearing by the panel entered March 30, 2022.

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Other

PETITION FOR WRIT OF CERTIORARI

Petitioner Russell Jackson respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is available at 2022 WL 303231 and is reproduced in the appendix to this petition at Pet. App. p. 10.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on February 2, 2022, Pet. App. p. 8, and denied Mr. Jackson's petition for rehearing *en banc* on March 30, 2022. Pet. App. p. 14. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 994:

> (h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—
>
> (1) has been convicted of a felony that is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and
>
> (2) has previously been convicted of two or more prior felonies,

each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46

U.S.S.G. § 4B1.1:

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

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

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

STATEMENT OF THE CASE

A. Introduction

In a variety of ways, our federal sentencing laws call for an increase in a defendant's sentence if he or she has prior qualifying drug convictions. For example, the Armed Career Criminal Act, 18 U.S.C. § 924(e), the "three strikes" law, 18 U.S.C. § 3559(c), the federal drug trafficking statutes, 21 U.S.C. §§ 841, 851, and the United States Sentencing Guidelines, all require courts to determine whether a defendant's prior drug conviction requires a higher statutory or Guideline sentencing range.

This, of course, requires application of the categorical approach. Just like it was not enough in *Taylor v. United States*, 495 U.S. 575 (1990), for state courts to call a crime a "burglary" for it to qualify as a predicate for the ACCA, it is not enough for state courts to call a crime a drug offense to find it meets the generic definition of a federal sentencing enhancement provision. A comparison between the elements of the state conviction and the generic definition of the federal sentencing enhancement provision is still required.

Various disagreements have emerged between circuits on how to apply the categorical approach in these circumstances. However, circuit courts were all in agreement that only substances that were controlled at the time of federal sentencing—when the enhancement was being applied—could justify a sentencing enhancement. Whether looking to state or federal drug laws, courts all agreed that the generic definition of any federal sentencing enhancement provision did not include decontrolled substances.

That was, until the Eighth Circuit Court of Appeals created a circuit split in Mr. Jackson's case. The Eighth Circuit acknowledged that Mr. Jackson's prior Iowa state drug conviction included a substance no longer controlled under federal or Iowa law, as it included hemp. Still, the Eighth Circuit determined that convictions for decontrolled substances qualified as controlled substance offenses, resulting in the court applying the career-offender enhancement to Mr. Jackson's sentencing range. The Court reached this holding in a one-sentence reference to *McNeill v. United States*, 563 U.S. 816 (2011), pointing to *McNeill*'s language stating courts may not look to "current state law to define a previous offense."

Every other Court of Appeal that has considered decontrolled substances has recognized that *McNeill* is not on point: *McNeill* explains only how to determine the elements and penalty for the prior State conviction. *United States v. Hope*, 28 F.4th 487 (4th Cir. 2022); *United States v. Abdulaziz*, 998 F.3d 519 (1st Cir. 2021); *United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021); *United States v. Williams*, 850 F. App'x 393, 401 (6th Cir. 2021). Whether looking to the ACCA or the Guidelines, these courts have applied the fundamental time-of-sentencing doctrine to find that decontrolled substances are not "controlled substances." *See* 18 U.S.C. § 3553(a)(4); U.S.S.G. § 1B1.11. This Court should grant the petition for certiorari to address this circuit split.

B. Proceedings at District Court

On May 12, 2020, Mr. Jackson was indicted in the Southern District of Iowa on one count of possession of cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and one count of being felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), & 924(a)(2). R. Doc. 25.[1] On September 8, 2020, he pled to the possession with intent to distribute count, pursuant to a plea agreement. R. Doc. 84.

A presentence investigation report ("PSR") was prepared for sentencing. The PSR determined Mr. Jackson was a career offender, resulting in an increased base offense level of 32. PSR ¶ 33. The PSR asserted Mr. Jackson's qualifying convictions were (1) Iowa possession of marijuana with intent to distribute, PSR ¶ 41; and (2) Iowa delivery of marijuana, PSR ¶ 42. After a three-level reduction for acceptance of responsibility, Mr. Jackson's advisory Guideline range was 151 to 188 months of imprisonment, based upon a total offense level of 29 and criminal history category VI. PSR ¶ 116.

Mr. Jackson filed several objections to the PSR. As relevant to this petition, he objected to the career-offender finding. R. Doc. 95. He asserted his Iowa marijuana convictions were overbroad because Iowa's definition of marijuana at the time of his convictions included hemp. *Id.* Mr. Jackson argued that the definition of

[1] In this petition, "R. Doc." refers to the criminal docket in Southern District of Iowa Case No. 4:20-cr-00073-001, and is followed by the docket entry number. "Sent. Tr." refers to the sentencing transcript in Southern District of Iowa Case No. 4:20-cr-00073-001.

"controlled substance offense" was limited to substances under the federal Controlled Substances Act ("CSA"), and that hemp was no longer controlled under the CSA. *Id*. He noted Iowa's statute was overbroad on its face, and that the Iowa Supreme Court had stated that his marijuana statute of conviction included hemp. *Id*.

The case proceeded to sentencing. The district court rejected Mr. Jackson's argument, and applied the career-offender enhancement. Sent. Tr. pp. 29-30. Mr. Jackson was ultimately sentenced to 132 months of imprisonment. Pet. App. p. 2.

C. Proceedings on Appeal

Mr. Jackson appealed, maintaining his challenge to the application of the career-offender enhancement. In briefing, the parties disputed whether the definition of controlled substance offense is limited to substances under the CSA. The parties also disputed whether the generic definition of "controlled substances" was limited to presently controlled substances, or could include substances that have since been decontrolled.

While Mr. Jackson's appeal was pending, the Eighth Circuit decided *United States v. Henderson*, 11 F.4th 713 (8th Cir. 2021). *Henderson* held that the definition of "controlled substance offense" is not limited to substances under the CSA, but also includes substances controlled under state law.

After *Henderson*, Mr. Jackson filed a Rule 28(j) letter. Mr. Jackson noted that *Henderson* did not change the outcome of his appeal, as the Iowa legislature had also removed hemp from the definition of marijuana. Based upon his argument that courts are limited to what substances are controlled at the time of his federal

sentencing, Mr. Jackson asserted he still established his statute of conviction was overbroad.

The panel rejected Mr. Jackson's argument. *United States v. Jackson*, No. 20-3684, 2022 WL 303231 (8th Cir. 2022). The Eighth Circuit agreed that Mr. Jackson's statute of conviction included hemp. *Id.* at * 1. However, the panel still ultimately found Mr. Jackson's convictions were not overbroad, stating:

> Attempting to distinguish *Henderson*, Jackson emphasizes that Iowa, too, has removed hemp from its marijuana definition since his convictions occurred. *See* Iowa Code § 124.401(6). But we may not look to "current state law to define a previous offense." *McNeill v. United States*, 563 U.S. 816, 822 (2011); *see also United States v. Santillan*, 944 F.3d 731, 733 (8th Cir. 2019) (explaining that "a prior conviction qualifies as a 'felony drug offense' if it was punishable as a felony at the time of conviction"). 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 *2.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUIT'S ARE IN DISAGREEMENT AS TO WHETHER CONVICTIONS INCLUSIVE OF DECONTROLLED SUBSTANCES CAN BE USED TO APPLY A SENTENCING ENHANCEMENT UNDER THE CATEGORICAL APPROACH.

A circuit split has developed regarding the potential application of *McNeill v. United States*, 563 U.S. 816 (2011), when analyzing prior drug convictions under the categorical approach. In Mr. Jackson's case, the Eighth Circuit held that *McNeill* required courts to rely on superseded statutes to define "controlled substance offense"

under the Guidelines. This position has been rejected in every other Circuit to decide the issue.

A closer look at *McNeill* illustrates why courts have almost uniformly rejected its applicability under these circumstances. In *McNeill*, this Court examined whether a prior conviction could serve as a predicate offense under the ACCA, which defines "serious drug offense" to include only prior convictions "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(1). At the time of McNeill's priors, the state statutory maximum was ten years. However, by the time of sentencing on the subsequent federal offense, the state legislature had reduced the maximum to less than ten years, raising the issue of which timeframe the sentencing court should consider. This Court held, "that a federal sentencing court must determine whether 'an offense under State law' is a 'serious drug offense' by consulting the 'maximum term of imprisonment' applicable to a defendant's previous drug offense at the time of the defendant's state conviction for that offense." *Id*. at 825. Therefore, *McNeill* did not address how to define the sentencing enhancement predicate—serious drug offense. It only addressed how to define a defendant's prior conviction.

All circuits except for the Eighth Circuit have held that *McNeill* does not stand for the proposition that the district court should look to superseded statutes to determine what substances are within the generic definition of a federal sentencing enhancement provision. As the First Circuit explained:

> *McNeill* did not also hold that ACCA's own criteria for deeming a "previous conviction[ ]" with those locked-in characteristics to be "a serious drug offense . . . were themselves also locked in at the time of the "previous conviction[]." In fact, *McNeill* simply had no occasion to address that question.

Abdulaziz, 998 F.3d at 526. *Abdulaziz* noted that *McNeill* analyzed how to define "previous conviction," and "the word 'conviction[ ]' in the guideline is not the word that matters here, given that we are trying to identify this guideline's criteria for what constitutes 'a controlled substance offense.' Nor does *McNeill* suggest otherwise." *Id.*

The Ninth Circuit also rejected that *McNeill* was binding, noting that the question here "bears little resemblance to the [question posed] in *McNeill*." *Bautista*, 989 F.3d at 703. The court determined that "*McNeill* nowhere implies that the court must ignore current federal law and turn to a superseded version of the United States Code." *Id.* at 705. The Fourth Circuit relied upon *Bautista* to reject the government's argument that courts can look to superseded statutes for the definition of "serious drug offense" under the ACCA. *United States v. Hope*, 28 F.4th 487 (4th Cir. 2022); *see also Williams*, No. 19-6410, 2021 WL 1149711 at *6 (6th Cir. March 25, 2021) ("*McNeill* expresses the principle that the element of the state offense of conviction are locked in at the time of that conviction."); *United States v. Perry*, No. 20-6183, 2021 WL 3662443, at *2 (6th Cir. Aug. 18, 2021) (not deciding issue but suggesting agreement with *Abdulaziz*, *Bautista*, and *Williams*). Instead, *McNeill* directs courts

to define a defendant's prior conviction according to how it was defined at the time of the prior conviction.

Instead, the First, Fourth, Sixth, and Ninth Circuits have all held that the generic definition of the sentencing enhancement provision is limited to currently controlled substances under the fundamental time-of-sentencing doctrine. 18 U.S.C. § 3553(a)(4)(A)(ii); U.S.S.G. § 1B1.11(a); *Peugh v. United States*, 569 U.S. 530, 543 (2013). This is a straightforward, party-neutral rule that promotes uniformity in sentencing, a central tenet of federal sentencing. *See United States v. Booker*, 543 U.S. 220, 253-54 (2005) ("Congress' basic goal in passing the Sentencing [Reform] Act [of 1984] was to move the sentencing system in the direction of increased uniformity"); U.S.S.G. Ch. One, Pt. A(1)(3) (recognizing reasonable uniformity as a goal of the sentencing guidelines).

The Eighth Circuit's decision[2] has created a circuit split, and is an erroneous interpretation of *McNeill*. This Court should grant the petition for certiorari to address this circuit split.

II. THE ISSUE IS FREQUENTLY OCCURRING AND HAS SIGNIFICANT IMPACTS ON A DEFENDANT'S SENTENCE.

The issue raised in Mr. Jackson's petition will be relevant whenever the categorical approach is used to determine if a prior drug conviction is a qualifying sentencing enhancement predicate. While Mr. Jackson's case involves the Guidelines,

[2] The Eighth Circuit has applied its holding in *Jackson* in other cases. *United States v. Scott*, No. 21-3371, 2022 WL 1233083 (8th Cir. Apr. 27, 2022); *United States v. Mason*, No. 21-1402, 2022 WL 1931489 (8th Cir. June 6, 2022).

this issue also impacts whether a prior conviction is a "serious drug offense" under the ACCA and three strikes law, as well as whether a prior conviction is a "serious drug felony" or "felony drug offense,"—otherwise known as an § 851 enhancement—subjecting a defendant to higher statutory penalties under 21 U.S.C. § 841(b)(1). *See, e.g., Hope*, 28 F.4th 487 (addressing the decontrolled substances question, finding it relevant to whether a prior drug conviction was an ACCA predicate).

This will impact a significant number of federal defendants. 70.8% of Armed Career Criminals received the enhancement based upon at least one prior drug offense, and 35.6% had three or more such convictions. U.S. Sent'g Comm'n, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways*, p. 31 (March 2021). In 2016, federal prosecutors filed an § 851 enhancement against 757 drug trafficking offenders. U.S. Sent'g Comm'n, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders*, p. 6 (July 2018).

Further, this issue will frequently arise in the Guidelines context. As discussed, the Guidelines can increase a defendant's Guideline range if he or she has a prior conviction(s) for a "controlled substance offense," defined under U.S.S.G. § 4B1.2. The most notable increase is the one applied in Mr. Jackson's case, the career-offender enhancement under § 4B1.1. 1,200 to 2,000 defendants every year—roughly 3% of all federal defendants are classified as career offenders. U.S. Sent'g Comm'n, *Report to Congress: Career Offender Sentencing Enhancements*, p. 18 (2016). The career-offender designation increases the final Guidelines range for over 91% of

defendants sentenced under § 4B1.1. *Id.* at 21. Notwithstanding the Sentencing Commission's finding that drug offenders generally have less serious criminal histories and recidivate at a lower level, the "the career offender directive has the greatest impact on federal drug trafficking offenders because of the higher statutory maximum penalties for those offenders." *Id.* at 2.

Moreover, section 4B1.2 applies not only to those sentenced under § 4B1.1 (*i.e.*, defendants whose instant offense is a crime of violence or controlled substance offense), but also to defendants sentenced under other provisions of the Guidelines that incorporate § 4B1.2's definitions. At least three other sections—§ 2K1.3 (instant offense involving explosive materials), § 2K2.1 (instant offense is the unlawful possession of a firearm by a felon), § 5K2.17 (instant offense is crime of violence or controlled substance offense committed with a semiautomatic firearm)—incorporate § 4B1.2's definition of "controlled substance offense." Alone, those sentenced under § 2K2.1 make up over 11% of the Bureau of Prison population. U.S. Sent'g Comm'n, *Use of Guidelines and Specific Offense Characteristics* (2020).

III. MR. JACKSON'S CASE IS AN IDEAL VEHICLE TO DECIDE THIS ISSUE.

Mr. Jackson preserved this question before the district court and on appeal. Further, as the Eighth Circuit acknowledged, this question is dispositive to Mr. Jackson's sentencing challenge. Finally, Mr. Jackson's case is unencumbered by procedural anomalies.

CONCLUSION

Mr. Jackson respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

/s/ Heather Quick
Heather Quick
Assistant Federal Public Defender
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
TELEPHONE: 319-363-9540
FAX: 319-363-9542

ATTORNEY FOR PETITIONER