No. 22-6389

IN THE SUPREME COURT OF THE UNITED STATES

JUSTIN RASHAAD BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the classification of a prior state conviction as a "serious drug offense" under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(2)(A)(ii), depends on the federal controlled-substance schedules in effect at the time of a defendant's federal sentencing.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 47 F.4th 147.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2022. On November 22, 2022, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including December 28, 2022. The petition was filed on December 21, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted on one count of distributing and possessing with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1), and one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g). Pet. App. 17a. He was sentenced to 180 months of imprisonment, to be followed by six years of supervised release. Id. at 18a-19a. The court of appeals affirmed. Id. at 1a-16a.

1. In 2016, police officers in Pennsylvania conducted a series of controlled cocaine purchases from petitioner. Pet. App. 3a. Officers then performed a warrant-authorized search of petitioner's apartment, where they discovered cocaine, scales, and money. Ibid. Officers also found a loaded .38-caliber revolver tucked under the couch cushion where petitioner had been sitting at the time of the search. Ibid.

A federal grand jury in the Middle District of Pennsylvania charged petitioner with seven counts of distributing cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); two counts of distributing and possessing with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g); one count of possessing a firearm in

furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and one count of possessing a stolen firearm, in violation of 18 U.S.C. 922(j). Indictment 1-12.

Petitioner entered into a plea agreement in which he agreed to plead guilty to one of the drug-distribution counts and the felon-in-possession count, in return for the government dismissing the remaining charges. Plea Agreement 1-2. The district court accepted petitioner's guilty plea. D. Ct. Doc. 72 (July 8, 2019).

2. At the time when petitioner unlawfully possessed a firearm, the default term of imprisonment for that offense was zero to ten years. 18 U.S.C. 924(a)(2) (2012).* The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense" committed on separate occasions. 18 U.S.C. 924(e)(1).

The ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years

* For Section 922(g) offenses committed after June 25, 2022, the default term of imprisonment is zero to 15 years. See Bipartisan Safer Communities Act, Pub. L. No. 117-159, Div. A, Tit. II, § 12004, 136 Stat. 1329 (18 U.S.C. 924(a)(8) (Supp. 2022)).

or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). To determine whether a prior state offense meets that definition, courts "ask whether the state offense's elements 'necessarily entail one of the types of conduct' identified in § 924(e)(2)(A)(ii)." Shular v. United States, 140 S. Ct. 779, 784 (2020) (citation and emphasis omitted).

3. The Probation Office recommended that petitioner be sentenced under the ACCA. Presentence Investigation Report (PSR) ¶ 24. The Probation Office listed five prior Pennsylvania convictions as ACCA predicate offenses: one in 2008 for delivering cocaine, and four between 2009 and 2014 for possessing marijuana with intent to deliver it. PSR ¶¶ 29-31, 33, 35; see Pet. App. 3a.

Petitioner objected to the Probation Office's recommendation, arguing that his prior marijuana-trafficking convictions do not qualify as predicate offenses under the ACCA because Pennsylvania defined marijuana more broadly than does present federal law. D. Ct. Doc. 106, at 5-14. Petitioner did not dispute that the state definition was a categorical match with the federal definition both at the time of his prior state crimes and at the time of his federal offense. But he contended that the state definition was overbroad at the time of his federal sentencing because the Agricultural Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, had excluded hemp from the federal definition of

marijuana, while Pennsylvania law contained no similar hemp exclusion. D. Ct. Doc. 106, at 6; see Pet. App. 6a.

The district court rejected that contention and imposed the ACCA's statutory-minimum term of 180 months of imprisonment on the felon-in-possession count, and a concurrent sentence of 180 months on the drug count. Pet. App. 18a; D. Ct. Doc. 120, at 41.

4. The court of appeals affirmed. Pet. App. 1a-16a.

The court of appeals observed that "Pennsylvania law defines marijuana to consist of 'all forms' and 'every derivative' of the cannabis plant," subject to limited exceptions not relevant here. Pet. App. 6a (quoting 35 Pa. Stat. Ann. § 780-102(b)) (ellipsis omitted). And the court further observed that "the federal definition was identical to [Pennsylvania's] in every material respect" until 2018, when Congress revised the federal definition to "distinguish[] between illegal marijuana and legal hemp." Ibid.; see id. at 7a.

Petitioner and the government accordingly agreed that while "Pennsylvania's definition of marijuana is now broader than its federal counterpart," "without the changes to federal law introduced" in 2018, petitioner's "prior state convictions would be ACCA predicates." Pet. App. 7a. But the parties differed on "the proper comparison time to determine whether state and federal law are a categorical match" under the ACCA. Id. at 6a-7a. Petitioner "look[ed] to the federal schedule at the time of federal

sentencing," whereas the government focused on "the federal schedule at the time of commission of the federal offense." Id. at 7a.

Presented with those two options, the court of appeals chose the time-of-federal-offense approach. Pet. App. 12a, 16a. The court found petitioner's position foreclosed by the federal saving statute, 1 U.S.C. 109, which provides that the "repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide." Id. at 8a (quoting 1 U.S.C. 109). The saving statute "mandates that a court apply the penalties in place at the time the crime was committed unless [a] new law expressly provides otherwise." Ibid. (citation omitted; bracket in original).

The court of appeals concluded that "[t]he saving statute controls here" because the Agricultural Improvement Act "chang[ed] the definition of marijuana" and "indirectly affected penalties associated with prior serious drug offenses," thereby "effect[ing] a 'repeal' within the meaning of the saving statute." Pet. App. 8a-9a. The court reasoned that petitioner had "'incurred' ACCA penalties" for purposes of the saving statute "at the time he violated § 922(g)," id. at 9a, and it rejected petitioner's contention that the Agricultural Improvement Act retroactively reduced those penalties, id. at 9a-12a.

The court of appeals also criticized the time-of-federal-sentencing rule as inviting "a significant and arbitrary disparity" in penalties based on the date of the defendant's sentencing hearing. Pet. App. 11a. The court acknowledged that the Fourth Circuit had adopted a time-of-federal-sentencing rule in United States v. Hope, 28 F.4th 487 (2022), relying on the principle that "federal courts use the version of the Guidelines 'in effect on the date that the defendant is sentenced.'" Pet. App. 13a (quoting Hope, 28 F.4th at 505). But the court disagreed with the Fourth Circuit's analysis, noting that "neither Hope nor this case are Guidelines cases" and "that longstanding principles of statutory interpretation allow different results under the Guidelines as opposed to under the ACCA." Ibid.

Lastly, the court of appeals addressed this Court's decision in McNeill v. United States, 563 U.S. 816 (2011), which held that the "plain text of ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense" to determine whether "'a maximum term of imprisonment of ten years or more is prescribed by law'" for a defendant's previous state drug convictions. 563 U.S. at 820 (quoting 18 U.S.C. 924(e)(2)(A)(ii)). McNeill explained that the ACCA "is concerned with convictions that have already occurred" and that the "only way to answer this backward-looking question" is "to consult the law that applied at

the time of that conviction." Ibid. In the court of appeals' view, McNeill "prescribe[d] only the time for analyzing the elements of the state offense," not "the elements of the federal offense," and thus allowed a federal-offense benchmark for comparing federal and state drug definitions. Pet. App. 14a-15a.

ARGUMENT

Petitioner contends (Pet. 14-20) that the classification of his prior state convictions as "serious drug offense[s]" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii), depends on the federal controlled-substance schedules in effect at the time of his federal sentencing. That contention concerns an aspect of a more general timing question -- about whether the proper comparison point is the time of the state crime, the time of the federal offense, or the time of federal sentencing -- that is both important and recurring, and on which the government is recommending that the Court grant further review in Jackson v. United States, No. 22-6640 (filed Jan. 24, 2023). Because this case presents only a limited portion of the question, however, it does not warrant an independent grant of certiorari. The Court should therefore hold the petition for a writ of certiorari in this case pending resolution of the petition in Jackson and then dispose of it as appropriate in light of Jackson.

1. As explained in the government's concurrently filed brief in Jackson, supra (No. 22-6640), the correct time of

comparison of state and federal drug definitions for ACCA purposes is the time of a defendant's prior state crimes. See U.S. Br. 9-11. As that brief observes, however, the issue is the subject of a circuit conflict: one circuit has held that courts should consult the federal drug schedules in effect at the time of a defendant's prior state crimes; another circuit has adopted a time-of-federal-sentencing rule; the decision in this case adopted a time-of-federal offense rule; and two circuits have rejected a time-of-state-offense rule without deciding between a time-of-federal-offense and time-of-federal-sentencing rule. See id. at 11-12. In light of that conflict, and the recurrence and importance of the question presented in Jackson, the Court should grant certiorari in that case. See id. at 12-13; see also Pet. 8-14, 20-23.

2. This case, however, does not present a suitable vehicle for further review. In the court of appeals, the government advocated a time-of-federal-offense approach that it would not continue to advocate in this Court. See Gov't C.A. Br. 11-19. The distinction between the time-of-state-crime approach that the government advocates and a time-of-federal-offense approach is immaterial in this case because petitioner's sentence is valid under either approach. See Pet. App. 7a; see also Gov't C.A. Br. 19 n.3. But it would be material in some cases (like Jackson), and if the Court were to grant the petition, neither party would

defend a time-of-federal-offense approach, which formed the basis for the court of appeals' judgment.

In Jackson, in contrast, the petitioner would prevail under either a time-of-federal-offense or a time-of-federal-sentencing approach, and he accordingly advocates for both rules in the alternative. See Pet. 35, 38, Jackson, supra (No. 22-6640). And because that case squarely tees up the difference between a state-crime-focused and a federal-crime-focused approach, and the Court is unlikely to adopt the latter without explaining which of the two alternative federal-crime-focused approaches is correct, Jackson should by itself provide a suitable -- and far superior -- vehicle for complete resolution of the timing issue. The Court should therefore grant the petition in Jackson and hold the petition in this case pending its resolution of Jackson.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition in Jackson v. United States (No. 22-6640), and then disposed of as appropriate in light of that case.

Respectfully submitted.

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