APPENDIX

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APPENDIX A

[PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-13963

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EUGENE JACKSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

D.C. Docket No. 1:19-cr-20546-KMW-1

Before ROSENBAUM, JILL PRYOR, and ED CARNES, Circuit Judges.

ROSENBAUM, Circuit Judge:

The Armed Career Criminal Act, 18 U.S.C. § 924(e), mandates a fifteen-year minimum sentence for a defendant who possesses a firearm and satisfies any of 18 U.S.C. § 922(g)(1)'s conditions while having at least three qualifying "previous convictions." "[P]revious convictions" qualify if they are for a "violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). This appeal concerns ACCA's definition of "serious drug offense."

A prior state conviction satisfies ACCA's definition of "serious drug offense" if it is one "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (*as defined in section 102 of the Controlled Substances Act* . . .), for which a maximum term of imprisonment of ten years or more is prescribed by law." *Id.* § 924(e)(2)(A)(ii) (emphasis added). Not surprisingly, the Controlled Substances Act's list of controlled substances changes from time to time. We must decide which version of the controlled-substances list ACCA's definition of "serious drug offense" incorporates: the one in effect when the defendant violated 18 U.S.C. § 922(g)(1) (the "firearm offense") or the one in effect when the defendant was convicted of his prior state drug offense. We hold that the Supreme Court's reasoning in *McNeill v. United States*, 563 U.S. 816 (2011), requires us to conclude that ACCA's "serious drug offense" definition incorporates the version of the controlled-substances list in effect when the defendant was convicted of his prior state drug offense.

I.

The facts here are straightforward. Eugene Jackson pled guilty to possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). In support of his guilty plea, the factual proffer shows that he unlawfully possessed a loaded firearm on September 26, 2017.

In Jackson's presentence investigation report, the probation officer concluded that Jackson qualified for a sentence enhancement under ACCA based on his prior criminal history. That is, the officer determined that, when Jackson possessed the firearm, he had at least three prior convictions for a "violent felony or a serious drug offense, or both, committed on occasions different from one another." *Id.* § 924(e)(1). And under those circumstances, ACCA mandates a fifteen-year minimum sentence for violation of the firearm prohibition in 18 U.S.C. § 922(g).

Although Jackson conceded that he had two prior convictions that satisfy ACCA's definition of a "violent felony,"[1] he objected to the probation officer's conclusion that his two cocaine-related convictions met ACCA's "serious drug offense" definition. But the district court overruled Jackson's objection, finding that his cocaine-related convictions did qualify. Based on that

[1] As relevant here, these prior offenses of Jackson's are "violent felon[ies]" because each had "as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* § 924(e)(2)(B)(i).

determination, the district court sentenced Jackson to ACCA's mandatory fifteen-year minimum.

Jackson now appeals his sentence.

II.

We review de novo the legal question whether a prior state conviction qualifies as a "serious drug offense" under ACCA. *United States v. Conage*, 976 F.3d 1244, 1249 (11th Cir. 2020) (citing *United States v. Robinson*, 583 F.3d 1292, 1294 (11th Cir. 2009)). When we conduct our review, federal law binds our construction of ACCA, and state law governs our analysis of elements of state-law crimes. *Id.* (quoting *United States v. Braun*, 801 F.3d 1301, 1303 (11th Cir. 2015)).

III.

Jackson contends that neither of his prior cocaine-related convictions under Florida Statute § 893.13 meets ACCA's definition of a "serious drug offense." So we turn to that definition. As we have noted, ACCA defines a "serious drug offense" to include "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 or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii).

To determine whether a prior conviction under state law qualifies as a "serious drug offense," we focus on "the statutory

definition of the state offense at issue, rather than the facts underlying the defendant's conviction." *Conage*, 976 F.3d at 1250. We call this the "categorical approach." *Id.* (quoting *Robinson*, 583 F.3d at 1295).

Under this approach, a state conviction cannot serve as an ACCA predicate offense if the state law under which the conviction occurred is categorically broader—that is, if it punishes more conduct—than ACCA's definition of a "serious drug offense." *See id.* So if there is conduct that would violate the state law but fall outside of ACCA's "serious drug offense" definition, the state law cannot serve as a predicate offense—"regardless of the actual conduct that resulted in the defendant's conviction." *Id.* Our task here, then, is to compare the state law that defines Jackson's prior cocaine-related offenses with ACCA's definition of a "serious drug offense" to see whether the state crime is categorically broader than a "serious drug offense."[2]

[2] Sometimes a statute is divisible, meaning it lists "elements in the alternative, and thereby define[s] multiple crimes." *Mathis v. United States*, 579 U.S. 500, 505 (2016). When that's the case, we use the "modified categorical approach" to assess whether a prior conviction qualifies as an ACCA predicate. *Id.* Under this modified categorical approach, we look "to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id.* at 505–06 (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005)). We "then compare that crime, as the categorical approach commands," with ACCA's "serious drug offense" definition. *See id.* at 506. In contrast to the modified categorical approach, when the statute lists alternative means of

In conducting that analysis, we analyze "the version of state law that the defendant was actually convicted of violating." *McNeill*, 563 U.S. at 821. Here, Jackson's two potential "serious drug offenses" include convictions for violating Florida Statute § 893.13 in 1998 and in 2004 with conduct involving cocaine. In 1998 and in 2004, when Jackson was convicted of his cocaine-related offenses, Section 893.13(1) criminalized selling, manufacturing, delivering, or possessing with the intent to sell, manufacture, or deliver, cocaine and cocaine-related substances, including a substance called ioflupane (^{123}I) ("ioflupane").[3]

satisfying a single element, the standard categorical approach applies. *See id.* at 517. And under that approach, we presume that the defendant's conviction "rested upon nothing more than the least of the acts criminalized or the least culpable conduct." *United States v. Kushmaul*, 984 F.3d 1359, 1364 (11th Cir. 2021) (quotation marks omitted). As we explain in greater detail below, we assume without deciding that the standard categorical approach applies here. *See infra* note 9.

[3] At the time of Jackson's convictions, Section 893.13(1) prohibited selling, manufacturing, delivering, or possessing with the intent to sell, manufacture, or deliver, "a controlled substance." Fla. Stat. § 893.13(1) (1998); *see also id.* (2004). Florida law defined "[c]ontrolled substance" as "any substance named or described in Schedules I through V of s. 893.03." *Id.* § 893.02(4) (1998); *see also id.* (2004) ("'Controlled substance' means any substance named or described in Schedules I-V of s. 893.03."). Florida's Schedule II included "[c]ocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine." *Id.* § 893.03(2)(a)(4) (1998); *see also id.* (2004). It's clear that definition encompassed ioflupane because the Florida Legislature has since amended Florida's Schedule II to expressly exempt ioflupane from that definition. *Id.* (2017); 2017

The federal version of Schedule II also encompassed ioflupane in 1998 and 2004, when Jackson was convicted of his Section 893.13(1) offenses.[4] But that changed in 2015. Then, the federal government exempted ioflupane from Schedule II because of its potential value in diagnosing Parkinson's disease. 80 Fed. Reg. at 54716; *see also* 21 C.F.R. § 1308.12(b)(4)(ii) (2017); *id.* (2021).[5] So in 2017, when Jackson possessed the firearm that resulted in his federal conviction under 18 U.S.C. § 922(g)(1) here, ioflupane was not a controlled substance "as defined . . . [under] the Controlled Substances Act," *id.* § 924(e)(2)(A)(ii).

Based on this fact, Jackson argues that Section 893.13(1), which punished ioflupane-related conduct when Jackson was convicted of his prior state drug offenses, is categorically broader than

Fla. Sess. Law Serv. Ch. 2017-110 (C.S.H.B. 505) (West); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256–60 (2012) (explaining that "a change in the language of a prior statute presumably connotes a change in meaning").

[4] Until 2015, "ioflupane was, by definition, a schedule II controlled substance because it is derived from cocaine via ecgonine, both of which are schedule II controlled substances." Schedules of Controlled Substances: Removal of [123 I] Ioflupane from Schedule II of the Controlled Substances Act, 80 Fed. Reg. 54715, 54715 (Sept. 11, 2015) (codified at 21 C.F.R. § 1308.12(b)(4)(ii)).

[5] The Controlled Substances Act authorizes the Attorney General to "remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule." 21 U.S.C. § 811(a); *see also id.* § 812 n.1 ("Revised schedules are published in the Code of Federal Regulations, Part 1308 of Title 21, Food and Drugs.").

ACCA's definition, which no longer punished ioflupane-related conduct when Jackson committed his present § 922(g)(1) firearm offense. This argument works if ACCA's definition incorporates the version of the controlled-substances schedules in effect when a defendant commits the firearm offense rather than the version in effect when he was convicted of his prior state drug offense. We consider, then, which version of the federal controlled-substances schedules ACCA's definition of "serious drug offense" incorporates: the one in place at the time of the prior state conviction, or the one in place at the time the defendant committed the present federal firearm offense.

We divide our discussion into two parts. In Section A, we explain why the Supreme Court's and our precedents on Section 893.13(1) do not answer the question we must address. Section B, in contrast, shows why the Supreme Court's reasoning in *McNeill* does. Section B then answers the question this case presents, before applying that answer to the facts in this appeal.

A.

The government identifies three decisions it says foreclose Jackson's argument. We think not.

In two of the decisions the government identifies, we addressed whether Section 893.13(1)'s lack of a mens rea element[6] with respect to the illicit nature of the controlled substance renders the state statute overbroad in comparison to ACCA's "serious drug offense" definition. And in all three decisions, the Supreme Court and this Court held that Section 893.13(1), which lacks a mens rea element as to the illicit nature of the controlled substance, qualifies as a "serious drug offense" under ACCA.

In *United States v. Travis Smith*, 775 F.3d 1262 (11th Cir. 2014), we held that ACCA's definition of a "serious drug offense" does not include a mens rea element with respect to the illicit nature of the controlled substance. *Id.* at 1267. Rather, that definition "require[s] only that the predicate offense 'involv[es],' . . . certain activities related to controlled substances." *Id.* (second alteration in original) (quoting 18 U.S.C. § 924(e)(2)(A)(ii)). And because Section 893.13(1) involves those activities, we held that a violation of the statute qualifies as a "serious drug offense" under ACCA—despite the fact that the statute lacks a mens rea element with respect to the illicit nature of the controlled substance. *Id.* at 1268. In so holding, we made clear that "[w]e need not search for the elements of" a generic definition of "serious drug offense" because that term is "defined by a federal statute . . . ." *Id.* at 1267.

[6] Mens rea is "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime . . . ." *Mens Rea*, *Black's Law Dictionary* (11th ed. 2019).

In *Shular v. United States*, 140 S. Ct. 779 (2020), the Supreme Court agreed. Shular argued that the definition of "serious drug offense" describes "not conduct, but [generic] offenses." *Id.* at 782. In his view, courts were required to "first identify the elements of the 'generic' offense" before asking "whether the elements of the state offense match those of the generic crime." *Id.* But the Court rejected that view, holding that ACCA's "'serious drug offense' definition requires only that the state offense involve the conduct specified in the federal statute; it does not require that the state offense match certain generic offenses." *Id.* Although *Shular* explicitly did not reach the mens rea issue we addressed in *Travis Smith*, *see Shular*, 140 S. Ct. at 787 n.3, the Court nevertheless affirmed our judgment that convictions under Section 893.13(1) do qualify as "serious drug offenses" under ACCA, *id.* at 784, 787; *see also United States v. Shular*, 736 F. App'x 876, 877 (11th Cir. 2018) (relying on *Travis Smith* to hold that Shular's convictions under Fla. Stat. § 893.13 qualify as serious drug offenses under ACCA), *aff'd*, 140 S. Ct. 779 (2020).

Finally, in *United States v. Xavier Smith*, 983 F.3d 1213 (11th Cir. 2020), relying on *Travis Smith* and *Shular*, we affirmed that "ACCA's definition of a serious drug offense 'requires only that the state offense *involve* the conduct specified in the [ACCA]'" and does not require a "'generic-offense matching exercise.'" *Id.* at 1223 (alteration in original) (quoting *Shular*, 140 S. Ct. at 782–84). And we again rejected the argument that Section 893.13(1) cannot qualify as a "serious drug offense" under ACCA because it lacks a

mens rea element. *See id.* ("Smith's argument that his prior convictions cannot qualify because the state offense lacks a mens rea element is foreclosed by our [*Travis*] *Smith* precedent and the Supreme Court's precedent in *Shular*.").

The government insists that these three decisions, together with our prior-panel-precedent rule, require us to conclude that Jackson's cocaine-related convictions under Section 893.13 are "serious drug offense[s]" because, in the government's view, we have already declared that Section 893.13 is a "serious drug offense." Under our prior-panel-precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (quoting *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008)). And we have "categorically rejected an overlooked reason or argument exception to the prior-panel-precedent rule." *Id.*

But "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *see also, e.g.*, *United States v. Edwards*, 997 F.3d 1115, 1120 (11th Cir. 2021) ("[W]e weren't confronted with the question we face today . . . and so, of course, we had no occasion to resolve it."). And *Travis Smith*, *Shular*, and *Xavier Smith* did not address, as Jackson asks us to do here, whether ACCA's "serious drug offense" definition incorporates the

version of the controlled-substances schedules in effect when the defendant was convicted of his prior state drug offenses or the version in effect when he committed his present firearm offense.

Rather, those decisions presented two questions relating to ACCA's "serious drug offense" definition: first, whether the definition requires that the state offense match certain generic offenses, *see Travis Smith*, 775 F.3d at 1267; *Shular*, 140 S. Ct. at 782; and second, whether Section 893.13(1) convictions cannot qualify as ACCA predicates because that statute lacks a mens rea element with respect to the illicit nature of the controlled substance, *see Travis Smith*, 775 F.3d at 1267–68; *Xavier Smith*, 983 F.3d at 1223. In answering the two questions, the decisions construed the part of ACCA's "serious drug offense" definition that requires the state offense to involve the *conduct* of "manufacturing, distributing, or possessing with intent to manufacture or distribute." 18 U.S.C. § 924(e)(2)(A)(ii); *see Travis Smith*, 775 F.3d at 1267 (holding that ACCA's serious drug offense definition requires "only that the predicate offense involves . . . certain activities related to controlled substances" (alteration adopted and quotation marks omitted)); *Shular*, 140 S. Ct. at 782 (holding that ACCA's "'serious drug offense' definition requires only that the state offense involve the conduct specified in the federal statute"); *Xavier Smith*, 983 F.3d at 1223 (noting that "ACCA's definition of a serious drug offense 'requires only that the state offense *involve* the conduct specified in the ACCA'" (alteration adopted) (quoting *Shular*, 140 S. Ct. at 782)).

In contrast, this case asks us to construe the part of ACCA's "serious drug offense" definition that requires the state offense to involve "a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. [§] 802))." 18 U.S.C. § 924(e)(2)(A)(ii). At best, the *Smith* decisions and *Shular* assumed that this part of the "serious drug offense" definition and Section 893.13(1) encompass the same universe of substances. But "assumptions are not holdings." *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1239 (11th Cir. 2016); *see also Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) ("[S]ince we have never squarely addressed the issue, and have at most assumed [the issue], we are free to address the issue on the merits."); *Fernandez v. Keisler*, 502 F.3d 337, 343 n.2 (4th Cir. 2007) ("We are bound by holdings, not unwritten assumptions."); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions."); *United States v. Norris*, 486 F.3d 1045, 1054 (8th Cir. 2007) (en banc) (Colloton, J., concurring in the judgment) (collecting decisions in which implicit assumptions, findings, or questions were not given precedential effect).

And *Travis Smith*, *Xavier Smith*, and *Shular* did not address the question this appeal presents: whether ACCA's "serious drug offense" definition incorporates the version of the federal controlled-substances schedules in effect when the defendant was convicted of his prior state drug offenses or the version in effect when he committed his firearm offense. We consider that question now.

B.

We apply the categorical approach in three steps. First, we identify the criteria ACCA uses to define a state "serious drug offense" under 18 U.S.C. § 924(e)(2)(A)(ii). This step requires us to decide which version of the federal controlled-substances schedules that definition incorporates. Second, we turn to the "statutory definition of the state offense at issue." *Conage*, 976 F.3d at 1250. Here, that definition resides at Florida Statute § 893.13(1), which describes the elements of Jackson's prior cocaine-related offenses. Third, we compare the results of those steps to determine whether Section 893.13(1) is categorically broader—that is, whether it punishes more conduct—than ACCA's "serious drug offense" definition. If Section 893.13(1) is not categorically broader than ACCA's "serious drug offense" definition, then Jackson's prior cocaine-related offenses qualify as "serious drug offense[s]."

i.

We break the first step into two parts. The first part explains our bottom-line conclusion: ACCA's definition of a state "serious drug offense" incorporates the version of the federal controlled-substances schedules in effect when the defendant was convicted of the prior state drug offense. The second part then addresses arguments against that conclusion.

1.

We start with the three criteria ACCA uses to define a state "serious drug offense" under 18 U.S.C. § 924(e)(2)(A)(ii). First, the prior state offense must involve certain conduct: "manufacturing, distributing, or possessing with intent to manufacture or distribute." *Id.* Second, that conduct must involve "a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. [§] 802))." *Id.* And third, that conduct involving a controlled substance must be punishable by a maximum term of imprisonment of at least ten years. *Id.*

The Supreme Court has already interpreted the first and third criteria. As we've explained, *Shular* settles the meaning of the first criterion, which the Supreme Court held "requires only that the state offense involve the conduct specified in the federal statute; it does not require that the state offense match certain generic offenses." 140 S. Ct. at 782. The Supreme Court addressed the third criterion ("for which a maximum term of imprisonment of ten years or more is prescribed by law") in *McNeill*, 563 U.S. at 820–21, so it is likewise not in controversy here.

That leaves the second criterion—the offense must involve a "controlled substance." The part of the "serious drug offense" definition that deals with prior state convictions defines a "controlled substance" by reference to Section 102 of the Controlled Substances Act. *See* 18 U.S.C. § 924(e)(2)(A)(ii) (incorporating 21 U.S.C. § 802). Section 102, in turn, defines a "controlled substance" to include any substance on the federal drug schedules. *See* 21 U.S.C. § 802(6). But those schedules are not static. Indeed,

Congress has authorized the Attorney General to remove drugs from (and add drugs to) those schedules. *See supra* note 5; 21 U.S.C. § 811 (authorizing the Attorney General to add substances to, subtract them from, or transfer them between the controlled-substances schedules). So we must decide whether ACCA's definition of a "serious drug offense" under state law incorporates the version of the federal drug schedules in effect when Jackson was convicted of his prior state drug offenses or the version in effect when Jackson committed his firearm offense.

We conclude that the Supreme Court's reasoning in *McNeill* requires us to read ACCA's definition of a "serious drug offense" under state law to incorporate the version of the federal controlled-substances schedules in effect when Jackson was convicted of his prior state drug offenses.

In *McNeill*, as we've mentioned, the Supreme Court construed ACCA's third criterion for qualifying prior state drug offenses: the requirement that the state law prescribe "a maximum term of imprisonment of ten years or more" as a punishment for that drug offense. 563 U.S. at 820 (quoting 18 U.S.C. § 924(e)(2)(A)(ii)). Similar to the question here, in *McNeill* the Supreme Court considered whether, when a federal court assesses the maximum penalty under the state statute of prior conviction, ACCA requires the court to consider the penalties that applied under the state law at the time of the prior conviction or the ones that applied at the time of the sentencing on the firearm offense. *See id.* The Supreme Court concluded that "[t]he 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." *Id.*

To explain why the text is plain, the Supreme Court emphasized the term "'previous convictions,'" which ACCA uses in 18 U.S.C. § 924(e)(1). *See id.* at 819 (quoting § 924(e)(1)). As a reminder, Section 924(e)(1) imposes a fifteen-year mandatory minimum prison sentence when a defendant possesses a firearm in violation of 18 U.S.C. § 922(g) while having at least "three *previous convictions*" for a "serious drug offense" or a "violent felony." *Id.* § 924(e)(1) (emphasis added). The Supreme Court explained that the term "previous convictions" necessarily calls for a "backward-looking" inquiry and shows that "ACCA is concerned with convictions that have already occurred." *McNeill*, 563 U.S. at 819–20 (quotation marks omitted). So, the Court continued, the "only way" to determine whether a prior state conviction qualifies as a "serious drug offense" is "to consult the law that applied at the time of that conviction." *Id.* For that reason, the Court concluded, "the maximum sentence that 'is prescribed by law' for [a previous state conviction] must also be determined according to the law applicable at that time." *Id.* And as a result, changes in state law after a previous conviction occurs cannot "erase" that "earlier conviction for ACCA purposes." *Id.* at 823.

To be sure, *McNeill* addresses only the third criterion for ACCA's "serious drug offense" definition—that is, the criterion concerning the penalty imposed under state law. And in addressing

that criterion, *McNeill* holds only that (assuming the state crime involved the manufacture, distribution, or possession with intent to manufacture or distribute a qualifying controlled substance) a prior state conviction qualifies as an ACCA predicate if at the time of that conviction the state law authorized a maximum penalty of at least ten years. *See id.* at 817–18.

McNeill does not address the second criterion, which requires that the prior offense involve a federally controlled substance. So *McNeill* does not expressly determine the answer to the question we address today. *See United States v. Brown*, 47 F.4th 147, 154–55 (3d Cir. 2022); *United States v. Hope*, 28 F.4th 487, 504–05 (4th Cir. 2022); *United States v. Perez*, 46 F.4th 691, 699–700 (8th Cir. 2022); *United States v. Williams*, 48 F.4th 1125, 1142–43 (10th Cir. 2022).[7]

[7] The First, Second, Sixth, and Ninth Circuits have addressed a similar question arising under the Sentencing Guidelines. *See United States v. Abdulaziz*, 998 F.3d 519, 521–22, 525–27 (1st Cir. 2021); *United States v. Bautista*, 989 F.3d 698, 701, 703 (9th Cir. 2021); *United States v. Clark*, 46 F.4th 404, 406 (6th Cir. 2022); *United States v. Gibson*, ___ F.4th ____, No. 20-3049, 2022 WL 17419595, at *1, 6–7 (2d Cir. Dec. 6, 2022). But "longstanding principles of statutory interpretation allow different results under the Guidelines as opposed to under the ACCA." *Brown*, 47 F.4th at 154. The Guidelines provide, for example, that "court[s] shall use the Guidelines Manual in effect on the date that the defendant is sentenced." U.S.S.G. § 1B1.11(a). So while we express no opinion about the correctness of the First, Second, Sixth, and Ninth Circuits' opinions in *Abdulaziz*, *Bautista*, *Clark*, and *Gibson*, we conclude that reliance on them here would be "misplaced." *Brown*, 47 F.4th at 154.

But in our view, upon close consideration, *McNeill*'s reasoning requires us to conclude all the same that the federal controlled-substances schedules in effect at the time of the previous state conviction govern. That is so (1) because using the federal controlled-substances schedules in effect at the time the defendant committed the federal firearm offense would "erase an earlier [state] conviction for ACCA purposes," in violation of *McNeill*'s reasoning, *see McNeill*, 563 U.S. at 823, and (2) because of the way *McNeill* informs our reading of ACCA's structure.

To explain why, we begin with a 10,000-foot overview of ACCA's structure as it relates to the term "previous convictions" in Section 924(e)(1). Again, Section 924(e)(1) applies a mandatory minimum sentence of fifteen years' imprisonment to a defendant who possesses a firearm in violation of 18 U.S.C. § 922(g) and who "has three previous convictions . . . for a violent felony or a serious drug offense, or both." Section 924(e)(2) then defines the terms "violent felony" and "serious drug offense." The definition of "serious drug offense" separately specifies the conditions under which prior federal drug-related convictions qualify (§ 924(e)(2)(A)(i)) and prior state drug-related convictions qualify (§ 924(e)(2)(A)(ii)). Meanwhile, the definition of "violent felony" in Section 924(e)(2)(B) applies uniformly to both prior federal convictions and prior state convictions. So as relevant here, "serious drug offense" has two definitions (that pertain separately to prior federal convictions and prior state convictions), and "violent felony" has one

definition, for a total of three ways Section 924(e)(2) defines "previous convictions" in Section 924(e)(1).

With that in mind, we move on to *McNeill*'s reasoning. As we've noted, *McNeill* broadly construes the term "previous convictions" to require a "backward-looking" inquiry. 563 U.S. at 819–20 (quotation marks omitted). Because "violent felon[ies]" and both kinds of "serious drug offense[s]" are kinds of "previous convictions" under ACCA, 18 U.S.C. § 924(e), *McNeill*'s reasoning requires us to view these definitions through a backward-looking perspective.

On this score, the Supreme Court reads ACCA's "violent felony" definition in Section 924(e)(2)(B) to incorporate the state law in effect at the time of a defendant's prior state convictions. *McNeill*, 563 U.S. at 822 (noting that the Court has "repeatedly looked to the historical statute of conviction in the context of violent felonies"). And that is so even though, as the Supreme Court noted, ACCA's definition of "violent felony" uses the present tense:

> ACCA defines "violent felony" in part as a crime that "*has* as an element the use, attempted use, or threatened use of physical force against the person of another" or "*is* burglary, arson, or extortion, *involves* use of explosives, or otherwise *involves* conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B) (emphasis added).

> Despite Congress' use of present tense in that definition, when determining whether a defendant was convicted of a "violent felony," we have turned to the version of state law that the defendant was actually convicted of violating.

Id. at 821. In other words, under *McNeill*, the "backward-looking" inquiry governs ACCA's "violent felony" definition wholesale. *See id.* at 821–22.

McNeill also reads at least part of ACCA's definition of a "serious drug offense" involving a prior state conviction as incorporating that same "backward-looking" inquiry. *See id.* at 825 (holding "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" (quoting § 924(e)(2)(A)(ii))); *id.* at 820 (noting that because "ACCA is concerned with convictions that have already occurred," "[w]hether the prior conviction was for an offense 'involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance' can only be answered by reference to the law under which the defendant was convicted"). "Having repeatedly looked to the historical statute of conviction in the context of violent felonies," the Court saw "no reason to interpret 'serious drug offenses' in the adjacent section of the same statute any differently" because in "both definitions,

Congress used the present tense to refer to past convictions." *Id.* at 822 (alteration adopted).

Not only is the "previous conviction" inquiry a backward-looking one, but the Supreme Court has concluded that "[i]t cannot be correct that subsequent changes in state law can erase an earlier conviction for ACCA purposes." *Id.* at 823. In this respect, the Court has reasoned that "Congress based ACCA's sentencing enhancement on prior convictions and could not have expected courts to treat those convictions as if they had simply disappeared." *Id.*

And that brings us to the first reason that we must conclude that ACCA's definition of a "serious drug offense" under state law incorporates the federal drug schedules in effect at the time of the prior state conviction. If we instead read ACCA's state "serious drug offense" definition to incorporate the federal drug schedules in effect at the time a defendant committed the firearm offense, the state drug convictions would be "erase[d]" or "disappear[]" for ACCA purposes when, as in Jackson's case, the federal schedules at the time he committed the firearm offense have omitted the substances that were federally controlled at the time of the prior state conviction. But we know from *McNeill* that that is an impermissible result.

And there's more. So we turn to our second reason why we hold that ACCA's definition of a "serious drug offense" under state law incorporates the federal drug schedules in effect at the time of the prior state conviction: what *McNeill*'s reasoning tells us about

how to construe federal law relating to a prior federal drug offense when assessing whether that prior federal drug conviction qualifies as a "previous conviction[]" for ACCA purposes. ACCA defines prior federal "serious drug offense[s]" to include, for example, "an offense under the Controlled Substances Act . . . for which a maximum term of imprisonment of ten years or more is prescribed by law."[8] 18 U.S.C. § 924(e)(2)(A)(i).

Under *McNeill*'s reasoning requiring a "backward-looking" inquiry, we must read the definition of a prior federal "serious drug offense" as incorporating the version of the Controlled Substances Act (and thus the federal controlled-substances schedules) in effect at the time the defendant's prior federal drug conviction occurred. After all, *McNeill* supports a conclusion that the elements of and penalties for an offense underlying a previous conviction are set—that is, immutable—at the time of that conviction. *See* 563 U.S. at 820 (noting that in "assessing" a previous offense, the Court "consulted" the "statutes and penalties that applied at the time of" the defendant's conviction); *id.* at 821–22 (noting that "present-tense verbs" did not "persuade" the Court "to look anywhere other than the law under which" defendants "were actually convicted to determine the elements of their offenses"). And whether the drug

[8] Under Section 924(e)(2)(A)(i), a prior federal conviction is a "serious drug offense" if it is "an offense under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law."

involved in the prior federal drug conviction was on the federal controlled-substances schedules at the time of the prior federal drug conviction is certainly an element of an offense under the Controlled Substances Act. So we must read "Controlled Substances Act" to refer to the version of the Act (along with the version of its attendant federal drug schedules) in effect at the time of the prior federal drug conviction.

Because we must construe the definition of a federal "serious drug offense" to incorporate the Controlled Substances Act (and the federal drug schedules it mandates) in existence at the time of the prior federal drug conviction, we cannot simultaneously construe the federal "serious drug offense" definition's single use of that term—Controlled Substances Act—to incorporate the federal drug schedules in effect at the time the defendant committed the federal firearm offense. *See*, *e.g.*, *United States v. Bryant*, 996 F.3d 1243, 1258 (11th Cir.) ("[W]e presume that the same words will be interpreted the same way in the same statute."), *cert. denied*, 142 S. Ct. 583 (2021).

Reading the term "Controlled Substances Act" in the definition of a federal "serious drug offense" to refer to the version of the law in effect at the time of the federal firearm offense would also cause another problem under *McNeill*. If the drug involved in the prior federal drug conviction no longer appeared on the federal drug schedules at the time the defendant committed the federal firearm offense, the prior federal drug conviction would be "erase[d] . . . for ACCA purposes." *McNeill*, 563 U.S. at 823. But

as we've noted, *McNeill* prohibits that result. *See id.* (noting that result "cannot be correct"). So under *McNeill*, the only way to assess whether a prior federal drug conviction is a "serious drug offense" is to apply the federal drug law and accompanying schedules in effect at the time of the prior federal drug conviction.

That means that if Jackson had been convicted of violating the Controlled Substances Act (rather than Florida Statute § 893.13(1)) for his cocaine-related activity in 1998 and 2004, his prior convictions would qualify as "serious drug offense[s]" under ACCA. *See* 18 U.S.C. § 924(e)(2)(A)(i). And that is so even though the federal definition of "cocaine" was broader in 1998 and in 2004 than it was in 2017, when Jackson possessed the firearm in violation of 18 U.S.C. § 922(g).

We do not think Congress would require the counting of prior federal drug convictions as "serious drug offense[s]" while at the same time not counting equivalent prior state drug convictions. But that would be the result of the construction Jackson urges.

In our view, the structure of ACCA's parallel definitions of "serious drug offense" for state and federal prior convictions logically requires the conclusion that the state-offense definition incorporates the federal drug schedules in effect at the time of the prior state drug conviction. And that we also read the definition of "violent felony" with a wholesale "backward-looking" perspective only adds support to our conclusion that ACCA's definitional structure for qualifying "previous convictions" requires us to read all the definitions with a "backward-looking" perspective. Were that not

the case, the definition of a state "serious drug offense" would be the only one of the three definitions of a "previous conviction[]" that did not employ a wholesale "backward-looking" perspective.

In sum, then, Section 924(e)'s requirements all turn on the law in effect when the defendant's prior convictions occurred. When possible, we interpret the provisions of a text harmoniously. *See* Scalia & Garner, *supra*, at 180–82; *see also Hylton v. U.S. Att'y Gen.*, 992 F.3d 1154, 1160 (11th Cir. 2021) (applying the harmonious-reading canon). To read the definition in Section 924(e)(2)(A)(ii) harmoniously with the rest of Section 924(e)'s subparts, we must read that definition to incorporate the version of the federal controlled-substances schedules in effect when Jackson's prior state convictions occurred.

2.

Some of our sister circuits and Jackson have identified two arguments for why we should construe ACCA's definition of a "serious drug offense" to incorporate the version of the federal controlled-substances schedules in effect at the time the defendant committed the federal firearm offense instead of the version in effect at the time of the prior conviction: (1) due process requires such a reading; and (2) when Congress enacted ACCA, we looked to the federal controlled-substances schedules in effect at the time of the federal firearm offense because otherwise, there would have been no federal drug schedules to compare at least some of the prior state drug convictions to, since they would have predated the

federal drug schedules. While these are thoughtful arguments, we ultimately must reject them.

First, Jackson and our sister circuits contend that reading Section 924(e)(2)(A)(ii) to incorporate the version of federal drug schedules in effect when the defendant was convicted of his prior state drug offenses raises concerns about fair notice and thus due process. *See Williams*, 48 F.4th at 1142; *Perez*, 46 F.4th at 701. But those with "previous convictions" that are federal "serious drug offenses" are charged with knowing that their federal drug convictions continue to qualify even if the controlled substances involved in their prior federal drug convictions are no longer on the federal drug schedules at the time of their federal firearms offenses. And we are aware of nothing that precludes Congress from enacting legislation that works in this manner.

As we've noted, the Supreme Court has reasoned that the "only way" to determine whether a prior state drug conviction qualifies as a "previous conviction" under ACCA is by "consult[ing] the law that applied at the time of that conviction." *McNeill*, 563 U.S. at 820 (alteration adopted). Doing so, the Supreme Court has explained, "permits a defendant to know even before he violates § 922(g) whether ACCA would apply." *Id.* at 823. That reasoning applies as much to the statutory language we consider here as it did to the language the Court addressed in *McNeill*. Put simply, the ACCA term "previous convictions" puts a defendant on notice when he is convicted of a drug offense for conduct involving a controlled substance that at that time appears on the federal drug

schedules that his conviction qualifies as a "serious drug offense" under ACCA. And in this way, a person has a means of knowing "before he violates § 922(g) whether ACCA would apply." *Id.*

We think the second argument against the incorporation of historical federal drug schedules also cannot succeed in the end. That argument goes like this: if Congress intended to incorporate the version of the federal drug schedules in effect at the time of a defendant's prior state drug offense, then convictions that predate the federal drug schedules would not qualify as ACCA predicates. Because that result would be, in Jackson's words, "odd," Congress must have intended to incorporate the version of the federal drug schedules in effect at the time the defendant committed the firearm offense.

But even if a law produces a result that "may seem odd," that oddity does not render the law "absurd." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005). And a law "must be truly absurd before" we can disregard its plain meaning. *Silva-Hernandez v. U.S. Bureau of Citizenship & Immigr. Servs.*, 701 F.3d 356, 363 (11th Cir. 2012) (quotation marks omitted). We cannot say that is the case here. *Cf. McNeill*, 563 U.S. at 822 ("This natural reading of ACCA [to require consulting the law that applied at the time of the prior state conviction] also avoids the absurd results that would follow from consulting current state law to define a previous offense."). So we must follow what the Supreme Court has found is the plain meaning of ACCA's text. And that plain meaning, as we've noted, requires that we apply a backward-

looking perspective to the entirety of the "serious drug offense" definition.

In short, we hold that Section 924(e)(2)(A)(ii) incorporates the version of the federal drug schedules in effect when a defendant was convicted of his prior state drug offenses. When Jackson was convicted of his state cocaine-related offenses in 1998 and 2004, the federal schedules included ioflupane as a controlled substance. *See supra* note 3. So at step one of our categorical analysis, we conclude that ACCA's "serious drug offense" definition encompasses a prior state offense that involved "manufacturing, distributing, or possessing with intent to manufacture or distribute" ioflupane, "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii).

ii.

That brings us to steps two and three. At step two, we look at the "statutory definition of the state offense at issue." *Conage*, 976 F.3d at 1250. "All that counts" at this step "are 'the elements of the statute of conviction.'" *Mathis*, 579 U.S. at 509 (quoting *Taylor v. United States*, 495 U.S. 575, 601 (1990)). To find those elements, we consider "the version of state law that the defendant was actually convicted of violating." *McNeill*, 563 U.S. at 821. Then, at step three, we compare the elements of the state offense to ACCA's "serious drug offense" definition to determine whether the state offense is categorically broader than ACCA's "serious drug offense" definition.

Jackson argues that Florida Statute § 893.13(1), the statute he was convicted of violating in 1998 and 2004, is categorically overbroad because in 1998 and 2004, Section 893.13(1) encompassed conduct involving ioflupane while the definition of "serious drug offense" did not.[9] But as we have explained, the federal drug schedules included ioflupane in 1998 and 2004, when Jackson was convicted of his prior state drug offenses. And *McNeill*'s reasoning requires us to conclude that the 1998 and 2004 versions of the federal drug schedules are what govern. So Section 893.13(1) did not reach more conduct with respect to cocaine than does ACCA's "serious drug offense" definition as it relates to Jackson's 1998 and 2004 prior state drug convictions.

[9] Jackson asks us to find that ioflupane and cocaine are alternative means of satisfying the same element. In other words, he asks us to find that Section 893.13(1) is indivisible for each form of a given drug. When a statute lists alternative means of satisfying the same element (unlike when a statute lists alternative elements), the standard categorical approach applies, meaning that "ACCA disregards the means by which the defendant committed his crime, and looks only to that offense's elements." *Mathis*, 579 U.S. at 517; *see also supra* note 2. As a result, we must assume those offenses involved the least culpable conduct—here, conduct involving ioflupane rather than cocaine. But because we hold that ACCA's "serious drug offense" definition incorporates the version of the federal drug schedules in effect when Jackson was convicted of his prior state drug offenses, and because that version of the federal schedules listed ioflupane, it makes no difference whether Jackson's convictions involved ioflupane or cocaine. We therefore assume without deciding that Section 893.13(1) is divisible for each form of a given drug, meaning we also assume that Jackson's prior state drug convictions could have been for conduct involving ioflupane.

Jackson has suggested no other reason why Section 893.13(1) might be categorically broader than ACCA's definition for a "serious drug offense." We therefore conclude that Jackson's 1998 and 2004 Section 893.13(1) cocaine convictions qualify as "serious drug offense[s]" under 18 U.S.C. § 924(e)(1).

IV.

For these reasons, we affirm the district court's judgment.

AFFIRMED.

ROSENBAUM, Circuit Judge, concurring:

The statutory language we interpret here is yet another example of how ACCA produces "statutory questions" that "end up clogging the federal court dockets," Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 206 (2019). Even "judges struggle" to resolve those questions. *Id.* Indeed, today's decision tallies the score at one circuit that concludes that we look to the federal controlled-substances schedules in effect at the time of the prior state conviction and four that reach the opposite conclusion and instead look to the federal controlled-substances schedules in effect at the time of the federal firearm offense. *See United States v. Brown*, 47 F.4th 147, 154–55 (3d Cir. 2022); *United States v. Hope*, 28 F.4th 487, 504–05 (4th Cir. 2022); *United States v. Perez*, 46 F.4th 691, 699–700 (8th Cir. 2022); *United States v. Williams*, 48 F.4th 1125, 1142–43 (10th Cir. 2022). And it's even more confusing than that, as we previously agreed with those four circuits. *United States v. Jackson*, 36 F.4th 1294, 1299–1301 (11th Cir. 2022) ("*Jackson I*"), *vacated*, 2022 WL 4959314 (11th Cir. 2022).

Due process requires that criminal laws notify "ordinary people" not only about the lawfulness of their conduct, but also about the penalties for engaging in conduct that is unlawful. *Johnson v. United States*, 576 U.S. 591, 595–96 (2015). An ordinary citizen seeking notice about whether her prior offenses qualify as ACCA predicates must, in line with today's decision, research the

historical versions of controlled-substances list. And that's a heavy lift for the ordinary citizen.

That said, and as the panel opinion explains, the Supreme Court has said that the term "previous convictions" evidences congressional intent to read the definitions for "violent felony" and "serious drug offense" with an eye to what the law was at the time of the "previous conviction[]," so we can't say that the statute doesn't provide fair notice of what prior convictions qualify as predicate offenses under ACCA. *See* Maj. Op. at 16–17, 20–22 (citing *McNeill v. United States*, 563 U.S. 816 (2011)).

Still, it is quite remarkable to expect the "ordinary citizen," seeking "to conform his or her conduct to the law," *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999), to understand the ins and outs of ACCA—especially when, as today's decision demands, they require historical research of the federal controlled-substance schedules. *Cf. Williams*, 48 F.4th at 1142. Adding to the extraordinary nature of what we find ACCA requires is the fact that ACCA may be unique in requiring application of historical federal law in this way, as opposed to the federal law in place at the time of the federal violation.[1]

[1] The immigration context fails to supply a helpful analogue here. To be sure, we have looked to the federal drug schedules in effect at the time of a prior conviction to determine whether that conviction renders a non-citizen removable. *See, e.g.*, *Gordon v. U.S. Att'y Gen.*, 962 F.3d 1344, 1351 n.4 (11th Cir. 2020). But in the immigration context, a prior conviction immediately triggers

For the reasons we explain in the panel opinion, the law mandates an affirmance in this case. But I am deeply concerned that our reading seemingly requires the "ordinary person" to be an expert in ACCA and in historical knowledge of the federal drug schedules. Incorporating the federal drug schedules in effect at the time of the federal firearm offense (and for prior federal convictions, at both the times of the prior conviction and the federal firearm offense) would be far more consistent with how we generally construe statutes. It would also provide the "ordinary person" with more accessible and realistic notice. And finally, as our sister circuits have observed, incorporating the federal drug schedules in effect at the time of the federal firearm offense would be far more consistent with Congress's determination to decriminalize certain substances. *See Williams*, 48 F.4th at 1144 ("[I]f Congress has decided hemp should not be criminalized, then surely Congress would not intend for it to continue to be included within the narrow class of serious crimes that contributes to a 15-year mandatory minimum prison sentence."); *see also Perez*, 46 F.4th at 700.

removal consequences. In contrast, a prior state conviction carries no federal consequences under § 924(e) unless and until the person with that conviction is convicted of carrying a firearm in violation of § 922(g)(1). For that reason, "it makes sense" in the immigration context, unlike in the ACCA context, "to determine whether the conviction is a removable offense *at the time of that controlled-substance conviction.*" *Williams*, 48 F.4th at 1143; *see also Brown*, 47 F.4th at 155; *Perez*, 46 F.4th at 700.

For these reasons, if Congress continues to retain ACCA, I respectfully urge Congress to consider amending the statute to incorporate the version of the controlled-substances list in effect when the defendant commits his federal firearm offense.

APPENDIX B

No. 21-13963-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
***Plaintiff/appellee*,**

v.

EUGENE JACKSON,
Defendant/appellant.

On Appeal from the United States District Court
for the Southern District of Florida

SUPPLEMENTAL BRIEF BY APPELLANT EUGENE JACKSON

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL CASE)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Eugene Jackson
Case No. 21-13963-BB

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, as required by 11th Cir. R. 26.1.

Adler, Andrew L.

Brenner, Michael

Caruso, Michael

Fajardo Orshan, Ariana

Gonzalez, Juan Antonio

Holt, Julie

Irvin, Hillary

Jackson, Eugene

Laserna, Peter A.

Louis, Hon. Lauren Fleischer

McAliley, Hon. Chris M.

Mollison, Kathleen

Reding, Jason A.

Reid, Hon. Lisette M.

Rivero, Laura T.

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Smachetti, Emily M.

State of Alabama

State of Florida

State of Georgia

United States of America

Williams, Hon. Kathleen M.

Wu, Jason

Zloch, William T.

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STATEMENT OF THE ISSUE

The facts and procedural history are set out in the panel opinion of June 10, 2022. *United States v. Jackson*, 36 F.4th 1294 (11th Cir. 2022). On September 8, 2022, the panel *sua sponte* vacated that opinion and ordered the parties to file supplemental briefs "addressing the specific question of whether *McNeill*'s past-tense interpretation of 'serious drug offense' requires that we assess whether a prior state conviction qualifies as a 'serious drug offense' under federal law at the time of the state conviction rather than at the time of the federal offense. The parties may also address other relevant authorities on the question of which version of the Controlled Substances Act § 924(e)(2)(A)(ii) incorporates."

ARGUMENT & CITATIONS TO AUTHORITY

The government declined to seek rehearing or certiorari in this case for a reason: the panel got it right. In addition to the panel's unanimous opinion, the First, Third, Fourth, Eighth, Ninth, and Tenth Circuits have all unanimously held that, when analyzing whether a prior state conviction is a "serious drug offense" or a "controlled substance offense," a federal court must compare its elements to the federal drug schedules in effect at the time of the federal offense—not at the time of the prior.

The Sixth Circuit has reached a contrary conclusion in the Guidelines context, but its opinion is wrong (and a rehearing petition is now pending). That court went astray because it misread *McNeill v. United States*, 563 U.S. 816 (2011). But seven other circuits have persuasively explained that *McNeill* has no bearing on the issue here.

Once *McNeill* is properly read and distinguished, there is no basis for comparing the prior conviction's elements to federal drug schedules that were not in effect at the time of the federal crime. That comparison would violate bedrock constitutional principles of fair notice. It finds no support in the statutory text. And it would lead to absurd results that Congress could not have possibly intended. The panel should stand firm.

I. *McNeill* Is Inapposite

A. Section 924(e)(2)(A)(ii) Requires a Two-Step Analysis

As relevant here, 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 or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii).

In *Shular v. United States*, 140 S. Ct. 779 (2020), the Supreme Court confirmed that the "categorical approach" applies to this definition. That means the federal "court must look only to the state offense's elements, not the facts of the case or labels pinned to the state conviction." *Id.* at 784. And the court must then "ask whether the state offense's elements necessarily entail one of the types of conduct identified in § 924(e)(2)(A)(ii)." *Id.* at 784–85 (quotation and emphasis omitted). If not, then the state offense is overbroad and does not satisfy the definition.

The "serious drug offense" definition in § 924(e)(2)(A)(ii) thus requires a two-step analysis: step one is controlled by state law; step two is controlled by federal law. Step one requires the federal court to

ascertain the elements of the state offense (and the least culpable conduct encompassed by them). To do so, the federal court must look to state law that was in effect at the time of the prior state conviction. After all, that backwards-looking analysis is the only way to identify the elements of the state offense for which the defendant was actually convicted.

With those elements in hand, step two then requires the federal court to compare the state-law offense elements against the criteria in § 924(e)(2)(A)(ii). That is a question of federal—not state—law. And the prior state offense will satisfy that federal definition only if its elements necessarily involve "manufacturing, distributing, or possessing with intent" to do so "a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." The parenthetical expressly incorporates the federal drug schedules into the ACCA's definition.

That brings us to the dispositive question in this case. When comparing the offense elements against the federal drug schedules, does the court look to the federal schedules in effect at the time of the instant federal firearm offense? Or does it look to the schedules in effect at the time of the prior state drug conviction? As explained below, the Supreme Court's decision in *McNeill* has nothing to say about that timing question.

B. *McNeill* Addressed Only the State-Law Question at Step One, Not the Federal-Law Question at Step Two

1. *McNeill* addressed § 924(e)(2)(A)(ii)'s requirement that the prior state conviction be one "for which a maximum term of imprisonment of ten years or more is prescribed by law." In that case, the defendant's prior drug convictions carried a ten-year statutory maximum at the time of conviction (and he in fact received that maximum sentence). However, by the time of his subsequent federal firearm offense, the state legislature had reduced the statutory maximum to less than ten years. *McNeill*, 563 U.S. at 818. Thus, the question in *McNeill* was whether the federal court should look to state law in effect at the time of the federal offense, or state law in effect at the time of the priors? The Supreme Court "h[e]ld that the 'maximum term of imprisonment' for a defendant's prior state drug offense is the maximum sentence applicable to his offense when he was convicted of it." *Id*. at 817–18; *see id*. at 825 (repeating that holding).

The Court reached that holding for three reasons. *First*, and notwithstanding present-tense language ("is prescribed"), the Court emphasized that the ACCA "requires the court to determine whether a 'previous conviction' was for a serious drug offense." *Id*. at 820 (brackets omitted). And the only way to determine the statutory maximum for a

"previous conviction" was by looking backwards and "consult[ing] the law that applied at the time of that conviction." *Id*. *Second*, in the context of the ACCA's neighboring "violent felony" definitions, and notwithstanding present-tense language there too, the Court had always "turned to the version of state law that the defendant was actually convicted of violating" in order "to determine the elements of their offenses." *Id*. at 821–22. *Third*, using the version of state law in effect at the time of the federal offense would create "absurd results." *Id*. at 822. If a state reformulated its criminal law after the defendant's conviction, his "prior conviction could 'disappear' entirely for ACCA purposes." *Id*. at 822–23.

2. Seven circuits—including this panel—have explained in published opinions that *McNeill* has no bearing on the timing question here, rejecting the government's contrary position. These opinions were all unanimous on that point. *See United States v. Williams*, __ F.4th __, 2022 WL 4102823, at *13 & n.12 (10th Cir. Sept. 8, 2022); *United States v. Brown*, 47 F.4th 147, 154–55 (3d Cir. 2022); *United States v. Perez*, 46 F.4th 691, 699–700 (8th Cir. 2022); *United States v. Jackson*, 36 F.4th 1294, 1306 (11th Cir. 2022); *United States v. Hope*, 28 F.4th 487, 504–05

(4th Cir. 2022); *United States v. Abdulaziz*, 998 F.3d 519, 525–27 (1st Cir. 2021); *United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021).

These seven circuit opinions have all made the same observation: *McNeill* addressed only the state-law question at step one, not the federal-law comparator question at step two. Under *McNeill*, a federal court must consult state law in effect at the time of the prior in order to determine its offense elements and the statutory maximum. That makes perfect sense: looking backwards in that way is the only way to ascertain the state-law attributes of the prior offense for which the defendant was actually convicted. But *McNeill* said nothing about the version of federal law to which the state-law offense elements must then be compared.

This panel correctly recognized that distinction. It explained that, while "*McNeill* holds that the elements of the state offense of conviction are locked in at the time of that conviction, it does not also hold that the ACCA's own criteria for deeming a previous conviction . . . to be a 'serious drug offense' are themselves also locked in as of the time of the previous conviction." *Jackson*, 36 F.4th at 1306 (quotations and brackets omitted).

"In fact, *McNeill* simply had no occasion to address that question, because there had been no relevant change in that case" to federal law,

only to state law. *Abdulaziz*, 998 F.3d at 526; *see Hope*, 28 F.4th at 505 (distinguishing *McNeill* because "[t]he instant matter concerns changes to federal law, not state law"); *Bautista*, 989 F.3d at 703 ("Bautista's argument bears little resemblance to the argument in *McNeill*. Unlike in *McNeill*, the state law in our case has not changed. Rather, federal law has changed."). And *McNeill* certainly had no occasion to address the specific federal-law issue here. Indeed, in quoting the "relevant" part of § 924(e)(2)(A)(ii), the Court used an ellipsis to skip over the parenthetical incorporating the federal drug schedules. *McNeill*, 563 U.S. at 819–20.

C. An Outlier Sixth Circuit Decision Over-read *McNeill*

Disagreeing with the other circuits above, the Sixth Circuit afforded *McNeill* near-dispositive weight in *United States v. Clark*, 46 F.4th 404 (6th Cir. 2022). But it badly misread *McNeill* and should not be followed.

In expressly breaking with several other circuits, including this panel, *Clark* faulted those courts for "not adequately engag[ing] with *McNeill*'s reasoning." *Id.* at 412. But, as the Tenth Circuit later explained when disagreeing with *Clark*, that is just "[n]ot so. The First, Fourth, Eighth, Ninth, and Eleventh Circuits meaningfully considered *McNeill* and correctly recognized, as we do, that *McNeill* did not

contemplate what version of federal law to apply, let alone 'definitively h[o]ld that the time of conviction is the proper reference under the ACCA.'" *Williams*, __ F.4th at __, 2022 WL 4102823, at *13 n.12 (quoting *Clark*, 46 F.4th at 409). In reality, it is the Sixth Circuit—not the other circuits—that misunderstood *McNeill* by "read[ing] [it] too broadly." *Id*.

The very face of the *Clark* opinion reflects that error. It concluded that "*McNeill* definitively held that the time of [the prior] conviction is the proper reference under the ACCA." *Clark*, 46 F.4th at 409. But *Clark*'s own discussion of *McNeill* began by admitting that "no binding caselaw exists that directly addresses the issue presented here." *Id*. Exactly: *McNeill* did not address the federal-law timing issue here.

Internal inconsistencies aside, *Clark* failed to grapple with the key distinction with *McNeill* that seven other circuits have identified. To the contrary, the Sixth Circuit asserted that *Clark* and *McNeill* were "remarkably similar" because, "[i]n both cases, the defendant relied on an intervening change in state law (and here federal too) that shifts the meaning of a provision that enhances their sentence." *Id*. But the legal changes in *Clark* went to the step-two question about the relevant

comparator, not to the step-one question about the elements of the prior state conviction. *Clark* elided that critical distinction with *McNeill*.

In fact, *Clark* addressed that distinction only briefly, and it missed the point. In accordance with the other circuits, an earlier unpublished Sixth Circuit decision had distinguished *McNeill* on the ground that it "only addressed the first prong of the categorical approach." *Id.* at 414. *Clark* responded that this "did not fully engage" with *McNeill*'s reasoning because *McNeill* "determined that the proper way to define th[e] term ['serious drug offense'] is by referencing state law at the time of conviction." *Id.* But that is no response at all. It ignores that the analysis has two distinct steps—one based on state law, one based on federal law—and simply assumes that the second looks to outdated federal law.

To justify that critical assumption, *Clark* offered only one sentence: "The Court [in *McNeill*] could not have applied the enhancement without assessing all steps of the categorical approach, necessarily deciding that McNeill's prior convictions did in fact constitute 'serious drug offenses.'" *Id.* The flaw in that reasoning is manifest: there was no change to *federal* law in *McNeill*. The enhancement there turned solely on which version of *state* law applied—the one in effect at the time of the federal offense,

or the one in effect at the time of the priors. In selecting the latter, *McNeill* did not "necessarily decide" anything at all about the federal-law issue here. It couldn't have; that issue was not presented. Thus, while *Clark* accused the earlier Sixth Circuit panel of "draw[ing] too fine a line between the first and second steps of the categorical approach," *id.* at 414–15, *Clark* drew no line at all. It just obliterated that distinction.

Continuing in that vein, *Clark* also stated that it "would be absurd to consult current law to define a previous offense." *Id.* at 412. Right: that is why, under *McNeill*, federal courts at step one consult state law in effect at the time of the prior state offense to define the elements and maximum punishment for that previous conviction. But the step-two question here and in *Clark* does not require a federal court to "define a previous offense" at all. Rather, it requires a federal court to determine whether that previous offense—as defined by state law at the time of the defendant's conviction—satisfies the federal criteria in § 924(e)(2)(A)(ii).[1]

[1] The Eighth Circuit—in one unreasoned sentence adopting an unpublished opinion—made the same mistake in *United States v. Bailey*, 37 F.4th 467, 469–70 (8th Cir. 2022) (adopting *United States v. Jackson*, 2022 WL 303231, at *2 (8th Cir. Feb. 2, 2022)). But *Bailey* (like *Clark*) arose in the Guidelines context, and the Eighth Circuit has since declined to apply *Bailey* in the ACCA context. *See Perez*, 46 F.4th at 703 n.4.

To shoehorn that question into *McNeill*, *Clark* wrenched some of its language out of context. In *McNeill*, the Court stated: "A defendant's history of criminal activity—and the culpability and dangerousness that such history demonstrates—does not cease to exist when a State reformulates its criminal statutes." 563 U.S. at 823. That statement was made in the broader context of explaining why federal courts must look to *state* law in effect at the time of the prior conviction. Were it otherwise, the Court explained, then a prior state conviction would cease to be a "conviction" for ACCA purposes if the state legislature subsequently redefined the crime; the prior offense would be "erased." *Id*. at 822–23.

Contrary to *Clark*'s understanding, that discussion in *McNeill* has no bearing on which version of *federal* law applies at step two. *Clark*, 46 F.4th at 412–13. Using the federal schedules from the time of the federal offense could never "erase" a prior state conviction. That approach would merely require courts to compare the elements of that prior conviction to the federal criteria that is in effect at the time of the federal offense.

In short, when properly read in context, "*McNeill* nowhere implies that the court must ignore current federal law and turn to a superseded version of" the federal drug schedules. *Bautista*, 989 F.3d at 703.

II. Courts Must Use the Federal Schedules in Effect at the Time of the Federal Offense, Not the Prior Conviction

Without *McNeill*, there is no basis for requiring courts to consult superseded federal schedules that were in effect at the time of the prior state conviction. To the contrary, constitutional principles of fair notice, the statutory text, and common sense all require courts to use the federal drug schedules in effect at the time of the federal firearm offense.

A. Constitutional Fair-Notice Principles Require Using the Schedules From the Time of the Federal Offense

1. Fair notice of the criminal law is enshrined in the Constitution. As relevant here, there are at least "three related manifestations of the fair warning requirement." *United States v. Lanier*, 520 U.S. 259, 266 (1997). First, the Due Process Clause of the Fifth and Fourteenth Amendments prohibits the enforcement of a criminal law that is "so vague that men of common intelligence must necessarily guess at its meaning." *Id*. (quotation omitted). Second, those same Clauses—along with the Constitution's separation of powers—undergird the rule of lenity, "ensur[ing] fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Id*. And, third, the

Ex Post Facto Clauses in Article I, Sections 9 and 10, "bar legislatures from making substantive criminal offenses retroactive." *Id*. at 266–67.

These fair-notice requirements "apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." *Johnson v. United States*, 576 U.S. 591, 596 (2015) (vagueness); *see Bifulco v. United States*, 447 U.S. 381, 387 (1980) (lenity "applies not only to interpretation of the substantive ambit of criminal prohibitions, but also to the penalties they impose"); *Peugh v. United States*, 569 U.S. 530, 532–33, 538 (2013) (*ex post facto* laws "change[ ] the punishment, and inflict[ ] a greater punishment, than the law annexed to the crime, when committed") (quoting *Calder v. Bull*, 3 Dall. 386, 390 (1798) (brackets omitted)).

Fair-notice principles "dr[o]ve" the panel's decision here—and rightfully so. *Jackson*, 36 F.4th at 1297, 1300. Underlying the panel's reasoning was this critical fact: a defendant incurs the ACCA's penalties *only* when he "becomes subject to them, *i.e.*, commits the underlying conduct that makes the offender liable." *Dorsey v. United States*, 567 U.S. 260, 272 (2010). And so a defendant becomes subject to the ACCA *only* when he commits the federal firearm offense—*not* when he commits an earlier state offense that may at some point serve as an ACCA predicate.

Think about it from the defendant's perspective. When a defendant is convicted of a drug offense in state court, he has little reason to think about the consequences that the conviction may have on some entirely hypothetical future federal crime that he has not yet committed (and likely has no intention of ever committing). Take Mr. Jackson. When he was convicted of a Florida cocaine-related offense in 1998, he had no reason to think about how that conviction might affect a future sentence for a federal gun offense that he would not commit until 2017, nearly two decades later. (And that is especially true given that this prior conviction would have been only his first, not third, ACCA predicate). At that time, he had no reason to analyze federal drug schedules that were in effect.

The upshot is that, to ensure fair notice to defendants, a federal court must use the federal schedules that are in effect at the time the defendant committed the federal firearm offense. *That* is the time the defendant actually incurs the ACCA's penalties. And so *that* is the time when those penalties may actually deter him from violating federal law.

Conversely, using the schedules that were in effect at the time of the prior state conviction would deprive defendants of fair notice. At that time, they have not actually incurred any penalties under the ACCA.

And so they have no reason to scour the federal drug schedules with an eye towards their sentencing exposure for some future federal crime that they not yet committed and have no intention of ever committing.

Agreeing that courts must use the federal schedules in effect at the time the federal offense is committed, a unanimous Third Circuit has endorsed this panel's fair-notice reasoning. It said: "As the Eleventh Circuit sensibly reasoned, this rule gives a defendant notice 'not only that his conduct violated federal law, but also of his potential minimum and maximum penalty for his violation and whether his prior felony convictions could affect those penalties.'" *Brown*, 47 F.4th at 153 (quoting *Jackson*, 36 F.4th at 1300). The Eighth Circuit (granting relief on plain error) and the Tenth Circuit have also found the panel's notice reasoning persuasive. *Williams*, __ F.4th at __, 2022 WL 4102823, at *13; *Perez*, 46 F.4th at 699–701. That's because it is; the panel should reaffirm it.[2]

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[2] Some courts have looked to the federal schedules in effect at the time of federal *sentencing*. *E.g.*, *Hope*, 28 F.4th at 504–05 & n.15. But, as the Third Circuit has explained, they mistakenly relied on First and Ninth Circuit decisions adopting that approach in the context of the Guidelines (not ACCA), where that outcome is mandated by 18 U.S.C. § 3553(a)(4)(A) and U.S.S.G. § 1B1.11. *Brown*, 47 F.4th at 153–54. Regardless, the federal schedules excluded ioflupane *both* when Mr. Jackson committed the federal crime *and* when he was sentenced. So that issue is academic here, as it was in *Williams*, __ F.4th at __, 2022 WL 4102823, at *9 n.8.

2. That conclusion is also compelled by this Court's precedent in *United States v. Reynolds*, 215 F.3d 1210 (11th Cir. 2000). There, the defendant was subject to the ACCA based in part on a 1984 drug conviction that pre-dated the ACCA's 1986 enactment, and he argued that this application violated the Ex Post Facto Clause. *Id*. at 1212. But this Court rejected that argument, reasoning that "[i]n no sense did the [ACCA] impose or increase punishment for a crime committed before its enactment." *Id*. at 1213. Instead, the Court explained, "the ACCA was applied to Reynolds's possession of a firearm in the spring of 1997, more than ten years *after* the [ACCA] was enacted. Indeed, at the time of Reynolds's possession of the shotgun, plainly he was on notice that as a felon convicted three times he would receive a 15-year mandatory minimum sentence if convicted of violating 18 U.S.C. § 922(g)." *Id*.

Reynolds confirms that, for ACCA purposes, notice is evaluated at the time the defendant commits the federal firearm offense, not at the time of the prior. Again, that is the moment when the ACCA's penalties are triggered. And so that is the moment when the defendant may be deterred from violating federal criminal law. The holding and analysis of *Reynolds* precludes this panel from adopting a contrary approach here.

Also "[i]mplicit in [its] analysis is that a prior conviction is an ACCA predicate if it meets the definition of 'violent felony' or 'serious drug offense' at the time of the instant federal offense—were it otherwise, then no convictions predating the passage of the ACCA could qualify as a predicates." *Williams*, __ F.4th at __, 2022 WL 4102823, at *12 n.11. Yet all agree that pre-ACCA priors *do* qualify. And all agree that courts apply the version of the ACCA in effect at the time of the federal offense.

It would be bewildering for courts to apply *that* version of the ACCA, but then apply an *earlier* version of the federal schedules that the ACCA expressly incorporates. No defendant should be expected to look to the version of the ACCA in effect when he commits his federal offense, but then look to the ACCA-incorporated federal schedules that were in effect at the time of his state convictions. Defendants should expect one temporal version of federal law to determine whether the ACCA applies.

Consulting the federal drug schedules in effect at the time of the federal offense is also the most manageable option. Those schedules will be current and so easy to locate. And defendants need only consult *one* version of the schedule—*i.e.*, the one in effect at the time of their federal offense. Meanwhile, the contrary regime would be difficult to navigate.

After temporally differentiating among two types of federal law—*i.e.*, one version of ACCA, but a different version of the schedules it incorporates—defendants would then need to track down three (and sometimes many more) obsolete federal drug schedules from the time of their prior state convictions. It would be impracticable for defendants to engage in that laborious task, which would be challenging for even the most competent lawyers, probation officers, and judges (who would all have to do it too).

3. The fair-notice considerations above easily distinguish cases arising in the immigration context. In that context, courts have looked to the federal drug schedules in effect at the time of a prior conviction to determine whether that conviction renders the non-citizen removable. *E.g.*, *Gordon v. U.S. Att'y Gen.*, 962 F.3d 1344, 1351 n.4 (11th Cir. 2020).[3] In doing so, courts have reasoned that a time-of-prior-conviction rule provides "the alien with maximum clarity at the point at which it is most critical for an alien to assess (with aid from his defense attorney) whether

[3] These courts thought this comparison was required by *Mellouli v. Lynch*, 575 U.S. 798 (2015). But that misreads *Mellouli*. *See Abdulaziz*, 998 F.3d at 529–30 (explaining why). Regardless, that dispute makes no difference here because the immigration context is distinguishable from this one. *See Williams*, __ F.4th at __, 2022 WL 4102823, at *14 & n.13.

pending criminal charges may carry a risk of adverse immigration consequences." *Doe v. Sessions*, 886 F.3d 203, 210 (2d Cir. 2018).

However, as five circuits have recognized, that immigration-specific rationale has no application in the context of a recidivism enhancement. *See Williams*, __ F.4th at __, 2022 WL 4102823, at *14; *Brown*, 47 F.4th at 155; *Perez*, 46 F.4th at 700; *Abdulaziz*, 998 F.3d at 530–31; *Bautista*, 989 F.3d at 704. Those circuits have all easily recognized the key distinction: in the immigration context, a prior state drug conviction *immediately* triggers removal consequences; in the ACCA context, by contrast, a prior drug conviction does not trigger consequences under the ACCA unless and until the defendant later commits a federal gun offense.

That distinction is confirmed by the obligations that the Sixth Amendment imposes on criminal defense attorneys. In the immigration context, the Supreme Court has held that "a non-citizen does not receive effective assistance of counsel unless counsel advises the defendant of the possible immigration consequences of a plea to a criminal charge," and a "time-of-removal rule would make the dispensing of such advice practically impossible." *Williams*, __ F.4th at __, 2022 WL 4102823, at *14 (quotation omitted) (citing *Padilla v. Kentucky*, 559 U.S. 356

(2010)). But there is no comparable Sixth Amendment "right to be advised on whether a state conviction could potentially combine with two other convictions to support a federal sentencing enhancement if, hypothetically, the defendant commits a specific federal crime in the future." *Id*. To the contrary, this Court has repeatedly held that defense counsel is *not* required to advise a state defendant that "drug charges could have sentencing consequences if he [is] later convicted in federal court." *McCarthy v. United States*, 320 F.3d 1230, 1234 (11th Cir. 2003).

Even the outlier decision in *Clark* acknowledged this distinction. The Sixth Circuit recognized that "the justifications for a time-of-conviction rule are most compelling in the immigration context given the immediate removal consequences that flow from criminal convictions." *Clark*, 46 F.4th at 410. "But," it maintained, "citizen criminal defendants . . . deserve the same clarity when they plead guilty to offenses that carry the possibility of future sentencing enhancements if they reoffend." *Id*. That is incorrect. Again, "there is no need for certainty about possible consequences under federal criminal law at the time of state conviction. Any future federal consequences are determined based on the federal law

at the time of the federal offense that triggers those consequences." *Perez*, 46 F.4th at 700. In short, immigration cases are not instructive.

B. The Statutory Text Requires Using the Schedules From the Time of the Federal Offense

Although no statute could overcome the constitutional fair-notice principles above, there is no such tension here. To the contrary, the statutory text also requires using the federal schedules in effect at the time of the federal offense, not at the time of the prior state convictions.

1. Section 924(e)(2)(A)(ii) requires the elements of the state drug offense to involve "a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." Section 102, in turn, defines a "controlled substance" as any substance "included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C. § 802(6). Part B, in turn, established the "initial[ ]" federal drug schedules, 21 U.S.C. § 812(a), and authorized the Attorney General to add, move, or remove any substance on those initial schedules based on certain criteria, 21 U.S.C. § 811(a). The Attorney General later delegated that authority to the DEA Administrator. *See generally Touby v. United States*, 500 U.S. 160 (1991).

Under that statutory regime, the federal schedules are constantly evolving. Indeed, "by design, they change over time." *Abdulaziz*, 998 F.3d at 523. And the purpose of that design is to allow the federal government to update the schedules based on the latest scientific and medical information. Based on such information, a substance previously deemed to have a low potential for abuse may be moved to a higher schedule. A substance previously deemed to have a high potential for abuse may be moved to a lower schedule or removed entirely. Or a brand new substance may emerge that needs to added to one of the schedules.

The key point here is that Congress deliberately keyed the "serious drug offense" definition in § 924(e)(2)(A)(ii) to these ever-evolving schedules. Why would Congress do that unless it wanted courts to apply the updated version from the time of the federal offense? That textual choice must be given effect. Meanwhile, "[n]othing in the language of the statute indicates Congress intended 'controlled substance' to incorporate historical versions of the federal drug schedules." *Williams*, __ F.4th at __, 2022 WL 4102823, at *12. Were that the intent, Congress would have incorporated static rather than dynamic criteria into the definition.

And Congress knew well how to do that. Indeed, Congress elsewhere defined the exact same term ("serious drug offense") to mean "an offense under State law that, had the offense been prosecuted in a court of the United States, would have been punishable" under certain federal statutes. 18 U.S.C. § 3559(c)(2)(H)(ii). In asking how the offense "would have been" punishable "had [it] been prosecuted" in federal court, that definition requires courts to look back to the time of the state offense. That stark textual contrast with § 924(e)(2)(A)(ii) must be given meaning.

2. The Supreme Court in *Shular* looked to the "neighboring" "violent felony" definitions in § 924(e)(2)(B) to interpret § 924(e)(2)(A)(ii), 140 S. Ct. at 785, and that approach is instructive here too. To determine whether a prior state conviction is a "violent felony," courts routinely apply not just the *version* but also the *meaning* of § 924(e)(2)(B) from the time of the federal offense (not the prior). Again, were it otherwise, pre-ACCA priors would never qualify as "violent felonies." And courts would still be applying the ACCA's residual clause to determine whether pre-*Johnson* priors qualified. Nobody advocates for that approach, which would upend how ACCA cases have always been litigated in federal court.

That same methodological approach should apply equally to the term "controlled substance" in § 924(e)(2)(A)(ii). Just as courts apply the meaning of the ACCA's elements clause from the time of the federal offense, courts must likewise apply the meaning of "controlled substance" from the time of the federal offense. After all, the meaning of that term in § 924(e)(2)(A)(ii) is a question of federal law, just as "[t]he meaning of 'physical force' in § 924(e)(2)(B)(i) is a question of federal law." *Johnson v. United States*, 559 U.S. 133, 138 (2010). There is no basis for subjecting those federal-law ACCA terms to different interpretive methodologies.[4]

In *Clark*, the defendant made a version of this argument in the Guidelines context, "liken[ing] the removal of burglary from the enumerated offenses to the removal of hemp from the drug schedules." 46 F.4th at 411. The Sixth Circuit rejected that argument on the ground that "the Commission amended the text of the Guidelines to remove burglary," whereas "the Guidelines' text itself was not similarly amended when hemp was removed" from the drug schedules. *Id*. But that distinction goes only so far. It fails to account for the case law narrowing

[4] Plus, using the federal schedules from the time of the state prior would mean that no priors from before 1970 would qualify, since that is when the CSA and its initial schedules first came on the books. That'd be odd.

(or invalidating) the ACCA's "violent felony" definitions. In that scenario, the ACCA's statutory text does not change, but courts still apply the meaning of that text from the time of the federal offense, not the prior.

Meanwhile, the only textual hook for the holding in *McNeill* was the phrase "previous conviction." 18 U.S.C. § 924(e)(1). But that phrase also governs the "violent felony" definitions, and yet their current meaning still controls. As explained, the "previous conviction" language affects only the state-law question at step one. *See Jackson*, 36 F.4th at 1306 ("here, we are considering the *federal standard* to which we compare the answer to *McNeill*'s 'backward-looking question' of what the defendant's 'previous [state] conviction' was. And that federal standard comes into play only because of the federal firearm-possession violation to which it is attached—a violation that occurred after the 'previous conviction.'") (brackets omitted). But when it comes to the federal-law comparator at step two, courts have always used the meaning in effect at the time of the federal offense. The "violent felony" case law from the last few decades confirms that point. And there is no basis to "read into the ACCA an exception solely for the definition of 'controlled substance'" in § 924(e)(2)(A)(ii). *Williams*, __ F.4th at __, 2022 WL 4102823, at *12 n.11.

3. Other rules of textual interpretation cut in the same direction.

a. In *Brown*, the Third Circuit "h[e]ld that, absent contrary statutory language, we look to federal law in effect at the time of commission of the federal offense when employing the categorical approach in the ACCA context." 47 F.4th at 148; *see id*. at 155 (repeating that holding). That court relied heavily on the saving statute in 1 U.S.C. § 109. That statute provides a default rule: "it mandates that a court apply the penalties in place at the time the crime was committed unless a new law expressly provides otherwise." *Id*. at 151 (quotation omitted).

In *Brown*, the Third Circuit addressed how that default rule applied in the context of the Agriculture Improvement Act of 2018, which removed "hemp" from the federal definition of marijuana. *Id*. at 150. That statute took effect after the defendant committed his federal firearm offense but before he was sentenced for it. And because that statute "indirectly affected penalties associated with prior serious drug offenses for marijuana convictions," the Third Circuit addressed whether it expressly, or by necessary implication, repealed the ACCA penalties that were incurred at the time the defendant committed his federal firearm offense. The court concluded that it did not. *See id*. at 151–53.

For present purposes, though, the key point is that the saving statute establishes a strong default rule. Absent a clear statutory basis, federal courts apply the federal penalties in effect the time the defendant commits the underlying federal offense. In light of that default rule, the Third Circuit did not even take seriously the idea that courts should use the federal schedules in effect at the time of the prior. *See id*. at 151 n.3. On that point, it simply distinguished *McNeill* and the immigration cases, just as six other circuits have done. *See id*. at 154–55.

b. In addition to the saving statute, two other interpretive rules support using the schedules in effect at the time of the federal offense.

First, the rule of lenity requires a court to strictly read ambiguous penalty statutes like the ACCA in favor of the defendant. *See Wooden v. United States*, 142 S. Ct. 1063, 1082–83 (2022) (Gorsuch, J., concurring in the judgment). Thus, to the extent § 924(e)(2)(A)(ii) is ambiguous on the timing question, it would have to be read in Mr. Jackson's favor.

Second, and again assuming that the statute is susceptible to two readings, the canon of constitutional avoidance would require the same result. *See Clark v. Martinez*, 543 U.S. 371, 381–82 (2005). That is so

because, for the reasons explained above, the contrary reading would deprive defendants of fair notice, raising serious constitutional questions.

4. Finally, the text refutes the government's reliance (in a prior Rule 28(j) letter) on *United States v. Voltz*, 579 F.Supp.3d 1298 (N.D. Ala. Jan. 6, 2022), a district court decision that no other court has even cited, much less followed. The only point that *Voltz* made that has not already been addressed above is related to the other "serious drug offense" definition in § 924(e)(2)(A)(i), which deals with prior *federal* convictions. That definition captures "an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law."

Voltz opined that using the schedules in effect at the time of the federal offense would create a disparity between prior federal and state drug convictions. *Voltz* emphasized the following scenario. If someone committed a hemp offense back in 2000 and was convicted under the *federal* CSA, that would presumably be a "serious drug offense" under § 924(e)(2)(A)(i). But were that person instead convicted in *state* court, it would not be a "serious drug offense" under § 924(e)(2)(A)(ii) if the federal

court used the schedules from the time of a recent federal firearm offense. According to *Voltz*, that would be an "odd contradiction." *Id*. at 1303–04.

Even if *Voltz* was correct about the federal hemp prior—which this Court need not decide—the purported "contradiction" would arise from the plain statutory text. That is so because the "serious drug offense" definitions in §§ 924(e)(2)(A)(i) and (ii) are keyed to two different criteria. Congress keyed the former definition for federal priors to the statute of conviction. By contrast, Congress keyed the latter definition for state priors to the federal drug schedules. Given that distinction, the Supreme Court has recognized that "the divergent text of the two provisions of the serious-drug-offense definition . . . makes any divergence in their application unremarkable." *Shular*, 140 S. Ct. at 786 (quotation omitted).

And the Court must presume that any federal-state divergence was deliberate. Indeed, as one circuit just explained: "If Congress wanted, it could have defined 'serious drug offense' to include any state-law offense that, had it been prosecuted federally, would have fit the criteria described in § 924(e)(2)(A)(i). Elsewhere, it has done just that. *See* 18 U.S.C. § 3559(c)(2)(H)(i)-(ii) (defining the term 'serious drug offense,' in a different context, to mean either an offense under certain federal

drug-law provisions or a state-law offense 'that, had it been prosecuted in a federal court would have been punishable under' those same federal provisions). But it chose not to here." *United States v. Fields*, 44 F.4th 490, 515 (6th Cir. 2022) (brackets and ellipsis omitted). So any disparity between federal and state priors is compelled by § 924(e)(2)(A)'s text.

C. Common Sense Requires Using the Schedules From the Time of the Federal Offense

In addition to both the Constitution and the statutory text, common sense requires using the schedules in effect at the time of the federal offense. Indeed, a time-of-state-prior rule would create absurd results.

1. In § 924(e)(2)(A)(ii), Congress expressly incorporated federal drug schedules that, by design, are constantly updated to incorporate the latest medical and scientific knowledge. And § 924(e)(2)(A)(ii) comes into play only when the defendant commits a federal firearm offense. Because that is the moment when the federal drug schedules become salient, using the schedules in effect at that moment is the most logical choice.

That approach also "effectuates Congress' intent to remove certain substances from classification as federal drug offenses." *Perez*, 46 F.4th at 700. Again, that accounts for current information. So where "Congress

has decided that hemp should not be criminalized, then surely Congress would not intend for it to continue to be included within the narrow class of serious crimes that contributes to a 15-year mandatory minimum prison sentence." *Williams*, __ F.4th at __, 2022 WL 4102823, at *15.

Conversely, requiring courts to use the schedules from the time of the prior conviction "would prevent amendments to federal criminal law from affecting federal sentencing and would hamper Congress' ability to revise federal criminal law." *Bautista*, 989 F.3d at 703; *accord Perez*, 46 F.4th at 699. That cannot be right. And it would be downright "illogical to conclude that federal sentencing law attaches 'culpability and dangerousness' to an act that, at the time of sentencing, Congress has concluded is *not* culpable and dangerous." *Bautista*, 989 F.3d at 703.

2. Yet that illogical position is what the Sixth Circuit endorsed in *Clark*. To do so, it relied on "the purpose of recidivism enhancements," which is "to deter future crime by punishing those futures crimes more harshly if the defendant has committed certain prior felonies." 46 F.4th at 411. But, again, that purpose supports using the schedules in effect at the time of the federal offense (not the prior). After all, *that* is the "future crime" that the ACCA seeks to deter. And because the

commission of that federal crime is what triggers the ACCA, *that* is the time at which the schedules become salient for deterrence purposes.

Missing that point, *Clark* thought that courts should use the schedules from the time of the prior conviction because "culpability and dangerousness attach at the time a defendant's guilt established." *Id.* at 412. But, in the ACCA context, the federal court is not sentencing the defendant for the prior drug conviction. Rather, it is sentencing him for the federal firearm offense. And any ACCA enhancement for that federal offense is based on a "judgment about how problematic th[e] past conduct is when viewed as of the time of the sentencing itself." *Abdulaziz*, 998 F.3d at 528. Thus, in determining whether to impose a *federal* sentencing enhancement for a *federal* gun offense, it makes no sense to use outdated *federal* drug schedules from the time of the prior *state* drug conviction.

3. To illustrate the problem, consider the reverse scenario. A new never-before-seen dangerous and addictive drug—let's call it Z—hits the streets in one particular American city, spiking a local epidemic. The state legislature there reacts swiftly and criminalizes Z. Perhaps Z then begins to spread to neighboring states, where the legislatures take similar action. But it takes some time before Z spreads to the rest of the

country. And it therefore takes some time before the federal government can diagnose the problem, conduct any necessary research, and follow the legal procedures required to add Z to one of the federal drug schedules.

Now consider a defendant who is convicted of a Z offense in state court. Perhaps he even started the Z epidemic. Fast forward several months or years, and the federal government adds Z to a federal schedule. The defendant then commits a federal firearm offense. Should his prior state Z conviction qualify as a "serious drug offense?" Of course it should.

At the time the defendant committed the federal offense, the federal government had determined that Z should be illegal. And the defendant would have known that fact at the time he committed his federal firearm offense. But were courts required to use the federal drug schedules that were in effect at the time of the prior conviction, then it would *not* qualify as an ACCA predicate. That result makes no sense: defendants should not skirt the ACCA's penalties just because they were lucky enough to commit their drug offense before the federal government could act. Yet a time-of-prior-state-conviction rule would require that absurd result.

That scenario is far from hypothetical. In fact, it happened when bath salts first emerged on the scene, and the states beat the Feds to the

punch. In January 2011, Florida became the second state to criminalize bath salts. Alexia Campbell & Aaron Deslatte, Florida Bans 'Bath Salt' Drugs After Violent Outbursts, Sun Sentinel (Jan. 27, 2011).[5] Despite invoking "emergency" rulemaking authority, the federal government did not act until ten months later. *See* DEA, Chemicals Used in "Bath Salts" Now Under Federal Control and Regulation (Oct. 21, 2011).[6] The next year, there was a news story about a man—crudely dubbed the "Miami Zombie" and "Causeway Cannibal"—who attacked a homeless man and was suspected (perhaps erroneously) of being under the influence of bath salts. Outcry from that incident finally sparked the federal government to permanently add baths salts to the federal schedules—after more than 30 states had criminalized it. Daniel Newhauser, Miami Attack May Push Action on 'Bath Salts' Ban, Roll Call (June 2, 2012);[7] *see* Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144 §§ 1151–52.

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[5] https://www.sun-sentinel.com/health/fl-xpm-2011-01-27-fl-bath-salts-florida-20110126-story.html.

[6] https://www.dea.gov/press-releases/2011/10/21/chemicals-used-bath-salts-now-under-federal-control-and-regulation.

[7] https://rollcall.com/2012/06/02/miami-attack-may-push-action-on-bath-salts-ban/.

Were federal courts required to use the federal schedules in effect at the time of the prior state conviction, then the first wave of Florida bath-salts convictions would not qualify as ACCA predicates. And that would be true even where the defendant committed the federal firearm offense *after* the federal government added bath salts to a federal schedule. For the reasons above, that outcome defies common sense.

That same illogical outcome would also apply to "drugs of concern" that are currently criminalized by the states but are not (yet) federally controlled. *See* DEA Drugs of Abuse, A DEA Resource Guide 102–05 (2020).[8] *Salvia divinorum*, for example, is controlled by the majority of states, but it is not federally controlled at this time. If the federal government decides to add it to a schedule in the future, then prior state convictions involving that substance would not qualify as ACCA predicates under a time-of-prior-conviction rule. But if courts instead looked to the federal schedules in effect at the time of the federal offense, then those prior convictions would qualify—as well they should.

In sum, using the federal drug schedules from the time of the prior would be completely upside down. That approach would require federal

[8] https://www.dea.gov/documents/2020/2020-04/2020-04-13/drugs-abuse.

courts to impose a 15-year prison sentence for substances that the federal government no longer deems dangerous. At the same time, it would dispense with the ACCA enhancement for substances that federal government now *does* deem dangerous. That regime would be perverse.

* * *

Using the federal drug schedules in effect at the time of the federal firearm offense resolves this appeal. As the panel correctly explained, and the government has never disputed: (1) the elements of Mr. Jackson's 1998 and 2004 cocaine-related offenses under Fla. Stat. § 893.13 encompassed a cocaine derivative known as ioflupane, *Jackson*, 36 F.4th at 1302–04; and (2) the federal government de-scheduled ioflupane in September 2015, so it was not a federally "controlled substance" when Mr. Jackson committed his federal firearm offense in 2017, *id*. at 1300–02.[9] As a result, his prior convictions are categorically overbroad vis-à-vis § 924(e)(2)(A)(ii). So they are not "serious drug offenses." *Id*. at 1304.

[9] That analysis underscores the doubly limited reach of the panel's holding: (1) because Florida excluded ioflupane from its schedules on July 1, 2017, the panel opinion applies only to Florida cocaine convictions preceding that cutoff date; and (2) because the federal government de-scheduled ioflupane in September 2015, the panel opinion applies only where the defendant committed the federal offense after that cutoff date.

CONCLUSION

As it did before, the Court should once again vacate Mr. Jackson's sentence and remand for re-sentencing without the ACCA enhancement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,970 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in New Century Schoolbook 14-point font.

/s/ Andrew L. Adler

CERTIFICATE OF SERVICE

I certify that on this 6th day of October 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, and it is being served this day via CM/ECF on Laura T. Rivero, Assistant U.S. Attorney, 99 N.E. 4th Street, Suite 523, Miami, FL 33132.

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. **21-13963-BB**

United States of America,

Appellee,

- versus -

Eugene Jackson,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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Certificate of Interested Persons

The undersigned certifies that the list set forth below is a complete list of the persons and entities in the CIPs previously filed by the parties and also includes additional persons and entities (designated in bold face) who have an interest in the outcome of this case.

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Introduction

In McNeill v. United States, 563 U.S. 816, 820 (2011), the Supreme Court held that, when evaluating whether a prior state conviction is a "serious drug offense" under the Armed Career Criminal Act ("ACCA") because it carries a "maximum term of imprisonment of ten years or more," 18 U.S.C. § 924(e)(2)(A)(ii), sentencing courts look to the state's law at the time of the prior conviction. This Court sua sponte vacated its opinion, 36 F.4th 1294 (11th Cir. 2022), and ordered the parties to submit supplemental briefs addressing "whether McNeill's past-tense interpretation of 'serious drug offense' requires that we assess whether a prior state conviction qualifies as a 'serious drug offense' under federal law at the time of the state conviction rather than at the time of the federal offense."

McNeill is not directly on point, but its interpretation of the statutory phrase immediately following the phrase at issue here strongly suggests that both phrases should be read consistently with each other. We agree that courts must apply the version of the ACCA in effect at the time Jackson committed his federal firearm offense. And the definition of "serious drug offense" in effect when Jackson committed his federal offense (which, incidentally, has not changed over time, unlike the ACCA's "violent felony" definition) requires application of the state and federal drug schedules in effect at the time of the prior drug conviction. That is because the ACCA requires courts to examine "previous" convictions, making its

definition of a "serious drug offense" entirely backward-looking, not a hybrid of past and current law. When Jackson sold cocaine in Florida in 1998 and 2004, cocaine (including its derivative, ioflupane) was illegal under both Florida and federal law. That's what matters. Jackson's Florida sale-of-cocaine crimes were "serious drug offenses" when he committed them, and a later revision to the federal drug schedules changes neither his culpability nor the seriousness of his drug crimes.

Argument

The ACCA's Definition of "Serious Drug Offense" Requires Courts to Apply the Version of the Federal Drug Schedules in Effect When the Defendant Committed the Prior State Drug Crime.

The ACCA, 18 U.S.C. § 924(e), provides for an enhanced sentence when a defendant who violates 18 U.S.C. § 922(g) "has three previous convictions" for a violent felony or a serious drug offense, or both, committed on occasions different from one another. 18 U.S.C. § 924(e)(1). Subsection (e)(2)(A) defines "serious drug offense." It says that a "serious drug offense" can be either a federal or state drug conviction. See 18 U.S.C. §§ 924(e)(2)(A)(i) (prior federal offense) and (ii) (prior state offense). Jackson has two prior Florida cocaine convictions, so the definition covering state offenses, § 924(e)(2)(A)(ii), applies in this case.

The ACCA's definition of serious drug offense requires three things of a state drug conviction: it must be for an offense "[1] involving manufacturing, distributing, or possessing with intent to manufacture or distribute [2] a controlled substance (as

defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), [3] for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). The Supreme Court has examined two of the three phrases of § 924(e)(2)(A)(ii). Shular v. United States, 140 S. Ct. 779 (2020) explained the first phrase ("involving" certain conduct).[1] McNeill addressed the last phrase ("for which a maximum term of imprisonment of ten years or more is prescribed by law"). The second phrase (a "controlled substance" as defined in the federal drug schedules) is the one at issue here. McNeill did not examine the "controlled substance" phrase, but it examined the adjacent "maximum term" phrase. McNeill's reasoning applies to both phrases of the definition. Under its logic, courts must apply the federal drug schedules in effect at the time of the state offense to determine whether it involved a "controlled substance."

We begin with a brief review of McNeill and its holding. Then we explain why McNeill and the text of § 924(e)(2)(A)(ii) support our reading of the statutory text, which avoids the absurd results that McNeill warned against. Next, we show that our interpretation not only aligns with McNeill, but also gives just as much or

[1] In Shular, the Court considered whether the "involving" phrase in § 924(e)(2)(A)(ii) required a comparison of the state drug crime to a generic offense and held it did not. "The serious drug offense' definition requires only that the state offense involve the conduct specified in the federal statute; it does not require that the state offense match certain generic offenses." 140 S. Ct. at 782.

more notice and due process to defendants. Finally, we explain why this Court should not follow the out-of-Circuit decisions to the contrary.

A. McNeill's Analysis

McNeill considered the "maximum term" phrase of § 924(e)(2)(A)(ii). When McNeill committed his prior North Carolina drug trafficking crimes in the 1990's, they carried a 10-year maximum sentence. 563 U.S. at 818. In 2008, McNeill pleaded guilty to unlawful possession of a firearm by a felon. Id. He argued that his state drug convictions did not qualify as ACCA predicates because by the time he committed his federal firearm offense, North Carolina had reduced the maximum sentences below 10 years. 563 U.S. at 818-19. The question before the Court was which "maximum term of imprisonment" applied: the one in effect when McNeill was convicted of the state drug crimes in the 1990's or the one in effect when he committed his federal felon-in-possession crime years later. The Court held "that the 'maximum term of imprisonment' for a defendant's prior state drug offense is the maximum sentence applicable to his offense when he was convicted of it." Id. at 818.

To reach that conclusion, the Court began with the language of the ACCA's definition of "serious drug offense" and the "specific context in which that language is used." 563 U.S. at 819. McNeill explained that the ACCA requires a sentencing court to determine whether a "previous conviction," § 924(e)(1), was for a serious

drug offense, as defined in § 924(e)(2), and "[t]he only way to answer this backward-looking question is to consult the law that applied at the time of that conviction." 563 U.S. at 820. The Court explained that use of the present tense in the definition of "serious drug offense" ("is prescribed by law") did not suggest otherwise. Id. This is because the "ACCA is concerned with convictions that have already occurred." Id. "Whether the prior conviction was for an offense 'involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance' can only be answered by reference to the law under which the defendant was convicted." Id. (emphasis added).

The Court explained that "the broader context of the statute as a whole," specifically the adjacent definition of "violent felony," confirmed its interpretation. 563 U.S. at 821. Even though the ACCA's definition of "violent felony" included the present tense ("has as an element," "is burglary"), the Court consulted "the version of the state law that the defendant was actually convicted of violating." Id. "Having repeatedly looked to the historical statute of conviction in the context of violent felonies," the Court saw "no reason to interpret 'serious drug offense[s]' in the adjacent section of the same statute any differently." Id. at 822.

McNeill explained that its "natural reading" of the ACCA's "maximum term" phrase "avoids absurd results that would follow from consulting current state law to define a previous offense." 563 U.S. at 822. The Supreme Court cautioned against

an approach where "a prior conviction could 'disappear' entirely for ACCA purposes if a State reformulated the offense between the defendant's state conviction and federal sentencing." Id. "It cannot be correct," the Court explained, "that subsequent changes in state law can erase an earlier conviction for ACCA purposes." Id. "A defendant's history of criminal activity—and the culpability and dangerousness that such history demonstrates—does not cease to exist when a State" changes the penalties in its criminal statutes. Id. "Congress based ACCA's sentencing enhancement on prior convictions and could not have expected courts to treat those convictions as if they had simply disappeared." Id.

Finally, the Supreme Court explained that its time-of-state-conviction approach "permits a defendant to know even before he violates § 922(g) whether ACCA would apply." 563 U.S. at 823. It rejected a time-of-federal-sentencing interpretation that "would make ACCA's applicability depend on the timing of the federal sentencing proceeding." Id.

B. The ACCA's Text and Purpose Support a Time-of-Conviction Approach.

McNeill's interpretation of the "maximum term" phrase in § 924(e)(2)(A)(ii) guides us to the correct interpretation of the "controlled substance" phrase immediately preceding it. When Congress defined a "serious drug offense" as an offense that carried a maximum sentence of ten or more years, it meant the maximum sentence in effect when the defendant committed the state drug crime. By the same

logic, when Congress defined a "serious drug offense" as an offense involving a controlled substance as defined in Section 102 of the Controlled Substances Act ("CSA"), it must have meant the federal drug schedules in effect when the defendant committed the state drug offense.

Before we examine the text of the statute, we must put one issue to rest. Jackson argues, and we agree, that courts generally apply the federal law in effect when a defendant commits his federal crime. That is uncontroversial. To be clear, we agree that courts apply the version of the ACCA in effect at the time the defendant committed his federal offense. For example, in 1986, Congress amended the ACCA's definition of "violent felony" in § 924(e)(2)(B).[2] And in 2015, the "violent felony" definition changed again after the Supreme Court invalidated the residual clause.[3] After the changes to the definition, courts applied the revised version of ACCA's violent felony definition, not the definition that applied when the defendant committed the prior violent felony. That sometimes meant that some prior felony convictions (for example, Florida burglary) no longer qualified as ACCA predicates because the definition itself changed.

[2] See Stokeling v. United States, 139 S.Ct. 544, 551 (2019) (explaining 1986 amendment, which "replaced the two enumerated crimes of 'robbery or burglary' with the current elements clause, a new enumerated-offenses list, and a (now-defunct) residual clause").

[3] Johnson v. United States, 576 U.S. 591 (2015) (invalidating residual clause in violent felony definition).

Again, the parties agree that courts must apply the text of the ACCA in effect at the time of the federal offense, and either party's reading of § 924(e)(2)(A)(ii) does that. But unlike the definition of "violent felony," the definition of "serious drug offense" in § 924(e)(2)(A)(ii) has not changed. This appeal is not about which version of the definition to apply, and we do not suggest that the Courts should apply an outdated or superseded version of the ACCA to evaluate Jackson's prior cocaine convictions.

With that point clarified, we turn to the definition of "serious drug offense" as it existed when Jackson committed his federal firearm offense. "As in all statutory construction cases," this Court must "begin with the language itself and the specific context in which the language is used." McNeill, 563 U.S. at 819. The Court must "consider the entire text, in view of its structure and of the physical and logical relation to its many parts." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 167 (2012).

First, the entire text of the ACCA, § 924(e), demands a historical look at convictions that already happened for violating the law in effect then. Section 924(e) has two parts: subsection (e)(1) is the operative provision, and subsection (e)(2) defines the terms in the operative provision. The operative provision, subsection (e)(1), requires a sentencing court to determine whether the defendant has three "previous" convictions, and that requires the court to look to the past, to what already

happened. The definitional subsections in (e)(2) do not shift the court's focus from past to present. We do not look at current law to define prior convictions anywhere else in § 924(e). When we consider the elements of a prior offense to determine whether it is a violent felony, we look to the elements of the crime (whether state or federal) when the defendant committed it. Logic dictates that when we ask whether a prior drug offense involved a "controlled substance," we must ask whether it was a controlled substance "as defined in" the Section 102 of the CSA when the defendant committed it. Nothing in the text of the ACCA isolates the phrase "as defined in" the CSA for special treatment, keeping it in the present while focusing the rest of Section 924(e) on the past.

The same principle of reading the entire text in view of its structure and logical relation to its other parts applies when we narrow our focus from the ACCA as a whole to the definition of "serious drug offense" in particular. The Court cannot consider the "controlled substance" phrase of subsection (e)(2)(A)(ii) in isolation, divorced from the phrases around it. The Court must consider the text in view of its physical and logical relation to the other phrases in subsection (e)(2)(A)(ii). McNeill's holding about the "maximum term" phrase applies with equal force to the interpretation of the "controlled substance" phrase that immediately precedes it. Where "Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations." Nijhawan v.

Holder, 557 U.S. 29, 39 (2009). Nothing in the text of the statute suggests that we construe adjacent phrases in the definition of "serious drug offense" inconsistently.[4] And the use of the present tense in the "controlled substance" phrase of subsection (e)(2)(A)(ii) ("as defined in") does not require an application of present law any more than the "maximum term" phrase of the same subsection ("is prescribed") does. McNeill, 563 U.S. at 820.

Jackson argues that Congress intended a "serious drug offense" to be constantly evolving with changes to the federal schedules, not locked in at the time of the prior state drug conviction. He argues that Congress could have defined "serious drug offense" as "a controlled substance (as defined in section 102 of the Controlled Substances Act at the time of the prior offense)" but did not do so. True enough, but that argument cuts both ways. Congress also could have defined "serious drug offense" as "a controlled substance (as defined in section 102 of the Controlled Substances Act at the time of the instant federal offense)" but did not do so. Cf. Caraco Pharm. Lab'ys, Ltd. v. Novo Nordisk A/S, 566 U.S. 399, 416 (2012) (rejecting a similar argument and observing that "the mere possibility of clearer" or

[4] In fact, the "controlled substance" phrase is sandwiched between two phrases of the definition that require a backward-look to state law in effect at the time of the state conviction. When applying the first "involving" phrase, this Court considers the statutory elements as they existed at the time of the state conviction. See United States v. Wilcoxson, 699 F. App'x 888, 890-91 (11th Cir. 2017) (examining the version of the Florida drug trafficking statute in effect at time of conviction); United States v. Ackerman, 709 F. App'x 925, 927-28 (11th Cir. 2017) (same).

different "phrasing cannot defeat the most natural reading of a statute"). So that argument doesn't help either party.

Jackson also points to the fact that in the Three Strikes Act, 18 U.S.C. § 3559(c)(2)(H), Congress defined "serious drug offense" as an "offense under State law that, had the offense been prosecuted in a court of the United States, would have been punishable under" the federal drug statutes, 21 U.S.C. § 841(b)(1)(A), 848 or 21 U.S.C. § 960(b)(1)(A). But his negative inference argument does not work because of the big difference between the two statutes. Section 3559(c)'s requirement that a prior state offense exactly match the elements of 21 U.S.C. § 841(b)(1)(A), 848 or 21 U.S.C. § 960(b)(1)(A) is much narrower than the ACCA's definition of serious drug offense, which includes a wider range of state drug offenses—whether or not they could have been prosecuted as federal crimes—as long as they "involve" certain prohibited conduct. See Shular, 140 S. Ct. at 786 (explaining that § (e)(2)(A)(ii)'s definition requires that state offenses "involve" certain conduct, not that they align with specific offenses). Thus, that difference in phrasing does not imply that the ACCA focuses on a different timeframe; on the contrary, the "had the offense been prosecuted" limitation in § 3559(d) represents an attempt to narrow the type of conduct that qualifies for the more severe three-strikes enhancement.

In sum, McNeill teaches that whether a prior conviction was for an offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance' can only be answered by reference to the law under which the defendant was convicted." 563 U.S. at 520. Our textual analysis aligns with McNeill. Jackson's does not.

C. A Time-of-Conviction Approach Avoids Absurd Results and Unwarranted Sentencing Disparities

Jackson's time-of-federal-offense approach leads directly to the "absurd results" that the Supreme Court cautioned against. McNeill, 563 U.S. at 822. Under Jackson's view, his prior cocaine convictions, which were indisputably "serious" when he committed them, disappear as ACCA predicates simply because the federal drug schedules changed between the time of his state conviction and his federal gun offense. As McNeill cautioned, "[i]t cannot be correct that subsequent changes in state law can erase an earlier conviction for ACCA purposes." 563 U.S. at 823. The same logic applies with equal force to subsequent changes in federal drug schedules. "A defendant's history of criminal activity—and the culpability and dangerousness that such history demonstrates—does not cease to exist when" the CSA schedules de-criminalize a particular substance like ioflupane. McNeill, 563 U.S. at 823

Jackson's interpretation of § 924(e)(2)(A) would create at least two types of unwarranted sentencing disparities that Congress cannot have intended. First, Jackson's view creates a disparity between defendants with prior federal drug

convictions and defendants with prior state drug convictions. Recall that Section 924(e)(2)(A) provides two definitions of "serious drug offense," one for past federal convictions and the second for past state convictions. Consider co-defendants Jack and Diane, who unlawfully possess firearms on the same day in 2020. If Jack has a prior federal conviction under the CSA for distributing cocaine/ioflupane in 2004 (when ioflupane was still on the federal drug schedules), he has a qualifying conviction because it was an offense "under" the CSA. The fact that Congress later decriminalized ioflupane in 2015 doesn't change that Jack was convicted "under the Controlled Substances Act (21 U.S.C. § 802)" in 2004. His federal judgment of conviction does not disappear, and it counts as an ACCA predicate when he is sentenced for his 2020 firearm possession, notwithstanding the removal of ioflupane from the federal drug schedules.

Now consider co-defendant Diane, who also has a 2004 conviction for distributing cocaine/ioflupane, the only difference being that she was convicted under Florida, not federal, law. Diane's conviction would not qualify as a predicate because (under Jackson's reading) the federal drug schedules no longer included ioflupane in 2020. Our time-of-prior-conviction approach avoids that illogical disparity.[5] "Nothing in the ACCA's text suggests that Congress intended past

[5] In Shular, the Supreme Court observed that the "divergent text" of subsections (e)(2)(A)(i) and (ii) "makes any divergence in their application unremarkable." 140 S.Ct. at 786. But that is different from our point here. The issue in Shular was

federal convictions to be treated more severely than past state convictions when Congress changes federal law." United States v. Voltz, 579 F. Supp. 3d 1298, 1303 (N.D. Ala. 2022).

As these examples illustrate, Congress could not have intended for state cocaine/ioflupane offenders to phase out of ACCA eligibility based on changes to the federal drug schedules, while identically situated federal cocaine/ioflupane offenders still qualify as armed career criminals. This Court should adopt a consistent rule that captures all offenders (state and federal) who possessed substances that were illegal under both state and federal drug schedules when they committed their drug offense.

Jackson's approach creates a second type of sentencing disparity between two defendants who differ only in the dates of their prior state convictions. Here is another example. Jack and Diane both have prior Florida convictions for sale of cocaine, they committed their federal felon-in-possession crimes together on the same day, and they are sentenced on the same day. The only difference is that Jack's

whether § (e)(2)(A)(ii) required a comparison of the state crime to a generic drug offense. It was in that context that the Court explained that Congress's decision to identify prior federal offenses by reference to the United States Code in subsection (A)(i) "does not speak to whether it identified state offenses by reference to named offenses or conduct" in (A)(ii). Shular had no occasion to consider whether Congress intended courts to apply federal law in effect at the time of the prior conviction for federal predicates while applying federal law in effect at the time of the federal gun crime for state predicates.

cocaine convictions are from 2016, while Diane's cocaine convictions are from 2018. Under a time-of-federal-offense approach, Jack is not subject to an ACCA-enhanced sentence because his cocaine convictions pre-date 2017, but Diane faces a mandatory minimum 15-year sentence. That sentencing disparity can be avoided under the government's time-of-state-conviction approach.

In short, courts should read the ACCA's definition of "serious drug offense" in a way that is internally consistent. The "maximum term" phrase looks back in time and the "controlled substance" phrase preceding it should too. Examining a defendant's previous convictions requires courts to apply not only the state statute, but also the federal drug schedule, that was in effect at the time the defendant committed the previous state drug crime. This approach aligns with McNeill's reading of the next clause in § 924(e)(2)(A)(ii) and avoids inconsistent application of the same statute.

D. The Time-of-Conviction Approach Provides Fair Notice and Due Process to Defendants.

McNeill explained that its time-of-state-conviction approach to the "maximum term" phrase "permits a defendant to know even before he violates § 922(g) whether ACCA would apply." 563 U.S. at 823. The Supreme Court rejected a contrary interpretation that "would make ACCA's applicability depend on the timing of the federal sentencing proceeding." Id. The government's reading of the preceding "controlled substance" phrase in § 924(e)(2)(A)(ii) not only squares with

McNeill, but also gives defendants as much or more notice as Jackson's contrary interpretation. Under our time-of-state-conviction reading, a defendant knows he has a qualifying "serious drug offense" on the date of his state conviction. The defendant is aware of the consequences of his state offense when he commits it.

In the immigration context, when courts determine whether a noncitizen's prior conviction qualifies as an "aggravated felony" for removal purposes, they apply the federal drug schedules at the time of his prior conviction. Mellouli v. Lynch, 135 S. Ct. 1980, 1984 (2015) (petitioner's state-law conviction did not make him removable because, at the time of his conviction, the state schedules included substances not on the federal schedules); Gordon v. United States, 962 F.3d 1344, 1351 n. 4 (11th Cir. 2020) (when "assessing whether a noncitizen's conviction qualifies as an aggravated felony, we compare his offense of conviction to the CSA schedules in effect when he was convicted").

This approach in the immigration context promotes fairness and predictability. A person should have "maximum clarity" about whether his state conviction is an aggravated felony "at the point at which it is most critical for an alien to assess (with aid from his defense attorney) whether pending criminal charges may carry a risk of adverse immigration consequences." Doe v. Sessions, 886 F.3d 203, 210 (2d Cir. 2018). See also Martinez v. Attorney General, 906 F.3d 281, 287 (3d Cir. 2018) (rejecting argument that prior conviction did not relate to controlled

substance because the federal drug schedules later exempted ioflupane; "the categorical approach directs us to compare the schedules at the time of conviction").

The same reasoning should apply to ACCA sentencing. A mandatory minimum 15-year sentence is no less significant to a criminal defendant than the adverse immigration consequences that result from his prior serious drug conviction. "It is true that the justifications for a time-of-conviction rule are most compelling in the immigration context given the immediate removal consequences that flow from criminal convictions, but citizen criminal defendants, too, deserve the same clarity when they plead guilty to offenses that carry the possibility of future sentencing enhancements if they reoffend." United States v. Clark, 46 F.4th 404, 410 (6th Cir. 2022) (applying McNeill and adopting time-of-conviction approach in Sentencing Guidelines context).

Due process and notice are better served when a defendant knows when he commits his state drug crime that it will expose him to an enhanced federal sentence if he later decides to unlawfully possess a firearm. Under both parties' positions, a person deciding whether to possess a firearm knows, when he commits his federal offense, whether he has ACCA predicates. But under the government's reading, he has more notice: he knows the consequences when he still has a chance to avoid the unlawful conduct. See, e.g., City of Chicago v. Morales, 527 U.S. 41, 42 (1999)

("[T]he fair notice requirement's purpose is to enable the ordinary citizen to conform his or her conduct to the law.").

Stability and predictability, two other due process concerns, also favor the government's position. Under a time-of-state-conviction approach, a state conviction's ACCA status is knowable and stays the same from the moment of the state conviction. Under Jackson's approach, on the other hand, every revision to the federal drug schedules changes the ACCA status of old convictions in unpredictable ways. While a narrowing of the schedules excludes old convictions, as occurred here, an expansion or addition could transform some previously non-qualifying state convictions into ACCA predicates! The Court can avoid that situation by reading all parts of § 924(e)(2)(A)(ii) to require sentencing courts to apply the state and federal law in effect when the defendant was convicted. This not only affords notice and due process, but also adheres to McNeill.

E. Contrary Decisions From Other Circuits Are Not Persuasive.

To date, six other circuits have considered the timing issue presented in this appeal, and only one has adopted the government's position.[6] We urge this Court to

[6] Another circuit, the Third, recently considered a different ACCA timing issue: what version of the federal drug schedule applies when the schedule changes between a defendant's commission of the § 922(g) offense and his guilty plea and sentencing. United States v. Brown, 47 F.4th __, 2022 WL 3711868 (3d Cir. 2022). The Court held that the federal savings statute, 1 U.S.C. § 109, requires courts to apply the federal drug schedules in effect when the defendant commits the federal firearm offense. That meant Brown did not benefit from the CSA's intervening

reject the reasoning of its five sister circuits and join the Sixth Circuit in its more faithful application of McNeill's reasoning.

Three circuits have considered the timing issue in the Sentencing Guidelines context. See United States v. Clark, 46 F.4th 404 (6th Cir. 2022) (time of state conviction); United States v. Abdulaziz, 998 F.3d 519, 531 (1st Cir. 2021) (time of federal sentencing); United States v. Bautista, 989 F.3d 698, 704 (9th Cir. 2021) (same). Three circuits have adopted a time-of-federal-offense or time-of-federal-sentencing rule in the ACCA context. See United States v. Williams, -- F.4th --, 2022 WL 4102823 (10th Cir. 2022) (time of federal offense); United States v. Perez, 46 F.4th 691 (8th Cir. 2022) (same); United States v. Hope, 28 F.4th 487, 505–06 (4th Cir. 2022) (time of federal sentencing).[7] Although it is not directly on point because it is a Guidelines case, the Sixth Circuit's opinion in Clark, 46 F.4th 404, is well-reasoned and persuasive. It adopted the government's time-of-state-conviction rule and rejected the "flawed reasoning" of its sister Circuits, faulting them for

decriminalization of hemp, and he was sentenced as an armed career criminal. Id. at *3.

[7] The Fourth Circuit applied a time-of-sentencing approach, which neither party advocates in this case, based in part on its observation that the Sentencing Guidelines required the district court to use the manual in effect on the date of sentencing. Id. at 505. But it does not matter for this case, because the federal drug schedules excluded ioflupane at both times: when Jackson violated § 922(g) in September 2017 and when he was sentenced in October 2021.

"insufficiently grappl[ing] with the Supreme Court's reasoning in McNeill." Id. at 414.

The Sixth, Ninth, and First Circuits examined whether the definition of "controlled substance offense" in the career offender guideline, USSG § 4B1.2, requires a comparison to the federal drug schedules at the time of the prior state conviction or at the time of sentencing. These cases start from the (erroneous) premise that the definition of "controlled substance offense" in the career offender guideline, USSG § 4B1.2(b), requires a defendant's prior conviction to be an offense under the federal CSA. This Court and several other circuits have rejected that interpretation because it conflicts with the text of the guideline.[8] Based on their assumption that § 4B1.2 defines a controlled substance as a substance on the federal drug schedules (like the ACCA's definition), the three circuits then considered

[8] The career offender guideline defines a "controlled substance offense" (in relevant part) as "an offense under federal or state law" that "prohibits the manufacture, import, export, distribution, or dispensing of," or the possession with intent to manufacture, import, export, distribute, or dispense, a "controlled substance." USSG § 4B1.2(b) (emphasis added). Unlike the ACCA's definition of "serious drug offense," the guideline's definition of "controlled substance offense" is not limited to substances listed in the federal CSA. United States v. Howard, 767 F. App'x 779, 784 n.5 (11th Cir. 2019) (rejecting "argument that 'controlled substance' under § 4B1.2 refers only to those illegal substances that are federally controlled."). See also United States v. Jones, 15 F.4th 1288, 1290 (10th Cir. 2021); United States v. Henderson, 11 F.4th 713, 718-19 (8th Cir. 2021); United States v. Ward, 972 F.3d 364, 372 (4th Cir. 2020) 372-73 (4th Cir. 2020); United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020).

whether courts apply the federal drug schedules in effect at the time of the prior state conviction or the federal sentencing.

In Clark, the Sixth Circuit considered whether the defendant's prior Tennessee marijuana conviction qualified as a predicate "controlled substance offense." At the time of Clark's drug conviction, Tennessee's definition of marijuana included hemp, but hemp had been removed from the federal and state drug schedules prior to his federal sentencing. Id. at 407. The Sixth Circuit applied McNeill and adopted a time-of-conviction rule. Id. at 408. It found, first, that the language of the career offender guideline, which considers "prior" convictions, "indicates that the court should take a backward-looking approach and assess the nature of the predicate offenses at the time the convictions for those offenses occurred." Id. at 409.

Second, the Sixth Circuit explained that the time-of-conviction approach found support in the immigration context. Id. at 410. Clark acknowledged that the justification for a time-of-conviction rule is "most compelling" in the immigration context but held criminal defendants "deserve the same clarity when they plead guilty to offenses that carry the possibility of future sentencing enhancements if they reoffend." Id.

Clark observed that a sentencing court applies the version of the Guidelines in effect on the date of sentencing, just as we agree that the court applies the current version of the ACCA. But, it said, that "leaves unanswered the definitional question:

what the term 'controlled substance' means at sentencing." Id. at 411. Clark explained:

> Under McNeill's logic, courts must define the term as it exists in the Guidelines at the time of federal sentencing by looking backward to what was considered a "controlled substance" at the time the defendant received the prior conviction that triggers the enhancement. This approach tracks the purpose of recidivism enhancements. Recidivism enhancements are intended to deter future crime by punishing those future crimes more harshly if the defendant has committed certain prior felonies.

Id. The same reasoning applies with equal force in the ACCA context. As Clark concluded: "It would be absurd to consult current law to define a previous offense." Id. at 412.

The other five Circuits, in both the Guidelines and ACCA contexts, have reached the opposite conclusion, for many of the same reasons. First, the other Circuits distinguish McNeill because McNeill involved a change in state law, not federal law. See Bautista, 989 F.3d at 703; Abdulaziz, 998 F.3d at 526-27; Hope, 28 F.4th at 505; Perez, 46 F.4th at 699-700; Williams, 2022 WL 4102823 at *12-13. They point out that courts apply the federal law in effect when the defendant committed his federal crime, not a "superseded" or "historical" version of the ACCA. As we explained from the start, we agree that courts apply the version of the ACCA in effect at the time of a defendant's federal firearm offense. But the version of the ACCA's definition when Jackson violated federal law by having a firearm

requires us to consult the federal drug schedules when he violated Florida law by selling cocaine.

Next, the Ninth Circuit found "it would be illogical to conclude that a federal sentencing law attaches 'culpability and dangerousness' to an act that, at the time of sentencing, Congress has concluded is not culpable and dangerous." Bautista, 989 F.3d at 703. In agreement with the Ninth, the Eighth Circuit commented that whether a previous state conviction is a serious drug offense "only becomes salient at the time of sentencing" for the § 922(g) crime. Perez, 46 F.4th at 699. We think these Courts ignore McNeill, which explains that culpability and dangerousness attach at the time of the state conviction. A defendant's past criminal conduct "and the culpability and dangerousness that such history demonstrates—does not cease to exist" when a state changes its penalties. McNeill, 563 U.S. at 822. Likewise, a defendant's culpability and dangerousness do not change with a subsequent change of the federal drug schedules.[9]

The fact that a substance (like ioflupane or hemp) is removed from the federal

[9] Although it reached the opposite conclusion, the First Circuit correctly observed that "a § 922(g) defendant's past criminal conduct involving a substance that the CSA's drug schedules classified at that earlier time as 'controlled' suggests a reason to be concerned that the defendant is especially defiant of law and thus a reason to find the earlier classification of the substance by those schedules potentially relevant to the sentence that the defendant should receive for his § 922(g) conviction." Abdulaziz, 998 F.3d at 528.

drug schedules shows nothing more than a shift in contemporary views away from the gravity of the conduct. But, when courts apply a recidivist sentencing enhancement, it must assess the defendant's respect for the law, or lack thereof, and the circumstances at the time of his conviction. That is partly why McNeill applied a backward-looking approach to the maximum sentence criteria. The existence of a lengthy maximum term of imprisonment suggests the seriousness of the offense. While a state's subsequent reduction of the statutory maximum might reveal that the state no longer views the crime as serious, that does not change the seriousness of the defendant's crime when he committed it or ameliorate valid concerns about the defendant's respect for the law.

As another reason for its holding, the Ninth Circuit concluded that a time-of-federal-offense approach promotes uniformity in federal sentencing law and prevents sentencing disparities. Bautista, 989 F.3d at 703-04. To the contrary, using the current version of the federal drug schedules creates as many disparities as it avoids. As we explained above in our example with Jack and Diane, the time-of-federal-conviction approach creates a disparity between two similar defendants who differ only in the dates of their prior state convictions. The Court avoids that sentencing disparity by applying the government's time-of-state-conviction approach.

Finally, the Tenth Circuit found that a time-of-federal-offense approach was "most consistent with fundamental principles of due process." Williams, 2022 WL 4102823, at *13. But, as we explained above, the government's time-of-state-conviction approach gives a defendant as much or more notice of the consequences of his state drug convictions.

Conclusion

For the reasons we explain above, the government's time-of-conviction approach aligns with McNeill and the text of § 924(e)(2)(A)(ii), it avoids the absurd results that McNeill warned against, and it gives just as much or more notice and due process to defendants. We urge the Court to adopt the Sixth Circuit's approach and reject the contrary reasoning of the other circuits.

Respectfully submitted,

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This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements for Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-based typeface using Microsoft Word 2016, 14-point Times New Roman.

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I hereby certify that four copies of the foregoing Supplemental Brief for the United States were mailed to the Court of Appeals via Federal Express this 6th day of October, 2022, and that, on the same day, the foregoing brief was filed using CM/ECF and served via CM/ECF on counsel of record.

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jp

APPENDIX D

[PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-13963

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EUGENE JACKSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:19-cr-20546-KMW-1

Before ROSENBAUM, JILL PRYOR, and ED CARNES, Circuit Judges.

ROSENBAUM, Circuit Judge:

Forewarned is forearmed. That's a common-sense notion that people have recognized for at least hundreds[1] of years. In fact, Shakespeare incorporated it into *Henry VI, Part 3*—written around 1591 or '92—when King Edward IV says, "Well I will arm me, being thus forewarned." William Shakespeare, *King Henry VI, Part 3* act 4 sc. 1, l. 115, Folger Shakespeare Library, edited by Barbara A. Mowat & Paul Werstine (Simon & Schuster Paperbacks Mar. 2009).

The concept of "forewarned is forearmed" also explains why fair notice—a principle enshrined in the Constitution by the Fifth Amendment's Due Process clause—is so important. Knowing that certain conduct violates the law and will result in a specified minimum penalty (or perhaps a maximum penalty), a person may decide to avoid engaging in that conduct. And even if she goes ahead, anyway, and violates the law, she knows in advance what the potential consequences could be.

This due-process cornerstone of fair notice drives our decision today under the Armed Career Criminal Act ("ACCA").

[1] Ancient Romans apparently identified the principle thousands of years ago. "*Praemonitus, praemunitus*" is a Latin proverb that translates loosely to "forewarned, forearmed." The Phrase Finder, https://www.phrases.org.uk/meanings/forewarned-is-forearmed.html (last visited June 9, 2022).

ACCA increases the sentence of, among others, a felon in unlawful possession of a firearm if that person has at least three prior convictions for a "violent felony," 18 U.S.C. § 924(e)(2)(B), or a "serious drug offense," 18 U.S.C. § 924(e)(2)(A), or both. This appeal requires us to decide which version of the Controlled Substance Act Schedules incorporated into ACCA's definition of "serious drug offense" applies when a defendant is convicted of being a felon in possession of a firearm: the version in effect at the time of the defendant's federal firearm-possession violation (for which he is being sentenced), or the ones in effect when he was convicted of his predicate state crimes that we are evaluating to see whether they satisfy ACCA's definition of "serious drug offense."

We hold that due-process fair-notice considerations require us to apply the version of the Controlled Substance Act Schedules in place when the defendant committed the federal firearm-possession offense for which he is being sentenced. When we apply that iteration here, we conclude that Defendant-Appellant Eugene Jackson does not qualify for ACCA's sentence enhancement. Because the district court reached the opposite conclusion, we vacate Jackson's sentence and remand for resentencing.

I.

Jackson pled guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). According to the factual proffer supporting Jackson's guilty plea, he unlawfully possessed the firearm on September 26, 2017.

In Jackson's presentence investigation report ("PSI"), the probation officer determined that Jackson's prior criminal history qualified him for an ACCA sentencing enhancement. ACCA applies to a conviction under 18 U.S.C. § 922(g) for firearm possession by a prohibited person if the defendant has three qualifying convictions for "a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). In support of the ACCA enhancement the probation officer recommended for Jackson, the PSI concluded Jackson had five qualifying predicate convictions:

> (1) a 1998 Florida conviction for battery on a law enforcement officer;
>
> (2) a 1998 Florida conviction for the sale of cocaine;
>
> (3) a 2003 Florida conviction for armed robbery;
>
> (4) a 2004 Florida conviction for possession with intent to sell cocaine; and
>
> (5) 2012 Florida convictions for aggravated assault with a deadly weapon and aggravated battery with a deadly weapon, each arising out of the same incident.

The recommended ACCA enhancement increased Jackson's total offense level from 23 to 30, which caused his advisory guideline range to change from 92–115 months to 180–210 months.

Jackson objected to the probation officer's determination that ACCA applied. He conceded that he had two ACCA

predicates: the 2003 Florida armed robbery and the 2012 aggravated battery.[2] (Jackson disputed that the 2012 aggravated assault qualified as a "violent felony" but admitted that the accompanying aggravated battery did.)

But Jackson argued that neither of his cocaine-related convictions qualified as a third ACCA predicate offense. He acknowledged that "serious drug offense" means, as relevant here, "an offense under State law, involving . . . distributing, or possessing with intent to . . . 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 or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). But Jackson contended that the cocaine-related conduct that Fla. Stat. § 893.13 prohibited when both of Jackson's cocaine-related convictions occurred encompassed, among other things, the sale of, or possession with intent to distribute, ioflupane (^{123}I) ("ioflupane"). Yet when Jackson possessed the firearm here, ioflupane was not a "controlled substance" for purposes of the "serious drug offense" definition in § 924(e)(2)(A)(ii). So Jackson urged that, categorically, a cocaine-related offense under Fla. Stat. § 893.13 at the times of his cocaine-

[2] As relevant here, these offenses qualified as "violent felon[ies]" because they each were a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

related convictions could not qualify as a "serious drug offense" under ACCA.

For its part, the government conceded that Jackson's 1998 Florida battery conviction did not qualify as an ACCA predicate. It also agreed that the 2012 aggravated assault and aggravated battery counted as only a single "violent felony." As to the cocaine-related § 893.13 offenses, the government did not address Jackson's ioflupane argument on the merits. Instead, it argued that Jackson's convictions necessarily are "serious drug offenses" under our decision in *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), and the Supreme Court's decision in *Shular v. United States*, 140 S. Ct. 779 (2020).

Jackson disagreed.

Ultimately, the district court agreed with the government. Based on that conclusion, it sentenced Jackson to ACCA's mandated fifteen-year minimum.

Jackson now appeals.

II.

We review de novo whether a state conviction qualifies as a "serious drug offense" for ACCA purposes. *United States v. Conage*, 976 F.3d 1244, 1249 (11th Cir. 2020). When conducting our review, we are "bound by federal law when we interpret terms in the ACCA" and "bound by state law when we interpret elements of state-law crimes." *Id.* (internal quotation marks omitted).

III.

As we have noted, this case requires us to determine whether Jackson's 1998 and 2004 cocaine-related drug convictions qualify as "serious drug offense[s]" for purposes of ACCA. To accomplish that task, we employ the "categorical approach." *Conage*, 976 F.3d at 1250. Under that approach, we look to the state offense of which the defendant was previously convicted and identify the elements of that crime. *Id.* The categorical approach requires that we do not consider the individual facts underlying the defendant's prior conviction—just the elements. *Id.* We then compare these elements of the state offense with the components of ACCA's definition of "serious drug offense." *See id.* A conviction qualifies as a "serious drug offense" only if the state statute under which the defendant was convicted defines the offense as least as narrowly as ACCA's definition of "serious drug offense." *Id.*

In conducting our analysis here, we proceed in three steps. First, we identify the criteria that ACCA uses to define a "serious drug offense" under 18 U.S.C. § 924(e)(2)(A)(ii). Second, we analyze the outer bounds of the elements that would have satisfied Fla. Stat. § 893.13's requirements for a cocaine-related conviction at the time of each of Jackson's convictions. And third, we compare the results of the first two steps to see whether § 893.13's "elements 'necessarily entail one of the types of conduct'" set forth in ACCA's definition of "serious drug offense." *Shular v. United States*, 140 S. Ct. 779, 784 (2020) (emphasis and citation omitted). If so, we count the conviction as a "serious drug offense." But if not, the

conviction does not qualify as a "serious drug offense." Finally, after we conduct our analysis, we explain why the precedent on which the government relies does not alter our conclusion.

A. As relevant here, § 924(e)(2)(A)(ii)'s definition of "serious drug offense" requires satisfaction of three criteria: (1) the state offense must involve distributing, or possessing with intent to distribute (2) "cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the[se] substances," but not ioflupane; and (3) the state offense must have been punishable by a maximum term of imprisonment of at least ten years.

1. The Controlled Substance Act Schedules that were incorporated into ACCA's § 924(e)(2)(A)(ii) definition of "serious drug offense" as of the time Jackson committed his federal-firearm-possession violation are the ones that govern.

Before we can determine what ACCA's § 924(e)(2)(A)(ii) definition of "serious drug offense" "necessarily require[s]," we must first decide the version of the statute we must consult: the one in effect at the times of Jackson's cocaine-related convictions, the one in effect at the time of Jackson's firearm possession for which he is being sentenced, or some other version. We conclude that due-process considerations require us to use the iteration of the Controlled Substances Act Schedules incorporated into §

924(e)(2)(A)(ii)'s definition of "serious drug offense" in effect when Jackson possessed the firearm that undergirds his federal conviction pending before us.

Under the Fifth Amendment, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "[C]onsonant . . . with ordinary notions of fair play and the settled rules of law," due process contemplates criminal laws that "give ordinary people fair notice of the conduct [they] punish[]." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citation and quotation marks omitted). Fair notice allows "the ordinary citizen to conform his or her conduct to the law." *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999). It also ensures uniformity of enforcement by police and courts. *See Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966). And if an individual decides to break the law, anyway, the fair notice that due process requires advises him of the maximum (and depending on the statute, minimum) statutory penalty he can expect, so he knows what he risks before he undertakes his crime. *See Dale v. Haeberlin*, 878 F.2d 930, 934 (6th Cir. 1989). After all, forewarned is forearmed.

To be sure, the Supreme Court has emphasized these principles in cases with vague statutes that did not clearly identify the conduct that violated them or the potential sentence upon conviction. *See, e.g.*, *Johnson*, 576 U.S. at 593. But these concepts apply with at least as much force when a statute does unambiguously delineate the conduct that violates it, and the defendant's conduct does not satisfy that standard.

If they did not, an ordinary person would receive *no notice* (let alone vague notice) that her conduct that falls outside the statute's parameters brings potential criminal consequences. And police and courts would be free to punish individuals for conduct that the law does not criminalize. That type of situation would do violence to the interests of "fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws" that due process protects. *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001); *see also Beckles v. United States*, 137 S. Ct. 886, 892 (2017) (noting that due-process concerns require "statutes fixing sentences" to "specify the range of available sentences with 'sufficient clarity'") (citations omitted).

Given these interests, the form of the Controlled Substances Act Schedules incorporated into § 924(e)(2)(A)(ii)'s definition of "serious drug offense" that was in place on September 26, 2017, when Jackson possessed the firearm here, must govern. That way, Jackson had notice at the time of his firearm-possession offense not only that his conduct violated federal law, but also of his potential minimum and maximum penalty for his violation and whether his prior felony convictions could affect those penalties.

2. The Controlled Substance Act Schedules that were incorporated into § 924(e)(2)(A)(ii) as of the time Jackson possessed the firearm here necessarily required a "serious [cocaine-related] drug offense" not to have involved ioflupane.

As relevant here, ACCA defines a "serious drug offense" as "an offense under State law, involving . . . distributing, or possessing with intent to . . . 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 or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). This definition requires a state crime to meet three criteria: (1) the offense under state law must "involve[e] . . . distributing, or possessing with intent to . . . distribute" (2) "a controlled substance (as defined in section 102 of the Controlled Substances Act . . .)", (3) and the state offense must be punishable by a maximum term of imprisonment of at least ten years. *Id.*

The Supreme Court has already clarified the meaning of the first element. In *Shular*, the Court explained that "involving . . . distributing, or possessing with intent to . . . distribute" refers to "conduct" that the definition "necessarily require[s]." 140 S. Ct. at 785 (alteration omitted). And the third element—concerning the potential penalty for the offense of the prior conviction—is self-explanatory.

That leaves us with the second element: "a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802))." 18 U.S.C. § 924(e)(2)(A)(ii). Section 102, in turn, defines a "controlled substance" to "mean[ ] 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). For its part, on September 26, 2017 (and currently), Schedule II included

the following cocaine-related substances: "cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph." 21 U.S.C. § 812(c), Schedule II(a)(4). But it did not include ioflupane.

Schedule II once included ioflupane (indeed, it did at the times Jackson was convicted of his two cocaine-related prior offenses). When that was the state of affairs, ioflupane was "by definition, a schedule II controlled substance because it is derived from cocaine via ecgonine, both of which are schedule II controlled substances." Schedules of Controlled Substances: Removal of [123 I] Ioflupane from Schedule II of the Controlled Substances Act, 80 Fed. Reg. 54715, 54715.

But it turns out that ioflupane has value in potentially diagnosing Parkinson's Disease. *See id.* at 54716–17. So in September 2015, under 21 U.S.C. § 811[3], the United States Attorney General "remove[d] the regulatory controls and administrative, civil, and criminal sanctions applicable to controlled substances, including

[3] Section 811(a)(2) authorizes the Attorney General to "remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule." *See also* 21 U.S.C. § 812(c), Schedule II(a) (listing controlled substances "[u]nless specifically excepted"); *id.* § 812 Note ("For updated and republished schedules of controlled substances established by this section, see Code of Federal Regulations, Part 1308 of Title 21, Food and Drugs.").

those specific to schedule II controlled substances, on persons who handle or propose to handle [(^{123} I)] ioflupane." *Id.* at 54716. Since then, ioflupane has not been included on any federal drug Schedule. *See* 21 C.F.R. § 1308.12(b)(4)(ii) (2021) ("except[ing]" ioflupane from current Schedule II).

As a result, ioflupane has not been a federally "controlled substance," as defined in 21 U.S.C. § 802, since September 2015. And consequently, also since that time, a cocaine-related offense that involved only ioflupane has not involved a federally "controlled substance" for purposes of § 924(e)(2)(A)(ii).

B. At the times of Jackson's cocaine-related prior offenses for which he sustained convictions under Fla. Stat. § 893.13, the cocaine-related activity § 893.13 criminalized categorically included activity involving ioflupane.

Having identified the components of a "serious drug offense," we next consider the elements of Jackson's prior state cocaine-related offenses under Fla. Stat. § 893.13. When we examine prior state convictions under the categorical approach, we analyze "the version of state law that the defendant was actually convicted of violating." *McNeill v. United States*, 563 U.S. 816, 821 (2011). That is so because § 924(e)(2)(A)(ii)'s definition of "serious drug offense" refers to the term "previous conviction[]" in ACCA's § 924(e)(1) enhancement language. *See* 18 U.S.C. § 924(e)(1) (applying the enhancement to those "who violate[] section 922(g) of this title and ha[ve] three ***previous convictions*** . . . for . . . a serious drug offense, . . . committed on occasions different from one another")

(emphasis added). And "previous conviction[]" is a "backward-looking" term that requires us "to consult the law that applied at the time of that conviction." *McNeill*, 563 U.S. at 820.

That settled, we preface our review of the elements of the Jackson's state cocaine-related convictions with a brief discussion of the distinction between the elements of a crime and the means of committing a single element. *See Mathis v. United States*, 579 U.S. 500, 504–05 (2016). The Supreme Court has explained that "'[e]lements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.'" *Id.* at 504. Alternative means, on the other hand, are different ways to satisfy a single element. *See id.* at 505.

When a statute lists alternative "elements," rather than alternative "means" of satisfying an element, the statute is "divisible." *See id.* In that case, the "modified categorical approach" permits a court to consult a limited class of documents for the sole purpose of ascertaining the elements on which the defendant was actually convicted. *Id.* These documents include a plea agreement, the transcript of a plea colloquy, the charging document, jury instructions, or a "comparable judicial record of this information." *Shepard v. United States*, 544 U.S. 13, 26 (2005).

But when a statute lists alternative means of satisfying a single element, the standard categorical approach governs. *Mathis*, 579 U.S. at 517. So we must consider all listed means of satisfying the elements of the state offense to be able to compare that covered

conduct at the third step of our analysis to ACCA's definition of "serious drug offense."

With this understanding in mind, we turn to the elements of Fla. Stat. § 893.13 at the times of Jackson's convictions. In 1998 and 2004, § 893.13(1)(a) prohibited, as relevant here, the sale of or possession with intent to sell a "controlled substance," as defined in Schedules I through V, Fla. Stat. § 893.02(4). The only element of that crime in question is the meaning of "controlled substance."[4]

In *Guillen v. U.S. Attorney General*, 910 F.3d 1174 (11th Cir. 2018), we held that, under Florida law, each category of substance separately enumerated in Florida's Controlled Substance Schedules was an alternative controlled-substance "element." *See id.* at 1182–83. So for example, sale of marijuana and sale of heroin were different crimes. *See id.*

In contrast, we explained, when a drug schedule identified different formulations of the same category of substance, the alternatives were different "means" of satisfying a particular "controlled substance" element. *See id.* Take the example we pointed to in *Guillen*: Florida courts have held that possession of marijuana is the same crime as possession of hashish, since "marijuana and

[4] The Supreme Court has discussed other elements of § 893.13(1)(a), but they are not relevant here. *See Shular*, 140 S. Ct. at 784 (noting that under Section 893.13(1)(a), "'knowledge of the illicit nature of a controlled substance is not an element,' but lack of such knowledge 'is an affirmative defense'") (quoting Fla. Stat. § 893.101(2)).

hashish were defined as the same controlled substance under Florida law" in that both fell under the definition of "cannabis." *Id.* at 1183 (citing *Retherford v. State*, 386 So. 2d 881, 882 (Fla. 1st DCA 1980)).

Guillen establishes that the enumerated categories of "controlled substances" in Florida's drug Schedules are alternative "elements." For that reason, we may consult *Shepard* documents to identify the "controlled substance" element for which Jackson was convicted. The criminal information submitted in the district court shows that his offenses related to "cocaine."

When Jackson was convicted of his cocaine-related offenses, § 893.03(2)(a)(4) set forth the formulations encompassed within the category of cocaine, according to Florida's Schedule II: "[c]ocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine." That description also included ioflupane.

We know this because of Florida's actions after the United States exempted ioflupane from the federal Schedule II. As of July 1, 2017, Florida followed suit and expressly exempted ioflupane from its Schedule II. 2017 Fla. Sess. Law Serv. Ch. 2017-110 (C.S.H.B. 505).

Since that time, Florida's Schedule II has included "[c]ocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine, ***except that these substances shall not include ioflupane I 123***." Fla.

Stat. § 893.03(2)(a)(4) (2017) (emphasis added). This amended version of the statute expressly excepts ioflupane from qualifying as a Schedule II substance even though it implicitly acknowledges that ioflupane otherwise qualifies as "[c]ocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine." So the amendment confirms that, before the addition of the emphasized phrase—when Jackson committed his § 893.13 offenses—Florida law criminalized sale and possession of ioflupane as a part of its prohibition on the sale and possession of "[c]ocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine." Fla. Stat. § 893.03(2)(a)(4).

Because § 893.03(2)(a)(4) identified "means," not "elements," in 1998 and 2004, when Jackson was convicted under § 893.13(a)(1), a cocaine-related conviction could have been based on any one of these several formulations, including sale of or possession with intent to distribute ioflupane.

C. At the times of Jackson's prior cocaine-related state convictions, Fla. Stat. § 893.13(a)(1)'s controlled-substance element was broader for cocaine-related offenses than ACCA's "serious drug offense" definition, so Jackson's 1998 and 2004 cocaine-related convictions do not qualify as "serious drug offense[s]."

We've sifted through ACCA's definition of "serious drug offense" at the time Jackson unlawfully possessed the firearm for which he was convicted here. We've also sorted out the breadth

of Fla. Stat. § 893.13(1)(a) at the times of Jackson's cocaine-related convictions. Now, we must compare the two to see whether Jackson's prior cocaine-related convictions qualify as "serious drug offense[s]" under ACCA.

Everyone agrees that Jackson's 1998 and 2004 § 893.13 cocaine-related convictions satisfy the first and third criteria of a "serious drug offense": they involve sale or possession with intent to distribute, and they are punishable by at least ten years' imprisonment. So we turn to the second criterion: whether Jackson's convictions involved a "controlled substance."

Because we apply the categorical approach in conducting this comparison, we must presume that Jackson's cocaine-related convictions "rested upon nothing more than the least of the acts criminalized or the least culpable conduct." *United States v. Kushmaul*, 984 F.3d 1359, 1364 (11th Cir. 2021) (internal quotation marks omitted). Here, that means we must assume that Jackson sold and possessed with intent to sell ioflupane. But as we have explained, on September 26, 2017—when Jackson possessed the firearm here—the federal Schedule II expressly excluded ioflupane as a cocaine-related controlled substance. Because ioflupane was not a "controlled substance" under federal law when Jackson committed his § 922(g) firearm-possession offense, his state offenses did not "necessarily entail" the conduct set out in ACCA's "serious drug offense" definition. *See Shular*, 140 S. Ct. at 784. As a result, Jackson's cocaine-related prior convictions do not qualify under ACCA as "serious drug offense[s]."

D. The two *Smith* cases, *Shular*, and *McNeill* do not require the conclusion that Jackson's prior cocaine-related convictions qualify as "serious drug offense[s]."

The government argues that *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014) ("*Smith 2014*"), *United States v. Smith*, 983 F.3d 1213 (11th Cir. 2020) ("*Smith 2020*"), and *Shular*, 140 S. Ct. 779, require the conclusion that Jackson's prior cocaine-related convictions qualify as "serious drug offense[s]." We disagree.

We start with the two *Smith* cases and *Shular*. As relevant here, in *Smith 2014*, we considered whether Fla. Stat. § 893.13(1) was a "serious drug offense" under ACCA's § 924(e)(2)(A)(ii), given that § 893.13(1) included no mens rea element on the illicit nature of the controlled substance. *See Smith 2014*, 775 F.3d at 1268. We concluded it was. A few years later, in *Shular*, the Supreme Court agreed. *See Shular*, 140 S. Ct. at 784–85. It explained that, when evaluating whether a state offense qualifies as a "serious drug offense," we "should ask whether the state offense's elements 'necessarily entail one of the types of conduct' identified in § 924(e)(2)(A)(ii)." *Id.* at 784 (emphasis omitted). Later in 2020, the same issue came before us again. Relying on *Shular* (and *Smith 2014*), we confirmed that Fla. Stat. § 893.13(1)'s lack of a mens rea element does not prevent it from qualifying as a "serious drug offense." *Smith 2020*, 983 F.3d at 1223.

The government argues that the two *Smith* cases bind us under the prior-panel-precedent rule (and *Shular* binds us as Supreme Court precedent) to conclude that any conviction—

including Jackson's 1998 and 2004 ones—under § 893.13(1) satisfies the definition of "serious drug offense" in § 924(e)(2)(A)(ii). Not so.

Under our prior-panel-precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015). True, we have "categorically rejected an overlooked reason or argument exception to the prior-panel-precedent rule." *Id.* But "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

The question of which version of the Controlled Substance Act's drug Schedules governs under § 924(e)(2)(A)(ii)'s definition of "serious drug offense" was not even a twinkle in our eyes or in those of the Supreme Court in the *Smith* cases and in *Shular*. Rather, in those three cases, the issue was whether Fla. Stat. § 893.13(1)'s lack of a mens rea element precluded it from qualifying as a "serious drug offense." At most, the *Smith* panels and the Supreme Court in *Shular* implicitly assumed all the other criteria to satisfy the federal definition of "serious drug offense" were met. But "assumptions are not holdings, *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1239 (11th Cir. 2016). Indeed, the Supreme Court has recognized that where it has "never squarely addressed [an] issue, and ha[d] at most assumed [the issue], [it is] free to address the issue on the merits" in a later case presenting it.

Brecht v. Abrahamson, 507 U.S. 619, 631 (1993); *see also United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The effect of the omission was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point.") (footnote omitted). Our sister circuits adhere to this principle as well. *See, e.g.*, *Fernandez v. Keisler*, 502 F.3d 337, 343 (4th Cir. 2007) ("We are bound by holdings, not unwritten assumptions."); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("In those cases, this court simply assumed that the commerce clause applied, but the issue was never raised or discussed. Such unstated assumptions on non-litigated issues are not precedential holdings binding future decisions."); *United States v. Norris*, 486 F.3d 1045, 1054 (8th Cir. 2007) (en banc) (Colloton, J., concurring in the judgment) (citing cases finding that *sub silentio* holdings, unstated assumptions, and implicit rejections of arguments by prior panel are not binding circuit precedent).

Here, to the extent that *Shular* and *Smith 2020* bind us to reach any conclusion, it's that Jackson's 1998 and 2004 § 893.13(1) cocaine-related convictions cannot qualify as "serious drug offense[s]" under § 924(e)(2)(A)(ii). That is so because *Shular* holds that we "should ask whether the state offense's elements 'necessarily entail one of the types of conduct' identified in § 924(e)(2)(A)(ii)" to determine whether the state offense meets the definition of "serious drug offense." 140 S. Ct. at 784 (emphasis omitted). And conduct involving the sale of or possession with

intent to distribute cocaine-related substances under § 924(e)(2)(A)(ii) does not include conduct involving the sale of or possession with intent to distribute ioflupane.

As for *McNeill*, there, as we have mentioned, the Supreme Court held that, in evaluating whether a prior state conviction qualifies as a "serious drug offense" under § 924(e)(2)(A)(ii), we must consider the offense under state law as it existed at the time of that prior state conviction, not later. 563 U.S. at 820. The Court grounded its analysis in the "previous convictions" language in § 924(e), which necessarily asks a "backward-looking question." *Id.*

But here, we are considering the *federal standard* to which we compare the answer to *McNeill*'s "backward-looking question" of what the defendant's "previous [state] conviction[]" was. And that federal standard comes into play only because of the federal firearm-possession violation to which it is attached—a violation that occurred after the "previous conviction[]." Our question was not before the Court in *McNeill.* And *McNeill*'s reasoning, which relied on the language "previous convictions," has no application here. As the First Circuit has explained, though *McNeill* holds that "the elements of the state offense of conviction are locked in at the time of that conviction," it does "not also hold that ACCA's own criteria for deeming a 'previous conviction[]' with those locked-in characteristics to be a 'serious drug offense,' [a]re themselves also locked in as of the time of the 'previous conviction[].'" *United States v. Abdulaziz*, 998 F.3d 519, 525–26 (1st Cir. 2021) (citations and quotation marks omitted); *see also United States v. Bautista*,

989 F.3d 698, 703 (9th Cir. 2021) ("*McNeill* nowhere implies that the court must ignore current federal law and turn to a superseded version of the United States Code."); *United States v. Hope*, 28 F.4th 487, 505 (4th Cir. 2022) ("*McNeill* does not prohibit us from considering changes to federal law for the purposes of the ACCA.").

In short, no prior precedent precludes our ruling today.

IV.

Because Jackson's cocaine-related § 893.13 offenses do not qualify as "serious drug offenses" under ACCA, we vacate Jackson's sentence and remand to the district court for sentencing without the ACCA enhancement.

VACATED and REMANDED.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

EUGENE JACKSON

JUDGMENT IN A CRIMINAL CASE

Case Number: **1:19-CR-20546-KMW(1)**

USM Number: **20683-104**

Counsel for Defendant: **Julie Holt**

Counsel for United States: **Hillary Irvin**

THE DEFENDANT:

☒	pleaded guilty to count(s)	1
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☐	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
18:922G.F Possession Of Firearm and Ammunition By Convicted Felon/18:922G.F	08/29/2019	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 21, 2021
Date of Imposition of Judgment

Signature of Judge

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

10/21/21
Date

DEFENDANT: EUGENE JACKSON
CASE NUMBER: 1:19-CR-20546-KMW(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

180 months as to Count 1, time of imprisonment to be calculated from the date defendant was arrested on 11/5/2019. This sentence shall run concurrent - -nunc pro tunc- - to the sentence in Case 18-008975-CF-10A.

☒ The court makes the following recommendations to the Bureau of Prisons:
Defendant be designated to a facility in or as close to South Florida as possible.
Defendant be provided substance abuse and mental health treatment.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: EUGENE JACKSON
CASE NUMBER: 1:19-CR-20546-KMW(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: EUGENE JACKSON
CASE NUMBER: 1:19-CR-20546-KMW(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.flsp.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: EUGENE JACKSON
CASE NUMBER: 1:19-CR-20546-KMW(1)

SPECIAL CONDITIONS OF SUPERVISION

Anger Control / Domestic Violence: The defendant shall participate in an approved treatment program for anger control/domestic violence. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third-party payment.

Mental Health Treatment: The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third-party payment.

Permissible Search: The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment: The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third-party payment.

Unpaid Restitution, Fines, or Special Assessments: If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: EUGENE JACKSON
CASE NUMBER: 1:19-CR-20546-KMW(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$100.00	$.00	$.00		

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the schedule of payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of **$.00**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.
** Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: EUGENE JACKSON
CASE NUMBER: 1:19-CR-20546-KMW(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payments of $100.00 due immediately, balance due

It is ordered that the Defendant shall pay to the United States a special assessment of $100.00 for Count 1, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Payment is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:
FORFEITURE of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement. The United States shall submit a proposed Order of Forfeiture within three days of this proceeding.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.