

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL ANTHONY CONAGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the “serious drug offense” definition in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(A)(ii), incorporates the federal drug schedules in effect at the time of the federal firearm offense (as the Third, Fourth, Eighth, and Tenth Circuits have held), or the federal drug schedules in effect at the time of the prior state drug offense (as the Eleventh Circuit has held).¹

¹ This question is also presented in *Jackson v. United States*, Case No. 22-6640. Mr. Conage respectfully asks this Court to hold his petition pending its consideration of *Jackson* and then dispose of it as appropriate.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)

United States v. Conage, Case No. 6:17-cr-28-PGB-GJK-1.

United States Court of Appeals (11th Cir.)

United States v. Conage, No. 17-13975.

TABLE OF CONTENTS

Question Presented	i
Related Proceedings	ii
Table of Authorities.....	iv
Petition for a Writ of Certiorari	1
Order and Opinion Below.....	1
Jurisdiction	1
Relevant Statutory Provision.....	1
Statement of the Case	2
Reasons for Granting the Writ.....	5
The circuits are split on what version of the federal controlled-substances schedules are incorporated in the ACCA’s “serious drug offense” definition	5
Conclusion.....	7
Appendices	
Eleventh Circuit’s Opinion	A
Eleventh Circuit’s Order Denying Rehearing En Banc	B

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Conage v. United States</i> , 346 So. 3d 594 (Fla. 2022).....	3
<i>United States v. Brown</i> , 47 F.4th 147 (3d Cir. 2022).....	6
<i>United States v. Conage</i> , 976 F.3d 1244 (11th Cir. 2020).....	3
<i>United States v. Conage</i> , 50 F.4th 81 (11th Cir. 2022)	4, 5
<i>United States v. Hope</i> , 28 F.4th 487 (4th Cir. 2022)	6
<i>United States v. Jackson</i> , 36 F.4th 1294 (11th Cir. 2022)	3, 4
<i>United States v. Jackson</i> , 55 F.4th 846 (11th Cir. 2022)	5, 6
<i>United States v. Perez</i> , 46 F.4th 691 (8th Cir. 2022).....	6
<i>United States v. Williams</i> , 48 F.4th 1125 (10th Cir. 2022)	6
Statutes	
28 U.S.C. § 1254(1)	1
18 U.S.C. § 924(e)(2)(A)(ii)	i, 1
21 U.S.C. § 802.....	2

PETITION FOR A WRIT OF CERTIORARI

Michael Anthony Conage respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

ORDER AND OPINION BELOW

The Eleventh Circuit's published opinion affirming Mr. Conage's sentence is provided in Appendix A. The Eleventh Circuit's order denying Mr. Conage's petition for rehearing en banc is provided in Appendix B.

JURISDICTION

The Eleventh Circuit issued its published opinion on September 30, 2022, and it denied Mr. Conage's petition for rehearing en banc on December 22, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(A)(ii), the term "serious drug offense" means, in relevant part: "[A]n 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.”

STATEMENT OF THE CASE

1. In April 2017, a jury convicted Mr. Conage of possessing a gun as a felon the year before (count one) and possessing with intent to distribute hydromorphone (count two).

In anticipation of sentencing, Probation prepared a presentence investigation report, in which it recommended that the district court sentence Mr. Conage under the ACCA based on three prior Florida cocaine convictions from 2004, 2005, and 2006. The 2004 conviction was for possession of cocaine with intent to sell or deliver, the 2005 conviction was for both possession of cocaine with intent to sell and sale of cocaine, and the 2006 conviction was for trafficking in 28 to 200 grams of cocaine.

Mr. Conage objected to the determination that his Florida conviction for trafficking in cocaine qualified as a “serious drug offense” under the ACCA. The district court, however, overruled his objection and imposed the mandatory-minimum sentence under the ACCA of 180

months' imprisonment on both counts to run concurrently.²

2. On appeal, Mr. Conage challenged whether his trafficking conviction under Fla. Stat. § 893.135 was a valid ACCA predicate offense, and the Eleventh Circuit certified a question to the Florida Supreme Court asking how Florida law defines the term "purchase" in its drug trafficking statute. *United States v. Conage*, 976 F.3d 1244 (11th Cir. 2020).

3. On August 25, 2022, the Florida Supreme Court answered the certified question, holding that for purposes of Florida's drug trafficking statute, a completed purchase requires proof that the defendant both gave consideration for, and obtained control of, a trafficking quantity of illegal drugs. *Conage v. United States*, 346 So. 3d 594 (Fla. 2022).

4. On June 10, 2022, while *Conage* was pending in the Florida Supreme Court, the Eleventh Circuit issued its opinion in *United States v. Jackson*, 36 F.4th 1294 (11th Cir. 2022). In *Jackson*, the Eleventh Circuit held that (1) the ACCA's "serious drug offense" definition

² Notably, at sentencing, the district court initially stated that it would impose a sentence of 100 months' imprisonment because the guideline range was "[d]raconian," but it amended the sentence to 180 months to comply with the ACCA's mandatory minimum.

incorporates the federal drug schedules in effect at the time the defendant commits the federal offense, and (2) applying that understanding, certain Florida cocaine convictions, like Mr. Conage’s, are not ACCA predicate offenses. *See* 36 F.4th at 1297. Specifically, the Eleventh Circuit held that for federal gun offenses committed after September 2015, pre-July 2017 Florida cocaine convictions are not “serious drug offense[s].” *Id.* at 1299–1304.

5. On September 8, 2022, the *Jackson* panel sua sponte vacated its opinion and ordered supplemental briefing on whether district courts should consult the federal drug schedules at the time of the prior state conviction rather than the time of the federal firearm offense.

6. On September 14, 2022, Mr. Conage moved to stay his appellate proceedings pending the issuance of the mandate in *Jackson*. In his motion, he explained that if *Jackson* is ultimately favorable to him, he would not be subject to the ACCA enhancement, regardless of the definition of “purchase” in Florida’s drug trafficking statute.

7. On September 30, 2022, the Eleventh Circuit issued a published opinion in this case, holding that “[g]iven the Florida Supreme Court’s response . . . Conage’s challenge to his sentence fails.” *United*

States v. Conage, 50 F.4th 81, 82 (11th Cir. 2022). In a footnote, the Eleventh Circuit stated that “Conage’s recent Motion to Stay Appellate Proceedings is DENIED.” *Id.* at 82 n.1.

8. On November 21, 2022, Mr. Conage petitioned the Eleventh Circuit to rehear his case en banc, arguing that his cocaine convictions were not “serious drug offenses” in light of *Jackson*.

9. On December 13, 2022, the Eleventh Circuit issued a revised opinion in *Jackson*, reversing itself and holding that the 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. *United States v. Jackson*, 55 F.4th 846, 854–61 (11th Cir. 2022).

10. On December 22, 2022, the Eleventh Circuit denied Mr. Conage’s petition for rehearing.

REASONS FOR GRANTING THE WRIT

The circuits are split on what version of the federal controlled-substances schedules are incorporated in the ACCA’s “serious drug offense” definition.

This Court’s review is warranted to resolve a circuit conflict over what version of the federal drug schedules are incorporated in the

ACCA’s “serious drug offense” definition. Consistent with Mr. Conage’s position, four circuits have held that the “serious drug offense” definition incorporates the schedules in effect at the time of the federal firearm offenses. *United States v. Williams*, 48 F.4th 1125 (10th Cir. 2022); *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022); *United States v. Brown*, 47 F.4th 147 (3d Cir. 2022); *United States v. Hope*, 28 F.4th 487 (4th Cir. 2022).³ The Eleventh Circuit, however, has held that the “serious drug offense” definition incorporates the schedules in effect at the time of the defendant’s prior state drug offense. *United States v. Jackson*, 55 F.4th 846 (11th Cir. 2022).

As explained in the petition for a writ of certiorari in *Jackson*, No. 22-6640, this Court’s review is warranted on this important and recurring question that has divided the circuits. Indeed, if Mr. Conage

³ In *Hope*, the Fourth Circuit held the “serious drug offense” definition incorporates that federal drug schedules in effect at the time of the federal sentencing rather than the time the federal offense was committed. 28 F.4th at 504–05. In *Brown*, however, the Third Circuit held that the schedules in effect when the federal offense was committed govern, not the schedules in effect at the time of the federal sentencing. 47 F.4th at 148, 155. As a practical matter, this distinction will rarely make a difference. It made no difference in *Williams* or *Perez*, and it makes no difference here.

had been sentenced in the Third, Fourth, Eighth, or Tenth Circuit, rather than in the Eleventh Circuit, he would have faced a maximum term of ten years in prison on his federal firearm conviction rather than the ACCA's 15-year mandatory minimum.

CONCLUSION

For the above reasons, Mr. Conage respectfully requests that this Court hold his petition for a writ of certiorari pending its consideration of *Jackson*, No. 22-6640, and then dispose of it as appropriate. Alternatively, Mr. Conage respectfully requests that the Court grant his petition.

Respectfully submitted,

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