No.

In the Supreme Court of the United States

RICHIE LEE EDMONDS, III, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prior state conviction for drug distribution qualifies as a "controlled substance offense" under U.S.S.G. § 4B1.2(b), when the state statute of prior conviction included substances that, at the time of defendant's sentencing for the instant offense, were legal under both federal and state statutes.

PARTIES TO THE PROCEEDINGS BELOW

Richie Lee Edmonds, III, was one of four defendants charged in a multi-count indictment. Three appeals were consolidated for briefing and submission by the United States Court of Appeals for the Sixth Circuit. In addition to Mr. Edmonds, the other appeals below were *United States v. Keenan Dunigan*, No. 21-1549 (6th Cir. May 28, 2021), and *United States v. Jennifer Lynne Davis*, No. 21-1588 (6th Cir. June 3, 2021).

RELATED PROCEEDINGS

United States of America v. Richie Lee Edmonds, III, No. 1:20-cr-29-2 (W.D. Mich. May 19, 2021)

United States of America v. Richie Lee Edmonds, III, No. 21-1564 (6th Cir. November 15, 2022)

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The unpublished *per curiam* opinion of the Sixth Circuit Court of Appeals is reproduced at App., *infra*, 2a-10a. The opinion is unpublished but appears at 2022 WL 3867560. The Sixth Circuit Court of Appeals' order denying *en banc* review is reproduced at App., *infra*, 12a.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2022. A timely petition for *en banc* review was filed on September 27, 2022. The petition was denied on November 15, 2022. The time to file this petition was 90 days afterwards, on February 13, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

UNITED STATES CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINE PROVISIONS INVOLVED

18 U.S.C. § 924(e)(2) states:

> As used in this subsection— (A) the term "serious drug offense" means— (i) 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; or (ii) 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[.]

U.S.S.G. § 4B1.1(a) states:

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

U.S.S.G. § 4B1.2(b) states:

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

INTRODUCTION

This case arises out of the application of the career offender sentencing enhancement in the Sixth Circuit, in a manner that is in direct conflict with the majority of circuit courts to address the issue. The result is that defendants in the Sixth Circuit are subject to substantially higher sentencing Guidelines than if they had been sentenced in a different jurisdiction.

On January 8, 2021, Richie Lee Edmonds, III, pleaded guilty to possession with intent to distribute fentanyl and heroin. Mr. Edmonds was classified as a career offender in the Sixth Circuit Court of Appeals, such that his advisory Guideline range was 188 to 235 months. However, if Mr. Edmonds had been sentenced in the First, Second, Fourth, Ninth, or Tenth Circuit Courts of Appeals, he would not have been classified as a career offender, and his advisory Guideline sentencing range would have been 37 to 46 months.

This drastic sentencing disparity was caused by a difference in how Courts of Appeals determine whether prior state drug offenses qualify as "controlled substance offense(s)" for the purposes of the career offender sentencing enhancement under U.S.S.G. § 4B1.2(b), or "serious drug offense(s)" under the Armed Career Criminal Act ("ACCA"). The majority of Courts of Appeals to address the issue use a "time-of-sentencing" approach. In this approach, courts compare the substances prohibited by the state statute of conviction to the federal drug schedules in existence at the time of sentencing for the instant offense. If federal and state law legalized substances that were previously prohibited under the state law of conviction, the prior offense

would not qualify as a "controlled substance offense." Conversely, three circuits, the Third, the Sixth, and the Eleventh, elected to use a "time-of-prior conviction" approach, through which courts apply the federal drug schedules that existed when a defendant was convicted of their previous offense. Under the time-of-prior conviction approach, a prior state drug offense would qualify as a "controlled substance offense" even if the state statute encompassed substances not included in current federal drug schedules.

In Mr. Edmonds' case, hemp had been legalized under *both* federal and state statutes at the time of his federal sentencing. However, the district court applied the time-of-prior conviction approach to hold that Mr. Edmonds' prior Michigan convictions for delivery of marijuana were "controlled substance offenses" under U.S.S.G. § 4B1.2(b), such that he was classified as a career offender. Consequently, his sentencing Guidelines range was more than five times as long as it would have been had he been sentenced in the majority of other circuits.

This Court should resolve this issue now. Mr. Edmonds' case is not unique. Every year, thousands of defendants are labeled career offenders. Like Mr. Edmonds, many of these defendants would face substantially lower sentences if they were sentenced in a different jurisdiction because their predicate offenses would not be considered "controlled substance offenses."

This Court has not yet reviewed this exact issue. It recently denied a petition involving a similar issue in *Guerrant v. United States*, 142 S. Ct. 640 (2022). Justices Sotomayor and Barrett supported the denial on the basis that it was "the

responsibility of the Sentencing Commission to address [the circuit split] to ensure fair and uniform application of the Guidelines." *Id.* at 640-641, citing *Braxton v. United States*, 500 U.S. 344, 348 (1991)." However, the Justices noted with concern, that "unresolved divisions among the Courts of Appeals can have *direct and severe consequences for defendants' sentences*." *Id.* at 641 (emphasis added).

Subsequent to *Guerrant*, other federal Courts of Appeals held that their interpretation of "controlled substance offense(s)" in U.S.S.G. § 4B1.2(b) is commensurate with the interpretation of "serious drug offense" in the Armed Career Criminal Act ("ACCA") at 18 U.S.C. § 924(e). ACCA is a different federal statute that triggers enhanced penalties based on prior drug convictions. *See, e.g., United States v. Lewis*, 2023 WL 411362, at *6 (3d Cir. Jan. 26, 2023); *United States v. Mongan*, 2022 WL 2208325 (8th Cir. June 21, 2022); *United States v. Jackson*, 2022 WL 303231 (8th Cir. Feb. 2, 2022); and *United States v. Clark*, 46 F.4th 404, 409 (6th Cir. 2022). The courts relied on ACCA jurisprudence and decisions in other statutory enhancement contexts. The instant issue therefore is not purely a guidelines issue, but a question of statutory interpretation. Therefore, only this Court can conclusively construe the law in this area.

Moreover, although the Sentencing Commission is soliciting comments on one issue in *Guerrant* (whether U.S.S.G. § 4B1.2(b) includes predicate state offenses that criminalize conduct outside of federal offenses), the issue presented in the instant case (how the same provision applies when both state and federal law have decriminalized conduct since the time of the prior offense) is distinct. Thus, the

Commission's ruling on its proposals will not resolve the issue presented in this petition. Nor will other proposed amendments resolve the issue presented in this case.

This Court should grant certiorari and hold in favor of the time-of-sentencing approach that is used in most circuits. A time-of-sentencing approach is consistent with the text of the Guidelines and their interpretive principles. From a policy and due process perspective, the time-of-sentencing approach is preferable because it upholds Congress's ability to reform criminal law, and ensures that defendants are not subject to excessive sentencing enhancements for conduct—such as possession of hemp—that Congress no longer deems culpable or dangerous.

STATEMENT

I. Background – The Categorical Approach

The United States Sentencing Guidelines define a "controlled substance offense" as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance … or the possession of a controlled substance … with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b). The Guidelines do not further define "controlled substance."

To determine whether a state offense qualifies as a "controlled substance offense," courts apply the "categorical approach," under which they "do not consider the actual conduct that led to [the defendant's] conviction under the [] statute at issue; [but], instead, [] look to the *least of the acts criminalized* by the elements of that statute. *United States v. Havis*, 927 F.3d 382, 385 (6th Cir. 2019), (citing *Moncrieffe v. Holder*, 569 U.S. 184, 190-191 (2013)) (emphasis in original). "If the least culpable conduct falls within the Guidelines' definition of 'controlled substance offense,' then the statute categorically qualifies as a controlled substance offense. *Havis*, 927 F.3d at 385. "But if the least culpable conduct falls outside that definition, then the statute is too broad to qualify." *Id.*

This case turns on the application of the categorical approach in instances wherein a defendant has been convicted of more than one drug offense, and state and federal drug schedules have changed from the time of one or more of the defendant's prior drug offenses such that the statutes of prior conviction are broader than the

federal statute in existence at the time of defendant's present sentencing. In these circumstances, courts pick either a time-of-prior conviction or a time-of-sentencing approach to determine whether a defendant's prior conviction is a "controlled substance offense" for the purposes of applying the "career offender" sentencing enhancement. The time-of-prior-conviction approach requires courts to apply the drug schedules that existed when a defendant was convicted of their previous offense, whereas the time-of-sentencing approach applies the schedules in existence at the time of a defendant's sentencing in the instant case. The time-of-prior-conviction approach renders the defendant's previous drug offenses as predicate offenses for the "career offender" sentencing enhancement, whereas the time-of-sentencing approach does not, resulting in substantially disparate sentencing guideline ranges depending on the approach chosen by the sentencing court.

II. The Instant Prosecution

On January 8, 2021, Richie Lee Edmonds, III, pleaded guilty to possession with intent to distribute fentanyl and heroin. Over defense objection, the district court concluded that Mr. Edmonds' two prior convictions under Michigan law for delivery of marijuana constituted "controlled substance offenses" for purposes of applying the career offender enhancement under U.S.S.G. § 4B1.1(b)(2). The court's ruling increased Mr. Edmonds' base offense level from 20 to 34 and escalated his criminal history category from IV to VI, thereby increasing his advisory sentencing range to 188 to 235 months. Without the career offender enhancement, his advisory sentencing range would have been 37 to 46 months.

III. The Appeal

On appeal, Mr. Edmonds argued that his prior marijuana convictions were not "controlled substance offenses" under U.S.S.G. § 4B1.2(b), because the prior Michigan statutes under which he had been convicted had included hemp in its definition of "marijuana," but hemp had been legalized under both state and federal law prior to his sentencing in the instant case.

The sole question on appeal was whether the sentencing court should have considered the list of controlled substances as it presently existed (time-of-sentencing) or as it existed at the time of Mr. Edmonds' prior state convictions for marijuana delivery (time-of-prior-conviction). At the time of Mr. Edmonds' appeal, the time-of-sentencing approach was the settled case law of the other Circuits that had decided the issue, as well as the holdings of the Sixth Circuit in two unpublished cases. *See United States v. Williams*, 850 F. App'x 393, 401 (6th Cir. 2021); *United States v. Perry*, No. 20-6183, 2021 WL 3662443 (6th Cir. Aug. 18, 2021).

Following a joint motion filed by Mr. Edmonds and the Government, the panel agreed to hold the case in abeyance until a different panel of this court addressed the same issue in *United States v. Clark*, 46 F.4th 404 (6th Cir. 2022). The *Clark* panel later adopted the time-of-conviction rule, holding that the defendant's prior marijuana offenses were "controlled substance offenses." *Id.* at 406. The *Clark* panel justified its departure from the settled federal caselaw of other federal Courts of Appeals by opining that a time-of-prior-conviction approach was supported by the Guideline text and the Supreme Court's decision in *McNeill v. United States*, 563 U.S.

816 (2011). The panel also cited out-of-circuit immigration cases. *Id*. The panel in the instant case issued an unpublished opinion denying Mr. Edmonds' appeal on the basis that his argument was "foreclosed" by *Clark*. App, *infra*, at 6a-7a.

Mr. Edmonds sought rehearing en banc. Pet. For Reh'g En Banc. He contended that the time-of-prior-conviction rule was not supported by the text of the U.S.S.G. § 4B1.2(b), existing Sixth Circuit decisions, or the decisions issued by other Courts of Appeals on the issue. Mr. Edmonds also argued that this Court's decision in *McNeill* and the extra-circuit immigration cases likewise did not support a time-of-prior conviction rule. Mr. Edmonds' petition for rehearing was summarily denied. App, *infra*, at 12a.

REASONS FOR GRANTING THE PETITION

I. There is an Acknowledged Circuit Split on this Issue

Three federal courts of appeal have rejected the time-of-prior-conviction approach in the context of defining a controlled substance under the "career offender" provision, holding that the correct point of comparison for the categorical approach is the *time of sentencing (or conviction) for the instant offense*, not the prior state offense. *United States v. Abdulaziz*, 998 F.3d 519, 531 (1st Cir. 2021) (time-of-sentencing); *United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021) (time-of-sentencing); *United States v. Gibson*, 55 F.4th 153 (2d Cir. 2022) (time-of-sentencing or time of instant conviction). Three other circuits made the same determination in the context of evaluating whether an offense is a "serious drug offense" under the Armed Career Criminal Act ("ACCA") sentencing enhancement,18 U.S.C. § 924(e). *United States v.*

Williams, 48 F.4th 1125 (10th Cir. 2022); *United States v. Hope*, 28 F.4th 487, 506-507 (4th Cir. 2022); *United States v. Perez*, 46 F.4th 691, 699 (8th Cir. 2022).

But three other federal courts of appeals have held in favor of using a *time-of-prior-conviction* approach in varied contexts: one in applying the 'career offender' enhancement, as in the instant case; another in applying the ACCA enhancement; and the third in the context of increasing a base offense level for a conviction for unlawful possession of a firearm under 18 U.S.C. § 922(g). *Clark*, 46 F.4th at 408-411 (6th Cir. 2022) (U.S.S.G. § 4B1.2(b)); *United States v. Jackson*, 55 F.4th 846, 861 (11th Cir. 2022) (ACCA); *United States v. Lewis*, 2023 WL 411362, at *3 (3d Cir. January 23, 2023) (18 U.S.C. § 922(g)).

This has created an acknowledged split among the federal courts of appeal. *See Williams*, 48 F.4th at 1141 (10th Cir. 2022).

II. The Circuit Split Creates Substantial Sentencing Disparities for Many Similarly Situated Defendants Across Circuits

The time-of-prior-conviction rule adopted by the Sixth Circuit in this case is squarely at odds with the approach taken by all three circuit courts to have addressed the issue in the application of the "career offender enhancement" under U.S.S.G. § 4B1.2, as well as the three courts to resolve it in the ACCA context. As a result, similarly situated defendants face drastically different sentences for the same conduct—solely depending on the federal circuit in which they are located at sentencing.

The differences in resulting sentencing outcomes is staggering. In Mr. Edmonds' case, the sentencing range under the career offender enhancement was

five times the length of the range without it. Data collected by the United States Sentencing Commission shows that the average sentence length for an offense under U.S.S.G. § 2D1.1 is ***141*** months when the career offender enhancement is applied, versus only ***70*** months without it.[1] When the data is limited to sentences for heroin and fentanyl trafficking convictions, the average sentence is ***55*** months without the enhancement, versus ***124*** months with it.[2] These sentencing disparities affect thousands of defendants: the career offender enhancement was applied to 1,246 defendants in 2021 alone.[3]

This Court should not permit this continued disparity in sentencing for similarly situated defendants based solely on which federal court of appeals they are sentenced in. Such arbitrary deprivations on personal liberty directly contravene Congress's express intentions. *See* 18 U.S.C. § 3553(a)(6) (instructing sentencing judges on "the need to avoid unwarranted sentence disparities among defendants with similar records"); 28 U.S.C. § 991(b)(1)(B) (stating that the Sentencing Commission must set policies to "avoid[ ] unwarranted sentencing disparities among defendants with similar records").

The disparate application of the enhancement fails also offends basic notions of fairness, justice, and due process. The existence of different interpretations of the term "controlled substance offense" fails to provide constitutionally required fair notice; produces inexplicably inconsistent results among similarly situated

[1] U.S. Sent'g Comm'n, *Interactive Data Analyzer* (Feb. 8, 2023), https://ida.ussc.gov/analytics/saw.dll?Dashboard.
[2] *Id.*
[3] *Id.*

defendants; and invites more severe sentences for a class of persons whose conduct involves a drug that the legislature has deemed does not pose a great risk. Supreme Court review is needed. U.S. Sup. Ct. R. 10(a).

III. This Court Should Resolve This Issue Now

Just over one year ago, this Court considered a petition for writ of certiorari on an issue similar to the one presented in this case—whether predicate offenses under U.S.S.G. § 4B1.2(b) include state offenses that criminalize conduct that is not criminalized under federal law. *Guerrant*, 142 S. Ct. 640 (2022). In denying the petition, Justices Sotomayor and Barrett explained that it was "the responsibility of the Sentencing Commission to address [the circuit split] to ensure fair and uniform application of the Guidelines," and they pointed to *Braxton*, 500 U.S. at 348 as precedent for this principle of non-intervention. However, both Justices cautioned that the "unresolved divisions among the Courts of Appeals can have *direct and severe consequences for defendants' sentences*." *Id*. at 640-641 (emphasis added).

Since the denial in *Guerrant*, it has become clear that (a) *Braxton* does not foreclose this Court's review because this is not only a Guidelines issue, but also of statutory interpretation, and (b) even after assembling a quorum, the Sentencing Commission's proposals will not resolve the issue presented in this case. Accordingly, this Court should grant review.

A. This is Not a Pure Guidelines Issue

As noted, federal courts of appeals use the same analysis to determine whether to use a time-of-prior conviction or time-of-sentencing approach under the Guidelines

(U.S.S.G. § 4B1.2(b)) and federal statutes such as ACCA. *Compare Clark*, 46 F.4th at 408-411 (6th Cir. 2022) (U.S.S.G. § 4B1.2(b)); *Williams*, 48 F.4th 1125 (10th Cir. 2022) (ACCA). The inextricability of the analysis is evidenced by the Sixth Circuit's holding in *Clark*, which interpreted the term "controlled substance offense" in the "career offender" context by relying on *McNeill*, 563 U.S. at 816, regarding the definition of "serious drug felony" under the ACCA statute. *Clark*, 46 F. 4th at 408-410 (6th Cir. 2022). In fact, the Sixth Circuit also justified its holding by summarily citing decisions from Courts of Appeals that analyzed other **statutory** sentencing enhancements as well, including the "three strikes" provision under 18 U.S.C. § 3559(c)(1) and enhancements for prior drug convictions under 21 U.S.C. § 841(b)(1)(B). *Clark*, 46 F. 4th at 410-11 (6th Cir. 2022).

Likewise, the Eighth Circuit and the Third Circuit also relied on *McNeill*'s ACCA analysis in decisions addressing the interpretation of the phrase "controlled substance offense(s)" in U.S.S.G. § 4B1.2(b). *United States v. Jackson*, 2022 WL 303231 (8th Cir. Feb. 2, 2022); *United States v. Mongan*, 2022 WL 2208325 (8th Cir. June 21, 2022); *United States v. Lewis*, 2023 WL 411362, at *6 (3d Cir. Jan. 26, 2023). The reliance on statutory analysis jurisprudence by the appellate courts in these decisions, which were issued subsequent to *Guerrant*, signifies that the issue is the correct application of the categorical approach in both statutory and Guidelines frameworks.

B. The Sentencing Commission's Proposals Will Not Address the Issue

On January 12, 2023, the Commission proposed an amendment that would address an issue presented in *Guerrant*. However, the proposal would not resolve the issue presented in the instant case. Specifically, the Commission's proposed solutions to determining whether controlled substance offenses include state offenses that are broader than federal ones under U.S.S.G. § 4B1.2(b) are to either: 1) tie the definition to the substances prohibited under the Controlled Substances Act ("CSA"), or 2) tie the definition to the CSA and applicable state law.[4] If adopted, each of these proposed amendments would resolve the issue of whether state or federal law applies generally, but they would not resolve the issue presented in this case—*which version* of law applies when both state and federal law has been altered since the defendant's prior conviction(s).

Additionally, the Commission's proposal to eliminate the categorical approach in analyzing prior convictions does not resolve the issue in this case either.[5] Adopting this proposal would directly conflict with language of the "career offender" statute, which specifically requires a prior *conviction* for the enhancement to apply. 28 U.S.C. § 944(h). The Commission's proposal would also violate this Court's well-established precedent holding that the use of the phrase "conviction" requires the application of a categorical approach. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690 (2013), *see also*

[4] U.S. Sent'g Comm'n, Proposed Amendments to the Sentencing Guidelines (Preliminary), www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230112_prelim_RF.pdf, at 72-73 (last visited Feb. 8, 2023).

[5] *Id.* at 148-154.

Kawashima v. Holder, 132 S. Ct. 1166, 1172 (2012). Thus, irrespective of whether the Commission's proposals are adopted, the question of how federal sentencing courts should define the phrase "controlled substance offense" will require resolution by this Court.

IV. This Court Should Adopt the Time of Sentencing Approach Set Forth by the Majority of Courts

The federal courts of appeals who adopted the time-of-sentencing approach—that is, the First, Second, Fourth, Ninth, and Tenth Circuits—have rejected the time-of-conviction approach on both legal and policy bases. From a legal perspective, these courts have held that a time-of-prior conviction approach is inconsistent with the text of the Guidelines, the well-established principle that the Guidelines in effect at sentencing must be applied, and principles of due process. From a policy perspective, these courts hold that a time-of-prior conviction approach unduly punishes defendants for conduct that Congress no longer deems culpable, undermining Congress's ability to reform criminal law.

Despite this authority, the Third, Sixth, and Eleventh Circuits have endorsed a time-of-conviction approach. However, these decisions are based on a misunderstanding of the Guideline text, incorrectly apply this Court's decision in *McNeill*, and rely on immigration cases that are irrelevant to the issue presented here.

A. The Time-of-Prior Conviction Approach is Flawed from a Legal and Policy Perspective

Most Circuits have rejected the time-of-conviction approach as a matter of law for several reasons.

First, federal criminal sentencing is underpinned by the bedrock principle that courts must "ordinarily employ the Guidelines in effect at sentencing, rather than the Guidelines in effect either at the time of the defendant's conviction of the offense for which he is being sentenced or at any earlier time." *Abdulaziz*, 998 F. 3d at 523; *see also* U.S.S.G. § 1B1.11(a).

Second, the text of U.S.S.G. § 4B1.2(b) is understood to incorporate the federal drug schedules as they exist at the time of sentencing. *Abdulaziz*, 998 F. 3d at 523; *see also Gibson*, 55 F.4th at *8 ("How odd it would be if the district court, in a criminal case referring to 'controlled substances,' were not at least implicitly required to consult the [Controlled Substance Act] schedules that the Guidelines use.").

Third, "applying the federal definition in effect at the time of the federal offense is most consistent with fundamental principles of due process" because defendants would be on notice when they commit the federal crime that they have a prior enhancement qualifying offense on their record. *Williams*, 48 F.4th at 1142.

Moreover, the Circuits have emphasized that important policy considerations caution against using a time-of-prior-conviction approach to determine whether a defendant is a career offender. As the Ninth Circuit noted, it would be "illogical to conclude 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; *see also Abdulaziz*, 998 F.3d at 528 (1st Cir. 2021) ("a guideline's enhancement for a defendant's past criminal conduct … is reasonably understood to be based in no small part on a judgment about how problematic that past conduct is when viewed as of the time of the sentencing itself."); *Gibson*, 55 F.4th at 165 (2d Cir. 2022) (if defendant were classified as a career offender using a time-of-prior-conviction approach, "he would serve not just the five years warranted for his present federal crimes, but an additional 10-plus years' imprisonment on account of the state-law-prohibited conduct for which he has already been punished by the state and which is no longer federally prohibited.").

As the First Circuit noted, the risk of punishing defendants for past conduct that is no longer deemed illegal is especially unjust, given that the Sentencing Guidelines already provide other avenues through which defendants' sentences are enhanced for the past conduct. *Abdulaziz*, 998 F. 3d at 528. Furthermore, using past federal drug schedules to determine present sentencing enhancements "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; *see also Perez*, 46 F.4th at 699 (8th Cir. 2022) ("[a]pplying now-superseded federal drug definitions would also undermine Congress's ability to revise federal criminal law as it deemed appropriate.").

B. The Sixth Circuit's Outlier Decision Misunderstands the Guideline Text and Misapplies Inapposite Supreme Court and Immigration Case Law

The Sixth Circuit justified its deviation from both published decisions in other circuits and its own unpublished decisions on the basis that a time-of-prior-conviction approach is supported by 1) the Guideline text, 2) this Court's decision in *McNeill v. United States*, 563 U.S. 816 (2011), and 3) several immigration cases. *Clark*, 46 F.4th at 408-411; *see also Jackson*, 55 F.4th at 2022 WL 17588240 at 854-861 (explaining that *McNeill* mandates a time-of-conviction approach under ACCA). None of these justifications are persuasive.

i. The Guideline Text Does Not Support the Time-of-Prior-Conviction Rule

Without disputing the long-standing principle that courts must apply the Guidelines in effect at the time of sentencing, *see Bautista*, 989 F. 3d 698 at 702 (citing U.S.S.G. § 1B1.11), the Sixth Circuit nevertheless opined that the language of U.S.S.G. §§ 4B1.1 and 4B1.2(c) requires courts to use the controlled substance schedules from the time of a defendant's prior conviction. *Clark*, 46 F.4th at 408-409.

The Sixth Circuit developed and resolved its entire textual analysis in just one paragraph:

> The time-of-conviction approach flows from the Guidelines' text. Section 4B1.1 states that a career offender is a person who has "at least two *prior* felony convictions" for a crime of violence or controlled substance offense. U.S.S.G. § 4B1.1(a) (emphasis added). Section 4B1.2(c), which immediately follows the definition of "controlled substance offense," further defines "two prior felony convictions" to require that the defendant's commission of the instant offense be "*subsequent to* sustaining at least two felony convictions" for a crime of violence or controlled substance offense. *Id.* § 4B1.2(c) (emphasis added). The words

> "prior" and "subsequent to" direct the court's attention to events that occurred in the past. Thus, the Guidelines language 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.

This perfunctory analysis does not warrant such a strident departure from the Guidelines' bedrock time-of-sentencing principle. The Sixth Circuit's analysis is excessively generalized and fails to take into account the important context set forth in the Guidelines. Both this principle and the plain text of the Guideline demonstrate that the term "prior" in section 4B1.1 stands for the unremarkable rule that, for a felony to be counted towards career offender status, the defendant must have committed the felony before the present offense. The phrase "subsequent to" in section 4B1.2(c) further explains that the instant offense cannot be counted as one of the two "prior" convictions for the purposes of section 4B1.1. Neither section defines the term "controlled substance." The terms "prior" and "subsequent to" cannot be reasonably understood to provide guidance about what drug schedules courts should use. The other courts of appeals held that the term "controlled substance" in U.S.S.G. § 4B1.2(b) refers to "a substance listed in the Controlled Substances Act ('CSA')." *Bautista*, 989 F.3d at 702; *see also Abdulaziz*, 998 F. 3d at 523.

ii. This Court's Decision in *McNeill* Did Not Resolve the Issue Presented in this Case

In *McNeill*, this Court reviewed whether a defendant's previous North Carolina drug-trafficking convictions qualified as a "serious drug offense" under the ACCA. The ACCA statute requires that the offense be punishable by a "maximum

sentence of ten years or more." 18 U.S.C. § 924(e)(2)(A)(i); *McNeill*, 563 U.S. at 817. The defendant argued that his prior convictions were not serious drug offenses, because although his convictions were punishable by ten years at the time of his conviction, the state of North Carolina had since reduced the minimum to under ten years. *Id*. at 818. This Court disagreed, holding 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*.

As explained by several other courts of appeals, *McNeill* is not instructive on whether courts should use time-of-conviction approach to determine whether a defendant's prior conviction is a "controlled substance offense" under the Guidelines. *McNeill* involved a "a subsequent change in the prior [state] offense of conviction—and not the federal definition to which it is compared." *Williams*, 48 F.4th at 1142-1143. As such, it only stands for the uncontroversial principle that "the elements of the state offense of conviction are locked in at the time of that conviction." *Abdulaziz*, 998 F.3d at 525 (citations omitted).

The Sixth Circuit in *Clark* "reads *McNeill* too broadly[.]" *Williams*, 48 F.4th at 1143, n 12. The determination of what conduct was criminalized by the state statute of conviction is only the first step of the categorical approach. As the Tenth Circuit recognized, *McNeill* "has no bearing" on the second step of the approach, which is to determine "what version of *federal law* serves as the point of comparison for the prior state offense, which is the question here." *Williams,* 48 F.4th at 1143. *See also Bautista*, 989 F.3d at 703 ("*McNeill* nowhere implies that the court must ignore

current federal law and turn to a superseded version of the United States Code."); *Abdulaziz*, 998 F.3d at 527 ("[T]he government's reliance on *McNeill* here is misplaced."); *Hope*, 28 F.4th at 505 ("*McNeill* does not prohibit us from considering changes to federal law for the purposes of the ACCA."); *Perez*, 46 F.4th at 700 ("[T]he reasoning in *McNeill* regarding state law does not translate to this issue concerning the federal drug statute.").

iii. Immigration Decisions Applying the Time-of-Prior-Conviction Approach are Inapposite

The Sixth Circuit further relied on several immigration cases to justify its time-of-conviction approach. None are binding or persuasive.

The Sixth Circuit cited *Mellouli v. Lynch*, 575 U.S. 798 (2015) for its assertion that courts have adopted a time-of-prior-conviction approach "[i]n the immigration realm[.]" In *Mellouli*, this Court examined a statute authorizing the removal of "[a]ny alien ... convicted of a violation of ... any law or regulation … relating to a controlled substance (as defined in section 802 of Title 21)." *Mellouli*, 575 U.S. at 811 (quoting 8 U.S.C. § 1227(a)(2)(B)(i)). The Supreme Court relied on the Kansas drug schedules from the time of the defendant's conviction to determine what controlled substances the state conviction related to, and the Kansas drug schedules included substances not included in the federal schedules. *Id*. at 812-813.

"But, much like in *McNeill*, the Court did not consider—because it had no occasion to consider—the issue of what temporal version of the *federal* drug schedules was relevant in determining the answer to the question that is analogous to the one presented here: what constitutes a "controlled substance" under 8 U.S.C. §

1227(a)(2)(B)(i)." *Abdulaziz*, 998 F.3d at 530 (emphasis in original). Like *McNeill*, *Mellouli* did not address the issue of how to apply the categorical approach when there is a change in federal law, because there was no change in federal law.

Additionally, the Sixth Circuit's reliance on *Doe v. Sessions* is misplaced for several reasons. 886 F.3d 203, 210 (2d Cir. 2018). Factually, *Doe* is distinct because the petitioner was challenging a prior *federal* conviction for an aggravated felony involving a controlled substance. *Id*. at 206. Thus, the case did not involve a comparison of the elements of parallel state and federal offenses. *Id*. at 207-208. Rather, the issue in *Doe* turned on the simple inquiry of "whether that conviction was for an aggravated felony," which was a "question [that] could only be answered by looking at the law that was actually applied." *Gibson*, 55 F.4th at 167.

Moreover, the justifications presented in *Doe* are persuasive in the context of deportation but not criminal sentencing. As the Second Circuit noted in distinguishing *Doe*, "an alien removal proceeding is not a criminal prosecution." *Gibson*, 55 F.4th at 166-167. The *Doe* court noted that relying on the federal drug schedules at the time of conviction was advantageous because it would provide "both the Government and 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 'pending criminal charges may carry a risk of adverse immigration consequences.'" *Doe*, 886 F.3d at 210. This justification is valid in immigration matters because of the close temporal nexus (instantaneous) between the conviction and immigration consequences. In the immigration context, "[a] time of removal rule would make

dispensing of [advice on immigration consequences] practically impossible." *Williams*, 48 F.4th at 1144. However, "there is no similar concern in [non-immigration criminal matters] given both the gap in time that necessarily exists between the prior conviction and any consequence . . . that is attributable to it and the highly contingent nature of that consequence, as it results only if a defendant commits a new crime." *Abdulaziz*, 998 F.3d at 530-31; *see also Bautista*, 989 F.3d at 704 (holding that a time-of-prior conviction rule is "limited to removal in the immigration context"). As the Second Circuit emphasized when distinguishing its own precedent and rejecting a time-of-prior conviction rule, "*Doe* did not involve more than one set of convictions, did not require comparison of the laws of two sovereigns, and did not concern punishment." *Gibson*, 55 F.4th at 167. For all these reasons, the immigration cases are neither applicable nor persuasive here.

This Court's guidance is needed. Until this Court resolves the issue, thousands of defendants, with convictions for the same conduct will be subjected to substantially different sentences, depending on where the federal sentencing takes place. Under the circumstances, the petition for writ of certiorari should be granted.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: February 13, 2023

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 33

I hereby certify that this petition for writ of certiorari complies with the type-volume limitation set forth in Rule 33(2). This petition contains 26 pages and uses 12-point Century Schoolbook proportionally spaced type.

Respectfully submitted,

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APPENDIX A

Opinion and Judgment August 30, 2022

United States v. Richie Edmonds, III

Case No. 21-1564

NOT RECOMMENDED FOR PUBLICATION
File Name: 22a0358n.06

Nos. 21-1564/1588

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 30, 2022
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RICHIE LEE EDMONDS, III (21-1564); JENNIFER LYNNE DAVIS (21-1588), Defendants-Appellants.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN OPINION

Before: GIBBONS, ROGERS, and MURPHY, Circuit Judges.

ROGERS, Circuit Judge. The defendants in this case each participated in a conspiracy to distribute heroin and fentanyl in Michigan. After defendant Keenan Dunigan was arrested in connection with that distribution, Dunigan began directing the other defendants to continue operating the drug operation. Defendants Richie Edmonds, III and Sierra Singleton-Moore retained possession of the supply of heroin and continued to provide defendant Jennifer Davis with quantities of heroin to sell. After the Government conducted several controlled buys, the four defendants were indicted and each pleaded guilty pursuant to a plea agreement. Edmonds and Davis appealed, challenging different aspects of their respective sentences. Edmonds argues that the district court improperly determined that he was a career offender based on his prior controlled-substance offenses. Davis asserts that she was entitled to a minor-role reduction to her offense level and that she was improperly held responsible for 250 grams of heroin purportedly pictured

and described in a text from Dunigan. For the reasons set forth below, the district court properly rejected both Edmonds's and Davis's arguments.

In September 2019, law enforcement executed a search warrant at Keenan Dunigan's residence that resulted in the seizure of a firearm, ammunition, cash, and 45.35 grams of a mixture of heroin and fentanyl. Dunigan was charged in state court in connection with that search and was released on bond. At least as early as December 5, 2019, Dunigan began residing with Jennifer Davis at her residence in Battle Creek, Michigan, and he enlisted her to deliver heroin to one of his regular customers, Travis Thompson. Thompson bought heroin from Davis on approximately ten occasions in quantities of about .25 to .50 grams at a time. Near the end of 2019, Dunigan moved out of Davis's Battle Creek residence, and in January 2020, he began staying at Richie Edmonds and Sierra Singleton-Moore's residence in Kalamazoo, Michigan.

Dunigan continued to sell heroin after he began residing with Edmonds and Singleton-Moore. In the early morning hours of January 14, 2020, Dunigan had been exchanging text messages with Davis when he sent her a message saying "I'm broke now I just re up I bought a quarter brick" along with an accompanying picture of what appeared to be a large quantity of heroin in a plastic bag on the floor of Edmond's and Singleton's residence. Davis did not directly respond to the message concerning the drugs, but she continued texting Dunigan.

During the early hours of January 14, 2020, Dunigan sent text messages to customers to see if they wanted to purchase heroin. One of those customers, P.S., purchased heroin from Dunigan, and subsequently passed away from fentanyl ingestion after using the heroin mixture purchased from Dunigan.

Dunigan also communicated with Thompson on January 14, 2020, to coordinate a heroin sale. Dunigan entered Thompson's vehicle for the exchange, and law-enforcement officers

subsequently conducted a traffic stop on the vehicle where they recovered heroin and $60. Thompson told the officers that he had met Dunigan to purchase $60 of heroin, and Dunigan was arrested. During the arrest, Dunigan managed to slip out of his handcuffs and drove away in a law-enforcement vehicle. Officers pursued Dunigan and successfully arrested him after tasing him.

After Dunigan had been taken to the county jail, he began making phone calls to Davis, Edmonds, and Singleton-Moore to direct them on how to continue the drug business. Dunigan first called Edmonds to inform Edmonds that he would need to take over the drug operation, and Dunigan explained details of the drug operation, such as drug pricing and how to cut the heroin. Dunigan instructed Edmonds to keep the heroin at his residence and to provide quantities for Davis to sell in Battle Creek. On another jail call the next day, however, Dunigan suggested that it may make more logistical sense for Davis to hold the stash of heroin and for Edmonds to drive to Davis because Edmonds had a more reliable car. In this situation, Davis would have the supply, and Edmonds would travel to get 20–30 grams from Davis at a time.

While in jail, Dunigan continued to discuss heroin sales with Edmonds, Singleton-Moore, and Davis. On January 15, 2020, Thompson showed up at Davis's house while Davis was on the phone with Dunigan, and Thompson purchased heroin from Davis both at that time and again later that day. The next day, Dunigan spoke with Davis about several heroin customers. Using a confidential source, officers also conducted several controlled purchases of heroin from Singleton-Moore. After conducting multiple controlled buys, law enforcement obtained a search warrant for Edmonds and Singleton-Moore's residence. At that residence, officers recovered $1,900, 12.92 grams of a mixture of heroin and fentanyl, a digital scale, and sandwich baggies. Edmonds, Singleton-Moore, and Davis were subsequently arrested and charged with the

distribution of heroin and fentanyl and participating in a conspiracy to distribute heroin and fentanyl.

Davis and Edmonds each pleaded guilty to their respective distribution charges pursuant to plea agreements. Neither of their plea agreements contained an agreement as to the appropriate sentence, and both defendants had contested sentencing hearings.

Edmonds's final presentence investigation report (PSR) recommended that he be classified as a career offender based on one prior crime-of-violence conviction and two prior controlled-substance convictions. At his sentencing, Edmonds argued that his Michigan convictions for delivery/manufacture of marijuana did not qualify as controlled-substance offenses under USSG §4B1.1(a). The district court overruled Edmonds's objection to the classification as a career offender because Edmonds's argument was supported only by non-binding precedent. Edmonds was sentenced to 120 months' imprisonment. Edmonds timely appeals.

Davis's final PSR attributed 252.5 grams of heroin to Davis based on her selling Thompson 2.5 grams of heroin and the photograph she received from Dunigan purportedly depicting 250 grams of heroin. At the sentencing hearing, a Government witness explained that Dunigan's referring to a "quarter brick" in his text to Davis was slang for a quarter of a kilogram of heroin. Davis objected to the drug quantity, arguing that she never personally saw the bag of alleged heroin and questioning whether Dunigan actually possessed such a quantity. She also argued that she should receive a minor-role reduction pursuant to USSG §3B1.2. The district court rejected both arguments. First, the district court concluded that Davis was involved "just as extensively as Mr. Edmonds and Ms. Singleton-Moore in the distribution of these drugs." Second, the district court concluded that the Government had shown by a preponderance of the evidence that Davis should

be held responsible for 252.5 grams of heroin. The district court then sentenced Davis to 57 months' imprisonment, the low end of her guideline range. Davis timely appeals.

Edmonds appeals the district court's determination that he had two prior controlled-substance offenses, but his argument on appeal is foreclosed by our recent published decision in *United States v. Clark*, 21-6038, 2022 WL 3500188, __ F.4th __ (6th Cir. 2022). In short, Edmonds argues that his prior convictions occurred when the definition of marijuana included hemp and, now that both Michigan and federal law exclude hemp from the definition of marijuana, his convictions cannot be considered controlled-substances offenses using the categorical approach. This argument depends on whether USSG §4B1.1(a) requires application of the controlled-substance schedules in effect at the time of the federal sentencing to determine that a prior conviction qualifies as a controlled-substance offense. In *Clark*, we squarely rejected that argument and concluded that §4B1.1(a) requires courts to determine whether a prior conviction qualifies as a controlled-substance offense based on the controlled-substance schedules in effect at the time of the prior conviction rather than at the time of federal sentencing. *Clark*, 2022 WL 3500188, at *2–8. This disposes of Edmonds's only argument on appeal. The district court did not err in determining that two of Edmonds's prior convictions qualified as controlled-substance offenses under §4B1.1(a), and the district court therefore properly classified Edmonds as a career offender.

Turning to Davis's appeal, she first challenges the district court's refusal to apply a minor-participant reduction to her offense level under USSG §3B1.2. Because a preponderance of the evidence supported the district court's determination that Davis played an average role in the conspiracy, the district court did not err in refusing to apply the minor-participant reduction to Davis's offense level. The district court relied on evidence that Davis was aware that Dunigan

was distributing heroin out of her residence in December 2019 and that Davis operated the distribution of heroin mainly to the conspiracy's Battle Creek customers. Further, the district court relied on evidence that Davis expressed a willingness to run the heroin operation and that Dunigan told Edmonds that all the heroin could be moved to Davis's house if necessary. This evidence supports the determination that Davis played a role in the conspiracy similar to that of Edmonds and Singleton-Moore. A minor participant under §3B1.2 "is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal." USSG §3B1.2 cmt. n.5. The district court's factual determination must be upheld unless clearly erroneous, *United States v. Randolph*, 794 F.3d 602, 616 (6th Cir. 2015), and the district court did not clearly err when it declined to apply the minor-participant reduction in §3B1.2 to Davis's offense level.

Davis offers two factual arguments that she was a minor participant, but both are undermined by the evidence presented at the sentencing hearing. First, Davis argues that she played a limited role related to "distributions that she made when she was directed to make them by codefendant Dunigan." This argument is undermined by the fact that Davis told Dunigan in one of the jail calls that Edmonds had been asking her for advice about the business, and Davis told Dunigan "[y]ou showed me enough. I paid attention. Just know that. If I could tell you anything, just know that." Thus, the Government presented evidence that Davis was knowledgeable about how to run the drug operation and that her role went beyond simply completing heroin sales as directed. Second, Davis argues that she was a minor participant because her residence was not searched for drugs. The logic of this argument—that Davis played a minor role because the heroin was not actually stored at her house—is undermined by the evidence that Dunigan trusted Davis enough to consider storing the heroin at Davis's residence. Thus, the fact

that Davis did not end up holding the supply of heroin does not suggest that Davis played a minor role in the conspiracy. In sum, Davis has not shown that the district court clearly erred when it declined to apply a minor-participant reduction to Davis's offense level.

Davis next argues that the district court erred by holding her responsible for 250 grams of heroin. Because the Government presented evidence that Davis knew Dunigan had acquired 250 grams of heroin to distribute, the district court did not clearly err by attributing that amount of heroin to Davis. The final PSR indicated that Davis had been helping distribute heroin both before and after Dunigan had been arrested. Further, at the sentencing hearing, the Government presented text messages from Dunigan to Davis indicating that Davis had actual knowledge of Dunigan's purchase of 250 grams of heroin to distribute. A "'defendant may be sentenced based upon quantities of drugs attributable to other members of a conspiracy, provided the district court finds that those quantities were known . . . or were reasonably foreseeable' to the defendant." *United States v. Tisdale*, 980 F.3d 1089, 1097 (6th Cir. 2020) (quoting *United States v. Moss*, 9 F.3d 543, 552 (6th Cir. 1993)). The district court could therefore attribute the 250 grams of heroin to Davis because the evidence showed that Davis participated in Dunigan's drug distribution scheme and Davis knew Dunigan had purchased 250 grams of heroin to distribute.

Davis contends that she should not be held responsible for the 250 grams of heroin for two reasons, but neither is persuasive. First, Davis asserts that she never possessed the 250 grams of heroin. This contention is immaterial because, as discussed above, Davis can be held responsible for quantities of heroin that were reasonably foreseeable to her. Moreover, by participating in Dunigan's distribution of heroin, it would have been reasonably foreseeable to Davis that Dunigan purchased the heroin so that it could be distributed by the members of the conspiracy.

Second, Davis asserts that the photograph and text messages are not reliable evidence that Dunigan actually purchased 250 grams of heroin to be distributed by the members of the conspiracy, and Davis suggests that she doubted Dunigan purchased that much heroin. The photograph, however, appears to depict a large quantity of heroin that Dunigan himself identified as a "quarter brick," which the Government witness explained is slang for a quarter of a kilogram of heroin. Davis acknowledges that the background of the photograph matches the tile in Edmonds's residence where Dunigan was staying. Thus, the evidence supports the conclusion that Dunigan actually possessed the contents depicted in the photograph. Further, the evidence strongly suggests that the contents in the photograph were heroin because Dunigan texted customers about buying heroin right after he sent the photograph to Davis, and the Government's witness testified that the color of the heroin sold to P.S. that night was consistent with the heroin depicted in the photograph. The evidence was sufficient to show by a preponderance of the evidence that Dunigan had purchased 250 grams of heroin when he texted Davis. The Government need only prove the amount of drugs attributed to Davis by a preponderance of the evidence, *United States v. Hernandez*, 227 F.3d 686, 697 (6th Cir. 2000), and we review the district court's determination of drug quantity for clear error, *United States v. Smith-Kilpatrick*, 942 F.3d 734, 746 (6th Cir. 2019). The district court here did not clearly err by attributing 250 grams of heroin to Davis during her sentencing.

For the foregoing reasons, the district court's judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 21-1564/1588

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

RICHIE LEE EDMONDS, III (21-1564); JENNIFER LYNNE DAVIS (21-1588)

Defendants - Appellants.

FILED
Aug 30, 2022
DEBORAH S. HUNT, Clerk

Before: GIBBONS, ROGERS, and MURPHY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED in its entirety.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

Order Denying Petition for Rehearing En Banc November 15, 2022

United States v. Richie Edmonds, III

Case No. 21-1564

No. 21-1564

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 15, 2022
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHIE LEE EDMONDS, III,

Defendant-Appellant.

O R D E R

BEFORE: GIBBONS, ROGERS, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk