NO. _____

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

JAMES CLARK, III,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

---

# PETITION FOR WRIT OF CERTIORARI

---

Doris A. Randle-Holt
Federal Public Defender for the
Western District of Tennessee
By: M. Dianne Smothers
Assistant Federal Public Defender
Attorneys for Petitioner
200 Jefferson, Suite 200
Memphis, Tennessee 38103
E-mail: Dianne_Smothers@fd.org
(901) 544-3895

## QUESTION PRESENTED FOR REVIEW

Whether prior drug convictions inclusive of substances that have since been decontrolled can be used to impose present day federal sentencing enhancements.[1]

[1] The same question is presented in Altman, et al. v. United States (S. Ct. No. 22-5877) (response requested Nov. 16, 2022), and a related question is presented in Brown v. United States (S. Ct. No. 22-6389) (docketed Dec. 23, 2022) and Jackson v. United States (S. Ct. No. 22-6640) (docketed Jan. 23. 2023).

## LIST OF PARTIES

All of the parties to the proceeding are listed in the style of the case.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases** **Page**

## Statutory Authority

## Other Authority

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

---

# PETITION FOR WRIT OF CERTIORARI

---

Petitioner, James Clark, III, respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINION BELOW

The Sixth Circuit opinion is available electronically at United States v. Clark, 46 F.4th 404, 407 (6th Cir. 2022). It is also submitted herewith in Appendix A.

## JURISDICTION

On August 18, 2022, a three-judge panel in the Sixth Circuit Court of Appeals entered its opinion in United States v. Clark, 46 F.4th 404 (6th Cir. 2022). Mr. Clark then petitioned for en banc review, which was denied on October 28, 2022. See United States v. Clark, No. 21-6038, 2022 WL 17411290 (6th Cir. Oct. 28, 2022). In accordance with Supreme Court Rule 13.5, Mr. Clark filed an application for extension of time in which to file a petition for certiorari. The application was granted by the Honorable Justice Kavanaugh, extending the time to file a petition for certiorari until March 27, 2023. (See Clark v. United States, No. 22A587, Appl. granted Jan. 3, 2023). This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

## STATUTES, ORDINANCES AND REGULATIONS INVOLVED

### 1. 28 U.S.C. § 994

The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and (2) has previously been convicted of two or more prior felonies, each of which is— (A) a crime of violence; or (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

28 U.S.C. § 994(h).

### 2. The Career Offender Guideline

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

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

USSG § 4B1.1.

### 3. The Guidelines' definition of "controlled substance offense"

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.

USSG § 4B1.2(b).

## STATEMENT OF THE CASE

In a variety of ways, the federal sentencing laws call for an increase in a defendant's sentence if he or she has prior qualifying drug convictions. For example, the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), the "three strikes" law, 18 U.S.C. § 3559(c), the federal drug trafficking statutes, 21 U.S.C. §§ 841, 851, and the United States Sentencing Guidelines, all require courts to determine whether a defendant's prior drug conviction requires a higher statutory or Guideline sentencing range. This requires application of the categorical approach. Just as it was not enough in Taylor v. United States, 495 U.S. 575 (1990), for state courts to call a crime a "burglary" for it to qualify as a predicate for the ACCA, it is not enough for state courts to call a crime a drug offense to find it meets the generic definition of a federal sentencing enhancement provision. A comparison between the elements of the state conviction and the generic definition of the federal sentencing enhancement provision is still required. Various disagreements have emerged between circuits on how to apply the categorical approach in these circumstances. Until recently, however, the circuit courts were all in agreement that only substances that were controlled at the time of federal sentencing—when the enhancement was being applied—could justify a sentencing enhancement. Whether looking to state or federal drug laws, courts all agreed that the generic definition of any federal sentencing enhancement provision did not include decontrolled substances.

### A. There is a growing circuit split.

This serene situation came to an end when the Third, Sixth and Eighth Circuit Courts of Appeal created a circuit split on the definition of "controlled substance offense" under the Guidelines, exacerbating a similar circuit split brewing over the meaning of "serious drug offense" under the ACCA. Here, the Sixth Circuit Court of Appeals acknowledged that a Tennessee state

drug conviction included a substance no longer controlled under federal or Tennessee law. Still, the circuit determined that convictions for decontrolled substances qualified as controlled substance offenses using a time-of-prior-conviction rule, resulting in the court applying an increased advisory Guideline range.

For its holding, the court relied primarily upon this Court's decision in McNeill v. United States, 563 U.S. 816 (2011). The circuit courts are now almost evenly split in that other circuits have recognized that McNeill is not on point. These circuits instead find that McNeill explains only how to determine the elements and penalty for the prior State conviction. United States v. Gibson, 55 F.4th 153 (2d Cir. 2022); United States v. Williams, 48 F.4th 1125 (10th Cir. 2022); United States v. Hope, 28 F.4th 487 (4th Cir. 2022); United States v. Abdulaziz, 998 F.3d 519 (1st Cir. 2021); United States v. Bautista, 989 F.3d 698, 705 (9th Cir. 2021). Whether looking to the ACCA or the Guidelines, these courts have applied the fundamental time-of-sentencing doctrine to find that delisted substances are not "controlled substances." See 18 U.S.C. § 3553(a)(4); USSG § 1B1.11.

This timing question is central to drug over-breadth arguments that defendants are routinely advancing and winning nationwide. The arguments arise in various legal contexts, they affect numerous state drug offenses, and they determine decades of federal prison time. Mr. Clark respectfully requests this Court to grant his petition for certiorari to address this growing circuit split.

### B. Mr. Clark received a substantial increase to his advisory Guidelines range for having two prior convictions for a controlled substance offense inclusive of a now decontrolled substance.

Mr. Clark pled guilty to a drug crime in federal court, and he received an enhanced sentence because he was designated a career offender under the Guidelines based on two prior marijuana

convictions. In the time between Mr. Clark's previous drug crimes and the current one, Tennessee and the federal government amended their respective drug schedules to narrow the definition of marijuana by excluding hemp. Mr. Clark contested his career offender designation, arguing that his prior marijuana offenses were not categorically controlled substance offenses because hemp had since been delisted from both the federal and state drug schedules and no longer qualified as marijuana. He asserted that courts should rely on the definition of "controlled substance offense" as it exists at the time of federal sentencing, not at the time of the prior state conviction. In other words, he urged a time-of-sentencing versus a time-of-prior-conviction rule. This argument was rejected by the Sixth Circuit, which expressly adopted a "time-of-prior-conviction rule." Clark, 46 F.4th at 408.

Although the court relied in part on the text of the Guidelines, it relied most heavily on McNeill. It acknowledged that, "[a]lthough McNeill interpreted the ACCA and here the panel interprets the Guidelines, the cases are remarkably similar," and "McNeill definitively held that the time [of the state drug] conviction is the proper reference under the ACCA." Id. at 409. According to the Sixth Circuit: "Under McNeill's logic, courts must define the term ['controlled substance offense'] 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." Id. at 411. "This approach," the court continued, "tracks 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." Id. Although Mr. Clark relied on contrary decisions from the First, Fourth, Ninth, and Eleventh Circuits, as well as an earlier unpublished Sixth Circuit opinion, the court declined to follow them because they "did not adequately engage with McNeill's reasoning." Id.; see id. at 412-415. The

court reiterated that McNeill "determined that the proper way to define the term ['serious drug offense'] is by referencing state law at the time of conviction." Id. at 414. The court also rejected Mr. Clark's urging to apply the rule of lenity because the Guideline's text is ambiguous. Id. at 415.

Other judges in the Sixth Circuit have before and since disagreed with Clark. In a recent concurrence, two Judges opined that, "[i]n the absence of controlling precedent" in Clark, they would follow "the decisions of the five other circuits that have determined that the time-of-prior-conviction rule is not appropriate." Baker, 2022 WL 17581659, at *2 (Moore, J., with whom Stranch, J. joined, concurring). After summarizing the decisions of the First, Third, Fourth, Ninth, and Eleventh Circuits, they concluded that "[t]he collective judgment of other circuits that the time-of-prior-conviction rule is incorrect further convinces [us] that Clark was wrongly decided" and should be reconsidered en banc. Id. Notably, however, rehearing in Clark had already been denied. See Clark, 2022 WL 17411290, at *1. The petition for en banc rehearing in Baker was also denied. See United States v. Baker, No. 22-5110, 2023 U.S. App. LEXIS 1763, at *2 (6th Cir. Jan. 23, 2023).

## REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision below creates a square conflict of authority with at least three other circuits on an important and recurring question of federal sentencing law. This case is an excellent vehicle to resolve that conflict.

### I. THE CIRCUITS ARE SQUARELY DIVIDED

#### A. The Circuits are divided 3-3 on the Guidelines question presented.

A circuit split has developed regarding the potential application of McNeill when analyzing prior drug convictions under the categorical approach. The Sixth Circuit, joined by two others, has held that McNeill requires courts to rely on superseded statutes to define "controlled substance offense" under the Guidelines. This position has been rejected by three other circuits.

The Ninth Circuit was the first to reject the government's reliance on McNeill in Bautista. That court explained: "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." Bautista, 989 F.3d at 703. In the Ninth Circuit's view, "McNeill nowhere implies that the court must ignore current federal law and turn to a superseded version of the United States Code." Id. "Indeed," it continued, "it would be 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. Such a view would prevent amendments to federal criminal law from affecting federal sentencing and would hamper Congress' ability to revise federal criminal law." Id.

The First Circuit followed the Ninth Circuit in Abdulaziz. Citing Bautista, as well as an unpublished Sixth Circuit decision, the First Circuit agreed that "McNeill simply had no occasion to address" or "answer" the federal-law question "because there had no relevant change in that

case to [that] criteria" in McNeill. Abudlaziz, 998 F.3d at 526 & n.3. While McNeill "plainly required a backwards-looking inquiry into the elements of and penalties attached to the prior offense at the time of its commission," that inquiry "simply does not bear on the answer to the interpretive question that we confront here." Id. at 527; see id. at 530. The First Circuit further observed that a recidivist sentencing "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 reviewed as of the time of the [federal] sentencing itself." Id. at 528.

In Gibson, the Second Circuit joined the rejection of the government's reliance on McNeill. It explained that McNeill "did not present the same question" because there, "the change was one in state law, not, as here, a change of federal law." Gibson, 55 F.4th at 162. The court also observed that the state-law change in McNeill "only lessened the severity of the punishment," but "it did not make a substantive change as to what acts were lawful or unlawful." Id. And "a defendant's culpability and dangerousness plainly change in the eyes of federal law when the conduct for which he was previously convicted under state law is no longer unlawful under federal law." Id. Finally, the court emphasized, "in enacting the CSA, Congress launched a panorama of controlled substances that it plainly envisioned would be ever-evolving, not an unchanged array engraved in stone." Id. And those schedules "had no relevance to [the] state-law crime. There was no suggestion of any relevance of the CSA to Gibson until he was to be sentenced in 2020 for his present federal" offenses. Id. at 165. Adopting a time-of-prior-conviction rule would thus effectively "punish Gibson for the crime he committed in 2002," even though it "is no longer a federal crime." Id.

A closer look at McNeill illustrates why these courts rejected its applicability under these circumstances. In McNeill, this Court examined whether a prior conviction could serve as a

predicate offense under the ACCA, which defines "serious drug offense" to include only prior convictions "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(i). At the time of McNeill's priors, the state statutory maximum was ten years. However, by the time of sentencing on the subsequent federal offense, the state legislature had reduced the maximum to less than ten years, raising the issue of which timeframe the sentencing court should consider. This Court held, "that a federal sentencing court must determine whether 'an offense under State law' is a 'serious drug offense' by consulting the 'maximum term of imprisonment' applicable to a defendant's previous drug offense at the time of the defendant's state conviction for that offense." Id. at 825. Therefore, McNeill did not address how to define the sentencing enhancement predicate – serious drug offense. It only addressed how to define a defendant's prior conviction. The majority of circuits have held that McNeill does not stand for the proposition that the district court should look to superseded statutes to determine what substances are within the generic definition of a federal sentencing enhancement provision. As the First Circuit explained: McNeill did not also hold that ACCA's own criteria for deeming a "previous conviction[s]" with those locked-in characteristics to be "a serious drug offense . . . were themselves also locked in at the time of the "previous conviction[]." In fact, McNeill simply had no occasion to address that question. Abdulaziz, 998 F.3d at 526. Abdulaziz noted that McNeill analyzed how to define "previous conviction," and "the word 'conviction[ ]' in the guideline is not the word that matters here, given that we are trying to identify this guideline's criteria for what constitutes 'a controlled substance offense.' Nor does McNeill suggest otherwise." Id. The Ninth Circuit also rejected that McNeill was binding, noting that the question here "bears little resemblance to the [question posed] in McNeill." Bautista, 989 F.3d at 703. The court determined

that "McNeill nowhere implies that the court must ignore current federal law and turn to a superseded version of the United States Code." Id. at 705.

In contrast the previously discussed circuits, the Third and Eighth Circuits, like the Sixth, have held that McNeill requires courts to use the federal schedules from the time of the prior drug offense. 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)), pet. for cert. filed sub. nom., Altman, et al. v. United States (No. 22-5877) (response requested Nov. 16, 2022), the Eighth Circuit adopted a time-of-prior-conviction rule. In that circuit, the substance need only be controlled under state (not federal) law. See Guerrant v. United States, 142 S. Ct. 640, 640–41 (2022) (Sotomayor, J., respecting the denial of certiorari) (urging the Commission to resolve this split). Given that state-law focus, the Eighth Circuit thought McNeill required a time-of-prior-conviction rule. Yet, that Circuit has held that McNeill applies differently in the ACCA context. See United States v. Perez, 46 F.4th 691, 703 & n.4 (8th Cir. 2022).

Likewise in United States v. Lewis, No. 21-2621, 2023 WL 411362 (3d Cir. Jan. 26, 2023), the Third Circuit adopted a time-of-prior-conviction rule. That circuit not only disagreed with Gibson's focus on the federal drug schedules and the time-of-sentencing rule, but agreed the Eighth Circuit that the result would be different in the ACCA context. See United States v. Brown, 47 F.4th 147, 153 (3d Cir. 2022), pet. for cert. filed (No. 22-6389, docketed Dec. 23, 2022).

**B. The score is 4-1 in the ACCA context.**

The Third, Fourth, Eighth, and Tenth Circuits have unanimously held in published opinions that the ACCA's "serious drug definition" in § 924(e)(2)(A)(ii) incorporates the federal drug schedules in effect at the time of the defendant's federal firearm offense, not the schedules in effect at the time of the prior state drug offense. Starting with the most recent of those decisions, the

Tenth Circuit reached that conclusion in Williams. It acknowledged that "[s]ix of our sister circuits have recently considered this same timing issue and all but one have resolved it" in that manner. Williams, 48 F.4th at 1138 (citing cases). "Consistent with the First, Fourth, Eighth, Ninth, and Eleventh Circuits,[2] we hold a defendant's prior state conviction is not categorically a 'serious drug offense' under the ACCA if the prior offense included substances not federally controlled at the time of the instant federal offense. We thus reject the government's time-of-prior-state-conviction rule and adopt a time-of-instant-federal-offense comparison." Id. In doing so, the Tenth Circuit reviewed the other circuit decisions on that issue, both in the ACCA and Guidelines context. It explained that "[t]he overwhelming majority of circuits to have considered the issue agree the correct point of comparison is the time of the instant federal offense—not the prior state offense." Id. at 1139; see id. at 1139–41. The Tenth Circuit rejected the government's reliance on McNeill as "unpersuasive," for it was "discussing a subsequent change in the prior offense of conviction—and not the federal definition to which it is compared." Id. at 1142–43. On that point, the Tenth Circuit noted that five other circuits had agreed that McNeill had "no bearing on what version of federal law serves as the point of comparison for the prior state offense." Id. at 1143. It noted that the Sixth Circuit had reached the contrary conclusion in a Guidelines case, but "[t]he 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." Id. at 1143 n.12.

The Eighth Circuit reached the same conclusion in Perez. Addressing "which version" of the federal drug schedules it should use, the court "conclude[d] that the relevant federal definition for ACCA purposes is the definition in effect at the time of the federal offense—for Perez, 2019"

---

[2] At the time of the Tenth Circuit's decision the initial opinion in United States v. Jackson, 36 F.4th 1294 (11th Cir. 2022), had not yet been sua sponte vacated and superseded by United States v. Jackson, 55 F.4th 846 (11th Cir. 2022).

when he committed his federal firearm offense. Id. at 699; see id. at 696. Citing decisions from four other circuits, the court explained that "McNeill did not address" the question presented here: "Do we apply the version of the federal statute in force at the time Perez's instant federal offense." Id. Nor did "the reasoning in McNeill regarding state law . . . translate to this issue." Id. at 700. Notably, the Eighth Circuit found the law to be so clear that it granted relief on plain-error review. Id. at 701–02. It emphasized that "at least four of our sister circuits have addressed the same or a closely related question, all concluding that the categorical comparison is between the state law at the time of prior conviction and the federal law at the time of federal offense." Id. at 701.

As the Eighth Circuit did in Perez, the Fourth Circuit has previously granted relief on plain error in Hope. The Fourth Circuit concluded that "the Government incorrectly relies on McNeill," which concerned a "subsequent change in state law," whereas the "instant matter concerns changes to federal law." Hope, 28 F.4th at 505. Quoting the Ninth Circuit's decision in Bautista, a Guidelines case, the Fourth Circuit agreed that the contrary regime would be "illogical." Id. Judge Thacker agreed that courts should consult the federal drug schedules from the time of the federal offense, and McNeill was not to the contrary; she dissented only because she believed that "the district court's error was not plain." Id. at 512 (Thacker, J., dissenting). Although the Fourth Circuit declined to look to the federal schedules in effect at the time of the prior state drug offense, it notably looked to those in effect at the time of federal sentencing rather than the time the federal offense was committed. Id. at 504–05. That distinction made no difference in Williams, so the Tenth Circuit would later decline to address it. Williams, 48 F.4th at 1138 n.8. And although it also made no difference in Perez, the Eighth Circuit later looked to the time the federal offense was committed. In adopting a time-of-federal-sentencing approach, the Fourth Circuit emphasized that courts use the Guidelines that are in effect at the time of sentencing. Hope, 28 F.4th at 505.

In Brown, the Third Circuit addressed one of the few cases where the above distinction made a difference. The defendant committed his federal firearm offense before Congress legalized hemp in December 2018, but he was sentenced after that date. 47 F.4th at 150–51. Oddly, the government on appeal did not make its usual McNeill argument that the court should look to the federal schedules in effect at the time of the prior state drug offense. Instead, it argued that the saving statute in 1 U.S.C. § 109 required the court to look, at the very least, to the federal schedules at the time the defendant committed the federal offense, not when he was later sentenced for it. Id. at 151 n.3. The Third Circuit agreed, "hold[ing] 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." Id. at 148, 155. Based on that default rule from the saving statute, the Third Circuit "appl[ied] the penalties in effect at the time the defendant committed the federal offense," and thus "look[ed] to the federal schedule in effect when Brown violated § 922(g)." Id. at 153. In doing so, the court expressly "part[ed] ways with the Fourth Circuit" in Hope, which "held that courts must look to federal law in effect when the defendant is sentenced federally." Id. Instead, the Third Circuit followed the Eleventh Circuit's initial panel decision in Jackson, which "also held that courts must look to the federal law in effect when the defendant committed the federal offense." Id. As the government had not pressed its McNeill argument on appeal, the Third Circuit only briefly considered the possibility that courts should look to the federal drug schedules that were in effect at the time of the prior drug conviction. See id. at 151 n.3. On that point, it simply stated that "McNeill . . . present[ed] no barrier" to its holding because McNeill "concerned an intervening to state sentencing law." Id. at 154. The court further noted that "[o]ther circuits . . . have uniformly understood McNeill to prescribe only the time for analyzing the elements of the state offense." Id. (citing decisions from the First, Fourth, Ninth, and Eleventh Circuits).

The sole Circuit applying the law in effect at the time of the prior state conviction in the ACCA context is the Eleventh Circuit. In its superseding Jackson opinion, the court reversed itself and broke with all the above circuits. In doing so, the court repeatedly "h[e]ld" and "conclu[ded]" that the ACCA's "serious drug offense" definition in § 924(e)(2)(A)(ii) incorporated the federal schedules in effect at the time of the prior state drug offense, not those in effect at the time of the federal firearm offense. Although the Eleventh Circuit acknowledged that McNeill was not directly on point, the court believed that McNeill's "reasoning" compelled that conclusion. See Jackson, 55 F.4th at 849.

In acknowledging that McNeill was not directly on point, the Eleventh Circuit cited the decisions summarized above from the Third, Fourth, Eighth, and Tenth Circuits. Curiously, however, the majority opinion did not expressly acknowledge that those decisions reached the opposite conclusion about the question presented. Nor did it say that its holding was creating a conflict with those decisions. Indeed, later in the opinion, the Eleventh Circuit recognized that "[s]ome of our sister circuits . . . have identified" "thoughtful" arguments supporting the contrary position, and the Eleventh Circuit expressly "reject[ed] them." Jackson, 55 F.4th at 859-60. Moreover, the author of the decision, Judge Rosenbaum, issued a concurring opinion expressly acknowledging that the court's decision created a 4–1 circuit conflict. Id. at 862 (Rosenbaum, J. concurring). In addition to expressing support for the reasoning employed by "our sister circuits," particularly on the point of fair notice, she recognized that "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."

Id. "And," she continued, "it's even more confusing than that, as we previously agreed with those four circuits."[3] Id.

The landscape is even more confusing than Judge Rosenbaum recognized when one adds in the cases discussed above that arose under the Guidelines. The confusion about McNeill is widespread. Only this Court can clarify its own precedent.

## II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

Since the inception of the federal guidelines system, courts have been required to apply the version of the guidelines in effect at the time of sentencing unless doing so violates the ex post facto clause. 18 U.S.C. § 3553(a)(4)(A)(ii); USSG §1B1.11(a); Peugh v. United States, 569 U.S. 530, 543 (2013). A "background principle" of the Sentencing Reform Act ("SRA"), Dorsey v. United States, 567 U.S. 260, 275 (2012), this is a straightforward, party-neutral time-of-federal-sentencing rule that promotes certainty and fairness, avoids unwarranted disparities, and "reflect[s], to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process" – the central tenets of the guidelines system. 28 U.S.C. § 991(b)(1); Mistretta v. United States, 488 U.S. 361, 374 (1989).

A time-of-prior-conviction rule that goes against these central tenets, not only governs in the Guidelines' context, but its principles will be relevant whenever the categorical approach is used to determine if a prior drug conviction is a qualifying sentencing enhancement predicate. The question presented here arises in the context of the "controlled substance offense" definition in the Guidelines where USSG § 4B1.2(b) implements a congressional directive to sentence repeat

[3] Interestingly, the Sixth Circuit likewise previously agreed that a time-of-sentencing rule was the better approach in the Guidelines context. See United States v. Williams, 850 F. App'x 393, 401 (6th Cir. 2021); see also United States v. Perry, No. 20-6183, 2021 WL 3662443, at *2 (6th Cir. Aug. 18, 2021).

offenders near the statutory maximum, 28 U.S.C. § 994(h), resulting in "particularly severe punishment." Buford v. United States, 532 U.S. 59, 60 (2001). The most notable increase is the career-offender enhancement under § 4B1.1., which at last count applied to 1,200 to 2,000 defendants every year—roughly 3% of all federal defendants are classified as career offenders. U.S. Sent'g Comm'n, Report to Congress: Career Offender Sentencing Enhancements, p. 18 (2016). The career-offender designation increases the final Guidelines range for over 91% of defendants sentenced under § 4B1.1. Id. at 21. Notwithstanding the Sentencing Commission's finding that drug offenders generally have less serious criminal histories and recidivate at a lower level, the "the career offender directive has the greatest impact on federal drug trafficking offenders because of the higher statutory maximum penalties for those offenders." Id. at 2. Moreover, § 4B1.2 applies not only to those sentenced under § 4B1.1 (i.e., defendants whose instant offense is a crime of violence or controlled substance offense), but also to defendants sentenced under other provisions of the Guidelines that incorporate § 4B1.2's definitions. At least three other sections—§ 2K1.3 (instant offense involving explosive materials), § 2K2.1 (instant offense is the unlawful possession of a firearm by a felon), § 5K2.17 (instant offense is crime of violence or controlled substance offense committed with a semiautomatic firearm)—incorporate § 4B1.2's definition of "controlled substance offense." Alone, those sentenced under § 2K2.1 make up over 11% of the Bureau of Prison population. Id. at 2.

But this issue also impacts whether a prior conviction is a "serious drug offense" under the ACCA and three strikes law, as well as whether a prior conviction is a "serious drug felony" or "felony drug offense,"—otherwise known as an § 851 enhancement—subjecting a defendant to higher statutory penalties under 21 U.S.C. § 841(b)(1). Hence, it will impact a significant number of federal defendants. 70.8% of Armed Career Criminals received the enhancement based upon at

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

Resolving the question presented in this petition will also clarify the widespread confusion about this Court's decision in McNeill. As explained, McNeill is the principal reason why the Third, Sixth and Eighth Circuits (in the Guidelines context), and the Eleventh Circuit (in the ACCA context) have adopted a time-of-prior-conviction rule. Including the ACCA cases, the circuits have broken down 8–4 (with the Third and Eighth Circuits falling on both sides) over whether McNeill requires a time-of-prior-conviction rule. McNeill has produced disparate sentencing outcomes in both ACCA and Guidelines cases around the country. And this Court often grants review "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification." Stephen M. Shapiro et al., Supreme Court Practice § 4.5 pp. 4-23–24 (11th ed. 2019).

Finally, the need for this Court's review is especially pressing because the question presented now recurs with great frequency in these various legal contexts. Over the last few years, defendants have routinely argued that their prior state drug offenses are categorically overbroad vis-à-vis the relevant federal definition because they encompass a substance that is no longer federally controlled at the time of the federal offense. At least nine different circuits have issued at least one published opinion addressing such a challenge since only 2021. This occurs because the timing question here is central to over-breadth challenges relating to numerous state drug offenses. This over-breadth argument has been made and accepted in lower courts in the context

of marijuana since hemp was federally de-scheduled in 2018. See, e.g., Williams, 48 F.4th at 1137–45 (Oklahoma marijuana; ACCA); Hope, 28 F.4th at 504–07 (South Carolina marijuana; ACCA); Abdulaziz, 998 F.3d at 531 (Massachusetts marijuana; Guidelines); Bautista, 989 F.3d at 704–05 (Arizona marijuana; Guidelines). So too with other substances that have been federally de-scheduled. See, e.g., Gibson, 55 F.4th at 167 (holding that a New York drug offense was not a "controlled substance offense" because it included naloxegol, an opium derivative that was federally de-scheduled in 2015). Thus, the question presented here will determine the viability of drug over-breadth challenges to federal sentencing enhancements involving numerous prior state drug offenses.

Mr. Clark's case presents a clean vehicle to decide this issue. He preserved the issue below. Mr. Clark therefore respectfully urges the Court to grant certiorari to provide much-needed guidance on this recurring and consequential question of federal sentencing law.

## CONCLUSION

For all of the foregoing reasons, Petitioner respectfully prays that this Court will grant certiorari to review the judgment of the Sixth Circuit in his case.

DATED: 24th day of February, 2023.

Respectfully submitted,

DORIS RANDLE HOLT
FEDERAL DEFENDER

/s/ M. Dianne Smothers
By: M. Dianne Smothers
Assistant Federal Defender
Attorneys for Petitioner
200 Jefferson, Suite 200
Memphis, Tennessee 38103
(901) 544-3895