No. ____

IN THE

Supreme Court of the United States

MINNELA MOORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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June 1, 2023

QUESTIONS PRESENTED

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 a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b).

The circuits have split on whether § 4B1.2(b) incorporates only the federal drug schedules in defining "controlled substance," as well as on which drug schedules to consider—the drug schedules in effect at the time of the federal offense; at the time of the federal sentencing; or at the time of the defendant's prior state drug offense.

The questions presented are:

(1) Whether the term "controlled substance," from the "controlled substance offense" definition in U.S.S.G. § 4B1.2(b), is limited to substances that are federally controlled.

(2) Whether the "controlled substance offense" definition in U.S.S.G. § 4B1.2(b) incorporates the drug schedules in effect at the time of the federal offense; at the time of the federal sentencing; or at the time of the defendant's prior state drug offense.[1]

[1] The Court has granted certiorari in a pair of cases addressing the same question with regard to the Armed Career Criminal Act's "serious drug offense" definition, which is almost identical to the Guidelines definition at issue here. *See Jackson v. United States*, No. 22-6640 (cert. granted May 15, 2023); *Brown v. United States*, No. 22-6389 (cert. granted May 15, 2023). At a minimum, the Court should stay this case pending the disposition of *Jackson* and *Brown*.

Additionally, this issue is pending before the Court in two other Guidelines cases—*Harbin v. United States*, No. 22-6902, and *Clark v. United States*, No. 22-6881.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Moore*, No. 21-14210 (11th Cir. Feb. 1, 2023);
- *United States v. Moore*, No. 20-cr-20153 (S.D. Fla. Nov. 19, 2021).

There are no other proceedings related to this case under Rule 14.1(b)(iii).

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Petitioner, Minnela Moore, respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion affirming Petitioner's enhanced sentence is unpublished, and available at 2023 WL 1434181 (11th Cir. Feb. 1, 2023). It is reproduced as Appendix ("App.") A, 1a–10a.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its final decision on February 1, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed pursuant to the Court's April 19, 2023 Order, which granted Petitioner's Application No. 22A914, extending the time to file a petition for certiorari review until June 1, 2023.

PROVISIONS INVOLVED

U.S.S.G. § 2K2.1(a)(2)

(a) Base Offense Level (Apply the Greatest):

> (2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

U.S.S.G. § 2K2.1 cmt. n.1

1. **Definitions**.—For purposes of this guideline:

> "***Controlled substance offense***" has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

U.S.S.G. § 4B1.2(b)

(b) 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.

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

1. The definition of a "controlled substance offense" is found in U.S.S.G. § 4B1.2, which provides that 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." U.S.S.G. § 4B1.2(b).

To determine whether a prior offense is a "controlled substance offense," courts apply the now-familiar "categorical approach." *United States v. Lange*, 862 F.3d 1290, 1293–94 (11th Cir. 2017). This means that courts consider only whether the "elements" of the predicate conviction—not the actual facts—match the Guidelines' "controlled substance offense" definition. *Id.* (citing *United States v. Lipsey*, 40 F.3d 1200, 1201 (11th Cir. 1994)). That is, given that focus on the elements, courts "examine what the state conviction necessarily involved," and therefore courts "must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the" federal definition. *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (brackets and quotation omitted).

Thus, for a state drug offense to satisfy the definition of "controlled substance offense," it must necessarily involve a "controlled substance." If the elements of a

state drug offense do not include a controlled substance, that offense is categorically overbroad and does not qualify as a "controlled substance offense."

Applying the categorical approach to this case, Petitioner argues that the elements of his prior Florida cannabis conviction do not necessarily involve a "controlled substance" under the Guidelines for two, independent reasons.

First, Florida's definition of cannabis includes the "mature stalks" of "any plant of the genus Cannabis," whereas "mature stalks" are excluded from the federal definition of cannabis. *Said v. U.S. Att'y Gen.*, 28 F.4th 1328, 1333–1344 (11th Cir. 2022). If—as Petitioner contends—a "controlled substance" under the Guidelines is limited to federally-controlled substances, his prior Florida cannabis conviction is categorically overbroad. Further, because the federal definition of cannabis has excluded "mature stalks" since before Petitioner's prior Florida offense, this result holds regardless of which version of the federal schedules the court consults—the federal schedule in place at the time of Petitioner's state cannabis conviction; at the time of Petitioner's commission of the federal offense; or at the time of Petitioner's federal sentencing.

Second—and irrespective of whether a "controlled substance" includes only federally-controlled substances—Florida's definition of cannabis also included "hemp" at the time of Petitioner's prior state drug offense. Both Florida *and* the federal government, however, removed "hemp" from their respective cannabis definitions—and controlled substance schedules—before Petitioner committed his federal offense. *See* Agriculture Improvement Act of 2018, Pub. L. No. 115-334,

§ 12619, 132 Stat. 4490, 5018 (effective Dec. 20, 2018); Fla. Stat. § 581.217 (2019); Fla. Stat. § 893.02(3) (2019). Therefore, if a "controlled substance" under the Guidelines refers to the state *or* federal drug schedules at the time of the federal offense, or the federal sentencing (as opposed to the time of the prior conviction), Petitioner's prior Florida cannabis conviction is still categorically overbroad.

Under *either* argument—each the subject of a circuit split—Petitioner's prior Florida cannabis conviction is not a "controlled substance offense."

B. PROCEEDINGS BELOW

1. Based on offense conduct occurring on January 30, 2020, Petitioner was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (Dist. Ct. Dkt. No. 1.) Petitioner entered a conditional plea of guilty, preserving his right to challenge certain issues on appeal. (Dist. Ct. Dkt. Nos. 51; 54; 55.)

Prior to his sentencing, the United States Probation Office prepared a presentence investigation report ("PSI"). Referring to U.S.S.G. § 2K2.1(a)(2) of the 2018 U.S. Sentencing Guidelines, the PSI calculated Petitioner's base offense level at 24, because Petitioner had at least two prior felony convictions that Probation considered "controlled substance offense[s]." (PSI ¶ 15.) The PSI listed prior case numbers F17-2187 and F18-136 as the "controlled substance offense" predicates. (*Id.*) According to the PSI, in case number F17-2187, Petitioner was adjudicated guilty by the state of Florida for possession of cocaine with intent to sell, manufacture, or deliver. (PSI ¶ 31.) And, in case number F18-136, Petitioner was adjudicated guilty by the state of Florida for possession of cannabis with intent to sell, manufacture, or

deliver. (PSI ¶ 32.) Including these two prior "controlled substance offense[s]," Petitioner's guideline imprisonment range was 70 to 87 months. (PSI ¶ 80.)

At sentencing—on November 18, 2021—Petitioner agreed that his advisory Guidelines range was 70–87 months' imprisonment. (Dist. Ct. Dkt. No. 82:2.) He moved for a downward variance to 60 months' imprisonment due in part to his history and characteristics, including instability in his childhood, homelessness as a young adult, the hardship of being incarcerated during the covid-19 pandemic, and in light of his responsibilities as a father of two young children. (Dist. Ct. Dkt. No. 82:3–6.) The district court denied Petitioner's motion for a downward variance, agreeing instead with the government's recommendation of a sentence at the low end of the Guidelines range. (Dist. Ct. Dkt. No. 82:6–7, 9–10.) Petitioner was sentenced to 70 months' imprisonment, followed by 3 years of supervised release. (Dist. Ct. Dkt. No. 64.)

2. On appeal, Petitioner challenged his base offense level calculation, which was predicated upon the determination that two of his prior state drug offenses—Miami-Dade Circuit Court case numbers F17-2187 and F18-136—were "controlled substance offense[s]" under U.S.S.G. § 2K2.1. (*See* Pet. C.A. Br. 51–61.) He argued that this calculation was incorrect because his cannabis offense in F18-136 was not a "controlled substance offense," at the time of his 2021 sentencing. (*See id.*) That is, at the time of his 2018 cannabis conviction, Florida law defined cannabis to include the "mature stalks" of a cannabis plant—as well as hemp—rendering its 2018 cannabis definition overbroad at all relevant times—at the time of the state

conviction (when the federal drug schedule excluded "mature stalks"), as well as at the time of the federal offense and sentencing (when both the state and federal drug schedules excluded hemp). (*See id.*)

In response, the government argued that circuit precedent foreclosed Petitioner's argument. (*See* U.S. C.A. Br. 30.) More specifically, the government contended that prior panel precedent had already rejected the argument that "controlled substances" under § 4B1.2(b) were limited to federally-controlled substances. (*See id.*) Similarly, the government reiterated that prior binding Supreme Court precedent—specifically, *McNeill v. United States*, 563 U.S. 816 (2011)—dictated that, in determining whether a prior state conviction is a "controlled substance offense," courts must look to the state's law at the time of the state conviction. (*See id.* at 40.) Since cannabis—including its "mature stalks" and hemp—was a controlled substance under Florida law at the time of Petitioner's state cannabis conviction, the government maintained that Petitioner's prior cannabis conviction satisfied the Guidelines' definition of a "controlled substance offense." (*See id.*)

Prior to issuing its opinion, the Eleventh Circuit ordered supplemental briefing, asking the parties to address its intervening decision in *United States v. Jackson*, 55 F.4th 846 (11th Cir. 2022) (*Jackson II*):

> What impact, if any, does the decision in *United States v. Jackson* have on [Petitioner's] argument the district court plainly erred at sentencing by assigning [Petitioner] a base offense level under U.S.S.G. § 2K2.1(a)(2) because [Petitioner's] 2018 cannabis-related conviction qualified as

> a "controlled substance offense" using the definition in U.S.S.G. § 4B1.2(b).

Petitioner responded that even under the reasoning of *Jackson II*, his prior Florida cannabis conviction did not qualify as a "controlled substance offense" under § 4B1.2 (as incorporated into § 2K2.1(a)). (Pet'r Suppl. Br. 1–10.) The government disagreed, and the Eleventh Circuit agreed with the government, holding that the district court did not plainly err because there were no published cases holding, "whether to apply the version of a controlled substance offense from the time of earlier conviction or the time of the sentencing in the current case," for purposes of determining whether a prior offense is a "controlled substance offense." *See* App. 9a–10a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision below creates a square conflict of authority with numerous other circuits on important and recurring questions of federal sentencing law. This case is a good vehicle to resolve that conflict. And the Eleventh Circuit's decision is wrong. The standard criteria for certiorari are satisfied.

I. THE CIRCUITS ARE SQUARELY DIVIDED AND DEEPLY CONFUSED

A. The Circuits are Divided 5-2 on Whether the Term "Controlled Substance," from the "Controlled Substance Offense" Definition in U.S.S.G. § 4B1.2(b), is limited to substances that are federally controlled

1. The Eleventh Circuit, in *United States v. Smith*, held that a conviction under Fla. Stat. § 893.13 is a "controlled substance offense" under § 4B1.2(b) of the Sentencing Guidelines. 775 F.3d 1262, 1268 (11th Cir. 2014). The court rejected the argument that Fla. Stat. § 893.13's definition of a controlled substance was too broad and must be tied to statutory federal analogues or generic federal definitions. *Id.* at

1267; *see also United States v. Pridgeon*, 853 F.3d 1192, 1200 (11th Cir. 2017) (rejecting the argument that *Smith* was wrongly decided and affirming *Smith*'s holding that convictions under Fla. Stat. § 893.13 qualify as "controlled substance offenses" under the Sentencing Guidelines).

While the court in *Smith* did not decide the issue raised herein, the Eleventh Circuit has nonetheless repeatedly relied on *Smith* (and *Pridgeon*) to summarily reject any "argument that convictions under Fla. Stat. § 893.13 are not 'controlled substance offenses,'" *see United States v. Roper*, 842 F. App'x 477, 481 (11th Cir. 2021), including the claim that § 893.13(1)(a) is overbroad because it includes substances that are not federally controlled. *See United States v. Howard*, 767 F. App'x 779, 784–85 (11th Cir. 2019) (recognizing that court "has not considered" the specific argument that § 893.13 is overbroad because it criminalizes substances that are not federally controlled, but holding that such a challenge was nonetheless "precluded by [ ] binding precedent in *Smith*").

Because *Smith* is applied in this broadly preclusive way, criminal defendants in the Eleventh Circuit with prior § 893.13(1)(a) convictions that do not involve federally-controlled substances are in the same position as defendants in the Tenth, Eighth, Seventh, and Fourth Circuits, where courts have explicitly held that a prior state drug conviction need not involve a federally-controlled substance to qualify as a "controlled substance offense." *See United States v. Jones*, 15 F.4th 1288 (10th Cir. 2021); *United States v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021); *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020); *United States v. Ward*, 972 F.3d 364, 372

(4th Cir. 2020). *See also Howard*, 767 F. App'x at 784 n.5 (rejecting, in dicta, argument that "controlled substance" under § 4B1.2 refers only to federally-controlled substances, because the guideline refers to offenses "under federal or state law," and, alternatively, because the defendant's prior Florida convictions involved cocaine, which "is both federally and state controlled").

Compounding the inter-circuit inequity, the Eleventh Circuit's approach is uniquely flawed. *Smith* held only that § 893.13(1)(a) offenses were not overbroad, as compared to the Guidelines' "controlled substance offense" definition, because that definition does not contain a mens rea element as to the illicit nature of the substance. *Smith*, 775 F.3d at 1267–68. *Smith* did not "squarely address" whether the term "controlled substance" in U.S.S.G. § 4B1.2(b) is limited to federally-controlled substances. *See Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (recognizing that where court has "never squarely addressed [an] issue, and has at most assumed [the issue], [it is] free to address the issue on the merits" in a later case). The *Smith* court "at most assumed" that § 893.13(1)(a) met the other "controlled substance offense" criteria, and assumptions are not holdings. *See id. See also Fernandez v. Keisler*, 502 F.3d 337, 343 (4th Cir. 2007) ("We are bound by holdings, not unwritten assumptions."); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions."); *United States v. Norris*, 486 F.3d 1045, 1054 (8th Cir. 2007) (en banc) (Colloton, J., concurring in the judgment) (citing cases finding that *sub silentio* holdings, unstated assumptions, and implicit rejections of arguments by

prior panel are not binding circuit precedent). Therefore, *Smith* should not foreclose consideration of the claim raised herein. Moreover, because the Guidelines' "controlled substance offense" definition is limited to federally-controlled substances, Petitioner's sentencing guideline range was miscalculated, to his detriment.

2. The Second and Ninth Circuits' contrary approach is the correct one. In *United States v. Townsend*, the Second Circuit held that the term "controlled substance" in § 4B1.2 refers exclusively to a substance controlled by the [federal Controlled Substances Act] (CSA)." 897 F.3d 66, 71–72 (2d Cir. 2018).

In so holding, the court rejected the position of the lower court, and the government, that, by including offenses under "state law," the "plain language" of § 4B1.2(b) "unambiguous[ly]" included substances controlled only by the state. *Id.* at 69–70. The Second Circuit instead found the guideline language to be ambiguous, noting:

> Although a "controlled substance offense" includes an *offense* "under federal or state law," that does not also mean that the *substance* at issue may be controlled under federal or state law. To include substances controlled under only state law, the definition should read ". . . a controlled substance *under federal or state law*." But it does not.

Id. at 70 (emphasis in original). The court further reasoned that "transitively apply[ing] the 'or state law' modifier from the term 'controlled substance offense' to the term 'controlled substance,'" would "undermine the presumption that federal standards define federal sentencing provisions." *Id.*

The court highlighted the long-standing presumption that "the application of federal law does not depend on state law unless Congress plainly indicates

otherwise," which "applies equally to the Guidelines." *Id.* at 71 (citing *Jerome v. United States*, 318 U.S. 101, 104 (1943), among others). It further observed that, rather than allowing state law to determine whether a federal defendant qualifies for a federal sentencing enhancement, the Supreme Court has repeatedly required that state convictions satisfy a "uniform federal standard" before they can be used to enhance federal criminal punishment. *Id.* (citing *Taylor v. United States*, 495 U.S. 575, 579, 590–91 (1990), and *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017)). The Second Circuit therefore reasoned "that imposing a *federal* sentencing enhancement under the Guidelines requires something more than a conviction based on a state's determination that a given substance should be controlled." *Id.* (emphasis in original). Therefore, "federal law is the interpretive anchor to resolve the ambiguity" in § 4B.12(b), and "a 'controlled substance' under § 4B1.2 must refer exclusively to those drugs listed under federal law—that is, the CSA." *Id.*

The *Townsend* court noted that the Ninth Circuit had come to the same conclusion because, "defining the term 'controlled substance' to have its ordinary meaning of a drug regulated by law would make what offenses constitute a [federal] drug offense necessarily depend on the state statute at issue." *Id.* at 72 (citing *United States v. Leal-Vega*, 680 F.3d 1160, 1166 (9th Cir. 2012) (emphasis in original)).

In *Leal-Vega*, the Ninth Circuit analyzed the term "controlled substance" in the unlawful re-entry guideline, which provides for a "drug trafficking offense" enhancement for a defendant with a prior:

> offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of,

> or offer to sell 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.

U.S.S.G. § 2L1.2, cmt. n. 2.

The government in *Leal-Vega* contended that the absence of a specific reference to the CSA in § 2L1.2, combined the drafting history of the guideline, "counsels against incorporation of the CSA in the definition of 'controlled substance,'" and thus the term "controlled substance" should mean any substance controlled by law. 680 F.3d 1160, 1165, 1167.

The Ninth Circuit found that the government's position undermined the purposes of the categorical approach, and of the Guidelines. *Id.* The court noted that the Supreme Court's decision in *Taylor* set forth the categorical approach, and rejected reliance on the "labels employed by various states' criminal codes," with the goal of "arriving at a national definition to permit uniform application of the Sentencing Guidelines." *Id.* at 1166–67. The Ninth Circuit observed that the Guidelines' stated purpose is to seek "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." *Id.* at 1167 (quoting U.S.S.G. Ch. One, Pt. A). It concluded that the only approach compatible with the goals of the categorical approach, and of the Sentencing Guidelines, would be to "hold that the term 'controlled substance' as used in the 'drug trafficking offense' definition in § 2L1.2, means those substances listed in the CSA." *Id.* *See also United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015) ("For a prior conviction to qualify as a 'drug

trafficking offense,' the government must establish that the substance underlying that conviction is covered by the CSA.").

In *United States v. Bautista*, the Ninth Circuit determined that the minor differences between the Guidelines' "drug trafficking offense" definition, and the Guidelines' "controlled substance offense" definition, were "immaterial"—and thus that *Leal-Vega*'s "uniformity-in-federal-sentencing rationale" applied equally to the term "controlled substance" in the "controlled substance offense" definition in § 4B1.2. 989 F.3d 698, 702 (9th Cir. 2021).

3. Therefore, in the Ninth Circuit, like in the Second Circuit, the term "controlled substance" in the Guidelines' "controlled substance offense" definition is limited to substances that are included in the federal CSA. *Id.* This is as it should be. Without tying the term "controlled substance" to a uniform, federal standard, the aims of the categorical approach, and the Guidelines, give way to the vagaries of state law. A "controlled substance offense" becomes whatever a given state says it is. As observed by the Second and Ninth Circuits, the approach adopted by the Eleventh Circuit, among others, undermines uniformity in federal sentencing, and results in the kind of unwarranted sentencing disparity exemplified by Petitioner's case. *See also United States v. Crocco*, 15 F.4th 20, 23–24 (1st Cir. 2020) (explaining why the approach of Fourth, Seventh and Eighth [and now Tenth and Eleventh] Circuits is "fraught with peril").

B. The Circuits are Divided on Whether the "Controlled Substance Offense" Definition in U.S.S.G. § 4B1.2(b) Incorporates the Drug Schedules in Effect at the Time of the Federal Offense; at the Time of the Federal Sentencing; or at the Time of the Defendant's Prior State Drug Offense

There is another robust circuit split regarding the Guidelines' "controlled substance offense" definition. Specifically, the Courts of Appeal are also divided as to whether the "controlled substance offense" definition in § 4B1.2(b) incorporates the drug schedules in effect at the time of the prior state drug offense, or those in effect at the time of the federal offense or sentencing. As discussed below, the circuits alternately rely on—or reject reliance on—*McNeill* in deciding this issue.

The Court recently granted a petition for certiorari in *Jackson II*, which presents the same issue presented here, but in the Armed Career Criminal Act (ACCA) context:

> Whether the "serious drug offense" definition in the [ACCA] incorporates the federal drug schedules that were in effect at the time of the federal firearm offense . . . or the federal drug schedules that were in effect at the time of the prior state drug offense (as the Eleventh Circuit held [in *Jackson II*]).

See Jackson v. United States, No. 22-6640. Just like the split regarding the applicable drug schedules under § 4B1.2(b), the circuit split outlined by the *Jackson* petition stems from opposing interpretations of *McNeill*. *See* Pet. Writ of Cert. 14–26, *Jackson v. United States*, No. 22-6640. Moreover, interpretations of the ACCA's "serious drug offense" definition heavily influence interpretations of the Guidelines' "controlled substance offense" definition (and vice-versa). Thus, the Court's opinion in *Jackson*

will likely provide much-needed clarity to the closely-related Guidelines issue presented by this Petition.

As to the Guidelines' "controlled substance offense" definition, three circuits have unanimously rejected the view that *McNeill* requires courts to use the drug schedules in effect at the time of the prior state drug offense. Two circuits have, however, adopted that minority view. As to *McNeill*, then, the confusion is widespread. That confusion is the source of the conflict; the lower courts need guidance; and only this Court can clarify its precedent.

1. The First, Second, and Ninth Circuits have held that, notwithstanding *McNeill,* courts look to the federal schedules in effect at the time of federal sentencing.

a. The Ninth Circuit was the first to reject the government's reliance on *McNeill* in *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021). 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." *Id*. 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 from affecting federal sentencing and would hamper Congress' ability to revise federal criminal law." *Id*.

b. The First Circuit followed the Ninth Circuit in *United States v. Abdulaziz*, 998 F.3d 519 (1st Cir. 2021). 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 been no relevant change in that case to [that] criteria" in *McNeill*. *Id.* 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.

c. Finally, and most recently, in *United States v. Gibson*, 55 F.4th 153 (2d Cir. 2022), the Second Circuit likewise rejected 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." *Id.* 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.*

2. By contrast, the Sixth and Eighth Circuits have held that *McNeill* requires courts to use the drug schedules from the time of the prior drug offense.

a. In *United States v. Clark*, 46 F.4th 404 (6th Cir. 2022), the Sixth Circuit expressly "adopt[ed] a time-of-[prior-]conviction rule." *Id.* at 408. Although the court relied in part on the text of the Guidelines, that court 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 [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 the defendant relied on contrary decisions from

the First, Fourth, Ninth, and Eleventh Circuits, as well as an earlier unpublished Sixth Circuit opinion, *Clark* 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 that term ['serious drug offense'] is by referencing state law at the time of conviction." *Id.* at 414.

Other Judges on the Sixth Circuit have 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." *United States v. Baker*, 2022 WL 17581659, at *2 (6th Cir. Dec. 12, 2012) (Moore, J., concurring, joined by Stranch, J.). 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 reconsidered en banc. *Id.* Notably, however, rehearing in *Clark* had already been denied. *See Clark*, No. 21-6038, ECF No. 39 (6th Cir. Oct. 28, 2022).

b. 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. denied sub. nom. Altman, et al. v. United States* (No. 22-5877) (May 1, 2023), the Eighth Circuit also adopted a time-of-prior-conviction rule. In that circuit (and others), and unlike in the First/Second/Ninth Circuits, 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.

* * *

The Circuit Courts are all over the spectrum when it comes to answering the question of which "controlled substance offense[s]" qualify defendants for enhanced sentences. Adopting a time-of-federal-sentencing rule, the First, Second, and Ninth Circuits have held that *McNeill* does not require a time-of-prior-conviction rule. Like the Eleventh Circuit in the ACCA context the, Sixth and Eighth Circuits have held that *McNeill does* require that rule. In so holding, the Sixth Circuit declined to follow an earlier unpublished opinion, and two Judges now openly disagree with their own court's precedent. The Eighth Circuit also believed that *McNeill* required a time-of-prior-conviction rule as to the Guidelines, yet it has reached the opposite conclusion in the ACCA context. Thus, the confusion about *McNeill* is widespread. *McNeill* is why three circuits have adopted a time-of-prior-conviction rule. And only this Court can clarify its own precedent. This Court's intervention is required to ensure uniformity amongst the courts in federal sentencing.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

This Court should grant certiorari primarily to resolve the deep circuit conflict on the Guidelines questions presented. In light of the conflict, geography alone now determines whether defendants will be subject to enhanced sentences based upon prior state controlled substance offenses.

1. Additionally, Florida drug offenses are perhaps some of the most common controlled substance offenses of all in the Eleventh Circuit. After all, § 893.13 is the flagship drug statute in Florida, a state with over 20 million people where drug offenses are routinely enforced. *See* Fla. Dep't Law Enforcement, Florida Drug Offense Arrests (reporting over 100,000 drug arrests every year between 1998 and 2019).[2] Since the Eleventh Circuit first held in *Smith* that Florida cocaine offenses qualified under the ACCA and the Guidelines, that court has upheld enhancements based on § 893.13 in well over 100 reported decisions (which are under-representative). *See Curry v. United States*, Pet. App. F 72a–80a (U.S. No. 20-7284) (Feb. 24, 2021) (cataloguing 129 such decisions through January 2021, including 74 ACCA cases).

And there are numerous appeals currently in the Eleventh Circuit that are awaiting this Court's resolution of the questions presented herein.[3] These appeals demonstrate that, in Florida alone, the questions presented are recurring and implicate decades if not centuries of additional prison time. Leaving the split intact

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[2]https://www.fdle.state.fl.us/CJAB/UCR/IndividualCrime/Arrests/Society.aspx (page 2 of 9).

[3] *See, e.g.*, *United States v. Cheramy*, No. 22-13841 (Guidelines); *United States v. Farmer*, No. 22-13304 (Guidelines); *United States v. Storey*, No. 22-11841 (ACCA); *United States v. Beach*, No. 22-11720 (Guidelines); *United States v. Jenkins*, No. 22-11564 (ACCA); *United States v. Wilson*, No. 21-14460 (ACCA); *United States v. Moore*, No. 21-14210 (Guidelines); *United States v. Gardner*, No. 21-14082 (ACCA); *United States v. Gilbert*, No. 21-12010 (ACCA); *United States v. Hall*, No. 21-11641 (ACCA); *United States v. Frazier*, No. 21-10145 (ACCA); *United States v. Harvin*, No. 20-14497 (ACCA); *United States v. Williams*, No. 20-13184 (ACCA); *United States v. Williams*, No. 20-12742 (ACCA); *United States v. Harris*, No. 20-12457 (ACCA); *United States v. McCobb*, No. 20-12263 (ACCA); *United States v. Hameen*, No. 19-14279 (ACCA); *United States v. Hampton*, No. 17-15276 (ACCA).

would thus subject countless defendants in the Eleventh Circuit—and Florida in particular—to lengthy prison sentences that they would not receive anywhere else.

2. Resolving the second question presented will clarify the widespread confusion about this Court's decision in *McNeill*. As explained above, *McNeill* is the principal reason why the Eleventh Circuit (in the ACCA context) and the Sixth/Eighth Circuits (in the Guidelines context) have imposed a time-of-prior-conviction rule. Including the non-Guidelines cases, the circuits have broken down 7–3 (with the Eighth Circuit falling on both sides) over whether *McNeill* requires a time-of-prior-conviction rule. Thus, granting review here would clarify *McNeill*, which 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).

3. Finally, the need for this Court's review is especially pressing because the questions presented recurs with great frequency. 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. Nine different circuits have issued (at least one) published opinion addressing such a challenge since only 2021.

That is so because the timing question here is central to over-breadth challenges relating to numerous state drug offenses. Take the cannabis-based over-breadth challenge here. That is not limited to prior Florida cannabis offenses. Far from it: the same over-breadth challenge will be viable any time a state criminalized the mature stalks of cannabis or hemp at the time of the prior state cannabis offense, and any time the federal offense occurs after 2018, when the federal government de-scheduled hemp, for example. That is a common scenario. *See, e.g.*, *United States v. Williams*, 48 F.4th 1125, 1137–45 (10th Cir. 2022) (Oklahoma marijuana; ACCA); *United States v. Hope*, 28 F.4th 487, 504–07 (4th Cir. 2022) (South Carolina marijuana; ACCA); *Abdulaziz*, 998 F.3d at 531 (Massachusetts marijuana; Guidelines); *Bautista*, 989 F.3d at 704–05 (Arizona marijuana; Guidelines). The questions presented here will determine the viability of drug over-breadth challenges to federal sentencing enhancements involving numerous prior state drug offenses.

As a result, the Court should grant certiorari now to provide much-needed guidance on this recurring and consequential question of federal sentencing law. Or, at a minimum, the Court should stay this case pending the Court's resolution of the nearly identical questions presented in *Jackson* and *Brown*.

III. THIS CASE IS A GOOD VEHICLE IN WHICH TO RESOLVE TWO IMPORTANT AND BROAD CIRCUIT SPLITS

1. Factually, this case implicates the current circuit splits on the two questions presented. Had Petitioner been sentenced in another circuit, his advisory Guidelines range would have been lower because he would have only one, not two,

prior "controlled substance offense[s]." Based solely on that arbitrariness of geography, Petitioner was sentenced under an inflated Guidelines range.

2. Procedurally, though Petitioner advanced his drug over-breadth arguments for the first time on appeal, the error is plain under current binding Eleventh Circuit precedent regarding prior Florida cannabis convictions, or it will be made plain through further ruling by this Court.

3. Additionally, resolution in Petitioner's favor of either of the questions presented would be dispositive. Without reliance on his prior cannabis offense, Petitioner's Guidelines range would be lower than the range relied on by the district court at his sentencing hearing. This type of error generally requires relief, even on plain error review. *See Molina-Martinez v. United States*, 578 U.S. 189, 201 (2016).

IV. THE DECISION BELOW IS WRONG

This Court's review is warranted whichever side of the circuit split is correct. If the Eleventh Circuit's decision below is correct, then criminal defendants in other circuits are skirting the Guidelines various sentencing enhancement's based upon 4B1.2's definition of a "controlled substance offense" when they should receive them. But the decision below is wrong. And that means criminal defendants in that circuit alone are receiving enhanced sentences that they should not legally receive and that identically-situated defendants around the country are not receiving. Thus, the need for review is urgent.

1. The "controlled substance offense" definition in § 4B1.2 incorporates the federal drug schedules in effect at the time of the federal sentencing. The Fourth Circuit has reached that conclusion in the ACCA context, *Hope*, 28 F.4th at 504–05,

and the First (*Abdulaziz*), Second (*Gibson*), and Ninth (*Bautista*) Circuits have done so in the Guidelines context. After all, the Sentencing Reform Act requires courts to use the Guidelines in effect at sentencing. 18 U.S.C. § 3553(a)(4)(A)(ii); *see* U.S.S.G. § 1B1.11.

2. The error is particularly egregious here where Petitioner's prior Florida cannabis conviction would not qualify on account of the federal government's de-controlling of hemp in 2018, but also because the federal government has never controlled the mature stalks of cannabis. Additionally, by the time of Petitioner's federal offense and sentencing, his offense would no longer have been an offense under Florida law because of Florida's de-controlling of hemp.

CONCLUSION

The petition for a writ of certiorari should be granted. Or, at a minimum, the Court should hold the petition pending its review of *Jackson* and *Brown*.

Respectfully submitted,

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