No. ____

IN THE

Supreme Court of the United States

BRANDON ROSS WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the categorical approach established by this Court for determining whether a previous state conviction can qualify as a predicate "serious drug offense" under the Armed Career Criminal Act (ACCA), a sentencing court is to apply the federal definition of "controlled substance" as it existed (1) at the time of the prior state conviction, (2) at the time of the commission of the federal offense, or (3) at the time of federal sentencing.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Williams*, No. 22-6021 (10th Cir. March 6, 2023);
- *United States v. Williams*, No. 20-cr-00211-PRW-1 (W.D. Okla. Jan. 25, 2022).

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

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Petitioner, Brandon Ross Williams, respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals (App. A, 1a–20a) is reported at 61 F.4th 799. The district court did not issue a written opinion in this case.

JURISDICTION

The Tenth Circuit entered its judgment on March 6, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(A)(ii),

(A) the term "serious drug offense" means—

* * *

> (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.

STATEMENT

A. Legal Background

The Armed Career Criminal Act (ACCA) mandates a fifteen-year federal prison sentence for being a felon in possession of a firearm where the defendant has three prior "violent felonies" or "serious drug offenses." 18 U.S.C. § 924(e). As relevant here, the ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). A "controlled substance" is "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V," as listed and further defined in 21 U.S.C. §§ 811–14. 21 U.S.C. § 802(6). Because the ACCA references the federal drug schedules specifically, a state drug offense is only a "serious drug offense" under the ACCA if that state offense must have involved a substance included on the federal schedule.

Whether a state offense involves a substance listed on the federal schedule is determined by application of the categorical approach. *See Shular v. United States*, 140 S.Ct. 779, 784–85 (2020). This requires a court to "look only to the state offense's elements, not the facts of the case or labels pinned to the state conviction." *Id.* at 784. The court "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). So, when evaluating a prior state drug offense, if that state conviction could have been for a drug that is not on the federal drug schedule, the state conviction is categorically overbroad, and does not qualify as a serious drug offense under the ACCA.

This would be a relatively simple task but for the fact that the federal drug schedules are continually updated and republished on an annual basis in accordance with 21 U.S.C. § 812(a). As a result, sometimes what was a federally controlled substance at the time of the state offense is delisted from the federal drug schedules by the time of federal sentencing on a later-committed 18 U.S.C. § 922(g) federal firearms offense. This begs the question: To which version of the federal drug schedules does § 924(e)(2)(A)(ii) refer?

Courts have split on which version of the federal drug schedules is the proper federal comparator. The Third, Eighth, and Tenth Circuits look to the federal drug schedule in place at the time of the commission of the instant federal offense. Under this "time of federal offense" approach, if a defendant's prior state conviction included

substances not federally controlled at the time of the instant federal offense, it is not categorically a "serious drug offense" under the ACCA. *United States v. Brown*, 47 F.4th 147, 153 (3d Cir. 2022), *cert. granted*, No. 22-6389 (May 15, 2023); *United States v. Perez*, 46 F.4th 691, 699 (8th Cir. 2022); *United States v. Williams*, 48 F.4th 1125, 1142 (10th Cir. 2022); *United States v. Williams*, 61 F.4th 799, 808 (10th Cir. 2023). App. A, 21a. The Fourth Circuit holds the appropriate comparison is to the federal schedule in effect at the time of *sentencing* on the instant federal offense. *United States v. Hope*, 28 F.4th 487, 504–05 (4th Cir. 2022). The Eleventh Circuit looks all the way back to the federal drug schedules in effect at the time of the underlying state conviction. *United States v. Jackson*, 55 F.4th 846, 855 (11th Cir. 2022), *cert. granted*, No. 22-6640 (May 15, 2023). This Court recently granted certiorari in both *Brown*, *supra*, and *Jackson*, *supra*, and ordered the two cases consolidated to consider which approach is correct.

B. Proceedings Below

On May 3, 2018, Petitioner was stopped in Dewey County, Oklahoma for traffic violations, and thereafter arrested for driving under the influence of alcohol. An inventory search of his vehicle revealed a pistol in the back pocket of the front passenger seat. While the state chose not to proceed with any firearm-related charges against Petitioner, the United States filed an indictment against him in the Western District of Oklahoma over two years later, on August 18, 2020, alleging he possessed that firearm on May 3, 2018, in violation of 18 U.S.C. § 922(g)(1). He pled guilty to the offense. *See* Dist. Ct. ECF Nos. 55, 57. In the presentence investigation report,

the probation officer determined that Petitioner was subject to the ACCA based on a violent felony and two prior Arkansas drug convictions: a 2001 conviction for Delivery of Marijuana and a 2003 conviction for Possession of Marijuana with Intent to Deliver. As a result, he faced an enhanced fifteen-year mandatory minimum sentence rather than what otherwise would have been a ten-year statutory maximum. *See* 18 U.S.C. §§ 924(a)(2), 924(e).[1]

Petitioner objected to the 2001 and 2003 Arkansas drug convictions qualifying as "serious drug offenses" under the ACCA and the attendant increase to his advisory guideline range under U.S.S.G. § 4B1.4(b)(3)(B) (which increases the advisory guideline sentence markedly due to the statutory armed career criminal designation). Petitioner argued the federal drug schedules in place at the time of his 2022 sentencing were the correct federal comparator, as opposed to those in place at the time he committed the state offenses or when he committed his federal offense on May 3, 2018. There was a mismatch between the substances included in the federal Controlled Substances Act as it existed at the time of Petitioner's sentencing and the substances included in the Arkansas drug schedules at the time of his state convictions. This mismatch did not exist at the time he committed his federal offense, or any time prior to that. The federal drug schedules changed on December 20, 2018, when the Agricultural Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2019) ("2018 Farm Bill"), modified the Controlled Substances Act, 21 U.S.C. § 802, by expressly excluding hemp from its definition of marijuana. As a result,

[1] Since Petitioner's sentencing, Congress has raised the statutory maximum from ten to fifteen years (absent the ACCA). Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

"marijuana" under the Controlled Substances Act today, and anytime since the passage of the 2018 Farm Bill, is categorically narrower than any state's definition of marijuana that includes hemp. Thus, there was a categorical mismatch between what Petitioner was convicted of delivering or intending to deliver (marijuana, under a definition that *includes* hemp) and what is federally prohibited today (marijuana, under a definition that expressly *excludes* hemp). In other words, it is possible Petitioner's state convictions involved only hemp. And because hemp was no longer included in the federal drug schedules by the time Petitioner was sentenced, his state hemp convictions should not count as "serious drug offenses."

The district court overruled the objection, stating Petitioner was subject to the ACCA because there was no mismatch between the state and federal drug schedules at the time he committed the state offenses. It sentenced Petitioner to 180 months, the mandatory minimum. App. E, 120a–126a.

On direct appeal, Petitioner again argued the correct federal comparator was the version of the Controlled Substances Act in place at the time of federal sentencing, urging the court to follow the Fourth Circuit's "time of sentencing" holding in *Hope*, 28 F. 4th 487. The Fourth Circuit supported its holding by relying on basic sentencing principles, noting:

> [I]t 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. at 505, quoting *United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021) (which used the time-of-sentencing categorical approach in considering what is a "controlled substance" under the sentencing guidelines). Petitioner argued alternatively, in light of the confusion regarding the timing issue, the rule of lenity should be applied. App. B, 48a–49a.

After Petitioner filed his opening brief, and before the government filed its response, the Tenth Circuit issued its ruling in *United States v. Williams*, 48 F.4th 1125 (10th Cir. 2022)[2], holding the "time of federal offense" approach is correct—i.e., the correct federal comparator is the Controlled Substances Act in place at the time of commission of the federal offense. *Id.* at 1138. It did so based on notice principles, stating that "enhancing [a defendant's] sentence based on a conflicting definition that predates his federal offense would deprive him of fair notice of the consequences of violating federal law. Thus, he must be sentenced according to the federal definition of 'controlled substance' in effect at the time of his federal offense, as expressly referenced in the ACCA." *Id.* at 1142. The Tenth Circuit rejected the government's argument that this Court's decision in *McNeill v. United* States, 563 U.S. 816 (2011), and the Sixth Circuit's reliance on the same, supported its proposed time-of-prior-state-conviction rule. *See id.* at 1142–43. While *McNeill* discussed a subsequent change in a prior offense of conviction in the ACCA context, the panel found the case had "no bearing on what version of *federal law* serves as the point of comparison for

[2] *United States v. Williams*, 48 F.4th 1125 (10th Cir. 2022) also involved a defendant with the last name of Williams defending against application of the ACCA. That defendant was Gregory Williams, not to be confused with the Petitioner herein, Brandon Williams.

the prior state offense." *Williams*, 48 F.4th at 1143. The panel expressly declined to decide "whether the district court looks to the federal definition at the time of the *commission* of the instant federal offense or at the time of *sentencing* thereon" and stated it was "leav[ing] that issue open for future resolution in the appropriate case." *Id.* at 1133 n.3. Petitioner's case turned out to be that case.

The government did not file a petition for rehearing in *Williams*, and responded to Petitioner's brief by arguing, in light of *Williams*, that the comparison "should be made between the state schedules in effect at the time of the defendant's state conviction and the federal drug schedules at the time the defendant committed the federal offense." App. C, 95a. It urged the panel to follow the Third Circuit's decision in *Brown*, 47 F.4th 147, which held the federal saving statute in 1 U.S.C. § 109 required the panel to determine that ACCA penalties are incurred at the time of the commission of the federal offense, and not later. App. C, 101a–103a. Petitioner countered that reliance on the federal saving statute was inapposite arguing that the relevant sentencing statute was 18 U.S.C. § 924(e), which was not changed by an act of Congress. App. D, 113a. Moreover, the 2018 Farm Bill did not repeal penalties for marijuana convictions but merely modified the definition of marijuana to exclude hemp; therefore, the saving statute was not in play. App. D, 113a–114a.

The Tenth Circuit held that fair notice principles fairly supported adoption of the "time of federal offense" comparison. *See* App. A, 17a–18a. The panel found this approach would minimize potential disparities in sentencing and avoid any incentive to delay sentencing to either party's advantage. App. A, 19a. It declined to decide

whether the federal saving statute was relevant, and declined to apply the rule of lenity. App. A, 19a–20a. As a result, Petitioner's 15-year ACCA sentence was affirmed.

REASONS FOR GRANTING THE PETITION

The circuit courts are deeply divided on the correct application of the categorical approach to determine whether a state prior is a "serious drug offense" under the ACCA. This Court recently granted certiorari in *Brown v. United States*, No. 22-6389 (May 15, 2023), a case in which the Third Circuit held that "time of federal offense" is the correct federal comparator. Like Petitioner here, the "time of federal sentencing" approach is urged by the *Brown* petitioner. On the same day, this Court also granted certiorari in *Jackson v. United States*, No. 22-6640 (May 15, 2023), a case in which the Eleventh Circuit held that "time of state offense" was the correct time of comparison, and the petitioner would receive relief if either the "time of federal offense" or "time of federal sentencing" approach were adopted. This Court consolidated those two cases as Case Number 22-6389 in order to determine which of these varying approaches is correct. The Court should accordingly hold this petition for writ of certiorari pending its decision in the consolidated *Brown* and *Jackson* matters and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Brown v. United States*, No. 22-6389 (May 15, 2023) *and Jackson v. United States*, No. 22-6640 (May 15, 2023) (consolidated as No. 22-6389), and then disposed of as appropriate in light of that decision.

Respectfully submitted,

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