IN THE

# Supreme Court of the United States

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BRANDON ROSS WILLIAMS,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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## APPENDIX

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BRANDON ROSS WILLIAMS,

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## APPENDIX A

*Opinion by the U.S. Court of Appeals for the Tenth Circuit (March 6, 2023)*

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FILED
United States Court of Appeals
Tenth Circuit

March 6, 2023

Christopher M. Wolpert
Clerk of Court

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRANDON ROSS WILLIAMS,

Defendant - Appellant.

No. 22-6021

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**Appeal from the United States District Court**
**for the Western District of Oklahoma**
**(D.C. No. 5:20-CR-00211-PRW-1)**

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Laura Deskin, Research and Writing Specialist, (and Jeffrey M. Byers, Federal Public Defender, on the briefs), Oklahoma City, Oklahoma, for Defendant-Appellant.

Danielle Connolly, Assistant United States Attorney, (and Robert J. Troester, United States Attorney, on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellee.

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Before **MATHESON**, **KELLY**, and **PHILLIPS**, Circuit Judges.

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**KELLY**, Circuit Judge.

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Defendant Brandon Ross Williams pled guilty to being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), and was sentenced to 180 months' imprisonment. On appeal, he challenges his lengthy sentence as an improper application of the Armed Career Criminal Act (ACCA). He asserts that his two prior Arkansas drug

convictions are not categorically "serious drug offenses" under 18 U.S.C. § 924(e)(2)(A)(ii) because his state convictions could have applied to hemp, and hemp was no longer a federally controlled substance at the time of his federal sentencing. Our jurisdiction arises under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) and we affirm.

Ultimately, this case is all about timing. Specifically, in the context of assessing whether a prior state drug conviction qualifies as a predicate "serious drug offense" under the ACCA, we must resolve the proper time of comparison to determine whether state and federal drug laws are a categorical match. There are two possible approaches: (1) comparing the state drug schedules in effect at the time of Mr. Williams' prior convictions and the federal drug schedules in effect at the time of his federal sentencing ("time of federal sentencing comparison"); and (2) comparing the state drug schedules in effect at the time of Mr. Williams' prior convictions and the federal drug schedules in effect at the time he committed the instant federal offense ("time of federal offense comparison"). See United States v. Gregory Williams, 48 F.4th 1125, 1133 & n.3 (10th Cir. 2022)

For the reasons discussed below, we adopt the time of federal offense comparison. Since there was a categorical match between Arkansas' definition of marijuana at the time of Mr. Williams' prior convictions and the federal definition at the time he committed his federal offense, the district court properly applied the ACCA enhancement.

**Background**

On May 2, 2018, a Dewey County Sheriff's Deputy initiated a traffic stop of Mr. Williams' car after observing two traffic violations. 2 R. 9. Mr. Williams appeared under the influence, and an inventory search of the car revealed a loaded Glock 27 pistol and a loaded Glock magazine. Id.

On August 18, 2020, Mr. Williams was indicted for being a felon in possession of a firearm on or about May 3, 2018. 1 R. 11–12. On November 4, 2021, Mr. Williams pled guilty to the indictment and acknowledged he potentially faced a minimum 15-year sentence pursuant to the ACCA. Id. 53–65.[1]

The presentence investigation report (PSR) classified Mr. Williams as an armed career criminal and thus subject to an enhanced sentence under 18 U.S.C. § 924(e). To trigger the ACCA's application, the PSR identified three prior Arkansas convictions for a violent felony or serious drug offense: (1) a 2001 conviction for delivery of marijuana; (2) a 2003 conviction for residential burglary; and (3) a 2003 conviction for possession of marijuana with intent to deliver. 2 R. 10, 13–15. The enhancement increased the statutory range on his § 922(g) conviction from 0–10 years' imprisonment to 15 years to life imprisonment. 18 U.S.C. § 924(e)(1).

As for the Sentencing Guidelines, the PSR calculated Mr. Williams' initial base offense level as 20 under U.S.S.G. § 2k2.1(a)(4)(A). The ACCA designation

[1] Mr. Williams initially pled guilty on January 28, 2021, but withdrew his plea upon learning he was subject to the ACCA enhancement. He nonetheless reentered a guilty plea later.

increased the offense level to 33 under § 4B1.4(b)(3)(B). Three levels were then subtracted for acceptance of responsibility under § 3E1.1(a)–(b). At an offense level of 30 with a criminal history category of IV, the guidelines range was 135 to 168 months' imprisonment. However, the ACCA's 15-year mandatory minimum increased the guidelines range to 180 months' imprisonment.

Mr. Williams objected to the ACCA designation arguing the 2001 and 2003 Arkansas drug convictions do not qualify as "serious drug offenses" and thus cannot serve as valid predicate offenses under the ACCA. He argued they do not qualify because the Arkansas drug schedule in effect at the time of his state convictions is categorically overbroad in that it criminalized more substances than did the federal Controlled Substances Act (CSA) in effect at the time of his federal sentencing in 2022. Specifically, Arkansas included hemp in its definition of marijuana at the time of Mr. Williams' state convictions, see Ark. Code Ann. § 5-64-101 (2001), id. (2002), while the federal CSA has exempted hemp from its definition of marijuana since December 20, 2018. See Agricultural Improvement Act of 2018, Pub. L. No. 115-334, § 12619, 132 Stat. 4490, 5018; 18 U.S.C. § 802(16) ("The term 'marihuana' does not include . . . hemp."). Without the ACCA designation, Mr. Williams total offense level would be 17 with a Guidelines range of 37–46 months' imprisonment. 2 R. 33.

The district court overruled the objection. Relying on United States v. Traywicks, 827 F. App'x 889 (10th Cir. 2020), the district court found that since there was a categorical match between the federal and state drug schedules at the

time of the prior state convictions, the convictions qualify as predicate offenses under the ACCA. 3 R. 68–69. Thus, on January 25, 2022, the district court sentenced Mr. Williams to 180 months' imprisonment. Id. 89.

**Discussion**

As noted, Mr. Williams argues that the ACCA enhancement is improper because his two prior Arkansas drug convictions are categorically broader than the ACCA's definition of "serious drug offense" in effect at the time of his federal sentencing. After Mr. Williams was sentenced, this court held that "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." Gregory Williams, 48 F.4th at 1138. However, we left open "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." Id. at 1133 n.3. It was unnecessary to decide that issue because the federal definition of marijuana excluded hemp at both times. Id.

That is not the case here. Both parties agree that the application of the ACCA enhancement turns on whether the Arkansas offense is overbroad. Here, there is a categorical **match** under the time of federal offense comparison such that application of the ACCA is proper, as both the Arkansas state drug schedules in effect in 2001 and 2003 and the federal drug schedules in effect on May 3, 2018 when Mr. Williams committed his federal offense, included hemp. See Aplt. Br. at 14; Aplee. Br. at 16. There is a categorical **mismatch** under the time of federal sentencing comparison, as

the federal drug schedules excluded hemp pursuant to the 2018 Farm Bill at the time of Mr. Williams' sentencing on January 25, 2022.

The two parties disagree only on which version of the federal drug schedules we must look to in determining categorical overbreadth. The government urges we look at the federal drug schedules in effect when Mr. Williams committed his underlying federal offense. Mr. Williams contends we must look at the federal drug schedules in effect when he was sentenced.

**A. The ACCA**

The ACCA imposes a sentence enhancement for being a felon in possession of a firearm for any person who has "three previous convictions . . . for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). Relevant here, the statutory definition of "serious drug offense" includes "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 [CSA] (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 924(e)(2)(A)(ii). In turn, 21 U.S.C. § 802(6) states a "controlled substance" is "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter [21 U.S.C §§ 811–14]." We now must determine whether Mr. Williams' prior state drug convictions qualify as serious drug offenses.

**B. Whether Mr. Williams was properly subjected to an enhanced sentence under the ACCA**

We review de novo whether a prior state conviction qualifies as an ACCA

predicate offense. Gregory Williams, 48 F.4th at 1137. To determine whether a prior state drug conviction qualifies as a serious drug offense, we employ the categorical approach. See United States v. Cantu, 964 F.3d 924, 926–27 (10th Cir. 2020). "Under the categorical approach, a state drug offense that includes non-federally controlled substances is overbroad and thus not categorically a 'serious drug offense.'" Gregory Williams, 48 F.4th at 1137.

**1. In employing the categorical approach, circuit courts have employed different approaches to resolve the embedded timing issue**

In employing the categorical approach, the circuits have taken a variety of approaches regarding which version of drug schedules apply. Only one other circuit has addressed the precise issue presented here. Instead, the circuit debates have largely concerned whether a court should compare state and federal law as it existed at the time of the prior state conviction (time of prior state conviction comparison) or compare past state law with some version of current federal law.

As noted, this court adopted the time of federal offense comparison, albeit leaving open the specific issue we must answer. Gregory Williams, 48 F.4th at 1133 & n.3. We relied in part on holdings of the First and Ninth Circuits that courts must look to the federal drug schedules in effect at the time of federal sentencing to determine whether a prior conviction is a "controlled substance offense" within the meaning of the Sentencing Guidelines. See United States v. Abdulaziz, 998 F.3d 519, 531 (1st Cir. 2021); United States v. Bautista, 989 F.3d 698, 703 (9th Cir. 2021). Those cases of course addressed this timing question in the context of the Guidelines

and not the ACCA — an important distinction. Such a distinction is important as those circuits found the term "controlled substance" under U.S.S.G. § 4B1.2(b) to be limited to substances listed in the federal CSA, Bautista, 989 F.3d at 702; Abdulaziz, 998 F.3d at 529, whereas this court has found that the meaning of "controlled substance" in the Guidelines is not so limited. United States v. Jones, 15 F.4th 1288, 1294 (10th Cir. 2021). Moreover, those cases were deciding whether to employ a time of federal sentencing or time of prior state conviction comparison. A time of federal offense comparison was never considered.

In the ACCA context, the Fourth Circuit held courts must compare federal law in effect at the time of federal sentencing with the state law in effect at the time of state sentencing for the prior convictions. See United States v. Hope, 28 F.4th 487, 504–05 (4th Cir. 2022). Thus, the Fourth Circuit adopted the time of federal sentencing comparison. The court based its decision on the fact that "the Sentencing Guidelines require that a district court use the manual that is 'in effect on the date that the defendant is sentenced . . . .'" Id. at 505 (quoting U.S.S.G. § 1B1.11). While it appears adopting the time of federal sentencing comparison as opposed to the time of federal offense comparison would have been outcome determinative (like Mr. Williams, the defendant in Hope committed his crime prior to the 2018 Farm Bill but was sentenced afterward, and argued overbreadth based on the 2018 Farm Bill's exclusion of hemp) the Fourth Circuit also presented its resolution as a dispute between whether to employ the time of federal sentencing comparison or time of prior state conviction comparison. Id. at 492–93, 504–05.

Next, the Eighth Circuit held that under the ACCA, "the categorical approach requires comparison of the state drug schedule at the time of the prior state offense to the federal schedule at the time of the federal offense." United States v. Perez, 46 F.4th 691, 700 (8th Cir. 2022). Thus, the Eighth Circuit adopted the time of federal offense comparison. However, it appears the court was not required to decide whether to consult federal law at the time of the federal offense or federal sentencing.[2] Instead, it was confronted with whether to use the federal definition at the time of the prior state conviction or a more current definition. Id. at 699–700. The court in Perez rooted its decision in due process and fair notice considerations stating that consulting the federal drug schedule in force at the time of the federal offense ensures that a defendant has notice of whether his prior convictions could affect the penalty he faces for the underlying federal offense. Id. Interestingly, Perez employed a different comparative approach under the Guidelines, holding that "whether a prior state conviction is a controlled substance offense for Guidelines purposes is based on the law at the time of conviction, without reference to current

[2] This understanding of Perez is reinforced by some imprecise language in the court's holding. After deciding the relevant timeframe is the "time of the federal offense," the Eighth Circuit went on to state that "[w]hether a previous state conviction is a serious drug offense only becomes salient at the time of sentencing . . . . Therefore, the federal law in effect at the time of the federal sentencing is the relevant definition for ACCA purposes." Id. While Perez sends mixed signals concerning the timing issue, it unequivocally applied the relevant drug definition at the time of the federal offense—2019—even though the defendant was sentenced in 2021, and thus employed the time of federal offense comparison. Id. at 696–97, 699–700.

state law."[3] Id. at 703 (emphasis added). The Eighth Circuit like our circuit has found that the term "controlled substance," is not limited to those substances listed in the federal CSA. Id. at 702.

Next, the Third Circuit explicitly parted ways with the Fourth Circuit's decision in Hope and held "that courts must look to the federal law in effect when the defendant committed the federal offense." United States v. Brown, 47 F.4th 147, 153 (3d Cir. 2022). Most importantly, the Third Circuit appears to be the only circuit presented with the precise issue this court faces — whether to adopt the time of federal offense comparison or the time of federal sentencing comparison. Cf. Hope, 28 F.4th at 504–05 (discussing why it employed a time of federal sentencing comparison as opposed to a time of prior state conviction comparison).

The Third Circuit's decision to adopt the federal offense approach was guided in part by the federal saving statute, which provides that the "repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide." 1 U.S.C. § 109. Under the saving statute, "penalties are 'incurred' under the older statute when an offender becomes subject to them, i.e., commits the underlying

[3] On the same day that Perez was issued, the Sixth Circuit, in the context of the Guidelines' career offender enhancement — U.S.S.G. § 4B1.1(a) — and to determine the meaning of "controlled substance offense" under U.S.S.G. § 4B1.2 adopted a time of prior state conviction comparison and held courts must consult "the drug schedules in place at the time of the prior conviction" not the drug schedules in place at the time of instant federal sentencing. United States v. Clark, 46 F.4th 404, 408 (6th Cir. 2022).

conduct that makes the offender liable." Dorsey v. United States, 567 U.S. 260, 272 (2012). The Third Circuit determined that the 2018 Farm Bill effected a repeal within the meaning of the saving statute given that it changed the definition of marijuana and thereby indirectly affected federal penalties associated with prior serious drug offenses. Brown, 47 F.4th at 151. Moreover, since the defendant committed the offense prior to the effective date of the 2018 Farm Bill, the defendant incurred his penalties at that time, when there was still a categorical match for purposes of the ACCA. Id. at 151–52. Lastly, the court determined the 2018 Farm Bill did not make the new definition of marijuana retroactive and therefore did not disturb application of the federal saving statute. Id. at 152–53.

The Third Circuit distinguished the Supreme Court's decision in Dorsey, which addressed a similar timing issue. 567 U.S. 260. In Dorsey, the Court considered whether lighter sentencing penalties for crack cocaine introduced by the Fair Sentencing Act of 2010 should apply to offenders who committed their offense prior to the Act's passage. 567 U.S. at 264. There, the Court found pre-Act offenders were entitled to the lesser penalties because the Act incorporated a background sentencing principle embodied in the Sentencing Reform Act of 1984 that courts apply the Guidelines in effect on the date of sentencing. Id. at 275. In contrast, the Third Circuit found that nothing in the 2018 Farm Bill implies retroactive application of newer versions of the federal drug schedule nor does it direct courts to look to the background sentencing principle embodied in the Sentencing Reform Act. Brown, 47 F.4th at 152.

Additionally, in reaching its conclusion, the Third Circuit noted that applying the time of federal offense comparison best comports with fair notice principles as it allows a defendant to know whether his prior convictions constitute serious drug offenses when he commits the underlying federal offense. Id. at 153. Moreover, it reasoned that applying federal law at the time of federal sentencing would lead to significant and arbitrary sentencing disparities. Id. While the court acknowledged all line-drawing creates some degree of arbitrariness, it concluded that any resulting disparity ought to be rooted in a defendant's voluntary conduct, as opposed to when that defendant is sentenced, which can be affected by countless considerations beyond the defendant's control.[4] Id. Thus, the defendant in Brown was properly subjected to the ACCA's enhanced penalties because there was a categorical match between the federal and state definition of marijuana at the time he committed his federal offense even though there was a subsequent mismatch caused by the 2018 Farm Bill when he was sentenced. Id. at 150–53.

Lastly, we note that the Eleventh Circuit initially adopted the time of federal offense comparison as well. See United States v. Jackson, 36 F.4th 1294, 1297 (11th Cir. 2022) superseded, 55 F.4th 846 (11th Cir. 2022). Much like Perez and Brown, its decision was grounded in the fact "that due-process fair-notice considerations

[4] The Third Circuit offered the hypothetical of two defendants violating the same law on the same date in 2016 in identical fashion with identical prior convictions. Id. at 153. However, if one pleaded earlier and was sentenced in 2017, that defendant would be subject to the ACCA whereas the defendant who was sentenced after the 2018 Farm Bill would receive a lighter sentence. Id.

require us" to adopt the time of federal offense comparison. Id. However, the Eleventh Circuit reversed course and adopted the time of prior state conviction comparison holding that approach was required by the Supreme Court's decision in McNeill v. United States, 563 U.S. 816 (2011). See Jackson, 55 F.4th at 855. Thus, in employing the categorical approach the court compared the state drug schedules to the federal drug schedules as they existed at the time of the prior state conviction. Id. at 856. It is worth noting that this court explicitly rejected the contention that McNeill controls which version of federal law courts must consult because McNeill "was discussing a subsequent change in the prior offense of conviction—and not the federal definition to which it is compared." Gregory Williams, 48 F.4th at 1142–43.

For those keeping count, in the ACCA context that makes two circuits adopting the time of federal offense comparison, see Brown, 47 F.4th at 153; Perez, 46 F.4th at 700; one circuit adopting the time of federal sentencing comparison, see Hope, 28 F.4th at 504–05; and one circuit adopting time of prior state conviction comparison—after originally adopting the time of federal offense comparison, see Jackson, 55 F.4th at 855. As for determining whether prior convictions can serve as predicate "controlled substance offenses" under the Guidelines, see U.S.S.G. § 4B1.2, every circuit that limits the definition of "controlled substance" to the federal definition as embodied in the CSA has adopted the time of federal sentencing comparison. See Abdulaziz, 998 F.3d at 531; Bautista, 989 F.3d at 703. By contrast, in circuits that do not define "controlled substance" by reference to the CSA, every circuit to reach the timing question has held that a court only consults the law at the

time of the prior state conviction, not current federal or state law. See Clark, 46 F.4th at 408; Perez, 46 F.4th at 703. Though the cases on the timing issue are not entirely uniform, we think that the correct approach is to employ the time of federal offense comparison.

**2. The parties' contentions**

Mr. Williams argues the time of federal sentencing comparison is correct because the "text, history, and purpose of the ACCA all point toward comparing the state drug schedules at the time of state conviction to current CSA drug schedules." Aplt. Br. at 15. Mr. Williams contends that because the text reflects an understanding that the drug schedules may change, one must apply current federal law as opposed to older versions. Id. at 17. For support, he points out that the term "controlled substance" is defined as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." Id. at 15 (citing 21 U.S.C. § 802(6)). In turn, Part B of the relevant subchapter states that in addition to these initial five schedules, "[t]he schedules established by this section shall be updated and republished on a semiannual basis." Id. at 15–16 (citing 21 U.S.C. § 812(a)). Moreover, Mr. Williams argues that Congress was aware of the background principle that we apply the sentencing laws in place on the date of sentencing when crafting § 924(e)(2)(A)(ii). Id. at 18 (citing Dorsey, 567 U.S. at 275).

In addition, he urges this court to follow the Fourth Circuit's lead in Hope. As discussed, Hope relied on the fact that the Guidelines require courts to use the

manual in effect on the date of sentencing.[5] Lastly, to the extent there is ambiguity, Mr. Williams urges this court to apply the rule of lenity and decide the timing issue in his favor. Aplt. Br. at 22–23.

In response, the government argues that the federal saving statute resolves the question in its favor. Aplee. Br. at 13–17. It argues Mr. Williams incurred his ACCA penalty on the date he committed his offense. See Dorsey, 567 U.S. at 272. Moreover, just as the Third Circuit found, it argues the 2018 Farm Bill constitutes a repeal within the meaning of the saving statute as it excluded hemp from the definition of marijuana and thereby indirectly affected federal penalties for marijuana convictions. See id. (discussing that a repeal occurs when a new statute decreases the penalties under the older statute). Moreover, it argues, as the Third Circuit found, the 2018 Farm Bill did not express an intent to apply retroactively[6] and, as such, Mr. Williams properly incurred the enhanced ACCA penalties because he committed his underlying offense while hemp was still included in the federal definition of marijuana.

Mr. Williams counters that reliance on the federal saving statute is inapposite. Aplt. Reply Br. at 2–6. According to Mr. Williams, the relevant sentencing statute is

[5] In fact, Hope directly quoted Bautista, a Guidelines case, which stated "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. Hope, 28 F.4th at 505 (quoting Bautista, 989 F.3d at 703) (emphasis in original). According to the Fourth Circuit, such a view would nullify Congress' ability to revise the criminal code. Id.

[6] Mr. Williams concedes the bill's new definition of marijuana is not retroactive. Aplt. Reply Br. at 3.

18 U.S.C. § 924(e), and that statute has not been changed by any act of Congress. Moreover, the 2018 Farm Bill did not repeal penalties for marijuana convictions but merely modified the definition of marijuana to exclude hemp. Thus, the saving statute is simply not in play here and it cannot tell us which federal drug schedule to consult in conducting our categorical analysis. Id. at 3. Instead, according to Mr. Williams and as the Fourth Circuit found in Hope, background sentencing principles, utilized in Guidelines cases, require us to consult the federal drug schedule in effect at the date of sentencing.

**3. Analysis**

Mr. Williams' first contention — that the "text, history, and purposes of the ACCA" dictates that we adopt time of federal sentencing comparison — is unavailing. To be sure, the ACCA's definition of "serious drug offense" does reference a schedule that is subject to change. However, that simply does not address which version of that changing drug schedule a court must consult in conducting its categorical analysis. He provides no other textual, historical, or purpose-based arguments.

In addition, Mr. Williams' reliance on the Fourth Circuit's decision in Hope is unpersuasive. Hope relied on Guidelines cases such as Bautista[7] and the Guidelines directive that courts use the manual in effect on the date of sentencing, neither of

[7] Indeed Hope mistakenly asserts that Bautista concerned a similar timing issue in the ACCA context. Id. at 505 n.15. The case did not concern the ACCA but rather whether a prior conviction was for a "controlled substance offense" under § 4B1.2(b) of the Guidelines. Bautista, 989 F.3d at 701.

which applies here. 28 F.4th at 505. As the Third Circuit rightly pointed out, this is not a Guidelines case, but rather a case involving the ACCA, which omits a similar directive requiring courts to use the law in effect at the time of sentencing. Brown, 47 F.4th at 153–54. Accordingly, Mr. Williams' argument concerning background sentencing principles embodied in the Guidelines does not overcome the due process and fair notice considerations that ultimately carry the day as discussed below. To be sure, the cases that have employed the time of federal sentencing comparison for purposes of the Guidelines could be persuasive and favor Mr. Williams' position. However, Bautista and Abdulaziz are distinctly unpersuasive given that unlike the Tenth Circuit, the First and Ninth Circuits limit the term "controlled substance" in U.S.S.G. § 4B1.2(b) to substances listed in the federal CSA, Bautista, 989 F.3d at 702; Abdulaziz, 998 F.3d at 529. As for the circuits that have reached this issue but do not so limit the term "controlled substance" like the Tenth Circuit does, see Jones, 15 F.4th at 1294, they have employed a time of prior state conviction comparison. See Clark, 46 F.4th at 408; Perez, 46 F.4th at 703. In total, looking to these out-of-circuit cases discussing the timing issue under the Guidelines provides little meaningful guidance. Thus, we decline to follow Hope, which expressly relied on those cases.

In rejecting Mr. Williams' argument, we instead adopt the time of federal offense comparison as due process and fair notice considerations mandate such an approach. It is vital that when a defendant commits a federal offense, that defendant is aware of the penalties he faces and the nature of his prior convictions should he

have any. See United States v. Johnson, 576 U.S. 591, 595 (2015). Leaving a defendant in limbo until he is sentenced violates this notice requirement. As Judge Hartz noted, applying the federal schedules in effect at the time of the federal offense best comports with fundamental notions of due process. See Cantu, 964 F.3d at 936–37 (Hartz, J., concurring). This court in Gregory Williams embraced this rationale when it chose the time of federal offense as the appropriate reference point. See 48 F.4th at 1142. So too did the Third and Eighth Circuits. See Brown, 47 F.4th at 153 ("[T]his rule gives a defendant notice not only that his conduct violated federal law, but also of his potential minimum and maximum penalty for his violation and whether his prior felony convictions could affect those penalties." (internal quotation omitted)); Perez, 46 F.4th at 699.

In addition, this approach minimizes potential disparities in sentencing. Under Mr. Williams' desired approach, two individuals who violate § 922(g) in identical respects with identical prior convictions could receive different sentences simply because they might be sentenced at different times. See Brown, 47 F.4th at 153. Sentencing dates are affected by a variety of factors including plea negotiations, health concerns, and court schedules. In fact, several years may pass between the commission of an offense and sentencing. See e.g., United States v. Gould, 672 F.3d 930, 933–34 (10th Cir. 2012) (indicating over six years passed between the defendant's commission of his offenses and sentencing thereon).

In light of this troubling potential for disparity, the Third Circuit reasoned, "[i]f penalties are to differ because of an arbitrarily selected date, it seems fairer that

the severity of the penalty depend upon the voluntary act of a defendant in choosing the date of his criminal conduct than upon the date of sentencing." Brown, 47 F.4th at 153 (quoting United States v. Reevey, 631 F.3d 110, 114 (3d Cir. 2010)). Of course, we recognize disparities could result from the time of federal offense comparison. However, the approach we adopt makes those disparities less arbitrary as it ties them to a defendant's voluntary act. Moreover, it avoids another problematic aspect inherent in the time of federal sentencing comparison. That approach could incentivize delay (in hopes of a change in the law creating or eliminating a categorical mismatch) to the defendant's or government's advantage.

As for the government's federal saving statute argument and Mr. Williams' dispute of its applicability, we note that Congress did not change the ACCA — the underlying sentencing statute at issue here. Moreover, the 2018 Farm Bill simply excluded hemp from its definition of a controlled substance, it did not repeal penalties for marijuana convictions. What it did do is de-criminalize hemp. The government argues the 2018 Farm Bill set off a chain of events that indirectly affected penalties under the ACCA and as such implicated a statutory change of the ACCA. Given the more direct approach of our disposition, we need not resolve this contention.

Lastly, the rule of lenity does not rescue Mr. Williams' argument. "[T]he rule of lenity applies when a court employs all of the traditional tools of statutory interpretation and, after doing so, concludes that the statute still remains grievously ambiguous, meaning that the court can make no more than a guess as to what the

statute means." Shular v. United States, 140 S. Ct. 779, 789 (2020) (Kavanaugh, J., concurring). First, we are not in a position where we must merely guess which is the correct approach. Instead, we exhaust our tools of statutory interpretation by looking to our own circuit decisions in Cantu and Gregory Williams. In addition, the basis of our decision is rooted in due process and avoiding arbitrary sentencing discrepancies. Second, not a single circuit court when confronted with these timing issues has resorted to the rule of lenity. While that does not prevent us from becoming the first circuit to do so, it demonstrates that our normal tools of interpretation are sufficient, and that the statute is not so "grievously ambiguous." Also, not employing it here comports with the Court's admonition that "the rule of lenity rarely comes into play." Shular, 140 S. Ct. at 788.

Because there was a categorical match between Arkansas' definition of marijuana at the time of Mr. Williams' two prior drug convictions and the federal definition at the time he committed the underlying 922(g) offense, the district court properly applied the ACCA's enhanced penalties.

AFFIRMED.

IN THE

# Supreme Court of the United States

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BRANDON ROSS WILLIAMS,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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## APPENDIX B

*Opening Brief for Brandon Ross Williams*
*(July 25, 2022)*

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No. 22-6021

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

V.

BRANDON ROSS WILLIAMS, DEFENDANT-APPELLANT.

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ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE HONORABLE PATRICK R. WYRICK
DISTRICT JUDGE

D.C. No. CR-20-00211-PRW-1

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# APPELLANT'S OPENING BRIEF

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Oral argument is requested.

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July 25, 2022

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Attachment 3: Shepard document (*State v. Williams*, Case No. CR-2001-52).

Attachment 4: Shepard document (State v. Williams, Case No. CR-2003-907-B).

## TABLE OF AUTHORITIES

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## PRIOR OR RELATED APPEALS

Mr. Williams has no prior appeals. Related appeals currently pending before this Court briefing the "ACCA timing" question at issue in this matter are:

*United States v. Gregory Williams*, No. 21-6061; and

*United States v. Cornell Pitts-Green,* No. 21-6111.

## STATEMENT OF JURISDICTION

The United States District Court for the Western District of Oklahoma had jurisdiction over this criminal case under 18 U.S.C. § 3231. This is a direct appeal of right taken pursuant to Rule 4(b), Federal Rules of Appellate Procedure. The Court of Appeals has jurisdiction to consider this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

## THE ISSUE

Is a pre-2018 Arkansas drug conviction, which could have been for delivery or possession with intent to deliver hemp under since-repealed Arkansas Code Ann. 5-64-401, qualify as a "serious drug offense" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(A)(ii), when hemp was not a federally controlled substance at the time of federal sentencing?

## STATEMENT OF THE CASE

This is a direct criminal appeal from a 180-month term of imprisonment imposed upon Mr. Williams's unlawful-possession-of-a-firearm conviction.

### A. Relevant Procedural Background

On August 18, 2020, a federal grand jury in the Western District of Oklahoma returned a one-count indictment against Mr. Williams charging him with possession of a firearm by a previously convicted felon, 18 U.S.C. § 922(g)(1). R1.11–12.[1] The indictment alleged that the offense occurred on May 3, 2018. R1.11. In November 2021[2], Mr. Williams pleaded guilty to the indictment without a plea agreement. R1.51, 53–65.

United States Probation, in its Presentence Investigation Report (PSR), classified Mr. Williams as an armed career criminal requiring enhanced sentencing under 18 U.S.C. § 924(e). Mr. Williams objected to

[1] Citations to the record on appeal will take the following form: "R1.1," with "R1" indicating the volume of the record on appeal, and ".1" indicating the page number of that volume of the record on appeal. This latter number is the number that appears in the bottom right corner of the record on appeal. For digital readers, this number also corresponds with the .pdf page number of the referenced volume.

[2] Mr. Williams previously entered a plea of guilty on January 28, 2021. R1.18. He withdrew his plea after learning he was subject to the ACCA enhancement. R1.23-35. Mr. Williams reentered a plea of guilty on November 4, 2021. R1.51.

this classification, and to a Chapter 4 ACCA guideline enhancement. R1.66-69, R2.32–33. The district court overruled the objections, R3.68, 73, and, at a sentencing hearing held January 25, 2022, imposed the mandatory minimum sentence of 180 months of imprisonment, to be followed by a three-year term of supervised release, R1.97–98, R3.89.

Mr. Williams timely appealed his federal sentence. R1.103. His appeal is limited to one issue: whether the district court erred in finding that his 2001 and 2003 Arkansas marijuana convictions under Arkansas Code Ann. § 5-64-401 qualify as serious drug offenses under 18 U.S.C. § 924(e)(2)(A)(ii). We present below the specific arguments presented at sentencing relevant to that issue, and the district court's response to those arguments.

## B. Sentencing Proceedings

### 1. The PSR identifies three ACCA predicates, including two "serious drug offenses."

In the PSR, probation claimed that Mr. Williams had two serious drug offenses and a violent felony in his criminal record that qualified him for an enhanced ACCA sentence: (1) a 2001 Arkansas conviction for Delivery of Marijuana; (2) a 2003 Arkansas Conviction for Residential Burglary; and (3) a 2003 Arkansas conviction for Possession of Marijuana

with Intent to Deliver. R2.13–16. The record on appeal does not contain any *Shepard* documents[3] relating to these convictions; however, Mr. Williams has included with this brief the Judgment and Sentence for the two Arkansas drug priors as Attachments C and D. He requests the Court take judicial notice of these documents under Federal Rules of Evidence, Rule 201(b)(2).[4]

The ACCA designation resulted in Mr. Williams's statutory sentencing range increasing from 0–10 years of imprisonment to 15 years–life imprisonment.

The guidelines set the initial base offense level for Mr. Williams's § 922(g)(1) offense at 20 under U.S.S.G. § 2K2.1(a)(4)(A). R2.10. The armed career criminal designation increased that offense level to 33 under

[3] *See Shepard v. United States*, 544 U.S. 13, 21 (2005) (limiting consideration of documents to those "conclusive records made or used in adjudicating guilt").

[4] *See* Fed. R. Evid. 201, 1972 Proposed Rules, Notes to Subdivision (f) ("[J]udicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal.")(citations omitted); *St. Louis Baptist Temple, Inc. v. Fed'l Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (allowing judicial notice of state court proceedings); *See also United States v. Burris*, 912 F.3d 386, 396 (6th Cir. 2019) (taking judicial notice of *Shepard* documents in appeal of ACCA determination); *cf. United States v. Zubia-Torres*, 550 F.3d 1202, 1209 (10th Cir. 2008) (suggesting that appellant should have presented "evidence that relevant documents would indicate his conviction was not for drug trafficking" on plain error appeal of guideline application issue).

U.S.S.G. § 4B1.4(b)(3)(B). R2.10–11. After subtracting three levels under U.S.S.G. § 3E1.1 for acceptance of responsibility, the probation officer set Mr. Williams's total offense level at 30. R2.11. At a level 30 with a criminal history category of IV, the guidelines, including the Chapter 4 Enhancement, would have dictated an advisory sentencing guideline range of 135 to 168 months. R2.28. The ACCA designation further increased the advisory guideline term of imprisonment to 180 months under U.S.S.G. § 5G1.1(b). R.2.28. Without the armed career criminal designation, Mr. Williams's total offense level would be 17, R2.32, and his advisory guidelines range would have been a much lower 37–46 months' of imprisonment.

**2. Mr. Williams objects to the ACCA designation.**

Mr. Williams objected to the 2001 and 2003 Arkansas drug convictions qualifying as "serious drug offenses" under the ACCA, and the attendant increase to his statutory sentencing range and his advisory guidelines. R1.67–69; R2.31–33. He argued this was because there was a mismatch between the substances included in the federal Controlled Substances Act (CSA) at the time of Mr. Williams's sentencing and the substances included in the Arkansas drug schedules at the time of his

state convictions. R2.32. Specifically, the old Arkansas definition of marijuana included hemp, while the current federal CSA specifically excluded hemp from its drug schedules. R2.32. Application of the required categorical approach thus meant the Arkansas marijuana offenses categorically failed to qualify as serious drug offenses. R2.32.

Probation responded that the priors qualified as serious drug offenses pursuant to *United States v. Traywicks*, 827 Fed.Appx. 889 (10th Cir. 2020), stating:

> [T]he Tenth Circuit Court of Appeals determined that Traywicks' 1990, 1991, and 2002 controlled substances convictions under Oklahoma law qualified as "serious drug offenses" under ACCA because Salvia Divinorum and Salvinorin A were not added to the Oklahoma drug schedules until November 1, 2008, after Traywicks had committed his controlled substances offenses.
>
> Therefore, the defendant's 2001 and 2003 convictions for Delivery of Marijuana and Possession of Marijuana with Intent to Deliver qualify as predicate "serious drug offenses" under ACCA.

R2.32.

In his sentencing memorandum, Mr. Williams argued application of the categorical approach required the court to compare the federal drug schedules at the time of Mr. Williams's sentencing to the Arkansas drug

schedules at the time of his state conviction, noting that *Traywicks* did not provide the answer to the question at issue. R1.69. The government did not file a sentencing memorandum, or otherwise file a written response to Mr. Williams's ACCA objections.

**3. The district court overruled Mr. Williams's ACCA objections.**

The district court overruled the objections. R3.73. In so doing, the district court relied on its own perception of the holding in the unpublished case of *United States v. Traywicks*, 827 Fed.Appx. 889 (10th Cir. 2020). It stated that *Traywicks* held, "because there was no mismatch [between state and federal drug schedules] at the time of the commission of the state offenses, that those state convictions did count as predicates under the ACCA." R3.69. The district court then called Mr. Williams's situation "the inverse" of that in *Traywicks* but stated that the result "in terms of the mismatch problem . . . would be the same; that here hemp was not excluded from the CSA until long after the state convictions" and that, because there was no mismatch at the time of the state convictions, Mr. Williams's priors would count as serious drug offenses under the ACCA. R3.69.

With the objections overruled, the district court set the statutory sentencing range as 15 years to life imprisonment, with an advisory guideline range of 180 months, and a sentence of 180 months' imprisonment. R3.77, 89. Had the district court sustained Mr. Williams's ACCA objections, a bottom-of-the-guidelines sentence would have been 143 months lower (37 months) and a top-of-guidelines sentence would have been 134 months lower (46 months).

## SUMMARY OF THE ARGUMENT

Mr. Williams renews his argument below that he is not subject to the ACCA because his two prior Arkansas marijuana convictions are not "serious drug offenses" under 18 U.S.C. § 924(e)(2)(A)(ii).

When Mr. Williams was convicted in 2001 and 2003, Arkansas's definition of marijuana mirrored the definition in the CSA that existed at that time, and neither excluded hemp from their definitions of marijuana during those years. By 2022, when Mr. Williams was sentenced in this federal case, hemp was expressly excluded from the CSA's definition of marijuana. *See* Agricultural Improvement Act, Pub. L. 115-334, 132 Stat. 4490; 21 U.S.C. § 802(16) ("The term 'marihuana' does not include . . . hemp."). That exclusion renders Mr. Williams's

Arkansas marijuana convictions categorically overbroad under the categorical approach that must be employed when determining whether a defendant's state conviction constitutes a predicate "serious drug offense" under the ACCA. *See United States v. Cantu*, 964 F.3d 924, 926 (10th Cir. 2020). Because Mr. Williams's alleged marijuana predicates could have been "hemp" convictions, and under Tenth Circuit precedent must be considered "hemp" convictions, it cannot today be considered a conviction under the CSA to qualify as an ACCA predicate, since hemp is not currently a federally controlled substance.

The government will no doubt argue in response to this brief, as it has in other related cases, that Mr. Williams is comparing the wrong schedules, and that the correct comparison to make is the state drug schedule in effect at the time of the state offense versus the CSA in effect at the time of the state offense. Mr. Williams argues for a "time of sentencing" rule—i.e., that the correct application of the ACCA requires the court to review the CSA in effect at the time Mr. Williams was sentenced to determine whether Mr. Williams's prior state convictions can be considered a "serious drug offense" under today's ACCA.

Alternatively, Mr. Williams argues for application of the rule of lenity.

Under either the time-of-sentencing approach or by application of the rule of lenity, Mr. Williams's 2001 and 2003 drug priors are not serious drug offenses within the meaning of the ACCA. The court erred when it concluded otherwise and subjected him to an ACCA-enhanced mandatory minimum sentence of 180 months. Accordingly, Mr. Williams's case should be remanded to the district court for resentencing.

## ARGUMENT

**The district court erred when it found that Mr. Williams's prior Arkansas marijuana convictions qualified as serious drug offenses under 18 U.S.C. § 924(e)(2)(A)(ii).**

### A. Issue Raised and Ruled On

Mr. Williams argued below that his 2001 and 2003 Arkansas marijuana convictions under since-repealed Arkansas Code Ann. § 5-64-401 did not qualify as "serious drug offenses" under the Armed Career Criminal Act (ACCA). *See* 18 U.S.C. § 924(e)(2)(A)(ii). The argument presented by Mr. Williams below is the same presented herein: Mr. Williams's Arkansas marijuana priors do not trigger the ACCA because the elements of A.C.A. § 5-64-401 do not establish that they involved a

federally controlled substance at the time of his federal sentencing. *See* R1.67–69, R2.31-33; R3.68–73. The district court rejected this argument and found that his prior Arkansas marijuana convictions qualified as serious drug offenses under the ACCA. R3.73–74.

**B. Standard of Review**

This Court reviews "a sentence enhancement imposed under the ACCA de novo." *United States v. Delossantos*, 680 F.3d 1217, 1219 (10th Cir. 2012). In addition, whether a prior conviction qualifies as a "'serious drug offense' involves statutory interpretation, which [this Court] review[s] de novo." *United States v. Johnson*, 732 Fed.Appx. 704, 705 (10th Cir. 2018) (citing *United States v. Trent*, 884 F.3d 985, 991 (10th Cir. 2018), cert. denied 139 S.Ct. 615 (2018).

**C. Mr. Williams's 2001 and 2003 convictions under Arkansas Code Ann. § 5-64-401 are not ACCA predicates because they could have been committed by means of hemp, a substance that was not a federally controlled substance under the Controlled Substances Act at the time of federal sentencing.**

**1. ACCA predicate convictions for serious drug offenses must involve only federally controlled substances; otherwise, they are overbroad under the required categorical approach.**

The ACCA, in relevant part, requires enhanced sentencing for "a person who violates section 922(g)" and who has three previous

convictions "for a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). It defines "serious drug offense" as

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et. seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. § 924(e)(2)(A).

To determine whether a prior state offense qualifies as a "serious drug offense," federal courts must apply the "categorical approach." *Shular v. United States*, 140 S.Ct. 779, 784–85 (2020); *United States v. Cantu*, 964 F.3d 924, 926–27 (10th Cir. 2020). In *Shular*, the Supreme Court clarified that the ACCA's "serious drug offense" definition in § 924(e)(2)(A)(ii) sets out conduct, not generic drug offenses. Thus, under the categorical approach, the "state offense's elements [must] necessarily entail one of the types of conduct identified in § 924(e)(2)(A)(ii)" in order

to qualify as a "serious drug offense." *Shular*, 140 S.Ct. at 784–85 (citation omitted). As recently put by this Court, in order for a defendant's state conviction to constitute a predicate "serious drug offense" under the ACCA,

> [t]he particular facts of the defendant's prior offense are irrelevant. All that counts is what the defendant had to do to be guilty of the offense.... [I]t is not enough that there is an overlap between the elements of the state offense and the definition of *serious drug offense*. It is necessary that essentially any conduct that satisfies elements of the state offense also satisfy the definition of *serious drug offense*. If one can commit the state offense by conduct that is not a serious drug offense, then conviction of the state offense cannot be a predicate for the ACCA.

*Cantu*, 964 F.3d at 927.

At the time of the Arkansas state priors at issue, A.C.A. § 5-64-401 (since repealed) prohibited, among other things, delivery or intent to deliver marijuana. A.C.A. § 5-64-401 (2001) and (2003). During these years, Arkansas's definition of marijuana mirrored the CSA's at the time, and included hemp. *See* A.C.A. § 5-65-101 (2001); A.C.A. § 5-65-101 (2003); 21 U.S.C. § 802(16) (2001); 21 U.S.C. § 802(16) (2003). Thus, Mr. Williams's 2001 and 2003 convictions could have been for hemp, as that was encompassed by the then-definition of marijuana.

Since 2018, the CSA has expressly excluded hemp from its definition of marijuana. *See* Agricultural Improvement Act, Pub. L. 115-334, 132 Stat. 4490; 21 U.S.C. § 802(16) (2019–2022).

In the district court, there was no expressed disagreement that Mr. Williams's alleged ACCA drug predicates were indeed overbroad when comparing the federal drug schedule in effect *at the time of federal sentencing*, with the state drug schedules in effect at the time of the state convictions. Under this time-of-sentencing approach, Mr. Williams's prior convictions do not qualify as serious drug offenses under the ACCA. If one instead compared the state and federal drug schedules in effect *at the time of the state convictions*, there was no mismatch between the two, and Mr. Williams's priors would indeed be serious drug offenses under the CSA. Also, if one compared the state drug schedules in effect at the time of state convictions to the federal drug schedules in effect *at the time of the federal offense*, there was no mismatch. The issue is one of timing, and the correct point of comparison. Which drug schedules do we compare? At the time of this briefing, this Court has not directly addressed the issue.

**2. In applying the categorical approach, the point of comparison should be between the state drug schedules in effect at the time of the state conviction and the federal drug schedules in effect at the time of federal sentencing.**

The text, history, and purpose of the ACCA all point toward comparing the state drug schedules at the time of state conviction to current CSA drug schedules.

The ACCA originally included only robberies and burglaries as predicate offenses triggering its application. *See* Armed Career Criminal Act of 1984, § 1802, 98 Stat. 2185. In 1986, Congress expanded the range of predicate offenses, re-defining and greatly enlarging the meaning of "violent felony" beyond robberies and burglaries, and adding priors for a "serious drug offense" to its reach. Career Criminals Amendment Act of 1986, § 1402(b), 100 Stat. 3207–40, codified at 18 U.S.C. § 924(e)(2).

The text of the ACCA provision at issue, codified in 1986, states that the term "controlled substance" is "defined in section 802 of the Controlled Substances Act (21 U.S.C. 802)." 18 U.S.C. § 924(e)(2)(A)(ii). Section 802 defines "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C. § 802(6). Part B of the relevant subchapter states that those five schedules "shall initially consist of the substances

listed in [21 U.S.C. 812]" but provides that that list would be continually changing:

> The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970, and shall be updated and republished on an annual basis thereafter.

21 U.S.C. § 812(a). Indeed, "[w]ith the exception of anabolic steroids, section 812 of the CSA lists only those substances which were controlled in 1970 when the law was enacted. Since then, over 200 substances have been added, removed, or transferred from one schedule to another." U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION – DIVERSION CONTROL DIVISION, LISTS OF: SCHEDULING ACTIONS, CONTROLLED SUBSTANCES AND REGULATED CHEMICALS (April 2022), *Foreword*, *available at* https://www.deadiversion.usdoj.gov /schedules/ orangebook/orangebook.pdf. Currently federally controlled substances are listed in Part 1308 of the most recent issue of Title 21 of the Code of Federal Regulations. *See id.*; 21 C.F.R. 1308.

Thus, the federal drug schedules regularly change to reflect an evolving understanding of what should or should not be federally controlled: the term "controlled substance" under the ACCA is not a term

of art, but a "concept that can be given scope and content only by reference" to another "body of potentially evolving law," *Jam v. International Finance Corporation*, 139 S.Ct. 759, 769-70 (2019). This distinguishes "controlled substance" from terms such as "burglary" in the ACCA, a term which the Supreme Court has held is to be defined in light of the "ordinary understanding of burglary as of 1986" when section 924(e) was enacted. *See Quarles v. United States*, 139 S.Ct. 1872, 1879 (2019). By contrast, the dynamic nature of what is a "controlled substance" compels the conclusion that the federal drug schedule to be used for comparative purposes under the categorical approach is the federal CSA at the time of the federal sentencing, and not the outdated schedule in effect at the time of the state prior.

Indeed, had Congress desired that we compare state drug offenses to the federal law in place at the time of the prior conviction, it would have said so, just as it did within its "sentencing classification of offenses" statute. *See* 18 U.S.C. § 3559(c)(2)(H)(ii). There, Congress specifically defined the term "serious drug offense" as

> an offense under State law that, had the offense been prosecuted in a court of the United States, would have been punishable under section 401(b)(1)(A) or 408 of the Controlled Substances

> Act (21 U.S.C. 841(b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(A).

18 U.S.C. § 3559(c)(2)(H)(ii). That Congress chose not to define "serious drug offense" under the ACCA in the same way, or anything close to it, is telling. *See Va. Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1900 (2019) ("In any field of statutory interpretation, it is [the court's] duty to respect not only what Congress wrote but, as importantly, what it didn't write.").

Background sentencing principles also support the "time of sentencing" approach. When Congress included the cross-reference to 21 U.S.C. § 802 in § 924(e)(2)(A)(ii), it "was aware of" the background sentencing principle that the applicable sentencing laws are those "in effect on the date the defendant is sentenced." *Dorsey v. United States*, 567 U.S. 260, 275 (2012). It follows that Congress would have expected courts to consider the current federal definition of a controlled substance offense and not a definition from decades prior. Nothing within § 924(2)(e)(2)(A)(ii) dictates otherwise.

**3. The Fourth Circuit agrees that the time of sentencing approach is correct when analyzing serious drug offenses under the ACCA; the Eleventh Circuit uses the "time of federal offense" approach but not the time-of-state-conviction approach.**

This year, the Fourth Circuit in *United States v. Hope* had the opportunity to consider the ACCA timing question at issue here. The Fourth Circuit held, as Mr. Williams urges, that courts must compare the prior state offense against the federal schedules in effect at the time of the federal sentencing. *United States v. Hope*, 28 F.4th 487, 505 (4th Cir. 2022). *Hope* looked to basic sentencing principles to support its holding, 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 guidelines).

The Eleventh Circuit also addressed the ACCA timing issue this year, but held, based on "due-process fair-notice considerations," the

correct analysis is to look to the federal schedules in place at the time of the federal firearm offense and not the ones in effect at the time the defendant was convicted of his predicate state crimes. *United States v. Jackson*, 36 F.4th 1294, 1300 (11th Cir. 2022). In so doing, its focus was not on rejecting the "time of sentencing" approach, an issue that went unbriefed by the parties, but on rejecting the government's advocacy for a "time of state conviction" approach. If this Court follows the Eleventh Circuit, Mr. Williams does not get relief.

Mr. Williams posits that federal sentencing principles dictate that the Fourth Circuit's holding is correct.

**4. The district court's conclusion that *Traywicks* supported its "time of state conviction" drug schedule comparison was incorrect.**

The district court misunderstood the "timing problem" in *United States v. Traywicks*, 827 Fed.Appx. 889 (10th Cir. 2020). This misunderstanding led the district court to conclude that *Traywicks* stood for the proposition that if there is no "mismatch" between federal and state controlled substance schedules at the time of the state conviction the conviction involved a "controlled substance" within the meaning of the ACCA. *See* R3.69. What happened in *Traywicks*, however, does not

defeat Mr. Williams's timing argument whatsoever. In *Traywicks*, the defendant argued he was not subject to the ACCA because Salvia Divinorum and Salvinorin A were listed in Oklahoma's drug schedule but were not included in the current federal CSA. The problem was that Salvia Divinorum and Savinorin A were *not* listed on Oklahoma's drug schedules *at the time of his state offenses*, so Oklahoma's drug schedule at that time was not overbroad compared to the current federal CSA. That was Traywicks's timing problem, quite different from the district court's stated understanding.

Traywicks also argued that 4-methoxyamphetamine and cyclohexamine were listed on Oklahoma's drug schedules at the time of his state offenses, but not included in the federal schedules but he was wrong there: they *were* on the federal schedules at the time of Traywicks' offenses in 1990, 1991, and 2002 (and continue to be), though not on the federal schedules initially established in 1970. There was never a mismatch at any point in time.

This Court did note, without comment, Judge Hartz's statement in his concurring opinion in *Cantu*, 964 F.3d at 936, that "the comparison that must be made is between what the defendant could have been

convicted of at the time of the commission of the predicate state offense and what constitutes a federal drug offense at the time of the federal offense." *Traywicks*, 827 Fed.Appx. 889, 892, n2. Thus, this Court chose to compare the federal schedules in 2018, the time of Traywicks's federal offense, to the state schedules at the time of the state convictions. *See id.* at 891–92. This Court has never held, however, that this is the correct approach to the timing question. And the results would have been the same in *Traywicks* no matter when it chose to make the comparison (unless it looked only at the initial federal drug schedules published in 1970). In *Cantu,* timing was not an issue either. At the time of Mr. Cantu's state drug convictions, his conviction could have been for two drugs that do not appear in the federal drug schedules in effect either at the time of the state offense or at the time he committed his federal offense. Cantu's state priors were categorically overbroad at no matter what point one made the comparison.

**5. The Rule of Lenity**

In the sense that the ACCA is ambiguous regarding whether to look at the federal CSA at the time of federal sentencing, as Mr. Williams advocates, or at the time he committed his 922(g) offense, the rule of

lenity applies. "[T]he rule of lenity applies when a court employs all of the traditional tools of statutory interpretation and, after doing so, concludes that the statute still remains grievously ambiguous, meaning that the court can make no more than a guess as to what the statute means." *Shular*, 140 S.Ct. at 789 (Kavanaugh, J., concurring). When the rule of lenity applies, a court will "'not interpret a federal criminal statute so as to increase the penalty that it places on an individual." *United States v. Concha*, 233 F.3d 1249, 1256 (10th Cir. 2000), quoting *United States v. Diaz*, 989 F.2d 391, 393 (10th Cir. 1993). To the extent that there is ambiguity surrounding this particular timing issue, the rule of lenity favors Mr. Williams's interpretation, for "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S.Ct. 2319, 2333 (2019).

**CONCLUSION**

It was error for the district court to sentence Mr. Williams to 180 months as an armed career criminal, well above the 37–46 month advisory guideline sentence recommended were he not so designated, and well-above the statutory maximum of 120 months. For the reasons stated

herein, his sentence should be vacated, and this case should be remanded for resentencing.

## STATEMENT REGARDING ORAL ARGUMENT

Mr. Williams requests oral argument because counsel believes it will substantially aid this Court in its analytical process.

Respectfully submitted.

Jeffrey M. Byers
Federal Public Defender

s/ *Laura K. Deskin*
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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,686 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook font, Size 14.

s/ *Laura K. Deskin*

## CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2022, I electronically transmitted the attached brief to the Clerk of Court using the NextGen PACER System for filing, which will send notification to: Danielle Connolly, Assistant United States Attorney.

s/ *Laura K. Deskin*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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***United States of America v. Brandon Ross Williams***

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Case No. CR-20-00211-PRW-1

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**ATTACHMENT 1**

*January 25, 2022, Judgment in a Criminal Case*

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

# UNITED STATES DISTRICT COURT

Western District of Oklahoma

UNITED STATES OF AMERICA
**v.**
BRANDON ROSS WILLIAMS

**JUDGMENT IN A CRIMINAL CASE**

Case Number: CR-20-00211-001-PRW

USM Number: 16147-509

Taylor McLawhorn & Traci L Rhone
Defendant's Attorney

## THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. § 922(g)(1), 18 U.S.C. § 924(e) | Felon in Possession of a Firearm | 05/03/2018 | 1 |

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 25, 2022
Date of Imposition of Judgment

PATRICK R. WYRICK
UNITED STATES DISTRICT JUDGE

1/25/2022
Date Signed

AO 245B (Rev. 09/19) Judgment in Criminal Case
Sheet 2 — Imprisonment



DEFENDANT: Brandon Ross Williams
CASE NUMBER: CR-20-00211-001-PRW

## IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
**180 months.**

☒ The court makes the following recommendations to the Bureau of Prisons:

It is recommended the defendant participate in the Federal Bureau of Prisons Inmate Financial Responsibility Program at a rate determined by Bureau of Prisons staff in accordance with the program.

If eligible, it is recommended that the defendant participate in the Residential Drug Abuse Program while incarcerated.

If eligible, it is recommended that the defendant be incarcerated at FCI El Reno.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ By 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: Brandon Ross Williams
CASE NUMBER: CR-20-00211-001-PRW

## SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **3 years.**

## MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight (8) drug tests per month.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Brandon Ross Williams
CASE NUMBER: CR-20-00211-001-PRW

## STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. Stricken.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

## U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Brandon Ross Williams
CASE NUMBER: CR-20-00211-001-PRW

## SPECIAL CONDITIONS OF SUPERVISION

The defendant must submit to a search of his person, property, electronic devices or any automobile under his control to be conducted in a reasonable manner and at a reasonable time, for the purpose of determining possession, or evidence of possession, of firearms, controlled substances, drug paraphernalia, and/or drug trafficking at the direction of the probation officer upon reasonable suspicion. Further, the defendant must inform any residents that the premises may be subject to a search.

The defendant shall participate in a program of substance abuse aftercare at the direction of the probation officer to include urine, breath, or sweat patch testing, and outpatient treatment. The defendant shall totally abstain from the use of alcohol and other intoxicants both during and after completion of any treatment program. The defendant shall not frequent bars, clubs, or other establishments where alcohol is the main business. The court may order that the defendant contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties



DEFENDANT: Brandon Ross Williams
CASE NUMBER: CR-20-00211-001-PRW

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | Restitution | Fine | AVAA Assessment* | JVTA Assessment** |
|---|---|---|---|---|---|
| **TOTALS** | $ 100.00 | $ 0.00 | $ 0.00 | $ 0.00 | $ 0.00 |

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss*** | Restitution Ordered | Priority or Percentage |
|---|---|---|---|

**TOTALS** $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments



DEFENDANT: Brandon Ross Williams
CASE NUMBER: CR-20-00211-001-PRW

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

If restitution is not paid immediately, the defendant shall make payments of 10% of the defendant's quarterly earnings during the term of imprisonment.

After release from confinement, if restitution is not paid immediately, the defendant shall make payments of the greater of $_____ per month or 10% of defendant's gross monthly income, as directed by the probation officer. Payments are to commence not later than 30 days after release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be paid through the United States Court Clerk for the Western District of Oklahoma, 200 N.W. 4th Street, Room 1210, Oklahoma City, Oklahoma 73102.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

| Case Number<br>Defendant and Co-Defendant Names<br>*(including defendant number)* | Total Amount | Joint and Several Amount | Corresponding Payee, if appropriate |
|---|---|---|---|

☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall pay the following court cost(s):
☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
All right, title, and interest in the assets listed in the Preliminary Order of Forfeiture dated February 10, 2021 (doc. no. 33).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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***United States of America v. Brandon Ross Williams***

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Case No. CR-20-00211-PRW-1

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**ATTACHMENT 2**

*Portion of March 3, 2022 Sentencing Transcript Relevant to Mr. Williams's ACCA Objection, Including Jury Wyrick's Oral Ruling on the Objection and Pronouncement of Sentence.*

*R.3.68-69;72-74; 89*

THE COURT: All right. So I'm going to overrule that objection for the reasons given by the Tenth Circuit in *Jones*.

Next is your argument that the ACCA shouldn't apply here and, again, arguing that the underlying Arkansas convictions shouldn't count with respect to the ACCA.

First, I want to start with the residential burglary. I mean, I think I do have an Eighth Circuit case that's directly on point with respect to that, counting that as a predicate under the ACCA.

Anything further you want to say with respect to that?

MR. McLAWHORN: No, your Honor. And that's correct. And I believe we noted that in our objection.

THE COURT: So next I'm going to move to the conviction -- the marijuana convictions under Arkansas law. This is where it gets a little more complicated.

As I understand your argument, it's that, because that Arkansas statute criminalizes the delivery -- or whatever the laundry list of things -- delivery, possession of hemp, and hemp has now been excluded from the Federal Controlled Substances Act, that we have a mismatch and, under the categorical approach, that that Arkansas conviction shouldn't count.

As I understand, you know, the law based on *Cantu* and Traywicks -- I mean, Traywicks told us -- in that case we had

sort of an inverse situation. Where the problem in Traywicks was that, subsequent to the state convictions, Oklahoma added a couple of substances -- salvia substances to its state Controlled Substances Act statute, those two substances were not violations of the federal law.

And in Traywicks, the Court resolved that by holding that, while there may have been a mismatch between state and federal law at the time of the federal offense, because there was no mismatch at the time of the commission of the state offenses, that those state convictions did count as predicates under the ACCA.

When I look at this, it looks like I have the inverse. But in terms of the mismatch problem, it's -- the result would be the same; that here hemp was not excluded from the Federal CSA until long after the state convictions. And at the time of the state convictions, under Arkansas law there was no mismatch.

So applying the categorical approach, these would count as serious drug offenses under the ACCA.

You made some argument in the briefing that Traywicks wasn't on point. I don't think that's right. But I'm going to give you a chance if you have anything else you want to say on that.

MR. McLAWHORN: May I approach the podium?

THE COURT: You may.

THE COURT: Okay. Thank you.

MR. McLAWHORN: Thank you, Judge.

THE COURT: I'll just note a couple of things.

So in Traywicks, the issue with respect to the two salvia substances, there was a mismatch. Traywicks made a secondary argument to try to avoid the timing issue with respect to some other substances.

And the Tenth Circuit there noted that those actually were Schedule I controlled substances because the attorney general had added them. But, again, that was a separate argument with respect to the two salvia substances there was a mismatch, and that, I think, is squarely on point with this case.

And the Court held that that mismatch didn't matter with respect to the ACCA because at the time of the commission of the underlying state offense those were serious drug offenses under the ACCA.

Second, factually, here, this case is even different because federal law wasn't changed, as I understand it, until after the commission of the federal offense here; whereas, in Traywicks, federal law had changed prior to the commission of the federal offense. So, again, I think that fact doesn't cut in your client's favor.

Lastly -- and I know you are just making a record, but what's been hammered into me from day one is the constitution

says I have no say when it comes to policy. I have absolutely no power or authority to make policy. Only Congress does.

So whether the law is good, wise, or otherwise is just of no matter to me. My job is to apply it. So the Armed Career Criminal Act is the law, and I will apply it.

Anything from you, Mr. Harley?

MR. HARLEY: Nothing to add, your Honor.

THE COURT: Okay. So I'm going to overrule the objections with respect to whether the two -- the Arkansas convictions -- marijuana convictions qualify as predicate offenses under the ACCA for the reasons that I've just given.

I think that that resolves -- I think all the other objections to all the paragraphs all fall back on this argument of whether those count, whether the ACCA applies.

MR. McLAWHORN: That's correct, your Honor.

The remainder of our objections are for record purposes, and in case the ACCA were not to be applied, to ensure that if there is a case that comes down --

THE COURT: Right.

MR. McLAWHORN: -- that there is a clear record as to what Mr. Williams' sentencing guidelines should be.

THE COURT: Right. So your objections to all the other paragraphs are those paragraphs, you know, stating what the various ranges and maximum penalties are. So my determination that the ACCA does apply means that I'll be

overruling all of the subsequent objections.

I just want to make sure for the record purposes we are not leaving an objection to any paragraph out there that needs to be resolved. I think I resolved everything with my finding that the ACCA applies.

MR. McLAWHORN: I agree with that.

And also for the record, we would object to the application of the ACCA.

THE COURT: Yes. I understand.

The next thing that comes up is will the government be moving for a one-level decrease of defendant's offense level for acceptance of responsibility?

MR. HARLEY: Yes, your Honor. At this time we would move for such.

THE COURT: Okay. And, again, this is usually something I grant as a matter of course. Here, a little bit of unusual situation given what happened in the case, which is, Mr. Williams originally pled guilty, withdrew -- I allowed him to withdraw that plea because at the time of the original plea hearing he was not on notice that the ACCA might apply.

But at that hearing on the motion to withdraw, he was fully apprised and briefed by me, and we all talked about and understood where we stood. And at that time he made a decision to plead not guilty. It wasn't until sometime later that he did plead guilty.

CHRISTINA L. CLARK, RPR, CRR
United States Court Reporter
200 N.W. Fourth Street, Suite 5419
Oklahoma City, Oklahoma 73102
christina_clark@okwd.uscourts.gov - ph(405)609-5123

out on the other end of this and get employed and that I never see you again. That would be my hope for you.

It's the judgment of the Court that the defendant, Brandon Ross Williams, is committed to the custody of the Bureau of Prisons for a term of 180 months.

I'll recommend that you participate in the Residential Drug Abuse Program while incarcerated, if eligible. Mr. Harley mentioned that program. It's a good program.

The federal prison system has better programming than what you'll get in the state system. If you take advantage of it, I think it can be good for you and help you. So I encourage you to take advantage of those opportunities while you're in.

I am not imposing community service.

Upon release from imprisonment, you will be placed on supervised release for a term of three years. Within 72 hours of release from custody, you will report in person to the probation office in the district to which you are released.

You shall comply with the standard conditions of supervision adopted by this Court and you shall not possess a firearm or other destructive device and you shall cooperate in the collection of DNA as directed by law.

You shall also comply with the special conditions listed in Part D of the presentence investigation report. And I adopt the probation officer's justification for each of those

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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***United States of America v. Brandon Ross Williams***

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Case No. CR-20-00211-PRW-1

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**ATTACHMENT 3**

*Shepard Document*
*State of Arkansas v. Williams, CR-2001-52 December 17, 2001 Judgment and Commitment Order*

Defendant's full name: BRANDON ROSS WILLIAMS

JUDGMENT AND COMMITMENT ORDER
IN THE CIRCUIT COURT OF CRAWFORD COUNTY, ARKANSAS
21ST DISTRICT I DIVISION

On DECEMBER 12, 2001 the Defendant appeared before the Court, was advised of the nature of the charge(s), of constitutional and legal rights, of the effect of a guilty plea upon those rights, and of the right to make a statement before sentencing. The Court made the following findings:

FILED
CRAWFORD COUNTY
CIRCUIT COURT CLERK
2001 DEC 17 P 4:03
BY

DEFENDANT'S FULL NAME: BRANDON ROSS WILLIAMS
DATE OF BIRTH: [redacted]2/81
RACE: WHITE
SEX: MALE
SID #:
DEFENDANT'S ATTORNEY: ROBERT MARQUETTE
PROSECUTING ATTORNEY OR DEPUTY: MARC MCCUNE
CHANGE OF VENUE FROM:

Defendant was represented by ___ private counsel ___ appointed counsel
_X_ public defender ___ himself/herself

Defendant made a voluntary, knowing and intelligent waiver of the right to counsel:
___ Yes _X_ No

There being no legal cause shown by the Defendant, as requested, why judgment should not be pronounced, a judgment of conviction is hereby entered against the Defendant on each charge enumerated, fines levied, and court costs assessed. The Defendant is sentenced to the Arkansas Department of Correction (A.D.O.C.) for the term specified on each offense shown below:

---

TOTAL NUMBER OF COUNTS: 1

---

Offense # 1 Docket #: CR-2001-52
Arrest Tracking #: 690913

A.C.A. # of Offense: 5-64-401
Name of Offense: DELIVERY OF MARIJUANA
Seriousness Level of Offense: 3
Criminal History Score: 0
Presumptive Sentence: RPS-
Sentence is a departure from the sentencing grid. ___ Yes X No.
Offense is a _X_ felony ___misdemeanor.
Classification of offense: ___A ___B _X_C ___D ___U ___Y
Sentence imposed: 12_ months.
Suspended imposition of sentence: 108 months.
Defendant was sentenced as an Habitual Offender under A.C.A. 5-4-501, Subsection ___(a) ___(b) ___(c) ___(d).
Sentence was enhanced by A.C.A. _____.
Defendant ___attempted ___solicited ___conspired to commit the offense.
Offense date: AUGUST 7, AND 13, 2001 * 2000
Number of counts: 2
Defendant was on ___probation ___parole at time of conviction.
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence. ___ Yes _X_ No.
Victim of the offense was ___under ___over the age of 18 years.
Defendant voluntarily, intelligently, and knowingly entered a
_X_ negotiated plea of guilty or nolo contendere.
___ plea directly to the court of guilty or nolo contendere.
Defendant
___ entered a plea as shown above and was sentenced by a jury.
___ was found guilty of said charge(s) by the court, and sentenced by ___the court ___a jury.
___ was found guilty at a jury trial, and sentenced by ___the court ___a jury.

---



2749

CR 2001-

Defendant's full name: BRANDON ROSS WILLIAMS

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Indicate which sentences are to run consecutively:
Death Penalty; Execution Date:
Total time to serve on all offenses listed above: ___12_____ months.
Time is to be served at: ___ Department of Correction _X_ Regional Punishment Facility.
Jail time credit: __1____ days.

The Defendant was convicted of a target offense under the Community Punishment Act. The Court hereby orders that the Defendant be judicially transferred to the Department of Community Punishment (D.C.P.). _X_ Yes ___ No
Failure to meet the criteria or violation of the rules of the D.C.P. could result in transfer to the A.D.O.C.
Fines $0 Court Costs $WAIVED
A judgment of restitution is hereby entered against the Defendant in the amount and terms as shown below:
Amount $0 ___ Due immediately ___ Installments of:
Payment to be made to:
If multiple beneficiaries, give names and show payment priority:

Defendant is a Sex or Child Offender as defined in A.C.A. 12-12-903, and is ordered to complete the Sex Offender Registration Form: ___ Yes _X_ No.
Defendant is alleged to be a Sexually Violent Predator, and is ordered to undergo an evaluation at a facility designated by the Department of Correction pursuant to A.C.A. 12-12-918: ___ Yes _X_ No.
Defendant was adjudicated guilty of a sex offense, a violent offense, residential burglary, commercial burglary, or a repeat offense (as defined in A.C.A. 12-12-1103), and is ordered to have a DNA sample drawn at:
___ a D.C.P. facility ___ the A.D.O.C. or _____ (other): ___ Yes _X_ No.
Defendant was informed of the right to appeal: _X_ Yes ___ No.
Appeal Bond: $
The County Sheriff is hereby ordered to transport the Defendant to ___the Arkansas Department of Correction _X_Regional Punishment Facility.

---

The short report of circumstances attached hereto is approved.

Date: 12/16/01 Circuit Judge: FLOYD G. ROGERS Signature: Floyd G Rogers

I certify this is a true and correct record of this Court.

Date: 12/17/2001 Circuit Clerk/Deputy: Elizabeth Jones

(SEAL) CIRCUIT CLERK CRAWFORD COUNTY, ARK.

(Seal)
Form Revised 8/01

Judge Floyd G. Rogers
12/17/01
Jury Trial [ ]
Bench Trial [ ]
Plea [X]



2750

Defendant's full name: BRANDON ROSS WILLIAMS

ADDITIONAL TERMS/CONDITIONS OF DISPOSITION

_____ Additional checks that come in may be added by separate order or to the Prosecutor's ledger.

_____ Restitution JOINT/SEVERAL with co-defendant(s).

_____ $5.00 administrative fee to be paid with each fine payment.

_____ Adult Probation for ____ mths, pay $25 mthly fee beg._____.

_____ Forfeiture of monies $_____, _____payable _____. _____seized at arrest.

__X__ Forfeiture of property DRUGS AND ANY PARAPHERNALIA TO BE DESTROYED.

_____ Community Service work____DAYS; with _____hrs suspended to be completed at the Crawford County Courthouse.

_____ Defendant to serve one (1) day in the Arkansas Department of Correction pursuant to A.C.A. 5-4-320; Defendant and Adult Probation to schedule day, and Defendant to provide his own transportation to, and from ADC.

__X__ Surrender for ADC/RPF sentence on JANUARY 2, 2002 at 5:00 am

Bond provision: REMAIN ON SAME BOND, OR MAKE NEW BOND.

_____ Boot camp authorized.

_____ Counseling/Rehab for _____yr/mth at _____.

Progress reports to _____Court _____Prosecutor

_____ Victim approves disposition.

_____ No contact with victim(s).

__X__ Driver's license suspended 6 months; _____w/o permit __X__with permit for driving to and from work.

__X__ Suspended time conditioned upon good behavior.

__X__ Any violation of the terms and conditions of this suspended imposition of sentence may result in a revocation and/or a finding of contempt of court.

_____ OTHER:_____

_____

_____ Restitution to be paid FIRST to the CRAWFORD COUNTY PROSECUTING ATTORNEY'S OFFICE. Upon payment in full of restitution, payments are to be made to the Crawford County Sheriff's Office for fine and court costs, and are to continue each month thereafter until paid in full.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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***United States of America v. Brandon Ross Williams***

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Case No. CR-20-00211-PRW-1

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**ATTACHMENT 4**

*Shepard Document*
*State of Arkansas v. Williams, CR-2003-907-B*
*September 19, 2003 Judgment and Commitment*

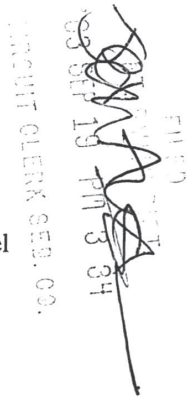
BOOK 541 PAGE 2147

Brandon R. Williams
CR-2003-907-B
G-CR-2003-90-C

JUDGMENT AND COMMITMENT ORDER
IN THE CIRCUIT COURT OF SEBASTIAN, ARKANSAS
FORT SMITH/GREENWOOD DISTRICT CRIMINAL DIVISION V

On SEPTEMBER 17, 2003, the Defendant appeared before the Court, was advised of the nature of the charge(s), of constitutional and legal rights, of the effect of a guilty plea upon those rights, and of the right to make a statement before sentencing. The Court made the following findings:

DEFENDANT'S FULL NAME: BRANDON ROSS WILLIAMS
DATE OF BIRTH: [redacted]1981
RACE: WHITE
SEX: MALE
SID #:
DEFENDANT'S ATTORNEY: CASH HAASER
PROSECUTING ATTORNEY OR DEPUTY: MICHAEL WAGONER
CHANGE OF VENUE FROM:



Defendant was represented by ___ private counsel ___ appointed counsel
_X_ public defender ___ himself/herself

Defendant made a voluntary, knowing and intelligent waiver of the right to counsel:
___ Yes _X_ No

There being no legal cause shown by the Defendant, as requested, why judgment should not be pronounced, a judgment of conviction is hereby entered against the Defendant on each charge enumerated, fines levied, and court costs assessed. The Defendant is sentenced to the Arkansas Department of Correction (A.D.O.C.) for the term specified on each offense shown below:

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TOTAL NUMBER OF COUNTS: 7

---

Offense # 1

A.C.A. # of Offense: 5-36-106
Name of Offense: THEFT BY RECEIVING
Seriousness Level of Offense: 3
Criminal History Score: 1
Presumptive Sentence: RPF/AS
Sentence is a departure from the sentencing grid. _X_ Yes ____ No.
Offense is a _X_ felony ____ misdemeanor.
Classification of offense: ____A ____B _X_ C ____D ____U ____Y
Sentence imposed: _60_ months.
Suspended imposition of sentence: _60_ months.

Brandon R. Williams
CR-2003-907-B
G-CR-2003-90-C

Defendant was sentenced as an Habitual Offender under A.C.A. 5-4-501, Subsection __(a) __(b) __(c) __(d).
Sentence was enhanced by A.C.A. _____.
Defendant ___attempted ___solicited ____conspired to commit the offense.
Offense date: AUGUST 21, 2003
Docket #: CR-2003-907-B
Arrest Tracking #: 3763004
Number of counts: 1
Defendant was on ___probation ___parole at time of conviction.
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence. ____ Yes __X__ No.
Victim of the offense was ___under ___over the age of 18 years.
Defendant voluntarily, intelligently, and knowingly entered a
_X_ negotiated plea of guilty
___ plea directly to the court of guilty/nolo contendere.
Defendant
___ entered a plea as shown above and was sentenced by a jury.
___ was found guilty of said charge(s) by the court, and sentenced by ___ the court ___ the jury
___ was found guilty at a jury trial, and sentenced by ___ the court ___ a jury.

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Offense # 2

A.C.A. # of Offense: 5-64-401
Name of Offense: POSSESSION MARIJUANA WITH INTENT TO DELIVER
Seriousness Level of Offense: 3
Criminal History Score: 1
Presumptive Sentence: RPF/AS
Sentence is a departure from the sentencing grid. _X_ Yes _____ No.
Offense is a _X_ felony _____ misdemeanor.
Classification of offense: _____A _____B _X_C _____D _____U _____Y
Sentence imposed: 60 months.
Suspended imposition of sentence: 60 months.
Defendant was sentenced as an Habitual Offender under A.C.A. 5-4-501, Subsection __(a) __(b) __(c) __(d).
Sentence was enhanced by A.C.A. _____.
Defendant ___attempted ___solicited ____conspired to commit the offense.
Offense date: AUGUST 21, 2003
Docket #: CR-2003-907-B
Arrest Tracking #: 3763004
Number of counts: 1
Defendant was on ___probation ___parole at time of conviction.
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence. ____ Yes __X__ No.
Victim of the offense was ___under ___over the age of 18 years.

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Defendant voluntarily, intelligently, and knowingly entered a
_X_ negotiated plea of guilty
___ plea directly to the court of guilty/nolo contendere.
Defendant
___ entered a plea as shown above and was sentenced by a jury.
___ was found guilty of said charge(s) by the court, and sentenced by ___ the court ___ the jury
___ was found guilty at a jury trial, and sentenced by ___ the court ___ a jury.

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Offense # 3

A.C.A. # of Offense: 5-64-401
Name of Offense: POSSESSION HYDROCODONE (REDUCED)
Seriousness Level of Offense: 4
Criminal History Score: 1
Presumptive Sentence: PEN18/RPF/AS
Sentence is a departure from the sentencing grid. _X__Yes _____ No.
Offense is a _X___ felony _____ misdemeanor.
Classification of offense: _____A _____B _X__C _____D _____U _____Y
Sentence imposed: 60 months.
Suspended imposition of sentence: 60 months.
Defendant was sentenced as an Habitual Offender under A.C.A. 5-4-501, Subsection __(a) __(b) __(c) __(d).
Sentence was enhanced by A.C.A. _____.
Defendant ___attempted ___solicited _____conspired to commit the offense.
Offense date: AUGUST 21, 2003
Docket #: CR-2003-907-B
Arrest Tracking #: 3763004
Number of counts: 1
Defendant was on ___probation ___parole at time of conviction.
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence. _____ Yes _X___ No.
Victim of the offense was ___under ___over the age of 18 years.
Defendant voluntarily, intelligently, and knowingly entered a
_X_ negotiated plea of guilty
___ plea directly to the court of guilty/nolo contendere.
Defendant
___ entered a plea as shown above and was sentenced by a jury.
___ was found guilty of said charge(s) by the court, and sentenced by ___ the court ___ the jury
___ was found guilty at a jury trial, and sentenced by ___ the court ___ a jury.

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Offense # 4

A.C.A. # of Offense: 5-73-107
Name of Offense: POSSESSION DEFACED FIREARM
Seriousness Level of Offense: 2
Criminal History Score: 1
Presumptive Sentence: RPF/AS
Sentence is a departure from the sentencing grid. _X_ Yes _____ No.
Offense is a _X_ felony _____ misdemeanor.
Classification of offense: _____A _____B _____C _X_ D _____U _____Y
Sentence imposed: 60 months.
Suspended imposition of sentence: 12 months.
Defendant was sentenced as an Habitual Offender under A.C.A. 5-4-501, Subsection __(a) __(b) __(c) __(d).
Sentence was enhanced by A.C.A. _____.
Defendant ___attempted ___solicited ____conspired to commit the offense.
Offense date: AUGUST 21, 2003
Docket #: CR-2003-907-B
Arrest Tracking #: 3763004
Number of counts: 1
Defendant was on ___probation ___parole at time of conviction.
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence. _____ Yes _X_ No.
Victim of the offense was ___under ___over the age of 18 years.
Defendant voluntarily, intelligently, and knowingly entered a
_X_ negotiated plea of guilty
___ plea directly to the court of guilty/nolo contendere.
Defendant
___ entered a plea as shown above and was sentenced by a jury.
___ was found guilty of said charge(s) by the court, and sentenced by ___ the court ___ the jury
___ was found guilty at a jury trial, and sentenced by ___ the court ___ a jury.

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Offense # 5

A.C.A. # of Offense: 5-64-403
Name of Offense: POSSESSION DRUG PARAPHERNALIA
Seriousness Level of Offense: 3
Criminal History Score: 1
Presumptive Sentence: RPF/AS
Sentence is a departure from the sentencing grid. _X_ Yes _____ No.
Offense is a _X_ felony _____ misdemeanor.
Classification of offense: _____A _____B _X_ C _____D _____U _____Y



**(75a)**

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Sentence imposed: 60 months.
Suspended imposition of sentence: 60 months.
Defendant was sentenced as an Habitual Offender under A.C.A. 5-4-501, Subsection __(a) __(b) __(c) __(d).
Sentence was enhanced by A.C.A. _____.
Defendant ___attempted ___solicited ____conspired to commit the offense.
Offense date: AUGUST 21, 2003
Docket #: CR-2003-907-B
Arrest Tracking #: 3763004
Number of counts: 1
Defendant was on ___probation ___parole at time of conviction.
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence. ____ Yes __X__ No.
Victim of the offense was ___under ___over the age of 18 years.
Defendant voluntarily, intelligently, and knowingly entered a
__X__ negotiated plea of guilty
___ plea directly to the court of guilty/nolo contendere.
Defendant
___ entered a plea as shown above and was sentenced by a jury.
___ was found guilty of said charge(s) by the court, and sentenced by ___ the court ___ the jury
___ was found guilty at a jury trial, and sentenced by ___ the court ___ a jury.

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Offense # 6

A.C.A. # of Offense: 5-73-103
Name of Offense: FELON IN POSSESSION OF A FIREARM
Seriousness Level of Offense: 2
Criminal History Score: 1
Presumptive Sentence: RPF/AS
Sentence is a departure from the sentencing grid. __X__Yes _____ No.
Offense is a __X__ felony _____ misdemeanor.
Classification of offense: _____A _____B _____C __X__D _____U _____Y
Sentence imposed: 60 months.
Suspended imposition of sentence: 12 months.
Defendant was sentenced as an Habitual Offender under A.C.A. 5-4-501, Subsection __(a) __(b) __(c) __(d).
Sentence was enhanced by A.C.A. _____.
Defendant ___attempted ___solicited ____conspired to commit the offense.
Offense date: AUGUST 21, 2003
Docket #: CR-2003-907-B
Arrest Tracking #: 3763004
Number of counts: 1
Defendant was on ___probation ___parole at time of conviction.
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of

sentence. ____ Yes __X__ No.
Victim of the offense was ___under ___over the age of 18 years.
Defendant voluntarily, intelligently, and knowingly entered a
_X_ negotiated plea of guilty
___ plea directly to the court of guilty/nolo contendere.
Defendant
___ entered a plea as shown above and was sentenced by a jury.
___ was found guilty of said charge(s) by the court, and sentenced by ___ the court ___ the jury
___ was found guilty at a jury trial, and sentenced by ___ the court ___ a jury.

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Offense # 7

A.C.A. # of Offense: 5-39-201
Name of Offense: RESIDENTIAL BURGLARY
Seriousness Level of Offense: 6
Criminal History Score: 1
Presumptive Sentence: PEN42/RPF/AS
Sentence is a departure from the sentencing grid. _X__Yes _____ No.
Offense is a _X__ felony ____ misdemeanor.
Classification of offense: ____A __X__B ____C ____D ____U ____Y
Sentence imposed: __60__ months.
Suspended imposition of sentence: __60__ months.
Defendant was sentenced as an Habitual Offender under A.C.A. 5-4-501, Subsection __(a) __(b) __(c) __(d).
Sentence was enhanced by A.C.A. _____.
Defendant ___attempted ___solicited ____conspired to commit the offense.
Offense date: MARCH 1, 2003
Docket #: G-CR-2003-90-C
Arrest Tracking #: 3759975
Number of counts: 1
Defendant was on ___probation ___parole at time of conviction.
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence. ____ Yes __X__ No.
Victim of the offense was ___under ___over the age of 18 years.
Defendant voluntarily, intelligently, and knowingly entered a
_X_ negotiated plea of guilty
___ plea directly to the court of guilty/nolo contendere.
Defendant
___ entered a plea as shown above and was sentenced by a jury.
___ was found guilty of said charge(s) by the court, and sentenced by ___ the court ___ the jury
___ was found guilty at a jury trial, and sentenced by ___ the court ___ a jury.

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Indicate which sentences are to run concurrently: with each other
Death Penalty: Execution Date:
Total time to serve on all offenses listed above: 60 months.
Time is to be served at: X Department of Correction _____ Regional Punishment Facility.
Jail time credit: 27 days

The Defendant was convicted of a target offense under the Community Punishment Act. The Court hereby orders that the Defendant be judicially transferred to the Department of Community Punishment (D.C.P.).
_____ Yes X No
Failure to meet the criteria or violation of the rules of the D.C.P. could result in transfer to the A.D.O.C.

Fines $_____ and Court Costs $_____, to be paid to the Prosecuting Attorneys Office at the rate of $ _____ per month beginning _____and continuing each month thereafter until paid in full.
A judgment of restitution is hereby entered against the Defendant in the amount and terms as shown below:
Amount $_____ ____Due immediately ___Installments of: $_____per month to be paid starting _____and continuing each month thereafter until paid in full.
Payment to be made to: PROSECUTING ATTORNEY'S OFFICE
If multiple beneficiaries, give names and show payment priority:

Defendant is a Sex or Child Offender as defined in A.C.A. 12-12-903, and is ordered to complete the Sex Offender Registration Form: ____ Yes ____ No.
Defendant is alleged to be a Sexually Violent Predator, and is ordered to undergo an evaluation at a facility designated by the Department of Correction pursuant to A.C.A. 12-12-918: ___ Yes ___ No.
Defendant was adjudicated guilty of a felony offense, a misdemeanor sexual offense, or a repeat offense (as defined in A.C.A. 12-12-1103), and is ordered to have a DNA sample drawn at: ___ a D.C.P. facility _X_ the A.D.O.C. or ___ other: _X__ Yes ___ No.
Defendant has committed an aggravated sex offense, as defined in A.C.A. 12-12-903 _____Yes _____No
Defendant was informed of the right to appeal: ___ Yes ___ No.
Appeal Bond: $
The County Sheriff is hereby ordered to transport the Defendant to X the Arkansas Department of Correction _____Regional Punishment Facility.

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The short report of circumstances attached hereto is approved.

Date: 9/19/05 Circuit Judge: J. MICHAEL FITZHUGH Signature: _____

I certify this is a true and correct record of this Court.

Date: 9/19/05 Circuit Clerk/Deputy: _____

(Seal)

Form Revised 7/2003

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ADDITIONAL TERMS/CONDITIONS OF DISPOSITION

_____ Additional checks that come in may be added by separate order and/or
_____ specific amount to be set by separate order

_____ Restitution JOINT/SEVERAL with co-defendant(s).

_____ $5.00 administrative fee to be paid with each fine payment.

_____ Adult probation for ___yrs/mths, pay $20 mthly fee beg.____

_____ Forfeiture of monies $_____, _____payable, _____ seized at arrest.

_____ Forfeiture of property _____.

_____ Community service work _____hrs/days; with _____hrs suspended to be completed, within _____ days.

_____ Landfill work _____days beginning_____.
To be served _____from home _____from SCDC

_____ Surrender for ADC sentence on _____at _____ am.
Bond provision: _____.

_____ Boot camp authorized.

_____ Counseling/Rehab: _____.
Progress reports to _____Court _____Prosecutor

_____ Defendant to complete Long Term Rehabilitation Program.

_____ Victim approves of disposition ____ appears ____ defendant to have no contact with victim(s).

X Driver's license suspended 6 months; _____w/o permit
X with permit for driving work related.

_____ Defendant to pay Public Defender fee of $100.00

X Suspended time conditioned upon good behavior.

X Any violation of the terms and conditions of this suspended imposition of sentence may result in a revocation and/or a finding of contempt of court.

X OTHER: W/D PTR based on this plea.

IN THE

# Supreme Court of the United States

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BRANDON ROSS WILLIAMS,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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## APPENDIX C

*Opening Brief for the Government*
*(September 23, 2022)*

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**No. 22-6021**

# In the United States Court of Appeals for the Tenth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

V.

BRANDON ROSS WILLIAMS, DEFENDANT-APPELLANT.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE HONORABLE PATRICK R. WYRICK
DISTRICT JUDGE

D.C. NO. CR-20-211-PRW

BRIEF OF PLAINTIFF-APPELLEE
ORAL ARGUMENT NOT REQUESTED

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**Fed. R. App. P. 26.1(b) Statement**

The United States is not aware of any organizational victims of the criminal activity in this case.

## Table of Contents

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## Table of Authorities

**Page(s)**

### Federal Cases

**State Cases**



**Federal Statutes**

**State Statutes**



**Federal Rule**



**Other Authorities**

## Prior or Related Appeals

There are no prior appeals. The following appeals raise a similar issue—whether the exclusion of hemp from the federal definition of marijuana in 2018 disqualifies a prior state drug conviction from qualifying as a serious drug offense under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e):

> *United States v. Williams*, No. 21-6061, 2022 WL 4102823 (10th Cir. Sept. 8, 2022); and
>
> *United States v. Cornell Pitts-Green*, No. 21-6111 (10th Cir. Sept. 21, 2021) (to be submitted on the briefs on September 29, 2022).

## Jurisdictional Statement

Brandon Ross Williams was charged with and pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). ROA, Vol. 1, at 11-12, 53-65.[1] On January 25, 2022, the district court entered a final order sentencing Mr. Williams to 180 months' imprisonment. *Id.* at 96-102. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. Mr. Williams filed a timely notice of appeal on February 7, 2022. *Id.* at 103-04. This Court has jurisdiction pursuant to 18 U.S.C. § 3742.

## Statement of the Issue

In determining whether Mr. Williams's prior Arkansas drug convictions qualified as serious drug offenses under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e):

(1) Did the district court properly compare the federal and state drug schedules as they existed at the time of the predicate convictions (time-of-state-conviction comparison); or

[1] Citations are to documents included in the record on appeal, identifying the volume and page number where they are located, e.g., "ROA, Vol. ___, at ___." *See* 10th Cir. R. 28.1(A)(2).

(2) Should the district court have compared the state drug schedules in effect at the time of the predicate convictions to the federal drug schedules in effect at the time of the sentencing for the federal offense (time-of-federal-sentencing comparison) or at the time the federal offense was committed (time-of-commission-of-federal-offense comparison)?

## Statement of the Case

On May 2, 2018, a Dewey County Sheriff's Deputy observed a vehicle being driven by Brandon Williams commit two traffic violations. ROA, Vol. 2, at 9 (¶ 11). Upon contact with Mr. Williams, the deputy determined that Williams was under the influence of alcohol and arrested him. *Id.* During an inventory search of the vehicle, the deputy discovered a loaded firearm in the back pocket of the front passenger seat and a loaded magazine in the center console. *Id.* (¶ 12).

On August 19, 2020, a grand jury returned an Indictment charging Mr. Williams with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). ROA, Vol. 1, at 11-12. Mr. Williams pled guilty to the Indictment without a plea agreement; however, upon learning that he was subject to enhanced penalties under the Armed Career Criminal

Act (ACCA), 18 U.S.C. § 924(e), he filed a motion to withdraw his guilty plea, which the district court granted. *Id.* at 23-35, 50; ROA, Vol. 2, at 8 (¶¶ 3-4). On November 4, 2021, Mr. Williams again pled guilty, acknowledging the potential of a mandatory minimum sentence of 15 years to a maximum of life imprisonment. *Id.* at 53-65.

The final presentence report (PSR) was issued on November 29, 2021. ROA, Vol. 2, at 5. The probation officer determined that Mr. Williams was an armed career criminal based on the following prior Arkansas convictions: (1) delivery of marijuana, Circuit Court of Crawford County, Van Buren, Arkansas, Case No. CR-2001-52, *id.* at 13 (¶ 33); (2) residential burglary, Circuit Court of Sebastian County, Greenwood, Arkansas, Case No. G-CR-2003-90-C. *id.* at 14 (¶ 35); and (3) possession of marijuana with intent to deliver, Circuit Court of Sebastian County, Fort Smith, Arkansas, Case No. CR-2003-907-B, *id.* at 15 (¶ 36). *Id.* at 10-11 (¶ 24). After deducting three levels for acceptance of responsibility, the total offense level was 30, *id.* at 11 (¶¶ 25-27), the criminal history category was IV, *id.* at 17 (¶ 42), and the advisory guideline range would normally have been 135 to 168 months' imprisonment, *id.* at 28 (¶ 99). However, because of the mandatory

minimum of 15 years required by the ACCA, the guideline range became 180 months' imprisonment. *Id.*

Mr. Williams objected to the application of the armed career criminal enhancement, arguing that his two prior Arkansas drug convictions and Arkansas burglary conviction did not qualify as predicate offenses. *Id.* at 32 (Objection to ¶ 24).[2] Specifically, he argued that his Arkansas drug convictions did not qualify as serious drug offenses because, at the time of his convictions, the Arkansas definition of marijuana included hemp, whereas the current federal definition of marijuana does not. *Id.* (noting that "since December 20, 2018, the CSA has excluded hemp from its definition of marijuana"). Thus, he contended that "an Arkansas marijuana offense categorically fails to qualify as a 'serious drug offense'" because "the Arkansas definition of marijuana is broader than the *current* federal definition of marijuana under the CSA [Controlled Substance Act]." *Id.* (emphasis added). Mr. Williams's argument was based, in part, on a Ninth Circuit case, *United*

[2] Mr. Williams acknowledged that his objection to his Arkansas burglary conviction was foreclosed by *United States v. Sims*, 933 F.3d 1009 (8th Cir. 2019), *see* ROA, Vol. 2, at 32, and he does not challenge this predicate on appeal.

*States v. Bautista*, 982 F.3d 263 (9th Cir. 2020), in which the court compared the federal drug schedules at the time of the federal offense with the state drug schedules at the time of the defendant's prior convictions in holding that an Arizona drug conviction did not qualify as a controlled substance offense under the guideline definition. ROA, Vol. 2, at 31 (Objection to ¶¶ 18 and 23). In response to Mr. Williams's hemp argument, the probation officer noted that this Court in *United States v. Traywicks*, 827 F. App'x 889 (10th Cir. 2020), based its determination of whether a drug conviction was a serious drug offense on a comparison of drug tables at the time of the defendant's prior conviction. *Id.* at 32.

At sentencing, the district court rejected Mr. Williams's argument and overruled his objection to his Arkansas drug convictions. Sent. Tr. at 10. It explained that "in *Traywicks*, the Court resolved [the issue] by holding that, while there may have been a mismatch between the state and federal law at the time of the federal offense, because there was no mismatch at the time of the commission of the state offenses, that those state convictions did count as predicates under the ACCA." *Id.* at 6. Thus, the district court found there was no "mismatch problem" with the Arkansas drug convictions because "hemp was not excluded from the

Federal CSA until long after the state convictions." *Id.* "So applying the categorical approach," the district court found that the Arkansas drug convictions "count as serious drug offenses under the ACCA." *Id.*

After considering the arguments of counsel and the relevant 18 U.S.C. § 3553(a) factors, the district court sentenced Mr. Williams to a prison term of 180 months. *Id.* at 26. Mr. Williams filed a timely notice of appeal. ROA, Vol. 1, at 103-04.

## Summary of the Argument

Mr. Williams challenges the application of the ACCA enhancement, arguing that the Arkansas drug schedules at the time of his state conviction should be compared to the current federal drug schedules when determining whether his prior Arkansas drug convictions qualify as serious drug offenses. Based on this "time-of-federal-sentencing" comparison, Mr. Williams argues that his prior Arkansas drug convictions do not qualify as predicate offenses because the Arkansas definition of marijuana included hemp at the time of his state convictions, whereas the current federal definition of marijuana does not.

At the time that Mr. Williams filed his opening brief, this Court had not directly addressed the question of whether a "time-of-state-

conviction" or "time-of-federal-sentencing" comparison of drug schedules applies in determining whether a prior state conviction qualifies as a serious drug offense under the ACCA. This Court recently decided this issue and adopted a "time-of-instant-federal-offense" comparison. This Court, however, declined to address the alternative issue presented in this appeal: whether the state schedules in effect at the time of the prior conviction should be compared to the federal schedules in effect at the time of the defendant's commission of the federal offense or at the time of the federal sentencing.

For purposes of this appeal, the comparison of drug schedules 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. A time-of-federal-sentencing comparison is inconsistent with the principles of retroactivity and raises due process and potential ex post facto concerns. Because Mr. Williams committed his federal offense prior to the effective date of the legislation excluding hemp from the federal definition of marijuana, the district court properly found that his Arkansas drug convictions qualified as serious drug offenses.

## Argument

### I. The district court properly determined that Mr. Williams's Arkansas drug convictions qualified as serious drug offenses under the ACCA.

#### A. Standard of Review

This Court reviews de novo the question of whether a defendant's prior conviction qualifies as a "serious drug offense" under the ACCA. *United States v. Traywicks*, 827 F. App'x 889, 891 (10th Cir. 2020) (citing *United States v. Degeare*, 884 F.3d 1241, 1245 (10th Cir. 2018)).

#### B. Discussion

A defendant who violates 18 U.S.C. § 922(g)(1) and has "three previous convictions . . . for a violent felony or a serious drug offense, or both" qualifies as an armed career criminal subject to a mandatory minimum sentence of 15 years. 18 U.S.C. § 924(e)(1). A "serious drug offense" is defined, in part, as:

> [A]n offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, or possessing with intent to distribute, a controlled substance (as defined in section 102 of the Controlled Substance 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). In determining whether a state drug offense

meets the definition of a "serious drug offense," the court applies a categorical approach, *see United States v. Cantu*, 964 F.3d 924, 926 (10th Cir. 2020), looking "only to the state offense's elements, not the facts of the case or labels pinned to the state conviction," *Shular v. United States*, 140 S. Ct. 779, 784 (2020). In applying the categorical approach to the definition of a "serious drug offense," this Court has held that it requires a categorical match between the state drug schedules and federal drug schedules. *See Cantu*, 964 F.3d at 927 (citing *Mellouli v. Lynch*, 575 U.S. 798 (2015)). In other words, if the state drug schedules contain controlled substances not included in the federal drug schedules, then the state offense is not categorically a serious drug offense. *Id.*

The question raised by Mr. Williams in this appeal involves the timing of the comparison of the drug schedules. Arkansas, like many states, adopted the Uniform Controlled Substances Act in 1971, *see Curry v. State*, 649 S.W.2d 833, 835 (Ark. 1983), which included hemp in the definition of marijuana, *see* Uniformed Controlled Substances Act § 101(n) (1970). As Mr. Williams acknowledges, at time of his prior convictions in 2001 and 2003, the Arkansas definition of marijuana, *see* Ark. Code Ann. § 5-64-101(n), and the federal definition of marijuana, *see*

21 U.S.C. § 802(16), both included hemp and were a categorical match.[3] *See* Aplt's Br. at 13-14. Effective December 1, 2018, Congress removed hemp from the definition of marijuana, *see* Aplt's Br. at 14 (citing Agricultural Improvement Act ("the Act"), Pub. L. 115-334, 132 Stat. 4490 (2018)); thus, creating a mismatch between the Arkansas state drug schedules at the time of Mr. Williams's convictions and the federal drug schedules in effect at the time of his sentencing on January 25, 2022, *see* ROA, Vol. 1, at 96. However, Mr. Williams committed his federal offense on or about May 3, 2018, *see* ROA, Vol. 1, at 11, prior to the effective date of the Act; thus, there was no mismatch between the state and federal drug schedules at the time he committed the federal offense.

Accordingly, the question presented in this appeal is whether the comparison of drug schedules should be made: (1) between the state and federal drug schedules in effect at the time of the Mr. Williams's prior state convictions (time-of-state-conviction comparison); (2) between the state drug schedules in effect at the time of Mr. Williams's prior

[3] Effective July 24, 2019, Arkansas removed industrial hemp from the definition of marijuana. *See* H.B. 1518, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019); Ark. Code Ann. § 5-64-101(15)(B)(vi).

convictions and the federal drug schedule in effect at the time of his federal sentencing (time-of-federal-sentencing comparison); or (3) between the state drug schedules in effect at the time of Mr. Williams's prior convictions and the federal drug schedules in effect at the time he committed his offense (time-of-commission-of-federal-offense comparison).

**1. The comparison of drug schedules should be made between the state and federal drug schedules in effect at the time of Mr. Williams's prior convictions (time-of-state-conviction comparison).[4]**

While this appeal was pending, this Court decided one of the timing issues in this appeal. In *United States v. Williams*, ___ F.4th ___, 2022

[4] There is a circuit split on this issue, which the government raises here in the interest of preservation. *See United States v. Hope*, 28 F.4th 487, 504-05 (4th Cir. 2022) (adopting the time-of-federal sentencing comparison); *United States v. Jackson*, 36 F.4th 1294, 1297 (11th Cir. 2022) (adopting a time-of-federal-offense comparison), *sua sponte vacated by the panel*, Order, No. 21-13963 (11th Cir. Sept. 8, 2022); *United States v. Perez*, 46 F.4th ___, 2022 WL 3453566, at *3 (8th Cir. Aug. 18, 2022) (adopting a time-of-federal-offense comparison for ACCA purposes, but a time-of-state-conviction rule for guideline purposes); *but see United States v. Clark*, 46 F.4th ___, 2022 WL 3500188, at *1 (6th Cir. Aug. 18, 2022) (adopting the time-of-state-conviction comparison). The United States has not yet determined whether it will seek en banc review of the court's decision in *United States v. Williams* and preserves this issue in the event it seeks en banc review and the decision is overruled or abrogated.

WL 4102823 (10th Cir. Sept. 8, 2022), this Court rejected the time-of-state-conviction comparison and held that the state drug schedules in effect at the time of the defendant's prior conviction should be compared with the federal drug schedules in effect at the time of the instant federal offense ("time-of-instant-federal-offense comparison").[5] *Id.* at *9. The court, however, did not address the separate issue presented in this appeal: whether the comparison of state drug schedules should be made between the federal drug schedules in effect at the time Mr. Williams committed his offense (time-of-commission-of-federal-offense comparison) or the time of the federal sentencing (time-of-federal-sentencing comparison). *Id.* at *9 n.8 ("[W]e need not decide in this case which definition would apply if, for example, a prior offense was overbroad at the time of the commission of the offense, but not at sentencing.").

[5] Although the court's use of this term is somewhat ambiguous, the court specifically noted that it was not reaching the question of whether the comparison was made with the federal schedules in effect at the time of the commission of the offense or the time of sentencing. *Williams*, 2022 WL 4102823, at *9 n.8. To avoid any confusion, the government refers to the comparisons as the "time-of-commission-of-federal-offense" versus the "time-of-federal-sentencing."

**2. The comparison of drug schedules should be made between the state drug schedules in effect at the time of Mr. Williams's prior convictions and the federal drug schedules at the time he committed the federal offense (time-of-commission-of-federal-offense comparison).**

In lieu of the time-of-state-conviction comparison, the government submits that the appropriate comparison of drug schedules in this case is at the time the defendant committed the federal offense. This conclusion is compelled by the operation of the savings statute which provides that the repeal or amendment of "any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide." 1 U.S.C. § 109. For purposes of the savings statute, "penalties are 'incurred' under the older statute when an offender becomes subject to them, i.e., *commits the underlying conduct* that makes the offender liable[,]" not when a court enters a judgment of conviction. *Dorsey v. United States*, 567 U.S. 260, 272 (2012) (emphasis added). Although Congress can override the savings statute by making the repeal or amendment of a criminal law retroactive, it must do so expressly or by the plain import of the statute. *Id.* at 274-75.

In applying these principles, the courts have uniformly declined to retroactively apply changes in the federal drug schedules. For example, in *Lopez Ventura v. Sessions*, 907 F.3d 306 (5th Cir. 2018), the court held that amendments to the controlled substance schedules do not apply retroactively in determining whether a petitioner's prior drug conviction qualifies as a drug-trafficking crime. As explained by the court in *Lopez*, retroactively applying drug schedules raises both due process and ex post facto concerns where, at the time of the petitioner's conviction, the drug was not federally controlled but was added to the schedules prior to his sentencing. *Id.* at 313-14 (noting that the "presumption [against retroactivity] is grounded in numerous constitutional provisions from the Ex Post Facto Clause to the Due Process Clause").

Directly on point with the issue in this appeal, the Third Circuit in *United States v. Brown*, ___ F.4th ___, 2022 WL 3711868 (3d Cir. Aug. 29, 2022), recently adopted the time-of-commission-of-federal-offense comparison in determining whether the defendant's prior Pennsylvania marijuana conviction qualified as a serious drug offense under the ACCA. In reaching this determination, the court explained that "[t]he savings statute [1 U.S.C. § 109] controls . . . because the Agriculture

Improvement Act effectively repealed federal penalties associated with federal marijuana convictions." *Id.* at *3. After examining the text and the purpose of the legislation, the court concluded that the Act did not expressly or implicitly make the definition of marijuana retroactive and held that it must "look to the federal schedule in effect when [the defendant] violated § 922(g)."[6] *Id.* at *5. Because the defendant committed his federal offense in 2016—at a time when the Pennsylvania[7] and federal schedules both included hemp in the definition of marijuana—the court held that the defendant "was, therefore, properly

[6] In a different context, the district court in *United States v. Liu*, No. 18-CR-162-1, No. 2022 WL 180155, at *2 (N.D. Ill. Jan. 20, 2022), *appeal docketed*, No. 22-1282 (7th Cir. Feb. 22, 2022), also found that the savings statute applied to the 2018 amendment to the CSA excluding hemp from the definition of marijuana. It specifically found that "nothing in the text of the 2018 Farm Bill indicates any intent to make retroactive its amendment to the definition of marijuana" and nothing in the legislative history "suggest[ed] that Congress intended the amendment to apply retroactively." *Id.* (citing H.R. Rep. No. 115-1072, at 788 (2018) (Conf. Rep.)). Because the defendant's conduct occurred before the 2018 amendment, the court denied his motion for judgment of acquittal from his conviction for conspiracy to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846. *Id.* at *3-*4.

[7] At the time of the defendant's prior convictions and at the time of his federal offense, the Pennsylvania definition of marijuana included hemp.

subject to the ACCA's enhanced penalties." *Id.* at *7.

Although not specifically addressing the issue, the court in *United States v. Jackson*, 36 F.4th 1294 (11th Cir. 2022),[8] has also held that the federal schedules in effect at the time the defendant committed his federal firearm offense governed in determining whether his prior Florida drug conviction qualified as a serious drug offense. *Id.* at 1300 (concluding that "the form of the Controlled Substances Act Schedules incorporated into § 924(e)(2)(A)(ii)'s definition of 'serious drug offense" that was in place . . . when [the defendant] possessed the firearm . . . must govern").

Because Mr. Williams committed his federal offense (May 3, 2018) prior to the effective date of the Agricultural Improvement Act (December 1, 2018), he would not be entitled to relief under a time-of-commission-of-federal-offense comparison. *See* Aplt's Br. at 14 ("[I]f one compared the

[8] On September 8, 2022, the panel in *United States v. Jackson* vacated its opinion *sua sponte* and ordered additional briefing on "whether *McNeill*'s past-tense interpretation of 'serious drug offense' requires that we assess whether a prior state conviction qualifies as a 'serious drug offense' under federal law at the time of the state conviction rather than at the time of the federal offense." *See* Order, *United States v. Jackson*, No. 21-13963 (11th Cir. Sept. 8, 2022).

state drug schedules in effect *at the time of the federal offense*, there was no mismatch."). Although acknowledging that he is not entitled to relief under a time-of-commission-of-federal-offense comparison, *see* Aplt's Br. at 20, Mr. Williams does not offer any arguments as to why this does not apply. Accordingly, this Court should apply the time-of-commission-of-federal-offense comparison and affirm the district court's determination that his Arkansas drug convictions qualify as serious drug offenses.

## Conclusion

For these reasons, this Court should affirm the judgment and sentence of the district court.

Respectfully submitted,

ROBERT J. TROESTER
United States Attorney

s/ Danielle M. Connolly
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As required by Fed. R. App. P. 32(g), I certify that this brief is proportionally spaced and contains 3475 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I relied on my word processor to obtain the count and it is: Microsoft Word 365.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ Danielle M. Connolly
Assistant United States Attorney

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Assistant United States Attorney

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Laura K. Deskin, counsel for Brandon Ross Williams.

s/ Danielle M. Connolly
Assistant United States Attorney

IN THE

# Supreme Court of the United States

---

BRANDON ROSS WILLIAMS,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

---

## APPENDIX D

*Reply Brief for Brandon Ross Williams*
*(October 14, 2022)*

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No. 22-6021

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

---

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

V.

BRANDON ROSS WILLIAMS, DEFENDANT-APPELLANT

---

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE HONORABLE PATRICK R. WYRICK
DISTRICT JUDGE

D.C. No. CR-20-00211-PRW-1

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# APPELLANT'S REPLY BRIEF

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JEFFREY M. BYERS
Federal Public Defender

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Oklahoma City, Oklahoma 73102
Telephone: (405) 609-5930
*Attorney for Defendant-Appellant*

October 14, 2022

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# TABLE OF AUTHORITIES

## CASES



## FEDERAL STATUTES

## ARGUMENT IN REPLY

The parties agree that Arkansas' definition of marijuana in 2001 and 2003 is overbroad as compared to its federal counterpart at the time of Mr. Williams' sentencing, and that is not overbroad as compared to its federal counterpart at the time that Mr. Williams committed his federal offense.

As the government acknowledges in its brief, since Mr. Williams filed his opening brief in this matter, this Court in *United States v. Gregory Williams*, 48 F.4th 1125, 1138 (10th Cir. 2022), held that "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." The Court expressly declined to decide "whether the district court looks to the 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. This is that case.

Although it is possible that the government will file a petition for rehearing or rehearing *en banc* in *Williams*, such a filing being due on October 24, 2022, the government in this matter has not made any substantive argument that the "time-of-state-conviction" approach applies here, though it has stated that it "preserves this issue." Gov't Brief at 11, n.4. The government instead states, "For purposes of this appeal, the comparison of drug schedules 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." Gov't Brief at 7. Accordingly, this Reply Brief will only address that argument. The government's brief cites primarily to the saving statute and principles of retroactivity as supporting its position. This reply brief counters that argument.

**The saving statute and principles of "retroactivity" are irrelevant to resolution of the ACCA timing issue.**

The government's relies on the saving statute (1 U.S.C. § 109), and the Third Circuit's same reliance in *United States v. Brown*, 47 F.4th 147 (3rd Cir. 2022), is misplaced. The saving statute simply provides that the repeal of a statute does not "release or extinguish any penalty . . . incurred under such statute, unless the repealing Act shall so expressly

provide." 1 U.S.C. § 109. "'Repeal' applies when a new statute simply diminishes the penalties that the older statute set forth." *Dorsey v. United States*, 567 U.S., 260, 272 (2012). The government and the Third Circuit mistakenly conflate 18 U.S.C. 924(e), the sentencing statute at issue, with the Agriculture Improvement Act's change to the definition of marijuana. We do not have here a criminal or sentencing statute that has changed since Mr. Williams committed his federal offense. There is no retroactivity question at issue. There is no suggestion at all that the Farm Bill's definition of marijuana applies retroactively. The question is, Which federal schedules did Congress intend us to review when determining whether a defendant's prior qualifies as "serious drug offense" for enhanced sentencing treatment? Does 18 U.S.C. § 924(e)(2)(A)(ii)'s reference to the definitions provided in the Controlled Substance Act tie itself to the definitions that existed at the time of the commission of the federal offense or the time of the federal sentencing? The savings statute does not inform the answer to that question.

*Brown*'s statement that the Agriculture Improvement Act "effectively repealed federal penalties associated with federal marijuana convictions" is curious. See *Brown*, 47 F.4th at 151. This it did not do. It

merely exempted hemp from the definition of marijuana; it modified no federal marijuana conviction penalties, directly or indirectly. As *Brown* acknowledged, "the Agriculture Improvement Act is primarily devoted to agriculture and nutritional policy. We hate to import background presumptions pertaining to one statutory area when reading a law on a wholly different subject matter." *Id.* at 153. Exactly. The Agriculture Improvement Act does not inform the meaning or intention of the Armed Career Criminal Act's definition of "serious drug offense." Therefore, it does not help us determine which federal schedules apply at the time of Mr. Williams' sentencing.

Nor does *Ventura v. Sessions*, 907 F.3d 306 (5th Cir. 2018). *See* Gov't Brief at 14. The government mistakenly asserts in its brief that the substance at issue in that case (AB-CHMINACA) was not federally controlled at the time of his conviction but was added to the schedules prior to his sentencing. *See* Gov't Brief at 14. In reality, in *Ventura*, AB-CHMINACA was added to the list of federally controlled substances after the noncitizen was arrested *but before he was convicted*. *See Ventura*, 907 F.3d at 309. But this has no impact on the case's import, or lack thereof, to Mr. Williams' predicament. That case was purely about whether a

change to the controlled substance schedules could apply retroactively to a noncitizen's conduct, making him newly inadmissible for that old conduct. Principles of "'fair notice, reasonable reliance, and settled expectations' help[ed] guide the analysis." *Id.* at 314, quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). Given the heated debate surrounding the ACCA's application in courts across this country, one cannot say these same principles resolve the debate in the government's favor here. There are certainly no "settled expectations" in play here. Moreover, the "retroactivity" question in *Ventura* applied to the inadmissible aliens statute, 8 U.S.C. § 1182(a)(2)(A)(ii), not to whether the Agricultural Improvement Act (or other definitional statute) is "retroactive." Following *Ventura,* the correct question here would be whether 18 U.S.C. § 924(e) (not the Agricultural Improvement Act) applies "retroactively," and that is not the question at issue. Mr. Williams makes no claim that the Agricultural Improvement Act applies retroactively (or, for that matter, that the ACCA is retroactive[1]). The

[1] After all, "the ACCA is not retroactive." *United States v. Springfield*, 337 F.3d 1175, 1179 (10th Cir. 2003).

savings statute and principles of retroactivity simply do not inform the answer to this question to be answered here.

It makes sense to interpret the ACCA's reference to the federal schedules as a reference to those in place at the time of sentencing. As this Court in *Williams* stated, "if Congress has decided hemp should not be criminalized, then surely Congress would not intend for it to continue to be included within the narrow class of serious crimes that contributes to a 15-year mandatory minimum sentence." *Williams*, 58 F.4th at 1144, citing *United States v. Perez*, 46 F.4th 691, 700 (8th Cir. 2022) ("[R]elying on current federal definitions effectuates Congress's intent to remove certain substances from classification as federal drug offenses.") Ultimately, principles of "fairness" weigh in favor of a "time of sentencing" approach.[2]

[2] While *Perez* held in favor of a "time of federal offense" approach, the government in that case took the position of a "time of state sentencing" approach. It does not appear that "time of federal sentencing" was proposed or at issue in that matter. It would not have made a difference to that defendant.

## CONCLUSION

For the reasons stated herein and in his opening brief, Mr. Williams' sentence should be vacated, and this case remanded for resentencing, as he was erroneously sentenced as an armed career criminal.

Respectfully submitted,

Jeffrey A. Byers,
Federal Public Defender

s/ *Laura K. Deskin*
Laura K. Deskin
Research & Writing Specialist
Okla. Bar Assn. No. 30371

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Counsel for Defendant/Appellant

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,207 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook, Size 14.

s/ *Laura K. Deskin*

## CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2022, I electronically transmitted the attached brief to the Clerk of Court using the NextGen PACER System for filing, which will send notification to: Danielle Connolloy, Assistant United States Attorney.

s/ *Laura K Deskin*

IN THE

# Supreme Court of the United States

---

BRANDON ROSS WILLIAMS,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

---

## APPENDIX E

*Judgment of Conviction in the U.S. District Court for the Western District of Oklahoma (January 25, 2022)*

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AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

# UNITED STATES DISTRICT COURT

Western District of Oklahoma

UNITED STATES OF AMERICA
**v.**
BRANDON ROSS WILLIAMS

**JUDGMENT IN A CRIMINAL CASE**

Case Number: CR-20-00211-001-PRW

USM Number: 16147-509

Taylor McLawhorn & Traci L Rhone
Defendant's Attorney

## THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. § 922(g)(1), 18 U.S.C. § 924(e) | Felon in Possession of a Firearm | 05/03/2018 | 1 |

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 25, 2022
Date of Imposition of Judgment

PATRICK R. WYRICK
UNITED STATES DISTRICT JUDGE

1/25/2022
Date Signed

DEFENDANT: Brandon Ross Williams
CASE NUMBER: CR-20-00211-001-PRW

## IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
**180 months.**

☒ The court makes the following recommendations to the Bureau of Prisons:

It is recommended the defendant participate in the Federal Bureau of Prisons Inmate Financial Responsibility Program at a rate determined by Bureau of Prisons staff in accordance with the program.

If eligible, it is recommended that the defendant participate in the Residential Drug Abuse Program while incarcerated.

If eligible, it is recommended that the defendant be incarcerated at FCI El Reno.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ By 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: Brandon Ross Williams
CASE NUMBER: CR-20-00211-001-PRW

## SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **3 years.**

## MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight (8) drug tests per month.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Brandon Ross Williams
CASE NUMBER: CR-20-00211-001-PRW

## STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. Stricken.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

## U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Brandon Ross Williams
CASE NUMBER: CR-20-00211-001-PRW

## SPECIAL CONDITIONS OF SUPERVISION

The defendant must submit to a search of his person, property, electronic devices or any automobile under his control to be conducted in a reasonable manner and at a reasonable time, for the purpose of determining possession, or evidence of possession, of firearms, controlled substances, drug paraphernalia, and/or drug trafficking at the direction of the probation officer upon reasonable suspicion. Further, the defendant must inform any residents that the premises may be subject to a search.

The defendant shall participate in a program of substance abuse aftercare at the direction of the probation officer to include urine, breath, or sweat patch testing, and outpatient treatment. The defendant shall totally abstain from the use of alcohol and other intoxicants both during and after completion of any treatment program. The defendant shall not frequent bars, clubs, or other establishments where alcohol is the main business. The court may order that the defendant contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

DEFENDANT: Brandon Ross Williams
CASE NUMBER: CR-20-00211-001-PRW

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | Restitution | Fine | AVAA Assessment* | JVTA Assessment** |
|---|---|---|---|---|---|
| **TOTALS** | $ 100.00 | $ 0.00 | $ 0.00 | $ 0.00 | $ 0.00 |

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss*** | Restitution Ordered | Priority or Percentage |
|---|---|---|---|

**TOTALS** $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Brandon Ross Williams
CASE NUMBER: CR-20-00211-001-PRW

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

If restitution is not paid immediately, the defendant shall make payments of 10% of the defendant's quarterly earnings during the term of imprisonment.

After release from confinement, if restitution is not paid immediately, the defendant shall make payments of the greater of $_____ per month or 10% of defendant's gross monthly income, as directed by the probation officer. Payments are to commence not later than 30 days after release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be paid through the United States Court Clerk for the Western District of Oklahoma, 200 N.W. 4th Street, Room 1210, Oklahoma City, Oklahoma 73102.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

| Case Number<br>Defendant and Co-Defendant Names<br>*(including defendant number)* | Total Amount | Joint and Several Amount | Corresponding Payee, if appropriate |
|---|---|---|---|

☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall pay the following court cost(s):
☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
All right, title, and interest in the assets listed in the Preliminary Order of Forfeiture dated February 10, 2021 (doc. no. 33).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.