CASE NO. _____

IN THE

Supreme Court of the United States

October 202__ Term

JEROME WILLIAMS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
to the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Submitted By:

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QUESTION PRESENTED

Sections 4B1.1 and 4B1.2 of the federal sentencing guidelines recommend additional punishment for "career offenders." Certain types of prior state drug convictions may trigger this enhancement if they involved a "controlled substance." The relevant guidelines provisions do not define "controlled substance," and instead borrow the meaning of that term from state law.

Congress and the U.S. Sentencing Commission require courts to apply the law in effect as of the date of the federal sentencing when calculating the guidelines range. Despite this directive, the Eighth Circuit interprets "controlled substance" to include substances that the state does not control. So here, the sentencing court increased Petitioner's guidelines range by more than a decade because of two prior Missouri convictions that encompassed substances Missouri has not controlled for years. Like the other Circuits on its side of a current split, the Eighth Circuit believes this Court's decision in *McNeill v. United States*, 563 U.S. 816 (2011) compels this result.

The question presented is:

Does *McNeill* require courts to define "controlled substance" under §§ 4B1.1 and 4B1.2 of the federal sentencing guidelines by consulting superseded state schedules that had been in effect at the time of a prior state conviction?[1]

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[1] This Court has granted a petition for a writ of certiorari in case no. 22-6640 (now consolidated with case no. 22-6389) on the closely related question of whether *McNeill* requires courts to consult superseded schedules to determine if a conviction qualifies as a "serious drug offense" under the Armed Career Criminal Act, 18 U.S.C. §924(e). Petitioner respectfully requests that the Court hold this petition pending a decision in consolidated case nos. 22-6389 and 22-6640.

PARTIES TO THE PROCEEDINGS

Petitioner Jerome Williams was represented in the lower court proceedings by his appointed counsel, Federal Public Defender Nanci H. McCarthy and Assistant Federal Public Defender Tyler K. Morgan, 1010 Market, Suite 200, Saint Louis, Missouri 63101. The United States was represented by United States Attorney Sayler Fleming, Assistant United States Attorney Donald Boyce, and Special Assistant United States Attorneys Gerald Jackson and Daniel James, Thomas Eagleton Courthouse, 111 South 10th Street, Saint Louis, Missouri 63102.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Williams*, 4:20-CR-00826-MTS, (E.D. Mo) (criminal proceeding), judgment entered Oct. 20, 2022;

- *United States v. Williams*, 22-3224 (8th Cir.) (direct criminal appeal), summary disposition judgment entered Feb. 13, 2023; and

- *United States v. Williams*, 22-3224 (8th Cir.) (direct criminal appeal), order denying petition for rehearing en banc and rehearing by the panel entered Mar. 15, 2023.

There are no other proceedings directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jerome Williams respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The summary disposition judgment of the United States Court of Appeals for the Eighth Circuit is reproduced in the appendix to this petition at Pet. App. 1a.

JURISDICTION

The United States District Court for the Eastern District of Missouri entered its judgment on October 20, 2022. Dist. Ct. ECF No. 72. The Eighth Circuit Court of Appeals summarily affirmed the District Court judgment on direct appeal on February 13, 2023. Pet. App. 1a. Petitioner filed a timely petition for rehearing, and the Eighth Circuit denied that petition on March 15, 2023. Pet. App. 2a. Petitioner timely filed this petition by mailing on June 7, 2023. The District Court had jurisdiction under 18 U.S.C. § 3231, the Court of Appeals had jurisdiction under 28 U.S.C. § 1291, and Petitioner now invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

U.S.S.G. § 4B1.1(a) provides that:

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

U.S.S.G. § 4B1.2(b) defines a "controlled substance offense" as follows:

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

STATEMENT OF THE CASE

A. Legal Background.

I. The § 4B1.1 Enhancement, § 4B1.2, and the Categorical Approach.

Section 4B1.1 of the federal sentencing guidelines increases a defendant's sentencing range if "(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). The effect of this enhancement can be significant. For example, it increased Petitioner's guidelines range from 77 to 96 months to 188 to 235 months. In this case and many others, the possibility of such a steep increase hinges on whether certain prior state convictions qualify as "controlled substance offenses."

Section 4B1.2 defines a "controlled substance offense" as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or

dispense." U.S.S.G. § 4B1.2(b). This section does not define "controlled substance." In some Circuits (including the Eighth), the term is not limited to substances controlled under the federal Controlled Substances Act, so § 4B1.2 incorporates the law of the state of conviction. *United States v. Henderson*, 11 F.4th 713, 719 (8th Cir. 2021), *petition for cert. denied* 142 S. Ct. 1696 (U.S. Apr. 18, 2022).

Courts apply the "categorical approach" to determine if a prior conviction qualifies as a "controlled substance offense." *See, e.g.*, *Borden v. United States*, 141 S. Ct. 1817, 1822 (2021) (describing categorical approach in context of related statutory enhancement). Under that approach, "the facts of a given case are irrelevant" and courts instead focus "on whether the elements of the statute of conviction meet the federal standard." *Id.* If any of the elements of the prior conviction do not match the elements of that federal standard, the prior conviction cannot be an enhancement predicate. *Id.* This is the case even if the defendant's actual conduct that led to the conviction matched the federal standard to the letter. The categorical approach matches elements to elements, not elements to conduct.

A conviction is "categorically overbroad" if the statute of conviction criminalized a broader range of conduct than the federal standard. One way a state drug offense might be categorically overbroad vis-à-vis the federal standard is if the state offense involved a substance that the federal standard does not cover. For example, the Eighth Circuit has held that an Iowa conviction that encompassed the cocaine derivative [123I]Ioflupane ("ioflupane") was overbroad because the relevant federal standard did not include ioflupane. *United States v. Perez*, 46 F.4th 691, 700-01 (8th

Cir. 2022). The overbroad Iowa conviction thus could not serve as a predicate for the statutory enhancement at issue. *Id.* Many defendants have challenged enhanced sentences on theories of drug overbreadth of the kind in *Perez*, resulting in published decisions in nearly every Circuit in the past three years.[2]

II. Changes to Missouri's Drug Laws.

Like the federal government and many states, Missouri has recently amended its controlled substance schedules. Two changes are relevant here. In 2017, Missouri removed ioflupane from its definition of "cocaine." *See* Orders of Rulemaking, 42 Mo. Reg. 394 (Apr. 3, 2017); *compare* 19 C.S.R. 30-1.002(1)(B)(1)(D) (2016) *with* 19 C.S.R. 30-1.002(1)(B)(1)(D) (2017) & § 195.017 RSMo., Schedule II(1)(d) (2017) *with* § 195.017 RSMo., Schedule II(1)(d) (2020). Criminalizing ioflupane through a broad definition of "cocaine" became untenable after ioflupane proved useful in diagnosing Parkinson's disease. *See* Schedules of Controlled Substances: Removal of [123I]Ioflupane from Schedule II of the Controlled Substances Act, 80 Fed. Reg. 54715-01, 54716-17 (Sep. 11, 2015). The federal government de-scheduled ioflupane to allow medical professionals to screen for the disease without the Controlled Substances Act standing in the way. *Id.* States like Missouri duly followed suit.

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[2] *See, e.g., United States v. Abdulaziz*, 998 F.3d 519 (1st Cir. 2021); *United States v. Gibson*, 55 F.4th 153 (2d Cir. 2022); *United States v. Lewis*, 58 F.4th 764 (3d Cir. 2023); *United States v. Ward*, 972 F.3d 364 (4th Cir. 2020); *United States v. Clark*, 46 F.4th 404 (6th Cir. 2022); *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020); *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021); *United States v. Jones*, 15 F.4th 1288 (10th Cir. 2021); *United States v. Jackson*, 55 F.4th 846 (11th Cir. 2022).

About a year after decriminalizing ioflupane, Missouri amended its definition of "marijuana" to exclude low-THC cannabis that it calls "industrial hemp." *Compare* § 195.010(24) RSMo. (2011) *with* § 195.010(28) RSMo. (2018); *see also* § 195.010(24) RSMo. (2018) (industrial hemp definition). Hemp came to America with the Puritans and was long used as rigging, ropes, and canvas on ships.[3] Econ. Research Serv., U.S. Dep't. of Agric., *Economic Viability of Industrial Hemp in the United States: A Review of State Pilot Programs* (Feb. 2020). The advent of steam shipping, introduction of cheaper alternatives, and eventually a strict New Deal licensing regime killed the U.S. market. *Id.* Then war in the Pacific cut off substitute imports in the early 1940s, leading to a revival in domestic production. *Id.* But hemp's second act did not last long. Even though use of hemp does not produce a high, Congress swept it into the Controlled Substances Act as part of the definition of "marijuana" in 1970. *See United States v. White Plume*, 447 F.3d 1067, 1072 (8th Cir. 2006) (discussing history of hemp regulation). It was that accident of history that Missouri (followed shortly after by the federal government) corrected in 2018.

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[3] Missouri produced little of the expensive form of hemp used in shipping. R. Douglas Hurt, *Agriculture and Slavery in Missouri's Little Dixie* (1992), at 114. Instead, its farmers grew a cheap form primarily used to secure cotton bales. *Id.* at 103. As cotton production increased in the 1830s and moved west with the expansion of slavery, so too did hemp cultivation. *Id.* By the 1840s, hemp was a staple crop in Missouri's "Little Dixie." *Id.* Hemp production was "hard, dirty work, and few white men were willing to do it." *Id.* at 109. So farmers exploited Black slave labor, without which hemp "would not have been economically viable." *Id.* at 123. But the poor quality of the product, the flow of foreign imports, and other market pressures stunted production through the 1850s. *Id.* at 118, 119. Then secession and the Civil War closed key markets and trade routes, emancipation ended the abuse of slave labor, and Missouri's nineteenth century hemp heyday sunset by the 1870s. *Id.* at 123.

The above changes meant that Missouri controlled ioflupane under the umbrella of "cocaine" and hemp under the umbrella of "marijuana" at the time of Petitioner's prior Missouri convictions, but did not control either substance at the time of his federal sentencing. That would seemingly have implications for §§ 4B1.1 and 4B1.2:

- Since Missouri controlled neither ioflupane nor hemp at the time of Petitioner's 2022 sentencing; *and*
- Under the categorical approach, the question is not whether Petitioner's Missouri cocaine and cannabis convictions involved ioflupane or hemp, but whether Missouri's definitions of cocaine and cannabis were broader than the current standard for a "controlled substance;" *then*
- Petitioner's ioflupane- and hemp-inclusive offenses were categorically overbroad; *so long as*
- A "controlled substance" under §§ 4B1.1 and 4B1.2 means a substance actually controlled at the time the enhancement comes into play (*i.e.*, at federal sentencing).

That would indeed be the result in the three Circuits that have concluded that the guidelines' text and sound sentencing principles require courts to honor changes to state law by applying the law as it exists at sentencing. *See Gibson*, 55 F.4th at 159; *Abdulaziz*, 998 F.3d at 531; *Bautista*, 989 F.3d at 703. However, the Eighth Circuit has decided that a decision of this Court requires it to ignore that text and those principles by reading repealed state law into the guidelines.

III. The Eighth Circuit's "Time-of-Conviction" Rule.

The Eighth Circuit addressed the effect of changes to state drug laws in *United States v. Bailey*, 37 F.4th 467, 469-70 (8th Cir. 2022) (per curiam), *petition for cert. denied sub. nom. Altman, et al. v. United States* (No. 22-5877), ___ S. Ct. ____ (U.S. May 1, 2023). The defendant in *Bailey* argued that his prior Iowa marijuana

conviction was not a controlled substance offense under § 4B1.2 after Iowa de-scheduled hemp. *Id.* at 469. The Eighth Circuit rejected his claim and adopted without further comment its prior unpublished opinion in *United States v. Jackson*, No. 20-3684, 2022 WL 303231 (8th Cir. Feb. 2, 2022) (unpublished), *petition for cert. denied* 143 S.Ct. 172 (U.S. Oct. 3, 2022).

Jackson had involved substantially the same argument as *Bailey*. *Id.* at *1-2. It rejected that argument in a single line that relied on this Court's decision in *McNeill v. United States*, 563 U.S. 816 (2011). Specifically, *Jackson* quoted *McNeill* in holding that "we may not look to 'current state law to define a previous offense.'" *Id.* at *2 (quoting *McNeill*, 563 U.S. at 822). Since Iowa scheduled hemp at the time of Mr. Jackson's prior conviction, current law was irrelevant, and the guidelines recommended increased punishment on account of now-innocent conduct.

Given that *Bailey* and *Jackson* treated *McNeill* as dispositive, it is worth noting what *McNeill* actually decided. *McNeill* was not a guidelines case; it concerned an enhancement under the Armed Career Criminal Act, 18 U.S.C. §924(e) ("ACCA"). *McNeill*, 563 U.S. at 817. That enhancement applies to someone convicted under 18 U.S.C. § 922(g)[4] with three or more prior convictions for a "violent felony" or "serious drug offense." *Id.* For a conviction to be a "serious drug offense," it must (among other things) carry a maximum prison term of at least ten years. 18 U.S.C. § 924(e)(2)(A)(i), (ii). Mr. McNeill had prior North Carolina trafficking convictions

[4] Section 922(g) outlines various firearms offenses, including the prohibition of possession of a firearm by a person with a prior felony conviction.

that had ten-year maximums when he committed them. *McNeill*, 563 U.S. at 818. North Carolina later reduced the maximum sentence for such offenses to below ten years. *Id.*

In 2008, Mr. McNeill pled guilty to a § 922(g) offense and possession with intent to distribute cocaine base. *Id.* Facing an ACCA enhancement, he argued that because his trafficking convictions now carried a maximum sentence of less than ten years, they were not serious drug offenses. *Id.* This Court unanimously concluded otherwise, holding that "a federal sentencing court must determine whether 'an offense under State law' is a 'serious drug offense' by consulting the 'maximum term of imprisonment' applicable to a defendant's previous drug offense at the time of the defendant's state conviction for that offense." *Id.* at 825. The maximum term for Mr. McNeill's offenses was set in stone at the time of his prior convictions, and later legislative changes could not rewrite that history.

McNeill told courts where to look to find the elements of a *prior conviction*. What it did not address was where to look for the elements of the *current federal standard*. For example, it did not hold that if Congress amended the federal standard between the time of Mr. McNeill's state convictions and his federal sentencing to raise the statutory maximum required of a serious drug offense, courts must ignore that change and use the superseded standard. As recounted above, the categorical approach requires courts to compare the elements of a prior conviction to the elements of the current federal standard. *McNeill* dealt solely with the former, while this case (like *Bailey* and *Jackson* before it) concerns only the latter.

Bailey and *Jackson* nevertheless imported *McNeill*'s holding without noting the differences between these two inapposite inquiries. The resulting "time-of-conviction" rule makes §§ 4B1.1 and 4B1.2 blind to changes to the federal standard caused by changes in state drug laws like those described above. If a state labeled a substance a "controlled substance" at the time of a prior state conviction (and of course it did, because there would otherwise be no prior state conviction to speak of), then §§ 4B1.1 and 4B1.2 forever consider that substance a "controlled substance."

B. The Proceedings Below.

Petitioner pled to possession with intent to distribute fifty grams or more of a mixture containing methamphetamine in violation of 21 U.S.C. § 841(a)(1). Dist. Ct. ECF Nos. 1, 53, 54. The presentence investigation report ("PSR") calculated a guidelines range of 188 to 235 months based on its conclusion that Petitioner qualified for the § 4B1.1 enhancement. Dist. Ct. ECF No. 62 ¶¶ 27, 91. The PSR identified his Missouri cannabis and cocaine convictions as predicate convictions for the enhancement. *Id.* at ¶ 27. Petitioner objected, arguing that Missouri's de-scheduling of ioflupane and hemp since the time of those convictions rendered his convictions categorically overbroad. Dist. Ct. ECF No. 61. He acknowledged that *Bailey* foreclosed this argument because it required courts to apply law that Missouri had since repealed. *Id.* at 7-8.

The District Court announced at sentencing that it was "going to overrule the objection, basically, because I'm bound to." Dist. Ct. ECF No. 81, at 8. It then calculated an enhanced guidelines range in accordance with the PSR. *Id.* at 8-9. It ultimately ordered a sentence of 142 months in custody and five years of supervised

release. *Id.* at 30. It did not indicate the sentence it would have imposed under the non-enhanced range.

Petitioner filed a timely notice of appeal. Dist. Ct. ECF No. 75. His opening brief in the Eighth Circuit argued (in relevant part) that *Bailey* rests on a misapplication of *McNeill*. Pet. C.A. Br. 32-42. An Eighth Circuit panel summarily affirmed the judgment below, citing (again, in relevant part) *Bailey*. Pet. App. 1a. The Eighth Circuit denied Petitioner's petition for rehearing and rehearing *en banc*. *Id.* at 2.

GROUNDS FOR GRANTING THE WRIT

A. This case implicates a Circuit split over the meaning and reach of *McNeill*, and only this Court can clarify what *McNeill* means.

Two Circuits have since agreed with the Eighth Circuit that *McNeill* requires courts to look backward to define a "controlled substance" under current § 4B1.2, even if looking backward means applying law that the state of conviction has rejected. *Lewis*, 58 F.4th at 773; *Clark*, 46 F.4th at 406. Three others have distinguished *McNeill* and held that a substance is not a "controlled substance" under the guidelines if the state no longer controls it at the time of the federal sentencing. *Gibson*, 55 F.4th at 159; *Abdulaziz*, 998 F.3d at 531; *Bautista*, 989 F.3d at 703.

The Court is set to clarify *McNeill*'s holding in case no. 22-6640 (now consolidated with case no. 22-6389), where the Eleventh Circuit relied on *McNeill* to adopt a time-of-conviction rule under ACCA. The petitioner in that case asked the Court to resolve an ACCA split stemming from the same confusion over *McNeill* that generated the parallel § 4B1.2 split at issue here. Br. for Pet. 3 (U.S. No. 22-6640) (Jan. 24, 2023) (confusion over *McNeill* "affects cases arising under the Guidelines too, creating more

disparities"). The government agreed that the split over *McNeill* warranted the Court's attention, at least when it came to ACCA. Br. for U.S. 11-13 (U.S. No. 22-6640) (Mar. 24, 2023).

Although Petitioner recognizes that the Court does not traditionally take up disputes over the interpretation of the guidelines, *see Braxton v. United States*, 500 U.S. 344, 347-349 (1991), the split here is only superficially about the guidelines. The cause of the split begins and ends with *McNeill*. For example, the Eight Circuit's opinion in *Jackson* treated *McNeill* as decisive, *Jackson*, 2022 WL 303231, at *2, and *Bailey* adopted *Jackson* in full and without elaboration, *Bailey*, 37 F.4th at 469-70. The Eighth Circuit later rejected *Bailey*'s time-of-conviction approach in the ACCA context, but in doing so reiterated its belief that *McNeill* still requires a time-of-conviction rule in the guidelines context. *Perez*, 46 F.4th at 703 n.4. To date, the Eighth Circuit has never justified *Bailey*'s time-of-conviction rule as anything other than an application of *McNeill*.

The Sentencing Commission declined to address the § 4B1.2 split in its latest round of amendments. *See* U.S. Sent'g Comm'n, *Amendments to the Sentencing Guidelines*, Pt. 7, Circuit Conflicts (Apr. 27, 2023). Even if it had, *Bailey*'s rule has nothing to do with the text of the guidelines. That time-of-conviction rule is actually *inconsistent* with the text as well as a related Congressional directive, both of which require courts to apply the guidelines as they exist on the date of the federal

sentencing.[5] Neither the guideline nor the directive leaves room for incorporating superseded state law into a federal sentencing (absent *ex post facto* concerns). *Bailey* nonetheless averred to *McNeill* rather than engaging with any textual argument. The problem here is not one that a tweak to the text by the Sentencing Commission can fix. The Eighth Circuit has read *McNeill* as outcome-determinative regardless of what the guidelines say, and only this Court can say what it meant in *McNeill*.

B. The coming clarification of *McNeill* in case no. 22-6640 will require a reevaluation of the rule in this case.

The eventual decision from the Court in case no. 22-6640 will have implications here, because resolving that case will inevitably require the Court to further explain the meaning of *McNeill*. *See* Br. for Pet. 30 (U.S. No. 22-6640) (Jan. 24, 2023) (arguing that granting cert "would have the added bonus of clarifying *McNeill*, which has produced disparate sentencing outcomes in both ACCA and Guidelines cases around the country"). The lower court opinions in this case and case no. 22-6640 share the same analytical error that led both to misapply *McNeill*. As explained by the petitioner in case no. 22-6640:

> In adopting [a time-of-conviction] regime, Eleventh Circuit relied almost entirely on *McNeill*, which held that courts must look to state law in effect at the time of the prior drug offense to determine its statutory maximum. The same is true when it comes to the offense elements. And that makes sense: courts must use state law from the time of the state conviction to ascertain the state-law attributes of the offense for which the defendant was actually convicted. Those attributes are locked in at the time of conviction. But *McNeill* said nothing about the federal

[5] *See* Pet. C.A. Br., at 31, 36-37, 38; *Gibson*, 55 F.4th at 163-64; *Abdulaziz*, 998 F.3d at 523; *Bautista*, 989 F.3d at 703; *see also United States v. Hope*, 28 F.4th 487, 504-05 (8th Cir. 2022) (citing guidelines' text as reason to reject time-of-conviction rule under ACCA).

> criteria (here, the federal drug schedules) to which the state-law attributes (here, the offense elements) are compared.

Id. at 39. Petitioner mirrored this argument in his Eighth Circuit opening brief. Pet. C.A. Br. 32-42. *McNeill* recognized that *the elements of a prior state offense* are historical facts that cannot and do not change with the times. But *the federal criteria for a sentencing enhancement* (here, §§ 4B1.1 and 4B1.2) can and do change to reflect intervening changes in the law—the guidelines themselves require as much, and nothing in *McNeill* says otherwise. Yet under both ACCA and the guidelines, courts have misapplied *McNeill* by conflating the static elements of a prior state offense with the evolving elements of the current federal criteria.

The Eighth Circuit does recognize a limit to *McNeill*'s reasoning, but it is a limit divorced from *McNeill* itself. After *Jackson* and *Bailey*, the Eighth Circuit explained that whether *McNeill* directs a particular result turns on whether courts must turn to state or federal law to find the current federal criteria. When considering whether a state drug conviction is a § 4B1.1 predicate, courts in the Eighth Circuit look to state law to define a "controlled substance." *Henderson*, 11 F.4th at 719. But under ACCA, they must look to the federal Controlled Substances Act to define that term. 18 U.S.C. 924(e)(2)(A)(ii). In holding that *McNeill* did not require a time-of-conviction approach under ACCA even though it does under the guidelines, the Eighth Circuit in *Perez* said that "the reasoning in *McNeill regarding state law does* not translate to this issue *concerning the federal drug statute*." *Perez*, 46 F.4th at 700 (emphasis added). So according to *Perez*'s gloss on *Bailey*, *McNeill* controls when the federal

standard incorporates state law, but has nothing relevant to say when the standard incorporates other federal law. *See id.* at 703 & n.4.

This federal vs. state distinction finds no support in *McNeill*. *McNeill* repeatedly emphasized that it was determining the elements of an offense that had already occurred, and the Court concluded that such a backward-looking inquiry compelled a backward-looking test. *McNeill*, 563 U.S. at 820, 821, 822-23. The opinion did not hint that the state law provenance of Mr. McNeill's priors also affected its result. ACCA does have separate subsections for state and federal priors, *see* 18 U.S.C. § 924(e)(2)(A)(i), (ii), so *McNeill* made a federal/state distinction to understand where to look within the statute. *McNeill*, 563 U.S. at 817. But once it found the relevant subsection, the timing analysis that followed had nothing to do with any distinction between federal and state law.

The Eighth Circuit's federal/state dichotomy also does not work on its own terms. Defining "controlled substance" as the *federal sentencing guidelines* use that term is an act of interpreting federal law; those federal guidelines are no less federal law just because they happen to borrow their meaning from state law. The focus on an illusory state vs. federal distinction is a symptom of the Eighth Circuit's misunderstanding of what cases like this one and *Bailey* ask courts to do. Rather than asking courts "to define a previous offense," *Bailey*, 37 F.4th at 470, these cases ask courts to define *the current federal standard*. *McNeill* does not say anything about how to do that, much less direct a way of doing so that is contrary to the text of the guidelines and the usual approach to sentencing.

In short, the error below resulted from the same misapplication of *McNeill* that led to the error in case no. 22-6640, which this Court will soon address. While the Eighth Circuit has proposed a federal vs. state distinction that would arguably justify a different application of *McNeill* in guidelines cases like this one vs. ACCA cases like case no. 22-6640, it is an arbitrary distinction that finds no support in *McNeill*. Following the anticipated clarification of *McNeill* in case no. 22-6640, it will be necessary to send this case back to the Eighth Circuit so it can interpret §§ 4B1.1 and 4B1.2 without the distorting effect of its misapplication of *McNeill*.

C. The Split Over § 4B1.2 is as Deserving of This Court's Attention as the ACCA Split That It Will Soon Resolve.

Petitioner recognizes that non-binding §§ 4B1.1 and 4B1.2 will not always produce the same sentencing cliffs as the mandatory ACCA provision at issue in consolidated case nos. 22-6389 and 22-6640. Nevertheless, they sway outcomes considerably. Take Petitioner's case, where the enhancement ballooned the guidelines range from 77 to 96 months to 188 to 235 months. While the District Court did not have to sentence Petitioner within that range (and its sentence indeed varied slightly), it also could not choose to ignore it. *Gall v. United States*, 552 U.S. 38, 49 (2007) (guidelines are "the starting point and the initial benchmark" for sentencing). As a practical matter, the range has the effect of "anchor[ing] the court's discretion in selecting an appropriate sentence." *Molina-Martinez v. United States*, 578 U.S. 189, 204 (2016). And in Circuits like the Eighth, within-guidelines sentences are partially insulated on appeal thanks to a presumption of reasonableness. *United States v. Jones*, 990

F.3d 1141, 1144 (8th Cir. 2021). Simply put, §§ 4B1.1 and 4B1.2 can cause wild swings in the guidelines range, and those swings end up having a human cost.

Section 4B1.2's "controlled substance offense" definition is far too important a part of the guidelines scheme to leave its operation subject to the vagaries of geography thanks to a Circuit split. The § 4B1.1 enhancement (which turns on the definitions in § 4B1.2) applies to more than 2,000 people every year. U.S. Sent'g Comm'n, *Report to Congress: Career Offender Sentencing Enhancements*, 18 (Aug. 2016). And when § 4B1.1 applies, it matters. Those hit with the enhancement see an increase to their final guidelines range over 91% of the time. *Id.* at 21; *see also Buford v. United States,* 532 U.S. 59, 60 (2001) (noting that § 4B1.1 leads to "particularly severe punishment"). Further, the problem does not stop at § 4B1.1. Two other guidelines (§ 2K1.3 (offenses involving explosive materials) and § 2K2.1 (certain firearm offenses)) also incorporate § 4B1.2 and call for more punishment when a defendant's criminal history includes one or more controlled substance offenses. Uneven application of a definition so baked into the guidelines cannot help but create unwarranted disparities.

The Eighth Circuit's misapplication of *McNeill* has resulted in a rule requiring courts to incorporate superseded law into the guidelines against Congressional and Sentencing Commission directives, exposing Petitioner and those like him to increased punishment based on conduct no longer deemed deserving of sanctions. Pet. C.A. Br. 28-31. This result puts the Eighth Circuit at odds not only with the First,

Second, and Ninth Circuits, but with itself.[6] The split here masquerades as a guidelines issue, but at bottom it is about *McNeill*. The prerogative to clarify *McNeill* rests with this Court, and it will exercise that prerogative soon in case no. 22-6640. After it does, Petitioner requests that the Court grant his petition.

[6] As the Eighth Circuit explained in *Perez*, a change in drug laws can render a state conviction categorically overbroad for purposes of a statutory enhancement while the same prior remains a predicate for a guidelines enhancement. *Perez*, 46 F.4th at 698-703 & n.4. Same defendant, same prior conviction, same federal sentencing, but disparate results within that sentencing—due solely to confusion over *McNeill*.

CONCLUSION

WHEREFORE, Petitioner requests that this Court grant his Petition for a Writ of Certiorari. Petitioner further requests that the Court temporarily hold his petition pending a decision in case nos. 22-6389 and 22-6640.

Respectfully submitted,

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