

To Justice Brett M. Kavanaugh:

Petitioner Leroy Tate, through his attorney of record, Assistant Federal Public Defender Amanda L. Altman, requests an additional 60 days in which to file a petition in this Court seeking certiorari to the Eighth Circuit Court of Appeals, up through July 28, 2023. Petitioner requests this extension under Supreme Court Rule 13.5.

JURISDICTION

Petitioner is preparing to request this Court's review of the judgment issued by the Eighth Circuit Court of Appeals on January 13, 2023, affirming a 10-year prison sentence that the District Court imposed upon his conviction for possessing methamphetamine with intent to distribute. Appendix at 1-2. The Eighth Circuit denied Petitioner's timely motion for rehearing on February 28, 2023. Appendix at 3. The deadline for filing a petition for a writ of certiorari in this case is May 29, 2023. Petitioner files this request for additional time at least 10 days before the date the petition is currently due, in compliance with Supreme Court Rule 13.5.

REASONS FOR APPLICATION FOR EXTENSION

This case raises a recurrent issue of exceptional importance concerning lower courts' misapplication of this Court's decision in *McNeill v. United States*, 563 U.S. 816 (2011). Petitioner intends to challenge his enhanced sentencing guidelines range that the District Court calculated after declaring his prior Missouri state cannabis convictions to be "controlled substance offenses" under U.S.S.G. § 4B1.2(b).

Sections 4B1.1 and 4B1.2 of the federal sentencing guidelines recommend increased punishment for those it deems "career offenders." One type of offense that

can trigger this enhancement is a “controlled substance offense.” Courts decide whether a prior state conviction is a controlled substance offense by using the categorical approach. That approach requires courts to ask whether the elements of the prior state drug offense were the same as, or narrower than, those of the current federal generic offense. Only if the answer is “yes” can the prior offense serve as an enhancement predicate.

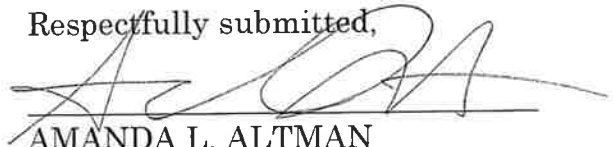
Missouri amended its laws to drop “hemp” from its definition of “marijuana” in the interim between the time of Petitioner’s prior state cannabis convictions and his federal sentencing. The Eighth Circuit has rendered the guidelines blind to such changes by interpreting a “controlled substance offense” to include substances that are no longer controlled at the time of the federal sentencing, *i.e.* the time a court must decide whether or not to apply the enhancement. The Circuit, like the others on its side of a current split on this issue, believes that *McNeill* compels this result.

Based on a textualist interpretation of the Armed Career Criminal Act, 18 U.S.C. §924(e), *McNeill* held that courts must define the elements *of a prior state conviction* by reference to those elements as they existed at the time that conviction. Neither *McNeill’s* holding nor its underlying logic translates to the question in Petitioner’s case, which is how to determine the elements *of the current generic offense* under the federal sentencing guidelines. Congress and the Sentencing Commission have directed courts to answer that question by reference to the law in effect at the time of the federal sentencing. Nothing in *McNeill* purports to trump those directives, and no fair reading of that opinion leads to such a result.

Petitioner's counsel requires additional time to fully develop the above arguments for this Court's consideration. Counsel is an assistant federal public defender in the Eastern District of Missouri. Counsel's appointed assignments include significant day-to-day duties representing clients in all stages of criminal prosecution. Counsel requires an extension to properly present this complex and recurrent issue that has deeply divided the Circuits in guidelines cases and in cases involving an analogous statutory enhancement. Counsel makes this request with no dilatory purpose, but rather to ensure proper presentation of the important questions raised in Petitioner's case while also providing effective representation in all cases to which she is assigned.

WHEREFORE, Petitioner requests additional time to file his Petition for Writ of Certiorari, up through and including July 28, 2023.

Respectfully submitted,



AMANDA L. ALTMAN

Assistant Federal Public Defender
325 Broadway, 2nd Floor
Cape Girardeau, Missouri 63701
Telephone: (573) 339-0242
Fax: (573) 339-0305
E-mail: Amanda_Altman@fd.org

ATTORNEY FOR PETITIONER

United States Court of Appeals
For the Eighth Circuit

No. 22-1119

United States of America

Plaintiff - Appellee

v.

Leroy C. Tate

Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Missouri - Cape Girardeau

Submitted: December 12, 2022

Filed: January 13, 2023

[Unpublished]

Before LOKEN, MELLOY, and KOBES, Circuit Judges.

PER CURIAM.

Leroy Tate pled guilty to possession with intent to distribute fifty grams or more of methamphetamine. Tate appeals the finding that he qualified as a career offender under the sentencing guidelines § 4B1.1(a). We affirm.

Appendix p. 1

Tate had two convictions for the sale of low-THC cannabis, or hemp, in Missouri in 2004 and 2010. The district court¹ found the two prior convictions were controlled substance offenses under U.S.S.G. § 4B1.2(b). With the two controlled substance offenses Tate qualified as a career offender under U.S.S.G. § 4B1.1(a).

Missouri removed hemp as a controlled substance in 2018. Tate argues the change in law should disqualify his convictions as controlled substance offenses. After this appeal was filed, the Eighth Circuit expressly rejected this argument. United States v. Bailey, 37 F.4th 467, 470 (8th Cir. 2022), *petition for cert. filed*, (U.S. Oct. 18, 2022) (No. 22-5877) (“we may not look to current state law to define a previous offense” (citations omitted)). Therefore, the “uncontested prior marijuana convictions under the hemp-inclusive version of” Missouri law “categorically qualified as controlled substance offenses for the career offender enhancement.” Id. (citations omitted).

We affirm the judgment of the district court.

¹The Honorable Stephen N. Limbaugh, Jr. United States District Judge for the Eastern District of Missouri.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-1119

United States of America

Appellee

v.

Leroy C. Tate

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - Cape Girardeau
(1:21-cr-00088-SNLJ-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 28, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix p. 3

IN THE SUPREME COURT OF THE UNITED STATES
October 2022 Term

LEROY TATE,)
)
Petitioner,) On Petition for Writ of
) Certiorari to the United
vs.) States Court of Appeals
) for the Eighth Circuit
UNITED STATES OF AMERICA,)
) Supreme Court Case No. _____
Respondent.)

PROOF OF SERVICE

The undersigned counsel hereby affirms and declares under penalty of perjury, that I am counsel of record for Petitioner and that on May 11, 2023, I served copies of Petitioner's Application Directed to Justice Kavanaugh for Additional Time to File Petition For a Writ of Certiorari to the Eighth Circuit Court Of Appeals, plus this Proof of Service, on each party to the above proceeding or their counsel, by depositing an envelope containing copies thereof in the mail, first-class postage prepaid for delivery to:

Solicitor General
U.S. Department of Justice, Room 5614
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
(202) 514-2217

and by delivering a copy of those documents by hand on May 11, 2023 to:

Office of United States Attorney
For the Eastern District of Missouri
555 Independence, Third Floor
Cape Girardeau, MO 63703
(573) 334-3736

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 11, 2023.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. Altman', written over a horizontal line.

AMANDA L. ALTMAN

Assistant Federal Public Defender

325 Broadway, 2nd Floor

Cape Girardeau, Missouri 63701

Telephone: (573) 339-0242

Fax: (573) 339-0305

E-mail: Amanda_Altman@fd.org