

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DOROTHY PEARL SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the “serious drug offense” definition in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(A)(ii), incorporates the federal drug schedules in effect at the time of the federal firearm offense or federal sentencing (as the Third, Fourth, Eighth, and Tenth Circuits have held), or the federal drug schedules in effect at the time of the prior state drug offense (as the Eleventh Circuit has held).¹

¹ This Court has granted the petitions for a writ of certiorari in 22-6389, and *Jackson v. United States*, Case No. 22-6640, to resolve this question. Ms. Smith respectfully asks this Court to hold her petition pending its consideration of *Brown* and *Jackson* and then dispose of it as appropriate.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)

United States v. Smith, Case No. 3:17-cr-246-BJD-JBT-1.

United States Court of Appeals (11th Cir.)

United States v. Smith, No. 19-10946.

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PETITION FOR A WRIT OF CERTIORARI

Dorothy Pearl Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

ORDER AND OPINION BELOW

The Eleventh Circuit's unpublished opinion affirming Ms. Smith's sentence is provided in Appendix A.

JURISDICTION

The Eleventh Circuit issued its unpublished opinion on April 28, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(A)(ii), the term “serious drug offense” means, in relevant part: “[A]n offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.”

STATEMENT OF THE CASE

1. In August 2018, Ms. Smith pled guilty to possessing a gun as a felon the year before. The district court sentenced her to 96 months' imprisonment under the Armed Career Criminal Act (ACCA), followed by 60 months' supervised release.

In anticipation of sentencing, Probation prepared a presentence investigation report. Doc. 37. In its report, Probation recommended Ms. Smith's guidelines range be calculated under USSG § 4B1.4 because she is an armed career criminal. Probation relied on the following three convictions:

- (a) Delivery of Cocaine, Hillsborough County Circuit Court, Case No. 88CF11262, a serious drug offense, committed on August 5, 1988,
- (b) Robbery and Aggravated Assault (three counts), Hillsborough County Circuit Court, Case No. 89CF06487, violent felony offenses, committed on April 25 and 26, 1989, and
- (c) Aggravated Assault with a Deadly Weapon, Hillsborough County Circuit Court, Case No. 04CF23211, a violent felony offense, committed on December 10, 2004.

Id.

Because Ms. Smith possessed a firearm in connection with a

“controlled substance offense” (distribution of cocaine base), Probation recommended that Ms. Smith’s base offense level be set at level 34 and her criminal history category be set at category VI. With a three-level reduction for acceptance of responsibility, Ms. Smith’s recommended total offense level was 31. Therefore, Ms. Smith had a recommended guidelines range of 188 to 235 months’ imprisonment. Without the ACCA enhancement, Ms. Smith would have had a total offense level of 21, a criminal history category of V, and a guidelines range of 70-to-87 months’ imprisonment.

Ms. Smith objected to the ACCA recommendation, arguing, among other things, that her Florida convictions for delivery of cocaine and aggravated assault do not qualify as ACCA predicate offenses. At sentencing, the district court overruled Ms. Smith’s objection to the application of the ACCA, adopted the PSR without change, and sentenced Ms. Smith to 96 months’ imprisonment and 60 months’ supervised release.

2. On appeal, Ms. Smith challenged whether her aggravated assault conviction was a “violent felony.” While Ms. Smith’s case was pending on appeal, however, the Eleventh Circuit issued a decision

impacting the classification of her cocaine conviction. In *United States v. Jackson*, 36 F.4th 1294, 1300–04 (11th Cir. 2022) (*Jackson I*), the Eleventh Circuit held that, for federal firearm offenses committed after September 2015, Florida cocaine offenses committed before July 2017, like Ms. Smith’s, are not “serious drug offense[s]” under the ACCA because the Florida drug schedules at the time of the state offense included ioflupane and the federal schedules at the time of the federal offense did not.

The Eleventh Circuit later vacated *Jackson I* and issued a new opinion in *Jackson II*, in which it held that the relevant comparison is between the state and federal schedules in place at the time of the defendant’s state conviction. *United States v. Jackson*, 55 F.4th 846 (11th Cir. 2022) (*Jackson II*). Under *Jackson II*, Ms. Smith’s cocaine conviction is a “serious drug offense.”

The Eleventh Circuit subsequently affirmed Ms. Smith’s sentence, holding that her aggravated assault conviction was a “violent felony.” *United States v. Smith*, No. 19-10946, 2023 WL 3151106, at *1 (11th Cir. Apr. 28, 2023). After the Eleventh Circuit affirmed Ms. Smith’s sentence, this Court granted certiorari in *Brown* and *Jackson*.

REASONS FOR GRANTING THE WRIT

The circuits are split on what version of the federal controlled-substances schedules are incorporated in the ACCA’s “serious drug offense” definition.

This Court’s review is warranted to resolve a circuit conflict over what version of the federal drug schedules are incorporated in the ACCA’s “serious drug offense” definition. Consistent with Ms. Smith’s position, four circuits have held that the “serious drug offense” definition incorporates the schedules in effect at the time of the federal firearm offenses or federal sentencing. *United States v. Williams*, 48 F.4th 1125 (10th Cir. 2022); *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022); *United States v. Brown*, 47 F.4th 147 (3d Cir. 2022); *United States v. Hope*, 28 F.4th 487 (4th Cir. 2022).² The Eleventh Circuit, however, has held that the “serious drug offense” definition incorporates the schedules in effect at the time of the defendant’s prior state drug offense. *Jackson*

² In *Hope*, the Fourth Circuit held the “serious drug offense” definition incorporates that federal drug schedules in effect at the time of the federal sentencing rather than the time the federal offense was committed. 28 F.4th at 504–05. In *Brown*, however, the Third Circuit held that the schedules in effect when the federal offense was committed govern, not the schedules in effect at the time of the federal sentencing. 47 F.4th at 148, 155. This distinction makes no difference here.

II, 55 F.4th at 850–61 (11th Cir. 2022).

As explained, this Court has granted the petitions for a writ of certiorari in *Brown* and *Jackson*. A favorable ruling for the petitioners in either case would mean that Ms. Smith was wrongly sentenced under the ACCA. Instead, she should have faced a maximum sentence of ten years in prison and three years of supervised release.

CONCLUSION

For the above reasons, Ms. Smith respectfully requests that this Court hold her petition for a writ of certiorari pending its consideration of *Brown* and *Jackson* and then dispose of it as appropriate. Alternatively, Ms. Smith respectfully asks the Court to grant her petition.

Respectfully submitted,

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