No. _____

IN THE
# Supreme Court of the United States

ERMIN ADZEMOVIC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Federal Sentencing Guidelines provide for an enhanced advisory Guideline range for certain offenses if the defendant has a prior conviction for a "controlled substance offense," as that phrase is defined in USSG § 4B1.2(b).

The question presented is:

Does a prior drug conviction under a statute that included now decontrolled substances qualify as a "controlled substance offense" to enhance a defendant's Guideline range and sentence?

## LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

## RELATED PROCEEDINGS

*United States v. Adzemovic*, No. 3:20-cr-00149-PDW, United States District Court for the District of North Dakota. Judgment entered November 17, 2021.

*United States v. Adzemovic*, No. 21-3751, United States Court of Appeals for the Eighth Circuit. Judgment entered March 2, 2023.

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## PETITION FOR A WRIT OF CERTIORARI

Ermin Adzemovic respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-3a) is unreported but available at 2023 WL 2320337. The district court's relevant rulings are unreported.

## JURISDICTION

The court of appeals entered judgment on March 2, 2023. Adzemovic received an extension of time to file a petition for rehearing. The court of appeals denied his timely petition for rehearing *en banc* on April 21, 2023. This petition is timely filed under Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## UNITED STATES SENTENCING GUIDELINE PROVISIONS INVOLVED

**USSG § 2K2.1(a) provides in relevant part:**

> (a) Base Offense Level (Apply the Greatest):
>
> . . .
>
> (2) 24, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
>
> . . .
>
> (6) 14, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;
>
> . . . .

**USSG § 4B1.2(b) provides:**

> (b) 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.

## INTRODUCTION

This petition presents an important question of federal law that has divided the courts of appeals and that affects thousands of criminal defendants a year—does a prior drug conviction under a statute that included now-decontrolled substances qualify as a "controlled substance offense" under USSG § 4B1.2(b). The courts of appeals are evenly divided on this question. *Compare United States v. Gibson*, 55 F.4th 153, 166 (2d Cir. 2022), *adhered to on reh'g*, 60 F.4th 720 (2d Cir. 2023) (per curiam); *United States v. Abdulaziz*, 998 F.3d 519, 531 (1st Cir. 2021); *United States v. Bautista*, 989 F.3d 698, 703-04 (9th Cir. 2021) (all comparing the prior conviction to the relevant drug schedules in effect at the time of the federal offense or sentencing) *with United States v. Lewis*, 58 F.4th 764, 773 (3d Cir. 2023); *United States v. Clark*, 46 F.4th 404, 408-15 (6th Cir. 2022), *pet'n for cert. filed* (U.S. Dec. 21, 2022) (No. 22-6881);[1] *United States v. Bailey*, 37 F.4th 467, 469-70 (8th Cir. 2022) (per curiam), *cert denied*, 143 S. Ct. 2437 (2023) (all applying the relevant drug schedules in effect at the time of the prior conviction).

This Court recently granted certiorari on a closely related issue in the context of the Armed Career Criminal Act (ACCA). *See Brown v. United States*, No. 22-6389; *Jackson v. United States*, No. 22-6640.

[1] In addition to the petition for a writ of certiorari in *Clark*, a number of other pending petitions raise the same question presented. *See, e.g.*, *Harbin v. United States*, No. 22-6902 (filed Feb. 28, 2023); *Turman v. United States*, No. 22-7792 (filed June 12, 2023); *Hoffman v. United States*, No. 22-7903 (filed June 27, 2023).

The Court should grant certiorari to resolve the important question of federal law raised by this case or, in the alternative, hold this petition pending the decision in *Brown* and *Jackson*.

## STATEMENT OF THE CASE

Ermin Adzemovic was sentenced to the statutory maximum sentence of 10 years in prison for being a felon in possession of a firearm and ammunition. Dist. Ct. Dkt. 44.[2] His sentence was largely based on the district court's finding that his 2013 and 2016 North Dakota convictions for possession of marijuana with intent to deliver were "controlled substance offense[s]" under USSG § 2K2.1(a)(2). *See* PSR ¶ 10. This finding increased Adzemovic's base offense level from 14 to 24 and his advisory Guideline range from 41 to 51 months to 110 to 120 months. *See* USSG § 2K2.1(a)(2), (6); PSR ¶ 10; Sent. Tr., at 12, 20-21.

Adzemovic argued below that his North Dakota convictions did not qualify as "controlled substance offense[s]" because North Dakota's definition of "marijuana" was broader at the time of his prior convictions than at the time of his federal sentencing. *See* Sent. Tr., at 8-12, 15-17. Specifically, at the time of his prior convictions, North Dakota's definition of "marijuana" included hemp. N.D. Cent. Code § 19-03.1-01(18) (2013).[3] At the time of his federal sentencing, North Dakota's

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[2] All citations to "Dist. Ct. Dkt." are to the docket in *United States v. Adzemovic*, No. 3:20-cr-00149-PDW (D.N.D.). All citations to the sentencing transcript are to the transcript of the continued sentencing hearing, available at Dist. Ct. Dkt. 52.

[3] At the time of Adzemovic's prior convictions, North Dakota law defined "marijuana" as:

definition of "marijuana" expressly excluded hemp. N.D. Cent. Code § 19-03.1-01(17) (2021).[4] Thus, Adzemovic argued, his 2013 and 2016 convictions were overbroad as

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> all parts of the plant cannabis whether growing or not; the seeds thereof; the resinous product of the combustion of the plant cannabis; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of mature stalks, fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.

N.D. Cent. Code § 19-03.1-01(18) (2013). This definition did not exclude hemp or low-concentration tetrahydrocannabinol.

[4] North Dakota first amended its definition of "marijuana" to expressly exclude hemp on April 9, 2019. *See* 2019 N.D. Laws 185. At the time of Adzemovic's federal sentencing in November 2021, North Dakota law defined "marijuana" as:

> all parts of the plant of the genus cannabis, whether growing or not; the seeds thereof; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant. The term does not include:
>
> a. The tetrahydrocannabinol extracted or isolated from the plant;
>
> b. The mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination;
>
> c. Hemp as defined in chapter 4.1-18.1; or
>
> d. A prescription drug approved by the United States food and drug administration under section 505 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355].

N.D. Cent. Code § 19-03.1-01(17) (2021).

compared to the state law in effect at the time of his federal sentencing. The district court rejected this argument and applied an enhanced base offense level of 24 under USSG § 2K2.1(a)(2). Sent. Tr., at 18; PSR ¶ 10.

Adzemovic advanced the same argument on appeal. The court of appeals rejected his argument, finding that under circuit precedent, sentencing courts should look to the law at the time of the conviction:

> Adzemovic claims his prior convictions stopped being controlled substance offenses when North Dakota's definition of marijuana was narrowed to exclude hemp. *Compare* N.D. Cent. Code § 19-03.1-01(18) (2013) and (2016), *with* N.D. Cent. Code § 19-03.1-01(17), (18) (2021). Determining whether a conviction qualifies as a controlled substance offense, sentencing courts look not to the law at the time of sentencing, but rather to the law "at the time of the conviction." *United States v. Doran*, 978 F.3d 1337, 1340 (8th Cir. 2020). *See United States v. Jackson*, 2022 WL 303231, at *2 (8th Cir. Feb. 2, 2022) (per curiam) (unpublished) (considering whether the prior marijuana convictions were controlled substance offenses at the time of the conviction). Adzemovic does not deny that his convictions were controlled substance offenses at the time of the conviction. The court did not err in counting them.

App. 2a-3a.[5] The court of appeals exercised jurisdiction under 28 U.S.C. § 1291. App. 2a.

Adzemovic timely filed a petition for rehearing *en banc*. The court of appeals denied his petition in a summary order. App. 4a. This petition for a writ of certiorari follows.

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[5] Adzemovic also attempted to preserve the argument that the term "controlled substance offense" in § 4B1.2(b) refers to the federal drug schedules, not to state drug schedules, but the court of appeals found that he waived this argument below. App. 3a.

## REASONS FOR GRANTING THE PETITION

### I. The circuits are divided on the question presented.

The Sentencing Guidelines provide for an enhanced Guideline range for several of the most common federal offenses where the defendant has a prior conviction for a "controlled substance offense." *See, e.g.*, USSG § 2K2.1 (enhanced base offense level for unlawful receipt, possession, or transportation of firearms or ammunition offenses); USSG § 4B1.1 (enhanced base offense level and criminal history category if defendant qualifies as a career offender). The Sentencing Guidelines define "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.

USSG § 4B1.2(b).

The meaning of "controlled substance," specifically whether this term refers to the relevant drug schedules in effect at the time of the prior conviction (the "time-of-prior-conviction approach") or the relevant drug schedules in effect at the time of the federal sentencing (the "time-of-sentencing approach") has divided the courts of appeals. This question arises when the defendant was convicted of a drug offense involving a substance that is no longer controlled under state or federal law or, as here, where the defendant was convicted of a drug offense involving a substance, the definition of which was broader at the time of the prior conviction than it was at the time of the federal case.

The courts of appeals are evenly divided on the drug schedule timing issue in the context of the Sentencing Guidelines. The First, Second, and Ninth Circuits follow the time-of-sentencing approach, comparing the prior conviction to the relevant drug schedules in effect at the time of the federal offense or sentencing:

- ***United States v. Abdulaziz*, 998 F.3d 519, 531 (1st Cir. 2021)** ("In sum, hemp was not on the CSA's drug schedules when Abdulaziz was sentenced on account of his § 922(g) offense in September of 2019. *See* Agriculture Improvement Act § 12619. That means, given the government's timely arguments to us, that hemp was not a 'controlled substance' within the meaning of the version of § 4B1.2(b) that was in effect at the time of Abdulaziz's sentencing and, by extension, § 2K2.1(a)(2) as of that same time. Accordingly, Abdulaziz's July 2014 Massachusetts conviction was not a conviction of 'a controlled substance offense' within the meaning of that term as it was used in the version of § 2K2.1(a)(2) that was applicable at his sentencing.");

- ***United States v. Gibson*, 55 F.4th 153, 166 (2d Cir. 2022), *adhered to on reh'g*, 60 F.4th 720 (2d Cir. 2023) (per curiam)** ("Here, by the time Gibson began his 2017 bank robbery spree, the CSA schedules, having eliminated naloxegol in 2015, were narrower than the New York schedules applicable to his 2002 state-law conviction. We have seen no reason to believe that Congress, which required that federal 'drug schedules'--which are 'incorporated into the *statutory* definition of a "controlled substance"' (Government brief on appeal at 16-17 (emphasis in original))--be updated with appropriate additions, reclassifications, and deletions every year, would have intended that such changes in the federal substantive criminal law should be ignored in connection with controlled-substance-related principles of enhanced sentencing for a contemporaneous offense.");

- ***United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021)** ("At federal sentencing, the district judge was required to compare the elements of the state crime as they existed when Bautista was convicted of that offense to those of the crime as defined in federal law at the time of federal sentencing—that is, after the Agriculture Improvement Act removed hemp from the federal drug schedule. Because the federal CSA excludes hemp but Section 13-3405 of the Arizona Revised Statutes did not, the latter crime's greater breadth is evident from its text." (internal quotation omitted)).

The Third, Sixth, and Eighth Circuits, on the other hand, follow the time-of-prior-conviction approach, applying the relevant drug schedules in effect at the time of the prior conviction:

- ***United States v. Lewis*, 58 F.4th 764, 773 (3d Cir. 2023)** ("The meaning of 'controlled substance' as used in Guidelines § 4B1.2(b)'s definition of 'controlled substance offense' includes drugs regulated by state law at the time of the predicate state conviction, even if they are not federally regulated or are no longer regulated by the state at the time of the federal sentencing.");

- ***United States v. Clark*, 46 F.4th 404, 415 (6th Cir. 2022), *pet'n for cert. filed* (U.S. Dec. 21, 2022) (No. 22-6881)** ("[C]ourts must define the term 'controlled substance offense' in the Guidelines with reference to the law in place at the time of the prior conviction at issue.");

- ***United States v. Bailey*, 37 F.4th 467, 469-70 (8th Cir. 2022) (per curiam), *cert denied*, 143 S. Ct. 2437 (2023)** ("[Defendant] emphasizes that Iowa, too, has removed hemp from its marijuana definition since his convictions occurred. *See* Iowa Code § 124.401(6). But we may not look to 'current state law to define a previous offense.' [Defendant's] uncontested prior marijuana convictions under the hemp-inclusive version of Iowa Code § 124.401(1)(d) categorically qualified as controlled substance offenses for the career offender enhancement." (quoting and adopting reasoning of *United States v. Jackson*, No. 20-3684, 2022 WL 303231, at *1-2 (8th Cir. Feb 2, 2022) (per curiam) (unpublished)).

There is a deep and fully developed circuit split on the meaning of "controlled substance" in § 4B1.2(b).

## II. The decision below was wrongly decided.

The courts following the time-of-sentencing approach have it right. The time-of-sentencing approach is consistent with the well-established rule that the sentencing court must apply the version of the Sentencing Guidelines in effect at the time of sentencing (barring any Ex Post Facto Clause violations). Under 18

U.S.C. § 3553(a)(4)(A)(ii), the district court must apply the version of the Sentencing Guidelines "in effect on the date the defendant is sentenced." Similarly, the Sentencing Guidelines also require that the court "use the Guidelines Manual in effect on the date that the defendant is sentenced" unless it would violate the Ex Post Facto Clause. USSG § 1B1.11; *see also Peugh v. United States*, 569 U.S. 530, 533, 537-38 (2013). It makes little sense to use the old state drug schedules to determine the meaning of "controlled substance offense" as that term is used in the version of the Sentencing Guidelines in effect at the time of the federal sentencing. Nothing in the text of § 2K2.1(a)(2) or § 4B1.2(b) compels a different conclusion. Neither provision expressly requires the court to look to the state schedule at the time of the prior conviction. "The guideline does not refer, for example, . . . to 'what at the time of the prior conviction was considered a controlled substance offense.'" *Abdulaziz*, 998 F.3d at 525. The text of the Sentencing Guidelines supports the time-of-sentencing approach.

The courts rejecting the time-of-sentencing approach in favor of the time-of-prior conviction approach rely heavily on this Court's opinion in *McNeill v. United States*, 563 U.S. 816 (2011). *See Lewis*, 58 F.4th at 770-73; *Clark*, 46 F.4th at 409-10, 414-15; *United States v. Jackson*, No. 20-3684, 2022 WL 303231, at *2 (8th Cir. Feb. 2, 2022) (per curiam) (unpublished). In *McNeill*, the Court held that for the purposes of ACCA, the "maximum term of imprisonment" for a prior state drug offense is the maximum sentence applicable at the time of the prior conviction. 563 U.S. at 817-18. The issue in *McNeill* was "how a federal court should determine the

maximum sentence for a prior state drug offense for ACCA purposes." *Id.* at 817. The answer was: "the 'maximum term of imprisonment' for a defendant's prior state drug offense is the maximum sentence applicable to his offense when he was convicted of it." *Id.* at 818. This was true even though the state later reduced the maximum sentence for the offense. *Id.*

*McNeill* was not a Sentencing Guidelines case. It did not address the meaning of the term "controlled substance" in § 4B1.2(b). And it did not address the question of whether the sentencing court should apply the version of the relevant drug schedules in effect at the time of the prior conviction or at the time of the federal case. In other words, *McNeill* instructs the sentencing court to look to the state law in effect at the time of the prior conviction to determine the maximum penalty for the offense (at least in the context of ACCA). But this is a different question than the question of what the court should compare the prior conviction *to* under the categorical approach. As the First, Second, and Ninth Circuits have held, the court should look to the drug schedule in effect at the time of the federal case, and *McNeil* should not be interpreted to require otherwise. *See generally Gibson*, 55 F.4th at 160-62; *Abdulaziz*, 998 F.3d at 525-29; *Bautista*, 989 F.3d at 703 (all rejecting argument that *McNeill* supports application of the time-of-prior-conviction approach).

### III. This Court has granted certiorari on a closely related question.

This Court recently granted certiorari in *Brown v. United States*, No. 22-6389 and *Jackson v. United States*, No. 22-6640. Both cases raise the drug schedule

timing issue in the context of ACCA. As stated in the *Jackson* petition, the quested presented is:

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

Pet. for Cert. at i, *Jackson*, No. 22-6640. The Court's resolution of that issue will likely require clarification of whether and how *McNeill* informs the timing question at the heart of these cases. *See id.* at 30 ("[R]esolving the question presented will clarify the widespread confusion about this Court's decision in *McNeill*."); *see also* Brief for Petitioner at 26-28, *Brown*, No. 22-6389; Brief for Petitioner at 21-24, *Jackson*, No. 22-6640 (both discussing *McNeill*). *Brown* and *Jackson* arise from a different context (ACCA versus the Sentencing Guidelines), but the Court's decision in those cases will likely inform the question presented here.

## IV. This Court should act to resolve this important question of federal law.

The courts of appeals are divided on the question presented. The Court should act to resolve this split of authority and ensure that defendants do not face dramatically different Guideline ranges for the same conduct and criminal history based only on the circuit they happen to have been prosecuted in. *Cf. United States v. Crocco*, 15 F.4th 20, 24 n.4 (1st Cir. 2021) ("It makes little sense for career-offender criteria to vary from circuit to circuit based on whether a federal-law or state-law approach is chosen.").

A prior conviction for a "controlled substance offense" within the meaning of § 4B1.2(b) can enhance a defendant's advisory Guideline range in a number of ways. It can contribute to a finding of "career offender" status under USSG § 4B1.1. Such a designation "can have significant implications in setting the base guideline range." *Crocco*, 15 F.4th at 24 n.4. In recent years, between 1,200 and 1,800 defendants were found to be a career offender each year. U.S. Sentencing Comm'n, *Quick Facts – Career Offenders*, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY22.pdf (last accessed July 19, 2023). Without this designation, almost 93 percent of defendants would have had a lower Guideline range. *Id.*

A prior conviction for a "controlled substance offense" can also increase the offense level under USSG § 2K2.1 (which applies to the unlawful receipt, possession, or transportation of firearms or ammunition, including 18 U.S.C. § 922(g) offenses), USSG § 2K1.3 (which applies to the unlawful receipt, possession, or transportation of explosive materials), and USSG § 4B1.4 (which applies in ACCA cases). Many federal defendants are sentenced under these Guidelines. In fiscal year 2022, over 8,800 offenders (which amounts to 14.3 percent of all offenders) were sentenced under § 2K2.1 alone. U.S. Sentencing Comm'n, *2022 Sourcebook of Federal Sentencing Statistics*, at 71, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf (last

accessed July 19, 2023). The definition of "controlled substance offense" impacts thousands of defendants a year.

This Court should not wait for the United States Sentencing Commission to resolve this important issue. The Sentencing Commission did not address the drug schedule timing issue in the 2023 amendments to the Sentencing Guidelines. *See* U.S. Sentencing Comm'n, *Amendments to the Sentencing Guidelines* at 54-59, *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305_Amendments.pdf (last accessed July 19, 2023). And it did not identify this issue in its proposed priorities for the next amendment cycle. *See* U.S. Sentencing Comm'n, *Proposed Priorities for Amendment Cycle*, *available at* https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2023-2024-priorities (last accessed July 19, 2023). This Court can and should act to resolve the meaning of "controlled substance offense" in § 4B1.2(b). *See generally Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (reaffirming role of courts in interpreting agency regulations).

## V. This case is an ideal vehicle for the question presented.

This case squarely presents the drug schedule timing issue raised by the definition of "controlled substance offense" in the Sentencing Guidelines. Adzemovic had two prior convictions for possession with intent to distribute marijuana under a state statute that defined "marijuana" to encompass hemp. By the time of Adzemovic's federal sentencing, both state and federal law excluded hemp from the definition of "marijuana." The finding that Adzemovic's prior convictions qualified

as controlled substance offenses had a dramatic effect on his sentence. This finding increased his base offense level from 14 to 24 and more than doubled his advisory Guideline range, increasing it from 41 to 51 months to 110 to 120 months. *See* USSG § 2K2.1(a)(2), (6); PSR ¶ 10; Sent. Tr., at 12, 20-21. Adzemovic was sentenced to 120 months in prison, the top of his Guideline range and the then-applicable statutory maximum sentence for the offense. If Adzemovic had been charged and sentenced in a circuit where the time-of-sentencing approach governs, his Guideline range would have been lower, and he likely would have received a significantly shorter sentence. This case is an ideal vehicle for the question presented.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 19th day of July, 2023.

Respectfully submitted,

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