No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARVAS AURELIEN,

***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 WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the "controlled substance" definition in United States Sentencing Guideline § 4B1.2(b) incorporates the federal drug schedules in effect at the time of the federal firearm offense or federal sentencing (as the First, Second, and Ninth Circuits have held), or the federal drug schedules in effect at the time of the prior state drug offense (as the Third, Sixth, and Eighth Circuits have held).[1]

II. Whether the "controlled substance" definition in § 4B1.2(b) refers exclusively to substances controlled by the federal government (as the Second and Ninth Circuits have held), or also to substances controlled by the pertinent state government (as the Third, Fourth, Seventh, Eighth, and Tenth Circuits have held).

[1] The same question is presented in *Clark v. United States*, No. 22-6881, which is pending. And this Court has granted the petitions for writs of certiorari in *Jackson v. United States*, No. 22-6640, and *Brown v. United States*, No. 22-6389, to resolve a related question. Mr. Aurelien respectfully asks this Court to hold his petition pending its decision in *Jackson*/*Brown* and its consideration of *Clark*, and then dispose of it as appropriate.

ADDITIONAL RELATED PROCEEDINGS

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

United States v. Marvas Aurelien
Case No. 21-12995-DD
Judgment Date: February 2, 2023

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA

United States v. Marvas Aurelien
Case No. 6:19-cr-81-GKS-DCI
Judgment Date: August 19, 2021

LIST OF PARTIES

Petitioner, Marvas Aurelien, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

United States Sentencing Guidelines

Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Marvas Aurelien respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDER BELOW

The Eleventh Circuit's unpublished opinion affirming Mr. Aurelien's sentence is provided in Appendix A-1, and its order denying rehearing is provided in Appendix A-2. The district court's judgment of conviction and sentence is provided in Appendix A-3.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction. The Eleventh Circuit issued its unpublished opinion on February 2, 2023, and denied petitions for rehearing on April 26, 2023. This petition is timely filed under Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND GUIDELINE PROVISIONS

28 U.S.C. § 994(h) provides:

> **(h)** The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and--
>
> **(1)** has been convicted of a felony that is--
>
> **(A)** a crime of violence; or
>
> **(B)** an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and
>
> **(2)** has previously been convicted of two or more prior felonies, each of

which is--

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

U.S.S.G. § 2K2.1(a) provides:

(a) Base Offense Level (Apply the Greatest):

(1) 26, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) 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;

(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;

(3) 22, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) 20, if--

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) 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;

(5) 18, if the offense involved a firearm described in 26 U.S.C. § 5845(a);

(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;
(7) 12, except as provided below; or
(8) 6, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.

U.S.S.G. § 4B1.1 provides:

(a) 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.
(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.
. . .

U.S.S.G. § 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.

STATEMENT OF THE CASE

Mr. Aurelien pled guilty to possessing a firearm and ammunition as a felon on March 14, 2019, and the district court sentenced him on August 28, 2019. On appeal, the Eleventh Circuit vacated his sentence and remanded for resentencing. On remand, the district court determined that Mr. Aurelien's guideline range was 63 to 78 months imprisonment, and it resentenced him on August 18, 2021, to 63 months' imprisonment, followed by three years' supervised release.

The district court arrived at Mr. Aurelien's guideline range by applying U.S.S.G. § 2K2.1(a)(4)(A) and implicitly finding—over Mr. Aurelien's objections—that his reported 2017 Florida conviction for possession of cannabis (marijuana) with intent to sell or deliver was a "controlled substance offense" as defined in U.S.S.G. § 4B1.1. Without a prior "controlled substance offense," Mr. Aurelien's guidelines would have been 33 to 41 months using the base offense level assigned under § 2K2.1(a)(6).

On appeal, Mr. Aurelien challenged whether a 2017 Florida cannabis-related conviction was a "controlled substance offense." In 2017, Florida defined cannabis broadly to include all parts of the cannabis plant. Fla. Stat. § 893.02(3) (eff. June 23, 2017, to Sept. 30, 2018). There were no exceptions for low-tetrahydrocannabinol (THC) concentrations (hemp) or mature stalks. So Mr. Aurelien argued two reasons why Florida's inclusion of hemp and mature stalks in its cannabis definition meant that a 2017 cannabis-related conviction was not a "controlled substance offense."

First, he made a timing argument that implicated Florida's inclusion of hemp.

He argued that "controlled substance" means a substance that is controlled at the time of the federal sentencing, and neither the federal government nor Florida controlled hemp at the time of his federal sentencing ("timing argument"). He asked the Eleventh Circuit to join the First, Second, and Ninth Circuits in holding that the drug schedules in effect at the time of the federal offense or sentencing determine whether a substance is a "controlled substance" for purposes of U.S.S.G. § 4B1.2(b). *See United States v. Gibson*, 55 F.4th 153, 166 (2d Cir. 2022) (consulting the version of the drug schedule at the time of the federal offense or sentencing, not the time of the prior conviction); *United States v. Abdulaziz*, 998 F.3d 519, 531 (1st Cir. 2021) (adopting a time-of-federal-sentencing approach); *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021) (adopting a time-of-federal-sentencing approach).

Second, he made a separate argument implicating mature stalks. He argued that the court may only consider federal drug schedules—not Florida's—when determining whether a substance is a "controlled substance" an ("sovereign argument"). He argued that "controlled substance" refers exclusively to a substance controlled by the federal government, and the federal government has never prohibited mature stalks. He cited the Eleventh Circuit's inconsistent, unpublished opinions on the issue and urged the Eleventh Circuit to join the Second, Fifth, and Ninth Circuits in holding that "controlled substance" includes only substances controlled by the federal drug schedules. *See Bautista*, 989 F.3d at 702 (interpreting "controlled substance" in the Guidelines by exclusive reference to the federal schedules (citing *United States v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012)); *United*

States v. Townsend, 897 F.3d 66, 75 (2d Cir. 2018) (same); *United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015) (same)*; cf. United States v. Crocco*, 15 F.4th 20, 23 (1st Cir. 2021) (finding the federal-law approach "appealing" in dicta but not deciding the issue).

The Eleventh Circuit affirmed Mr. Aurelien's sentence. Relying on *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), and *United States v. Pridgeon*, 853 F.3d 1192 (11th Cir. 2017), the court applied prior circuit precedents holding that Florida convictions for possessing cannabis with the intent to sell were "controlled substance offense[s]" under the Guidelines. App. A-1 at *3.

Mr. Aurelien petitioned the Eleventh Circuit for panel and en banc rehearing. He explained that the issues he presented—which sovereign or sovereigns define "controlled substance" and when—were distinct from those in *Smith* and *Pridgeon*, and that, at best, the universe of substances included in the definition of "controlled substance" had either been assumed or were lurking in the record in *Smith* and *Pridgeon*. As such, he explained that the questions were open and argued that the circuit's prior precedent rule did not apply.

The Eleventh Circuit denied Mr. Aurelien's petition for rehearing. App. A-2.

REASONS FOR GRANTING THE WRIT

This Court's review is warranted to resolve circuit conflicts over the meaning of "controlled substance" in § 4B1.2(b) in two respects: (1) whether "controlled substance" refers to substances controlled at the time of the prior conviction or at the time of the federal offense or sentencing; and (2) whether "controlled substance" refers exclusively to substances on the federal drug schedules or also includes substances on state drug schedules.

The first question relates to timing and requires a determination of the role of *McNeill v. United States*, 563 U.S. 816 (2011), in the analysis—a question this Court will decide this term in the consolidated cases *United States v. Jackson*, No. 22-6640, and *United States v. Brown*, No. 22-6389. The second question has already caught the attention of two members of this Court, *see Guerrant v. United States*, 142 S. Ct. 640 (2022) (Sotomayor, J., joined by Barrett, J., respecting the denial of certiorari), and the Sentencing Commission has still not addressed it.

Mr. Aurelien respectfully requests this Court grant his petition, or at least hold it until the Court resolves *Jackson* and *Brown* and the pending petition in *United States v. Clark*, No. 22-6881.

I. The Circuits are split on two questions involving the "controlled substance" definition.

A. The Circuits are split on the timing question, and this Court has granted certiorari to answer that question in the Armed Career Criminal Act (ACCA) context.

The Circuits are split on whether "controlled substance" refers to a substance controlled at the time of the prior conviction or at the time of the federal offense or

sentencing. At the heart of the split is whether *McNeill* applies when analyzing prior drug convictions under the categorical approach. The First, Second, and Ninth Circuits have held that *McNeill* is not on point and does not stand for the proposition that a district court should look to superseded schedules to determine what substances are within the "controlled substance" definition in § 4B1.2(b). *See Bautista*, 989 F.3d at 703; *Abdulaziz*, 998 F.3d at 526; *Gibson*, 55 F.4th at 162. Instead, *McNeill* explains only how to determine the elements and penalty for the prior state conviction. These courts have applied the fundamental time-of-sentencing doctrine to find that delisted substances are not "controlled substances." *See* 18 U.S.C. § 3553(a)(4); U.S.S.G. § 1B1.11; *Peugh v. United States*, 569 U.S. 530, 543 (2013); *Dorsey v. United States*, 567 U.S. 260, 275 (2012). The time-of-federal-sentencing rule is a "background principle" of the Sentencing Reform Act ("SRA"), *Dorsey*, 567 at 275, and a straightforward, party-neutral rule that promotes certainty and fairness, avoids unwarranted disparities, and "reflect[s], to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process"—the central tenets of the guidelines system. 28 U.S.C. § 991(b)(1); *Mistretta v. United States*, 488 U.S. 361, 374 (1989); *see also United States v. Booker*, 543 U.S. 220, 253-54 (2005) ("Congress' basic goal in passing the Sentencing [Reform] Act [of 1984] was to move the sentencing system in the direction of increased uniformity"); U.S.S.G. Ch.1, Pt.A(1)(3) (recognizing reasonable uniformity as a goal of the sentencing guidelines).

In contrast, the Third, Sixth, and Eighth Circuits have held that *McNeill* requires courts to use the federal schedules from the time of the prior drug offense. *United States v. Lewis*, 54 F.4th 764 (3d Cir. 2023); *United States v. Clark*, 46 F.4th 404 (6th Cir. 2022), *pet. for cert. filed* (Feb. 24, 2023); *United States v. Bailey*, 37 F.4th 467, 469-70 (8th Cir. 2022), *cert. denied sub nom., Altman v. United States*, No. 22-5877 (May 1, 2023). The petition for certiorari in *Clark* remains pending before this Court, and the petitioner has asked this Court to hold its petition pending *Jackson* and *Brown*. Reply in Support of Petition for Writ of Certiorari at 3, *Clark v. United States*, (No. 22-6881).

For its part, the Eleventh Circuit has explicitly declined to express an opinion about the correctness of these circuit decisions. *United States v. Jackson*, 55 F.4th 846, 856 n.7 (11th Cir. 2022), *cert. granted*, No. 22-6640 (U.S.) (listing the other circuits that have addressed the timing question in the Guidelines context and expressing no opinion about the correctness of those opinions). And in unpublished opinions, the Eleventh Circuit has acknowledged that it has not decided this timing question. *United States v. Moore*, 2023 WL 1434181, *3 (11th Cir. Feb. 1, 2023) (unpublished) ("There are no cases published by this Court or the Supreme Court holding whether to apply the version of a controlled substance offense from the time of the earlier conviction or the time of the sentencing in the current case for the purpose of determining whether it is a controlled substance offense under U.S.S.G. § 4B1.2(b)."); *United States v. Posey*, 2022 WL 17056662, *7 (11th Cir. Nov. 17, 2022) (unpublished) ("Neither we nor the Supreme Court has ever addressed whether a

state marijuana conviction continues to qualify as a predicate 'controlled substance offense' under section 2K2.1(a)(4)(A) when hemp has been delisted from both the state and federal drug schedules before a defendant's federal sentencing."). In Mr. Aurelien's appeal, the Eleventh Circuit did not engage in the timing question. Instead, the court considered itself bound by *Smith* and *Pridgeon*. Those decisions, however, addressed the unrelated question of whether "controlled substance offense" is defined by reference to statutory federal analogues.[2] App. A-1 at *3.

This Court has granted certiorari review of this *McNeill* timing question in the ACCA context. *See Jackson v. United States*, No. 22-6640 (May 15, 2023); *Brown v. United States*, No. 22-6389 (May 15, 2023). The Court's interpretation of *McNeill* and resolution of the timing issue in the ACCA context will influence the resolution of the timing issue in the Guidelines context. With the benefit of this Court's guidance on *McNeill*, the Eleventh Circuit may finally address the timing question in the Guidelines context. Accordingly, like the petitioner in *Clark*, Mr. Aurelien respectfully requests that the Court hold his petition pending the decision in *Jackson* and *Brown*, or alternatively, grant his petition.

B. The Circuits are split on the sovereign question, as members of this Court have observed.

The Circuits are split on whether "controlled substance" refers exclusively to substances controlled by the federal schedules or also by the state schedules. *See Guerrant,* 142 S. Ct. at 640 (Sotomayor, J., joined by Barrett, J., respecting the

[2] Even so, the court did not consider that Florida also removed hemp from its definition of cannabis by the time of Mr. Aurelien's federal sentencing.

denial of certiorari) (describing the circuit split). Since two Justices explicitly recognized the split 18 months ago, it has only become more entrenched.

The Second and Ninth Circuits have held that the term "controlled substance" in § 4B1.2 includes only those substances listed in the CSA, 21 U.S.C. § 801 *et seq*., and does not incorporate substances controlled (or previously controlled) under state law. *See Bautista*, 989 F.3d at 702 (interpreting "controlled substance" in the Guidelines by exclusive reference to the federal CSA (citing *Leal-Vega*, 680 F.3d at 1160); *Townsend*, 897 F.3d at 75 (same). The First and Fifth Circuits have not directly resolved this question but have indicated agreement with its approach. *Crocco*, 15 F.4th at 23 (finding the federal-law approach "appealing" in dicta but not deciding the issue); *Gomez-Alvarez*, 781 F.3d at 794. In contrast, the Third, Fourth, Seventh, Eighth, and Tenth Circuits interpret "controlled substance" as any substance controlled under federal or state law. *See Lewis*, 58 F.4th at 771; *United States v. Jones*, 15 F.4th 1288, 1292 (10th Cir. 2021); *United States v. Henderson*, 11 F.4th 713,718-19 (8th Cir. 2021); *United States v. Ward*, 972 F.3d 364, 371-72, 374 & n.12 (4th Cir. 2020); *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020).

The Eleventh Circuit's unpublished opinions are internally inconsistent *See Guerrant*, 142 S. Ct. at 640, n.* First, the Eleventh Circuit held that whether marijuana was a "controlled substance" under Georgia law was immaterial because federal law, not state law, governs the Guidelines. *United States v. Stevens*, 654 F. App'x 984, 987 (11th Cir. 2016). Later, relying on the prior precedent rule, the Eleventh Circuit declined to address an argument that "controlled substance" must

be defined by the CSA. *United States v. Peraza*, 754 F. App'x 908, 909-10 (11th Cir. 2018). Then, in dicta, the Eleventh Circuit appeared to contradict *Stevens* when it rejected the argument that "controlled substance" under § 4B1.2 refers only to federally controlled substances. *United States v. Howard*, 767 F. App'x 779, 784, n.5 (11th Cir. 2019). Finally, in Mr. Aurelien's appeal, the Eleventh Circuit did not engage directly in determining the contours of the definition of "controlled substance" because it focused on the distinct term "controlled substance offense." App. A-1 at *3. The Eleventh Circuit had previously found that "controlled substance offense" was not defined by reference to the elements of federal statutory analogous offenses in *Smith* and *Pridgeon* . The Eleventh Circuit's curious reliance on *Smith* and *Pridgeon* in Mr. Aurelien's case—despite *Stevens, Peraza,* and *Howard*—only adds to the inconsistency and confusion within the Eleventh Circuit and contributes to the need for this Court to address the circuit split.

C. **The Sentencing Commission has not proposed an amendment to address the circuit splits.**

In 2023, the Sentencing Commission adopted amendments to the Guidelines but did not address these issues. *See generally Sentencing Guidelines for United States Courts*, 88 Fed. Reg. 28,254 (May 3, 2023). Both the timing question and the sovereign question were in play during the amendment process, and the Commission was aware of them. But the Sentencing Commission declined to address these issues. Furthermore, even if the Sentencing Commission does later amend the Guidelines, it will not affect defendants, like Mr. Aurelien, harmed by the current circuit split.

II. The issues recur frequently and result in disparate sentences depending on geography.

Both issues here are relevant whenever the categorical approach is used to determine whether a prior drug conviction is a This Court has already agreed to resolve the timing question in ACCA cases in *Jackson* and *Brown*. Mr. Aurelien respectfully asks the Court to hold his petition until it decides *Jackson* and *Brown*.

These issues will continue to arise frequently in the Guidelines context. The interpretation of "controlled substance" in § 4B1.2—and whether *McNeill* affects it—determines whether defendants guideline ranges are enhanced under § 2K1.3 (instant offense involving explosive materials), § 2K2.1 (instant offense is the unlawful possession of a firearm by a prohibited person), § 4B1.1 (career offender provision), and § 5K2.17 (instant offense is a crime of violence or controlled substance offense committed with a semiautomatic firearm). In particular, the career-offender enhancement applies to 1,200 to 1,800 defendants every year—roughly more than 2% of all federal defendants. U.S. Sent'g Comm'n, QuickFacts Career Offenders, available at https://www.ussc.gov/research/quick-facts (last accessed July 25, 2023). And there are potentially thousands sentenced under § 2K2.1 whose sentences are enhanced for having a "controlled substance offense" like Mr. Aurelien.[3] And "the resultant unresolved divisions among the Courts of

[3] Base offense level enhancements under § 2K2.1 apply where defendants have either a prior crime of violence or controlled substance offense. *See* U.S.S.G. § 2K2.1(a)(1)-(3); U.S.S.G. § 2K2.1(a)(4)(A). Thus, the Sentencing Commission's data does not reveal how many defendants received an enhancement for a prior controlled substance offense rather than a prior crime of violence. *See* U.S. Sent'g Comm'n, *Use of Guidelines and Specific Offense Characteristics Guideline Calculation Based* (FY

Appeals can have direct and sever consequences for defendants' sentences." *Guerrant*, 142 S. Ct. at 640.

Because the issues are important and recurring, Mr. Aurelien respectfully requests that this Court grant his petition.

CONCLUSION

For the foregoing reasons, Mr. Aurelien respectfully requests that this Court hold his petition for a writ of certiorari pending its consideration of *Jackson, Brown*, and *Clark*, and then dispose of it as appropriate. Alternatively, Mr. Aurelien respectfully asks the Court to grant his petition.

Respectfully submitted,

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2022), at 129-30. In total, over 4,000 defendants received an enhancement under § 2K2.1(a)(1), (2), (3), or (4)(A) for having at least one controlled substance offense or crime of violence. *Id.*