NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

CHRISTOPHER NERIUS,

***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

MICHAEL CARUSO
Federal Public Defender

Janice L. Bergmann*
Assistant Federal Public Defender
One East Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
Janice_Bergmann@fd.org

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

In *Justin Rashaad Brown v. United States*, No. 22-6389, and *Eugene Jackson v. United States*, No. 22-6640, the Court will decide whether, when determining if a prior offense is a "serious drug offense" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), a federal sentencing court should consult the law in effect at the time of the federal sentencing, the federal offense, or the prior offense. The ACCA enhances sentences of defendants convicted of firearm offenses who have three prior "violent felonies" or "serious drug offenses."

The instant petition asks the Court to resolve a similar timing question regarding the definition of "controlled substance offense" in the analogous career offender provision of the United States Sentencing Guidelines. That provision increases the guideline range where 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.

The question presented is whether, in determining if a prior offense is a "controlled substance offense" for purposes of the career offender guideline, U.S.S.G. § 4B1.2(b), sentencing courts should consult the law in effect at the time of the federal sentencing, or at the time the prior offense was committed.[1]

---

[1] This question is similar to that presented in *Devin Baker v. United States*, No. 22-7359. Mr. Baker filed his reply to the government's response to the petition for writ of *certiorari* on July 31, 2023.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Nerius*, No. 22-10578 (11th Cir. May 25, 2023)
- *United States v. Nerius*, No. 21-cr- 80053 (S.D. Fla. Feb. 14, 2022)

There are no other proceedings related to this case under Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER PROVISIONS INVOLVED:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

No:

CHRISTOPHER NERIUS,
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

Christopher Nerius respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 22-1578 in that court on May 25, 2023.

OPINION BELOW

The decision of United States Court of Appeals for the Eleventh Circuit is unpublished but available electronically at 2023 WL 3644969, and reproduced in Appendix A-1. The judgment of the United States District Court for the Southern District of Florida is unreported and reproduced in Appendix A-2.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The judgment of the court of appeals was entered on May 25, 2023. This petition is timely filed pursuant to S. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

United States Sentencing Guidelines § 4B1.1

(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.

United States Sentencing Guidelines § 4B1.2(b)

(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

In *Justin Rashaad Brown v. United States*, No. 22-6389, and *Eugene Jackson v. United States*, No. 22-6640, the Court recently granted *certiorari* to decide whether, when a federal sentencing court is determining if a prior offense is a "serious drug offense" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(A), it should consult the law in effect at the time of the federal sentencing, the time of the federal offense, or the time the prior offense was committed. *Brown v. United States*, 143 S. Ct. 2458 (2023); *Jackson v. United States*, 143 S. Ct. 2437 (2023). The ACCA enhances sentences of defendants convicted of illegal firearm possession who have three prior "violent felonies" or "serious drug offenses." 18 U.S.C. § 924(e)(1).

This petition asks the Court to resolve a circuit split on a similar timing question regarding the definition of "controlled substance offense" in the analogous career offender provision of the United States Sentencing Guidelines. The career offender provision dramatically increases the advisory guideline range where the defendant has at least two prior felony convictions for either a "crime of violence" or a "controlled substance offense." U.S.S.G. § 4B1.1. The First, Second, and Ninth Circuits hold that when a federal sentencing court is determining whether a prior offense is a "controlled substance offense" for purposes of the career offender guideline, U.S.S.G. § 4B1.2(b), it should consult the law in effect at the time of the

federal sentencing. But the Third, Sixth, and Eighth Circuits hold that sentencing courts should consult the law at the time the prior offense was committed.

In light of the Court's grant of *certiorari* in *Brown* and *Jackson*, the similarity between the question to be resolved in those cases and that presented herein, and the circuit split on the question presented, Petitioner respectfully requests that the Court hold the instant petition pending its decision in *Brown* and *Jackson*.

STATEMENT OF THE CASE

A. Legal background.

1. The career offender enhancement in the United States Sentencing Guidelines increases the guideline range where, *inter alia*, "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 "controlled substance offense" is "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).

To determine if a prior state offense qualifies as a "controlled substance offense," federal sentencing courts apply a "categorical approach."[2] Under that

[2] *See, e.g., United States v. Lewis*, 58 F.4th 764, 767-68 (3d Cir. 2023); *United*

familiar approach, "[a] court must look only to the state offense's elements, not the facts of the case or labels pinned to the state conviction." *Id*. at 784. Given this focus on the elements, courts "must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by" the federal definition. *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (brackets and quotation omitted).

2. Here, as is true in *Jackson*, the timing question presented arises in the context of Florida's drug statute, Fla. Stat. § 893.13. In Florida, it is a second-degree felony to sell or possess with intent to sell a Schedule II "controlled substance," and a first-degree felony if the sale or possession with intent to sell takes place within 1000 feet of certain protected areas, such as schools or parks. *See* Fla. Stat. § 893.13(1)(a)1 & (c)1. For many years, including at the time of Mr. Nerius's drug offenses, "controlled substances" in Florida included "cocaine or ecgonine, including any of their stereoisomers, and any salt, compound, *derivative*, or preparation of cocaine or ecgonine." Fla. Stat. § 893.03(2)(a)4 (emphasis added). One cocaine-related derivative is ioflupane I^{123}.

States v. Dupree, 57 F.4th 1269, 1289 n.6 (11th Cir. 2023); *United States v. Campbell*, 22 F. 4th 438, 442 (4th Cir. 2022); *United States v. Crocco*, 15 F.4th 20, 21-22 (1st Cir. 2021); *United States v. Furaha*, 992 F.3d 871, 875 (9th Cir. 2021); *United States v. Smith*, 960 F.3d 883, 887 (6th Cir. 2020); *United States v. Williams*, 926 F.3d 966, 969 (8th Cir. 2019); *United States v. Smith*, 921 F.3d 708, 712 (7th Cir. 2019); *United States v. Townsend*, 897 F.3d 66, 72-73 (2d Cir. 2018); *United States v. McKibbon*, 878 F.3d 967, 976 (10th Cir. 2017); *United States v. Maldonado*, 864 F.3d 893, 897 (8th Cir. 2017); *United States v. Hinkle*, 832 F.3d 569, 572 (5th Cir. 2016).

3. In 2015, the federal government removed ioflupane I^{123} from federal drug schedules. Exercising statutory authority under the Controlled Substances Act, *see* 21 U.S.C. §§ 811–12, the Attorney General (via the Administrator of the Drug Enforcement Administration (DEA)) legalized that substance because it could be used to help diagnose Parkinson's disease. Schedules of Controlled Substances: Removal of [I^{123}] Ioflupane from Schedule II of the Controlled Substances Act, 80 Fed. Reg. 54,715 (Sept. 11, 2015); *see* 21 C.F.R. § 1308.12(b)(4)(ii) (listing cocaine and its derivatives under Schedule II but "except[ing]" ioflupane I^{123}). In 2017, Florida followed the federal government's lead, expressly removing ioflupane I^{123} from the state's drug schedules. *See* Fla. Sess. Law Serv. Ch. 2017-110 (C.S.H.B. 505); Fla. Stat. § 893.03(2)(a)4 (listing cocaine and its derivatives, "except that these substances shall not include ioflupane I^{123}"). This express removal made clear that, before that time, Fla. Stat. § 893.13 had indeed criminalized selling and possessing with intent to sell ioflupane I^{123}.

B. Proceedings below.

1. Two years after Florida eliminated criminal penalties for the sale or possession with intent to sell ioflupane I^{123}, Petitioner Christopher Nerius sold confidential informants crack cocaine on two separate transactions. The total combined weight of crack sold in the two transactions was only slightly more than one gram.[3] A federal grand jury charged Mr. Nerius with two counts of possession

[3] The DEA estimates that a crack user is likely to consume anywhere from 3.3

with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). Mr. Nerius agreed to plead guilty to one count in exchange for dismissal of the other.

2. As part of his plea agreement, Mr. Nerius admitted that he had prior convictions for two Florida felony drug offenses in violation of Fla. Stat. § 893.13(1). Both arose before Florida descheduled ioflupane I[123]. One conviction for possession of cocaine with intent to sell within 1,000 feet of a park occurred in 2011; the other for sale of cocaine took place in 2005. Although Mr. Nerius admitted to the convictions, he objected to the district court's use of them to enhance his sentence under the career offender provision in U.S.S.G. § 4B1.1. Without the career offender enhancement, Mr. Nerius's advisory Sentencing Guidelines range was 21 to 27 months. As a career offender, however, Mr. Nerius's advisory range jumped more than ten years – to 151 to 188 months. At the October 2021 sentencing, the district court overruled Mr. Nerius's objections and sentenced him as a career offender, but departed downward and imposed an 84-month term of imprisonment because Mr. Nerius sold only small, street-level quantities of drugs.

3. Before the Eleventh Circuit, Mr. Nerius argued, *inter alia*, that the district court erred when it consulted the law at the time of his state conviction to determine whether his prior convictions qualified as a "controlled substance offense." *See* Appellant's Brief, *United States v. Christopher Nerius*, 2022 WL 4550232, *12-13 (filed 11th Cir. Sept. 22, 2022). His brief noted that the circuit

---

to 16.5 grams of crack a week. U.S. Dep't of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties*, 4 (March 17, 2002).

courts were divided on the timing issue. *See id*. (comparing *United States v. Clark*, 46 F.4th 404, 412 (6th Cir. 2022) (adopting time-of-state-conviction rule); with*, inter alia, United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021) (adopting time-of-federal-sentencing rule); *United States v. Abdulaziz*, 998 F.3d 519, 531 (1st Cir. 2021) (same)). Mr. Nerius also cited to the Eleventh Circuit's later-superseded decision in *United States v. Eugene Jackson*, 36 F.4th 1294, *superseded by* 55 F.4th 846 (11th Cir. 2022), *cert. granted*, 143 S. Ct. 2357 (May 15, 2023), wherein the panel agreed that the law at the time of the federal offense applied to determine whether a prior conviction qualified as a "serious drug offense" for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). *See id*. at *13.

4. In an unpublished opinion, the Eleventh Circuit rejected Mr. Nerius's claim, concluding that "[b]ecause other circuits are split on the definition of 'controlled substance' under § 4B1.2, and neither this Court nor the Supreme Court has directly spoken on the matter, Nerius cannot show plain error." App. A-1 at 5.

C. Other circuits decide the timing issue, creating a 3-to-3 split.

During the litigation of Mr. Nerius's appeal, other circuits weighed in on the timing issue. The Second Circuit joined the First and the Ninth, holding that a federal court must use the law at the time of the federal sentencing to determine whether a prior offense is a "controlled substance offense" for purposes of § 4B1.1. *See United States v. Gibson*, 55 F.4th 153, 160-61 (2d Cir. 2022). The Third and Eighth Circuits, however, joined the Sixth Circuit, and adopted a

time-of-prior-conviction rule. *See United States v. Lewis*, 58 F.4th 764, 771 (3d Cir. 2023); *United States v. Bailey*, 37 F.4th 467, 469-70 (8th Cir. 2022), *cert. denied sub nom Altman v. United States*, 143 S. Ct. 2437 (May 1, 2023) (No. 22-5877).

REASONS FOR GRANTING THE WRIT

In little over two years, six circuits have agreed to disagree on the law a sentencing court should apply when determining whether a prior conviction qualifies as a "controlled substance offense" for purposes of the career offender guideline, U.S.S.G. § 4B1.1. Three circuits decided that *McNeill v. United States*, 563 U.S. 816 (2011), requires application of the law at the time of the prior offense; three others found *McNeill* inapposite and concluded the applicable law is that at the time of the federal sentencing. The question presented asks this Court to resolve the timing question on which the circuits are split.

In *Justin Rashaad Brown v. United States*, No. 22-6389, and *Eugene Jackson v. United States*, No. 22-6640, this Court recently granted *certiorari* to decide a timing question remarkably analogous to that presented herein. In those cases, the Court will decide whether, when determining if a prior offense is a "serious drug offense" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), a federal sentencing court should consult the law in effect at the time of the federal sentencing (*Brown*), the federal offense (*Jackson*), or the prior offense. As is true of the question presented in the instant petition, the proper interpretation of *McNeill* lies at the heart of the questions presented in *Brown* and *Jackson*.

This flurry of federal litigation over so short a period of time shows the recurring nature of the question presented, and the grants of certiorari in *Brown* and *Jackson* demonstrate its importance. Moreover, this case squarely presents the

question, and its outcome would dramatically lower the guideline range for Mr. Nerius's offenses.

However, given the impact the Court's resolution of *Brown* and *Jackson* may have on the reach of *McNeill*, and therefore the question presented herein, Mr. Nerius respectfully requests that the Court hold his petition pending its decisions in *Brown* and *Jackson*.

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

A. Three circuits – the First, Second, and Ninth – have adopted a time-of-sentencing rule, and therefore look to the law at the time of sentencing to determine whether a prior conviction was a "controlled substance offense" for purposes of the career offender enhancement, U.S.S.G. § 4B1.1.

1. The Ninth Circuit first decided the issue in *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021). There, the district court used a prior marijuana offense to enhance Bautista's sentence under the career offender provision in the Sentencing Guidelines, U.S.S.G. § 4B1.1. *Id*. at 701. The Ninth Circuit held the district court plainly erred when, in determining whether the marijuana offense was a "controlled substance offense" for purposes of U.S.S.G. § 4B1.2(b), it relied on the drug schedules from the time of the prior conviction rather than those at the time of the current sentencing. *Id*. at 702-03.

In reaching this conclusion, the Ninth Circuit rejected the government's argument that *McNeill v. United States*, 563 U.S. 816 (2011), required reference to

the law at the time of the prior state conviction. *Id*. at 703-04. The Ninth Circuit reasoned that unlike the backward-looking statutory language at issue in *McNeill*, the "present-tense text" of 18 U.S.C. § 3553 and U.S.S.G. § 1B1.11 dictated that the sentencing court should use a time-of-sentencing rule. *Id*. at 703.

2. The First Circuit followed the same approach in *United States v. Abdulaziz*, 998 F.3d 519 (1st Cir. 2021). It held the proper point of reference for defining a "controlled substance offense" under the Guidelines is the drug schedules at time of sentencing, and therefore Abdulaziz's prior conviction for possession of marijuana did not qualify because Massachusetts delisted hemp in the time between that conviction and the federal sentencing. *Id*. at 524. Like the Ninth Circuit in *Bautista*, the First Circuit determined *McNeill* did not resolve the issue. *Id*. at 525-26. While *McNeill* "plainly required a backwards-looking inquiry into the elements of and penalties attached to the prior offense at the time of its commission," that inquiry "simply does not bear on the answer to the interpretive question that we confront here." *Id*. at 527.

3. Most recently, the Second Circuit joined the First and Ninth Circuits. *See United States v. Gibson*, 55 F.4th 153 (2d Cir. 2022). It, too, rejected the government's contentions that *McNeill* required the sentencing court to look to the law at the time of the state offense, concluding that *McNeill* did not "involve the same question." *Id*. at 160-62. Adopting a time-of-prior-conviction rule, the court

noted, would effectively "punish Gibson for the crime he committed in 2002," even though it "is no longer a . . . crime." *Id.* at 165.

B. On the other side of the split are the Third, Sixth, and Eighth Circuits. These circuits look to the law at the time of the prior conviction to determine whether that conviction was a "controlled substance offense" under § 4B1.1. *See United States v. Lewis*, 58 F.4th 764, 771 (3d Cir. 2023); *United States v. Clark*, 46 F.4th 404, 412 (6th Cir. 2022); *United States v. Bailey*, 37 F.4th 467, 469-70 (8th Cir. 2022), *cert. denied sub nom Altman v. United States*, 143 S. Ct. 2437 (May 1, 2023) (No. 22-5877).

Unlike the analysis undertaken by the First, Second, and Ninth Circuits, all three of these circuits relied heavily on *McNeill* to determine that federal courts must consult the law in place at the time of the defendant's prior state drug convictions. *See Lewis*, 58 F.4th at 771; *Clark*, 46 F.4th at 412-14; *Bailey*, 37 F.4th at 469-70 (adopting reasoning from *United States v. Jackson*, 2022 WL 303231, *2 (8th Cir.), *cert. denied*, 143 S. Ct. 172 (2022), which holds that *McNeill* requires a time-of-prior-conviction rule). In adopting their time-of-prior-conviction rules, the Third and Sixth Circuits expressly acknowledged the contrary decisions in *Bautista* and *Abdulaziz*, but declined to join them. *See Lewis*, 58 F.4th at 771; *Clark*, 46 F.4th at 412-14.

II. The Court should hold this petition pending *Brown* and *Jackson*.

The flurry of divergent circuit court decisions over so short a period of time regarding *McNeill*'s implications for the definition of "controlled substance offense" in the career offender guideline shows the recurring nature of the question presented as well as its importance.

However, the implications of *McNeill* for the analogous definition of "serious drug offense" in the ACCA is directly before the Court in *Brown* and *Jackson*. *See Brown*, Ptr.'s Br. 10, 12, 14, 26, 27 (filed July 12, 2023); *id*., Gov't Br. 7-8 (filed Mar. 24, 2023); *Jackson*, Ptr.'s Br. 3, 9-14, 16-26, 30, 34-35, 39-40 (filed July 12, 2023); *id*., Gov't Br. 5-7, 10-11 (filed Mar. 24, 2023). Indeed, *McNeill* is the primary reason for the circuit split that the Court will resolved in *Brown* and *Jackson*. In *Jackson*, the Eleventh Circuit held that this Court's "reasoning in *McNeill* requires us to conclude that ACCA's 'serious drug offense' definition incorporates the version of the controlled-substances list in effect when the defendant was convicted of his prior drug offense." *United States v. Jackson*, 55 F.4th 846, 849 (11th Cir. 2022) (superseding 36 F.4th 1294), *cert. granted*, 143 S. Ct. 2357 (May 15, 2023). The Eleventh Circuit determined *McNeill* mandated its conclusion even though four other circuits held that courts instead look to the law at the time of the federal offense. *Id*. at 862 (Rosenbaum, J., concurring).

Because this Court will consider the implications of *McNeill* on the timing question presented by the definition of "serious drug offense" in *Brown* and *Jackson*,

and the split on the timing question presented in the instant petition also depends primarily on the correct reading of *McNeill*, Mr. Nerius respectfully requests that the Court hold his petition pending the decision in *Brown* and *Jackson*.

III. This case squarely raises the question presented.

This case clearly implicates the 3-to-3 split on the question presented. Had Mr. Nerius been sentenced in the First, Second, or Ninth Circuits, his prior state drug offenses would not have been determined to be "controlled substance offenses" and his advisory guideline range would have been 21 to 27 months. Neither the federal nor state drug schedules included ioflupane either at the time he committed his federal offense in 2019 or at the time he was sentenced in 2021. Nonetheless, after determining that his prior state convictions were "controlled substance offenses," the district court sentenced him as a career offender using an advisory range of 151 to 188 months, and the Eleventh Circuit affirmed. Although the district court departed downward at sentencing, Mr. Nerius's ultimate sentence of 84 months was still approximately five years longer than his advisory guideline range without the career offender enhancement.

CONCLUSION

For all of the foregoing reasons, the Court should hold this petition pending the decisions in *Brown v. United States*, No. 22-6389, and *Jackson v. United States*, No. 22-6640. Thereafter, if appropriate in light of the decisions in those cases, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *Janice L. Bergmann*
Janice L. Bergmann
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
August 14, 2023