No.

IN THE

SUPREME COURT OF THE UNITED STATES

EMANUEL BEACH

Petitioner,

v.

UNITED STATES,

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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QUESTION PRESENTED

I. Whether the "serious drug offense" definition in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii), and the Career Offender enhancement section of the United States Sentencing Guidelines, U.S.S.G. § 4B1.1(a), which have similar provisions and similar definitions for the term Career Offender, incorporate either the federal drug schedules that were in effect at the time of the federal offense for which a defendant is currently being sentenced, as the Eleventh Circuit originally held in *United States v. Jackson*, 36 F.4th 1294 (11th Cir. 2022) (*Jackson I*), and currently four Circuits, the Third, Fourth, Eighth, and Tenth Circuits have now held, and not the federal drug schedules that were in effect at the time of the prior state drug offense as the Eleventh Circuit subsequently held in *United States v. Jackson,* 55 F.4th 846 (11th Cir. 2022) (En Banc) *(Jackson II),* and whether that subsequent holding by the Eleventh Circuit in *Jackson II* is incorrect, requiring this Court to resolve the current conflict among the Circuit Courts of Appeals and ambiguity in the law regarding the federal statutory definition of the term "serious drug offense" for purposes of sentencing enhancements under ACCA and the Career Offender Sentencing Guidelines?

II. Whether the "Rule of Lenity" applies and should guide this court's consideration of the important issues raised by Petitioner here?

III. Whether the "Plain Error Doctrine" applies and this Court should consider the important issues raised by Petitioner here?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the original proceeding in the United States District Court for the Northern District of Florida and the Eleventh Circuit United States Court of Appeals are the Petitioner Emanuel Beach defendant-appellant, and the Respondent the United States, plaintiff-appellee. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Emanuel Beach, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit issued on May 8, 2023.

OPINIONS BELOW

On May 8, 2023, the Eleventh Circuit Court of Appeals affirmed Petitioner 's conviction and sentence in the unpublished opinion of *United States v. Emanuel Beach,* 2023 WL 3302877 (11th Cir. 2023) (Pet. App. a).

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit affirming the petitioner's conviction and sentence, of which review is now sought, was entered on May 8, 2023. Pursuant to Supreme Court Rule 13.1, this petition is timely filed within the prescribed ninety day time period from the date of that judgment. This Court's jurisdiction is invoked under Title 28, United States Code, §1254 providing for review by this Court of decisions of the United States courts of appeals, and Supreme Court Rule 10(a) addressing this Court's jurisdiction to review conflicting decisions among the United States Courts of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., amend. V

> No person shall ... be deprived of life, liberty, or property, without due process of law...

U.S. Const., amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a ... to be informed or the nature and cause of the accusation...

Supreme Court Rule 10. Considerations Governing Review on writ of certiorari

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . .

Supreme Court Rule 13. Review on Certiorari; Time for petitioning

> 1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. . .

Title 28, U.S.C. § 1254 Court of appeals; certiorari; certified questions

> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
> . . . .

Title 18 U.S.C. § 924(e)(1)(A) -Armed Career Criminal Act (ACCA):

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(I) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an 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;

Title 21, United States Code, § 841(a)(1) and (b)(1)(B)(viii)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(B) In the case of a violation of subsection (a) of this section involving--

. . .

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

. . .

Title 21, United States Code, § 851

Proceedings to establish prior convictions

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

. . .

U.S.S.G. § 1.1B1.1(a) - Application Instructions

(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (see 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual . . .

U.S.S.G. § 4B1.1(a) - Career Offender

(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.

. . .

STATEMENT OF THE CASE

I. History of the Proceedings in the District Court Relevant to Petition.

A. The Charges

On June 15, 2021, Petitioner was charged by a Federal Grand Jury sitting in the Northern District of Florida, Tallahassee Division, with one count of possession with intent to distribute 5 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(B)(viii). Indictment (R-1) (Pet. App. b)[*] The charges in the single count indictment were the result of Petitioner 's arrest on December 22, 2020, when police found 27 grams of methamphetamine in Petitioner's car after a drug dog purportedly alerted to drugs after Petitioner 's vehicle was stopped by police following him while investigating him for selling drugs for supposedly not making a full stop at a stop sign. Plea Agreement Statement of Facts (R - 50 at pp. 1-2). During its investigation, two government delators claimed that Petitioner had been regularly supplying them with drugs, one, AR, claiming he bought drugs from Petitioner from late 2018 to 2019, and the second, JC, claiming he bought drugs from Petitioner from mid- 2019 to early 2020, almost a full year before Petitioner's arrest in this case on December 22, 2020. (*Id.*); Withdrawal/Sentencing Hearing [SEALED TESTIMONY] (R-86 at pp. 4-6 [AR], pp. 13-14 [JC]). On October 13, 2021, the government filed an

[*]References to the record will be made to both the Appendix to this Petition (Pet. App. #) which contains only documents relevant to this Petition, and to the original record by reference to the document number on the docket, followed by citation to the specific page in the document when appropriate in parentheses as follows: (R.# at #).

"Information and Notice of Intent" to establish that Petitioner had two prior convictions for felony drug offenses within the last 15 years and that the government would seek enhanced penalties pursuant to 21 U.S.C. § 841 and § 851.Information and Notice of Intent (R-24) (Pet. App. c). Specifically, the government alleged that Petitioner had been convicted and sentenced on August 8, 2006, of the sale of a controlled substance, in Bay County case 2004CF0053, and Possession with Intent to Distribute a controlled substance in Bay County case 2005CF1239, thus subjecting him to enhanced penalties of a minimum mandatory sentence of ten (10) year imprisonment to a maximum of life imprisonment, a fine of up to $8,000,000, and a term of at least eight (8) years on supervised release. Information and Notice of Intent (R-24 at pp. 2-3) (Pet. App. c at 2-3).

B. The Guilty Plea

On February 18, 2021, Petitioner entered into a written plea agreement agreeing to plead guilty to the one count in the indictment. Plea Agreement and Statement of Facts (R-49, 50). On February 18, 2022, Petitioner entered his plea of guilty to the sole count of possessing illegal drugs as charged in the indictment. Minutes Change of Plea Hearing (R-48); Transcript Change of Plea Hearing (R-84).

C. Sentencing Hearing

The District Court ultimately imposed a "guideline" sentence of 360 months (30 years) imprisonment followed by 8 years of supervised release, and a $100.00 special monetary assessment. Judgment (R-59) (Pet. App. d); Transcript

Withdrawal/Sentencing Hearing (R-87 at pp. 49, 49-54); Minutes of Withdrawal/Sentencing Hearing (R-58).

II. Appellate Proceedings - The Eleventh Circuit's Decision.

After his sentencing Petitioner filed a seasonable Notice of appeal. *Pro Se* Notice of Appeal Filed on May 16, 2022 (R-61), and a Notice of Appeal filed by the Petitioner's attorney of record on May 19, 2022, (R)-65), appealing the judgment and sentence imposed on May 2, 2022 (R-59) and entered on the docket on May 9, 2022. (R-59, 60).

On May 8, 2023, the Eleventh Circuit Court of Appeals affirmed Petitioner 's conviction and sentence in the unpublished opinion of *United States v. Emanuel Beach,* 2023 WL 3302877 (11th Cir. 2023) (Pet. App. a), rejecting without addressing, Petitioner's argument that the trial court had committed prejudicial plain error when the trial court enhanced the Petitioner's sentence based on two prior Florida state convictions under Fla. Stat. § 893.13 after the Eleventh Circuit's original decision in *United States v. Jackson,* 36 F.4th 1294 (11th Cir 2022) (*Jackson I*) (Pet App. e), *vacated,* No. 21-13963, 2022 WL 4959314, *superseded*, *United States v. Jackson*, 55 F.4th 846 (11th Cir. 2022) (*En Banc)* (*Jackson II*) (Pet. App. f), *Petition for Writ of Certiorari Granted,* No. 22-6640, 2023 WL 3440568 (May 15, 2023) (Pet. App. g). *See, Beach,* 2023 WL 3302877 at *3-*4 (Pet. App. a).

Importantly, as already noted, the Eleventh Circuit did not even address the *Jackson I* and *Jackson II* cases relied on by Petitioner in its opinion, instead affirming based on prior circuit precedent, to wit, *United States v. Smith*, 775 F.3d 1262 (11th

Cir. 2014) and purported "invited error" caused when Petitioner's trial counsel conceded that he qualified as a career offender. *Beach,* 2023 WL 3302877 at *3-*4 (Pet. App. a). However, *Smith* was decided well before either *Jackson I* and *Jackson II,* it did not address the categorical analysis relied on in *Jackson I,* and therefore *Smith* was, and is, therefore inapposite, a fact the Eleventh Circuit has itself previously recognized. *See and compare, Jackson I,* 36 F.4th at 1304-06 (Pet. App. 5). (Eleventh Circuit rejecting government's argument that under the prior precedent rule, the Court was required to follow the holding in *Smith*, the Eleventh Circuit concluding that although *Smith* had previously held that Fla. Stat § 893.13 was a serious drug offense for purposes of ACCA, *Smith* did not address the categorical analysis of Fla. Stat. § 893.13). As for applicability of the invited error doctrine, the Eleventh Circuit ignored Petitioner's "plain error" argument which it is respectfully submitted clearly applied. *See* Petitioner Emanuel Beach's Initial Brief at pp. 41-42, 49 ("While Mr. Beach's trial counsel conceded that Mr. Beach had two prior Florida state drug convictions and was therefore technically subject to the career offender enhancement, Withdrawal/Sentencing Hearing (R-87 at p. 8), that concession should not bar review of this issue by this Court here. The concession was made before this Court's recent decision in *Jackson [I]*, and it is respectfully submitted that the holding in *Jackson [I]* now controls the resolution of this issue, an issue that appears to be one of first impression, and as such can be raised in this appeal. . . In any event, this Court can and should still consider this issue for plain error. . .") (case citations omitted); *see also,*

Petitioner Emanuel Beach's Reply Brief at pp. 13-17 ("As for the government's argument that plain error review is not available because the error was not clear and obvious, . . . , little need be said. Plain error does not mean simple error. Mr. Beach was sentenced on May 2, 2022. ... Prior to Mr. Beach's sentencing, numerous courts had applied the plain error standard to the same issue being argued here, rejecting the same argument made by the government here. . .") (citing cases).

At present, the Petitioner is in prison serving his sentence.

REASONS FOR GRANTING THE PETITION

I. PETITIONER'S SENTENCING ENHANCEMENT AS A "SERIOUS DRUG OFFENDER" WAS ILLEGAL AND PLAINLY ERRONEOUS; THE ELEVENTH CIRCUIT'S REASONING IN ITS ORIGINAL DECISION AND OPINION IN *UNITED STATES V. JACKSON*, 36 F.4TH 1294 (11TH CIR. 2022) (*JACKSON I*) WAS CORRECT, AND THE ELEVENTH CIRCUITS SUBSEQUENT DECISION VACATING *JACKSON I*, *UNITED STATES V. JACKSON*, 55 F.4TH 846 (11th Cir. 2022) (*En Banc*) (*JACKSON II*), WAS WRONGLY DECIDED, CONFLICTS WITH THE HOLDINGS OF FOUR OTHER COURTS OF APPEALS, AND SHOULD BE REVERSED BY THIS COURT IN ORDER TO RESOLVE THIS CLEAR CONFLICT AMONG THE CIRCUITS, AND PETITIONER'S CASE SHOULD BE REVERSED AND REMANDED TO THE ELEVENTH CIRCUIT WITH INSTRUCTIONS TO REVERSE, VACATE PETITIONER'S SENTENCE AND REMAND PETITIONER'S CASE TO THE DISTRICT COURT FOR RESENTENCING *SANS* THE CAREER OFFENDER ENHANCEMENT.

Petitioner's sentencing range in this case was based on him being designated a "career offender" pursuant to U.S.S.G. § 4B1.1(a) and (b). According to Petitioner's Final Presentence Report, Petitioner was a career offender based on two previous Florida convictions from 2004 and 2005 for possessing drugs with intent to distribute in violation of Fla. Stat. § 893.13. Final Presentence Report (R-56 at p. 8, paragraph 37). In the Eleventh Circuit's original decision in *United States v. Jackson,* 36 F.4th 1294 (11TH Cir. 2022) (*I*) (Pet. App. e), the Eleventh Circuit reviewed a defendant's sentencing enhancement under the Armed Career Criminal Act (ACCA) which increases the sentence if the putative defendant has at least three prior convictions for, *inter alia,* a "serious drug offense." The sentencing enhancement provisions of ACCA and the Career Offender enhancements cabined in U.S.S.G. § 4B1.1 are very similar,

if not identical, and it is Petitioner's position that the holding and reasoning in *Jackson I*, and now the holding and reasoning of four other Circuit Courts of Appeals should apply to Petitioner's sentence.

In *Jackson I* the defendant conceded that two of his prior convictions qualified as ACCA predicate offenses. However, he argued that his other drug convictions, a 1998 and a 2004 Florida cocaine-related conviction under Fla. Stat. § 893.13 did not qualify as the required third ACCA predicate offense because the version of Fla. Stat. § 893.13 in force at the time those convictions were entered cocaine related convictions also prohibited the sale of, or possession with intent to distribute ioflupane, which was not a "controlled substance" for purposes of the "serious drug offense" definition in § 924(e)(2)(A)(ii) at the time the conviction of the defendant in *Jackson I* pending federal conviction for which the government was seeking to enhance the sentence under ACCA. As such, the defendant in *Jackson I* argued that, categorically, a cocaine-related offense under Fla. Stat. § 893.13 at the times of his cocaine-related convictions could not qualify as a "serious drug offense" under ACCA. The Eleventh Circuit originally agreed, holding that the pre-2017 Fla. Stat. § 893.13 did not categorically qualify as a "serious drug offense" under federal law after conducting a detailed analysis of the requirements of ACCA and the relevant predicate Florida cocaine offense. *Jackson I,* 36 F.4th at 1297 (Pet. App. e). The Petitioner argued on appeal that the Eleventh Circuits categorical analysis in *Jackson I* of the applicability of convictions for violations of versions of Fla. Stat. § 893.13 prior to 2017 for purposes of ACCA enhancements applied with equal force to Petitioners sentencing, and prohibited the

use of Petitioner's 2004 and 2005 Fla. Stat. § 893.13 cocaine related drug convictions to enhance his sentence as a career offender under the Sentencing Guidelines. The Petitioner also argued that although *Jackson I* addressed enhancements under ACCA and the Petitioner's sentence was enhanced under the career offender provisions of both 21 U.S.C. § 851 and U.S.S.G. § 4B1.1(a), both enhancement provisions rely on convictions for the same type of previous convictions for serious drug offenses, and therefore *Jackson I* controlled, Petitioner's career offender designation did not pass constitutional muster, and his sentence enhancement and designation as a career offender was illegal and should be set aside.

The Eleventh Circuit subsequently vacated *Jackson I* and contrary to the holdings of at least four other Circuit Court of Appeals, held that the Controlled Substance Act Schedules that were incorporated into the definition of "serious drug offense" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(A)(I), as of the time defendant was convicted of his prior state drug offense, rather than the schedules at the time he committed his crime of being a felon in possession of firearm, governed, in determining whether defendant's prior Florida convictions for sale of cocaine and possession with intent to sell cocaine qualified as predicate "serious drug offenses" that would support imposition of enhanced sentence under the ACCA. *Jackson II,* 55 F.4th at 854-59 (Pet. App. f).

The Eleventh Circuit's decision in *Jackson II* was wrongly decided. As noted in the concurring opinion to *Jackson II*:

> The statutory language we interpret here is yet another example of how ACCA produces "statutory questions" that "end up clogging the federal court dockets," Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 206 (2019). Even "judges struggle" to resolve those questions. *Id.* Indeed, today's decision tallies the score at one circuit that concludes that we look to the federal controlled-substances schedules in effect at the time of the prior state conviction and four that reach the opposite conclusion and instead look to the federal controlled-substances schedules in effect at the time of the federal firearm offense. *See United States v. Brown*, 47 F.4th 147, 154-55 (3d Cir. 2022); *United States v. Hope*, 28 F.4th 487, 504-05 (4th Cir. 2022); *United States v. Pérez*, 46 F.4th 691, 699-700 (8th Cir. 2022); *United States v. Williams*, 48 F.4th 1125, 1142-43 (10th Cir. 2022). And it's even more confusing than that, as we previously agreed with those four circuits. *United States v. Jackson*, 36 F.4th 1294, 1299-1301 (11th Cir. 2022) ("Jackson I"), vacated, 2022 WL 4959314 [55 F.4th 846](11th Cir. 2022) (*Jackson II).*
>
> Due process requires that criminal laws notify "ordinary people" not only about the lawfulness of their conduct, but also about the penalties for engaging in conduct that is unlawful. *Johnson v. United States*, 576 U.S. 591, 595-96, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). An ordinary citizen seeking notice about whether her prior offenses qualify as ACCA predicates must, in line with today's decision, research the historical versions of controlled-substances list. And that's a heavy lift for the ordinary citizen.

Jackson II, 55 F.4th at 862 (Rosenbaum, J. concurring) (Pet. App. f). Importantly, the appellant in *Jackson II* filed a Petition for a Writ of Certiorari with this Court, and that petition was granted. *See Jackson v. United States,* No. 22-6640, 2023 WL 3440568 (U.S. May 15, 2023) (Pet. App. g). That decision by this Court is still pending.

It is respectfully submitted that the Eleventh Circuit's categorical analysis in *Jackson I* of the applicability of convictions for violations of versions of Fla. Stat. § 893.13 prior to 2017 for purposes of ACCA enhancements applies with equal force to the use of Petitioner's 2004 and 2005 pre-2017 Fla. Stat. § 893.13 drug convictions

here, which were the career offender predicates used to enhance Petitioner's sentence as a career offender under both 21 U.S.C. § 851 and U.S.S.G. § 4B1.1(a). *See generally and compare, United States v. Ward*, 972 F.3d 364, 368-74 (4th Cir. 2020) (Fourth Circuit applying same categorical approach applied in *Jackson I* to uphold federal sentencing enhancement based on prior state drug convictions pursuant to the Career Offender provision of the Sentencing Guidelines, U.S.S.G. § 4B1.1(a) and § 4B1.2(b)); *United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021) (Ninth Circuit applying analysis in context of Sentencing Guidelines determining that Federal firearm defendant's prior Arizona state court conviction of attempted transportation of marijuana, under state statute that criminalized the attempted transportation of hemp as well as marijuana, was not a categorical match with generic federal offense at time of his federal sentencing, and thus did not warrant a six-level increase in his base offense level pursuant to firearms section of Sentencing Guidelines, U.S.S.G. § 2K2.1(a)(4)(A); *United States v. Townsend*, 897 F.3d 66, 70-71 (2d Cir. 2018) (Second Circuit applying same categorical analysis in context of Sentencing Guidelines enhancement holding that State conviction will qualify as predicate offense under U.S.S.G. § 2K2.1(a)(2) allowing for increase in base offense level of federal defendant convicted of firearms offense who has prior state conviction for "controlled substance offense", if state conviction aligns with, or is categorical match with, federal law's definition of controlled substance, but if state statute criminalizes some conduct that is not criminalized under analogous federal law, then state conviction cannot support increase in base offense level); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793 (5th

Cir. 2015) (Fifth Circuit applying categorical analysis in context of Sentencing Guidelines finding that Defendant's conviction under California law for possession of a controlled substance was not categorically a drug trafficking offense under U.S.S.G. § 2L1.2(b)(1)(A) requiring sentencing enhancement to base offense level for federal immigration defendant charged with reentry after deportation, if defendant was previously deported after conviction for felony drug trafficking offense; California law criminalized possession and purchase of certain substances that were not covered by federal Controlled Substances Act).

In Petitioner's case here, like the 1998 and 2004 versions of the pre-2017 Fla. Stat. § 893.13 in *Jackson II*, ioflupane continued to be included as an alternative means (element) for conviction under Florida state law. *Jackson I*, 36 F.4th at 1302) (Pet. App. e). However, again, like in *Jackson I*, ioflupane was not included as in the list of drugs prohibited under the federal drug statute Petitioner was convicted and sentenced under Schedule II. 21 C.F.R. § 1308.12(d)(2). *See, United States v. Macedo*, 406 F.3d 778 (7th Cir.2005); *Jackson I*, 36 F.4th at 1302) (The court noting that ioflupane is not currently included as a schedule II controlled substance under federal law). Therefore Petitioner's sentence should not have been enhanced under the Career Offender provisions of the Sentencing Guidelines, U.S.S.G. § 4B1.1(a). And although both *Jackson I* and *Jackson II* addressed enhancements under ACCA and Petitioner's sentence was enhanced under the career offender provisions of both 21 U.S.C. § 851 and U.S.S.G. § 4B1.1(a), both enhancement provisions rely on convictions for the same type of previous convictions, "serious drug offenses", and therefore the *Jackson I*

analysis should control. *See generally and compare*, *Sessions v. Dimaya*, 584 U.S. , 138 S.Ct. 1204, 1215-16, 200 L.Ed.2d 549 (2018) (Supreme Court holding that the residual clause of the federal criminal Code's §16 (b) definition of "crime of violence", as incorporated into the Immigration and Nationality Act's (INA) definition of "aggravated felony", 8 U.S.C.A. §1101(a)(43)(F), and previously declared unconstitutional for ACCA enhancements, was also impermissibly vague in violation of due process and unconstitutional for the same reasons as used in the INA), *citing, Johnson v. United States*, 576 U.S. 591, 594-98, 135 S.Ct. 2551, 2556-58, 192 L.Ed.2d 569 (2015). *See also, United States v. Brown*, 47 F.4th 147, 151-53 (3d Cir. 2022) (Third Circuit holding that to determine whether defendant's prior state offense constitutes predicate "serious drug offense" under Armed Career Criminal Act (ACCA), court must compare state drug schedule with federal drug schedule at time defendant committed federal offense not prior state offense); *United States v. Hope*, 28 F.4th 487, 504-05 (4th Cir. 2022) (Fourth Circuit holding that the status, under the Armed Career Criminal Act (ACCA), of a prior state conviction as a serious drug offense is determined by federal law at sentencing, rather that federal law that applied at time of state conviction); *United States v. Pérez*, 46 F.4th 691, 699-700 (8th Cir. 2022) (Eighth Circuit holding that "the relevant federal definition for ACCA purposes is the definition in effect at the time of the new federal offense."); *United States v. Williams*, 48 F.4th 1125, 1142 43 (10th Cir. 2022) (Tenth Circuit citing several other circuits and adopting Eleventh Circuit's original holding *Jackson I,* holding that "[c]onsistent with the First, Fourth, Eighth, Ninth, and Eleventh Circuits, we hold a defendant's prior

state conviction is not categorically a 'serious drug offense' under the ACCA if the prior offense included substances not federally controlled at the time of the instant federal offense."); *but see, United States v. Clark*, 46 F.4th 404, 408-14 (6th Cir. 2022) (Sixth Circuit holding that determining if a prior conviction qualifies as a controlled substance offense under the career offender sentencing enhancement, courts assess the meaning accorded the term in place at the time of the prior conviction, rather than the drug schedules in place at the time of the instant federal sentencing, rejecting holding in *Jackson I*); *but see also and compare*, *United States v. Baker,* 2022 WL 17581659 at *2-*3 (6th Cir. 2022) (Other Judges on the Sixth Circuit have since disagreed with *Clark*; in a recent concurrence, two Judges opined that, "[i]n the absence of controlling precedent" in Clark, they would follow "the decisions of the five other circuits that have determined that the time-of-prior-conviction rule is not appropriate, concluding that '[t]he collective judgment of other circuits that the time-of-prior-conviction rule is incorrect further convinces [us] that Clark was wrongly decided.'") (Moore, J., concurring, joined by Stranch, J.).

II. THE "RULE OF LENITY" APPLIES AND SHOULD GUIDE THIS COURT'S CONSIDERATION OF THE IMPORTANT ISSUES RAISED BY PETITIONER HERE.

The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely.' To be free of tyranny in a free country, the causeways edges must be clearly marked.

***United States v. Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996), quoting, Robert Boalt, "A Man For All Seasons" Act II, 89 (vintage 1960) (Speech of Sir Thomas More)**

The "Rule of Lenity" requires courts to read ambiguous penal statutes strictly in favor of the defendant. As this Court has made clear for well over a century now:

> [A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite". This principle is founded on two policies that have long been part of our tradition. First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear. Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

United States v. Bass, 404 U.S. 336, 348, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971) (quotation marks and citations omitted); *see also generally and compare, United States v. Latcher,* 134 U.S. 624, 628, 10 S.Ct. 624, 626, 33 L.Ed. 1080 (1890) ("For the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required. . . . there can be no constructive offenses; and, before a man can be punished, his case must be plainly and unmistakably within the statute.") (citations omitted).

If there is ambiguity in a penal statute that leaves reasonable doubt of its meaning, a court's duty is not to inflict the penalty. *Wooden v. United States,* ___ U.S. __, 142 S. Ct. 1063, 1082-83 (2022) (Gorsuch, J., concurring in the judgment). Under our Constitution, "[a]ll" of the federal government's "legislative Powers" are vested in Congress. U.S. Const. art. I, § 1. Perhaps the most important consequence of this assignment concerns the power to punish. Lenity enforces the constitutional requirement of fair notice by ensuring that an individual's liberty always prevails over ambiguous laws. *See Wooden*, 142 S.Ct. at 1082-83 ("[T]he connection between lenity and fair notice [is] clear: If the law inflicting punishment does not speak 'plainly' to the defendant's conduct, liberty must prevail."), *quoting*, *United States v. Mann,* 26 F. Cas. 1153 (No. 15,718) (CC NH 1812) (Story, J.). In *fine,* it is respectfully submitted that lenity requires that this Court interpret the requirements of ACCA as applied in *Jackson II* and the Career Offender provisions of the Sentencing Guidelines as applied to the Petitioner here, strictly and when in favor of the defendant being sentenced.

III. THE "PLAIN ERROR DOCTRINE" APPLIES AND THIS COURT SHOULD CONSIDER THE IMPORTANT ISSUES RAISED BY PETITIONER HERE

Appellate courts review matters not properly raised in the trial court for plain error, and provide redress only upon finding that (1) there was error; (2) the error was plain, clear or obvious; and (3) the error affected the substantial rights of the appellant. *United States v. Cotton*, 535 U.S. 625, 631-34, 122 S.Ct. 1781, 1785-87, 152 L.Ed.2d 860 (2002); *United States v. Olano*, 507 U.S. 725, 732-36, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993), *see generally, Fed. R. Crim. P.* 52 (b) ("Plain Error. A plain error

that affects substantial rights may be considered even though it was not brought to the court's attention."). However, plain error does not mean simple error. The District Court has a duty to correctly determine the statutory sentencing range, including a putative defendant's correct criminal history score and the applicability of any condign sentencing enhancements. *See generally, Gall v. United States,* 552 U.S. 38, 49, 128 S.Ct. 586, 596, 169 L.Ed.2d 445 (2007) (". . . a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. . . . As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."), *citing Rita v. United States*, 551 U.S. 338, 347-48, 127 S.Ct. 2456, 2463, 168 L.Ed.2d 203 (2007); U.S.S.G. § 1.1B1.1(a) ("(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines."). As such, even if Petitioner's trial counsel conceded that Petitioner had two prior Florida state drug convictions and was therefore technically subject to the career offender enhancement, *see* Withdrawal/Sentencing Hearing (R-87 at p. 7-8), that concession should not bar review of the important issue raised by the Petitioner here, and current split in the circuits regarding that issue, by this Court here under the plain error standard. *Cotton*, 535 U.S. at 631-34, 122 S.Ct. at 1785-87; *Olano*, 507 U.S. at 732-36, 113 S.Ct. at 1777-78.

Other courts have applied the plain error standard to the same issue being argued here, rejecting any claim that plain error did not apply. *See e.g., United States v. Pérez,* 46 F.4th 691, 701-02 (8th Cir. 2022) ("An error is plain when a district court's decision is clearly contrary to law at the time of appeal. At present, at least four of our

sister circuits have addressed the same or a closely related question, all concluding that the categorical comparison is between the state law at the time of prior conviction and the federal law at the time of federal offense. These conditions are sufficient to conclude that the district court's decision, while not necessarily clearly contrary to law at the time of [Appellant's] sentencing before the current wave of circuit court decisions on this issue is plainly contrary to the current state of the law, which is sufficient to reverse even under plain error review.") (internal citations omitted), *citing, Johnson v. United States*, 520 U.S. 461, 467-68, 117 S.Ct. 1544, 1549, 137 L.Ed.2d 718 (1997) (Court's error in deciding materiality of false statement rather than submitting question to jury in perjury prosecution was plain, for purposes of test for plain error review, even though error was not clear at time of trial, as it was clear at time of appellate consideration).

CONCLUSION

THEREFORE, for the reasons set out above, the Petitioner, Emanuel Beach, respectfully submits that the *writ of certiorari* should issue to review the judgment of the Eleventh Circuit Court of Appeals.

RESPECTFULLY SUBMITTED, this August 4, 2023.

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APPENDIX

2023 WL 3302877
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Emanuel BEACH, Defendant-Appellant.

No. 22 11720

Non Argument Calendar

Filed: 05/08/2023

Appeal from the United States District Court for the Northern District of Florida, D.C. Docket No. 4:21-cr-00029-AW-MAF-1

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Before Jordan, Newsom, and Branch, Circuit Judges.

Opinion

PER CURIAM:

***1** Emanuel Beach appeals his conviction and 360-month sentence for possession with intent to distribute five grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(viii). First, Beach contends that the district court abused its discretion by denying his motion to withdraw his guilty plea despite his repeated claims that his lawyer had promised a ten-year sentence if he pled. Second, he says that the district court's sentence is procedurally and substantively unreasonable. Third, Beach argues that the district court erred in classifying him as a career drug offender and enhancing his sentence as a result.

The parties are acquainted with the facts, so we repeat them here only as necessary to decide the case. After considering the record and the parties' briefs, we affirm.

I

We review the district court's decision to deny a defendant's motion to withdraw a guilty plea for abuse of discretion. *United States v. McCarty*, 99 F.3d 383, 385 (11th Cir. 1996). "The denial of a motion to withdraw a guilty plea is not an abuse of discretion unless the denial was arbitrary or unreasonable." *United States v. Izquierdo*, 448 F.3d 1269, 1276 (11th Cir. 2006) (internal quotation omitted).

The defendant may withdraw his guilty plea after the district court accepts it but before sentencing if he "can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). But "[t]here is no absolute right to withdraw a guilty plea." *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994). The "good faith, credibility and weight" of the defendant's representations in support of the motion to withdraw are issues for the trial court to decide. *United States v. Buckles*, 843 F.2d 469, 472 (11th Cir. 1988). Furthermore, "[t]here is a strong presumption that the statements made during the [plea] colloquy are true." *Medlock*, 12 F.3d at 187. Thus, any post-colloquy withdrawals "bear[ ] a heavy burden to show" that the statements made under oath were false. *United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988).

To analyze the propriety of a defendant's request to withdraw his plea, we consider the totality of the circumstances, paying particular attention to the four *Buckles* factors: "(1) whether close assistance of counsel was available; (2) whether the plea was knowing and voluntary; (3) whether judicial resources would be conserved; and (4) whether the government would be prejudiced if the defendant were allowed to withdraw his plea." *Buckles*, 843 F.2d at 472 (internal citation omitted). A defendant isn't permitted to use his guilty plea to gauge the potential sentence that he faces. *United States v. Gonzalez-Mercado*, 808 F.2d 796, 801 (11th Cir. 1987). Thus, the timing of the motion is relevant because it could point to the defendant's motivation for seeking to withdraw his guilty plea. *Id.*

The totality of the circumstances reveals that the district court didn't abuse its discretion in denying Beach's motion to withdraw his guilty plea. On the first *Buckles* factor, Beach confirmed that he received close assistance of counsel.

See Buckles, 843 F.2d at 472. During the change of plea hearing colloquy, Beach stated that he had spoken with his counsel about his criminal charge and understood the penalties it carried. Beach stated that he was satisfied with his counsel's representation, denied having any complaints about his counsel, and said that there was nothing that he thought his counsel should have done differently. His sworn statements indicate that he received close assistance of counsel.

***2** As for the second *Buckles* factor, the transcript from Beach's plea colloquy shows that he entered the plea agreement knowingly and voluntarily. *See Buckles*, 843 F.2d at 472. As for voluntariness, Beach denied that the government had made any promises that weren't included in the plea documents or that anyone had threatened him. *United States v. Moriarty*, 429 F.3d 1012, 1019 (11th Cir. 2005). He also confirmed that no one promised him what his sentence would be. While Beach now asserts that his attorney made him promises about his sentence, he marshals scant evidence to overcome the strong presumption that his previous statements during the plea colloquy were true. *See Medlock*, 12 F.3d at 187.

As to knowledge, the district court read aloud Beach's charge and the elements of that charge during the plea colloquy. The transcript shows that he knew the factual basis and terms of his plea agreement. Beach also stated that he understood how his conduct mapped onto the charge. When the district court asked if he was planning to use all of the methamphetamine or if he planned to distribute it to others, he replied, "[b]oth." Beach then confirmed that he intended to distribute and sell at least five grams of methamphetamine. Finally, Beach stated that he understood the consequences of his plea, including the effect of the government's notice of enhancement and the minimum and maximum statutory sentence based on his prior convictions. He also acknowledged that his actual sentence would be determined at a subsequent hearing and could range up to life imprisonment. Likewise, he knew that the length of his resulting sentence wouldn't constitute a basis to withdraw his guilty plea. Accordingly, Beach failed to show that he didn't enter into the guilty plea knowingly and voluntarily. *See Buckles*, 843 F.2d at 472.

What's more, Beach brought the pertinent motion to withdraw his guilty plea only after the district court announced that it intended to sentence him to 360 months' imprisonment. That suggests that his motivation was due to dissatisfaction with his sentence, which isn't a valid basis for Beach to withdraw his guilty plea. *Gonzalez-Mercado*, 808 F.2d at 801.

If an appellant doesn't satisfy the first two *Buckles* factors, it isn't necessary to thoroughly analyze the remaining two. *See id.* (affirming a district court's denial of a motion to withdraw a guilty plea based on the first two factors but declining to give "considerable weight" to the third factor or "particular attention" to the possibility of prejudice to the government). Because Beach failed the first two *Buckles* factors, we conclude that the district court didn't err in denying his motion to withdraw his guilty plea. *See id.*

II

In reviewing the reasonableness of a sentence, we first consider whether the district court committed a procedural error, such as improperly calculating the Guidelines range, selecting the sentence based on clearly erroneous facts, inadequately explaining the chosen sentence, or failing to consider the § 3553(a) factors. *Gall v. United States*, 522 U.S. 38, 51 (2007). We review the procedural reasonableness of a sentence for abuse of discretion, the interpretation and application of the Guidelines de novo, and the factual findings for clear error. *United States v. Barrington*, 648 F.3d 1178, 1194 (11th Cir. 2011).

The district court didn't impose a procedurally unreasonable sentence in Beach's case. It properly calculated his adjusted offense level of 37 and Guidelines range of 360 months to life imprisonment, and it correctly noted that the minimum term of imprisonment was 10 years with the maximum being life. U.S.S.G. §§ 2D1.1, 3C1, 4B1.1(b)(1); 21 U.S.C. § 841(b)(1)(B)(viii). Additionally, in fashioning Beach's sentence, the district court considered the statutory purposes of sentencing, the advisory guidelines, the § 3553(a) factors, and the parties' arguments. Finally, there is no indication in the record that the district court selected the sentence based on clearly erroneous facts or failed to adequately explain the chosen sentence. *See Gall*, 522 U.S. at 51.

***3** After reviewing for procedural error, we consider the substantive reasonableness of a sentence under an abuse-of-discretion standard. *Gall*, 552 U.S. at 51. On substantive reasonableness review, we may vacate the sentence only if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors to arrive at an unreasonable sentence based on the facts of the case. *United States v. Irey*, 612 F.3d 1160, 1190 (11th Cir. 2010) (en banc). Although we

don't "automatically presume a sentence" falling within the Guidelines range is reasonable, we ordinarily expect such a sentence to be so. *United States v. Hunt*, 526 F.3d 739, 746 (11th Cir. 2008). A sentence imposed well below the statutory maximum penalty is another indication of reasonableness. *United States v. Gonzalez*, 550 F.3d 1319, 1324 (11th Cir. 2008).

Beach contends that his sentence is substantively unreasonable because the district court improperly considered testimony from government cooperators about unconnected drug transactions that occurred a year before Beach was ultimately arrested for the present violation. There are no limitations on the information a sentencing court may receive and consider "concerning the background, character, and conduct of the person convicted of an offense." 18 U.S.C. § 3661. For instance, the sentencing court may consider uncharged and acquitted conduct when determining the appropriate sentence. *United States v. Maitre*, 898 F.3d 1151, 1160 n.6 (11th Cir. 2018) (quoting *United States v. Hamaker*, 455 F.3d 1316, 1336 (11th Cir. 2006)). Even if a defendant's conduct is completely unrelated to his offense of conviction, it may be considered as part of his history and characteristics under § 3553(a). *United States v. Overstreet*, 713 F.3d 627, 638 n.14 (11th Cir. 2013).

The district court here explicitly stated that it considered the additional drug quantity that the cooperators attributed to Beach only to inform Beach's history, background, character, and conduct under § 3553(a), not to calculate his Guidelines range. Thus, it didn't err in considering their testimony. *Maitre*, 898 F.3d at 1160 n.6. Furthermore, Beach's 360-month sentence is at the bottom of the Guidelines range and well below the maximum penalty of life imprisonment, which further indicates that his sentence is reasonable. *Hunt*, 526 F.3d at 746; *Gonzalez*, 550 F.3d at 1324. Accordingly, Beach's 360-month sentence is both procedurally and substantively reasonable. *See Gall*, 552 U.S. at 51.

III

Finally, Beach contends that the district court improperly elevated his total offense level from 34 to 37 based on its determination that two prior Florida drug-related convictions required applying the career-offender enhancement. *See* U.S.S.G. § 4B1.1(a), (b)(1). We disagree with Beach on two bases.

First, the district court didn't err in its determination that Beach qualified for the career-offender enhancement. This Court has held that drug convictions under Fla. Stat. § 893.13—the statute under which Beach was previously convicted—are controlled substance offenses under § 4B1.2(b) of the Sentencing Guidelines. *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014). Beach was, therefore, correctly designated as a career offender.

And second, even if that determination were error, Beach invited it when he conceded at sentencing that he, indeed, qualified as a career offender. The invited-error doctrine is the cardinal rule of appellate review that a party may not challenge a ruling or other trial proceeding that he invited. *United States v. Love*, 449 F.3d 1154, 1157 (11th Cir. 2006). The doctrine's rationale is the commonsense view that when a party invited the sentencing court to commit error, he "cannot later cry foul on appeal"; no litigant should benefit from introducing error in the district court hoping to create grounds for appeal. *United States v. Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009). The doctrine applies when a defendant induced the district court's error or expressly agreed that the district court should make the erroneous ruling. *United States v. Feldman*, 931 F.3d 1245, 1260 (11th Cir. 2019).

***4** In *United States v. Haynes*, we held that a defendant had invited the very error that he contested on appeal—that he was impermissibly sentenced as a career offender—when he requested a sentence that "incorporated the career-offender enhancement." 764 F.3d 1304, 1310 (11th Cir. 2014). Beach's concession that he was a career offender amounts to the same invitation of error.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2023 WL 3302877

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App. a pp 3

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

v.

INDICTMENT

4:21-cr-29-AW/MAF

EMANUEL BEACH

_____/

THE GRAND JURY CHARGES:

COUNT ONE

On or about December 22, 2020, in the Northern District of Florida, the defendant,

EMANUEL BEACH,

did knowingly and intentionally possess with intent to distribute a controlled substance, and this offense involved 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers.

In violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(viii).

On or about August 8, 2006, **EMANUEL BEACH** was convicted in the State of Florida of a serious drug felony, that is, Sale of Controlled Substance, an offense described in Title 18, United States Code, Section 924(e)(2)(A)(ii) and

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Returned in open court pursuant to Rule 6(f)
6/15/2021
Date
Hope Thai Cannon
United States Magistrate Judge

Title 21, United States Code, Section 802(57), for which he served a term of imprisonment of more than twelve months and was released from service of that term within fifteen years of the commencement of the offense charged in this Count.

On or about August 8, 2006, **EMANUEL BEACH** was convicted in the State of Florida of a serious drug felony, that is, Possession with Intent to Distribute, an offense described in Title 18, United States Code, Section 924(e)(2)(A)(ii) and Title 21, United States Code, Section 802(57), for which he served a term of imprisonment of more than twelve months and was released from service of that term within fifteen years of the commencement of the offense charged in this Count.

CONTROLLED SUBSTANCE FORFEITURE

The allegation contained in Count One of this Indictment is hereby realleged and incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of Title 21, United States Code, Section 853.

From his engagement in the violation alleged in Count One, punishable by imprisonment for more than one year, the defendant,

EMANUEL BEACH,

shall forfeit to the United States, pursuant to Title 21, United States Code, Sections 853(a)(1) and (2), all of his interest in:

A. Property constituting or derived from any proceeds the defendant obtained directly or indirectly as the result of such violation.

B. Property used in any manner or part to commit or to facilitate the commission of such violation.

If any of the property subject to forfeiture as a result of any act or omission of the defendant:

i. cannot be located upon the exercise of due diligence;

ii. has been transferred or sold to, or deposited with, a third person;

iii. has been placed beyond the jurisdiction of this Court;

iv. has been substantially diminished in value; or

v. has been commingled with other property that cannot be divided without difficulty,

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendant up to the value of the above forfeitable property.

A TRUE BILL:

[redacted]

15 Jun 2021
DATE

JASON R. COODY
Acting United States Attorney

al-lor for
KAITLIN WEISS
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

Case No.: 4:21cr29-AW

v.

EMANUEL BEACH

_____/

INFORMATION AND NOTICE OF INTENT

COMES NOW the United States of America, by and through the undersigned Assistant United States Attorney, pursuant to Section 851 of Title 21 of the United States Code, and gives this Notice of Intent, that should the Defendant, Emanuel Beach, be convicted of the drug offense charged in this Indictment, the United States will seek enhanced penalties as provided under Title 21, U.S.C. §§ 841 and 851, as shown below.

1. The Defendant has been charged in Count One with Possession with Intent to Distribute a Controlled Substance, involving 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(B)(viii).

2. The offense charged occurred between on or about December 22, 2020, in the Northern District of Florida.

3. Based upon the quantities of drugs the Government anticipates proving, the Defendant would normally be subject to statutory penalties for Count One of not

less than five (5) years imprisonment, a maximum of forty (40) years imprisonment, a fine up to $5,000,000.00, and a term of supervised release of at least four (4) years.

4. Prior to the commission of the offense alleged in Count One, the Defendant had been convicted of a serious drug felony, that is:

a. On or about August 8, 2006, Emanuel Beach was convicted in the State of Florida in Bay County case number 04-000053 of a serious drug felony, that is, Sale of Controlled Substance, an offense described in Title 18, United States Code, Section 924(e)(2)(A)(ii) and Title 21, United States Code, Section 802(57), for which he served a term of imprisonment of more than twelve months and was released from service of that term within fifteen years of the commencement of the offense charged in this Count.

b. On or about August 8, 2006, Emanuel Beach was convicted in the State of Florida in Bay County case number 05-001239 of a serious drug felony, that is, Possession with Intent to Distribute, an offense described in Title 18, United States Code, Section 924(e)(2)(A)(ii) and Title 21, United States Code, Section 802(57), for which he served a term of imprisonment of more than twelve months and was released from service of that term within fifteen years of the commencement of the offense charged in this Count.

5. It is submitted that, for Count One, any of the convictions set forth above will subject the Defendant to a mandatory minimum term of ten (10) years

imprisonment, a maximum of Life imprisonment, a fine of up to $8,000,000, and a term of at least eight (8) years on supervised release.

6. It is also submitted that each of the convictions set forth above qualifies as a felony drug offense, because they are each offenses punishable by imprisonment for more than one year prohibiting or restricting conduct related to narcotic drugs, marijuana, anabolic steroids, or depressant or stimulant substances.

7. Accordingly, the Government hereby gives notice that it will seek all enhanced penalties that are available under law in this case.

Respectfully submitted,

JASON R. COODY
Acting United States Attorney

/s/ Kaitlin Weiss
KAITLIN WEISS
Assistant United States Attorney
Florida Bar No. 106130
Northern District of Florida
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(850) 942-8430
Kaitlin.Weiss@usdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Attorney for the Defendant electronically via ECF on this 13th day of October, 2021.

/s/ Kaitlin Weiss
KAITLIN WEISS
Assistant United States Attorney

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Northern District of Florida

UNITED STATES OF AMERICA
v.
EMANUEL BEACH

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:21CR00029-001

USM Number: 51928-509

Richard A. Greenberg (Appointed)
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) Count One

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(viii) and 851	Possession with Intent to Distribute 5 Grams or More of Methamphetamine	12/22/2020	One

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/2/2022
Date of Imposition of Judgment

s/ Allen Winsor
Signature of Judge

Allen Winsor, United States District Judge
Name and Title of Judge

5/9/2022
Date

DEFENDANT: EMANUEL BEACH
CASE NUMBER: 4:21CR00029-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
three hundred sixty (360) months.
Note: There are pending state charges against the defendant. *See* ECF No. 56, paragraph 63. This federal sentence shall be concurrent with any subsequent state sentence in Leon County Case Nos. 2020-CF-2197; 2020-CF-3375 if - and only if - the state sentencing judge directs that the state and federal sentences be concurrent. If the state sentencing judge does so direct, the Bureau of Prisons may designate a state facility for service of his federal sentence, thus in effect making this federal sentence concurrent with the state sentence.

☑ The court makes the following recommendations to the Bureau of Prisons:
that the defendant be designated to an institution in Tallahassee, Florida.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: EMANUEL BEACH
CASE NUMBER: 4:21CR00029-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

eight (8) years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

36 F.4th 1294
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Eugene JACKSON, Defendant-Appellant.

No. 21-13963

Filed: June 10, 2022

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of Florida, No. 1:19-cr-20546-KMW-1, Kathleen M. Williams, J., of being a felon in possession of a firearm, and was sentenced under the Armed Career Criminal Act (ACCA) to a 15-year prison term. Defendant appealed.

Holdings: The Court of Appeals, Rosenbaum, Circuit Judge, held that:

[1] Controlled Substance Act Schedules that were incorporated into ACCA's "serious drug offense" definition at time defendant committed his crime of being a felon in possession of firearm governed, and

[2] prior Florida convictions for sale of cocaine and possession with intent to sell cocaine were not predicate "serious drug offenses" under ACCA.

Vacated and remanded.

West Headnotes (19)

[1] Criminal Law Review De Novo

The Court of Appeals reviews de novo whether state conviction qualifies as a predicate "serious drug offense" for Armed Career Criminal Act (ACCA) purposes. 18 U.S.C.A. § 924(e)(2)(A).

[2] Sentencing and Punishment Construction

Sentencing and Punishment Miscellaneous particular offenses

When conducting review of whether state conviction qualifies as a predicate "serious drug offense" for Armed Career Criminal Act (ACCA) purposes, the Court of Appeals is bound by federal law when it interprets terms in ACCA and bound by state law when it interprets elements of state-law crimes. 18 U.S.C.A. § 924(e)(2)(A).

[3] Sentencing and Punishment Miscellaneous particular offenses

Under the "categorical approach" for determining whether defendant's prior convictions qualify as "serious drug offenses" for purposes of Armed Career Criminal Act (ACCA), a court looks to the state offense of which defendant was previously convicted and identifies elements of that crime. 18 U.S.C.A. § 924(e)(2)(A).

[4] Sentencing and Punishment Miscellaneous particular offenses

The categorical approach for determining whether defendant's prior convictions qualify as "serious drug offenses" for purposes of Armed Career Criminal Act (ACCA) requires that the court does not consider individual facts underlying the defendant's prior convictions, just the elements; the court then compares these elements of state offense with components of ACCA's definition of "serious drug offense." 18 U.S.C.A. § 924(e)(2)(A).

[5] Sentencing and Punishment Miscellaneous particular offenses

The Controlled Substance Act Schedules that were incorporated into the definition of

"serious drug offense" under the Armed Career Criminal Act (ACCA) as of the time defendant committed his crime of being a felon in possession of firearm were the ones that governed, in determining whether defendant's prior Florida convictions for sale of cocaine and possession with intent to sell cocaine qualified as predicate "serious drug offenses" that would support imposition of enhanced sentence under the ACCA. 18 U.S.C.A. § 924(e)(2)(A); Comprehensive Drug Abuse Prevention and Control Act of 1970 § 102, 21 U.S.C.A. § 802; Fla. Stat. Ann. § 893.13.

[6] **Constitutional Law** 🔑 Certainty and definiteness in general

Consonant with ordinary notions of fair play and the settled rules of law, due process contemplates criminal laws that give ordinary people fair notice of the conduct they punish. U.S. Const. Amend. 5.

[7] **Constitutional Law** 🔑 Certainty and definiteness; vagueness

Fair notice, for purposes of due process, allows the ordinary citizen to conform his or her conduct to the law. U.S. Const. Amend. 5.

[8] **Constitutional Law** 🔑 Certainty and definiteness in general

Fair notice of criminal laws, for purposes of due process, ensures uniformity of enforcement by police and courts. U.S. Const. Amend. 5.

[9] **Constitutional Law** 🔑 Statutory minimum, maximum, or mandatory sentences

If an individual decides to break the law, the fair notice that due process requires advises him of the maximum, and depending on the statute, minimum, statutory penalty he can expect, so he knows what he undertakes. U.S. Const. Amend. 5.

[10] **Sentencing and Punishment** 🔑 Miscellaneous particular offenses

Defendant's prior Florida convictions for sale of cocaine and possession with intent to sell cocaine did not qualify as predicate "serious drug offenses," and thus, could not support imposition of enhanced sentence under the Armed Career Criminal Act (ACCA) for defendant's federal offense of being a felon in possession of a firearm; Florida statute in effect at time of defendant's prior convictions prohibited, among other things, the sale of, or possession with intent to distribute, ioflupane, but when defendant possessed the firearm supporting his federal conviction, ioflupane was not a "controlled substance" for purposes of the ACCA's "serious drug offense" definition. 18 U.S.C.A. § 924(e)(2)(A); Comprehensive Drug Abuse Prevention and Control Act of 1970 § 102, 21 U.S.C.A. § 802; Fla. Stat. Ann. § 893.13.

[11] **Sentencing and Punishment** 🔑 Miscellaneous particular offenses

When a court examines prior state convictions under the categorical approach for determining whether the prior state convictions qualify as predicate "serious drug offenses" under the Armed Career Criminal Act (ACCA), it analyzes the version of state law that the defendant was actually convicted of violating. 18 U.S.C.A. § 924(e)(2)(A).

[12] **Criminal Law** 🔑 Nature of crime in general

"Elements" of a criminal offense are the constituent parts of a crime's legal definition, that is, the things the prosecution must prove to sustain a conviction.

[13] **Criminal Law** 🔑 Criminal act or omission

"Alternative means" are different ways to satisfy a single element of a crime.

[14] **Sentencing and Punishment** Controlled substance offenses

When a criminal statute lists alternative elements, rather than alternative means of satisfying an element, the statute is "divisible," and the modified categorical approach for determining whether a prior conviction qualifies as a predicate serious drug offense under the Armed Career Criminal Act (ACCA) permits the court to consult a limited class of documents for sole purpose of ascertaining the elements on which the defendant was actually convicted, including the plea agreement, transcript of the plea colloquy, the charging document, jury instructions, or a comparable judicial record of this information. 18 U.S.C.A. § 924(e)(2)(A).

[15] **Sentencing and Punishment** Controlled substance offenses

When the statute of the prior conviction lists alternative means of satisfying a single element of the offense, the standard categorical approach governs in determining whether the prior conviction qualifies as a predicate "serious drug offense" under Armed Career Criminal Act (ACCA), and the court must consider all listed means of satisfying the elements of the prior offense to be able to compare that covered conduct to ACCA's definition of "serious drug offense." 18 U.S.C.A. § 924(e)(2)(A).

1 Cases that cite this headnote

[16] **Sentencing and Punishment** Miscellaneous particular offenses

Under the categorical approach for determining if a prior state drug conviction qualifies as a predicate serious drug offense under the Armed Career Criminal Act (ACCA), the court must presume that the prior conviction rested upon nothing more than the least of the acts criminalized in the state statute or the least culpable conduct. 18 U.S.C.A. § 924(e)(2)(A).

[17] **Courts** Number of judges concurring in opinion, and opinion by divided court

A holding of a prior panel of the Court of Appeals is binding on all subsequent panels in the same circuit unless and until it is overruled or undermined to point of abrogation by the United States Supreme Court or by the Court of Appeals sitting en banc.

[18] **Courts** Dicta

Questions which merely lurk in record, neither brought to attention of the Court of Appeals nor ruled upon, are not to be considered as having been so decided as to constitute "precedents."

[19] **Courts** Dicta

Assumptions by the Court of Appeals are not "holdings."

***1296** Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:19-cr-20546-KMW-1

Attorneys and Law Firms

Michael Benjamin Brenner, Assistant U.S. Attorney, Emily M. Smachetti, U.S. Attorney's Office, Jason Wu, Assistant U.S. Attorney, U.S. Attorney Service - SFL, Miami, FL, for Plaintiff-Appellee.

Andrew L. Adler, Federal Public Defender's Office, Fort Lauderdale, FL, Julie Erin Holt, Michael Caruso, Federal Public Defender, Kathleen E. Mollison, Federal Public Defender's Office, Miami, FL, for Defendant-Appellant.

Before Rosenbaum, Jill Pryor, and Ed Carnes, Circuit Judges.

Opinion

ROSENBAUM, Circuit Judge

***1297** Forewarned is forearmed. That's a common-sense notion that people have recognized for at least hundreds[1] of years. In fact, Shakespeare incorporated it into *Henry VI,*

Part 3—written around 1591 or '92—when King Edward IV says, "Well I will arm me, being thus forewarned." William Shakespeare, *King Henry VI, Part 3* act 4 sc. 1, l. 115, Folger Shakespeare Library, edited by Barbara A. Mowat & Paul Werstine (Simon & Schuster Paperbacks Mar. 2009).

The concept of "forewarned is forearmed" also explains why fair notice—a principle enshrined in the Constitution by the Fifth Amendment's Due Process clause—is so important. Knowing that certain conduct violates the law and will result in a specified minimum penalty (or perhaps a maximum penalty), a person may decide to avoid engaging in that conduct. And even if she goes ahead, anyway, and violates the law, she knows in advance what the potential consequences could be.

This due-process cornerstone of fair notice drives our decision today under the Armed Career Criminal Act ("ACCA"). ACCA increases the sentence of, among others, a felon in unlawful possession of a firearm if that person has at least three prior convictions for a "violent felony," 18 U.S.C. § 924(e)(2)(B), or a "serious drug offense," 18 U.S.C. § 924(e)(2)(A), or both. This appeal requires us to decide which version of the Controlled Substance Act Schedules incorporated into ACCA's definition of "serious drug offense" applies when a defendant is convicted of being a felon in possession of a firearm: the version in effect at the time of the defendant's federal firearm-possession violation (for which he is being sentenced), or the ones in effect when he was convicted of his predicate state crimes that we are evaluating to see whether they satisfy ACCA's definition of "serious drug offense."

We hold that due-process fair-notice considerations require us to apply the version of the Controlled Substance Act Schedules in place when the defendant committed the federal firearm-possession offense for which he is being sentenced. When we apply that iteration here, we conclude that Defendant-Appellant Eugene Jackson does not qualify for ACCA's sentence enhancement. Because the district court reached the opposite conclusion, we vacate Jackson's sentence and remand for resentencing.

I.

Jackson pled guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). According to the factual proffer supporting Jackson's ***1298** guilty plea, he unlawfully possessed the firearm on September 26, 2017.

In Jackson's presentence investigation report ("PSI"), the probation officer determined that Jackson's prior criminal history qualified him for an ACCA sentencing enhancement. ACCA applies to a conviction under 18 U.S.C. § 922(g) for firearm possession by a prohibited person if the defendant has three qualifying convictions for "a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). In support of the ACCA enhancement the probation officer recommended for Jackson, the PSI concluded Jackson had five qualifying predicate convictions:

> (1) a 1998 Florida conviction for battery on a law enforcement officer;
>
> (2) a 1998 Florida conviction for the sale of cocaine;
>
> (3) a 2003 Florida conviction for armed robbery;
>
> (4) a 2004 Florida conviction for possession with intent to sell cocaine; and
>
> (5) 2012 Florida convictions for aggravated assault with a deadly weapon and aggravated battery with a deadly weapon, each arising out of the same incident.

The recommended ACCA enhancement increased Jackson's total offense level from 23 to 30, which caused his advisory guideline range to change from 92–115 months to 180–210 months.

Jackson objected to the probation officer's determination that ACCA applied. He conceded that he had two ACCA predicates: the 2003 Florida armed robbery and the 2012 aggravated battery.[2] (Jackson disputed that the 2012 aggravated assault qualified as a "violent felony" but admitted that the accompanying aggravated battery did.)

But Jackson argued that neither of his cocaine-related convictions qualified as a third ACCA predicate offense. He acknowledged that "serious drug offense" means, as relevant here, "an offense under State law, involving ... distributing, or possessing with intent to ... 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." 18 U.S.C. § 924(e)(2)(A)(ii). But Jackson contended that the

cocaine-related conduct that Fla. Stat. § 893.13 prohibited when both of Jackson's cocaine-related convictions occurred encompassed, among other things, the sale of, or possession with intent to distribute, ioflupane (^{123}I) ("ioflupane"). Yet when Jackson possessed the firearm here, ioflupane was not a "controlled substance" for purposes of the "serious drug offense" definition in § 924(e)(2)(A)(ii). So Jackson urged that, categorically, a cocaine-related offense under Fla. Stat. § 893.13 at the times of his cocaine-related convictions could not qualify as a "serious drug offense" under ACCA.

For its part, the government conceded that Jackson's 1998 Florida battery conviction did not qualify as an ACCA predicate. It also agreed that the 2012 aggravated assault and aggravated battery counted as only a single "violent felony." As to the cocaine-related § 893.13 offenses, the government did not address Jackson's ioflupane argument on the merits. Instead, it argued that Jackson's convictions necessarily are "serious drug offenses" under our decision in *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), and the Supreme Court's decision in *Shular v. United States*, —— U.S. ——, 140 S. Ct. 779, 206 L.Ed.2d 81 (2020).

***1299** Jackson disagreed.

Ultimately, the district court agreed with the government. Based on that conclusion, it sentenced Jackson to ACCA's mandated fifteen-year minimum.

Jackson now appeals.

II.

[1] **[2]** We review de novo whether a state conviction qualifies as a "serious drug offense" for ACCA purposes. *United States v. Conage*, 976 F.3d 1244, 1249 (11th Cir. 2020). When conducting our review, we are "bound by federal law when we interpret terms in the ACCA" and "bound by state law when we interpret elements of state-law crimes." *Id.* (internal quotation marks omitted).

III.

[3] **[4]** As we have noted, this case requires us to determine whether Jackson's 1998 and 2004 cocaine-related drug convictions qualify as "serious drug offense[s]" for purposes of ACCA. To accomplish that task, we employ the "categorical approach." *Conage*, 976 F.3d at 1250. Under that approach, we look to the state offense of which the defendant was previously convicted and identify the elements of that crime. *Id.* The categorical approach requires that we do not consider the individual facts underlying the defendant's prior conviction—just the elements. *Id.* We then compare these elements of the state offense with the components of ACCA's definition of "serious drug offense." *See id.* A conviction qualifies as a "serious drug offense" only if the state statute under which the defendant was convicted defines the offense as least as narrowly as ACCA's definition of "serious drug offense." *Id.*

In conducting our analysis here, we proceed in three steps. First, we identify the criteria that ACCA uses to define a "serious drug offense" under 18 U.S.C. § 924(e)(2)(A)(ii). Second, we analyze the outer bounds of the elements that would have satisfied Fla. Stat. § 893.13's requirements for a cocaine-related conviction at the time of each of Jackson's convictions. And third, we compare the results of the first two steps to see whether § 893.13's "elements 'necessarily entail one of the types of conduct' " set forth in ACCA's definition of "serious drug offense." *Shular v. United States*, —— U.S. ——, 140 S. Ct. 779, 784, 206 L.Ed.2d 81 (2020) (emphasis and citation omitted). If so, we count the conviction as a "serious drug offense." But if not, the conviction does not qualify as a "serious drug offense." Finally, after we conduct our analysis, we explain why the precedent on which the government relies does not alter our conclusion.

A. As relevant here, § 924(e)(2)(A)(ii)'s definition of "serious drug offense" requires satisfaction of three criteria: (1) the state offense must involve distributing, or possessing with intent to distribute (2) "cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the[se] substances," but not ioflupane; and (3) the state offense must have been punishable by a maximum term of imprisonment of at least ten years.

1. The Controlled Substance Act Schedules that were incorporated into ACCA's § 924(e)(2)(A)(ii) definition of "serious drug offense" as of the time Jackson committed his federal-firearm-possession violation are the ones that govern.

[5] Before we can determine what ACCA's § 924(e)(2)(A)(ii) definition of "serious ***1300** drug offense" "necessarily require[s]," we must first decide the version of the statute we must consult: the one in effect at the times of Jackson's cocaine-related convictions, the one in effect at the time of Jackson's firearm possession for which he is being sentenced, or some other version. We conclude that due-process considerations require us to use the iteration of the Controlled Substances Act Schedules incorporated into § 924(e)(2)(A)(ii)'s definition of "serious drug offense" in effect when Jackson possessed the firearm that undergirds his federal conviction pending before us.

[6] **[7]** **[8]** **[9]** Under the Fifth Amendment, "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "[C]onsonant ... with ordinary notions of fair play and the settled rules of law," due process contemplates criminal laws that "give ordinary people fair notice of the conduct [they] punish[ ]." *Johnson v. United States*, 576 U.S. 591, 595, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) (citation and quotation marks omitted). Fair notice allows "the ordinary citizen to conform his or her conduct to the law." *City of Chicago v. Morales*, 527 U.S. 41, 58, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). It also ensures uniformity of enforcement by police and courts. *See Giaccio v. Pennsylvania*, 382 U.S. 399, 403, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). And if an individual decides to break the law, anyway, the fair notice that due process requires advises him of the maximum (and depending on the statute, minimum) statutory penalty he can expect, so he knows what he risks before he undertakes his crime. *See Dale v. Haeberlin*, 878 F.2d 930, 934 (6th Cir. 1989). After all, forewarned is forearmed.

To be sure, the Supreme Court has emphasized these principles in cases with vague statutes that did not clearly identify the conduct that violated them or the potential sentence upon conviction. *See, e.g.*, *Johnson*, 576 U.S. at 593, 135 S.Ct. 2551. But these concepts apply with at least as much force when a statute does unambiguously delineate the conduct that violates it, and the defendant's conduct does not satisfy that standard.

If they did not, an ordinary person would receive *no notice* (let alone vague notice) that her conduct that falls outside the statute's parameters brings potential criminal consequences. And police and courts would be free to punish individuals for conduct that the law does not criminalize. That type of situation would do violence to the interests of "fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws" that due process protects. *Rogers v. Tennessee*, 532 U.S. 451, 460, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001); *see also Beckles v. United States*, —— U.S. ——, 137 S. Ct. 886, 892, 197 L.Ed.2d 145 (2017) (noting that due-process concerns require "statutes fixing sentences" to "specify the range of available sentences with 'sufficient clarity' ") (citations omitted).

Given these interests, the form of the Controlled Substances Act Schedules incorporated into § 924(e)(2)(A)(ii)'s definition of "serious drug offense" that was in place on September 26, 2017, when Jackson possessed the firearm here, must govern. That way, Jackson had notice at the time of his firearm-possession offense not only that his conduct violated federal law, but also of his potential minimum and maximum penalty for his violation and whether his prior felony convictions could affect those penalties.

***1301** *2. The Controlled Substance Act Schedules that were incorporated into § 924(e)(2)(A)(ii) as of the time Jackson possessed the firearm here necessarily required a "serious [cocaine-related] drug offense" not to have involved ioflupane.*

[10] As relevant here, ACCA defines a "serious drug offense" as "an offense under State law, involving ... distributing, or possessing with intent to ... 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." 18 U.S.C. § 924(e)(2)(A)(ii). This definition requires a state crime to meet three criteria: (1) the offense under state law must "involve[e] ... distributing, or possessing with intent to ... distribute" (2) "a controlled substance (as defined in section 102 of the Controlled Substances Act ...)", (3) and the state offense must be punishable by a maximum term of imprisonment of at least ten years. *Id.*

The Supreme Court has already clarified the meaning of the first element. In *Shular*, the Court explained that "involving ... distributing, or possessing with intent to ... distribute" refers to "conduct" that the definition "necessarily require[s]." 140 S. Ct. at 785 (alteration omitted). And the third element—concerning the potential penalty for the offense of the prior conviction—is self-explanatory.

That leaves us with the second element: "a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802))." 18 U.S.C. § 924(e)(2)(A)(ii). Section 102, in turn, defines a "controlled substance" to "mean[ ] a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C. § 802(6). For its part, on September 26, 2017 (and currently), Schedule II included the following cocaine-related substances: "cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph." 21 U.S.C. § 812(c), Schedule II(a)(4). But it did not include ioflupane.

Schedule II once included ioflupane (indeed, it did at the times Jackson was convicted of his two cocaine-related prior offenses). When that was the state of affairs, ioflupane was "by definition, a schedule II controlled substance because it is derived from cocaine via ecgonine, both of which are schedule II controlled substances." Schedules of Controlled Substances: Removal of [123 I] Ioflupane from Schedule II of the Controlled Substances Act, 80 Fed. Reg. 54715, 54715.

But it turns out that ioflupane has value in potentially diagnosing Parkinson's Disease. *See id*. at 54716–17. So in September 2015, under 21 U.S.C. § 811[3], the United States Attorney General "remove[d] the regulatory controls and administrative, civil, and criminal sanctions applicable to controlled substances, including those specific to schedule II controlled substances, on persons who handle or propose to handle [(^{123} I)] ioflupane." *Id*. at 54716. Since then, ***1302** ioflupane has not been included on any federal drug Schedule. *See* 21 C.F.R. § 1308.12(b)(4)(ii) (2021) ("except[ing]" ioflupane from current Schedule II).

As a result, ioflupane has not been a federally "controlled substance," as defined in 21 U.S.C. § 802, since September 2015. And consequently, also since that time, a cocaine-related offense that involved only ioflupane has not involved a federally "controlled substance" for purposes of § 924(e)(2)(A)(ii).

B. At the times of Jackson's cocaine-related prior offenses for which he sustained convictions under Fla. Stat. § 893.13, the cocaine-related activity § 893.13 criminalized categorically included activity involving ioflupane.

[11] Having identified the components of a "serious drug offense," we next consider the elements of Jackson's prior state cocaine-related offenses under Fla. Stat. § 893.13. When we examine prior state convictions under the categorical approach, we analyze "the version of state law that the defendant was actually convicted of violating." *McNeill v. United States*, 563 U.S. 816, 821, 131 S.Ct. 2218, 180 L.Ed.2d 35 (2011). That is so because § 924(e)(2)(A)(ii)'s definition of "serious drug offense" refers to the term "previous conviction[ ]" in ACCA's § 924(e)(1) enhancement language. *See* 18 U.S.C. § 924(e)(1) (applying the enhancement to those "who violate[ ] section 922(g) of this title and ha[ve] three ***previous convictions*** ... for ... a serious drug offense, ... committed on occasions different from one another") (emphasis added). And "previous conviction[ ]" is a "backward-looking" term that requires us "to consult the law that applied at the time of that conviction." *McNeill*, 563 U.S. at 820, 131 S.Ct. 2218.

[12] **[13]** That settled, we preface our review of the elements of the Jackson's state cocaine-related convictions with a brief discussion of the distinction between the elements of a crime and the means of committing a single element. *See Mathis v. United States*, 579 U.S. 500, 504–05, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016). The Supreme Court has explained that " '[e]lements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.' " *Id.* at 504, 136 S.Ct. 2243. Alternative means, on the other hand, are different ways to satisfy a single element. *See id.* at 505, 136 S.Ct. 2243.

[14] When a statute lists alternative "elements," rather than alternative "means" of satisfying an element, the statute is "divisible." *See id.* In that case, the "modified categorical approach" permits a court to consult a limited class of documents for the sole purpose of ascertaining the elements on which the defendant was actually convicted. *Id.* These documents include a plea agreement, the transcript of a plea colloquy, the charging document, jury instructions, or a "comparable judicial record of this information." *Shepard v. United States*, 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).

[15] But when a statute lists alternative means of satisfying a single element, the standard categorical approach governs. *Mathis*, 579 U.S. at 517, 136 S.Ct. 2243. So we must consider all listed means of satisfying the elements of the state offense

to be able to compare that covered conduct at the third step of our analysis to ACCA's definition of "serious drug offense."

With this understanding in mind, we turn to the elements of Fla. Stat. § 893.13 at the times of Jackson's convictions. In 1998 and 2004, § 893.13(1)(a) prohibited, as relevant here, the sale of or possession with intent to sell a "controlled substance," ***1303** as defined in Schedules I through V, Fla. Stat. § 893.02(4). The only element of that crime in question is the meaning of "controlled substance."[4]

In *Guillen v. U.S. Attorney General*, 910 F.3d 1174 (11th Cir. 2018), we held that, under Florida law, each category of substance separately enumerated in Florida's Controlled Substance Schedules was an alternative controlled-substance "element." *See id.* at 1182–83. So for example, sale of marijuana and sale of heroin were different crimes. *See id.*

In contrast, we explained, when a drug schedule identified different formulations of the same category of substance, the alternatives were different "means" of satisfying a particular "controlled substance" element. *See id.* Take the example we pointed to in *Guillen*: Florida courts have held that possession of marijuana is the same crime as possession of hashish, since "marijuana and hashish were defined as the same controlled substance under Florida law" in that both fell under the definition of "cannabis." *Id.* at 1183 (citing *Retherford v. State*, 386 So. 2d 881, 882 (Fla. 1st DCA 1980)).

Guillen establishes that the enumerated categories of "controlled substances" in Florida's drug Schedules are alternative "elements." For that reason, we may consult *Shepard* documents to identify the "controlled substance" element for which Jackson was convicted. The criminal information submitted in the district court shows that his offenses related to "cocaine."

When Jackson was convicted of his cocaine-related offenses, § 893.03(2)(a)(4) set forth the formulations encompassed within the category of cocaine, according to Florida's Schedule II: "[c]ocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine." That description also included ioflupane.

We know this because of Florida's actions after the United States exempted ioflupane from the federal Schedule II. As of July 1, 2017, Florida followed suit and expressly exempted ioflupane from its Schedule II. 2017 Fla. Sess. Law Serv. Ch. 2017-110 (C.S.H.B. 505).

Since that time, Florida's Schedule II has included "[c]ocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine, ***except that these substances shall not include ioflupane I 123***." Fla. Stat. § 893.03(2)(a)(4) (2017) (emphasis added). This amended version of the statute expressly excepts ioflupane from qualifying as a Schedule II substance even though it implicitly acknowledges that ioflupane otherwise qualifies as "[c]ocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine." So the amendment confirms that, before the addition of the emphasized phrase—when Jackson committed his § 893.13 offenses—Florida law criminalized sale and possession of ioflupane as a part of its prohibition on the sale and possession of "[c]ocaine 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).

Because § 893.03(2)(a)(4) identified "means," not "elements," in 1998 and 2004, when Jackson was convicted under ***1304** § 893.13(a)(1), a cocaine-related conviction could have been based on any one of these several formulations, including sale of or possession with intent to distribute ioflupane.

C. At the times of Jackson's prior cocaine-related state convictions, Fla. Stat. § 893.13(a)(1)'s controlled-substance element was broader for cocaine-related offenses than ACCA's "serious drug offense" definition, so Jackson's 1998 and 2004 cocaine-related convictions do not qualify as "serious drug offense[s]."

We've sifted through ACCA's definition of "serious drug offense" at the time Jackson unlawfully possessed the firearm for which he was convicted here. We've also sorted out the breadth of Fla. Stat. § 893.13(1)(a) at the times of Jackson's cocaine-related convictions. Now, we must compare the two to see whether Jackson's prior cocaine-related convictions qualify as "serious drug offense[s]" under ACCA.

Everyone agrees that Jackson's 1998 and 2004 § 893.13 cocaine-related convictions satisfy the first and third criteria of a "serious drug offense": they involve sale or possession with intent to distribute, and they are punishable by at least ten years' imprisonment. So we turn to the

second criterion: whether Jackson's convictions involved a "controlled substance."

[16] Because we apply the categorical approach in conducting this comparison, we must presume that Jackson's cocaine-related convictions "rested upon nothing more than the least of the acts criminalized or the least culpable conduct." *United States v. Kushmaul*, 984 F.3d 1359, 1364 (11th Cir. 2021) (internal quotation marks omitted). Here, that means we must assume that Jackson sold and possessed with intent to sell ioflupane. But as we have explained, on September 26, 2017—when Jackson possessed the firearm here—the federal Schedule II expressly excluded ioflupane as a cocaine-related controlled substance. Because ioflupane was not a "controlled substance" under federal law when Jackson committed his § 922(g) firearm-possession offense, his state offenses did not "necessarily entail" the conduct set out in ACCA's "serious drug offense" definition. *See Shular*, 140 S. Ct. at 784. As a result, Jackson's cocaine-related prior convictions do not qualify under ACCA as "serious drug offense[s]."

D. The two *Smith* cases, *Shular*, and *McNeill* do not require the conclusion that Jackson's prior cocaine-related convictions qualify as "serious drug offense[s]."

The government argues that *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014) ("*Smith 2014*"), *United States v. Smith*, 983 F.3d 1213 (11th Cir. 2020) ("*Smith 2020*"), and *Shular*, —— U.S. ——, 140 S. Ct. 779, 206 L.Ed.2d 81, require the conclusion that Jackson's prior cocaine-related convictions qualify as "serious drug offense[s]." We disagree.

We start with the two *Smith* cases and *Shular*. As relevant here, in *Smith 2014*, we considered whether Fla. Stat. § 893.13(1) was a "serious drug offense" under ACCA's § 924(e)(2)(A)(ii), given that § 893.13(1) included no mens rea element on the illicit nature of the controlled substance. *See Smith 2014*, 775 F.3d at 1268. We concluded it was. A few years later, in *Shular*, the Supreme Court agreed. *See Shular*, 140 S. Ct. at 784–85. It explained that, when evaluating whether a state offense qualifies as a "serious drug offense," we "should ask whether the state offense's elements 'necessarily entail one of the types of conduct' identified in § 924(e)(2)(A)(ii)." *Id.* at 784 (emphasis ***1305** omitted). Later in 2020, the same issue came before us again. Relying on *Shular* (and *Smith 2014*), we confirmed that Fla. Stat. § 893.13(1)'s lack of a mens rea element does not prevent it from qualifying as a "serious drug offense." *Smith 2020*, 983 F.3d at 1223.

The government argues that the two *Smith* cases bind us under the prior-panel-precedent rule (and *Shular* binds us as Supreme Court precedent) to conclude that any conviction—including Jackson's 1998 and 2004 ones—under § 893.13(1) satisfies the definition of "serious drug offense" in § 924(e)(2)(A)(ii). Not so.

[17] **[18]** Under our prior-panel-precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015). True, we have "categorically rejected an overlooked reason or argument exception to the prior-panel-precedent rule." *Id.* But "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed. 411 (1925).

[19] The question of which version of the Controlled Substance Act's drug Schedules governs under § 924(e)(2)(A)(ii)'s definition of "serious drug offense" was not even a twinkle in our eyes or in those of the Supreme Court in the *Smith* cases and in *Shular*. Rather, in those three cases, the issue was whether Fla. Stat. § 893.13(1)'s lack of a mens rea element precluded it from qualifying as a "serious drug offense." At most, the *Smith* panels and the Supreme Court in *Shular* implicitly assumed all the other criteria to satisfy the federal definition of "serious drug offense" were met. But "assumptions are not holdings," *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1239 (11th Cir. 2016). Indeed, the Supreme Court has recognized that where it has "never squarely addressed [an] issue, and ha[d] at most assumed [the issue], [it is] free to address the issue on the merits" in a later case presenting it. *Brecht v. Abrahamson*, 507 U.S. 619, 631, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *see also United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38, 73 S.Ct. 67, 97 L.Ed. 54 (1952) ("The effect of the omission was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point.") (footnote omitted). Our sister circuits adhere to this principle as well. *See, e.g.*, *Fernandez v. Keisler*, 502 F.3d 337, 343 (4th Cir. 2007) ("We are bound by holdings, not unwritten assumptions."); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("In those cases, this court simply assumed that the commerce clause applied, but the issue was never raised or discussed. Such unstated assumptions on non-

litigated issues are not precedential holdings binding future decisions."); *United States v. Norris*, 486 F.3d 1045, 1054 (8th Cir. 2007) (en banc) (Colloton, J., concurring in the judgment) (citing cases finding that *sub silentio* holdings, unstated assumptions, and implicit rejections of arguments by prior panel are not binding circuit precedent).

Here, to the extent that *Shular* and *Smith 2020* bind us to reach any conclusion, it's that Jackson's 1998 and 2004 § 893.13(1) cocaine-related convictions cannot qualify as "serious drug offense[s]" under § 924(e)(2)(A)(ii). That is so because *Shular* holds that we "should ask whether the state offense's elements 'necessarily entail one of the types of conduct' identified in § 924(e)(2)(A)(ii)" to determine ***1306** whether the state offense meets the definition of "serious drug offense." 140 S. Ct. at 784 (emphasis omitted). And conduct involving the sale of or possession with intent to distribute cocaine-related substances under § 924(e)(2)(A)(ii) does not include conduct involving the sale of or possession with intent to distribute ioflupane.

As for *McNeill*, there, as we have mentioned, the Supreme Court held that, in evaluating whether a prior state conviction qualifies as a "serious drug offense" under § 924(e)(2)(A)(ii), we must consider the offense under state law as it existed at the time of that prior state conviction, not later. 563 U.S. at 820, 131 S.Ct. 2218. The Court grounded its analysis in the "previous convictions" language in § 924(e), which necessarily asks a "backward-looking question." *Id.*

But here, we are considering the *federal standard* to which we compare the answer to *McNeill*'s "backward-looking question" of what the defendant's "previous [state] conviction[ ]" was. And that federal standard comes into play only because of the federal firearm-possession violation to which it is attached—a violation that occurred after the "previous conviction[ ]." Our question was not before the Court in *McNeill*. And *McNeill*'s reasoning, which relied on the language "previous convictions," has no application here. As the First Circuit has explained, though *McNeill* holds that "the elements of the state offense of conviction are locked in at the time of that conviction," it does "not also hold that ACCA's own criteria for deeming a 'previous conviction[ ]' with those locked-in characteristics to be a 'serious drug offense,' [a]re themselves also locked in as of the time of the 'previous conviction[ ].' " *United States v. Abdulaziz*, 998 F.3d 519, 525–26 (1st Cir. 2021) (citations and quotation marks omitted); *see also United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021) ("*McNeill* nowhere implies that the court must ignore current federal law and turn to a superseded version of the United States Code."); *United States v. Hope*, 28 F.4th 487, 505 (4th Cir. 2022) ("*McNeill* does not prohibit us from considering changes to federal law for the purposes of the ACCA.").

In short, no prior precedent precludes our ruling today.

IV.

Because Jackson's cocaine-related § 893.13 offenses do not qualify as "serious drug offenses" under ACCA, we vacate Jackson's sentence and remand to the district court for sentencing without the ACCA enhancement.

VACATED and REMANDED.

All Citations

36 F.4th 1294, 29 Fla. L. Weekly Fed. C 1235

Footnotes

1 Ancient Romans apparently identified the principle thousands of years ago. "*Praemonitus, praemunitus*" is a Latin proverb that translates loosely to "forewarned, forearmed." The Phrase Finder, https://www.phrases.org.uk/meanings/forewarned-is-forearmed.html (last visited June 9, 2022).

2 As relevant here, these offenses qualified as "violent felon[ies]" because they each were a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

3 Section 811(a)(2) authorizes the Attorney General to "remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule." *See also* 21 U.S.C. § 812(c), Schedule II(a) (listing controlled substances "[u]nless specifically excepted"); *id.* § 812 Note ("For updated and republished schedules of controlled substances established by this section, see Code of Federal Regulations, Part 1308 of Title 21, Food and Drugs.").

4 The Supreme Court has discussed other elements of § 893.13(1)(a), but they are not relevant here. *See Shular*, 140 S. Ct. at 784 (noting that under Section 893.13(1)(a), " 'knowledge of the illicit nature of a controlled substance is not an element,' but lack of such knowledge 'is an affirmative defense' ") (quoting Fla. Stat. § 893.101(2)).

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55 F.4th 846
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Eugene JACKSON, Defendant-Appellant.

No. 21 13963

Filed: 12/13/2022

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of Florida, No. 1:19-cr-20546-KMW-1, Kathleen M. Williams, J., of being a felon in possession of a firearm, and was sentenced under the Armed Career Criminal Act (ACCA) to a 15-year prison term. Defendant appealed.

Holdings: The Court of Appeals, Rosenbaum, Circuit Judge, held that:

[1] Controlled Substance Act Schedules that were incorporated into ACCA's "serious drug offense" definition at time defendant committed his prior state drug offense governed, and

[2] prior Florida convictions for sale of cocaine and possession with intent to sell cocaine qualified as predicate "serious drug offenses" under ACCA.

Affirmed.

Opinion, 36 F.4th 1294, superseded.

Rosenbaum, Circuit Judge, filed a concurring opinion.

West Headnotes (12)

[1] **Criminal Law** Review De Novo

The Court of Appeals reviews de novo whether state conviction qualifies as a predicate "serious drug offense" for Armed Career Criminal Act (ACCA) purposes. 18 U.S.C.A. § 924(e)(2)(A).

[2] **Sentencing and Punishment** Construction

Sentencing and Punishment Miscellaneous particular offenses

When conducting review of whether state conviction qualifies as a predicate "serious drug offense" for Armed Career Criminal Act (ACCA) purposes, the Court of Appeals is bound by federal law when it interprets terms in ACCA and bound by state law when it interprets elements of state-law crimes. 18 U.S.C.A. § 924(e)(2)(A).

[3] **Sentencing and Punishment** Miscellaneous particular offenses

To determine whether prior conviction under state law qualifies as "serious drug offense" for purposes of Armed Career Criminal Act (ACCA), Court of Appeals focuses on statutory definition of state offense at issue, rather than facts underlying defendant's conviction. 18 U.S.C.A. § 924(e)(2)(A)(ii).

[4] **Sentencing and Punishment** Miscellaneous particular offenses

A state conviction cannot serve as an Armed Career Criminal Act (ACCA) predicate offense if the state law under which the conviction occurred is categorically broader, that is, if it punishes more conduct, than ACCA's definition of a "serious drug offense"; so if there is conduct that would violate the state law but fall out-side of ACCA's "serious drug offense" definition, the state law cannot serve as a predicate offense, regardless of the actual conduct that resulted in the defendant's conviction. 18 U.S.C.A. § 924(e)(2)(A)(ii).

4 Cases that cite this headnote

[5] **Sentencing and Punishment** Offenses Usable for Enhancement

When a statute is divisible, meaning it lists elements in the alternative, and thereby defines multiple crimes, the Court of Appeals uses the modified categorical approach to assess whether a prior conviction qualifies as an Armed Career Criminal Act (ACCA) predicate. 18 U.S.C.A. § 924(e)(2)(A)(ii).

[6] **Sentencing and Punishment** Offenses Usable for Enhancement

In contrast to the modified categorical approach to assess whether a prior conviction qualifies as an Armed Career Criminal Act (ACCA) predicate, when the statute lists alternative means of satisfying a single element, the standard categorical approach applies. 18 U.S.C.A. § 924(e)(2)(A)(ii).

[7] **Courts** Number of judges concurring in opinion, and opinion by divided court

Under the prior-panel-precedent rule, a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by Court of Appeals sitting en banc.

[8] **Courts** Previous Decisions as Controlling or as Precedents

For purposes of application of the prior-panel-precedent rule, questions which merely lurk in record, neither brought to attention of court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.

[9] **Sentencing and Punishment** Miscellaneous particular offenses

The Controlled Substance Act Schedules that were incorporated into the definition of "serious drug offense" under the Armed Career Criminal Act (ACCA) as of the time defendant was convicted of his prior state drug offense, and not schedules at the time he committed his crime of being a felon in possession of firearm, governed, in determining whether defendant's prior Florida convictions for sale of cocaine and possession with intent to sell cocaine qualified as predicate "serious drug offenses" that would support imposition of enhanced sentence under the ACCA. 18 U.S.C.A. § 924(e)(2)(A); Comprehensive Drug Abuse Prevention and Control Act of 1970 § 102, 21 U.S.C.A. § 802; Fla. Stat. Ann. § 893.13.

7 Cases that cite this headnote

[10] **Sentencing and Punishment** Miscellaneous particular offenses

Defendant's prior Florida convictions for sale of cocaine and possession with intent to sell cocaine qualified as predicate "serious drug offenses," and would support imposition of enhanced sentence under the Armed Career Criminal Act (ACCA) for defendant's federal offense of being a felon in possession of a firearm; Florida statute in effect at time of defendant's prior convictions prohibited, among other things, the sale of, or possession with intent to distribute, ioflupane, and at the time of his state convictions ioflupane was a "controlled substance" for purposes of the ACCA's "serious drug offense" definition. 18 U.S.C.A. § 924(e)(2)(A); Comprehensive Drug Abuse Prevention and Control Act of 1970 § 102, 21 U.S.C.A. § 802; Fla. Stat. Ann. § 893.13.

2 Cases that cite this headnote

[11] **Constitutional Law** Habitual and career offenders

Sentencing and Punishment Miscellaneous particular offenses

Construction of the Armed Career Criminal Act's (ACCA) definition of a "serious drug offense" to incorporate the version of the federal controlled substances schedules in effect at the time defendant committed his prior state drug

offense, instead of the version in effect at the time he committed the federal firearm offense, did not violate due process; defendants with prior convictions that were "serious drug offenses" were charged with knowing that their federal drug convictions continued to qualify even if the controlled substances involved in their prior drug convictions were no longer on the federal drug schedules at the time of their federal firearms offenses, thereby eliminating any concerns as to fair notice. U.S. Const. Amend. 5; 18 U.S.C.A. § 924(e)(2)(A)(ii).

8 Cases that cite this headnote

[12] **Statutes** Unintended or unreasonable results; absurdity

Even if a law produces a result that may seem odd, that oddity does not render the law absurd, and a law must be truly absurd before a court can disregard its plain meaning.

***848** Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:19-cr-20546-KMW-1

Attorneys and Law Firms

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Edmund Gerard LaCour, Jr., Alabama Attorney General's Office, Montgomery, AL, for Amici Curiae State of Alabama, State of Georgia, State of Florida.

Before Rosenbaum, Jill Pryor, and Ed Carnes, Circuit Judges.

Opinion

ROSENBAUM, Circuit Judge:

***849** The Armed Career Criminal Act, 18 U.S.C. § 924(e), mandates a fifteen-year minimum sentence for a defendant who possesses a firearm and satisfies any of 18 U.S.C. § 922(g)(1)'s conditions while having at least three qualifying "previous convictions." "[P]revious convictions" qualify if they are for a "violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). This appeal concerns ACCA's definition of "serious drug offense."

A prior state conviction satisfies ACCA's definition of "serious drug offense" if it is one "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (*as defined in section 102 of the Controlled Substances Act* ...), for which a maximum term of imprisonment of ten years or more is prescribed by law." *Id.* § 924(e)(2)(A)(ii) (emphasis added). Not surprisingly, the Controlled Substances Act's list of controlled substances changes from time to time. We must decide which version of the controlled-substances list ACCA's definition of "serious drug offense" incorporates: the one in effect when the defendant violated 18 U.S.C. § 922(g)(1) (the "firearm offense") or the one in effect when the defendant was convicted of his prior state drug offense. We hold that the Supreme Court's reasoning in *McNeill v. United States*, 563 U.S. 816, 131 S.Ct. 2218, 180 L.Ed.2d 35 (2011), 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 state drug offense.

I.

The facts here are straightforward. Eugene Jackson pled guilty to possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). In support of his guilty plea, the factual proffer shows that he unlawfully possessed a loaded firearm on September 26, 2017.

In Jackson's presentence investigation report, the probation officer concluded that Jackson qualified for a sentence enhancement under ACCA based on his prior criminal history. That is, the officer determined that, when Jackson possessed the firearm, he had at least three prior convictions for a "violent felony or a serious drug offense, or both, committed on occasions different from one another." *Id.* § 924(e)(1). And under those circumstances, ACCA mandates

a fifteen-year minimum sentence for violation of the firearm prohibition in 18 U.S.C. § 922(g).

Although Jackson conceded that he had two prior convictions that satisfy ACCA's definition of a "violent felony,"[1] he objected to the probation officer's conclusion that his two cocaine-related convictions met ACCA's "serious drug offense" definition. But the district court overruled Jackson's objection, finding that his cocaine-related convictions did qualify. Based on that determination, the district court sentenced Jackson to ACCA's mandatory fifteen-year minimum.

Jackson now appeals his sentence.

II.

[1] **[2]** We review de novo the legal question whether a prior state conviction ***850** qualifies as a "serious drug offense" under ACCA. *United States v. Conage*, 976 F.3d 1244, 1249 (11th Cir. 2020) (citing *United States v. Robinson*, 583 F.3d 1292, 1294 (11th Cir. 2009)). When we conduct our review, federal law binds our construction of ACCA, and state law governs our analysis of elements of state-law crimes. *Id.* (quoting *United States v. Braun*, 801 F.3d 1301, 1303 (11th Cir. 2015)).

III.

Jackson contends that neither of his prior cocaine-related convictions under Florida Statute § 893.13 meets ACCA's definition of a "serious drug offense." So we turn to that definition. As we have noted, ACCA defines a "serious drug offense" to include "an 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." 18 U.S.C. § 924(e)(2)(A)(ii).

[3] To determine whether a prior conviction under state law qualifies as a "serious drug offense," we focus on "the statutory definition of the state offense at issue, rather than the facts underlying the defendant's conviction." *Conage*, 976 F.3d at 1250. We call this the "categorical approach." *Id.* (quoting *Robinson*, 583 F.3d at 1295).

[4] **[5]** **[6]** Under this approach, a state conviction cannot serve as an ACCA predicate offense if the state law under which the conviction occurred is categorically broader—that is, if it punishes more conduct—than ACCA's definition of a "serious drug offense." *See id.* So if there is conduct that would violate the state law but fall out-side of ACCA's "serious drug offense" definition, the state law cannot serve as a predicate offense—"regardless of the actual conduct that resulted in the defendant's conviction." *Id.* Our task here, then, is to compare the state law that defines Jackson's prior cocaine-related offenses with ACCA's definition of a "serious drug offense" to see whether the state crime is categorically broader than a "serious drug offense."[2]

In conducting that analysis, we analyze "the version of state law that the defendant was actually convicted of violating." *McNeill*, 563 U.S. at 821, 131 S.Ct. 2218. Here, Jackson's two potential "serious drug offenses" include convictions for violating Florida Statute § 893.13 in 1998 and ***851** in 2004 with conduct involving cocaine. In 1998 and in 2004, when Jackson was convicted of his cocaine-related offenses, Section 893.13(1) criminalized selling, manufacturing, delivering, or possessing with the intent to sell, manufacture, or deliver, cocaine and cocaine-related substances, including a substance called ioflupane (123I) ("ioflupane").[3]

The federal version of Schedule II also encompassed ioflupane in 1998 and 2004, when Jackson was convicted of his Section 893.13(1) offenses.[4] But that changed in 2015. Then, the federal government exempted ioflupane from Schedule II because of its potential value in diagnosing Parkinson's disease. 80 Fed. Reg. at 54716; *see also* 21 C.F.R. § 1308.12(b)(4)(ii) (2017); *id.* (2021).[5] So in 2017, when Jackson possessed the firearm that resulted in his federal conviction under 18 U.S.C. § 922(g)(1) here, ioflupane was not a controlled substance "as defined ... [under] the Controlled Substances Act," *id.* § 924(e)(2)(A)(ii).

Based on this fact, Jackson argues that Section 893.13(1), which punished ioflupane-related conduct when Jackson was convicted of his prior state drug offenses, is categorically broader than ACCA's definition, which no longer punished ioflupane-related conduct when Jackson committed his present § 922(g)(1) firearm offense. This argument works if ACCA's definition incorporates the version of the controlled-substances schedules in effect when a defendant commits the

firearm offense rather than the version in effect when he was convicted of his prior state drug offense. We consider, then, which version of the federal controlled-substances schedules ACCA's definition of "serious drug offense" incorporates: the one in place at the time of the prior state conviction, or the one in place at the time the defendant committed the present federal firearm offense.

We divide our discussion into two parts. In Section A, we explain why the Supreme Court's and our precedents on Section 893.13(1) do not answer the question we must address. Section B, in contrast, ***852** shows why the Supreme Court's reasoning in *McNeill* does. Section B then answers the question this case presents, before applying that answer to the facts in this appeal.

A.

The government identifies three decisions it says foreclose Jackson's argument. We think not.

In two of the decisions the government identifies, we addressed whether Section 893.13(1)'s lack of a mens rea element[6] with respect to the illicit nature of the controlled substance renders the state statute overbroad in comparison to ACCA's "serious drug offense" definition. And in all three decisions, the Supreme Court and this Court held that Section 893.13(1), which lacks a mens rea element as to the illicit nature of the controlled substance, qualifies as a "serious drug offense" under ACCA.

In *United States v. Travis Smith*, 775 F.3d 1262 (11th Cir. 2014), we held that ACCA's definition of a "serious drug offense" does not include a mens rea element with respect to the illicit nature of the controlled substance. *Id.* at 1267. Rather, that definition "require[s] only that the predicate offense 'involv[es],' ... certain activities related to controlled substances." *Id.* (second alteration in original) (quoting 18 U.S.C. § 924(e)(2)(A)(ii)). And because Section 893.13(1) involves those activities, we held that a violation of the statute qualifies as a "serious drug offense" under ACCA—despite the fact that the statute lacks a mens rea element with respect to the illicit nature of the controlled substance. *Id.* at 1268. In so holding, we made clear that "[w]e need not search for the elements of" a generic definition of "serious drug offense" because that term is "defined by a federal statute ...." *Id.* at 1267.

In *Shular v. United States*, —— U.S. ——, 140 S. Ct. 779, 206 L.Ed.2d 81 (2020), the Supreme Court agreed. Shular argued that the definition of "serious drug offense" describes "not conduct, but [generic] offenses." *Id.* at 782. In his view, courts were required to "first identify the elements of the 'generic' offense" before asking "whether the elements of the state offense match those of the generic crime." *Id.* But the Court rejected that view, holding that ACCA's " 'serious drug offense' definition requires only that the state offense involve the conduct specified in the federal statute; it does not require that the state offense match certain generic offenses." *Id.* Although *Shular* explicitly did not reach the mens rea issue we addressed in *Travis Smith*, *see Shular*, 140 S. Ct. at 787 n.3, the Court nevertheless affirmed our judgment that convictions under Section 893.13(1) do qualify as "serious drug offenses" under ACCA, *id.* at 784, 787; *see also United States v. Shular*, 736 F. App'x 876, 877 (11th Cir. 2018) (relying on *Travis Smith* to hold that Shular's convictions under Fla. Stat. § 893.13 qualify as serious drug offenses under ACCA), *aff'd*, —— U.S. ——, 140 S. Ct. 779, 206 L.Ed.2d 81 (2020).

Finally, in *United States v. Xavier Smith*, 983 F.3d 1213 (11th Cir. 2020), relying on *Travis Smith* and *Shular*, we affirmed that "ACCA's definition of a serious drug offense 'requires only that the state offense *involve* the conduct specified in the [ACCA]' " and does not require a " 'generic-offense matching exercise.' " *Id.* at 1223 (alteration in original) (quoting *Shular*, 140 S. Ct. at 782–84). And we ***853** again rejected the argument that Section 893.13(1) cannot qualify as a "serious drug offense" under ACCA because it lacks a mens rea element. *See id.* ("Smith's argument that his prior convictions cannot qualify because the state offense lacks a mens rea element is foreclosed by our [*Travis*] *Smith* precedent and the Supreme Court's precedent in *Shular*.").

[7] The government insists that these three decisions, together with our prior-panel-precedent rule, require us to conclude that Jackson's cocaine-related convictions under Section 893.13 are "serious drug offense[s]" because, in the government's view, we have already declared that Section 893.13 is a "serious drug offense." Under our prior-panel-precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (quoting *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008)). And we have

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"categorically rejected an overlooked reason or argument exception to the prior-panel-precedent rule." *Id.*

[8] But "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed. 411 (1925); *see also, e.g.*, *United States v. Edwards*, 997 F.3d 1115, 1120 (11th Cir. 2021) ("[W]e weren't confronted with the question we face today ... and so, of course, we had no occasion to resolve it."). And *Travis Smith*, *Shular*, and *Xavier Smith* did not address, as Jackson asks us to do here, whether ACCA's "serious drug offense" definition incorporates the version of the controlled-substances schedules in effect when the defendant was convicted of his prior state drug offenses or the version in effect when he committed his present firearm offense.

Rather, those decisions presented two questions relating to ACCA's "serious drug offense" definition: first, whether the definition requires that the state offense match certain generic offenses, *see Travis Smith*, 775 F.3d at 1267; *Shular*, 140 S. Ct. at 782; and second, whether Section 893.13(1) convictions cannot qualify as ACCA predicates because that statute lacks a mens rea element with respect to the illicit nature of the controlled substance, *see Travis Smith*, 775 F.3d at 1267–68; *Xavier Smith*, 983 F.3d at 1223. In answering the two questions, the decisions construed the part of ACCA's "serious drug offense" definition that requires the state offense to involve the *conduct* of "manufacturing, distributing, or possessing with intent to manufacture or distribute." 18 U.S.C. § 924(e)(2)(A)(ii); *see Travis Smith*, 775 F.3d at 1267 (holding that ACCA's serious drug offense definition requires "only that the predicate offense involves ... certain activities related to controlled substances" (alteration adopted and quotation marks omitted)); *Shular*, 140 S. Ct. at 782 (holding that ACCA's " 'serious drug offense' definition requires only that the state offense involve the conduct specified in the federal statute"); *Xavier Smith*, 983 F.3d at 1223 (noting that "ACCA's definition of a serious drug offense 'requires only that the state offense *involve* the conduct specified in the ACCA' " (alteration adopted) (quoting *Shular*, 140 S. Ct. at 782)).

In contrast, this case asks us to construe the part of ACCA's "serious drug offense" definition that requires the state offense to involve "a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. [§] 802))." 18 U.S.C. § 924(e)(2)(A)(ii). At best, the *Smith* decisions ***854** and *Shular* assumed that this part of the "serious drug offense" definition and Section 893.13(1) encompass the same universe of substances. But "assumptions are not holdings." *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1239 (11th Cir. 2016); *see also Brecht v. Abrahamson*, 507 U.S. 619, 631, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) ("[S]ince we have never squarely addressed the issue, and have at most assumed [the issue], we are free to address the issue on the merits."); *Fernandez v. Keisler*, 502 F.3d 337, 343 n.2 (4th Cir. 2007) ("We are bound by holdings, not unwritten assumptions."); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions."); *United States v. Norris*, 486 F.3d 1045, 1054 (8th Cir. 2007) (en banc) (Colloton, J., concurring in the judgment) (collecting decisions in which implicit assumptions, findings, or questions were not given precedential effect).

And *Travis Smith*, *Xavier Smith*, and *Shular* did not address the question this appeal presents: whether ACCA's "serious drug offense" definition incorporates the version of the federal controlled-substances schedules in effect when the defendant was convicted of his prior state drug offenses or the version in effect when he committed his firearm offense. We consider that question now.

B.

We apply the categorical approach in three steps. First, we identify the criteria ACCA uses to define a state "serious drug offense" under 18 U.S.C. § 924(e)(2)(A)(ii). This step requires us to decide which version of the federal controlled-substances schedules that definition incorporates. Second, we turn to the "statutory definition of the state offense at issue." *Conage*, 976 F.3d at 1250. Here, that definition resides at Florida Statute § 893.13(1), which describes the elements of Jackson's prior cocaine-related offenses. Third, we compare the results of those steps to determine whether Section 893.13(1) is categorically broader—that is, whether it punishes more conduct—than ACCA's "serious drug offense" definition. If Section 893.13(1) is not categorically broader than ACCA's "serious drug offense" definition, then Jackson's prior cocaine-related offenses qualify as "serious drug offense[s]."

i.

We break the first step into two parts. The first part explains our bottom-line conclusion: ACCA's definition of a state "serious drug offense" incorporates the version of the federal controlled-substances schedules in effect when the defendant was convicted of the prior state drug offense. The second part then addresses arguments against that conclusion.

1.

[9] We start with the three criteria ACCA uses to define a state "serious drug offense" under 18 U.S.C. § 924(e)(2)(A)(ii). First, the prior state offense must involve certain conduct: "manufacturing, distributing, or possessing with intent to manufacture or distribute." *Id.* Second, that conduct must involve "a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. [§] 802))." *Id.* And third, that conduct involving a controlled substance must be punishable by a maximum term of imprisonment of at least ten years. *Id.*

The Supreme Court has already interpreted the first and third criteria. As we've explained, *Shular* settles the meaning of the first criterion, which the Supreme Court held "requires only that the state offense involve the conduct specified in the ***855** federal statute; it does not require that the state offense match certain generic offenses." 140 S. Ct. at 782. The Supreme Court addressed the third criterion ("for which a maximum term of imprisonment of ten years or more is prescribed by law") in *McNeill*, 563 U.S. at 820–21, 131 S.Ct. 2218, so it is likewise not in controversy here.

That leaves the second criterion—the offense must involve a "controlled substance." The part of the "serious drug offense" definition that deals with prior state convictions defines a "controlled substance" by reference to Section 102 of the Controlled Substances Act. *See* 18 U.S.C. § 924(e)(2)(A)(ii) (incorporating 21 U.S.C. § 802). Section 102, in turn, defines a "controlled substance" to include any substance on the federal drug schedules. *See* 21 U.S.C. § 802(6). But those schedules are not static. Indeed, Congress has authorized the Attorney General to remove drugs from (and add drugs to) those schedules. *See supra* note 5; 21 U.S.C. § 811 (authorizing the Attorney General to add substances to, subtract them from, or transfer them between the controlled-substances schedules). So we must decide whether ACCA's definition of a "serious drug offense" under state law incorporates the version of the federal drug schedules in effect when Jackson was convicted of his prior state drug offenses or the version in effect when Jackson committed his firearm offense.

We conclude that the Supreme Court's reasoning in *McNeill* requires us to read ACCA's definition of a "serious drug offense" under state law to incorporate the version of the federal controlled-substances schedules in effect when Jackson was convicted of his prior state drug offenses.

In *McNeill*, as we've mentioned, the Supreme Court construed ACCA's third criterion for qualifying prior state drug offenses: the requirement that the state law prescribe "a maximum term of imprisonment of ten years or more" as a punishment for that drug offense. 563 U.S. at 820, 131 S.Ct. 2218 (quoting 18 U.S.C. § 924(e)(2)(A)(ii)). Similar to the question here, in *McNeill* the Supreme Court considered whether, when a federal court assesses the maximum penalty under the state statute of prior conviction, ACCA requires the court to consider the penalties that applied under the state law at the time of the prior conviction or the ones that applied at the time of the sentencing on the firearm offense. *See id.* The Supreme Court concluded that "[t]he plain text of ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense." *Id.*

To explain why the text is plain, the Supreme Court emphasized the term " 'previous convictions,' " which ACCA uses in 18 U.S.C. § 924(e)(1). *See id.* at 819, 131 S.Ct. 2218 (quoting § 924(e)(1)). As a reminder, Section 924(e)(1) imposes a fifteen-year mandatory minimum prison sentence when a defendant possesses a firearm in violation of 18 U.S.C. § 922(g) while having at least "three *previous convictions*" for a "serious drug offense" or a "violent felony." *Id.* § 924(e)(1) (emphasis added). The Supreme Court explained that the term "previous convictions" necessarily calls for a "backward-looking" inquiry and shows that "ACCA is concerned with convictions that have already occurred." *McNeill*, 563 U.S. at 819–20, 131 S.Ct. 2218 (quotation marks omitted). So, the Court continued, the "only way" to determine whether a prior state conviction qualifies as a "serious drug offense" is "to consult the law that applied at the time of that conviction." *Id.* For that reason, the ***856** Court concluded, "the maximum sentence that 'is prescribed by law' for [a previous state conviction] must also be determined according to the law applicable at that time." *Id.* And as a result, changes in state

law after a previous conviction occurs cannot "erase" that "earlier conviction for ACCA purposes." *Id.* at 823, 131 S.Ct. 2218.

To be sure, *McNeill* addresses only the third criterion for ACCA's "serious drug offense" definition—that is, the criterion concerning the penalty imposed under state law. And in addressing that criterion, *McNeill* holds only that (assuming the state crime involved the manufacture, distribution, or possession with intent to manufacture or distribute a qualifying controlled substance) a prior state conviction qualifies as an ACCA predicate if at the time of that conviction the state law authorized a maximum penalty of at least ten years. *See id.* at 817–18, 131 S.Ct. 2218.

McNeill does not address the second criterion, which requires that the prior offense involve a federally controlled substance. So *McNeill* does not expressly determine the answer to the question we address today. *See United States v. Brown*, 47 F.4th 147, 154–55 (3d Cir. 2022); *United States v. Hope*, 28 F.4th 487, 504–05 (4th Cir. 2022); *United States v. Perez*, 46 F.4th 691, 699–700 (8th Cir. 2022); *United States v. Williams*, 48 F.4th 1125, 1142–43 (10th Cir. 2022).[7]

But in our view, upon close consideration, *McNeill*'s reasoning requires us to conclude all the same that the federal controlled-substances schedules in effect at the time of the previous state conviction govern. That is so (1) because using the federal controlled-substances schedules in effect at the time the defendant committed the federal firearm offense would "erase an earlier [state] conviction for ACCA purposes," in violation of *McNeill*'s reasoning, *see McNeill*, 563 U.S. at 823, 131 S.Ct. 2218, and (2) because of the way *McNeill* informs our reading of ACCA's structure.

To explain why, we begin with a 10,000-foot overview of ACCA's structure as it relates to the term "previous convictions" in Section 924(e)(1). Again, Section 924(e)(1) applies a mandatory minimum sentence of fifteen years' imprisonment to a defendant who possesses a firearm in violation of 18 U.S.C. § 922(g) and who "has three previous convictions ... for a violent felony or a serious drug offense, or both." Section 924(e)(2) then defines the terms "violent felony" and "serious drug offense." The definition of "serious drug offense" separately specifies the conditions under which prior federal drug-related convictions qualify (§ 924(e)(2)(A)(i)) and prior state drug-related convictions qualify (§ 924(e)(2)(A)(ii)). Meanwhile, the definition of "violent felony" in Section 924(e)(2)(B) applies uniformly to both prior federal convictions and prior state convictions. So as relevant here, "serious drug ***857** offense" has two definitions (that pertain separately to prior federal convictions and prior state convictions), and "violent felony" has one definition, for a total of three ways Section 924(e)(2) defines "previous convictions" in Section 924(e)(1).

With that in mind, we move on to *McNeill*'s reasoning. As we've noted, *McNeill* broadly construes the term "previous convictions" to require a "backward-looking" inquiry. 563 U.S. at 819–20, 131 S.Ct. 2218 (quotation marks omitted). Because "violent felon[ies]" and both kinds of "serious drug offense[s]" are kinds of "previous convictions" under ACCA, 18 U.S.C. § 924(e), *McNeill*'s reasoning requires us to view these definitions through a backward-looking perspective.

On this score, the Supreme Court reads ACCA's "violent felony" definition in Section 924(e)(2)(B) to incorporate the state law in effect at the time of a defendant's prior state convictions. *McNeill*, 563 U.S. at 822, 131 S.Ct. 2218 (noting that the Court has "repeatedly looked to the historical statute of conviction in the context of violent felonies"). And that is so even though, as the Supreme Court noted, ACCA's definition of "violent felony" uses the present tense:

> ACCA defines "violent felony" in part as a crime that "*has* as an element the use, attempted use, or threatened use of physical force against the person of another" or "*is* burglary, arson, or extortion, *involves* use of explosives, or otherwise *involves* conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B) (emphasis added).
>
> Despite Congress' use of present tense in that definition, when determining whether a defendant was convicted of a "violent felony," we have turned to the version of state law that the defendant was actually convicted of violating.

Id. at 821. In other words, under *McNeill*, the "backward-looking" inquiry governs ACCA's "violent felony" definition wholesale. *See id.* at 821–22, 131 S.Ct. 2218.

McNeill also reads at least part of ACCA's definition of a "serious drug offense" involving a prior state conviction as incorporating that same "backward-looking" inquiry. *See id.* at 825, 131 S.Ct. 2218 (holding "that a federal sentencing court must determine whether 'an offense under State law' is a 'serious drug offense' by consulting the 'maximum term of imprisonment' applicable to a defendant's previous drug offense at the time of the defendant's state conviction for that offense" (quoting § 924(e)(2)(A)(ii))); *id.* at 820,

131 S.Ct. 2218 (noting that because "ACCA is concerned with convictions that have already occurred," "[w]hether the prior conviction was for an offense 'involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance' can only be answered by reference to the law under which the defendant was convicted"). "Having repeatedly looked to the historical statute of conviction in the context of violent felonies," the Court saw "no reason to interpret 'serious drug offenses' in the adjacent section of the same statute any differently" because in "both definitions, Congress used the present tense to refer to past convictions." *Id.* at 822, 131 S.Ct. 2218 (alteration adopted).

Not only is the "previous conviction" inquiry a backward-looking one, but the Supreme Court has concluded that "[i]t cannot be correct that subsequent changes in state law can erase an earlier conviction for ACCA purposes." *Id.* at 823, 131 S.Ct. 2218. In this respect, the Court has reasoned that "Congress based ACCA's sentencing enhancement on prior convictions and could not have expected courts to ***858** treat those convictions as if they had simply disappeared." *Id.*

And that brings us to the first reason that we must conclude that ACCA's definition of a "serious drug offense" under state law incorporates the federal drug schedules in effect at the time of the prior state conviction. If we instead read ACCA's state "serious drug offense" definition to incorporate the federal drug schedules in effect at the time a defendant committed the firearm offense, the state drug convictions would be "erase[d]" or "disappear[ ]" for ACCA purposes when, as in Jackson's case, the federal schedules at the time he committed the firearm offense have omitted the substances that were federally controlled at the time of the prior state conviction. But we know from *McNeill* that that is an impermissible result.

And there's more. So we turn to our second reason why we hold that ACCA's definition of a "serious drug offense" under state law incorporates the federal drug schedules in effect at the time of the prior state conviction: what *McNeill*'s reasoning tells us about how to construe federal law relating to a prior federal drug offense when assessing whether that prior federal drug conviction qualifies as a "previous conviction[ ]" for ACCA purposes. ACCA defines prior federal "serious drug offense[s]" to include, for example, "an offense under the Controlled Substances Act ... for which a maximum term of imprisonment of ten years or more is prescribed by law."[8] 18 U.S.C. § 924(e)(2)(A)(i).

Under *McNeill*'s reasoning requiring a "backward-looking" inquiry, we must read the definition of a prior federal "serious drug offense" as incorporating the version of the Controlled Substances Act (and thus the federal controlled-substances schedules) in effect at the time the defendant's prior federal drug conviction occurred. After all, *McNeill* supports a conclusion that the elements of and penalties for an offense underlying a previous conviction are set—that is, immutable—at the time of that conviction. *See* 563 U.S. at 820, 131 S.Ct. 2218 (noting that in "assessing" a previous offense, the Court "consulted" the "statutes and penalties that applied at the time of" the defendant's conviction); *id.* at 821–22, 131 S.Ct. 2218 (noting that "present-tense verbs" did not "persuade" the Court "to look anywhere other than the law under which" defendants "were actually convicted to determine the elements of their offenses"). And whether the drug involved in the prior federal drug conviction was on the federal controlled-substances schedules at the time of the prior federal drug conviction is certainly an element of an offense under the Controlled Substances Act. So we must read "Controlled Substances Act" to refer to the version of the Act (along with the version of its attendant federal drug schedules) in effect at the time of the prior federal drug conviction.

Because we must construe the definition of a federal "serious drug offense" to incorporate the Controlled Substances Act (and the federal drug schedules it mandates) in existence at the time of the prior federal drug conviction, we cannot simultaneously construe the federal "serious drug offense" definition's single use of that term—Controlled Substances Act—to incorporate the federal drug schedules in effect at the time the defendant committed the federal firearm offense. *See, e.g.*, ***859** *United States v. Bryant*, 996 F.3d 1243, 1258 (11th Cir.) ("[W]e presume that the same words will be interpreted the same way in the same statute."), *cert. denied*, —— U.S. ——, 142 S. Ct. 583, 211 L.Ed.2d 363 (2021).

Reading the term "Controlled Substances Act" in the definition of a federal "serious drug offense" to refer to the version of the law in effect at the time of the federal firearm offense would also cause another problem under *McNeill*. If the drug involved in the prior federal drug conviction no longer appeared on the federal drug schedules at the time the defendant committed the federal firearm offense, the prior federal drug conviction would be "erase[d] ... for ACCA purposes." *McNeill*, 563 U.S. at 823, 131 S.Ct. 2218. But as we've noted, *McNeill* prohibits that result. *See id.* (noting that result "cannot be correct"). So under *McNeill*, the only

way to assess whether a prior federal drug conviction is a "serious drug offense" is to apply the federal drug law and accompanying schedules in effect at the time of the prior federal drug conviction.

[10] That means that if Jackson had been convicted of violating the Controlled Substances Act (rather than Florida Statute § 893.13(1)) for his cocaine-related activity in 1998 and 2004, his prior convictions would qualify as "serious drug offense[s]" under ACCA. *See* 18 U.S.C. § 924(e)(2)(A)(i). And that is so even though the federal definition of "cocaine" was broader in 1998 and in 2004 than it was in 2017, when Jackson possessed the firearm in violation of 18 U.S.C. § 922(g).

We do not think Congress would require the counting of prior federal drug convictions as "serious drug offense[s]" while at the same time not counting equivalent prior state drug convictions. But that would be the result of the construction Jackson urges.

In our view, the structure of ACCA's parallel definitions of "serious drug offense" for state and federal prior convictions logically requires the conclusion that the state-offense definition incorporates the federal drug schedules in effect at the time of the prior state drug conviction. And that we also read the definition of "violent felony" with a wholesale "backward-looking" perspective only adds support to our conclusion that ACCA's definitional structure for qualifying "previous convictions" requires us to read all the definitions with a "backward-looking" perspective. Were that not the case, the definition of a state "serious drug offense" would be the only one of the three definitions of a "previous conviction[ ]" that did not employ a wholesale "backward-looking" perspective.

In sum, then, Section 924(e)'s requirements all turn on the law in effect when the defendant's prior convictions occurred. When possible, we interpret the provisions of a text harmoniously. *See* Scalia & Garner, *supra*, at 180–82; *see also Hylton v. U.S. Att'y Gen.*, 992 F.3d 1154, 1160 (11th Cir. 2021) (applying the harmonious-reading canon). To read the definition in Section 924(e)(2)(A)(ii) harmoniously with the rest of Section 924(e)'s subparts, we must read that definition to incorporate the version of the federal controlled-substances schedules in effect when Jackson's prior state convictions occurred.

2.

Some of our sister circuits and Jackson have identified two arguments for why we should construe ACCA's definition of a "serious drug offense" to incorporate the version of the federal controlled-substances schedules in effect at the time the defendant committed the federal firearm ***860** offense instead of the version in effect at the time of the prior conviction: (1) due process requires such a reading; and (2) when Congress enacted ACCA, we looked to the federal controlled-substances schedules in effect at the time of the federal firearm offense because otherwise, there would have been no federal drug schedules to compare at least some of the prior state drug convictions to, since they would have predated the federal drug schedules. While these are thoughtful arguments, we ultimately must reject them.

[11] First, Jackson and our sister circuits contend that reading Section 924(e)(2)(A)(ii) to incorporate the version of federal drug schedules in effect when the defendant was convicted of his prior state drug offenses raises concerns about fair notice and thus due process. *See Williams*, 48 F.4th at 1142; *Perez*, 46 F.4th at 701. But those with "previous convictions" that are federal "serious drug offenses" are charged with knowing that their federal drug convictions continue to qualify even if the controlled substances involved in their prior federal drug convictions are no longer on the federal drug schedules at the time of their federal firearms offenses. And we are aware of nothing that precludes Congress from enacting legislation that works in this manner.

As we've noted, the Supreme Court has reasoned that the "only way" to determine whether a prior state drug conviction qualifies as a "previous conviction" under ACCA is by "consult[ing] the law that applied at the time of that conviction." *McNeill*, 563 U.S. at 820, 131 S.Ct. 2218 (alteration adopted). Doing so, the Supreme Court has explained, "permits a defendant to know even before he violates § 922(g) whether ACCA would apply." *Id.* at 823, 131 S.Ct. 2218. That reasoning applies as much to the statutory language we consider here as it did to the language the Court addressed in *McNeill*. Put simply, the ACCA term "previous convictions" puts a defendant on notice when he is convicted of a drug offense for conduct involving a controlled substance that at that time appears on the federal drug schedules that his conviction qualifies as a "serious drug offense" under ACCA. And in this way, a person has

a means of knowing "before he violates § 922(g) whether ACCA would apply." *Id.*

We think the second argument against the incorporation of historical federal drug schedules also cannot succeed in the end. That argument goes like this: if Congress intended to incorporate the version of the federal drug schedules in effect at the time of a defendant's prior state drug offense, then convictions that predate the federal drug schedules would not qualify as ACCA predicates. Because that result would be, in Jackson's words, "odd," Congress must have intended to incorporate the version of the federal drug schedules in effect at the time the defendant committed the firearm offense.

[12] But even if a law produces a result that "may seem odd," that oddity does not render the law "absurd." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005). And a law "must be truly absurd before" we can disregard its plain meaning. *Silva-Hernandez v. U.S. Bureau of Citizenship & Immigr. Servs.*, 701 F.3d 356, 363 (11th Cir. 2012) (quotation marks omitted). We cannot say that is the case here. *Cf. McNeill*, 563 U.S. at 822, 131 S.Ct. 2218 ("This natural reading of ACCA [to require consulting the law that applied at the time of the prior state conviction] also avoids the absurd results that would follow from consulting current state law to define a previous offense."). So we must follow what the Supreme Court has found is the plain meaning of ACCA's text. And ***861** that plain meaning, as we've noted, requires that we apply a backward-looking perspective to the entirety of the "serious drug offense" definition.

In short, we hold that Section 924(e)(2)(A)(ii) incorporates the version of the federal drug schedules in effect when a defendant was convicted of his prior state drug offenses. When Jackson was convicted of his state cocaine-related offenses in 1998 and 2004, the federal schedules included ioflupane as a controlled substance. *See supra* note 3. So at step one of our categorical analysis, we conclude that ACCA's "serious drug offense" definition encompasses a prior state offense that involved "manufacturing, distributing, or possessing with intent to manufacture or distribute" ioflupane, "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii).

ii.

That brings us to steps two and three. At step two, we look at the "statutory definition of the state offense at issue." *Conage*, 976 F.3d at 1250. "All that counts" at this step "are 'the elements of the statute of conviction.' " *Mathis*, 579 U.S. at 509, 136 S.Ct. 2243 (quoting *Taylor v. United States*, 495 U.S. 575, 601, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)). To find those elements, we consider "the version of state law that the defendant was actually convicted of violating." *McNeill*, 563 U.S. at 821, 131 S.Ct. 2218. Then, at step three, we compare the elements of the state offense to ACCA's "serious drug offense" definition to determine whether the state offense is categorically broader than ACCA's "serious drug offense" definition.

Jackson argues that Florida Statute § 893.13(1), the statute he was convicted of violating in 1998 and 2004, is categorically overbroad because in 1998 and 2004, Section 893.13(1) encompassed conduct involving ioflupane while the definition of "serious drug offense" did not.[9] But as we have explained, the federal drug schedules included ioflupane in 1998 and 2004, when Jackson was convicted of his prior state drug offenses. And *McNeill*'s reasoning requires us to conclude that the 1998 and 2004 versions of the federal drug schedules are what govern. So Section 893.13(1) did not reach more conduct with respect to cocaine than does ACCA's "serious drug offense" definition as it relates to Jackson's 1998 and 2004 prior state drug convictions.

Jackson has suggested no other reason why Section 893.13(1) might be categorically broader than ACCA's definition for a "serious drug offense." We therefore conclude that Jackson's 1998 and 2004 ***862** Section 893.13(1) cocaine convictions qualify as "serious drug offense[s]" under 18 U.S.C. § 924(e)(1).

IV.

For these reasons, we affirm the district court's judgment.

AFFIRMED.

Rosenbaum, Circuit Judge, concurring:

The statutory language we interpret here is yet another example of how ACCA produces "statutory questions" that "end up clogging the federal court dockets," Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum*

Sentencing, 133 HARV. L. REV. 200, 206 (2019). Even "judges struggle" to resolve those questions. *Id.* Indeed, today's decision tallies the score at one circuit that concludes that we look to the federal controlled-substances schedules in effect at the time of the prior state conviction and four that reach the opposite conclusion and instead look to the federal controlled-substances schedules in effect at the time of the federal firearm offense. *See United States v. Brown*, 47 F.4th 147, 154–55 (3d Cir. 2022); *United States v. Hope*, 28 F.4th 487, 504–05 (4th Cir. 2022); *United States v. Perez*, 46 F.4th 691, 699–700 (8th Cir. 2022); *United States v. Williams*, 48 F.4th 1125, 1142–43 (10th Cir. 2022). And it's even more confusing than that, as we previously agreed with those four circuits. *United States v. Jackson*, 36 F.4th 1294, 1299–1301 (11th Cir. 2022) ("*Jackson I*"), *vacated*, 2022 WL 4959314 (11th Cir. 2022).

Due process requires that criminal laws notify "ordinary people" not only about the lawfulness of their conduct, but also about the penalties for engaging in conduct that is unlawful. *Johnson v. United States*, 576 U.S. 591, 595–96, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). An ordinary citizen seeking notice about whether her prior offenses qualify as ACCA predicates must, in line with today's decision, research the historical versions of controlled-substances list. And that's a heavy lift for the ordinary citizen.

That said, and as the panel opinion explains, the Supreme Court has said that the term "previous convictions" evidences congressional intent to read the definitions for "violent felony" and "serious drug offense" with an eye to what the law was at the time of the "previous conviction[ ]," so we can't say that the statute doesn't provide fair notice of what prior convictions qualify as predicate offenses under ACCA. *See* Maj. Op. at 16–17, 20–22 (citing *McNeill v. United States*, 563 U.S. 816, 131 S.Ct. 2218, 180 L.Ed.2d 35 (2011)).

Still, it is quite remarkable to expect the "ordinary citizen," seeking "to conform his or her conduct to the law," *City of Chicago v. Morales*, 527 U.S. 41, 58, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999), to understand the ins and outs of ACCA—especially when, as today's decision demands, they require historical research of the federal controlled-substance schedules. *Cf. Williams*, 48 F.4th at 1142. Adding to the extraordinary nature of what we find ACCA requires is the fact that ACCA may be unique in requiring application of historical federal law in this way, as opposed to the federal law in place at the time of the federal violation.[1]

***863** For the reasons we explain in the panel opinion, the law mandates an affirmance in this case. But I am deeply concerned that our reading seemingly requires the "ordinary person" to be an expert in ACCA and in historical knowledge of the federal drug schedules. Incorporating the federal drug schedules in effect at the time of the federal firearm offense (and for prior federal convictions, at both the times of the prior conviction and the federal firearm offense) would be far more consistent with how we generally construe statutes. It would also provide the "ordinary person" with more accessible and realistic notice. And finally, as our sister circuits have observed, incorporating the federal drug schedules in effect at the time of the federal firearm offense would be far more consistent with Congress's determination to decriminalize certain substances. *See Williams*, 48 F.4th at 1144 ("[I]f Congress has decided hemp should not be criminalized, then surely Congress would not intend for it to continue to be included within the narrow class of serious crimes that contributes to a 15-year mandatory minimum prison sentence."); *see also Perez*, 46 F.4th at 700.

For these reasons, if Congress continues to retain ACCA, I respectfully urge Congress to consider amending the statute to incorporate the version of the controlled-substances list in effect when the defendant commits his federal firearm offense.

All Citations

55 F.4th 846, 29 Fla. L. Weekly Fed. C 1988

Footnotes

1 As relevant here, these prior offenses of Jackson's are "violent felon[ies]" because each had "as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* § 924(e)(2)(B)(i).

2 Sometimes a statute is divisible, meaning it lists "elements in the alternative, and thereby define[s] multiple crimes." *Mathis v. United States*, 579 U.S. 500, 505, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016). When that's the case, we use the "modified categorical approach" to assess whether a prior conviction qualifies as an ACCA predicate. *Id.* Under this modified categorical approach, we look "to a limited class of documents (for example, the indictment, jury instructions, or

plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id.* at 505–06, 136 S.Ct. 2243 (citing *Shepard v. United States*, 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)). We "then compare that crime, as the categorical approach commands," with ACCA's "serious drug offense" definition. *See id.* at 506, 136 S.Ct. 2243. In contrast to the modified categorical approach, when the statute lists alternative means of satisfying a single element, the standard categorical approach applies. *See id.* at 517, 136 S.Ct. 2243. And under that approach, we presume that the defendant's conviction "rested upon nothing more than the least of the acts criminalized or the least culpable conduct." *United States v. Kushmaul*, 984 F.3d 1359, 1364 (11th Cir. 2021) (quotation marks omitted). As we explain in greater detail below, we assume without deciding that the standard categorical approach applies here. *See infra* note 9.

3 At the time of Jackson's convictions, Section 893.13(1) prohibited selling, manufacturing, delivering, or possessing with the intent to sell, manufacture, or deliver, "a controlled substance." Fla. Stat. § 893.13(1) (1998); *see also id.* (2004). Florida law defined "[c]ontrolled substance" as "any substance named or described in Schedules I through V of s. 893.03." *Id.* § 893.02(4) (1998); *see also id.* (2004) (" 'Controlled substance' means any substance named or described in Schedules I-V of s. 893.03."). Florida's Schedule II included "[c]ocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine." *Id.* § 893.03(2)(a)(4) (1998); *see also id.* (2004). It's clear that definition encompassed ioflupane because the Florida Legislature has since amended Florida's Schedule II to expressly exempt ioflupane from that definition. *Id.* (2017); 2017 Fla. Sess. Law Serv. Ch. 2017-110 (C.S.H.B. 505) (West); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256–60 (2012) (explaining that "a change in the language of a prior statute presumably connotes a change in meaning").

4 Until 2015, "ioflupane was, by definition, a schedule II controlled substance because it is derived from cocaine via ecgonine, both of which are schedule II controlled substances." Schedules of Controlled Substances: Removal of [123 I] Ioflupane from Schedule II of the Controlled Substances Act, 80 Fed. Reg. 54715, 54715 (Sept. 11, 2015) (codified at 21 C.F.R. § 1308.12(b)(4)(ii)).

5 The Controlled Substances Act authorizes the Attorney General to "remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule." 21 U.S.C. § 811(a); *see also id.* § 812 n.1 ("Revised schedules are published in the Code of Federal Regulations, Part 1308 of Title 21, Food and Drugs.").

6 Mens rea is "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime ...." *Mens Rea*, *Black's Law Dictionary* (11th ed. 2019).

7 The First, Second, Sixth, and Ninth Circuits have addressed a similar question arising under the Sentencing Guidelines. *See United States v. Abdulaziz*, 998 F.3d 519, 521–22, 525–27 (1st Cir. 2021); *United States v. Bautista*, 989 F.3d 698, 701, 703 (9th Cir. 2021); *United States v. Clark*, 46 F.4th 404, 406 (6th Cir. 2022); *United States v. Gibson*, —— F.4th ——, ——, ——– ———, No. 20-3049, 2022 WL 17419595, at *1, 6–7 (2d Cir. Dec. 6, 2022). But "longstanding principles of statutory interpretation allow different results under the Guidelines as opposed to under the ACCA." *Brown*, 47 F.4th at 154. The Guidelines provide, for example, that "court[s] shall use the Guidelines Manual in effect on the date that the defendant is sentenced." U.S.S.G. § 1B1.11(a). So while we express no opinion about the correctness of the First, Second, Sixth, and Ninth Circuits' opinions in *Abdulaziz*, *Bautista*, *Clark*, and *Gibson*, we conclude that reliance on them here would be "misplaced." *Brown*, 47 F.4th at 154.

8 Under Section 924(e)(2)(A)(i), a prior federal conviction is a "serious drug offense" if it is "an offense under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law."

9 Jackson asks us to find that ioflupane and cocaine are alternative means of satisfying the same element. In other words, he asks us to find that Section 893.13(1) is indivisible for each form of a given drug. When a statute lists alternative means of satisfying the same element (unlike when a statute lists alternative elements), the standard categorical approach applies, meaning that "ACCA disregards the means by which the defendant committed his crime, and looks only to that offense's elements." *Mathis*, 579 U.S. at 517, 136 S.Ct. 2243; *see also supra* note 2. As a result, we must assume those offenses involved the least culpable conduct—here, conduct involving ioflupane rather than cocaine. But because we hold that ACCA's "serious drug offense" definition incorporates the version of the federal drug schedules in effect

when Jackson was convicted of his prior state drug offenses, and because that version of the federal schedules listed ioflupane, it makes no difference whether Jackson's convictions involved ioflupane or cocaine. We therefore assume without deciding that Section 893.13(1) is divisible for each form of a given drug, meaning we also assume that Jackson's prior state drug convictions could have been for conduct involving ioflupane.

1 The immigration context fails to supply a helpful analogue here. To be sure, we have looked to the federal drug schedules in effect at the time of a prior conviction to determine whether that conviction renders a non-citizen removable. *See, e.g.*, *Gordon v. U.S. Att'y Gen.*, 962 F.3d 1344, 1351 n.4 (11th Cir. 2020). But in the immigration context, a prior conviction immediately triggers removal consequences. In contrast, a prior state conviction carries no federal consequences under § 924(e) unless and until the person with that conviction is convicted of carrying a firearm in violation of § 922(g)(1). For that reason, "it makes sense" in the immigration context, unlike in the ACCA context, "to determine whether the conviction is a removable offense *at the time of that controlled-substance conviction*." *Williams*, 48 F.4th at 1143; *see also Brown*, 47 F.4th at 155; *Perez*, 46 F.4th at 700.

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Supreme Court of the United States.

Eugene JACKSON,

v.

UNITED STATES

No. 22-6640

May 15, 2023

Case below, 55 F.4th 846.

Opinion

***1** The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari is granted. The case is consolidated, and a total of one hour is allotted for oral argument.

All Citations

--- S.Ct. ----, 2023 WL 3440568 (Mem)

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