No. _____

IN THE

Supreme Court of the United States

VICTOR GRANT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Armed Career Criminal Act mandates fifteen years in prison for federal firearm offenses where the defendant has three prior "violent felonies" or "serious drug offenses." The ACCA defines a "serious drug offense" as "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) (emphasis added).

Four circuits have unanimously held that § 924(e)(2)(A)(ii) incorporates the federal drug schedules in effect at the time of the federal firearm offense to which the ACCA applies. In the decision below, the Eleventh Circuit rejected those circuit decisions and relied on its prior decision in *Jackson v. United States*, 55 F.4th 846, 850 (11th Cir. 2022), *cert. granted*, 143 S. Ct. 2457 (2023). The Eleventh Circuit held that § 924(e)(2)(A)(ii) instead incorporates the federal drug schedules that were in effect at the time of the defendant's prior state drug offense.

The question presented is:

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

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Grant*, No. 22-10910 (11th Cir. Sept. 19, 2023);
- *United States v. Grant*, No. 20-cr-00050-WFJ-CPT-1 (M.D. Fla. Mar. 21, 2022).

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

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Petitioner, Victor Grant, respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion affirming Petitioner's ACCA sentence is unpublished at *United States v. Grant*, No. 22-10910, 2023 U.S. App. LEXIS 21239 (11th Cir. Aug. 15, 2023) and is reproduced as Appendix ("App.") A, 1a–14a. The district court did not issue a written opinion in this case.

JURISDICTION

The Eleventh Circuit issued its decision on August 15, 2023. A motion to stay was denied on September 18, 2023. App. 15a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(A)(ii),

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

* * *

(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.

INTRODUCTION

The Armed Career Criminal Act mandates fifteen years in federal prison for certain federal firearm offenses where the defendant has three prior "violent felonies" or "serious drug offenses." The question presented here is whether a "*serious* drug offense" includes state offenses for substances that have become fully *legal* under federal law by the time of the federal firearm offense to which the ACCA applies.

In the decision below, the Eleventh Circuit held that the ACCA's "serious drug offense" definition in 18 U.S.C. § 924(e)(2)(A)(ii) incorporates the federal drug schedules that were in effect at the time of the prior state drug offense, not at the time of the federal firearm offense. The court relied on its decision in *Jackson v. United States*, 55 F.4th 846, 850 (11th Cir. 2022), which expressly acknowledged a split among the circuits on the issue. *Id.* at 862 (Rosenbaum, J., concurring). This Court granted certiorari in *Jackson* to resolve the circuit split on the identical question presented here. *Jackson v. United States*, 143 S. Ct. 2457 (2023). The Court

also granted certiorari in *Brown v. United States*, 143 S. Ct. 2458 (2023), to resolve the same question.

This Court's review is necessary because Petitioner and countless defendants in the Eleventh Circuit and Florida will receive a mandatory fifteen-year sentence based on geography alone. The government agreed in *Jackson* that this Court should review the question presented to resolve the circuit conflict. *Jackson v. United States*, Br. for United States 11-12 (No. 22-6640) (Mar. 2, 2023).

STATEMENT

A. Legal Background

The Armed Career Criminal Act (ACCA) requires that any person who violates 18 U.S.C. § 922(g) serve a mandatory minimum sentence of fifteen years when the defendant has three prior convictions for violent felonies or serious drug offenses committed on occasions different from one another. 18 U.S.C. § .S.S(e)(1). The ACCA de-fines a "serious drug offense," in relevant part, as "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))." *Id.* § 924(e)(2)(A)(ii) mandates a fifteen-year federal prison sentence for being a felon in possession of a firearm where the defendant has three prior "violent felonies" or "serious drug offenses." 18 U.S.C. § 924(e). A "serious drug offense" is defined under the ACCA as "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) (emphasis added).

To determine whether a prior state offense qualifies as a "serious drug offense," federal courts must apply the "categorical approach." *Shular v. United States,* 140 S. Ct. 779, 784-85 (2020). Under that familiar approach, "[a] court must look only to the state offense's elements, not the facts of the case or labels pinned to the state conviction." *Id.* at 784. Given that singular focus on the elements of the offense, not the actual facts of the case, courts must "examine what the state conviction necessarily involved," and therefore they "must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the" federal definition. *Moncrieffe v. Holder,* 569 U.S. 184, 190-91 (2013) (brackets and quotation omitted).

In *Shular,* the Supreme Court clarified that the ACCA's "serious drug offense" definition in § 924(e)(2)(A)(ii) sets out conduct, not generic drug offenses. Thus, under the categorical approach, the "state offense's elements [must] necessarily entail one of the types of conduct identified in § 924(e)(2)(A)(ii)" in order to qualify as a "serious drug offense." *Shular,* 140 S. Ct. at 784-85 (citation omitted). "If it does not do so, the state conviction does not qualify as a serious drug offense regardless of the actual conduct that resulted in the defendant's conviction." *Conage, supra,* 976 F.3d at 1250.

For a state drug offense to satisfy the definition in § 924(e)(2)(A)(ii), it must necessarily involve a "controlled substance," which is defined as a substance on the federal drug schedules. 21 U.S.C. § 802(6). If the elements do not include such a controlled substance, then the offense is categorically overbroad and does not qualify.

The current version of the federal drug schedules excludes ioflupane. 21 C.F.R. § 1308.12(b)(4)(ii) (July 12, 2021) ("except[ing]" ioflupane I^{123} from current Schedule II). But the federal drug schedules included ioflupane until 2015. App. 10a. As relevant here, the question is whether § 924(e)(2)(A)(ii) refers to the federal drug schedules that were in effect at the time of the instant federal firearm offense, or the federal drug schedules that were in effect at the time of the prior state drug offense?

The elements of Petitioner's prior offenses under § 893.13 did not necessarily entail the conduct set out in § 924(e)(2)(A)(ii). That is so because the elements of his offenses encompassed ioflupane I^{123} which is not a "controlled substance" for purposes of the ACCA's "serious drug offense" definition.

B. Proceedings Below

The Amended PreSentence Investigation Report (PSR), noted Petitioner's eligibility under the ACCA based on four prior state court drug convictions. ECF No. 126 at 5, ¶ 22. Consequently, Petitioner's offense level was adjusted from Level 22 to 33. *Id.*, ¶The Amended PSR also determined that Petitioner was subject to a minimum mandatory sentence of fifteen years under § 924(e). *Id.* at 15, ¶ 76.

Defense counsel for the Petitioner noted the application of the minimum sentence of 15 years under the ACCA. ECF No.155 at 3. Specifically, defense counsel did not object to the minimum sentence of 15 years under the ACCA or the enhanced offense level under § 924(e).

The District Court imposed a sentence of 262 months imprisonment. App. 17a.

The Eleventh Circuit reviewed for plain error, App. 12a, and concluded that it was bound by the decision in *Jackson*. App. 13a.

The Eleventh Circuit denied Petitioner's motion for stay on September 18, 2023. App. 15a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision creates a conflict of authority with other circuits on an important and recurring question of federal sentencing law. The decision below is wrong and failed to correctly apply the law as to whether Petitioner's prior convictions qualified under the ACCA or U.S.S.G. §4B1.4 by looking to the definition of "controlled substance" not at the time federal consequences attached but when the state court convictions occurred.

The circuits are deeply divided over whether, under *McNeill v. United States*, 563 U.S. 816 (2011), "controlled substance" is defined as of the time when federal consequences attach, or at the time of the predicate offense. Five circuits read *McNeill* narrowly as defining only the elements of the predicate—not the comparator. Those circuits correctly look to the law in effect when federal consequences attach to define "controlled substance." *See United States v. Williams*, 61 F.4th 799, 808 (10th Cir. 2023); *United States v. Gibson*, 55 F.4th 153, 162-167 (2d Cir. 2022); *United States v. Hope*, 28 F.4th 487, 504-505 (4th Cir. 2022); *United States v. Abdulaziz*, 998 F.3d 519, 523-531 (1st Cir. 2021); *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021).

The Third and Eighth Circuits used the time of consequences approach but vary on ACCA cases from Guidelines cases. See *United States v. Brown*, 47 F.4th 147 (3d Cir. 2022), cert. granted, 143 S. Ct. 2458 (2023); *United States v. Perez*, 46 F.4th 691, 699 (8th Cir. 2022).

A. The Circuits are Divided on the ACCA Question Presented

The First, Third, Fourth, Eighth, and Tenth Circuits have unanimously held in published opinions that the ACCA's "serious drug definition" in § 924(e)(2)(A)(ii) incorporates the federal drug schedules in effect at the time of the defendant's federal firearm offense, not the schedules in effect at the time of the prior state drug offense.

Starting with the most recent of those decisions, the Tenth Circuit reached that conclusion in *United States v. Williams*, 48 F.4th 1125 (10th Cir. 2022). It acknowledged that "[s]ix of our sister circuits have recently considered this same timing issue and all but one have resolved it" in that manner. *Id*. at 1138 (citing cases). "Consistent with the First, Fourth, Eighth, Ninth, and Eleventh Circuits,[1] 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. We thus reject the government's time-of-prior-state-conviction rule and adopt a time-of-instant-federal-offense comparison." *Id*.

In doing so, the Tenth Circuit reviewed the other circuit decisions on that issue, both in the ACCA and Guidelines context. It explained that "[t]he overwhelming majority of circuits to have considered the issue agree the correct point of comparison is the time of the instant federal offense—not the prior state offense." *Id.* at 1139; *see id.* at 1139–41. The court agreed with that conclusion based on "[t]he plain language" of the statute, *id.* at 1141–42, how the "violent felony" definitions are construed, *id.* at 1141 n.11, and "fundamental principles of due process" and "fair notice," *id.* at 1142.

[1] At the time of the Tenth Circuit's decision the original panel decision in *Jackson* was in effect. See *United States v. Jackson*, 36 F.4th 1294 (11th Cir. 2022).

Meanwhile, the Tenth Circuit rejected the government's reliance on *McNeill* as "unpersuasive," for it was "discussing a subsequent change in the prior offense of conviction—and not the federal definition to which it is compared." *Id.* at 1142–43. On that point, the Tenth Circuit noted that five other circuits had agreed that *McNeill* had "no bearing on what version of *federal law* serves as the point of comparison for the prior state offense." *Id.* at 1143. It noted that the Sixth Circuit had reached the contrary conclusion in a Guidelines case, but "[t]he First, Fourth, Eighth, Ninth, and Eleventh Circuits meaningfully considered *McNeill* and correctly recognized, as we do, that *McNeill* did not contemplate what version of federal law to apply." *Id.* at 1143 n.12. Finally, after distinguishing immigration cases upon which the government relied, *id.* at 1143–44 & n.13, the court emphasized that, where "Congress has decided [a substance] 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," *id.* at 1144.

The Eighth Circuit reached the same conclusion in *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022). Addressing "which version" of the federal drug schedules it should use, the court "conclude[d] that the relevant federal definition for ACCA purposes is the definition in effect at the time of the federal offense—for Perez, 2019" when he committed his federal firearm offense. *Id.* at 699; *see id.* at 696.

Like the Eighth Circuit in *Perez*, the Fourth Circuit had previously granted relief on plain error in *United States v. Hope*, 28 F.4th 487 (4th Cir. 2022). The Fourth Circuit concluded that "the Government incorrectly relies on

McNeill," which concerned a "subsequent change in *state* law," whereas the "instant matter concerns changes to federal law." *Id.* at 505. Quoting the Ninth Circuit's decision in a Guidelines case (discussed below), the Fourth Circuit agreed that the contrary regime would be "illogical." *Id.* Judge Thacker agreed that courts should consult the federal drug schedules from the time of the federal offense, and that *McNeill* was not to the contrary; she dissented only because she believed that "the district court's error was not plain." *Id.* at 512 (Thacker, J., dissenting).

Although the Fourth Circuit declined to look to the federal schedules in effect at the time of the prior state drug offense, it notably looked to those in effect at the time of federal *sentencing* rather than the time the federal offense was *committed*. *Id.* at 504–05.

In *United States v. Brown*, 47 F.4th 147 (3d Cir. 2022), *cert. granted* 143 S. Ct. 2458 (2023), the Third Circuit "appl[ied] the penalties in effect at the time the defendant committed the federal offense," and thus "look[ed] to the federal schedule in effect when Brown violated § 922(g)." *Id.* at 153. In doing so, the court expressly "part[ed] ways with the Fourth Circuit" in *Hope*, which "held that courts must look to federal law in effect when the defendant is sentenced federally." *Id.* Instead, the Third Circuit followed the Eleventh Circuit's initial panel decision, which "also held that courts must look to the federal law in effect when the defendant the federal offense." *Id.* In doing so, the court stated that "the Eleventh Circuit sensibly reasoned" that "this rule gives a defendant notice" of the statutory penalties he would face were he to later violate federal law. *Id.*

B. The Court Should Hold Until *Jackson* and *Brown* are Decided

The above decisions demonstrate that there is substantial conflict and the Court has already determined that it will resolve same in *Jackson* and *Brown*.

At minimum, the Court should hold this case pending the resolution of *Jackson* and *Brown*, which present identical timing questions under the ACCA. This Court's ultimate decision in *Jackson* and *Brown* necessarily affects the reasoning of the decision below, which expressly acknowledges that it was bound by the en banc decision in *Jackson*. The Eleventh Circuit also noted that certiorari had been granted to review *Jackson*. App. 13a. This is a textbook case for a GVR.

This Court routinely grants review, vacates a decision, and remands for reconsideration ("GVR") in circumstances such as those present here when an intervening event might change the outcome of the case. *See Lawrence v. Chater*, 516 U.S. 163, 166 (1996) ("[T]he GVR order has, over the past 50 years, become an integral part of this Court's practice."). Additionally, a petition requesting a hold is proper in this particular case. *See Grzegorczyk v. United States*, 142 S. Ct. 2580, 2583 (2022) (Sotomayor, J.,) (explaining that a petition requesting a hold need not prove with "an absolute certainty that the judgment would be different on remand"). And because "[w]hether a GVR order is ultimately appropriate depends * * * on the equities of the case," *Lawrence*, 516 U.S. at 167-168, GVRs are particularly appropriate in the criminal context, *see Stutson v. United States*, 516 U.S. 193, 196-197 (1996).

This Court should not treat this petition any differently. There is a "reasonably probability" that resolving the timing question in *Jackson* and *Brown* will affect the proper interpretation of the question presented. Both involve the same basic issue, both turn on the proper interpretation of *McNeill*, and both involve similar policy considerations. A hold is even more appropriate here because of the unique equities and liberty interests at stake. *See Lawrence*, 516 U.S. at 167-168.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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