NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 20__

TRIVANSKY SWINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether prior drug convictions inclusive of substances that have since been decontrolled can be used to impose present day federal sentencing enhancements?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Northern District of Iowa, and the United States Court of Appeals for the Eighth Circuit:

United States v. Swington, 6:21-cr-02033-001 (N.D. Iowa) (criminal proceedings), judgment entered October 26, 2022.

United States v. Swington, 22-3362 (8th Cir.) (direct criminal appeal), opinion and judgment entered January 9, 2024.

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Trivansky Swington respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit affirmed the district court's decision in an unpublished decision, available at 2024 WL 94280. The opinion is reproduced in the appendix to this petition at Pet. App. p. 9.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment in Mr. Swington's case on January 9, 2024. Pet. App. p. 14. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 994:

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

1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46

USSG §2K2.1(a)(4)(A)

(a) Base Offense level (apply the greatest)

(4) 20, if --

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

USSG §4B1.2(b) defines a "controlled substance offense" as follows:

The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

STATEMENT OF THE CASE

A. Introduction

In a variety of ways, our federal sentencing laws call for an increase in a defendant's sentence if he or she has prior qualifying drug convictions. For example, the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), the "three strikes" law, 18 U.S.C. § 3559(c), the federal drug trafficking statutes, 21 U.S.C. §§ 841, 851, and the United States Sentencing Guidelines, all require courts to determine whether a defendant's prior drug conviction requires a higher statutory or Guideline sentencing range.

This, of course, requires application of the categorical approach. Just like it was not enough in *Taylor v. United States*, 495 U.S. 575 (1990), for state courts to call a crime a "burglary" for it to qualify as a predicate for the ACCA, it is not enough for state courts to call a crime a drug offense to find it meets the generic definition of a federal sentencing enhancement provision. A comparison between the elements of the state conviction and the generic definition of the federal sentencing enhancement provision is still required.

Various disagreements have emerged between circuits on how to apply the categorical approach in these circumstances. In one split, courts have disagreed as to whether only substances that were controlled at the time of federal sentencing—when the enhancement was being applied—could justify a sentencing enhancement. This Court recently granted two petitions for writ of certiorari to address this

question in the ACCA context. *Brown v. United States*, 22-6389; *Jackson v. United States*, 22-6640.

Currently, the Eighth Circuit has held that convictions for decontrolled substances qualified as controlled substance offenses, resulting in the court applying an increased advisory Guideline range in each case. For this holding, the circuit relied upon *McNeill v. United States*, 563 U.S. 816 (2011), pointing to *McNeill*'s language stating courts may not look to "current state law to define a previous offense."

This Court should grant Mr. Swington's petition for writ of certiorari or hold the petition until *Brown* and *Jackson* are decided. Although Mr. Swington's case involves application of the U.S. Sentencing Guidelines, *Brown* and *Jackson* will likely still impact the Guideline's analysis.

B. Mr. Swington receives a substantial increase to his advisory United States Sentencing Guideline range for having a prior conviction for a controlled substance offense that is inclusive of now decontrolled substances.

On May 18, 2021, Mr. Swington was indicted on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). R. Doc. 2. The charges stemmed from an incident involving Mr. Swington, Samantha Mathenia, Loren Tigue, Joanne Taylor, Cleo Jackson, and Demiah Moore. The prosecution alleged that Mr. Swington assaulted Mathenia while possessing a .38 special revolver, and that he shot the firearm at Joanne Taylor's residence. After this alleged altercation, law enforcement found Mr. Swington walking in the area. He did not have a firearm

in his possession. Hours after the incident, a .38 special revolver was found buried in the snow behind a garage at a house down the street from Taylor's residence.

The case proceeded to a jury trial. The jury convicted Mr. Swington of the sole count. R. Doc. 138. The case proceeded to sentencing.

A draft presentence report ("PSR") was created. The PSR determined the base offense level was 20 under USSG §2K2.1(a)(4)(A), because Mr. Swington had a prior conviction for a controlled substance offense. PSR ¶ 11. The PSR determined that Mr. Swington's prior Iowa conviction for possession of marijuana with intent to deliver, in violation of Iowa Code § 124.401(1)(d), was a controlled substance offense. PSR ¶ 26. He received a four-level increase under USSG §2K2.1(b)(6)(B) for possessing a firearm in connection with another felony offense. PSR ¶ 12. Mr. Swington's total offense level was 24. PSR ¶ 19. Combined with a criminal history category VI, Mr. Swington's advisory Guideline range was 100 to 120 months of imprisonment. PSR ¶ 81.

Mr. Swington objected to the increase in his base offense level. R. Doc. 153. He argued that his Iowa marijuana conviction was not a controlled substance offense, but acknowledged this argument had previously been rejected by the Eighth Circuit. R. Doc. 153. Mr. Swington also objected to the PSR's assertion that he had prior involvement with gangs. R. Doc. 153.

At sentencing, Mr. Swington maintained his objection to the assertion that he was involved in a gang. Sent. Tr. p. 5. He also maintained his objection to the increase

to his base offense level at sentencing. Sent. Tr. p. 13. The district court overruled the base offense level objection, noting it was controlled by Circuit precedent. Sent. Tr. pp. 13-14. The court did not rule on the gang affiliation objection. The prosecution did not present evidence to support that Mr. Swington was involved in a gang.

The court accepted the PSR's advisory Guideline calculation of 100 to 120 months of imprisonment. Sent. Tr. p. 18. Ultimately, the court sentenced Mr. Swington to 120 months of imprisonment. Sent. Tr. p. 35.

C. The Eighth Circuit rejects Mr. Swington's argument and holds that convictions inclusive of now decontrolled substances can be used to enhance a criminal defendant's sentence.

Mr. Swington appealed to the Eighth Circuit Court of Appeals. As relevant to this petition, he maintained his challenge to the increase to his base offense level. Mr. Swington again asserted his Iowa marijuana conviction was overbroad, as it was inclusive of the substance hemp, which had since been decontrolled. Generally, he argued that courts should rely on the definition of "controlled substance offense" as it exists at the time of federal sentencing, when the enhancement is applied.

The Eighth Circuit affirmed, noting the challenge was foreclosed by *United States v. Bailey*, 37 F.4th 467 (8th Cir. 2022). *United States v. Swington*, 22-3362, 2024 WL 94280 (8th Cir. Jan. 9, 2024).[1] Pet. App. p. 9. *Bailey* adopted verbatim the circuit's analysis in its prior unpublished decision *United States v. Jackson*, No. 20-

[1] The Eighth Circuit did agree that the mention of gang affiliation in the PSR should be struck, as it was objected to and unproven.

3684, 2022 WL 303231, at *1–2 (8th Cir. Feb. 2, 2022) (unpublished) (per curiam), stating:

> Although *United States v. Jackson*, No. 20-3684, 2022 WL 303231 (8th Cir. Feb 2, 2022) (per curiam), is not precedential, *see* 8th Cir. R. 32.1A, we find its reasoning persuasive, and so we adopt that reasoning here. There, we stated:
>
> > We determined in [*Henderson*, 11 F.4th 713] that U.S.S.G. § 4B1.2(b)[, which defines "controlled substance offense,"] contains "no requirement that the particular substance underlying the state offense is also controlled under [the CSA]." Instead, we agreed with the Fourth Circuit's interpretation that the "ordinary meaning of ... 'controlled substance,' is any type of drug whose manufacture, possession, and use is regulated by law." Jackson concedes he was convicted of delivering and possessing with intent to deliver marijuana, a drug regulated by Iowa law. Whether the statute additionally proscribed hemp within the definition of marijuana is immaterial.
> >
> > Attempting to distinguish *Henderson*, Jackson emphasizes that Iowa, too, has removed hemp from its marijuana definition since his convictions occurred. *See* Iowa Code § 124.401(6). But we may not look to "current state law to define a previous offense." *McNeill v. United States*, 563 U.S. 816, 822 (2011); *see also United States v. Santillan*, 944 F.3d 731, 733 (8th Cir. 2019) (explaining that "a prior conviction qualifies as a 'felony drug offense' if it was punishable as a felony at the time of conviction"). Jackson's uncontested prior marijuana convictions under the hemp-inclusive version of Iowa Code § 124.401(1)(d) categorically qualified as controlled substance offenses for the career offender enhancement.

Bailey, 37 F.4th at 469-70.

REASON FOR GRANTING THE WRIT

I. THIS COURT GRANTED CERTIORARI TO ADDRESS WHETHER PRIOR DRUG CONVICTIONS INCLUSIVE OF DECONTROLLED SUBSTANCES CAN BE USED TO APPLY THE ARMED CAREER CRIMINAL ENHANCEMENT. THIS DECISION WILL LIKELY BE INSTRUCTIVE, IF NOT CONTROLLING, TO MR. SWINGTON'S CASE.

This Court recently granted two petitions for certiorari to address a circuit split regarding the potential application of *McNeill v. United States*, 563 U.S. 816 (2011), when analyzing prior drug convictions under the categorical approach. *Brown v. United States*, 22-6389; *Jackson v. United States*, 22-6640. Both cases involve the Armed Career Criminal Act and determining whether a prior conviction is a "serious drug offense."

Mr. Swington's case involves application of the U.S. Sentencing Guidelines and whether a prior conviction inclusive of decontrolled substances is a "controlled substance offense." But like *Brown* and *Jackson*, the question involves the application of *McNeill*. *United States v. Bailey*, 37 F.4th 467 (8th Cir. 2022), did not rely upon Guideline language for its analysis. It relied upon *McNeill*, a decision analyzing whether a prior conviction qualified as an Armed Career Criminal Act predicate offense, to determine that a controlled substance offense is not limited to substances controlled at the time of a defendant's federal sentencing.

While the Eighth Circuit stated in *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022), that it believed the Guidelines analysis to be different, *Perez* should not dissuade this Court from holding Mr. Swington's case until *Brown* and *Jackson* are

decided. *Perez* supports that there is no meaningful distinction in the analysis between the Guidelines and the Armed Career Criminal Act. In *Perez*, the Court held that "serious drug offenses" under the Armed Career Criminal Act are limited to convictions for substances controlled at the time of federal sentencing. *Id.* at 699. In doing so, the Eighth Circuit cited a Ninth Circuit Guidelines decision to support its holding:

> And as the Ninth Circuit observed, "it would be illogical to conclude that federal sentencing law attaches culpability and dangerousness to an act that, at the time of [federal] sentencing, Congress has concluded is not culpable and dangerous." *United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021) (quotation omitted).

Id. *Bautista* analyzed the timing question as it applied to the definition of controlled substance offense.

Overall, the argument for the Guidelines and the ACCA is virtually identical. The focus of each argument is the proper interpretation of *McNeill*. While, in the Guidelines context, defendants also argue that the time of sentencing rule under 18 U.S.C. § 3553(a)(4)(A)(ii) supports that controlled substances offenses are limited to convictions for substances controlled at the time of federal sentencing, this does not mean the analysis is materially different.

The Eighth Circuit's decision in Mr. Swington's case is an erroneous interpretation of *McNeill*. This Court should grant the petition for certiorari, as its decisions in *Brown* and *Jackson* will likely be instructive, if not controlling.

CONCLUSION

For these reasons, Mr. Swington respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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