SUPREME COURT
OF THE
UNITED STATES OF AMERICA
CASE NO._____

DEKEILON JOHNSON PETITIONER

V.

PETITION FOR WRIT OF CERTIORARI

UNITED STATES OF AMERICA DEFENDANT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT IN COURT OF APPEALS
CASE NUMBER 23-5753

Respectfully submitted,

s/ Jeffrey C. Rager_____
Jeffrey C. Rager
Rager Law Firm, PLLC
P.O. Box 911006
Lexington, KY 40591-1006
jrager@ragerlawky.com
(859) 963-2929
Counsel of Record for Dekeilon Johnson

QUESTIONS PRESENTED FOR REVIEW

I. Should Mr. Johnson be sentenced as a career offender under the United States Sentencing Guidelines based upon the current Circuit split of whether predicate crimes must be viewed at the "time of sentencing" for the federal offense or the "time of conviction" of the predicate offense.

II. Whether the Rule of Lenity should apply in Petitioner's case.

LIST OF ALL PARTIES TO THE PROCEEDING

PETITIONER/APPELLANT/DEFENDANT – DEKEILON JOHNSON

RESPONDENT/APPELLEE/PLAINTIFF – UNITED STATES OF AMERICA

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Mr. Johnson's Appeal to the Sixth Circuit was taken from a Judgment entered against him whereby the District Court imposed a sentence of 271 months for bank robbery and the use of weapon in relation to the bank robbery on August 7, 2023. The Judgment of the District Court is attached hereto in Appendix A. A timely appeal was taken from the Judgment and Sentence to the Sixth Circuit Court of Appeals. On November 1, 2024, the Sixth Circuit Court of Appeals affirmed the District Court's sentence and Judgment. Said Opinion is attached hereto in Appendix B.

STATEMENT OF JURISDICTION

The basis of subject matter jurisdiction for the United States District Court for the Western District of Tennessee was 18 U.S.C. § 2113(a) and 924(c)(1)(A)(ii) for which Mr. Johnson was initially indicted on May 25, 2021. A Final Judgment and Sentence was rendered by the District Court on August 7, 2023. The Defendant filed his Notice of Appeal on August 21, 2023. The basis for the jurisdiction of the Court of Appeals was Fed. R. App. P. 3 and 28 U.S.C. §1291. The Sixth Circuit Court of Appeals affirmed the District Court's sentence on November 1, 2024. The jurisdiction of Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1) and SCR 10 and 13(3). The United States of America is a party, and the Solicitor General of the United States has been served with this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment 5 to U.S. Constitution: "…nor be deprived of life, liberty, or property, without due process of law." As expressed by the Rule of Lenity.

2. U.S.C. 3553(a):

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

3. U.S.S.G. §1B1.11:

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b) (1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

(2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.

(3) If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.

4. U.S.S.G. §4B1.1:

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

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

Offense Statutory Maximum	**Offense Level***
(1) Life	**37**
(2) 25 years or more	**34**
(3) 20 years or more, but less than 25 years	**32**
(4) 15 years or more, but less than 20 years	**29**
(5) 10 years or more, but less than 15 years	**24**
(6) 5 years or more, but less than 10 years	**17**
(7) More than 1 year, but less than 5 years	**12**.

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

(1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).

(2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of—

(A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and

(B) the guideline range determined using the table in subsection (c)(3).

(3) Career Offender Table for 18 U.S.C. § 924(c) or § 929(a) Offenders

§3E1.1Reduction	**Guideline Range for the 18 U.S.C. § 924(c) or § 929(a) Count(s)**
No reduction	360–life
2-level	reduction 292–365
3-level reduction	262–327.

5. U.S.S.G. §4B1.2:

(a) Crime of Violence.—The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) Controlled Substance Offense.—The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) 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; or

(2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(c) Two Prior Felony Convictions.—The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the

sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

(d) Inchoate Offenses Included.—The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(e) Additional Definitions.—

(1) Forcible Sex Offense.—"***Forcible sex offense***" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(2) Extortion.—"***Extortion***" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

(3) Robbery.—"***Robbery***" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(4) Prior Felony Conviction.—"***Prior felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

STATEMENT OF THE CASE

Mr. Johnson was arrested and brought before the District Court on March 12, 2021, upon a criminal complaint. Shortly thereafter he was indicted for bank robbery and use of weapon during the bank robbery. As set forth in the Indictment, the robbery happened on October 20, 2017. (Indictment, RE 7, Page ID # 21). The Presentence Investigation Report (hereinafter referred to as PSR) set forth the facts that were accepted by the District Court at sentencing. In short, on October 20, 2017, Mr. Johnson robbed a Brinks Security truck that was delivering cash to an ATM at a local bank. As one of the Brinks Security guards retrieved the money from the truck, Mr. Johnson pointed a gun at him. The security guard dropped the money he was holding and pulled his own revolver to shoot at Mr. Johnson. There was an exchange of gunfire between the two. At that time, Mr. Johnson grabbed a cassette of cash (a holder of cash that is to be placed in the ATM) and fled the scene. The amount of cash in the cassette he took was $50,000.00 and the vast majority of the money was recovered. (PSR, RE 81, Page ID ## 76-79).

Mr. Johnson eventually pled guilty to the charges in the Indictment. However, he did not have a plea agreement with the United States. (PSR, RE 81, Page ID # 75). Based on the facts outlined in the PSR, and Mr. Johnson's guilty plea, United States Probation determined that Mr. Johnson, at 27 years of age, was a career criminal pursuant to the Sentencing Guidelines. This determination resulted in an adjusted offense level of 29 for the bank robbery. Without the implication of the career offender guideline, his adjusted offense level for the robbery would be 20. (PSR, RE 81, Page ID ## 80-81). Furthermore, because of the use of the gun during the robbery he faced a consecutive mandatory minimum of 10 years under 18 U.S.C. §924(c).

The determination of career offender status was based upon two of three prior convictions of Mr. Johnson. The first was an aggravated assault when he was 16 years old. (PSR, RE 81, ID ## 82). Mr. Johnson was transferred out of juvenile court and prosecuted as an adult. (PSR, RE 81, Page ID # 82). The second conviction relied upon for the application of the career offender was possession of marijuana with intent to deliver, which was also committed when Mr. Johnson was 16 years old and was within a month of the assault conviction above. The total amount of marijuana in that case was less than one ounce. The third relevant conviction was an unlawful possession of a controlled substance (i.e. marijuana) with intent to deliver and he received a sentence of 83 days on this charge. This was the first of the convictions that occurred after he had turned 18. This last conviction involved a total amount of a little over 2 ounces of marijuana. (PSR, RE 81, Page ID # 85).

At sentencing, Mr. Johnson argued against the implication of the career offender. He argued that the marijuana convictions found in paragraphs 45 and 50 of the PSR should not be used to determine he was a career offender. (Defendant's Position on PSR, RE 78, Page ID # 110). He argued that such convictions were no longer predicate "controlled substance offenses" for the career offender enhancement as that term is now defined in the guidelines. Both state and federal jurisdictions had delisted hemp as a controlled substance when Mr. Johnson was sentenced. (Defendant's Position on PSR, RE 78, Page ID # 111). By analyzing these charges under the three-step categorical approach, Courts look at the least culpable conduct under the elements of the prior conviction. Since the least criminal act proscribed by the Tennessee statute in question was possession of hemp and hemp is no longer a controlled substance under current state

and federal law, these two convictions fell outside the definition of controlled substances under the guidelines. Therefore, neither could be used as predicate offenses. (Defendant's Position on PSR, RE 78, Page ID # 112). This argument centered around whether a Court should look at the law at the time of the prior conviction or at the law as it is at sentencing. (Defendant's Position on PSR, RE 78, Page ID ## 112-114).

As was required, Mr. Johnson's trial attorney made the District Court aware of adverse caselaw in the Sixth Circuit, *United States v. Clark*, 46 F.4th 404 (6th Cir. 2022). In *Clark*, the Sixth Circuit had adopted the "time of conviction" rule. In following this precedent, the District Court found that the two prior marijuana convictions, whether hemp or marijuana, were a controlled substance offenses at the time that Mr. Johnson was convicted. (Sentencing Transcript, RE 93, Page ID ## 231-232). Therefore, Mr. Johnson was determined to be a career offender, which increased his guideline sentence by approximately eight years. (Defendant's Position on PSR, RE 78, Page ID # 117).

Mr. Johnson timely appealed his sentence to the Sixth Circuit Court of Appeals. In relation to the issue of whether the "time of conviction" or "time of sentence" should apply for career offender purpose, the Sixth Circuit Panel ruled in favor of the "time of conviction" rule in reliance upon prior Sixth Circuit precedent. Furthermore, the Panel concluded that the Rule of Lenity did not apply because the ambiguity surrounding whether Mr. Johnson's prior marijuana convictions were Career Offender predicate offenses did not present a grievous ambiguity. *See* Johnson Opinion attached hereto in Appendix B.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

This case presents an important Federal sentencing issue which is subject to a split of Opinions from the Circuit Courts. This issue concerning the interpretation of past marijuana convictions as predicate offenses for the Career Offender status is creating a disparity in sentence. It is the type of issue that has a direct impact on the years of incarceration for criminal defendants. In the case at bar, it created an eight-year difference for Mr. Johnson. However, in at least the three other Circuits, Mr. Johnson would not be a career offender. The second issue is whether the Rule of Lenity should apply in a case like Mr. Johnson's and he requests that Lenity be resurrected from the purgatory of grievous ambiguity.

I. MR. JONHNSON IS NOT A CAREER OFFENDER UNDER THE "TIME OF SENTENCING RULE"

It is important at the outset to set forth certain facts that narrow down the issue in the case bar. The first is that this case does not deal with only federal law decriminalizing hemp, but Tennessee also followed suit within few months after the passage of the Agriculture Improvement Act. In 2018, Congress passed the Agriculture Improvement Act, which narrowed the federal definition of marijuana to exclude "hemp." *See* Pub. L. No. 115-334, 132 Stat. 4490, § 12619 (2018) (codified at 21 U.S.C. §802(16)). Following the federal government's lead, Tennessee amended its definition of marijuana to exclude hemp. *See* 2019 Tenn. Pub. Laws, ch. 87, sec. 1 (codified at Tenn. Code Ann. § 39-17-402(16)(c)). Therefore, the Court is not being asked to answer the question of whether a prior state conviction criminalizes conduct that federal law no

longer does or vice versa. Both Tennessee and the United States have removed hemp from the definition of marijuana at the time of Mr. Johnson's sentencing.

The Sixth Circuit Opinion in Mr. Johnson's case relied heavily on the Circuit's precedent of *United States v. Clark,* 46 F4th 404 (6th Cir. 2022). The Panel was "duty-bound to apply governing precedent." Johnson Opinion, RE 36-2 at p. 8. Furthermore, while Mr. Johnson's appeal was pending, the Supreme Court rendered an Opinion in *Brown .v United States*, 602 U.S. 101 (2024). The *Brown* case dealt with what period of time should courts look at the drug schedules to determine if the defendant had committed a predicate drug offense for the ACCA purposes. However, Mr. Johnson argued that there was a distinction between the interpretation of the Armed Career Criminal Act and the Career Offender Guideline. Mr. Johnson brought to the Sixth Circuit Panel's attention that both the majority opinion and the dissent in *Brown* made distinctions between the guideline career offender and the Armed Career Criminal Act. *See Brown*, 602 U.S. at 102 (Majority Opinion at n. 7), 127 (Dissent at n. 1). However, the Panel in Mr. Johnson's case interpreted these footnotes differently. *See* Johnson Opinion, RE 36-2 at p. 9-10.

In *United States v. Garth*, 965 F.3d 493 (6th Cir. 2020), a panel of the Sixth Circuit held that to determine whether a prior conviction is a predicate offense for the career offender guideline a "three-step categorical" approach is used. This approach stems from the line of Supreme Court cases leading up to *Descamps v. United States*, 570 U.S. 254 (2013) and *Mathis v. United States*, 579 U.S.500 (2016). Furthermore, the Sixth Circuit as well as most other Circuits have extended the Supreme Court's categorical approach to the analysis of predicate offenses of the Career Offender

Sentencing guideline. *See e.g. United States v. Monanez*, 442 F.3d 485, 489 (6th Cir. 2006).

The "three-step categorical" approach requires a court to assume or presume that the defendant committed the least culpable offense under a divisible state statute of conviction. In the case at bar, the least culpable conduct is possession with intent to deliver hemp pursuant to the Tennessee statute under which Mr. Johnson was convicted (which is also the case under Federal law).

U.S.S.G. §4B1.1 treats a defendant as a career offender if, among other things, the defendant has "at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. §4B1.1(a)(3). "Controlled substance offense" is defined in USSG § 4B1.2(b) to include "an offense under federal or state law . . . that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance; or the possession of a controlled substance with intent to manufacture, import, export, distribute, or dispense." The term "controlled substance" itself, however, is not defined in U.S.S.G. § 4B1.2, but the Circuits have interpreted the phrase to mean those substances listed in the current federal schedules of controlled substances under the Controlled Substances Act ("CSA"), codified at 21 U.S.C. § 801 et seq. as well as any state-controlled schedule of substances. *See United States v. Sheffey*, 818 Fed. App'x. 513, 519-520 (6th Cir. 2020); *United States v. Bautista* 989 F4th 698 (9th Cir. 2021); *United States v. Abdulaziz*, 998 F.3d 519, 531 (1st Cir. 2021). Regardless, it is undisputed in the case at bar that both Tennessee and the United States removed hemp from their schedules. Therefore, the gravamen for Mr. Johnson's argument is solely whether the sentencing court should look at the drug schedules as they were when he

committed the predicate crime or as the schedules are when he was sentenced. Viewing Mr. Johnson's marijuana crimes at the time of sentencing would lead to a sentencing range of 63 through 78 months while viewing it at the time of the prior conviction implicates the career offender, increasing this range by 88 to 110 months. (Sentencing Transcript, RE 93 Page ID # 270) (this calculation does not include the mandatory minimum consecutive sentence for his gun conviction).

In relation to the split among the Circuits, the Sixth Circuit Opinion of *United States v. Clark,* 46 F4th 404 (6th Cir. 2022) identifies the split of Opinions in the case itself. The *Clark* panel took great pains to distinguish its reasoning from other Circuits that had already adopted the "time-of-sentencing" rule. In Section C of *Clark*, the Court identified the following cases:

> Clark contends that we should follow the other circuits that have adopted a time-of-sentencing rule. *See United States v. Bautista*, 989 F.3d 698, 704 (9th Cir. 2021); *United States v. Abdulaziz*, 998 F.3d 519, 531 (1st Cir. 2021); *United States v. Hope*, 28 F.4th 487, 505–06 (4th Cir. 2022); but see *United States v. Jackson*, No. 20-3684, 2022 WL 303231, at *1–2 (8th Cir. Feb. 2, 2022) (per curiam). Those courts, however, did not adequately engage with McNeill's reasoning.

Clark, 46 F.4th at 412. As referenced in the above citation, the *Clark* Court disagreed with these other Circuit's view of the Supreme Court case *of McNeil v. United States*, 516 U.S. 816 (2011). While the *Clark* Court concluded that *McNeil* confirmed the "time-of-conviction" rule, other Courts determined that *McNeil* did not and used the "time of sentencing" rule. *United States Bautista*, 989 F.3d 698 (9th Cir. 2021) distinguished *McNeil* by holding that *McNeil* did not dictate that a sentencing court should ignore current federal law. Furthermore, it was illogical to determine that a prior crime attached culpability and dangerousness when Congress has presently and specifically said that it

does not. *See United States v. Bautista* 989 F4th 698, 703 (9th Cir. 2021). *Bautista* reasoned that the "present-tense text" of 18 U.S.C. §3553 and U.S.S.G. § 1B1.11 dictate that the court should use a time-of-sentencing rule. *See Bautista*, 989 F.3d at 703. The First Circuit took a similar view as *Bautista* concerning whether the "time of sentence" would apply to guideline enhancement. *See United States v. Abdulaziz*, 998 F3d 919 (1st Cir. 2021). The *Abdulaziz* Court distinguished *McNeil* by holding that *McNeil* only dealt with the first step of the categorical approach in defining the elements of the state statute of conviction and ruled in favor of the "time of sentencing" rule under the relevant guideline provision. *See United States v. Abdulaziz*, 998 F3d 919, 525-26 (1st Cir. 2021). The *Abdulaziz* Court also based its reasoning on that "[a] guideline's enhancement for a defendant's past criminal conduct ... is reasonably understood to be based in no small part on a judgment about how problematic that past conduct is when viewed as of the time of the sentencing itself." *Id.* at 528. The Fourth Circuit took a similar view as the First and Ninth Circuit. *See United States v. Hope*, 28 F4th 27 (4th Cir. 2022). The Second Circuit has also ruled in favor of the "time of sentencing" rule under the career offender guideline. *See United States v. Gibson*, 55 F.4th 153 (2nd Cir. 2022).

However, other Circuits do agree with the Sixth Circuit case of *Clark.* *See United States v. Dubois*, 94 F4th 1284 (11th Cir. 2024); *United States v. Lewis*, 58 F4th 764 (3rd Cir. 2023); and *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022). Regardless, the Circuit conflict is self-evident, and this case presents a question of exceptional importance. Therefore, Mr. Johnson requests that that this Court grant his Petition for Writ of Certiorari.

II. THE RULE OF LENITY IS DECISIONAL AND SHOULD APPLY TO MR. JOHNSON'S CASE

Although Mr. Johnson argues that "present-tense" dictates of the Sentencing Guidelines and 18 U.S.C. §3553 should control the interpretation of the issue above, he presents a second issue of whether Rule of Lenity is either decisional or defunct rule of law. In Mr. Johnson's case, he raised the Rule of Lenity as requiring that the balance between two interpretation concerning predicate offenses should tip in favor of the individual who faces a loss of liberty.

The Rule of Lenity's is mainly grounded in the fair warning doctrine of due process and the second is to uphold the separation of powers doctrine so that courts do no not encroach on legislative functions. *See United States v. Wiltberger*, 18 U.S. 76 (1820). The Rule of Lenity "is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department." *Id.* at 95. The Rule of Lenity was inherited from England when the British Crown had a propensity to punish many crimes with death. *See* John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev.189, 198 (1985). English jurists fed up with hanging so many on the courthouse steps were coming up with creative ways to save the lives of the those to be sentenced before them. As a result, the Rule of Lenity was created to strictly construe death penalty statutes in favor of the defendant. *See* Phillip M. Spector, The Sentencing Rule of Lenity, 33 U. Tol. L. Rev. 511, 518–19 (2002). The very heart of the rule was to save defendants from overly harsh penalties. Thus, the rule is aptly named as one of lenity.

However, the modern version of this rule focuses mainly on preserving the separation of powers and not on fair warning. In *United States v. C.I.T. Credit Corp.*,

344 U.S. 218, 220-21 (1952), the Court stated that "when a 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." The Court did choose the less harsh interpretation of the statute in question, but the Court stated it should use all light available to shed light on Congress' intent, i.e. to seize everything from which aid can be derived to interpret the intent of Congress. *See id.* at 222. This "all light possible" test is a good one in respect to upholding separation of powers test, but it is less good in upholding an individual's right to due process. However, as Justice Gorsuch points out in his concurring opinion in *Snyder v. United States*, 603 U.S. 1 (2024), Lenity is at work in many Opinions, but for some reason it goes by different names, including that of "fair notice". *See Snyder v. United States*, 603 U.S. 1, 20 (2024).

In *United States v. Bass*, 404 U.S. 336, 348-49 (1971), the Court explained that when it comes to taking a person's liberty, Congress must speak in clear terms and draw a clear line that the common world would understand "of what the law intends to do if a certain line is passed." Legislatures should define criminal activity clearly and this policy embodies "instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should." *See id.* With this in mind, does the current view of lenity that a Court should look under all the rocks to decipher Congressional intent really comport with fair warning? There are two reasons for asking question in terms of lenity. First, the "all light possible" test is still placing the lawmaker's power to define laws superior to that of giving the individual citizen fair warning under due process. Secondly, should any Article III Court really be declaring the will of Congress, when the very law

Congress has passed ambiguously states such will? The answer is no. "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bass*, 404 U.S. at 83.

The Opinion in Mr. Johnson's case rejected his argument for lenity because "the rule of lenity plays "a very limited role," applying "only when after seizing everything from which aid can be derived, the statute is still grievously ambiguous." Johnson Opinion, RE 36-2 at p. 13-14. No longer does it appear the law has to be genuinely ambiguous, but now must be grievously so. Again, this a weakening of the fair warning pillar of lenity in favor of the lawmaker's lawmaking power. Furthermore, from a historical context and those of earlier Supreme Court opinions, this input of "grievous" disregards the heart of lenity, saving citizens from overly harsh punishments when the lawmaker does not speak clearly. It appears that since the 1990's there has been a shift and the Rule of Lenity is now regulated to dissenting opinions after a reasoned disagreement with the majority opinion. *See Wooden v. United States*, 595 U.S. 360, 384 (J. Gorsuch concurring opinion). In Justice Scalia's dissent in *Holloway*, he raised the banner of Lenity when he stated, "[i]t seems to me that one can best judge what Congress "obviously intended" not by intuition, but by the words that Congress enacted…" *Holloway v. United States*, 526 U.S. 1, 18 (1999); *see also Wooden*, 595 U.S. at 383 (Justice Barrett's Concurring Opinion, with whom Justice Thomas joined). Justice Scalia's dissent cites to *Bell v. United States*, 349 U.S. 81 (1955). "It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Holloway*, 526 U.S. at 21 (citing to *Bell*

v. United States, 349 U.S. 81 (1955)). "If that is no longer the presupposition of our law, the Court should say, and reduce the rule of lenity to a historical curiosity." *Id.*

However, if the rule is no longer a presupposition of our law, then it makes sense for courts resorting to things like a 35-year-old Solicitor General Brief to figure out Congressional intent. However, it is Congress' job to enact laws that are clear or, at least, clear enough for most people to understand the law and conform their actions. "Lenity works to enforce the fair notice requirement by ensuring that an individual's liberty always prevails over ambiguous laws." *Wooden*, 595 U.S. at 389. "Under that rule, any reasonable doubt about the application of a penal law must be resolved in favor of liberty." *Id.* at 388. If reasonable minds differ on the application of penal law, then the Court should rule in favor of the defendant. *See id.* (Concurrence). Clearly, the rule should be applied to protect liberty over respect for the lawmaker's power.

"This 'grievous" business does not derive from any well considered theory or the mainstream of this Court's opinions." *Wooden*, 595 U.S. at 392 (J. Gorsuch, J Sotomayor concurring). Justice Gorsuch is also correct in that lenity is decisional rule. However, on the other side of this argument, the rule should not kick in, if ever, until after the Court digs through legislative history to ponder the meaning of a law. Instead, after the Court exhausts traditional tools to decipher a poorly written law, the next step is lenity for such issues. *See id.* at 395 (Concurrence). To large extent such issues become self-evident like the one in the case at bar.

The Rule of Lenity involves the Court's balancing legislative power to make laws while protecting the liberty of individuals. However, these two goals would lose some meaning, but for the very reason for the Rule, mercy for the individuals who stand before

a Court to be punished. The rule serves another purpose that will be useful to the Courts. It will encourage those who make the laws to make better and more accurate laws, instead of giving Congress a pass. The Rule of Lenity is good rule of law. Again, Justice Gorsuch recognizes that lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly," forcing the government to seek any clarifying changes to the law rather than impose the costs of ambiguity on presumptively free persons. *See Wooden*, 595 U.S. at 391 (citing to *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). This, in turn, also protects the secondary goal of lenity, the preservation of the separation of powers.

The recent Supreme Court decisions, *Pulsifer v. United States*, 601 U.S. 124 (2024), and in *Snyder v. United States*, 603 U.S. 1 (2024), are relevant to Mr. Johnson's case. In *Pulsifer*, the majority converted the conjunctive word of "and" to an "or" to save the safety valve statute from the Rule of Lenity. As set forth in the Dissent, the *Pulisfer* case's gravamen was what Congress really meant when it used the word "and" in 19 U.S.C. § 3553(f). *See Pulsifer*, 601 U.S. at 161-63 (2024) (J. Gorsuch, J. Sotomayor, and J. Jackson dissenting). However, the Majority did not use the term "grievous ambiguity" as the Sixth Circuit used to reject Mr. Johnson's Lenity argument. *See* Johnson Opinion, RE 36-2 at p. 13-14. Instead, in rejecting Mr. Pulisfer's lenity argument, the Majority found that 18 U.S.C. §3553(f) was not "genuinely ambiguous". *See Pulsifer*, 601 U.S. at 152. *Snyder* provides and even stronger basis to believe that factors are developing to articulate when the Rule should be applied. Because of a split in the Circuits about whether 18 U.S.C. § 666 criminalized gratuities given to public officials after an official act, the Supreme Court reviewed the *Snyder* case. The Majority in *Snyder* interpreted 18

U.S.C. § 666 to not criminalize gratuities and used six reasons in support of this conclusion, i.e. "text, statutory history, statutory structure, statutory punishments, federalism, and fair notice." *See Snyder*, 603 U.S. at 10. Three of these reasons appear to fall in line with traditional tools of statutory interpretation. However, federalism and fair notice appear to Justice Gorsuch in his concurring Opinion as just another name for the ancient and well-established Rule of Lenity. Federalism, in the *Snyder* context, is no more than a respect for the state's power to regulate its own public official's conduct. *See Snyder*, 603 U.S. at 17. The Supreme Court's precedents caution against the Federal Government interfering with states making their own sovereign rules. Fair notice is an obvious application of the Lenity in that the statute, as interpreted by the government, would create traps for the unwary state official. *See id.* at 17. If distinguished jurists struggle with a statute's meaning, how can an individual of common intelligence do so? Courts need to tell Congress (or the Commission) to rewrite its laws instead of the individual standing before a Court in judgment paying the price.

CONCLUSION

Several years ago, the Supreme Court made the implication of the guidelines advisory for sentencing judges. When so doing, the traditional power of judges to sentence an individual was strengthened by providing more judicial discretion. When clearly written statutes carrying mandatory minimums are prosecuted, such as the ACCA, this discretion is rightly fettered. However, a Sentencing Guideline is a different story because the overarching sentencing theme is to adjudge the individual as he stands before the Court on the day that this defendant's liberty is taken away. Furthermore, it is also to avoid disparity. Mr. Johnson's prior marijuana crimes should not be considered predicate

offenses for Career Offender status. It is obvious that there are well-reasoned opinions on both sides of this issue. Mr. Johnson asks this Court to apply the Rule of Lenity in his case as a decisional factor, which would tip the balance of opinions in his favor.

Respectfully Submitted,

s/ Jeffrey C. Rager
Jeffrey C. Rager
Rager Law Firm, PLLC.
P.O. Box 911006
Lexington, Kentucky 40591-1006
(859) 963-2929
jrager@ragerlawky.com
Counsel of Record for Dekeilon Johnson

CERTIFICATE OF SERVICE

I, Jeffrey C. Rager, attorney for the petitioner, Dekeilon Johnson, hereby certify that the original and ten copies of this Petition for Writ of Certiorari were mailed to the Office of the Clerk, Supreme Court of the United States, One 1st Street NE Washington, DC 20543; and that a true copy of the foregoing Petition was served by mail with first-class postage prepaid, upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001; Karen Hartridge, United States Attorney's Office for Western District of Tennessee, 167 North Main Street, Suite 800, Memphis, Tennessee 38103; Dekeilon Johnson, Inmate No. 35602-509, FCI Forrest City, P.O. Box 3000, Forrest City, AR, 72336 by first class mail and direct email, on this the 4th day of December, 2024;

s/ Jeffrey C. Rager
Jeffrey C. Rager

APPENDIX A

APPENDIX A: Judgment of the District Court, United States v. Johnson, 2:21-cr-20036-1 entered on August 7, 2023, at District Court Docket Entry 86.

UNITED STATES DISTRICT COURT

Western District of Tennessee

UNITED STATES OF AMERICA
v.
DEKEILON MARQUEL JOHNSON

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:21cr20036-01-MSN

USM Number: 35602-509

Eric Scott Hall, Retained
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) One (1) and Two (2) of the Indictment on 03/21/2023.

☐ 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
18 U.S.C. § 2113(a)	Bank Robbery, Aiding and Abetting	10/20/2017	1

The defendant is sentenced as provided in pages 2 through 7 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.

8/7/2023
Date of Imposition of Judgment

s/ Mark S. Norris
Signature of Judge

Mark S. Norris U.S. District Judge
Name and Title of Judge

8/7/2023
Date

DEFENDANT: DEKEILON MARQUEL JOHNSON
CASE NUMBER: 2:21cr20036-01-MSN

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 924(c); 18 U.S.C. § 924(c)(1)(A)(ii);	Using, Carrying, Brandishing, and Discharging a Firearm During and in Relation to a Crime of Violence, Bank Robbery, Aiding and Abetting	10/20/2017	2

DEFENDANT: DEKEILON MARQUEL JOHNSON
CASE NUMBER: 2:21cr20036-01-MSN

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

One Hundred Fifty One (151) months as to Count 1, One Hundred Twenty (120) months as to Count 2 to be served consecutively as to Count 1, for a total term of Two Hundred Seventy One (271) months incarceration.

☑ The court makes the following recommendations to the Bureau of Prisons:

1. The defendant be allowed to participate in the 500-hour Residential Drug Abuse Program (RDAP), if eligible or any other drug treatment program as qualified.
2. The defendant be allowed to participate in mental health treatment and counseling.
3. The defendant be allowed to participate in GED classes and/or vocational training.
4. The defendant be allowed to participate in Moral Reconation Therapy (MRT) or another similar cognitive behavioral therapy program.
5. The defendant be designated to serve his term of imprisonment at a facility closest to defendant's family in Memphis, TN.

☑ 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: DEKEILON MARQUEL JOHNSON
CASE NUMBER: 2:21cr20036-01-MSN

SUPERVISED RELEASE

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

Three (3) years as to each count to be served concurrently with each other, for a total term of Three (3) years supervised release.

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.

DEFENDANT: DEKEILON MARQUEL JOHNSON
CASE NUMBER: 2:21cr20036-01-MSN

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: DEKEILON MARQUEL JOHNSON
CASE NUMBER: 2:21cr20036-01-MSN

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall participate in substance abuse testing and treatment as directed by the probation officer

2. The defendant shall participate in mental health treatment/counseling as directed by the probation officer.

3. The defendant shall maintain lawful full-time employment or participate in GED classes and/or vocational training as directed by the probation officer.

4. The defendant shall participate in Moral Reconation Therapy (MRT) or another similar and approved cognitive behavioral therapy program as directed by the Probation Officer.

5. The defendant shall submit his person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: DEKEILON MARQUEL JOHNSON
CASE NUMBER: 2:21cr20036-01-MSN

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 200.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

APPENDIX B

APPENDIX B: Opinion of the Court of Appeal for the Sixth Circuit affirming the District Court in United States of America v. Johnson, Case No. 23-5753 entered on November 1, 2024, at Docket Entry 36-2.

NOT RECOMMENDED FOR PUBLICATION
File Name: 24a0441n.06

No. 23-5753

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 01, 2024
KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DEKEILON MARQUEL JOHNSON, Defendant-Appellant.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE OPINION

Before: MOORE, THAPAR, and DAVIS, Circuit Judges.

KAREN NELSON MOORE, Circuit Judge. Dekeilon Johnson robbed a bank in Memphis, Tennessee at gunpoint. After he pleaded guilty, the Probation Office recommended that he receive a sentencing enhancement as a career offender due to two prior Tennessee convictions for the possession of marijuana with the intent to manufacture, sell, or distribute. At the time of those convictions, both the federal and Tennessee drug schedules included "hemp" within the definition of "marijuana" for the purposes of defining a controlled-substance offense. Both schedules were later amended to exclude hemp from the definition prior to Johnson's sentencing for the bank robbery. Johnson argued at sentencing that he was not eligible for the career-offender enhancement because of those amendments and argued for a downward variance based on changing views regarding marijuana. But because we have already adopted a time-of-conviction rule regarding the prior controlled-substances offenses, and because the district court did not abuse

its discretion in imposing a bottom-of-the-Guidelines sentence, Johnson's arguments fail to pass muster.

We **AFFIRM** the judgment of the district court.

I. FACTUAL BACKGROUND

A. Johnson's Armed Bank Robbery

On October 20, 2017, Johnson, along with at least one accomplice, committed an armed robbery at Regions Bank in Memphis, Tennessee. R. 81 (Final PSR at ¶ 9) (Page ID #154–55). While two security guards were reloading an ATM machine at Regions Bank from an armored vehicle, Johnson approached and pulled a handgun on the guard handling the transfer of cash from the armored vehicle into the ATM. *Id.* The guard, who was armed, produced his own handgun, and the two exchanged fire, although neither was injured. *Id.* While the guard was reloading his handgun, Johnson grabbed a cash cassette holding $50,000 and fled. *Id.* After a lengthy investigation, law enforcement linked Johnson to the robbery via DNA analysis. *Id.* at ¶¶ 13, 19. An FBI agent submitted a criminal complaint on March 12, 2021, and an arrest warrant was issued that day. R. 3 (Complaint at 1) (Page ID #3), R. 4 (Arrest Warrant at 1) (Page ID #8).

B. The Proceedings Below

A grand jury indicted Johnson on counts of aiding and abetting bank robbery and the use, carrying, brandishing, and discharging of a firearm during a bank robbery in violation of 18 U.S.C. § 2113(a) and 18 U.S.C. § 924(c), respectively. R. 7 (Indictment at 1–2) (Page ID #21–22). After initially pleading not guilty, R. 16, Johnson entered an open plea of guilty to both counts of the indictment on March 21, 2023. R. 75.

In preparation for Johnson's sentencing, the Probation Office prepared a presentence investigation report (PSR) in which it determined that Johnson qualified for a sentencing enhancement as a career offender. R. 81 (Final PSR at ¶¶ 36) (Page ID #158–59). Specifically, the Probation Office determined that Johnson qualified as a career offender under U.S.S.G. § 4B1.1because, as required by that provision, (1) he was at least 18 years old at the time of the instant offense, (2) the instant offense was a felony involving a crime of violence; and (3) he had at least two prior felony convictions for either a crime of violence or a controlled substance offense. *Id.* Probation determined that Johnson had three qualifying prior felony convictions: a 2015 Tennessee conviction for aggravated assault; a 2015 Tennessee conviction for the possession of marijuana with the intent to manufacture, sell, or distribute; and a 2018 Tennessee conviction for possession of marijuana with the intent to sell. *Id.* at ¶¶ 44, 45, 50 (Page ID #160–61, 163). Applying the career-offender enhancement, Probation recommended that Johnson's total offense level be calculated as 29, which, combined with his criminal history category of VI, resulted in a total Guidelines range of 271 to 308 months of imprisonment. *Id.* at ¶¶ 36, 55, 102 (Page ID #158–59, 164, 171).

Johnson's sentencing hearing was held on August 7, 2023. R. 84. At sentencing, Johnson raised a number of objections to Probation's calculation of his offense level and the resulting Guidelines range. R. 93 (Sent'g Tr. at 15) (Page ID #226). One of those objections was to the application of the career-offender enhancement. *Id.* Johnson argued that the enhancement should not apply because two out of the three of his prior offenses—the 2015 and 2018 Tennessee marijuana convictions—theoretically could have been for the possession of hemp, which no longer qualified as a controlled substance under either the federal or Tennessee drug schedules. *Id.*

According to Johnson, because the modern versions of the statutes are less inclusive, his prior marijuana offenses should not have been considered "controlled substance offenses" for the purposes of the enhancement. *Id.* at 15–17 (Page ID #226–28). Noting that this argument was foreclosed by our precedent, Johnson nevertheless presented the argument in order to preserve it for appellate review. *Id.* at 17 (Page ID #228). After discussing the issue at length, the district court overruled Johnson's objection to the applicability of the career-offender enhancement. *Id.* at 21 (Page ID #232).

Johnson also requested a variance to his calculated total Guidelines range of 271 to 308 months on the basis of his criminal history and characteristics. *Id.* at 34–35 (Page ID #245–46). Specifically, Johnson's counsel noted the strength of Johnson's familial support system, the trauma he went through in his youth, and his dedication to his children. *Id.* Counsel also made an argument regarding the need to reduce unwarranted sentencing disparities by varying downward to reflect the allegedly diminished seriousness of Johnson's previous marijuana-related convictions. *Id.* at 35–36 (Page ID #246–47). This argument extended into a lengthy discussion by defense counsel about changing views regarding marijuana, the legalization of marijuana in a number of jurisdictions, and the failure of Congress to amend the Guidelines to reflect these changes. *Id.* at 35–42 (Page ID #246–53). By contrast, the government emphasized the violent nature of the bank robbery and the fact that it involved a shootout; Johnson's criminal history beginning at age fifteen and extending through his young adulthood; and Johnson's repeated disciplinary infractions while in pretrial detention pending his sentencing. *Id.* at 26–31 (Page ID #237–42).

After taking a recess to consider the arguments made by both parties, *id.* at 54–55 (Page ID #265–66), the district court, having reviewed "the entire record and closely scrutinizing the 3553 factors as we're required to do," denied Johnson's request for a downward variance. *Id.* at 60 (Page ID #271). Specifically, the district court found that "the facts established here by a preponderance of the evidence . . . demonstrate that the defendant is dangerous" and "a danger to this community." *Id.* The district court also found that "the record reflects that [Johnson has] demonstrated a lack of respect for the law and the Courts by his conduct and by violating probation and by virtue of the numerous offenses committed while in custody" and that Johnson's prior periods of incarceration had failed to "adequately deter[] his criminal behavior." *Id.* The district court additionally noted the importance of imposing a sentence adequate not only to deter Johnson from committing future crimes "but also to send a message to [the] general public, a message of deterrence." *Id.* at 60–61 (Page ID #271–72). The district court concluded that a bottom-of-the-Guidelines range sentence of 271 months was "sufficient but not greater than necessary" to achieve the goals of sentencing. *Id.* at 60 (Page ID #271).

Johnson timely filed a notice of appeal on August 21, 2023. R. 87 (Notice of Appeal) (Page ID #198).

II. DISCUSSION

A. Standard of Review

Johnson raises three issues on appeal: (1) whether the district court erred in classifying his prior drug felony convictions as "controlled substance offenses" under the Sentencing Guidelines; (2) whether his 271-month sentence was substantively unreasonable; and (3) whether the rule of lenity should apply to reduce Johnson's sentence. We review de novo the district court's

determination that a prior conviction qualifies as a "controlled substance offense" under the Guidelines. *United States v. Havis*, 927 F.3d 382, 384 (6th Cir. 2019) (en banc) (per curiam). By contrast, we review substantive-reasonableness claims for an abuse of discretion. *United States v. Ruiz*, 777 F.3d 315, 319 (6th Cir. 2015).

B. "Controlled Substance Offense" Classification

The first issue Johnson raises on appeal is whether his two prior Tennessee marijuana felony convictions qualify as predicate "controlled substance offenses" for the purposes of the career-offender enhancement under the Guidelines. In evaluating whether a conviction qualifies as a predicate offense for an enhancement, we employ a three-step categorical approach. *United States v. Garth*, 965 F.3d 493, 495 (6th Cir. 2020). "Under this approach we look only to the elements of the criminalized conduct, not the defendant's actual conduct." *United States v. Clark*, 46 F.4th 404, 407–08 (6th Cir. 2022). We proceed by (1) identifying the conduct criminalized under the state law of conviction; (2) evaluating that conduct as defined under the Guidelines; and (3) overlaying the two and determining whether "the outer edges of the state law—often the 'least culpable conduct' that the law proscribes—extend past the guidelines' definition," in which case the conviction does not count as a predicate offense. *Garth*, 965 F.3d at 495. "[I]f, however, the boundaries of the state law and the guidelines' definition are coterminous, or the guidelines' definition sweeps more broadly, then the conviction counts" as a predicate offense. *Id.*

Johnson was twice convicted for possession of marijuana with intent to deliver or sell under Tennessee law. R. 81 (Final PSR at ¶¶ 45, 50) (Page ID #161, 163); Tenn. Code Ann. § 39-17-417. At the time of these convictions (2015 and 2018), both Tennessee and federal law defined "marijuana" as including hemp. Tenn. Code Ann. § 39-17-402(16) (2012); 21 U.S.C. § 802(16)

(2018). Since that time, both jurisdictions have amended their drug schedules to exclude hemp from the definition of "marijuana." Tenn. Code Ann. § 39-17-402(16)(C) (2019); 21 U.S.C. § 802(16)(B) (2018); *see also* Agriculture Improvement Act, Pub. L. No. 115-334, § 12619(a)(2), 132 Stat. 4490, 5018 (2018) (removing "hemp" from the definition of "marijuana" in the schedule of controlled substances). Employing the first step of the categorical approach, however, we look to the conduct criminalized by the state statute at the time of Johnson's state convictions, which included the possession of hemp.

Employing the second step of the categorical approach, we then look to the relevant conduct as defined in the Guidelines. For the career-offender enhancement to apply, a defendant must have "at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a)(3). The Guidelines define a "controlled substance offense" as "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 the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense[.]" U.S.S.G. § 4B1.2(b)(1). The Guidelines do not otherwise define the term "controlled substance offense."

It is at this step of the required analysis that Johnson argues the district court erred. According to Johnson, in determining whether his two prior marijuana-related offenses count as "controlled substance offenses" under the Guidelines for the purposes of the career-offender enhancement, we should look not to the state and federal drug schedules as they existed at the time of his state convictions but instead to the schedules as they existed at the time of his federal sentencing in the instant case, i.e., August 7, 2023. Appellant Br. at 15–16. Applying this

approach, the relevant drug schedules would exclude hemp from the definition of a "controlled substance" and neither of Johnson's state marijuana offenses would qualify as predicate offenses. *Id.* By contrast, the government argues that our precedent makes clear that we must look instead to the drug schedules as they existed at the time of Johnson's underlying state convictions. Appellee Br. at 7.

In *Clark*, we clearly stated that, although Circuits differ as to the applicable rule, "[w]e adopt a time-of-conviction rule." 46 F.4th at 408. In that case, we reviewed the sentence of an individual with two underlying Tennessee convictions for possessing marijuana with the intent to sell or deliver to whom the district court had applied the career-offender enhancement. *Id.* at 407. After analyzing the Guidelines' text, relevant caselaw, and prudential considerations, we held that, though the state and federal drug schedules had both since excised hemp from the definition of marijuana, "courts must define the term 'controlled substance offense' in the Guidelines with reference to the law in place at the time of the prior conviction at issue." *Id.* at 415. The same question of law is present here as in *Clark*, and thus we reach the same conclusion. The time-of-conviction rule[1] applies.

Johnson devotes a significant portion of his briefing arguing that *Clark* was wrongly decided and criticizing its internal logic. Appellant Br. at 12, 23–25; Reply Br. at 5. But "we are duty-bound to apply governing precedent." *Hubbell v. FedEx SmartPost, Inc.*, 933 F.3d 558, 571 (6th Cir. 2019). And we have done so in a number of cases subsequent to *Clark*. *See United States*

[1]To be clear, in the context of this rule, "time-of-conviction" refers to the time of a defendant's conviction on the prior crime or crimes being counted as qualifying convictions for the purposes of the career-offender enhancement. So, in the context of this case, "time-of-conviction" refers to the dates on which Johnson was convicted of his previous felony offenses—the possession of marijuana with the intent to distribute under Tennessee law—i.e., 2015 and 2018.

v. Wilkes, 78 F.4th 272, 278 (6th Cir. 2023); *United States v. Long*, No. 22-6041, 2023 WL 5242509, at *1 (6th Cir. July 28, 2023) (order); *United States v. Rogers*, No. 21-6134, 2023 WL 152517, at *4 (6th Cir. Jan. 11, 2023).

Finally, the Supreme Court recently decided a case that lends support to our holding in *Clark*. In *Brown v. United States*, the Court took up the question of whether courts should look to the federal drug schedules in place at the time of a prior conviction or at the time of sentencing in determining whether a previous state drug conviction qualifies as an Armed Career Criminal Act (ACCA) predicate offense. 602 U.S. 101, 107–08 (2024). The Court held that, in the context of the ACCA, a time-of-conviction rule applies. *Id.* at 115. In so holding, the Court noted its previous holding that the argument that an offense should no longer be treated as "serious" following a change in state law was "absurd" and that "[t]he 'subsequent chang[e] in state law' did not 'erase [the] earlier conviction.'" *Id.* (quoting *McNeill v. United States*, 563 U.S. 816, 822–23 (2011)).

Johnson argues that *Brown* is distinguishable from the case at bar because *Brown* involved the interpretation of the ACCA, not the Sentencing Guidelines. D. 32 (Appellant 28(j) Letter at 1–2). Citing footnotes in both the majority opinion and dissent, Johnson argues that the Supreme Court's decision in *Brown* instead casts doubt upon our decision in *Clark* by noting that "Congress has expressly directed courts to apply the Guidelines 'in effect on the date the defendant is sentenced.'" *Id.* (citing *Brown*, 602 U.S. at 120 n.7 (majority); 127 n.1 (Jackson, J., dissenting)). Johnson's citation to these footnotes misunderstands their meaning. District courts are indeed required to apply the Guidelines as they exist at the time of a federal criminal defendant's sentencing, and the district court did so in this case. But Congress has provided no guidance as to whether courts are to look to the drug schedules in place at the time of sentencing for the instant

offense or at the time of the prior conviction(s) in determining whether a previous offense qualifies as a predicate offense for the purposes of the career-offender enhancement. That lack of guidance has resulted in a circuit split on the issue. Our circuit has determined that a time-of-conviction rule applies. And nothing that the Court stated in *Brown* casts doubt upon that determination. In fact, the reasoning that the Court employs in *Brown* bolsters the notion that a time-of-conviction rule comports with precedent and statutory context. *Id.* at 111–16.

Under the time-of-conviction rule, we look to the drug schedules in place at the time of Johnson's prior convictions, i.e., 2015 and 2018. *Clark*, 46 F.4th at 415. Both the federal and Tennessee drug schedules included hemp within the definition of marijuana at those times. Both convictions therefore qualify as controlled-substance offenses under U.S.S.G. § 4B1.1(a), even if we assume that Johnson possessed hemp. The district court did not err in applying the career-offender enhancement.

C. Substantive Reasonableness

Johnson also argues that his 271-month sentence is substantively unreasonable. Appellant Br. at 26. "For a sentence to be substantively reasonable, 'it must be proportionate to the seriousness of the circumstances of the offense and offender, and sufficient but not greater than necessary, to comply with the purposes' of § 3553(a)." *United States v. Curry*, 536 F.3d 571, 573 (6th Cir. 2008) (quoting *United States v. Vowell*, 516 F.3d 503, 512 (6th Cir. 2008)). On the other hand, "[a] sentence may be considered substantively unreasonable when the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor." *United States v. Conatser*, 514 F.3d 508, 520 (6th Cir. 2008).

As an initial matter, a sentence falling within the Guidelines range is presumed to be reasonable. *United States v. Parrish*¸ 915 F.3d 1043, 1049 (6th Cir. 2019); *see also Conatser*, 514 F.3d at 520 ("A properly calculated advisory guidelines range represents the starting point for substantive-reasonableness review because it is one of the § 3553(a) factors and because the guidelines purport to take into consideration most, if not all, of the other § 3553(a) factors."). Here, Johnson's advisory Guidelines range was calculated as 271 to 308 months of imprisonment. R. 93 (Sent'g Tr. at 8) (Page ID #219). The district court sentenced Johnson to 271 months, the lowest end of the applicable Guidelines range. *Id.* at 60 (Page ID #271). Johnson's sentence is thus presumptively reasonable.

We have held that "[t]he sentencing judge may not presume that the guidelines range is reasonable, but must consider all of the relevant § 3553(a) factors and impose a sentence that is sufficient but not greater than necessary to comply with the purposes of § 3553(a)(2)." *Conatser*, 514 F.3d at 520 (internal quotations omitted). "Section 3553(a) mandates that a district court imposing a sentence consider the defendant's guideline range; the nature of the offense; the characteristics of the defendant; the need to deter criminal conduct, protect the public, and provide the defendant with appropriate treatment; and the need to avoid sentencing disparities with defendants who have been found guilty of the same conduct and who have similar criminal histories." *Curry*, 536 F.3d at 573–74.

Here, after hearing arguments from both parties, the district court considered the § 3553(a) factors and emphasized those that it found most relevant to Johnson's case, including the nature of the offense, Johnson's criminal history, and the need to protect the public and deter Johnson from committing future crimes. R. 93 (Sent'g Tr. at 60–61) (Page ID #271–72). Specifically, the

district court emphasized the violent nature of the crime of conviction, including the fact that it involved a shootout; Johnson's "demonstrated . . . lack of respect for the law and the Courts by his conduct and by violating probation and by virtue of the numerous offenses committed while in custody"; and the need to deter both Johnson himself and others from committing similar crimes. *Id.* Upon considering the factors, along with the arguments for leniency presented by defense counsel, the district court determined that a sentence at the bottom of the Guidelines range of 271 months' imprisonment was reasonable. *Id.* at 60 (Page ID #271).

Johnson argues that the district court "put an unreasonable amount of weight" on certain of the § 3553(a) factors—specifically, his recidivism risk and potential danger to the community—at the expense of others, including his youth at the time of his marijuana convictions and the life changes he has made since his arrest for the instant offense. Appellant Br. at 26–28. In so arguing, Johnson essentially reiterates many of the arguments made by his trial counsel at sentencing in favor of a downward variance. But the record at sentencing does not reflect that the district court gave unreasonable weight to any one factor; instead, it reflects the district court's careful consideration of a number of factors that it found relevant. And the district court's decision to weigh certain factors, including Johnson's lengthy criminal history, the seriousness of the instant offense, and the risk of recidivism, more than others was reasonable. *See United States v. Gates*, 48 F.4th 463, 478 (6th Cir. 2022) (stating that "a sentence is not necessarily substantively unreasonable because a court places greater weight on some factors than others"); *United States v. Dunnican*, 961 F.3d 859, 881 (6th Cir. 2020) (same).

With the understanding that Johnson's within-Guidelines sentence is entitled to a presumption of reasonableness, we conclude that the district court did not abuse its discretion by

imposing a 271-month sentence. After considering several of the § 3553(a) factors, including Johnson's arguments about his age at the time of his previous offenses and changes to his life since, as well as the government's arguments regarding the seriousness of the offense and the relevance of Johnson's criminal history, the district court concluded that a sentence at the lowest end of Johnson's Guidelines range was sufficient but not greater than necessary to achieve the aims of sentencing. That conclusion was substantively reasonable.

D. The Rule of Lenity

Finally, Johnson engages in a lengthy discussion of why the rule of lenity should apply to the case at bar, arguing that the "plethora of ambiguity" involved in the question of whether Johnson's prior marijuana convictions should qualify as controlled substance offenses under the career-offender enhancement and that the "social ambiguity concerning marijuana" warrants the exercise of lenity. Appellant Br. at 45. This argument is, in essence, a policy argument as to the role of the federal judiciary versus Congress and changing views regarding marijuana.

We reviewed a similar argument in *Clark*. 46 F.4th at 415. There, we noted that "the rule of lenity plays 'a very limited role,' applying 'only when after seizing everything from which aid can be derived, the statute is still grievously ambiguous.'" *Id.* (quoting *Wooden v. United States*, 595 U.S. 360, 377 (2022) (Kavanaugh, J., concurring); *see also Muscarello v. United States*, 524 U.S. 125, 138–39 (1998) (explaining that "[t]o invoke the rule [of lenity], we must conclude that there is a 'grievous ambiguity or uncertainty' in the statute" such that the court "can make 'no more than a guess as to what Congress intended.'") (first quoting *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); then quoting *United States v. Wells*, 519 U.S. 482, 499 (1997)). We concluded that, "[b]ecause a reasoned interpretation of the text can be reached by 'exhaust[ing] all

the tools of statutory interpretation,' we need not rely on the rule of lenity here." *Clark*, 46 F.4th at 415 (quoting *Wooden*, 595 U.S. at 377 (Kavanaugh, J., concurring)).

Here, as in *Clark*, the career-offender enhancement provision is not so ambiguous as to require the application of the rule of lenity. And while Johnson may not agree with our interpretation of the provision's meaning, such disagreement is inadequate to require the application of lenity. Furthermore, any argument that Johnson was not on notice that his previous convictions qualified as controlled substance offenses for the purposes of the career offender enhancement is vitiated by the fact of our existing precedent on the issue. *Id.* Under these circumstances, the rule of lenity does not apply.

III. CONCLUSION

Dekeilon Johnson was convicted of state offenses involving the possession and sale of marijuana under a broader statutory framework that was more inclusive (by including hemp in the definition of marijuana) than that in existence at the time of his sentencing for bank robbery. But we apply a time-of-conviction rule, looking to the time of a defendant's conviction(s) on previous crimes, not a time-of-sentencing rule. The district court therefore properly concluded that Johnson's prior marijuana convictions under state law qualified as "controlled substance offenses" for the purposes of the career-offender enhancement. And Johnson's 271-month sentence, a sentence at the lowest end of his recommended Guidelines range, is not substantively unreasonable.

We **AFFIRM** the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5753

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEKEILON MARQUEL JOHNSON,

Defendant - Appellant.

FILED
Nov 01, 2024
KELLY L. STEPHENS, Clerk

Before: MOORE, THAPAR, and DAVIS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk