

No. _____

IN THE
Supreme Court of the United States

NASHAUN DRAKE,
Petitioner,
v.
UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

STEPHEN C. NEWMAN
FEDERAL PUBLIC DEFENDER

CATHERINE ADINARO SHUSKY*
1660 WEST 2ND STREET
Suite 750
Cleveland, OH 44113
(216) 891-3955
cathi_shusky@fd.org

Counsel for Petitioner

July 25, 2025

*Counsel of Record

QUESTION PRESENTED

1. When defining a controlled substance offense under U.S.S.G. § 4B1.2(b) do courts look to the substances that were controlled on the date of the prior conviction or to the substances controlled on the date of federal sentencing?

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 Ohio, and the United States Court of Appeals for the Sixth Circuit:

United States v. Drake, 1:21CR519 (N.D. Ohio) (criminal proceedings), judgment entered March 28, 2023.

United States v. Drake, 23-3304 (6th Cir.) (direct criminal appeal), initial petition for rehearing en banc denied on August 1, 2024; merits opinion entered on January 28, 2025; petition for rehearing en banc denied on March 28, 2025.

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

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
DIRECTLY RELATED PROCEEDINGS	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
OPINIONS AND ORDERS BELOW.....	1
JURISDICTION.....	2
LEGAL FRAMEWORK	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE PETITION.....	7
I. This Court has recognized the split among the Courts of Appeals in defining a controlled substance offense and impressed upon the Com- mission the need to resolve the conflict and restore uniformity in sen- tencing. This unresolved split has caused another split among the circuits which is implicated in this case.	8
II. The circuit courts have differing interpretations of decisions from this Court	10
III.The question presented raises an important and recurring issue fun- damental to fair sentencing.....	12
IV.This case is an ideal vehicle for resolving the question presented.....	13
CONCLUSION.....	13

APPENDIX A: Order Denying Rehearing En Banc <i>United States v. Drake</i> , No. 23-3304 (6th Cir. Mar. 28, 2025).....	1a
APPENDIX B: Opinion, <i>United States v. Drake</i> , 126 F.4th 1242 (6th Cir. 2025) ...	2a
APPENDIX C: Order Denying Initial Rehearing En Banc, <i>United States v. Drake</i> , No. 23-3304 (6th Cir. Aug. 1, 2024).....	8a
APPENDIX D: Judgment Entry, <i>United States v. Drake</i> , N.D. Oh. No. 1:21CR519 (Mar. 28, 2023)	9a
APPENDIX E: Sentencing Transcript, <i>United States v. Drake</i> , N.D. Oh. No. 1:21CR519 (Mar. 28, 2023)	17a

TABLE OF AUTHORITIES

CASES

<i>Brown v. United States</i> , 602 U.S. 101 (2024)	<i>passim</i>
<i>Guerrant v. United States</i> , 142 S. Ct. 640 (2022)	9
<i>McNeill v. United States</i> , 563 U.S. 816 (2011)	10, 11
<i>United States v. Abdulaziz</i> , 998 F.3d 519 (1st Cir. 2021)	10
<i>United States v. Bailey</i> , 37 F.4th 467 (8th Cir. 2022)	10
<i>United States v. Bautista</i> , 989 F.3d 698 (9th Cir. 2021)	8, 10
<i>United States v. Clark</i> , 46 F.4th 404 (6th Cir. 2022)	<i>passim</i>
<i>United States v. Dubois</i> , 94 F.4th 1284 (11th Cir. 2024), <i>cert. granted</i> , <i>judgment vacated on other grounds</i> , No. 24-5744, 2025 WL 76413 (U.S. Jan. 13, 2025)	8, 10
<i>United States v. Gibson</i> , 55 F.4th 153 (2d Cir. 2022), <i>adhered to on reh’g</i> , 60 F.4th 720 (2d Cir. 2023)	10
<i>United States v. Gomez-Alvarez</i> , 781 F.3d 787 (5th Cir. 2015)	8
<i>United States v. Henderson</i> , 11 F.4th 713 (8th Cir. 2021)	8
<i>United States v. Patrick Jones</i> , 15 F.4th 1288 (10th Cir. 2021)	8
<i>United States v. T’Shaun Jones</i> , 81 F.4th 591 (6th Cir. 2023)	8
<i>United States v. Lewis</i> , 58 F.4th 764 (3d Cir. 2023), <i>cert. denied</i> , 144 S. Ct. 489 (2023)	8, 10
<i>United States v. Minor</i> , 121 F.4th 1085 (5th Cir. 2024)	6, 9, 11
<i>United States v. Ruth</i> , 966 F.3d 642 (7th Cir. 2020)	8
<i>United States v. Townsend</i> , 897 F.3d 66 (2d Cir. 2018)	8
<i>United States v. Ward</i> , 972 F.3d 364 (4th Cir. 2020)	8

<i>Wiggins v. United States</i> , 606 U.S. ___, No. 24-6410, 2025 WL 1787666, (June 30, 2025)	<i>passim</i>
--	---------------

STATUTES

18 U.S.C. § 924(e)(1)	5
18 U.S.C. § 924(e)(2)(A)(i)	11
18 U.S.C. § 3553(a)(4)(A)(ii)	7

UNITED STATES SENTENCING GUIDELINES

U.S.S.G § 4B1.1	4
U.S.S.G. § 4B1.2(b)	<i>passim</i>

INTRODUCTION

Federal courts have defined a controlled substance offense under the career offender provision differently. Some circuits find the definition includes any substance controlled under state or federal law while other circuits hold only substances controlled by federal law are included. This Court has recognized this inconsistent definition is resulting in significantly different sentencing ranges being used based solely on geography and has urged the Commission to address the split. The Commission has not yet done so, and this Court should not wait any longer to address this national disparity in federal sentencing.

This Court should not wait because the differing definition has produced a secondary split, which is implicated in this case. This secondary split relates to whether a substance must be controlled at the time of federal sentencing or at the time of the prior offense. In answering this question, the Courts of Appeals are divided on how to interpret decisions by this Court. This Court should seize this opportunity to clarify its decisions and restore uniformity in federal sentencing.

OPINIONS AND ORDERS BELOW

In *United States v. Drake*, Case No. 23-3304, the United States Court of Appeals for the Sixth Circuit denied Drake's petition for an initial rehearing en banc. The Sixth Circuit's order denying initial rehearing is not published and is reproduced in Appendix A. *See* App. at 1a. The Sixth Circuit's opinion affirming Drake's sentence is reported at *United States v. Drake*, 126 F.4th 1242 (6th Cir. 2025), and reproduced

in Appendix B. *See App. at 2a-7a.* After the panel decision, Drake petitioned for rehearing en banc, which was denied. The order denying an en banc rehearing is not published but is available electronically at 2025 WL 1165890 (6th Cir. Mar. 28, 2025), and is reproduced in Appendix C. *See App. at 8a.*

The orders and opinion from the Sixth Circuit arise from a direct appeal from Drake's sentencing in the United States District Court for the Northern District of Ohio. The judgment entry and transcript of Drake's sentencing hearing are reproduced in Appendix D, *see App. at 9a-16a*, and Appendix E, *see App. at 17a-49a*.

JURISDICTION

In *United States v. Drake*, Case No. 23-3304, the court of appeals entered judgment on January 28, 2025. *See App. at 2a-7a.* Drake timely filed a petition for rehearing en banc, which the court denied on March 28, 2025. *See App. at 8a.* This Court granted Drake an extension of time to file this petition until July 28, 2025. *Drake v. United States*, Case No. 25A29.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL FRAMEWORK

United States Sentencing Commission Guidelines Manual (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.

U.S.S.G. § 4B1.2(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).

STATEMENT OF THE CASE

Nashaun Drake was convicted in 2016 of trafficking marijuana in Cuyahoga County Court of Common Pleas. At that time, both federal law and Ohio law criminalized marijuana regardless of the level of tetrahydrocannabinol (“THC”). In 2018, federal law changed the definition of marijuana to exclude marijuana with a THC level below a certain amount (*i.e.*, hemp). Ohio law made the same change in 2019. Since 2019, hemp is no longer a controlled substance under federal or Ohio law.

In 2021, Drake was charged in federal court with five counts of possession with the intent to distribute a controlled substance. He pled guilty with a written plea agreement and reserved his right to challenge any determination that he qualified as a career offender. A defendant qualifies as a career offender if (1) the defendant was at least 18 years old at the time he committed the instant offense; (2) the instant offense is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions for either a crime of violence or a

controlled substance offense. U.S.S.G. § 4B1.1(a). 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—

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).

U.S.S.G. § 4B1.2(b).

Drake’s presentence investigation report concluded that he qualified as a career offender based, in part, on his 2016 state marijuana conviction. The career offender classification increased Drake’s Guideline range from 110–to–137 months to 188–to–235 months. App. at 29a-30a. Drake objected and argued his 2016 marijuana conviction did not qualify as a controlled substance offense under § 4B1.2(b) because at the time of his prior conviction the definition of marijuana included hemp, which was no longer controlled. Because his prior conviction could be predicated on broader conduct than what was criminalized at the time of his federal sentencing, it does not meet the Guidelines’ definition utilizing the requisite categorical approach.

At sentencing, Drake noted the circuits were split on this question and recognized that binding Sixth Circuit precedent went against him. *See United States v. Clark*, 46 F.4th 404 (6th Cir. 2022). He preserved the issue for further review. App. at 23a. The district court found Drake’s marijuana conviction qualified as a controlled substance offense, found him to be a career offender, and sentenced him to 200 months in prison. App. at 37a-39a, 10a. Drake appealed.

Drake’s direct appeal was stayed pending this Court’s decision in *Brown v. United States*, 602 U.S. 101 (2024). After *Brown* was issued, Drake petitioned for initial en banc review, requesting the Sixth Circuit revisit the issue of whether the controlled substance offense definition in the Guidelines involved only substances controlled under federal law by the Controlled Substances Act or whether the definition also included any state-controlled substances. The Sixth Circuit denied Drake’s petition. App. at 1a.

In his merits brief, Drake argued the controlled substance offense under U.S.S.G. § 4B1.2(b), referred to only to substances controlled at the time Drake was sentenced in federal court on the instant offense and not substances controlled (either under federal or state law) at the time of his prior conviction. Drake acknowledged the Sixth Circuit had reached a contrary conclusion in *United States v. Clark*, 46 F.4th 404 (6th Cir. 2022). Drake argued, however, that a footnote in this Court’s recent *Brown* decision undermined *Clark*.

In *Brown*, this Court held that a serious drug offense under 18 U.S.C. § 924(e)(1) was defined by the federal drug schedules at the time of the prior conviction. The Court rejected petitioners’ arguments that the federal drug schedules either at the time of the federal offense or at the time of federal sentencing controlled. In a footnote, this Court noted that it was unpersuaded by the petitioners’ arguments regarding the “ordinary practice” of the Guidelines because the Guidelines function differently than the Armed Career Criminal Act (“ACCA”) due to Congress’ express instruction “to apply the Guidelines in effect on the date the defendant is sentenced”

and the “ACCA contains no similar instruction.” *Brown*, 602 U.S. at 120, fn. 7. The Sixth Circuit rejected Drake’s argument that the footnote in *Brown* undermined *Clark*’s instruction to use the substances controlled at the time of the prior conviction. App. at 5a-6a.

In denying Drake’s appeal, the panel concluded it was bound by *Clark* and held the footnote in *Brown* did “not permit [them] to depart from *Clark*.” App. at 5a. The panel noted that “at least one circuit court has distinguished § 4B1.2 from the Armed Career Criminal Act based on the footnote’s logic: that courts must use the guidelines manual in effect at the time of sentencing.” App. at 5a. (citing *United States v. Minor*, 121 F.4th 1085, 1091-93 (5th Cir. 2024)).

Drake petitioned for rehearing en banc, which the court denied. App. at 8a.

REASONS FOR GRANTING THE PETITION

The Federal Courts of Appeals do not agree on the definition of a controlled substance offense under the career offender provision in the United States Sentencing Guidelines. This Court has recognized that the courts are firmly divided over whether the definition refers to substances controlled under state or federal law (or both). Because of this split disparate sentences are being imposed on similarly situated defendants based solely on geography. *See Wiggins v. United States*, 606 U.S. ___, No. 24-6410, 2025 WL 1787666, (June 30, 2025) (Statement of Sotomayor, J., respecting denial of certiorari). This case implicates a secondary split from this differing definition. Specifically, the federal courts are divided over whether the substances must be controlled at the time of the prior conviction or at the time of federal sentencing.

This Court recently answered this question with respect to the Armed Career Criminal Act in *Brown* and noted in a footnote that the Guidelines may be treated differently because of Congress' express directive to apply the Guidelines "in effect on the date the defendant is sentenced." *Brown*, 602 U.S. at 120, fn. 7 (citing 18 U.S.C. § 3553(a)(4)(A)(ii)). This Court's opinion in *Brown* has only added to the confusion in the appellate courts on the issue presented and requires resolution by this Court.

The opposing definitions are responsible for dramatically different sentences being imposed on similarly situated defendants based only on their geographic location. This case squarely presents this important and recurring question and is an

ideal vehicle for which this Court may resolve this conflict and help create uniformity in federal sentencing throughout the nation.

- I. This Court has recognized the split among the Courts of Appeals in defining a controlled substance offense and impressed upon the Commission the need to resolve the conflict and restore uniformity in sentencing. This unresolved split has caused another split among the circuits which is implicated in this case.**

The Courts of Appeals are split on how to define a “controlled substance offense” under § 4B1.2(b) of the Federal Sentencing Guidelines. The Second, Fifth, and Ninth Circuits hold the term refers exclusively to substances controlled by federal law under the Controlled Substances Act (“CSA”). *See United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018); *United States v. Gomez-Alvarez*, 781 F.3d 787 (5th Cir. 2015); *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021). In contrast, the Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits hold that the definition of a controlled substance in § 4B1.2(b) includes all state-controlled substances, regardless of whether the substance is included in the CSA. *See United States v. Lewis*, 58 F.4th 764, 768-69 (3d Cir. 2023), *cert. denied*, 144 S. Ct. 489 (2023), (discussing circuit split); *United States v. Ward*, 972 F.3d 364, 364 (4th Cir. 2020); *United States v. Jones*, 81 F.4th 591 (6th Cir. 2023); *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020); *United States v. Henderson*, 11 F.4th 713 (8th Cir. 2021); *United States v. Jones*, 15 F.4th 1288 (10th Cir. 2021); *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024), *cert. granted, judgment vacated on other grounds*, No. 24-5744, 2025 WL 76413 (U.S. Jan. 13, 2025). This Court has recognized this split and its disparate impact on similarly situated defendants based “solely on geography.” *Wiggins v.*

United States, 606 U.S. ___, No. 24-6410, 2025 WL 1787666, (June 30, 2025) (Statement of Sotomayor, J., respecting denial of certiorari). *See also Guerrant v. United States*, 142 S. Ct. 640, (2022) (Statement of Sotomayor, J., respecting denial of certiorari).

In her June 30, 2025 statement respecting the denial of certiorari, Justice Sotomayor noted the Commission’s recognition of the split and its failure to plan to address it during the 2025-2026 amendment cycle. *Wiggins*, 606 U.S. ___, No. 24-6410, 2025 WL 1787666, at *1. Justice Sotomayor, joined by Justice Barrett, requested that “[i]f the Commission does not intend to resolve the split, it should provide an explanation so that this Court can decide whether to address the issue and restore uniformity.” *Id.* This Court should not wait.

The differing definition of a controlled substance offense has created another split among the Courts of Appeals, which is implicated in this case. Based on how the circuits define the controlled substance offense, the courts are split on whether the substance must be controlled at the time of the prior conviction or at the time of federal sentencing. The Courts of Appeals that define a controlled substance offense as substances controlled by federal law look to the CSA’s definition at the time of federal sentencing. The circuits who define a controlled substance offense to include substances controlled under state law look to the substances controlled at the time of the prior conviction. *See Minor*, 121 F.4th at 1090 (discussing the split and the differing “textual analysis”). Although this Court has noted it is the responsibility of the Sentencing Commission to “address this division to ensure fair and uniform application

of the Guidelines,” the Commission has yet to address this problem. More importantly, this split is based on differing interpretations of decisions from this Court. This Court should accept review in this case to provide clarification of its decisions and to prevent a defendant’s geographic location from continuing to determine the severity of his punishment. *Wiggins*, 606 U.S. ___, No. 24-6410, 2025 WL 1787666.

II. The circuit courts have differing interpretations of decisions from this Court.

The Third, Sixth, Eighth, and Eleventh Circuits—who define a controlled substance offense to include state-controlled substances—have held that courts should look at the drug schedules in effect at the time of the prior conviction. *See Lewis*, 58 F.4th 764; *Clark*, 46 F.4th 404; *United States v. Bailey*, 37 F.4th 467 (8th Cir. 2022); *Dubois*, 94 F.4th 1284. These circuits rely on this Court’s decision in *McNeill v. United States*, 563 U.S. 816 (2011), despite recognizing that the question presented in *McNeill* was not the same. *See Clark*, 46 F.4th at 409 (*McNeill* “answered a closely related question”); *Dubois*, 94 F.4th at 1299; *Lewis*, 58 F.4th at 771-772 (*McNeill* does not control but is persuasive).

The other circuits—the First, Second, Fifth, and Ninth Circuits—who hold a controlled substance offense is defined by the CSA look to the federally controlled substances in effect at the time of federal sentencing. *See United States v. Abdulaziz*, 998 F.3d 519 (1st Cir. 2021); *United States v. Gibson*, 55 F.4th 153 (2d Cir. 2022), *adhered to on reh’g*, 60 F.4th 720 (2d Cir. 2023); *Minor*, 121 F.4th 1085; *Bautista*, 989 F.3d 698. These circuits find *McNeill* inapplicable to the Guidelines.

In *McNeill* this Court addressed the question of whether a defendant’s previous North Carolina drug trafficking conviction qualified as a serious drug offense

under the ACCA. *McNeill*, 563 U.S. at 817-819. To qualify as a serious drug offense, the offense must be punishable by a maximum sentence of ten years or more. *Id.* at 817; 18 U.S.C. § 924(e)(2)(A)(i). At the time of McNeill’s prior conviction, his drug trafficking offense was punishable by 10 years under North Carolina law. *Id.* at 818. After his state conviction, however, North Carolina reduced the punishment to under ten years. *Id.* This Court held that the ACCA required courts to consult the state law at the time of the prior conviction to determine if its elements matched the statutory definition of a serious drug offense. *Id.* at 820.

McNeill is consistent with this Court’s recent decision in *Brown*, 602 U.S. 101, which held that a prior state drug conviction qualifies as a serious drug offense under the ACCA if the prior conviction was predicated on a substance that was controlled by federal law at the time of the prior conviction. The Court noted, however, that the ACCA and the Guidelines function differently. Specifically, Congress expressly instructed courts to apply the Guidelines in effect at the time of federal sentencing but gave no such mandate in the ACCA. *Id.* at 120, fn. 7. The interpretations of *McNeill* and *Brown* differ in the Courts of Appeals.

The Fifth Circuit found *McNeill* and *Brown* did not dictate the outcome in a Guidelines case because the ACCA and the Guidelines “differ in key ways.” *Minor*, 121 F.4th at 1092. In *Minor*, the government acknowledged “that the Court in *Brown* cast doubt on whether it would employ the same approach in the Guidelines context.” *Id.* The Sixth Circuit, however, continues to rely on *McNeill* and has dismissed *Brown*’s footnote, finding it did not undermine its reasoning in *Clark* that required

looking to the substances controlled at the time of the prior conviction. App. at 5a-6a.

Because the Courts of Appeals continue to interpret this Court's decisions differently and defendants continue to be subjected to significantly different sentences based solely on geography, this Court should grant review.

III. The question presented raises an important and recurring issue fundamental to fair sentencing.

Drake was found to be a career offender based on an Ohio marijuana trafficking conviction from 2016. At that time both federal and state law included hemp within its definition of marijuana and listed marijuana as a controlled substance. Years later, when Drake was sentenced in federal court, both federal and state law had changed to exclude hemp from its definition of marijuana. Drake was found to be a career offender only because of where his federal case was charged.

Drake is just one example of the significantly disparate sentences facing defendants based only on the location of their federal conviction. This Court has recognized that “[s]o long as the split persists, two defendants whose criminal histories include identical drug offenses and who commit the same federal crime will be subject to significantly different sentencing ranges based solely on geography.” *Wiggins*, 606 U.S. ___, No. 24-6410, 2025 WL 1787666. Drake is a perfect example of this disparity. Because Drake was convicted in the Sixth Circuit, he was classified as a career offender and his Guidelines range was 188-to-235 months. App. at 38a-39a. However, if Drake were charged in the First, Second, Fifth, or Ninth Circuits, he would not be a career offender, and his Guideline range would have been 110-to-

137. App. at 38a-39a. The question presented raises an important and recurring issue fundamental to fair sentencing.

IV. This case is an ideal vehicle for resolving the question presented.

Drake objected to the district court's conclusion that his 2016 marijuana conviction qualified as a controlled substance offense under § 4B1.2(b). Without this conviction Drake would not have two qualifying predicate offenses and could not be classified as a career offender. He filed a direct appeal and challenged the use of his marijuana conviction for classification as a career offender. This issue was addressed by the Sixth Circuit on the merits. App. at 2a-7a. This case is thus an ideal vehicle for the Court to review and decide the question presented.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

STEPHEN C. NEWMAN
*Federal Public Defender,
Northern District of Ohio*

/s/ Catherine Adinaro Shusky
Catherine Adinaro Shusky
Counsel of Record
1660 W. 2nd Street, Suite 750
Cleveland, Ohio 44113
(216) 522-4856
cathi_shusky@fd.org

Counsel for Petitioner