NO:_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2025

NAMIR WHITE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

Nos. 22-1179 & 22-1714

_____

UNITED STATES OF AMERICA

v.

NAMIR WHITE,
also known as NA,
Appellant in No. 22-1179

UNITED STATES OF AMERICA

v.

DARRELL WYLIE,
also known as Rell,
Appellant in No. 22-1714

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Nos. 2:17-cr-00617-002 & 2:17-00617-001)
District Judge: Honorable Cynthia M. Rufe

_____

Submitted Under Third Circuit L.A.R. 34.1(a)
on May 21, 2024

Before: RESTREPO, FREEMAN, and McKEE, *Circuit Judges*

(Opinion filed: December 18, 2025)

OPINION*

FREEMAN, *Circuit Judge*.

A jury convicted Namir White and Darrell Wylie of crimes including robbery, theft, and firearm offenses. Both defendants challenge their convictions, and White also challenges his sentence. For the following reasons, we will affirm both judgment and conviction orders.[1]

I

Between April and August 2017, White sold eleven guns to a cooperating informant (CI) who was working with agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). White made those sales to the CI in nine separate transactions, and the CI paid for the guns with ATF funds. As part of an investigation into gun violence in South Philadelphia, ATF agents monitored and audio and video recorded each of White's gun sales to the CI. The agents also monitored and recorded the CI's phone calls and text messages arranging the transactions with White.

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[1] After these appeals were submitted to the Court, we appointed the Federal Public Defender Office for the Western District of Pennsylvania as amicus counsel to address one of the issues Wylie raised in his pro se brief. We thank amicus counsel for their service to the Court.

In October 2017, Wylie sold two guns to the same CI in two separate transactions. As with the sales from White, ATF agents provided the money for those transactions and monitored and recorded them.

In November 2017, White and Wylie jointly agreed to sell the CI three more guns. They agreed upon a price of $3,200, and ATF agents provided the cash to the CI. On the arranged date, the CI met White and Wylie in White's car, handed the $3,200 in cash to White, and received a bag from Wylie. The bag contained pieces of metal instead of guns. Seeing no guns in the bag, the CI asked for the money back, but Wylie refused to return it. When the CI continued to ask for the money, Wylie pulled out a gun, pointed it at the CI, and threatened to shoot the CI if he did not get out of the car. The CI feared for his life but thought Wylie would not shoot him while inside White's car, so he refused to get out.

Eventually, Wylie got spooked by an undercover police vehicle and left White's car, taking the $3,200 with him. With Wylie gone, the CI fled the car and met the ATF agents who had been listening to the interaction. Shortly thereafter, the agents who were following White's car arrested White. They later found Wylie near his suspected residence and arrested him, too. At the time of Wylie's arrest, he had a loaded gun, twenty packets of fentanyl-laced heroin, and $3,200 in cash on his person. The gun was in his waistband, and the packets of drugs were in his underwear.

A grand jury returned an eighteen-count second superseding indictment charging White and Wylie with various offenses. As particularly relevant to this appeal, both defendants were charged with robbery that interferes with interstate commerce and aiding

and abetting, in violation of 18 U.S.C. §§ 1951(a) and 2 ("Hobbs Act robbery"), and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2 (the "crime-of-violence § 924(c) count").[2] Wylie was also charged with possession with intent to distribute a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (the "drug-trafficking § 924(c) count").[3]

At trial, the government presented video and audio recordings of the gun sales, text messages and recordings of phone calls arranging the gun sales, and the guns. It also presented testimony from the CI, ATF agents, and a narcotics-trafficking expert who testified that Wylie's possession of drugs was consistent with drug distribution, not personal use.

During closing arguments, the prosecutor remarked that the defendants "were involved in possibly having these firearms as far as they knew go onto the streets of South Philadelphia with the mayhem that could have resulted." App. 784. White objected to this remark, arguing that it injected fear into the minds of the jurors. He

[2] Both defendants were also charged with theft of government property and aiding and abetting, in violation of 18 U.S.C. §§ 641 and 2.

[3] Wylie's remaining charges were three counts of possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). White's other charges were for dealing in firearms without a license, in violation of 18 U.S.C. § 924(c)(1), and nine counts of possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

moved for a mistrial, which the District Court denied. The District Court also declined to issue a curative instruction.

The jury found the defendants guilty of all charges.

At White's sentencing, the District Court applied a Sentencing Guidelines enhancement based on White's two prior Pennsylvania convictions for possession with intent to distribute drugs. *See* U.S.S.G. § 2K2.1(a)(4)(A). White did not object to the enhancement, and he was sentenced to 180 months' imprisonment.[4]

White and Wylie both timely appealed, and we permitted Wylie to proceed pro se for his appeal. After the parties filed their briefs, we appointed amicus counsel to address Wylie's argument regarding the force element of his Hobbs Act robbery conviction. We subsequently granted amicus counsel's request to brief an additional issue pertaining to the interstate commerce element of Wylie's Hobbs Act robbery conviction.

II[5]

White raises two arguments on appeal: (1) the District Court erred in denying his motion for a mistrial based on the prosecutor's remark during closing arguments; and (2) the District Court improperly applied the U.S.S.G. § 2K2.1(a)(4)(A) enhancement. Neither argument is availing.

[4] Wylie was sentenced to 204 months' imprisonment. He does not challenge his sentence on appeal.

[5] In both cases, the District Court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction to review the convictions pursuant to 28 U.S.C. § 1291 and to review a sentence pursuant to 18 U.S.C. § 3742.

A.

We review the denial of a motion for a mistrial for abuse of discretion. *United States v. Savage*, 85 F.4th 102, 124 (3d Cir. 2023). When the motion was based on a prosecutor's remarks in a closing argument, we evaluate whether the remarks were improper and assess any improper remarks for harmless error. *Id.* Here, we need not address whether the remarks were improper because they were harmless. As White admits, "the weight of the evidence most definitely weighs against him and likely dooms his appeal." White Br. 20. He acknowledges the "avalanche of irrefutable video and audio evidence produced by the government," which amounted to "undeniable and largely uncontested evidence of guilt." *Id.* at 7–8. In the face of that evidence, the prosecutor's fleeting remark about the potential effects of the gun sales did not prejudice White, so the District Court did not abuse its discretion.

B.

White did not object to the U.S.S.G. § 2K2.1(a)(4)(A) enhancement at sentencing, so we review its application for plain error. *United States v. Couch*, 291 F.3d 251, 252–53 (3d Cir. 2002). There was none.

This sentencing enhancement applies where a defendant has two prior convictions for "controlled substance offense[s]." U.S.S.G. § 2K2.1(a)(4)(A). White has two prior convictions for possession with intent to distribute a controlled substance in violation of 35 Pa. C.S. § 730:113(a)(30). He argues that those convictions do not qualify for the enhancement because the state statute is broader than the Guidelines' definition of a controlled substance. However, after White filed his brief, we held in *United States v.*

Lewis that "a 'controlled substance' under § 4B1.2(b) of the United States Sentencing Guidelines is a drug regulated by either state or federal law." 58 F.4th 764, 771 (3d Cir. 2023). Under *Lewis*, White's claim cannot succeed.

III

Wylie raises three arguments on appeal: (1) his conviction on the crime-of-violence § 924(c) count is invalid; (2) the evidence at trial was insufficient to support the drug-trafficking § 924(c) count; and (3) the evidence at trial was insufficient to support his Hobbs Act robbery conviction. Additionally, amicus counsel has briefed a fourth argument pertaining to Wylie's case: (4) the evidence at trial was insufficient to support the jurisdictional element of the Hobbs Act robbery conviction. The first three arguments are unavailing, and we decline to reach the fourth.

A.

Wylie argues that his conviction on the crime-of-violence § 924(c) count is invalid because the predicate was an attempted Hobbs Act robbery, not a completed Hobbs Act robbery. Attempted Hobbs Act robbery is not categorically a "crime of violence" under 18 U.S.C. § 924(c), *United States v. Taylor*, 596 U.S. 845, 860 (2022), while completed Hobbs Act robbery is a "crime of violence," *United States v. Stoney*, 62 F.4th 108, 112–13 (3d Cir. 2023). But the record here is clear that Wylie's crime-of-violence § 924(c) count was predicated on a completed Hobbs Act robbery. *See Stoney*, 62 F4th at 112 (concluding from a clear record that the defendant's § 924(c) predicate was a completed Hobbs Act robbery); *see also United States v. Wilson*, 880 F.3d 80, 83 (3d Cir. 2018)

(exercising plenary review of a determination that a conviction is "a crime of violence" under the Sentencing Guidelines).

The government presented evidence that Wylie pointed a gun at the CI, took the cash that the CI brought, and fled from the car with the cash. When the District Court charged the jury on Count 1 (Hobbs Act robbery), it instructed the jury to consider whether "the Defendant took from the victim alleged in the Indictment the property described in the Indictment." App. 865. It explained that the government needed to prove Wylie "unlawfully took the alleged victim's property against [the victim's] will." App. 866. And when the District Court charged the jury on Count 2 (the crime-of-violence § 924(c) count), it instructed the jury to consider whether Wylie committed the offense charged in Count 1 while using or carrying a firearm. Given this record, and absent any reference to an attempted robbery, Wylie's argument fails.

B.

Wylie makes a twofold argument that the evidence at trial was insufficient to support his conviction on the drug-trafficking § 924(c) count. He challenges the sufficiency of the evidence that (1) he possessed the drugs for purposes of distribution and (2) he possessed the firearm in furtherance of that drug distribution.

Our review of sufficiency-of-the-evidence challenges is "highly deferential" to the jury's verdict. *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430 (3d Cir. 2013) (en banc). We "review the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt[] beyond a reasonable doubt." *Id.* (alteration in original) (quoting *United States v. Brodie*, 403 F.3d

123, 133 (3d Cir. 2005)). We may only set aside the jury's verdict "if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam).

Wylie has not met this standard. The government's narcotics-trafficking expert testified that the way the drugs were packed, bundled, and stamped; the total quantity of drugs Wylie possessed; the absence of any drug-consumption paraphernalia on Wylie's person; and Wylie's possession of a firearm all were consistent with drug trafficking. Based on this testimony, it was reasonable for the jury to find that Wylie possessed the drugs for purposes of distribution.

In the second part of his argument, Wylie contends that the evidence showed he possessed the firearm to "facilitate the swindling of money from the CI over a firearm purchase" rather than for drug trafficking. Wylie Br. 12. But to convict him on the drug-trafficking § 924(c) count, the trafficking need not have been the sole reason for his possession of the firearm; as long as drug trafficking was one reason, his § 924(c) conviction stands. *See United States v. Williams*, 464 F.3d 443, 447–48 (3d Cir. 2006) (observing that the jury reasonably could have found that the defendants used firearms "at least in part" to further their drug-trafficking offense).

To determine whether the evidence "demonstrate[s] that possession of the firearm advanced or helped forward a drug trafficking crime," we consider factors including the accessibility of the firearm, whether the possession was illegal, whether the firearm was loaded, the firearm's proximity to drugs, and the circumstances under which the firearm was found. *United States v. Sparrow*, 371 F.3d 851, 853 (3d Cir. 2004), *as*

amended (Aug. 3, 2004). Here, Wylie illegally possessed a loaded firearm that was found on his person and in close proximity to twenty packets of drugs packed for distribution. Based on that evidence, it was reasonable for a jury to find that at least one purpose of the firearm possession was to further the drug-trafficking offense.

C.

Supported by briefing from amicus counsel, Wylie argues that the government did not present sufficient evidence of the force element of Hobbs Act robbery. His argument is largely based on evidence that he took the cash from the CI *before* threatening to use force against the CI.[6] Given that order of events, Wylie argues that he did not commit an unlawful taking "by means of" force or threatened force, as required by the Hobbs Act. *See* 18 U.S.C. § 1951(b)(1) (defining "robbery" as "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").

Wylie did not raise this aspect of the sufficiency challenge in the District Court, so we review it for plain error.[7] *United States v. Williams*, 974 F.3d 320, 340 (3d Cir. 2020).

[6] Wylie also argues that the government failed to prove that the CI experienced fear or felt threatened. But the CI testified that he feared for his life when Wylie pointed a gun at him and threatened to shoot him. That testimony is sufficient to support the jury's finding that Wylie used "actual or threatened force, or violence, or fear of injury." 18 U.S.C. § 1951(b)(1).

[7] Construing his pro se brief liberally, Wylie made this argument in his opening brief on appeal. After Wylie's and White's appeals were submitted on the parties' briefs, we

Under that standard, we cannot reverse a judgment unless there is (1) an error that (2) is plain and (3) affects substantial rights. *Id.* If those three conditions are satisfied, we have discretion to correct the error if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)).

After reviewing the excellent briefs from amicus counsel and the government, we are confident that if there was an error (which we need not decide), it was not plain. *See United States v. Dorsey*, 105 F.4th 526, 529 (3d Cir. 2024) ("An error is 'plain' if it is 'clear or obvious, rather than subject to reasonable dispute.'" (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009))).

In construing certain federal robbery offenses, we have looked to the ordinary meaning of the word "robbery." We did so when addressing the federal bank robbery statute, *United States v. Williams*, 344 F.3d 365, 375 (3d Cir. 2003), which we recently observed is "virtually identical" to the Hobbs Act robbery statute, *United States v. Stevens*, 70 F.4th 653, 659 (3d Cir. 2023).[8,9] We explained that, under the ordinary

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appointed amicus counsel, who provided detailed briefing on Wylie's argument. White then filed a motion to adopt the arguments in amicus counsel's brief. White's motion is denied, as he forfeited any issues that he did not raise in his own opening brief. *See Geness v. Cox*, 902 F.3d 344, 355 (3d Cir. 2018).

[8] *See* 18 U.S.C. § 2113(a) (stating that an individual commits bank robbery if he, "by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another" the property of a bank or similar institution).

[9] We are unpersuaded by amicus counsel's argument that *Stevens* supports Wylie's position. In *Stevens*, we clarified that Hobbs Act robbery requires an unlawful taking of property but does not require the carrying away of the property. 70 F.4th at 658–59. We did not address whether force used after an unlawful taking suffices for a conviction.

meaning of robbery, "a bank robbery is not concluded when the offender pockets the goods, but continues to the point where the robber has removed and relocated the goods." *Williams*, 344 F.3d at 375. Similarly, the Model Penal Code states that an individual commits robbery if "in the course of committing a theft" he inflicts injury, threatens injury, or commits or threatens to commit a felony, and "[a]n act shall be deemed 'in the course of committing a theft' if it occurs in an attempt to commit theft or in flight after the attempt or commission." Model Penal Code § 222.1(1) (2002).

It would be logical (or at least subject to reasonable dispute) to apply the same principles to Hobbs Act robbery. And doing so would mean Wylie's crime did not conclude until Wylie fled White's car with the money—after he threatened the CI with a gun. A reasonable jury could find that Wylie used the threat of force in the commission of the robbery. Applying *Williams* there is sufficient evidence to support the Hobbs Act robbery conviction. On these facts, and absent clear authority supporting Wylie's position, any error was not plain.

D.

Amicus counsel also briefed a challenge to the interstate commerce element of Wylie's Hobbs Act robbery conviction. Applying the party-presentation rule, we will not address that argument because Wylie did not raise it (or anything resembling it) in his appellate brief. *See United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation . . . [and] 'rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'" (quoting *Greenlaw v. United States*, 554 U.S. 237,

243 (2008))). Moreover, because Wylie waived his right to counsel for this direct appeal, his pro se status does not support a departure from the party-presentation rule. *See id.* (noting that departures from the party-presentation rule have occurred in criminal cases to protect a pro se litigant's rights, and citing *Castro v. United States*, 540 U.S. 375 (2003)—a collateral challenge in which the pro se litigant had no right to counsel).

* * *

For the reasons set forth above, we will affirm both judgment and conviction orders.

2023 WL 5753604 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Jamar LEWIS, Petitioner,
v.
UNITED STATES OF AMERICA, Respondent.

No. 23-198.
August 31, 2023.

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

Petition for a Writ of Certiorari

Lisa Van Hoeck, Office of the Federal Public Defender, 22 South Clinton Ave., Station Plaza Four, Fourth Floor, Trenton, NJ 08609, David Willner, Hogan Lovells Us LLP, Two North Cascade Ave., Suite 1300, Colorado Springs, CO 80903, Sean Marotta, Danielle Desaulniers Stempel, Counsel of Record, Nathaniel A.G. Zelinsky, Devin Urness, Hogan Lovells Us LLP, 555 Thirteenth St., N.w., Washington, D.C. 20004, (202) 637-5600, danielle.stempel @hoganlovells.com, Counsel for Petitioner.

***i QUESTIONS PRESENTED**

Under the federal Sentencing Guidelines § 2K2.1(a)(4)(A), a defendant previously convicted of a "controlled substance offense" is subject to a sentencing enhancement. The Guidelines define "controlled substance offense" as "an offense under federal or state law * * * that prohibits the manufacture, import, export, distribution, or dispensing of a *controlled substance."* U.S.S.G. § 4B1.2(b) (emphasis added); *see id.* § 2K2.1 application note 1. The Guidelines do not, however, define "controlled substance."

In *McNeill v. United States*, 563 U.S. 816 (2011), this Court confronted the "serious drug offense" enhancement in the Armed Career Criminal Act. According to this Court, to determine the elements of a prior predicate conviction for purposes of applying the categorical approach and thus to determine whether that conviction qualifies as a "serious drug offense," a court should look to the state law at the time of the predicate conviction. *Id.* at 818.

The questions presented are:

1. Under this Court's decision in *McNeill*, is the term "controlled substance" in the Sentencing Guidelines defined at the time of the predicate conviction or when federal consequences attach?

2. When a federal defendant is subject to a controlled substance enhancement under the Sentencing Guidelines, does the term "controlled substance" in the Sentencing Guidelines refer only to those substances controlled under federal law or also include substances controlled under state law?

***II PARTIES TO THE PROCEEDING**

Jamar Lewis, petitioner on review, was the defendant-appellee below.

The United States of America, respondent on review, was the appellant below.

*III RELATED PROCEEDINGS

U.S. Court of Appeals for the Third Circuit:

• *United States v. Lewis*, No. 21-2621 (Jan. 26, 2023) (reported at 58 F.4th 764)

• *United States v. Lewis*, No. 21-4067 (May 3, 2023) (not reported)

U.S. District Court for the District of New Jersey:

• *United States v. Lewis*, Crim. No. 20-583 (FLW) (Aug. 10, 2021)

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*vi TABLE OF AUTHORITIES

CASES:

*1 PETITION FOR A WRIT OF CERTIORARI

Jamar Lewis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit's opinion is reported at 58 F.4th 764 and reproduced at Pet. App. la-19a. The order denying rehearing is not reported, and is reproduced at Pet. App. 47a-48a. The District Court's opinion is not reported, and is reproduced at Pet. App. 20a-46a.

*2 JURISDICTION

The Third Circuit entered judgment on January 26, 2023. Petitioner filed a timely petition for rehearing en banc, which was denied on May 3, 2023. On June 7, 2023, Justice Alito granted an extension of the period to file this petition until August 31, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

GUIDELINES PROVISIONS INVOLVED

U.S.S.G. § 2K2.1(a)(4)(A) provides in relevant part: Base Offense Level (Apply the Greatest): * * * (4) **20,** if - (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense.

Application note 1 to U.S.S.G. § 2K2.1 provides in relevant part:

"Controlled substance offense" has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

U.S.S.G. § 4B1.2(b) provides:

The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a

counterfeit substance) or the possession of a controlled substance (or a counterfeit ***3** substance) with intent to manufacture, import, export, distribute, or dispense.

INTRODUCTION

This petition presents two persistent and deep circuit splits regarding this Court's categorical approach. The categorical approach is a tool often used to apply the Armed Career Criminal Act (ACCA) and the federal Sentencing Guidelines. It requires courts to compare the elements of a predicate offense to a relevant comparator-such as the elements of a generic offense. If a predicate offense categorically "matches" the comparator, a harsher penalty attaches under federal law.

This particular case involves the categorical approach's application to the Sentencing Guidelines. Under the Guidelines, defendants who have committed a prior "controlled substance offense" receive significantly enhanced sentences. The Guidelines define a "controlled substance offense" as "an offense under federal or state law" involving "a controlled substance." U.S.S.G. § 4B1.2(b). The Guidelines, however, do not define "controlled substance." To define that critical phrase, courts look to controlled substance schedules, such as the federal Controlled Substances Act (CSA). Using the categorical approach, courts then compare that schedule against the predicate to determine whether the defendant's prior offense involved a "controlled substance."

But this application of the categorical approach presents two complications: Drug schedules change over time. And states and the federal government have different controlled substance schedules. This ***4** case provides an example: In 2012, Petitioner Jamar Lewis was convicted under a New Jersey law criminalizing marijuana possession. In 2020, Lewis pleaded guilty to an unrelated federal crime. In the interim, however, the definition of marijuana under both federal law and New Jersey law changed. As a result, Lewis's predicate New Jersey marijuana conviction from 2012 no longer categorically matched either the 2020 federal or New Jersey controlled substance schedules. This mismatch raises two legal questions that have deeply divided the circuits.

First, when defining a "controlled substance" to create the comparator for the categorical approach, should the sentencing court look to the drug schedule in effect at the time when federal law imposes an additional consequence as a result of the defendant's predicate offense? Or should the court rely on an outdated drug schedule from the time of the predicate conviction? The same question arises in the context of ACCA, with respect to a predicate "serious drug offense" enhancement. 18 U.S.C. § 924(e).

The Circuits have adopted three different approaches based on divergent applications of *McNeill v. United States*, 563 U.S. 816 (2011). *McNeill* concerned whether historic or contemporary law defines a *predicate offense's* elements for ACCA. Five circuits read *McNeill* narrowly and define the federal comparator for the Guidelines or ACCA based on drug schedules in effect when the federal consequences associated with that predicate attach. This is the "time-of-consequences approach." By contrast, two circuits read *McNeill* broadly and look to drug schedules from the time of the predicate offense. This is the "time-of-conviction approach." Meanwhile, ***5** two more circuits apply *McNeill* inconsistently depending on whether the case involves ACCA or the Guidelines. These circuits apply the time-of-consequences approach in ACCA cases, but the time-of-conviction approach for the Guidelines.

The circuits are further divided over a second question involving the meaning of "controlled substance": Does "controlled substance" mean *only* drugs on the federal schedule? Or does "controlled substance" also include drugs that individual states have deemed controlled? Three circuits define a "controlled substance" by exclusive reference to federal law. Six circuits, by contrast, hold that "controlled substance" means *any* substance regulated by federal *or* state law.

In the decision below, the Third Circuit decided both questions presented incorrectly-leading to a truly bizarre result. To decide whether Lewis was subject to a controlled substance offense enhancement in 2020, the Third Circuit looked back in time to the meaning of controlled substance in 2012. And rather than adopting a consistent comparator, the Third Circuit held that *any* substance controlled under New Jersey law counted as a "controlled substance." As a result, the Third Circuit collapsed the categorical approach-intended to assess whether Lewis should be subject to a federal controlled-substance-offense enhancement in 2020-into a single question: When Lewis committed his predicate New Jersey marijuana offense in 2012, were the regulated

substances that comprised the elements of his offense controlled under New Jersey law? In other words, the Third Circuit compared the 2012 New Jersey law against *itself*-and presto, found a categorical match.

***6** The Third Circuit's approach is as wrong as it sounds. The "chief" purpose of the categorical approach is to "ensure[] that all defendants whose convictions establish the *same facts"* receive "consistent[]" and "predictabl [e]" treatment "under federal law." *Moncrieffe v. Holder*, 569 U.S. 184, 205 n.11 (2013) (emphasis added). The purpose of the Sentencing Guidelines is likewise to eliminate "disparities among similarly situated offenders." *Peugh v. United States*, 569 U.S. 530, 535 (2013). To further that goal of national uniformity, sentencing courts must apply the law "in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(4)(A)(ii). And under the venerable *Jerome* presumption-which serves as the interpretive underpinning for the categorical approach-this Court applies a consistent interpretation of federal law across all jurisdictions, rather than pinning the interpretation of federal law to the vagaries of state statutes. *See Jerome v. United States*, 318 U.S. 101, 104 (1941).

The Third Circuit's approach violates these foundational principles. By defining a controlled substance based on the schedule in effect at the time of the predicate, the Third Circuit's decision fosters dis-uniformity among similarly-situated defendants sentenced on the same day and imposes penalties for subsequently-decriminalized conduct. And by looking to a state schedule to define the *federal* comparator, the Third Circuit imposes federal sentencing enhancements based on each *state* legislature's choice of what substances to criminalize. Worse still, the confluence of these two holdings means that the Third Circuit imposes a *federal* sentencing enhancement for *any* state offense at any point in time.

***7** This Court should grant this petition. This Court has already granted review of two ACCA cases implicating the first question presented, *Brown v. United States*, No. 22-6389 (May 15, 2023), and *Jackson v. United States*, No. 22-6640 (May 15, 2023). This petition provides a clean vehicle to resolve the timing question for purposes of the Guidelines, to the extent the Court's decision in *Brown* and *Jackson* does not do so already.

The time has also come to resolve the second question, whether *federal* law alone defines a "controlled substance" in the *federal* Guidelines. In 2022, Justice Sotomayor joined by Justice Barrett identified this exact split. *Guerrant v. United States*, 142 S. Ct. 640, 641 (2022) (Sotomayor, J., respecting the denial of certiorari). Justice Sotomayor noted that the Sentencing Commission lacked a quorum at that time, and expressed hope that the Commission would regain function and resolve this split on its own. But the Commission has a quorum and has acknowledged this split, yet nevertheless has failed to resolve it.

This Court should step in and ensure the uniform application of federal sentencing law. *See S.* Ct. R. 10(a). In the alternative, the Court should hold this petition in abeyance pending resolution *of Brown* and *Jackson.* The Court should then dispose of this petition as appropriate in light of that decision.

STATEMENT

A. Legal Framework

At sentencing, criminal defendants with certain previous convictions for "controlled substance offenses" are subject to enhanced penalties. *See, e.g.*, U.S.S.G. § 2K2.1(a)(4)(A); *id.* § 4B1.1(a). The ***8** Sentencing 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); *see id.* § 2K2.1 application note 1. The Guidelines do not define "controlled substance."

To determine whether a prior conviction qualifies as a predicate offense, courts apply the "categorical approach." *See Taylor v. United States*, 495 U.S. 575, 598-599 (1990). Under the categorical approach, the facts of the predicate offense are irrelevant. Instead, the categorical approach compares the elements of a predicate offense to a generic comparator, such as a generic offense or "some other criterion," to determine whether the predicate is a categorical match. *Shular v. United States*, 140 S. Ct. 779, 783 (2020). The purpose of the categorical approach-and the reason courts use a standard comparator across all cases-is to ensure "that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law." *Moncrieffe*, 569 U.S. at 205 n.11. The categorical approach thus reflects the longstanding presumption that "federal laws are not to be construed so that their application is dependent on state law." *Taylor*, 495 U.S. at 591 (citing *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119-120 (1983)).

***9 B. Procedural History**

1. In 2012, Jamar Lewis was convicted of possession of marijuana with intent to distribute. Pet. App. 3a. At the time, both New Jersey and the United States defined marijuana to include hemp. *See* N.J. Stat. Ann. § 2C:35-2 (2012); 21 U.S.C. § 802(16)(B) (2012). In 2018, Congress amended the federal definition in the CSA to exclude hemp. *See* Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 12619, 132 Stat. 4490, 5018; 21 U.S.C. § 802(16)(B)(i). New Jersey followed suit in 2019. N.J. Stat. Ann. §§ 2C:35-2, 4:28-8 (2019).

2. In 2020, Lewis pleaded guilty to unlawful possession of a firearm. Pet. App. 3a. The Probation Office recommended applying a controlled-substance-offense enhancement based on Lewis's 2012 New Jersey conviction, which would substantially increase his base offense level. *Id.* at 21a; *see* U.S.S.G. § 2K2.1(a)(4)(A).

Lewis objected. He explained that "controlled substance" in the Guidelines means only substances listed in the current federal schedule. Pet. App. 21a. But the New Jersey statute under which Lewis was convicted in 2012 defined marijuana more broadly than the federal schedule in effect at the time of Lewis's federal offense and sentencing. Pet. App. 22a-23a. The Government argued that "controlled substance" includes substances controlled under state law, even if they are not also controlled federally. *Id.* In the Government's view, because New Jersey regulated hemp in 2012, Lewis's 2012 conviction triggered the controlled-substance-offense enhancement. *Id.* at 22a.

***10** The District Court agreed with Lewis. The District Court relied on the *Jerome* presumption, the rule "that Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Jerome*, 318 U.S. at 104; *see* Pet. App. 41a-44a. As the District Court explained, that presumption made particular sense in this context. The Guidelines' "animating principle is uniformity in sentencing." Pet. App. 42a. A *"federal* sentencing enhancement under the Guidelines requires something more than a conviction based on a state's determination that a given substance should be controlled." *Id.* at 43a.

After declining to apply the enhancement for Lewis's marijuana conviction, the District Court varied upwards slightly and sentenced Lewis to 42 months' imprisonment and three years' supervised release. *Id.* at 23a.

3. After the government appealed, the Third Circuit disagreed with the District Court and reversed.

The Third Circuit first addressed whether to look to federal or state law to define "controlled substance." *Id.* at 8a-13a. The court acknowledged that "courts of appeals have answered the question differently." *Id.* at 8a. The Third Circuit held that because a "controlled substance *offense"* includes "offenses 'under federal *or state* law,"' federal and state laws can "define what drugs are *controlled substances." Id.* at 9a (quoting U.S.S.G. § 4B1.2(b)) (some emphases added). Because the definition of "offenses" "contemplates state-law discrepancies," the Third Circuit saw "no reason to apply the" *Jerome* "presumption against state law to" the portion of the definition involving controlled substances. *Id.* at 11a.

***11** The panel also declared the "sentencing goal of uniformity" to be "illusory." *Id.* And the court emphasized the fact that "the Guidelines often do cross-reference the United States Code," but the definition of controlled substance offense does not explicitly cross-reference the CSA. *Id.* at 9a. Based on that evidence, the Third Circuit concluded that a "controlled" substance includes substances regulated solely under state law. *See id.*

The Third Circuit next addressed whether to define a "controlled substance" based on drug schedules from "the date of the predicate state conviction" or schedules from "the date of federal sentencing." *Id.* at 13a. The court again expressly acknowledged that the question "has divided the courts of appeals." *Id.* at 14a.

The court "start[ed]" its analysis with *McNeill*. *Id.* In *McNeill*, this Court interpreted ACCA's "serious drug offense" enhancement. That enhancement applies when the predicate offense carries a "maximum term of imprisonment of ten years or more." 563 U.S. at 817-818 (citation omitted). In *McNeill*, the state law qualified at the time the defendant committed the offense. But by the time of the defendant's federal offense and sentencing, the state had reduced the maximum penalty, meaning the state law no longer qualified under ACCA. *Id.* at 818. The question was whether, in light of that change, the predicate still qualified as a "serious drug offense." This Court answered yes, holding that whether a predicate qualifies for an ACCA enhancement turns on the predicate's elements "at the time of that conviction." *Id.* at 820.

***12** The Third Circuit acknowledged that *McNeill* did "not control Lewis's case" but nevertheless found *McNeill* "persuasive." Pet. App. 15a. The court recognized that *"McNeill* prescribes only the time for analyzing the elements of the [predicate] state offense, rather than the time for determining the elements of the" comparator. *Id.* at 16a (cleaned up). But the court deemed this difference immaterial. In the court's view, because Lewis was convicted under a law that, at the time, qualified as a controlled substance offense, "it would strain credulity" and "yield absurd results" to "reclassify Lewis's prior conviction as something other than possession with intent to distribute a controlled substance." *Id.* at 16a-17a.

4. Lewis petitioned for panel rehearing or rehearing en banc. The Third Circuit denied the petition. *Id.* at 47a-48a. Judges Restrepo and Freeman would have granted rehearing en banc. *Id.* at 47a n.*.

Lewis moved to stay the mandate, and explained that he had been released from prison and is currently serving a three-year term of supervised release. Staying the mandate would prevent the risk that he would be resentenced and returned to prison while his petition was pending.

The Third Circuit panel stayed the issuance of the mandate. This petition follows.

***13 REASONS FOR GRANTING THE PETITION**

I. THE CIRCUITS ARE SPLIT OVER WHETHER *MCNEILL* DICTATES A TIME-OF-CONSEQUENCES OR TIME-OF-CONVICTION APPROACH.

This Court should grant this petition to resolve the first question presented. The decision below deepens an acknowledged circuit split over the application of *McNeill* to defining a "controlled substance" in Guidelines cases and a "serious drug offense" in ACCA cases. Five circuits read *McNeill* narrowly and look to a drug schedule in effect when federal consequences attach (the "time-of-consequences approach"). Two circuits read *McNeill* broadly and look to a drug schedule in effect at the time of the predicate offense (the "time-of-conviction approach"). Two more circuits-including the Third Circuit in the decision below-adopt the time-of-consequences approach for ACCA and the time-of-conviction approach for the Guidelines.

This Court already acknowledged that this question presents an important issue worthy of resolution when it granted certiorari in two ACCA cases raising this precise question. *See Brown*, No. 22-6389; *Jackson*, No. 22-6640. This Court could grant

this petition to decide this question in the context of the Guidelines, if it determines that *Brown* and *Jackson* do not provide appropriate vehicles. At minimum, this Court should hold this petition pending the resolution *of Brown* and *Jackson.*

***14 A. The Circuits Are Deeply Divided Over The Application *Of McNeill* To The Timing Question.**

In both Guidelines and ACCA cases, the First, Second, Fourth, Ninth, and Tenth Circuits read *McNeill* narrowly and define the relevant federal comparator based on a controlled substance schedule in effect when federal consequences attach. The Sixth and Eleventh Circuits read *McNeill* broadly and look to law in effect at the time of the predicate conviction. Finally, the Third Circuit and Eighth Circuits apply the former approach in Guidelines cases and the latter approach in ACCA cases. Even looking at just Guidelines cases, the circuits are divided 3-3: the First, Second, and Ninth Circuits apply a time-of-consequences approach, and the Third, Sixth, and Eighth Circuits apply a time-of-conviction approach. The Court should resolve this entrenched split.

1. The First, Second, Fourth, Ninth, and Tenth Circuits define a "controlled substance" based on the federal drug schedule in effect when federal consequences attach. These circuits read *McNeill* narrowly as defining only the elements of a predicate offense-not the elements of the relevant federal provision against which the predicate offense is compared. [1]

[1] These circuits are sub-divided over whether to use the drug schedule in effect at sentencing or at the time the federal offense was committed. *Compare, e.g., United States v. Hope*, 28 F.4th 487, 504-505 (4th Cir. 2022), *with, e.g., United States v. Williams*, 61 F.4th 799, 808 (10th Cir. 2023). That distinction is not at issue here.

Consider the Ninth Circuit. In *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021), the defendant ***15** committed a state-law offense, after which Congress amended the federal CSA to narrow the definition of the substance in question, *id.* at 701. The Ninth Circuit held that the state conviction no longer qualified as a controlled substance offense because the state-law predicate offense did not categorically match the current federal drug schedule. *Id.* at 703. The Ninth Circuit explained that this approach promotes "uniformity in federal sentencing law." *Id.* In contrast, "[a]pplying superseded versions of the" relevant schedule "depending on when in the past a defendant committed an identical state crime would cause the very sentencing disparities Congress has repeatedly stated it intends to avoid." *Id.* at 703-704.

In so holding, the Ninth Circuit squarely rejected the Government's argument that *McNeill* required defining the comparator "at the time of the prior state conviction." *Id.* at 703. As the Ninth Circuit explained, *McNeill* has nothing to say on that question: *McNeill* speaks to how to determine the elements of a predicate offense, not the elements of the comparator. *See id.* at 703-704. And in *Bautista*, only the comparator had changed. Moreover, it "would be illogical to conclude that federal sentencing law attaches 'culpability and dangerousness' to an act that, at the time of sentencing, Congress has concluded is not culpable and dangerous." *Id.* at 703. Indeed, adopting the Government's approach "would prevent amendments to federal criminal law from affecting federal sentencing and would hamper Congress' ability to revise federal criminal law." *Id.*

The First Circuit has likewise adopted the time-of-consequences approach to define "controlled substance." *See* ***16** *United States v. Abdulaziz*, 998 F.3d 519, 523-531 (1st Cir. 2021). As the First Circuit explained, *McNeill* confirms that "the elements of the state offense of conviction are locked in at the time of that conviction," meaning courts must "look back to the time of conviction * * * to discern the elements of" a predicate offense. *Id.* at 525. But *McNeill's* "backward-looking inquiry" says nothing about whether the definition of controlled substance is also "locked in as of the time of the previous conviction." *Id.* at 526-527 (internal quotation marks omitted). Echoing the Ninth Circuit, the First Circuit emphasized the oddity of applying a federal sentencing enhancement "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 * * * without regard to whether the conduct" involved a substance that is no longer controlled. *See id.* at 528.

The Second Circuit also follows the time-of-consequences approach. *United States v. Gibson*, 55 F.4th 153, 162-167 (2d Cir. 2022). Like the First and Ninth Circuits, the Second Circuit reads *McNeill* as narrowly focused on how to define the predicate, not

the comparator. *Id.* at 162. The Second Circuit has also emphasized the logic of looking to modern drug schedules: A "defendant's culpability and dangerousness plainly change in the eyes of federal law when the conduct for which he was previously convicted under state law is no longer unlawful." *Id.* Indeed, controlled substance schedules are intended to be "a moving target," and the federal CSA has frequently changed over time. *Id.* at 163 (citation omitted).

***17** In ACCA cases, the Fourth and Tenth Circuits likewise define the comparator using the drug schedule in effect when federal consequences attach.

In *Hope*, the Fourth Circuit cited the Ninth Circuit's decision in *Bautista*, a Guidelines case; it likewise concluded that *McNeill* explained how to define the elements of a predicate, not the comparator; and the Fourth Circuit held that it would be "illogical" to define a controlled substance according to an outdated drug schedule. *United States v. Hope*, 28 F.4th 487, 505 (4th Cir. 2022) (quoting *Bautista*, 989 F.3d at 703).

In *Williams*, the Tenth Circuit agreed with "[t]he overwhelming majority of circuits" that "the correct point of comparison is the time of the instant federal offense-not the prior state offense." *United States v. Williams*, 48 F.4th 1125, 1139 (10th Cir. 2022). The Tenth Circuit likewise declined to rely on *McNeill*, holding that *McNeill* involved "a subsequent change in the prior offense of conviction-and not the federal definition to which it is compared." *Id.* at 1142.

2. In sharp contrast to those five Courts of Appeal, the Sixth and Eleventh Circuits read *McNeill* more expansively to support defining the federal comparator based on the law at the time of the predicate offense. This is the "time-of-conviction approach."

In *Clark*, the Sixth Circuit defined a "controlled substance" based on drug schedules in effect at the time of conviction. *United States v. Clark*, 46 F.4th 404, 408-409 (6th Cir. 2022). According to the Sixth Circuit, the Guidelines' use of the term *"prior"* in describing the relevant felony convictions that can ***18** trigger an enhancement means a "court should take a backward-looking approach and assess the nature of the predicate offenses at the time [of those] convictions." *Id.* at 408-409 (quoting U.S.S.G. § 4B1.2(c)). The Sixth Circuit read *McNeill* to "confirm" the appropriateness of "a time-of-conviction rule." *Id.* at 409. According to that court, both *McNeill* and *Clark* involved "recidivism enhancements" and "an intervening change" in law "that ostensibly shifts the meaning of a provision that enhances [a] sentence." *Id.* The court recognized that other circuits take the opposite approach, but determined that those "courts insufficiently grapple with the Supreme Court's reasoning in *McNeill.*" *Id.* at 414.

The Eleventh Circuit adopted a similar approach for ACCA cases in *Jackson*, which this Court is hearing this term. *See United States v. Jackson*, 55 F.4th 846, 855 (11th Cir. 2022), *cert. granted*, 143 S. Ct. 2457 (2023). According to the Eleventh Circuit, *McNeill* "requires" interpreting a "serious drug offense" in ACCA "to incorporate the version of the federal controlled-substances schedules in effect" at the time of the predicate state conviction. *Id.* The Eleventh Circuit concluded that looking to drug schedules at the time federal consequences attach "would 'erase an earlier state conviction for ACCA purposes,' in violation of *McNeill[].*" *Id.* at 856 (alterations omitted) (quoting *McNeill*, 563 U.S. at 823). Additionally, the Eleventh Circuit read *McNeill* to mandate "a backward-looking perspective," which it read to support looking to "the federal controlled-substances schedules" "in effect at the time the defendant's prior federal drug conviction occurred." ***19** *Id.* at 857-859. But like the Sixth Circuit, the Eleventh Circuit recognized its "sister circuits" had reached the opposite result based on "thoughtful arguments." *Id.* at 860.

3. The Third and Eighth Circuits split the difference. For ACCA cases, these courts define the federal comparator based on drug schedules in existence at the time federal consequences attach. But they adopt the time-of-conviction approach for Guidelines cases.

The Third Circuit adopted the time-of-consequences rule for ACCA in *United States v. Brown*, 47 F.4th 147 (3d Cir. 2022), *cert. granted*, 143 S. Ct. 2458 (2023), which this Court will hear this term. The Third Circuit held that *McNeill* prescribes "only the time for analyzing the elements of the state [predicate] offense." *Id.* at 154 (citing *United States v. Jackson*, 36 F.4th 1294, 1306, *superseded by* 55 F.4th 846 (11th Cir. 2022), *cert granted*, 143 S. Ct. 2457 (2023); *Hope*, 28 F.4th at 505; *Bautista*, 989

F.3d at 703; *Abdulaziz*, 998 F.3d at 526). The Eighth Circuit has similarly held that *McNeill* does not speak to how to determine the comparator under ACCA. *See United States v. Perez*, 46 F.4th 691, 699 (8th Cir. 2022) (citing *Abdulaziz*, 998 F.3d at 525).

But these courts reverse course for Guidelines cases, read *McNeill* expansively, and define "controlled substance" based on drug schedules in effect at the time of the predicate. In the decision below, the Third Circuit held that just as "later amendments to state law did not change the classification of the already-adjudicated offense in *McNeill*, deregulation of hemp does not reclassify Lewis's prior conviction as ***20** something other than possession with intent to distribute a controlled substance." Pet. App. 15a-16a. The Third Circuit acknowledged the tension between its holding here and *Brown*, which reached the opposite result under ACCA. *Id.* at 18a. But the Third Circuit reasoned that *Brown* had taken "no view on the correctness of" the time-of-consequences rule as applied to the Guidelines and concluded that the result in *Brown* stemmed from other factors not present in Guidelines cases. *Id.* (citation omitted); *see also United States v. Bailey*, 37 F.4th 467, 469-470 (8th Cir. 2022) (per curiam) (adopting time-of-conviction approach under the Guidelines).

4. As the decision below acknowledges, the question presented "has divided the courts of appeals." Pet. App. 14a. Indeed, just looking at Guidelines cases, the circuits are split 3-3. *Compare Abdulaziz*, 998 F.3d at 531 (time-of-consequences), *and Gibson*, 55 F.4th at 162-167 (same), *and Bautista*, 989 F.3d at 703-705 (same), *with Clark*, 46 F.4th at 406 (time-of-conviction), *and* Pet. App. 14a-16a (same), *and Bailey*, 37 F.4th at 469-470 (same). This Court has already granted review of this question in the ACCA context; hearing this case would allow the Court to expressly resolve the Guidelines issue as well.

At a minimum, however, this Court should hold this petition pending its resolution *of Brown* and *Jackson*. As the *Jackson* petition explained, resolving "the question presented" in those cases "will clarify the widespread confusion about this Court's decision in *McNeill,"* thereby providing important guidance for both ACCA and "Guidelines cases around the country." Pet. for Cert. 30, *Jackson*, No. 22-6389 (Jan. 24, 2023). Indeed, this Court has long recognized that ***21** precedent and principles from statutory cases can inform the Guidelines, and vice versa. *See, e.g., Dorsey v. United States*, 567 U.S. 260, 276 (2010) (applying background principle from the Guidelines to interpret Fair Sentencing Act); *United States v. Rodriquez*, 553 U.S. 377, 392 (2008) (using Sentencing Reform Act to interpret ACCA); *see also, e.g., United States v. Ramos-Gonzalez*, 775 F.3d 483, 504 n.24 (1st Cir. 2015) ("Much of the case law developing the [categorical approach] has arisen in the context of the Armed Career Criminal Act[.] * * * We have long recognized the applicability of this precedent to the career offender inquiry.").

B. The Decision Below Is Wrong.

Federal law generally applies "the Guidelines that are 'in effect on the date the defendant is sentenced.'" *Dorsey*, 567 U.S. at 275 (quoting 18 U.S.C. § 3553(a)(4)(A)(ii)) (emphasis omitted). This principle requires defining "a controlled substance offense" based on the drug schedule "at the time of a defendant's federal sentencing." *Abdulaziz*, 998 F.3d at 527.

Defining sentencing enhancements based on current law makes intuitive sense. Sentencing enhancements reflect "how problematic [a defendant's] past conduct is when viewed as of the time of the sentencing itself." *Id.* at 528; *accord Bautista*, 989 F.3d at 703. They do not "punish" someone for having committed a prior offense in the past. *Gibson*, 55 F.4th at 165. Instead, they constitute a "judgment" *in the present* about the need to incarcerate a person *for the future. Abdulaziz*, 998 F.3d at 528. But imposing an enhancement based on outdated drug schedules would mandate an ***22** additional and often extremely harsh penalty for conduct that "is no longer a * * * crime." *Gibson*, 55 F.4th at 165. It "would be illogical to conclude that federal sentencing law attaches 'culpability and dangerousness' to an act that, at the time of sentencing," the legislature "has concluded is not culpable and dangerous." *Bautista*, 989 F.3d at 703.

Moreover, defining a controlled substance at the time federal consequences attach "serves the goal of uniformity in federal sentencing law." *Id.* The time-of-consequences approach ensures that two similarly-situated "individuals" who "were sentenced *at the same time"* do not "receive radically different sentences." *Dorsey*, 567 U.S. at 277 (emphasis added). By contrast, varying the definition of a controlled substance depending on the date of a predicate conviction could mean two individuals sentenced *on*

the same day would receive different penalties for "an identical state crime" "depending on when in the past" each "defendant committed" the offense. *Bautista*, 989 F.3d at 703.

The Third Circuit's contrary time-of-conviction approach does not withstand scrutiny.

First, the Third Circuit erred by relying on *McNeill*. *McNeill* asked only how to define a predicate offense. *"McNeill* simply had no occasion to address" or "answer" the question of when to define the comparator. *Abdulaziz*, 998 F.3d at 526 & n.3.

Second, the Third Circuit's policy arguments do not hold up. The court below worried that under the time-of-consequences approach, some defendants will not receive enhanced sentences because of a change in state law. Pet. App. 16a. But that argument has little ***23** to do with defining a "controlled substance"; it is an objection to the categorical approach. The categorical approach assumes the defendant committed the least culpable conduct and asks whether that least culpable conduct meets the measure of a uniform comparator, precisely to avoid leaving federal sentencing "to the vagaries of state law." *Taylor*, 495 U.S. at 588. In other words, the categorical approach is underinclusive by design. *Moncrieffe*, 569 U.S. at 205 & n.11. That a state may change its law-and a state offense may no longer constitute a federal predicate is already baked into the categorical approach.

Third, the Third Circuit's divergent approach to ACCA and the Guidelines does not pass muster. According to the Third Circuit, because ACCA expressly defines controlled substance by reference to the federal CSA, "it makes sense" to rely on the current version of the CSA. Pet. App. 18a. But sentencing courts must likewise use the current version of the Guidelines, and the current definition of any terms they contain. And given the fundamental similarity between ACCA enhancements and Guidelines enhancements and the analytical framework underlying them, it makes little sense to adopt different approaches for ACCA and the Guidelines. *See supra* pp. 20-21 (discussing overlap of ACCA and Guidelines' precedent).

II. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER WHETHER "CONTROLLED SUBSTANCE" INCLUDES SUBSTANCES CONTROLLED ONLY BY STATE LAW.

The Court should also grant this petition to address a second deep and acknowledged split. The Courts of ***24** Appeals disagree 3-6 over whether "controlled substance" includes substances controlled under federal law only or also includes substances controlled under state law. As two Justices of this Court have recognized, this split erodes national uniformity in federal sentencing. Given the Sentencing Commission's longstanding inability to address this question, this Court should grant this petition to resolve this split.

A. The Decision Below Deepened An Acknowledged Split Over The Federal-Or-State-Law Question.

1. In the Second, Fifth, and Ninth Circuits, a criminal defendant will only face an enhanced federal sentence based on a substance controlled under federal law.

In *United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018), the Second Circuit held that the phrase "controlled substance" in the Guidelines refers only to substances controlled under the CSA. The Second Circuit explained that as "a general rule, commonly called the *Jerome* presumption, the application of a federal law does not depend on state law unless" the drafter "indicates otherwise." *Id.* at 71 (citing *Jerome*, 318 U.S. at 104). As the Second Circuit recognized, this Court's categorical-approach precedent represents a specialized application *of Jerome*. *See id.* (citing *Taylor*, 495 U.S. at 579; *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 393 (2017)). Combined, these precedents confirm that when it comes to the Guidelines, "federal law is the interpretive anchor." *Id.*

***25** Relying on these principles, the Second Circuit made short work of the question presented. Absent contrary evidence, a *"federal* sentencing enhancement under the Guidelines requires something more than a conviction based on a state's determination that a given substance should be controlled." *Id.* "[I]f the Sentencing Commission wanted 'controlled substance'

to include substances controlled under only state law to qualify, then it should have" defined that term to "read '* * * a controlled substance *under federal or state law.'* But it [did] not." *Id.* at 70 (ellipsis and emphasis in original). Thus, the words "controlled substance" "must refer exclusively to those drugs listed under federal law-that is, the CSA." *Id.* at 71.

The Ninth Circuit has similarly held that a "controlled substance" refers to only substances controlled under federal law.[2] *United States v. Leal-Vega*, 680 F.3d 1160, 1165 (9th Cir. 2012). Applying "a national definition" of "controlled substance" promotes the "uniform application of the Sentencing Guidelines." *Id.* at 1167; *see Bautista*, 989 F.3d at 702 (reiterating that defining "controlled substance" based on federal law "furthers uniform application of federal sentencing law").

2 *Leal-Vega* involved U.S.S.G. § 2L1.2(b)(1)(A)'s sentencing enhancement for a prior "drug trafficking offense," which is defined as an offense involving "a controlled substance." The Ninth Circuit later extended *Leal-Vega's* holding to U.S.S.G. § 4B1.2(b)'s "identical" "text." *Bautista*, 989 F.3d at 702.

The Fifth Circuit followed the same approach in *United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015). There, the Fifth Circuit expressly "adopt[ed] the reasoning of the Ninth Circuit" and held that for a prior state conviction to qualify as a ***26** predicate conviction, "the government must establish that the substance underlying that conviction is covered by the CSA." *Id.*[3]

3 Like *Leal-Vega, Gomez-Alvarez* involved U.S.S.G. § 2L1.2.

Finally, the First Circuit has noted the clear circuit split and signaled its agreement with the Second, Fifth, and Ninth Circuits. *United States v. Crocco*, 15 F.4th 20, 22 (1st Cir. 2021). Although it has yet to squarely confront the question, the First Circuit has explained that defining controlled substances based on federal law "is appealing," while the contrary approach is "fraught with peril." *Id.* at 23. Federal "courts cannot blindly accept anything that a state names or treats as a controlled substance." *Id.* Otherwise, the courts would "turn the categorical approach on its head by defining a controlled substance offense as whatever is illegal under the particular law of the State where the defendant was convicted." *Id.* (cleaned up).

2. In contrast, the Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits define "controlled substance" by reference to federal *and* state law.

In the decision below, the Third Circuit rejected the reasoning of the Second, Fifth, and Ninth Circuits, and held that a substance regulated by state law is a "controlled substance" even if it is not regulated by federal law. Pet. App. 8a. The court recognized that the ordinary meaning of "controlled substance"-"a drug regulated by law"-does not shed light on *"which* law must regulate the drug." *Id.* at 9a. According to the court, the Guidelines answer that question because the definition of a controlled substance ***27** *offense* "explicitly includes offenses 'under federal *or state* law.'" *Id.* (quoting U.S.S.G. § 4B1.2(b)).

The Third Circuit faulted the circuits on the other side of the split for "read[ing] into" the definition of a controlled substance offense "a cross-reference to the CSA that isn't there" and for "rely[ing] too heavily on the rebuttable presumption that federal law does not turn on the vagaries of state law." *Id.* at 9a-10a (citing *Jerome*, 318 U.S. at 104).

The Seventh Circuit reached the same conclusion in *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020). The defendant argued that his state conviction did not qualify as a predicate controlled substance offense because state law defined cocaine more broadly than the CSA. *Id.* at 644. The Seventh Circuit disagreed. According to that court, the "Sentencing Commission clearly knows how to cross-reference federal statutory definitions when it wants to." *Id.* at 651. Because the definition of a controlled substance "does not incorporate, cross-reference, or in any way refer to the Controlled Substances Act," the court concluded that the phrase "controlled substance" includes substances regulated by federal or state law. *Id.*

The Fourth Circuit took the same approach in *United States v. Ward*, 972 F.3d 364 (4th Cir. 2020). It too highlighted the lack of an express cross-reference to the CSA on the theory that, if the Commission "intended for the federal definition of 'controlled substance' to apply," it could have said so. *Id.* at 373. The Fourth Circuit also declined to rely on the *Jerome* presumption because, in defining controlled substance *offense*, the Guidelines ***28** specifically reference *offenses* under "state law." *Id.* at 373-374 (quoting U.S.S.G. § 4B1.2(b)).

The Sixth, Eighth, and Tenth Circuits likewise look to federal or state law in defining a "controlled substance." Those courts similarly emphasize the Guidelines' textual reference to an *offense* under state law and the lack of an explicit cross-reference to the CSA in the Guidelines. *See United States v. Jones*, Nos. 22-1280/1281, ___ F.4th ___, 2023 WL 5543660, at *4 (6th Cir. Aug. 29, 2023); *United States v. Henderson*, 11 F.4th 713, 718-719 (8th Cir. 2021); *United States v. Jones*, 15 F.4th 1288, 1292 (10th Cir. 2021).

Given this straightforward division in authority on an important and recurring question, the Court should grant certiorari.

B. The Decision Below Is Wrong.

This Court's precedent establishes a clear rule: absent an express indication to the contrary, federal sentencing law does not depend on state law. Indeed, the entire purpose of the Guidelines and the categorical approach is to ensure nationally uniform sentencing law. That leads to a straightforward conclusion here: "controlled substance" means only those substances controlled under federal law.

The principle that federal law-in particular federal criminal law-does not turn on state law is shot through this Court's precedent. Nearly a century ago, *Jerome* explained that courts "must generally assume, in the absence of a plain indication to the contrary, that" federal law does not "depend[] on state law." *Jerome*, 318 U.S. at 104. Among other things, "[t]hat assumption is based on the fact that the application of ***29** federal legislation is nationwide." *Id.* Since *Jerome*, this Court has repeatedly "rejected attempts to impose enhanced federal punishments on criminal defendants in light of a state conviction" without ensuring that the state-law conviction meets "a uniform federal standard." *Townsend*, 897 F.3d at 71 (collecting cases); *see, e.g., Dickerson*, 460 U.S. at 119-120; *United States v. Turley*, 352 U.S. 407,411 (1957).

Indeed, the categorical approach itself is an application of this principle. In *Taylor*, this Court cited *Jerome's* progeny and developed the categorical approach to prevent federal sentencing enhancements from varying based on "the vagaries of state law." *Taylor*, 495 U.S. at 588, 591-592 (citing *Dickerson* and *Turley)*. In the Court's words, the "chief concern" of the categorical approach is to "ensure[ ] that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law." *Moncrieffe*, 569 U.S. at 205 n.11. To secure uniformity, the categorical approach compares state predicate offenses against a "uniform, categorical definition[ ]," *Taylor*, 495 U.S. at 590, even if that uniform comparator is at times underinclusive, *see Moncrieffe*, 569 U.S. at 205 & n.11.

These principles resolve this question presented: Had the Commission wanted the definition of "controlled substance" to include substances controlled under only state law, the Commission could have said so. It didn't. Instead, the Guidelines are silent regarding whether a "controlled substance" includes substances controlled under only federal law, or federal and state law. Given that silence, this Court's precedent dictates that federal law alone controls.

***30** Defining controlled substance according to both federal and state law, as the Third Circuit did, undermines the categorical approach's goals. "Whereas the categorical approach was intended to prevent inconsistencies based on state definitions of crimes," defining a "controlled substance" based on state law "creates" inconsistencies. *Ward*, 972 F.3d at 383-384 (Gregory, C.J., concurring in judgment). Under the Third Circuit's approach, it is immaterial whether a drug is "not federally regulated." Pet. App. 19a. Indeed, according to the decision below, a defendant can face an enhanced federal sentence for a state-law offense that is not-and never has been-illegal under federal law, or in any of the other 49 states. That is precisely the "odd result []" the categorical approach seeks to prevent. *See Taylor*, 495 U.S. at 591.

The Third Circuit reached the wrong result for three reasons.

First, the Third Circuit picked the wrong starting point for its analysis. The court acknowledged that neither the text of the Guidelines nor the plain meaning of controlled substance directly answer the question at hand. *See* Pet. App. 9. But instead of applying the *Jerome* presumption and the corresponding principals underlying the categorical approach, the Third Circuit took silence to imply that the Guidelines incorporate state law. According to the Third Circuit, because "the Guidelines often do cross-reference the United States Code," the *absence* of a cross-reference means the Guidelines incorporated state law. *Id.*

***31** That fundamental mistake "has it backwards." *Townsend*, 897 F.3d at 70. Silence means the Guidelines incorporate *only* federal law. As this Court explained in *Taylor*, "we do not interpret Congress' omission of" certain language to mean "that * * * Congress intended to abandon its general approach of using uniform categorical definitions to identify predicate offenses." 495 U.S. at 591.

Second, the Third Circuit stated that because the Guidelines define a "controlled substance *offense"* as "an *offense* under federal *or state* law," it could disregard the *Jerome* presumption. Pet. App. 9a-10a (some emphases added) (citation omitted).

That butchers the text. The fact that the Commission sought to include "an *offense* 'under federal or state law"' "does not also mean that the *substance* at issue may be controlled under federal or state law." *Townsend*, 897 F.3d at 70. That language simply means that if substance X is deemed controlled, a conviction under federal or state law involving substance X qualifies as a "controlled substance offense"-whereas a conviction under foreign law involving substance X does not. It says nothing about what law defines whether the *substance* is controlled. If anything, the fact that the Commission specified that "an offense" includes an offense under federal or state law but did not similarly define a "controlled substance" as a substance controlled under federal or state law supports the federal-only approach.

Third, the Third Circuit gave short shrift to this Court's goal of national uniformity in federal sentencing law. The Third Circuit acknowledged that ***32** its approach "would treat differently" two "offenders who had previously trafficked hemp-one in a state where it was criminalized and another in a state where it was legal." Pet. App. 11a. But the Third Circuit worried that relying on federal law to define a controlled substance also created dis-uniformity depending on whether an offender was convicted in a state whose state schedule matched the federal schedule. *Id.* at 11a-12a.

That is a yet another thinly-veiled attack on the categorical approach. The categorical approach always assumes the defendant committed the least culpable conduct necessary to have committed the predicate offense. If a state law criminalizes less culpable conduct than a federal comparator, the predicate will always fail to categorically match the comparator. Any "objection to that underinclusive result is little more than an attack on the categorical approach itself." *Moncrieffe*, 569 U.S. at 205.

Every federal defendant sentenced at "the same time, [in] the same place, and even [by] the same judge" ought to be treated the same. *Dorsey*, 567 U.S. at 277. This Court should grant this petition to make that goal a reality.

III. THE QUESTIONS PRESENTED ARE IMPORTANT, RECURRING, AND WARRANT REVIEW.

The two questions presented are critically important, impact countless defendants across the country, and are worthy of this Court's review.

These two persistent circuit splits undermine the very purpose of the Sentencing Guidelines. Congress tasked the Sentencing Commission with eliminating "unwarranted sentencing disparities" for those "found ***33** guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). Consistent with that goal, the Commission's Guidelines play a "central role in sentencing." *Molina-Martinez v. United States*, 578 U.S. 189, 191 (2016). "[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007).

But allowing these circuit splits to persist creates the very discrepancies the Guidelines seek to avoid. Today, a defendant being federally sentenced in roughly half the circuits could receive a substantially lengthy sentencing increase that he or she would not receive in the other circuits. The Guidelines should not treat a defendant differently "simply because they were lucky enough to commit" their federal offense "on the right side of the border"-or unlucky enough to commit it on the wrong side. *Ward*, 972 F.3d at 381 (Gregory, C.J., concurring in judgment).

This persistent dis-uniformity is all the more troubling because prior convictions involving a controlled substance trigger numerous sentencing enhancements, including the extremely serious career-offender enhancement. *See, e.g.*, U.S.S.G. § 4B1.1 (career offender provision); *id.* § 2K2.1 (possession of a firearm); *id.* § 2K1.3 (explosive-materials); *id.* § 5K2.17 (semiautomatic-firearms); *id.* § 2L1.2 (unlawful reentry). Federal courts impose these enhancements thousands of times every year, often leading to years- or even decades-long sentencing increases. *See generally* U.S. Sentencing Comm'n, *Quick Facts: Career Offenders* 1 (1,356 ***34** career offenders in fiscal year 2022)[4]; U.S. Sentencing Comm'n, *Use of Guidelines and Specific Offense Characteristics Guideline Calculation Based Fiscal Year 2022* 129 (§ 2K2.1 enhancement applied 4,016 times for controlled substances or crimes of violence in fiscal year 2022).[5]

4 *Available at* https://tinyurl.com/mpcr8aj4.

5 *Available at* https://tinyurl.com/bd3m5843.

Courts are deeply divided, and the questions presented are not going away. Nor are these questions limited to prior marijuana convictions like Lewis's 2012 New Jersey conviction. The same disparities arise in cases involving all sorts of controlled substances. *See, e.g., Henderson*, 11 F.4th 713 (cocaine); *Ward*, 972 F.3d 364 (heroin); *United States v. Holliday*, 853 F. App'x 53 (9th Cir. 2021) (methamphetamine). Because federal drug definitions "are updated every year" and do not necessarily track state law, there is every reason to think these problems will only grow worse. *Gibson*, 55 F.4th at 165. And given that the issues and arguments have been fully developed across multiple cases, there is no need to wait for any additional circuits to weigh in.

Indeed, this Court has already signaled that each question presented warrants review. It recently granted certiorari to review the timing question as it pertains to ACCA, confirming that this question is deeply important. Meanwhile, as Justice Sotomayor noted in a statement joined by Justice Barrett, the federal-or-state-law question presented has "direct and severe consequences for defendants' sentences." ***35** *Guerrant*, 142 S. Ct. at 641 (Sotomayor, J., respecting denial of certiorari).

In fact, the combination of the questions presented produces a particularly concerning result that cries out for this Court's intervention. In the decision below, the Third Circuit defined the controlled substance comparator (1) based on the law in effect at the time of predicate conviction, and (2) based on state law, rather than federal law. In other words, the court defined the comparator as the state law in effect at the time of Lewis's predicate conviction-meaning it effectively compared his state law predicate *against itself*. That "turns the categorical approach on its head by defining [a controlled substance] as whatever is illegal under the particular law of the State where the defendant was convicted." *Esquivel-Quintana*, 581 U.S. at 393. As a result, *every* prior controlled substance conviction will *always* count as a "controlled substance offense." That will produce enhanced sentences in *every single case-often* meaning defendants receive years or decades more than they should. That bizarre result is as wrong as it sounds-and calls out for this Court's review.

This Court should not hesitate to resolve the questions presented because they involve the Guidelines. As Justice Sotomayor explained in 2022, the Sentencing Commission has a "responsibility" to address circuit splits, and often gets the first crack at solving them. *Guerrant*, 142 S. Ct. at 640 (Sotomayor, J., respecting denial of certiorari). At that time, the Commission lacked a quorum, and Justice Sotomayor expressed hope that the Commission would resume its duties and resolve the second question presented.

***36** Since Justice Sotomayor's statement, however, the Commission gained a quorum, but has not solved these splits. Indeed, the Commission labeled resolving the second question presented a "priority," requested public comment on that issue, and even amended *other* aspects of the definition of "controlled substance." *See* Final Priorities for Amendment Cycle, 87 Fed. Reg. 67756, 67756 (Nov. 9, 2022). Yet the Commission declined to resolve the federal-or-state-law question. *See* Sentencing Guidelines for United States Courts, 88 Fed. Reg. 7180, 7200-7201 (Feb. 2, 2023); Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28254, 28276 (May 3, 2023). [6]

6 The Commission's priorities for the upcoming amendment cycle include discussing the use of the "categorical approach" in determining career-offender status. *See* U.S. Sentencing Comm'n, *Federal Register Notice of Final 2023-2024 Priorities 4*, https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20230824_fr-final-priorities.pdf. But the Commission did not expressly identify resolving either circuit split as a priority. And it is unclear whether the Commission will propose-much less promulgate-an amendment addressing the categorical approach that resolves either question presented (let alone both).

Hoping against reason that the Commission might act is not a rational basis for denying review. The Guidelines are federal law, and this Court has an independent "duty" "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This Court already permitted the "Commission * * * the opportunity to address" these reoccurring issues "in the first instance," *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the ***37** denial of certiorari), and was "restrained and circumspect in using * * * certiorari power as the primary means of resolving" these conflicts over the proper interpretation of the Guidelines, *Braxton v. United States*, 500 U.S. 344, 348 (1991). But the Commission has let the first question presented fester and affirmatively chose "not to act" on the second. *McClinton v. United States*, 143 S. Ct. 2400, 2403 (2023) (Sotomayor, J., respecting the denial of certiorari). This Court should "take up" these issues, exercise its own obligation to resolve conflicting approaches among the federal courts, and eliminate these glaring dis-uniformities in federal sentencing law. *Id.; see also Early v. United States*, 502 U.S. 920, 920 (1991) (White, J., dissenting from denial of certiorari) (urging review where the Commission "has not addressed" a "recurring issue").

IV. THIS PETITION IS A GOOD VEHICLE.

This petition is a good vehicle for resolving both questions presented. There are no jurisdictional problems or factual disputes. The record is not voluminous. And the two questions presented are outcome determinative: As a result of the Third Circuit's decision, Lewis must be resentenced under a *higher* Guidelines range. Had the court interpreted "controlled substance" to mean substances listed in the federal CSA or substances controlled when federal consequences attach, Lewis's existing sentence would stand. Moreover, this case presents both the timing question and the federal-or-state-law question, unlike prior petitions that have presented only one of those two questions.

***38** This case is also a good vehicle because Lewis will remain on supervised release through April 2025, obviating any risk of mootness if the Court grants review this term. Further, Lewis does not have any other prior convictions that could substitute as a predicate offense. If Lewis's 2012 marijuana conviction is not a predicate offense, then his prior sentence will stand.

At a minimum, the Court should hold this petition pending its decision in *Brown* and *Jackson.* That decision will likely clarify *McNeill.* At that point, if appropriate, the Court could grant this petition, vacate the judgment, and remand for consideration in light of *Brown* and *Jackson.* Alternatively, depending on the resolution of *Brown* and *Jackson*, the Court could grant the petition to consider the second question presented.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed. Alternatively and to the extent the Court deems it appropriate here, the Court should hold this petition pending resolution of *Brown* and *Jackson*, and should dispose of it in light of the decisions in those cases.

***39** Respectfully submitted,

LISA VAN HOECK

OFFICE OF THE FEDERAL PUBLIC DEFENDER

22 South Clinton Ave.

Station Plaza Four, Fourth Floor

Trenton, NJ 08609

DAVID WILLNER

HOGAN LOVELLS US LLP

Two North Cascade Ave., Suite 1300

Colorado Springs, CO 80903

SEAN MAROTTA

DANIELLE DESAULNIERS STEMPEL

Counsel of Record

NATHANIEL A.G. ZELINSKY

DEVIN URNESS

HOGAN LOVELLS US LLP

555 Thirteenth St., N.W.

Washington, D.C. 20004

(202) 637-5600

danielle.stempel@hoganlovells.com

Counsel for Petitioner

AUGUST 2023

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1179

UNITED STATES OF AMERICA

v.

NAMIR WHITE, a/k/a NA,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 2:17-cv-00617-002)

PETITION FOR REHEARING

Present: RESTREPO, FREEMAN, and McKEE, *Circuit Judges*

The petition for rehearing filed by Appellant Namir White in the above-captioned case having been submitted to the judges who participated in the decision of this Court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing by the panel is denied.

By the Court,

s/ Arianna J. Freeman
Circuit Judge

Dated: February 10, 2026
PDB/cc: All Counsel of Record