SUPREME COURT
OF THE UNITED STATES

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           IN THE SUPREME COURT OF THE UNITED STATES
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JUSTIN RASHAAD BROWN,                    )

              Petitioner,        )

          v.                     ) No. 22-6389

UNITED STATES,                           )

              Respondent.        )
- - - - - - - - - - - - - - - - - - -
EUGENE JACKSON,                          )

              Petitioner,        )

          v.                     )  No. 22-6640

UNITED STATES,                           )

              Respondent.        )
- - - - - - - - - - - - - - - - - - -

Pages:  1 through 97

Place:  Washington, D.C.

Date:   November 27, 2023
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16   Washington, D.C.

17   Monday, November 27, 2023

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19   The above-entitled matter came on for

20   oral argument before the Supreme Court of the

21   United States at 10:03 a.m.

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23

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25

1   APPEARANCES:

2   JEFFREY T. GREEN, ESQUIRE, Washington, D.C.; on behalf

3   of Petitioner Justin Rashaad Brown.

4   ANDREW ADLER, Assistant Federal Public Defender,

5   Fort Lauderdale, Florida; on behalf of Petitioner

6   Eugene Jackson.

7   AUSTIN RAYNOR, Assistant to the Solicitor General,

8   Department of Justice, Washington, D.C.; on behalf

9   of the Respondent.

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1   P R O C E E D I N G S

2   (10:03 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear

4   argument this morning in Case 22-6389, Brown

5   versus United States, and the consolidated case.

6   Mr. Green.

7   ORAL ARGUMENT OF JEFFREY T. GREEN

8   ON BEHALF OF PETITIONER BROWN

9   MR. GREEN: Mr. Chief Justice, and may

10   it please the Court:

11   Once more we confront the Armed Career

12   Criminal Act, this time with regard to which

13   drug schedules a sentencing court is to consult

14   in order to determine whether a prior state drug

15   crime is a match with those federal schedules

16   and, thus, either is or is not a predicate under

17   the ACCA.

18   We submit that the sentencing court

19   should use the schedules that are current at the

20   time of sentencing. That is because, at its

21   core, the ACCA is a sentencing enhancement. It

22   is not a crime unto itself. And this Court has

23   said that the ordinary practice is to apply

24   current law, including at sentencing.

25   There's no reason to deviate from that

1   ordinary practice here. The statute is phrased

2   in uniformly present terms. The goal of the

3   ACCA is to incapacitate only the most serious

4   offenders. And, finally, to do otherwise, as

5   the government suggests, would be to ignore

6   entirely Congress's choice to change those drug

7   schedules with the 2018 Farm Bill.

8   With that, I invite the Court's

9   questions.

10   JUSTICE THOMAS: Mr. Green, didn't we

11   say in McNeill that looking at the statute is a

12   backward-looking exercise?

13   MR. GREEN: You certainly did, Justice

14   Thomas. And McNeill, however, is actually a

15   complement in some sense for this case, not a

16   barrier, and the reason why I say that is that

17   McNeill looked at the historical facts of the

18   state crime. We are now engaged in the

19   present-tense effort to figure out what the

20   federal sentence should be, including a

21   potential ACCA mandatory minimum enhancement.

22   McNeill acknowledged, as I just said,

23   that the statute is phrased in the present

24   tense, but McNeill found a particular problem,

25   and that was that if a state reformulates its

1   criminal laws -- and the Court pointed to a

2   Sixth Circuit case about how to assess drug

3   weight -- different prior state crimes could

4   disappear because a court couldn't figure out

5   under the new formulations what the maximum

6   sentence would be.

7   JUSTICE THOMAS: Let me ask you a

8   question, and then I'll let you go, but what if

9   just say, using your logic and your approach,

10   there was a crime, some -- a -- a state offense

11   that was not on the schedule, it was not

12   included on the controlled substance schedule,

13   but then, subsequently, after the commission of

14   the state crime but before sentencing, it's

15   added? How would you -- how would that work

16   under your logic or your approach?

17   MR. GREEN: Well, if the government --

18   if the government tried to make that a match, I

19   think the defendant might have the opportunity

20   to claim that that was an ex post facto

21   application of the law. In other words, it

22   wasn't a match at the time of the offense, but

23   it is now a match at sentencing.

24   And we would say under our approach

25   that, yes, it is a match, but the Ex Post Facto

1   Clause would be a barrier to applying the -- the

2   newer drug schedules there. And, there, you

3   would shift back to the drug schedules that

4   apply at the time of the federal offense, the

5   922(g) offense.

6   JUSTICE SOTOMAYOR: Isn't that an

7   argument why your reading is strained? You're

8   building in an ex post facto problem.

9   MR. GREEN: Well, respectfully, Your

10   Honor, we're not building in an ex post facto

11   problem because there already is an ex post

12   facto problem. In other words, we're not

13   avoiding a constitutional question here. This

14   Court decided in Peugh that a -- if, after the

15   commission of the federal crime, the sentencing

16   range shifted upward, that would be an ex post

17   facto problem, and that was because of the way

18   that the guidelines anchor the sentence.

19   Certainly, here, where we have a

20   statute and not any kind of discretionary

21   exercise, there would be an ex post facto

22   problem potentially with the application of the

23   -- the new drug schedules to -- that had a --

24   that -- that added drugs.

25   JUSTICE SOTOMAYOR: Can I ask you what

1   purpose your rule has to putting a defendant on

2   notice as to what his potential liability may be

3   at the moment he commits the federal offense?

4   At that point, he has no idea what an

5   enhancement may or may not be based on what

6   conduct he committed in the state offense or

7   even in the federal offense. I'm not sure what

8   rule of interpretation would counsel that

9   approach.

10   MR. GREEN: Respectfully, Justice

11   Sotomayor, I think that's an odd conception of

12   notice to be honest with you. Due process

13   notice problems arise when a -- an offender

14   can't tell where the law is and can't tell what

15   the sentence is. It doesn't usually arise if

16   the defendant -- if the -- if the offender gets

17   a break on the way to the sentencing forum.

18   That's what happened in Dorsey.

19   That's what happened in Peugh. That's what

20   happened in Concepcion. So, if a -- if an

21   offender gets a break on the way, the defender

22   gets the opportunity to take advantage of that

23   break to make the argument.

24   We don't -- we don't say that somebody

25   who is on notice 10, 12, 15 years ago when they

1   commit a state crime should have that crime --

2   JUSTICE SOTOMAYOR: Except, counsel --

3   MR. GREEN: -- or should have the

4   whole thing --

5   JUSTICE SOTOMAYOR: -- that's the

6   whole I want to say fallacy of sentencing

7   enhancements, that somehow, because there's a

8   potential for enhancement, there may be a

9   decision by a defendant not to commit a crime.

10   It's unlikely to ever really happen,

11   but accepting that supposition, your rule

12   doesn't do anything to enhance rejection of a

13   criminal from committing a crime again.

14   MR. GREEN: Well, I think our rule

15   does do something very important, which is to

16   respect Congress's choice to change the drug

17   schedules and to narrow the types of drugs that

18   are going to go onto the federal schedule. And

19   that, of course, affects the matching exercise.

20   So our rule respects the change that Congress

21   made in 2018.

22   And with respect to the prior notice,

23   as I said, I -- I -- I think it's an odd

24   conception to say that you should be culpable

25   for some future act that you had not even

1   committed yet because you were on notice at that

2   time.

3   JUSTICE BARRETT: Mr. Green, can I ask

4   you a question about the distinction between

5   your approach and the time-of-federal-offense

6   approach? Why does it make sense or why would

7   it make sense for Congress to say that two

8   defendants who were convicted at the exact same

9   time should be sentenced differently simply by

10   virtue of when their sentencing happened?

11   I mean, doesn't the other approach --

12   if we're not going to choose the government's

13   approach, it just seems to me like the

14   time-of-federal-offense approach makes more

15   sense of the scheme.

16   MR. GREEN: Well, any -- any

17   line-drawing that's done with respect to the

18   applicability or the matching exercise is going

19   to create some arbitrariness there, and -- and

20   the Court acknowledged that in -- in Dorsey.

21   And, in fact, the same sort of

22   hypothetical that Your Honor posed was discussed

23   in McNeill and also discussed in Dorsey, and the

24   resolution there was that a time-of-sentencing

25   approach uniformly -- even though there's going

1   to be, as I say, arbitrariness to any line --

2   temporal line-drawing exercise that the Court

3   does, the time-of-sentencing position at least

4   anchors it in a way that's consistent throughout

5   and -- and, according to the Court in Dorsey,

6   removes some of the arbitrariness.

7   JUSTICE JACKSON: And isn't that the

8   -- isn't that the sort of way it's ordinarily

9   done in the sentencing world? I mean, I

10   understood that under the sort of normal federal

11   sentencing process, a federal judge applies the

12   sentencing law at the time of sentencing.

13   MR. GREEN: That's correct, Your

14   Honor.

15   JUSTICE JACKSON: So that's the

16   standard in sentencing.

17   MR. GREEN: That is the --

18   JUSTICE JACKSON: So, to the extent

19   that we accept that this ACCA is a sentencing

20   statute, then the kind of normal ordinary course

21   would be to apply a time-of-sentencing rule?

22   MR. GREEN: That's correct. And as I

23   said in the outset, the Court has -- the Court

24   has repeatedly said that. That's also

25   consistent with a very long line of cases going

1   all the way back to, as we say in our brief,

2   Schooner Peggy and Justice Marshall's decision

3   that -- that show that you -- as a general

4   matter, you apply current law.

5   JUSTICE BARRETT: Counsel, let me ask

6   you a question about that, your -- your focus on

7   current law. I mean, you say that you always

8   have to apply the current sentencing, and, you

9   know, similarly, we always apply the statute

10   that's current at the time, which I completely

11   agree with.

12   Do you disagree, however, that

13   Congress could ever enact a statute that

14   referred back to a historical drug schedule as

15   -- as it would be in this case? I mean,

16   wouldn't we still be applying the current

17   version of ACCA even if it incorporated by

18   reference a prior statute?

19   That's not applying an old version,

20   correct?

21   MR. GREEN: Right. Congress --

22   Congress not only can do that, but Congress did

23   that in Section 3559(c), which is in essence a

24   federal three-strikes law.

25   Congress wrote the words if --

1   JUSTICE BARRETT: Well, I -- I

2   understand that Congress phrased it differently

3   there. There was nothing that bound Congress to

4   phrase it the same way here. But I just wanted

5   to clarify that you agree that if Congress -- if

6   we interpret this statute that way to

7   incorporate the historical Controlled Substances

8   Act schedule, we're not applying a prior version

9   of the statute, correct?

10   MR. GREEN: You're not applying a

11   prior version of the statute, no. Well, let me

12   --

13   JUSTICE BARRETT: We're -- we're still

14   respecting the --

15   MR. GREEN: Yes.

16   JUSTICE BARRETT: -- current

17   statute -- he -- the -- the -- the defendant

18   would still be sentenced under the current

19   version on that interpretation of the statute?

20   MR. GREEN: Well, no, because the ACCA

21   incorporates the dynamic Controlled Substances

22   Act and the -- and the drugs --

23   JUSTICE BARRETT: Well -- well, you

24   say -- you say that. I understand that that's,

25   you think, the best interpretation. All I'm

         1   saying is that if we accept the government's

         2   interpretation, we're not saying that he's

         3   somehow convicted of a different offense under

         4   922? We're just interpreting it differently to

         5   incorporate a prior drug schedule by reference

         6   in the statutory text itself?

         7   MR. GREEN: Justice Barrett, I -- I

         8   would say that you're using -- you're using a

         9   version of the ACCA in that instance that is

        10   old, right, and because the drug schedules have

        11   changed and the ACCA incorporates by reference

        12   the drug schedules, so you actually would be

        13   using an old version of the ACCA in that

        14   instance.

        15   JUSTICE JACKSON: Can I ask you about

        16   the federal prong of this? The -- we -- this

        17   case arises under the state prong, but it seems

        18   to me that the sort of weak spot of your

        19   argument is whether it is requiring a different

        20   rule for the federal prong than the state prong

        21   so that when a court is looking back to evaluate

        22   "serious drug offense," the definition, as it's

        23   applied under the federal prong, is the court

        24   just seeing whether or not the person was

        25   convicted at that historical point of a

 1   particular crime without reference to the

 2   federal schedule or referencing the federal

 3   schedule at that time and you're now arguing

 4   that for the state prong, they should be

 5   referencing the federal schedule at present and

 6   so we would have two different results if those

 7   -- if I'm understanding your rule? Am I right

 8   about that? Are -- is the federal requiring the

 9   past schedule be employed?

10   MR. GREEN: Justice Jackson, with

11   respect to (a)(1), the federal --

12   JUSTICE JACKSON: Yes.

13   MR. GREEN: -- the federal

14   convictions, I do think some of the arguments

15   that we make about using current law at

16   sentencing and respecting Congress's choices

17   might open up questions about exactly how to

18   interpret (a)(1) in that regard, but we don't

19   need that to prevail here because the Court has

20   already indicated that it is permissible to have

21   different interpretations --

22   JUSTICE JACKSON: So are you saying --

23   MR. GREEN: -- of the statute.

24   JUSTICE JACKSON: -- there would be or

25   do you have an argument -- like, if I disagree

1   with that, if -- if -- if I think that these two

2   should be read in parallel, is there an argument

3   that the (a)(1) prong, when it says an offense

4   under the Controlled Substances Act, is

5   Congress's invitation to look at what the

6   offenses are today?

7   MR. GREEN: I think, if you said you

8   had to read them in parallel, Justice Jackson, I

9   would say that (a)(1) should also use -- or that

10   in determination of whether there's an -- an

11   (a)(1) predicate, you should also use the --

12   the -- the current schedule.

13   JUSTICE JACKSON: And is that --

14   JUSTICE KAGAN: Well, what would be

15   the -- the justification for that? I mean, if

16   you look at the language of (a)(1), it just

17   refers to a prior conviction. It doesn't give

18   any sense that there's some kind of

19   intertemporal federal-to-federal categorical

20   approach going on.

21   MR. GREEN: Well, that's right. And

22   it -- and it is -- and, you know, in -- in -- in

23   the event that -- that the Court views (a)(1) to

24   be interpreted that way, I mean, we -- we -- the

25   (a)(2) is really an accident of the fact that we

1   have to do the matching exercise, right?

2   And so there would be a sensible

3   difference between (a)(1) and (a)(2) precisely

4   because it's categorical.

5   JUSTICE KAGAN: Right. But, if you

6   assume that (a)(1) is not doing that, can you

7   think of any reason why Congress would have

8   wanted (a)(1) and (a)(2) to work differently?

9   MR. GREEN: Because -- because

10   Congress -- for two reasons. One is, as I said

11   at the outset, Congress only wants to put away

12   the most serious offenders. So, in this regard,

13   the ACCA does look prospectively. The ACCA

14   wants to make sure that we are incarcerating for

15   a mandatory minimum 15 years the people who are

16   the most serious offenders, as I say, and those

17   people who wouldn't be the most serious

18   offenders if Congress had changed the drug

19   schedules, and there's the other point, right?

20   I mean, Congress changed the drug schedules, and

21   that should be --

22   JUSTICE KAVANAUGH: But we all --

23   MR. GREEN: -- respected.

24   CHIEF JUSTICE ROBERTS: Thank you.

25   JUSTICE ALITO: Let's say that --

1   well, I'm sorry.

2   CHIEF JUSTICE ROBERTS: Yeah. Thank

3   you, counsel. One of the things you emphasize

4   in your -- not emphasize -- raise in your brief

5   is the complexity that would accompany the

6   government's approach. You know, as -- as you

7   said, prosecutors, courts, probation officers,

8   defense counsel would have to track down,

9   cross-reference outdated federal.

10   I -- I don't think that's that hard at

11   all and -- and not that I could do it, but, you

12   know, people who are --

13   (Laughter.)

14   CHIEF JUSTICE ROBERTS: --

15   technologically sophisticated can do it.

16   It's -- apparently, it's all online. Just check

17   it that way.

18   MR. GREEN: Well, I would -- I would

19   refer Your Honor to the amicus brief of the

20   National Association -- or, excuse me, the

21   Clause 40 Foundation where they lay out all the

22   databases and they talk about exactly how

23   difficult that the -- that it would be. It is

24   an exercise, and even if you are a technological

25   savant, it's an exercise.

1   But we're talking about, as the

2   National Association of Federal Defenders' brief

3   indicates, we're talking about defense attorneys

4   that have to advise their clients of what the

5   maximum penalty might be. Now that defense

6   attorney has to go back and look at defunct

7   decades-old Codes of Federal Regulations.

8   CHIEF JUSTICE ROBERTS: Well, but I

9   guess my point is they're defunct and they're

10 decades old and they're readily available on

11 current databases with a couple of key strokes?

12   MR. GREEN: But, respect --

13 respectfully, they're not, and that's what the

14 amicus brief shows working through all the --

15 the databases. At some future point, they might

16 be, but at the -- the -- the point of

17 administrability is to demonstrate that there

18 could be problems on the other side just like

19 McNeill was concerned about problems with

20 changes in -- in state reformulation.

21   By the other side, I mean there could

22 be changes to the Code of Federal Regulations

23 that actually get missed because people don't

24 use the databases right.

25   CHIEF JUSTICE ROBERTS: Thank you,

1   counsel.

2   MR. GREEN: We have a -- thank you.

3   CHIEF JUSTICE ROBERTS: Justice

4   Thomas?

5   Justice Alito?

6   JUSTICE ALITO: Can I ask you a

7   question about the Rule of Lenity? Is it true

8   that your approach would in some cases be

9   harsher on defendants than the government's

10   approach? And if that is true, have we ever

11   said that the Rule of Lenity applies in a

12   situation like that?

13   MR. GREEN: No, because the Court has

14   said the Ex Post Facto Clause applies in a

15   situation like that. I mean, I -- I do think

16   there's an argument for lenity here, but I

17   really don't think we need it because the text

18   is clear and the goals of the ACCA are clear and

19   the need to respect Congress's choice in

20   changing the drug schedules is also clear.

21   JUSTICE ALITO: Is it true that

22   acceptance of your argument would mean that no

23   marijuana conviction prior to 2018 would count

24   as an ACCA predicate?

25   MR. GREEN: It -- no, because there

1   would have to be a match between the state and

2   the federal. Now, if the federal were broader

3   and -- or, excuse me, if the state were broader

4   and it included hemp, then there would be no

5   match, but I can assure Your Honor, because I've

6   actually looked, that states are catching up

7   rapidly.

8   CHIEF JUSTICE ROBERTS: Justice

9   Sotomayor?

10   Justice Kagan?

11   Justice Gorsuch?

12   Justice Kavanaugh?

13   JUSTICE KAVANAUGH: We know that

14   Congress thought about this because of

15   921(a)(20), the expungement/pardon provision,

16   and so Congress specifically addressed the

17   circumstances under which a prior conviction

18   would no longer count.

19   But it doesn't include this situation.

20   So this is not a case where we're speculating

21   about did Congress -- were they aware of this

22   kind of issue arising. They were and they --

23   they limited it to those, and we relied on that

24   in McNeill as well.

25   So how do you respond to that?

 1   MR. GREEN: Well, I would respond to

 2   that by saying that that would simply wipe away

 3   all of the categorical approach and the work

 4   that the categorical approach does to see

 5   whether or not the state drug offense matches

 6   the federal drug offense.

 7   Expungement also, Your Honor, is not

 8   the only thing that can happen along the way to

 9   the forum, in addition to the categorical

10   matching, that would cause the predicate to no

11   longer be a predicate. A defendant, for

12   example, can cooperate, and -- and that would

13   eliminate the possibility of a mandatory

14   minimum, assuming the sentencing court accepted

15   the 5k letter from the prosecutor, but --

16   JUSTICE KAVANAUGH: Thank you.

17   CHIEF JUSTICE ROBERTS: Justice

18   Barrett?

19   Justice Jackson?

20   JUSTICE JACKSON: Can I just ask about

21   your sort of textual reading of the state law

22   provision? So, as I understand it, are you

23   saying that when it says "a controlled substance

24   (as defined in Section 102)," et cetera, you

25   mean as currently defined? Is that --

1   MR. GREEN: Yes.

2   JUSTICE JACKSON: -- the way that

3   you're reading it?

4   MR. GREEN: Yes.

5   JUSTICE JACKSON: And -- and -- and I

6   guess the government's position is "as

7   previously defined." So can you just make the

8   best argument for why "currently defined" is the

9   right way to interpret this "as defined"?

10   MR. GREEN: Well, "as" -- "as defined

11 in" --

12   JUSTICE JACKSON: Mm-hmm.

13   MR. GREEN: -- we would maintain is --

14 that's present-tense language.

15   JUSTICE JACKSON: Mm-hmm.

16   MR. GREEN: "Is" is in the statute.

17 That's also present-tense language, even though

18 McNeill found problems that were sufficient

19 enough to ignore the fact that -- that

20 particular present-tense language. "Involving"

21 is also present-tense language.

22   But what it -- what it essentially

23 does, Justice Jackson, is incorporate, as I said

24 earlier, the -- the Controlled Substances Act --

25 Controlled Substances Act and the drug schedules

1   that are part of that Controlled Substances Act,

2   and those are dynamic and changing.

3   And when Congress enacted the

4   Controlled Substances Act, Congress wanted it to

5   change. Congress said here's the list of drugs,

6   but we're going to change those as -- as -- as

7   they -- we want you to change those as they go

8   along. And they change for important reasons.

9   They change --

10   JUSTICE JACKSON: So would you have

11   expected Congress to have said something static

12   if it didn't mean that? In other words, if it

13   was talking about the historical definitions, it

14   would have said a controlled substance, you

15   know, as defined in the Act at the time of the

16   commission of the state offense --

17   MR. GREEN: Or even --

18   JUSTICE JACKSON: -- or something like

19   that?

20   MR. GREEN: Yeah, or even as then

21   defined. I mean, as Justice Barrett and I

22   discussed, the -- 3559(c) shows that Congress

23   knows exactly how to do that. They used almost

24   exactly that language --

25   JUSTICE JACKSON: Thank you.

1   MR. GREEN: -- we have in --

2   CHIEF JUSTICE ROBERTS: Thank you,

3   counsel.

4   Mr. Adler.

5   ORAL ARGUMENT OF ANDREW ADLER

6   ON BEHALF OF PETITIONER JACKSON

7   MR. ADLER: Mr. Chief Justice, and may

8   it please the Court:

9   The 922(g) offense is what triggers

10   ACCA's penalties.   The government, therefore,

11   agrees that courts must apply ACCA's criteria in

12   effect at the time of the 922(g) offense, not

13   the prior conviction.   For example, if Congress

14   amended ACCA's criteria to delete burglary and

15   someone then committed a 922(g) offense, all

16   agree that a prior burglary conviction would not

17   be an ACCA predicate, even if it was one at the

18   time it occurred.

19   The only question here then is whether

20   ACCA's controlled substance criterion somehow

21   warrants different treatment.   And it does not.

22   That criterion expressly incorporates the

23   substances on the federal schedules.   Under

24   basic rules of statutory construction, that

25   means the substances are effectively written

1   into ACCA itself. So where a substance is

2   removed from the schedules before the 922(g)

3   offense, it is also removed from ACCA's

4   coverage, no less than burglary in the

5   hypothetical.

6   I welcome the Court's questions.

7   JUSTICE THOMAS: Subsection (e)(1)

8   says that in the case of a person who violates

9   Section 922(g) of this title and has three

10   previous convictions. So we're talking about

11   the previous convictions.

12   Why would we look at a current

13   interpretation -- or a current violation to

14   determine whether or not the previous conviction

15   was -- fit within the statute?

16   MR. ADLER: So, Your Honor, that is

17   the language that this Court interpreted in

18   McNeill, and when it did so, it was referring to

19   the historical attributes of the state law

20   conviction.

21   McNeill said nothing about the federal

22   comparator against which we are comparing those

23   attributes. And that question is governed by

24   the default principle, the time-of-offense

25   principle with which -- the government and we

 1   agree on that.

 2   So it's an entirely different question

 3   here. Previous conviction, that's something

 4   that's already happened. So, of course, we're

 5   going to look at the law in effect at the time

 6   of the prior.

 7   The government is not arguing to you

 8   as I understand it that we should be looking at

 9   the federal criteria in effect at the time of

10   the prior conviction. What I understand the

11   government to be saying is that somehow this

12   controlled substance criteria in ACCA is somehow

13   different than every other criteria.

14   That's why the burglary hypothetical

15   is correct because, even though the burglary

16   qualified under ACCA at the time it occurred, it

17   -- Congress is revising its judgment and saying

18   we no longer think burglary should count.

19   So, if that happens by the time of the

20   922(g) offense, then everyone agrees, I believe

21   the government agrees, that that burglary should

22   not qualify. So it's important to recognize

23   that McNeill was addressing a completely

24   different question than is presented in this

25   case. That's why it was such an easy case, we

1   say.

2   JUSTICE THOMAS: So you don't think

3   there's any difference between the reference to

4   the schedule and actually amending the

5   underlying statute?

6   MR. ADLER: That is correct, Your

7   Honor. And that is -- that is absolutely

8   correct. And the government gives us a single

9   sentence in its brief about why that would not

10   be on page 41, and it's no supporting authority.

11   And all the government says is, well, the

12   schedules are not contained in ACCA and so

13   amending the schedules is not the equivalent of

14   amending ACCA.

15   But, as we explain on pages 8 to 9 of

16   our reply brief, that is simply not true. Under

17   established canons of statutory construction,

18   where one statute incorporates another or

19   cross-references another, that latter statute is

20   effectively contained and written into the

21   former. That's how cross-references work.

22   And if the government really means

23   what it says here, that would have a profoundly

24   destabilizing effect on legislation in this

25   country. Congress would have to copy and paste

1   every statute that it wants to reference, and

2   if, you know, you think the U.S. Code is

3   unwieldy already, it would explode if that's

4   what Congress had to do. And so that cannot

5   possibly be right.

6   So then we are left asking: Well, how

7   -- how are the schedules any different here than

8   the burglary or anything like that? So that's

9   why you see the government relying so much on

10   McNeill. But I don't think the government

11   believes that argument either because, if you

12   really take the government's view of McNeill,

13   then what you're really doing is looking at the

14   federal criteria in ACCA at the time of the

15   prior for all of the criteria. And that is not

16   the government's submission in this case. That

17   proves far too much.

18   JUSTICE KAVANAUGH: I thought the

19   reason it -- it mattered in McNeill or the

20   argument in McNeill was that the prior state

21   conviction no longer qualified as a serious drug

22   offense because the change in the maximum

23   sentence under state law, but the key was that

24   no longer qualified as a serious drug offense as

25   a matter of ACCA.

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 1                 The same argument here is that the
 2      change subsequent to the prior state offense
 3      means that it no longer qualifies as a serious
 4      drug offense under ACCA.  Yet, in McNeill -- I
 5      mean, you're well aware the language in McNeill
 6      is -- is not -- not good for you because it's
 7      confronted that and said you must consult the
 8      law that applied at the time of that conviction.
 9                 MR. ADLER:  Your --
10                 JUSTICE KAVANAUGH:  So I guess I see a
11      parallel with McNeill, but -- but --
12                 MR. ADLER:  Your Honor, the sentence
13      you just quoted has to be read in context.  And
14      the law in that sentence is referring to state
15      law.  Of course, subsequent changes in state law
16      have no --
17                 JUSTICE KAVANAUGH:  Right.  Sorry to
18      interrupt, but the state law change mattered
19      because it no longer qualified as a serious drug
20      offense as a matter of federal law.
21                 MR. ADLER:  Your Honor, I -- I
22      disagree with that reading of McNeill.  We --
23                 JUSTICE KAVANAUGH:  Just isn't that an
24      accurate statement, though, about the facts?
25      The change in the state law maximum sentence
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1   meant that as of the time of sentencing or

2   later, it no longer was a serious drug offense

3   for purposes of federal law, correct?

4   MR. ADLER: Your Honor, I disagree

5   with the characterization because the state law

6   has nothing to do with whether something is

7   serious enough to be a drug offense. That's

8   something for Congress.

9   And if I could give you an example --

10   JUSTICE KAVANAUGH: Well, let me just

11   pause you there. I -- I thought that it had to

12   be a 10-year sentence, right, to qualify?

13   MR. ADLER: That is correct.

14   JUSTICE KAVANAUGH: Okay. And the

15   change in the state offense meant it was -- no

16   longer had a 10-year sentence?

17   MR. ADLER: It no longer satisfied --

18   JUSTICE KAVANAUGH: So, therefore, it

19   was no longer as a matter of federal law a

20   serious drug offense, correct?

21   MR. ADLER: That would have been

22   correct, but --

23   JUSTICE KAVANAUGH: And McNeill said

24   that didn't matter?

25   MR. ADLER: Because states do not get

1   to decide what is serious enough for ACCA. So I

2   can give -- if I can give you a hypothetical

3   that's a variation of the burglary example.

4   Let's say Congress raises the

5   statutory maximum threshold from 10 to 20 years.

6   Someone then commits a 922(g) offense. They

7   have a statutory maximum and their prior does of

8   15 years. That's not going to qualify because

9   Congress has revised its judgment.

10   McNeill only says that we look to

11   state law in effect at the time of the prior to

12   figure out what the maximum was. That's the 15

13   years. But Congress gets to decide if that's

14   serious enough or not for ACCA. The states

15   don't get to do that.

16   So that's why the state -- change in

17   state law had really nothing to do with the

18   question we are asking here, which is what

19   federal criteria are we looking at. And, again,

20   this is where the default time-of-offense

21   principle comes in that is grounded in the

22   federal saving --

23   JUSTICE KAVANAUGH: One -- one last

24   question on that. It would have meant that it

25   was a serious drug offense for federal law

         1   purposes at the time he committed the state

         2   offense, correct?

         3   MR. ADLER: That -- that --

         4   JUSTICE KAVANAUGH: But then was no

         5   longer a serious drug offense for purposes of

         6   federal law later on, correct?

         7   MR. ADLER: That's correct. That's

         8   exactly the same thing as the burglary

         9   hypothetical with which the government agrees.

        10   It would have qualified at the time it occurred,

        11   but then Congress changes its judgment and says

        12   we don't want burglaries anymore or we think the

        13   statutory maximum should be 20 years, so even

        14   though it would have qualified at the time it

        15   occurred, it no longer does at the time of the

        16   922(g) offense.

        17   And, again, this time-of-offense

        18   principle is a default rule in federal criminal

        19   law. It's --

        20   JUSTICE JACKSON: But wait, why is --

        21   why -- can you speak to the default principle in

        22   sentencing, which is not, I think, that you do

        23   the sentencing statutes or sentencing

        24   enhancements that exist at the time of the

        25   offense, you do it at -- do you agree with me

 1   that you do it at the time of the sentencing?

 2   MR. ADLER: No, Your Honor, I agree

 3   with that in terms of the guidelines because the

 4   Sentencing Reform Act specifically says for the

 5   guidelines you look to the version in effect at

 6   sentencing.

 7   JUSTICE JACKSON: Mm-hmm.

 8   MR. ADLER: But, when we're talking

 9   about federal statutory penalties, that's where

10   the federal saving statute comes in, that's

11   where the Ex Post Facto Clause comes in, and

12   under those doctrines, we are always looking at

13   the federal statutory penalties in effect at the

14   time of the crime. That is when we are looking

15   at notice. Is someone on notice that their

16   conduct is unlawful? And what are the potential

17   consequences for violating the law? That

18   happens at the time of the offense, right?

19   So the government is trying to look at

20   notice at the time of the prior conviction,

21   which cannot possibly right -- be right because

22   it would mean that ACCA could not apply to prior

23   convictions that predated its enactment. That

24   would violate the Ex Post Facto Clause.

25   We know that it does not from this

1   Court's decision in Gryger versus Burke, so that

2   confirms that we're looking at notice at the

3   time of the 922(g) offense, and then, once we do

4   that, the administrability problems with the

5   government's rule come into sharp focus.

6   And if I could turn to the Chief

7   Justice's point earlier, what the government's

8   rule would require people to do, ordinary

9   people, not law librarians, is to dredge up

10   decades-old drug schedules. They are not

11   online. The closest database we have is the

12   ECFR, which is published by the National

13   Archives. It goes back only to January 2017.

14   That's not going to do much good for anybody.

15   And the --

16   JUSTICE ALITO: Well, couldn't some of

17   your -- some of your amici, the National

18   Association of Criminal Defense Lawyers or the

19   Clause 40 Foundation, put out a handy little

20   handbook for defense attorneys including all of

21   these schedules? That would solve that problem,

22   wouldn't it?

23   MR. ADLER: Your Honor, the key

24   response to that is that that is not what

25   Congress would have intended in 1986 before

1   there was such a thing as electronic databases,

2   before there were online digital sources.

3   That's just not something that a Congress would

4   have thought to do.

5   And if you --

6   JUSTICE KAGAN: You're -- you're

7   making this argument, am I right, not as a

8   matter of due process? You're just saying it's

9   a key to statutory interpretation?

10   MR. ADLER: Correct. And it also goes

11   to the administrability of the government's rule

12   because not only are ordinary people going to

13   have to do this, but, yes, judges, probation

14   officers, you know, lawyers are going to have to

15   do this. It is extremely difficult to do.

16   JUSTICE GORSUCH: Well, what do you

17   say to the -- your -- your friend's argument I'm

18   sure would say to you, well, even under your

19   rule, you're going to have to go look at old

20   sentencing guidelines, sentencing regimes, and

21   some people are going to be denied the benefit

22   of later-enacted revisions to the schedule, you

23   know, reducing penalties under the schedule

24   between the time of federal conviction and

25   federal sentencing.

1   What do you say to those two

2   complaints from -- your -- your friend would

3   otherwise agree, I'm sure, with almost

4   everything you're saying?

5   MR. ADLER: Well, we would have no

6   problem, of course, with the time of sentence --

7   JUSTICE GORSUCH: I -- I -- I know you

8   wouldn't. I -- I got that. That wasn't my

9   question.

10   MR. ADLER: Sure, Your Honor. So I

11   just don't think that is consistent with notice

12   principles that we typically use in criminal

13   law. We're looking at notice when someone

14   commits the crime. That's how it's always done.

15   JUSTICE GORSUCH: But there's still

16   going to be the practical problem you just

17   talked about so well of looking at old -- old

18   sentencing rules.

19   MR. ADLER: No, Your Honor, because

20   that's a key difference between our rule and the

21   government's rule.

22   JUSTICE GORSUCH: I get it's better

23   than the government's rule, but I'm sure Mr.

24   Green would say it's still worse than his from

25   that perspective.

1   MR. ADLER: Your Honor, I actually

2   don't think so because, in a -- because, for a

3   time-of-sentencing rule, you're going to have to

4   look at not just the federal schedules from the

5   time of offense but -- from the time of

6   sentencing but also from the time of offense to

7   make sure there's no ex post facto problem if

8   substances are added in the intervening period.

9   So our rule, it's a single contemporaneous

10   schedule. That's it.

11   JUSTICE GORSUCH: Okay. I appreciate

12   that response. And your time is up. I got one

13   more question for you later.

14   MR. ADLER: Thank you.

15   CHIEF JUSTICE ROBERTS: Thank you,

16   counsel.

17   Justice Thomas?

18   Justice Alito?

19   Justice Sotomayor?

20   Justice Kagan?

21   JUSTICE ALITO: Would you say -- no, I

22   --

23   CHIEF JUSTICE ROBERTS: Sorry.

24   JUSTICE ALITO: -- I did have a

25   question, Chief.

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 1                CHIEF JUSTICE ROBERTS:  Yes.

 2                JUSTICE ALITO:  Would you say that

 3      someone who -- I assume that in your district

 4      and the other districts of Florida there have

 5      been lots of convictions for possession with

 6      intent to distribute huge quantities of cocaine.

 7                Would you say that's correct?

 8                MR. ADLER:  Huge?  Perhaps.

 9                JUSTICE ALITO:  Large quantities?

10                MR. ADLER:  Sure.

11                JUSTICE ALITO:  Ten kilos, 20 kilos?

12                MR. ADLER:  Well, I don't want to

13      agree to that, Your Honor, but --

14                JUSTICE ALITO:  There haven't been --

15                MR. ADLER:  -- large quantities, sure.

16                JUSTICE ALITO:  -- there haven't been

17      -- there haven't been cases in Florida involving

18      that?

19                MR. ADLER:  I'm sure there have, Your

20      Honor.

21                JUSTICE ALITO:  All right.  Would you

22      say that somebody who was convicted of such an

23      offense in 2012 committed a serious drug

24      offense?

25                MR. ADLER:  A federal offense or a
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1   state offense?

2   JUSTICE ALITO: A state offense.

3   MR. ADLER: A state offense in 2012

4   for --

5   JUSTICE ALITO: Yes.

6   MR. ADLER: -- possession with intent

7   to distribute cocaine?

8   JUSTICE ALITO: Yes, yes.

9   MR. ADLER: Under our view, that would

10   not -- in Florida at least, that would not

11   qualify. However, I want to emphasize --

12   JUSTICE ALITO: That -- that would not

13   qualify because the Florida schedule at that

14   time included this drug, 123 Ioflupane?

15   MR. ADLER: That is --

16   JUSTICE ALITO: That's why?

17   MR. ADLER: -- that is correct.

18   JUSTICE ALITO: And when these people

19   were arrested for possession of 10 kilos, I

20   mean, 10 kilos wasn't a lot in New Jersey when I

21   was -- when I was a U.S. Attorney there. That

22   was our -- our minimum for prosecuting. I think

23   you must have had bigger cases than that.

24   But let's say 20 kilos. Somebody's

25   arrested for 20 kilos of -- of cocaine. Is

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 1    there any realistic possibility that this is 20

 2    kilos of Ioflupane?

 3              MR. ADLER:  Your Honor, the government

 4    has not made any sort of argument like that in

 5    this case.  This is a function of the

 6    categorical approach.  We're just asking the

 7    Court to faithfully apply that approach in this

 8    case as it always does in all of its cases.

 9              And if I can say one more thing about

10    the Florida schedules, I want to be clear, that

11    in July 2017, Florida de-scheduled this

12    substance.  It followed the feds.  And so this

13    is a time-limited rule.

14              Moving forward, Florida convictions

15    for cocaine postdating July '17 would not have

16    the same overbreadth problem that we are

17    identifying here.  And states routinely follow

18    the federal government when they de-schedule

19    substances.  So it's a time-limited rule.  And

20    it's not going to knock out all Florida cocaine

21    convictions or anything like that.

22              JUSTICE ALITO:  Well, which ones will

23    it not knock out?

24              MR. ADLER:  It would not knock out

25    Florida cocaine convictions post-dating July
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1   2017 because there would be no overbreadth that

2   we are identifying.

3   JUSTICE ALITO: Yeah, but all the ones

4   before that are knocked out. Should we consider

5   -- should we put out -- put the categorical

6   approach out of our mind in -- out of our minds

7   in considering what Congress intended?

8   MR. ADLER: I -- I'm not sure how the

9   Court can -- can do that. I mean, the Court has

10   held that the categorical approach is a

11   by-product of Congress's intent in the statute.

12   It's held that for over 30 years. So I'm not

13   sure how the Court could put it out of its mind.

14   And, of course, the government is not

15   asking you to do anything like that. There's

16   been no dispute about how the categorical

17   approach applies in this particular case at any

18   stage of this litigation.

19   JUSTICE ALITO: So, if we -- if we

20   believe that Congress must have had the

21   categorical approach in mind because that's what

22   we said in Taylor and subsequent cases when it

23   enacted the ACCA provision at issue here, what

24   does that do to your argument?

25   MR. ADLER: I think it means that we

1   win, Your Honor, because we win under the

2   categorical approach in this case, and that was

3   -- has been around, as you said, since Taylor,

4   since 1990. So there's just no dispute about

5   how it applies in this particular case.

6   JUSTICE ALITO: Thank you.

7   CHIEF JUSTICE ROBERTS: Justice

8   Sotomayor?

9   Justice Kagan?

10   JUSTICE KAGAN: Mr. Adler, could you

11   speak to the distinction between federal prior

12   convictions and state prior convictions and why

13   it would be that they would be two rules, that

14   the federal predicates would operate with the

15   old drug schedules and the state predicates

16   would operate with the new drug schedules?

17   MR. ADLER: Sure. Of course. So we

18   do not believe that is the correct

19   interpretation of (e)(2)(A)(i) for the reasons

20   we explain in our brief.

21   JUSTICE KAGAN: Okay. Let's say that

22   I don't accept that argument and I think that

23   the -- the federal provision is pretty clear

24   that -- that there's no categorical approach

25   going on and that it would be the old schedules.

1   MR. ADLER: Sure. So two points on

2   that. The reason, as we explain on page 17 of

3   our reply brief, one possible reason at least,

4   is that when you are doing the federal analysis,

5   it's easy to just look at the statute of

6   conviction. There's no notice problem. There's

7   no administrability problem. You look at the

8   judgment and say: Was this person convicted

9   under the CSA? Easy.

10   You can't do that for state priors

11   because there's -- you know, you can't enumerate

12   all the state statutes. So what Congress has

13   done, it has looked to evolving federal drug

14   schedules. That was the only criteria -- that

15   was the federal criteria they chose. And as I

16   was explaining before, it is incredibly

17   difficult and problematic for notice purposes

18   for people to have to go all the way back,

19   decades earlier, to the time of their state

20   offenses to identify the federal drug schedule.

21   So that's one --

22   JUSTICE KAGAN: So this is why I asked

23   whether you were making the notice argument as a

24   constitutional argument or, instead, just as a

25   key to statutory intent, because it's not clear,

 1   right, that Congress in enacting statutes always

 2   wants to give the best notice possible to

 3   criminal defendants.

 4   MR. ADLER: That may be right, Your

 5   Honor. We're not making a full-throated due

 6   process violation argument. I think the canon

 7   of constitutional avoidance, though, may well

 8   come into this at some point if we're requiring

 9   ordinary people to go back decades and decades.

10   And the second point I wanted to make

11   on the (e)(2)(A)(i) point is the Court

12   absolutely does not have to interpret that

13   provision to resolve this case in our favor

14   because the Court should simply say the exact

15   same thing it said in Shular on page 786. The

16   Court unanimously said that the divergent text

17   of the two definitions renders any divergence

18   unremarkable, and that was quoting the

19   government's own brief in that case.

20   The exact same logic applies here.

21   And, in fact, in Shular, we -- the only question

22   was whether (e)(2)(A)(ii) referred to offenses

23   or conduct. And everybody agreed that

24   (e)(2)(A)(i) referred to offenses. And the

25   Court still said we don't care, the text is

1   different, it's referring to conduct in

2   (e)(2)(A)(ii). The same logic would apply here.

3   It's just different text. Thank you.

4   JUSTICE KAGAN: Thank you, Mr. Adler.

5   CHIEF JUSTICE ROBERTS: Justice

6   Gorsuch?

7   JUSTICE GORSUCH: Just to finish up

8   where we left off, suppose the schedules are

9   revised after the time of federal conviction. I

10   understand that if they were increased -- if a

11   new drug were added, you would say ex post facto

12   violation.

13   But, if a drug is removed, I think Mr.

14   Green would say the defendant should get the

15   benefit of that. You disagree? I want to

16   understand why.

17   MR. ADLER: We -- we don't disagree

18   because, of course, we would prevail under time

19   of sentencing.

20   JUSTICE GORSUCH: No, I -- I -- I --

21   MR. ADLER: But --

22   JUSTICE GORSUCH: -- I got that

23   argument.

24   MR. ADLER: -- if you're using a

25   time-of-offense rule that we are advocating

1   here, then I think that's where the federal

2   saving statute would come into play. And so

3   Congress would really have to speak clearly to

4   overcome the presumption in the federal saving

5   statute that we apply the penalties in effect at

6   the time of the offense, and that is what this

7   Court in Dorsey referred to as an important

8   background principle of interpretation.

9   So I don't want to fight you too hard

10   on that, but if we are operating under a

11   time-of-offense rule, then, yes, that would --

12   you would not get the benefit of that.

13   JUSTICE GORSUCH: You'd take the

14   bitter with the sweet?

15   MR. ADLER: Correct, Your Honor.

16   JUSTICE GORSUCH: Got it. Thank you.

17   CHIEF JUSTICE ROBERTS: Justice

18   Kavanaugh?

19   JUSTICE KAVANAUGH: I just want to

20   make sure I understand your notice point. At

21   the time of his first serious drug offense,

22   let's say, or someone's first serious drug

23   offense, you know, okay, I can't possess a

24   firearm. 922(g). Then you commit another

25   serious drug offense. Still 922(g). Then you

1   commit a and are convicted of a third serious

2   drug offense that qualifies, and you know at

3   that time, okay, I can't possess a firearm and

4   I'm subject to a 15-year mandatory minimum if I

5   do so.

6   You have all the notice you want at

7   that point even if there are later changes to

8   the federal drug schedule. So I don't

9   understand any notice problem.

10   MR. ADLER: Your Honor, the notice is

11   not applied at the time of the prior conviction.

12   If it was, again, there would be an ex post

13   facto problem for convictions that predate the

14   enactment of the recidivist statute, and that

15   can't be right.

16   But, practically too, people are not

17   on notice at the time of their prior proceeding.

18   They are not thinking about ACCA. Their lawyers

19   do not have to advise them about ACCA. People

20   are just dealing with the state case at that

21   time. So to say that people have notice of ACCA

22   when they haven't even committed a 922(g)

23   offense yet, ACCA does not become legally

24   relevant in any way until someone commits the

25   922(g) offense.

1   That is when the penalties are

2   incurred. That is when we are assessing notice,

3   not at the time of the prior conviction.

4   JUSTICE KAVANAUGH: Thank you.

5   CHIEF JUSTICE ROBERTS: Justice

6   Barrett?

7   Justice Jackson?

8   JUSTICE JACKSON: So the thing I'm

9   struggling with with your argument is that you

10   say that we ordinarily apply the penalties in

11   effect at the time of the offense, which I

12   understand. But I guess, in the context of this

13   exercise, I thought what the statute was

14   requiring courts to do was to essentially

15   classify or categorize a past offense.

16   So the court is today trying to impose

17   sentence, today trying to determine if 15 years

18   should be added, and Congress directs them to do

19   so by looking at this person's rap sheet and

20   determining if there are "serious drug offenses"

21   there.

22   What is hard for me is trying to

23   understand why that classification is in any way

24   related to the time of the ACCA offense. I get

25   clearly Mr. Green's situation because he says

1   you're doing that classification today, and so

2   what counts as a serious drug offense should be

3   made relative to what we would think is serious

4   now by looking at the schedules now.

5   And the government I get because they

6   say: Well, when you're looking back at that

7   offense, those offenses in the rap sheet, you

8   should at least consider or it should be

9   determined by what was serious then, right, what

10   was on the schedule at that time.

11   Your position, I'm trying to

12   understand how it relates to the exercise of

13   classification -- classifying this as a serious

14   drug offense.

15   MR. ADLER: Thank you, Your Honor. So

16   let me try to explain it this way. This Court

17   has a long line of precedents about recidivist

18   statutes, and they all say the same thing, that

19   recidivist statutes punish the latest offense of

20   conviction, which is here the 922(g) offense.

21   The government, by the way, ignores this line of

22   precedent. Talking about Gryger versus Burke,

23   Nichols, Whitt, Bryant, and Rodriquez, which is

24   an ACCA decision.

25   And so our point is that you're not

1   looking at someone's culpability at the time

2   they commit the prior. That -- the state court

3   has already sentenced them based on that

4   understanding of culpability. You're sentencing

5   them for what they have done at the time they

6   commit the 922(g) offense.

7   And the government's sort of contrary

8   logic would prove too much because let's go back

9   again to the burglary hypothetical. In that

10   situation, someone commits a --

11   JUSTICE JACKSON: Yes, I understand

12   the government. What about Mr. Green's point?

13   MR. ADLER: Again, we -- we would have

14   no problem if the Court goes that way, but I

15   think we have -- we are punishing the 922(g)

16   offense, and this is how we always calculate

17   statutory penalties in the law. We're looking

18   at what were the penalties at the time the

19   person committed the crime. Theoretically,

20   those penalties are what could deter someone

21   from committing --

22   JUSTICE JACKSON: No, I understand.

23   MR. ADLER: -- that crime in the first

24   place.

25   JUSTICE JACKSON: But we're -- but

 1   it's not relevant to the exercise -- this --

 2   this is an exercise that is embedded in a

 3   definition of "serious drug offense," which is,

 4   I think, what is the ultimate goal. We're

 5   assessing whether or not these prior things were

 6   a serious drug offense.

 7   Your argument is just, you know, if we

 8   were sentencing without that sort of

 9   definitional overlay, then we would do so based

10   on what happened with respect to the ACCA crime.

11   But I guess I'm just confused about the

12   definition of "serious drug offense" and how it

13   has any bearing on your rationale.

14   MR. ADLER: So, Your Honor, I don't

15   think there's any question that the statutory

16   penalties in ACCA are incurred the moment

17   someone commits the crime. That is the crime

18   that we are punishing here, right?

19   So we have to then view -- this is why

20   the government agrees, we look at the version of

21   ACCA in effect at the time of the crime, not at

22   the time of sentencing, at the time of the

23   crime. And then the question again comes back

24   to where we began, which is, well, why are we

25   going to look to all of the criteria in ACCA in

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1    effect at the time of the crime, not sentencing,

2    at the time of the crime, but carve out --

3               JUSTICE JACKSON:  Yeah.

4               MR. ADLER: -- this one exception?

5               JUSTICE JACKSON:  Thank you.

6               MR. ADLER:  Thank you.

7               CHIEF JUSTICE ROBERTS:  Thank you,

8    counsel.

9               Mr. Raynor.

10              ORAL ARGUMENT OF AUSTIN RAYNOR

11              ON BEHALF OF THE RESPONDENT

12              MR. RAYNOR:  Mr. Chief Justice, and

13   may it please the Court:

14              To determine whether a prior state

15   conviction qualifies as a predicate under the

16   Armed Career Criminal Act, courts should consult

17   the federal drug schedules in effect at the time

18   of that conviction.  That rule flows from the

19   ACCA's text.  As this Court recognized in

20   McNeill, the ACCA establishes a sentencing

21   enhancement for defendants with previous

22   convictions involving drugs listed on the

23   federal schedules.

24              That language dictates a

25   backward-looking inquiry that requires courts to
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1   assess the attributes of a prior conviction at

2   the time that it occurred.

3   Critically, the ACCA treats both

4   federal and state convictions as predicates.

5   Under subclause 1, which unambiguously requires

6   courts to consult the federal drug schedules in

7   effect at the time of the prior conviction,

8   there's no question about this. Courts have to

9   look to the past.

10   The same rule should apply to

11   subclause 2. A -- a prior federal conviction

12   would not disappear for ACCA purposes simply

13   because the drug schedules were later amended to

14   remove the relevant controlled substance. And

15   there's no reason to treat state crimes

16   differently when they involve the same culpable

17   conduct and the same regulated drug.

18   Rather than engage with the statutory

19   text, Petitioners rely exclusively on purported

20   background rules of interpretation. Jackson,

21   most significantly, argues that courts should

22   apply the federal criminal law in effect at the

23   time of the federal offense conduct. But the

24   government agrees the version of the ACCA in

25   effect at the time of the federal offense

1   conduct is what controls here.

2   The question in this case is which

3   version of the federal drug schedules the ACCA's

4   cross-reference specifies, and Jackson's

5   interpretive principle does not answer that

6   question.

7   Just as in McNeill this Court

8   recognized that the ACCA points courts to the

9   prior version of state law in effect at the time

10   of the state conviction, so too it points courts

11   to the version of the federal drug schedules in

12   effect at that same time.

13   This Court should affirm the judgments

14   below.

15   JUSTICE THOMAS: If we -- rather than

16   looking at an underlying drug schedule, if the

17   statute itself was amended, would your analysis

18   be the same?

19   MR. RAYNOR: No, Justice Thomas. We

20   acknowledge that if the ACCA included a static

21   list of substances, so if appended to this

22   provision there was just a list of substances,

23   cocaine, marijuana, and so forth, an amendment

24   to that list would apply at the time of the

25   federal offense conduct. We think the

1   cross-reference to an external body of law that

2   is dynamic is critical here.

3   And in our view, the cross-reference

4   raises a temporal question. When Congress

5   chooses to reference an external body of law,

6   that raises the question, which version of that

7   body of law is Congress intending to reference?

8   And we think the temporal question is

9   particularly --

10   JUSTICE SOTOMAYOR: I -- I'm not sure

11   why. I -- I'd like you to concentrate on

12   Justice Thomas's point. I think this is the

13   most serious weakness in your argument because

14   it doesn't make much sense to me. You take --

15   when you're cross-referencing something, you're

16   taking everything with it.

17   You're picking and choosing and now

18   saying I'm only going to take a piece of it, not

19   all of it.

20   MR. RAYNOR: To be clear, Justice

21   Sotomayor, we agree you're looking at all the

22   federal schedules. We're not only taking a

23   piece of the schedules. The question is simply

24   which version of the schedule -- schedules. And

25   as the Court discussed in Jam --

1   JUSTICE GORSUCH: I think -- I think

2   the question, though, is normally when we have a

3   cross-reference, we look at the contemporaneous

4   version of the cross-reference. I -- I think

5   that's -- I think that's Mr. Jackson's primary

6   argument. And the -- and the statutory text

7   here says "as defined in," which suggests we

8   look at the present law, just as we normally

9   would, just as you concede we -- a moment ago

10   that we normally would.

11   What in the text suggests this

12   backward-looking approach that you want to put

13   into it?

14   MR. RAYNOR: Yes, Justice Gorsuch.

15   JUSTICE GORSUCH: In -- in the text.

16   MR. RAYNOR: So, in the text, we think

17   the cross-reference raises the temporal question

18   and the context answers the temporal question.

19   JUSTICE GORSUCH: How? "As defined

20   in." Those are --

21   MR. RAYNOR: Right.

22   JUSTICE GORSUCH: -- those are the

23   only terms that we have to work with.

24   MR. RAYNOR: So, as the Court

25   explained in McNeill, I don't think the present

 1   tense does a lot of work here because this is a

 2   backward-looking statute. I disagree that the

 3   background rule is that we always look to the

 4   contemporaneous referenced law.

 5   As the Court discussed in Jam, the

 6   reference canon actually supplies the background

 7   rule here, and the reference canon has temp --

 8   different temporal branches depending on

 9   context. The reason the reference canon is

10   structured that way is because cross-references

11   may refer to past law --

12   JUSTICE GORSUCH: Of course.

13   MR. RAYNOR: -- they may refer to

14   present law.

15   JUSTICE GORSUCH: And, in fact, in

16   (h), we have such a thing. We don't here. We

17   just has -- we have "as defined in," not "as was

18   once defined" or "as at the time of state

19   conviction" or "as had been." Lots of

20   alternatives I can come up with that would

21   accomplish exactly what you want and, in fact,

22   appear elsewhere in the statute but not here.

23   MR. RAYNOR: I agree all of those

24   formulations would answer the question

25   dispositively. In our view, there's three

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1      aspects of the text that dictate a

2      backward-looking inquiry.  There's the term

3      "previous convictions," there's the term

4      "involving," which we think refers to historical

5      attributes of an offense, and, third, there is

6      subclause 1, which unambiguously requires a

7      backward-looking inquiry.

8                 JUSTICE GORSUCH:  For sure.  We ask

9      backward-looking inquiry when we're saying do

10     you have these things, these prior convictions.

11     But, when we're asking what is a controlled --

12     what is a serious drug offense, that's defined,

13     that's the section that we're now dealing with.

14     So what do we -- what do we do with that?

15                 MR. RAYNOR:  It -- it's true that

16     subclause 1 is separate from this, but "previous

17     convictions" is an umbrella term that informs

18     the meaning of everything that follows.

19     "Involving" is actually in the clause that's at

20     issue here.  "Involving" is followed by a list

21     of attributes of the prior state offense.  And

22     "as defined in the federal schedules" is part of

23     that list.

24                 I think both of those textual pieces

25     still apply in this case.
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1              JUSTICE GORSUCH:  And just shifting

2     gears, your colleagues on the other side raised

3     an ex post facto concern.  What -- what is the

4     government's analysis of that?  Is there an ex

5     post facto concern?  If not, why not?

6              MR. RAYNOR:  We agree that there's an

7     ex post facto problem with Mr. Brown's

8     interpretation because anytime a drug is added

9     to the schedules after the federal offense

10    conduct --

11             JUSTICE GORSUCH:  No, no, I'm -- I'm

12    saying with respect to your interpretation.  If

13    we accept the state offense time, there are

14    going to be some drugs that will be added

15    later --

16             MR. RAYNOR:  Correct.

17             JUSTICE GORSUCH:   -- inevitably.

18             MR. RAYNOR:  Yes.

19             JUSTICE GORSUCH:  It's just the way

20    the world works these days.  And your colleagues

21    on the other side say, well, that poses a

22    serious ex post facto concern with your

23    interpretation.

24             And we're going to inevitably invite a

25    number of ex post facto challenges, and I'm sure
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1       the government's given that thought, and I just
2       want to know what you think the merits of that
3       argument might be.
4                MR. RAYNOR:  We do not think there is
5       any merit to that argument.  And I actually
6       don't understand them to be arguing that our
7       position would create an ex post facto violation
8       because we --
9                JUSTICE GORSUCH:  Let's suppose I
10      understand that to be their argument.  Then
11      what?
12               MR. RAYNOR:  Then I -- I still
13      disagree that there would be such a problem
14      because we agree that the ACCA in effect at the
15      time of the federal offense conduct governs.  Up
16      until that point, the defendant can choose to
17      possess a firearm or not to possess a firearm,
18      so there's nothing retroactively being imposed
19      on prior conduct.
20               The prior convictions here are used to
21      help ascertain the seriousness of the offense,
22      how dangerous this defendant is, but,
23      ultimately, he's still being punished for the
24      gun possession, which is the 922(g) violation.
25               JUSTICE GORSUCH:  Well, again, but the
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1   serious drug offense changes on your view, we

2   said it at the time of state conviction, but the

3   schedules are dynamic, as you point out, and --

4   and it's going to lead some individuals to be

5   punished under -- under your reading who would

6   not otherwise be punished.

7   And I guess I'm just trying to

8   understand, again, do you think that's an ex

9   post facto problem? If not, why not?

10   MR. RAYNOR: I think the only way that

11   there would be an ex post facto problem is if

12   they were being punished for additions to the

13   schedules after their 920 --

14   JUSTICE GORSUCH: Yeah.

15   MR. RAYNOR: -- 922(g) offense.

16   JUSTICE GORSUCH: That's what I'm

17   asking about.

18   MR. RAYNOR: And that's not the case

19   under our interpretation. Under our

20   interpretation, you look to the schedules in

21   effect at the time of their prior state offense.

22   It's locked in at the earliest possible time of

23   all the three.

24   JUSTICE KAVANAUGH: It's only -- it's

25   only Brown's interpretation that would create an

1   ex post facto problem. Neither Jackson's nor

2   yours would create any ex post facto issues as I

3   understood it.

4   Is that your understanding?

5   MR. RAYNOR: That is also my

6   understanding.

7   JUSTICE BARRETT: Mr. Raynor, I'd like

8   you to address the difficulty or, you know, the

9   lack of access to the prior drug schedules,

10   because I think that might be a problem with

11   your approach from an administrability point of

12   view.

13   MR. RAYNOR: Yes. So, Justice

14   Barrett, if we're talking about defendants, I

15   think they paint this sort of artificial

16   portrait that defendants at the time of their

17   state convictions will be totally unaware of the

18   federal schedule. I think that ignores an

19   important part of how the statute works.

20   The statute picks up federal

21   convictions and analogous state convictions. So

22   state convictions involving federally prohibited

23   conduct, like manufacturing, distributing, or

24   possessing with intent to do those things, a

25   federally controlled substance.

1   If you're a defendant who has

2   trafficked in a federally controlled substance,

3   you're going to be very interested in your

4   federal exposure at the time even if you're

5   being prosecuted by state authorities --

6   JUSTICE BARRETT: No, I understand

7   that from a notice point of view, and, in fact,

8   I think it would be more difficult for

9   defendants who can't predict if the schedules

10   are going to change later and not know whether

11   their offense would be a predicate. I -- I

12   understand that.

13   I'm just saying, at the time of

14   sentencing for everyone, for the prosecutor, for

15   the district judge, for the defendant who after

16   the ACCA offense is committed has to figure out

17   does this predicate count, how do you find the

18   schedules? You know, so --

19   MR. RAYNOR: I think part of it is you

20   rely on the attorneys. Like, you know, the

21   relevant scheduling changes are well-known to

22   both sides of the bar in Florida. It's

23   Ioflupane and hemp. I think they're overstating

24   the degree to which this will be a practical

25   problem.

65

1   But, to the extent you were worried

2   about it, our position doesn't create any

3   greater practical problems than McNeill already

4   requires. McNeill is going to require you to go

5   back and look at the state code in effect at the

6   time.

7   JUSTICE BARRETT: Well, the state code

8   might be easier to find. I mean, how often do

9   the drug schedules change at the federal level?

10   MR. RAYNOR: Justice Barrett, I'm not

11 sure that it will be easier to find because you

12 won't just be able to look at the conviction

13 documents, right? To conduct the categorical

14 inquiry, you're often going to have to pull old

15 state drug schedules, which is going to be much

16 harder to find than old federal drug schedules.

17   You're also going to have to pull old

18 versions of the state code to determine what the

19 maximum applicable punishment was because the

20 punishment to which you were sentenced might not

21 answer the question.

22   JUSTICE BARRETT: Are the old federal

23 drug schedules hard to find?

24   MR. RAYNOR: It depends on what type

25 of -- what -- what you're looking for. So,

1   here, if we're talking about cocaine, cocaine

2   has been scheduled since the beginning. If you

3   look at the prior -- the modern definition of

4   cocaine, there's an exemption for Ioflupane.

5   You can discover that Ioflupane was de-scheduled

6   in 2015 via a Google search. So the argument

7   presented here --

8   JUSTICE SOTOMAYOR: I -- I --

9   MR. RAYNOR: -- is just not difficult

10   to --

11   JUSTICE SOTOMAYOR: Assuming I accept

12   that there's a burden -- I know you're saying

13   there's not and the Chief suggested there might

14   not be. I accept it because I think every

15   prosecution, probation officer, and defense

16   counsel in these various amicus tell us there's

17   a problem.

18   Who bears the burden of proving this

19   at sentence? I know that defense counsel says

20   we have to figure it out because we have to

21   advise our client. But, at the end, they're

22   just defending against a charge. Doesn't the

23   prosecutor bear the burden of proving it?

24   MR. RAYNOR: Correct. It's a

25   sentencing --

1   JUSTICE SOTOMAYOR: And if there's any

2   doubt, you don't -- are -- are you conceding on

3   behalf of the government that if there's a

4   doubt, it's in favor of the defendant and the

5   enhancement should not be given?

6   MR. RAYNOR: I don't concede that if

7   there is any doubt that the -- the defense

8   automatically wins. This --

9   JUSTICE SOTOMAYOR: Why?

10   MR. RAYNOR: In our view, this is a

11   sentencing factor that can be found by the

12   judge.

13   JUSTICE SOTOMAYOR: By a preponderance

14   of the evidence?

15   MR. RAYNOR: That question is not

16   presented here. I don't want to get out ahead

17   of --

18   JUSTICE SOTOMAYOR: On a legal

19   question?

20   MR. RAYNOR: No, Justice Sotomayor,

21   I'm not suggesting that. All I was taking issue

22   with was your suggestion that any doubt is

23   enough to get the defendant off the hook. I

24   agree the government is going to have to bear

25   the burden on this and prove it and --

1   JUSTICE SOTOMAYOR: So how would you

2   want me to phrase that? It seems to me that if

3   it's as difficult as is being suggested, if

4   there is doubt, quantify how much doubt is

5   enough to favor the defendant.

6   MR. RAYNOR: Justice Sotomayor, as I

7   said, the Sixth Amendment question is coming

8   before the Court soon. I don't want to get out

9   ahead of our briefing on that. I do think that

10   under Almendarez-Torres, this could be found

11   along with the fact of the prior conviction.

12   But I agree with you that this is something that

13   the government must carry its burden on.

14   And to get back to the burden question

15   --

16   JUSTICE SOTOMAYOR: By a preponderance

17   of the evidence on a legal question?

18   MR. RAYNOR: No, Justice Sotomayor. I

19   think it's likely that it's beyond a reasonable

20   doubt, but I'm not prepared to take a position

21   on that today.

22   JUSTICE JACKSON: Can I just direct

23   your attention to the kind of overall theory of

24   this? Because I -- I'm, as usual, struggling

25   with that.

1   Do you concede that a change in the

2   drug schedules reflects a change in what is

3   considered to be a serious drug offense? In

4   other words, to -- to -- to take a drug off the

5   schedule, Congress has made a determination that

6   that's no longer a controlled substance. It's

7   not going to be something that we consider to be

8   a crime.

9   MR. RAYNOR: Justice Jackson, I

10   certainly agree that, going forward, that means

11   someone can't be punished for that. And a state

12   conviction, going forward, also would not be

13   treated as --

14   JUSTICE JACKSON: All right. So then

15   my question, I guess, is, why would Congress

16   want to incapacitate defendants who have

17   committed crimes that federal law no longer

18   regards as serious? I mean, I thought the point

19   of this was we're doing ACCA because we think,

20   Congress says, that certain people need to be

21   taken off the streets for long periods of time,

22   and in order to identify those people, we look

23   at their histories and determine whether they

24   have committed certain kinds of crimes.

25   If we today, as we undertake

1   sentencing, have an understanding that these

2   certain kinds of prior crimes are no longer

3   considered serious because the change -- the

4   schedules have changed, I guess I'm trying to

5   understand why the government's position is that

6   they should still be ACCA predicates.

7   MR. RAYNOR: Right. The reason,

8   Justice Jackson, is because we think, in terms

9   of assessing the seriousness of the prior

10   offense, it makes sense to look at the legal

11   landscape at the time that the offense occurred.

12   JUSTICE JACKSON: Why? We're doing

13   sentencing today --

14   MR. RAYNOR: Right.

15   JUSTICE JACKSON: -- and we're trying

16   to determine whether this person today needs to

17   be put in jail for 15 more years. So why does

18   the seriousness or the label or the perception

19   of the past as to what he did matter? Why

20   wouldn't the criteria for determining that be

21   what we think about his prior crimes today?

22   MR. RAYNOR: It -- it's relevant to

23   his willingness to disregard the law. So, to

24   take Jackson as an example, he trafficked

25   cocaine in 1998 and 2004. That was considered a

1   very serious crime at the time. The fact that

2   there was later a medical use discovered for a

3   derivative of cocaine --

4   JUSTICE JACKSON: Yes. No, I

5   understand how it turns into a technicality in

6   the particulars of this case. But what I'm

7   saying is ACCA is not about punishing the person

8   for the past offense. He's already, you know,

9   been held responsible, culpable, sentenced for

10   the past offense.

11   I thought it was about incapacitating

12   people who we can identify as particularly

13   dangerous based on the nature of their past

14   offenses. So it's not really about his

15   willingness to -- to commit a crime. I mean, he

16   has these criminal offenses. Congress would

17   have just said, do you have an offense?

18   Instead, they say, do you have a serious drug

19   offense?

20   And what I am struggling with and

21   trying to get beyond is why we are evaluating

22   the seriousness of that offense based on past

23   standards as opposed to the standards that would

24   apply today as we're making this 15-year

25   determination.

1   MR. RAYNOR: Justice Jackson, I think

2   another way to come at this is this is

3   unambiguously what subclause 1 does. It cares

4   about the seriousness of the offense at the

5   time. It cares about whether you had a federal

6   conviction, even if --

7   JUSTICE JACKSON: Well, I -- I'm not

8   so sure about that. I mean, it doesn't -- it --

9   it too doesn't necessarily -- I'm trying to find

10 the statute. You know, it says an offense. It

11 doesn't say a conviction under the Controlled

12 Substances Act. And I appreciate that the

13 previous thing says you have to have three

14 previous convictions, right, but for a serious

15 drug offense, and then it says an offense under

16 the Controlled Substance Act.

17   I mean, one could interpret that also

18 with respect to modern standards because the

19 exercise is trying to identify what is a serious

20 drug offense. And if today we would say this is

21 not an offense under the -- the Controlled

22 Substances Act, I suppose we could interpret the

23 federal statute differently than what you're --

24 you're -- you're articulating, right?

25   MR. RAYNOR: I don't think so, Justice

1   Jackson. I think the text says, do you have a

2   previous conviction for an offense under the

3   Controlled Substances Act? If you have a

4   conviction for an offense under the Controlled

5   Substances Act, that's just the end of the

6   analysis.

7   JUSTICE JACKSON: But why -- why

8   couldn't it be today's Controlled Substance --

9   that's what I'm asking you. It would be -- it

10   wouldn't be an offense for the Controlled

11   Substances Act as it exists today.

12   MR. RAYNOR: No, but it -- it would be

13   literally a conviction under the Controlled

14   Substances Act. And, to be clear, it -- it -- I

15   am not aware of any court entertaining this

16   argument before, much less adopting it.

17   JUSTICE JACKSON: But it's also not at

18   issue in this case, right? We're doing the

19   other thing. We're doing --

20   JUSTICE KAVANAUGH: I thought --

21   JUSTICE JACKSON: Yeah.

22   JUSTICE KAGAN: Mr. Raynor --

23   JUSTICE KAVANAUGH: Sorry.

24   JUSTICE KAGAN: I'm sorry. Go ahead.

25   JUSTICE KAVANAUGH: Go ahead.

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 1              JUSTICE KAGAN:  No, you -- you were

 2     first.

 3              JUSTICE KAVANAUGH:  Go ahead.

 4              CHIEF JUSTICE ROBERTS:  Justice Kagan.

 5              (Laughter.)

 6              CHIEF JUSTICE ROBERTS:  Justice Kagan.

 7              JUSTICE KAGAN:  Can I take you back to

 8     the conversation that you started having with

 9     Justice Thomas?  If I understand your responses

10     to those questions, you agree with Mr. Adler

11     that if ACCA were amended so that burglary was

12     not a predicate, you would go with the new

13     version.  Is that right?

14              MR. RAYNOR:  The version in effect at

15     the time of the offense conduct, correct.

16              JUSTICE KAGAN:  Correct.  And same,

17     if, instead of this language, you had a list of

18     five controlled substances and those five

19     controlled substances were amended, again, the

20     same result would follow, correct?

21              MR. RAYNOR:  I agree, yes.

22              JUSTICE KAGAN:  So -- so your whole

23     argument rests on treating differently a list of

24     five substances or any other attribute of ACCA,

25     treating it differently from a controlled
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        1   substance as defined in Section 102.

        2   And that seems a little bit mysterious

        3   to me. I mean, if you ask why it is that

        4   Congress put in this language, "a controlled

        5   substance (as defined in Section 102)," it's,

        6   well, number one, there are lots of controlled

        7   substances, and you don't want to have to list

        8   all, however many there are. And, number two,

        9   we expect them to change, so what's going to be

        10   a controlled substance next year is not

        11   necessarily the same as this year.

        12   And so, on both of those theories of

        13   why Congress used this language, it seems

        14   perplexing as to why you would have a different

        15   rule than you would if Congress had just listed

        16   the substances.

        17   MR. RAYNOR: Right. Justice Kagan, I

        18   think one way to think about this is, if it had

        19   listed the substances, that would reflect a

        20   static concern with particular substances. But,

        21   by referencing an external body of law, Congress

        22   evinced its concern with the drug's status under

        23   federal law.

        24   And for the reasons I was discussing

        25   with Justice Jackson, it makes a lot more sense

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1    to look at the drug's status under federal law

2    at the time of the prior conviction.

3             JUSTICE KAGAN:  I mean, I would think

4    quite the opposite, that what Congress is saying

5    when it does -- when it uses this kind of

6    language is we know this is going to be in flux,

7    so keep on updating, you know?

8             And -- and that's -- that's an

9    argument in Mr. Adler's favor, not in yours.

10             MR. RAYNOR:  Right.  So, Justice

11   Kagan, another way to come at this is that we

12   think the cross-reference -- as I mentioned to

13   Justice Gorsuch, it raises the temporal

14   question.  When Congress puts in a

15   cross-reference, we know from the reference

16   canon there's multiple points in time it could

17   be referencing.  There's no background rule that

18   it's always referencing current law.

19             So, in our view, the cross-reference,

20   it only raises the question.  It doesn't answer

21   the question.  We think what answers the

22   temporal question is subclause 1, the term

23   "previous convictions," the term "involving,"

24   and McNeill and this Court's precedent.  It's

25   that text and context that in our view answers
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1   the question in favor of the prior state

2   conviction ruling.

3   JUSTICE KAVANAUGH: Can I ask about,

4   following up on Justice Jackson's questions, how

5   to think about this statute? Because I think

6   about it not as a purely recidivist statute for

7   recidivist drug offenses but -- but as a gun

8   statute.

9   Once you have the three prior offenses

10   for serious drug offenses or a violent felony,

11   you know don't possess a firearm. In fact, if

12   you have one, you know don't possess a firearm.

13   Once you have three, don't possess a firearm or

14   you're getting a mandatory minimum because

15   Congress was concerned about guns with drugs,

16   not about drugs alone in this statute, about

17   guns with drugs, and that's why you look --

18   that's what Congress was concerned about.

19   MR. RAYNOR: Yes, Justice Kavanaugh.

20   I think that's an important response.

21   JUSTICE KAVANAUGH: So without -- it's

22   not just the drugs. It's the gun.

23   MR. RAYNOR: Right, exactly. And I

24   think that's an important response to their --

25   to their notice argument. As -- as you

1   mentioned earlier in your questioning of my

2   friend, as soon as the defendant receives that

3   third conviction, he's going to know he cannot

4   possess a gun going forward. That's not an

5   inquiry for him to undertake 10 years later when

6   he decides to --

7   JUSTICE KAVANAUGH: Now the response

8   to that -- so I want you to respond to what

9   counsel said -- was not really, they don't

10   really pay attention to that if they're not

11   advised of that. So will you respond to that?

12   MR. RAYNOR: Yes. I -- I think

13   there's two responses to that. The first is

14   what I just said to you. It inhibits their

15   behavior going forward because they know one

16   minute after that third conviction, if they

17   possess a gun, they're subject to the ACCA

18   enhancement.

19   JUSTICE KAVANAUGH: Okay.

20   MR. RAYNOR: And the other response I

21   think is what I mentioned to Justice Barrett

22   earlier, which is this statute picks up federal

23   convictions and analogous state convictions.

24   And if you trafficked in a federally controlled

25   substance, you're going to be highly aware at

1   the time of what your federal exposure is, even

2   if you end up being prosecuted under state law.

3   So that's the second reason the defendants will

4   care at the time.

5   All of that being said, we think even

6   if this is something that they researched later,

7   the burden -- they'll still have to do that

8   research before possessing a firearm. We don't

9   think there's a problem even then, but we think

10   the other side overstates the degree to which

11   the defendant will be ignorant of federal

12   schedules at the time of the state conviction.

13   JUSTICE GORSUCH: Counsel, you, in

14   response to Justice Kagan, were talking about

15   the reference canon, noted that sometimes it can

16   refer to the past law rather than present law.

17   But do you agree with the Court in Jam that a

18   general reference to an external body of law

19   takes that body of law as it evolves over time?

20   MR. RAYNOR: Justice Gorsuch, I agree

21   with that insofar as it's not fixed at the time

22   that the referring statute was enacted. We

23   don't think that the Jam Court had occasion to

24   get to the level of specificity required to

25   resolve this case.

1   So every party in -- in here at least

2   --

3   JUSTICE GORSUCH: Let me just

4   interrupt you there, I'm sorry. When a statute

5   refers to a general subject, the statute adopts

6   the law on that subject as it exists whenever a

7   question under the statute arises.

8   There's other language too. I mean, I

9   can -- the reference is to an external body of

10   potentially evolving law. So that's the general

11   rule this Court has adopted.

12   And -- and it's for you to overcome

13   that general presumption, isn't it?

14   MR. RAYNOR: I don't think so, Justice

15   Gorsuch. The Court actually articulated two

16   branches of the canon. It said, if there's a

17   reference to a general body of law, it evolves.

18   JUSTICE GORSUCH: The --

19   MR. RAYNOR: If there's a reference to

20   a --

21   JUSTICE GORSUCH: -- specific --

22   MR. RAYNOR: -- specific provision --

23   JUSTICE GORSUCH: -- can sometimes be

24   fixed, sometimes, but generally, if there's

25   reference to a general body of law, the rule is,

1   always an exception, that -- that it takes it as

2   it finds it.

3   MR. RAYNOR: Yes. I think on its face

4   the canon here would suggest it's fixed because

5   this is a specific reference. All the parties

6   agree that that is overcome here.

7   I think, once the implication of the

8   canon is overcome, the Court should just look to

9   Congress's intent without further reference to

10   the canon. It should just ask, what did

11   Congress intend here? And for the textual

12   reasons you and I discussed earlier.

13   JUSTICE GORSUCH: Yeah. Okay.

14   MR. RAYNOR: And I will say, even if

15   you think that this falls within the dynamic

16   prong of the reference canon --

17   JUSTICE GORSUCH: Yeah.

18   MR. RAYNOR: -- all of the parties

19   agree that the schedules evolve and that this

20   statute does not reference the schedules as they

21   existed at the time of the ACCA's enactment.

22   The question is which of our dynamic reference

23   points is correct --

24   JUSTICE GORSUCH: That's interesting.

25   MR. RAYNOR: -- and I don't think -- I

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1     don't think that --
2               JUSTICE GORSUCH:  Yeah.  So you -- you
3     concede that it's dynamic too, but just it stops
4     at a certain point?
5               MR. RAYNOR:  We concede it's not fixed
6     at the time, correct.  I -- I don't concede that
7     that branch of the canon necessarily applies,
8     but, if you thought that it did, I don't think
9     it supplies the requisite granularity to figure
10    out which of the dynamic points that we're
11    arguing about is correct.
12              And this is evidenced by the fact that
13    both Mr. Jackson and Mr. Brown claim that the
14    reference canon supports their position even
15    though they have different positions.
16              JUSTICE GORSUCH:   Thank you.
17              JUSTICE SOTOMAYOR:  What do I do -- I
18    found it curious that the government argued for
19    a time-of-federal-offense approach in the court
20    of appeals in Brown.  It's now changed its
21    position -- it wasn't the solicitor general
22    making the argument down there.  You're entitled
23    to raise any argument you want.
24              But it does suggest to me that there
25    is a reading of this statute that comports with
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1   Mr. Jackson's approach.

2   MR. RAYNOR: Justice Sotomayor, just

3   to clarify, the -- the Brown briefs were filed

4   at a time when this issue was just arising. It

5   was very much in flux. And the government

6   offered the Third Circuit the saving statute

7   approach as a narrow way to resolve the case

8   because Mr. Brown would lose under either a

9   time-of-federal-offense rule or a

10   time-of-state-crime rule.

11   JUSTICE SOTOMAYOR: He only wins under

12   his current rule, yeah.

13   MR. RAYNOR: And -- and we -- we

14   include in Footnote 3 of our court of appeals

15   brief reserves the time-of-state-crime rule for

16   cases where it might matter.

17   JUSTICE SOTOMAYOR: All right.

18   MR. RAYNOR: But --

19   JUSTICE BARRETT: Why is this issue

20   only arising now?

21   MR. RAYNOR: That's a good question,

22   Justice Barrett. I'm not sure about the answer.

23   It -- it may be that we've had more major

24   de-scheduling recently than we did in -- in the

25   first, you know, 20 or 30 years of the ACCA's

1   existence, but, to my knowledge, this has really

2   only started to arisen in the past two or three

3   years.

4   If I may for a moment just talk about

5   Mr. Jackson's background rule. He says courts

6   always apply current federal criminal law at the

7   time of the offense conduct. It's important to

8   note that that rule doesn't exist in the

9   abstract. He draws it from three separate

10   bodies of law.

11   He -- he amalgamates it first from the

12   Ex Post Facto Clause, which says that post

13   offense changes that make the offense more

14   culpable don't apply retroactively. That rule

15   obviously doesn't implicate our position here.

16   Second, he -- he draws it from the

17   saving statute, which says that post offense

18   changes that make the conduct less culpable also

19   don't apply retroactively. Again, that sheds no

20   light on our position here.

21   And, third, he draws it from the

22   logical point that if you commit an act that's

23   not a crime at the time, you haven't committed a

24   crime. So, if Congress passes a law that says

25   you shall not murder, they repeal that law, and

1   two days later you commit a murder, you simply

2   have not violated any law. Again, that doesn't

3   shed any light on our position here, which

4   depends on ascertaining the seriousness of a

5   predicate conviction.

6   JUSTICE JACKSON: So, in -- in that

7   situation, Congress repeals a federal statute,

8   let's say we're looking at the federal prong and

9   you commit federal crimes under the Controlled

10   Substances Act at the time, and then Congress

11   repeals that portion of the Controlled

12   Substances Act.

13   Is the government's position that it

14   would still be ACCA -- ACCA predicate?

15   MR. RAYNOR: Justice Jackson, if I'm

16   understanding you correctly, if you were

17   convicted of a CSA offense --

18   JUSTICE JACKSON: Yes.

19   MR. RAYNOR: -- Congress later

20   repealed that aspect of the CSA, but it didn't

21   make the change retroactive -- retroactive, so

22   your conviction is still on the books?

23   JUSTICE JACKSON: Yes.

24   MR. RAYNOR: Yes, that would qualify

25   as an ACCA predicate.

1   My point in discussing the -- the

2   sources of this background rule is to show that

3   when you reduce it to these sources, none of

4   them shed any light on the question in this

5   case.

6   To say that courts apply current

7   federal law and, therefore, the cross-reference

8   points to the current federal schedules is

9   entirely question-begging. It assumes the

10   conclusion.

11   CHIEF JUSTICE ROBERTS: Thank you,

12   counsel.

13   Justice Thomas?

14   JUSTICE THOMAS: Mr. Raynor, just so

15   I'm clear, you do take the position that if the

16   statute itself had been -- if ACCA had been

17   amended to change the schedule, if it was more

18   dynamic, that it would -- Petitioners would win?

19   MR. RAYNOR: Justice Thomas, we agree

20   that if the drugs were listed in the text of

21   ACCA and that drug list was modified, Mr.

22   Jackson's rule would apply.

23   JUSTICE THOMAS: Now this seems to be

24   in effect an amendment of ACCA. So, if in

25   effect it's an amendment of ACCA, why is it

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 1    treated differently or less exactingly than an

 2    actual amendment of ACCA?

 3              MR. RAYNOR:  Justice Thomas, we

 4    disagree that this -- this is equivalent to an

 5    amendment of ACCA.  We think the way to think

 6    about this is there's the text of the ACCA and

 7    then there's the external bodies of law that the

 8    ACCA requires courts to consult.

 9              And it's referring courts to external

10    bodies of law because it cares about the legal

11    landscape in existence at the time of the prior

12    conviction.  The external bodies of law include

13    both the schedules and state law.

14              So just as in McNeill the Court said

15    you have to look at state law at the time of the

16    prior conviction, so too here.

17              CHIEF JUSTICE ROBERTS:  Justice Alito?

18              Justice Sotomayor?

19              Justice Kagan?

20              Justice Gorsuch?

21              JUSTICE GORSUCH:  Just to follow up on

22    Justice Thomas's question and not to belabor the

23    point, but let's suppose that the language of

24    g -- (e)(1) was exactly as it is, so all of your

25    textual clues are exactly as they are.
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 1                But, in (a)(1), instead of referencing

 2     the -- the schedules, it listed drugs.  You

 3     concede, I think, that despite all of your

 4     textual clues that you pointed to, that that

 5     would be dynamic?

 6                MR. RAYNOR:  Justice Gorsuch, just to

 7     clarify, if in (a)(1) it listed drugs?

 8                JUSTICE GORSUCH:  Yeah, if in (a)(1)

 9     it said a serious drug offense means conviction

10     for the following substances:  cocaine,

11     dah-dah-dah, not whatever the crazy drug is, you

12     know, that was added in or whatever, okay, but

13     if it listed those drugs, you -- I think you've

14     conceded multiple times that that would be

15     dynamic --

16                MR. RAYNOR:  Correct.

17                JUSTICE GORSUCH:   -- despite all of

18     the textual clues that you hang your hat on in

19     the preceding paragraph?

20                MR. RAYNOR:  Right.  And, Justice

21     Gorsuch, just to be clear about our analytical

22     framework, if there's no cross-reference,

23     there's no temporal question.  So we think the

24     cross-reference raises --

25                JUSTICE GORSUCH:  Right.
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 1              MR. RAYNOR:  -- the temporal question.
 2              JUSTICE GORSUCH:  I -- I -- I
 3      understand that.
 4              MR. RAYNOR:  And then the clues answer
 5      it.
 6              JUSTICE GORSUCH:  But all of the clues
 7      wouldn't overcome the -- the dynamic nature of
 8      the -- of -- of the statute in those
 9      circumstances, right?
10              MR. RAYNOR:  It -- I agree, it would
11      not overcome the actual text of the ACCA if the
12      ACCA was --
13              JUSTICE GORSUCH:  Well, the only --
14      the only change I'm positing is the definition
15      of a -- of -- of a "serious drug offense" means
16      an offense under the Controlled Substances Act,
17      yada, yada, yada.  Instead of that, it's just a
18      list.
19              MR. RAYNOR:  Right.  And I'm assuming
20      the list also applies to subclause 2 in your
21      hypothetical?
22              JUSTICE GORSUCH:  Well, whatever.
23              MR. RAYNOR:  Okay.
24              JUSTICE GORSUCH:  It does, yeah.
25              MR. RAYNOR:  Yeah.  So, if -- if
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1   Congress actually listed drugs in both subclause

2   1 and subclause 2, we agree that a --

3   JUSTICE GORSUCH: That all the -- the

4   -- the textual clues that you otherwise think so

5   important wouldn't overcome it?

6   MR. RAYNOR: Correct, Justice Gorsuch,

7   and the reason is that we think those clues

8   answer the temporal question raised by the

9   cross-reference. If you eliminate the

10   cross-reference, there's just no temporal

11   question in the first place.

12   JUSTICE GORSUCH: Thank you.

13   CHIEF JUSTICE ROBERTS: Justice

14   Kavanaugh?

15   Justice Barrett?

16   Justice Jackson?

17   JUSTICE JACKSON: So can -- can I just

18   ask you again about the point of the

19   legislation? Because you had a back-and-forth

20   with Justice Kavanaugh, and it seems -- do you

21   -- does the government concede that

22   incapacitation of certain serious offenders is

23   what ACCA is about?

24   MR. RAYNOR: At -- at a general

25   level -- high level of generality, yes, Justice

 1   Jackson.

 2   JUSTICE JACKSON: Because that's what

 3   the -- the legislative history shows. I mean,

 4   there are -- we have House reports, we have

 5   Senate reports that say the purpose of this

 6   legislation is to curb armed habitual career

 7   criminals, and then it has a big discussion of

 8   how we identify those people. So that's what

 9   this is about, right?

10   MR. RAYNOR: Yes, Justice Jackson. At

11   a high level of generality, we agree this is

12   about incapacitating dangerous offenders.

13   JUSTICE JACKSON: And so, with Justice

14   Gorsuch's point of the -- and -- and Justice

15   Kagan's point, I just want to be clear. If

16   burglary is -- sorry. If other elements of this

17   definition are changed, like possession, for

18   example, hypothetically, you would agree that

19   we'd be looking at the current definition and

20   not the definition of "serious drug offense" at

21   the time of the state conviction?

22   MR. RAYNOR: If Congress actually

23   amended in the text of the ACCA a definition of

24   burglary, we agree that definition would apply

25   to federal offense conduct occurring thereafter.

1   JUSTICE JACKSON: And why is that?

2   Why isn't that inconsistent with your argument

3   that we should be applying the law at the time

4   of the state offense?

5   MR. RAYNOR: The reason, Justice

6   Jackson, is we agree that what he's being

7   punished for is his federal firearm offense.

8   That's what this is punishing him for. But it's

9   looking to prior convictions to ascertain his

10   dangerousness, to ask: Is this the sort of

11   person we really don't want possessing a gun?

12   Is this a drug dealer who we really don't want

13   possessing a gun?

14   And in ascertaining the seriousness of

15   the prior convictions, it makes sense to look to

16   the legal landscape at the time and --

17   JUSTICE JACKSON: No, no, no. I'm

18   saying so we have a definition. We have a

19   definition of "serious drug offense," and the

20   definition says manufacturing, distributing, or

21   possessing a controlled substance.

22   You seem to be saying that if Congress

23   changed that definition to drop possession out,

24   you would not consider or you would -- you would

25   apply the new definition, right --

1   MR. RAYNOR: Correct.

2   JUSTICE JACKSON: -- even if it

3   previously included possession and it was a

4   categorical match before, at the time of the

5   state conviction. I don't understand why the

6   same argument doesn't apply to a change in the

7   controlled substance. It's just another element

8   of the definition. Congress changes it, so why

9   would you be saying that it has to be a

10   categorical match only back at the time and not

11   today?

12   MR. RAYNOR: Right. Justice Jackson,

13   we agree that the statute of conviction, the

14   ACCA, in effect at the time of the federal

15   offense is the one that applies because, if you

16   don't violate the version of the ACCA at the

17   time of your federal offense conduct, you

18   haven't violated the law.

19   But the ACCA references external

20   bodies of law. And so just as in McNeill the

21   Court looked at the state law in effect at the

22   time of the previous conviction, so too here.

23   We think the -- this is an analogous inquiry.

24   JUSTICE JACKSON: Thank you.

25   CHIEF JUSTICE ROBERTS: Thank you,

1   counsel.

2   Mr. Adler, rebuttal?

3   REBUTTAL ARGUMENT OF ANDREW ADLER

4   ON BEHALF OF PETITIONERS

5   MR. ADLER: Thank you, Mr. Chief

6   Justice.

7   The colloquies between Justice

8   Jackson, Justice Kagan, Justice Thomas

9   illustrate why the government's position fails

10   in this case. I'd like to read you a quote from

11   this Court's decision in Engel versus Davenport

12   from 1926. It's on page 8 of our reply brief,

13   and it says that the "adoption of an earlier

14   statute by reference makes it as much a part of

15   the later act as though it had been incorporated

16   at full length." That is exactly what ACCA is

17   doing with the controlled substances schedules.

18   There is no legal basis to say that

19   ACCA -- that we would win this case had Congress

20   enumerated all of the substances, but we lose

21   this case just because Congress incorporated

22   them by reference. But, as Mr. Raynor

23   repeatedly said at the podium today, that is the

24   government's position in this case.

25   We submit there is simply no legal

 1   basis to draw that sort of distinction. And we

 2   think that is simply the end of the case. The

 3   government's remaining arguments based on

 4   McNeill, culpability, backward-looking, all of

 5   that prove too much because it would apply to

 6   all of the criteria in ACCA, burglary,

 7   possession, everything in ACCA, and the

 8   government agrees that cannot be right. So --

 9   so that argument fails too.

10   I want to address briefly the

11   reference canon because it came up a bunch. I'm

12   not sure why the government is referring to it

13   because there's no dispute in this case that the

14   reference canon, it's not -- the government's

15   position is not even one of the options.

16   There's two options. There's 1986, which would

17   be for static reference, which no one thinks

18   applies here, and there's a dynamic general law,

19   which is -- everyone agrees this is dynamic.

20   And so the question when you have a

21   general referent is, when does the question

22   arise under ACCA? The question arises when the

23   person commits the 922(g) offense. That's it.

24   Finally, I want to address notice to

25   address Justice Kavanaugh's earlier concerns and

 1   -- and Justice Gorsuch's concerns about ex post

 2   facto. Our position on that is that if you

 3   think about a recidivist statute, a newly

 4   enacted one, let's say, it would have to apply

 5   to prior convictions that predated it. That's

 6   the whole point of the recidivist statute. But,

 7   if you analyze notice at the time of the prior

 8   conviction, you couldn't do that. It would

 9   violate the Ex Post Facto Clause in that

10   situation.

11   That's why ACCA covers pre-ACCA

12   predicates. Gryger versus Burke held that in

13   the exact same situation. And this is not

14   something of the past. Congress revises

15   recidivist statutes all the time. It just did

16   that in the First Step Act. The NAFD brief

17   talks about this.

18   841 is the federal drug statute. It

19   applies -- it has enhanced mandatory minimums

20   based on prior convictions for serious drug

21   felonies, serious violent felonies. Those are

22   brand-new terms.

23   So, under the government's view of

24   notice, those -- those terms don't -- that

25   statute doesn't apply to any conviction that

1   predates the First Step Act of December 2018?

2   That would be the logical implication of the

3   government's argument. And -- and nobody thinks

4   that Congress could have intended that.

5   We ask that the Court reverse the

6   judgment of the Eleventh Circuit. Thank you.

7   CHIEF JUSTICE ROBERTS: Thank you,

8   counsel.

9   The case is submitted.

10   (Whereupon, at 11:28 a.m., the case

11   was submitted.)

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