

# Armed Career Criminal Act (ACCA): When Does a Prior Drug Offense Qualify?

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## Introduction

It is a federal [crime](#) for a convicted felon, among others, to possess a firearm. Under the Armed Career Criminal Act ([ACCA](#)), the offense carries a mandatory minimum term of imprisonment when the offender has three or more prior violent felony or serious drug (controlled substance) predicate convictions. The ACCA defines a “serious drug offense” as (1) an offense punishable by a maximum term of imprisonment of ten years or more that is (2)(i) an offense under federal controlled substance laws, or (ii) “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the [federal] Controlled Substance Act (21 U.S.C. [§] 802)).” According to the Supreme Court in a recent parallel “violent felony” case, to qualify under the ACCA, the state law governing a prior offense must be [no more](#) inclusive than its federal counterpart. Yet federal and state laws governing the meaning of controlled substances have ebbed and flowed over the years, and the qualification of a prior offense as a serious drug offense may have ebbed and flowed with them. As such, for purposes of qualifying serious drug offenses under the ACCA, timing matters. The Supreme Court has [determined](#) that the ten-year penalty threshold for prior offenses must have been in place at the time of the prior conviction. The lower federal courts disagree over whether a prior offense must satisfy the other element of the definition of a “serious drug offense” at the time of unlawful firearm possession (as in the [Third](#), [Eighth](#) and [Tenth](#) Circuits), at the time of the federal firearm offense sentencing (as in the [Fourth Circuit](#)), or at the time of the prior predicate offense (as in the [Eleventh Circuit](#)). In *Brown v. United States* and *Jackson v. United States*, the Supreme Court has agreed to consider the [question](#).

## ACCA: Overview of Prior “Serious Drug Offense”

### Caselaw

The Supreme Court has had more than a few occasions to resolve disputes arising out of the ACCA. Many cases have involved the meaning of the term “violent felony,” but a few have concerned the scope

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of the term “serious drug offense.” In *Shular v. United States*, the Court [explained](#) that the phrase “State law, involving . . . a controlled substance” in the definition of “serious drug offense” refers to the statutory elements of a prior state predicate offense rather than those of some composite, generic controlled substance offense. Additionally, a unanimous Court in *McNeill v. United States* [held](#) that the “ten-year-maximum penalty” element in the definition of a prior “serious drug offense” means the maximum penalty available at the time of the prior conviction. However, the Court has not previously addressed whether the definition of the controlled substance at issue must also be the definition in effect at the time of prior conviction, at the time of unlawful firearm possession, or at the time of sentencing for the unlawful firearm possession.

## United States v. Brown and United States v. Jackson Before the Supreme Court

This term, the Supreme Court is scheduled to hear *United States v. Brown* and *United States v. Jackson*, which come from the Third and Eleventh Circuits, respectively. In 2019, a federal district court convicted defendant Brown of being a felon in possession of a firearm in 2016, sentencing him in 2021. When convicted, Brown had five prior state drug trafficking convictions, one involving cocaine and four involving marijuana. Prior to 2018, state and federal law defined marijuana in much the same way. In 2018, however, Congress removed hemp from the federal definition, making state law, which continued to include hemp, more inclusive and thus no longer an ACCA predicate. Brown argued that the federal definition of marijuana at the time of sentencing (2021, after the 2018 amendment to the definition) applied; the government argued for the definition at the time of the unlawful firearm possession (2016). The Third Circuit accepted the government’s position.

A separate federal district court convicted defendant Jackson of felony possession of a firearm in 2017. Jackson argued that two prior cocaine convictions, one in 1998 and the other in 2004, did not qualify as “serious drug offenses” under the ACCA because in 2015 federal law changed, dropping ioflupane from the class of cocaine-related controlled substances and making the state statutory provision more inclusive. The Eleventh Circuit rejected Jackson’s argument, concluding that the qualifying dates for ACCA purposes were the dates of Jackson’s prior convictions in 1998 and 2004 (i.e., before the disqualifying shift in federal law in 2015).

## Positions of the Parties

The Supreme Court granted review to consider [whether](#) the “serious drug offense” definition depends on the federal drug schedules that were in effect at the time of the prior state drug offense, the time of the federal firearm offense, or the time of federal sentencing for the firearm offense.

The government [contends](#) that the schedules in effect at the time of a defendant’s prior drug offense are the proper reference point. Brown [prefers](#) the schedules in effect at the time of the defendant’s *sentencing* for the firearm offense; Jackson [favors](#) the schedules in effect at the time the defendant *commits* the firearm offense.

In amicus or “friend of the court” briefs, several stakeholder organizations take varying positions. At least [two organizations](#) urge the Court to reject the Eleventh Circuit’s time-of-prior-drug-offense approach. [Another](#) recommends the Court adopt either the firearm offense’s time-of-commission or time-of-sentencing approach. Yet another suggests a time-of-sentencing approach and [contends](#) that “the ACCA’s text forecloses application of a mandatory minimum in these cases.”

In its Supreme Court brief, the government [claims](#) support from the Court’s *McNeill* and *Mellouli v. Lynch* decisions, each of which endorsed a time-of-prior-conviction approach—*McNeill* with respect to the ACCA’s ten-year penalty element and *Mellouli* for a comparably worded immigration offense. [Brown](#) and [Jackson](#) respond that *McNeill* addresses a different element and should be treated differently, and [that](#) the *Mellouli* statute is not materially comparable to the ACCA.

[Brown](#), [Jackson](#), and [some](#) of the [amici](#) also urge the Court to apply the rule of lenity as a last resort. The [rule](#) calls for the Court to opt for the least punitive interpretation of a criminal statute in cases of ambiguity. The government [answers](#) that an election in favor of the defendants here would disadvantage defendants differently situated, and in any event, there is no ambiguity.

## Congressional Options

The cases involve a matter of statutory interpretation. Subject to constitutional limitations, Congress is free to enact legislation establishing the interpretation that it prefers. For example, should the Supreme Court hold that the definition of a controlled substance in effect at the time of the defendant’s unlawful firearm possession governs, Congress, if it disagrees with that interpretation, may declare statutorily that going forward the definition of controlled substance in effect at the time of the defendant’s prior drug conviction should govern. By the same token, should the Court hold that the definition of a controlled substance in effect at the time of the defendant’s prior conviction governs, Congress might respond legislatively that in future unlawful firearm possession prosecutions the definition of a controlled substance in effect at time of the unlawful possession controls instead.

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