# Making Mountains out of Minor Offenses [United States v. Brown, 47 F.4th 147 (3d Cir. 2022), *aff'd* 602 U.S. 101 (2024).

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**Summary**:

In *United States v. Brown*, the Third Circuit Court of Appeals affirmed the implementation of a mandatory minimum fifteen-year sentence based upon the defendant's previous marijuana convictions. Prior to the defendant's sentencing, the Agriculture Improvement Act of 2018 was enacted and legalized hemp containing minor traces of THC on a nationwide level. The Third Circuit refused to apply the Agriculture Improvement Act retroactively, and found that the Armed Criminal Career Act of 1984 controlled at sentencing. Although the critical analysis within the Armed Criminal Career Act turns on whether there is a categorical match between state and federal law, the Supreme Court of the United States has yet to solidify the correct approach, thus causing a split between the circuit courts. The Supreme Court has granted Brown's writ of certiorari in this case and has the opportunity to render a workable rule. The Court should find that the Fourth Circuit Court of Appeals' analysis in *United States v. Hope* is correct—comparing state law to federal law at the time of the defendant's sentencing. Furthermore, Brown's prior marijuana convictions should not have been considered "serious drug offenses" at the time of his sentencing because the Agriculture Improvement Act's decriminalization of certain types of marijuana.

**Keywords**: Marijuana, Hemp, Convictions, *Brown*, The Armed Criminal Career Act, ACCA, The Farm Bill, The Agriculture Improvement Act, Categorical, Sentencing, Enhanced, Serious Drug Offense, Controlled Substance.

## I. INTRODUCTION

In *United States v. Brown*, the Third Circuit Court of Appeals affirmed the imposition of a mandatory minimum sentence of fifteen years imprisonment under 18 U.S.C. § 924(e)(1) because the defendant had the statutory required three prior serious drug offenses, this included four marijuana convictions.[1] In the scope of this Comment, the marijuana convictions are merely a vehicle for the overarching discussion revolving around the imposition of large sentences justified by minor prior crimes.[2]

In essence, sentencing courts are making mountains out of minor offenses by considering low-level criminal offenses as enhancing vehicles for large mandatory minimum sentences.[3] In the absence of a strong Supreme Court decision, the circuit courts are all over the place and lack uniformity in their application of the Armed Criminal Career Act ("ACCA"), thus rendering a circuit split.[4] In the middle of this circuit split, the ACCA battles for enhancing authority over the Agriculture Improvement Act of 2018 ("Farm Bill").[5] On one end, the ACCA's success results in a mandatory minimum fifteen-year sentence for felons convicted of possessing a firearm with three or more prior "serious drug offenses;"[6] whereas the Farm Bill, on the other end, cancels out prior marijuana convictions due to their inability to be considered as "serious drug offenses."[7] This comment advances the position that the Supreme Court should consider the Fourth Circuit's analysis of the categorical approach dictated within *United States v. Hope*—

[1]United States v. Brown, 47 F.4th 147, 148–49 (3d Cir. 2022), *aff'd* 602 U.S. 101 (2024).
[2]*See generally id.*
[3]
[4]*See Brown*, 47 F.4th at 156; United States v. Williams, 61 F.4th 799, 810 (10th Cir. 2023); United States v. Perez, 46 F.4th 691, 699 (8th Cir. 2022); United States v. Jackson, 36 F.4th 1294, 1297 (11th Cir. 2022). *But see* United States v. Hope, 28 F.4th 487, 504–05 (4th Cir. 2022).
[5]*Brown*, 47 F.4th at 150–51; *see also* 18 U.S.C. § 924; The Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018).
[6]18 U.S.C. § 924(e).
[7]*Brown*, 47 F.4th at 149 (citing United States v. Henderson, 841 F.3d 623, 627 (3d Cir. 2016) ("Importantly, a state crime may not qualify as a "serious drug offense"—and thus may not serve as an ACCA predicate—if its elements are different from or broader than the generic version of that offense.")).

comparing relevant state substance laws to its federal counterpart at the time of the defendant's sentencing[8]—to be the correct analysis as compared to the alternative categorical approach offered by the Third, Eighth, Tenth, and Eleventh Circuits.[9] Ultimately, in finding the Fourth Circuit's analysis to be controlling, the Supreme Court should hold that Brown's prior marijuana convictions are not "serious drug offenses."

## II. BACKGROUND

### *A. Case Description*

After conducting multiple controlled purchases of illegal drugs from Justin Rashaad Brown ("Brown"), York County police obtained a valid search warrant in 2016.[10] Upon execution of the search warrant, police found cocaine, scales, and money in his apartment.[11] The police also found a handgun in Brown's possession.[12] Brown plead guilty to one count of possession of cocaine, as well as one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g).[13] Pursuant to 18 U.S.C. § 922(g), a convicted felon is prohibited from transporting, shipping, or possessing a firearm or ammunition.[14] At the time of his sentencing hearing, Brown had five prior drug convictions in the state of Pennsylvania.[15] Of the five convictions, one conviction was attributed to the possession of cocaine, while the subsequent four were based on Brown's illegal possession of marijuana with the intent to distribute.[16]

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[8]*Hope*, 28 F.4th at 504–05.
[9]*Brown*, 47 F.4th at 156; *Williams*, 61 F.4th at 810; *Perez*, 46 F.4th at 699; *Jackson*, 36 F.4th at 1297.
[10]*Brown*, 47 F.4th at 148.
[11]*Id.*
[12]*Id.*
[13]*Id.* at 148–49.
[14]*Section 922(G) Firearms*, U.S. SENT'G COMM'N, https://www.ussc.gov/research/quick-facts/section-922g-firearms#:~:text=§%20922(g).,were%20convicted%20under%2018%20U.S.C [https://perma.cc/PJN6-J56M] (last visited Oct. 21, 2024).
[15]*Brown*, 47 F.4th at 149.
[16]*Id.*

Relying on Brown's previous convictions, the sentencing court applied the ACCA, which "imposes a fifteen-year mandatory minimum sentence on offenders who violate § 922(g) and who have at least three prior federal or state convictions for violent felonies or serious drug offenses."[17] Thus, Brown was handed a minimum fifteen-year sentence for violating § 922(g) with three prior felonies.[18]

On appeal, Brown argued that the Farm Bill should control the issue, and the court should find that Brown's previous marijuana convictions were not considered "serious drug offenses" at the time of sentencing because Pennsylvania's law defining marijuana was broader than federal law.[19] Comparing Pennsylvania's controlled substance statute with the Farm Bill, the Farm Bill sets out what legal marijuana is, hemp, while Pennsylvania's controlled substance statute does not include any form of legal marijuana — it effectively repeals the penalties related to marijuana.[20]

The Third Circuit was faced with a difficult decision. On one hand, Brown committed the marijuana offenses while they were still considered "serious drug offenses" under the ACCA.[21] On the other, Brown plead guilty and was sentenced after the Farm Bill was enacted, which reduced the severity of Brown's convictions after the fact.[22]

Framing it as a "timing" issue, the Third Circuit favored the government's federal saving statute argument and provided that the saving statute "mandates that a court apply the penalties

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[17] *Id.*
[18] *Id.*
[19] *Id.* at 150; *see also* John Hudak, *The Farm Bill, Hemp Legalization and the Status of CBD: An Explainer*, BROOKINGS (Dec. 14, 2018), https://www.brookings.edu/articles/the-farm-bill-hemp-and-cbd-explainer/ [https://perma.cc/5YG4-ZPJA]. Before the passing of the Farm Bill, hemp was deemed illegal and was lumped into the same category as marijuana. *Id.* After the Farm Bill was passed, hemp with an amount no more than 0.3 percent of THC became legal. *Id.*
[20] *See Brown*, 47 F.4th at 150–51.
[21] *Id.* at 150.
[22] *Id.* at 150, 153.

in place at the time the crime was committed unless a new law expressly provides otherwise."[23] The Third Circuit held that the saving statute controls "because the Agriculture Improvement Act effectively repealed federal penalties associated with federal marijuana convictions."[24] With the support of the saving statute, the Third Circuit found that Brown "'incurred' ACCA penalties at the time he violated § 922(g)."[25] In an attempt to save Brown's argument, the Third Circuit had to determine whether the Farm Bill retroactively repealed prior penalties, either expressly or implicitly.[26] Although the Farm Bill was silent and did not expressly repeal prior penalties, the court found that it did decriminalize hemp with minimal amounts of THC.[27] The fact that the Agriculture Improvement Act failed to mention retroactivity or sentencing was more persuasive than finding its decriminalization of hemp.[28]

### *B. Legal Background*

#### *i. The Armed Career Criminal Act*

From its powers within the Comprehensive Crime Control Act, Congress created the Armed Criminal Career Act in 1984.[29] The overarching goal of the ACCA was to lower recidivism rates for repeat offenders.[30] In an effort to incapacitate habitual offenders, the ACCA

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[23]*Id.* at 151 (quoting *United States v. Reevy*, 631 F.3d 110, 114 (3rd Cir. 2010). For additional explanation the court provided a summary of the federal saving statute: "The federal saving statute . . . provides that the 'repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide.'" *Id.* (internal citations omitted).
[24]*Id.*
[25]*Id.*
[26]*Id.* at 152–53.
[27]*Id.* at 150, 152.
[28]*Id.* at 153.
[29]U.S. SENT'G COMM'N, FEDERAL ARMED CAREER CRIMINALS: PREVALENCE, PATTERNS, AND PATHWAYS 11 (Mar. 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf [https://perma.cc/5HFB-RCL3].
[30]*See id*. at 11 ("The Act focuses on the incapacitation of these habitual offenders by incarceration."). In a recent study performed by the United States Sentencing Commission, (a) over 80% of felons convicted for possession of firearms had a previous violent offense; (b) it took on average about 16 months for those offenders to be rearrested and convicted; and (c) from 2009 to 2011, almost 60% of armed career criminals were rearrested within eight years. *Id.* at 7–8.

imposes harsh sentences in order to keep repeat offenders off the streets.[31] The ACCA is only concerned about repeat offenders who have committed three or more "serious drug offenses," or "violent felonies."[32]

Pursuant to the ACCA, any person who violates 18 U.S.C. § 922(g), while also having three "serious drug offenses," shall receive a mandatory minimum sentence of fifteen years imprisonment.[33] The ACCA defines "serious drug offenses," as "offenses listed in the Controlled Substance Act . . . and as state offenses involving substances on the Federal Schedules of Controlled Substances . . . that carry a term of imprisonment of ten years or more."[34] Importantly, a state crime cannot serve as an ACCA predicate offense (which would allow enhancement of the sentence) "if its elements are different from or broader than the generic [federal] version of that offense."[35]

As a result, the courts looking to apply the ACCA must compare federal and state law.[36] This is known as the "categorical approach," and is at the center of the dispute between the Circuits.[37] Although it might not seem controversial on the surface, the Supreme Court has heard the issue of what constitutes a "serious drug offense" multiple times.[38]

*ii. The Agriculture Improvement Act of 2018*

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[31]*See id.* at 11 ("The ACCA requires a 15-year mandatory minimum term of imprisonment . . . .").
[32]*Id.* at 11–12.
[33]*Brown*, 47 F.4th at 149; *see also* 18 U.S.C. § 922(e).
[34]*Brown*. 47 F.4th at 149; *see also* 18 U.S.C. § 924(e)(2)(A).
[35]*Brown*. 47 F.4th at 149 (citing United States v. Henderson, 841 F.3d 623, 627 (3d Cir. 2016)).
[36]*Id.*
[37]*Id*. at 149–50 ("When undertaking this comparison, [the courts] employ the 'categorical approach,' which directs [them] to look solely at the elements of the compared crimes and to ignore the particular facts of a case.").
[38]*See* CHARLES DOYLE, CONG. RSCH. SERV., LSB11077, ARMED CAREER CRIMINAL ACT (ACCA): WHEN DOES A PRIOR DRUG OFFENSE QUALIFY? (2023) (The Supreme Court considered what the term "serious drug offense" means in *Shular v. United States,* 589 U.S. 154 (2020), and again in *McNeil v. United States*, 563 U.S. 816, 825 (2011)).

More recently, Congress passed the Agriculture Improvement Act of 2018, also referred to as "The Farm Bill."[39] Interestingly, this is not the first time Congress has passed a "Farm Bill"; in the 1930s, Congress passed the original farm bill to help the Midwest restructure its agricultural industry after the infamous dust bowl displaced most of the Midwest.[40] Even though nearly 90 years have passed since the creation of the original farm bill, the goals remain the same: "to keep food prices fair for farmers and consumers, ensure an adequate food supply, and protect and sustain the country's vital natural resources."[41]

Starting in 1937, the Marihuana Tax Act effectively criminalized the use of marijuana and did not differentiate hemp from cannabis.[42] In 1970, the Controlled Substance Act formally banned all uses of cannabis.[43] Since the passing of the Controlled Substance Act, society's view on marijuana use has changed.[44] As noted by the United States Department of Agriculture, there is a need for research opportunities to develop a globally competitive U.S. hemp industry.[45] With a regulated hemp market, governmental agencies can explore the various benefits and medical uses of hemp derivatives.[46] However, these ventures wouldn't be possible without the passing of the Farm Bill.[47] The Farm Bill distinguished legal marijuana from illegal marijuana by removing

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[39]The Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018).
[40]*What is the Farm Bill?*, NAT'L SUSTAINABLE AGRIC. COAL., https://sustainableagriculture.net/our-work/campaigns/fbcampaign/what-is-the-farm-bill/ [https://perma.cc/Y66B-89QX] (last visited Oct. 21, 2024).
[41]*Id.*
[42]Hudak, *supra* note 19.
[43]*Id.*
[44]Ted Van Green, *Americans Overwhelmingly Say Marijuana Should be Legal for Medical or Recreational Use*, PEW RSCH. CTR. (Nov. 22, 2022), https://www.pewresearch.org/short-reads/2022/11/22/americans-overwhelmingly-say-marijuana-should-be-legal-for-medical-or-recreational-use/ [https://perma.cc/U4DD-FPWD]. "An overwhelming share of U.S. adults (88%) say either that marijuana should be legal for medical *and* recreational use by adults (59%) or that it should be legal for medical use only (30%)." *Id.*
[45]*See Hemp Research Needs Roadmap*, U.S. DEP'T. OF AGRIC. https://www.usda.gov/topics/hemp [https://perma.cc/97P6-AYJP] (last visited Oct. 21, 2024)
[46]*See generally* Grace Yarrow, *How the 2023 Farm Bill Could Change the Game for THC Products*, HILL (Mar. 21, 2023, 5:00 AM), https://thehill.com/policy/future-of-farming/3903815-how-the-farm-bill-could-curb-the-chaos-around-hemp-products/.
[47]*Id.*

"hemp" from the Drug Enforcement Administration's controlled substances Schedules.[48] Essentially, the Farm Bill decriminalizes the possession of low-level marijuana – marijuana with less than 0.3% THC. Even then, there have been advocates pushing to raise the limit from 0.3% to limits as high as 1% THC.[49]

## III. COURT'S DECISION

As mentioned above, Brown was charged in 2016—a time in which the ACCA controlled—and was sentenced in 2021, after the Farm Bill was enacted.[50] The ACCA's mandatory minimum is applicable if "state law governing a particular offense criminalizes more conduct than its generic federal counterpart."[51] To conduct this analysis, the Third Circuit used the categorical approach, "which direct[ed] [it] to look solely at the elements of the compared crimes and to ignore the particular facts of the case."[52] The Third Circuit began their analysis by looking at Pennsylvania law where Brown's prior convictions occurred, and then shifted their focus to federal law.[53]

Starting with the state law, Pennsylvania's controlled substance statute makes it illegal to manufacture or possess with intent to distribute marijuana.[54] According to Pennsylvania law, marijuana encompasses "'all forms' and 'every . . . derivative' of the cannabis plant."[55] For some time, the federal laws were identical in their criminalization of marijuana.[56] This changed

[48]*See Hemp Research Needs Roadmap*, *supra* note 45.
[49]*See* Yarrow, *Supra* note 46.
[50]United States v. Brown, 47 F.4th 147, 151 (3d. Cir. 2002), *aff'd* 602 U.S. 101 (2024).
[51]*Id.* at 149. The Third Circuit uses the term "generic." *Id.* What this means is that "the offenses must be viewed in the abstract, to see whether the statute shares the nature of the federal offense that serves as a point of comparison." *Id.* (internal citation omitted).
[52]*Id.* at 149–50.
[53]*See id*. at 149–51.
[54]*Id.* at 150.
[55]*Id.*
[56]*Id.*

with the passing of the Farm Bill.[57] The Farm Bill changed the federal definition of marijuana to exclude "hemp" as legal marijuana.[58]

As accurately set out in Brown's argument, the passing of the Farm Bill—distinguishing illegal marijuana from legal hemp based on its THC levels—also meant that Pennsylvania's law was broader than its federal counterpart.[59] Although the Third Circuit acknowledged that Pennsylvania's law made no such distinction between marijuana and hemp, it ultimately escaped the contrasting laws by resorting to the savings statute offered by the government.[60]

The key issue, as presented by the Third Circuit, was whether the categorical mismatch required application of the federal law at the time Brown committed the crimes, or at the time of Brown's sentencing.[61] Aligning with the government, the Third Circuit held that the sentencing court should look to the federal schedule at the time the offenses were committed because of the federal savings statute.[62] Essentially, the federal savings statute keeps alive any repealed statutes that may be relevant for criminal convictions, unless the new repealing act expressly bars it from doing so.[63]

By changing the definition of marijuana, the Farm Bill "indirectly affected penalties associated with prior serious drug offenses for marijuana convictions."[64] Even though the Farm Bill was the relevant and controlling act at the time of Brown's sentencing, because of its

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[57]*Id.*
[58]*See id.* ("The Agriculture Improvement Act . . . removed 'hemp' from the definition of marijuana . . . . [a]s defined by the Act, hemp means 'any part' and 'all derivatives' of the cannabis plant 'with delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.'") (internal citations and quotations omitted).
[59]*Id.* at 150 (While Brown's argument accurately depicted the differences between Pennsylvania's controlled substance statutes and its federal counterpart, the argument was unsuccessful in the Third Circuit.).
[60]*Id.* at 151–52.
[61]*Id.* at 151.
[62]*Id.*
[63]*Id.* at 151. The enactment of the Farm Bill effectively repealed the prior statutes in place. *Id.* Therefore, the Farm Bill would be the repealing act which needs to expressly bar the enforcement of prior statutes. *Id.* at 152.
[64]*Id.* at 151.

repealing effect, it failed to assist Brown's position due to its lack of expressed or implied retroactivity.[65] The Third Circuit found its support in three key areas: first, that the Farm Bill failed to mention sentencing; second, the Farm Bill is dedicated to nutrition and agriculture policy; and third, some provisions within the Farm Bill seemed to be forward looking, rather than backwards (retroactive) looking.[66] More importantly, in concluding that the Farm Bill did not retroactively apply, the Third Circuit compared Pennsylvania's marijuana definition to its federal counterpart at the time Brown committed the offenses.[67] Respectfully, the Third Circuit created an artificial categorical match between Pennsylvania's controlled substance statute and its federal counterpart, allowing the ACCA to advance and impose upon Brown a mandatory minimum fifteen-year sentence.

## IV. COMMENTARY

### *a. The Difference in the Fourth Circuit's Categorical Approach*

While the Third Circuit ultimately declined to apply the Agriculture Improvement Act in *Brown*—aligning its position with that of the Eleventh Circuit in *United States v. Jackson*[68]—the Fourth Circuit reached the opposite conclusion in a very similar case.[69] In *United States v. Hope*, the Fourth Circuit found that the sentencing court erred when it enhanced the defendant's sentence through the ACCA because the defendant's prior marijuana convictions were not "serious drug offenses."[70] Similar to *Brown*, the defendant in *Hope* had three prior marijuana convictions, all of which were committed before the Farm Bill was passed, and he was sentenced

[65]*Id.* at 152 ("A statute may retroactively repeal prior penalties either 'expressly' . . . or by 'necessary implication.'") (internal citations omitted).
[66]*Id.* at 152–53.
[67]*Id.* at 155.
[68]*Id.* at 153 (citing United States v. Jackson, 36 F.4th 1294, 1299–1300 (11th Cir. 2022) (When conducting a categorical analysis between the relevant state and federal law, *Jackson* set out the rule that courts "must look to the federal law in effect when the defendant committed the federal offense.").
[69]United States v. Hope, 28 F.4th 487, 504–05 (4th Cir. 2022).
[70]*Id.* at 492.

after the Farm Bill was in effect.[71] "[A]t the time of Hope's state convictions . . . South Carolina defined marijuana as '*all* species or variety of the marijuana plant' and did not exempt hemp or differentiate marijuana by its THC levels."[72] Yet another similarity to *Brown*, the defendant in *Hope* was sentenced after the Farm Bill was passed, making the South Carolina marijuana law broader than its federal counterpart at the time of sentencing.[73]

The Fourth Circuit relied on the Farm Bill to support their holding; because the Farm Bill legalizes possession of marijuana with lower levels of THC and South Carolina law at the time of sentencing (the state where the defendant was convicted for his prior marijuana charges) made possession of any or all marijuana illegal. Subsequently, the Fourth Circuit found that the state statute was not a categorical match and therefore the ACCA could not apply.[74]

Drawing some key comparisons to the Third and Fourth Circuits' respective cases: in *Hope*, the Fourth Circuit used the same categorical approach as the Third Circuit did in *Brown*; the prior charges in *Hope* were identical to *Brown*; and the state statutes in each case were seemingly identical, in that they were broader than their federal counterparts.[75] Yet, the two circuits arrive at distinctly different outcomes.

The Fourth Circuit started their analysis by scrutinizing the affects that the Farm Bill has on the ACCA and the Controlled Substance Act.[76] Through the Farm Bill, the Fourth Circuit determined that "a cannabis/marijuana plant with less than 0.3 percent THC is not a Schedule I

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[71] *Id.* at 497–98.
[72] *Id.* at 499.
[73] *See id.*
[74] *Id.*
[75] *See id.* 496–99; *but cf*. United States v. Brown, 47 F.4th 147, 150–51 (3d. Cir. 2002), *aff'd* 602 U.S. 101 (2024).
[76] *See Hope*, 28 F.4th at 496. The Fourth Circuit included a summary that makes this analysis easier to understand, "if the least culpable conduct falls within the ACCA's definition of 'a serious drug offense,' then the statute categorically qualifies as a serious drug offense. But if the least culpable conduct falls outside that definition, then the statute is too broad to qualify." *Id.* at 496–97.

controlled substance because it is 'hemp.'"[77] Similarly, the Third Circuit respected the Farm Bill's decriminalization of hemp after its enactment.[78]

The key difference between the Third Circuit and Fourth Circuit is how they applied the categorical approach to determine if a match in state and federal law is sufficient enough to apply the ACCA's sentence enhancement. The underlying difference in analysis that is leading the courts to a different result is whether they are going to compare the state law to the federal law at the time the federal offense was committed, or the state law to the federal law at the time of sentencing.[79]

When it came time to conduct the underlying analysis, the Third and Fourth Circuits diverged. The crucial point in the *Hope* opinion is that the Fourth Circuit, when determining the prior state convictions' status under the ACCA, applied the relevant federal law, the Farm Bill, at the time of sentencing.[80] To this effect, the Fourth Circuit applied the Farm Bill to the defendant's prior marijuana convictions and barred the ACCA's mandatory minimum sentence because the convictions could not be considered "serious drug offenses."[81] This crucial finding ultimately led the Fourth Circuit to the conclusion that there is no categorical match between South Carolina's marijuana laws and the Farm Bill, therefore, the ACCA's enhancement is inapplicable.[82]

*b. Overlooking Federal Sentencing Guidelines*

[77] *Id.* at 497–98.
[78] *See Brown*, 47 F.4th at 152.
[79] *Id.* at 151; *Hope*, 28 F.4th at 499.
[80] *Hope*, 28 F.4th at 504–05.
[81] *See id.*
[82] *Id.* at 506 ("[B]ecause South Carolina's definition of 'marijuana,' as defined in 2013, is broader than the definition of 'marijuana,' as defined by the 2018 Farm Bill in 21 U.S.C. § 802, there is no categorical match. . . . Accordingly, Hope's prior state convictions do not meet the definition of 'a serious drug offense,' and therefore, should not have triggered the ACCA minimum sentence enhancement.").

In *Brown*, the Third Circuit justified their use of the ACCA's mandatory minimum because "neither *Hope* nor this case are Guidelines cases."[83] In other words, the issues in *Hope* and *Brown* were centered around "a Congressionally prescribed mandatory minimum sentence under the ACCA," which lacked a mandate requiring the use of federal sentencing guidelines at the time of sentencing.[84] Therefore, the sentencing court was justified in imposing a sentence far beyond the limits of any federal guidelines.

In support of the Fourth Circuit's decision in *Hope* not to apply the ACCA's mandatory minimum, the Fourth Circuit stated that "district courts are instructed to use the federal sentencing manual that is 'in effect on the date that the defendant is sentenced.'"[85] Finding no categorical match between the state and federal law, the issue in *Hope* slipped from the grasps of the ACCA and found its way into the control of the federal sentencing guidelines.[86] Thus, with the application of the Farm Bill in *Hope*, the previous marijuana convictions were not considered as "serious drug offenses" at sentencing.[87] Upon a finding that there is no categorical match, Brown's case should be subjected to the federal sentencing guidelines in effect at the time of his sentencing and his previous marijuana convictions should not be considered as "serious drug offense."

Although the Third, Eighth, Tenth, and Eleventh Circuits favor a position counter to that of the Fourth Circuit's in *Hope*,[88] the determination to conduct a categorical approach pursuant to

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[83]*Brown*, 47 F.4th at 154. The Third Circuit doubled down and supported the proposition that *Brown* is simply a congressionally prescribed mandatory minimum, rather than a guidelines case. *See id.*
[84]*Id.*
[85]*Hope*, 28 F.4th 487, 507–08 (citing 18 U.S.C. § 3553(a)(4)(A)(ii)).
[86]*Id.* at 506–07.
[87]*Id.* ("Hope's prior state convictions do not meet the definition of 'a serious drug offense,' and, therefore, should not have triggered the ACCA minimum sentence enhancement.").
[88]*See* United States v. Williams, 61 F.4th 799, 801 (10th Cir. 2023) (drawing comparison of the state's drug schedules at the time of the offense for a categorical match to its federal counterpart, as the correct analysis); United States v. Perez, 46 F.4th 691, 699 (8th Cir. 2022) (the categorical approach requires comparison of the state drug schedule at the time of the prior offense); United States v. Jackson, 36 F.4th 1294, 1299–30.

the ACCA—comparing the state's drug schedule to its federal counterpart at the time of the prior offense—is largely dependent on statutory interpretation.[89] As the Third Circuit stated in *Brown*, "[the] longstanding principles of statutory interpretation allow different results under the Guidelines as opposed to under the ACCA."[90] Moreover, the opposing circuits imbedded their reasoning in the principles of fairness and opportunity of notice.[91]

In *Brown*, the Third Circuit also reasoned that using the federal drug schedule in effect at the time that the offenses were committed complied with precedent set out by the Supreme Court in *McNeil v. United States*.[92] *McNeil* stated, "to determine whether these prior state offenses were 'serious drug offense[s]' courts must look to the state law as it existed at the time of the state conviction."[93] As the Fourth Circuit made clear in *Hope*, the case at hand dealt with changes to federal law after the offense was committed. It did not deal with state law, therefore "*McNeil* does not prohibit [the courts] from considering changes to federal law for purposes of the ACCA."[94] Subsequently, a change to federal law that decriminalizes hemp clearly shows the legislatures' intent to remove such drugs from the likes of "serious drug offenses."[95]

## V. CONCLUSION

Respectfully, the Third Circuit got the decision wrong in *United States v. Brown*. Concluding that Brown's prior marijuana convictions were "serious drug offenses" required twisting and turning within the categorical approach that was not required, nor accurate.

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[89]*See Brown*, 47 F.4th at 154.
[90]*Id.* (citing Dorsey v. United States, 567 U.S. 260, 291 (2012) (Scalia, J., dissenting).
[91]*Id.* at 153 (citing United States v. Jackson, 36 F.4th 1294, 1299–30 (11th Cir. 2022)). The Eleventh Circuit reasoned, a rule requiring the categorical approach to go back to the federal law at the time of the prior conviction allows the defendant the opportunity to be aware of his offending conduct, as well as the potential sentence imposed. *Id.*
[92]*Id.* at 154 (citing McNeil v. United States, 563 U.S. 816 (2011)).
[93]McNeil v. United States, 563 U.S. 816, 820 (2011).
[94]United States v. Hope, 28 F.4th 487, 505 (4th Cir. 2022).
[95]*See id*. (citing United States v. Bautista, 989 F.3d 698, 703 (9th Cir. 2021)).

Interpretating the Farm Bill, the Third Circuit determined the Bill did not include any language indicating an intent from legislature to apply the Bill retroactivity, which would have allowed its application to Brown's prior offenses; nor did it bar the ACCA's mandatory minimum to prevent the imposition of a large sentence based on Brown's criminal history.[96] Moreover, the Third Circuit did not categorize *United States v. Brown* as a sentencing guideline case, which would have required application of the relevant federal law at sentencing.

The Fourth Circuit's categorical approach—applying the federal law at the time of sentencing—should overtake the Third Circuit's approach. While the Third Circuit supports its arguments with notions of fairness and opportunity of notice,[97] the Fourth Circuit supports its arguments with precedent and the federal sentencing guidelines.[98] More importantly, the Farm Bill was effectuated before Brown was sentenced,[99] which implies an intent from Congress to reduce the severity of marijuana convictions. In line with fairness, it seems correct for the Farm Bill to prevent the ACCA's mandatory minimum as applied to marijuana convictions. After all, they are not considered to be "serious drug offenses."

[96]*Brown*, 47 F.4th at 152–53.
[97]*Id.* at 153.
[98]*Hope*, 28 F.4th at 508.
[99]*Brown*, 47 F.4th at 150–51.