No. _____

In the Supreme Court of the United States

DEON PITTMAN,

***Petitioner*,**

v.

UNITED STATES of AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

FEDERAL DEFENDER OFFICE

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QUESTION PRESENTED FOR REVIEW

Michigan Compiled Laws § 333.7401(2)(a)(iv) prohibits the manufacture, creation, delivery, or possession with intent to manufacture, create, or deliver less than 50 grams of a "controlled substance" listed on schedules 1 or 2, § 333. 7214(a)(iv). Michigan's schedule 1 includes two substances not included in schedule I of the federal Controlled Substances Act, 21 U.S.C. § 812. The Michigan narcotics statute is therefore broader than the CSA. Thus, whether § 333.7401(2)(a)(iv) constitutes a "controlled substance offense" under section 4B1.2(b) of the U.S. Sentencing Guideline depends on whether the specific controlled substance, i.e., heroin, cocaine, or Salvinorin A, is an element of the offense or one of many means to commit the offense.

When a state statute prohibits the delivery of a "controlled substance" by reference to various schedules, is the specific type of substance an element of the offense?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Deon Pittman respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's unpublished opinion affirming Deon Pittman's sentence is reported at 736 F. App'x 551 (6th Cir. 2018), and included in the Appendix at A-1. The Sixth Circuit's unreported order denying Pittman's petition for rehearing en banc is included in the Appendix at A-2. The mandate is included in the Appendix at A-3.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2012) and Part III of the Rules of the Supreme Court of the United States. The court of appeals denied Pittman's petition for rehearing *en banc* on July 16, 2018. The petition for certiorari was filed on October 15, 2018. This petition is therefore timely.

STATUTORY PROVISIONS INVOLVED

In pertinent part, **18 U.S.C. § 3553(a) (2012)** provides:

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

* * *

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced . . . .

Section 3742 of Title 18 states, in pertinent part:

Consideration.--Upon review of the record, the court of appeals shall determine whether the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

Mr. Pittman was convicted of violating **Mich. Comp. Laws § 333.7401 (2)(a)(iv)**, which states, in pertinent part:

(1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(*iv*) and:

*** * ***

(*iv*) Which is in an amount less than 50 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $25,000.00, or both.

U.S. SENTENCING GUIDELINES PROVISIONS INVOLVED

United States Sentencing Guideline 4B1.1(a) states, in pertinent part:

§ 4B1.1. Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

	Offense Statutory Maximum	Offense Level*
(A)	Life	37
(B)	25 years or more	34
(C)	20 years or more, but less than 25 years	32
(D)	15 years or more, but less than 20 years	29
(E)	10 years or more, but less than 15 years	24
(G)	More than one year, but less than 5 years	12.

*If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

United States Sentencing Guideline 4B1.2 states, in pertinent part:

§ 4B1.2. Definitions of Terms Used in Section 4B1.1

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

INTRODUCTION

The Sentencing Guidelines require district courts to increase a defendant's base offense level if "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a) (2016). Under the Guidelines, the term "controlled substance offense" means any federal or state offense "punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b) (2016). The Guidelines do not provide a definition of a "controlled substance."

The Controlled Substances Act, 21 U.S.C. § 812, contains a list of numerous substance, which Congress has subcategorized into five schedules (I–V). Michigan, like the federal government and many other states, has criminalized the possession, sale, delivery, and manufacture of various controlled substances. *See, e.g.*, Mich. Comp. Laws § 333.7401; R.I. Gen. Laws Ann. § 21-28-4.01. Like Congress, the Michigan legislature has grouped all controlled substances into five schedules (I–V). *See* Mich. Comp. Laws §§ 333.7212, 333.7214, 333.7216, 333.7218, 333.7220. For the most part, the schedules have considerable overlap. *Compare* 21 U.S.C. § 812, Schedule II(a)(1), *with* Mich. Comp. Laws § 333.7214(a)(ii) (opium and opiates). But some states, including Michigan, have chosen to add some substances to the

schedules, which Congress has opted not to include. Michigan, for example, lists Salvinorin A as a Schedule 1 controlled substance, Mich. Comp. Laws § 333.7212 (w), while the DEA has not placed this substance on the federal schedule at all. *See* 21 U.S.C. § 812; U.S. Dep't Justice, *Drug Enforcement Administration, Lists of: Schedu ling Actions, Controlled Substances, Regulated Chemicals* (Dec. 2017), https://www. deadiversion.usdoj.gov/schedules/orangebook/orangebook.pdf.

Every court to consider the question has held "that imposing a *federal* sentencing enhancement under the Guidelines requires something more than a conviction based on a state's determination that a given substance should be controlled." *United States v. Townsend*, 897 F.3d 66, 71 (2d Cir. 2018). Accordingly, "a 'controlled substance' under § 4B1.2(b) must refer exclusively to those drugs listed under federal law—that is, the CSA." *Id.*; *see also United States v. Gomez-Alvarez*, 781 F.3d 787, 793–94 (5th Cir. 2015) (holding that a "drug trafficking offense" under U.S.S.G. § 2L1.2 applies only to substances on the CSA); *United States v. Leal-Vega*, 680 F.3d 1160, 1166–67 (9th Cir. 2012) (same); *United States v. Sanchez-Garcia*, 642 F.3d 658, 661–62 (8th Cir. 2011) (same). If the state statute criminalizes possession, delivery, sale, or manufacture of a substance not included on the federal CSA's schedules, then the conviction cannot serve as the basis to enhance a person's sentence.

This petition presents the question of what courts should do when confronted with a state offense that requires proof that the defendant had a "controlled

substance" and references schedules of multiple drugs. The courts of appeals cannot agree about whether the specific type of drug is an element of the offense or a means of committing it. The answer to that question is consequential, as the career-offender designation dramatically increases the sentencing range the Guidelines recommend and applies to thousands of people every year. This Court should grant this petition to address whether Michigan's statute, which is similar to many other state statutes, is divisible, and whether the specific controlled substance is an element of the offense.

BACKGROUND

1. In October 2016, a federal grand jury filed an indictment charging Petitioner Deon Pittman with one count of possession with intent to distribute and distribution of controlled substances (cocaine base and heroin). Mr. Pittman accepted responsibility for his conduct and entered into a plea agreement with the government.

2. At the change of plea hearing, the district judge discussed some, but not all of the rights waived by the agreement. Importantly, the district court did not advise Mr. Pittman that the agreement included an appeal waiver or explain the effect of that waiver. Indeed, the word "appeal" appears only once in the transcript—when the prosecutor casually mentioned, that the appeal waiver provision was on page six of the agreement. The district judge did not follow up to ensure Mr. Pittman understood that waiver as required by Federal Rule of Criminal Procedure 11(b)(1)(N).

3. After a presentence interview, the Probation Office concluded that he was a career offender under U.S.S.C. § 4B1.2(b) because of five convictions for low-level drug offenses. Mr. Pittman has felony and misdemeanor convictions, but none resulted in a prison sentence. In fact, he was sentenced to probation in all of his prior cases and received one jail sentence after some violations of his probation in just one of those prior cases; in 2012 an amended judgement of 60 days in jail was entered in his 2008 high court misdemeanor attempt delivery of marijuana case. That same 2008 high court misdemeanor marijuana conviction, along with a 2012 attempt possession with intent to distribute drugs conviction, catapulted Mr. Pittman into the career-offender category, which raised his guideline range. At the sentencing hearing, the district court imposed a sentence of 84 months' incarceration—a term of imprisonment 42 times longer than Mr. Pittman's longest sentence ever.

4. On direct appeal, Mr. Pittman challenged the career-offender designation by arguing that Mich. Comp. Laws § 333.7401(2)(a)(iv) is divisible and broader than generic controlled-substance offenses. Although Mr. Pittman's plea agreement contained an appeal waiver, the government elected not to enforce it.

Applying plain-error review, the panel held that the district court did not erroneously classify Mr. Pittman as a career offender. *United States v. Pittman*, 736 F. App'x 551, 554–55 (6th Cir. 2018). In doing so, it concluded that Mich. Comp. Laws § 333.7401(2)(a)(iv) is a generic controlled substance offense within the meaning of U.S.S.G. § 4B1.2(b) because § 333.7401(2)(a)(iv) is divisible, and so district courts

may look at the charging documents to determine whether the substance possessed is one of the substances included on both the federal and Michigan schedules of controlled substances. *Id.* at 555.

5. Mr. Pittman filed a timely petition for rehearing en banc, noting that the Sixth Circuit's holding conflicts with the holdings of other federal courts of appeals. The Sixth Circuit denied his petition for rehearing. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

This petition presents a pressing question that federal courts often confront. Various sentencing enhancement statutes, including the Sentencing Guidelines, require longer and even mandatory terms of imprisonment if a defendant has two or more convictions for drug offenses. The career-offender guideline is substantially similar to numerous federal statutes where punishment or removal is predicated on a prior conviction.

Michigan Compiled Laws § 333.7401 is one of many state statutes that prohibit the possession, sale, distribution, delivery, or manufacture of controlled substances. Like many state statutes, the text references a separate part of the code to define the term "controlled substance" with various schedules. *See, e.g.*, *id.* §§ 333.7401(2)(a), (2)(b), (2)(c). The penalty for the offense depends on which of the five schedules includes the specific drug. *See, e.g.*, *id.* §§ 333.7401(2)(a), (2)(c). Also, like many state drug statutes, Michigan's schedules include some substances not included in the

CSA. Consider Michigan Complied Laws § 333.7401(2)(e), which criminalizes possession with intent to distribute schedule 5 controlled substances. Michigan has chosen to include Loperamide (an anti-diarrheal medication, like Imodium) on the list of schedule 5 substances. Mich. Comp. Laws § 333.7220(1)(a). Yet the federal government chose to remove Loperamide from the list of controlled substances in 1982. *See* 47 FR 49840-02 (1982).

Despite these similarities between state statutes, the federal circuit courts have reached different conclusions about whether the specific substance is an element of the offense despite the fact that the sources of state law do not materially differ. This Court should clarify how to determine whether a specific drug is an element or means of a drug offense. By doing so, this Court will offer significant guidance to the lower federal courts about how to apply the categorical approach to drug offenses in various contexts, such as whether a defendant must receive an enhanced sentence or whether an alien is removable. Finally, the Sixth Circuit erroneously applied this Court's precedents when it held that Michigan Compiled Laws § 333.7401(2)(a)(iv) is a divisible statute because the specific type of drug is an element of the offense.

A. The courts of appeals do not agree about how to determine whether the type of drug is an element or means of committing a controlled substance offense under state law.

The Sixth Circuit held that Michigan Compiled Laws § 333.7401(2)(a)(iv) is a divisible statute and the type of controlled substance is an element of the offense.

Thus, it concluded courts may consult a limited class of documents to determine whether the controlled substance charged is one on the CSA. *See Pittman*, 736 F. App'x at 555. That holding conflicts with holdings of other circuit courts, which have examined whether similarly worded state drug convictions are predicate offenses for sentencing enhancements or removal from the country. Because the Sixth Circuit addressed the merits of this argument, this case presents an ideal vehicle to resolve the issue presented.

To determine whether a prior conviction qualifies as a "controlled substance offense" under the Guidelines and various other similarly worded statutes, courts must use the categorical approach. *E.g.*, *Townsend*, 897 F.3d at 72–73; *United States v. Dozier*, 848 F.3d 180, 183 (4th Cir. 2017); *United States v. Montanez*, 442 F.3d 485, 489 (6th Cir. 2006). The categorical approach requires "focus[ing] solely on whether the elements of the crime of conviction sufficiently match the elements of [a] generic [controlled-substance offense], while ignoring the particular facts of the case." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). If a state statute is "divisible," then courts may consult a limited class of documents to determine which alternative element "was integral to the defendant's conviction (that is, which was necessarily found or admitted)." *Id.* at 2249. Applying this task becomes more complicated because some statutes "enumerate[] various factual means of committing a single element." *Id.*

When confronted with such a statute, courts must "determine whether the listed items are elements or means." *Id.* at 2256. If the alternative items are elements, the court should "review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others to those of the generic crime." *Id.* If the alternatives listed are means, however, "the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution." *Id.*

The task of determining whether alternatives are elements or means can be deceptively difficult, so this Court has offered some places to look for answers to the question. When a state supreme court has specifically held that a listed alternative is an element of the crime, then the inquiry ends. *Id.* (citing *State v. Duncan*, 312 N.W.2d 519, 523 (Iowa 1981) (holding that the jury need not reach a unanimous decision about whether the defendant burgled a marina or a boat)). "[T]he statute on its face may resolve the issue," such as when the statutory alternatives carry different penalties. *Id.* If these sources of state law do not clarify whether an alternative is an element or a means, then federal judges may peek at a limited class of documents "for the sole and limited purpose of determining whether the listed items are elements of the offense." *Id.* at 2256–57 (internal quotation marks and brackets omitted).

The circuit courts of appeals are divided on the question whether the type of controlled substance a defendant possessed, delivered, sold, or manufactured is an

element of the offense or a means of committing the crime. Each of them have considered statutes substantially similar to Mich. Comp. Laws. § 333.7401(2)(a)(iv). Each has consulted the same sources of law—state caselaw, the text of the statute, and model jury instructions. And they cannot agree about whether the specific substance is an element of the offense.

On one side are the First, Second, Seventh, and Ninth Circuits, which have held that the specific type of drug is a means of committing an offense, not an element, and so various state controlled-substance statutes are not divisible.

In *Swaby v. Yates*, 847 F.3d 62, 64 (1st Cir. 2017), the First Circuit confronted the question whether a conviction for a violation of R.I. Gen. Laws Ann. § 21-28-4.01 renders a resident alien removable. Immigration courts also apply the categorical approach to determine whether a conviction is a predicate for removability. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015). Section 21-28-4.01(a)(1) prohibits manufacturing, delivering, or possessing "with an intent to manufacture or deliver a controlled substance," and prescribes a maximum penalty of thirty years if the controlled substance is "classified in schedule I or II," *id.* §§ 21-28-4.01(4)(i). Like Michigan's schedule I, Rhode Island's statute includes substances that the federal schedule I does not. *Swaby*, 847 F.3d at 65 (comparing R.I. Gen. Laws § 21–28–2.08(e)(13), *with* 21 C.F.R. § 1308.11-1308.15). For that reason, the First Circuit held that "the plain terms of the Rhode Island drug schedules make clear that the Rhode Island offense covers at least one drug not on the federal schedules," and so a

conviction under the Rhode Island statute does not qualify as a predicate conviction for removal. *Id.* at 66.

The Second Circuit reached a similar conclusion when it held that criminal sale of controlled substances in the fifth degree, N.Y.P.L. § 220.31, is indivisible and not a generic controlled-substance offense. *Harbin v. Sessions*, 860 F.3d 58, 64–65, 68 (2d Cir. 2017). N.Y.P.L. § 220.31 provides: "A person is guilty of criminal sale of a controlled substance in the fifth degree when he knowingly and unlawfully sells a controlled substance." Acknowledging that "controlled substance" is defined as "any substance listed in schedule I, II, III, IV or V," the Second Circuit nevertheless concluded the crime consists of four elements: "the defendant must (1) knowingly and (2) unlawfully (3) sell (4) a controlled substance." *Harbin*, 860 F.3d at 65 (discussing N.Y.P.L. § 220.00(5)). The statute's "text suggests that it creates only a single crime, but provides a number of different factual means by which that crime may be committed. The statute criminalizes sale of a 'controlled substance.'" *Id.* The court found further support for this conclusion by looking at the statute's penalty scheme, which provides the same penalties no matter the substance. *See id.* Finally, the Second Circuit rejected the government's reliance on cases showing that charging documents must describe the particular substance in order to provide fair notice of the charges and to protect against future prosecutions. *See id.* at 66–67. These cases, the court explained, are inapposite because "the values of fair notice and avoidance of double jeopardy often demand that the government specify accusations in ways

unrelated to a crime's elements." *Id.* at 66. In *Townsend*, 897 F.3d at 74, the Second Circuit applied this rule, holding that N.Y.P.L. § 220.00(5) was not a "controlled substance offense" under the career-offender guideline.

The Seventh Circuit recently considered the divisibility of Arizona's statute prohibiting "possess[ion] [of] equipment or chemicals, or both, for the purpose of manufacturing a dangerous drug." Ariz. Rev. Code §13-3407(A)(3). *United States v. Elder*, 900 F.3d 491, 503 (7th Cir. 2018). The term "dangerous drug" is defined elsewhere in the Arizona code, and so the Seventh Circuit addressed "whether section 13-3407(A)(3) is divisible such that the *type* of dangerous drug is an element of the offense, as opposed to a means of committing the offense." *Id.* Without a clear answer from the Arizona Supreme Court, the Seventh Circuit looked at the structure of the statute and held that the fact that the term "dangerous drug" was defined in a separate section of the code meant "'[d]angerous drug' is an element of a conviction under section 13-3407(A)(3); the type of dangerous drug is not." *Id.*

On the other side of the debate are the Third, Fourth, Fifth, and Eighth Circuits. In *United States v. Henderson*, 841 F.3d 623, 630 (3d Cir. 2016), the Third Circuit held that 35 Pa. Stat. Ann. § 780–113(f)(1) is a predicate controlled-substance offense under the ACCA. Section 780-113(30) prohibits "the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with

intent to deliver, a counterfeit controlled substance." Section 780-113(f)(1) sets forth the penalty if the controlled substance or counterfeit substance is a narcotic drug classified in Schedule I or II. In a footnote, the statute cross-references 5 Pa. Stat. Ann. § 780–104, which defines schedules of controlled substances. Examining the text of the statute alone, the Third Circuit held that the cross-reference "creat[es] several alternative elements; not separate means of commission." *Henderson*, 841 F.3d at 630–31. Peeking at the charging document and change of plea form, the court found further evidence for that conclusion because the charging document listed heroin as the controlled substance. *See id.* at 631.

One month before this Court issued an opinion in *Mathis*, the Fourth Circuit addressed the divisibility of D.C. Code § 48-904.01(a)(1), which makes it "unlawful for any person knowingly or intentionally to manufacture, distribute, or possess, with intent to manufacture or distribute, a controlled substance" as defined by D.C. law. *Carcamo v. Lynch*, 648 F. App'x 306, 310 (4th Cir. 2016). According to the Fourth Circuit, the text alone supported the conclusion that the type of drug is an element because "[t]he schedules serve as a list of alternative elements," like the illustrative example provided in *Descamps v. United States*, 570 U.S. 254, 273 (2013). *Carcamo*, 648 F. App'x at 311. The Fourth Circuit expressly rejected the view that the structural separation between the offense and the schedules of controlled substances proved the type of substance is not an element of the offense. *See id.* In addition, the court referenced cases from the D.C. Court of Appeals, which held that a defendant

in possession of two different controlled substances committed two separate offenses. *Id.* at 312 (citing *Plummer v. United States*, 43 A.3d 260, 273–74 (D.C. 2012)). Finally, the court looked at D.C. pattern jury instructions, which include bracketed language for the specific type of drug. *Id.*

Also without the benefit of the *Mathis* opinion, the Fifth Circuit permitted the use of the modified categorical approach to determine the specific "designated controlled substance" the defendant "possess[ed] or purchase[d] for sale of" when he was convicted of violating California Health & Safety Code § 11351. *Gomez-Alvarez*, 781 F.3d at 794. The court did not provide much discussion about why it believed the type of drug is an element of the crime. *See id.*

When the Eighth Circuit addressed the divisibility of Missouri Revised Statutes § 195.211.1, which prohibits "possess[ion] with intent . . . to deliver . . . a controlled substance," it held that the specific type of controlled substance is an element of the crime. *Martinez v. Sessions*, 893 F.3d 1067, 1070 (8th Cir. 2018). A separate section, Mo. Stat. Rev. § 191.010(5), defines the term "controlled substance" by reference to five schedules set forth in Mo. Rev. Stat. § 195.017. The Eighth Circuit relied on two Missouri Court of Appeals decisions holding that two convictions involving different drugs do not violate Double Jeopardy to conclude that the specific drug is an element of the offense. *See Martinez*, 893 F.3d at 1071 (discussing *Salmons v. State*, 16 S.W.3d 635 (Mo. Ct. App. 2000), and *State v. Harris*, 153 S.W.3d 4 (Mo. Ct. App. 2005)).The court also looked at Missouri's pattern jury instructions, which

tell judges to insert the specific drug in place of the bracketed term "controlled substance." *See id.* at 1072 (reproducing MAI-CR 3d 325.08).

Finally, the state of Ninth Circuit law in this area is muddled. The en banc court held that California Health & Safety Code § 11352, is divisible with respect to its controlled-substance requirement based on various decisions from the California Supreme Court, which implicitly endorsed the practice of charging a defendant with multiple crimes for the possession of multiple substances. *See United States v. Martinez–Lopez*, 864 F.3d 1034, 1040–41 (9th Cir. 2017) (en banc) (discussing *In re Adams*, 536 P.2d 473 (1975) and *People v. Jones*, 278 P.3d 821, 827 (2012)). The court also looked at the pattern jury instructions, which require the judge to insert the particular type of drug in the place of the phrase "controlled substance." *Id.* at 1041. Judges Berzon and Bybee concurred in the judgment, but noted that the California Supreme Court had never "expressly address[ed] the validity of multiple convictions under California Health and Safety Code § 11352 for single acts or courses of conduct involving different controlled substances." *Id.* at 1057 (Berzon, J., concurring in part and dissenting in part). She further noted that the state of California law was in flux. *See id.* at 1057–58. Judges Reinhardt and Thomas dissented, however, arguing that the California Supreme Court had not offered clear guidance on the elements-vs-means question, and suggested certifying the question. *See id.* at 1059–60 (Reinhardt, J., dissenting).

Adding to the confusion, the Ninth Circuit recently confronted a Nevada drug statute that stumped the judges when they had to decide whether the specific substance was an element of the offense. *See generally United States v. Figueroa-Beltran*, 892 F.3d 997 (9th Cir. 2018). Nevada Revised Statute § 453.337 prohibits the "possess[ion] for the purpose of sale . . . any controlled substance classified in schedule I or II," but Nevada's schedules I and II contain more substances than the CSA. *Figueroa-Beltran*, 892 F.3d at 1002. Faced with uncertainty about whether the specific drug was an element or a means of committing the offense, the Ninth Circuit certified the question to the Nevada Supreme Court. *Id.* at 1004.

In sum, the texts of these various statutes do not differ meaningfully. Rarely have the state supreme courts squarely said whether the specific drug is an element or means of committing the offense. And many of the pattern jury instructions are remarkably similar with instructions to insert the specific drug in place of the term "controlled substance." Yet the courts of appeals cannot agree whether the specific drug is an element of the offense.

6. This case provides an opportunity to clear up the confusion plaguing the lower federal courts. The Sixth Circuit squarely addressed the question presented: whether the specific type of controlled statute is an element of Mich. Comp. Laws § 333.7401(2)(a)(iv). *Pittman*, 736 F. App'x at 554–55. The text of Michigan's statute bears striking resemblance to many of the state statutes the courts of appeals have already addressed. Like other states, Michigan defines the term "controlled

substance" with reference to various schedules. The pattern jury instructions also recommend identifying the specific controlled substance, but the commentary references *McFadden v. United States*, 135 S. Ct. 2298, 2304 (2015), where this Court held that the 21 U.S.C. § 841(a)(1) (possession with intent to distribute controlled substance) does not require proof that the defendant knew the specific type of substance he was delivering, only that it was a substance listed on the CSA's schedules. Mich. Crim. Jury Instruction 12.2. The drafters' reference to *McFadden* provides strong evidence that the specific type of drug is not an element of the offense.

B. The question presented is important.

District courts routinely interpret and apply the career-offender guideline when defendants have prior convictions for drug offenses. In fiscal year 2017, 1,593 people had higher sentencing ranges because of the career-offender guideline. U.S. Sentencing Comm'n, *Quick Facts: Career Offenders* (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY17.pdf. Designation as a career offender increases the final offense level and criminal history. *Id.* Because the career-offender designation has such a significant impact on a defendant's final sentence, consistent and proper application of the guidelines is imperative. Clear directive from this Court will help simplify the district court's task.

Federal courts must apply the categorical approach to state statutes in other circumstances, and so addressing this question will help clarify how courts should

apply the categorical approach in various contexts. The definition of a "controlled substance offense" in the career-offender provision of the guidelines, U.S.S.G. § 4B1.2(b), is substantially similar to the definition of a "serious drug offense" under the Armed Career Criminal Act, 18 U.S.C. §924(e)(2)(A)(ii) ("an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in [21 U.S.C. § 802], for which a maximum term of imprisonment of ten years or more is prescribed by law"). The guideline is also substantially similar to the provision of the Immigration and Nationality Act that renders certain aliens removable. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (rendering removable "[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in [21 U.S.C. § 802])").

C. Sixth Circuit's decision is erroneous.

Mr. Pittman's petition should be granted because the Sixth Circuit erroneously applied this Court's precedents to conclude that Mich. Comp. Laws § 333.7401(2)(a)(iv) is divisible and the specific drug is an element of the offense.

The text of the statute helps answer the question about whether the type of controlled substance is an element of the offense or a means of committing it. In relevant part, the statute states:

> (1) [A] person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled

> substance, a prescription form, or a counterfeit prescription form. . . .
>
> (2) A person who violates this section as to:
>
> (a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(*iv*) and:
>
> . . .
>
> Which is in an amount less than 50 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $25,000.00, or both.

Mich. Comp. Laws § 333.7401(1), (2)(a)(iv).

By the plain terms of the statute, the elements are (1) the actus reus (manufacturing, creating, delivering, or possessing); (2) the specific intent (with intent to manufacture, create, or deliver); (3) the object (a controlled substance, a prescription form, or a counterfeit prescription form); and, (4) if the object is a controlled substance, the amount was less than 50 grams.

The statute informs us that the penalty changes depending on the amount of the controlled substance: a defendant who possesses more than 1,000 grams of a controlled substance is punished more severely than a defendant who possesses less than 50 grams of a controlled substance. *Compare id.* § 333.7401(2)(a)(i), *with id.* § 333.7401(2)(a)(iv). The Supreme Court has explained that this is a good sign that the drug quantity is an element of the offense. *See Mathis*, 136 S. Ct. at 2256. Other sections of the statute also help clarify that a jury must find beyond a reasonable doubt that the controlled substance is listed on Schedule 1 or 2 because other controlled substances included on Schedule 5 are punished less severely. *Compare*

Mich. Comp. Laws § 333.7401(2)(a) (prescribing a range of maximum penalties for possession of Schedule 1 or 2 substances varying from life to twenty years), *with id.* § 333.7401(2)(e) (prescribing a maximum penalty of two years' imprisonment if the controlled substance is a Schedule 5 substance). The penalty generally does not change, however, depending on the type of substance included on Schedule 1.[1]

The statute's text therefore clarifies that the specific type of Schedule 1 controlled substance does not matter for a jury to find a defendant guilty. Each schedule "merely specifies diverse means of satisfying a single element of a single crime," and "a jury need not find (or a defendant need not admit" to possession of any one of the listed offenses. *Mathis*, 136 S. Ct. at 2249. In that sense, § 333.7401(2)(a)(iv) is like burglary, which might "itemize the various places that a crime could occur as disjunctive factual scenarios rather than separate elements." *Mathis*, 136 S. Ct. at 2249.

Instead of looking at the statute's text, the Sixth Circuit looked at two opinions of the appellate court, not the Michigan Supreme Court. *See Pittman*, 736 F. App'x at 555 (citing *People v. Wolfe*, 489 N.W.2d 748, 752 (Mich. 1992); *People v. Williams*, 811 N.W.2d 88, 93 (Mich. Ct. App. 2011)). But neither case actually clarifies whether the specific substances are means or elements because, in both instances, the courts were not asked to decide that question.

[1] There are two exceptions to this general rule: methylenedioxymethamephetamine, otherwise known as ecstasy or MDMA; and synthetic equivalents of cannabis. Mich. Comp. Laws Ann. §§ 337401(b), 333.7212(d)(1), (h).

In *Wolfe*, the Michigan Supreme Court addressed whether there was sufficient evidence of possession and specific intent. 489 N.W.2d at 753. The panel relied on a portion of the opinion, where the court stated:

> As the Court of Appeals explained, to support a conviction for possession with intent to deliver less than fifty grams of cocaine, it is necessary for the prosecutor to prove four elements: (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver.

Id. at 752. Because the court was not addressing whether the specific drug was an element of the offense rather than a means, the court's passing reference to the "elements" of the crime is not a holding.

Williams is similarly inapplicable. The portion of the opinion upon which the Sixth Circuit relied dealt not with this question, but with whether convictions for delivery and possession of the same substance violates the Double Jeopardy Clause. *Williams*, 811 N.W.2d at 92. Moreover, *Williams* discussed the elements of Mich. Comp. Laws §§ 333.7401(1) and (2)(d)(*iii*), which prescribes the specific penalty for marijuana offenses. *Id.* at 93. Sections 333.7401(a) and (d) make clear that the penalties described in subsections (a)(i)–(iv) are inapplicable if the controlled substance is marijuana. Thus, no state court decision "definitively answers the question" whether the type of substance is an element or means. *Mathis*, 136 S. Ct. at 2256.

Because the text of the statute clarifies whether the type of controlled substance is an element of the offense, the panel was wrong to hold that Mich. Comp. Laws § 333.7401(1)(a)(iv) is divisible and district courts may look at the charging documents to determine what type of controlled substance was involved in the conviction.

Finally, the Sixth Circuit looked to the charging and plea documents to conclude that, because those documents definitively showed that the substance was cocaine, the specific substance is an element. *See Pittman*, 736 F. App'x at 555. But the Sixth Circuit failed to appreciate why these documents do not necessarily clarify whether the specific drug is an element of the offense.

Due Process requires that charging documents "contain[] the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, that it enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007) (internal quotation marks and brackets omitted). To meet the second requirement sometimes requires that the indictment identify certain crucial facts are missing. *See Russell v. United States*, 369 U.S. 749, 770 (1962) ("Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of a criminal statute."). The specific type of drug is such a fact. Failure to identify the type of substance involved would "require[] the defendant to go to trial with the chief issue

undefined" and "give[] the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Id.* at 766. In addition, without identifying the specific drug courts would be left guessing "as to what was in the minds of the grand jury at the time they returned the indictment," thereby depriving the defendant of the procedural benefits of the grand jury. *Id.* at 770. Courts therefore cannot rely on the fact that the specific drug is included in charging documents to determine whether the specific drug is an element of the crime.

Section 333.7401(1)(a)(iv)'s text indicates that one element of the offense is that the defendant had a "controlled substance" listed on Schedule I or II. Prosecutors can make that showing by proving the defendant had any number of substances, and there is nothing to limit a jury's ability to find a defendant guilty if he possessed 25 grams of cocaine and 24 grams of heroin. The specific type of substance is therefore not an element of the offense. The Sixth Circuit's conclusion to the contrary is erroneous.

CONCLUSION

The petition for certiorari should be granted.

October 15, 2018

Respectfully submitted,

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No. _____

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DEON PITTMAN,
Petitioner,

v.

UNITED STATE of AMERICA,
Respondent.

CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATIONS

Petitioner Deon Pittman, through undersigned counsel, and pursuant to Sup. Ct. R. 29.2 and 28 U.S.C. § 1746, declares that the **Petition for Writ of Certiorari** filed in the above-styled matter complies with the type-volume limitation of Sup. Ct. R. 33.2(b). It contains 5,567 words. Certification is based on the word count of the word-processing program used in preparing the petition, Microsoft Word 2013.

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CERTIFICATE OF SERVICE

I certify that on October 15, 2018, in accordance with Sup. Ct. R. 29, copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed In Forma Pauperis, (3) Certificate of Compliance with Word Count Limitations, (4) Declaration Verifying Timely Filing, and (5) Certificate of Service were served by mail within three days upon the United States Attorney for the Eastern District of Michigan, 211 W. Fort Street, Suite 2001, Detroit, MI 48226, and upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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