No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLESTON PIERRE WIGGINS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I

Whether an offense-matching categorical approach applies to the determination of a "controlled substance offense" under the USSG § 4B1.2(b)?

II

Whether courts may defer to Sentencing Guideline commentary which strays from the unambiguous text of the Guideline to conclude that "distribution" of drugs includes attempted distribution of drugs.

[NOTE: ISSUE II is currently pending review in *Tabb v. United States*, Case No. 20-579. Petitioner adopts and incorporates the arguments raised in *Tabb*, but presents a somewhat abbreviated argument for the convenience of the Court.**]**

PARTIES INVOLVED

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Charleston Pierre Wiggins respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered in Case No. 20-10307, on January 13, 2021, affirming the judgment of the District Court for the Northern District of Florida.

OPINION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Charleston Pierre Wiggins,* 840 F. App'x 498 (11th Cir. 2021) (unpublished), was issued on January 13, 2021, and is attached as Appendix A to this Petition.

JURISDICTION

The Court of Appeals filed its decision in this matter on January 13, 2021. Petitioner did not move for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c)

GUIDELINE PROVISIONS INVOLVED

This petition involves the application of USSG §§ 2K2.1(a)(2) and 4B1.2 (2018), which provide in pertinent part:

> (a) Base Offense Level (Apply the Greatest):
>
> * * * * * *
>
> (2) **24,** if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense; . . .

USSG § 2K2.1(a)(2) (November 1, 2018 Guidelines Manual).

> (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.

USSG § 4B1.2(b) (November 1, 2018 Guidelines Manual).

Application Note 1 to § 4B1.2(b) provides:

> 1. **Definitions.**—For purposes of this guideline—
>
> > **"Crime of violence"** and **"controlled substance offense"** include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

FLORIDA STATUTES INVOLVED

Section 893.13(1)(a), Florida Statutes, provides:

> (1)(a) Except as authorized by this chapter and chapter 499, a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance.

Fla. Stat. § 893.13(1)(a).

Section 893.101, Florida Statutes, provides:

> (1) The Legislature finds that the cases of *Scott v. State*, Slip Opinion No. SC94701 (Fla. 2002) and *Chicone v. State*, 684 So. 2d 736 (Fla. 1996), holding that the state must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.
>
> (2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.
>
> (3) In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection.

Fla. Stat. § 893.101.

INTRODUCTION

The categorical approach applies in a variety of contexts – in the construction of criminal statutes, immigration statutes, criminal sentencing provisions, and Guideline sentencing provisions. In the sentencing context, the categorical approach promotes the interests of efficiency, uniformity and fairness. The circuit courts generally employ an offense-matching categorical approach in the interpretation of "controlled substances offenses" under the Sentencing Guidelines. In the enumerated offense context, the categorical approach compares the elements of the prior state conviction to the elements of the generic federal crime to determine if the state offense is the same as, or narrower than, the generic crime, and thus qualifies for purposes of a federal sentencing enhancement. The Eleventh Circuit interprets the Guidelines definition of "controlled substance offense" a "conduct test" which requires a comparison of the conduct involved in a prior state conviction with the corresponding conduct listed in USSG § 4B1.2(b). The Eleventh Circuit's approach misinterprets the Guideline and undercuts the interests of efficiency, uniformity and fairness without adequate support from its text. The rule of the Eleventh Circuit creates a deep and intractable split among the circuits. Due to the widespread application of the Guidelines' "controlled substance offense" provision, this case is worthy of certiorari review.

STATEMENT OF THE CASE

Petitioner, Charleston Pierre Wiggins, pled guilty to the offense of possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), while reserving the right to appeal the sentence imposed. The probation officer prepared a Presentence Investigation Report (PSR). Pertinent to this petition, the probation officer established Wiggins's base offense level at 20, pursuant to USSG § 2K2.1(a)(4)(A), on the ground that Wiggins had a prior felony conviction for either a crime of violence or a controlled substance offense. His prior offense was a violation of Section 893.13(1)(a), Florida Statutes, which makes it unlawful to "sell, manufacture, deliver, or possess with the intent to sell, manufacture, or deliver a controlled substance." The PSR describes the prior conviction as one for "cocaine possession with intent to sell manufacture deliver." Without the prior conviction, Wiggins's base offense level would have been 14. *See* USSG § 2K2.1(a)(6).

Wiggins objected to the calculation of the base offense level, arguing the term "controlled substance offense," as defined in USSG § 4B1.2(b), was not intended to apply to a conviction under Fla. Stat. § 893.13(1)(a) which lacks a *mens rea* element. In other words, the State of Florida did not have to prove that Wiggins acted with knowledge that the substance he possessed with the intent to sell, manufacture, or deliver was cocaine. Wiggins argued that the controlling circuit precedent, *United States v. Smith*, 775 F.3d 1262, 1267 (11th Cir. 2014), was erroneous insofar as it rejected the application of an offense-based categorical approach requiring comparison of the prior crime to the federal generic crime. The district court

overruled the objection on the authority of *Smith*, which held "[n]o element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied" in the definition of controlled substance in USSG § 4B1.2(b)).

Based upon a total offense level of 19 and a criminal history category of VI, Wiggins had an advisory guidelines range of 63-78 months in prison. (PSR ¶ 93); (Doc. 35) (sealed). If the prior Florida conviction did not qualify as a controlled substance offense, Wiggins's total offense level would have been 13 which, together with a criminal history of VI, would have produced an advisory guidelines range of 33-41 months in prison. The district court sentenced Wiggins to a term of 76 months in prison to be followed by three years of supervised release and a monetary penalty of $100.00.

Wiggins raised the same issue on direct appeal. He argued that the term "controlled substance offense" included a number of enumerated offenses which qualify to enhance the defendant's base offense level.

> The Guideline provision refers to offenses that "prohibit" manufacturing, distribution, etc. In the criminal context, the term "prohibits" is synonymous with criminalizes," and suggests an offense-based approach. And the offense-based approach applies equally to federal and state predicate offenses.

(Initial Brief of Appellant at 10). Wiggins specifically argued that *Smith* was abrogated by the Court's recent decision in *Shular v. United States*, 140 S. Ct. 779 (2020), which may inform consideration of the issue. And although *Shular* rejected the "generic offense" approach in considering a similar provision under ACCA, the

difference in the language of the Guidelines favors the traditional offense-based categorical approach under the Guidelines. (Initial Brief of Appellant at 7-10).

In the alternative, Wiggins argued that even if the generic offense analysis did not apply, under the conduct-based approach adopted in *Shular*, his prior conviction still did not qualify as a "controlled substance offense." (Initial Brief of Appellant at 7). Under Florida law his crime did not necessarily entail the *conduct* of "distribution" because "sale" or "possession with intent to sell" may be proved by delivery and delivery may be proved by an *attempted* transfer of a controlled substance for value. (Initial Brief of Appellant at 13-15, citing *In re Standard Jury Instructions in Criminal Cases*, 153 So.3d 192, 196 (Fla. 2014); Fla. Std. Jury Instr. (Crim.) 25.6; Fla. Stat. § 893.02(6); *Milazzo v. State*, 377 So. 2d 1161 (Fla. 1979) (by statute, both the actual transfer and the attempted transfer are sufficient to constitute the act of "delivery," therefore, there can be no such offense as attempted delivery of cocaine); *State v. Vinson*, 298 So. 2d 505 (Fla. 2d DCA 1974) ("[O]ne who attempts to make the transfer is guilty of the substantive offense even though the transfer is not successful.")). Wiggins therefore argued his offense did not qualify as a "controlled substance offense" because it may be proved by the attempted transfer of a controlled substance and did not necessarily entail the *conduct* of distribution.

The circuit court, in an unpublished decision, rejected Wiggins's arguments. The circuit court first opined that *Shular* did not abrogate *Smith*, rejected the generic offense approach, and ruled the prior conviction constituted a "controlled substance offense" under *Smith*. (App. A). In the alternative, the circuit court rejected the claim

that an "attempt" offense cannot be a controlled substance offense under the Guidelines, stating:

> Second, we are bound by the commentary to § 4B1.2(b), which says that an attempt to commit a controlled substance offense qualifies as a predicate felony under the Guidelines. *See* [*United States v. Lange*, 862 F.3d 1290, 1294 (11th Cir. 2017)].

United States v. Wiggins, 840 F. App'x 498 (11th Cir. 2021) (App. A).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the decision below defines a split of authority among the circuit courts and erodes the rules guiding the categorical and modified categorical approaches articulated in decisions such as *Taylor v. United States*, 495 U.S. 575 (1990), *Shepard v. United States*, 544 U.S. 13 (2005), *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S.Ct. 2243 (2016).

An overwhelming majority of circuit courts hold that the determination of "controlled substance offenses" under the Guidelines requires an offense-matching categorical (or modified categorical) approach as explained in *Taylor* and its progeny. The present case is worthy of certiorari review because the conflict implicates a vast number of criminal cases and because the continued viability of the majority approach may have been cast in doubt by the Court's recent decision in *Shular v. United States*, 140 S. Ct. 779 (2020), construing a similarly worded provision of the Armed Career Criminal Act.

I

> The law of the Eleventh Circuit conflicts with that of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits as to whether the Guideline definition of "controlled substance offense" requires an offense-matching categorical approach.

The circuit courts generally apply the categorical and modified categorical approaches to the determination of qualifying offenses under the Sentencing Guidelines. In the context of "controlled substance offenses" under § 4B1.2(b), *see e.g.*, *United States v. Capelton*, 966 F.3d 1 (1st Cir. 2020); *United States v. Townsend*,

897 F.3d 66 (2d Cir. 2018); *United States v. Nasir*, 982 F.3d 144 (3rd Cir. 2020) (en banc); *United States v. Dozier*, 848 F.3d 180 (4th Cir. 2017); *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016); *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc); *United States v. Smith*, 921 F.3d 708 (7th Cir. 2019); *United States v. Maldonado*, 864 F.3d 893 (8th Cir. 2017); *United States v. Brown*, 879 F.3d 1043 (9th Cir. 2018); *United States v. Madkins*, 866 F.3d 1136 (10th Cir. 2017).

Here, the relevant Guideline provides:

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

USSG § 4B1.2(b) (November 1, 2018 Guidelines Manual).

The "controlled substance offense" provision of the Guidelines creates a class of enumerated offenses. The enumerated offenses are: (1) manufacture of a controlled substance; (2) import of a controlled substance; (3) export of a controlled substance; (4) distribution of a controlled substance; (5) dispensing a controlled substance; (6) possession of a controlled substance with intent to manufacture; (7) possession of a controlled substance with intent to import; (8) possession of a controlled substance with intent to export; (9) possession of a controlled substance with intent to distribute; (10) possession of a controlled substance with intent to dispense; (11) possession of a counterfeit controlled substance with intent to manufacture; (12) possession of a counterfeit controlled substance with intent to import; (13) possession

of a counterfeit controlled substance with intent to export; (14) possession of a counterfeit controlled substance with intent to distribute; and (15) possession of a counterfeit controlled substance with intent to dispense. These are the names of the generic controlled substance offenses enumerated in § 4B1.2(b). These are also the names of the generic drug trafficking offenses listed in the Federal Code. *See* 21 U.S.C. §§ 841(a)(1) and (a)(2) (listing drug trafficking crimes under federal law). In accordance with the categorical approach explained in *Taylor*, to determine whether a prior state offense constitutes a "controlled substance offense" under the Guidelines, the federal courts should compare the elements of the state offense with the elements of the generic federal crime.

In *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), and the present case, the circuit court deviated from the established methodology by disavowing an essential feature of the categorical approach – the determination of the elements of the "generic" offense.

> We need not search for the elements of "generic" definitions of "serious drug offense" and "controlled substance offense" because these terms are defined by a federal statute and the Sentencing Guidelines, respectively. . . . No element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by either definition. We look to the plain language of the definitions to determine their elements. . . .

Id. at 1267.

In the present case, Wiggins argued the lack of a *mens rea* element made his Florida conviction for possession with intent to sell cocaine broader than the federal generic crime and, therefore, not a qualifying controlled substance offense. Under

the Eleventh Circuit's model, however, the plain language of § 4B1.2(b) did not include a *mens rea* element, so *mens rea* was not required, and Wiggins's prior Florida offense was no broader than the Guideline definition. The Eleventh Circuit therefore rejected Wiggins's argument.

A majority of circuit courts take a contrary view. In *United States v. Capelton*, 966 F.3d 1 (1st Cir. 2020), the court applied the categorical approach of *Taylor* to determine whether a prior Ohio conviction qualified as a "controlled substance offense" under the Guidelines. The court agreed that USSG § 4B1.2(b) contains a list of enumerated offenses. "[A] prior conviction qualifies as one for a ['controlled substance offense'] so long as the elements of the prior offense encompass no more conduct than do the elements of the 'generic' version of an offense that the guideline expressly enumerates." *Id*. at 6 (citations omitted); *see also United States v. Garcia-Cartagena*, 953 F.3d 14 (1st Cir. 2020) (an offense under § 4B1.2(b) refers to a "generic" crime as defined in the law, and not the defendant's conduct that happens to violate it).

The Second Circuit holds that the determination of a "controlled substance offense" requires the federal sentencing court to "compare the elements of [the state crime] to the elements of the corresponding generic federal crime." *United States v. Townsend*, 897 F.3d 66, 72 (2d Cir. 2018). If the "state statute is broader than its federal counterpart," the prior offense is not a "controlled substance offense." *Id*. By referring to a "corresponding generic federal crime," the Second Circuit construed the "controlled substance offense" provision as an enumerated offense clause requiring a

comparison between the elements of the prior offense of conviction with the elements of the generic federal crime identified in § 4B1.2(b). "In other words, a state statute that punishes conduct not criminalized by federal law cannot affect the Guidelines." *Id*. at 73.

In *Townsend*, the dispute was whether a conviction for an offense involving a substance controlled only by state law would qualify as a controlled substance offense under § 4B1.2(b). Finding the guideline ambiguous on this point, and proceeding from the presumption that federal sentencing provisions must be construed under federal standards, the court held the definition of the guideline term "controlled substance" must refer to the definition provided in the federal Controlled Substances Act. *Id*. at 71. Accordingly, because the defendant was convicted under an indivisible state statute for sale of a substance not criminalized under federal law, his prior conviction did not constitute a controlled substance offense under § 4B1.2(b). *Id*. at 74.

The Third Circuit holds that a prior state conviction cannot qualify as a "controlled substance offense" "if its elements are broader than those of a listed generic offense." See *United States v. Glass*, 904 F.3d 319, 321-22 (3rd Cir. 2018) (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2551 (2016). As indicated in *Glass*, the Third Circuit views § 4B1.2(b) as setting forth a list of generic drug offenses, while holding that the defendant's prior drug trafficking conviction did not "sweep more broadly than § 4B1.2(b)." *Id*. at 324. Significantly, the court did not simply compare the elements of the prior state crime to the plain text of § 4B1.2(b), as would the

Eleventh Circuit. The court compared the definition of the state element of "delivery" to the Guideline terms "distribute" and "dispense." *Id*. at 323. In defining the "federal counterpart" to the state offense, the court referred to the federal Controlled Substance Act which defines "delivery" in 21 U.S.C. § 802(8). *Id*. at 322. Comparing the state definition of delivery to the federal statutory definition the court was able to conclude that the state offense was no broader than the federal generic offense. *Glass* teaches that the determination of the federal generic crime under § 4B1.2(b) may require reference to the federal law, i.e., the Controlled Substance Act.

In *United States v. Dozier*, 848 F.3d 180 (4th Cir. 2017), the court held that a prior West Virginia conviction for attempted distribution of a controlled substance did not qualify as a "controlled substance offense." *Id*. at 181. Following the *Taylor* model, the court opined that the elements of the prior offense must correspond to the elements of the "enumerated offense." *Id*. at 183. Moreover, in the context of an "attempt" offense, the court must first determine whether the state's definition of attempt comports categorically with the generic attempt. *Id*. at 185. Second, the court must determine "whether the underlying state offense is a categorical match for the Guideline predicate offense." *Id*. Both inquiries are required to determine whether the state statute sweeps more broadly than the "generic crime." *Id*. at 185-86 (citing *Descamps*, 133 S. Ct. at 2281).

In *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), the court explained that it employs the categorical approach to determine "whether a prior conviction is included within an offense defined or enumerated in the Guidelines." *Id*. at 572. The

defendant argued that his prior Texas conviction for delivery of heroin did not qualify as a "controlled substance offense" because the offense broadly included an "offer to sell" a controlled substance. The circuit court agreed that the prior offense proscribed a "greater swath of conduct than the elements of the relevant [Guidelines] offense." *Id*. at 576 (quoting *Mathis*, 136 S.Ct. at 2551). This "mismatch of elements" meant that the prior conviction did not constitute a "controlled substance offense." *Id*. at 576 (quoting *Mathis*, 136 S. Ct. at 2551).

The Seventh Circuit agrees that the determination of a "controlled substance offense" requires an offense-matching categorical approach. The elements of the prior crime of conviction are examined to see if they "match" the elements of the "generic" offense. *United States v. Smith*, 921 F.3d 708, 712 (7th Cir.) (quoting *Mathis*, 136 S. Ct. at 2248), *cert. denied*, 140 S. Ct. 502 (2019). In *Smith*, the Seventh Circuit assumed that the Indiana offense of conviction – dealing in a controlled substance – was broader than a generic distribution offense because it included "financing" the manufacture or delivery. The court reasoned that the statute was divisible and, under the modified categorical approach, the government proved the defendant knowingly possessed with intent to *deliver* cocaine. *Id*. at 715. The elements of the prior offense therefore matched the elements of the offense enumerated in the Guidelines: "(1) possession (2) of a controlled substance (3) with intent to *distribute* that substance." *Id*. at 715-16. The court discounted any distinction between the state term "deliver" and the federal term "distribute," adopting the federal definition of "distribute" found in 21 U.S.C. § 802(11).

United States v. Maldonado, 864 F.3d 893 (8th Cir. 2017), is the same. "To determine whether a prior conviction qualifies as a controlled substance offense," the court employs a categorical approach. *Id.* at 897 (quoting *United States v. Robinson*, 639 F.3d 489, 495 (8th Cir. 2011)). The court inquires "whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding [controlled substance offense]." *Id.* at 897 (quoting *United States v. Roblero-Ramirez*, 716 F.3d 1122, 1125 (8th Cir. 2013)). Applying the appropriate test, the court rejected the defendant's claim that state statutes defining "delivery" encompassed mere offers to sell drugs. *Id.* at 899-901. The circuit court therefore concluded that Maldonado's prior convictions for (1) attempt to conspire to distribute methamphetamine in Nebraska and (2) possession with intent to deliver marijuana in Iowa fell within the generic definitions of "distribution" or "dispensing" a controlled substance set forth in § 4B1.2(b). *Id.* at 900-01.

Similarly, the Ninth Circuit applies the categorical approach to the determination of controlled substance offenses under the Guidelines. *United States v. Brown*, 879 F.3d 1043 (9th Cir. 2018). "If the statute of conviction sweeps more broadly than the generic crime, a conviction under that law cannot categorically count as a qualifying predicate, even if the defendant actually committed the offense in its generic form." *Id.* at 1047 (quoting *United States v. Hernandez*, 769 F.3d 1059, 1062 (9th Cir. 2014)). In *Brown*, the court concluded that the Washington offense of conspiracy to distribute a controlled substance was broader than the generic federal

definition because, unlike the generic crime, it criminalized an agreement with a state agent. *Id*. at 1048-49.

Rounding out the majority view, *United States v. Madkins*, 866 F.3d 1136 (10th Cir. 2017), held that the categorical approach applied to the determination of "controlled substance offenses" under § 4B1.2(b). *Id*. at 1144-45. The elements of the prior conviction were compared to the elements of the "generic predicate offense" to see if there is a match. *Id*. at 1145. In *Madkins*, the prior Kansas conviction for possession with intent to sell cocaine and marijuana did not qualify as a controlled substance offense because the Kansas statute defined "sale" to include an "offer to sell" which the court found to be broader than "distribution" under the Guidelines. *Id*. at 1145. Significantly, the court did not rely on the plain text of § 4B1.2(b). The court noted that the Guideline term "distribute" must be accorded the definition found in 21 U.S.C. § 802(11). *Id*. at 1144.

Also significant is the fact that *Madkins* expressly repudiated the circuit's former "conduct-based approach" described in *United States v. Smith*, 433 F.3d 714 (10th Cir. 2006). In *Smith*, the court held that a prior conviction for receiving proceeds from a drug sale qualified as a "controlled substance offense" under § 4B1.2(b), reasoning that the defendant's actual conduct—selling drugs and receiving money therefor—could have been charged as distribution of a controlled substance and therefore constituted a controlled substance offense under § 4B1.2(b). The court's repudiation of *Smith* is also a repudiation on the Eleventh Circuit's test in *Travis*

Smith, finding any state offense prohibiting "activities" "related to" distribution of a controlled substance to qualify under § 4B1.2(b).

The above survey of circuit court decisions demonstrates a clear split in the interpretation of "controlled substance offenses" under § 4B1.2(b) of the sentencing Guidelines. The split of authority begs resolution by the Court.

> **A.** Petitioner's case presents an appropriate vehicle for resolution of the circuit split on the important question presented.

This case involves a question which arises in a vast number of cases throughout the federal system, i.e., whether a prior conviction qualifies as a "controlled substance offense" for the purpose of a Guidelines sentencing range enhancement. The split of authority is well developed, mature and ripe for review. Nearly every circuit has weighed in on the question with differing results.

The record is clear. The question whether Petitioner's prior Florida conviction qualifies as a controlled substance offense was preserved for review in the district court and the circuit court.

The resolution of the question is dispositive of the case. If Mr. Wiggins's prior conviction does not qualify as a controlled substance offense, his base offense level will be reduced by four, and he will be entitled to a resentencing hearing. *Cf*. USSG § 2K2.1(a)(2), with § 2K2.1(a)(4). His advisory sentencing range of 63-78 months would be reduced to 33-41 months.

B. The decision below is wrong.

The decision below is wrong because it conflicts with the law of the Court established by *Taylor* and its progeny—a generically identified offense will qualify for a federal sentencing enhancement if its elements are the same as, or narrower than, the generic federal crime. The decision below deviated from this rule because the circuit court failed to recognize the "controlled substance offense" provision of § 4B1.2(b) encompasses a list of generic enumerated offenses, and Petitioner's offense lacks the *mens rea* required of the generic federal crime.

The government may argue that § 4B1.2(b) pertains to offenses that include specified *conduct* rather than enumerated offenses, just as the Court interpreted the somewhat similar provision of 18 U.S.C. § 924(e)(2)(A)(ii) in *Shular v. United States*, 140 S. Ct. 779 (2020). In *Shular*, the statutory provision defined "serious drug offenses," in pertinent part, as "an offense under State law *involving* manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance. . . ." (e.s.). The Court concluded that the term "involving" belied a legislative purpose to identify generic crimes; it referred to conduct. The Court should resist the temptation to follow *Shular* here because there are critical distinctions between the two provisions.

The qualifying "controlled substance offenses" are defined as:

> an offense under federal or state law, . . . that prohibits the manufacture, import, export, distribution, or dispensing 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.

USSG § 4B1.2(b) (November 1, 2018 Guidelines Manual).

The first difference between the Guideline provision and the statutory provision is that the guideline encompasses both federal and state qualifying offenses with identical text, thus suggesting similarity in the nature of the federal and state offenses. In the Armed Career Criminal Act, however, Congress provided separate definitions for the federal and state qualifying offenses, thus suggesting independent means of determination. *Cf.* 18 U.S.C. § 924(e)(2)(A)(i) with (A)(ii). See *Shular*, 140 S. Ct. at 786 ("the divergent text of the two provisions" of the serious-drug-offense definition . . . "makes any divergence in their application unremarkable.") (quoting Brief for United States at 22).

Next, § 4B1.2(b) does not use the term "involving" critical to the Court's reasoning in *Shular*; it uses the term "prohibits." In *Shular*, the Court reasoned the term "involving" naturally "suggests that the descriptive terms immediately following the word "involving" identify conduct." *Id*. at 785. But as explained by the First Circuit in *United States v. Garcia-Cartagena*, 953 F.3d 14 (1st Cir. 2020), not so for the term "prohibits." Under § 4B1.2, whether under the definition of "crime of violence" or "controlled substance offense,"

> it's the "*offense under federal or state law*," and not the defendant's "conduct," that must "ha[ve] as an element" the violent use of force, USSG § 4B1.2(a)(1), . . . or "prohibit" drug possession with distributive intent."

Id. at 22 (emphasis in original).

> The same goes for § 4B1.2(b), which (covering "an offense under federal or state law . . . that prohibits" drug

> trafficking) also refers to a "generic" crime as defined in the law, and not the defendant's conduct which happens to violate it. After all, criminal laws—not criminal defendants—are what "prohibit" drug dealing (unless we are to say that legislators commit "controlled substance offenses" by enacting them).

Id. at 23.

Under the offense-matching approach, the decision below is clearly wrong. In 2002, the Florida Legislature enacted a sweeping reform of its controlled substance crimes. *See* Fla. Stat. § 893.101. Under the new law, no drug offense under Chapter 893, Florida Statutes, includes a *mens rea* element.[1] Florida makes the unknowing possessor or distributor just as guilty as the knowing.[2] The generic federal drug

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[1] Some Florida drug crimes require proof of "knowledge of the presence of the substance." While this is a "state of mind" element, it is not a guilty state of mind element or mens rea element, for it is satisfied by knowledge of the presence of an unknown substance. See *Chicone v. State*, 684 So. 2d 736 (Fla. 1996), *superseded on other grounds by* Fla. Stat. § 893.101 (eliminating the judicially inferred element of knowledge of the illicit nature of the substance).

[2] In dictum, *Shular* suggested that Florida's disregard for *mens rea* is "overstated." *Shular*, 140 S. Ct. at 787. The Supreme Court pointed to a Florida standard jury instruction providing that where the defendant raises the affirmative defense of lack of knowledge of the illicit nature of the substance the jury is then "require[d]" to find guilty knowledge beyond a reasonable doubt. *Id*. The dictum is misguided for it overlooks a key feature of the Florida law applicable to affirmative defenses.

Under Fla. Stat. § 893.10(1), the defendant asserting an affirmative defense bears the initial burden of producing competent evidence in support of the defense. *See In re Standard Jury Instructions In Criminal Cases – Instructions 25.9 – 25.13*, 112 So. 3d 1211, 1214 (Fla. 2013) (Pariente, J., concurring) (citing Fla. Stat. § 893.10(1)060 (Fla. 1st DCA 1983); *Smith v. State*, 826 So. 2d 1098, 1099 n.1 (Fla. 5th DCA 2002). The defendant must carry his initial burden of production in order to shift the burden of proof to the State. *See Wright*. If the jury finds the defendant failed to carry his initial burden the State will not be required to disprove the defense. Applied here, the failure of the defense to carry its initial burden of production means that the State would not have to prove the defendant had knowledge of the illicit nature of the

trafficking offenses such as manufacturing, distributing or possessing with intent to manufacture, distribute, etc., a controlled substance, similar to the list set forth in USSG § 4B1.2(b), include the *mens rea* element of knowledge of the illicit nature of the substance. *See* 21 U.S.C. § 841(a); *McFadden v. United States*, 135 S. Ct. 2298 (2015), and the survey of state laws, circa 1986,[3] set forth in Appendix B, describing the *mens rea* requirements for drug trafficking offenses. Indeed, 48 of 50 states required a *mens rea* element even for the lesser offense of simple possession of a controlled substance. *See Dawkins v. State*, 547 A.2d 1041, 1044 n.6 (Md. 1988) (surveying *mens rea* requirement for simple possession of a controlled substance in 50 states). Even the Eleventh Circuit acknowledges that where an offense-matching categorical approach applies, a Florida drug conviction is broader than its generic analogue because the Florida offense lacks the element of knowledge of the illicit nature of the substance. See *Donawa v. U.S. Att. General*, 735 F.3d 1275 (11th Cir. 2013) (due to lack of *mens rea* element, and notwithstanding availability of affirmative defense of lack of knowledge of the illicit nature of the substance, Florida

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substance. So, too, the jury's verdict of guilt would not encompass a finding that the defendant had knowledge of the illicit nature of the substance. Whether the State is required to prove the defendant acted with guilty knowledge is a matter resting within the discretion of the jury. It cannot be said, therefore, as a categorical matter, that where the defendant raises the affirmative defense of lack of knowledge of the illicit nature of the substance the standard jury instructions *require* a finding of guilty knowledge beyond a reasonable doubt as suggested by the *Shular* dictum.

[3] The current Guidelines definition of "controlled substance offense" was originally adopted November 1, 1989. *See* Federal Sentencing Guidelines Manual, Vol. 3, (2011 ed.), Appendix C, Amendment 268, effective November 1, 1989. A 1986 survey of state laws therefore reflects the presumptive knowledge of the Sentencing Commission at the time of the Amendment.

conviction for possession of cannabis with intent to sell or deliver does not constitute a "drug trafficking" aggravated felony under immigration statute as it is broader than its generic analog).

Petitioner's prior Florida conviction for possession of cocaine with intent to sell is broader than its generic counterpart and does not qualify as a "controlled substance offense" under § 4B1.2(b). Moreover, even if the Court were to apply a conduct-based approach as in *Shular*, Petitioner's conduct would not satisfy the test because his Florida conviction could have been based upon possession coupled with an attempt to sell cocaine.

> "Sell" means to transfer to or deliver something of value to another person in exchange for money or something of value or a promise of money or something or value.
>
> "Deliver" or "delivery" means the actual, constructive, or *attempted* transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

Fla. Std. Jury Instr. (Crim.) 25.6 (emphasis added); Fla. Stat. § 893.02(6); *see also Milazzo v. State*, 377 So. 2d 1161 (Fla. 1979) (by statute, both the actual transfer and the attempted transfer are sufficient to constitute the act of delivery); *State v. Vinson*, 298 So. 2d 505 (Fla. 2d DCA 1974) ("[O]ne who attempts to make the transfer is guilty of the substantive offense even though the transfer is not successful.").

In sum, Petitioner's prior Florida conviction does not constitute a "controlled substance offense" for either of two reasons: (1) under the generic offense analysis, his crime lacked the *mens rea* element required by the federal generic crime; (2) under a conduct-based test, his crime did not require the conduct of "sale" because it could

be committed by an attempted sale (or transfer). In either case, the decision below was wrong.

II

> Whether courts may defer to Sentencing Guideline commentary which strays from the unambiguous text of the Guideline to conclude that "distribution" of drugs includes attempted distribution of drugs.

If the Court rejects the generic offense analysis urged in ISSUE I and adopts the conduct-based approach articulated in *Shular*, the question then is whether Petitioner's prior conviction required the conduct of possession with intent to sell cocaine. Petitioner's argues his offense did not necessarily entail the conduct of possession with intent to sell cocaine because it could have been committed by possession with the *attempt* to sell cocaine. The government may argue that such conduct was not required because the commentary to the Guideline provides that the definition of "controlled substance offense" includes the offenses of aiding and abetting, conspiring and attempting to commit such offenses. See USSG § 4B1.2, comment (n.1). All of this tees up the second issue presented. Petitioner contends the guideline commentary embracing attempts and other inchoate offenses constitutes an invalid exercise of the authority vested in the Sentencing Commission because it is inconsistent with the plain text of the Guideline.

A. The Circuit Courts disagree on whether the courts may defer to commentary which expands the scope of unambiguous Guidelines text.

Widespread disagreement exists among the circuit courts on whether the Sentencing Commission may use commentary to expand the scope of unambiguous

Guidelines text. Three circuits hold the Commission may not. In *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc), the court held that nothing in § 4B1.2(b) suggests the inclusion of attempt offenses under the definition of "controlled substance offense." *Id*. at 386-87. Because the commentary was implemented without the constraints of Congressional review and notice and comment, the Commission exceeded its authority by adding attempt offenses to the unambiguous Guideline. *Id*. Controlled by the plain text of the Guideline, the circuit court ruled that the lower court erred by counting the defendant's prior conviction for attempted delivery of a controlled substance as a "controlled substance offense." *Id*. at 387.

United States v. Winstead, 890 F.3d 1082 (D.C. Cir. 2018), is in the same camp. The guideline excludes inchoate offenses even though its neighboring provision specially includes attempt crimes in the definition of "crime of violence." *Id*. at 1091. While noting the contrary decisions of sister courts, *Winstead* held that the commentary improperly adds the crime of attempted distribution of a controlled substance and represents an invalid exercise of the Commission's authority. *Id*.

Most recently, the Third Circuit came to the same conclusion in *United States v. Nasir*, 982 F.3d 144 (3rd Cir. 2020) (en banc), overruling its prior contrary decision in *United States v. Hightower*, 25 F.3d 182 (3rd Cir. 1994). "The guideline does not even mention inchoate offenses. That alone indicates it does not include them." *Id*. at 159. Based upon the Court's recent decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the circuit court held it could not depart from the unambiguous text of the guideline and concluded that a prior conviction for attempting to possess with intent

to distribute cocaine did not qualify as a "controlled substance offense." *Id*. ay 156-160.

The following circuits take the opposite view holding that the guideline commentary including inchoate offenses is a reasonable interpretation of the text of § 4B1.2(b). *See United States v. Lewis*, 963 F.3d 16, 22 (1st Cir. 2020); *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020); *United States v. Adams*, 934 F.3d 720, 729 (7th Cir. 2019); *United States v. Broadway*, 815 F. App'x 95, 96 (8th Cir. 2020) (quoting *United States v. Mendoza-Figueroa*, 65 F.3d 691, 693 (8th Cir. 1995)) (en banc); *United States v. Crum*, 934 F.3d 963 (9th Cir. 2019); *United States v. Martinez*, 602 F.3d 1166, 1174 (10th Cir. 2010); *United States v. Lange*, 862 F.3d 1290, 1295 (11th Cir. 2017); *see also United States v. Cingari*, 952 F.3d 1301, 1308 (11th Cir. 2020).

B. Petitioner's case presents an appropriate vehicle for resolution of the circuit split on the important question presented.

This case involves a question which arises in a vast number of cases throughout the federal system—whether the Sentencing Commission exceeded its authority in construing § 4B1.2(b) to include inchoate offenses. The split of authority is well developed, mature and ripe for review. Nearly every circuit has weighed in on the question with differing results. Although the Eleventh Circuit takes the majority view, the minority view seems to be gaining traction, particularly after the Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), as evidenced by the recent en banc decisions in *United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020) (en banc) and *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc). Although the pendulum seems

to be swinging toward the minority view, the split of authority is not likely to resolve itself because the Eighth Circuit is committed to the majority view through its en banc decision in *Mendoza-Figueroa*, and as shown here, the Eleventh Circuit has reaffirmed its position even after *Kisor*.

The record is clear. The question whether the Sentencing Commission exceeded its authority was preserved for review in the district court because Petitioner raised the claim that his prior Florida conviction did not qualify as a controlled substance offense at sentencing. And on appeal, the Eleventh Circuit rejected his claim that his conviction did not qualify because it was merely an "attempt" crime.

The resolution of the question is dispositive of the case. If Mr. Wiggins's prior conviction does not qualify as a controlled substance offense, his base offense level will be reduced by four, and he will be entitled to a resentencing hearing. *Cf*. USSG § 2K2.1(a)(2), with § 2K2.1(a)(4). His advisory sentencing range of 63-78 months would be reduced to 33-41 months.

C. The decision below is wrong.

If the proper disposition of this issue was not clear before, it is clear after the Court's decision in *Kisor v. Wilkie*. In *Kisor*, the Court reaffirmed a bedrock principle of administrative law—a court should not defer to an agency's interpretation of its own regulation "unless the regulation is genuinely ambiguous." *Id*. at 2415.

> And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction.

Id. at 2415.

Here, the threshold determination of genuine ambiguity calls for the application of a most basic rule of construction—*expressio unius est exclusion alterius* (the expression of one thing implies the exclusion of another). *See Winstead*, 890 F.3d at 1091. Applying that canon of construction, the Third Circuit opined: "The guideline [§ 4B1.2(b)] does not even mention inchoate offenses. That alone indicates it does not include them." *Nasir***,** 982 F.3d at 159. Applying this basic tool of construction, as required by *Kisor*, leads to the strong conclusion that the Sentencing Commission exceeded its authority by interpreted the Guidelines definition of "controlled substance offenses" to include inchoate offenses.

CONCLUSION

For the reasons stated above, the Court should grant the writ.

Respectfully submitted,

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