No. _____

In the Supreme Court of the United States

ANTONIO RODRIGUEZ, JR., *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAUREEN SCOTT FRANCO
Federal Public Defender

BRADFORD W. BOGAN
Assistant Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206-1205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

Is it obvious error to find a prior federal drug trafficking conviction is a "controlled substance offense" under the Sentencing Guidelines when the substance trafficked is not, at the time of sentencing, categorically a federally controlled substance?[1]

---

[1] The same question is presented in *Belducea-Mancinas v. United States*, No. 22-5204 (petition for cert. filed July 25, 2022).

No. _____

In the Supreme Court of the United States

ANTONIO RODRIGUEZ, JR., *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Antonio Rodriguez, Jr. asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on May 23, 2022.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

- *United States v. Antonio Rodriguez, Jr.*, No. 7:21-CR-77-DC-1 (W.D. Tex.) (judgment entered July 19, 2021)
- *United States v. Antonio Rodriguez, Jr.*, No. 21-50680 (5th Cir.) (judgment and opinion entered May 23, 2022)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

United States Sentencing Guidelines

OPINION BELOW

A copy of the unpublished opinion of the court of appeals, *United States v. Rodriguez*, No. 21-50680 (5th Cir. May 23, 2022) (per curiam), is reproduced at Pet. App. 1a–3a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on May 23, 2022. This petition is filed within 90 days after entry of the judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

1. The Sentencing Reform Act instructs courts to calculate:

> (4) the kinds of sentence and sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines— …
>
> (ii) that … are in effect on the date the defendant is sentenced[.]

18 U.S.C. § 3553(a)(4)(ii).

2. Effective December 21, 2018, the federal Controlled Substances Act defines "marihuana" as:

> (16)(A) Subject to subparagraph (B), the term "marihuana" means all parts of the plant Cannabis sativa L.,

> whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.
>
> (B) The term "marihuana" does not include--
>
> (i) hemp, as defined in section 1639o of Title 7; or
>
> (ii) the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C. § 802(16) (Dec. 21, 2018).

3. "Hemp" is defined as "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 1639o (2018).

4. The definition of "marihuana" before the 2018 amendment was:

> (16) The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

> Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C. § 802(16) (effective through Dec. 20, 2018).

FEDERAL SENTENCING GUIDELINES PROVISIONS INVOLVED

1. Policy statement 1B1.11 provides:

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b)(1) If the court determines that use of the Guide-lines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

(2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.

2. Guideline §2K2.1(a)(2) provides:

Base Offense Level (Apply the Greatest) … **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[.]

3. Guideline §4Bl.2(b) 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….

INTRODUCTION

The district court determined that Antonio Rodriguez, Jr. was subject to an enhanced base offense level under the Sentencing Guidelines because he had a prior conviction for a "controlled substance offense:" a 2008 federal conviction for trafficking marijuana. The court sentenced him to 87 months' imprisonment, the top of the resulting Guidelines range. Had the enhancement not applied, Rodriguez's Guidelines range would have been 46 to 57 months.

On appeal, Rodriguez argued that the district court plainly erred by applying the enhancement because statute underlying his prior federal marijuana conviction was categorically broader than the applicable definition of a "controlled substance offense:" the former included hemp and the latter does not.

Had Rodriguez been prosecuted in the Fourth or Ninth Circuits, his sentence would have been vacated due to the plain error. *See United States v. Hope*, 28 F.4th 487, 506–08 (4th Cir. 2022); *United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021). But the Fifth Circuit held that any error was neither clear nor obvious because circuit precedent was "unsettled," given that the court "has never held that a pre-2018 predicate conviction does not qualify as a 'controlled substance offense' for purposes of [Sentencing Guidelines] because hemp was subsequently removed from the

[Controlled Substances Act] prior to the time of federal sentencing." Pet. App. 3a (quoting *United States v. Belducea-Mancinas*, No. 20-50929, 2022 WL 1223800, at *1 (5th Cir. Apr. 26, 2022) (per curiam) (unpublished)). But the Fifth Circuit had already held that the term "controlled substance" in the Sentencing Guidelines *is* defined by the federal CSA. *United States v. Gomez-Alvarez*, 781 F.3d 787 (5th Cir. 2021). The straightforward application of precedent, statutes, and the Guidelines render the error plain.

STATEMENT

Rodriguez was indicted on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He pleaded guilty as charged.

A probation officer prepared a presentence report recommending a base offense level of 24, under guideline §2K2.1(a)(2). That base offense level applies if the defendant committed the offense after "sustaining at least two felony convictions of either a crime of violence or a controlled substance offense[.]" U.S.S.G. §2K2.1(a)(2). The report said that Rodriguez had two such convictions: a 2008 federal conviction for possession of less than 50 kilograms of marijuana with the intent to distribute it, and a 2014 Texas conviction for aggravated assault. A three-level adjustment

for Rodriguez's acceptance of responsibility reduced the total offense level to 21. U.S.S.G. §3E1.1. The report calculated 12 criminal history points, placing Rodriguez in criminal history category V. U.S.S.G. Ch.5, Pt.A (Sentencing Table). The resulting Guidelines range was 70 to 87 months' imprisonment. *See* U.S.S.G. Ch.5, Pt.A (Sentencing Table).

Rodriguez did not submit any written objections to the presentence report. At sentencing, he brought up an issue with the criminal history scoring, although not one that affected the Guidelines calculation. Rodriguez noted that the probation officer had flagged an issue with a criminal history point that was assessed for one of the two aggravated assault counts for which Rodriguez had been convicted in 2014. The district court removed that point, which reduced Rodriguez's criminal history score to 11 but did not affect the Guidelines calculation because Rodriguez remained in criminal history category V with a Guidelines range of 70 to 87 months. *See* U.S.S.G. Ch.5, Pt.A (Sentencing Table). The court then adopted the report and that Guidelines calculation. Rodriguez asked the court to "consider a low end of the guideline range sentence." The Government, apart from telling the court that it had no objections to the report, did not say anything about what it be-

lieved to be an appropriate sentence. The court sentenced Rodriguez to 87 months' imprisonment, to be followed by three years' supervised release. The court did not say why it selected that particular sentence, other than that it "f[ou]nd the guideline range in this case to be fair and reasonable."

On appeal, Rodriguez argued his prior federal marijuana conviction did not categorically qualify as a "controlled sub-stance offense," as defined in guideline §4B1.2(b), because Congress removed hemp from the federal schedule of controlled substances by amending the definition of marijuana in 21 U.S.C. § 802(16) to exclude "hemp," which it defined as a cannabis sativa L. plant with a delta-9 tetrahydrocannabinol ("THC") concentration of 0.3 percent or less. Agriculture Improvement Act of 2018, Pub. L. 115-334, Title XII, § 12619(a), 132 Stat. 5018 (Dec. 20, 2018) ("2018 Farm Bill").

Rodriguez acknowledged his challenge was subject to plain-error review, but he argued a straightforward application of precedent and the plain text of the applicable statutory and Guidelines provisions dictated the result:

- Fifth Circuit precedent defines "controlled substance" by looking to federal law. *United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015) (adopting reasoning of *United*

States v. Leal-Vega, 680 F.3d 1160 (9th Cir. 2012), in interpreting former version of guideline §2L1.2); *United States v. Arayatanon*, 980 F.3d 444, 453 n.8 (5th Cir. 2020) ("Because the qualifying prior convictions in §2L1.2 and §4B1.2(b) are defined in substantially the same way, 'cases discussing these definitions are cited interchangeably.'").

- Congress instructs courts to apply the version of the Sentencing Guidelines in effect at sentencing, absent ex post facto concerns. 18 U.S.C. § 3553(a)(4)(ii); *see Peugh v. United States*, 569 U.S. 530, 533 (2013); U.S.S.G. §1B1.11.
- Guideline §4B1.2(b) uses the present tense and defines a "controlled substance offense" for both the instant offense and prior convictions.

Rodriguez also pointed to the Ninth Circuit's plain-error decision in *United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021). Like the Fifth Circuit, the Ninth Circuit had previously held that the term "controlled substance" in the former §2L1.2 "drug trafficking offense" definition is informed by the federal Controlled Substances Act. *Leal-Vega*, 680 F.3d at 1167. The Ninth Circuit held that the §4B1.2(b) "controlled substance" term was also de-

fined by the federal CSA and that the version of the CSA that applied to the definition was obviously the one in effect at the time of sentencing. *Bautista*, 989 F.3d at 705.

The Fifth Circuit affirmed in an unpublished opinion. Pet. App. 1a–3a. The court of appeals noted that it "has never held that a pre-2018 predicate conviction does not qualify as a 'controlled substance offense' for purposes of the [Sentencing Guidelines] because hemp was subsequently removed from the CSA prior to the time of federal sentencing." Pet. App. 3a (quoting *United States v. Belducea-Mancinas*, No. 20-50929, 2022 WL 1223800, at *1 (5th Cir. Apr. 26, 2022) (per curiam) (unpublished)). "Because our 'case law is unsettled' on this issue," the court continued, "'we cannot say that any error is clear or obvious' and Rodriguez cannot satisfy the second prong of plain-error review." Pet. App. 3a (quoting *United States v. Ramos Ceron*, 775 F.3d 222, 226 (5th Cir. 2014)).

REASONS FOR GRANTING THE WRIT

The decision below deepens a circuit conflict, and the Court should give courts and defendants guidance about this recurring, important issue.

The Fifth Circuit's refusal to find plain error deepens a circuit split. The Ninth Circuit, with the same legal backdrop to the Fifth Circuit, found plain error under circumstances nearly identical to Rodriguez's. *See United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021). Both circuits had held that the federal Controlled Substances Act informed the definition of "controlled substance" in a former version of guideline §2L1.2. *Id.* at 702 (citing *United States v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012)); *United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015) (same). Against that precedent, the Ninth Circuit held that the federal CSA obviously applied to the definition of "controlled substance" in guideline §4B1.2(b). *See Bautista*, 989 F.3d 702. Fifth Circuit law also dictates that result. See *United States v. Arayatanon*, 980 F.3d 444, 453 n.8 (5th Cir. 2020); *Gomez-Alvarez*, 781 F.3d at 794.

The Ninth Circuit further held that, because the Sentencing Reform Act requires courts to apply the Guidelines Manual in effect at the time of sentencing, the version of the CSA that defines "controlled substance" is obviously the one in effect at the time of sentencing. *Bautista*, 989 F.3d at 703; *see* 18 U.S.C.

§ 3553(a)(4)(ii). So has the Fourth Circuit. *See United States v. Hope*, 28 F.4th 487, 506–08 (4th Cir. 2022). The Fifth Circuit, by contrast, has held that application of the current CSA is not obvious—and thus the error cannot be plain. *See Belducea-Mancinas*, 2022 WL 1223800, at *1; Pet. App. 3a; *see also United States v. Williams*, 850 F. App'x 393, 402 (6th Cir. 2021).

This Court should resolve the important question of which version of the Controlled Substances Act applies to the guideline §4B1.2(b) "controlled substance offense" definition. To be sure, the Court often declines to resolve circuit splits involving application of the Sentencing Guidelines. *See, e.g., Guerrant v. United States*, 142 S. Ct. 640, 640 (2022) (denying petition about §4B1.2(b)); *Longoria v. United States*, 141 S. Ct. 978, 978 (2021) (denying petition about §3E1.1); *Braxton v. United States*, 500 U.S. 344, 348–49 (1991) (choosing to not resolve the first question "because the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of §1B1.2"). The Court recognizes that Congress gave the Sentencing Commission the duty to "periodically review and revise" the Guidelines and the power to decide which revisions are retroactive. *Braxton*, 500 U.S. at 348 (citing 28 U.S.C. § 944(o), (u) and U.S.S.G. §1B1.10).

But for more than three years, the Sentencing Commission lacked a quorum and was unable to resolve circuit splits over the meaning of particular guidelines. Even though the Commission regained a quorum in August 2022, there is no way to know when, or if, the Commission will resolve the circuit split over the meaning of "controlled substance" in §4B1.2(b). Meanwhile, "unresolved divisions among the Courts of Appeals can have direct and severe consequences for defendants' sentences." *Guerrant*, 142 S. Ct. at 641 (Sotomayor & Barrett, JJ., statement respecting denial of cert.). Defendants like Rodriguez are subjected to significantly higher Guidelines ranges than they would be if prosecuted in a different circuit. The Court should address the issue so that Rodriguez does not serve a sentence much longer than the one that is presumptively reasonable under the Sentencing Guidelines.

CONCLUSION

FOR THESE REASONS, Rodriguez asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
Tel.: (210) 472-6700
Fax: (210) 472-4454

s/ Bradford W. Bogan
BRADFORD W. BOGAN
Assistant Federal Public Defender

Counsel of Record for Petitioner

DATED: August 22, 2022