No. _____

IN THE
Supreme Court of the United States

TRACY LAMONT MILES,
***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 A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the term "controlled substance," from the "controlled substance offense" definition in U.S.S.G. § 4B1.2(b), is limited to substances that are federally controlled.

INTERESTED PARTIES

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

RELATED CASES

(1) *United States v. Miles,* No. 20-13174 (11th Cir. Jul. 22, 2022)

(2) *United States v. Miles,* No. 19-cr-20687-JEM (S.D. Fla. Aug. 11, 2020)

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Tracy Lamont Miles 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, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the July 22, 2022 unpublished decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the unpublished judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1), and is available at 2022 WL 2904076.

STATEMENT OF JURISDICTION

The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on July 22, 2022. This petition is timely filed pursuant to the Court's October 13, 2022 Order, which granted Miles' Application No. 22A313, and extended the deadline to file a petition for certiorari until November 19, 2022.

STATUTORY AND OTHER PROVISIONS INVOLVED

18 U.S.C § 3553(a) provides, in relevant part:

> The court, in determining the particular sentence to be imposed, shall consider . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . .

United States Sentencing Guideline § 2K2.1(a) provides that the base offense level or a person convicted of an 18 U.S.C. § 922(g)(1) violation is:

> (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.

United States Sentencing Guideline § 4B1.2(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 (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

The term "controlled substance" is not defined in the guidelines.

STATEMENT OF THE CASE[1]

Petitioner Tracy Miles' federal sentencing guideline range was enhanced because the district court found that his prior Florida drug offense qualified as a "controlled substance offense," under United States Sentencing Guideline § 4B1.2(b). Miles appealed, arguing that this prior offense presumably involved a substance that was not federally controlled, and therefore did not qualify as a guideline "controlled substance offense." The Eleventh Circuit affirmed, based on prior precedent holding that violations of Miles' statute of prior conviction were "controlled substance offenses," even though this precedent did not address whether the term "controlled substance" includes substances that are not federally controlled. *See United States v. Miles*, No. 20-13174, slip op. at 17-18 (11th Cir. Jul. 22, 2022) (citing *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014), and *United States v. Pridgeon*, 853 F.3d 1192, 1200 (11th Cir. 2017)).

Miles would have faced the same fate in the Fourth, Seventh, Eighth and Tenth Circuits, where courts have explicitly held that prior state drug convictions need not involve federally-controlled substances to qualify as § 4B1.2 "controlled substance offenses." *See United States v. Ward*, 972 F.3d 364, 372 (4th Cir. 2020); *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020); *United States v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021); *United States v. Jones*, 15 F.4th 1288 (10th Cir. 2021); *cert. denied*, 22-5342, 2022 WL 4657048 (U.S. Oct. 3, 2022).

[1] Citations to the record in the district court will be referred to by the abbreviation "DE" followed by the docket entry number, and the page number, as applicable.

In the Second and Ninth Circuits, however, Miles' prior Florida conviction would not count as a "controlled substance offense," because it presumably involved a substance that is not federally controlled. *See United States v. Townsend*, 897 F.3d 66, 70-72 (2d Cir. 2018); *United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021).[2,3] In at least two courts of appeals, then, Miles' sentencing guideline range—and likely his sentence—would have been lower, thereby creating "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," in violation of 18 U.S.C. § 3553(a)(6). This petition therefore presents an important federal question, of the sort that concerns the Court, because the Eleventh Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]" SUP. CT. R. 10. Accordingly, certiorari should be granted to resolve the circuit split, and to determine whether the term "controlled substance," from the "controlled substance offense" definition in § 4B1.2(b), is limited to substances that are federally controlled.

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[2] "The First and Fifth Circuits have not directly resolved th[is] question, but have indicated agreement with [the Second and Ninth Circuits'] approach." *Guerrant v. United States*, 142 S.Ct. 640 (U.S. Jan. 10, 2022) (Sotomayor, J., joined by Barrett, J., respecting the denial of certiorari) (citing *United States v. Crocco*, 15 F.4th 20, 23–25 (1st Cir. 2021), and *United States v. Gomez-Alvarez*, 781 F.3d 787, 792–794 (5th Cir. 2015)). The Sixth Circuit has "issued internally inconsistent decisions on the question." *Id*. (citing *United States v. Solomon*, 763 Fed. App'x 442, 447 (6th Cir. 2019)).

[3] This question is also currently pending before the Third Circuit Court of Appeals. *United States v. Jamar Lewis*, No. 21-2621 (3rd Cir. argued Sept. 6, 2022).

1. Petitioner Miles was convicted by a jury of the knowing possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). (DE58).
2. Prior to sentencing, the United States Probation Office prepared a final Presentence Investigation Report (PSR), which applied a base offense level of 24 to Miles' § 922(g)(1) offense, because Miles had purportedly previously sustained "two felony convictions of either a crime of violence or a controlled substance offense," pursuant to U.S.S.G. §§ 2K2.1(a)(2) and 4B1.2(b). (PSR ¶17).
3. The PSR identified Miles' prior Florida conviction for possession with intent to sell, manufacture, or deliver a controlled substance, as a "controlled substance offense." (PSR ¶¶17,36).
4. At sentencing, the district court adopted the PSR's recommended sentencing guideline range of 97 to 121 months' imprisonment. (DE87:10-11). The district court then imposed a sentence of 108 months' imprisonment, followed by 3 years of supervised release. (DE76).
5. Miles challenged on appeal the district court's reliance on his prior Florida conviction for possession with intent to sell, manufacture, or deliver a controlled substance, in violation of Florida Statutes § 893.13(1)(a)(2), because that conviction presumably involved a substance that is not federally

controlled.[4] Appellant Brief at 59-64, *United States v. Miles*, No. 20-13174 (11th Cir. filed Jul. 21, 2021). He therefore argued that his prior conviction was overbroad as compared to the guidelines' "controlled substance offense" definition, because "the term 'controlled substance' should be given the [] federal definition set out in the [Controlled Substances Act]." *Id*. at 62 (acknowledging circuit split on this issue).

6. The Eleventh Circuit Court of Appeals rejected Miles' challenge on plain error review because it found that:

> Miles's arguments are foreclosed by precedent. In *United States v. Smith*, we held that a conviction under Fla. Stat. § 893.13 is a "controlled substance offense" under § 4B1.2(b) of the Sentencing Guidelines. 775 F.3d 1262, 1268 (11th Cir. 2014). We rejected the argument that Fla. Stat. § 893.13's definition of a controlled substance was too broad and must be tied to statutory federal analogues or generic federal definitions. *Id*. at 1267; *see also United States v. Pridgeon*, 853 F.3d 1192, 1200 (11th Cir. 2017) (rejecting the argument that *Smith* was wrongly decided and affirming *Smith*'s holding that convictions under Fla. Stat. § 893.13 qualify as "controlled substance offenses" under the Sentencing Guidelines).

Miles, No. 20-13174, slip op. at 17.

7. This petition follows.

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[4] Although the PSR identified the controlled substance involved in Miles' prior offense as cocaine, Miles was convicted of violating § 893.13(1)(a)(2), which does not include cocaine. *Miles*, No. 20-13174, slip op. at 8. While it could not have involved cocaine, Miles' prior conviction under § 893.13(1)(a)(2) could have involved propylhexedrine, *see* Fla. Stat. §893.03(4)(b) (2018), which has not been federally controlled since 1991. *Schedules of Controlled Substances; Removal of Propylhexedrine From Control*, 56 Fed. Reg. 61372-01 (Dec. 3, 1991) (codified at 21 C.F.R. § 1308.22). Appellant Brief at 60, *United States v. Miles*, No. 20-13174 (11th Cir. filed Jul. 21, 2021).

REASONS FOR GRANTING THE WRIT

Petitioner Miles would have a lower sentencing guideline range pursuant to the law in at least two other federal circuits.[5] Certiorari review is warranted to resolve the unwarranted sentencing disparity that resulted in his case, and will continue to occur in federal criminal cases throughout the country, until the question presented is resolved. Moreover, the approach of the Second and Ninth Circuits is superior to that of the Eleventh, Tenth, Eighth, Seventh and Fourth Circuits, and should be adopted nationwide. Finally, while the resolution of this circuit split is one of the United States Sentencing Commission's fourteen "policy priorities" for the current amendment cycle, the Commission is not *required* to address the issue within that timeframe—and the Court is not required to, and should not, abstain from resolving an important federal question just because an agency *might* resolve it.

I. The Eleventh Circuit's approach is uniquely flawed.

According to the Eleventh Circuit, Miles' claim that his Fla. Stat. § 893.13(1)(a)(2) was not a "controlled substance offense," because it presumably involved a substance that is not federally controlled, was "foreclosed by precedent" because:

> In *United States v. Smith*, we held that a conviction under Fla. Stat. § 893.13 is a "controlled substance offense" under § 4B1.2(b) of the

[5] With one, as opposed to two, "crime of violence" or "controlled substance offense" priors, Miles' guideline range would have decreased from 97 to 121 months' imprisonment, to 78 to 97 months' imprisonment. Appellant Brief at 65, *Miles*, No. 20-13174.

> Sentencing Guidelines. 775 F.3d 1262, 1268 (11th Cir. 2014). We rejected the argument that Fla. Stat. § 893.13's definition of a controlled substance was too broad and must be tied to statutory federal analogues or generic federal definitions. *Id.* at 1267; *see also United States v. Pridgeon*, 853 F.3d 1192, 1200 (11th Cir. 2017) (rejecting the argument that *Smith* was wrongly decided and affirming *Smith*'s holding that convictions under Fla. Stat. § 893.13 qualify as "controlled substance offenses" under the Sentencing Guidelines).

Miles, No. 20-13174, slip op. at 17.

However, in *Smith*, the court was not asked to decide whether the guidelines' "controlled substance offense" definition encompassed prior state convictions involving substances that were not federally controlled. Instead, the defendant in *Smith* argued that his prior § 893.13(1)(a)[6] convictions were not "controlled substance offenses" because § 893.13(1)(a) does not include a *mens rea* element "with respect to the illicit nature of the controlled substance," whereas the generic federal offense and or federal analogue does contain such a *mens rea* element. 775 F.3d 1262, 1266-67. The court rejected this argument, reasoning that it "need not search for the elements of 'generic' definitions of . . . 'controlled substance offense,'"

[6] Florida Statutes § 893.13(1)(a) prohibits the sale, manufacturing, and delivery of a controlled substance, as well as the possession with intent to sell, manufacture, or deliver a controlled substance. Fla. Stat. § 893.13(1)(a). It has three tiers, which correspond with the degree of penalty (second degree felony, third degree felony, and misdemeanor) associated with the identity of the substance involved. Fla. Stat. § 893.13(1)(a)(1)-(3). The statute covers hundreds—if not thousands—of substances. *Id. See also* Fla. Stat. § 893.03. This includes substances that are not federally controlled, such as propylhexedrine. Fla. Stat. § 893.03(4)(b) (2018); *Schedules of Controlled Substances; Removal of Propylhexedrine From Control*, 56 Fed. Reg. 61372-01 (Dec. 3, 1991) (codified at 21 C.F.R. § 1308.22) (removing propylhexedrine from federal controlled substances schedule).

nor compare prior state drug offenses with "substantially similar" federal drug trafficking crimes, because the "plain language" of guidelines' "controlled substance offense" definition "unambiguously" "require[s] only that the predicate offense" "prohibits" "certain activities relating to controlled substances." *Id.* at 1267-68. The court thus held that "[n]o element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied" by the guidelines' "controlled substance offense" definition, and that the defendant's § 893.13(1)(a) convictions qualified as "controlled substance offenses." *Id.*

While the court in *Smith* did not decide the issue raised by Miles, the Eleventh Circuit has nonetheless repeatedly relied on *Smith* (and *Pridgeon,* 853 F.3d at 1198, 1200, which merely reaffirmed *Smith*) to summarily reject *any* "argument that convictions under Fla. Stat. § 893.13 are not 'controlled substance offenses,'" *see United States v. Roper*, 842 Fed. App'x 477, 481 (11th Cir. 2021), including the claim that § 893.13(1)(a) is overbroad because it includes substances that are not federally controlled. *See United States v. Howard*, 767 F. App'x 779, 784-85 (11th Cir. 2019) (recognizing that court "has not considered" the specific argument that § 893.13 is overbroad because it criminalizes substances that are not federally controlled, but holding that such a challenge was nonetheless "precluded by [] binding precedent in *Smith*").

Because *Smith* is applied in this broadly preclusive way, Eleventh Circuit defendants with prior § 893.13(1)(a) convictions that do not involve federally-controlled substances are in the same position as defendants in the Tenth, Eighth,

Seventh, and Fourth Circuits, where courts have explicitly held that a prior state drug conviction need not involve a federally-controlled substance to qualify as a "controlled substance offense." *See United States v. Jones*, 15 F.4th 1288 (10th Cir. 2021); *United States v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021); *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020); *United States v. Ward*, 972 F.3d 364, 372 (4th Cir. 2020). *See also Howard*, 767 F. App'x at 784 n.5 (rejecting, in dicta, argument that "controlled substance" under § 4B1.2 refers only to federally-controlled substances, because the guideline refers to offenses "under federal or state law," and, alternatively, because the defendant's prior Florida convictions involved cocaine, which "is both federally and state controlled").

While, as explained below, the Second and Ninth Circuits' contrary approach is the correct one, the Eleventh Circuit's approach is also uniquely flawed. *Smith* held only that § 893.13(1)(a) offenses were not overbroad, as compared to the guidelines' "controlled substance offense" definition, because that definition does not contain a *mens rea* element as to the illicit nature of the substance. *Smith*, 775 F.3d at 1267-68. *Smith* did not "squarely address" whether the term "controlled substance" in U.S.S.G. § 4B1.2(b) is limited to federally-controlled substances. *See Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (recognizing that where Court has "never squarely addressed [an] issue, and has at most assumed [the issue], [it is] free to address the issue on the merits" in a later case). The *Smith* court "at most assumed" that § 893.13(1)(a) met the other "controlled substance offense" criteria, and assumptions are not holdings. *See id*. *See also Fernandez v. Keisler*, 502 F.3d

337, 343 (4th Cir. 2007) ("We are bound by holdings, not unwritten assumptions."); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions."); *United States v. Norris*, 486 F.3d 1045, 1054 (8th Cir. 2007) (en banc) (Colloton, J., concurring in the judgment) (citing cases finding that *sub silentio* holdings, unstated assumptions, and implicit rejections of arguments by prior panel are not binding circuit precedent). Therefore, *Smith* should not foreclose consideration of Miles' claim. Moreover, because the guidelines' "controlled substance offense" definition *is* limited to federally-controlled substances, Miles' sentencing guideline range was miscalculated, to his detriment.

II. The Second and Ninth Circuits' contrary approach is correct.

In *United States v. Townsend*, the Second Circuit held that the term "controlled substance" in § 4B1.2 refers exclusively to a substance controlled by the [federal Controlled Substances Act] (CSA)." 897 F.3d 66, 71-72 (2nd Cir. 2018).

In so holding, the court rejected the position of the lower court, and the government, which was that, by including offenses under "state law," the "plain language" of § 4B1.2(b) "unambiguous[ly]" included substances controlled only by the state. *Id*. at 69-70. The Second Circuit instead found the guideline language to be ambiguous, noting:

> Although a "controlled substance offense" includes an *offense* "under federal or state law," that does not also mean that the *substance* at issue may be controlled under federal or state law. To include substances controlled under only state law, the definition should read "... a controlled substance *under federal or state law*." But it does not.

Id. at 70 (emphasis in original). The court further reasoned that "transitively apply[ing] the 'or state law' modifier from the term 'controlled substance offense' to the term 'controlled substance,'" would "undermine the presumption that federal standards define federal sentencing provisions." *Id.*

The court highlighted the long-standing presumption that "the application of federal law does not depend on state law unless Congress plainly indicates otherwise," which "applies equally to the Guidelines." *Id.* at 71 (citing *Jerome v. United States*, 318 U.S. 101, 104 (1943), among others). It further observed that, rather than allowing state law to determine whether a federal defendant qualifies for a federal sentencing enhancement, the Supreme Court has repeatedly required that state convictions satisfy a "uniform federal standard" before they can be used to enhance federal criminal punishment. *Id.* (citing *Taylor v. United States*, 495 U.S. 575, 579, 590-91 (1990), and *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562, 1570 (2017)). The Second Circuit therefore reasoned "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." *Id.* (emphasis in original). Therefore, "federal law is the interpretive anchor to resolve the ambiguity" in § 4B.12(b), and "a 'controlled substance' under § 4B1.2 must refer exclusively to those drugs listed under federal law—that is, the CSA." *Id.*

The *Townsend* court noted that the Ninth Circuit had come to the same conclusion because, "defining the term 'controlled substance' to have its ordinary

meaning of a drug regulated by law would make what offenses constitute a [federal] drug offense *necessarily* depend on the state statute at issue." *Id*. at 72 (citing *United States v. Leal-Vega*, 680 F.3d 1160, 1166 (9th Cir. 2012) (emphasis in original)).

In *Leal-Vega*, the Ninth Circuit analyzed the term "controlled substance" in the unlawful re-entry guideline, which provides for a "drug trafficking offense" enhancement for a defendant with a prior:

> offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell 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. § 2L1.2, cmt. n. 2.

The government in *Leal-Vega* contended that the absence of a specific reference to the CSA in § 2L1.2, combined the drafting history of the guideline, "counsels against incorporation of the CSA in the definition of 'controlled substance,'" and thus that the term "controlled substance" should mean any substance controlled by law. 680 F.3d 1160, 1165, 1167.

The Ninth Circuit found that the government's position undermined the purposes of the categorical approach, and of the guidelines. *Id*. The court noted that the Supreme Court's decision in *Taylor* set forth the categorical approach, and rejected reliance on the "labels employed by various states' criminal codes," with the goal of "arriving at a national definition to permit uniform application of the Sentencing Guidelines." *Id*. at 1166-67. The Ninth Circuit observed that the

guidelines' stated purpose is to seek "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." *Id.* at 1167 (quoting U.S.S.G. Ch. One, Pt. A). It concluded that the only approach compatible with the goals of the categorical approach, and of the sentencing guidelines, would be to "hold that the term 'controlled substance' as used in the 'drug trafficking offense' definition in § 2L1.2, means those substances listed in the CSA." *Id.* *See also United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015) ("For a prior conviction to qualify as a 'drug trafficking offense,' the government must establish that the substance underlying that conviction is covered by the CSA.").

In *United States v. Bautista*, the Ninth Circuit determined that the minor differences between the guidelines' "drug trafficking offense" definition, and the guidelines' "controlled substance offense" definition, were "immaterial"—and thus that *Leal-Vega*'s "uniformity-in-federal-sentencing rationale" applied equally to the term "controlled substance" in the "controlled substance offense" definition in § 4B1.2. 989 F.3d 698, 702 (9th Cir. 2021).

Therefore, in the Ninth Circuit, like the Second, the term "controlled substance" in the guidelines' "controlled substance offense" definition is limited to substances that are included in the federal CSA. *Id.* This is as it should be. Without tying the term "controlled substance" to a uniform, federal standard, the aims of the categorical approach, and the guidelines, give way to the vagaries of state law. A "controlled substance offense" becomes whatever a given state says it is. As

observed by the Second and Ninth Circuits, the approach adopted by the Eleventh Circuit, among others, undermines uniformity in federal sentencing, and results in the kind of unwarranted sentencing disparity exemplified by Miles' case. *See also United States v. Crocco*, 15 F.4th 20, 23-24 (1st Cir.2020) (explaining why approach of Fourth, Seventh and Eighth [and now Tenth and Eleventh] Circuits is "fraught with peril").

III. The Court should resolve the circuit split regarding this important federal question notwithstanding that the Sentencing Commission might resolve this issue, for some defendants, at some point.

The Sentencing Commission recently reached a quorum for the first time in three years. *See* U.S.S.C. News Release: Acting Chair Judge Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners (Aug. 5, 2022), *available at* https://www.ussc.gov/about/news/press-releases/august-5-2022. The newly-recostituted Commission has now published its policy priorities for the amendment cycle ending on May 1, 2023. *See* U.S.S.C. Federal Register Notice of Final 2022-2023 Priorities, *available at* https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-final-2022-2023-priorities (Oct. 28, 2022). The circuit split addressed in this petition is among the Commission's fourteen policy priorities. *Id.*

There are at least three reasons that the Court should nonetheless resolve the circuit split itself, through the granting of this petition. First, the Commission may not actually address the split. Given significant changes in federal sentencing law over the last three years, the Commission's priority list is understandably quite

long. *See id*. At the same time that it published its policy priorities, the Commission reasonably cautioned that,

> Other factors . . . may affect the Commission's ability to complete work on any or all identified priorities by May 1, 2023. Accordingly, the Commission may continue to work on any or all identified priorities after that date or may decide not to pursue one or more identified priorities.

Id. The Court should not avoid resolving an entrenched, impactful circuit split on the basis that the Commission *might or might not* address the issue.

Second, even if the Commission addresses the circuit split regarding § 4B1.2, in this amendment cycle, it may do so by way of guideline commentary, rather than by amending the guideline itself. This would not actually resolve the circuit split, however, because the extent to which guideline commentary is binding is itself the source of ongoing controversy. *Compare United States v. Nasir*, 17 F.4th 459, 471–72 (3d Cir. 2021) (holding that, pursuant to *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), courts can only defer to commentary when the guideline is "genuinely ambiguous," and concluding that—despite commentary's explicit addition of inchoate crimes—§ 4B1.2(b) unambiguously *excludes* inchoate crimes); *with United States v. Moses*, 23 F.4th 347, 357 (4th Cir. 2022) (finding that *Kisor* did not overrule *Stinson v. United States*, 113 S.Ct. 1913 (1993), and, thus that, pursuant to *Stinson*, "Guidelines commentary is authoritative and binding, regardless of whether the relevant Guideline is ambiguous, except when the commentary 'violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of,' the Guideline"). Should the Commission address the § 4B1.2 circuit split by way of the

commentary, the Court would again be presented with questions regarding whether the "controlled substance offense" definition unambiguously includes state offenses involving substances that are not federally controlled (and whether, and to what extent, ambiguity matters). Thus, even if the Commission does address this issue, the Court may still be called upon to resolve the same—or a related—circuit split.

Third, even if the Commission amends the § 4B1.2 guideline this cycle, an amendment would not necessarily help prisoners, like Miles, who were sentenced under the current version of the guideline. Only "clarifying" guideline amendments apply retroactively, on direct appeal, whereas "substantive" amendments do not. *See United States v. Sanchez-Villarreal*, 857 F.3d 714, 719–20 (5th Cir. 2017); *United States v. Jerchower*, 631 F.3d 1181, 1184 (11th Cir. 2011); *United States v. Crudup*, 375 F.3d 5, 8 (1st Cir. 2004). Courts apply a "case-specific inquiry" to distinguish between the two, and if "the amendment addresses an issue upon which the courts of appeals have already staked out opposing positions," that factor may weigh against retroactivity. *See Crudup*, 375 F.3d at 10 (citing *United States v. Huff*, 370 F.3d 454, 465-66 (5th Cir.2004), among others). *But see United States v. Quintero-Leyva*, 823 F.3d 519, 522 (9th Cir. 2016) (considering resolution of circuit split to weigh in favor of retroactivity). Without knowing what a future § 4B1.2 amendment would say, the Court cannot know whether it will leave already-sentenced prisoners, like Miles, without recourse to correct their sentences. *Cf. Spencer v. United States*, 773 F.3d 1132, 1138-40 (11th Cir. 2014) (holding that advisory sentencing guideline error is not cognizable on collateral review).

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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