No. 22-7359

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IN THE SUPREME COURT OF THE UNITED STATES

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DEVIN BAKER, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

ANN O'CONNELL ADAMS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

## QUESTION PRESENTED

Whether courts should consult the drug schedules in effect at the time of a defendant's prior state crime or the time of his federal sentencing in assessing whether a defendant's prior conviction was for a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b) (2018).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tenn.):

United States v. Baker, No. 20-cr-20026 (Feb. 1, 2022)

United States Court of Appeals (6th Cir.):

United States v. Baker, No. 22-5110 (Dec. 12, 2022)

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6)[1] is not published in the Federal Reporter but is available at 2022 WL 17581659.

## JURISDICTION

The judgment of the court of appeals was entered on December 12, 2022. A petition for rehearing was denied on January 23, 2023

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[1] The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the appendix containing the court of appeals decision as Pet. App. A and the appendix containing the order denying the petition for rehearing as Pet. App. B.

(Pet. App. B1-B2). The petition for a writ of certiorari was filed on April 18, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the Western District of Tennessee, petitioner was convicted on one count of possessing methamphetamine with the intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and one count of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c). Judgment 1. The district court sentenced him to 100 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals vacated the district court's judgment and remanded for resentencing. Pet. App. A1-A6.

1. In 2019, after a woman died of a drug overdose in a hotel room in Memphis, Tennessee, the police received information that petitioner resided in the room and had provided the victim with a fatal dose of narcotics. Presentence Investigation Report (PSR) ¶¶ 6, 8. Police officers set up surveillance and observed heavy foot and vehicle traffic to the room. PSR ¶ 9. A week later, officers arrested petitioner when he left the room to engage in a drug transaction. PSR ¶ 10. After obtaining a warrant, officers searched the hotel room and found drugs and multiple loaded firearms. PSR ¶ 11.

A federal grand jury in the Western District of Tennessee returned an indictment charging petitioner with possessing methamphetamine with the intent to distribute, in violation of 21 U.S.C. 841(a)(1); possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c); and possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. Petitioner pleaded guilty to the drug offense and the Section 924(c) offense; the felon-in-possession count was dismissed on the motion of the government. Judgment 1.

The Probation Office determined that petitioner had "at least two prior felony convictions of either a crime of violence or a controlled substance offense" and therefore qualified as a career offender under Sentencing Guidelines § 4B1.1(a)(3) (2018); see PSR ¶ 30. The Guidelines define "'controlled substance offense'" as "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." Sentencing Guidelines § 4B1.2(b) (2018). With the career-offender designation, the Probation Office calculated an advisory Guidelines range of 262 to 327 months of imprisonment. PSR ¶ 89.

Petitioner objected to a career-offender designation, asserting that one of the prior convictions identified by the Probation Office -- a 2012 Tennessee felony conviction for possessing marijuana with intent to sell -- did not qualify as a controlled substance offense. D. Ct. Doc. 49 (Feb. 16, 2021); see PSR ¶ 40. Petitioner recognized that at the time of the state conviction, both Tennessee and the federal government defined "marijuana" to include hemp, D. Ct. Doc. 49, at 1-2 (citing Tenn. Code Ann. § 39-17-402(16) (2012); 21 U.S.C. 802(16) (2012)), but noted that both governments had since amended their drug schedules to exclude hemp, id. at 2 (citing, e.g., Tenn. Code Ann. § 39-17-402(16)(C) (2019); id. § 43-27-101(3) (2019); 21 U.S.C. 802(16) (2018)). And he argued that courts applying Section 4B1.2(b) should compare the state statute of conviction to the federal drug schedules at the time of federal sentencing to determine whether the offense involved a controlled substance. Id. at 3. Under that approach, petitioner's conviction would be categorically overbroad, as the state offense of conviction encompassed hemp but the federal drug schedules at the time of sentencing did not. Ibid.; see Pet. App. A2-A3.

The district court agreed with petitioner and refused to classify the 2012 Tennessee marijuana conviction as a controlled substance offense. Pet. App. A3. In the court's view, applying "the versions of the schedules" in effect at the time of federal

sentencing "is the correct way to proceed." Sent. Tr. 18-19. Without the career-offender enhancement, petitioner's Guidelines range was 37 to 46 months of imprisonment on the drug count, with a mandatory consecutive sentence of at least 60 months on the Section 924(c) count. Pet. App. A3. The court sentenced petitioner to a total of 100 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

2. The court of appeals vacated the district court's judgment and remanded for resentencing. Pet. App. A1-A6.

While the appeal was pending, the court of appeals decided United States v. Clark, 46 F.4th 404 (6th Cir. 2022), petition for cert. pending, No. 22-6881 (filed Feb. 24, 2023). In Clark, the Sixth Circuit explained that, to determine whether a prior state conviction qualifies as a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b), courts should consult the drug schedules in effect at the time of that conviction. 46 F.4th at 408.

The decision here accordingly observed that Clark controlled petitioner's case. Pet. App. A2. The court of appeals explained that "[e]ven under the categorial approach that requires us to assume that [petitioner's] prior offense was for the possession of hemp, that substance was a 'controlled substance' under both federal and state law at the relevant time in 2012." Id. at A4. As a result, the court found that petitioner's "2012 marijuana

conviction qualifies as a controlled substance offense under [Sentencing Guidelines] § 4B1.1." Ibid. And because the district court had applied "the wrong legal rule" in calculating petitioner's advisory Guidelines range, the court of appeals vacated the district court's judgment and remanded for resentencing. Ibid.

Judge Moore authored a concurring opinion expressing her view that Clark was incorrectly decided. Pet. App. A5-A6.

ARGUMENT

Petitioner contends (Pet. 8-10) that his prior marijuana-related conviction under Tennessee law is not categorically a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b) (2018) because he was convicted of that offense at a time when the Tennessee drug schedules included hemp, which had been removed from the federal schedules (as well as the state schedules) by the time he was sentenced for his federal crimes. Because the question is presented in an interlocutory posture and involves the interpretation of the Sentencing Guidelines, the petition for a writ of certiorari does not warrant this Court's review. In any event, the court of appeals correctly rejected petitioner's contention; petitioner overstates the conflict in the circuits; and this Court has recently declined to review this

issue. See Altman v. United States, 143 S. Ct. 2437 (2023) (No. 22-5877). It would be appropriate to follow the same course here.[2]

1. As a threshold matter, the interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree."); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court"); see also Virginia Military Inst. v. United States, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari). The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. A4.

On remand, the district court's sentence may mitigate petitioner's objections (e.g., by imposing the same sentence). And if it does not, petitioner may reassert his current contention

[2] Several pending petitions raise the same issue. See Clark v. United States, No. 22-6881 (filed Feb. 24, 2023); Edmonds v. United States, No. 22-6825 (filed Feb. 13, 2023); Harbin v. United States, No. 22-6902 (filed Feb. 28, 2023); Ivery v. United States, No. 22-7675 (filed May 26, 2023); Moore v. United States, No. 22-7716 (filed June 1, 2023); Williams v. United States, No. 22-7755 (filed June 7, 2023); Turman v. United States, No. 22-7792 (filed June 12, 2023); Lawrence v. United States, No. 22-7898 (filed June 26, 2023); Wright v. United States, No. 22-7900 (filed June 26, 2023); Hoffman v. United States, No. 22-7903 (filed June 27, 2023); Demont v. United States, No. 22-7904 (filed June 27, 2023).

-- together with any other appropriate contentions that may arise on remand -- in a single certiorari petition after final judgment. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam). Petitioner provides no sound basis for departing from the Court's normal practice of denying petitions by parties challenging interlocutory determinations that, like the decision in this case, may be reviewed after final judgment.

2. Furthermore, this Court ordinarily does not review decisions interpreting the Sentencing Guidelines, because the Sentencing Commission can amend the Guidelines to eliminate any conflict or correct any error. See Braxton v. United States, 500 U.S. 344, 347-349 (1991). Congress has charged the Commission with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Id. at 348; see United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."). Review by this Court of Guidelines decisions is particularly unwarranted in light of United States v. Booker, which rendered the Guidelines advisory only. 543 U.S. at 245.

No sound reason exists to depart from that practice here. The Commission has carefully attended to Section 4B1.2's

definition of "controlled substance offense," amending it multiple times. Compare Sentencing Guidelines § 4B1.2(b), with id. § 4B1.2(2) (1989); id. § 4B1.2(2) (1987). The Commission initially defined the term to include offenses under specified federal statutory provisions as well as "similar offenses," id. § 4B1.2(2) (1987), and later supplanted that enumeration with a broad reference to any "federal or state law" that prohibits certain conduct, id. § 4B1.2(b). See United States v. Ruth, 966 F.3d 642, 652 (7th Cir. 2020), cert. denied, 141 S. Ct. 1239 (2021). More generally, the Commission has devoted considerable attention in recent years to the "definitions relating to the nature of a defendant's prior conviction," and it continues to work "to resolve conflicting interpretations of the guidelines by federal courts." Proposed Priorities for Amendment Cycle, 81 Fed. Reg. 37,241, 37,241 (June 9, 2016).

Earlier this year, the Commission sought public comment on the potential resolution of circuit disagreement about whether the definition of "controlled substance offense" in Section 4B1.2(b) is limited to offenses involving substances controlled by the federal Controlled Substances Act, or whether it also applies to offenses involving substances controlled by applicable state law. See U.S. Sent. Comm'n, Proposed Amendments to the Sentencing Guidelines (Preliminary), Part 4, Circuit Conflicts, pp. 8-11 (Jan. 12, 2023), https://www.ussc.gov/sites/default/files/pdf/

amendment-process/reader-friendly-amendments/20230112_prelim_RF.pdf; see also Guerrant v. United States, 142 S. Ct. 640, 640 (2022) (statement of Sotomayor, J., respecting the denial of certiorari) (noting circuit disagreement).[3] The Commission did not address that conflict in its final amendments for the current amendment cycle, nor did it address the related question presented in this case of when the substance at issue must have been controlled. See generally Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28,254 (May 3, 2023).

Petitioner does not dispute that the Commission could, however, address those issues in a future amendment cycle. In its

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[3] Because in this case the state and federal schedules were the same for relevant purposes at the relevant times, the court of appeals had no need to decide that issue here. Petitioner does not raise it as a distinct question regarding the interpretation of Section 4B1.2(b), and this Court has repeatedly denied petitions for writs of certiorari presenting it. See Trapps v. United States, 143 S. Ct. 841 (2023) (No. 22-6591); Miles v. United States, 143 S. Ct. 612 (2023) (No. 22-6117); Russey v. United States, 143 S. Ct. 330 (2022) (No. 22-5461); Rodriguez v. United States, 143 S. Ct. 329 (2022) (No. 22-5449); Nichols v. United States, 143 S. Ct. 326 (2022) (No. 22-5427); Jones v. United States, 143 S. Ct. 268 (2022) (No. 22-5342); McConnell v. United States, 143 S. Ct. 166 (2022) (No. 21-8099); Bagola v. United States, 143 S. Ct. 161 (2022) (No. 21-8075); Henderson v. United States, 142 S. Ct. 1696 (2022) (No. 21-7391); Jones v. United States, 142 S. Ct. 1167 (2022) (No. 21-6758); Sisk v. United States, 142 S. Ct. 785 (2022) (No. 21-5731); McLain v. United States, 142 S. Ct. 784 (2022) (No. 21-5633); Atwood v. United States, 142 S. Ct. 753 (2022) (No. 20-8213); Guerrant v. United States, supra (No. 21-5099); Wallace v. United States, 142 S. Ct. 362 (2021) (No. 21-5413); Ward v. United States, 141 S. Ct. 2864 (2021) (No. 20-7327); Ruth v. United States, 141 S. Ct. 1239 (2021) (No. 20-5975).

proposed priorities for the upcoming amendment cycle, the Commission lists "[c]ontinued examination of the career offender guidelines" and "[r]esolution of circuit conflicts as warranted." Proposed Priorities for Amendment Cycle, 88 Fed. Reg. 39,907, 39,907 (June 20, 2023). Any disagreement between the courts of appeals on the question presented has emerged only recently, see pp. 15-16, infra, and the Commission only recently obtained a quorum, see News Release, U.S. Sent. Comm'n, Acting Chair Judge Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners (Aug. 5, 2022), https://www.ussc.gov/about/news/press-releases/august-5-2022. To the extent that any inconsistency requires intervention, the Commission "should have the opportunity to address this issue in the first instance." Longoria v. United States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the denial of certiorari) (discussing another Guidelines dispute) (citing Braxton, 500 U.S. at 348); see Guerrant, 142 S. Ct. at 641 (statement of Sotomayor, J., respecting the denial of certiorari) (similar for circuit conflict regarding Section 4B1.2(b)).

3. In any event, the court of appeals' decision is correct. The term "'controlled substance offense'" in Section 4B1.2(b) is defined to include "an offense under * * * state law * * * 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." Sentencing Guidelines § 4B1.2(b) (2018). Here, petitioner's relevant prior drug conviction was for possessing marijuana with intent to sell. PSR ¶ 40. Because marijuana is a substance whose possession was restricted by Tennessee law, it falls squarely within the meaning of "controlled substance," namely, "'any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use are restricted by law.'" Ruth, 966 F.3d at 654 (quoting The Random House Dictionary of the English Language 443 (2d ed. 1987)).

Petitioner contends (Pet. 8-10) that a predicate offense is categorically overbroad if the relevant federal and state drug schedules have been narrowed between the time when the predicate offense occurred and when federal sentencing takes place. That contention finds no basis in the Guidelines' text. Petitioner literally committed an "offense under * * * state law" "that prohibits" "the possession of a controlled substance" with intent to distribute. Sentencing Guidelines § 4B1.2(b) (2018). Nothing in that language suggests that a court should compare different versions of the state code as it existed at different times, much less compare the state code to the federal controlled-substance schedules in effect at a later date. Instead, the state

convictions themselves provide the most natural place to look in determining the nature of a defendant's prior state crimes.

The Guidelines' context confirms that a court should determine whether a defendant's prior offense qualifies as a predicate based on state law at the time the offense occurred. For example, Section 4B1.1 states that a career offender is a person who has "at least two prior felony convictions" for a crime of violence or controlled substance offense. Sentencing Guidelines § 4B1.1(a) (2018). Section 4B1.2, which defines "'prior felony convictions,'" requires that the federal crime of conviction be "subsequent to sustaining at least two felony convictions" for a crime of violence or controlled substance offense. Id. § 4B1.2(c) (2018); see id. § 2K2.1(a)(2) (2018) (similar). Those words "direct the court's attention to events that occurred in the past" and suggest a "backward-looking approach" that assesses "the nature of the predicate offenses at the time the convictions for those offenses occurred." United States v. Clark, 46 F.4th 404, 409 (6th Cir. 2022), petition for cert. pending, No. 22-6881 (filed Feb. 24, 2023).

This Court's caselaw further supports that interpretation. In McNeill v. United States, 563 U.S. 816 (2011), the defendant had been previously convicted of North Carolina drug offenses punishable at the time by ten-year sentences, after which the State lowered the statutory maximum. See id. at 818. Following a guilty

plea to a firearm-possession charge under 18 U.S.C. 922(g)(1), the defendant contended that the sentencing court should look to current state law in determining whether those previous state convictions carried a "maximum term of imprisonment of ten years or more" for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(2)(A)(ii). McNeill, 563 U.S. at 818. This Court rejected that contention, reasoning that the "plain text of ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense." Id. at 820. The Court explained that the ACCA "is concerned with convictions that have already occurred" and that the "only way to answer this backward-looking question is to consult the law that applied at the time of that conviction." Ibid. Doing otherwise would mean that "subsequent changes in state law c[ould] erase an earlier conviction for ACCA purposes" -- a result that "cannot be correct." Id. at 823. Similar logic applies here.

A time-of-state-conviction rule also provides fair notice by allowing a defendant to ascertain the consequences of a predicate conviction at the time of that conviction. Petitioner's preferred approach, in contrast, would promote arbitrariness and a lack of notice. That approach would potentially subject two defendants whose predicate and federal offenses occurred on identical days to different advisory Guidelines ranges, based merely on the fortuity

of when their respective federal sentencing proceedings took place.

4. a. There is a conflict on the question presented, but petitioner overstates its scope. See Pet. 6-7, 10-18. Petitioner correctly notes (Pet. 6-7, 13) that, in addition to the Sixth Circuit, the Third and Eighth Circuits also consult the drug schedules in place at the time of the prior state crime when determining whether a prior conviction is a controlled substance offense under Section 4B1.2(b). United States v. Lewis, 58 F.4th 764, 773 (3d Cir. 2023) ("The meaning of 'controlled substance' * * * includes drugs regulated by state law at the time of the predicate state conviction, even if they are * * * no longer regulated by the state at the time of the federal sentencing."); United States v. Bailey, 37 F.4th 467, 469-470 (8th Cir. 2022) (per curiam) (declining to "look to 'current state law to define a previous offense'") (citation omitted), cert. denied, 143 S. Ct. 2437 (2023).

The First and Ninth Circuits, however, have taken the view that courts should consult the drug schedules in effect at the time of federal sentencing to determine whether a predicate state drug conviction qualifies as a controlled substance offense. See United States v. Abdulaziz, 998 F.3d 519, 531 (1st Cir. 2021); United States v. Bautista, 989 F.3d 698, 703 (9th Cir. 2021). The Second Circuit has similarly disagreed with the government's

position that courts should apply the drug schedules in effect at the time of a defendant's prior state crime, but it has not determined whether courts should instead consult the schedules in effect on the date of the defendant's federal offense or his federal sentencing. See United States v. Gibson, 55 F.4th 153, 165-166 (2022). As explained above, the nascent circuit conflict can and should be resolved by the Sentencing Commission. See pp. 8-11, supra.

b. Petitioner contends (Pet. 6-7, 14-18) that this case also implicates a different circuit conflict regarding a similar timing question that arises in the context of statutory minimum sentences under the ACCA. But courts need not treat the two questions the same way, and multiple courts of appeals have declined to do so.

The ACCA defines a "serious drug offense" to include "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." 18 U.S.C. 924(e)(2)(A)(ii). In determining whether a prior state offense met that definition, the Eleventh Circuit recently "read ACCA's definition of a 'serious drug offense' under state law to incorporate the version of the federal controlled-substances schedules in effect when [the defendant] was convicted of his prior state drug offenses." United States v.

Jackson, 55 F.4th 846, 855 (2022), cert. granted, 143 S. Ct. 2457 (2023). The Third Circuit, however, examines the federal drug schedules in effect at the time of the defendant's federal offense. See United States v. Brown, 47 F.4th 147, 151-153 (2022), cert. granted, 143 S. Ct. 2458 (2023). The Fourth Circuit looks to the federal drug schedules in effect at the time of the defendant's federal sentencing. See United States v. Hope, 28 F.4th 487, 504 (2022). And the Eighth and Tenth Circuits have rejected a time-of-state-conviction approach without deciding between a time-of-federal-offense and time-of-federal-sentencing rule. See United States v. Williams, 48 F.4th 1125, 1133 & n.3 (10th Cir. 2022); United States v. Perez, 46 F.4th 691, 699 (8th Cir. 2022).

Although this Court has granted writs of certiorari in Jackson, supra, and Brown, supra, to resolve the timing question in ACCA cases, the Guidelines question in this case is distinct and may not have the same answer. Apart from this Court's practice of leaving Guidelines interpretation questions to the Commission -- which need not have the Guidelines mirror the ACCA -- the language in the relevant provisions is different. Indeed, the Third and Eighth Circuits have reached different outcomes on the timing question under the Guidelines and the ACCA. See Brown, 47 F.4th at 154 (3d Cir.) (observing that defendant's "reliance on several Guidelines cases is misplaced" and noting "that longstanding principles of statutory interpretation allow

different results under the Guidelines as opposed to under the ACCA"); Lewis, 58 F.4th at 773 (3d Cir.) (reaching different result from Brown under Guidelines but contending that "our holding today is not inconsistent with our opinion in Brown"); Perez, 46 F.4th at 703 n.4 (8th Cir.) (explaining why the court of appeals' Guidelines and ACCA holdings are purportedly consistent, despite the adoption of different timing rules).

To the extent that the Court may nevertheless perceive the Guidelines issue to be properly influenced by the ACCA issue, it could elect to hold petitions presenting the Guidelines issue pending its resolution of the ACCA issue in Jackson and Brown. But it need not do so, and the ACCA conflict provides no sound reason for plenary consideration of the separate Guidelines question.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

ANN O'CONNELL ADAMS
Attorney

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