

IN THE SUPREME COURT OF THE UNITED STATES

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MINNELA MOORE, 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 ELEVENTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the phrase "controlled substance" in Sentencing Guidelines § 4B1.2(b) (2018) includes substances that are controlled under relevant state law but not under the federal Controlled Substances Act, 21 U.S.C. 801 et seq.

2. 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 offense or sentencing in assessing whether a defendant's prior conviction was for a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b) (2018).

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No. 22-7716

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not published in the Federal Reporter but is available at 2023 WL 1434181.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 2023. On April 19, 2023, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 1, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced him to 70 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-10a.

1. In January 2020, police officers in Miami, Florida, responded to a 911 call reporting domestic violence. Pet. App. 2a. When they arrived on the scene, a woman identified petitioner as the man who had assaulted her. Ibid. The woman informed the responding officers that petitioner had pushed her to the ground, hit her on the forehead, and brandished a gun. Presentence Investigation Report (PSR) ¶ 7. She also informed them that petitioner kept the gun in a backpack, which was lying on the ground. Ibid. With petitioner's consent, police opened the backpack and discovered a gun inside. PSR ¶ 8.

Petitioner had previously been convicted of a felony. PSR ¶ 9. A federal grand jury in the Southern District of Florida accordingly returned an indictment charging petitioner with one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Indictment 1. Petitioner pleaded guilty. Judgment 1.

2. The Probation Office calculated a base offense level of 24 under the Sentencing Guidelines because petitioner committed the instant offense after already having two felony convictions for "controlled substance offense[s]." PSR ¶¶ 15, 31-32; see Sentencing Guidelines § 2K2.1(a)(2) (2018). The Guidelines define a "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). One of the controlled substance offenses identified by the Probation Office was a 2018 Florida conviction for possessing cannabis with intent to sell, manufacture, or deliver. PSR ¶ 32; see Fla. Stat. Ann. §§ 893.13(1)(A)(2), 893.03(1)(c)(7) (West 2017).

The Probation Office calculated an advisory Guidelines range of 70 to 87 months of imprisonment. PSR ¶ 80. Petitioner did not object to any of the Probation Office's calculations, including its calculation of his base offense level. Sent. Tr. 2; Pet. 6. The district court sentenced petitioner to 70 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-10a. The court rejected petitioner's argument, raised for the first time on appeal, that his Florida cannabis conviction did not qualify as a controlled substance offense under the Guidelines. Id. at 9a.

Petitioner contended that the offense was categorically overbroad, asserting that at the time of his state conviction in 2018, Florida law featured a broader definition of cannabis than it did at the time of sentencing for his federal offense in 2021. Pet. App. 7a-8a. The court of appeals determined, however, that the district court had not plainly erred, because "[t]here are no cases published by this [c]ourt or the Supreme Court holding whether to apply the version of a controlled substance offense from the time of earlier conviction or the time of the sentencing in the current case for the purpose of determining whether it is a controlled substance offense under U.S.S.G. § 4B1.2(b)." Id. at 9a.

#### ARGUMENT

Petitioner contends (Pet. 24-25) that his Florida cannabis conviction is not a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b) for two alternative reasons. First, he argues (Pet. 4) that a prior state conviction involves a "controlled substance" for purposes of Section 4B1.2(b) only if the substance is also listed on the federal drug schedules, and that at the time of his state conviction, the Florida cannabis law

included substances that were not on the federal schedules. Second, he argues (Pet. 4-5) that a court should consult the drug schedules (whether state or federal) as they exist at the time of the defendant's federal offense or sentencing, rather than at the time of his prior state crime, and by those points, that state as well as federal law encompassed a narrower range of substances than the state law underlying his conviction.

Because both issues involve 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 determined that petitioner's prior conviction was for a controlled substance offense under Section 4B1.2(b), and this case would be a poor vehicle for addressing either issue because the court of appeals affirmed under plain-error review without reaching the merits. The petition for a writ of certiorari should be denied.

1. 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 definition 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). And earlier this year, the Commission sought public comment on the potential resolution of circuit disagreement regarding the first question presented here, namely, whether the definition of “controlled substance offense” in Section 4B1.2(b) is limited to offenses involving substances controlled under the federal Controlled Substances Act, 21 U.S.C. 801 et seq., or whether it also applies to offenses involving substances controlled by applicable state law. See United States 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](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).

The Commission did not address the conflict in its final amendments for that amendment cycle, nor did it address the related question (petitioner’s second question presented) 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). But petitioner does not dispute that the Commission could address those issues in the future. In its proposed priorities for the current amendment cycle, the Commission lists “[c]ontinued examination of the career offender guidelines” (which

also rely on the definition of “‘controlled substance offense’” in Section 4B1.2(b)) 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 these questions has emerged only relatively recently, see pp. 9, 11, infra, and the Commission just 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 in circuits’ approaches to the questions presented here 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 640-641 (statement of Sotomayor, J., respecting the denial of certiorari) (similar for circuit conflict concerning the first question presented in this case).

2. In any event, the decision below is correct, and the alleged circuit conflicts do not warrant this Court’s review.

a. For the reasons explained in the government’s brief in opposition to the petition for a writ of certiorari in Guerrant v.

United States, 142 S. Ct. 640 (2022) (No. 21-5099), the first question presented -- regarding whether a state crime can be a "controlled substance offense" only if it is restricted to federally controlled substances -- does not warrant this Court's review.<sup>1</sup> The Sentencing Guidelines define the term "'controlled substance offense'" to include "an offense under \* \* \* state law \* \* \* that prohibits \* \* \* the possession of a controlled substance \* \* \* with intent to \* \* \* distribute." Sentencing Guidelines § 4B1.2(b). As the government has explained, that definition by its plain text encompasses offenses involving substances that are controlled under state law, even if those substances are not also controlled under federal law. See Br. in Opp. at 7-10, Guerrant, supra (No. 21-5099).

Petitioner contends (Pet. 8-14) that the courts of appeals disagree about whether the term "controlled substance" in Section 4B1.2(b) implicitly incorporates the federal drug schedules. But as explained in the brief in opposition in Guerrant, any direct circuit disagreement is relatively recent and limited, which counsels against this Court's review and in favor of allowing the Sentencing Commission the opportunity to address it. See Br. in Opp. at 10-12, Guerrant, supra (No. 21-5099). This Court has

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<sup>1</sup> The government has served petitioner with a copy of its brief in Guerrant, which is also available on this Court's online docket.

repeatedly denied petitions for writs of certiorari raising this question.<sup>2</sup> It should do the same here.

b. For the reasons explained in the government's brief in opposition to the petition for a writ of certiorari in Baker v. United States, No. 22-7359 (July 26, 2023), the second question presented -- regarding whether a comparison of drug schedules should look to the time of the state crime or instead the later date of the federal offense or sentencing -- likewise does not warrant this Court's review. As the government has explained, only drug schedules at the time of the state crime are relevant to determining whether a defendant's prior state crime qualifies as a predicate under Section 4B1.2(b). See Gov't Br. in Opp. at 11-

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<sup>2</sup> See Ramirez v. United States, 143 S. Ct. 2480 (2023) (No. 22-7263); 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).

15, Baker, supra (No. 22-7359).<sup>3</sup> As that brief also explains, any circuit conflict concerning that issue is recent and should be addressed by the Sentencing Commission. Id. at 8-11.

Furthermore, although this Court has granted certiorari in Jackson v. United States, 143 S. Ct. 2457 (2023) (No. 22-6640), and Brown v. United States, 143 S. Ct. 2458 (2023) (No. 22-6389), to review a similar timing question in the context of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), it is unnecessary to hold Guidelines cases pending the Court's decision on the ACCA question, because the ACCA and Guidelines questions are distinct. See Gov't Br. in Opp. at 16-18, Baker, supra (No. 22-7359). On May 1, 2023, this Court denied the petition for a writ of certiorari in Altman v. United States, 142 S. Ct. 2437 (2023) (No. 22-5877), which, like petitioner's case, raised the timing question in the Guidelines context. See Pet. at i, 8-9, Altman, supra (No. 22-5877).<sup>4</sup> It should do the same here.

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<sup>3</sup> The government has served petitioner with a copy of its brief in Baker, which is also available on this Court's online docket.

<sup>4</sup> Several pending petitions raise the same issue. See Edmonds v. United States, No. 22-6825 (filed Feb. 13, 2023); Clark v. United States, No. 22-6881 (filed Feb. 24, 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

To the extent that the Court may nevertheless perceive the Guidelines issue to be properly influenced by the ACCA issue, the Court 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.

3. This case would be an especially poor vehicle for addressing either of the questions presented because petitioner did not object to the calculation of his Guidelines range on either ground in the district court. See Pet. App. 7a; Sent. Tr. 2. As a result, the court of appeals addressed petitioner's claims under the plain-error standard, and denied relief on the ground that any error was not plain -- without reaching the merits of either question presented, and emphasizing the absence of circuit precedent. See Pet. App. 8a-10a; see also Fed. R. Crim. P. 52(b). That is not a suitable posture for review in this Court.

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27, 2023); Demont v. United States, No. 22-7904 (filed June 27, 2023); Tate v. United States, No. 23-5114 (filed July 10, 2023); Adzemovic v. United States, No. 23-5164 (filed July 19, 2023); Aurelien v. United States, No. 23-5236 (filed July 25, 2023).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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