NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 20__

ANDREW RYAN DEMONT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Heather Quick
Appellate Chief
Assistant Federal Defender
FEDERAL PUBLIC DEFENDER'S OFFICE
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
(319) 363-9540
ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

(1) Whether prior drug convictions inclusive of substances that have since been decontrolled can be used to impose present day federal sentencing enhancements.

(2) Whether "controlled substance[s]" in the Federal Sentencing Guidelines §4B1.2(b) are limited to those substances defined and regulated under the federal Controlled Substances Act, 21 U.S.C. § 801 et seq.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Southern District of Iowa, and the United States Court of Appeals for the Eighth Circuit:

United States v. Demont, 3:21-cr-00104-001 (S.D. Iowa) (criminal proceedings), judgment entered October 19, 2022.

United States v. Demont, 22-3281 (8th Cir.) (direct criminal appeal), judgment entered March 29, 2023.

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Andrew Demont respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The Eighth Circuit summarily affirmed the district court's decision. The order is reproduced in the appendix to this petition at Pet. App. p. 8.

JURISDICTION

The Eighth Circuit entered judgment in Mr. Demont's case on March 29, 2023, Pet. App. p. 8.

This Court has jurisdiction over these cases under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 994:

> (h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—
>
> (1) has been convicted of a felony that is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and
>
> (2) has previously been convicted of two or more prior felonies, each of which is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and

1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46

USSG §2K2.1(a)(2):

(a) Base Offense Level (Apply the Greatest):

. . .

(2) 24, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

USSG §4B1.2(b) defines a "controlled substance offense" as follows:

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.

STATEMENT OF THE CASE

A. Introduction

In a variety of ways, our federal sentencing laws call for an increase in a defendant's sentence if he or she has prior qualifying drug convictions. For example, the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), the "three strikes" law, 18 U.S.C. § 3559(c), the federal drug trafficking statutes, 21 U.S.C. §§ 841, 851, and the United States Sentencing Guidelines, all require courts to determine whether a defendant's prior drug conviction requires a higher statutory or Guideline sentencing range.

This, of course, requires application of the categorical approach. Just like it was not enough in *Taylor v. United States*, 495 U.S. 575 (1990), for state courts to call a crime a "burglary" for it to qualify as a predicate for the ACCA, it is not enough for state courts to call a crime a drug offense to find it meets the generic definition of a federal sentencing enhancement provision. A comparison between the elements of the state conviction and the generic definition of the federal sentencing enhancement provision is still required. Various disagreements have emerged between circuits on how to apply the categorical approach in these circumstances. Mr. Demont's case involves two circuit splits.

In the first split, courts have disagreed as to whether only substances that were controlled at the time of federal sentencing—when the enhancement was being applied—could justify a sentencing enhancement. This Court recently granted two

petitions for writ of certiorari to address this question in the ACCA context. *Brown v. United States*, 22-6389; *Jackson v. United States*, 22-6640.

Currently, the Eighth Circuit has held that convictions for decontrolled substances qualified as controlled substance offenses, resulting in the court applying an increased advisory Guideline range in each case. For this holding, the circuit relied upon *McNeill v. United States*, 563 U.S. 816 (2011), pointing to *McNeill*'s language stating courts may not look to "current state law to define a previous offense." As one of Mr. Demont's prior convictions used to increase his base offense level is inclusive of decontrolled substances, this Court should grant the petition for writ of certiorari, as *Brown* and *Jackson* will likely be controlling.

The second split involves the proper interpretation of USSG §4B1.2—namely, what a "controlled substance offense" means under the Sentencing Guidelines, specifically, how courts determine what substances are considered "controlled substance offenses."

Courts in nine circuits have weighed in on this question presented and have split four to five: five circuits hold that "controlled substance offenses" should include substances criminalized under state law, even if the conduct is not illegal under federal law, while four circuits hold that "controlled substance offense" comprises only those offenses criminalized under the federal Controlled Substances Act.

This split is wide, entrenched, and has been in existence for more than a decade. This Court should intervene because recent steps taken by the Sentencing

Commission indicate that they will not resolve the issue. The Commission acknowledged that this question was a circuit split to be resolved, but has specifically declined to address this circuit split in its proposed amendments sent to Congress. *Cf. Braxton v. United States*, 500 U.S. 344, 348–49 (1991) (declining to resolve Guidelines issue because the Commission had undertaken a proceeding to resolve conflict). Again, because one of Mr. Demont's convictions is for inclusion of a substance not controlled federally, this Court should grant the petition to address this split.

Overall, this Court should grant Mr. Demont's petition for writ of certiorari to address these two questions, or at least hold the petition until *Brown* and *Jackson* are decided. Although Mr. Demont's case involves application of the U.S. Sentencing Guidelines, *Brown* and *Jackson* will likely still impact the Guideline's analysis.

B. Proceedings at the District Court.

Mr. Demont was indicted in the Southern District of Iowa with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) & 924(a)(2). R. Doc. 1. The government alleged that Mr. Demont was a prohibited person, and that he possessed a shotgun in his vehicle. PSR ¶¶ 6-14. Eventually, Mr. Demont plead guilty to the sole count, without a plea agreement. R. Doc. 33, 35.

The case proceeded to sentencing. The presentence investigation report ("PSR") calculated Mr. Demont's base offense level at 24. PSR ¶ 19. The PSR increased Mr. Demont's base offense level because Mr. Demont had two prior

convictions for a controlled substance offense. PSR ¶¶ 19, 33, 38. The first prior conviction was for Illinois delivery of controlled substance within 1,000 feet of a park, in violation of 720 ILCS § 570/407(b)(1) (2006). PSR ¶ 33. The second prior conviction was for Illinois possession of cannabis with intent to deliver, in violation of 720 ILCS § 550/5(d). PSR ¶ 38.

He also received a four-level enhancement for possessing the firearm in connection with another felony offense. PSR ¶ 20. After a three-level reduction, Mr. Demont's recommended total offense level was 25. PSR ¶ 28. Combined with a criminal history category IV, this resulted in an advisory guideline range of 84 to 105 months of imprisonment. PSR ¶ 104.

As relevant to this petition, Mr. Demont objected to his base offense level. R. Doc. 42, 49. Mr. Demont asserted that the convictions under paragraphs 33 and 38 were not controlled substance offenses, because they criminalized substances that are not within the definition of controlled substance offense. R. Doc. 42, 49. Further, he also objected to the PSR narrative for each prior conviction. R. Doc. 42, 49.

The case proceeded to sentencing. He maintained his challenge to the base offense level. Sent. Tr. p. 9. The prosecution did not introduce any *Shepard*[1] documents. The district court overruled Mr. Demont's objection to his base offense level and accepted the PSR's calculation of the advisory Guideline range. Sent. Tr.

[1] *Shepard v. United States*, 544 U.S. 13 (2005).

pp. 9-10. The court sentenced Mr. Demont to 72 months of imprisonment. Sent. Tr. p. 23.

C. Proceedings on Appeal.

Mr. Demont appealed to the Eighth Circuit Court of Appeals, maintaining his challenge to an increase to his base offense level. First, he argued that his Illinois cannabis conviction was overbroad, because it was inclusive of a now decontrolled substance—hemp. Next, Mr. Demont argued that his Illinois delivery of controlled substance within 1,000 feet of a park conviction was inclusive of substances outside of the federal Controlled Substances Act, so it was overbroad.

The prosecution moved for summary affirmance, asserting his arguments were foreclosed by Eighth Circuit case law. First, the prosecution argued Mr. Demont's argument that decontrolled substances do not qualify was foreclosed by *United States v. Bailey*, 37 F.4th 467 (8th Cir. 2022). *Bailey* adopted verbatim the circuit's analysis in its prior unpublished decision in *United States v. Jackson*, No. 20-3684, 2022 WL 303231, at *1–2 (8th Cir. Feb. 2, 2022) (unpublished) (per curiam), stating:

> Although *United States v. Jackson*, No. 20-3684, 2022 WL 303231 (8th Cir. Feb 2, 2022) (per curiam), is not precedential, *see* 8th Cir. R. 32.1A, we find its reasoning persuasive, and so we adopt that reasoning here. There, we stated:
>
> > We determined in [*United States v. Henderson*, 11 F.4th 713 (8th Cir. 2021)] that U.S.S.G. § 4B1.2(b)[, which defines "controlled substance offense,"] contains "no requirement that the particular substance underlying the state offense is also controlled under [the CSA]." Instead, we agreed with the Fourth Circuit's interpretation that the "ordinary meaning of ... 'controlled substance,' is any type of drug whose manufacture, possession, and use is

> regulated by law." Jackson concedes he was convicted of delivering and possessing with intent to deliver marijuana, a drug regulated by Iowa law. Whether the statute additionally proscribed hemp within the definition of marijuana is immaterial.
>
> Attempting to distinguish *Henderson*, Jackson emphasizes that Iowa, too, has removed hemp from its marijuana definition since his convictions occurred. *See* Iowa Code § 124.401(6). But we may not look to "current state law to define a previous offense." *McNeill v. United States*, 563 U.S. 816, 822 (2011); *see also United States v. Santillan*, 944 F.3d 731, 733 (8th Cir. 2019) (explaining that "a prior conviction qualifies as a 'felony drug offense' if it was punishable as a felony at the time of conviction"). Jackson's uncontested prior marijuana convictions under the hemp-inclusive version of Iowa Code § 124.401(1)(d) categorically qualified as controlled substance offenses for the career offender enhancement.

Bailey, 37 F.4th at 469-70. Next, the prosecution argued that Mr. Demont's argument that "controlled substance offenses" are limited to substances controlled under the federal Controlled Substances Act was foreclosed by *United States v. Henderson*, 11 F.4th 713 (8th Cir. 2021).

In a 2-1 decision, the Eighth Circuit granted the prosecution's motion for summary affirmance based upon *Bailey*. Pet. App. 8. Judge Kelly voted to deny the motion. Pet. App. 8.

REASONS FOR GRANTING THE WRIT

Below, the district court used two of Mr. Demont's prior convictions to significantly increase his advisory Guideline range. Each conviction involves a separate circuit split. This Court should grant the petition to resolve the two splits, detailed below.

I. THIS COURT GRANTED CERTIORARI TO ADDRESS WHETHER PRIOR DRUG CONVICTIONS INCLUSIVE OF DECONTROLLED SUBSTANCES CAN BE USED TO APPLY THE ARMED CAREER CRIMINAL ENHANCEMENT. THIS DECISION WILL LIKELY BE INSTRUCTIVE, IF NOT CONTROLLING, TO MR. DEMONT'S CASE.

First, this Court recently granted two petitions for certiorari that could impact whether Mr. Demont's Illinois cannabis conviction is a controlled substance offense. This Court will address a circuit split regarding the potential application of *McNeill v. United States*, 563 U.S. 816 (2011), when analyzing prior drug convictions under the categorical approach. *Brown v. United States*, 22-6389; *Jackson v. United States*, 22-6640. Both cases involve the Armed Career Criminal Act and determining whether a prior conviction is a "serious drug offense."

Mr. Demont's case involves application of the U.S. Sentencing Guidelines and whether a prior conviction inclusive of decontrolled substances is a "controlled substance offense." But like *Brown* and *Jackson*, the question involves the application of *McNeill*. *United States v. Bailey*, 37 F.4th 467 (8th Cir. 2022), did not rely upon Guideline language for its analysis. It relied upon *McNeill*, a decision analyzing whether a prior conviction qualified as an Armed Career Criminal Act

predicate offense, to determine that a controlled substance offense is not limited to substances controlled at the time of a defendant's federal sentencing.

While the Eighth Circuit stated in *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022), that it believed the Guidelines analysis to be different, *Perez* should not dissuade this Court from holding Mr. Demont's case until *Brown* and *Jackson* are decided. *Perez* supports that there is no meaningful distinction in the analysis between the Guidelines and the Armed Career Criminal Act. In *Perez*, the Court held that "serious drug offenses" under the Armed Career Criminal Act are limited to convictions for substances controlled at the time of federal sentencing. *Id.* at 699. In doing so, the Eighth Circuit cited a Ninth Circuit Guidelines decision to support its holding:

> And as the Ninth Circuit observed, "it would be illogical to conclude that federal sentencing law attaches culpability and dangerousness to an act that, at the time of [federal] sentencing, Congress has concluded is not culpable and dangerous." *United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021) (quotation omitted).

Id. *Bautista* analyzed the timing question as it applied to the definition of controlled substance offense.

Overall, the argument for the Guidelines and the ACCA is virtually identical. The focus of each argument is the proper interpretation of *McNeill*. While, in the Guidelines context, defendants also argue that the time of sentencing rule under 18 U.S.C. § 3553(a)(4)(A)(ii) supports that controlled substances offenses are limited to

convictions for substances controlled at the time of federal sentencing, this does not mean the analysis is materially different.

The Eighth Circuit's decision in Mr. Demont's case is an erroneous interpretation of *McNeill*. This Court should grant the petition for certiorari, as its decisions in *Brown* and *Jackson* will likely be instructive, if not controlling.

II. THIS COURT SHOULD ADDRESS WHETHER THE DEFINITION OF CONTROLLED SUBSTANCE OFFENSE IS LIMITED TO SUBSTANCES CONTROLLED UNDER THE FEDERAL CONTROLLED SUBSTANCES ACT.

Mr. Demont's second Illinois conviction also requires a court to determine whether "controlled substance offense" is limited to substances included within the federal definition. This Court should address this question for several reasons, detailed below.

A. A Direct Conflict Exists Among the Courts of Appeals

i. Four Circuits Define "Controlled Substance" Solely By Reference to the Federal Controlled Substances Act.

The First, Second, Fifth, and Ninth Circuits interpret "controlled substance[s]" to include only federal substances offenses under the Controlled Substances Act.

Interpreting §4B1.2, the Ninth Circuit reasoned that the Guidelines' goal of sentencing uniformity supporting using the Controlled Substances Act to define "controlled substances:"

> We have interpreted the term "controlled substance" as used in the Guidelines to mean a substance listed in the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 et seq. As we noted in *Leal-Vega*, construing the phrase in the Guidelines to refer to the definition of "controlled substance" in the CSA—rather than to the varying definitions of

> "controlled substance" in the different states—furthers uniform application of federal sentencing law, thus serving the stated goals of both the Guidelines and the categorical approach.

United States v. *Bautista*, 989 F.3d 698, 702 (9th Cir. 2021) (citing *United States v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012)).

The Second Circuit also interpreted §4B1.2 in relation to the CSA and noted a textual basis for its holding:

> [W]e find that "controlled substance" refers exclusively to substances controlled by the CSA. . . . 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.

United States v. Townsend, 897 F.3d 66, 68–70 (2d Cir. 2018) (emphasis in original). The Second Circuit further supported its conclusion by citing the *Jerome* presumption, which prescribes that "the application of a federal law does not depend on state law unless Congress plainly indicates otherwise." *Id.* at 71. "Because of the presumption that federal—not state—standards apply to the Guidelines . . . if the Sentencing Commission wanted 'controlled substance' to include substances controlled under only state law to qualify, then it should have said so." *Id.* at 70 (citations omitted).

The Fifth Circuit adopted the Ninth Circuit's reasoning, concluding that the Controlled Substances Act defines which offenses constitute predicates for sentence enhancements. *United States v. Gomez-Alvarez*, 781 F.3d 787, 793–94 (5th Cir. 2015) (citing to *United States v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012)) ("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.").[2]

Finally, the First Circuit has indicated it believes "controlled substance" should be defined by reference to federal law. The First Circuit noted that "[b]ecause we are interpreting the federal sentencing guidelines and utilizing the categorical approach (a creation of federal case law), this federally based approach is appealing," because "federal courts cannot blindly accept anything that a state names or treats as a controlled substance." *United States v. Crocco*, 15 F.4th 20, 23 (1st Cir. 2021) (internal quotations omitted). It found the competing approach, endorsed by the Fourth, Seventh, Eighth and Tenth Circuits to be "fraught with peril." *Id.*

Had Mr. Demont been tried in any of the above circuits, this Guidelines' range would have been significantly lower than what he received in the Eighth Circuit.

ii. Five Circuits Define "Controlled Substance" With Reference to the State Definition of "Controlled Substances."

Aside from the Eighth Circuit, four circuits have found that the plain text of §4B1.2 incorporates state definitions of "controlled substances."

The Fourth Circuit explicitly stated as much in *United States v. Ward*, 972 F.3d 364, 374 (4th Cir. 2020):

> The term "controlled substance offense" means an offense under federal *or state law*. § 4B1.2(b) (emphasis added). Thus, the Commission has specified that we look to *either* the federal or state law of conviction to

[2] Although *Gomez-Alvarez* interpreted "drug trafficking offense" under §2L1.2, rather than "controlled substance offense" in §4B1.2, this statutory distinction is "immaterial," because §4B1.2 and §2L1.2 define these terms identically. *Bautista*, 989 F.3d at 702 (stating "[t]he relevant text in the two provisions is identical.")

define whether an offense will qualify.

The Seventh Circuit came to a similar conclusion:

> We see no textual basis to engraft the federal Controlled Substance Act's definition of "controlled substance" into the career-offender guideline. The career-offender guideline defines the term controlled substance offense broadly, and the definition is most plainly read to "include state-law offenses related to controlled or counterfeit substances punishable by imprisonment for a term exceeding one year."

United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020) (citing *United States v. Hudson*, 618 F.3d 700, 703 (7th Cir. 2010)).

The Tenth Circuit also found that absent a clear directive in §4B1.2(b)'s reference to "controlled substance," the courts should use state definitions:

> [B]y not referencing the Controlled Substance Act definition in § 4B1.2(b), the Commission evidenced its intent that the enhancement extend to situations in which the state-law offense involved controlled substances not listed in the Controlled Substance Act.

United States v. Jones, 15 F.4th 1288, 1294 (10th Cir. 2021).

Most recently, the Third Circuit held that controlled substance offenses are inclusive of offenses controlled under state law. *United States v. Lewis*, 58 F.4th 764 (3d Cir. 2023). The court relied upon the plain language of the Guideline, including the Guidelines' failure to explicitly state the definition was limited to substances controlled under federal law. *Id*. at 769. At this time, the Third Circuit has stayed the mandate pending the disposition of this Court's decision in *United States v. Jackson*, 22-6640.

iii. Three Circuits Have Yet to Resolve This Issue.

The D.C. Circuit has not yet reached the merits of the issue.

The Sixth Circuit appears, in several unpublished opinions, to agree with the Fourth, Seventh, Eighth, and Tenth Circuits:

> [B]ecause the Guidelines specifically include offenses under state law in § 4B1.2, the fact that Illinois may have criminalized the "manufacture, import, export, distribution, or dispensing" of some substances that are not criminalized under federal law does not prevent conduct prohibited under the Illinois statute from qualifying, categorically, as a predicate offense.

United States v. Smith, 981 F. App'x 483, 488 (6th Cir. 2017); *see United States* v. *Sheffey*, 818 F. App'x 513 (6th Cir. 2020) (finding that even if overbroad, the state law was severable and federal law regulated the substance at issue). Yet, in other unpublished opinions, the Sixth Circuit appears to favor the other side of the split. *See United States v. Pittman*, 736 F. App'x 551, 554 (6th Cir. 2018) ("Because [the state law] criminalizes the distribution of at least some substances that are not 'controlled substances' within the meaning of 21 U.S.C. § 802(6), it necessarily criminalizes some actions that are not 'controlled substance offenses' within the meaning of USSG § 4B1.2(b).").

The Eleventh Circuit has, in an unpublished opinion, applied Florida state law's definition of 'controlled substance' to enhance an individual's sentence:

> We have twice held that [Florida statute § 893.13] is a controlled substance offense under § 4B1.2(b). Under the prior panel precedent rule, we are bound by our prior decisions "unless and until [they are] overruled or undermined to the point of abrogation by the Supreme Court or by this court sit[t]ing *en banc*." And *there is no overlooked argument exception to the rule.*

United States v. *Peraza*, 754 F. App'x 908, 910 (11th Cir. 2018) (citations omitted) (emphasis added).

Although the defendant in *Peraza* argued, like Mr. Demont, that his Florida conviction was not a "controlled substance offense" because it was broader than §4B1.2, the Eleventh Circuit declined to consider this argument. Under the prior panel precedent doctrine, the Eleventh Circuit will not weigh in on a split until it encounters the issue for a state statute it has not previously upheld as a "controlled substance offense."

Thus, eleven of the twelve courts of appeals have addressed Mr. Demont's issue in some manner and have roughly split down the middle on its resolution. So long as that is the case, there is no possibility of uniform federal sentencing law.

B. The Eighth Circuit's decision finding "controlled substance offense" includes substances not controlled federally is incorrect.

i. The Eighth Circuit's Decision is Contrary to the Text of §4B1.2.

The Eighth Circuit was incorrect in *Henderson* when it claimed that "there is no textual basis to graft a federal law limitation onto a [federal] career-offender guideline." 11 F.4th at 718-19. Instead, the plain text and authorizing statute, 28 U.S.C. § 994(h), indicate that §4B1.2 does not incorporate state law definitions of controlled substances.

The Commission's authority to promulgate regulations for career offenders stems from 28 U.S.C. § 994(h). Section 994(h) instructs the Commission to provide for enhanced sentencing of defendants who had been convicted of two prior felonies that were "offense[s] described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import

and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46." 28 U.S.C. § 994(h)(2)(b).

The Commission originally drafted §4B1.2 with this mandate in mind, explicitly incorporating § 994(h)'s references to the Controlled Substances Act. See USSG §4B1.2 (1987) ("The term 'controlled substance offense' as used in this provision means an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 955a, 959; §§ 405B and 416 of the Controlled Substance Act as amended in 1986, and similar offenses.").[3] Indeed, if §4B1.2 were interpreted to include controlled substances not outlined in the Controlled Substances Act, contrary to § 994(h), there is a colorable argument that the Commission exceeded its authority.

Additionally, although the Commission has modified §4B1.2 once, this amendment only reinforced that "controlled substance[s]" are limited to substances outlined in the Controlled Substances Act. The current version of §4B1.2 originated in 1989. As the Sentencing Commission states, this alteration was intended to bring the definition of "controlled substance offenses" in line with "serious drug offense[s]" in the Armed Career Criminal Act. U.S. Sent'g Comm'n, Report to the Congress: Career Offender Sentencing Enhancements, at App. A-8 (2016) (citing USSG App. C,

[3] Early court opinions interpreting §4B1.2 determined that the Guidelines permitted enhanced sentencing based on state convictions only where the prior conviction also could have been charged under federal law. *United States v. Stewart*, 761 F.3d 993, 999 (9th Cir. 2014), *United States v. Jemine*, 555 F. App'x 624, 625 (7th Cir. 2014), *United States v. Najar*, 225 F.3d 660 (6th Cir. 2000), *United States v. Gonsalves*, 121 F.3d 1416, 1419 (11th Cir. 1997), *United States v. Consuegra*, 22 F.3d 788 (8th Cir. 1994), *United States v. Brown*, 23 F.3d 839, 841 (4th Cir. 1994), *United States v. Whyte*, 892 F.2d 1170 (3d Cir. 1989).

amend. 268 (Nov. 1, 1989)). In turn, "serious drug offense[s]" are explicitly limited to substances defined under federal law. 18 U.S.C. § 924(e)(2)(A). Therefore, the 1989 revision reinforces Mr. Demont's argument that controlled substances only include those substances under the Controlled Substance Act.

The structure of §4B1.2 further supports Mr. Demont's interpretation of the Guideline. Section 4B1.2 defines a "controlled substance offense [as] an offense under federal or state law," that prohibits the manufacture, import, export, distribution, dispensing, or possession "of a controlled substance." USSG §4B1.2(b). "Offense" is the subject of the sentence and the phrase "under federal or state law" modifies that term. "Federal or state law" does not modify the term "controlled substance."

As such, §4B1.2 permits state convictions to justify sentencing enhancements but does not define controlled substances by reference to 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." *Townsend*, 897 F.3d at 70. (emphasis in original). Rather, to determine whether an offense is a controlled substance offense, "the *conduct* of which the defendant was convicted is the focus of inquiry." USSG §4B1.2, comment. (n.2) (emphasis added); see also *United States v. Nardello,* 393 U.S. 286, 293–95 (1969).

ii. The Eighth Circuit's Approach Contravenes the Guidelines Goal of Avoiding Sentencing Disparity.

The practice followed by the Third, Fourth, Seventh, Eighth, and Tenth circuits upsets the "precise calibration of sentences," *Payne v. Tennessee*, 501 U.S. 808, 820

(1991), that Congress established, see United States Sent'g Comm'n, Guidelines Manual, 2 (Nov. 2021) (describing Congress' "three objectives" in enacting the Sentencing Reform Act of 1984 as combating crime, reasonable uniformity in sentencing, and proportionality); *Rita v. United States*, 551 U.S. 338, 349 (2007) ("Congress 'sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct.'").

Further, the Eighth Circuit's method "turns the categorical approach on its head." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017); *see also Descamps v. United States*, 570 U.S. 254 (2013). The Eighth Circuit now permits two identical defendants to receive different sentences "based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct" a controlled substance offense. *See Taylor v. United States*, 495 U.S. 575, 591 (1990). This type of disparate outcome is precisely what the Guidelines were designed to avoid. *Rita*, 551 U.S. at 349 (stating that the Guidelines developed "a system that imposes appropriately different sentences for criminal conduct of different severity" not based upon the geographic location where the crime was committed.).

Such an approach has been consistently rejected in other areas of criminal law. Cf. *Taylor*, 495 U.S. at 590–91 (rejecting the use of state-law definitions of "burglary" for sentence enhancement purposes because "[t]hat would mean that a person . . . would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that

conduct 'burglary.'"); *Esquivel-Quintana*, 137 S. Ct. at 1570 (rejecting argument that "sexual abuse of a minor" encompasses all state convictions regardless of state's age of consent, because "defining [an offense] . . . as whatever is illegal under the particular law of the State where the defendant was convicted" turns "the categorical approach on its head"); *Nardello,* 393 U.S. at 293–94 (finding it untenable that "[g]iving controlling effect to state classifications would result in coverage . . . if appellees' activities were centered in Massachusetts, Michigan, or Oregon, but would deny coverage in Indiana, Kansas, Minnesota, or Wisconsin"). Controlled substance offenses are no different.

The text, drafting history, and general principles of criminal law show that the Eighth Circuit is wrong on the merits.

C. The Sentencing Commission has declined to address this split.

The Sentencing Commission has acknowledged that this split exists. *See generally*, U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines, Pt. 8, Circuit Conflicts (Apr. 5, 2023), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230405_prelim-RF.pdf. Initially, the Commission was considering whether to adopt an amendment to address this split and determine whether controlled substances offenses are limited to substances listed under the federal Controlled Substances Act, or whether it also includes substances controlled under state law. The final proposed amendments indicate that the Commission will not

address this question. *See id*. Therefore, the Commission will not resolve this conflict; this Court should do so.

More still, this Court need not wait for the Commission to act. Sentencing courts and courts of appeals are already acting to sentence thousands of defendants annually to divergent sentences. And as recognized in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the interpretation of federal regulations like the Guidelines remains firmly in the hands of the Court. *Kisor*, 139 S. Ct at 2415; *see also United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020) (interpreting *Kisor* as requiring courts to make an independent inquiry into the Sentencing Guideline's meaning and interpretation).

CONCLUSION

For these reasons, Mr. Demont respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

/s/ Heather Quick
Heather Quick
Assistant Federal Public Defender
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
TELEPHONE: 319-363-9540
FAX: 319-363-9542

ATTORNEY FOR PETITIONER