No. 22-7904

IN THE SUPREME COURT OF THE UNITED STATES

ANDREW RYAN DEMONT, PETITIONER

v.

UNITED STATES OF AMERICA

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

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

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 8) is not published in the Federal Reporter but is available at 2023 WL 4277642.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2023. The petition for a writ of certiorari was filed on June 27, 2023. 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 Iowa, petitioner was convicted on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. 1. The district court sentenced him to 72 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals affirmed. Id. at 8.

1. In June 2021, according to a victim statement, petitioner got into an argument with customers at a convenience store in Rock Island, Illinois. Presentence Investigation Report (PSR) ¶¶ 7, 13. In the parking lot, petitioner opened the trunk of his car, pulled out a gun and said "I'll do it," then placed the gun in the front seat of his car. PSR ¶ 13. When the customers left the parking lot, petitioner chased them through Rock Island and over a bridge into Davenport, Iowa. PSR ¶¶ 7, 14.

The customers called the police and reported that a person in a white Dodge Charger had pointed a gun at them and chased them to Davenport. PSR ¶ 7. Responding to the call, police intercepted a white Dodge Charger driven by petitioner. PSR ¶ 8. The Charger pulled over and, after a conversation with petitioner, police recovered a 12-gauge shotgun that lay in plain view behind the front passenger seat. PSR ¶¶ 8-10.

Petitioner had previously been convicted of a felony. PSR ¶ 11. A grand jury in the Southern District of Iowa returned an indictment charging him 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. Pet. App. 1.

2. The Probation Office calculated a base offense level of 24 under the Sentencing Guidelines, based in part on a determination that petitioner committed the instant offense after two felony convictions for "controlled substance offense[s]." PSR ¶¶ 19, 33, 38; see Sentencing Guidelines § 2K2.1(a)(2). 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). One of the controlled substance offenses identified by the Probation Office was a 2007 Illinois conviction for delivering a controlled substance (which its presentence report identified as cocaine) within 1000 feet of a park, PSR ¶ 33, and the other was a 2016 Illinois conviction for possessing cannabis with intent to deliver, PSR ¶ 38. The Probation Office calculated

an advisory Guidelines range of 84 to 105 months of imprisonment. PSR ¶ 104.

Petitioner objected to the classification of his prior cocaine and cannabis offenses as controlled substance offenses under the Guidelines. He contended that the cocaine offense was categorically not a qualifying predicate because the Illinois controlled-substance schedules (including the definition of cocaine) are overbroad compared to the federal schedules. D. Ct. Doc. 49, at 3-6 (Oct. 13, 2022); see United States v. Ruth, 966 F.3d 642, 647 (7th Cir. 2020), cert. denied, 141 S. Ct. 1239 (2021). Petitioner further contended that his cannabis conviction was categorically not a qualifying offense because the Illinois definition of cannabis included hemp at the time of his prior conviction, but Congress had removed hemp from the federal controlled-substance schedules by the time of petitioner's sentencing in this case. D. Ct. Doc. 49, at 6-9.

The district court overruled petitioner's objections based on circuit precedent. Sent. Tr. 9-10. The court sentenced petitioner to 72 months of imprisonment, to be followed by three years of supervised release. Pet. App. 2-3.

3. The court of appeals summarily affirmed, Pet. App. 8, citing United States v. Henderson, 11 F.4th 713 (8th Cir. 2021), cert. denied, 142 S. Ct. 1696 (2022), and United States v. Bailey, 37 F.4th 467 (8th Cir. 2022) (per curiam), cert. denied, 143 S. Ct.

2437 (2023). In Henderson, the court had recognized that the definition of "controlled substance offense" under the Guidelines includes offenses involving substances controlled by the State, and is not limited to the substances controlled under federal law pursuant to the federal Controlled Substances Act (CSA), 21 U.S.C. 801 et seq. 11 F.4th at 718-719. And in Bailey, the court had recognized that sentencing courts should consult the drug schedules in effect at the time of the prior state crime, rather than at the time of federal sentencing, when determining whether a prior conviction is a controlled substance offense under the Guidelines. 37 F.4th at 469-470.

ARGUMENT

Petitioner renews his contention (Pet. 9-11, 16-20) that his prior Illinois drug convictions are not "controlled substance offense[s]" under Sentencing Guidelines § 4B1.2(b). He contends that the Guidelines definition is limited to substances controlled under the federal CSA, see Pet. 16-20, and further contends that sentencing courts should compare the state offense of conviction to the federal drug schedules as they exist at the time of federal sentencing, rather than at the time of the prior state crime, see Pet. 9-11. Because this case turns on the proper interpretation of the Guidelines, the petition for a writ of certiorari does not warrant this Court's review. In any event, the court of appeals correctly rejected both of petitioner's contentions. The Court

has previously denied petitions presenting similar contentions, see pp. 14 n.2, 21, infra, and should follow the same course here.

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, e.g., 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 one of the questions presented here, namely, whether the definition of "controlled substance offense" in Section 4B1.2(b) is limited to offenses involving substances controlled under the CSA, 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; 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 (also 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). But petitioner does not dispute that the Commission could address those issues in the future. See Pet. 20-21. In its priorities for the current amendment cycle, the Commission lists "[c]ontinued examination of the career offender guidelines" (which rely on the definition of "controlled substance offense" in Section 4B1.2(b)) and "[r]esolution of circuit conflicts as warranted." United States Sent. Comm'n, Federal Register Notice of Final 2023-2024 Priorities, https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-final-2023-2024-priorities.

Any disagreement between the courts of appeals on the questions presented is relatively recent, see pp. 13-14, 18-19, infra, and the Commission obtained a quorum just last year, 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 the circuits' approaches to those questions 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 whether controlled substance offense must involve a substance listed on the federal schedules to qualify under the Guidelines).

2. In any event, the court of appeals correctly recognized that the term "controlled substance offense" in Sentencing Guidelines § 4B1.2(b) includes substances that are controlled under relevant state law but not under the federal CSA.[1]

a. The Guidelines define that term to encompass "an offense under federal or state law * * * that prohibits the * * * distribution[] or dispensing of a controlled substance" or "the possession of a controlled substance * * * with intent to * * * distribute[] or dispense." Sentencing Guidelines § 4B1.2(b). Because state law restricted the use of the substances at issue in both of petitioner's prior state convictions, those substances fall squarely within the ordinary meaning of the term "controlled substance[s]" -- namely, "'any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use

[1] Other pending petitions for writs of certiorari raise the same issue. See Moore v. United States, No. 22-7716 (filed June 1, 2023); Aurelien v. United States, No. 23-5236 (filed July 25, 2023).

are restricted by law.'" Ruth, 966 F.3d at 654 (quoting The Random House Dictionary of the English Language 443 (2d ed. 1987)).

Petitioner argues (Pet. 9-11, 16-20) that Illinois's definitions of the controlled substances at issue in his prior offenses are broader than the corresponding federal definitions contained in the CSA, and that Section 4B1.2(b) implicitly incorporates the CSA's schedule of controlled substances. But Section 4B1.2(b) "does not incorporate, cross-reference, or in any way refer to the Controlled Substances Act." Ruth, 966 F.3d at 651. Nor does it contain any other textual indication that it is limited in scope to federally prohibited conduct. See United States v. Ward, 972 F.3d 364, 372 (4th Cir. 2020) (observing that the argument that Section 4B1.2(b) is limited "to state offenses that define substances just as federal law defines them" "ignores the plain meaning of [Section] 4B1.2(b)"), cert. denied, 141 S. Ct. 2864 (2021).

To the contrary, Section 4B1.2(b) defines a controlled substance offense as an offense "under federal or state law," Sentencing Guidelines § 4B1.2(b) (emphasis added), specifically "refer[ring] [a court] to state law in defining the offense," Ward, 972 F.3d at 374. The Guidelines' definition accordingly applies to offenses involving substances controlled under federal or relevant state law. And the unadorned term "controlled substance" is a natural one to use in a general description of federal and

state drug crimes, which focus on unlawful activities involving a product that the relevant jurisdiction regulates. The court below has thus correctly recognized that "there is no textual basis to graft a federal law limitation onto" the Guidelines' definition of "controlled substance." United States v. Henderson, 11 F.4th 713, 718-719 (8th Cir. 2021), cert. denied, 142 S. Ct. 1696 (2022); see Pet. App. 8 (relying on Henderson).

The use of the term "controlled substance" is particularly unlikely to be a silent cross-reference to the federal schedules because "[t]he Sentencing Commission clearly knows how to cross-reference federal statutory definitions when it wants to." Ruth, 966 F.3d at 651. Section 4B1.2 itself incorporates definitions from federal statutes in defining the terms "firearm" and "explosive material." Sentencing Guidelines § 4B1.2(a)(2) (referring to "a firearm described in 26 U.S.C. § 5845(a)" and "explosive material as defined in 18 U.S.C. § 841(c)"). Other provisions likewise define particular terms by reference to federal law. See, e.g., Sentencing Guidelines § 2D1.1, comment. (nn.4 & 6).

The absence of any cross-reference in Section 4B1.2(b) to the CSA is especially telling because -- as petitioner acknowledges, see Pet. 17 -- the Commission amended Section 4B1.2 to remove such a cross-reference. And it replaced that cross-reference with a broad definition that expressly includes "state law" offenses

relating to "a controlled substance" more generally. Compare Sentencing Guidelines § 4B1.2(2) (1987) (defining the term to mean 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."), with id. § 4B1.2(b) (defining it to mean "an offense under federal or state law, * * * that prohibits the * * * distribution[] or dispensing of a controlled substance" or "the possession of a controlled substance * * * with intent to * * * distribute[] or dispense").

Petitioner advances the policy argument (Pet. 18-20) that referring to state law will undermine uniformity in sentencing by "permit[ting] 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." Pet. 19 (citation omitted). But "the federal-law-only approach would do likewise," United States v. Lewis, 58 F.4th 764, 770 (3d Cir. 2023), because any differences are inherent in the inclusion of convictions under "state law," Sentencing Guidelines § 4B1.2(b), which turns on what States choose to criminalize, how they choose to criminalize it, and their prosecutorial strategies, see id. at 770 n.2 (observing that there is "good reason for the purported discrepancy * * * between the hypothetical hemp dealer in a state that did not criminalize hemp and the one in a state that did," given that "culpability attaches

to trafficking a controlled substance because the state criminalizes it"). Under petitioner's own approach, even when defendants are convicted in different States for similar conduct, one State's law may be too broad to fit within the Guidelines, while the other's is not, leading to differential results.

b. The decision below accords with published decisions from the Third, Fourth, Seventh, Tenth, and Eleventh Circuits, as well as an unpublished decision from the Sixth Circuit, which have likewise declined "to engraft the federal Controlled Substances Act's definition of 'controlled substance'" onto Section 4B1.2(b). Ruth, 966 F.3d at 654; see Lewis, 58 F.4th at 768-771; Ward, 972 F.3d at 369-374; United States v. Jones, 15 F.4th 1288, 1291-1296 (10th Cir. 2021), cert. denied, 143 S. Ct. 268 (2022); United States v. Smith, 775 F.3d 1262, 1267-1268 (11th Cir. 2014), cert. denied, 576 U.S. 1013 (2015); see also United States v. Smith, 681 Fed. Appx. 483, 489 (6th Cir.), cert. denied, 581 U.S. 983 (2017). Petitioner asserts (Pet. 15) that the Sixth Circuit has issued inconsistent decisions on this issue, but this Court ordinarily does not grant review to resolve intracircuit conflicts. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Two courts of appeals have concluded that the term "controlled substance" in Section 4B1.2(b) refers exclusively to a substance

controlled by the CSA. See United States v. Bautista, 989 F.3d 698, 702 (9th Cir. 2021); United States v. Townsend, 897 F.3d 66, 72 (2d Cir. 2018). Petitioner cites (Pet. 13) the First Circuit's decision in United States v. Crocco, 15 F.4th 20 (2021), cert. denied, 142 S. Ct. 2877 (2022), but the court in that case reviewed the defendant's unpreserved claims for plain error and specifically stated that it was not deciding the issue here. Id. at 21, 23. Petitioner also cites (Pet. 12) the Fifth Circuit's decision in United States v. Gomez-Alvarez, 781 F.3d 787 (2015), but as petitioner acknowledges (Pet. 13 n.2), that decision does not interpret Section 4B1.2(b) and instead addresses the definition of "drug trafficking offense" in the commentary to Section 2L1.2. See Gomez-Alvarez, 781 F.3d at 792-793. Thus, although some courts of appeals, like petitioner, view the circuit disagreement somewhat more broadly, see Ruth, 966 F.3d at 653; Bautista, 989 F.3d at 702-703, any direct conflict is relatively recent and limited. That counsels even further against this Court's review and in favor of allowing the Sentencing Commission the opportunity to address it.

This Court has denied numerous petitions for writs of certiorari raising this issue.[2] It should do the same here.

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[2] 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-

3. The court of appeals here also correctly recognized that in determining whether a prior conviction involved a controlled substance under Section 4B1.2(b), courts should compare the state statute of conviction to the drug schedules in effect at the time of the prior state crime. With respect to his cannabis conviction, petitioner advocates (Pet. 16-20) for a time-of-federal-sentencing rule, contending that a predicate offense is categorically overbroad if the federal drug schedules have been narrowed in a relevant respect between the time when the predicate crime occurred and when federal sentencing takes place. Petitioner is mistaken.[3]

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, 142 S. Ct. at 640 (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).

[3] Several pending petitions for writs of certiorari 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); Baker v. United States, No. 22-7359 (filed Apr. 18, 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

a. Petitioner's interpretation finds no basis in the Guidelines' text. In possessing cannabis with intent to distribute, see PSR ¶ 38, 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). Nothing in the Guidelines' language suggests that a court should compare the state code underlying a prior offense to the state code or the federal controlled-substance schedules in effect at a later date. Instead, contemporaneous law provides the most natural place to look in determining the nature of a defendant's prior conviction.

The Guidelines' context confirms that a court should consult the drug schedules in effect at the time the prior crime 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). 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);

(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); Nerius v. United States, No. 23-5364 (filed Aug. 14, 2023).

see id. § 2K2.1(a)(2) (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-crime rule also provides fair notice by allowing a defendant to ascertain the consequences of a predicate conviction at the time of the prior crime. 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.

b. Although petitioner does not discuss it, circuits disagree on the Guidelines timing question. In addition to the court below, the Third and Sixth 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). See Lewis, 58 F.4th at 773 ("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."); Clark, 46 F.4th at 408 ("We adopt a time-of-conviction rule.").

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); Bautista, 989 F.3d at 703. 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. 6-9, supra.

c. Although he does not discuss the circuit conflict on the Guidelines question, petitioner contends (Pet. 9-11) that this case 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 and Tenth Circuits, however, have examined 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 (3d Cir. 2022), cert. granted, 143 S. Ct. 2458 (2023); United States v. Williams, 61 F.4th 799, 801 (10th Cir. 2023), petition for cert. pending, No. 22-7736 (filed June 5, 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 Circuit has rejected a time-of-state-crime approach without deciding between a time-of-federal-offense and time-of-federal-sentencing rule. See United States v. Perez, 46 F.4th 691, 699 (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 court below, as well as the Third Circuit, has reached different outcomes on the timing question under the Guidelines and the ACCA. See Perez, 46 F.4th at 703 n.4 (8th Cir.) (explaining why its Guidelines and ACCA holdings are purportedly consistent, despite the adoption of different timing rules); see also 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 stating that "our holding today is not inconsistent with our opinion in Brown").

On May 1, 2023, this Court denied the petition for a writ of certiorari in Altman v. United States, 143 S. Ct. 2437 (2023) (No. 22-5877), which likewise raised the timing question in the Guidelines context. See Pet. at i, 8-9, Altman, supra (No. 22-5877). The Court should do the same here. 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.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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