No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES AGERTON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether an offense-matching categorical approach applies to the determination of a "controlled substance offense" under the Sentencing Guidelines?

Parties Involved

All parties appear in the caption of the case on the cover page.

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Petition for Writ of Certiorari

Charles Agerton respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered in Case No. 22-10194, on August 29, 2023, affirming the judgment of the District Court for the Northern District of Florida.

Opinion Below

The decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Charles Agerton,* No. 22-10194, 2023 WL 5537057 (11th Cir. 2023) (unpublished), was issued on August 29, 2023, and is attached as Appendix A to this Petition.

Jurisdiction

The Court of Appeals filed its decision in this matter on August 29, 2023. Petitioner did not move for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c)

Guidelines Provisions Involved

This petition involves the application of USSG § 4B1.1 and 4B1.2 (2021), which provide in pertinent part:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

USSG § 4B1.1(a) (November 1, 2021, Guidelines Manual).

> (b) 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.

USSG § 4B1.2(b) (November 1, 2021, Guidelines Manual).

Florida Statutes Involved

Section 893.13(1)(a), Florida Statutes, provides:

> (1)(a) Except as authorized by this chapter and chapter 499, a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance.

Fla. Stat. § 893.13(1)(a).

Florida Standard Jury Instructions Involved

25.2 SALE, PURCHASE, MANUFACTURE, DELIVERY, OR POSSESSION WITH INTENT TO SELL, PURCHASE, MANUFACTURE, OR DELIVER A CONTROLLED SUBSTANCE
§ 893.13(1)(a), Fla. Stat.; § 893.13(2)(a), Fla. Stat.

Certain drugs and chemical substances are by law known as "controlled substances." (Specific substance alleged) is a controlled substance.
To prove the crime of (crime charged), the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) [sold] [manufactured] [delivered] [purchased] [possessed with intent to [sell] [manufacture] [deliver] [purchase]] a certain substance.
2. The substance was (specific substance alleged).
3. (Defendant) had knowledge of the presence of the substance.

…

Sell.

"Sell" means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.

Manufacture. § 893.02(15)(a), Fla. Stat.

"Manufacture" means the production, preparation, propagation, compounding, cultivating, growing, conversion, or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging of the substance or labeling or relabeling of its container.

…

Deliver. § 893.02(6), Fla. Stat.

"Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship …

Fla. Sta. Jury Instr. (Crim) 25.2 (2019).

Introduction

The categorical approach applies in a variety of contexts – in the construction of criminal statutes, immigration statutes, criminal sentencing provisions, and Guideline sentencing provisions. In the sentencing context, the categorical approach promotes the interests of efficiency, uniformity, and fairness. Circuit courts generally employ an offense-matching categorical approach in the interpretation of enumerated "crimes of violence" and "controlled substances offenses" under the Sentencing Guidelines. In the enumerated offense context, the categorical approach compares the elements of the prior state conviction to the elements of the generic federal crime to determine if the state offense is the same as, or narrower than, the generic crime, and thus qualifies for purposes of a federal sentencing enhancement.

The Eleventh Circuit is among a minority of circuits which interpret the Guidelines definition of "controlled substance offense" as an elements clause itself, which requires a comparison of only an element of the prior state conviction with a corresponding element listed in the Guidelines definition of "controlled substance offense." The Eleventh Circuit's approach misinterprets the Guideline and undercuts the interests of efficiency, uniformity, and fairness without adequate support from its text. The rule of the Eleventh Circuit and others is incompatible with the Court's prior precedent. Due to the widespread application of the Guidelines' "controlled substance offense" provision, this case is worthy of certiorari review.

Statement of the Case

Petitioner, Charles Agerton, pled guilty to the offense of possession with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(viii). The probation officer prepared a Presentence Investigation Report (PSR). Pertinent to this petition, the probation officer concluded Mr. Agerton qualified to be sentenced as a career offender in accordance with USSG § 4B1.1, based on two prior Florida controlled substance offenses: one for sale of marijuana, the other for sale of methamphetamine. His total offense level was 34, and his criminal history category VI, resulting in an advisory guidelines range of 262 to 327 months' imprisonment. Without the career offender enhancement, he would have been placed in criminal history category III, resulting in a guidelines range of 188 to 235 months' imprisonment. Mr. Agerton was ultimately sentenced to 135 months' imprisonment.

After preserving the issue below, Mr. Agerton argued again on appeal that the term "controlled substance offense," as defined by the Guidelines, did not include inchoate offenses. Under Fla. Stat. § 893.13(1)(a), a jury can convict if it determines a defendant merely "attempted" to deliver a controlled substance. Therefore, because the Florida offense incorporates attempts, it is broader than the

corresponding generic federal offense, and is not a qualifying "controlled substance offense" under the Guidelines.[1]

The circuit court, in an unpublished decision, rejected Mr. Agerton's argument, opining that the case was controlled by its prior decision in *United States v. Smith,* 775 F.3d 1262 (11th Cir. 2014) and *United States v. Penn,* 63 F.4th 1305 (11th Cir. 2023), *cert. denied,* -- S. Ct. --, 2023 WL 7475215 (2023).

[1] Mr. Agerton acknowledges that USSG § 4B1.2 was amended on November 1, 2023, and the guideline text now explicitly includes inchoate and attempted offenses in the definition of "controlled substance offenses." This amendment does not change, however, the dispute over the correct standard to be applied when considering § 4B1.2. That issue will continue to be inconsistently resolved until this Court addresses the issue. Furthermore, Mr. Agerton himself suffered from the Eleventh Circuit's erroneous conclusion, as related to the version of the guidelines applied to him, and therefore amendment or not, he is still entitled to relief.

Reasons for Granting the Writ

This Court should grant the writ because the decision below illuminates a split of authority among the circuit courts and erodes the rules guiding the categorical and modified categorical approaches articulated in decisions such as *Taylor v. United States*, 495 U.S. 575 (1990), *Shepard v. United States*, 544 U.S. 13 (2005), *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016).

I. The decision below conflicts with the Court's decision in Taylor and its progeny.

In *Taylor*, the Court articulated a categorical approach to determine whether a prior state conviction for burglary constituted an enumerated predicate "burglary" offense for purposes of sentencing under the Armed Career Criminal Act (ACCA). The Court found the categorical approach was intended by Congress as a means of promoting efficiency, uniformity, and fairness in sentencing.

In *Taylor* the defendant had a prior California conviction for burglary which was, nominally, a "match" for the ACCA's enumerated burglary offense. Notwithstanding the match, the Supreme Court required a comparison of the elements of the prior California burglary to the elements of the "generic" burglary to determine whether the California burglary qualified as a "violent felony" under ACCA.

In the intervening years, the circuit courts have applied the categorical and modified categorical approaches to the determination of qualifying offenses under the Sentencing Guidelines. In the context of "controlled substance offenses" under

§ 4B1.2(b), *see e.g.*, *United States v. Bryant*, 571 F.3d 147 (1st Cir. 2009); *United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018); *United States v. Glass*, 904 F.3d 319 (3rd Cir. 2018); *United States v. Dozier*, 848 F.3d 180 (4th Cir. 2017); *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016); *United States v. Montanez*, 442 F.3d 485 (6th Cir. 2006); *United States v. Smith*, 921 F.3d 708 (7th Cir. 2019); *United States v. Maldonado*, 864 F.3d 893 (8th Cir. 2017); *United States v. Brown*, 879 F.3d 1043 (9th Cir. 2018); *United States v. Madkins*, 866 F.3d 1136 (10th Cir. 2017); *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 287 (2015).

In the context of "crimes of violence" under § 4B1.2(a), *see e.g.*, *United States v. Winter*, 22 F.3d 15, 18 (1st Cir. 1994); *United States v. Walker*, 595 F.3d 441, 443-44 (2d Cir. 2010); *United States v. Ramos*, 892 F.3d 599, 606 (3rd Cir. 2018); *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018); *United States v. Howell*, 838 F.3d 489, 494 (5th Cir. 2016); *United States v. Covington*, 738 F.3d 759, 762 (6th Cir. 2014); *United States v. Edwards*, 836 F.3d 831, 833 (7th Cir. 2016); *United States v. McMillan*, 863 F.3d 1053, 1056 (8th Cir. 2017); *United States v. Quintero-Junco*, 754 F.3d 746, 751 (9th Cir. 2014); *United States v. Armijo*, 651 F.3d 1226, 1230 (10th Cir. 2011); *United States v. Estrella*, 758 F.3d 1239, 1244 (11th Cir. 2014); *United States v. Brown*, 892 F.3d 385, 402 (D.C. Cir. 2018).

The relevant Guideline provides:

> The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

USSG § 4B1.2(b)(1) (November 1, 2021, Guidelines Manual).

Like the enumerated offense clause in ACCA, the "controlled substance offense" provision of the Guidelines creates a class of enumerated offenses. The enumerated offenses are: (1) manufacture of a controlled substance; (2) import of a controlled substance; (3) export of a controlled substance; (4) distribution of a controlled substance; (5) dispensing a controlled substance; (6) possession of a controlled substance with intent to manufacture; (7) possession of a controlled substance with intent to import; (8) possession of a controlled substance with intent to export; (9) possession of a controlled substance with intent to distribute; (10) possession of a controlled substance with intent to dispense; (11) possession of a counterfeit controlled substance with intent to manufacture; (12) possession of a counterfeit controlled substance with intent to import; (13) possession of a counterfeit controlled substance with intent to export; (14) possession of a counterfeit controlled substance with intent to distribute; and (15) possession of a counterfeit controlled substance with intent to dispense. These are the names of the generic controlled substance offenses enumerated in § 4B1.2(b). *Cf.* 21 U.S.C. § 841(a) (listing drug trafficking crimes under federal law).

In accordance with the framework established in *Taylor*, to determine whether a prior state offense constitutes a "controlled substance offense" under the Guidelines, the district court should compare the elements of the state offense with the elements of the generic federal crime.

In *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), and the present case, the circuit court deviated from the established methodology by disavowing an essential feature of the categorical approach – the determination of the elements of the "generic" offense.

> We need not search for the elements of "generic" definitions of "serious drug offense" and "controlled substance offense" because these terms are defined by a federal statute and the Sentencing Guidelines, respectively …

Id. at 1267.

The Eleventh Circuit seems to have construed the "controlled substance offense" provision as an elements clause setting forth elements of unspecified state-controlled substance offenses. Under traditional elements clause analysis, the sentencing court need only compare a specific element of a state crime with the corresponding element in § 4B1.2(b) to determine whether the state element is the same as, or narrower than, the corresponding federal element. The rule of the Eleventh Circuit is actually broader than the established elements clause analysis. *Smith* held that § 4B1.2(b) requires only that the predicate offense prohibits certain activities "related to" controlled substances. *Id*.

In the present case, Mr. Agerton argued the relevant Florida statute includes an *attempt* to distribute a controlled substance,[2] hence the offense is broader than its federal generic counterpart (which does not include attempts, *see United States*

[2] The relevant Florida Jury Instruction gives the jury the option of convicting of sale or delivery (among other things). The definition in the instruction for "sell" includes "delivery," and the definition of "delivery" includes an attempted transfer. The jury is not required to determine whether a defendant attempted or completed a transaction – those elements are indivisible. Therefore, a defendant can be convicted of the offense while having only committed an attempt. This is, of course, broader than the generic federal offenses defined in USSG § 4B1.2(b).

v. Dupree, 57 F.4th 1269 (11th Cir. 2023) (en banc)) and therefore is not a qualifying controlled substance offense. Under the Eleventh Circuit's model however, Mr. Agerton's prior Florida offense was no broader than the Guideline definition. The Eleventh Circuit, therefore, rejected Mr. Agerton's argument.

The decision of the Eleventh Circuit below conflicts with the consistent pronouncements of this Court in *Taylor* and subsequent decisions such as *Descamps* and *Mathis*. Two other circuits appear, like the Eleventh, to take an elements-based approach. *See United States v. Bryant*, 571 F.3d 147 (1st Cir. 2009) (prior New York conviction for attempted sale of a controlled substance was no broader than the "federal definition;" although "sale" element encompassed an "offer to sell" which required a bona fide offer and intent and ability to sell, the indictment and plea colloquy (under modified categorical approach) proved that the defendant pled guilty to possessing with intent to distribute cocaine as required under Guideline definition); *United States v. Montanez*, 442 F.3d 485 (6th Cir. 2006) (prior Ohio convictions for possession of specific quantity of a controlled substance did not qualify as a controlled substance offense because Ohio offense did not require "intent to distribute" specifically required under Guideline definition).

The present case is worthy of certiorari review because the law of the Eleventh, First, and Sixth Circuit Courts of Appeal conflict with the Court's well-established categorical approach applicable to enumerated offense clauses.

II. The law of the First, Sixth and Eleventh Circuits conflicts with that of the Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Circuits, as to whether the Guideline definition of "controlled substance offense" requires an offense-matching categorical approach.

As set forth above, the First, Sixth, and Eleventh Circuits appear to regard the Guideline definition of "controlled substance offense" as an elements clause. Under that model, the federal sentencing court need only inquire as to whether a particular element of a prior conviction is the same, or narrower than, the corresponding element set forth in § 4B1.2(b). This minority rule should be compared to the rule in the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuit Courts of Appeal.

The Second Circuit holds that the determination of a "controlled substance offense" requires the federal sentencing court to "compare the elements of [the state crime] to the elements of the corresponding generic federal crime." *United States v. Townsend*, 897 F.3d 66, 72 (2d Cir. 2018). If the "state statute is broader than its federal counterpart," the prior offense is not a "controlled substance offense." *Id.* By referring to a "corresponding generic federal crime," the Second Circuit construes the "controlled substance offense" provision as an enumerated offense clause requiring a comparison between the elements of the prior offense of conviction with the elements of the generic enumerated federal crime identified in § 4B1.2(b).

The Third Circuit holds that a prior state conviction cannot qualify as a "controlled substance offense" "if its elements are broader than those of a listed generic offense." *See United States v. Glass*, 904 F.3d 319, 321-22 (3rd Cir. 2018)

(quoting *Mathis v. United States*, 136 S. Ct. 2243, 2551 (2016)). As indicated in *Glass*, the Third Circuit views § 4B1.2(b) as setting forth a list of generic drug offenses, while holding that the defendant's prior drug trafficking conviction did not "sweep more broadly than § 4B1.2(b)." *Id*. at 324.

In *United States v. Dozier*, 848 F.3d 180 (4th Cir. 2017), the court held a prior West Virginia conviction for attempted distribution of a controlled substance did not qualify as a "controlled substance offense." *Id*. at 181. Following the *Taylor* model, the court opined that the elements of the prior offense must correspond to the elements of the "enumerated offense." *Id*. at 183. Moreover, in the context of an "attempt" offense, the court must first determine whether the state's definition of attempt comports categorically with the generic attempt. *Id*. at 185. Second, the court must determine "whether the underlying state offense is a categorical match for the Guideline predicate offense." *Id*. Both inquiries are required to determine whether the state statute sweeps more broadly than the "generic crime." *Id*. at 185-86 (citing *Descamps*, 133 S. Ct. at 2281).

In *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), the court explained that it employs the categorical approach to determine "whether a prior conviction is included within an offense defined or enumerated in the Guidelines." *Id*. at 572. The defendant argued that his prior Texas conviction for delivery of heroin did not qualify as a "controlled substance offense" because the offense broadly included an "offer to sell" a controlled substance. The circuit court agreed that the prior offense proscribed a "greater swath of conduct than the elements of the relevant

[Guidelines] offense." *Id*. at 576 (quoting *Mathis*, 136 S. Ct. at 2551). This "mismatch of elements" meant that the prior conviction did not constitute a "controlled substance offense." *Id*. at 576 (quoting *Mathis*, 136 S. Ct. at 2551).

The Seventh Circuit agrees that the determination of a "controlled substance offense" requires an offense-matching categorical approach. The elements of the prior crime of conviction are examined to see if they "match" the elements of the "generic" offense. *United States v. Smith*, 921 F.3d 708, 712 (7th Cir.) (quoting *Mathis*, 136 S. Ct. at 2248), *cert. denied*, 140 S. Ct. 502 (2019). In *Smith*, the Seventh Circuit assumed that the Indiana offense of conviction – dealing in a controlled substance – was broader than a generic distribution offense because it included "financing" the manufacture or delivery. The court reasoned that the statute was divisible, and, under the modified categorical approach, the government proved the defendant knowingly possessed with intent to deliver cocaine. *Id*. at 715. The elements of the prior offense therefore matched the elements of the offense enumerated in the Guidelines: "(1) possession (2) of a controlled substance (3) with intent to distribute that substance." *Id*. at 715-16.

United States v. Maldonado, 864 F.3d 893 (8th Cir. 2017), is the same. "To determine whether a prior conviction qualifies as a controlled substance offense," the court employs a categorical approach. *Id*. at 897 (quoting *United States v. Robinson*, 639 F.3d 489, 495 (8th Cir. 2011)). The court inquires "whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding [controlled substance offense]." *Id*. at 897 (quoting

United States v. Roblero-Ramirez, 716 F.3d 1122, 1125 (8th Cir. 2013)). Applying the appropriate test, the court concluded Maldonado's prior convictions fell within the generic definitions of "distribution" or "dispensing" a controlled substance set forth in § 4B1.2(b). *Id.* at 900-01.

Similarly, the Ninth Circuit applies the categorical approach to the determination of controlled substance offenses under the Guidelines. *United States v. Brown*, 879 F.3d 1043 (9th Cir. 2018). "If the statute of conviction sweeps more broadly than the generic crime, a conviction under that law cannot categorically count as a qualifying predicate, even if the defendant actually committed the offense in its generic form." *Id.* at 1047 (quoting *United States v. Hernandez*, 769 F.3d 1059, 1062 (9th Cir. 2014)). In *Brown*, the court concluded the Washington offense of conspiracy to distribute a controlled substance was broader than the generic federal definition because, unlike the generic crime, it criminalized an agreement with a state agent. *Id.* at 1048-49.

Rounding out the majority view, *United States v. Madkins*, 866 F.3d 1136 (10th Cir. 2017), held the categorical approach applied to the determination of "controlled substance offenses" under § 4B1.2(b). *Id.* at 1144-45. The elements of the prior conviction were compared to the elements of the "generic predicate offense." *Id.* at 1145. The defendant's prior Kansas conviction for possession with intent to sell cocaine and marijuana did not qualify as a controlled substance offense because the Kansas statute defined "sale" to include an "offer to sell" which the court found to be broader than "distribution" under the Guidelines. *Id.* at 1145.

The above survey of circuit court decisions demonstrates a clear split in the interpretation of "controlled substance offenses" under § 4B1.2(b) of the sentencing Guidelines. The split of authority begs resolution by the Court.

III. Petitioner's case presents an appropriate vehicle for resolution of the circuit split on the important question presented.

This case involves a question which arises in a vast number of cases throughout the country, i.e., whether a prior conviction qualifies as a "controlled substance offense" for the purpose of a Guidelines sentencing range enhancement. The split of authority is well developed, mature, and ripe for review. Nearly every circuit has weighed in on the question with differing results.

The record is clear. The question whether Mr. Agerton's prior Florida conviction qualifies as a controlled substance offense was preserved for review in the district and circuit courts.

The resolution of the question is dispositive of the case. If Mr. Agerton's prior convictions do not qualify as controlled substance offenses, he is not a career offender, and therefore would be placed in criminal history category III. Mr. Agerton's advisory sentencing range of 262 to 327 months would be reduced to 188 to 235 months imprisonment. Mr. Agerton would therefore be entitled to a re-sentencing.

IV. The decision below is wrong.

The decision below is wrong because it conflicts with the law of the Court established by *Taylor* and its progeny – absent the identification of a specific statutory crime, an enumerated offense will qualify for a federal sentencing enhancement only if its elements are the same as, or narrower than, the generic federal definition. The decision below deviated from this rule because the circuit court failed to recognize that the "controlled substance offense" provision of § 4B1.2(b) encompasses a list of enumerated offenses and does not include attempts or inchoate offenses.

A split of authority has developed on the issue. A minority of circuit courts apply an elements-based analysis rather than an offense-matching analysis.

Under the offense-matching approach, the decision below is clearly wrong. The generic federal drug trafficking offenses such as manufacturing, distributing, or possessing with intent to manufacture, distribute, etc., a controlled substance, as set forth in USSG § 4B1.2(b), do not include inchoate offenses such as attempt or conspiracy. *See, e.g., Dupree,* 57 F.4th 1269 (11th Cir. 2023); *United States v. Nasir,* 17 F.4th 459, 471 (3d Cir. 2021) (en banc); *United States v. Winstead,* 890 F.3d 1082 (D.C. Cir. 2018).

Mr. Agerton's prior Florida convictions for sale of a controlled substance under Fla. Stat. § 893.13(1)(a) are broader than their generic counterpart and do not qualify as "controlled substance offenses" under § 4B1.2(b).

Conclusion

For the reasons stated above, the Court should grant the writ.

Respectfully submitted,

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