No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DARWIN DWAYNE HUTCHINS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the district court err when it counted Hutchins's Ohio cocaine conviction as a controlled substance offense to make him a career offender under the Sentencing Guidelines when Ohio's definition of cocaine covers more substances than the federal definition of cocaine?

2. Was Hutchins's 327-month sentence "greater than necessary" when it was at the top of the career offender guideline sentence range and his current and predicate convictions were for minor non-violent drug crimes?

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit:

- United States of America v. Darwin Dwyane Hutchins, N.D. Ohio Case No. 1:21-cr-95, Judgment of Sentence entered July 27, 2022

- United States of America v. Darwin Dwayne Hutchins, Case No. 22-3655, 2023 U.S. App. LEXIS 30303 (6th Cir. November 13, 2023)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Darwin Dwyane Hutchins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The United States Court of Appeals for the Sixth Circuit affirmed Hutchins's conviction and sentence in an opinion not recommended for publication filed on November 13, 2023. United States v. Darwin Dwayne Hutchins, Case No. 22-3655, 2023 U.S. App. LEXIS 30303 (6th Cir. November 13, 2023) (Pet. App. 1a).

JURISDICTION

The Sixth Circuit's opinion was filed on November 13, 2023. Hutchins's petition for rehearing was denied on December 14, 2023. The mandate issued on December 27, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the definition of "controlled substance offense" in the career offender sentencing guidelines. Section 4B1.1 of the United States Sentencing Guidelines Manual says:

> (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).

A controlled substance offense is "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 the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense ." USSG § 4B1.2(b) (November 1, 2021).

These guidelines implement instructions in the Sentencing Reform Act of 1984 that:

> (h) The [Sentencing] Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized [when] . . . the defendant . . .
>
> (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 Substance Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substance Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46[46 USCS §§ 70501, et seq.]; 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 Substance Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substance Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46[46 USCS §§ 70501, et seq.].

28 U.S.C. § 994(h).

The case also involves 18 U.S.C. § 3553(a), which says that courts shall impose sentences "sufficient, but not greater than necessary " to comply with the purposes of sentencing.

STATEMENT OF THE CASE

In November 2020, based on a report that a black Mercedes had run a red light, Cleveland police officers assigned to a gang suppression unit blocked in a black Mercedes SUV stopped at a traffic signal. Hutchins was driving. One officer saw a handgun in the driver's seat. Officers seized the gun and then found 18 grams of a mixture of fentanyl and other drugs in the car. (Trial Tr., R. 84, Page ID # 1022–23, 1055–56, 1058, 1061, 1099–1100, 1102, Motion to Suppress, R. 21, Page ID # 66-67).

Hutchins was charged and convicted of firearm and drug trafficking offenses. The district court imposed a career offender sentence of 327 months—a sentence at the top of the Guidelines sentence range. If not

sentenced as a career offender, Hutchins's sentence range was 63–78 months, plus 60 months consecutive for the firearm charge. (Sentencing Tr., R. 78, Page ID # 699–701).

Hutchins appealed. He raised three arguments: first, that the evidence from the traffic stop should have been suppressed; second, that the court should not have sentenced him as a career offender because one of his two predicate drug convictions should not count to make him a career offender; and third, that the sentence was too long based on his age and his criminal history, and because the career offender guideline inappropriately inflates Guidelines sentence ranges for low-level non-violent drug offenders like him.

The Court of Appeals rejected Hutchins's arguments. The court said that the district court did not plainly err when it counted the 2002 Ohio drug conviction as a predicate conviction to make Hutchins a career offender and that Hutchins's within-Guidelines sentence was not too long because the district court considered the § 3553 factors and its weighing of them was not an abuse of discretion. United States v. Darwin Dwayne Hutchins, 2023 U.S. App. LEXIS 30303 at *14–20.

REASONS FOR GRANTING THE WRIT

When deciding if it will grant a petition for certiorari, the Court considers if the petition presents an important issue "that has not been, but

should be, settled by [the] Court." Sup. Ct. R. 10(a).

Here, the Court should grant the petition in order to resolve conflicting decisions of the circuit courts on an important issue.

Hutchins was sentenced in 2010 as a career offender for selling 0.62 grams of cocaine near a protected place. At that time his two predicate convictions were for a 2002 Ohio drug conviction and a 2007 Ohio burglary conviction. (PSR, R. 63, ¶¶ 55, 57, Page ID # 585–87). In 2010, the career offender guideline provided that a burglary conviction counted as a crime of violence, but in 2016 the Commission removed burglary from the list of crimes of violence. USSG App. C, amend. 798.

So, when he was sentenced in 2022, Hutchins's career offender predicates were the 2002 Ohio drug conviction and the 2010 federal cocaine conviction. He argued on appeal that the 2002 conviction should not count because Ohio defines cocaine differently than federal law.

Hutchins's 2002 conviction was for preparation of drugs for sale (F3), contrary to Ohio Revised Code § 2925.03, PSR, R. 62, ¶ 55, Page ID # 585–86). The PSR said that the charge involved distributing more than 5 grams of "crack cocaine." (Id.).[1]

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[1]The 2002 Ohio conviction nearly did not count as a career offender predicate because it was too old. Hutchins was released from prison on that conviction on November 30, 2005, 14 years and more than 11 months before

Ohio prohibits all isomers of cocaine, including positional isomers. Federal law defines cocaine differently than Ohio. It only criminalizes optical and geometric isomers of cocaine. Compare Ohio Revised Code § § 2925.01(x)(1) and (2) with 21 U.S.C. § 812 and 21 C.F.R. § 1308.02(c).

The Sentencing Commission has not defined the term "controlled substance offense." If it means offenses that involve just the substances listed in the Controlled Substances Act, then Hutchins's Ohio conviction should not count because Ohio defines cocaine to cover more substances than the federal definition of cocaine. If it means any state or federal offense that involves a substance controlled by state or federal law, then it counts.

The circuit courts are split over the meaning of "controlled substance offense" in the Guidelines. The Second, Fifth, and Ninth Circuits have held that the meaning of controlled substance is limited to drugs regulated by the Controlled Substance Act because construing "controlled substance" to refer to the Controlled Substances Act "furthers uniform application of federal sentencing law. . . serving the stated goals of both the Guidelines and the categorical approach." United States v. Bautista, 989 F.3d 698, 702 (9th Cir.

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his new offense on November 4, 2020. The Guidelines don't count convictions when the defendant was released from prison more than 15 years before the new offense. USSG § 4A1.2(e)(1).

2021), United States v. Townsend, 897 F.3d 66, 74–75 (2d. Cir. 2018), United States v. Gomez-Alvarez, 781 F.3d 787, 793–94 (5th Cir. 2015). To the contrary, the Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits have held that drugs regulated by state law, but not by federal law, still count as controlled substances under the career offender guideline, because the guideline does not incorporate, cross-reference, or refer to the Controlled Substances Act and the plain meaning of "controlled substance" is not limited to substances federal law controls. United States v. Ruth, 966 F.3d 642, 651–54 (7th Cir. 2020), United States v. Lewis, 58 F.4th 764, 768–69 (3d. Cir. 2023), United States v. Jones, 81 F.4th 591, 599 (6th Cir. 2023), United States v. Ward, 972 F.3d 364, 372–74 (4th Cir. 2020), United States v. Henderson, 11 F.4th 713, 717–19 (8th Cir. 2021), United States v. Jones, 15 F.4th 1288, 1291 (10th Cir. 2021).[2]

The circuit split means that in some circuits a person can get a career offender sentence even though his state court conviction involved a substance

[2]But the Tenth Circuit says that federal definitions of crimes of violence apply when deciding if a person is a career offender—not state definitions. United States v. Madkins, 866 F.3d 1136 (10th Cir. 2017), United States v. Jones, 32 F.4th 1290 (10th Cir. 2022) Rossman, J., (dissenting from denial of petition for rehearing en banc and noting inconsistent methods for determining the meaning of undefined terms in the career offender guideline).

not controlled by federal law.

When Congress told the Commission to set a sentence at or near the maximum term authorized for defendants with two or more convictions for a controlled substances offense it said that the offense should be one "described in" federal law. 28 U.S.C. § 994(h). This direction cuts against reading "controlled substance offense" to include state offenses involving substances not listed in the federal schedule of controlled substances.

A definition of controlled substance offense that includes state controlled substances other than those on the federal schedules of controlled substances is "at odds with the plain language" and "ordinary meaning" of 28 U.S.C. § 994(h). United States v. LaBonte, 520 U.S. 751 at 756–757 (1997) quoting Moskal v. United States, 498 U.S. 103, 108 (1990) (internal quotation marks omitted). In LaBonte the Court held that the Commission could not amend the commentary to USSG § 4B1.1 in a way that was inconsistent with the plain language of § 994(h). Nor should the Commission have the authority to expand the definition of controlled substance offense in way that is inconsistent with the plain language of § 994(h).

The circuits that use state definitions have also ignored this Court's instruction that the definition of a predicate offense does not "depend on the definition adopted by the State of conviction," but on federal law or on an

assessment of a generic definition of the crime. Taylor v. United States, 495 U.S. 570, 591 (1990). Taylor's approach promotes national uniformity in sentencing.

Nearly two years ago the Court denied a petition for certiori that sought review of the circuit split. Justice Sotomayor then stated that the Sentencing Commission was responsible to address the split "to ensure fair and uniform application of the Guidelines." Guerrant v. United States, 142 S.Ct. 640 (2022) (citing Braxton v. United States, 500 U.S. 344, 348 (1991)). But the Commission has not acted. It did not address the circuit split in its list of proposed amendments for 2024 that was released on December 14, 2023. https://www.ussc.gov/guidelines/proposed-2024-amendments-federal-sentencing-guidelines, last accessed December 19, 2023.

Deferring action to the Sentencing Commission may not resolve the conflict. There is no guarantee that the Commission will act, or that it will act in a timely fashion. Darwinder S. Sidhu, Article: Sentencing Guidelines Abstention, 60 Am. Crim. L. Rev. 405, 434–35 (2023).

Moreover, Braxton does not say that the Court must defer to the Commission to resolve circuit splits over the meaning of the Guidelines. In Braxton the Court declined to resolve a split over the meaning of "stipulation" in the Guidelines, because the Commission had already started to resolve the

split and because "the specific controversy before us can be decided on other grounds . . ." Braxton v. United States, 500 U.S. at 348. In dicta, the Court observed that, while ordinarily it would resolve conflicts over the meaning of federal law, the Commission had the statutory duty to revise and review the Guidelines and the statutory power to decide if amendments reducing sentences would have retroactive effect. Therefore, the Court said it would act with restraint in resolving conflicting decisions about the Guidelines. Id.

Ten years later this dicta did not stop the Court from deciding a circuit split about what level of deference was due to a district court's Guidelines determination that prior convictions were not functionally consolidated and not "related' offenses, so that they counted as separate convictions to permit sentencing the defendant as a career offender. Buford v. United States, 532 U.S. 59 (2001). The Court adopted a deferential standard of review, not de novo review, because the dispute involved a "minor, detailed, interstitial question of sentencing law . . . not a generally recurring, purely legal matter, such as interpreting a set of legal words, say those of an individual guideline. . ." Buford v. United States, 532 U.S. at 65.

But here, the meaning of controlled substance offense recurs, is a purely legal matter, and involves interpreting a set of legal words in a guideline. The Court should resolve the circuit split and interpret the term.

Even though Congress has the power to set up a Sentencing Commission, that power does not override the power of the Court to say "what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). Bear in mind, too, that criminal law is not like administrative law. "Criminal law and the interpretation of criminal statutes is the bread and butter of the work of the federal courts." Dolphi v. Pontesso, 156 F.3d 696, 700 (6th Cir. 1998).

Congress in § 994(h) of the Sentencing Reform Act did not tell the Sentencing Commission to use state law definitions of controlled substance offenses when creating the career offender guideline. To the contrary, § 994(h) refers to federal laws that use the Controlled Substances Act to define controlled substances. It follows that the term controlled substance offense should apply to federally controlled substances only.

Practical reasons support the Court granting certiorari, too. The Court exists to resolve circuit splits in order to secure uniformity in federal law. Cash v. Maxwell, 132 S.Ct. 611, 612–13 (2012) ("The principal purpose of this Court's jurisdiction is to clarify the law.") (quotation omitted). The Court routinely addresses conflicts involving statutes or administrative rules, even though Congress can revise laws and administrative agencies can revise rules to eliminate conflicts.

The issue presented here applies to more than potential career

offenders. The felon-in-possession guideline incorporates the definition of controlled substance offense in § 4B1.2, and the illegal reentry guideline uses a materially identical definition for "drug-trafficking offenses." See USSG §§ 2K2.1, n.1 and 2L1.2, n. 2.

Delay in resolving the conflict extends sentencing disparities. Because sentencing affects liberty, it should be the last area where the Court, by failing to act, perpetuates different results depending on what circuit court has jurisdiction.

The Court should grant the petition in order to resolve the circuit split, even though Hutchins did not make the argument in the district court. The issue is purely legal and the district court could not have granted relief, given Sixth Circuit precedent. Errors in calculating the Guidelines affect a defendant's substantial rights and warrant correction, even if the defendant did not assert the error in the district court. Rosales-Mirales v. United States, 138 S.Ct. 1897, 1904 (2018).

If the Court concludes that the term "controlled substance offense" is ambiguous then under the rule of lenity the Court should interpret it in the favor of the defendant. Wooden v. United States, 142 S.Ct. 1063, 1081 (2022) (Gorsuch J., concurring).

In addition, the Court should take the opportunity this case presents to

hold that the career offender guideline should not apply in cases when the offender, like Hutchins, is a low level drug dealer because the guideline results in sentences that are unreasonably long.

The Commission says that the guideline does not promote the sentencing objective of protecting the public when applies to low-level drug dealers because "[i]ncapacitating a low-level drug seller prevents little, if any drug selling . . . ." United States Sentencing Commission, 15 years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentence Reform, 134 (November 2004) ("15-year Report"). The guideline is ineffective because it does not deter drug traffickers—low-level dealers are quickly replaced by new dealers. United States v. Newhouse, 919 F. Supp. 2d. 955, 975 (N.D. Iowa, 2013).

The guideline doesn't protect the public because all career offenders get a criminal history category score of VI, which makes the criminal history category score a poorer measure of recidivism risk. 15-year Report at 134. The guideline is particularly suspect because it was created in response to congressional directives, not in response to empirical study. Congress directed the Commission to create a guideline that sentences repeat offenders near the top of the statutory range in order to reach the kingpins engaged in repeated and lucrative drug dealing. United States v. Newhouse, 919 F.

Supp. 2d. at 969–70, citing S. Rep. No. 98-225 at 175 (1983).

In a 2016 report the Commission found that persons who have only drug trafficking convictions re-offend less than persons with convictions for crimes of violence, and when they do re-offend they are less likely to commit violent crimes than persons with convictions for crimes of violence. Yet, because the law sets higher penalties for drug crimes compared to crimes of violence, drug offenders face higher career offender sentencing ranges than violent offenders. United States Sentencing Commission, Report to the Congress: Career Offender Sentencing Enhancements, pp. 3, 25–45 (August 2016) ("2016 Report").

The guideline does not consider the offender's role in the offense. It treats a mule the same as a kingpin. A person convicted twice of selling a single marijuana cigarette is treated the same as one who has two convictions for trafficking tons of marijuana. (United States v. Newhouse, 919 F. Supp. 2d. at 978). The result: sentences that are grossly disproportionate to the role of the offender and his culpability. (Id., at 980).

In the 2016 Report the Commission recommended to Congress that it exclude drug-trafficking-only offenders from the career offender guideline. (2016 Report at p. 3).

Hutchins's career offender- sentence is vastly out of proportion to his

characteristics. He is very much like the two-marijuana-cigarette seller described in Newhouse. He sold 0.62 grams of cocaine near a protected place in 2010, and in 2002, he distributed 5 grams or more of crack cocaine. (PSR, R. 63, ¶ 55, Page ID # 585–86). Hutchins's 327-month sentence doesn't pass any rational test for substantive reasonableness.

The sentencing statute says the courts shall impose sentences that are not "greater than necessary." 18 U.S.C. § 3553(a). The sentence here is greater than necessary.

CONCLUSION

The Court should grant the petition to resolve the circuit split over the meaning of "controlled substance" in the career offender guideline because of the substantial number of cases that the term affects and to make clear that sentencing courts should not rely on the career offender guideline sentence range in cases involving drug only non-violent offenders.

Dated: January 2, 2024

Respectfully submitted,

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