NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

TODD NORMAN,
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 A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether an offense must have involved a substance that was controlled under federal law to be considered a "controlled substance offense" as that term is defined under § 4B1.2(b) of the U.S. Sentencing Guidelines.

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States v. Todd Norman, No. 5:23-cr-50020, U.S. District Court for the Western District of Arkansas. Judgment entered October 11, 2023.

United States v. Todd Norman, No. 23-3372, U.S. Court of Appeals for the Eighth Circuit. Judgment entered June 28, 2024; rehearing en banc and panel rehearing denied by order entered August 20, 2024.

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OPINION BELOW

On June 28, 2024, the Eighth Circuit entered its opinion and judgment, in which it affirmed the judgment of the district court sentencing Todd Norman as a career offender to 120 months imprisonment. *United States v. Norman*, No. 23-3372, 2024 WL 3220335 (8th Cir. June 28, 2024) (per curiam). Petitioner's Appendix ("Pet. App.") 1a-2a. The Eighth Circuit's order denying rehearing, entered on August 20, 2024, is not reported. Pet. App. at 3a.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2024. On July 12, 2024, an order was entered granting Mr. Norman until July 26, 2024, to file a petition for rehearing. A petition for en banc or panel rehearing was timely filed on July 26, 2024. On August 20, 2024, an order was entered denying the petition for rehearing. *See* Pet. App. 3a. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

SENTENCING GUIDELINE INVOLVED

The Petitioner refers this Honorable Court to the following relevant portions of the United States Sentencing Commission's Guidelines Manual:

U.S.S.G. § 4B1.2(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.

STATEMENT OF THE CASE

1. Todd Norman pleaded guilty to possession of fentanyl with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(C). The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The district court found Mr. Norman to be a career offender under U.S.S.G. § 4B1.1 based on his prior Arkansas convictions for delivery of methamphetamine and possession of cocaine with purpose to deliver. Norman argued that these offenses did not meet the definition of a "controlled substance offense" as that term is defined at U.S.S.G. § 4B1.2(b) and that he accordingly should not be considered a career offender. This argument was based on the contention that the term "controlled substance" under § 4B1.2(b) should refer only to substances that are controlled under federal law, and the fact that Arkansas law defines both methamphetamine and cocaine to include certain isomers that federal law does not.

2. Mr. Norman appealed his sentence to the United States Court of Appeals for the Eighth Circuit. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which gives it jurisdiction over all final decisions of the district courts of the United States. Norman asserted the same argument on appeal that he had made to the district court—that his prior Arkansas convictions did not qualify as a career-offender predicates because they did not categorically involve federally controlled substances. Norman acknowledged that Eighth Circuit precedent was against him on this issue, as the court had previously decided that the term "controlled substance" in § 4B1.2(b) includes substances that are controlled only

under state law. *See United States v. Henderson*, 11 F.4th 713, 717-19 (8th Cir. 2021). Norman also challenged the substantive reasonableness of his below-guidelines sentence.

3. In its unpublished opinion, a panel of the Eighth Circuit affirmed the district court's judgment. *United States v. Norman*, No. 23-3372, 2024 WL 3220335 (8th Cir. June 28, 2024) (per curiam); Pet. App. 1a. The court rejected Mr. Norman's argument regarding his career-offender designation based on its precedent in *Henderson*. The court also found no abuse of discretion by the district court regarding the reasonableness of the sentence it imposed.

Mr. Norman filed a timely petition for rehearing that was denied on August 20, 2024. Pet. App. 3a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. This Court should resolve an entrenched circuit split and determine whether the term "controlled substance" in U.S.S.G. § 4B1.2(b) should be interpreted to refer only to federally controlled substances or also to substances categorized as controlled under state law.

The Third, Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits have agreed with the Eighth Circuit that a controlled substance offense under U.S.S.G. § 4B1.2(b) may involve a substance that is controlled only under state law. *See United States v. Lewis*, 58 F.4th 764, 768-69 (3d Cir. 2023); *United States v. Ward*, 972 F.3d 364, 370-71 (4th Cir. 2020); *United States v. Jones*, 81 F.4th 591, 598-99 (6th Cir. 2023); *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020); *United States v. Jones*, 15 F.4th 1288, 1291-96 (10th Cir. 2021); *United States v. Dubois*, 94 F.4th 1284, 1296-98, 1300 (11th Cir. 2024). The Second, Fifth, and Ninth Circuits, however, have

determined that the guideline term "controlled substance" refers only to substances that are controlled under federal law—specifically, the Controlled Substances Act ("CSA"). *See United States v. Townsend*, 897 F.3d 66, 71 (2d Cir. 2018); *United States v. Gomez-Alvarez*, 781 F.3d 787, 792-94 (5th Cir. 2015); *United States v. Leal-Vega*, 680 F.3d 1160, 1166-67 (9th Cir. 2012).

While the First Circuit has not formally decided this issue, its precedent suggests that it may be inclined to adopt the federally based approach. *See United States v. Crocco*, 15 F.4th 20 (1st Cir. 2021). In *Crocco*, the court described this approach—adopted by the Second, Fifth, and Ninth Circuits—as "appealing" because the issue involves interpretation of the federal sentencing guidelines and utilization of the categorical approach (a creation of federal case law). *Id.* at 23. On the other hand, the court suggested that the competing approach adopted by the Eighth Circuit and others, which looks to state law to supply the definition of "controlled substance," is "fraught with peril," noting that "federal courts cannot blindly accept anything that a state names or treats as a controlled substance." *Id.* The court further discussed the danger inherent in the use of a common-meaning approach, as different dictionaries provide varying definitions of "controlled substance." *Id.* at 23-24. Meriam-Webster, for example, defines the term to mean "a drug that requires permission from a doctor to use." *Id.* at 23. Under this definition, defendants could reasonably make the argument that none of the Schedule I drugs—like heroin and ecstasy—should be considered controlled substances because none can be prescribed by a doctor under federal law. *Id.* at 23-24.

Moreover, the court noted, while the categorical approach was developed to prevent inconsistencies based on state definitions of crimes, the approach adopted by the Eighth Circuit and others on this issue serves to create them. *Crocco*, 15 F.4th at 24. As the Ninth Circuit has also pointed out, "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 *Leal-Vega*, 680 F.3d at 1166). The First Circuit also noted that the federally based approach avoids the need to answer the question of "whether a prior state conviction for a substance (such as marijuana) in an amount which has been decriminalized under that state's law (but not federally) should count as a controlled substance offense under § 4B1.2(b)," as such an approach would simply suggest that it should, "while the answer is less clear under the state-law approach . . . ." *Crocco*, 15 F.4th at 24. Mr. Norman suggests that the federally based approach is the better one and urges this Court to grant certiorari to resolve the conflict among the circuits on this issue.

II. Mr. Norman's prior convictions did not necessarily involve substances that were controlled under federal law.

Mr. Norman suggests that his particular case is an appropriate vehicle for the Court's consideration of this issue. Norman properly preserved this issue for appeal by objecting to the career-offender designation in his presentence investigation report on the basis that his prior Arkansas convictions did not necessarily involve federally

controlled substances; he likewise raised and argued the issue in his direct appeal to the Eighth Circuit.

At the time of Mr. Norman's sentencing, the term "controlled substance offense" was defined at U.S.S.G. § 4B1.2(b) to mean 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. Norman's prior conviction for delivery of methamphetamine is not a controlled substance offense because Arkansas law defines methamphetamine more broadly than does federal law. Under Arkansas law, methamphetamine is defined to include "its salts, isomers, and salts of its isomers." Ark. Admin. Code 007.07.2, Sched. II(d)(2). In the directly preceding subsection, amphetamine is defined to include "salts, optical isomers, and salts of its isomers." Ark. Admin. Code 007.07.2, Sched. II(d)(1). Because the definition of methamphetamine is not limited to include only certain types of isomers, the definition includes all methamphetamine isomers, without limitation. By contrast, federal law limits the isomers of methamphetamine for which one may be subjected to criminal prosecution. Federally, "[m]ethamphetamine, its salts, isomers, and salts of its isomers" are controlled under Schedule II. 21 C.F.R. § 1308.12(d). However, the term "isomer" is generally limited under federal law to mean the optical isomer, except as used in certain specific schedules that do not concern methamphetamine. 21 U.S.C. § 802(14). Thus, "for

purposes of federal drug offenses, methamphetamine includes only its optical isomers." *United States v. De La Torre*, 940 F.3d 938, 951 (7th Cir. 2019). By including only optical isomers, the federal definition of methamphetamine excludes all non-optical isomers, including positional and geometric isomers. In other words, non-optical isomers of methamphetamine are controlled under Arkansas law but not federal law, making the Arkansas statute overbroad.

Likewise, Mr. Norman's prior conviction for possession of cocaine with purpose to deliver would not qualify as a career-offender predicate if the term "controlled substance" were interpreted to refer only to federally controlled substances. Under Arkansas law, cocaine is defined to include its "salts, isomers, derivatives and salts of isomers and derivatives[], and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine." Ark. Admin. Code 007.07.2, Sched. II(b)(4). Thus, cocaine is defined under Arkansas law to include cocaine and all of its isomers, without limitation. By contrast, federal law limits the isomers of cocaine for which one may be subjected to criminal prosecution. Federally, cocaine, "its salts, isomers, derivatives, and salts of isomers and derivatives" are controlled under schedule II. 21 C.F.R. § 1308.12(b)(4). However, as used in schedule II(a)(4), which relates to cocaine, the term "isomer" is limited to mean only any optical or geometric isomer. 21 U.S.C. § 802(14). *See also* 21 U.S.C. § 812, sched. II(a)(4). Thus, for purposes of federal drug offenses, the definition of cocaine includes only its

optical and geometric isomers. In other words, isomers of cocaine other than optical and geometric—such as positional isomers—are controlled under Arkansas law but not under federal law, making the Arkansas statute overbroad. *See Ruth*, 966 F.3d at 647 (finding an Illinois drug statute that controlled "optical, positional, and geometric isomers" of cocaine to be overbroad when compared to federal law, which controlled only optical and geometric isomers).

Arkansas law defines methamphetamine and cocaine more broadly than federal law by including isomers that are not controlled federally. Accordingly, if this Court determines that the term "controlled substance" under § 4B1.2(b) should be interpreted to refer only to federally controlled substances, then Mr. Norman's convictions are not controlled substance offenses and he was improperly sentenced as a career offender.

CONCLUSION

For all of the foregoing reasons, Petitioner Todd Norman respectfully requests that this Court grant the petition for a writ of certiorari and accept this case for review.

DATED: this 15th day of November, 2024.

Respectfully submitted,

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