

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2024

ANTOINE WIGGINS,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under the federal Sentencing Guidelines § 2K2.1(a)(2), a defendant previously convicted of a “controlled substance offense” is subject to a sentencing enhancement. The Guidelines define “controlled substance offense” as “an offense under federal or state law * * * that prohibits the manufacture, import, export, distribution, or dispensing of a *controlled substance*.” U.S.S.G. § 4B1.2(b) (emphasis added); *see id.* § 2K2.1 application note 1. The Guidelines do not, however, define “controlled substance.”

When a federal defendant is subject to a controlled substance enhancement under the Sentencing Guidelines, does the term “controlled substance” in the Sentencing Guidelines refer only to those substances controlled under federal law or also include substances controlled under state law?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. United States of America
2. Antoine Wiggins

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Antoine Wiggins respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 27, 2024, in the captioned matter.

OPINION BELOW

The decision of the United States Court of Appeals for the Third Circuit was memorialized in an unpublished opinion: *United States v. Wiggins*, Docket No. 22-2831 (3d Cir. 2024). The opinion is attached at Appendix 1-6 (“App.”)

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered

judgment on September 27, 2022. The Third Circuit had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, and entered judgment on September 27, 2024. App. 1-6. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to this proceeding, namely, Petitioner, Antoine Wiggins, and respondent, the United States.

RELEVANT GUIDELINES PROVISIONS

U.S.S.G. § 2K2.1(a)(2) provides in relevant part: Base Offense Level (Apply the Greatest): * * * (2) 24, if - (A) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense.

Application note 1 to U.S.S.G. § 2K2.1 provides in relevant part:

“Controlled substance offense” has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

U.S.S.G. § 4B1.2(b) 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.

STATEMENT OF THE CASE

Petitioner Antoine Wiggins was charged with and pled guilty to a single count of illegal possession of a firearm by a convicted felon, under 18 U.S.C. §

922(g)(1). Mr. Wiggins faced an advisory Guidelines range of 100 to 120 months based on a total offense level 25 and criminal history category V. He argued that his prior New Jersey cocaine distribution convictions should not be used to increase his base offense level under § 2K2.1(a)(2) because those offenses did not meet the definition of “controlled substance offense” under U.S.S.G. § 4B1.2(b). The district court rejected this argument, finding that § 4B1.2(b)’s definition of “controlled substance offense” properly included convictions under state law.

Mr. Wiggins appealed his conviction and sentence to the Third Circuit Court of Appeals. On September 27, 2024, the Third Circuit Court of Appeals held that its precedential opinion in *United States v. Lewis*, 58 F.4th 764 (3d Cir. 2023), squarely foreclosed Mr. Wiggins’s argument on appeal. App. 3-4. In *Lewis*, the Third Circuit held that the term “controlled substance” in the Guidelines refers to a “drug regulated by either state or federal law.” 58 F.4th at 771.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted because the Courts of Appeals are deeply divided over whether the Sentencing Guidelines’ definition of “controlled substance” includes substances controlled only by state law and the Sentencing Commission has explicitly declined to address the entrenched circuit split.

The precise question raised in Mr. Wiggins’s petition for a writ of certiorari has been raised before this Court in numerous prior petitions. *See e.g., Lewis v. United States*, No. 23-198 (June 6, 2023); *Demont v. United States*, No. 22-7904 (Aug. 30, 2023); *Aurelien v. United States*, No. 23-5236 (Oct. 30, 2023). The Government filed a full brief in opposition to the petition for certiorari in *Demont*.

Certiorari has been denied in every case raising this precise issue. *See e.g., Lewis v. United States*, 144 S.Ct. 489 (2023) (Mem); *Demont v. United States*, 144 S.Ct. 281 (2023) (Mem); *Aurelien v. United States*, 144 S.Ct. 353 (2023) (Mem).

Mr. Wiggins’s petition for certiorari relies upon and adopts the same legal arguments raised in Point II of Jamar Lewis’s petition for certiorari. *See Lewis v. United States*, No. 23-198, Petition for Certiorari, 2023 WL 5753604, at App.18-23. As in *Lewis*, Mr. Wiggins contends that his two prior New Jersey state convictions for cocaine distribution did not meet the definition of “controlled substance offense” under U.S.S.G. § 4B1.2(b) because New Jersey state law defines cocaine more broadly than the Federal Controlled Substances Act.

Guidelines Section 4B1.2(b) 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 counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

To determine whether the state statute under which a defendant was convicted is a “controlled substance offense,” a court must compare the elements of the state statute with the federal Controlled Substance Act. The comparison allows the court to determine whether the state statute is broader, narrower, or the same as its federal counterpart. *See, e.g., Taylor v. United States*, 495 U.S. 515, 599 (1990).

It is Mr. Wiggins’s position that the federal counterpart -- section 802(44) of the Controlled Substances Act -- provides the exclusive definition of “controlled substance offense.” *Burgess v. United States*, 553 U.S. 124, 133 (2008). Section

802(44) of Title 21 states: “The term ‘controlled substance offense’ means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.” Other subsections define each substance group. *See* 21 U.S.C. § 802(17) (defining “narcotic drug”); § 802(16) (defining “marihuana”); § 802(41) (defining “anabolic steroid”); § 802(9) (defining “depressant or stimulant substance”).

Prior to making the comparison between the state statute and the federal statute, the district court should have determined whether there was a categorical match between NJSA Sections 2C:35-2, 2C:35-5, and 2C:35-7. Doing so would have revealed a categorical mismatch between the New Jersey statutes and § 802 of the federal Controlled Substances Act because the New Jersey statutes define cocaine more broadly than § 802 to include hemp and positional isomers. *Id.*

After Mr. Wiggins’s sentencing, however, the Third Circuit held that a “controlled substance” under § 4B1.2(b) includes drugs regulated by either state or federal law. *Lewis*, 58 F.4th at 771. It was, therefore, “irrelevant that the New Jersey statute under which [Wiggins] was convicted defined ‘marijuana’ more broadly than federal law.” *Id.* On appeal, Mr. Wiggins acknowledged that his argument was foreclosed by *Lewis*. However, he noted that there was a deep, entrenched circuit split on this exact issue. Three circuits hold that “controlled substance” refers to only those substances controlled under federal law. *United States v. Townsend*, 897 F.3d 66, 74-75 (2d Cir. 2018); *United States v. Bautista*,

989 F.3d 698, 702 (9th Cir. 2021); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793-794 (5th Cir. 2015). Additionally, the First Circuit has noted the clear circuit split and signaled its agreement with the Second, Fifth, and Ninth Circuits. *United States v. Crocco*, 15 F.4th 20, 22 (1st Cir. 2021). Although it has yet to squarely confront the question, the First Circuit has explained that defining controlled substances based on federal law “is appealing,” while the contrary approach is “fraught with peril.” *Id.* at 23. Federal “courts cannot blindly accept anything that a state names or treats as a controlled substance.” *Id.* Otherwise, the courts would “turn the categorical approach on its head by defining a controlled substance offense as whatever is illegal under the particular law of the State where the defendant was convicted.” *Id.* (cleaned up).

Seven circuits, including the Third Circuit, hold that "controlled substance" is one regulated by either federal or state law. *Lewis*, 58 F.4th at 769; *United States v. Dubois*, 94 F.4th 1284, 1296 (11th Cir. 2024)¹; *United States v. Jones*, 81 F.4th 591, 599 (6th Cir. 2023); *United States v. Jones*, 15 F.4th 1288, 1291-96 (10th Cir. 2021); *United States v. Henderson*, 11 F.4th 713, 717-719 (8th Cir. 2021); *United States v. Ward*, 972 F.3d 364, 372-374 (4th Cir. 2020); *United States v. Ruth*, 966 F.3d 642, 651-654 (7th Cir. 2020). These courts emphasize the Guidelines' textual reference to an *offense* under state law and the lack of an explicit cross-reference to the CSA in the Guidelines.

This persistent circuit split undermines the very purpose of the Sentencing

¹ *Dubois* was decided several months after certiorari was denied in *Lewis*.

Guidelines. Congress tasked the Sentencing Commission with eliminating “unwarranted sentencing disparities” for those “found guilty of similar criminal conduct.” 28 U.S.C. § 991(b)(1)(B). Consistent with that goal, the Commission's Guidelines play a “central role in sentencing.” *Molina-Martinez v. United States*, 578 U.S. 189, 191 (2016). “[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007).

But allowing this circuit split to persist creates the very discrepancies the Guidelines seek to avoid. Today, a defendant being federally sentenced in two-thirds of the circuits could receive a significantly longer sentence based solely on the location of his criminal conduct. The Guidelines should not treat a defendant differently “simply because they were lucky enough to commit” their federal offense “on the right side of the border”-or unlucky enough to commit it on the wrong side. *United States v. Ward*, 972 F.3d 364, 381 (4th Cir. 2020) (Gregory, C.J., concurring in judgment).

The Sentencing Commission had the opportunity to weigh in and clarify this split and refused to do so. The Commission has a quorum, it identified this issue as a priority to resolve during the 2023 amendment cycle, and yet it expressly declined to weigh in. Compare U.S. Sentencing Comm'n, *Final Priorities for Amendment Cycle 3* (Oct. 2022), with U.S. Sentencing Comm'n, *Amendments to the Sentencing Guidelines* 55 (May 2023). The Sentencing Commission did not address this issue as part of the 2024 amendment cycle. See U.S. Sentencing Comm'n, *Amendments to*

the Sentencing Guidelines (April 30, 2024). Nor has the Sentencing Commission identified this issue as one of the circuit conflicts it intends to tackle in 2025. *See* U.S. Sentencing Comm’n, *Proposed 2025 Amendments to the Federal Sentencing Guidelines Published December 2024*, Circuit Conflicts (December 2024).

This Court should not wholly abrogate its solemn constitutional “duty” “to say what the law is” just because the law in question is the Sentencing Guidelines. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Instead, this Court allows the Sentencing Commission the chance to rectify circuit splits in the “first instance.” A full quorum of Commissioners has now had not one, but *three*, opportunities to rectify this entrenched circuit split and has shown no inclination to do so. In the face of the Commission’s consistent failure to act, this Court should step in. *See McClinton v. United States*, 143 S.Ct. 2400, 2403 (2023) (statement of Sotomayor, J., respecting the denial of certiorari) (when the Commission is aware of an issue but “does not act expeditiously or chooses not to act, * * * this Court may need to take up the * * * issue[]”).

CONCLUSION

For the foregoing reasons, Petitioner Antoine Wiggins respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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