

No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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BENJAMIN DALE MARSHALL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Does due process require the government to bring charges for crimes committed close in time so that the timing of the charges does not prejudice the defendant at sentencing?

## 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- United States of America v. Benjamin Dale Marshall, Case No. 24-3192, unpublished order (6th Cir. February 4, 2025).
- United States of America v. Benjamin Dale Marshall, N.D. Ohio, Case No.5:22-cr-563, judgment of sentence entered February 27, 2024.

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

Benjamin Dale Marshall 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The United States Court of Appeals for the Sixth Circuit dismissed Marshall's appeal in an unpublished order filed on February 4, 2025. United States v. Benjamin Dale Marshall, Case No. 24-3192, unpublished order (6th Cir. February 4, 2025).

### JURISDICTION

The Sixth Circuit's order was filed on February 4, 2025. There was no petition for rehearing. The Sixth Circuit's judgment was entered the same day. There was no mandate. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment's Due Process Clause which says, "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend V.

The case also involves United States Sentencing Commission, Guidelines Manual § 3D1.2 (Nov. 2023), which concerns grouping of

convictions and implements one of the purposes of the sentencing guidelines—that defendants are sentenced based on their conduct, not based on arbitrary charging decisions. See United States Sentencing Commission, Guidelines Manual (“USSG”), Ch. 3, Pt. D, intro. comment. (Nov. 2023).

### STATEMENT OF THE CASE

Marshall sold 26.6 grams of pure methamphetamine to an informant. (Plea Agreement, R. 44, Page ID # 172). More than two years later the government got an indictment charging him with distributing 5 grams or more of methamphetamine. (Indictment, R. 1, Page ID # 1).

Before Marshall was indicted, the same United States Attorney’s office prosecuted him in a separate case, charging that, nearly seven months after the drug sale, he possessed a firearm after a felony conviction. He sold the methamphetamine on July 23, 2020; he possessed a firearm on January 17, 2021. (Indictment, R. 1, Page ID # 1, Presentence Report (“PSR”), R. 56, ¶¶, 61–62, Page ID # 256–58, Indictment, R. 1, Page ID # 1, N.D. Ohio, Case No. 5:21-cr-147).

The record does not explain why the government delayed in charging Marshall for distributing methamphetamine or why his two charges were not charged in the same indictment or consolidated for sentencing. Marshall was sentenced to serve 38 months in prison on November 15, 2021, on the felon-

in-possession charge. (Sentencing Tr., R. 70, Page ID # 329–330, 335, See docket sheet, United States v. Marshall, N.D. Ohio Case No. 5:21-cr-147). On February 27, 2024, he was sentenced to serve 84 months in prison on the drug charge, consecutive to the 38-month sentence. (Sentencing Tr., R. 70, Page ID # 338–39).

When Marshall pled guilty to the methamphetamine charge he signed a plea agreement that waived his right to appeal and his right to file a post-conviction attack, except for claims of ineffective assistance of counsel and prosecutorial misconduct. (Plea Agreement, R. 44, Page ID # 171).

At sentencing, Marshall did not object to the presentence report's calculation that his sentence range under the sentencing guidelines was 92--115 months. (Sentencing Tr., R. 70, Page ID # 320, PSR, R. 56, ¶ 91, Page ID # 262, 269).

Marshall asked for a 60-month sentence. He said the sentence range was too high because the 10:1 drug quantity ratio of pure to mixed methamphetamine was unjustified, (Sentencing Tr., R. 70, Page ID # 322–23). He said his crimes over the past 12 years resulted from his drug addiction and that he never had substance abuse treatment before his arrest on January 17, 2021. He had completed more than 100 programs while in federal custody. (Id., Page ID # 330–32).

Marshall did not object to the consecutive sentence, nor did he argue that the government's charging decisions had deprived him of due process of law.

On appeal Marshall argued that his lawyer was ineffective for failing to argue that his firearm offense was relevant conduct to his drug offense, so that his drug sentence should be imposed to run concurrently with his undischarged firearm offense sentence under USSG § 5G1.3(b)(2). He also argued that prosecutor's delay in prosecuting him denied him due process of law by denying him the benefit at sentencing of the grouping rules under the Sentencing Guidelines.

The government moved to dismiss the appeal based on the waiver of appeal in Marshall's plea agreement. The court granted the motion and dismissed the appeal. The court deferred to collateral proceedings Marshall's claim that his trial lawyer was ineffective.

The court also said the record did not support the claim that the prosecutor's delay in prosecuting Marshall prejudiced him at sentencing because the record did not show why the prosecutor delayed in bringing the drug charges. United States v. Benjamin Dale Marshall, Case No. 24-3192, unpublished order, p. 3.

#### REASONS FOR GRANTING THE WRIT

When deciding if it will grant a petition for certiorari, the Court considers if the petition presents “an important question of federal law that has not been, but should be, settled by [the] Court”. Sup. Ct. R. 10(c).

The district court did not consider the government’s delay in charging Marshall. Nor did the Sixth Circuit analyze the issue. Nonetheless, the Court should grant the petition to make clear that the government may not arbitrarily or negligently charge defendants in a way that prejudices them at sentencing.

The Court should also grant the petition to resolve conflicting decisions of the United States courts of appeals. Sup. Ct. R. 10(a). To establish a due process violation based on delay, the Sixth Circuit says that the government must act intentionally to gain an advantage, while the Ninth Circuit says that delay that results from negligence may violate due process, and the Fourth Circuit balances the prejudice to the defendant against the government’s reason for the delay to decide if the delay violates “fundamental conceptions of justice.” See United States v. Norris, 501 F. Supp 2d 1092, 1100–01 and n. 4 (N.D. Ohio 2007) (discussing circuit split), quoting United States v. Automated Med. Labs, 770 F.2d 399, 403–04 (4th Cir. 1985). See United States v. Sabath, 990 F. Supp 1007, 1017–18 (N.D. Ill. 1998) (discussing circuit split).

Marshall can show prejudice. The government's decision to charge him with distributing methamphetamine after securing a conviction and sentence on the felon-in-possession charge meant that he did not have the benefit of the grouping rules under the Sentencing Guidelines.

One of the purposes of the Guidelines is to make sure that defendants are sentenced based on their conduct, not based on arbitrary charging decisions. To accomplish that goal the Guidelines contain grouping rules. See USSG, Ch. 3, Pt. D, intro. comment. The rules provide for incremental punishment for significant additional criminal conduct, using the most serious offense as the starting point. (Id., ¶ 2).

When a defendant is convicted of multiple counts in the same indictment or convicted of multiple counts in different indictments for which sentences are to be imposed at the same time, the charges are grouped. "In essence, counts that are grouped together are treated as constituting a single offense for purposes of the guidelines." (Id., ¶ 4).

Under the grouping rules, drug distribution and firearm possession convictions are grouped if the offense behavior involves a common criminal objective, or is part of a common scheme or plan involving the same victim, or if one of the counts includes conduct that is an offense characteristic or adjustment to the guideline for another count, or if the offense behavior is

ongoing. USSG § 3D1.2(b),(c), (d).

Marshall's crimes involved a common and ongoing criminal objective—possession of methamphetamine. His firearm conviction arose when officers making a traffic stop found that he possessed a loaded handgun, as well as 0.62 grams of methamphetamine. (PSR, R. 56, ¶ 51, Page ID # 256–57). Marshall's sentence range in that case was 33–41 months. (Sentencing Tr., R. 70, Page ID # 329). His sentence range for the methamphetamine conviction was 92–115 months, based on an offense level score of 23 and criminal history category VI. (PSR, R. 56, ¶ 91, Page ID # 262).

If Marshall's felon-in-possession conviction was grouped with his methamphetamine conviction, his offense level would have been 23. His sentence range would have been unchanged at 92–115 months. But the district court gave him 84 months, consecutive to 38 months. His effective sentence of 122 months was seven months above the top of the sentencing range of 92–115 months.<sup>1</sup>

The Court should recognize a due process right to have charges brought in a way that does not prejudice the defendant at sentencing. Cf. United

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<sup>1</sup>If the gun possession was treated as relevant conduct to the drug charge, then Marshall's offense level score would increase by two levels, changing his sentence range to 100–137 months. USSG § 2D1.1(b)(1).

States v. Lovasco, 431 U.S. 783, 789, 795 n. 17 (1977) (recognizing that tactical or reckless delay in bringing charges may violate the Due Process Clause).

In Lovasco, the government conceded that a prosecutor's delay could violate due process if made with reckless disregard for how the delay impaired the defendant's ability to defend. United States v. Lovasco, 431 U.S. at 795, n. 17.

The Sixth Circuit requires a defendant who claims a due process violation to show that the government intended to gain a tactical advantage by delaying. United States v. Rogers, 118 F.3d 466, 476 (6th Cir. 1997). In contrast, the Ninth Circuit says that pre-indictment delay that results from negligence may violate due process. United States v. Ross, 123 F.3d 1181, 1184 (9th Cir. 1997). The Fourth Circuit says courts should balance the prejudice to the defendant against the government's reason for the delay to determine if the delay violates "fundamental conceptions of justice." United States v. Automated Med. Labs, 770 F.2d at 403–04.

The Court should not allow the government to manipulate a defendant's sentence by how and when it charges the defendant.

By delaying in charging Marshall for the drug offense the government took away his chance to have the favorable guideline grouping rules apply. The Court should apply the Due Process Clause to avoid unfair results like

the result here. Cf., Betterman v. Montana, 578 U.S. 437, 448 n. 12 (2016).

In Betterman, the Court said that the Due Process Clause supported a right to relief from undue delay at sentencing, citing footnote 17 from Lovasco.

Betterman v. Montana, 578 U.S. at 441. After conviction a defendant still “retains an interest in a proceeding that is fundamentally fair.” Id., at 448.<sup>2</sup>

Because even one day of extra time in jail has constitutional significance, Glover v. United States, 531 U.S. 198, 200 (2001), the Court should grant Marshall’s petition, even though he failed to press the issue in the district court.

### CONCLUSION

The Court should grant the petition for writ of certiorari and remand the case for further proceedings in the district court.

Respectfully submitted,

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<sup>2</sup>Betterman made no due process claim, so the Court expressed “no opinion on how he might fare under that more pliable standard.” Id.