No. _____

IN THE

Supreme Court of the United States

ALANTE MARTEL NELSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To determine a controlled substance offense under USSG § 4B1.2(b) using the categorical approach, do courts compare the elements of the prior conviction to substances that were controlled on the date of the prior conviction, or to the substances controlled on the date of federal sentencing?

2. Does the undefined term "controlled substance" in USSG § 4B1.2(b) take its ordinary meaning, or the statutory definition in the Controlled Substances Act, 21 U.S.C. § 802(6)?

3. Does the undefined term "distribution" in USSG § 4B1.2(b) take its ordinary meaning, or the statutory definition in the Controlled Substances Act, 21 U.S.C. §§ 802(8), 802(11)?

RELATED PROCEEDINGS

This case arises from the following directly related proceedings:

- *United States v. Nelson*, No. 22-4658 (4th Cir. Aug. 15, 2025), *reh'g denied, United States v. Nelson*, No. 22-4658 (4th Cir. Sep. 15, 2025)

- *United States v. Nelson*, No. 1:21-CR-00014 (N.D.W. Va. Nov. 14, 2025)

There are no other proceedings directly related to this case under Rule 14.1(b)(iii).

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Petitioner, Alante Martel Nelson, respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion affirming Petitioner's sentence is published at 151 F.4th 577, and is reproduced as Appendix ("App.") A. 1a-13a. The Fourth Circuit's order denying rehearing is reproduced as Appendix B. 14a. The district court's written opinion was not published and is reproduced as Appendix C. 15a-25a.

JURISDICTION

The Fourth Circuit entered a decision on August 15, 2025, and denied rehearing on September 15, 2025. An extension of time to file this petition until January 13, 2026 was granted. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal Controlled Substances Act ("CSA") provides, in relevant part, that:

> it shall be unlawful for any person knowingly or intentionally—to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. § 841(a)(1).

> The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical. The term "distributor" means a person who so delivers a controlled substance or a listed chemical.

21 U.S.C. § 802(11).

> The terms "deliver" or "delivery" mean the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship.

21 U.S.C. § 802(8).

> The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.

21 U.S.C. § 802(6).

Virginia's Drug Control Act ("DCA") provides, in relevant part:

> Except as authorized in the Drug Control Act (§ 54.1-3400 et seq.), it shall be unlawful for any person to manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance.

Va. Code § 18.2-248.

> "Distribute" means to deliver other than by administering or dispensing a controlled substance…
>
> "Deliver" or "delivery" means the actual, constructive, or attempted transfer of any item regulated by this chapter, whether or not there exists an agency relationship…

Va. Code § 54.1-3401.

> Except as provided in subsection C1, any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than 40 years and fined not more than $500,000.

Va. Code § 18.2-248(C).

> Any person who attempts to commit any offense defined in this article or in the Drug Control Act (§ 54.1-3400 et seq.) which is a felony shall be imprisoned for not less than one nor more than ten years; provided, however, that any person convicted of attempting to commit a felony for which a lesser punishment may be imposed may be punished according to such lesser penalty.

Va. Code § 18.2-257(a).

LEGAL FRAMEWORK

Under the United States Sentencing Guidelines in effect at the time of Nelson's sentencing,

> 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.

U.S. Sent'g Comm'n, *Guidelines Manual* (USSG), § 4B1.1(a) (Nov. 2021).

> Controlled Substance Offense.—The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) 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; or
>
> (2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

USSG § 4B1.2(b) (Nov. 2021).

INTRODUCTION

Over four years ago, justices of this Court urged the Sentencing Commission to resolve a longstanding circuit split interpreting the Sentencing Guidelines: whether the undefined term "controlled" substance in the Career Offender Guideline took its federal statutory meaning, 21 U.S.C. § 802(6) (defining a "controlled" substance as one in the federal schedules), or its ordinary, plain dictionary-definition meaning. Today, that split persists. Not only has this split not been resolved, but it also is implicated in, and contributes to, two other guidelines interpretive splits that also remain unresolved by the Sentencing Commission.

First, federal courts have split on which version of the 'elements of a prior offense' to compare to the 'guidelines criteria' under the categorical approach. Some use the elements of the offense that were in effect when the defendant committed the prior offense. Others use the elements of the offense in effect at the time of federal commission or sentencing. Although the Court answered this 'timing question' as to the Armed Career Criminal Act (ACCA) in *Brown v. United States*, 602 U.S. 101 (2024) (holding that for ACCA, elements of the prior offense are determined at the time of prior commission), the timing split continues unabated as to the Sentencing Guidelines. After *Brown*, courts of appeals are still reaching different conclusions as to the Guidelines.

Those differing conclusions line up with whether "controlled" in the Career Offender guideline—an undefined term—takes its ordinary or statutory meaning. That is, whether "controlled" means controlled by the federal Controlled Substances Act (CSA)—i.e., the federal drug schedules; or whether it includes substances

"controlled" by states as well. Circuits holding the former also hold that courts must use the drug schedules in effect at the time of instant federal commission or sentencing; whereas circuits holding the latter also hold that courts must use the drug schedules in effect at the time of prior conviction.

Second, that same overarching interpretive question—whether undefined terms in the Sentencing Guidelines take their statutory CSA meaning or ordinary meaning—also determines the outcome of a different question: whether "distribution" in the Career Offender Guideline includes mere "attempted transfer," as statutory distribution is defined to include; or does not include "attempted transfer," since no ordinary meaning of distribution contemplates such a broad technical definition, nor would any native English speaker say that someone who failed to transfer drugs had 'distributed' them.

For years, this has Court recognized that inconsistent guidelines definitions result in significantly different sentencing ranges being used based solely on geography, and urged the Commission to address such splits. The Commission has not resolved any of these splits, and it does not intend to in the upcoming amendment cycle. This Court should not wait any longer to address these stark national disparities in federal sentencing. This Court should seize this opportunity to clarify *Brown* and the timing question as to the Guidelines, to interpret whether "controlled" refers to the federal CSA or also includes state schedules, to interpret whether "distribution" has its statutory or ordinary meanings; and restore desperately-needed uniformity in federal sentencing.

STATEMENT

A. Legal Background

The Sentencing Guidelines substantially increase a defendant's guideline range if he or she has two previous convictions for a "controlled substance offense." U.S.S.G. §§ 4B1.1(a), 4B1.2(b). To determine whether a prior conviction is a "controlled substance offense," federal courts use the categorical approach. To do that, courts "compare the elements of the prior offense with the criteria that the Guidelines use to define a 'controlled substance offense.'" *United States v. Ward*, 972 F.3d 364, 368 (4th Cir. 2020) (citing *Shular v. United States*, 140 S.Ct. 779, 783 (2020).

The "controlled substance offense" guidelines criteria timing is that "in effect on the date that the defendant is sentenced," unless to do so "would violate the *ex post facto* clause," USSG § 1B1.11, which it would not here. However, because drug laws and drug schedules are periodically amended, 'the elements of the prior offense' can be wider or narrower at the time of federal commission or sentencing, than they were when the prior drug offense was committed.

In those situations, are the 'elements of the prior offense' those that existed at the time of prior commission? Or as they existed at the time of instant federal commission, or sentencing? The 'timing' question hopelessly split the circuit courts as to the Guidelines, as well as the Armed Career Criminal Act (ACCA). And this Court's subsequent decision in *Brown*, 602 U.S. 101 (2024), in which it answered the timing question for ACCA, has done nothing to resolve the conflict as to the *Guidelines*. The circuits continue to reach different conclusions after *Brown*.

This split also involves a second, long-languishing circuit split, the resolution of which Justices of this Court have urged for the past four years, to no result. The circuits that hold that courts must look to drug schedules in effect at the time of prior conviction are the same courts that define "controlled" to include state-controlled substances. But the circuits that hold that courts must look to drug schedules at the time of instant federal sentencing are the same courts that define "controlled" to mean controlled by the federal CSA.

Despite all of this, the Sentencing Commission has not resolved any of these splits. Consequently, this Court's determination of the 1) timing question as to the Guidelines, and the statutory-meaning-versus-ordinary-meaning question as to 2) "controlled" federally or by the states, and 3) "distribution" as it is statutorily defined or ordinarily meant are all urgently needed to restore uniformity and fundamental fairness in federal sentencing.

B. Proceedings Below

In 2012, Mr. Nelson pleaded guilty to distributing an unspecified quantity of a schedule I or II controlled substance in the Northern District of West Virginia, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C). In 2017, Mr. Nelson pleaded guilty to distributing a schedule I or II controlled substance in Virginia, in violation of Va. Code § 18.2-258.

Mr. Nelson pleaded guilty in February 2022 to two offenses: possession with intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C); and unlawful possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). App. 2a. He argued, in the district court and again on appeal, that he was not a Career

Offender under the 2021 Guidelines Manual because neither of his two prior drug convictions were "controlled substance offenses" as then defined in USSG § 4B1.2(b).

First, Mr. Nelson's 2012 Federal conviction for distributing a "schedule I or II controlled substance," 21 U.S.C. §§ 841(a)(1), (b)(1)(C), was categorically overbroad by substance. Mr. Nelson argued that § (b)(1)(C) was indivisible by substance, so the categorical approach applied; and that the "schedule I or II" element that had to be compared to guidelines controlled substance offense criteria was the one that existed at his federal sentencing in 2022. In other words, only substances that were "controlled" at the time of his federal sentencing were part of the guidelines criteria. And he explained that at least two substances had been removed from schedule I or II in the interim. *See* App. 9a. Consequently, the 'schedule I or II' element of his (b)(1)(C) offense[1] was broader in 2012 than it was in 2021 when he committed his federal offenses, and in 2022 when he was sentenced for them. *Id.*

Mr. Nelson argued that although this Court reached a different result for ACCA, *Brown's* rationale pointed in the other direction as to the Guidelines. App. 11a. Specifically, this Court noted the *Brown* petitioners' reliance on the "ordinary practice" of the Guidelines was unpersuasive in an ACCA case, because unlike Congress' express instruction to "apply the Guidelines in effect on the date the defendant is sentenced," "ACCA contains no similar instruction." *Brown*, 602 U.S. at 120, fn. 7; App. 11a.

[1] *Terry v. United States*, 593 U.S. 486, 493 (2021) (while crack cocaine is an element of an (A) or (B) offense, the element for a (C) offense is "some unspecified amount of a schedule I or II drug.").

The Court of Appeals acknowledged that there "was support for Nelson's view," as well as authority against it, post-*Brown*. App. 11a (citing *United States v. Minor*, 121 F.4th 1085, 1092 (5th Cir. 2024) and *United States v. Drake*, 126 F.4th 1242, 1245-46 (6th Cir. 2025)). It described itself as 1) "free to decide between th[e time-of-sentencing] approach and the time-of-conviction approach," but also 2) bound to reject Nelson's argument by a 1997 decision holding that whether a prior conviction is a "prior felony conviction" requiring that it be "punishable by . . . imprisonment for a term exceeding one year" must be determined based on the date of prior conviction, instead of at the time of federal sentencing. App. 12a (citing *United States v. Johnson*, 114 F.3d 435, 445 (4th Cir. 1997)). Accordingly, the Court of Appeals "conclude[d] that the time-of-conviction approach applies to Nelson's career offender analysis," and "reject[ed] Nelson's contention that his prior § 841(a)(1) and (b)(1)(C) offense is overbroad by substance." App. 13a.

Second, Mr. Nelson argued that his 2017 Virginia conviction for distribution of a schedule I or II controlled substance, Va. Code § 18.2-248, was categorically overbroad by conduct. That was so because Virginia distribution has always included the mere "attempted transfer" of drugs, while the Guidelines did not.[2] *See* App. 6a. Relying on decisions from other circuits that were materially opposite in a relevant guidelines dispute about whether the term "distribution" in the Guidelines takes its

[2] The Sentencing Commission changed this effective November 1, 2023, when the textual definition of "controlled substance offense" in USSG § 4B1.2(b) was amended to include, *inter alia*, attempts to commit substantive drug offenses. But as Nelson was sentenced in 2022 before this change, the Guidelines definition at the time of his instant federal sentencing did not include attempts to commit drug offenses.

ordinary or statutory (CSA) meaning, the panel below held that an attempted transfer of drugs under Va. Code § 18.2-258 was a completed distribution; and therefore, not categorically overbroad by conduct. App. 7a-9a.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's decision below on the timing question deepens a circuit split and concerns an important question of federal law that should be settled by this Court. S. Ct. R. 10(a), (c).

1. The circuits are still divided as to the Guidelines after *Brown*.

a. Before *Brown*, the courts of appeals were intractably split on the timing question. Six circuits adopted a time-of-federal-*sentencing* approach in ACCA and Guidelines cases. *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022) (ACCA), *abrogated by Brown,* 602 U.S. 101; *United States v. Hope,* 28 F.4th 487 (4th Cir. 2022) (ACCA), *abrogated by Brown*, 602 U.S. 101; *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021) (guidelines, using CSA schedules, *id.* at 702); *United States v. Abdulaziz*, 998 F.3d 519, 523 (1st Cir. 2021) (guidelines, using CSA schedules). The Second circuit considered both a time-of-federal-*commission* and time-of-federal sentencing approach, but it made no difference in that case. *United States v. Gibson*, 55 F.4th 153, 156 (2d. Cir. 2022). And it rejected a time-of-prior-conviction approach. *Id.* at 164 (guidelines, using CSA schedules (citing *United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018)).[3]

[3] The time-of-federal-commission versus time-of-federal sentencing distinction does not make a difference in this case, since Mr. Nelson is not a career offender under either approach.

b. Five circuits adopted a time-of-prior-conviction approach. *United States v. Dubois*, 94 F.4th 1284, 1298 (11th Cir. 2024) (Guidelines, looking to state law, *id.* at 1301); *United States v. Lewis*, 58 F.4th 764, 769 (3d Cir. 2023) (Guidelines, including state or federal schedules); *cert. denied*, 144 S. Ct. 489 (2023); *United States v. Clark*, 46 F.4th 404, 408 (6th Cir. 2022) (Guidelines, looking to state and federal schedules); *United States v. Bailey*, 37 F.4th 467, 469-70 (8th Cir. 2022) (Guidelines, using state schedules).

c. Although *Brown* settled the timing question for ACCA, it resolved nothing as to the Guidelines. The confusion persisted, centered around significant differences between ACCA and the Guidelines—particularly footnote 7 of *Brown*, in which this Court signaled that its rationale in that ACCA case was inapplicable to the Guidelines.

In *Minor*, the Fifth Circuit held that a time-of-federal-sentencing approach remained correct for the Guidelines after *Brown*, for several reasons. First, Congress' and the Guidelines' directive to "'use the Guidelines Manual in effect on the date that the defendant is sentenced' … means incorporating the CSA's definition of 'controlled substance' in effect at the time of current sentencing." *Minor*, 121 F.4th at 1089-90. Second, applying the reference canon, "the Guidelines' general reference to 'controlled substance' weighs in favor of applying the definition of that term 'as it exists whenever a question under the statute arises'—i.e., sentencing for the instant offense." *Id.* at 1090 (quoting *Jam v. Int'l Fin. Corp.*, 586 U.S. 199, 209 (2019)). And notably, "the reference canon operated differently in *Brown* than it does here," since ACCA contains an explicit reference to 21 U.S.C. § 802 while the career offender

guideline does not. *Id.* at 1092. Third, there are *two* steps to the categorical comparison; while "courts must look backward to determine the elements of a defendants' prior felony convictions" at the first step, the second step is to compare them to "the Guidelines' definition of 'controlled substance offense' … in effect at the time of the current sentencing." *Id.* at 1090. Fourth, *McNeill v. United States*, 563 U.S. 816 (2011) was "distinguishable for two reasons: (1) it concerned ACCA rather than the Guidelines, and (2) it resolved a question about the first step of the categorical approach rather than the second." *Id.* at 1091. Fifth and finally, the Fifth Circuit observed that in footnote 7, this "Court in B*rown* cast doubt on whether it would employ the same approach in the Guidelines context because, 'Congress has expressly directed courts to apply the Guidelines 'in effect on the date the defendant is sentenced,' while 'ACCA contains no similar instruction.' *Id.* at 1092 (quoting *Brown*, 602 U.S. at 120 n.7).

Two months later, the Sixth Circuit held that "[n]othing in *Brown's* footnote [7] undermine[d its earlier] reasoning" in *Clark* that the time-of-prior-conviction approach applied to the Guidelines. *Drake*, 126 F.4th at 1245. That was so because *Clark's* rationale "relied on the text and purpose of § 4B1.2." *Id.* at 1246. And the rest of *Brown* "'len[t] support to our holding in *Clark*' because it invoked the same reasoning." *Id*. at 1246 (seemingly referring to *McNeill*, although it gave no specifics). Therefore, *Clark* remained binding in the Sixth Circuit.

Later that same year, the Fourth Circuit below acknowledged *Minor* and *Drake's* competing decisions post-*Brown*. *United States v. Nelson*, 151 F.4th 577, 583-84 (4th Cir. 2025). "We do not read the *Brown* footnote to mandate a time-of-

sentencing approach in the Guidelines context," it concluded, "leaving us free to decide between" the two approaches. *Id.* at 583. In the next sentence, it explained that it was not really free to decide because precedent from 1997, deciding a different question, constrained it to "adhere" to "the time-of-conviction approach" for any career offender inquiry. *Id.* at 583, 584 (citing *United States v. Johnson*, 114 F.3d 435, 445 (4th Cir. 1997).

d. Now, the timing split for the Guidelines is as follows:

Four circuits—the First, Second, Fifth, and Ninth—hold that the elements of the prior conviction at the time it was committed must be compared to the Guidelines' definition of a "controlled substance offense" as defined by the CSA schedules in effect at federal sentencing, *Abdulaziz*, 998 F.3d at 523; *Minor*, 121 F.4th at *Bautista*, 989 F.3d 698; or possibly at federal commission; but in any case, not at the time of prior conviction. *Gibson*, 55 F.4th at 167. These circuits recognize that *McNeill* is inapplicable to the Guidelines. *Minor*, 121 F.4th at 1091 ("*McNeill* is distinguishable for two reasons: (1) it concerned ACCA rather than the Guidelines, and (2) it resolved a question about the first step of the categorical approach rather than the second."); *Gibson*, 55 F.4th at 162 ("*McNeill['s*]change in North Carolina law only lessened the severity of the punishment prescribed for a defendant's unlawful acts; it did not make a substantive change as to what acts were lawful or unlawful."); *Bautista*, 989 F.3d at 703 ("Bautista's argument bears little resemblance to the argument in McNeill.").

Five circuits—the Third, Fourth, Sixth, Eighth, and Eleventh Circuits—hold that the elements of the prior offense at the time of prior conviction must be compared to the elements of the prior offense at the time of prior conviction. *Lewis*, 58 F.4th

764; *Clark*, 46 F.4th 404; *Bailey*, 37 F.4th 467, *Dubois*, 94 F.4th 1284. In other words, it must be compared to itself, which is not a comparison at all. These circuits rely on *McNeill*, despite acknowledging that the question presented in *McNeill* was not the same. *See Clark*, 46 F.4th at 409 (*McNeill* "answered a closely related question"); *Dubois*, 94 F.4th at 1299; *Lewis*, 58 F.4th at 771-72 (*McNeill* does not control, but is persuasive).

II. Whether "controlled substance" in § 4B1.2(b) takes its ordinary meaning or its federal CSA meaning is an important question splitting the circuits that should be settled by this Court.

a. The circuits that hold that courts must look to drug schedules at the time of instant federal sentencing at the second step of the categorical comparison—the First, Second, Fifth, and Ninth—are the same courts that define "controlled" to mean controlled by the federal CSA only. *Minor*, 121 F.4th at 1090 (citing *Abdulaziz*, 988 F.3d at 531, 523; *Gibson*, 55 F.4th at 153, 157; *Bautista*, 989 F.3d at 702, 703). "[T]hese circuits all use the CSA's definition of 'controlled substance' to define the meaning of that phrase as used in the Guidelines." *Ibid.* They give the term 'controlled' its statutory, not its ordinary, meaning.

b. In contrast, circuits that hold that courts must look to drug schedules in effect at the time of prior conviction—the Third, Fourth, Sixth, Eighth, and Eleventh—all define "controlled" using its ordinary meaning, to include state-controlled substances. *Minor*, 121 F.4th at 1090 (citing *Lewis*, 58 F.4th at 771; *Clark*, 46 F.4th at 411; and *Henderson*, 11 F.4th at 717-19); *see also Ward*, 972 F.3d at 371–374: *Dubois*, 94 F.4th at 1296, 1298). The definitional split thus directly feeds into the timing split. As a result of their opposite position on the definitional split, "[t]he

textual analysis for those circuits is therefore different" than the one used by the First, Second, Fifth, and Ninth Circuits. *Minor*, 121 F.4th at 1090.

III. Whether "distribution" in § 4B1.2(b) takes its ordinary meaning or its federal CSA meaning is an important question that should be settled by this Court.

Whether undefined guidelines terms take their statutory or ordinary meaning also controls the outcome to Mr. Nelson's argument that his 2017 Virginia distribution conviction is categorically overbroad by conduct. Below, he argued that the least culpable conduct of the elements of his 2017 Virginia distribution conviction was mere attempted transfer, as Virginia code defined it. He explained that if "distribution" in the career offender guideline takes its ordinary meaning, as circuit precedent required, then Guidelines distribution did *not* include attempted transfer. And that the existence of both "attempted transfer" and "attempted distribution" in Virginia's code scheme, just as in federal law, did not implicate the canon against surplusage because there was none.

Whether guidelines 'distribution' includes 'attempted transfer' directly depends on whether the term 'distribution' in the Career Offender Guideline takes its statutory or ordinary meaning. If 'distribution' takes its statutory—i.e., CSA—meaning, then the Career Offender Guideline also includes 'attempted transfer' because the federal Controlled Substances Act also defines 'distribution' to include mere 'attempted transfer." And if 'distribution' in the Career Offender Guideline takes its statutory/CSA meaning, then Mr. Nelson's 2017 Virginia distribution conviction is not categorically overbroad by conduct.

But if 'distribution'—an undefined term in the Career Offender Guideline—takes its ordinary meaning, the result changes. There is no lay definition or plain meaning of 'distribution' that would encompass mere attempted transfer. The ordinary meaning of 'distribution' includes "dividing and dealing out," "bestowing in portions," "apportioning or giving out." *Ward*, 972 F.3d at 371. Similarly, "terms" like " 'sell' and 'give' . . . fall within the plain meaning of 'distribution' or 'dispensing' in § 4B1.2(b)." *Id.* These terms all describe acts of transfer. What they plainly do not describe are failed or unsuccessful efforts to transfer. No English speaker, "using language in its normal way," would say that someone who tried but failed to transfer drugs to someone else had "distributed" drugs. *Wooden v. United States*, 142 S. Ct. 1063, 1069 (2022).

But below, the Fourth Circuit continued to rely on analyses of the Third and Sixth Circuits[4] to conclude that a Virginia 'attempted transfer' is actually a completed distribution. *Nelson*, 151 F.4th at 581 (noting "we followed the lead of three of our sister courts of appeals"). In so doing, it neglected to account for the Third and Sixth Circuits' materially opposite position on the other side of the split—that in those circuits, the term "distribution" in the Career Offender Guidelines takes its statutory, not its ordinary, meaning. There, guidelines "distribution" takes the exact same definition as "distribution" in the Controlled Substances Act. *United States v. Booker*, 994 F.3d 591, 595 (6th Cir. 2021) ("Essential to our reasoning was [] that the word

[4] The Eleventh Circuit case on which the panel below relied was not a Guidelines case at all, but rather an ACCA decision that did not consider or involve how "distribution" in the career offender guideline should be defined and applied. For that reason, *United States v. Penn*, 63 F.4th 1305 (11th Cir. 2023) is inapposite to this question.

'distribution' has the same definition in both the career-offender Guidelines and the CSA."); *United States v. Glass*, 904 F.3d 319, 322-23 (3d Cir. 2018) ("if § 780-102(b) sweeps in mere offers to sell, then . . . so does . . . § 802(8) and U.S.S.G. § 4B1.2, making the state offense . . . no broader then the federal one).

But in the Fourth Circuit, the analysis must be to the *ordinary* meaning of the term distribution. That is required by Fourth Circuit precedent dating back to 2007. *Ward*, 972 F.3d at 372-73 (noting it had long "rejected [the] argument that we must look to the federal [CSA's] definitions" where there is no cross-reference).

Finally, the surplusage canon does not require judicially erasing "attempted transfer" out of a statute in which it was duly enacted by the legislature because there is no surplusage. There is a 1-3 circuit split on this question.

The Seventh Circuit has held that the plain text of § 802(8) is controlling, and rejects surplusage principles as requiring courts to ignore or rewrite "attempted transfer" to have no conduct in common with § 846 attempted distribution. In *United States v. McKenzie*, the defendant challenged the denial of his motion for acquittal on an § 841 distribution conviction, arguing that he could not be guilty of distributing drugs under § 841 because law enforcement intercepted the parties before the transfer was complete. 743 Fed. App'x 1, 2 (7th Cir. 2018). But even if so, the Seventh Circuit explained, McKenzie's actions were still "chargeable as a delivery because it was an 'attempted' transfer under § 802(8)." *Id.* at *3.

McKenzie argued that the court should "read 'attempted transfer' out of the Act's definition of 'deliver'" because "an 'attempt to distribute' is criminalized by 21 U.S.C. § 846, the general 'attempt' statute." *Id.* The Seventh Circuit found the

redundancy between § 808(8) and § 846 unproblematic, because "[t]he plain text of the statute governs, and it defines 'distribution' as 'delivery" and 'delivery' as 'attempted transfer.'" *Id*. The Seventh Circuit thus found the plain text of § 802(8) dispositive, despite the overlap with § 846, and rejected McKenzie's surplusage argument.

The Seventh Circuit thus stands opposite the Third, Fourth, and Sixth Circuits, all of whom have concluded that surplusage principles require courts to construe an "attempted transfer" of drugs as having no conduct in common with an "attempted distribution" of drugs. *Nelson,* 151 F.4th at 581 ("to avoid rendering § 846 superfluous, an attempted transfer under § 841(a)(1) must be interpreted to be a completed delivery and thus a completed distribution offense") (internal punctuation omitted); *United States v. Dawson*, 32 F.4th 254, 260 (3d Cir. 2022) (refusing to interpret 'attempted transfer' in Pennsylvania drug statute as overlapping with 'attempted distribution' because that "would mean holding that Pennsylvania has codified a redundant, vestigial crime—violating the canon against surplusage"); *Booker*, 994 F.3d at 596 (finding § 841 distribution not categorically overbroad, in relevant part, because '[w]e must 'construe statutes, where possible, so as to avoid rendering superfluous any parts thereof[,]'" and "[t]he same applies to the analogous provisions of the CSA.").

IV. This Court should decide these issues to end years of unfairness in federal sentencing that will continue unabated if it does not.

Despite all of this longstanding confusion and persisting splits, the Sentencing Commission has not resolved any of them and will not do so any time soon. "It is the

responsibility of the Sentencing Commission to address" circuit splits to "ensure fair and uniform application of the Guidelines." *Guerrant v. United States*, 142 S. Ct. 640, 641 (2022) (Justice Sotomayor, joined by Justice Barrett, respecting the denial of certiorari). In cases—like this one—where a guideline enhancement "can shift the Guidelines range by years, and even make the difference between a fixed-term and a life sentence," the need for clarification is clear. *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (Justice Sotomayor, joined by Justice Gorsuch, respecting the denial of certiorari with respect to a circuit split interpreting USSG § 3E1.1).

But "[i]f the Commission does not intend to resolve the split," this Court should "decide whether to address the issue and restore uniformity" itself. *Wiggins v. United States*, 145 S. Ct. 2621, 2622 (2025) (Justice Sotomayor, joined by Justice Barrett, respecting the denial of certiorari). That is apparently the case. The splits in this case have festered for years. They have not been resolved. They are not on the current list of proposed amendments.[5] They have lead to "direct and severe consequences for defendants' sentences," *Guerrant*, 142 S. Ct. at 642, based on where a defendant committed his offense.

[5] U.S. Sent'g Comm'n, *Proposed 2026 Amendments to the Federal Sentencing Guidelines Published December 2025*, https://www.ussc.gov/guidelines/amendments/proposed-2026-amendments-federal-sentencing-guidelines-published-december-2025 ; *see also* U.S. Sent'g Comm'n, *Federal Register Notice of Proposed 2025-2026 Amendments Published December 2025*, https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2025-2026-amendments-published-december-2025

V. The questions presented are important and recurring.

These issues are all important ones. There are few—if any—guidelines interpretation disagreements that have such a substantial impact as these, all of which implicate the career offender enhancement, in addition to other enhancements that incorporate this definition (*see*, e.g., USSG § 2K2.1)."So long as the split persists, two defendants whose criminal histories include identical drug offenses and who commit the same federal crime" will continue to face markedly different sentencing ranges "based solely on geography." *Wiggins,* 145 S. Ct. at 2622 (discussing definitional split). Some will continue to "face dramatically higher sentencing ranges for their crime of conviction" than their similarly-situated counterparts elsewhere. *Id.* (quoting *Guerrant*, 142 S.Ct. at 641)).

And it will do so unfairly to many. Defendants with guidelines "controlled substance offenses" make up "nearly three-quarters (74.1%) of career offenders." U.S. Sent'g Comm'n, *Report to the Congress: Career Offender Sentencing Enhancements*, at 2 (Aug. 2016).[6] That figure does not even account for the many other defendants with drug priors whose base offense levels are increased by six to ten levels under U.S.S.G. § 2K2.1(a)(1)-(4). And the Commission also found that "[d]rug trafficking only career offenders . . . should not categorically be subject to the significant increases in penalties required by the career offender directive." *Id*. at 3. Almost a decade later, the Sentencing Commission has not yet managed to revise the career offender guideline to stop excessively punishing those, like Mr. Nelson, it knows do

[6] https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf

not deserve it. Continuing to do so for drug offenses that are *also* categorically overbroad by substance is doubly unfair. And to do so for defendants in this circuit, while defendants in the First, Second, Fifth, and Ninth Circuits are correctly excluded, is triply unfair.

To be sure, the career offender guideline enhancement applied to Mr. Nelson only because of where he committed his instant federal offense. Had he done so in the First, Second, Fifth, or Ninth Circuit, instead of the Fourth, his guideline range would have only been 41-51 months, instead of 151-188 months. App. 3a. Consequently, Mr. Nelson's guideline range almost *quadrupled* because of where he committed his instant offense.

These questions and disparities will continue to recur until the Sentencing Commission or this Court resolves them. *Brown* only created more confusion about the Guidelines. The splits about how to properly define a 'controlled substance offense' and how to use that proper definition in a categorical comparison have not only persisted, but deepened. There is no resolution from the Commission in sight. This Court should seize this opportunity to restore much-needed uniformity and fundamental fairness to federal sentencing.

VI. The decision below is wrong.

Although review is urgently needed regardless of which approach is correct, the decision below is wrong as to the timing question, as well as the interpretation of "controlled substance" and "distribution."

a. As to the timing question, the Fourth Circuit's reliance on *Johnson* is misplaced and wrong. *Johnson* asked and answered a different question than was

presented here, decades before *Brown* or any of these decisions. The only relevant question in *Johnson* was whether an offense that was a felony at the time of prior state conviction but had been changed to a misdemeanor by the time of federal sentencing counted as a "prior felony conviction" for career offender purposes. 114 F.3d at 445. *Johnson's* bare rationale, thirty years ago, contemplated none of the arguments in *Brown* and other modern decisions. It said only that "§ 4B1.2(3) of the guidelines provides that the conviction is sustained *on the date the guilt of the defendant is established*," and therefore, the statutory penalty at the time of prior state conviction controlled when determining whether a prior conviction is a "felony." *Id.* at 445. And it did not contemplate the critical language in § 1B.11(a) at all, as evidenced by its conclusion that "the plain language and accompanying application notes do not provide any support for Johnson's notion that the nature of the conviction at the time of sentencing, rather than at the time of conviction, controls the career offender analysis." *Id.*

Consequently, *Johnson* had little relevance to the question before the Fourth Circuit in this case. Like *McNeill*, *Johnson* also did not concern the second step of the categorical comparison. And like *McNeill*, *Johnson* also answered a different question: whether an intervening change in the term of imprisonment rendered a prior conviction no longer a prior *felony* conviction. Neither case grappled with whether the *elements of the offense* were broader at federal sentencing compared to the relevant comparator, as the categorical approach requires. This is so because unlike the question of whether a substance is "controlled," which is an element of the offense at all times, the *term of imprisonment is not an element of the offense at any*

time. In other words, "*McNeill* did not present the same question as this case because the change in North Carolina law only lessened the severity of the punishment prescribed for a defendant's unlawful acts; it did not make a substantive change as to what acts were lawful or unlawful." *Gibson*, 55 F.4th at 162. And as this Court has said time and time again, the categorical approach is concerned only with elements.

For all five reasons explained in *Minor*, *see* p. 11-14, supra, the Guidelines require a time-of-federal-sentencing approach at the second step of the categorical comparison. *Minor* is the only post-*Brown* decision to correctly interpret the career offender guideline using the reference canon, and applying *Jam*. The reference canon and *Jam* are wholly absent from the Fourth Circuit's opinion below, from either of the Sixth Circuit's opinions in *Clark* or *Drake*, and from any other circuit decision on the issue, for that matter.

b. As to the "controlled substance" question, whether a substance is "controlled" for the purposes of the career offender guideline must necessarily be considered in reference to the federal CSA. The Fourth Circuit's (and the other four circuits on that side of the split) stance—that "controlled" substance takes its ordinary meaning because it does not explicitly cross-reference the federal CSA schedules or § 802—runs afoul of *Jam's* recognition that under the reference canon, general references to a subject merely inform the *timing* of the reference. 586 U.S. at 209 (under "the 'reference' canon, when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises."). Accordingly, the fact that the career offender guideline does not explicitly cross-reference the federal schedules does *not* preclude "controlled" from

being interpreted to do so. It merely requires that the *current* federal schedules be consulted.

c. As to attempted transfer, the panel's determination below that attempted transfer and attempted distribution must not have any conduct in common based not on an actual parsing of the least culpable conduct involved in each, but instead based on the surplusage canon, is both wrong *and* flatly ignores decades of this Court's categorical approach jurisprudence. It also overlooks this Court's decision in *United States v. Batchelder*, 442 U.S. 114 (1979). There is no surplusage to avoid.

The canon against surplusage is hardly an absolute prohibition. It provides that "every word and every provision is to be given effect [and that n]one should *needlessly* be given an interpretation that causes it to duplicate another provision or to have no consequence," A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012) (emphasis added), or "to be *entirely* redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988) (emphasis added). Accordingly, there *is* no surplusage to avoid where a word or phrase "still has work to do" or "serves another purpose." *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019). In this circumstance, the words or phrases simply "[a]re not superfluous," *id*, leaving no basis to support the canon's application.

The Fourth Circuit wrongly applied the canon against surplusage where there is none. Even if "attempted transfer" and "attempted distribution" fully overlapped conduct-wise, that is not surplusage. Both would still have "effect" and "consequence" for four independent reasons.

First, Congress criminalized the "attempted transfer" of drugs in § 802(8), and

criminalized *all* "attempts" to commit drug crimes in § 846—not just attempted distribution, but also attempted manufacture, attempted possession with intent to distribute, attempted possession, and so on. The same is true of the language Virginia adopted in §§ 18.2-258 and 18.2-257. Federal and Virginia "attempt" thus have a much broader scope than federal and Virginia "attempted transfer" from the outset, giving them "work to do" despite—and "another purpose" to serve independent of—any attempted transfers.

Second, Congress' well-known reason for enacting § 846, despite full awareness that "attempted transfer" was already in § 802(8), was to remove the impossibility defense to prosecutions for attempted drug crimes under § 846. *United States v. Everett*, 700 F.2d 900 (3d. Cir. 1983). But § 802(8)—and therefore, the Virginia statute that adopted its language—lack that same clear legislative history, which is specific only to § 846. This difference in defense likewise distinguishes both statutes even further, despite the clear, plain-text overlap in conduct they prohibit.

Third, criminal statutes covering precisely the same conduct are not superfluous in any case. "This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute[] under either." *Batchelder*, 442 U.S. at 123-124. This is true even "when two statutes prohibit *exactly the same conduct*." *Id.* at 124 (internal quotation marks omitted) (emphasis added). Far from creating surplusage, Congress' inclusion of "attempted transfer" in § 802(8) and "attempted distribution" in § 846 simply reflects this "'settled rule' allowing prosecutorial choice." *Id.* It does not justify selectively reading one out of the statute

Congress duly enacted. Nor does it justify judicially rewriting the statute to have no overlap, as the Fourth Circuit did below.

Fourth, both have independent effect and consequence for another reason: Virginia proscribes different punishments for defendants who distribute by means of attempted transfer under § 18.2-248, than for those who attempt a distribution under § 18.2-257. Virginia thus provides distinct statutory punishments for attempted transfers or attempted distributions under distinct statutory schemes. *Compare* § 18.2-257(a) (providing for 1 – 10 years' imprisonment, though sentencer retains discretion to impose the penalty for the felony attempted if it is less); *with* § 18.2-248(C) (providing that the penalty for a 248 violation involving a Schedule I or II controlled substance is 5 – 40 years' imprisonment for a first offense, 5 – life with 3 year mandatory minimum for a second offense, and 10 – life with a 10-year mandatory minimum for a third offense).

There is substantial tolerance for redundancy in criminal statutes. Even where a term *has* actually "become unnecessary or redundant," "sometimes the better overall reading of the statute contains some redundancy." *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S.Ct. 873, 881 (2019). That is because "some redundancy is hardly unusual in statutes" addressing crimes, as discussed. *Id.* (quoting *Marx v. General Revenue Corp.*, 568 U.S. 371, 385 (2013) (internal quotation marks omitted)).

The Fourth Circuit's decision below was based on the incorrect assumption that the canon against surplusage required it to interpret "attempted transfer" and "attempted distribution" to have no overlap in conduct. This Court's precedents make

clear that 1) the canon against surplusage does not apply where, as here, there is no surplusage; and 2) even if there is redundancy between the two, that does not justify judicially overwriting the language Congress purposefully enacted.

VII. This case is a good vehicle.

Mr. Nelson's arguments were preserved below, and fully aired at each stage. There are no factual disputes; the disputes in this case are purely legal. Resolution of the questions presented would be dispositive. The Fourth Circuit's published opinion provides a sufficient basis for review. This case is a good vehicle to clarify long-recurring interpretive splits in the career offender guideline that are incredibly important and fundamental to fair sentencing.

* * *

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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