No. 25-6622

IN THE SUPREME COURT OF THE UNITED STATES

ALANTE MARTEL NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior convictions under federal and state drug laws were for "controlled substance offense[s]" under Sentencing Guidelines § 4B1.2(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 151 F.4th 577. The order of the district court (Pet. App. 15a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2025. A petition for rehearing was denied on September 15, 2025 (Pet. App. 14a). On December 5, 2025, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 13, 2026, and the petition was

filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of West Virginia, petitioner was convicted on one count of possessing heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. He was sentenced to 151 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-13a.

1. On August 21, 2020, officers responding to shots fired at a bar in Morgantown, West Virginia, detained and subsequently arrested petitioner. Presentence Investigation Report (PSR) ¶¶ 15-16. During a search of his person incident to that arrest, officers found approximately 11 grams of heroin, approximately $3000 in United States currency, and a semi-automatic pistol holding a bullet that matched shell casings found at the scene of the shooting. PSR ¶¶ 15, 17, 19, 22.

A federal grand jury in the Northern District of West Virginia charged petitioner with one count of possessing heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2).

Superseding Indictment 1-2. Petitioner pleaded guilty. Pet. App. 2a.

2. In preparation for sentencing, the Probation Office determined that petitioner had "at least two prior felony convictions of either a crime of violence or a controlled substance offense" and therefore qualified as a career offender under Sentencing Guidelines § 4B1.1(a) (2021). PSR ¶ 43. Section 4B1.1(b) of the applicable version of the Guidelines defined "'controlled substance offense'" to include

> 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.

Sentencing Guidelines § 4B1.2(b) (2021). The Probation Office identified petitioner's 2012 federal conviction for distribution of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) (2012), and his 2017 Virginia conviction for distribution of a controlled substance, in violation of Va. Code Ann. § 18.2-248 (West 2014), as satisfying that definition. PSR ¶¶ 49, 51, 57.

Petitioner objected to the enhancement, arguing that neither of the prior offenses identified by the Probation Office in fact qualified as a controlled substance offense. C.A. J.A. 287-296. Petitioner asserted that his federal conviction for crack cocaine distribution was not a qualifying offense because he was convicted of that offense at a time when the federal drug schedules included

hemp and ioflupane, which had been removed from the schedules by the time of his sentencing in this case. Id. at 293-296. Petitioner also asserted that his prior convictions were for violating statutes that prohibited both attempted and completed offenses and that the Section 4B1.2(b)(1) definition then in effect could not be satisfied by such convictions. Id. at 287-293.

The district court overruled petitioner's objections and applied the career-offender enhancement. Pet. App. 15a-25a. It accordingly calculated an advisory guidelines range of 151 to 188 months of imprisonment. Id. at 3a. And it sentenced petitioner to 151 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-13a.

The court first determined that neither of petitioner's prior convictions was for violating a statute that criminalized attempt offenses. Pet. App. 4a-9a & n.5. The court of appeals explained that, under its precedents, convictions under the federal drug statutes -- and similarly structured state drug statutes -- that have a specific provision criminalizing attempts are not properly viewed as convictions for attempt unless they rest on the attempt provision. See id. at 7a-8a. That precedent directly foreclosed petitioner's argument with respect to his prior federal conviction, see id. at 9a n.5, and the court found Virginia's drug statutes to have a similar dichotomization between completed and attempted drug crimes. See Pet. App. 8a-9a.

The court of appeals then rejected petitioner's argument that, because Congress had removed hemp and ioflupane from the federal drug schedules between the time of his prior federal offense of distributing crack cocaine and the sentencing in this case, his federal conviction for distribution of crack cocaine was not a controlled substance offense. Pet. App. 9a-13a. The court observed that while petitioner's appeal had been pending, this Court had decided Brown v. United States, 602 U.S. 101 (2024). Pet. App. 10a-11a. In Brown, the Court held that "a state drug conviction counts as" a "'serious drug offense'" for purposes of an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA) "if it involved a drug on the federal [drug] schedules at the time of that offense." Id. at 105, 123 (quoting 18 U.S.C. 924(e)(1)). And although the court of appeals did not view Brown as directly dispositive of petitioner's claim in this case, it determined that its precedent required a similar "time-of-conviction approach * * * for a Guidelines career offender analysis." Pet. App. 12a. And it found that, under that approach, petitioner's federal conviction was a proper predicate for the Guidelines career offender enhancement. Ibid.

ARGUMENT

Petitioner renews his contention that his prior federal conviction for distribution of crack cocaine is not a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b) (2021) because, by the time he was sentenced for the instant federal

offenses, Congress had removed hemp and ioflupane from the federal drug schedules. Pet. 10-14. Because the question presented involves the interpretation of the Sentencing Guidelines, the petition for a writ of certiorari does not warrant this Court's review. In any event, the court of appeals correctly rejected petitioner's contentions, and this Court has recently and repeatedly denied petitions presenting similar contentions. It would be appropriate to follow the same course here.

Petitioner also asks the Court to grant review to consider two other questions regarding the definitions of certain terms in Section 4B1.2(b) (2021), see Pet. i (Questions 2 and 3), but neither of those questions is presented in this case. Whether the phrase "controlled substance" includes substances that are controlled under relevant state law but not under the federal Controlled Substances Act (Pet. 14-15) was never passed upon below, nor does petitioner contend it is relevant to his career-offender status under Sentencing Guidelines § 4B1.2(a) (2021). Nor does petitioner's case turn on any question regarding the definition of "distribution" in Sentencing Guidelines § 4B1.2(b) (2021), which is of diminishing importance in any event since the United States Sentencing Commission (Commission) has already clarified the Guidelines in relevant part.

1. This Court ordinarily does not review decisions interpreting the Sentencing Guidelines, because the Sentencing Commission can amend the Guidelines to eliminate any conflict or

correct any error. See Braxton v. United States, 500 U.S. 344, 347-349 (1991). Congress has charged the Commission with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Id. at 348 (citing 28 U.S.C. 994*(o)* and (u)); see United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."). Review by this Court of Guidelines decisions is particularly unwarranted in light of Booker, which rendered the Guidelines advisory only. 543 U.S. at 245.

No sound reason exists to depart from that practice here. The Commission has carefully attended to Section 4B1.2's definition of "controlled substance offense," amending it multiple times. See, e.g., Sentencing Guidelines § 4B1.2(2) (1987); id. § 4B1.2(2) (1989). The Commission initially defined the term by reference to the Controlled Substances Act, 21 U.S.C. 801 et seq., id. § 4B1.2(2) (1987), then by reference to specific provisions of federal law, id. § 4B1.2(2) (1988), and then by replacing the cross-references to federal law with a broad reference to "federal or state law" that prohibits certain conduct, id. § 4B1.2(b)(2) (1989). See United States v. Ruth, 966 F.3d 642, 652 (7th Cir. 2020), cert. denied, 141 S. Ct. 1239 (2021).

The Commission has also devoted considerable attention in recent years to the "definitions relating to the nature of a defendant's prior conviction," and it continues to work "to resolve conflicting interpretations of the guidelines by the federal courts." *Proposed Priorities for Amendment Cycle*, 81 Fed. Reg. 37,241, 37,241 (June 9, 2016). Indeed, as petitioner acknowledges (Pet. 9 n.2), the Sentencing Commission has already amended Sentencing Guidelines § 4B1.2(b) in 2023 to clarify that an attempt offense is a "controlled substance offense" as defined therein, thereby resolving one of the issues that his petition purports to present.

In addition, earlier this year, the Commission sought public comment on "which temporal version of the applicable drug schedule * * * should be used to decide if a prior offense qualifies as a predicate 'controlled substance offense'" -- specifically, "(1) the schedule in place at the time of defendant's prior conviction; or (2) the schedule in place at the time of the instant offense or sentencing for the instant federal offense." See U.S. Sent'g Comm'n, *Proposed Amendments to the Sentencing Guidelines* 43-50 (Jan. 30, 2026), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202602_rf-proposed.pdf. The Commission's proactive effort suggests that it may address and resolve that issue in an upcoming amendment cycle as well. The Commission accordingly "should have the opportunity to address this issue in the first instance." Longoria v. United

States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the denial of certiorari) (discussing another Sentencing Guidelines dispute) (citing Braxton, 500 U.S. at 348).

2. In any event, the court of appeals correctly recognized that determining whether a prior conviction involved a controlled substance under Section 4B1.2(b) requires a comparison of the statute of conviction to the drug schedules in effect at the time of the prior crime. Petitioner's contrary interpretation finds no basis in the Guidelines' text. In distributing crack cocaine, PSR ¶ 49, petitioner literally committed an "offense under federal" law "that prohibits" the "distribution * * * of a controlled substance." Sentencing Guidelines § 4B1.2(b) (2021). Nothing in the Guidelines' language suggests that a court should compare the federal controlled-substance schedules at the time of that prior crime to the schedules in effect at a later date. Instead, the most natural place to look in determining the nature of a defendant's prior conviction is the law in effect at the time of the prior crime.

The Guidelines' context confirms that a court should consult the drug schedules in effect at the time the prior crime occurred. For example, Section 4B1.1 states that a career offender is a person who has "at least two prior felony convictions" for a crime of violence or controlled substance offense. Sentencing Guidelines § 4B1.1(a) (2021). Section 4B1.2, which defines "prior felony convictions," requires that the federal crime of conviction

be "subsequent to sustaining at least two felony convictions" for a crime of violence or controlled substance offense. Id. § 4B1.2(c); see id. § 2K2.1(a)(2) (similar). Those words "direct the court's attention to events that occurred in the past" and suggest a "backward-looking approach" that assesses "the nature of the predicate offenses at the time the convictions for those offenses occurred." United States v. Clark, 46 F.4th 404, 409 (6th Cir. 2022), cert. denied, 144 S. Ct. 107 (2023).

This Court's caselaw further supports that interpretation. In Brown v. United States, 602 U.S. 101 (2024), and McNeill v. United States, 563 U.S. 816 (2011), this Court held that sentencing courts evaluating whether a prior conviction is a valid ACCA predicate should consult the law that applied at the time of that conviction. Brown, 602 U.S. at 123; McNeill, 563 U.S. at 820. The Court explained that the ACCA "is concerned with convictions that have already occurred," and requires a "backward-looking" examination of then-applicable law. Brown, 602 U.S. at 111-112, 120 (citation omitted); McNeill, 563 U.S. at 820. And the Court rejected an approach under which the ACCA's applicability could "depend on the timing of the federal sentencing proceeding" and intervening changes in substantive law could "erase an earlier conviction for ACCA purposes," which "cannot be correct." McNeill, 563 U.S. at 823. Similar logic applies here.

Contrary to petitioner's contention (Pet. 11-12), nothing about that logic is undermined by a footnote in Brown expressing

"doubt that the Guidelines practice" of applying the most up-to-date version of the manual is "relevant" to the ACCA context. Brown, 602 U.S. at 120 n.7. The issue is not which version of the Guidelines Manual to use -- there is no dispute here that the district court correctly consulted the 2021 edition -- but instead how to apply the language of the Guidelines provisions in that version of the manual. As the Sixth Circuit has observed since Brown, "the requirement that district courts use the current manual leaves unanswered the critical question: what does the term 'controlled substance' in § 4B1.2 of that current manual mean?" United States v. Drake, 126 F.4th 1242, 1245–1246, cert. denied, 146 S. Ct. 240 (2025) (citation and internal quotation marks omitted). And as the Sixth Circuit has recognized, see ibid., and for the reasons explained here, Section 4B1.2 requires a backward-looking historical inquiry.

3. In addition to the court below, the Third, Sixth, Eighth, and Eleventh Circuits also consult the drug schedules in place at the time of the prior crime when determining whether a prior conviction is a controlled substance offense under Section 4B1.2(b). See Drake, 126 F.4th at 1245; United States v. Dubois, 94 F.4th 1284, 1296 (11th Cir. 2024), vacated, 145 S. Ct. 1041, reinstated, 139 F.4th 887 (11th Cir. 2025), cert. denied, 2026 WL 135685 (2026); United States v. Lewis, 58 F.4th 764, 771-773 (3d Cir.), cert. denied, 144 S. Ct. 489 (2023); United States v. Perez, 46 F.4th 691, 703 (8th Cir. 2022), abrogation on other grounds

recognized by United States v. Gordon, 111 F.4th 899, 901 n.4 (8th Cir. 2024).

The First, Fifth, and Ninth Circuits, however, have taken the view that courts should consult the drug schedules at the time of federal sentencing to determine whether a predicate drug conviction qualifies as a controlled substance offense. See United States v. Minor, 121 F.4th 1085 (5th Cir. 2024); United States v. Bautista, 989 F.3d 698, 703 (9th Cir. 2021); United States v. Abdulaziz, 998 F.3d 519, 523 (1st Cir. 2021). The Second Circuit has similarly disagreed with the government's position that courts should apply the drug schedules in effect at the time of a defendant's prior crime, but it has not determined whether courts should instead consult the schedules in effect on the date of the defendant's federal offense or his federal sentencing. See United States v. Gibson, 55 F.4th 153, 165-166 (2d Cir. 2022).

As explained above, circuit disagreement can and should be resolved by the Sentencing Commission. See pp. 6-9, supra. This Court has recently and repeatedly denied petitions presenting similar contentions, including the petition for a writ of certiorari in Drake v. United States, 146 S. Ct. 240 (No. 25-5226), which sought review of a published Sixth Circuit decision on which the court of appeals relied in this case.[1] The same result is warranted here.

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[1] See also, e.g., Ordunez v. United States, 144 S. Ct. 1102 (2024) (23-5604); Nerius v. United States, 144 S. Ct. 430 (2023) (No. 23-5364); Long v. United States, 144 S. Ct. 429 (2023) (No.

4. Petitioner also lists (Pet. i) two other questions presented regarding definitions of certain Guidelines terms, but neither is implicated in this case.

a. Petitioner first purports to raise the issue of whether "the undefined term 'controlled substance' in [Sentencing Guidelines] § 4B1.2(b) take[s] its ordinary meaning, or the statutory definition in the Controlled Substances Act, 21 U.S.C. § 802(6)." Pet. i. That issue was neither pressed nor passed upon below, and does not warrant review in the first instance now, see United States v. Williams, 504 U.S. 36, 41 (1992) -- particularly because it is irrelevant to the proper resolution of his case.

Petitioner did not contend below, and does not contend now, that his prior Virginia conviction implicates substances that are not on the federal drug schedule. Thus, circuit disagreement regarding whether the phrase "controlled substance" in Sentencing

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23-5358); Adzemovic v. United States, 144 S. Ct. 353 (2023) (No. 23-5164); Tate v. United States, 144 S. Ct. 234 (2023) (No. 23-5114); Lewis v. United States, 144 S. Ct. 489 (2023) (No. 23-198); Demont v. United States, 144 S. Ct. 281 (2023) (No. 22-7904); Hoffman v. United States, 144 S. Ct. 180 (2023) (No. 22-7903); Wright v. United States, 144 S. Ct. 179 (2023) (No. 22-7900); Lawrence v. United States, 144 S. Ct. 181 (2023) (No. 22-7898); Turman v. United States, 144 S. Ct. 162 (2023) (No. 22-7792); Williams v. United States, 144 S. Ct. 157 (2023) (No. 22-7755); Moore v. United States, 144 S. Ct. 150 (2023) (No. 22-7716); Ivery v. United States, 144 S. Ct. 142 (2023) (No. 22-7675); Baker v. United States, 144 S. Ct. 114 (2023) (No. 22-7359); Harbin v. United States, 144 S. Ct. 106 (2023) (No. 22-6902); Clark v. United States, 144 S. Ct. 107 (2023) (No. 22-6881); Edmonds v. United States, 144 S. Ct. 104 (2023) (No. 22-6825); Altman v. United States, 143 S. Ct. 2437 (2023) (No. 22-5877).

Guidelines § 4B1.2(b) includes substances that are controlled under relevant state law but not under the federal Controlled Substances Act, see Pet. 14-15, would be irrelevant here. And petitioner's other prior conviction was a federal conviction, as to which the court of appeals implicitly presumed -- in petitioner's favor -- that if the conviction could have been for a drug not on the federal drug schedule at the relevant time, it would not be a qualifying predicate under Section 4B1.2. See Pet. App. 9a-13a. This case therefore does not implicate the second question presented.

Moreover, the Sentencing Commission also sought public comment earlier this year on the potential resolution of this circuit disagreement. See U.S. Sent'g Comm'n 43-50. This Court has denied numerous petitions for certiorari raising similar contentions, see Br. in Opp. at 5 & n.2, Edwards v. United States, 146 S. Ct. 123 (2025) (No. 24-6898) (collecting examples),[2] and should follow the same course here.

b. Petitioner also asks this Court to review whether the word "distribution" in Sentencing Guidelines § 4B1.2(b) (2021) takes an "ordinary" or "statutory" meaning, on the theory that the former view would require construing Va. Code Ann. § 18.2-248 (West 2014) as an attempt offense not within the then-applicable definition of a "controlled substance offense." Pet. 15-18; see

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[2] At least one other pending petition raises this issue. See White v. United States, No. 25-6906 (filed Feb. 20, 2026).

United States v. Campbell, 22 F.4th 438, 445-447 (4th Cir. 2022) (interpreting a prior version of the Sentencing Guidelines § 4B1.2(b) definition of that term not to include attempt offenses). But petitioner identifies no authority supporting his supposition that an "ordinary" meaning approach would require that result. Indeed, according to petitioner, the court below has adopted the approach he advocates, Pet. 17, yet reached the opposite result in his case. Insofar as petitioner claims the decision below created an intra-circuit conflict, this Court does not grant review to resolve such conflicts. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

As petitioner appears to acknowledge (Pet. 16-17, 24), the decision below did not rely on the question of Guidelines construction that he asks this Court to review but instead turned on the panel's statutory analysis of Va. Code Ann. § 18.2-248 (West 2014), informed by the canon against surplusage, to determine that the state statute under which he was convicted did not actually criminalize noncompleted offenses. Pet. App. 4a-9a. That determination is consistent with the decisions of other courts of appeals that have analyzed whether convictions under 21 U.S.C. 841(a)(1) or similarly structured state drug distribution statutes can constitute a controlled substance offense under Section 4B1.2(b). See United States v. Dawson, 32 F.4th 254, 259 (3d Cir. 2022); United States v. Booker, 994 F.3d 591, 595-596 (6th Cir. 2021).

Petitioner identifies no contrary authority. He cites no case holding that an offense under Section § 18.2-248 is not a controlled substance offense, or even a case holding that a similar offense from another State with an analogous statutory scheme is not a controlled substance offense.[3] And particularly in the absence of a conflict, there is no basis for this Court to grant certiorari to consider whether a single state predicate offense qualifies as a controlled substance offense under the Sentencing Guidelines. Indeed, even setting aside the Sentencing Guidelines context, but see supra pp. 6-9, resolution of that issue ultimately depends on the interpretation of state statutes, and this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004); see Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law.").

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[3] Petitioner errs in suggesting (Pet. 17-18) that the Seventh Circuit's unpublished order in United States v. McKenzie, 743 Fed. Appx. 1 (2018), supports his position. In McKenzie, which did not involve the Sentencing Guidelines, the Seventh Circuit found that the defendant "deliver[ed]" drugs within the meaning of 21 U.S.C. 802(8) when he gave another person a locked box filled with methamphetamine even if "possession" of the drugs did not transfer because the recipient lacked a key. McKenzie, 743 Fed. Appx. at 2-4. That is consistent with the court of appeals' explanation below that "the proper way to see an 'attempted transfer' in a § 841(a)(1) case is 'as "a completed delivery rather than an attempt crime."'" Pet. App. 7a (quoting Groves, 65 F.4th at 172).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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