

No. 23-198

IN THE
Supreme Court of the United States

JAMAR M. LEWIS,
Petitioner,

v.

UNITED STATES,
Respondent.

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

**BRIEF OF *AMICUS CURIAE* NATIONAL
ASSOCIATION FOR PUBLIC DEFENSE IN
SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICUS CURIAE*¹

The National Association for Public Defense (NAPD) is an association of more than 28,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel.

NAPD's members are advocates in jails, in courtrooms, and in communities, and are experts in not only theoretical best practices but also in the practical, day-to-day delivery of legal services. NAPD's collective expertise represents federal, state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital, and appellate offices, and a diversity of traditional and holistic practice models.

In addition, NAPD hosts annual conferences and webinars where discovery, investigation, cross-examination, and prosecutorial duties are addressed. NAPD also provides training to its members

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made any monetary contribution to its preparation or submission. Pursuant to Rule 37.2, amicus provided timely notice to all counsel of record of its intent to file this brief.

concerning zealous pretrial and trial advocacy and strives to obtain optimal results for clients both at the trial level and on appeal.

SUMMARY OF ARGUMENT

The Petition presents two issues that are of great importance because they substantially impact the sentences imposed on countless criminal defendants. Every day, defendants convicted in some circuits receive sentences much longer than the sentences imposed on identically situated defendants convicted in other circuits, with a particular impact on Black and indigent defendants.

Specifically, the Petition concerns the proper interpretation of the term “controlled substance” for purposes of applying the categorical approach to the career offender enhancement under the federal Sentencing Guidelines, which recommends an enhanced sentence for criminal defendants with an instant or prior conviction for a “crime of violence” or a “controlled substance offense.” U.S.S.G. § 2k2.1(a)(4)(A); U.S.S.G. § 4B1.1 (the “Career Offender Guidelines”). The Petition raises two issues as to which there are deep and pervasive circuit splits regarding the controlled substance offense prong of the Career Offender Guidelines.

First, the circuits disagree regarding whether the term “controlled substance” in the Career Offender Guidelines is defined at the time of the predicate conviction or at the time the defendant is sentenced for the federal crime (“Issue 1”). Recently, the Court granted certiorari in two consolidated cases, *Brown v. United States*, No. 22-6389, and *Jackson v.*

United States, No. 22-6640 (the “ACCA Cases”), raising the same issue in the context of the Armed Career Criminal Act (“ACCA”). Specifically, the question presented in the ACCA Cases is whether the “serious drug offense” definition in the ACCA incorporates the federal drug schedules that were in effect at the time of the federal firearm offense or the federal drug schedules that were in effect at the time of the prior state drug offense.

There is no principled basis on which to treat the Guidelines cases differently than the ACCA Cases for the purpose of determining whether “controlled substance” is defined by drug schedules in effect at the time of the predicate offense or those in effect at the time of sentencing. Importantly, this case involving the Guidelines stands to affect an even greater number of criminal defendants than do the ACCA Cases.

Issue 1 accordingly merits review in its own right. At a minimum, however, the Court should hold this case in abeyance as to Issue 1 pending its decision in the ACCA Cases. It can then decide whether to grant the Petition as to Issue 1, vacate the judgment, and remand the case to the Third Circuit to reconsider its decision in light of this Court’s guidance in the ACCA Cases.

Second, there is also a substantial circuit split regarding whether the term “controlled substance” is defined by reference only to the drugs listed on the

federal drug schedule or if it also encompasses additional drugs controlled under state law (“Issue 2”). On this second issue, the Court should grant certiorari to resolve the split instead of abdicating to the Sentencing Commission.

Justice Sotomayor recognized this split in *Guerrant v. United States*, 142 S. Ct. 640 (2022) (mem.), noting her “hope” that “in the near future the Commission will be able to resume its important function in our criminal justice system.” *Id.* at 641. The Commission achieved a quorum in August of 2022 but still has done nothing to resolve the split. The issue urgently needs resolution because it so severely impacts so many criminal defendants. Considering that the Commission has failed to act and is plagued by bureaucratic delays and other administrative problems—and the great importance of the issue—this Court should step in to resolve the split. *Cf. McClinton v. United States*, 600 U.S. ___, 143 S. Ct. 2400 (2023) (mem.) (Sotomayor, J., respecting the denial of certiorari).

On the merits, the term “controlled substance” should be defined by reference to federal drug schedules. Otherwise, criminal defendants convicted of federal crimes will receive vastly different sentences based solely on the happenstance of how different states categorize the same drug. This is directly contrary to the Sentencing Commission’s statutorily mandated purpose to ensure more uniform federal sentences. *See Mistretta v. United States*, 488

U.S. 361, 374 (1989) (describing one purpose of the Sentencing Commission as “avoiding unwarranted sentencing disparities among defendants with similar records” (quoting 28 U.S.C. § 991(b)(1)(B))).

Moreover, Issue 2 is not one on which the Court should defer to the Sentencing Commission. In *Jerome v. United States*, 318 U.S. 101 (1943), this Court held that “we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law.” *Id.* at 104. The *Jerome* presumption applies here too: unless the Guidelines include a clear direction to apply state law, federal law supplies the definition. There is no reason to distinguish between statutes enacted by Congress and the Guidelines promulgated by the Sentencing Commission for purposes of applying the *Jerome* presumption.

For those reasons, the Petition should be granted.

ARGUMENT

- I. The Court should, at a minimum, hold the Petition so it can determine, in light of its decision in the ACCA Cases, whether to grant certiorari on Issue 1, vacate the judgment below, and remand this case for further consideration.**

As discussed in the Petition, Issue 1 is worthy of review in its own right. Pet. 14-20. In the alternative, however, this Court should hold the Petition so that it may grant review, vacate the decision, and remand (“GVR”) to the Third Circuit to reconsider its decision in light of this Court’s decision in the ACCA Cases, if appropriate.

- A. The Court has applied the GVR practice to sentencing cases numerous times.**

This Court has an established practice of GVR’ing a case when an intervening event might change the outcome of that case. *See Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (“[T]he GVR order has, over the past 50 years, become an integral part of this Court’s practice.”). The Court has “GVR’d in light of a wide range of developments, including [its] own decisions, State Supreme Court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, and confessions of error or other positions newly taken by the Solicitor General and

state attorneys general.” *Id.* at 166-67 (internal citations omitted). Accordingly, if a pending case presents an issue the resolution of which could cause the lower court to reconsider its decision, then the Court is well within its authority to hold the case and consider GVR if appropriate.

The Court explained its GVR practice in criminal cases in *Stutson v. United States*, 516 U.S. 193 (1996), stating “[w]hen a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated.” *Id.* at 196. Consistent with that principle, the Court has followed its GVR practice in sentencing cases; those cases often present difficult issues as to which the courts of appeals have taken differing approaches and impact many criminal defendants.

GVRs granted after *Mathis v. United States*, 579 U.S. 500 (2016), are illustrative of this principle in practice. There, the Court considered the proper application of the rule that a “prior crime qualifies as an ACCA predicate [offense] if, but only if, its elements are the same as, or narrower than, those of the generic offense.” *Id.* at 503. The Court held that there is no exception to that rule “when a defendant is convicted under a statute that lists multiple, alternative means of satisfying one (or more) of its elements.” *Id.* An offense does not qualify as a

predicate offense under the ACCA if any of the alternative means of satisfying one or more of its elements is broader than the generic offense listed in the ACCA. *Id.* at 504.

Counsel for amicus curiae located twenty-one cases that were GVR'd following *Mathis*.² Many of the GVRs involved cases under the Sentencing Guidelines, not the ACCA. See *Olalde-Gonzalez v. United States*, 580 U.S. 911, 137 S. Ct. 296 (2016) (mem.) (GVR'ing petition based on *United States v. Olalde-Gonzalez*, 642 F. App'x 426 (5th Cir. 2016) (mem.), which involved Guidelines, not ACCA); *Castro-Martinez v. United States*, 579 U.S. 939, 136 S. Ct. 2541 (2016) (mem.) (same based on *United States v. Castro-Martinez*, 624 F. App'x 357 (6th Cir. 2015)); *Bryant v. United States*, 579 U.S. 939, 136 S. Ct. 2541 (2016) (mem.) (same based on *United States v. Bryant*, 615 F. App'x 199 (5th Cir. 2015) (mem.)); *Diaz-Morales v. United States*, 579 U.S. 939, 136 S. Ct. 2540 (2016) (mem.) (same based on *United States v. Diaz-Morales*, 595 F. App'x 932 (11th Cir. 2014)); *Stephens v. United States*, 580 U.S. 1193, 137 S. Ct. 1334 (2017)

² Counsel searched “grant! /5 vacat! AND remand! /p ‘Mathis v. United States’” on Westlaw. The search produced twenty-three results, twenty-one of which were confirmed to be GVRs in light of *Mathis*. See, e.g., *Sharbutt v. Vasquez*, 579 U.S. 939, 136 S. Ct. 2538 (2016) (mem.); *Castro-Martinez v. United States*, 579 U.S. 939, 136 S. Ct. 2541 (2016) (mem.); *Boman v. United States*, 580 U.S. 802, 137 S. Ct. 87 (2016) (mem.); *Wright v. United States*, 580 U.S. 802, 137 S. Ct. 192 (2016) (mem.).

(mem.) (same based on *United States v. Stephens*, 651 F. App'x 445 (6th Cir. 2016)); *Guevara v. United States*, 579 U.S. 939, 136 S. Ct. 2542 (2016) (mem.) (same based on *United States v. Guevara*, 619 F. App'x 648 (9th Cir. 2015)); *Alexander v. United States*, 580 U.S. 911, 137 S. Ct. 295 (2016) (mem.) (same based on *United States v. Alexander*, 642 F. App'x 506 (6th Cir. 2016)).

GVRs granted after *Johnson v. United States*, 576 U.S. 591 (2015), are also instructive. Like *Mathis*, *Johnson* involved the proper interpretation of the ACCA. *Id.* at 593. Counsel for amicus curiae located sixty-two decisions that were GVR'd in light of *Johnson*.³ Notwithstanding that *Johnson* involved the ACCA, the Court held and GVR'd numerous petitions not involving the ACCA in light of the pending decision in *Johnson*. See, e.g., *Denson v. United States*, 576 U.S. 1080, 135 S. Ct. 2931 (2015) (mem.) (Alito, J., concurring) (noting that the Court “held the petition in this and many other cases pending the decision in *Johnson*,” where case below, *Denson v. United States*, 569 F. App'x 710 (11th Cir.

³ Counsel searched “grant! /5 vacat! AND remand! /p ‘Johnson v. United States,’” and then filtered for decisions after June 25, 2015, on Westlaw. The search produced sixty-three results, sixty-two of which were confirmed to be GVRs in light of *Johnson*. See, e.g., *Aiken v. Pastrana*, 576 U.S. 1080, 135 S. Ct. 2940 (2015) (mem.); *Coney v. Pastrana*, 576 U.S. 1081, 135 S. Ct. 2943 (2015) (mem.); *Nipper v. Pastrana*, 576 U.S. 1081, 135 S. Ct. 2946 (2015) (mem.); *Bernardini v. United States*, 576 U.S. 1080, 135 S. Ct. 2932 (2015) (mem.).

2014), involved Career Offender Guidelines, not ACCA); *Beckles v. United States*, 576 U.S. 1082, 135 S. Ct. 2928 (2015) (mem.) (same where petition based on *Beckles v. United States*, 579 F. App'x 833 (11th Cir. 2014)); *Maldonado v. United States*, 576 U.S. 1079, 135 S. Ct. 2929 (2015) (mem.) (same where petition based on *United States v. Maldonado*, 581 F. App'x 19 (2d Cir. 2014)); *Cooper v. United States*, 576 U.S. 1080, 135 S. Ct. 2938 (2015) (mem.) (same where petition based on *United States v. Cooper*, 598 F. App'x 682 (11th Cir. 2015)); *Gonzales v. United States*, 577 U.S. 801, 136 S. Ct. 84 (2015) (mem.) (same where petition is based on *United States v. Gonzales*, 598 F. App'x 311 (5th Cir. 2015) (mem.) (per curiam)); *Jones v. United States*, 577 U.S. 918, 136 S. Ct. 333 (2015) (mem.) (same where petition based on *Jones v. United States*, 597 F. App'x 1064 (11th Cir. 2015)).

This Court would accordingly be well within its authority and precedent if it agrees to hold the Petition, pending the decision in the ACCA Cases, notwithstanding that this case involves issues under the Career Offender Guidelines.

B. The Court's decision in the ACCA Cases is likely to resolve Issue 1.

The principles that resulted in the GVRs following *Mathis* and *Johnson* apply here. The ACCA Cases present the question whether the “serious drug offense” definition under the ACCA incorporates drug schedules in effect at the time of sentencing for the

federal firearm offense or at the time of the prior state drug offense. Likewise, the first question presented here is whether “the term ‘controlled substance’ in the Sentencing Guidelines [is] defined at the time of the predicate conviction or when federal consequences attach.” Pet. at i. There is no principled reason that the answer to the question of what date to use in determining whether a drug falls within the definition of a “controlled substance” should be treated differently under the ACCA than under the Sentencing Guidelines.⁴ In all probability, therefore, the Court’s decision in the ACCA Cases will determine the proper outcome as to Issue 1 in this case because

⁴ Although the circuits are deeply divided on this issue, as discussed below, seven of the nine that have ruled on the issue have concluded that the same analysis applies in both ACCA and Guidelines cases. The Third Circuit rejected the idea that the same approach applies to both types of cases, asserting that the ACCA’s statutory language justifies the distinction because it defines a “controlled substance” as one regulated by the Controlled Substances Act. Pet App. 18a. According to the Third Circuit, based on the express cross-reference to the Controlled Substances Act, “it makes sense that amendments to federal drug schedules implicitly amend the corresponding Guidelines or statutory penalty provision.” *Id.* at 18a-19a. However, there is no principled reason that the explicit cross-reference changes the analysis of what date controls the definition of “controlled substance” without additional language indicating that it must be the “current” or “present” Controlled Substances Act. Thus, regardless of whether the Controlled Substances Act is explicitly cross-referenced, the analysis should remain the same.

the questions presented require the exact same analysis.

Under the ACCA, if a defendant is convicted of a firearm offense and has three “serious drug offense” convictions, the minimum sentence is fifteen years. Both state and federal offenses can count as a “serious drug offense.” This Court has held that under the ACCA, if a defendant has prior state drug convictions, courts must apply the “categorical approach” to compare federal and state law to determine if the elements of the state law are “the same as, or narrower than” those of its federal counterpart and thus whether the state conviction counts for sentence-enhancement purposes. *See Mathis*, 579 U.S. at 517, 519. The circuits have split over whether in making this determination they must consult the federal drug law in effect at the time of the prior state conviction or at the time of federal sentencing.

The Guidelines cases, like this one, present the same question. Under Guideline § 2K2.1(a)(4)(A), a defendant’s sentence should be enhanced if “the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense.” Like the ACCA, a controlled substance offense can be either a state or federal conviction. U.S.S.G. § 4B1.2(b). Also like the ACCA, courts apply the categorical approach to determine whether the predicate offense matches the comparator and thus whether a sentencing enhancement should apply.

Pet. at 3. The circuits have likewise split over whether they must consult drug schedules in effect at the time of the prior state conviction or at the time of federal sentencing.

The circuits are deeply divided as to whether the time-of-consequences or time-of-the-conviction approach governs sentencing under both the ACCA and the Career Offender Guidelines. As noted in the Petition, five circuits apply the time-of-consequences approach in both Guidelines and ACCA cases, two circuits apply the time-of-conviction approach in both Guidelines and ACCA cases, and two circuits apply the time-of-consequences approach in ACCA cases but the time-of-conviction approach in Guidelines cases. Pet. at 13.

Both the ACCA and the Sentencing Guidelines impose additional punishments on defendants with previous violent felonies based on their previous convictions. Although the ACCA and Guidelines apply in different contexts, it makes no logical sense to treat them differently for purposes of determining the date on which to measure whether a drug is a “controlled substance.” There are accordingly substantial similarities between the ACCA and the Sentencing Guidelines, and what they accomplish. Additionally, the Court has recognized that precedent and principles from statutory cases can inform the Guidelines and vice versa. *See* Pet. at 20-21 (collecting cases).

The Court's decision in the ACCA Cases thus stands to provide much-needed clarity on this issue that will shed light on the proper conclusion in this case. The Court should accordingly either grant the Petition to decide Issue 1 or hold the Petition so that it can, at a minimum, vacate and remand this case for reconsideration in light of the decision in the ACCA Cases.

C. Issue 1 is exceedingly important under the Career Offender Guidelines.

The question presented in Issue 1 is an exceedingly important one; indeed, more federal offenders are sentenced under the Guidelines than the ACCA, making the issue even more important to address under the Guidelines. Specifically, according to the United States Sentencing Commission, “[a]rmed career criminals represented less than one percent of the federal criminal caseload in FY2019.” *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways*, U.S. SENTENCING COMM’N (March 2021), at 6, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf. Cases under the ACCA “consistently comprise a small portion of the federal criminal caseload.” *Id.* at 7. By contrast, the Career Offender Guidelines at issue in this case applied to over 2% of federal criminal sentences in fiscal years 2021 and 2022. See *Quick Facts: Career Offenders (Fiscal Year 2021)*, U.S. SENTENCING COMM’N, <https://www.>

[ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY21.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY21.pdf) (last visited Oct. 3, 2023); *Quick Facts: Career Offenders (Fiscal Year 2022)*, U.S. SENTENCING COMM'N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY22.pdf. (last visited Oct. 3, 2023).

The current circuit split has resulted in disparities in federal sentences imposed for similar crimes, depending on the circuit in which the defendant is convicted and sentenced. This is directly contrary to the purpose of the Guidelines to ensure “reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.” *Guidelines Manual 2021*, U.S. SENTENCING COMM'N, Ch.1, Pt.A.3 (Nov. 2021), www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf.

Here, the district court, applying the time-of-consequences approach and thereby avoiding application of the career offender enhancement, sentenced Lewis to 42 months (about 3 and a half years) imprisonment and 3 years' supervised release. Pet. at 10. On appeal, the Third Circuit reversed, determining that the time-of-conviction approach applies in Guidelines cases. *Id.* By that time, Lewis had already been released from prison and began serving his supervised release term. *Id.* at 12. The Third Circuit agreed to stay the mandate to prevent

the risk that Lewis would be resentenced and returned to prison while the Petition is pending. *Id.*

If the Court denies the Petition, this case will be remanded to the district court for resentencing consistent with the Third Circuit's decision vacating Lewis's sentence. In that event, Lewis will not get the benefit of a subsequent decision in the ACCA Cases if that decision is favorable to his position. By holding this case and then GVR'ing if appropriate (assuming the Court decides a grant at the outset is inappropriate for any reason), the Court will assure fairness to Lewis by permitting his sentence to be determined with the benefit of the Court's decision. See Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs – And an Alternative*, 107 MICH. L. REV. 711, 725-26 (2009) (discussing the interrelationship between retroactive application of new decisions on pending cases and the Court's GVR practice). The Court's decision in the ACCA Cases thus stands to have a significant, real-world impact on Lewis and other defendants.

Beyond ensuring Lewis is afforded the benefit of this Court's decision in the ACCA Cases, the Third Circuit should have an opportunity to revisit the issue in light of this Court's decision. With such a deep split, it will be important for the Third Circuit to weigh in as to whether this Court's decision in the ACCA Cases does in fact change the outcome under the Career Offender Guidelines. That approach will ensure that the Third Circuit has an opportunity to

decide and articulate its understanding of the law in this area with the benefit of this Court's most recent relevant decision, rather than leaving in place a decision issued without that guidance. If the Court determines that a grant at the outset is not appropriate, it should thus hold the Petition in abeyance until it issues its decision in the ACCA Cases and then consider whether to GVR the case as to Issue 1.

II. Issue 2 merits review.

With respect to Issue 2, it is time for the Court to grant review to resolve the circuit split. Whether the term "controlled substance" is defined by reference to federal law only, or also state law, is a critical issue for sentencing purposes. Under the former, defendants like Lewis would be subject to similar sentences regardless of in which state they are sentenced. However, under the latter, the applicable Guidelines range would depend on whether a particular state did or did not treat a drug as a "controlled substance."

This Court has previously recognized this split but declined to resolve it in deference to the Sentencing Commission. Yet, more than a year after it achieved a quorum, the Sentencing Commission has still failed to resolve the split, and there is no reason to think it will do so any time soon. Moreover, the issue is a purely legal one that is apt for this Court's review. Indeed, if the Commission were to act, there

is only one possible correct outcome: because the Commission is tasked with avoiding disparities in sentencing for similarly situated defendants, “controlled substance” must be defined by reference to federal law only. Thus, the Court should grant review to decide this issue rather than once again abdicating to the Commission.

A. There is no reason to think the Sentencing Commission will resolve the split addressed in Issue 2 within a reasonable time.

In a statement issued in connection with the denial of review in *Guerrant v. United States*, 142 S. Ct. 640 (2022) (mem.), Justice Sotomayor called upon the Commission to resolve the “controlled substance” definition issue and pointed out that the Sentencing Commission lacked a quorum. *Id.* at 641 (“I hope in the near future the Commission will be able to resume its important function in our criminal justice system.”). Today, the Commission has had a quorum since August 5, 2022, but still has not taken action to resolve this critical split. Pet. at 35-36; *Acting Chair Judge Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners*, U.S. SENTENCING COMM’N (Aug. 5, 2022), <https://www.ussc.gov/about/news/press-releases/august-5-2022>.

Unfortunately, the Commission suffers from bureaucratic hurdles that have prevented it from

resolving the circuit split. Carly Knight, *High Time to Revisit Federal Drug Sentencing: The Confusing Interplay Between Controlled Substances and Career Offender Sentence Enhancements*, 39 GA. ST. U. L. REV. 895, 918 (2023). Amendments to the Guidelines require the “affirmative vote of at least four members of the Commission.” *Id.* Prior to 2022, the Commission was without a quorum and could not act. Although the Commission now has a quorum and has acknowledged the split, no progress has been made to resolve it. Pet. at 36.

It is now time for the Court to step in to resolve this pivotal issue that Justice Sotomayor aptly described as bearing “direct and severe consequences for defendants’ sentences.” *Guerrant*, 142 S. Ct. at 641; *cf. McClinton*, 600 U.S. ___, 143 S. Ct. at 2403. (Sotomayor, J., respecting the denial of certiorari) (“The Court’s denial of certiorari today should not be misinterpreted. The Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted-conduct sentencing in the coming year. If the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented.” (footnote omitted)).

B. Whether federal or state law defines the term “controlled substance” is a legal issue to be decided by the courts, not the Sentencing Commission.

As explained in the Petition, “the Guidelines are federal law, and this Court has an independent ‘duty’ ‘to say what the law is.’” Pet. at 36 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). When the courts of appeals come into conflict with each other, as they do here, a compelling case is made for the Court to grant a writ of certiorari. See S. Ct. R. 10(a). Indeed, at a general level, “the [C]ourt’s certiorari power exists to clarify the law when there is a compelling public necessity to do so.” Cynthia M. Karnezis, *When Judicial Deference Erodes Liberty: The Shortcomings of Stinson v. United States and its Implications on Judicial Ethics*, 34 GEO. J. LEGAL ETHICS 1073, 1093 (2021). Given the importance of sentencing, the number of criminal defendants affected, and the depth of the split, the Court’s review is warranted.

The purpose of the Sentencing Commission is, in part, to “provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing

practices.” 28 U.S.C. § 991(b)(1)(B). If the Commission permitted a conviction based on conduct involving substances controlled under the law of some states but not under federal law or the law of all states to serve as a basis for enhancing a sentence, offenders who have committed similar crimes may be subject to widely varying federal sentences based on differing state laws. This would violate Congress’s statutory directive to avoid unwarranted sentencing disparities. *See United States v. LaBonte*, 520 U.S. 751, 753 (1997) (noting the Commission “was not granted unbounded discretion” and is limited by Congress’s statutory directives).

Moreover, the *Jerome* presumption, which provides that “we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law,” *Jerome*, 318 U.S. at 104, applies equally to the Guidelines. This presumption is rooted in the notion that the “application of federal legislation is nationwide” and that “federal program[s] would be impaired if state law were to control.” *Id.* As lower courts have correctly recognized, regardless of whether Congress has enacted a statute or the Commission has promulgated a Guideline, the interpretation of the federal rule of decision should not be governed by state law, unless the federal law clearly incorporates state law. *See, e.g., Townsend*, 897 F.3d at 71. Thus, under the *Jerome* principle, the proper interpretation of

“controlled substance” is based only on reference to drugs listed on the federal schedule.

Lower courts have rightly applied the *Jerome* presumption to interpret the Guidelines. For example, in *Townsend*, the Second Circuit applied *Jerome* to the phrase “controlled substance” in section 4B1.2(b) of the Sentencing Guidelines. 897 F.3d at 71-72. The court reasoned that deferring to state law to interpret the Sentencing Guidelines would conflict with the categorical approach. *Id.* at 71; *see also, e.g., United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021) (“[C]onstruing the phrase in the Guidelines to refer to the definition of ‘controlled substance’ in the CSA—rather than to the varying definitions of ‘controlled substance’ in the different states—further[s] uniform application of federal sentencing law, thus serving the stated goals of both the Guidelines and the categorical approach.” (citing *United States v. Leal-Vega*, 680 F.3d 1160, 1166 (9th Cir. 2012))); *United States v. Gomez-Alvarez*, 781 F.3d 787, 792-94 (5th Cir. 2015) (similar); *United States v. Crocco*, 15 F. 4th 20, 22-23 (1st Cir. 2021) (acknowledging split but not deciding issue, emphasizing that the “federally based approach is appealing” while “look[ing] to state law to supply the definition of ‘controlled substance’ . . . is fraught with peril”).

Based on these principles, there is only one permissible interpretation of the Career Offender Guidelines: a “controlled substance” only includes those substances listed on the federal drug schedule,

not any additional substances listed on some state drug schedules. If the Commission issued a rule stating otherwise, it would exceed its statutory authority.

Furthermore, the question is a purely legal one for which the *Jerome* presumption already provides the answer. Because the Commission did not explicitly provide that state law applies, the federal Guidelines must be interpreted by reference to federal law only. Thus, this Court should grant review to clarify what the law is on Issue 2.

III. Both issues presented are exceptionally important because they dramatically alter the sentences imposed on similarly situated criminal defendants in different circuits.

The Third Circuit's broad definition of "controlled substance" and reference to state law in effect at the time of the predicate conviction, results in more individuals being subject to the application of the Career Offender Guidelines. *Offenses*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited Oct. 3, 2023). Most cases involving the application of the Career Offender Guidelines involve drug offenses, not violent crimes. *Id.* Accordingly, if "controlled substance" includes all substances controlled under federal and state law, more criminal defendants will necessarily receive longer sentences because the

ambit of controlled substances is greater when both state and federal schedules are considered.

Similarly, if a court refers to substances included in drug schedules in place at the time of the conviction, it is likely that this will result in more defendants being subject to the Career Offender Guidelines. Take, for example, Congress's amendment of the Controlled Substances Act and New Jersey's similar amendment of its drug schedule to exclude hemp from the definition of marijuana. Pet. App. 5a. Referring to the old drug schedules means the Career Offender Guidelines will apply to more criminal defendants, resulting in more enhanced sentences.

But more enhanced sentences for defendants convicted of drug offenses do not make logical sense. Compared to those who commit crimes of violence, recidivism rates for career offenders who only have drug-trafficking convictions are significantly lower. *Report to the Congress: Career Offender Sentencing Enhancements*, U.S. SENTENCING COMM'N, at 40-41 (Aug. 2016), <https://tinyurl.com/USSCReportToCongress> (last visited Oct. 3, 2023). Specifically, one 2010 study reports that "only 1.06% of drug crimes committed in 2010 involved physical injury to a victim." Jennifer Lee Barrow, *Recidivism Reformation: Eliminating Drug Predicates*, 135 HARV. L. REV. F. 418, 428 (2022). Furthermore, "a Bureau of Justice Statistics study found that only 1.1% of people convicted of drug possession and 1.6% of people

convicted of drug trafficking are rearrested for a violent felony, which is lower than the 1.9% average for all people with convictions.” *Id.* There is accordingly no policy justification for expanding the category of drugs for which the possession or sale may result in a criminal conviction, and so a longer federal sentence, beyond those drugs that federal law currently deems to be a controlled substance.

The Third Circuit’s approach will have a disparate and unfair impact on Black and indigent people in particular. For Black and indigent people, the likelihood of arrest and prosecution is much higher compared to other similarly situated individuals. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1173-74 (2010); Powder v. Crack: NYU Study Identifies Arrest Risk Disparity for Cocaine Use, N.Y. UNIV. (Feb. 19, 2015), <https://tinyurl.com/NYUPowderVsCrackStudy>.

For example, as of September 23, 2023, the Federal Bureau of Prisons reported that Black people represented 38.6% of the federal prisoner population. *Inmate Race*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last visited Oct. 3, 2023). However, in FY2022, 57.7% of career offenders were Black. *QuickFacts: Career Offenders*, U.S. SENTENCING COMM’N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY22

.pdf (last visited Oct. 3, 2023). The number of career offenders who are Black is accordingly disproportionate to the overall number of federal inmates, which suggests that Black people are significantly more likely to be affected by the Career Offender Guidelines than other criminal defendants. Additionally, although Black people do not use marijuana more than people of other races, Black people are approximately 3.7 times more likely to be arrested for marijuana possession than white people. *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, AMERICAN CIVIL LIBERTIES UNION, at 32 (2020), <https://tinyurl.com/ACLURaciallyTargetedArrests> (last visited Oct. 3, 2023).

Similarly, indigent people face a higher likelihood of being arrested and prosecuted for drug crimes. German Lopez, *These maps show the war on drugs is mostly fought in poor neighborhoods*, VOX (Apr. 16, 2015, 2:10PM), <https://tinyurl.com/VoxWarOnDrugsMaps>. Oftentimes, indigent defendants who are incapable of paying bail plead guilty to minor controlled substance offenses to evade incarceration while awaiting trial. Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time*, PRISON POLICY INITIATIVE (May 10, 2016), <https://tinyurl.com/PrisonPolicyIncome>. Focusing on the Third Circuit, even within areas that have diversion programs for marijuana use, indigent

individuals are still more likely to face underlying controlled substance convictions. For instance, in Philadelphia's Small Amounts of Marijuana Court, those who pay a fine and complete a course are eligible to have their marijuana charges dropped. *The War on Marijuana in Black and White*, ACLU (June 2013), at 105-107, <https://tinyurl.com/ACLUTheWarOnMarijuana>. However, less than half of the participants finish the program because most program participants are too poor to afford the program's fees. *Id.* at 106. If those same defendants are later convicted of a federal offense, their sentence is thus subject to enhancement if the earlier drug conviction comes within the terms of the Career Offender Guidelines.

Because the Third Circuit's approach includes more drugs within the reach of the Career Offender Guidelines, it will have a substantial adverse impact on many defendants, including a disparate and unfair impact on Black and indigent defendants. The Court should accordingly grant review to resolve these critically important issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

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