No. 24-6410

IN THE

Supreme Court of the United States

ANTOINE WIGGINS,

Petitioner,

v.

UNITED STATES,

Respondent.

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

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

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April 7, 2025

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

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[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 *amici curiae* made any monetary contribution to its preparation or submission. Pursuant to Rule 37.2, counsel for *amici* provided timely notice to all counsel of record of their intent to file this brief.

SUMMARY OF ARGUMENT

This Court should grant review to resolve the deep circuit split over whether the term "controlled substance" in U.S.S.G. § 2K2.1 refers to federally controlled substances or also includes substances controlled only by state law.

Although the Sentencing Commission has the authority to resolve the split by amending the Guidelines, it has consistently failed to do so and there is no indication that it will change course in the future. To the contrary, the Commission recently proposed amendments to the Guidelines explicitly retaining the language that has divided the circuits.

Review is also warranted to correct the decision of the Third Circuit in this case. The Third Circuit's holding—that the § 2K2.1 enhancement applies for controlled substances that are illegal only under state law—is at odds with the uniformity goal of the federal sentencing scheme. Federal statutes direct the Sentencing Commission to adopt Guidelines that minimize unwarranted sentencing disparities. By subjecting defendants to radically different federal sentences based on differences in state law, the Third Circuit's holding defeats that goal.

The Third Circuit's holding is also inconsistent with this Court's directive in *Jerome v. United States*, 318 U.S. 101, 104 (1943), that federal law generally should not depend on state law. Unless there is a clear indication to the contrary, federal laws are presumed to be written with a nationwide, rather than state-by-state, scope. The Third Circuit erred by disregarding this presumption.

The Third Circuit's holding also runs contrary to the rule of lenity. That rule directs courts to interpret ambiguous criminal provisions in a way that favors defendants. Accordingly, to the extent that there is uncertainty whether § 2K2.1 defines controlled substance by reference to both federal law and state law or instead to federal law only, the rule of lenity supports interpreting the Guideline to apply only to substances controlled by federal law.

The issue presented is critically important. Under the Guidelines, sentence enhancements based on prior convictions for "controlled substance" offenses are common. The circuit split on the meaning of that term results in similarly situated defendants receiving drastically different sentences depending on the circuit in which they are sentenced. In this case, for example, Petitioner received a sentence more than double what would have been the high end of the Guideline range had he been sentenced in a circuit on the other side of the split.

ARGUMENT

Antoine Wiggins was convicted of violating the federal felon-in-possession statute, which criminalizes possession of a firearm by a felon. 18 U.S.C. § 922(g)(1). At sentencing, his base offense level was increased under U.S.S.G. § 2K2.1(a)(2), which provides for a sentencing enhancement if the offender has "at least two felony convictions of . . . a controlled substance offense." U.S.S.G. § 2K2.1(a)(2) (Nov. 2024).

Application Note 1 to § 2K2.1 specifies that "'[c]ontrolled substance offense' has the meaning

given that term in § 4B1.2(b)." U.S.S.G. § 2K2.1 cmt. n.1. Section 4B1.2(b)(1), in turn, defines "controlled substance offense" as 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." U.S.S.G. § 4B1.2(b)(1).

I. Review is warranted to resolve the deep circuit split about whether the term "controlled substance" in the Guidelines refers only to federally controlled substances and to correct the Third Circuit's misinterpretation of that phrase.

This Court should grant review to resolve the disagreement among the circuits about whether a state-law conviction triggers § 2K2.1 if the state law extends to a substance that is not a "controlled substance" under federal law. The Sentencing Commission has failed to address the longstanding circuit split on this question. Indeed, just recently, the Commission issued proposed amendments to the Guidelines expressly retaining the language about which the circuits are split.

Given the Commission's inaction, it is imperative for the Court to resolve the split, which results in widely divergent sentences for similarly situated defendants. This case presents an ideal vehicle for the Court to do so. Granting review is particularly

important because the lower court's interpretation of § 2K2.1 is incorrect.

A. The courts of appeals are deeply divided over whether "controlled substance" refers only to federally controlled substances or also includes substances controlled only by state law.

The courts of appeals are deeply divided over whether a prior state-law conviction qualifies as a controlled substance offense when that conviction involves a substance not classified as a controlled substance under federal law.

The Second, Fifth, and Ninth Circuits hold that "controlled substance" means a substance controlled under federal law. *United States v. Townsend*, 897 F.3d 66, 71 (2d Cir. 2018) ("[A] 'controlled substance' under § 4B1.2(b) must refer exclusively to those drugs listed under federal law[.]"); *United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021) (similar); *United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015) (similar).[2] *See also United States v. Crocco*, 15 F.4th 20, 22–23 (1st Cir. 2021) (acknowledging split

[2] Although some of these cases involve application of § 4B1.2 or § 2L1.2, those cases establish the meaning of § 2K2.1 because § 2K2.1 incorporates § 4B1.2's definition of "controlled substance." *See* U.S.S.G. § 2K2.1 cmt. n.1. *See also* U.S.S.G § 2L1.2 cmt. n.2 ("Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell 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.").

but not deciding the 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").

Under the approach adopted by these circuits, the § 2K2.1 sentencing enhancement cannot be applied if the defendant has a state-law conviction involving a substance that is not a "controlled substance" under federal law. In deciding whether the state-law conviction qualifies as a predicate offense under § 2K2.1, these circuits apply the well-established categorical or modified categorial approach by asking whether "the state conviction aligns with, or is a 'categorical match' with, federal law's definition of controlled substance." *Townsend*, 897 F.3d at 72–73; *Bautista*, 989 F.3d at 704 (similar); *Gomez-Alvarez*, 781 F.3d at 792 (similar); *Crocco*, 15 F.4th at 21–22 (similar).

In contrast, the Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits interpret "controlled substance" under § 2K2.1 to include substances regulated only by state law.[3] *United States v. Jones*, 15 F.4th 1288, 1292 (10th Cir. 2021) ("So § 4B1.2(b)'s controlled-substance-offense definition necessarily applies to and includes state-law controlled-substance offenses."); *United States v. Lewis*, 58 F.4th 764, 768–69 (3d Cir. 2023) (similar); *United States v. Ward*, 972

[3] *See also United States v. Dubois*, 94 F.4th 1284, 1296 (11th Cir. 2024) (interpreting "controlled substance" under § 2K2.1 to include substances regulated by state law, "even if federal law does not regulate that drug"), *vacated and remanded on other grounds by Dubois v. United States*, No. 24-5744, 2025 WL 76413 (Jan. 13, 2025) (mem.)

F.3d 364, 372–74 (4th Cir. 2020) (similar); *United States v. Ruth*, 966 F.3d 642, 651–54 (7th Cir. 2020) (similar). *See also United States v. Jones*, 81 F.4th 591, 597–98 (6th Cir. 2023); *United States v. Henderson*, 11 F.4th 713, 718–19 (8th Cir. 2021). Under this approach, the sentencing enhancement applies to state-law convictions involving substances not controlled under federal law.

B. The Sentencing Commission's proposed amendments to the Guidelines show that it is necessary for this Court to resolve the conflict among the circuits.

The disagreement among the circuits about the meaning of "controlled substance" has persisted for many years, with the resulting "direct and severe consequences for defendants' sentences" prompting Justices Sotomayor and Barrett in 2022 to call upon the Commission to address the issue. *Guerrant v. United States*, 142 S. Ct. 640, 641 (2022). Yet, despite having had a quorum since August 5, 2022, the Commission has not acted and similarly situated defendants continue to receive radically different sentences under § 2K2.1 and other Guidelines with the same language, depending on the circuit in which they are sentenced.

In January 2025, the Commission proposed amending the definition of "controlled substance" in § 4B1.2 to address "recurrent criticism of the categorical approach and modified categorical approach." Sentencing Guidelines for United States Courts, 90 Fed. Reg. 128-01, 129 (Jan. 2, 2025). The proposed amendments likely would resolve the issue as to § 4B1.2 by deleting "or state law" from the

definition of "controlled substance offense" and instead defining that term by identifying a list of specific federal statutes regarding controlled substances. *Id.* at 130.

But the proposed amendments would not resolve the issue for § 2K2.1. To the contrary, the proposed amendments reflect a conscious decision to retain the language as to which the circuits are so deeply split. Specifically, the proposed amendments eliminate the application note to § 2K2.1 incorporating by reference § 4B1.2's definition of "controlled substance offense." The amendments then insert into the application note the same language including the "or state law" formulation now in § 4B1.2's definition of "controlled substance offense." *Id.* at 134–35. Similar changes to retain the "or state law" formulation are proposed for other Guidelines. *See, e.g.*, *id.* at 133 (§ 2K1.3); *id.* at 136 (§ 4B1.4); *id.* at 136–37 (§ 5K2.17). *See also id.* at 130 ("The proposed amendment would maintain the status quo by amending the Commentary to [guidelines that incorporate by reference the definition of § 4B1.2] by amending the Commentary to these guidelines to incorporate the relevant part or parts of § 4B1.2.").

By taking this approach, the proposed amendments retain in § 2K2.1 and other Guidelines the exact language giving rise to the circuit split. The Government emphasized this point in its public comments on the proposed amendments: "Under this proposal, a defendant's state drug trafficking offense would qualify as a controlled substance offense under multiple Guideline provisions (such as § 2K1.3 and § 4B1.4) but would not be a controlled substance

offense for career offender purposes simply because the defendant was previously prosecuted in state court." DOJ Public Comment at 14, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf. Thus, according to the Government, rather than resolving the split, the Commission's proposals "would add unnecessary confusion and inconsistency to the Guidelines." *Id.* Similar concerns were expressed by speakers at the February 12 public hearing. *See* United States Sent'g Comm'n, Public Hearing, 56–58 (Feb. 12, 2025) ("We think it can all be a unified definition. I think that would be less confusing.").

This Court'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); *see Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("[I]t cannot be doubted that there is an important need for uniformity in federal law . . . ."). That standard is met here. The circuit split results in significantly different sentences for untold numbers of similarly situated defendants. This Court's intervention is the only remaining option in light of the Commission's refusal to resolve the disagreement.

To be sure, in *Braxton v. United States*, 500 U.S. 344 (1991), this Court declined to resolve disagreements about the meaning of certain Guidelines where "the Commission has already undertaken a proceeding that will eliminate circuit

conflict." *Id.* at 348–49. But this case presents the opposite situation from that in *Braxton*. The Commission's proposed amendments expressly do not resolve the split but instead cement into the Guidelines the language about which the circuits are split. The proposed amendments accordingly do not provide a basis for declining review.

At the least, the Court should hold the petition until the Commission publishes its finalized amendments, which is expected to happen when the current cycle for amending the guidelines ends on May 1. 28 U.S.C. § 994(p).[4] At that point, the Court will know whether the Commission will adhere to the proposed amendments and, if not, whether any change will be retroactive.

C. The Third Circuit erred by permitting a federal sentence to be enhanced based on a state conviction involving a substance that is not a "controlled substance" under federal law.

Review is also warranted because the Third Circuit's interpretation of § 2K2.1 is erroneous.

1. As an initial matter, interpreting "controlled substance" to include substances outlawed by state law but not federal law conflicts with the goal of uniformity in federal sentencing. The core purpose of the Sentencing Commission is to "provide certainty

[4] On April 3, the Government filed a motion to extend its deadline to respond to the Petition to May 7. If the extension is granted, the finalized amendments likely will be published before the Government's response is due.

and fairness in . . . sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B); *accord* 18 U.S.C. § 3553(a)(6) (requiring courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records" in sentencing).

Under the Third Circuit's approach, a person convicted in state court of an offense involving conduct that is not unlawful under either federal law or the law of many, or even most, states would face a much longer federal sentence than an otherwise similarly situated person convicted of the same federal offense. That approach directly undermines Congress's directive to avoid "unwarranted sentencing disparities." 28 U.S.C. § 994(f); *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).

2. The Third Circuit's decision also violates the *Jerome* presumption, under which this Court directed 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 v. United States*, 318 U.S. 101, 104 (1943). 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.*

Lower courts have rightly extended the *Jerome* presumption to the Sentencing Guidelines because the Guidelines are nationwide regulations. For

example, in *Townsend*, the Second Circuit relied on *Jerome* to support its reading of "controlled substance" in § 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 undermine the goal of national uniformity and conflict with the categorical approach. *Id.* at 71; *see also, e.g.*, *Bautista*, 989 F.3d at 702 ("[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—furthers 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))); *Gomez-Alvarez*, 781 F.3d at 792–94 (similar); *Crocco*, 15 F.4th at 22–23 (noting that the state-law approach is "fraught with peril").

3. The rule of lenity also counsels in favor of reading "controlled substance offense" to include only convictions based on conduct involving substances classified as "controlled substances" under federal law. Under that rule, where "a reasonable doubt persists" as to the meaning of a penal provision, a court should adopt the meaning more favorable to the defendant. *See Moskal v. United States*, 498 U.S. 103, 108 (1990); *Harrison v. Vose*, 50 U.S. 372, 378 (1850) ("[I]t is well settled, also, that all reasonable doubts concerning [the criminal statute at issue's] meaning ought to operate in favor of the [defendant].").

The rule of lenity is especially important in the "universe of hard" cases "where a long list of non-exhaustive, only sometimes relevant, and often

incommensurable factors" does not provide a "clear answer." *Wooden v. United States*, 595 U.S. 360, 386 (2022) (Gorsuch, J., concurring). This is just such a case. The Guideline at issue is, at best, ambiguous.[5] Accordingly, the rule of lenity should have been applied in favor of the federal-only interpretation.

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For these reasons, the Third Circuit erred in holding that a federal criminal sentence may be enhanced based on a prior state-law conviction for an offense covering conduct involving a substance that is not a "controlled substance" under federal law. This Court should grant review to correct this error.

II. The issue presented is exceptionally important.

Review is particularly warranted because the issue presented is critically important. The disagreement over the meaning of "controlled substance offense" results in similarly situated defendants receiving

[5] There is a circuit split on how to apply the rule of lenity in Guidelines cases. *Compare, e.g.*, *United States v. Vaquerano,* 81 F.4th 86, 93 n.2 (1st Cir. 2023) (applying lenity principle when "substantial ambiguity" remains), *with, e.g.*, *United States v. Tony*, 121 F.4th 56, 69–70 (10th Cir. 2024) (applying lenity when a "grievous" ambiguity remains); *United States v. Scott*, 990 F.3d 94, 122 n.35 (2d Cir. 2021) (en banc) (same); *Jones*, 81 F.4th at 600 n.6 (same); *United States v. Cervantes*, 109 F.4th 944, 947 (7th Cir. 2024) (same). One circuit has even suggested that the rule of lenity may not apply in the Guidelines context at all. *See United States v. Vargas*, 74 F.4th 673, 697–98 (5th Cir. 2023) (en banc) (evenly divided on applicability).

vastly different sentences, depending on the circuit in which they are sentenced.

Tens of thousands of offenders are sentenced under § 2K2.1 each year. *See Quick Facts, Felon in Possession of a Firearm*, United States Sentencing Commission, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY23.pdf (last visited Apr. 1, 2025) (recounting that in FY 2023, § 2K2.1 was applied in 82.1% of over 64,000 cases). By expanding the category of state-law convictions triggering an enhancement of a federal sentence, the Third Circuit's approach results in more people being subject to the sentencing enhancement.

The sentencing disparity resulting from the disagreement about the scope of § 2K2.1 is stark. Without the sentencing enhancement, Petitioner's base offense level would have been a 14 instead of a 24. Pet. App 4. Using the higher base offense level, and applying the other relevant enhancements and deductions, the district court calculated a Guideline range of 100 to 120 months—the statutory maximum. Pet. App 3. Petitioner was sentenced to 96 months. *Id.* Had the district court used the lower base offense level, the Guidelines range would have been 37 to 46 months, less than half of Petitioner's actual sentence even at the high end of the range. Pet. App. 3 n.1. Sentencing disparities of this sort run directly against the uniformity values of the Guidelines and lead to disparate results that are inherently unfair, because they are determined not on the merits but rather by the circuit in which the defendant is sentenced.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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