No. __-_____

IN THE

Supreme Court of the United States

TIMOTHY A. WARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

GEREMY C. KAMENS
Federal Public Defender

Caroline S. Platt
Appellate Attorney
Counsel of Record
Valencia D. Roberts
Assistant Federal Public Defender
Office of the Federal Public Defender
for the Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
caroline_platt@fd.org

February 26, 2021

QUESTION PRESENTED

Under the provisions of the career offender enhancement in the United States Sentencing Guidelines, guideline ranges are dramatically increased for people, among others, who have previous convictions for "controlled substance offenses." That term is defined in the guidelines, but the term "controlled substance" is undefined.

The question presented is whether the term "controlled substance" should be defined by federal law, the federal Controlled Substances Act, or whether it is defined by the law of every state in which any prior conviction arose?

Put alternatively, when the federal sentencing guidelines say "controlled substance," the question is "substances controlled by which government, federal or state?" And thus, whether prior convictions from states that have overbroad drug schedules can be predicate "controlled substance offenses" in the federal sentencing guidelines, under the categorical approach.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Ward*, No. 3:18-cr-44, U.S. District Court for the Eastern District of Virginia. Judgment entered Sept. 18, 2018.

(2) *United States v. Ward*, No. 18-4720, U.S. Court of Appeals for the Fourth Circuit. Judgment entered August 20, 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

U.S. Sentencing Guidelines

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Timothy Ward respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at 972 F.3d 364 (4th Cir. 2020) and appears in Appendix A to this petition. Pet. App. 1a-16a.[1] The opinion of the district court appears in Appendix B to the petition, Pet. App. 17a-21a, and is unpublished. *See United States v. Ward*, 2018 WL 9848286 (Dec. 6, 2018).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court issued its opinion and judgment on August 20, 2020. A timely petition for rehearing en banc was denied by the court of appeals on September 29, 2020, and a copy of

---

[1] "Pet. App." refers to the appendix attached to this petition. "C.A.J.A." refers to the joint appendix filed in the court of appeals.

the order denying rehearing appears in Appendix C to the petition. Pet. App. 22a. This Court's order of March 19, 2020, extended the deadline for filing a petition for certiorari to 150 days after the date of the lower court's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(a)(6) provides in relevant part:

> The court, in determining the particular sentence to be imposed, shall consider . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . . .

United States Sentencing Guidelines § 4B1.1(a), provides in relevant part:

> 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.

United States Sentencing Guidelines § 4B1.2(b), provides in relevant part:

> The term "controlled substance offense" means 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 . . . .

The term "controlled substance" is not defined in the U.S. Sentencing Guidelines.

INTRODUCTION

Petitioner Timothy Ward was sentenced in federal court to serve 120 months in prison for selling less than a single gram of cocaine due to the Fourth Circuit's faulty interpretation of the career offender enhancement in the federal sentencing guidelines. In this case, the Fourth Circuit joined the short side of an existing Circuit split about the meaning of the undefined term "controlled substance" in the guidelines. This Circuit split is ripe for this Court's adjudication.

This proceeding involves a federal question of exceptional importance, especially to the petitioners sentenced to lengthy prison terms in federal court as a result of the career offender enhancement. The Fourth Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]" S. Ct. R. 10. Disparate sentences are being imposed in different circuits, contrary to the command in 18 U.S.C. § 3553(a)(6) ("the need to avoid

unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

The question is whether Mr. Ward's two prior convictions under Virginia Code § 18.2-248 are "controlled substance offenses" within the meaning of U.S.S.G. § 4B1.2(b). The question is complicated by the undisputed fact that the Virginia drug schedules prohibit a large number of substances that the federal schedules do not, and thus are overbroad. *See* infra. n.2.

The Fourth Circuit first erred by applying the categorical approach, rather than the modified categorical approach. This was error, because the Virginia statute previously was held to be divisible. *See Cucalon v. Barr*, 958 F.3d 245, 253 (4th Cir. 2020) ("we conclude that the identity of the prohibited substance is an element of Virginia Code § 18.2-248 and that the statute is divisible on that basis"). Because the statute was held to be divisible, the modified categorical approach applies. The Fourth Circuit, however, failed to follow this Court's clear instructions in *Descamps v. United States*, 570 U.S. 254, 257 (2013), and *Mathis v. United States*, 136 S. Ct. 2243, 2253-54 (2016), and several of its own prior decisions. Instead, the Fourth Circuit applied the categorical

approach to a case involving a divisible statute, treating the categorical approach and the modified categorical approach as "alternatives." *See* Appendix A, Pet. App. 3a n.3.

Using its chosen and erroneous categorical approach methodology, the Fourth Circuit then made its second legal error, thereby deepening a circuit split. The career offender guideline defines "controlled substance offense," but fails to define "controlled substance." The question is, a substance "controlled" under which law? The federal Controlled Substances Act, or the law of any state? Mr. Ward relied on the published decision of the Second Circuit, as well as several other circuits, who have all have held that "controlled substance" in the federal sentencing guidelines must mean a substance "controlled" under federal law.

The Fourth Circuit, though, held that Mr. Ward's prior offense qualified as a career offender predicate "controlled substance offense," without addressing in any depth his argument about the lack of a definition of "controlled substance," and without addressing Second Circuit decision on which Mr. Ward principally relied. The Fourth Circuit panel majority acknowledged the contrary Second Circuit decision in only

a footnote. *See* Appendix A, Pet. App. 8a n.12. At least four other circuits agree with the Second Circuit, and it has the better position.

The Fourth Circuit thus erred in its application of the categorical approach, and then deepened an entrenched circuit split on the meaning of the undefined phrase "controlled substance" in the career offender guideline, one of the harshest recidivist enhancements in federal sentencing law. This important circuit split merits the review of the Supreme Court.

STATEMENT OF THE CASE

A federal grand jury charged Timothy Ward with distribution of cocaine, in violation of 21 U.S.C. § 841. C.A.J.A. 8. After Mr. Ward's guilty plea, a probation officer designated him a career offender under U.S.S.G. § 4B1.1(a) for having "at least two prior felony convictions for a controlled substance offense[.]" C.A.J.A. 159. His sentencing guideline range without the career offender designation would have been 24 to 30 months rather than 151 to 181 months. C.A.J.A. 72.

The probation officer and the parties agreed that one prior conviction counted as a "controlled substance offense" as defined in § 4B1.2. C.A.J.A. 169-70. The parties did not agree about two Virginia

state court convictions from 2010 for possession with intent to distribute a controlled substance, in violation of Virginia Code § 18.2-248. C.A.J.A. 171-73.

Mr. Ward objected to the application of the career offender guideline. C.A.J.A. 18-23. The district court overruled the objection, both orally and in a written opinion, *see* Appendix B, Pet. App. 17a-21a, and sentenced Mr. Ward to a downward variance sentence of 120 months in prison. C.A.J.A. 128, 133-38. Mr. Ward appealed.

A divided panel of the Fourth Circuit disagreed on the guideline interpretation issue, deepening a circuit split, with the panel majority holding that the undefined term "controlled substance" in the federal sentencing guidelines need not be defined by reference to the federal Controlled Substances Act, and that a state conviction qualifies, regardless of how broadly any state drug statute reaches. *See* Appendix A, Pet. App. 3a-6a.

Chief Judge Gregory wrote a lengthy concurrence in the judgment, concluding that the majority had erred in its categorical approach analysis as well as on the merits of Mr. Ward's guidelines argument. *See* Appendix A, Pet. App. 8a-16a.

The Fourth Circuit denied Mr. Ward's petition for en banc rehearing on September 29, 2020. *See* Appendix C, Pet App. 22a.

REASONS FOR GRANTING THE PETITION

The Court should issue a writ of certiorari for several reasons. First, the Fourth Circuit deepened an entrenched and acknowledged circuit split about the meaning of the undefined term "controlled substance" within the federal sentencing guidelines. At least nine of the federal courts of appeals have opined on the question. Second, the Fourth Circuit's decision is wrong on the merits. The Second Circuit has the better approach. Third, this issue is important. The Sentencing Commission is unlikely to resolve the issue any time soon, given that it has not done so, and also given that the Commission currently lacks a quorum. The issue is also important because it involves uniformity in sentencing, and involves a severe recidivist sentencing enhancement that should be applied in accordance with law. The Supreme Court should resolve this issue because persons sentenced in the Fourth and Seventh Circuits should not be subjected to a harsh recidivist enhancement like the career offender enhancement, as Mr. Ward was, when the Second Circuit (and four other circuits) have the better position on the guideline

interpretation issue, as Chief Judge Gregory noted in his separate opinion in this case. *See* Appendix A, Pet. App. 11a-16a. This Court's intervention is required to restore uniformity in federal sentencing, in accordance with § 3553(a)(6). And finally, this case provides a good vehicle in which the Court can address the issue.

I. THERE IS AN ACKNOWLEDGED CIRCUIT SPLIT ABOUT THE MEANING OF THE TERM "CONTROLLED SUBSTANCE" IN THE FEDERAL SENTENCING GUIDELINES.

The federal courts of appeals cannot agree on the definition of the phrase "controlled substance" that appears in several places in the U.S. Sentencing Guidelines, including the career offender enhancement. The career offender enhancement is a three-strikes provision that applies to persons with previous "controlled substance offenses." U.S.S.G. § 4B1.1(a). That term is defined in the guidelines, *see* U.S.S.G. § 4B1.2(b), but the phrase "controlled substance" is not.

Petitioner Timothy Ward's sentencing guideline range increased more than six-fold, from a range of 24 to 30 months to a range of 151 to 188 months, on the premise that his two prior convictions under Virginia Code § 18.2-248 were U.S.S.G. § 4B1.2(b) "controlled substance offenses."

At least nine of the twelve circuit courts of appeals have opined on the meaning of the phrase "controlled substance" in the sentencing guidelines. There are, at this point, at least working three definitions of "controlled substance" in use among the lower courts. This Court's intervention is necessary to restore uniformity in federal sentencing.

On one side of the circuit split, five courts of appeals – the Second, Fifth, Eighth, Ninth, and Tenth Circuits – have held that the phrase "controlled substance" in the sentencing guidelines must be defined by reference to the federal Controlled Substances Act ("CSA"). *See* infra. In those circuits, Mr. Ward's guideline range in this case, for selling less than one gram of cocaine, should have been 24 to 30 months in prison, because Virginia defines "controlled substance" far more broadly than the federal Controlled Substances Act. The Virginia drug schedules prohibit dozens of substances that the federal government does not.[2]

---

[2] "[W]e agree with the parties that Virginia Code § 18.2-248 is categorically overbroad, because Virginia includes on its controlled substance schedules at least one substance not listed on the federal schedules." *Cucalon v. Barr*, 958 F.3d 245, 251 (4th Cir. 2020); *see also Bah v. Barr*, 950 F.3d 203, 213 (4th Cir. 2020) (Thacker, J., dissenting) ("Petitioner provided an expert's affidavit concluding that Virginia's drug schedules contain at least 52 substances not found on federal schedules, including 42 substances on Virginia's Schedule I alone.").

Three circuits, including the Fourth Circuit in this case, have held that "controlled substance" can be defined by reference to any state law of a prior conviction, including in states where the drugs schedules are broader than the federal drug schedules, as in this case.

There is a sharp division among the courts of appeals about the meaning of "controlled substance" in the sentencing guidelines. This Court should grant certiorari.

A. A Plurality of the Courts of Appeals, Represented by the Second Circuit, Define "Controlled Substance" by Looking to the Federal Controlled Substances Act.

As noted above, the Second, Fifth, Eighth, Ninth, and Tenth Circuits hold that the meaning of the term "controlled substance" in the federal sentencing guidelines should be determined by looking to federal law, the federal Controlled Substances Act.

The most thorough explanation of this side of the split comes from the Second Circuit's decision in *United States v. Townsend*, 897 F.3d 66 (2nd Cir. 2018). In *Townsend*, the defendant objected that he should not receive a "controlled substance offense" enhancement. Townsend argued that, because the statute of prior conviction in his New York state drug case included substances not found in the federal CSA, it swept more

broadly than "controlled substance[s]," as referenced in U.S.S.G. § 4B1.2(b). *Townsend*, 897 F.3d at 68-69. Like Mr. Ward, Townsend argued that the federal court should limit the definition of "controlled substance" to substances in the federal CSA.

The Second Circuit agreed. It began its analysis with the *Jerome* presumption. *See Jerome v. United States*, 318 U.S. 101, 104 (1943). The Second Circuit understood *Jerome* to mean that "in the absence of a plain indication to the contrary . . . the application of the federal [law is not] dependent on state law." *Townsend*, 897 F.3d at 71. The reason for the presumption is that federal law must apply equally across the country, even when cases arise in different states. According to the Second Circuit, the guidelines' non-definition of a "controlled substance" was not enough to indicate that the federal sentencing guidelines should depend on the vagaries of state law.

The Second Circuit expressly limited the definition of "controlled substance" to those substances in the CSA, stating: "a 'controlled substance' under § 4B1.2(b) must refer exclusively to those drugs listed under federal law—that is, the CSA." *Id.* (footnote omitted).

> Any other outcome would allow the Guidelines enhancement to turn on whatever substance 'is

> illegal under the particular law of the State where the defendant was convicted,' a clear departure from *Jerome* and its progeny.

Townsend, 897 F.3d at 71.

The Fifth, Eighth, Ninth and Tenth Circuits have all held similarly. *See United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015) ("For a prior conviction to qualify as a 'drug trafficking offense,' the government must establish that the substance underlying that conviction is covered by the CSA."); *United States v. Sanchez-Garcia*, 642 F.3d 658, 661 (8th Cir. 2011) (using the CSA to determine whether a prior conviction is a § 2L1.2 "drug trafficking offense"); *United States v. Bautista*, 982 F.3d 563, 568 (9th Cir. 2020), as amended, 19-10448 (9th Cir. Feb. 26, 2021) (a "controlled substance offense" as defined in § 4B1.2, used to enhance offense level in § 2K2.1, must be defined by comparing state law to federal Controlled Substances Act, holding that "[a] state drug statute is therefore categorically overbroad if it includes substances other than those listed in the federal CSA"); *United States v. Leal-Vega*, 680 F.3d 1160, 1166-67 (9th Cir. 2012) ("we hold that the term 'controlled substance,' as used in the 'drug trafficking offense' definition in U.S.S.G. § 2L1.2, means those substances listed in the CSA"); *cf. United States v.*

Abdeljawad, 794 F. App'x 745, 748 (10th Cir. 2019) ("The legal definition of 'controlled substance' comes from the Controlled Substances Act.") (citing *Leal-Vega*, supra).[3]

As a result, for federal criminal defendants in those circuits, if the elements of a state drug conviction prohibit substances that are not prohibited under the federal CSA, that conviction is not a "controlled substance offense" under U.S.S.G. § 4B1.2(b) or the similarly worded U.S.S.G. § 2L1.2, because the state drug statute is overbroad.

If Mr. Ward, with his actual record, had committed the instant offense in the Second Circuit, or the Fifth, Eighth, Ninth, or Tenth

---

[3] Some of these cases involve U.S.S.G. § 2L1.2 as well as U.S.S.G. § 4B1.2. The definition of "drug trafficking offense" in the former and "controlled substance offense" in the latter are very close to one another, and neither defines the term "controlled substance." *Compare* 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.") *with* § 4B1.2(b) ("The term 'controlled substance offense' means 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.")

The precise issue from this case, in the context of the career offender guideline specifically, is pending in the Tenth Circuit in *United States v. Jones*, Tenth Circuit Case No. 20-6122.

Circuits, he would have faced a guideline range of 24 to 30 months, instead of 151 to 188 months. This demonstrates the importance of the question presented.

B. The Fourth, Sixth, and Eleventh Circuits Define "Controlled Substance" By Looking at Any State Law.

In this case, the Fourth Circuit presented the most thorough published rejection of the *Townsend* approach. For the Fourth Circuit, the analysis is not whether the state conviction categorically involves a substance prohibited by the federal CSA. Instead, its analysis is simpler: Was the substance at issue illegal in the state of the prior conviction? Answer (always): Yes.

For the Fourth Circuit, if a state criminalizes a substance, it is necessarily included in the § 4B1.2(b) definition of "controlled substance offense," for two reasons: first, because the Fourth Circuit reads the guidelines to expressly include all substances that a state calls a "controlled substance" due to its definition of "controlled substance offense." Appendix A, Pet. App. 7a (quoting U.S.S.G. § 4B1.2(b)'s definition of "controlled substance offense" as "[a]n offense under federal or state law . . . ."). The Fourth Circuit noted that "[t]he state has not

restricted itself to regulating only those substances listed on the federal drug schedules." Appendix A, Pet. App. 5a. Second, the panel majority relied on "plain language," *see* infra section C. *See* Appendix A, Pet. App. 5a.

As Chief Judge Gregory noted in his separate opinion below, this approach "turns the point of the categorical approach on its head," and in so doing eliminates it. Appendix A, Pet. App. 15a (Gregory, C.J., concurring in the judgment) (citing *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017)). That is, if courts compare a federal enhancement for a state prior conviction to that same state's statute of conviction, there will necessarily be a match. Using this approach, the federal enhancement expands and contracts, depending on which state's law is being considered. "Whereas the categorical approach was intended to prevent inconsistencies based on state definitions of crimes, the majority's approach creates them." *Id.*

The Sixth and Eleventh Circuits sometimes follow this approach, though each Circuit suffers from an intra-circuit split, with unpublished decisions going both ways. *See United States v. Smith*, 681 F. App'x 483, 489 (6th Cir. 2017) (using state law definitions); *United States v. Peraza*,

754 F. App'x 908, 910 (11th Cir. 2018) (using state law definitions); *United States v. Howard*, 767 F. App'x 779, 784-85 & n.5 (11th Cir. 2019) (using state law definitions). *But see United States v. Solomon*, 763 F. App'x 442, 447 (6th Cir. 2019) (defining "controlled substance" in § 4B1.2(b) according to the federal Controlled Substances Act); *United States v. Pittman*, 736 F. App'x 551, 553 (6th Cir. 2018) (defining "controlled substance" in U.S.S.G. § 4B1.2(b) by reference to the Controlled Substances Act, 21 U.S.C. § 802(6)); *United States v. Stevens*, 654 F. App'x 984, 987 (11th Cir. 2016) (defining "controlled substance" in U.S.S.G. § 4B1.2(b) by reference to the Controlled Substances Act, 21 U.S.C. § 802(6)).

C. The Seventh Circuit Defines "Controlled Substance" By Its "Natural Meaning" and By Reference to a Dictionary.

Finally, the Seventh Circuit recently held that "controlled substance" in § 4B1.2 should be defined by its "natural meaning." *See United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020) (using "natural meaning" of phrase "controlled substance," as defined by 1987 edition of Random House dictionary, rather than either state or federal drug statutes). The Seventh Circuit thus offered a third definitional

methodology. Rather than joining the minority of circuits who define "controlled substance" by reference to any state law, or the plurality of circuits who use the uniform definition in the federal Controlled Substances Act, the Seventh Circuit offered a third way, holding that "controlled substance" in U.S.S.G. § 4B1.2(b) is defined by its "natural meaning." *Ruth*, 966 F.3d at 654.

The Fourth Circuit below also held, alternatively, that the "plain meaning" of "controlled substance" in U.S.S.G. § 4B1.2(b) includes substances beyond the CSA. Appendix A, Pet. App. 5a. For the Fourth Circuit, the *Jerome* presumption upon which *Townsend* relies is overcome by the plain meaning of "controlled substance." Appendix A, Pet. App. 5a. But this reasoning is circular.

The term "controlled substance" has no plain meaning in the absence of the answer to the question asked here: a substance "controlled" by which government, federal or state? The very nature of "controlled substance" renders it outside the scope of "plain and ordinary meaning." As observed by the Ninth Circuit:

> While the word "controlled" may have a plain and ordinary meaning, whether a substance is "controlled" must, of necessity, be tethered to some state, federal, or local law in a way that is not true

> of the definition of "counterfeit." To construe the term "controlled" as the Government urges would require the Sentencing Guidelines to take into account the substances that individual states "control." This would be contrary to the goal of the Sentencing Guidelines to seek "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." U.S.S.G. Ch. One, Pt. A.

Leal-Vega, 680 F.3d at 1167; *see also* Appendix A, Pet. App. 11a-12a (Gregory, C.J., concurring in the judgment) (identifying analytical difference between "counterfeit substance" and "controlled substance", observing that "[o]ne cannot appeal to any plain meaning of the term 'controlled' to resolve this question. Unlike 'counterfeit,' which any ordinary person would understand to mean 'fake,' the word 'controlled' does not stand on its own.").

"Controlled substance" has no plain meaning without an answer to the question presented in this case; "controlled" by the federal government as in the Controlled Substances Act, or controlled by the state of every prior conviction?

This issue is entrenched, and the circuits are deeply split both between themselves, and in some cases, within themselves.

II. THE FOURTH CIRCUIT'S DECISION BELOW IS WRONG ON THE MERITS, AND THE SECOND CIRCUIT HAS THE BETTER APPROACH.

The Fourth Circuit's decision is wrong on the merits. This Court should adopt the reasoning and holding of the Second Circuit, that "'controlled substance' refers exclusively to substances controlled by the [federal Controlled Substances Act.]" *United States v. Townsend*, 897 F.3d 66, 68 (2d Cir. 2018). The Fourth Circuit below not only deepened an entrenched circuit split over the meaning of the undefined phrase "controlled substance" in the guidelines; it also picked the wrong side. Does that term of art refer to substances regulated under the federal Controlled Substances Act, or is the draconian career offender sentencing enhancement also triggered by convictions in states that outlaw substances the federal government has declined to prohibit?

The Fourth Circuit's deference to all state definitions of "controlled substances" in interpreting the federal sentencing guidelines term is inconsistent with this Court's decision in *Taylor v. United States*, 495 U.S. 575 (1990). In *Taylor*, the Court expressly rejected a construction that would make a sentencing enhancement "depend on the definition adopted by the State of conviction." 495 U.S. at 591. The Court cited cases

going back decades, that establish a presumption that federal criminal statutes be construed uniformly nationwide, and not defer to state definitions. *See id.* (citing *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119-20 (1983); *United States v. Turley*, 352 U.S. 407, 411 (1957) ("[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law")).

The Fourth Circuit's conclusion that U.S.S.G. § 4B1.2 permits prior convictions to trigger the career offender enhancement even when states law prohibits substances not controlled federally misses the mark. The opposite is true: there is a presumption that the phrase "controlled substance" has a nationwide unitary definition, one not dependent on state law. That uniform definition, as five circuit courts of appeals have concluded, is the federal Controlled Substances Act.

To enhance a sentence, "the Guidelines language must make clear – to the court, to the defendant, and to the government – the basis for a sentencing enhancement." *Townsend*, 897 F.3d at 68. Accordingly, "courts begin with the language of the Guidelines." *Id.* at 69. The Sentencing Guidelines define the term "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). Crucially, the Guidelines do not define the phrase "controlled substance."

As the Second Circuit pointed out, it is not the phrase "controlled substance offense" alone that matters; it is "controlled substance" as well.

The *Townsend* court explained:

> But the government has it backwards: Because of the presumption that federal – not state – standards apply to the Guidelines, discussed in more detail below, if the Sentencing Commission wanted "controlled substance" to include substances controlled under only state law to qualify, then it should have said so.
>
> And the Guidelines language is not as clear as the government and the court below made it out to be. *Although a "controlled substance offense" includes an offense "under federal or state law," that does not also mean that the substance at issue may be controlled under federal or state law. To include substances controlled under only state law, the definition should read ". . . a controlled substance under federal or state law." But it does not.*

> It may be tempting to transitively apply the "or state law" modifier from the term "controlled substance offense" to the term "controlled substance." *But to do so would undermine the presumption that federal standards define federal sentencing provisions.* Because the Guidelines presume the application of federal standards unless they explicitly provide otherwise, the ambiguity in defining "controlled substance" must be resolved according to federal – not state – standards.

Townsend, 897 F.3d at 70-71 (emphases added).

This is because as a general matter, "the application of a federal law does not depend on state law unless Congress plainly indicates otherwise." *Id.* at 71 (citing *Jerome*, 318 U.S. at 104); *see* Appendix A, Pet. App. 8a-16a (Gregory, C.J., concurring in judgment).

The Fourth Circuit's alternative approach – and that of the Seventh Circuit, looking to the "natural meaning" of the language – was rejected by this Court in *Taylor*, and violates well-established principles of statutory construction. In *Taylor*, the Court expressly rejected a construction that would make a sentencing enhancement "depend on the definition adopted by the State of conviction." 495 U.S. at 591. "That would mean that a person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly

the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary.'" *Id.*

The text of the guideline at issue here does not lead to the result that all substances controlled by every state must be considered "controlled substances." *Townsend*, 897 F.3d at 70-71. And uniformity in sentencing and the *Jerome* presumption require that the undefined term "controlled substance" be interpreted by reference to the federal Controlled Substances Act. The Second Circuit's approach is consistent with *Taylor*, the categorical approach, 18 U.S.C. § 3553(a)(6), and the goals of federal sentencing. The decision below is not.

As Chief Judge Gregory wrote below: "Something went wrong here. Rather than follow the rationale of the Supreme Court, the majority adopts the very approach *Taylor* addressed and rejected." Appendix A, Pet. App. 15a (Gregory, C.J., concurring in the judgment). The decision below was incorrect.

III. THIS QUESTION IS IMPORTANT, THE SENTENCING COMMISSION WILL NOT SETTLE THIS CIRCUIT SPLIT, AND THE CIRCUITS ARE DRIFTING APART.

The question presented here arises frequently in sentencing calculations, and neither courts, nor the Sentencing Commission, have

fixed this problem for nearly a decade. For instance, according to *Ruth*, the Seventh Circuit first stated its approach while defining "counterfeit" according to its "natural meaning," in a case in 2010. *Ruth*, 966 F.3d at 652 (citing *United States v. Hudson*, 618 F.3d 700 (7th Cir. 2010)). The Ninth Circuit refused to follow *Hudson* in 2012, in *Leal-Vega*, which required a match between the predicate conviction and the federal CSA. 680 F.3d at 1166-67. The Sixth Circuit rejected *Leal-Vega* and the Second Circuit's decision in *Townsend*, in *United States v. Sheffey*. 818 F. App'x 513, 520 (6th Cir. 2020). Then the Seventh Circuit stepped away from *Sheffey* in *Ruth*, supra, to recommit itself to *Hudson*. In *Ward*, the Fourth Circuit declined to fully adopt *Ruth*, when it defined "controlled substance" according to the state statute, but added an alternative holding about "plain meaning," closer to the *Ruth* court's rationale. Pet. App. 5a. Finally, the Ninth Circuit recommitted itself to *Leal-Vega*, and thus the *Townsend* side of the split, in *Bautista*, after *Ward* and *Ruth* were decided. 982 F.3d at 568.

Importantly, the lower courts are not trying to reconcile the competing theories, as much as they are picking sides. The three courts of appeals in *Ruth*, *Ward* and *Sheffey* all recognize that their decisions

are incompatible with *Townsend*. *Leal-Vega*, supra, recognized its incompatibility with the Seventh Circuit's now-reinvigorated *Hudson*. District courts are also weighing in. Recently, in *United States v. Miller*, 480 F. Supp. 3d 614, 620-21 (M.D. Pa. 2020), a district court in the Third Circuit published an opinion choosing *Townsend* over *Ruth*, surmising that the Third Circuit would likely choose *Townsend* based on *United States v. Glass*, 904 F.3d 319, 322 (3rd Cir. 2018) (holding that U.S.S.G. § 4B1.2(b) incorporates the CSA definition of "delivery" from 21 U.S.C. § 802(8)).

As *Miller* and this case, *Ward*, demonstrate, lower courts are simply picking a side, and waiting for this Court to determine who is correct.

Resolution of the question presented in this case is vitally important to Mr. Ward, and the likelihood of huge sentencing inconsistencies illustrates exactly why it is important to many other litigants. The split causes a multi-year difference in Mr. Ward's guideline range, which was increased more than six-fold. Similarly stark disparities can occur in 18 U.S.C. § 922(g) felon-in-possession cases, where the base offense level under U.S.S.G. § 2K2.1(a) can increase by up to 12 levels (representing several years on the sentencing table),

depending on the number of previous "controlled substance offenses" a defendant has under § 4B1.2(b). *Compare* U.S.S.G. § 2K2.1(a)(1) *with* U.S.S.G. § 2K2.1(a)(5).

Even though they are advisory, the guidelines "remain the foundation of federal sentencing decisions." *Hughes v. United States*, 138 S. Ct. 1768, 1775-76 (2018); *see United States v. Booker*, 543 U.S. 220, 264 (2005). A guideline change "itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016). The guidelines calculation must be accurate. *Gall v. United States*, 552 U.S. 38, 49 (2007). The accuracy of that starting point should not change drastically depending on the courthouse location.

When calculations do change by location, the guidelines undermine Congress's unambiguous command "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Because of the § 4B1.2(b) "controlled substance" split, two defendants, identical in every way, would receive drastically different sentences in different

courtrooms, because they are walking in with drastically different "foundations" by way of their guideline calculations.

Sometimes the distance between courtrooms is absurdly short. The Rock Island, Illinois federal courthouse is just a few minutes away from the Davenport, Iowa federal courthouse. The former is in the Seventh Circuit, the latter is in the Eighth Circuit. In this case, two people with identical conduct and identical records would receive two incompatible, and drastically different, sets of guidelines calculations.

The question's importance is highlighted by how common it is. Because it applies to gun cases, explosive materials cases, and career offender determinations, the definition of "controlled substance" from U.S.S.G. § 4B1.2(b) applied to as many as 9,716[4] federal defendants in 2019 alone.

---

[4] *See* U.S. Sentencing Commission, *2019 Annual Report and Sourcebook of Federal Sentencing Statistics*, Tables 20 and 26, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf, (last visited February 19, 2021) (showing total cases in 2019 with primary sentencing guideline U.S.S.G. §§ 2K2.1 (gun), 2K1.3 (explosives), and 4B1.1 (career offender)).

The number effectively triples when accounting for the fact that virtually the same language of § 4B1.2(b) also appears in Application Note 2 to U.S.S.G. § 2L1.2, defining "drug trafficking offenses," which enhances immigration sentences. *See* U.S.S.G. §§ 2L1.2(b)(2)(E) and (3)(E) & cmt. n.2. Section 2L1.2 was the primary

The split currently forces parties to litigate this matter to the hilt every time it comes up, just to preserve the issue. Even if the Sentencing Commission or Congress acts – something neither has done since the split became clear in 2012 – defendants and lower courts will continue to operate in tremendous uncertainty while everyone waits. Litigants and lower courts need immediate direction.

IV. THIS CASE IS AN EXCELLENT VEHICLE.

This case represents a good vehicle for review, for several reasons. First, the issue was preserved in the lower courts. Mr. Ward objected to the district court's definition of "controlled substance" before sentencing, making the same arguments he makes here. The parties disputed this provision and discussed various circuits' approaches in the briefs and at oral argument before the Fourth Circuit as well.

Second, there is no chance that the case will become moot. Despite the COVID-19 coronavirus pandemic, Mr. Ward's requests for compassionate release have been denied. His release date is far in the

---

guideline in 22,077 sentencings proceedings in 2019. *See* U.S. Sentencing Commission, 2019 Annual Report and Sourcebook of Federal Sentencing Statistics, Table 20, supra.

future, as he was sentenced to a 120-month prison sentence based on the Fourth Circuit's faulty interpretation.

Third, the issues here are purely legal questions. The facts of the case are not in dispute. The overbreadth of Virginia's drug statute is not disputed. The split is not due to nuanced (or even any) factual differences. It is simply that the various circuit courts take competing approaches to defining "controlled substance" in U.S.S.G. § 4B1.2(b).

"Controlled substance" is a term of art, the definition of which has to come from somewhere. In *Ward, Sheffey*, and *Peraza*, the Fourth, Sixth, and Eleventh Circuits chose state legislatures. In *Ruth*, the Seventh Circuit chose judges. In *Townsend*, *Leal-Vega*, *Bautista*, *Gomez-Alvarez*, *Sanchez-Garcia*, and *Abdeljawad*, supra, the Second, Fifth, Eighth, Ninth, and Tenth Circuits chose Congress. The latter Circuits are correct.

Title 18 U.S.C. § 3553(a)(6) is an unambiguous Congressional command to avoid unwarranted sentencing disparities. Rejecting the *Townsend* analysis, as the Fourth Circuit did below, undermines that imperative.

CONCLUSION

For the reasons given above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

GEREMY C. KAMENS
Federal Public Defender

Caroline S. Platt
Appellate Attorney
Counsel of Record
Valencia D. Roberts
Assistant Federal Public Defender
Office of the Federal Public Defender
for the Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
caroline_platt@fd.org

February 26, 2021