No. ___-_____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES ATWOOD, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the undefined term "controlled substance" in the federal Sentencing Guidelines mean substances controlled by federal law, the federal Controlled Substances Act (CSA)—or, does the term also refer to the myriad definitions found in each state law, such that prior convictions from states with drug schedules broader than the federal CSA qualify as predicate "controlled substance offenses" for purposes of the career-offender enhancement?

The same question is currently pending before this Court in *Ward v. United States*, No. 20-7327.

LIST OF PARTIES

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

DIRECTLY RELATED CASES

United States v. Atwood, No. 20-2794, U.S. Court of Appeals for the Seventh Circuit. Judgment entered Apr. 30, 2021.

United States v. Atwood, No. 2:16-cr-20043, U.S. District Court for the Central District of Illinois. Judgment entered Sept. 9, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner James Atwood respectfully prays for a writ of certiorari to review the judgment below.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit appears at Appendix A to the petition and is unpublished. Pet. App. 1a-2a. The oral decision of the United States District Court for the Central District of Illinois appears in transcript form in Appendix B to the petition and is unpublished. Pet. App. 3a-12a.

JURISDICTION

The United States Court of Appeals decided this case on April 30, 2021. No petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Sentencing Guideline § 4B1.1(a) provides:

> 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 Guideline § 4B1.2(b) provides:

> 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) . . . .

INTRODUCTION

An entrenched and important circuit split exists regarding the meaning of the undefined term "controlled substance" in the career-offender guideline, U.S.S.G. § 4B1.2(b). This question has been percolating in the federal courts of appeal for at least the past decade, and given the Sentencing Commission's lack of a quorum, the issue will not be resolved internally anytime soon.

The Second, Fifth, Eighth, and Ninth Circuits have issued published decisions indicating that "controlled substance" refers to the federal Controlled Substance Act (CSA). In these circuits, a prior state conviction qualifies as a career-offender predicate if the state statute is not categorically overbroad, as compared to the drug schedules in the federal CSA.

The Fourth and Seventh Circuits have taken the contrary view. In these circuits, *any* prior state drug conviction qualifies as a career-offender predicate, even if the state criminalizes substances that are not prohibited by federal law or by the laws of any other state.

As Mr. Atwood's case demonstrates, this divide is one of great significance and importance. Had he been sentenced in the Eighth Circuit

instead of the Seventh Circuit, Mr. Atwood would not have received a career-offender enhancement, and as a result, his Guidelines range would have been approximately 10 *years* lower. Career-offender enhancements are common and often severe, resulting in disparate sentences among the circuits every day, directly contrary to the command of 18 U.S.C. § 3553(a)(6).

On the merits, the minority approach, adopted by the Fourth and Seventh Circuits, is unsupported by the text, structure, and purpose of the Guidelines, and is contrary to this Court's precedent. The term "controlled" is a legal term of art that must be tethered to some law. The only question is: which law—state or federal?

In *Jerome v. United States*, 318 U.S. 101, 104 (1943), this Court supplied the answer: in the absence of a "plain" indication to the contrary, courts must assume that federal law is *not* dependent on state law. There is nothing in the Guidelines to rebut this presumption regarding the term "controlled substance." The minority approach is inconsistent not only with *Jerome* and the categorical approach of *Taylor v. United States*, 495 U.S. 575 (1990), but also with a primary goal of the Guidelines—to create reasonable uniformity in sentencing.

This Court should grant certiorari to resolve the circuit split and put an end to these dramatic disparities in federal criminal sentencing.

STATEMENT OF THE CASE

A federal grand jury charged Mr. Atwood with drug conspiracy and related charges, in violation of 21 U.S.C. §§ 841, 843, 846. The district court had jurisdiction under 18 U.S.C. § 3231 and the substantive statutes.

Mr. Atwood pled guilty without a plea agreement. Based on two prior Illinois convictions for distributing cocaine, and over Mr. Atwood's objection, the court found him to be a "career offender" under the Guidelines, which significantly increased his advisory sentencing range. The court sentenced Mr. Atwood to a within-Guidelines sentence of 210 months of imprisonment.

Mr. Atwood appealed, arguing that the career-offender enhancement was improper and also raising an unrelated sentencing issue. The Seventh Circuit had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291. Without reaching the career-offender question, the court remanded for resentencing. *See United States v. Atwood*, 941 F.3d 883 (7th Cir. 2019).

Shortly before Mr. Atwood's resentencing, the Seventh Circuit decided *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1239 (Jan. 19, 2021), which involved the same issue as the instant case. Pet. App. 13a-21a. In *Ruth*, the court acknowledged that, under the categorical approach, the Illinois definition of "cocaine" was broader than the definition in the federal CSA. Pet. App. 16a, 19a. Nevertheless, the court held that the defendant's prior Illinois drug conviction qualified as a career-offender

predicate because the term "controlled substance" has a "natural" meaning that does not exclusively refer to federal law. Pet. App. 20a-21a.

Over Mr. Atwood's objection, the district court again applied the career-offender enhancement, holding that it was bound by *Ruth*. Pet. App. 3a-12a. Mr. Atwood's Guidelines range with the career-offender enhancement was 151 to 188 months of imprisonment; without the enhancement, his range would have been approximately 30 to 37 months. The court sentenced Mr. Atwood to a within-Guidelines sentence of 156 months.

Mr. Atwood appealed, arguing only that *Ruth* should be reconsidered. The Seventh Circuit declined to revisit *Ruth* and summarily affirmed the judgment on April 30, 2021. Pet. App. 1a-2a. This petition followed.

REASONS FOR GRANTING THE PETITION

I. A long-standing circuit split exists regarding the meaning of the undefined term "controlled substance" in the federal Sentencing Guidelines.

The federal courts of appeal are split regarding the issue of whether the undefined term "controlled substance," found in the (often-harsh) career-offender guideline, U.S.S.G. § 4B1.2(b), refers exclusively to federal law. The divide has been evident for the last decade without the Sentencing Commission resolving the dispute.

The majority of the published decisions in the courts of appeal have held that the Guidelines incorporate the definition of "controlled substance"

in the federal CSA. *See United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021); *United States v. Townsend*, 897 F.3d 66, 71 (2d Cir. 2018); *United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015); *United States v. Sanchez-Garcia*, 642 F.3d 658, 661 (8th Cir. 2011); *see also United States v. Abdeljawad*, 794 F. App'x 745, 748 (10th Cir. 2019) (unpublished); *United States v. Miller*, 480 F. Supp. 3d 614, 620-21 (M.D. Pa. 2020) (predicting that the Third Circuit would adopt the majority approach).[1] These courts reason that construing "controlled substance" to refer to federal law, as opposed to the widely varying state definitions, is consistent with the *Jerome* presumption[2] and furthers uniform application of federal sentencing law, serving the goals of both the Guidelines and the categorical approach. *See Bautista*, 989 F.3d at 702; *Townsend*, 897 F.3d at 71.

A minority of the published decisions in the courts of appeal have held that "controlled substance" does not refer exclusively to federal law. *See United States v. Ward*, 972 F.3d 364, 369-74 (4th Cir. 2020), *petition for cert. filed* (U.S. Feb. 26, 2021) (No. 20-7327); *United States v. Ruth*, 966 F.3d 642,

[1] Some of these cases involve the similarly worded definition of "drug trafficking offense" in U.S.S.G. § 2L1.2. The issue is currently pending in the Tenth Circuit in *United States v. Jones*, No. 20-6112 (oral argument May 14, 2021).

[2] In *Jerome v. United States,* 318 U.S. 101, 104 (1943), this Court held that "in the absence of a plain indication to the contrary," courts must assume that "the application of the federal act [is not] dependent on state law."

654 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1239 (Jan. 19, 2021). Side-stepping the *Jerome* presumption, the Seventh Circuit in *Ruth* adopted what it termed a "natural" meaning of "controlled substance" by applying a prior decision construing the term "counterfeit substance" in the career-offender guideline. *See* Pet. App. 20a-21a (citing *United States v. Hudson*, 618 F.3d 700 (7th Cir. 2010)).

The Fourth Circuit, on the other hand, held that the *Jerome* presumption was "overcome" because the Guidelines contain "clear textual and structural expressions" that the term "controlled substance" refers to state and federal law. *See Ward*, 972 F.3d at 374. In both of these circuits, the result is the same: *any* prior state drug conviction qualifies as a career-offender predicate, even if the state statute includes substances that are not found in the federal CSA. Using this approach, the same prior conduct may or may not result in a career-offender enhancement, depending on the state where the prior conduct occurred. *See Townsend*, 897 F.3d at 71.

To make the situation even more complicated, the Sixth and Eleventh Circuits have issued recent, unpublished decisions on both sides. *Compare United States v. Pittman*, 736 F. App'x 551, 553 (6th Cir. 2018), *with United States v. Smith*, 681 F. App'x 483, 489 (6th Cir. 2017); *United States v. Peraza*, 754 F. App'x 908, 910 (11th Cir. 2018), *with United States v. Stevens*, 654 F. App'x 984, 987 (11th Cir. 2016).

The courts of appeal have shown no indication that they will resolve this disagreement on their own. Indeed, shortly after the Seventh Circuit addressed the definition of "counterfeit" in *Hudson*, the Ninth Circuit distinguished that decision, holding that, unlike "counterfeit," the word "controlled" referred to federal law. *See United States v. Leal-Vega*, 680 F.3d 1160, 1166-67 (9th Cir. 2012). Thereafter, despite recognizing that all of the published decisions from its sister circuits had construed "controlled" in favor of the defendant, the Seventh Circuit adopted an opposing view in *Ruth*. *See* Pet. App. 20a-21a.

Most recently, the Fourth Circuit joined the Seventh Circuit, *see Ward*, 972 F.3d at 374, while the Ninth Circuit reaffirmed the contrary position, *see Bautista*, 989 F.3d at 702-03. This ever-growing circuit split requires review.

II. This issue is one of national importance, and often results in dramatic increases in defendants' advisory sentencing ranges.

As this Court consistently has found, the Sentencing Guidelines matter. The Guidelines must be calculated accurately, and they "remain the foundation of federal sentencing decisions." *Hughes v. United States*, 138 S. Ct. 1765, 1775 (2018); *see also Gall v. United States*, 552 U.S. 38, 49 (2007); *United States v. Booker*, 543 U.S. 220, 264 (2005). For that reason, a change in the advisory Guidelines range "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).

Here, based solely on the career-offender enhancement, Mr. Atwood's Guidelines range increased by 10 *years*—from a range of approximately 30 to 37 months, to a range of 151 to 188 months. Mr. Atwood was sentenced to a within-Guidelines sentence of 156 months. Had he instead been sentenced in the neighboring Eighth Circuit, Mr. Atwood likely would have received a much lower sentence. A federal sentencing court's "lodestar" should not change so drastically depending entirely on the location of the courthouse. *See id.* at 1346 ("In the usual case, then, the systemic function of the selected Guidelines range will affect the sentence.").

When the Guidelines vary widely by location, they undermine Congress's statutory 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). The problem identified in this petition is particularly pervasive. The term "controlled substance offense," or a similarly worded definition, appears not only in the career-offender enhancement but also in the firearms and immigration guidelines, U.S.S.G.

§§ 2K2.1, 2L1.2, respectively. These additional provisions were used as the primary sentencing guideline in over 26,000 cases in 2020 alone.[3]

A resolution to this dispute will stretch far beyond Mr. Atwood to tens of thousands of defendants every year. The gravity and ubiquity of the issue counsels in favor of this Court's immediate review.

III. The minority approach, adopted by the Fourth and Seventh Circuits, is wrong on the merits and contrary to this Court's precedent.

In holding that the undefined term "controlled substance" refers to the federal CSA, the Second Circuit properly hinged its analysis on the so-called *Jerome* presumption: "the application of a federal law does not depend on state law unless Congress plainly indicates otherwise." *Townsend*, 897 F.3d at 71 (citing *Jerome*, 318 U.S. at 104). The court explained that the presumption was justified by the goal of applying federal law equally across the country, and concluded that the Guidelines' failure to define the term "controlled substance" was not enough to rebut the presumption. *See id.*

In adopting the contrary view, the Seventh Circuit disregarded *Jerome*, choosing instead to analogize to a prior decision that adopted a "natural" meaning of the undefined term "counterfeit substance." *See* Pet. App. 20a-

[3] *See* U.S. Sentencing Commission, *2020 Annual Report and Sourcebook of Federal Sentencing Statistics*, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf (last visited May 24, 2021).

21a. The prior decision was inapposite, however, because "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.'" *Leal-Vega*, 680 F.3d at 1167; *see also Ward*, 972 F.3d at 379 (Gregory, C.J., concurring, and explaining that, "[u]nlike 'counterfeit,' which any ordinary person would understand to mean 'fake,' the word 'controlled' does not stand on its own"). In declining to reconsider *Ruth*, the Seventh Circuit recommitted to a faulty methodology.

The Fourth Circuit gave *Jerome* more consideration, but ultimately concluded that the presumption was "overcome" because of "plain indication" that "controlled substance" also referred to state law. *Ward*, 972 F.3d at 374. Specifically, the court emphasized that the first line of § 4B1.2(b) begins by stating: "The term 'controlled substance offense' means an offense under federal *or state law*." *Id.* (emphasis in *Ward*).

In a thoughtful and persuasive concurrence, Chief Judge Gregory offered a different construction of this phrase. According to the Chief Judge, the first line of § 4B1.2(b) has little relevance to the debate at hand because that text only dictates "whether a state law offense could serve as a predicate controlled substance offense under § 4B1.2(b)," rather than "whether the 'controlled substance' at issue refers to substances controlled solely under state law." *Id.* at 382; *see also Townsend*, 897 F.3d at 70 ("To include

substances controlled under only state law, the definition should read ' . . . a controlled substance *under federal or state law*.' But it does not.").[4] In other words, the phrase indicates that both state and federal convictions *may* serve as career-offender predicates, but it does not indicate whether *certain* state convictions involving overbroad drug statutes ultimately trigger the enhancement.

As Chief Judge Gregory saw it, there was more than sufficient ambiguity in the career-offender guideline to apply the *Jerome* presumption. *See Ward*, 972 F.3d at 380-82. Indeed, as the Chief Judge noted, the commentary accompanying § 4B1.2(b) refers entirely to federal law when providing examples of "controlled substance offenses." *Id.* at 382-83.

More importantly, Chief Judge Gregory maintained that allowing all prior state drug convictions to qualify as career-offender predicates "turns the point of the categorial approach on its head" and is totally inconsistent with a primary goal of the Guidelines—namely, to create "reasonable uniformity in sentencing." *Id.* at 381, 383-84 (citing *Taylor v. United States*, 495 U.S. 575, 588 (1990)).[5] To be sure, neither *Taylor* nor the Guidelines sought an

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[4] In *Hudson*, the Seventh Circuit reached the same conclusion as Chief Judge Gregory regarding this text. 618 F.3d at 705 ("The reference to federal or state law says nothing about the definition of a 'counterfeit substance' . . . .").

[5] In *Taylor*, this Court expressly rejected a construction of federal law that would make a sentencing enhancement depend on a state definition. 495 U.S. at 591 ("That would mean that a person convicted of unlawful possession of a firearm would, or would not, receive a

outcome where courts "treat someone from Virginia more favorably than someone from West Virginia simply because they were lucky enough to commit the conduct on the right side of the border." *See id*. at 381. But that is exactly what will keep happening in the Fourth and Seventh Circuits without this Court's intervention.

The minority approach is not supported by the text, structure, and purpose of the Guidelines and is inconsistent with this Court's precedent in *Jerome* and *Taylor*, as well as 18 U.S.C. § 3553(a)(6). This Court should restore national uniformity in federal sentencing.

IV. This case is an ideal vehicle for review.

Mr. Atwood is aware that this Court recently denied a very similar petition for writ of certiorari to the Seventh Circuit. *See Ruth v. United States*, 141 S. Ct. 1239 (Jan. 19, 2021). However, in opposing certiorari, the government argued that the petition could (and should) be denied simply because it arose in an interlocutory posture. *See Ruth*, No. 20-5975, Gov't Opp. Br. 15-16 (arguing that "[t]he decision's interlocutory posture alone furnishes sufficient ground for the denial of [Ruth's] petition") (internal quotations omitted).

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sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary.'").

Mr. Atwood's case is different. He objected to the career-offender enhancement in the district court, and raised the issue in his first appeal. After his case was remanded pursuant to an unrelated issue, Mr. Atwood again objected to the enhancement at resentencing, and the district court expressly found that he preserved a challenge to *Ruth*. Pet. App. 6a. In his second appeal, Mr. Atwood urged the Seventh Circuit to reconsider *Ruth*, and the parties fully briefed this issue. *See* Pet. App. 1a-2a.

In addition, there is no chance that this case will become moot. Mr. Atwood's request for compassionate release has been denied, and his projected release date is not until 2027.

Finally, the issue here is limited and purely legal. The Seventh Circuit has already found that, under the categorical approach, the Illinois definition of "cocaine" is broader than the definition in the federal CSA. Pet. App. 16a, 19a. Indeed, the *only* issue below was whether the court should revisit its legal interpretation of the term "controlled substance." *See* Pet. App. 1a. These circumstances distinguish Mr. Atwood's case not only from *Ruth* but also from *Ward*. *See Ward*, No. 20-7327, Gov't Opp. Br. 14-15 (arguing that "petitioner does not show that he would be entitled to relief even under his preferred reading of Section 4B1.2(b)").

Thus, there are no procedural hurdles to granting Mr. Atwood's petition. The issue is legal, straightforward, and ripe for this Court's review.

CONCLUSION

For the foregoing reasons, Mr. Atwood's petition for a writ of certiorari should be granted.

Respectfully submitted,

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