No. 20-8213

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

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The government's opposition is nearly a word-for-word replica of its opposition briefs in *Ward* (No. 20-7327) and *Ruth* (20-5975), without any critical analysis of Mr. Atwood's arguments, many of which had anticipated the government's response. As such, Atwood's reply will be brief.

The government inaccurately depicts the pervasive circuit split 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 there is no indication that the Commission will resolve the issue internally.

The government totally ignores that this divide is one of great significance and importance. Mr. Atwood is a prime example: had he been sentenced in the Eighth Circuit instead of the Seventh Circuit, his Guidelines range would have been approximately *10 years* lower.

The government fails to seriously grapple with the merits, neglecting to even mention this Court's relevant decision in *Jerome v. United States*, 318 U.S. 101 (1943). And the government does not dispute that this case is an ideal vehicle for review in ways that *Ward* and *Ruth* were not.

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

ARGUMENT

I. The government inaccurately depicts the pervasive circuit split regarding the meaning of the undefined term "controlled substance" in the career-offender guideline, U.S.S.G. § 4B1.2(b).

The government contends that, "although some courts of appeal, like petitioner, view the circuit disagreement somewhat more broadly . . . any direct conflict is recent and limited." BIO 13. This assertion is inaccurate.

The Second, Fifth, Eighth, and Ninth Circuits (majority view), as well as the Fourth and Seventh Circuits (minority view), have issued published opinions regarding the meaning of the undefined term "controlled substance" in the Guidelines. Pet. 5-7. Indeed, in adopting the minority view, the Seventh Circuit explicitly acknowledged that it was disagreeing with *four* of its sister circuits. *See United States v. Ruth*, 966 F.3d 642, 653 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1239 (2021) ("We recognize that a circuit split exists on this issue, and that the weight of authority favors Ruth.").[1] The courts also uniformly agree that decisions interpreting "controlled substance" in other guidelines are directly on point. *See id.* at 653; *United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021) ("The relevant text in the two provisions is identical.").

[1] The government's citation to *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), is perplexing. BIO 11. *Smith* looked to the definition of "controlled substance offense" in § 4B1.2 to determine whether it included "crimes that do not require an element of *mens rea* regarding the illicit nature of the controlled substance." *Id.* at 1264. No court of appeals has included *Smith* in its discussion of the circuit split at issue here.

The circuit courts have shown no indication that they will resolve this disagreement on their own. Indeed, since the Seventh Circuit's related decision in *United States v. Hudson*, 618 F.3d 700 (7th Cir. 2010), the entrenchment of the divide has become even more apparent:

Year	Majority View	Minority View
2011	*Sanchez-Garcia* (8th Cir.)	
2012	*Leal-Vega* (9th Cir.)	
2015	*Gomez-Alvarez* (5th Cir.)	
2018	*Townsend* (2d Cir.)	
2020		*Ruth* (7th Cir.)
2020		*Ward* (4th Cir.)
2021	*Bautista* (9th Cir.)	

Nevertheless, the government posits that this Court need not take action "because the Sentencing Commission can amend the Guidelines to eliminate any conflict or correct any error." BIO 5. But "can" is not "will," and there is no indication that the Commission's ability to take up this issue will become a reality anytime in the near (or distant) future.

The government claims that the Commission has "carefully attended" to § 4B1.2, but only cites amendments in the late 1980s. BIO 6. The government also refers to *Braxton v. United States*, 500 U.S. 344, 348-49 (1991), but there, this Court declined to address a Guidelines issue "because the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of [the provision at issue]." The Commission

has initiated no comparable proceeding here; as the government concedes, the Commission currently lacks a quorum to take any action at all. BIO 7.

Mr. Atwood acknowledges that Justice Sotomayor's recent comments, joined by Justice Gorsuch, respecting the denial of certiorari in *Longoria v. United States*, 141 S. Ct. 978, 979 (2021), indicate an expectation that the Commission "should have the opportunity to address [the] issue in the first instance, once it regains a quorum of voting members." However, the circuit split at issue in *Longoria* resulted in a *one-level* difference in offense level under the Guidelines. *See id.*

Although Mr. Atwood agrees that "[t]he effect of a one-level reduction can be substantial," *id.*, his career-offender designation resulted in a *16-level* increase in offense level. Given that, for the vast majority of career-offender defendants, the increase in offense level is similarly dramatic, the stakes are much higher, and *Longoria* is inapposite.

II. The government totally ignores that this issue is one of national importance, and often results in dramatic increases in defendants' advisory sentencing ranges.

The government completely bypasses Mr. Atwood's argument about the importance of this issue, which (to repeat) resulted in a *10-year* increase in his Guidelines range. Pet. 8-10. The government does not explain why a federal sentencing court's "lodestar" should change so drastically depending entirely on the location of the courthouse, much less acknowledge 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).

It is undisputed that a resolution to this matter will stretch far beyond Mr. Atwood to tens of thousands of defendants every year. Pet. 9-10. The gravity and ubiquity of the issue counsels in favor of review.

III. The government fails to seriously grapple with the merits.

The government argues that the minority view is correct on the merits for two reasons: a) § 4B1.2(b) includes the phrase "under federal or state law"; and b) § 4B1.2(b) does not explicitly cross-reference the federal drug schedules.[2] BIO 8-9. Notably, the government does not even *attempt* to analyze the relevance of this Court's *Jerome* presumption, which was discussed not only in Mr. Atwood's petition, Pet. 3, 6-7, 10, but also in the circuit-court decisions adopting the minority view. *See United States v. Ward*, 972 F.3d 364, 373-74 (4th Cir. 2020), *cert. denied*, No. 20-7327, 2021 WL 2637911 (June 28, 2021); *Ruth*, 966 F.3d at 653.

Mr. Atwood's petition anticipated the government's arguments on the merits. Pet. 10-13. As astutely explained by the concurrence in *Ward*, the

[2] "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) . . . ." U.S.S.G. § 4B1.2(b) (emphasis added).

phrase "under federal or state law" in § 4B1.2(b) only dictates "whether a state law offense could serve as a predicate controlled substance offense," not "whether the 'controlled substance' at issue refers to substances controlled solely under state law." *Ward*, 972 F.3d at 382 (Gregory, C.J., concurring). In other words, "[a]lthough 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." *United States v. Townsend*, 897 F.3d 66, 70 (2d Cir. 2018).

And as for the lack of a cross-reference to the federal drug schedules, this omission is easily overcome by applying the *Jerome* presumption: in the absence of a "plain" indication to the contrary, courts must assume that federal law is *not* dependent on state law. *See Jerome*, 318 U.S. at 104. In disregarding *Jerome*, the government gets the analysis backwards. *See Townsend*, 897 F.3d at 70 ("Because of the presumption that federal—not state—standards apply to the Guidelines, . . . if the Sentencing Commission wanted 'controlled substance' to include substances controlled under only state law to qualify, then it should have said so.").

The government offers no response to Mr. Atwood's showing that the minority approach is inconsistent with the purpose of the Guidelines, this Court's precedent in *Jerome* and *Taylor v. United States*, 495 U.S. 575 (1990),

and 18 U.S.C. § 3553(a)(6). Pet. 12-13. This Court should restore national uniformity in federal sentencing.

IV. The government does not dispute that this case is an ideal vehicle for review in ways that *Ward* and *Ruth* were not.

The government does not dispute that, unlike the petition in *Ruth*, Mr. Atwood's petition did not arise in an interlocutory posture. Indeed, the government admits that Mr. Atwood's argument has been fully preserved and raises no procedural anomalies. BIO 3-4.

In a footnote, the government attempts to cloud the issue by maintaining that "it is not clear that the Illinois statute is meaningfully broader than the Controlled Substances Act." BIO 11. But 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. 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 from *Ruth* and *Ward*. The issue here is legal, straightforward, and ripe for review.

CONCLUSION

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

Respectfully submitted,

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