

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

MILLARD JEROME STRICKLAND, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

(CA4 No. 20-4407)

Petition for Writ of Certiorari

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QUESTION PRESENTED

The Sentencing Guidelines provide a significant enhancement for a federal criminal defendant deemed to be a career offender. U.S.S.G. § 4B1.1. That enhancement applies when, among other things, “the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.” U.S.S.G. § 4B1.1(a). The Guidelines go onto to define a “controlled substance offense” as follows:

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(a).

Whether a “controlled substance offense” is limited to substances prohibited under federal law or whether it also encompasses substances illegal only under relevant state law has divided the lower courts. Many Circuits refuse to provide enhanced punishment in a federal criminal case for substances that Congress has not criminalized. *See, e.g., United States v. Townsend*, 897 F.3d 66, 72 (2d Cir. 2018) (“In holding that a ‘controlled substance’ refers exclusively to a substance controlled by the [federal Controlled Substances Act], we are in good company. The Fifth, Eighth, and Ninth Circuits have found ‘controlled substance’ in the Guidelines to have the same meaning we now find.” (footnote and citations omitted)). But some Circuits, including the Fourth Circuit below, hold otherwise. *See, e.g., United States v. Mills*, 485 F.3d 219, 224 (4th Cir.

2007) (“[T]he Sentencing Commission, by specifying that federal *and* state violations serve as predicate offenses for career offender status, clearly intended for repeat offenders of *both* state and federal counterfeit crimes to be subject to an enhanced sentence. *See* U.S.S.G. § 4B1.2(b).” (original emphasis)).

This Petition calls upon this Court to resolve the Circuit split below by answering the following question:

1. Can a prior conviction involving a substance that is not a controlled substance for the purposes of federal law render a federal defendant a “career offender” under U.S.S.G. § 4B1.1?

LIST OF PARTIES

All parties appear in the caption of this Petition's cover page.

PRIOR PROCEEDINGS

U.S. District Court for the District of South Carolina:

United States v. Strickland, No. 8:18-cr-00855-DCC-1 (jmt. entered Aug. 7, 2020).

U.S. Court of Appeals for the Fourth Circuit:

United States v. Strickland, No. 20-4407 (jmt. entered April 8, 2021).

Table of Contents

Question Presented	i
List of Parties	iii
Prior Proceedings	iii
Table of Authorities	v
Opinions and Orders Below	1
Jurisdiction.....	1
Regulatory Provisions Involved.....	1
Statement of the Case.....	1
A. Mr. Strickland Pleads Guilty.....	1
B. The District Court Finds that Mr. Strickland Is a Career Criminal Even Though one of His Prior Convictions Involved a Substance No Longer Criminalized Under Federal Law.....	1
C. The Fourth Circuit Affirms the Sentence.	2
Reasons for Granting the Petition.....	2
A. The Circuits Are Divided About Which Drug Convictions Count for the Purposes of the Career Offender Guideline.	3
B. This Court Should Use this Petition to Resolve that Split.....	5
Conclusion	6

Table of Contents to Appendix

Fourth Circuit Opinion, <i>United States v. Strickland</i> , No. 20-4407 (April 8, 2021)	App. 1
U.S. District Court Oral Order, <i>United States v. Strickland</i> , No. 8:18-cr-0855 (D. S.C. Aug. 6, 2020)	App. 5

TABLE OF AUTHORITIES

Cases

<i>United States v. Abdeljawad</i> , 794 F. App'x 745 (10th Cir. 2019).....	4
<i>United States v. Abdulaziz</i> , 998 F.3d 519 (1st Cir. 2021).....	4
<i>United States v. Martinez</i> , 232 F.3d 728 (9th Cir. 2000).....	4
<i>United States v. Mills</i> , 485 F.3d 219 (4th Cir. 2007)	ii, 5
<i>United States v. Stevens</i> , 654 F. App'x 984 (11th Cir. 2016)	4
<i>United States v. Townsend</i> , 897 F.3d 66 (2d Cir. 2018)	i, 4
<i>United States v. Ward</i> , 972 F.3d 364 (4 th Cir. 2020).....	5

Rules

U.S.S.G. § 4B1.1.....	passim
U.S.S.G. § 4B1.2.....	i, 2, 3

Statutes

18 U.S.C. § 3231	1
18 U.S.C. § 3553.....	2
18 U.S.C. § 922	1
21 U.S.C. § 841	1
21 U.S.C.S. § 802(16)(B) (2020)	2
28 U.S.C. § 1254.....	1
Agriculture Improvement Act, 115 P.L. 334, § 12619 (Dec. 20, 2018).....	2

Regulations

U.S. Sentencing Commission, <i>Quick Facts: Career Offenders</i> , available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY20.pdf (last accessed July 13, 2021).....	5
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Millard Jerome Strickland, Jr. respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND ORDERS BELOW

The Fourth Circuit Court of Appeals did not select its opinion for publication. It is reprinted in the Appendix. [App. 1-4].

The district court did not prepare a written opinion. Its oral ruling is printed in the Appendix. [App. 6-7].

JURISDICTION

The district court had jurisdiction over the federal criminal charge. 18 U.S.C. § 3231.

This Court has jurisdiction to review the judgment of the Fourth Circuit. 28 U.S.C. § 1254(1). Judgment was entered on April 8, 2021. Due to the COVID-19 pandemic, this Court extended the deadline for this Petition to 150 days. 594 U.S. __ (Order of July 19, 2021).

REGULATORY PROVISIONS INVOLVED

(a) 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.

U.S. S.G. § 4B1.1(a)

* * *

(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.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

U.S.S.G. § 4B1.2(b)-(c)

STATEMENT OF THE CASE

A. Mr. Strickland Pleads Guilty.

As is relevant here, a grand jury in the District of South Carolina indicted Millard Jerome Strickland, Jr., for one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and one count of possession with intent to distribute 50 g or more of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 841(a)(1).

Pursuant to an oral plea agreement, Mr. Strickland pleaded guilty to those charges, and the Government dismissed the remaining charges against him.

B. The District Court Finds that Mr. Strickland Is a Career Criminal Even Though one of His Prior Convictions Involved a Substance No Longer Criminalized Under Federal Law.

The presentence investigation report (“PSR”) determined that Mr. Strickland (with 16 criminal-history points in total) was a career offender under U.S.S.G. § 4B1.1 due to the following two state-court convictions:

- A conviction on December 16, 2013, in South Carolina state court for possession of marijuana with intent to distribute, a conviction for which he was sentenced to three years’ imprisonment; and
- A conviction on December 16, 2013, in South Carolina state court for possession of Adderall and marijuana with intent to distribute, a conviction for which he was sentenced to three years’ imprisonment.

Based upon the PSR’s determination that Mr. Strickland was a career offender, the Guideline range was 188-235 months. Had the career offender enhancement not applied, the Guideline range would have been 151-188 months (i.e., 29/VI).

In an oral ruling, the district court overruled Mr. Strickland’s objection that the career offender enhancement ought not apply. [App. 6-7]. It sentenced Mr. Strickland to, among other things, 168 months’ imprisonment.

C. The Fourth Circuit Affirms the Sentence.

In an unpublished opinion, a panel of the Fourth Circuit affirmed Mr. Strickland’s sentence following a timely appeal to that court. [App. 1-4]. Bound by prior Circuit precedent, it held that Mr. Strickland’s state marijuana conviction counted as a “controlled substance offense” for the federal sentencing guidelines, even though the “state definition of marijuana is broader than the federal definition.” [App. 3].¹

REASONS FOR GRANTING THE PETITION

Although Congress has expressed a desire to prevent “unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,” 18 U.S.C. § 3553(a)(6), the Circuits disagree about

¹ Upon the passage of the Agriculture Improvement Act, 115 P.L. 334, § 12619 (Dec. 20, 2018), the federal Controlled Substances Act now expressly excludes hemp—as defined in the Agricultural Marketing Act—from the definition of marijuana. 21 U.S.C.S. § 802(16)(B) (2020). South Carolina criminal law, however, does not distinguish between hemp and marijuana. S.C. Code § 44-53-110(27)/

how to apply the career offender enhancement. Thus, defendants with the same criminal record face different guideline sentences based upon which Circuit they happen to find themselves at the time of their sentencing, as explained below. This Court should grant this Petition and resolve that split.

A. The Circuits Are Divided About Which Drug Convictions Count for the Purposes of the Career Offender Guideline.

Under the Guidelines, an adult defendant convicted of “a felony that is either a crime of violence or a controlled substance offense [who] ... has at least two prior felony convictions of either a crime of violence or a controlled substance offense” is subject to the career offender enhancement. U.S.S.G. § 4B1.1(a). The Guidelines, in turn, define a “controlled substance offense” as follows:

[A]n 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).

While states generally criminalize the same controlled substances as does federal law, sometimes states criminalize more than Congress has chosen to do. In that case, the Circuits are divided about how to proceed.

Most Circuits that have considered the question in published opinions have decided a state conviction involving a substance legal under federal law will not provide a qualifying conviction for career-offender purposes. *See, e.g.,*

United States v. Abdulaziz, 998 F.3d 519, 523 (1st Cir. 2021) (“[T]he government agrees with Abdulaziz...that a ‘controlled substance’ in § 4B1.2(b) was defined as of that time by reference to whether a substance was either included in or excluded from the drug schedules set forth in the federal Controlled Substances Act....” (footnote omitted)); *United States v. Townsend*, 897 F.3d 66, 72 (2d Cir. 2018) (collecting citations) (joining the Fifth, Eighth, and Ninth Circuits to hold that only state convictions for federally controlled substances count).² For these Circuits, a controlled substance offense for federal Guidelines purposes should be “interpreted according to a uniform, national definition, not dependent upon the vagaries of state law. This single-definition approach rest[s] centrally on the consideration that application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control.” *United States v. Martinez*, 232 F.3d 728, 732 (9th Cir. 2000) (citations and quotations omitted)).

Published authority in a few Circuits, however, holds otherwise. *United States v. Ruth*, 966 F.3d 642, 651 (7th Cir. 2020) (acknowledging the split but holding that “the career-offender guideline, and its definition of controlled substance offense, does not incorporate, cross-reference, or in any way refer to the

² *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. 21 U.S.C. § 802(6).” (footnote omitted)); *United States v. Stevens*, 654 F. App’x 984, 987 (11th Cir. 2016) (“That marijuana may not constitute a ‘controlled substance’ under Georgia law is immaterial. The Guidelines are governed by definitions set forth in federal law, *not* state law.” (original emphasis) (citation omitted))

Controlled Substances Act.”); *United States v. Mills*, 485 F.3d 219, 224 (4th Cir. 2007) (“[T]he Sentencing Commission, by specifying that federal and state violations serve as predicate offenses for career offender status, clearly intended for repeat offenders of *both* state and federal counterfeit crimes to be subject to an enhanced sentence. *See* U.S.S.G. § 4B1.2(b).” (original emphasis)). But even in those Circuits, the view is not without controversy. *See United States v. Ward*, 972 F.3d 364, 380-85 (4th Cir. 2020) (Gregory, C.J., concurring) (critiquing applying an enhancement to substances not also controlled under federal law).

B. This Court Should Use this Petition to Resolve that Split.

Determining the proper scope of the career offender Guideline enhancement, U.S.S.G. § 4B1.1, is an important question in federal criminal sentencing. In fiscal year 2020, for example, the U.S. Sentencing Commission reported receiving sentencing data from 64,565 federal cases, of which 1,216 involved a career-offender designation. U.S. Sentencing Commission, *Quick Facts: Career Offenders*, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY20.pdf (last accessed July 13, 2021). The U.S. Sentencing Commission found that that classification increased the guideline range in 90.7% of those cases. *Id.*

This Petition presents just such an example. Had Mr. Strickland not been deemed a career offender, his Guideline range would have dropped from 188-235 months to 151-188 months.

CONCLUSION

For the forgoing reasons, this Court should grant the petition, reverse the judgment below, and remand with instructions for the district court to resentence Mr. Strickland.

Dated: August 2, 2021

Respectfully submitted,

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