No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROLAND J. McLAIN,
Petitioner,

v.

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 A WRIT OF CERTIORARI

ROLAND J. McLAIN, Petitioner

THOMAS A. BRODNIK
McNeelyLaw LLP
143 W. Market Street, Suite 600-A
Indianapolis, IN 46204
(317) 825-5110 Telephone
(317) 825-5109 Facsimile
TBrodnik@McNeelylaw.com

Attorney for Petitioner

QUESTIONS PRESENTED

A defendant convicted of violating the Controlled Substances Act, 21 U.S.C. § 801, *et seq*. (the "CSA") is a "career offender" under the United States Sentencing Guidelines if, among other things, he "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 define "controlled substance offense," in part, 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*...." U.S.S.G. § 4B1.2(b) (emphasis added). Further, the Guideline applicable to a felon in possession, U.S.S.G. § 2K2.1, increases a defendant's base offense level if a defendant has prior "controlled substance offenses," as that term is used in the career offender Guideline, U.S.S.G. § 4B1.2.

The questions presented are:

1. Does the phrase "controlled substance" in U.S.S.G. § 4Bl.2(b), including as it is incorporated into U.S.S.G. § 2K2.1, include substances that are excluded from the CSA?
2. When defining an operative, but undefined, term in the Federal Sentencing Guidelines, should courts use analogous federal statutory definitions, should they use State statutory definitions, or should they use a judge-made "natural meaning" of that term?

DIRECTLY RELATED CASES

Court	Case Name	Case Number	Date of Judgment
United States Court of Appeals for the Seventh Circuit	*United States v. McLain*	20-2969	June 7, 2021
United States District Court for the Southern District of Indiana	*United States v. McLain*	1:18-cr-354	Sept. 29, 2020

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PETITION FOR CERTIORARI

Petitioner Roland McLain respectfully petitions for writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is unpublished, and appears in Appendix A to this Petition. Pet. App. 1a-2a. The September 29, 2020, oral decision of

the United States District Court for the Southern District of Indiana was unreported, but pertinent parts of the transcript are reproduced in Appendix B. Pet. App. 3a-6a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed, as calculated by Rule 30.1 of this Court.

STATUTORY PROVISIONS INVOLVED

Title 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 ("U.S.S.G.") § 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….

U.S.S.G. § 2K2.1, Application Note 1, provides in relevant part:

> "Controlled substance offense" has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.2).

The federal Controlled Substance Act, at 21 U.S.C. § 802(16), defines "marijuana," in part, as:

> All parts of Cannabis sativa L. and every compound of this plant.

The Indiana Controlled Substances Act, at 35-48-4-10, defines "marijuana" to include:

> Marijuana, hash oil, hashish or salvia, pure or adulterated.

INTRODUCTION

Petitioner Roland McLain ("Mr. McLain") is a career offender in the Seventh Circuit. He would not be a career offender in several sister circuits. Mr. McLain's base offense level for his felon in possession conviction was increased six levels, based on the Seventh Circuit's interpretation of the meaning of "controlled substance offense" found in the career offender Guideline, as incorporated by U.S.S.G. § 2K2.1. Accordingly, in the Seventh Circuit, Mr. McLain's base offense level for being a felon in possession began at level 26. It would have begun at level 20 in several other sister circuits. The reason for both of these anomalies is that the Seventh Circuit held that the term "controlled substance," in U.S.S.G. § 4B1.2(b), includes substances that are not prohibited by the federal Controlled Substances Act. In the Second Circuit and three others, he would not be a career offender, nor would his base offense level have begun at 26 for the felon in possession conviction. There, the CSA defines the scope of the term "controlled substance" for purposes of U.S.S.G. § 4B1.2(b).

"A principal purpose of the Sentencing Guidelines is to promote 'uniformity in sentencing imposed by different federal courts for similar criminal conduct.'" *Hughes v. United States*, 138 S. Ct. 1765, 1774 (2018) citing *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016). But because of the circuit split affecting Mr. McLain's case and others like it, identically situated defendants in different circuits face drastically disparate Guidelines ranges. This circuit split therefore undermines a "principal purpose" of the Guidelines, and thwarts Congress' 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).

Moreover, this circuit split is long-lived and openly acknowledged, having endured for nearly a decade since one circuit court split with another. In that time, none of the circuits that have

ruled on this crucial sentencing issue has shown an intention to reconcile the competing approaches. Likewise, the Sentencing Commission has failed to step in over that period. In short, unless this Court takes up the issue now, the split is likely to endure, subjecting many more defendants to unwarranted sentencing disparities.

This case presents an excellent opportunity to resolve this split now. There are no peripheral issues that would prevent the Court from squarely addressing, and deciding, this purely legal question: Does the term "controlled substance," as used in U.S.S.G. § 4B1.2(b), mean controlled substance as that term is defined by the CSA, or rather should the definition of the term vary based on the contents of State law or some other judge-made definition?

For these reasons, and as explained more fully below, this Court should grant certiorari and impose much needed uniformity. It should then conclude that "controlled substance," in the Federal Sentencing Guidelines, means a substance listed in the Federal Controlled Substances Act.

STATEMENT OF THE CASE

A. The 2014 and 2016 Indiana Convictions

In 2014 and 2016, Mr. McLain was convicted in Marion County, Indiana, Cause No. 49G20-1406-FC-031240 and Cause No. 49G20-1601-F5-001433, respectively, which appear in Appendix C and D to this Petition. Pet. App. 7a-10a. The statute of conviction in both cases was Ind. Code § 35-48-4-10, a provision that outlaws the manufacture or delivery of marijuana, hash oil, hashish or salvia. As the Seventh Circuit held below, the Indiana statute is broader than the federal definition, which does not include salvia. *See* Pet. App. 2a.

B. Mr. McLain's Federal Conviction and Sentencing

In November, 2018, a federal grand jury in the Southern District of Indiana charged Mr. McLain by indictment. Count One and Count Two charged violations of 21 U.S.C. § 841(a)(1).

Count Three charged a violation of 18 U.S.C. § 922(g)(1). The District Court had jurisdiction over his case pursuant to 18 U.S.C. § 3231.

McLain pled guilty to all three counts on September 17, 2020. In the Presentence Investigation Report, the U.S. Probation Officer determined that Mr. McLain was a career offender, based on the 2014 and 2016 Indiana convictions.

At sentencing, Mr. McLain objected to his classification as a career offender.[1] He argued that Indiana law proscribed salvia, whereas the CSA does not. Thus, the 2014 and 2016 Indiana convictions do not categorically involve a "controlled substance" as that term is used in U.S.S.G. § 4B1.2(b). As a result, these convictions could not serve as a career offender predicate under U.S.S.G. §§ 4B1.1 and 4B1.2(b).

Shortly before sentencing, the Seventh Circuit decided *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020). *Ruth* held that the term "controlled substance offense" in U.S.S.G. § 4B1.2(b) does not incorporate the CSA. *Ruth*, 966 F.3d at 651-54. Instead, *Ruth* applied a "natural meaning" of, or what it "generally understood" by, the term "controlled substance," as opposed to the federal definition. *Id*. at 654. Mr. McLain conceded that *Ruth* foreclosed his arguments in the district court, but preserved the issue for appeal. Pet. App. 4a-5a.

Mr. McLain's Guidelines range was thus calculated to be 188-235 months. Without the career offender enhancement, his Guidelines range would have been 70-87 months.

[1] Mr. McLain also objected to use of the 2014 and 2016 Indiana convictions to enhance the Guidelines range for the § 922(g) (felon in possession) count. Pet. App. 4a-5a. Like the career offender enhancement, the § 922(g) enhancement turns on the definition of "controlled substance" in U.S.S.G. § 4B1.2(b). Since the career offender enhancement for his drug convictions and the enhancement for his felon in possession conviction turn on the same question, Mr. McLain will primarily refer to the career offender provisions as applied to the drug convictions, though all arguments apply to both enhancements.

Ultimately, the District Court sentenced Mr. McLain to 156 months in the custody of the Bureau of Prison. Pet. App. 6a.

C. The Seventh Circuit's Decision Below

Mr. McLain appealed his sentence. The Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. Mr. McLain argued that the Seventh Circuit's *Ruth* decision was erroneous, and that the term "controlled substance offense" in the career offender Guideline should be interpreted by reference solely to the CSA. Doing so would have reduced Mr. McLain's Guidelines range to 70-87 months, as opposed to 188-235 months.

The Seventh Circuit rejected Mr. McLain's invitation to revisit *Ruth* and its progeny. In *Ruth*, the Seventh Circuit held that the phrase "controlled substance" in U.S.S.G. § 4B1.2(b) is defined *not* by the federal definition of controlled substance – and not even by a given State definition – but instead by that term's "natural meaning." *Ruth*, 966 F.3d at 652-54. According to the Seventh Circuit, since the Guidelines do not define the phrase "controlled substance," and since they do not explicitly incorporate the federal statute, the phrase "controlled substance" is defined by reference to the Random House Dictionary. *Id*. at 654.

The Seventh Circuit recognized that a circuit split exists on this issue, and that the weight of authority was against it. *Id*. at 653. Nevertheless, the Seventh Circuit declined to define the phrase "controlled substance" by limiting it to those substances in the CSA, as it stated the Second, Fifth, Eighth and Ninth Circuits do. *See United States v. Townsend*, 897 F.3d 66, 71, (2d Cir. 2018); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793-94 (5th Cir. 2015); *United States v. Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012); *United States v. Sanchez-Garcia*, 642 F.3d. 658, 661-62 (8th Cir. 2011). It also declined to join those Circuits defining "controlled substance" according to

various State laws. *Ruth*, 966 F.3d at 654; *see also United States v. Smith*, 681 F. App'x 483, 489 (6th Cir. 2017).

Relying on its 2010 decision in *United States v Hudson*, 618 F.3d 700 (7th Cir. 2010), the Seventh Circuit eschewed statutory definitions, and used its own, judge-made standard to find the "natural meaning" of "controlled substance." *Ruth*, 966 F.3d at 652-53. Quoting the Random House Dictionary, the court concluded that a

> controlled substance is generally understood to be "any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use are restricted by law."

Id. at 654 (citing the Random House Dictionary of the English Language (2d ed. 1987) for "*controlled substance*"). Because the Illinois statute was a "law" that "restricted" the use and possession of Illinois' version of cocaine, the defendant's conviction under that statute qualified as a U.S.S.G § 4B1.2(b) Controlled Substance Offense.

REASONS FOR GRANTING THE PETITION

On both questions presented, the courts of appeals have acknowledged the split, in both published and unpublished opinions.

A. The Circuit Split is Acknowledged and Important

1. Seventh Circuit Acknowledgment of Circuit Split

The Seventh Circuit "recognize[d] that a circuit split exists on [how to define "controlled substance" in U.S.S.G. § 4B1.2(b)], and that the weight of authority favors Ruth [and therefore McLain as well], *Ruth*, 966 F.3d at 653. The Seventh Circuit noted that the Second, Fifth, Eighth, and Ninth Circuits have held that the CSA delineates the meaning of "controlled substance" in U.S.S.G. § 4B1.2(b). *Id*. *But see United States v. Henderson*, ____ F. 4th ____, 2021 WL 3717853 (8th Cir. August 27, 2021) (removing the Eighth Circuit from the CSA controls approach and

placing it in the State law controls approach). The Seventh Circuit placed the Sixth and Eleventh Circuits on the other side of the split, because they define "controlled substance" according to relevant State controlled substances acts. *Ruth*, 966 F.3d at 653.

After acknowledging the split, the Seventh Circuit maintained that it was "not joining a side," and would instead stand separately form the other circuits. *Id*. at 654. In other words, the Seventh Circuit opted against both the CSA controls approach, and the State law controls approach. In the Seventh Circuit, the judge-made "natural meaning" of "controlled substance" controls.

2. Fourth Circuit Acknowledgment of Circuit Split

In *United States v. Ward*, 972 F.3d 364 (4th Cir. 2020), the Fourth Circuit cited *Ruth* while acknowledging that the "Second Circuit has held to the contrary…." *Id*. at 375 n.12. The Fourth Circuit held: "Like the Seventh Circuit [in *Ruth*, we] see no textual basis to engraft the federal Controlled Substances Act's definition of 'controlled substance' into the career-offender guideline." (Internal quotations omitted). It expressly disavowed the *Jerome* argument that uniformity among federal courts warrants defining § 4B1.2(b) according to the CSA. *Ward*, 972 F.3d at 373-74; *see Jerome v. United States*, 318 U.S. 101, 104 (1943).

In a concurrence in *Ward*, Chief Circuit Judge Gregory acknowledged the Second Circuit's *Townsend* opinion and wrote that the *Ward* majority "requires us to split from several of our sister circuits." *Ward*, 972 F.3d at 375 (Gregory, C.J., concurring). He urged a rejection of *Ward*'s "plain meaning" standard: "One cannot appeal to any plain meaning of the term 'controlled' to resolve this question." *Id*. at 379 (Gregory, C.J., concurring). As Chief Judge Gregory saw it, a "plain meaning" standard "begs the question: [Controlled by] which law? The choice is between a unform federal definition on the one hand [like the Second Circuit in *Townsend*]; or individual, inconsistent state definitions on the other." *Id.*

The Fourth Circuit's position largely aligns with the Sixth and Eleventh Circuits, because it relies on Virginia's State drug laws to define "controlled substance" in that case. It also vaguely aligns with the Seventh Circuit, though, because it defines "controlled substance" according to its "plain meaning," which closely resembles a "natural meaning" standard.

3. Sixth Circuit Acknowledgment of Circuit Split

In an unpublished opinion the Sixth Circuit also acknowledges a split. In *United States v Sheffey,* it held that its 2017 decision in *Smith,* 681 F. App'x 483, "added to a split among the circuits concerning whether the career offender enhancement's reference to 'controlled substance' is defined exclusively by federal law and the Controlled Substances Act." *Sheffey*, 818 F. App'x 513, 520 (6th Cir. 2020).[2] In *Sheffey*, the Sixth Circuit "decline[d] to adopt the reasoning embraced by [the Second, Fifth, Eight, Ninth, and Tenth Circuits]," and ultimately decided the case on other grounds. *Id*. at 520.

4. Eighth Circuit Acknowledgment of Circuit Split

In a very recent decision, *United States v. Henderson*, ____ F. 4th ____, 2021 WL 3817853 (8th Cir. August 27, 2021), the Eighth Circuit also acknowledged the circuit split. *Henderson*, at *4-5. "Other circuits have addressed the issue and reached conflicting conclusions." *Id*. at *4. The Eighth Circuit stated that some circuits limit prior State court convictions to those involving substances controlled under the CSA, based on the *Jerome* presumption and the need for national uniformity, but rejected such reasoning. *Id* at *5.

Notably, the Seventh Circuit had placed the Eighth Circuit firmly in the CSA controls approach, based on the Eighth Circuit's decision in *Sanchez-Garcia,* 642 F.3d at 661-62. *Ruth,* 966

[2] In 2018, the Second Circuit had acknowledged the split in *Townsend*, when it cited the Sixth Circuit's *Smith* case without discussion beyond noting its opposing result. *See Townsend*, 897 F.3d at 72.

F.3d at 653. Yet, in *Henderson*, the Eighth Circuit stated it never addressed this particular issue in *Sanchez-Garcia*. *Henderson*, at *4. Thus, the Eighth Circuit has now changed its position from that which the Seventh Circuit believed it to be.

5. A Split Exists

The Fourth, Sixth, Seventh, and Eighth Circuits are all correct in identifying a split. In the Second, Fifth, Ninth, and Tenth Circuits, circuit courts use federal statutory definitions in the CSA to define the phrase "controlled substance" in U.S.S.G. § 4B1.2(b). In the Fourth, Sixth, Eighth, and Eleventh Circuits, courts focus on State law to define the phrase "controlled substance," then apply the categorical approach to compare it against U.S.S.G. § 4B1.2(b). *See e.g. Ward*, 972 F.3d at 371 ("Here, the state law… satisfies [the 'controlled substance'] criterion of § 4B1.2(b).").

In the Seventh Circuit, a conviction is a career offender predicate if the judge finds that the conviction involved a substance falling under the "natural meaning" of "controlled substance." *Ruth*, 966 F.3d at 654. In *Ward*, the Fourth Circuit largely joined the Seventh Circuit's reasoning, as an independent basis supporting its decision.

The Second, Fifth, Ninth and Tenth Circuits will always have the same result (no career offender predicate) if the predicate conviction did not categorically include a substance in the CSA. The Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits will always have the same result (finding a career offender predicate), if the predicate conviction is from a State controlled substances list, no matter the federal CSA. The Seventh Circuit's approach is more expansive that the others, though. First the language of the opinion appears to also include substances outlawed in *other* states from the predicate conviction. The Seventh Circuit definition also seems to include selling beer to a 20 year-old, since alcohol is a "substance" that is "restricted by law" and is "behavior-altering."

B. Competing Approaches to Defining "Controlled Substance"

1. The Second, Fifth, Ninth, and Tenth Circuits Hold that U.S.S.G § 4B1.2(b) Relies on Federal Law

The most thorough explanation of this side of the split comes from the Second Circuit's 2018 decision in *United States vs. Townsend*, 897 F.3d 66 (2nd Cir. 2018). In *Townsend*, the defendant contested that he did not have a "controlled substance offense" enhancement on his Guidelines. He argued that, since the statute of conviction of his New York State drug case included substances not found in the 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. McLain, Townsend argued that the Circuit Court should limit the definition of "controlled substance" to substances in the CSA.

The Second Circuit agreed. It began its analysis with the *Jerome* presumption. *See Jerome v. United States*, 318 U.S. at 104. 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." *Jerome*, 318 U.S. at 104; *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 "controlled substance" was not enough to indicate that the federal Guidelines should depend on State law.

It expressly limited the definition of "controlled substance" to those substances in the CSA:

> 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 form *Jerome* and its progeny.

Townsend, 897 F.3d at 71.

The Fifth, Ninth and Tenth Circuits have all held similarly. *See Gomez-Alvarez*, 781 F.3d 787, 793 (5th Cir. 2015); *Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012); *United States v.*

Abdeljawad, 794 F. App'x 745, 748 (10th Cir. 2019). As a result, for defendants in those circuits, if the elements of a State conviction prohibit substances that are excluded from the CSA, that conviction is not a "controlled substance offense" under U.S.S.G. § 4B1.2(b).

If Mr. McLain, with his actual record, had committed the exact offenses in these circuits, he would have faced a Guidelines range of 70-87 months, instead of 188-235 months.

2. The Fourth, Sixth, Eighth, and Eleventh Circuits Hold that U.S.S.G. § 4B1.2(b) Relies on State Law

In *Ward*, 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 involved a substance from the CSA. Instead, its analysis is simpler: Was the substance 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," for two reasons. First, because it reads the Guidelines to expressly include all substances that a State calls a "controlled substance." *Ward*, 972 F.3d at 374 (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." *Id.* at 371.

This approach "turns the categorical approach on its head," and in so doing eliminates it. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017) (applying categorical analysis of prior sex offense in immigration context). That is, if courts compare a federal enhancement for a State 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. The Sixth, Eighth, and Eleventh Circuits follow this approach. *See Henderson*, ____ F. 4th ____, 2021 WL 3817853, at *4; *United States v. Peraza*, 754 F. App'x 908, 910 (11th

Cir. 2018); S*mith*, 681 F. App'x 483, 489 (6th Cir. 2017). *But see United States v. Solomon*, 763 F. App'x 442, 447 (6th Cir. 2019) (creating an intra-circuit split by defining § 4B1.2(b) according to the CSA).

The Fourth Circuit also holds that the "plain meaning" of "controlled substance" in U.S.S.G. § 4B1.2(b) includes substances beyond the CSA. *Ward*, 972 F.3d at 372. For the Fourth Circuit, the *Jerome* presumption upon which *Townsend* relies is overcome by the Guidelines' plain meaning of "controlled substance." *Id*. at 373-74.

3. **The Seventh Circuit's Approach**

In *Ruth*, the Seventh Circuit rejected both the CSA controls approach and the State law controls approach. *Ruth*, 966 F.3d at 654. Instead, it found that "controlled substance" should be given it's "natural" or "generally understood" meaning, and then applied a definition from the Random House Dictionary. *Id* at 651-54.

Subsequent to *Ruth*, the Seventh Circuit decided *United States v. Wallace*, 991 F.3d 810 (7th Cir. 2021). The defendant in *Wallace* argued that *Ruth*'s "natural meaning" of "controlled substance" was still overbroad because the substance at issue was not behavior altering or addictive, which The Random House Dictionary, relied on in *Ruth*, required. *Wallace*, 991. F.3d at 817.

The Seventh Circuit rejected this argument because

> there is no reason to think *Ruth*'s quotation of a Random House Dictionary definition of "controlled substance" is the only possible way to say the natural meaning of the phrase. And there is no reason to think *Ruth*'s quotation establishes an exclusive list of technical alternative elements that must be satisfied. *Ruth* itself contains no such indications. We could have used a different dictionary in *Ruth* just as well.

Id.

Indeed, the Seventh Circuit is correct that there are numerous dictionary definitions it could have used:

> Controlled substance: "A drug that is illegal to possess or use without a doctor's prescription; specif., any type of drug whose manufacture, possession, and use is regulated by law, including a narcotic, a stimulant, or a hallucinogen." *Controlled Substance*, BLACK'S LAW DICTIONARY (11th ed. 2019).
>
> Controlled substance: "a drug that requires permission from a doctor to use." *Controlled Substance*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/controlled%20substance[https://perma.cc/RX4X-SV5G].
>
> Controlled substance: "a substance subject to the U.S. Controlled Substances Act (1970), which regulates the prescribing and dispensing, as well as the manufacturing, storage, sale, or distribution of substances assigned to five schedules according to their 1) potential for or evidence of abuse, 2) potential for psychic or physiologic dependence, 3) contribution to a public health risk, 4) harmful pharmacologic effect, or 5) role as a precursor of other controlled substances." *Controlled Substance*, STEDMANS MED. DICTIONARY 860170, Westlaw (database updated Nov. 2014).
>
> Controlled substance: "A drug, the usage or possession of which is regulated in the United States. A controlled substance is any drug or other substance, particularly the precursor materials from which drugs are made, that is placed on a schedule of controlled substances owing to its likelihood of abuse, addiction, and either its lack of a bona fide medical use or its risk of diversion from bona fide medical uses." STEPHEN SHEPPARD, WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION, CONTROLLED SUBSTANCE (2012).
>
> Controlled substance: "any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use are restricted by law." *Controlled Substance*, DICTIONARY.COM, https://www.dictionary.com/browse/controlled-substance [https://perma.cc/MU6G-X45A].
>
> Controlled substance: "an illegal drug." *Controlled Substance*, OXFORD ADVANCED AM. DICTIONARY, https://www.oxfordlearnersdictionaries.com/us/definition/american_english/controlled-substance [https://perma.cc/T7QY-NL9L].
>
> Controlled substance: "A drug or other substance that is tightly controlled by the government because it may be abused or cause addiction." *Controlled Substance*, NCI Dictionaries, NAT'L CANCER INST., https://www.cancer.gov/publications/dictionaries/cancer-drug [https://perma.cc/BTF2-LCBR].

> Controlled substance: "A drug or chemical substance whose possession and use are prohibited by or regulated under the federal Controlled Substances Act or an analogous state law." *Controlled Substance*, AM. HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011), Free Dictionary, https://www.thefreedictionary.com/controlled+substance [https://perma.cc/5X5P-HHGX].
>
> Controlled substance: "an addictive or behaviour-altering drug: restricted by law in respect of availability, possession, or use." *Controlled, adj.*, OXFORD ENGLISH DICTIONARY (3d ed. 2015), www.oed.com/view/Entry/40566 (last visited May 11, 2021).
>
> Controlled substance: "a drug regulated by the Federal Controlled Substances Acts, including opiates, depressants, stimulants, and hallucinogens." *Controlled Substance*, WEBSTER'S NEW WORLD COLL. DICTIONARY (4th ed. 2010), Collins, https://www.collinsdictionary.com/us/dictionary/english/controlled-substance [https://perma.cc/6NLU-X3Z4].
>
> Controlled substance: "a drug or chemical that the law does not allow you to make, own or use." *Controlled Substance*, MACMILLAN DICTIONARY, https://www.macmillandictionary.com/us/dictionary/american/controlled-substance [https://perma.cc/PN2K-BWDN].

As can be seen clearly by the dictionary definitions listed above, there are a whole host of "natural meanings" of "controlled substance." Admittedly, some of these definitions would still create a "fit" between or the marijuana/salvia at issue here and the "natural meaning" of "controlled substance." Others, however, most assuredly do not.

Indeed, two of these definitions provide that the "natural meaning" of "controlled substance" *is a substance proscribed by the federal CSA*. Had these been the definitions chosen by *Ruth* (or *Wallace* for that matter) as the "natural meaning" of "controlled substance," then Mr. McLain's Guidelines range would have been 70-87 months.

The point is that there is no "natural meaning" of "controlled substance" untethered to some law. *Wallace* at least implicitly recognizes this fact. The defendant in *Wallace* argued that positional isomers of cocaine are unlikely to be psychoactive, so they are unlikely to be behavior altering, which is a requirement of the dictionary definition used in *Ruth*. *Wallace*, 991 F.3d at 817.

Wallace then held that because Illinois law proscribed positional isomers of cocaine, "we should not speculate about whether they alter behavior." *Id*.

So which is it? Does a substance need to be behavior altering? *Ruth*, using the natural meaning of controlled substance as set forth in the Random House Dictionary says yes, while *Wallace* says no, because a different dictionary definition could have been used in *Ruth*. What about "addictive?" Like behavior altering, a substance being addictive appears to be a requirement of *Ruth*. Has *Wallace* abrogated this part of the "natural meaning" of controlled substance as well?[3]

Again, the point is that *Ruth* did not choose sides between the federal CSA controls and the State law controls approach. Instead, it chose a "natural meaning" approach, which as set forth above is unworkable. A "controlled substance" must be tethered to some law, not to an amorphous, subject to change, "natural meaning." That law should be federal law, as federal sentencing judgments should not depend on which definition, out of many such definitions, is used to define "controlled substance." Nor should federal defendants receive substantially larger sentences based on which definition is used in a particular case, or where they committed the underlying crime.

C. Neither the Sentencing Commission Nor the Circuit Courts Have Resolved the Split

The questions presented here arise frequently in Guidelines calculations, and neither courts, nor the Sentencing Commission, have fixed this problem for nearly a decade. For instance,

[3] Indeed, what about the necessity of the substance being a drug? States are certainly free to ban the manufacture or distribution of not just drugs, but also a variety of non-drug substances: alcohol and hazardous chemicals for instance. Indiana creates a host of crimes for the illegal manufacture, transportation, and distribution of alcohol and hazardous chemicals. Ind. Code §§ 7.1-5-1, *et. seq*.; 13-30-10-1.5. Alcohol and hazardous chemicals are definitely "controlled" and they are unquestionably "substances." If an individual unlawfully possessed and distributed alcohol or hazardous chemicals, is a prior State court conviction for that offense a "controlled substance" offense? Under *Ruth* it would appear not, because the offense must be a drug to qualify. But if *Wallace* can dispense with the requirement that the substance alters behavior, does the substance even need to be a drug?

according to *Ruth*, the Seventh Circuit first stated its approach while defining "counterfeit" according to its "natural meaning," in *Hudson* in 2010. *Ruth,* 966 F.3d at 652-54. The Ninth Circuit refused to follow *Hudson* in 2012, through *Leal-Vega,* which required a match between the predicate conviction and the CSA. *Leal-Vega,* 680 F.3d at 1166-67. The Sixth Circuit rejected *Leal-Vega* and *Townsend* in *Sheffey*. *Sheffey,* 818 F. App'x at 520. Then the Seventh Circuit stepped away from *Sheffey* in *Ruth* to recommit itself to *Hudson*. *Ruth,* 966 F.3d at 652-54. In *Ward,* the Fourth Circuit declined to fully adopt *Ruth*, when it defined "controlled substance" according to the State statute. *Ward,* 972 F.3d at 371. Finally, in *Henderson,* the Eighth Circuit "switched sides," at least from what the Seventh Circuit believed its position to be in *Sanchez-Garcia,* 642 F.3d at 661.

Importantly, the lower courts are not trying to reconcile the competing theories, as much as they are just picking sides. *Ruth*, *Ward* and *Sheffey* all recognize that their decisions are incompatible with *Townsend*. *Leal-Vega* 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), the Middle District of Pennsylvania published an opinion choosing *Townsend* over *Ruth*, and holding 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 CSA definition of "delivery" from 21 U.S.C. § 802(8)). The same result was reached in *United States v. Jamison,* 502 F.Supp.3d 923 at 929 (M.D. Pa. 2020) ("While we credit the Fourth Circuit's statutory interpretation in *Ward*, we remain unconvinced").

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

1. The Resolution of this Split Is Vitally Important for Consistent Criminal Practice

Resolution of the question presented in this case is vitally important to Mr. McLain, and the likelihood of huge sentencing inconsistencies illustrates exactly why it is important to many others. The split causes a nearly ten-year difference in Mr. McLain's Guidelines at the low end, and over a twelve-year difference at the high end. For individuals charged under 21 U.S.C. § 841(b)(1)(B) or (A), the disparity is even larger. 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 swing by up to **14**-levels (representing several years), depending on the number of "controlled substance offenses" a defendant has under § 4B1.2(b).

Even though they are advisory, the Guidelines "remain the foundation of federal sentencing decisions." *Hughes*, 138 S. Ct. at 1775; *United States v. Booker*, 543 U.S. 220, 264 (2005). A guidelines change "itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez,* 136 S. Ct. at 1345. 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 so drastically depending on the courthouse location.

When they change by location, these Guidelines undermine Congress' 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). Due to the § 4B1.2(b) split, two defendants, identical in every way, would receive drastically different sentences in different courtrooms, because they are walking in with drastically different "foundations" from their Guidelines. As Congress has commanded, an Indiana defendant, charged with the same crime and with a similar criminal history as a defendant in New York, should not face a decade of difference in his or her Guidelines calculation.

The question's importance is highlighted by how common it is. Since 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) affected as many as 8326[4] federal defendants in 2020, alone. *See* U.S. Sentencing Commission, *2020 Annual Report and Sourcebook of Federal Sentencing Statistics*, Tables 20 and 26 (showing total cases in 2020 with primary Sentencing Guidelines from §§ 2K2.1 (gun), 2K1.3 (explosives), and 4B1.1 (career offender)).

The split currently forces parties to litigate this matter every time it comes up, just to preserve the issue. Even if the Sentencing Commission or Congress act – something they have not done since the split became clear in 2012 – defendants and lower courts will continue operating in tremendous uncertainty while everyone waits. Lower courts need immediate direction.

D. This is an Excellent Case to Resolve the Circuit Split

1. The Questions Presented are Directly before this Court, Procedurally and Substantively

This case is an appropriate one to review, for several reasons. First, the issues were preserved in the lower courts. Mr. McLain recognized *Ruth* foreclosed his argument in the district court, maintaining his objection and preserving the issue for appeal. Mr. McLain disputed this provision and discussed various circuits' approaches in his briefs before the Seventh Circuit.

Second, there is no chance that the case will become moot. Mr. McLain's Guidelines must be accurately calculated at the time of sentencing. *Gall*, 552 U.S. at 49. The government, the district court, and Mr. McLain all depend on those Guidelines to frame the resentencing.

[4] The number is even higher when accounting for the fact that essentially 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). The U.S.S.G. § 4B1.2(b) definition of "controlled substance" also determines the applicable guideline range for some supervised release violations, driving the number even higher. *See* U.S.S.G. §§ 7B1.1(a)(1) and 7B1.4.

Third, the issues here are purely legal questions. The facts of the case are not in dispute. The overbreadth of Indiana's statute is straightforward on the face of the State statute and the CSA. The Seventh Circuit's opinion recognized as much. Pet. App. 2a. The split is not due to nuanced (or even any) factual differences. It is just 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, whose definition has to come from somewhere. In *Ruth*, the Seventh Circuit chose judges. In *Ward*, *Henderson*, *Sheffey*, and *Peraza*, the Fourth, Sixth, Eighth, and Eleventh Circuits chose State legislatures. In *Townsend*, *Leal-Vega*, *Gomez-Alvarez*, and *Abdeljawad*, the Second, Fifth, Ninth, and Tenth Circuits chose Congress. The Second, Fifth, Ninth, and Tenth Circuits are correct.

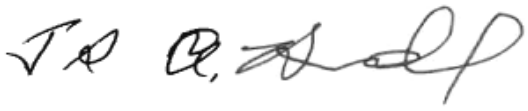
Title 18 U.S.C. § 3553(a)(6) is an unambiguous Congressional command to avoid unwarranted sentencing disparities. Rejecting the *Townsend* analysis undermines that imperative.

CONCLUSION

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

September 7, 2021

ROLAND McLAIN, Petitioner



Thomas A. Brodnik, Attorney No. 14508-49
McNeelyLaw LLP
143 W. Market Street, Suite 600-A
Indianapolis, IN 46204
Telephone: (317) 825-5110
Facsimile: (317) 825-5109
TBrodnik@McNeelylaw.com

IN THE

SUPREME COURT OF THE UNITED STATES

ROLAND McLAIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

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