No. _____

In the Supreme Court of the United States

DIANA BUSTAMANTE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to The United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do statutes criminalizing simulated controlled substances count as predicate "controlled substance offenses" for applicability of the career offender enhancement?

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JURISDICTION

On August 24, 2021, the Eighth Circuit Court of Appeals affirmed the judgment of the United States District Court for the Southern District of Iowa. On September 7, 2021, the Petitioner filed a Motion for En Banc Rehearing with the Eighth Circuit. On September 29, 2021, the Eighth Circuit denied en banc review and rehearing. Jurisdiction for the Eighth Circuit was pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. Jurisdiction for the United States Supreme Court is pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 3742(a)

(a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

21 U.S.C. § 802(6)

The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

21 U.S.C. § 802(44)

The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

21 U.S.C. § 841(a)(1)

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance

21 U.S.C. § 841(b)(1)(A)

In the case of a violation of subsection (a) of this section involving—

(i)

1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii)

5 kilograms or more of a mixture or substance containing a detectable amount of—

(I)

coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II)

cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III)

ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV)

any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii)

280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv)

100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v)

10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi)

400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii)

1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii)

50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be

less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the

greater of twice that authorized in accordance with the provisions of title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place

on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree…

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

United States Sentencing Guidelines § 4B1.1(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.

United States Sentencing Guidelines § 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, 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.

Iowa Code § 124.101(27) (2001)

"Simulated controlled substance" means a substance which is not a controlled substance but which is expressly represented to be a controlled substance, or a substance which is not a controlled substance but which is *impliedly represented* to be a controlled substance and which because of its nature, packaging, or appearance would lead a reasonable person to believe it to be a controlled substance.

Iowa Code § 124.401(1) (2001)

Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, or a simulated controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, or a simulated controlled substance.

Iowa Code § 124.401(l)(b)(7)

124.401 Prohibited acts — manufacture, delivery, possession — counterfeit substances, simulated controlled substances, imitation controlled substances — penalties.

1. Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance, or to act with, enter into a common scheme or design with, or conspire with one

or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance.

b. Violation of this subsection with respect to the following controlled substances, counterfeit substances, simulated controlled substances, or imitation controlled substances is a class "B" felony, and in addition to the provisions of section 902.9, subsection 1, paragraph "b", shall be punished by a fine of not less than five thousand dollars nor more than one hundred thousand dollars:

(7) More than five grams but not more than five kilograms of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine, or any compound, mixture, or preparation which contains any quantity or detectable amount of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine.

Iowa Code § 124.401(1)(c)(1)

124.401 Prohibited acts — manufacture, delivery, possession — counterfeit substances, simulated controlled substances, imitation controlled substances — penalties.

1. Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance.

c. Violation of this subsection with respect to the following controlled substances, counterfeit substances, simulated controlled substances, or imitation controlled substances is a class "C" felony, and in addition to the provisions of section 902.9, subsection 1, paragraph "d", shall be punished by a fine of not less than one thousand dollars nor more than fifty thousand dollars:

(1) One hundred grams or less of a mixture or substance containing a detectable amount of heroin.

Iowa Code § 124.401(1)(c)(6)

124.401 Prohibited acts — manufacture, delivery, possession — counterfeit substances, simulated controlled substances, imitation controlled substances — penalties.

1. Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance.

c. Violation of this subsection with respect to the following controlled substances, counterfeit substances, simulated controlled substances, or imitation controlled substances is a class "C" felony, and in addition to the provisions of section 902.9, subsection 1, paragraph "d", shall be punished by a fine of not less than one thousand dollars nor more than fifty thousand dollars:

(6) Five grams or less of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine, or any compound, mixture, or preparation which contains any quantity or detectable amount of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine.

Tex. Health & Safety Code § 481.113(a)

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 2 or 2-A.

(b) An offense under Subsection (a) is a state jail felony if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, less than one gram.

(c) An offense under Subsection (a) is a felony of the second degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, one gram or more but less than four grams.

(d) An offense under Subsection (a) is a felony of the first degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, four grams or more but less than 400 grams.

(e) An offense under Subsection (a) is punishable by imprisonment in the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

STATEMENT OF THE CASE

Ms. Bustamante pled guilty to Possession with Intent to Distribute 50 Grams or More of Methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B). The presentence investigation report ("PSIR") prepared in this case indicated that Ms. Bustamante was subject to the career offender enhancement because she had three prior felony convictions for a controlled substance offense under Iowa Code § 124.401. In 2002, Ms. Bustamante was convicted of Conspiracy to Commit a Felony in violation of Iowa Code § 124.401(1) (2001), a Class D Felony in the Iowa District Court for Story County; Dkt. # FECR031717. That statute made it:

> unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, or a simulated controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, or a simulated controlled substance.

Iowa Code § 124.401(1) (2001).

In 2007, Ms. Bustamante was also convicted of Possession with Intent to Deliver Methamphetamine in violation of Iowa Code § 124.401(1)(c)(6) (2007), a Class C Felony, and Possession with Intent to Delivery Heroin in violation of Iowa Code § 124.401(1)(c)(1) (2007), a Class C Felony in the Iowa District Court for Story County; Dkt. # FECR039448. Those statutes were substantially similar to the 2002 version.

In 2014, Ms. Bustamante was convicted of Possession of Methamphetamine with Intent to Deliver in violation of Iowa Code § 124.401(1)(b)(7) (2014), a Class B

Felony in the Iowa District Court for Marshall County; Dkt. # FECR084529. That statute was substantially similar to the 2002 version.

The district court found these prior convictions qualified Ms. Bustamante as a career offender. With the enhancement, Ms. Bustamante's guideline range was between 262 and 327 months. Ultimately, the district court sentenced Ms. Bustamante to 200 months imprisonment.

The Eighth Circuit Court of Appeals affirmed the district court decision, finding that Ms. Bustamante's prior felony convictions qualified as controlled substance offenses sufficient for the career offender enhancement on the reasoning that the predicate offenses "d[id] not 'criminalize[] more than the guidelines definition of [a] controlled substance offense.'" The Court leaned on prior Eighth Circuit precedent that held "counterfeit substances" equated to "simulated controlled substances" under § 124.401 and therefore was not broader than the guideline definition. Pursuant to Supreme Court Rule 10(c), the Eighth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." The Eighth Circuit's continued misapplication of this Court's categorical approach yearns to be corrected.

This petition follows.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. THE QUESTION PRESENTED REPRESENTS AN IMPASSABLE CIRCUIT SPLIT THAT ONLY THE SUPREME COURT CAN RESOLVE

Ms. Bustamante was sentenced as a career offender under the Federal Guidelines because the district court found she had at least two prior felony

convictions of a "controlled substance offense." USSG § 4B1.1(a)(3). The Guidelines define "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.

§ 4B1.2(b). The circuit courts have diverged considerably in interpreting this definition and applying the categorical approach in this context.

A. Categorical Approach

When the Government alleges that a state conviction qualifies as a controlled substance offense sufficient for the career offender enhancement under § 4B1.1(a), this Court has directed courts to use the categorical approach. The Eighth Circuit has acknowledged this direction: "[c]ourts apply a categorical approach to determine whether a prior conviction is a control substance offense," but has failed to put it into practice. United States v. Thomas, 886 F.3d 1274, 1275 (8th Cir. 2018).

Under the categorical approach, when assessing whether an offense qualifies as a controlled substance offense, "[c]ourts look to 'how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" Id. (quoting Johnson v. United States, 576 U.S. 591, 596 (2015)). The court must "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the generic crime." Mahn v. AG of the United States, 767 F.3d 170, 174 (3d Cir. 2014).

"Applying the categorical approach, a court considers not the facts of an individual's conduct, but rather whether the offense of conviction necessarily or categorically triggers a consequence under federal law." Pereida v. Wilkinson, 141 S. Ct. 754, 756 (2021). Because the specific facts of the underlying conviction are not to be considered, "[c]ourts 'must presume that the conviction rested upon nothing more than the least of the acts proscribed by the state law and then determine whether even those acts are encompassed by the generic federal offense.'" Thomas, 886 F.3d at 1275 (quoting United States v. Maldonado, 864 F.3d 893, 897 (8th Cir. 2017)).

If the underlying offense statute is broader than the guideline definition, encompassing both controlled substance offenses and crimes that are not controlled substance offenses, the underlying offense does not qualify as a predicate felony for the career offender enhancement, despite the defendant's actual conduct.

B. Modified Categorical Approach

"If a state statute is broader than the generic federal definition, we must determine whether the statute is 'divisible,' meaning that it 'comprises multiple, alternative versions of the crime.'" Id. (quoting Descamps v. United States, 570 U.S. 254, 262 (2013)). "If a statute is divisible, courts may apply the 'modified categorical approach.'" Id at 897-98 (quoting Mathis v. United States, 136 S. Ct. 2243, 2249 (2016)). A divisible statute "lists multiple elements disjunctively," rather than "enumerat[ing] various factual means of committing a single element." Mathis, 136 S. Ct. at 2249.

In order to be able to compare the underlying offense statute with the generic offense when the underlying offense statue is divisible, the court must determine what specific facts the defendant was convicted under. Maldonado, 864 F.3d at 898. To do so, the court is permitted to "look at a limited class of documents from the record of a prior conviction." Mathis, 136 S. Ct. at 2245-46. "The modified approach serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." Descamps, 570 U.S. at 260.

C. The Second, Fifth, and Ninth Circuits Limit "Controlled Substance Offenses" to Those Specifically Designated in the Controlled Substances Act

The circuit courts vary considerably in applying the categorical approach when determining what constitutes a controlled substance offense for purposes of the career offender enhancement. On one side, the Second, Fifth, and Ninth circuits have held that only convictions for those substances specifically listed in the Controlled Substances Act (CSA) can qualify as prior convictions for purposes of the career offender enhancement. On the other side, the Fourth, Seventh, Eighth, and Tenth circuits view the text of the career offender enhancement more expansively and rarely find that a state statute is overbroad in this respect. As will be seen, this schism is in desperate need of reconciliation to ensure equal outcomes across all jurisdictions.

For example, in U.S. v Leal-Vega, 680 F.3d 1160 (9th Cir. 2012), the Ninth Circuit limited controlled substance offenses to convictions only for those substances

that are listed in the federal statute. In that case, the Government argued that because the term "controlled substances" in the sentencing guidelines is not explicitly linked to the definition found in the Controlled Substances Act, the list of substances enumerated in the CSA should not be controlling. Leal-Vega, at 1165. The Court rejected this argument, referencing the Supreme Court's decision in United States v. Taylor, which "aspires to 'a single national' definition of a given crime under its categorical approach." Id. The Court found that the goal of promoting uniform application of the Sentencing Guidelines outweighed any ambiguity in the statute and held explicitly that the Guidelines definition of "controlled substance" refers to those explicitly listed in the CSA. Id. at 1167.

The Fifth Circuit relied heavily on the Ninth Circuit's reasoning in U.S. v. Gomez-Alvarez, 781 F.3d 787 (5th Cir. 2015). The Court explicitly adopted the reasoning in Leal-Vega and concluded, "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." Gomez-Alvarez, 781 F.3d at 794.

In U.S. v. Townsend, 897 F. 3d 66 (2d Cir. 2018), the Second Circuit echoed the holdings of the Fifth and Ninth Circuits. Noting the presumption that federal standards apply to the sentencing guidelines, the Court reasoned, "if the Sentencing Commission wanted 'controlled substance' to include substances controlled under only state law to qualify, then it should have said so." Townsend, 897 F.3d at 70. The Court conceded that there was a degree of ambiguity in the text of § 4B1.2(b), as it refers to "[a]n offense under *federal* or *state law*." Id. at 69. However, the Court

found that this ambiguity could be resolved by looking at the plain language of the statute and held that while "a 'controlled substance offense' includes an *offense* 'under federal or state law,' that does not mean that the *substance* at issue may be controlled under federal or state law." Id. at 70. In interpreting the application of federal guidelines, the ambiguity must be resolved according to federal, not state, standards. Id. at 70-71.

D. The Fourth, Seventh, and Tenth Circuits Take an Expansive View of the Definition of "Controlled Substance"

In United States v. Ward, 972 F.3d 364 (4th Cir. 2020), the Fourth Circuit declined to limit "controlled substance offenses" to convictions only for those substances listed in the CSA. The Court pointed to the plain language of §4B1.2(b) and, contrary to the Second Circuit's reasoning in Townsend, found that the phrase "under federal or state law" encompassed convictions for any substance controlled by state statute. Ward, 972 F.3d at 372. The Court found it significant that § 4B1.2 fails to explicitly reference the CSA when other sections of the Guidelines refer to definitions contained in other federal statutes. Id. at 374. In the absence of an explicit definition, the ordinary meaning of the term is controlling. Id.

The Seventh Circuit employed similar reasoning in U.S. v. Ruth, 966 F.3d 642 (7th Cir. 2020). Finding it significant that the Guidelines fail to include a specific reference to the CSA, the Court held that there is "no textual basis to engraft the federal Controlled Substances Act's definition of 'controlled substance' into the career-offender guideline." Ruth, 966 F.3d at 654. the Court used a dictionary definition of the term "controlled substance" to guide its reasoning. Id. As that

definition of the term amounted to "any of a category of behavior-altering or addictive drugs," the Court rejected Ruth's argument that the state statute was overbroad and found that the state-level offense for which Ruth was convicted was easily encompassed by the text of § 4B1.2. Id.

In U.S. v. Jones, 15 F.4th 1288 (10th Cir. 2021), the Tenth Circuit reached a similar conclusion. The absence of any explicit reference to the CSA figured prominently in its analysis. Jones, 15 F.4th at 1292. "The Guidelines explicitly cross-reference the CSA in other provisions…But no such cross-reference suggests we use the CSA definition of 'controlled substance' or the federal drug schedules in applying § 4B1.2(b). Id. at 1293. The Court failed to consider the nuances of the Second Circuit's textual analysis in Townsend and simply concluded that because the text refers to an offense "under federal or state law," all that is needed to trigger the career offender enhancement is a violation of state law. Id. at 1292.

E. The Eighth Circuit's Contradictory Precedent

As if to emphasize the need for the Supreme Court's resolution of this issue, the Eighth Circuit has issued contradictory decisions in this context. Indeed, while the Second Circuit in Townsend includes the Eighth Circuit among those that agree with its interpretation, so too does the Tenth Circuit in Jones. See Townsend, 897 F. 3d at 72; Jones, 15 F.4th at 1292. In U.S. v. Sanchez-Garcia, 642 F.3d 658 (8th Cir. 2011), the Court accepted Sanchez-Garcia's contention that the definition of "controlled substance" found in the CSA was controlling. Sanchez-Garcia, 642 F.3d at 661. Employing the categorical approach, the Court found that the state statute

was overinclusive (although it ultimately held that the enhancement was proper under the modified categorical approach). Id. at 662.

However, more recently, in U.S. v. Henderson, 11 F.4th 713 (8th Cir. 2021), the Eight Circuit reversed course. The Court asserted that in Sanchez-Garcia it made no ruling on the precise issue of what constitutes a "controlled substance offense" for purposes of the career offender Guidelines; it merely accepted the appellant's framing for argument's sake before ultimately affirming the sentencing enhancement. Henderson, 11 F.4th at 717-18. The Court stressed the importance of textual analysis and, grounding its reasoning in Ward and Ruth, found that "[t]here is no textual basis to graft a federal law limitation onto a career-offender guideline that specifically includes in its definition of controlled substance offense, 'an offense under…state law.'" Id. at 718-19.

II. THE DECISION AND EIGHTH CIRCUIT PRECEDENT IS INCORRECT

A. Ms. Bustamante's Prior Convictions Do Not Qualify as "Controlled Substance Offenses" Sufficient for the Career Offender Enhancement Under the Categorical Approach

When comparing all of Ms. Bustamante's prior convictions to the USSG § 4B1.2(b) definition of "controlled substance offenses," which include both controlled substances and counterfeit substances, the issue becomes readily apparent: the Iowa statutes criminalize the manufacture, delivery, and possession of not just controlled substances and counterfeit substances, but additionally, *simulated* controlled substances.

In United States v. Brown, 638 F.3d 816, 818 (8th Cir. 2011), the Eighth Circuit found that simulated controlled substances under Iowa law equated to counterfeit substances under the guidelines based upon the plain meaning of counterfeit, that being, "made in imitation" and "with intent to deceive." While that decision was controlling law in the Eighth Circuit at the time, this Court's decision in Mathis five years later required the Eighth Circuit to adjust its analysis. It has failed to do so.

Under Mathis, a crime counts as a "controlled substance offense" if its elements "are the same as, or narrower than, those of the generic offense." 136 S. Ct. at 2248. Iowa law at the time of Ms. Bustamante's prior convictions defined a "simulated controlled substance" as:

> a substance which is not a controlled substance but which is expressly represented to be a controlled substance, or a substance which is not a controlled substance but which is *impliedly represented* to be a controlled substance and which because of its nature, packaging, or appearance would lead a reasonable person to believe it to be a controlled substance.

Iowa Code § 124.101(27) (2001). The definition of simulated controlled substance under Iowa law plainly includes an additional means of satisfaction that must not be ignored in light of this Court's Mathis decision. A simulated controlled substance under Iowa law may be *impliedly represented* to be a controlled substance, as an alternative to it being expressly represented. The "impliedly represented" language in § 124.101(27) creates an alternative means to satisfy a single element under Mathis. An impliedly represented controlled substance requires no element of "intent to deceive" under the guideline definition of counterfeit controlled

substances. Specifically, a simulated controlled substance may be impliedly represented because "its nature, packaging, or appearance would lead a reasonable person to believe it to be a controlled substance." § 124.101(27). This reasonable person's standard in no way reflects the intent of the deliverer to deceive the recipient. Rather, this means focuses on the objective view of the recipient as to what they receive, while, at the most, *express representation* necessarily reflects the deliverer's intent to mislead the recipient into believing they are getting a controlled substance.

The Eighth Circuit has previously ruled that Iowa's simulated controlled substance offense does not violate the federal Controlled Substances Act in other contexts. For the purpose of the ACCA, the Eighth Circuit found that prior convictions for delivery of a simulated controlled substance under Iowa law were not convictions for a "felony drug offense" under 21 U.S.C. §§ 841(b)(1)(A) and § 802(44). United States v. Brown, 598 F.3d 1013, 1015 (8th Cir. 2010). 21 U.S.C. § 802(44) defines a felony drug offense as an "offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." The Eighth Circuit made several considerations that led them to conclude that an offense involving only simulated controlled substances was "not an offense that prohibits or restricts conduct relating to narcotic drugs within the meaning of § 802(44)." Id. While there was categorical overlap in purpose between the Iowa statute and the federal

Controlled Substances Act, "a person may violate the Iowa statute without ever possessing, distributing, or using a controlled substance and without having any involvement whatsoever with an actual narcotic drug." Id. at 1017-18. The court therefore concluded that the convictions for delivering simulated controlled substances did not qualify as "felony drug offenses" within the meaning of 21 U.S.C. § 802(44). Id. at 1018. The statutory language is concerned with the regulation of actual controlled substances. Id. at 1016. Congress has never "regulated simulated or look-alike-controlled substances." Id.

Recently, in Vetcher v. Barr, 953 F.3d 361, 367 (5th Cir. 2020), the Fifth Circuit employed the categorical approach in its analysis of a Texas statute in comparison with the Immigration and Nationality Act ("INA") which permitted the deportation of "[a]ny alien who . . . ha[d] been convicted of a violation of . . . any law . . . of a State . . . related to a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. § 802))." The Controlled Substance Act defined a controlled substance as "a drug or other substance . . . included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C. § 802(6). The Texas statute made it unlawful for a person to "knowingly manufacture[], deliver[], or possess[] with intent to deliver a controlled substance listed in Penalty Group 2 or 2-A." Tex. Health & Safety Code § 481.113(a). The court determined "a controlled substance listed in Penalty Group 2 or 2-A" was an element of the offense subject to various different means of satisfaction. Vetcher, 953 F.3d at 367. After comparing the two definitions, the court found the Texas statute to be "facially broader than its

federal analog . . . [because] there [were] at least six substances listed in Penalty Group 2 that do not appear on any federal schedule . . . [and] 43 substances [in Penalty Group 2-A] that [were] not federally controlled." Id.; See also Alejos-Perez v. Garland, 991 F.3d 642 (5th Cir. 2021) (finding "Penalty Group 2-A is broader than the federal statute, and 'there is no categorical match' between Penalty Group 2-A and its federal counterpart" because "Penalty Group 2-A criminalizes possession of at least one substance – naphthoylindane – that the federal statute doesn't mention.").

For similar reasons, the underlying offense statute including simulated controlled substances in addition to controlled substances and counterfeit substances "cover[s] a greater swath of conduct than the elements of the relevant" generic guideline definition of controlled substance offenses. Mathis, 136 S. Ct. at 2251. Simulated controlled substances therefore do not categorically match the definition of counterfeit substances and Ms. Bustamante's prior convictions cannot qualify as controlled substance offenses sufficient for the career offender enhancement.

The prior 8th Circuit decisions in United States v. Ford, 888 F.3d 922, 930 (8th Cir. 2018), United States v. Castellanos Muratella, 956 F. 3d 541 (8th Cir. 2020), and United States v. Brown, 638 F.3d 816, 819 (8th Cir. 2011) (Brown II) are of the same progeny of cases that have incorrectly decided issues regarding Iowa's controlled substance statutes in the circuit.

B. Ms. Bustamante's Prior Convictions Do Not Qualify as "Controlled Substance Offenses" Sufficient for the Career Offender Enhancement Under the Modified Categorical Approach

The analysis ends after application of the categorical approach unless the statue is divisible. The Iowa statute is not divisible because it lists alternative factual means of committing a single element rather than alternative versions of the crime. See id. at 2249. Under the statute, the substance can be methamphetamine, counterfeit methamphetamine, or simulated methamphetamine. Iowa Code § 124.401(1). The court's analysis should end at the categorical approach.

In United States v. Ford, 888 F.3d 922 (8th Cir. 2018), the Eighth Circuit incorrectly concluded that the Iowa statute was divisible. The court reasoned that "different drug types and quantities carry different punishments." Id. at 930. However, the *particular substance* under the Iowa Controlled Substance Act is not an element of the offense. Rather, the statute is violated "regardless of whether the substance possessed, delivered, or manufactured is a controlled substance, a counterfeit substance, or a simulated controlled substance." State v. Meyer, 705 N.W.2d 676, 678 (Iowa Ct. App. 2005). Much like in Mathis when the court said that a "building, structure, or land or air or water vehicle" were various means that referred to one single locational element, "controlled substance or counterfeit substance or simulated controlled substance" are all means that refer to one "substance" element. See Mathis, 136 S. Ct. at 2250. The disjunctive "or" makes clear that each substance is an alternate means for satisfying one element.

Ford is correct that the punishment changes depending on whether the substance is, for example, marijuana or methamphetamine. It also changes depending on the amount of controlled substance. But it never changes based off of whether the substance involved is a controlled substance, a counterfeit substance, or a simulated controlled substance. That element is what makes the statutes divisible, and not any others. The Ford panel should not have extended their finding that statute was divisible so far.

Moreover, Iowa law has never required unanimous verdicts on every single theory or means of committing the offense; they only require the jury to agree that they have found alternative ways to commit the crime that are consistent with and not repugnant to each other. State v. Bratthauer, 354 N.W.2d 774, 776 (Iowa 1984). "When a jury is not required to agree on the way that a particular requirement of an offense is met, the way of satisfying that requirement is a means of committing an offense not an element of the offense." United States v. Hinkle, 832 F.3d 569, 575 (5th Cir. 2016). If 6 jurors found that Ms. Bustamante was trafficking in an actual controlled substance, and 6 jurors found that Ms. Bustamante was trafficking in a simulated controlled substance, it would be immaterial. The jury could find her guilty even if they disagreed over the different manner in which she was guilty.

C. There is a Realistic Probability that a Defendant Would Be Convicted Under the Iowa Statute for Conduct that Falls Outside the USSG Generic Definition

To show that a state statute is broader than its federal counterpart, Ms. Bustamante must also show "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic

definition of a crime." Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) (quoting Gonzalez v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)). "To do so, the detainee must 'point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner." Vetcher, 953 F.3d at 367 (quoting Vazquez v. Sessions, 885 F.3d 862, 873 (5th Cir. 2018)).

There is a realistic probability and not just a theoretical possibility that Iowa would apply its statute to conduct that falls outside the generic definition of a crime. See Moncrieffe, 569 U.S. at 191. The defendant's prior convictions in Brown, 598 F.3d at 1014 confirm that Iowa prosecutes and convicts persons for trafficking in simulated controlled substances and not just controlled substances under the federal Controlled Substances Act. In addition, in State v. Leiss, No. 09-1247, 2010 WL 2757200, at *1 (Iowa Ct. App. July 14, 2010) the defendant was convicted of violating the statute for possessing a simulated controlled substance (in a slightly different, later version of the statute).

D. The Eighth Circuit Erred When It Abided By Stare Decisis

United States v. Castellanos Muratella, 956 F. 3d 541 (8th Cir. 2020) repeats the mistake of Brown, 638 F.3d 816 (8th Cir. 2011), and was wrongly decided because it adhered to incorrect precedent. Stare decisis is entitled to great weight and the court should ordinarily adhere to stare decisis. United States v. State of Minnesota, 113 F.2d 770, 774 (8th Cir. 1940). However, the court should not adhere to a decision if the reasons for that decision no longer exist, are clearly erroneous, or are manifestly wrong. Id. Respect for precedent has qualifications and limitations.

Id. It is more important that the court's decision be correct than that the court's decision be in harmony with its previous decisions. Id. Stare decisis is subordinate to legal reason. Id. The court should depart from stare decisis when necessary to avoid the perpetuation of error. Id. at 774-75.

III. THIS CASE DECISIVELY RESOLVES THE CIRCUIT SPLIT

This case neatly represents the split dividing the Second, Fifth, and Ninth Circuits form the Fourth, Seventh, and Tenth. United States v. Townsend, 897 F.3d 66, 70-71 (2d Cir. 2018); United States v. Gomez-Alvarez, 781 F.3d 787, 703-94 (5th Cir. 2015); and United States v. Leal-Vega, 680 F.3d 1160, 1167 (9th Cir. 2012), all agree that the term "controlled substance" in the Sentencing Guidelines refers to the definition of that term found in the CSA. By contrast, United States v. Ward, 972 F.3d 364, 372 (4th Cir. 2020); United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020); and U.S. v. Jones, 15 F.4th 1288 (10th Cir. 2021), all hold that the absence of any reference to the CSA in the text of § 4B1.2 means that the ordinary meaning of the term is controlling. The Eighth Circuit, in U.S. v. Sanchez-Garcia, 642 F.3d 658 (8th Cir. 2011), and U.S. v. Henderson, 11 F.4th 713 (8th Cir. 2021), has come down on both sides of the issue. Ms. Bustamante has raised this issue at every possible opportunity, and it is dispositive here. This case is therefore a suitable vehicle to resolve the circuit split.

CONCLUSION

Ms. Bustamante respectfully requests that the Supreme Court grant his petition for a writ of certiorari for all the reasons stated herein.

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