NO. _____
October Term, 2021

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK LaJUAN JONES, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(a) The Question Presented for Review Expressed in the Terms and Circumstances of the Case.

Does a state definition of "controlled substance" control a federal sentencing enhancement under the Sentencing Guidelines, when the state lists substances that are not federally controlled?

(b) List of all Parties to the Proceeding

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) Table of Contents and Table of Authorities

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(d) Reference to the Official and Unofficial Reports of any Opinions

The order and judgment of the United States Court of Appeals for the Tenth Circuit is published. *United States v. Jones*, No. 20-6112, 15 F.4th 1288 (10th Cir. 2021).

(e) Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.

(i) Date of judgment sought to be reviewed.

The published Order and Judgment of the Tenth Circuit of which review is sought was filed October 19, 2021;

(ii) Date of any order respecting rehearing.

The Order denying Appellant/Petitioner's Petition for Rehearing and Petition for Rehearing En Banc was filed on May 9, 2022;

(iii) Cross Petition.

Not applicable;

(iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, Section 1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

(v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

(f) The Constitutional Provisions, Statutes and Rules which the Case Involves.

(1) Constitutional Provisions:

None.

(2) Statutes Involved: 18 U.S.C. § 994(h):

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and--

(1) has been convicted of a felony that is--

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is--

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

(3) Rules Involved:

None.

(4) Other: United States Sentencing Guideline § 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, 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.

(g) Concise Statement of the Case.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of the judgment entered by a United States Court of Appeals. The jurisdiction of the District Court was invoked pursuant Title 18, United States Code, Section 3231. Review in the Court of Appeals was sought under Title 28, United States Code, Section 1291. The Court of Appeals denied Mr. Jones's appeal on October 19, 2021 and denied his Petition for Rehearing on May 9, 2022. Review in this Court is sought under Title 28, United States Code, Section 1254. This petition is timely filed pursuant to Supreme Court Rule 13.1.

Statement of the Case

On November 6, 2019, a federal grand jury indicted Mr. Jones on three counts, including one count of possessing a firearm after former conviction of a felony in violation of 18 U.S.C. § 922(g)(1). Mr. Jones entered into a plea agreement in which

he agreed to plead guilty to the felon in possession count and the United States agreed to dismiss the remaining two counts.

The United States Probation Office filed a Presentence Investigation Report ("PSR") on May 27, 2020. Based on his prior Oklahoma conviction for possession of a controlled substance with intent to distribute, the PSR calculated Mr. Jones' base offense level at 20 pursuant to USSG § 2K2.1(a)(4)(A). After application of a four level enhancement for use in connection with a felony offense, and a reduction of three levels for acceptance of responsibility pursuant to USSG §§ 3E1.1(a)&(b), Mr. Jones' total offense level was calculated at 21. When combined with a criminal history category of V, the PSR concluded his advisory guideline range was 70-87 months.

A Second Revised PSR was prepared on July 15, 2020 following the Tenth Circuit Court's opinion in *United States v. Cantu*, 964 F.3d 924 (10th Cir. 2020). In this report, the United States Probation Office determined *Cantu* applied to the definition of a controlled substance offense in USSG § 4B1.2(b) and therefore Mr. Jones' base offense level was 14 pursuant to USSG § 2K1.2(a)(6)(A). After the same enhancements and reductions, Mr. Jones' advisory guideline range was recalculated as 37-46 months based on a total offense level of 15 and a criminal

history category of V. The parties disputed whether Mr. Jones' prior conviction was a controlled substance offense.

At the sentencing hearing, the parties reiterated their respective positions regarding whether *Cantu* altered the definition of controlled substance offense. The Court determined his prior conviction was a controlled substance offense:

> Application Note 1 [to USSG § 2K2.1] refers to Guideline Section 4B1.2(b) and its Application Note 1 from the meaning of "controlled substance offense." The definition includes a state law offense punishable by more than one year in prison for possession of a controlled substance with intent to distribute. The defendant received such a conviction, as detailed in paragraph 33 of the presentence investigation report.
>
> Thus, based on plain reading of the applicable guidelines, the Court finds the objection – the objections should be sustained. The government is not – excuse me – the Court is not persuaded that the case of *United States vs. Cantu*, 2020 [WL] 3636331, [(10th Cir. July 6, 2020)], controls.
>
> The Court finds more applicable the reasoning in *United States vs. Thomas*, 939 F.3d 1121, [(10th Cir. 2019)].

With that finding, the applicable advisory guideline range was 70 to 87 months. The court granted Mr. Jones a downward variance based upon, in part, his drug dependence. Mr. Jones was sentenced to a term of 60 months imprisonment, followed by three years of supervised release. Mr. Jones appealed. The United States agreed not to seek enforcement of the appellate waiver on this issue. (ROA, Vol. I, at 39).

On direct appeal, the Tenth Circuit joined one side of a nationwide circuit split on this issue. The Tenth Circuit held the district court's plain-language analysis of Guideline Section 4B1.2(b) was appropriate and affirmed the sentence. To arrive at this conclusion, the Court discounted the presumption against making the application of federal law dependent on state law in *Jerome v. United States*, 318 U.S. 101, 104 (1943). *Jones*, 15 F.4th at 1292. It tethered its holding to the term "offense under federal or state law" in USSG § 4B1.2(b) as modifying each term, including "controlled substance." *Id.*

While acknowledging the deepening circuit split on this issue, the panel joined the Fourth, Seventh, and Eighth Circuits, and abandoned the approach in the Second, Ninth, and Fifth Circuits. *Id.* at 1291-92. However, the opinion did not define the term "controlled substance," instead relying on whether a state court conviction is considered by the state court to involve a controlled substance. Mr. Jones petitioned the Circuit for rehearing and was denied. Circuit Judge Rossman dissented from the denial of rehearing en banc. *United States v. Jones*, 32 F.4th 1290 (Mem) (10th Cir. 2022).

(h) Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.

The Tenth Circuit's decision below has further entrenched a circuit split that usurps federal sentencing law uniformity. The Supreme Court's intervention is

necessary to resolve the important question of federal law and ensure consistency throughout.

Four circuits hold that the term "controlled substance" in the sentencing guidelines refers to a substance defined as a "controlled substance" under federal law. Other circuits, including the Tenth Circuit in the decision below, hold that the term refers to any substance controlled under federal law or state law, despite the difference between the states and the federal definition. Review is imperative to resolve the circuit split, particularly in light of the inaction of the United States Sentencing Commission.

ARGUMENT

I. One set of Courts of Appeals correctly use federal law to supply the definition to a federal sentencing enhancement

The Second, Fifth, and Ninth Circuits hold that "controlled substance" in the sentencing guidelines refers to the federal schedule. In *United States v. Townsend*, the Second Circuit concluded "controlled substance" from USSG § 4B1.2(b) "refers exclusively to substances controlled by the [Controlled Substances Act[.]" 897 F.3d 66, 68 (2d Cir. 2018). Townsend's appeal involved the identical issue presented in this case – whether a prior state drug offense qualified as a controlled substance offense so as to enhance the applicable base offense level in USSG § 2K2.1. In particular, the Court reasoned that because of the presumption that federal standards

apply to the guidelines, the absence of a specific directive to state law clearly indicated the federal schedule controlled. *Id.* at 70. *Townsend* drew upon the *Jerome* presumption, reasoning that "the application of a federal law does not depend on state law unless Congress plainly indicates otherwise." *Id.* at 71. (citing *Jerome v. United States*, 318 U.S. 101 (1943)).

Similarly, the Ninth Circuit held in *United States v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012) the term "controlled substance" in the earlier version of USSG § 2L1.2 refers to the CSA. In *Leal-Vega*, the defendant contested whether his prior California drug conviction qualified as a "drug trafficking offense" under USSG § 2L1.2(b)(1)(A). As the Court applied the categorical approach from *Taylor v. United States*, 495 U.S. 575 (1990), it first had to determine the definition for "controlled substance" within the drug trafficking offense provision, which similarly lacked an express reference to either state law or the CSA. *Leal-Vega* acknowledged the importance of national uniformity "independent of the labels employed by various states' criminal codes. *Id.* at 1166 (internal quotation and alteration omitted). *See also United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021) (holding that the definition of controlled substance offense is limited to substances under the CSA); *United States v. Crocco*, 15 F.4th 20 (1st Cir. 2021); *United States v. Gomez-Alvarez*, 781 F.3d 787 (5th Cir. 2015).

II. Some circuits rely on state law to supply the definition to a federal sentencing enhancement

The Tenth, Fourth, Seventh, Eighth, and Eleventh Circuits determined controlled substances were not limited to the federal definition. *See United States v. Jones*, 15 F.4th 1288 (10th Cir. 2021); *United States v. Ward*, 972 F.3d 364 (4th Cir. 2020); *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020); *United States v. Henderson*, 11 F.4th 713 (8th Cir. 2021); and *United States v. Howard*, 767 Fed.Appx. 779 (11th Cir. 2019) (unpublished). In an unpublished decision, the Sixth Circuit summarily concluded "controlled substance offense" did not require the underlying substance to be listed on the CSA. *United States v. Smith*, 681 Fed.Appx. 483, 489 (6th Cir. 2017) (unpublished).[1]

Ward based its reasoning almost entirely upon its conclusion that the text of USSG §4B1.2(b) is clear. *Ward*, 972 F.3d at 372 ("Ward's argument ignores the plain meaning of § 4B1.2(b)."). As the deepening circuit split indicates, the language is anything but clear. *Ward* relied upon the earlier case of *United States v. Mills*, 485 F.3d 219 (4th Cir. 2007), in which the Fourth Circuit determined the definition of "counterfeit substances" was not limited to the federal definition. The reliance

[1] The Sixth Circuit is internally conflicted on this particular issue. *See United States v. Pittman*, 736 Fed.Appx. 551, 553 (6th Cir. 2018) (unpublished). In *Pittman*, a different Sixth Circuit panel relied on the CSA for the definition of controlled substance. *Pittman*, 736 F.App'x at 553. *See also United States v. Solomon*, 763 Fed.Appx. 442, 447 (6th Cir. 2019) (unpublished) (discussing conflict between Smith and Pittman).

on earlier case law discussing "counterfeit substances" is not controlling. As outlined in the *Ward* concurrence, "'counterfeit' has an ordinary, independent meaning, where as 'controlled' does not." *Ward*, 972 F.3d at 379 (Gregory, C.J., concurring). *See also Leal-Vega*, 680 F.3d at 1167 ("This definition of "counterfeit substances" has an independent meaning from however it may be defined in a specific state or federal statute."). Controlled may have ordinary meaning, but in the legal context, it must "be tethered to some state, federal, or local law in a way that is not true of the definition of 'counterfeit.'" *Id.* *See also Gonzales v. Oregon*, 546 U.S. 243, 259 (2006) ("Control is a term of art in the CSA.").

The Seventh Circuit in *Ruth* began the circuit split on this issue, erroneously believing it was bound by its decision in *United States v. Hudson*, 618 F.3d 700 (7th Cir. 2010). *Ruth*, 966 F.3d at 652-54 (7th Cir. 2020). *Hudson* also addressed the meaning of "counterfeit substance." *Ruth* acknowledged the split, but believed *Hudson* was dispositive. *Id.* at 654 ("[W]e are not joining a side today; we have already staked out our position in *Hudson*.").

The disagreement amongst the circuits results in drastic sentencing disparities for similarly situated clients who just happen to be sentenced in a different judicial district. Clarity and uniformity is critical.

III. The Tenth Circuit's Decision is Wrong

Oklahoma controls substances that are not federally controlled. *Compare* OKLA. STAT. ANN. TIT. 63, §§ 204(C)(23), (24), (28) *with* 21 C.F.R § 1308.11 – 15 (not listing three substances found in Oklahoma law); *see also Vazquez v. Sessions*, 885 F.3d 862, 869 (5th Cir. 2018) (noting Oklahoma statute's overbreadth with regard to Salvia Divinorum and Salvinorin A). Oklahoma's drug schedule is not divisible under the principles of *Taylor v. United States*, 495 U.S. 575 (1990) and *Mathis v. United States*, 579 U.S. 500 (2016). *See United States v. Cantu*, 964 F.3d 924, 934 (10th Cir. 2020) ("[Oklahoma's drug schedule] is not divisible by individual drug.").

The Tenth Circuit nonetheless concluded an Oklahoma drug conviction is a "controlled substance offense" because the "plain language" of USSG § 4B1.2(b) includes state law definitions of controlled substance:

> To support our plain-language analysis, we need only turn to the text. Section 4B1.2(b) requires an "offense under federal or state law" to trigger the enhancement. Black's Law Dictionary defines "offense" as "[a] violation of the law." Offense, Black's Law Dictionary (11th ed. 2019). And "federal or state law" modifies "offense." U.S.S.G. § 4B1.2(b). So to trigger the enhancement, a defendant must violate a federal or state law.
>
> Section 4B1.2(b) also requires that the federal or state law be "punishable by imprisonment for a term exceeding one year." *Id.* The provision addresses the prohibited acts. *Id.* Thus, when a defendant's conviction arises under a state statute, we turn to the state law defining

> the offense for its punishment term and the prohibited conduct. See id. The prohibited acts include Defendant's state conviction-possession of a controlled substance with intent to distribute. OKLA. STAT. TIT. 63 § 2-401. And the phrase "under federal or state law" modifies the entire provision. U.S.S.G. § 4B1.2(b). So the plain meaning of the text shows that a predicate offense arises under "federal or state law" assuming it satisfies the other two criteria.

Jones, 15 F.4th at 1292.

In *Taylor v. United States*, the Supreme Court expressly rejected an interpretation that would make a sentencing enhancement "depend on the definition adopted by the State of conviction." 495 U.S. 575, 591 (1990). *Taylor* cited cases going back decades, which establish a presumption that federal criminal statutes be construed uniformly nationwide, and not defer to state definition. *See id.* (citing *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119-20 (1983) (absent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law, "because the application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control"); *United States v. Turley*, 352 U.S. 407, 411 (1957) ("[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statutes should not be dependent on state law.").

There are additional reasons to conclude "controlled substance" is limited to federally controlled substances. The "*Jerome* presumption" from *Jerome v. United*

States, 318 U.S. 101 (1943) ensures federal criminal law is not dependent on state law:

> [W]e must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide and at times on the fact that the federal program would be impaired if state law were to control. When it comes to federal criminal laws such as the present one, there is a consideration in addition to the desirability of uniformity in application which supports the general principle.

Jerome, 318 U.S. at 104 (internal citations omitted). There are no plain indications to the contrary that either Congress or the Commission intended for "controlled substance" to include state law definitions of controlled substances.

The presumption should apply with maximum force when it comes to federal sentencing. The mission of the federal sentencing guidelines is to achieve uniformity and consistency in federal sentencing. U.S. SENT'G COMM'N GUIDELINES MANUAL 2-3 (2022). In this vein, this Court recently rejected the government's argument that the term "sexual abuse of a minor" as an aggravated felony under the immigration laws means whatever the State defines it to mean. This approach "turns the categorical approach on its head by defining the generic federal offense of sexual abuse of a minor as whatever is illegal under the particular law of the State where

the defendant was convicted." *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562, 1570 (2017).

The Tenth Circuit's departure from uniform federal sentencing was error. *See* Aubrey Watson, Note, *Controlled by What? Reining in the Circuits by Resolving the Federal Drug Enhancement Split*, 57 TULSA L. REV 695 (2022) (arguing the circuit split over the definition of "controlled substance" in the Guidelines should be resolved in favor of the definition found in the Controlled Substances Act).

IV. This issue is worthy of review before this Court and is squarely presented

The Court should grant review to resolve this clear circuit split. Traditional abstention in resolving disputes in guideline interpretations is not a compelling reason to refrain from providing clarity to sentencing courts. *Cf. United States v. Braxton*, 500 U.S. 344 (1991) (declining to resolve guideline interpretation issue when Commission had started process to revise guideline provision at issue).

Braxton does not stand for proposition for sentencing guidelines abstention. The Court declined to resolve the guideline issue presented because the Sentencing Commission had already initiated the process for amending the guideline. *Braxton*, 500 U.S. at 348 ("We choose not to resolve the first question presented in the current case, because the Commission has already undertaken a proceeding that will eliminate circuit conflict[.]"). Moreover, *Braxton* was resolved on a separate ground

that did not require resolution of the circuit split. *Id.* at 349 ("Unlike the first question discussed above, which presents a general issue of law on which the Circuits have fallen into disagreement, *Braxton*'s second question is closely tied to the facts of the present case."). This renders any discussion on guidelines abstention dicta.

Indeed, relying on *Braxton* to avoid resolving circuit splits squarely conflicts with this Court's role. Supreme Court Rule 10 provides guidance for when a question presented is sufficiently compelling. When different Circuit Courts of Appeals have decided important questions of federal law differently, this Court is best suited to intervene and resolve the differences. Rule 10(a). The Supreme Court must resolve these differences. *See* Sidhu, Dawinder S., *Sentencing Guidelines Abstention* (February 15, 2022). AMERICAN CRIMINAL LAW REVIEW, Vol. 60, (arguing guidelines abstention by the Court is "inconsistent with the Court's role and rules, congressional intent, administrative law principles, and the practical realities of the Commission's amendment process.").[2]

Finally, the Court cannot rely on the Sentencing Commission to promptly address this question. It has been over three years since the Commission had a

[2] Available at: https://ssrn.com/abstract=3950703

quorum. U.S. SENT'G COMM'N, 2019 Annual Report 3 (2020).[3] Though a slate of Commissioners was recently confirmed by the Senate, it will take many months before the Commission is able to promulgate amendments. *See, e.g.*, 28 U.S.C. § 994(p) (detailing the lengthy process for the amendment process).

In the interim, this issue is heard in sentencing courts throughout the United States every day. According to the data prepared by the United States Sentencing Commission, in 2020 nearly 40% of all federal criminal defendants sentenced under USSG § 2K2.1, are subject to an enhanced based offense level due to a prior controlled substance offense (or crime of violence).[4] In 2021, 1,246 federal criminal defendants were subject to the career offender enhancement.[5] Simply put, this guideline issue affects a tremendous amount of federal sentencings. Intervention is critical.

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[3] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report.pdf

[4] See Use of Guidelines and Specific Offense Characteristics (Guideline Calculation Based) for Fiscal Year 2020, pages 51-52. Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/Use_of_SOC_Guideline_Based.pdf (Appended as Appendix C).

[5] See Table 26, Number of Career Offenders and Armed Career Criminals by Type of Crime for Fiscal Year 2021. Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/Table26.pdf) (Appended as Appendix D).

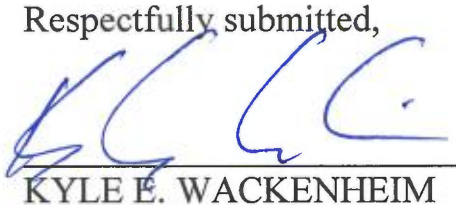
Moreover, the Sentencing Commission, lower courts, and practitioners would benefit from this Court's resolution to guideline interpretation issues. How the Court approaches the dispute and reasons its decision will inform practitioners on the appropriate interpretative tools to apply when a guideline dispute occurs. *United States v. Jones*, 32 F.4th 1290, 1296 (10th Cir. 2022) (Rossman, J., dissenting from denial of rehearing) ("We lack uniformity even in how to decipher the intent of the Sentencing Commission."). The lack of this guidance is a primary reason different courts of appeals have arrived at opposite conclusions concerning the same issue.

This Court should grant the petition to resolve the circuit split on the application of the plain-language analysis and the definition of a controlled substance in Guideline Section 4B1.2(b). There are no procedural impediments in this case. It was preserved before the district court and argued on appeal. It is ripe for adjudication.

Conclusion

The petition should be granted.

Respectfully submitted,



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(i) **Appendix.**

(i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Jones, No. 20-6112, 15 F.4th 1288 (10th Cir. 2021).

(ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

(iii) Any order on rehearing:

United States v. Jones, No. 20-6112, 32 F.4th 1290 (Mem) (10th Cir. 2022) (Rossman, J., dissenting from denial of rehearing en banc));

(iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

None;

(v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

(vi) Other appended materials:

U.S. SENT'G COMM'N, *Use of Guidelines and Specific Offense Characteristics* (Guideline Calculation Based) for Fiscal Year 2020, pages 51-52.

U.S. SENT'G COMM'N, Table 26, Number of Career Offenders and Armed Career Criminals by Type of Crime for Fiscal Year 2021.