No. 22-_____

In the Supreme Court of the United States

James Keith Russey et al.,
Petitioners,

v.

United States of America,
Respondent

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

Petition for Writ of Certiorari

Virginia L. Grady
Federal Public Defender

Howard A. Pincus
Shira Kieval
Shira_Kieval@fd.org
Counsel of Record for Petitioners
Assistant Federal Public Defenders
Office of the Federal Public Defender for the
Districts of Colorado and Wyoming
633 17th Street, Suite 1000
Denver, Colorado 80202
Tel: (303) 294-7002
Fax: (303) 294-1192

Question Presented

Whether the categorical approach requires courts to define Sentencing Guidelines terms like "controlled substance" uniformly, as three circuits have held, or whether the meaning of such a term may vary from case to case depending on how the relevant state or federal jurisdiction defines it, as the Tenth Circuit held below, and as three other circuits have also held.

(This question is already pending before this Court in *Jones v. United States*, Case No. 22-5342, and Mr. Russey and Mr. Ritchie request that the Court hold this petition pending the disposition in *Jones*.)

List of Parties

Petitioners: James Keith Russey and Jerry James Kendall Ritchie.

Respondent: United States of America.

Statement of Related Cases

In Mr. Russey's case:

United States v. Russey, No. 5:19-cr-00264-PRW (W.D. Okla.)
(Judgment entered March 10, 2020)

United States v. Russey, No. 20-6036 (10th Cir.)
(Judgment entered October 27, 2021)

In Mr. Ritchie's case:

United States v. Ritchie, No. 18-cr-00283-SLP (W.D. Okla.)
(Judgment entered April 29, 2020)

United States v. Ritchie, No. 20-6069 (10th Cir.)
(Judgment entered October 20, 2021)

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PETITION FOR WRIT OF CERTIORARI

Opinions Below

The Tenth Circuit's unreported decision in Mr. Russey's case is available at 2021 WL 4979819, and is in the Appendix at 5a. Its unreported decision in Mr. Ritchie's case is available at 2021 WL 4889801 and in the Appendix at 27a.

Basis for Jurisdiction

In Mr. Russey's case, the Tenth Circuit entered judgment on October 27, 2021. App'x at 5a. It denied Mr. Russey's request for rehearing on May 25, 2022. *Id.* at 3a. In Mr. Ritchie's case, the Tenth Circuit entered judgment on October 20, 2021. *Id.* at 27a. It denied his request for rehearing on May 10, 2022. *Id.* at 25a. Justice Gorsuch has extended the time to seek certiorari until August 25, 2022. *Id.* at 31a.

This petition is timely under 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

This single petition covering both judgments is permitted by Supreme Court Rule 12.4. The judgments sought to be reviewed are from the same court and involve the same question.

Statutory Provisions and Regulations Involved

In 28 U.S.C. § 994(h), Congress directed the U.S. Sentencing Commission to create a special guideline for certain repeat offenders as follows:

> (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.
>
> * * *

Pursuant to that statute, and in U.S.S.G. § 4B1.2 (a)(1), the Sentencing Commission defined the term "controlled substance offense" for the purposes of the career offender guideline as follows:

> 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 dispens-

> ing 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.
>
> * * *

In turn, U.S.S.G. § 2K2.1 elevates the base offense level for certain firearms crimes for defendants who "committed any part of the instant offense subsequent to sustaining [one or more] felony convictions of . . . a controlled substance offense." Application Note 2 explains that,

> For purposes of this guideline:
>
> "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 4B1.1).
>
> * * *

Before Amendment 802 became effective in November 2016, U.S.S.G. § 2L1.2 elevated the offense level for certain illegal immigration offenses for defendants with prior convictions for certain "drug trafficking offense[s]." The following definition of that term contained in Application Note 1(b)(iv) is similar to U.S.S.G. § 4B1.2(a)(1)'s definition of controlled substance offense:

> "Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell 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.
>
> * * *

At the time relevant to Mr. Russey's underlying state conviction, which was for conduct in 2016, and to the latter of Mr. Ritchie's two underlying state convictions,

which was for conduct in 2015, the State of Oklahoma criminalized certain acts relating to the substances listed at Okla. Stat. Ann. Tit. 63, § 2-204 (2011 West, 2015 Supp.), including:

> C. Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers, and salts of isomers, unless specifically excepted, when the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:
>
> […]
>
> 23. Salvia Divinorum;
>
> 24. Salvinorin A;
>
> […]
>
> 28. 1-(3-trifluoromethylphenyl) piperazine[.[1]]
>
> * * *

Then and now, the federal government has not included Salvia Divinorum, Salvinorin A, or 1-(3-trifluoromethylphenyl) piperazine ["TFMPP"] in any of its schedules of substances controlled under section 401 of the Controlled Substances Act (21 U.S.C. 841), which can be found at 21 C.F.R. §§ 1308.11–15. [2]

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[1] At the time of the 2009 conduct in Mr. Ritchie's earlier underlying state conviction, this statute read the same in relevant part, except that it listed Salvia Divinorum and Salvinorin A, but not TFMPP. *See* 2008 Okla. Sess. Law Serv. Ch. 332 (H.B. 3148) (eff. Nov. 1, 2008).

[2] At the time of the 2009 conduct in Mr. Ritchie's earlier underlying state conviction, the federal government did not include either Salvia Divinorum or Salvinorin A in any of its schedules of substances. *See* 21 C.F.R. §§ 1308.11–15 (2009).

Statement of the Case

a. James Russey was charged with a single count of being a prohibited person in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). App'x at 5a. He pled guilty, and his Presentence Report suggested that his base offense level should be 26. *Id.* at 6a. This is the correct level for a case involving a large capacity magazine and a defendant with at least two felony convictions for crimes of violence or controlled substance offenses, as defined in U.S.S.G. § 4B1.2. *See* U.S.S.G. § 2K2.1(a)(3). But if a defendant in possession of a large capacity magazine only has one such prior conviction, then his base offense level is only 22. U.S.S.G. § 2K2.1(a)(3).

Without objection, the district court followed the PSR's recommendation and applied base offense level 26. *Id.* at 6a. Mr. Russey was sentenced to 108 months, the bottom end of the final guidelines range calculated by the district court. *Id.* at 9a.

Of relevance to this petition is Mr. Russey's prior conviction in Oklahoma County Case No. CF-2016-3999. Court records show that he was charged with the May 4, 2016, possession of a controlled dangerous substance with intent to distribute, in violation of Okla. Stat. Ann. Tit. 63, § 2-401(A)(1). *See* App'x 20a–26a. On January 31, 2018, he was convicted as charged and given a suspended sentence. *Id.* at 22a.

Previously, in *United States v. Cantu*, the Tenth Circuit determined that a materially identical Oklahoma conviction involving the same category of drugs is not an ACCA serious drug offense, because the indivisible state offense prohibited distribution of three substances that were not federally controlled. *See* 964 F.3d 924, 929–30 (10th Cir. 2020). On appeal, Mr. Russey argued (inter alia) that his base offense level

was plainly miscalculated because his Oklahoma conviction did not count as a guidelines controlled substance offense for the same reason. *See* App'x at 11a.

The Tenth Circuit disagreed. It had "recently rejected the argument that a prior state drug offense only qualifies as a controlled substance offense under § 4B1.2(b) if the state criminalizes the same controlled substances identified in the [federal Controlled Substances Act]." App'x at 11a–12a. Rather, the court had held, a defendant's prior state conviction involves a "controlled substance" even if it could have involved a substance that the federal government does not control. *Id.* That prior case was *United States v. Jones*, in which the Tenth Circuit chose sides in a long-acknowledged circuit split. *See* 15 F.4th 1288, 1289 (10th Cir. 2021).

b. Jerry James Kendall Ritchie was charged with offenses relating to drugs and a gun that were found under the hood of a car he had borrowed. He was convicted after a trial of possession of methamphetamine with intent to distribute, *see* 21 U.S.C. §§ 841(a)(1), (b)(1)(C), being a felon in possession of a firearm, *see* 18 U.S.C. § 922(g)(1), and possessing a firearm in furtherance of a drug-trafficking offense, *see* 18 U.S.C. § 924(c)(1)(A). App'x at 27a.

The Presentence Report determined Mr. Ritchie to be a career offender under U.S.S.G. § 4B1.1(a). *See* App'x at 27a. It considered him to meet the requirement of having "at least two prior felony convictions of either a crime or violence or a controlled substance offense," U.S.S.G. § 4B1.1(a)(3), based on two Oklahoma drug convictions, one for possessing drugs with intent to distribute in 2015 and one for distributing drugs in 2009. *See* App'x at 27a.

Without objection, the district court accepted the report's conclusion that Mr. Ritchie was a career offender and that his advisory guideline range was 360 months to life. App'x at 27a–28a. The court varied downward to a total sentence of 240 months, ten years below the bottom of that range. *Id.* at 28a. If Mr. Ritchie had been found to have zero or one controlled substance offenses, he would not have been a career offender and his guidelines would have been significantly lower.

On appeal to the Tenth Circuit, Mr. Ritchie maintained the same argument as Mr. Russey: using the categorical approach, and under the Tenth Circuit's prior analysis of the non-divisibility of the relevant Oklahoma statute, one or both of his prior convictions were not categorically controlled-substance offenses. App'x at 28a–29a.

As in Mr. Russey's case, the Tenth Circuit rejected Mr. Ritchie's argument on the authority of its recent decision in *Jones*. App'x at 29a.

c. Mr. Russey and Mr. Ritchie each filed a petition for panel rehearing, requesting relief if the Tenth Circuit overruled *Jones* en banc. Over the dissent of Judge Rossman, the Tenth Circuit denied rehearing in *Jones*. *See United States v. Jones*, 32 F.4th 1290 (10th Cir. 2022). The panels in Mr. Russey's case and in Mr. Ritchie's case then denied rehearing. App'x at 3a, 25a.

Mr. Jones has since petitioned this Court to grant him a writ of certiorari on this issue. *See* Pet'n, *Jones v. United States* (Case No. 22-5343). As noted in that petition, this issue was litigated in the district court and is preserved. *Id.* at 12–13.

Reasons for Granting the Petition.

This petition raises an issue of great importance to national uniformity in criminal sentencing. The federal courts of appeals all apply the categorical approach in connection with the U.S. Sentencing Guidelines, but they are firmly divided on the proper method for interpreting individual guidelines terms while doing so. Some circuits prioritize the adoption of uniform federal definitions for guidelines terms, while others are too willing to entertain definitions entirely dependent on state law.

In *Jones*, which controlled the outcome of both Mr. Russey's and Mr. Ritchie's appeals, the Tenth Circuit improperly rejected a uniform definition of "controlled substance" in favor of a supposedly plain meaning. But the term "controlled substance" does not have a plain meaning independent of the law. Rather, is a legal creation, like "murder" (vs. "kill") or "assault" (vs. "hit"). Thus, the "plain meaning" that the Tenth Circuit relied upon actually incorporates the law of the jurisdiction of the prior conviction, meaning that it can differ from case to case. And the Tenth Circuit embraced a flawed methodology of interpreting terms in the guidelines as a general matter.

The newly reconstituted Sentencing Commission may well redefine "controlled substance," as members of this Court have called upon it to do. *See Guerrant v. United States*, 142 S.Ct. 640, 640 (2022) (statement of Sotomayor, J., joined by Barrett J., respecting denial of certiorari). But that will not resolve the methodological split at the heart of this petition.

This Court should grant Mr. Jones's separate petition for writ of certiorari in order to resolve the larger disagreement among the circuits about how to define terms in the guidelines, in order to reestablish national uniformity. After ruling in his favor,

this Court should then grant Mr. Russey's and Mr. Ritchie's petition, vacate their judgments, and remand their cases to the Tenth Circuit.

I. The circuit courts are divided on whether a single term in the guidelines can have multiple meanings.

Every federal court of appeals has adopted the categorical approach as a tool to interpret terms in the guidelines.[3] However, they disagree about whether a single guidelines term can have multiple meanings that depend on the content of state law. This disagreement is most apparent in cases interpreting the term "controlled substance" in U.S.S.G. §§ 4B1.2(b) and 2L1.2(b)(1)(A).

A. Several courts have adopted a uniform federal definition of "controlled substance," as the categorical approach and the *Jerome* presumption require.

The Second, Fifth, and Ninth Circuits all correctly hold that the guidelines term "controlled substance" must have a single, nationwide definition. *See United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021); *United States v. Townsend*, 897 F.3d 66, 70–71 (2d Cir. 2018); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793 (5th Cir. 2015); *United States v. Leal-Vega*, 680 F.3d 1160, 1164-68 (9th Cir. 2012); *see*

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[3] *United States v. Crocco*, 15 F.4th 20, 23 (1st Cir. 2021), *cert. denied*, 142 S.Ct. 2877 (2022); *United States v. Tabb*, 949 F.3d 81, 84 (2d Cir. 2020), *cert. denied*, 141 S.Ct. 2793 (2021); *United States v. Bullock*, 970 F.3d 210, 214 (3d Cir. 2020); *United States v. Rice*, 36 F.4th 578, 580 (4th Cir. 2022); *United States v. Adair*, 16 F.4th 469, 470 (5th Cir. 2021), *cert. denied*, 142 S.Ct. 1215 (2022); *United States v. Garth*, 965 F.3d 493, 495 (6th Cir. 2020); *United States v. Dixon*, 27 F.4th 568, 570 (7th Cir. 2022); *United States v. Lopez-Castillo*, 24 F.4th 1216, 1218 (8th Cir. 2022); *United States v. House*, 31 F.4th 745, 749 (9th Cir. 2022) (per curiam); *United States v. Babcock*, 40 F.4th 1172, 1175 (10th Cir. 2022); *United States v. Lange*, 862 F.3d 1290, 1293 (11th Cir. 2017); *United States v. Brown*, 892 F.3d 385, 402 (D.C. Cir. 2018).

also United States v. Crocco, 15 F.4th 20, 23 (1st Cir. 2021), *cert. denied*, 142 S.Ct. 2877 (2022) (declining to decide issue on plain error review, but criticizing methodology that would lead to contrary conclusion).[4] In selecting a uniform definition, these courts have all determined that a controlled substance is one regulated under the federal Controlled Substances Act.

These courts recognize that a single, nation-wide definition is always required when applying the categorical approach. As the Fifth Circuit explained, defining "controlled substance" to mean simply "a drug regulated by law . . . would conflict with *Taylor*'s vision for a uniform generic definition under federal law independent of the definition applied by any particular state of conviction." *Gomez-Alvarez*, 781 F.3d at 793 (5th Cir. 2015) (citing *Taylor v. United States*, 495 U.S. 575, 602 (1990)). Similarly, the First Circuit has counseled against "blindly accept[ing] anything that a state names or treats as a controlled substance," because that "would 'turn[] the categorical approach on its head by defining [a controlled substance offense] as whatever is illegal under the particular law of the State where the defendant was convicted.'" *Crocco*, 15 F.4th at 23 (quoting *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017)) (alteration marks in *Crocco*).

[4] The Sixth Circuit has reached conflicting conclusions, but all are non-precedential. *Compare United States v. Pittman*, 736 F. App'x 551, 553 (6th Cir. 2018) (unpublished) (adopting nationwide definition) *with United States v. Smith*, 681 F. App'x 483, 489 (6th Cir. 2017) (unpublished) (adopting definition dependent on state law).

The Second Circuit has also noted that a line of this Court's cases predating the categorical approach also requires the conclusion that the definition must be uniform and federal. The presumption first identified by this Court in *Jerome v. United States,* 318 U.S. 101 (1943), requires courts to "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." *Id.* at 103. Relying on this *Jerome* presumption, the Second Circuit explained that "the ambiguity in defining 'controlled substance' must be resolved according to federal—not state—standards." *Townsend*, 897 F.3d at 70–71.[5]

These courts rightly agree that a single, federal definition furthers the universal goal of "uniform application of federal sentencing law." *Bautista*, 989 F.3d at 702. "The underlying theory of *Taylor* is that a national definition of the elements of a crime is required so as to permit uniform application of federal law in determining the federal effect of prior convictions." *Leal-Vega*, 680 F.3d at 1165 (quotation marks omitted). Although "uniform application" of federal law is always important, there is "arguably . . . an even greater need for uniform application" of the non-statutory sentencing guidelines. *Townsend*, 897 F.3d at 71 (citation omitted).

[5] As discussed in Part III below, the Second Circuit believes that the *Jerome* presumption and the categorical approach each dictate the adoption of a different definition of "controlled substance": the former, the federal statutory definition from the Controlled Substances Act; and the latter, a "generic definition" like those in *Taylor* and *Esquivel-Quintana*. *See id.* at 71 n.4.

B. Other courts permit "controlled substance" to be defined by the content of state law, which means that the definition can differ from case to case, and even within a case.

In contrast, the Fourth, Seventh, Eighth, and Tenth Circuits all refuse to apply a nationally uniform definition to "controlled substance." Instead, they posit that the term has the "ordinary meaning" of any drug "*regulated by law*." *United States v. Ward*, 972 F.3d 364, 371 (4th Cir. 2020) (emphasis original), *cert. denied*, 141 S.Ct. 2864 (2021); *accord United States v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021), *cert. denied*, 142 S.Ct. 1696 (2022); *see also Jones*, 15 F.4th at 1290 ("ordinary meaning"; "plain reading"); *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020) ("natural meaning"; "restricted by law"), *cert. denied*, 141 S.Ct. 1239 (2021); *see also United States v. Howard*, 767 F. App'x 779 (11th Cir. 2019) (unpublished). This definition is circular: a controlled substance is a substance that is controlled. Far from being uniform, then, it is fully dependent on state law. As such, the definition can vary from case to case—and even at a single sentencing hearing—depending on where and when the defendants were previously convicted.

The mischief caused by this interpretation is particularly apparent in *Ruth*, which essentially held that the categorical approach does not counsel in favor of a uniform federal definition for a term, but rather that such a definition only applies if the text leaves no doubt that it should.

In *Ruth*, the Seventh Circuit was called upon to determine whether an Illinois drug conviction counted as a predicate felony for the purposes of an enhancement under 21 U.S.C. § 851 and/or career offender status under U.S.S.G. § 4B1.1(a). As to the statutory enhancement, the court explained that the conviction *was not* a felony

drug offense—a term defined in 21 U.S.C. § 802(44) to include "narcotic drugs," which 21 U.S.C. § 802(17) in turn is defined to include fewer isomers of cocaine than the relevant Illinois statute. 966 F.3d at 646. However, as to the guideline enhancement—where the phrase "controlled substance" is not further defined—the conviction *was* a controlled substance offense. *Id.* at 654.[6]

The Guidelines' lack of a definition for "controlled substance" should not have led to these disparate outcomes. As the Seventh Circuit itself noted, a court needs to know the statutory meaning of "narcotic" before it can decide whether a state offense prohibits "conduct relating to narcotic drugs." Only then can it "match the elements of the federal recidivism statute" with the state prior. *See Ruth*, 966 F.3d at 646. That last step—the matching of elements—is required for national uniformity, as the categorical approach does not "allow for [any] margin of inconsequential discrepancy" between the offense described in the statute and the state law. *See id.* at 647.

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[6] The definitions contained in those provisions are:

21 U.S.C. § 802(44):	U.S.S.G. § 4B1.2(b):
"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."	"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."

With the Guidelines, however, the Seventh Circuit got the categorical approach exactly backwards: it allowed the individual state law involved in the case to control the meaning of the term in Section 4B1.2(b). Because the text of the career-offender guideline did not explicitly "engraft the federal Controlled Substance Act[]," the court decided that "controlled substance" could mean "'*any* of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use *are restricted by law*.'" *Ruth*, 966 F.3d at 654 (emphasis added) (quoting *Controlled substance*, The Random House Dictionary of the English Language (2d ed. 1987)). Thus, instead of adopting a single, independent definition of "controlled substance" that could be compared to the state statute to prevent any discrepancies, the court adopted a definition that "tethered" the term "controlled substance" to whatever "state, federal, or local law" happened to apply in the case. *Id.* at 654 (quotation marks omitted). But when it comes to recidivism provisions—in statutes or elsewhere—courts should be looking for a clear textual mandate to abandon national uniformity, not a reason to keep it.

II. Because a single guidelines term can only have one meaning, Mr. Russey and Mr. Ritchie were improperly sentenced.

In 2018, Mr. Russey was convicted of possession of a controlled dangerous substance with intent to distribute, in violation of Okla. Stat. Ann. Tit. 63, § 2-401. The Oklahoma statute setting forth what drugs are regulated is not divisible by individual drug, and the relevant provision reaches three substances that are not federally controlled. *See Cantu*, 964 F.3d at 928, 930. Because of this, the Tenth Circuit had already held that Mr. Russey's conviction would not count as an ACCA predicate. *See*

id. at 935. Under a properly uniform federal definition of "controlled substance," it would not count as a guidelines controlled substance offense either.

This holds true for Mr. Ritchie as well. His conviction for violating the same Oklahoma statute in 2015 was essential to his classification as a career offender. At that time, his conviction could have been for conduct with respect to the same three substances that are not federally controlled. Under a properly uniform definition of "controlled substance," Mr. Ritchie's conviction would not count as a controlled substance offense under the guidelines and he would not be a career offender.[7]

Under the categorical approach, terms "must have some uniform definition independent of the labels employed by the various States' criminal codes." *Taylor*, 495 U.S. at 592. Every circuit court purports to apply the categorical approach to terms contained in the U.S. Sentencing Guidelines.[8] Thus, the term "controlled substance" requires a uniform, federal definition that is not dependent on state law.

In this case, the correct definition of "controlled substance" is provided by the federal Controlled Substances Act. It is true that Section 4B1.2(b) does not *explicitly* tie the term "controlled substance" to the federal Controlled Substances Act. But that is the conclusion counseled by 28 U.S.C. § 994, the statute that tasked the United States Sentencing Commission, upon its creation, with developing certain guidelines.

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[7] His 2009 conviction could have been for conduct respecting two of those substances, which were and are not federally controlled. Under the specific definition of "controlled substance" adopted in the Second, Fifth, and Ninth Circuits, this would not have been a controlled substance offense either.

[8] *See supra*, note 4.

Of note here is Section 994 (h)'s directive to "specify a sentence . . . at or near the maximum term authorized" for those convicted of certain *federally defined*, drug-related felonies. *See* 28 U.S.C. §§ 994(h)(1)(B) & (2)(B) (describing qualifying drug offenses and drug-predicates as those "described in section 401 of the Controlled Substances Act (21 U.S.C. 941)" and related federal statutes). It was this command that led to the creation of the Career Offender Guideline at issue here. *See United States v. LaBonte*, 520 U.S. 751, 757 (1997). While the Commission could have included additional predicates not set out in Section 994(h), courts may presume that it would have done so explicitly and not merely by the omission of an explicit reference to the federal Controlled Substances Act. *See, e.g.*, *United States v. Savin*, 349 F.3d 27, 35 (2d Cir. 2003) ("Absent a plain indication to the contrary, the Guidelines should be applied uniformly to those convicted of federal crimes irrespective of how [something] happens to be characterized by its home jurisdiction.").

It is also the conclusion favored by the *Jerome* presumption, which counsels in favor of adopting federal statutory definitions for otherwise ambiguous terms. *See Townsend*, 897 F.3d at 71 n.4.

At most, Section 4B1.2's lack of an explicit reference to the federal Controlled Substances Act counsels in favor of looking for another uniform federal definition of controlled substance. It does *not* mean that courts should define the term in a way that is "necessarily dependent on . . . state law." *See Leal-Vega*, 680 F.3d at 1166; *accord Gomez-Alvarez*, 781 F.3d at 793. Even if a court were to survey jurisdictions to create its own generic list of controlled substances, Mr. Russey and Mr. Ritchie would

still prevail. TFMPP—one of the substances that makes Oklahoma's definition overly broad, and that Oklahoma regulated at the time relevant to their possession-with-intent-to-distribute convictions—is not controlled by the federal government, or over thirty states.[9]

In coming out the other way, the Tenth Circuit misread the plain text of the guideline. It got hung up on Section 4B1.2's use of the phrase "an offense under federal or state law." *See Jones*, 15 F.4th at 1292; *see also Ward*, 972 F.3d at 374 & n. 11. But, as the Second Circuit has explained, this phrase means that *some* state court

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[9] Okla. Stat. Ann. Tit. 63, § 2-204(C)(28) (2011 West, 2015 Supp.) lists 1-(3-trifluoromethylphenyl) piperazine, commonly known as TFMPP. TFMPP has not been controlled federally since 2004. *See* Drug Enforcement Administration, Office of Diversion Control, Drug & Chemical Evaluation Section, 1-[3-(Trifluoro-methyl)-phenyl]piperazine (Oct. 2018), at https://www.deadiversion.usdoj.gov/drug_chem_info/tfmpp.pdf.

TFMPP is not regulated in Alaska, Arkansas, California, Colorado, Delaware, Idaho, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, or Wyoming.

It is regulated in Alabama (Ala. Code § 20-2-23(b)(4)(b)(270)), Arizona (Ariz. Rev. Stat. Ann. § 13-3401(6)(xli)), Connecticut (Conn. Agencies Regs. 21a-243-7(c)(43)), Florida (Fla. Stat. Ann. § 893.03(1)(c)(57)), Georgia (Ga. Code Ann. § 16-13-25(8)), Hawaii (Haw. Rev. Stat. Ann. § 329-14(d)(36)), Illinois (720 Ill. Comp. Stat. Ann. 570/204(d)(2.2-1)), Kansas (Kan. Stat. Ann. § 65-4105(d)(33)), Kentucky (Ky. Rev. Stat. Ann. § 218A.010(51)), Michigan (Mich. Comp. Laws Ann. § 333.7212(1)(k)), Nevada (Nev. Admin. Code 453.510), New Hampshire (N.H. Rev. Stat. Ann. § 359-O:2(IV)(l)(20)), North Dakota (N.D. Cent. Code Ann. § 19-03.1-05(5)(r)), Oklahoma (Okla. Stat. Ann. tit. 63, § 2-204(C)(28)), Pennsylvania (28 Pa. Code § 25.72(b)(6)(xxviii)), Rhode Island (21 R.I. Gen. Laws Ann. § 21-28-2.08 (Schedule I)(h)), South Dakota (S.D. Codified Laws § 34-20B-14(42)), Texas (Tex. Health & Safety Code Ann. § 481.103(a)(1)), and Vermont (12-5 Vt. Code R. § 23; 12-5 Vt. Code R. § 23).

convictions can count as controlled substance offenses. It "does not also mean that the substance at issue may be controlled under federal or state law." *Townsend*, 897 F.3d at 70. *Jones* was wrong when it said that "the phrase 'under federal or state law' modifies the entire provision." 15 F.4th at 1292. If the Commission had meant not just that the conviction could be a state or a federal one, but also that the substance could be whatever one of the fifty states might choose to regulate, it could easily have said so. It could simply have provided that the offense involved "a controlled substance *under federal or state law*." *Townsend*, 897 F.3d at 70 (emphasis original).

Even if it were not clear what Section 4B1.2 means by the phrase "an offense under federal or state law," the *Jerome* presumption would require the interpretation adopted in *Townsend*. "The *Jerome* presumption reflects a preference for the uniform application of federal law irrespective of where within the United States an issue regarding the law arises." *Savin*, 349 F.3d at 35 (applying presumption to sentencing guidelines). The *Jerome* presumption means that any ambiguity in the text of Section 4B1.2 should be interpreted in favor of uniformity. *See id.*

If Mr. Russey and Mr. Ritchie had preserved this claim in district court, their cases would be ideal vehicles for this Court to address this circuit split. But they did not. Mr. Jones did, however, which is why Mr. Russey and Mr. Ritchie are urging this Court to grant review in Mr. Jones's case. Mr. Jones should obtain relief for the reasons discussed above. If Mr. Jones obtains relief in this Court, then Mr. Russey and Mr. Ritchie would plainly be entitled to relief as well because: (1) there was error in their sentencing; (2) that error would be plain under the new decision in *Jones*; (3)

the error would have impacted Mr. Russey's and Mr. Ritchie's substantial rights because the district court in each case incorrectly calculated a too-high guideline range; and (4) the integrity of the judicial process is put at risk in such a situation. *See Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1907–09 (2018).

III. Even if the sentencing commission redefines "controlled substance," the methodological split will remain.

This petition presents "a recurring question of exceptional public importance with far-reaching implications . . . nationally." *See Jones*, 32 F.4th 1290 at 1291 (Rossman, J., dissenting from denial of rehearing en banc). The federal circuit courts are not only "sharply divided" about how to interpret the individual term "controlled substance," but also on "the correct approach to" defining any guidelines terms. *See id.* Although all courts are in accord that the categorical approach applies to the guidelines, they do not apply the categorical approach in the same way. Rather, "widespread categorical-approach fatigue in our federal courts," *id.* at 1295, is leading to disparate applications in the guidelines context, often in conflict with clear decisions from this Court.

This case raises the following overarching questions that are not unique to any one guideline and therefore cannot be resolved with a simple amendment from the Sentencing Commission:

- In defending the panel decision in *Jones*, the government argued broadly "that while the entire definition of a predicate offense cannot be controlled by labels put on it by state law, a term in the definition could be." *See Jones*, 32 F.4th at 1294 (Rossman, J., dissenting from denial of rehearing en banc)

(quoting Resp. Pet. Reh'g 17). That position—adopted by the Tenth Circuit in *Jones*—is inconsistent with *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562. It will survive any individual guidelines amendment and should be addressed by this Court.

- In *Jones*, the Tenth Circuit justified adopting a *nonuniform* interpretation of a guidelines term by stating that the categorical exclusions of certain state predicate offenses actually "undermines national uniformity in sentencing," and "is not at all unique to the 'controlled substance offense' context." *See Jones*, 15 F.4th at 1296. That position is inconsistent with *Taylor*, where this Court held that national uniformity counsels in favor of interpreting terms contained in statutory sentencing enhancements in a uniform manner. *See* 495 U.S. at 593. It will survive any individual guidelines amendment and should be addressed by this Court.
- All courts use the categorical approach to interpret terms in the guidelines, and most use the *Jerome* presumption. *See Savin*, 349 F.3d at 35 (citing cases from seven other circuit courts). But those approaches can conflict. Any individual guideline amendment will not answer the broader question of when a court should follow the *Jerome* presumption and interpret an ambiguous term by adopting a federal statutory definition, and when it should instead follow *Taylor* and "decipher the generic definition." *See, e.g.*, *Townsend*, 997 F.3d at 71 n.4. Only this Court is in a position to address this more general conflict.

- In *Jones*, the panel purported to "focus on the Sentencing Commission's intent." 15 F.4th at 1289. But even within individual circuits there is a "lack [of] uniformity . . . in how to decipher the intent of the Sentencing Commission." *Jones*, 32 F.4th at 1296 (Rossman, J., dissenting from denial of rehearing en banc). Only this Court is in a position to resolve definitively the proper weight to be given to the Commission's intent, and whether and when the courts may look beyond the text of the guidelines to discern that intent.

This Court rarely steps in to address circuit splits regarding the ultimate meaning of individual guidelines, because the Sentencing Commission has the ability to address any such conflict. *See Braxton v. United States*, 500 U.S. 344, 348 (1991). When it comes to the proper method of interpreting the guidelines generally, however, this justification no longer stands. In that situation, it is appropriate for this Court to establish methodological uniformity, so that similarly situated defendants in neighboring courthouses in Texas and Oklahoma, for example, receive equal justice. *See, e.g.*, *Stinson v. United States*, 508 U.S. 36 (1993) (addressing the proper treatment of commentary interpreting or explaining the guidelines).

Given the wide range of approaches that the circuits now take to interpreting terms in the Guidelines, including but not limited to the term at issue in Mr. Russey's case, this case is not a run-of-the-mill guidelines case, but rather poses the type of broader issues that this Court has elected to address in cases like *Stinson*. Supreme Court review is required.

Conclusion

For the foregoing reasons, this Court should grant Mr. Jones's petition for certiorari. After ruling in his favor, it should then grant Mr. Russey's and Mr. Ritchie's petition, vacate their judgments, and remand their cases to the Tenth Circuit for reconsideration.

Respectfully submitted,

Virginia L. Grady
Federal Public Defender

s/ Shira Kieval
Shira Kieval
Shira_Kieval@fd.org
Counsel of Record for Petitioners
Howard A. Pincus
Assistant Federal Public Defenders
Office of the Federal Public Defender for the Districts of Colorado and Wyoming
633 17th Street, Suite 1000
Denver, Colorado 80202
Tel: (303) 294-7002
Fax: (303) 294-1192