NO:

In the Supreme Court of the United States

T'SHAUN JONES,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In the absence of an explicit definition, is the definition of "controlled substance" in the federal sentencing guidelines controlled by federal or state law?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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T'Shaun Jones respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is included in the Federal Reporter at *United States v. Jones*, 81 F.4th 591 (6th Cir. 2023), and it is reprinted in the appendix at pages 1 to 14. The district court ruled orally on the issue in this petition, and a transcript of that ruling is included in the appendix at 15 to 35.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the court of appeals affirming Jones's conviction and sentence was entered on April 21, 2023. This petition is timely filed pursuant to Supreme Court Rule 13.1.

LEGAL PROVISION INVOLVED

United States Sentencing Guideline § 4B1.2(b) states as follows:

> **(b) Controlled Substance Offense.**--The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> **(1)** 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; or
>
> **(2)** is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

INTRODUCTION

There is an entrenched circuit split on whether federal or state law controls the federal sentencing guideline definition of "controlled substance"—a term the guidelines do not expressly define. Justice Sotomayor, with Justice Barrett joining, noted this split in *Guerrant v. United States*, 142 S. Ct. 640 (2022). The Justices urged the Sentencing Commission to correct the split, but the Commission, despite gaining a quorum and promulgating amended guidelines, has not done so. As a result, criminal defendants in different jurisdictions are receiving disparate sentencing outcomes. This same question is raised in at least one other pending petition, *Lewis v. United States,* No. 23-198 (Aug. 31, 2023). The National Association of Public Defense has filed an amicus brief in support of review in *Lewis*, explaining: "The issue urgently needs resolution because it so severely impacts so many criminal defendants." *Lewis v. United States,* No. 23-198, Brief of Amicus Curiae National Association for Public Defense in Support of Petitioner, at 5 (Oct. 5, 2023).

This Court's review is needed to provide uniformity on this question of law, and this case is an appropriate vehicle for the Court to do so.

STATEMENT OF THE CASE

1. In November 2021, Jones pleaded guilty, under a written plea agreement, to possessing a stolen firearm. Both parties agreed that a sentence of 10 years was the appropriate resolution, but also that the district court needed to

calculate and consider the guideline range at sentencing. Jones preserved his ability to appeal any sentence above the guidelines range determined by the court.

2. The probation department calculated a sentencing guideline range of 77 to 96 months, based on a total offense level of 21 and a criminal history category of VI. Jones objected to the applicability of a guideline enhancements for his having a prior "controlled substance offense" as defined under USSG § 4B1.2(b). He argued that the higher offense level did not apply because his prior Michigan conviction for delivery or manufacturing less than 50 grams of cocaine or heroin should not be considered a "controlled substance offense" because the Michigan definitions of cocaine and heroin are broader than the federal definition under the Controlled Substances Act.

3. The district court rejected Jones's argument, reasoning that it was "going to wait until the Sixth Circuit makes a decision on the issue." App.23. The court stated, "if the Sixth Circuit makes a decision on the case," then defense counsel should "feel free to come back and clarify the guidelines based on some new law in the Sixth Circuit about that isomer issue." *Id.* The district court imposed a sentence of 10 years' imprisonment followed by 3 years' supervised release.

4. The Sixth Circuit affirmed, rejecting Jones's argument because it decided that the definition of "controlled substance offense" under § 4B1.2(b) is not limited to the definition under the Controlled Substances Act. App.6. The court emphasized that the definition in § 4B1.2(b) covers offenses "under federal or *state*

law." App.6. It also observed that other guideline provisions do explicitly refer only to federal provisions of law. App.7, 8. Thus, the court concluded: "we see no textual limit that a controlled substance offense must contain a substance listed in the Controlled Substances Act, and we decline to add such a requirement here." App.8.

5. The Sixth Circuit acknowledged, however, that it was taking one side of a circuit split. App.8. It explained that it was adopting the approach of the Third, Fourth, Seventh, Eighth, and Tenth Circuits, which conflicted with the approach of the Second, Fifth, and Ninth Circuits—circuits that "only defined controlled substances according to the Controlled Substances Act, refusing to look at state law in that determination." App.8, 9. The court also found that the rule of lenity did not apply because "the structure and plain meaning of the text establish that the court may consider state law in determining predicate offenses under § 4B1.2(b), there is no 'grievous ambiguity.'" App.9, quoting *United States v. Castleman*, 572 U.S. 157, 172–73 (2014).

REASON FOR GRANTING THE WRIT

1. There is an entrenched circuit split on the definition of "controlled substance offense" in the federal sentencing guidelines.

As the Sixth Circuit recognized, there is an entrenched split among the circuits on this issue. In fact, Justice Sotomayor, with Justice Barrett joining, highlighted this circuit split in a statement regarding the denial of certiorari in *Guerrant v. United States*, 142 S. Ct. 640 (2022). Justice Sotomayor observed that the definition

of "controlled substance offense" under § 4B1.2 implicates "which defendants qualify as career offenders." *Id.* at 640. She also emphasized that the guidelines themselves "do not define the term 'controlled substance.'" *Id.* And she cautioned that defendants in the circuits who adopt the government's position "are subject to far higher terms of imprisonment for the same offenses as compared to defendants similarly situated in the Second or Ninth Circuits." *Id.*

Justice Sotomayor explained: "It is the responsibility of the Sentencing Commission to address this division to ensure fair and uniform application of the Guidelines." *Id.* at 640–41. She explained that, at the time, the Sentencing Commission lacked the quorum needed to resolve this split. *Id.* at 641. Since then, the Commission has gained a quorum and promulgated an amended guideline manual that went into effect November 1, 2023. In this new manual, however, the definition of "controlled substance offense" in § 4B1.2 remains unchanged, and there remains a lack of definition of "controlled substance." Thus, the entrenched circuit split remains, leading to continued disparities in sentencing outcomes among jurisdictions.

Justice Sotomayor's statement makes clear that the guideline is, at minimum, ambiguous. And under the rule of lenity, this Court should require more specificity before subjecting defendants to higher penalties based on language that reasonable jurists about. *See United States v. R.L.C.*, 503 U.S. 291, 293, 305 (1992) (explaining

the leniency rule exists because of "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should").

Ultimately, this Court should adopt the approach by the Second, Fifth, and Ninth Circuits, which apply a categorical and uniform federal definition of "controlled substance" to the federal sentencing guidelines by looking to the federal Controlled Substance Act. *See United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021); *United States v. Townsend*, 897 F.3d 66, 68, 71 (2d Cir. 2018); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793–94 (5th Cir. 2015). Those courts properly recognize that this Court has established a presumption that "the application of a federal law does not depend on state law unless Congress plainly indicates otherwise." *Townsend*, 897 F.3d at 71 (discussing *Jerome v. United States*, 318 U.S. 101, 104 (1943)). "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." *Jerome*, 318 U.S. at 104 (internal citation omitted).

Thus, in regard to defining what constitutes a controlled substance under the federal guidelines, "[a]ny other outcome would allow the Guidelines enhancement to turn on whatever substance 'is illegal under the particular law of the State where the defendant was convicted,' a clear departure from *Jerome* and its progeny." *Townsend*, 897 F.3d 66, 71 (2d Cir. 2018). "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.

"Although not a federal statute, the Guidelines are given the force of law, and arguably have an even greater need for uniform application." *Townsend*, 897 F.3d at 71. Thus, "the Guidelines should be applied uniformly to those convicted of federal crimes irrespective of how the victim happens to be characterized by its home jurisdiction." *Id.* (quotation omitted).

The approach relying on varied state definitions "is fraught with peril" because it leaves the definition up to the whim of the states. *United States v. Crocco*, 15 F.4th 20, 23 (1st Cir. 2021). The Fourth and Seventh Circuit tried to rein in the outer limits of this rule by consulting dictionary definitions. The Seventh Circuit defined "controlled substance" to mean "any of a category of behavior-altering or addictive drugs, such as heroin or cocaine, whose possession and use are restricted by law." *United States v. Ruth,* 966 F.3d 642, 654 (7th Cir. 2020) (quoting *Controlled Substance*, The Random House Dictionary of the English Language (2d ed. 1987)). The Fourth Circuit held that the term means "any type of drug whose manufacture, possession, and use is regulated by law." *United States v. Ward*, 972 F.3d 364, 371 (4th Cir. 2020) (emphasis omitted) (quoting *Controlled Substance*, Black's Law Dictionary 417 (11th ed. 2019)). But this begs the question: what do the words "drug," "behavior-altering," or "addictive" mean? Even sugar may qualify. Nicole M. Avena, Pedro Rada, & Bartley G. Hoebel, *Evidence for sugar addiction: Behavioral and neurochemical effects of intermittent, excessive sugar intake*, 32 NEUROSCI. BIOBEHAV.

REV. 20–39 (2008), *available at* https://perma.cc/897A-TUTM. These attempts to narrow the limitless approach are ultimately ineffective.

Although the text references "state law," that is true of the definition of "crime of violence" as well. *Compare* USSG § 4B1.2(a) ("any offense under federal or state law" that has a use-of-force element or is an enumerated offense), *with id.* § 4B1.2(b) ("an offense under federal or state law . . ."). And nonetheless, when applying the categorical approach to determine if a state crime is one of the enumerated offenses in the federal guidelines, courts compare the elements of the state offense to the "generic definition" of the offense. *See United States v. Covington*, 738 F.3d 759, 764 (6th Cir. 2014). That is because "the Supreme Court has rejected attempts to impose enhanced federal punishments on criminal defendants in light of a state conviction, when those attempts do not also ensure that the conduct that gave rise to the state conviction justified imposition of an enhancement under a uniform federal standard." *Townsend*, 897 F.3d at 71. "These decisions reinforce the idea that imposing a *federal* sentencing enhancement under the Guidelines requires something more than a conviction based on a state's determination that a given substance should be controlled." *Id.* The guidelines and the categorical approach seek to achieve uniformity. Defining the term "controlled substance" by referring to federal schedules accomplishes that.

When employing the categorical approach to determine a "controlled substance offense," courts must ask "whether the state offense's elements necessarily entail one

of the types of conduct" identified in the guidelines. *Shular v. United States*, 140 S. Ct. 779, 784 (2020). "The categorical approach prohibits federal sentencing courts from looking at the particular facts of the defendant's previous state or federal felony convictions; rather, federal sentencing courts may look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses." *United States v. Burris*, 912 F.3d 386, 392 (6th Cir. 2019) (quotations omitted). If the state statute defining an offense sweeps more broadly than the federal definition of the offense, then a conviction is not a "controlled substance offense." *Shular*, 140 S. Ct. at 783; *see also Descamps v. United States*, 570 U.S. 254, 261 (2013).

The government argues that this Court should push aside the presumption in *Jerome* because the guidelines define "controlled substance offense" as "an offense under federal or state law." USSG § 4B1.2(b). But this language, as best understood, is intended to make sure that a defendant's prior convictions involving substances banned under federal law are considered no matter whether the defendant was convicted in federal or state court. The guidelines never speak in clear language about allowing state law definitions of "controlled substance" to expand the federal guidelines' definitions. Such a reading could lead to unintended results if state law defines certain substances in a far more sweeping manner than federal law. Without clear language to the contrary, the *Jerome* presumption applies, and the definitions in the federal CSA must control.

2. <u>This case is an appropriate vehicle to resolve this issue and the matter is ripe for this Court's consideration.</u>

Jones made this objection at sentencing, properly preserving the question. The Sixth Circuit held oral argument, fully analyzed the issue, and recognized the circuit split. The district court also invited Jones to return if the law on this issue were to change. This case thus provides an appropriate vehicle to address this entrenched circuit split and provide needed clarity to this area of law.

CONCLUSION

Petitioner T'Shaun Jones prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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November 21, 2023