

No: 24-_____

IN THE
Supreme Court of the United States

JAMES EARL ROBINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

***ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT***

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this honorable Court should grant *certiorari* to review whether the Sixth Circuit’s determination that Mr. Robinson’s prior state convictions qualify as “felony drug offenses” as the state statutes of convictions encompass categorically broader conduct than is described in the federal statutes for purposes of applying the 21 U.S.C. §851 sentencing enhancement?
2. Whether this honorable Court should grant *certiorari* to review whether the Sixth Circuit’s determination that Mr. Robinson’s prior state convictions qualify as “felony drug offenses” as the state statutes of convictions encompass categorically broader conduct than is described in the federal statutes for purposes of applying the USSG §4B1.1 career offender enhancement?

PARTIES TO THE PROCEEDING

The parties to the proceedings, both in the Federal District Court for the Western District of Michigan as well as in the United States Court of Appeals for the Sixth Circuit, included the United States of America, Respondent herein, and James Earl Robinson, the Petitioner herein. There are no parties to these present proceedings other than those named in the Petition.

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PETITION FOR A WRIT OF CERTIORARI

Mr. James Earl Robinson (hereinafter “Mr. Robinson”) hereby respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit issued December 5, 2023.

OPINIONS BELOW

The Decision of the Sixth Circuit in this matter was issued on December 5, 2023. The Decision is unpublished, but can be found at the following citation *United States v. Robinson*, No. 22-1230, 2023 WL 8437242, (6th 2023), and is reproduced at Petitioner’s Appendix A.

The relevant District Court Judgment underlying Mr. Robinson’s conviction was not published, but is reproduced at Petitioner’s Appendix B.

STATEMENT OF JURISDICTION

Because the underlying cases involved a federal indictment against Mr. Robinson for violations of federal law, the United States District Court for the Western District of Michigan, had jurisdiction pursuant to 18 U.S.C. §3231. Because Petitioner Robinson timely filed a notice of appeal from the final judgment of a United States District Court, the United States Court of Appeals for the Sixth Circuit had jurisdiction pursuant to 28 U.S.C. §1291. Because Petitioner Robinson is timely filing this Petition for Writ of Certiorari within the time allowed by the Supreme Court Rules from the Sixth Circuit’s Decision on December 5, 2023, this honorable Court has jurisdiction pursuant to 28 U.S.C. §1254. *See also*, Supreme Court Rule 13.1.

STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The relevant Rules and statutory provisions are USSG § 3B1.1(a), USSG §4B1.2, 21 U.S.C. §851, M.C.L §333.7401, and M.C.L. §333.7214 all of which are set forth, respectively, in the attached Petitioner's Appendix C, D, E, F, and G.

STATEMENT OF THE CASE

On June 23, 2021, Defendant-Appellant James Robinson (hereinafter “Mr. Robinson”) was named in a three count Indictment issued by a federal grand jury in the United States District Court for the Western District of Michigan. (Indictment, RE 1, PAGEID #1-4). Mr. Robinson was charged in Count 1 with Felon in Possession of a Firearm in violation of 18 U.S.C. §922(g)(1) and 18 U.S.C. §924(a)(2), in Count 2 with Possession with Intent to Distribute Controlled Substances in violation of 21 U.S.C. §841(a)(1), (b)(1)(C), and in Count 3 with Possession of a Firearm in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. §924(c)(1)(A)(i). *Id.* The parties entered into a plea agreement which was filed in the District Court, however, Mr. Robinson later opted to forego the plea agreement and plead as charged to the indictment. (Plea Agreement, RE 16, PAGEID# 30-42). On July 14, 2021, Mr. Robinson appeared before the Honorable Magistrate Judge John J. Green and plead guilty to all three counts of the Indictment. (See T.p. Plea, RE 69, PAGEID# 726-761). The Magistrate Judge filed a Report and Recommendation recommending Mr. Robinson’s plea be accepted and the same was adopted by Judge Paul L. Malony on July 30, 2021. (Report and Recommendation, RE 20, PAGEID# 46-47; Order Adopting Report and Recommendation, RE 21, PAGEID# 49).

An Initial Presentence Investigation Report (Initial PSIR) was prepared and filed on September 14, 2021. (Initial PSIR, RE 23, PAGEID# 50-82). Mr. Robinson’s trial counsel made numerous written objections to the Initial Presentence Investigation Report. (Objections to Presentence Report, RE 25, PAGEID# 83-87).

Trial counsel also filed a written objection to the Government's proposed 21 U.S.C. §851 sentencing enhancement. (Defendant's Objections to §851 Enhancement, RE 24, PAGEID# 78-82). A Final Presentence Investigation Report ("PSIR") was prepared and filed on November 22, 2021 leaving several of Mr. Robinson's objections unresolved. (Final PSIR, RE 39, PAGEID# 107-139).

On February 4, 2022, the trial court held an evidentiary hearing on defendant's objections to the application of the 21 U.S.C. §851 sentencing enhancement and the application of the career offender guideline enhancement. (T.p. Evidentiary Hearing, RE 52, PAGEID# 264-349). After the evidentiary hearing and prior to sentencing, Mr. Robinson's trial counsel filed a brief following evidentiary hearing, a sentencing memorandum, and a memorandum summarizing the unresolved legal objections to the PSIR. (Defendant's Brief, RE 55, PAGEID#422-433, Defendant's Sentencing Memorandum, RE 56, PAGEID#493-510, Unresolved Legal Objections, RE 57, PAGEID# 617-645). Then on March 23, 2022, Mr. Robinson appeared before the Honorable Judge Paul L. Maloney for sentencing. (T.p. Sentencing, RE 67, PAGEID# 689-722; Judgement RE 64, PAGEID #677-683). On March 24, 2022, Mr. Robinson was sentenced to a term of imprisonment of two hundred and sixty-two months to be followed by supervised release for a term of six years. (Judgment, RE 64, PAGEID #677-683). Mr. Robinson filed a timely notice of appeal from this Judgment on March 24, 2022. (Notice of Appeal, RE 66, PAGEID #688).

Mr. Robinson is a thirty-seven-year-old man who came from a tragic and disadvantaged childhood with a history of substance abuse and mental health

disorders. (PSIR, RE 39, PAGEID# 127-130; *See also* Defendant's Sentencing Memorandum RE 56, PAGEID# 495-499). Mr. Robinson grew up in a poor neighborhood and both of his parents were alcoholics. *Id.* He witnessed domestic violence in his home and his father was physically abusive. *Id.* Mr. Robinson's father went to prison when he was ten years old and was no longer a part of his life after that. *Id.* Mr. Robinson's mother only had a fourth-grade education. *Id.*

Mr. Robinson spent several of his formative years in and out of foster homes, juvenile detention, and youth boot camps. *Id.* He eventually dropped out of school in the eleventh grade, but later received his GED. *Id.* Mr. Robinson began drinking alcohol at the age of sixteen and continued to abuse alcohol or use it to self-medicate throughout his adult life. *Id.* Mr. Robinson struggles with depression, anxiety, PTSD, and bipolar, but has had very little formal treatment for these issues. *Id.*

Mr. Robinson was arrested on July 27, 2021 for this matter. (PSIR, RE 39, PAGEID#111 at ¶11). With the assistance of a confidential informant, police officers obtained a search warrant and conducted surveillance on Mr. Robinson. *Id.* Mr. Robinson was found to be in possession of a .22 caliber pistol, digital scales, 1.04 grams of heroin, and 6.87 grams of methamphetamine. *Id.* at 11-112, ¶12-13. The methamphetamine was determined to be 98% ± 6% purity. *Id.* at ¶15. A search of Mr. Robinson's cell phone revealed additional evidence of drug trafficking. *Id.* at ¶16. At the time, Mr. Robinson was also an absconder from parole. *Id.* at ¶11. Mr. Robinson plead guilty as charged to all three charges in the indictment. (See T.p. Plea, RE 69, PAGEID# 726-761).

In calculating Mr. Robinson's guidelines sentencing range, the PSIR determined Mr. Robinson's prior drug convictions under Michigan state law qualified him as a career offender and applied that enhancement which essentially increased his offense level by ten. (Final PSIR, RE 39, PAGEID#114 at ¶14). In addition, Mr. Robinson was found to have a total criminal history score of 13 giving him a criminal history category of VI. *Id.* at PAGEID# 123-124 at ¶57-60. Of particular concern in this case are two prior state convictions for violations of M.C.L. §333.7401(2)(a)(iv) in 2005 and 2009. (PSIR, RE 39, PAGED # 111, 114, 117, 122 at ¶10, 36, 48, 54).

In addition to his objection to the government's §851 enhancement in a separate filing, Mr. Robinson objected to the enhanced scoring of the methamphetamine based on its purity and the career offender enhancement pursuant to USSG §4B1.1(b)(2) raising several grounds for this objection. (Objections to Presentence Report, RE 25, PAGEID# 83-87). One of Mr. Robinson's arguments in objecting to both the §851 enhancement and the guidelines career offender enhancement, was that the definition of cocaine in the Michigan statute of conviction was much broader than that of the federal statute and thus Mr. Robinson's prior Michigan state convictions could not constitute a prior felony drug offense. (Objections to Presentence Report, RE 25, PAGEID# 85 at ¶5; Defendant's Objections to §851 Enhancement, RE 24, PAGEID# 78-82).

On February 4, 2022, the trial court held an evidentiary hearing on defendant's objections to the application of the 21 U.S.C. §851 sentencing enhancement and the application of the career offender guideline enhancement. (T.p. Evidentiary Hearing,

RE 52, PAGEID# 264-349). At this hearing, the government presented the expert testimony of Professor Scott Denmark, a professor of chemistry at the University of Illinois, and provided the trial court with Professor Denmark's Curriculum Vitae and Declaration. (T.p. Evidentiary Hearing, RE 52, PAGEID# 267-312; Notice of Filing, RE 49, PAGEID# 164-227). Mr. Robinson presented the expert testimony of Professor Gregory B. Dudley, a professor of chemistry at West Virginia University, and provided the trial court with Professor Dudley's Curriculum Vitae and Expert Report. (T.p. Evidentiary Hearing, RE 52, PAGEID# 313-341; Notice of Filing, RE 50, PAGEID# 228-261).

At this hearing Professor Denmark, the government's expert, opined that the federal statute and the state statute define and prohibit the same substances. (T.p. Evidentiary Hearing, RE 52, PAGEID# 267-312). However, Professor Dudley disagreed, it was his opinion that the state statute prohibited substances which were not defined and prohibited by the federal statute. *Id.* at 313-341 Resolution of this issue came down to the definition of the term "geometric isomerism" as used in the federal definition of cocaine and the two experts disagreed as to its definition. In coming to their opinions, both experts cited to the International Union of Pure and Applied Chemistry ("IUPAC") and even Professor Denmark agreed the IUPAC was the "standard or gold standard" for definitions and refers to it as the "consensus resource." (T.p. Evidentiary Hearing, RE 52, PAGEID# 311; Dudley's Report, RE 50-2, PAGEID# 258; Denmark's Report, RE 49-2, PAGEID# 224). According to both experts agreed the IUPAC standard and generally accepted definition of "geometric

isomerism” is an “[o]bsolete synonym for *cis-trans* isomerism. (Usage strongly discouraged).” (Dudley’s Report, RE 50-2, PAGEID# 258; Denmark’s Report, RE 49-2, PAGEID# 224; *see also* <https://goldbook.iupac.org/terms/view/G02620>). However, Professor Denmark deviated from the consensus view and relied upon a less reliable minority view, found in a treaty published by Gunter Helmchen, when defining the term “geometric isomerism.” (Denmark’s Report, RE 49-2, PAGEID# 224).

After the evidentiary hearing and prior to sentencing, Mr. Robinson’s trial counsel filed a brief following evidentiary hearing, a sentencing memorandum, and a memorandum summarizing the unresolved legal objections to the PSIR. (Defendant’s Brief, RE 55, PAGEID#422-433, Defendant’s Sentencing Memorandum, RE 56, PAGEID#493-510, Unresolved Legal Objections, RE 57, PAGEID# 617-645). At sentencing, the trial court was to resolve the following unresolved legal objections: the application of the §851 sentencing enhancement, the application of USSG §4B.1 career offender enhancement, the enhanced scoring of the methamphetamine based on its purity. In addition to the arguments discussed above, when objecting the application of the USSC §4B1.1 career offender enhancement Mr. Robinson also objected on the following grounds: that Mr. Robinson’s 2005 felony convictions were outside the time range to count as a predicate offense, that the Sentencing Commission exceeded its statutory authority when creating the career offender guideline.

Ultimately the trial court did not rule in Mr. Robinson’s favor on any of his objections. Mr. Robinson was sentenced to one hundred and twenty months on Count

1 and two hundred and two months on Count 2 to be run concurrent and an additional sixty months on Count three be run consecutive for a total of two hundred and sixty two months. (Judgment, RE 64, PAGEID# 678).

REASONS FOR GRANTING THE WRIT

The issues Mr. Robinson brings to this Honorable Court's attention are important for ensuring federal sentencing is uniform, defendants are not unnecessarily sentenced to greater sentences than warranted, and to avoid disparity in the sentences of criminal defendant's amount the several jurisdictions. Mr. Robinson request writ based on the application of two sentencing enhancements that significantly increased his sentence. The below issues involve circuit splits, the resolution of which is imperative to ensure criminal defendants in varying jurisdictions are not receiving disparate sentences. This Honorable Court has previously found the resolution of this split to be the obligation of the Sentencing Commission to resolve. *Guerrant v. United States*, 142 S. Ct. 640 (2022). However, after having made sweeping changes to the Guidelines just last year, the Commission has failed to resolve this split resulting from its own failure to include the necessary definitions and the vagueness of the Guidelines leaving the courts to interpret these vague provisions. In addition to the lack of uniformity among the Circuit Court of Appeals, the Sixth Circuit itself from which this case is appealed, has issued internally inconsistent decisions on this issue.

Review by this Honorable Court is necessary to resolve these lower court conflicts and provide uniformity in the law and avoid disparate sentences.

I. *Certiorari* is requested to review whether to review whether the Sixth Circuit's determination that Mr. Robinson's prior state convictions qualify as "felony drug offenses" as the state statutes of convictions encompass categorically broader conduct than is described in the federal statutes for purposes of applying the 21 U.S.C. §851 sentencing enhancement.

At issue here is whether the Sixth Circuit properly upheld the district court's application of the §851 sentencing enhancement when sentencing Mr. Robinson. The §851 enhancement increases the statutory maximum term of imprisonment from twenty years to thirty years. 21 U.S.C. §841(b)(1)(C). The Sixth Circuit resolved both this issue and issue II below together, however, these two issues, while interrelated and involve the same underlying state convictions, are different and raise separate concerns. *United States v. Robinson*, No. 22-1230, 2023 WL 8437242, at *2-3 (6th Cir. Dec. 5, 2023). It was the opinion of the Sixth Circuit that both of Mr. Robinson's arguments contained herein were foreclosed by two recent Sixth Circuit decisions. *Id.* citing *United States v. Jones*, 81 F.4th 591, 597 (6th Cir. 2012)(holding that the Guidelines definition of a controlled substance offense is not "limited to substances criminalized under the Controlled Substances Act."); *United States v. Wilkes*, 78 F.4th 272, 285 (6th Cir. 2023)(holding that Michigan's definition of cocaine was not broader than definition found in the Controlled Substances Act); *United States v. Johnson*, 2023 WL 5206447, at *2 (6th Cir. Aug. 14, 2023)(Applying *Wilkes* to a §851 sentencing enhancement and holding *Wilkes* settled the meaning of cocaine under the Controlled Substances Act).

The district court found that under a categorical approach, Mr. Robinson's Michigan state convictions qualified as "felony drug offenses" and applied the

enhancements. (T.p. Sentencing, RE 52, PAGEID# 695-698). The trial court reasoned that the testimony of the government's expert, Professor Denmark, was more persuasive. *Id.* The trial court rejected the testimony and opinion of Mr. Robinson's expert reasoning because the result would be that no Michigan state cocaine conviction would ever qualify as a predicate offense and that result would be absurd. *Id.*

Mr. Robinson argues that the court should apply a "conduct-based-categorical-approach" pursuant to *Shular v. United States*, 140 S. Ct. 779, 783 (2020). Mr. Robinson further argues, the expert testimony is not necessary in the conduct based categorial analysis, the court need only look at the plain language of the statute. *United States v. Ruth*, 966 F.3d 642, 647 (7th Cir. 2020), *cert denied*, 141 S. Ct. 1239 (2021). *Wilke* went beyond the plain language of the statute and reviewed the testimony of the same experts used in Mr. Robinson's case. *Robinson* at *3, fn 2. The Sixth Circuit did not apply the correct approach, rather the Sixth Circuit should have applied the "conduct-based-categorical- approach" looking only to the plain language of the statute pursuant to *Shular*.

In order to resolve this issue, this Honorable Court must first determine which categorical analysis is applicable. As trial counsel stated in his briefing of Mr. Robinson's unresolved legal objections, the parties were in agreement that the Court should use a categorical approach to analyze whether Mr. Robinson's Michigan convictions qualified as a prior "felony drug offense" and they further agreed the statute was divisible and thus a "modified categorical approach" was to

be used. (Unresolved Legal Objections, RE 57, PAGEID# 620). The parties were not in agreement as to the nature of the categorical analysis or the results of such analysis. *Id.*

As it relates to the §851 sentencing enhancement, Mr. Robinson argues the appropriate and applicable analysis is the “conduct-based categorical approach” recently established by this Honorable Court in *Shular v. United States*, 140 S. Ct. 779, 783 (2020).

In *Shular*, the United States Supreme Court defined two categorical approach methods – a “generic offense” approach and a “conduct based” approach. *Id.* The “generic offense” approach applies when a statute refers generally to an offense without specifying its elements and requires the court to come up with a generic version of the crime or its elements as “commonly understood.” *Id.* This generic approach is applicable where a statute lists types of offenses or lists offenses by a generic name. *Id.*

However, a categorical approach is necessary where the statute requires the court to determine “not whether the prior conviction was for a certain offense, but whether the conviction meets some other criterion. *Id.* Whether the statute defines a particular conduct or a generic offense. *Id.* at 785-787. In *Shular*, this Court found the categorical approach was necessary where the federal statute referred to conduct rather than generic offenses. *Id.* This Court determined the categorical approach was necessary for comparing the federal definition of “serious drug offense” which lists conduct rather than generic offenses, specifically the terms

“manufacturing, distributing, or possession with the intent to manufacture or distribute, a controlled substance.” *Id.* quoting 18 U.S.C. §924(e)(2)(A)(ii). Finding that these terms “undoubtedly” describe conduct rather than offenses. *Id.* In so finding, the court compared this “serious drug offenses” definition found in the ACCA with the ACCA’s definition of “violent felony” which uses the terms “burglary,” “arson,” and “extortion” which terms unambiguously name offenses. *Id.* citing 18 U.S.C. §924(e)(2)(B)(ii).

In addition, both the Seventh Circuit and Eighth Circuit have both applied the conduct based categorical approach in analyzing an Illinois state statute to determine if the state statute was a qualifying offense triggering the §851 sentencing enhancement.

The Seventh Circuit in *United States v. Ruth*, specifically dealt with the term “felony drug offense” as it relates to the application of the §851 sentencing enhancement; the same statute at issue in Mr. Robinson’s case. *United States v. Ruth*, 966 F.3d 642, 645-650 (7th Cir. 2020), *cert denied*, 141 S. Ct. 1239 (2021). The court found that “felony drug offense” is defined only by referencing the Controlled Substances Act. *Id.* at 645-646. In *Ruth*, the court reasoned that the term “felony drug offense” describes predicate offenses that prohibit certain conduct rather than generic offenses. *Id.* at 647. Thus, the court determined it was necessary to compare the state statute with federal statute and determine if the state law is the same or narrower than that the federal law. *Id.* at 648. Ultimately, *Ruth* held that the indivisible state statute included broader conduct

than that in the federal statute, specifically the state statute prohibited particular isomers of cocaine which the federal statute did not and thus the Illinois state conviction in dispute did not qualify as a predicate offense for the §851 enhancement. *Id.* Finally, the *Ruth* court found there was plain error when the trial court found the Illinois conviction to be a felony drug offense and apply the enhancement. *Id.*

The Eighth Circuit agreed with and applied *Ruth*'s analysis when determining whether an Illinois cocaine conviction qualified as a "serious drug felony" as defined by 18 U.S.C. § 924(e)(2) for purposes of applying the §851 sentencing enhancement. *United States v. Oliver*, 987 F.3d 794, 806-808 (8th Cir. 2021). While *Oliver* was dealing with a different federal statute, the same analysis applies. *Id.* In addition, while *Oliver* is not dealing with cocaine, the court opined that if the conviction had involved cocaine, it would not qualify as a serious drug felony as Illinois's definition of cocaine is overly broad. *Id.* at 807.

Finally, as discussed below, the Sixth Circuit has applied the conduct based categorical approach as it related to the career offender enhancement in reference to conduct other than the definition of cocaine. See *United States v. Elliot*, 835 F. App'x 78, 80-81 (6th Cir. 2020). At issue here is whether the definition of cocaine under Michigan law is broader than the definition of cocaine under the federal law. According to *Shular*, *Ruth*, *Oliver*, and *Elliot* the terms used in the federal statute define conduct rather than offenses and thus, Mr. Robinson asserts that the conduct based categorical approach is the appropriate analysis. However, now, here in this

case, the Sixth Circuit has applied a different approach and gone beyond the plain language of the statute. *Robinson*, at 2-3 *citing Wilke* at 285. This has created not only a circuit split, but inconsistent opinions within the Sixth Circuit.

Applying the conduct based categorical approach defined in *Shular* to the facts in Mr. Robinson's case, the statute of conviction, M.C.L §333.7401(1), provides that "a person shall not manufacture, create, deliver, or possess with the intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form." M.C.L. 333.7401(2)(a) defines those substances prohibited by the statutes, specifically, "A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv)." Section 333.7401(2)(A)(iv) defines the penalty for violating the statutes "in an amount less than 50 grams, of any mixture containing that substance."

It is necessary to look further at the definitions contained in the statute to determine the conduct proscribed. *Ruth* at 645-648. Mr. Robinson's convictions involved the manufacturing, creating, delivering, or possessing with intent to manufacture, create, or deliver cocaine. (Government's Legal Brief, RE 53, PAGEID# 368-376, Exhibits 1, 2). M.C.L. §333.7214(a)(iv) defines cocaine as:

Coca leaves and any salt, compound, derivative, or preparation thereof which is chemically equivalent to or identical with any of these substances, except that the substances do not include decocainized coca leaves or extraction of coca leaves which extractions do not contain cocaine or ecgonine. The substances include cocaine, its salts, stereoisomers, and salts of stereoisomers when the existence of the salts, stereoisomers, and salts of stereoisomers is possible within the specific chemical designation.

The federal statute defines cocaine as:

coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, *optical and geometric isomers*, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph.

21 U.S.C. §812 (*emphasis added*).

Pursuant to *Ruth*, this requires no particular expertise because, as in *Ruth*, the plain language of the statutes differs. *Ruth* at 647. The Illinois statute at issue in *Ruth*, included all isomers of cocaine and specifically noted that included optical, positional, and geometric isomers. *Id.* Here, the Michigan statute includes all isomers of cocaine. M.C.L. §333.7214(a)(iv). Whereas the federal statute only includes geometric and optical isomers. 21 U.S.C. §812. The divergent plain language of the statutes was enough in *Ruth* to find that the state statute included broader conduct than the federal statute and thus the state offense did not qualify as a “felony drug offense” and the enhancement was applied in error.

Though, pursuant to *Ruth*, expertise is not necessary in this situation, the evidentiary hearing in the matter brought to light that even the chemistry as defined by the industry standard establishes that these are divergent statutes. Both experts agreed the IUPAC standard and generally accepted definition of “geometric isomerism” is an “[o]bsolete synonym for *cis-trans* isomerism. (Usage strongly discouraged).” (Dudley’s Report, RE 50-2, PAGEID# 258; Denmark’s Report, RE 49-2, PAGEID# 224).

Thus, applying the conduct based categorical approach, the Michigan statute under which Mr. Robinson was convicted prohibits broader conduct than that prohibited in the federal statute and thus Mr. Robinson's convictions do not qualify as "felony drug offenses." The Sixth Circuit's decision to uphold the district court's application of the §851 Enhancement was in error and the matter must be remanded. The lack of uniformity among the several Court of Appeals and within the Sixth Circuit require this court to review this matter to resolve these splits and provide uniformity in the law and sentencing.

II. *Certiorari* is requested to review whether the Sixth Circuit's determination that Mr. Robinson's prior state convictions qualify as "felony drug offenses" as the state statutes of convictions encompass categorically broader conduct than is described in the federal statutes for purposes of applying the USSG §4B1.1 career offender enhancement.

At issue here is whether the Sixth Circuit properly upheld the district court's application of the USSG §4B1.1 career offender enhancement when sentencing Mr. Robinson. It was the opinion of the Sixth Circuit that both of Mr. Robinson's arguments contained herein were foreclosed by two recent Sixth Circuit decisions. *Id.* citing *United States v. Jones*, 81 F.4th 591, 597 (6th Cir. 2012)(holding that the Guidelines definition of a controlled substance offense is not "limited to substances criminalized under the Controlled Substances Act."); *United States v. Wilkes*, 78 F.4th 272, 285 (6th Cir. 2023)(holding that Michigan's definition of cocaine was not broader than definition found in the Controlled Substances Act); *United States v. Johnson*, 2023 WL 5206447, at *2 (6th Cir. Aug. 14, 2023)(Applying *Wilkes* to a §851

sentencing enhancement and holding *Wilkes* settled the meaning of cocaine under the Controlled Substances Act).

Mr. Robinson argues the appropriate analysis in the case requires an analysis of the federal law definition of controlled substance contained in Control Substances Act. Mr. Robinson further argues, the court must apply a conduct based categorical analysis to determine if the state statute prohibits broader conduct than the federal statute when determining whether the USSG §4B1.1 career offender enhancement should apply.

The Guidelines instruct the trial court to enhance certain sentences based upon certain prior convictions. USSG §4B1.1 requires an enhancement of the Guidelines for an offender with “at least two prior felony convictions of either a crime of violence or a controlled substance.” USSG §4B1.1. USSG §4B1.2 defines “controlled substances 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 the intent to manufacture, import, export, distribute, or dispense.”

- a) *The career offender guideline should be interpreted in light of the federal definition of controlled substances contained in the Control Substances Act when determining if a state conviction applies as a predicate offense for purposes of applying the guideline.*

While the guidelines define “controlled substances offense,” as noted above, they guidelines do not define “controlled substance.” Statement Respecting Denial

of Certiorari, *Guerrant v. United States*, 142 S. Ct. 640 (2022). There is presently a circuit split regarding the definition of “controlled substance” with some circuits looking to the relevant state definitions of controlled substances, others looking to the federal Controlled Substances Act (“CSA”), codified in 21 U.S.C. §801 *et. seq.* *Id.* The Sixth Circuit upheld the district court’s application of the applicable state laws; however, Mr. Robinson argues the definitions contained in the federal Controls Substances Act should apply. To apply the state law definitions only creates additional disparate sentencing and is illogical.

The Eleventh Circuit has issued “internally inconsistent decisions on this question.” *Id.* (noting the same for the Sixth Circuit prior to *Jones*). The Ninth Circuit and Second Circuit have followed the “CSA Approach” while the First Circuit and Fifth Circuit have not resolved the question directly but indicated agreement with this approach - using the federal definitions to define the terms not otherwise defined by the guidelines. See *United States v. Bautista*, 989 F.3d 698, 702-704 (9th Cir. 2021); *United States v. Townsend*, 897 F.3d 66, 68 (2nd Cir. 2018); *United States v. Crocco*, 15 f. 4th 20 23-25 (1st Cir. 2021); and *United States v. Gomez-Alvarez*, 781 F.3d 787, 792-794 (5th Cir. 2015). Notably, the First Circuit opined CSA Approach was “appealing” while following state law appeared “fraught with peril.” *Crocco* at 23-25.

However, the Tenth, Eighth, Fourth, and Seventh Circuits have seen fit to qualify defendants as career offenders relying on state law and definitions, “even if their only prior offenses involved substances not prohibited by federal law.”

Guerrant at 640; *United States v. Jones*, 15 F. 4th 1288, 1291-1296 (10th Cir. 2021); *United States v. Henderson*, 11 F. 4th 713, 718-719 (8th Cir. 2021); *United States v. Ward*, 972 F.3d 364, 371-374 (4th Cir. 2020); *United States v. Ruth*, 966 F.3d 642, 651-654 (7th Cir. 2020). The Sixth Circuit has joined in with these courts with its decision in *Jones*.

However, the Sixth Circuit has been internally inconsistent. See *Guerrant* at 640. The Sixth Circuit has held that the career offender guidelines should be interpreted in light of the CSA and applied definitions from the CSA to the guidelines in other cases. In utilizing the definitions found in the CSA to analyze the application of the career offender enhancement, the Sixth Circuit opined “the Guidelines draw their definitions from the Controlled Substances Act, which paints a more complete picture of a “controlled substance offense.” *United States v. Jackson*, 995 F.3d 476, 480 (6th Cir. 2021). The Sixth Circuit further supported this position by pointing out that “utilizing the CSA does not broaden the text of the Guidelines. Congress enacted the CSA.” *Id.* at 481. Further, through 28 U.S.C. §994, Congress “incorporated the substantive offenses articulated in the CSA in to the Guidelines.” *Id.* The Sixth Circuit cited to several cases in which it “routinely utilize[s] the CSA in defining the relevant conduct covered by the Guidelines.” *Id.* citing *United States v. Garth*, 965 F.3d 493, 495 (6th Cir. 2020); *United States v. Thomas*, 969 F.3d 583, 585 (6th Cir. 2020); *United States v. Powell*, 863 F. App’x 391, 398 (6th Cir. 2020).

Thus, the Sixth Circuit and several other Courts of Appeals have used definitions from the CSA to interpret the meaning of “controlled substances offense” under the Guidelines. This approach is the most appropriate and yields the most logical result and avoids disparate sentences. The Court should take this approach when analyzing the meaning of controlled substances in this case. The circuit split and internally inconsistent decisions within the Sixth Circuit make this matter appropriate for review by this Court.

b) This Court should use the categorial approach when analyzing whether Mr. Robinson’s prior state convictions qualify as predicate offenses for purposes the USSC §4B1.1 career offender enhancement.

This Honorable Court established the relevant categorical approach in Shular as discussed above. *United States v. Jackson*, 995 F.3d 476, 480 (6th Cir. 2021). The Sixth Circuit has also applied the categorical approach in determining which offenses qualify as a “controlled substance offense” under the Guidelines. However, the Sixth Circuit seems to now be shifting gears, if the Court’s decision even reaches this portion of the issue at hand. The categorical approach does not consider the defendant’s actual conduct, but looks “to the least of the acts criminalized by the statute.” *United States v. Havis*, 927 F.3d 382, 384-85 (6th Cir.), *reconsideration denied*, 929 F.3d 317 (6th Cir. 2019) *citing Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013).

United States v. Williams, 850 Fed. Appx 393, 397 (6th Cir. 2021) (*Williams II*), explains how the categorical approach applies when analyzing the career offender guidelines:

We first map out what conduct is criminalized under the guidelines' definition. Next, we do the same for conduct criminalized under the state law that led to the conviction. Finally, we overlay the two: if the outer edges of the state law—often the “least culpable conduct” that the law proscribes—extend past the guidelines' definition, then the conviction doesn't count; if, however, the boundaries of the state law and the guidelines' definition are coterminous, or the guidelines' definition sweeps more broadly, then the conviction counts. In other words, the guidelines must fully envelop the state law of conviction.

Williams II further held that “controlled substances” in the Guidelines are the substances listed in the CSA. *Id.* at 396-99. *Williams II* held that a Tennessee marijuana offense is not a “controlled substance offense” because at the time the defendant incurred his conviction, Tennessee defined marijuana to include hemp, prohibiting a broader conduct than that in the federal statute. *Id.* at 396-399.

The Sixth Circuit has consistently applied this approach, until now, and consistently reached the same result. Notably, applying this same approach and recognizing that the M.C.L. §333.7401 prohibits at least some substances that are not controlled substances within the CSA, it criminalizes some conduct that is not a “controlled substances offense” under the Guidelines. *United States v. Pittman*, 736 F. App'x 551, 553-54 (6th Cir.), *cert denied*, 139 S. Ct. 608 (2018); *see also United States v. Perry*, No. 20-6183, 2021 WL 3662443 at *2 (6th Cir. August 18, 2021)(noting that other appellate

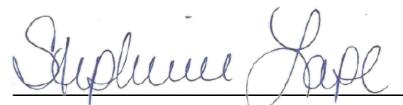
courts and the majority of district courts considering the *Williams II* issue have reached the same decision); *United States v. Williams*, 762 Fed. Appx 278, 280-81 (6th Cir. 2019)(*Williams I*)(using the federal schedules to define controlled substances, specifically addressing marijuana).

As discussed above regarding the §851 sentencing enhancement, Michigan's definition of cocaine is broader than the federal definition of cocaine under the CSA. Thus, Mr. Robinson's convictions are not categorically included in the definition of "controlled substance offense" pursuant to the career offender guideline. Accordingly, Mr. Robinson's prior convictions are not controlled substances and the Sixth Circuit erred in upholding the district court application of the career offender guideline enhancement. This matter must be remanded.

CONCLUSION

Wherefore, and for all of the foregoing reasons, Petitioner Robinson respectfully requests that this honorable Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,



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