No. 21-_____

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS JAVION GUERRANT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a state conviction for distribution of a substance not defined as a "controlled substance" by federal law qualify as a career offender predicate conviction under the Sentencing Guidelines?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Thomas Javion Guerrant respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, *United States v. Guerrant*, No. 20-4358 (4th Cir. March 26, 2021), is unpublished and attached as Appendix A. Pet. App. 1a–5a. The district court's oral decision rejecting the challenge to the career offender designation was unreported, but a transcript is reproduced in Appendix B. Pet. App. 6a–38a.

JURISDICTION

The Court of Appeals entered its final judgment on March 26, 2021. Jurisdiction of this Court to review this Petition is conferred by 28 U.S.C. § 1254(1). This petition is being filed within 150 days of the date of the decision of the Court of Appeals.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(a)(6) relevantly provides:

> The court, in determining the particular sentence to

> be imposed, shall consider . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . . .

United States Sentencing Guidelines (U.S.S.G.) § 4B1.2(b) relevantly provides:

> 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 . . . .

The federal Controlled Substances Act, at 21 U.S.C. § 802(16), defines "marihuana" (a Schedule I "controlled substance") as:

> **(A)** Subject to subparagraph (B), the term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.
> **(B)** The term "marihuana" does not include—
> **(i)** hemp, as defined in section 1639*o* of title 7; or
> **(ii)** the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

Virginia Code § 18.2-247D defines "marijuana" to include (emphasis added):

> The term "marijuana" when used in this article means any part of a plant of the genus Cannabis, whether growing or not, its seeds or resin; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, its resin, or any extract containing one or more cannabinoids. *Marijuana does not include the mature stalks of such plant, fiber produced from such stalk, oil or cake made from the seed of such plant, unless such stalks, fiber, oil or cake is combined with other parts of plants of the genus Cannabis.* Marijuana shall not include (i) industrial hemp, as defined in § 3.2-4112, that is possessed by a person registered pursuant to subsection A of § 3.2-4115 or his agent or (ii) a hemp product, as defined in § 3.2-4112, containing a tetrahydrocannabinol concentration of no greater than 0.3 percent that is derived from industrial hemp, as defined in § 3.2-4112, that is grown, dealt, or processed in compliance with state or federal law.

INTRODUCTION

Thomas Guerrant is serving a ten-year term of imprisonment because he sold about seven grams of heroin to an undercover informant (a felony) and fled from the police, slightly damaging a U.S. Marshals Service vehicle (a misdemeanor). That lengthy sentence stemmed directly from the district court's determination that Mr. Guerrant was a "career offender"

owing to two prior convictions (and at least two are required)—a conviction for malicious wounding in violation of a Virginia statute and a Virginia conviction for possession with intent to distribute marijuana. If he had not been deemed a career offender, Mr. Guerrant's guidelines range would have been 37 to 46 months.

Mr. Guerrant unsuccessfully challenged his career offender designation in both the district court and the court of appeals, arguing that his Virginia marijuana conviction should not count as a career offender predicate because it was not a qualifying "controlled substance" offense under the career offender guideline provision. Specifically, he argued that because Virginia law defines the substance "marijuana" more broadly than does federal law, and because the federal definition controls in determining whether an offense is a controlled substance offense under the career offender guideline section, his conviction should not have caused him to be sentenced as a career offender. And he would have prevailed had he been charged in the Second, Fifth, Eighth, Ninth, or Tenth Circuits; but because he was charged in the Fourth Circuit he lost—the same fate he would have met in the Sixth, Seventh, and Eleventh Circuits.

Mr. Guerrant is asking this Court to resolve this Circuit split and

side with those courts which have correctly held that a "controlled substance offense" in the career offender guideline section refers to a substance controlled under federal law. This outcome is consistent with the statutory mandate to avoid unwarranted sentence disparities and the presumption that the application of a federal law does not depend on state law unless there is a "plain indication to the contrary." *Jerome v. United States*, 318 U.S. 101, 104 (1943).

STATEMENT OF THE CASE

1. Mr. Guerrant pleaded guilty to distribution of a measurable quantity of heroin, a felony, and resisting, assaulting, or impeding a federal law enforcement officer, a misdemeanor. He sold approximately 7 grams of heroin to an undercover informant, and he fled in his car when police came to arrest him. While fleeing, he made slight contact with a U.S. Marshals Service vehicle.

2. In the presentence report, the probation officer set forth the guidelines calculations and concluded that Mr. Guerrant should be sentenced as a career offender under U.S.S.G. § 4B1.1. The career offender designation increased the offense level from level 18 to level 32, the criminal history category from category V to category VI, and the

recommended guidelines range after due credit for acceptance of responsibility from 37 to 46 months to 151 to 188 months.

3. Mr. Guerrant objected to the career offender designation. He agreed that one of the two convictions identified by the probation officer qualified as a career offender predicate conviction—his conviction for malicious wounding in 2012. He argued, however, that the second identified conviction—a 2018 Virginia felony conviction for possession of marijuana with intent to distribute—did not qualify as a career offender predicate conviction. Specifically, he argued that because the Virginia definition of marijuana was broader than the federal definition of marijuana[1] and because the federal definition of the term controls, the Virginia conviction did not qualify as a "controlled substance offense" within the meaning of the guideline provision. For the proposition that the federal definition of "controlled substance" is binding, Mr. Guerrant relied

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1. The federal definition of marijuana is narrower than the Virginia definition in two respects. First, it excludes sterilized seeds which are incapable of sterilization. Second, the federal definition excludes "mature stalks" and "fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom)," while the Virginia definition has a similar exclusion except when these items are "combined with other parts of plants of the genus Cannabis." The differences are particularly important because in Virginia the dividing line between felony marijuana offenses and misdemeanor offenses is dictated by the weight of the "marijuana."

primarily on the Second Circuit's thorough treatment of the issue in *United States v. Townsend*, 897 F.3d 66, 71 (2d Cir. 2018) where the court held that the term "controlled substance" as used in the career offender guideline provision "must refer exclusively to those drugs listed under federal law—that is the CSA [Controlled Substances Act, 21 U.S.C. § 801 *et seq.*]."

4. The district court, though not bound by any Fourth Circuit decision specifically addressing the issue, rejected Mr. Guerrant's argument and imposed a sentence of 120 months. Pet. App. 26a. This was below the career offender guideline range but considerably higher than the range Mr. Guerrant would have faced if he had not been sentenced as a career offender.

5. Having reserved his right to appeal the career offender determination, Mr. Guerrant noted his appeal. Before he filed his opening brief, however, the Fourth Circuit held in *United States v. Ward*, 972 F.3d 364, 374 (4th Cir. 2020) that the term "controlled substance" as used in the career offender guideline section refers to substances controlled under both federal and state law and thus any state offense may qualify as a "controlled substance offense" even if the substance might not be a

controlled substance under federal law. Notably, *Ward* did not involve a situation where the "controlled substance" at issue was defined differently by the state and the federal government. *Id.* at 377 (Gregory, CJ., concurring in the judgment). Ward had combed through Virginia's list of controlled substances and found obscure substances having nothing to do with his case that were not on the federal list. *Id.* at 367 (majority opinion) He argued that this fact invalidated his career offender designation—despite the fact that his state conviction involved a substance (heroin) controlled under both federal and state law. *Id.* at 377 (Gregory, CJ., concurring in the judgment).

The Fourth Circuit held that any substance controlled by a state is a "controlled substance" under the sentencing guideline provision. *Ward*, 972 F.3d at 374 (majority opinion). In a thorough concurring opinion, Chief Judge Gregory would have ruled, consistently with *Townsend*, that the term "controlled substance" refers to substances controlled under federal law, and because Ward's offense involved a federally controlled substance (heroin), it qualified as a career offender predicate. *Id.* at 377 (Gregory, CJ., concurring in the judgment).

6. Mr. Guerrant's appeal was rejected in short order in light of *Ward*. Pet. App. 1a–5a. The Fourth Circuit acknowledged that Mr. Guerrant was arguing that his Virginia marijuana conviction should not count because Virginia defined marijuana differently (more broadly) than marijuana is defined under federal law. Pet. App. 4a. But the court, citing *Ward*, said that "it is unnecessary to consider whether the state law definition of a 'controlled substance' is analogous to its federal counterpart," because a qualifying predicate offense is one that "arises under either federal or state law." Pet. App. 5a.

That holding directly conflicts with holdings in other circuits, is contrary to the statutory mandate to minimize "unwarranted sentence disparities" and is contrary to the long-established principle that state laws that "interfere with, or are contrary to" federal law cannot hold sway—they must yield to federal law. *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824).

REASONS FOR GRANTING THE PETITION

The Fourth Circuit has consciously deepened a circuit split over the meaning of the term "controlled substance" as used in a federal sentencing guideline provision that dramatically affects one's sentence. Five circuits

hold that this term, as used in the career offender guideline provision or the nearly identically worded enhancement for immigration offenses, refers to a substance defined as a controlled substance under federal law. Four circuits, including the Fourth Circuit, hold that the term refers to any substance controlled under federal law or state law—even where the substance is defined differently by those sovereigns. This Court's review is necessary to resolve this deep division.

ARGUMENT

I. A Plurality of the Courts of Appeals Define the Term "Controlled Substance" in the Career Offender Guideline Section or the Nearly Identically Worded definition of a "drug trafficking offense" in the Guideline Provision for Immigration Offenses (Application Note 2 to U.S.S.G. § 2L1.2) to Mean a Substance Controlled Under Federal Law.

United States v. Townsend, 897 F.3d 66 (2d Cir. 2018) is the leading case on this side of the split. Townsend was convicted of a federal drug offense and faced the possibility of a career offender sentencing enhancement based in part on a New York drug conviction. *Townsend*, 897 F.3d at 68. He argued that his New York conviction should not count as a controlled substance offense under § 4B1.2(b) because the New York statute he was convicted of violating included substances not found in the

federal Controlled Substances Act (21 U.S.C. § 801 *et seq.*—hereinafter the "CSA"). *Townsend*, 897 F.3d at 68–69. He argued that only convictions for substances controlled under federal law should qualify under the guideline enhancement. *Id.*

The Second Circuit agreed. Starting with the text of § 4B1.2(b), the court observed that even though the guideline provision starts with the guidance that a "'controlled substance offense' includes an *offense* 'under federal or State law,' that does not also mean that the *substance* at issue may be controlled under federal or State law." *Townsend*, 897 F.3d at 70 (quoting U.S.S.G. § 4B1.2(b)) (emphasis in original). Had this been intended, the court noted, "the definition should read '. . . a controlled substance *under federal or state law*.' But it does not." *Id.* (alteration and emphasis in original).

Given what it termed the "ambiguity" in defining "controlled substance" present in § 4B1.2(b), the court applied the "*Jerome* presumption [that] the application of a federal law does not depend on State law unless Congress plainly indicates otherwise." *Id.* at 71 (citing *Jerome v. United States*, 318 U.S. 101, 104 (1943)). No such indication is found in the Guidelines, the court noted. *Id.* To the contrary, the

Guidelines seek uniformity and consistency, and "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." *Id.* at 71 (citing *Taylor v. United States,* 495 U.S. 575, 579, 590–91 (1990) (holding that for purposes of career offender determination burglary has a generic, uniform definition not dependent on how a particular State defines the offense); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017) (rejecting the government's argument that "sexual abuse of minor" as an aggravated felony under the immigration laws means whatever the State defines it to mean as this definition "turns the categorical approach on its head by defining the generic federal offense of sexual abuse of a minor as whatever is illegal under the particular law of the State where the defendant was convicted")).

The court thus concluded that "federal law is the interpretive anchor to resolve the ambiguity at issue." *Townsend*, 897 F.3d at 71. It reasoned that "[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.'" *Id.* (quoting *Esquivel-Quintana*, 137 S. Ct. at 1570). This would undermine the goal of uniformity in federal sentencing that is a core aim of the sentencing guidelines. *Id.*

The Fifth, Eighth, and Ninth Circuits have reached the same conclusion in construing either the definition of "controlled substance" in the career offender guideline provision in U.S.S.G. § 4B1.2(b) or the nearly identical definition of a "drug trafficking offense" in the guideline section addressing guideline enhancements for immigration offenses.[2] *See United States v. Bautista,* 989 F.3d 698, 702 (9th Cir. 2021) ("'[C]ontrolled substance' in § 4B1.2(b) refers to a 'controlled substance' as defined in the CSA."); *United States v. Sanchez-Garcia*, 642 F.3d 658, 661–62 (8th Cir. 2011) (concluding that the California statute criminalized some conduct that would not trigger the enhancement because it was broader than the CSA); *United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015) ("For a prior conviction to qualify as a 'drug trafficking offense' [under the immigration offense guideline section], the government must establish

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2. Application Note 2 to U.S.S.G. § 2L1.2 defines "drug trafficking offense" as: "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."

that the substance underlying that conviction is covered under the CSA."); *cf.*, *United States v. Abdeljawad*, 794 F. App'x 745, 748 (10th Cir. 2019) ("The legal definition of 'controlled substance' comes from the Controlled Substances Act.").[3]

II. The Fourth, Sixth, Seventh and Eleventh Circuits Define "Controlled Substance" to Include Substances Controlled Under Federal or State Law.

The Fourth Circuit, in *United States v. Ward*, 972 F.3d 364 (4th Cir. 2020), rejected the Second Circuit's holding in *Townsend* that the term "controlled substance" as used in the career offender guideline section means only federally controlled substances. *See Ward*, 972 F.3d at 374 n.12. In the Fourth Circuit, the guideline provision is not all ambiguous—the term "controlled substance offense" means any offense involving a "controlled substance" as so defined under federal or state law. *Id.* at 374 So if a state made it a crime to distribute salt, this would qualify under the federal guideline. And, as here, if the substance was controlled under both federal and state law, but defined differently by those sovereigns, a conviction of violating the state statute would qualify.

As Chief Judge Gregory noted in his concurring opinion in *Ward*, this

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3. The Tenth Circuit is considering the precise question presented in this case

approach "turns the point of the categorical approach on its head." *Ward*, 972 F.3d at 383 (Gregory, CJ., concurring in the judgment) (citing *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017)). Using this approach, the scope of the federal sentencing enhancement expands and contracts, depending on which state's law is being considered, undermining the goal of eliminating federal sentence disparities, and contrary to the presumption, "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." *Jerome v. United States*, 318 U.S. 101, 104 (1943).

The Sixth and Eleventh Circuits follow this approach, though not consistently. *See United States v. Smith*, 681 F. App'x 483, 489 (6th Cir. 2017) (using state law definitions); *United States v. Solomon*, 763 F. App'x 442, 447 (6th Cir. 2019) (defining "controlled substance" in § 4B1.2(b) with reference to the federal Controlled Substances Act); *United States v. Peraza*, 754 F. App'x 908, 910 (11th Cir. 2018) (using state law definitions); *United States v. Stevens*, 654 F. App'x 984, 987 (11th Cir. 2016) (defining "controlled substance" in U.S.S.G. § 4B1.2(b) by reference to the federal

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in *United States v. Jones*, No. 20-6112 (argued May 14, 2021).

Controlled Substance Act).

The Seventh Circuit follows a slightly different approach but reaches the same result—that the term "controlled substances" in the career offender guideline enhancement includes substances not included in the federal Controlled Substances Act. *United States v. Ruth*, 966 F.3d 642, 653 (7th Cir. 2020). In the Seventh Circuit, the dictionary decides whether something is a "controlled substance"; therefore "'any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use are restricted by law'" qualifies as a "controlled substance" for purposes of the career offender enhancement. *Id.* at 654, (quoting *Controlled substance,* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987)).

In sum, the circuits are split on an issue that makes a big difference in federal sentencing, and even courts that reach the same result get there by different paths. What's needed is clarity. This case provides the opportunity to provide it—a case where the question is squarely presented and, unlike in *Ward* and *Ruth*, a case where the answer is outcome determinative.[4]

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4. This Court rejected petitions for certiorari in both cases. In *Ward,* as the United

III. The Fourth Circuit's Decision in this Case is Wrong.

Virginia law defines "marijuana" one way and federal law defines "marihuana" differently—specifically excluding parts of the plant that are included in the Virginia definition. *See* 21 U.S.C. § 802(16). The Fourth Circuit nonetheless held that a Virginia marijuana conviction triggers federal career offender treatment because it is:

> 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.

U.S.S.G. § 4B1.2(b). That conclusion is wrong for all of the reasons explained by the Second Circuit in *Townsend*.

First, the fact that the definition begins with the phrase "[a]n offense under federal or state law," does not mean that any such offenses qualify.

States noted in its opposition to the petition in that case, a decision in Ward's favor would not have mattered because Ward was convicted of a heroin offense—a substance controlled under both Virginia and federal law. Ward had argued that because he could have been convicted of a Virginia offense involving a substance that was "controlled" under Virginia law but not under federal law, his Virginia conviction for a heroin offense should not count for career offender purposes. He did not argue that "heroin" is defined differently under Virginia and federal law. *Ruth*, as the government noted in its opposition to his petition, involved an interlocutory decision, as the Seventh Circuit had sent his case back to the district court based on a Guidelines calculation error.

The definition requires that the offense under "federal or state law" involve a "controlled substance." As the *Townsend* court observed, if the definition aimed to include all state and federal offenses, then the reference to "controlled substance" following "distribution, dispensing" etc., "should read '. . . a controlled substance *under federal or state law*.'" *Townsend,* 897 F.3d at 70 (alteration and emphasis in original). At minimum, the absence of the explicit designation of what "controlled substances" qualify, gives rise to an "ambiguity." *Id.* at 71.

And in that circumstance, the "*Jerome* presumption, [that] the application of federal law does not depend on State law unless Congress plainly indicates otherwise" applies. *Townsend*, 897 F.3d at 71 (citing *Jerome v. United States*, 318 U.S. 101, 104 (1943)). Indeed, the presumption should apply with maximum force when it comes to federal sentencing. The mission of the federal sentencing guidelines is to achieve uniformity and consistency in federal sentencing. U.S. SENT'G COMM'N GUIDELINES MANUAL 2–3 (2018). Thus, for example, this Court has rejected a construction that would make a federal sentencing enhancement "depend on the definition adopted by the State of conviction." *Taylor v. United States*, 495 U.S. 575, 590 (1990). More

recently, this Court similarly rejected the government's argument that the term "sexual abuse of minor" as an aggravated felony under the immigration laws means whatever the State defines it to mean. This approach "turns the categorical approach on its head by defining the generic federal offense of sexual abuse of a minor as whatever is illegal under the particular law of the State where the defendant was convicted." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017).

Long ago this Court held that State laws that "interfere with, or are contrary to, federal law cannot hold sway—they "must yield" to federal law. *Gibbons v. Ogden*, 22 U.S. 1, 211(1824).

The Fourth Circuit erred in not following these precedents.

V. This Case Is an Excellent Vehicle To Resolve an Important Issue that has Divided the Lower Courts.

As noted, this Court recently denied certiorari in two cases presenting a similar issue. In *Ward*, this Court was asked to resolve a hypothetical question, and in *Ruth* the request was interlocutory in nature. Here, the issue is straightforward and starkly framed. If the term "controlled substance" as used in the career offender enhancement means a substance controlled under federal law, as held by several circuits, then

Mr. Guerrant plainly deserves relief. If the term also includes substances "controlled" under state law as held by other circuits—even substances defined differently by the two sovereigns—then Mr. Guerrant does not deserve relief.

Sentencing judges are tasked by Congress in 18 U.S.C. § 3553(a)(6) to avoid "unwarranted sentence disparities," and the federal sentencing guidelines seek uniformity and consistency in sentencing. U.S. SENT'G COMM'N GUIDELINES MANUAL 1–3 (2018). The career offender enhancement dramatically affects federal sentences. It should be applied consistently, with a clear and uniform definition of a term that controls whether someone is treated as a career offender. The Fourth Circuit and other circuits have chosen a definition that is not faithful to the text of the guideline provision and undermines consistency and fairness in federal sentencing. This Court should grant certiorari to review that unsound approach to this important issue.

For the reasons stated and pursuant to the authorities discussed above, the petition for a writ of certiorari should be granted to address whether the term "controlled substances" as used in the career offender enhancement means substances controlled under federal law or substances

controlled under both federal and state laws—even where the substances are defined differently.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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