No. _____

IN THE
Supreme Court of the United States

RICKY BAGOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Sentencing Guidelines provide for an enhanced advisory Guideline range for certain offenses if the defendant has a prior conviction for a "controlled substance offense," as that phrase is defined in USSG § 4B1.2(b).

The question presented is:

Is the term "controlled substance" in § 4B1.2(b) limited to those substances defined and regulated under the federal Controlled Substances Act, 21 U.S.C. § 801 et seq.?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

RELATED PROCEEDINGS

United States v. Bagola, No. 5:20-cr-50043, United States District Court for the District of South Dakota. Judgment signed April 8, 2021 and entered April 9, 2021.

United States v. Bagola, No. 21-1916, United States Court of Appeals for the Eighth Circuit. Judgment entered March 7, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Ricky Bagola respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-12a) is unreported but available at 2022 WL 664812. The district court's judgment (App. 13a-19a) is unreported.

JURISDICTION

The court of appeals entered judgment on March 7, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

UNITED STATES SENTENCING GUIDELINE PROVISIONS INVOLVED

USSG § 4B1.1 provides in relevant part:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.
>
> (b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum	**Offense Level***
(1) Life	37
(2) 25 years or more	34
(3) 20 years or more, but less than 25 years	32
(4) 15 years or more, but less than 20 years	29
(5) 10 years or more, but less than 15 years	24
(6) 5 years or more, but less than 10 years	17
(7) More than 1 year, but less than 5 years	12.

USSG § 4B1.2(b) provides:

> (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

INTRODUCTION

This petition presents an issue that has divided the courts of appeals—what is the meaning of "controlled substance offense" in the United States Sentencing Guidelines? The courts of appeals are evenly divided on the question of whether the term "controlled substance" within the meaning of USSG § 4B1.2(b) includes only those substances prohibited under the federal Controlled Substances Act or whether this phrase includes substances criminalized under state (but not federal) law as well.

The resolution of this issue potentially affects thousands of federal criminal defendants a year. The United States Sentencing Commission lacks the necessary quorum to address this question, so it falls on this Court to act. This case presents an ideal opportunity to address this important question of federal law that has divided the courts of appeals for years.

STATEMENT OF THE CASE

Criminal case: Ricky Bagola pleaded guilty to second-degree murder in violation of 18 U.S.C. §§ 1111(a) and 1153 for shooting into a trailer after a disputed drug deal in Pine Ridge, South Dakota. App. 13a; Dist. Ct. Dkt. 61.[1] At sentencing, Bagola was found to be a career offender under USSG § 4B1.1 based on two prior drug convictions: a 2011 federal conviction for distribution of a controlled substance and a 2017 Wyoming state conviction for possession with intent to deliver

[1] All citations to "Dist. Ct. Dkt." are to the docket in *United States v. Bagola*, No. 5:20-cr-50043 (D.S.D.).

marijuana. PSR, Dist. Ct. Dkt. 91, at ¶¶ 19, 33, 34. These were Bagola's only prior convictions. PSR, Dist. Ct. Dkt. 91, at ¶¶ 31-34.

Bagola did not challenge his career offender designation at sentencing. *See* Dist. Ct. Dkt. 92. This designation did not affect his total offense level (which was 37) but increased his criminal history category from IV to VI and his advisory Guideline range from 292 to 365 months to 360 months to life. *See* PSR, Dist. Ct. Dkt. 91, at ¶¶ 19, 28, 39; USSG Ch. 5, Pt. A (Sentencing Table). Bagola was sentenced to 420 months in prison. App. 14a. The district court repeatedly emphasized Bagola's status as a career offender and his placement in criminal history category VI in explaining its chosen sentence. *See, e.g.*, Sent. Tr., Dist. Ct. Dkt. 115, at 37, 69, 71-72.

Appeal: On appeal, Bagola argued that the district court plainly erred in applying the career offender enhancement because his Wyoming conviction for possession with intent to deliver marijuana did not quality as a "controlled substance offense." Bagola argued that at the time of his prior conviction, the Wyoming statute encompassed hemp and low-concentration tetrahydrocannabinol (THC), which were excluded from the federal drug schedules in effect at the time of his federal sentencing.

While Bagola's appeal was pending, the Eighth Circuit held that the term "controlled substance offense" in the Sentencing Guidelines is not limited by the federal drug schedules. *See United States v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 1696 (2022). Rather, the Eighth Circuit held, as long

as the substance is controlled under *state* law, the prior conviction can qualify as a "controlled substance offense." *See id.* at 718-19.

In Bagola's case, the Eighth Circuit applied *Henderson* and found that the district court properly found Bagola to be a career offender. App. 11a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

The question of whether the term "controlled substance" within the meaning of USSG § 4B1.2(b) is limited to substances controlled under federal law is an important question that must be settled by this Court. The courts of appeals are deeply divided on this question, with at least three circuits holding that the phrase "controlled substance" in the Sentencing Guidelines refers only to substances listed on the federal drug schedules and four circuits holding that the phrase "controlled substance" incorporates state definitions of this phrase. This case presents the ideal opportunity for the Court to resolve this deep and fully developed split of authority on this important question of federal law.

I. The circuits are divided on the question presented.

The courts of appeals are divided on the question of whether the phrase "controlled substance offense" in § 4B1.2(b) refers to the federal drug schedules or whether it incorporates state drug schedules as well. Under § 4B1.2(b),

> The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or

> the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

The issue of whether the phrase "controlled substance" is defined under federal or state law has divided the circuits.

A. A number of circuits have held that the definition of "controlled substance offense" includes only substances controlled under the federal Controlled Substances Act.

Several circuits have held that the definition of "controlled substance offense" includes only substances controlled under the federal Controlled Substances Act (CSA), 21 U.S.C. § 801 et seq. *United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021); *United States v. Townsend*, 897 F.3d 66, 70-71 (2d Cir. 2018); *see also United States v. Gomez-Alvarez*, 781 F.3d 787, 793-94 (5th Cir. 2015) (interpreting definition of "drug trafficking offense" in USSG § 2L1.2).

The Ninth Circuit interprets the term "controlled substance" as used in § 4B1.2(b) "to mean a substance listed in the Controlled Substances Act (CSA)." *Bautista*, 989 F.3d at 702 (citing *United States v. Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012)). As the Ninth Circuit reasoned, the alternative approach (defining "controlled substance" with reference to state law) would undermine the uniform application of federal sentencing law:

> [C]onstruing the phrase in the Guidelines to refer to the definition of "controlled substance" in the CSA—rather than to the varying definitions of "controlled substance" in the different states—furthers uniform application of federal sentencing law, thus serving the stated goals of both the Guidelines and the categorical approach.

Id.

Similarly, the Second Circuit has held that the term "controlled substance" refers exclusively to substances controlled under the CSA. *Townsend*, 897 F.3d at 68. The Second Circuit explained:

> Although 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. To include substances controlled under only state law, the definition should read ". . . a controlled substance *under federal or state law*." But it does not.
>
> It may be tempting to transitively apply the "or state law" modifier from the term "controlled substance offense" to the term "controlled substance." But to do so would undermine the presumption that federal standards define federal sentencing provisions. Because the Guidelines presume the application of federal standards unless they explicitly provide otherwise, the ambiguity in defining "controlled substance" must be resolved according to federal—not state—standards.

Id. at 70-71.

And the Fifth Circuit has held that the phrase "drug trafficking offense" in USSG § 2L1.2, the definition of which is virtually identical to the definition of "controlled substance offense" in § 4B1.2(b),[2] refers to the federal CSA: "For a prior

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[2] *Compare* USSG § 4B1.2(b) ("The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.") *with* USSG § 2L1.2, comment. (n.2) ("'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."). The Fifth Circuit treats cases discussing the meaning of "controlled substance offense" in § 4B1.2(b) and "drug trafficking offense" in § 2L1.2 interchangeably. *United States v. Arayatanon*, 980 F.3d 444, 453 n.8 (5th Cir. 2020), *cert. denied*, 142 S. Ct. 378 (2021).

conviction to qualify as a 'drug trafficking offense,' the government must establish that the substance underlying that conviction is covered by the CSA." *Gomez-Alvarez*, 781 F.3d at 794. Given the similarity between the two definitions, the rationale of *Gomez-Alvarez* applies with equal weight to the definition of "controlled substance offense" in § 4B1.2(b).

Finally, while not expressly deciding the issue, the First Circuit has expressed strong support for the approach taken by the Second, Fifth, and Ninth Circuits. *United States v. Crocco*, 15 F.4th 20, 22-24 (1st Cir. 2021) (discussing the issue but finding no plain error).[3] The First Circuit noted, "[b]ecause we are interpreting the federal sentencing guidelines and utilizing the categorical approach (a creation of federal case law), this federally based approach is appealing." *Id.* at 23. The competing approach of looking to state law to supply the definition of "controlled substance" is "fraught with peril." *Id.* As the First Circuit explained, the alternative approach raises the question of "which version of state law should supply the definition of the predicate offense: the version in effect at the time of the instant federal sentencing, the one in force at the time of the previous state-court conviction, or another version?" *Id.* Further, to "blindly accept anything that a state names or treats as a controlled substance" would "turn[] the categorical approach on its head." *Id.* (quoting *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017)).

[3] The First Circuit affirmed without definitively resolving this issue because under circuit law, the defendant could not show plain error where the question of law was unsettled in the circuit and there was a circuit split on the issue. *Crocco*, 15 F.4th at 24-25.

Any attempt to circumscribe the term "controlled substance" by consulting a dictionary only raises more issues. *Id.* at 23-24. Thus, the First Circuit reasoned, the state law approach creates the very inconsistencies the categorical approach was intended to prevent. *Id.* (citing *United States v. Ward*, 972 F.3d 364, 383-84 (4th Cir. 2020) (Gregory, J., concurring opinion)).[4]

B. Four other circuits disagree.

On the other side of the split, the Fourth, Seventh, Eighth, and Tenth circuits have held that the phrase "controlled substance" in § 4B1.2(b) is not limited to the substances controlled by the federal CSA and instead encompasses substances controlled by state law:

- *United States v. Jones*, 15 F.4th 1288, 1291 (10th Cir. 2021) ("Defendant . . . argues that a prior state offense qualifies as a controlled-substance offense under § 4B1.2(b) only if it matches those controlled substances identified by the CSA. We disagree.");

- *Henderson*, 11 F.4th at 718 ("There is no requirement that the particular substance underlying the state offense is also controlled under a distinct federal law.");

- *United States v. Ward*, 972 F.3d 364, 372 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2864 (2021) ("Where a defendant is convicted under a state statute, we look to see how the state law defining that offense defines the punishment and the prohibited conduct (*e.g.*, distribution of a controlled substance).");

- *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1239 (2021) ("We see no textual basis to engraft the federal Controlled Substances Act's definition of 'controlled substance' into the career-offender guideline. The career-offender guideline defines the term controlled substance offense broadly, and the definition is most

[4] The Sixth Circuit has issued internally inconsistent unpublished opinions on this issue. *See United States v. Solomon*, 763 F. App'x 442, 446 (6th Cir. 2019) (unpublished) (noting inconsistency in recent opinions).

> plainly read to 'include state-law offenses related to controlled or counterfeit substances punishable by imprisonment for a term exceeding one year.'" (quoting *United States v. Hudson*, 618 F.3d 700, 703 (7th Cir. 2010)).

In short, there is a deep and fully developed circuit split on the meaning of "controlled substance" in § 4B1.2(b).

II. The decision below was wrongly decided.

Here, the Eighth Circuit followed *Henderson* and held that Bagola's Wyoming conviction qualified as a "controlled substance offense" because the substance underlying his offense was controlled under state law. The court had it wrong.

The text of § 4B1.2(b) supports the federal law approach of the Second, Fifth, and Ninth Circuits rather than the state law approach of the Eighth Circuit (and the Fourth, Seventh, and Tenth Circuits). Under § 4B1.2(b), "controlled substance offense" means "an offense *under federal or state law*" that prohibits certain conduct relating to "a controlled substance." The definition explicitly applies to "*an offense*" under federal or state law, but it does not apply to "*a controlled substance*" under federal or state law. In other words, "'[t]o include substances controlled under only state law, the definition should read ". . . a controlled substance *under federal or state law*." *Townsend*, 897 F.3d at 70. "But it does not." *Id.*

Further, "[b]ecause of the presumption that federal—not state—standards apply to the Guidelines, . . . if the Sentencing Commission wanted 'controlled substance' to include substances controlled under only state law to qualify, then it should have said so." *Id*. Again, it did not. Under the "*Jerome* presumption, 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)). The courts of appeals have applied the *Jerome* presumption to the Sentencing Guidelines. *See id.* Section 4B1.2(b) does not plainly indicate that state law supplies the definition of "controlled substance." The Court should interpret this phrase as referring to federal law.

Finally, the Eighth Circuit's state law approach undermines the goal of uniformity at the heart of the federal Sentencing Guidelines. *See Bautista*, 989 F.3d at 702 ("[C]onstruing the phrase in the Guidelines to refer to the definition of 'controlled substance' in the CSA—rather than to the varying definitions of 'controlled substance' in the different states—furthers uniform application of federal sentencing law, thus serving the stated goals of both the Guidelines and the categorical approach."). The state law approach also "turns the categorical approach on its head by defining the generic federal offense . . . 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). "Whereas the categorical approach was intended to prevent inconsistencies based on state definitions of crimes, the [state law] approach creates them." *Ward*, 972 F.3d at 383-84 (Gregory, J., concurring). The text, context, and purpose of § 4B1.2(b) all point to one conclusion. The term "controlled substance" refers exclusively to substances controlled under the federal CSA. It is not enough, as the court below concluded, that the substance was controlled under state law.

III. This Court should act now to resolve this important question of federal law.

The courts of appeals are essentially evenly divided on the question presented. This Court should act now to resolve this split of authority and ensure that defendants do not face dramatically different Guideline ranges for the same conduct and criminal history based only on the circuit they happen to have been prosecuted in. *Cf. Crocco*, 15 F.4th at 24 n.4 ("It makes little sense for career-offender criteria to vary from circuit to circuit based on whether a federal-law or state-law approach is chosen.").

A prior conviction for a "controlled substance offense" within the meaning of § 4B1.2(b) can enhance a defendant's advisory Guideline range in a number of ways. It can contribute to a finding of "career offender" status under USSG § 4B1.1 (as it did in Bagola's case). Such a designation "can have significant implications in setting the base guideline range." *Crocco*, 15 F.4th at 24 n.4. In recent years, between 1,200 and 1,800 defendants a year were found to be career offenders. U.S. Sentencing Comm'n, *Quick Facts – Career Offenders*, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY20.pdf (last accessed June 2, 2022). Without this designation, over 90 percent of defendants would have had a lower Guideline range. *Id.*

A prior conviction for a "controlled substance offense" can also increase the offense level under USSG § 2K2.1 (which applies to the unlawful receipt, possession, or transportation of firearms or ammunition & prohibited transactions

involving firearms or ammunition, including 18 U.S.C. § 922(g) offenses), USSG § 2K1.3 (which applies to the unlawful receipt, possession, or transportation of explosive materials), and USSG § 4B1.4 (which applies in Armed Career Criminal Act cases). Many federal defendants are sentenced under these Guidelines. Indeed, in fiscal year 2021, over 7,700 offenders (which amounts to 14.1 percent of all offenders) were sentenced under § 2K2.1 alone. U.S. Sentencing Comm'n, *2021 Sourcebook of Federal Sentencing Statistics*, at 71. The definition of "controlled substance offense" impacts hundreds or thousands of defendants a year.

This Court need not and should not wait for the United States Sentencing Commission to resolve this important issue. Despite repeated calls for the Sentencing Commission to resolve this issue, it remains without the necessary quorum to do so. *See, e.g.*, *Guerrant v. United States*, 142 S. Ct. 640 (2022) (statement of Sotomayor, J., respecting the denial of certiorari) (noting that Sentencing Commission has not had a quorum for three years); *Crocco*, 15 F.4th at 24 n.4 ("This broad sketch of the legal landscape also demonstrates why it is problematic that the U.S. Sentencing Commission currently is without sufficient members to conduct business."). While the President recently announced a slate of nominees for the Sentencing Commission, there is no timeline for their confirmation. *See* The White House, *President Biden Nominates Bipartisan Slate for the United States Sentencing Commission* (May 11, 2022). And there is no indication if and when a full Sentencing Commission will take up this issue. The Sentencing Commission has been unable to act for years, and it remains unable to act today.

This Court can and should act to resolve the meaning of "controlled substance offense" in § 4B1.2(b). *See generally Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (reaffirming role of courts in interpreting agency regulations).

IV. This case is an ideal vehicle for the question presented.

This case squarely presents the issue of whether the phrase "controlled substance" in § 4B1.2(b) is limited to the substances controlled by the federal CSA or whether this phrase incorporates state definitions of that term. While Bagola did not challenge his career offender designation at sentencing, it was undisputed on appeal that at the time of his 2017 Wyoming conviction for possession with intent to deliver marijuana, the Wyoming statute encompassed possession with intent to deliver hemp and that if the federal CSA applied to the definition of "controlled substance offense," Bagola's Wyoming conviction would have been overbroad. The career offender designation had a dramatic effect on Bagola's sentence. It increased his advisory Guideline range from 292 to 365 months to 360 months to life, and the district court mentioned Bagola's career offender status multiple times before imposing a sentence of 420 months in prison. This case is an ideal vehicle for the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 2nd day of June, 2022.

Respectfully submitted,

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