NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 20__

MICHAEL ANDREW TAYLOR,

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 WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether "controlled substance[s]" in the Federal Sentencing Guidelines §4B1.2(b) are limited to those substances defined and regulated under the federal Controlled Substances Act, 21 U.S.C. § 801 et seq.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Southern District of Iowa, and the United States Court of Appeals for the Eighth Circuit:

United States v. Taylor, 3:22-cr-00050-001 (S.D. Iowa) (criminal proceedings), judgment entered January 24, 2023.

United States v. Taylor, 23-1267 (8th Cir.) (direct criminal appeal), judgment entered December 5, 2023.

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Taylor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The Eighth Circuit affirmed the district court's decision in an unpublished decision, available at 2023 WL 8433642. The opinion is reproduced in the appendix to this petition at Pet. App. p. 8.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment in Mr. Taylor's case on December 5, 2023. Pet. App. p. 12. The Court has previously granted two extensions. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 994:

> (h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—
>
> (1) has been convicted of a felony that is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and
>
> (2) has previously been convicted of two or more prior felonies, each of which is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled

> Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46

USSG §4B1.1

> (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.

USSG §4B1.2(b) defines a "controlled substance offense" as follows:

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

STATEMENT OF THE CASE

A. Introduction

In a variety of ways, our federal sentencing laws call for an increase in a defendant's sentence if he or she has prior qualifying drug convictions. For example, the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), the "three strikes" law, 18 U.S.C. § 3559(c), the federal drug trafficking statutes, 21 U.S.C. §§ 841, 851, and the United States Sentencing Guidelines, all require courts to determine whether a defendant's prior drug conviction requires a higher statutory or Guideline sentencing range.

This, of course, requires application of the categorical approach. Just like it was not enough in *Taylor*, 495 U.S. 575, for state courts to call a crime a "burglary" for it to qualify as a predicate for the ACCA, it is not enough for state courts to call a crime a drug offense to find it meets the generic definition of a federal sentencing enhancement provision. A comparison between the elements of the state conviction and the generic definition of the federal sentencing enhancement provision is still required. Various disagreements have emerged between circuits on how to apply the categorical approach in these circumstances. Mr. Taylor's case involves one of those splits.

The split involves the proper interpretation of USSG §4B1.2—namely, what a "controlled substance offense" means under the Sentencing Guidelines, specifically, how courts determine what substances are considered "controlled substance offenses."

Courts in eleven circuits have weighed in on this question presented and have split seven to four: seven circuits hold that "controlled substance offenses" should include substances criminalized under state law, even if the conduct is not illegal under federal law, while four circuits hold that "controlled substance offense" comprises only those offenses criminalized under the federal Controlled Substances Act.

This split is wide, entrenched, and has been in existence for more than a decade. This Court should intervene because the Sentencing Commission has repeatedly declined to resolve the issue. The Commission previously acknowledged that this question was a circuit split to be resolved but has specifically declined to address this circuit split in its proposed amendments sent to Congress. *Cf. Braxton v. United States*, 500 U.S. 344, 348–49 (1991) (declining to resolve Guidelines issue because the Commission had undertaken a proceeding to resolve conflict). Again, because two of Mr. Taylor's convictions include a substance not controlled federally, this Court should grant the petition to address this split.

B. Proceedings at the District Court.

On February 10, 2022, law enforcement responded to a call of a suspicious person at an apartment. PSR[1] ¶ 8. The caller reported that a man—later determined

[1] In this petition, the following abbreviations will be used:
"R. Doc." -- district court clerk's record, followed by docket entry and page number, where noted;
"PSR" -- presentence report, followed by the page number of the originating document and paragraph number, where noted; and

to be Mr. Taylor—appeared to be intoxicated and was trying to enter her apartment. PSR ¶ 8. Law enforcement arrived and found Mr. Taylor to be "incredibly intoxicated." PSR ¶ 9. In general, Mr. Taylor was compliant with the law enforcement commands. PSR ¶ 9. After talking with Mr. Taylor, law enforcement learned that Mr. Taylor lived two doors down, and that Mr. Taylor thought he was entering his own apartment. PSR ¶ 10. Mr. Taylor was arrested after law enforcement found a firearm and baggies of cocaine on his person. PSR ¶¶ 8-17.

Mr. Taylor was indicted in the Southern District of Iowa with one count of possession of cocaine and cocaine base with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2). R. Doc. 1. Eventually, Mr. Taylor pled guilty to both counts, without a plea agreement. R. Doc. 26, 28.

The case proceeded to sentencing. The presentence investigation report ("PSR") relied upon the felon in possession of a firearm Guideline, under USSG §2K2.1. The PSR determined Mr. Taylor was a career offender because he had two prior convictions for either a crime of violence or a controlled substance offense. PSR ¶ 30; USSG §4B1.1. Specifically, the PSR stated that Mr. Taylor had two prior convictions for a controlled substance offense and a prior conviction for a crime of violence. PSR ¶¶ 30, 36, 39, 42. The first alleged controlled substance offense conviction was for Illinois manufacture/delivery of cocaine, in violation of 720 ILCS §

"Sent. Tr." – Sentencing hearing transcript, followed by page number.

570/401(c)(2). PSR ¶ 36. The second prior conviction was for Illinois manufacture/delivery of any other amount narcotic schedule I & II, in violation of 720 ILCS § 570/401(d)(i). PSR ¶ 39. The alleged crime of violence was Iowa domestic abuse strangulation. PSR ¶ 42.

The career offender enhancement increased Mr. Taylor's base offense level to 32, and his criminal history category from V to VI. PSR ¶¶ 30, 46. After a reduction for acceptance of responsibility, Mr. Taylor's total offense level was 29. PSR ¶ 33. Combined with a criminal history category VI, this resulted in an advisory guideline range of 151 to 188 months of imprisonment. PSR ¶ 110.

Mr. Taylor objected to the career offender enhancement. R. Doc. 38, 42. As relevant to this appeal, Mr. Taylor asserted that the convictions under paragraphs 36 and 39 were not controlled substance offenses, because they criminalized substances that are not within the definition of controlled substance offense. R. Doc. 38, 42. Further, he also objected to the PSR narrative for each prior conviction. R. Doc. 38, 42.

The case proceeded to sentencing. He maintained his challenge to the application of the career offender enhancement. Sent. Tr. p. 6. The prosecution did not introduce any *Shepard*[2] documents. The district court overruled Mr. Taylor's objection and accepted the PSR's calculation of the advisory Guideline range. Sent.

[2] *Shepard v. United States*, 544 U.S. 13 (2005).

Tr. pp. 6-8. The court sentenced Mr. Taylor to 151 months of imprisonment. Sent. Tr. p. 20.

C. Proceedings on Appeal.

Mr. Taylor appealed to the Eighth Circuit Court of Appeals, maintaining his challenge to the career offender enhancement. As relevant to this appeal, he again argued that his Illinois convictions were inclusive of substances outside of the federal Controlled Substances Act, so they were overbroad.

The Eighth Circuit rejected Mr. Taylor's argument that "controlled substance offenses" are limited to substances controlled under the federal Controlled Substances Act, noting it was foreclosed by *United States v. Henderson*, 11 F.4th 713 (8th Cir. 2021). *United States v. Taylor*, No. 23-1267, 2023 WL 8433642 (8th Cir. Dec. 5, 2023). The Court stated, "In *Henderson*, noting that § 4B1.2(b)(1) contains 'no requirement that the particular substance underlying the state offense is also controlled under a distinct federal law,' we held that a controlled substance conviction under state law is a "controlled substance offense" under § 4B1.2(b)(1) even if state law regulates substances not controlled under federal law." *Id*.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD ADDRESS WHETHER THE DEFINITION OF CONTROLLED SUBSTANCE OFFENSE IS LIMITED TO SUBSTANCES CONTROLLED UNDER THE FEDERAL CONTROLLED SUBSTANCES ACT.

A. A Direct Conflict Exists Among the Courts of Appeals

i. Four Circuits Define "Controlled Substance" Solely By Reference to the Federal Controlled Substances Act.

The First, Second, Fifth, and Ninth Circuits interpret "controlled substance[s]" to include only federal substances offenses under the Controlled Substances Act.

Interpreting §4B1.2, the Ninth Circuit reasoned that the Guidelines' goal of sentencing uniformity supporting using the Controlled Substances Act to define "controlled substances:"

> We have interpreted the term "controlled substance" as used in the Guidelines to mean a substance listed in the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 et seq. As we noted in *Leal-Vega*, construing 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.

United States v. *Bautista*, 989 F.3d 698, 702 (9th Cir. 2021) (citing *United States v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012)).

The Second Circuit also interpreted §4B1.2 in relation to the CSA and noted a textual basis for its holding:

> [W]e find that "controlled substance" refers exclusively to substances controlled by the CSA. . . . 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.

United States v. Townsend, 897 F.3d 66, 68–70 (2d Cir. 2018) (emphasis in original). The Second Circuit further supported its conclusion by citing the *Jerome* presumption, which prescribes that "the application of a federal law does not depend on state law unless Congress plainly indicates otherwise." *Id.* at 71. "Because 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.* at 70 (citations omitted).

The Fifth Circuit adopted the Ninth Circuit's reasoning, concluding that the Controlled Substances Act defines which offenses constitute predicates for sentence enhancements. *United States v. Gomez-Alvarez*, 781 F.3d 787, 793–94 (5th Cir. 2015) (citing to *United States v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012)) ("For a prior conviction to qualify as a 'drug trafficking offense,' the government must establish that the substance underlying that conviction is covered by the CSA.").[3]

Finally, the First Circuit has indicated it believes "controlled substance" should be defined by reference to federal law. The First Circuit noted that "[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,"

[3] Although *Gomez-Alvarez* interpreted "drug trafficking offense" under §2L1.2, rather than "controlled substance offense" in §4B1.2, this statutory distinction is "immaterial," because §4B1.2 and §2L1.2 define these terms identically. *Bautista*, 989 F.3d at 702 (stating "[t]he relevant text in the two provisions is identical.")

because "federal courts cannot blindly accept anything that a state names or treats as a controlled substance." *United States v. Crocco*, 15 F.4th 20, 23 (1st Cir. 2021) (internal quotations omitted). It found the competing approach, endorsed by the Fourth, Seventh, Eighth and Tenth Circuits to be "fraught with peril." *Id.*

Had Mr. Taylor been tried in any of the above circuits, his Guidelines' range would have been significantly lower than what he received in the Eighth Circuit.

ii. Seven Circuits Define "Controlled Substance" With Reference to the State Definition of "Controlled Substances."

Aside from the Eighth Circuit, six circuits have found that the plain text of §4B1.2 incorporates state definitions of "controlled substances."

The Fourth Circuit explicitly stated as much in *United States v. Ward*, 972 F.3d 364, 374 (4th Cir. 2020), *cert denied*, 141 S. Ct. 2864 (2021):

> The term "controlled substance offense" means an offense under federal *or state law*. § 4B1.2(b) (emphasis added). Thus, the Commission has specified that we look to *either* the federal or state law of conviction to define whether an offense will qualify.

The Seventh Circuit came to a similar conclusion:

> We see no textual basis to engraft the federal Controlled Substance 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 plainly read to "include state-law offenses related to controlled or counterfeit substances punishable by imprisonment for a term exceeding one year."

United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1239 (2021) (citing *United States v. Hudson*, 618 F.3d 700, 703 (7th Cir. 2010)).

The Tenth Circuit also found that absent a clear directive in §4B1.2(b)'s reference to "controlled substance," the courts should use state definitions:

> [B]y not referencing the Controlled Substance Act definition in § 4B1.2(b), the Commission evidenced its intent that the enhancement extend to situations in which the state-law offense involved controlled substances not listed in the Controlled Substance Act.

United States v. Jones, 15 F.4th 1288, 1294 (10th Cir. 2021).

The Third Circuit held that controlled substance offenses are inclusive of offenses controlled under state law. *United States v. Lewis*, 58 F.4th 764 (3d Cir. 2023). The court relied upon the plain language of the Guideline, including the Guidelines' failure to explicitly state the definition was limited to substances controlled under federal law. *Id*. at 769. At this time, the Third Circuit has stayed the mandate pending the disposition of this Court's decision in *Jackson v. United States,* 22-6640.

Most recently, the Sixth Circuit and the Eleventh Circuit agreed that the definition of controlled substance offenses is not limited to substances controlled under federal law, relying on the plain language of the Guideline. *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024); *United States v. Jones*, 81 F.4th 591 (6th Cir. 2023).

Thus, eleven of the twelve courts of appeals have addressed Mr. Taylor's issue in some manner and a split is well established. So long as that is the case, there is no possibility of uniform federal sentencing law.

B. The Eighth Circuit's decision finding "controlled substance offense" includes substances not controlled federally is incorrect.

i. The Eighth Circuit's Decision is Contrary to the Text of §4B1.2.

The Eighth Circuit was incorrect in *Henderson* when it claimed that "there is no textual basis to graft a federal law limitation onto a [federal] career-offender guideline." 11 F.4th at 718-19. Instead, the plain text and authorizing statute, 28 U.S.C. § 994(h), indicate that §4B1.2 does not incorporate state law definitions of controlled substances.

The Commission's authority to promulgate regulations for career offenders stems from 28 U.S.C. § 994(h). Section 994(h) instructs the Commission to provide for enhanced sentencing of defendants who had been convicted of two prior felonies that were "offense[s] described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46." 28 U.S.C. § 994(h)(2)(b).

The Commission originally drafted §4B1.2 with this mandate in mind, explicitly incorporating § 994(h)'s references to the Controlled Substances Act. See USSG §4B1.2 (1987) ("The term 'controlled substance offense' as used in this provision means an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 955a, 959; §§ 405B and 416 of the Controlled Substance Act as amended in 1986, and similar

offenses.").[4] Indeed, if §4B1.2 were interpreted to include controlled substances not outlined in the Controlled Substances Act, contrary to § 994(h), there is a colorable argument that the Commission exceeded its authority.

Additionally, although the Commission has modified §4B1.2 once, this amendment only reinforced that "controlled substance[s]" are limited to substances outlined in the Controlled Substances Act. The current version of §4B1.2 originated in 1989. As the Sentencing Commission states, this alteration was intended to bring the definition of "controlled substance offenses" in line with "serious drug offense[s]" in the Armed Career Criminal Act. U.S. Sent'g Comm'n, Report to the Congress: Career Offender Sentencing Enhancements, at App. A-8 (2016) (citing USSG App. C, amend. 268 (Nov. 1, 1989)). In turn, "serious drug offense[s]" are explicitly limited to substances defined under federal law. 18 U.S.C. § 924(e)(2)(A). Therefore, the 1989 revision reinforces Mr. Taylor's argument that controlled substances only include those substances under the Controlled Substance Act.

The structure of §4B1.2 further supports Mr. Taylor's interpretation of the Guideline. Section 4B1.2 defines a "controlled substance offense [as] an offense under federal or state law," that prohibits the manufacture, import, export, distribution,

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[4] Early court opinions interpreting §4B1.2 determined that the Guidelines permitted enhanced sentencing based on state convictions only where the prior conviction also could have been charged under federal law. *United States v. Stewart*, 761 F.3d 993, 999 (9th Cir. 2014), *United States v. Jemine*, 555 F. App'x 624, 625 (7th Cir. 2014), *United States v. Najar*, 225 F.3d 660 (6th Cir. 2000), *United States v. Gonsalves*, 121 F.3d 1416, 1419 (11th Cir. 1997), *United States v. Consuegra*, 22 F.3d 788 (8th Cir. 1994), *United States v. Brown*, 23 F.3d 839, 841 (4th Cir. 1994), *United States v. Whyte*, 892 F.2d 1170 (3d Cir. 1989).

dispensing, or possession "of a controlled substance." USSG §4B1.2(b). "Offense" is the subject of the sentence and the phrase "under federal or state law" modifies that term. "Federal or state law" does not modify the term "controlled substance."

As such, §4B1.2 permits state convictions to justify sentencing enhancements but does not define controlled substances by reference to 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." *Townsend*, 897 F.3d at 70. (emphasis in original). Rather, to determine whether an offense is a controlled substance offense, "the *conduct* of which the defendant was convicted is the focus of inquiry." USSG §4B1.2, comment. (n.2) (emphasis added); see also *United States v. Nardello,* 393 U.S. 286, 293–95 (1969).

ii. The Eighth Circuit's Approach Contravenes the Guidelines Goal of Avoiding Sentencing Disparity.

The practice followed by the Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh circuits upsets the "precise calibration of sentences," *Payne v. Tennessee*, 501 U.S. 808, 820 (1991), that Congress established, see United States Sent'g Comm'n, Guidelines Manual, 2 (Nov. 2021) (describing Congress' "three objectives" in enacting the Sentencing Reform Act of 1984 as combating crime, reasonable uniformity in sentencing, and proportionality); *Rita v. United States*, 551 U.S. 338, 349 (2007) ("Congress 'sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct.'").

Further, the Eighth Circuit's method "turns the categorical approach on its head." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017); *see also Descamps v. United States*, 570 U.S. 254 (2013). The Eighth Circuit now permits two identical defendants to receive different sentences "based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct" a controlled substance offense. *See United States v. Taylor*, 495 U.S. 575, 591 (1990). This type of disparate outcome is precisely what the Guidelines were designed to avoid. *Rita*, 551 U.S. at 349 (stating that the Guidelines developed "a system that imposes appropriately different sentences for criminal conduct of different severity" not based upon the geographic location where the crime was committed.).

Such an approach has been consistently rejected in other areas of criminal law. Cf. *Taylor*, 495 U.S. at 590–91 (rejecting the use of state-law definitions of "burglary" for sentence enhancement purposes because "[t]hat would mean that a person . . . would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary.'"); *Esquivel-Quintana*, 137 S. Ct. at 1570 (rejecting argument that "sexual abuse of a minor" encompasses all state convictions regardless of state's age of consent, because "defining [an offense] . . . as whatever is illegal under the particular law of the State where the defendant was convicted" turns "the categorical approach on its head"); *Nardello,* 393 U.S. at 293–94 (finding it untenable that "[g]iving controlling effect to state classifications would result in coverage . . . if

appellees' activities were centered in Massachusetts, Michigan, or Oregon, but would deny coverage in Indiana, Kansas, Minnesota, or Wisconsin"). Controlled substance offenses are no different.

The text, drafting history, and general principles of criminal law show that the Eighth Circuit is wrong on the merits.

C. The Sentencing Commission has declined to address this split.

The Sentencing Commission has acknowledged that this split exists. *See generally*, U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines, Pt. 8, Circuit Conflicts (Apr. 5, 2023), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230405_prelim-RF.pdf. Initially, in 2023, the Commission was considering whether to adopt an amendment to address this split and determine whether controlled substances offenses are limited to substances listed under the federal Controlled Substances Act, or whether it also includes substances controlled under state law. However, the Commission ultimately did not address the issue. *See id*. This issue is also absent from the recent proposed amendments. *See generally*, U.S. Sentencing Comm'n, Proposed 2024 Amendments to the Sentencing Guidelines, Part 4 Circuit Conflicts, *available at* https://www.ussc.gov/guidelines/amendments/proposed-2024-amendments-federal-sentencing-guidelines. Therefore, the Commission will not resolve this conflict; this Court should do so.

More still, this Court need not wait for the Commission to act. Sentencing courts and courts of appeals are already acting to sentence thousands of defendants

annually to divergent sentences. And as recognized in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the interpretation of federal regulations like the Guidelines remains firmly in the hands of the Court. *Kisor*, 139 S. Ct at 2415; *see also United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020) (interpreting *Kisor* as requiring courts to make an independent inquiry into the Sentencing Guideline's meaning and interpretation).

CONCLUSION

For these reasons, Mr. Taylor respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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