No. _____

IN THE

Supreme Court of the United States

CURTIS HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

THOMAS W. PATTON
Federal Public Defender

MICHAEL WILL ROY
Assistant Federal Public Defender
Counsel of Record

OFFICE OF THE FEDERAL PUBLIC DEFENDER
300 W. Main Street
Urbana, Illinois 61801
Phone: (217) 373-0666
Email: michael_roy@fd.org
Counsel for Petitioner

QUESTION PRESENTED

Defendants who have two prior felony convictions for "controlled substance offense[s]" qualify as career offenders under the federal Sentencing Guidelines. In the First, Second, Fifth, and Ninth Circuits, a conviction counts as a "controlled substance offense" only if the conduct involved a substance listed in the federal Controlled Substances Act.

Is the Seventh Circuit on the wrong side of a circuit split when it construes the term "controlled substance offense" under § 4B1.2(b) of the Sentencing Guidelines to include state convictions, even when those convictions involve substances that are not outlawed by federal law?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

United States Court of Appeals (7th Cir.):

United States v. Harris, No. 24-1173, (February 24, 2025).

United States District Court (N.D. Ill.):

United States v. Harris, No. 1:19-CR-00804(1), (January 26, 2024).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Curtis Harris respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

DECISIONS BELOW

The Seventh Circuit's opinion (App. 1a–3a) is unpublished but available on Westlaw at 2025 WL 586834. The district court's judgment (App. 4a–11a) and the sentencing transcript (App. 12a–57a) are unpublished.

JURISDICTION

The Seventh Circuit entered judgment on February 24, 2025. (App. 1a.) Neither side petitioned for rehearing. This petition is filed within 90 days of the February 24, 2025 judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED

28 U.S.C. § 994(h) provides, in relevant part:

> The [United States Sentencing] 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 [specific felonies]; 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.

United States Sentencing Guidelines (U.S.S.G.) § 4B1.1(a) provides:

> 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.

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

> The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> > (1) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or
> >
> > (2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

The Federal Controlled Substances Act, at 21 U.S.C. § 812, Schedule III(b)(7), outlaws and defines phencyclidine as:

> any material, compound, mixture, or preparation which contains any quantity of … Phencyclidine.

The Illinois Controlled Substances Act, at 720 ILCS 570/206(e), outlaws and defines phencyclidine as:

> Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever

> the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation: … Phencyclidine.

INTRODUCTION

The case implicates a deep circuit split, in which every geographic circuit apart from the D.C. Circuit has already weighed in. A district judge in the Northern District of Illinois ruled that Curtis Harris was a career offender and sentenced him to 10 years for distributing 7.4 grams of fentanyl. But if Harris had been sentenced in New York, California, or Texas instead of Chicago, he would not be considered a career offender. And as a result, his sentence would have been significantly shorter.

The Second, Fifth, and Ninth Circuits all use a categorical approach to determine whether a prior conviction counts as a predicate "controlled substance offense" under §§ 4B1.1(a) and 4B1.2(b) of the Sentencing Guidelines. In those circuits, a state drug conviction is a controlled substance offense only if the offense necessarily involved a substance listed in the federal Controlled Substances Act. *See United States v. Minor*, 121 F.4th 1085, 1089 (5th Cir. 2024); *United States v. Bautista*, 989 F.3d 698, 702–704 (9th Cir. 2021); *United States v. Townsend*, 897 F.3d 66, 68, 71 (2nd Cir. 2018). Harris has prior Illinois convictions for distribution of phencyclidine (PCP), but those convictions don't count for career-offender status in those circuits because Illinois's definition of PCP is categorically broader than the federal definition.

Bad luck for Harris that he lives in the Seventh Circuit, where courts do not use the categorical approach to apply the career-offender guideline. Instead, the

Seventh Circuit construes the term "controlled substance offense" broadly to include state crimes involving "any of a category of behavior-altering or addictive drugs," regardless of whether those same drugs are legal under federal law. *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020). Similar rules apply in the Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits. The upshot is that Harris became a career offender with a guideline sentencing range *five times* higher than it would have been in other parts of the country.

This case is not the first time this Court has been asked to address this circuit split. Three years ago, this Court denied a similar petition for certiorari in *Guerrant v. United States*, 142 S. Ct. 640 (2022) (Sotomayor, J., statement respecting denial of certiorari). But Justice Sotomayor, joined by Justice Barrett, wrote separately to highlight the importance of the split: Defendants like Harris are "subject to far higher terms of imprisonment for the same offenses as compared to defendants similarly situated in the Second or Ninth Circuits." *Id.* at 640. At the time, the justices noted that the United States Sentencing Commission lacked the quorum necessary to resolve the split. *Id.* at 640–41. They voted to deny certiorari with the hope that the commission would address this issue once it regained a quorum. *Id.*

Even after regaining a quorum, however, the commission has not amended this provision. Nor does the commission look like it plans to resolve the circuit split in the near future. Instead, the commission has repeatedly punted on this issue. Most recently, the commission proposed an amendment to the definition of

"controlled substance offense" in December 2024 that would finally address the split. But it later backpedaled and removed that proposal from the list of 2025 amendments. The split remains active. And as time goes on, the need for this Court's intervention to resolve the split becomes clearer.

Harris's case demonstrates why the split is important for this Court to address. Harris's career-offender status quintupled his guideline range, increasing it from 30 to 37 months to 151 to 188 months. A disparity that stark should not depend upon geography. This Court should weigh in.

STATEMENT OF THE CASE

I. Background on the Career-Offender Guideline

The United States Sentencing Commission establishes sentencing guidelines for federal defendants. *Molina-Martinez v. United States*, 578 U.S. 189, 192 (2016). The guidelines are composed of two basic parts: an offense level, calculated from the details of the defendant's relevant conduct; and a criminal-history score, calculated from the defendant's prior criminal history. *Rosales-Mireles v. United States*, 585 U.S. 129, 133–34 (2018). When the offense level and criminal-history score are combined, the sentencing court gets an advisory sentencing range of anywhere from 0–6 months to life in prison. *See* U.S.S.G. Ch. 5 Pt. A. One purpose of these guidelines is to achieve uniformity in sentencing; the guidelines are meant to recommend similar sentences for similarly situated defendants. *Molina-Martinez*, 578 U.S. at 192 (citing *Rita v. United States*, 551 U.S. 338, 349 (2007)).

Ultimately, the commission's power to create these guidelines comes from Congress. 28 U.S.C. §§ 991, 994(a); *Mistretta v. United States*, 488 U.S. 361, 367 (1989). And among other things, Congress has directed the commission to increase the guideline ranges for certain career offenders. As relevant here, Congress instructed the commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for certain defendants convicted of specific federal crimes of violence or drug offenses. 28 U.S.C. § 994(h). Congress said that this provision should apply, among other things, when a defendant "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." 28 U.S.C. § 994(h)(2).

The commission responded to the mandate of § 994(h) by creating the career-offender guideline. *See* U.S.S.G. § 4B1.1. Just as directed in § 994(h), the guideline applies to certain defendants sentenced for federal crimes of violence or controlled substance offenses. U.S.S.G. § 4B1.1(a). But the commission used its own terminology to define the prior convictions necessary for career-offender status. Rather than use the list of federal drug offenses provided in § 994(h), the guideline says that a defendant can qualify as a career offender if the defendant has two prior convictions for a "controlled substance offense." U.S.S.G. § 4B1.1(a).

Another guideline further defines "controlled substance offense" to include "an offense under federal or state law … 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). The guidelines do not define "controlled substance," however, and federal circuits are split on how to define the term as it applies to state offenses.

Some circuits turn to federal law, reasoning that a state drug conviction is a predicate "controlled substance offense" only if it involves a substance that is also illegal under the Controlled Substances Act. *See, e.g., United States v. Bautista*, 989

F.3d 698, 702 (9th Cir. 2021). These circuits use the "categorical approach," under which a court looks at a state's statutory definition for an offense to see if it is the same or narrower than its federal counterpart. *Id*. at 704. Under the categorical approach, courts do not look at the underlying facts of a defendant's prior conviction. *Descamps v. United States*, 570 U.S. 254, 263 (2013). Instead, courts look solely to whether the elements of the crime of conviction match the elements of the federal recidivism statute. *Taylor v. United States*, 495 U.S. 575, 600 (1990). "If, and only if, the elements of the state law mirror or are narrower than the federal statute can the prior conviction qualify" as a predicate offense. *United States v. Ruth*, 966 F.3d 642, 646 (7th Cir. 2020) *(*internal quotation omitted).

Other circuits, including the Seventh where this case originates, reject the use of the categorical approach when applying § 4B1.2(b)'s definition of "controlled substance offense." The Seventh Circuit has construed the provision to include not only federally outlawed substances, but also any state crime involving "any of a category of behavior-altering or addictive drugs" regardless of whether those same drugs are illegal under federal law. *Id.* at 654. This means that a defendant who previously distributed a substance that is federally legal but banned at the state level may nonetheless qualify as a career offender in the Seventh Circuit. The same defendant would not be a career offender in the Ninth Circuit.

Regardless of the circuit, however, career-offender status carries grave consequences under the guidelines. The defendant is automatically assigned to the highest criminal-history category and subject to an enhanced offense level based on

the statutory maximum sentence. U.S.S.G. 4B1.1(b). In general, the career-offender guideline is designed so that the recommended sentence will always be near or at the maximum sentence. *Compare* U.S.S.G. § 4B1.1(b) *and* U.S.S.G. Ch. 5 Pt. A.

II. The District Court Proceedings in this case

Curtis Harris pleaded guilty to distributing fentanyl to an undercover police officer. (R. 79.) Through a plea agreement, the parties stipulated to the drug quantity at issue, to a base offense level of 14 under the Sentencing Guidelines, and to an offense-level reduction for acceptance of responsibility. (R. 79 ¶ 9.b.) The parties disputed, however, whether Harris qualified for a career-offender enhancement under § 4B1.1. (R. 79 ¶ 9.d.) They recognized that a ruling that Harris qualified as a career offender would more than quintuple his final guideline range. (R. 79 ¶ 9.e.)

The presentence investigation report identified two potential "controlled substance offenses" that could qualify as predicate offenses for a career-offender enhancement under § 4B1.1. (R. 80 ¶ 21.) Both prior convictions were for the manufacture and/or delivery of phencyclidine (PCP), in violation of Illinois law. (R. 80 ¶¶ 41, 44.) According to the report, the conduct underlying both convictions was also relatively minor: In each case, Curtis was convicted for a single sale of PCP for less than $50. (R. 80 ¶¶ 41, 44.)

The Illinois law under which Harris was twice convicted defined PCP to encompass any material, compound, mixture, or preparation containing either PCP or "its salts, isomers, and salts of isomers whenever the existence of such salts,

isomers, and salts of isomers is possible." 720 ILCS 570/206(e). The Illinois definition for PCP was broader than the federal Controlled Substances Act, which outlaws any substance containing PCP but lacks any mention of salts or isomers of PCP. 21 U.S.C. § 812, Schedule III(b)(7). The differences between the Illinois and federal definitions means that Illinois law allows convictions for substances that are legal at the federal level.

Harris objected that his prior state PCP convictions should not count as "controlled substance offenses." (R. 88 at 2–3; App. 15a–16a.) But the district court overruled Harris's objection and applied the career-offender guideline. (App. 16a–18a.) With the career-offender enhancement, Harris's guideline range was 151 to 188 months' imprisonment. (App. 30a.) Without the enhancement, Harris's guideline range would have been only 30 to 37 months.[1]

The district court imposed the government's recommended sentence of 120 months' imprisonment. (App. 41a, 55a.) In mitigation, the court recognized that Harris's predicate offenses for the career-offender enhancement had involved only minor conduct: small quantities of drugs sold for personal use. (App. 52a.) But the court expressed agreement with the policy decisions behind the career-offender guideline. (App. 52a.) And, although the court ultimately varied below the final

[1] With no career-offender enhancement: Harris's base offense level is 14 (App. 18a; R. 80 ¶ 20), minus two points for acceptance of responsibility (R. 80 ¶ 22), but he would be ineligible for an additional third point off for acceptance because his offense level would be below 15 (U.S.S.G. § 3E1.1(b)). That results in a final offense level of 12. When combined with Harris's criminal-history category of VI (App. 30a; R. 80 ¶ 49), an offense level of 12 creates a guideline range of 30–37 months. U.S.S.G. Ch. 5 Pt. A.

guideline recommendation, the court still reasoned that the career-offender enhancement (along with other things) warranted a 10-year sentence. (App. 52a–54a.) The court did not explain how it would have sentenced Harris if he were not a career offender under the guidelines.

III. The Seventh Circuit's Decision

On appeal, Harris preserved his claim that he should not be considered a career offender. (App. 2a.) He argued that Illinois's PCP-trafficking law is broader than its federal counterpart, which lacks any mention of salts or isomers. *Compare* 720 ILCS 570/206(e) *with* 21 U.S.C. § 812, Schedule III(b)(7). (App. 2a.) Therefore, using the categorical approach as in the Second or Ninth Circuits, Harris maintained that the Illinois law should not qualify as a controlled substance offense under the guidelines. (App. 2a.)

Harris recognized, however, that his argument was foreclosed by binding circuit precedent. (App. 2a.) He also recognized that the Seventh Circuit had repeatedly declined requests to switch sides in this circuit split. *See, e.g., United States v. Tovar*, 88 F.4th 720, 725 (7th Cir. 2023). He thus preserved his claims solely for purposes of seeking certiorari. (App. 2a.)

The Seventh Circuit affirmed, eschewing the categorical approach and applying its circuit rule that the term "controlled substance" under the guideline "refers to the ordinary meaning of that term—not the definitions in the federal Controlled Substances Act." (App. 2a–3a.) But the appellate court recognized that Harris had preserved his argument for further review. (App. 3a.)

REASONS FOR GRANTING THE PETITION

Within the federal Sentencing Guidelines, few provisions can have as dramatic an effect on a defendant's sentence as the career-offender provisions of § 4B1.1. In this case, for example, the district court's conclusion that Harris is a career offender quintupled his guideline range from 30 to 37 months to 151 to 188 months.

This important provision of the guidelines works differently depending on where in the country a defendant is sentenced. The circuits are deeply misaligned over how to apply § 4B1.2(b)'s definition of "controlled substance offense," which is incorporated into § 4B1.1. And despite this Court's hope that the sentencing commission would amend the guidelines to address the circuit split, the commission has shown an unwillingness to do so. Defendants like Harris, who would not be a career offender in other circuits, meanwhile receive much higher sentences because of differences in circuit law.

This Court's intervention is needed to bring uniformity to federal sentencing, and Harris's case is the ideal vehicle. He is a defendant who is a career offender under the laws of some circuits but not others. And his case is one in which the career-offender guideline drastically alters the sentence. At the same time, he is not alone. As demonstrated by the several other petitions for certiorari brought previously by other defendants, many people are in the same position as Harris. Allowing the split to fester will only continue these geographic disparities and undermine the guidelines' goal of consistency in sentencing.

I. This case involves a well-developed circuit split.

A. Four circuits rely on federal law alone to define "controlled substance offense."

Four circuits have endorsed the use of the categorical approach to determine whether a prior state conviction counts as a "controlled substance offense." In these circuits, a criminal defendant's prior drug convictions count as predicate offenses only if they necessarily involved a substance outlawed by federal law.

The Second, Fifth, and Ninth Circuits have all held explicitly that the federal Controlled Substances Act controls the definition of "controlled substance" under § 4B1.2(b). *United States v. Minor*, 121 F.4th 1085, 1089 (5th Cir. 2024); *United States v. Townsend,* 897 F.3d 66 (2d Cir. 2018); *Bautista*, 989 F.3d at 702. These circuits also all use the categorical approach: A state crime is not a controlled substance offense if the state statute defines outlawed substances more broadly than the federal Controlled Substances Act. *Bautista*, 989 F.3d at 704.

To reach this conclusion, these circuits relied on the text of the guideline, which refers to "an offense under federal or state law" involving a "controlled substance." U.S.S.G. § 4B1.2(b). As the Second Circuit explained, if this language were meant to be aimed at all federal *and* state controlled substances, then the provision "should read '... a controlled substance *under federal or state law*.' But it does not." *Townsend*, 897 F.3d at 70 (alteration and emphasis in original). This conclusion is bolstered by the presumption that federal laws should not depend on state law unless the drafter plainly indicates otherwise. *Id.* at 71. The categorical

approach also achieves the guidelines' goal of uniformity in sentencing, unlike a rule that defers to state definitions of controlled substances that leads to inconsistency from state to state. *Id.*; *United States v. Gomez-Alvarez*, 781 F.3d 787, 793 (5th Cir. 2015) (citing *United States v. Leal-Vega*, 680 F.3d 1160, 1166 (9th Cir. 2012)).

The First Circuit has not yet squarely confronted this issue, but it has nonetheless signaled its agreement with the Second, Fifth, and Ninth Circuits. *United States v. Crocco*, 15 F.4th 20, 22 (1st Cir. 2021). Federal "courts cannot blindly accept anything that a state names or treats as a controlled substance." *Id.* at 23. Thus, the First Circuit has described the categorical approach in this context as "appealing," while deference to state definitions would be "fraught with peril." *Id.*

B. Seven circuits define "controlled substance offense" to include state crimes involving substances that are legal under federal law.

The Seventh Circuit, and six other circuits, have taken the path "fraught with peril." *Crocco*, 15 F.4th at 23. Relying on a common understanding of "controlled substance," the Seventh Circuit construed the term to include "any of a category of behavior-altering or addictive drugs" regardless of whether those same drugs are illegal under federal law. *Ruth*, 966 F.3d at 654 (quoting *Controlled substance*, The Random House Dictionary of the English Language (2d ed. 1987)). The Seventh Circuit noted that its position was, at the time, on the minority side of a circuit split. *See id.* at 653 ("the weight of authority favors Ruth"). But it

nonetheless reasoned that its decision was dictated by related circuit precedent involving the career-offender guideline. *Id.* at 654.

After the Seventh Circuit's decision in *Ruth*, the Third, Fourth, Sixth, Eighth, Tenth, and Eleventh circuits all published decisions adopting similar rules. *See United States v. Lewis*, 58 F.4th 764, 769 (3d Cir.2023) (relying on same dictionary definition as Seventh Circuit); *United States v. Ward*, 972 F.3d 364, 373 (4th Cir. 2020) ("Like the Seventh Circuit, we see no textual basis to engraft the federal Controlled Substances Act's definition of 'controlled substance' into the career-offender guideline.") (cleaned up and internal citation omitted); *United States v. Jones*, 81 F.4th 591, 598 (6th Cir. 2023) ("The Guidelines don't define 'controlled substance,' so we look to its ordinary meaning: 'a drug regulated by law.'"); *United States v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021) (agreeing with *Ruth* that the guideline is "most plainly read to 'include state-law offenses related to controlled or counterfeit substances'"); *United States v. Jones*, 15 F.4th 1288, 1292 (10th Cir. 2021) ("§ 4B1.2(b)'s controlled-substance-offense definition necessarily applies to and includes state-law controlled-substance offenses"); *United States v. Dubois*, 94 F.4th 1284, 1296 (11th Cir. 2024) ("A drug regulated by state law is a "controlled substance" for state predicate offenses, even if federal law does not regulate that drug"), *vacated on other grounds Dubois v. United States*, 145 S. Ct. 1041 (2025).

All seven circuits on this side of the split have emphasized that § 4B1.2(b) does not cross-reference the Controlled Substances Act. *Ruth*, 966 F.3d at 651–52. And textually, when reviewing § 4B1.2(b)'s definition of "controlled substance

offense," these courts have focused on the phrase "an offense under federal or state law" rather than the unmodified term "controlled substance." *Dubois*, 94 F.4th at 1296.

These cases demonstrate a clear-cut disagreement among the circuits. As a result, defendants sentenced within the seven circuits that do not rely on federal law to define the term "controlled substance" are "subject to far higher terms of imprisonment for the same offenses as compared to defendants similarly situated in the Second or Ninth Circuits." *Guerrant v. United States*, 142 S. Ct. 640, 641 (2022) (Sotomayor, J., statement respecting denial of certiorari).

II. The Seventh Circuit is on the wrong side of the split.

In the Seventh Circuit, the result of this case was dictated by the Seventh Circuit's prior decision in *Ruth*. The *Ruth* decision is wrong, as are the decisions of other circuits that look to state-law definitions of controlled substances, for at least three reasons.

A. *Ruth* and similar cases construe the guidelines in a way that assumes that the Sentencing Commission exceeded its congressional mandate.

When Congress delegates interpretive authority to an agency, that agency's construction of the statute must remain within the scope of authority delegated by Congress. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394–95 (2024) (citing *Batterton v. Francis*, 432 U.S. 416, 425 (1977)). For the Sentencing Guidelines, this means that statutory authority must prevail whenever a guideline conflicts with a

statute. The Sentencing Commission's "discretion ... must bow to the specific directives of Congress." *United States v. LaBonte*, 520 U.S. 751, 757 (1997).

Here, Congress directed the Sentencing Commission to apply career-offender status to defendants with two or more prior felonies for a "crime of violence" or:

> 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.

28 U.S.C. § 994(h). In other words, when deciding what types of prior drug convictions should count as predicate offenses, Congress enumerated specific federal offenses. This Court should presume that "Congress said what it meant." *LaBonte*, 750 U.S. at 757. Only federally outlawed drug-related conduct should qualify for career-offender status.

The categorical approach endorsed by the First, Second, Fifth, and Ninth Circuits construes the term "controlled substance offense" so that it hews closely to the federally outlawed conduct listed in § 994(h). But the Seventh Circuit construes the term broadly enough to include conduct that falls outside of Congress's directions. The Seventh Circuit's interpretation assumes the Sentencing Commission exercised authority beyond the scope delegated to it. Either the Seventh Circuit is wrong, or the guideline should be invalidated.

B. The First, Second, Fifth, and Ninth Circuits have the stronger textual reading.

Many of the courts that have construed § 4B1.2(b) to include state-defined substances have focused on the part of the definition that says "an offense under federal or state law." *E.g., Dubois*, 94 F.4th at 1296 (quoting U.S.S.G. § 4B1.2(b)). Focusing on that phrase alone is myopic. Here, for context, is the full guideline definition for "controlled substance offense":

> (b) Controlled Substance Offense.—The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> > (1) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or
> >
> > (2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

U.S.S.G. § 4B1.2(b).

As the Second Circuit explained, if this language were meant to be aimed at all federal and state controlled *substances*, then the provision "should read '... a controlled substance *under federal or state law*.'" *Townsend*, 897 F.3d at 70 (alteration and emphasis in original). Although the guideline explains that "offense" means both federal and state conviction, the guidelines does provide a similar clarification for "controlled substance." No modifier was included in subsection (1) of

the definition to suggest that courts should look to state definitions for controlled substances as well as federal definitions.

At minimum, the absence of any clarification about what "controlled substances" qualify gives rise to an "ambiguity." *Id.* at 71. And in light of this ambiguity, courts should apply the longstanding presumption that the application of federal law does not depend on state law unless the drafter plainly indicates otherwise. *Jerome v. United States*, 318 U.S. 101, 104 (1943). In the criminal context, this Court has repeatedly applied this presumption to ensure that federal provisions based on prior state convictions are construed so that any predicate offenses are assessed against a concrete federal definition. *See, e.g., Taylor*, 495 U.S. at 579, 590-91 (rejecting argument that "burglary" in Armed Career Criminal Act means "burglary" however a state chooses to define it); *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 393 (2017) (rejecting argument that "sexual abuse of a minor" encompasses all state statutory rape convictions regardless of the state's age of consent, because that definition would turn on "whatever is illegal under the particular law of the State where the defendant was convicted"). Consistent with this Court's precedents, the Second Circuit's reading of the guideline ensures that defendants' criminal histories are subject to a "uniform federal standard." *Townsend*, 897 F.3d at 71.

The courts that disagree with this interpretation, like the Seventh Circuit, have argued that § 4B1.2(b) does not contain an explicit cross-reference to the Controlled Substances Act. *Ruth*, 966 F.3d at 651. But this reasoning "has it

backwards." *Townsend*, 897 F.3d at 70. Silence on whether to use federal or state law generally means that the commission meant to incorporate federal law only. As this Court previously explained regarding statutory construction, "we do not interpret Congress' omission of" certain language to mean "that … Congress intended to abandon its general approach of using uniform categorical definitions to identify predicate offenses." *Taylor*, 495 U.S. at 591. The First, Second, Fifth, and Ninth Circuits properly read the guideline with respect to the general approach of using uniform categorical definitions. The Seventh Circuit does not.

C. Broader policy considerations favor the categorical-approach side of the split.

Congress passed the Sentencing Reform Act to address the "[s]erious disparities" that were "common" under the old federal sentencing scheme. *Mistretta*, 488 U.S. at 365–67. As part of the act's reforms, the Sentencing Guidelines were invented to bring consistency to sentencing. *Molina-Martinez*, 578 U.S. at 192. The Sentencing Commission likewise recognizes its mission to promulgate guidelines that achieve uniformity and proportionality in sentencing. U.S.S.G. Ch. 1, Pt. A, Subpt. 1. And, even though the guidelines are no longer mandatory, this Court has recognized the vital role they play in maintaining fairness in sentencing nationwide. *See Gall v. United States*, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

The Seventh Circuit's interpretation of the career-offender guideline undermines these goals by allowing career-offender status to vary state to state. Or as Chief Judge Gregory emphasized in his concurring opinion in *Ward*, while rejecting the majority's adoption of the same rule as the Seventh Circuit: "Whereas the categorical approach was intended to prevent inconsistencies based on state definitions of crimes, the majority's approach creates them." *Ward*, 972 F.3d 364, 383–84 (Gregory, C.J., concurring) (citing *Taylor*, 495 U.S. at 588). A fair and uniform sentencing scheme cannot exist if the guidelines rely on individual states to come up with their own, inconsistent definitions of controlled substances.

III. Resolution of this split is necessary to avoid unfair disparities in sentencing.

In 2022, Justice Sotomayor noted that defendants in the Fourth, Seventh, Eighth, and Tenth Circuits "are subject to far higher terms of imprisonment for the same offenses as compared to defendants similarly situated in the Second or Ninth Circuits." *Guerrant*, 142 S. Ct. at 640 (Sotomayor, J., statement respecting denial of certiorari). The split has only become more entrenched since this Court denied certiorari in *Guerrant*, with circuit courts publishing new opinions on both sides of the split. *See Minor*, 121 F.4th 1085; *Dubois*, 94 F.4th 1284; *Jones*, 81 F.4th 591; *Lewis*, 58 F.4th 764.

Statistics from the Sentencing Commission confirm what Justice Sotomayor warned about in *Guerrant*. Circuits that use both federal *and* state definitions of

"controlled substance" apply the career-offender guideline at a much higher rate than other circuits:

Application of Career-Offender Status in FY2024[2]

Circuit	Definition of "controlled substance" under 4B1.2(b)	Defendants	Career Offenders	Percentage given career-offender status
1st	Federal Only	2,010	32	1.59%
2nd	Federal Only	3,061	37	1.21%
3rd	Federal and State	2,487	164	6.59%
4th	Federal and State	3,984	137	3.44%
5th	Federal Only	17,741	89	0.50%
6th	Federal and State	4,330	167	3.86%
7th	Federal and State	2,013	118	5.86%
8th	Federal and State	4,864	230	4.73%
9th	Federal Only	10,775	110	1.02%
10th	Federal and State	4,884	51	1.04%
11th	Federal and State	4,993	136	2.72%
1st, 2nd, 5th, & 9th combined	Federal Only	33,587	268	0.80%
3rd, 4th, 6th, 7th, 8th, 10th, & 11th combined	Federal and State	27,555	1,003	2.72%

[2] The data for this chart, and for the subsequent charts, was drawn from the United States Sentencing Commission's Interactive Data Analyzer, available at: https://ida.ussc.gov/ (last visited, were other websites in is petition, on May 22, 2025).

Here is a summary of the same data, presented in another way:

Federal Law Only

Circuit	Percentage career-offender
1st	1.59%
2nd	1.21%
5th	0.50%
9th	1.02%
All circuits:	**0.80%**

Federal and State Law

Circuit	Percentage career-offender
3rd	6.59%
4th	3.44%
6th	3.86%
7th	5.86%
8th	4.73%
10th	1.04%
11th	2.72%
All circuits:	**2.72%**

In other words, defendants are about three times more likely to be designated a career offender if sentenced in a circuit that uses both federal and state law to define a "controlled substance" under § 4B1.2(b). The Sentencing Guidelines were intended to avoid this type of disparity from circuit to circuit. Allowing this circuit split to continue will only undermine that goal of consistency, and the split will continue to have "direct and severe consequences for defendants' sentences." *Guerrant*, 142 S. Ct. at 641.

The lower courts will not resolve the split on their own. Every geographic circuit apart from the D.C. Circuit has already taken a position. And as mentioned above, both sides have gained new opinions since *Guerrant*. At the same time, litigants have repeatedly asked this Court to take up the issue. *See, e.g., Jones v. United States*, 144 S. Ct. 611 (2024) (denying certiorari from *Jones*, 81 F.4th 591); *Lewis v. United States*, 144 S. Ct. 489, (2023) (denying certiorari from *Lewis*, 58

F.4th 764). This Court will likely continue to receive requests for certiorari on this issue until it chooses a case to take.

IV. This Court cannot rely on the Sentencing Commission to resolve the split.

In 2022, Justice Sotomayor explained that the Sentencing Commission has a "responsibility" to address circuit splits involving the guideline, and that this Court would defer to the commission before intervening on this issue. *Guerrant*, 142 S. Ct. at 640–41. (Sotomayor, J., respecting denial of certiorari). At the time, the commission lacked a quorum, and Justice Sotomayor expressed hope that the Commission would resolve the question once it regained a quorum. *Id.* at 641.

Despite having a quorum for nearly three years,[3] the commission has still not addressed this issue. For three years in a row, the commission declared it a "priority" to amend the definition of "controlled substance offense."[4] But it has continually failed to act on this priority. And despite numerous other amendments to the guidelines during this time, the definition of "controlled substance offense" remains the same.

The commission came close to resolving the split in December 2024, when it issued a *proposed* amendment that would have redefined "controlled substance

[3] *See* Press Release, *Acting Chair Judge Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners*, U.S. Sentencing Commission (Aug. 5, 2022), https://www.ussc.gov/about/news/press-releases/august-5-2022

[4] *See* Final Priorities for Amendment Cycle, 87 Fed. Reg. 67756 (Nov. 9, 2022); Final Priorities for Amendment Cycle, 88 Fed. Reg. 60536 (Sep. 1, 2023); Final Priorities for Amendment Cycle, 89 Fed. Reg. 66176 (Aug. 14, 2024).

offense" to encompass only specific federal drug statutes.[5] But without explanation, the commission later rescinded this proposal. The 2025 amendments to the guidelines will include no update to the definition of "controlled substance offense" under § 4B1.2(b). *See* Sentencing Guidelines for United States Courts, 90 Fed. Reg. 19798 (May 9, 2025).

Waiting for the Sentencing Commission no longer makes sense. True, this Court often defers ruling on issues related to the guidelines so that the commission can "have the opportunity to address [the] issue in the first instance." *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the denial of certiorari). Here, however, the commission has already had the opportunity to amend § 4B1.2(b) and chosen not to take that opportunity. When the commission shows that it "chooses not to act" on an issue of importance, this Court has the duty to step in. *McClinton v. United States*, 143 S. Ct. 2400, 2403 (2023) (Sotomayor, J., respecting the denial of certiorari). *See also Early v. United States*, 502 U.S. 920, 920 (1991) (White, J., dissenting from denial of certiorari) (urging review where the Commission "has not addressed" a "recurring issue").

Considering the commission's failure to act and the dramatic impact of this split on defendants like Harris, this Court should step in. A prompt resolution would ensure that justice is applied consistently, and that the integrity of the federal sentencing process is restored.

[5] *See* Sentencing Guidelines for United States Courts, 90 Fed. Reg. 128 (Jan. 2, 2024).

V. This case is an excellent vehicle to resolve the split.

This case provides a clear example of why the circuit split matters. Harris would not be a career offender in the First, Second, Fifth, or Ninth Circuits. But he is a career offender in the Seventh Circuit, as he would be in the Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits. And the effect of the career-offender guideline is especially stark for Harris: Based solely on the circuit law that applied at sentencing, his guideline range jumped from 30 to 37 months to 151 to 188 months. More than a five-fold increase.

Seventh Circuit precedent aptly demonstrates why Harris would not have been a career offender if the Seventh Circuit were on the other side of the split. This petition has discussed at length the Seventh Circuit's holding in *Ruth* that "controlled substance offenses" includes convictions under state statutes that outlaw substances not criminalized under federal law. *Ruth*, 966 F.3d at 648. But the *Ruth* court actually resolved *two* issues related to a defendant's prior state drug conviction: (1) did the prior conviction count as a predicate "controlled substance offense" under § 4B1.2(b); and (2) did it count as a "felony drug offense" for a statutory enhancement under 21 U.S.C. § 841(b)(1)(C). The court came to opposite conclusions for each question, after applying different tests for each enhancement.

The defendant in *Ruth* had a prior Illinois conviction for possession with intent to deliver cocaine. *Id.* at 644. But Illinois defines cocaine to include its positional isomers, whereas the federal definition covers only cocaine's optical and geometric isomers. *Id.* The defendant thus argued that the Illinois offense was

overbroad and should not count as a predicate conviction for a sentencing enhancement. Regarding the statutory enhancement under § 841(b)(1)(C), the Seventh Circuit agreed. The court used the categorical approach to conclude that Illinois's cocaine definition is broader than its federal counterpart, and therefore Illinois cocaine convictions cannot count as a "felony drug offense." *Id.* at 646–51. When it came to the career-offender guideline, however, the court ruled that the categorical approach did not apply because the guideline was written broadly enough to include both federal and state drug definitions. *Id.* at 651–54. The same Illinois conviction, while not a "felony drug offense," was a "controlled substance offense" according to the Seventh Circuit.

Harris's prior Illinois convictions closely mirror the Illinois conviction at issue in *Ruth*. His conviction did not involve cocaine, but Illinois's definition of PCP is overbroad for the exact same reasons as Illinois's definition of cocaine. The federal Controlled Substances Act outlaws "any material, compound, mixture, or preparation which contains any quantity of … Phencyclidine." 21 U.S.C. § 812, Schedule III(b)(7). The Illinois statute, on the other hand, encompasses not only phencyclidine but also "its salts, isomers, and salts of isomers." 720 ILCS 570/206(e). So like the cocaine conviction at issue in *Ruth*, Harris's PCP convictions are categorically overbroad in that they encompass a larger variety of chemical isomers. Harris would have no trouble challenging his career-offender status in the Seventh Circuit if (like the Second, Fifth, or Ninth Circuits) that court used the same test for § 4B1.2(b) that is uses for § 841(b)(1)(C).

One final note: This Court should not be concerned that, during the appellate proceedings below, the parties squabbled over whether Harris had preserved or forfeited his request to apply the categorical approach. (App. 2a.) The parties' dispute about preservation was academic. Even if Harris forfeited his categorical-approach argument, he still would have been able to obtain plain-error relief if the Seventh Circuit were on the other side of the split. The Seventh Circuit has repeatedly granted plain-error relief on categorical-approach claims, even when (as here) the defendant relies on technical arguments about isomers of drugs. *See Ruth*, 966 F.3d at 650 (granting plain-error relief to vacate § 841(b)(1)(C) enhancement because Illinois's cocaine definition includes additional isomers); *United States v. Turner*, 55 F.4th 1135, 1142 (7th Cir. 2022) (holding that court plainly erred by relying on prior state drug conviction, which was overbroad under categorical approach, to enhance sentence). In short, the only barrier to Harris obtaining relief on appeal was the Seventh Circuit's position in the circuit split. And on that front, the Seventh Circuit's position is wrong.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Thomas W. Patton
Federal Public Defender

s/ Michael Will Roy
MICHAEL WILL ROY
Assistant Federal Public Defender
Counsel of Record
Office of the Federal Public Defender
300 W. Main Street
Urbana, Illinois 61801
Phone: (217) 373-0666
Email: michael_roy@fd.org
Counsel for Petitioner

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