

No. 25-6622

IN THE
Supreme Court of the United States

ALANTE MARTEL NELSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF OF PETITIONER

Jenny R. Thoma
Counsel of Record
RESEARCH & WRITING SPECIALIST
Federal Public Defender's Office
101 Cambridge Place
Bridgeport, WV 26330
(304) 622-3823
jenny_thoma@fd.org

Counsel for Petitioner

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INTRODUCTION

The government opposes review, but it concedes that the circuits remain intractably divided 5-4 on the timing question for the Sentencing Guidelines even after *Brown v. United States*, 602 U.S. 101 (2024). And it does not dispute that this case is a good vehicle. The government urges this Court to do nothing because after this petition was filed—four and eight years respectively after these splits emerged—the Sentencing Commission finally sought public comment on them. But that is near meaningless, since interest has *rarely* led to resolutions for “controlled substance offense” issues in U.S.S.G. § 4B1.2(b). Its history makes that very clear. Soliciting public comment on an issue does not mean the Commission is going to resolve an issue at all, let alone soon. Meanwhile, draconian sentence disparities will persist in nearly half of the circuits, and defendants like Petitioner Nelson—who received a sentence quadruple his unenhanced guideline range—will unfairly bear the steep cost of indefinite delay.

The government does not dispute the 5-4 ‘controlled’ split, now in its eighth year. It claims that the question is not presented in this case, and that the answer would be irrelevant here. It is wrong on both counts. The first question and second question are interdependent, as Petitioner Nelson and the Fifth Circuit both explained. The circuits using the time-of-current-sentencing approach are using a different textual analysis than the circuits who do not; because the former are using the Controlled Substance Act’s definition, whereas the latter are not. And even if these two questions could be isolated (though they are interdependent), the distinction *would* make a difference in Mr. Nelson’s case.

Finally, the government does not dispute the 3-2 split on whether ‘distribution’ takes its ordinary or CSA meaning. That was raised below and is outcome-determinative. It also does not dispute that *Barrett v. United States*, 146 S. Ct. 482 (2026) further supports Nelson’s petition. It acknowledges the Fourth Circuit’s decision depended on its surplusage-based interpretation of Va. Code § 18.2-248. Mr. Nelson argued that surplusage does not support narrowing the statute from “attempted transfers” to “completed distributions” (on which there is a 3-1 split). The Fourth Circuit therefore wrongly compared a “completed distribution” to a distribution, instead of comparing an “attempted transfer” to a distribution. Both questions are therefore absolutely implicated in the *correct* categorical comparison.

FIRST QUESTION PRESENTED

- I. The government opposes review, but concedes the 5-4 split, and does not dispute that this case is a good vehicle. There is no resolution, and it could be years before one materializes, if it ever does.**

The government opposes review, but it concedes that the circuits remain intractably divided 5-4 on the timing question for the Sentencing Guidelines even after *Brown*. BIO 11-12;¹ Pet. 13. And it does not dispute that this case is a good vehicle. Pet. 27.

It says only that this Court’s review is not warranted to interpret the Guidelines, BIO 6, as the Sentencing Commission “should have the opportunity to address this issue in the first instance,” BIO 8—as if it has not already had several

¹ The BIO contains no page numbers. For citation purposes, Petitioner excludes the title page and question presented from his page count.

(it has). The government does not dispute that this split has steadily deepened for at least four years and persists two years after *Brown*. Pet. 10-13. It does not dispute the amendments promulgated through October 31, 2027 do not clarify the timing issue (or any of the longstanding disputes pertaining to the Career Offender enhancement).² Despite having four opportunities to address the timing split, the Commission has not—even though this Court was able to resolve the question for the Armed Career Criminal Act (ACCA) within two years.

The government urges this Court to do nothing because after this petition was filed, the Commission sought public comment on the timing issue. BIO 8. To be sure, the government cannot say *if* the Commission will resolve the split at all, let alone *when*. It suggests only that at some unknown future point, enough voting Commission members “*may*” be able to agree how to resolve the timing split. BIO 8 (emphasis added). But that is near meaningless, since interest has rarely led to resolutions for “controlled substance offense” issues in § 4B1.2(b).

For one example, the government does not dispute that the Commission’s own 2016 research found the Career Offender enhancement was not warranted for drug-only offenders—nearly 75 percent of career offenders (including Petitioner Nelson). Pet. 20-21. Although “implementing the recommendations” in that report was among the Commission’s “priorities” for several years, no amendment materialized. It was

² U.S. Sent. Comm’n, *Amendments to the Sentencing Guidelines (Preliminary)* (Apr. 16, 2026), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202604_prelim-RF.pdf

priority (3) in 2017-2018, and priority (2) in 2018-2019.³ After regaining a quorum, the Commission tried a different approach in 2022-2023, which—although “revising the ‘categorical approach’ for purposes of the career offender guideline” continued as priority (1) in 2024-2025⁴—also produced no amendments. Now, the Commission’s back to the drawing board: “updating the data analyses set forth in the Commission’s 2016 report.”⁵ Today, drug-only defendants like Mr. Nelson nationwide are still receiving draconian career offender enhancements that the Commission concluded lack empirical support a decade ago. Pet. 20.

For another example, as this Court is well aware,⁶ the “controlled” split has festered for at least eight years now without resolution. *See United States v. Ruth*, 966 F.3d 642, 653-54 (7th Cir. 2020) (citing competing 2017 and 2018 decisions, among others). Not until late 2024 did the Commission propose a revision that would have largely solved most of these issues: removing *state* drug offenses as predicates.⁷

³ U.S. Sent. Comm’n, *Federal Register Notice of Proposed 2017-2018 Priorities*, <https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2017-2018-priorities>; U.S. Sent. Comm’n, *Federal Register Notice of Proposed 2018-2019 Priorities*, <https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2018-2019-priorities>.

⁴ U.S. Sent. Comm’n, *Federal Register Notice of Proposed 2023-2023 Priorities*, <https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-final-2022-2023-priorities>; U.S. Sent. Comm’n, *Federal Register Notice of Proposed 2023-2024 Priorities*, <https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-final-2024-2025-priorities>.

⁵ U.S. Sent. Comm’n, *Federal Register Notice of Proposed 2024-2025 Priorities*, <https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-final-2025-2026-priorities> (emphasis added).

⁶ *Wiggins v. United States*, 145 S. Ct. 2621, 2622 (2025).

⁷ U.S. Sent. Comm’n, *Proposed Amendments to the Sentencing Guidelines* (Dec. 19, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20241230_rf_proposed.pdf (proposed amendment would limit “controlled substance offenses” “to specific federal drug statutes”).

Although it now urges this Court to let the Commission revise the career offender guideline, the government “oppose[d]” the Commission’s attempt to do so,⁸ which ultimately failed.

The government offers no basis for more optimism here. It points only to three initial adjustments from 1987-1989, and nothing for the *next 37 years* except the 2023 relocation of inchoate offenses from the commentary to the text. BIO 7. Given this history and context, the claim that the Commission has “carefully attended to” controlled substance definitional issues strains credulity. *Id.* And given the same, the suggestion that the Commission “may” eventually resolve the timing issue inspires little confidence. There is no proposal to do so. History teaches that even if a proposed resolution eventually materializes, that hardly means it will pass. All despite Congress’ mandate that the Commission “periodically *shall...revise*” the guidelines “in consideration of comments and data coming to its attention.” 28 U.S.C. § 994(o) (emphasis added). Not may—*shall*. And not intermittently or irregularly—*periodically*. That means “at regular intervals of time” and “frequently.”⁹

While progress stagnates, defendants in four circuits will continue receiving sentences that are up to quadrupled, as Petitioner Nelson did; while similarly-situated defendants in five circuits will not. Despite the government’s attempted minimization that the Guidelines are merely “advisory,” BIO 7, it does not dispute

⁸ U.S. Dep’t of Justice, *Letter to Hon. Carlton Reeves, Chair*, at 12 (Feb. 3, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf#page=716

⁹ *Periodically*, Merriam-Webster, <http://merriam-webster.com/dictionary/periodically>

that Mr. Nelson was *actually sentenced* to 151 months in prison. Pet. 21. Meanwhile petitions will continue, as the government’s footnote aptly illustrates. BIO 12, n.1.

This Court’s resolution is needed now, and the disparity in Petitioner Nelson’s sentence highlights the urgency. Under his career-offender 151-month sentence, Petitioner Nelson will remain imprisoned for six more years—until March 20, 2032. See Federal Bureau of Prisons, *Find an Inmate*, <https://www.bop.gov/inmateloc/> (results for Alante Nelson, Register Number 07974-087). Had he been instead sentenced within his correct, non-career-offender range, just 41-51 months, Pet. 21, he would have already been released. This Court should not—and defendants across the country cannot—wait for a Commission resolution that will be years in arriving, if it ever does.

Finally, the government asserts that review is unwarranted because the decision below is correct. BIO 9. That would not justify denying certiorari even if it was true, given the undisputed entrenched conflict and the importance of the question presented. But it is not true.

Insisting otherwise, the government recites the Sixth Circuit’s and *Brown*’s rationales. BIO 9-10. It wholly avoids the Fifth Circuit’s post-*Brown* reasoning in *Minor*, in which it explained that the reference canon and *Jam v. Int’l Fin Corp.*, 586 U.S. 199 (2019) made guidelines text different from ACCA. Pet. 11-12, 23. That is, the career offender guideline’s “general reference” to a ‘controlled substance,’ unlike ACCA’s specific reference to 21 U.S.C. § 802, counsels determining a ‘controlled substance’ at the time of sentencing. *Id.*

The government offers no answer to this. Nor is there one in *Clark* or *Drake*: neither decision addressed how the reference canon or *Jam* affected the guidelines interpretation. *Brown*'s discussion of the reference canon suggests only a different result for the guidelines. 602 U.S. at 115, 116; Pet. 23 (citing *Minor*). Both sides of the split post-*Brown* purport to “rel[y] on the text” of the guidelines, *Drake*, 126 F.4th 1242, 1246 (6th Cir. 2025) (citing *United States v. Clark*, 46 F.4th 404 (6th Cir. 2022); see also *Minor*, 121 F.4th at 1089 (agreeing with *Minor* that “the text of the Sentencing Reform Act and the Guidelines direct us to” use a ‘time of sentencing’ approach”), but they continue to disagree about what that text means.

SECOND QUESTION PRESENTED

II. The government does not dispute the eight-year, 5-4 “controlled” split; it is implicated in this case, the answer would make a difference here, and there is no resolution yet in sight.

The government does not dispute that for eight years (and counting), the Commission has failed to resolve the “controlled” split—four years after Justices of this Court urged it. Pet. 4, 19. For the same reasons just explained, solicitation of public comment is little help. BIO 14. The government finally claims that the question of what “controlled” means in the Career Offender Guideline “is not presented” in this case, BIO 6, and that the answer would be “irrelevant” here. BIO 14. It is wrong on both counts.

The second question is interdependent with the first, as Petitioner explained. This is because “the circuits that do not apply the time-of-current-sentencing approach do not incorporate the CSA's definition of ‘controlled substance’ into the

Guidelines,” whereas the circuits on the other side of the split do. Pet. 14-15 (citing *United States v. Minor*, 121 F.4th 1085, 1090 (5th Cir. 2024)). As a result, the First, Second, Fifth, and Ninth Circuits are using a “different” “textual analysis” than the Third, Fourth, Sixth, Eighth, and Eleventh Circuits. *Id.* This distinction drives the different outcomes. Consequently, resolution of the first question would necessarily resolve the second.

Even if these two questions could be isolated (though they are interdependent), the distinction *would* make a difference. BIO 13. If the CSA definition of “controlled substance” is correct for the Guidelines, Mr. Nelson’s 2017 Virginia conviction is categorically overbroad by substance; but if the ‘ordinary meaning’ state-or-federal approach is correct, it is not. That is because Virginia’s description of heroin (which criminalizes “any” isomers—positional, optical, and geometric) is broader than Congress’s definition of that same drug in the CSA (which criminalizes only optical isomers).¹⁰ Consequently, in a *correct* categorical comparison of the elements of Nelson’s prior offenses to the guidelines criteria, which the Fourth Circuit’s opinion lacks, the question of which schedules “controlled” refers to would immediately arise for Petitioner Nelson.¹¹

¹⁰ Compare Va. Code § 54.1-3446, Schedule I, Sec. 2; and Va. Code § 54.1-3401 (defining “narcotic”) with 21 U.S.C. § 802(14) (for a Schedule I “narcotic” such as heroin, the term “isomer” under Title 21 of the United States Code means optical isomers exclusively); 21 U.S.C. § 812(c), Schedule I(b) (listing heroin as a schedule I narcotic).

¹¹ Because litigation of isomer overbreadth for Virginia heroin arose after Mr. Nelson’s sentencing in July 2022, that argument was not raised at his original sentencing. However, under binding precedent, counsel *would* be required to raise it on remand. See *United States v. Cannady*, 63 F.4th 259 (4th Cir. 2023).

THIRD QUESTION PRESENTED

III. The government does not dispute the 3-2 “distribution” split; it was raised below and is implicated here.

Whether Petitioner Nelson’s 2017 Virginia conviction is overbroad by conduct because the least culpable conduct is the attempted transfer of drugs involves two circuit splits. Those are 1) whether “distribution” in § 4B1.2(b) takes its ordinary or CSA meaning, Pet. 15-17, and 2) whether surplusage requires courts to interpret “attempted transfers” of drugs as completed distributions of drugs. Pet. 17-18.

The government does not dispute the significant circuit split on whether Guidelines distribution takes its ordinary or CSA meaning, which is now at least 3-2. The Sixth, Seventh, and Tenth circuits give guidelines distribution the CSA definition. Pet 16-17. The Third and Fourth circuits now give guidelines distribution its ordinary meaning. Although the Third Circuit previously used the CSA meaning, Pet. 17, it more recently used the ordinary meaning. *See United States v. Dawson*, 32 F.4th 254, 261 (3d Cir. 2022). Its other, non-split-related objections are unpersuasive.

The government complains that whether “distribution” takes its ordinary or CSA meaning was not “passed on” below. BIO 13. Of course not: that question was decided six years ago in *United States v. Ward*, 972 F.3d 364, 370-71, n.6 (4th Cir. 2020). Pet. 16. Nelson raised that settled law at every stage; it needed only to be applied (but wasn’t, due to the surplusage error). And it controls the outcome: if “distribution” in § 4B1.2(b) takes its CSA meaning, he concedes his argument fails. Pet. 15.

IV. The government does not dispute that *Barrett* supports this petition, or that ‘attempted transfer’ is not surplusage. The 3-1 attempted transfer split is presented, and 70 percent of states criminalize attempted transfer.

The government says *United States v. McKenzie*, 743 Fed. Appx 1. (7th Cir. 2018) is not about the guidelines. BIO 16, n.3. True, but irrelevant: *McKenzie* was cited for the attempted transfer split, and it is about that. Pet. 17-18. The claim that *McKenzie* does not support Nelson is also wrong. McKenzie took the same position the government did in the Third, Fourth, and Sixth Circuits: that “attempted transfer” should be read out of the statute as duplicative of attempts. Pet. 24-27. Although those three circuits adopted it to uphold *sentence enhancements*, the Seventh Circuit rejected it to uphold a *conviction*. *Id.*

The government does not dispute that “attempted transfer” is not surplusage—not under this Court’s precedent, Pet. 24-27, nor under the interpretive principles in *Barrett* and *United States v. Batchelder*, 442 U.S. 114 (1979). Supp. Br. 3-6, Pet. 24-25. It does not dispute that § 18.2-248 is indivisible by conduct, and that it provides for different penalties than Virginia’s drug attempt statute. Supp. Br. 2-4.

The government primarily argues that surplusage is a distinct question from the distribution split. BIO 15. Mr. Nelson agrees that surplusage *shouldn’t* have played any role here, because it does not apply. Pet. 17-18. But since the Fourth Circuit used surplusage to find that Virginia attempted transfers must be completed distributions—as the government concedes, BIO 15—it *made* surplusage a necessary threshold question to resolving whether Nelson’s 2017 Virginia conviction is categorically overbroad. Once the surplusage error is corrected, the categorical

comparison—whether “attempted transfer” is broader than guidelines “distribution”—must be made. That is nowhere in the Fourth Circuit’s opinion, because it wrongly compared a “completed distribution” to distribution instead. *Nelson*, 151 F.4th 577, 581 (4th Cir. 2025). Mr. Nelson explained that the ordinary-meaning interpretive principles in *Wooden v. United States*, 142 S. Ct. 1063 (2022) are clearly applicable. Pet. 16, BIO 15.

Regarding attempted transfers, the government says this Court should defer to the Fourth Circuit’s interpretation of § 18.2-248. BIO 16. But it is the province of *states* to make their own laws and say what they mean. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Where the Virginia legislature duly enacted “attempted transfer” and chose to define distribution broadly, Supp. Br. 2, a federal court’s improper narrowing of that statute warrants this Court’s review. This Court often reviews state statutes involving the categorical approach (as it does here). *See Stokeling v. United States*, 586 U.S. 73, 85-85 (2019) (reviewing Florida robbery statute).

The government’s attempt to minimize the scope to a single statute also fails. As the government admits elsewhere, *most* jurisdictions—36 of them, or “70% of state[s]”—criminalize attempted transfer. Resp. Br. at 15, *United States v. Hartsfield*, 4th Cir. No. 21-4550, 2022 WL 1322319. The “attempted transfer” of drugs is widespread.

Finally, the government incorrectly suggests the Commission’s recent movement of attempts to the text resolved this issue. BIO 6. Plenty of “attempted transfer” overbreadth guidelines challenges are pending for different states. *See, e.g., United States v. Cayemite*, 4th Cir. No. 25-4288 (West Virginia) *United States v.*

Starkey, 4th Cir. No. 25-4099 (Delaware); *United States v. Banks*, 4th Cir. No. 23-4667 (Virginia); *United States v. Jones*, 4th Cir. No. 23-4711 (Pennsylvania). It forgets that “attempted transfer” overbreadth challenges will continue unabated in other contexts, like ACCA. *See, e.g., United States v. Penn*, 63 F.4th 1305 (11th Cir. 2023). Defendants sentenced before November 1, 2023 can also raise it in postconviction proceedings. *See Jenkins v. United States*, 2023 WL 8806160 (E.D.N.C. Dec. 20, 2023). Consequently, the “attempted transfer” question will persist.

CONCLUSION

For all the reasons herein and in the petition, these questions should be resolved now. Certiorari should be granted.

Respectfully Submitted,

/s/ Jenny R. Thoma.
Counsel of Record

Jenny R. Thoma
Research & Writing Attorney
Federal Public Defender’s Office
101 Cambridge Place
Bridgeport, WV 26330
(304) 622-3823
jenny_thoma@fd.org