In the

United States Court of Appeals

for the Seventh Circuit

No. 21-2231

DEANDRE CHERRY,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 20 CV 4752 — **Ronald A. Guzmán**, *Judge*.

ARGUED DECEMBER 5, 2024 — DECIDED NOVEMBER 5, 2026

Before ROVNER, SYKES, and ST. EVE, *Circuit Judges*.

SYKES, *Circuit Judge*. With the help of a confidential informant, federal agents from the Drug Enforcement Administration ("DEA") arrested DeAndre Cherry for possessing heroin with intent to distribute. A jury found him guilty of that crime. This was not Cherry's first drug offense: In 2003 he was convicted in Illinois state court of manufacturing or delivering cocaine. Based on that conviction (and others), the district judge applied the enhanced statutory penalties under

21 U.S.C. § 841(b)(1)(B) for defendants with "a prior conviction for a felony drug offense."[1] The judge also applied a separate enhancement under § 4B1.1(a) of the Sentencing Guidelines, which subjects career offenders to an increased advisory sentencing range.[2] As a result, Cherry was sentenced to 20 years in prison—10 years above the 10-year statutory minimum but 10 years below the low end of the applicable Guidelines range of 30 years to life. His sentence also included the minimum 8-year term of supervised release.

We affirmed Cherry's conviction on direct appeal, and his case now returns to us on postconviction review under 28 U.S.C. § 2255. Cherry raises two Sixth Amendment claims for ineffective assistance of counsel under the rubric of *Strickland v. Washington*, 466 U.S. 668 (1984). He first challenges his trial counsel's failure to object to the sentencing enhancements. He also argues that his trial and appellate attorneys were constitutionally ineffective for failing to object to the testimony of Special Agent David Brazao, who recounted incriminating details that the agents learned from the confidential informant.

The government agrees that Cherry's counsel should have challenged at least the statutory sentencing enhancement, but it denies that Cherry suffered any prejudice. Because Cherry's sentence falls well below the applicable Guidelines range, the

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[1] The current version of § 841(b)(1)(B) applies to offenders who have previously committed either "a serious drug felony or [a] serious violent felony." We refer to the version in effect in 2016, when the probation office prepared Cherry's initial presentence report.

[2] The presentence report references the 2015 version of the Sentencing Guidelines. We do the same.

government maintains that counsel's failure to object to either enhancement was inconsequential. The government also argues that the evidence against Cherry was so overwhelming that Agent Brazao's testimony couldn't have influenced the jury's verdict.

We agree, but only in part. Counsel's failure to object to the § 841(b)(1)(B) statutory enhancement prejudiced Cherry because it increased both the advisory Guidelines range and the mandatory minimum terms of imprisonment and supervised release. But the remaining ineffective-assistance claims are meritless. Our decision in *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020), dooms the claim centered on the application of the § 4B1.1 career-offender enhancement, and the admission of Agent Brazao's testimony did not prejudice Cherry's defense. We vacate his sentence and remand for resentencing.

I. Background

A complete description of the facts leading to Cherry's arrest and conviction is contained in our prior opinion and won't be repeated here. *United States v. Cherry*, 920 F.3d 1126 (7th Cir. 2019). While investigating the importation of cocaine from Mexico into Chicago, DEA agents arrested a man who was attempting to collect 26 kilograms of cocaine near O'Hare International Airport. After his arrest, the man informed the agents that he planned to deliver half the cocaine to Cherry—whom he knew only as "Mo." At the agents' suggestion, the man agreed to serve as a confidential informant and assist them with a sting operation.

The informant told the agents that he knew Cherry from prior drug transactions and that the pair planned to meet that

evening at Cherry's home in Harvey, Illinois. Cherry was an average-height and average-weight black man, the informant reported, and he drove a white Mercedes SUV.

The agents concocted a sting operation in which the informant would conceal sham cocaine in a hidden compartment in his red Volkswagen Jetta and ask Cherry to change their meeting location to a nearby parking lot in Markham, Illinois. Once Cherry confirmed his interest in the cocaine, the informant would step out of the car as a signal to the agents that the transaction was complete.

That's exactly what happened. At the appointed time, a 2012 white Mercedes SUV entered and circled the parking lot, pulling up next to the informant's Jetta. Cherry emerged from the SUV and entered the Jetta's front passenger side. The informant told Cherry that he had hidden the cocaine in a compartment in the back of the car, and Cherry responded that he wanted to see it. At that point the informant exited the car, signaling to the agents that Cherry had accepted the sham cocaine. Almost a dozen agents immediately swarmed the Jetta while Cherry darted into his SUV, trying to flee the scene. He was unsuccessful; the agents pulled Cherry out of the SUV and arrested him.

As one agent returned to the SUV, he spotted an open black satchel in plain view on the front passenger seat; spilling out of the satchel were clear baggies of what appeared to be either heroin or cocaine. Testing confirmed that it was a combination of both: The baggies contained 348.1 grams of heroin and 13.7 grams of crack cocaine. The agents also found $19,495 stashed in the satchel and the SUV's center console.

Cherry told the agents that three weeks earlier, the informant had fronted him half a kilogram of low-quality heroin. His customers complained, so Cherry had asked to exchange the remaining heroin for cocaine. He and the informant were meeting to make the exchange when the agents moved in and arrested him.

Cherry was indicted for possessing 100 or more grams of heroin with intent to distribute. *See* 21 U.S.C. § 841(a)(1). After four years of protracted litigation over the lawfulness of Cherry's arrest and the search of his SUV—the details of which are not relevant here—the case proceeded to a three-day jury trial.

The prosecutor called several DEA agents to testify about the sting operation and the evidence recovered in Cherry's SUV. Particularly important here is the testimony of Special Agent David Brazao, the government's first witness. During his direct examination, Agent Brazao recounted much of what we just described, though he did not disclose the details of the DEA's arrangement with the confidential informant. On cross-examination, however, defense counsel asked Brazao about the instructions given to the informant and whether it was possible that the black satchel had actually been found in the informant's Volkswagen Jetta.

In light of these questions, the prosecutor argued that defense counsel had opened the door to further testimony about the informant. The district judge agreed. So on redirect examination, Agent Brazao testified about the informant's arrest, the planned sting operation, and the informant's relationship with Cherry—specifically, that the informant had "dealt with [Cherry] in the past" and had been to his residence "to do other transactions." The informant also told the agents that

Cherry was a black male who drove a white Mercedes. Cherry's counsel did not object to this testimony.

At the close of evidence, the judge gave the jury the following limiting instruction: "You have heard testimony from Agent Brazao … about statements made by an informant to agents. Those statements should be considered only for the purpose of explaining the actions of the agents, and you may not consider it for any other purpose." After about two hours of deliberation, the jury returned a guilty verdict.

In advance of Cherry's sentencing hearing, the probation office prepared a presentence report ("PSR") calculating the advisory Guidelines range. Two aspects of that calculation are at issue here. First, the PSR applied the heightened statutory penalties for repeat offenders under § 841(b)(1)(B). The version of that provision then in effect stated that a defendant who violates § 841(a)(1) "after a prior conviction for a felony drug offense" shall be sentenced to a prison term of not "less than 10 years" and "a term of supervised release of at least 8 years." § 841(b)(1)(B) (2016). The baseline minimum penalty, by contrast, was 5 years in prison and at least 4 years of supervised release. *Id.* As the government charged in an information, Cherry's qualifying predicate was a 2003 Illinois conviction for manufacturing or delivering cocaine. *See* 720 ILL. COMP. STAT. 570/401; 21 U.S.C. § 851(a)(1) (requiring the government to file an information stating "in writing the previous convictions to be relied upon").

Second, the PSR applied the career-offender enhancement set forth in § 4B1.1 of the Sentencing Guidelines. Under § 4B1.1(a), a defendant qualifies as a career offender if, among other things, he "has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

Cherry's criminal history is extensive. Along with the cocaine-trafficking conviction we've just mentioned, he was convicted in 2003 of possessing a machine gun. And in 1993 he was convicted of two counts of attempted murder and one count of armed robbery; the sentences for these three 1993 offenses were imposed the same day. (The importance of that fact will become clear when we turn to the claim centered on this enhancement.) Without the career-offender enhancement, Cherry would have been placed in criminal-history category V with an offense level of 24; with it, he was placed in category VI with an offense level of 37. § 4B1.1(b)(1).

Cherry's offense level and criminal-history category yielded an advisory Guidelines range of 30 years to life. Defense counsel objected to that recommendation, arguing that Cherry's personal circumstances and single new offense didn't justify the application of the § 4B1.1 career-offender enhancement; she did not, however, contest that Cherry qualified as a career offender. She likewise did not contest the application of the § 841(b)(1)(B) statutory enhancement.

The district judge adopted the PSR with a few modifications that aren't important here. The prosecutor then advocated for a 20-year sentence, arguing that Cherry's serious criminal history warranted a steep sentence. Defense counsel urged the judge to impose the 10-year mandatory minimum.

The judge ultimately followed the prosecutor's recommendation. Even setting aside the career-offender enhancement, he explained, Cherry had numerous prior convictions—some for violent offenses—and many more encounters with law enforcement. The judge found that there was a "great likelihood" that Cherry would return to committing crimes, so a "substantial period of incarceration" was

necessary to protect the community. He accordingly imposed a 20-year term of imprisonment and, as § 841(b)(1)(B) requires, an 8-year term of supervised release.

Cherry appealed, asserting that the agents lacked probable cause to arrest him and to search both his SUV and the satchel inside it. He further accused the government of violating its affirmative duty to disclose evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). We rejected all three challenges and affirmed Cherry's conviction. *United States v. Cherry*, 930 F.3d 1126 (7th Cir. 2019).

After his unsuccessful direct appeal, Cherry sought collateral review in a pro se motion under § 2255. His 86-page handwritten motion, along with two subsequently filed motions to amend, raised a total of nine claims for relief. Only two *Strickland* claims are relevant here. Cherry argued that his trial and appellate counsel should have challenged the use of his 2003 Illinois drug conviction as a predicate for the statutory and Guidelines sentencing enhancements. He also challenged his trial counsel's failure to call the confidential informant as a witness after the informant's out-of-court statements were admitted through Agent Brazao.

The district judge denied relief, holding that Cherry's state convictions for attempted murder, armed robbery, and cocaine trafficking supported the statutory and Guidelines sentencing enhancements, so counsel's failure to object was neither a mistake nor prejudicial. The judge also concluded that Cherry's trial attorney reasonably declined to call the informant, whose testimony likely would have been damaging to Cherry.

Cherry appealed, and we granted a certificate of appealability on the question of counsel's effectiveness with respect to the statutory sentencing enhancement. We then appointed counsel and later granted counsel's motion to expand the certificate of appealability to include the question of counsel's failure to object to the career-offender enhancement and the admission of the informant's out-of-court statements through Agent Brazao's testimony.

II. Discussion

To prove a violation of his Sixth Amendment right to the effective assistance of counsel, Cherry must show that his counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 688, 691. The prejudice element of the familiar *Strickland* standard requires Cherry to demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. For his claim of trial error, there must be a reasonable probability that "the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. For his claim of sentencing error, there must be a reasonable probability that "the judge would have imposed a lower sentence." *Day v. United States*, 962 F.3d 987, 992 (7th Cir. 2020). These are legal questions, and our review of the district judge's decision is de novo. *Harris v. United States*, 13 F.4th 623, 627 (7th Cir. 2021).

A. Section 841(b)(1)(B) Enhancement

Cherry first challenges his trial counsel's failure to object to the § 841(b)(1)(B) statutory enhancement, which at the time applied to any § 841(a)(1) offender with "a prior conviction

for a felony drug offense." Invoking our 2020 decision in *United States v. Ruth*, Cherry asserts that his Illinois cocaine-trafficking conviction is not a qualifying "felony drug offense" as § 841(b)(1)(B) uses that term. It follows, he argues, that his counsel's failure to object to the statutory enhancement was deficient performance that prejudiced his defense.

Our holding in *Ruth* is unambiguous and squarely on point: The definition of cocaine under Illinois law "is categorically broader than the federal definition"; the state-law definition includes "optical, positional, and geometric" cocaine isomers, 720 ILL. COMP. STAT. 570/206(b)(4), whereas the federal definition includes only "optical and geometric isomers," 21 U.S.C. § 812, Schedule II(a)(4). *Ruth*, 966 F.3d at 647. So applying the required categorical approach, a cocaine-based conviction under section 401 of the Illinois Controlled Substances Act is "not a predicate 'felony drug offense'" for purposes of a § 841(b)(1) sentencing enhancement. *Id.* at 650.

That said, our decision in *Ruth* postdated Cherry's sentencing hearing by almost three years. That's potentially a problem for Cherry: We have long recognized that the "Sixth Amendment does not require counsel to forecast changes or advances in the law." *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993). We have also recognized, however, that "there are some circumstances" in which an argument "is sufficiently foreshadowed in existing case law" such that counsel "may be obliged to make, or at least to evaluate" it. *Bridges v. United States*, 991 F.3d 793, 804 (7th Cir. 2021).

Applying the latter rule, we concluded in *Coleman v. United States* that defense counsel should have known that a categorical challenge to the use of an Illinois cocaine conviction to support a § 841(b)(1) enhancement was potentially

available long before we decided *Ruth*. 79 F.4th 822, 831 (7th Cir. 2023). By 2017 "the categorical approach was well-established," and at least one circuit had already applied the approach to the federal definition of "felony drug offense." *Harris*, 13 F.4th at 629–30 (citing *United States v. Ocampo-Estreda*, 873 F.3d 661, 667 (9th Cir. 2017)). We thus held that it would have been objectively unreasonable for counsel not to have "even *considered* a categorical challenge" to the use of petitioner's prior Illinois cocaine convictions as a basis to enhance his sentence under § 841(b)(1). *Coleman*, 79 F.4th at 832.

Relying on *Coleman*, Cherry argues that his counsel's sentencing advocacy was objectively unreasonable. There, as here, trial counsel did not raise a categorical challenge to the application of the § 841(b)(1) sentencing enhancement based on an Illinois cocaine conviction; and there, as here, "the framework for making such a challenge had been established" by the time of sentencing. *Id.* at 831–32.

The government doesn't disagree. Indeed, based on our holding in *Coleman*, the government concedes that trial counsel's performance was deficient.[3]

We accept that concession, though we note that *Coleman* now stands on shaky ground. In *Neal v. United States*, we rejected the argument that under *Coleman*, an attorney who fails to consider a categorical challenge to a § 841 enhancement "*necessarily* provide[s] constitutionally ineffective assistance." 155 F.4th 678, 686 (7th Cir. 2025) (emphasis added). As we

[3] The government initially argued that Cherry waived his categorical challenge by failing to raise it in his § 2255 motion. But it has since retracted that argument, acknowledging that Cherry's pro se motion cited *Ruth* for the proposition that Illinois's definition of cocaine "is categorically broader than the federal definition of a felony drug offense."

explained, the petitioner in *Coleman* faced a harsh, binary sentence—"life or not"—which distinguished that case from any other in which "a wider set of outcomes is possible." *Id.* at 687. We also identified other decisions that called *Coleman*'s reasoning into question. *See id.* (citing *Harris*, 13 F.4th at 630; *White v. United States*, 8 F.4th 547, 557 (7th Cir. 2021)). Summing up, we held that every case requires "an objective assessment of counsel's performance," considering *all* the options "available to the defense." *Id.* at 687–88 (quotation omitted).

Our decision in *Elion v. United States* picked up where *Neal* left off. 155 F.4th 889 (7th Cir. 2025). We explained that a broad reading of *Coleman*'s holding was "misaligned with our *Strickland* jurisprudence." *Id.* at 905 (quotation omitted). *Coleman* thus must be read contextually and narrowly—in other words, as holding that "only egregious errors amount to deficient performance." *Id.* With that background understanding in mind, we articulated the governing standard this way: Counsel performs deficiently only if an argument was so clearly foreshadowed in existing law "that no reasonable attorney would fail to make it." *Id.* at 906. We emphasized that *Coleman* "sits at the outer boundary of that test." *Id.*

Still, the government has not retracted its *Coleman*-based concession or asked us to consider how *Neal* and *Elion* bear on this case. We thus assume that Cherry's trial counsel performed deficiently by failing to challenge the § 841(b)(1)(B) statutory enhancement.

On the question of prejudice, the government insists that the § 841(b)(1)(B) sentencing enhancement did not affect the outcome here because the judge imposed a 20-year prison term—10 years below the Guidelines range of 30 years to life.

Accordingly, as the government sees things, there is no reason to think that the statutory enhancement influenced the sentence the judge chose.

We disagree. As already mentioned, § 841(b)(1)(B) prescribes increased minimum and maximum penalties for offenders with qualifying prior convictions. More specifically, repeat offenders must be sentenced to a term of 10 years to life in prison—up from the baseline minimum term of 5 years and maximum of 40 years in prison. § 841(b)(1)(B). The statute also increases the minimum term of supervised release to 8 years—twice the ordinary 4-year minimum. *Id.*

That's not all. Section 4B1.1 of the Guidelines, which we'll discuss in greater detail later, assigns an offense level of 37 to any career offender facing a maximum sentence of life in prison. § 4B1.1(b)(1). A defendant subject to the typical 40-year maximum, by contrast, is assigned an offense level of 34. *Id.* The upshot of this three-level increase is significant: As applied to Cherry, an offense level of 34 would have yielded an advisory sentencing range of 262 to 327 months in prison. His range, which was based on an offense level of 37, was 360 months to life.

In these circumstances, the application of the § 841(b)(1)(B) enhancement prejudiced Cherry. As the Supreme Court has explained, the Sentencing Guidelines "are not only the starting point for most federal sentencing proceedings but also the lodestar"; they "inform and instruct the district court's determination of an appropriate sentence." *Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016). Accordingly, in most cases a defendant who establishes that the district judge mistakenly started from "an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different

outcome." *Id.* Or as we put it in *Coleman*, "absent unusual circumstances," a "reasonable probability of prejudice is presumed." 79 F.4th at 832; *see United States v. Duncan*, 185 F.4th 761, 768 (7th Cir. 2026) ("[E]rrors that impact the Guidelines range are presumptively prejudicial.").

Setting the Guidelines aside, the lengthier minimum and maximum statutory penalties confirm that counsel's failure to object was prejudicial. "Statutory minima and maxima have an obvious anchoring effect on the judge's determination of a reasonable sentence" because "they demarcate the range within which the judge may impose a sentence." *United States v. Currie*, 739 F.3d 960, 966 (7th Cir. 2014); *see United States v. Wilkinson*, 139 F.4th 583, 590 (7th Cir. 2025). With this "anchoring" assumption in mind, the district judge may have chosen a lower sentence had he understood that the ordinary minimum and maximum penalties applied.

The government reads the record differently, insisting that Cherry's 20-year sentence had little (if anything) to do with the statutory and Guidelines ranges. In the government's view, the § 3553(a) sentencing factors—and particularly Cherry's lengthy criminal record—predominantly influenced the judge's decision to impose a term of 20 years in prison.

A district judge's sentencing explanation is sometimes sufficient to rebut the presumption of prejudice, but only when the judge makes clear that the sentence is based "on factors independent of the Guidelines." *Molina-Martinez*, 578 U.S. at 200. Put another way, when the judge expressly states that he "would have imposed the same sentence" regardless of any potential error in the Guidelines calculation, there is no reason to vacate the defendant's sentence and remand for resentencing. *United States v. Gibson*, 996 F.3d 451, 466 (7th Cir.

2021); *see United States v. Robinson*, 165 F.4th 1043, 1053 (7th Cir. 2026).

Here, however, it's not clear that the judge would have imposed the same 20-year sentence had he known the correct sentencing ranges. He certainly didn't say as much. It's true, as the government argues, that the judge emphasized Cherry's criminal history. He explained that even "[l]eaving aside all career offender considerations," Cherry's criminal-history score was concerning, reflecting his "multiple prior convictions" and "many encounters with the law." But this vague reference to Cherry's criminal record does not confirm that the judge thought the 20-year sentence was appropriate "irrespective of" the § 841(b)(1)(B) enhancement. *Molina-Martinez*, 578 U.S. at 200. On this record, the judge's sentencing remarks are not enough to overcome the ordinary presumption of prejudice. *See United States v. Rollins*, 836 F.3d 737, 743 (7th Cir. 2016) (enforcing the presumption even though the defendant's sentence was "below the correctly calculated range once the career-offender error [was] removed").

Besides, the government concedes that trial counsel's failure to object to the § 841(b)(1)(B) enhancement prejudiced Cherry in at least one way—namely, in the imposition of an 8-year term of supervised release. This concession is appropriate. The record gives us no clue as to what the judge might have done had he known that Cherry was subject to a 4-year minimum rather than an 8-year minimum term of supervised release. And key to the prejudice analysis here, Cherry's 8-year term of supervised release is part of the same "sentencing package" as his 20-year prison term. We see no basis to try to disentangle the prejudice traceable to each aspect of Cherry's sentence.

We're especially hesitant to do so because the judge may wish to reconfigure Cherry's overall sentence on remand in order "to achieve the goals [he] had in mind at the original sentencing." *United States v. Wilcher*, 91 F.4th 864, 875 (7th Cir. 2024). To be sure, there's no guarantee that the judge will impose a different—or even a lesser—sentence, and the government is free to argue that Cherry's criminal history justifies reimposition of the original sentence. Still, Cherry has shown a reasonable probability of a lower sentence without the § 841(b)(1)(B) enhancement. He has accordingly satisfied *Strickland*'s prejudice standard and is entitled to resentencing.[4]

B. Section 4B1.1 Guidelines Enhancement

We reach a different conclusion on counsel's failure to object to the career-offender enhancement under § 4B1.1 of the Guidelines. A defendant qualifies as a career offender if: (1) he was over the age of 18 at the time of the "offense of conviction"; (2) the offense of conviction qualifies as "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." U.S.S.G. § 4B1.1(a). There's no dispute that Cherry satisfies the first two conditions. He was in his mid-30s when he was arrested in the sting operation, and possession with intent to distribute heroin qualifies as a "controlled substance offense" under § 4B1.1. *See id.* § 4B1.2(b) (defining that term).

[4] We thus do not consider Cherry's alternative—and extremely speculative—argument that he would have been more likely to plead guilty and receive a lower sentence had he known the correct Guidelines range.

Cherry's claim turns on the third element—whether he had been twice convicted of "a crime of violence or a controlled substance offense." § 4B1.1(a). He was convicted in 1993 of attempted murder and armed robbery. But because his sentences for these crimes were imposed on the same day, they count as a single conviction. § 4B1.2(c); § 4A1.2(a)(2). And as we've already discussed, Cherry's record also includes 2003 Illinois convictions for manufacturing or delivering cocaine and possessing a machine gun. He contends that neither qualifies as a crime of violence or a controlled-substance offense, so his counsel should have objected to the § 4B1.1 career-offender enhancement. The failure to do so, he argues, deprived him of his Sixth Amendment right to the effective assistance of counsel.

Our decision in *Ruth* forecloses this claim. There we held that § 4B1.2's definition of "controlled substance offense" does not incorporate the "federal definition of controlled substance" found in the Controlled Substances Act. 966 F.3d at 651–52. Rather, the Guidelines career-offender provisions define "controlled substance offense" to include all state-law drug-trafficking offenses that involve "behavior-altering or addictive drugs" and that are punishable by at least one year in prison. *Id.* at 654 (quotation omitted); *see* § 4B1.2(b). Given the breadth of that definition, we concluded that a cocaine-based conviction under Illinois law plainly qualifies as a controlled-substance offense for purposes of the career-offender enhancement. *Ruth*, 966 F.3d at 654.

Because *Ruth* had not yet been decided at the time of his sentencing hearing, Cherry argues that a timely objection to the application of the career-offender enhancement may have led to a favorable decision in the district court or on appeal.

We're skeptical. It's true that some of our sister circuits have embraced Cherry's preferred reading of § 4B1.2 and concluded that the Guidelines incorporate the federal definition of "controlled substance." *Ruth*, 966 F.3d at 653. But as we explained in *Ruth*, our holding was heavily informed—if not foreordained—by our prior decision in *United States v. Hudson*, which held that "controlled-substance offenses include state-law offenses related to controlled or counterfeit substances punishable by imprisonment for a term exceeding one year," 618 F.3d 700, 703 (7th Cir. 2010). *Ruth*, 966 F.3d at 652, 654. Because *Hudson* was on the books when Cherry was sentenced, it's unlikely that an objection from trial counsel would have produced a different outcome.

Cherry's related theory that the Supreme Court might have granted his petition for certiorari and agreed with our sister circuits' interpretation of § 4B1.2 is even more unlikely: A few years after Cherry's sentencing, the Supreme Court denied a petition for certiorari presenting this very question. *Guerrant v. United States*, 142 S. Ct. 640 (2022). So no matter how he slices it, Cherry cannot demonstrate prejudice resulting from trial counsel's failure to object to the § 4B1.1 career-offender enhancement.

C. Agent Brazao's Testimony

The claim premised on Agent Brazao's redirect examination testimony is also meritless. Cherry contends that his trial counsel should have objected to the testimony recounting what the confidential informant told the agents about Cherry and their prior relationship. He says there were two grounds to do so. The first is the Confrontation Clause, which guarantees criminal defendants an opportunity to confront and cross-examine the witnesses against them. U.S. CONST.

amend. VI; *Samia v. United States*, 599 U.S. 635, 643 (2023). The second is Rule 403 of the Federal Rules of Evidence, which authorizes a district judge to exclude testimony if its probative value is "substantially outweighed" by the risk of "unfair prejudice" to the defendant. Cherry likewise faults his appellate counsel for failing to raise both issues on appeal.

Even if we assume that trial and appellate counsel performed deficiently by failing to raise these challenges, Cherry hasn't proven that the admission of this testimony prejudiced him.[5] In other words, he hasn't demonstrated a reasonable probability of an acquittal had this limited portion of Agent Brazao's redirect examination been excluded.

Nor could he. The judge gave a limiting instruction informing the jury to consider this testimony—including the informant's out-of-court statements—"only for the purpose of explaining the actions of the agents." The jury was forbidden, in other words, to use the informant's description of Cherry as proof of his guilt. Absent evidence to the contrary, we presume that the jury followed this instruction. *United States v. Garcia*, 81 F.4th 691, 698 (7th Cir. 2023). There is no contrary evidence here.

Setting aside the presumption about limiting instructions, the government's evidence against Cherry was overwhelming, and the defense theory was at best highly implausible. Several agents testified about the heroin recovered from the black satchel in his Mercedes SUV. Another recounted Cherry's postarrest interview in which he admitted to possessing the heroin with the plan of exchanging it for cocaine.

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[5] There is accordingly no need for us to address the government's argument that Cherry forfeited this claim by omitting it from his § 2255 motion.

And Cherry's alternative theory—that the heroin actually had been found in the informant's car—was farfetched and entirely speculative. Put simply, the informant's description of Cherry was insignificant as compared to the mountain of evidence against him. There is no probability, let alone a reasonable one, that a challenge to Agent Brazao's testimony would have produced a different result either at trial or on appeal.

In short, counsel's failure to object to the § 841(b)(1) statutory sentencing enhancement entitles Cherry to a new sentence, but his conviction is sound. We accordingly AFFIRM the judgment in part and REVERSE it in part, VACATE Cherry's sentence, and REMAND for resentencing.