No. __-_____

IN THE

Supreme Court of the United States

MICAH G. PRITCHETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Virginia offense of distribution of a controlled substance categorically qualifies as a "controlled substance offense" under the U.S. Sentencing Guidelines?

PARTIES TO THE PROCEEDINGS

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

U.S. Sentencing Guidelines

Court Documents

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Micah G. Pritchett respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals, Pet. App. 1a-5a (slip opinion), appears at 733 F. App'x 128 (4th Cir. 2018).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court issued its opinion and judgment on August 1, 2018. A timely petition for rehearing was denied by the court of appeals on August 28, 2018; a copy of the order denying rehearing appears at Pet. App. 6a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Virginia Code § 18.2-248 provides, in relevant part, as follows:

> A. Except as authorized in the Drug Control Act (§ 54.1-3400 et seq.), it shall be unlawful for any person to manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance.
>
> . . . .
>
> C. Except as provided in subsection C1, any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be

> imprisoned for not less than five nor more than 40 years and fined not more than $500,000. [. . .]

Va. Code § 18.2-248.

2. Section 4B1.2 of the U.S. Sentencing Guidelines defines "controlled substance offense" as

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

U.S.S.G. § 4B1.2(b) (Nov. 2016 ed.). Commentary to § 4B1.2 provides that the term "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2, comment. (n.1).

STATEMENT OF THE CASE

Micah Pritchett's range under the U.S. Sentencing Guidelines was more than doubled because the district court held that his convictions under Virginia Code § 18.2-248(A) and (C) were "controlled substance offenses." In making such determinations, this Court has laid out clear rules and reinforced them. But the district court imposed, and the Fourth Circuit affirmed, Mr. Pritchett's 84-month sentencing without conducting the analysis required by this Court's precedents. The Fourth Circuit's chief error was opening a split with the published decisions of four other circuits by allowing the definition of the federal sentencing term "controlled substance offense" to depend on state law, in violation of decades of clear instructions from this Court. Certiorari is warranted not only because the Fourth Circuit's

approach is wrong, but because its effects will be widespread and severe in large numbers of federal sentencing proceedings if allowed to continue. This Court should grant certiorari to resolve the split, or, alternatively, should summarily vacate the judgment below and remand to require the Fourth Circuit to acknowledge and apply this Court's precedents in the first instance.

1. Petitioner Micah Pritchett pled guilty in federal court to a single count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). Section 2K2.1 of the U.S. Sentencing Guidelines is the primary offense guideline applicable to § 922(g) cases. The guideline sets an offense level of 14 for a prohibited person (such as a felon in possession), but requires increasingly higher base offense levels depending on whether, among other factors, the defendant has one or more convictions for controlled substance offenses. *See* U.S.S.G. § 2K2.1(a)(1)-(7).

The commentary to § 2K2.1 provides that, for purposes of the guideline, "the term 'controlled substance offense' has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 . . . ." U.S.S.G. § 2K2.1, comment. (n.1). Section 4B1.2, in turn, defines "controlled substance offense" as

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

U.S.S.G. § 4B1.2(b). Section 4B1.2 does not further define the phrase "controlled substance," but its commentary provides that the term "'controlled substance offense'

include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. §4B1.2, comment. (n.1).

Mr. Pritchett has two Virginia convictions described in the presentence report as possession of cocaine with intent to distribute. C.A.J.A 233, 234-35. Under Virginia law, "[e]xcept as authorized in the Drug Control Act (§ 54.1-3400 et seq.), it shall be unlawful for any person to manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance." Va. Code § 18.2-248(A). Further, "[e]xcept as provided in subsection C1, any person who violates this section *with respect to a controlled substance classified in Schedule I or II* shall upon conviction be imprisoned for not less than five nor more than 40 years and fined not more than $500,000." Va. Code § 18.2-248(C) (emphasis added). The sections of § 18-2-248 under which Mr. Pritchett was charged and convicted do not provide penalties for specific types of drugs, but only by the schedule classification of the drug. *Cf.* 21 U.S.C. § 841(a), (b)(1)(A)-(C) (providing lists of specific types of drugs in penalty provision).

In preparing Mr. Pritchett's presentence report, the probation officer counted Mr. Pritchett's two Virginia convictions as "controlled substance offenses" under U.S.S.G. § 4B1.2. That determination increased the base offense level from 14 to 24. C.A.J.A. 231; *see* U.S.S.G. § 2K2.1(a)(2), (7). The impact of the increase was substantial: it drove Mr. Pritchett's advisory guideline from 30 to 37 months (reflecting a 2-level reduction for acceptance of responsibility and final offense level of 12) up to

77 to 96 months (final offense level of 21 after 3-level reduction for acceptance). C.A.J.A. 238, 245; *see* U.S.S.G. Ch. 5, Pt. A (sentencing table).

2. Mr. Pritchett objected to the treatment of his convictions as controlled substance offenses. Relying on this Court's categorical approach cases, he requested a comparison of the elements of a generic controlled substance offense with the elements of Virginia Code § 18.2-248(A) and (C); and he requested a comparison between Virginia aiding and abetting and generic aiding and abetting. C.A.J.A. 31-93 (defendant's objections to presentence report); *id.* at 120-135 (defendant's reply). He argued that the Virginia drug statute, and Virginia aiding and abetting liability, were overbroad and indivisible such that his conviction should not qualify as a "controlled substance offense." *Id.* To support his arguments, Mr. Pritchett relied on this Court's decisions in *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007).

The government did not contest that the Virginia drug statute was indivisible. Instead, it only argued that § 4B1.2 incorporate state law on what substances are controlled substances; and it argued that Virginia aiding and abetting liability was no broader than generic aiding and abetting. C.A.J.A. 100-19. The government also described the categorical approach as "a spectacular failure for American law." C.A.J.A. 109; *see id.* (further commenting that "[n]o country in the world looking for a model for its laws would want to copy how federal law approaches these issues today").

At the sentencing hearing, the district court declined to determine the elements of the Virginia drug trafficking offense, much less compare those elements to a generic drug trafficking offense:

> [Counsel for Mr. Pritchett]: Is it the Court's view that the element[] of 18.2-248A is a Schedule I or II substance, or is the Court saying that the element is the particular substance, cocaine or methamphetamine, or whatever it is?
>
> The Court: Run that by me again.
>
> [Counsel for Mr. Pritchett]: So is the element[] a Schedule I or II controlled substance, and methamphetamine or cocaine is just a means by which the Commonwealth proves that element?
>
> The Court: I don't need to reach that decision. What I'm finding is this, and I'll repeat it for the hundredth time, the judgment and commitment order says possession with the intent to distribute cocaine.

C.A.J.A. 174.

> [Counsel for Mr. Pritchett]: So I would ask Your Honor for – I mean, to the extent the Court can, and believes it's relevant, I think we need on the record what the elements of the state offense are and what the elements of the generic definition are.
>
> The Court: I don't give law school lectures. I'm just going to give my opinion today, okay?
>
> [Counsel for Mr. Pritchett]: Understood.

C.A.J.A. 176.

The court overruled Mr. Pritchett's objection to the calculation of the § 2K2.1(a) base offense level. C.A.J.A. 184-91. After summarizing the arguments made by defense counsel, the court concluded that "[t]he defendant's arguments are factually

and legally flawed." C.A.J.A. 184-85. At the outset of its analysis, the court stated, "Unlike the sample judgment and commitment order attached as exhibits by the defendant, the judgment and commitment orders in this case are not generic. They specifically reflect the defendant was convicted of possession with the intent to distribute cocaine. Cocaine is a controlled substance under both federal and state laws."[1] C.A.J.A. 185-86. "Therefore," the court continued, "the defendant's argument on that ground founders at the starting gate." C.A.J.A. 186. The court went on to address Mr. Pritchett's specific arguments, rejecting each one. C.A.J.A.186-91.

The district court sentenced Mr. Pritchett to 84 months of imprisonment (the middle of the objected-to range), and three years of supervised release. C.A.J.A. 205, 214, 220, 224.

3. On appeal to the Fourth Circuit, Mr. Pritchett again challenged the treatment of his Virginia drug convictions as controlled substance offenses under the Guidelines, renewing the arguments he made below.

In an unpublished per curiam opinion, issued without oral argument, the Fourth Circuit affirmed Mr. Pritchett's sentence. Pet. App. 1a-5a. In so doing, the appellate court did not indicate that it had conducted the analyses of overbreadth or divisibility mandated by this Court under the categorical approach. It did not distinguish, cite to, or acknowledge *Mellouli* or *Duenas-Alvarez.* While it included a "cf." citation to a pre-*Mathis* case in which none of the arguments Mr. Pritchett presented were raised,

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[1] *But see Mathis*, 136 S. Ct. at 2256 (if statute is not divisible, courts have "no call to decide which of the statutory alternatives was at issue in the earlier prosecution").

the court cited *Mathis* itself only in a parenthetical to another citation, and only for the uncontroversial proposition that a divisible statute is one that lists elements in the alternative, thus defining multiple offenses. Pet. App. 4a. The court did no divisibility analysis of the Virginia statute, and it did not mention Mr. Pritchett's aiding and abetting argument. Rather, after reciting uncontroverted background principles, the court summarily concluded that the district court "did not err." Pet. App. 3a-4a.

The Fourth Circuit denied Mr. Pritchett's timely petition for panel rehearing or rehearing en banc. Pet. App. 6a.

REASONS FOR GRANTING THE PETITION

Certiorari is appropriate in this case because the Fourth Circuit has opened a split with the Second, Fifth, Eighth, and Ninth Circuits on the basic standard for determining one of the most severe enhancements the Sentencing Guidelines provide. Those circuits faithfully apply this Court's precedents to hold that the bare phrase "controlled substance" in the term "controlled substance offense" under the Guidelines refers to federally controlled substances – the only set of substances with a uniform nationwide application. In contrast, the Fourth Circuit effectively espoused the view that this term incorporates whatever substances the states control, even when state schedules go beyond the federal schedules. The effect of this disuniformity will be widespread because the term applies in a large number of cases; and it will be severe, because it can have the effect of increasing guideline ranges from years to decades.

Certiorari is also appropriate because the Fourth Circuit's decision conflicts with decisions from this Court on three levels. First, as a general matter, it conflicts with

the presumption that federal law is not dependent on state law unless Congress has indicated to the contrary, and accordingly, that references to offenses made in federal sentencing provisions do not depend on state definitions of the offense. *See, e.g.*, *Jerome v. United States*, 318 U.S. 101 (1043); *United States v. Turley*, 352 U.S. 407 (1957); *Taylor v. United States*, 495 U.S. 575 (1990); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017). In particular, the decision below conflicts with *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), which found a state's drug laws to be overbroad because the state controlled substance schedules included substances not on the federal schedules. Second, the Fourth Circuit's decision conflicts with *Mathis v. United States*, 136 S. Ct. 2243 (2016), in that the court below failed to undertake a fulsome analysis of the Virginia controlled substances statute to determine under the categorical approach whether that statute is overbroad, and if so, whether it is divisible. Finally, given that one can violate Virginia's drug laws by being an aider or abettor, the failure by the Fourth Circuit to conduct any analysis to determine whether Virginia's aiding and abetting law is broader than generic aiding and abetting conflicts with this Court's decision in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007).

Furthermore, this case presents an appropriate vehicle to determine the question. The issues were fully presented to both the district court and the Fourth Circuit, and the harm to Mr. Pritchett is great.

Alternatively, summary reversal would be appropriate in order to require that the court below acknowledge this Court's precedents and apply them in fully addressing the arguments made below.

I. The Fourth Circuit Has Created a Circuit Split on an Important Federal Sentencing Issue That Requires Uniform Application Across the Country.

This Court's consideration of the issue presented is necessary to resolve the circuit split that the Fourth Circuit's decision in this case has created. Four federal courts of appeals – the Second, Fifth, Eighth and Ninth Circuits – have held in published opinions that the bare phrase "controlled substance" in the U.S. Sentencing Guidelines refers to federally controlled substances. *See United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793-94 (5th Cir. 2015); *United States v. Leal-Vega*, 680 F.3d 1160, 1166-67 (9th Cir. 2012); *United States v. Sanchez-Garcia*, 642 F.3d 658, 661-62 (8th Cir. 2011). The Fourth Circuit, with no analysis, reached the opposite conclusion.

1. *Townsend*, decided by the Second Circuit only days before the Fourth Circuit ruled in this case, provides the starkest contrast. In *Townsend*, as here, the appellant had been convicted of a violation of 18 U.S.C. § 922(g), being a felon in possession of a firearm. 897 F.3d at 68. And, like in this case, his offense level was enhanced under U.S.S.G. § 2K2.1 because he had a prior state drug offense that the district court determined was a "controlled substance offense" under U.S.S.G. § 4B1.2. *Id.* Like in this case, divisibility of the statute was not at issue. *Id.* at 74. And, again as in this case, there was no dispute that the state drug schedules are broader than the federal schedules. *Id.* (New York includes chorionic gonadotropin). As to whether the conviction qualified, the only dispute (again, like this case) was whether the phrase

"controlled substance" in § 4B1.2 referred to only the federal schedules or to whatever substances the state of conviction happens to include on its schedules.

Unlike the Fourth Circuit in this case, however, the Second Circuit vacated the sentence. It did so because of the oft-repeated admonition from this Court that "the application of a federal law does not depend on state law unless Congress plainly indicates otherwise." *Id.* at 71 (citing *Jerome v. United States*, 318 U.S. 101, 104 (1943).

Further, the Second Circuit acknowledged that its sister circuits had reached the same conclusion for the same reason. *Id.* (discussing *Leal-Vega*, *Gomez-Alvarez*, and *Sanchez-Garcia*). The *Townsend* court and its predecessors rejected the proposition that the bare phrase "controlled substance" in the Guidelines could, in light of the presumption against incorporating state law, refer to whatever substances the state of conviction controlled. *Id.* (surveying this Court's categorical approach precedents, holding that "imposing a federal sentencing enhancement under the Guidelines requires something more than a conviction based on a state's determination that a given substance should be controlled."). And the only set of controlled substances with a nationwide uniform definition is the set of federally controlled substances. *Id.* (calling federal law the "interpretive anchor" to resolve the question).

Thus, in those circuits where the uniform federal schedules are the standard, many state convictions will not count as controlled substance offenses under the Guidelines' definition of that term. *See, e.g.*, *Townsend*, 879 F.3d at 74-75 (New York 5th degree sale of a controlled substance not a "controlled substance offense"); *United*

States v. Elder, 900 F.3d 491, 501-02 (7th Cir. 2018) (holding that Arizona dangerous drug conviction did not qualify for enhancement under 21 U.S.C. § 841 because Arizona's schedules were broader than federal schedules and formed indivisible element of offense). In states within the Fourth Circuit, however, any conviction will automatically qualify, even if it clearly and demonstrably was for a substance not controlled under federal law.

2. The consequences of this split on the proper definition of "controlled substance offense" are far-reaching and can be severe. Section 4B1.2 of the Sentencing Guidelines, in which the definition of "controlled substance offense" is located, is used to determine career offender status. In a comprehensive 2016 report to Congress on career offender sentencing, the Sentencing Commission noted that over 87% of those who were sentenced as career offenders qualified for that status at least in part on the basis of instant or prior convictions for a "controlled substance offense." *See* U.S. Sentencing Comm'n, Report to the Congress: Career Offender Sentencing Enhancements 28 (July 2016).[2]

As well, the definition of "controlled substance offense" triggers increases in sentencing ranges under a number of Chapter Two offense guidelines, under the Chapter Four guideline applicable to armed career criminals, and under the Chapter Seven guidelines applicable to probation and supervised release revocation proceedings. *See* U.S.S.G. § 2K1.3 (explosives offenses); U.S.S.G. § 2K2.1 (firearms

[2] The Commission's report is available on its website at https://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements.

offenses); U.S.S.G. § 4B1.4 (armed career criminal); U.S.S.G. § 7B1.1 (classification of violations).[3]

In particular, the definition applies in nonviolent firearms possession cases like Mr. Pritchett's, which far exceed the number of career offender cases. *Compare, e.g.*, U.S. Sentencing Comm'n, 2017 Sourcebook of Federal Sentencing Statistics, Table 17 (6,366 defendants sentenced under U.S.S.G. § 2K2.1 as primary offense in FY2017) *with id.* Table 22 (1,593 defendants sentenced as career offenders in FY2017).[4] In Mr. Pritchett's own case, for example, even without being subject to career offender status, his advisory guideline range more than doubled because of his two prior convictions, from 30 to 77 months at the low end and from 37 to 96 months at the high end.

In short, the definition of "controlled substance offense" in the Sentencing Guidelines plays a role in numerous sentencings with high stakes for the defendants. Accordingly, the disagreement over that definition requires this Court's prompt intervention and consideration.

II. The Fourth Circuit's Ruling Conflicts With This Court's Relevant Precedents.

The opinion of the Fourth Circuit in this case conflicts with decades of this Court's precedents by failing to apply them.

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[3] The term "controlled substance" is also used to increase sentencing ranges in provisions such as U.S.S.G. § 2B1.1(c)(1) (theft offenses); U.S.S.G. § 2B2.1(b)(3) (burglary offenses); U.S.S.G. § 2B3.1 (robbery offenses); U.S.S.G. § 2P1.2(c)(1) (contraband in prison); and U.S.S.G. § 2S1.1(b)(1) (money laundering).

[4] The 2017 Sourcebook is available on the Commission's website at https://www.ussc.gov/research/sourcebook/archive.

1. *The presumption against incorporating state law into federal sentencing definitions.* Seventy-five years ago, this Court announced a presumption against incorporating state law into federal sentencing schemes. As the Court wrote in *Jerome v. United States*, "we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law." 318 U.S. 101, 104 (1943). In *Taylor v. United States*, that principle led this Court to reject the argument that the definition of "burglary" in the Armed Career Criminal Act (ACCA) should "depend on the definition adopted by the State of conviction." 495 U.S. 575, 591 (1990). Instead, the Court ruled, the generic definitions used in a federal sentencing proceeding should have a uniform nationwide definition. *See id*.[5]

Nothing in § 4B1.2 rebuts the presumption that the Sentencing Commission, as Congress's appointed expert sentencing body charged with "provid[ing] certainty and fairness in meeting the purposes of sentencing [and] avoiding unwarranted sentencing disparity among [similarly situated] defendants," 28 U.S.C. 994(a) & (b)(1)(B), intended to adhere to a nationwide uniform federal standard. Further, no other set of substances have a nationwide uniform definition besides federally controlled

[5] Both before and after *Taylor*, this Court has forbidden making federal sentencing terms depend on state law. *See United States v. Turley*, 352 U.S. 407, 411 (1957) ("[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law"); *see also Esquivel-Quintana v. Sessions*, 136 S. Ct. 1562 (2017) ("[T]he Government's definition turns the categorical approach on its head by defining the generic federal offense of sexual abuse of a minor as whatever is illegal under the particular law of the State where the defendant was convicted.").

substances. *See* 21 U.S.C. 802(a)(6) ("The term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.").

Moreover, this Court itself (albeit in the immigration context) has held that a state's drug laws were overbroad compared to the federal schedules due to the presence of substances on its schedules beyond the set of federally controlled substances. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1988 (2015) (holding Kansas's drug schedules overbroad due to inclusion of salvia and jimson weed). Virginia likewise includes Salvinorin A (the active ingredient of salvia) on its schedules, while the federal schedules do not. *Compare* Va. Code § 54.1-3446(3) (2009) (Va. Schedule I) (listing "Salvinorin A") *with* 21 C.F.R. §§ 1308.11–1308.15 (federal Schedules I-V).

For the reasons that Mr. Pritchett consistently argued below, the Virginia schedules, like the Kansas schedules in *Mellouli*, are overbroad. The Fourth Circuit failed to apply this Court's controlling precedents, and as a result, its conclusion that Virginia's controlled substance statute qualifies as a controlled substance offense for purposes of sentencing Mr. Pritchett conflicts with that precedent.

2. *Divisibility.* When a state statute is broader than the category into which it must fit, courts must consider whether the statute is divisible – that is, whether it describes a single crime with a single set of overbroad elements, or whether it describes alternative crimes with alternative elements. *See Mathis v. United States*, 136 S. Ct.

2243, 2255-57 (2016). And as this Court has repeated many times, the categorical approach requires courts to identify the elements of the state crime and compare them to the elements of the generic definition. The entire task of the categorical approach is determining "whether the elements of the crime of conviction sufficiently match the elements of" the generic offense. *Mathis*, 136 S. Ct. at 2248. And by elements, the Court has clarified that it actually means elements – facts that must be alleged in an indictment and proven beyond a reasonable doubt to a unanimous jury. *See id.* at 2254 (rejecting alternative definitions of "elements").

The Fourth Circuit, however, did not undertake the necessary divisibility analysis, and the government waived the argument by failing to raise it at any stage of the proceedings. *See United States v. Atkinson*, 297 U.S. 157, 158-59 (1936) ("The government, by its assignment of errors here, assails, as it did in the court below, the correctness of this ruling, but examination of the record discloses that no such objection was presented to the trial court. In consequence the government is precluded from raising the question on appeal.").

In any case, the statute is not divisible. Mr. Pritchett presented undisputed evidence that Virginia grand juries indict defendants for possession and distribution of a "Schedule I or II controlled substance" without identifying the substance. C.A.J.A. 70-75. The indictments are relevant and persuasive evidence of the state of the law in Virginia. *See West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236-37 (1940). Elements must be charged in an indictment and particular substances are routinely not charged. Therefore, Virginia's drug distribution statute is indivisible. The Fourth Circuit failed

to adhere to this Court's required analysis and its resulting decision conflicts with that analysis.

3. *Aiding and Abetting*. Finally, in *Gonzales v. Duenas-Alvarez*, this Court held that the generic definition of an offense – theft, in that case – includes liability as an accomplice. 549 U.S. 183, 190 (2007) ("[T]he criminal activities of . . . aiders and abetters of a generic" offense "must themselves fall within the scope of the federal statute."); *see* U.S.S.G. 4B1.2, comment. (n.1) ("Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."). Therefore, this Court mandated a comparison between the majority-rule, commonly accepted understanding of aiding and abetting, as embodied in the Guidelines' definition of controlled substance offense, and the particular state's aiding and abetting law.

The Fourth Circuit again failed to adhere to the Court's required analysis; indeed, it gave no indication that it even considered this argument, which provided an independent basis for reversal of Mr. Pritchett's sentence. Had the court of appeals done so, it would have concluded that Virginia's controlled substance offense could not qualify as a controlled substance offense under the Sentencing Guidelines.

This is because Virginia applies a substantially broader theory of aiding and abetting: "one who is present at a crime and does not oppose it can be guilty of aiding and abetting if the existence of other circumstances allow the fact finder to infer that the accused assented to and lent his countenance and approval to the crime." *Dunn v. Commonwealth*, 52 Va. App. 611 (Va. Ct. App. 2008) (en banc); *see also Sutton v.*

Commonwealth, 228 Va. 654, 666 (1985) (allowing conviction if defendant "procured, encouraged, countenanced *or approved*" principal's crime; "she must have share his criminal intent or have committed some over act in furtherance of the offense." (emphasis added)). Thus, presence alone is not enough, but presence and approval is sufficient. And approval can be inferred from a failure to intervene or object. This is broader than generic aiding and abetting which requires some act or agreement in furtherance of the crime. Nor is Virginia aiding and abetting divisible from principal liability. *See Ward v. Commonwealth*, 205 Va. 564, 568 (1964) (principal in second degree may be charged as principal in first degree, Commonwealth need not elect theory); *Hyman v. Commonwealth*, 206 Va. 891, 892-93 (1966) (same for accessories before the fact). Therefore, Virginia aiding and abetting liability is overbroad and indivisible.

III. This Case Provides an Excellent Vehicle for Deciding the Question Presented.

This case presents the question on which certiorari is requested squarely and clearly. Mr. Pritchett presented the issues and his arguments to the district court as well as to the Fourth Circuit, including a petition for rehearing. The question of whether his prior convictions qualify as controlled substance offenses under § 4B1.2 is a purely legal question; and no dispute of fact exists. Indeed, Mr. Pritchett's counsel in the district court, in reliance on this Court's precedents on the limited use of the modified categorical approach, stipulated on the record that his particular judgment referenced cocaine. C.A.J.A. 162. The government, for its part, did not dispute at any point in the district court or on appeal that the "Schedule I or II controlled substance"

element is divisible. The issue presented therefore has only two possible resolutions: either Virginia Code § 18.2-248(C) qualifies, categorically, as a "controlled substance offense" or it does not.

The answer to that question has serious and immediate consequences for Mr. Pritchett's sentence. If his convictions qualify, his guideline range was properly calculated at 77 to 96 months. But if they do not qualify, his correct range was 30 to 37 months, a fraction of the actual 84-month sentence he received. As this Court has made clear even in the plain error context, "[w]hen a defendant is sentenced under an incorrect Guidelines range – whether or not the defendant's ultimate sentence falls within the correct range – the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (quoting *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016)).

Although the government argued harmless error, *see* Brief of United States 30-32, *United States v. Pritchett*, 4th Cir. No. 18-4003 (May 15, 2018, Doc. 23), the Fourth Circuit did not base its decision on that issue, and instead held squarely that the advisory guideline range was properly calculated. Further, Mr. Pritchett would likely prevail in the event of a remand. Fourth Circuit precedent requires the appellate court to be "certain" that the district court "would have imposed the same sentence[.]" *United States v. Gomez*, 690 F.3d 193, 203 (4th Cir. 2012). Although the district court indicated it would vary upward to the higher guideline range, *see* C.A.J.A. 195, 205, at no point did it state that it would disregard the Guidelines completely and

impose the same sentence of 84 months. The guideline range is a § 3553(a) factor in its own right, and there is nothing in the district court record to suggest it played no role in the court's decision. Even when a court varies upward from the guideline range, the range still forms the "starting point and initial benchmark" for every sentencing proceeding. *Molina-Martinez*, 136 S. Ct. at 1345.

In any event, this Court has in the past not declined to decide a material, contested sentencing issue simply because other issues must be decided in its wake. For example in *Stinson v. United States*, the government argued that the petitioner was ineligible for a sentence reduction on an independent ground not decided by the court of appeals. 508 U.S. 36, 47 (1993). This Court declined to address the argument, noted the narrow scope of the question on which certiorari was granted, and left "the contentions of the parties on this aspect of the case to be addressed by the Court of Appeals on remand." *Id.* at 48. The Court should do so here as well.

IV. In the Alternative, the Court Should Summarily Reverse the Fourth Circuit's Ruling and Remand the Case to That Court.

It is a basic principle of the American court system that "[i]f a precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls." *Rodriguez de Quijas v. Shearson / Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). Situations in which a court of appeals does not follow this Court's precedent are rare, but they do arise. Here, Mr. Pritchett presented serious arguments for the application of *Mellouli*, *Mathis*, and *Duenas-Alvarez* to the question of whether his prior convictions qualified as controlled substance offenses. He presented it at every stage of the proceeding, beginning in the district court. He relied on this Court's

cases explicitly. But the court of appeals did not give any reasoning for its rejection of them.

This Court has not hesitated to summarily reverse in a criminal case where the court below issued a reasoned decision, but failed to address an argument by the criminal defendant under clear precedent at the time. In *Youngblood v. West Virginia*, the petitioner (a criminal defendant) had argued that the state had suppressed exculpatory evidence, relying on "cases citing and applying *Brady v. Maryland*, 373 U.S. 83 [] (1963)." 547 U.S. 867, 868 (2006). In its opinion, the Supreme Court of West Virginia affirmed, "but without examining the specific constitutional claims associated with the alleged suppression of favorable evidence." *Id.* at 869. This although the petitioner had "clearly presented a federal constitutional *Brady* claim to the State Supreme Court." *Id.* In response, this Court summarily granted the petition for certiorari, vacated the opinion, and remanded. *Id.*

Likewise, the Court has not hesitated to summarily reverse in a criminal case arising from the Fourth Circuit in which that court referenced, and even quoted from, a decision from this Court directly applicable to the case at hand, yet then disregarded it. In *Nelson v. United States*, 129 S. Ct. 890 (2009), the district court treated the guideline range as presumptively reasonable even though this Court had made clear in both *Rita v. United States*, 551 U.S. 338 (2007), and again just a few months later in *Gall v. United States*, 552 U.S. 38 (2007), that the presumption of reasonableness applied only on appeal. 129 S. Ct. at 891, 892. Although the Fourth Circuit quoted from *Rita*, that court concluded that the district court had not treated the guidelines

as mandatory and affirmed the sentence. *Id.* at 892. As this Court found, "That is true, but beside the point. The Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable." *Id.* "Under our recent precedents," the Court concluded, the district court's treatment of the defendant's guideline range as presumptively reasonable "constitutes error." *Id.*

This case presents a parallel example of lack of examination of a criminal defendant's arguments asserting this Court's precedents, and the same result should obtain. Mr. Pritchett presented his arguments under *Mellouli*, *Mathis*, and *Duenas-Alvarez* at every stage from the trial court through a petition for rehearing in the Fourth Circuit. Although the panel cited the correct and undisputed background principles of the categorical approach – that it turns on elements, for example, Pet. App. 4a – it failed to address the particular argument that Virginia's drug schedules were overbroad and an indivisible element of the Virginia drug trafficking statute. Whereas Mr. Pritchett expressly relied on *Mellouli* for that analysis, the panel opinion contains no mention of the case. And it devoted no *Mathis* analysis pursuant to the (in)divisibility of the Virginia drug trafficking statute. Finally, the decision made no reference at all to *Duenas-Alvarez*, and did not even purport to compare Virginia's aiding and abetting liability to generic accomplice liability, as this Court did in *Duenas-Alvarez*. Under these circumstances, a summary reversal would be appropriate.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted. In the alternative, this Court should grant the petition, vacate the judgment of the Fourth Circuit, and remand the case with instructions to apply to Virginia Code § 18.2-248 the analyses the Court has mandated in *Mellouli*, *Mathis*, and *Duenas-Alvarez*.

Respectfully submitted,

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