No. 20-7327

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IN THE SUPREME COURT OF THE UNITED STATES

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TIMOTHY A. WARD, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner's Virginia convictions for possessing heroin with intent to distribute, in violation of Va. Code Ann. § 18.2-248 (2009), were convictions for "controlled substance offense[s]" under Sentencing Guidelines § 4B1.2(b).

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 972 F.3d 364. The order of the district court (Pet. App. 17a-21a) is unreported but is available at 2018 WL 9848286.

## JURISDICTION

The judgment of the court of appeals was entered on August 20, 2020. A petition for rehearing was denied on September 29, 2020 (Pet. App. 22a). The petition for a writ of certiorari was filed on February 26, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Virginia, petitioner was convicted of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). Judgment 1; see Pet. App. 1a. The district court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3; see Pet. App. 1a. The court of appeals affirmed. Pet. App. 1a-16a.

1. In 2017, petitioner sold 0.1645 grams of cocaine to a confidential source. Pet. App. 2a; C.A. App. 157-158 ¶ 5. A grand jury in the Eastern District of Virginia indicted petitioner for distributing cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Indictment 1-2; see Pet. App. 2a. Petitioner pleaded guilty to that offense. Judgment 1; see Pet. App. 2a.

Before sentencing, the Probation Office determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1(a). Pet. App. 2a; C.A. App. 159 ¶ 18. As relevant here, Section 4B1.1(a) increases a defendant's advisory sentencing range where, inter alia, he has at least two prior felony convictions for a "controlled substance offense." Sentencing Guidelines § 4B1.1(a). The Guidelines define a "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." Id. § 4B1.2(b).

The Probation Office found that petitioner had a 2001 federal conviction for possessing crack cocaine with intent to distribute, a 2011 Virginia conviction for possessing heroin with intent to distribute, and a 2011 Virginia conviction for manufacturing, selling, distributing, or possessing with intent to distribute a controlled substance. C.A. App. 169-173 ¶¶ 48, 52, 54; see Pet. App. 2a, 17a. Both of petitioner's Virginia convictions arose under Va. Code Ann. § 18.2-248 (2009), which makes it unlawful "for any person to manufacture, sell, give, distribute, or possess with intent to * * * distribute a controlled substance or an imitation controlled substance." Pet. App. 18a (quoting Va. Code. Ann. § 18.2-248(A) (2020)). The court records for the second Virginia conviction indicated that it, like the first, rested on petitioner's possession of heroin with intent to distribute. C.A. App. 173 ¶ 54; see Pet. App. 2a, 17a. Applying the career-offender Guideline, the Probation Office classified petitioner as a career offender under Section 4B1.1(a) and calculated an advisory guidelines range of 151 to 188 months of imprisonment. Pet. App. 2a (quoting C.A. App. 159); see C.A. App. 183 ¶ 105.

Petitioner acknowledged that his prior federal conviction counted as a "controlled substance offense" under Section 4B1.2(b), but objected to his classification as a career offender, arguing that neither of his Virginia convictions was a "controlled substance offense" because Virginia's schedules of controlled substances include one substance, Salvinorin A, that is not listed on the federal schedules of controlled substances. Pet. App. 2a, 17a-19a; see C.A. App. 71-101. The district court overruled petitioner's objection, finding that Sentencing Guidelines § 4B1.2(b) "unambiguously cover[ed]" petitioner's two Virginia convictions. Pet. App. 19a; see id. at 17a-21a; C.A. App. 101. The court accordingly classified petitioner as a career offender under Section 4B1.1(a) and adopted the Probation Office's calculation of petitioner's advisory guidelines range. C.A. App. 124, 189.

Before announcing petitioner's sentence, the district court observed that petitioner had engaged in "an unremitting pattern of violating the law," C.A. App. 123, and had incurred "significant penalties" for his prior drug offenses that did not "seem to have gotten his attention," id. at 118. See id. at 104-107, 116-117, 126-127. The court also determined, however, that categorizing petitioner as a career offender led to an advisory guidelines range that was higher than what was "required to deal with this particular defendant's case." Id. at 118; see id. at 120-121,

126. The court additionally found the sentencing factors in 18 U.S.C. 3553(a) counseled against imposing a sentence that treated petitioner like "a kingpin in the drug organization or a violent person." C.A. App. 118; see id. at 118-119, 128. The court sentenced petitioner to 120 months of imprisonment (31 months below the bottom of the advisory sentencing range), to be followed by three years of supervised release. Id. at 128; Judgment 2-3; Pet. App. 2a.

2. The court of appeals affirmed. Pet. App. 1a-16a.

The court of appeals determined that the district court correctly recognized that petitioner satisfied the prerequisites for classification as a career offender under the Sentencing Guidelines because his two Virginia drug convictions "categorically qualify" as controlled substance offenses under Section 4B1.2(b). Pet. App. 7a; see id. at 2a-8a. The court rejected petitioner's contention that a "controlled substance offense" under Section 4B1.2(b) that arises under state law must be limited solely to controlled substances under federal law and cannot reach a substance regulated by the state of conviction itself. Id. at 2a-8a. The court observed that petitioner's argument was inconsistent with "the structure of the Guidelines" because, even though various Guidelines provisions, including Section 4B1.2 itself, show that the Sentencing Commission "understood how to cross-reference other federal provisions and

definitions," Section 4B1.2 "refers neither to the federal definition of a 'controlled substance' nor to the federal drug schedule." Id. at 6a. The court thus found "no textual basis to engraft the federal Controlled Substances Act's definition of 'controlled substance' into the career-offender guideline." Ibid. (quoting United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020), cert. denied, 141 S. Ct. 1239 (2021)).

The court of appeals also rejected petitioner's reliance on "the Jerome presumption," under which courts "'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.'" Pet. App. 6a (quoting Jerome v. United States, 318 U.S. 101, 104 (1943)). The court determined that, even "[a]ssuming the Jerome presumption should be applied to Guidelines promulgated by the Sentencing Commission," the presumption was "overcome here." Id. at 7a. Observing that Section 4B1.2(b) provides that "'[t]he term "controlled substance offense" means an offense under federal or state law,'" the court explained that "the Commission has specified that we look to either the federal or state law of conviction to define whether an offense will qualify" as a controlled substance offense. Ibid. (quoting Sentencing Guidelines § 4B1.2(b)).

Judge Gregory concurred in the judgment. Pet. App. 8a-16a. Because the court of appeals had recently determined that Va. Code

Section 18.2-248 "is divisible by the identity of the controlled substance," Pet. App. 9a, Judge Gregory would have affirmed petitioner's sentence on the ground that petitioner had a conviction under that law for an offense involving heroin, which "is also a substance controlled under federal law." Id. at 10a; see id. at 8a. But Judge Gregory disagreed with the court's determination that "controlled substance" in Section 4B1.2 may "refer[] to substances controlled solely under state law." Id. at 13a; see id. at 11a-16a.

ARGUMENT

Petitioner contends (Pet. 8-30) that his prior Virginia drug convictions are not "controlled substance offense[s]" within the meaning of Sentencing Guidelines § 4B1.2(b) and that the district court therefore erred in determining that he satisfies the prerequisites for a career-offender enhancement. Because the question presented involves the interpretation of the Sentencing Guidelines, the petition for a writ of certiorari does not warrant this Court's review. In any event, the court of appeals correctly rejected petitioner's contention. And this case would be an unsuitable vehicle for reviewing any disagreement among the courts of appeals regarding the application of Section 4B1.2(b), because petitioner would not be entitled to relief from his sentence even in the circuits that have adopted his preferred interpretation of that provision. This Court recently denied a petition for a writ

of certiorari raising a similar issue, see Ruth v. United States, 141 S. Ct. 1239 (2021) (No. 20-5975), and the same result is warranted here.

1. This Court ordinarily does not review decisions interpreting the Sentencing Guidelines, because the Sentencing Commission can amend the Guidelines to eliminate any conflict or correct any error. See Braxton v. United States, 500 U.S. 344, 347-349 (1991). Congress has charged the Commission with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Id. at 348 (citing 28 U.S.C. 994(o) and (u)); see United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."). Review by this Court of Guidelines decisions is particularly unwarranted in light of Booker, which rendered the Guidelines advisory only. 543 U.S. at 243; cf. Pet. App. 2a (observing that petitioner received a sentence below the guidelines range the district court deemed applicable).

No sound reason exists to depart from that practice here. The Commission has carefully attended to Section 4B1.2's definition of "controlled substance offense," amending it multiple

times. See, e.g., Sentencing Guidelines § 4B1.2(2) (1987); id. § 4B1.2(2) (1989). The Commission initially defined the term by reference to the Controlled Substances Act, id. § 4B1.2(2) (1987), then by reference to specific provisions of federal law, id. § 4B1.2(2) (1988), and then by replacing the cross-references to federal law with a broad reference to "federal or state law" that prohibits certain conduct, id. § 4B1.2(2) (1989). See United States v. Ruth, 966 F.3d 642, 652 (7th Cir. 2020), cert. denied, 141 S. Ct. 1239 (2021). More generally, the Commission has devoted considerable attention in recent years to the "definitions relating to the nature of a defendant's prior conviction," and it continues to work "to resolve conflicting interpretations of the guidelines by the federal courts." 81 Fed. Reg. 37,241, 37,241 (June 9, 2016). This Court's intervention would not be warranted.

Recognizing that this Court does not normally review Guidelines decisions, petitioner contends that the Commission "will not settle" the asserted conflict. Pet. 24 (capitalization omitted); see also Pet. 8. But his only support for this assertion is that the Commission has not yet acted. See Pet. 8, 24-25, 29. That assertion lacks merit. Any disagreement between the courts of appeals on this question has emerged only recently, see pp. 15-17, infra, and the opinion below, which petitioner himself characterizes (Pet. 15) as the most "thorough" decision rejecting his position, was issued only nine months ago, during a period

when the Commission has lacked a quorum, see U.S. Sent. Comm'n, Organization, https://www.ussc.gov/about/who-we-are/organization. To the extent that any inconsistency requires intervention, the Commission would be able to address it. See Longoria v. United States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the denial of the petition for a writ of certiorari) (observing, with respect to another Guidelines dispute, that the "Commission should have the opportunity to address th[e] issue in the first instance, once it regains a quorum of voting members") (citing Braxton, 500 U.S. at 348).

2. In any event, the court of appeals' decision is correct and does not warrant further review.

The term "controlled substance" in Section 4B1.2 is defined to encompass "an offense under * * * state law, * * * that prohibits * * * the possession of a controlled substance * * * with intent to * * * distribute." Sentencing Guidelines § 4B1.2(b). Petitioner's prior convictions were for violating Va. Code Section 18.2-248, a provision of state law that prohibits, in relevant part, "possess[ing] with intent to * * * distribute a controlled substance." Va. Code Ann. § 18.2-248(A) (2009). "[T]he identity of the prohibited substance is an element of Virginia Code § 18.2-248," and "the statute is divisible on that basis." Cucalon v. Barr, 958 F.3d 245, 253 (4th Cir. 2020). Accordingly, "each substance listed on the Virginia schedules" of controlled

substances "'goes toward a separate crime.'" Id. at 252 (quoting Mathis v. United States, 136 S. Ct. 2243, 2257 (2016)).

In petitioner's case, the specific substance that formed the basis of his prior Virginia convictions was heroin. See Pet. App. 2a, 17a; see also id. at 10a (Gregory, J., concurring in the judgment) (recognizing that relevant documents established that one of petitioner's Virginia convictions involved heroin); C.A. App. 171-173 ¶¶ 52, 54. Because heroin is a substance whose use is restricted by Virginia law, see Va. Code Ann. § 54.1-3446(2) (2008) (Schedule I of Virginia's schedules of controlled substances), it falls squarely within the ordinary meaning of "controlled substance," namely, "'any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use are restricted by law.'" Ruth, 966 F.3d at 654 (quoting The Random House Dictionary of the English Language (2d ed. 1987)). Indeed, Virginia law itself underscores that ordinary meaning, specifically labeling heroin a "controlled substance." Va. Code Ann. § 54.1-3401 (2008) (defining "Controlled Substance" to include a drug listed on Schedule I of Virginia's schedules of controlled substances).

Petitioner resists (Pet. 4-6) the classification of his Virginia convictions as convictions for controlled substance offenses, asserting that Section 4B1.2(b) implicitly incorporates the federal Controlled Substances Act's schedule of controlled

substances, which does not include some of the substances listed on Virginia's schedules of controlled substances. See Pet. 4, 10 & n.2; Pet App. 1a. But Section 4B1.2 "does not incorporate, cross-reference, or in any way refer to the Controlled Substances Act." Ruth, 966 F.3d at 651; see Pet. App. 6a. Nor does it contain any other textual indication that it is limited in scope to federally prohibited conduct. See Pet. App. 5a-6a (observing that the argument that Section 4B1.2(b) is limited "to state offenses that define substances just as federal law defines them" "ignores the plain meaning of [Section] 4B1.2(b)"). To the contrary, Section 4B1.2(b) defines a controlled substance offense as an offense "under federal or state law," Sentencing Guidelines § 4B1.2(b) (emphasis added), specifically "refer[ring] us to state law in defining the offense." Pet. App. 7a. It accordingly applies to offenses involving substances controlled under federal or relevant state law. And the unadorned term "controlled substance" is a natural one to use in a general description of federal and state drug crimes, which focus on unlawful activities involving a product that the relevant jurisdiction regulates. The court of appeals correctly discerned "no textual basis to engraft the federal Controlled Substances Act's definition of 'controlled substance' into the career-offender guideline." Id. at 6a (quoting Ruth, 966 F.3d at 654).

The use of the term "controlled substance" is particularly unlikely to be a silent cross-reference to the federal schedules because "[t]he Sentencing Commission clearly knows how to cross-reference federal statutory definitions when it wants to." Ruth, 966 F.3d at 651; see Pet. App. 6a. Section 4B1.2 itself incorporates definitions from federal statutes in defining the terms "firearm" and "explosive material." Sentencing Guidelines § 4B1.2(a)(2) (referring to "a firearm described in 26 U.S.C. § 5845(a)" and "explosive material as defined in 18 U.S.C. § 841(c)"). Other provisions likewise define particular terms by reference to federal law. See, e.g., Sentencing Guidelines § 2D1.1, comment. (nn.4 & 6). And the absence of any cross-reference of "controlled substance" in Section 4B1.2 to the Controlled Substances Act is especially telling because, as explained above (at p. 9, supra), the Commission amended Section 4B1.2 to remove a reference to the Controlled Substances Act, replacing it with a broad definition that expressly includes "state law" offenses that prohibit certain conduct related to "a controlled substance" more generally. Compare Sentencing Guidelines § 4B1.2(2) (1987) ("The term 'controlled substance offense' as used in this provision means an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 955a, 959; §§ 405B and 416 of the Controlled Substance[s] Act as amended in 1986, and similar offenses."), with Sentencing Guidelines § 4B1.2(b) ("The term

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

In any event, petitioner does not show that he would be entitled to relief even under his preferred reading of Section 4B1.2(b). As explained above, see pp. 10-11, supra, and as petitioner now appears to acknowledge (Pet. 4), the Virginia statute underlying petitioner's prior convictions "is divisible by prohibited substance."* Cucalon, 958 F.3d at 248. The concurring judge below accordingly found that petitioner would not be entitled to relief even if Section 4B1.2 were implicitly limited to state crimes involving federally controlled substances, see Pet. App. 9a-10a, and petitioner does not appear to argue otherwise. This Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no

* Petitioner took the opposite position in the court of appeals, arguing that the Virginia statute was indivisible and urging the court of appeals not to view the offense as limited to heroin. Pet. C.A. Br. 16, 21-25, 33. To the extent that petitioner now faults the court of appeals for taking the approach he advocated, see Pet. 4-6, 16, his argument is barred by doctrines of forfeiture, waiver, and invited error. See, e.g., United States v. Olano, 507 U.S. 725, 733 (1993) (waiver and forfeiture); United States v. Wells, 519 U.S. 482, 488 (1997) (invited error).

right" of the parties, Supervisors v. Stanley, 105 U.S. 305, 311 (1882), and should not do so here.

3. The decision below accords not only in result, but also in approach, with recent published decisions from at least two other courts of appeals, which have likewise declined "to engraft the federal Controlled Substances Act's definition of 'controlled substance'" onto Section 4B1.2(b). Ruth, 966 F.3d at 654 (7th Cir.); see United States v. Smith, 775 F.3d 1262, 1267-1268 (11th Cir. 2014), cert. denied, 576 U.S. 1013 (2015) (determining that state convictions for possessing marijuana and cocaine with intent to sell satisfy Section 4B1.2(b) because it does not require that state offenses be similar to federal crimes); see also United States v. Smith, 681 Fed. Appx. 483 (6th Cir.), cert. denied, 137 S. Ct. 2144 (2017) (determining that Illinois controlled-substances conviction are "controlled substance offense[s]" under Section 4B1.2(b) even though "Illinois may have criminalized" conduct involving "some substances that are not criminalized under federal law"). Petitioner asserts (Pet. 16-17) that the Sixth and Eleventh Circuits have "intra-circuit split[s]" on this issue, but this Court ordinarily does not grant review to resolve intracircuit conflicts. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Two courts of appeals have concluded that the term "controlled substance" in Section 4B1.2(b) "refers exclusively to a substance controlled by the" federal Controlled Substances Act. United States v. Townsend, 897 F.3d 66, 72 (2d Cir. 2018); see United States v. Bautista, 989 F.3d 698, 702 (9th Cir. 2021). Petitioner also relies (Pet. 13) on the Eighth Circuit's decision in United States v. Sanchez-Garcia, 642 F.3d 658 (2011), but while the Eighth Circuit did use the federal definition of "controlled substance" in interpreting Section 4B1.2(b) in that case, id. at 661-662, it did so in the course of agreeing with the government that the Section 4B1.2(b) enhancement was applicable to the defendant, id. at 662. Moreover, the government did not dispute in that case that the federal definition was relevant, instead arguing that (as the court ultimately found) the definition was satisfied, see Gov't C.A. Br. at 12-17, Sanchez-Garcia, supra (No. 10-2266). Petitioner additionally contends (Pet. 13-14) that the Fifth and Tenth Circuits have adopted his view of Section 4B1.2(b), but the cases petitioner cites in support of that proposition do not interpret Section 4B1.2(b) and instead address the commentary to other Guidelines provisions. See United States v. Gomez-Alvarez, 781 F.3d 787, 792-793 (5th Cir. 2015) (construing the definition of "drug trafficking offense" in the commentary to Section 2L1.2); United States v. Abdeljawad, 794 Fed. Appx. 745, 748 (10th Cir. 2019) (construing the term "controlled substance" in the

commentary to Section 2D1.1). Thus, although some courts of appeals, like petitioner, view the circuit disagreement somewhat more broadly, see Ruth, 966 F.3d at 653; Bautista, 989 F.3d at 702-703, any direct conflict is recent and limited. That counsels against this Court's review and even more in favor of allowing the Sentencing Commission the opportunity to address it. See pp. 8-10, supra.

4. Even if the disagreement petitioner identifies otherwise warranted this Court's review, this case would not be an appropriate vehicle to resolve it. First, as described above, see pp. 14-15, supra, the concurring judge agreed with petitioner that Section 4B1.2 implicitly incorporates the federal schedules but found that petitioner was nevertheless not entitled to relief. Petitioner does not explain why the outcome would be different in another circuit. Second, any error in the application of the career-offender enhancement was harmless because the record indicates that the district court would have imposed the same 120-month sentence even without the career-offender enhancement. See Gov't C.A. Br. 26-31.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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