No. 20-7327

IN THE

Supreme Court of the United States

TIMOTHY A. WARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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REPLY BRIEF OF THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

U.S. Sentencing Guidelines

INTRODUCTION

The Court should issue a writ of certiorari for several reasons. The issue in this case is not just about Mr. Ward's prior state convictions, as the government rephrases the question presented. BIO (I). The issue here is whether an undefined term in the Sentencing Guidelines, "controlled substance," means a substance "controlled" under the law of any state, or whether it means a substance "controlled" by Congress in the federal Controlled Substances Act. There is a deep and acknowledged split among the federal courts of appeals on this exact issue, and the Sentencing Commission is currently both unable to and uninterested in resolving it. As it has done before, this Court should step in because the question presented is important, the split is both deep and longstanding, and this legal question implicates the important interest of uniformity in federal sentencing.

A. The United States Errs In Describing The Question Presented.

As a preliminary matter, the United States errs in its description of the legal issue presented by this case. The government conflates a defined term in the Sentencing Guidelines, "controlled substance offense," with the crucial non-defined term, "controlled substance,"

repeatedly in its Brief in Opposition. For example, the United States writes:

> 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."

BIO 10. That is the definition of "controlled substance offense," not "controlled substance." A "substance" is not an "offense."

Similarly, the United States avers that "the unadorned term 'controlled substance' is a natural one to use in a general description of federal and state drug crimes." BIO 12. The term "controlled substance" does not necessarily describe a "crime." It describes a "substance." A substance can be "controlled" by way of regulatory or civil law as well as criminal law. And more importantly, that lack of a provided definition of "controlled substance" is the legal issue on appeal here, as it was in the Fourth Circuit. The conflation of the two terms of art is unhelpful, at best.

The government's lack of attention to the difference between the undefined term "controlled substance" and the defined term "controlled substance offense" in U.S.S.G. § 4B1.2(b), however, is not a reason to

overlook that the definition of the former is an important issue on which the courts of appeals are clearly divided.

B. There Is A Deep And Acknowledged Circuit Split.

First, as the government agrees, BIO 16-17, there is an acknowledged circuit split about the meaning of the undefined term "controlled substance" in the Sentencing Guidelines. The government further acknowledges that the courts of appeals think the circuit split is more dire than the Solicitor General's office does. BIO 17 ("some courts of appeals, like petitioner, view the circuit disagreement somewhat more broadly").

Indeed, another court of appeals joined the split just last week. *See United States v. Abdulaziz*, No. 19-2030, __ F.3d __, 2021 WL 2217452, at *3 (1st Cir. June 2, 2021) (holding contrary to the Fourth Circuit below and with agreement of the parties that "a 'controlled substance' in § 4B1.2(b) was defined as of that time by reference to whether a substance was either included in or excluded from the drug schedules set forth in the federal Controlled Substances Act.").

The government asserts that the circuit split "emerged only recently," BIO 9, but that is incorrect. *See* Pet. 25-26 (outlining

development of circuit split). In *United States v. Bautista*, 982 F.3d 563 (9th Cir. 2020), the Ninth Circuit relied on its own precedent under U.S.S.G. § 2L1.2, *United States v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012), to hold that "controlled substance" in § 4B1.2 means a substance controlled under the federal CSA. By applying *Leal-Vega* to define "controlled substance" in § 4B1.2, the Ninth Circuit contradicts the government's assertion, BIO 16, that there is any daylight between "controlled substance" under U.S.S.G. § 2L1.2 or under § 4B1.2(b). No circuit courts have agreed with the government's distinction between "controlled substance" in one guideline provision and the other.[1]

The Ninth Circuit's own characterization of *Leal-Vega*, which matches petitioner's understanding, also undermines the government's argument that this circuit split is of recent vintage. BIO 9. In 2012 the

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[1] Just as with cases interpreting the force clause in the ACCA, 18 U.S.C. § 924(e) and the force clause in the career offender guideline, U.S.S.G. § 4B1.2, circuit courts apply cases interchangeably. *E.g.*, *United States v. Carthorne*, 726 F.3d 503, 511 (4th Cir. 2013) ("We rely on precedents addressing whether an offense is a crime of violence under the Guidelines interchangeably with precedents evaluating whether an offense constitutes a violent felony under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), as the two terms are defined in a substantively identical manner.") (cleaned up).

Ninth Circuit defined "controlled substance" in *Leal-Vega*, 680 F.3d at 1166, and directly addressed and rejected the Seventh Circuit's reasoning in *United States v. Hudson*, 618 F.3d 700 (7th Cir. 2010). At that point, the split was clear. The Seventh Circuit later declined to adopt *Leal-Vega*'s rejection of *Hudson*, and re-applied *Hudson* to define "controlled substance." *United States v. Ruth*, 966 F.3d 642, 652-53 (7th Cir. 2020).

The Fourth Circuit in this case created its own analysis, different from *Ruth*'s in logic though not in result, disavowing that "controlled substance" in § 4B1.2 referred to the federal CSA, and deepening the established split. Pet. App. 7a.

The Ninth Circuit in *Bautista* then again held that the undefined term "controlled substance" in the Sentencing Guidelines did, indeed, incorporate the federal CSA. 982 F.3d at 568. The First Circuit agreed last week. *Abdulaziz*, 2021 WL 2217452, at *3. There is no disputing the extent of the circuit split, or that the disagreement between the circuits has existed since 2012 and will not resolve itself. This is not a "recent and limited" conflict, contrary to the United States's assertion. BIO 17.

C. The Sentencing Commission Shows No Signs of Resolving The Circuit Split, And This Court Can And Has Stepped In On Sentencing Guideline Issues.

The United States also asserts that certiorari should be denied so that the Sentencing Commission can resolve the issue. BIO 8. The Sentencing Commission has failed to resolve this circuit disagreement for the past nine years, and there is no timetable for future action. Thus this is not a good reason for this Court to deny review.

The government cites *Braxton v. United States*, 500 U.S. 344 (1991), claiming that it stands for the broad proposition that "[t]his 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." BIO 8. Be that as it may, this case, and this conflict, are distinguishable from *Braxton*.

In *Braxton*, "after we had granted Braxton's petition for certiorari," the Commission requested public comment on whether U.S.S.G. § 1B1.2(a) should be amended. 500 U.S. at 348. At issue was "the precise question presented raised by the first part of Braxton's petition here." *Id.* Thus, *Braxton* came out the way it did because the Commission had shown explicit signs of resolving the question presented after the Court

granted certiorari. *Id*. at 348-49 ("We choose not to resolve the first question presented in the current case, because the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of § 1B1.2"). In this case, in direct contrast, the Commission has shown no signs of resolving the circuit split. *Braxton* therefore is inapposite.

Further, the Sentencing Commission currently lacks a quorum, and thus *cannot* amend the Guidelines.[2] The Commission's present inability to act exacerbates its choice not to act since the split emerged. Moreover, even were the Commission to gain a quorum, there is no reason to believe it would address this particular legal issue. The Commission's most recent proposal to amend § 4B1.2, in 2018, was well after this circuit split emerged. *Supra* 5; Pet. 25-26. Yet that amendment would have had no effect on the instant controversy. The proposal would have allowed judges

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[2] *See* December 13, 2018 Sentencing Commission Press Release noting only "two voting commissioners" remain, available at https://www.ussc.gov/about/news/press-releases/december-13-2018, accessed June 4, 2021.

to look at court documents from prior convictions, and eliminated the categorical approach.[3]

The Commission's 2018 proposal would not have resolved this legal issue, because access to court records and the categorical approach (or lack thereof) still do not tell sentencing judges whether the substances at issue in a prior conviction mean substances "controlled" by all the state schedules, or controlled by the federal CSA. To determine whether a prior conviction is a § 4B1.2(b) predicate, courts would still have to compare the prior state convictions to *something*. And that undefined comparator – what is a "controlled substance" – is the issue presented, on which the circuits disagree.

More fundamentally, the proposal is speculative. Multiple commissioners who were on the Commission at the time of the proposed amendment are gone. There is no guarantee that their successors will support it. Similarly, there is no guarantee that the 117th Congress (or

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[3] *See* December 20, 2018 Proposed Amendments to the Sentencing Guidelines, at 21, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20181219_rf-proposed.pdf, accessed June 4, 2021.

118th, or 119th, and so on) will approve new commissioners. The 116th Congress did not.

The problem is not just that "the Commission has not yet acted," as the government says. BIO 9 (emphasis in original). The problem is that the Commission has ignored this issue for several years, and there is no guarantee that the Commission will change course, or when. The Sentencing Guidelines have a meaning today, and even if the Commission promulgates different guidelines in the future, sentencing courts need an answer on the current meaning, so that sentences today do not have unwarranted disparities.

Section 3553(a)(6) of Title 18 commands courts to avoid unwarranted sentencing disparities. The different definitions for "controlled substance" cause unwarranted sentencing disparities. Waiting undermines that Congressional intent for the many thousands of defendants who will be sentenced before the Commission acts. *See* Pet. 28 and n.4 (estimating large number of cases in which this definition arises); *see also Barber v. Thomas*, 560 U.S. 474, 480 (2010) (granting certiorari because the case "affects the interests of a large number of

federal prisoners"). This issue is important, and the Court should settle it.

There is precedent for this Court resolving questions concerning the application of the career offender guideline, specifically. In *Buford v. United States*, 532 U.S. 59 (2001), the circuits were split on the proper standard of review when evaluating a district court's application of U.S.S.G. § 4B1.2(c). The Court granted certiorari, observing that the "Guidelines' treatment of 'career offenders,' [results in] particularly severe punishment." *Id.* at 60.

Buford is a good model for this case, because it notes how important the career offender enhancement is. The § 4B1.2(b) split at issue here shows that lower courts use competing analytical methods when applying that guideline. In the Seventh Circuit, the absence of express incorporation of the federal statute creates a presumption of non-incorporation, and the court of appeals instead relied on the Random House dictionary. *Ruth*, 966 F.3d at 654. In the Second Circuit, however, the absence of express *non*-incorporation of federal statutes creates a presumption of incorporation. *Townsend*, 897 F.3d at 71. As this Court held in *Kisor v. Wilkie*, "hard interpretive conundrums, even relating to

complex rules, can often be solved." 139 S. Ct. 2400, 2415 (2019). But for them to be solved consistently, the courts of appeals must use the same approach.

Buford is also instructive because it, too, involved several circuits going their own ways. 532 U.S. at 63. Like in this case, the issue had percolated through several circuit courts over many years when this Court granted certiorari. *Id.* at 63 (collecting circuit court cases). In *Buford*, the Court granted certiorari to prevent similarly-situated defendants from continuing to get disparate sentences based on geography.

The government places undue emphasis on *Braxton* for the proposition that the Commission, not the Court, must resolve any sentencing guidelines splits. BIO 8. *Buford* took place after *Braxton*, so any supposed "*Braxton* rule" should be cabined by a countervailing "*Buford* rule" that encourages this Court to resolve questions of interpretive approach. And *Buford* is not the only Guidelines cert. grant this Court has made, of course. *See, e.g.*, *United States v. Labonte*, 520 U.S. 751 (1997) (resolving circuit split with regard to Amendment 506 to the Sentencing Guidelines); *Neal v. United States*, 516 U.S. 284 (1996)

(resolving issue about LSD weight under the Sentencing Guidelines); *Melendez v. United States*, 518 U.S. 120 (1996) (interpreting U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e)); *cf. Molina-Martinez v. United States*, 136 S. Ct. 1338, 1341 (2016) (stating in first line: "This case involves the Federal Sentencing Guidelines"; holding that, in most cases, "when a district court adopts an incorrect Guidelines range, there is a reasonable probability that the defendant's sentence would be different absent the error"). Finally, *Braxton* itself says this: When an agency such as the Commission is not taking steps to resolve a circuit split, this Court "[o]rdinarily. . . regard[s] the task as initially and primarily" its own. *Braxton*, 500 U.S. at 348.

Sentencing Commission action on this question is speculative on several levels. While waiting for Commission action that may never come, courts violate the § 3553(a)(6) mandate to avoid sentencing disparities in thousands of cases per year. This Court's intervention is required.

D. The Fourth Circuit's Decision Below Is Wrong, Contradicts This Court's Decision In *Taylor*, and Eviscerates the Categorical Approach

As Mr. Ward argued in his petition, the Fourth Circuit's decision below was wrong. Pet. 20-24. The government asserts otherwise, BIO 10-

13, but conflates the definitions of a "controlled substance offense" and a "controlled substance." *Supra* 2-3. The government relies extensively on the Seventh Circuit's decision in *Ruth*, the side of the circuit split the Fourth Circuit below joined, without grappling at all with the Second Circuit's decision in *Townsend*, or the fact that, as the Seventh Circuit in *Ruth* itself acknowledged, "[w]e recognize that a circuit split exists on this issue, and that the weight of authority favors Ruth." 966 F.3d at 653. The government pretends that only one side of this circuit split exists, but the courts of appeals themselves know better. *Id*. That is exactly why this Court's intervention is merited.

Mr. Ward will not repeat the interpretive merits arguments from his petition at length, but the Fourth Circuit's approach also guts the categorical approach and is contrary to this Court's decision in *Taylor v. United States*, 495 U.S. 575 (1990). Pet. 20-24.

The government asserts that Mr. Ward "appears to acknowledge" that the Virginia statute of his prior conviction is divisible by substance. BIO 14. He does not. He acknowledges that the Fourth Circuit has so held, but believes that that decision was incorrect as a matter of Virginia

state law. *See* Rehearing Petition, *United States v. Ward*, Docket 53 (4th Cir. Sept. 17, 2020).[4]

The government relatedly asserts that Mr. Ward has not explained "why the outcome would be different in another circuit" and thus the petition should be denied. BIO 17. Because other circuits decide issues of statute divisibility differently than the Fourth Circuit, however, and Mr. Ward argues that the Virginia drug statute is both indivisible as well as indisputably overbroad, he would be entitled to relief in another circuit, just as Townsend was. *See, e.g.*, *United States v. Townsend*, 897 F.3d 66, 70 n.2 (2d Cir. 2018) (noting indivisibility of New York drug statute at issue); *Najera-Rodriguez v. Barr*, 926 F.3d 343, 347 (7th Cir. 2019) (Illinois drug statute is indivisible); *see also United States v. Oliver*, 955

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[4] Mr. Ward did not invite error, as the government suggests. BIO 14 n.*. Mr. Ward does and has always maintained that the Virginia drug statute is indivisible by controlled substance, while recognizing that *Bah* and *Cucalon* are currently the law of the Fourth Circuit. *Bah v. Barr*, 950 F.3d 203 (4th Cir. 2020); *Cucalon v. Barr*, 958 F.3d 245, 253 (4th Cir. 2020) ("we conclude that the identity of the prohibited substance is an element of Virginia Code § 18.2-248 and that the statute is divisible on that basis"). The Fourth Circuit thus erred in this case in applying the categorical approach to a statute it had previously held to be divisible. *See* Pet. 4-5. That error was not invited by Mr. Ward, however, who consistently argued below that the Virginia statute is indivisible.

F.3d 887, 897 (11th Cir. 2020) (where "the statute's text, state case law, and the record of conviction do not 'speak plainly' as to whether the statute is divisible," the court applies a presumption to "resolve[s] the inquiry in favor of indivisibility.") (cleaned up); *United States v. Titties*, 852 F.3d 1257, 1268 (10th Cir. 2017) (similar).

CONCLUSION

The split on the issue presented is clear, acknowledged, and long-lived. The Sentencing Commission has failed to act for years, cannot act currently, and has no timetable for acting in the future.

Mr. Ward's sentencing guideline range increased more than six-fold, from a range of 24 to 30 months to a range of 151 to 188 months, on the premise that his two prior state court convictions were U.S.S.G. § 4B1.2(b) "controlled substance offenses." But what is a "controlled substance?" The interpretative error by the Fourth Circuit led to Mr. Ward's 120-month sentence for selling less than a single gram of cocaine. That sentence is unreasonable and unduly disparate under 18 U.S.C. § 3553(a). The lengthy prison sentence is an example of the importance of this circuit split. He asks this Court to grant certiorari to resolve the question presented.

Respectfully submitted,

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