No. 21-5099

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS JAVION GUERRANT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's Virginia conviction for possessing with intent to distribute marijuana, in violation of Va. Code Ann. § 18.2-10(e) (2018), was a conviction for a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b).

ADDITIONAL RELATED PROCEEDING

United States District Court (W.D. Va.):

United States v. Guerrant, No. 19-cr-39 (July 6, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 849 Fed. Appx. 410.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2021. The petition for a writ of certiorari was filed on July 7, 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 Western District of Virginia, petitioner was convicted of

distributing heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and assaulting, resisting, or impeding a federal law-enforcement officer, in violation of 18 U.S.C. 111(a) and (b). Judgment 1. The district court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-5a.

1. In February 2019, petitioner sold a quarter ounce of heroin to an informant. Gov't C.A. Br. 2-3. A few hours after the sale, federal agents attempted to stop and arrest petitioner, who was in his car at the time. Id. at 3. Petitioner drove into a government vehicle, turned, jumped the curb, and drove away. Ibid. Petitioner led officers on a high-speed chase for several miles before he lost control of his car and crashed into other vehicles. Ibid. After the crash, officers discovered 10 more grams of heroin in petitioner's car. Ibid.

A grand jury in the Western District of Virginia indicted petitioner on one count of distributing heroin, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(C); three counts of forcibly assaulting, resisting, opposing, impeding, and interfering with a federal employee, in violation of 18 U.S.C. 111(a) and (b); and one count of possessing with intent to distribute heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Indictment 1-3. Petitioner pleaded guilty, pursuant to a plea agreement, to the

distribution count and one of the assault counts. 1 C.A. App. 11-23, 27-56.

Before sentencing, the Probation Office determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1(a). 2 C.A. App. 18-19. Section 4B1.1(a) increases a defendant's advisory sentencing range when, among other things, he has at least two previous 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 2012 Virginia conviction for malicious wounding and using a firearm to commit malicious wounding and a 2018 Virginia conviction for possessing marijuana with intent to distribute. 2 C.A. App. 20-21, 24. The marijuana conviction was for violating Va. Code Ann. § 18.2-248.1 (2006), which "makes it unlawful 'to sell, give, distribute or possess with intent to sell, give or distribute marijuana." Pet. App. 3a (quoting Va. Code Ann. § 18.2-248.1 (2020)); see Va. Code

Ann. § 18.2-248.1 (2006) (same). The Probation Office accordingly classified petitioner as a career offender and calculated an advisory sentencing range of 151 to 188 months of imprisonment. 2 C.A. App. 28; see id. at 18-19.

Petitioner objected to his classification as a career offender, arguing that his Virginia marijuana conviction was not a "controlled substance offense" based on the assertion that Virginia's definition of marijuana includes certain oily extracts and mature stalks that the relevant federal definitions do not. 2 C.A. App. 1-6. The district court overruled petitioner's objection and adopted the Probation Office's calculation of his advisory guidelines range. Pet. App. 13a-15a, 17a. The court imposed a below-Guidelines sentence of 120 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

2. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-5a. The court observed that, in United States v. Ward, 972 F.3d 364, 372 (4th Cir. 2020), cert. denied, 141 S. Ct. 2864 (2021), it had rejected the contention that a "controlled substance offense" under Section 4B1.2(b) must involve a controlled substance under the federal Controlled Substances Act, as opposed to a controlled substance under the relevant state law. Pet. App. 4a-5a. And accordingly, the court upheld the district court's determination that petitioner's

previous Virginia marijuana conviction was a "controlled substance offense" under Section 4B1.2(b). Id. at 5a.

ARGUMENT

Petitioner contends (Pet. 9-21) that his Virginia marijuana conviction is not a "controlled substance offense" 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. This Court recently denied two petitions for writs of certiorari raising a similar issue. See Ward v. United States, 141 S. Ct. 2864 (2021) (No. 20-7327); Ruth v. United States, 141 S. Ct. 1239 (2021) (No. 20-5975).* 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

* At least four petitions raising a similar issue are pending before this Court. See Atwood v. United States, No. 20-8213 (filed May 27, 2021); Wallace v. United States, No. 21-5413 (filed Aug. 13 2021); McLain v. United States, No. 21-5633 (filed Sept. 7, 2021); Sisk v. United States, No. 21-5731 (filed Sept. 20, 2021).

"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.

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 is not warranted.

Petitioner does not dispute that the Commission could act to resolve the asserted conflict. Any disagreement between the courts of appeals on this question has emerged only recently, see pp. 10-12, infra, and the Commission currently lacks 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 offense" 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 previous drug conviction was for violating Va. Code

Ann. Section 18.2-248.1, a provision of state law that prohibits, in relevant part, "possess[ing] with intent to * * * distribute marijuana." Pet. App. 3a (quoting Va. Code Ann. § 18.2-248.1 (2020)); see Va. Code Ann. § 18.2-248.1 (2006) (same). Because marijuana is a substance whose use is restricted by Virginia law, see Va. Code Ann. § 18.2-247(D) (2004) and Va. Code Ann. § 18.2-248.1 (2006), 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)).

Petitioner argues (Pet. 4-6, 17-19) that Virginia's definition of marijuana is broader than the definition in the federal Controlled Substances Act and that Section 4B1.2(b) implicitly incorporates the federal Controlled Substances Act's schedule of controlled substances. 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. Nor does it contain any other textual indication that it is limited in scope to federally prohibited conduct. See United States v. Ward, 972 F.3d 364, 372 (4th Cir. 2020) (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)"), cert. denied, 141 S. Ct. 2864 (2021).

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] [a court] to state law in defining the offense." Ward, 972 F.3d at 374. 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 has thus correctly discerned "no textual basis to engraft the federal Controlled Substances Act's definition of 'controlled substance' into the career-offender guideline." Ward, 972 F.3d at 373 (quoting Ruth, 966 F.3d at 654); see Pet. App. 5a (relying on Ward, 972 F.3d at 371-372).

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. Section 4B1.2 itself incorporates definitions from federal statutes in defining the terms "firearm" and "explosive material." See 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 (see p. 6, 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 Substances Act as amended in 1986, and similar offenses."), with id. § 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.").

3. The decision below accords with recent published decisions from the Seventh, Eighth, Tenth, and Eleventh Circuits, as well as an unpublished decision from the Sixth Circuit, 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. Henderson, 11 F.4th 713, 718-719 (8th Cir. 2021); United States v. Jones, No. 20-6112, 2021 WL 4851812, at *2-*6 (10th Cir. Oct. 19, 2021); United States v. Smith, 775 F.3d 1262, 1267-1268 (11th Cir. 2014), cert. denied, 576 U.S. 1013 (2015); see also United States v. Smith, 681 Fed. Appx. 483, 489 (6th Cir.), cert. denied, 137 S. Ct. 2144 (2017). Petitioner asserts (Pet. 15) that the Sixth and Eleventh Circuits have issued inconsistent decisions 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 cites (Pet. 13) the Eighth Circuit's decision in United States v. Sanchez-Garcia, 642 F.3d 658 (2011), but as the Eighth Circuit recently explained, that that case did not decide the issue. See Henderson, 11 F.4th at 717-718. Moreover, after petitioner filed the petition for a writ of certiorari in this case, the Eighth

Circuit determined that Section 4B1.2(b) includes "no requirement that the particular substance underlying the state offense is also controlled under a distinct federal law." Id. at 718.

Petitioner also cites (Pet. 13-14) the Fifth Circuit's decision in United States v. Gomez-Alvarez, 781 F.3d 787 (2015), but as petitioner acknowledges, that decision does not interpret Section 4B1.2(b) and instead addresses the definition of "drug trafficking offense" in the commentary to Section 2L1.2. See id. at 792-793. 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 even further against this Court's review and in favor of allowing the Sentencing Commission the opportunity to address it. See pp. 5-7, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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