No. 21-6077

IN THE SUPREME COURT OF THE UNITED STATES

TORRI MCCRAY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

TYLER ANNE LEE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court violated petitioner's Fifth Amendment rights when it considered conduct that it found to be established by a preponderance of the evidence, in imposing a sentence outside the advisory guidelines range but within the statutory range.

2. Whether the court of appeals erred by interpreting the term "analogue" in 21 U.S.C. 841(b)(1)(B)(vi) according to its ordinary meaning.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D.N.Y.):

United States v. McCray, No. 17-cr-147 (July 22, 2020)

United States Court of Appeals (2d Cir.):

United States v. McCray, No. 20-2545 (July 29, 2021)

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-6077

TORRI MCCRAY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 7 F.4th 40.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2021. The petition for a writ of certiorari was filed on October 21, 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 New York, petitioner was convicted of

possessing with intent to distribute and distributing fentanyl, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing with intent to distribute and distributing 10 grams or more of butyryl fentanyl, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). Judgment 1. Petitioner was sentenced to 90 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A24.

1. Starting in June 2017, federal law enforcement officers enlisted a confidential source to arrange controlled purchases of drugs from petitioner. Pet. App. A5. In one transaction, the purchaser paid $600 for approximately five grams of a substance later determined to be a mixture of fentanyl, butyryl fentanyl, furanyl fentanyl, and U-47700 (a synthetic opioid). Ibid. In another pair of transactions, the buyer paid $1000 and $1400 for approximately 11 and 15 grams, respectively, of butyryl fentanyl. Ibid. Petitioner also sold a total of approximately 30 grams of heroin hydrochloride to the purchaser on two additional occasions, after which petitioner was arrested. Plea Agreement 4; Pet. App. A5.

A federal grand jury in the Western District of New York charged petitioner with one count of possessing with intent to distribute and distributing fentanyl, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and two counts of possessing with intent to distribute and distributing 10 grams or more of butyryl fentanyl, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B).

Indictment 1-2. As relevant to the latter two counts, Section 841(b)(1)(B) imposes a five-year mandatory minimum term of imprisonment for offenses involving "40 grams or more of a mixture or substance containing a detectable amount of [fentanyl] or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of [fentanyl]." 21 U.S.C. 841(b)(1)(B)(vi).

2. Petitioner moved to dismiss the two butyryl fentanyl counts, arguing that butyryl fentanyl was not "any analogue of [fentanyl]," 21 U.S.C. 841(b)(1)(B)(vi). See Pet. App. A6. Petitioner relied on 21 U.S.C. 802(32), which states that a "'controlled substance analogue' * * * does not include * * * a controlled substance." 21 U.S.C. 802(32)(A) and (C)(i). The Administrator of the Drug Enforcement Administration had recently designated butyryl fentanyl as a Schedule I controlled substance. 81 Fed. Reg. 29,492 (May 12, 2016) (temporary designation); see 83 Fed. Reg. 17,486 (Apr. 20, 2018) (final order maintaining that designation) (21 C.F.R. 1308.11(b)(22)). Petitioner asserted that because butyryl fentanyl did not meet Section 802(32)'s definition of the specific term "controlled substance analogue," it could not be "any analogue of [fentanyl]" within the meaning of Section 841(b)(1)(B).

The district court denied petitioner's motion to dismiss. D. Ct. Doc. 49 (Sept. 28, 2018). The court observed that Section 841(b)(1)(B) uses the phrase "'any analogue of [fentanyl],' not 'controlled substance analogue.'" Id. at 5 (brackets in original).

The court explained that "'controlled substance analogue' is a term of art under the statute," id. at 6, whereas "'any analogue,'" which is undefined, should be given its "plain and ordinary meaning," id. at 5. And the court determined that the plain and ordinary meaning of "analogue" would include butyryl fentanyl as an analogue of fentanyl. Id. at 5-6. While describing its "conclusion that an analogue of a controlled substance (that is, fentanyl) is not a 'controlled substance analogue'" as being one that "only a lawyer can love," the court emphasized that it was correct "based on the science," the "definition of analogue," the "fact that 'controlled substance analogue' is a term of art," and "other canons of construction." Id. at 6.

Petitioner pleaded guilty to the fentanyl count and one of the butyryl fentanyl counts, and the government dismissed the other butyryl fentanyl count. Plea Agreement 1-2; Judgment 1.

3. At a pre-sentencing evidentiary hearing, the government presented evidence that petitioner's relevant conduct included a November 2016 incident in which another of petitioner's customers fatally overdosed on drugs that petitioner had sold to the informant. See Pet. App. A7-A10. The informant testified about the circumstances of the death, and explained that "he began to cooperate with the Drug Enforcement Administration in an effort to hold [petitioner] responsible for the victim's death." Id. at A10.

The district court determined by a preponderance of the evidence that the victim's death resulted from petitioner's relevant conduct, thereby warranting an upward departure under Sentencing Guidelines § 5K2.1. D. Ct. Doc. 104, at 4-10 (Jan. 9, 2020); see Sentencing Guidelines § 5K2.1 ("If death resulted, the court may increase the sentence above the authorized guideline range."). The parties had agreed that petitioner's advisory Sentencing Guidelines range was the statutory minimum of 60 months of imprisonment. Plea Agreement 6. The district court sentenced petitioner to 90 months of imprisonment. Judgment 2.

4. The court of appeals affirmed. Pet. App. A1-A24. The court explained that a substance can be an "analogue" of fentanyl under Section 841(b)(1)(B)(vi) even if it is not a "controlled substance analogue" under Section 802(32). Id. at A10-A15. Because the statute does not define "analogue" or "any analogue of [fentanyl]," the court construed the term "in accord with its ordinary or natural meaning." Id. at A11 (citation omitted). And the court observed that petitioner did not dispute that butyryl fentanyl was an "analogue" of fentanyl under the ordinary meaning of that term, and that petitioner "expressly admitted that butyryl fentanyl is a fentanyl analogue during his guilty plea." Id. at A11-A12.

The court of appeals found that declining to use Section 802(32)'s definition of "controlled substance analogue" in this context would not render Section 802(32) superfluous. See Pet.

App. A13-A14. The court explained that "controlled substance analogue" was a "term of art" that was used elsewhere in Section 841 and elsewhere in the subchapter; for example, "Congress defined the term 'date rape drug' as 'gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol.'" Ibid. (quoting 21 U.S.C. 841(g)(2)(A)(i)). And the court observed that the principle that "'it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion'" of a particular term in a statute, id. at A13-A14 (quoting Russello v. United States, 464 U.S. 16, 23 (1983)), thus supported giving "analogue" in Section 841(b)(1)(B)(vi) its ordinary meaning here. Id. at A14. The court also rejected petitioner's contention that Section 841(b)(1)(B)(vi) failed to provide sufficient notice of the conduct it prohibits, explaining that "Section 841(b)(1)(B)(vi) states that dealing in 10 grams or more of 'any analogue of [fentanyl]' is subject to an enhanced penalty," and petitioner "d[id] not dispute that butyryl fentanyl is such an analogue under the ordinary meaning of the word." Id. at A14 (first brackets in original).

The court of appeals additionally determined that the district court did not abuse its discretion in applying an upward departure under Sentencing Guidelines § 5K2.1. Pet. App. A15-A22. The court of appeals found no clear error in the district court's determination that the November 2016 drug sale that resulted in

the victim's death was relevant conduct, explaining that the controlled buys that led to petitioner's convictions "occurred within [petitioner's] existing drug-dealing relationship to the [confidential informant] -- involving the same drug (fentanyl), the same method of payment (cash), and the same principal characters ([petitioner] and [the confidential informant]) as the November 21, 2016, deal." Id. at A17; see id. at A17-A18. The court of appeals also rejected petitioner's challenge to the reliability of the government's evidence, see id. at A19-A20, and found that "the Government's evidence easily surpassed the preponderance standard," id. at A21.

Finally, the court of appeals rejected petitioner's argument that due process required the district court "to apply a higher standard of proof than a preponderance of the evidence" in determining that an upward departure was warranted. Pet. App. A22. The court observed that its prior decision in United States v. Cordoba-Murgas, 233 F.3d 704 (2d Cir. 2000), "foreclose[d]" that argument. Pet. App. A22.

ARGUMENT

Petitioner renews his contention (Pet. 9-17) that due process required the district court to find the facts supporting the upward departure by clear and convincing evidence, rather than a preponderance of the evidence. Petitioner also renews his contention (Pet. 17-23) that "any analogue of [fentanyl]" in 21 U.S.C. 841(b)(1)(B)(vi) does not carry its ordinary meaning, but

instead must be given the same meaning as "controlled substance analogue" in 21 U.S.C. 802(32). The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The court of appeals correctly recognized that a sentencing court may rely on conduct it finds by a preponderance of the evidence in determining a sentence within the prescribed statutory range. This Court has long held that, in selecting a sentence within the applicable statutory range, a sentencing court may rely on facts found by that court by a preponderance of the evidence. United States v. Watts, 519 U.S. 148, 156 (1997) (per curiam) ("[W]e have held that application of the preponderance standard at sentencing generally satisfies due process."); see 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); cf. Alleyne v. United States, 570 U.S. 99, 116 (2013) ("[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."); United States v. Booker, 543 U.S. 220, 233 (2005) ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

Consistent with Watts, the courts of appeals have uniformly recognized that a sentencing judge may generally find facts relevant to the determination of the sentencing range under the post-Booker advisory federal Sentencing Guidelines by a preponderance of the evidence, so long as the judge imposes a sentence within the statutory range. See, e.g., United States v. Culver, 598 F.3d 740, 752-753 (11th Cir.), cert. denied, 562 U.S. 896 (2010); United States v. Grubbs, 585 F.3d 793, 803 (4th Cir. 2009), cert. denied, 559 U.S. 1022 (2010); United States v. Villareal-Amarillas, 562 F.3d 892, 897-898 (8th Cir. 2009); United States v. Sanchez-Badillo, 540 F.3d 24, 34 (1st Cir. 2008), cert. denied, 555 U.S. 1121 (2009); United States v. Sexton, 512 F.3d 326, 329-330 (6th Cir.), cert. denied, 555 U.S. 928 (2008); United States v. Bras, 483 F.3d 103, 107-108 (D.C. Cir. 2007); United States v. Grier, 475 F.3d 556, 568 (3d Cir.) (en banc), cert. denied, 552 U.S. 848 (2007); United States v. Kilby, 443 F.3d 1135, 1140-1141 (9th Cir. 2006); United States v. Garcia, 439 F.3d 363, 369 (7th Cir. 2006); United States v. Vaughn, 430 F.3d 518, 525 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); United States v. Magallanez, 408 F.3d 672, 684-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); United States v. Mares, 402 F.3d 511, 519 (5th Cir.), cert. denied, 546 U.S. 828 (2005). The district court's determination of petitioner's sentence, based in part on its finding by a preponderance of the evidence that petitioner's

relevant conduct resulted in a death, is consistent with that uniform authority.

Petitioner contends (Pet. 9) that this Court's review is warranted to resolve a circuit conflict about the proper factfinding standard "where a sentence has been significantly increased by uncharged conduct," even when the sentence remains within the prescribed statutory range. Petitioner overstates the division of authority among the courts of appeals post-Booker, and in any event this case does not implicate any lingering disagreement.

Before this Court's decision in Booker, "a divergence of opinion [existed] among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence." Watts, 519 U.S. at 156. But since then, lower courts have clarified that a sentencing judge may find facts that increase the defendant's sentence by a preponderance of the evidence, provided that the sentence remains within the statutory range.

For example, the Third Circuit in United States v. Kikumura, 918 F.2d 1084 (1990), had suggested, without deciding, that due process might require using a clear-and-convincing standard of proof to find sentencing factors in some exceptional cases. See id. at 1102-1103. The Third Circuit has since expressly repudiated that suggestion, recognizing that Booker obviated any prior doubts about sentencing judges' ability to "find facts by a preponderance

of the evidence, provided that the sentence actually imposed is within the statutory range, and is reasonable." United States v. Fisher, 502 F.3d 293, 305 (2007), cert. denied, 552 U.S. 1274 (2008). Other courts likewise have recognized that the "debate has * * * been rendered academic by United States v. Booker," for "[w]ith the guidelines no longer binding the sentencing judge, there is no need for courts of appeals to add epicycles to an already complex set of (merely) advisory guidelines by multiplying standards of proof." United States v. Reuter, 463 F.3d 792, 793 (7th Cir. 2006), cert. denied, 549 U.S. 1186 (2007); see, e.g., Grubbs, 585 F.3d at 801 ("Whatever theoretical validity may have attached to [an] exception to a preponderance of the evidence sentencing standard, the Supreme Court's decision in Booker and subsequent cases applying Booker have nullified its viability."); Villareal-Amarillas, 562 F.3d at 895 ("[E]ven if valid when the Guidelines were mandatory, this principle did not survive the Supreme Court's recent decisions in Booker and Gall.") (citations omitted).

The exception is the Ninth Circuit, whose decision in United States v. Staten, 466 F.3d 708 (2006), adhered to its pre-Booker rule that "when a sentencing factor has an extremely disproportionate effect on the sentence relative to the conviction, the government must prove such a factor by clear and convincing evidence." Id. at 717 (citation omitted); see United States v. Parlor, 2 F.4th 807, 816-817 (9th Cir.), cert. denied,

142 S. Ct. 623 (2021) (No. 21-6148). Staten's endorsement of the clear-and-convincing standard of proof, however, "trace[d] back to," and relied heavily on, the Third Circuit's decision in Kikumura. 466 F.3d at 719; see id. at 719-720. The Third Circuit has since overruled that decision, explaining that any suggestion in Kikumura that due process requires a heightened standard of proof "was predicated on the then-mandatory nature of the Guidelines" and "does not survive Booker." Fisher, 502 F.3d at 305-306. The full Ninth Circuit might well decide in the future to likewise realign with other circuits.

Moreover, the Ninth Circuit itself has repeatedly acknowledged that its precedents have "'not been a model of clarity' in explaining when the higher standard should apply." Parlor, 2 F.4th at 817 (quoting United States v. Valle, 940 F.3d 473, 479 n.6 (9th Cir. 2019), in turn quoting United States v. Berger, 587 F.3d 1038, 1048 (9th Cir. 2009)). The sentencing factors in Staten "increased [the defendant's] offense level by more than four levels and more than doubled her sentence," 466 F.3d at 717-718, and in its recent decision in United States v. Parlor, supra, the Ninth Circuit clarified that two considerations are particularly important: "whether the increase in the number of offense levels is less than or equal to four," and "whether the length of the enhanced sentence more than doubles the length of the sentence authorized by the initial sentencing guidelines range in a case where the defendant would otherwise have received a

relatively short sentence," 2 F.4th at 817 (citation omitted). Neither of those considerations specifically applies to the Guidelines-consistent upward departure in petitioner's case, and petitioner identifies no basis to otherwise conclude that the Ninth Circuit necessarily would have applied its outlier rule to the "moderate" 30-month upward departure in this case, Pet. App. A22. Accordingly, petitioner cannot show that any court would have found his case to present the sort of "extreme circumstances," Watts, 519 U.S. at 156, that might warrant an exception to the preponderance standard.

Petitioner contends (Pet. 12-14) that several other circuits continue to use the "clear and convincing evidence" standard, but none of the post-Booker examples he cites has applied that standard. See United States v. Sandoval, 6 F.4th 63, 115 (1st Cir. 2021) (explaining that "the applicability of relevant conduct need only be proved by a preponderance of the evidence where it does not change the statutory sentencing range," and that "the use of the preponderance standard to determine relevant conduct in this particular case" did not "lead to an outcome so unfair as to raise due process concerns"), cert. denied, 142 S. Ct. 801, and 142 S. Ct. 802 (2022); United States v. Simpson, 741 F.3d 539, 559 (5th Cir.) (stating "we have never actually required a heightened burden for factual determinations at sentencing" and recognizing a recent decision under which an enhancement "did not require proof by clear and convincing evidence"), cert. denied, 572 U.S. 1127

(2014); United States v. Olsen, 519 F.3d 1096, 1106 (10th Cir. 2008) ("[W]e have no occasion today to decide whether any exceptions exist to the usual preponderance standard for the finding of sentencing facts."); United States v. Clay, 483 F.3d 739, 744 (11th Cir. 2007) (finding no due process violation where acquitted conduct was established by preponderance of the evidence at sentencing).

To the extent petitioner suggests (Pet. 15-16) that an intracircuit division of authority exists within the Second Circuit, that suggestion is based on a pre-Booker case involving the then-mandatory Guidelines. See United States v. Gigante, 94 F.3d 53, 56 (2d Cir. 1996), cert. denied, 522 U.S. 868 (1997). And in any event, this Court generally 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.").

This Court has repeatedly declined to review claims similar to the one petitioner raises. E.g., Parlor v. United States, 142 S. Ct. 623 (2021) (No. 21-6148); Siegelman v. United States, 577 U.S. 1092 (2016) (No. 15-353); O'Bryant v. United States, 577 U.S. 987 (2015) (No. 15-5171); Chandia v. United States, 568 U.S. 1011 (2012) (No. 12-5093); Butler v. United States, 565 U.S. 1063 (2011) (No. 11-5952); Lee v. United States, 565 U.S. 829 (2011) (No. 10-9512); Culberson v. United States, 562 U.S. 1289 (2011) (No. 10-

7097); Gibson v. United States, 559 U.S. 906 (2010) (No. 09-6907). The same result is warranted here.

In any event, this case would be a poor vehicle in which to resolve the first question presented. As explained above, petitioner has not demonstrated that the 30-month upward departure in this case warrants application of a clear-and-convincing standard of proof even if applying that standard were appropriate in certain "extreme circumstances," Watts, 519 U.S. at 156. Moreover, the evidence supporting that departure, which the court of appeals found "easily surpassed the preponderance standard," Pet. App. A21, was clear and convincing. The confidential informant testified extensively about petitioner's drug sales and the resulting overdose death. See Pet. App. A7-A10. The informant began purchasing drugs from petitioner in early 2016, a course of conduct that continued through the informant's participation in the controlled purchases. Id. at A8. The informant and the victim used drugs together every day and the victim would often accompany the informant to purchase drugs from petitioner. Ibid. On November 21, 2016, the informant and the victim purchased approximately half a gram of drugs from petitioner. Id. at A9. They used some of the drugs together, remarking that the drugs seemed "stronger than usual." Ibid. The informant passed out; when he awoke a few hours later, the victim and the rest of the drugs were gone. Ibid. The victim, who died shortly thereafter,

was found with the bag of drugs that he and the informant had purchased from petitioner. Id. at A9-A10.

That testimony thus provided clear and convincing evidence that petitioner supplied the fentanyl that resulted in the victim's death. The district court specifically found that the informant was a "credible" and "knowledgeable" witness who "did not wa[v]er or hesitate" and "showed no signs of confusion or doubt," but at the same time "did not attempt to overstate what he knew." D. Ct. Doc. 104, at 8. And the court of appeals, for its part, found that "the record amply support[ed] the district court's assessment." Pet. App. A19. The petition provides no basis to conclude otherwise. Nor does the petition challenge the district court's determination that the November 2016 sale of fentanyl to the victim was relevant conduct for purposes of the Sentencing Guidelines. See D. Ct. Doc. 104, at 8 n.2 (explaining that "[r]elevant conduct includes 'all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction'") (citation and ellipsis omitted). Petitioner thus would not be entitled to relief even if the first question presented were resolved in his favor.

2. The court of appeals correctly applied the ordinary meaning of "analogue" to determine that butyryl fentanyl qualifies as "any analogue of [fentanyl]," 21 U.S.C. 841(b)(1)(B)(vi). When a "word is not defined by statute," this Court "normally construe[s] it in accord with its ordinary or natural meaning."

Smith v. United States, 508 U.S. 223, 228 (1993). The term "analogue" in Section 841(b)(1)(B)(vi) is not defined in the relevant statutes, and -- as petitioner conceded below -- butyryl fentanyl is an "analogue" of fentanyl under the ordinary meaning of that term. See Pet. App. A11-A12, A14. Petitioner nevertheless renews his contention (Pet. 17-23) that "analogue" in Section 841(b)(1)(B)(iv) must instead be given the same meaning as "controlled substance analogue," which is defined in Section 802(32). But those two phrases are not the same, and the statutory scheme provides no sound reason to conclude that Congress meant to replace the ordinary meaning of "analogue" with the more specialized statutory definition of a different phrase that it used elsewhere.

For example, elsewhere in Section 841, Congress defined "'date rape drug'" to include "gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB." 21 U.S.C. 841(g)(2)(A)(i) (emphasis added). There, Congress did not use the simpler phrasing "GHB or any analogue of GHB"; conversely, here, in Section 841(b)(1)(B)(vi), Congress did not refer to "any controlled substance analogue of [fentanyl]." This Court has explained that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983) (citation omitted). Under

that principle, Congress's deliberate choice to use the circumlocutory "any controlled substance analogue of GHB" in Section 841(g)(2)(A)(i) -- while simply using "any analogue of [fentanyl]" in Section 841(b)(1)(B)(vi) -- should be given effect.

The court of appeals also correctly determined that using the ordinary meaning of "analogue" in Section 841(b)(1)(B)(vi) "provides [petitioner] with fair notice and satisfies the Fifth Amendment's requirement of due process." Pet. App. A15. As noted, petitioner did not dispute that butyryl fentanyl was an analogue of fentanyl "under the ordinary meaning of the word." Id. at A14; see id. at A11-A12. Nor does petitioner identify any appellate decision in which the application of the ordinary meaning of a statutory term or phrase was held to violate principles of fair notice under the Due Process Clause. Because butyryl fentanyl is an "analogue" of fentanyl under the ordinary meaning of that term, "a person of ordinary intelligence" would understand that the mandatory minimum sentence in Section 841(b)(1)(B)(vi) would apply to offenses involving 10 grams or more of butyryl fentanyl. United States v. Williams, 553 U.S. 285, 304 (2008). Indeed, petitioner admitted in the plea agreement that he "knowingly, intentionally and unlawfully possessed with intent to distribute, and distributed, 10 grams or more of a mixture and substance containing butyryl fentanyl, * * * an analogue of [fentanyl]." Plea Agreement 4.

In any event, petitioner neither identifies any appellate decision interpreting "any analogue of [fentanyl]" in Section 841(b)(1)(B)(vi), nor contends that the court of appeals' determination otherwise conflicts with any decision of another court of appeals. Those alone are sufficient reasons to deny further review of the second question presented. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

TYLER ANNE LEE
Attorney

FEBRUARY 2022