No. 21-7236

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH CROCCO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to plain-error relief on his claim that his Virginia conviction for possessing with the intent to distribute marijuana, in violation of Virginia Code Annotated § 18.2-248.1 (2006), was a conviction for a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b), notwithstanding petitioner's failure to properly raise several of his arguments in the lower courts.

ADDITIONAL RELATED PROCEEEDINGS

United States District Court (D. N.H.):

United States v. Crocco, No. 18-cr-37 (Oct. 30, 2019)

United States Court of Appeals (1st Cir.):

United States v. Crocco, No. 19-2140 (Sept. 27, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 15 F.4th 20.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2021. On November 23, 2021, Justice Breyer extended the time within which to file a petition for a writ of certiorari to February 24, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Hampshire, petitioner was convicted of bank robbery, in violation of 18 U.S.C. 2113(a). Judgment 1. The district court sentenced petitioner to 144 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1-14.

1. On December 21, 2017, petitioner entered a credit union in Hinsdale, New Hampshire. Presentence Investigation Report (PSR) ¶ 8. He approached a bank teller and gave her two notes, one of which stated that he had a bomb that would detonate in 60 seconds unless she complied with his demands for money. Ibid. The teller gave petitioner $2709 in a plastic bag, and he left the bank. Ibid. Law enforcement used video footage and still photographs from inside the bank to identify petitioner as the suspect. PSR ¶ 9. He was arrested in February 2018 in connection with the bank robbery. PSR ¶¶ 9-14.

A jury found petitioner guilty of bank robbery, in violation of 18 U.S.C. 2113(a). See Pet. App. 2. Before sentencing, the Probation Office determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1(a). PSR ¶ 28. Section 4B1.1(a) increases a defendant's advisory sentencing range when, among other things, he has at least two prior felony convictions for a crime of violence or 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 1995 North Carolina conviction for voluntary manslaughter and a 2012 Virginia conviction for possessing with the intent to distribute marijuana. PSR ¶¶ 35, 47. The marijuana conviction was for violating Virginia Code Annotated § 18.2-248.1 (2006), which made it unlawful for any person to "to sell, give, distribute or possess with intent to sell, give or distribute marijuana." Pet. App. 5 n.2 (quoting Va. Code Ann. § 18.2-248.1 (2006)). The Probation Office classified the manslaughter conviction as a conviction for a crime of violence, classified the marijuana conviction as a conviction for a controlled substance offense, and applied the career-offender guideline to calculate an advisory sentencing range of 210 to 240 months of imprisonment. PSR ¶¶ 28, 83.

At sentencing, petitioner did not object to the classification of his Virginia marijuana conviction as a controlled substance offense for purposes of the Guidelines' career-offender provision.

See Pet. App. 2. The district court, without directly addressing that undisputed issue, agreed with the Probation Office's determination that petitioner's guidelines range was 210 to 240 months. Ibid. The court imposed a below-Guidelines sentence of 144 months of imprisonment, to be followed by three years of supervised release. Ibid.

2. The court of appeals affirmed. Pet. App. 1-14.

a. Petitioner's opening brief to the court of appeals argued that his Virginia conviction for marijuana trafficking did not qualify as a conviction for a controlled substance offense under the Sentencing Guidelines, on the theory that Virginia had both a general statute that regulated the possession and sale of "controlled substance[s]" and a separate statute that regulated the sale of marijuana. See Pet. C.A. Br. 15-16 (quoting Va. Code Ann. § 18.2-250 (2020)). He also noted that, in 2020, Virginia had decriminalized possession of marijuana as a matter of state law. Id. at 16.

After oral argument in petitioner's case but before the court of appeals issued its decision, the court held in United States v. Abdulaziz, 998 F.3d 519 (1st Cir. 2021), that a defendant's 2014 Massachusetts conviction for a hemp-based marijuana offense did not qualify as a "controlled substance offense" under, inter alia, Sentencing Guidelines § 4B1.2(b) because hemp was not listed on the federal drug schedules at the time of the defendant's federal

sentencing in 2019.* Petitioner then filed a supplemental brief arguing that, in light of Abdulaziz, his prior Virginia conviction could have involved hemp and thus did not qualify as a controlled substance offense under Section 4B1.2(b) of the Guidelines. Pet. Supp. C.A. Br. 7, 9. He also noted that, in March 2019, Virginia had exempted hemp and other low-THC cannabis from state control. Id. at 8. The government replied that petitioner's new arguments opposing his career-offender designation had been waived or forfeited. Gov't Supp. C.A. Br. 3-7.

b. The court of appeals rejected petitioner's challenge to his sentence, finding that he had "establishe[d] neither plain error nor a sufficient reason to excuse waiver." Pet. App. 3. The court observed that courts of appeals have taken different approaches to determining what constitutes a "controlled substance offense" under Guidelines Section 4B1.2(b), see id. at 5-9, but explained that it "d[id] not have occasion to address these issues here because they have not been properly preserved," id. at 9. Applying plain-error principles, see Fed. R. Crim. P. 52(b), the court noted that circuit courts' disagreement regarding the definition of the relevant Guidelines term as referring to state or federal drug schedules would prevent petitioner from demonstrating

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* In 2018, Congress redefined marijuana to exclude hemp as part of the Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 12619, 132 Stat. 4490, 5018 (effective December 20, 2018). See 21 U.S.C. 802(16)(B)(i).

any "plain or obvious" error. Pet. App. 10. And the court additionally observed that, "even if state law were chosen as the source, it is not clear or obvious that the exact wording used by the state ('controlled substance' or otherwise) would control the inquiry." Id. at 10-11.

The court of appeals also rejected petitioner's two new arguments in his supplemental brief -- based on the reasoning of Abdulaziz and Virginia's March 2019 statute lifting controls on hemp -- finding that petitioner had "waived" those arguments by failing to raise them in his opening brief. See Pet. App. 11-12. And "even putting waiver aside," the court found that petitioner "cannot establish plain error due to the myriad unanswered, unbriefed questions" surrounding the proper interpretation of Guidelines Section 4B1.2(b). Id. at 12. The court observed that petitioner's arguments opposing application of the career-offender guideline in his case were "neither clear nor obvious." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 15-33) that the district court erred by treating his Virginia conviction for trafficking marijuana as a "controlled substance offense" within the meaning of Sentencing Guidelines § 4B1.2(b). Because the ultimate issue in this case 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

determined that petitioner either waived or forfeited his arguments, which moreover lack merit. This Court has recently denied multiple petitions for writs of certiorari raising issues relating to the Guidelines' definition of "controlled substance offense," see Sisk v. United States, 142 S. Ct. 785 (2022) (No. 21-5731); McLain v. United States, 142 S. Ct. 784 (2022) (No. 21-5633); Atwood v. United States, 142 S. Ct. 753 (2022) (No. 20-8213); Guerrant v. United States, 142 S. Ct. 640 (2022) (No. 21-5099); Wallace v. United States, 142 S. Ct. 362 (2021) (No. 21-5413); Ward v. United States, 141 S. Ct. 2864 (2021) (No. 20-7327); Ruth v. United States, 141 S. Ct. 1239 (2021) (No. 20-5975), including in another case (Guerrant) that concerned the same Virginia marijuana statute at issue in this case. 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 United States v. 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 (CSA), Pub. L. No. 91-513, Title II, 84 Stat. 1242, see Sentencing Guidelines § 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 underlying Guidelines issue in this case. Any disagreement between the courts of appeals on this question has emerged only recently, see Pet. App. 5-6 (citing cases), and while the Commission currently lacks a quorum, see U.S. Sentencing Comm'n, Organization, https://go.usa.gov/xuu5T, the President has recently submitted nominations to Congress for individuals to serve on the Commission, The White House, President Biden Nominates Bipartisan Slate for the United States Sentencing Commission (May 11, 2022), https://go.usa.gov/xuu52. To the extent that any inconsistency requires intervention, the Commission would be able to address it upon the confirmation of those nominees. See Guerrant, 142 Ct. at 640-641 (Sotomayor, J., respecting the denial of certiorari) ("It is the responsibility of the Sentencing Commission to address this division to ensure fair and uniform application of the Guidelines") (citing Braxton, 500 U.S. at 348).

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

a. Petitioner first contends (Pet. 16, 21-23) that his Virginia marijuana conviction was not a "controlled substance offense" because Virginia treats marijuana offenses differently from other controlled substance offenses. But petitioner did not raise

that objection in the district court, see p. 3, supra, and the court of appeals thus correctly determined that petitioner's argument was subject at most to plain-error review. Pet. App. 9-10; see Fed. R. Crim. P. 52(b). To prevail under the Rule 52(b) plain-error standard, a defendant must show an (1) error that is (2) plain and (3) affects substantial rights. See United States v. Olano, 507 U.S. 725, 732-735 (1993). Even if these conditions are met, a court of appeals will not notice or remedy an otherwise plain error unless it seriously affects the "fairness, integrity or public reputation of judicial proceedings." Id. at 736; see Greer v. United States, 141 S. Ct. 2090, 2096-2097 (2021).

The word "plain," as used in Rule 52(b), is "synonymous with 'clear' or, equivalently, 'obvious.'" Olano, 507 U.S. at 734. An error generally can be "plain" or "obvious" if, for example, it contradicts either circuit or Supreme Court precedent in existence at the time of appellate consideration. See Johnson v. United States, 520 U.S. 461, 467 (1997); see also Henderson v. United States, 568 U.S. 266, 270, 273 (2013). The court of appeals correctly applied that standard here and determined that petitioner's argument implicated "myriad unanswered, unbriefed questions," Pet. App. 12, some of which have divided the courts of appeals, see id. at 5-9, and thus petitioner cannot establish any clear or obvious error, id. at 10-11.

Indeed, petitioner has not shown any error at all. The term "controlled substance offense" in Guidelines 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 Virginia Code Annotated § 18.2-248.1 (2006), a provision of state law that prohibited, in relevant part, "possess[ing] with intent to * * * distribute marijuana." Pet. App. 5 n.2 (citation omitted). 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 fell 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)). Virginia's criminalization of other drugs in separate statutes, or its own use of the term "controlled substance" (which has no bearing on the scope of its laws), see Pet. 21-23, is therefore legally irrelevant.

Petitioner asserts (Pet. 17-21) a conflict in the courts of appeals regarding whether the definition of the term "controlled substance offense" in Guidelines § 4B1.2(b) is governed by the federal definition of a drug in the CSA, 21 U.S.C. 801, et seq. or

by state-law definitions. See also Guerrant, 142 S. Ct. at 640 (Sotomayor, J., respecting the denial of certiorari). But that question is not squarely presented in this case, because the court of appeals expressly did not decide that issue. See Pet. App. 9. And even if petitioner were correct in asserting (Pet. 24) that it is a "fact, not subject to reasonable dispute" that, "[u]nder any definition of 'controlled substance,' in any Circuit Court, [his] 2012 Virginia [marijuana] conviction was not a valid career offender predicate," such a case-specific error would not warrant this Court's review.

b. Petitioner objects to his career-offender classification (Pet. 23, 26-27) on the further ground that both the federal government and the State of Virginia had legalized hemp before his federal sentencing. But petitioner did not raise those objections until after oral argument in the court of appeals; the court accordingly found the arguments "waived," Pet. App. 11-12; and petitioner identified no authority requiring the court of appeals to consider them.

The Federal Rules of Appellate Procedure provide that an appellant's brief "must contain * * * appellant's contentions and the reasons for them." Fed. R. App. P. 28(a)(8)(A). And the courts of appeals have uniformly interpreted that provision to establish a general procedural rule that "[a]n appellant waives any issue which it does not adequately raise in its initial brief."

Playboy Enterprises. v. Public Serv. Comm'n, 906 F.2d 25, 40 (1st Cir.), cert. denied, 498 U.S. 959 (1990); cf. Joseph v. United States, 574 U.S. 1038, 1038-1039 (2014) (Kagan, J., respecting the denial of certiorari) (explaining that the general rule that issues not presented in an opening appellate brief are forfeited "makes excellent sense: It ensures that opposing parties will have notice of every issue in an appeal, and that neither they nor reviewing courts will incur needless costs from eleventh-hour changes of course").

The courts of appeals have recognized that the rule is not jurisdictional, and thus courts have discretion to address issues not timely raised by the parties. See, e.g., United States v. Miranda, 248 F.3d 434, 443-444 (5th Cir. 2001) (noting that "the issues-not-briefed-are-waived rule is a prudential construct that requires the exercise of discretion," and that a court may consider an issue that was not timely raised "where substantial public interests are involved"), cert. denied, 534 U.S. 980 (2001) and 534 U.S. 1086 (2002); United States v. Quiroz, 22 F.3d 489, 490-491 (2d Cir. 1994) (per curiam) (court will review issue not raised in the brief where manifest injustice would otherwise result); Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988) (same); see also Fed. R. App. P. 2 (granting courts discretion to suspend most rules for "good cause"). But the court of appeals did not abuse its discretion here in finding that petitioner had relinquished his

challenge to his sentence based on federal and state hemp regulations, especially given the complexity of the legal issues surrounding the proper definition of a "controlled substance offense." See Pet. App. 12. And in any event, the court's fact-bound determination not to consider petitioner's particular unpreserved argument here does not warrant this Court's review.

3. Finally, petitioner contends (Pet. 30-33) that the decision below implicates a circuit conflict about whether a defendant can demonstrate plain error where circuit precedent is unsettled and other courts of appeals disagree on the issue. That question does not warrant further review in this case. The decision below reasoned that petitioner's claim involved unresolved issues beyond the one on which it perceived a circuit conflict. See, e.g., Pet. App. 10 (noting that petitioner's position on a subsidiary issue was "not clear or obvious"). Petitioner identified no court of appeals that has found plain error notwithstanding "myriad, unanswered, unbriefed questions" of the sort that the court of appeals encountered here, id. at 12, let alone any court that has found that the asserted guideline error at the center of this case can justify plain-error relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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