

No. 14-165

In the Supreme Court of the United States

TAURUS D. HOYLE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.

*Solicitor General
Counsel of Record*

LESLIE R. CALDWELL

Assistant Attorney General

WILLIAM A. GLASER

Attorney

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

QUESTION PRESENTED

Federal law prohibits the possession of firearms by a person “who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year.” 18 U.S.C. 922(g)(1). The provision that defines “crime punishable by imprisonment for a term exceeding one year,” 18 U.S.C. 921(a)(20), also provides that “[a]ny conviction * * * for which a person * * * has had civil rights restored shall not be considered a conviction for purposes of this chapter.” The question presented is whether that definitional provision supersedes Sentencing Guidelines § 2K2.1, which directs a sentencing court to count all prior convictions, including those for which a defendant’s civil rights have been restored, when calculating the defendant’s base offense level for firearms offenses.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is published at 751 F.3d 1167. A prior relevant decision of the court of appeals is published at 697 F.3d 1158.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 2014. The petition for a writ of certiorari was filed on August 11, 2014. 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 Kansas, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Pet. App. 2a. The district court sentenced him to 262 months of impris-

onment, to be followed by four years of supervised release. Judgment 2-3. The court of appeals affirmed his conviction but remanded for resentencing. 697 F.3d 1158, 1170. On remand, the district court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Pet. App. 4a-5a; Am. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-14a.

1. In March 2010, petitioner arrived at the home of Alex Adams in Kansas City, Kansas, and refused to leave when Mr. Adams asked him to go. During the ensuing argument, petitioner pointed a silver revolver at Tyda Hall, a guest at Mr. Adams's home, and threatened to shoot her. Petitioner finally left the house after Ms. Hall called 911. 697 F.3d at 1161. Police officers located petitioner, who fled on foot, and they retrieved a loaded silver revolver that petitioner had abandoned during the chase. *Id.* at 1161-1162.

a. A grand jury in the United States District Court for the District of Kansas indicted petitioner on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. A jury found him guilty of the charge. 697 F.3d at 1163.

At sentencing, the district court concluded that petitioner was a career offender under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), based on three prior convictions: (1) a 1994 Kansas conviction for aggravated assault, (2) a 1994 Kansas conviction for aggravated escape from custody, and (3) a 1995 federal conviction for possessing five or more grams of cocaine base, in violation of 21 U.S.C. 844 (1994). 697 F.3d at 1166. Because of his classification as an armed career criminal, petitioner faced a mandatory minimum prison sentence of 15 years. 18

U.S.C. 924(e)(1). Petitioner's criminal history category of VI, combined with his offense level of 34, yielded an imprisonment range under the Sentencing Guidelines of 262-327 months. The district court sentenced petitioner to 262 months of imprisonment. 697 F.3d at 1166.

b. The court of appeals affirmed petitioner's conviction but remanded for resentencing. 697 F.3d at 1161-1170. The court rejected petitioner's argument that the evidence was insufficient to support his conviction. *Id.* at 1162-1165. With respect to his sentence, however, the court concluded that petitioner did not have three prior convictions for violent felonies or serious drug offenses as required by the ACCA. *Id.* at 1168-1170. In order to qualify as a violent felony, a prior conviction must be a "crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 924(e)(2)(B). In defining that term, the statute provides that "[a]ny conviction * * * for which a person * * * has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such * * * restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. 921(a)(20).

In reviewing petitioner's three prior felony convictions, the court of appeals noted that "most of [petitioner's] civil rights" had been restored by the time he violated 18 U.S.C. 922(g). 697 F.3d at 1166. The court concluded, as a matter of Kansas law, that petitioner's two state-law convictions did not subject him to a lifetime ban on firearm possession, but only to a ban of up to ten years following his release from imprisonment for those offenses. *Id.* at 1168-1170. Because he was released from state custody in 1998, petitioner's

“civil rights were restored by operation of Kansas law in 2008.” *Id.* at 1169-1170. Petitioner’s federal drug offense in 1995 also affected his right to possess firearms under Kansas law. *Id.* at 1170. But the state-law restriction on firearm possession flowing from the federal offense had “expired in 2009—*i.e.* prior to commission of [petitioner’s] § 922(g)(1) offense in 2010.” *Ibid.* Therefore, because petitioner “did not have the requisite three ACCA prior convictions,” the court of appeals remanded for resentencing. *Ibid.*

2. On remand, the Probation Office prepared a presentence investigation report (PSR) that calculated petitioner’s recommended sentence under the advisory Sentencing Guidelines. See 5/24/13 PSR. In calculating petitioner’s criminal history, the PSR took into account petitioner’s two 1994 Kansas convictions, assessing three criminal history points for each conviction under Guidelines § 4A1.1(a). Pet. App. 4a. The resulting total for all of petitioner’s past crimes amounted to 16 points, putting him in criminal history category VI. *Ibid.*; 5/24/13 PSR ¶¶ 29-47.

The PSR also counted the 1994 Kansas convictions for purposes of calculating petitioner’s base offense level under Guidelines § 2K2.1. Pet. App. 4a. Under that provision, a defendant’s base offense level is 24 “if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense.” Sentencing Guidelines § 2K2.1(a)(2). In addition, the PSR assessed a four-level increase under Section 2K2.1(b)(6)(B) because petitioner had “used or possessed the firearm” in connection with another felony offense—namely, the Kansas state offense of criminal threat—because he had

used the firearm to threaten Ms. Hall. Pet. App. 4a; 5/24/13 PSR ¶ 19.

Petitioner objected to the PSR's calculations, arguing that because his civil rights had been restored, his two Kansas felony convictions could not be used to assess criminal history points or to set his base offense level. Pet. App. 4a. He also objected to the four-level increase under Guidelines § 2K2.1(b)(6)(B) based on his assertion that Ms. Hall was not a credible witness. The district court overruled petitioner's objections and adopted the PSR's calculations. Petitioner's criminal history category of VI and his total offense level of 28 would have produced a Guidelines range of 140-175 months of imprisonment. Pet. App. 4a. But because the statutory maximum sentence for a Section 922(g) violation is ten years when the ACCA does not apply, see 18 U.S.C. 924(a)(2), petitioner's Guidelines range was 120 months. 5/24/13 PSR ¶ 83; see Pet. App. 22a. The court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. *Id.* at 5a, 26a.

3. The court of appeals affirmed petitioner's sentence. Pet. App. 1a-14a. Petitioner argued that the definitions in the Sentencing Guidelines of "felony convictions" and a "prior sentence of imprisonment exceeding one year and one month," Sentencing Guidelines §§ 2K2.1(a)(2) and 4A1.1(a), conflicted with the statutory definition of "crime punishable by imprisonment for a term exceeding one year" in 18 U.S.C. 921(a)(20). Pet. App. 7a-8a. Because the statutory definition excludes "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored," 18 U.S.C. 921(a)(20), petitioner argued that his Kansas

convictions also could not be counted for any purpose under the Guidelines. Pet. App. 8a. The court of appeals rejected that argument. *Id.* at 8a-12a.

The court of appeals reasoned that the statutory definition in 18 U.S.C. 921(a)(20) was not a “specific directive” to the Sentencing Commission to adopt a similar definition for purposes of the Sentencing Guidelines. Pet. App. 8a-9a. The court noted that the definitions in Section 921(a) are limited to “This chapter”—that is, Chapter 44 of Title 18 of the United States Code. *Id.* at 9a. The statutory definition therefore “does not illuminate what convictions the Commission can use to determine an appropriate sentence under the guidelines.” *Ibid.*

The court of appeals also pointed out that the statute and the Sentencing Guidelines “have different purposes” because the statute addresses criminal liability, whereas the Sentencing Guidelines address the appropriate sentence. Pet. App. 10a. “That Congress sought to avoid felon-in-possession liability for persons who had their felonies negated by restoration of civil rights does not mean that Congress sought to avoid enhanced punishment for persons who were nonetheless guilty of § 922 and two previous, albeit negated, felonies.” *Ibid.* (citations omitted).

The court of appeals discussed the Ninth Circuit’s contrary opinion in *United States v. Palmer*, 183 F.3d 1014 (1999), which held that past convictions for which civil rights have been restored may not be used to calculate an offender’s base offense level. The court of appeals disagreed with *Palmer* for two reasons. First, *Palmer* had made a “jump of logic” by concluding that because Section 921(a)(20) “sets out maximum sentences for offenses under this chapter,” that means it

also controls the Sentencing Commission’s “discretion to consider how prior convictions affect the appropriate sentence.” Pet. App. 11a (quoting *Palmer*, 183 F.3d at 1017). Second, *Palmer* held that convictions for which civil rights had been restored *could* be used to establish a defendant’s criminal history under Guidelines § 4A1.2 (1997), even though they could *not* be used to establish his offense level. Pet. App. 12a. The Ninth Circuit’s lack of analysis to justify that contradictory result, the court of appeals said, “undermines the soundness of [*Palmer*’s] holding.” *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 13-17) that prior felony convictions for which a defendant’s civil rights have been restored may not be used to calculate the defendant’s base offense level under the Sentencing Guidelines for firearms offenses. He also asserts (Pet. 9-13) that this Court’s intervention is necessary to resolve a conflict on this issue among the courts of appeals. The decision below is correct, and petitioner greatly overstates the extent of disagreement among the courts of appeals. Further review is unwarranted.

1. The court of appeals held that the definitional limitation contained in 18 U.S.C. 921(a)(20) does not prevent the Sentencing Commission from counting offenses for which civil rights have been restored when calculating a defendant’s base offense level under Sentencing Guidelines § 2K2.1(a)(2). Pet. App. 10a. That holding is correct.

a. The statutory provisions that govern the process of federal criminal sentencing are contained in Chapter 227 of Title 18 of the United States Code. Section 3551 is entitled “Authorized sentences.” It provides statutory authorization for sentencing federal offend-

ers, instructing that federal offenders “shall be sentenced in accordance with the provisions of this chapter.” 18 U.S.C. 3551(a); see 18 U.S.C. 3551(b)(3) (authorizing a sentence that includes “a term of imprisonment as authorized by subchapter D” of Chapter 227). Section 3553 provides further guidance in choosing a proper sentence, including through a subsection that lists “Factors To Be Considered in Imposing a Sentence.” 18 U.S.C. 3553(a). One such factor requires a sentencing court to consider “the sentencing range established for * * * the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines * * * issued by the Sentencing Commission.” 18 U.S.C. 3553(a)(4)(A)(i).

Congress established the federal Sentencing Commission “as an independent commission in the judicial branch of the United States.” 28 U.S.C. 991(a). Within the minimum and maximum penalties that are prescribed by statute, the Commission is empowered to create guidelines for the appropriate punishment of federal offenders, 28 U.S.C. 994(a)(1), as well as to issue “general policy statements regarding application of the guidelines.” 28 U.S.C. 994(a)(2). Under this Court’s decision in *United States v. Booker*, 543 U.S. 220, 245-246 (2005), the Sentencing Guidelines are advisory only.

The Guidelines provision that sets the base offense level for firearm-possession offenses is Section 2K2.1. Subsection (a)(2) prescribes a base offense level of 24 “if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense.” To determine whether a prior

conviction qualifies as a “felony conviction,” application note 10 instructs that a sentencing court should count “those felony convictions that receive criminal history points under § 4A1.1(a), (b), or (c).” The commentary to Section 4A1.1, in turn, points to the definitions and instructions contained in Section 4A1.2. Finally, in application note 10 to Section 4A1.2, the Guidelines explain the treatment accorded to prior convictions that have been set aside or pardoned:

A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, *e.g.*, in order to restore civil rights or to remove the stigma associated with a criminal conviction. *Sentences resulting from such convictions are to be counted.* However, expunged convictions are not counted.

Sentencing Guidelines § 4A1.2, comment. (n. 10) (emphasis added).

The Guidelines thus make clear that petitioner’s two 1994 Kansas convictions are properly counted when calculating his base offense level. Each conviction is “a crime of violence” as the term is used in Section 2K2.1(a)(2). Although the court of appeals determined that petitioner’s civil rights have been restored with respect to those convictions, the Guidelines explain that they nevertheless “are to be counted” when calculating his criminal history points, and hence also when calculating his base offense level. The courts below were therefore correct in taking them into account.

b. Petitioner argues that 18 U.S.C. 921(a)(20) forbids a sentencing court from using his two 1994 Kan-

sas convictions in calculating his applicable Guidelines range because his civil rights were restored for those convictions. He reasons that Congress’s instruction in Section 921(a)(20) binds the Sentencing Commission in framing the Guidelines. That contention lacks merit because Section 921(a)(20) does not prevent the Commission from counting convictions under the Sentencing Guidelines when a defendant’s civil rights were restored.

Chapter 44 of Title 18 of the United States Code addresses the licensing, possession, and use of firearms and ammunition. The first provision, Section 921, contains a list of defined terms that apply “[a]s used in this chapter.” 18 U.S.C. 921(a). Subsection (a)(20) addresses the phrase “crime punishable by imprisonment for a term exceeding one year.” It clarifies that the phrase does not include certain “offenses relating to the regulation of business practices” or include state offenses that are “punishable by a term of imprisonment of two years or less” but are classified by the State as misdemeanors. 18 U.S.C. 921(a)(20)(A) and (B). It also contains the further limitation at issue here:

Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction *for purposes of this chapter*, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. 921(a)(20) (emphasis added).

That limitation means that certain prior convictions—namely, those that have been “expunged, or set aside or for which a person has been pardoned or has

had civil rights restored”—generally cannot be used for the various purposes specified in Chapter 44. For instance, it is illegal to sell or dispose of a firearm or ammunition to any person who “has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year.” 18 U.S.C. 922(d)(1). Similarly, firearm possession is forbidden to any person “who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year.” 18 U.S.C. 922(g)(1).¹ By virtue of Section 921(a)(20), these prohibitions do not apply if the prior conviction at issue “has been expunged, or set aside” or if the offender “has been pardoned or has had civil rights restored” with respect to the conviction. An exception, however, is if the “pardon, expungement, or restoration of civil rights expressly provides” that firearm possession is still forbidden.

In addition to containing criminal prohibitions, Chapter 44 also specifies the statutory maximum and minimum sentences that can be imposed for those offenses. Cross-referencing the prohibition on possession contained in Section 922(g), the statute directs that a felon who possesses a firearm shall be “imprisoned not more than 10 years.” 18 U.S.C. 924(a)(2). That ten-year ceiling on imprisonment becomes a fifteen-year floor under the ACCA if the offender “has three previous convictions” for certain violent felonies or serious drug offenses. 18 U.S.C. 924(e)(1); see 18 U.S.C. 924(e)(2)(B) (defining “violent felony” to include certain specified “crime[s] punishable by im-

¹ Petitioner does not dispute that his 1995 federal drug possession conviction is a qualifying felony under Section 922(g), and so he concedes that his possession of a firearm was unlawful. See Pet. 17-18.

prisonment for a term exceeding one year”). But nothing in these provisions, or in any other provision in Chapter 44, specifies or controls what sentence an offender should receive within those maximum and minimum levels.

For that reason, petitioner is incorrect to argue that the Guidelines are “in conflict” with 18 U.S.C. 921(a)(20) in their treatment of convictions for which civil rights have been restored. Pet. 17. The definitions contained in Section 921(a) apply only “[a]s used in this chapter”—that is, Chapter 44 of Title 18—and the specific limitation of subsection (a)(20) also operates only “for purposes of this chapter.” The Guidelines, by contrast, are issued by the Sentencing Commission pursuant to authority granted under Title 28. And a sentencing court must consider the Guidelines in the manner provided by 18 U.S.C. 3553(a)(4), which is located in Chapter 227. Thus, none of the statutory provisions that relate to the creation or application of the Guidelines is contained in Chapter 44 of Title 18.

Petitioner nonetheless argues that Section 921(a)(20) applies to Guidelines calculations by virtue of its “plain language” because it uses the phrase “for the *purposes* of this chapter.” Pet. 16 (emphasis omitted). One dictionary definition of “purpose” is “the reason why something is done or used”; and, petitioner notes, “sentencing is § 924’s purpose.” Pet. 16-17 (brackets omitted). Petitioner thus concludes that “§ 921(a)(20)’s limitation against the use of convictions for which civil rights had been restored applies to sentencing,” which is also “the same purpose” of the Guidelines. Pet. 17. But the phrase “for purposes of this chapter” specifies the relevant statutory provisions to which the limitation applies—namely, those in

“this chapter.” See *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 370 (1980) (“The key statutory term, ‘nonforfeitable benefits,’ is nowhere defined in Title IV. Petitioner relies on the definition of ‘nonforfeitable’ in Title I, § 3 (19). But definitions in that section are not necessarily applicable to Title IV, because they are limited by the introductory phrase, ‘For purposes of this title.’” (citation and footnote omitted)). Congress’s use of the phrase “for purposes of this chapter” does not refer to other statutory provisions, such as the provisions authorizing the Guidelines, that are outside of that chapter.

c. Petitioner’s reliance on *United States v. LaBonte*, 520 U.S. 751 (1997), is misplaced. See Pet. 13, 15-17. In *LaBonte*, this Court considered whether the Sentencing Guidelines were in conflict with 28 U.S.C. 994(h) (1994), which directed the Sentencing Commission to “assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of” certain offenders who commit a third felony drug offense or violent crime. 520 U.S. at 753. The Commission implemented “this directive by promulgating the ‘Career Offender Guideline,’” Sentencing Guidelines § 4B1.1 (1987), which enhanced a career offender’s total offense level “based on the so-called ‘offense statutory maximum.’” 520 U.S. at 753-754. But in commentary to Section 4B1.1, the Commission stated that the offense statutory maximum does not include “any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant’s prior criminal record.” *Id.* at 755 (citation omitted). In other words, the Commission said that “offense statu-

tory maximum” did not include statutory enhancements. See *ibid.*

The Supreme Court reversed, finding the commentary to Section 4B1.1 to be “at odds with § 994(h)’s plain language.” *LaBonte*, 520 U.S. at 757. The Court found that the statutory “phrase ‘at or near the maximum term authorized’ is unambiguous and requires a court to sentence a career offender ‘at or near’ the ‘maximum’ prison term available once all relevant statutory sentencing enhancements are taken into account.” *Id.* at 762. Because the Guidelines commentary had ignored sentencing enhancements even though the statute explicitly said they must be considered, the Court held that the commentary “must give way” to the clear statutory command. *Id.* at 757.

LaBonte has no application here. The statutory provision at issue in *LaBonte* was a “specific directive[.]” aimed at the Sentencing Commission. 520 U.S. at 757; see *id.* at 753 (“Congress directed that the Commission ‘shall assure * * * ’”). And the career offender Guideline (Section 4B1.1) implemented that statutory command. Because the Commission’s implementation of the statute was “at odds with” the statute’s “plain language,” the Guideline provision was invalid. *Id.* at 757; see *id.* at 753.

Here, by contrast, the limitation in 18 U.S.C. 921(a)(20) is not aimed at the Sentencing Commission, nor does it purport to direct how sentences should be set within the statutorily authorized range. Rather, Congress has in a separate provision directed the Commission to establish guidelines that “take * * * into account” a defendant’s “criminal history.” 28 U.S.C. 994(d)(10). That provision generally leaves to the Commission’s discretion which prior

convictions should be taken into account. The Sentencing Commission was well within its “significant discretion in formulating guidelines,” *LaBonte*, 520 U.S. at 757, when it instructed that an offender’s base offense level should include prior convictions for which civil rights have been restored. See *ibid.* (“Guidelines commentary ‘is authoritative unless it violates the Constitution or a federal statute’”) (quoting *Stinson v. United States*, 508 U.S. 36, 38 (1993)).

This case bears a closer resemblance to *Kimbrough v. United States*, 552 U.S. 85 (2007), in which the Court recognized the Sentencing Commission’s discretion to establish sentencing ranges that adopt approaches at variance with general criminal statutes, so long as the Commission does not contradict specific requirements directed to it. In *Kimbrough*, the Court rejected an argument that sentencing courts and the Commission were bound to employ the same 100:1 ratio between powder and crack cocaine offenses that Congress had used in establishing statutory mandatory and minimum sentences in a former version of 21 U.S.C. 841(b). 552 U.S. at 102-105. The Court emphasized that “[t]he statute, by its terms, mandates only maximum and minimum sentences,” but “says nothing about the appropriate sentences within these brackets.” *Id.* at 102-103. The Court found it particularly inappropriate to read Section 841(b) to constrain the Commission because Congress “has shown that it knows how to direct sentencing practices in express terms.” *Id.* at 103 (citing 28 U.S.C. 994(h)). Here, Section 921(a)(20) plays the same role as the drug-sentencing statute did in *Kimbrough*: The civil-rights-restoration provision applies to the statutory sentencing provisions to which it expressly applies,

but “says nothing about the appropriate sentences within these brackets.” *Ibid.*

2. Petitioner argues that review is warranted to resolve a conflict among the courts of appeals. Pet. 9-13. But he greatly overstates the degree of conflict that exists. The Tenth Circuit in this case was only the second court of appeals to rule on the question presented, and that limited conflict does not warrant this Court’s review.

In *United States v. Palmer*, 183 F.3d 1014 (1999), the Ninth Circuit reasoned that because Section 921(a)(20)’s definition applies “for purposes of this chapter,” and Chapter 44 includes the sentencing provisions in Section 924, the phrase “‘for purposes of this chapter’ clearly includes sentencing.” *Id.* at 1017. The court then held that “the governing statute specifically preclude[s] the use of a conviction for which civil rights have been restored” when calculating a defendant’s base offense level for a firearms offense under Sentencing Guidelines § 2K2.1 (1997). *Ibid.*

Although *Palmer* conflicts with the decision below, the reasoning of that decision is internally inconsistent, and the Ninth Circuit might reconsider that decision in an appropriate case. *Palmer* concluded that convictions for which civil rights were restored cannot be counted under Guidelines § 2K2.1. But the *Palmer* court nevertheless held that convictions for which civil rights had been restored could be used to establish a defendant’s criminal history under Sentencing Guidelines § 4A1.2 (1997). 183 F.3d at 1018. Because Section 4A1.2 “is used in determining a defendant’s criminal history category for any crime covered by the Sentencing Guidelines,” the *Palmer* court reasoned that it “does not conflict with the stat-

utory prohibition in 18 U.S.C. § 921(a)(20) against using such a conviction ‘for purposes of this chapter.’” *Ibid.* But, as the Tenth Circuit in this case explained, *Palmer*’s reasoning “cannot be squared with the [*Palmer*] court’s earlier holding that Chapter 44 ‘clearly includes sentencing.’” Pet. App. 12a (quoting *Palmer*, 183 F.3d at 1017). A defendant’s criminal history category “is as much a part of his ‘sentencing’ as his base offense level, and neither are mentioned in Chapter 44.” *Ibid.* (citation omitted).

In light of that internal tension in *Palmer*, the reasoned rejection of *Palmer* in the decision below, and this Court’s intervening decision in *Kimbrough* clarifying the relationship between general criminal provisions and the Commission’s authority to formulate sentencing guidelines, the Ninth Circuit might reconsider its flawed decision in *Palmer* in an appropriate case. In any event, because the Sentencing Guidelines are advisory only in the wake of *United States v. Booker*, *supra*, whether the Commission has acted within its authority by counting convictions for which civil rights have been restored under Guidelines § 2K2.1 is an issue of limited importance that does not warrant this Court’s review.

Petitioner suggests that the Fourth Circuit agrees with *Palmer*. Pet. 11; see Pet. 9, 13. That is incorrect. The Fourth Circuit has cited *Palmer* in two unpublished opinions, neither of which addressed the use of convictions for which a defendant’s civil rights have been restored. In *United States v. Metheney*, 11 Fed. Appx. 92 (4th Cir.) (unpublished) (per curiam), cert. denied, 534 U.S. 902 (2001), the defendant argued that “that the Sentencing Commission exceeded its authority in creating an enhancement for possession of a

semiautomatic assault weapon by a prohibited person without including an exception” for possession that was lawful under 18 U.S.C. 922(v) (2000). *Id.* at 94. The court rejected the defendant’s argument, stating that “Metheney has not identified a conflict as clear as those at issue in *LaBonte* and *Palmer*.” *Ibid.* The Fourth Circuit rejected the same argument about semiautomatic assault weapons in *United States v. Hayes*, 68 Fed. Appx. 432 (4th Cir.) (unpublished) (per curiam), cert. denied, 540 U.S. 95, and 540 U.S. 1084 (2003), this time merely noting the defendant’s reliance on *Palmer* without mentioning the case further. *Id.* at 435-436. Neither of those decisions is precedential, and neither resolved the issue in this case.

Petitioner also asserts (Pet. 11-13) that the First, Third, Sixth, and Eighth Circuits have joined the Tenth Circuit in this case in rejecting *Palmer*. But the cases he cites involved a different aspect of Section 921(a)(20): the statute’s exception for “any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.” 18 U.S.C. 921(a)(20)(B). In those cases, the defendants argued that Section 921(a)(20)(B) superseded application notes to Guidelines § 2K2.1, which define a prior felony conviction as a conviction “for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed.” The courts of appeals rejected that argument. See *United States v. Mosley*, 635 F.3d 859, 864 (6th Cir. 2011); *United States v. Damon*, 595 F.3d 395, 399 (1st Cir. 2010); *United States v. Shelton*, 91 Fed. Appx. 247, 249 (3d Cir. 2004) (unpublished), *aff’d*, 364

Fed. Appx. 733 (3d Cir.), cert. denied, 131 S. Ct. 440 (2010); *United States v. Morris*, 139 F.3d 582, 583-584 (8th Cir. 1998) (per curiam). These decisions correctly interpreted the relationship between Section 921(a)(20) and Guidelines § 2K2.1, but they do not directly conflict with *Palmer* because they addressed a different aspect of 18 U.S.C. 921(a)(20) and a different aspect of Guidelines § 2K2.1. Those cases therefore provide no support for petitioner's claim that the issue in this case has been broadly considered and is ripe for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
WILLIAM A. GLASER
Attorney

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