No. 18-5391

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL SEXTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

SONJA M. RALSTON
Attorney

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

QUESTIONS PRESENTED

1. Whether the district court committed plain error in ordering the forfeiture under 18 U.S.C. 981(a)(1)(C) of an amount to which petitioner agreed in his plea agreement, which represented proceeds obtained by petitioner and businesses that he owned as a result of his bank-fraud conspiracy.

2. Whether the district court committed plain error in ordering restitution for certain victim losses under the Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227 (18 U.S.C. 3663A), where petitioner has identified no evidence in the record showing that the losses were unrelated to his crime or its investigation by the federal government.

3. Whether the district court correctly determined that a 24-month term of probation imposed on petitioner after pleading nolo contendere to a state-law offense -- in a case that was ultimately dismissed following petitioner's successful completion of that term of probation -- is a "prior sentence" for purposes of calculating petitioner's criminal-history score under Sentencing Guidelines §§ 4A1.1 and 4A1.2.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 894 F.3d 787.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2018. A petition for rehearing was denied on July 16, 2018. The petition for a writ of certiorari was filed on July 25, 2018. 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 Eastern District of Kentucky, petitioner was convicted of

conspiracy to commit bank fraud, in violation of 18 U.S.C. 1344(1) and 1349. Pet. App. B1. Petitioner was sentenced to 109 months of imprisonment, to be followed by five years of supervised release, and was ordered to pay restitution and to forfeit an agreed-upon amount representing proceeds of the conspiracy. Id. at B2-B3, B6, C1-C2. The court of appeals affirmed. Id. at A1-A17.

1. Petitioner owned several mobile-home parks and other businesses in Kentucky. Pet. App. A2. From May 2006 to September 2010, petitioner and several co-conspirators -- including a certified public accountant who variously acted as a manager or co-owner of petitioner's companies, petitioner's office manager, and a bank loan officer -- operated a scheme using petitioner's businesses to secure loans from multiple banks based on misrepresentations about the businesses' assets and the borrowers' true identities. Ibid. For example, petitioner and the businesses' co-owner repeatedly "submitted financial records to banks and other lenders valuing the mobile home parks [they owned] as an approximately $25 million asset, even though a 2011 appraisal showed their value at approximately $16 million." Presentence Investigation Report (PSR) ¶ 8; Gov't C.A. Br. 2-6. They also submitted to banks false records regarding the value of a private jet and arranged for straw purchasers of their properties themselves to take out additional fraudulent loans. Pet. App. A2; see also PSR ¶¶ 8-16.

Over the conspiracy's five-year span, banks disbursed more than $8 million in loans, and petitioner and his co-conspirators had attempted to secure an additional $27 million in loans. Pet. App. A2. Petitioner used the funds to live a lavish lifestyle, including owning homes in three States and the Bahamas and taking weekend flights to California on his private plane. See Gov't C.A. Br. 1, 3-6. Despite remedial efforts once the fraud was discovered (such as selling collateral), the banks that loaned the money collectively lost more than $2.5 million. See id. at 1, 7.

2. a. In 2016, a grand jury in the Eastern District of Kentucky returned an indictment charging petitioner and his co-conspirators with one count of conspiracy to commit bank fraud, in violation of 18 U.S.C. 1344(1) and 1349, and 23 counts of substantive bank fraud, in violation of 18 U.S.C. 1344(1). Indictment 1-11. The indictment also alleged that the proceeds of the conspiracy and property derived from those proceeds were forfeitable under (inter alia) 18 U.S.C. 981(a)(1)(C). Indictment 11-12.

Petitioner pleaded guilty to the bank-fraud conspiracy count pursuant to a plea agreement, and the government ultimately moved in return to dismiss the substantive bank-fraud counts against him. Pet. App. A3; see Plea Agreement 1-7. The plea agreement provided that petitioner "w[ould] forfeit to the United States all interest in the property listed in the forfeiture allegation of the Indictment" and that he "agree[d] to the imposition of a money

judgment in the amount of $2,534,912." Plea Agreement 4. Petitioner also agreed to pay restitution to the banks totaling the same amount. See ibid. The parties agreed to jointly recommend various calculations under the Sentencing Guidelines but preserved their rights to "object to or argue in favor of other calculations," and they made no agreement "about [petitioner's] criminal history category" under the Guidelines. Id. at 3-4.

b. At sentencing, after overruling petitioner's objections to the PSR, see Pet. App. A3, the district court calculated a criminal-history score of four points, placing petitioner in criminal-history category III for purposes of determining petitioner's advisory Sentencing Guidelines range. Sent. Tr. 29. The court assigned three of those criminal-history points based on a 2005 nolo contendere plea that petitioner had entered in California state court for willful infliction of corporal injury. Pet. App. A3. The state court in that case did not sentence petitioner to prison, but it imposed a 24-month term of probation and ordered that, if petitioner successfully completed the probation, he could withdraw the plea and have the case dismissed; petitioner did complete the probation and withdrew his plea, and in 2008 the California case was dismissed. Id. at A5. Those three criminal-history points consisted of one point for petitioner's 24-month probation term under Sentencing Guidelines § 4A1.1(c), and two points under Section 4A1.1(d) because petitioner's bank-fraud conspiracy here began while he was still serving that

probation term. See id. at A3, A5; PSR ¶¶ 45, 49; see also PSR ¶ 46 (adding one point for a 2009 Kentucky drunk-driving conviction); Sent. Tr. 25-26. The court determined that petitioner's advisory Sentencing Guidelines range was 97 to 121 months of imprisonment, Sent. Tr. 29, and sentenced him to 109 months of imprisonment, Pet. App. B2.

The district court also granted the government's motion for an order of forfeiture and money judgment under 18 U.S.C. 981(a)(1)(C) consistent with the parties' plea agreement. Pet. App. C1. The court ordered the forfeiture from petitioner of $2,534,912 -- the amount on which the parties agreed in the plea agreement -- "which represent[ed] the proceeds obtained as a result of the commission of" the bank-fraud conspiracy. Ibid.; id. at B7 (ordering that "[petitioner] shall forfeit the defendant's interest in * * * [a]ll property listed in the Forfeiture Allegation of the Indictment, which includes a money judgment in the amount of $2,534,912"). Petitioner did not object to the entry of the forfeiture order or to the amount. Id. at A11.[1]

[1] The district court also entered a forfeiture order against the co-owner of petitioner's businesses. Pet. App. C1; Gov't C.A. Br. 19-20. The court initially entered forfeiture judgments against petitioner's other co-conspirators, but it granted the government's motion to dismiss those orders following this Court's decision in Honeycutt v. United States, 137 S. Ct. 1626 (2017), because those co-conspirators had not obtained proceeds of the conspiracy. Gov't C.A. Br. 19-20. Although petitioner's sentencing occurred two weeks after this Court's decision in Honeycutt, petitioner did not object to the forfeiture order against him based on that case (or on any other ground).

In addition, the district court ordered petitioner to pay restitution collectively totaling $2,637,058.32 -- for which petitioner was jointly and severally liable with his co-conspirators -- to four defrauded banks. Pet. App. B6-B7. The restitution figure was slightly higher than the sum stated in the presentence report and on which the parties had agreed in the plea agreement, because one of the banks had been unable to sell certain collateral for as much as it had originally anticipated. Id. at A13, B7. The $110,001.32 restitution ordered to one of the victim banks, Forcht Bank, included -- in addition to the nearly $60,000 loss of loan principal -- approximately $50,000 the bank claimed for accrued interest ($29,045.83), late fees ($1,460.74), legal fees ($12,554.14), property taxes ($1,646.74), required insurance on the relevant properties ($2,111.96), and appraisal fees ($3500). PSR ¶ 19. Petitioner did not object to the restitution amount. Sent. Tr. 29.

3. The court of appeals affirmed. Pet. App. A1-A17.

a. The court of appeals rejected petitioner's challenge to the district court's reliance on his 2005 California nolo contendere plea and resulting 24-month probation term in calculating petitioner's criminal-history score. Pet. App. A4-A6. The court of appeals reasoned that a probationary sentence "is treated as a sentence under [Sentencing Guidelines] § 4A1.1(c)," and that petitioner's participation in the bank-fraud conspiracy here commenced while he was serving that probation term, so as to

trigger an enhancement under Section 4A1.1(d). Id. at A5. The court rejected petitioner's argument that the probation term should not be counted because the California case was ultimately dismissed after petitioner completed that term, explaining that, under the Sentencing Guidelines, such a "diversionary disposition" that results in dismissal of the charges still counts as a prior sentence. Ibid. (quoting Sentencing Guidelines § 4A1.2(f)).

The court of appeals also upheld the forfeiture order. Pet. App. A11-A12. After noting that plain-error review applied, id. at A11, the court rejected petitioner's contention that this Court's decision in Honeycutt v. United States, 137 S. Ct. 1626 (2017) -- which held that joint and several liability may not be imposed in forfeiture orders under 21 U.S.C. 853 -- applies to forfeitures under 18 U.S.C. 981(a)(1)(C), citing differences in the text of the two statutes. Pet. App. A12. The court acknowledged that two other circuits had reached the opposite conclusion but stated that the court believed those circuits' decisions were incorrect. Ibid.

Finally, the court of appeals found no plain error in the district court's decision to include Forcht Bank's legal fees and other losses -- together totaling approximately $50,000 -- in the roughly $2.6 million restitution award. Pet. App. A13-A15. The court agreed with petitioner that, under this Court's recent decision in Lagos v. United States, 138 S. Ct. 1684 (2018), only those "legal fees" incurred by the bank during the government's

investigation or criminal prosecution would qualify for restitution. Pet. App. A15. The court of appeals observed, however, that the record was silent on "how these fees were accrued," and that the absence of more detailed district court findings resulted from petitioner's failure to object in the district court. Ibid. That silence, the court of appeals reasoned, was insufficient to show plain error. Ibid. The court applied similar reasoning to the other categories of Forcht Bank's losses that petitioner challenged. See id. at A15-A16.

b. Judge Moore concurred in part and dissented in part. Pet. App. A17. Judge Moore disagreed with the majority only with respect to her view that, in light of Lagos, the restitution award with respect to Forcht Bank's $12,500 in legal fees should be vacated because the government had not proven that the bank "accrued these legal fees within the limits that [this] Court recently set in Lagos." Ibid.

ARGUMENT

Petitioner contends (Pet. 10-12) that the district court erred in imposing a forfeiture under 18 U.S.C. 981(a)(1)(C) in the amount to which petitioner agreed in his plea agreement. The court of appeals correctly rejected that argument, which was subject to plain-error review, and the result does not conflict with any decision of this Court. Although the court of appeals stated its disagreement with two other circuits about whether the reasoning of Honeycutt v. United States, 137 S. Ct. 1626 (2017), applies to

forfeiture under 18 U.S.C. 981(a)(1)(C), the forfeiture order here comports with Honeycutt irrespective of that issue. In any event, that shallow and recent conflict does not warrant review in this case, because the government agrees with the view adopted by those other circuits that Honeycutt's reasoning does apply to Section 981(a)(1)(C), and additional appellate decisions adopting a contrary view are unlikely to arise.

Petitioner also contends (Pet. 13-17) that the district court erred in including in the $2.6 million restitution order approximately $50,000 in legal fees and other losses incurred by one of the victim banks, and in calculating his criminal-history score and category based in part on a 24-month probation term that petitioner received and served in connection with his 2005 nolo contendere plea in California state court. The court of appeals rejected each of those arguments -- the first also in a plain-error posture -- and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 10-12) that the district court erred in ordering forfeiture under 18 U.S.C. 981(a)(1)(C) of the amount to which petitioner agreed in his plea agreement. Pet. App. C1. That contention does not warrant this Court's review.

a. As the court of appeals observed, and as petitioner acknowledged below, because petitioner did not object to the forfeiture order in the district court, his challenge to it was

reviewable only for plain error. Pet. App. A11 (citing United States v. Hampton, 732 F.3d 687, 690 (6th Cir. 2013), cert. denied, 571 U.S. 1145 (2014)). Indeed, petitioner agreed in the district court to the forfeiture and to the entry of a money judgment in the specific amount -- $2,534,912, about one-third of the total loan proceeds, see Pet. App. A2 -- that the district court ordered. See Plea Agreement 4; Pet. App. C1. Petitioner did not "object to the entry of the forfeiture money judgment on any grounds." Pet. App. A11 (citation omitted); see Gov't C.A. Br. 18, 20. And in this Court, petitioner does not dispute that plain-error review was appropriate, and he fails to demonstrate that the district court committed plain error.[2]

Petitioner contends that the forfeiture order conflicts with "the reasoning of" the Court's decision in Honeycutt, supra, Pet. 10 (emphasis omitted), which held that another forfeiture statute, 21 U.S.C. 853, did not permit a court to hold a defendant "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1630; see id. at 1631-1635. As the government has explained in filings in other lower courts, the government agrees with petitioner that, contrary to the court of appeals' view in this case, Honeycutt's rejection of joint and several liability

[2] As noted above, although petitioner's sentencing occurred two weeks after this Court's decision in Honeycutt, supra, petitioner did not argue in the district court, as he does in this Court, that the forfeiture order was inconsistent with Honeycutt.

also applies to forfeiture orders under Section 981(a)(1)(C).[3] The government did not directly express a position on that specific issue in the court of appeals in this case. But, as the government explained below, the forfeiture order in this particular case is consistent with the Court's reasoning in Honeycutt. See Gov't C.A. Br. 19-20.

In Honeycutt, this Court held invalid a forfeiture order issued under Section 853 that required Honeycutt, who conspired to sell chemicals used to manufacture drugs, to forfeit the full outstanding amount of the conspiracy's profits, even though Honeycutt had "never obtained tainted property as a result of the crime." 137 S. Ct. at 1635; see id. at 1631-1635. The chemicals were sold (and the proceeds from the sales were obtained) by a store owned by Honeycutt's brother. Id. at 1630. Honeycutt himself "had no ownership interest in his brother's store and did not personally benefit from the * * * sales" of the chemicals. Id. at 1635.

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[3] See, e.g., Gov't Br. at 17-18 & n.4, United States v. Villegas, No. 17-10300 (9th Cir. May 14, 2018) (stating that "[t]he reasoning in Honeycutt applies to other forfeiture statutes as well, including * * * 18 U.S.C. § 981(a)(1)(C)," but arguing that the district court in that case "did not impose joint and several liability"); Gov't Br. at 43-44, United States v. Haro, No. 17-40539 (5th Cir. Feb. 23, 2018) (observing that "the government has agreed in other cases that Honeycutt precludes imposing joint and several liability on a defendant for the reasonably foreseeable proceeds obtained by coconspirators for a number of forfeiture statutes," including 18 U.S.C. 981(a)(1)(C) (citing United States v. Gjeli, 867 F.3d 418, 427-428 (3d Cir. 2017), cert. denied, 138 S. Ct. 697, and 138 S. Ct. 700 (2018))).

Unlike Honeycutt, petitioner here owned the businesses that received the proceeds of the crime (the fraudulent loans in the bank-fraud conspiracy), and he acquired nearly all of the proceeds either directly or through those businesses. See Gov't C.A. Br. 19; Pet. App. A8. Loans that petitioner and his co-conspirators obtained themselves or through straw borrowers paid for petitioner's mobile-home properties, his house in the Bahamas, his condominiums in Florida, various other property, and his travel expenses. Gov't C.A. Br. 19. Petitioner is thus more akin to Honeycutt's brother who received and benefited from the proceeds of the conspiracy. Ibid. The forfeiture order in this case -- to which petitioner agreed -- thus did not impose joint and several liability on petitioner inconsistent with Honeycutt. Petitioner's contention that the forfeiture order was plainly erroneous in light of Honeycutt therefore lacks merit and does not warrant further review.

b. Petitioner's suggestion (Pet. 10-11) that review is warranted to resolve a conflict between the decision below in this case and decisions of other courts of appeals on the applicability of Honeycutt's reasoning to 18 U.S.C. 981(a)(1)(C) is accordingly misplaced.

As petitioner observes, the Third and Eleventh Circuits have concluded, contrary to the opinion below, that Honeycutt does apply to Section 981(a)(1)(C). See United States v. Gjeli, 867 F.3d 418, 427-428 & n.16 (3d Cir. 2017), cert. denied, 138 S. Ct. 697,

and 138 S. Ct. 700 (2018); United States v. Carlyle, 712 Fed. Appx. 862, 864 (11th Cir. 2017) (per curiam). That shallow and recent conflict does not warrant review, however, because as explained above, the government agrees with petitioner and the Third and Eleventh Circuits that Honeycutt's reasoning applies to Section 981(a)(1)(C) and has taken that position in lower courts. See pp. 10-11, supra. Further cases adopting the court of appeals' position here are therefore unlikely to arise, and the Sixth Circuit may itself revisit the issue at a later date.

Moreover, this case would be an unsuitable vehicle for addressing the application of Honeycutt to Section 981(a)(1)(C) because the forfeiture order affirmed in this case is consistent with Honeycutt. See pp. 11-12, supra. At a minimum, it does not constitute plain error under that decision. Because resolution of the question presented would not affect the outcome, further review of that question in this case is not warranted.

2. Petitioner separately contends (Pet. 13-14) that the district court erred in including in the restitution award (which totaled $2,637,058.32, Pet. App. A13, B6) approximately $50,000 for legal fees and other losses incurred by one of the victims, Forcht Bank. That contention also does not warrant review.

As with petitioner's challenge to the forfeiture order, the court of appeals explained that his challenge to the inclusion of those losses in the restitution award was reviewable only for plain error because petitioner "did not object to the amount of

restitution." Pet. App. A13; see Sent. Tr. 29 (district court observing at sentencing that "there's not an objection to the restitution amount"). In this Court, petitioner does not dispute that plain-error review was appropriate. The court of appeals concluded that the district court did not commit plain error by including those losses in the award, Pet. App. A13-A16, and petitioner has not shown that conclusion to be incorrect.

Petitioner contends (Pet. 13-14) that including the legal fees and other losses incurred by Forcht Bank in the restitution award is inconsistent with 18 U.S.C. 3663A as construed by this Court in Lagos v. United States, 138 S. Ct. 1684 (2018), which was decided while petitioner's appeal was pending. Section 3663A provides that, in the case of crimes involving damage to, loss of, or destruction of property, the district court shall order the defendant to return the property or, if returning the property would be "impossible, impracticable, or inadequate," to "pay an amount equal to" the value of the lost, damaged, or destroyed property. 18 U.S.C. 3663A(b)(1). Section 3663A additionally provides that, "in any case," the court shall require the defendant to "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4). Lagos held that "the words 'investigation' and 'proceedings'" in Section 3663A(b)(4) "are limited to government investigations and

criminal proceedings," and that Section 3663A(b)(4) covers only "'expenses incurred during participation in the investigation or prosecution'" -- not "expenses incurred before the victim's participation in a government's investigation began." 138 S. Ct. at 1688, 1690 (quoting 18 U.S.C. 3663A(b)(4)).

Petitioner contends (Pet. 13-14) that Lagos precludes ordering restitution under Section 3663A for Forcht Bank's $12,554.14 in legal fees. The court of appeals agreed with petitioner that, under Lagos, which the government had brought to the court's attention, see C.A. Doc. 41, at 1 (May 30, 2018), Section 3663A requires restitution of those fees only if they were incurred during a government investigation or criminal proceeding, Pet. App. A15. But as the government explained, see C.A. Doc. 41, at 1, and the court of appeals determined, Lagos did not require vacating that portion of the restitution award in this case because "[t]he record d[id] not contain any information as to whether Forcht Bank paid those fees as part of the government's investigation and criminal proceedings." Pet. App. A15. And "[b]ecause it [wa]s not clear to [the court of appeals] how these fees were accrued," the court found "it [wa]s hard to say that the district court committed any error," let alone plain error. Ibid. In other words, petitioner had not carried his burden of demonstrating under the plain-error standard on appeal that the legal fees at issue in fact fell outside the scope of Section 3663A(b)(4) as construed in Lagos. Nor could petitioner fault the

district court for failing to "make more specific factual findings," given that petitioner "did not dispute the restitution amount." Ibid.[4]

In this Court, petitioner does not identify any error in the court of appeals' conclusion. By discussing and applying Lagos, the court of appeals "appl[ied] the law in effect at the time it renders its decision," as he asserts it should. Pet. 13 (quoting Thorpe v. Housing Auth., 393 U.S. 268, 281 (1969)); see Pet. App. A17 (Moore, J., concurring in part and dissenting in part). If it were clear from the record in this case -- as it was from the record in Lagos -- that the legal fees at issue had not been incurred during the government's criminal investigation or prosecution, then petitioner would be correct that the relevant portion of the restitution award should have been vacated. But an intervening change the in law such as Lagos does not relieve petitioner from his burden under the plain-error standard to show that the challenged ruling was "plainly wrong." Henderson v. United States, 568 U.S. 266, 278 (2013). The court of appeals

[4] In petitioner's response to the government's letter apprising the court of appeals of Lagos, he asserted generally that Lagos "support[ed] [his] position that many improper assessments were ordered against him by the District Court" and that his failure to dispute the restitution amount did not foreclose appellate review, stating that "this is clearly plain error that on appeal this Court may entertain." C.A. Doc. 42, at 1 (June 4, 2018). Petitioner did not identify any record evidence regarding when or how the legal fees were incurred, nor did he suggest that a remand was appropriate to adduce new evidence.

correctly determined that petitioner failed to carry that burden here.

In addition to challenging restitution of the legal fees, petitioner also contends (Pet. 13-14) that Lagos precludes ordering restitution for $37,765.27 in other losses incurred by Forcht Bank for accrued interest, late fees, property taxes, required insurance on the relevant properties, and appraisal fees. Lagos, however, did not address whether such losses may be included in a restitution order, under either Section 3663A(b)(1) or (b)(4); the Court addressed only what types of "investigations" and "proceedings" are encompassed by Section 3663A(b)(4) and when expenses in connection with such investigations or proceedings must be incurred. See 138 S. Ct. at 1687-1690. The court of appeals determined that petitioner had not shown that including those losses was plain error because he had "provide[d] no evidence that the losses were unrelated to the conspiracy" and because "a number of cases" petitioner himself cited had determined that such losses were "properly included * * * in a restitution order." Pet. App. A15 (citing United States v. Robers, 698 F.3d 937, 955 (7th Cir. 2012), aff'd, 572 U.S. 639 (2014)). Petitioner does not identify any decision of another court of appeals that conflicts with that plain-error determination.

At most, petitioner's contention that the lower courts erred in applying Section 3663A(b) to the restitution order in this particular case amounts to a claim of factbound error. That claim does not warrant this Court's review.

3. Finally, petitioner contends (Pet. 15-17) that the district court, when calculating his advisory Sentencing Guidelines range, erred in assigning him one criminal-history point based on a 2005 California state-law offense. That contention likewise does not warrant review.[5]

Sentencing Guidelines §§ 4A1.1 and 4A1.2 govern the calculation of a defendant's criminal-history category. Section 4A1.1(c) directs a court to assign one criminal-history point for each "prior sentence" of less than 60 days of imprisonment. Section 4A1.1(d) directs a court to assign two criminal-history points "if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." Sentencing Guidelines § 4A1.1(d). Section 4A1.2(a)(1) defines a "prior sentence" to include "any sentence previously imposed upon adjudication of guilt," including by "plea of nolo contendere, for conduct not part of the instant offense." Id. § 4A1.2(a)(1).

As the court of appeals explained, the district court correctly assigned one criminal-history point to petitioner under Section 4A1.1(c) based on the probation term he received after pleading nolo contendere in California state court to willful

[5] Petitioner states (Pet. 15) that treating his California probation term as a prior sentence elevated his criminal-history points from zero to three. Petitioner overlooks that he received one criminal-history point for a subsequent drunk-driving conviction. Counting the California probation term thus changed his criminal-history score from one to four points, and changed his criminal-history category from I to III.

infliction of corporal injury. Pet. App. A4-A5. Petitioner received a 24-month probation term for that offense, which he served. Ibid. A sentence of probation is treated as a sentence of less than 60 days of imprisonment under Section 4A1.1(c). See id. at A5 (citing Sentencing Guidelines § 4A1.2, comment. (n.2)). Because petitioner became involved in the bank-fraud conspiracy for which he was convicted in this case in 2006, while still serving his probation term, the district court correctly assessed an additional two criminal-history points under Guidelines Section 4A1.2. Ibid.

Petitioner contends (Pet. 15-16) that the 2005 California probation term does not constitute a prior sentence under Sections 4A1.1 and 4A1.2 because the California case was dismissed after he completed his probation. That is incorrect. The California court that sentenced petitioner in 2005 had ordered "that if Sexton successfully completed summary probation, he would be permitted to withdraw his plea and the case would be dismissed." Pet. App. A5. After petitioner completed the probation term, he was permitted to withdraw his plea, and the case was dismissed. Ibid. As the court of appeals explained, the fact that a conviction was not formally entered does not mean the probation term does not count as a prior sentence. Ibid. Section 4A1.2(f) provides that (with the exception of juvenile proceedings) "[a] diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted as a sentence under

§ 4A1.1(c) even if a conviction is not formally entered." Sentencing Guidelines § 4A1.2(f). Petitioner's California probation term therefore was properly counted as a prior sentence irrespective of the fact that it did not ultimately result in a judgment of conviction.

Petitioner further contends (Pet. 15) that his California probation term nevertheless should not be counted based on commentary to Section 4A1.2 providing that "[s]entences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted." Sentencing Guidelines § 4A1.2, comment. (n.6). That note, however, applies only to cases where a legal or constitutional error infected the conviction or new evidence exonerated the defendant. Ibid. It does not apply to petitioner's California sentence, which was not reversed or vacated because of legal error, or ruled constitutionally invalid. Instead, his case was dismissed only after he received and served a 24-month probation term.

In any event, any error in the lower courts' application of the Guidelines to the facts of this case would not warrant this Court's review. Petitioner does not identify any decision of this Court or another court of appeals that conflicts with the decision below. Moreover, this Court ordinarily leaves issues of Sentencing Guidelines application in the hands of the Sentencing Commission,

which is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991). Given that the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Guidelines. See ibid.; see also 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."). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

SONJA M. RALSTON
Attorney

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