No. 20-5975

IN THE SUPREME COURT OF THE UNITED STATES

NATHANIEL RUTH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

BRIAN C. RABBITT
Acting Assistant Attorney General

JENNY C. ELLICKSON
Attorney

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

QUESTION PRESENTED

Whether petitioner's Illinois conviction for possessing cocaine with intent to distribute, in violation of 720 Ill. Comp. Stat. Ann. 570/401(c)(2) (West 2004), was for a "controlled substance offense," as defined by Sentencing Guidelines § 4B1.2(b).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 966 F.3d 642.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2020. The petition for a writ of certiorari was filed on October 5, 2020. 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 Central District of Illinois, petitioner was convicted on one count of possessing a firearm as a felon, in violation of 18

U.S.C. 922(g)(1), and on one count of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 2a; see id. at 76a; Indictment 2. The district court sentenced petitioner to 108 months of imprisonment, to be followed by six years of supervised release. Pet. App. 77a-78a. The court of appeals vacated petitioner's sentence and remanded for resentencing. Id. at 1a-23a.

1. On multiple occasions in 2018, petitioner sold narcotics to a confidential source. Pet. App. 2a; Presentence Investigation Report (PSR) ¶ 13. Officers subsequently arrested petitioner for driving with a revoked license, and petitioner told the officers that he had a gun in the car. Pet. App. 2a; PSR ¶ 15. Officers later executed a search warrant at petitioner's home, where they found 2.9 grams of crack cocaine, 5.6 grams of powder cocaine, $2250 in cash, and drug paraphernalia. Pet. App. 2a; PSR ¶¶ 14, 16-18.

A grand jury in the Central District of Illinois charged petitioner with possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), and possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 2a; Indictment 2; Superseding Indictment 1. The government notified petitioner that he was subject to a statutory sentencing enhancement on the drug charge under 21 U.S.C. 841(b)(1)(C) based on a prior conviction for a "felony drug

offense," namely, a 2006 Illinois conviction for possessing cocaine with intent to distribute, in violation of 720 Ill. Comp. Stat. Ann. 570/401(c)(2) (West 2004). Pet. App. 2a-3a. Petitioner did not object to the proposed statutory enhancement. Id. at 3a. He pleaded guilty to both counts in the indictment. Id. at 3a, 76a.

Before sentencing, the Probation Office determined that petitioner was a career offender under Sentencing Guidelines § 4B1.1. Pet. App. 3a; PSR ¶ 40. Section 4B1.1(a) increases a defendant's advisory sentencing range where, as relevant here, a defendant has at least two prior felony convictions for a "controlled substance offense." Sentencing Guidelines § 4B1.1(a). The Guidelines define a "controlled substance offense" as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." Id. § 4B1.2(b).

The Probation Office determined that petitioner had two prior convictions for controlled substance offenses: the 2006 Illinois cocaine conviction and a 2010 Illinois conviction for possessing cannabis with intent to distribute. Pet. App. 3a; PSR ¶¶ 40, 47, 49. The Probation Office accordingly classified petitioner as a

career offender under Section 4B1.1(a) and calculated an advisory guidelines range of 188 to 235 months of imprisonment. Pet. App. 3a; PSR ¶ 91.

Petitioner objected to his classification as a career offender, arguing, as relevant here, that his 2006 Illinois cocaine conviction was not a "controlled substance offense" as defined in Section 4B1.2(b) because Illinois's definition of cocaine includes positional isomers, while the federal definition does not. Pet. App. 3a, 25a-31a, 38a-40a, 44a-45a; D. Ct. Doc. 47, at 8-9 (Dec. 30, 2019). The district court overruled petitioner's objection and adopted the Probation Office's calculation of his advisory guidelines range. Pet. App. 4a, 46a-47a, 65a. Before announcing petitioner's sentence, the court observed that petitioner had "a fairly substantial criminal history," id. at 68a, but that categorizing petitioner as a career offender "materially overrepresent[ed] where the proper sentence should be in this case," id. at 70a. The court then sentenced petitioner to 108 months of imprisonment, 80 months below the bottom of the assigned guidelines range, to be followed by six years of supervised release. Id. at 70a, 77a-78a.

2. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 1a-23a.

The court first concluded, on plain error review, that petitioner's 2006 Illinois cocaine offense did not qualify as a

"felony drug offense" that subjected petitioner to an enhanced statutory maximum under 21 U.S.C. 841(b)(1)(C). Pet. App. 4a-16a. The court took the view that Illinois's definition of cocaine is categorically broader than the federal definition because the Illinois definition "includes optical, positional and geometric isomers," while federal law defines cocaine "to include only its 'optical and geometric isomers.' " Id. at 9a (citation omitted). The court then observed that eliminating the statutory enhancement would have the effect of lowering petitioner's guidelines range from 188 to 235 months to 151 to 188 months of imprisonment. Id. at 15a. And although the district court had sentenced petitioner to 108 months of imprisonment, a term that was "below either Guidelines range," the court of appeals vacated petitioner's sentence and remanded to the district court for resentencing. Id. at 15a-16a, 23a.

The court of appeals rejected, however, petitioner's challenge to his career-offender designation under the Sentencing Guidelines, which was premised on the argument that a "controlled substance offense" as defined in Section 4B1.2(b) must involve a controlled substance under the federal Controlled Substances Act and thus would exclude offenses defined to include positional isomers of cocaine. See Pet. App. 17a-23a. The court acknowledged that some out-of-circuit precedent had accepted such an argument, but explained that Section 4B1.2(b)'s definition of "controlled

substance offense" "does not incorporate, cross-reference, or in any way refer to the Controlled Substances Act." Id. at 17a. "This is significant," the court reasoned, because "[t]he Sentencing Commission clearly knows how to cross-reference federal statutory definitions when it wants to." Id. at 17a-18a. The court thus found "no textual basis to engraft the federal Controlled Substances Act's definition of 'controlled substance' into the career-offender guideline." Id. at 23a. The court explained that, instead, "[a] controlled substance is generally understood to be 'any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use are restricted by law.'" Ibid. (quoting Random House Dictionary of the English Language (2d ed. 1987)).

ARGUMENT

Petitioner contends (Pet. 9-21) that his 2006 Illinois cocaine conviction is not a "controlled substance offense" within the meaning of Sentencing Guidelines § 4B1.2(b) and that the district court therefore erred in determining that he qualifies for a career-offender enhancement. The court of appeals correctly rejected that contention, and its decision on that question of Guidelines interpretation does not warrant further review. In any event, the petition for a writ of certiorari arises in an interlocutory posture, which is in itself a sufficient basis for denying it.

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 Booker, which rendered the Guidelines advisory only. 543 U.S. at 243; cf. Pet. App. 15a (observing that petitioner received a sentence substantially below the guidelines range the district court deemed applicable).

The Court's practice of declining to grant review to interpret particular Sentencing Guidelines provisions is especially germane to Section 4B1.2. 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); Sentencing Guidelines § 4B1.2(2) (1989). The Commission

initially defined the term by reference to the Controlled Substances Act, Sentencing Guidelines § 4B1.2(2) (1987), then by reference to specific provisions of federal law, Sentencing Guidelines § 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, Sentencing Guidelines § 4B1.2(2) (1989). See Pet. App. 18a. 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). Given the Commission's attention to this issue, the Court's intervention would not be warranted.

Recognizing that the Court does not normally review Guidelines decisions, petitioner contends that the Commission "[w]ill [n]ot [s]ettle" the asserted conflict. Pet. 17. But his only support for this assertion is that the Commission has not yet acted. See ibid. That is not enough -- any disagreement between the courts of appeals on this question has emerged only recently, see pp. 13-14, infra, and the decision petitioner himself characterizes as the most "thorough" decision supporting the court of appeals' interpretation, Pet. 14, was issued a mere three months ago, see United States v. Ward, 972 F.3d 364, 373 (4th Cir. 2020),

during a period when the Commission has lacked a quorum, see U.S. Sentencing Comm'n, Organization, https://www.ussc.gov/about/who-we-are/organization; U.S. Sentencing Comm'n, 2019 Annual Report at 3, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report.pdf. To the extent that there is any inconsistency that warrants intervention, the Commission will be able to address it.

2. In any event, the court of appeals' decision is correct and does not warrant further review. The definition of "controlled substance" in Section 4B1.2 specifically encompasses "an offense under * * * state law, * * * that prohibits * * * the possession of a controlled substance * * * with intent to manufacture * * * [or] distribute." Sentencing Guidelines § 4B1.2(b). Petitioner's prior conviction was for possessing with intent to deliver cocaine under a provision of state law that prohibits, in relevant part, "possess[ing] with intent to manufacture or deliver[] a controlled substance." Ill. Comp. Stat. Ann. 570/401 (West 2004). The specific substance that formed the basis of petitioner's conviction was "cocaine, or an analog thereof," id. 570/401(c)(2). See Pet. App. 14a (noting the absence of any dispute that petitioner "was convicted under subsection (c)(2)" and that subsection (c)(2) is divisible from other provisions of the Illinois statute). Cocaine and its analogues

are on Illinois's schedule of controlled substances. See 720 Ill. Comp. Stat. Ann. 570/206(b)(4) (West 2000). Because cocaine and its analogues are substances whose use is restricted by Illinois law, they fall squarely into 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.' " See Pet. App. 23a (quoting Random House Dictionary of the English Language (2d ed. 1987)). Further underscoring that ordinary meaning, Illinois law specifically labels cocaine and its analogues "controlled substance[s]." Ill. Comp. Stat. Ann. 570/401 (West 2004); see 720 Ill. Comp. Stat. Ann. 570/206(b)(4) (West 2000).

Petitioner resists (Pet. 3-5) the classification of his 2006 conviction as a conviction for a controlled substance offense, noting that Illinois's schedule of controlled substances defines cocaine to include positional isomers, see 720 Ill. Comp. Stat. Ann. 570/206(b)(4) (West 2000), and asserting that Section 4B1.2(b) incorporates the federal Controlled Substances Act's definition of controlled substance (and its schedules of enumerated substances), which do not, see 21 U.S.C. 812, Schedule II(a)(4). See Pet. 3; Pet. App. 17a. But Section 4B1.2 "does not incorporate, cross-reference, or in any way refer to the Controlled Substances Act." Pet. App. 17a. Nor does it contain any other textual indication that it is limited in scope to federally

prohibited conduct. See Ward, 972 F.3d at 372 (observing that the argument that Section 4B1.2(b) is limited "to state offenses that define substances just as federal law defines them" "ignores the plain meaning of [Section] 4B1.2(b)"). To the contrary, Section 4B1.2(b) defines a controlled substance offense as an offense "under federal or state law," Sentencing Guidelines § 4B1.2(b) (emphasis added), specifically "refer[ring] us to state law in defining the offense." Ward, 972 F.3d at 374. It accordingly applies to offenses involving substances controlled under federal or relevant state law. And the court of appeals correctly found "no textual basis to engraft the federal Controlled Substances Act's definition of 'controlled substance' into the career-offender guideline." Pet. App. 23a.

As the court of appeals observed, "[t]he Sentencing Commission clearly knows how to cross-reference federal statutory definitions when it wants to." Pet. App. 17a-18a; see Ward, 972 F.3d at 373. Section 4B1.2 itself incorporates definitions from federal statutes in defining the terms "firearm" and "explosive material." Sentencing Guidelines § 4B1.2(a) (referring to "a firearm described in 26 U.S.C. § 5845(a)" and "explosive material as defined in 18 U.S.C. § 841(c)"). Other provisions likewise define particular terms by reference to federal law. See, e.g., Sentencing Guidelines § 2D1.1, comment. (nn.4 & 6). And limiting the definition of "controlled substance" to the one set out in the

Controlled Substances Act is particularly inappropriate because, as explained above (at pp. 7-8, supra), the Commission amended Section 4B1.2 to remove reference to the Controlled Substances Act, replacing it with a broad definition that expressly includes "state law" offenses that prohibit certain conduct related to "a controlled substance" more generally. Compare Sentencing Guidelines § 4B1.2(2) (1987) ("The term 'controlled substance offense' as used in this provision means an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 955a, 959; §§ 405B and 416 of the Controlled Substances Act as amended in 1986, and similar offenses."), with Sentencing Guidelines § 4B1.2(b) ("The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.").*

* Moreover, even if federal law were relevant to the analysis, it is not clear that the Illinois statute is meaningfully broader than the Controlled Substances Act. As the government argued below, no basis exists to conclude that positional isomers of cocaine exist in the drug trade. Pet. App. 10a (citing affidavit of a retired DEA research chemist who testified that "he analyzed over 50,000 cocaine samples from law enforcement evidentiary seizures and did not identify any positional isomers of cocaine in any of those samples"). Even in its original form, Section 4B1.2 defined a "controlled substance offense" as one

3. The decision below accords with recent decisions from at least three other courts of appeals, which have likewise declined "to engraft the federal Controlled Substances Act's definition of 'controlled substance'" onto Section 4B1.2(b). Ward, 972 F.3d at 373 (quoting Pet. App. 23a). See United States v. Smith, 681 Fed. Appx. 483 (6th Cir.), cert. denied, 137 S. Ct. 2144 (2017) (determining that defendant's prior convictions under 720 Ill. Comp. Stat. Ann. 570/401(d) are "controlled substance offense[s]" under Section 4B1.2(b)); United States v. Smith, 775 F.3d 1262, 1267-1268 (11th Cir. 2014), cert. denied, 576 U.S. 1013 (2015) (determining that state convictions for possessing marijuana and cocaine with intent to sell satisfy Section 4B1.2(b) because it does not require that state offenses be similar to federal crimes).

One other court of appeals has concluded that the term "controlled substance" in Section 4B1.2(b) "refers exclusively to a substance controlled by the" federal Controlled Substances Act. United States v. Townsend, 897 F.3d 66, 72 (2d Cir. 2018). Petitioner also relies (Pet. 14) on the Eighth Circuit's decision in United States v. Sanchez-Garcia, 642 F.3d 658 (8th Cir. 2011), but while the Eighth Circuit did use the federal definition of "controlled substance" in interpreting Section 4B1.2(b) in that case, id. at 661-662, it did so in the course of agreeing with the government that the Section 4B1.2(b) enhancement was applicable to

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identified in the Controlled Substances Act or an offense that is "similar." See Sentencing Guidelines § 4B1.2(2) (1987).

the defendant, id. at 662. Moreover, the government did not dispute in that case that the federal definition was relevant, instead arguing that (as the court ultimately determined) the definition was satisfied, see Gov't C.A. Br. at 12-17, Sanchez-Garcia, supra (No. 10-2266).

Petitioner additionally contends (Pet. 13-14) that the Fifth, Ninth, and Tenth Circuits have adopted his view of Section 4B1.2(b), but the cases petitioner cites in support of that proposition do not interpret Section 4B1.2(b) and instead address the commentary to other Guidelines provisions. See United States v. Gomez-Alvarez, 781 F.3d 787, 792-793 (5th Cir. 2015) (construing the definition of "drug trafficking offense" in the commentary to Section 2L1.2); United States v. Leal-Vega, 680 F.3d 1160, 1167 (9th Cir. 2012) (same), cert. denied, 568 U.S. 1145 (2013); United States v. Abdeljawad, 794 Fed. Appx. 745, 748 (10th Cir. 2019) (construing the term "controlled substance" in the commentary to Section 2D1.1). Thus, although the court of appeals, like petitioner, viewed the circuit disagreement somewhat more broadly, see Pet. App. 20a-21a, any direct conflict is limited, and other circuits have not yet addressed the decision below or the Fourth Circuit's "thorough," Pet. 14, decision in United States v. Ward, supra. And one court's mistaken application of Section 4B1.2 does not provide a sound basis for this Court's review.

4. In any event, review of the decision below is unwarranted because the decision is interlocutory. See, e.g., American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372, 384 (1893). Although the court of appeals determined that the district court properly classified petitioner as a career offender under Section 4B1.1, it also determined that "the district court calculated an incorrect Guidelines range" based on its erroneous application of an enhanced statutory maximum under 21 U.S.C. 841(b)(1)(C). Pet. App. 23a. The court of appeals accordingly vacated petitioner's sentence and remanded for resentencing without directing the imposition of any particular sentence. And at the original sentencing, the district court varied substantially below the advisory guidelines range precisely because it believed that the career-offender designation suggested a "materially overrepresent[ative]" sentence. Id. at 70a.

The decision's interlocutory posture "alone furnishe[s] sufficient ground for the denial of" his petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam); Virginia Mil. Inst. v. United States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari); see also Stephen M. Shapiro et al., Supreme Court Practice § 4.18 & n.72, at 282-283 (10th ed. 2013) (noting that the Court routinely denies

interlocutory petitions in criminal cases). If petitioner ultimately is dissatisfied with the sentence imposed on remand, and if that sentence is upheld in any subsequent appeal, petitioner will be able to raise his current claims, together with any other claims that may arise with respect to his resentencing, in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought after the most recent" judgment). This case presents no occasion for this Court to depart from its usual practice of awaiting final judgment before determining whether to review a challenge to a criminal conviction or sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

BRIAN C. RABBITT
Acting Assistant Attorney General

JENNY C. ELLICKSON
Attorney

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