No. 20-8213

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ATWOOD, 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

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QUESTION PRESENTED

Whether petitioner's Illinois convictions for delivering cocaine, in violation of 720 Ill. Comp. Stat. Ann. 570/401(c)(2) (West 2004) and 720 Ill. Comp. Stat. Ann. 570/401(a)(2)(A) (West 2010), were convictions for "controlled substance offense[s]" under Sentencing Guidelines § 4B1.2(b).

ADDITIONAL RELATED PROCEEDING

United States Court of Appeals (7th Cir.):

United States v. Atwood, No. 18-2113 (Oct. 24, 2019)

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2021. The petition for a writ of certiorari was filed on May 27, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of Illinois, petitioner was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C.

841(b)(1)(C) and 846; distributing cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and using a communication facility to facilitate a drug transaction, in violation of 21 U.S.C. 843(b). D. Ct. Doc. 107, at 1 (May 17, 2018). The district court sentenced petitioner to 210 months of imprisonment, to be followed by six years of supervised release. Id. at 2-3. The court of appeals vacated petitioner's sentence and remanded for resentencing by a different judge. 941 F.3d 883, 886. On remand, the district court sentenced petitioner to 156 months of imprisonment, to be followed by three years of supervised release. D. Ct. Doc. 169, at 2-3 (Sept. 9, 2020). The court of appeals affirmed. Pet. App. 1a-2a.

1. In 2014 and 2015, petitioner organized a conspiracy to distribute at least 70 grams of cocaine. Presentence Investigation Report (PSR) ¶¶ 11-19. In late 2014, petitioner gave 27.6 grams of cocaine to a confidential informant with instructions to sell the cocaine on his behalf. PSR ¶ 13. After petitioner received money from the sale, he arranged for co-conspirators to supply the informant with more cocaine to sell. PSR ¶¶ 14-18.

A grand jury in the Central District of Illinois indicted petitioner for conspiring to distribute cocaine, in violation of 21 U.S.C. 841(b)(1)(C) and 846; distributing cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and using a communication facility to facilitate a drug transaction, in violation of 21

U.S.C. 843(b). Petitioner pleaded guilty to those offenses, and the district court sentenced him 210 months of imprisonment, to be followed by six years of supervised release. D. Ct. Doc. 107, at 1-3. Petitioner appealed, and the court of appeals vacated that sentence based on a judicial-disqualification issue and remanded for resentencing by a different judge. 941 F.3d at 883-886.

2. Before resentencing, the Probation Office determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1(a). PSR ¶ 33. Section 4B1.1(a) increases a defendant's advisory sentencing range when, among other things, he has at least two previous 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 found that petitioner had two previous Illinois convictions for delivering a controlled substance (cocaine). PSR ¶¶ 44, 47.

Petitioner objected to his classification as a career offender, arguing (inter alia) that neither of his Illinois

convictions was a "controlled substance offense" because Illinois's definition of cocaine includes positional isomers, while the federal definition does not. D. Ct. Doc. 152, at 11-13 (June 23, 2020). The district court overruled petitioner's objection and adopted the Probation Office's calculation of his advisory guidelines range. Pet. App. 4a-6a, 9a-11a. The court sentenced petitioner to 156 months of imprisonment, to be followed by three years of supervised release. D. Ct. Doc. 169 2-3; Pet. App. 2a.

3. The court of appeals summarily affirmed in an unpublished order. Pet. App. 1a-2a. Relying on its decisions in United States v. Ruth, 966 F.3d 642 (7th Cir. 2020), cert. denied, 141 S. Ct. 1239 (2021), and United States v. Wallace, 991 F.3d 810 (7th Cir. 2021), the court rejected petitioner's contention that a "controlled substance offense" under 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. Pet. App. 1a-2a.

ARGUMENT

Petitioner contends (Pet. 5-14) that his previous Illinois cocaine convictions are not "controlled substance offense[s]" within the meaning of Sentencing Guidelines § 4B1.2(b) and that the district court therefore erred in determining that he satisfies the prerequisites for a career-offender enhancement. Because the

question presented 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 rejected petitioner's contention. This Court recently denied two petitions for writs of certiorari raising a similar issue. See Ruth v. United States, 141 S. Ct. 1239 (2021) (No. 20-5975); Ward v. United States (No. 20-7327) (2021). 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 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, id. § 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.

Recognizing that the Court does not normally review Guidelines decisions, petitioner contends (Pet. 2) that the Commission will not resolve the asserted conflict "anytime soon." But his only support for that assertion (Pet. 5) is that the Commission has not yet acted. The assertion lacks merit. Any disagreement between the courts of appeals on this question has emerged only recently, see pp. 11-13, infra, and as petitioner

notes (Pet. 2), the Commission currently lacks a quorum, see U.S. Sentencing Comm'n, Organization, https://www.ussc.gov/about/who-we-are/organization. To the extent that any inconsistency requires intervention, the Commission would be able to address it. See Longoria v. United States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the denial of the petition for a writ of certiorari) (observing, with respect to another Guidelines dispute, that the "Commission should have the opportunity to address [the] issue in the first instance, once it regains a quorum of voting members") (citing Braxton, 500 U.S. at 348).

2. In any event, the court of appeals' decision is correct and does not warrant further review. The term "controlled substance" in 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 convictions were for delivering cocaine under a provision of state law that prohibits, in relevant part, "deliver[ing] * * * a controlled substance." 720 Ill. Comp. Stat. Ann. 570/401 (West 2010). See 720 Ill. Comp. Stat. Ann. 570/401 (West 2004); D. Ct. Doc. 152-2, at 1 (judgment for 2010 Illinois conviction); D. Ct. Doc. 152-1, at 1 (judgment for 2004 Illinois conviction).

The specific substance that formed the basis of petitioners' convictions was "cocaine, or an analog thereof." 720 Ill. Comp.

Stat. Ann. 570/401(a)(2)(A) (West 2010); 720 Ill. Comp. Stat. Ann. 570/401(c)(2) (West 2004). See Pet. App. 1a; D. Ct. Doc. 152-2, at 1; D. Ct. Doc. 152-1. Because cocaine and its analogs are substances whose use is restricted by Illinois law, see 720 Ill. Comp. Stat. Ann. 570/206(b)(4) (West 2007); 720 Ill. Comp. Stat. Ann. 570/206(b)(4) (West 2000), they fall 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 is restricted by law.'" Ruth, 966 F.3d at 654 (quoting Random House Dictionary of the English Language (2d ed. 1987)). Illinois law itself underscores that ordinary meaning, specifically labeling cocaine and its analogs "controlled substance[s]." 720 Ill. Comp. Stat. 570/401 (West 2010); 720 Ill. Comp. Stat. 570/401 (West 2004); see 720 Ill. Comp. Stat. Ann. 570/206(b)(4) (West 2007); 720 Ill. Comp. Stat. Ann. 570/206(b)(4) (West 2004).

Petitioner resists (Pet. 10-13) the classification of his Illinois convictions as convictions for controlled substances, asserting that Illinois's definition of cocaine is broader than the definition in the federal Controlled Substances Act and arguing that Section 4B1.2(b) implicitly incorporates the federal Controlled Substances Act's schedule of controlled substances. See Pet. 2-4, 14. But Section 4B1.2 "does not incorporate, cross-reference, or in any way refer to the Controlled Substances Act."

Ruth, 966 F.3d at 651. Nor does it contain any other textual indication that it is limited in scope to federally prohibited conduct. See United States v. Ward, 972 F.3d 364, 372 (4th Cir. 2020) (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)"), cert. denied, No. 20-7327 (June 28, 2021).

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 unadorned term "controlled substance" is a natural one to use in a general description of federal and state drug crimes, which focus on unlawful activities involving a product that the relevant jurisdiction regulates. The court of appeals thus correctly discerned "no textual basis to engraft the federal Controlled Substances Act's definition of 'controlled substance' into the career-offender guideline." Ruth, 966 F.3d at 654; see Pet. App. 2a (relying on Ruth, 966 F.3d at 654).

The use of the term "controlled substance" is particularly unlikely to be a silent cross-reference to the federal schedules because "[t]he Sentencing Commission clearly knows how to cross-

reference federal statutory definitions when it wants to." Ruth, 966 F.3d at 651. Section 4B1.2 itself incorporates definitions from federal statutes in defining the terms "firearm" and "explosive material." See Sentencing Guidelines § 4B1.2(a)(2) (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 the absence of any cross-reference of "controlled substance" in Section 4B1.2 to the Controlled Substances Act is especially telling because, as explained above (at pp. 5-6, supra), the Commission amended Section 4B1.2 to remove a 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 id. § 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.").*

3. The decision below accords with recent published decisions from the Fourth and Eleventh Circuits, as well as an unpublished decision from the Sixth Circuit, 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 (4th Cir.) (quoting Ruth, 966 F.3d at 654); see 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); see also United States v. Smith, 681 Fed. Appx. 483, 489 (6th Cir.), cert. denied, 137 S. Ct. 2144 (2017) (determining that defendant's previous

* 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. Although Illinois's definition of cocaine includes positional isomers, while the federal definition does not, no sound basis exists to conclude that positional isomers of cocaine exist in the drug trade. See Ruth, 966 F.3d at 647-648 (citing affidavit of 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 identified in the Controlled Substances Act or an offense that is "similar." Sentencing Guidelines § 4B1.2(2) (1987).

convictions under 720 Ill. Comp. Stat. Ann. 470/401(d) are "controlled substance offense[s]" under Section 4B1.2(b) even though "Illinois may have criminalized" conduct involving "some substances that are not criminalized under federal law"). Petitioner asserts (Pet. 7) that the Sixth and Eleventh Circuits have "issued recent, unpublished decisions on both sides" of this issue, but this Court ordinarily does not grant review to resolve intracircuit conflicts. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Two courts of appeals have 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) (citation omitted); see United States v. Bautista, 989 F.3d 698, 702 (9th Cir. 2021). Petitioner also cites (Pet. 6) the Eighth Circuit's decision in United States v. Sanchez-Garcia, 642 F.3d 658 (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 the defendant, id. at 662. Moreover, the government did not dispute in that case that the federal definition was relevant, instead arguing (as the court ultimately found) that

the definition was satisfied, see Gov't C.A. Br. at 12-17, Sanchez-Garcia, supra (No. 10-2266).

Petitioner additionally asserts (Pet. 6-7) that the Fifth and Tenth Circuits have adopted his view of Section 4B1.2(b), but the decisions that petitioner cites in support of that assertion 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) (addressing the definition of "drug trafficking offense" in the commentary to Section 2L1.2); United States v. Abdeljawad, 794 Fed. Appx. 745, 748 (10th Cir. 2019) (addressing the term "controlled substance" in the commentary to Section 2D1.1). Thus, although some courts of appeals, like petitioner, view the circuit disagreement somewhat more broadly, see Ruth, 966 F.3d at 653; Bautista, 989 F.3d at 702-703, any direct conflict is recent and limited. That counsels even further against this Court's review and in favor of allowing the Sentencing Commission the opportunity to address it. See pp. 5-7, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2021