

No. 23-7587

IN THE SUPREME COURT OF THE UNITED STATES

JONDELL MIDDLEBROOKS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

DAVID M. LIEBERMAN
Attorney

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

QUESTION PRESENTED

Whether petitioner's prior New York conviction for attempted second-degree murder is a crime of violence under Sentencing Guidelines § 4B1.2(a) (2021).

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Middlebrooks, No. 22-cr-390 (Mar. 31, 2023)

United States Court of Appeals (2d Cir.):

United States v. Middlebrooks, No. 23-6320 (Feb. 28, 2024)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is available at 2024 WL 825621.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2024. The petition for a writ of certiorari was filed on May 24, 2024. 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 Northern District of New York, petitioner was convicted on one count of possessing cocaine base (crack cocaine) with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. A4. He was sentenced to 192 months of imprisonment, to be followed by six years of supervised release. Id. at A5-A6. The court of appeals affirmed. Id. at A1-A3.

1. On three occasions in May and June 2022, a confidential source purchased crack cocaine from petitioner. Presentence Investigation Report (PSR) ¶ 10. Each time, law enforcement officers observed petitioner leave his residence and travel to the meeting location. Ibid. The confidential source purchased a total of 138.9 grams of crack cocaine from petitioner. PSR ¶ 11.

On June 23, 2022, law enforcement officers arrested petitioner as he arrived at his probation office for a drug test. PSR ¶ 13. During a post-arrest interview, petitioner admitted that he routinely sold crack cocaine. PSR ¶ 14. Petitioner also revealed that he had placed a two-ounce bag of crack cocaine in the basement of his building before traveling to the probation office. Ibid. After obtaining petitioner's consent, the officers searched the basement and recovered a bag containing 83.3 grams of cocaine base, a digital scale, and multiple cell phones. PSR ¶¶ 14-15.

2. In a superseding information, the government charged petitioner with one count of possessing cocaine base (crack cocaine) with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). C.A. App. 96-97. Petitioner pleaded guilty. Id. at 78 (Mar. 29, 2023 minute entry).

The Probation Office determined that petitioner had "at least two prior felony convictions of either a crime of violence or a controlled substance offense" and therefore qualified as a career offender under Sentencing Guidelines § 4B1.1(a) (2021). PSR ¶ 27. Under the version of the Guidelines then in effect, Section 4B1.2(a) defined "'crime of violence'" to include "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that * * * has as an element the use, attempted use, or threatened use of physical force against the person of another," Sentencing Guidelines § 4B1.2(a)(1) (2021) (the "elements clause"), "or" is one of several enumerated offenses, including "murder," id. § 4B1.2(a)(2). Application Note 1 to Guidelines § 4B1.2 further stated that the term "'[c]rime of violence' * * * includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." id. § 4B1.2, comment. (n.1). In recommending the career offender enhancement, the Probation Office cited petitioner's prior New York conviction for attempted second-degree murder and prior federal conviction

for possession with intent to distribute, and distribution of, heroin and fentanyl. PSR ¶ 27.

Petitioner objected to the career offender enhancement. He argued that attempted New York second-degree murder does not require the use, attempted use, or threatened use of physical force against the person of another and therefore does not qualify as a “crime of violence” under Sentencing Guidelines § 4B1.2(a)(1) (2021). C.A. App. 114-115. Petitioner also argued that the crime does not constitute the enumerated offense of “murder” in Guidelines § 4B1.2(a)(2) and that the Sentencing Commission exceeded its authority when it promulgated Application Note 1 defining a “crime of violence” to include attempt offenses. C.A. App. 115-117.

At sentencing, the district court overruled petitioner’s objections, applied the career offender enhancement, and calculated petitioner’s Guidelines range as 188 to 235 months of imprisonment. C.A. App. 194-195, 199. After considering the sentencing factors in 18 U.S.C. 3553(a), the court imposed a 192-month sentence, to be followed by six years of supervised release. C.A. App. 199-200.¹

¹ The district court also separately sentenced petitioner to an 18-month term of imprisonment, to be served consecutively to the 192-month term, for violating the conditions of his supervised release imposed in a different case. See Pet. App. A1.

3. The court of appeals affirmed in an unpublished summary order, finding that the district court had properly applied the career offender enhancement. Pet. App. A1-A3. The court cited its recent decision in United States v. Pastore, 83 F.4th 113 (2d Cir. 2023), cert. granted sub nom. Delligatti v. United States, No. 23-825 (June 3, 2024), in which the court had recognized that “attempt to commit second-degree murder under New York law [as incorporated into a federal racketeering offense] is * * * categorically a crime of violence” under the definition in 18 U.S.C. 924(c)(3)(A), which is similar to Sentencing Guidelines § 4B1.2(a)(1)’s elements clause. See 83 F.4th at 120-121; compare 18 U.S.C. 924(c)(3)(A), with Sentencing Guidelines § 4B1.2(a)(1) (2021).

The court of appeals had explained in Pastore that because the New York offense “requires both an intent to use physical force and a substantial step towards the use of physical force,” 83 F.4th at 121, it satisfies Section 924(c)(3)(A)’s requirement that it “ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. 924(c)(3)(A); see 83 F.4th at 120-121. And in this case, the court reasoned that Pastore’s “analysis squarely applies to the question whether attempted second degree murder is a ‘crime of violence’ for purposes of [Guidelines] § 4B1.1(a).” Pet. App. A2.

ARGUMENT

Petitioner contends that his prior New York attempted murder conviction does not make him a career offender under Sentencing Guidelines § 4B1.2(a) (2021) on the theory that the crime does not require the use, attempted use, or threatened use of physical force against another (Pet. 6-12), and that the text of the Guidelines definition of “crime of violence” does not include attempt offenses (Pet. 12-18). Both questions presented involve only the interpretation of the Guidelines, as to which circuit conflicts can be resolved by the Sentencing Commission, which has recently done so with respect to the second issue. And although the former issue may be informed by this Court’s forthcoming decision in Delligatti v. United States, cert. granted, No. 23-825 (June 3, 2024), it is irrelevant to the disposition of this case, because even if petitioner were correct in his interpretation of Section 4B1.2(a)(1)’s elements clause, his attempted murder would independently qualify as a crime of violence under Section 4B1.2(a)(2)’s enumerated-offenses clause. The petition for a writ of certiorari should be denied.

1. This Court ordinarily does not review decisions interpreting the 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; 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 245.

The Commission has devoted considerable attention in recent years to the “statutory and guideline definitions relating to the nature of a defendant’s prior conviction,” including the Guidelines’ definition of a “‘crime of violence.’” 81 Fed. Reg. 37,241, 37,241 (June 9, 2016). In 2016, the Commission amended the definition of a “crime of violence” in Section 4B1.2(a), see Sentencing Guidelines App. C Supp., Amend. 798 (Aug. 1, 2016), and eliminated an analogous “crime of violence” provision in Section 2L1.2, see id. Amend. 802 (Nov. 1, 2016). More recently, the Commission amended Section 4B1.2, effective November 1, 2023, to incorporate the substance of former Application Note 1 into the guideline text itself. Id. Amend. 822 (Nov. 1, 2023); see Sentencing Guidelines § 4B1.2(d) (2023) (“The terms ‘crime of violence’ and ‘controlled substance offense’ include the offenses

of aiding and abetting, attempting to commit, or conspiring to commit any such offense."). Finally, the Commission continues to study "the impact of such definitions on the relevant statutory and guideline provisions" and to work "to resolve conflicting interpretations of the guidelines by the federal courts." 81 Fed. Reg. at 37,241; see 83 Fed. Reg. 30,477, 30,477-30,478 (June 28, 2018) .

2. The career offender guideline applies when "the instant offense of conviction is a felony that is * * * a controlled substance offense" and the defendant "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." Sentencing Guidelines § 4B1.1(a) (2021). Petitioner's challenges to the lower courts' application of that guideline do not warrant further review.

Petitioner first contends (Pet. 6-9) that his prior attempted murder conviction is not a "'crime of violence'" because it does not have "as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1) (2021). This Court has granted review in Delligatti, supra (No. 23-825), to decide whether attempted murder, as incorporated into a conviction for violating the Violent Crimes in Aid of Racketeering statute, 18 U.S.C. 1959(a)(5), "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C.

924(c)(3)(A). Given the similar definitional language in Section 924(c)(3)(A), this Court's forthcoming decision in Delligatti may inform the question whether petitioner's prior attempted murder conviction qualifies as a "crime of violence" under Guidelines § 4B1.2(a)(1) (2021).

Holding the petition in this case for Delligatti is unnecessary, however, because petitioner's prior attempted murder conviction is also a "crime of violence" under Sentencing Guidelines § 4B1.2(a)(2) (2021). Independent of Section 4B1.2(a)(1)'s elements clause, Section 4B1.2(a)(2) separately defines a "'crime of violence'" as any state or federal felony offense that "is murder." Ibid. As the government explained in its brief below (at 38-43), the generic crime of murder referenced in Section 4B1.2(a)(2) encompasses causing a death purposely or knowingly, and the New York murder offense at issue criminalizes intentional causation of death. Former Application Note 1 to Section 4B1.2, in turn, interprets the definition of "crime of violence" to include inchoate offenses, including attempt offenses like petitioner's. See Sentencing Guidelines § 4B1.2 comment. (n.1) (2021) ("For purposes of [the career offender] guideline[,]' '[c]rime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.") (emphasis omitted). And although the court of appeals did not address the question whether petitioner's prior

conviction is a “crime of violence” under Sentencing Guidelines § 4B1.2(a)(2) (2021), it is well-settled that a “prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted.” United States v. New York Tel. Co., 434 U.S. 159, 166 n.8 (1977); see Gov’t C.A. Br. 38-43 (raising Section 4B1.2(a)(2) as an alternative argument).

Petitioner does contest (Pet. 12-18) the validity of Application Note 1 to the 2021 Guidelines. But the court of appeals had previously “upheld the authority of the Sentencing Commission to adopt Application Note 1” and “preclude[d] any further argument ‘that Application Note 1 improperly conflict[ed] with the guideline text.’” United States v. Richardson, 958 F.3d 151, 154 (2d Cir.) (citation omitted), cert. denied, 141 S. Ct. 423 (2020). And while petitioner urges (Pet. 15-16) certiorari on the question whether that determination conflicts with this Court’s decision in Kisor v. Wilkie, 588 U.S. 558 (2019), which concerns the degree of deference to an agency’s interpretation of its own regulations, that question does not warrant this Court’s review for reasons set forth in the government’s brief in opposition to the petition for a writ of certiorari in Ratzloff v. United States, cert. denied, 144 S. Ct. 554 (2024) (No. 23-310). See Br. in Opp. at 12-18, Ratzloff, supra (No. 23-310).

In particular, petitioner overstates the degree of any conflict about whether and how Kisor applies in the distinct context of the Commission's commentary to the Guidelines. See Gov't Br. in Opp. at 15-17, Ratzloff, supra (No. 23-310). In addition, as noted above, the Commission recently amended Section 4B1.2 to incorporate the substance of former Application Note 1 into the guideline text itself. See p. 7, supra. The deference owed to former Application Note 1 is thus of diminishing importance.² As that episode illustrates, the Commission is fully capable of resolving disputes concerning the application of particular commentary by amending the text of the Guidelines. Indeed, the Commission has announced that one of its policy priorities for the immediate future is the "[c]ontinuation of its multiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary." 88 Fed. Reg. 60,536, 60,537 (Sept. 1, 2023); cf. Braxton, 500 U.S. at 348 (explaining that this Court should be "restrained and circumspect in using [its] certiorari power" to resolve guidelines issues in light of the Commission's "statutory

² In circuits that previously declined to defer to former Application Note 1, the government has agreed that the 2023 amendment should not be applied to defendants who committed their offenses before its effective date. See Peugh v. United States, 569 U.S. 530, 544 (2013) (finding that Ex Post Facto Clause is implicated for Guidelines enhancements enacted between the time of the crime and the time of sentencing).

duty ‘periodically to review and revise’ the Guidelines”) (brackets and citation omitted).

This Court has repeatedly and recently denied petitions for writs of certiorari seeking review of questions concerning the applicability of Kisor to the Guidelines, see Gov’t Br. in Opp. at 8 n.2, Ratzloff, supra (No. 23-310) (collecting cases),³ and the same course is warranted here. And without plenary review and reversal of the court of appeals’ approach to that issue, the disposition of petitioner’s case will remain unchanged regardless of the outcome of Delligatti. The petition for a writ of certiorari should accordingly be denied.

³ See also, e.g., Rodriguez v. United States, No. 23-7522 (June 17, 2024); Alexander v. United States, 144 S. Ct. 1470 (2024) (No. 23-7122); Melancon v. United States, 144 S. Ct. 1468 (2024) (No. 23-7107); Thomas v. United States, 144 S. Ct. 1369 (2024) (No. 23-6907); Maloid v. United States, 144 S. Ct. 1035 (2024) (No. 23-6150); Smith v. United States, 144 S. Ct. 868 (2024) (No. 23-6486); Shaw v. United States, 144 S. Ct. 867 (2024) (No. 23-6485); Rivera v. United States, 144 S. Ct. 861 (2024) (No. 23-6421); Reese v. United States, 144 S. Ct. 848 (2024) (No. 23-6312); Ratzloff v. United States, 144 S. Ct. 554 (2024) (No. 23-310).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

DAVID M. LIEBERMAN
Attorney

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