No. 25-5091

IN THE SUPREME COURT OF THE UNITED STATES

ANDRES BURGARA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court plainly erred in imposing separate sentences for two counts of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1), where police in one day found cocaine in two different vehicles, parked in two geographically distinct locations, that were under his control.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is available at 2025 WL 17127.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 2025. A petition for rehearing was denied on February 11, 2025 (Pet. App. 12a). On May 5, 2025, Justice Kagan extended the time within which to file a petition for writ of certiorari to and including July 11, 2025. The petition for a writ of certiorari

was filed on July 10, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of possessing 50 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii); two counts of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of possessing marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D); two counts of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i); and three counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. 13a. Petitioner was sentenced to 271 months of imprisonment, to be followed by five years of supervised release. Id. at 14a. The court of appeals affirmed with a limited remand to correct the judgment on marijuana-possession and felon-in-possession counts. Id. at 1a-11a.

1. In 2016, law enforcement began investigating allegations that a drug-trafficking organization was engaged in large-scale methamphetamine and cocaine sales in Los Angeles. C.A. E.R. 1369. Law enforcement identified 20 individuals with ties to the

organization, including petitioner. C.A. Mot. for Judicial Notice 31-42; see Pet. App. 11a n.1.

In March 2018, as part of that investigation, law enforcement conducted surveillance of petitioner. See C.A. E.R. 698, 1274-1277, 1280, 1460. Officers followed petitioner as he drove from his home to another residence, conducted what appeared to be a drug sale, and then began driving again. Id. at 698, 1274-1278, 1280, 1460. After observing petitioner commit three driving infractions, officers initiated a traffic stop of petitioner's vehicle. Id. at 492-493, 526-27, 1232-1235, 1466.

The officers subsequently arrested petitioner for unlicensed driving, and then searched his vehicle before impounding it. C.A. E.R. 1467-1469. That search uncovered cocaine, methamphetamine, cash, and a loaded handgun. Id. at 497-498, 504, 506, 512. Petitioner confessed to having more drugs and firearms at home. Id. at 624.

A warrant to search petitioner's home and any vehicles found there was executed later that day. C.A. E.R. 625. Officers found marijuana, drug paraphernalia, two loaded pistols, and ammunition from the bedroom. Id. at 627, 757. They also found cocaine, ammunition, an AR-15, and a loaded handgun in a truck parked on petitioner's lawn. Id. at 656-657, 757.

2. A federal grand jury in the Central District of California charged petitioner with one count of possessing 50 grams or more of methamphetamine with intent to distribute, in violation

of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii); two counts of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of possessing marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D); two counts of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i); and three counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. 19a-35a. The district court instructed the jury that in order to find guilt on the multiple drug counts, it had to find "beyond a reasonable doubt that" petitioner "stored" "different" cocaine in "different places." C.A. E.R. 57, 63.

The jury found petitioner guilty on all counts. Pet. App. 13a. At sentencing, the district court imposed concurrent 151-month terms of imprisonment on the methamphetamine-possession, cocaine-possession, marijuana-possession, and felon-in-possession counts, and two terms of imprisonment of 60 months on the Section 924(c) counts, to be served consecutively to the terms imposed on the other counts and to each other, for a total term of 271 months of imprisonment. Pet. App. 14a. Petitioner did not object to the court's decision to independently sentence him on the two counts of possessing cocaine with intent to distribute. Id. at 8a.

3. The court of appeals unanimously affirmed, with a limited remand, in an unpublished opinion. Pet. App. 1a-11a.

The court of appeals rejected petitioner's claim, made for the first time on appeal, that his convictions for possession with intent to distribute cocaine were multiplicitous, on the theory that the facts showed only one cocaine-possession crime. Pet. App. 8a. The court explained that "where separate caches of a controlled substance are found in separate vehicles which are themselves found in different locations, it was at the very least not plain error for [petitioner] to be charged and convicted of multiple § 841(a) offenses." Ibid. (citing United States v. Privett, 443 F.2d 528, 531 (9th Cir. 1971)).

Separately, the court of appeals observed that the district court had imposed terms of imprisonment in excess of the statutory maximum for the marijuana-possession and felon-in-possession offenses. Pet. App. 10a. It accordingly ordered a limited remand "to correct the judgment to accurately reflect the statutory maximums." Id. at 10a-11a. And it made clear that the district court could, on remand, reconsider whether a Sentencing Guidelines enhancement that petitioner had challenged on appeal (but not at the original sentencing) was warranted. Id. at 11a.

ARGUMENT

Petitioner renews (Pet. 9-25) his contention that the district court plainly erred in sentencing him for two counts of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a), on the theory his possession of two distinct packages of cocaine in two distinct locations on the same day

necessarily showed only a single possession crime. That contention does not warrant this Court's review. The decision below is correct and does not conflict with any decision of this Court or another court of appeals. And in all events, this case would be a poor vehicle to review the question presented.

1. As a threshold matter, the decision that petitioner asks this Court to review is interlocutory. The court of appeals affirmed petitioner's convictions, but ordered a limited remand that would include a "resentencing." Pet. App. 11a; see id. at 10a-11a. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial of the application." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see, e.g., National Football League v. Ninth Inning, Inc., 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J.).

This Court routinely denies interlocutory petitions in criminal cases. See Stephen M. Shapiro et al., Supreme Court Practice § 4-55 n.72 (11th ed. 2019). That practice promotes judicial economy. Here, it would enable petitioner to raise his current claims, along with any other claims that may arise on remand, 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) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of

Appeals."). This case presents no occasion for this Court to depart from its usual practice.

2. The court of appeals correctly recognized that the district court did not commit plain error in concluding that petitioner could be charged and convicted for two Section 841(a) cocaine offenses. The Fifth Amendment's Double Jeopardy Clause forbids punishing a defendant twice for the same offense. U.S. Const. Amend. V. But the Constitution assigns Congress the role of defining criminal offenses, and determining whether conduct amounts to one or more violations of a single statute. See United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952).

Section 841 makes it illegal for a person to "possess" any "controlled substance" with the "intent to manufacture, distribute, or dispense" that substance. 21 U.S.C. 841(a). As petitioner acknowledges (Pet. 21), Section 841(a) sets out a "continuing offense." For such offenses, when a course of conduct is attributable to a "single 'impulse'" or arises from a "singleness of thought, purpose, or action," the entire series of subsidiary acts is treated as "one offense." Universal C.I.T., 344 U.S. at 224 (citation omitted). But where a course of conduct is separated by "wholly distinct" acts or decisions, then each distinct action "would constitute a different offense." Id. at 225. Whether a course of conduct is the product of a single impulse or multiple independent decisions is fundamentally a question of fact for the jury. See ibid.; see also, e.g., United

States v. Richards, 52 F.4th 879, 887 (9th Cir. 2022) (asking whether the "evidence supports" a finding that the defendant committed separate possession offenses).

Here, the jury found beyond a reasonable doubt that petitioner stored two "different" stashes of cocaine in "different place[s]" -- namely, vehicles that were found in geographically distinct locations. C.A. E.R. 57; see Pet. App. 8a. The first stash was hidden in the rear of petitioner's Honda, which officers stopped while he was driving it; the second stash was hidden within petitioner's truck, which was parked on his lawn; and both stashes were divvyed up into varying quantities. Gov't C.A. Br. 10-11. Moreover, the evidence revealed that petitioner was part of a sophisticated drug-trafficking organization that engaged in many separate transactions among many separate buyers. Id. at 5-7. Put together, it was not plain error for the jury to find -- and the district court accordingly to treat -- possession of each distinct stash of cocaine as a distinct act of possession done with its own intent to distribute.

Petitioner appears to take the position (Pet. 19-24) that under Section 841(a), a court must invariably aggregate whatever narcotics a defendant has in his possession at a given time, and (so long as it involves the same controlled substance) sentence the defendant to a single offense "based on the type of drug possessed and its total weight" (id. at 23). But nothing in the text of the statute compels that inflexible approach. Section

841(a) criminalizes the "possess[ion]" of a controlled substance for certain illicit purposes. That crime can be the product of either a single uninterrupted course of conduct, or a series of "separate and distinct possessions," each constituting its own legal wrong. United States v. Blakeney, 753 F.2d 152, 155 (D.C. Cir. 1985); cf. United States v. Kennedy, 682 F.3d 244, 256 (3d Cir. 2012) (collecting similar cases under 18 U.S.C. 922(g)). Far from commanding a single inflexible rule across all fact patterns, Section 841(a) contemplates a case-specific inquiry that turns on the particular circumstances at issue -- i.e., the precise sort of analysis that the jury and the court of appeals performed here. Nothing about their fact-bound application of that well-established inquiry warrants this Court's attention.

3. Petitioner errs in asserting (Pet. 9-16) that the decision of the court of appeals conflicts with decisions from the Second, Fourth, Sixth, and Eleventh Circuits. As even petitioner seems to accept (Pet. 21), all courts of appeals apply the same general standard in Section 841(a) drug-possession cases: they ask whether a course of conduct is best understood as constituting a single uninterrupted act of possession, or whether the events are sufficiently distinct in time, location, or purpose to constitute separate acts of possession. At times, that fact-bound inquiry has led courts to find that a defendant's simultaneous possession of multiple stashes of a controlled substance amounts to a single offense; at others, courts have found that the evidence

supports multiple offenses, for discrete and independent instances of illicit possession. But petitioner identifies no case in which a court of appeals has adopted an inflexible approach that automatically mandates a single conviction and sentence in a case like his.

The Eleventh Circuit's practice is illustrative. In United States v. Maldonado, 849 F.2d 522 (1988) (per curiam), for example, the Eleventh Circuit found that the defendant's simultaneous possession of cocaine in his home and in his car amounted to two distinct offenses. Id. at 524-525. In so doing, the court relied on the D.C. Circuit's decision in United States v. Blakeney -- which petitioner places (Pet. 12) on the other side of the purported disagreement -- for the proposition that the possession of different quantities of a drug in different locations can give rise to "separate and distinct offenses." Maldonado, 849 F.2d at 525. By contrast, in United States v. Clay, 355 F.3d 1281 (per curiam), cert. denied, 543 U.S. 999 (2004), the Eleventh Circuit found that two stashes of cocaine separated by "only a few blocks" were one offense. Id. at 1284-1285 (quotation marks omitted). The court grounded that finding in the "evidence adduced at trial," id. at 1284, not any categorical rule mandating a single charge for any and all cases with simultaneous possession within the same county.

The Sixth Circuit is of a piece. Petitioner relies on United States v. Stephens, 118 F.3d 479 (6th Cir. 1997) (cited at Pet. 7,

13, 21, 25), but there, the court declined to find multiple possession offenses where the defendants kept a single "load of cocaine," and one defendant moved a small portion of it to his car in order to sell it. Id. at 480; see United States v. Register, 931 F.2d 308, 313 (5th Cir. 1991) (cited at Pet. 15) (examining whether the narcotics came from some "common 'stash'"). Nowhere in that decision did the Sixth Circuit endorse the sort of inflexible rule that petitioner appears to advocate. And that court has, in the context of addressing a habeas corpus application by a state prisoner, approvingly cited other circuits' recognition that "that separate convictions for possession of the same controlled substance will not violate the Double Jeopardy Clause if the possessions are sufficiently differentiated by time, location, or intended purpose." Rashad v. Burt, 108 F.3d 677, 681 (6th Cir. 1997) (citing, among other decisions, Blakeney and Maldonado), cert. denied, 522 U.S. 1075 (1998); see ibid. (looking for "evidence in the record that either stash . . . was intended by [the applicant] to be dedicated to a specific distribution").

Nothing in the other decisions passingly cited by petitioner marks a division of authority. The Second Circuit's decision in United States v. McCourty, 562 F.3d 458 (cited at Pet. 14), cert. denied, 558 U.S. 1100 (2009), did not involve "'two counts'" or "'two crimes,'" but instead a situation in which the court viewed the government to have permissibly included "two independent bases or theories of liability" within a single charged drug offense.

Id. at 473 & n.4. And in United States v. Bennafield, 287 F.3d 320 (cited at Pet. 14-15), cert. denied 537 U.S. 961 (2002), the Fourth Circuit found that the "simultaneous possession of multiple packages of cocaine base in close proximity to one another" amounted to a single offense where one package of cocaine was seized from a van the defendant was driving, while the other was seized from the ground after the defendant threw it as he fled. Id. at 323; see ibid. (citing Eighth Circuit decision finding single offense where "officers stopped [the] defendant] leaving his hotel and found cocaine both on his person and under the bed in his hotel room"). That is different in kind from here, where discrete stashes of drugs were found in distinct locations at different times.

This Court "do[es] not grant * * * certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). Petitioner's fact-bound challenge to the unpublished and nonprecedential decision below does not provide any basis to deviate from that practice.

4. That is particularly so because this case would be a poor vehicle to consider the question presented for reasons even beyond its interlocutory posture. As petitioner himself acknowledges (Pet. 25-26), he did not raise his current contention to the district court, and it thus comes to this Court on plain error review. Fed. R. Crim. P. 52(b). And petitioner cannot show entitlement to plain-error relief.

Among other things, on petitioner's own account, there is circuit disagreement over the question presented, with the most on-point controlling authority supporting the decision below. Pet. 24-26 (citing United States v. Privett, 443 F.2d 528, 531 (9th Cir. 1971)). That alone would preclude him from satisfying the plain-error requirement to show a "clear or obvious" error not "subject to reasonable dispute," Puckett v. United States, 556 U.S. 129, 135 (2009); see, e.g., United States v. Bennett, 469 F.3d 46, 50 (1st Cir. 2006) ("In light of conflicting case law, any error that might have been committed by the district court was not 'obvious,' and therefore not plain error.") (citation omitted), cert. denied, 549 U.S. 1312 (2007).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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