No. 21-5714

IN THE SUPREME COURT OF THE UNITED STATES

JAYREN JAKAR WYNN, 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

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner's prior conviction for conspiring to distribute cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) and 846, is a "controlled substance offense" under Section 4B1.2(b) of the advisory Sentencing Guidelines.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Conn.):

United States v. Wynn, No. 18-cr-203 (Feb. 6, 2020)

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

United States v. Wynn, No. 20-588 (Apr. 1, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is not published in the Federal Reporter but is reprinted at 845 Fed. Appx. 63.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 2021. A petition for rehearing was denied on April 22, 2021 (Pet. App. B1). The petition for a writ of certiorari was filed on September 17, 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 District of Connecticut, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. C1. He was sentenced to 78 months of imprisonment, to be followed by three years of supervised release. Ibid. The court of appeals affirmed. Id. at A1-A8.

1. In July 2018, a loaded semi-automatic pistol was seized from a vehicle petitioner was driving. Plea Agreement 11. Petitioner admitted the firearm was his. Ibid. Petitioner knew that he had previously been convicted of a felony and was prohibited from possessing a firearm. Ibid.

Petitioner pleaded guilty to one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). 18-cr-203 Docket Entry No. 46 (Aug. 30, 2019). Before sentencing, the Probation Office determined that, pursuant to Sentencing Guidelines § 2K2.1(a)(2) (2018), petitioner had a base offense level of 24, because petitioner committed the "the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense." Presentence Investigation Report (PSR) ¶ 17; see Sentencing Guidelines § 2K2.1(a)(2) (2018). In particular, the Probation Office determined that petitioner's prior state conviction for assault in the first degree qualified as a crime of violence and that his prior federal conviction for conspiring to possess cocaine

base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) and 846, qualified as a controlled substance offense. PSR ¶¶ 17, 31, 32; see 12-cr-206 Judgment (D. Conn. Jan. 12, 2015).

Petitioner objected to the application of Guidelines Section 2K2.1(a)(2) on the theory that his prior conviction for conspiring to possess cocaine base with intent to distribute was not a "controlled substance offense" under the Guidelines. Pet. App. A3; see id. at A2-A3. An Application Note to Sentencing Guideline § 2K2.1 provides that for purposes of Section 2K2.1 "controlled substance offense" "has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2." Sentencing Guidelines § 2K2.1, comment. (n.1) (2018) (emphasis omitted). Section 4B1.2 of the Guidelines defines 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). Application Note 1 in the commentary to Section 4B1.2 states that the term "'controlled substance offense' include[s] the offense of aiding and abetting, conspiring, and attempting to commit such [an] offense[]." Id. § 4B1.2, comment. (n.1) (emphasis omitted).

Petitioner contended that his prior conviction for conspiring to possess cocaine base with intent to distribute was not a

controlled substance offense under the Guidelines, asserting that the text of Section 4B1.2(b) does not include conspiracy offenses. See, e.g., Sent. Tr. 21-27. The district court overruled that objection and adopted the presentence report's calculations at sentencing. Id. at 50. Based on those calculations, petitioner's advisory guidelines range was 70 to 87 months of imprisonment. Id. at 51; see PSR ¶ 58. The district court sentenced petitioner to 78 months of imprisonment, to be followed by three years of supervised release. Sent. Tr. 53; Pet. App. C1.

2. The court of appeals affirmed in an unpublished, per curiam summary order. Pet. App. A1-A8. The court rejected petitioner's challenge to the application of Section 2K2.1(a)(2), in which he asserted that his prior conviction for conspiring to possess cocaine base with intent to distribute was not a controlled substance offense under the Guidelines. Id. at A3-A5; Pet. C.A. Br. 11-34. Specifically, petitioner contended that the court "should disregard Application Note 1 because it improperly expands the bounds of the plain text of Section 4B1.2(b)." Pet. App. A4. The court observed that petitioner's argument was "foreclosed by [its] precedents." Ibid. (citing United States v. Richardson, 958 F.3d 151, 154 (2d Cir.), cert. denied, 141 S. Ct. 423 (2020); United States v. Tabb, 949 F.3d 81, 88 (2d Cir. 2020), cert. denied, 141 S. Ct. 2793 (2021); United States v. Jackson, 60 F.3d 128, 133 (2d Cir.), cert. denied, 516 U.S. 980 (1995), 516 U.S. 1130, and 516 U.S. 1165 (1996)).

ARGUMENT

Petitioner renews his contention (Pet. 4-10) that the district court erred in calculating his advisory Sentencing Guidelines range based on an enhancement that applies to defendants who commit certain firearm offenses after "sustaining at least two felony convictions of either a crime of violence or a controlled substance offense." Sentencing Guidelines § 2K2.1(a)(2) (2018). In particular, petitioner contends (Pet. 4-10) that his prior conviction for conspiracy to possess cocaine base with intent to distribute is not a "controlled substance offense," as that term is defined in Sentencing Guidelines § 4B1.2(b), because Application Note 1 impermissibly expands the definition set forth in the text of Section 4B1.2(b) to include inchoate offenses like conspiracy. This Court has recently denied multiple petitions for writs of certiorari raising similar challenges, including a petition seeking review of circuit precedent on which the summary order below relies. See United States v. Tabb, 949 F.3d 81 (2d Cir. 2020), cert. denied, 141 S. Ct. 2793 (2021) (No. 20-579); see also, e.g., United States v. Wiggins, 840 Fed. Appx. 498 (11th Cir.) (per curiam), cert. denied, 142 S. Ct. 139 (2021) (No. 20-8020); United States v. Kendrick, 980 F.3d 432 (5th Cir. 2020), cert. denied, 141 S. Ct. 2866 (2021) (No. 20-7667); United States v. Broadway, 815 Fed. Appx. 95 (8th Cir. 2020), cert. denied, 141 S. Ct. 2792 (2021) (No. 20-836). It should follow the same course here.

As explained at pages 9 to 27 of the government's brief in opposition in Tabb, petitioner's challenge to the validity of Application Note 1 is inconsistent with the text, context, and design of the Sentencing Guidelines § 4B1.2(b) and its commentary, see Br. in Opp. at 9-13, Tabb, supra (No. 20-579); is not supported by either Kisor v. Wilkie, 139 S. Ct. 2400 (2019), or other precedent of this Court, see Br. in Opp. at 13-17, Tabb, supra (No. 20-579); and is based on an incorrect understanding of Application Note 1 and its history, see id. at 18-23.* In addition, the same Application Note to Sentencing Guidelines § 2K2.1 that incorporates the challenged definition of "controlled substance offense" in Section 4B1.2(b) also explicitly incorporates "Application Note 1 of the commentary to § 4B1.2." Sentencing Guidelines § 2K2.1, comment. (n.1) (2018) (emphasis omitted). And in any event, the United States Sentencing Commission has already begun the process of addressing the recent disagreement in the courts of appeals over the validity of Application Note 1 to Section 4B1.2. See Br. in Opp. at 23-25, Tabb, supra (No. 20-579); see also, e.g., 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

* We have served petitioner with a copy of the government's brief in opposition in Tabb.

regains a quorum of voting members") (citing Braxton v. United States, 500 U.S. 344, 348 (1991)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2021