No. 05-54

In the Supreme Court of the United States

JON RILEY HAYS, 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

Petitioner pleaded guilty to tampering with a consumer product, in violation of 18 U.S.C. 1365(a)(4), and obtaining a controlled substance by fraud, in violation of 21 U.S.C. 843(a)(3). The question is whether petitioner's counsel provided constitutionally ineffective assistance by failing to advise petitioner that the government could not prove the jurisdictional element of the tampering charge; failing to advise petitioner that he could assert a defense of involuntary drug addiction to the Section 843(a)(3) charge; and forcing petitioner to plead guilty by threats and misrepresentations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 397 F.3d 564. The memorandum and order of the district court (Pet. App. 12a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2005. A petition for rehearing was denied on April 6, 2005 (Pet. App. 17a-18a). The petition for a writ of certiorari was filed on July 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Southern District of Illinois, petitioner was convicted of tampering with a consumer

product, in violation of 18 U.S.C. 1365(a)(4), and obtaining a controlled substance by fraud, in violation of 21 U.S.C. 843(a)(3). He was sentenced to 51 months of imprisonment. Petitioner did not take a direct appeal. Thereafter, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court denied that motion, Pet. App. 15a-16a, and the court of appeals affirmed, *id.* at 1a-11a.

1. Petitioner was a licensed physician who practiced medicine in Illinois. After he injured his back in a car accident, petitioner took OxyContin to relieve his pain and became addicted to the drug. Although the recommended oral dosage was 20 to 40 milligrams per day, petitioner would often inject himself daily with approximately 300 milligrams of the drug. Pet. App. 2a, 5a.

In order to obtain such a large quantity of OxyContin, petitioner prescribed it to his patients and then stole it from them during house calls. The government argued that petitioner crushed the OxyContin, dissolved the particles in a syringe, injected patients with only a portion of the dissolved drug, and retained for his own use both the syringe filled with the drug and some of the remaining tablets. Petitioner denied that he injected patients with the dissolved OxyContin, stating that he thought "crushing something . . . would be dangerous." Pet. App. 2a. Instead, petitioner claimed that he broke pills in half or prescribed more of the drug than the patient needed so that he could take some of the pills for himself. Petitioner also admitted that he injected some patients with a placebo so that he could inject the entire dose of OxyContin into himself. *Ibid.*

2. Petitioner was charged with tampering with a consumer product in violation of 18 U.S.C. 1365(a), which prohibits "tamper[ing] with any consumer product that

affects interstate or foreign commerce" with "reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk." He was also charged, in a separate count, with violating 21 U.S.C. 843(a)(3), which makes it a crime "knowingly and intentionally * * * to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge."

3. Petitioner pleaded guilty to both charges pursuant to a plea agreement. See Pet. App. 1a. Under that agreement, the government promised, in return for petitioner's guilty plea and cooperation, not to prosecute petitioner in the Southern District of Illinois for any other offense then known to the government or to become known to the government through petitioner's cooperation (Pet. C.A. App. C at 2), to recommend a sentence at the low end of the applicable range under the Sentencing Guidelines (*id.* at 6), and to recommend a three-level downward adjustment under Sentencing Guidelines § 3E1.1 for acceptance of responsibility (*id.* at 7).

At the subsequent change-of-plea proceeding, the district court ascertained that OxyContin is manufactured out of state, and therefore affects interstate commerce. Pet. C.A. App. A at 32; Pet. App. 20a. The court informed petitioner that if he pleaded guilty, he would be sentenced to prison, the sentence could be at the top of the applicable sentencing range of 51-63 months of imprisonment, and neither the court nor the attorneys could control the decision whether to place him in a drug program. *Id.* at 8a.

The court also asked petitioner whether defense counsel, the prosecutor, or anyone else had attempted

"to force" him or to "put undue pressure" on him to plead guilty. Petitioner responded, "[c]ertainly not my counsels, Judge." Pet. C.A. App. A at 22. He went on to state: "I certainly feel that the Government may attack me more vociferously on charges that probably have not much merit, but certainly I think that that is an action that they've not said so much that they would take, but that is certainly looming out there. It is a threat. I feel that this is something I had to accept, yes." *Ibid.*; Pet. App. 9a. In response to further inquiry by the court, petitioner stated: "[N]o, sir, nobody has quote-unquote twisted my arm to make this plea. This is done of my own free will." Pet. C.A. App. A at 24; Pet. App. 10a.

The district court accepted petitioner's plea and imposed concurrent sentences of 51 months of imprisonment for tampering with a consumer product and 48 months of imprisonment for obtaining a controlled substance by fraud. Pet. App. 1a.

4. Petitioner filed a pro se motion under 28 U.S.C. 2255 to vacate his sentence, alleging that his attorneys had rendered ineffective assistance in advising him to plead guilty. The district court denied that motion without holding an evidentiary hearing. See Pet. App. 15a-16a.

5. On appeal, petitioner argued that his guilty plea to the product tampering charge was not knowing and intelligent, and resulted from ineffective assistance of counsel, because he was unaware at the time he entered the plea that the interstate commerce element of the offense was not satisfied. Petitioner relied on the Tenth Circuit's decision in *United States* v. *Levine*, 41 F.3d 607 (1994), which held that, in order to satisfy the interstate commerce element, "the effect on interstate commerce must occur at or after the tainting." *Id.* at 613.

The court of appeals rejected that claim. Pet. App. 4a-7a. The court explained that because of petitioner's acts, pharmacies in Illinois were required to order OxyContin from Minnesota to replenish their supplies—an effect on interstate commerce. *Id.* at 6a. The court also declined to follow *Levine*, and stated that a violation of Section 1365(a) occurs "whether the tampering takes place before, during, or after the product moves in interstate commerce." *Ibid.*; see *id.* at 5a.

The court of appeals next rejected petitioner's claim that counsel misled him about his likely sentence. Pet. App. 7a-8a. It determined that the district court had correctly informed petitioner of the consequences of his plea and that counsel's advice to petitioner was not "objectively unreasonable" because petitioner could have received a "substantially higher" sentence if he had gone to trial. *Id.* at 8a.

Finally, the court of appeals rejected petitioner's claim that his guilty plea was involuntary because the government had threatened to add charges against him if he did not plead guilty. Pet. App. 9a-11a. The court relied on petitioner's representation to the district court that his guilty plea was an act of free will and on evidence of petitioner's guilt in the record. *Id.* at 10a-11a.

ARGUMENT

Petitioner contends (Pet. 11-15) that he received ineffective assistance of counsel. That claim lacks merit and does not warrant review.[1]

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[1] The petition does not present an issue under *United States* v. *Booker*, 125 S. Ct. 738 (2005), because, as part of the plea agreement, petitioner waived both the right to a jury trial and the right to challenge his sentence on direct appeal or collateral review. Pet. C.A. App. C at

1. Petitioner argues primarily (Pet. 8-13) that his misconduct did not satisfy the interstate commerce element of Section 1365(a) and that his counsel incompetently failed to learn or advise him of that fact. To obtain reversal of a conviction based on ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced as a result. *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). There is a "strong presumption" that counsel's performance "falls within the wide range of reasonable professional assistance." *Id.* at 689. Moreover, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985).

a. Because petitioner's misconduct affected interstate commerce, his counsel did not act unreasonably, and certainly did not cause him any prejudice, by failing to advise him to the contrary. Congress prohibited "tamper[ing] with any consumer product that affects interstate or foreign commerce." 18 U.S.C. 1365(a). OxyContin is a consumer product that affects interstate commerce because it is shipped in interstate commerce from its place of manufacture in Minnesota to other States, in this case Illinois. See Pet. App. 5a. As the court of appeals explained, petitioner's unlawful scheme therefore required "pharmacies in Illinois * * * to order more OxyContin from Minnesota to replenish their supplies." *Id.* at 6a; accord *United States* v. *Moyer*, 182

3, 9; see Pet. App. 8a n.1 (noting that *Booker* "is not implicated in this case").

F.3d 1018, 1021 (8th Cir. 1999) (upholding Section 1365(a) conviction of physician who stole morphine from patients and replaced it with saline solution because the theft "contributed to the depletion of the hospital's morphine supply, which in turn required the hospital to order additional morphine" from out of state), cert. denied, 530 U.S. 1203 (2000).

b. Petitioner argues that Section 1365(a) should be read narrowly to require that "the effects on interstate commerce [must] occur either at the time of or after the tampering, but not before." Pet. 8 (quoting *United States* v. *Levine*, 41 F.3d 607, 613 (10th Cir. 1994)). He contends (Pet. 9) that under the Tenth Circuit's decision in *Levine*, "the place of manufacture of the consumer product has nothing to do with a § 1365 violation."

Petitioner overreads *Levine*. Although the Tenth Circuit stated in that case that "the effect on interstate commerce must occur at or after the tainting" of the product, it made clear that the interstate commerce element is nonetheless satisfied if: (i) "the product was in interstate commerce at the time of tainting"; (ii) the product "was returned to interstate commerce" after the tainting; or (iii) "there was an actual impact on interstate commerce as a result of the tainting." 41 F.3d at 614-615. The Tenth Circuit noted that—unlike the OxyContin at issue here—the product at issue there, a can of Diet Pepsi, "never left Colorado during its existence." *Id.* at 614 n.8. Nonetheless, the court held that the evidence was sufficient to support the conviction of a person who had purchased and then tainted a can of Diet Pepsi and reported the tainted can to the media. The court explained that the interstate commerce element was satisfied because, as a result of the defen-

dant's misconduct, future sales of Diet Pepsi in interstate commerce would decline. *Id.* at 615.

There is no square conflict between *Levine* and the decision below. Both courts of appeals held that the interstate commerce element was satisfied because "there was an actual impact on interstate commerce as a result of the tainting." *Levine*, 41 F.3d at 614-615. The Tenth Circuit explained that Levine caused Diet Pepsi sales to decline, *id.* at 615, while the Seventh Circuit explained that petitioner caused pharmacies in Illinois to order OxyContin from Minnesota, Pet. App. 6a. Because the Seventh Circuit's supply-and-demand analysis does not focus solely on *past* effects on interstate commerce, it is not in conflict with the Tenth Circuit's approach.[2]

Thus, although the court of appeals stated that it was declining to follow *Levine* and held that "a violation of § 1365(a) occurs whether the tampering takes place before, during, or after the product moves in interstate commerce," Pet. App. 6a, that methodological disagree-

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[2] Petitioner contends (Pet. 10) that Illinois pharmacies did not need to replenish their supplies of OxyContin because his patients (to whom he prescribed the drug) "did not need it in the first place." Even assuming *arguendo* that the patients had no need for OxyContin or some other pain medication manufactured out of state, the net effect of petitioner's scheme was still to increase demand for OxyContin in Illinois, with the inevitable effect that more OxyContin had to be shipped from Minnesota to Illinois. See *Moyer*, 192 F.3d at 1021-1022 (holding that it was irrelevant whether patients' use of morphine would have resulted in same depletion of supply as doctor's theft, because "[t]he fact remains that [the doctor] stole the morphine * * * and the reduction in supply was thus a result of her actions and not theirs"). Although petitioner claims (Pet. 10) that there is no record evidence to that effect, petitioner's guilty plea relieved the government of the burden of presenting evidence at trial, and the record does reflect that OxyContin is manufactured out of state. Pet. App. 20a.

ment has no significance in this case. Nor is it clear that the disagreement will be dispositive in other cases, given the fact-specific nature of the inquiry and the infrequency with which the issue arises. Indeed, *Levine* and the decision below are the only cases cited by petitioner on this issue, and both held that the interstate commerce element was satisfied.

c. To the extent that there is a methodological disagreement between the Seventh and Tenth Circuits, the decision below is correct that "a violation of § 1365(a) occurs whether the tampering takes place before, during, or after the product moves in interstate commerce." Pet. App. 6a. Congress broadly prohibited "tamper[ing] with any consumer product that affects interstate or foreign commerce." 18 U.S.C. 1365(a). Congress's use of the term "affects" commerce is significant, because the phrase "affecting commerce * * * normally signals Congress' intent to exercise its Commerce Clause powers to the full." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995); see *Russell* v. *United States*, 471 U.S. 858, 859 (1985); *Scarborough* v. *United States*, 431 U.S. 563, 571 (1977).

For that reason, this Court has long construed an analogous statute prohibiting felons from possessing firearms "in or affecting commerce" (18 U.S.C. 922(g)(1)) to require only "the minimal nexus that the firearm have been, *at some time*, in interstate commerce." *Scarborough*, 431 U.S. at 575 (emphasis added). Proof that a gun traveled in interstate commerce *before* the offense is therefore sufficient to satisfy the "affecting commerce" element of a felon-in-possession charge. See *ibid*. The same analysis applies here: at a minimum, Section 1365(a) prohibits tampering with consumer products once they enter the stream of com-

merce, regardless of whether the tampering causes some additional effect on interstate commerce. Here, that means that petitioner violated the statute by tampering with OxyContin tablets after they had traveled in interstate commerce.

d. In light of that analysis, counsel did not render deficient performance in advising petitioner to plead guilty instead of pursuing an unmeritorious jurisdictional defense at trial. Indeed, counsel would have been derelict in advising petitioner to go to trial based on *Levine*, given that petitioner's conduct affected interstate commerce even under the analysis in that case. In any event, further review of the fact-specific questions whether the interstate commerce element is satisfied in this case, whether counsel acted unreasonably in recommending that petitioner accept the benefits of a plea bargain instead of attempting to prevail at trial on that issue, and whether any unreasonable performance resulted in prejudice, is not warranted.

2. Petitioner also argues (Pet. 13) that his counsel should have advised him that he could have asserted a defense of involuntary drug addiction to the charge of obtaining a controlled substance by fraud in violation of 21 U.S.C. 843(a)(3). Petitioner did not raise that contention in the court of appeals, and that court did not address it. To the contrary, petitioner *conceded* in the court of appeals that he "violated 21 U.S.C. § 843(a)(3)." Pet. C.A. Reply Br. 11; accord *id.* at 8 n.4 ("Dr. Hays is not challenging his conviction on Count 2 except to the extent that he was sentenced to the statutory maximum on Count 2 because of the greater sentence received on Count 1."). Review should be denied for that reason alone. See, *e.g.*, *Adarand Constructors, Inc.* v. *Mineta*,

534 U.S. 103, 109 (2001); *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

Moreover, involuntary drug or alcohol addiction is not, standing alone, a valid defense. In addition to showing that he became addicted involuntarily, petitioner would have to show that at the time of the offense he did not know the nature and quality of his acts or know that those acts were wrong. See, *e.g.*, *United States* v. *F.D.L.*, 836 F.2d 1113, 1116-1117 (8th Cir. 1988). Petitioner could not possibly prevail on such a defense, in part because his own testimony demonstrates that he retained the capacity to make moral distinctions. For example, petitioner stated at the change-of-plea hearing that crushing OxyContin was something that he "would have never done" because it would have been "dangerous" for his patients. Pet. C.A. App. A at 35; Pet. App. 21a. At sentencing, petitioner similarly stated that he broke OxyContin tablets in half because he believed, based on consultation with a pharmacist, that doing so would not be harmful to his patients. Pet. C.A. App. B at 9-10. Counsel did not act unreasonably in failing to advise petitioner of an untenable defense, and knowledge of such a defense could not plausibly have motivated petitioner to plead not guilty. In any event, such a fact-bound claim does not warrant further review. See Sup. Ct. R. 10.[3]

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[3] Although the petition for a writ of certiorari appears to raise only an ineffective-assistance-of-counsel claim, some language in the petition might be construed to raise a separate attack on the plea based upon the contention that petitioner's plea was unintelligent and involuntary because he did not understand the elements of the crime. See Pet. 14, 15. Such a claim would be procedurally defaulted because petitioner failed to raise it on direct appeal. See *Bousley* v. *United States*, 523 U.S. 614, 621 (1998). Because petitioner cannot show any cause for that

3. Finally, petitioner claims (Pet. 13, 14), without elaboration, that "it is undisputed" that defense counsel used threats and misrepresentations to persuade him to plead guilty. As the court of appeals explained, the record does not support that claim. See Pet. App. 9a-11a. At the change-of-plea proceeding, the district judge asked petitioner whether anyone, including defense counsel, had "attempted in any way to force" him or to "put undue pressure" on him to plead guilty, and petitioner answered, "[c]ertainly not my counsels, Judge." Pet. C.A. App. A at 22. Petitioner stated in response to further questioning from the court that "nobody has * * * twisted my arm to make this plea," and that he was pleading guilty "of my own free will." *Id.* at 24; Pet. App. 10a.

Nor is petitioner entitled to relief on the ground that counsel provided him with incorrect information. Petitioner argued below that counsel erroneously told him that he would receive a prison sentence of 10-20 years if he did not plead guilty, and that a guilty plea would probably result in little or no prison time. Pet. App. 31a. Even assuming *arguendo* that counsel made those representations, both the plea agreement (Pet. C.A. App. C at 6) and the district court at the change-of-plea proceeding (Pet. C.A. App. A at 15; Pet. App. 8a) correctly informed petitioner that, barring a departure, his sentence under the Sentencing Guidelines would be 51-63 months. The district court emphasized to petitioner that he was "looking at prison time * * *, not probation" (Pet. C.A. App. A at 10), and later imposed the lowest

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failure, he would bear the burden of proving that he is actually innocent. *Id.* at 622. Petitioner cannot carry that burden. His sole claims of innocence (*i.e.*, challenges to the interstate commerce element and mental state element) lack merit for the reasons explained above.

sentence (51 months) in the range explained to petitioner. See Pet. App. 1a.

Accordingly, at the time he pleaded guilty, petitioner had an accurate understanding of the consequences of his plea. Especially in view of the benefits of the plea (including a substantial reduction in the likely sentence, see Pet. App. 8a), and the strength of the government's case (which would have included eyewitness testimony of the patients petitioner victimized, see Pet. C.A. App. A at 31), the allegedly erroneous representations of counsel could not have affected petitioner's decision to plead guilty. In any event, petitioner's fact-bound claims do not warrant further review. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2005