No. 09-1533

In the Supreme Court of the United States

FRANTZ DEPIERRE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was correctly sentenced under the provisions of 21 U.S.C. 841(b) that govern offenses involving "cocaine base" as opposed to other forms of cocaine.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 599 F.3d 25.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2010. The petition for a writ of certiorari was filed on June 15, 2010. 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 District of Massachusetts, petitioner was convicted of distribution of powder cocaine, in violation of 21 U.S.C. 841(a)(1), and distribution of 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1)

and 841(b)(1)(A)(iii).[1] He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. Pet. App. 1a, 15a; C.A. R. App. 25-26, 28 (R.A.). The court of appeals affirmed. Pet. App. 1a-12a.

1. Under 21 U.S.C. 841(b)(1), the penalties for controlled-substance offenses identified in 21 U.S.C. 841(a) vary according to the type and quantity of controlled substance involved. Section 841(b)(1)(A)(ii) provides for a sentence of between ten years and life for a defendant who commits an offense involving five kilograms or more of a mixture or substance containing a detectable amount of "coca leaves," "cocaine, its salts, optical and geometric isomers, and salts of isomers," or "ecgonine, its derivatives, their salts, isomers, and salts of isomers." Section 841(b)(1)(A)(iii) provides for the same sentence for a defendant who commits an offense involving 50 grams or more of "a mixture or substance described in clause (ii) which contains cocaine base." Similarly, Section 841(b)(1)(B)(iii) provides for a sentence of between five years and 40 years for a defendant who commits an offense involving five grams or more of cocaine base, while 500 grams or more of other forms of cocaine are required under Section 841(b)(1)(B)(ii).[2]

2. In January 2005, petitioner called a man who proved to be a confidential informant (CI) for the gov-

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[1] Before trial, petitioner pleaded guilty to possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k), and three other firearms charges were dismissed. Pet. App. 2a-3a.

[2] Congress recently passed legislation amending Section 841(b)(1)(A)(iii) to require 280 grams of cocaine base (as opposed to 50 grams) to trigger the ten-year mandatory minimum sentence, and Section 841(b)(1)(B)(iii) to require 28 grams of cocaine base (as opposed to five grams) to trigger the five-year mandatory minimum sentence. See Fair Sentencing Act of 2010, S. 1789, 111th Cong. § 2(a) (enacted).

ernment and offered to sell him crack cocaine. In a follow-up call initiated by the CI, petitioner confirmed that he had "the cookies," a slang term for crack cocaine, but also used the word "riggedy," a slang term for powder cocaine. The CI asked petitioner if he could "chef [the cocaine] up," meaning to cook it into crack, and petitioner said he would. Gov't C.A. Br. 4-5 (brackets in original); Pet. App. 2a.

Despite the CI's request that petitioner "chef up" the cocaine, petitioner sold him only powder cocaine at their first meeting on February 8, 2005. During subsequent conversations, the CI specified that next time he wanted crack cocaine, not powder cocaine. The CI met with petitioner a few days later, but petitioner could not sell the CI crack at that time because he had left the equipment needed for cooking powder into crack at his girlfriend's house. Gov't C.A. Br. 5-6.

In March 2005, petitioner and the CI continued to discuss another drug deal, with the CI asking for "flago," another slang term for crack cocaine, stating that he wanted petitioner to "chef it," and emphasizing that he did not want cocaine powder. On April 5, 2005, petitioner sold the CI two bags of drugs for $1800. Gov't C.A. Br. 6-8. The bags contained an off-white colored chunky substance. Gov't C.A. Supp. App. 298, 336. Laboratory testing determined that the bags contained cocaine base and had a total weight of 55.1 grams, with a purity level of 40%. Pet. App. 2a; Gov't C.A. Br. 8; Gov't C.A. Supp. App. 331-335. Inositol was found mixed in the substance; sodium bicarbonate was not found in detectable amounts. Gov't C.A. Supp. App. 342-345.

3. Petitioner went to trial on two drug counts: one charging distribution of powder cocaine, and one charg-

ing distribution of 50 grams or more of cocaine base. Pet. App. 1a-3a.

a. At trial, petitioner asked the district court to instruct the jury that to find him guilty of distribution of cocaine base it had to find beyond a reasonable doubt that petitioner "distributed the form of cocaine base known as crack cocaine. 'Crack' is a street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form. * * * Chemical analysis cannot establish a substance as crack because crack is chemically identical to other forms of cocaine base, although it can reveal the presence of sodium bicarbonate, which is usually used in the processing of crack." R.A. 53-54. At the instructions conference, petitioner reiterated his position that the reference to "cocaine base" in 21 U.S.C. 841(b)(1)(A)(iii) required the jury to find that he possessed "crack cocaine." Gov't C.A. Supp. App. 358.

The district court rejected petitioner's proposed instruction, holding, based on First Circuit precedent, that cocaine base is "the non-hydrochloride form of cocaine, which may or may not manifest itself in something that's been identified as crack cocaine." Gov't C.A. Supp. App. 359. The court instructed the jury that "the statute that's relevant asks about cocaine base. * * * Crack cocaine is a form of cocaine base, so you'll tell us whether or not what was involved is cocaine base." *Id.* at 428. The jury convicted petitioner on both counts, and found that he had distributed 50 grams or more of "cocaine base." Pet. App. 1a; Verdict 2.

b. The Presentence Investigation Report (PSR) calculated petitioner's offense level under Sentencing Guidelines § 2D1.1 (2006) based, in part, on the determi-

nation that petitioner was responsible for 55.1 grams of "cocaine base." PSR ¶¶ 21-22. For the purpose of that Guidelines provision, "[c]ocaine base" is defined to mean "crack," *i.e.*, "the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." Sentencing Guidelines § 2D1.1 (Drug Quantity Table, Note D). Under the Drug Equivalency Table (Sentencing Guidelines § 2D1.1 (Note E)), one gram of cocaine is equal to 200 grams of marijuana, whereas one gram of "cocaine base" (*i.e.*, crack cocaine) is equal to 20 kilograms of marijuana (or 20,000 grams). PSR ¶ 22. The PSR held petitioner accountable for 61.7 grams of cocaine (the equivalent of 12.34 kilograms of marijuana) and 55.1 grams of crack cocaine (the equivalent of 1102 kilograms of marijuana), for a total marijuana equivalency of 1114.34 kilograms. *Ibid.* Based on that calculation, and after a reduction under Application Note 10(D)(ii), petitioner's offense level was 30. *Id.* ¶¶ 23, 24, 29, 46. Combined with a criminal history category of III, petitioner's advisory guidelines range was 121 to 151 months of imprisonment. *Id.* ¶¶ 55, 93. Petitioner raised no objection to the calculation or to the advisory guidelines range.

At sentencing, the district court agreed that 121 to 151 months was the applicable advisory guidelines range based on petitioner's offense—"dealing in crack cocaine." Sent. Tr. 39-40; *id.* at 41 (acknowledging that petitioner got "himself into the 121 to 151 Guideline" by "deal[ing] in crack cocaine and guns"). Petitioner again raised no objection. The court ultimately sentenced petitioner to the statutory mandatory minimum sentence of 120 months of imprisonment. *Id.* at 43.

4. The court of appeals affirmed. Pet. App. 1a-12a. As relevant here, the court recognized that some courts of appeals had concluded "that the statute should be read to apply only to that form of cocaine base called crack." *Id.* at 9a & n.3. Although the court of appeals noted that "some evidence indicates the substance here was crack and at sentencing the judge repeatedly referred to it as crack," the court did not rely on that as a basis for decision. *Id.* at 10a. Instead, the court of appeals concluded that the district court correctly instructed the jury and imposed the mandatory minimum sentence based on First Circuit precedent holding that cocaine base referred to "all forms of cocaine base, including but not limited to crack cocaine." *Id.* at 10a-12a. The court also suggested that the conflict among the courts of appeals on this "issue does need resolution by the Supreme Court"—"at least in a case where its resolution matters." *Id.* at 11a-12a.

ARGUMENT

Petitioner contends (Pet. 13-27) that the term "cocaine base" in Section 841(b)(1) is limited to "crack" and that, as a result, he was not subject to a mandatory ten-year term of imprisonment. The court of appeals correctly rejected that claim. And although there is a circuit conflict about the meaning of the term "cocaine base" in Section 841(b)(1), this case would not be an appropriate one in which to resolve that conflict.

1. The court of appeals correctly rejected petitioner's claim that 21 U.S.C. 841(b)(1)(A)(iii) reaches only crack. See Pet. App. 10a-11a & n.4 (citing, *inter alia*, *United States* v. *Anderson*, 452 F.3d 66, 86-87 (1st Cir.), cert. denied, 549 U.S. 1068 (2006)). Although the statute does not define "cocaine base," it is "a chemical term

* * * whose meaning is undisputed in the scientific community." *United States* v. *Jackson*, 968 F.2d 158, 163 (2d Cir.), cert. denied, 506 U.S. 1024 (1992). "Cocaine base" is defined by the formula $C_{17}H_{21}NO_4$, and is readily identifiable by chemical analysis. It is distinct from cocaine hydrochloride (powder cocaine), and the two substances have "different solubility levels, different melting points and different molecular weights." *Id.* at 161. "Crack" is "the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate[] and usually appearing in a lumpy rocklike form." Sentencing Guidelines § 2D1.1 (2006) (Drug Quantity Table, Note D); see *ibid.* (defining "[c]ocaine base" as "crack" for purposes of the advisory Sentencing Guidelines).

Although the legislative history reflects that Congress "was concerned with the scourge of 'crack'" (*Jackson*, 968 F.2d at 162) when it enacted the enhanced penalties for "cocaine base" in Section 841(b)(1), nothing in the statute suggests that Congress used the term "cocaine base" to refer only to a certain form of that substance. Rather "[t]he only proper inference [to] draw from Congress' use of the chemical term 'cocaine base,' without explanation or limitation, is that [Congress] intended the term to encompass all forms of cocaine base." *United States* v. *Barbosa*, 271 F.3d 438, 466 (3d Cir. 2001), cert. denied, 537 U.S. 1049 (2002); see *Jackson*, 968 F.2d at 161 (stating that "[w]here Congress has used technical words or terms of art, 'it [is] proper to explain them by reference to the art or science to which they [are] appropriate'" (brackets in original) (quoting *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 201 (1974)). In addition, "nothing in the legislative history [of 21 U.S.C. 841(b)(1)] indicates that Congress intended 'co-

caine base' to be limited to crack cocaine." *United States* v. *Easter*, 981 F.2d 1549, 1588 n.7 (10th Cir. 1992), cert. denied, 508 U.S. 953 (1993). Section 841(b)(1) thus "regulates exactly what its terms suggest: the possession of any form of 'cocaine base.'" *United States* v. *Medina*, 427 F.3d 88, 92 (1st Cir. 2005), cert. denied, 552 U.S. 880 (2007).

2. Petitioner correctly notes (Pet. 13-17) that there is a conflict in the circuits on whether the term "cocaine base" in Section 841(b)(1) reaches forms of cocaine base other than crack. In addition to the First Circuit, five other circuits have held that the statutory term covers all forms of cocaine base. See *Jackson*, 968 F.2d at 161-162 (2d Cir.); *Barbosa*, 271 F.3d at 467 (3d Cir.); *United States* v. *Ramos*, 462 F.3d 329, 333-334 (4th Cir.), cert. denied, 549 U.S. 1065 (2006); *United States* v. *Butler*, 988 F.2d 537, 542-543 (5th Cir.), cert. denied, 510 U.S. 956 (1993); *Easter*, 981 F.2d at 1588 (10th Cir.). Four circuits, by contrast, have held that only crack qualifies as "cocaine base" for purposes of Section 841(b)(1). See *United States* v. *Higgins*, 557 F.3d 381, 395 (6th Cir.), cert. denied, 130 S. Ct. 817 (2009); *United States* v. *Hollis*, 490 F.3d 1149, 1156 (9th Cir. 2007), cert. denied, 552 U.S. 1166 (2008); *United States* v. *Edwards*, 397 F.3d 570, 576 (7th Cir. 2005); *United States* v. *Munoz-Realpe*, 21 F.3d 375, 377-378 (11th Cir. 1994). The D.C. Circuit has held that "cocaine base" as used in Section 841(b)(1) does not encompass all forms of cocaine base, but it has not decided whether the term is limited only to crack. See *United States* v. *Brisbane*, 367 F.3d 910, 914 ("'[C]ocaine base' could mean only crack. * * * But this approach may be too narrow."), cert. denied, 543 U.S. 938 (2004). The Eighth Circuit has not yet decided the issue. See *United States* v. *Robinson*, 462

F.3d 824, 826 (2006) (explaining that the court "need not decide" the question), cert. denied, 549 U.S. 1172 (2007); *United States* v. *Williams*, 557 F.3d 556, 562-563, cert. denied, 130 S. Ct. 237 (2009).

3. This case would not be an appropriate vehicle for resolving the conflict among the courts of appeals on whether the term "cocaine base" in 21 U.S.C. 841(b)(1) is limited to crack, because the arguments and evidence at trial and the district court's findings at sentencing show that the substance in this case was, in fact, crack.[3] In his opening statement, petitioner's counsel specifically argued that the government had entrapped petitioner into selling crack. See, *e.g.*, Gov't C.A. Supp. App. 18 ("you're going to hear it's not right for the Government to get you to sell crack cocaine when you were never going to do that"); *id.* at 19 ("what you'll see is an experienced, manipulative drug dealer, [the CI], encouraging [petitioner] to sell him crack; specifically, crack cocaine."). In his questions at trial, petitioner's counsel again characterized the substance at issue as crack cocaine. See, *e.g.*, *id.* at 115 ("When you met back up at the staging area, you took the crack cocaine from [the CI]?"); *id.* at 210 ("And you eventually get some crack from [petitioner]?").

The evidence at trial overwhelmingly confirmed counsel's implicit concession. The CI and petitioner specifically discussed the sale of crack on multiple occasions,

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[3] Petitioner acknowledges (Pet. 20 n.10) that this Court has often and recently denied certiorari on this question, and his efforts to distinguish those cases fall short. The Court has denied certiorari in cases where resolution of the circuit conflict would not lead to a different result. See, *e.g.*, *Anderson*, 549 U.S. 1068 (2006) (cited at Pet. 21 n.10); *Evans* v. *United States*, 129 S. Ct. 452 (2008) (Gov't Br. at 6, *Evans*, *supra* (No. 08-5001)). The same is true in this case.

see Gov't C.A. Supp. App. 28, 52, 98-99, 110-114, 124-125, 149-150, 155-158, 165-166, 173-174, but never mentioned freebase, coca paste, or coca leaves. *Id.* at 245 ("Q. You were always clear with him: I want crack, right? A. That's correct."). The case agent testified that after the April 5, 2005 meeting with petitioner the CI provided him with "two separate ounces of crack cocaine." *Id.* at 51, 54. The CI testified that the substance he received from petitioner was crack cocaine. *Id.* at 183-188, 269. The task force agent who received the substance from the CI testified that it was "an off-white colored chunky substance." *Id.* at 298. That physical description is consistent with the characteristics that courts adopting petitioner's proposed definition of "cocaine base" for purposes of 21 U.S.C. 841(b)(1) have identified as evidence of crack cocaine. See *Edwards*, 397 F.3d at 574 (describing crack as a cocaine mixture boiled into a "rocklike substance"); *Munoz-Realpe*, 21 F.3d at 377 (describing crack as usually appearing "in a lumpy, rocklike form"); see also Sentencing Guidelines § 2D1.1 (Drug Quantity Table, Note D) (describing "crack" as "usually appearing in a lumpy, rocklike form").[4]

Consistent with the evidence at trial, the PSR characterized the substance at issue as crack cocaine (PSR ¶¶ 21-22), and calculated petitioner's advisory guidelines range based on that characterization. Petitioner did not challenge that characterization at sentenc-

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[4] Petitioner's claim (Pet. 11 n.5) that the evidence "would not have supported a finding that [his] offense involved crack cocaine" because "baking soda would have been present if the substance had been crack cocaine" is simply wrong. Although crack is usually prepared with baking soda, any weak base can be used and thus the presence of baking soda is not necessary to support a finding that a substance is crack. See *United States* v. *Gonzalez*, 608 F.3d 1001, 1004 (7th Cir. 2010).

ing, nor did he object to the advisory guidelines range. To the contrary, in his sentencing memorandum, petitioner argued that he "relented to the cooking of crack cocaine upon the [CI's] insistence," and criticized the government for "getting [him] to sell crack cocaine." R.A. 57-58, 60. During the sentencing hearing, both the district court and petitioner's counsel repeatedly referred to the substance as "crack cocaine." See, *e.g.*, Sent. Tr. 17 (Court: "he, in fact, delivered crack cocaine."); *id.* at 19 (Petitioner's counsel: "the only reason he was providing crack cocaine * * * is because the government * * * insisted on that."); *id.* at 28 (Petitioner's counsel: "they get him to sell 50 grams of crack cocaine."); *id.* at 39 (Court: "There's nothing surprising about his delivery of crack cocaine. He said he could do it and he did ultimately."). And, before sentencing petitioner, the district court adopted the PSR's advisory guidelines range of 121 to 151 months—based on a finding that petitioner had been "dealing in crack cocaine." Sent. Tr. 39-40; *id.* at 41 (acknowledging that petitioner got "himself into the 121 to 151 Guideline" by "deal[ing] in crack cocaine and guns").

Even now, although petitioner speaks of other types of "cocaine base" such as freebase, coca paste, or coca leaves, he never suggests that the substance he sold to the CI was any of the above. Cf. *United States* v. *Gonzalez*, 608 F.3d 1001, 1005 (7th Cir. 2010) (finding "sufficient expert evidence * * * that the sale of any form of cocaine base other than crack is rare"); *Brisbane*, 367 F.3d at 914 (noting that freebase cocaine is dangerous to manufacture and expensive, and that "cocaine paste smoking never caught on in the United States"). Because the district court found the substance to be crack cocaine, because petitioner acquiesced in that finding,

and because the evidence at trial supports that conclusion, this case is not a suitable vehicle to resolve the conflict among the courts of appeals.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
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AUGUST 2010

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[5] Petitioner complains only about his mandatory minimum sentence. This Court has made clear that facts that raise a mandatory minimum sentence within an otherwise-authorized statutory range may constitutionally be found by the court by a preponderance of the evidence. See *Harris* v. *United States*, 536 U.S. 545, 568 (2002). In any case, petitioner does not argue in his petition for a writ of certiorari that the *jury* was required to find that the substance was "crack."