

IN THE SUPREME COURT OF THE UNITED STATES

MARK ANTHONY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming petitioner's recidivism-enhanced sentence for drug possession in the absence of a notice of enhancement filed "before trial," 21 U.S.C. 851(a)(1), where the indictment charged a greater-included offense with a substantially higher sentencing range; the relevant prior conviction was identified in the indictment in relation to another count; and the lesser-included drug-possession offense was submitted to the jury at petitioner's request, just before closing arguments, over the government's objection.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is not published in the Federal Reporter but is reprinted at 737 Fed. Appx. 741. The order of the district court (Pet. App. B1-B7) is not published in the Federal Supplement but is available at 2017 WL 1948606.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2018. A petition for rehearing was denied on August 28, 2018 (Pet. App. C1). The petition for a writ of certiorari was filed on

November 19, 2018. 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 Southern District of Ohio, petitioner was convicted of possession of cocaine base, in violation of 21 U.S.C. 844(a). Pet. App. 1. He was sentenced to 18 months of imprisonment, to be followed by one year of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A15.

1. In 2015, Columbus Police Department officers arrested petitioner in his home after responding to a report of an altercation there. Pet. App. A2. While doing so, they saw in plain view a plastic bag containing cocaine base, a digital scale, and an open box of plastic sandwich bags. Ibid. After obtaining a warrant to search the home, officers also recovered two guns, ammunition, and additional drug paraphernalia. Ibid.; Gov't C.A. Br. 5.

A grand jury in the United States District Court for the Southern District of Ohio charged petitioner with two counts of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), and one count of possession of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Superseding Indictment 1-3. The superseding indictment identified a prior Ohio felony

conviction for drug trafficking as a predicate offense for petitioner's firearm and ammunition charges. Id. at 1-2.

2. The case went to trial in November 2016. Pet. App. B2. Just before closing arguments, petitioner's counsel asked the district court to instruct the jury on the lesser-included offense of simple drug possession, in violation of 21 U.S.C. 844(a), as an alternative to the charged offense of possession of cocaine base with the intent to distribute it. Pet. App. B2. Over the government's objection, the court instructed the jury that it could convict petitioner of the lesser-included offense of simple drug possession. Ibid. The jury found petitioner guilty of that offense and found him not guilty of the firearm and ammunition charges. Ibid.

Drug possession in violation of 21 U.S.C. 844(a) is punishable by up to one year of imprisonment, with an increased range of 15 days to two years if the offender had a prior conviction for a drug-related offense. 21 U.S.C. 844(a). Prior to sentencing, the Probation Office prepared a presentence report stating that petitioner's prior Ohio drug-trafficking conviction rendered him eligible for the higher sentencing range. Pet. App. A12. In its post-trial sentencing memorandum, the government sought a 21-month sentence, within the range triggered by the prior conviction -- which the superseding indictment had alleged as a predicate offense for petitioner's firearm and ammunition charges -- and within the

guidelines range for petitioner's drug-possession offense. Gov't Sentencing Mem. 1, 3.

The district court imposed an 18-month sentence. Pet. App. A3. In doing so, it rejected petitioner's argument that the district court could not impose a sentence of more than a year because the government had not filed a notice of enhancement under 21 U.S.C. 851(a)(1). Pet. App. B3. Section 851(a)(1) states that a person convicted of certain drug offenses, including drug possession in violation of Section 844(a), shall not receive a statutory enhancement based on a prior conviction "unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." The court explained that, in the circumstances of this case, "the Government could not have filed an information before trial, as required under § 851(a)(1), because the § 844(a) possession count was only added to the case during the jury charging conference, which was held after the start of trial." Id. at B5. It also determined that the government had provided petitioner with reasonable notice of the possible enhancement, and therefore satisfied Section 851(a)(1)'s requirements, because the superseding indictment had alleged in the firearm and ammunition counts that petitioner had been convicted of the Ohio drug offense that served as the prior

conviction triggering the sentencing enhancement under Section 844(a). Id. at B6.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A15. The court noted that "the government did not, prior to trial, file a § 851 information announcing its intent to seek an enhancement and indicating the predicate conviction to support it." Id. at A10. The court reasoned, however, that Section 851's notice requirement should be understood "so as to avoid elevating form over substance." Id. at A11 (quoting United States v. Layne, 192 F.3d 556, 576 (6th Cir. 1999), cert. denied, 529 U.S. 1029 (2000)). The court observed that petitioner did not argue that he was "surprised that the government knew of his earlier drug conviction," because "his prior conviction was included in the indictment as the predicate for the weapons charges on which he went to trial." Id. at A12. The court further observed that petitioner did not "argue that he lacked the opportunity to challenge the old conviction's validity." Ibid. The court therefore determined that petitioner had "reasonable notice and an opportunity to be heard regarding the possibility of an enhanced sentence," which is "all that due process and Section 851(a) require." Id. at A13 (quoting United States v. Boudreau, 564 F.3d 431, 436 (6th Cir.), cert. denied, 558 U.S. 1062 (2009)).

The court of appeals also determined, in the alternative, that any noncompliance with Section 851(a)(1) was harmless under the circumstances. Pet. App. A13-A14. The court reiterated that

petitioner knew that the government was aware of his prior drug-trafficking conviction and that he received reasonable notice of the government's intention to seek a sentencing enhancement based on that conviction. Id. at A14. The court observed that although the government did not provide such notice before trial, "the government had no reason to seek the enhancement until after [petitioner] himself moved for the jury to consider a new charge." Id. at A14 n.2. The court also observed that petitioner had the opportunity to challenge the sentencing enhancement in the district court, and that he never contended that his prior drug conviction was an invalid basis for the enhancement. Id. at A14. Finding "no harm to [petitioner's] substantial rights on these facts," the court of appeals determined that petitioner's claim fails "under harmless-error analysis just as it does under [the court of appeals'] cases interpreting the requirements of § 851." Ibid.

ARGUMENT

Petitioner contends (Pet. 1-16) that the court of appeals erred in affirming his sentence on his conviction for drug possession because the government did not file a pretrial notice of enhancement under 21 U.S.C. 851(a)(1). That contention lacks merit, and the factbound and unpublished decision below does not implicate any conflict in the courts of appeals. Petitioner's challenge to his sentence is also moot because he has been released from prison. No further review is warranted.

1. Section 851(a)(1) provides that "[n]o person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." 18 U.S.C. 851(a)(1). That provision "was designed to satisfy the requirements of due process and provide the defendant with 'reasonable notice and an opportunity to be heard regarding the possibility of an enhanced sentence for recidivism.'" United States v. King, 127 F.3d 483, 489 (6th Cir. 1997) (quoting United States v. Belanger, 970 F.2d 416, 418 (7th Cir. 1992)), cert. denied, 522 U.S. 1130 (1998).

Here, although the government did not file a Section 851(a)(1) information before trial identifying the previous conviction to be relied upon for a sentencing enhancement on the charge of simple drug possession under 21 U.S.C. 844(a), that is because the government did not charge petitioner with violating Section 844(a). Instead, just before closing arguments, petitioner asked the district court to instruct the jury to consider that offense, and the court agreed to do so -- over the government's objection. Pet. App. B2. At that point, it was not possible for the government to file a Section 851(a)(1) information "before trial." And prior to petitioner's late-trial request, the government had no reason

to file a Section 851(a)(1) information. The superseding indictment charged petitioner with possession of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), as to which a prior drug-related conviction would simply increase the statutory maximum sentence from 20 to 30 years of imprisonment, see 21 U.S.C. 841(b)(1)(C) -- an unnecessary enhancement given petitioner's guidelines range of only 27 to 33 months for that offense. See Pet. App. A10.

Petitioner "cannot argue that the government's failure to file a pretrial information deprived him of the 'substance' § 851 requires." Pet. App. A12 (quoting United States v. Layne, 192 F.3d 556, 576 (6th Cir. 1999), cert. denied, 529 U.S. 1029 (2000)). Petitioner's theory that he was "sentenced to increased punishment" beyond what he expected, and prejudiced thereby, implies that the government should always file a Section 851(a)(1) information before trial, just in case a defendant later asks the trial court to instruct the jury to consider an offense that was not charged in the indictment. Such a rule would inadvisably "result in routine increased sentencing exposure for defendants -- here it would have raised [petitioner's] maximum sentence on the trafficking charge by ten years -- even in cases, like this one, in which the government did not believe such exposure warranted." Id. at A14 n.2. And a defendant's unanticipated and opposed request to present the jury with a new alternative charge -- which

is made precisely because it would lower the defendant's sentencing exposure even further -- should not entitle him to a windfall.

Petitioner errs in contending (Pet. 13) that the decision below will permit the government to "lie in wait until after the jury verdict to seek a statutorily enhanced sentence under 21 U.S.C. § 841." The decision below is limited to the circumstances of this case -- circumstances in which petitioner's argument about potential gamesmanship by the government in seeking an enhancement under Section 841 is particularly misplaced. No gamesmanship was involved here; instead the government simply "did not file a pretrial information because it did not plan to seek the maximum sentence [under Section 841], let alone a ten-year enhancement." Pet. App. A10. Indeed, the government never sought a statutory enhancement under Section 841; it sought an enhancement only under Section 844(a), the lesser possession offense that petitioner asked the trial judge to send to the jury. Petitioner cannot claim to have been surprised by his own decision to subject himself to criminal liability under Section 844(a).

Furthermore, as the court of appeals correctly explained, Pet. App. A12, A14, the Ohio drug-trafficking conviction that triggered petitioner's sentencing enhancement under Section 844(a) was identified by the government, before trial, as the predicate for the firearm and ammunition offenses charged in the superseding indictment. See Superseding Indictment 1-2. Petitioner therefore had actual notice that the government intended to rely on that

prior conviction at trial. And after trial, the government informed petitioner in its sentencing memorandum that it intended to rely on his prior conviction as the basis for a sentencing enhancement under that provision. Gov't Sentencing Memo. 1, 3. Petitioner therefore had full opportunity to contest the validity of the prior drug conviction and to dispute whether that conviction rendered him eligible for an enhanced sentence under Section 844(a).

The court of appeals accordingly determined that "the harmless-error statute and the rules" would preclude relief in this case because petitioner cannot "demonstrate prejudice." Pet. App. A14 (quoting 28 U.S.C. 2111 and Fed. R. Crim. P. 52(a)) (brackets omitted). As the court observed, petitioner "knew the government was aware of his prior conviction" and "received reasonable notice of [its] intention" to seek an enhancement based on that conviction." Ibid. Petitioner also had ample "opportunity to make his case against an enhanced sentence before the trial court," and he cannot "posit that, if only the government had dotted its i's and crossed its t's, he would not have received an enhancement." Ibid. Petitioner did not contest in the district court (and does not contest here) the validity of the prior Ohio drug conviction. He also did not claim there (and does not argue here) that his prior conviction constitutes an invalid basis for a sentencing enhancement under Section 844(a).

Petitioner nevertheless contends that he was prejudiced because one of the purposes of 851(a)(1) "is to allow [a] defendant to have ample time to determine whether to enter a plea or go to trial and plan his trial strategy with full knowledge of the consequences of a potential jury verdict." Pet. 10 (quoting United States v. Williams, 59 F.3d 1180, 1185 (11th Cir. 1995), cert. denied, 517 U.S. 1157 (1996)). Yet that purpose is not implicated by this case, where the offense for which petitioner received an enhanced sentence was introduced late in the trial at petitioner's own request. Having requested the change himself, he cannot now claim (Pet. 12) to be prejudiced by his felony conviction on that charge. Petitioner does not argue that he would have "adjust[ed] his trial or plea strategy," Pet. 10, such as by not submitting the drug-possession charge to the jury, had the government filed a Section 851(a)(1) information before trial.¹

2. The factbound and nonprecedential decision below does not implicate any conflict among the courts of appeals.

¹ Petitioner further argues that the enhancement was invalid because "the Constitution 'does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" Pet. 11 (quoting Alleyne v. United States, 570 U.S. 99, 126 (2013)) (brackets, ellipsis, and internal quotation marks omitted). But this Court has made clear that recidivism enhancements are sentencing factors that may be found by a judge, not elements of the offense that must be decided by a jury. See Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998); see, e.g., United States v. Cheek, 415 F.3d 349, 352-353 (4th Cir.) (noting that this Court did not overrule Almendarez-Torres in Apprendi v. New Jersey, 530 U.S. 466, 495 (2000), cert. denied, 546 U.S. 1010 (2005)).

As an initial matter, the court of appeals' decision was based on the unusual factual circumstances of this case, in which petitioner requested that the jury consider an offense that was not charged in the indictment and received a sentencing enhancement for that new offense based on a predicate drug-related conviction that was alleged in the indictment. The opinion in this case is not binding on further circuit panels, and the Sixth Circuit has repeatedly described Section 851(a)(1)'s requirements as "mandatory" in published opinions. See, e.g., United States v. Boudreau, 564 F.3d 431, 437 (6th Cir. 2009), cert. denied, 558 U.S. 1062 (2009); United States v. Pritchett, 496 F.3d 537, 548 (6th Cir. 2007); United States v. Layne, 192 F.3d 556, 575 (6th Cir. 1999); King, 127 F.3d at 487. The court has also vacated enhanced sentences in cases where the government failed to comply with those mandatory requirements. See, e.g., United States v. Williams, 899 F.3d 1526, 1529 (6th Cir. 1990) (vacating a sentencing enhancement, even though the defendant had expressly agreed in his plea agreement that the enhancement applied, because "[n]one of the safeguards mandated by Section 851 were provided in this case"). In this case, the court simply found that, in light of the unusual circumstances presented, any failure by the government to file a pretrial notice under Section 851(a)(1) did not deprive the district court of authority to impose an enhanced sentence. Pet. App. A13-A14.

Furthermore, petitioner does not identify any court of appeals that has reversed the imposition of an enhanced sentence under circumstances comparable to the ones here. Petitioner's reliance on the Eleventh Circuit's statement in United States v. Weaver, 905 F.2d 1466, 1481 (1990), cert. denied, 498 U.S. 1091 (1991), is misplaced. Weaver and the case upon which it relied, see United States v. Noland, 495 F.2d 529, 533 (5th Cir. 1976), cert. denied, 419 U.S. 966 (1974), were decided based on the now-rejected view that Section 851(a)'s requirements are jurisdictional, see, e.g., United States v. DiFalco, 837 F.3d 1207, 1216 (11th Cir. 2016) (citing Harris v. United States, 149 F.3d 1304, 1307 (11th Cir. 1998)). The Eleventh Circuit has since recognized that its "decisions that § 851 imposes a jurisdictional limit on a district court's authority have been undermined to the point of abrogation by subsequent decisions of the Supreme Court." Ibid. In any event, neither Weaver nor any of the other cases cited by petitioner (Pet. 9-10) involved the unusual facts presented here. He thus fails to show that another court of appeals would reverse a district court's imposition of an enhanced sentence where, as here, (1) the defendant's predicate conviction was identified in the indictment; (2) the defendant sought an instruction mid-trial, over the government's objection, on a lesser-included offense; (3) the government notified the defendant and the court of its intention to seek an enhanced sentence for that offense; (4) the enhancement was applied solely to that

offense, not to any offense the government itself submitted to the jury; and (5) the defendant did not contest the validity of the predicate conviction or claim that his prior conviction constitutes an invalid basis for the enhancement. No further review of this case is warranted.

3. Finally, this case is moot because petitioner's 18-month term of imprisonment has already expired.

According to the Federal Bureau of Prisons, petitioner was released on September 14, 2018. See Fed. Bureau of Prisons, Find an Inmate, <https://www.bop.gov/inmateloc> (February 19, 2019) (search for record for register 76004-061). Because petitioner's challenge affects only the length of his sentence rather than his underlying conviction, the case became moot on that date. See Lane v. Williams, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

The completion of a criminal defendant's sentence will not normally moot an appeal challenging the conviction because criminal convictions generally have "continuing collateral consequences" beyond just the sentences imposed. Spencer v. Kemna, 523 U.S. 1, 8 (1998). But a "presumption of collateral consequences" does not extend beyond criminal convictions. Id. at 12. Therefore, when a defendant challenges only the length of his term of imprisonment, his completion of that prison term moots an

appeal, unless the defendant can show that the challenged action continues to cause "collateral consequences adequate to meet Article III's injury-in-fact requirement," id. at 14, and that those consequences are "'likely to be redressed by a favorable judicial decision,'" id. at 7 (citation omitted).

Petitioner cannot make that showing here. The only portion of petitioner's sentence to which he is still subject is his one-year term of supervised release. And in United States v. Johnson, 529 U.S. 53, 54 (2000), this Court held that a prisoner who serves too long a term of incarceration is not entitled to receive credit against his term of supervised release. The Court in Johnson recognized that a prisoner who has been incarcerated beyond his proper term of imprisonment might be able to persuade the sentencing court to exercise its discretion to shorten the duration of the prisoner's term of supervised release under 18 U.S.C. 3583(e)(1), which permits a court to do so "if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." See 529 U.S. at 60. But, as the Third Circuit has explained, "[t]he possibility that the sentencing court will use its discretion to modify the length of [a defendant's] term of supervised release * * * is so speculative" that it does not suffice to present a live case or controversy. Burkey v. Marberry, 556 F.3d 142, 149, cert. denied,

558 U.S. 969 (2009).² In addition, petitioner's one-year supervised release term will likely have run its course by the time of any merits decision in this case, if certiorari were granted.

Petitioner contends (Pet. 13) that collateral consequences flow from his enhanced sentence because drug possession in violation of 21 U.S.C. 844(a) is punishable by up to one year of imprisonment and therefore is only a misdemeanor, whereas the enhanced sentence makes him a felon and will cause him to lose important civil rights. But petitioner was already a felon before his conviction and recidivist enhancement in this case. The enhancement of petitioner's sentence under Section 844(a) was based on a prior Ohio felony conviction for drug-trafficking, which petitioner has never challenged. See pp. 2-3, supra. Accordingly, any deprivation of rights that flows from a felony conviction would apply to petitioner even without his felony conviction in this case.

² Other courts of appeals have concluded that the possibility that the sentencing court would exercise its discretion to reduce a defendant's supervised-release term is sufficient to prevent his sentencing challenge from becoming moot upon completion of his prison term. See Tablada v. Thomas, 533 F.3d 800, 802 n.1 (9th Cir. 2008), cert. denied, 560 U.S. 964 (2010); Levine v. Apker, 455 F.3d 71, 77 (2d Cir. 2006). Those decisions, however, failed to address this Court's decision in Johnson. Regardless, the need for this Court to resolve the mootness question at a minimum makes this case a poor vehicle for considering the underlying question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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