No. 18-8472

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ALLEN EAPMON, 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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QUESTIONS PRESENTED

1. Whether the district court erred in imposing a statutory minimum life sentence on petitioner, where the possibility of such a sentence was stated in petitioner's plea agreement and referenced multiple times during his change-of-plea hearing.

2. Whether Section 401 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, which applies to pre-enactment offenses only "if a sentence for the offense has not been imposed as of [the] date of [the Act's] enactment," § 401(c), 132 Stat. 5221, applies to petitioner's sentence, which was imposed ten months before the statute's enactment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is not published in the Federal Reporter but is reprinted at 758 Fed. Appx. 370 and is available at 2018 WL 6505523.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 2018. The petition for a writ of certiorari was filed on March 8, 2019. 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 Eastern District of Kentucky, petitioner was convicted on one count of conspiracy to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846. Judgment 1; see Superseding Indictment 1. The court sentenced petitioner to life imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-10.

1. In 2016, petitioner ran a methamphetamine distribution operation in eastern Kentucky. Presentence Investigation Report (PSR) ¶¶ 6-23. Petitioner regularly distributed, both personally and through subordinates, double-digit-gram quantities of methamphetamine, including to a confidential witness. PSR ¶¶ 12, 13, 17, 19. Petitioner also threatened to kill a subordinate who owed him money, PSR ¶ 19, and petitioner's brother told the confidential witness that he, petitioner, and their father had killed their cousin, PSR ¶ 11.

A federal grand jury indicted petitioner on one count of conspiring to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846, and one count of distributing 5 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1). Superseding Indictment 1, 3. At the time of petitioner's indictment, as well as at the time of his guilty plea and sentencing, the default penalty for violating 21 U.S.C.

841(a)(1) and 846 by conspiring to distribute 50 grams or more of methamphetamine was a sentence of ten years to life imprisonment. 21 U.S.C. 841(a) and (b)(1)(A)(viii) (2012); see 21 U.S.C. 846 (providing that penalties for underlying offense apply to conspiracy to commit that offense). But Section 841(b)(1)(A) provided that a defendant who violated the relevant provisions "after two or more prior convictions for a felony drug offense ha[d] become final * * * shall be sentenced to a mandatory term of life imprisonment without release." 21 U.S.C. 841(b)(1)(A) (2012). The government filed an information pursuant to 21 U.S.C. 851, which stated that petitioner had multiple prior state felony drug convictions that made him subject to a life sentence under 21 U.S.C. 841(b)(1)(A) (2012). Information 1-2; see PSR ¶¶ 43-46; 8/4/17 Tr. (Plea Tr.) 23-27.

Following petitioner's arraignment, his retained counsel requested, and the district court ordered, an evaluation of petitioner's competency. Pet. App. 2. Both the Bureau of Prisons psychologist and an independent evaluator hired by the defense determined that petitioner was competent to stand trial. Id. at 2-4; Plea Tr. 5.

2. Petitioner then entered into a written plea agreement in which he agreed to plead guilty to the conspiracy charge, and the government agreed to move to dismiss the individual distribution charge. Plea Agreement 1. The government also agreed to recommend that petitioner receive credit under Sentencing Guidelines § 3E1.1

(2016) for his acceptance of responsibility. Plea Agreement 3. The plea agreement stated that due to petitioner's prior criminal history, "the statutory punishment for Count 1 is life imprisonment." Id. at 2. Petitioner and his attorney "acknowledge[d] that [petitioner] underst[oo]d[] th[e] Agreement, that [petitioner's] attorney ha[d] fully explained th[e] Agreement to [petitioner], and that [petitioner's] entry into th[e] Agreement [wa]s voluntary." Id. at 6.

In a supplemental agreement, petitioner agreed to cooperate with the investigation. Pet. App. 3. The supplemental agreement "specified that the government 'has the sole discretion to decide whether or not to file' a motion for a downward departure or for a sentence below the applicable minimum" sentence based on petitioner's "'truthfulness'" and "'level of assistance'" and "'the benefits obtained from [his] assistance.'" Ibid. The supplemental agreement further stated that the district court would ultimately decide whether to grant any such motion. Ibid.

The district court held a change-of-plea hearing in August 2017. The court observed that the "statutory penalty" in petitioner's case was "life" imprisonment, but that the penalty might be "avoided" if the government filed a motion to reduce petitioner's sentence based on his cooperation. Plea Tr. 10. The court explained that it could not "guarantee" the filing of such a motion, because "the individual who decides" whether to file the motion "is not [the judge]. It's not [petitioner]. It's not

[defense counsel]. It's [the prosecutor]," and the judge could not "force [the prosecutor] to make that motion." Id. at 10-11. Petitioner stated, under oath, that he understood. Id. at 11; see id. at 3-4.

Later in the change-of-plea hearing, the district court advised petitioner for a second time, "as plainly as [it could]," that "[u]nless [the prosecutor] makes a motion on [petitioner's] behalf pursuant to 18 U.S. Code, Section 3553(e), the Court will have no discretion to sentence [petitioner] to anything other than life in prison." Plea Tr. 21. The court asked petitioner if he understood, and petitioner again stated that he did. Ibid. After discussing the Sentencing Guidelines, the court reiterated once more that the filing of a cooperation motion was not within the court's control. Id. at 30. The court then found petitioner "fully competent and capable of entering an informed plea" and accepted his guilty plea. Id. at 40.

3. The government ultimately declined to file a motion for a substantial-assistance departure under Section 3553(e). 2/23/18 Tr. (Sent. Tr.) 3-4, 6, 8. At his sentencing in February 2018, petitioner stated that he "would have never pled guilty to life" without what he claimed was a promise that the government would file a motion to reduce the sentence based on his cooperation. Id. at 10. The government, however, informed the court that petitioner "was never promised a motion," but that the government had instead made clear to petitioner before his plea that

"cooperation, simply talking, is never enough," and that the government must see a "tangible benefit" from the cooperation, such as the "seizure of evidence" or the "prosecution of individuals," before a Section 3553(e) motion might be made. Id. at 12-15. Petitioner's counsel summarized the relevant discussions in similar terms. See id. at 11-12.

Petitioner then orally moved to withdraw his plea. Sent. Tr. 33-34. The district court analyzed the factors governing withdrawal under circuit precedent, including the time that had elapsed between the plea and the motion; whether petitioner had a valid reason to wait; whether petitioner maintained his innocence; the circumstances of the plea; petitioner's nature and background; petitioner's prior experience with the criminal justice system; and the potential prejudice to the government if the motion to withdraw were granted. Id. at 36-38; see United States v. Bashara, 27 F.3d 1174, 1180-1181 (6th Cir. 1994), cert. denied, 513 U.S. 1115 (1995), superseded on other grounds as recognized in United States v. Caseslorente, 220 F.3d 727, 734 (6th Cir. 2000). The court found that "five of the seven [factors] substantially favor[ed]" denying the motion, while "none of them actually favor[ed] granting the motion." Sent. Tr. 38. The court accordingly denied petitioner's motion to withdraw his guilty plea, ibid., and imposed the statutory sentence of life imprisonment, id. at 43.

4. The court of appeals affirmed. Pet. App. 1-10. The court observed that petitioner challenged the district court's imposition of a life sentence, but did "not elaborate on this issue at all." Id. at 6. The court of appeals therefore found petitioner's challenge to his sentence "waived." Ibid. The court nevertheless proceeded to determine that "a challenge to [petitioner's] sentence would fail on the merits because the district court imposed the only sentence available" under the statute. Ibid.

Petitioner also challenged -- in the body of his brief, but not the statement of issues -- the voluntariness of his plea and the district court's denial of his oral motion to withdraw the plea. Pet. App. 6-7. The court of appeals found those issues "forfeited on appeal," but then also went on to find that "they would fail on the merits." Id. at 7. The court applied plain-error review to petitioner's challenge to the voluntariness of his plea because petitioner had not raised the issue or contended that the district court failed to comply with Fed. R. Crim. P. 11 until he moved to withdraw the plea at sentencing, "over four months after entering it." Pet. App. 7. The court of appeals then determined that petitioner's challenge failed because he was competent to plead guilty. Id. at 8.

The court of appeals further observed that "[t]he record contradicts [petitioner]'s assertions" that "his plea was not voluntary * * * because 'he thought by signing the agreement, he

would help the government and get 15 to 20 years in prison'" rather than life. Pet. App. 9. The court explained that petitioner "was informed several times over as to what exactly he was agreeing to by pleading guilty and signing the plea agreement." Ibid. In particular, the court found that the plea agreement and supplement were clear as to the government's discretion about whether to move for a sentence below the applicable statutory minimum and the district court's discretion to grant or deny such a motion; petitioner "confirmed that he had discussed the plea agreement with his attorney, who explained its terms to him in detail"; and "the district court thoroughly explained these circumstances" to petitioner at the plea hearing. Ibid. Finally, the court of appeals determined that the district court did not abuse its discretion in applying the relevant factors to deny petitioner's oral motion to withdraw his plea. Id. at 9-10.

5. On December 21, 2018, nearly ten months after petitioner's sentencing, the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, 132 Stat. 5194, became law. Section 401 of the Act modified the predicate convictions that trigger enhanced statutory penalties for certain drug-trafficking offenses, including the penalties under 21 U.S.C. 841(b)(1)(A).

Under the version of Section 841(b)(1)(A) in effect when petitioner was sentenced, an increased penalty was triggered if a defendant had one or more prior, final convictions for a "felony drug offense." 21 U.S.C. 802(44). The First Step Act replaced

the reference to "felony drug offense[s]" with two new predicates, "serious drug felon[ies]" and "serious violent felon[ies]." See First Step Act § 401(a)(2) and (b)(1), 132 Stat. 5220-5221. While the prior definition of a "felony drug offense" depended solely on the statutorily authorized term of imprisonment for the prior offense, see 21 U.S.C. 802(44), the new predicates are defined in part based on the amount of time the offender actually served, see 21 U.S.C. 802(57) (2018) (definition of "serious drug felony"); 21 U.S.C. 802(58) (2018) (definition of "serious violent felony"). Section 401 of the First Step Act also reduced the statutory minimum triggered by two prior qualifying convictions from life to 25 years of imprisonment. § 401(a)(2)(A)(ii), 132 Stat. 5220.

Section 401 also contains a provision entitled "Applicability to Pending Cases." First Step Act § 401(c), 132 Stat. 5221 (capitalization altered). That provision, Section 401(c), expressly specifies that Section 401 "shall apply to any offense that was committed before the date of enactment of th[e First Step] Act, if a sentence for the offense has not been imposed as of such date of enactment." § 401(c), 132 Stat. 5221.

ARGUMENT

Petitioner asserts (Pet. 8-18) that his sentence should have been governed by the Sentencing Guidelines, rather than the statutory minimum, and that the First Step Act invalidates his sentence. Neither of those contentions warrants this Court's review. Petitioner did not present either argument to the lower

courts. And contrary to petitioner's assertion, the district court correctly sentenced petitioner to the only term authorized by the statute. In addition, Section 401 of the First Step Act is inapplicable to sentences, like petitioner's, that were imposed prior to the Act's enactment.[1]

1. Petitioner first contends (Pet. 8-9) that the district court erred in imposing a life sentence. In particular, petitioner asserts (ibid.) that the Sentencing Guidelines, rather than the statutory minimum, should have controlled his sentence, on the theory that the plea agreement's reference to the Sentencing Guidelines demonstrated that the government had withdrawn the previously filed information under Section 851. Petitioner did not raise this argument in the lower courts, and this Court should deny review on that basis alone. See, e.g., United States v. Williams, 504 U.S. 36, 41 (1992).

In any event, petitioner's fact-bound argument lacks merit. The plea agreement expressly states that "[b]ecause of" petitioner's criminal history, "the statutory punishment for Count 1 is life imprisonment." Plea Agreement 2. At the plea hearing, the district court repeatedly explained that petitioner would receive the statutorily required life sentence unless the

[1] The supplemental brief for petitioner in Wheeler v. United States, No. 18-7187 (filed Dec. 19, 2018), which the United States has suggested should be treated as a motion for leave to amend the petition, see Gov't Br. in Opp. at 22 n.3, Wheeler, supra, presents a similar question regarding the First Step Act's applicability to sentences imposed before the Act's enactment.

government moved for a substantial-assistance departure under 18 U.S.C. 3553(e) and that the government alone would decide whether to file that motion. See pp. 4-5, supra. Petitioner twice represented, under oath, that he understood. See ibid. Thus, the court of appeals correctly recognized (albeit in response to a different argument that petitioner had raised on appeal) that the district court did not abuse its discretion in "impos[ing] the only sentence available" under the statute. Pet. App. 6.

Petitioner's reliance (Pet. 9) on an unpublished decision of the Eleventh Circuit, United States v. Bowden, No. 08-11935, 2009 WL 32755 (Jan. 7, 2009) (per curiam), cert. denied, 558 U.S. 1091 (2009), is misplaced. Bowden found that the district court lacked jurisdiction to impose an enhanced sentence where the Section 851 information "listed one wrong conviction date and the wrong enhancement statute." Id. at *1. The Eleventh Circuit itself does not treat Bowden as binding precedent, see United States v. Jones, 491 Fed. Appx. 160, 162 n.1 (2012) (per curiam), cert. denied, 568 U.S. 1180 (2013), and petitioner identifies no similar flaws in the Section 851 information here. See Information 1-2 (identifying 21 U.S.C. 841 as the relevant enhancement statute and listing four prior convictions with dates and case numbers); PSR ¶¶ 43-46 (listing the same dates and case numbers).

2. Petitioner also contends (Pet. 10-18) that under the First Step Act, his prior convictions do not trigger an enhanced sentence, and any enhanced sentence would be only 25 years. But

Section 401(c) of the First Step Act, entitled "Applicability to Pending Cases," expressly provides that "the amendments made by [Section 401], shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." § 401(c), 132 Stat. 5221 (emphasis added; capitalization altered).[2] Here, petitioner's sentence was imposed on February 23, 2018, nearly ten months before the First Step Act was enacted, and petitioner has been serving that sentence since that time. See 18 U.S.C. 3553(a) (sentencing court "shall impose a sentence" after considering various factors); 18 U.S.C. 3584(a) (multiple terms of imprisonment may be "imposed on a defendant" concurrently or consecutively, and the choice of how to impose them involves consideration of the Section 3553(a) factors); Fed. R. Crim. P. 32(b)(1) ("The court must impose sentence without unnecessary delay."). The First Step Act is thus inapplicable to petitioner.

Petitioner's contention (Pet. 12) that the First Step Act applies to all criminal cases pending on "direct appeal" is incompatible with the statutory language. Congress instructed that the relevant provisions of the First Step Act apply only to pending cases in which "a sentence * * * has not been imposed." § 401(c), 132 Stat. 5221. Petitioner's position also is inconsistent with the "ordinary practice" in federal sentencing

[2] Petitioner's quotation of the First Step Act (Pet. 15) omits the underscored language.

"to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." Dorsey v. United States, 567 U.S. 260, 280 (2012). That practice is codified in the saving statute, 1 U.S.C. 109, which provides that the repeal of any statute will not have the effect "to release or extinguish any penalty, forfeiture, or liability incurred under such statute" unless the repealing act so provides.

The First Step Act is thus unambiguously inapplicable to petitioner's sentence, and no sound basis exists for granting, vacating, and remanding to the court of appeals. This Court ordinarily does not consider questions not pressed or passed on below. E.g., Williams, 504 U.S. at 41.[3] And this Court generally will not grant, vacate, and remand in light of an intervening development absent "a reasonable probability" that the court of appeals would reach a different conclusion on remand and "that such a redetermination may determine the ultimate outcome of the litigation." Greene v. Fisher, 565 U.S. 34, 41 (2011) (quoting Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam)). No such probability exists here.

[3] The court of appeals decided petitioner's case one week before the First Step Act's enactment, but petitioner did not seek rehearing based on the new statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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