No. 18-9070

IN THE SUPREME COURT OF THE UNITED STATES

GABRIEL URZUA SANCHEZ, 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 court of appeals correctly found that petitioner waived any challenge to the district court's decision to permit two proposed defense witnesses to invoke their Fifth Amendment privilege against self-incrimination, where petitioner agreed with the district court that the witnesses had properly invoked the privilege.

2. Whether petitioner forfeited any claim for resentencing under Section 401 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5220, by failing to seek relief on that basis in the court of appeals.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Mich.):

United States v. Sanchez, No. 14-cr-20800 (Jan. 10, 2018)

United States Court of Appeals (6th Cir.):

United States v. Sanchez, No. 18-1092 (Feb. 5, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2019. The petition for a writ of certiorari was filed on April 30, 2019. 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 Eastern District of Michigan, petitioner was convicted on

one count of conspiring to distribute controlled substances and to possess controlled substances with intent to distribute, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(A), and 846, and one count of attempting to possess controlled substances with intent to distribute, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(A) and 846. See Pet. App. 2a. The district court sentenced petitioner to 240 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-8a.

1. On November 25, 2014, the Michigan state police caught long-haul trucker Joe Amaya with approximately $350,000 worth of heroin, cocaine, and methamphetamine hidden in a speaker-box of the cab in his truck, en route to Detroit. Pet. App. 1a; Gov't C.A. Br. 3. Amaya agreed to cooperate with authorities in a controlled delivery of the drugs later that day. Pet. App. 1a.

With law enforcement present at each step, Amaya proceeded to the Detroit area and called the man (known to Amaya as "Marcos") who had paid him to deliver the drugs. Pet. App. 1a; Gov't C.A. Br. 3-4. Marcos instructed Amaya to use a different phone to call a third person to arrange the delivery. Pet. App. 1a-2a. Amaya borrowed a state trooper's phone, dialed the number he was given, and reached petitioner. Id. at 2a. Petitioner instructed Amaya to drive to meet him and texted Amaya the address of a grocery store. Ibid. When Amaya arrived, petitioner was waiting for him outside the store. Ibid. Petitioner called the trooper's phone

and directed Amaya to bring "the stuff" to him in a bag. Gov't C.A. Br. 4 (citation omitted). Amaya, trying to stall, exited the truck and had a further conversation with petitioner, who directed him to bring "the product" or the "stuff" to him in a bag at a nearby restaurant. Ibid. (citation omitted). Officers arrested petitioner as he began to walk to the restaurant. Ibid. He was carrying the cell phone used to communicate with Amaya. Id. at 4-5; Pet. App. 2a.

Coincidentally, petitioner had been under surveillance by a federal drug taskforce, based on a tip, since flying from California to Michigan the previous day. Pet. App. 1a; Gov't C.A. Br. 2-3. Officers from that task force observed petitioner's conduct before and during the controlled delivery, including his arrival in the delivery area -- apparently to await the drug courier -- even before Amaya made contact with him. See Gov't C.A. Br. 2-4, 10-11, 26-27.

2. A grand jury in the Eastern District of Michigan charged petitioner with one count of conspiracy to distribute controlled substances and to possess controlled substances with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) and 846, and one count of attempted possession of controlled substances with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) and 846. Indictment 1-2. The indictment alleged that each offense involved one kilogram or more of a mixture or substance containing heroin, 500 grams or more of a mixture or substance containing

cocaine, and 500 grams or more of a mixture or substance containing methamphetamine. Ibid.; see 21 U.S.C. 841(b)(1)(A)(i), (ii), and (viii). The case proceeded to trial.

Amaya testified for the government. See Pet. App. 3a-4a; Gov't C.A. Br. 10-12. In addition to recounting the sequence of events described above, Amaya testified that he encountered petitioner during their pre-trial confinement and that petitioner demanded to know why Amaya "couldn't keep [his] mouth shut." Pet. App. 4a. Amaya further testified that, to defuse a potentially dangerous confrontation, he told petitioner that he would not testify against petitioner. Ibid.; see 3/16/16 Tr. 114. On cross-examination, defense counsel asked whether Amaya recalled also telling petitioner that "the truth was that [petitioner] had nothing to do with [Amaya's] criminal activity" and that Amaya would send a letter to petitioner's lawyer to "straighten the mess out that [Amaya] made." 3/16/16 Tr. 172. Amaya denied making those statements. Ibid.

Petitioner proposed to call as witnesses two inmates who purportedly observed the jailhouse conversation at issue. Pet. App. 4a; see Pet. C.A. Br. 25-27. The two witnesses informed the district court, through counsel, that they would invoke their Fifth Amendment privilege against self-incrimination if called to testify, because both feared being subject to cross-examination on matters that might adversely affect them in other pending criminal proceedings. Pet. App. 4a-5a; Gov't C.A. Br. 19. After counsel

for the first witness so stated, the court asked each party for a response. 3/17/16 Tr. 24. Defense counsel told the court that she understood "that [the witness] has some Fifth Amendment concerns at this point" and that she was "not sure there's anything [she] can say to that issue." Id. at 25. The court then indicated that its "understanding of the law" was that, if the witness has "invoked his Fifth Amendment privilege, then there's nothing further that should be done." Ibid. Asked whether she had "a different view," defense counsel stated that she did not. Ibid. Similarly, when informed that the second proposed defense witness also intended to assert the privilege, defense counsel stated, "[i]f he doesn't want to [testify] now, that's fine, but * * * my client needs to have that [on the] record. I need a record to be made of that so that in the event there's a conviction, I'm not left with then why didn't you call the witness." Id. at 28. When the second witness confirmed his intent to assert the privilege, defense counsel stated that the situation was "the same as with" the first witness and that she "would imagine the inquiry would have to end there and [the defense] would not be permitted to call him in this case." Id. at 42. Petitioner did not request that the court take any further steps with respect to either witness.

The jury found petitioner guilty on both counts. Pet. App. 2a. Before trial, the government had given notice of its intent to seek an enhanced penalty based on petitioner's prior conviction for a "felony drug offense." D. Ct. Doc. 11, at 2 (Jan. 5, 2015);

see 21 U.S.C. 841(b)(1)(A) (2012) (providing for a sentence of 20 years to life for any person who violates Section 841(a) "after a prior conviction for a felony drug offense has become final"). On January 10, 2018, the district court sentenced petitioner to the applicable minimum term of 240 months of imprisonment, to be followed by ten years of supervised release. Judgment 1-3.

3. The court of appeals affirmed in an unpublished order. Pet. App. 1a-8a. As relevant here, petitioner argued that the district court erred in accepting the two potential witnesses' invocation of their Fifth Amendment privilege against self-incrimination without further inquiry. Id. at 5a. Petitioner also argued that the court erred in permitting a blanket assertion of the privilege, rather than proceeding question-by-question. Ibid. The court of appeals determined, however, that petitioner had waived those challenges when defense counsel "agreed with the district court's original ruling about the first witness" and later agreed that "the district court's first ruling would hold" as to the second witness as well. Id. at 6a. The court of appeals explained that "an attorney cannot agree in open court with a judge's proposed course of conduct and then charge the court with error in following that course." Ibid. (quoting United States v. Aparco-Centeno, 280 F.3d 1084, 1088 (6th Cir.), cert. denied, 536 U.S. 948 (2002)) (brackets omitted).

ARGUMENT

Petitioner renews his contention (Pet. 9-18) that the district court erred by not adequately inquiring into the basis for two proposed defense witnesses' invocation of their Fifth Amendment privilege against self-incrimination and by permitting a blanket assertion of the privilege. That contention does not warrant this Court's review. The court of appeals determined that petitioner waived those challenges, and its fact-bound decision does not conflict with any decision of this Court or another court of appeals.

Petitioner further contends (Pet. 19-25) that he is entitled to a resentencing under a provision of the First Step Act of 2018, Pub. L. No. 115-391, § 401, 132 Stat. 5220, that reduces the minimum penalty associated with the recidivist drug-trafficking offense set forth in Section 841(b)(1)(A). This Court recently granted, vacated, and remanded in two matters presenting substantially the same question. See Richardson v. United States, No. 18-7036, 2019 WL 2493913 (June 17, 2019); Wheeler v. United States, No. 18-7187, 2019 WL 2331301 (June 3, 2019). Unlike the defendants in those cases, however, petitioner had the opportunity to present his First Step Act claim to the court of appeals in the first instance. He failed to do so, thus forfeiting the claim and obviating any grounds to remand here. Accordingly, the petition for a writ of certiorari should be denied.

1. The first question presented does not warrant this Court's review because the court of appeals determined that petitioner waived his challenge to the district court's handling of two Fifth Amendment issues at trial by affirmatively agreeing with the district court's approach. Pet. App. 5a-6a.

Petitioner principally contends (Pet. 9-18) that the district court failed to inquire adequately into the basis for the proposed defense witnesses' invocation of the privilege against self-incrimination and that the court should not have permitted the witnesses to invoke the privilege on a blanket basis. But the court of appeals did not address the merits of that challenge, nor did it "approve[]" (Pet. 18) of the district court's rulings. Instead, the court of appeals merely held that petitioner, by affirmatively agreeing with the district court's understanding of how to proceed, had waived any challenge to that approach on appeal. Pet. App. 4a-6a.

As explained above, petitioner proposed to call two witnesses who purportedly observed a jailhouse conversation between Amaya and petitioner, and both potential defense witnesses indicated through counsel that they would invoke their privilege against self-incrimination if called to testify. See pp. 4-5, supra. When the district court expressed its "understanding" that "there's nothing further that should be done" after the first witness indicated his intent to invoke, defense counsel agreed. Pet. App. 5a-6a. And when the second witness confirmed (through counsel)

his intent to assert the privilege, defense counsel stated that she "would imagine the inquiry would have to end there." Ibid.

The court of appeals thus found that petitioner waived any argument that the district court erred in taking the course that petitioner "agreed" the court should take. Pet. App. 6a. As the court of appeals explained, "an attorney cannot agree in open court with a judge's proposed course of conduct and then charge the court with error in following that course." Ibid. (quoting United States v. Aparco-Centeno, 280 F.3d 1084, 1088 (6th Cir.), cert. denied, 536 U.S. 948 (2002)) (brackets omitted); see Johnson v. United States, 318 U.S. 189, 201 (1943) (noting that a defendant may not "elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him"). Petitioner does not challenge the well-founded proposition of law underlying the court of appeals' waiver determination, nor does he allege that the waiver determination conflicts with any decision of this Court or another court of appeals. Petitioner suggests in passing (Pet. 8) that defense counsel did not actually agree with the district court's Fifth Amendment privilege rulings, but that fact-bound dispute with the court of appeals' reading of the trial record does not warrant this Court's review. See Sup. Ct. R. 10.

Even if petitioner did not waive his challenge to the district court's approach, the court's rulings would be reviewable on appeal only for plain error because petitioner failed to make a

contemporaneous objection. Fed. R. Crim. P. 52(b). To satisfy that standard, petitioner must establish (i) error that (ii) was "clear or obvious, rather than subject to reasonable dispute"; (iii) "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings,'" and (iv) "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" Puckett v. United States, 556 U.S. 129, 135 (2009) (citations omitted); see Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904-1905 (2018).

Here, at a minimum, petitioner cannot meet the third or fourth requirements. Assuming for the sake of argument that further inquiry in the district court would have revealed that the two proposed defense witnesses did not have valid Fifth Amendment privileges, and assuming that those proposed witnesses then testified as petitioner claims they would have (see Pet. 9-10; Pet. C.A. Br. 26-27), the testimony would have made no difference to the outcome at trial. The only purpose of the witnesses' testimony was to impeach Amaya's account of a jailhouse conversation with petitioner, and petitioner had already cross-examined Amaya on that same issue. See p. 4, supra. Moreover, testimony from law enforcement officers and phone records conclusively demonstrated that petitioner participated in the attempted drug sale. Among other things, the government introduced unrebutted evidence that the instructions Amaya received regarding

where to deliver the drugs came from petitioner's phone, and that petitioner in fact appeared at the agreed-upon location to demand "the stuff" from Amaya. See Gov't C.A. Br. 18, 26-27.

Finally, even if this were a suitable vehicle for reviewing the first question presented, petitioner presents no sound reason for this Court to review it. He views (Pet. 18) the approach to that issue in published Sixth Circuit precedent to accord with the decisions of this Court and other circuits. The unpublished decision below would not have created any conflict on the issue even if the decision had addressed it. Cf. Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

2. Petitioner separately contends (Pet. 19-25) that he is entitled to a resentencing under the First Step Act. Petitioner was sentenced under Section 841(b)(1)(A). At the time of petitioner's November 2014 offense conduct and his January 2018 sentencing, Section 841(b)(1)(A) provided for a minimum penalty of 20 years of imprisonment for a defendant who violated Section 841(a) (or conspired or attempted to do so) "after a prior conviction for a felony drug offense ha[d] become final." 21 U.S.C. 841(b)(1)(A) (2012); see 21 U.S.C. 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."). Section 401(a) of the First Step

Act reduced this minimum penalty to 15 years of imprisonment. See § 401(a)(2)(A)(i), 132 Stat. 5220.*

Petitioner is not eligible to benefit from that amendment. Section 401(c) of the First Step Act 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." 132 Stat. 5221 (emphasis added). Petitioner's sentence was imposed on January 10, 2018, see Judgment 1 -- well before the First Step Act was enacted on December 21, 2018. Accordingly, the amendments made by Section 401 do not apply to petitioner's offense.

This Court recently granted two petitions, vacated the respective judgments, and remanded to the courts of appeals to consider the application of Section 401 of the First Step Act, notwithstanding the government's contention that both defendants' sentences had been imposed prior to the enactment of the statute. See Richardson, supra; Wheeler, supra. A similar disposition would not be warranted here, however. Unlike the defendants in those cases, petitioner had the opportunity to present his claim for resentencing under the First Step Act to the court of appeals, but he failed to do so. The First Step Act was enacted while

* The First Step Act also altered the predicate offenses that trigger the enhanced penalty. See § 401(a)(2)(A)(i), 132 Stat. 5220 (amending 21 U.S.C. 841(b)(1)(A) to replace the term "felony drug offense" with the term "serious drug felony"); see also § 401(a)(1), 132 Stat. 5220 (amending 21 U.S.C. 802 to add a new definition of "serious drug felony"). Petitioner does not contend that those amendments have any bearing on his case.

petitioner's appeal was still pending in the Sixth Circuit, 46 days before the court of appeals ultimately entered its judgment. See Pet. App. 1a. Although, as petitioner observes (Pet. 19), the principal briefs in the case had already been filed, and petitioner had agreed that the case did not warrant oral argument, see Pet. C.A. Br. 1, petitioner could have raised the issue by other means -- for example, by requesting leave to file a supplemental brief addressing the effect of the statute on his sentence. See, e.g., United States v. Walker, 615 F.3d 728, 734-735 (6th Cir.) (considering an argument based on an intervening legal development raised for the first time in the defendant's supplemental brief), cert. denied, 562 U.S. 1075 (2010).

Having failed to avail himself of the opportunity to present the First Step Act issue to the court of appeals, petitioner has forfeited the argument. See Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 75-76 & n.5 (2010) (determining that the respondent forfeited an argument in the court of appeals when he "could have submitted a supplemental brief" addressing the issue in the period between the intervening legal development and the court of appeals' entry of judgment). The Court should therefore deny the petition, rather than remanding it for the court of appeals to consider an argument petitioner could have presented to that court in a timely fashion in his prior appeal. Cf. Lawrence v. Chater, 516 U.S. 163, 173-174 (1996) (per curiam) (recognizing the Court's power to grant, vacate, and remand in light of "intervening developments,"

but cautioning that the power "should be exercised sparingly," out of "[r]espect for lower courts" and for "the public interest in finality of judgments").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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