

No. 18-9431

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM MAURICE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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 more than two years before the Act's enactment.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Mont.):

United States v. Smith, No. 15-cr-00015 (Sept. 1, 2016)

United States Court of Appeals (9th Cir.):

United States v. Smith, No. 16-30210 (Aug. 6, 2018)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is reprinted at 733 Fed. Appx. 415.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2018. A petition for rehearing was denied on January 15, 2019 (Pet. App. C1). On May 28, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including May 30, 2019. The petition was filed on May 14, 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 District of Montana, petitioner was convicted of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. 841(b)(1)(A) (2012) and 21 U.S.C. 846; possession of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2012); and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Judgment 1-2. The district court sentenced petitioner to concurrent terms of life imprisonment on the first two counts and a consecutive term of five years on the third count, with no term of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. A1-A4.

1. On three separate occasions in January 2015, undercover law enforcement officers purchased methamphetamine from petitioner's girlfriend, who was living with petitioner in a motel room in Billings, Montana, and who had obtained the methamphetamine from him. Gov't C.A. Br. 6. Aware that petitioner had a suspended driver's license and outstanding arrest warrants, officers stopped and arrested him when they observed him leave the motel in a car. Id. at 6-7. A search of petitioner incident to that arrest revealed methamphetamine, drug paraphernalia, and an empty pistol holster on his person. Id. at 7. Officers later obtained warrants to search the motel room and the car. They found over a pound of methamphetamine, two firearms, and two digital scales in the motel

room, as well as a third firearm and \$6840 in cash in the car. Id. at 7-8.

A grand jury in the District of Montana returned an indictment charging petitioner with conspiracy to distribute 500 grams or more of a substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846, and 21 U.S.C. 841(b)(1)(A) (2012); possession of 500 grams or more of a substance containing a detectable amount of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(A) (2012); and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Indictment 1-3.

The case proceeded to trial, and a jury found petitioner guilty on all three counts. Judgment 1. Before trial, the government had given notice of its intent to seek an enhanced penalty for the two drug counts, based on petitioner's six prior felony drug convictions. D. Ct. Doc. 78, at 1-2 (Mar. 28, 2016); see 21 U.S.C. 859. Because he had committed those two drug crimes "after two or more prior convictions for a felony drug offense ha[d] become final," he was subject to a "mandatory term of life imprisonment." 21 U.S.C. 841(b)(1)(A) (2012); see 21 U.S.C. 846 (same penalty for conspiracies). On September 1, 2016, the district court sentenced petitioner to the statutorily prescribed term of life imprisonment on those counts, and a consecutive term

of five years of imprisonment on the Section 924(c) count, with no term of supervised release. Judgment 3.

2. On August 6, 2018, the court of appeals affirmed in an unpublished opinion. Pet. App. A1-A4. The court rejected petitioner's challenges to the lawfulness of the search of his person, motel room, and vehicle; the jury instructions; and his sentence. See ibid. The court subsequently permitted petitioner's attorney to withdraw so that petitioner could proceed pro se. C.A. Doc. 54, at 1-2 (Oct. 1, 2018). After several extensions, petitioner filed a pro se petition for rehearing, docketed on December 10, 2018, in which he again challenged the search of his motel room. See C.A. Doc. 58, at 1-16. The court denied his petition on January 15, 2019. Pet. App. C1.

The next day, the court of appeals docketed a letter from petitioner invoking Federal Rule of Appellate Procedure 28(j), dated January 10, 2019. C.A. Doc. 62, at 1-2 (Jan. 16, 2019). In the letter, petitioner contended that he was entitled to resentencing under Section 401 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5220-5221, which had been enacted on December 21, 2018. That section of the First Step Act had amended Section 841(b)(1)(A) to provide for a minimum penalty of 25 years of imprisonment, rather than life imprisonment, for a defendant who violates Section 841(b)(1)(A) "after 2 or more prior convictions for a serious drug felony or serious violent felony have become final." First Step Act § 401(a)(2)(A)(ii), 132 Stat.

5220. The First Step Act specifies, however, that those amendments "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.

In his letter, petitioner contended that the First Step Act's amendments to Section 841(b)(1)(A) applied in his case "because his conviction has yet to be final," and he requested that the court "remand this matter back to the District Court to consider this argument in the first instance." C.A. Doc. 62, at 2. The court of appeals issued its mandate on January 23, 2019, without addressing petitioner's letter. C.A. Doc. 61, at 1. On May 10, 2019, petitioner filed a pro se motion to recall the mandate. C.A. Doc. 63, at 1-2. In his motion, petitioner renewed his contention that the First Step Act applies to his case and that the appropriate remedy would be to remand for resentencing. Id. at 3.

Petitioner filed his petition for a writ of certiorari on May 14, 2019. On July 5, 2019, the court of appeals denied his motion to recall the mandate. C.A. Doc. 66, at 1. In its one-page order, the court stated that the motion was "denied without prejudice, such that [petitioner] may file a motion for resentencing under the First Step Act of 2018 with the district court." Ibid.

ARGUMENT

Petitioner contends (Pet. 11-12) that the court of appeals erred in failing to grant the relief he sought in his Rule 28(j) letter, which petitioner contends was timely filed via the prison

mail system before the court denied his petition for rehearing. In substance, his petition renews his argument that he is entitled to resentencing in light of Section 401 the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5220, which reduced the statutory minimum sentence applicable to certain recidivist drug offenders under 21 U.S.C. 841(b) (1) (A). Under the plain terms of the First Step Act, those amendments do not affect petitioner's previously imposed sentence. In any event, the court of appeals indicated that he may pursue his claim in the first instance in the district court. Accordingly, the petition for a writ of certiorari should be denied.¹

1. The district court sentenced petitioner to two concurrent terms of life imprisonment pursuant to Section 841(b) (1) (A). At the time of petitioner's January 2015 offense conduct and his September 2016 sentencing, Section 841(b) (1) (A) provided for a mandatory sentence of life imprisonment for a defendant who committed a violation of Section 841(a) (or who conspired to commit such a violation) involving 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, if the violation was committed "after two or more prior convictions 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

¹ Two other pending petitions raise substantially the same issue. See Pizarro v. United States, No. 18-9789 (filed June 19, 2019); Sanchez v. United States, No. 18-9070 (filed Apr. 30, 2019).

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 the statutory minimum penalty for such offenses to 25 years of imprisonment. See § 401(a)(2)(A)(ii), 132 Stat. 5220.²

That amendment has no application to petitioner’s sentence. Section 401(c) of the First Step Act specifies 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). Petitioner’s sentence was imposed on September 1, 2016, see Judgment 1 -- more than two years before the First Step Act was enacted on December 21, 2018. See 18 U.S.C. 3553 (“Imposition of a sentence”) (emphasis omitted); see also, e.g., United States v. Aviles, No. 18-2967, 2019 WL 4309665, at *5 (3d Cir. Sept. 12, 2019) (“Congress’s use of the word ‘imposed’ [in Section 401(c)] * * * clearly excludes cases in which a sentencing order has been entered by a district court from the reach of the amendments made by the First Step Act.”); United States v. Wiseman, 932 F.3d 411, 417 (6th Cir. 2019) (determining that the defendant “cannot benefit from” Section 401

² The First Step Act also altered the predicate offenses that trigger the enhanced penalty. See § 401(a)(2)(A)(ii), 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.

of the First Step Act because "he was sentenced prior to its effective date"); United States v. Pierson, 925 F.3d 913, 928 (7th Cir. 2019) ("Sentence was 'imposed' here within the meaning of § 401(c) when the district court sentenced the defendant, regardless of whether he appealed a sentence that was consistent with applicable law at that time it was imposed."). Accordingly, Section 401 does not entitle petitioner to resentencing.

2. In two cases involving claims similar to petitioner's, this Court recently granted petitions for writs of certiorari, vacated the courts of appeals' judgments, and remanded to allow the courts of appeals to consider the potential applicability of the First Step Act in the first instance, notwithstanding the government's contention that the relevant amendments were inapplicable because the defendants' sentences in those cases had been imposed before the enactment of the statute. See Richardson v. United States, 139 S. Ct. 2713 (2019) (No. 18-7036); Wheeler v. United States, 139 S. Ct. 2664 (2019) (No. 18-7187).³ The government respectfully suggests, however, that the same course is not warranted here for two reasons.

First, the disposition of the petitions in Richardson and Wheeler occurred before the emergence of a circuit consensus on

³ Richardson concerned Section 403(b) of the First Step Act, governing the applicability of the amendments made by Section 403, whereas Wheeler concerned Section 401(c), the same provision at issue here. See Br. in Opp. at 12-16, Richardson, supra (No. 18-7036); Br. in Opp. at 22-25, Wheeler, supra (No. 18-7187). But the relevant language in Sections 401(c) and 403(b) is identical. See First Step Act §§ 401(c), 403(b), 132 Stat. 5221-5222.

the meaning of the relevant language in the First Step Act. See pp. 7-8, supra. Every court of appeals to consider the question has recognized that the term “imposed” as used in Section 401(c) of the First Step Act, 132 Stat. 5221, refers to the district court’s entry of sentence, and thus that the amendments made by Section 401 are inapplicable in any case in which the district court sentenced the defendant before the effective date of the First Step Act (December 21, 2018).

Second, unlike the defendants in Richardson and Wheeler, petitioner had a prior opportunity to (and did) present his First Step Act claim to the court of appeals. Petitioner raised the claim in a Rule 28(j) letter. Whether or not that letter was timely (see Pet. 11), the court addressed it in its order denying petitioner’s motion to recall the court’s mandate. See C.A. Doc. 66, at 1. The court stated, in particular, that it was denying petitioner’s motion to recall the mandate “without prejudice, such that [petitioner] may file a motion for resentencing under the First Step Act of 2018 with the district court.” Ibid. The First Step Act does not itself provide for such a motion, but the court of appeals may have been referring to a motion for post-conviction relief under 28 U.S.C. 2255. But particularly given the court’s order indicating that petitioner may seek relief in the district court in the first instance, no sound basis exists to grant, vacate, and remand for the court of appeals to address his First Step Act argument. 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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