No. 18-9615

IN THE SUPREME COURT OF THE UNITED STATES

SHAWN RUSSELL SORENSEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's convictions for possession of a dangerous drug, in violation of Ariz. Rev. Stat. Ann. § 13-3407(A)(1) (2006), and possession of a controlled substance, in violation of S.D. Codified Laws § 22-42-5 (1998), are "felony drug offense[s]" under 21 U.S.C. 802(44) and 841(b)(1)(A).

2. Whether petitioner's life sentence for conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine violates the Eighth Amendment's ban on cruel and unusual punishment.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.S.D.):

United States v. Sorensen, No. 4:16-CR-40062 (Apr. 25, 2017)

United States Court of Appeals (8th Cir.):

United States v. Sorensen, No. 17-1984 (June 26, 2018)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 893 F.3d 1060.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2018. On October 4, 2018, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including November 23, 2018. The petition for a writ of certiorari was not filed until May 20, 2019, and is out of time under Rule 13.1 of the Rules of this Court. 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 South Dakota, petitioner was convicted of conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846, and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to life imprisonment. Judgment 2. The court of appeals affirmed. Pet. App. A1-A7.

1. In April 2016, postal inspectors conducted a warrant-authorized search of a suspicious package mailed from Arizona to Minnesota and found that it contained 4620 grams -- more than ten pounds -- of methamphetamine (4237 grams of actual methamphetamine) and 192 grams of cocaine. 893 F.3d 1060, 1063; Presentence Investigation Report (PSR) ¶ 7. Postal inspectors arranged for a controlled delivery of the package to the house in Luverne, Minnesota, to which it was addressed. 893 F.3d at 1063. Shortly after Gayle Hartz (the addressee) received the package, she texted petitioner, "Its here. So get ur butt here." Ibid. Petitioner responded, "I'm on my way." Ibid. Officers then arrested Hartz, who told investigators that she had received the package on behalf of petitioner and that he was on his way to retrieve it. Ibid.

Task force agents quickly located petitioner at his home in Sioux Falls, South Dakota; followed him to Luverne, Minnesota; and

arrested him when he entered Hartz's home. 893 F.3d at 1063. Officers discovered $15,700 in cash in petitioner's pocket and three firearms, more drugs, and four cell phones in his vehicle. Ibid. A search of petitioner's residence uncovered U.S. Postal Service mailing labels connecting him to at least six packages sent to Hartz from Arizona. Ibid. The search also revealed evidence that petitioner took flights from Sioux Falls to Arizona on dates corresponding to many of those packages. Id. at 1063-1064. Hartz testified at trial that she had agreed to receive packages of methamphetamine for petitioner and had previously received approximately six such packages in exchange for money or methamphetamine. Ibid.

2. A federal grand jury indicted petitioner on one count of conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846, and one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). Superseding Indictment 1-2.

a. Under Section 841(b)(1)(A), the default penalty for conspiring to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine is a term of imprisonment not less than ten years nor more than life. 21 U.S.C. 841(b)(1)(A)(viii) (2012); see 21 U.S.C. 841(a)(1) and 846 (2012). At the time of petitioner's 2016 offense conduct and April 2017 sentencing, however, Congress prescribed a mandatory

life sentence for a defendant who committed such an offense "after two or more prior convictions for a felony drug offense ha[d] become final." 21 U.S.C. 841(b)(1)(A) (2012). A "felony drug offense" was defined as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44) (2012).

A court generally may not impose an increased punishment under Section 841 based on one or more prior convictions unless, before trial or a guilty plea, the United States Attorney files with the court (and serves on the defendant) "an information * * * stating in writing the previous convictions to be relied upon." 21 U.S.C. 851(a)(1). "Clerical mistakes in the information," however, "may be amended at any time prior to the pronouncement of sentence." Ibid.

Before trial, the government filed an information giving notice of its intent to seek an increased penalty based on two prior convictions: one for possession of a controlled substance on or about December 2, 2002, in South Dakota state court, and one "for transporting or selling [a] dangerous drug on or about March, 10, 2008," in the "Superior Court for Mojave County, Arizona." Information 1 (Sept. 16, 2016). After the jury found petitioner guilty on both counts of the indictment, but before sentencing, the parties discovered that petitioner's Arizona conviction had

been for possession, rather than transportation or sale, of a dangerous drug. 893 F.3d at 1064. The government accordingly filed an amended information to correct "clerical mistakes," which stated that the Arizona conviction was a "[c]onviction for possession of dangerous drugs (methamphetamine) on or about March 10, 2008, in the Superior Court of Mohave County, Arizona (file no. CR-2007-1523)." Am. Information 1-2 (Apr. 12, 2017). The district court determined that the amended information permissibly corrected clerical mistakes. Sent. Tr. 5-7. The court further found, in light of petitioner's admissions, that petitioner was convicted of both prior offenses. Id. at 8.

b. At petitioner's April 2017 sentencing, the government explained that petitioner was a 55-year-old "career drug dealer" with numerous prior drug convictions; that petitioner's drug offense involved the seizure of ten pounds of "very high purity" methamphetamine as well as cocaine; and that postal records showed that the packages that petitioner had sent to Hartz involved a total weight of 108 pounds, suggesting a very substantial quantity of drugs. Sent. Tr. 25-26. The government noted that even without the statutory life sentence, the "very bottom end [of the] guideline range" was 30 years of imprisonment, which "would have been a life sentence for [petitioner]." Id. at 26.

The district court observed that petitioner's drug offense was his "fifth drug conviction" and involved a "huge amount of meth and some cocaine." Sent. Tr. 26-27. The court determined that

petitioner's criminal history and offense conduct showed that his "involvement in the drug trade was pretty extensive" and that the "ten pounds of meth" found in the one package intercepted by law enforcement would have affected "a tremendous number of people that live in our community." Id. at 28. The court stated that, in the absence of a statutory requirement to do so, it would not have imposed a life sentence, but that it "probably would [have] impose[d] a sentence of 360 months [30 years], just based on [petitioner's] background and the extensiveness of this conspiracy." Ibid. The court sentenced petitioner to a life sentence on the drug-conspiracy count and ten years of concurrent imprisonment on the firearm count. Id. at 28-29.

3. The court of appeals affirmed. 893 F.3d 1064.

The court of appeals rejected petitioner's challenges to the classification of his prior felony drug offenses that triggered his statutory life sentence. 893 F.3d at 1065-1067. First, the court rejected on plain-error review petitioner's contention that his 2002 South Dakota conviction did not qualify as a "felony drug offense" because "no record of drug quantity" had been identified, explaining that petitioner's conviction was punishable by more than one year and met "the statutory requirements as a prior felony drug offense under 21 U.S.C. § 841(b)." Id. at 1065-1066. Second, the court determined that the government had permissibly amended its information under Section 851(a) to correct a clerical error regarding petitioner's 2008 Arizona drug conviction. Id. at 1066-

1067. The original information, the court explained, itself gave petitioner "reasonable notice of the government's intent" to rely on the Arizona drug conviction because it not only identified the "exact date of the conviction" but also the "state and county" in which it was entered. Ibid.

The court of appeals rejected petitioner's contention that his life sentence violated the Eighth Amendment. 893 F.3d at 1067. The court noted that "[i]n only 'an extremely rare case' will a noncapital sentence be so disproportionate to the underlying crime that it runs afoul of the Eighth Amendment." Ibid. (quoting United States v. Meeks, 756 F.3d 1115, 1120 (8th Cir. 2014)). And the court found that, "given the gravity of the offense" and petitioner's "history of felony convictions," "this case does not present the 'extremely rare' circumstance where the sentence runs afoul of the Constitution." Ibid.

ARGUMENT

Petitioner contends (Pet. 8-13) for the first time that his prior Arizona conviction for possession of a dangerous drug and his prior South Dakota conviction for possession of a controlled substance were based on state statutory provisions that apply to substances that are not federally controlled and, for that reason, were not "felony drug offense[s]" under 21 U.S.C. 802(44) and 841(b)(1)(A). Petitioner also renews (Pet. 14-19) his contention that his sentence of life imprisonment violates the Eighth Amendment. Petitioner is incorrect and his contentions do not warrant

review by this Court. His untimely petition for a writ of certiorari should be denied.

1. As an initial matter, the petition should be denied because it is untimely. The court of appeals entered its judgment on June 26, 2018. 893 F.3d at 1060. Justice Gorsuch then extended the 90-day period for filing a certiorari petition by 60 days from September 24, 2018, to November 23, 2018. Cf. Sup. Ct. R. 13.1. But petitioner did not file his petition until May 20, 2019.

This Court has discretion to consider an untimely petition in a criminal case. See Schacht v. United States, 398 U.S. 58, 63-65 (1970) (considering untimely petition where the government did not deny or otherwise challenge "[a]ffidavits filed with [a] motion" to consider the untimely filing showing that the delay was caused by "circumstances largely beyond [the petitioner's] control"). Petitioner, however, has provided no explanation that would justify filing his petition nearly six months after its extended November 2018 deadline. Although petitioner states that he did not have "all the records" he needed to "properly" present his argument by the time that deadline had passed, and asserts that he submitted a second extension application that was granted by the Clerk of this Court, Pet. 1, the Court's docket does not reflect such a filing. Moreover, petitioner fails to explain what documents he needed to make the legal arguments in his petition. This Court should therefore decline to exercise its discretion to review the untimely petition.

2. Petitioner argues (Pet. 8-13) that his 2002 South Dakota conviction for possession of a controlled substance and his 2008 Arizona conviction for possession of a dangerous drug were based on state statutory provisions that apply to substances that are not federally controlled and, for that reason, were not "felony drug offense[s]" under 21 U.S.C. 802(44) and 841(b)(1)(A). That contention is not properly before this Court because it was neither pressed in, nor passed upon by, the court of appeals. Moreover, petitioner's new contention does not establish error, let alone meet the standards for plain-error relief.

a. As a threshold matter, this Court's "traditional rule * * * precludes a grant of certiorari" when "'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). In the court of appeals, petitioner argued that his 2002 South Dakota drug conviction was not a "felony drug offense" because the government failed to establish the quantity of methamphetamine for which he was convicted in 2002. Pet. C.A. Br. 23, 26-29. Petitioner never argued that his 2002 conviction or his 2008 Arizona conviction were not "felony drug offenses" because they arose under state statutes that apply to drug substances that are not federally controlled. The court of appeals likewise never addressed that question. See 893 F.3d at 1064-1067. No sound reason exists in this case to depart from the Court's settled practice of declining

to review arguments that were neither raised in nor decided by the court of appeals.

b. In addition, because petitioner did not previously present his current felony-drug-offense contentions, those contentions could be reviewed only for plain error. See Fed. R. Crim. P. 52(b). "[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it," United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004), and requires, among other things, a showing that the asserted error is "clear" or "obvious," United States v. Olano, 507 U.S. 725, 734 (1993), and not "subject to reasonable dispute," Puckett v. United States, 556 U.S. 129, 135 (2009). Any such error must also be plain "at the time of appeal." Johnson v. United States, 520 U.S. 461, 468 (1997); see Henderson v. United States, 568 U.S. 266, 273, 276 (2013) (concluding that, where "the law is unsettled at the time of error," the plain-error "rule will help [a defendant] only if * * * the law changes in the defendant's favor" and "the change comes after trial but before the appeal is decided"). Petitioner, however, does not address the plain-error context and points to nothing that, either before his appeal ended or otherwise, would support any assertion of plain error. That failure to demonstrate that any sentencing error would have been plain when the court of appeals decided his case in itself precludes relief.

c. In any event, even if petitioner had timely asserted his felony-drug-offense contentions, those contentions lack merit.

Petitioner argues (Pet. 10-12) that his 2008 Arizona drug conviction under Ariz. Rev. Stat. Ann. § 13-3407 (2006) is not a "felony drug offense" under 21 U.S.C. 802(44) and 841(b)(1)(A) because, he asserts, the statute of conviction is "indivisible" and applies to drug compounds -- including what petitioner labels "geometric isomers" of methamphetamine -- that are not prohibited by the federal Controlled Substances Act, Pet. 12. See Pet. 9 (citing Section 13-3407). Petitioner is incorrect.

The courts of appeals have generally applied some form of the categorical or modified categorical approaches set forth in Taylor v. United States, 495 U.S. 575 (1990), and its progeny to determine whether a prior conviction qualifies as a "felony drug offense," 21 U.S.C. 841(b)(1)(A), i.e., a felony that "prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances," 21 U.S.C. 802(44). See, e.g., United States v. Ocampo-Estrada, 873 F.3d 661, 666-667 (9th Cir. 2017); United States v. Elder, 900 F.3d 491, 497-498 (7th Cir. 2018). Under the categorical approach, courts "focus solely" on "the elements of the crime of conviction," not "the particular facts of the case." Mathis v. United States, 136 S. Ct. 2243, 2248 (2016). But if the statute of conviction lists multiple alternative elements and is thus "'divisible,'" a court may apply a "'modified categorical approach'" that "looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what

elements, [the] defendant was convicted of." Id. at 2249 (citations omitted); see Shepard v. United States, 544 U.S. 13, 26 (2006). This Court has cautioned against applying "legal imagination to a state statute's language" under those approaches. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007). And in order to conclude that a state offense does not qualify as a predicate offense, there must be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." Ibid.; see Taylor, 495 U.S. at 602 (holding that the categorical approach is met if the "statutory definition [of the prior conviction] substantially corresponds to [the] 'generic' [offense]").

The Arizona statute under which petitioner was convicted for his drug-offense conduct in October 2007 (see PSR ¶ 47) is divisible into different crimes based on the type of drug involved. In Mathis v. United States, supra, this Court identified several tools for determining whether a statute is divisible. For instance, "[i]f statutory alternatives carry different punishments," then "they must be elements" and "the statute on its face [will] resolve the issue." Mathis, 136 S. Ct. at 2256. Alternatively, "the record of a prior conviction itself," including the indictment and any jury instructions, may answer the question if they, for instance, "indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime." Id.

at 2256-2257. The Arizona statute of conviction here, as well as the records of petitioner's conviction, show that the identity of the substance possessed -- particularly where that substance is methamphetamine -- is an element of the offense, such that different drug types define different offenses.

The statute in question prohibits knowingly "possess[ing] or us[ing] a dangerous drug," Ariz. Rev. Stat. Ann. § 13-3407(A)(1) (2006), which is defined to include methamphetamine, id. § 13-3401(6)(c)(xxxviii). The State may move to reduce the offense from a class 4 felony to a misdemeanor but only if the offense did not involve four specific substances, including methamphetamine. Id. § 13-3407(B)(1). Because possession of methamphetamine, as opposed to most other dangerous drugs, subjects the defendant to a higher potential penalty by removing the possibility of a misdemeanor sentence, the drug's identity is an element of the offense. See Mathis, 136 S. Ct. at 2256 ("If statutory alternatives carry different punishments, then * * * they must be elements.").

The record of the 2008 Arizona conviction in this case further confirms that the statute is divisible. See Mathis, 136 S. Ct. at 2257. According to the uncontested recitation in the presentence report, petitioner was convicted of "Possession of Dangerous Drugs (Methamphetamine)."[1] PSR ¶ 47. Although the underlying Arizona

[1] The narrative portion of the presentence report stated that petitioner was initially charged with "Transportation of Dangerous Drugs for Sale (Methamphetamine)," PSR ¶ 47, but that statement was later corrected by the government's amended information, which

state-court records of petitioner's conviction were not themselves included in the record, that was only because petitioner neither challenged the presentence report nor raised his current claim below. Because the presentence report presumably reflects state-court documents that "referenc[e] one alternative term to the exclusion of all others," those materials indicate that drug type was an element of the Arizona offense. Mathis, 136 S. Ct. at 2257.

Because petitioner was convicted of a methamphetamine-specific crime, his argument that the crime encompasses an over-broad set of substances must turn solely on the substances that qualify as methamphetamine. Petitioner contends (Pet. 12) that Arizona's definition of methamphetamine is broader than the federal definition because it includes both "optical and geometric isomers," whereas federal law "defines the drug more narrowly to include optical isomers." That is incorrect. Although federal law does not reference geometric isomers of methamphetamine, see 21 U.S.C. 802(9)(B) and (14); 21 C.F.R. 1308.02, 1308.12(d)(2), Arizona's law does not truly include them because, as the government has recently explained through expert evidence in other cases, no geometric isomers of methamphetamine exist. See, e.g., United States v. Trinidad Hernandez, 759 Fed. Appx. 590, 594 (9th Cir. 2018) (unpublished) (noting that a prior decision did not address that factual issue, which the government supported with

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specifically stated that petitioner was convicted of "possession of dangerous drugs (methamphetamine)." See p. 5, supra.

affidavits in the case on appeal); cf. United States v. Bogusz, 43 F.3d 82, 88-89 & n.10 (3d Cir. 1994) (explaining that methamphetamine has "two isomeric forms," both of which are "enantiomers" or "optical" isomers identified by the "optical rotation of light"), cert. denied, 514 U.S. 1090 (1995).[2]

Petitioner thus cannot show a "realistic probability" or even a "theoretical possibility" that "the State would apply its statute" to possession of a geometric isomer of methamphetamine. Duenas-Alvarez, 549 U.S. at 193. Although Arizona law defines the term "dangerous drug" to include a number of listed substances (including methamphetamine) and the "isomers, whether optical, positional or geometric," thereof, Ariz. Rev. Stat. Ann. § 13-3401(6)(c) and (6)(c)(xxxviii) (2006), that general statutory provision applies to a list of dozens of substances and does not suggest that each of the relevant substances actually has geometric isomers. And in light of petitioner's failure to raise this issue below so as to permit relevant factual development, he cannot establish error on the record of his case, let alone plain error that was obvious when his appeal was decided. Cf. United States v. Luque-Rodriguez, 764 Fed. Appx. 578, 579 (9th Cir.) (rejecting similar plain-error argument that turned on "whether geometric

[2] The term "optical isomer" is used to describe "enantiomers" and reflects the method by which enantiomers are identified. Sunovian Pharm., Inc. v. Teva Pharm. USA, Inc., 731 F.3d 1271, 1273 n.* (Fed. Cir. 2013).

isomers of methamphetamine exist"), cert. denied, 140 S. Ct. 68 (2019).

Contrary to petitioner's contention (Pet. 8-9, 13), the decision below does not conflict with decisions of other courts of appeals. Indeed, the decision of the court of appeals here could not conflict with any such decision on the question petitioner now presents for the first time in this Court, because the court of appeals did not address that question. In any event, the decisions petitioner cites are inapposite. For instance, the Seventh Circuit in Elder concluded that a different subsection of Ariz. Rev. Stat. Ann. § 13-3407 -- Section 13-3407(A)(3) (1997) -- was not divisible by drug type. 900 F.3d at 494 & n.1, 503. And at the time of the offense conduct in that case, the relevant Arizona statute did not yet provide for differing penalties based on the drug involved. See Ariz. Rev. Stat. Ann. § 13-3407(B)(3) (1997) (stating that violation of Section 13-3407(A)(3) was a class 3 felony). The Ninth Circuit's decision in Madrid-Farfan v. Sessions, 729 Fed. Appx. 621, 622 (2018) (unpublished), not only is non-precedential and thus could not create a conflict of authority warranting review, it also involved a statute that did not contain the type of heightened penalties for certain substances like the statute at issue here. Indeed, in another unpublished decision, the Ninth Circuit found that subsection (A)(7) of the Arizona statute at issue here, Ariz. Rev. Stat. Ann. § 13-3407, was divisible based

on a "peek" at the record of conviction. Gonzalez-Dominguez v. Sessions, 743 Fed. Appx. 808, 811-812 (9th Cir. 2018) (unpublished).[3]

d. Petitioner briefly argues (Pet. 13) that the state statute underlying his 2002 South Dakota conviction "also criminalizes substances that are not found in the Federal Controlled Substance List, thus, making it overbroad." But petitioner neither identifies any such substances nor cites any decision holding that possession of a controlled substance in violation of South Dakota law is not a "felony drug offense." In any event, similar to the Arizona statute, the South Dakota statute imposes different penalties based on the schedule on which the substance is listed, see S.D. Codified Laws § 22-42-5 (1998), and petitioner's

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[3] The other decisions that petitioner cites do not address the Arizona or South Dakota statutes at issue here or even the definition of "felony drug offense" in 21 U.S.C. 802(44). Some instead address whether different state statutes are predicate "controlled substance offense[s]" under the Sentencing Guidelines. See United States v. Townsend, 897 F.3d 66, 69-70 (2d Cir. 2018); United States v. Hinkle, 832 F.3d 569, 571-572 (5th Cir. 2016); United States v. McKibbon, 878 F.3d 967, 971-972 (10th Cir. 2017). The court of appeals in United States v. Phifer, 904 F.3d 947, replaced by 909 F.3d 372 (11th Cir. 2018), withdrew the decision petitioner cites (Pet. 13) and its replacement does not address whether a state offense was a felony drug offense under 21 U.S.C. 802(44). 909 F.3d at 375.

Relying on Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905 (9th Cir. 2004), petitioner briefly asserts (Pet. 13) that his prior convictions do not count as felony drug offenses because they were "not punishable as * * * felon[ies] under federal law because [they] did not involve a trafficking element." But Cazarez-Gutierrez involved a different question -- the meaning of the phrase "illicit trafficking in a controlled substance" in 8 U.S.C. 1101(a)(43)(B) -- and it therefore has no relevance to this case. 382 F.3d at 909-910.

indictment for the relevant South Dakota offense specifically alleged that he knowingly "posses[ed] a controlled drug or substance[,] methamphetamine." Pet. C.A. Addendum A12. Petitioner thus fails to show error, let alone plain error, in the classification of his 2002 crime as a "felony drug offense."

e. The petition in this case should not be held pending the Court's upcoming decision in Shular v. United States, No. 18-6662 (oral argument scheduled for Jan. 21, 2020). Shular presents the question whether a state drug offense must categorically match the elements of a generic analogue offense in order to qualify as a "serious drug offense" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(A)(ii). Pet. at i, 6, 23-24, Shular, supra. This case involves classification of a different state drug offense under a different federal provision. And the petition's untimeliness provides further reason to deny it. See p. 8, supra.

3. Petitioner separately renews his contention that his sentence of life imprisonment violated the Eighth Amendment. Pet. 16-19. The contention lacks merit and does not warrant further review.

a. This Court has instructed that "the Eighth Amendment contains a 'narrow proportionality principle'" that "'forbids only extreme sentences that are "grossly disproportionate" to the crime.'" Graham v. Florida, 560 U.S. 48, 59-60 (2010) (quoting Harmelin v. Michigan, 501 U.S. 957, 997, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)). In

determining whether a sentence is grossly disproportionate, "[a] court must begin by comparing the gravity of the offense and the severity of the sentence." Id. at 60. That initial, "objective" inquiry requires courts to "grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." Solem v. Helm, 463 U.S. 277, 290 (1983). Only "'[i]n the rare case in which [that] threshold comparison . . . leads to an inference of gross disproportionality'" should a court then proceed to "compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions" to determine whether the initial inference of disproportionality is correct. Graham, 560 U.S. at 60 (citation omitted; second set of brackets in original).

Petitioner's sentence is not grossly disproportionate to his offense. In Harmelin v. Michigan, supra, for instance, the Court upheld a life sentence without parole for possession of 672 grams of cocaine. 501 U.S. at 990, 996. And in Rummel v. Estelle, 445 U.S. 263 (1980), the Court upheld a mandatory life sentence under a statutory three-strike recidivist enhancement for a defendant whose three fraud offenses triggering that enhancement collectively involved a total of about $229. Id. at 264-266, 284-285. Petitioner's recidivist enhancement likewise complies with the Eighth Amendment.

The court of appeals correctly recognized that a sentence of life imprisonment was not grossly disproportionate to petitioner's offense in light of the "gravity of the offense" and petitioner's "history of felony convictions." 893 F.3d at 1067. The package of drugs that petitioner received in this case contained more than ten pounds of methamphetamine and 233 grams of cocaine. PSR ¶ 7. Hartz had received six other similar packages on petitioner's behalf in 2014 and 2015. PSR ¶¶ 11, 14, 16. Petitioner was carrying a .22 caliber handgun and two shotguns in his vehicle when he attempted to retrieve the package of drugs from Hartz. PSR ¶ 13. And in addition to his Arizona and South Dakota convictions, petitioner had prior convictions for possession of controlled substances in 1985 and 1987 and for assault in 1990. PSR ¶¶ 37, 38, 41. In light of the gravity of petitioner's offense and his lengthy criminal history, his life sentence does not violate the Eighth Amendment.

b. Petitioner argues (Pet. 14-16) that "his sentence is erroneous under the First Step Act [of 2018]" and that this Court should therefore grant certiorari, vacate the decision below, and remand for further proceedings in light of that statute, Pet. 14. Section 401 of the First Step Act reduced the statutory minimum in 21 U.S.C. 841(b)(1)(A) for a defendant who has two qualifying prior convictions from life to 25 years of imprisonment and replaced the term "felony drug offense" with the terms "serious drug felony or serious violent felony." First Step Act of 2018, Pub. L. No.

115-391, § 401(a)(2)(A)(ii), 132 Stat. 5220. But those amendments apply only to cases in which "a sentence for the offense ha[d] not been imposed as of" December 2018. Id. § 401(c), 132 Stat. 5221. The amendments therefore do not apply to petitioner's case because he was sentenced in April 2017. And because Congress did not make the reduced statutory minimum sentences in 21 U.S.C. 841(b)(1)(A) retroactive, no basis exists to grant, vacate, and remand this case for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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