

IN THE SUPREME COURT OF THE UNITED STATES

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DAN PIZARRO, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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. La.):

United States v. Pizarro, No. 16-cr-63 (Feb. 7, 2018)

United States Court of Appeals (5th Cir.):

United States v. Pizarro, No. 18-30201 (Mar. 7, 2019)

Supreme Court of the United States:

Pizarro v. United States, No. 19-5102 (Aug. 6, 2019) (removed from docket)

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No. 18-9789

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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 756 Fed. Appx. 458.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2019. A petition for rehearing was denied on April 9, 2019 (Pet. App. A5). The petition for a writ of certiorari was filed on June

19, 2019.<sup>1</sup> 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 Louisiana, petitioner was convicted on one count of conspiracy to distribute and to possess with intent to distribute 500 grams or more of methamphetamine and a quantity of heroin, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A), and (b)(1)(C), and 846 (2012). Judgment 1; see Pet. App. A1. The district 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. A1-A4.

1. From February to June 2014, petitioner and others conspired to transport methamphetamine and heroin from California to Louisiana for distribution. Presentence Investigation Report (PSR) ¶¶ 15-23; Gov't C.A. Br. 2-3. Law-enforcement officers investigating the group's activities recovered more than 1000 grams of methamphetamine that petitioner's drug source in California had shipped to petitioner's co-conspirators in Louisiana. PSR ¶¶ 22-23; Gov't C.A. Br. 3-5.

A grand jury in the Eastern District of Louisiana charged petitioner with one count of conspiracy to distribute and to possess with intent to distribute controlled substances, in

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<sup>1</sup> A later petition for a writ of certiorari, filed June 28, 2019 (No. 19-5102), was removed from this Court's docket on August 6, 2019.

violation of 21 U.S.C. 841(a)(1), (b)(1)(A), and (b)(1)(C), and 846 (2012). Superseding Indictment 1-2. The indictment alleged that the offense involved 500 grams or more of a substance containing methamphetamine and an unspecified quantity of a mixture or substance containing heroin. Id. at 2; see 21 U.S.C. 841(b)(1)(A)(viii) and (C) (2012).

The case proceeded to trial, and the jury found petitioner guilty. Pet. App. A1. Before trial, the government had given notice of its intent to seek an enhanced penalty based on petitioner's prior convictions for two "felony drug offense[s]." 21 U.S.C. 841(b)(1)(A) (2012). See D. Ct. Doc. 113, at 1-2 (June 23, 2017); 21 U.S.C. 851. Because those "prior convictions for a felony drug offense ha[d] become final" before petitioner committed the charged offense, petitioner was subject to a mandatory sentence of life imprisonment. 21 U.S.C. 841(b)(1)(A) (2012). On February 7, 2018, the district court imposed the statutory sentence of life imprisonment, to be followed by ten years of supervised release. Judgment 2-3.

2. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A4. The court rejected petitioner's contention that the district court abused its discretion in admitting evidence of petitioner's prior arrest and conviction for possession of marijuana with intent to distribute. Id. at A2-A3. The court of appeals also denied petitioner's pro se motion to file a supplemental brief -- raising a series of issues not relevant here

-- because petitioner was represented by counsel and was "not entitled to hybrid representation." Id. at A3-A4.

#### ARGUMENT

Petitioner contends (Pet. 3-11) that he is entitled to a resentencing under a provision of the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, § 401, 132 Stat. 5220, that reduces the minimum penalty associated with the recidivist drug-trafficking offense set forth in 21 U.S.C. 841(b)(1)(A).<sup>2</sup> This Court recently granted, vacated, and remanded in two matters presenting substantially the same question. 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). 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. Petitioner was sentenced under Section 841(b)(1)(A). At the time of petitioner's 2014 offense conduct and his February 2018 sentencing, Section 841(b)(1)(A) provided for a mandatory penalty of life imprisonment for a defendant who conspired to commit a violation of 21 U.S.C. 841(a) involving 500 grams or more of a substance containing methamphetamine "after two or more prior

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<sup>2</sup> Another pending petition for a writ of certiorari raises a similar issue. See Sanchez v. United States, No. 18-9070 (filed Apr. 30, 2019).

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 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 that offense to 25 years of imprisonment. See § 401(a)(2)(A)(ii), 132 Stat. 5220.<sup>3</sup>

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." § 401(c), 132 Stat. 5221 (emphasis added). Petitioner's sentence was imposed on February 7, 2018, see Judgment 1 -- well before the First Step Act was enacted on December 21, 2018. See 18 U.S.C. 3553 ("Imposition of a sentence") (emphasis omitted); United States v. Wiseman, No. 18-3904, 2019 WL 3367615, at \*3 (6th Cir. July 26, 2019) (determining that defendant "cannot benefit from" Section 401 of the First Step Act because "he was sentenced prior

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<sup>3</sup> 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.

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, the amendments made by Section 401 do not apply to petitioner's offense.

2. This Court recently granted two petitions for writs of certiorari, vacated the respective judgments, and remanded to the courts of appeals to consider the First Step Act, notwithstanding the government's contention that the defendants' sentences had been imposed before the enactment of the statute. See Richardson, supra (No. 18-7036); Wheeler, supra (No. 18-7187).<sup>4</sup> 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 petitioner's appeal was still pending in the Fifth Circuit, 76 days before the court of appeals ultimately entered its judgment. See Pet. App. A1. Although, as petitioner observes (Pet. 2), the principal briefs in the case had

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<sup>4</sup> Richardson concerned Section 403(b) of the First Step Act, governing the applicability of 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). The two provisions have the same wording.

already been filed, and petitioner had agreed that the case did not warrant oral argument, see Pet. C.A. Br. ii, 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 DSC Commc'ns Corp. v. Next Level Commc'ns, 107 F.3d 322, 326-327 & n.2 (5th Cir. 1997) (considering an argument based on an intervening legal development raised for the first time in a supplemental brief).<sup>5</sup>

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 therefore should 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,"

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<sup>5</sup> Indeed, shortly before the enactment of the First Step Act, petitioner sought leave to file a pro se supplemental brief in the court of appeals that addressed other issues. See Pet. App. A3; 18-30201 Docket entry (Dec. 13, 2018). The court denied that motion on the ground that petitioner was represented by counsel and not entitled to "hybrid representation." Pet. App. A3.

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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