No. 19-6078

IN THE SUPREME COURT OF THE UNITED STATES

TERREALL MCDANIEL, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

SANGITA K. RAO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5221, 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," § 403(b), 132 Stat. 5222, applies to petitioner's sentence, which was imposed several months before the Act's enactment.

2. Whether plain-error relief is warranted on petitioner's claim that the court of appeals impermissibly determined that his prior convictions were for offenses "committed on occasions different from one another," for purposes of sentencing under the Armed Career Criminal Act of 1984, 18 U.S.C 924(e)(1).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Mo.):

United States v. McDaniel, No. 15-cr-240 (Mar. 1, 2018)

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

United States v. McDaniel, No. 18-1477 (May 30, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 925 F.3d 381.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2019. A petition for rehearing was denied on July 17, 2019 (Pet. App. C1). The petition for a writ of certiorari was filed on September 24, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Western District of Missouri, petitioner was convicted on one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C), (b)(1)(D), and 851 (2012); one count of possession with intent to distribute marijuana and cocaine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C), (b)(1)(D), and 851 (2012); two counts of possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c) (2012); and two counts of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Amended Judgment 1; see Indictment 1-3. The district court sentenced petitioner to 622 months of imprisonment, to be followed by six years of supervised release. Amended Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A12.

1. In December 2014, a state trooper conducted a traffic stop of petitioner's car. Presentence Investigation Report (PSR) ¶ 2. The trooper smelled marijuana, and petitioner admitted that he had a small marijuana "joint" in the car. Ibid. A search of the car revealed marijuana, 22 baggies of cocaine, and two digital scales, as well as a loaded 9mm handgun under the driver's seat. Ibid.; Pet. App. A5. The trooper's dash camera captured petitioner stating into a phone, "It's over for me" and "They're about to find the gun and shit." Pet. App. A5; see PSR ¶ 3. Petitioner

was arrested by local police, but was released pending the filing of charges. PSR ¶ 4.

In June 2015, petitioner crashed a car in a wooded area after attempting to evade a traffic stop. PSR ¶¶ 5-6. Petitioner was arrested nearby. PSR ¶ 6. An officer observed a loaded .40 caliber pistol on the car's driver's seat. PSR ¶ 7. An inventory search of the car revealed, inter alia, marijuana, ten baggies of cocaine, a metal marijuana grinder, and a digital scale. PSR ¶ 7; see Pet. App. A5.

A federal grand jury charged petitioner with one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C), (b)(1)(D), and 851 (2012); one count of possession with intent to distribute marijuana and cocaine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C), (b)(1)(D), and 851 (2012); two counts of possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c) (2012); and two counts of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Indictment 1-2. After a bench trial, the district court found petitioner guilty on all counts. Pet. App. A1; Amended Judgment 1.

Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of possession of a firearm by a felon is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA),

18 U.S.C. 924(e), prescribes a penalty of 15 years to life imprisonment if the defendant has at least "three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1).

The Probation Office determined that petitioner qualified for an enhanced sentence under the ACCA based on three Missouri convictions for selling cocaine in violation of Mo. Rev. Stat. § 195.211. PSR ¶¶ 27, 33. The Probation Office explained that the three-count information from the relevant state-court case showed that one of the convictions (Count I) resulted from offense conduct occurring on January 24, 2002, another (Count II) resulted from conduct occurring on January 28, 2002, and the third (Count III) resulted from conduct occurring on February 4, 2002. PSR ¶ 33. Petitioner objected, arguing that the evidence did not "support the conclusion that he was previously convicted of controlled substances offenses on three different occasions" because the state judgment listed the controlled substance offenses relating to Counts I and II as having occurred on the same date, January 24, 2002. See PSR Addendum 1-2.

In response to petitioner's objection, the government introduced "a certified copy of the information in the [state] case," which "included a handwritten amendment to the offense date of Count II." Pet. App. A7. "As amended, the information charged

[petitioner] with three counts of violating § 195.211" of the Missouri drug statute, "occurring on three separate dates: January 24, 2002, January 28, 2002, and February 4, 2002." Ibid. To further "clarify the discrepancy between the information and the judgment, the government introduced a certified copy of the guilty plea transcript," which "show[ed] that the parties discussed and [petitioner] agreed that the correct date for Count II was January 28, 2002." Ibid.

The district court overruled petitioner's objection. Sent. Tr. 20. The court sentenced petitioner to a total term of 622 months of imprisonment, to be followed by six years of supervised release. Amended Judgment 2-3. The term of imprisonment consisted of concurrent terms of 262 months of imprisonment on the two drug counts (Counts 1 and 4) and the two felon-in-possession counts (Counts 3 and 6), as well as a mandatory consecutive 60-month term on the first Section 924(c) count (Count 2), and a mandatory consecutive 300-month term on the second Section 924(c) count (Count 5). Id. at 2; see Pet. App. B2-B3 (initial judgment omitting information on Count 5).

2. a. The court of appeals affirmed. Pet. App. A1-A12. As relevant here, the court of appeals rejected petitioner's argument that "the district court erred in sentencing him" under the ACCA, which had rested on his assertion that "[t]he government failed to demonstrate that two of the predicate convictions relied

on by the district court were 'committed on occasions different from one another.'" Id. at A6 (brackets in original). The court of appeals noted that it had "repeatedly held that convictions for separate drug transactions on separate days are multiple ACCA predicate offenses," ibid. (citation omitted), and determined that the district court did not err in determining that petitioner's prior drug offenses here had occurred on different days. Pet. App. A6-A9.

The court observed that the district court's finding was supported by "a certified copy of the information in the case" showing that Count II occurred on January 28, 2002, as well as a "certified copy of the guilty plea transcript." Pet. App. A7. The court quoted from the plea transcript, in which the state-court judge directed that "[t]he information * * * be amended to reflect th[e] fact" that "discovery show[ed]" that the drug transaction underlying Count II had occurred on January 28, 2002, rather than January 24, 2002. Ibid. The court also quoted the state-court judge asking petitioner whether "four days later on January 28th, did you sell crack cocaine again?" and petitioner responding "Yes." Ibid. The court of appeals accordingly determined that "the information and plea transcript * * * show that [petitioner] was convicted of three violations of" the Missouri statute, "occurring on three separate occasions." Id. at A8.

Judge Stras filed a concurring opinion. Pet. App. A10-A12. Judge Stras did not dispute that the court of appeals had reached the correct result in light of circuit precedent, but he "question[ed] why we allow judges, rather than juries, to determine whether offenses were 'committed on occasions different from one another.'" Id. at A10 (quoting 18 U.S.C. 924(e)(1)). Judge Stras observed, however, that because petitioner "waived his right to a jury trial," he "might not have been deprived of his Sixth Amendment rights" even if the Sixth Amendment requires juries, rather than judges, to conduct the different-occasions inquiry. Id. at A12.

b. While petitioner's appeal was pending, on December 21, 2018 -- after the completion of briefing in this case, but before oral argument -- the President signed into law the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, 132 Stat. 5194. At the time petitioner committed his offenses, as well as at the time of his sentencing, Section 924(c) provided for a minimum sentence of 25 years of imprisonment "[i]n the case of a second or subsequent conviction" under Section 924(c). 18 U.S.C. 924(c)(1)(C) (2012). This Court had interpreted that provision to apply when a defendant was convicted of the "second or subsequent" violation of Section 924(c) in the same proceeding as the defendant's first Section 924(c) violation. See Deal v. United States, 508 U.S. 129, 132-137 (1993). In the First Step Act,

Congress amended Section 924(c)(1)(C) by striking the prior reference to a "second or subsequent conviction" and instead specifying that the enhanced mandatory penalty applies to a "violation of [Section 924(c)] that occurs after a prior conviction under [Section 924(c)] has become final." § 403(a), 132 Stat. 5221-5222. Congress specified that those amendments "shall apply to any offense that was committed before the date of enactment of th[e] Act, if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222.

Following enactment of the First Step Act, petitioner filed a letter under Fed. R. App. P. 28(j), arguing that he was entitled to resentencing under Section 403 of the Act, such that he would be subject to a five-year, rather than a 25-year, mandatory consecutive sentence for his second Section 924(c) conviction. See Pet. C.A. Letter (Jan. 11, 2019). The government maintained in response that the First Step Act did not apply because petitioner's sentence was imposed before the Act's effective date. Gov't C.A. Letter 1-2 (Feb. 1, 2019). The court of appeals did not specifically address petitioner's First Step Act claim in its opinion.

c. Petitioner sought panel rehearing and rehearing en banc, arguing for the first time that the Sixth Amendment precluded the district court from determining that his state drug offenses were "committed on occasions different from one another," 18 U.S.C.

924(e)(1). Compare Pet. C.A. Pet. for Reh'g 1-2, 6 n.1, with Pet. C.A. Br. 38-44. Petitioner also renewed the contention that he was entitled to resentencing under the First Step Act. See Pet. C.A. Pet. for Reh'g 9-11. The court of appeals denied rehearing. Pet. App. C.

ARGUMENT

Petitioner contends (Pet. 7-18) that this Court should grant his petition for a writ of certiorari, vacate the judgment below, and remand the case to the court of appeals for consideration of whether the amendments made by Section 403 of the First Step Act apply to this case. No such action is warranted. The First Step Act's plain language forecloses petitioner's claim, and petitioner already had the opportunity to present his argument to the court of appeals. This Court has recently denied petitions for writs of certiorari raising the same question, or the analogous question under the identically worded Section 401(c) of the First Step Act, 132 Stat. 5221.[1] The Court should follow the same course here.[2]

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[1] See Coleman v. United States, No. 19-5445 (Nov. 25, 2019); Smith v. United States, No. 18-9431 (Nov. 4, 2019); Pizarro v. United States, 140 S. Ct. 211 (2019) (No. 18-9789); Sanchez v. United States, 140 S. Ct. 147 (2019) (No. 18-9070).

[2] Similar questions are presented in other pending petitions for writs of certiorari. See Nelson v. United States, petition for cert. pending, No. 19-6264 (filed Aug. 29, 2019); Huskisson v. United States, petition for cert. pending, No. 19-527 (filed Oct. 17, 2019); Pierson v. United States, petition for cert. pending, No. 19-566 (filed Oct. 28, 2019).

Petitioner also contends (Pet. 18-26) that the Sixth Amendment prohibited the district court from determining from judicial records of his prior convictions that his prior offenses were "committed on occasions different from one another," for purposes of sentencing under the ACCA, 18 U.S.C. 924(e)(1). The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. This Court has repeatedly denied review of petitions for writs of certiorari presenting related questions.[3] The same result is warranted here.[4]

1. Petitioner requests (Pet. 7-18) that this Court grant the petition, vacate his sentence, and remand to the court of appeals to consider whether he is entitled to resentencing under the First Step Act. Petitioner's request is unsound.

a. Petitioner was sentenced under 18 U.S.C. 924(c)(1)(C) (2012). At the time of petitioner's 2014 and 2015 offense conduct and his February 2018 sentencing, Section 924(c) provided for a

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[3] See, e.g., Hennessee v. United States, No. 19-5924 (Jan. 13, 2020); Perry v. United States, 140 S. Ct. 90 (2018) (No. 18-9460); Smallwood v. United States, 137 S. Ct. 51 (2016) (No. 15-9179); Blair v. United States, 574 U.S. 828 (2014) (No. 13-9210); Brady v. United States, 566 U.S. 923 (2012) (No. 11-6881); Garza v. United States, 547 U.S. 1132 (2006) (No. 05-8902).

[4] Similar questions are presented in other pending petitions for writs of certiorari. See Jones v. United States, No. 19-6662 (filed Nov. 14, 2019); Starks v. United States, No. 19-6693 (filed Nov. 19, 2019).

minimum penalty of 25 years of imprisonment "[i]n the case of a second or subsequent conviction" under Section 924(c). Ibid. This Court had interpreted that provision to apply when a defendant was convicted of the "second or subsequent" violation of Section 924(c) in the same proceeding as the defendant's first Section 924(c) violation. See Deal v. United States, 508 U.S. 129, 132-137 (1993). Section 403(a) of the First Step Act later amended Section 924(c)(1)(A) by striking the prior reference to a "second or subsequent conviction" and instead specifying that the enhanced mandatory penalty applies to a "violation of [Section 924(c)] that occurs after a prior conviction under [Section 924(c)] has become final." § 403(a), 132 Stat. 5221-5222.

That amendment does not apply to petitioner. Section 403(b) of the First Step Act provides that "the amendments made by [Section 403] 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. 5222 (emphasis added). Petitioner's sentence was imposed on February 28, 2018, see Pet. App. B1 -- well before the First Step Act was enacted on December 21, 2018. Accordingly, the amendments made by Section 403 do not apply to petitioner's case.[5]

[5] Even if this Court were to consider the date of the amended judgment -- April 25, 2018 -- as the date the sentence was imposed, that date also is months before the First Step Act's enactment.

Indeed, every court of appeals to have considered the question has found that the plain text of the First Step Act forecloses its application to sentencing orders issued before December 21, 2018. See United States v. Aviles, 938 F.3d 503, 510 (3d Cir. 2019) ("Congress's use of the word 'imposed' thus clearly excludes cases in which a sentencing order has been entered by a district court [before December 21, 2018] from the reach of the amendments made by the First Step Act."); see also United States v. Hodge, No. 19-1930 (3d Cir. Jan. 17, 2020), slip op. 3-5 (same); United States v. Wiseman, 932 F.3d 411, 417 (6th Cir. 2019) (same); United States v. Pierson, 925 F.3d 913, 928 (7th Cir. 2019) (same), petition for cert. pending, No. 19-566 (filed Oct. 28, 2019); Young v. United States, 943 F.3d 460, 463-464 (D.C. Cir. 2019);.

Petitioner contends (Pet. 8) that the First Step Act "cannot be read to limit or prohibit its application to cases on direct appeal, because a sentence does not become a 'final judgment,' (or finally 'imposed') until it has reached a judgment in the Supreme Court." See Pet. 12-18. That contention lacks merit. As noted, Congress instructed that the relevant provisions of the First Step Act apply only to pending cases where "a sentence * * * has not been imposed," § 403(b), 132 Stat. 5222, and the ordinary meaning of the term "imposed" is that a sentence is "imposed" when it is pronounced by the district court. Congress routinely uses the term "impose" to refer to the act of sentencing by the trial court,

not the pendency of a case on direct appeal. See, e.g., Fed. R. Crim. P. 32(b)(1) ("The court must impose sentence without unnecessary delay."); 18 U.S.C. 3553(a) ("factors to be considered in imposing a sentence") (capitalization omitted); 18 U.S.C. 3661 (no limit on information the district court may consider "for the purpose of imposing an appropriate sentence"); 18 U.S.C. 3742 (specifying the grounds on which a party may appeal "an otherwise final sentence" that "was imposed"); 21 U.S.C. 851(b) (challenge to an information alleging a sentencing enhancement must be made "before sentence is imposed"). And this Court likewise uses the term "impose" to describe the district court's actions and not the pendency of the case on direct appeal. See, e.g., Molina-Martinez v. United States, 136 S. Ct. 1338, 1347 (2016) (stating that the record did not explain why the district court "chose the sentence it imposed"); Pepper v. United States, 562 U.S. 476, 492 (2011) (stating that the likelihood a defendant will reoffend is a key factor that a "district court[] must assess when imposing sentence"); Gall v. United States, 552 U.S. 38, 51 (2007) (stating that appellate courts review "the substantive reasonableness of the sentence imposed using an abuse-of-discretion standard").

b. Adhering to the plain meaning of the term "imposed" in the First Step Act is also consistent with the "ordinary practice" in federal sentencing "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 specifies 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 "expressly provide[s]."

Petitioner nonetheless contends that the "repeal of a criminal statute while an appeal is pending, including any 'repeal and re-enactment with different penalties . . . [where only] the penalty was reduced,' * * * must be applied by the court of appeals, absent 'statutory direction . . . to the contrary.'" Pet. 14 (quoting Bradley v. United States, 410 U.S. 605, 607-608 (1973), and Bradley v. School Bd., 416 U.S. 696, 711 (1974), respectively). For purposes of federal law, however, the saving statute "abolish[ed] the common-law presumption" that petitioner invokes. Warden v. Marrero, 417 U.S. 653, 660 (1974) (citing Bradley, 410 U.S. at 607); see ibid. ("To avoid such abatements -- often the product of legislative inadvertence -- Congress enacted 1 U.S.C. § 109, the general saving clause.").

The saving statute thus ensures that a "convicted criminal defendant does not fortuitously benefit from more lenient laws that may be passed after he or she has been convicted." United States v. Smith, 354 F.3d 171, 174 (2d Cir. 2003) (Sotomayor, J.). As relevant here, "the saving clause has been held to bar

application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense." Marrero, 417 U.S. at 661. In any event, Section 403 of the First Step Act itself dictates that the amendments made by that provision do not apply to a Section 924(c) conviction, like the one at issue here, for which a sentence was already imposed before the enactment of the Act. The Act thus provides clear "statutory direction" about its applicability to pending cases, School Board, 416 U.S. at 711, and that direction should be given effect.[6]

c. Petitioner additionally contends (Pet. 16-17) that had Congress intended for the relevant amendments not to apply to cases on direct appeal on the date of enactment, it would have used the language it adopted in connection with the First Step Act's amendments to certain provisions of Title 18. See, e.g., First Step Act § 402(b) ("The amendments made by this section [to 18 U.S.C. 3553, 132 Stat. 5221] shall apply only to a conviction entered on or after the date of enactment of this Act."). But the applicability of other parts of the First Step Act on the date a

[6] Petitioner errs in relying (Pet. 15-16) on Hamm v. City of Rock Hill, 379 U.S. 306 (1964). Hamm involved the enactment of a statute substantially different in kind, the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, which "substitute[d] a right for a crime," by giving the petitioners a right to engage in the conduct for which they had previously been prosecuted -- participating in sit-in demonstrations at racially segregated lunch counters. Hamm, 379 U.S. at 314; see id. at 307, 311.

conviction is entered says nothing about Congress's choice to use the date of the imposition of a sentence in Section 403(b).

Petitioner's reliance (Pet. 12-13) on United States v. Clark, 110 F.3d 15 (6th Cir. 1997), is misplaced. The Sixth Circuit in Clark interpreted the applicability provision of the safety valve statute (18 U.S.C. 3553(f)), which stated that the statute applied "to all sentences imposed on or after the date of enactment," Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. VIII, § 80001(c), 108 Stat. 1986, to apply to cases pending on appeal when the statute was enacted. "[N]o other circuits have applied Clark's definition of 'imposed' while interpreting the safety-valve statute, let alone applied it while interpreting any other statute." Pierson, 925 F.3d at 928; see Young, 943 F.3d at 463-464; see, e.g., United States v. Pelaez, 196 F.3d 1203, 1205 n.4 (11th Cir. 1999) (rejecting Clark's interpretation of the applicability of the safety valve statute to cases pending on appeal).[7] Moreover, notwithstanding Clark, the

[7] Petitioner suggests (Pet. 13-14) that United States v. Mihm, 134 F.3d 1353 (8th Cir. 1998), followed Clark. But in Mihm, the Eighth Circuit decided only that a district court could apply the safety valve statute during a sentence modification proceeding under 18 U.S.C. 3582(c) that occurred after the effective date of the statute on the theory that the modification proceeding resulted in a new sentence, thus falling within the applicability provision (which encompassed "all sentences imposed on or after the date of enactment). Mihm, 134 F.3d at 1354 (citation omitted). The court in Mihm did not hold that a sentence is not "imposed" until it

Sixth Circuit has itself interpreted the pertinent language in the First Step Act not to apply to defendants, like petitioner, who were sentenced by the district court prior to the effective date of the statute. See Wiseman, 932 F.3d at 417 (interpreting Section 401(c) of the First Step Act).

Petitioner further contends (e.g., Pet. 10-12, 17) that while other provisions of the First Step Act that also use the word "imposed" may not apply to sentences pronounced by a district court before the First Step Act's enactment, Section 403 should be treated differently because it is entitled "Clarification of Section 924(c)." First Step Act § 403, 132 Stat. 5221 (capitalization and emphasis omitted). A word in a title, however, cannot override the explicit plain language of Section 403(b). See Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 528-529 (1947) (noting the "wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text"). "[T]he fact that Congress used the 'clarification' label in § 403's heading does not clearly indicate Congress's intent" -- notwithstanding the express statutory text -- to permit resentencing for defendants like petitioner who were sentenced before the First Step Act took effect but whose cases

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becomes final upon the completion of direct review, as petitioner contends.

were pending on direct appeal in December 2018. United States v. Hunt, No. 19-1075, 2019 WL 5700734, at *2 (10th Cir. Nov. 5, 2019) (explaining that "the First Step Act's amendments to § 924(c) were substantive, rather than clarifying").[8]

Finally, petitioner contends (Pet. 17-18) that the rule of lenity supports applying Section 403 to cases pending on direct appeal when the First Step Act was enacted. But the rule of lenity applies only if, after the application of the traditional tools of statutory construction, a court concludes that a statute contains "grievous ambiguity," such that the court "can make 'no more than a guess as to what Congress intended.'" Muscarello v. United States, 524 U.S. 125, 138-139 (1998) (citations omitted). Section 403 does not contain any such ambiguity, particularly in light of the saving statute.

d. This Court has recently granted three petitions, vacated the respective judgments, and remanded to the courts of appeals to consider the applicability of the First Step Act on appeal, notwithstanding the government's observation that the defendants'

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[8] Petitioner also relies (Pet. 11-12) on Fiore v. White, 531 U.S. 225 (2001) (per curiam), in which this Court held that a defendant was entitled to vacatur of his state conviction where the state supreme court subsequently clarified that his conduct did not fall within the statute "at the time of [the defendant's] conviction." Id. at 228. Here, in contrast, this Court's interpretation of the prior version of Section 924(c) remained the law at the time of petitioner's sentencing.

sentences had been imposed before the enactment of the statute. See Jefferson v. United States, No. 18-9325 (Jan. 13, 2020); Richardson v. United States, 139 S. Ct. 2713 (2019) (No. 18-7036); Wheeler v. United States, 139 S. Ct. 2664 (2019) (No. 18-7187). Jefferson and Richardson involved the provision at issue here, while Wheeler involved the identically worded Section 401(c). See Br. in Opp. at 12-15, Jefferson, supra (No. 18-9325); Br. in Opp. at 22-25, Wheeler, supra (No. 18-7187); Br. in Opp. at 12-16, Richardson, supra (No. 18-7036). Petitioner asks (Pet. 9-10, 18) that the Court do the same here, but a similar disposition is not warranted in this case.

In contrast to Jefferson, Richardson, and Wheeler, petitioner here already had a sufficient opportunity to make the court of appeals aware of his First Step Act claim prior to the court of appeals issuing its opinion.[9] And he exercised that opportunity, through his Rule 28(j) letter and his petition for rehearing. The court's affirmance of his sentence notwithstanding petitioner's presentation of that argument suggests that it agreed with every

[9] In Richardson and Wheeler, the petitioners did not have the opportunity to present their First Step Act claims to the court of appeals, because the Act was enacted after the petition for a writ of certiorari was filed. Br. in Opp. at 22, Wheeler, supra (No. 18-7187); Br. in Opp. at 12, Richardson, supra (No. 18-7036). In Jefferson, the petitioner had only seven days between the Act's enactment and the date the court of appeals entered its judgment. Br. in Opp. at 13, Jefferson, supra (No. 18-9325).

other court of appeals to consider the issue that petitioner's argument lacks merit.

Since the Court's disposition of Richardson and Wheeler, the courts of appeals that have decided the issue have uniformly determined that Section 403 of the First Step Act -- or Section 401, which has materially similar language -- does not apply to offenses for which a defendant was already sentenced before the enactment of the First Step Act. See Hodge, slip op. 3-5; Young, 943 F.3d at 462-463; Aviles, 938 F.3d at 510; Wiseman, 932 F.3d at 417; Pierson, 925 F.3d at 928; cf. Hunt, 2019 WL 5700734, at *3; United States v. Melvin, 777 Fed. Appx. 652, 653 (4th Cir. 2019) (per curiam); United States v. Means, 2019 WL 4302941, at *2 (11th Cir. Sept. 11, 2019) (per curiam).

Because petitioner's First Step Act claim was presented below and lacks merit, no reasonable probability exists that the court of appeals would remand this case for resentencing in light of that statute. See Greene v. Fisher, 565 U.S. 34, 41 (2011) (explaining that this Court will not grant, vacate, and remand in light of an intervening development unless, as relevant here, "a reasonable probability" exists that the court of appeals will reach a different conclusion on remand) (quoting Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam)). Accordingly, no remand or review by this Court is warranted.

2. Petitioner separately contends (Pet. 18-27) that the Sixth Amendment prohibited the district court from determining from judicial records of his prior convictions that his prior offenses were "committed on occasions different from one another," for purposes of the ACCA, 18 U.S.C. 924(e)(1). That contention does not warrant this Court's review.

a. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a * * * trial[] by an impartial jury." U.S. Const. Amend. VI. "This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt," or be admitted by the defendant. Alleyne v. United States, 570 U.S. 99, 104 (2013) (opinion of Thomas, J.). In a line of decisions beginning with Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court has held that facts -- other than the fact of a prior conviction -- that increase the minimum or maximum sentence that may be imposed on the defendant are elements of the defendant's offense "and must be submitted to the jury and found beyond a reasonable doubt." Alleyne, 570 U.S. at 108 (plurality opinion); see id. at 123-124 (Breyer, J., concurring in part and concurring in the judgment).

In Almendarez-Torres v. United States, 523 U.S. 224 (1998), this Court held that a defendant's prior conviction may be used as the basis for enhanced penalties without transforming it into an

element of the offense that must be alleged in the indictment and proven beyond a reasonable doubt to the jury, see id. at 239-247. Consistent with Almendarez-Torres, the Court's holding in Apprendi is cabined to penalty-enhancing facts "[o]ther than the fact of a prior conviction." Apprendi, 530 U.S. at 490. And this Court has repeatedly reiterated that the rule announced in Apprendi does not apply to "the simple fact of a prior conviction." Mathis v. United States, 136 S. Ct. 2243, 2252 (2016); see Descamps v. United States, 570 U.S. 254, 269 (2013); Alleyne, 570 U.S. at 111 n.1; Southern Union Co. v. United States, 567 U.S. 343, 346 (2012); Carachuri-Rosendo v. Holder, 560 U.S. 563, 567 n.3 (2010); James v. United States, 550 U.S. 192, 214 n.8 (2007), overruled on other grounds by Johnson v. United States, 135 S. Ct. 2551 (2015); Cunningham v. California, 549 U.S. 270, 274-275 (2007); United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v. Washington, 542 U.S. 296, 301-302 (2004).

A sentencing court's authority under Almendarez-Torres to determine the fact of a conviction, without offending the Sixth Amendment, necessarily includes the determination of when a defendant's prior offenses occurred, and whether two of them occurred on the same or separate occasions. That determination is "sufficiently interwoven" with the fact of the conviction that "Apprendi does not require different fact-finders and different burdens of proof for Section 924(e)'s various requirements."

United States v. Santiago, 268 F.3d 151, 157 (2d Cir. 2001), cert. denied, 535 U.S. 1070 (2002). Indeed, whether two offenses occurred on separate occasions "is not a fact which is different in kind from the types of facts already left to the sentencing judge by Almendarez-Torres," such as the fact that "the defendant being sentenced is the same defendant who previously was convicted of those prior offenses." Id. at 156 (emphasis omitted). And it would be anomalous for the Constitution to require a judge to determine whether a prosecution is barred altogether by the Double Jeopardy Clause because the defendant was previously convicted of the "same offence" -- which may entail a determination of the time when the prior offense occurred -- but foreclose that same judge from making a substantially identical determination for sentencing purposes. U.S. Const. Amend. V; see Oregon v. Kennedy, 456 U.S. 667, 669-670, 679 (1982).

b. As petitioner appears to acknowledge (Pet. 26), the courts of appeals have uniformly recognized that the Sixth Amendment does not foreclose Congress from assigning to sentencing judges the task of determining whether a defendant has committed three or more predicate felonies "on occasions different from one another" for purposes of the ACCA. 18 U.S.C. 924(e)(1). See, e.g., United States v. Blair, 734 F.3d 218, 227-228 (3d Cir. 2013), cert. denied, 574 U.S 828 (2014); United States v. Thomas, 572 F.3d 945, 952 n.4 (D.C. Cir. 2009), cert. denied, 559 U.S. 986

(2010); United States v. White, 465 F.3d 250, 254 (5th Cir. 2006) (per curiam), cert. denied, 549 U.S. 1188 (2007); United States v. Michel, 446 F.3d 1122, 1132-1133 (10th Cir. 2006); United States v. Spears, 443 F.3d 1358, 1361 (11th Cir.) (per curiam), cert. denied, 549 U.S. 916 (2006); United States v. Thompson, 421 F.3d 278, 284-287 (4th Cir. 2005), cert. denied, 547 U.S. 1005 (2006); United States v. Burgin, 388 F.3d 177, 184-186 (6th Cir. 2004), cert. denied, 544 U.S. 936 (2005); United States v. Morris, 293 F.3d 1010, 1012-1013 (7th Cir.), cert. denied, 537 U.S. 987 (2002); Santiago, 268 F.3d at 156-157.

Petitioner appears to suggest (Pet. 21-22) that if sentencing judges may conduct the different-occasions inquiry, the Sixth Amendment nonetheless forecloses them from considering facts other than elements of a prior offense -- such as the date on which the offense occurred – that are contained in documents that fall within this Court's decision in Shepard v. United States, 544 U.S. 13 (2005). This Court held in Shepard that a sentencing court may consider a limited class of documents, including the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented," to determine whether the defendant's prior conviction qualifies as a "violent felony" or "serious drug offense" under the ACCA. Id. at 15-16. As petitioner appears to recognize (Pet. 26), the courts of appeals have uniformly

recognized that such documents may be consulted for non-elemental facts relevant to the different-occasions inquiry.

To the extent that petitioner relies on Descamps and Mathis (Pet. 19-25), for the proposition that sentencing courts conducting the different-occasions inquiry may not consider non-elemental facts contained in Shepard documents, that reliance is misplaced. Those cases concerned the "modified categorical approach" sometimes used to determine whether a prior conviction qualifies as a "violent felony" under 18 U.S.C. 924(e)(2)(B), not whether two or more such felonies were "committed on occasions different from one another" under 18 U.S.C. 924(e)(1). Unlike the "violent felony" determination, the different-occasions requirement of Section 924(e)(1) does not involve any form of categorical comparison between a prior crime of conviction and a generic federal offense or element. Instead, it focuses on the question of whether prior offenses were "committed on" different occasions. Compare 18 U.S.C. 924(e)(1), with 18 U.S.C. 924(e)(2)(B) (defining "violent felony" based on generic federal offenses and elements). Thus, neither Descamps nor Mathis supports petitioner's position here, under which a district court apparently would have to treat every prior conviction as having occurred on a single occasion, unless the convictions at issue presented the rare circumstance in which the date or time is an element of the offense.

Because facts relevant to the different-occasions inquiry -- including the time, location, or specific victim of the prior offense -- are infrequently elements of the offense, petitioner's proposed rule would prohibit district courts from making the different-occasions determination in many cases. See Hennessee v. United States, 932 F.3d 437, 443 (6th Cir. 2019), cert. denied, No. 19-5924 (Jan. 13, 2020). "Such a restriction would not make sense," and would "render violent-felony convictions adjudged together by the same court inseparable in the different-occasions context." Ibid. Indeed, it is not even clear how, under petitioner's proposal, courts could even rely on different dates of judgment (which is not an offense element) as a basis for determining that offenses were committed on different occasions. The Sixth Amendment imposes no such restriction, and petitioner provides no sound reason why Congress would have chosen to impose it in drafting the ACCA.

c. Even if the question presented otherwise warranted this Court's review, this case would be a poor vehicle for addressing it. In the district court and in his merits briefing in the court of appeals, petitioner did not argue that the Sixth Amendment precluded the district court from determining that his state drug offenses were "committed on occasions different from one another," 18 U.S.C. 924(e)(1). See Pet. C.A. Br. 37-44; PSR Addendum 1-2; see also Pet. C.A. Pet. for Reh'g 1-2, 6 n.1 (raising Sixth

Amendment issue for the first time). The court of appeals therefore did not address that issue. See Pet. App. A7-A8. 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), and petitioner provides no reason to deviate from the usual practice here.

Moreover, because petitioner did not preserve his argument in district court, review would be for plain error. See Fed. R. Crim. P. 52(b). On plain-error review, petitioner bears the burden to establish (1) error that (2) was "clear or obvious," (3) "affected the defendant's substantial rights," and (4) "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904-1905 (2018) (citations omitted); see Puckett v. United States, 556 U.S. 129, 135 (2009). "Meeting all four prongs is difficult, 'as it should be.'" Puckett, 556 U.S. at 135 (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).

Petitioner does not suggest that his claim satisfies that standard. It does not. Because the courts of appeals uniformly recognize that this Court's Sixth Amendment jurisprudence permits sentencing courts to conduct the different-occasions inquiry, see Pet. 26, petitioner cannot demonstrate error, much less "clear or obvious" error, Rosales-Mireles, 138 S. Ct. at 1904 (citation

omitted). To satisfy the second element of plain-error review, a defendant must show that an error was so obvious under the law as it existed at the time of the relevant district court or appellate proceedings that the courts "were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." United States v. Frady, 456 U.S. 152, 163 (1982). Furthermore, petitioner's admission, in his state-court plea colloquy, that his second state offense occurred "four days later on January 28th," when he sold crack "again," Pet. App. A7, would independently preclude a showing of prejudice under the third requirement of the sort of injustice necessary to satisfy the fourth requirement. The lower courts did not plainly err in failing to adopt petitioner's Sixth Amendment argument in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

SANGITA K. RAO
Attorney

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