No. 19-6389

IN THE SUPREME COURT OF THE UNITED STATES

QUINCY DENNIS, PETITIONER

v.

J.A. TERRIS, WARDEN

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to collateral relief under 28 U.S.C. 2241 from his federal sentence for drug crimes based on his claim that his prior state conviction for possessing bulk cocaine, in violation of Ohio Rev. Code Ann. § 2925.03(A)(4) (West 1994), was not a "felony drug offense" under the Controlled Substances Act, 21 U.S.C. 802(44) (Supp. II 1996).

ADDITIONAL RELATED PROCEEDINGS

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

Dennis v. Terris, No. 17-cv-14087 (Aug. 9, 2018)

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

United States v. Dennis, No. 96-cr-127 (Sept. 12, 1997)

Dennis v. United States, No. 00-cv-114 (June 28, 2000)

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

United States v. Dennis, No. 97-4036 (April 7, 1999)

Dennis v. Terris, No. 18-2081 (June 21, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 927 F.3d 955. The opinion of the district court dismissing petitioner's petition for relief under 28 U.S.C. 2241 (Pet. App. B1-B2) is not published in the Federal Supplement but is available at 2018 WL 10110903. An earlier opinion of the court of appeals in petitioner's direct appeal is unpublished, but the decision is noted at 178 F.3d 1297 (Tbl.) and is available at 1999 WL 220115.

JURISDICTION

The judgment of the court of appeals (Pet. App. A10) was entered on June 21, 2019. The petition for a writ of certiorari was filed on September 16, 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 Southern District of Ohio, petitioner was convicted on one count of attempting to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and 846 and 21 U.S.C. 841(b)(1)(A)(iii) (1994); one count of possessing cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(A)(iii) (1994); and one count of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(B)(ii) (1994). 17-cv-14087 D. Ct. Doc. 5-3, at 1 (Feb. 23, 2018). Petitioner was sentenced to life imprisonment. Id. at 2. The court of appeals affirmed. United States v. Dennis, 178 F.3d 1297, 1999 WL 220115 (6th Cir. 1999) (Tbl.)(per curiam).

Petitioner filed a motion for relief under 28 U.S.C. 2255, which was denied. 00-cv-114 Docket entry No. 6 (S.D. Ohio June 28, 2000). Petitioner's sentence of life imprisonment was later commuted by the President to a term of 30 years. 17-cv-14087 D. Ct. Doc. 5-4, at 5 (Feb. 23, 2018). Petitioner subsequently

filed in the United States District Court for the Eastern District of Michigan, the district where he was then imprisoned, a motion under 28 U.S.C. 2241 challenging his commuted sentence. The district court dismissed the petition. Pet. App. B1-B2. The court of appeals affirmed. Id. at A1-A8.

1. a. In November 1996, an informant indicated to police that petitioner had offered to sell the informant cocaine. Dennis, 1999 WL 220115, at *1. Police arranged a controlled purchase, but petitioner fled when approached by the officers. Ibid. He was arrested in a nearby yard. Ibid. The owner of the yard subsequently found a bag containing nine ounces of cocaine -- the same amount the informant had arranged to buy. Ibid. Police obtained and executed a warrant for petitioner's residence, where they found and seized 1313.68 grams of cocaine and 275.70 grams of cocaine base. Ibid.

A grand jury in the Southern District of Ohio returned an indictment charging petitioner with one count of attempting to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and 846 and 21 U.S.C. 841(b)(1)(A)(iii) (1994); one count of possessing cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(A)(iii) (1994); and one count of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(B)(ii) (1994). 17-cv-14087 D. Ct. Doc. 5-2, at 1-2 (Feb. 23, 2018). Following a

trial, a jury found petitioner guilty on all three counts. 17-cv-14087 D. Ct. Doc. 5-3, at 1.

b. At the time of petitioner's offenses involving cocaine base, the default statutory term of imprisonment for those offenses under 21 U.S.C. 841(b)(1)(A)(iii) (1994) was ten years to life. 21 U.S.C. 841(b)(1)(A) (1994). In the case of a person who committed such a violation "after two or more prior convictions for a felony drug offense ha[d] become final," however, the Controlled Substances Act (CSA), 21 U.S.C. 801 et seq., required a term of life imprisonment. 21 U.S.C. 841(b)(1)(A) (1994). "The term 'felony drug offense'" was defined to include "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 [and certain other] drugs." 21 U.S.C. 802(44) (Supp. II 1996); accord 21 U.S.C. 802(44).

The government had filed an information under 21 U.S.C. 851, stating that petitioner was subject to a statutory minimum sentence of life imprisonment for the cocaine-base counts under 21 U.S.C. 841(b)(1)(A) (1994), because he had two 1995 Ohio aggravated-drug-trafficking convictions that constituted "felony drug offense[s]." 17-cv-14087 D. Ct. Doc. 1, at 37 (Dec. 18, 2017). The information and the state-court judgments identified one prior conviction as "aggravated trafficking (preparation/transporting)" in violation

of Ohio Rev. Code Ann. § 2925.03(A)(2) (West 1994), and the second as "aggravated trafficking (possession-bulk)," in violation of Ohio Rev. Code Ann. § 2925.03(A)(4) (West 1994). 17-cv-14087 D. Ct. Doc. 1, at 37; see id. at 34-35. Petitioner was sentenced to one and one-half years of imprisonment on each count. Id. at 34-35. As relevant here, Ohio Rev. Code Ann. § 2925.03(A)(4) (West 1994) provided that "[n]o person shall knowingly * * * [p]ossess a controlled substance in an amount equal to or exceeding the bulk amount, but in an amount less than three times that amount." Ibid.; see United States v. Montanez, 442 F.3d 485, 488 n.1 (6th Cir. 2006).

The district court sentenced petitioner to life imprisonment on the cocaine-base counts and to a concurrent term of 30 years on the cocaine count. 17-cv-14087 D. Ct. Doc. 5-3, at 2.

c. The court of appeals affirmed. 1999 WL 220115, at *1-*2. Petitioner initially "asserted numerous grounds of error," but he subsequently "abandoned all but the claim that" evidence from the search of his residence should have been suppressed. Id. at *1. The court of appeals rejected that contention. Id. at *2.

2. Petitioner filed a motion for relief under 28 U.S.C. 2255 (2000). 00-cv-114 Docket entry No. 1 (S.D. Ohio Feb. 9, 2000). That motion was denied, 00-cv-114 Docket entry No. 6, and petitioner did not appeal.

In January 2017, President Obama commuted petitioner's life sentence to a term of 30 years. 17-cv-14087 D. Ct. Doc. 5-4, at 5. The grant of commutation was "condition[ed]" on petitioner's "enrolling in a [residential drug abuse program] by written agreement." Ibid.; see Pet. App. A3.

3. a. In December 2017, petitioner filed in the Eastern District of Michigan, where he was then imprisoned, a motion under 28 U.S.C. 2241 challenging his commuted sentence. 17-cv-14087 D. Ct. Doc. 1. Petitioner contended (as relevant here) that his sentence should be vacated because one of his two 1995 Ohio convictions, for possessing bulk cocaine, did not qualify as a "felony drug offense." Id. at 6-9, 10-12. Petitioner asserted that he was "actually innocent" of the life sentence the district court had imposed (subsequently commuted to 30 years) in light of this Court's decision in Mathis v. United States, 136 S. Ct. 2243 (2016). 17-cv-14087 D. Ct. Doc. 1, at 6, 11-12. Petitioner asserted that Mathis applied retroactively to his case and that it established that his prior Ohio bulk-possession conviction was only "a categorical match with 21 U.S.C. § 844(a)," not a "'felony drug offense'" that would serve to enhance his sentence under Section 841(b)(1)(A). Id. at 11-12.

The district court dismissed the petition, concluding that it could not entertain a collateral attack on petitioner's original sentence because that sentence had since been commuted, rendering

his challenge moot, and that the court could not review the presidential commutation. Pet. App. B1-B2.

b. The court of appeals denied the petition on the merits. Pet. App. A1-A8. The court determined that the presidential commutation of petitioner's original sentence did not preclude the court from reviewing petitioner's challenge to it, id. at A3-A7, and "assuming" arguendo that petitioner could seek relief under 28 U.S.C. 2241 for the type of challenge he asserted, Pet. App. A7, the court rejected petitioner's challenge "on the merits," id. at A8.

The court of appeals observed that, "[a]t the time of [petitioner's] federal conviction, § 841(b)(1)(A) required life imprisonment for anyone who violated that subsection 'after two or more prior convictions for a felony drug offense have become final,'" and that, "[t]hen as now, the law defined a 'felony drug offense' as 'an offense that is punishable by imprisonment for more than one year' under any state or federal drug law." Pet. App. A8. (citations omitted). The court reasoned that "Ohio sentenced [petitioner] to more than one year of imprisonment for both of his 1995 drug convictions, and both qualify as felony drug offenses for purposes of the sentencing enhancement." Id. at A7-A8 (citing Burgess v. United States, 553 U.S. 124, 126-127 (2008)).

The court of appeals rejected petitioner's contention that "one of his convictions was for 'simple possession,' making it the

equivalent of a federal misdemeanor." Pet. App. A8. The court explained that the "labels, like titles, often are overrated," and that "all that matter[ed]" in this case was that petitioner's "prior conviction was for a drug crime, and Ohio law allowed more than a year of punishment for that crime." Ibid.

ARGUMENT

Petitioner contends (Pet. 9-19) that the court of appeals erred in denying his claim that his prior conviction for possessing bulk cocaine, in violation of Ohio Rev. Code Ann. § 2925.03(A)(4) (West 1994), was a "felony drug offense" that qualified petitioner for a statutory minimum sentence of life imprisonment under 21 U.S.C. 841(b)(1)(A) (1994). The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. a. At the time of petitioner's conduct underlying his cocaine-base offenses under Section 841(a)(1) and (b)(1)(A)(iii), the CSA provided that the sentence for such an offense is life imprisonment in the case of a person who had "two or more prior convictions for a felony drug offense" that "ha[d] become final." 21 U.S.C. 841(b)(1)(A) (1994). The statute defined a "'felony drug offense'" to include 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 [and certain other] drugs." 21 U.S.C. 802(44) (Supp. II 1996). The "relating to narcotic drugs" language in Section 802(44) includes a drug possession offense. See, e.g., United States v. Spikes, 158 F.3d 913, 932 (6th Cir. 1998), cert. denied, 525 U.S. 1086 (1999); United States v. Sandle, 123 F.3d 809, 812 (5th Cir. 1997).

The court of appeals correctly determined that petitioner's conviction for possessing bulk cocaine, in violation of Ohio Rev. Code Ann. § 2925.03(A)(4) (West 1994), satisfied that definition. That provision proscribed "[p]ossess[ing] a controlled substance in an amount equal to or exceeding the bulk amount, but in an amount less than three times that amount." Ibid. Petitioner was convicted under that provision and sentenced to a term of imprisonment of one and one-half years. 17-cv-14087 D. Ct. Doc. 1, at 34. His conviction therefore qualified as an offense "punishable by imprisonment for more than one year under any law of * * * a State * * * that prohibits or restricts conduct relating to narcotic drugs." 21 U.S.C. 802(44) (Supp. II 1996); see Burgess v. United States, 553 U.S. 124, 126-127 (2008) (holding that a South Carolina conviction for possession of cocaine was a conviction for a "'felony drug offense'" because it was "punishable by more than one year," in that the maximum sentence available is two years of imprisonment).

b. Petitioner contends (Pet. 9-11) that his Ohio conviction for possessing bulk cocaine is not a "felony drug offense" because federal law imposes a term of imprisonment of no more than one year for the same conduct. See Pet. 11 (citing 21 U.S.C. 844(a)). That is incorrect. As this Court explained in Burgess, Section 802(44) itself "provide[s] the exclusive definition of 'felony drug offense,'" and "all defendants whose prior drug crimes were punishable by more than one year in prison would be subject to the § 841(b)(1)(A) enhancement." 553 U.S. at 129. That is true, the Court explained, "regardless of the punishing jurisdiction's classification of the offense" as a misdemeanor rather than a felony. Ibid. And although the CSA "also defines the term 'felony'" as an offense that is "'classified by applicable Federal or State law as a felony,'" the Court in Burgess determined that "[t]he language and structure of the statute * * * indicate that Congress used the phrase 'felony drug offense' as a term of art defined by § 802(44) without reference to" that definition. Id. at 129-130 (quoting 21 U.S.C. 802(13)).

Petitioner also contends (Pet. 9-13) that Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010), requires excluding a "[s]imple [p]ossession" offense from the definition of felony drug offense. In Carachuri-Rosendo, this Court concluded that, "when a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a prior conviction, he has not

been 'convicted' under [8 U.S.C.] § 1229b(a)(3) of a 'felony punishable' as such 'under the [CSA],' 18 U.S.C. § 924(c)(2)." Id. at 582; see id. at 566 ("We * * * hold that second or subsequent simple possession offenses are not aggravated felonies under § 1101(a)(43) when, as in this case, the state conviction is not based on the fact of a prior conviction."). That decision addressing a different question under a different statutory scheme is inapposite to the question presented in the petition, which is resolved by the statutory text and Burgess.

2. Petitioner additionally contends (Pet. 14-19) that his prior Section 2925.03(A)(4) conviction does not qualify as a "felony drug offense" in Section 802(44) under the categorical approach articulated by this Court in Taylor v. United States, 495 U.S. 575 (1990), Mathis v. United States, 136 S. Ct. 2243 (2016), and other decisions. Petitioner did not present this argument to the court of appeals, and that court did not address or decide it. Petitioner's opening brief in the court of appeals argued that the district court erred by dismissing his petition on mootness grounds, and that his prior Section 2925.03(A)(4) conviction was a mere drug possession offense that did not qualify as a "felony drug offense" under Section 802(44). See generally 18-2081 Pet. C.A. Br. 1-14 (Jan. 17, 2019). This Court ordinarily does not address issues that were "not raised or resolved in the lower courts" absent "unusual circumstances." Taylor v. Freeland

& Kronz, 503 U.S. 638, 646 (1992) (brackets and citations omitted); see, e.g., OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 397-398 (2015). Petitioner identifies no reason for the Court to depart from that practice here.

In any event, petitioner's claim fails on the merits. The categorical approach that petitioner invokes "generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense," not to the particular "facts of each defendant's conduct." Taylor, 495 U.S. at 601-602; see, e.g., Kawashima v. Holder, 565 U.S. 478, 483 (2012) ("To determine whether" certain aliens' prior convictions rendered them removable, "we employ a categorical approach by looking to the statute defining the crime of conviction, rather than to the specific facts underlying the crime."). Irrespective of the facts of petitioner's particular case, looking only to the statutory definition of the crime, it is a law that "prohibits or restricts conduct relating to narcotic [and certain other] drugs," 21 U.S.C. 802(44) (Supp. II 2006), namely, possession of a certain amount of a controlled substance.

Petitioner's reliance (Pet. 17) on United States v. Montanez, 442 F.3d 485 (6th Cir. 2006), and United States v. Foster, 28 F.3d 109, 1994 WL 201201 (9th Cir. 1994) (Tbl.), is misplaced. In each case, the court of appeals concluded that a conviction for an Ohio drug offense under Section 2925.03(A) did not qualify as a

controlled-substance offense under Sentencing Guidelines § 4B1.2 because Section 4B1.2 does not include simple drug-possession offenses. See Montanez, 442 F.3d at 487-494; Foster, 1994 WL 201201, at *1. Those decisions did not address the definition of the term "felony drug offense" in Section 802(44). See ibid.; see also Sandle, 123 F.3d at 812 (distinguishing Section 802(44) from Section 4B1.2). Moreover, Montanez is a decision from the same court of appeals as the decision below, and the decision in Foster is unpublished. Neither decision gives rise to a conflict that warrants this Court's review.

3. Petitioner additionally contends (Pet. 7-9) that review is warranted to resolve a lower-court conflict concerning whether and in what circumstances a defendant may seek review under 28 U.S.C. 2241 of a previously imposed federal sentence to assert statutory arguments based intervening developments. As the government has previously acknowledged, the courts of appeals are divided on that question. See, e.g., Br. in Opp. at 17-18, Talada v. Cole, No. 18-7444 (filed Apr. 15, 2019). This case, however, does not implicate that conflict. Although a court would have to confront that question before granting petitioner relief, the court of appeals expressly "assum[ed]" that petitioner could challenge his original sentence under Section 2241, Pet. App. A7, and it rejected his challenge "on the merits," id. at A8. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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