No. 12-784

In the Supreme Court of the United States

NOE JAIMES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, on remand from this Court, the court of appeals correctly rejected petitioner's challenge to his sentence in light of *Dorsey* v. *United States*, 132 S. Ct. 2321 (2012).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4A-6A) is not published in the Federal Reporter but is available at 2012 WL 4496506. A prior opinion of the court of appeals (Pet. App. 1A-2A) is not published in the Federal Reporter but is reprinted at 446 Fed. Appx. 713.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2012. The petition for a writ of certiorari was filed on December 21, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted on one count of possessing five grams or more of cocaine base with the intent to distribute it, in viola-

tion of 21 U.S.C. 841(a)(1) and (b)(1)(B). He was sentenced to 292 months of imprisonment, to be followed by eight years of supervised release. The court of appeals affirmed. Pet. App. 1A-2A. This Court granted petitioner's petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of *Dorsey* v. *United States*, 132 S. Ct. 2321 (2012). Pet. App. 3A. On remand, the court of appeals again affirmed. *Id.* at 4A-6A.

1. On December 31, 2009, a cooperating defendant told an officer of the Austin, Texas, Police Department that petitioner stored several illegal drugs, including crack cocaine, at his apartment. Dkt. 24, at 1 (written factual basis for petitioner's guilty plea). Shortly thereafter, a police officer stopped petitioner for a traffic violation. *Ibid.* The officer arrested petitioner after he smelled a strong odor of marijuana and learned that petitioner was driving with a suspended license and that the vehicle registration belonged to a different car. *Id.* at 1-2. A search of the car revealed 8.71 grams of crack cocaine in a concealed compartment, as well as some marijuana. *Id.* at 2. The officers found more than $1600 in cash in petitioner's pocket. *Ibid.*

After being read *Miranda* warnings, petitioner admitted that the crack cocaine was his. Dkt. 24, at 2. He also acknowledged that he was selling crack cocaine at the apartment where he lived and that he also had other narcotics, including powder cocaine, MDMA (Ecstasy), and marijuana. *Id.* at 2-3. Officers obtained and executed a search warrant for the apartment, where they found 15.54 grams of crack cocaine, 0.67 grams of powder cocaine, and 0.95 grams of MDMA, as well as assorted baggies and a digital scale with marijuana residue. *Id.* at 3.

2. On June 15, 2010, a grand jury in the Western District of Texas charged petitioner with one count of knowingly possessing five grams or more of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (2006). C.A. R.E. 29. The indictment included a penalty enhancement information pursuant to 21 U.S.C. 851, alleging that petitioner had a prior felony drug conviction that subjected him to enhanced penalties. C.A. R.E. 30.

On September 29, 2010, petitioner moved to dismiss the indictment, pointing out that the Fair Sentencing Act of 2010 (FSA), Pub. L. No. 111-220, 124 Stat. 2372 (effective Aug. 3, 2010), "increased the amount of crack from 5 grams to 28 grams to qualify for a 5 year mandatory minimum sentence." Dkt. 23, at 1 (Mot. to Dismiss). Petitioner argued that in light of the new law his "case should be dismissed, and, if the Government wishes to continue the prosecution of [petitioner], the case should be reindicted under the law as it stands today." *Id.* at 2.

The next day, however, petitioner pleaded guilty to the indictment without a plea agreement. The court informed petitioner that the statutory penalty for the crime to which he was pleading guilty would normally be no less than five years and no more than 40 years of imprisonment, but that if the Section 851 information was correct, petitioner would be facing a prison term of no less than ten years up to a maximum of life. Plea Tr. 13-14. Petitioner indicated that he understood and that he wanted to plead guilty. *Id.* at 14. Petitioner's counsel then noted that he had filed a motion to dismiss the indictment because "the new crack law * * * has lowered the minimum in this case," adding that at sentencing he intended to urge the court "perhaps not as a

motion to dismiss but that the range of punishment would be lower, and it should apply to [petitioner]." *Id.* at 14-15. At the same time, counsel made clear that "whatever the range may be, we intend to go forward with a plea of guilty." *Id.* at 15. The court stated that it was "overruling" the motion to dismiss, but that petitioner could argue "legal issues as well as factual issues on sentencing." *Ibid.* The court then confirmed that petitioner understood that although the government contended that petitioner faced an enhanced prison sentence of ten years to life, petitioner's attorney intended to argue that the sentencing range should be lower. *Id.* at 16. Further, the court made clear that petitioner would be pleading guilty "in light of this enhancement" for a prior felony drug offense. *Id.* at 22. The court then accepted petitioner's guilty plea. *Id.* at 23.

3. The Probation Office determined that petitioner was accountable for 40.37 grams of cocaine base. Presentence Investigation Report (PSR) ¶ 16. First, the Probation Office took the 8.71 grams of cocaine base that was found in petitioner's car and added that figure to the 15.54 grams of cocaine base retrieved from petitioner's apartment, for a subtotal of 24.25 grams of cocaine base. PSR ¶¶ 8, 14, 16. Next, the Probation Office determined that the $1612 in petitioner's pocket when he was arrested "converts into 16.12 grams of cocaine base," because an average rock of crack cocaine costs $20 in Austin and weighs 0.2 grams. PSR ¶ 16. Finally, adding the 24.25 gram figure and the 16.12 gram figure together, the Probation Office determined that petitioner was accountable for 40.37 grams of cocaine base. *Ibid.*

The Probation Office also determined that petitioner was a career offender under Sentencing Guidelines § 4B1.1(a), because he had at least two prior felony convictions for either a crime of violence or a controlled substance offense. PSR ¶ 32. Specifically, petitioner had been convicted in 2003 of aggravated assault with serious bodily injury (PSR ¶ 41) and in 2005 of possession with intent to manufacture and deliver cocaine (PSR ¶ 48). Finding that petitioner faced a statutory maximum of life imprisonment for the enhanced crack cocaine offense to which he had pleaded guilty (PSR ¶¶ 32, 87), the Probation Office determined that petitioner's offense level was 37 under the career offender guideline, Sentencing Guidelines § 4B1.1(b)(1). PSR ¶ 32. The Probation Office subtracted two offense levels for petitioner's acceptance of responsibility and thus assigned petitioner a total offense level of 35. PSR ¶¶ 33-34.

Petitioner had a criminal history category of VI, both because he was a career offender (see Sentencing Guidelines § 4B1.1(b)) and because he had 23 criminal history points. PSR ¶ 52; see PSR ¶¶ 37-51 (cataloging petitioner's adult criminal convictions). Petitioner's advisory Guidelines range was therefore 292 to 365 months of imprisonment. PSR ¶ 88.

Petitioner submitted only one objection to the PSR, *viz.*, that his prior felony drug conviction did not qualify as a "controlled substance offense" for purposes of the career offender guideline. PSR Addendum 1A. The Probation Office disagreed, explaining that petitioner had been convicted not simply of delivering a controlled substance, as petitioner contended, but of "Possession with Intent to Manufacture and Deliver Cocaine," an

offense which did qualify as a predicate offense under the career offender guideline. *Ibid.*

Petitioner also filed a Sentencing Memorandum in which he renewed his contention that his prior felony drug conviction did "not necessarily" qualify as a controlled substance offense for purposes of the career offender Guideline. Dkt. 29, at 1 (Sent. Memo.). In addition, petitioner argued that the firearm found in his residence should not have been attributed to him (see PSR ¶ 27) and that he should have been awarded a "third point" for acceptance of responsibility. Sent. Memo. 2. Finally, petitioner argued that "under the factors of 18 U.S.C. § 3553(a), a guideline sentence would be inappropriately high in this case." *Id.* at 3. "In the alternative," petitioner "request[ed] that the court sentence him to the least amount of time in the suggested sentencing guideline range." *Ibid.* Petitioner did not renew the argument based on the FSA.

At sentencing, petitioner acknowledged that his "charges were enhanced, which put [him] at the sentencing guidelines from 292 to 365 months." Sent. Tr. 10-11. Petitioner's counsel asked the court to "vary downward substantially from the guideline," because otherwise petitioner was "looking at nearly 25 years, at a minimum." *Id.* at 15. After considering further argument and witness testimony, the court sentenced petitioner to 292 months of imprisonment, the bottom of petitioner's career offender Guideline range. *Id.* at 24. The court emphasized that petitioner's "criminal record more than justifies the sentence I have imposed." *Id.* at 25. Contrary to petitioner's suggestion at the plea hearing (Plea Tr. 15), petitioner did not renew any argument about the FSA at sentencing. When asked at sentencing if he had anything further to say, petitioner's counsel simply

asked the court to recommend that petitioner be imprisoned as close to Austin as possible. Sent. Tr. 25.

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1A-2A. On appeal, petitioner argued that the district court had erred in denying his motion dismiss the indictment in light of the FSA. Pet. C.A. Br. 6-11. Further, petitioner contended that the district court erred in considering his prior conviction for possession with intent to manufacture and deliver cocaine to be a qualifying "controlled substance offense" under the career offender Guideline. *Id.* at 11-15. The court of appeals summarily rejected both claims. It held that petitioner's "voluntary and unconditional guilty plea waived any challenge to the denial of his motion to dismiss the indictment." Pet. App. 1A. And it held that, under circuit precedent, petitioner's prior state conviction for possession with intent to manufacture and deliver cocaine was a "controlled substance offense" under the career offender Guideline. *Id.* at 2A.

5. Petitioner filed a petition for a writ of certiorari. On June 29, 2012, this Court granted the petition, vacated the court of appeals' judgment, and remanded for further consideration in light of *Dorsey*, *supra*. Pet. App. 3A. In *Dorsey*, the Court held that "Congress intended the Fair Sentencing Act's more lenient penalties to apply to those offenders whose crimes preceded August 3, 2010, but who are sentenced after that date." 132 S. Ct. at 2331.

6. On remand to the court of appeals, the parties filed letter briefs addressing *Dorsey*. Petitioner argued that he possessed only 24.25 grams of cocaine base, an amount that, under the FSA, would be subject to the penalty provisions in 21 U.S.C. 841(b)(1)(C), rather than 21 U.S.C. 841(b)(1)(B) (Supp. V 2011). Pet. C.A. Letter

Br. 1. Under those circumstances, petitioner explained, his enhanced offense statutory maximum would have been 30 years rather than life imprisonment, and therefore his base offense level as a career offender under Sentencing Guidelines § 4B1.1(b) would have been 34, rather than 37, resulting in a lower advisory Guidelines range. Pet. C.A. Letter Br. 1-2. The government countered that petitioner had been "held accountable for a total of 40.37 grams of cocaine base, not 24.25 grams of cocaine base." Gov't C.A. Letter Br. 2. The government explained that because 40.37 grams exceeded even the FSA's new statutory threshold for a cocaine base offense under 21 U.S.C. 841(b)(1)(B) (Supp. V 2011), petitioner's offense statutory maximum remained at life imprisonment, and his base offense level as a career offender was still 37. Gov't C.A. Letter Br. 2.

7. The court of appeals again affirmed petitioner's sentence in an unpublished per curiam opinion. Pet. App. 4A-6A. The court offered three reasons for its decision. First, the court explained that petitioner's argument concerning the attribution of 40.37 grams of cocaine base to him was "foreclosed," because "he failed to object to the PSR on th[at] basis prior to sentencing." *Id.* at 5A-6A. Second, the court noted that petitioner had failed to raise such an argument on appeal. *Ibid.* Third, the court of appeals held "that the application of the FSA would have no effect on [petitioner's] statutory maximum term of imprisonment or offense level under the Guidelines" and that "therefore resentencing is unnecessary." *Id.* at 5A. The court of appeals determined that the "final drug quantity reflected in the PSR" was 40.37 grams of cocaine base, not 24.25 grams, and that "40.37 grams of cocaine base exceeds both the old and the new statutory threshold for cocaine base" in

21 U.S.C. 841(b)(1)(B). Pet. App. 5A-6A. Consequently, the court of appeals concluded, "the new statute has no impact" on petitioner's guidelines range or the sentence imposed. *Id.* at 6A.

ARGUMENT

Petitioner contends (Pet. 5-6) that the court of appeals "misconstrued" *Dorsey* v. *United States*, 132 S. Ct. 2321 (2012), when it determined that his offense statutory maximum was life imprisonment in calculating his offense level under the career offender guideline. Petitioner's factbound argument lacks merit because he raised no objection, either in the district court or in his initial appeal, to the district court's attribution to him of more than 28 grams of cocaine base. Further review of the court of appeals' unpublished decision is unwarranted.

1. On August 3, 2010, after petitioner committed his offense but before he was convicted and sentenced, the President signed into law the FSA, which lowered the penalties for some cocaine base offenses by increasing the threshold quantities of cocaine base required to trigger mandatory minimum sentences under 21 U.S.C. 841(b)(1) (2006 & Supp. V 2011). Under the law as amended by the FSA, an offender with a prior felony drug conviction who is convicted of a drug trafficking offense involving 28 grams or more of cocaine base, but less than 280 grams, faces a mandatory minimum penalty of ten years and a maximum penalty of life imprisonment. See FSA § 2(a), 124 Stat. 2372, 21 U.S.C. 841(b)(1) (Supp. V 2011).

Petitioner acknowledges that the lower courts attributed 40.37 grams of cocaine base to him, an amount that included both the 24.25 grams of cocaine base recovered from his car and his apartment and the conver-

sion of his cash drug proceeds into an additional 16.12 grams of cocaine base. Pet. 5; see Pet. App. 5A; PSR ¶ 16; Sent. Tr. 2, 23-24 (accepting the Guidelines calculation of the Probation Office). Petitioner argues (Pet. 5-6) that he possessed only 24.25 grams of cocaine base and that it was improper for the courts to convert the cash that he possessed into an additional quantity of cocaine base.

In accepting the factual basis for his plea, petitioner acknowledged that more than $1600 was seized from his pocket. See Dkt. 24, at 2; Plea Tr. 18. Petitioner does not dispute that the cash reflected proceeds from the sale of illegal drugs (though he does now claim that because he possessed powder cocaine, MDMA, and marijuana, as well as cocaine base, "[a]ny of the other drugs could have accounted for the cash," Pet. 6). And at sentencing, the district court accepted the Probation Office's Sentencing Guidelines calculation without objection from any party to the quantity of cocaine base attributed to petitioner, see Sent. Tr. 2, 23-24, thus accepting as a factual matter that petitioner possessed cocaine base in addition to the cocaine base actually recovered from his car and residence, for a total of 40.37 grams of cocaine base.

Petitioner further argues that he was "subjected to a higher range without having pled guilty to the higher amount or having proof beyond a reasonable [doubt] of the higher amount of cocaine base." Pet. 6. To the extent that reflects a claim that petitioner's sentence of imprisonment violates *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), petitioner's contention is mistaken. Petitioner's 292-month sentence is less than even the 30-year statutory maximum term of imprisonment that petitioner apparently would concede could be imposed on him

under 21 U.S.C. 841(b)(1)(C), as a person convicted of possessing a detectable amount of cocaine base and having a prior conviction for a felony drug offense. To the extent petitioner instead contends that the advisory Sentencing Guidelines require that the "Offense Statutory Maximum" that sets the base offense level under the career offender Guideline (see Sentencing Guidelines § 4B1.1(b)) be established by the defendant's admission or proof to a jury beyond a reasonable doubt, as discussed below, no such claim was preserved in the lower courts and, in view of the uncontested evidence, could not rise to the level of reversible plain error. See *United States* v. *Cotton*, 535 U.S. 625 (2002).

2. None of petitioner's contentions is properly presented here, and none was properly presented below, because petitioner failed to raise any of them in the district court or in the court of appeals during his initial appeal.

a. After petitioner's motion to dismiss the indictment was denied, he abandoned his claim that his statutory maximum sentence was less than life imprisonment. Petitioner thus did not raise in the district court the arguments he presses now—any of which depends on the contention that his statutory maximum sentence was *not* life imprisonment—nor did petitioner otherwise challenge in the district court the 40.37 gram quantity of cocaine base attributed to him for sentencing purposes. See PSR ¶ 16; PSR Addendum 1A (petitioner's "one objection" was to the characterization of his prior felony drug conviction, not to the quantity of drugs attributed to him in connection with the instant offense). Indeed, when the district court asked petitioner during the plea colloquy whether he understood that he would "be sentenced [to] ten years to life," petitioner responded, "Yes,

sir." Plea Tr. 16. Although petitioner subsequently argued on appeal that "he possessed less than 28 grams of crack cocaine" and was "therefore erroneously informed" of the statutory range of punishment for his offense (Pet. C.A. Br. 11), the court of appeals determined that petitioner's "voluntary and unconditional guilty plea waived" that argument. Pet. App. 1A; see Plea Tr. 15 ("[W]hatever the range may be, we intend to go forward with a plea of guilty.").

As the court of appeals signaled in its decision on remand from this Court, see Pet. App. 5A-6A (noting petitioner's failure to object in district court), petitioner's claim would be reviewed at most for plain error under Federal Rule of Criminal Procedure 52(b). To establish reversible plain error, petitioner would have to show (1) that there was an error, (2) that was obvious, (3) that affected his substantial rights, and (4) that seriously affected the fairness, integrity or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); see *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). Even assuming petitioner could satisfy the first two prongs of that test, he cannot satisfy the third or fourth prong.

With respect to the third prong, petitioner cannot show that an error in setting his base offense level under the career offender Guideline affected his substantial rights. If petitioner's advisory Guidelines range had been lower, there is ample reason to believe the district court would have varied upward and imposed a similar sentence. See Sent. Tr. 2 (noting that "an upward departure could be granted" under 18 U.S.C. 3553(a) in light of petitioner's "23 criminal history points" which "doesn't include all of his convictions," but deciding that "in light of the guideline range, there's no need for any

upward departure"); *id.* at 25 ("[Y]our criminal record more than justifies the sentence I have imposed.").

With respect to the fourth prong, the course of proceedings in the district court reveals that recognizing any error here would tend to undermine the integrity and public reputation of judicial proceedings. In particular, petitioner was well aware of the potential relevance of the FSA at the time he pleaded guilty. Indeed, he had already argued that the FSA had "increased the amount of crack from 5 grams to 28 grams to qualify" for the statutory penalties under 21 U.S.C. 841(b)(1)(B) (Supp. V 2011). Mot. to Dismiss 1. Yet he made an informed decision "to go forward with a plea of guilty," while suggesting that at sentencing he would urge the court "that the range of punishment would be lower, and it should apply to [petitioner]." Plea Tr. 15. But petitioner did not (contrary to counsel's statements at the plea hearing) urge that position again at sentencing, yet it is the gravamen of his position now. That conduct goes beyond the sort of ordinary forfeiture that may be forgiven under Rule 52(b) and more closely resembles the sort of affirmative waiver that is enforced on appeal to preserve the integrity and public reputation of trial and appellate proceedings.

b. Plain-error considerations aside, the court of appeals correctly determined that petitioner has forfeited his present arguments by failing to raise them in his initial appeal. See Pet. App. 5A-6A ("[Petitioner's] argument regarding drug quantity is foreclosed as he failed to object to the PSR * * * in his prior appeal."). Petitioner's FSA-related argument in his initial appeal was that the indictment should have been dismissed in light of the enactment of the FSA; the court of appeals rejected that contention because "[petitioner's] volun-

tary and unconditional guilty plea waived any challenge to the denial of his motion to dismiss the indictment." *Id.* at 1A. Although petitioner's argument now and his argument on his initial appeal both relate to the FSA, the resemblance ends there, inasmuch as petitioner now challenges his sentence rather than the indictment or his guilty plea. The court of appeals' enforcement of its appellate forfeiture rule thus reflects the court's "appl[ication of] ordinary prudential doctrines," including "determining * * * whether [an] issue was [properly] raised," *United States* v. *Booker*, 543 U.S. 220, 268 (2005), and is an independent basis for its judgment affirming petitioner's sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2013