No. 18-261

In The
Supreme Court of the United States

JOSE GUADALUPE CEBREROS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

MICHAEL S. ROMANO
Attorney for Petitioner
THREE STRIKES PROJECT
559 Nathan Abbott Way
Stanford, California 94305
(650) 736-7757
mromano@law.stanford.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

REPLY BRIEF FOR PETITIONER

The government does not contest that this Court has consistently recognized that "a defendant who successfully attack[s] his state conviction[s]" may "apply for reopening of any federal sentence enhanced by the state sentences." *Johnson v. United States*, 544 U.S. 295, 303 (2005) (internal quotation marks omitted); *accord Daniels v. United States*, 532 U.S. 374, 382 (2001); *Custis v. United States*, 511 U.S. 485, 497 (1994). Nor does it dispute that this Court expressly left open whether a federal recidivist sentence must be adjusted when "a State subsequently lowers the maximum penalty applicable to [the predicate] offense and makes that reduction available to defendants previously convicted and sentenced for that offense." *McNeill v. United States*, 563 U.S. 816, 825 n.1 (2011). That is precisely the situation here. As the government concedes, because it must, Petitioner Jose Cebreros is serving a mandatory 20-year sentence enhanced by a prior felony conviction that a California court recalled and retroactively reduced to a misdemeanor "for all purposes," under new state law, Proposition 47, Cal. Penal Code § 1170.18(k). Finally, the government does not challenge that the Tenth and Ninth Circuits reached opposite conclusions on the Question Presented.

Nonetheless, the government argues that certiorari should be denied. It presents a welter of arguments, contending that Mr. Cebreros does not present a constitutional claim, he is wrong on the merits, there is no true split of authority below, and this case is an unsuitable vehicle for review. As discussed below, none

of these arguments is persuasive, and this Court should grant the Petition for Certiorari.

ARGUMENT

I. MR. CEBREROS RAISES A CONSTITUTIONAL CLAIM.

The government argues that Mr. Cebreros' case does not warrant review because he "does not attempt to establish that his claim satisfies the COA standard." BIO 8.[1] Despite conceding that an illegal sentencing enhancement can give rise to a constitutional claim, the government asserts that Mr. Cebreros fails to set forth such a claim because he references due process "only in passing" in his pleadings. *Ibid.*

In fact, Mr. Cebreros has argued both in courts below, *see* Pet. App. 3, and to this Court, *see* Pet. 4, 10, 13-15, that *Custis* and *Johnson* compel, as a matter of due process, the reduction of an enhanced federal sentence when a defendant successfully attacks the underlying prior convictions. The government does not challenge that these cases are of constitutional dimension. Nor

[1] To obtain a COA, a defendant must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The government has previously acknowledged that a COA should issue over an illegal sentencing enhancement. *See Hohn v. United States*, 524 U.S. 236, 238-39 (1998) (noting that once certiorari was granted, the government conceded the defendant's claim that his sentence enhancement was illegal was "constitutional in nature").

could it. In *Custis*, this Court held that when a prisoner is "successful in attacking [his] state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences." 511 U.S. at 497; *see also Daniels*, 532 U.S. at 382-83 (discussing *Custis* and noting that Section 2255 encompasses "claim[s] that an enhanced federal sentence violates due process"). This Court reaffirmed that right in *Johnson*, observing that "a defendant given a sentence enhanced for a prior conviction is *entitled* to a reduction if the earlier conviction is vacated." 544 U.S. at 303 (emphasis added). Mr. Cebreros thus raises a constitutional issue by citing, quoting, and discussing *Custis* and *Johnson* throughout his Petition.

Specifically, Mr. Cebreros argues that his sentence is illegal, and serving this illegal sentence violates his due process rights. Mr. Cebreros' sentence is illegal because it is based on recidivist enhancements for "a prior conviction for a felony drug offense [that] has become final." 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1). Yet California eliminated Mr. Cebreros' predicate *felony*—it is now a *misdemeanor*, prospectively, retroactively, and "for all purposes," including instant purposes. Cal. Penal Code § 1170.18(k). Requiring Mr. Cebreros to serve a term of imprisonment for an illegal sentencing enhancement violates "his constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." *Whalen v. United States*, 445 U.S. 684, 690 (1980); *see also United States v. Tucker*, 404 U.S. 443, 449 (1972) (reversing a sentence based in part on defendant's criminal history

where several prior convictions were invalid); *Townsend v. Burke*, 334 U.S. 736, 739-41 (1948) (finding a violation of the Due Process Clause and ordering resentencing because the lower court relied on invalid prior convictions in sentencing).

II. MR. CEBREROS' CLAIM IS MERITORIOUS.

The government maintains that California's redesignation of Mr. Cebreros' predicate felony to a misdemeanor has no legal effect on his enhanced federal sentence. BIO 8-13. It offers four arguments to support its position, but none withstand scrutiny.

First, the government argues that Proposition 47, Cal. Penal Code §§ 1170.18 *et seq.*, provides Mr. Cebreros no relief because it does not change the "historical fact" that his predicate felony drug offense had "become final" before his sentencing under Sections 841 and 960. BIO 9 (first quoting *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 115 (1983), then quoting 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1)). In the government's view, California cannot "rewrite history." BIO 9 (quoting *United States v. Diaz*, 838 F.3d 968, 972 (9th Cir. 2016)).

The government is mistaken. Indeed, it admits that history can be rewritten for the purposes of recidivist sentences—when, for example, a prior conviction is vacated or reversed. BIO 12. In such a case, the result "nullif[ies] that conviction," *Dickerson*, 460 U.S. at 111, so as to remove it from "the literal language of the statute" requiring a sentence enhancement, *id.* at 115.

That is the situation here. Mr. Cebreros successfully petitioned a California court to recall his prior felony conviction and remove it from "the literal language of the statute." Acknowledging elimination of a *felony* is no more rewriting history than acknowledging vacatur of a *conviction*. *See McNeill*, 563 U.S. at 825 n.1 (suggesting that a state's retroactive sentencing changes may warrant reconsideration of federal sentences enhanced by the altered state convictions); *Custis*, 511 U.S. at 497 (observing that a defendant who is "successful in attacking [his] state *sentence*" may then apply for a reduction of "any federal sentence enhanced by the state *sentences*" (emphasis added)).

Second, the government asserts that *Burgess v. United States*, 553 U.S. 124 (2008), refutes Mr. Cebreros' claim. BIO 9-10. There, this Court defined a "felony drug offense" for federal purposes as any conviction "punishable by more than one year in prison," irrespective of how a state labels the offense. *Burgess*, 553 U.S. at 129. From that, the government concludes that "[i]t follows that a defendant whose prior state conviction meets the federal definition cannot rely on an after-the-fact *re*classification" to dispute a federal sentence. BIO 11 (emphasis in original).

However, *Burgess* says nothing about retroactivity. Rather, it held that federal courts should define a state conviction as a felony not by how a state *labels* the conviction but based on the conviction's *legal effect*—specifically, whether it carries a maximum punishment of less than one year (misdemeanor) or one year or more (felony). *Burgess*, 553 U.S. at 129. *Burgess* thus

underscores that federal sentencing enhancements depend on state sentencing regimes, particularly what a state determines is the maximum sentence for a given conviction.

To the extent *Burgess* is relevant, it supports Mr. Cebreros, not the government. Under *Burgess*, California misdemeanors *are* federal misdemeanors. *See* Cal. Penal Code § 18.5 (defining misdemeanor as an offense "punishable by imprisonment . . . for a period not to exceed 364 days"). By re-designating the prior conviction as a misdemeanor, California fundamentally changed Mr. Cebreros' underlying offense in precisely the way *Burgess* directs courts to give legal effect.

Third, the government contends that *McNeill* "seriously undermines" Mr. Cebreros' argument that a defendant is entitled to a new federal sentence when a state retroactively reduces the punishment for a sentence-enhancing conviction. BIO 11.

But *McNeill* explicitly declined to answer this question. 563 U.S. at 825 n.1. In fact, the government in *McNeill* advanced the position that Mr. Cebreros now advocates. Specifically, the government argued:

> Of course, if a State subsequently lowered the maximum penalty and made that reduction available to defendants previously sentenced as of the same date as the defendant now at issue, the defendant could plausibly look to that reduced maximum as stating the law applicable to his previous conviction. For example, if such a defendant had taken advantage

> of state sentence-modification proceedings to lower his sentence in accordance with a reduced maximum . . . that reduced maximum could apply to his conviction for [sentence enhancement] purposes.

Br. for the United States, *McNeill*, 2011 WL 1294503 at *18 n.5.

Now the government asserts that Mr. Cebreros' reliance on its brief in *McNeill* is "misplaced." BIO 11. The government was right the first time, and its shifting position favors granting Mr. Cebreros' Petition to resolve the question *McNeil* left open.

Fourth, the government argues that Mr. Cebreros did not successfully attack his state sentence because it was not "vacated." BIO 11-12. According to the government, only vacatur undermines the predicate conviction so as to warrant the reopening of a federal recidivist sentence. BIO 12. The government posits that California's re-designation of Mr. Cebreros' felony to a misdemeanor under Proposition 47 is, "[a]t best," akin to an expungement, which has little legal force. BIO 13.

The government's analysis is erroneous at each step. A prisoner is entitled to habeas relief if he "successfully attack[s]" the state convictions or *sentences* underlying his federal recidivist sentence. *Johnson*, 544 U.S. at 303; *accord Daniels*, 532 U.S. at 382-83; *Custis*, 511 U.S. at 497. In *Custis*, this Court used broad language to describe the scope of a successful attack, observing that a petitioner need only be "successful in

attacking [his] state *sentence*"—not the conviction itself—in order to seek relief from "any federal sentence enhanced by the state *sentences*." 511 U.S. at 497 (emphasis added). *McNeill* provides further support for a broad reading of the term, as it explicitly left open the question of whether a defendant is eligible for relief from a federal recidivist sentence when a state retroactively reduces the punishment for the predicate offense. 563 U.S. at 825 n.1. Here, Mr. Cebreros successfully attacked his underlying state conviction when it was reduced to a misdemeanor "for all purposes." Cal. Penal Code § 1170.18(k).

In any event, Proposition 47 did "vacate" Mr. Cebreros' prior drug conviction as that term is commonly understood. *See Vacate*, Black's Law Dictionary (10th ed. 2014) (defining "vacate" as to "nullify or cancel; make void; invalidate"); *Vacate*, Merriam-Webster Dictionary Online (accessed Nov. 30, 2018) (defining "vacate" as "to make legally void"). As set forth in Mr. Cebreros' Petition (Pet. 12), California recalled the felony conviction used to enhance his federal sentence and retroactively reduced it to a misdemeanor. Accordingly, Mr. Cebreros is serving an enhanced sentence for a prior felony conviction he does not have and, by operation of California law, never had. *See People v. Buycks*, 422 P.3d 531, 547 (Cal. 2018) (stressing that when a defendant obtains relief under Proposition 47, "it can no longer be said that the defendant was previously convicted of a felony" (internal quotation marks omitted)).

State law also flatly contradicts the government's position that expungement and similar mechanisms that cannot support a habeas motion are "a more drastic change" than relief under Proposition 47. *See* BIO 13 (quoting *United States v. Diaz*, 838 F.3d 968, 974 (9th Cir. 2016)). That law enacted a wholesale, retroactive revision of the California criminal code. The comprehensive reclassification of a felony to misdemeanor under Proposition 47 is nothing like the superficial relief afforded by expungement. *See, e.g.*, *People v. Tidwell*, 200 Cal. Rptr. 3d 567, 572-73 (Ct. App. 2016) (explaining that, Proposition 47 relief, unlike expungement, "erase[s] the convictions" and "cancel[s] the potential for continuing or future consequences of those convictions"). For one thing, Proposition 47 re-designations are misdemeanors "for all purposes," whereas California law expressly provides that expunged convictions "have the same effect" on recidivist sentencing enhancements as non-expunged convictions. *Compare* Cal. Penal Code § 1203.4(a)(1) (enhancements); *id.* (licensure); *id.* at § 1203.4(a)(3) (public office) *with People v. Abdallah*, 201 Cal. Rptr. 3d 198, 204-05, 206 (Ct. App. 2016) (dismissing sentencing enhancement predicated on felony re-designated as misdemeanor). Likewise, Proposition 47 re-designations are mandatory, reflecting California's fundamental reclassification of criminal punishment, whereas an expungement is a "reward for good conduct." *Meyer v. Super. Ct.*, 55 Cal. Rptr. 350, 356 (Ct. App. 1966); *compare* Cal. Penal Code § 1170(f)-(g) *with id.* § 1203.4(a)(1).

III. THERE IS A CIRCUIT SPLIT OVER THE QUESTION PRESENTED.

Mr. Cebreros' claim reveals a clean split between the Ninth Circuit and the Tenth Circuit. *See* Pet. 8-9. The Ninth Circuit denied Mr. Cebreros a COA on whether he is entitled to relief because the prior felony used to enhance his sentence has been retroactively redesignated a misdemeanor. *See* Pet. App. 1-2. By contrast, the Tenth Circuit recently granted a COA on that very issue. *See United States v. McGee*, No. 18-5019, slip. op. at 2 (10th Cir. Jul. 16, 2018) (issuing COA on whether relief under Proposition 47 renders defendant's federal sentence unconstitutional under "the Due Process Clause . . . in light of *United States v. Johnson*, 544 U.S. 295 (2005), and related cases").

Despite these diametrically opposite rulings, the government advances two arguments as to why the Tenth Circuit's order "does not create a circuit conflict." BIO 14. Neither has merit.

The government first insists that *McGee* does not produce a circuit split with the Ninth Circuit's ruling below because it merely "signals intracircuit inconsistency within the Tenth Circuit." BIO 14. To be sure, an intracircuit split alone may not warrant this Court's review. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1975) (per curiam). But that is not this case. The Tenth Circuit granted a COA in *McGee* on the precise claim which the Ninth Circuit rejected as not reasonably debatable here. That is a textbook example of a circuit split. To the degree that the Tenth Circuit is also

internally confused, that simply underscores the need for this Court's intervention.

Next, the government downplays the circuit split by arguing that *McGee* "does not indicate that the Tenth Circuit would likewise grant a COA" to Mr. Cebreros. BIO 14. That is doubly wrong. The possibility that a petitioner may or may not have prevailed in a different court is no basis for denying the existence of a circuit split. Indeed, such speculation is irrelevant to the merits of this Petition. But moreover, this case is indistinguishable from *McGee*. The petitioner in that case raised the same issue as Mr. Cebreros, and he too filed other habeas motions prior to pursuing relief under *Johnson*.[2] *See, e.g.*, *United States v. McGee*, 245 Fed. Appx. 857 (10th Cir. 2007). *McGee* thus confirms that the denial of a COA to Mr. Cebreros is but a fortuity of geography. In sum, the direct split of authority over the Question Presented calls for this Court's review.

IV. NO VEHICLE PROBLEM PREVENTS THE RESOLUTION OF THIS ISSUE.

Finally, the government attempts to evade review by suggesting a supposed vehicle problem—that Mr.

---

[2] In fact, when Mr. McGee sought permission from the Tenth Circuit to file a COA, the Tenth Circuit dismissed his "motion for authorization as unnecessary," concluding that his claim would not constitute a "second or successive" petition. Order, *In re McGee*, No. 15-5088 (10th Cir. Oct. 19, 2015). This directly refutes the government's contention (BIO 14) that the Tenth Circuit would likely decline Mr. Cebreros' motion for a COA as procedurally barred.

Cebreros' Section 2255 Motion was an unauthorized "second or successive" petition. BIO 14-15.

The government is mistaken. "[I]t is well settled that the phrase does not simply 'refer to all [federal habeas] applications filed second or successively in time.'" *Magwood v. Patterson*, 561 U.S. 320, 332 (2010) (brackets omitted) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007)). Rather, a petition is not second or successive when it raises a claim that was unripe for review when the first habeas petition was filed. *Panetti*, 551 U.S. at 945-47; *cf. Johnson*, 544 U.S. at 308 (finding that order vacating predicate state conviction is a new fact that restarts the one-year statute of limitations to attack an enhanced federal sentence).

Here, because the basis for Mr. Cebreros' Section 2255 motion—the re-designation of his state felony to a misdemeanor under Proposition 47—was not yet ripe when he first filed for habeas relief,[3] his claim is not "second or successive." *See United States v. Hairston*, 754 F.3d 258, 262 (4th Cir. 2014) (holding defendant's Section 2255 motion seeking vacatur of federal sentence after successfully attacking underlying state convictions was not "second or successive"); *In re Weathersby*, 717 F.3d 1108, 1110-11 (10th Cir. 2013)

[3] As set forth in his Petition (Pet. 6-7), Mr. Cebreros first filed for habeas relief in August 2005, but California voters did not pass Proposition 47 until November 4, 2014, and his predicate felony conviction was not re-designated a misdemeanor under Proposition 47 until November 17, 2016.

(per curiam) (same); *Stewart v. United States*, 646 F.3d 856, 863-65 (11th Cir. 2011) (same).

If, in fact, the government now takes the opposite position, then that is another reason to grant certiorari. But it does not diminish the suitability of this case for further review.

CONCLUSION

For the reasons stated above and in Mr. Cebreros' Petition for Certiorari, this Court should grant certiorari and a Certificate of Appealability.

Dated: December 11, 2018

Respectfully submitted,

MICHAEL S. ROMANO
Attorney for Petitioner
THREE STRIKES PROJECT
559 Nathan Abbott Way
Stanford, California 94305
(650) 736-7757
mromano@law.stanford.edu