No. 18-5222

IN THE SUPREME COURT OF THE UNITED STATES

CORVAIN T. COOPER, aka CV, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying a certificate of appealability on petitioner's postconviction claim that he is entitled to vacatur of his federal sentence on the ground that his "prior convictions for a felony drug offense," 21 U.S.C. 841(b)(1)(A), were reclassified as state-law misdemeanors after his federal sentencing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-3) is not published in the Federal Reporter but is reprinted at 714 Fed. Appx. 259. The order of the district court (Pet. App. 4-23) is unreported but is available at 2017 WL 4366744.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1) was entered on March 8, 2018. On May 22, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 9, 2018. The petition for a writ of certiorari

was filed on July 7, 2018. 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 Western District of North Carolina, petitioner was convicted on one count of conspiracy to possess with intent to distribute 1000 kilograms or more of marijuana, in violation of 21 U.S.C. 841(b)(1)(A) and 846; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); and one count of structuring and aiding and abetting the structuring of financial transactions to avoid reporting requirements, in violation of 31 U.S.C. 5324(a)(3) and (d), and 18 U.S.C. 2. Judgment 1; Pet. App. 5. He was sentenced to life imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed, 624 Fed. Appx. 819, and this Court denied a petition for a writ of certiorari, 136 S. Ct. 1502 (No. 15-1056). Petitioner subsequently filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, and the district court denied and dismissed the motion and declined to issue a certificate of appealability (COA). Pet. App. 4-23. The court of appeals likewise denied a COA and dismissed the appeal. Id. at 2-3.

1. a. From 2004 through 2013, petitioner helped lead a drug-distribution network that shipped over 20,000 kilograms of marijuana from California to the East Coast, including North Carolina. Presentence Investigation Report (PSR) ¶¶ 5-8, 10, 25;

Pet. App. 4-7. Petitioner's East Coast co-conspirators distributed the marijuana and delivered the proceeds to petitioner and his California co-conspirators by depositing the money into bank accounts in amounts below $10,000. Pet. App. 4-6. Petitioner enlisted others to withdraw the proceeds, also in amounts below $10,000. Pet. App. 4-5; PSR ¶¶ 9, 12-13, 15-16. The drug-distribution operation generated millions of dollars. Pet. App. 5; PSR ¶ 16.

A grand jury in the Western District of North Carolina indicted petitioner and others on one count of conspiracy to possess with intent to distribute 1000 kilograms or more of marijuana, in violation of 21 U.S.C. 841(b)(1)(A) and 846; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); and one count of structuring and aiding and abetting the structuring of financial transactions to avoid reporting requirements, in violation of 31 U.S.C. 5324(a)(3) and (d), and 18 U.S.C. 2. Third Superseding Indictment 1-3; Pet. App. 5. Petitioner proceeded to trial, and the jury found him guilty on all three charges. Pet. App. 5, 9.

b. The default penalty for a conspiracy to violate 21 U.S.C. 841(b)(1)(A) is a sentence of imprisonment for ten years to life. 21 U.S.C. 841(b)(1)(A); see 21 U.S.C. 846 (sentencing range for drug conspiracy same as for substantive offense). A defendant convicted under those provisions "after two or more prior convictions for a felony drug offense have become final," however,

"shall be sentenced to a mandatory term of life imprisonment." 21 U.S.C. 841(b)(1)(A). A "felony drug offense" is "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." 21 U.S.C. 802(44).

At the time of his federal drug offense, petitioner had two felony convictions under California law for drug offenses: a 2011 felony conviction for selling or furnishing marijuana and a 2011 felony conviction for possessing codeine. Pet. App. 5, 52. The government filed an information establishing those prior felony convictions under 21 U.S.C. 851. Pet. App. 5, 52. Because those "prior convictions for a felony drug offense ha[d] become final" before his federal sentencing, petitioner was subject to a mandatory sentence of life imprisonment. 21 U.S.C. 841(b)(1)(A).

2. The Probation Office prepared a PSR that assigned petitioner a base offense level of 36 based on the quantity of drugs involved in his offense. PSR ¶ 22. It also recommended enhancements because petitioner possessed a dangerous weapon, was convicted under 18 U.S.C. 1956, was an organizer or leader of the criminal activity, and obstructed justice. PSR ¶¶ 22, 25-26. Those calculations yielded an adjusted offense level of 46 and a total offense level of 43, which corresponded to a recommended sentence of life imprisonment regardless of petitioner's criminal-history category. PSR ¶¶ 27, 35, 38; see Sentencing Guidelines Ch. 5, Pt. A (n.2) (2013). The Probation Office also determined

that petitioner had 20 criminal history points, which placed petitioner in criminal-history category VI. PSR ¶¶ 42-55. Although the Probation Office assigned petitioner six criminal history points for his 2011 California convictions for selling or furnishing marijuana and possessing codeine, PSR ¶¶ 51-52, petitioner would have been in criminal-history category VI even without those points, see Sentencing Guidelines Ch. 5, Pt. A (2013).

At sentencing, the district court declined to apply the recommended two-level enhancement for obstruction of justice, thereby reducing petitioner's offense level to 44, but petitioner's recommended sentence under the Sentencing Guidelines would have been life imprisonment regardless of his criminal-history category or any applicable statutory minimum. Pet. App. 10; see Sentencing Guidelines Ch. 5, Pt. A (n.2) (2013). The court imposed the statutory sentence of life imprisonment required by 21 U.S.C. 841(b)(1)(A). Pet. App. 10. The court of appeals affirmed, 624 Fed. Appx. 819, and this Court denied a petition for a writ of certiorari, 136 S. Ct. 1502 (No. 15-1056)

3. a. In 2014, California voters enacted Proposition 47, Cal. Penal Code § 1170.18 (West Supp. 2018). Among other changes to state law, Proposition 47 prospectively reclassifies certain drug felonies as misdemeanors and authorizes offenders serving sentences for such felonies to petition for a "recall of sentence" and "request resentencing" under the new misdemeanor penalties.

Id. § 1170.18(a). In addition, a "person who has completed his or her sentence for a" felony subsequently reclassified as a misdemeanor may "file an application * * * to have the felony conviction or convictions designated as misdemeanors." Id. § 1170.18(f). A "felony conviction that is recalled and resentenced" or "designated as a misdemeanor * * * shall be considered a misdemeanor for all purposes," except for California's ban on firearm possession by felons. Id. § 1170.18(k). An adjustment pursuant to Proposition 47, however, "does not diminish or abrogate the finality of judgments in any case that does not come within the purview of" the statute. Id. § 1170.18(n) (emphasis omitted).

In addition, in 2016, California voters enacted Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act. 2016 Cal. Legis. Serv. Prop. 64. Among other changes to state law, Proposition 64 authorizes offenders who have completed their sentences for certain marijuana felony convictions to have those convictions redesignated as misdemeanors. Cal. Health & Safety Code § 11361.8(e) and (f) (West Supp. 2018). Any felony conviction that is designated as a misdemeanor under that provision "shall be considered a misdemeanor * * * for all purposes." Id. § 11361.8(h). As with Proposition 47, however, an adjustment pursuant to Proposition 64 is not "intended to diminish or abrogate the finality of judgments in any case not falling within the purview of" that statute. Id. § 11361.8(k).

b. In 2016, petitioner successfully petitioned a California court to reclassify his prior felony conviction for codeine possession as a misdemeanor under Proposition 47. Pet. App. 60-61. He then filed a motion for relief under 28 U.S.C. 2255 in federal district court, arguing in part that the reclassification of his California conviction for codeine possession entitled him to resentencing for his federal crimes. See Pet. App. 11. While that motion was pending, petitioner successfully petitioned a California court to reclassify his California felony conviction for selling or furnishing marijuana as a misdemeanor under Proposition 64. Id. at 53-54. Petitioner then moved to supplement his Section 2255 motion to note that state reclassification. Id. at 11.

4. The district court denied petitioner's Section 2255 motion and declined to issue a COA. Pet. App. 4-23. As relevant here, the court dismissed petitioner's claim that he was entitled to resentencing based on California's reclassification of his prior conviction for codeine possession. Id. at 12-14. The court determined that "California's reclassification of his [codeine-possession] offense as a misdemeanor does not change the fact that it was a felony drug offense" for purposes of 21 U.S.C. 841(b). Pet. App. 13. The court also observed that, even without that prior offense, petitioner would still be subject to a life sentence under the advisory Sentencing Guidelines and Section 841. Id. at 13 n.1.

The district court denied petitioner's motion to supplement his Section 2255 motion with information about the reclassification of his California conviction for selling or furnishing marijuana. Pet. App. 21-22. The court determined that any supplement would be futile because the reclassification of petitioner's marijuana offense "does not alter that fact that it still constitutes a prior felony drug offense under Section 841." Id. at 22.

5. In an unpublished order, the court of appeals denied a COA and dismissed petitioner's appeal. Pet. App. 2-3. The court noted that a COA requires "a substantial showing of the denial of a constitutional right" and determined that petitioner "ha[d] not made the requisite showing." Id. at 3 (quoting 28 U.S.C. 2253(c)(2)).

ARGUMENT

Petitioner contends (Pet. 13-18) that he is no longer subject to a mandatory life sentence under 21 U.S.C. 841(b)(1)(A) because, after his federal sentence became final, a state court reclassified his prior felony drug convictions as misdemeanors. Petitioner, however, identifies no error in the lower courts' denial of a COA on his statutory claim, and the district court's rejection of petitioner's claim on the merits was correct. No conflict exists among the courts of appeals on the question presented, and this Court has recently declined to review the issue. See Duncan v. United States, 138 S. Ct. 2652 (2018) (No. 17-7796); Bell v. United

States, 138 S. Ct. 1282 (2018) (No. 17-678); Vasquez v. United States, 137 S. Ct. 840 (2017) (No. 16-7259). In any event, petitioner's case is a poor vehicle for review of the question presented because of the procedural posture of the case and because the life sentence imposed by the district court was lawful and consistent with the Sentencing Guidelines regardless of how his California convictions are treated. Further review is unwarranted.

1. A federal prisoner seeking to appeal the denial of a Section 2255 motion must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, the prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a showing "that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong," Slack v. McDaniel, 529 U.S. 473, 484 (2000). The courts below correctly determined that petitioner did not make that showing. Pet. App. 3, 23.

Although a defendant's argument that he was wrongly subjected to a statutory sentencing enhancement may in some cases give rise to a constitutional claim, petitioner does not attempt to establish that his claim satisfies the COA standard, invoking "Due Process and fundamental fairness" only in passing (Pet. 17). Even assuming that he would be entitled to reframe his statutory claim in constitutional terms in this Court, federal courts "refuse to take cognizance of arguments that are made in passing without proper

development." Johnson v. Williams, 568 U.S. 289, 299 (2013). The court of appeals' determination that petitioner failed to meet the standard required for a COA accordingly does not warrant further review.

2. In any event, petitioner's claim that the reclassification of his prior state-law felony convictions as misdemeanors entitles him to relief from his life sentence lacks merit. See Duncan v. United States, 704 Fed. Appx. 914, 915 (11th Cir. 2017) (per curiam) (rejecting similar claim regarding California Proposition 47), cert. denied, 138 S. Ct. 2652 (2018); United States v. Bell, 689 Fed. Appx. 598, 599 (10th Cir. 2017) (same), cert. denied, 138 S. Ct. 1282 (2018); United States v. Diaz, 838 F.3d 968 (9th Cir. 2016) (same), cert. denied, 137 S. Ct. 840 (2017).

a. A district court is required to impose a mandatory life sentence under 21 U.S.C. 841(b)(1)(A) if the defendant committed his offense "after two or more prior convictions for a felony drug offense have become final." Ibid. As "a matter of plain statutory meaning," that provision applies to petitioner. United States v. Dyke, 718 F.3d 1282, 1292 (10th Cir.) (Gorsuch, J.), cert. denied, 571 U.S. 939 (2013). Petitioner committed his federal drug-conspiracy offense "after two or more prior convictions for a felony drug offense" -- his California convictions for selling or furnishing marijuana and possessing codeine -- had "become final." 21 U.S.C. 841(b)(1)(A); see Pet. App. 5; PSR ¶¶ 51-52. Petitioner

thus does not dispute that he was subject to a mandatory life sentence under 21 U.S.C. 841(b)(1)(A) at the time of his conviction. See Pet. 6, 9-10.

Petitioner contends, however (Pet. 13-18), that California's subsequent reclassification of his felony drug offenses as state-law misdemeanors entitles him to relief from his federal sentence. But whatever effect Propositions 47 and 64 had as a matter of state law, they cannot change the "historical fact," Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 115 (1983), that petitioner committed his federal drug crime "after two or more prior convictions for a felony drug offense have become final" and is thus subject to a mandatory life sentence, 21 U.S.C. 841(b)(1)(A). Although a State may adjust its own criminal penalties prospectively or retroactively, "it [can]not rewrite history for the purposes of the administration of the federal criminal law." Diaz, 838 F.3d at 972 (brackets in original; citation omitted); accord Dyke, 718 F.3d at 1293 ("The question posed by § 841(b)(1)(A) is whether the defendant was previously convicted, not the particulars of how state law later might have, as a matter of grace, permitted that conviction to be excused, satisfied, or otherwise set aside.").

This Court has explained that a "felony drug offense" is an offense "punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country," 21 U.S.C. 802(44), "regardless of the punishing jurisdiction's

classification of the offense," Burgess v. United States, 553 U.S. 124, 129 (2008). It follows that a defendant whose prior state convictions meet the federal definition cannot rely on after-the-fact reclassifications, long after his state sentences have been served, as the basis for challenging a federal term of imprisonment that was undisputedly lawful when it was imposed.

This Court's decision in McNeill v. United States, 563 U.S. 816 (2011), is instructive. There, the Court considered the meaning of "serious drug offense" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(A)(ii), which is defined in relevant part as a drug "offense under State law * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." Ibid. McNeill was convicted of North Carolina drug offenses punishable by ten-year sentences at the time of his convictions for those offenses, but the State subsequently reduced the punishment. McNeill, 563 U.S. at 818. At his federal sentencing, McNeill argued that the district court should look to current state law in determining whether "a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). This Court rejected his argument, holding that the "plain text of [the] ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense." McNeill, 563 U.S. at 820. The Court explained that the statute "is concerned with convictions that have already occurred"

and that the "only way to answer this backward-looking question is to consult the law that applied at the time of that conviction." Ibid.

McNeill did not address "a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." 563 U.S. at 825 n.*. But the approach in McNeill seriously undermines petitioner's position. As in McNeill, the subsequent modification of state law here does not alter the fact that petitioner's federal sentence was imposed "after two or more prior convictions for a felony drug offense ha[d] become final." 21 U.S.C. 841(b)(1)(A). Because petitioner was convicted "of the type of crime specified by the statute," he is subject to the prescribed punishment. Dickerson, 460 U.S. at 110; accord Diaz, 838 F.3d at 974.

b. Petitioner observes (Pet. 13-14) that this Court has assumed that a federal prisoner may seek to vacate his sentence under 28 U.S.C. 2255 if he has successfully challenged "the validity of a prior conviction supporting an enhanced federal sentence." Johnson v. United States, 544 U.S. 295, 303 (2005). But a successful challenge to the "validity" of a prior conviction requires establishing that the conviction has been "vacated." Ibid.; see ibid. (assuming that "a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated"); Bell, 689 Fed. Appx. at 599

("Johnson concerns the right to reopen a federal sentence where a defendant successfully attacks a state conviction in state court, i.e., the conviction is vacated."). That understanding follows from the statutory text. When a defendant successfully attacks the validity of a prior conviction by having it "vacated or reversed on direct appeal," the result is "to nullify that conviction" and thus to remove it from "the literal language of the statute" requiring a sentence enhancement. Dickerson, 460 U.S. at 111, 115; see Dyke, 718 F.3d at 1293 (questioning whether "a conviction vacated or reversed due [to] the defendant's innocence or an error of law fairly qualifies as a 'conviction' at all").

Petitioner's felony convictions were not vacated; they were reclassified as state-law misdemeanors. Pet. App. 53-54, 60-61; see Cal. Penal Code § 1170.18(a)-(b) and (f)-(g) (West Supp. 2018); Cal. Health & Safety Code § 11361.8(a)-(b) and (e)-(f) (West Supp. 2018). Even as a matter of state law, that modification does not "diminish or abrogate the finality of judgments in any case" that falls outside "the purview of" Propositions 47 or 64. Cal. Penal Code § 1170.18(n) (West Supp. 2018); Cal. Health & Safety Code § 11361.8(k) (West Supp. 2018). Thus, "reclassification of a felony to a misdemeanor does not necessarily mean that the crime will be treated as a misdemeanor retroactively for the purpose of other statutory schemes" under state law, let alone under federal law (which the State lacks the power to modify). Diaz, 838 F.3d

at 974-975 (citing People v. Park, 299 P.3d 1263 (Cal. 2013)); see Bell, 689 Fed. Appx. at 599 (denying relief under similar circumstances because petitioner's California conviction was not "vacated").

At best, the reclassification of petitioner's felony convictions as misdemeanors might be considered analogous to a state's expungement of his felony convictions. Cf. Diaz, 838 F.3d at 974 (referring to expungement as "a more drastic change" than reclassification). But as this Court has explained, "expunction does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty." Dickerson, 460 U.S. at 115. Moreover, Congress "clearly knows * * * how to ensure that expunged convictions are disregarded in later judicial proceedings." Dyke, 718 F.3d at 1292. And although Congress has required that result in some contexts, see, e.g., 18 U.S.C. 921(a)(20)(B) ("Any conviction which has been expunged, or set aside * * * shall not be considered a conviction for purposes of this chapter."), it has "made no similar effort" in Section 841, Dyke, 718 F.3d at 1292. Thus, the "courts of appeals that have considered this § 841 question * * * have counted prior felony drug convictions even where those convictions had been set aside, expunged, or otherwise removed from a defendant's record for" reasons "unrelated to innocence or an error of law." United States v. Law, 528 F.3d

888, 911 (D.C. Cir. 2008) (per curiam) (collecting cases), cert. denied, 555 U.S. 1147 (2009).

3. Petitioner errs in asserting (Pet. 14-16) the existence of a circuit conflict.

The courts of appeals that have addressed the merits of a claim like petitioner's have uniformly recognized that California's reclassification of certain past felony convictions as misdemeanors does not undermine a prior conviction's felony status for purposes of Section 841. See United States v. London, No. 15-1206, 2018 WL 4189616, at *3-*4 (3d Cir. Aug. 31, 2018); Duncan, 704 Fed. Appx. at 915; Bell, 689 Fed. Appx. at 599; Diaz, 838 F.3d at 975.

Contrary to petitioner's contention (Pet. 14-15), neither the decision below nor the Ninth Circuit's decision in Diaz conflicts with the decisions of the Eleventh Circuit. None of the Eleventh Circuit cases that petitioner cites addresses whether a state's reclassification of a prior offense affects that prior conviction's felony status for purposes of Section 841. See United States v. Martinez, 606 F.3d 1303, 1304 (11th Cir. 2010) (addressing a court of appeals' authority under 28 U.S.C. 2106 to fashion mandates to allow appropriate proceedings on remand in a criminal case); Spencer v. United States, 773 F.3d 1132, 1139 (11th Cir. 2014) (determining that Section 2255 does not provide a remedy to "a federal prisoner, sentenced below the statutory maximum, [who] complains of a sentencing error and does not prove either

actual innocence of his crime or the vacatur of a prior conviction"), cert. denied, 135 S. Ct. 2836 (2015); Stewart v. United States, 646 F.3d 856, 858-859 (11th Cir. 2011) (addressing the effect of a state-court vacatur of a predicate conviction). Indeed, in Duncan, the Eleventh Circuit rejected a Section 2255 movant's claim that the reclassification of his prior California felony conviction as a misdemeanor conviction entitled him to relief from his life sentence by lowering the statutory minimum sentence from 20 years to ten years of imprisonment. 704 Fed. Appx. at 915 (noting that Spencer required that result).

Petitioner also asserts (Pet. 16-17) that the decision below conflicts with earlier decisions of the court of appeals. But the earlier decisions petitioner cites addressed the vacatur of prior convictions and did not discuss whether the reclassification of a prior state offense as a misdemeanor affects that prior conviction's felony status for purposes of Section 841. See United States v. Gadsen, 332 F.3d 224, 227 (4th Cir. 2003) ("Gadsen's challenge arises out of his contention that South Carolina has vacated a key conviction relied on by the original federal court in setting Gadsen's career offender sentence."); United States v. Dorsey, 611 Fed. Appx. 767 (4th Cir. 2015) (per curiam) ("We granted a certificate of appealability on the issue of whether Dorsey is entitled to re-sentencing due to the vacatur of one of his state court convictions used to enhance his federal sentence."); United States v. Mobley, 96 Fed. Appx. 127, 128 (4th

Cir. 2004) (per curiam) ("[W]e conclude that the Supreme Court's decisions * * * allow a prisoner * * * to seek reopening of his federal sentence when a state court conviction, for which criminal history points were assessed, has been overturned."). In any event, any intracircuit conflict would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

4. Petitioner's case would be a poor vehicle for review for two additional reasons. First, the decision below is nonprecedential and addresses only the requirements for a COA. Second, although petitioner's California convictions resulted in a mandatory sentence of life imprisonment, they did not affect the maximum term of imprisonment, which was life imprisonment even if petitioner had no prior convictions. 21 U.S.C. 841(b)(1)(A); see Duncan, 704 Fed. Appx. at 915 (defendant's life sentence "was and is lawful, both before and after California reclassified his offense") (internal quotation marks omitted). And the advisory Sentencing Guidelines would have recommended a life sentence regardless of how petitioner's California convictions were treated. See pp. 4-5, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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