NO. _____

IN THE
UNITED STATES SUPREME COURT

JOSEPH RAMON SANTILLAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RAPHAEL M. SCHEETZ
425 Second Street S.E.
Suite 1010
Cedar Rapids, Iowa 52402
319-378-7416
scheetzlaw@aol.com
ATTORNEY FOR PETITIONER

Question Presented

Did defendant's State of California marijuana conviction constitute a "prior conviction for a felony drug offense," increasing defendant's mandatory minimum sentence from 10 years to 20 years, pursuant to 21 U.S.C. Section 841(b)(1)(B), where the State Superior Court of California re-designated defendant's State marijuana felony to a misdemeanor?

List of Parties

All parties appear in the caption of the case on the cover page.

Related Cases

None.

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Statutes And Rules:

Petition for Writ of Certiorari

The Petitioner, Joseph Ramon Santillan, respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit in this matter.

Opinion Below

On December 9, 2019, the United States Court of Appeals for the Eighth Circuit entered its Opinion and Judgment affirming the United States District Court for the Northern District of Iowa. See, *United States v. Santillan*, 944 F.3d 731 (8th Cir. 2019).

Jurisdictional Statement

The date on which the United States Court of Appeals decided the case was December 9, 2019. This Petition for Writ of Certiorari is timely filed within ninety (90) days of the filing of the Eighth Circuit's decision.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Code:

21 U.S.C. § 841(b)(1)(A) (excerpt)[1]:

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

> (1)(A) In the case of a violation of subsection (a) of this section involving—
>
> (viii) 50 grams or more of methamphetamine, it salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;
>
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life . . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . . .

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[1]This statute was subsequently amended by the "First Step Act of 2018" on December 21, 2018.

21 U.S.C. § 802(44):

The term "felony drug offense" means 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 drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

California Statute:

Health and Safety Code § 11361.8

[a] person who has completed his or her sentence for a conviction under [§ 11359] . . . who would have been guilty of a lesser offense under the Control Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the conviction . . . re-designated as a misdemeanor . . [§11361.8(e)];

Once the applicant satisfies the criteria in subdivision (e), the court shall re-designate the conviction as a misdemeanor . . .. [§11361.8(f)]; and,

Any felony conviction that is . . . designated as a misdemeanor . . . under subdivision (f) shall be considered a misdemeanor . . . for all purposes. [§ 11361.8(h)].

Statement of the Case

In 2008, defendant Joseph Ramon Santillan was convicted in California state court for possession of marijuana for sale. At the time of his conviction, the offense was a felony.

In a reflection of society's changing attitude towards marijuana, on November 8, 2016, the California electorate passed Proposition 64.[2] Among other things, the Proposition amended California Health and Safety Code § 11359. The Proposition reclassified possession of marijuana for sale as a misdemeanor (punishable by "imprisonment in a county jail for a period of not more than six months").

Proposition 64 also added Health and Safety Code § 11361.8 which provided that persons with certain marijuana felony convictions could apply to the California State Court to have their charge re-designated as a *misdemeanor*:

> [a] person who has completed his or her sentence for a conviction under [§ 11359] . . . who would have been guilty of a lesser offense under the Control Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense, may file an

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[2] See 2016 Cal. Legis. Serv. Prop. 64.

> application before the trial court that entered the judgment of conviction in his or her case to have the conviction . . . re-designated as a misdemeanor...[§11361.8(e)];
>
> Once the applicant satisfies the criteria in subdivision (e), the court shall re-designate the conviction as a misdemeanor...[§11361.8(f)]; and,
>
> *Any felony conviction that is...designated as a misdemeanor...under subdivision (f) shall be considered a misdemeanor...for all purposes. [§ 11361.8(h)].*

Health and Safety Code § 11361.8 (emphasis added).

In November 2017, the defendant filed an application in the Superior County Court of California to re-designate his marijuana felony conviction to a misdemeanor. In December 2017, the Superior Court granted the application. The Superior Court recalled the February 2008 felony sentence, ordered that the complaint be deemed amended to allege a misdemeanor, and re-designated the 2008 conviction as a misdemeanor conviction "for all purposes".

On November 30, 2017, the defendant was indicted in federal district court for possession of 500 grams or more of a mixture or substance containing methamphetamine, in violation

of 21 U.S.C. § 841(b)(1)(A)(viii). The defendant pleaded guilty. According to the plea agreement of the parties, the defendant's offense conduct began in April 2017.

In the federal district court, the government filed a notice of sentencing enhancement, pursuant to 21 U.S.C. Section 851. The government sought to increase defendant's mandatory minimum prison sentence from 10-years to 20-years based upon the defendant's prior 2008 California marijuana conviction

The defendant moved to strike the Section 851 enhancement. Defendant argued that he did not have a felony drug conviction due to the California court's re-designation of the offense to a misdemeanor. In a decision filed on March 11, 2018, the district court disagreed. Appendix B.

Without the enhancement, defendant's recommended Sentencing Guideline range was 188 to 235 months in prison on the drug count; he would have also received only five years of supervised release.

The district court sentenced defendant to 240-months mandatory minimum sentence on Count 1, and a ten year term of

supervised release (the defendant also received a consecutive 60-month sentence for his conviction of 21 U.S.C. Section 924(c) for a total sentence of 300 months).

The defendant appealed the sentencing enhancement issue. In a published opinion dated December 9, 2019, *United States v. Santillan*, 944 F.3d 731 (8th Cir. 2019), the United States Court of Appeals for the Eighth Circuit affirmed the district court.

Reasons for Granting the Petition

The United States Court of Appeals for the Eighth Circuit has decided an important question of federal law that has not, but should be, settled by this Court. See, Supreme Court Rule 10(c).

A. A "Prior Conviction for a Felony Drug Offense" Did Not Exist at Time of Defendant's Sentencing.

A prior conviction meeting the definition of an "offense that is punishable by imprisonment for more than one year," see, 21 U.S.C. § 802(44), did not exist when defendant was sentenced in federal district court in October 2018. In December 2017, the prior California felony sentence was recalled, the charging document was amended by operation of law to allege a misdemeanor, and the offense was retroactively designated a

misdemeanor "for all purposes". Assuming the prior conviction was an enhancement predicate at all, it had been vacated.

The validity of a prior conviction supporting an enhanced federal sentence is not beyond challenge. *Johnson v. U.S.*, 544 U.S. 295, 303, 125 S.Ct. 1571, 1577 (2005). "Our cases applying these provisions assume the contrary, that a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated." *Id.* (citing *Custis v. United States*, 511 U.S. 485 (1994); *Daniels v. United States*, 532 U.S. 374 (2001)).

The Supreme Court has held that, if a prior conviction has not been set aside by the time of sentencing, it may be used to enhance the federal sentence. *Daniels*, 532 U.S. at 382. The logical corollary is that if a felony conviction is set aside prior to sentencing, the conviction may not be used to enhance the federal sentence.

When the defendant was sentenced in 2008, his offense was punishable as a felony drug conviction. However, that changed on November 8, 2016, when California passed Proposition 64 which

amended defendant's offense of conviction to a misdemeanor. California Health and Safety Code § 11359(b). The statute applied retroactively and provided a procedure in which to have the felony conviction recalled and re-designated as a misdemeanor. California Health and Safety Code §11361.8(e).

The record shows that on December 26, 2017, a California Superior Court set aside defendant's felony and resulting sentence. The complaint setting out defendant's offense was deemed amended to allege a misdemeanor, and defendant's offense was retroactively designated a misdemeanor for all purposes. The effect was to vacate defendant's prior felony conviction and replace it with a misdemeanor conviction as a matter of law. Thus, defendant did not have a felony conviction when he was sentenced in federal district court in October 2018.

Arreola-Castillo v. United States, 889 F.3d 378 (7th Cir. 2018) is the most recent on-point case. In *Arreola-Castillo*, the defendant was convicted of a federal drug crime. 889 F.3d at 381. In 2006, he received a mandatory minimum sentence of life imprisonment because he had two predicate New Mexico felony

drug convictions. *Id.* He subsequently challenged both convictions in New Mexico state courts where he claimed ineffective assistance of counsel. *Id.* One conviction was vacated in November 2014; and, the other conviction was vacated in June 2015. *Id.*

In December 2014, Arreola-Castillo filed a 28 U.S.C. § 2255 motion to reopen his federal sentence. He did not challenge the validity of the prior State court convictions; rather, he challenged "their very existence." *Id.* at 385. The district court found 21 U.S.C. § 851(e) barred Arreolo-Castillo from reopening his sentence.

The United States Court of Appeals for the Seventh Circuit reversed. The Court determined that the sentencing court should have examined the vacated convictions.

Because vacated convictions are properly considered in a resentencing following a § 2255 motion, vacated convictions must also be considered in an original sentencing. In either case, increased punishment cannot be imposed where a once-qualifying

conviction no longer exists because it no longer meets the definition of a qualifying predicate.

In denying the defendant Santillan's appeal, the Eighth Circuit relied primarily on *United States v. Diaz*, 838 F.3d 968, 973-74 (9th Cir. 2016). It is important to note that *Diaz* did not address the California statute at issue in the instant case.

Diaz dealt only with the issue of whether a California conviction qualified as a predicate conviction. *Diaz* did not recognize the fact that, even if a qualifying felony conviction existed historically, punishment cannot be applied if that qualifying felony conviction no longer exists (as in the instant case). *Diaz's* reasoning was based primarily on a Supreme Court case that recognized this legal principle in the context of an 18 U.S.C. § 924(g) prosecution -- *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 115, 103 S.Ct. 986 (1983), *holding superseded by 18 U.S.C. § 921(a)(20).* *Dickerson* stated "if [the defendant] was [convicted of the type of crime specified by the statute] and that conviction somehow was rendered a nullity" there would not be a firearms prohibition. 460 U.S. at 111.

Diaz did not discuss this part of *Dickerson* and did not address the holdings of *Custis, Daniels,* or *Johnson.*

The Ninth Circuit case governing this issue is *United States v. McChristian*, 47 F.3d 1499 (9th Cir. 1995). There, a defendant received a § 841(b) enhanced sentence even though his prior state court conviction was stricken after the federal indictment was filed. Much as in the instant case, the district court in *McChristian* found it was irrelevant that the state conviction was set aside after defendant's federal indictment. *Id.* at 1503. The Ninth Circuit agreed with the defendant's argument "that the district court erred in relying on this invalid conviction..." *Id.* at 1502 ("Ingram contends that the district court erred in relying on this invalid conviction and the Section 851(e) does not preclude Ingram from showing the court that the conviction has been invalidated. We agree.").

In the instant case, after the California court nullified defendant's felony conviction in December 2017 and convicted defendant of a misdemeanor, no qualifying felony conviction existed. On October 2, 2018, the defendant was "otherwise not

subject to an increased sentence as a matter of law." 21 U.S.C. § 851(d)(2). *See also, Johnson*, 544 U.S. at 303 ("a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated.").

Proposition 64 did more than provide "post-conviction relief," *Diaz*, 838 F.3d at 975. Proposition 64 provided "*no-conviction* relief."

B. No "Final" Conviction Existed at the time of the Commission of the Instant Offense.

California law treats the defendant's 2008 conviction the same as a person who is convicted of possessing marijuana for sale after November 8, 2016—the convictions are both classified as misdemeanors. Because the change in law took place before defendant's federal offense was committed, federal law accords the defendant the same treatment.

This issue requires an examination of two subsections of Title 21. The first subsection, 21 U.S.C. § 841(b)(1)(A), sets out the basis for increased punishment for a federal drug violation:

> If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment...

(underlining added for comparison).

Second, 21 U.S.C. § 802 sets out the definition of "felony drug offense":

> (44) The term "felony drug offense" means 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 drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

(underlining added for comparison).

Therefore, a person may not be required to serve increased punishment for a federal drug violation unless there is a final conviction for an offense that "is punishable" as a felony prior to when he or she "commits" the federal offense.

1. When the defendant committed the federal offense, he did not have a final state conviction for a felony offense. The California felony sentence was nullified and the conviction was for a misdemeanor offense.

Here, as a matter of law, there was no "final" qualifying prior felony conviction when the defendant committed his federal offense. In April 2017, the defendant did not have final conviction for "an offense that *is* punishable by imprisonment for more than one year" under California law.

The first step in the analysis is to determine whether there was a prior felony offense conviction that was "final" as required by Title 21 for recidivist enhancement. This is a backwards-looking determination, cf. *McNeill v. United States*, 563 U.S. 816, 131 S.Ct. 2218, 2222 (2011). But the look back does not go to February 19, 2008, when defendant was convicted in a California court. The look goes back to the April 2017 federal offense date.[3]

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[3] In *McNeill*, for purposes of the ACCA, the Court looked to the date of conviction to determine the maximum sentence applicable to the underlying state offense. However, firearm statutes do not require that a conviction be "final;" they require only a conviction. *Lewis v. United States*, 445 U.S. 55, 67 (1980).

Pursuant to Section 841(b)(1)(A), a prior conviction is not "final" the day the sentence is imposed; time and events must pass before a conviction is final. See, *United States v. Maxon*, 339 F.3d 656, 659 (8th Cir. 2003) (final-conviction language applies to conviction no longer subject to examination on direct appeal because of conclusion of the appellate process or passage of time for appeal). Therefore, a § 841(b) look-back cannot go to the date of a prior conviction; a conviction is not final on that date. The look-back goes to the date of the new federal crime to determine if there was a final prior conviction for an "offense that is punishable by imprisonment for more than one year." 21 U.S.C. § 802(44).

In April 2017, defendant did not have a final conviction for an "offense that is punishable by imprisonment for more than one year." In April 2017, possession of marijuana for sale was an "offense that is punishable by imprisonment for" up to six months in jail. If no possession-of-marijuana-for-sale felony offense existed, there could be no felony offense for which a conviction could be final.

A conviction cannot be final if it changes.

2. Defendant's state court conviction does not support the enhanced federal sentence because, at the time of the federal offense, the state offense was not a crime that "is" punishable as a felony.

The next question is whether, at the time of the federal offense, defendant had a final conviction for a crime that "is" punishable as a felony. This is what the plain language of Title 21 requires, and, in April 2017, there was no such thing as a California offense of possession of marijuana for sale that "is punishable" as a felony.

It is well-established that:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent."

Robinson v. Shell Oil Co., 519 U.S. 337, 340-41 (1997).

Congress' use of two different tenses in 21 U.S.C. § 841(b)(1)(A) is critical. The statute uses the present perfect tense twice when it describes a conviction: "after a prior conviction for a felony drug offense has become final", and, "after two or more

prior convictions for a felony drug offense have become final." That tense denotes something that has been completed. *Barrett v. United States*, 423 U.S. 212, 217, 96 S.Ct. 498 (1976).

The statute uses the present tense twice: "commits such a violation" and "is punishable." Present tense does not include the past.

Congress' choice of tense is determinative. In *Carr v. United States*, 560 U.S. 438, 448 (2010), the Supreme Court stated:

> Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach. See, *e.g.*, *United States v. Wilson*, 503 U.S. 329, 333, 112 S.Ct. 1351, 117 L.Ed.2d 593 (1992) ("Congress' use of a verb tense is significant in construing statutes"); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987) ("Congress could have phrased its requirement in language that looked to the past . . ., but it did not choose this readily available option"); *Barrett v. United States*, 423 U.S. 212, 216, 96 S.Ct. 498, 46 L.Ed.2d 450 (1976) (observing that Congress used the present perfect tense to "denot[e] an act that has been completed").
>
> The Dictionary Act also ascribes significance to verb tense. It provides that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise[,]. . . words used in the present tense include the future as well as the present." 1 U.S.C. § 1. By implication, then, the Dictionary Act instructs that the present tense generally does not include the past.

The present tense phrase "is punishable by imprisonment for more than one year" means the applicable punishment "is" determined based upon the time when a person "commits" the new federal drug offense. If Congress had intended otherwise, it would have said "offense that *was* punishable."

Accepting the Eighth Circuit's view would make "is" insignificant, if not wholly superfluous.

> "It is our duty 'to give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche*, 348 U. S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U. S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U. S. 362, 404 (2000) (describing this rule as a "cardinal principle of statutory construction"); *Market Co. v. Hoffman*, 101 U. S. 112, 115 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'"). We are thus "reluctan[t] to treat statutory terms as surplusage" in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 698 (1995); see also *Ratzlaf v. United States*, 510 U. S. 135, 140 (1994). We are especially unwilling to do so when the term occupies so pivotal a place in the statutory scheme...

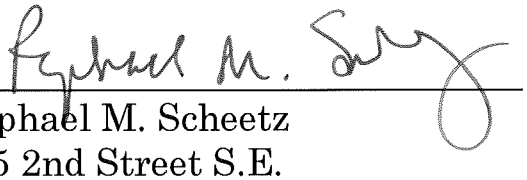
Duncan v. Walker, 533 U.S. 167, 174 (2001).

The significance of "is" means the date a defendant "commits" a federal crime is the date used to determine the available punishment for a prior offense. This is consistent with Congress' decision to defer to state law in determining whether a prior offense is so serious that federal sentence enhancements should be imposed for recidivism.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Raphael M. Scheetz
425 2nd Street S.E.
Suite 1010
Cedar Rapids, Iowa 52401
319-378-7416
scheetzlaw@aol.com
ATTORNEY FOR PETITIONER