No. 20-136

In the Supreme Court of the United States

TREMAYNE T. DOZIER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior state drug conviction was for "an offense that is punishable by imprisonment for more than one year," 21 U.S.C. 802(44), for purposes of his sentencing range under 21 U.S.C. 841(b)(1)(A) (2012).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (C.D. Ill.):
United States v. *Dozier*, No. 18-cr-20002 (Nov. 15, 2018)

United States Court of Appeals (7th Cir.):
United States v. *Dozier*, No. 18-3447 (Feb. 4, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 949 F.3d 322.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2020. A petition for rehearing was denied on March 6, 2020 (Pet. App. 57a-58a). The petition for a writ of certiorari was filed on August 3, 2020. 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 Central District of Illinois, petitioner was convicted of conspiring to possess 50 grams or more of methamphetamine with the intent to distribute, in violation of 21 U.S.C. 841(a)(1), 846, and 21 U.S.C. 841(b)(1)(A) (2012). Judgment 1. He was sentenced to

240 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-26a.

1. In February 2006, petitioner was charged in Dallas County, Texas with possessing less than one gram of cocaine. Pet. App. 3a; see Tex. Health & Safety Code Ann. § 481.115(a) (West 2003). Under state law, that offense was categorized as a "'state jail felony,'" which was "punishable by 'confinement in a state jail for any term of not more than two years or less than 180 days.'" Pet. App. 3a (quoting Tex. Penal Code Ann. § 12.35(a) (West 2003) (brackets omitted)); see Tex. Health & Safety Code Ann. § 481.115(b) (West 2003).

State law further provided that "[a] court may punish a defendant who is convicted of a state jail felony by imposing the confinement permissible as punishment for a Class A misdemeanor if, after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, the court finds that such punishment would best serve the ends of justice." Tex. Penal Code Ann. § 12.44(a) (West Supp. 2006). Class A misdemeanors were punishable by "confinement in jail for a term not to exceed one year." *Id.* § 12.21(2) (West 2019).

On May 3, 2006, petitioner pleaded guilty pursuant to a plea agreement in exchange for a sentence of nine months. Pet. App. 3a. The plea agreement "lists the offense and its punishment range" as "'State Jail Felony, 180 days – 2 years State Jail,'" and specifies an "'agreed sentence' of nine months, citing section 12.44(a) of the Texas Penal Code." *Id.* at 3a-4a. The state court accepted the guilty plea and plea agreement, found petitioner guilty of "a *State Jail Felony* as charged," and

sentenced petitioner to nine months in jail. *Id.* at 4a (emphasis added).

2. In October 2017, petitioner was arrested for dealing methamphetamine. Pet. App. 4a. A federal grand jury indicted him for conspiring to possess methamphetamine with the intent to distribute, in violation of 21 U.S.C. 841(a)(1), 846, and 21 U.S.C. 841(b)(1)(A) (2012), and possessing methamphetamine with the intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(B)(viii) (2012). Pet. App. 4a-5a. As relevant here, the conspiracy charge carried a 10-year statutory minimum. *Id.* at 6a.

The government filed an information under 21 U.S.C. 851 "notifying the court that it intended to rely on [petitioner's] 2006 Texas conviction to enhance the applicable penalties under" 21 U.S.C. 841. Pet. App. 5a. As relevant to petitioner's conspiracy charge, the then-existing version of that provision required a minimum sentence of 20 years for a defendant with a prior conviction for a "felony drug offense." *Ibid.* A "felony drug offense" is a drug-related "offense that is punishable by imprisonment for more than one year under any law of the United States or of a State." 21 U.S.C. 802(44).

Petitioner pleaded guilty to the conspiracy charge, and the government dropped the charge for possession with intent to distribute. Pet. App. 5a; Pet. 7 n.1. At sentencing, petitioner contended that the prior-conviction enhancement did not apply, asserting that his prior state conviction was not for a felony drug offense. Pet. App. 5a. He argued that under the plea agreement, his crime of conviction was not "punishable by imprisonment for more than one year." 21 U.S.C. 802(44); Pet. App. 5a. The district court overruled the objection and

sentenced petitioner to the statutory-minimum 20-year term of imprisonment. Pet. App. 5a.

3. The court of appeals affirmed. Pet. App. 1a-13a. It noted that "[t]he word 'punishable' in ordinary English simply means 'capable of being punished.'" *Id.* at 6a (quoting *United States* v. *Nieves-Rivera*, 961 F.2d 15, 17 (1st Cir. 1992) (Breyer, J.)). And it observed that state law "plainly authorizes up to two years of imprisonment" for petitioner's crime of conviction—"a fact which is unaltered by the sentencing judge's discretionary decision under section 12.44(a) to impose a lesser sentence." *Id.* at 9a (quoting *United States* v. *Harrimon*, 568 F.3d 531, 533 n.3 (5th Cir.) (brackets omitted), cert. denied, 558 U.S. 1093 (2009)). The court accordingly determined that petitioner had been convicted of "an offense that is punishable by imprisonment for more than one year." 21 U.S.C. 802(44).

The court of appeals rejected petitioner's reliance on *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010), in which this Court held that an alien was not ineligible for cancellation of removal simply because he could have been, but was not, prosecuted and convicted for an aggravated felony. Pet. App. 10a. The court of appeals observed that in this case, in contrast, petitioner actually was convicted of a felony. *Id.* at 10a-11a. It also explained that two out-of-circuit decisions—*United States* v. *Valencia-Mendoza*, 912 F.3d 1215 (9th Cir. 2019), and *United States* v. *Haltiwanger*, 637 F.3d 881 (8th Cir. 2011)—were inapposite. The court observed that the defendants in those cases, given their criminal history and lack of aggravating factors, faced mandatory maximum sentences of one year or less. Pet. App. 11a-12a. The court explained that petitioner's prior

conviction is different because Section 12.44(a) "is discretionary, not mandatory." *Id.* at 11a.

Judge Hamilton dissented. Pet. App. 14a-26a. Taking the view that the state court became legally obligated to impose a sentence consistent with the plea agreement once it had accepted that agreement, he would have held the definition of "felony drug offense" inapplicable. *Id.* at 15a-17a.

ARGUMENT

Petitioner renews his contention (Pet. 21-24) that his prior conviction was not for a felony drug offense because he was sentenced to nine months of imprisonment pursuant to a plea agreement, and further contends (Pet. 9-18) that the courts of appeals are divided over the question presented. Those contentions lack merit. The courts below correctly rejected petitioner's claim on the merits, and this case does not implicate any conflict in the courts of appeals. Further review is not warranted.

1. a. Under federal law, a "felony drug offense" is a drug-related "offense that is punishable by imprisonment for more than one year under any law of the United States or of a State." 21 U.S.C. 802(44); see *Burgess* v. *United States*, 553 U.S. 124, 126-127 (2008). The statute does not define the term "punishable," which accordingly takes its "ordinary meaning," *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1140 (2018): "'capable of being punished,'" Pet. App. 6a (quoting *United States* v. *Nieves-Rivera*, 961 F.2d 15, 17 (1st Cir. 1992) (Breyer, J.)).

At the time of petitioner's 2006 state offense, Texas law prohibited "knowingly or intentionally possess[ing] a controlled substance." Tex. Health & Safety Code

Ann. § 481.115(a) (West 2003). And it categorized a violation of that prohibition as "a state jail felony if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, less than one gram." *Id.* § 481.115(b). Petitioner's offense involved "less than one gram of cocaine" and was therefore a "'state jail felony.'" Pet. App. 3a (citation omitted).

Texas law further provided that "an individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days." Tex. Penal Code Ann. § 12.35(a) (West 2003). Petitioner's guilty plea to a state jail felony was thus a plea to an offense with a potential prison sentence of between 180 days and two years. His plea agreement accordingly stated that he was pleading guilty to a "State Jail Felony" carrying a penalty of "180 days – 2 years State Jail." Pet. App. 3a. Because Texas law authorized more than one year of imprisonment for petitioner's offense of conviction, that offense was "capable of being punished" by more than one year in prison, *id.* at 6a (quoting *Nieves-Rivera*, 961 F.2d at 17), and was therefore "an offense that is punishable by imprisonment for more than one year under [a state] law," 21 U.S.C. 802(44).

b. Petitioner's contrary argument turns on Section 12.44(a) of the Texas Penal Code, which provides that "[a] court *may* punish a defendant who is convicted of a state jail felony by imposing the confinement permissible as punishment for a Class A misdemeanor if, after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, the court finds that such pun-

ishment would best serve the ends of justice." Tex. Penal Code Ann. § 12.44(a) (West Supp. 2006) (emphasis added). Class A misdemeanors carry a maximum jail term of one year, and have no minimum term. *Id.* § 12.21(2) (West 2019). Petitioner's plea agreement included a stipulated term of imprisonment of nine months pursuant to Section 12.44(a), which the state court accepted. Pet. App. 4a. Petitioner contends that "after considering factors enumerated in the Texas Penal Code, [the state judge] specifically found that a misdemeanor punishment would 'best serve the ends of justice'" under Section 12.44(a), and that this "determination" "*bound* the court to sentence [petitioner] to *less* than a year's imprisonment." Pet. 23 (first emphasis added).

That contention is unsound. Section 12.44(a)'s plain text—which states that a court "may" impose a misdemeanor sentence "if" it makes certain findings—is permissive rather than mandatory. Tex. Penal Code Ann. § 12.44(a) (West Supp. 2006). Both Texas courts and the regional court of appeals have accordingly recognized that the provision grants the judge the *discretion* to impose a sentence of one year or less, but does not require him to impose such a sentence. See *Fite* v. *State*, 60 S.W.3d 314, 319 (Tex. App. 2001) ("Section 12.44(a) is a permissive sentencing provision."); Tex. Gov't Code Ann. § 311.016(1) (West 2013); *United States* v. *Harrimon*, 568 F.3d 531, 533 n.3 (5th Cir.) ("[T]he relevant statute plainly authorizes up to two years of imprisonment * * * , a fact which is unaltered by the sentencing judge's discretionary decision * * * to impose a lesser sentence."), cert. denied, 558 U.S. 1093 (2009). Petitioner cites no support for the contrary proposition. In any event, a disagreement about the meaning of state

law would not warrant this Court's review. See *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1150 (2017); *Mullaney* v. *Wilbur*, 421 U.S. 684, 690-691 (1975).

Petitioner additionally argues (Pet. 6-7) that he was entitled to withdraw his plea—and would have done so—in the event the court rejected the stipulated sentence.[*] But the relevant question is what punishment state law authorized for the *offense of conviction*, as the plain text of the "felony drug offense" definition in 21 U.S.C. 802(44) "clearly focuses" on the "offense," not "the circumstances of the particular [offender]." *United States* v. *Rodriquez*, 553 U.S. 377, 393 (2008); see 21 U.S.C. 802(44) (referring to the available punishment for an "offense" "under any law of * * * a State"); *United States* v. *Valdovinos*, 760 F.3d 322, 327 (4th Cir. 2014) (rejecting similar argument and holding that "the critical question * * * is whether the particular defendant's prior *offense of conviction* was itself punishable by imprisonment exceeding one year"). The contingent possibility that petitioner might have withdrawn his plea does not change the fact that the offense of conviction—a state jail felony—was "capable of being punished" under state law by more than one year in prison. Pet. App. 6a (quoting *Nieves-Rivera*, 961 F.2d at 17); see Tex. Penal Code Ann. § 12.35(a) (West 2003) ("[A]n individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days.").

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[*] Petitioner claims (Pet. 7) that the parties stipulated he would have withdrawn his plea had the state court rejected the agreed-upon sentence. That is incorrect. The government stipulated only that petitioner would have *testified* at the federal sentencing hearing that he would have withdrawn his plea. See Pet. App. 29a.

As petitioner himself appears to acknowledge (Pet. 23), a plea agreement is not part of the offense, and an offense may be "punishable" by more than one year in prison, 21 U.S.C. 802(44), even if it is actually punished by a lesser sentence pursuant to a binding plea agreement. And his effort to distinguish this case from "ad hoc plea bargaining" (Pet. 23) depends on the view of Section 12.44 that (as discussed above) the state and regional federal appellate courts have rejected. See pp. 7-8, *supra*. Nor does *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010), support his position. See Pet. 21-23. The Court held there that an alien's prior conviction for a *non-recidivist* simple drug-possession offense did not qualify as an "aggravated felony" rendering him ineligible for cancellation of removal, *Carachuri-Rosendo*, 560 U.S. at 566 (citation omitted), where "only *recidivist* simple possession offenses * * * might, conceivably, be an 'aggravated felony.'" *Id.* at 568 (citation omitted). Although the alien *could have been* convicted of recidivist possession based on the facts, he had not been. *Id.* at 571. Here, in contrast, petitioner *was* convicted of a state offense for which the statutorily authorized punishment exceeded one year, which fits squarely within the plain language of 21 U.S.C. 802(44).

2. Petitioner errs in contending (Pet. 9-18) that the decision below conflicts with decisions of the Fourth, Ninth, and Tenth Circuits, and "likely" the Eighth Circuit. Pet. 9. His contention relies solely on inapposite cases concluding that a crime is not punishable by more than one year in prison when the applicable sentencing regime precluded a sentence of more than one year. See *United States* v. *Simmons*, 649 F.3d 237, 243 (4th Cir. 2011) (en banc) (reasoning that the defendant, "as a

first-time offender," "could not have received a sentence exceeding eight months' community punishment" under North Carolina law); *United States* v. *Haltiwanger*, 637 F.3d 881, 884 (8th Cir. 2011) (reasoning that "[n]onrecidivists, such as Haltiwanger, may only be sentenced to seven months of imprisonment" under the "Kansas sentencing structure"); *United States* v. *Valencia-Mendoza*, 912 F.3d 1215, 1218 (9th Cir. 2019) ("Washington law required the sentencing court to impose a sentence within the final standard sentence range of zero to six months."); *United States* v. *Brooks*, 751 F.3d 1204, 1210-1211 (10th Cir. 2014) ("Under Kansas law, Defendant could not have been sentenced to more than seven months in jail for his eluding conviction.").

As the court of appeals explained, this case "is different" because "Section 12.44(a) is discretionary, not mandatory." Pet. App. 11a; see *id.* at 12a. For reasons explained above, the Texas sentencing regime authorized the court to impose a sentence of more than one year, even if the court ultimately declined to do so as a matter of discretion. The Ninth Circuit similarly recognized the importance of that distinction in *United States* v. *Asuncion*, 974 F.3d 929 (2020). There, the court observed that the outcome in *United States* v. *Valencia-Mendoza*, *supra*, turned on the fact that state law had not authorized a sentence of more than one year in prison for the prior offense. *Asuncion*, 974 F.3d at 932. In contrast, in *Asuncion*, although the top end of the defendant's guidelines range for the prior offenses had not exceeded one year, the sentencing court had enjoyed broad discretion to impose sentences of more than one year. *Id.* at 932-933. *Ascuncion* accordingly recog-

nized that those prior offenses counted as felonies "punishable" by more than one year in prison, even though the defendant was in fact sentenced to less than one year. See *id.* at 932, 934.

The decisions cited by petitioner are also different in another important respect. Each involved a prior offense that was punishable by more than one year only if the prosecutor proved certain aggravating factors (such as recidivism), which the prosecutor in each case failed to do. See *Simmons*, 649 F.3d at 243; *Haltiwanger*, 637 F.3d at 884; *Valencia-Mendoza*, 912 F.3d at 1224; *Brooks*, 751 F.3d at 1208. Aggravated crimes may be characterized as different "offense[s]" than their non-aggravated counterparts under 21 U.S.C. 802(44). See *Carachuri-Rosendo*, 560 U.S. at 567 n.3; *Simmons*, 649 F.3d at 246 ("[W]hen a state statute provides a harsher punishment applicable only to recidivists, it creates different 'offenses' for the purpose of federal sentencing enhancements."); *Valencia-Mendoza*, 912 F.3d at 1224 ("[C]ourts must consider *both* a crime's statutory elements *and* sentencing factors when determining whether an offense is 'punishable' by a certain term of imprisonment."). Here, in contrast, petitioner's plea agreement had no effect on the "offense" of conviction, which was itself plainly "punishable" under state law by more than one year in prison. 21 U.S.C. 802(44); see Pet. App. 7a (noting that "the 'crime remains a felony even if punished as a misdemeanor under'" Section 12.44(a)) (quoting *United States* v. *Rivera-Perez*, 322 F.3d 350, 352 (5th Cir.) (per curiam), cert. denied, 539 U.S. 950 (2003)) (listing state cases).

Indeed, the Fourth Circuit itself recognized precisely the same distinction in *United States* v. *Valdovi-*

nos, *supra*—authored by the very same judge who authored *United States* v. *Simmons*, *supra*. See Pet. App. 25a (Hamilton, J., dissenting) (noting that "[t]o my knowledge, only one other circuit has examined a plea agreement with a binding sentencing term after *Carachuri-Rosendo*," and citing *Valdovinos*). There, the defendant argued that "a plea agreement of the sort he negotiated—that binds the judge to a sentence once the judge accepts the plea— * * * establishes the maximum punishment for every defendant sentenced pursuant to such a deal." *Valdovinos*, 760 F.3d at 327. The court rejected that argument, reasoning that a plea agreement "differs in critical respects" from a state sentencing regime that imposes a maximum sentence. *Id.* at 327-328. The court recognized that "the critical question * * * is whether the particular defendant's prior *offense of conviction* was itself punishable by imprisonment exceeding one year," and determined that the defendant's offense satisfied this test, notwithstanding the sentence set out in the plea agreement. *Id.* at 327. The court of appeals here correctly reached a similar determination, and no conflict in the circuits or other reason exists that would warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2020