No. 20-136

IN THE
Supreme Court of the United States

TREMAYNE T. DOZIER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

REPLY ON PETITION FOR CERTIORARI

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The government does not dispute that the courts of appeals are openly split on the proper interpretation of § 841 and similarly worded statutes that expose a defendant to a higher federal sentence if the defendant has a prior "felony drug offense" that is "punishable by imprisonment for more than one year under any law . . . of a State." *See* 21 U.S.C. §§ 841, 802(44). Some circuits hold that an offense qualifies only if a defendant, in light of the findings made in his particular case, could have been sentenced to more than one year of imprisonment under the applicable state law. Other circuits hold that an offense qualifies if the maximum hypothetical sentence available for the offense—irrespective of the findings made by the court in a particular case—is more than a year. The result is that defendants who have been convicted of exactly the same offense under state law are receiving dramatically different federal sentences depending on the circuit in which their federal case arises.

Having not disputed the split itself, the government also does not dispute its importance, or even contend that the cases on our side of the split are incorrect. Instead, the government's opposition rests entirely on the contention that Mr. Dozier would not benefit from the rule in the more favorable circuits because his nine-month sentence was supposedly imposed under a "discretionary" state regime in which the court was permitted, but not required, to impose a sentence of no more than a year. BIO 6-8.

The government misapprehends the nature of the state conviction below and the nature of the "discretion"

afforded to the state court. Although the state court would have been allowed to sentence Mr. Dozier to a term exceeding a year under different circumstances, the court was required to impose a sentence of no more than one year once it found, based on the circumstances of the crime and other factors specified by state law, that the lower maximum sentence was in the interests of justice. The judge did not have to make that finding, but once she did, Mr. Dozier was pleading guilty to an offense with a potential sentence that could not exceed a year's imprisonment, and thus was not felony drug offense for purposes of § 841.

Texas's statutory scheme is like other schemes underlying the split in the courts of appeals. In other cases in the split, whether a defendant could receive a sentence of more than one year for a given offense depended on the findings made by the court. Once a finding was made (or not made), a particular mandatory sentencing regime followed. So too here. Had Mr. Dozier's case come from a different circuit, his mandatory minimum sentence would have been reduced by 10 years. Federal treatment of a prior state offense should not depend on the fortuity of the circuit in which the case arises. Only this Court can resolve that legal question and end that disparity, the existence and importance of which the government does not dispute.

The petition for a writ of certiorari should be granted.

I. MR. DOZIER COULD NOT HAVE BEEN SENTENCED TO A TERM OF MORE THAN ONE YEAR UNDER THE APPLICABLE STATE LAW AT THE TIME OF HIS CONVICTION.

It is undisputed that, in the cases on the other side of this circuit split, the § 841 inquiry turns on the maximum possible sentence under the applicable state law at the time of conviction. The government contends that Mr. Dozier would not benefit from the rule applied in those circuits because the state court supposedly had discretion to sentence him to a term of more than twelve months at the time of his conviction. *See* BIO 7 ("[Section 12.44(a)] grants the judge the discretion to impose a sentence of one year or less, but does not require him to impose such a sentence."). That is incorrect.

As we have explained, *see* Pet. 6-7, 22-24, under Texas Penal Code § 12.44(a), where a judge makes a finding based on "the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant that" "imposing the confinement permissible as punishment for a Class A misdemeanor" would "best serve the ends of justice," the judge must impose a sentence that does not exceed one year of imprisonment. And that is precisely what happened in this case: Prior to Mr. Dozier's conviction, when the judge accepted the plea agreement, the judge made the determination that the case satisfied the statutory criteria to be sentenced only as a misdemeanor under § 12.44(a). Pet. 6-7.

Texas courts squarely hold that once the judge makes that finding under § 12.44(a), it is legal error to impose a sentence in excess of the misdemeanor range set out in the statute. For example, in *State v. Shepard*, the trial court made the finding under then-operative version of § 12.44(a) "that the ends of justice would best be served by punishment as a Class B Misdemeanor," which permitted a maximum sentence of 6 months.[1] The trial court nonetheless sentenced the defendant to 12 months, and the Texas Court of Appeals reversed. *Shepard*, 920 S.W.2d at 422. It held that the judgment was "void on its face" because it "imposed a punishment outside the range of a class B misdemeanor." *Id.* at 422-23; *accord State v. Rowan*, 927 S.W.2d 116, 118 (Tex. App. 1996) (holding that the defendant's sentence was not authorized by law because the judge did not use the sentencing range for the appropriate class of offenses).

In other words, a judge has discretion as to whether she will find that a misdemeanor sentence serves the ends of justice and is therefore warranted under the § 12.44(a) criteria. But once she finds that a misdemeanor sentence is warranted under the § 12.44(a) criteria, she is then bound to sentence only under the statute's misdemeanor sentencing provision and cannot impose a sentence of more than one year.

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[1] 920 S.W.2d 420, 421-22 (Tex. App. 1996). In 1995, Texas amended § 12.44(a) to require punishment as a Class A misdemeanor (*i.e.*, requiring a sentence not in excess of 12 months) rather than a Class B misdemeanor (*i.e.*, requiring a sentence not in excess of 6 months) where the judge makes the requisite finding. *See* 1995 Tex. Gen. Laws 2734, 2735.

The government's citations do not establish otherwise. *See* BIO 7. They stand for the unremarkable proposition that a judge is not required *to make* the finding that a misdemeanor sentence is warranted in the interests of justice; they do not stand for the proposition that the judge, having made that finding, may nevertheless impose a sentence in excess of the misdemeanor range. In *United States v. Harrimon*, for example, the Fifth Circuit held that §12.44 is "punishable" by more than one year because it "authorizes up to two years of imprisonment" notwithstanding the "sentencing judge's discretionary decision either to impose a lesser sentence or to allow the prosecutor to prosecute the offense as a misdemeanor." 568 F.3d 531, 533 n.3 (5th Cir. 2009). That determination places the Fifth Circuit on the other side of the circuit split on this issue because it looks to whether the maximum hypothetical sentence available for the offense is more than a year. Pet. 16-17. It does not mean that a Texas judge is free to impose a sentence in excess of 12 months if it makes the finding that interests of justice warrant otherwise. The government's other citation, *Fite v. State*, states that § 12.44 is "permissive" in that it "allow[ed] a trial court to reduce punishment of a non-aggravated state jail felony to misdemeanor punishment when finding it would better serve the interests of justice." 60 S.W.3d 314, 319 (Tex. App. 2001). Again, it is undisputed that a state court need not make the finding about what the interests of justice require; but if the court makes that

finding, the defendant cannot be sentenced to more than a year's imprisonment.[2]

That is why the government is wrong to suggest that a sentence under § 12.44(a) is akin to a plea bargain in which a defendant pleads guilty to an offense that at the time of conviction carried a maximum potential sentence in excess of a year. *See* BIO 9. Texas law does not state that a defendant can be sentenced to somewhere between zero and twenty-four months if he is convicted of a state jail felony, depending on the court's assessment of the offense and offender. It says that a defendant must be sentenced to between six and twenty-four months, *unless* the court makes the requisite finding, in which case the maximum sentence is a year. Tex. Penal Code §§ 12.35(a), 12.44(a). Unlike a run-of-the-mill plea bargain, once the finding is made under § 12.44(a), the "offense of conviction" cannot give rise to a sentence of longer than year. *Cf. United States v. Valdovinos*, 760 F.3d 322, 326-27 (4th Cir. 2014) (noting that the state sentencing regime, rather than the individual plea agreement, determines whether the defendant's conviction is punishable by imprisonment over a year). Or put another way, Mr. Dozier's plea bargain did not expose him to a sentence in excess of twelve months; his admission of guilt was conditioned on

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[2] Nor is this case like *United States v. Asuncion*. 974 F.3d 929 (9th Cir. 2020). *See* BIO 10-11. There, the court made the uncontroversial point that, in situations where a judge has "broad discretion" to go beyond a sentencing range, the sentencing range can no longer be treated as the limit of the defendant's exposure. *Asuncion*, 974 F.3d at 930, 933-34.

the court first making a finding under § 12.44(a) that limited his maximum sentence to twelve months.

Equally misguided is the government's suggestion that it is meaningful that Texas labels Mr. Dozier's offense as a "state jail felony," even when the court's findings require a sentence of no more than one year. *See* BIO 8. It is not the label of the offense that matters for purposes of federal law, but the maximum sentence to which the defendant is exposed at the time of conviction. *Burgess v. United States*, 553 U.S. 124, 129 (2008).

II. THIS CASE SQUARELY PRESENTS AN OPPORTUNITY TO RESOLVE A SPLIT AMONG THE COURTS OF APPEALS.

Once the government's mischaracterization is corrected, the Texas sentencing scheme here is fundamentally the same as the sentencing schemes that underlie the entrenched split as to what constitutes an offense "punishable by imprisonment for more than one year" for purposes of federal law. Like those cases, the question here is whether the particular findings made by the state court affect the analysis of whether the state offense is a felony for purposes of § 841. *See, e.g.*, *United States v. Simmons*, 649 F.3d 237, 240 (4th Cir. 2011) (en banc) (analyzing the North Carolina Structured Sentencing Act); *United States v. Rivera-Perez*, 322 F.3d 350, 352 (5th Cir. 2003) (per curiam) (analyzing the same Texas provision at issue in the present case); *see also United States v. Valencia-Mendoza*, 912 F.3d 1215, 1216-17 (9th Cir. 2019) (analyzing Washington state's sentencing regime); *United States v. Brooks*, 751 F.3d 1204, 1205-06 (10th Cir. 2014) (analyzing Kansas'

sentencing regime); *United States v. Haltiwanger*, 637 F.3d 881, 882 (8th Cir. 2011) (same).

Moreover, the relevant findings in those cases are similar in kind to the finding that § 12.44(a) requires in that they focus on the defendant's history and the gravity of the offense. *Compare* § 12.44(a) (directing consideration of "the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant"), *with Simmons*, 649 F.3d at 240 (directing consideration of the class of offense and the offender's prior record); *Valencia-Mendoza*, 912 F.3d at 1216-17 (sentencing maximum based on the seriousness of defendant's offense and his criminal history); *Brooks*, 751 F.3d at 1206-07 (sentencing range calculated based on crime severity and criminal history, with upward departures permitted only if aggravating factors are found beyond a reasonable doubt).

And like the Texas scheme, the other cases in the split frequently implicate the meaning of findings that are "discretionary" in the same sense that the § 12.44(a) finding is discretionary. For example, the government appears to acknowledge that a case like *Simmons* involved a mandatory sentence of no more than a year. There, the mandatory sentence could only have exceeded a year if the prosecutor proved or the defendant pleaded to certain aggravating factors. *Simmons*, 649 F.3d at 240-41. The state was by no means obligated to try to prove those aggravating factors and indeed did not try to do so. What mattered there, and here, is that once the finding was, or was not,

made a mandatory sentencing regime resulted. *Id.* at 241.

The government also appears to attempt to distinguish petitioner's case from others in the split on the basis that the other decisions involved aggravating factors that increased the defendant's criminal exposure, rather than mitigating factors that decreased his exposure. *See* BIO 11. That is incorrect as those cases often effectively involve findings of mitigating factors. *E.g.*, *Simmons*, 649 F.3d at 240 (presumptive sentencing range "governs unless the judge makes written findings that identify specific factors, separately designated by the Act, that permit a departure to the aggravated or mitigated range"); *Haltiwanger*, 637 F.3d at 882 (seven-month cap on defendant's state sentence was based on his status as a nonrecidivist and the fact that his offense was the least severe form of state felony). And in any case there is no meaningful distinction between a defendant who faces a maximum sentence of less than a year because the court found a mitigating factor, and one who faces the same sentence because the court declined to find an aggravating factor. *See* Pet. App. 24a (Hamilton, J., dissenting) ("Since federal recidivist rules can be governed by the post-charging actions of a state prosecutor to raise the legally permissible sentence in an earlier case, I see no reason to disregard similar actions that lowered the legally permissible sentence in an earlier case.").

* * *

The government does not dispute the existence of the split or its importance; indeed, it does not even dispute that the circuits on petitioner's side of the split

are correct. Its sole basis for opposing certiorari is its incorrect assertion that the state sentencing regime permitted the state court to impose a sentence in excess of one year after it made a finding that such a sentence was not in the interests of justice. Because the government misapprehends the nature of the conviction and sentencing regime below, this case is an excellent vehicle to resolve that acknowledged split and end the disparity in the interpretation of frequently invoked provisions of federal sentencing law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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