

20-5417

IN THE SUPREME COURT OF THE UNITED STATES

RASHEED ROBINSON

PETITIONER,

v.

ORIGINAL

UNITED STATES OF AMERICA

RESPONDENT.

FILED

JUN 04 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.

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

PETITION FOR WRIT OF CERTIORARI

RASHEED ROBINSON

PRO SE LITIGANT

U.S. PENITENTARY POLLOCK

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MAY 28, 2020

QUESTION(S) PRESENTED

RASHEED ROBINSON'S enhanced sentence based on a retroactively erased felony violates due process of law, and the denial of a Certificate of Appealability ("COA"), reflects a breakdown in the COA review process, and raises a pressing matter of national importance:

Does two Courts disagreeing, warrant the issuance of a COA - and if so, did/is the Eleventh Circuit impose/imposing an improper, too demanding, and unduly burdensome COA standard that contravenes this Court's precedents, and is deeply arbitrary?; and does the downgrading of a prior after sentencing invalidate the prior and warrant resentencing under due process and the Eighth Amendment?

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COLUMBIA LAW SCHOOL

PETITION FOR WRIT OF CERTIORARI

Petitioner RASHEED ROBINSON, respectfully Petition for a Writ of Certiorari to Review the order of the United States Court of Appeals for the Eleventh Circuit, denying a Certificate of Appealability and upholding an unconstitutional sentence.

Opinions Below

The District Court's Decision Denying Mr. Robinson, Habeas Corpus Relief is Available At Case No. 8:19-cv-01466-TGW Document 8 Aug 15, 2019 (Appendix A). The District Court issued a short order denying Mr. Robinson Motion for relief from Judgement Pursuant to Fed. R. Civ. P 60(b)(6); 59(e); And declining The Issuance of A Certificate of Appealability. See Rasheed Robinson v. United States of America Case No. 8:19-cv-1466-T-26 TGW Document 11 (Appendix B). The Eleventh Circuit denied a COA and a motion for reconsideration. Rasheed Robinson v. United States of America Case No. 19-13671-C Jan. 15, 2020; No: 19-13673-C March 4, 2020 (Appendix C). Mr. Robinson filed A motion for re-hearing EN BANC And Re-hearing. ~~But the Clerk of Court sent a notification providing no action will be taken due to 11th Cir. R. 35-4. 19-13671 (March 24, 2020) (Appendix D)~~

Jurisdiction

This Court has Jurisdiction Pursuant to 28 U.S.C. § 1254(1). This petition is timely filed.

Relevant Provisions

This case involves a Federal criminal defendant's constitutional rights under Eighth, Tenth and Fourteenth Amendments.

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Tenth Amendment to the United States Constitution provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the application of 28 U.S.C. § 2253(c) which states:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;...

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Statement of the Case

Mr. Robinson is currently serving an enhanced sentence of 22 years predicated on a prior "felony drug offense" that no longer exist. Mr. Robinson was sentenced in 2009 for conspiracy to possess with intent to distribute 1000 kilograms or more of marijuana. Due to two priors, one of which is a California felony drug conviction, he was subject to a sentencing enhancement requiring a twenty-year mandatory minimum sentence under USSC § 4B1.1. A California Court has since recalled that felony conviction and retroactively redesignated it as a misdemeanor "for all purposes" under California's Proposition 64. See Cal. Health and Safety Code § 11361.8. As Mr. Robinson set out fully, in his motion (in great detail) for reconsideration from the denial from his 2255; COA, 60(b) and 59(e), the 11th Circuit

misapprehended his claim as Statutory rather than Constitutional and because the prior was retroactively erased, the enhanced sentence is unconstitutional.

The Court in denying reconsideration ruled that the California prior was not vacated, it was reclassified and therefore Mr. Robinson had not been deprived of due process of law nor subject to cruel and unusual under the Eighth Amendment (See Appendix B). Semantics aside, Prop 64 relief reduced felony convictions like Mr. Robinson's to misdemeanor "for all purposes". Under California law, Mr. Robinson's felony conviction has been erased." *People v. Tidwell*, 246 Cal. App 4th 212, 219-20 (2016). In other words, it is a misdemeanor for all purposes including Johnson/McNeill Analysis. Despite the Constitution prohibiting a sentence longer than one authorized by law, Mr. Robinson is still serving a prohibited sentence.

Mr. Robinson's case presents a question that the Ninth Circuit decided differently than the Eleventh Circuit's decision in Mr. Robinson's case. In *Clay*, 2018 WL 6333671 (C.D. Cal 2018) the Ninth Circuit granted a similarly situated defendant as Mr. Robinson, habeas relief in light of his due process and Eight Amendment claims. The Eleventh Circuit recognized the result reached in *Clay* but

"disagreed with the reasoning".¹ (Appendix B). In light of this disagreement, there is little doubt that reasonable jurist could debate this issue. "An issue is debatable for the purposes of meeting the Barefoot Standard, when a petitioner shows that another circuit has decided the issue differently." See *Lozada v. Deeds*, 498 U.S. 430, 432 (1991). Nevertheless, the Eleventh Circuit chose to ignore the principals guiding issuance of a COA. Moreover, recent study suggest and Mr. Robinson's case illustrates a deeply troubling pattern within the Eleventh Circuit that reflects a breakdown of the COA review process. The Eleventh Circuit's interpretation of the COA standard contravenes this Court's guidance and is imposing an improper and unduly burdensome COA standard upon Mr. Robinson.

Lastly, and of critical importance the Eleventh Circuit's failure to carry out the limited COA review with the requisite open-mindedness and even-handedness is the subject of recent study and is an issue currently before this court in *Tomlin v. Patterson*, Case No: 19-7127 (Dec. 27, 2019).

Mr. Robinson therefore "judicially notices":

Tomlin v. Patterson, Case No: 19-7127 (Dec. 27, 2019) and adopts the facts and law as it relate to Mr. Robinson's claim, as set out in the following:

1 Mr. Robinson pointed the Eleventh Circuit to the Clay Court. As a pro se litigant Mr. Robinson was entitled liberal construction.

" Appendix K: "Certificates of Appealability in habeas cases in the United States Court of Appeals for the Eleventh Circuit: A study" By Julia Udell. Columbia University "

" Appendix L: "Table of local rules for certificates of appealability by Circuit," By Naomi Bates and Ashwini Velchamy, Columbia Law School "

" Section I A of 19-7127: "The Empirical evidence demonstrates that the Eleventh Circuit's COA review process has deepened a pre-existing Circuit split, is Arbitrary and result in cruel and unusual punishment. "

For All these reasons, the refusal to grant Mr. Robinson a COA represents the systematic breakdown of the COA process that effectively denied Mr. Robinson due process, results in cruel and unusual punishment, and continues to deny Mr. Robinson his constitutional right of Access to the Court.

... Continued footnote

and that his pleading would be read to raise the strongest argument it suggest.

Statement of the Facts and Procedural History

Rasheed Robinson pleaded guilty to conspiracy to possess with intent to distribute 1000 kilograms or more of marijuana pursuant to written plea agreement. The Government cited two prior felony convictions which qualified Mr. Robinson as a career offender under USSC § 4B1.1, subjecting Mr. Robinson to an enhanced statutory minimum penalty of 20 years minimum in prison. Mr. Robinson was sentenced to 262 months imprisonment in June 2009 to run concurrent with his illegal re-entry case.

Mr. Robinson's prior felony controlled substance convictions were for possession with intent to distribute more than five pounds of marijuana in Henrico County, Virginia and possession of marijuana for sale in San Diego County, California. The California prior no longer exist because a State Court retroactively reclassified it as a misdemeanor for all purposes under Proposition 64. Going so far as to retroactively amend the charging document as if he had never been charged with a felony. (Appendix E). Accordingly, Mr. Robinson is entitled to resentencing, as keeping the 841(b)(1) enhancement in place after learning that his prior is treated by clear retroactive state law as if it had never been a felony, violates Mr. Robinson right to due process of law and the Eighth Amendment.

In 2018, the Ninth Circuit in *Clay v. United States*, 2018 WL 6333671 (C.D. Cal. 2018) held that "Johnson v. U.S., 544 U.S. 295 (2005), vindicates Clay's position that it would violate his right to due process of law and the Eighth Amendment to keep the 841(b)(1) enhancement in place after learning that his prior is treated by clear retroactive State law as if it had never been a felony". *id.* (Court order @ 6). Mr. Robinson raised the identical legal claim in practically the identical factual context in State-Post conviction and Federal habeas Corpus - The only difference being Proposition 64 as opposed to Proposition 47. The District Court Circuit denied a COA even after disagreeing with the result reached in *Clay*. (Appendix B). The Eleventh Circuit Court of Appeals denied COA without ever addressing the Constitutional claim. Appendix C. In another cursory one paragraph order, Judge Newsome and Wilson of the Eleventh Circuit, on a two Judge panel, denied Mr. Robinson reconsideration (Appendix C). Because two District Courts of equal authority disagreed and the issue was debatable Mr. Robinson applied for a COA to seek appellate review.

Reason for granting the WRIT.

The Eleventh Circuit is imposing an unduly burdensome and improper standard beyond what is mandated by this Court, And upholding an unconstitutional sentence. Therefore Certiorari is warranted.

The Eleventh Circuit's upholding of Mr. Robinson's sentence after learning his prior has been retroactively erased is violative of Mr. Robinson's due process rights by subjecting him to arbitrarily increased sentence greater than what is intended under § 841. Moreover the Eleventh Circuit tends to receive more COA petitions than its sister Circuits, yet denies most applicants their ability to appeal and thus deprives them of their due process rights. (See Judicially noticed Appendix K). This trend has persisted over the past decade.² The Eleventh Circuit's interpretation of the COA standard continues to contravene this Court's guidance. This Court has previously corrected misapplications of the COA standard within the Eleventh Circuit on a case-by-case basis to maintain uniformity. This Court should grant Certiorari to address this breakdown in the COA review process.

² See Nancy J. King, Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis 308-10 (Vanderbilt University Law School, Working Paper No. 12-3, 2011) (Discussing the varied COA grant rates across circuits from 2003 through 2011)

1. Corrected Misapplication of COA Standard

This Court has previously corrected misapplications of the COA standard by the Eleventh Circuit and other circuits on a case-by-case basis. In *Tharpe v. Sellers* for instance, this Court recently found that the Eleventh Circuit erroneously denied a COA and failed to apply the proper standard whether jurist of reason could debate the question presented, 138 S. Ct. 545, 546 (2018). In another recent case questioning the retroactive applicability of a new rule, this Court reversed the Eleventh Circuit's decision to deny a COA on the basis that the debatable question "Implicated a Broader Legal Issue" *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016).

Several of this Court's decisions have also reexamined COA denials in other circuits, such as the Fifth Circuit. As mentioned in the "judicially noticed facts", the Fifth Circuit typically grants only 7% of COA's. See Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 308. In *Miller-El v. Cockrell*, this Court found that the Fifth circuit used "too demanding a standard" in denying a COA. 537 U.S. 322, 341 (2003). This Court further reiterated that the COA standard is meant as a "Threshold" determination and only requires a showing of a debatable issue among jurists. *Id.* at 327. A year after *Miller-El*, this Court reversed two fifth circuit COA denials because the petitioners made "substantial showings of the denial of a

constitutional right" and that their issues presented were debatable. See *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (Quoting 18 U.S.C. § 2253(c)(2) (2012)); *Banks v. Dretke*, 540 U.S. 668, 674 (2004). In 2017, this Court applied reasoning from *Miller-El* to find that the petitioner met the threshold for receiving a COA and reversed the decision of the lower court. See *Buck* 137 S.Ct. at 773-74. This Court has emphasized the importance of maintaining uniformity in upholding the COA standard when granting Certificates of Appealability. In *McGeek McFadden*, Justice Sotomayor acknowledged that "unless Judges take care to carry out the limited COA review with the requisite open mind, the process breaks down," 139 S.Ct. 2608, 2611 (Mem) (2019) (Sotomayor, J.) dissenting from denial of certiorari ("Any given filing, though it may feel routine to the judge who plucks it from the top of a large stack - could be the petitioner's last, best shot at relief from an unconstitutional imposed sentence"). Justice Sotomayor also warned against using the COA standard as a "rubber stamp" *Id.* ("The large volume of COA request, the small chance that any particular petition will lead to further review, and the press of competing priorities may turn the circumscribed COA standard of review into a rubber stamp"). Justices of this Court have also emphasized that the COA standard is meant only as a threshold inquiry for appellate review. *Jordan v. Fisher*, 135 S.Ct. 2647, 2652 (Mem) (2015) (Sotomayor, J., joined by Ginsburg and Kagan, J.J. dissenting from denial of certiorari).

("In cases where a habeas petitioner makes a threshold showing that his constitutional rights were violated, a COA should issue")

Since the Eleventh Circuit rejects the vast majority of COA applications, petitioners such as Mr. Robinson are improperly prohibited from challenging violations of their constitutional rights. The Eleventh Circuit has "unduly restricted the pathway to appellate review" for Mr. Robinson by denying his COA application and the reconsideration of that denial. *Id.* Mr. Robinson's case exemplifies the breakdown of the COA process within the Eleventh Circuit that this Court has previously remedied on a case-by-case basis but should now address in this instance and more systematically.

2. Reasonable Jurist could unquestionably debate the issue as to whether Mr. Robinson's sentence violated due process and the Eighth Amendment.

Mr. Robinson's case is virtually identical to that of the petitioner in Clay, where the Ninth Circuit held that Mr. Clay was entitled to resentencing under 2255, because it would violate his right to due process and the Eighth Amendment to keep the 841(b)(1) enhancement in place after learning that his prior is treated by clear retroactive State law as if it had never been a felony. See Clay 2018 WL 6333671 (C.D. Cal 2018)

The Eleventh Circuit District Court "recognizes the result reached in Clay, yet disagrees with its reasoning," Appendix B, making it clear that the issue is debatable. By disagreeing with a circuit of equal authority, the District Court judge acknowledged that reasonable jurists could debate this question. The very question for which the Eleventh Circuit denied Mr. Robinson a COA. Mr. Robinson's case makes it clear that the Eleventh Circuit is imposing an unduly burdensome and improper standard, beyond what is mandated by this Court, and therefore, certiorari is warranted.

The petitioner in Clay pled guilty to distributing cocaine base in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(iii), and (b)(1)(B)(iii). Clay had a prior drug conviction, that triggered a mandatory 20 years in prison per § 841(b)(1). The judge in that case found Clay had a prior drug felony conviction that had become final, he applied the enhancement, yielding a statutory 20 years to life.³ Without the enhancement Clay would face a shorter mandatory minimum prison term. On October 18, 2006, Clay was sentenced to the minimum 20 years.

3 Mr. Robinson had a career offender enhancement that triggered a 20 year mandatory minimum

On November 4, 2014, California voters passed a ballot initiative significantly reforming the State's criminal justice laws and procedures ("Proposition 47"), reclassifying, among others, California Health and Safety Code § 11350, the offense for which Clay was convicted. The reclassification erases the felony conviction. *People v. Tidwell*, 246 Cal. App. 4th at 219-20. The State Court action applies for all purposes⁴.

Mr. Clay successfully petitioned the Superior Court of the County of Los Angeles to reclassify his felony drug conviction as a misdemeanor⁵. Mr. Clay then moved pursuant to § 2255 arguing that the enhanced sentence violates due process and the Eighth Amendment by relying on a prior drug felony that

⁴ On November 8, 2016 California voters passed Prop 64, reclassifying California's Health and Safety Code 11359, the offense for which Mr. Robinson was convicted. The reclassification erases Mr. Robinson conviction for all purposes

⁵ Mr. Robinson successfully petitioned the Superior Court of the County of San Diego, to reclassify his prior felony drug conviction as a misdemeanor

no longer exists. The Ninth Circuit agreed⁶⁰. Mr. Robinson pointed out the debatability when he applied for a COA, and that is the question two judges of the Eleventh Circuit decided to foreclose, despite Mr. Robinson's showing that another "Circuit" decided differently." (Quoting *Lozada v Deeds* 498 U.S. 430, 432 (1991))

The precedent of this Court is clear that a COA involves only a threshold analysis and preserves full appellate review of potentially meritorious claims. This threshold inquiry is satisfied so long as reasonable jurists could either disagree with the district court's decision or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336. Under this standard, a claim can be debatable regardless of whether jurists would grant or deny the petition for habeas corpus once the case has received full consideration. *Id.* at 338. The key is "the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.* at 342; see also *id.* at 348 (Scalia, J., concurring) (recognizing that a COA is required when the district court's denial of relief is not "undebatable")

⁶⁰ Mr. Robinson moved Pursuant to § 2255, making the same argument as Clay. The Eleventh Circuit disagreed and denied COA, stating reasonable jurists would not debate the district court's denial of Robinson's § 2255 motions. (Appendix C.) Also, plaintiff has failed to make a substantial showing of a denial of a Constitutional right (Appendix A).

This Court clarified more recently that a case need not show "extraordinary circumstances" in the habeas context to be granted a COA. *Buck*, 137 S. Ct. at 774 (No. 15-8049).

In both its order denying Mr. Robinson motion for a COA and its order denying the motion for reconsideration, the Eleventh Circuit provided no explanation, opting instead to provide a single paragraph stating the denials in a conclusory manner, without ever addressing the constitutional claim. As in *Buck*, the Eleventh Circuit in Mr. Robinson case phrased its determination that the COA was denied in accordance with the standard - that Mr. Robinson "failed to make a substantial showing of the denial of a constitutional right." *Buck*, 137 S. Ct. at 773 (No. 15-8049); *Rasheed Robinson Case No. 8:19-cv-01466-TGW (Appendix A)*. However, as in *Buck*, it reached its conclusion after effectively, and improperly, deciding the case as if it were a statutory rather than a constitutional claim on the merits. It is evident based on the facts of Mr. Robinson's case and the Ninth Circuit's decision in *Clay* that reasonable jurists could in fact disagree on his claim.

To remove any doubt as to debatability, in briefing before this Court the government conceded that if a state law retroactively reduced a prior conviction that served as a predicate for a subsequent federal sentence as it does here, a defendant could successfully challenge the federal sentence enhancement:

Of course, if a State subsequently lowered

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the maximum penalty and made that reduction available to defendants previously sentenced, ... 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 ACCA purposes.

Brief for the Government at 18-19 n.5, McNeill, 563 U.S. 816 (No. 10-5258), 2006 WL 1294503, at *18 n.5.3.

For decades, due process has forbidden sentences based on "assumptions concerning a defendant's criminal record which were materially untrue." *Townsend*, 334 U.S. at 741. And the United States Supreme Court confirmed that the finality of a federal conviction is not a sufficient reason to throw aside the due process requirement that a sentence enhanced by a prior conviction must be modified if the predicate convictions are no longer valid. See *Tucker*, 404 U.S. at 444 (resentencing was required after predicate convictions were invalidated "several years" after the defendant's original sentencing).

The issue is debatable as to whether Mr. Robinson's sentence violates due process in the Eighth Amendment, as Mr. Robinson's sentence is greater than what is intended under § 841. See *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

(A defendant has a due process right to be deprived of his liberty "only to the extent determined by the sentence in exercise of his statutory discretion" And this right "preserves against arbitrary deprivation by the State"); *Ingraham v. Wright*, 430 U.S. 651, 658 (1977) (cruel and unusual punishment includes "Arbitrary infliction" of punishment). Additionally, by ignoring the wishes of the people of California in passing Proposition 64, Mr. Robinson's federal sentence violates his Tenth Amendment right to be free from "government action taken in excess of the authority federalism defines." *Bond v. United States*, 564 U.S. 211, 220 (2011) (recognizing an individual right to the protections of federalism).

To further demonstrate debatability, The Ninth Circuit in granting Mr. Clay relief on the same issue raised by Mr. Robinson, relied on *Johnson v. US*, 544 U.S. 295 (2005). Johnson pled guilty to federal distribution of cocaine base. Finding prior Georgia felony convictions for cocaine distribution, the federal court enhanced sentence under U.S.S.G. 4B1.1. On Appeal, Johnson attacked the enhancement on the ground that one of the required priors had been invalidated, *id.* at 298-299. The Circuit disagreed, noting he had not objected to the prior conviction in district court and the career-offender findings were not clear error, *id.* at 299.

The U.S. Court of Appeals stated, however, that "should Johnson obtain at some future date the vacation of the state

court conviction because obtained in violation of his constitutional rights, he could petition... under " 2255 for resentencing without consideration of that prior, Johnson, 544 U.S. at 299. In 1998, Johnson filed a state habeas petition, the state court vacated the prior, and Johnson filed federal habeas to vacate his federal enhancement. *Id.* at 300-301. Ultimately, the Supreme Court determined Johnson's 2255 was untimely, But Johnson continued:

The Government shares Johnson's preliminary Assumption that if he filed his section 2255 motion in time, he is entitled to federal resentencing now that the State has vacated one of the judgments supporting his enhanced sentence.

Neither the enhancement provision of the Sentencing Guidelines that was applied here, nor the mandatory enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C. section 924(e), has been read to mean that the validity of a prior conviction supporting an enhanced federal sentence is beyond challenge.

*** 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. *Custis*..., 511 U.S. 485... (1994); *Daniels*..., 532 U.S. 374... (2001)

544 U.S. at 303. Prior decisions had preserved the right to habeas

relief from a federal enhancement if a state had vacated a predicate prior and defendant then timely filed a federal habeas motion:

*** A defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated. Such was the premise in *Custis*, ..., even though we held that the ACCA generally created no opportunity to attack a prior state conviction collaterally at a federal sentencing proceeding, 511 U.S. at 490. ***

We recognized only one exception to this rule that collateral attacks were off-limits, and that was for challenges to state convictions allegedly obtained in violation of the right to appointed counsel, an exception we thought necessary to avoid undermining *Gideon*... *Custis*... 511 U.S. at 494-495, ...

As to challenges falling outside of that exception, we pointed out that a defendant who successfully attacked his state conviction in state court or on federal habeas review could then "Apply for reopening of any federal sentence enhanced by the state sentences (*sic*). " *Custis*, 511 U.S. at 497, ...

Again, too, we acknowledged that a prisoner could

proceed under section 2255 after successful review of the prior state conviction....

Id. At 303-304. Johnson did not state that defendants gain this right to relief from an enhancement only where a predicate prior was vacated as unconstitutional. Johnson stated, without qualification, that "A defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated." Id at 303

Because Mr. Robinson prior drug felony was vacated, it is unquestionably debatable whether Mr. Robinson had right to relief per Johnson. Furthermore, this Court precedent since Johnson does not undermine this analysis. In *McNeill v. US*, 563 U.S. 816 (2011), McNeill pled guilty in 2008 to unlawful possession of a firearm by a previously convicted felon in violation of 18 U.S.C. § 922(g)(1) and possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1). The Court held that, as a matter of statutory construction, "a federal sentencing court must determine whether 'an offense under State law' is a 'serious drug offense' by consulting the 'maximum term of imprisonment' applicable to a defendant's previous drug offense at time of defendant's state conviction for that offense." *McNeill*, 563 U.S. at 825 (citing 18 U.S.C. section 924(e)(2)(A)(ii)). But the Supreme Court went out of its way to conclude McNeill with the caution that "as the Government notes, this case not concern 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", McNeill, 563 U.S. at 825 n.1, precisely Mr. Robinson's situation here.

McNeill ended with The disclaimer, "We do not Address whether And under what circumstances A federal court could consider The effect of That state Action."

As to whether Robinson's prior sentence was vacated for the purposes of analysis above, the Clay court's reasoning is instructive. In Clay the Judge reasoned: "The government seems to reason that because Clay, (Read Robinson), had a prior drug conviction before Prop 47, (Read Prop 64), proceeding and still had a prior drug conviction afterwards, his "conviction" viewed generically was only "downgraded", not vacated. In turn, the government contends that as a matter of law, someone in Clay's situation is entitled to federal habeas relief from his federal enhancement based on that prior only if the prior conviction no longer exists in any degree or form. The Court rejects the government's argument on both scores.

9 In Clay's Prop 47 proceeding, a state superior court judge did more than just retroactively eliminate Clay's felony conviction, which would already be enough to support a determination that that prior felony had been "vacated." The state superior court judge did more than just retroactively eliminate Clay's felony conviction.

judge even went back and struck the charging document that had purported to charge Clay with that 1999 simple-possession felony. The federal enhancement provision at issue here predicated the enhancement specifically on Clay having a prior felony drug conviction, not just any type of prior drug conviction. Due to the Prop 47 judge's order, it is as if Clay had never even been charged by the State of California with a felony drug offense, let alone been convicted of such an offense. It is fair to say, then, that the type of conviction needed for the federal sentencing enhancement, a felony was "vacated."

See Clay, 2018 WL 6333671 (C.D. Cal 2018) (2:17-cv-05720-VBF Document 23 pg 5-6). Like Mr. Clay, the type of conviction needed for Mr. Robinson's federal sentencing enhancement, a felony was vacated.¹⁷

Clearly the Eleventh Circuit is paying lip service to the principal guiding issuance of a COA as Mr. Robinson has met the threshold determination "that a court resolve the issue in a different manner; or that the questions are adequate to deserve encouragement to proceed further," (Quoting *Barfoot v. Estelle*, 463 U.S. 880 Fn4 (1983)).

¹⁷ Mr. Robinson was enhanced Pursuant to, USSG § 4B1.1(a) which provided in relevant part: ... (3) The defendant has at least two prior felony convictions of either a crime of violence or a control substance offense.

3. Reasonable jurist could unquestionably debate whether Mr. Robinson's current sentence violated his Tenth Amendment right to be free from Government action taken in excess of the authority federalism define.

Proposition 64 was enacted and became effective immediately on Nov 8, 2016. See Control, Regulate and Tax Adult use of Marijuana Act 2016, Cal. Legis. SERV. Prop 64 (Proposition 64). Proposition 64 authorizes individuals with qualifying marijuana convictions to petition a Court to have their conviction reclassified. Proposition 64 (like Prop. 47) reflects the position that California voters do not believe possession of a controlled substance under 11359 should have ever been treated as conduct worthy of a felony. "United States v. Norwood, No. CR-13-0388 RGR-2, 2016 WL 269571, at *5 (C.D. Cal. 2016)".⁸ California voters intended to "up the ante to this position" by ensuring convicted felons could retroactively re-designate their felony convictions as misdemeanors, even after the sentence had been served. Id. In other words, the State of California believes that it was mistaken that Mr. Robinson's 1998 conviction be considered a felony and corrected that mistake by providing that the offense shall never be considered a felony,

⁸ Though the cited case reference Prop 47. Prop 47 functions similarly to Propositions 64.

in the past and the future, "for all purposes."

Federal courts must defer to state definitions for interpreting prior drug offenses under 21 U.S.C. § 841. Failure to defer to the state's power to define felonies within their jurisdiction is not harmless error; it violates the principles of federalism. *United States v. Lopez*, 514 U.S. 549, 561 (1995) (Under the federal system, states possess the primary authority to define and enforce criminal law). The right to be free from "governmental action taken in excess of the authority that federalism defines" does not belong only to the states, but also to individuals. *United States v. Bond*, 564 U.S. 211, 220-22 (2011). Disregard for Mr. Robinson's successful redesignation of his prior felony conviction to a misdemeanor exceeds the power of the federal government to enhance his sentence and impose a mandatory minimum based solely on a state conviction. *Id.* at 222 (federalism "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions" and by protecting "the liberty of the individual from arbitrary power.") The federal courts relied on California's definition of a "felony drug offense" to enhance Mr. Robinson's sentence under 21 U.S.C. § 841. Had California not defined Mr. Robinson's conviction as a felony in the past, the federal government would have been unable to seek this enhancement for sentence. *Id.* Mr. Robinson's felony has been "erased" "for all purposes," by the State of California. There is little doubt that reasonable jurist can

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debate whether Mr. Robinson current sentence violated his Tenth Amendment rights to be free from Government action taken in excess of the authority federalism define.

In short, the Constitution prohibits a sentence longer than one authorized by law. *** Where, as here, a sentence is premised on "assumptions concerning criminal record which were materially untrue," that sentence is "inconsistent with due process of law." *Townsend v. Burke*, 334 U.S. 736, 741 (1948). ***

Accordingly, this Court should grant certiorari because it is clear that the Eleventh Circuit imposed an improper and unduly burdensome COA standard when it denied Mr. Robinson a COA over an issue that clearly met the threshold determination - a showing of a debatable issue among reasonable jurists.

Furthermore, in light of the "Judicially noted facts" (See the Judicially Noticed Brief "Tomlin v. Patterson, Case No. 19-7127 (Dec 27, 2019) Section I A"). There is a split in the Eleventh Circuit's COA standard; Arbitrariness in the COA review process across circuits; Arbitrariness within the Eleventh circuit; and an ongoing history leading to a current breakdown. Thus, the consequences viewed from either the individual perspective or at a systematic level are substantial.

Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari.

Done and Declared under penalty of perjury 28 U.S.C. § 1746
Dated this 28th day of May, 2020.

Respectfully submitted,
Rasheed Robinson