No. 20-5417

IN THE SUPREME COURT OF THE UNITED STATES

RASHEED LAMAR ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying a certificate of appealability on petitioner's postconviction claim that he is entitled to vacatur of his federal sentence on the ground that a prior state felony drug conviction was reclassified as a state-law misdemeanor after his federal sentencing.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Fla.):

Robinson v. United States, Nos. 8:19-cv-1466, 8:19-cv-1467 (Aug. 16, 2019)

Robinson v. United States, Nos. 8:19-cv-1466, 8:19-cv-1467 (Sept. 3, 2019)

United States Court of Appeals (11th Cir.):

Robinson v. United States, Nos. 19-13671, 19-13673 (Jan. 15, 2020)

Robinson v. United States, Nos. 19-13671, 19-13673 (Mar. 4, 2020)

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OPINIONS BELOW

The order of the court of appeals denying petitioner a certificate of appealability (Pet. App. C1-C4[1]) is not published in the Federal Reporter but is available at 2020 WL 1492164. The order of the court of appeals denying petitioner's motion for reconsideration (Pet. App. C5-C6) is unreported. The orders of the district court denying petitioner's motions to vacate his sentence under 28 U.S.C. 2255 (Pet. App. A1-A5) are not published in the Federal Supplement but are available at 2019 WL 3834523 and

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[1] For ease of reference, this brief treats the pages in Appendix C as if they were consecutively paginated.

2019 WL 3834669, respectively. The orders of the district court denying petitioner's motions under Federal Rules of Civil Procedure 60(b)(6) and 59(e) (Pet. App. B1-B2) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2020. A motion for reconsideration was denied on March 4, 2020 (Pet. App. C5-C6). The petition for a writ of certiorari was filed on June 4, 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 Middle District of Florida, petitioner was convicted of one count of conspiring to possess with intent to distribute 1000 or more kilograms of marijuana, in violation of 21 U.S.C. 846 and 841(a)(1) (2006).[2] Am. Judgment 1. He was sentenced to 262 months of imprisonment, to be followed by ten years of supervised release. Id. at 2-3. In a separately docketed case, petitioner pleaded guilty to unlawful reentry after removal, in violation of 8 U.S.C. 1326. Pet. App. A2; see Docket No. 08-cr-539 (M.D. Fla.) (Dec. 30, 2008). On that offense, he was sentenced to serve a concurrent term of 240 months of imprisonment, to be followed by three years of supervised release. Pet. App. A2. His direct appeal of his drug conviction was dismissed for failure to pay the filing fee;

[2] All citations to 21 U.S.C 841 and 802(44) in the context of petitioner's case are to the 2006 version of the statute, which was in force at the time of petitioner's offense.

he did not file a direct appeal of his unlawful-reentry conviction. Ibid. In both cases, the district court denied motions under 28 U.S.C. 2255 to vacate petitioner's sentences and denied certificates of appealability (COA). Pet. App. A1-A5. The court of appeals consolidated the cases and denied a COA. Id. at C1-C4.

1. For a period spanning several years, petitioner conspired with others to possess with the intent to distribute 1000 or more kilograms of marijuana. Plea Agreement 17. Petitioner and his co-conspirators stored large amounts of marijuana in various locations in Florida and then transported money and marijuana from Florida to Arizona and elsewhere. Presentence Investigation Report (PSR) ¶¶ 12, 14, 17-22. After he was caught and arrested, petitioner admitted that between 2001 and 2008 he received and distributed between 3000 and 10,000 kilograms of marijuana. PSR ¶ 27.

A grand jury in the Middle District of Florida charged petitioner with one count of conspiracy to possess with intent to distribute 1000 kilograms or more of marijuana, in violation of 21 U.S.C. 846 and 841(a)(1). Superseding Indictment 1-2. A separate grand jury in the District of Arizona charged petitioner with unlawful reentry after removal, in violation of 8 U.S.C. 1326. Indictment 1 (No. 08-cr-1241). The unlawful-reentry case was subsequently transferred to the Middle District of Florida. Petitioner pleaded guilty to both charges. Pet. App. A1-A2.

2. At the time of petitioner's sentencing, a defendant who committed a violation of Section 841 involving a certain quantity of drugs "after a prior conviction for a felony drug offense has become final" was subject to a statutory minimum term of 20 years of imprisonment. 21 U.S.C. 841(b)(1)(A). A defendant who committed a violation of Section 841 "after two or more prior convictions for a felony drug offense have become final" was subject to a statutory life sentence. Ibid. A "felony drug offense" is defined as "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." 21 U.S.C. 802(44).

The government filed an information under 21 U.S.C. 851 establishing that petitioner had two prior felony drug convictions at the time he committed his federal drug offense: a 1997 conviction under Virginia law for possession with intent to distribute more than five pounds of marijuana, and a 1998 conviction under California law for felony possession of marijuana for sale. PSR ¶¶ 50, 53; D. Ct. Doc. 184 (Oct. 31, 2008). Either conviction alone would qualify petitioner for a statutory minimum sentence of 20 years of imprisonment. 21 U.S.C. 841(b)(1)(A); PSR ¶ 103. Pursuant to the plea agreement, the government did not rely on the two prior convictions together to seek a statutory life sentence. Plea Agreement 5; see 21 U.S.C. 841(b)(1)(A).

In calculating petitioner's advisory sentencing range under the Sentencing Guidelines, the Probation Office noted that petitioner's two prior felony convictions made him subject to the career-offender provision of the Guidelines, which (similar to the statute) applies to a defendant who has two qualifying prior felony drug convictions. PSR ¶ 45; see Sentencing Guidelines § 4B1.1. Under the career-offender provision, petitioner's advisory sentencing range was 262 to 327 months' imprisonment. PSR ¶ 104. The district court imposed a 262-month sentence -- the low end of the guidelines range. Am. Judgment 2. The court also imposed a concurrent term of 240 months of imprisonment on petitioner's unlawful-reentry offense. Pet. App. A2.

2. In 2016, California voters enacted Proposition 64. 2016 Cal. Legis. Serv. Prop. 64. Among other changes to state law, Proposition 64 authorizes offenders who have completed their sentences for certain felony marijuana crimes to have their convictions reclassified as misdemeanors. Cal. Health & Safety Code § 11361.8(h). Such an adjustment pursuant to Proposition 64, however, is not "intended to diminish or abrogate the finality of judgments in any case not falling within the purview of" that statute. Id. § 11361.8(k).

After petitioner's felony conviction for possession of marijuana for sale was reclassified as a misdemeanor under Proposition 64, he filed a motion for relief under 28 U.S.C. 2255 in federal district court, arguing in relevant part that he was

sentenced in violation of "due process" and that the state reclassification entitled him to resentencing for his federal crimes. Pet. App. A2.

The district court denied petitioner's motion and declined to issue a COA. Pet. App. A1-A4.[3] The court observed that every court to have considered petitioner's argument in the context of Proposition 64 had rejected it, id. at A3 (collecting cases), and explained that such a reclassification has no effect on the Sentencing Guidelines absent a showing of actual innocence or legal error in the proceedings, which petitioner could not make, see ibid. The court also observed that numerous courts had rejected a similar argument in the context of California's Proposition 47, which had similarly reclassified certain felony drug convictions as misdemeanors. Id. at A3-A4. The court further determined that a COA was unwarranted because petitioner "failed to make a substantial showing of the denial of a constitutional right." Id. at A4.

Petitioner subsequently filed a joint motion for relief from the judgment or to alter or amend the judgment, arguing in relevant part that the district court misconstrued his claim as a statutory claim rather than a constitutional claim sounding in due process and the Eighth Amendment. D. Ct. Doc. 10, at 10-15 (Aug. 29,

[3] The order included in the appendix to the petition was filed in petitioner's unlawful-reentry case. The district court filed an identical order in his drug case. D. Ct. Doc. 8, No. 19-cv-1467 (Aug. 15, 2019).

2019). The court denied the motion. Pet. App. B1-B2.[4] The court determined that petitioner was neither deprived of due process under the Fifth Amendment nor subjected to cruel and unusual punishment under the Eighth Amendment because his marijuana conviction "was not vacated or invalidated by the California court, it was reclassified." Id. at B2.

3. The court of appeals consolidated petitioner's appeals in his drug and illegal-entry cases and denied a COA. Pet. App. C1-C4. The court explained that "reasonable jurists would not debate" the district court's determination that petitioner failed to show a denial of a constitutional right. Id. at C3. The court of appeals observed that petitioner's California conviction was "final" at the time of his federal sentencing, and that he was therefore subject to the 20-year minimum sentence required by 21 U.S.C. 841(b)(1)(A). Pet. App. C3. The court added that 21 U.S.C. 851(e) establishes a five-year limitations period for a defendant to challenge prior convictions, and petitioner's California conviction fell outside that period. Ibid.

ARGUMENT

Petitioner contends (Pet. 11-28) that he is no longer subject to a mandatory 20-year minimum sentence under 21 U.S.C. 841(b)(1)(A), or to sentencing as a career offender under

[4] The order included in the appendix to the petition was filed in petitioner's unlawful-reentry case, but the district court filed an identical order in his drug case. D. Ct. Doc. 11, No. 8:19-cv-1467 (Sept. 3, 2019).

Sentencing Guidelines § 4B1.1, because a state court reclassified one of his prior felony drug convictions as a misdemeanor after his federal sentence became final. The lower courts correctly denied a COA on petitioner's claim, and no conflict exists among the courts of appeals on the question presented. This Court has recently and repeatedly declined to review similar claims, see Cebreros v. United States, 139 S. Ct. 791 (2019) (No. 18-261); Cooper v. United States, 139 S. Ct. 377 (2018) (No. 18-5222); Duncan v. United States, 138 S. Ct. 2652 (2018) (No. 17-7796); Bell v. United States, 138 S. Ct. 1282 (2018) (No. 17-678), and should follow the same course here. Indeed, petitioner's case is an unsuitable vehicle for review of the question presented because petitioner has an additional prior state felony conviction that would independently render him subject to the 20-year minimum sentence under 21 U.S.C. 841(b)(1)(A), even if the California conviction did not.

1. A federal prisoner seeking to appeal the denial of a Section 2255 motion must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, the prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a showing "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Petitioner initially contends (Pet. 11-13, 16-18) that the court of appeals misapplied the standard for granting a COA. That

is incorrect. The district court explicitly considered whether petitioner had "ma[d]e a substantial showing of the denial of a constitutional right," and concluded that he "failed" to do so. Pet. App. A4. The court of appeals likewise cited the appropriate standard and determined that petitioner had not met it. Id. at 2C-3C. Petitioner's disagreement with the courts' determinations that he failed to meet the COA standard is insufficient to show that courts applied an incorrect standard.

2. Petitioner's claim that the reclassification of his prior state-law felony conviction to a misdemeanor entitles him to relief from his federal sentence lacks merit. Other courts of appeals have reached similar results in both published and unpublished decisions. See, e.g., United States v. Santillan, 944 F.3d 731 (8th Cir. 2019), cert. denied, 140 S. Ct. 2691 (2020) (rejecting similar claim); United States v. Diaz, 838 F.3d 968 (9th Cir. 2016) (same), cert. denied, 137 S. Ct. 840 (2017); see also United States v. London, 747 Fed. Appx. 80 (3d Cir. 2018) (same); Duncan v. United States, 704 Fed. Appx. 914 (11th Cir. 2017) (per curiam) (same), cert. denied, 138 S. Ct. 2652 (2018); United States v. Bell, 689 Fed. Appx. 598 (10th Cir. 2017) (same), cert. denied, 138 S. Ct. 1282 (2018). Those decisions are correct.

a. A district court is required to impose a sentence of at least 20 years of imprisonment under 21 U.S.C. 841(b)(1)(A) if the defendant committed his offense "after a prior conviction for a felony drug offense has become final." Ibid. As "a matter of

plain statutory meaning," those provisions apply to petitioner. United States v. Dyke, 718 F.3d 1282, 1292 (10th Cir.) (Gorsuch, J.), cert. denied, 571 U.S. 939 (2013). Petitioner committed his federal drug offense "after a prior conviction for a felony drug offense" -- his California conviction for possession of marijuana for sale (or, alternatively, his Virginia conviction for possession with intent to distribute more than five pounds of marijuana) -- had "become final." 21 U.S.C. 841(b)(1)(A); see PSR ¶¶ 50, 53. Petitioner thus does not dispute that, at least at the time of his sentencing, he was subject to a 20-year statutory-minimum sentence under 21 U.S.C. 841(b)(1)(A) and to sentencing as a career offender under the similar provision of Sentencing Guidelines § 4B1.1.

Petitioner contends (Pet. 13-16), however, that California's subsequent reclassification of his felony drug offense as a state-law misdemeanor now entitles him to relief from his federal sentence. But whatever effect Proposition 64 had as a matter of state law, it cannot change the "historical fact," Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 115 (1983), that petitioner committed his federal drug crime "after two or more prior convictions for a felony drug offense have become final" and is thus subject to at least a 20-year mandatory sentence, 21 U.S.C. 841(b)(1)(A). Although a State may adjust its own criminal penalties prospectively or retroactively, "it [can]not rewrite history for the purposes of the administration of the federal

criminal law." Diaz, 838 F.3d at 972 (brackets in original; citation omitted); accord Dyke, 718 F.3d at 1293 ("The question posed by § 841(b)(1)(A) is whether the defendant was previously convicted, not the particulars of how state law later might have, as a matter of grace, permitted that conviction to be excused, satisfied, or otherwise set aside.").

This Court has explained that a "felony drug offense" is an offense "punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country," 21 U.S.C. 802(44) (2006), "regardless of the punishing jurisdiction's classification of the offense," Burgess v. United States, 553 U.S. 124, 129 (2008). It follows that a defendant whose prior state convictions meet the federal definition cannot rely on after-the-fact reclassifications, long after his state sentences have been served, as the basis for challenging a federal term of imprisonment that was indisputably lawful when it was imposed.

This Court's decision in McNeill v. United States, 563 U.S. 816 (2011), is instructive. There, the Court considered the meaning of "serious drug offense" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(A)(ii), which is defined in relevant part as a drug "offense under State law * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." Ibid. McNeill was convicted of North Carolina drug offenses punishable by ten-year sentences at the time of his convictions for those offenses, but the State subsequently reduced

the punishment. McNeill, 563 U.S. at 818. At his federal sentencing, McNeill argued that the court should look to current state law in determining whether "a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). This Court rejected his argument, holding that the "plain text of [the] ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense." McNeill, 563 U.S. at 820. The Court explained that the statute "is concerned with convictions that have already occurred" and that the "only way to answer this backward-looking question is to consult the law that applied at the time of that conviction." Ibid.

As petitioner notes (Pet. 23), McNeill did not address "a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." 563 U.S. at 825 n.*. And a defendant whose state offense was reclassified while he was still serving his state sentence might be differently situated from petitioner. See ibid.; U.S. Br. at 18 n.5, McNeill, supra (No. 10-5258). But the approach in McNeill seriously undermines petitioner's position with respect to his own circumstances. As in McNeill, the subsequent modification of state law here does not alter the fact that petitioner's federal sentence was imposed "after a prior conviction for a felony drug offense

ha[d] become final." 21 U.S.C. 841(b)(1)(A). Because petitioner was convicted "of the type of crime specified by the statute," he is subject to the prescribed punishment. Dickerson, 460 U.S. at 110; accord Diaz, 838 F.3d at 974. A similar analysis applies to his challenge to his advisory guidelines range.[5]

b. Petitioner observes (Pet. 20-22) that this Court has assumed that a federal prisoner may seek to vacate his sentence under 28 U.S.C. 2255 if he has successfully challenged "the validity of a prior conviction supporting an enhanced federal sentence." Johnson v. United States, 544 U.S. 295, 303 (2005). But a successful challenge to the "validity" of a prior conviction requires establishing that the conviction has been "vacated." Ibid.; see ibid. (assuming that "a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated"); Bell, 689 Fed. Appx. at 599 ("Johnson concerns the right to reopen a federal sentence where a defendant successfully attacks a state conviction in state court, i.e., the conviction is vacated."). That understanding follows from the statutory (or Guidelines) text. When a defendant

[5] Petitioner's suggestion (Pet. 17-18) that the government conceded the question presented here in McNeill is misplaced. The government's brief in McNeill suggested that a defendant could "plausibly look to" a retroactively reduced state sentence in arguing for relief from an ACCA sentence but noted that "the Court need not address that issue." U.S. Br. at 18-19 n.5, McNeill, supra (No. 10-5258); see 4/25/11 Tr. at 21-24, McNeill, supra (No. 10-5258). But petitioner here served his state sentence before his conviction was reclassified, and thus did not retroactively lower his actual state sentence.

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

Petitioner's California felony conviction here was not vacated; it was reclassified as a state-law misdemeanor. Pet. App A2; see Cal. Health & Safety Code § 11361.8(e)-(f) (West Supp. 2018). Even as a matter of state law, that modification does not "diminish or abrogate the finality of judgments in any case" that falls outside "the purview of" Proposition 64. Cal. Health & Safety Code § 11361.8(k) (West Supp. 2018). Thus, "reclassification of a felony to a misdemeanor does not necessarily mean the crime will be treated as a misdemeanor retroactively for the purpose of other statutory schemes" under state law, let alone under federal law (which the State lacks the power to modify). Diaz, 838 F.3d at 974-975 (citing People v. Park, 299 P.3d 1263 (Cal. 2013)); see Bell, 689 Fed. Appx. at 599 (denying relief under similar circumstances because the defendant's California conviction was not "vacated").

At best, the reclassification of petitioner's felony conviction as a misdemeanor might be considered analogous to a

state's expungement of his felony conviction. Cf. Diaz, 838 F.3d at 974 (referring to expungement as "a more drastic change" than reclassification). But as this Court has explained, "expunction does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty." Dickerson, 460 U.S. at 115. Moreover, Congress "clearly knows * * * how to ensure that expunged convictions are disregarded in later judicial proceedings." Dyke, 718 F.3d at 1292. And although Congress has required that result in some contexts, see, e.g., 18 U.S.C. 921(a)(20)(B) ("Any conviction which has been expunged, or set aside * * * shall not be considered a conviction for purposes of this chapter."), it has "made no similar effort" in Section 841, Dyke, 718 F.3d at 1292. Thus, the "courts of appeals that have considered this § 841 question * * * have counted prior felony drug convictions even where those convictions have been set aside, expunged, or otherwise removed from a defendant's record for" reasons "unrelated to innocence or an error of law." United States v. Law, 528 F.3d 888, 911 (D.C. Cir. 2008) (per curiam) (collecting cases), cert. denied, 555 U.S. 1147 (2009).

3. Petitioner errs in contending (Pet. 13-24) that reasonable jurists could debate whether his sentence violated due process. Petitioner identifies (Pet. 16) a single district court decision -- Clay v. United States, No. LA CR 05-948-VBF, 2018 WL 6333671 (C.D. Cal. May 14, 2018) -- to argue that a "Circuit"

conflict exists on the question this Court left open in McNeill. But a district court decision cannot create a conflict warranting this Court's review. See Sup. Ct. R. 10. And petitioner disregards the consistent (although unpublished) courts of appeals decisions rejecting similar constitutional claims, particularly where, as here, a conviction has been reclassified rather than vacated. See, e.g., United States v. Stiger, 824 Fed. Appx. 581 (10th Cir. 2020) (rejecting claims, identical to petitioner's here, that federal sentence imposed under Section 841 predicated on reclassified state conviction violated either due process or the Eighth Amendment); United States v. McGee, 760 Fed. Appx. 610, 613 (10th Cir.) (concluding that only enhancements based on convictions "that have been vacated or successfully attacked" raise due process concerns and not convictions, like petitioner's, "that have merely been excused as a matter of legislative grace"), cert. denied, 140 S. Ct. 218 (2019); Bell, 689 Fed. Appx. at 599 (rejecting claim that mandatory life sentence following state felony reclassification violated due process and equal protection). Petitioner offers no sound reason for this Court to consider a question that has resulted in uniform treatment among those courts of appeals to have considered it.

Petitioner also contends (Pet. 25-27) that his sentence violates the Tenth Amendment because federal courts must defer to state definitions for drug offenses under 21 U.S.C. 841. Even assuming this Court would consider this claim despite petitioner's

failure to raise it in the courts below, see, e.g., Granite Rock Co. v. International Bhd. of Teamsters, 561 U.S. 287, 306 (2010), the argument is unsound. The determination of whether petitioner has prior qualifying convictions for purposes of 21 U.S.C. 841(b)(1)(A) and Sentencing Guidelines § 4B1.1 is a question of federal, not state, law. See, e.g., Diaz, 838 F.3d at 972; Dyke, 718 F.3d at 1293; Hirman v. United States, 613 F.3d 773, 777-778 (8th Cir. 2010).

The petition also makes a passing reference (Pet. 18) to an Eighth Amendment claim, but he failed to raise an Eighth Amendment claim in his initial 2255 motion before the district court. In any event, petitioner provides no basis for concluding that his sentence violates the Eighth Amendment.

4. Finally, petitioner's case would be a poor vehicle for review of the question presented for two additional reasons. First, the decision below is nonprecedential and addresses only the requirements for a COA. And second, petitioner was convicted of a second state-law drug felony -- in Virginia -- that he has not challenged, and that conviction continues to serve as a valid predicate for the 20-year mandatory term of imprisonment under 21 U.S.C. 841(b)(1)(A) regardless of whether his California conviction does. Pet. App. A1-A2; PSR ¶¶ 27, 53.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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