20-7006

IN THE

SUPREME COURT OF THE UNITED STATES

JACQUERE DORAN – PETITIONER

vs.

UNITED STATES OF AMERICA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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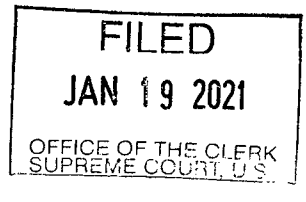
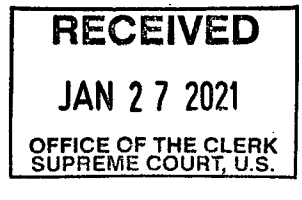


PRO-SE PETITIONER



QUESTION PRESENTED

Did the District Court err in treating Mr. Doran's prior California conviction for sale of marijuana as a felony conviction and using it to enhance his base offense level pursuant to Sentencing Guidelines § 2K2.1(a)(2)?

LIST OF PARTIES

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

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SENTENCING GUIDELINES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Mr. Doran respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United Stated court of appeals appears at Appendix A to the petition and is unpublished.

JURISDICTIONAL STATEMENT

The Honorable Stephen N. Limbaugh, Jr., United States District Judge for the Eastern District of Missouri, presided at the hearing.

The government invoked the jurisdiction of the District Court pursuant to 18 U.S.C. § 922 (g).

The District Court clerk entered judgment on the docket on October 3, 2019. Mr. Doran filed a timely notice of appeal on October 9, 2019. Mr. Doran invoked the jurisdiction of the Appellate Court pursuant to 28 U.S.C. § 1291.

The Appellate Court clerk entered judgment on the docket on November 2, 2020. Mr. Doran invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in relevant parts, that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . .nor shall any person be subject for the same offence to be twice put into jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

On March 23, 2018, police conducted a traffic stop and found Mr. Doran in possession of a handgun. Presentence Investigation Report ("PSR"), DCD 53, at pp. 4-5.[1] On May 2, 2018, the government filed a one-count indictment alleging that on April 8, 2018, Doran had unlawfully possessed a firearm while having been previously convicted of a felony. Indictment, DCD 2. On April 4, 2019, Mr. Doran entered a plea of guilty to the indictment. Guilty Plea Agreement, DCD 38 and 39.

At the time of the federal offense conduct, Doran had two prior California convictions for threatening crime with intent to terrorize in 2012, a violation of Cal. Penal Code § 422(a) (2011); and possession of marijuana for sale in 2015, a violation of Cal. Health & Safety Code § 11359 (2015). PSR, DCD 53, at pp. 12, 14. The PSR applied Sentencing Guidelines § 2K2.1(a)(2), which provides for an enhanced base offense level of 24 if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense. PSR, DCD 53, at p. 6; Sentencing Guidelines § 2K2.1(a)(2) 2018).

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[1]"DCD" denotes the District Court's Docket, which is followed by the docket reference number.

Reduced by three levels for acceptance of responsibility pursuant to Sentencing Guidelines § 3E1.1, the total offense level was 21. PSR at p. 6. This offense level yielded an advisory guidelines sentencing range of 77 to 96 months. PSR, DCD 53, at pp. 14, 20.

In 2016, California voters enacted Proposition 64, the Control, Regulate, and Tax Adult Use of Marijuana Act. *People v. Smit,* 234 Cal.Rptr.3d 554, 555 (Cal. Ct. App. 2018). Proposition 64 "legalized marijuana use and reduced penalties for a number of marijuana-related offenses from felonies to misdemeanors," including possession of marijuana for sale under Cal. Health & Safety Code § 11359. *Id.* The proposition also provided a procedure by which a defendant who had completed his sentence for a conviction under § 11359 could petition the court of conviction "to have the conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction in accordance with" § 11359, among other statutes, as amended by the proposition. Cal. Health & Safety Code § 11361.8(e). If a defendant satisfies the criteria of subsection (e), "the court shall redesignate the conviction as a misdemeanor or infraction or dismiss and seal the conviction as legally invalid." Cal. Health & Safety Code § 11361.8(f).

In February 2017, Doran, proceeding under the name Jacare J. Gorman,

filed a petition to redesignate his marijuana conviction pursuant to Cal. Health & Safety Code § 11361.8. *People v. Gorman,* No. 15F00530 (Sacramento Sup. Ct. March 24, 2017) (Appendix B). In a minute order, the court granted the petition, redesignated the conviction as a misdemeanor, imposed a sentence of time served, and terminated Doran's probation. *Id.*

In light of the redesignation of Doran's marijuana conviction as a misdemeanor, he objected to the PSR finding that it qualified as a prior felony conviction of a controlled substance offense under Sentencing Guidelines § 2K2.1(a)(2). Def. Obj. to PSR, DCD 46, 47. He further objected that his prior threat conviction did not qualify as a crime of violence under Sentencing Guidelines § 4B1.2(a). *Id.*

At the sentencing hearing, the District Court overruled Doran's objections and adopted the factual findings and guidelines calculations of the PSR. Sent. Tr., DCD 76, at pp. 5-7. The District Court sentenced Doran to the top of the guidelines range, 96 months of imprisonment, and three years of supervised release. *Id.* at p. 21.

The District Court clerk entered judgment on the docket on October 3, 2019. Judgment, DCD 60. Doran filed a timely notice of appeal on October 9, 2019. DCD 63.

On March 10, 2020, Doran, through counsel, filed an appellate brief with United States Court of Appeals for the Eighth Circuit. Case No. 19-3222.

The Eighth Circuit affirmed Doran's conviction and sentence on November 2, 2020. (Appendix A).

REASONS FOR GRANTING THE PETITION

1. THE DISTRICT COURT ERRED IN APPLYING AN ENHANCED BASE OFFENSE LEVEL FOR TWO PRIOR FELONY CONVICTIONS FOR A CRIME OF VIOLENCE OR A CONTROLLED SUBSTANCE OFFENSE WHEN ONE OF THE OFFENSES WAS A MISDEMEANOR.

At the time he committed the instant offense, and when he was sentenced for it, Doran had a misdemeanor conviction for sale of marijuana that was punishable by imprisonment of not more than six months or a fine, pursuant to Cal. Penal Code § 11359(b). The PSR found that Doran's prior conviction for sale of marijuana was a felony conviction. PSR, DCD 53, at pp. 6, 14. Over Doran's objection, the District Court adopted the finding of the PSR, even though the state of California had redesignated the offense as a misdemeanor in 2017, prior to the offense conduct and sentencing in this case. The District Court erred in treating this offense as a felony conviction.

The District Court relied on *Hirman v. United States,* 613 F.3d 773 (8th Cir. 2010). Hirman pleaded guilty to one count of manufacturing marijuana plants, a violation of 21 U.S.C. § 841(a)(1)(B). *Id.* at 775. The sentencing court found that Hirman was a career offender based on prior Minnesota convictions for third degree assault and making terrorist threats. *Id.* The Minnesota courts had stayed imposition of both sentences pending successful completion of

probation. *Id.* After his federal sentencing, Hirman sought and obtained early termination of his probation for both offenses, which had the effect of changing his felony convictions to misdemeanors under Minnesota law. *Id.* He then filed a motion to vacate, set aside, or correct his federal sentence, arguing that because his felony convictions were changed to misdemeanors, he no longer qualified as a career offender. *Id.*

The Eighth Circuit affirmed the sentencing court's denial of relief. It noted that Hirman's prior Minnesota convictions had not been vacated, but were merely deemed to be misdemeanors under Minnesota law. *Id.* at 776. The Eighth Circuit concluded, "[t]he fact remains that Hirman was convicted of crimes that were 'punishable by. . .imprisonment for a term exceeding one year,' U.S.S.G. § 4B1.2." *Id.* It noted that the focus of the federal definition of crime of violence is on the sentence that *may* be imposed, not on whether the state labels the crime a misdemeanor." *Id.* At Doran's sentencing hearing, the District Court found *Hirman* "pretty dispositive" and overruled his objection. Sent. Tr., DCD 76, at pp. 5-6.

After Doran's sentencing, the Eighth Circuit decided *United States v. Santillan,* 944 F.3d 731 (8th Cir. 2019); the case involves an issue related to the one in this appeal. Santillan pleaded guilty to conspiracy to distribute

methamphetamine, a violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A). *Id.* at 732. His sentence was enhanced pursuant to 21 U.S.C. § 851 on the basis of a California prior conviction for possession of marijuana for sale. *Id.* After he committed the federal offense and was arrested for it, but before being indicted, Santillan sought relief in a California court based on Proposition 64, which reclassified possession of marijuana for sale as a misdemeanor for all purposes. *Id.* The California court redesignated Santillan's offense as a misdemeanor prior to his federal sentencing. *Id.* The district court treated the redesignated offense as a felony conviction for purposes of the § 851 enhancement, and the Eighth Circuit affirmed. *Id.* at 732, 734.

In *Santillan*, the Eighth Circuit adopted the reasoning of the Ninth Circuit in *United States v. Diaz,* 838 F.3d 968 (9th Cir. 2016), which also involved a § 841 enhancement. "In *Diaz,* the Ninth Circuit held that Proposition 47, which similarly reclassified certain felony convictions as misdemeanors, did 'not change the historical fact that [the defendant] violated § 841 after two or more prior convictions for a felony drug offense [had] become final.'" *Id.* at 733 (quoting *Diaz,* 838 F.3d at 971). Because the inquiry under § 841 is "backward-looking" and requires only that the prior conviction be "final," 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 permitted relief from the defendant's state conviction." *Id.* at 733 (quoting *Diaz,* 838 F.3d at 973). The Eighth Circuit noted that it applies the same "historical fact" approach, and a prior conviction qualifies as a "felony drug offense" under § 841(b)(1)(A) if it was punishable as a felony at the time of conviction. *Id.* (citations omitted).

The District Court erred in relying on *Hirman,* and the Eighth Circuit should not have affirmed based on the holdings in *Santillan* and *Diaz.* First, this trio of cases is distinguishable. In each case, the defendant's prior conviction was not reclassified as a misdemeanor until after his federal offense conduct, and in two of the cases, until after the federal sentence was imposed. Additionally, each case involved a § 841 enhancement, not an enhancement under the Sentencing Guidelines. *Hirman* and *Santillan* are not dispositive authority as applied to the facts of Doran's case, and *Diaz* is not dispositive authority as applied to the facts of Doran's case, and *Diaz* is not persuasive.

A sentencing court should consider the status of the defendant's prior conviction as of the time of federal offense conduct or the federal sentencing proceeding when determining whether a prior state conviction is a misdemeanor or a felony. This approach is consistent with § 2K2.1(a)(2) and

other Guidelines, the structure of which demonstrate that the Sentencing Commission intended courts to consider the sentence actually imposed by state courts for state criminal conduct when calculating a defendant's criminal history score and to defer to state lawmakers' assessment of the seriousness of the state criminal conduct. Such an approach promotes judicial economy and efficiency, and it satisfies basic fairness concerns by allowing a defendant to know the sentencing consequences of a federal offense before he commits it.

A. *Hirman, Santillan,* and *Diaz* Are Factually Distinguishable and Involved Enhanced Sentences under Section 841, Not the Sentencing Guidelines.

Hirman, Santillan, and *Diaz* are distinguishable from Doran's case because of the timing of the redesignation of the prior state offense. In *Hirman* and *Diaz,* the state court redesignated the prior conviction as a misdemeanor *after* the federal offense conduct and *after* the federal sentencing. In *Santillan,* the state court reduced the offense to a misdemeanor after the federal offense conduct but *before* the federal sentencing. Thus, in two of the three cases, at the time the federal sentence was imposed, the defendant had a prior felony conviction that was only later redesignated as a misdemeanor. In all three cases, the defendant had a prior felony conviction when he committed the federal offense; Doran did not. When Doran's federal sentence was imposed,

his offense had *already* been redesignated as a misdemeanor. This factual distinction is crucial, as explained below.

Hirman, Diaz, and *Santillan* each involved a violation of 21 U.S.C. § 841(b)(1)(A). That statute provides for an enhancement if a person "commits" a violation of the statute after a prior conviction for a serious drug felony "has become final." The plain language of the statute – "commits," in the present tense – directs the sentencing court to look to the defendant's status at the time he commits the § 841 violation.

The applicable statutory text in Doran's case is Sentencing Guidelines § 2K2.1(a)(2), which provides for an enhanced base offense level "if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense." Like § 841(b)(1)(A), the plain language of the guideline directs the sentencing court to look to the defendant's status at the time he committed the federal offense. When Doran committed the instant offense, he did not have two prior felony convictions, as his California marijuana conviction had already been redesignated as a misdemeanor.

Other decisions of the Ninth Circuit concerning Sentencing Guidelines provisions – as opposed to *Diaz,* which involved § 841(b)(1)(A) – also look to

the status of the prior conviction as of the time the defendant committed the federal offense. "[W]hen calculating criminal history points, the sentencing court 'looks to a defendant's status at the time he commits the federal crime.'" *United States v. Norwood,* 733 Fed. App'x 387, 389 (9th Cir. 2018) (quoting *United States v. Yepez,* 704 F.3d 1087, 1090 (9th Cir. 2012) (en banc) (per curiam)).

Hirman, Santillan, and *Diaz* are distinguishable because of the timing of the redesignated of the state offense vis-a-vis the federal offense conduct and sentencing. However, the results in all three cases are also consistent with the plain language of § 841, which applies the enhancement if the defendant has prior felony convictions at the time he commits the federal offense. Sentencing Guidelines § 2K2.1(a)(2) contains the same language, and thus also applies if the defendant had two prior felony convictions when he committed the federal offense. Doran did not.

In affirming Doran's sentence, however, the Eighth Circuit found the *Santillan* case indistinguishable from Doran's case. As that court noted, "[a]nd, nothing about our prior cases suggests the precise timing of the post-conviction changes to state law drove our analysis. Rather, we described our analysis as involving a 'backward looking' question of 'federal, not state, law' that asks

whether 'a prior conviction. . .was punishable as a felony at the time of the conviction.'" *United States v. Doran*, Case No. 19-3222 (8th Cir. Nov. 2, 2020), at * 5 (quoting *Santillan*, 944 F.3d at 733).

The eighth Circuit's decision not only upends the history and purpose of § 2K2.1, but would also lead to unwarranted sentencing disparities and would promote judicial inefficiency and confusion.

B. The History of § 2K2.1 and Other Guidelines Provisions Shows that a Sentencing Court Should Determine the Status of a Prior State Offense as of the Time the Defendant Commits the Federal Offense or Is Sentenced Federally.

I. History of Amendments to § 2K2.1

Prior to 2011, § 2K2.1(a)(2) applied if the defendant "had at least two prior felony convictions of either a crime of violence or a controlled substance offense." Sentencing Guidelines § 2K2.1(a)(2) (2000). The Sentencing Commission amended the guideline "to resolve a circuit conflict regarding whether a crime committed after the commission of the instant offense and before sentencing for the instant offense is counted as a prior felony conviction for purposes of determining the defendant's base offense level." Sentencing Guidelines, App'x C, Amdt. 630 (Nov. 1, 2001). The amendment "adopt[ed] the minority view that an offense committed after the commission of any part

of the offense cannot be counted as a prior felony conviction" and clarified "that the instant offense must have been committed subsequent to sustaining the prior felony conviction. In so doing, this amendment adopt[ed] a rule that is consistent with the requirements concerning the use of prior convictions under §§ 4B1.1 . . . and 4B1.2."

The Eighth Circuit was among the circuits that had expressed the "minority" view, as stated by the Commission, which in the amendment cited *United States v. Oetken,* 241 F.3d 1057 (8th Cir. 2001). In *Oetken,* the Eighth Circuit construed the former version of § 2K2.1(a)(4)(A), which provided for an enhancement if the defendant "had one prior felony conviction." The panel found that the use of the past-tense "had" refers to convictions that a defendant possessed at some point prior to sentencing. "To satisfy the 'had' language, a sentencing judge must therefore look to some point in the past and determine whether the defendant had a 'prior' conviction at that time. We believe that the most obvious time to look to would be the time that the defendant committed the offense of conviction." *Id.* at 1059. "The fact that Mr. Oetken was convicted of a crime of violence after he committed the instant offense ought not to transform his possession of a firearm into a more serious offense retroactively," the Eighth Circuit reasoned. *Id.*

Doran's situation is similar. The fact that he once had a felony conviction that was redesignated as a misdemeanor before his federal offense conduct should not retroactively render his federal offense more serious. The amendment to § 2K2.1 and the reasoning of *Oetken* support that the sentencing court should have considered whether Doran's prior conviction was a felony or a misdemeanor as of the date of the federal offense conduct.

Noticeably, the Eighth Circuit failed to address this argument when it affirmed Doran's sentence.

ii. The suggested Approach is Consistent with Other Criminal History Guidelines and Thus Promotes Consistency and Avoids Unwarranted Sentence Disparity.

Construing § 2K2.1(a)(2) to apply to the status of the defendant's prior convictions at the time he commits the federal offense or is sentenced for it is also consistent with the career offender guideline, which like § 2K2.1(a)(2) provides for an enhancement on the basis of prior felony convictions. The commentary to § 4B1.1 implements a departure provision for state misdemeanors as follows:

> In a case in which one or both of defendant's "two prior felony convictions" is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, application of the career offender guideline may result

> in a guideline range that substantially overstates the seriousness of the defendant's criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted. . .

Sentencing Guidelines § 4B1.1, cmt n. 4 (emphasis added). This provision clearly expresses the Sentencing Commission's view that the failure of a federal sentencing court to defer to a state court's redesignation of an offense can result in an overly harsh sentence, as in Doran's case.

It would be anomalous for sentencing courts to reduce a sentencing range under the career offender Guideline based on an offense that was classified as a misdemeanor at the time of federal sentencing, but to enhance a sentence under § 2K2.1(a)(2) based on the very same prior conviction. Such a divergence would increase unwarranted sentence disparity, whereas giving effect to the status of a prior conviction as of the date of the federal offense or federal sentencing would represent consistent treatment of the same prior conviction under different Guidelines, thus reducing disparity.

Considering the status of the prior conviction as of the time of the federal offense conduct is also consistent with § 4A1.1(d), which provides for an enhancement "if the defendant committed the instant offense while under any criminal justice sentence." The Eighth Circuit has found that the enhancement

was correctly applied when a defendant's prior convictions were modified after he committed his federal offense but before he was sentenced for it. *United States v. Martinez-Cortez,* 354 F.3d 830, 832 (8th Cir. 2004).

In *Martinez-Cortez,* the panel looked to the status of the prior convictions as of the date of the federal offense conduct. *Id.* It concluded that the "timing and purpose of" the state sentence reductions required the sentencing court to find that the defendant properly received criminal history points under § 4A1.1(d). *Id.* Unlike Martinez-Cortez, Doran did not petition to have his prior conviction redesignated as a misdemeanor only after he was charged with the instant offense. Doran successfully petitioned the state of California to redesignate his conviction in 2017, well before his federal criminal conduct in 2018.

In addressing a similar issue to Doran's, this Court also looked to the status of the prior conviction at the time the defendant committed the federal offense, in *McNeill v. United States*, 563 U.S. 816 (2011). *McNeill* considered whether a prior conviction qualified as a "serious drug offense" under 18 U.S.C. § 924(e); to qualify, a "maximum term of imprisonment of ten years or more" must be prescribed by law for the offense. *Id.* at 825 (quoting § 924(e)(2)(A)(ii)). This Court held that the "maximum term of imprisonment"

for a defendant's prior state drug offense is the maximum sentence applicable to the offense when the defendant was convicted of it. *Id.* This Court emphasized the status of the prior conviction as of the date of the instant offense conduct:

> McNeill cannot explain why two defendants who violated § 922(g) on the same day and who had identical criminal histories – down to the dates on which they committed and were sentenced for their prior offenses – should receive dramatically different federal sentences solely because one's § 922(g) sentencing happened to occur after the state legislature amended the punishment for one of the shared prior offenses. In Contrast, the interpretations we adopt permits a defendant to know even before he violates § 922(g) whether ACCA would apply.

563 U.S. at 823 (emphasis added). As this Court observed, the appropriate date of focus is the date on which a defendant violates a federal statute. A defendant in Doran's position would reasonably think that, because the state court had already redesignated his prior offense as a misdemeanor by the time he committed a federal offense, he would not face a federal sentence enhancement for having a prior felony conviction.

Crucially, the particular change in state law at issue in McNeill was prospectively only, not retroactive as is the case with Doran. The McNeill Court explicitly left open the issue posed by Doran's case, noting: "this case does not concern a situation in which a State subsequently lowers the

maximum penalty applicable to an offense and makes that reduction available to defendant's previously convicted and sentenced for that offense. . . We do not address whether or under what circumstances a federal court could consider the effect of that state action." *Id.* at 825 n1.

On direct appeal, the Eighth Circuit noted that "[t]he Court made this comment for the express purpose of limiting its holding. It did not otherwise suggest how such a reclassification should be treated." *United States v. Doran,* Case No. 19-3222 (8th Cir. Nov. 2, 2020), at * 5.

Doran's appellate brief, however, suggested an alternative approach to retroactive reclassified offenses.[2]

The alternative approach – determining the status of a prior conviction as of the time of federal sentencing – would also be consistent with other Guidelines. "The structure of the Guidelines evidences an intent on the part of the Sentencing Commission to look to the sentences actually imposed by state courts for state criminal convictions when calculating a federal defendant's criminal history score." *Martinez-Cortez,* 354 F.3d at 833 (Lay, J., dissenting).

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[2]In addition to the notice concerns mentioned in *McNeill,* the suggested approach would also avoid potential *ex post facto* issues. See *Calder v. Bull*, 3 U.S. 386, 390 (1798) (Chase, J.) (identifying as an ex post facto law "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed").

"In assessing the length of a federal sentence, therefore, the sentencing court looks only at the prior state sentences as they exist at the time of sentencing." *Id.* at 834. Doing so respects "fundamental principles of federalism and deference owed by federal courts to state courts in processing their own criminal cases." *Id.* at 833. The approach of *Hirman, Santillan,* and *Diaz*, by contrast, fails to respect these fundamental principles of federalism and deference and conflicts with the approach of the other cited Guidelines provisions. In fact, the rule the District Court applied could also apply to federal convictions. if a court declined to give effect to a sentence commutation that reduced a federal felony to a federal misdemeanor, for example, the Sentencing Guidelines would trump the pardon power and nullify the executive's act of clemency.

This Court has recognized the importance of deference to state lawmakers' judgment in measuring "the seriousness of state offenses involving the manufacture, distribution, or possession of illegal drugs." *United States v. Rodriguez,* 553 U.S. 377, 388 (2008). By choosing to rely on the maximum term of imprisonment prescribed by state law as the measure of the seriousness of an offense under 18 U.S.C. § 924(e)(2)(A)(ii), "Congress presumably thought – not without reason – that if state lawmakers provide that a crime is

punishable by 10 years' imprisonment, the lawmakers must regard the crime as 'serious,' and Congress chose to defer to the state lawmakers' judgment." *Id.*

The converse is also true. The retroactive reduction of an offense from a felony to a misdemeanor punishable by no more than six months of imprisonment (*see* Cal. Penal Code § 11359(b)) demonstrates that the state does not view the offense as serious, certainly not serious enough to warrant a significant sentence enhancement under federal law. This Court should reiterate the appropriateness of deferring to state lawmakers' judgment; in Doran's case, that means deferring to California's redesignation of Doran's marijuana conviction as a misdemeanor.

C. Considering the Status of the Prior Conviction as of the Time of the Federal Offense Conduct or the Federal Sentencing Promotes Judicial Economy and Efficiency.

Considerations of judicial economy support determining the status of a defendant's prior convictions as they are at the time of federal offense conduct or federal sentencing. In *Daniels v. United States,* 532 U.S. 374, 378 (2001), this Court elaborated on its decision in *Custis v. United States,* 511 U.S. 485 (1994), which held that "with the sole exception of convictions obtained in violation of the right to counsel, Custis had no right under the ACCA or the Constitution 'to collaterally attack prior convictions' in the course of his

federal sentencing proceeding." *Id.* at 378 (quoting *Custis,* 511 U.S. at 490-97). This Court explained that the decision was based on considerations of "ease of administration and the interest in promoting the finality of judgments." *Id.* at 378. The Daniels Court explained:

> resolving non-*Gideon*-type constitutional attacks on prior convictions "would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state court transcripts or records.' . . . [and] allowing collateral attacks would "inevitably delay and impair the orderly administration of justice" and "deprive the state-court judgment of its normal force and effect."

Id. (quoting *Custis,* 511 U.S. at 496-97).

The Ninth Circuit has also described the government's interest in finality and in "excluding collateral challenges to old convictions," which include the "expense of keeping court records indefinitely, concerns about evidence being lost over time, and 'thorny procedural difficulties' at sentencing hearings." *United States v. McChristian*, 47 F.3d 1499, 1503 (9th Cir. 1995).

Importantly, Doran did not collaterally attack his prior conviction during his federal sentencing. he had already successfully petitioned the state of California to have his prior conviction redesignated as a misdemeanor before he committed the instant offense, and before he was sentenced for it; no collateral attack was necessary. The approach he urges the Court to adopt does

not implicate any of the finality concerns expressed in *Custis* and *Daniels*. When a state redesignates a prior conviction as a misdemeanor before the federal sentence is imposed, deferring to the redesignation does no implicate those government interests in the finality of sentences, nor does it require federal courts to reopen sentences years after the fact due to subsequent changes in state law. Indeed, it may be procedurally more difficult to reach back and determine whether a redesignated sentence was originally for a felony (particularly in the case of a "wobbler" statute such as § 11359), than to establish that the state conviction is a misdemeanor at the time of the federal sentencing. Doran's approach is thus best suited to promoting judicial economy and efficiency.[3]

Determining the status of the defendant's prior conviction as of the time of federal offense conduct or the federal sentencing is consistent with § 2K2.1(a)(2) and other Guidelines. It demonstrates appropriate deference to state lawmakers' assessment of the seriousness of an offense, a concern the Supreme Court has emphasized in other contexts. such an approach also

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[3]A "wobbler" is an offense that can be punished as either a felony or misdemeanor offense. *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1132 (9th Cir. 2016). a "wobbler" offense is presumptively a felony and remains a felony unless the sentencing court subsequently reduces it to a misdemeanor. *Id.* (citation omitted).

reduces unwarranted sentence disparity, avoids the disparate application of criminal history Guidelines, promotes judicial economy and efficiency, and satisfies basic fairness concerns by allowing a defendant to know the sentencing consequences of a federal offense before he commits it. The district Court erred in relying on *Hirman,* and this Court should reject any reliance on the "backward-looking" approach of *Santillan* and *Diaz.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jacquere Doran

Jacquere Doran #77521-097

1/15/2021

Date