No. 21-6282

IN THE SUPREME COURT OF THE UNITED STATES

TANNOUS FAZAH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to claim that he lacked "prior conviction[s] for a felony drug offense," 21 U.S.C. 841(b)(1)(A) and 960(b)(1) (Supp. V 2010), for purposes of enhancing the penalties for his federal drug-trafficking crimes, where he does not dispute that he had such prior convictions when he committed and was charged with the federal drug-trafficking offenses, on the ground that a state court later reclassified petitioner's prior state offenses as state-law misdemeanors.

2. Whether petitioner is entitled to plain-error relief on his claim that, in a drug-conspiracy prosecution under 21 U.S.C. 846, each conspirator's statutory sentencing range must be based on a jury finding about the quantity of drugs with which the conspirator was personally involved or that he could reasonably foresee, rather than the quantity of drugs attributable to the conspiracy as a whole.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

United States v. Laredo, No. 13-cr-537 (Apr. 17, 2017)

United States Court of Appeals (9th Cir.):

United States v. Sanchez, No. 17-50139 (Mar. 15, 2021)

United States Supreme Court:

Sanchez v. United States, No. 21-5511 (petition for cert. filed Aug. 24, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-14) is not published in the Federal Reporter but is reprinted at 850 Fed. Appx. 472. The judgment of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 2021. A petition for rehearing was denied on June 22, 2021 (Pet. App. 49-50). The petition for a writ of certiorari was filed on

November 10, 2021.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conspiring to commit racketeering, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d) (Count 1); committing assault resulting in serious bodily injury in aid of racketeering, in violation of the Violent Crime in Aid of Racketeering statute (VICAR), 18 U.S.C. 1959(a)(6) (Count 2); conspiring to possess with intent to distribute and to distribute controlled substances, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A) (Supp. V 2010), and 21 U.S.C. 846 (Count 3); possessing with intent to distribute five or more grams of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (Supp. V 2010) (Count 4); and unlawfully possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) (Count 8). Judgment 1. The district court sentenced petitioner to life imprisonment. Pet. App. 43. The court of appeals affirmed. Id. at 2-14.

1. Petitioner was a member of the Florencia 13 street gang, which operated in southern California and engaged in drug

[1] Petitioner originally joined in the petition for a writ of certiorari filed by three of his co-defendants, Sanchez v. United States, No. 21-5511 (petition for cert. filed Aug. 24, 2021), but subsequently withdrew from that petition in order to file a separate petition. See 11/8/21 Order, Sanchez, supra (No. 21-5511).

trafficking, extortionate "tax" collection from drug dealers, and violence. Gov't C.A. Br. 5-9 (summarizing trial evidence). Florencia 13 was controlled by the Mexican Mafia prison gang, and in particular by Leonel Laredo and brothers Arturo and Braulio Castellanos, all of whom were incarcerated in state prison. Id. at 6, 8.

The Mexican Mafia appointed "shot-callers" to run the gang's activities in accordance with their orders and also to collect "taxes" and provide the proceeds to Mexican Mafia leadership. Gov't C.A. Br. 8. To carry out the Mexican Mafia's orders, shot-callers called upon the services of younger gang members, known as "soldiers," who were required to commit violence and to earn money for the gang through drug trafficking and "tax[]" collection from drug dealers. Id. at 9.

Petitioner was a soldier and also a member of the crew of Javier Manual Ulloa, a higher-level soldier in the gang. Gov't C.A. Br. 18, 20. Petitioner regularly sold drugs from his home, as often as 15 to 20 times per day. Id. at 20; Gov't C.A. E.R. 682-685. He also helped to smuggle drugs into the Los Angeles County Jail system. Gov't C.A. Br. 21. During a search of petitioner's residence, law enforcement officers found and seized 16.9 grams of methamphetamine. Id. at 21; Gov't C.A. E.R. 567-568, 1596.

At the direction of Ulloa, petitioner, with the assistance of another gang associate (Jose Manuel Dorado), killed a fellow gang

member who was suspected of cooperating with law enforcement and of having accused Ulloa of cooperating with law enforcement. Gov't C.A. Br. 21-27. Another gang member brought the victim to petitioner's apartment. Id. at 26. Petitioner, Dorado, and others took the victim to a back alley, formed a circle around him, and started punching him. Ibid. Once the victim fell to the ground, the gang members kicked him until he was unconscious. Ibid. Petitioner then pulled out a handgun, aimed it at the victim's head, and pulled the trigger, but the firearm jammed. Ibid. Petitioner cocked the weapon, expelling an unused round, and fired again, inches from the victim's face, killing the victim. Ibid.

2. A federal grand jury in the Central District of California returned an indictment charging petitioner and other defendants with various offenses related to Florencia 13. Indictment 1-50. After a superseding indictment, petitioner stood charged of conspiring to commit racketeering, in violation of RICO, 18 U.S.C. 1962(d) (Count 1); committing assault resulting in serious bodily injury in aid of racketeering, in violation of VICAR, 18 U.S.C. 1959(a)(6) (Count 2); conspiring, through June 4, 2014, to possess with intent to distribute and to distribute controlled substances, including 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (Supp. V 2010), and 21 U.S.C. 846 (Count 3); possessing with intent to distribute five or more grams of methamphetamine on March 14, 2010, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (Supp. V

2010) (Count 4); and unlawfully possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) (Count 8). Pet. C.A. E.R. 365-413 (Second Superseding Indictment). Many defendants pleaded guilty, but petitioner and three others proceeded to trial.

In November 2015, the government filed an information pursuant to 21 U.S.C. 851(a)(1) alleging that petitioner had two prior convictions for "felony drug offense[s]" that enhanced the sentencing range in Counts 3 and 4: (1) a March 3, 2010 conviction for possessing methamphetamine, in violation of California Health and Safety Code § 11377 (West 2010); and (2) an April 14, 2010 conviction for possessing cocaine, in violation of California Health and Safety Code § 11350(a) (West 2010). D. Ct. Doc. 854, at 1-3 (Nov. 25, 2015); see 21 U.S.C. 841(b)(1)(A), 802(44). Based on those prior convictions and the drug amount charged in the superseding indictment, petitioner faced a mandatory life sentence on Count 3 and a statutory range of imprisonment from 10 years to life on Count 4. See 21 U.S.C. 841(b)(1)(A)-(B) (Supp. V 2010), 21 U.S.C. 846.

In early 2016, more than two years after the grand jury returned petitioner's indictment in this case, a California state court reduced petitioner's 2010 felony drug convictions to misdemeanors pursuant to a California voter-enacted initiative known as Proposition 47, Cal. Penal Code § 1170.18 (West Supp. 2018). See Pet. App. 19-21; United States v. Diaz, 838 F.3d 968, 971 (9th Cir. 2016), cert. denied, 137 S. Ct. 840 (2017).

Proposition 47 prospectively reclassified certain drug felonies as misdemeanors and authorized a "person who has completed his or her sentence for a" felony subsequently reclassified as a misdemeanor to "file an application * * * to have the felony conviction or convictions designated as misdemeanors." Id. § 1170.18(f). Under California law, a "felony conviction that is recalled and resentenced" or "designated as a misdemeanor" under Proposition 47 "shall be considered a misdemeanor for all purposes," except for California's ban on firearm possession by felons. Id. § 1170.18(k). An adjustment pursuant to Proposition 47, however, "does not diminish or abrogate the finality of judgments in any case that does not come within the purview of" the statute. Id. § 1170.18(n).

Petitioner's trial took place in June and July 2016. The government presented evidence including the testimony of three Florencia 13 insiders who detailed the inner workings of the gang and petitioner's involvement in the conspiracies; physical evidence, including drugs, firearms, incriminating notes, and correspondence seized from the defendants' homes, gang businesses, and elsewhere; wiretap intercepts; jailhouse calls; videos of one of the defendants' visits to the gang's leader in state prison; and the testimony of law enforcement officers. See Gov't C.A. Br. 6-7. The government also presented evidence of specific, identified seizures showing 198.48 grams of actual methamphetamine distributed by the conspiracy. See id. at 133-134. That amount

included the 16.9 grams of methamphetamine seized from petitioner's residence. Ibid.; Gov't C.A. E.R. 567-568, 1596. The government also presented evidence that petitioner was involved in drug trafficking on a daily basis, multiple times a day. Gov't C.A. Br. 20-21; Gov't C.A. E.R. 682-685.

The district court instructed the jury regarding drug quantity as follows:

> If you find the defendants guilty of the charge in Count Three of the Indictment, you must then determine whether the government proved beyond a reasonable doubt that the amount of methamphetamine, the amount of a mixture or substance containing a detectable amount of methamphetamine, the amount of marijuana, the amount of heroin, or amount of cocaine, or mixture or substance containing a detectable amount of cocaine, equaled or exceeded certain weights.
>
> Each of the verdict forms includes a section that asks you to note such findings about the drug amounts involved in this case.
>
> Your determination of weight must not include the weight of any packaging material. Your decision as to weight must be unanimous.
>
> The government does not have to prove that the defendants knew the quantity of methamphetamine, marijuana, heroin, or cocaine.

Pet. C.A. E.R. 559; see Gov't C.A. Br. 139-140.[2]

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[2] One of petitioner's co-defendants objected to the last sentence of the instruction, contending that a jury finding as to knowledge was required under this Court's decision in Alleyne v. United States, 570 U.S. 99 (2013); petitioner and the other co-defendants raised no objections to the instruction. Gov't C.A. E.R. 3258-3260; see Gov't C.A. Br. 140. Petitioner does not contest that he forfeited in the district court the drug-quantity claim that he asserted on appeal and reasserts in this Court.

The jury received a separate verdict form for each defendant, including petitioner. The verdict form instructed the jury that, if it found petitioner guilty of conspiring to distribute controlled substances, it should then determine beyond a reasonable doubt the drug type and quantity involved in the conspiracy in which petitioner participated. Pet. C.A. E.R. 691; see Gov't C.A. Br. 140.

The jury found petitioner guilty on all of the charged counts. See Pet. C.A. E.R. 688-694. In connection with the drug-conspiracy count (Count 3), the jury also returned a special verdict finding beyond a reasonable doubt that the conspiracy involved over 50 grams of methamphetamine. Id. at 691; see Gov't C.A. Br. 28.

3. At sentencing, petitioner contended that the offenses underlying his 2010 California drug convictions no longer qualified as sentence-enhancing "felony drug offense[s]" under 21 U.S.C. 841(b)(1) on the ground that in 2016 -- after petitioner committed and was charged with the drug-trafficking offenses at issue in this case -- a California state court had reclassified them as misdemeanors. Pet. App. 39-40. The district court rejected petitioner's contention, explaining that, under controlling circuit precedent in United States v. Diaz, supra, "whether or not [a drug conviction] * * * is a prior felony * * * is measured from the time of the commission of the instant offense," not the time of sentencing. Pet. App. 40.

The district court found that petitioner "was an integral part of th[e gang's] narcotics trafficking enterprise" and held him responsible for at least 150 grams of methamphetamine under the advisory Sentencing Guidelines. Pet. App. 40-41. The court further found that, for Guidelines purposes, petitioner was responsible for the first-degree murder described above. Id. at 28-29, 42-43. Based on those findings, the court computed a total offense level of 43, which resulted in an advisory Guidelines sentence at the statutory maximum for all five counts of conviction. Id. at 41-43; see Sentencing Guidelines Ch. 5, Pt. A (2016) (sentencing table) (setting a Guidelines sentence of "life" for offense level 43); id. § 5G1.1(a). As to Count 3, the court further found that petitioner was subject to a mandatory life sentence under 21 U.S.C. 841(b)(1)(A). Pet. App. 41. The court sentenced petitioner to concurrent terms of life imprisonment on Counts 1, 3 and 4; 36 months of imprisonment on Count 2; and 120 months of imprisonment on Count 8. Id. at 43.

4. In an unpublished opinion, the court of appeals affirmed petitioner's convictions and sentence. Pet. App. 2-14.

Applying plain-error review, the court of appeals found no reversible error in the instructions to the jury regarding its drug-quantity determinations. Pet. App. 9-10. The court observed that it had recently determined, in its en banc decision in United States v. Collazo, 984 F.3d 1308 (9th Cir. 2021), that "a defendant convicted of conspiracy under [21 U.S.C.] § 846 is subject to a

penalty under [21 U.S.C.] § 841(b)(1)(A)-(B) if the government has proven beyond a reasonable doubt that the underlying § 841(a)(1) offense involved the drug type and quantity set forth in § 841(b)(1)(A)-(B)," such that "[t]he government does not have to prove that the defendant had any knowledge or intent with respect to those facts." Pet. App. 9-10 (quoting Collazo, 984 F.3d at 1336). And the court found that, having read "together the jury instructions and the verdict form, which required a finding that the conspiracy that the defendant joined involved a specified quantity of drugs," the jury in this case "was not misled." Id. at 10 (citing United States v. Pineda-Doval, 614 F.3d 1019, 1031 (9th Cir. 2010)).

The court of appeals also found sufficient evidence supporting the jury's findings of drug quantity as to petitioner, because "evidence supported the conclusion that fellow gang members sold the requisite quantities of drugs." Pet. App. 10. The court cited Collazo for the proposition that "[w]hen the government proves that a defendant had a knowing connection with an extensive enterprise (such as a drug trafficking organization) and had reason to know of its scope, a fact-finder may infer that the defendant agreed to the entire unlawful scheme." Ibid. (quoting Collazo, 984 F.3d at 1319).

The court of appeals also rejected petitioner's claim that his 2010 California drug convictions did not qualify as sentence-enhancing felony drug offenses under 21 U.S.C. 841(b)(1). Pet.

App. 13. The court of appeals agreed with the district court that, under Diaz, 838 F.3d at 974-975, petitioner's drug "convictions retain[ed] federal significance despite state-court recharacterizations of the convictions." Pet. App. 13.

ARGUMENT

1. Petitioner contends (Pet. 5-13) that he was not subject to enhanced statutory penalties under 21 U.S.C. 841(b)(1) based on his prior California drug convictions because, years after petitioner committed and was charged with the federal offenses at issue in this case, a California state court recharacterized his prior felony drug convictions as misdemeanors. The court of appeals correctly rejected petitioner's claim, and its unpublished decision does not conflict with any decision of this Court or another court of appeals. This Court has repeatedly denied petitions for writs of certiorari raising similar questions. See, e.g., Newton v. United States, 140 S. Ct. 939 (2020) (No. 19-780); Santillan v. United States, 140 S. Ct. 2691 (2020) (No. 19-7878); McGee v. United States, 140 S. Ct. 218 (2019) (No. 19-38); Sanders v. United States, 139 S. Ct. 2661 (2019) (No. 18-8932); Norwood v. United States, 139 S. Ct. 1358 (2019) (No. 18-7823); Bell v. United States, 138 S. Ct. 1282 (2018) (No. 17-678); Cortes-Morales v. Hastings, 137 S. Ct. 2186 (2017) (No. 16-773). It should follow the same course here.

a. At all times relevant here,[3] 21 U.S.C. 841(b)(1)(A) required a life sentence for a defendant who "commit[ted] [a] violation" of subsection 841(b)(1)(A) "after two or more prior convictions for a felony drug offense ha[d] become final." 21 U.S.C. 841(b)(1)(A); see 21 U.S.C. 846 (same penalty for conspiracy as for substantive offense). Similarly, 21 U.S.C. 841(b)(1)(B) prescribed enhanced statutory penalties for a violation of 21 U.S.C. 841(a) and (b)(1)(B) if the defendant "commit[ted] such a violation after a prior conviction for a felony drug offense ha[d] become final." 21 U.S.C. 841(b)(1)(B). As "a matter of plain statutory meaning," those aggravating circumstances apply to petitioner's drug-trafficking offenses in Counts 3 and 4, respectively. United States v. Dyke, 718 F.3d 1282, 1292 (10th Cir.) (Gorsuch, J.), cert. denied, 571 U.S. 939 (2013). Petitioner here conspired to traffic controlled substances, including methamphetamine, through June 2014, well "after two or more prior convictions for a felony drug offense"

[3] In 2018, Congress altered the predicate offenses that trigger the enhanced penalty under 21 U.S.C. 841(b)(1)(A) and (B). See First Step Act of 2018, Pub. L. No. 115-391, § 401(a)(2)(A)(ii), 132 Stat. 5220 (amending 21 U.S.C. 841(b)(1)(A) and (B) to replace the term "felony drug offense" with the term "serious drug felony"); see also § 401(a)(1), 132 Stat. 5220 (amending 21 U.S.C. 802 to add a new definition of "serious drug felony"). Those amendments, which apply to pre-enactment offenses only "if a sentence for the offense has not been imposed as of [the] date of [the Act's] enactment," § 401(c), 132 Stat. 5221, do not apply to petitioner's sentence, which was imposed more than two years before the Act's enactment. Petitioner does not argue otherwise.

-- his two 2010 convictions for felony drug possession in California -- had "become final." 21 U.S.C. 841(b)(1)(A); compare Pet. C.A. E.R. 402-404, with Presentence Report (PSR) ¶¶ 111, 113. And he committed the drug-trafficking offense in Count 4 on March 14, 2010, after one of his California "prior conviction[s] for a felony drug offense" -- his March 2, 2010, conviction for felony possession of methamphetamine -- "ha[d] become final." 21 U.S.C. 841(b)(1)(A); compare Pet. C.A. E.R. 402-404, with PSR ¶¶ 111, 113. Petitioner was therefore subject to the enhanced penalties in 21 U.S.C. 841(b)(1) (Supp. V 2010) on Counts 3 and 4 at the time he "committed" his federal crimes.

Petitioner contends (Pet. 5-12), however, that California's subsequent reclassification of his felony drug offenses as state-law misdemeanors entitled him to be sentenced on Counts 3 and 4 without regard to the felony convictions he had when he committed them, resulting in a term of imprisonment between 10 years and life on Count 3 and a term of imprisonment between 5 and forty years on Count 4. But whatever effect Proposition 47 had on state law, it cannot change the "historical fact," Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 115 (1983), that petitioner "commit[ted]" the federal drug crime in Count 3 "after two or more prior convictions for a felony drug offense ha[d] become final," making him subject to a statutory life sentence on that count, 21 U.S.C. 841(b)(1)(A) (Supp. V 2010). Nor can Proposition 47 change the historical fact that that petitioner "committed" the

federal drug crime in Count 4 "after a prior conviction for a felony drug offense ha[d] become final," making him subject to a statutory sentencing range between 10 years of imprisonment and life imprisonment on that count, 21 U.S.C. 841(b)(1)(B) (Supp. V 2010). 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 (citation omitted; brackets in original); 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), "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 conviction meets the federal definition cannot rely on an after-the-fact reclassification -- long after he has served his state sentences (PSR ¶¶ 111, 113) -- as the basis for challenging a federal term of imprisonment that was undisputedly applicable when the defendant "commit[ted]" his offenses, 21 U.S.C. 841(b)(1)(A), (B).

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." 18 U.S.C. 924(e)(2)(A)(ii). McNeill was convicted of North Carolina drug offenses that were punishable by ten-year sentences at the time of his convictions for those offenses, but the State subsequently reduced the punishment. 563 U.S. at 818. McNeill argued that, at his federal sentencing, the district 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." 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 observes (Pet. 6, 8), 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 it is possible that a defendant whose state offense was reclassified while he was still serving his state sentence might be differently situated from petitioner, see ibid.; Gov't Br. at 18 n.5, McNeill, supra (No. 10-5258). But the approach in McNeill strongly supports the conclusion that petitioner's "convictions retain federal significance despite state-court recharacterizations of the convictions." Pet. App. 13. 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.[4]

b. Petitioner's counterarguments lack merit. Petitioner observes (Pet. 9) that this Court has assumed that a federal prisoner may seek to collaterally attack his federal sentence 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). As the Tenth Circuit has

[4] Petitioner's suggestion (Pet. 7-8) that the government "acknowledged" the question presented here in McNeill is misplaced. The government's brief in McNeill suggested that a defendant who had already "taken advantage of state sentence-modification proceedings to lower his [state] sentence" could "plausibly" argue for relief from an ACCA sentence but noted that "the Court need not address that issue." Gov't Br. at 18 n.5, McNeill, supra (No. 10-5258); see Oral Arg. Tr., McNeill, supra, at 21-24 (No. 10-5258). Petitioner here did not lower his state sentences, however; he completed those sentences before his convictions were recharacterized in 2016. PSR ¶¶ 111, 113.

explained, however, a successful challenge to the "validity" of a prior conviction, ibid., requires establishing that the conviction has been "vacated," United States v. Bell, 689 Fed. Appx. 598, 599 (10th Cir. 2017), cert. denied, 138 S. Ct. 1282 (2018); see Johnson, 544 U.S. at 303 (assuming that "a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated"). That understanding follows from the statutory text. When a defendant 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 the defendant's innocence or an error of law fairly qualifies as a 'conviction' at all").

Petitioner's felony convictions were not vacated; they were reclassified as state-law misdemeanors. Cal. Penal Code § 1170.18(a)-(b) and (f)-(g) (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 does not come within the purview of" Proposition 47. Id. § 1170.18(n). 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.

At best, the recharacterization of petitioner's felony convictions as misdemeanors might be considered analogous to a state's expungement of his felony convictions. Cf. Diaz, 838 F.3d at 974 (calling expungement "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 had 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).

c. Petitioner errs in asserting (Pet. 11-12) the existence of a circuit conflict on the issue.

As petitioner acknowledges, the Third, Seventh, Eighth, and Tenth Circuits have addressed the issue and their decisions are in agreement with the unpublished decision below and Diaz. See United States v. London, 747 Fed. Appx. 80, 84–85 (3d Cir. 2018); United States v. Sanders, 909 F.3d 895, 899–904 (7th Cir. 2018), cert. denied, 139 S. Ct. 2661 (2019); United States v. Santillan, 944 F.3d 731, 733 (8th Cir. 2019), cert. denied, 140 S. Ct. 2691 (2020); United States v. McGee, 760 Fed. Appx. 610, 612-616 (10th Cir.), cert. denied, 140 S. Ct. 218 (2019); Bell, 689 Fed. Appx. at 599 (10th Cir.); cf. Dyke, 718 F.3d at 1292-1293 (10th Cir.) (addressing expunged conviction under Kansas law).

And contrary to petitioner's suggestion (Pet. 11-12), neither the decision below nor Diaz conflicts with Cortes-Morales v. Hastings, 827 F.3d 1009 (11th Cir. 2016) (per curiam), cert. denied, 137 S. Ct. 2186 (2017). In Cortes-Morales, the Eleventh Circuit rejected a prisoner's claim that he was entitled to habeas corpus relief from his ACCA sentence under 28 U.S.C. 2241 following amendments to New York's drug laws that retroactively lowered the penalties for certain offenders. 827 F.3d at 1011. The court concluded that the New York laws were "not retroactive as to" the prisoner and thus could not serve as a basis for habeas relief in connection with the prisoner's federal ACCA sentence. Id. at 1015.

That holding does not conflict with the decision below (or Diaz), and petitioner does not contend otherwise.

Petitioner purports to find conflict, instead, between the decision below and "dicta" (Pet. 12) in Cortes-Morales stating that the prisoner in that case could "succeed on the merits of his claim only if the New York sentencing reductions appl[ied] retroactively." 827 F.3d at 1014 (emphasis added). No such conflict exists. As an initial matter, mere "dicta" (Pet. 12) such as the statement quoted by petitioner cannot create a "decision[al]" conflict among the circuits' precedents, much less a conflict meriting this Court's intervention. Sup. Ct. R. 10(a). Moreover, the statement quoted by petitioner does not, by its terms, suggest any disagreement among the courts of appeals: a court's recognition that a successful challenge to a state conviction based on a retroactive law would be a necessary prerequisite for obtaining relief from a federal sentence does not indicate that it would be a sufficient ground for postconviction relief.

Petitioner also suggests (Pet. 12) that the decision below conflicts with three district court decisions involving New York's drug laws: United States v. Cabello, 401 F. Supp. 3d 362, 366 (E.D.N.Y. 2019); United States v. Jackson, No. 13-cr-142, 2013 WL 4744828 (S.D.N.Y. Sept. 4, 2013); and United States v. Calix, No. 13-cr-582, 2014 WL 2084098 (S.D.N.Y. May 13, 2014). But, like dicta in a court of appeals' opinion, a district court decision is

not precedential and does not give rise to a conflict of the sort that this Court would ordinarily review. See Sup. Ct. R. 10; cf. Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011). Here, moreover, the district court decisions cited by petitioner are in tension with Rivera v. United States, 716 F.3d 685 (2d Cir. 2013), which determined that an ACCA enhancement applied to a defendant where the State punished his crime as a "serious drug offense" at "the time he was convicted for that offense." Id. at 690 (citing McNeill, 563 U.S. at 825).

2. Petitioner separately contends (Pet. 13-22) that he is entitled to plain-error relief because the district court, for purposes of establishing the statutory sentencing range for petitioner's conviction for conspiring to traffic in controlled substances in violation of Sections 846 and 841, instructed the jury to assess the drug quantity attributable to the conspiracy as a whole, rather than requiring "knowledge with respect to type and quantity." Pet. 21. The same question is presented in the petition for a writ of certiorari recently filed by petitioner's co-defendants in Sanchez v. United States, No. 21-5511 (petition for cert. filed Aug. 24, 2021), which is currently pending before the Court. As the government has explained in its brief in opposition to that petition, the question does not warrant this Court's review. See Gov't Br. in Opp. at 17-18, Sanchez v. United

States, No. 21-5511 (filed Nov. 29, 2021).[5] Moreover, even if the question did warrant further review, the plain-error posture of this case would make this an unsuitable vehicle in which to address it. See id. at 12-17.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] We have served petitioner with a copy of the government's brief in opposition in Sanchez.