No. 21 - 6282

IN THE SUPREME COURT OF THE UNITED STATES

TANNOUS FAZAH,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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A. The Decision Below Conflicts with This Court's Cases.

The government argues that [a]s a 'matter of plain statutory meaning,' th[e] aggravating circumstances [described in 21 U.S.C. §841(b)(1)(A)] apply to petitioner's drug-trafficking offenses in Counts 3 and 4, respectively." Brief in Opposition (BIO) 12 (quoting *United States v. Dyke*, 718 F.3d 1282, 1292 (10th Cir. 2013). Not so.

Section 841 is clear and unambiguous. The sentence enhancement requiring a life sentence for certain federal drug crimes applies only to defendants with "two or more convictions for a *felony* drug offense." 21 U.S.C. §841(b)(1)(A) (emphasis added).

Here, the State of California recalled petitioner's two prior felonies, reclassified those offenses as misdemeanors "for all purposes," and resentenced petitioner accordingly. Cal. Pen. Code section 1170.18. Thus, under the plain statutory meaning of the law, petitioner does not qualify for the life enhancement he is currently serving.

Dyke was premised on the holding that "'expunction under state law . . . does not alter the historical fact of the conviction.'" *Dyke*, 718 F.3d at 1292 (quoting *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 115 (1983)); *see also* BIO 13 (relying on "historical fact" argument). But *Dyke's* "historical fact" argument

conflicts directly with this Court's precedent holding that "a defendant who successfully attack[s] his state conviction in state court . . . c[an] then apply for reopening of any federal sentence enhanced by the state sentences." *Johnson v. United States*, 544 U.S. 295, 303 (2005) (quotation omitted); *accord Custis v. United States*, 511 U.S. 485, 597 (1994) (same).

Overturning of a conviction on collateral review does not change "the historical fact" that another crime was committed after a prior offense became final. Accordingly, under *Johnson* and *Custis*, the "historical fact" argument is insufficient to justify treating prior convictions that have been recalled—and misdemeanor sentencing imposed—as if they were still felonies. Particularly because recall and resentencing is a far more drastic alteration than mere expungement: "[A] conviction which has been expunged still exists for limited purposes" whereas section 1170.18 "erase[s] the [felony] conviction[.]" *People v. Tidwell*, 246 Cal. App. 4th 212, 219–220 (2016); *see also People v. Frawley*, 82 Cal. App. 4th 784, 790 (2000) (explaining that the legal limitations on expungement or dismissal under California law "are numerous and substantial."). For the same reasons, the government's argument that the recall and resentencing procedure should be "considered analogous to a state's expungement of his felony convictions" fails. BIO 18.

The government argues that "[a]lthough 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.'" BIO 14 (quoting *United States v.*

Diaz, 838 F.3d 968, 972 (9th Cir. 2016)). Yet again the government does not square this argument with this Court's holding that overturned convictions warrant reversal of federal sentencing enhancements. The government has not pointed to any material distinction warranting disparate treatment between reversal of a conviction, on the one hand, and recall and resentencing, on the other.

The government asserts that "[w]hen 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." BIO 17 (quoting *Dickerson*, 460 U.S. at 111, 115). As argued above, the same is true of recall and resentencing under section 1170.18.

Dickerson is inapposite. The case addressed the differences between expungement of a conviction and nullification. The Court therefore emphasized that expunction "means no more than that the State has provided a means for the trial court not to accord a conviction certain continuing effects under state law." *Dickerson*, 460 U.S. at 115. But the recall and resentencing procedure used here does far more than mere expungement—it "erase[s] the [felony] conviction[.]" *Tidwell*, 246 Cal. App. 4th at 219–220.

The government argues that a felony drug offense is defined by the length of imprisonment attached to the offense "'regardless of the punishing jurisdiction's classification of the offense[.]'" BIO 14 (quoting *Burgess v. United States*, 553 U.S. 124, 129 (2008)). *Burgess* does not apply.

Burgess addressed whether a South Carolina conviction for possessing cocaine qualified as a felony offense under federal law. Under South Carolina law, "that offense carried a maximum sentence of two years' imprisonment" but was nevertheless "classified . . . as a misdemeanor." *Burgess*, 553 U.S. at 127. *Burgess* held that the length of punishment was decisive, not the term used to describe the offense. *Id.* at 129. Thus, *Burgess* might apply if California had reclassified petitioner's prior offenses as misdemeanors without any change in sentence. But section 1170.18 is not so limited—the law explicitly reduces the punishment associated with petitioner's convictions, and it does so retroactively.

Petitioner was resentenced to misdemeanor terms that no longer meet the federal definition of a felony. People v. Fazah, Los Angeles County Case Nos. BA358538, VA107994; *see also* Cal. Pen. Code §1170.18(a) (allowing persons to "petition for a recall of *sentence*" and to "request resentencing"). Thus, the convictions no longer meet any part of the federal definition of a felony offense, even in light of *Burgess*. For this same reason, the government's argument that petitioner "did not lower his state sentences" because he "completed those sentences before his convictions were recharacterized in 2016" fails. BIO 16 n.4.

B. This Court's Review Is Needed.

The government acknowledges that this Court in *McNeill v. United States*, 563 U.S. 816 (2011) explicitly left open the question whether a retroactive reduction in a state sentence would invalidate a federal sentence enhancement under section 841(b)(1)(A). BIO 15–16. The Court noted that "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 defendants previously convicted and sentenced for that offense." *Id.* at 2224 n.1. Accordingly, the Court did not "address whether or under what circumstances a federal court could consider the effect of that state action." *Id.*

Nevertheless, the government claims that the "approach in *McNeill* strongly supports the conclusion that petitioner's 'convictions retain federal significance despite state-court recharacterizations of the convictions.'" BIO 16. Not so.

McNeill was premised on the holding that non-retroactive "changes in state law can[not] erase an earlier conviction for ACCA purposes." *McNeill*, 563 U.S. at 823. But California's recall and resentencing procedure *does* "erase" the earlier conviction. *Tidwell*, 246 Cal. App. 4th at 219–220. *McNeill* does not support the government's argument. Indeed, if *McNeill* did support the government, the Court would not have included a footnote stating that its opinion "do[es] not address whether or under what circumstances a federal court could consider the effect of" a retroactive change in sentencing law. *McNeill*, 563 U.S. at 825 n.1.

As observed in the petition, the government in *McNeill* acknowledged that a State's retroactive reduction of a felony to a misdemeanor would undermine a federal sentence enhancement predicated on the state felony:

> Of course, if a State subsequently lowered the maximum penalty and made that reduction available to defendants previously sentenced as of the same date as the defendant now at issue, the defendant could plausibly look to that reduced maximum as stating the law applicable to his previous conviction. For example, if such a defendant had taken advantage of state sentence-modification proceedings to lower his

> sentence in accordance with a reduced maximum . . . that reduced maximum could apply to his conviction for [sentence enhancement] purposes.

Br. of the United States, *McNeill*, 2011 WL 1294503 at *18 n.5. Here, the government asserts that petitioner's citation to the brief in *McNeill* is "misplaced" because the brief in *McNeill* used equivocal language like "plausibly" and "could apply." BIO 16 n.4.

Importantly, the government conveniently ignores petitioner's additional citation to *Saxon v. United States*, No. 12-cr-00320-ER, 2016 WL 3766388 at *6 (S.D.N.Y. Jul. 8, 2016). There, the court observed: "The government does not dispute that in those cases where offenders have applied for and received relief under [retroactive resentencing statutes], the [federal sentence] enhancement is not available." Truly, the government has taken inconsistent positions on this question.

Finally, the government argues that the decision below is not in conflict with the Eleventh Circuit's opinion in *Cortes-Morales v. Hastings*, 827 F.3d 1009, 1014 (11th Cir. 2016). BIO 19–20. The court in *Cortes-Morales* reasoned that a retroactive change in state law could allow a defendant to "succeed on the merits" in a claim seeking reversal of a federal sentencing enhancement predicated on the relevant state conviction. *Cortes-Morales*, 827 F.3d at 1013–1014 (citing *McNeill*, 563 U.S. at 2224 n.1). As petitioner acknowledged, while this reasoning was only *dicta* under the facts of the case, it nevertheless demonstrates a lack of cohesion in the federal courts that is further reflected in district court decisions. *See, e.g.*,

United States v. Jackson, No. 13-cr-00142-PAC, 2013 WL 4744828 at *5 (S.D.N.Y. Sep. 4, 2013) ("Where the state law's sentencing modifications apply retroactively, th[e] logic [of *McNeill*] strongly suggests that the ACCA's application should be dependent on the revised state sentencing provisions . . . .").

Moreover, the lack of cohesion between the federal courts is just one reason supporting this Court's review. Petitioner also pointed to the growing number of states that are granting, or considering granting,[1] retroactive sentencing relief to individuals convicted of non-violent drug offenses. *See, e.g.*, N.Y. Pen. Law §70.70 (providing for retroactive resentencing); N.H. Rev. Stat. Ann. § 651:5-b (providing for annulment of convictions for drug possession); Md. Code Crim. Pro. §10-110 (providing for expungement of past drug offenses); Okla. Stat. Ann. tit. 22, §18 (providing for expungement of past drug offenses).

With ever-more jurisdictions granting retroactive sentencing relief, the question left unanswered in *McNeill*—what effect these state-law changes have on federal recidivism enhancements—will only grow in importance. That important question should be settled by this Court. Sup. Ct. R. 10(c).

In sum, this Court should grant certiorari to end the divide below and settle that a retroactive reduction in the punishment for a state law offense affects how that offense should be treated for the purpose of federal recidivism statutes.

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[1] *See* Deborah Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. Crim. Law and Criminology 379, 409–410 & nn. 142–149 (2020), re jurisdictions considering retroactive sentencing relief.

II. THE WRIT SHOULD BE GRANTED TO RESOLVE THE CIRCUIT SPLIT CREATED BY THE NINTH CIRCUIT'S ERRONEOUS *EN BANC* HOLDING THAT THERE IS NO LEVEL OF INDIVIDUAL *SCIENTER* REQUIRED TO IMPOSE ENHANCED PENALTIES BASED ON DRUG TYPE AND QUANTITY IN A DRUG CONSPIRACY CASE.

As to the second question presented for review—whether an individual co-conspirator convicted under 21 U.S.C. §846 is liable only for the type and quantity of drugs that was reasonably foreseeable to him—the government notes that "[t]he 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 . . . ." BIO 21. The government asserts that this question "does not warrant this Court's review" for the reasons explained in the brief in opposition filed in that case. *Id.* Below, petitioner responds to the arguments raised in that brief.

The government argues that "the plain-error posture of this case would make it a poor vehicle for additional consideration." Brief in Opposition at 10, Sanchez, No. 21-5511 (*Sanchez*-BIO). But this Court does not have any rule against considering an issue solely because it is presented under the plain error doctrine. Just recently the Court issued an opinion in a case subject to the plain error doctrine. *Greer v. United States*, 593 U.S. ___, 141 S.Ct. 2090, 2096 (2021) ("The question for this Court is whether Greer and Gary are entitled to plain-error relief for their unpreserved *Rehaif* claims."). The plain-error posture of this case does not provide a basis for denying review.

The government notes that "[i]n *United States v. Collazo*, 984 F.3d 1308 (2021), the en banc Ninth Circuit determined, consistent with the holdings of all

other regional courts of appeals, that Section 841(b)'s drug- and amount-specific statutory penalties do not require proof that the defendant knew the specific drug type and quantity involved in the offense." *Sanchez*-BIO 11. While true, the government's statement is beside the point.

Petitioner has not challenged this aspect of *Collazo*. Rather, he has challenged *Collazo's* holding that there is no *foreseeability* requirement with respect to the quantity of drugs involved in a conspiracy under 21 U.S.C. §846. The court in *Collazo* expressly "note[d] [its] departure from the other circuits" on this issue. *Collazo*, 984 F.3d at 1335.

The government argues that the foreseeability holding in *Collazo* is "consistent with the 'framework' used by this Court 'for determining whether the intent requirement for a conspiracy count is "greater than" the intent required for the underlying substantive offense.'" *Sanchez*-BIO 13 (quoting *Collazo*, 984 F.3d at 1331 (quoting *United States v. Feola*, 420 U.S. 671, 686 (1975))). The government is wrong.

Feola provides a poor comparison to the drug laws at issue here. *Feola* addressed a federal statute that prohibited assault upon a federal officer engaged in the performance of official duties. Feola and his coconspirators arranged a heroin sale with prospective buyers who were undercover federal agents. When one of the officers detected an imminent assault upon a colleague, he drew his weapon. Feola and the others were arrested and charged with conspiring to assault and assaulting federal officers. *Feola*, 420 U.S. at 674–675.

The Court found that the element of the underlying offense requiring that the victims of the crime be federal officers was a jurisdictional element giving rise to federal authority. *Feola*, 420 U.S. at 676–677. Because the element was jurisdictional, there was no requirement that the conspirators know that the individuals were officers to be guilty of conspiracy: "The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum." *Id.* at 685.

In contrast, the quantity of drugs involved in a conspiracy is not jurisdictional. Federal jurisdiction over a drug offense is based on the "detrimental effect on the health and general welfare of the American people" posed by the prohibited drugs, the fact that "local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances[,]" and that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. §801; *United States v. Visman*, 919 F.2d 1390, 1391 (9th Cir. 1990). Jurisdiction is not based on the drug quantity involved. Accordingly, the basis in *Feola* for finding the absence of a foreseeability requirement is itself absent. *Collazo's* and the government's reliance on *Feola* is misplaced.

The government next faults the petitioners in the *Sanchez* case for relying on *United States v. Becerra* in their petition. *Sanchez*-BIO 14. Petitioner Fazah did not cite or rely on *Becerra*. Accordingly, that argument is irrelevant here.

The government then argues that the *Sanchez* petitioners "cannot

demonstrate that such an error affected their substantial rights" because their sentences were well above the statutory-minimum sentence associated with the drug offenses; they received enhancements that would have applied regardless of the drug quantity; and they received concurrent sentences for RICO conspiracy identical in length to their sentences for violating section 846. *Sanchez*-BIO 14–16. The government has not made a similar argument with respect to petitioner Fazah. Nevertheless, the government's argument is speculative. A properly-instructed jury may well have rejected the drug-quantity findings.

On the question of what quantity of drugs was reasonably foreseeable to petitioner, the government introduced evidence of the drugs he discussed smuggling into the jail for Ulloa and the drugs found at his residence. The drugs smuggled into the jail (by someone other than petitioner) contained 4.3 grams of actual methamphetamine and 25 grams of a mixture or substance containing a detectable amount of heroin. Fazah PSR ¶ 50. The drugs found at petitioner's residence comprised 16.9 grams of actual methamphetamine. Fazah PSR ¶52.

The government presented its case by relying heavily on recordings of wiretapped telephone conversations between the alleged members of the criminal enterprise. But petitioner was not on any of the wiretap calls discussing drug trafficking. Nor was there any testimony presented linking him to any of the "casitas" or to collecting any taxes. Petitioner was not involved in any of the undercover drug transactions.

Thus, if the jury had been correctly instructed, it would have found that the

reasonably foreseeable amount that petitioner jointly agreed to was far less than the 50 grams of methamphetamine set forth in the special verdict. Application of the correct standard would have resulted in a lower base offense level for the narcotics trafficking related calculation. And a lower base offense level would have reduced petitioner's sentence. While he also received a mandatory life sentence under section 841, petitioner argues above why that sentence too must be overturned. Accordingly, the drug quantity instructional error was prejudicial.

Finally, the government argues that "the circuit conflict [created by *Collazo*] is unlikely to have significant practical effects" because "in January 2014, . . . the Department of Justice adopted a nationwide charging policy for drug-conspiracy cases" that requires prosecutors to request instructions limiting drug quantities to those "that the defendant was personally involve with or could reasonably foresee in the course of the conspiracy." *Sanchez*-BIO 17–18. The government's argument fails.

While the policy statement was issued after petitioner was indicted, it was issued well before his jury was instructed. Nevertheless, the jury was not instructed on foreseeability with respect to the drug quantity finding. Plainly, the nationwide charging policy is not being followed and offers no obstacle to instructional errors such as those that occurred here.

Notably, the government has not addressed petitioner's analysis of this Court's opinions in *Pinkerton*, *Dean*, and *Rehaif*—although that analysis was at the heart of the petition. Petition at 15–22. Petitioner demonstrated that the opinion

below conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c). And that demonstration is left uncontested.

In sum, this Court should grant certiorari to address the circuit split, and because the Ninth Circuit has "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

CONCLUSION

Review of the decision below is necessary to prevent the improper application of severe sentencing enhancements to the increasing population of federal defendants whose prior felony state drug convictions have been reclassified as misdemeanors. The court of appeals below relied on reasoning contrary to decisions of this Court to hold that retroactive changes in state law do not affect federal recidivism enhancements.

Review is further necessary to resolve a circuit split over the *mens rea* element that attaches to the drug quantity determination in conspiracy cases under 21 U.S.C. §§841 and 846.

Accordingly, petitioner respectfully requests that the Petition for Writ of Certiorari be granted. Sup. Ct. R. 10.

DATED: February 24, 2022

Respectfully submitted,

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TANNOUS FAZAH
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CERTIFICATE OF COMPLIANCE

PURSUANT TO Sup. Ct. R. 33.2(b)

Case No. 21 - 6282

I certify that the foregoing petition for writ of certiorari is proportionally spaced, has a typeface of 12 points, is in Century font, is double-spaced, and is 13 pages long.

JAMES S. THOMSON