No. 17-678

In The
Supreme Court of the United States

HAROLD EUGENE BELL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals
For The Tenth Circuit

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

RULES

REPLY BRIEF FOR PETITIONER

The government argues that Petitioner Harold Bell is not entitled to relief, despite the uncontested fact that the prior felonies on which his mandatory life sentence under 21 U.S.C. § 841(b)(1)(A) rests have been reduced to misdemeanors "for all purposes" under California's Proposition 47, Cal. Penal Code § 1170.18(k). 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). But a California court has recalled Mr. Bell's two prior felonies and retroactively reclassified the offenses as misdemeanors "for all purposes" under Cal. Penal Code § 1170.18(k). Mr. Bell is thus serving a mandatory life sentence for two prior convictions he does not have and, by operation of California law, he never had.

"[A] defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated," *Johnson v. United States*, 544 U.S. 295, 303 (2005). This is the situation here. Mr. Bell's recidivist punishment under Section 841 is unconstitutional because a California court retroactively eliminated his prior predicate *felonies* and reduced them to *misdemeanors*. *See id.*

The government attempts to obscure the certworthiness of this case with a fog of ancillary issues while glossing over its own change in positions and this Court's prior decision explicitly leaving the question unresolved. *See United States v. McNeill*, 563 U.S. 816, 825 n.1 (2011). The Court should not be distracted: The issues were preserved; the claims are meritorious; the circuits are split; and there are no vehicle problems.

ARGUMENT

I. THE ISSUES ARE PROPERLY PRESENTED AND PRESERVED.

The Tenth Circuit denied Mr. Bell a Certificate of Appealability (COA) because it found he was not entitled to relief under *Johnson*, 544 U.S. 295. Pet. App. at 2-3. Specifically, the court ruled that reducing Mr. Bell's prior state felonies to misdemeanors did not leave him serving an illegal sentence under 21 U.S.C. § 841, and thus did not implicate the constitutional problem at issue in *Johnson*, a prerequisite for issuing a COA. *Id.*

The government argues that Mr. Bell's Petition does "not address the court of appeals' reasoning or attempt to establish that his claim satisfies the certificate of appealability standard." BIO at 7. But the appellate court conflated the merits of Mr. Bell's claim for relief under *Johnson* with its analysis of whether that claim is a constitutional one (which it is). The question of whether *Johnson* applies – which was Mr. Bell's Question Presented – thus "fairly includes" the question of whether the court of appeals erroneously denied Mr. Bell a COA. Sup. Ct. R. 14.1(a). Moreover, to the degree the two questions are distinct, this case creates a square split on the latter issue, further supporting a grant of certiorari.

A. Mr. Bell Raises A Constitutional Claim.

A COA requires "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Mr. Bell made that showing: His sentence violates 21 U.S.C. § 841, and serving this illegal sentence violates due process. *See Hicks v. Oklahoma*, 447 U.S. 343, 345-47 (1980).

Mr. Bell's mandatory life sentence is illegal because it is predicated on recidivist enhancements for three prior "felony drug offense[s]," 21 U.S.C. § 841(b)(1)(A), which a California court has since revoked and replaced with misdemeanor drug offenses. Pet. at 5. After Mr. Bell's conviction in this case, California comprehensively reclassified certain drug offenses as misdemeanors and allowed some offenders, including Mr. Bell, to have their prior convictions for those offenses retroactively reclassified as misdemeanors "for all purposes." Cal. Penal Code § 1170.18(k); Pet. at 5-6. It is undisputed that Mr. Bell did just that.

Mr. Bell argued in his Petition that he is entitled to a sentencing reduction under *Johnson*. This Court has repeatedly recognized that federal prisoners serving recidivist enhancements are "entitled to a reduction if the earlier conviction is vacated." *Johnson*, 544 U.S. at 303; *Daniels v. United States*, 532 U.S. 374, 382 (2001); *Custis v. United States*, 511 U.S. 485, 497 (1994). Mr. Bell's *felonies* were eliminated – they are now *misdemeanors*, prospectively, retroactively, and "for all purposes," including instant purposes. Cal. Penal Code § 1170.18(k).

The government does not dispute that Mr. Bell's *Johnson* argument raises a constitutional claim. *See* BIO at 7; Sup. Ct. R. 15.2. An unlawful sentencing enhancement such as Mr. Bell's violates due process. *See Hicks*, 447 U.S. at 345-47; *Gardner v. Florida*, 430 U.S. 349, 358 (1977); *United States v. Tucker*, 404 U.S. 443, 447-49 (1972) (reversing a sentence based in part on the defendant's prior criminal history after discovering certain prior convictions were invalid); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948) (finding due process violation and ordering resentencing where court had relied in part on invalid prior convictions at sentencing). Requiring Mr. Bell to keep serving his unlawful sentence denies "his constitutional right to be deprived of liberty as a punishment for criminal conduct only to the extent authorized by Congress." *Whalen v. United States*, 445 U.S. 684, 690 (1980).

Mr. Bell's sentence also implicates the Eighth Amendment. *See* Pet. at 4-5.[1] A mandatory life sentence imposed under a recidivist sentencing law has never been upheld against an Eighth Amendment challenge when its predicate offenses are all misdemeanors. *Cf. Ewing v. California*, 538 U.S. 11, 29 (2003) ("In weighing the gravity of [defendant's] offense

[1] The government does not dispute – or even address – the Eighth Amendment problem with Mr. Bell's sentence. *See* Sup. Ct. R. 15.2.

[under the Eighth Amendment] . . . we must place on the scales . . . his long history of felony recidivism.”).

B. Mr. Bell’s Constitutional Claim Is Fairly Included In The Question Presented.

Mr. Bell’s Petition responds directly to the Tenth Circuit’s reasoning and holding. The Tenth Circuit intermixed the statutory and constitutional issues. Its brief opinion denying Mr. Bell a COA turned on whether Mr. Bell successfully raised a *Johnson* claim. Pet. App. at 4. The panel correctly recognized that Mr. Bell contended that his illegal sentence violated “his constitutional rights to Due Process and Equal Protection.” Pet. App. at 3. It also correctly understood that the constitutional question hinged on a statutory interpretation of Section 841. Pet. App. at 3. The appellate court found Mr. Bell’s *Johnson* argument “unavailing.” Pet. App. at 4. Once it concluded that *Johnson* did not apply, it necessarily found that Mr. Bell “failed to demonstrate the violation of a constitutional right” and, accordingly, declined to issue a COA. *Id.*

The question of whether the court of appeals erred in denying Mr. Bell a COA on his *Johnson* claim is “fairly included” within Mr. Bell’s Question Presented. Sup. Ct. R. 14.1(a); *see also Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (discussing the purpose of Rule 14). Mr. Bell’s Question Presented is the same *Johnson* issue on which the appellate court’s decision rested. Mr. Bell asked, “Is a federal recidivist sentence enhancement predicated on prior state convictions under 21 U.S.C. § 841(b)(1)(A) undermined when the state convictions are retroactively reduced by subsequent state action?" Pet. at i. The appellate court answered that question "no." For that reason, it found no constitutional issue nor justification for issuing a COA. Mr. Bell's Question Presented squarely addresses that error.

Finally, to the degree that the question of whether a COA should have issued is separable from the merits of Mr. Bell's *Johnson* claim, Mr. Bell has no opposition to granting certiorari on the former question. The Tenth Circuit's position that Mr. Bell's illegal sentence does not pose a constitutional question only strengthens Mr. Bell's petition for writ of certiorari as there is a square split on whether a COA should issue for the specific illegal sentence at issue in this case, *compare* Pet. App. at 3-4 *with United States v. Spearman*, No. 16-55177, Dkt. 4 (9th Cir. Feb. 11, 2016) (accepting district court grant of certificate of appealability in Proposition 47 redesignation case).

The government has acknowledged elsewhere that a COA should issue over an illegal sentencing enhancement. In *Hohn v. United States*, 524 U.S. 236 (1998), Mr. Hohn contended that he was illegally subjected to the sentencing enhancement using or carrying a gun during and in relation to a drug trafficking offense, 18 U.S.C. § 924(c)(1), in violation of Due Process. *Hohn*, 524 U.S. at 238-39. The Court of Appeals denied a certificate of appealability, reasoning that Hohn claimed only a statutory violation, not a constitutional issue. *Id.* at 240. After the Supreme Court granted certiorari, however, "[t]he Government now found itself in agreement with Hohn, saying his claim was, in fact, constitutional in nature." *Id.*; *id.* at 253 (vacating and remanding "[i]n light of the position asserted by Solicitor General in the brief for the United States"). Mr. Bell's argument that he is subject to an illegal sentencing enhancement likewise is "constitutional in nature." *Id.*

II. MR. BELL'S CLAIMS ARE MERITORIOUS.

The government treats the reclassification of Mr. Bell's prior felonies as misdemeanors as if California merely relabeled certain convictions as misdemeanors, to no real legal effect. BIO at 8-10. That is not what happened. California law makes clear that reclassified offenses "shall be considered misdemeanors for all purposes." Cal. Penal Code § 1170.18(k). Refusing to acknowledge California's criminal law and choice of sanctions, as the government would have this Court do, is inconsistent with the very precedent on which the government relies and disrespects comity.

First, the government ignores the transformative and retroactive aspect of Proposition 47 by focusing on the "historical fact" that Mr. Bell had suffered multiple prior convictions for "felony drug offense[s]" that had "become final" at the time of his sentencing under Section 841. BIO at 8 (quoting *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 115 (1983) and 21 U.S.C. § 841(b)(1)(A)). The government argues that California cannot "rewrite history." BIO at 8-9. But of course even the government concedes, as it must, that history can indeed be rewritten for the purposes of recidivist sentences under Section 841 – when, for example, a prior conviction is vacated or reversed. BIO at 11. "[T]he result is 'to nullify that conviction' and thus to remove it from 'the literal language of the statute'. . . ." *Id.* (quoting *Dickerson*, 460 U.S. at 111). That is exactly what happened here. Bell successfully petitioned a California court to recall his prior felony convictions and remove them from "the literal language of the statute." Acknowledging elimination of a *felony* is no more rewriting history than acknowledging vacatur of a *conviction*.

Second, the government's reliance on *Burgess v. United States*, 553 U.S. 124 (2008), is misplaced. *See* BIO at 9. To the limited degree that *Burgess* is relevant, it supports Mr. Bell. *Burgess* defines a felony for federal purposes as any conviction "punishable by imprisonment for more than one year . . . ", regardless of how a state labels the conviction. *Burgess*, 553 U.S. at 129, 134.

The case says nothing about retroactivity. Rather, it underscores the dependence of federal sentencing enhancements on state sentencing regimes. In redesignating the Proposition 47 convictions as misdemeanors, and capping punishment at 364 days, California fundamentally changed the legal effect of the redesignated offenses in precisely the way *Burgess* – and the text of § 841 – require federal courts to defer to. Cal. Penal Code §§ 18.5, 1170.18(k).

Third, the government claims that *McNeill* "strongly supports the conclusion" that Mr. Bell cannot vacate his recidivist sentencing enhancement. BIO at 10. But *McNeill* expressly reserved the very issue presented here. *McNeill*, 563 U.S. 816, 825 n.1. In fact, the only position referenced in *McNeill* was the one the government advanced at the time – the same position that Mr. Bell now advocates. *McNeill*, 563 U.S. at 825 n.1. The government argued:

> 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. for the United States, *McNeill*, 2011 WL 1294503 at *18 n.5; *see also Johnson*, 544 U.S. at 302-03 ("The Government shares Johnson's preliminary assumption that if he filed his § 2255 motion in time, he is entitled to federal resentencing now that the State has vacated one of the judgments supporting his enhanced sentence."). The government now claims that Mr. Bell's reliance on the government's position in *McNeill* is "misplaced" – that perhaps relief would be available if Mr. Bell were still incarcerated for his state sentence.

BIO at 9, 10 & n.3. But the government made no such caveats in its original briefing nor did this Court.

Finally, state law flatly contradicts the government's claim that expungement and similar mechanisms that cannot support a habeas motion are "a more drastic change" than reclassification. *See* BIO at 12 (citing *United States v. Diaz*, 838 F.3d 968, 974 (9th Cir. 2016)). Proposition 47 enacted a wholesale restructuring and revision of the California criminal code, made retroactive. This comprehensive reclassification of a felony to misdemeanor is nothing like the superficial relief afforded by expungement. *See, e.g.*, *People v. Tidwell*, 246 Cal. App. 4th 212, 219-20 (2016). For example, Proposition 47 redesignations are misdemeanors "for all purposes," whereas California law expressly provides that expunged convictions "have the same effect" on recidivist sentencing enhancements as non-expunged convictions. *Compare* Cal. Penal Code § 1203.4(a)(1) (enhancements); *id.* (licensure); *id.* at § 1203.49(a)(3) (public office) *with People v. Abdallah*, 246 Cal. App. 4th 736, 740, 746 (2016) (dismissing sentencing enhancement predicated on felony redesignated as misdemeanor); *People v. Khamvongsa*, 8 Cal. App. 5th 1239, 1244 (2017) (allowing redesignated misdemeanor to be dismissed under statute that does not apply to felonies because "for all purposes" language "applies to all such [collateral] consequences" except firearms). Likewise, Proposition 47 redesignations are mandatory, reflecting California's fundamental reclassification of criminal punishment, whereas expungements are small rewards for good behavior – "a matter of grace." *Compare* Cal. Penal Code §§ 1170(f), (g) *with id.* § 1203.4(a)(1); *see United States v. Dyke*, 718 F.3d 1282, 1283 (10th Cir. 2013).

III. THE CIRCUITS ARE SPLIT.

Mr. Bell's claim reveals a clean split between the Ninth and Tenth Circuits, on the one hand, and the Eleventh Circuit, on the other. *See* Pet. at 15-18.

Eleventh Circuit case law is consistent with Petitioner's position. A prisoner can "succeed on the merits of his claim only if the [state] sentencing reductions apply retroactively." *Cortes-Morales v. Hastings*, 827 F.3d 1009, 1014 (11th Cir. 2016); *see also* Pet. at 16-18 (New York district court cases). The government counters that this statement outlines only a "necessary prerequisite for obtaining relief," not necessarily a "sufficient ground" for relief. BIO at 13. The government cites no authority for its vague claim, nor does *Cortes-Morales* make any such assertion.

By contrast, the Tenth Circuit rejected Mr. Bell's claim for the reasons discussed above. *Supra* at 2, 5; Pet. App. at 1. And the Ninth Circuit likewise rejected the same claim in *United States v. Diaz*, reasoning from the erroneous premise, discussed *supra* at 10-11, that expungement is "a more drastic change" than reclassification under California law. *Diaz*, 838 F.3d at 974.

IV. THERE ARE NO OTHER VEHICLE PROBLEMS.

The government also argues that this case presents a "potential jurisdictional obstacle," in that Mr. Bell's Section 2255 motion may be an unauthorized "second or successive" motion. BIO at 14-15. This Court has previously rejected that argument. *See Magwood v. Patterson*, 561 U.S. 320, 332 (2010) (recognizing exception to "second or successive" requirement when claim "would have been unripe had the petitioner presented it in his first application"); *Johnson*, 544 U.S. at 305 (finding claim not ripe until state conviction vacated); *In re Winship*, 717 F.3d 1108, 1110-11 (10th Cir. 2013) (collecting cases). If in fact the government now takes the opposite position, then that is further reason to grant certiorari. But it is not a vehicle problem.

The government also argues that the fact that the decision below is nonprecedential further counsels against granting certiorari. BIO at 14. The government cites to no legal authority in support of that position, and Mr. Bell can find none. To the contrary, this Court routinely grants certiorari on nonprecedential decisions, *see, e.g.*, *Descamps v. United States*, 570 U.S. 254, 260 (2013), including decisions denying COAs, *see*, *e.g.*, *Buck v. Davis*, 865 U.S. 215 (2017).

CONCLUSION

For the foregoing reasons, Mr. Bell's petition for writ of certiorari should be granted.

Dated: February 20, 2018

Respectfully submitted,

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