

No. 17-7796

IN THE SUPREME COURT OF THE UNITED STATES

MARCO D. DUNCAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to vacatur of his sentence under 18 U.S.C. 2255 on the ground that his "prior conviction for a felony drug offense," 21 U.S.C. 841(b)(1)(A), was reclassified as a state-law misdemeanor after his federal sentencing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. K1-K3) is not published in the Federal Reporter but is reprinted at 704 Fed. Appx. 914. The opinion of the district court (Pet. App. F1-F4) is not published in the Federal Supplement but is available at 2015 WL 6391159.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 2017. The petition for a writ of certiorari was filed on February 13, 2018. 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 Northern District of Florida, petitioner was convicted of conspiracy to distribute and to possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(ii) & (iii), and 846 (2000). Pet. App. F1. The district court sentenced petitioner to life imprisonment, the court of appeals affirmed, and this Court denied a petition for a writ of certiorari. Ibid.; see 546 U.S. 940 (No. 05-5467). The district court denied petitioner's first motion for post-conviction relief under 28 U.S.C. 2255. Pet. App. F1. Petitioner filed a second motion under 28 U.S.C. 2255, which the district court dismissed. Id. at F1, F4. The court of appeals affirmed. Id. at K1-K3.

1. a. Petitioner helped to develop a drug-distribution network in Florida and supplied that network with cocaine and cocaine base. Presentence Investigation Report (PSR) ¶¶ 7-8, 16. Between 1999 and 2001, petitioner and a partner distributed approximately 30 kilograms of cocaine to network members in Florida. PSR ¶¶ 7, 18. A grand jury charged petitioner with conspiracy to distribute and to possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(ii) & (iii),

and 846 (2000). Pet. App. A1-A2. Petitioner proceeded to trial, and the jury found him guilty. Id. at F1.

b. The default penalty for a conspiracy to violate 21 U.S.C. 841(b) (1) (A) is a sentence of imprisonment for ten years to life. 21 U.S.C. 841(b) (1) (A); see 21 U.S.C. 846 (sentencing range for drug conspiracy same as for substantive offense). A defendant convicted under those provisions "after a prior conviction for a felony drug offense has become final," however, "shall be sentenced to a term of imprisonment" ranging from 20 years to life. 21 U.S.C. 841(b) (1) (A). A "felony drug offense" is "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country." 21 U.S.C. 802(44).

At the time of the federal offense at issue here, petitioner had a 1992 felony conviction for possession of cocaine base under California law. PSR ¶ 63; see Pet. App. B1. Because that "prior conviction for a felony drug offense ha[d] become final" before his federal sentencing, petitioner was subject to a minimum sentence of 20 years of imprisonment. 21 U.S.C. 841(b) (1) (A).

2. In preparation for sentencing, the Probation Office assigned petitioner a base offense level of 38 based on the quantity of drugs involved in his offense. See Addendum to PSR ¶¶ 136-137. It also recommended enhancements because petitioner routinely possessed a firearm, was an organizer or leader of the

criminal activity, and obstructed justice. Id. ¶¶ 137, 139, 143-144. Those calculations yielded a total offense level of 46, which corresponded to a then-mandatory Sentencing Guidelines range of life imprisonment regardless of petitioner's criminal history category. Id. ¶ 54; see Sentencing Guidelines Ch. 5, Pt. A (2001).¹

At sentencing, the district court found that petitioner's 1992 California drug conviction was valid, overruled petitioner's objections to the Probation Office's calculations, and imposed the then-mandatory Sentencing Guidelines sentence of life imprisonment. Pet. App. D23-D36. The court did not suggest that the statutory minimum sentence of 20 years of imprisonment played any role in its decision to impose a sentence of life imprisonment.²

3. The court of appeals affirmed petitioner's conviction and sentence, rejecting a variety of challenges, including an argument that United States v. Booker, 543 U.S. 220 (2005), required vacatur of his sentence. See 400 F.3d 1297, 1300-1308. This Court denied a petition for a writ of certiorari. 546 U.S.

¹ The Probation Office determined that petitioner's criminal history category was IV; it did not recommend that petitioner be sentenced as a career offender. Addendum to PSR ¶ 117.

² At one point during the sentencing hearing, the district court stated that petitioner's total offense level was 42. Pet. App. D31. In its statement of reasons, however, the court made clear that it was adopting the Probation Office's factual findings and Sentencing Guidelines calculations and that petitioner's total offense level was 46. See Statement of Reasons 1.

940. In 2006, petitioner filed a motion for post-conviction relief under 28 U.S.C. 2255, which the district court denied. Pet. App. F1; see D. Ct. Doc. 268 (Oct. 12, 2006); D. Ct. Doc. 285 (Sept. 17, 2007).

4. a. In 2014, California voters enacted Proposition 47, Cal. Penal Code § 1170.18 (West Supp. 2018). Among other changes to state law, Proposition 47 prospectively reclassifies certain drug felonies as misdemeanors and authorizes offenders serving sentences for such felonies to petition for a “recall of sentence” and “request resentencing” under the new misdemeanor penalties. Id. § 1170.18(a). A “person who has completed his or her sentence for a” felony subsequently reclassified as a misdemeanor may “file an application * * * to have the felony conviction or convictions designated as misdemeanors.” Id. § 1170.18(f). A “felony conviction that is recalled and resentenced” or “designated as a misdemeanor * * * 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).

b. Petitioner successfully petitioned a California court to reclassify his prior felony conviction as a misdemeanor. Pet. App. E6. He then filed a second motion for relief under 28 U.S.C. 2255

in federal district court, arguing that his California conviction no longer qualified as a "prior conviction for a felony drug offense" under Section 841(b)(1)(A) and that he was accordingly no longer subject to a statutory minimum sentence of 20 years of imprisonment under that provision. Pet. App. E1-E5, F2.

The district court dismissed petitioner's motion. Pet. App. F4. Relying on the Eleventh Circuit's decision in Spencer v. United States, 773 F.3d 1132 (2014) (en banc), cert. denied, 135 S. Ct. 2836 (2015), the court explained that a Section 2255 movant attacking his sentence based on a non-constitutional error can obtain relief only if "the claimed error constitute[s] 'a fundamental defect which inherently results in a complete miscarriage of justice.'" Pet. App. F3 (quoting Spencer, 773 F.3d at 1138). "An error in applying a sentencing enhancement," the court continued, "is not 'a fundamental defect which inherently results in a complete miscarriage of justice' unless the petitioner can establish that he is 'either actually innocent of his crime or that a prior conviction used to enhance his sentence has been vacated.'" Ibid. (quoting Spencer, 773 F.3d at 1139).

The district court found no "suggestion that [petitioner] was factually innocent" and explained that his California drug conviction "has not been vacated," but "just reclassified." Pet. App. F4. The court added that because petitioner's life sentence "does not exceed the statutory maximum even in the absence of the

challenged enhancement," petitioner could not "show a 'fundamental defect which inherently results in a complete miscarriage of justice.'" Ibid. (citation omitted).

4. The court of appeals affirmed. Pet. App. K1-K3. The court stated that "a district court does not have the authority to review an alleged sentencing error under § 2255 unless the error 'constituted a fundamental defect which inherently results in a complete miscarriage of justice.'" Id. at K2 (quoting United States v. Addonizio, 442 U.S. 178, 186 (1979)). To satisfy that standard, the court explained, a prisoner must "show either 'actual innocence of his crime or the vacatur of a prior conviction.'" Id. at K2-K3 (quoting Spencer, 773 F.3d at 1139). The court determined that petitioner had not made either showing. Id. at K3. The court further determined that petitioner's life sentence "'was and is lawful,' both before and after California reclassified his offense," because "the statutory maximum at all times remained life imprisonment." Ibid. (quoting Spencer, 773 F.3d at 1144).

ARGUMENT

Petitioner contends (Pet. 11-18) that he is entitled to relief from his life sentence under 28 U.S.C. 2255 on the theory that he is no longer subject to a statutory minimum sentence of 20 years of imprisonment under 21 U.S.C. 841(b)(1)(A). That contention lacks merit. Although California reclassified petitioner's conviction as a misdemeanor after his federal sentencing,

petitioner nevertheless committed his federal offense “after a prior conviction for a felony drug offense has become final,” which required a sentence of at least 20 years of imprisonment under 21 U.S.C. 841(b)(1)(A). No conflict exists among the courts of appeals on the question presented, and this Court has recently declined to review the issue. In any event, petitioner’s case is an unsuitable vehicle for review of the question presented because the life sentence imposed by the district court was lawful and consistent with the Sentencing Guidelines regardless of how his California conviction is treated. Further review is unwarranted.

1. The court of appeals correctly rejected petitioner’s claim that the reclassification of his prior state-law felony conviction as a misdemeanor conviction entitles him to relief from his life sentence by lowering the statutory minimum sentence from 20 years to ten years of imprisonment. Pet. App. K1-K3; see United States v. Diaz, 838 F.3d 968 (9th Cir. 2016) (rejecting similar claim regarding California Proposition 47), cert. denied, 137 S. Ct. 840 (2017); United States v. Bell, 689 Fed. Appx. 598 (10th Cir. 2017) (same), cert. denied, 138 S. Ct. 1282 (2018).

a. A district court must impose a sentence of at least 20 years of imprisonment under 21 U.S.C. 841(b)(1)(A) if the defendant committed his offense “after a prior conviction for a felony drug offense has become final.” As “a matter of plain statutory meaning,” that provision applies to petitioner. United States v.

Dyke, 718 F.3d 1282, 1292 (10th Cir.) (Gorsuch, J.), cert. denied, 571 U.S. 939 (2013). Petitioner committed his drug-conspiracy offense "after a prior conviction for a felony drug offense" -- his conviction for felony possession of cocaine base in California -- had "become final." 21 U.S.C. 841(b)(1)(A); see PSR ¶ 63. Petitioner thus does not dispute that he was subject to a 20-year statutory minimum sentence under 21 U.S.C. 841(b)(1)(A) at the time of his conviction. See Pet. 8, 11.

Petitioner contends (Pet. 11-18), however, that California's subsequent reclassification of his felony drug offense as a state-law misdemeanor entitles him to relief from his federal sentence. 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 committed his federal drug crime "after a prior conviction for a felony drug offense ha[d] become final" and is thus subject to a statutory minimum sentence of 20 years of imprisonment, 21 U.S.C. 841(b)(1)(A). Although a State may adjust its own criminal penalties prospectively or retroactively, "it [can]not rewrite history for the purposes of the administration of the federal criminal law." Diaz, 838 F.3d at 972 (brackets in original; citation omitted); accord Dyke, 718 F.3d at 1293 ("The question posed by § 841(b)(1)(A) is whether the defendant was previously convicted, not the particulars of how state law later might have, as a matter

of grace, permitted that conviction to be excused, satisfied, or otherwise set aside.").

This Court has explained that a "felony drug offense" is an offense "punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country," 21 U.S.C. 802(44), "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 his state sentence has been served, as the basis for challenging a federal term of imprisonment that was undisputedly lawful when it was imposed.

This Court's decision in McNeill v. United States, 563 U.S. 816 (2011), is instructive. There, the Court considered the meaning of "serious drug offense" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(A)(ii), which is defined in relevant part as a drug "offense under State law * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." McNeill was convicted of North Carolina drug offenses punishable by ten-year sentences at the time of his convictions for those offenses, but the State subsequently reduced the punishment. 563 U.S. at 818. At his federal sentencing, McNeill argued that the court should look to current state law in determining whether "a maximum term of imprisonment of ten years

or more is prescribed by law.” 18 U.S.C. 924(e)(2)(A)(ii). This Court rejected his argument, holding that the “plain text of [the] ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant’s previous drug offense at the time of his conviction for that offense.” 563 U.S. at 820. The Court explained that the statute “is concerned with convictions that have already occurred” and that the “only way to answer this backward-looking question is to consult the law that applied at the time of that conviction.” Ibid.

As petitioner notes (Pet. 13, 18), 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.*. But the approach in McNeill seriously undermines petitioner’s position. Like in McNeill, the subsequent modification of state law here does not alter the fact that petitioner’s federal sentence was imposed “after a prior conviction for a felony drug offense ha[d] become final.” 21 U.S.C. 841(b)(1)(A). Because petitioner was convicted “of the type of crime specified by the statute,” he is subject to the prescribed punishment. Dickerson, 460 U.S. at 110; accord Diaz, 838 F.3d at 974.

b. Petitioner observes (Pet. 15-16) that this Court has assumed that a federal prisoner may seek to vacate his sentence

under 28 U.S.C. 2255 if he has successfully challenged “the validity of a prior conviction supporting an enhanced federal sentence.” Johnson v. United States, 544 U.S. 295, 303 (2005). As the courts below explained, however, a successful challenge to the “validity” of a prior conviction, ibid., requires establishing that the conviction has been “vacated,” Pet. App. F4; see id. at K3; see also 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”); Bell, 689 Fed. Appx. at 599 (“Johnson concerns the right to reopen a federal sentence where a defendant successfully attacks a state conviction in state court, i.e., the conviction is vacated.”). That understanding follows from the statutory 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 conviction was not vacated; it was reclassified as a state-law misdemeanor. Pet. App. F4; see 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 that the crime will be treated as a misdemeanor retroactively for the purpose of other statutory schemes” under state law, let alone under federal law (which the State lacks the power to modify). Diaz, 838 F.3d at 974-975 (citing People v. Park, 299 P.3d 1263 (Cal. 2013)); see Bell, 689 Fed. Appx. at 599 (denying relief under similar circumstances because petitioner’s California conviction was not “vacated”); Pet. App. F3-F4.

At best, the reclassification of petitioner’s felony conviction as a misdemeanor might be considered analogous to a state’s expungement of his felony conviction. Cf. Diaz, 838 F.3d at 974 (referring to expungement as “a more drastic change” than reclassification). But as this Court has explained, “expunction does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty.” Dickerson, 460 U.S. at 115. Moreover, Congress “clearly knows * * * how to ensure that expunged convictions are disregarded in later judicial proceedings.” Dyke, 718 F.3d at 1292. And although Congress has required that result in some contexts, see, e.g., 18 U.S.C. 921(a)(20)(B) (“Any conviction which has been expunged, or set aside * * * shall not

be considered a conviction for purposes of this chapter.”), it has “made no similar effort” in Section 841, Dyke, 718 F.3d at 1292. Thus, the “courts of appeals that have considered this § 841 question * * * have counted prior felony drug convictions even where those convictions 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).

c. Petitioner does not identify any circuit conflict regarding the question presented, and none exists. To the contrary, the courts of appeals that have addressed the question have all rejected the contention advanced by petitioner. See Bell, 689 Fed. Appx. at 599; Diaz, 838 F.3d at 975. And this Court has denied petitions for a writ of certiorari presenting the question. See Bell v. United States, 138 S. Ct. 1282 (2018) (No. 17-678); Vasquez v. United States, 137 S. Ct. 840 (2017) (No. 16-7259). The same course is appropriate here.

2. Petitioner’s case is an unsuitable vehicle for review for two additional reasons.

First, petitioner would not be entitled to relief even if he were correct about the effect under federal law of California’s reclassification of his prior conviction. Although petitioner’s California conviction raised his statutory minimum sentence from ten to 20 years of imprisonment, petitioner received a life

sentence, which was the sentence indicated by the Sentencing Guidelines regardless of how his California conviction was treated. See Pet. App. D36. As the court of appeals thus recognized, and as petitioner acknowledges (Pet. 17), his sentence “‘was and is lawful,’ both before and after California reclassified his offense.” Pet. App. K3 (citation omitted). Petitioner’s assertion (Pet. 17) that his sentence was adversely affected because of a “label” resulting from the district court’s reliance on his California conviction thus lacks foundation.

Second, addressing the question presented would require the Court to resolve an antecedent jurisdictional issue. A federal prisoner may not file a “second or successive” motion for collateral relief without authorization from the court of appeals. 28 U.S.C. 2255(h); see 28 U.S.C. 2244(b)(3). The court below took the view that a “numerically second § 2255 motion” does not constitute a second or successive motion where the “state conviction used to enhance [a movant’s] federal sentence was subsequently vacated,” because such a motion is “based on a fact that did not exist when [the movant] filed his first § 2255 motion.” Pet. App. K2 (citing Stewart v. United States, 646 F.3d 856, 856 (11th Cir. 2011)). The court proceeded to affirm the dismissal of petitioner’s motion for the distinct reason that he failed to show “a fundamental defect which inherently results in a complete miscarriage of justice,” as that requirement has been

construed by the court's en banc precedent in Spencer -- a case that did not involve a numerically second motion. Pet. App. K2-K3 (citation omitted); see Spencer, 773 F.3d at 1144.

If this Court were to disagree with the court of appeals' basis for dismissing petitioner's Section 2255 motion, it would still have to address whether petitioner was required to obtain authorization from the court of appeals for his motion, which is a jurisdictional requirement. See Burton v. Stewart, 549 U.S. 147, 157 (2007) (per curiam); see, e.g., Triestman v. United States, 124 F.3d 361, 367 (2d Cir. 1997); see also Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (explaining that "courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party"). That potential jurisdictional obstacle further counsels against review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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