

No. 17-7796

IN THE SUPREME COURT OF THE UNITED STATES

MARCO D. DUNCAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

PETITIONER'S REPLY

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QUESTION PRESENTED

- I. Under 28 U.S.C. 2255(f)(4), does federal law permit resentencing where the petitioner is originally sentenced as a career offender, but the predicate state felony conviction is later legislatively and judicially re-designated to a misdemeanor conviction “for all purposes”?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Eleventh Circuit Court of Appeals include the United States of America and Petitioner Marco D. Duncan. There are no parties to the proceedings other than those named in the petition.

TABLE OF CONTENTS

INDEX OF APPENDICES	4
TABLE OF AUTHORITIES	5
PETITION FOR WRIT OF CERTIORARI	6
OPINIONS BELOW	7
JURISDICTION.....	7
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	7
REPLY.....	8
I. Under 28 U.S.C. 2255(f)(4), does federal law permit resentencing where the petitioner is originally sentenced as a career offender, but the predicate state felony conviction is later legislatively and judicially re-designated to a misdemeanor conviction “for all purposes”?.....	8
A. “Historical Fact” of Conviction or Full Faith and Credit?	8
B. Otherwise “Legal Sentence” or “Sufficient, but Not Greater Than Necessary”?	10
C. Jurisdiction	11
CONCLUSION.....	12

INDEX OF APPENDICES

Indictment.....	A
Notice of Enhancement Information.....	B
Judgment	C
Sentencing Transcripts.....	D
Motion to Vacate, Set Aside, or Correct Sentence.....	E
Order	F
Notice of Appeal.....	G
Initial Brief	H
Answer Brief	I
Reply Brief	J
Opinion.....	K

TABLE OF AUTHORITIES

28 U.S.C. § 841 (2018)	passim
28 U.S.C. § 1738 (2018)	9
28 U.S.C. § 2255 (2018)	passim
Cal. Penal Code § 1170.18 (2018).....	passim
<u>Buford v. United States</u> , 532 U.S. 59 (2001).....	10
<u>Davis v. United States</u> , 417 U.S. 333 (1979)	10, 11
<u>Dickerson v. New Banner Inst., Inc.</u> , 460 U.S. 103 (1983).....	9
<u>Johnson v. United States</u> , 544 U.S. 295 (2005)	11
<u>McNeill v. United States</u> , 563 U.S. 816 (2011)	12
<u>Panetti v. Quarterman</u> , 551 U.S. 930, 942-47 (2007).....	12
<u>People v. Park</u> , 200 P.3d 1263 (Cal. 2013)	9
<u>Spencer v. United States</u> , 773 F.3d 1132 (11th Cir. 2014).....	10
<u>United States v. Addonizio</u> , 442 U.S. 178 (1979).....	10
<u>United States v. Booker</u> , 543 U.S. 220 (2005)	11

PETITION FOR WRIT OF CERTIORARI

Petitioner, MARCO D. DUNCAN, respectfully petitions this Court for a writ of certiorari to review the *Opinion* rendered by the Eleventh Circuit Court of Appeals on November 27, 2017. See Appendix K.

OPINIONS BELOW

The *Opinion* rendered by the Eleventh Circuit Court of Appeal is attached as Appendix K.

JURISDICTION

The order of the Eleventh Circuit Court of Appeal became final on November 27, 2017. (App.K) This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court’s jurisdiction under 28 U.S.C. § 1254(1) (2018).

Specifically, Petitioner invokes this Court’s jurisdiction under Rule 10(c), because Eleventh Circuit decided a question of federal law which has not been—and should be—settled by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

“A prisoner in custody under sentence of a court established by Act of Congress claiming... that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.” 28 U.S.C. § 2255(a).

“A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of— the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2255(f)(4).

REPLY

- I. Under 28 U.S.C. 2255(f)(4), does federal law permit resentencing where the petitioner is originally sentenced as a career offender, but the predicate state felony conviction is later legislatively and judicially re-designated to a misdemeanor conviction “for all purposes”?

The question presented in the petition is whether Appellant, MARCO DUNCAN, may use a 28 U.S.C. § 2255(f)(4) motion to challenge a sentence that was based on a recidivist enhancement, when the predicate state felony conviction was later “redesignated” by legislative and judicial order to a misdemeanor conviction. See Cal. Penal Code § 1170.18(k) (“Proposition 47”). In its *Response*, the government advances three arguments: (A) Mr. Duncan cannot change the “historical fact” that, at the time of sentencing, he had actually been previously convicted of a state felony drug offense and then committed a federal drug crime; (B) review is unnecessary because Mr. Duncan’s current life sentence is permissible (legal) with or without the application of the recidivist enhancement; and (C) review of the case would require this Court to address the “antecedent jurisdictional issue” that Mr. Duncan did not seek authorization from the court of appeals before filing a “second or successive” motion for collateral relief.

A. “Historical Fact” of Conviction or Full Faith and Credit?

In its *Response*, the government first argues that “whatever effect Proposition 47 had on state law”, it does not change the “historical fact” that Mr. Duncan committed a federal drug crime “after a prior conviction for a felony drug offense ha[d]

become final”. See Response p.9 (quoting Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 115 (1983) and 21 U.S.C. 841(b)(1)(A)). But at the same time, the federal courts are required to give “full faith and credit” to the “records and judicial proceedings of any court of any such State”. See 28 U.S.C. 1738 (2018).

With this argument, the government has identified precisely why this Court should grant the writ of certiorari and decide this important issue where state and federal law intersect: Should the federal courts look only at the historical fact that, at the time of sentencing, an inmate had actually been previously convicted of a felony drug offense and then committed a federal drug crime? Or should the federal courts give full faith and credit to a state legislative and judicial determination that the same prior felony drug conviction never happened?¹ Stated differently, should the “historical fact” of the prior state felony conviction used in a federal sentencing proceeding yield to the equally “historical fact” that the people of the State of California exercised their voting right to determine what conduct constitutes felonies

¹ The California court rendered an order reducing Mr. Duncan’s conviction from a felony to a misdemeanor as follows:

The conviction is hereby redesignated a misdemeanor for all purposes, except that such redesignation shall not permit Petitioner to own, possess, or have in his custody or control any firearm...

(App.E p.6); see also People v. Park, 200 P.3d 1263, 1270 (Cal. 2013) (holding that once a conviction has been reduced to a misdemeanor, the conviction can no longer be used as a prior felony to enhance a sentence).

and misdemeanors under their own state law?

B. Otherwise “Legal Sentence” or “Sufficient, but Not Greater Than Necessary”?

Second, the government argues that this case is unsuitable for review because Mr. Duncan’s current sentence of life imprisonment is permissible (or legal) with or without the application of the recidivist enhancement at issue. See Response p.14-15. In other words, the same sentence could be imposed at resentencing as was imposed at the original sentencing proceeding. But this ignores the realities of the impact that a recidivist designation placed upon Mr. Duncan and other offenders, branding them as “subject to particularly severe punishment”. See Buford v. United States, 532 U.S. 59, 60 (2001). While this Court has held that an *unlawful* sentence is *sufficient* to satisfy the complete miscarriage of justice standard, see Davis v. United States, 417 U.S. 333, 346-47 (1979), United States v. Addonizio, 442 U.S. 178, 186-87 (1979), this Court has never said that a finding of *unlawfulness* was *necessary* to constitute a complete miscarriage of justice.

Moreover, the government’s position means that simply because a sentence is “lawful” prohibits a determination on collateral review that a complete miscarriage of justice has occurred. See Spencer v. United States, 773 So. 2d 1132, 1145 (11th Cir. 2014) (Wilson, J., dissenting). But the very basis of federal sentencing is to impose a sentence “sufficient, **but not greater than necessary**...” See 18 U.S.C. § 3553(a) (2018). (Emphasis added.) So when a punishment exceeds what is necessary

to achieve the purposes of sentencing, but is nonetheless within the Guidelines, does such not constitute a complete miscarriage of justice? Does a complete deprivation of freedom caused by serving a longer-than-deserved prison sentence result in prejudice sufficient to rise to the level of a complete miscarriage of justice?²

And as the government points out, it is also worth noting that Mr. Duncan was sentenced pre-Booker³ in 2003 when the Sentencing Guidelines *mandated* a sentence of life imprisonment based on the offense level of 46. If resentenced today without the recidivist enhancement, Mr. Duncan would not face a *mandatory* sentence of life imprisonment pursuant to Booker.

C. Jurisdiction

Finally, the government argues that review of this case would require this Court to address the “antecedent jurisdictional issue” that Mr. Duncan did not seek authorization from the court of appeals before filing this “second or successive” motion for collateral relief. See Response p. 15-16. Although the government did not argue this at the district or circuit court levels, this Court has already decided the issue when it held that a numerically second habeas corpus petition is not governed by the

² See Davis, 417 U.S. at 346 (recognizing that an error resulting in a sentence that punished the petitioner for “an act that the law does not make criminal” was sufficient to satisfy the complete miscarriage of justice standard); Johnson v. United States, 544 U.S. 295, 303 (2005) (recognizing a basis for relief when a sentence is erroneously enhanced under the mandatory guidelines).

³ United States v. Booker, 543 U.S. 220 (2005).

strictures of Section 2244(b)(2) where the claim was not ripe at the time of the initial petition. See Panetti v. Quarterman, 551 U.S. 930, 942-47 (2007). The California legislative and judicial redesignation from felony to misdemeanor of Mr. Duncan's prior conviction occurred in 2014: this fact was not available to him at the time of his original Section 2255 petition in 2006 and thus was not ripe for review. Under Panetti, Mr. Duncan's numerically second petition for collateral review was not governed by the strictures of Section 2244(b)(2).

CONCLUSION

This case presents an important and emerging area where state and federal law intersect. The freedom of Mr. Duncan and countless others affected by Proposition 47 is at stake. Given the discrepancies amongst state law, federal law, the ruling below, and this Court's existing jurisprudence, Mr. Duncan calls upon this Court to settle this important question of federal law: whether federal courts should consider the effect of state action upon recidivist enhancement statutes where "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." See McNeill v. United States, 563 U.S. 816, 825 (2011).

Accordingly, Mr. Duncan requests that this Court grant a writ of certiorari and consider this important question of federal law.



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