No. 17-678

In the Supreme Court of the United States

HAROLD EUGENE BELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying a certificate of appealability on petitioner's postconviction claim that he is no longer subject to a mandatory sentence of life imprisonment under 21 U.S.C. 841(b)(1)(A) (1994) because his "prior convictions for a felony drug offense" were reclassified as state-law misdemeanors after his federal sentencing.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is reprinted at 689 Fed. Appx. 598. The order of the district court (Pet. App. 6-11) is not published in the Federal Supplement but is available at 2016 WL 6407427.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2017. A petition for rehearing was denied on July 6, 2017 (Pet. App. 12). The petition for a writ of certiorari was filed on October 4, 2017. 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 Western District of Oklahoma, petitioner was convicted of conspiracy to distribute cocaine powder and cocaine base, in violation of 21 U.S.C. 841(a)(1)

(1994)[1] and 21 U.S.C. 846. He was sentenced to life imprisonment, to be followed by ten years of supervised release. C.A. App. 9. The court of appeals affirmed. 154 F.3d 1205. Petitioner filed several postconviction motions for relief, each of which was denied. Pet. 8-11. In 2016, petitioner again sought relief from his sentence under 28 U.S.C. 2255. The district court denied his motion and denied a certificate of appealability (COA). Pet. App. 6-11. The court of appeals likewise denied a COA and dismissed the appeal. *Id.* at 1-4.

1. a. In 1995, federal agents learned that petitioner and other members of the Acacia Block Crips gang were transporting cocaine from Compton, California, to Oklahoma City, Oklahoma, where petitioner cooked the cocaine into crack, bagged it for distribution, and sold it repeatedly to members of the community. See Presentence Investigation Report (PSR) ¶¶ 5, 11-12; 154 F.3d at 1206-1207. A grand jury in the Western District of Oklahoma indicted petitioner and others for conspiracy to distribute cocaine powder and cocaine base, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner proceeded to trial, and the jury found him guilty. PSR ¶ 2.

b. Under 21 U.S.C. 841(b)(1)(A), a defendant who commits a violation of Section 841 involving a certain quantity of drugs "after two or more prior convictions for a felony drug offense have become final * * * shall be sentenced to a mandatory term of life imprisonment." 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).

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[1] All citations to 21 U.S.C. 841 and 802(44) in the context of petitioner's case are to the 1994 version of the statute, which was in force at the time of petitioner's federal offense.

At the time of his federal drug offense, petitioner had three prior felony convictions for possession of cocaine under California law. PSR ¶¶ 31-32, 34. The government filed an information establishing those prior felony convictions under 21 U.S.C. 851, which triggered Section 841's mandatory sentence of life imprisonment, PSR ¶ 75. The district court imposed the life sentence, and the court of appeals affirmed. 154 F.3d at 1212.

2. Over the next 15 years, petitioner "launched at least seven collateral attacks" on his federal conviction and sentence. 526 Fed. Appx. 880, 880 (Gorsuch, J.), cert. denied, 134 S. Ct. 265 (2013). Petitioner first moved for acquittal or a new trial in 1999. The district court construed that motion as a request for relief under 28 U.S.C. 2255. 526 Fed. Appx. at 880. The court denied the motion and denied a COA, as did the court of appeals. 194 F.3d 1321, 1999 WL 713320, at *1 (Tbl.). Petitioner's subsequent collateral attacks likewise failed. See, *e.g.*, 385 Fed. Appx. 835, cert. denied, 562 U.S. 584 (2010); 526 Fed. Appx. at 880.

3. a. In 2014, California voters enacted Proposition 47, Cal. Penal Code § 1170.18 (West Supp. 2018). See Pet. App. 2; *United States* v. *Diaz*, 838 F.3d 968, 971 (9th Cir. 2016), cert. denied, 137 S. Ct. 840 (2017). 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. Cal. Penal Code § 1170.18(a) (West Supp. 2018). In addition, a "person who has completed his or her sentence for a" felony subsequently reclassified as a misdemeanor is authorized to "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 firearms 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. In 2016, petitioner successfully petitioned a California court to "reclassify his three prior felony convictions as misdemeanors." Pet. App. 2.[2] He then filed a motion for relief under Section 2255, arguing that his California drug convictions no longer qualified as "prior convictions for a felony drug offense" under Section 841(b)(1)(A) and that he was accordingly no longer subject to a mandatory life sentence under that provision. *Id.* at 8 (citation omitted).

The district court denied petitioner's motion. Pet. App. 6-11. As a threshold matter, the court stated that the government did "not disagree with [petitioner's] position that his [m]otion is not a second or successive motion, subject to the requirements of [28 U.S.C.] 2255(h), because the factual basis for relief did not previously exist." *Id.* at 7 (citing *In re Weathersby*, 717 F.3d 1108, 1111 (10th Cir. 2013)); see 28 U.S.C. 2255(h) (requiring

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[2] Petitioner applied for relief under California Penal Code § 1170.18(f) (West Supp. 2018), which applies to a "person who has completed his or her sentence for a" felony subsequently reclassified as a misdemeanor. C.A. App. 47, 51, 56. The state court appeared to grant relief under California Penal Code § 1170.18(a) (West Supp. 2018), which applies to a defendant "serving a sentence" for a felony conviction subsequently reclassified as a misdemeanor. C.A. App. 50, 55, 60. Neither petitioner nor the courts below has suggested that anything turns on that distinction.

that a "second or successive motion must be certified" by the court of appeals). The court also stated that the government did not "disagree with [petitioner's] assertion that the [m]otion was timely filed within one year after the claim arose." Pet. App. 7 (citing 28 U.S.C. 2255(f)(4)). "Based on the government's implicit concession that these procedural prerequisites are met," the court proceeded "directly to consideration of the merits of" petitioner's motion. *Ibid.*

On the merits, the district court explained that Section 841 requires a mandatory life sentence if the defendant committed a federal drug offense "after two or more prior convictions for a felony drug offense have become final." Pet. App. 8 (quoting 21 U.S.C. 841(b)(1)(A)). The court observed that California's reclassification of petitioner's offenses did not "alter the fact that his federal sentence was imposed * * * based on his commission of a federal drug offense after three felony drug convictions had become final," and it accordingly reasoned that "the plain language" of Section 841 required denying petitioner's motion. *Id.* at 8, 10. The court noted that *Diaz*, the "authoritative decision by the federal court of appeals for the judicial circuit that encompasses California," had reached the same conclusion on a claim petitioner acknowledged was "indistinguishable" from his own. *Id.* at 9, 10 n.1.

The district court denied a COA. Pet. App. 10-11. The court explained that a COA requires "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2), but that petitioner's claim "did not involve the denial of a constitutional right." Pet. App. 11. Rather, petitioner's claim involved "the construction and application of" a statute, 21 U.S.C. 841(b)(1)(A). Pet. App. 11 (citing *United States* v. *McGee*, 625 Fed.

Appx. 847, 851 (10th Cir. 2015) (denying a COA in another challenge to a federal sentence based on Proposition 47)).

4. The court of appeals denied a COA in an unpublished order. Pet. App. 1-4. Like the district court, the court of appeals explained that a COA requires "'a substantial showing of the denial of a *constitutional* right,'" but that petitioner's "argument is a statutory one." *Id.* at 3 (quoting 28 U.S.C. 2253(c)(2)). To the extent petitioner claimed a constitutional right to resentencing under *Johnson* v. *United States*, 544 U.S. 295 (2005), the court found that argument "unavailing" because *Johnson* involved the vacatur of a state conviction that served as a predicate for a federal sentence, not the mere reclassification of an offense. Pet. App. 4.

ARGUMENT

Petitioner contends (Pet. 12-24) that he is no longer subject to a mandatory life sentence under 21 U.S.C. 841(b)(1)(A) because, long after his federal sentence became final, a state court reclassified his prior felony drug convictions as misdemeanors. Petitioner, however, identifies no error in the lower courts' denial of a COA on a claim they perceived to be purely statutory, and the district court's rejection of petitioner's claim on the merits was correct and does not conflict with any decision of this Court or any court of appeals. Indeed, the district court's conclusion accords with the determination of the only court of appeals to consider such a claim. The procedural posture of this case, moreover, makes it an unsuitable vehicle for review. The petition should be denied.

1. a. A federal prisoner seeking to appeal the denial of a Section 2255 motion must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, the prisoner must make

"a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2)—that is, a showing "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000).

The courts below concluded that petitioner cannot meet that standard because he has not asserted a constitutional claim. Pet. App. 2-3; see *id.* at 11. Rather, the courts below understood his claim as "a statutory one"—that he is no longer subject to a mandatory life sentence under Section 841(b)(1)(A) because his prior convictions for "felony drug offense[s]" were subsequently reclassified as state-law misdemeanors. *Id.* at 3; accord *United States* v. *McGee*, 625 Fed. Appx. 847, 851 (10th Cir. 2015) (denying a COA on identical claim).

Although a defendant's argument that he was wrongly subjected to a statutory sentencing enhancement may in some cases give rise to a constitutional claim, petitioner does not address the court of appeals' reasoning or attempt to establish that his claim satisfies the COA standard. He instead argues the merits of his statutory position while invoking his "constitutional rights to Due Process and Equal Protection" only in passing (Pet. 12). Even assuming that he would be entitled to reframe his claim in constitutional terms in this Court, federal courts "refuse to take cognizance of arguments that are made in passing without proper development." *Johnson* v. *Williams*, 568 U.S. 289, 299 (2013). The court of appeals' conclusion that petitioner failed make "a substantial showing of the denial of a constitutional right" accordingly does not warrant further review. Pet. App. 2-3 (quoting 28 U.S.C. 2253(c)(2)).

2. In any event, petitioner's claim lacks merit. See Pet. App. 7-10 (district court rejecting claim on the merits); *United States* v. *Diaz*, 838 F.3d 968 (9th Cir. 2016) (rejecting similar claim), cert. denied, 137 S. Ct. 840 (2017).

a. A district court is required to impose a mandatory life sentence under 21 U.S.C. 841(b)(1)(A) if the defendant committed his offense "after two or more prior convictions for a felony drug offense have 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, 134 S. Ct. 365 (2013). Petitioner here committed his drug-trafficking offense "after two or more prior convictions for a felony drug offense"—his three prior convictions for felony cocaine possession in California—had "become final." 21 U.S.C. 841(b)(1)(A); see PSR ¶¶ 31-32, 34. Petitioner thus acknowledges that his life "sentence was valid under 21 U.S.C. § 841(b)(1)(A) at the time of his conviction." Pet. 6; see Pet. 5, 14.

Petitioner contends (Pet. 12-18), however, that California's subsequent reclassification of his felony drug offenses as state-law misdemeanors 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 two or more prior convictions for a felony drug offense ha[d] become final" and is thus subject to a mandatory life sentence, 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 *re*classification, 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.*

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 a defendant whose state offense was reclassified while he was still serving his state sentence might be differently situated from petitioner, see *ibid.*; U.S. Br. at 18 n.5, *McNeill*, *supra* (No. 10-5258). But the approach in *McNeill* strongly supports the conclusion that California's reclassification of petitioner's felony convictions as state-law misdemeanors "does not alter the fact that his federal sentence was imposed * * * based on his commission of a federal drug offense after three felony drug convictions had become final." Pet. App. 10. 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.[3]

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[3] Petitioner's suggestion (Pet. 18-19) that the government "conceded" the question presented here in *McNeill* is misplaced. The government's brief in *McNeill* suggested that a defendant could "plausibly look to" a retroactively reduced state sentence in arguing for relief from an ACCA sentence but noted that "the Court need not address that issue." U.S. Br. at 18 n.5, *McNeill*, *supra* (No. 10-

b. Petitioner observes (Pet. 12, 19-21) 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 court of appeals explained, however, a successful challenge to the "validity" of a prior conviction, *ibid.*, requires establishing that the conviction has been "vacated," Pet. App. 4; 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

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5258); see Oral Arg. Tr., *McNeill*, *supra*, 21-24 (No. 10-5258). Petitioner here served his state sentences before his convictions were reclassified.

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)).

At best, the reclassification 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).

3. Petitioner errs in asserting (Pet. 15-18, 21-23) the existence of a circuit conflict on the question presented.

a. The only court of appeals decision that addresses the merits of a claim like petitioner's is *Diaz*, the "authoritative decision by the federal court of appeals for

the judicial circuit that encompasses California." Pet. App. 9. In *Diaz*, the Ninth Circuit squarely held that "California's Proposition 47, offering post-conviction relief by reclassifying certain past felony convictions as misdemeanors, does not undermine a prior conviction's felony-status for purposes of § 841." 838 F.3d at 975. Petitioner concedes that his claim is "indistinguishable" from the claim in *Diaz*, Pet. App. 10 n.1, which this Court declined to review, 137 S. Ct. 840.

b. Contrary to petitioner's contention (Pet. 15-16), neither the decision below nor the Ninth Circuit's decision in *Diaz* conflicts with *Cortes-Morales* v. *Hastings*, 827 F.3d 1009 (11th Cir. 2016) (per curiam), cert. denied, 137 S. Ct. 2186 (2017). There, the Eleventh Circuit rejected a prisoner's claim that he was entitled to habeas corpus relief 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. Relying the footnote in *McNeill*, the court stated that the prisoner could "succeed on the merits of his claim only if the New York sentencing reductions apply retroactively." *Id.* at 1014. The court concluded, however, that the New York laws were "not retroactive as to" the prisoner. *Id.* at 1015. Petitioner thus errs in reading the decision to hold that a federal prisoner "would have a valid challenge to his federal enhancement if he or she successfully challenged his or her prior state conviction." Pet. 16 (emphasis omitted). That situation was not at issue in the case, and the 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 asserts (Pet. 16-18) that the decision below conflicts with several unpublished district court decisions involving New York's drug laws: *United States* v. *Jackson*, No. 13-cr-142, 2013 WL 4744828 (S.D.N.Y. Sept. 4, 2013); *United States* v. *Calix*, No. 13-cr-582, 2014 WL 2084098 (S.D.N.Y. May 13, 2014); and *Saxon* v. *United States*, No. 12-cr-320, 2016 WL 3766388 (S.D.N.Y. July 8, 2016). As an initial matter, a district court decision cannot give rise to a conflict warranting this Court's review. See Sup. Ct. R. 10; cf. *Camreta* v. *Greene*, 563 U.S. 692, 709 n.7 (2011). Moreover, the district court decisions cited by petitioner are in tension with *Rivera* v. *United States*, 716 F.3d 685 (2d Cir. 2013), which held that New York's drug-reform law was not retroactive with respect to the prisoner at issue, and accordingly concluded that an ACCA enhancement applied because 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).

c. In any event, none of the decisions cited by petitioner directly conflicts with the unpublished court of appeals order below, which denied petitioner a COA and did not reach the merits of his claim. Pet. App. 4.

4. Finally, several aspects of this case's procedural posture make it an unsuitable vehicle for further review. As noted, the decision below is nonprecedential and addresses only the requirements for a COA. Moreover, the district court relied on "the government's implicit concession" in determining that petitioner's Section 2255 motion was not a "second or successive" motion requiring pre-filing authorization from the court of appeals. Pet. App. 7; see 28 U.S.C. 2244(b)(3), 2255(h).

The requirement to obtain court of appeals authorization for such a motion, however, is jurisdictional. *Burton* v. *Stewart*, 549 U.S. 147, 157 (2007); see, *e.g.*, *Triestman* v. *United States*, 124 F.3d 361, 367 (2d Cir. 1997). Although the government did not expressly contest this issue below, and although some authority supports petitioner's position that a motion under Section 2255 is not second or successive when it relies on a newly available state-law alteration of a prior conviction, see, *e.g.*, *In re Weathersby*, 717 F.3d 1108, 1111 (10th Cir. 2013) (collecting cases), "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," *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514 (2006). 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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