No. 18-261

In the Supreme Court of the United States

JOSE GUADALUPE CEBREROS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN BENCZKOWSKI
Assistant Attorney General
DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in denying a certificate of appealability on petitioner's postconviction claim that he is entitled to vacatur of his federal sentences on the ground that his sentence-enhancing "prior conviction for a felony drug offense," 21 U.S.C. 841(b)(1)(A) and 960(b)(1) (2000), was reclassified as a state-law misdemeanor after his federal sentencing.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-2) is unreported. The order of the district court (Pet. App. 3-4) is unreported. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 83 Fed. Appx. 917.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2018. A motion for reconsideration was denied on March 30, 2018 (Pet. App. 6). On June 20, 2018, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 27, 2018, and the petition was filed on that date. 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 Southern District of California, petitioner was convicted on one count of importing methamphetamine, in violation of 21 U.S.C. 952 and 960 (2000); and one count of possessing with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1). Judgment 1. He was sentenced to 240 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed, 83 Fed. Appx. 917, and this Court denied a petition for a writ of certiorari, 543 U.S. 854.

In 2005, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255 (2000). D. Ct. Doc. 60 (Aug. 4, 2005). The district court denied the motion and denied a certificate of appealability (COA). D. Ct. Doc. 69 (Feb. 23, 2011); D. Ct. Doc. 72 (Apr. 6, 2011). The court of appeals likewise denied a COA. D. Ct. Doc. 75 (July 26, 2012).

In 2017, petitioner filed a second motion to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. 76 (Nov. 14, 2017). The district court dismissed petitioner's motion for failure to obtain the necessary authorization from the court of appeals, D. Ct. Doc. 78 (Nov. 21, 2017), and denied a COA, Pet. App. 3-4. The court of appeals likewise denied a COA. *Id.* at 1-2.

1. On August 31, 2001, petitioner attempted to enter the United States by car at a California port of entry. Presentence Investigation Report (PSR) 2. A customs inspector referred petitioner to the secondary inspection area, where a narcotics-detection dog responded to the car's rear seat. *Ibid.* A subsequent search of the car uncovered nine cellophane-wrapped packages containing 3.19 kilograms of methamphetamine. PSR 2-3.

A grand jury charged petitioner with one count of importing methamphetamine, in violation of 21 U.S.C. 952 and 960 (2000); and one count of possessing with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1). PSR 2. The default penalty for violating 21 U.S.C. 952(a) and 960(a) (2000) by importing 50 grams or more of methamphetamine is a sentence of imprisonment for ten years to life. 21 U.S.C. 960(b)(1) (2000). 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 of not less than 20 years and not more than life imprisonment." *Ibid.* Likewise, the default penalty for violating 21 U.S.C. 841(a)(1) by possessing with intent to distribute 50 grams or more of methamphetamine is a sentence of imprisonment for ten years to life, but a defendant convicted under those provisions "after a prior conviction for a felony drug offense has become final" faces a statutory sentencing range of 20 years to life imprisonment. 21 U.S.C. 841(b)(1)(A) (2000). 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) (2000).

At the time of his federal drug offenses, petitioner had a 1988 California felony conviction for cocaine possession. PSR 2, 5. The government filed an information establishing that prior felony conviction under 21 U.S.C. 851. PSR 2. Because that "prior conviction for a felony drug offense ha[d] become final" before his federal sentencing, petitioner was subject to statutory-minimum sentences of 20 years of imprisonment on each count. 21 U.S.C. 841(b)(1)(A), 960(b)(1) (2000).

Petitioner proceeded to trial, and the jury found him guilty on both counts. PSR 2. The district court sentenced petitioner to 240 months of imprisonment on each count, to run concurrently. Judgment 2. The court of appeals affirmed, 83 Fed. Appx. 917, and this Court denied a petition for a writ of certiorari, 543 U.S. 854.

2. In 2005, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255 (2000). D. Ct. Doc. 60. The district court denied relief and a COA. D. Ct. Doc. 69; D. Ct. Doc. 72. The court of appeals likewise denied a COA. D. Ct. Doc. 75.

3. 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). In addition, 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) (emphasis omitted).

In 2016, petitioner successfully petitioned a California court to reclassify his prior felony drug conviction

as a misdemeanor under Proposition 47. See D. Ct. Doc. 76-1 (Nov. 14, 2017).

b. Federal defendants who have previously filed a Section 2255 motion may not file a "second or successive" Section 2255 motion without obtaining pre-filing authorization from the court of appeals. See 28 U.S.C. 2244(b)(3)(A), 2255(h); see also *Burton* v. *Stewart*, 549 U.S. 147, 152 (2007) (per curiam). Without requesting or obtaining such authorization, petitioner filed a second motion to vacate his sentence under 28 U.S.C. 2255 in district court. D. Ct. Doc. 76. In the motion, petitioner argued that the reclassification of his California conviction for cocaine possession entitled him to resentencing for his federal crimes. *Id.* at 2-3, 5-6. Petitioner contended that his current sentence violates 21 U.S.C. 841 and 960 (2000), the Due Process Clause, the Eighth Amendment, and "constitutional principles of Federalism." D. Ct. Doc. 76, at 5-6. Petitioner further contended that his motion was "not barred by the rule of successive petitions" because it was "based on new evidence or law that was not available before." *Id.* at 4. The district court dismissed the motion "for failure to obtain the required certification from the Ninth Circuit," explaining that such certification is "a prerequisite to bringing a second [m]otion" under Section 2255. D. Ct. Doc. 78, at 1; see also Pet. App. 5.

Petitioner filed a notice of appeal and asked the district court to issue a COA. D. Ct. Doc. 81 (Dec. 6, 2017), at 4. In his COA request to the district court, petitioner stated that he was "seek[ing] a [COA] * * * to challenge the dismissal of his 28 U.S.C. § 2255 claim as 'second or successive.'" *Ibid.* Petitioner contended that "[i]t is at least fairly debatable that [his] current petition is not barred by 28 U.S.C. § 2255(h) as 'second or

successive' because [his] claim is based on evidence that was not available at the time of his original habeas claims." *Id.* at 7.

The district court denied a COA. Pet. App. 3-4. The court determined that petitioner had "fail[ed] to make a substantial showing of the denial of a constitutional right." *Id.* at 3. The court observed that, in his motion for a COA, petitioner "specifically recognize[d] that it is an open question whether a federal sentence is impacted by a state law that, serving as a predicate for a sentencing enhancement, is subsequently reduced from a felony to a misdemeanor." *Id.* at 3-4. Because petitioner sought collateral relief based on "an open question," the court found that he had "necessarily fail[ed] to make a substantial showing of the denial of a constitutional right." *Id.* at 4. The court noted the limited scope of review on a second or successive motion under Section 2255. *Id.* at 4 n.1.

4. The court of appeals denied a COA. Pet. App. 1-2. The court determined that petitioner had failed to show "that 'jurists of reason would find it debatable whether the section 2255 motion states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Pet. App. 1 (quoting *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000)) (brackets omitted). "In order for a district court to consider a second or successive 28 U.S.C. 2255 motion," the court stated, "this court must first authorize the district court to consider that motion." *Ibid.* (citing 28 U.S.C. 2244(b)(3), 2255(h)). The court directed its clerk to "serve this order and a copy of the standard form application for leave to file a second or successive motion on [petitioner]." *Id.* at 1-2.

Petitioner filed a motion for reconsideration, again arguing that his Section 2255 motion was not "'second or successive'" because it was "based on evidence that was not available at the time of his original habeas claim." Pet. C.A. Mot. for Reconsideration of Denial of COA 7 (citation omitted). Petitioner further argued that it was "at least 'fairly debatable' that he ha[d] raised a colorable constitutional claim." *Id.* at 8. The court of appeals summarily denied the motion. Pet. App. 6.

ARGUMENT

Petitioner contends (Pet. 8-17) that he is no longer subject to statutory-minimum sentences of 20 years of imprisonment under 21 U.S.C. 841(b)(1)(A) (2000) and 21 U.S.C. 960(b)(1) (2000) because, after his federal sentence became final, a state court reclassified his prior felony drug conviction as a misdemeanor. Petitioner, however, identifies no error in the lower courts' denials of a COA on his statutory claim, and those decisions were correct and do not conflict with any decision of this Court or another court of appeals. This Court has repeatedly and recently declined to review the issue, see *Cooper* v. *United States*, No. 18-5222 (Oct. 15, 2018); *Duncan* v. *United States*, 138 S. Ct. 2652 (2018) (No. 17-7796); *Bell* v. *United States*, 138 S. Ct. 1282 (2018) (No. 17-678); *Vasquez* v. *United States*, 137 S. Ct. 840 (2017) (No. 16-7259), and should follow the same course here. In any event, petitioner's case is an unsuitable vehicle for review of the question presented because petitioner raised that claim in a second Section 2255 motion that the court of appeals did not authorize. Further review is unwarranted.

1. 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 claim debatable or wrong," *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000). 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 attempt to establish that his claim satisfies the COA standard, invoking "due process" and "the Eighth Amendment" only in passing (Pet. 10). Petitioner thus identifies no error in the court of appeals' determination that he failed to meet the COA standard, and his challenge to that decision accordingly does not warrant further review.

2. In any event, petitioner's claim (Pet. 10-17) that the reclassification of his prior state-law felony conviction as a misdemeanor entitles him to relief from his sentence lacks merit. See *United States* v. *London*, No. 15-1206, 2018 WL 4189616 (3d Cir. Aug. 31, 2018) (rejecting similar claim); *Duncan* v. *United States*, 704 Fed. Appx. 914 (11th Cir. 2017) (per curiam) (same), cert. denied, 138 S. Ct. 2652 (2018); *United States* v. *Bell*, 689 Fed. Appx. 598 (10th Cir. 2017) (same), cert. denied, 138 S. Ct. 1282 (2018); *United States* v. *Diaz*, 838 F.3d 968 (9th Cir. 2016) (same), cert. denied, 137 S. Ct. 840 (2017).

a. A district court is required to impose a sentence of at least 20 years of imprisonment under 21 U.S.C. 841(b)(1)(A) and 960(b)(1) (2000) if the defendant committed his offense "after a prior conviction for a felony drug offense has become final." *Ibid.* As "a matter of plain statutory meaning," those provisions apply 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 offenses "after a prior conviction for a felony drug offense"—his California conviction for felony cocaine possession—had "become final." 21 U.S.C. 841(b)(1)(A), 960(b)(1) (2000); see PSR 5. Petitioner thus does not dispute (Pet. 6) that he was subject to 20-year statutory-minimum sentences under 21 U.S.C. 841(b)(1)(A) and 960(b)(1) (2000) at the time of his conviction.

Petitioner contends (Pet. 10-17), 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 crimes "after a prior conviction for a felony drug offense ha[d] become final" and is thus subject to statutory-minimum sentences of 20 years of imprisonment, 21 U.S.C. 841(b)(1)(A), 960(b)(1) (2000). 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 (citation omitted; brackets in original); 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." *Ibid.* 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. *McNeill*, 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." *McNeill*, 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. 16), *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* seriously undermines petitioner's position with respect to his own circumstances. As 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) (2000); see also 21 U.S.C. 960(b) (2000). Because petitioner was convicted "of the type of crime specified by the statute[s]," he is subject to the prescribed punishment. *Dickerson*, 460 U.S. at 110; accord *Diaz*, 838 F.3d at 974.[1]

b. Petitioner observes (Pet. 14-15) 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). But a successful challenge to

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[1] Petitioner's suggestion (Pet. 4, 13-14, 16) 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 18-19 n.5, *McNeill*, *supra* (No. 10-5258); see 4/25/11 Tr. at 21-24, *McNeill*, *supra* (No. 10-5258). Petitioner here served his state sentence before his conviction was reclassified.

the "validity" of a prior conviction requires establishing that the conviction has been "vacated." *Ibid.*; see *ibid.* (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 [to] 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. D. Ct. Doc. 76-1; Pet. 7; 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. Cal. Penal Code § 1170.18(n) (West Supp. 2018) (emphasis omitted). 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").

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, or Section 960(b). Thus, the "courts of appeals that have considered th[e] § 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), cert. denied, 555 U.S. 1147 (2009).

c. Petitioner errs in asserting (Pet. 8-9) the existence of a circuit conflict.

The courts of appeals that have addressed the merits of a claim like petitioner's have uniformly recognized that California's reclassification of past felony convictions as misdemeanors does not undermine a prior conviction's felony status for purposes of Section 841. See

London, 2018 WL 4189616, at *3-*4; *Duncan*, 704 Fed. Appx. at 915; *Bell*, 689 Fed. Appx. at 599; *Diaz*, 838 F.3d at 975.

Contrary to petitioner's contention (Pet. 8-9), the Tenth Circuit's order granting a COA in *United States* v. *McGee*, No. 18-5019 (July 16, 2018), does not create a circuit conflict. At most, that order signals intracircuit inconsistency within the Tenth Circuit, which had previously denied a COA on a similar claim. See *Bell*, 689 Fed. Appx. at 599. Any intracircuit inconsistency would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, the COA order in *McGee* does not indicate that the Tenth Circuit would likewise grant a COA in petitioner's case, which involves an unauthorized second Section 2255 motion, let alone grant relief on the merits. See *Eldridge* v. *Berkebile*, 791 F.3d 1239, 1244 (10th Cir. 2015) (explaining that a COA determination requires "a preliminary, though not definitive, consideration of the legal framework" applicable to the proposed claim) (brackets and citation omitted).

Petitioner also contends (Pet. 9) that a district court has issued a decision that is "consistent" with the Tenth Circuit's order in *McGee*, but a district-court decision could not create a conflict warranting this Court's review. See Sup. Ct. R. 10.

3. In any event, petitioner's case is an unsuitable vehicle for review because 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 post-conviction relief under Section 2255 without first obtaining certification from the court of appeals that the motion satisfies one of two enumerated grounds in 28 U.S.C. 2255(h). The

requirement to obtain appellate authorization for such a motion is jurisdictional. *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).

Although petitioner argued below that he was not required to obtain prior authorization to file his Section 2255 motion, he has not raised those arguments in his petition for a writ of certiorari to this Court. Furthermore, this Court could not review petitioner's case without addressing whether petitioner was required to obtain authorization from the court of appeals for his motion. See *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 denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN BENCZKOWSKI
Assistant Attorney General
DAVID M. LIEBERMAN
Attorney

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