

No.

**In The
Supreme Court of the United States**

CORVAIN T. COOPER,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition For A Writ Of Certiorari To The United
States Court Of Appeals for the Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a Petitioner Who Was Sentenced to Life Without the Possibility of Parole, Which was Enhanced By Two Later Invalidated State Convictions, May Apply for Resentencing Under 28 U.S.C. § 2255?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fourth Circuit. Rule 14.1(b) of the Supreme Court Rules.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Corvain Cooper, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth entered in the above-entitled case on March 8, 2018.

DECISIONS BELOW

The March 8, 2018 opinion of the United States Court of Appeals for the Fourth Circuit, whose judgment is herein sought to be reviewed, is not reported, and is reprinted in the separate Appendix to this Petition, page App. 4-11.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit to be reviewed was entered March 8, 2018. The mandate issued November 18, 2015. The instant Petition is filed within 90 days of the date of decision and one 10-day extension granted by this Court on February 8, 2016. Sup. Ct. R. 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISIONS,
TREATIES, STATUTES, RULES
AND REGULATIONS INVOLVED**

21 U.S.C §851 states as follows:

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of

three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would exempt the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied

upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed

to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

U.S. CONST. amend. V (App. 24)

U.S. CONST. amend. XIV (App. 24)

STATEMENT OF THE CASE

Corvain Cooper was charged in the United States District Court for the Western District of North Carolina with conspiracy to distribute and possession with intent to distribute 1000 kilograms or more of marijuana (21 U.S.C. § 841(b)(1)(A)), conspiracy to commit money laundering (18 U.S.C. § 1956(h)), and structuring transactions (31 U.S.C. § 5313(a)). (App. 5-6). A special information pursuant to 21 U.S.C. § 851 was also filed against Cooper, alleging two prior felony convictions for possession of drugs (one for marijuana, one for codeine cough syrup) in the California state courts. (App. 52). The filing of the § 851 information triggered a mandatory life sentence without parole in the event of a conviction.

Prior to trial, the Government filed a Rule 404(b) notice of its intent to introduce evidence of a prior arrest of Cooper in California, where Cooper was in possession of approximately one pound of marijuana and an alleged drug ledger. The Government sought to introduce evidence of Cooper's two prior felonies in California for possession of marijuana and argued that the evidence proffered in its 404(b) notice was "inextricably intertwined" with the conduct concerning the charged crimes. The District Court deemed the evidence admissible, ruling it was "linked in time, place and pattern of conduct." (App. 4-11).

On August 7, 2013, former Attorney General Eric Holder announced that the Department of Justice

instituted a new policy regarding reduced sentencing of non-violent drug offenders.

Cooper and two co-defendants were tried before a jury from October 15, 2013 – October 18, 2013. At no time prior to trial (or sentencing) did the Government withdraw the § 851 information filed against Cooper, or otherwise indicate that it would not seek a mandatory sentence of life without parole.

The evidence presented at trial established that on January 9, 2009, a cargo crate containing approximately 338 pounds of marijuana was intercepted by joint State and Federal task force agents in Charlotte, North Carolina. The Government linked this shipment to Cooper through investigation of co-conspirators telephone records, records of past shipments that had not been intercepted, and through several cooperating witnesses. Those cooperating witnesses generally testified that Cooper was involved in the acquisition and distribution of marijuana from California to North Carolina through the use of third-party cargo carriers. The sale proceeds were deposited into several bank accounts, some of which were opened under the two co-defendants' names, who worked as bank tellers, and were withdrawn from by Cooper and others.

At trial, no recorded conversations intercepted were produced. Other than the relatively small amount of marijuana and a cell phone recovered pursuant to his prior arrest in California, Cooper was not found in possession of any marijuana, packaging material, other drug paraphernalia, or weapons.

The main witness who testified for the Government at trial was Detective James Beaver, an employee of the Charlotte-Mecklenburg Police Department assigned to a joint Federal task force. Without objection, Detective Beaver, a non-expert, was allowed to testify about his familiarity with different grades of marijuana and the street prices of those grades. He also testified, without objection, as to the methods of shipping bulk marijuana, the use of masking agents to cover the smell and the process of transporting marijuana via vehicles.

Detective Beaver also testified about shipping crates a business owner found on his property and Beaver opined them to have held marijuana in them, subsequently, past transactions were entered into the record yet again this evidence was accepted without objection. Beaver used these past transactions and the recovered 338 pounds to calculate, based off his opinion, 5,000 pounds of marijuana had been shipped from California to Charlotte.

Lastly Beaver testified about going through Cooper's phone without a warrant. Beaver used images recovered from the warrantless search as evidence against Cooper as well as asserting that recorded phone calls from Mecklenburg County Jail were made in Cooper's voice.

On October 18, 2013, the jury returned guilty verdicts against all three defendants on all substantive counts. The case was continued for sentencing to a future date.

Represented now by undersigned counsel, prior to sentencing Cooper filed objections to the Pre-Sentence Report and a sentencing memorandum with the District Court. In those documents, Cooper presented extensive mitigation evidence, objected to an enhancement for firearms possession, drug amount, and leadership role, and objected to a mandatory life sentence without parole on Eighth Amendment grounds, pointing out the disparity in sentences meted out to the co-defendants and others similarly-situated.

On June 18, 2014, Cooper appeared for sentencing. The District Court recognized the severity of the mandatory life sentence, noting that it “would want to have discretion before imposing a life sentence. The absence of discretion is a troubling thing for the Court.” (App. 36-37). Later, the District Court stated that

[T]he Court is not comfortable with imposing a mandatory life sentence on a 34 year old individual without some discretion to consider the 3553(a) factors that a court normally is entitled to consider...The Court has no discretion. I’m not sure what I would do if I had discretion, but the absence of discretion is a difficult thing for the Court.

(App. 45).

Nevertheless, the District Court overruled the Eighth Amendment objection, and his other objections with the exception of one. As a consequence, Cooper was sentenced to life imprisonment without the possibility of parole.

Cooper appealed his conviction and sentence to the Fourth Circuit, arguing that (1) the Eighth Amendment prohibits the cruel and unusual punishment of mandatory life imprisonment without parole for a 34-year old man with two prior convictions for possession of possession of a controlled substance (marijuana and codeine) and no history of violence; (2) the District Court's admission of other-crimes evidence under Rule 404(b) deprived Cooper of his right to a fair trial; (3) the District Court's denial of severance deprived Cooper of a fair trial where he and his testifying co-defendants had mutually exclusive and antagonistic defenses; (4) the evidence was legally insufficient to sustain a conviction for conspiracy to possess with intent to distribute 1000 kilograms or more of marijuana where there was no reliable evidence of the weight of the marijuana actually trafficked; and (5) Cooper received ineffective assistance of counsel where his attorney failed to object to foundationless expert testimony based on hearsay, opinion testimony based upon hearsay, and calculations of drug amounts based on speculation.

The Fourth Circuit affirmed his conviction and sentenced without oral argument in an unpublished opinion on October 2, 2015. (App. 4-11).

Cooper filed a petition for rehearing en banc on October 15, 2015, pursuant to FED. R. APP. P. 35, which was denied on November 10, 2015. (App. 4-11). Subsequently Cooper filed a petition for certiorari to this Court. On March 28, 2016 this Court denied certiorari, rendering the conviction final.

In 2014, the State of California enacted Proposition 47, codified in the California Penal Code § 1170.18, which recategorized several non-violent offenses as misdemeanors, rather than felonies, and permitted people who had felony convictions under the old statute to vacate them and replace them with misdemeanor convictions.

On July 22, 2016, Cooper filed a petition pursuant to California Penal Code § 1170.18 seeking vacatur of the felony conviction entered in Case # ING YA08050901, California Superior Court (Inglewood), Los Angeles County. The petition was granted on July 22, 2016, the felony was vacated, and a misdemeanor conviction was substituted. That conviction was one of the predicate felony convictions used to enhance his sentence in the instant case. (App. 53-61).

On November 9, 2016, the State of California enacted Proposition 64, the Adult Use of Marijuana Act (Codified at California Health and Safety Code § 11361.8), which legalized recreational use of marijuana. The Act permitted certain people who had been convicted of marijuana offenses to apply for vacatur of those convictions.

On November 10, 2016, Cooper filed a petition pursuant to 28 U.S.C. § 2255, seeking to vacate the sentence and conviction on the grounds of one of the predicate convictions had been vacated, and he received ineffective assistance of counsel in the instant case. This motion was amended the following day to correct a formatting error. (App. 4-11).

While the petition was pending, Cooper applied for relief under Proposition 64, seeking to vacate the predicate conviction in Case # BH SA 07215401, Beverly Hills, California, as alleged in the § 851 enhancement. The state court granted his application, the conviction was vacated and substituted with a misdemeanor conviction on May 24, 2017. (App. 53-61). This conviction was the second predicate felony used to enhance his sentence in the instant case.

On February 16, 2017, the Government filed a motion to dismiss the Petitioner's motion to vacate, set aside, or correct the sentence. Six days later Petitioner filed a response, requesting dismissal of the motion made by the Government. On June 8, 2017 Cooper moved to supplement his § 2255 petition arguing the second predicate felony conviction further required resentencing. (App. 4-11)

The District Court granted the Government's motion to dismiss the § 2255 petition on October 2, 2017, thus denying Cooper relief and declining to issue a Certificate of Appealability. (App. 4-11). Cooper timely appealed to the United States Court of Appeals for the Fourth Circuit, seeking a Certificate of Appealability on the same issue raised in this petition.

The Fourth Circuit denied Cooper of a Certificate of Appealability on March 8, 2018. (App. 1-3).

This timely Petition follows.

REASONS FOR GRANTING THE WRIT

REVIEW IS NECESSARY FOR THIS COURT TO RESOLVE A SPLIT AMONGST THE CIRCUITS AND TO RESOLVE A CIRCUIT DEPARTURE FROM THIS COURT'S BINDING PRECEDENT THAT WHERE A FEDERAL SENTENCE IS ENHANCED BY A STATE COURT CONVICTION THAT IS SUBSEQUENTLY VACATED OR SET ASIDE, WHETHER THE FEDERAL PRISONER IS ENTITLED TO RESENTENCING

In Custis v. United States, 511 U.S. 485 (1994), this Court held that if a defendant “is successful in attacking [his] state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences.” Id. at 497. Seven years later, this Court decided in Daniels v. United States, 532 U.S. 374 (2001), that “after an enhanced federal sentence has been imposed...the person sentenced may pursue any channels of direct or collateral review still available to challenge his prior conviction.” Id. at 382. The Court further stated “[i]f any such challenge to the

underlying conviction is successful, the defendant may then apply for reopening of his federal sentence.” Id.

In 2005, this Court decided Johnson v. United States, 544 U.S. 295, 125 S.Ct. 1571, 1577, 161 L.Ed.2d 542 (2005) (emphasis added). In Johnson, the defendant received an enhanced sentence for his Federal drug conspiracy conviction by virtue of a state court conviction. He petitioned in the state court to vacate his conviction and succeeded. He later filed a § 2255 petition to challenge his enhanced sentence after the 1-year statute of limitations expired and was denied relief by the District Court and the Eleventh Circuit.

This Court affirmed, finding that Johnson’s petition was untimely and therefore relief was barred. However, the Court re-affirmed the validity of the underlying theory for relief, holding “a defendant given a sentence enhanced for a prior conviction is **entitled** to a reduction if the earlier conviction is vacated.” Id. at 303. (emphasis added).

The Eleventh Circuit has applied this Court’s precedent in several cases. In United States v. Martinez, 606 F .3d 1303 (11th Cir. 2010), the Eleventh Circuit held that when a criminal sentence is vacated, “it becomes void in its entirety; the sentence - including any enhancements - has been wholly nullified and the slate wiped clean.” Id. at 1304. See also Spencer v. United States, 773 F .3d 1132, 1139 (11th Cir. 2014). (indicating a prisoner may challenge a sentencing error as a “fundamental defect” on collateral review when he can prove that he is

either actually innocent of his crime or that a prior conviction used to enhance his sentence has been vacated), Stewart v. United States, 646 F.3d 856, 859 (11th Cir. 2011) (holding that “[t]he vacatur order gives a defendant ... the basis to challenge an enhanced federal sentence....”).

Up until the advent of this case, the Fourth Circuit likewise applied this Court’s precedent in several cases. In United States v. Gadsden, the Fourth Circuit held “sentence enhancements based on previous convictions should be reconsidered if those previous convictions are later vacated.” 332 F.3d 224, 228 (4th Cir. 2003) (noting that a defendant may apply for a reopening of his federal sentence once he has successfully challenged the underlying conviction); see also United States v. Dorsey, 611 Fed.Appx. 767 (4th Cir. 2015) (granting a Certificate of Appealability from the denial of 28 U.S.C. § 2255 petition seeking resentencing after vacatur of a state sentence); United States v. Mobley, 96 Fed.Appx. 127 (4th Cir. 2004) (same).

In the case of United States v. Diaz, 838 F.3d 968 (9th Cir. 2016) cert. denied sub nom. Vasquez v. United States, 137 S.Ct. 840 (2017), the Ninth Circuit turned away from this Court’s precedent. In Diaz, the defendant was convicted of Federal drug conspiracy charges and sentenced to life imprisonment as a result of two California state drug convictions. One of those convictions was vacated and reclassified as a misdemeanor under Proposition 47, and Diaz applied for relief from his Federal sentence. The District Court denied relief, and the Ninth Circuit affirmed,

finding that “Proposition 47 does not change the historical fact that Vasquez violated § 841 “after two or more prior convictions for a felony drug offense [had] become final.” Id. at 971.

Here, the Fourth Circuit turned away not only from its own precedent, but from this Court’s precedent as well in the instant case. Here, the Fourth Circuit and the District Court adopted the Ninth Circuit’s view in Diaz, finding that “Proposition 47 ‘does not undermine a prior conviction’s felony-status for purposes of § 841,’ since the state’s later actions cannot change the fact that a defendant committed his federal offense after his conviction for a felony drug offense became final.” App. 12-13.

There are several problems with this view. The first is that it disregards the inherent power of the California courts to modify their own judgments pursuant to California law, and for those judgments to be given the full faith and credit due under the Constitution.

Another problem with this view is that it disregards the power of the California legislature to decide what is, and what is not, illegal and punishable under state law. Here, the California legislature spoke and declared marijuana legal. It recognized that its citizens who were convicted under the old law should receive relief from convictions for that which was no longer illegal. The legislature also intended that those who were previously convicted of felonies under the old law should not suffer the same disabilities associated with a felony conviction. It is

inherently unjust to enhance a Federal prisoner's punishment based upon a conviction that has been effectively nullified because the state has legalized what had previously been illegal.

The reality of the situation is that drug law reform, especially marijuana reform, is at the forefront in many state legislature's agendas. Marijuana is now legalized, decriminalized, or approved for medicinal use in one form or another in the majority of states in the Union. Further anticipated reforms will relieve persons with criminal convictions for marijuana from the disabilities associated with those convictions. As these reforms continue, the Federal courts will be faced with the same issue present in this case repeatedly. Clarity in the law is therefore necessary to give the District Courts and the Circuits clear, unequivocal guidance as to how to ameliorate Federal sentences that were enhanced by virtue of now-invalidated prior state convictions.

Due Process and fundamental fairness are at the heart of this case. Boiled down to its essence, the question for this Court is whether a sentence of life without parole is justified for a person who now has no predicate felony convictions.

CONCLUSION

For the reasons set forth herein, Petitioner, Corvain Cooper, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on March 8, 2018.

Respectfully submitted on this 6th day of July, 2018.

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