DAVID S. McLANE (No. 124952)
KAYE, MCLANE, BEDNARSKI & LITT, LLP
234 East Colorado Boulevard, Suite 230
Pasadena, California 91101
Telephone: (626) 844-7660
Facsimile: (626) 844-7670

Attorneys for Defendant
EDWARD NOLAN NORWOOD, DEF. # 2

UNITED STATES DISTRICT COURT

DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiffs, vs. EDWARD NOLAN NORWOOD, Defendants.	Case No. CR 13-388-JVS-2 [Hon. James v. Selna] DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS INFORMATION FILED PURSUANT TO 21 U.S.C. § 851 (CR-20) Date: November 30, 2015 Time: 9:00 a.m. Courtroom: 10C

PLEASE TAKE NOTICE that on November 30, 2015, in Courtroom 10C, Hon. James V. Selna, 411 West Fourth Street, Santa Ana, California 92701, at 9:00 a.m., the defendant, Edward Norwood, by and through counsel, David S. McLane, will move the Court for leave to file Plaintiff's Motion to Dismiss Information filed Pursuant to 21 U.S.C. § 851.

Defendant's Motion is based on the attached Memorandum of Points and Authorities, all pleadings and papers on file in this action, and such other evidence and argument as may be presented on behalf of Defendant at the hearing on this Motion.

DATED: November 2, 2015

Respectfully submitted,

KAYE, McLANE, BEDNARSKI & LITT, LLP

By: /s/__*David S. McLane*_____
David S. McLane

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On September 6, 2013 the government filed an Information pursuant to 21 U.S.C. §851 alleging Mr. Norwood sustained a prior felony drug conviction – a California state court conviction for possession of a controlled substance in violation of H&S 11350 (Case No. BA311513). *See*, Information (CR-20), attached as Exhibit A. On July 28, 2015, however, this conviction was reduced to a misdemeanor pursuant to California's Proposition 47/PC §1170.18. *See*, Minute Order, attached as Exhibit B. As Mr. Norwood no longer has a qualifying *felony* drug conviction pursuant to the sentencing enhancements under 21 U.S.C. §841(b)(1)(B)(iii), he respectfully requests that this Court dismiss the Information.

II. ARGUMENT

A. MR. NORWOOD DOES NOT HAVE A QUALIFYING *FELONY* DRUG CONVICTION PURSUANT TO 21 U.S.C. §851

The relevant sentencing provision in this case, 21 U.S.C. § 841(b)(1)(B)(iii), provides a defendant in violation of that subsection "shall be sentenced to a term of imprisonment which may not be less than 5 years…If any person commits such a violation after a period of conviction for a *felony* drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years…" *Id.* (Emphasis added.)

The procedures for establishing such a prior conviction are set forth in 21 U.S.C.§ 851, which provides that "[n]o 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 entry of a plea of guilty, the United States attorney files an information ... stating in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1). "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." 21 U.S.C. § 851(b).

Here, the government seeks the above sentencing enhancement on the basis of Mr. Norwood's prior conviction in Case No. BA311513 for possession of a controlled substance in violation of H&S 11350. *See,* Exhibit A, Information. By operation of California's Proposition 47/PC §1170.18, however, this conviction is a misdemeanor, not a felony conviction, as alleged in the §851 Information. *See,* Exhibit B, Minute Order. The Information must therefore be dismissed.

The effect of California's Proposition 47/PC § 1170.18 on potential prior convictions in federal drug cases was recently thoroughly addressed by Hon. Judge Virginia Phillips in an Order Granting Motion for Resentencing in *United States v. Leonte Maurice Summey*, EDCV 15-00625-VAP, Order (CR-11), September 30, 2015 attached as Exhibit C.

In *Summey*, the petitioner brought a motion for resentencing pursuant to 28 U.S.C. § 2255. The *Summey* petitioner argued that because his prior felony drug conviction was now a misdemeanor pursuant to Proposition 47/PC § 1170.18, it could not lawfully serve as a prior felony drug conviction for purposes of the sentencing enhancement under 21 U.S.C. 841(b)(1)(B)(iii). *See*, Exhibit C at p. 3. The government opposed, in relevant part arguing that even if petitioner's conviction had been reduced to a misdemeanor before sentencing, it would still constitute a predicate felony for purposes of sentencing enhancement. *Id.* at p. 6.

The court rejected the government's arguments for several reasons equally applicable here. First, while the construction of the terms "conviction" and "final" in 28 U.S.C. §841 et seq. are questions of federal law, the term "felony drug offense" is defined by explicit reference to *state* law. *See,* 21 U.S.C. §802(44);

Exhibit C at p. 8. In *Sumney*, as here, the California Superior Court determined that the prior offense was, as a matter of state law, a misdemeanor pursuant to Proposition 47/Cal. Penal Code §1170.18. *See,* Exhibit B, Minute Order; Exhibit C at p. 8. This determination was made pursuant to a California statute that expressly applied *retroactively* to prior convictions:

> (f) *A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.*
>
> (g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.
>
> (k) Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm ....

Cal. Penal Code § 1170.18.(Emphasis added.)

The court in *Sumney* ultimately concluded that "Petitioner having succeed in collaterally attacking his prior felony conviction in state court, the conviction cannot serve as a "prior conviction of a felony drug offense" for purposes of sentencing under 21 U.S.C. § 841(b)(1)(B)." *See,* Exhibit C at p. 11. The matter was set for re-sentencing and as of the filing of this Motion the government has not appealed the Court's Order. Similarly, in this case, as Mr. Norwood has successfully reduced his prior felony drug conviction to a misdemeanor pursuant to Proposition 47/ Cal. Penal Code §1170.18 it cannot serve as a "prior conviction of a felony drug offense" for purposes of sentencing under 21 U.S.C. 841(b)(1)(B) and this Court must dismiss the Information.

III. CONCLUSION

For the foregoing reasons Mr. Norwood respectfully requests that the Court dismiss the Information filed pursuant to § 851.

DATED: November 2, 2015

Respectfully submitted,

KAYE, McLANE, BEDNARSKI & LITT, LLP

By: */S/DAVID S. McLANE*_____
DAVID S. McLANE

EXHIBIT A

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. EDWARD NOLAN NORWOOD, aka "Polo," Defendant.	CR No. 13-388 INFORMATION RE: PRIOR CONVICTION FOR A FELONY DRUG OFFENSE FOR DEFENDANT EDWARD NORWOOD [21 U.S.C. § 851: Proceedings to Establish Prior Conviction]

The United States Attorney charges:

[21 U.S.C. § 851]

Defendant EDWARD NOLAN NORWOOD, also known as "Polo" ("NORWOOD"), prior to committing the offenses alleged in Counts One and Two of the Indictment in United States v. Edward Nolan Norwood, et al., CR No. 13-388, had been finally convicted of a felony drug offense as that term is defined and used in Title 21, United States Code, Sections 802(44), 841, and 851, namely, on or about February 14, 2007, in the Superior Court of the State of California, Los Angeles County, case number BA311513, defendant

Ex. A-1

NORWOOD was convicted of Possession of a Controlled Substance, in violation of California Health and Safety Code Section 11350.

ANDRÉ BIROTTE JR.
United States Attorney

ROBERT E. DUGDALE
Assistant United States Attorney
Chief, Criminal Division

RODRIGO A. CASTRO-SILVA
Assistant United States Attorney
Chief, OCDETF Section

KEVIN S. ROSENBERG
Assistant United States Attorney
Deputy Chief, OCDETF Section

CHRISTOPHER K. PELHAM
Assistant United States Attorney
OCDETF Section

EXHIBIT B

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 07/29/15

CASE NO. BA311513

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: EDWARD NOLAN NORWOOD

INFORMATION FILED ON 11/27/06.

COUNT 01: 11350 H&S FEL

ON 07/28/15 AT 830 AM IN CENTRAL DISTRICT DEPT 650

CASE CALLED FOR PROPOSITION 47 APPLICATION HRG

PARTIES: RAND S. RUBIN (JUDGE) LORRAINE VALDEZ (CLERK)
PATRICIA MCNEAL (REP) DENNIS POEY (DA)

DEFENDANT IS NOT PRESENT IN COURT, AND NOT REPRESENTED BY COUNSEL

COURT ORDERS INFORMATION DEEMED AMENDED TO ALLEGE COUNT 01 AS A MISDEMEANOR PURSUANT TO PENAL CODE SECTION 1170.18 ET SEQ. AND COUNT SHALL PROCEED AS MISDEMEANOR.

COURT ORDERS AND FINDINGS:

-THE COURT FINDS THAT THE DEFENDANT IS ELIGIBLE AND SUITABLE TO

HAVE COUNT 01 REDUCED TO A MISDEMEANOR. ACCORDINGLY, THE COURT ORDERS COUNT 01 A MISDEMEANOR PURSUANT TO PROPOSITION 47.

DEFENDANT'S PETITION PURSUANT TO PROPOSITION 47 IS GRANTED WITH NO OBJECTION FROM THE PEOPLE.

NEXT SCHEDULED EVENT:
PROCEEDINGS TERMINATED

Ex. B-1

CLARA SHORTRIDGE FOLTZ
CRIMINAL JUSTICE CENTER
ATTN: POST JUDGMENT, RM. M-6
210 WEST TEMPLE STREET
LOS ANGELES, CA 90012

Kaye, McLane, Bednarski & Litt
234 East Colorado Boulevard
Suite 230
Pasadena, CA 91101

9110132230 C021

Ex. B-2

EXHIBIT C

cc: U.S. Probation, U.S. Bureau of Prisons, U.S. Marshals Service

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

United States of America,

Respondent,

v.

Leonte Maurice Summey,

Petitioner.

EDCV 15-00625-VAP
EDCR 08-00181 VAP

ORDER GRANTING MOTION FOR RESENTENCING

Before the Court is Petitioner Leonte Maurice Summey ("Petitioner")'s Motion for Resentencing, filed pursuant to 28 U.S.C. § 2255. (Civ.[1] Doc. No. 1.) For the reasons below, the Court **GRANTS** the motion.

I. BACKGROUND

On September 17, 2008, a grand jury in the Eastern Division of the Central District of California returned an Indictment against Petitioner, alleging violations of, inter alia, 21 U.S.C. § 841(a)(1) (distribution of cocaine base) and 18 U.S.C. § 922(g)(1) (felon in possession of a firearm), Counts 4 and 6 of the Indictment, respectively. (Crim. Doc. No. 8 ("Indictment").) On October 17, 2008, for purposes of seeking a sentencing enhancement, the government filed an information pursuant to 21 U.S.C. § 851, alleging that Petitioner had a prior conviction for a felony drug

[1] Citations to "Civ. Doc. No." refer to the docket of the current petition, docket number 5:15-cv-00625, while citations to "Crim. Doc. No." refer to the docket of Petitioner's original criminal case, docket number 5:08-cr-00181.

Ex. C-1

offense in California Superior Court, Case No. FSB21382. (Crim. Doc. No. 16 ("§ 851 Information").)

On February 9, 2010, Petitioner signed a plea agreement, which was filed with the Court on February 19, 2010. (Crim. Doc. No. 33 ("Plea Agreement").) In the Plea Agreement, Petitioner agreed to plead guilty to Counts 4 and 6 of the Indictment and affirmed a prior felony drug conviction in Case No. FSB048327. (Plea Agreement at 7-8.) Petitioner did not, however, affirm nor agree to affirm the prior felony drug conviction in Case No. FSB21382. (See id. at 8.)

On February 17, 2010, Petitioner pleaded guilty to Counts 4 and 6 of the Indictment pursuant to his Plea Agreement. At no point during the plea colloquy was Petitioner asked if he affirmed or denied that he had been convicted as alleged in the § 851 Information. (See generally Crim. Doc. No. 70 ("Change of Plea Hearing Transcript").)

On September 13, 2010, the Court sentenced Petitioner to a term of 120 months, the statutory minimum sentence under 21 U.S.C. § 841(b)(1)(B)(iii) for a defendant who has suffered a prior felony drug conviction. (Crim. Doc. No. 51.) The sentence imposed was explicitly predicated on the Court's inability to consider arguments for a lower sentence due to the statutory mandatory minimum. (See, e.g., Crim. Doc. No. 53 ("Sentencing Hearing Transcript") at 8:25-9:18, 11:18-21, 21:5-9.) At no point during the proceedings was Petitioner asked if he affirmed or denied that he had been convicted as alleged in the § 851 Information. (See generally Sentencing Hearing Transcript.)

Approximately 13 months later, on October 17, 2011, Petitioner filed a motion under 28 U.S.C. § 2255, arguing (1) he had been denied his right to effective assistance of counsel; (2) actual innocence; and (3) equitable tolling of the one-year

statute of limitations. (See generally Civil Docket No. 5:11-cv-01661.) The Court denied the motion as untimely and without merit. (Id.)

On January 29, 2015, Petitioner's prior drug convictions from California Superior Court Case Nos. FSB048327 and FSB21382 were retroactively designated as misdemeanors pursuant to California's Safe Neighborhoods and Schools Act, passed November 4, 2014. (See Civ. Doc. No. 1-2 Exs. C, D.) Petitioner then brought the current motion pursuant to 28 U.S.C. § 2255, arguing that, because Petitioner's prior drug conviction was a misdemeanor, not a felony, it could not lawfully serve as a prior felony drug conviction for purposes of a sentencing enhancement under 21 U.S.C. § 841(b)(1)(B)(iii). (Civ. Doc. No. 1.)

II. LEGAL STANDARD

A. MOTION TO VACATE SENTENCE

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of . . . the laws of the United States, . . . or 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). "If the court finds . . . that the sentence imposed was not authorized by law or [is] otherwise open to collateral attack, . . . the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

B. SENTENCING ENHANCEMENT

Petitioner was sentenced under 21 U.S.C. § 841(b)(1)(B)(iii), which provides that a defendant in violation of that subsection "shall be sentenced to a term of imprisonment which may not be less than 5 years . . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years . . . ." 21 U.S.C. § 841(b)(1)(B)(iii).

The procedures for establishing such a prior conviction are set forth in 21 U.S.C. § 851, which provides that "[n]o 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 entry of a plea of guilty, the United States attorney files an information . . . stating in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1). "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." 21 U.S.C. § 851(b).

III. DISCUSSION

A. PROCEDURAL PROPRIETY OF MOTION

A one-year period of limitation applies to motions under § 2255. 28 U.S.C. § 2255(f). The present motion is brought pursuant to § 2255(f)(4), which provides that the limitations period runs from "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). The facts supporting Petitioner's claim—specifically, the California Superior Court's designation of his prior conviction as a

misdemeanor—became discoverable on January 9th, 2015, less than a year before Petitioner brought the present motion. Accordingly, the motion is timely.

Petitioner already filed a motion under § 2255 on October 17, 2011 (Crim. Doc. No. 55), which was subsequently denied by this Court (Crim. Doc. No. 57). Generally, a "second or successive motion" under § 2255 must be certified by an appellate panel before consideration by this Court. 28 U.S.C. § 2255(h). As both parties acknowledge, however, "second or successive" is a term of art, and the Supreme Court has held that, where a claim was not ripe at the time of an initial habeas petition, a later habeas petition raising that claim will not be considered "second or successive." Panetti v. Quarterman, 551 U.S. 930, 944, 947 (2007); see also U.S. v. Buenrostro, 638 F.3d 720, 725 (9th Cir. 2011) ("Prisoners may file second-in-time petitions based on events that do not occur until a first petition is concluded . . . . [S]uch claims were not ripe for adjudication at the conclusion of the prisoner's first federal habeas proceeding.").

Accordingly, Petitioner's motion is properly before this Court.

B. MERITS OF MOTION

Petitioner's sentence was enhanced on the basis that the offense to which he pleaded guilty was committed "after a prior conviction for a felony drug offense ha[d] become final." See 21 U.S.C. § 841(b)(1)(B)(iii). This sentencing enhancement was imposed pursuant to 21 U.S.C. § 851, based on Petitioner's prior conviction in FSB21382 as alleged in the government's § 851 Information. Petitioner does not challenge the finality of the conviction set forth in the government's § 851 Information, nor does he challenge the validity of that conviction. Rather, Petitioner argues that his prior conviction in FSB21382 is a misdemeanor conviction, not a felony conviction as alleged in the § 851 Information. See Civ. Doc. No. 1-2 at 39

(minutes from California Superior Court designating the conviction in FSB21382 as a misdemeanor pursuant to Cal. Penal Code. § 1170.18).

The government opposes the motion on two grounds:

1. Petitioner's conviction in FSB21382 was a felony conviction at the time Petitioner was sentenced, precluding a collateral attack based on post-sentencing changes to the conviction; and
2. Even if Petitioner's conviction in FSB21382 had been reduced to a misdemeanor before sentencing, it would still constitute a predicate felony for purposes of sentencing enhancement.

The Court addresses each of these arguments in turn below.

The government's primary argument is that, because Petitioner did not challenge his prior conviction prior to sentencing—and further, had no ground for mounting such a challenge prior to sentencing—he cannot collaterally challenge it now by way of a § 2255 motion. Normally, when an enhanced sentence is imposed pursuant to § 851, "any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence." 21 U.S.C. § 851(b). As the Supreme Court has noted, "considerations of administration and finality" dictate that "a federal prisoner may not attack a predicate state conviction through a § 2255 motion challenging an enhanced federal sentence." Johnson v. U.S., 544 U.S. 295, 304 (2005).

There are, however, several notable exceptions to this general principle. Most relevant here, the Supreme Court has recognized that "a prisoner could proceed under § 2255 after . . . favorable resort to any postconviction process available under state law." Johnson, 544 U.S. at 304 (internal citations omitted); id. at 303 ("a defendant who successfully attacked his state conviction in state court . . . could then apply for reopening of any federal sentence enhanced by the state sentences").

Here, Petitioner favorably resorted to a postconviction process available under state law for designating his state conviction as a misdemeanor. The parties dispute whether the results of this postconviction process may support a subsequent § 2255 motion.

The Court need not, however, resolve such a broad question in order to dispose of the present motion. Any potential exceptions to the general rule barring post-sentencing challenges to prior convictions are immaterial, because a fundamental predicate for the general rule is lacking here. The general prohibition on post-sentencing challenges to prior convictions, codified in § 851(b), is predicated on § 851's requirement that one of two conditions be met before the enhanced sentence is imposed. Section 851(b) requires that either:

1. "[T]he person with respect to whom the information was filed . . . affirms . . . that he has been previously convicted as alleged in the information," 21 U.S.C. § 851(b); or
2. "If the person denies any allegation of the information of prior conviction, ... the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact," 21 U.S.C. § 851(c).

Including the requisite affirmation in a defendant's plea agreement is a standard practice in this district, and the Court has no cause to question the sufficiency of this custom for purposes of § 851. Here, however, although earlier drafts of the plea agreement included such an affirmation, the final executed Plea Agreement did not affirm Petitioner's prior conviction as alleged in the government's § 851 Information. (Compare Crim. Doc. No. 31 (earlier draft) at 8 with Crim. Doc. No. 33 (final agreement) at 8.) Further, at no point during Petitioner's change of plea hearing or sentencing hearing was Petitioner asked "whether he affirms or denies

that he has been previously convicted as alleged in the information." See 21 U.S.C. § 851(b); see generally Crim. Doc. No. 70 ("Change of Plea Hearing Transcript"); Crim. Doc. No. 53 ("Sentencing Hearing Transcript").

"The Ninth Circuit requires strict compliance with the procedural aspects of section 851(b)." U.S. v. Hamilton, 208 F.3d 1165, 1168 (9th Cir. 2000). It is clear from the record that the fundamental requirements of § 851(b) were not met in the prior criminal proceedings. Thus, the government has no basis to invoke § 851(b)'s provision that "any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence," 28 U.S.C. § 851(b), rendering immaterial any dispute as to whether the usual "considerations of administration and finality" apply here. Johnson, 544 U.S. at 304.

Accordingly, the Court concludes that Petitioner is entitled to raise this § 2255 challenge to his prior conviction.

The government argues in the alternative that, "even if [Petitioner's prior drug convictions] had been reduced to misdemeanors before sentencing in this case, they would still be predicate felonies for the mandatory minimum sentence[]." (Doc. No. 8 ("Opp'n") at 5.) The government's premise here is that enhanced sentencing is warranted if Petitioner committed his federal offense "after a prior conviction for a felony drug offense has become final," and that this condition is a question of federal law, rendering subsequent changes in state law immaterial.

This argument is unpersuasive for several reasons. First, while the construction of the terms "conviction" and "final" in the above-quoted language are questions of federal law, see, e.g., U.S. v. Norbury, 492 F.3d 1012, 1014-15 (9th Cir. 2007); U.S. v. Suarez, 682 F.3d 1214, 1220 (9th Cir. 2012), the term "felony drug offense" is defined by explicit reference to state law, see 21 U.S.C. § 802(44). Here, the California Superior Court determined that the offense for which Petitioner was

convicted in FSB21382 was, as a matter of state law, a conviction for a misdemeanor offense. See Civ. Doc. No. 1-2 at 39 (minutes from California Superior Court designating the conviction in FSB21382 as a misdemeanor pursuant to Cal. Penal Code. § 1170.18). This determination was made pursuant to a California statute that expressly applied retroactively to prior convictions:

> (f) A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.
>
> (g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.
>
> . . .
>
> (k) Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm . . . .

Cal. Penal Code § 1170.18.

Seeking to avoid this conclusion, the government cites a Third Circuit decision, U.S. v. McGlory, 968 F.2d 309 (3rd Cir. 1992), which rejected an appellate challenge to defendant's enhanced sentence mounted on the basis of subsequent changes in

state law. In McGlory, the defendant argued on appeal that his prior conviction "cannot be considered a felony for purposes of 21 U.S.C.A. § 841[] because if he were convicted of the same conduct today, that conduct would only amount to a misdemeanor under Pennsylvania law." Id. at 349. The McGlory court rejected this argument, noting that the Pennsylvania statute reducing certain offenses from felonies to misdemeanors did not apply retroactively. In contrast, the change in state law invoked by Petitioner is expressly retroactive, thus rendering McGlory distinguishable.

Moreover, although the holding in McGlory is inapplicable, the opinion does contain very instructive dicta. The McGlory court noted that, while the relevant provisions of Pennsylvania law did not apply retroactively, there was another statute that "could have provided the result [defendant] McGlory desires." Id. at 351 n.33. The statute, strikingly similar to Cal. Penal Code § 1170.18, provided as follows:

> [I]n any case final on or before June 12, 1972 in which a defendant was sentenced for the commission of acts similar to those proscribed by . . . this act [cocaine possession], such defendant shall be resentenced under this act upon his petition if the penalties hereunder are less than those under prior law . . . .

McGlory, 968 F.2d at 351 n.33 (citing 35 Pa. Cons. Stat. Ann. § 780-138).

While this statute "could have provided the result" sought by defendant, the McGlory court noted that the statute had been invalidated by the supreme court of Pennsylvania, rendering it unavailable to defendant in support of his challenge. McGlory, 968 F.2d at 351 n.33 (citing Commonwealth v. Sutley, 474 Pa. 256 (1977)). Thus, the government's strongest authority for its position explicitly distinguished itself from cases like the one presently before the court.

Finally, the Court finds the Supreme Court's comments in Johnson—"that a prisoner could proceed under § 2255 after . . . favorable resort to any postconviction process available under state law," 544 U.S. at 304—more directly applicable to the present case than McGlory. Although Johnson involved a successful collateral attack on the validity of the prior conviction, id. at 298, the Court's broad language—as well as the reasoning supporting that broad language—applies with equal force to a successful collateral attack on the designation of the prior conviction as a felony, id. at 303-04. The government provides no authority for distinguishing the two, and the Court sees no reason to do so.

Petitioner having succeeded in collaterally attacking his prior felony conviction in state court, the conviction cannot serve as a "prior conviction of a felony drug offense" for purposes of a sentencing enhancement under 21 U.S.C. § 841(b)(1)(B).

IV. CONCLUSION

Petitioner has successfully established that his "sentence was imposed in violation of . . . the laws of the United States, . . . or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Accordingly, Petitioner's Motion for Resentencing is **GRANTED**. The Court sets the matter for resentencing on Monday, January 11, 2016 at 9:00 AM, directs the U.S. Probation Office to prepare and disclose an updated Presentence Report, and orders the parties to file their sentencing memoranda no later than December 21, 2015.

IT IS SO ORDERED.

Dated: 9/30/15

Virginia A. Phillips

Virginia A. Phillips
United States District Judge