No. _____

In the Supreme Court of the United States

ALESTEVE CLEATON,
Petitioner,
v.
DEPARTMENT OF JUSTICE,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal law enforcement officer is "convicted" within the meaning of 5 U.S.C. § 7371 when a guilty plea has been entered but no sentence has been imposed, no judgment has issued, and the plea can still be withdrawn.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alesteve Cleaton respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-8a) is reported at 839 F.3d 1126. The opinion of the Merit System Protection Board (App. 20a-27a) is reported at 122 M.S.P.R. 296, 2015 MSPB 24. The Initial Decision of the Merit Systems Protection Board Administrative Judge (App. 9a-19a) is unreported.

JURISDICTION

The court of appeals entered judgment on October 13, 2016. App. 1a. On February 23, 2017, the court of appeals denied a petition for rehearing en banc. *Id.* at 28a-29a. On May 15, 2017, the Chief Justice granted petitioner's application for an extension of time within which to file a petition for a writ of certiorari to and including June 23, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 5 United States Code Section 7371 provides in pertinent part:

> **(a)** In this section, the term—
>
> **(1)** "conviction notice date" means the date on which an agency that employs a law enforcement officer has notice that the officer has been convicted of a felony that is entered by a Federal or State court, regardless of whether that conviction is appealed or is subject to appeal; and

> (2) "law enforcement officer" has the meaning given that term under section 8331(20) or 8401(17).
>
> (b) Any law enforcement officer who is convicted of a felony shall be removed from employment as a law enforcement officer on the last day of the first applicable pay period following the conviction notice date.
>
> * * *
>
> (d) If the conviction is overturned on appeal, the removal shall be set aside retroactively to the date on which the removal occurred, with back pay under section 5596 for the period during which the removal was in effect, unless the removal was properly effected other than under this section.

INTRODUCTION

This case presents the question whether the term "convicted" in 5 U.S.C. § 7371, a federal statute requiring the immediate and mandatory removal of a federal law enforcement officer "convicted" of a felony, requires something more than the mere entry of a withdrawable guilty plea. The Federal Circuit, which has exclusive jurisdiction over appeals from removal under § 7371, answered that question "no" and upheld petitioner's removal based exclusively on a superseded plea on which he was never sentenced. That decision is inconsistent with this Court's precedents and is an erroneous interpretation of the statute. Absent review by this Court, the Federal Circuit's decision will be the final word on the rules governing removal of the over 100,000 federal law enforcement officers in this country. Brian A. Reaves, Bureau of Justice Statistics,

Federal Law Enforcement Officers, 2008 at 1 (June 2012), http://www.bjs.gov/content/pub/pdf/fleo08.pdf (estimating that "federal agencies employed approximately 120,000 full-time law enforcement officers" in September 2008). Dozens of other federal statutes impose collateral consequences that are similarly triggered by the undefined term "conviction," and that have caused confusion among the courts of appeals. This case presents an ideal vehicle to resolve that confusion and to provide further guidance to the courts on this important and recurring issue.

STATEMENT OF THE CASE

A. State Court Proceedings

For nearly a decade, Alesteve Cleaton served without incident as a federal law enforcement officer for the Bureau of Prisons ("BOP"). App. 1a; A1053.[1] Petitioner had a good employment record and no prior criminal history. A1146-47. In December 2013, he was indicted in the Commonwealth of Virginia ("Commonwealth") on a state-law felony charge when more than one-half an ounce of marijuana was discovered at his family's home. App. 1a; A1097.

Petitioner entered into a plea agreement with the Commonwealth (the "First Plea") and, in March 2014, a Virginia trial court found him "guilty" at a hearing (the "March Hearing").[2] App. 1a-2a. In a May 6, 2014

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[1] Citations to "A____" refer to the Joint Appendix filed in the United States Court of Appeals for the Federal Circuit, ECF Nos. 32, 33.

[2] The First Plea is not in the record. In the Federal Circuit, the parties disputed whether petitioner had entered a plea of nolo contendere or a guilty plea. *See* Pet'r Br. 7, ECF No. 13 ("Mr. Cleaton pled no contest to the charge against him pursuant to a

Order (the "May Order"), the trial court explained that it had found petitioner guilty at the March Hearing, but that it had not imposed any sentence. App. 2a. The May Order also did not impose any sentence. *Id.* Instead, the court ordered petitioner to cooperate with the Probation Office in the preparation of a pre-sentence report. *Id.* The trial court never imposed any sentence or entered any formal judgment based on the First Plea. *See id.*; A1059.

On May 9, 2014, three days after the May Order, the BOP proposed removing petitioner from his position under 5 U.S.C. § 7371. App. 2a. That statute requires the removal of any federal law enforcement officer "convicted of a felony . . . on the last day of the first applicable pay period following the conviction notice date." 5 U.S.C. § 7371(b). "[C]onviction notice date" is defined as "the date on which an agency that employs a law enforcement officer has notice that the officer has been convicted of a felony that is entered by a Federal or State court, regardless of whether that conviction is appealed or is subject to appeal." *Id.* § 7371(a)(1). If the conviction is "overturned on appeal," however, "the removal shall be set aside retroactively to the date on which the removal occurred, with back pay." *Id.* § 7371(d).

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plea deal."); Resp't Opp'n to Reh'g 1 n.1 ("[T]he record shows that Mr. Cleaton pled guilty on March 20."). The Federal Circuit accepted the fact that petitioner had pleaded "no contest." *See, e.g.*, App. 1a-2a ("During a hearing on March 20, 2014, Mr. Cleaton pled no contest to the felony charge pursuant to a plea deal."); *see also id.* at 3a, 8a. But the difference between the two pleas is immaterial for purposes of this petition. Accordingly, unless otherwise noted, the term "guilty plea" is used throughout the petition to encompass both guilty and no contest pleas.

On May 31, 2014, the BOP removed petitioner from his position based solely on the May Order. App. 2a. Even though there was no formal judgment and no sentence of imprisonment or period of probation imposed at that time, and even though the First Plea could have been withdrawn under Virginia law,[3] the BOP concluded that petitioner was "convicted of a felony" that had been "entered" by a "state court." A1057.

After receiving notice of his removal, petitioner obtained new counsel and negotiated a new plea agreement (the "Controlling Plea"). App. 2a-3a. In September 2014, pursuant to the new plea agreement, petitioner entered a plea of nolo contendere to the felony charge against him, along with a new misdemeanor contempt charge.[4] *Id.* at 3a. The Commonwealth agreed that a final determination of guilt for both charges would be withheld by the trial court for a period of two years, during which time petitioner had to satisfy several conditions. If

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[3] Under Virginia law, a defendant may withdraw a plea of guilty or nolo contendere before a sentence is imposed if it will promote the ends of justice, including if the defendant had "a misunderstanding as to [the guilty plea's] effect." *Hernandez v. Commonwealth*, 793 S.E.2d 7, 12 (Va. Ct. App. 2016) (citation omitted); *see* Va. Code Ann. § 19.2-296; *Hall v. Commonwealth*, 515 S.E.2d 343, 346 (Va. Ct. App. 1999). The same is true under federal law. Federal Rule of Criminal Procedure 11(d) and (e) provide that a defendant may withdraw a guilty or nolo contendere plea "after the court accepts the plea, but before it imposes sentence if: . . . the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d), (e).

[4] The new charge of misdemeanor contempt is not relevant here; it is not a felony and may not serve as the basis for removal under 5 U.S.C. § 7371.

petitioner complied with those conditions, the government agreed that "both charges [would] be dismissed." A1144.

The Controlling Plea expressly stated that petitioner stood "indicted in th[e] Court for one felony." A1143. On November 20, 2014, the trial court issued an order memorializing the Controlling Plea. A1141-42. In that Order, the court expressly "withheld" a "finding of guilt" and ordered that "both charges will be dismissed" if petitioner satisfied the conditions set forth in the plea agreement. A1141. As discussed below, that is precisely what happened.

B. Merit Systems Protection Board Proceedings

On June 5, 2014, petitioner appealed his removal to the Merit System Protection Board ("MSPB"). App. 9a-19a. On October 3, 2014, the administrative judge issued an initial decision for the MSPB, finding that petitioner was properly removed under § 7371 because he was "convicted of a felony" that was "recorded" in the May Order. *Id.* at 10a-12a.

Mr. Cleaton petitioned the MSPB to review the initial decision. At that time, the Controlling Plea had been entered, superseding the First Plea. *Id.* at 22a. The MSPB accepted the Controlling Plea into the record, but affirmed petitioner's removal based solely on the May Order. *Id.* at 24a. Specifically, on February 27, 2015, the MSPB held that petitioner was "convicted of a felony" because the Virginia trial court had found him guilty in May 2014. *Id.* at 25a; *see also id.* at 24a ¶ 10. The MSPB further found "no indication that the [trial] court has expressly vacated that conviction." *Id.* at 25a.

C. The Federal Circuit Decision

On October 13, 2016, the Federal Circuit affirmed. App. 1a-8a. The court of appeals first determined that federal law controlled whether petitioner was "convicted" under § 7371. *Id.* at 5a. The Court then held that petitioner was "convicted" of a felony on May 6, 2014, because a "guilty plea alone" is enough to qualify as a "conviction" so long as "guilt has been established . . . and nothing remains to be done except pass sentence." *Id.* at 5a-6a (citations omitted). For that proposition, the Federal Circuit relied on this Court's decision in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983). The Federal Circuit acknowledged that "Virginia law permits a defendant to withdraw a plea agreement," but concluded that the "theoretical possibility that Mr. Cleaton could have withdrawn [the First Plea]" had no bearing on whether a "conviction" was entered in the first instance. App. 7a-8a. The Court also concluded that the subsequent Controlling Plea did not change the analysis because there was no evidence that petitioner formally moved to withdraw the First Plea, that the trial court vacated the First Plea, or that the May Order was "overturned on appeal." *Id.*

On November 7, 2016, petitioner successfully completed all of the conditions of the Controlling Plea. Accordingly, the Virginia trial court dismissed the indictment. Order of Dismissal (Nov. 7, 2016), ECF No. 45 (attachment to Pet'n for Reh'g *En Banc*).

On November 28, 2016, petitioner timely petitioned for rehearing en banc. The Federal Circuit requested a response but, on February 23, 2017, the petition was denied. App. 28a-29a.

REASONS FOR GRANTING THE WRIT

The Federal Circuit held that a federal law enforcement officer is "convicted" under 5 U.S.C. § 7371, and subject to immediate and mandatory removal from his job, when a court accepts his guilty plea—even though no sentence has been imposed or judgment entered, and even though the plea can still be withdrawn. That decision is inconsistent with decisions of this Court; it cannot be squared with the statutory text or purpose; and it leads to absurd results. Absent this Court's intervention, the Federal Circuit's erroneous decision will govern all future cases under § 7371. And it will add to the continued confusion among the courts of appeals over the meaning of the familiar terms "convicted" and "conviction" in federal statutes carrying collateral consequences. This is an important question and a particularly suitable vehicle. Further review is warranted.

I. The Federal Circuit's Interpretation Of "Convicted" In 5 U.S.C. § 7371 Is Inconsistent With This Court's Precedent And Cannot Be Squared With The Statute

A. The Federal Circuit's Decision Is Inconsistent With Decisions Of This Court

The Federal Circuit adopted a definition of "convicted" in 5 U.S.C. § 7371 that is inconsistent with this Court's decision in *Lott v. United States*, 367 U.S. 421 (1961). The Federal Circuit never mentioned, let alone distinguished, *Lott*. And it gravely misread the only Supreme Court decision on which it did rely, *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983).

In *Lott*, this Court considered when a "determination of guilt" was made for purposes of filing a motion for arrest of judgment under Federal Rule of Criminal Procedure 34. 367 U.S. at 423-24. Rule 34 required that such motions be filed within 5 days of the "determination of guilt." *Id.* at 425-26. In that case, the petitioners had pleaded nolo contendere to charges of tax evasion. *Id.* at 422. The district court had accepted their pleas and directed that a presentence report be prepared, but withheld pronouncement of judgment and sentencing until after their co-defendants' trial. *Id.* Three months later, after that trial concluded, the petitioners were sentenced and judgment was entered. *Id.* at 422-23. The following day, petitioners filed motions to arrest judgment. *Id.* at 423.

The issue before this Court was whether a "determination of guilt" was made when the guilty plea was entered (in March) or when the petitioners were sentenced and judgment was pronounced (in June). *Id.* at 423-24. The Court held it was the latter because a "*plea itself does not constitute a conviction* nor hence a 'determination of guilt.'" *Id.* at 426 (emphasis added). Rather, "[i]t is only a confession of the well-pleaded facts in the charge. It does not dispose of the case. It is still up to the court 'to render judgment' thereon." *Id.* (citation omitted). The Court recognized that "[a]t any time before sentence is imposed . . . the plea may be withdrawn, with the consent of the court." *Id.* at 426-27 (citing Fed. R. Crim. P. 32(d)). The Court thus concluded that, "[n]ecessarily," "it is the judgment of the court—not the plea—that constitutes the 'determination of guilt.'" *Id.* at 427. And the Court noted that it was aware of no other case, "[a]part from

the opinion below, . . . that holds or intimates to the contrary." *Id.*

Application of *Lott* to the facts of this case should have led inexorably to the conclusion that petitioner was not "convicted" when his First Plea was entered on May 6, 2014. As *Lott* held, the "plea itself does not constitute a conviction." *Id.* at 426. At that time, the Virginia court had not "render[ed] judgment" based on the First Plea. *Id.* And "the plea [could still have been] withdrawn, with the consent of the court." *Id.* at 426-27. As even the Federal Circuit acknowledged (App. 7a), Virginia law permits a defendant to withdraw a guilty plea before sentence is imposed, with the consent of the court, which should "ordinarily be given" if the defendant has a "misunderstanding as to [the plea's] effect," or if the plea was "entered inadvisedly." *Parris v. Commonwealth*, 52 S.E.2d 872, 874 (Va. 1949); *see* Va. Code Ann. § 19.2-296; *Hall v. Commonwealth*, 515 S.E.2d 343, 346 (Va. Ct. App. 1999). But the Federal Circuit ignored *Lott* entirely and instead relied on this Court's later decision in *Dickerson*. App. 5a-6a. That reliance is misplaced; *Dickerson* provides no support.

In *Dickerson*, this Court considered the meaning of the term "convicted" for purposes of 18 U.S.C. § 922(g)(1) and (h)(1), which prohibit those "convicted . . . of . . . a crime punishable by imprisonment for a term exceeding one year" from shipping, transporting, or receiving any firearm or ammunition, and maintaining a federal license to transport, ship, or receive firearms or ammunition. 460 U.S. at 105-06. In that case, the respondent had previously pleaded guilty to a qualifying crime but, pursuant to a plea agreement, the state court had

deferred entry of formal judgment and placed the petitioner on probation. *Id.* at 106-08. At the end of the probation term, the deferred judgment was expunged. *Id.* at 108.

The pertinent issue before this Court was whether the respondent had been "convicted." *Id.* at 109-10. In answering that question, the Court held that "a plea of guilty and its notation by the state court, *followed by a sentence of probation*" was sufficient to constitute a conviction "for purposes of the federal gun control laws." *Id.* at 114 (emphasis added). The Court noted that three critical elements were present: "(a) the charge of a crime of the disqualifying type, (b) the plea of guilty to that charge, and (c) the court's placing [the respondent] upon probation." *Id.* at 111. The Court emphasized that while there was "no written adjudication of guilt" nor "formal pronouncement of a sentence of imprisonment," the respondent had been sentenced to probation, and it is "plain that one cannot be placed on probation if the court does not deem him to be guilty of a crime." *Id.* at 113-14; *see id.* at 113 (noting that there was "more" here than other cases because the state court "placed" the respondent "on probation").

The Court distinguished *Lott* on three grounds. First, "in *Lott* the Court did not deal with the situation where probation is imposed on the basis of the plea." *Id.* at 113 n.7. Second, the petitioners in *Lott* had entered no contest pleas which could be withdrawn, whereas, here, the respondent's plea could not. *Id.* Third, the Court noted the broad purposes of the federal gun control laws and, specifically, the fact that the statute extended the statutory prohibitions beyond convictions to those "merely under indictment." *Id.* at

112 n.6; *see also id.* at 115-16. In contrast, the Court in *Lott* did not have before it "evidence of a congressional intent to rule broadly to protect the public comparable to that animating" the federal gun control laws. *Id.* at 113 n.7.

The Federal Circuit misunderstood the first two distinctions and misapplied the third. In finding that the May Order constituted a conviction under § 7371, the Federal Circuit noted that "*when an individual is placed on probation*, a court does not need to necessarily issue a formal adjudication of guilt because 'one cannot be placed on probation if the court does not deem him to be guilty of a crime.'" App. 6a (emphasis added) (quoting *Dickerson*, 460 U.S. at 113-14). But that is precisely the problem: petitioner was not "placed on probation" or otherwise sentenced on May 6, 2014. As for the withdrawable nature of the First Plea, the Federal Circuit focused on whether the plea had, in fact, been withdrawn and deemed the "theoretical possibility that [petitioner] could have withdrawn his plea agreement" irrelevant. *Id.* at 8a. This Court's focus in *Dickerson*, in contrast, was on whether, "once the plea was noted and probation imposed," respondent "could" have withdrawn his plea as a matter of law. 460 U.S. at 113 n.7. The Federal Circuit thus effectively ignored the critical distinctions between the mere acceptance of a guilty plea and the something "more" (*i.e.*, a sentence of probation rendering the plea final) that distinguished *Dickerson* from *Lott*.

Instead, the Federal Circuit focused almost exclusively on the perceived unity of purpose between § 7371 and the federal gun control laws. App. 5a-6a. As discussed further below (*see* Part I.B, *infra*), that comparison is misplaced. Unlike § 922(g) and (h), a

federal law enforcement officer is not subject to mandatory removal if he is "merely under indictment," or is a "drug addict or an unlawful user of certain drugs." *Dickerson*, 460 U.S. at 113 n.6, 116. The extensive legislative record and "carefully constructed package of gun control legislation" at issue in *Dickerson* far exceeds the stray piece of legislative history on which the Federal Circuit relies and which does nothing to answer the predicate question of what it means to be "convicted." *Compare Dickerson*, 460 U.S. at 119-20 (citation omitted), *with* App. 6a. And, in the end, even the *Dickerson* Court required a non-withdrawable plea and a sentence of probation for a defendant to stand "convicted." 460 U.S. at 113-14. If the Federal Circuit had in fact applied the definition of "convicted" adopted in *Dickerson*, petitioner's First Plea would not qualify.

To be sure, *Dickerson* noted that, "[i]n some circumstances," this Court has described "a guilty plea alone" as a "'conviction.'" 460 U.S. at 112. But in the two cases cited, the Court was simply distinguishing an extrajudicial confession from a guilty plea and, specifically, explaining why additional safeguards are required when a defendant is entering a "plea of guilty." *See Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (imposing safeguards to ensure that guilty plea is voluntary); *Kercheval v. United States*, 274 U.S. 220, 223-24 (1927) (holding that withdrawn guilty plea is "naught" and cannot be evidence in subsequent trial).[5]

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[5] This Court also cited an Eighth Circuit decision where, as in *Dickerson*, the defendant had been "placed on probation." *United States v. Woods*, 696 F.2d 566, 570 (8th Cir. 1982).

Nor can this Court's more recent decision in *Deal v. United States*, 508 U.S. 129 (1993), explain the decision below. In *Deal*, the Court addressed the definition of "conviction" in 18 U.S.C. § 924(c)(1), which imposes a sentence enhancement for use of a firearm in relation to a crime of violence "[i]n the case of a second or subsequent conviction." *Id.* at 130-31 (quoting 18 U.S.C. § 924(c)(1)(C)). In that context, the Court held that the term "conviction" referred to "the finding of guilt," as opposed to the "judgment of conviction," because any other reading would have been "absurd," would have rendered the entire recidivist *sentencing* scheme "incoherent," and would have led to "strange" consequences—namely, "prescribing that a sentence which has already been imposed (the defendant's second or subsequent 'conviction') shall be 5 or 20 years longer than it was." *Id.* at 132-33. Because the exact opposite is true here (*see* Part I.B, *infra*), the Federal Circuit decision cannot be squared with this Court's precedents.

B. The Federal Circuit's Expansion Of *Dickerson* Cannot Be Explained By Anything In § 7371's Text, Context, Or Purpose

The Federal Circuit provided no justification for its *sub silentio* expansion of *Dickerson*, and § 7371 provides none. Read in context, a federal law enforcement officer is not "convicted" of a felony by the mere entry of a withdrawable plea.

Section 7371(b) provides for the mandatory and immediate removal of a federal law enforcement officer who "is convicted" of a felony. 5 U.S.C. § 7371(b). Such removal is triggered by the date on which the agency has notice that "the officer has been convicted of a

felony that is entered by a Federal or State court." *Id.* § 7371(a)(1). The statute does not define what it means to be "convicted," but there is no reason to think that Congress meant that term to apply to the mere entry of a guilty plea, without more. Indeed, all the evidence is to the contrary.

Section 7371(d) provides that, "[i]f *the conviction* is overturned on appeal, the removal shall be set aside retroactively to the date on which the removal occurred, with back pay under section 5596 for the period during which the removal was in effect." 5 U.S.C. § 7371(d) (emphasis added). "[T]he conviction" referenced here is the same conviction that requires removal under subsection (b). For subsection (d) to have its full effect (*i.e.*, permitting reinstatement when "a conviction is overturned on appeal"), the "conviction" must first be appealable. A withdrawable plea cannot be appealed; it does not have full legal effect until a sentence (of probation or otherwise) and judgment has been entered. Because "the conviction" in subsection (d) "necessarily" refers to the "judgment of conviction" and not mere entry of the plea, the term "convicted" in subsection (b) should be read likewise. *See Deal*, 508 U.S. at 133 (noting that surrounding provisions "confirm[]" reading of the term "conviction"); *cf. Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 86 (2006) ("Generally, 'identical words used in different parts of the same statute are . . . presumed to have the same meaning.'" (alteration in original) (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005))).

Treating the entry of a withdrawable guilty plea as a conviction would also lead to absurd results. For example, if a guilty plea is sufficient for a conviction, so

too is a jury verdict. *See Kercheval*, 274 U.S. at 223 (equating entry of guilty plea with jury verdict of guilt). Thus, under the Federal Circuit's decision, if a law enforcement officer were found guilty of a felony by a jury, he would at that precise moment be "convicted" within the meaning of the statute and would immediately lose his job. That would be true even if the trial court later overturned the jury verdict in light of jury tampering, prosecutorial misconduct, or even insufficient evidence. Regardless of the reason, the law enforcement officer would still have been "convicted" and that conviction would not have been overturned "on appeal."

Similarly, a federal law enforcement officer would immediately and permanently lose his job if he were to withdraw his guilty plea with the consent of the court—even if he was later acquitted at trial. Here too, he would have been "convicted" upon entry of the guilty plea and that conviction would not have been overturned "on appeal." Applying the Court's decision in *Lott*, and holding that there must be a judgment of conviction—or, at a minimum, a guilty plea and sentence of probation—for a defendant to be "convicted" within the meaning of § 7371, would avoid such absurd results. *See Deal*, 508 U.S. at 132, 134 (adopting alternative definition of "conviction" to avoid "absurd result[s]" and "strange consequences"); *see also Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (rejecting interpretation that "would produce an absurd and unjust result which Congress could not have intended" (citation omitted)).

In rejecting that approach, and purporting to apply *Dickerson*, the Federal Circuit rested on Congress's purpose in enacting § 7371. The court explained that

Congress's intent was to remove an agency's prior "discretion" not to remove a law enforcement officer "that had been convicted of a felony." App. 6a. But that just begs the question of when an officer is, in fact, "convicted." And the statement by Senator Grassley on which the Federal Circuit relied does nothing to answer that question. *Id.* The exceedingly limited legislative history demonstrates only that the purpose of the statute was to remove supervisors' discretion to continue employing federal law enforcement officers *convicted* of felonies. 146 Cong. Rec. S2617-18 (daily ed. Apr. 12, 2000) (statement of Sen. Grassley). The only example given was the case of a director of internal affairs at the Defense Criminal Investigative Service who committed numerous acts of fraud over a multi-year period and yet remained in his post. *Id.* at S2617. Senator Grassley complained that the employee was kept in his position for six months after his employer became aware of a felony fraud conviction and while the employee was "confined in jail." *Id.* Nothing in the legislative history indicates that Congress intended the severe sanction of mandatory removal from a law enforcement post to be triggered before sentencing, before judgment, and at a time when the guilty plea could still be withdrawn.

This sparse legislative history stands in stark contrast to the voluminous history supporting the federal firearms prohibition at issue in *Dickerson*. As this Court has "repeatedly observed," the legislative history of § 922 "ma[de] clear that '*Congress sought to rule broadly*—to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" *Dickerson*, 460 U.S. at 112 (emphasis added)

(quoting *Lewis v. United States*, 445 U.S. 55, 63 (1980)). That much was evident by the statute itself, which broadly imposed its firearm restrictions not just on the convicted, but also on those "under indictment," "fugitive[s] from justice," and "drug addict[s] or user[s] of certain drugs." *Dickerson*, 460 U.S. at 115-16 (citing 18 U.S.C. § 922(g), (h)); *see also* 18 U.S.C. § 922(d)(1), (n), (s)(3). Yet even in *Dickerson*, this Court emphasized that there was a sentence of probation *and* that the guilty plea could not be withdrawn. 460 U.S. at 113 & n.7. Without any comparable provisions or legislative history suggesting "convicted" should be read *more broadly* in § 7371 than in § 922, the Federal Circuit's decision cannot stand.

II. This Is A Recurring And Important Question That Has Caused Confusion In The Circuits And That Warrants Further Review

The Federal Circuit has exclusive jurisdiction over appeals from "a final order or final decision of the Merit Systems Protection Board." 28 U.S.C. § 1295(a)(9); *see also* 5 U.S.C. § 7703(b)(1)(A). There is thus no potential for a circuit split on the precise question presented. Absent review by this Court, the Federal Circuit's erroneous interpretation of the term "convicted" in § 7371 will be the law that governs tens of thousands of federal law enforcement officers for decades to come.

It will also govern other federal statutes within the Federal Circuit's exclusive jurisdiction that impose collateral consequences based on a "conviction." For example, the Federal Circuit similarly interpreted the term "conviction" in a veterans' benefits statute to "occur[] when the accused is found—or pleads—guilty," even when no sentence or probation has been imposed.

Mulder v. McDonald, 805 F.3d 1342, 1346-47 (Fed. Cir. 2015). And the court below relied on that decision in this case. *See* App. 5a (citing *Mulder*, 805 F.3d at 1347). The Federal Circuit's misreading of *Dickerson*, and its broad reading of "conviction," will thus extend beyond the statute at issue here.

Moreover, the question of what constitutes a conviction sufficient to trigger collateral consequences under a federal statute is a recurring and important one that has caused broader confusion in the circuits. The term "conviction" has been described as "a chameleon." *Harmon v. Teamsters, Chauffeurs & Helpers Local Union 371*, 832 F.2d 976, 978 (7th Cir. 1987) (Posner, J.). This Court has recognized that "the terms 'convicted' and 'conviction' do not have the same meaning in every federal statute." *Dickerson*, 460 U.S. at 112 n.6. And a number of statutes and regulations adopt specific and varying definitions of these familiar terms. *See, e.g.*, 8 U.S.C. § 1101(a)(48)(A) (defining "conviction" in federal immigration laws as "a formal judgment of guilt . . . entered by a court or, if adjudication has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere . . . and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty"); 18 U.S.C. § 921(a)(20)(B) (defining "conviction" in federal gun control laws to be "determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter").

As this case exemplifies, however, Congress does not always define what it means by "convicted." That unadorned term appears in a multitude of federal statutes imposing collateral consequences. *See, e.g.*, 28 U.S.C. § 1865(b)(5) (prohibiting someone "convicted" of a felony from serving on a grand or petit jury unless his civil rights have been restored); 21 U.S.C. § 824(a)(2) (permitting the Drug Enforcement Agency to revoke the registration to produce and sell controlled substances if a person has been "convicted" of a felony involving controlled substances); 49 U.S.C. § 31310 (disqualifying those convicted of certain offenses from maintaining a commercial motor vehicle license); 20 U.S.C. § 1091(r) (prohibiting someone with a drug conviction from receiving federal student loan assistance); *see generally* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. Rev. 623 (2006). Many of these statutes have required judicial interpretation, and the courts of appeals have struggled to find consistent answers.

In interpreting the word "convicted" or "conviction" in other federal statutes, some courts have held that the entry of a guilty plea alone is insufficient; rather, there must also be a sentence imposed or formal judgment entered. *See, e.g.*, *United States v. Steven W.*, 850 F.2d 648, 649 (10th Cir. 1988) (holding that a "finding of juvenile delinquency" occurs upon the "judgment of the court and not the defendant's admission at arraignment"), *cert. denied*, 488 U.S. 1012 (1989).[6] Other courts have followed the line set forth in

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[6] In the context of Federal Rule of Evidence 410, some courts of appeals have held that while a no contest plea may not be

Dickerson and held that the entry of a guilty plea that includes a sentence of probation is sufficient to constitute a conviction. *See, e.g.*, *United States v. McAllister*, 29 F.3d 1180, 1183-85 (7th Cir. 1994) (holding that "probation is a conviction under [the sentence enhancement in 21 U.S.C.] § 841(b)(1)(B)"); *United States v. Campbell*, 980 F.2d 245, 251 (4th Cir. 1992) (holding that for sentencing enhancement in 21 U.S.C. § 841, a "prior conviction" occurs when there was a sentence of probation after a guilty plea or verdict), *cert. denied*, 508 U.S. 952 (1993); *Harmon*, 832 F.2d at 979-80 (holding that a guilty plea followed by imposition of probation was a "conviction" in 29 U.S.C. § 504); *United States v. Bustamante*, 706 F.2d 13, 15 (1st Cir.) (Breyer, J.) (holding that defendant was "convicted" for purposes of 18 U.S.C. § 922(h) when he pleaded no contest and was sentenced to probation), *cert. denied*, 464 U.S. 856 (1983).

Other courts of appeals have agreed with the Federal Circuit that entry of a guilty plea (or a jury verdict of guilty) alone constitutes a qualifying conviction. *See, e.g.*, *United States v. Couch*, 291 F.3d 251, 254 (3d Cir. 2002) (holding that a guilty plea is a "conviction" under 18 U.S.C. § 924(c)(1)); *DeCuir v. U.S. Parole Comm'n*, 800 F.2d 1021, 1023 (10th Cir. 1986) (holding that "conviction" under 28 C.F.R. § 2.52(c)(2) occurs "upon the entry of [a] guilty plea");

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admissible as proof of guilt, the entry of judgment on such a plea is admissible. *See United States v. Green*, 842 F.3d 1299, 1316-19 (11th Cir. 2016); *Olsen v. Correiro*, 189 F.3d 52, 58-62 (1st Cir. 1999). And in the context of evidence to impeach a witness, the Fifth Circuit has held that it is the judgment of conviction and resulting sentence, "not the tender and acceptance of" a no contest plea, that constitutes a "determination of guilt." *United States v. Ward*, 481 F.2d 185, 186 (5th Cir. 1973).

United States v. Pennon, 816 F.2d 527, 528 (10th Cir.) (holding that "guilty plea satisfies the felony conviction requirement of [18 U.S.C.] § 1202(a)(1)"), *cert. denied*, 484 U.S. 987 (1987), *superseded by statute as recognized in United States v. Neeley*, 527 F. Supp. 2d 1326 (D. Kan. 2007); *United States v. Millender*, 811 F.2d 476, 477 (8th Cir. 1987) (holding that "a voluntary plea of guilty is a conviction" under 18 U.S.C. § 1202(a)(1)).

It has been over two decades since this Court last considered the meaning of the term "conviction" in a federal statute imposing collateral consequences. The Federal Circuit's authoritative decision badly misreads this Court's decisions, and other courts have struggled to find consistent meaning. Further guidance is needed.

III. This Case Is A Particularly Appropriate Vehicle In Which To Resolve The Question Presented

This case is a particularly appropriate vehicle for the Court to provide further guidance. Petitioner was removed from his position as a federal law enforcement officer based exclusively on the May 6, 2014 plea. There can be no dispute that petitioner never received any sentence (probation or otherwise) as a result of that plea; that the Virginia court never entered a formal judgment based on that plea; and that the guilty plea was withdrawable with the consent of the court. *See supra* at 4-5. The MSPB decision was not based on anything that happened *after* the May 2014 plea, and there has been no administrative (or judicial) determination that any subsequent event rendered petitioner "convicted" and, thus, removable within the meaning of § 7371. *Cf. Michigan v. EPA*, 135 S. Ct.

2699, 2710 (2015) ("[A] court may uphold agency action only on the grounds that the agency invoked when it took the action.") (citing *SEC v. Chenery*, 318 U.S. 80, 94 (1943)).

Although not before this Court as a cognizable ground for removal, the post-May 2014 proceedings serve to further illustrate that the Federal Circuit decision is wrong. As explained above, a critical reason why a person should not be deemed "convicted" under § 7371 until a sentence is imposed and judgment entered is because, before that time, a guilty plea can be withdrawn. To impose the extreme sanction of mandatory removal of a federal law enforcement officer at a time when the trial court can effectively negate the guilty plea, and before any purported conviction could be "overturned on appeal," would create absurd results and be patently unfair to law enforcement officers. And that is precisely what occurred here. Petitioner was removed from his job as a federal law enforcement officer in May 2014, even though (i) no sentence was imposed or formal judgment entered based on the First Plea, and (ii) the trial court effectively negated the First Plea by accepting the Controlling Plea and, ultimately, dismissing the indictment. Order of Dismissal (Nov. 7, 2016).[7] This case presents a clean and compelling vehicle for further review.

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[7] In the Federal Circuit, the parties disputed whether the First Plea was formally withdrawn. *See* Pet'r Br. 21-22, ECF No. 13; Resp't Br. 17, ECF No. 23. Whether technically withdrawn or not, the critical point is that entry of the Controlling Plea means that the First Plea can no longer be in effect. There can be no meaningful dispute that a court cannot enter a judgment of conviction based on two different pleas to the same offense, and the only sentence imposed tracked the Controlling Plea.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 23, 2017

APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Alesteve CLEATON, Petitioner

v.

DEPARTMENT OF JUSTICE, Respondent

2015-3126

Decided: October 13, 2016

Before DYKE, WALLACH, and HUGHES, Circuit Judges.

839 F.3d 1126

OPINION

HUGHES, Circuit Judge.

Alesteve Cleaton was removed from his position as Correctional Officer pursuant to 5 U.S.C. § 7371, which mandates the removal of any law enforcement officer who is convicted of a felony. Mr. Cleaton appeals the Merit Systems Protection Board's decision sustaining his removal. Because the Board did not err in finding that Mr. Cleaton was convicted of a felony on May 6, 2014, we affirm.

I

Mr. Cleaton was a Correctional Officer with the Bureau of Prisons (BOP) at the Federal Correctional Complex in Petersburg, Virginia. On December 17, 2013, Mr. Cleaton was indicted in Virginia State court on a felony charge for possession of marijuana with intent to distribute. J.A. 1097. During a hearing on March 20, 2014, Mr. Cleaton pled no contest to the

felony charge pursuant to a plea deal. Pet. Br. at 7 ("After his indictment, Mr. Cleaton pled no contest to the charge against him pursuant to a plea deal.").[1]

Following the hearing, on May 6, 2014, the trial court entered an order noting that "defendant was arraigned and plead [sic] guilty to the charge in the indictment." J.A. 1059. The court further noted that "having heard the evidence, [the court] accepted defendant's plea of guilty, and found him guilty of possess[ing] marijuana with intent." *Id.* The court deferred the imposition of the sentence "upon the condition that defendant cooperate fully with the requests for information made by the Probation Officer, who is directed to conduct a thorough investigation and to file a long-form presentence report with the Court." *Id.*

On May 9, 2014, BOP proposed to remove Mr. Cleaton from his position pursuant to 5 U.S.C. § 7371(b). J.A. 1057–58. Mr. Cleaton was notified on May 20, 2014, that he would be removed from his position effective May 31, 2014. J.A. 1055–56.

On June 5, 2014, Mr. Cleaton appealed his removal to the Board asserting that he was not convicted on May 6, 2014. The Administrative Judge issued an initial decision on October 3, 2014, finding that Mr. Cleaton was properly removed under 5 U.S.C. § 7371(b) because he was "convicted of a felony" that was "recorded on May 6, 2014." J.A. 1103.

After Mr. Cleaton was removed, he obtained new counsel and on November 20, 2014, he entered into a

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[1] The initial plea agreement and transcript from the March 20, 2014 hearing are not in the record.

revised plea agreement. J.A. 1143–49. The revised plea agreement added a misdemeanor charge for contempt, but did not change Mr. Cleaton's previous no contest plea to the felony. J.A. 1141. The court accepted the plea agreement noting that "Defendant pled no contest to both charges and stipulated that evidence was sufficient to convict him on both charges." *Id.* But, pursuant to the plea agreement the court "withheld a finding [of guilt] for a period of 2 years." *Id.* The court placed Mr. Cleaton on supervised probation for two years and, upon successful completion of the probation period, the charges against Mr. Cleaton will be dismissed.

Mr. Cleaton appealed the Administrative Judge's initial decision to the Board, arguing that pursuant to the revised plea agreement the court withheld a finding of guilt and therefore he was not convicted of a felony on May 6, 2014. The Board disagreed and upheld Mr. Cleaton's removal.

Mr. Cleaton appeals. We have jurisdiction under 5 U.S.C. § 7703(b)(1)(A) and 28 U.S.C. § 1295(a)(9).

II

The Board's decision upholding Mr. Cleaton's removal must be set aside "if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without following applicable procedures; or 'unsupported by substantial evidence in the record.' " *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 774 n.5, 105 S.Ct. 1620, 84 L.Ed.2d 674 (1985) (quoting 5 U.S.C. § 7703(c)(3)).

Pursuant to 5 U.S.C. § 7371(b), "[a]ny law enforcement officer who is convicted of a felony shall be removed from employment as a law enforcement

officer on the last day of the first applicable pay period following the conviction notice date." "Conviction notice date" is defined as the date on which the employing agency receives "notice that the officer has been convicted of a felony that is entered by a Federal or State court . . . ." *Id.* § 7371(a)(1). "[T]he removal is mandatory even if the conviction is not yet final because it has been appealed." *Canava v. Dep't of Homeland Sec.*, 817 F.3d 1348, 1350 (Fed. Cir. 2016). On appeal, Mr. Cleaton argues that the Board erred in sustaining his removal because he has not been "convicted" of a felony under Virginia law. Therefore, we must first determine whether state or federal law governs the meaning of "conviction" under § 7371(b), and second, whether Mr. Cleaton's plea constitutes a conviction for purposes of § 7371(b).

The statute itself does not specify whether state or federal law controls. Absent "plain indication to the contrary, . . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law." *NLRB v. Nat. Gas Util. Dist.*, 402 U.S. 600, 603, 91 S.Ct. 1746, 29 L.Ed.2d 206 (1971). In *Dickerson v. New Banner Institute, Inc.*, the Supreme Court held that whether a person has been "convicted" for purposes of a federal statute that imposed firearms disabilities was "a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State." 460 U.S. 103, 112, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983).[2] The Court reasoned that "[t]his

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[2] In *Dickerson*, the Supreme Court concluded that even if an individual's felony conviction is expunged, the individual may not maintain a federal license to manufacture or sell firearms

makes for desirable national uniformity unaffected by varying state laws, procedures, and definitions of 'conviction.' " *Id.* The same logic applies here. Section 7371(b) requires immediate removal of a law enforcement officer convicted of a felony. Because federal agencies employ law enforcement officers in every state, it is desirable to have one uniform standard for "conviction" that is unaffected by varying state laws, procedures, and definitions. Therefore, whether one has been "convicted" within the language of 5 U.S.C. § 7371(b) is necessarily a question of federal law.

Under federal law, "a guilty plea alone [can] constitute a conviction" in some circumstances. *Id.* at 113, 103 S.Ct. 986 (internal quotation marks and citation omitted); *see also Mulder v. McDonald*, 805 F.3d 1342, 1347 (Fed. Cir. 2015) ("[A]ccording to its ordinary meaning, a 'conviction' occurs when the accused is found—or *pleads*—guilty.") (emphasis added). In *Dickerson*, for example, the Court determined that a formal judgment was not necessary to establish that an individual had been convicted of a felony for purposes of the firearms disability statute because the purpose of the statute "was to keep firearms out of the hands of presumptively risky people" and there was "no reason whatsoever to

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under 18 U.S.C. § 922(g) because the individual had been convicted within the meaning of the statute. *See* 460 U.S. at 119–20, 103 S.Ct. 986. Congress overruled this outcome in the Firearms Owners' Protection Act, Pub. L. No. 99–308, § 101, 100 Stat. 449 (1986), by clarifying that a conviction expunged under state law would not prevent an individual from maintaining such a license. *See Logan v. United States*, 552 U.S. 23, 27–28, 128 S.Ct. 475, 169 L.Ed.2d 432 (2007).

suppose that Congress meant [conviction] to apply only to one against whom a formal judgment has been entered." *Id.* at 112 n.6, 103 S.Ct. 986.

Similarly, Congress's main concern in enacting § 7371(b) was prohibiting individuals that were guilty of felonies from serving the public as law enforcement officers. Before Congress enacted § 7371(b), an agency had discretion regarding the removal of a law enforcement officer that had been convicted of a felony. *See* 146 CONG. REC. S2617 (daily ed. Apr. 12, 2000) (statement of Sen. Grassley). Section 7371(b)'s broad language reflects Congress's intent to remove that discretion in order to maintain the public's trust in the federal law enforcement system. *Id.* ("Rank and file [law enforcement officers] . . . feel—as I do—that law enforcement officers, who are convicted of felonies—should be removed from their posts immediately. They don't want their badges tarnished by having one of their own, who committed a felony, remain on the job."). Nothing in the legislative history or statutory text indicates that Congress was concerned with whether the officer in question actually receives or serves a prison sentence, or whether a state court formally enters a written adjudication of guilt.

Therefore, we find that an individual can be "convicted" for purposes of § 7371(b) "once guilt has been established whether by plea or by verdict and nothing remains to be done except pass sentence." *Dickerson*, 460 U.S. at 114, 103 S.Ct. 986. Further, when an individual is placed on probation, a court does not need to necessarily issue a formal adjudication of guilt because "one cannot be placed on probation if the court does not deem him to be guilty of a crime." *Id.* at 113–14, 103 S.Ct. 986.

Here, Mr. Cleaton pled no contest to a single felony offense and on May 6, 2014, the court found him guilty of that felony. Because guilt was established on May 6, 2014, the Board correctly determined that Mr. Cleaton was convicted of a felony for purposes of § 7371(b) as of that date.

Mr. Cleaton argues that even if he was convicted of a felony under the initial plea agreement, the initial plea agreement was withdrawn and therefore the conviction was nullified. *See* Pet. Br. at 14. However, the statute is clear that a removal may only be set aside "retroactively to the date on which the removal occurred, with back pay," if the conviction is overturned on appeal, which has not happened in this case. 5 U.S.C. § 7371(d); *see id.* § 7371(e)(2) (stating that "[t]he employee may . . . contest or appeal a removal, but only with respect to whether—(A) the employee is a law enforcement officer; (B) the employee is convicted of a felony; or (C) the conviction was overturned on appeal."). And, although Virginia law permits a defendant to withdraw a plea agreement—which could potentially affect whether there was a conviction if the plea were withdrawn as a result—Mr. Cleaton failed to present any evidence establishing that he filed a motion to withdraw the plea or that the court actually set aside the initial plea agreement. *See* Va. Code Ann. § 19.2–296 (2016) ("A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of a sentence is suspended."); *Hall v. Commonwealth*, 30 Va.App. 74, 515 S.E.2d 343, 346 (1999) ("Whether a defendant should be permitted to withdraw a guilty plea rests within the sound discretion of the trial court to be determined based on

the facts and circumstances of each case."). Instead, Mr. Cleaton's initial plea agreement was simply revised to encompass an additional criminal offense. *See* Pet. Br. at 22; J.A. 1143. This conclusion is supported by the fact that Mr. Cleaton's plea from the initial plea agreement did not change in the revised plea agreement—he merely pled no contest to the additional charge. *Compare* Pet. Br. at 7 *with* J.A. 1143.

This is also not a situation where there is a plea agreement, and, hypothetically, a withdrawal of that agreement could affect whether there was a conviction. *See Dickerson*, 460 U.S. at 113 n.7, 103 S.Ct. 986. Here, there was a judgment of guilt by the trial court based on the plea agreement. The theoretical possibility that Mr. Cleaton could have withdrawn his plea agreement cannot affect that the judgment was entered.

Congress enacted this statute to require the immediate removal of a law enforcement officer convicted of a felony. *See supra* at 1029-30. It would be inconsistent with both the plain language of the statute and Congress's intent if we were to hold that, although Mr. Cleaton was convicted of a felony in May 2014 that has not been overturned on appeal, he must be reinstated and awarded back pay because the initial plea agreement was revised to include additional criminal activity.

Because Mr. Cleaton's conviction has not been overturned on appeal, for purposes of § 7371(b), he stands convicted of a felony as of May 6, 2014. Therefore, the Board did not err in sustaining his removal as of that date.

AFFIRMED

No costs.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGLIONAL OFFICE

ALESTEVE CLEATON, Appellant, v.	DOCKET NUMBER DC-0752-14-0760-I-1
DEPARTMENT OF JUSTICE, Agency.	DATE: OCT -3 2014

Alesteve Cleaton, Freeman, Virginia, pro se.
Tara Chen, Washington, D.C., for the agency.

BEFORE
Melissa Mehring
Administrative Judge

INITIAL DECISION

On June 5, 2014, the appellant filed an appeal seeking review of the agency's decision to remove him from his Correction Officer position, effective May 31, 2014. Appeal File (AF), Tab 1. The Board has jurisdiction over this timely filed appeal pursuant to 5 U.S.C. §§ 7511-7513, 7371. Because the appellant did not request a hearing, this appeal was decided on the written record. AF, Tab 1.

Based on the following analysis and findings, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The appellant was employed as a Corrections Officer with the Federal Bureau of Prisons at the time of his removal. *Id.*, Tab 5 at 10. The agency removed him from his position based on 5 U.S.C. § 7371, which provides that a federal law enforcement officer must be removed from his position if the officer is convicted of a felony. *Id.* at 12.

On May 6, 2014, the Circuit Court of Brunswick County in the Commonwealth of Virginia recorded its acceptance of the appellant's plea of guilty to Possession of Marijuana with Intent to Distribute, a violation of Virginia Code 18.2-248.1. *Id.* at 16. In accepting the appellant's plea, the court found the appellant guilty of a felony. *Id.*

The appellant argues that he was not in fact convicted on May 6, 2014, but instead he argues he "will return to court on June 24, 2014." *Id.*, Tab 1. In support of this argument, the appellant submitted a document indicating a hearing date of June 24, 2014, for a contempt charge under Section 18.2-456 of the Virginia Code. *Id.*, Tab 4 at 4.

The agency proved its charge by preponderant evidence.

The agency bears the burden of proving its charge by preponderant evidence.[1] 5 U.S.C. § 7701(c)(1)(b). The basis for the agency's removal action was that it

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[1] Preponderant evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2) (2012).

was required by 5 U.S.C. § 7371. Under that section, "[a]ny law enforcement officer who is convicted of a felony shall be removed from employment as a law enforcement officer on the last day of the first applicable pay period following the conviction notice date."

An appellant who is removed under the provisions of 5 U.S.C. § 7371 is entitled to the appeal his removal but the statute provides that he may only appeal with respect to: (1) whether he is a law enforcement officer; (2) he was convicted of a felony; and (3) whether the conviction was overturned on appeal. 5 U.S.C. § 7371(e)(2). The appellant has not disputed that he was a law enforcement officer or that his conviction was overturned on appeal.

The appellant's only argument is that he was "not convicted on this date," referring to the May 6, 2014, date stated in the agency's removal letter. AF, Tab 1. The appellant provided a document involving a contempt charge, for which there was a hearing scheduled for June 24, 2014. *Id.*, Tab 4 at 4. This document does not relate to his criminal conviction on the Possession of Marijuana with Intent to Distribute charge. Id., Tab 5 at 16. The appellant has offered no persuasive evidence or argument in support of this argument. On the other hand, the agency provided a copy of the Circuit Court of Brunswick County document entering the appellant's guilty plea and finding the appellant guilty of Possession of Marijuana with Intent to Distribute. *Id.*, Tab 5 at 16. I, therefore, find the appellant was convicted of a felony and his conviction was recorded on May 6, 2014. Accordingly, I find that the provisions of 5 U.S.C. § 7371 require that

the appellant be removed from his law enforcement position.

The penalty is reasonable and promotes the efficiency of the service.

An adverse action, such as removal, may be taken by an agency only for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a). Here the appellant was convicted of a crime and his position was as Correctional Officer with the Federal Bureau of Prisons. Therefore, it is clear that there is a nexus between the charged misconduct and the appellant's position.

Further, when, as here, the agency's charge is sustained, the agency's penalty determination is entitled to deference and will be reversed only if the penalty is beyond the tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). In determining whether the selected penalty is reasonable, the Board gives due deference to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency. *Woebcke v. Department of Homeland Security*, 114 M.S.P.R. 100, ¶ 7 (2010). The Board recognizes that its function is not to displace management's responsibility or to decide what penalty it would impose, but to assure that management judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum limits of reasonableness. *Id.* Thus, the Board will modify a penalty only when it finds the agency failed to weigh the relevant factors or that the penalty the agency imposed clearly exceeded the bounds of reasonableness. *Id.*

Here the appellant has not argued that the agency exceeded the bounds of reasonableness by its imposition of removal. The statute relied upon in taking the action here, 5 U.S.C. § 7371, mandates removal from the appellant's law enforcement position. Further, the Board has long made clear, an employee's conviction of a crime casts grave doubt on his reliability, trustworthiness and ethical conduct, all of which naturally affect the efficiency of the service. *See Brown v. Department of the Treasury*, 34 M.S.P.R. 132, 135 (1987). The Board has consistently upheld the penalty of removal in such cases. *See, e.g., Beasley v. Department of Defense*, 52 M.S.P.R. 272 (1992); *Taylor v. Department of the Navy*, 35 M.S.P.R. 438 (1987). In this case, appellant was employed as a law enforcement officer. The Board has consistently observed that law enforcement officers are held to a higher standard of conduct than other employees. *See, e.g., Carlton v. Department of Justice*, 95 M.S.P.R. 633, 638 (2004); *Zazueta v. Department of Justice*, 94 M.S.P.R. 493, 498 (2003). Moreover, the Board has ruled that the Department of Justice is permitted wide discretion in controlling the work-related conduct of those employees charged with maintaining the integrity of the federal prison system. *See Todd v. Department of Justice*, 71 M.S.P.R. 326, 330 (1996). Based on the above, I find that appellant's removal is for such cause as promotes the efficiency of the service and is within the bounds of reasonableness.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /s/ Melissa Mehring
Melissa Mehring
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on NOV -7 2014 , unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state

your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the

observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests

must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail

to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

If you are interested in securing pro bono representation for your court appeal, you may visit our website at http://www.mspb.gov/probono for a list of attorneys who have expressed interest in providing pro bono representation for Merit Systems Protection Board appellants before the court. The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2015 MSPB 24

DC-0742-14-0760-I-1

Alesteve Cleaton,

Appellant,

v.

Department of Justice,

Agency.

Feb. 27, 2015

122 M.S.P.R. 296

BEFORE

Susan Tsui Grndmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶ 1 The appellant has filed a petition for review of the initial decision, which sustained his removal. For the reasons discussed below, we DENY the appellant's petition for review, AFFIRM the initial decision AS MODIFIED by this Opinion and Order, and SUSTAIN the appellant's removal. We MODIFY the initial decision by addressing new evidence submitted on review that, we find, does not warrant a different outcome in this appeal.

BACKGROUND

¶ 2 The appellant was employed as a Correctional Officer with the Bureau of Prisons at the Federal Correctional Complex in Petersburg, Virginia. Initial Appeal File (IAF), Tab 5 at 10. On March 27, 2014, he pled guilty in the Circuit Court of Brunswick County, Virginia, to a felony charge of Possession of Marijuana with Intent to Distribute (Possession with Intent). *See id.* at 16. By order dated May 6, 2014, the court accepted the appellant's plea and found him guilty of Possession with Intent. *Id.* Effective May 31, 2014, the agency removed the appellant from his position pursuant to 5 U.S.C. § 7371, which provides that a law enforcement officer (LEO) must be removed from his LEO position if he is convicted of a felony. IAF, Tab 5 at 12.

¶ 3 The appellant filed an appeal of his removal with the Board but did not request a hearing. IAF, Tab 1. The appellant asserted that he was not convicted of a felony on May 6, 2014, and that he would be returning to court on June 24, 2014. *Id.* at 3. In support of this argument, the appellant submitted a document indicating that he was scheduled to appear in court on June 24, 2014, for a hearing on a Contempt charge. IAF, Tab 4.

¶ 4 Based on the written record, the administrative judge issued an initial decision dated October 3, 2014, affirming the appellant's removal. IAF, Tab 10, Initial Decision (ID) at 1, 5. The administrative judge found that the document the appellant submitted in support of his claim that he was not convicted of a felony on May 6, 2014, involved a Contempt charge for which a hearing was scheduled on June 24, 2014, and did not relate to his criminal

conviction on the charge of Possession with Intent. ID at 3. The administrative judge noted that the record contained the May 6, 2014 court order entering the appellant's guilty plea and finding the appellant guilty of Possession with Intent. ID at 3; *see* IAF, Tab 5 at 16. Based on this evidence, the administrative judge found that the appellant was convicted of a felony and that his conviction was recorded on May 6, 2014. ID at 3. Therefore, the administrative judge found that 5 U.S.C. § 7371 required that the appellant be removed from his LEO position. ID at 3.

¶ 5 The appellant has filed a petition for review in which he asserts that on September 25, 2014, the court found that he was not guilty of Possession with Intent. Petition for Review (PFR) File, Tab 1 at 5. In support of this assertion, the appellant has submitted a form titled "Criminal History Record Name Search Request," which indicates that a search of the appellant's criminal history conducted on November 4, 2014, yielded no conviction data regarding the appellant. *Id.* at 6.

¶ 6 The agency has filed a response in opposition to the petition for review. PFR File, Tab 3. With its response, the agency has submitted the following documents: (1) a plea agreement dated September 25, 2014, which provides, inter alia, for a no-contest plea to the charges of Possession with Intent and Contempt, and a stipulation by the appellant that the evidence is sufficient to convict him of both charges, *id.* at 9–15; and (2) a November 20, 2014 court order accepting the September 25, 2014 plea agreement and the appellant's

plea.[1] *Id.* at 7–8. Pursuant to the agreement, in its November 20, 2014 order, the court found that there was sufficient evidence for a finding of guilt but withheld such a finding for 2 years on the condition that the appellant comply with the terms of the agreement, including 2 years of supervised probation. *Id.* at 7. If, at the end of the 2–year period, the appellant has complied with the agreement, both charges will be dismissed; however, if he violates the agreement, he will be found guilty as originally charged on both offenses and will be sentenced by the court. *Id.*

ANALYSIS

We have considered the documents submitted on review.

¶ 7 The Board generally will not consider evidence submitted for the first time on review absent a showing that: (1) the documents and the information contained in the documents were unavailable before the record closed despite due diligence; and (2) the evidence is of sufficient weight to warrant an outcome different from that of the initial decision. *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980); *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980); 5 C.F.R. § 1201.115(d)(1). We have considered the documents submitted on review because they

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[1] Although the agreement provides for a plea of no contest and the order initially states that the appellant pled no contest to the charges, the order subsequently states that the appellant pled guilty. *See* PFR File, Tab 3 at 7, 9. For purposes of our analysis, however, the distinction between a no-contest plea and a guilty plea is of no consequence.

postdate the close of the record below[2] and thus were unavailable before the close of the record despite the parties' due diligence.

The appellant's removal is affirmed.

¶ 8 Under 5 U.S.C. § 7371(b), any LEO who is convicted of a felony shall be removed from employment as an LEO on the last day of the first applicable pay period following the conviction notice date. The term "conviction notice date" means the date on which an agency that employs an LEO has notice that the officer has been convicted of a felony that is entered by a federal or state court, regardless of whether that conviction is appealed or is subject to appeal. 5 U.S.C. § 7371(a)(1).

¶ 9 An employee who is removed under the provisions of 5 U.S.C. § 7371 is entitled to appeal his removal to the Board only with respect to whether: (1) he is an LEO; (2) he was convicted of a felony; or (3) the conviction was overturned on appeal. 5 U.S.C. § 7371(e)(2). The appellant did not dispute that his position was an LEO position. *See* ID at 3.

¶ 10 The record reflects that on May 6, 2014, the Virginia Circuit Court of Brunswick County accepted the appellant's guilty plea and found him guilty of Possession of Marijuana with Intent to Distribute, thereby convicting him but deferring the imposition of a sentence. IAF, Tab 5 at 16. In its November 20, 2014 order, however, the Virginia Circuit Court of Brunswick County, in addressing charges of Possession of Marijuana with Intent to Distribute and Contempt,

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[2] Pursuant to the administrative judge's July 2, 2014 order closing the record, the record in this appeal closed on August 1, 2014. IAF, Tab 6.

accepted a plea agreement and the appellant's plea of guilty, finding that there was sufficient evidence for a finding of guilt but withholding a finding of guilt for a period of 2 years. PFR File, Tab 3 at 7.[3] The circuit court placed the appellant on supervised probation during the 2–year period, holding that, if the appellant fully and successfully complied with certain terms and conditions, both charges would be dismissed. *Id.* If the appellant failed to comply with any of the terms and conditions, "he will be found guilty as originally charged on both offenses and will be sentenced by the Court with no agreement." *Id.* The circuit court did not, however, expressly address the prior conviction.

¶ 11 There is no dispute that the appellant was convicted of a felony. There is also no indication that the circuit court has expressly vacated that conviction. Even assuming, however, that the prior conviction is no longer in effect, the reason that it is no longer in effect is because of a plea agreement that led to a new court order, not because it was overturned on appeal. Under the maxim of statutory interpretation expressio unius est exclusio alterius, when Congress has enumerated specific things to which a statute applies, it should not be assumed that other things that could have been listed were meant to be included; rather, the specific mention of certain things implies the exclusion of others. *See Hart v. Department of Transportation*, 109 M.S.P.R. 280, ¶ 10 (2008). Here, therefore, the appellant may not contest on appeal the question of

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[3] The September 25, 2014 plea agreement predates the initial decision by 8 days, and the administrative judge was apparently unaware of this agreement when she issued the initial decision.

whether his conviction is no longer in effect based upon reasons other than that his conviction was overturned on appeal. *See Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed.Cir.1985) (the Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation).

ORDER

¶ 12 Accordingly, we DENY the appellant's petition for review, AFFIRM the initial decision AS MODIFIED by this Opinion and Order, and SUSTAIN the appellant's removal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
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Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed.Cir.1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's *Rules of Practice*, and *Forms* 5, 6, and 11.

If you are interested in securing pro bono representation for your court appeal, you may visit our website at http://www.mspb.gov/probono for a list of attorneys who have expressed interest in providing pro bono representation for Merit Systems Protection Board appellants before the court. The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

FOR THE BOARD:

_____

William D. Spencer
Clerk of the Board
Washington, D.C.

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ALESTEVE CLEATON,
Petitioner

v.

DEPARTMENT OF JUSTICE,
Respondent

2015-3126

Petition for review of the Merit Systems Protection Board in No. DC-0752-14-0760-I-1.

ON PETITION FOR REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES and STOLL, *Circuit Judges*.*

PER CURIAM.

O R D E R

Petitioner Alesteve Cleaton filed a petition rehearing en banc. A response to the petition was invited by the court and filed by Respondent Department of Justice. The petition was first referred as a petition for rehearing to the panel that heard the

* Circuit Judge Moore did not participate.

appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on March 2, 2017.

FOR THE COURT

February 23, 2017
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court