

## COMMENTS

# California’s Proposition 47 and Effectuating State Laws in Federal Sentencing

*Brenna Ledvora*<sup>†</sup>

*Proposition 47 is a California voter initiative that reduced possessory drug offenses and minor thefts from felonies to misdemeanors. The law allows individuals to retroactively reclassify their convictions and mandates that these convictions shall be considered misdemeanors “for all purposes.” Under California law, reclassified convictions cannot be predicate felonies for future state sentencing enhancements. However, federal courts have held that reclassified convictions still constitute prior convictions for federal sentencing enhancements. Thus, these convictions still trigger felony-based enhancements. This Comment argues that this result is not mandated by Supreme Court precedent and that it conflicts with California’s intent to ameliorate the effects of prior felony convictions. Proposition 47 presents a novel situation—a retroactive state law that broadly alters the underlying conviction. Under principles of comity and federalism, federal courts should give full effect to Proposition 47 and similar state laws in federal sentencing.*

INTRODUCTION .....	1800
I. BACKGROUND ON STATE PREDICATE OFFENSES .....	1802
A. Criminal Justice Reform and the States.....	1802
1. State reclassification laws.....	1803
2. Proposition 47. ....	1804
B. State Offenses in the Federal System.....	1806
1. Overview of the federal sentencing system. ....	1806
2. Felony-based enhancements. ....	1808
3. State law and predicate offenses.....	1811
II. COURTS’ CURRENT APPROACHES .....	1813
A. Supreme Court Precedent on State Predicate Offenses.....	1813
B. Lower Federal Courts’ Application of Precedent.....	1816
1. Prospective state laws. ....	1816
2. Retroactive state laws. ....	1816
C. The California Supreme Court’s Interpretation of Proposition 47. ....	1819

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<sup>†</sup> BS 2015, Northwestern University; JD Candidate 2021, The University of Chicago Law School.

D.	Federal Circuit Courts' Approach to Proposition 47 .....	1820
1.	“Felony drug offense” under § 841 of the CSA.....	1821
2.	“Felony” under the Guidelines. ....	1823
3.	Postconviction relief for sentencing enhancements based on reclassified convictions. ....	1824
III.	GIVING EFFECT TO RETROACTIVE STATE LAW CHANGES IN FEDERAL SENTENCING .....	1825
A.	Legal Precedent Supports Giving Effect to Retroactive Reclassification .....	1825
1.	Proposition 47 is broader than expungement or dismissal.....	1825
2.	Federal courts should not focus on literal vacatur.....	1828
3.	Retroactivity alters the historical fact of conviction. ....	1831
B.	Federalism and Proposition 47.....	1833
1.	Principles of comity.....	1834
2.	Federal supremacy is not threatened by Proposition 47.....	1836
3.	Recidivism, national uniformity, and federal sentencing concerns do not support the courts' current approach. ....	1838
C.	Impact on Federal Sentencing and Resentencing .....	1841
	CONCLUSION .....	1843

## INTRODUCTION

Vickie Sanders was convicted in a California state court of felony drug possession,<sup>1</sup> sixteen years before California voters would pass Proposition 47.<sup>2</sup> Proposition 47, which was passed in 2014, reduces most possessory drug offenses from felonies to misdemeanors,<sup>3</sup> and allows California courts to retroactively redesignate individuals' felonies as misdemeanors.<sup>4</sup> Sanders pursued redesignation of her felony, and in 2018, a California state court reclassified her state conviction to a misdemeanor.<sup>5</sup> Over twenty years after her initial conviction, and shortly after her prior conviction was designated a misdemeanor, a federal district court held that Sanders's misdemeanor still constituted a felony under federal law.<sup>6</sup> Due to federal sentencing enhancements, Sanders's

<sup>1</sup> *United States v Sanders*, 909 F3d 895, 898–99 (7th Cir 2018), cert denied, 139 S Ct 2661 (2019). Sanders was convicted in 1996, but her conviction did not become final until 1998. *Id.*

<sup>2</sup> Safe Neighborhoods and Schools Act (Proposition 47), 2014 Cal Legis Serv Prop 47, codified at Cal Penal Code § 1170.18.

<sup>3</sup> *Sanders*, 909 F3d at 899. See also J. Richard Couzens and Tricia A. Bigelow, *Proposition 47: “The Safe Neighborhoods and Schools Act”* \*36 (May 2017), archived at <https://perma.cc/HDL9-X2GZ>.

<sup>4</sup> *Sanders*, 909 F3d at 900, quoting Cal Penal Code § 1170.18(k).

<sup>5</sup> *Sanders*, 909 F3d at 899.

<sup>6</sup> See *id.*

prior “felony” triggered a mandatory imprisonment of 120 months.<sup>7</sup> The Seventh Circuit affirmed.<sup>8</sup>

Federal courts have uniformly ignored Proposition 47’s mandate to treat reclassified convictions as misdemeanors “for all purposes.”<sup>9</sup> Rather, they have held that reclassified misdemeanors still trigger harsh sentencing enhancements based on prior felony convictions.<sup>10</sup> These holdings are in direct conflict with California courts’ approach to Proposition 47. As one California court explained, “Proposition 47 explicitly anticipates that redesignation of an offense as a misdemeanor will affect the collateral consequences of a felony conviction.”<sup>11</sup> Accordingly, the California Supreme Court has held that reclassified misdemeanors are misdemeanors for purposes of state sentencing.<sup>12</sup>

Federal courts generally consider federal, not state, criminal law. But when applying federal recidivist enhancements, which increase a defendant’s sentence based on prior criminal convictions, federal courts must consider state convictions in discerning relevant prior convictions. Federal courts define what a “prior conviction” is, even when the prior conviction is a state conviction.<sup>13</sup> And in the case of Proposition 47, federal courts have defined “prior felony conviction” to include convictions that California has explicitly defined as a misdemeanor “for all purposes.”<sup>14</sup>

This Comment argues that federal courts should give effect to Proposition 47. It proceeds in three parts. Part I summarizes the role of predicate state offenses in federal sentencing and Proposition 47’s attempts to reclassify certain California felony convictions as misdemeanors. Part II examines how the Supreme Court has dealt with state law changes to predicate offenses, and how federal circuit courts have applied that precedent. It also considers federal courts’ current approach to Proposition 47—that Proposition 47 has no effect on federal sentencing. Part III.A first argues that the federal courts’ approach is not mandated by Supreme Court precedent, and that it misunderstands Proposition 47’s effects on prior convictions. Parts III.B and III.C then

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<sup>7</sup> Id at 898.

<sup>8</sup> Id at 906.

<sup>9</sup> Cal Penal Code § 1170.18(k).

<sup>10</sup> See Part II.D.

<sup>11</sup> *Sanders*, 909 F3d at 900, quoting *People v Khamvongsa*, 214 Cal Rptr 3d 623, 625 (Cal App 2017).

<sup>12</sup> See Part II.C.

<sup>13</sup> See *Dickerson v New Banner Institute, Inc*, 460 US 103, 111–12 (1983).

<sup>14</sup> See, for example, *Sanders*, 909 F3d at 900–01.

consider how giving Proposition 47 effect in federal court would positively impact the federal-state balance of power and federal sentencing. In light of these effects, federal courts should hold that Proposition 47 invalidates predicate offenses for federal sentencing.

## I. BACKGROUND ON STATE PREDICATE OFFENSES

This Part summarizes the states' attempts to enact criminal justice reform, including Proposition 47 and its impact on certain California offenses. It then briefly explains the role of state offenses in the federal sentencing system and how California altering its criminal offenses affects federal sentencing.

### A. Criminal Justice Reform and the States

Criminal justice reform has primarily occurred at the state level,<sup>15</sup> despite bipartisan support for reform at both the state and federal levels.<sup>16</sup> Congress has traditionally acted slowly and passed only modest changes.<sup>17</sup> Even with recent federal reforms, the states have continued to lead the way in passing numerous and varied criminal justice laws. These reforms include (but are not limited to): liberalizing marijuana laws, strengthening opioid laws, changing bail procedures, and reducing the collateral consequences for felony convictions.<sup>18</sup>

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<sup>15</sup> See Shon Hopwood, *The Effort to Reform the Criminal Justice System*, 128 Yale L J F 791, 794 n 16 (2019).

<sup>16</sup> See *id.* at 793 n 14; Maggie Astor, *Left and Right Agree on Criminal Justice: They Were Both Wrong Before* (NY Times, May 16, 2019), archived at <https://perma.cc/UCA6-422U>; Jennifer Bellamy, Dan Zeidman, and Amshula Jararam, *Promising Beginning: Bipartisan Criminal Justice Reform in Key States* \*7–41 (American Civil Liberties Union, Feb 2012), archived at <https://perma.cc/R9KS-GD72>. Although there is broad consensus on the general need for reform, at least one scholar has noted that this consensus is “tenuous,” and “relies upon different frames and different goals.” Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 Mich L Rev 259, 263 (2018).

<sup>17</sup> See Hopwood, 128 Yale L J F at 793 (cited in note 15). The exception to this historical trend is the recently passed First Step Act of 2018, Pub L No 115-391, 132 Stat 5194. The First Step Act enacted multiple reforms, including reducing statutory punishments for a variety of offenses. See *id.* at 798–99.

<sup>18</sup> See Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2019* (The Sentencing Project, Jan 17, 2020), archived at <https://perma.cc/CP42-ENFJ>. See also Robert Alt, *Criminal Justice Reform: A Survey of 2018 State Laws* \*4–5 (The Federalist Society, July 2019), archived at <https://perma.cc/5WUZ-GBRQ>.

1. State reclassification laws.

A recent state trend is enacting laws that reclassify certain felonies as misdemeanors.<sup>19</sup> Starting with California's Proposition 47 in 2014, at least six states have passed reclassification laws,<sup>20</sup> and several others have introduced reclassification bills.<sup>21</sup> Though these laws vary by state, all enacted and proposed laws reclassify simple drug possession from a felony to a misdemeanor. Almost all of the enacted laws define drug possession broadly by not specifying weight or drug type.<sup>22</sup> Some (including Proposition 47) also raise the dollar threshold for felony theft.<sup>23</sup> However, most have exclusions for people with prior criminal convictions.<sup>24</sup>

Additionally, most of these reclassification laws are purely prospective.<sup>25</sup> That means that people who commit simple drug possession in the future will be convicted of and sentenced to a misdemeanor, but people who have already been convicted cannot reclassify their felonies and receive lower sentences. Nor can they remove the collateral consequences of their felony conviction, which can include employment restrictions and disenfranchisement.<sup>26</sup> For those and other reasons, numerous commentators have noted the importance of retroactivity in various areas of criminal justice reform.<sup>27</sup>

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<sup>19</sup> See Brian Elderbroom and Julia Durnan, *Reclassified: State Drug Law Reforms to Reduce Felony Convictions and Increase Second Chances* \*3–6 (Urban Institute, Oct 2018), archived at <https://perma.cc/HVF5-KFSX> (explaining the growth of state reclassification laws).

<sup>20</sup> See *id.* at \*1 (discussing recent laws in California, Utah, Connecticut, Alaska, and Oklahoma); 2019 Colo Sess Laws Ch 291, codified in scattered sections of Colo Rev Stat § 18-18.

<sup>21</sup> A reclassification bill is currently pending in the Ohio state legislature, and a Rhode Island bill recently died in committee. See Michael Shields, *Reclassifying Drug Felonies Would Open Career Pathways - Retroactivity Would Maximize Reach* (Policy Matters Ohio, Jan 15, 2020), archived at <https://perma.cc/N2BE-63GC>; American Civil Liberties Union of Rhode Island, *Drug Reclassification (H 5760, S 472) Died in Committee* (2019), archived at <https://perma.cc/Z39V-8TKW>.

<sup>22</sup> See Elderbroom and Durnan, *Reclassified* at \*4–5 (cited in note 19). The Colorado law is the only enacted law to specify weights and types of drug. See 2019 Colo Sess Laws Ch 291 §§ 1–2, codified at Colo Rev Stat § 18-18-403.5, -406.

<sup>23</sup> See Couzens and Bigelow, *Proposition 47* at \*27 (cited in note 3). See also, for example, 2016 Okla Sess Laws Ch 221 § 4, codified at 21 Okla Stat § 1704.

<sup>24</sup> See Elderbroom and Durnan, *Reclassified* at \*4–5 (cited in note 19). See also, for example, 2019 Colo Sess Laws Ch 291 § 8, codified at Colo Rev Stat § 18-1.3-801.

<sup>25</sup> See Elderbroom and Durnan, *Reclassified* at \*5 (cited in note 19). See also, for example, 2019 Colo Sess Laws Ch 291 § 6, codified at Colo Rev Stat § 18-1.3-501.

<sup>26</sup> See Elderbroom and Durnan, *Reclassified* at \*1–3 (cited in note 19).

<sup>27</sup> See, for example, Nathaniel W. Reisinger, Note, *Redrawing the Line: Retroactive Sentence Reductions, Mass Incarceration, and the Battle between Justice and Finality*,

However, two states—Oklahoma and California—have made their reclassification laws retroactive.<sup>28</sup> That means the law affects people who have already been convicted of a felony that is now classified as a misdemeanor. The extent to which prior convictions are affected depends on the law. Under Oklahoma’s law, people with felony convictions that are now classified as misdemeanors can expunge their records,<sup>29</sup> and people who are currently serving applicable felony sentences can apply for an accelerated process to commute or modify their sentence.<sup>30</sup> As discussed in the next Section, Proposition 47 is retroactive in that people with prior felony convictions can apply for resentencing (if they are still serving the felony sentence) or redesignation (if they have already served the felony sentence).<sup>31</sup>

## 2. Proposition 47.

Proposition 47 amends various provisions of the California criminal code to reduce most possessory drug offenses and thefts involving less than \$950 from felonies to misdemeanors.<sup>32</sup> The maximum punishment for any newly misdemeanor offense is one year, unless the defendant has a designated prior conviction.<sup>33</sup>

A person currently serving a sentence for a felony that would be a misdemeanor under Proposition 47 may petition for resentencing.<sup>34</sup> If the petition is successful, “the petitioner’s felony

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54 Harv CR–CL L Rev 299, 320–25 (2019); Jeremy Haile, *Farewell, Fair Cruelty: An Argument for Retroactive Relief in Federal Sentencing*, 47 U Toledo L Rev 635, 640–42 (2016); Shields, *Reclassifying Drug Felonies* (cited in note 21) (arguing that Ohio’s proposed reclassification bill should be retroactive).

<sup>28</sup> The Oklahoma legislature recently amended its reclassification law—which was passed through a 2016 ballot measure—to apply retroactively. See 2019 Okla Sess Laws Ch 459, codified at 22 Okla Stat § 18; Porter, *Top Trends in State Criminal Justice Reform* at \*1 (cited in note 18).

<sup>29</sup> 2019 Okla Sess Laws Ch 459 § 51, codified at 22 Okla Stat § 18.A.15.

<sup>30</sup> 2019 Okla Sess Laws Ch 459, codified at 57 Okla Stat § 332.2.F.

<sup>31</sup> For a full discussion of how the California Supreme Court has interpreted Proposition 47’s retroactivity, see Part II.C.

<sup>32</sup> Couzens and Bigelow, *Proposition 47* at \*27 (cited in note 3).

<sup>33</sup> See *id.* at \*137. Proposition 47 does not apply to defendants with a prior conviction for a designated offense, and these defendants may be sentenced up to three years imprisonment. For more information on these disqualifying offenses, see note 43 and accompanying text.

<sup>34</sup> Cal Penal Code § 1170.18(a):

(a) A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (“this act”) had this act been

sentence shall be recalled and the petitioner resentenced to a misdemeanor,” unless the court determines that the defendant poses a danger to the public.<sup>35</sup> A person who has completed her sentence for a felony that would be a misdemeanor under Proposition 47 can file an application before her court of sentencing.<sup>36</sup> Then, the court “shall designate the felony offense or offenses as a misdemeanor.”<sup>37</sup>

Proposition 47 expressly states that “[a] felony conviction that is recalled and resentenced . . . or designated as a misdemeanor . . . shall be considered a misdemeanor *for all purposes*.”<sup>38</sup> However, petitioners whose convictions have been resentenced are still subject to firearm restrictions.<sup>39</sup> Judges can also deny petitions for resentencing if the prisoner “pose[s] an unreasonable risk of danger to public safety,”<sup>40</sup> and Proposition 47 does not

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in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with [s]ections . . . amended or added by this act.

<sup>35</sup> Cal Penal Code § 1170.18(b):

(b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to [s]ections . . . amended or added by this act, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.

<sup>36</sup> Cal Penal Code § 1170.18(f):

(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.

<sup>37</sup> Cal Penal Code § 1170.18(g):

(g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.

<sup>38</sup> Cal Penal Code § 1170.18(k) (emphasis added). For a discussion of the California Supreme Court’s interpretation of the “for all purposes” language, see Part II.C.

<sup>39</sup> Cal Penal Code § 1170.18(k):

A 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 resentencing shall not permit that person to own, possess, or have in his or her custody or control a firearm or prevent his or her conviction under [California’s felon in possession of a firearm statute].

<sup>40</sup> Cal Penal Code § 1170.18(b). An “unreasonable risk of danger to public safety” means “an unreasonable risk that the petitioner will commit a new violent felony.” Cal Penal Code § 1170.18(c). When determining whether a petitioner poses such a risk, the court can consider the petitioner’s criminal history, disciplinary and rehabilitations records while incarcerated, and any other relevant evidence. Cal Penal Code § 1170.18(b).

apply to any person who has previously been convicted of certain violent offenses or offenses requiring sex offender registration.<sup>41</sup> Finally, the statute notes that “[r]esentencing pursuant to this section does not diminish or abrogate the finality of judgments in any case that does not come within the purview of this section.”<sup>42</sup>

## B. State Offenses in the Federal System

Proposition 47, like other state sentencing reforms, only changes California criminal offenses and does not expressly affect federal incarceration. However, because parts of the federal sentencing system depend on state offenses, Proposition 47’s changes to state offenses affect federal sentencing as well. This Section surveys the federal sentencing system, specific sentencing enhancements, and the role of state offenses in federal sentencing.

### 1. Overview of the federal sentencing system.

When a defendant is convicted of an offense in federal court, federal law governs the sentencing process. Three main sources of law guide federal sentencing. First, the Sentencing Reform Act of 1984<sup>43</sup> (SRA) created the modern federal sentencing system by setting forth the primary sentencing statute<sup>44</sup> and facilitating the creation of the Federal Sentencing Guidelines (the “Guidelines”).<sup>45</sup> Second, the Guidelines create recommended sentencing ranges based on the defendant’s instant federal offense and prior

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<sup>41</sup> Cal Penal Code § 1170.18(i). See Couzens and Bigelow, *Proposition 47* at \*134–36 (cited in note 3) (listing Proposition 47’s disqualifying prior convictions).

<sup>42</sup> Cal Penal Code § 1170.18(n).

<sup>43</sup> Pub L No 98-473, 98 Stat 1987, codified as amended at 18 USC § 3551 et seq and 28 USC § 991 et seq.

<sup>44</sup> See 18 USC § 3553(a). Section 3553(a)(1) directs courts to consider certain factors in sentencing. These factors include: the “nature and circumstance of the offense and the history and characteristics of the defendant,” the sentencing range established by the Guidelines, and pertinent policy statements from the Sentencing Commission. 18 USC § 3553(a). See also Erica Zunkel, *18 U.S.C. § 3553(a)’s Undervalued Sentencing Command: Providing a Federal Criminal Defendant with Rehabilitation, Training, and Treatment in “the Most Effective Manner”*, 9 Notre Dame J Intl & Comp L 49, 54 (2019) (noting that § 3553(a) “has become the federal sentencing touchstone” since the Guidelines became advisory).

<sup>45</sup> See United States Sentencing Commission, *Federal Sentencing: The Basics* \*1 (Nov 2018), archived at <https://perma.cc/52NG-ALEU> (“[In] the landmark passage of the Sentencing Reform Act of 1984 (SRA) . . . Congress established a new federal sentencing system based primarily on sentencing guidelines.”). See also generally United States Sentencing Commission, *Guidelines Manual* (Nov 2018) (USSG).

criminal history.<sup>46</sup> Third, some federal statutes mandate minimum and maximum sentences tied to the defendant's offense.<sup>47</sup>

Federal sentencing law is a mix of advisory and mandatory provisions. The Guidelines are advisory, but continue to exert significant influence on federal sentencing.<sup>48</sup> The Supreme Court has made clear that judges should begin sentencing proceedings by calculating the defendant's Guidelines range, even though judges are not required to follow that range.<sup>49</sup> Statutory minimum and maximum sentences, on the other hand, are typically mandatory.<sup>50</sup> If a mandatory sentence applies, the judge must impose it.

Both the Guidelines and federal statutes contain sentencing enhancements, which increase the length of the defendant's sentence based on certain facts. There are two types of enhancements: nonrecidivist and recidivist.<sup>51</sup> Nonrecidivist enhancements are based on the particular circumstances of the offense, such as the presence of a gun during the crime.<sup>52</sup> Recidivist enhancements are "based on a defendant's prior criminal history."<sup>53</sup> These enhancements are typically triggered by a prior conviction for a specified offense (called a predicate offense). For example, the federal three-strikes law imposes mandatory life imprisonment if the defendant is convicted of "a serious violent felony" and has previously been convicted of at least two qualifying felonies.<sup>54</sup> Recidivist enhancements are common in the US system. Every

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<sup>46</sup> See Jeff Papa and Chris Kashman, *An Introduction to the Federal Sentencing Guidelines*, 51 Ind L Rev 357, 358–60 (2018) (explaining how the Guidelines calculate a defendant's sentencing range). For the Guidelines' sentencing table, see USSG § 5A (demonstrating how the defendant's offense level and criminal history interact to create the defendant's sentencing range).

<sup>47</sup> See United States Sentencing Commission, *Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* \*10–19 (July 2017), archived at <https://perma.cc/X8GH-T84E> (explaining federal mandatory minimum sentences and overiewing common mandatory minimums and maximums).

<sup>48</sup> See Paul Hofer, *After Ten Years of Advisory Guidelines, and Thirty Years of Mandatory Minimums, Federal Sentencing Still Needs Reform*, 47 U Toledo L Rev 649, 678–80 (2016).

<sup>49</sup> Id at 678, citing *Gall v United States*, 552 US 38, 49 (2007). The Guidelines were mandatory for almost twenty years before the Supreme Court held that they were advisory in *United States v Booker*, 543 US 220 (2005). Empirical studies have shown that although *Booker* impacted various disparities in sentencing, it did not dramatically reduce sentence length. See Hofer, 47 U Toledo L Rev at 678–89 (cited in note 48).

<sup>50</sup> Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 UC Davis L Rev 1135, 1158 (2010).

<sup>51</sup> Id at 1143.

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> 18 USC § 3559(c)(1).

state has statutory recidivist enhancements, and there are numerous recidivist enhancements in the federal statutes and Guidelines.<sup>55</sup>

## 2. Felony-based enhancements.

Recidivist enhancements are often based on prior felony convictions.<sup>56</sup> Because Proposition 47 reclassifies some California felonies to misdemeanors, it implicates many of these enhancements. A felony “is commonly defined to mean a crime punishable by imprisonment for more than one year.”<sup>57</sup> Both the advisory Guidelines and mandatory federal statutes have felony-based enhancements.

The Guidelines contain numerous recidivist enhancements specifically tied to the defendant’s instant federal offense.<sup>58</sup> These enhancements increase the defendant’s offense level—which leads to a longer recommended sentence<sup>59</sup>—if the defendant has a prior criminal conviction. For example, if the defendant’s instant offense is for unlawfully entering or remaining in the United States, her offense level (and thus recommended sentence) increases if she previously sustained a felony conviction.<sup>60</sup>

Regardless of the defendant’s instant offense, the Guidelines also separately factor in the defendant’s criminal history, meaning prior felony convictions are always relevant. The defendant’s criminal history is calculated on a point-based system, with points given for “each prior sentence of imprisonment.”<sup>61</sup> Three points are given for each sentence “exceeding one year and one month,” two points for those “of at least sixty days,” and one point for any sentence not previously counted.<sup>62</sup> More points correlate

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<sup>55</sup> See Russell, 43 UC Davis L Rev at 1149–50 (cited in note 50).

<sup>56</sup> Id (discussing state and federal recidivist enhancements).

<sup>57</sup> See *Burgess v United States*, 553 US 124, 130 (2008). See also USSG § 4A1.2(o) (“[A] ‘felony offense’ means any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed.”).

<sup>58</sup> Russell, 43 UC Davis L Rev at 1138 (cited in note 50) (noting that the Guidelines “contain enhancement provisions for virtually every type of federal offense”).

<sup>59</sup> USSG § 5A.

<sup>60</sup> See USSG § 2L1.2(b). This illegal reentry enhancement increases the defendant’s offense level depending on the type of prior conviction and the number of prior convictions. For example, if he committed the instant offense after sustaining “a conviction for a felony offense . . . for which the sentence imposed was five years or more,” his offense level is increased by ten levels. USSG § 2L1.2(b)(2)(A). If the imposed sentence for the prior felony “exceeded one year and one month,” his offense level is only increased by six levels. USSG § 2L1.2(b)(2)(C).

<sup>61</sup> USSG § 4A1.1.

<sup>62</sup> See USSG § 4A.1.1. The calculation includes other limitations and adds points for other actions related to the defendant’s criminal history. See USSG § 4A.1.1:

to a higher criminal history category, resulting in a longer recommended sentence.<sup>63</sup> Sentences “exceeding one year and one month” receive the most points and encompass most felony (but not misdemeanor) offenses. However, the criminal history calculation exempts certain prior convictions.<sup>64</sup> For example, it does not count expunged convictions<sup>65</sup> and diversionary dispositions without a finding of guilt,<sup>66</sup> but convictions that are set aside or pardoned “for reasons unrelated to innocence or errors of law” are counted.<sup>67</sup> Some of the specific enhancements have similar exceptions.<sup>68</sup>

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- (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
  - (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).
  - (c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.
  - (d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
  - (e) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of 3 points for this subsection.

<sup>63</sup> See USSG § 5A.

<sup>64</sup> Although the definitions for criminal history calculation use the term “prior sentence”, “the definitions for ‘prior sentence’ essentially equate ‘prior sentence’ with prior conviction.” Thomas W. Hutchison, Sigmund G. Popko, Deborah Young, Michael P. O’Connor, and Celia M. Rumann, *Federal Sentencing Law and Practice* § 4A1.1.5(b) (2020 ed). The Guidelines define “prior sentence” as “any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*.” USSG § 4A1.2(a)(1). A “sentence of imprisonment” is “a sentence of incarceration and refers to the maximum sentence imposed.” USSG § 4A1.2(b)(1). The determination of the length of the sentence of imprisonment is “based on the sentence pronounced, not the length of time actually served.” Hutchison, et al, *Federal Sentencing Law* § 4A1.1.6(a).

<sup>65</sup> USSG § 4A1.2(j). Expunged convictions can still be considered if the judge decides to depart from the sentencing range due to the inadequacy of the criminal history category. USSG § 4A1.3.

<sup>66</sup> USSG § 4A1.2(f).

<sup>67</sup> USSG § 4A1.2 n 10:

A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted.

<sup>68</sup> See, for example, USSG § 2K2.1 n 10 (directing courts to “use only those felony convictions that receive criminal history points” when applying the firearm recidivist enhancement).

Many federal statutory enhancements are also based on felonies.<sup>69</sup> These enhancements are typically mandatory.<sup>70</sup> They lengthen the defendant's sentence by increasing the mandatory minimum or maximum sentence.<sup>71</sup> One statutory enhancement that often arises in Proposition 47 litigation is the "felony drug offense" enhancement. Section 841 of the Controlled Substances Act<sup>72</sup> (CSA) mandates enhancements if the defendant commits certain drug offenses "after a prior conviction for a felony drug offense has become final."<sup>73</sup> A felony drug offense is a federal, state, or foreign drug offense "punishable by imprisonment for more than one year."<sup>74</sup> Prior to the First Step Act of 2018,<sup>75</sup> § 841 doubled the mandatory minimum if the defendant had a prior conviction.<sup>76</sup> The First Step Act amended § 841, which now increases the maximum sentence allowed by statute if the defendant has a prior felony drug offense.<sup>77</sup> Unlike the Guidelines and some statutory enhancements, § 841 does not explicitly exempt any prior convictions.

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<sup>69</sup> For example, one common statutory enhancement is contained in the Armed Career Criminal Act of 1984 (ACCA), Pub L No 98-473, 98 Stat 2185, codified as amended at 18 USC § 924(e). The ACCA mandates fifteen years to life imprisonment if the defendant is convicted of unlawful possession of a firearm and he has "three previous convictions . . . for a violent felony or a serious drug offense." 18 USC § 924(e)(1). The ACCA defines a "violent felony" as an offense with an element of force that is punishable by at least one year, or an offense that is enumerated in the statute. 18 USC § 924(e)(2)(B). A "serious drug offense" is defined as an offense involving a controlled substance that has a maximum imprisonment of ten years or more, which encompasses felony drug offenses. 18 USC § 924(e)(2)(A).

<sup>70</sup> Russell, 43 UC Davis L Rev at 1144 (cited in note 50).

<sup>71</sup> Id at 1158.

<sup>72</sup> Pub L No 91-513, 84 Stat 1242 (1970), codified as amended at 21 USC § 801 et seq.

<sup>73</sup> 21 USC § 841(b)(1)(C), (D), (E)(ii), (E)(iii)(2)–(3).

<sup>74</sup> See 21 USC § 802(44); *Burgess*, 553 US at 130 (holding that § 841(b)'s "felony drug offense" is defined by § 802(44)).

<sup>75</sup> Pub L No 115-391, 132 Stat 5194.

<sup>76</sup> See United States Sentencing Commission and Office of Education & Sentencing Practice, *ESP Insider Express Special Edition: First Step Act \*2* (Feb 2019), archived at <https://perma.cc/5FQR-6AP8>. For example, § 841(b)(1)(A), which has a ten-year statutory penalty, previously imposed a twenty-year mandatory sentence if the defendant had one prior conviction for a felony drug offense—in essence, a recidivist enhancement of ten years. Id.

<sup>77</sup> 21 USC § 841(b)(1)(C) (increases the maximum sentence from twenty to thirty years); 21 USC § 841(b)(1)(D) (from five to ten years); 21 USC § 841(b)(1)(E)(ii) (from twenty to thirty years); 21 USC § 841(b)(1)(E)(iii)(2) (from five to ten years); 21 USC § 841(b)(1)(E)(iii)(3) (from one to four years).

### 3. State law and predicate offenses.

Federal law governs the mechanics of applying federal recidivist enhancements. Although a federal enhancement can be based on a state conviction for a state offense, federal law defines which offenses constitute a predicate offense.<sup>78</sup> The meaning of “conviction” depends on the statute.<sup>79</sup> Absent a clear indication to the contrary, federal law (not state law) defines “conviction.”<sup>80</sup> Unlike the facts triggering mandatory nonrecidivist enhancements (which must be found by a jury), the fact of a prior conviction can be found by a judge.<sup>81</sup> When determining whether a conviction triggers an enhancement, federal courts generally look to the law that applied at the time of the prior conviction.<sup>82</sup>

Under federal law, a state’s postconviction actions generally do not alter federal sentencing. This is despite the large number of state laws that provide postconviction relief.<sup>83</sup> These laws vary by jurisdiction. A common form of postconviction relief is expungement, which removes a past conviction from an individual’s criminal record.<sup>84</sup> Additionally, many states have diversionary

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<sup>78</sup> For examples of predicate offense definitions, see notes 69–74 and accompanying text.

<sup>79</sup> See *Dickerson v New Banner Institute, Inc*, 460 US 103, 113 n 7 (1983).

<sup>80</sup> See *id* at 111–12 (“Whether one has been ‘convicted’ within the language of the [federal] gun control statutes is necessarily . . . 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.”); *id* at 119–20 (“[I]n the absence of a 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.”), quoting *NLRB v Natural Gas Utility District*, 402 US 600, 603 (1971); *United States v Dyke*, 718 F3d 1282, 1292 (10th Cir 2013) (“Neither, of course, does state law normally dictate the meaning of a federal statute, at least absent some evidence Congress sought to defer to and incorporate state law.”); *United States v Martinez-Cortez*, 354 F3d 830, 832 (8th Cir 2004) (“Whether an earlier sentence counts for [the Guidelines] criminal history purposes is a question of federal law.”).

<sup>81</sup> See *Apprendi v New Jersey*, 530 US 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”). See also Russell, 43 UC Davis L Rev at 1146–48 (cited in note 50) (describing the Supreme Court’s jurisprudence regarding sentencing enhancements and the Sixth Amendment right to a jury trial).

<sup>82</sup> See *McNeill v United States*, 563 US 816, 820 (2011) (looking at the state law that applied at the time of defendant’s prior conviction to determine whether he was eligible for a statutory enhancement). See also *United States v Bermudez-Zamora*, 788 F Appx 523, 524 (9th Cir 2019) (following the holding from *McNeill* for a Guidelines enhancement).

<sup>83</sup> See Restoration of Rights Project, *50-State Comparison: Judicial Expungement, Sealing, and Set-aside* (Dec 2019), archived at <https://perma.cc/4C3N-7NLD> (noting each state’s postconviction relief, including expungement, deferred adjudication, and pardon laws).

<sup>84</sup> See *Black’s Law Dictionary* (West 11th ed 2019) (defining “Expungement of Record”).

dispositions, such as deferred judgments, which typically “prevent entry of the underlying judgment of conviction.”<sup>85</sup> An exception to the general rule that state action does not alter federal sentencing is state court vacatur. The Supreme Court has explained that if a conviction is vacated or reversed on direct appeal, it cannot constitute a predicate offense.<sup>86</sup>

Under Proposition 47, certain offenses—namely, possessory drug offenses and minor theft—no longer fit the federal definition of felony. That is because Proposition 47 amended California’s criminal code to reduce these offenses to misdemeanors with an imprisonment term of one year or less.<sup>87</sup> Defendants have thus challenged their federal enhancements under § 841<sup>88</sup> and the Guidelines,<sup>89</sup> arguing that their reclassified convictions are no longer predicate felonies. Defendants have argued this both on direct appeal<sup>90</sup> and through postconviction challenges.<sup>91</sup>

28 USC § 2255 provides the primary postconviction remedy by which federal prisoners can challenge their sentences.<sup>92</sup> Section 2255 authorizes prisoners to move “to vacate, set aside or correct [their] sentence” if “the sentence was imposed in violation of the Constitution or laws of the United States.”<sup>93</sup> There are a number of limits on § 2255 motions, including a one-year statute of limitations and restrictions on filing second or successive motions.<sup>94</sup> Additionally, defendants cannot appeal a § 2255 motion unless a judge issues a certificate of appealability, which is issued only if the defendant “has made a substantial showing of the denial of a constitutional right.”<sup>95</sup> Though these limits on

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<sup>85</sup> *Black’s Law Dictionary* (West 11th ed 2019) (defining “Judgment”). See also James A. Shapiro, *Comity of Errors: When Federal Sentencing Guidelines Ignore State Law Decriminalizing Sentences*, 41 *Akron L Rev* 231, 231 (2008).

<sup>86</sup> See Part II.A.

<sup>87</sup> Couzens and Bigelow, *Proposition 47* at \*137–38 (cited in note 3). If the defendant has previously been convicted of a designated prior, the court may sentence him to sixteen months, two years, or three years. *Id.*

<sup>88</sup> See Part II.D.1.

<sup>89</sup> See Part II.D.2.

<sup>90</sup> See, for example, *United States v Sanders*, 909 F3d 895, 899 (7th Cir 2018).

<sup>91</sup> See, for example, *United States v McGee*, 760 F Appx 610, 611 (10th Cir 2019).

<sup>92</sup> See Wayne R. LaFave, Jerold H. Israel, Nancy J. King, and Orin S. Kerr, 7 *Criminal Procedure* § 28.9(a) (4th ed 2019).

<sup>93</sup> 28 USC § 2255(a).

<sup>94</sup> See LaFave, et al, *Criminal Procedure* § 28.9(b) (cited in note 92).

<sup>95</sup> 28 USC § 2253(c). See also David G. Knibb, *Federal Court of Appeals Manual* § 16:2 (6th ed 2019) (explaining that the requirement of a certificate of appealability has made § 2255 appeals “effectively . . . discretionary”).

postconviction relief have posed obstacles, defendants have continued to challenge their enhanced sentences in the Proposition 47 context.

The Supreme Court has never considered a law like Proposition 47—a retroactive reclassification law. Nonetheless, the federal courts have almost uniformly rejected defendants’ direct and postconviction challenges, as illustrated in the next Part.

## II. COURTS’ CURRENT APPROACHES

Almost all federal courts to consider the issue have held that Proposition 47 does not reclassify felonies for federal sentencing enhancements. This result is not mandated by Supreme Court precedent, and it conflicts with the California Supreme Court’s holding that convictions reclassified under Proposition 47 do not constitute predicate offenses for future state sentencing enhancements. The federal courts are thus out of step in their approach to federal sentencing.

This Part considers when changes in state law affect federal sentencing. Part II.A discusses Supreme Court precedent on this topic. Part II.B examines how federal circuit courts have applied this precedent to other state laws. Finally, Parts II.C and II.D contrast the California and federal courts’ differing approaches to Proposition 47.

### A. Supreme Court Precedent on State Predicate Offenses

Supreme Court precedent on how state laws affect federal sentencing is limited. The Court has never considered a retroactive reclassification state law like Proposition 47. It has, however, considered a small number of other laws affecting state convictions. These decisions have laid the framework for determining when state action alters prior convictions: federal law defines “conviction,” and subsequent state actions generally do not affect the historical fact of conviction.

In *Dickerson v New Banner Institute, Inc.*<sup>96</sup> the Supreme Court held that an expunged conviction still constituted a predicate offense in the context of a federal gun statute.<sup>97</sup> First, the Court established that “[w]hether one has been ‘convicted’ within the language of the gun control statutes is necessarily . . . a

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<sup>96</sup> 460 US 103 (1983).

<sup>97</sup> *Id.* at 114.

question of federal, not state, law.”<sup>98</sup> This is true even though “the predicate offense and its punishment are defined by the law of the State.”<sup>99</sup> Second, the Court acknowledged “an obvious exception to the literal language of the [federal] statute for one whose predicate conviction had been vacated or reversed on direct appeal.”<sup>100</sup> But the Court held that expungement under state law does not fall into this exception for vacated or reversed convictions because expungement “does not alter the historical fact of the conviction.”<sup>101</sup> It explained that “[expungement] does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty.”<sup>102</sup>

The Court next applied this reasoning in *McNeill v United States*,<sup>103</sup> and held that a *prospective* change to the state’s definition of a predicate offense did not alter the defendant’s prior conviction.<sup>104</sup> Clifton Terelle McNeill was convicted of a North Carolina offense that, at the time of his conviction, had an imprisonment term of at least ten years and thus qualified as a predicate offense under the Armed Career Criminal Act<sup>105</sup> (ACCA).<sup>106</sup> By the time of his sentencing for the ACCA enhancement, North Carolina had lowered the imprisonment term such that McNeill’s offense would no longer qualify.<sup>107</sup> The Court held that this change did not affect his federal sentencing.<sup>108</sup> It explained that whether a defendant has a “previous conviction” is a “backward-looking question.”<sup>109</sup> The only way to answer that “is to consult the law that applied at the time of that conviction.”<sup>110</sup> The Court noted that “[i]t cannot be correct that subsequent

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<sup>98</sup> *Id.* at 115.

<sup>99</sup> *Id.*

<sup>100</sup> *Dickerson*, 460 US at 115. The Court explained that this “obvious exception” was first recognized in a footnote in a case decided three years previously. *Id.*, citing *Lewis v United States*, 445 US 55, 61 n 5 (1980).

<sup>101</sup> *Dickerson*, 460 US at 115.

<sup>102</sup> *Id.* The Court referred to the law at issue in *Dickerson* as an “expunction” statute. The terms expungement and expunction are interchangeable in this context: both refer to laws that generally “remov[e] [ ] a conviction . . . from a person’s criminal record.” *Black’s Law Dictionary* (defining “Expungement of Record”) (cited in note 84). For consistency, this Comment solely uses the term “expungement.”

<sup>103</sup> 563 US 816 (2011).

<sup>104</sup> *Id.* at 824.

<sup>105</sup> Pub L No 98-473, 98 Stat 2185, codified as amended at 18 USC § 924(e).

<sup>106</sup> *McNeill*, 563 US at 818–19.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 824.

<sup>109</sup> *Id.* at 820.

<sup>110</sup> *McNeill*, 563 US at 820.

changes in state law can erase an earlier conviction for ACCA purposes.”<sup>111</sup> Despite this seemingly strong language, in a footnote, the Court declined to rule on a *retroactive* state law change:

[T]his case does not concern a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense. . . . We do not address whether or under what circumstances a federal court could consider the effect of that state action.<sup>112</sup>

Because Proposition 47 applies retroactively, *McNeill's* holding does not control whether convictions reclassified under Proposition 47 constitute predicate offenses.

In *Johnson v United States*,<sup>113</sup> the Court reaffirmed that a vacated conviction cannot constitute a predicate offense.<sup>114</sup> A Georgia state court vacated Samuel Johnson's prior convictions because he had not affirmatively waived his right to counsel.<sup>115</sup> Johnson then moved to vacate his ACCA enhancement under a postconviction motion.<sup>116</sup> Although the Court held that the statute of limitations had run on Johnson's motion, it acknowledged that he would have been entitled to federal resentencing if he had timely filed.<sup>117</sup> In addition to reinforcing that vacated convictions cannot be predicate offenses, the Court confirmed that a defendant who “successfully attack[s] his state conviction in state court or on federal habeas review [can] then ‘apply for reopening of any federal sentence enhanced by the state sentences.’”<sup>118</sup>

Though the Supreme Court has articulated a general framework for determining whether state action alters prior convictions, numerous unanswered questions remain. The Court has not answered how courts should analyze laws falling somewhere between expungement (postconviction relief unrelated to the underlying legality of the conviction) and vacatur (which erases the prior conviction, typically due to legal error or constitutional issues). Nor has it explained how retroactivity affects this analysis.

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<sup>111</sup> Id at 823.

<sup>112</sup> Id at 825 n \*.

<sup>113</sup> 544 US 295 (2005).

<sup>114</sup> Id at 303 (“Our cases . . . assume . . . that a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated.”).

<sup>115</sup> Id at 300.

<sup>116</sup> Id at 301.

<sup>117</sup> *Johnson*, 544 US at 302–03.

<sup>118</sup> Id at 303, quoting *Custis v United States*, 511 US 485, 497 (1994).

The next Section examines how the lower courts have approached these issues.

## B. Lower Federal Courts' Application of Precedent

The lower federal courts have applied Supreme Court precedent narrowly. In general, they have held that state action does not affect state convictions for federal sentencing purposes, regardless of whether that state action is prospective or retroactive.

### 1. Prospective state laws.

The federal circuit courts have held that most state laws altering predicate convictions do not affect federal sentencing. Under the Guidelines, circuit courts treat diversionary dispositions as convictions.<sup>119</sup> And despite the Guidelines' textual exemption for expunged convictions, most courts still count expunged convictions that are not based on actual innocence or constitutional invalidity.<sup>120</sup> For statutory enhancements, every circuit court to consider the issue has held that "a deferred, expunged or dismissed state conviction qualifies as a prior conviction under § 841."<sup>121</sup>

### 2. Retroactive state laws.

However, some courts have suggested that retroactivity may alter the above analysis.<sup>122</sup> Since *McNeill*, multiple circuits have acknowledged that the Supreme Court left open the issue of retroactivity.<sup>123</sup> But prior to Proposition 47, no circuit court reached

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<sup>119</sup> Shapiro, 41 Akron L Rev at 231–32 (cited in note 85).

<sup>120</sup> See, for example, *United States v Townsend*, 408 F3d 1020, 1025 (8th Cir 2005); *United States v Dobovsky*, 279 F3d 5, 8–9 (1st Cir 2002). See also Hutchison, et al, *Federal Sentencing Law* § 4A1.1.5(m)(iii) (cited in note 64) (explaining that the majority of circuit courts to consider the issue only discount "expungement to convictions set aside because of innocence or errors of law").

<sup>121</sup> *United States v Pritchett*, 749 F3d 417, 426–27 (6th Cir 2014) (collecting cases).

<sup>122</sup> Before *McNeill* was decided, the Third Circuit held that a Pennsylvania law reducing certain felony drug offenses to misdemeanors did not alter the conviction for federal sentencing purposes. See *United States v McGlory*, 968 F2d 309, 349 (3d Cir 1992). In a footnote, the court noted that a retroactive provision in the state statute, which was later struck down by the Supreme Court of Pennsylvania, "could have provided the result [defendant] desires." *Id* at 351 n 33. After *McNeill*, several district courts have held that a state law's retroactivity affects defendants' convictions for federal sentencing enhancements. See note 146 (discussing California district courts' treatment of Proposition 47).

<sup>123</sup> In considering New York sentencing reforms, which reduced penalties for certain drug offenses and allowed retroactive resentencing for some incarcerated individuals, two circuits noted *McNeill*'s open question. See *Cortes-Morales v Hastings*, 827 F3d 1009,

the merits of whether a state law that retroactively alters the defendant's conviction affects federal sentencing. Several circuits have, however, considered retroactive changes to the defendant's sentence length.

Three circuits have held that a state court's retroactive reduction to a defendant's probation term does not affect the Guidelines' criminal history calculation.<sup>124</sup> The Guidelines' criminal history calculation adds points if the defendant committed his instant federal offense while under probation.<sup>125</sup> To avoid having points added, defendants sought and received retroactive state court orders lowering their state probation term such that they were not on probation when they committed their federal offense.<sup>126</sup> The circuits focused on the text of the Guidelines in their analysis. Each noted that courts must count convictions that are set aside for "reasons unrelated to innocence or errors of law."<sup>127</sup>

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1013–14 (11th Cir 2016) (noting that the Court in *McNeill* "did not consider" a retroactive reduction, and that "[a]ccordingly, [the defendant] can succeed on the merits of his claim only if the New York sentencing reductions apply retroactively"); *Rivera v United States*, 716 F3d 685, 689 (2d Cir 2013) (clarifying that "[t]he state sentencing scheme considered by the Court in *McNeill*, however, applied only prospectively, . . . and in a footnote, the Supreme Court limited its holding to similarly non-retroactive statutory schemes."). Because both circuits held that the law was not retroactive as to the defendant, they did not reach this Comment's topic. See *Cortes-Morales*, 827 F3d at 1015–16; *Rivera*, 716 F3d at 689–90.

Several federal district courts in New York have held that a prior conviction cannot constitute a predicate offense if the New York law allows retroactive resentencing for the defendant's offense, even if the defendant himself is not eligible for resentencing. See *United States v Cabello*, 401 F Supp 3d 362, 364, 366 n 5 (EDNY 2019); *United States v Calix*, 2014 WL 2084098, \*14–15 (SDNY); *United States v Jackson*, 2013 WL 4744828, \*4 (SDNY). The Second Circuit discussed these cases when holding that failure to raise this retroactivity argument is not ineffective assistance of counsel. See *Saxon v United States*, 695 F Appx 616, 620 (2d Cir 2017). Though not reaching the merits of the issue, the circuit noted that "the import of [the *McNeill*] footnote . . . is far from clear," and that it "[did] not mean to suggest that we agree with . . . the conclusions of other district judges in the Southern District of New York." *Id.* at 620–21.

<sup>124</sup> See *United States v Yopez*, 704 F3d 1087, 1090 (9th Cir 2012) (en banc) (*Yopez II*); *United States v Pech-Aboytes*, 562 F3d 1234, 1240 (10th Cir 2009); *United States v Martinez-Cortez*, 354 F3d 830, 832 (8th Cir 2004). See also Andrew Tan, Note, *Breaking Bad Sentencing Habits: How State Courts' Retroactive Modifications of Probation Terms Affect Federal Mandatory Sentencing*, 86 S Cal L Rev 1079, 1096–1106 (2013) (discussing the circuits' decisions).

<sup>125</sup> See USSG § 4A1.1(d).

<sup>126</sup> *Pech-Aboytes*, 562 F3d at 1236–37; *Yopez II*, 704 F3d at 1089–90; *Martinez-Cortez*, 354 F3d at 832. The district courts in these cases used *nunc pro tunc* orders. *Nunc pro tunc* means "[h]aving retroactive legal effect through a court's inherent power." *Black's Law Dictionary* (West 11th ed 2019). If a court enters an order *nunc pro tunc*, it "shall have the same legal force and effect as if made at the time when it should have been made." *Id.*

<sup>127</sup> *Yopez II*, 704 F3d at 1091, quoting USSG § 4A1.2 n 10 ("Even when a conviction is set aside for 'reasons unrelated to innocence or errors of law,' we still count the resulting

Because the state courts modified the defendants' state sentences so that they received lower federal sentences, the state sentences still counted for the Guidelines' criminal history calculation.<sup>128</sup>

Before being overturned en banc, a Ninth Circuit panel broke with the other circuits and held that these sentences do not count. The panel's decision relied heavily on principles of comity and federalism.<sup>129</sup> Comity is the general principle that one sovereign should respect another sovereign's laws.<sup>130</sup> In the federal and state context, this concept is intertwined with federalism: federal courts should respect state courts' decisions.<sup>131</sup> The panel explained that "[w]here, as here, state laws permit the modification of ongoing terms of probation, principles of comity . . . require that the federal courts should, where possible, recognize state court actions terminating those probationary terms."<sup>132</sup>

The en banc court reversed the panel 6–5.<sup>133</sup> Though the panel's decision had primarily rested on comity and federalism, the en banc majority did not deeply analyze these issues.<sup>134</sup> Rather, it noted that the panel's approach was "closer to abdication than comity" and that "[s]tate courts cannot be given the authority to change a defendant's federal sentence."<sup>135</sup>

The Ninth Circuit panel's deference to state courts and state laws has not been followed by other federal circuits analyzing Proposition 47. As the following sections discuss, the federal and California courts have adopted conflicting approaches regarding Proposition 47's effect on recidivist enhancements.

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sentence.") (emphasis in original); *Pech-Aboytes*, 562 F3d at 1238, quoting *Martinez-Cortez*, 354 F3d at 832 ("[C]ourts must count sentences for convictions that, for reasons unrelated to innocence or errors of law, are set aside or for which the defendant is pardoned.").

<sup>128</sup> See *Yepez II*, 704 F3d at 1091; *Pech-Aboytes*, 562 F3d at 1238–39, quoting *Martinez-Cortez*, 354 F3d at 832.

<sup>129</sup> See *United States v Yepez*, 652 F3d 1182, 1190 (9th Cir 2011) (*Yepez I*), rev'd en banc, 704 F3d 1087 (9th Cir 2012). For more information on principles of comity and federalism, see Part III.B.1.

<sup>130</sup> See Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 Notre Dame L Rev 1310, 1312 (2015).

<sup>131</sup> See *Yepez I*, 652 F3d at 1190 ("[P]rinciples of comity and federalism [] counsel against substituting our judgment for that of the state courts."), quoting *Taylor v Maddox*, 366 F3d 992, 999 (9th Cir 2004).

<sup>132</sup> *Yepez I*, 652 F3d at 1190. See also *Yepez II*, 704 F3d at 1102–03 (Wardlaw dissenting).

<sup>133</sup> See generally *Yepez II*, 704 F3d 1087. Judge Kim McLane Wardlaw, who authored the original panel decision, also authored the en banc dissent, which was joined by the four other dissenters. The dissent reemphasized the original panel's reasoning. See *id.* (Wardlaw dissenting).

<sup>134</sup> See *id.* at 1091 (majority).

<sup>135</sup> *Id.*

C. The California Supreme Court's Interpretation of Proposition 47

The California Supreme Court has held that the intent behind Proposition 47's "for all purposes" language is to ameliorate the collateral consequences of a felony conviction.<sup>136</sup> The California Supreme Court explained that "the fact that Proposition 47 did not expressly mention recidivist offenders does not mean that voters intended to deny those resentenced under the measure any further mitigation of their punishment."<sup>137</sup> Rather,

[f]rom [ ] particular statements in the ballot materials for Proposition 47, it follows that a reduced penalty for a crime that had previously been classified as a felony would include a penalty that takes the form of an enhancement or other recidivist-based punishment that was alleged with that same felony.<sup>138</sup>

The California Supreme Court has therefore held that reclassified convictions cannot be predicate felonies for future state sentencing enhancements.<sup>139</sup> Further, it held that Proposition 47 ameliorates some already imposed sentencing enhancements. A sentencing enhancement based on a redesignated conviction can be challenged if "the judgment containing the sentence enhancement was not final when Proposition 47 took effect."<sup>140</sup> And regardless of finality, a defendant who successfully petitions for resentencing "may . . . challenge a felony-based enhancement contained in the same judgment."<sup>141</sup>

The court reached this holding by explaining that Proposition 47's resentencing and redesignation provisions "both clearly reflect an intent to have full retroactive application."<sup>142</sup> Though Proposition 47's directive that reclassified convictions "be misdemeanors for all purposes" does not use similar retroactive

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<sup>136</sup> See *People v Buycks*, 422 P3d 531, 545–56 (Cal 2018).

<sup>137</sup> Id at 545.

<sup>138</sup> Id at 546.

<sup>139</sup> Id at 540 ("Proposition 47 . . . mandates that the reduced conviction 'shall be considered a misdemeanor for all purposes.' . . . [This], therefore, plainly extends the retroactive ameliorative effects of Proposition 47 to mitigate any *future* collateral consequence of a felony conviction that is reduced under the measure.") (emphasis in original), quoting Cal Penal Code § 1170.18(k).

<sup>140</sup> *People v Foster*, 447 P3d 228, 232 (Cal 2019), citing *Buycks*, 422 P3d at 540.

<sup>141</sup> *Buycks*, 422 P3d at 540.

<sup>142</sup> Id at 541.

language,<sup>143</sup> the court noted that “Proposition 47 was intended to broadly mitigate the collateral penal consequences of certain narcotics and larceny-related offenses.”<sup>144</sup> Thus, under state precedent, reclassified convictions can only be predicate felonies for judgments that were final when Proposition 47 took effect.<sup>145</sup>

In sum, the California Supreme Court interpreted the “for all purposes” language to require that redesignated convictions be treated as misdemeanors in most state sentencing proceedings. This holding was largely based on Proposition 47’s intent to broadly ameliorate the consequences of certain convictions. As the next section demonstrates, the federal courts have not deferred to Proposition 47’s intent or to the California Supreme Court’s interpretation of California law.

#### D. Federal Circuit Courts’ Approach to Proposition 47

The California Supreme Court’s holding applies only to state sentencing; federal law determines Proposition 47’s effect on federal sentencing. And federal circuit courts have uniformly disregarded California’s interpretation of Proposition 47.<sup>146</sup> In a variety of contexts, courts have held that convictions reclassified under Proposition 47 still count as predicate offenses for federal recidivist enhancements, including § 841 of the CSA and the Guidelines’ enhancements.

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<sup>143</sup> See *id.*

<sup>144</sup> *Id.* at 543.

<sup>145</sup> *Buycks*, 422 P3d at 543. The California Supreme Court relied on the principle articulated in *In re Estrada*, 408 P2d 948 (Cal 1965). See *Buycks*, 422 P3d at 542–43. The *Estrada* rule presumes that in the absence of a “clear intention concerning any retroactive effect, ‘a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.’” *Id.* at 542, quoting *People v Conley*, 373 P3d 435, 440 (Cal 2016).

<sup>146</sup> Starting with the Ninth Circuit, all circuit courts to consider the issue have held that reclassification under Proposition 47 does not affect federal sentencing. See, for example, *United States v Diaz*, 838 F3d 968, 971 (9th Cir 2016). But before the Ninth Circuit ruled on the issue, multiple judges in the Central District of California held otherwise. See *United States v Pagan*, 2016 WL 8729980, \*6 (CD Cal); *United States v Norwood*, 2016 WL 269571, \*2–4 (CD Cal); *United States v Summey*, 2015 US Dist LEXIS 175511, \*11 (CD Cal). Even after the Ninth Circuit’s decision, one California district court interpreted the Ninth Circuit’s binding decision as foreclosing the defendant’s statutory claim, but leaving open constitutional issues. See *Clay v United States*, 2018 WL 6333671, \*4 (CD Cal). The court held that “it would violate [defendant’s] right to due process of law and the Eighth Amendment to keep the 841(b)(1) enhancement in place after learning that his prior is treated by clear retroactive state law as if it had never been a felony.” *Id.*, citing *Johnson*, 544 US at 303.

1. “Felony drug offense” under § 841 of the CSA.

All federal circuit courts to consider the issue have held that a conviction reclassified under Proposition 47 is still a felony drug offense under § 841 of the CSA’s recidivist enhancement. The Third,<sup>147</sup> Seventh,<sup>148</sup> Eighth,<sup>149</sup> and Ninth<sup>150</sup> Circuits each considered defendants who challenged their mandatory § 841 enhancement on direct appeal because of a reclassified California conviction.<sup>151</sup> All employed similar reasoning.<sup>152</sup> They focused on the text of § 841, which mandates a sentencing enhancement “after a prior conviction for a felony drug offense has become final”<sup>153</sup> and noted that “prior conviction” is defined by federal law, not state law.<sup>154</sup> Because § 841 is “backward-looking,”<sup>155</sup> they considered “whether

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<sup>147</sup> *United States v London*, 747 F Appx 80, 82 (3d Cir 2018).

<sup>148</sup> *United States v Sanders*, 909 F3d 895, 898–99 (7th Cir 2018).

<sup>149</sup> *United States v Santillan*, 944 F3d 731, 732 (8th Cir 2019).

<sup>150</sup> *Diaz*, 838 F3d at 971.

<sup>151</sup> Because the defendants were sentenced prior to the First Step Act, their § 841 enhancements imposed a mandatory minimum. Joe Ramon Santillan received twenty years, Vickie Sanders received ten, Anthony London received twenty, and Jesse Vasquez (the defendant in *Diaz*) received life imprisonment. See *Santillan*, 944 F3d at 736; *Sanders*, 909 F3d at 898–99; *London*, 747 F Appx at 82; *Diaz*, 838 F3d at 971.

<sup>152</sup> The courts all expressly relied on the other circuits’ decisions. The Ninth Circuit’s decision in *Diaz*, which was decided first, has been particularly influential. See, for example, *Santillan*, 944 F3d at 736 (“Because we find persuasive the reasoning of the Ninth Circuit’s decision in [*Diaz*], we disagree [with the defendant].”).

<sup>153</sup> 21 USC § 841(b)(1)(B) (1970), amended by the First Step Act of 2018, Pub L No 115-391, 132 Stat 5194. See *Santillan*, 944 F3d at 732–33, quoting *United States v Funchess*, 422 F3d 698, 703 (8th Cir 2010) (looking to the language of § 841 and explaining that whether to apply “the prior drug conviction enhancement . . . is a matter of statutory interpretation”); *Sanders*, 909 F3d at 901 (“As always, we must begin[] with the plain language of the statute. . . . Section 841(b) states that a defendant is subject to a ten-year minimum term of imprisonment if she commits a federal drug offense ‘after a prior conviction for a felony drug offense has become final.’”), quoting 21 USC § 841(b)(1)(B) (quotation marks and citations omitted); *London*, 747 F Appx at 84 (“[W]e begin the same way we begin all inquiries involving statutory interpretation—with the text of the statutory provision. . . . [The statute] requires only that the defendant commit his federal offense after his prior conviction ‘has become final.’”), quoting 21 USC § 841(b)(1)(A); *Diaz*, 838 F3d at 974 (“[A]s a matter of plain statutory meaning there [is] . . . no question’ the defendant committed his crime ‘after a [prior state felony] conviction’ has become final.”) (emphasis in original), quoting *United States v Dyke*, 718 F3d 1282, 1292 (10th Cir 2013).

<sup>154</sup> See *Santillan*, 944 F3d at 733 (“[T]he question of what constitutes a ‘prior conviction’ for purposes of § 841(b)(1)(A) is a matter of federal, not state, law.”) (quotation marks and citations omitted); *Sanders*, 909 F3d at 900 (“To determine whether a defendant has a prior state conviction for purposes of applying a federal recidivism enhancement provision, we look to federal law.”); *London*, 747 F Appx at 84 (“The interpretation of [§ 841] is a matter of federal law, rather than state law.”); *Diaz*, 838 F3d at 972 (“Federal law, not state law, governs our interpretation of federal statutes.”).

<sup>155</sup> *Santillan*, 944 F3d at 733, quoting *Diaz*, 838 F3d at 973; *Sanders*, 909 F3d at 901, quoting *Diaz*, 838 F3d at 973; *London*, 747 F Appx at 84, quoting *Diaz*, 838 F3d at 973.

the defendant was previously convicted, not the particulars of how state law later might have permitted relief from the defendant's state conviction."<sup>156</sup> The circuits thus held that California's later decision to reclassify the defendant's felony to a misdemeanor did not change the fact that the defendant's prior conviction for a felony drug offense had become final.<sup>157</sup>

Beyond this statutory conclusion, multiple circuits explained that affording a defendant relief in his federal sentence, despite prior criminal history, is contrary to § 841's purpose of punishing recidivism.<sup>158</sup> They also emphasized that "[i]gnoring later state actions for purposes of federal sentences . . . aligns with the Supreme Court's repeated admonishments that federal laws should be construed to achieve national uniformity."<sup>159</sup> Finally, the circuits noted that, unlike other federal sentencing statutes, Congress did not include a provision explicitly saying that changes in state law retroactively affect § 841.<sup>160</sup>

The reasoning of these § 841 cases has influenced other decisions involving Proposition 47's effect on federal sentencing. As

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<sup>156</sup> *Santillan*, 944 F3d at 733, quoting *Diaz*, 838 F3d at 973–74; *Sanders*, 909 F3d at 901, quoting *Diaz*, 838 F3d at 973–74; *London*, 747 F Appx at 84, quoting *Diaz*, 838 F3d at 973–74; *Diaz*, 838 F3d at 973–74, quoting *Dyke*, 718 F3d at 1293.

<sup>157</sup> See *Santillan*, 944 F3d at 733 ("Santillan was convicted of possession of marijuana for sale . . . , which was a felony under California law at that time. Thus, his California conviction qualifies as a 'felony drug offense' notwithstanding the fact it was later redesignated as a misdemeanor."); *Sanders*, 909 F3d at 901 ("California's later decision to reclassify the felony as a misdemeanor 'does not alter the historical fact of the [prior state] conviction becoming final—which is what § 841 requires.'"), quoting *Diaz*, 838 F3d at 974 (quotation marks and citation omitted); *London*, 747 F Appx at 84 ("[T]he decision of California voters to enact Proposition 47 does not change the fact that London committed his federal offense 'after a prior conviction for a felony drug offense ha[d] become final.'"), quoting 21 USC § 841(b)(1)(A).

<sup>158</sup> See *Sanders*, 909 F3d at 902 ("[I]t's unclear why a [federal] statute aimed at punishing recidivism . . . would afford the defendant relief in his federal sentence."), quoting *Diaz*, 838 F3d at 974; *London*, 747 F Appx at 85 ("The sentence enhancements in § 841 are also meant to combat recidivism. That purpose would not be served by affording a defendant relief from his federal sentence whenever a state provides him procedural relief related to a previous state conviction after he has already committed another federal drug offense."), citing *Diaz*, 838 F3d at 974.

<sup>159</sup> *Sanders*, 909 F3d at 902, quoting *Diaz*, 838 F3d at 974. See also *London*, 747 F Appx at 85.

<sup>160</sup> See *Sanders*, 909 F3d at 901–02 (noting that Congress ensured expunged convictions are disregarded under § 921(a)(20), but did not do so for § 841); *London*, 747 F Appx at 85 n 5 ("Congress could, of course, give retroactive effect to forms of relief under state law that are unrelated to trial error or actual innocence, and it has done so in other contexts."); *Diaz*, 838 F3d at 974 ("Congress could, of course, give retroactive effect to changes in state law for purposes of federal statutes for policy reasons unrelated to innocence or an error of law. . . . Indeed, it has done so in other circumstances.") (quotation marks and citation omitted).

the following sections demonstrate, similar logic has been employed in cases regarding the Guidelines and postconviction constitutional challenges.

## 2. “Felony” under the Guidelines.

Relying on its earlier reasoning in its § 841 case, *United States v Diaz*,<sup>161</sup> the Ninth Circuit—the only circuit to squarely consider the issue—has held that convictions reclassified under Proposition 47 still constitute felonies for the Guidelines’ sentencing enhancements. In two different cases, the court considered the criminal history calculation<sup>162</sup> and an offense-specific enhancement.<sup>163</sup> In the latter, the specific enhancement increased the defendant’s sentence for his federal immigration offense based on a prior felony conviction “for which the sentence imposed was five years or more.”<sup>164</sup> In the criminal history case, the district court treating the reclassified conviction “as a felony” increased the defendant’s criminal history points.<sup>165</sup>

In both cases, the court explained that the proper approach is to “look[ ] to a defendant’s status at the time he commits the federal crime.”<sup>166</sup> It then held that Proposition 47 did not change the “historical fact” of the defendant’s prior state conviction.<sup>167</sup> Thus, just as in the § 841 context, a reclassified conviction triggered the Guidelines’ felony-based sentencing enhancements.

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<sup>161</sup> 838 F3d 968 (9th Cir 2016).

<sup>162</sup> See *United States v Norwood*, 733 F Appx 387, 389 (9th Cir 2018).

<sup>163</sup> See *United States v Bermudez-Zamora*, 788 F Appx 523, 534 (9th Cir 2019).

<sup>164</sup> *Id* at 524, quoting USSG § 2L1.2(b)(3).

<sup>165</sup> *Norwood*, 733 F Appx at 389. Treating the defendant’s conviction as a felony yielded three criminal history points under USSG § 4A1.1(a), which directs courts to “[a]dd 3 points for each prior sentence of imprisonment exceeding one year and one month.” If the district court had treated the conviction as a misdemeanor with a misdemeanor sentence of imprisonment imposed, only two points would have been added. See USSG § 4A1.1(b) (“Add 2 points for each prior sentence of imprisonment of at least sixty days.”). The defendant in *Norwood* also received two additional points because he was on parole for his California conviction when he committed his instant federal offense. *Norwood*, 733 F Appx at 389.

<sup>166</sup> *Norwood*, 733 F Appx at 389, quoting *Yepez II*, 704 F3d at 1090. See *Bermudez-Zamora*, 788 F Appx at 524 (“Nor can we find in § 2L1.2(b)(3) any support for Bermudez-Zamora’s contention that we should evaluate the status of his state conviction as of the time he committed the federal offense, rather than the time of the original criminal conduct.”), citing *McNeill*, 563 US at 820.

<sup>167</sup> *Bermudez-Zamora*, 788 F Appx at 524, quoting *Diaz*, 838 F3d at 974. See *Norwood*, 733 F Appx at 389 (“The district court correctly determined that a reclassification under Proposition 47 did not alter these ‘historical fact[s].’”), quoting *Yepez II*, 704 F3d at 1090.

3. Postconviction relief for sentencing enhancements based on reclassified convictions.

The prior cases dealt with defendants' challenging of their enhanced sentences on direct appeal. Defendants have also reclassified their California offenses while imprisoned, and then challenged their enhanced federal sentence under § 2255, the primary form of federal postconviction relief.<sup>168</sup> Because denials of § 2255 motions can only be appealed if the defendant has made "a substantial showing of the denial of a constitutional right," defendants in the Proposition 47 context have—to varying extents—presented constitutional arguments when petitioning for a certificate of appealability.<sup>169</sup> These petitions have generally been denied.<sup>170</sup>

Reaching the merits of a § 2255 motion, the Tenth Circuit denied a defendant's due process challenge to his § 841 enhancement predicated on a reclassified California conviction.<sup>171</sup> The defendant relied on the Supreme Court's decision in *Johnson*, which acknowledged a right to resentencing if a predicate offense has been "successfully attacked, vacated, or set aside," to argue that his enhancement violated due process.<sup>172</sup> The Tenth Circuit relied on other circuit court decisions to conclude that the defendant's California conviction "remain[ed] authorized" by law, and he therefore "failed to demonstrate a due process violation" under *Johnson*.<sup>173</sup>

Thus, in a variety of contexts, the circuit courts have denied defendants' challenges to their federal sentencing enhancements based on convictions reclassified under Proposition 47. The next Part argues that this conclusion is not inevitable and that principles of comity support a contrary holding.

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<sup>168</sup> See 28 USC § 2255. For a further discussion of § 2255, see notes 92–95 and accompanying text.

<sup>169</sup> 28 USC § 2253(c)(2).

<sup>170</sup> See *United States v Ramos*, 758 F Appx 316, 317 (4th Cir 2019) (holding that the defendant did not show "that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong"); *Munayco v United States*, 2019 WL 2285470, \*1 (11th Cir) (same); *United States v Bell*, 689 F Appx 598, 599 (10th Cir 2017) (holding that the defendant did not show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further").

<sup>171</sup> *United States v McGee*, 760 F Appx 610, 610–12 (10th Cir 2019).

<sup>172</sup> *Id* at 612–13.

<sup>173</sup> *Id* at 613.

### III. GIVING EFFECT TO RETROACTIVE STATE LAW CHANGES IN FEDERAL SENTENCING

The federal circuit courts' conclusion—that Proposition 47 does not alter predicate offenses for federal sentencing—does not necessarily follow from Supreme Court precedent. The Supreme Court has never analyzed the effect of a *retroactive* state law, nor has it conclusively determined what state action can alter predicate offenses.

This Part argues that federal courts should allow Proposition 47 to affect federal sentencing. Part III.A argues that Proposition 47 should be treated differently than other state laws considered by the Supreme Court—not only is Proposition 47 broader than the expungement law considered by the Supreme Court in *Dickerson*, it is much more akin to the state vacating the defendant's conviction. Part III.B then argues that principles of comity support federal courts following the California courts' interpretation of Proposition 47. Finally, Part III.C discusses how this Comment's argument will provide relief for many federal defendants. Because the Supreme Court has not foreclosed treating retroactively reclassified state convictions as misdemeanors for federal sentencing, this Comment argues that principles of comity and federalism, as well as the positive benefits to federal defendants, support giving Proposition 47 full effect in federal courts.

#### A. Legal Precedent Supports Giving Effect to Retroactive Reclassification

1. Proposition 47 is broader than expungement or dismissal.

The Supreme Court has only considered the effect of a state expungement law and a state law that prospectively shortens an offense's length of imprisonment. The circuit courts have treated Proposition 47 exactly like these laws. The Ninth Circuit, for example, stated that “Proposition 47 presents a *slight* variation on what effect, if any, we must give to subsequent acts affecting a prior state sentence.”<sup>174</sup> Other circuits even concluded that “dismissal or expungement is *a more drastic change* than merely reclassifying [a conviction] as a misdemeanor’ under

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<sup>174</sup> *Diaz*, 838 F3d at 973 (emphasis added).

Proposition 47.”<sup>175</sup> But because Proposition 47 alters the defendant’s underlying penalty, conviction, and conduct, it is broader than these laws, and should be treated differently.

The California Supreme Court has explained that Proposition 47 alters the felonious nature of the defendant’s offense in numerous ways. Even though Proposition 47 did not “expressly mention recidivist offenders,” the court pointed to ballot materials stating that “the measure reduces the *penalties* for the following crimes,” which “extends logically to enhancements and subsequent offenses connected to those offenses.”<sup>176</sup> In other words, California believes that these offenses simply do not deserve long sentences or recidivist punishment; the penalty attached to certain conduct is fundamentally altered. Indeed, the California Supreme Court has explained that Proposition 47 changes the nature of the defendant’s underlying *conduct*. Under Proposition 47, “the reduction of defendant’s [ ] conviction to a misdemeanor establishes that he cannot be regarded as having engaged in *felonious* criminal conduct.”<sup>177</sup> In California’s view, a certain class of conduct is no longer dangerous or serious enough to be a felony. Finally, the court has also held that Proposition 47 alters the underlying felony *conviction*, because its text “mandates that a ‘felony conviction . . . shall be considered a misdemeanor for all purposes.’”<sup>178</sup> Thus, prospectively and retroactively, the defendant’s conviction accurately reflects California’s judgment on what conduct constitutes a felony and what penalties that conduct deserves.

Unlike the laws considered by the Supreme Court, Proposition 47 changes the defendant’s underlying conviction. The prospective change in length of imprisonment discussed in *McNeill* did not. Nor did the expungement law at issue in *Dickerson*. The Court explained in *Dickerson*: “[Expungement] in Iowa means no more than that the State has provided a means for the trial court not to accord a conviction certain continuing effects under state law.”<sup>179</sup> Like other postconviction relief, Proposition 47 intends to ameliorate “certain continuing effects.” But in contrast to the Iowa expungement at issue in *Dickerson*, Proposition 47

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<sup>175</sup> *United States v McGee*, 760 F Appx 610, 615 (10th Cir 2019), quoting *Diaz*, 838 F3d at 974. See also *United States v London*, 747 F Appx 80, 84 (3d Cir 2018) (“[W]e have held that there is no impact on § 841 eligibility when the defendant’s prior state conviction is outright dismissed following probation, which is a more drastic change than reclassification.”).

<sup>176</sup> *People v Buycks*, 422 P3d 531, 545–46 (Cal 2018) (emphasis in original).

<sup>177</sup> *People v Valenzuela*, 441 P3d 896, 904 (Cal 2019) (emphasis in original).

<sup>178</sup> *Buycks*, 422 P3d at 548 (emphasis added), quoting Cal Penal Code § 1170.18(k).

<sup>179</sup> *Dickerson*, 460 US at 115.

fundamentally changes the underlying conviction. According to the text of the statute (and the California Supreme Court) the *conviction* has been changed to a misdemeanor for all purposes. Expungement only “attempt[s] to conceal prior convictions or to remove some of their collateral or residual effects.”<sup>180</sup> Proposition 47 does not merely “conceal” prior convictions—it changes them to misdemeanors.

Even though Proposition 47 changes the conviction from a felony to a misdemeanor, “some of” the felony’s “residual effects” remain.<sup>181</sup> For example, Proposition 47 does not apply if the defendant has a conviction for certain violent or sexual offenses.<sup>182</sup> This is similar to a sentencing enhancement: if the defendant has a designated prior offense, he receives a felony and a higher penalty. The more challenging issue with Proposition 47 is its firearm provision, which prohibits firearm possession for individuals who have received resentencing and does not remove these individuals’ felon status for purposes of California’s felon-in-possession-of-a-firearm law.<sup>183</sup> But the California Supreme Court has explained that this “single exception to the collateral effect of Proposition 47’s resentencing provisions” actually bolsters the argument that reclassified convictions cannot be predicate offenses.<sup>184</sup> Proposition 47’s “mandate to reduce penalties for a distinct class of . . . offenses otherwise fully extends to enhancements and subsequent offenses alleged with those offenses.”<sup>185</sup> In other words, because the firearm restriction is the sole exception to the “for all purposes” language, no other exceptions—including recidivist enhancements—can be allowed.

Proposition 47 is also broader than other laws because it retroactively changes the defendant’s penalty by allowing resentencing and redesignation. Federal statutes and the Guidelines impose enhancements based on potential or actual length of imprisonment—in other words, federal law cares about penalties as a proxy for the crime’s severity. Expungement does not universally lower the offense’s penalty, unlike Proposition 47. Meanwhile, the law in *McNeill* did lower the offense’s penalty, but only prospectively. Neither law indicates an intent by the state to

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<sup>180</sup> *Id.* at 121.

<sup>181</sup> *See id.*

<sup>182</sup> Cal Penal Code § 1170.18(b), (i).

<sup>183</sup> Cal Penal Code § 1170.18(k).

<sup>184</sup> *Buycs*, 422 P3d at 546.

<sup>185</sup> *Id.*

reduce the penalty attached to certain conduct, both prospectively and retroactively. In contrast, the California Supreme Court explained that Proposition 47 shows that certain conduct (possessory drug offenses and minor theft) is no longer “*felonious* criminal conduct.”<sup>186</sup> Although “conviction” is defined by federal law, states still have the power to determine what conduct is criminal. As the Supreme Court acknowledged in *Dickerson*, “predicate offense[s] and [their] punishment are defined by the law of the State.”<sup>187</sup> Proposition 47 changes what conduct is felonious. In other words, the act of possessing drugs or committing petty theft is no longer felonious in California. And by making this change retroactive, California made clear that this conduct was *never* felonious under state law. According to California’s current law and (through retroactive reclassification) past law, possessing drugs or committing minor theft cannot, and never did, constitute a felony.

Because Proposition 47 is broader than the laws considered by the Supreme Court, it should be treated differently. But the circuit courts disagree. They have limited the exceptions to the general rule that state action does not affect federal sentencing to actions based on legal error or actual innocence. And they have largely ignored Proposition 47’s retroactivity, instead focusing on the “historical fact” of conviction.

## 2. Federal courts should not focus on literal vacatur.

In treating Proposition 47 like “dismissal or expungement” for federal sentencing purposes, the circuit courts have applied their very narrow interpretation of “prior conviction.”<sup>188</sup> The circuits have generally held that state action does not affect the fact of a prior conviction.<sup>189</sup> The exception to this rule, which stems from *Dickerson*, is where the “predicate conviction ha[s] been vacated or reversed on direct appeal.”<sup>190</sup> Some circuits have indicated that this exception only applies if the vacatur was due to

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<sup>186</sup> See *Valenzuela*, 441 P3d at 904 (“[T]he theft of Ramirez’s \$ 200 bicycle—the same conduct that gave rise to defendant’s conviction for grand theft—constituted the felonious criminal conduct involved with his conviction for street terrorism. In light of defendant’s Proposition 47 resentencing, that theft can no longer be regarded as felonious.”).

<sup>187</sup> *Dickerson*, 460 US at 112.

<sup>188</sup> See, for example, *McGee*, 760 F Appx at 615, quoting *Diaz*, 838 F3d at 974.

<sup>189</sup> See Part II.B.

<sup>190</sup> *United States v Sanders*, 909 F3d 895, 902 (7th Cir 2018), quoting *Dickerson*, 460 US at 115.

“innocence or errors of law,” at least for the Guidelines.<sup>191</sup> Other circuits have indicated that state laws like expungement can qualify for the *Dickerson* exception if they “alter[ ] the legality of the original state conviction—such as where there was a trial error or it appears the defendant was actually innocent of the underlying crime.”<sup>192</sup>

For multiple reasons, however, language from Supreme Court cases suggests that circuit courts need not interpret this exception so narrowly. The Court explained in *Dickerson*:

[W]e recognized an obvious exception to the literal language of the statute for one whose predicate conviction had been vacated or reversed on direct appeal. . . . But, in contrast, [expungement] does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty. . . . Clearly, firearms disabilities may be attached constitutionally to an expunged conviction, . . . and an exception for such a conviction, unlike one reversed or vacated due to trial error, is far from obvious.<sup>193</sup>

First, in this passage, the Court did not expressly state that vacated convictions are the *only* convictions that are exempted. Second, although trial error is an “obvious” exception, the Court did not preclude other state laws from affecting the underlying convictions. Finally, the Court does not expressly define what it means to “alter the legality of the previous conviction.” Taken together, this demonstrates that the Court left open the possibility of a broader definition of which state actions alter the underlying conviction for federal sentencing.

In *Johnson*, the Court similarly declined to define when exactly an underlying conviction can be altered for federal sentencing. In a series of sentencing procedure cases leading up to *Johnson*, the Court consistently recognized that “a defendant who *successfully attack[s]* his state conviction in state court or on federal habeas review [can] then ‘apply for reopening of any federal

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<sup>191</sup> See, for example, *United States v Martinez-Cortez*, 354 F3d 830, 832 (8th Cir 2004) (“If [defendant]’s convictions had been vacated for the express purpose of enabling him to become eligible for the safety valve, the sentences would have counted because the convictions would have been set aside for reasons unrelated to his innocence or errors of law.”).

<sup>192</sup> *Diaz*, 838 F3d at 973, citing *United States v Norbury*, 492 F3d 1012, 1015 (9th Cir 2007).

<sup>193</sup> *Dickerson*, 460 US at 115.

sentence enhanced by the state sentences.”<sup>194</sup> At times the *Johnson* opinion seems to suggest that a “successful attack” means a state vacatur: “Our cases . . . assume . . . that a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is *vacated*.”<sup>195</sup> At other times, it focuses on the validity of the prior conviction: “Congress does not appear to have adopted a policy of enhancing federal sentences regardless of the *validity* of state convictions relied on for the enhancement.”<sup>196</sup> “Validity” is not defined, but implies something broader than just vacatur. Unlike vacatur, “validity” does not suggest a specific state procedure. Nor is it necessarily limited to legal error or actual innocence. Rather, an invalid conviction implies that it is not recognized in state court—just like reclassified convictions are not recognized as felonies in California court.

When analyzing Proposition 47, the circuit courts conflated these different terms, at times using “vacated,” and at times using “successfully attacked.” The Seventh Circuit, for example, acknowledged that laws altering “the legality of the original state conviction” mean the conviction cannot be a predicate offense.<sup>197</sup> But it then stated: “Proposition 47 [ ] does not ‘vacate’ prior felony convictions; it *reclassifies* them as misdemeanors. Thus, *Johnson* is not helpful to [the defendant]’s argument.”<sup>198</sup> This argument implies a law *must* vacate a conviction to affect federal sentencing. Similarly, although the Tenth Circuit stated that *Johnson* applies where the predicate conviction was “vacated *or* successfully attacked,” it went on to distinguish “between a conviction that has been *vacated* because of a constitutional error or actual innocence and a conviction that has merely been reclassified as a matter of legislative grace.”<sup>199</sup>

Proposition 47’s effect on nonfinal judgments is more similar to state vacatur than expungement. The Seventh Circuit explained: “When a state court ‘vacates’ a prior conviction, it, in effect, nullifies that conviction; it is as if that conviction no longer

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<sup>194</sup> *Johnson*, 544 US at 303 (emphasis added), quoting *Custis v United States*, 511 US 485, 497 (1994).

<sup>195</sup> *Johnson*, 544 at 303 (emphasis added).

<sup>196</sup> *Id.* at 305–06 (emphasis added). See also *id.* at 303 (“[T]he mandatory enhancement under the [ACCA] has [not] been read to mean that the validity of a prior conviction supporting an enhanced federal sentence is beyond challenge.”).

<sup>197</sup> *Sanders*, 909 F3d at 903.

<sup>198</sup> *Id.*

<sup>199</sup> *McGee*, 760 F Appx at 615 (emphasis added).

exists.”<sup>200</sup> This is what California did for nonfinal judgments—for state purposes, the *felony* conviction no longer exists. California has decided that the underlying conduct no longer constitutes a felony. Thus, the penalties and collateral effects of a felony conviction can no longer attach to drug possession and minor theft. In its opinion, the Seventh Circuit cites to a California court that explained precisely this point:

[O]ne of the “chief” reasons for reclassifying a felony as a misdemeanor “is that under such circumstances the offense is not considered to be serious enough to entitle the court to resort to it as a prior conviction of a felony for the purposes of increasing the penalty for a subsequent crime.”<sup>201</sup>

Despite acknowledging that California did “not consider[ ]” possessory drug offenses “to be serious enough” to be a felony conviction,<sup>202</sup> the Seventh Circuit treated it exactly like a felony.<sup>203</sup>

Unlike postconviction relief that simply offers legislative grace, Proposition 47 comes much closer to altering the underlying legality of the felony conviction. A successful petition for redesignation or resentencing in state court also comes closer to the other terms the Supreme Court used in *Johnson*—a “successful attack” changing the underlying “validity” of the felony conviction.

### 3. Retroactivity alters the historical fact of conviction.

Finally, and importantly, the Supreme Court has never ruled on how a retroactive state law affects federal sentencing. The Court’s holding in *McNeill* only applies to state laws that prospectively lower the term of imprisonment, and the Court expressly declined to decide what would happen if that state law was retroactively applied to defendants.<sup>204</sup>

Despite this open question, the circuits either rejected or failed to meaningfully consider the effect of Proposition 47’s retroactivity. The circuits explained that although Congress could “give retroactive effect to changes in state law[s]” and has in other situations, it did not do so for § 841.<sup>205</sup> The Third Circuit had no

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<sup>200</sup> *Sanders*, 909 F3d at 902.

<sup>201</sup> *Id.* at 900, quoting *People v Abdallah*, 201 Cal Rptr 3d 198, 206 (2016).

<sup>202</sup> *Sanders*, 909 F3d at 900.

<sup>203</sup> *Id.* at 903.

<sup>204</sup> *McNeill*, 563 US at 825 n 1.

<sup>205</sup> *Sanders*, 909 F3d at 901–02, quoting *Diaz*, 838 F3d at 974; *London*, 747 F Appx at 85 n 5.

further analysis regarding Proposition 47's retroactivity. The Ninth Circuit first noted that it is unclear whether California applies Proposition 47 retroactively, an issue which has since been decided by the California Supreme Court.<sup>206</sup> The Ninth Circuit then explained that "even if California decided to give Proposition 47 retroactive effect for purposes of its own *state* law, that would not retroactively make [the defendant]'s felony conviction a misdemeanor for purposes of *federal* law."<sup>207</sup> To support this, the court simply reiterated that "§ 841 explicitly tells us when it applies," and that § 841 applies in this case.<sup>208</sup> The Tenth Circuit extensively quoted the Ninth Circuit's decision without expanding on it.<sup>209</sup> Finally, the Seventh Circuit briefly mentioned the Eleventh Circuit's examination of a retroactive New York sentencing law. The Seventh Circuit, quoting the Eleventh Circuit's language that discusses *McNeill*, explained "that the defendant could 'succeed on the merits of his [challenge to his federal sentencing enhancement] only if the New York sentencing reductions apply retroactively.'"<sup>210</sup> The Seventh Circuit stated that this was "mere dicta," without engaging in the retroactivity argument.<sup>211</sup>

Retroactivity should impact the federal courts' analysis because it alters the "historical fact" of conviction. In *McNeill*, the Court explained why a *prospective* state law change did not alter the historical fact of conviction: "A defendant's history of criminal activity—and the culpability and dangerousness that such history demonstrates—does not cease to exist when a State reformulates its criminal statutes in a way that prevents precise translation of the old conviction into the new statutes."<sup>212</sup>

When federal courts find the historical fact of conviction, they are not finding the underlying culpability or dangerousness of a defendant. Rather, the only fact that they are constitutionally allowed to find is the fact of conviction.<sup>213</sup> And the Supreme Court has noted that "a claim of [the fact of conviction] is subject to proof or disproof like any other factual issue."<sup>214</sup> Under Proposition 47,

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<sup>206</sup> See *Diaz*, 838 F3d at 974–75.

<sup>207</sup> *Id.* at 975 (emphasis in original).

<sup>208</sup> *Id.*

<sup>209</sup> See *McGee*, 760 F Appx at 615, citing *Diaz*, 838 F3d 968.

<sup>210</sup> *Sanders*, 909 F3d at 903–04, quoting *Cortes-Morales v Hastings*, 827 F3d 1009, 1014 (11th Cir 2016).

<sup>211</sup> *Sanders*, 909 F3d at 904.

<sup>212</sup> *McNeill*, 563 US at 823.

<sup>213</sup> See *Apprendi v New Jersey*, 530 US 466, 490 (2000).

<sup>214</sup> *Johnson*, 544 US at 307.

a defendant's historical conviction can be disproved, because the fact of the defendant's felony ceases to exist. California has reached back into the defendant's history and changed a felony to a misdemeanor. This reclassification does not prevent "precise translation of the old conviction." Rather, it facilitates a very clear translation of the old conviction (felony) to the new conviction (misdemeanor).

The emphasis on the historical fact of conviction explains why courts look to the law at the time of conviction, rather than current law. But with retroactive laws, looking to historical law produces odd results. Under Proposition 47, California declared that the historical statute does not exist, even for defendants convicted under that statute. A passage from *McNeill* highlights the problems with the historical fact approach:

Although North Carolina courts actually sentenced him to 10 years in prison for his drug offenses, McNeill now contends that the maximum term of imprisonment for those offenses is 30 or 38 months. We find it hard to accept the proposition that a defendant may lawfully [have] be[en] sentenced to a term of imprisonment that exceeds the "maximum term of imprisonment . . . prescribed by law."<sup>215</sup>

Because the North Carolina statute was not retroactive, McNeill's longer sentence was still lawful. In California, on the other hand, it is not lawful for people with reclassified convictions to serve a longer felony term; when their sentence is reclassified, defendants are resentenced. Proposition 47 explicitly mandates that "[r]esentencing pursuant to this section shall not result in the imposition of a term longer than the original sentence."<sup>216</sup> Unlike nonretroactive laws, a defendant can no longer lawfully be imprisoned based on his prior California conviction. Proposition 47's retroactivity therefore alters a key lynchpin in the courts' analysis—the historical fact of conviction.

#### B. Federalism and Proposition 47

For the aforementioned reasons, this Comment concludes that under federal law, the federal courts should give effect to Proposition 47. This Section argues that even though federal law defines federal recidivist enhancements, principles of comity and

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<sup>215</sup> *McNeill*, 563 US at 821 (quotation marks and citation omitted).

<sup>216</sup> Cal Penal Code § 1170.18(e).

federalism support considering the state's interpretation of its law. Contrary to the federal courts' argument, considering California's interpretation of Proposition 47 does not undermine federal interests, including federal supremacy.

### 1. Principles of comity.

Comity is a difficult-to-define set of norms originally stemming from international law.<sup>217</sup> At its base, it refers to the general principle that a governmental entity should respect another sovereign's laws.<sup>218</sup> The Supreme Court has defined "comity" as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation."<sup>219</sup> The Court has also explained that comity "is neither a matter of absolute obligation . . . nor of mere courtesy and good will."<sup>220</sup> In other words, comity does not compel one sovereign to defer to another—it is a voluntary decision.<sup>221</sup>

Comity and federalism are closely related: because the states are separate sovereigns, the federal government should respect their laws and judgments.<sup>222</sup> As the Supreme Court famously described in *Younger v Harris*:<sup>223</sup>

[Comity represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.<sup>224</sup>

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<sup>217</sup> Seinfeld, 90 Notre Dame L Rev at 1312 & n 6 (cited in note 130) (describing comity as "[n]ebulous," and noting that this description is "perhaps[ ] an understatement").

<sup>218</sup> *Id.* See also *Black's Law Dictionary* (West 11th ed 2019) (defining "Comity" as "[a] principle or practice among political entities (as countries, states, or courts of different jurisdictions), whereby legislative, executive, and judicial acts are mutually recognized").

<sup>219</sup> *Hilton v Guyot*, 159 US 113, 164 (1895).

<sup>220</sup> *Id.* at 163–64.

<sup>221</sup> See Sonja Larsen and Karl Oakes, 16 *American Jurisprudence, Conflict of Laws* § 11 (2d ed 2020).

<sup>222</sup> See Erwin Chemerinsky, *Federal Jurisdiction* § 1.5 at 40 (Aspen 3d ed 1999) ("A related issue concerning federalism is comity—the deference federal courts owe to state courts as those of another sovereign."); Seinfeld, 90 Notre Dame L Rev at 1334 & n 98 (cited in note 130) ("[I]t is difficult to say how much independent work comity performs in the cases involving duties that run from the federal government to the states, since it conspires with related forces—most notably state sovereignty.")

<sup>223</sup> 401 US 37 (1971).

<sup>224</sup> *Id.* at 44–45.

The Supreme Court has frequently relied on comity in cases requiring the federal government to defer to the states.<sup>225</sup> The most significant of these comity-based doctrines are the abstention doctrines, which require federal courts “to decline to exercise [their] jurisdiction in favor of the jurisdiction of a state court.”<sup>226</sup> The Court has also relied on comity to restrict federal habeas review of state criminal convictions,<sup>227</sup> and federal supplemental jurisdiction over related state law claims.<sup>228</sup>

Although the Supreme Court has relied on comity in these areas of law, few courts have referenced these principles in the Proposition 47 context, or in the context of state predicate offenses more generally.<sup>229</sup> But this context raises a particularly strong argument for employing comity. Comity would direct federal courts to respect California’s treatment of Proposition 47—its own criminal law. Because criminal law has traditionally been the state’s domain, principles of comity and federalism are particularly salient.<sup>230</sup> However, increasing federalization of the criminal justice system has led to the current system of dual jurisdiction.<sup>231</sup> Under this system, “each sovereign—whether the Federal

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<sup>225</sup> See Seinfeld, 90 Notre Dame L Rev at 1332–34 (cited in note 130). However, Professor Gil Seinfeld notes that comity has *not* been relied upon to justify the state’s obligation to the federal government and offers several theories for this. What is important for this Comment, however, is that in a comprehensive examination of the case law, decisions involving the federal government’s obligations to state governments “treat comity as a relevant norm.” Id at 1332.

<sup>226</sup> Barry Friedman, *A Revisionist Theory of Abstention*, 88 Mich L Rev 530, 534 (1989). See also James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 Stan L Rev 1049, 1050 n 1, 1051 n 5 (1994) (describing the various abstention doctrines). The most important of the abstention doctrines comes from *Younger* and requires federal courts to abstain from adjudicating requests for relief that would interfere with state criminal (and certain civil) proceedings. See Vikram David Amar, 17 *Federal Practice and Procedure (Wright & Miller)* § 4252 (Thomson Reuters 3d ed 2020).

<sup>227</sup> See, for example, *Francis v Henderson*, 425 US 536, 541–42 (1976) (relying on “considerations of comity and federalism” to limit collateral attacks on state convictions to showings of actual prejudice).

<sup>228</sup> See, for example, *United Mine Workers of America v Gibbs*, 383 US 715, 725–26 (1966) (explaining that supplemental jurisdiction “need not be exercised in every case in which it is found to exist,” and that “[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties”).

<sup>229</sup> The next Section discusses some federal courts that have discussed comity or federalism in this context. Additionally, Judge James A. Shapiro, a judge for the Circuit Court of Cook County in Chicago, Illinois, has argued that under principles of comity, federal courts should not treat state diversionary dispositions as convictions when applying the Guidelines. See Shapiro, 41 Akron L Rev at 241–43 (cited in note 85).

<sup>230</sup> See Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or Crying Wolf*, 50 Syracuse L Rev 1317, 1332 (2000).

<sup>231</sup> Id at 1329–30.

Government or a State—is responsible for the administration of its own criminal justice system.”<sup>232</sup> Though at least one court has argued that this means state law cannot infringe on federal law by defining prior conviction,<sup>233</sup> there is another interpretation of dual sovereignty. Under this view, because the state administers its own criminal law and justice system, the federal government should respect its decisions when possible.

This application of comity avoids several issues that arise in other comity-based doctrines. Scholarly criticism of the use of comity in the abstention doctrines does not apply to this Comment’s argument.<sup>234</sup> Most of these criticisms rest on the idea that federal courts “are, or should be, the primary guardians of federal rights”<sup>235</sup> and that abstention “hampers a plaintiff’s access to a lower federal court, even though the federal court has jurisdiction.”<sup>236</sup> In the Proposition 47 context, comity does not prevent any individual from pursuing their federal rights in federal court, nor does it strip federal courts of their jurisdiction. Rather, federal courts will still interpret federal sentencing enhancements, thus guarding the national government’s interests. But they will also respect California’s decision to retroactively change what conduct constitutes a felony, as well as a state court’s decision to approve a retroactive change to the defendant’s underlying state conviction. Looking to California’s treatment of reclassified convictions perfectly falls within the Supreme Court’s articulation of comity without undermining federal interests. Federal courts would recognize California’s legislative and judicial acts within “its territory”—within the federal system.

## 2. Federal supremacy is not threatened by Proposition 47.

As discussed in the prior Section, issues of comity and federalism have not been emphasized in the Proposition 47 cases. Only the Seventh Circuit considered any federalism argument. It summarily rejected the argument by explaining that the defendant did not “identify any individual right embodied in the Constitution or

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<sup>232</sup> *United States v Yopez*, 704 F3d 1087, 1091 (9th Cir 2012) (*Yopez II*), quoting *Sester v United States*, 566 US 231, 241 (2012).

<sup>233</sup> See Part II.B.2.

<sup>234</sup> See Rehnquist, 46 *Stan L Rev* at 1052 n 7 (cited in note 226) (describing strands of commentary criticizing the abstention doctrines); *id* at 1066 & nn 98–99 (collecting criticisms of the use of comity in the abstention doctrines, but noting that “comity is a convenient scapegoat for perceived defects in abstention doctrine”).

<sup>235</sup> *Id* at 1067.

<sup>236</sup> Friedman, 88 *Mich L Rev* at 535 (cited in note 226).

in a federal statute that allows [her] to challenge [her] sentence based on vague notions about the ‘principles of federalism.’”<sup>237</sup> The Seventh Circuit concluded: “Put simply, . . . federal law, and not state law, ‘dictate[s] the meaning of a federal statute.’”<sup>238</sup>

However, the Ninth Circuit focused heavily on comity when deciding whether a state court’s retroactive change to a defendant’s probation length affected his Guidelines calculation.<sup>239</sup> In the initial panel decision (and the dissent from the en banc decision), Judge Kim McLane Wardlaw emphasized the comity argument from *Younger v Harris*.<sup>240</sup> The en banc majority rejected this argument: “[G]ranting a state court the power to determine whether a federal defendant is eligible for safety valve relief under the Federal Sentencing Guidelines is closer to abdication than comity.”<sup>241</sup> It concluded that “[s]tate courts cannot be given the authority to change a defendant’s federal sentence by issuing a ruling that alters history and the underlying facts.”<sup>242</sup>

The Seventh and Ninth Circuit’s rejections of comity and federalism rest primarily on the idea of federal supremacy. This supremacy idea has been reiterated by many federal courts interpreting Proposition 47’s effect—state law cannot alter federal law. The primary reason federal supremacy is not threatened under this Comment’s argument is that federal law still defines “prior conviction.” Nothing—including principles of comity or federalism—requires federal courts to defer to the California Supreme Court’s interpretation of Proposition 47. This Comment simply argues that federal courts should define prior conviction more broadly, to account for the unique nature of Proposition 47 and California’s interpretation of it. But federal courts, not state courts, still define federal law.

Moreover, it is unclear how the supremacy of federal law is undermined by giving effect to California’s interpretation of *state* law. The federal government’s interest is in “vindicat[ing] and protect[ing] federal rights.”<sup>243</sup> Following a state’s interpretation of

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<sup>237</sup> *Sanders*, 909 F3d at 906, quoting *Ramos v United States*, 321 F Supp 3d 661, 668–69 (ED Va 2018).

<sup>238</sup> *Sanders*, 909 F3d at 906, quoting *United States v Dyke*, 718 F3d 1282, 1292 (10th Cir 2013).

<sup>239</sup> See notes 124–35 and accompanying text.

<sup>240</sup> See *United States v Yopez*, 652 F3d 1182, 1190 (9th Cir 2011) (*Yopez I*); *Yopez II*, 704 F3d at 1103 (Wardlaw dissenting).

<sup>241</sup> *Yopez II*, 704 F3d at 1091 (majority).

<sup>242</sup> *Id.*

<sup>243</sup> *Younger*, 401 US at 44.

its laws does not extinguish any federal claim.<sup>244</sup> The federal claim—prosecution of the defendant’s instant *federal* offense—is not extinguished by a state’s interpretation of the predicate offense. Indeed, allowing states to prospectively change their underlying predicate offenses inherently gives them the “authority to change a defendant’s federal sentence.”<sup>245</sup> But no one argues that Proposition 47’s prospective reclassification of certain offenses is an abdication of federal law. Given this reality, it is not clear why retroactive reclassification should be treated differently.

Similarly, the federal courts’ strong emphasis on federal law ignores the fact that the national government has made federal sentencing dependent on state law through recidivist enhancements. As the Ninth Circuit dissent articulated, “the entire concept of calculating criminal history points is predicated on respect for and deference to state court criminal proceedings; the system would unravel if district courts were to second-guess the motives of every state court judge who had previously convicted or sentenced a defendant.”<sup>246</sup> This principle extends to all federal recidivist enhancements. Giving effect to the state’s interpretation of its law does not abdicate control over federal law. Because recidivist enhancements are dependent on state law, considering the state court’s criminal proceedings does not flout the supremacy of federal law.

In sum, federal supremacy is not threatened by applying principles of comity to federal recidivist enhancements. As the next Section discusses, nor do other federal concerns counsel against this application of comity.

### 3. Recidivism, national uniformity, and federal sentencing concerns do not support the courts’ current approach.

In addition to overarching concerns about federal supremacy, the circuits identified several additional federal concerns purportedly justifying their conclusion that Proposition 47 does not affect federal sentencing. Many argued that giving effect to

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<sup>244</sup> See Seinfeld, 90 Notre Dame L Rev at 1324–25 (cited in note 130) (arguing that supremacy-based justifications for state courts’ obligation to hear federal causes of action are unpersuasive because it is unclear that “the supremacy of federal law is threatened by a jurisdictional scheme that does not extinguish any federal claims, but instead reroutes them to some other court”).

<sup>245</sup> See *Yepez II*, 704 F3d at 1091.

<sup>246</sup> *Id.* at 1098 (Wardlaw dissenting).

Proposition 47 conflicts with Congress's intent to punish recidivism.<sup>247</sup> Under this Comment's argument, however, the federal enhancements would still punish recidivism. The enhancements would just punish *felony* offenses, rather than *misdemeanor* offenses. Going forward, people who commit most possessory drug offenses and minor theft in California will not be "punished" under felony-based enhancements. If this is not contrary to Congress's intent, it is unclear why giving retroactive effect to Proposition 47 is.

The circuits also noted that allowing Proposition 47 to affect federal sentencing undermines national uniformity.<sup>248</sup> The concern regarding national uniformity is weak in this context. Because predicate offenses are based on irregular state law, an inherent lack of uniformity already exists. And defining conviction historically creates a lack of uniformity prospectively—people sentenced in California prior to Proposition 47 will receive different sentences than people sentenced after. Moreover, although national uniformity has benefits, so too does local variance. For example, local variance allows the states to act as laboratories of democracy when enacting criminal justice reforms<sup>249</sup> and ensures voters' preferences are better reflected in sentencing laws.<sup>250</sup>

Though not expressly articulated by any circuit, an additional concern with this Comment's approach is that giving retroactive reclassification effect in federal sentencing will allow states to change federal sentencing at will. This argument suggests that states will retroactively alter many of their criminal offenses. However, besides California, only Oklahoma has passed a retroactive reclassification law.<sup>251</sup> This seems to indicate that practical and political safeguards will continue to mitigate any concern about a flood of retroactive reclassification laws.<sup>252</sup> More

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<sup>247</sup> See, for example, *Sanders*, 909 F3d at 902, citing *Diaz*, 833 F3d at 974.

<sup>248</sup> See note 159 and accompanying text.

<sup>249</sup> See Michael M. O'Hear, *Federalism and Drug Control*, 57 Vand L Rev 783, 820 (2004) (noting the prevalence of "recent experiments with more fundamental [state drug law] reforms, largely as a result of successful ballot initiative campaigns").

<sup>250</sup> See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 Colum L Rev 1276, 1309 (2005) ("And if states do a better job of weighing costs and benefits, giving more sentencing authority to the states than to the federal government could better reflect the heterogeneous preferences of the voters.").

<sup>251</sup> See text accompanying notes 28–30.

<sup>252</sup> Indeed, in various states, reclassification laws have been introduced, but have failed to be enacted. See note 21 and accompanying text. And in at least one other state, the legislature has tried to repeal its recently passed reclassification laws. See HB No 20–

importantly, this concern must be tempered by respect for the state's ability to define its own laws. Because the federal government relies on state predicate offenses, it must trust the states to define their initial offenses and punishments. This trust in the states' lawmaking ability—and respect for these laws under principles of comity—applies equally to retroactive reclassification. The limiting principle of this Comment's argument is trusting in the state's ability to legislate its criminal laws.

Indeed, the federal courts' current approach raises a different—and perhaps more troubling—problem. Nothing (including principles of comity or federalism) requires federal courts to respect California's interpretation of Proposition 47. Although federal courts can continue to hold that Proposition 47 (and other state laws) have no effect on prior convictions for federal sentencing purposes, this leads to concerning questions about states' ability to control their predicate offenses. Even if California's legislation had more clearly evinced an intent to erase prior state convictions, it is unclear how federal courts would react. For example, the Supreme Court has established an exception for vacated convictions, suggesting that California should have declared possessory drug offenses “vacated.”<sup>253</sup> Even ignoring the practical and legal issues with this approach, federal courts could still refuse to give such vacatur effect, because they would not be based on legal error or actual innocence.<sup>254</sup> What then, if anything, can a state do to ensure its laws are effectuated in federal court?

This Comment argues that a better approach is a fuller trust in the states' ability to enact criminal law. Part of this trust is that when states decide to pass laws like Proposition 47, they are given effect in federal court. Because federal defendants are incarcerated based on state offenses, effectuating state ameliorative laws in federal court will provide relief to state and federal prisoners. The next Section discusses how this Comment's proposed conclusion would impact federal sentencing.

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1150, Colorado General Assembly, 77th General Assembly, 2d Regular Sess (Jan 17, 2020).

<sup>253</sup> *Dickerson*, 460 US at 115.

<sup>254</sup> See notes 191–92 and accompanying text.

### C. Impact on Federal Sentencing and Resentencing

In addition to impacting the general federal-state balance of power, holding that Proposition 47 affects federal sentencing would directly impact federal sentencing and federal prisoners. Nearly 1,000,000 people are eligible for reclassification under Proposition 47, and almost 280,000 reclassification petitions were submitted between Proposition 47's enactment on November 2014 and September 2016.<sup>255</sup>

It is not obvious how this Comment's interpretation of Proposition 47 affects people currently serving an enhanced federal sentence. The California Supreme Court has mostly avoided this issue by holding that state prisoners can challenge already-imposed state enhancements only if the judgment containing the enhancement was not final when Proposition 47 was enacted.<sup>256</sup> This distinction has been suggested by some district courts, but not the circuit courts.<sup>257</sup> If federal courts defer to California's interpretation of Proposition 47's retroactivity, most postconviction relief would be barred—only those whose federal judgments were not final could challenge their enhanced sentences.

However, this Comment's argument would affect federal prisoners who received a federal enhancement after reclassifying their California offense but were denied relief by a federal court. Whether federal prisoners can receive postconviction relief in this case depends on a number of factors, including whether the defendant has previously filed for relief. Section 2255,<sup>258</sup> the principal form of federal postconviction relief, sharply limits “second or successive motion[s]” to situations where there is “newly discovered evidence” or “a new rule of constitutional law, made retroactive . . . by the Supreme Court.”<sup>259</sup> This would likely bar any federal prisoner who already brought a § 2255 motion. In some

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<sup>255</sup> Elderbroom and Durnan, *Reclassified* at \*14 (cited in note 19). The final number of petitioners will be clear shortly, because all petitions must be submitted on or before November 4, 2022, unless there is a showing of good cause. See Cal Penal Code § 1170.18(j).

<sup>256</sup> See Part II.C.

<sup>257</sup> In *United States v Pagan*, 2016 WL 8729980 (CD Cal), the Central District of California held that the defendant's reclassified conviction was no longer a predicate offense for § 841. *Id.* at \*6–7. The court distinguished another district court case that reached the opposite holding, because Ashley Pagan was not yet convicted or sentenced for his federal enhancement, whereas the other “defendant was already convicted and sentenced to life imprisonment.” *Id.* at \*6, citing *United States v Spearman*, 2015 WL 13776957, \*1–2 (CD Cal).

<sup>258</sup> For a brief discussion of the mechanics of this provision, see Part II.D.3.

<sup>259</sup> 28 USC § 2255(h).

circuits, however, federal prisoners could file a petition for writ of habeas corpus, which is distinct from § 2255.<sup>260</sup> Federal prisoners can bring a writ of habeas corpus at any time if the prisoner's § 2255 motion was "inadequate or ineffective to test the legality of his detention."<sup>261</sup> The circuits are deeply split on what qualifies as "inadequate or ineffective."<sup>262</sup> Thus, whether a defendant who already filed a § 2255 motion could receive relief under habeas is highly dependent on the circuit.

If the defendant has not previously filed a § 2255 motion, she can likely receive relief. Enhancements based on vacated or "successfully attacked" convictions can be challenged under § 2255 motions.<sup>263</sup> Section 2255's one-year statute of limitations normally runs from the date the defendant's federal conviction became final.<sup>264</sup> The Supreme Court has held that this one-year period restarts "when a petitioner receives notice of the order vacating the prior conviction, provided that he has sought it with due diligence in state court, after entry of judgment in the federal case with the enhanced sentence."<sup>265</sup> This suggests that the statute of limitations would run from the date the defendant receives notice of her Proposition 47 reclassification, as long as she acted diligently in obtaining the reclassification.<sup>266</sup>

Allowing Proposition 47 to affect federal sentencing would clearly impact people who violate a federal statute *after* reclassifying their California conviction. In that case—just like in California state court—the predicate offense no longer exists. Any felony-based federal enhancement is simply unavailable. Thus, people

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<sup>260</sup> See 28 USC § 2241. Section 2241, the codification of the traditional writ of habeas corpus, has been largely displaced by § 2255. See LaFave, *Criminal Procedure* § 28.9(a) (cited in note 92).

<sup>261</sup> 28 USC § 2255(e). Section 2255(e) also prohibits courts from reviewing § 2241 petitions by prisoners "authorized to apply for relief under § 2255." See LaFave, *Criminal Procedure* § 28.9(b) (cited in note 92) (quotation marks omitted). Taken together, § 2255(e)—also called the "savings clause"—allows federal prisoners to obtain relief under § 2241 only under the "inadequate or ineffective" language. See *id.*

<sup>262</sup> See Lauren Casale, Note, *Back to the Future: Permitting Habeas Petitions Based on Intervening Retroactive Case Law to Alter Convictions and Sentences*, 87 *Fordham L Rev* 1577, 1588–97 (2019).

<sup>263</sup> *Johnson*, 544 US at 303 ("Our cases . . . assume . . . that a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated.").

<sup>264</sup> See 28 USC § 2255(f)(1).

<sup>265</sup> *Johnson*, 544 US at 298.

<sup>266</sup> See *United States v Summey*, 2015 US Dist LEXIS 175511, \*5–6 (CD Cal) (holding that § 2255's statute of limitation runs from when the Proposition 47 designation of defendant's prior conviction became discoverable).

who reclassify their convictions and subsequently violate a federal statute will likely receive lower sentences.

The inherent safeguards on postconviction relief limit any negative effects of this Comment's argument by ensuring federal judges are not flooded with requests for postconviction relief. Importantly, however, this Comment would allow for resentencing under § 2255 for some federal prisoners. Moreover, if reclassified California convictions no longer constitute predicate felonies, it would deeply impact defendants' sentences moving forward.

#### CONCLUSION

Proposition 47 is one of many recent state reforms attempting to ameliorate harsh criminal laws. Unlike many other state laws, Proposition 47 explicitly intends to mitigate the collateral effects of a felony conviction. The California Supreme Court has therefore held that reclassified felony convictions are misdemeanors for the purpose of *state* sentencing enhancements. The federal courts, however, have held that reclassified convictions are still felonies for the purpose of *federal* sentencing enhancements.

If the Seventh Circuit had given effect to California's reclassification of Vickie Sanders's conviction, she would have received a five-year sentence for her simple drug possession.<sup>267</sup> Instead, her reclassified conviction—which California treats as a misdemeanor—triggered a ten-year sentencing enhancement.<sup>268</sup> The Seventh Circuit's approach is not mandated by Supreme Court precedent. The Court has left open the issue of retroactive state law changes. And Proposition 47 is more than just a retroactive state law change. It does not merely offer legislative grace ameliorating the collateral effects of a felony conviction. It represents California's substantive decision that certain conduct—possessory drug offenses and petty theft—is not, and *never has been*, a felony. Federal courts should give effect to California's decision.

Of course, federal courts could continue to hold that federal sentencing is not affected by Proposition 47 or any similar state law in the future. This leads to the troubling outcome that states—no matter their intent or clear language—cannot do anything to alter their own predicate offenses. Nor can they enact

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<sup>267</sup> *United States v Sanders*, 909 F3d 895, 898 (7th Cir 2018). Sanders also received a concurrent sentence of eighty-seven months for her remaining five counts relating to manufacturing drugs. *Id.* at 899.

<sup>268</sup> *Id.*

truly retroactive state laws or erase prior state convictions. Federal courts should not reach this conclusion. Rather, federal courts should give effect to states' clear intent in enacting ameliorative laws. In this case, federal courts should listen to California's intent and hold that a reclassified California conviction is not a prior conviction for federal sentencing.