APPENDICES

In the

United States Court of Appeals

For the Seventh Circuit

No. 18-2165

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

VICKIE L. SANDERS,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Illinois.
No. 17-cr-40043 — **J. Phil Gilbert**, *Judge*.

ARGUED NOVEMBER 8, 2018 — DECIDED DECEMBER 3, 2018

Before FLAUM, MANION, and ST. EVE, *Circuit Judges*.

FLAUM, *Circuit Judge*. Vickie Sanders pleaded guilty to a federal drug offense. About twenty years earlier, she was convicted of a felony drug offense in California, and therefore, the government sought to impose a ten-year mandatory minimum term of imprisonment pursuant to a recidivist enhancement provision, 21 U.S.C. § 841(b)(1)(B). After her guilty plea, but before sentencing, a California state court reclassified Sanders's state drug offense as a misdemeanor pursuant to

Proposition 47, Cal. Penal Code § 1170.18. Nevertheless, the district court still imposed the ten-year mandatory minimum. We affirm.

I. Background

On July 12, 2017, the government charged Vickie Sanders with conspiracy to manufacture fifty grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846 (Count 1); attempting to manufacture methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846 (Count 2); and possession of pseudoephedrine knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. § 841(c)(2) (Counts 3, 4, 5, and 6).

Over twenty years earlier, in 1996, a California state court convicted Sanders of felony possession of a controlled substance in violation of Cal. Health & Safety Code § 11350(a). That conviction became final in 1998. On September 20, 2017, the government filed an information to establish that Sanders had been previously convicted of a felony drug offense in California. A prior state felony conviction triggers the § 841(b)(1)(B) recidivist enhancement, which raised the mandatory minimum term of imprisonment on Count 1 from five to ten years. On October 6, 2017, Sanders pleaded guilty to all charges and indicated she understood her prior drug conviction impacted the applicable sentencing range. On December 7, 2017, the probation office prepared a Presentence Investigation Report. It determined that Sanders's advisory Guidelines range was 87–108 months' imprisonment for Counts 2, 3, 4, 5, and 6. For Count 1, due to the ten-year statutory minimum, the Guidelines term of imprisonment was 120 months.

On January 11, 2018, Sanders filed a motion to continue her sentencing hearing. Eleven days later, a California state court reclassified her 1996 felony drug conviction as a misdemeanor pursuant to California Proposition 47, Cal. Penal Code § 1170.18. Then, on February 8, Sanders objected to the § 841(b)(1)(B) enhancement for a prior felony drug conviction, emphasizing her prior state conviction was no longer a felony. On April 27, the district court overruled Sanders's objection.

On May 9, the district court sentenced Sanders to concurrent sentences of 120 months' imprisonment on Count 1 and 87 months' imprisonment on Counts 2 through 6. It imposed an eight-year term of supervised release on Count 1, a six-year term of supervised release on Count 2, and a three-year term of supervised release on Counts 3 through 6, all to run concurrently. The court also imposed a $300 fine and $600 special assessment. This appeal followed.

II. Discussion

Sanders argues that because a California court reclassified her prior conviction as a misdemeanor, the district court improperly imposed a ten-year mandatory minimum prison term under § 841(b)(1)(B), or alternatively, did so in violation of the Constitution. We review questions of statutory interpretation and constitutionality de novo. *Arreola-Castillo v. United States*, 889 F.3d 378, 384 (7th Cir. 2018); *United States v. Morris*, 821 F.3d 877, 879 (7th Cir. 2016).

A. Statutory Framework

1. 21 U.S.C. § 841(b)(1)(B)

"Section 841(b) outlines the penalties for federal drug crimes based upon the quantity of drugs involved and the number of prior drug convictions." *Arreola-Castillo*, 889 F.3d

at 384. Relevant here, "[i]f any person commits [a federal drug offense] after a prior conviction for a felony drug offense has become final," that individual faces a mandatory minimum of ten years' imprisonment. 21 U.S.C. § 841(b)(1)(B).

"To impose a recidivism penalty under § 841, the government must follow the procedures in 21 U.S.C. § 851." *Arreola-Castillo*, 889 F.3d at 384. First, the government "must file an information with the sentencing court stating the previous convictions to be relied upon." *Id.* (citing 21 U.S.C. § 851(a)). Then, the defendant can file a written response either to deny the allegation of the prior conviction or to assert that the alleged conviction is invalid. *Id.* (citing 21 U.S.C. § 851(c)). If the defendant files a response, the court holds a hearing, the parties present evidence, and the court makes findings of fact and conclusions of law. *Id.* at 384–85.

2. California Proposition 47, Cal. Penal Code § 1170.18

In November 2014, California passed Proposition 47, the Safe Neighborhood and Schools Act. *See* Cal. Penal Code § 1170.18. Among other things, Proposition 47 reduces certain convictions for possession of a controlled substance from a felony to a misdemeanor. It also permits an individual "who has completed his or her sentence for a conviction … of a felony or felonies who would have been guilty of a misdemeanor under [the] act had [the] act been in effect at the time of the offense" to "file an application before the trial court that entered the judgment or conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." *Id.* § 1170.18(d).

"Proposition 47 explicitly anticipates that redesignation of an offense as a misdemeanor will affect the collateral

consequences of a felony conviction." *People v. Khamvongsa*, 214 Cal. Rptr. 3d 623, 625 (Ct. App. 2017). Thus, "[t]o ensure qualified offenders who have had their prior felony convictions redesignated can gain relief from … collateral consequences," *id.* at 626, Proposition 47 specifies that if a felony conviction is "recalled" or "designated as a misdemeanor," it "shall be considered a misdemeanor for all purposes" other than gun possession. Cal. Penal Code § 1170.18(k). "The 'for all purposes' language is broad, and there is no suggestion that it encompasses certain collateral consequences of a felony conviction while excluding others." *Khamvongsa*, 214 Cal. Rptr. 3d at 626. Indeed, one 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." *People v. Abdallah*, 201 Cal. Rptr. 3d 198, 206 (Ct. App. 2016) (quoting *People v. Park*, 299 P.3d 1263, 1270 (Cal. 2013)). At the same time, Proposition 47 is not intended to "diminish or abrogate the finality of judgments in any case not falling within the purview of" the statute. Cal. Penal Code § 1170.18(n).

B. Application of the § 841(b)(1)(B) Enhancement

Sanders argues that because a California court reclassified her 1996 felony conviction as a misdemeanor, she is not eligible for a sentence enhancement under § 841(b)(1)(B), as she no longer has a "prior conviction for a felony drug offense." The government disagrees, emphasizing the language of the provision itself. It points out that regardless of the California court's decision, Sanders "committed her federal drug-

trafficking offense 'after a prior conviction for a felony drug offense.'" (quoting 21 U.S.C. § 841(b)(1)(B)).

We join the Third and Ninth Circuits in holding that a defendant who commits a federal drug offense after previously being convicted of a state felony drug offense is subject to § 841's recidivist enhancement even if that prior offense was reclassified as a misdemeanor pursuant to Proposition 47. *See United States v. London*, No. 15-1206, slip op. at 9 (3d Cir. Aug. 31, 2018) (unpublished) ("Because the subsequent reclassification of [the defendant's] California conviction had no bearing on that conviction's underlying lawfulness, he remains eligible for the sentence enhancement he received under [§ 841]."); *United States v. Diaz*, 838 F.3d 968, 975 (9th Cir. 2016) ("California's Proposition 47, offering post-conviction relief by reclassifying certain past felony convictions as misdemeanors, does not undermine a prior conviction's felony-status for purposes of § 841."), *cert. denied sub nom.*, *Vasquez v. United States*, 137 S. Ct. 840 (2017).

To determine whether a defendant has a prior state conviction for purposes of applying a federal recidivism enhancement provision, we look to federal law. *See Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111–12 (1983) ("Whether one has been 'convicted' within the language of the 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."). This rule "makes for desirable national uniformity unaffected by varying state laws, procedures, and definitions of 'conviction.'" *Id.* at 112. Indeed, we have recognized this principle in the context of § 841(b). *See United States v. Lopez*, 907 F.3d 537, 546 (7th Cir. 2018) ("Federal law, not state law, defines 'conviction' for

purposes of the enhancement."); *United States v. Graham*, 315 F.3d 777, 783 (7th Cir. 2003); *United States v. Gomez*, 24 F.3d 924, 930 (7th Cir. 1994).

As always, "we must 'begin[] with the plain language of the statue.'" *Arreola-Castillo*, 889 F.3d at 385 (alteration in original) (quoting *United States v. Berkos*, 543 F.3d 392, 396 (7th Cir. 2008)). 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." 21 U.S.C. § 841(b)(1)(B). In this way, the statute calls for a "'backward-looking' inquiry." *Diaz*, 838 F.3d at 973 (quoting *McNeill v. United States*, 563 U.S. 816, 820 (2011)). It "tells us what event triggers the enhancement": a state felony drug conviction that is final. *Id.* We consider only "'whether the defendant was previously convicted, not the particulars of how state law later might have' permitted relief from the defendant's state conviction." *Id.* at 974 (quoting *United States v. Dyke*, 718 F.3d 1282, 1293 (10th Cir. 2013) (Gorsuch, J.), *cert. denied*, 571 U.S. 939 (2013)).

Here, there is no dispute that Sanders both committed a federal drug offense and was convicted of a prior felony drug offense in California that had become final. 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." *Id.* (alteration in original) (quoting *Dyke*, 718 F.3d at 1292); *see also id.* at 972 ("Although the [state's] statute [can] determine the status of the conviction for purposes of state law, it [can]not rewrite history for the purposes of the administration of the federal criminal law or the interpretation of federal criminal

statutes." (alterations in original) (quoting *United States v. Bergeman*, 592 F.2d 533, 536 (9th Cir. 1979))).

While we have not addressed whether a state felony reclassified as a misdemeanor can be used to enhance a federal drug sentence, we have held a discharged drug conviction is considered a predicate "conviction" for purposes of applying the § 841(b) enhancement. *See Lopez*, 907 F.3d at 546–47 (holding a prior conviction is a predicate for purposes of § 841(b) even though the defendant's probation was discharged before he received his federal offense); *Graham*, 315 F.3d at 783 ("[T]he fact that [the defendant] received probation that was later discharged does not alter the fact that he possesses a prior drug-related felony conviction qualifying him for the enhancement under § 841(b)(1)(B)."); *Gomez*, 24 F.3d at 930 ("Nothing in § 841(b)(1)(B) … suggest[s] that a defendant who has plainly been 'convicted' … obtains the benefit of a state's effort to wipe the slate clean retroactively."). Other circuits have also "counted prior felony drug convictions even where those convictions had been set aside, expunged, or otherwise removed from a defendant's record." *United States v. Law*, 528 F.3d 888, 911 (D.C. Cir. 2008) (per curiam) (citing cases).

Of course, if it desired, Congress could "give retroactive effect to changes in state law for purposes of federal statutes." *Diaz*, 838 F.3d at 974. Indeed, it "clearly knows … how to ensure that expunged convictions are disregarded in later judicial proceedings." *Dyke*, 718 F.3d at 1292; *see, e.g.*, 18 U.S.C. § 921(a)(20) ("Any conviction which has been expunged, or set aside … shall not be considered a conviction for purposes of this chapter."). But Congress made no similar effort with respect to § 841. *See Gomez*, 24 F.3d at 930 ("Section 841(b)(1)(B) lacks any provision comparable to the last

sentence of § 921(a)(20), and it would be inappropriate to treat these substantially different statutes as if they had the same meaning.").

This makes sense. A primary purpose of § 841 "is to discourage repeat offenders." *Diaz*, 838 F.3d at 974. Thus, "[i]f a state provides relief for a prior state drug conviction, after the defendant has committed another, federal, drug crime, 'it's unclear why a [federal] statute aimed at punishing recidivism … would afford the defendant' relief in his federal sentence." *Id.* (second alteration in original) (quoting *Dyke*, 718 F.3d at 1293); *see also London*, slip op. at 9 ("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."). Additionally, "[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." *Diaz*, 838 F.3d at 974 (citing *Dickerson*, 460 U.S. at 112). "If state post-conviction procedures always impacted eligibility under § 841, the federal sentence enhancement would apply in an unfair, 'patchwork' manner." *London*, slip op. at 9 (quoting *Diaz*, 838 F.3d at 974). It is unlikely Congress intended such a result.

Sanders argues an "absurdity results if courts fail to recognize changes made retroactive by the state: The length of a defendant's sentence would depend on the date on which an unrelated state crime was committed." She contends "[t]here is no principled reason why two defendants with identical criminal histories, who violated § 841(b)(1)(B) on the same day, should receive dramatically different federal sentences

solely because one's prior conviction occurred before, and the other's occurred after, the state legislature decreased the punishment." We disagree that such a result is absurd. While "[s]uch a regime may at first glance seem harsh, … there is good reason behind it." *London*, slip op. at 8. The recidivist enhancement applies because Sanders had already been convicted of a felony drug offense, not because of the underlying conduct. In any event, the language of § 841(b)(1)(B) is clear: the ten-year mandatory minimum applies if the defendant commits the federal drug offense "after a prior conviction for a felony drug offense has become final." In short, when Sanders committed the federal drug offense, her 1996 California drug conviction was a felony and it was final.

Despite the clear text and the Third and Ninth Circuit's opinions, Sanders maintains "Supreme Court precedent indicates that a federal recidivist sentence cannot rely on a state conviction retroactively reduced by state law." Not so. True, "a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is *vacated*." *Johnson v. United States*, 544 U.S. 295, 303 (2005) (emphasis added). This is not controversial. When a state court "vacates" a prior conviction, it, in effect, nullifies that conviction; it is as if that conviction no longer exists. *See Arreola-Castillo*, 889 F.3d at 385–86. For that reason, courts recognize an "obvious exception to the literal language" of federal recidivist statutes imposing enhanced penalties due to prior convictions where the "predicate conviction ha[s] been vacated or reversed on direct appeal." *Dickerson*, 460 U.S. at 115; *cf. Diaz*, 838 F.3d at 973 ("We noted one exception: where the dismissal or expungement alters 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.").

Proposition 47, however, does not "vacate" prior felony convictions; it *reclassifies* them as misdemeanors. Thus, *Johnson* is not helpful to Sanders's argument.[1]

Additionally, Sanders points to the Court's opinion in *McNeill*. There, the defendant argued that because North Carolina changed its drug laws, his prior state drug convictions should not qualify as "serious drug offenses" for purposes of the Armed Career Criminal Act ("ACCA") sentencing enhancement.[2] *McNeill*, 563 U.S. at 818. The Court disagreed; it held that the ACCA "requires the court to determine whether a 'previous conviction' was a serious drug offense," and "[t]he only way to answer this backward-looking question is to

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[1] For the same reason, Sanders's reliance on *Arreola-Castillo* is misplaced. In *Arreola-Castillo*, the defendant received a mandatory life sentence for a federal drug offense because he had two prior felony drug convictions. 889 F.3d at 381. Subsequent to his federal conviction, the New Mexico state court vacated the underlying state felony drug convictions. *Id*. At issue was whether 21 U.S.C. § 851(e), "which prohibits an individual from challenging the validity of a prior conviction that is more than five years old at the time the government seeks the recidivism enhancement," time-barred his challenge. *Id.* We held there was no statute-of-limitations concern because the defendant was "not challenging the validity of his prior convictions, but rather their very existence." *Id.* Unlike in *Arreola-Castillo*, however, Sanders's prior felony conviction was not vacated; rather, it was simply reclassified as a misdemeanor.

[2] Under the ACCA, a defendant who violates § 922(g) receives an enhanced sentence if he "has three prior convictions … for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). A "serious drug offense" must have "a maximum term of imprisonment of ten years or more." *Id.* § 924(e)(2)(A)(ii). In *McNeill*, one of the defendant's prior drug offenses carried a ten-year maximum sentence at the time of the state conviction but a less than ten-year maximum sentence at the time of the defendant's federal sentencing. 563 U.S. at 818.

consult the law that applied at the time of that conviction." *Id.* at 820. In a footnote, the Court expressly declined to consider the "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." *Id.* at 825 n.1.

Sanders suggests that *McNeill* indicates the Court believes the recidivist enhancement should not apply here, where California retroactively reclassified her state drug conviction from a felony to a misdemeanor. This is not the case; the Court did not comment one way or the other. Sanders points to the Eleventh Circuit's opinion in *Cortes-Morales v. Hastings*, 827 F.3d 1009 (11th Cir. 2016) (per curiam), *cert. denied*, 137 S. Ct. 2186 (2017). There, a defendant who received an enhanced sentence under the ACCA based on prior New York drug convictions sought resentencing on the grounds that he no longer qualified for an ACCA enhancement due to New York's 2004 and 2009 Drug Law Reform Acts ("DLRAs").[3] *Id.* at 1011. The Eleventh Circuit, citing the *McNeill* footnote, reasoned that the defendant could "succeed on the merits of his claim only if the New York sentencing reductions apply retroactively." *Id.* at 1013–14. However, that statement was mere dicta

[3] New York passed the DLRAs to "reform the sentencing structure of New York's drug laws to reduce prison terms for non-violent drug offenders, provide retroactive sentencing relief, and make related drug law sentencing improvements." *Rivera v. United States*, 716 F.3d 685, 688 (2d Cir. 2013) (citation omitted). The DLRAs reduce maximum sentences for some nonviolent drug offenders and allow resentencing for individuals who were convicted of certain drug offenses. *Id.* Notably, however, resentencing is only an option while an individual is "in the custody of the department of corrections." N.Y. Crim. Proc. Law § 440.46(1).

because the DLRAs were "not retroactive as to [the defendant]." *Id.* at 1015.[4]

In sum, we agree with the Third and Ninths Circuits that for purposes of applying the § 841(b) recidivist enhancement, it is immaterial whether a defendant's state felony conviction was reclassified as a misdemeanor after she committed a federal drug offense. The text of § 841(b)(1)(B) is unambiguous: Sanders committed a federal drug offense "after a prior conviction for a felony drug offense ha[d] become final." 21 U.S.C. § 841(b)(1)(B).

C. Constitutional Concerns

Sanders argues applying the § 841(b)(1)(B) enhancement under these circumstances is contrary to the Fifth Amendment's Due Process and Equal Protection Clauses and the Tenth Amendment's federalism principles. We disagree.

1. Due Process Clause

"[A] criminal defendant has the due process right to be sentenced on the basis of accurate information." *Ben-Yisrayl v.*

[4] Sanders also cites to several unpublished opinions from the District Court for the Southern District of New York. On three occasions, that court held that in order to determine whether to apply an ACCA enhancement, it should not consider the maximum term of imprisonment at the date of the prior state drug conviction, but rather the maximum term of imprisonment at the time of the federal sentencing based on the DLRAs. *See Saxon v. United States*, No. 12 CR 320, 2016 WL 3766388 (S.D.N.Y. July 8, 2016); *United States v. Calix*, No. 13 CR 582, 2014 WL 2084098 (S.D.N.Y. May 13, 2014); *United States v. Jackson*, No. 13 CR 142, 2013 WL 4744828 (S.D.N.Y. Sept. 4, 2013). These cases are incorrectly decided; the New York drug reform laws "are non-retroactive—and therefore governed by *McNeill*." *Rivera*, 716 F.3d at 689; *see also Cortes-Morales*, 827 F.3d at 1015 (declining to follow *Calix* and *Jackson*).

Buss, 540 F.3d 542, 554 (7th Cir. 2008); *see Townsend v. Burke*, 334 U.S. 736, 740–41 (1948) (holding that a sentence based on "assumptions concerning [a defendant's] criminal record which were materially untrue … is inconsistent with due process of law"). Here, however, Sanders was sentenced based on accurate information; she received an enhanced sentence because at the time she committed the federal offense, she had a "prior conviction for a felony drug offense" that was "final." *See* 21 U.S.C. § 841(b)(1)(B).

Sanders relies on *Hicks v. Oklahoma*, 447 U.S. 343 (1980). There, a defendant faced a jury trial for a state drug offense. *Id.* at 344. Since the defendant was convicted of two felonies in the prior ten years, the jury was instructed in accordance with Oklahoma's habitual offender statute that if it found the defendant guilty, it was required to impose a forty-year prison sentence. *Id.* at 344–45. The Oklahoma courts acknowledged that the habitual offender statute was unconstitutional, but nevertheless upheld a forty-year prison term because the sentence was within the range of punishment that could have been imposed. *Id.* at 345. The Supreme Court reversed. It noted that in Oklahoma, "a convicted defendant is entitled to have his punishment fixed by the jury," and there was a "substantial" possibility the jury would have returned a sentence of less than forty years if correctly instructed. *Id.* at 345–46. By affirming a sentence imposed by a jury pursuant to an unconstitutional statute, Oklahoma "deprived the [defendant] of his liberty without due process of law." *Id.* at 347.

The present case is distinct from *Hicks* for an obvious reason: unlike the habitual offender statute, § 841(b)(1)(B) is not unconstitutional. To be sure, the impact of prior convictions on a defendant's federal sentence due to the § 841(b)

enhancements is significant. *United States v. Arreola-Castillo*, 539 F.3d 700, 703 (7th Cir. 2008). Nevertheless, recidivist provisions like § 841(b) comply with the Due Process Clause so long as the "defendant receive[s] reasonable notice and an opportunity to be heard regarding the possibility of an enhanced sentence for recidivism." *United States v. Belanger*, 970 F.2d 416, 418 (7th Cir. 1992) (noting that § 851 "was enacted to fulfill this due process requirement"), *overruled on other grounds by United States v. Ceballos*, 302 F.3d 679 (7th Cir. 2002).

2. Equal Protection Clause

"Equal protection of the laws means that all persons similarly situated should be treated alike." *United States v. Nagel*, 559 F.3d 756, 760 (7th Cir. 2009). Sanders's equal-protection claim does not involve a suspect classification, and therefore, we use rational-basis review. *See United States v. Speed*, 656 F.3d 714, 720 (7th Cir. 2011). Under rational-basis review, Sanders "must show that there is no 'rational relationship between the disparity of treatment and *some* legitimate governmental purpose.'" *Id.* (quoting *Nagel*, 559 F.3d at 760).

Sanders contends applying § 841(b)(1)(B) to individuals like Sanders "creates two classes—those convicted of their predicate crime before California passed Proposition 47 and those convicted of their predicate crime after California passed Proposition 47." She asserts that such a distinction is "related only to the dates on which the two individuals committed their predicate offenses" and is "wholly unrelated to the date or nature of the current federal crime or the nature of the prior conviction." According to Sanders, such a result is "irrational and unrelated to any legitimate government interest." This argument is not persuasive.

In *Speed*, we rejected an equal protection challenge similar to Sanders's challenge. The defendant argued he was denied equal protection under the Fair Sentencing Act ("FSA") because "refusing to apply the FSA to defendants sentenced shortly before the passage of the FSA results in radically different sentences between them and those who are entitled to have the FSA apply to them." *Id.* We held that "the disparate treatment to which [the defendant] points is plainly rational, as 'discrepancies among persons who committed similar crimes are inescapable whenever Congress raises or lowers the penalties for an offense.'" *Id.* (quoting *United States v. Goncalves*, 642 F.3d 245, 253 (1st Cir. 2011)). We recognized that whenever a sentencing statute is amended, "[s]omeone, in the end, will always be left behind to live with the earlier, harsher penalty." *Id.* And we concluded that "[w]hatever arbitrariness there may be is therefore unavoidable." *Id.* The same reasoning applies here. Sanders's equal protection claim is unavailing.

3. Tenth Amendment & Federalism

Pursuant to the Tenth Amendment, an individual "can assert injury from governmental action taken in excess of the authority that federalism defines." *Bond v. United States*, 564 U.S. 211, 220 (2011); *see also id.* at 223–24 ("[A] litigant, in a proper case, [may] challenge a law as enacted in contravention of constitutional principles of federalism.").

Sanders asserts that by passing Proposition 47, California expressed its view that certain nonviolent drug offenses are misdemeanors "for all purposes." Cal. Penal Code § 1170.18(k). She suggests treating her prior drug conviction as a felony for purposes of the federal recidivism enhancement "infringes on the states' ability to determine the nature

and consequences of state crimes and is contrary to federalism principles set forth in the Tenth Amendment." We disagree. There is no question Congress had constitutional authority, pursuant to the Commerce Clause, to enact § 841. *See United States v. Westbrook*, 125 F.3d 996, 1009–10 (7th Cir. 1997). Moreover, Sanders "does not credibly identify any individual right embodied in the Constitution or in a federal statute that allows [her] to challenge [her] sentence based on vague notions about the 'principles of federalism.'" *Ramos v. United States*, 321 F. Supp. 3d 661, 668–69 (E.D. Va. 2018) (holding that "federal courts are not required to incorporate California's retroactive re-determinations about the seriousness of specific criminal conduct and the related reclassifications of previous offenses when applying the federal sentencing enhancement"). Put simply, as discussed above, federal law, and not state law, "dictate[s] the meaning of a federal statute." *Dyke*, 718 F.3d at 1292.

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.

AO 245B (SDIL Rev. 04/16) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT

Southern District of Illinois

UNITED STATES OF AMERICA

v.

VICKIE L SANDERS

JUDGMENT IN A CRIMINAL CASE

Case Number: **17-CR-40043-JPG-1**
USM Number: **13738-025**

MELISSA A. DAY
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1, 2, 3, 4, 5 and 6 of the Indictment

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 846, 841(b)(1)(B), & 851	Conspiracy to Manufacture Methamphetamine	4/21/2017	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

☐ No fine ☐ Forfeiture pursuant to order filed , included herein.

☐ Forfeiture pursuant to Order of the Court. See page for specific property details.

It is ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Restitution and/or fees may be paid to:
Clerk, U.S. District Court*
750 Missouri Ave.
East St. Louis, IL 62201

*Checks payable to: Clerk, U.S. District Court

May 9, 2018
Date of Imposition of Judgment

Signature of Judge
J. Phil Gilbert, U.S. District Judge
Name and Title of Judge

Date Signed: 5-11-2018

DEFENDANT: Vickie L Sanders
CASE NUMBER: 17-cr-40043-JPG-1

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 846, 841(b)(1)(C), & 851	Attempt to Manufacture Methamphetamine	4/21/2017	2
21 U.S.C. § 841(c)(2)	Possession of Pseudoephedrine Knowing It Would be Used to Manufacture a Controlled Substance-Methamphetamine	12/21/2016	3
21 U.S.C. § 841(c)(2)	Possession of Pseudoephedrine Knowing It Would be Used to Manufacture a Controlled Substance-Methamphetamine	12/15/2015	4
21 U.S.C. § 841(c)(2)	Possession of Pseudoephedrine Knowing It Would be Used to Manufacture a Controlled Substance-Methamphetamine	9/30/2015	5
21 U.S.C. § 841(c)(2)	Possession of Pseudoephedrine Knowing It Would be Used to Manufacture a Controlled Substance-Methamphetamine	4/3/2015	6

DEFENDANT: Vickie L Sanders
CASE NUMBER: 17-cr-40043-JPG-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **120 months as to Count 1 and 87 months on Counts 2, 3, 4, 5, and 6 of the Indictment. All counts shall run concurrently.**

☒ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends the RDAP program.
☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district:
☐ at _____ ☐a.m. ☐ p.m. on
☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☐before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Vickie L Sanders
CASE NUMBER: 17-cr-40043-JPG-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:
8 years as to Count 1; 6 years on Count 2, and 3 years on Counts 3, 4, 5 and 6 of the Indictment. All counts shall run concurrently.

Other than exceptions noted on the record at sentencing, the Court adopts the presentence report in its current form, including the suggested terms and conditions of supervised release and the explanations and justifications therefor.

MANDATORY CONDITIONS

The following conditions are authorized pursuant to 18 U.S.C. § 3583(d):

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court, not to exceed 52 tests in one year.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

ADMINISTRATIVE CONDITIONS

The following conditions of supervised release are administrative and applicable whenever supervised release is imposed, regardless of the substantive conditions that may also be imposed. These conditions are basic requirements essential to supervised release.

The defendant must report to the probation office in the district to which the defendant is released within seventy-two hours of release from the custody of the Bureau of Prisons.

The defendant shall not knowingly possess a firearm, ammunition, or destructive device. The defendant shall not knowingly possess a dangerous weapon unless approved by the Court.

The defendant shall not knowingly leave the judicial district without the permission of the Court or the probation officer.

The defendant shall report to the probation officer in a reasonable manner and frequency directed by the Court or probation officer.

The defendant shall respond to all inquiries of the probation officer and follow all reasonable instructions of the probation officer.

The defendant shall notify the probation officer prior to an expected change, or within seventy-two hours after an unexpected change, in residence or employment.

The defendant shall not knowingly meet, communicate, or otherwise interact with a person whom the defendant knows to be engaged, or planning to be engaged, in criminal activity.

The defendant shall permit a probation officer to visit the defendant at a reasonable time at home or at any other reasonable location and shall permit confiscation of any contraband observed in plain view of the probation officer.

The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

SPECIAL CONDITIONS

Pursuant to the factors in 18 U.S.C. § 3553(a) and 18 U.S.C. § 3583(d), the following special conditions are ordered. While the Court imposes special conditions, pursuant to 18 U.S.C. § 3603(10), the probation officer shall perform any other duty that the Court may designate. The Court directs the probation officer to administer, monitor, and use all suitable methods consistent with the conditions specified by the Court and 18 U.S.C. § 3603 to aid persons on probation/supervised release. Although the probation officer administers the special conditions, final authority over all conditions rests with the Court.

The defendant shall participate in treatment for narcotic addiction, drug dependence, or alcohol dependence, which includes urinalysis and/or other drug detection measures and which may require residence and/or participation in a residential treatment facility, or residential reentry center (halfway house). The number of drug tests shall not exceed 52 tests in a one-year period. Any participation will require complete abstinence from all alcoholic beverages and any other substances for the purpose of intoxication. The defendant shall pay for the costs associated with services rendered, based on a Court approved sliding fee scale and the defendant's ability to pay. The defendant's financial obligation shall never exceed the total cost of services rendered. The Court directs the probation officer to approve the treatment provider and, in consultation with a licensed practitioner, the frequency and duration of counseling sessions, and the duration of treatment, as well as monitor the defendant's participation, and assist in the collection of the defendant's copayment.

The defendant shall participate in a GED program and upon the recommendation of the program facilitator, take the GED test. The Court directs the probation officer to approve the GED program, monitor the defendant's participation, and obtain verification of the results of any part of the GED test taken.

The defendant shall participate in mental health services, which may include a mental health assessment and/or psychiatric evaluation, and shall comply with any treatment recommended by the treatment provider. This may require participation in a medication regimen prescribed by a licensed practitioner. The defendant shall pay for the costs associated with services rendered, based on a Court approved sliding fee scale and the defendant's ability to pay. The defendant's financial obligation shall never exceed the total cost of services rendered. The Court directs the probation officer to approve the treatment provider and, in consultation with a licensed practitioner, the frequency and duration of counseling sessions, and duration of treatment, as well as monitor the defendant's participation, and assist in the collection of the defendant's copayment.

DEFENDANT: Vickie L Sanders
CASE NUMBER: 17-cr-40043-JPG-1

While any financial penalties are outstanding, the defendant shall provide the probation officer and the Financial Litigation Unit of the United States Attorney's Office any requested financial information. The defendant is advised that the probation office may share financial information with the Financial Litigation Unit.

While any financial penalties are outstanding, the defendant shall apply some or all monies received, to be determined by the Court, from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to any outstanding court-ordered financial obligation. The defendant shall notify the probation officer within 72 hours of the receipt of any indicated monies.

The defendant shall pay any financial penalties imposed which are due and payable immediately. If the defendant is unable to pay them immediately, any amount remaining unpaid when supervised release commences will become a condition of supervised release and be paid in accordance with the Schedule of Payments sheet of the judgment based on the defendant's ability to pay.

The defendant's person, residence, real property, place of business, vehicle, and any other property under the defendant's control is subject to a search, conducted by any United States Probation Officer and other such law enforcement personnel as the probation officer may deem advisable and at the direction of the United States Probation Officer, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release, without a warrant. Failure to submit to such a search may be grounds for revocation. The defendant shall inform any other residents that the premises and other property under the defendant's control may be subject to a search pursuant to this condition.

U.S. Probation Office Use Only

A U.S. Probation Officer has read and explained the conditions ordered by the Court and has provided me with a complete copy of this Judgment. Further information regarding the conditions imposed by the Court can be obtained from the probation officer upon request.

Upon a finding of a violation of a condition(s) of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

Defendant's Signature _____ Date _____

U.S. Probation Officer _____ Date _____

DEFENDANT: Vickie L Sanders
CASE NUMBER: 17-cr-40043-JPG-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$600.00	$-0-	$300.00	$-0-

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for ☒ fine ☐ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Vickie L Sanders
CASE NUMBER: 17-cr-40043-JPG-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. ☐ Lump sum payment of $_____ due immediately, balance due
☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B. ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below; or

C. ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $_____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D. ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $_____ over a period of_____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E. ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F. ☒ Special instructions regarding the payment of criminal monetary penalties:
All criminal monetary penalties are due immediately and payable through the Clerk, U.S. District Court. Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be paid in equal monthly installments of $10 or ten percent of her net monthly income, whichever is greater. The defendant shall pay any financial penalty that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff, v. VICKIE SANDERS, Defendant.	Case No. 4:17-cr-40043-JPG-1

MEMORANDUM & ORDER

J. PHIL GILBERT, DISTRICT JUDGE

As her sentencing date nears, Vickie Sanders objects to the Government's attempt to establish a prior conviction of hers via an information filed pursuant to 21 U.S.C. § 851. (Doc. 54.) For the following reasons, the Court **OVERRULES** the objection.

I. BACKGROUND

In 2017, the Government charged Vickie Sanders with a number of drug offenses. (Doc. 1.) Later, the Government filed an information pursuant to 21 U.S.C. § 851 in order to establish a few prior convictions of hers. (Doc. 34.) If valid, the information would establish a ten-year mandatory minimum sentence for the 2017 federal charges pursuant to 21 U.S.C. § 841(b)(1)(B) & (C). Specifically, the information highlights that in the 1990s, Sanders was convicted of two felonies in California state court: burglary and possession of a controlled substance. Sanders's state court charges became final in the late 1990s when the state court entered judgment and her time to appeal expired. (*Id.*)

Sanders has since pled guilty to the federal charges. (Doc. 38.) But now, before her sentencing, she objects to the validity of the Government's § 851 information. (Doc. 54.) After Sanders pled guilty back in October 2017, she successfully moved a California state court to

reclassify her old 1990s felony drug conviction to a misdemeanor pursuant to California Proposition 47. That statute provides:

> 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.

Cal. Penal Code § 1170.18(f). Accordingly, Sanders argues that since California now considers her state drug conviction to be a misdemeanor, it cannot be used as a felony for § 851 purposes.

II. ANALYSIS

Sanders is wrong. The Ninth Circuit has already addressed this issue and concluded that "Proposition 47 does not change the historical fact that [a defendant] violated § 841 'after two or more prior convictions for a felony drug offense [had] become final.'" *United States v. Diaz*, 838 F.3d 968, 971 (9th Cir. 2016), *cert. denied sub nom. Vasquez v. United States*, 137 S. Ct. 840, 197 L. Ed. 2d 77 (2017) (citing 21 U.S.C. § 841(b)(1)(A)). The idea is simple: as soon as a defendant has two felony drug convictions on their record that become final, that defendant has violated § 841. It does not matter whether a state court later reclassifies one of the offenses to a misdemeanor—the defendant has already violated § 841 at a previous time. As *Diaz* explained, federal law—not state law—governs the interpretation of federal statutes, and state courts cannot change the fact that a defendant has previously violated a federal statute. *Id.* at 972; *see also United States v. Eleby*, 670 F. App'x 600 (9th Cir. 2016).

This holding is not limited to Proposition 47: *Diaz* plucked its ruling straight from Ninth Circuit cases dealing with other types of state post-conviction proceedings—such as dismissals and expungements—that the circuit already held did not affect § 841 for the same reasons as this

case. *Id.* at 973. The only exception to that rule is when the state proceeding "alters 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." *Id.* That exception is not at issue here.

There is only one case in this circuit that deals with Proposition 47: *Cummings v. U.S.*, No. 116CV02891SEBMJD, 2017 WL 5903926 (S.D. Ind. Nov. 30, 2017). The petitioner in *Cummings* argued that his sentence was invalid in the § 2255 context because Proposition 47 reduced his prior felony to a misdemeanor. *Id.* at *1. The district court rejected the petitioner's argument, relying on the holding in *Diaz*: the petitioner violated § 841 when his state felony conviction became final, and later post-conviction proceedings at the state level did not change the fact that he had already violated § 841 in the past. *Id.* at *3.

Sanders argues that *Diaz*, *Eleby*, and *Cummings* do not apply because they are all post-sentencing cases, whereas the Court here has not sentenced her yet. Her argument fails. The procedural postures in *Diaz*, *Eleby*, and *Cummings* are completely irrelevant to their holdings: those cases simply stand for the proposition that state post-conviction proceedings do not change the fact when a defendant's past felony conviction became final—like Sanders's did in the late 1990s—the defendant violated § 841. Accordingly, the Court **OVERRULES** Sanders's objection. (Doc. 54.)

IT IS SO ORDERED.

DATED: APRIL 27, 2018

s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE