No. _____

IN THE
Supreme Court of the United States

JOSE MANUEL AGUIRRE-GANCEDA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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

Petitioner, Jose Manuel Aguirre-Ganceda, respectfully prays that a writ of certiorari issue to review the memorandum disposition of the United States Court of Appeals for the Ninth Circuit, entered on July 12, 2019. (App. 1-4).

OPINIONS AND ORDERS BELOW

In 2004, following jury trial, Mr. Aguirre-Ganceda was convicted of conspiracy to distribute methamphetamine, distribution of methamphetamine, possession with intent to distribute methamphetamine, and endangering human life while illegally manufacturing or attempting to illegally manufacture a controlled substance.

On August 18, 2004, the District Court sentenced Mr. Aguirre-Ganceda to the statutory minimum of life imprisonment based on his four prior drug convictions. (*See* E.R. 13).

On June 23, 2017, Mr. Aguirre-Ganceda filed a motion pursuant to § 2255. In that motion, Mr. Aguirre-Ganceda argued that under the categorical approach, each of his prior California state convictions could not qualify as a "prior conviction for a felony drug offense" under 21 U.S.C. § 841 because the applicable California statutes are too broad. He also stated that one of his four prior California state convictions has

been vacated. On August 13, 2018, the District Court filed an order denying Mr. Aguirre-Ganceda's motion.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's order, finding that two of his California convictions were overbroad and indivisible, and that reclassification of a felony offense as a misdemeanor did not render that conviction a non-qualifying predicate offense.

STATEMENT OF JURISDICTION

The Court of Appeals affirmed the District Court's sentence in this matter. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841(b)(1)

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be

sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this subchapter or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

STATEMENT OF THE CASE

Mr. Aguirre-Ganceda was charged with a number of counts of distribution of controlled substances, conspiracy to distribute controlled substances, and possession with intent to distribute controlled substances. On September 16, 2003, the government filed a notice of intent to rely on prior drug offense convictions, pursuant to 21 U.S.C. § 851. That notice referred to the following convictions:

1. United States District Court for the Central District of California, Case No. 90-766-AWT – Mr. Aguirre-Ganceda was convicted of one count of

possession with intent to distribute marijuana pursuant to 21 U.S.C. § 841(a)(1), and was sentenced to thirteen months imprisonment.

2. Los Angeles County Superior Court Case No. TA008531 – Mr. Aguirre-Ganceda was convicted of one count of violating Health & Safety Code §11379(a), which punishes those who "willfully and unlawfully transport, import into the State of California, sell, furnish, administer, and give away, and offer to transport, import into the State of California, sell, furnish, administer, and give away, and attempt to import into the State of California and transport a controlled substance."

3. Los Angeles County Superior Court Case No. VA031998 -- Mr. Aguirre-Ganceda was convicted of one count of violating Health & Safety Code §11377(A), which punishes those who "willfully and unlawfully possess a controlled substance." Mr. Aguirre-Ganceda was punished with less than one year's jail time. The conviction was subsequently reduced to a misdemeanor.

4. Franklin Country Superior Court Case No. 00-1-50439-1 – Mr. Aguirre-Ganceda was convicted of unlawful possession of a controlled substance pursuant to RCW 69.50.401(d), and was sentenced to thirty days incarceration.

In 2004, following jury trial, Mr. Aguirre-Ganceda was convicted of conspiracy to distribute methamphetamine, distribution of methamphetamine, possession with intent to distribute methamphetamine, and endangering human life while illegally manufacturing or attempting to illegally manufacture a controlled substance.

On August 18, 2004, the District Court sentenced Mr. Aguirre-Ganceda to the statutory minimum of life imprisonment based on his four prior drug convictions.

The United States Court of Appeals for the Ninth Circuit affirmed the verdict and sentence. On October 16, 2006, the United States Supreme Court denied Mr. Aguirre-Ganceda's Petition for Writ of Certiorari in Case No. 06-6384.

On January 11, 2008, Mr. Aguirre-Ganceda filed his first § 2255 motion. He argued that he received ineffective assistance from defense counsel and that the sentencing enhancement under 21 U.S.C. § 851 for prior drug convictions was unconstitutional because the convictions were not found proven beyond a reasonable doubt by a jury. The District Court denied Mr. Aguirre-Ganceda's first § 2255 motion as untimely for failure to satisfy the one-year limitation period under § 2255(f). The Ninth Circuit affirmed the District Court's denial.

On March 2, 2015, Mr. Aguirre-Ganceda filed a motion for a sentence reduction under U.S. Sentencing Guidelines § 1B1.1(b) and Amendment 782. The District Court denied that motion because Amendment 782 to the United States Sentencing Guidelines could not alter the applicable statutory mandatory minimum sentence of life imprisonment stemming from his prior convictions.

On July 6, 2015, Mr. Aguirre-Ganceda filed a second §2255 motion, this time claiming that the U.S. Attorney's Office was "using 21 U.S.C. § 851 as a weapon for retaliation for exercising [the] right to proceed to trial by jury." The District Court denied Mr. Aguirre-Ganceda's second §2255 motion for failure to comply with §2255(h), which requires certification from the Ninth Circuit prior to filing a second § 2255 motion.

On June 23, 2017, Mr. Aguirre-Ganceda filed a motion pursuant to §2255. In that motion, Mr. Aguirre-Ganceda argued that under the categorical approach, each of

his prior California state convictions could not qualify as a "prior conviction for a felony drug offense" under 21 U.S.C. § 841 because the applicable California statutes are too broad. He also stated that one of his four prior California state convictions has been vacated. The District Court denied that motion with leave to renew, because Mr. Aguirre-Ganceda had not obtained Ninth Circuit certification before filing the instant §2255 motion.

The District Court subsequently issued an order finding that authorization to file a second or successive §2255 motion, and ordered Mr. Aguirre-Ganceda's motion transferred to the District Court and deemed the motion filed on August 8, 2017. Newly appointed counsel filed an amended motion which the District Court deemed filed as of August 8, 2017. The District Court ordered the government to respond. The government filed a response and Mr. Aguirre-Ganceda filed a reply.

On August 13, 2018, the District Court filed an order denying Mr. Aguirre-Ganceda's motion. Mr. Aguirre-Ganceda timely filed a notice of appeal. On August 27, 2018, the Ninth Circuit issued an order remanding the case to the District Court for the limited purpose of determining if a certificate of appeal would issue. The District Court issued a certificate of appealability.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's order, finding that two of his California convictions were

overbroad and indivisible, and that reclassification of a felony offense as a misdemeanor did not render that conviction a non-qualifying predicate offense.

REASONS FOR GRANTING THE WRIT

A. Mr. Aguirre-Ganceda's conviction in Los Angeles County Superior Court Case No. VA031998 does not qualify as a predicate because that conviction was reduced to a misdemeanor pursuant to Proposition 47, and Ninth Circuit precedent holding otherwise should be overruled

Pursuant to 21 U.S.C. § 802(44):

> The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under the law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

Mr. Aguirre-Ganceda's conviction in Case No. VA031998 does not qualify as a drug offense because that conviction is actually a misdemeanor conviction.

On October 13, 2016, a hearing was held in Los Angeles County Superior Court on Mr. Aguirre-Ganceda's motion in Case No. VA031998. Mr. Aguirre-Ganceda moved to have his prior conviction under California Health and Safety Code §11377(a) designated a misdemeanor conviction. Those proceedings were authorized based on California Proposition 47.[1] The Superior Court found that Mr. Aguirre-

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[1] On November 4, 2014, with 59.6 percent of the vote, California voters approved Proposition 47, which re-categorized possession of a controlled substance

Ganceda was eligible to have his felony conviction designated a misdemeanor conviction. "Accordingly, pursuant to Penal Code Section 1170.18(G), defendant's felony conviction is designated a misdemeanor conviction."

The United States Court of Appeal for the Ninth Circuit rejected a challenge to a life sentence based on two prior California convictions which had subsequently been reduced to misdemeanors pursuant to Proposition 47. *See United States v. Diaz*, 838 F.3d 968 (9th Cir. 2016). In *United States v. Diaz*, 838 F.3d 968, 971 (9th Cir. 2016), the district court sentenced the defendant to life imprisonment because he had two prior felonies which qualified him for a mandatory sentence enhancement under 21 U.S.C. § 841. Over four years after his sentencing, California adopted Proposition 47, and the defendant successfully petitioned a California court to reclassify one of his prior California felonies, as a misdemeanor. The Ninth Circuit held that Proposition 47 does not change the historical fact that the defendant in *Diaz* violated § 841 after two or more prior convictions for felony drug offense had become final.

In so holding, the Court relied on *United States v. Norbury*, 492 F.3d 1012, 1014 (9th Cir. 2007), which stated that federal law, not state law governs our interpretation of federal statutes. In *Norbury*, the Court denied the defendant's request not to

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as a misdemeanor rather than a felony, and allowing defendants previously convicted of possession offenses to have their former felony convictions retroactively reduced to misdemeanors under California Penal Code § 1170.18(a).

enhance his sentence under § 841 because the legality of a conviction does not depend upon the mechanics of the state post-conviction procedures, but rather the conviction's underlying lawfulness. *Id.* at 1015. The Court noted that *Norbury's* assertion that his subsequent dismissal with prejudice did not alter the legality of the conviction or that he was actually innocent because the order on the dismissal was based on is compliance with the terms of his sentence and judgment. *Id.* Thus, the defendant in *Norbury* could not assert that his conviction was reclassified and was not a prior conviction; just that he complied with the terms of his judgment and therefore his case would be dismissed.

Diaz then held based on *Norbury* that where the prior conviction was no longer a felony under State law pursuant to Proposition 47, that a reclassification under Proposition 47 would not change the historical fact that for purposes of section 841 the defendant had been convicted of a felony in the past. *Diaz*, at 973.

The Ninth Circuit was bound by Ninth Circuit precedent. This Court, however, is free to re-examine that precedent and reverse it.

B. The *Diaz* decision conflicts with *United States v. McChristian* and ignores 21 U.S.C. § 851(c)

Section 851 "confers an independent statutory right to attack collaterally prior felony convictions when the defendant is convicted under § 841[.]" *United States v.*

Burrows, 36 F.3d 875, 886 (9th Cir. 1994); *see also Custis v. United States*, 511 U.S. 485. 491 (1994) (unlike the ACCA, Section 851 "sets forth specific procedures allowing a defendant to challenge the validity of a prior conviction used to enhance the sentence for a federal drug offense"). It is thus difficult, if not impossible, to square the *Diaz* opinion with the statutory provision that expressly permits the collateral challenge by which Mr. Aguirre-Ganceda invalidated his felony conviction. Rather, as compelled by *United States v. McChristian*, 47 F.3d 1499 (9th Cir. 1995). Mr. Aguirre-Ganceda's successful challenge to his conviction rendered that felony conviction invalid, and in accordance with section 851(c), should render him ineligible for a mandatory life sentence.

McChristian addressed whether a defendant's successful collateral attack of his prior state court conviction during his federal prosecution should be given effect with respect to sentencing. Before the Ninth Circuit, the defendant challenged the life sentence which had been based upon a 1982 prior conviction; the Ninth Circuit held that the district court erred in not giving effect to the state court's order—issued in the midst of his federal prosecution— invalidating the defendant's prior conviction:

> After [defendant] Ingram was indicted in federal court and became aware that the government would attempt to rely on the 1982 conviction, Ingram went back to Kern County Superior Court, the court that convicted him in 1982, and moved that his case be reopened and his conviction be stricken. The Kern County Superior Court . . . reopened Ingram's case on July 7, 1992

> and granted Ingram's motion to strike the prior conviction. Thus, at the time Ingram was sentenced in federal court in October 1992, the 1982 conviction had been declared invalid by the court of conviction. Ingram contends that the district court erred in relying on this invalid conviction and that § 851(e) does not preclude Ingram from showing the court that the conviction has been invalidated. We agree.

47 F.3d at 1502.

The *Diaz* opinion thus contradicts *McChristian* when it declares that:

> ...even if California decided to give Proposition 47 retroactive effect for purposes of its own state law, that would not retroactively make Vasquez's felony conviction a misdemeanor for purposes of federal law. As we have explained, § 841 explicitly tells us when it applies...

Diaz, 838 F.3d at 974. The Court held otherwise in *McChristian*. The *Diaz* opinion ignores 21 U.S.C. § 851(c) and the defendant's right to challenge his prior state court convictions in state court. Instead, the *Diaz* panel applied a frozen-in-time approach to section 851 predicate convictions that ignores the applicable statute and precedent from the Ninth Circuit and the Supreme Court.

The *Diaz* panel's approach also overlooked additional authority permitting the very type of collateral attack Mr. Aguirre-Ganceda raised in the California courts to avoid the sentencing enhancement, and demonstrating that a defendant's prior state court conviction is not "frozen in time." *See United States v. LaValle*, 175 F.3d 1106,

1108 (9th Cir. 1999) ("adopt[ing] the position of the First, Fourth, Fifth and Tenth Circuits and hold[ing] that a defendant who successfully attacks a state conviction may seek review of any federal sentence that was enhanced because of the state prior conviction"); *see also Johnson v. United States*, 544 U.S. 295, 303 (2005) ("a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated"). If a defendant like LaValle may avoid a sentencing enhancement when a predicate state prior is invalidated after his federal case has gone final, a defendant like Mr. Aguirre-Ganceda should be permitted to obtain the same result under similar circumstances.

The cases the *Diaz* panel relied upon further demonstrate its error. The panel began with *United States v. Bergeman*, 592 F.2d 533 (9th Cir. 1979) and *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103 (1983), *superseded by statute, as stated in Logan v. United States*, 552 U.S. 23 (2007). *Bergeman* held that a state court's expungement of a state court conviction did not change the fact that, as a matter of federal law, the person "ha[d] been convicted" of a qualifying felony and thus was subject to federal prosecution under 18 U.S.C. § 922. Four years later, the Supreme Court applied the same analysis and held that expunction of a state court conviction did not alter the historical fact of conviction; the person "has been convicted" of a qualifying felony and is subject to section 922. 460 U.S. at 114-20.

But neither case supports the rule adopted in this case. To begin, neither *Bergeman* nor *Dickerson* remain good law because Congress amended 18 U.S.C. §921 to exclude from section 922's reach "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored." 18 U.S.C. §921(a)(20); *see also Logan v. United States*, 552 U.S. 23 (2007). Thus, by failing to examine the applicable statute in this case— 21 U.S.C. § 851—the panel opinion engaged in the wrong mode of analysis. A person's status is not frozen in time where the applicable statute or the statutory scheme provided by Congress permits the aggrieved individual to challenge and correct that status. *Custis*, 511 U.S. at 490-91; *see also Logan*, 552 U.S. 30-33. That is precisely what section 921(a)(20) did to correct *Dickerson* and *Bergeman*, and precisely what section 851(c) provides for Mr. Aguirre-Ganceda here. *See McChristian*, 47 F.3d at 1502.

For similar reasons, *United States v. Salazar-Mojica*, 634 F.3d 1070 (9th Cir. 2011), which addressed the application of U.S.S.G. §2L1.2, does not inform the analysis of section 851. The plain language of the applicable guideline defined the historic event to require the enhancement, and the guideline provided no mechanism to challenge or account for any subsequent change in the status of the defendant's conviction. 634 F.3d at 1072-74. Those circumstances are far different than the Controlled Substances Act's sentencing enhancement procedures. *See* 18 U.S.C. § 851.

The *Diaz* panel relied most heavily on *United States v. Norbury*, 492 F.3d 1012 (9th Cir. 2007) for the "general rule" that "when a state grants post-conviction relief to a defendant with respect to his state felony conviction, [the federal courts] do not apply those changes retroactively to invalidate federal sentence enhancements." *Diaz, supra*, at 972 (*citing Norbury*, 492 F.3d at 1015). The *Diaz* panel thus held that a federal enhancement "does not depend upon the mechanics of state post-conviction procedures, but rather involves the [state] conviction's underlying lawfulness." *Diaz, supra*, at 973 (*citing Norbury*, 492 F.3d at 1015).

But the *Diaz* opinion's analysis exhibits the same problem as its treatment of *Bergeman*. The "general rule" is to examine the applicable statute, and where Congress provides a mechanism to challenge the underlying conviction or report a successful challenge to a predicate conviction, to give that mechanism its intended effect. *Custis v. United States*, 511 U.S. 485, 490-91 (1994). This the *Diaz* opinion fails to do.

And *Norbury* is of questionable validity because it failed to address and give effect to *McChristian*, which was decided thirteen years earlier. Pursuant to *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003)(*en banc*), a subsequent panel cannot overrule a prior panel, and thus the *McChristian* was binding authority on both the *Norbury* and *Diaz* panels.

Nor does *Norbury* bear the weight placed upon it by the panel. *Norbury* addressed whether a state court's dismissal of a prior conviction upon the defendant's satisfaction of the terms and conditions of a state court judgment renders that conviction invalid. 492 F.3d at 1014-15. Defining the term "conviction" under federal law, the Court held it did not:

> [a]n expunged or dismissed state conviction qualifies as a prior conviction if the expungement or dismissal does not alter the legality of the conviction or does not represent that the defendant was actually innocent of the crime.

Id. at 1015 (emphasis added); *see also id.* (dismissal of charges does not "alter[] the legality of a prior conviction").

Unlike *Norbury*, Mr. Aguirre-Ganceda does not contend the state court's action constitutes a "dismissal" of his prior conviction. To the contrary, it is undisputed that to this day, he remains "convicted" of the section 11377(a) offense. Rather, Mr. Aguirre-Ganceda contends that the state court invalidated his prior felony conviction and issued a valid misdemeanor conviction in its place, and that this question turns on state law.

So too, the *Diaz* opinion overlooks another key distinguishing feature: unlike Norbury's dismissal—which stood as a reward for satisfying the judgment in his state court case—Mr. Aguirre-Ganceda's reclassified misdemeanor arose from California's

policy decision to downgrade categorically all simple possession cases to misdemeanors because they constitute "nonserious, nonviolent crimes" which merit a misdemeanor designation "unless the defendant has prior convictions for specified violent or serious crimes." *See* 2014 Cal. Legis. Serv. Prop. 47 § 3(3). California's policy judgment that Mr. Aguirre-Ganceda's section 11377(a) offense was never serious enough to warrant a felony classification in the first place should certainly be given effect now.

C. Important interests in federal-state comity animate section 851(c) and support the collateral attack presented by Mr. Aguirre-Ganceda

For the past 20 years, federal criminal law has emphasized as a reigning principle the great deference federal courts should give state courts and their assessment and interpretations of their judgments.[2] Indeed, with nary a word about comity and the federal courts' reliance on state court judgments when meting out sentencing enhancements, the *Diaz* opinion decided that the state courts' modifications of its judgments are meaningless under section 851(c). Mr. Aguirre-

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[2] *See e.g., Harrington v. Richter*, 5 562 U.S. 86 (2011); *Renico v. Lett*, 559 U.S. 766 (2010); *Cullen v. Pinholster*, 563 U.S. 170 (2011); *Coleman v. Johnson*, 132 S. Ct. 2060 (2012); *Burt v. Titlow*, 134 S. Ct. 10 (2013); *Cavazos v. Smith*, 132 S. Ct. 2 (2011); *Lambert v. Blodgett*, 393 F.3d 943 (9th Cir. 2004); *Clark v. Arnold*, 769 F.3d 711 (9th Cir. 2014); *Towery v. Schriro*, 641 F.3d 300 (9th Cir. 2010).

Ganceda respectfully disagrees. As Judge Wardlaw, joined by (now) Chief Judge Thomas and Judges Pregerson, Reinhardt, and Fletcher, persuasively explained in *United States v. Yepez*, 704 F.3d 1087, 1092-1107 (9th Cir. 2012) (*en banc*) (Wardlaw, CJ., dissenting), fundamental principles of justice, federalism, and comity, among others, require the federal courts to give effect to the California courts' orders reforming, recalling, and/or amending their judgments.

Those concerns—while expressed in a different context—certainly support Mr. Aguirre-Ganceda's contention that the Superior Court Order invalidating his felony conviction and replacing it with a misdemeanor should be given effect pursuant to 18 U.S.C. § 851(c).

By holding that federal—rather than state—law controls in this circumstance, the *Diaz* panel rejected California's judgment that certain drug offenses should be treated categorically as misdemeanors "for all purposes." That state judgment about the character of state crimes applies not merely to crimes committed in the future but also to any consequences flowing from crimes and convictions taking place in the past. Just as federal law necessarily must look to state law at the time of sentencing when determining whether the crime underlying a prior state-law conviction was a felony, federal law also should look to state law to determine whether a conviction for an offense that has been reclassified as a misdemeanor can still serve as a valid predicate for a life sentence under a federal anti-recidivism law.

D. *Diaz* is incorrect and conflicts with precedent, federal law and California state law

As relevant here, section 841 imposes a mandatory life sentence if a defendant commits a federal drug offense "after two or more prior convictions for a felony drug offense." 21 U.S.C. § 841(b)(1)(A). A "felony drug offense" is defined (again as relevant here) as "an offense that *is punishable* by imprisonment for more than one year under any law * * * *of a State*." *Id.* § 802(44) (emphases added). Thus, federal law expressly references and assimilates state law in determining whether a defendant is eligible for a mandatory life sentence. Because the definition is stated in the present tense, moreover, federal law incorporates changes to state law that reclassify a particular defendant's conviction from a felony to a misdemeanor. Indeed, it would be incongruous for federal law to treat a state conviction as more serious than the State itself understands it to be.

Proposition 47 provides that a reclassified felony conviction "shall be considered a misdemeanor *for all purposes*" except possession of firearms. Cal. Penal Code § 1170.18(k) (emphasis added). And Proposition 47 states not once, but twice, that it should be interpreted broadly. See Proposition 47, § 15 ("This act shall be broadly construed to accomplish its purposes."); *id.* § 18 ("This act shall be liberally construed to effectuate its purposes."). These statements reflect California voters' desire to enact wide-ranging reform. The panel thus erred in focusing on Section

841's text in isolation without properly taking into account the very definition of a "felony drug offense" in Section 802(44)—a definition that accords substantial deference to the authority under which a conviction arose. That definition should resolve the question presented in this case in favor of applying Proposition 47 here.

The panel also apparently misread *McNeill v. United States*, 563 U.S. 816 (2011). There, a defendant claimed that courts assessing whether a predicate offense is a serious drug offense for purposes of the Armed Career Criminal Act (ACCA) should look to the State's classification of the prior offense at the time of sentencing for the ACCA offense. The Supreme Court rejected that approach, holding that courts should look to the state sentence at the time of conviction for the state offense to determine if the predicate offense qualifies for an ACCA enhancement. *See id.* at 817-18. There is an obvious and important difference between a defendant whose personal conviction for a felony offense has been reduced to a misdemeanor based on a state's categorical judgment that certain crimes are not, and never should have been, felonies, and a defendant, like the petitioner in *McNeill*, who seeks a windfall because a State happened to change its laws in the meantime—but without affecting his or her conviction.

Indeed, the *McNeil* Court expressly noted this distinction and reserved the question presented here. Pointing out that the case did "not concern a situation in which a State subsequently lowers the maximum penalty available to an offense and

makes that reduction available to defendants previously convicted and sentenced for that offense"—the situation presented by the rehearing petition—the Court warned that it did "not address whether or under what circumstances a federal court could consider the effect of that state action." *Id.* at 825 n.1 (internal citation omitted). By relying on *McNeill*, the *Diaz* panel failed to heed the Court's "explicit disclaimer[]." *Zubik v. Burwell*, 136 S. Ct. 1557, 1561 (2016) (Sotomayor, J., concurring).

Conclusion

Based on the arguments discussed herein, it is requested that this Court grant this Petition for Writ of Certiorari, reverse the Ninth Circuit's decision affirming the District Court's denial of Mr. Aguirre-Ganceda's motion, and remand with instructions to conduct further proceedings consistent with this Court's decision.

Dated: September 25, 2019

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