

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Aug 13, 2018

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SEAN F. MCAVOY, CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSE MANUEL AGUIERRE-GANCEDA,

Defendant.

No. 2:03-CR-06016-EFS

[No. 4:18-CV-05044-EFS]

[No. 4:18-CV-05100-EFS]

**ORDER DENYING DEFENDANT'S § 2255  
MOTION**

Before the Court is Defendant Jose Manuel Aguirre-Ganceda's Motion Pursuant to 28 U.S.C. § 2255, ECF No. 253. For the reasons stated below, the Court denies Mr. Aguirre-Ganceda's motion.

**I. Procedural History and Prior § 2255 Motions**

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. ECF No. 133. On August 18, 2004, the Court sentenced Mr. Aguirre-Ganceda to the statutory minimum of life imprisonment based on his four qualifying prior drug convictions, case numbers 90-CR-766-AWT, TA008531, VA031998, and 00-1-50439-1.<sup>1</sup> See ECF Nos. 64, 149, 151, & 220.

<sup>1</sup> See 21 U.S.C. § 841(b)(1)(A) (mandating a term of life imprisonment for a conviction after two or more prior convictions for a felony drug offense).

1 The U.S. Court of Appeals for the Ninth Circuit affirmed the  
2 verdict and sentence. ECF No. 174. On October 16, 2006, the U.S. Supreme  
3 Court denied Mr. Aguierre-Ganceda's Petition for Writ of Certiorari.  
4 See ECF No. 187.

5 On January 11, 2008, Mr. Aguierre-Ganceda filed his first § 2255  
6 motion. ECF No. 180. In it, he claimed to have received ineffective  
7 assistance from defense counsel and that the sentencing enhancement  
8 under 21 U.S.C. § 851 for prior drug convictions was unconstitutional  
9 because the convictions were not found proven beyond a reasonable doubt  
10 by a jury. See ECF No. 180. The Court denied Mr. Aguierre-Ganceda's  
11 first § 2255 motion as untimely for failure to satisfy the one-year  
12 limitation period under § 2255(f), ECF No. 187, and the Ninth Circuit  
13 affirmed this Court's denial, ECF No. 203.

14 On March 2, 2015, Mr. Aguierre-Ganceda filed a motion for a  
15 sentence reduction under U.S. Sentencing Guidelines § 1B1.1(b) and  
16 Amendment 782. ECF No. 219. The Court denied his motion because  
17 Amendment 782 could not alter the fact that Count 1 carried a statutory  
18 mandatory minimum sentence of life imprisonment due to his prior  
19 convictions. See ECF No. 225.

20 On July 6, 2015, Mr. Aguierre-Ganceda filed a second § 2255 motion,  
21 this time claiming that the U.S. Attorney's Office was "using 21 U.S.C.  
22 § 851 as a weapon for retaliation for exercising [the] right to proceed  
23 to trial by jury." ECF No. 236 at 6-7. The Court denied Mr. Aguierre-  
24 Ganceda's second § 2255 motion for failure to comply with § 2255(h),  
25 which requires certification from the Ninth Circuit prior to filing a  
26 second § 2255 motion. See ECF No. 239.

1 On June 23, 2017, Mr. Aguierre-Ganceda filed a third § 2255 motion,  
2 ECF No. 244, which the Court again denied for failing to obtain  
3 certification from the Ninth Circuit before filing a successive § 2255  
4 motion. See ECF No. 245. On March 26, 2018, however, the Ninth Circuit  
5 reversed this Court's decision, holding that Mr. Aguierre-Ganceda did  
6 not need to obtain authorization to file his successive § 2255 motion.  
7 See ECF No. 248.<sup>2</sup> That said, the Ninth Circuit expressed "no opinion  
8 as to the merits of the applicant's claims or whether the procedural  
9 requirement of 28 U.S.C. § 2255(f) is satisfied." ECF No. 248.

10 Upon remand, this Court referred the matter for appointment of  
11 counsel. ECF No. 250. On April 3, 2018, Matthew A. Campbell filed a  
12 notice of appearance on behalf of Mr. Aguierre-Ganceda. ECF No. 252.  
13 On June 11, 2018, Mr. Aguierre-Ganceda - through counsel - filed an  
14 amended § 2255 motion, ECF No. 253. The Court deemed Mr. Aguierre-  
15 Ganceda's amended motion to be filed the same date as the August 8, 2017  
16 motion, and the Court ordered the Government to respond. See ECF  
17 Nos. 250 & 254. On July 9, 2018, the Government filed a response, ECF  
18 No. 255. On July 27, 2018, Mr. Aguierre-Ganceda filed a reply, ECF  
19 No. 257.

20 In the present motion, Mr. Aguierre-Ganceda argues that three of  
21 the four prior drug convictions used to enhance his sentence do not  
22 qualify as a "prior conviction for a felony drug offense" under 21  
23 U.S.C. § 841. See ECF No. 253 at 6.

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24  
25 <sup>2</sup> The Ninth-Circuit's decision relied on *United States v. Buenrostro*, 638 F.3d  
26 720, 725 (9th Cir. 2011) (holding that prisoners may file successive-in-  
time motions without the usually required certification if the new § 2255  
motion is based on events that did not occur until after the first motion  
was decided).



1 felony conviction was re-designated a misdemeanor on October 13, 2016.  
2 See ECF No. 257 at 2. Arguably, it would have been futile to challenge  
3 the other two convictions before this re-designation.<sup>3</sup> October 13,  
4 2016, was the earliest date on which he could have "discovered" the  
5 facts supporting a claim for substantive relief. The Court therefore  
6 finds Mr. Aguirre-Ganceda has satisfied § 2255(f), and the Court turns  
7 to the merits of his motion.

8 **III. Arguments & Analysis**

9 Mr. Aguirre-Ganceda is not contesting whether his 1991 conviction  
10 for possession with intent to distribute 44 pounds of marijuana in  
11 violation of 21 U.S.C. § 841(a)(1)(D), in case number 90-CR-766-AWT,  
12 constitutes a felony drug offense. Mr. Aguirre-Ganceda asserts, however  
13 that the three remaining state convictions (case numbers TA008531,  
14 VA031998, and 00-1-50439-1) should not constitute felony drug  
15 convictions. See ECF No. 253 at 2. The Court addresses each prior  
16 conviction in turn.

17 **A. Case Number TA008531**

18 On February 8, 1991, after pleading guilty in California Superior  
19 Court case number TA008531, Mr. Aguirre-Ganceda was convicted of  
20 transportation/sale of methamphetamine in violation of California  
21 Health and Safety Code § 11379(a). ECF No. 149 at 12, 20, 32. The Los  
22 Angeles County Superior Court selected the "mid term of 3 years for the  
23 base term as to Count One." ECF No. 149 at 12.

24  
25 <sup>3</sup> Cf. *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007) ("We are hesitant to  
26 construe a statute, implemented to further the principles of comity,  
finality, and federalism, in a manner that would require unripe (and, often,  
factually unsupported) claims to be raised as a mere formality, to the  
benefit of no party.").

1 Mr. Aguirre-Ganceda now argues that § 11379(a) is overbroad,  
2 meaning his conviction in TA008531 cannot be used categorically to  
3 enhance his sentence under 21 U.S.C. § 841(b)(1)(A). ECF No. 253 at 8.  
4 As support for this argument, Mr. Aguirre-Ganceda cites several cases  
5 in which the Court of Appeals for the Ninth Circuit held that § 11379(a)  
6 and other similar California statutes are overbroad as compared to the  
7 federal generic offense.<sup>4</sup>

8 Although some of the reasoning and analysis underlying the cited  
9 decisions might be useful here, the validity of Mr. Aguirre-Ganceda's  
10 sentence enhancement does not rest on whether his prior convictions  
11 match the corresponding federal generic offenses.<sup>5</sup> Instead, each prior  
12 conviction needs to match the definition of "felony drug offense" set  
13 forth in 21 U.S.C. § 802(44). Thus, the Court addresses Mr. Aguirre-  
14 Ganceda's implicit argument that California Health and Safety Code  
15 § 11379 is overly broad because it might regulate substances that do  
16 not fit within the categories listed in 21 U.S.C. § 802(44).

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20 <sup>4</sup> See, e.g., *United States v. Barragan*, 871 F.3d 689 (9th Cir. 2017) (accepting  
21 the government's concession that that California Health and Safety Code  
22 § 11379 is overbroad in comparison to the federal generic offense for  
23 purposes of the Guidelines' definition of "controlled substance offense,"  
24 and holding that § 11379 is divisible); *United States v. Martinez-Lopez*,  
864 F.3d 1034, 1044 (9th Cir. 2017) (holding California Health and Safety  
25 Code § 11352 is overbroad compared to the federal "drug trafficking  
26 offense," but it is divisible and therefore subject to the modified  
categorical approach).

<sup>5</sup> See *United States v. Smith*, 775 F.3d 1262, 1267 (11th Cir. 2014) ("We need  
not search for the elements of 'generic' definitions of 'serious drug  
offense' and 'controlled substance offense' because these terms are defined  
by a federal statute and the Sentencing Guidelines, respectively. . . . No  
element of mens rea with respect to the illicit nature of the controlled  
substance is expressed or implied by either definition.")

1           **1.     Definition of "Felony Drug Offense"**

2           As relevant here, to be a "felony drug offense" for purposes of  
3 21 U.S.C. § 841, the defendant must have violated a law "relating to  
4 narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant  
5 substances."<sup>6</sup> Other courts have recognized that this definition is  
6 expansive.<sup>7</sup> So, as a preliminary matter, the Court observes that any  
7 substance governed by § 11379 would likely constitute a "depressant or  
8 stimulant substance," and therefore fall under the definition set forth  
9 in 21 U.S.C. § 802(44).<sup>8</sup> Indeed, Mr. Aguierre-Ganceda does not specify  
10 any substance regulated by California Health and Safety Code § 11379

11  
12 <sup>6</sup> 21 U.S.C. § 802(44) (defining "felony drug offense"); see also 21 U.S.C.  
§ 841(b)(1)(A) (mandating a term of life imprisonment for a conviction after  
two or more prior convictions for a "felony drug offense").

13 <sup>7</sup> See, e.g., *United States v. Rains*, 615 F.3d 589, 598 (5th Cir. 2010) ("The  
14 statute speaks of 'any law . . . that prohibits or restricts conduct relating  
to narcotic drugs.' There is no qualification indicating that the law in  
question must 'only restrict,' 'always restrict,' or merely 'restrict in  
15 part' conduct relating to drugs." (quoting 21 U.S.C. § 802(44)) (alterations  
in original)); *United States v. Gonzalez-Pasos*, 673 F. App'x 492, 496 (6th  
16 Cir. 2016) ("A violation of Cal. Health & Safety Code § 11351 (eff. Mar.  
29, 2000) – which prohibits possessing or purchasing a controlled substance  
for purposes of sale – falls within 21 U.S.C. § 802(44)'s broad definition  
17 of 'felony drug offense' as a violation of a statute that 'prohibits or  
restricts conduct relating to certain drugs.'" (Internal alterations  
18 omitted.)); *United States v. Grayson*, 731 F.3d 605, 607 (6th Cir. 2013)  
(noting that the term "relating to" means a state statute need only have  
19 some connection with prohibiting or restricting drugs to fall within  
§ 802(44)'s definition).

20 <sup>8</sup> Compare Cal. Health & Safety Code § 11379 (1996) (applying to "any controlled  
substance which is (1) classified in Schedule III, IV, or V and which is  
21 not a narcotic drug, (2) specified in subdivision (d) of Section 11054,  
except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision  
22 (d), (3) specified in paragraph (2) or (3) of subdivision (f) of Section  
11054, or (4) specified in subdivision (d) or (e), except paragraph (3) of  
23 subdivision (e), or specified in subparagraph (A) of paragraph (1) of  
subdivision (f), of Section 11055, unless upon the prescription of a  
physician, dentist, podiatrist, or veterinarian, licensed to practice in  
24 this state") with 21 U.S.C. § 802(9)(D) (defining "depressant or stimulant  
substance" to include any drug containing barbituric acid, amphetamine,  
25 lysergic acid diethylamide, or "any drug which contains any quantity of a  
substance which the Attorney General, after investigation, has found to  
26 have, and by regulation designated as having, a potential for abuse because  
of its depressant or stimulant effect on the central nervous system or its  
hallucinogenic effect").

1 that does not also fall within the categories listed in § 802(44).  
2 Nonetheless, the Court will assume *arguendo* that California's § 11379  
3 reaches substances not included within the ambit of § 802(44), and the  
4 Court will therefore apply the modified categorical approach.<sup>9</sup>

## 5           2.     The Modified Categorical Approach

6           Under the modified categorical approach, the Court may look at  
7 certain records called "*Shepard* documents," which may include "the terms  
8 of the charging document, the terms of the plea agreement or transcript  
9 of colloquy between judge and defendant in which the factual basis for  
10 the plea was confirmed by the defendant, or to some comparable judicial  
11 record of this information."<sup>10</sup> If the conviction at issue arose from a  
12 guilty plea – as it did here – the question is whether the defendant  
13 "necessarily admitted the elements of the particular statutory  
14 alternative that is a categorical match with the federal definition."<sup>11</sup>  
15 Further, if proof of a prior conviction rests *solely* upon a charging  
16 document and an abstract of judgment, "the link between the charging  
17 papers and the abstract of judgment . . . must be clear and convincing."<sup>12</sup>

18           Here, the felony complaint in case number TA008531 alleged in  
19 Count 1 that Mr. Aguierre-Ganceda "did willfully and unlawfully  
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21 <sup>9</sup> See *Shepard v. United States*, 544 U.S. 13, 26 (2005); see also *United States*  
22 *v. Ocampo-Estrada*, 873 F.3d 661, 667 (9th Cir. 2017) ("If a predicate statute  
23 is divisible – i.e., it lists alternative elemental versions of the offense  
within the same statute, rather than simply separate means for committing  
a single offense – then the modified categorical approach is used to  
determine which elemental version of the offense was committed.").

24 <sup>10</sup> *Id.* at 668 (quoting *Shepard*, 544 U.S. at 26).

25 <sup>11</sup> *Id.* (citing *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1100 (9th Cir.  
2015)).

26 <sup>12</sup> See *Medina-Lara v. Holder*, 771 F.3d 1106, 1113 (9th Cir. 2014) (applying  
the modified categorical approach to determine whether California statutes  
match the Immigration and Nationality Act's definitions of "aggravated  
felony" and "controlled substance offense").



1 transport, import into the State of California, sell, furnish,  
2 administer, and give away . . . a controlled substance, to wit,  
3 methamphetamine." ECF No. 149 at 32. Mr. Aguierre-Ganceda pleaded  
4 guilty to Count 1, and the judgment of conviction is for Count 1.  
5 Moreover, a California probation officer's report listed the crime as  
6 "11379(a) H&S (Transportation/Sale of Methamphetamine)," and directly  
7 underneath that, it stated Mr. Aguierre-Ganceda had been convicted of  
8 the "same." ECF No. 149 at 20.

9 Mr. Aguierre-Ganceda argues the *Shepard* documents do not show that  
10 he "was necessarily convicted of an offense in which methamphetamine  
11 was an element." ECF No. 253 at 11. He argues that "precedent  
12 establishes that the complaint and minute orders submitted by the  
13 government can be considered as *Shepard* documents, while the probation  
14 report cannot be considered in applying the modified categorical  
15 approach." ECF No. 253 at 9. However, the unpublished case he cites as  
16 support, *United States v. Beltran*, 467 F. App'x 669, 670 (9th Cir.  
17 2012), dealt with a report authored by the reviewing federal district  
18 court's probation department. The court in *Beltran* was not presented  
19 with a report that was generated as part of the underlying state-  
20 proceedings.

21 Here, the probation officer's report in case number TA008531 is a  
22 part of the underlying state-court's record. It was produced after  
23 Mr. Aguierre-Ganceda had already pleaded guilty, and it was specifically  
24 intended to assist the state judge in pronouncing a sentence. It  
25 therefore qualifies as a "comparable judicial record" indicating the  
26 particular crime for which Mr. Aguierre-Ganceda pleaded guilty and was

1 convicted.<sup>13</sup> That said, the Court does not consider the factual  
2 statements in the probation officer's report, as there is no proof that  
3 Mr. Aguierre-Ganceda admitted to those *particular* facts. Rather, the  
4 Court considers the state probation officer's report only to the extent  
5 it serves as direct, reliable evidence that Mr. Aguierre-Ganceda did  
6 indeed plead guilty to transportation/sale of methamphetamine as charged  
7 in Count 1 of the complaint.<sup>14</sup> Accordingly, taking all the *Shepard*  
8 documents into account, the Court finds case number TA008531 qualifies  
9 as a "prior conviction for a felony drug offense" for purposes of  
10 enhancing his sentence in this case.<sup>15</sup>

11 **B. Case Number VA031998**

12 On May 30, 1996, in Los Angeles County Superior Court case number  
13 VA031998, Mr. Aguierre-Ganceda pleaded guilty to possession of a  
14 methamphetamine in violation of California Health and Safety Code 11377.  
15 ECF No. 149 at 39-41. On August 14, 1996, the Los Angeles County  
16 Superior Court sentenced him to 180 days' jail. ECF No. 149 at 45.  
17 Then, on October 31, 2016, pursuant to California Proposition 47, the  
18 Los Angeles County Superior Court ruled that "pursuant to Penal Code  
19 Section 1170.18(g), Defendant's felony conviction is designated a  
20 misdemeanor conviction." ECF No. 249 at Ex. 4.

21 **1. Subsequent Designation as a Misdemeanor**

22 Mr. Aguierre-Ganceda argues that his conviction in case number  
23 VA031998 "does not qualify as a drug offense because that conviction is  
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25 <sup>13</sup> See *Shepard*, 544 U.S. at 26.

26 <sup>14</sup> See *Ocampo-Estrada*, 873 F.3d at 668 (holding that the issue is whether the defendant "necessarily admitted the elements of the particular statutory alternative that is a categorical match with the federal definition").

<sup>15</sup> See 21 U.S.C. § 802(44).

1 actually a misdemeanor conviction." ECF No. 253 at 11:15-16. According  
2 to Mr. Aguierre-Ganceda, the "successful challenge to his conviction  
3 rendered that felony conviction invalid." ECF No. 253 at 14. As  
4 Mr. Aguierre-Ganceda concedes, however, the Court of Appeals for the  
5 Ninth Circuit has already rejected this very argument. See ECF No. 253  
6 at 12.

7 In *United States v. Diaz*, the Ninth Circuit stated,  
8 "Proposition 47, offering post-conviction relief by reclassifying  
9 certain past felony convictions as misdemeanors, does not undermine a  
10 prior conviction's felony-status for purposes of § 841." 838 F.3d 968,  
11 975 (9th Cir. 2016). The court reasoned that "Proposition 47 does not  
12 change the historical fact that [a defendant] violated § 841 'after two  
13 or more prior convictions for a felony drug offense [had] become  
14 final.'" *Id.* at 971 (quoting § 841(b)(1)(A)).

15 This Court is, of course, bound by Ninth Circuit precedent. As  
16 such, the Court finds case number VA031998 qualifies as a "prior  
17 conviction for a felony drug offense" for enhancement purposes under 21  
18 U.S.C. § 841.

19 **2. The Shepard Documents**

20 As an alternative argument, Mr. Aguierre-Ganceda argues that it  
21 is unclear whether he was actually convicted of illegally possessing  
22 methamphetamine in case number VA031998, as opposed to some other  
23 "controlled substance." See ECF No. 253 at 23-24.

24 The felony complaint in case number VA031998 plainly alleges in  
25 Count 1 that Mr. Aguierre-Ganceda possessed methamphetamine, not some  
26 other drug. See ECF No. 149 at 41. Mr. Aguierre-Ganceda pleaded guilty

1 to Count 1, and the judgment of conviction is for Count 1. Mr. Aguierre-  
2 Ganceda, however, argues that the language in the complaint is  
3 insufficient because his plea and the judgment do not contain the word  
4 "methamphetamine." See ECF No. 253 at 23-24.

5 Relying heavily on the Ninth Circuit case *Medina-Lara v. Holder*,  
6 he asserts that "California allows for indictments to be amended orally  
7 in open court," so "there would not necessarily be any written record  
8 of a superseding indictment in the state court papers." See ECF No. 257  
9 at 16 (quoting *Medina-Lara*, 771 F.3d 1106, 1114 (9th Cir. 2014)).  
10 However, in contrast to this case, the court in *Medina-Lara* was  
11 presented with several reasons to doubt the defendant was convicted of  
12 the same crime listed in the charging document that was provided. There,  
13 the defendant pleaded to count "3A" instead of "3" as contained in the  
14 charging document, an immigration judge had previously noted a  
15 "disconnect" between the charging document and the abstract of judgment,  
16 and records showed that a government attorney had expressed a need to  
17 obtain "the superseding indictment."<sup>16</sup>

18 The record in this case gives no reason to suspect that  
19 Mr. Aguierre-Ganceda pleaded guilty to any crime other than possession  
20 of methamphetamine as charged in Count 1 of the complaint. The  
21 complaint, the plea agreement, and the judgment all state "Count 1" and  
22 cite to the same statute. See ECF No. 149 at 39, 41, 48. Neither  
23 Mr. Aguierre-Ganceda's guilty plea nor the minute entries indicate  
24 Count 1 was altered, amended, or superseded in any way. See ECF No. 149

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<sup>16</sup> See *Medina-Lara*, 771 F.3d at 1114.

1 at 39-40, 44-49. Moreover, in his guilty plea, Mr. Aguierre-Ganceda  
2 acknowledged that he would likely be required to "register as a narcotic  
3 offender pursuant to section 11590 of the Health and Safety Code," ECF  
4 No. 149 at 39 - something he would only be required to do if his crime  
5 involved lysergic acid diethylamide (LSD), methamphetamine, or an  
6 analog/derivative thereof.<sup>17</sup>

7 The *Shepard* documents clearly and convincingly show that  
8 Mr. Aguierre-Ganceda pleaded guilty to, and was convicted of, illegally  
9 possessing methamphetamine as charged in Count 1 of the complaint.<sup>18</sup>  
10 Thus, the Court finds Mr. Aguierre-Ganceda's conviction in case number  
11 VA031998 qualifies as a prior felony drug conviction under 21 U.S.C.  
12 § 841(b)(1)(A).

13 **C. Case Number 00-1-50439-1**

14 On April 2, 2002, in Franklin County Superior Court case number  
15 00-1-50439-1, Mr. Aguierre-Ganceda pleaded guilty to unlawful  
16 possession of a controlled substance, methamphetamine, in violation of  
17 Revised Code of Washington (RCW) § 69.50.401(d). ECF No. 149 at 54. On  
18 May 7, 2018, the superior court sentenced him to 30 days' jail. ECF  
19 No. 149 at 60.

20 Mr. Aguierre-Ganceda argues that the case *United States v.*  
21 *Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), "would dictate that  
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23 <sup>17</sup> See Cal. Health & Safety Code § 11590(a) (referencing specific controlled  
substances for offenses defined in § 11377).

24 <sup>18</sup> Though not necessary to reach the same conclusion, Mr. Aguierre-Ganceda's  
25 own admissions during trial and sentencing that this particular prior  
conviction was for possession of methamphetamine further bolster the Court's  
26 conclusion that Mr. Aguierre-Ganceda pleaded guilty to Count 1 as charged  
in the complaint. See, e.g., ECF No. 166 at 10-12 (engaging in a § 851  
colloquy in which Mr. Aguierre-Ganceda discusses his various methamphetamine  
offenses).

1 based on the overbreadth and indivisibility of Washington aiding-and-  
2 abetting liability, Washington delivery of controlled substances does  
3 not qualify as a "felony drug offense." ECF No. 253 at 26. Again,  
4 however, the issue here is not whether "the Washington drug trafficking  
5 law on its face appears to have a more inclusive mens rea requirement  
6 for accomplice liability than its federal analogue."<sup>19</sup> Instead, the  
7 only question is whether Washington's § 69.50.401(d) is overly broad as  
8 compared to the definition of "felony drug offense" in 21 U.S.C.  
9 § 802(44).

10 **1. Comparison of the Two Statutes**

11 As it appeared at the time of Mr. Aguiere-Ganceda's offense and  
12 conviction, RCW § 69.50.401(d) read as follows:

13 It is unlawful for any person to possess a controlled  
14 substance unless the substance was obtained directly from,  
15 or pursuant to, a valid prescription or order of a  
16 practitioner while acting in the course of his or her  
17 professional practice, or except as otherwise authorized by  
18 this chapter. Any person who violates this subsection is  
19 guilty of a crime, and upon conviction may be imprisoned  
20 for not more than five years, fined not more than ten  
21 thousand dollars, or both . . . .

22 And the version of 21 U.S.C. § 802(44) in effect at the time read  
23 as follows:

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

The plain language of the two statutes shows that RCW  
§ 69.50.401(d) "prohibits or restricts conduct relating to narcotic  
drugs, marihuana, or depressant or stimulant substances," and a

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<sup>19</sup> See *Valdivia-Flores*, 876 F.3d at 1207.

1 violation of that statute is an offense punishable by imprisonment for  
2 more than one year. The definition provided in § 802(44) is "coherent,  
3 complete, and by all signs exclusive."<sup>20</sup> Additionally, to the best of  
4 the Court's knowledge, there is no binding case law or other authority  
5 suggesting that § 802(44) has an implied mens rea requirement. Indeed,  
6 other courts have noted that § 802(44) has none.<sup>21</sup> Accordingly, the  
7 Court finds that the Ninth Circuit's ruling in *Valdivia-Flores* has no  
8 effect on the enhancement based on Mr. Aguierre-Ganceda's conviction in  
9 case number 00-1-50439-1.

#### 10 IV. Conclusion

11 The Court finds that all three of Mr. Aguierre-Ganceda's challenged  
12 convictions qualify as prior felony drug convictions under 21 U.S.C.  
13 § 841(b)(1)(A). Moreover, had one - or even two - of his prior  
14 convictions been invalid for some reason, Mr. Aguierre-Ganceda would  
15 nonetheless be subject to a mandatory term of life imprisonment. Upon  
16 reaching the merits of his arguments, the Court therefore finds  
17 Mr. Aguierre-Ganceda is not entitled to the relief he seeks.

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20 <sup>20</sup> *Burgess v. United States*, 553 U.S. 124, 135 (2008).

21 <sup>21</sup> See *Devero v. United States*, No. 3:13-CR-12-J-32JRK, 2017 WL 2840670, at \*5  
22 (M.D. Fla. July 3, 2017) (noting that no mens rea element "is expressed or  
23 implied by § 802(44)'s definition of 'felony drug offense'"). Cf. also  
24 *United States v. Curry*, 404 F.3d 316, 319 (5th Cir. 2005) (providing a  
25 detailed analysis of § 802(44)'s lack of a mens rea requirement and holding  
26 that "the use and statutory definition of 'felony drug conviction' in  
§ 802(44) sweeps broadly enough to include even strict liability offenses");  
*United States v. Smith*, 775 F.3d 1262, 1267 (11th Cir. 2014) ("We need not  
search for the elements of 'generic' definitions of 'serious drug offense'  
and 'controlled substance offense' because these terms are defined by a  
federal statute and the Sentencing Guidelines, respectively. . . . No  
element of mens rea with respect to the illicit nature of the controlled  
substance is expressed or implied by either definition.").

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Mr. Aguierre-Ganceda's amended Motion Pursuant to 28 U.S.C.  
3 § 2255, **ECF No. 253**, is **DENIED**.

4 2. **The Clerk's Office** is directed to **CLOSE** this file and the  
5 related civil files, **No. 4:18-CV-05044-EFS** and **No. 4:18-CV-**  
6 **05100-EFS**.

7 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this  
8 Order and provide a copy to counsel.

9 **DATED** this 13<sup>th</sup> day of August 2018.

10  
11 s/Edward F. Shea

12 EDWARD F. SHEA

13 Senior United States District Judge  
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