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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. EDWARD NOLAN NORWOOD, aka "Polo," Defendant.	No. CR 13-388-JVS-2 GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INFORMATION FILED PURSUANT TO 21 U.S.C. § 851 Hearing Date: November 30, 2015 Hearing Time: 9:00 a.m. Location: Courtroom of the Hon. James V. Selna

Plaintiff United States of America, by and through its counsel of record, the United States Attorney for the Central District of California and Assistant United States Attorney Scott D. Tenley, hereby files its opposition to defendant's motion to dismiss information filed pursuant to 21 U.S.C. § 851.

This opposition is based upon the attached memorandum of points and authorities, the files and records in this case, and such further

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evidence and argument as the Court may permit.

Dated: November 8, 2015

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Edward Nolan Norwood, also known as "Polo" ("defendant"), is charged in a two-count indictment with conspiracy to distribute and possess with intent to distribute cocaine base in the form of crack cocaine ("crack cocaine"), in violation of 21 U.S.C. § 846, and distribution of crack cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(iii). On September 6, 2013, the government filed an Information pursuant to 21 U.S.C. § 851 alleging that defendant committed the charged offenses after having sustained a prior felony drug conviction (the "Information"). The Information alleges that on or about February 14, 2007, defendant was convicted of possession of a controlled substance, in violation of California Health and Safety Code Section 11350. (CR 20)

Defendant now moves to dismiss the Information on the ground that his felony conviction has since been reduced to a misdemeanor pursuant to California Proposition 47. Defendant's motion should be denied. Under controlling Ninth Circuit precedent, a felony conviction altered by a state post-conviction remedy continues to qualify as a prior felony conviction unless the post-conviction remedy alters the legality of the conviction or represents that the defendant was actually innocent of the crime. See United States v. Norbury, 492 F.3d 1012 (9th Cir. 2007). Because the reclassification of defendant's conviction from a felony to a misdemeanor did not affect the underlying lawfulness of the conviction, defendant's motion must be denied.

II. BACKGROUND

On November 4, 2014, California voters enacted Proposition 47, "the Safe Neighborhoods and Schools Act," which went into effect the next day (November 5, 2014). People v. Rivera, 183 Cal. Rptr. 3d 362, 363 (Ct. App. 2015). Proposition 47 reduced the penalties for certain drug- and theft-related offenses to make them misdemeanors, provided that the defendant does not have a disqualifying prior conviction. These offenses had previously been designated as either felonies or "wobblers."[1] See id. at 365 (generally describing changes effected by Proposition 47).

As pertinent here, Proposition 47 amended California Health & Safety Code § 11350, possession of a controlled substance. Previously, possession of the controlled substances designated in subdivision (a) of that section was a felony punishable under California Penal Code § 1170(h), which carries a maximum penalty of three years; possession of the controlled substances designated in subdivision (b) was a wobbler. Id. at 365 & n.2. As amended by Proposition 47, any violation of § 11350 is now punishable by imprisonment in a county jail for not more than one year, unless the defendant has a disqualifying prior conviction. Id.

Proposition 47 also created a procedure for reducing prior felonies to misdemeanors. Cal. Penal Code § 1170.18. Under §1170.18(a), a person "currently serving" a sentence for a felony offense that is now a misdemeanor under Proposition 47 may petition the trial court for a recall of that sentence and request

[1] Wobblers are offenses that can be punished as either felonies or misdemeanors. *United States v. Salazar-Mojica*, 634 F.3d 1070, 1072 (9th Cir. 2011).

resentencing in accordance with the statutes that were added or amended by Proposition 47. The trial court must recall the felony sentence and resentence the defendant to a misdemeanor "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." Cal. Penal Code § 1170.18(b). An "unreasonable risk of danger to public safety" is defined to mean an unreasonable risk that the defendant will commit one of the disqualifying offenses listed in California Penal Code § 667(e)(2)(C)(iv). Cal. Penal Code § 1170.18(c).

California Penal Code § 1170.18 also provides a remedy for defendants who have completed felony sentences for offenses that would now be misdemeanors. These defendants may file an application with the trial court to have their felony convictions designated as misdemeanors. Cal. Penal Code § 1170.18(f), (g).

The resentencing and redesignation provisions of § 1170.18 do not apply to defendants who have disqualifying prior convictions listed in Penal Code § 667(e)(2)(C)(iv). Cal. Penal Code § 1170.18(i). A petition seeking resentencing or redesignation must be filed within three years after the effective date of Proposition 47 (November 5, 2014) absent a showing of good cause. Cal. Penal Code § 1170.18(j).

Finally, § 1170.18 provides that "[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm" or prevent his or her conviction under various statutes which contain prohibitions on firearm access by persons with certain

criminal convictions. Cal. Penal Code § 1170.18(k). Significantly, the statute states that "[n]othing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." Cal. Penal Code § 1170.18(n).

III. ARGUMENT

A. Defendant's Motion Should Be Denied Pursuant To The Ninth Circuit's Decision In Norbury

Title 21, United States Code, Section 841 increases the punishment for a federal drug offense to a ten year mandatory minimum sentence if the violation involves a threshold quantity of drugs and the defendant commits the violation "after a prior conviction for a felony drug offense has become final." 21 U.S.C. § 841(b)(1)(B). The term "felony drug offense" in § 841(b)(1)(A) is defined in § 802(44) as "an offense that is punishable by imprisonment for more than one year under any 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." Burgess v. United States, 553 U.S. 124, 126 (2008) (the term "felony drug offense" contained in § 841(b)(1) is defined exclusively by § 802(44)); United States v. Mincoff, 574 F.3d 1186, 1200 n.4 (9th Cir. 2009) (same). To determine whether a state "felony drug offense" is punishable by more than one year for purpose of an enhanced sentence under § 841, this Court looks to the state's statutory maximum sentence. United States v. Rosales, 516 F.3d 749, 758 (9th Cir. 2008). However, the definition of "conviction" for purposes of § 841 is a question of federal law, not state law. Norbury, 492 F.3d at 1014-15. Whether a

conviction is "final" for purposes of § 841 is also a question of federal, not state, law. United States v. Suarez, 682 F.3d 1214, 1220 (9th Cir. 2012).[2]

There is no dispute that at the time defendant was convicted of violating California Health & Safety Code § 11350(a), in 2007, the maximum sentence provided by state law was more than one year. Indeed, defendant was sentenced to five years' imprisonment. It is also undisputed that that prior conviction was "final" when defendant committed the instant offenses. The only question is whether any subsequent state court action exempts defendant's 2007 conviction from the reach of § 841.

For purposes of § 841, the Ninth Circuit has held that an "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." Norbury, 492 F.3d at 1015 (adopting standard that Supreme Court applied in Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 111-15 (1983), to term "conviction" under 18 U.S.C. § 922). The defendant in Norbury argued that the state court's subsequent dismissal of his conviction with prejudice altered the legality of his conviction by invalidating the underlying charges, but the Ninth Circuit disagreed, holding that "[t]he legality of a conviction does not depend upon the mechanics of state post-conviction procedures, but rather involves the conviction's underlying lawfulness." Id. The dismissal in Norbury was based on

[2] A conviction becomes final for purposes of § 841(b)(1) once it is no longer subject to direct appellate review, including certiorari. Williams v. United States, 651 F.2d 648, 649-51 (9th Cir. 1981).

the defendant's compliance with the conditions of his judgment. Because that dismissal did not represent a determination that the crime never occurred and did not alter the legality of the defendant's conviction, Norbury's dismissed state conviction qualified as a prior conviction under 21 U.S.C. § 841. Id.; accord United States v. Law, 528 F.3d 888, 911 (D.C. Cir. 2008) (agreeing with Norbury that prior convictions set aside for policy reasons unrelated to innocence or an error of law are countable under § 841, and collecting cases from other circuits).

Applying the principles of Norbury, defendant's 2007 conviction for his violation of California Health & Safety Code § 11350 clearly qualifies as a prior conviction under 21 U.S.C. § 841 because redesignation of a felony conviction as a misdemeanor under Proposition 47 does not alter the conviction's underlying lawfulness. As described supra, the Proposition 47 remedy does not reverse or vacate a defendant's conviction based on any trial error, it does not represent a finding that the crime never occurred, nor does it rest on any finding of actual innocence. Instead, it redesignates the felony for policy reasons unrelated to innocence or legal error.[3]

[3] The primary purpose of Proposition 47 appears to be monetary savings. The "Findings and Declarations" state: "The people enact the Safe Neighborhoods and Schools Act to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K–12 schools, victim services, and mental health and drug treatment." California General Election November 4, 2014 Official Voter Information Guide at 70 (Aug. 13, 2014), http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf. The text of the proposed law further states in Section 3(6) ("Purpose and Intent") that the "measure will save significant state corrections dollars" and "will increase investments in programs that reduce crime and public safety, . . . which will further reduce expenditures for corrections." Id.

Defendant argues that the state's reclassification of defendant's conviction as a misdemeanor is determinative.[4] Norbury teaches, however, that the "mechanics of state post-conviction procedures" are not determinative. 492 F.3d at 1015. Moreover, defendant's argument mischaracterizes Proposition 47's remedy. When interpreting a voter initiative, the California Supreme Court applies the same principles that govern statutory construction. People v. Rizo, 22 Cal. 4th 681, 685 (2000). "Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the [voters] intended the same construction, unless a contrary intent clearly appears." Estate of Griswold, 25 Cal. 4th 904, 915-16 (2001). California's "wobbler" provision contains language similar to the Proposition 47 resentencing provision upon which defendant relies. Compare Cal. Penal Code § 17(b) (setting forth circumstances under which wobbler becomes a misdemeanor and stating that "it is a misdemeanor for all purposes") with Cal. Penal Code § 1170.18(k) (any felony redesignated under Proposition 47 "shall be considered a misdemeanor for all purposes,"

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[4] Defendant cites extensively to the district court's decision in United States v. Summey, No. EDCV 15-00625-VAP (Sept. 30, 2015 C.D. Cal.). In Summey, the district court granted a defendant's motion for resentencing under 28 U.S.C. § 2255, where defendant did not admit the validity of the underlying felony conviction during plea proceedings, and the conviction was subsequently reclassified as a misdemeanor on account of Proposition 47. For the reasons discussed herein, the government respectfully submits that Summey was wrongly decided. The government is evaluating whether to seek review of Summey, and the time for the government to do so has not yet begun to accrue. See Andrews v. United States, 373 U.S. 334 (1963) (appellate jurisdiction attaches upon the entry of a new judgment following resentencing). Finally, the government notes that impact of Proposition 47 on Information filed pursuant to § 851 is currently before the Ninth Circuit in at least one case.

except that it does not permit possession of firearms and does not prevent the defendant's conviction under various statutes containing prohibitions on firearm access by persons with certain criminal convictions). The California Supreme Court has held that under California Penal Code § 17(b), "the charge remains a felony until a contrary pronouncement of judgment occurs," such that "[i]f ultimately a misdemeanor sentence is imposed, the offense is a misdemeanor from that point on, but not retroactively." People v. Feyrer, 48 Cal. 4th 426, 439 (2010). It is presumed that the voters intended the same construction for the similar language in § 1170.18(k), unless a contrary intent clearly appears. Rivera, 183 Cal. Rptr. 3d at 372. The statutory text gives no indication that the voters intended retroactive application of Proposition 47's remedy to nullify recidivist enhancements for unrelated convictions. To the contrary, the resentencing provision specifically provides that "[n]othing in this section is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." Cal. Penal Code § 1170.18(n).

The recent state court decision in People v. Perez, 190 Cal. Rptr. 3d 738 (2015), pet. for review filed Sept. 3, 2015 (No. S229046) is informative. In Perez, the defendant was convicted of felony failure to appear (FTA) pending a felony drug charge. Id. at 739. California law provides that FTA pending a felony charge is a felony, but when the underlying charge is a misdemeanor, the FTA is a misdemeanor. Id. After his FTA conviction became final, California's voters passed Proposition 47 and the defendant petitioned to reduce both his drug felony and his FTA to misdemeanors. Id. at 739-40. The trial court reduced the drug

charge but not the FTA. Id. at 740. In affirming, the appellate court held that the language in § 1170.18(k) providing that a redesignated conviction "shall be considered a misdemeanor for all purposes" did not apply retroactively, and further held that Proposition 47 "does not speak to pendent or ancillary offenses, but only to the offenses listed therein." Id. at 741. Because the defendant was facing a felony charge when he failed to appear, the subsequent reduction of the underlying drug charge had no effect on the defendant's felony FTA charge. Id. at 743-44. Similarly here, the redesignation of defendant's prior state conviction affected only that offense itself, not whether the defendant committed the charged federal offense after having been finally convicted of a felony drug offense. Indeed, the state law specifically provides that "[n]othing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." Cal. Penal Code § 1170.18(n). See People v. Eandi, 190 Cal. Rptr. 3d 923, 925-26 (2015) ("[t]he initiative did not purport to exercise a power to go back in time and alter the felony status of every affected offense in every context"), pet. for review filed Sept. 21, 2015 (No. S229305).

Accordingly, any action taken by the California state court pursuant to Proposition 47 does not invalidate defendant's prior felony conviction for possession of a controlled substance for purposes of the recidivist provisions in 21 U.S.C. § 841 applicable to defendant's instant offenses.

B. The Text Of Section 841 And Cases Interpreting Similar Recidivist Provisions Support The Conclusion That The Subsequent Redesignation Of Defendant's Conviction Is Of No Consequence

Under the plain language of § 841, if the prior felony drug conviction became final before the defendant committed the charged federal drug offense, the defendant's punishment may be increased based on that prior felony, notwithstanding any subsequent change in the penalty under state law. United States v. McGlory, 968 F.2d 309 (3d Cir. 1992), is instructive. The defendant in McGlory sustained a conviction for possession of cocaine that was a felony under Pennsylvania law at the time. Id. at 348. After the defendant's conviction became final, Pennsylvania reduced the penalty for possession of cocaine to a misdemeanor offense. Id. The defendant argued that his prior conviction could not be considered a felony for purposes of the enhanced penalty in § 841(b)(1)(A)(i) because the conduct was no longer a felony. Id. at 349. The Third Circuit rejected this argument, reasoning that the text of the statute indicated that the felony status of the defendant's conviction should be determined as of the time of the prior conviction and § 841 did not contain any exception for subsequent amendments to the statute of conviction. Id. at 350.

McGlory is consistent with decisions of the Supreme Court and this Court interpreting other recidivist provisions containing similar language. For example, in McNeill v. United States, 131 S. Ct. 2218, 2220-21 (2011), the Supreme Court held that for purposes of the recidivist sentencing enhancement in the Armed Career Criminal Act ("ACCA"), which defines a "serious drug offense" as "an offense

under State law . . . for which a maximum term of imprisonment of ten years or more is prescribed by law," 18 U.S.C. § 924(e)(2)(A)(ii), the sentencing court looks to the maximum sentence at the time the defendant was convicted of the prior state offense. In McNeill, the defendant sustained state drug trafficking convictions that carried a ten-year maximum sentence at the time defendant committed those offenses. Subsequently, North Carolina reduced the maximum penalty for those offenses such that the maximum penalty was 38 months at the time defendant was sentenced on his federal offense of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Id. at 2221. The Supreme Court, noting that its analysis must begin with the statutory language itself, held that "[t]he plain text of ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense." Id. at 2221-22. The Court reasoned that "[t]he statute requires the court to determine whether a 'previous conviction' was for a serious drug offense" and that "[t]he only way to answer this backward-looking question is to consult the law that applied at the time of that conviction." Id. at 2222. The Court further reasoned that this "natural reading" of the ACCA "avoids the absurd results that would follow from consulting current state law to define a previous offense." Id. at 2223 ("A defendant's history of criminal activity – and the culpability and dangerous that such history demonstrates – does not cease to exist when a State reformulates its criminal statutes . . . Congress based ACCA's sentencing enhancement on prior convictions and could not have expected courts to treat those convictions as if they had simply disappeared."). The Court's interpretation, the opinion notes,

"permits a defendant to know even before he violates § 922(g) whether ACCA would apply." Id. at 2224.

The considerations discussed in McNeill apply with equal force to defendant's motion to dismiss. Like the ACCA, § 841's sentencing enhancements are based on "prior convictions," and the only way to engage in that backward-looking inquiry is to consult the maximum penalty that was applicable at the time of defendant's prior state conviction. Moreover, as in McNeill, "[i]t cannot be correct that subsequent changes in state law can erase an earlier conviction for [§ 841] purposes." Id. at 2223. Defendant was on notice at the time he committed the drug trafficking offenses charged in counts 1 and 2 that he was subject to an enhanced penalty on account of his prior felony drug convictions.[5]

The Ninth Circuit employed reasoning similar to McNeill in United States v. Salazar-Mojica, 634 F.3d 1070 (9th Cir. 2011), which held that the defendant's prior conviction for assault by means of force and with a deadly weapon supported a 16-level enhancement under U.S.S.G. § 2L1.2(b)(1) because the defendant's conviction was a

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[5] McNeill did not address "a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." 131 S. Ct. at 2224 n.1. Here, Proposition 47 did not retroactively apply the new maximum penalty to all defendants whose convictions have become final. Instead, it created a post-conviction remedy that permits defendants who have previously been convicted of the felony and served their sentences to petition a judge to redesignate their felony convictions as misdemeanors for most purposes if they meet certain criteria. Furthermore, Proposition 47, by its own terms, does not have a broader retroactive effect that would affect the finality of any other judgment. See Cal. Penal Code § 1170.18(n). Additionally, in the present case, unlike McNeill, it is undisputed that defendant's prior conviction was a felony not only at the time that defendant sustained the conviction but also at the time he committed the instant federal offenses.

felony at the time of deportation, even though a California court reduced the conviction to a misdemeanor after the defendant's arrest on his federal 8 U.S.C. § 1326 case. Id. at 1072-74. In "hold[ing] that the relevant time for evaluating a prior conviction for purposes of the U.S.S.G. § 2L1.2(b)(1)(A) enhancement is the time of deportation," id. at 1074, this Court relied on the plain language of the applicable guideline, which provides that a 16-level enhancement applies "[i]f the defendant previously was deported . . . after . . . a conviction for a felony that is . . . a crime of violence," id. at 1073 (quoting U.S.S.G. § 2L1.2(b)(1)(A)). The requirements of § 2L1.2(b)(1)(A) were satisfied, the Court concluded, because at the time of his deportation, the defendant's prior conviction was properly viewed as a felony, id., and "[t]here is no indication in the Guidelines that § 2L1.2(b)(1) is intended to entertain changes in felony status that occur after the deportation," id. at 1074. As in Salazar-Mojica, defendant's prior conviction under California Health & Safety Code § 11350(a) was properly viewed as a felony at the time he sustained it, as well as at the time he committed the instant offenses, and § 841 does not contain any exclusion for subsequent changes in felony status.

Finally, in United States v. Yepez, 704 F.3d 1087 (9th Cir. 2012) (en banc), the Ninth Circuit held that U.S.S.G. § 4A1.1(d) – which assigns two criminal history points if the defendant "committed [a federal] offense while under any criminal justice sentence, including probation" – "[b]y its plain language . . . looks to a defendant's status at the time he commits the federal crime." Id. at 1090. Accordingly, the fact that a state court later deemed the defendant's probation terminated nunc pro tunc to a date prior to the

defendant's commission of the federal offense had "no effect on [the] defendant's status at the moment he committed the federal crime" and "cannot alter the historical fact that the defendant had the status of probationer when he committed the federal crime." Id. Likewise, here, the state court's redesignation of defendant's 1996 offense cannot alter the historical fact that at the time he committed the instant drug trafficking offenses, defendant had two prior final convictions for felony drug offenses.

IV. CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court deny defendant's motion to dismiss the Information.