BREAKING BAD SENTENCING HABITS: HOW STATE COURTS' RETROACTIVE MODIFICATIONS OF PROBATION TERMS AFFECT FEDERAL MANDATORY SENTENCING

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I wouldn't give Mr. Yepez a 10-year sentence if it was up to me, if I had discretion. Wouldn't do it. I think that's disproportionate given his background, but that's not what's at issue . . . . I don't like it. I really don't like it . . . . I have imposed [this sentence] because I felt like I had to. That's the only reason.

—District court judge, *United States v. Yepez*

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I. INTRODUCTION

In 2006, Eduardo Alba-Flores was arrested for importing methamphetamine into the country from Mexico.[1] Importing methamphetamine carries a ten-year minimum sentence,[2] but first-time offenders who meet certain conditions are exempt from this mandatory minimum.[3] Unfortunately, Alba-Flores was ineligible because he was on

1. United States v. Alba-Flores, 577 F.3d 1104, 1105 (9th Cir. 2009). *See also* CAL. VEH. CODE § 14601.1(a) (West 2010) (setting out California law regarding driving with a suspended or revoked license).

2. 21 U.S.C. § 952 (2006); *Id.* § 960 (2006 & Supp. V 2011).

3. 18 U.S.C. § 3553(f) (2012).

probation at the time for driving with a suspended license earlier that year.[4] Alba-Flores convinced the state court to retroactively modify his probation term so that he served less than a year of it, hoping that this would make him eligible for an exemption from the mandatory ten-year sentence his drug crime carried.[5] In 2009, the Ninth Circuit held that, because he was in fact on probation when he committed the federal drug crime, the state's retroactive change did not affect his mandatory minimum sentence eligibility.[6] As of the time this article was written, Alba-Flores is still serving his ten-year sentence.

In 2007, David Yepez was similarly arrested for importing methamphetamine into the country from Mexico.[7] Like Alba-Flores, Yepez had been on probation at the time—in this case, for driving under the influence of alcohol in 2006—and at his sentencing, he convinced the state court supervising his probation to retroactively modify his probation term so that it legally ended the day before he committed the federal drug crime.[8] This time, in 2011, the Ninth Circuit held that this retroactive change should be credited, so Yepez could be exempted from the mandatory minimum and his sentence was vacated and remanded.[9] In the same opinion, the Ninth Circuit also affirmed a similar district court decision holding that a state court's retroactive termination of probation for a convicted shoplifter made the shoplifter eligible to avoid the federal mandatory minimum sentence for importing methamphetamine.[10] The majority panel distinguished this case from *United States v. Alba-Flores* based on the different motions that the state courts in each case had used to modify the probation terms.[11] However, in 2012, the Ninth Circuit reheard this case en banc.[12] In a 6-5 decision, the en banc panel[13] reversed the

4. *Alba-Flores*, 577 F.3d at 1106. *See also* CAL VEH. CODE § 14601.1(a).

5. *Alba-Flores*, 577 F.3d at 1106.

6. *Id.* at 1111.

7. United States v. Yepez, 652 F.3d 1182, 1185 (9th Cir. 2011), *rev'd en banc*, 704 F.3d 1087 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2040 (2013).

8. *Id.* at 1185–86.

9. *Id.* at 1198–99.

10. *Id.*

11. *Id.* at 1195.

12. This note was originally chosen for publication in April 2012. In June 2012, this case was reheard in United States v. Yepez (*Yepez II*), 704 F.3d 1087 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2040 (2013). Although the en banc panel reversed, bringing *United States v. Yepez* into apparent harmony with the other circuits, the policy considerations this Note explores remain relevant, and this Note has been updated to reflect the en banc decision.

13. The en banc panel consisted of Judges Kozinski, Pregerson, Reinhardt, Thomas, Graber, Wardlaw, Fletcher, Gould, Rawlinson, Callahan, and Smith. Judge Wardlaw, joined by Judges Pregerson, Reinhardt, Thomas, and Fletcher, wrote a dissenting opinion. *Id.* at 1089, 1092.

original panel majority to hold that a state court's retroactive termination of a defendant's probation term has no effect on his subsequent federal sentence.[14]

This problematic line of cases exposes the volatility of the federal judiciary's relationship with the sentencing guidelines and mandatory sentencing. Two Ninth Circuit decisions still cannot be reconciled, and as a result, individuals with markedly similar crimes and procedural histories are at risk of serving unacceptably different sentences. This Note first argues that *United States v. Alba-Flores* was decided incorrectly in the face of its precedent, *United States v. Mejia*, and should be reversed. This Note then analyzes how *United States v. Yepez* originally conflicted with *Alba-Flores*, and why some circuits may still find persuasive the reasoning of *Yepez*'s original panel majority, despite its recent invalidation by an en banc opinion that apparently brings the Ninth Circuit into harmony with the Eighth and Tenth Circuits.

To ensure consistent and principled sentencing outcomes—and clear instructions for district courts to follow—the effect that a state court's retroactive termination of a defendant's probation can have on federal sentencing must be decided with finality. This Note proposes that federal courts should not allow a state court's retroactive termination of a defendant's probation to affect sentencing for a subsequent federal crime. This Note concludes that the intracircuit confusion within the Ninth Circuit and potential intercircuit conflicts reveal a need to re-examine the federal mandatory sentencing paradigm.

Part II provides background on the statutes relevant to an analysis of three Ninth Circuit opinions: California's ability to modify probation terms under the California Penal Code, statutory minimum sentences for drug crimes under the United States Code, and the assignment of criminal points under the United States Sentencing Guidelines. Part III provides a detailed overview of three Ninth Circuit decisions in chronological order: *United States v. Mejia*, *United States v. Alba-Flores*, and *United States v. Yepez*. Part IV examines possible intra- and intercircuit conflicts that spawn from these Ninth Circuit decisions and decisions on similar facts in other circuits. Parts V and VI propose alternate solutions to these conflicts. Part VII concludes.

14. *Id.* at 1090–91.

II. BACKGROUND: THE RELEVANT STATUTES

United States v. Yepez and its precedents deal with the narrow intersection between state-supervised probation terms, federal mandatory sentencing, and the federal sentencing guidelines. This part first discusses California's ability to modify probation terms under its own state law. It then explains federal mandatory sentencing and provides the federal law relevant to the cases this Note primarily explores. Lastly, this part summarizes the relevant guidelines in assigning criminal history points under the federal sentencing guidelines.

A. CALIFORNIA'S ABILITY TO MODIFY PROBATION TERMS UNDER THE CALIFORNIA PENAL CODE

California has a longstanding "wholly statutory" supervisory authority over ongoing probationary terms.[15] The state court "retains jurisdiction over [a] defendant [during his probationary period], and at any time during that period the court may, subject to statutory restrictions, modify the order suspending imposition or execution of sentence."[16] California courts have repeatedly recognized that this supervisory authority ends at the conclusion of the probationary period,[17] which suggests that courts are expected to actively supervise probations while they are ongoing. Two sections of the California Penal Code, 1203.3 and 1203.4, provide the courts with the authority to alter ongoing probation terms.

California Penal Code section 1203.3 gives the court the "authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence. The court may at any time . . . terminate the period of probation, and discharge the person so held."[18]

Alternatively, California Penal Code section 1203.4 allows a court,

> "in its discretion and the interests of justice [to] determine[] that a defendant . . . shall, at any time after the termination of the period of

15. *See* People v. Howard, 946 P.2d 828, 835 (Cal. 1997) (citing CAL. PENAL CODE § 1203 (West 2004 & Supp. 2013)) ("[T]he authority to grant probation and to suspend imposition or execution of sentence is wholly statutory."); *In re* Oxidean, 16 Cal. Rptr. 193, 195 (Cal. Dist. Ct. App. 1961) (stating that probation "has no constitutional basis, but exists by reason of the statutes creating it").

16. *Howard*, 946 P.2d at 835 (citations omitted).

17. People v. O'Donnell, 174 P. 102, 104 (Cal. Dist. Ct. App. 1918) ("[T]he court loses jurisdiction or power to make an order revoking or modifying the order suspending the imposition of sentence or the execution thereof and admitting the defendant to probation after the probationary period has expired.").

18. CAL. PENAL CODE § 1203.3(a) (West 2004 & Supp. 2013).

> probation . . . be permitted by the court to withdraw his or her plea of guilty . . . and enter a plea of not guilty; or . . . shall set aside the verdict of guilty; and . . . the court shall thereupon dismiss the accusations or information against the defendant and . . . he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted . . . ."[19]

B. STATUTORY MINIMUM SENTENCING AND THE "SAFETY VALVE" PROVISION

Mandatory sentencing, in its most basic form, is nothing new.[20] Federal mandatory minimums first appeared in the United States in 1790[21] and appeared in real force as part of the "war on drugs" in the 1980s.[22] By 2007, 171 mandatory minimum sentences were in the books, and over 20,000 defendants in 2006 alone were sentenced under such provisions—a significant portion of which were for drug offenses.[23]

A major reason that legislators enact mandatory minimum sentences is that they believe these mandatory penalties will bring more certainty and consistency to the sentencing process.[24] These sentences have historically been harsh because legislators want to "send a message" to potential perpetrators of crimes considered particularly heinous.[25]

Congress sets minimum sentences for numerous drug crimes by

19. *Id.* § 1203.4.

20. Charles Doyle, *Federal Mandatory Minimum Sentencing Statutes: A List of Citations with Captions, Introductory Comments, and Bibliography*, *in* MANDATORY MINIMUM SENTENCING: OVERVIEW AND BACKGROUND 47, 52 (Lawrence V. Brinkley ed., 2003). The death penalty was the mandatory sentence for all felonies in English common law. Nathan Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, 36 AM. J. CRIM. L. 1, 2 (2008).

21. Suzanne Cavanagh & David Teasely, *Mandatory Minimum Sentencing for Federal Crimes: Overview and Analysis*, *in* MANDATORY MINIMUM SENTENCING: OVERVIEW AND BACKGROUND, *supra* note 20, at 1, 2.

22. *See* Christopher Mascharka, Comment, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 935–36 (2001) (noting that most mandatory minimum sentences are used for drug crimes).

23. *Mandatory Minimum Sentencing Laws–The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 6–7, 10 (2007) [hereinafter *Mandatory Minimum Sentencing Hearing*] (statement of Ricardo H. Hinojosa, Chair, United States Sentencing Comm.), *available at* http://judiciary.house.gov/hearings/printers/110th/36343.pdf (referring to 18 U.S.C. § 3553(e)–(f) (2012), which allow giving a sentence below the mandatory minimum when a defendant has given substantial assistance in an investigation, or when there are mitigating factors in drug trafficking cases).

24. Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 94 JUDICATURE 6, 6 (2010); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 423 (1992).

25. *See* Mauer, *supra* note 24, at 6.

statute, but it also enacted a "safety valve,"[26] which allows courts to "disregard the statutory minimum in sentencing first-time nonviolent drug offenders who played a minor role in the offense and who 'have made a good-faith effort to cooperate with the government.'"[27] Chapter 13 of Title 21 of the United States Code regulates the importation of controlled substances. Section 952 of the chapter makes it unlawful to import into the United States certain controlled substances,[28] including methamphetamine, and § 960 provides the penalties for crimes involving large amounts of controlled substances.[29]

Although there are many other crimes that are governed by the same or similar statutory language,[30] this Note will focus primarily on methamphetamine crimes as an example of the severe mandatory sentences imposed on drug offenders.[31] Recent Ninth Circuit cases deal with offenses involving large quantities of methamphetamine,[32] but the argument this Note makes can be made for other "hard drugs" such as cocaine, heroin, LSD, marijuana, and others regulated by the United States Code. The penalty for violations involving methamphetamine is provided under subsection (b)(1)(H), and reads:

> In the case of a violation . . . involving . . . 50 grams or more of methamphetamine . . . the person committing such violation shall be sentenced to a term of imprisonment of not less than 10 years . . . .[33]

Recognizing the undesirability of a nondiscriminating, harsh sentencing structure for all offenders regardless of mitigating factors, Congress created a "safety valve" provision.[34] This safety valve—§ 3553(f)

26. 18 U.S.C. § 3553(f) (2012).

27. United States v. Shrestha, 86 F.3d 935, 938 (9th Cir. 1996) (quoting United States v. Arrington, 73 F.3d 144, 147 (7th Cir.1996)).

28. 21 U.S.C. § 952 (2006).

29. *Id.* § 960 (2006 & Supp. V 2011).

30. *See, e.g.*, *id.* § 952 (setting out drug crimes relating to various controlled substances).

31. For two recent cases in the Ninth Circuit, see United States v. Alba-Flores, 577 F.3d 1104, 1105 (9th Cir. 2009), and United States v. Yepez, 652 F.3d 1182, 1185 (9th Cir. 2011), *rev'd en banc*, 704 F.3d 1087 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2040 (2013).

32. *See infra* Part III.

33. 21 U.S.C. § 960. Although this Note uses the portion of the statute that regulates methamphetamine, (b)(1)(H), the same analysis can be applied to any of the drug crimes in this section, as well as any federal crime that carries a mandatory minimum sentence and is governed by Chapter 227 of Title 18, which regulates sentencing.

34. *Mandatory Minimum Sentencing Hearing*, *supra* note 23, at 14–15 (statement of Ricardo H. Hinojosa, Chair, United States Sentencing Comm.) (referring to 18 U.S.C. § 3553(f) (2012) and explaining that the safety valve permits "offenders 'who are the least culpable participants in drug trafficking offenses, to receive strictly regulated reductions in prison sentences for mitigating factors' recognized in the federal sentencing guidelines" (quoting H.R. REP. NO. 103-460 (1994))).

of Title 18 of the United States Code—limits the applicability of statutory minimums under certain circumstances.[35] This safety valve allows a court to impose a sentence "without regard to any statutory minimum sentence" if the offender meets the following five requirements:

> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
>
> (3) the offense did not result in death or serious bodily injury to any person;
>
> (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense . . . ; and
>
> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense . . . .[36]

Based on the safety valve provision's language, its purpose is clearly to protect first-time, nonviolent, non-"kingpin" drug offenders from extremely harsh mandatory sentencing. According to a 2007 statistic, the safety valve allowed convicted offenders to avoid 23.5 percent of mandatory sentences in drug cases.[37]

In cases like *United States v. Yepez* and *United States v. Alba-Flores*, the defendants are nonviolent, nonorganizers who have fully cooperated with the government. Thus, safety valve eligibility in cases like these hinge on whether the defendant has more than one criminal history point.[38]

C. ASSIGNMENT OF CRIMINAL POINTS ACCORDING TO THE SENTENCING GUIDELINES

Because one of the requirements of safety valve eligibility is that a defendant has less than one criminal history point, a basic understanding of how criminal history points are assigned for prior sentences is crucial.

In 1984, the Sentencing Reform Act established the United States Sentencing Commission, which produced the Sentencing Guidelines

35. 18 U.S.C. § 3553(f) (2012).

36. *Id.*

37. *Mandatory Minimum Sentencing Hearing*, *supra* note 23, at 17 (statement of Ricardo H. Hinojosa, Chair, United States Sentencing Comm.).

38. *See* 18 U.S.C. § 3553(f)(1) (requiring that defendants have no more than one criminal history point for safety valve eligibility).

("Guidelines").[39] The establishment of the Guidelines has been called "perhaps the most dramatic change in sentencing law and practice in our Nation's history."[40] The Guidelines detail a system for quantifying the seriousness of felonies and serious misdemeanors, as well as a defendant's criminal history.[41] The Guidelines then provide a sentencing table that specifies sentencing ranges by cross-referencing the seriousness of the defendant's instant offense (indicated in order of increasing severity on the vertical axis) with the defendant's prior criminal history (indicated in order of increasing severity on the horizontal axis).[42] Accordingly, determining a defendant's criminal history under the Guidelines is paramount in determining the defendant's Guidelines-recommended sentence.

Although the Guidelines are now advisory in nature,[43] courts must use the calculus the Guidelines provide to calculate a defendant's criminal history points.[44] This calculus is unflinchingly rigid, and courts lack the discretion to lower the number of history points a defendant receives under the Guidelines.[45] Courts cannot deviate from this calculus, even when the

39. *See* U.S. Sentencing Comm'n, *An Overview of the United States Sentencing Commission*, http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf. For an overview of the history of the Guidelines, see Terence Dunworth & Charles D. Weisselberg, *Felony Cases and the Federal Courts: The Guidelines Experience*, 66 S. CAL. L. REV. 99, 99–100 (1992) (describing changes to the federal sentencing process).

40. J.C. Oleson, *Blowing Out All the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984*, 45 U. RICH. L. REV. 693, 695 (2011) (quoting U.S. Sentencing Comm'n, *The Sentencing Reform Act of 1984: Features Affecting Guideline Construction* (Simplification Draft Paper), *available at* http://www.ussc.gov/Research/Working_Group_Reports/Simplification/SRA.HTM (last visited Jan. 15, 2013)) (internal quotation marks omitted).

41. *See generally* U.S. SENTENCING GUIDELINES MANUAL (2012) (establishing the federal sentencing regime).

42. *Id.* ch. 5, pt. A. For a detailed explanation of how to use the Guidelines' sentencing table, see Gary M. Maveal, *Federal Presentence Reports: Multi-Tasking at Sentencing*, 26 SETON HALL L. REV. 544, 554–57 (1996).

43. For a discussion of the advisory nature of the sentencing guidelines since *United States v. Booker*, 543 U.S. 220 (2005), see generally William H. Danne, Jr., Annotation, *Comment Note: Construction and Application of United States Supreme Court Holdings of* U.S. v. Booker, *542 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), Rendering U.S. Sentencing Guidelines Advisory*, 10 A.L.R. FED. 2D 1 (2006) (providing a collection and discussion of *Booker* and its federal offspring). *See also* United States v. Booker, 543 U.S. 220, 249–58 (2005) (holding that increased sentencing under the Guidelines violates the Sixth Amendment right to jury trial, but safety valve relief nonetheless depended on defendant's criminal history as calculated by the Guidelines).

44. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1. *See also, e.g.*, Gall v. United States, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."); Rita v. United States, 551 U.S. 338, 351 (2007) (noting that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Booker*, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must consult those guidelines and take them into account when sentencing.").

45. *See, e.g.*, United States v. Feaster, 259 F.R.D. 44, 48–49 (E.D.N.Y. 2009) (finding that the

court sincerely believes that the resulting point total prescribed by the Guidelines paints an unfair portrait of the defendant's criminal history.[46] Criminal history points are used to determine a convicted offender's "criminal history category" for sentencing purposes, and offenders with more points are accorded harsher sentences.[47]

Subsection (c) of section 4A1.1 of the Sentencing Guidelines provides that the court should "[a]dd 1 point for each prior sentence . . . up to a total of 4 points for this [subsection]."[48] The next subsection, subsection (d), provides that a court should "[a]dd 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status."[49]

However, the next section of the Guidelines, section 4A1.2, tells us that certain sentences—listed in the section—"are counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense."[50] While section 4A1.1 must be read in conjunction with section 4A1.2,[51] what is not entirely clear from the statutory language is how section 4A1.2's limitations on what counts as a "sentence" applies to each subsection of section 4A1.1.

III. THREE RECENT NINTH CIRCUIT CASES THAT CONFUSE DISTRICT COURTS

In the last few years, three cases have been decided in the Ninth Circuit that give rise to a question of whether a state court's authority over its own probation terms also gives the state court broad authority to affect safety valve relief in federal mandatory minimums: *United States v. Mejia* (2009), *United States v. Alba-Flores* (2009), and *United States v. Yepez*

Guidelines-calculated points overrepresented the defendant's criminal history, but the defendant was ineligible for safety valve relief because the court had to adhere to the process set forth in the Guidelines to assign the defendant points).

46. *See, e.g.*, United States v. Watson, 61 F. App'x 514, 521 (10th Cir. 2003) (explaining that the defendant was not entitled to safety valve relief from the minimum sentence for her drug offense, even if her criminal history category overstated the seriousness of her past conduct, because this argument would not have permitted a revision in the calculation of criminal history points).

47. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1.

48. *Id.* § 4A1.1(c).

49. *Id.* § 4A1.1(d).

50. *Id.* §§ 4A1.1, 4A1.2(c)(1).

51. *See id.* § 4A1.1 cmt. nn.1–5 (making numerous references to § 4A1.2 while explaining how § 4A1.1 functions).

(2012). This part provides an overview of these cases.

A. *UNITED STATES V. MEJIA*

Although *United States v. Mejia* does not deal with a state court's retroactive modification of a state sentence, it is crucial in setting the backdrop for a string of confusing Ninth Circuit decisions on the topic. In *Mejia*, the defendant had previously been sentenced to two years of probation for resisting arrest.[52] A two-year probation sentence would have earned him a criminal history point under the Guidelines, which assigns a point for crimes that result in a "sentence."[53] A probation term of over a year is a "sentence."[54] However, Mejia's prior sentence had been suspended when it was pronounced, and then terminated three days later.[55] He argued on appeal that, although he had originally received a probation term of over a year for his crime, he should not have received the criminal history point for having a prior sentence because he served less than the year required under the Guidelines for his probation term "to be counted."[56]

Mejia was the first time the Ninth Circuit faced an important issue: What counts as a "prior sentence" of "over a year" under the Guidelines?[57] Do courts look to the sentence that was originally dealt, or to the sentence that the offender ended up actually serving?[58] The court analogized to an earlier decision[59] that dealt with a similar question, but with respect to a

52. United States v. Mejia, 559 F.3d 1113, 1115–16 (9th Cir. 2009).

53. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(c).

54. *Id.* § 4A1.2(c)(1).

55. *Mejia*, 559 F.3d at 1115–16.

56. *Id.* at 1116 (discussing U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c), which states the prerequisites for a probationary sentence to count).

57. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c)(1) ("Sentences for the [listed] prior [misdemeanor] offenses . . . *are counted only if* (A) the sentence was a term of probation of *more than one year* or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense." (emphasis added)).

58. Language present in the Guidelines may actually support the argument that the legislative intent here was that the length of a "sentence" should be determined by the amount of time to which an offender is actually sentenced, regardless of how much time the offender serves. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 cmt. n.2 ("For the purposes of applying §4A1.1(a), (b), or (c), the length of a sentence of imprisonment is the stated maximum . . . . That is, criminal history points are based on the sentence pronounced, not the length of time actually served."). *See also id.* § 4A1.2(a)(1) (stating that a "prior sentence" is "any sentence previously imposed upon adjudication of guilt . . . for conduct not part of the instant offense."); *id.* § 4A1.2(a)(3) (stating that a totally suspended sentence "shall be counted as a prior sentence under § 4A1.1(c)."). *But see id.* § 4A1.2 cmt. n.2. ("To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence.").

59. United States v. Gonzales, 506 F.3d 940 (9th Cir. 2007) (en banc). This case was decided en banc after Mejia was sentenced.

term of imprisonment instead of probation.[60]

Under the same section of the Guidelines, a sentence of a term of imprisonment counts only if it is for "at least thirty days."[61] In *United States v. Gonzales*, the Ninth Circuit decided en banc that "a *partially suspended* sentence . . . counts only if the *non-suspended portion* of the sentence is at least thirty days."[62] Thus, because Gonzales's sentence had been suspended before he served thirty days, that sentence was excluded from his criminal history point calculation under the Guidelines.[63]

Analogizing to *Gonzales*, the court held in *Mejia* that, in determining whether a defendant's prior conviction results in a criminal history point, "a term of probation means a term of actual probation."[64] Accordingly, the defendant in *Mejia* avoided the point he would have otherwise received under the Guidelines for having a prior sentence because his probation term had been suspended and then terminated after only three days—Mejia never actually served a year of probation.[65]

Mejia is significant because it establishes that a "term of actual [served] probation" of over one year is required for the probation to count as a "sentence" under the Guidelines.[66]

B. *UNITED STATES V. ALBA-FLORES*

Shortly after the Ninth Circuit's decision in *United States v. Mejia*, the Ninth Circuit once again faced an issue involving whether a defendant's probation term counted as a sentence under the Guidelines. This time, the court had to determine the effect that state courts' supervision over state-imposed probation terms have on the assignment of criminal history points in federal court.

On February 22, 2006, Eduardo Alba-Flores pled guilty to driving with a suspended or revoked license in violation of the California Vehicle

60. *Mejia*, 559 F.3d at 1115–16.

61. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c)(1)(A).

62. *Gonzales*, 506 F.3d at 945 (emphasis added). *See also* U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c). In *Gonzales*, the defendant's prior misdemeanor offense was driving with a suspended license, for which he received a thirty-day sentence, but his sentence was entirely suspended. *Gonzales*, 506 F.3d at 943.

63. *Gonzales*, 506 F.3d at 945.

64. *Mejia*, 559 F.3d at 1116.

65. *Id.*

66. *Id. See also* U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.1, 4A1.2 (explaining how criminal history points are assigned).

Code, and the state court sentenced him to a three-year probation term.[67] Several months later, Alba-Flores was arrested as he drove into California from Mexico in a car containing twenty packages of methamphetamine.[68] On August 15, 2006, he pled guilty before a federal judge to charges of importing methamphetamine in violation of Title 21 of the United States Code, §§ 952 and 960.[69] As part of his plea agreement, Alba-Flores acknowledged that the charges carried a ten-year mandatory minimum sentence,[70] but if he disclosed all information and evidence he had about the drugs, and if he qualified for the safety valve provision that would allow the judge to ignore the mandatory sentence, then "the government would recommend the reduction of his offense level by two points and recommend relief from the ten-year statutory minimum sentence."[71]

As it turns out, the fact that Alba-Flores was serving a three-year probation term at the time he was arrested for importing the methamphetamine disqualified him from safety valve relief because committing the current offense while under a criminal justice sentence earned him more than one criminal history point—besides the one point he earned for having a "prior sentence," he earned two for committing the instant offense "while under any criminal justice sentence."[72] Accordingly, his Presentence Report[73] recommended the statutory minimum sentence of ten years.[74] Faced with hard time, Alba-Flores sought a way to qualify for safety valve relief. He filed a Motion to Reduce Charge and Terminate Probation in the state court that had convicted him for the vehicle code violation in 2006 to try to reduce his previous misdemeanor conviction to an infraction.[75] The hope was that this reduction would "facilitate a more

67. United States v. Alba-Flores, 577 F.3d 1104, 1106 (9th Cir. 2009). *See also* CAL. VEH. CODE § 14601.1(a) (West 2010) (setting out California law regarding driving with a suspended or revoked license).

68. *Alba-Flores*, 577 F.3d at 1106.

69. *Id.*

70. *See* 21 U.S.C. § 960(b)(1) (2006 & Supp. V 2011) (setting out minimum sentences for various drug crimes).

71. *Alba-Flores*, 577 F.3d at 1106.

72. *Id.* at 1106–07. *See also* 18 U.S.C. § 3553(f) (2012) (setting out the requirements for safety valve eligibility); U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(d) (2012) ("Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.").

73. The Department of Justice uses the Guidelines to construct a presentencing report for each defendant, which recommends to the judge a sentence based on the defendant's criminal history points and other aspects of the his life, such as hobbies, religion, and personal tendencies. Maveal, *supra* note 42, at 552–53.

74. *Alba-Flores*, 577 F.3d at 1106.

75. *Id.*

favorable disposition" on the drug case that was pending.[76]

The superior court granted the motion on February 13, 2007, ordering the charge reduced to an infraction nunc pro tunc,[77] the guilty plea set aside, and the charge dismissed.[78] Although Alba-Flores made his motion pursuant to section 1203.3 of the California Penal Code, which gives California courts the authority to "revoke, modify, or change its order of suspension of imposition or execution of sentence," the court instead set aside the original guilty plea, entered a plea of "not guilty," and ordered his charge dismissed pursuant to a different section of the California Penal Code, section 1203.4, which gives California courts the authority to dismiss the accusations against a defendant and release the defendant from penalties *upon dismissal* of the charge.[79] The effect of the order was to end Alba-Flores's probation on the day the motion was granted, February 13, 2007—he had served nine days shy of one year.[80]

Armed with his now-truncated probation term, Alba-Flores asked the district court to find him eligible for safety valve relief.[81] He argued that the state court's order made it so that his prior probation term was less than a year,[82] so under the limiting provisions in the Guidelines, his sentence could not "be counted."[83] The district court ultimately decided that the actions of the superior court after Alba-Flores had committed his federal offense "did not . . . permit the reduction of his three criminal history points, one for the state conviction itself and two for his reoffending while on the term of probation arising out of that conviction."[84] Thus, because

76. *Id.*

77. "When an order is signed 'nunc pro tunc' as of a specified date, it means that a thing is now done which should have been done on the specified date." BLACK'S LAW DICTIONARY (9th ed. 2009) (citation omitted).

78. *Alba-Flores*, 577 F.3d at 1106. The court called it a California Penal Code section 1203.4 motion, rather than a section 1203.3 motion. *Id.* This subtle difference, which this Note will explore extensively, is what the majority panel in *United States v. Yepez* relied on to distinguish this case. United States v. Yepez, 652 F.3d 1182, 1193–95 (9th Cir. 2011), *rev'd en banc*, 704 F.3d 1087 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2040 (2013).

79. *Alba-Flores*, 577 F.3d at 1106. *Compare* CAL. PENAL CODE § 1203.3 (West 2004 & Supp. 2013) (giving California courts the authority to "revoke, modify, or change its order of suspension of imposition or execution of sentence"), *with* CAL. PENAL CODE § 1203.4 (giving California courts the authority to dismiss the accusations against a defendant and release the defendant from penalties).

80. *Alba-Flores*, 577 F.3d at 1106.

81. *Id.* at 1107.

82. Alba-Flores made two separate arguments for why the sentence should not have been counted toward his criminal history. His first argument relied on an expungement theory. *Id.* at 1108–09. The district court's rejection of this argument was affirmed and is irrelevant to the discussion here. *Id.*

83. *Id.* at 1109.

84. *Id.* at 1107 (footnotes omitted) (citing U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(c)–

Alba-Flores had more than one criminal history point, he was ineligible for safety valve relief.[85]

On appeal in the Ninth Circuit, the majority panel affirmed the district court's decision, reasoning that regardless of the state court's nunc pro tunc order, the state court could not "affect the concrete fact that [Alba-Flores] *was* 'under [a] criminal justice sentence' when he committed his federal offense," earning him at least two points.[86] The panel explained, "It is the actual situation at that precise point in time, not the situation at some earlier or later point that controls."[87] Thus, it seemed that the majority panel in *United States v. Alba-Flores* decided that a state could not qualify a defendant for safety valve relief from federal mandatory sentences by retroactively altering the defendant's state-imposed probation term.

C. *UNITED STATES V. YEPEZ* AND *UNITED STATES V. ACOSTA-MONTES*

In July of 2007, David Yepez, then eighteen years old, pled guilty to driving under the influence of alcohol.[88] The California state court sentenced him to a probation term of three years.[89] Just over a year later, Yepez needed money, and he agreed to smuggle marijuana into the United States from Mexico.[90] He was arrested at the border.[91] Upon arrest, Yepez was shocked to discover that the "marijuana" he thought he had in the car was actually over seven kilograms of methamphetamine, which carried with it a ten-year mandatory minimum sentence.[92] He pled guilty to importing the methamphetamine.[93]

As a nonviolent first-time drug offender, Yepez might have qualified for relief under the safety valve provision of the Federal Penal Code.[94] But the United States Probation Office determined in Yepez's Presentence

(d) (2012)).

85. *See* 18 U.S.C. § 3553(f) (2012) (describing the requirements for safety valve eligibility).

86. *Alba-Flores*, 557 F.3d at 1111 (second alteration in original) (footnote omitted) (citing U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(d)).

87. *Id.*

88. United States v. Yepez, 652 F.3d 1182, 1185 (9th Cir. 2011), *rev'd en banc*, 704 F.3d 1087 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2040 (2013).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 1185–86; 21 U.S.C. § 960 (2006 & Supp. V 2011) ("Any person who . . . knowingly or intentionally brings or possesses on board a . . . vehicle a controlled substance . . . [including] 50 grams or more of methamphetamine . . . shall be sentenced to a term of imprisonment of not less than 10 years . . . .").

93. *Yepez*, 652 F.3d at 1185–86.

94. 18 U.S.C. § 3553(f) (2012).

Report that he did not qualify because he had committed the current offense while still on probation for his prior DUI conviction.[95] Had Yepez qualified, the government would have recommended a fifty-seven month sentence.[96] Following this news, Yepez moved for nunc pro tunc termination of probation.[97] In April of 2009, the state judge ordered Yepez's probation terminated as of September 15, 2008—the day before Yepez committed his federal offense.[98]

At Yepez's sentencing, the district court agreed with the government's argument that "the state court could not rewrite the historical fact that, at the time of the federal offense, Yepez had been on state probation."[99] The district judge stated:

> I wouldn't give Mr. Yepez a 10-year sentence if it was up to me, if I had discretion. Wouldn't do it. I think that's disproportionate given his background, but that's not what's at issue . . . . I don't like it. I really don't like it . . . . I have imposed [this sentence] because I felt like I had to. That's the only reason.[100]

The district court gave Yepez the ten-year sentence, despite its view "that a 63 month sentence of imprisonment was the appropriate sentence."[101]

On appeal, the Ninth Circuit panel simultaneously dealt with the same issue in Audenago Acosta-Montes's case.[102] This case involved very similar facts to that of Yepez's case: Acosta-Montes had been convicted in California state court of misdemeanor theft for shoplifting, and was sentenced to one day in county jail and three years of probation.[103] A little less than two years later, he attempted to enter the United States from Mexico driving a pickup truck containing approximately 3.3 kilograms of

95. *Yepez*, 652 F.3d at 1186. The United States Probation Office concluded that Yepez was ineligible for safety valve relief because importing methamphetamine while on probation earned him two criminal history points under the Guidelines. *Id.* at 1186. *See also* 18 U.S.C. § 3553(f) (describing the requirements for safety valve eligibility); U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(d) (2012) (explaining that two criminal history points are added when the instant offense is committed while under any criminal justice sentence).

96. *Yepez*, 652 F.3d at 1186.

97. *Id.* In California, the court supervising a term of probation has the power to modify or terminate it at any time. CAL. PENAL CODE § 1203.3 (West 2004 & Supp. 2013).

98. *Yepez*, 652 F.3d at 1186.

99. *Id.*

100. *Id.* (ellipses and alteration in original).

101. *Id.*

102. *Id.* at 1187.

103. *Id.*

methamphetamine.[104]

If not for the two criminal history points Acosta-Montes would be assigned for committing his current offense while on probation, he would have qualified for safety valve relief.[105] He received a continuance of his sentencing date and then obtained an order from the state court retroactively terminating his probation to the day before he committed the federal offense, just as Yepez had done.[106] Despite the parallel facts in Acosta-Montes's and Yepez's cases, the outcomes were opposite: "the district court credited the order modifying Acosta-Montes's ongoing probationary term, and concluded that Acosta-Montes was safety-valve eligible."[107] Acosta-Montes was sentenced to only forty-six months in prison.[108]

On appeal, the Ninth Circuit's three-judge panel vacated Yepez's sentence and affirmed Acosta-Montes's, holding that federal courts, in calculating criminal history points for the purpose of assessing whether a defendant is eligible for safety valve relief from a mandatory sentence, must credit state orders modifying or terminating the defendant's probation term.[109] Accordingly, the panel majority held that Yepez and Acosta-Montes had legally not been on probation at the time of their respective federal offenses and were therefore eligible for safety valve relief.[110]

The next year, likely fearing conflict with *Alba-Flores*,[111] the Ninth Circuit reheard this case en banc[112] and reversed the original majority panel. In a 6-5 decision, the en banc panel[113] held that federal courts

104. *Id.*

105. *Id. See also* 18 U.S.C. § 3553(f) (2012) (describing the requirements for safety valve eligibility); U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.1(d), 4A1.2(c) (2012) (explaining the circumstances under which criminal history points are assigned).

106. *Yepez*, 652 F.3d at 1187.

107. *Id.*

108. *Id.*

109. *Id.* at 1190–91, 1199.

110. *Id.*

111. *See id.* at 1193 ("The government further argues that we are bound by the holding in *United States v. Alba–Flores* . . . to conclude that federal courts, when imposing sentences, may not credit state orders modifying or terminating ongoing probationary terms.").

112. United States v. Yepez, 672 F.3d 1125 (9th Cir. 2012) (ordering the case be reheard en banc). For an explanation of en banc review, see 9TH CIR. R. 22-4(d) ("Any active or senior judge of the Court may request that the en banc court review the panel's order. The request shall be supported by a statement setting forth the requesting judge's reasons why the order should be vacated. . . . Such a request for rehearing en banc shall result in en banc review if a majority of active judges votes in favor of en banc review.").

113. The en banc panel consisted of Judges Kozinski, Pregerson, Reinhardt, Thomas, Graber, Wardlaw, Fletcher, Gould, Rawlinson, Callahan, and Smith.

determining safety valve eligibility should not credit state courts' retroactive terminations of defendants' probation terms. Rather, the federal court should look at "a defendant's status at the moment he committed the federal crime."[114] The court concluded that, because "Yepez was on probation *while* he was arrested for importing methamphetamine on September 16, 2008, and had been for over a year," and "Acosta–Montes was on probation *while* he was arrested on May 7, 2008, and had been for almost two years," the fact that "state court[s] later deemed the probation[s] terminated before the federal crime[s were] committed can have no effect on [each] defendant's status at the moment he committed the federal crime."[115]

IV. WHERE CASES COLLIDE: CONFLICT IN THE NINTH CIRCUIT DECISIONS

United States v. Alba-Flores conflicts with *United States v. Mejia* and should be reviewed. Additionally, despite clever legal gymnastics, the original panel majority's decision in *United States v. Yepez* could not be reconciled with *Alba-Flores*, nor with other circuits that have dealt with this issue. Although *Yepez*, reheard en banc a year later, now follows *Alba-Flores*, *Alba-Flores* itself still conflicts with *Mejia*. While the Ninth Circuit may have brought itself into apparent harmony with the other circuits, these conflicts are worth analyzing in detail because other circuits may find the reasoning of the original panel majority in *Yepez* persuasive.

A. THE INTRACIRCUIT CONFLICTS

The Ninth Circuit decisions *United States v. Alba-Flores* and *United States v. Mejia* conflict and cannot be reconciled. Further, while the panel majority in *United States v. Yepez* purported to avoid conflict with *Alba-Flores*, it sidestepped the *Alba-Flores* decision in a way that flew in the face of the *Alba-Flores* court's express reasoning.

1. *United States v. Alba-Flores* Conflicts with *United States v. Mejia*

In light of *United States v. Mejia*, Alba-Flores should not have received one point for having a "prior sentence," nor should he have received two points for committing the current offense under a criminal justice sentence, because he served less than a year of his probation.

114. United States v. Yepez (*Yepez II*), 704 F.3d 1087, 1090–91 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2040 (2013).

115. *Id.* at 1090.

In *United States v. Alba-Flores*, defendant Alba-Flores's prior crime of driving with a suspended license is one of the crimes listed under section 4A1.2(c) of the Guidelines, so it is not "counted" if the sentence is a term of probation under a year.[116] Alba-Flores was originally sentenced to a three-year term of probation, which would—barring any interference from the state court—"be counted" for the single point that the Guidelines assigns for having a "prior sentence."[117] The majority panel in *Alba-Flores* conceded that "*Mejia* exerts a strong . . . pull toward a conclusion that because it ultimately turned out that by the date of his sentencing Alba-Flores had not and never would serve over one year on probation," he should not have been assigned one point to his criminal history score based on the prior sentence.[118] This is because "prior sentences" under Guidelines section 4A1.1(c) are only counted if they exceed a year,[119] and *Mejia* had held that the period at which courts should look to determine whether a probation term exceeds a year is the time actually served.[120]

However, the majority panel[121] in *Alba-Flores* dubbed *Mejia*'s pull "not necessarily ineluctable."[122] The court reasoned that the *Mejia* decision "emphasized the fact that the suspension of Mejia's sentence before he was placed on a truncated term of probation indicates that the offense of which he was convicted was not regarded as serious."[123] In contrast, the court reasoned, Alba-Flores's sentence, "when given, was obviously seen as a serious one" because it was a three-year probation term.[124] Further, the court felt that "[t]he facts of [*Alba-Flores*] are quite different from those in *Mejia*."[125] Ultimately, the panel majority avoided the question of whether Alba-Flores deserved the single point for having a prior sentence.[126] It

116. *See* United States v. Alba-Flores, 577 F.3d 1104, 1106 (9th Cir. 2009) (explaining that Alba-Flores had been convicted of a misdemeanor rather than a felony); U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c) (2012) (explaining what sentences are counted and excluded when calculating criminal history points).

117. *See Alba-Flores*, 577 F.3d at 1106 (noting Alba-Flores's three-year probation sentence); U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(c) (explaining that one criminal history point is added for such sentences).

118. *Alba-Flores*, 577 F.3d at 1109.

119. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c)(1).

120. United States v. Mejia, 559 F.3d 1113, 1115–16 (9th Cir. 2009).

121. The panel majority consisted of Judges Fernandez and Smith. Chief Judge Kozinski dissented.

122. *Alba-Flores*, 577 F.3d at 1109.

123. *Id.* (quoting *Mejia*, 559 F.3d at 1116) (internal quotation marks omitted).

124. *Id.*

125. *Id.*

126. *Id.* at 1110 ("[W]e need not, and do not, decide that precise issue because, as we will show, it would make no difference to the ultimate conclusion that Alba-Flores has more than one criminal history point.").

deliberately neglected this question because, according to the majority, this question did not affect the outcome of Alba-Flores's safety valve eligibility—committing the instant crime while under a criminal justice sentence already earned Alba-Flores two criminal history points, which was more than the one point maximum the safety valve tolerates.[127]

This legal detour around the precedent set in *Mejia* is misleading. It is very important to understand that there is no question that, under *Mejia*, Alba-Flores should not have been assigned a single point for his prior probation term. He had served less than a year when his probation was terminated and "never would serve over one year on probation."[128] The alternative outcome—that the federal court should look to his original three-year sentence when assigning criminal history points—would directly contradict *Mejia*, which was less than a year old at the time.[129] *Alba-Flores* does not purport to overrule *Mejia*, so the rule that courts should look at time actually served in determining what is to "be counted" as a sentence under the Guidelines still governs.[130]

Regardless, because offenders become ineligible for safety valve relief if they have "*more* than 1 criminal history point, as determined under the sentencing guidelines,"[131] Alba-Flores's safety valve eligibility did rest on his receiving two points for committing the instant crime "under any criminal justice sentence," pursuant to subsection (d) of Guidelines section 4A1.1.[132] So the pivotal question that the court ignored is whether Alba-Flores was "under [a] criminal justice sentence" when he imported the methamphetamine.

According to the majority panel, Alba-Flores's probation was "terminated nine days short of his having served one year of it," but he "was still serving his original state sentence when he reoffended," so he committed the instant offense "under" a criminal justice sentence.[133] In his dissent, Chief Judge Alex Kozinski[134] tersely objected to this reasoning, criticizing the majority's decision for suggesting that "Alba-Flores's probationary term was more than one year when he committed his federal crime, but was under one year when he was sentenced."[135] However, this

127. *Id.* at 1111.
128. *Id.* at 1109–10.
129. *See* United States v. Mejia, 559 F.3d 1113, 1115–16 (9th Cir. 2009).
130. *See id.*
131. 18 U.S.C. § 3553(f) (2012) (emphasis added).
132. *Alba-Flores*, 577 F.3d at 1111; U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(d) (2012).
133. *Alba-Flores*, 577 F.3d at 1106, 1109, 1111.
134. Chief Judge for the Ninth Circuit.
135. *Alba-Flores*, 577 F.3d at 1112 (Kozinski, C.J., dissenting).

oversimplifies the majority panel's reasoning and understates its grievous errors.

The majority focused on whether Alba-Flores was "under" probation at the time he committed his federal drug crime. Instead, the majority should have focused its analysis on whether that probation counts as a "sentence" under the Guidelines at all. Under *Mejia*, Alba-Flores's probation was not a "criminal justice sentence." Because of this error, the Ninth Circuit's decisions in *Alba-Flores* and *Mejia* cannot be reconciled—Alba-Flores was entitled to safety valve relief.

Under the Guidelines, sentences that are "a term of probation" are "counted only" if they are "a term of . . . more than one year."[136] "Counted"—as used in section 4A1.2(c) of the Guidelines—means that probation terms are only considered a "sentence" under the Guidelines if they are of a term over a year.[137] The application notes to the Guidelines make clear that, "[f]or the purposes of this subsection, a 'criminal justice sentence' means a sentence *countable* under [section] 4A1.2 (Definitions and Instructions for Computing Criminal History)."[138] Thus, a probation term of less than one year would not be considered a "criminal justice sentence" for the purposes of assigning two points under section 4A1.1(d) of the Guidelines.[139] In other words, if a defendant commits a crime while on probation, but the defendant's probation is for less than a year, then that defendant did not commit that crime under a criminal justice sentence. Accordingly, if the defendant commits a crime while on a probation term of over a year, but that probation is terminated before the defendant serves a year, then under *Mejia*, the defendant should not receive two points for committing the current offense under a criminal justice sentence because he did not actually serve over a year of probation.[140] To be clear, this is not because the offender was not "actually under . . . probation" at the time, but rather because the probation he was under does not count as a "sentence" under the Guidelines—he never actually served, and would never actually serve, a year of probation.

The majority panel ostensibly relied on a facts-as-they-were-at-the-time theory.[141] The court reasoned that "the later state court order could not

136. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c)(1).

137. *Id.* § 4A1.1 cmt. n.4.

138. *Id.* (emphasis added).

139. *Id.* § 4A1.1(d) (assigning two points if the instant offense was committed while the defendant was under a criminal justice sentence).

140. *Contra Alba-Flores*, 577 F.3d at 1111.

141. *See id.* ("Alba-Flores was actually 'under [a] criminal justice sentence' when he offended

change [the] concrete fact" that Alba-Flores "*was* 'under [a] criminal justice sentence' when he committed his federal offense."[142] In other words, the panel concluded that, at the time of Alba-Flores's offense, Alba-Flores's sentence was still a three-year probation. But this reasoning cannot be reconciled with *Mejia*, which provides that "a term of probation means a term of actual[ly] [served] probation."[143] The outcome the majority panel reached requires that Alba-Flores would have actually served over a year of probation at the time of his federal offense, which is patently false.[144] In reality, Alba-Flores *was* on probation at the time he committed his federal offense, but at no point in time was he under "any criminal justice sentence" under the Guidelines definition of "sentence" because he would never actually serve a year of probation. *Alba-Flores* abandoned *Mejia*, and either *Mejia* or *Alba-Flores* must be reviewed.[145]

Ultimately, the rule that must be gleaned from these two cases reads something like the following: To assess whether a defendant receives criminal history points for having a prior sentence, a state court's termination of a defendant's probation term before a year passes limits that probation term after-the-fact to less than a year. But if a state court terminates the probation after the instant crime has already taken place, then that termination does not affect whether that probation term was less than a year, even if the defendant will never serve a year of it.[146]

2. *United States v. Yepez* Stood at Odds With *United States v. Alba-Flores*

If *United States v. Alba-Flores* stands for the rule that state courts cannot retroactively alter whether a federal crime was committed while under probation for the purposes of calculating criminal history points,[147] then *United States v. Yepez* only adds to the confusion. The defendants in

because he was then serving an actual term of probation whose length was for a period exceeding one year . . . ." (alteration in original)).

142. *Id.* (second alteration in original) (footnote omitted).

143. United States v. Mejia, 559 F.3d 1113, 1116 (9th Cir. 2009).

144. *See Alba-Flores*, 577 F.3d at 1110–11 (explaining that Alba-Flores had committed the instant offense while under a criminal justice sentence despite getting the state to set the sentence aside before he had served a full year).

145. The Supreme Court declined to review *Alba-Flores*. Alba-Flores v. United States, 130 S. Ct. 3344 (2010) (mem.), *denying cert. to Alba-Flores*, 577 F.3d 1104. To overrule a prior circuit court decision, a decision must be rendered en banc or by the Supreme Court of the United States.

146. *See Alba-Flores*, 577 F.3d at 1112 (Kozinski, C.J., dissenting) (arguing that the majority's interpretation is "Janus-faced" and inconsistent with *Mejia*).

147. *See id.* at 1111 (majority opinion) ("The later state court order could not change that concrete fact [that Alba-Flores was on probation when he committed his current offense]. . . . We note [an] odor of gaming the federal sentencing system . . . .").

Yepez[148] both moved for nunc pro tunc orders terminating their probation terms pursuant to California Penal Code section 1203.3.[149] Under section 1203.3, California courts have the authority to terminate an offender's probation term at any time.[150] By using this authority to retroactively terminate the defendants' respective probations the day before they committed their federal offenses, the California court in each of these cases created legal fictions that the defendants were not on probation at the time they committed the instant offenses.[151] The question on appeal before the Ninth Circuit was whether the federal courts should accept the legal fiction created by state courts, or instead look at the "reality" of the situation as it stood at the point in time the defendants committed their federal crimes.[152] Initially, the Ninth Circuit chose to do the former.

In its original decision, the panel majority in *Yepez* seemed to conflict with the court's *Alba-Flores* holding. Remember, the *Alba-Flores* majority held that the defendant was properly assigned two criminal history points for being "under a criminal history sentence" because he was serving a sentence of probation (of more than a year) at the time he committed the federal offense, even though the probation was retroactively terminated before a year had passed.[153] The court expressly reasoned that the subsequent nunc pro tunc order shortening the term could not alter the "fact" that the defendant was under probation.[154] This reasoning should have bound the *Yepez* panel: "[R]easoning central to a panel's decision [is] binding [to] later panels."[155] "[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense."[156] For these reasons, Judge Timlin—who wrote a dissenting opinion in the original *Yepez*—would have affirmed Yepez's sentence, which is the mandatory minimum sentence for his crime, and reversed the order to resentence Acosta-Montes, who escaped the mandatory

148. David Yepez and Audenago Acosta-Montes.

149. United States v. Yepez, 652 F.3d 1182, 1186–87 (9th Cir. 2011), *rev'd en banc*, 704 F.3d 1087 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2040 (2013).

150. CAL. PENAL CODE § 1203.3 (West 2004 & Supp. 2013).

151. *Yepez*, 652 F.3d at 1186–87.

152. *Id.* at 1198–99.

153. United States v. Alba-Flores, 577 F.3d 1104, 1111 (9th Cir. 2009).

154. *Id.*

155. Garcia v. Holder, 621 F.3d 906, 911 (9th Cir. 2010).

156. Miranda B. v. Kitzhaber, 328 F.3d 1181, 1186 (9th Cir. 2003) (per curiam) (quoting United States v. Johnson, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (Kozinski, J., concurring)).

sentence.[157] In the en banc rehearing of *Yepez*, a narrow majority agreed with Judge Timlin.[158]

But as Judge Wardlaw observes in her dissent to the en banc decision, the original *United States v. Yepez* decision (also written by Judge Wardlaw) artfully dodged direct conflict with *Alba-Flores*.[159] The original panel majority had reasoned that *Alba-Flores* did not make a broad ruling on whether a state court's retroactive order affects federal sentencing.[160] Consequently, the panel majority relied on a subtle distinction between the motions used[161]: in *Alba-Flores*, the defendant obtained a 1203.4 motion,[162] but in *Yepez*, the defendants obtained 1203.3 motions.[163] A 1203.4 motion sets aside a guilty verdict and "thereafter" releases the defendant from his probation,[164] whereas a 1203.3 motion terminates the period of probation "at any time."[165] Thus, the majority panel reasoned that *Yepez* was unlike *Alba-Flores*, in which the defendant was still under his probation term when he committed the federal crime even assuming full effect of the nunc pro tunc dismissal, because the defendants in *Yepez* were not on probation as of the date they committed their federal offenses after the nunc pro tunc modifications of their probations took effect. The panel majority concluded that, although its decision may conflict with *Alba-Flores's* reasoning, it does not conflict with its holding, which is what is binding.[166]

At the very least, the Ninth Circuit's decisions in *Yepez* and *Alba-Flores* stood at an uncomfortable tension. Taken together, this line of cases articulated a profoundly confusing rule for deciding whether a probation term is a "sentence" under the Guidelines. This rule told district courts determining whether a defendant's state-imposed probation is a "sentence" to first look at the term of probation in terms of the length of time the

157. *Yepez*, 652 F.3d at 1199–1202 (Timlin, J., dissenting).

158. United States v. Yepez (*Yepez II*), 704 F.3d 1087, 1091 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2040 (2013).

159. *Id.* at 1096–97 (Wardlaw, J., dissenting).

160. *But see Yepez*, 652 F.3d at 1194 n.4 ("The majority . . . observed that it would not have decided the case differently had the *nunc pro tunc* order in fact been issued under § 1203.3.").

161. *Id.* at 1194.

162. United States v. Alba-Flores, 577 F.3d 1104, 1108–09 (9th Cir. 2009); CAL. PENAL CODE § 1203.4 (West 2004 & Supp. 2013).

163. *Yepez*, 652 F.3d at 1186–87.

164. CAL. PENAL CODE § 1203.4.

165. *Id.* § 1203.3.

166. "[H]ow a court *would have* decided a question not actually before it does not constitute binding precedent, because it is not germane to the final outcome." *Yepez*, 652 F.3d at 1194 n.4 (citing Miranda B. v. Kitzhaber, 328 F.3d 1181, 1186 (9th Cir. 2003) (per curiam)).

defendant actually serves.[167] But if the defendant *would have* (had the state court not tried to allow the defendant safety valve eligibility) served over a year at the moment he committed his federal crime, then a district court should look at the term that was originally sentenced to determine whether the defendant committed the federal crime while under a "sentence."[168] The *Yepez* panel majority apparently accepted the rule that a state court's nunc pro tunc order terminating the probation term before a year passes has no effect on the assessment of whether a probation term is a "sentence" under the Guidelines at the time of the defendant's federal crime,[169] but then prescribed a separate rule that a state court's nunc pro tunc order retroactively terminating the sentence to a date before the commission of the federal crime *does* have effect at the time of the defendant's federal crime.[170]

The en banc majority in *Yepez* reconciled two decisions that, at their core, stood for completely opposite propositions. In *Alba-Flores*, a state court *could not* retroactively affect a defendant's state-imposed probation at the time of the federal crime by terminating the probation before sentencing.[171] But in the original *Yepez* decision, a state court *could* affect federal sentencing for a federal crime by retroactively terminating a defendant's probation at the time of his federal offense.[172] In the en banc *Yepez* opinion, the en banc majority explicitly quashes the original panel majority's statutory distinctions by directly addressing Yepez's specific circumstances, holding, "That a state court later deemed the probation terminated before the federal crime was committed can have no effect on a defendant's status at the moment he committed the federal crime."[173] Further, because the defendants in *Yepez* both had actually served over a year of their probation terms by any calculation, *Mejia* is not directly implicated.[174]

167. United States v. Mejia, 559 F.3d 1113, 1116 (9th Cir. 2009).

168. United States v. Alba-Flores, 577 F.3d 1104, 1111 (9th Cir. 2009).

169. *See id.*

170. *Yepez*, 652 F.3d at 1198–99.

171. *See Alba-Flores*, 577 F.3d at 1112 (Kozinski, C.J., dissenting) (explaining why the majority's approach is flawed).

172. *Yepez*, 652 F.3d at 1198–99.

173. United States v. Yepez (*Yepez II*), 704 F.3d 1087, 1090 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2040 (2013).

174. *Id.* (observing that in *Mejia*, "[t]he state court order terminating the defendant's probation in that case was issued years before he committed the federal crime at issue. He was therefore no longer under a criminal justice sentence." (citation omitted)).

B. SIMILAR DECISIONS IN OTHER CIRCUITS

While the Ninth Circuit, in rehearing *United States v. Yepez*, is no longer squarely in conflict with the two other circuits—the Eighth and the Tenth—that have dealt with this issue,[175] those other circuits hinged their decisions on whether a nunc pro tunc order was issued for reasons related to the defendant's innocence or only because the state court felt the mandatory sentence was too harsh. The issue must still be dealt with on a national level; other circuits have yet to deal with the question of the extent to which state courts should be able to affect federal mandatory sentencing, and they may very well side with the original *Yepez* panel majority and the *Alba-Flores* dissent. This part provides an overview of the two cases in the Eighth and Tenth Circuits that tackled the same issue as did the Ninth Circuit in *Yepez*.

1. *United States v. Martinez-Cortez* (8th Cir. 2004)

In a 2004 Eighth Circuit decision, defendant Jerardo Martinez-Cortez pled guilty to conspiracy to distribute methamphetamine.[176] Martinez-Cortez already had two driving-related convictions, for which he had received jail time and a cumulative three years of probation.[177]

Martinez-Cortez was still on probation when he committed his federal drug offense, but had completed it by the time he was sentenced in federal court.[178] Before sentencing, he convinced the state court to reduce one of his probation terms "for the express purpose of avoiding a criminal history point in his federal drug sentencing,"[179] and to reduce another one of his probation terms so that "he would be off supervision during the time the government alleges the federal [drug] conspiracy was in existence."[180] The

175. *Compare Yepez*, 652 F.3d at 1196 (disagreeing with the majorities in *Martinez-Cortez* and *Pech-Aboytes*), *with* United States v. Martinez-Cortez, 354 F.3d 830, 832 (8th Cir. 2004) (explaining that courts could not "disregard some state court convictions and sentences for the purposes of criminal history" because Martinez-Cortez had already served his sentences by the time he asked for their modification), *and* United States v. Pech-Aboytes, 562 F.3d 1234, 1239 (10th Cir. 2009) ("[T]he district court should count previous convictions unless they have been set aside because of a finding of innocence or legal error.").

176. *Martinez-Cortez*, 354 F.3d at 831.

177. *Id.* ("For leaving the scene of the accident, Martinez-Cortez had been sentenced to ninety days in jail, with eighty-nine days suspended, followed by one year of probation. . . . For driving while intoxicated, Martinez-Cortez had been sentenced to thirty days in jail, with twenty-nine days stayed, and placed on probation for two years . . . .").

178. *Id.* at 831–32.

179. *Id.* at 831.

180. *Id.* (alteration in original).

district court accepted this legal fiction and found Martinez-Cortez to be safety valve eligible, but the Eighth Circuit panel reversed in a 2-1 majority.[181]

The panel majority held that Martinez-Cortez was not eligible for safety valve relief because, as "a factual matter," Martinez-Cortez had committed his federal drug offense "while he was on probation."[182] The majority ultimately held that "as a matter of federal law, Martinez-Cortez's lesser step of modifying his sentences after they were served for reasons unrelated to his innocence or errors of law is not a valid basis for not counting the sentences for criminal history purposes."[183]

2. *United States v. Pech-Aboytes* (10th Cir. 2009)

In a 2009 Tenth Circuit decision, a defendant similarly pled guilty to possession with intent to distribute methamphetamine, having previously been convicted of a misdemeanor for which he received three years of probation.[184] He was still on probation when he committed his federal drug offense.[185] Before he was sentenced, the defendant obtained a nunc pro tunc order from the state court terminating his probation so that he would be eligible for safety valve relief.[186] The district court declined to credit this order and found that the defendant was not entitled to safety valve relief, which the Tenth Circuit panel affirmed unanimously.[187]

The Tenth Circuit cited application notes 6 and 10 to Guidelines section 4A1.2, concluding that "[t]he implication" of application note 10 "is that the district court should count previous convictions unless they have been set aside because of a finding of innocence or legal error."[188]

Although courts that have faced the issue of whether state courts' retroactive actions can affect a defendant's status of being "under a criminal justice sentence" at the time of the defendant's federal crime may now be in apparent harmony,[189] these cases reveal a heated debate over

181. *Id.* Judge Lay dissented and criticized the majority decision as being incorrect and "without authority." *Id.* at 833 (Lay, J., dissenting).

182. *Id.* at 832 (majority opinion).

183. *Id.*

184. United States v. Pech-Aboytes, 562 F.3d 1234, 1235–36 (10th Cir. 2009).

185. *Id.* at 1236 & n.2. (Although the defendant committed his federal drug crime five years later, he was still on probation because of "several probation revocations and reinstatements").

186. *Id.* at 1236.

187. *Id.* at 1237, 1240.

188. *Id.* at 1239.

189. Because *Alba-Flores* conflicts with *Mejia*, *see supra* Part IV.A.1, an open question may remain as to whether a state court's retroactive termination of a defendant's probation before a year has

whether state courts should be able to affect federal sentencing at all.

V. RESOLVING CONFLICTS IN THE JUDICIARY: SHOULD STATE COURT NUNC PRO TUNC ORDERS BE GIVEN FULL EFFECT IN FEDERAL SENTENCING?

Congress has attempted to stymie the sometimes unintended harsh effects of mandatory minimum sentencing.[190] The purpose of the safety valve provision is ostensibly "to rectify an inequity in this system, whereby more culpable defendants who could provide the Government with new or useful information about drug sources fared better . . . than lower-level offenders, such as drug couriers or 'mules,' who typically have less knowledge."[191] But ironically, "for the very offenders who most warrant proportionally lower sentences—offenders that by guideline definitions are the least culpable—mandatory minimums generally operate to block the sentence from reflecting mitigating factors."[192]

For example, in Acosta-Montes's case, the district court judge stated that, "being 'brutally honest,' [the court] disagreed with 'hamstringing a court with a mandatory minimum where facts don't deserve that.'"[193] The district court explained that "given the nature of Acosta-Montes's offense, the nonviolent nature of Acosta-Montes's criminal record, which consisted solely of misdemeanor offenses, and Acosta-Montes's personal circumstances, a ten-year term of imprisonment was far too high."[194] The district court observed that while Acosta-Montes was not "free of criminal conduct," he had "been a productive worker that has provided for his family and children."[195]

When mandatory sentences seem too severe to lawyers, one of three things happen[196]: First, when a prosecutor views the mandatory sentence as

passed should affect the defendant's status of being under a "sentence" at the time of his federal crime.

190. *See, e.g.*, Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1472 (2000) ("In an effort to eliminate mandatory minimum sentences for low-level drug offenders, Congress enacted the 'safety valve' . . . .").

191. United States v. Shrestha, 86 F.3d 935, 938 (9th Cir. 1996).

192. *Id.* (quoting H.R. REP. NO. 103-460 (1994)).

193. United States v. Yepez, 652 F.3d 1182, 1187 (9th Cir. 2011), *rev'd en banc*, 704 F.3d 1087 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2040 (2013).

194. *Id.*

195. *Id.* (internal quotation marks omitted).

196. Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 67 (2009). *See also* Paul H. Robinson, *Are Criminal Codes Irrelevant?*, 68 S. CAL. L. REV. 159, 187 (1994) ("There frequently is good reason for the parties to subvert the operation of a mandatory minimum. Mitigating factors commonly exist that make the case

unfair, she may sidestep the law by neglecting to bring charges subject to them, or by agreeing to their dismissal in plea negotiations.[197] Second, judges or prosecutors may employ an awkward contrivance to avoid imposing an otherwise-required minimum.[198] Or third, and arguably worst of all, sometimes a sentence is imposed that everyone involved sincerely believes is unjustly severe.[199] As can be seen, mandatory sentences, which are ostensibly meant to produce consistent penalties across the board for similar crimes, actually result in a wide variety of disparate sentences in cases that are factually similar in every way except how the judges and lawyers involved chose to approach them.[200] The question of whether federal courts should credit state courts' retroactive modifications of probations exemplifies the consistency problems inherent in mandatory sentencing schemes.

The Guidelines themselves do not provide an answer to the question of whether a federal court must credit a state court's nunc pro tunc order when assigning criminal history points.[201] Notes 6 and 10 to the Guidelines section 4A1.2 come close, but ultimately prove inconclusive. Note 6 provides that "[s]entences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted."[202] Note 10 is a limitation on note 6, providing that sentences resulting from convictions that were set aside for reasons unrelated to guilt or innocence "are to be counted."[203] Both of these application notes involve only the effect of setting aside or expunging a conviction, so they are inapposite to the situation presented in *United States v. Yepez*, in which a defendant's

at hand inappropriate for a sentence of that severity. Yet, current codes rarely adjust the mandatory minimum sentence for such mitigating factors.").

197. Tonry, *supra* note 196, at 67. Attorney General Eric H. Holder Jr. explicitly instructed United States Attorneys in August 2013 "that low-level, nonviolent drug offenders with no ties to gangs or large-scale drug organizations [should] no longer be charged with offenses that impose severe mandatory sentences." Sari Horwitz, *Holder Seeks to Avert Mandatory Minimum Sentences for Some Low-Level Drug Offenders*, WASH. POST, http://www.washingtonpost.com/world/national-security/holder-seeks-to-avert-mandatory-minimum-sentences-for-some-low-level-drug-offenders/2013/08/11/343850c2-012c-11e3-96a8-d3b921c0924a_story.html (last visited Aug. 19, 2013).

198. Tonry, *supra* note 196, at 67.

199. *Id. See also supra* text accompanying notes 100, 193.

200. Tonry, *supra* note 196, at 68.

201. United States v. Yepez, 652 F.3d 1182, 1191 (9th Cir. 2011), *rev'd en banc*, 704 F.3d 1087 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2040 (2013).

202. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 cmt. n.6 (2012).

203. *Id.* § 4A1.2 cmt. n.10.

conviction is not set aside, but instead modified. The courts must once and for all address this specific question so that the outcome can be consistent across the circuits, providing the district courts with clear instruction.

A. THE CURRENT STATE OF AFFAIRS: PROBLEMS WITH THE NINTH CIRCUIT'S FIRST APPROACH

As the rule now stands in the Ninth Circuit, state courts seemingly have no power to affect criminal history point calculations through retroactive modifications of the probations they supervise. But because *Mejia* should have forced the *Alba-Flores* panel to come out the opposite way, *Alba-Flores* should have allowed state courts to shield defendants from the two points under Guidelines section 4A1.1(d) by terminating the defendant's probation term before he served a year of it. Further, the original *Yepez* decision would have allowed state courts to affect federal defendants' safety valve eligibility in federal sentencing. Although neither rule seems to be the status quo in the Eighth, Ninth, and Tenth Circuits, other circuits may yet hold that state courts *can* affect federal sentencing discretion if they agree that federal courts should look to the length of probation actually served, or that a state court's retroactive termination of a defendant's probation becomes the legal reality.[204] The real-world implication of this approach to state court nunc pro tunc orders—the approach dictated by *United States v. Mejia* and originally bolstered by *United States v. Yepez*—is that a state court supervising a defendant's probation has the power, in certain situations, to decide if that defendant deserves a federal mandatory minimum sentence.[205]

But an approach that allows state nunc pro tunc orders to affect federal sentencing discretion brings up serious concerns. First, allowing full effect to state court nunc pro tunc orders arguably undermines the legislative intent of mandatory minimum sentencing.[206] Congress deliberately instituted harsher punishments for drug offenses and outlined specific penalties in order "to ensure that all defendants convicted of a specific

204. *See* United States v. Mejia, 559 F.3d 1113, 1115–16 (9th Cir. 2009) (explaining that it was plain error to assign Mejia one criminal history point for his prior conviction).

205. *Contra* United States v. Alba-Flores, 577 F.3d 1104, 1110–11 (9th Cir. 2009) (explaining that Alba-Flores was properly assigned two criminal history points despite the state court's order).

206. *See* 28 U.S.C. § 991(b)(1) (2006) (setting out the purposes of the United States Sentencing Commission with respect to establishing sentencing policies and practices). *But see* Miller, *supra* note 24, at 423 (noting that viewing the Sentencing Commission and Guidelines as serving the "structural goals of narrowing judicial discretion and making sentences more certain . . . [is] not supported by the language of the [Sentencing Reform] Act or its legislative history.").

offense receive at least a minimum predetermined sentence."[207] In the case of criminal history points allocation, the introductory commentary to the criminal history section of Chapter 4 of the Sentencing Guidelines provides insight into the legislative intent:

> A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered.[208]

Thus, mandatory minimums are supposed to remove exactly the kind of discretion that state court nunc pro tunc orders could afford federal courts in cases involving recidivists.[209] There is a strong argument that, although judges and lawyers may find certain mandatory sentences disproportionate to the crimes for which they are imposed, the decision is for the legislature, and the judiciary must be bound by the legislature's limits on judicial discretion.[210]

A second major criticism is that allowing state court nunc pro tunc orders to affect safety valve eligibility places more discretion, at least initially, in the hands of state courts than in federal courts with regards to when a federal mandatory minimum must be imposed. In fact, this increased discretion is not only acknowledged, but offered as support by the dissents in both *Alba-Flores* and *Yepez II*.[211] But as Judge Timlin wrote

207. Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1851 (1995).

208. U.S. SENTENCING GUIDELINES MANUAL ch.4, pt.A, introductory comment. *See also* United States v. Pech-Aboytes, 562 F.3d 1234, 1240 (10th Cir. 2009) ("[T]he Guidelines are intended to capture, via an increase in criminal history points, the very behavior [the defendant] was attempting to avoid: the commission of a crime while under a probationary sentence. Such behavior is directly relevant to the harsher, mandatory-minimum penalty imposed when the safety-valve provision is inapplicable.").

209. *See* Robinson, *supra* note 196, at 186 ("To reduce judicial sentencing discretion, some jurisdictions have adopted mandatory minimum sentences that set a floor below which a sentencing judge cannot go.").

210. *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 501–02 (1992) ("Under the federal sentencing guidelines system, judicial discretion in selecting sentences is tightly structured: Sentences are determined by the combined consideration of the offender's criminal history, the offense or offenses for which the offender is convicted, and characteristics of the offense conduct.").

211. United States v. Yepez (*Yepez II*), 704 F.3d 1087, 1099 (9th Cir. 2012) (Wardlaw, J., dissenting) ("Permitting district courts to credit state court orders retroactively modifying probationary sentences does not somehow allow state courts to usurp the sentencing power of the federal judiciary.

in his dissent in the first *Yepez*, "The troubling effect . . . is a state court that will decide whether imposing that mandatory minimum [in federal court] is appropriate."[212] It is troubling that a state court can retroactively alter a defendant's probation term specifically to drive down the defendant's criminal history points in an effort to grant a federal judge more discretion in sentencing. A state judge should not have the power to decide the amount of discretion afforded the federal judge—again, that is the legislature's role.

B. PROPOSAL: STATE COURT NUNC PRO TUNC ORDERS SHOULD NOT AFFECT A DEFENDANT'S CRIMINAL HISTORY POINTS IF ISSUED FOR REASONS UNRELATED TO INNOCENCE

The concerns discussed above suggest that a federal court should only credit a state court's retroactive termination of a defendant's probation when the state court has committed some error in the conviction or sentencing of the defendant for the earlier offense, considered independently of the defendant's new federal charges. A state court's failure to anticipate the effect of a state sentence on federal mandatory minimums for a future crime is not such an error. As a bright line rule, a federal court should look at the length of the sentence given, not the sentence the defendant ended up serving, to determine whether a term of probation is a "sentence" under the Guidelines. This approach to criminal history point calculations would bring the Ninth Circuit in line with the other circuits and eliminate inconsistencies within the Ninth Circuit.

Unlike the haphazard rules that must be gleaned from the current string of Ninth Circuit cases, this proposal would provide a clear and consistent rule for district courts to follow: unless the state court has erred, the state court's retroactive modifications of an offender's sentence never affect the offender's safety valve eligibility in federal court, and the federal court now sentencing the offender must assign him two criminal history points if he committed his current offense while on probation.[213] Let us explore a hypothetical:

Quite the opposite is true. Allowing federal courts the discretion to credit such orders enhances the sentencing discretion of federal judges."), *cert. denied*, 133 S. Ct. 2040 (2013); United States v. Alba-Flores, 577 F.3d 1104, 1112 (9th Cir. 2009) (Kozinski, C.J., dissenting) ("The majority is wrong to cast aspersions on this salutary practice.").

212. United States v. Yepez, 652 F.3d 1182, 1200–01 (9th Cir. 2011) (Timlin, J., dissenting), *rev'd en banc*, 704 F.3d 1087 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2040 (2013).

213. This proposal may be the de facto reality in the Ninth Circuit following *Yepez II*. However, because *Yepez* does not articulate this bright line rule outright and *Mejia* is still good law, whether this proposal is in fact law is an open question.

Jesse, eighteen years old at the time, pleads guilty in January 2012 to driving his Toyota Tercel with a suspended license,[214] and a California court sentences him to three years of probation for this state crime. In January 2014, he pleads guilty to smuggling over fifty grams of methamphetamine into the United States, which is a federal crime.[215] All things unchanged, at his sentencing hearing for the federal offense, he will receive one point for having a prior sentence.[216] He will also receive two points for committing his federal drug crime while under his probation sentence.[217]

If, before his sentencing, Jesse obtains a state nunc pro tunc order retroactively terminating his probation on the day before his federal offense in 2014,[218] then he will still receive one point for having a prior sentence because he had been sentenced to over a year of probation, and in fact served over a year of that probation.[219] He will also receive two additional points for committing the instant offense while under a criminal justice sentence because he was under a probation sentence when he smuggled methamphetamine into the country.[220]

Even if Jesse obtains a state nunc pro tunc order retroactively terminating his probation in September 2012,[221] then Jesse still gets the single point for having a prior offense because he was sentenced to a term of probation of over a year.[222] He would also get two points for committing the current offense under a criminal justice sentence because he committed his federal crime under a probation term of over a year,[223] and the federal court should not credit the state court's order unless it was issued for reasons related to his innocence or legal error.

If Jesse had committed his federal offense in September 2012 instead

214. This is one of the crimes enumerated in the sentencing guidelines that would be limited by section 4A1.2(c). U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c) (2012).

215. 21 U.S.C. §§ 952, 960 (2006 & Supp. V 2011).

216. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(c).

217. *Id.* § 4A1.1(d).

218. *See* CAL. PENAL CODE § 1203.3 (West 2004 & Supp. 2013) (giving courts the authority to revoke, modify, or change orders of suspension of imposition or execution of sentence).

219. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(c).

220. *Contra* United States v. Yepez, 652 F.3d 1182, 1190 (9th Cir. 2011) ("Where . . . state laws permit the modification of ongoing terms of probation, principles of comity . . . require that the federal courts should, where possible, recognize state court actions terminating those probationary terms."), *rev'd en banc*, 704 F.3d 1087 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2040 (2013).

221. *See* CAL. PENAL CODE § 1203.3 (giving courts the authority to revoke, modify, or change orders of suspension of imposition or execution of sentence).

222. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(c).

223. *Id.* § 4A1.1(d).

of January 2014, and thus had yet to complete a year of his state probation sentence, and obtained the nunc pro tunc order either retroactively setting aside the guilty plea or terminating the probation retroactively on the day before he committed the federal crime, then he would get the single point for having a prior sentence because his original sentence was for over a year. He would also get two points for committing the current offense while under a criminal justice sentence, because at the time he committed the current offense, he had been on probation, and the federal court would not credit the state court's nunc pro tunc order in determining criminal history points.

Finally, if Jesse had his probation terminated shortly after receiving it in 2012, and then committed his federal crime at any point after that, Jesse would still receive a single point for a prior sentence because he was sentenced to a probation term of over a year.[224] But he would not receive two points for committing his crime under a criminal justice sentence[225] because at the time he committed the federal drug crime, he was no longer on probation. Thus, barring any other criminal history points, he would be eligible for safety valve relief because he would not have more than one criminal history point.[226]

Although this scheme successfully weighs principle over outcome to achieve a consistent sentencing regime, it has harsh real-world ramifications: Mejia should have received a criminal history point for having a prior sentence, and Yepez and Acosta-Montes were not eligible for safety valve relief.

C. LINGERING DOUBTS

This proposal brings with it a slew of lingering doubts that are difficult to negotiate. Firstly, principles of comity may dictate that federal courts should defer to state courts in determining whether a defendant was or was not on probation at any given time.[227] "Nunc pro tunc" means "a

224. *Id.* § 4A1.1(c). *Contra* United States v. Mejia, 559 F.3d 1113, 1116 (9th Cir. 2009) (explaining that Mejia should not have been assigned a criminal history point for his prior conviction).

225. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(d) (adding two points when the instant offense is committed while under a criminal justice sentence).

226. *See* 18 U.S.C. § 3553(f) (2012) (setting out the requirements for safety valve eligibility).

227. United States v. Yepez, 652 F.3d 1182, 1190 (9th Cir. 2011) ("By crediting state trial court terminations of ongoing probationary terms, federal courts respect the fundamental '[p]rinciples of comity and federalism [that] counsel against substituting our judgment for that of the state courts' which are actually supervising the individuals on probation." (alterations in original) (quoting Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir.2004))), *rev'd en banc*, 704 F.3d 1087 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2040 (2013). *See also* Younger v. Harris, 401 U.S. 37, 44 (1971) (addressing the

thing is done now, which shall have same legal force and effect as if done at time when it ought to have been done."[228] A state court is well within its rights to use a nunc pro tunc order to give effect to the express statutorily granted authority it has to modify the terms of a probation it is supervising. In fact, the California Penal Code seems to grant this authority broadly to serve the "ends of justice."[229] There is an argument to be made that, regardless of intentions, such a nunc pro tunc order should affect subsequent sentencing because what a state court is altering here is not the facts as they were at the time of the federal offense, but rather the legal consequences of the defendant's state conviction.

Further, allowing for judicial discretion by giving full effect to state court nunc pro tunc orders might lead to more desirable outcomes. Doing so does not bar federal courts from imposing sentences equivalent to or greater than the mandatory minimum. While it is true that state court nunc pro tunc orders might increase the level of judicial discretion at the federal level in these cases, federal judges would merely be given the latitude to decide whether an offender's criminal history warrants safety valve relief. If the conditions surrounding either crime are serious enough, the judge remains free to hand out an appropriately severe sentence. What crediting the state court nunc pro tunc termination of the defendant's probation *does* prevent is the situation the district court faced in *Yepez*, in which the district court judge felt compelled to impose a sentence he himself, faced with the actual defendant before him, felt was grossly unfair.[230]

Statutory language itself suggests that there should always be a degree of judicial subjectivity. The United States Code reads as the following:

> Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

nature and importance of comity between federal and state courts).

228. United States v. Allen, 153 F.3d 1037, 1044 (9th Cir. 1998) (quoting BLACK'S LAW DICTIONARY 964 (5th ed. 1979)).

229. *See* CAL. PENAL CODE § 1203.3(a) (West 2004 & Supp. 2013) (giving courts the authority to revoke, modify, or change orders of suspension of imposition or execution of sentence).

230. *See supra* text accompanying note 100.

> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .[231]

Thus, some form of judicial discretion in mandatory sentencing is not completely contradictory to the federal sentencing structure. In fact, allowing state courts discretion in determining a defendant's safety valve eligibility abates problems such as the "cliff effect," in which "sharp differentials in sentences . . . result from mandatory minimum sentences that base their punishments upon small differences in offense conduct or criminal record."[232] Two defendants should not receive sentences with a seven-year differential based solely on the distinction that one of the defendants had driven with a suspended license a year beforehand.[233] Perhaps the most egregious problem stemming from denying effect to state court nunc pro tunc orders is that federal courts will continue to be forced to mete out sentences to real people that shock the conscience for the sake of maintaining consistency. For example, in *Yepez*, Yepez and Acosta-Montes—both nonviolent, non-"king pin," first-time drug offenders—would have to be given ten-year prison terms under this Note's proposal.

These legitimate criticisms suggest that the current intracircuit conflicts and any future intercircuit conflicts in addressing the effect of state court nunc pro tunc orders on federal sentencing should be dealt with by the legislature, not by judges.

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231. 18 U.S.C. § 3553(a). In her Yepez II dissent, Judge Wardlaw argues that

> fundamental principles of justice, federalism, and comity, as well as the rule of lenity and the parsimony principle of 18 U.S.C. § 3553(a), permit district courts to exercise their broad sentencing discretion when calculating criminal history scores for purposes of safety valve relief, and then to exercise that same discretion in determining the appropriate sentence length.

United States v. Yepez (*Yepez II*), 704 F.3d 1087, 1092 (9th Cir. 2012) (Wardlaw, J., dissenting), *cert. denied*, 133 S. Ct. 2040 (2013).

232. *See* Froyd, *supra* note 190, at 1490 (citing Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 NW. U. L. REV. 1574, 1579 (1997)).

233. *Compare* United States v. Yepez, 652 F.3d 1182, 1196 (9th Cir. 2011) (allowing safety valve relief for a defendant guilty of importing methamphetamine), *rev'd en banc*, 704 F.3d 1087 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2040 (2013), *with* United States v. Alba-Flores, 577 F.3d 1104, 1106 (9th Cir. 2009) (denying safety valve relief and upholding a ten-year sentence for a defendant guilty of importing methamphetamine).

VI. AN ALTERNATIVE PROPOSAL TO LEGISLATORS: CHANGE THE LANGUAGE OF THE SENTENCING GUIDELINES TO WIDEN THE SAFETY VALVE

State court nunc pro tunc orders are not the only tool judges have at their disposal to work around statutory sentencing minimums, and some commentators question whether mandatory sentences are, in fact, ever truly mandatory.[234] But these efforts on behalf of the judiciary to circumvent federal sentencing—such as state courts retroactively terminating probation terms to allow defendants safety valve eligibility—evidence a larger problem with the mandatory sentencing scheme as a whole. A significant population of legal experts, scholars, and members of the judiciary are against mandatory minimum sentencing, and this resentment compromises the integrity of the entire mandatory minimum sentencing structure.[235]

There are arguments that support mandatory sentencing. For example, in considering whether Congress has had an impact on public safety and crime through its role in passing mandatory minimum sentences, former United States Attorney Michael J. Sullivan stated at a 2009 congressional hearing that "[t]he answer to that question can easily be found in crime statistics and is buttressed by anecdotal story after story from across our nation. Crime rates over the past 30 years certainly paint a picture of continuing success of reducing crime and victimization through sound public policy."[236] Some studies have found that twenty to fifty percent of the decline in violent crime can be attributed to rising imprisonment.[237]

On the other hand, there are strong arguments that mandatory

234. For a discussion of how judges and lawyers circumvent mandatory minimum sentences, see generally Greenblatt, *supra* note 20 (providing a detailed discussion of the methods by which judges can avoid mandatory minimum sentences).

235. For example, one federal judge even resigned because he believed the Guidelines, mandatory at the time, were inappropriate. *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, http://www.nytimes.com/1990/09/30/us/criticizing-sentencing-rules-us-judge-resigns.html ("If I remain on the bench I have no choice but to follow the law . . . . I just can't, in good conscience, continue to do this.").

236. *Mandatory Minimums and Unintended Consequences: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 75 (2009) (statement of Michael J. Sullivan, Partner, Ashcroft Sullivan, LLC), *available at* http://judiciary.house.gov/hearings/printers/111th/111-48_51013.PDF. On the other hand, even though there has been a decline in crime in the U.S. since the 1990s, similar declines also happened in Canada when the prison population there was declining, so a conclusion that there is any substantial causal effect between rising incarceration and declining crime rates is somewhat suspect. Mauer, *supra* note 24, at 7.

237. William Spelman, *The Limited Importance of Prison Expansion*, *in* THE CRIME DROP IN AMERICA 97, 108 (Alfred Blumstein & Joel Wallman eds., 2000).

sentencing is undesirable and ineffective. An obvious criticism is that mandatory minimums impose a blanket sentence that can often be harsher than the situation calls for, hamstringing judges from applying appropriate sentences.[238] Moreover, there are indications that mandatory sentencing fails to achieve any tangible results. Increased frequency and duration of prison sentences are particularly ineffective at abating drug offenses. Because "there is a virtually endless supply of potential offenders in the drug trade," imprisonment of one dealer or smuggler merely creates an employment vacancy for the next dealer or smuggler.[239] The Guidelines themselves are supposed to embody all the philosophies of punishment—deterrence, rehabilitation, retribution, and incapacitation.[240] A probation term is ostensibly also meant to serve these punishment goals.[241] But the evidence does not show that mandatory penalties provide effective deterrents to crime.[242] Deterrence is probably especially ineffective under a punishment regime that is confusing even to lawyers and lawmakers.

These considerations suggest that an alternative solution—short of reducing the length of mandatory sentences—might be to change the

238. There are many examples of overly harsh sentences under mandatory minimum sentencing provisions. California's three-strikes statute, for example, "has resulted in sentences of twenty-five years to life for thefts of a pair of sneakers, $20 of instant coffee, a $30 toolbox, and pockets full of chocolate cookies." Lance Cassack & Milton Heumann, *Old Wine in New Bottles: A Reconsideration of Informing Jurors About Punishment In Determinate- and Mandatory-Sentencing Cases*, 4 RUTGERS J. L. & PUB. POL'Y 411, 434 (2007) (footnotes omitted). A federal judge described a case in which he had to impose a mandatory minimum sentence as "without question the worst case of my [judicial] career." Greenblatt, *supra* note 20, at 4 (quoting Benjamin Weiser, *A Judge's Struggle To Avoid Imposing a Penalty He Hated*, N.Y. TIMES, Jan. 13, 2004, http://www.nytimes.com/2004/01/13/nyregion/a-judge-s-struggle-to-avoid-imposing-a-penalty-he-hated.html?pagewanted=all&src=pm).

239. Mauer, *supra* note 24, at 7.

240. *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 29 (2003) (explaining that the Guidelines "mandate[] a comprehensive, hybrid philosophy that accommodates all four of the traditional purposes of sentencing. But the SRA does not specify priorities among these purposes . . . ."); Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043, 1071–77 (2003) (describing conflicts among the different punishment purposes).

241. Oleson, *supra* note 40, at 697 ("[I]n a case in which an offender is placed on probation, the partial deprivation of his liberty interests repays the debt he owes society (retribution), deters him from committing the crime again (specific deterrence), deters others like him from committing the crime (general deterrence), reduces his opportunity to commit the crime again (incapacitation), and provides him with necessary training, treatment, and guidance to reduce the likelihood of his reoffending (rehabilitation).").

242. Tonry, *supra* note 196, at 68 ("From the accounts of pockets being picked at the hangings of pickpockets in eighteenth-century England to the systematic empirical evaluations of the past 30 years, similar conclusions emerge. Mandatory penalty laws have not been credibly shown to have measurable deterrent effects for any save minor crimes such as speeding or illegal parking or for short-term effects that quickly waste away." (internal citations omitted)).

language of the safety valve provision to widen the valve. The legislature could remove entirely the language referencing criminal history points, and provide instead that defendants are ineligible for the safety valve if they have previously been convicted of a drug crime. In this manner, the mandatory sentence would capture recidivist drug offenders, but allow judicial discretion in situations where the offender has a criminal history for a crime that, in retrospect, may not warrant a defendant's exclusion from safety valve relief. Within this discretion, egregious offenders and "career criminals" might be eligible for safety valve relief, but judges faced with such criminals could still deal them an appropriately harsh sentence. In fact, the Guidelines would still inspire a harsh sentencing recommendation in the Presentence Report, from which the judge could vary.[243]

But the incentive to change the mandatory minimum sentencing scheme itself is weak.[244] Legislatures often succumb to pressures from the public to appear tough of crime.[245] Often, passing harsh sentencing laws seems more a reaction to public outrage than a measured attack on crime rates.[246] As representatives of the people, legislators are likely more often than not called upon to reduce judicial discretion rather than to enhance it.[247] Thus, any change in the mandatory sentencing model will have to spawn from a change in the collective mindset of the people the legislature represents.

243. *See supra* note 73 and accompanying text.

244. In fact, a November 2012 amendment to the Sentencing Guidelines Manual raises the floor of Guidelines range sentences to the minimum statutory sentence for any count in a multi-count conviction. For a discussion of this amendment, see generally Kevin Bennardo, *Sweeping Up Guideline Floors: The Misguided Policy of Amendment 767 to the U.S. Sentencing Guidelines Manual*, 60 UCLA L. REV. DISCOURSE 60 (2013) (describing unintended and undesirable effects of the amendment).

245. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 940 (2006) ("These laws satisfy outsiders' desire to bind judges and clamp down on leniency while, in effect, giving insider prosecutors more tools and charging options.").

246. *Id.* at 941 ("In California, for example, voters used a ballot initiative to pass a law generally banning plea bargaining in cases whose indictments or informations charge specified serious crimes. Also in California, voters put a tough three-strikes-and-you're-out initiative on the ballot, mandating twenty-five-year minimum sentences for three-time felons. The legislature had buried the bill in committee, but then twelve-year-old Polly Klaas was kidnapped, molested, and murdered. In the wake of this heinous crime, a total of 840,000 people signed petitions to put the initiative on the ballot. Bowing to this pressure, the legislature passed the law.").

247. *See* Christopher M. Alexander, Note, *Indeterminate Sentencing: An Analysis of Sentencing in America*, 70 S. CAL. L. REV. 1717, 1718 (1997) (discussing legislation that has increased the sentences for many crimes in response to public concerns).

VII. CONCLUSION

Giving full credit to state court nunc pro tunc orders during federal sentencing is apparently no longer the rule in the Ninth Circuit, but doing so may still be attractive to other circuits because it allows judicial discretion in extreme circumstances where discretion may indeed be warranted. But the statutory language is not instructive as to how district courts should credit a state court's retroactive termination of a term of probation in federal sentencing, and a scheme that allows state courts to determine federal sentencing discretion is a confusing and unsatisfying workaround. The rule this Note proposes—that federal courts should not credit a state court's retroactive termination of probation for reasons unrelated to innocence or error—gives district courts clear and principled instruction as to how to assign criminal history points in this narrow but significant situation. The problem for which crediting state courts' retroactive alterations of probation terms provides a fix is a problem that an elected legislature must solve, and this responsibility should not be foisted on the shoulders of the judiciary.