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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FRANCIS WILLIAM ROBERT  
DESMOND,

Petitioner,

v.

S. PEERY,

Respondent.

No. 2:16-cv-0621 AC P

ORDER

Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with an application to proceed in forma pauperis. Petitioner has consented to the jurisdiction of the undersigned magistrate judge for all purposes pursuant to 28 U.S.C. § 636(c) and Local Rule 305(a). ECF No. 4.

I. Application to Proceed In Forma Pauperis

Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. ECF No. 2. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

II. Petitioner’s Allegations

Petitioner pled guilty to transportation of methamphetamines and having three prior felony convictions. ECF No. 1 at 1, 4, 14, 18. The judgment of conviction was entered on September 6,

1 2013, and petitioner did not appeal. Id. at 1. He alleges that as a result of Proposition 47, two of  
2 his prior convictions were reduced to misdemeanors and he is being subjected to double jeopardy  
3 because he is “s[e]rving ‘2’ years for those prison priors that are now misdemeanors.” Id. at 4.

4 III. Discussion

5 Rule 4 of the Habeas Rules Governing Section 2254 Cases requires the court to  
6 summarily dismiss a habeas petition “[i]f it plainly appears from the petition and any exhibits  
7 annexed to it that the petitioner is not entitled to relief in the district court.” As set forth below,  
8 the petition fails to state a cognizable claim for relief and will be dismissed.

9 California Penal Code § 667.5 is a recidivist statute that provides for the “[e]nhancement  
10 of prison terms for new offenses because of prior prison terms.” At the time petitioner was  
11 sentenced, he had three prior felonies that resulted in an enhanced sentence on the current offense  
12 under § 667.5. ECF No. 1 at 4, 18. To the extent petitioner argues the enhancement constitutes  
13 double jeopardy, he fails to state a claim.

14 It is true that the “Double Jeopardy Clause protects against . . . the  
15 actual imposition of two punishments for the same offense.” Witte  
16 v. United States, 515 U.S. 389, 115 S. Ct. 2199, 2204, 132 L. Ed.2d  
17 351 (1995). But although the three-strikes statute might seem to  
18 violate this principle, the Supreme Court has long since determined  
19 that recidivist statutes do not violate double jeopardy because “the  
20 enhanced punishment imposed for the later offense ‘is not to be  
21 viewed as either a new jeopardy or additional penalty for the earlier  
22 crimes,’ but instead as ‘a stiffened penalty for the latest crime,  
23 which is considered to be an aggravated offense because a  
24 repetitive one.’” Id. 115 S. Ct. at 2206 (quoting Gryger v. Burke,  
25 334 U.S. 728, 732, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948)); see also  
26 Spencer v. Texas, 385 U.S. 554, 559-60, 87 S. Ct. 648, 17 L. Ed.2d  
27 606 (1967); Moore v. Missouri, 159 U.S. 673, 16 S. Ct. 179, 40 L.  
28 Ed. 301 (1895).

22 United States v. Kaluna, 192 F.3d 1188, 1198-99 (9th Cir. 1999) (alteration in original).

23 Petitioner’s claim related to the reduction of his felonies to misdemeanors under  
24 Proposition 47 also fails to state a claim. “Proposition 47 changed portions of the Penal Code to  
25 reduce certain theft-related offenses from felonies or wobblers<sup>[1]</sup> to misdemeanors, unless the  
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27 <sup>1</sup> “Wobblers” are crimes that “are chargeable or, in the discretion of the court, punishable as  
28 either a felony *or* a misdemeanor.” People v. Park, 56 Cal. 4th 782, 789 (Cal. 2013) (emphasis in  
original) (citations omitted).

1 offenses were committed by certain ineligible offenders. Proposition 47 also created a procedure  
2 making those changes available to offenders who had previously been convicted of reclassified  
3 offenses.” People v. Jones, 1 Cal. App. 5th 221, 228 (Cal. Ct. App.) (citations omitted), petition  
4 for review granted on other grounds, 208 Cal. Rptr. 3d 281 (Cal. 2016). According to the  
5 petition, petitioner took advantage of the procedure for reclassifying previous offenses and had  
6 two of his three prior felonies reclassified as misdemeanors. ECF No. 1 at 4. He argues that  
7 because his prior felonies are now misdemeanors, the § 667.5 enhancements based on those  
8 offenses should be stricken. Id.

9 “[I]t is not the province of a federal habeas court to reexamine state-court determinations  
10 on state-law questions.” Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Middleton v. Cupp, 768  
11 F.2d 1083, 1085 (9th Cir. 1985) (habeas relief “is unavailable for alleged error in the  
12 interpretation or application of state law”). This principle encompasses the interpretation or  
13 application of state sentencing laws. Miller v. Vasquez, 868 F.2d 1116, 1118-19 (9th Cir. 1989)  
14 (declining to address “[w]hether assault with a deadly weapon qualifies as a ‘serious felony’  
15 under California’s sentence enhancement provisions [because it] is a question of state sentencing  
16 law”). In this case, whether reclassifications granted under Proposition 47 can be applied  
17 retroactively to invalidate sentencing enhancements under § 667.5 is a question of state law<sup>2</sup> and  
18 therefore not cognizable in federal habeas. Accordingly, the petition will be dismissed for lack of  
19 jurisdiction.

#### 20 IV. Certificate of Appealability

21 Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, this court must  
22 issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A  
23 certificate of appealability may issue only “if the applicant has made a substantial showing of the

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24 <sup>2</sup> A number of state courts of appeal have answered this question in the negative. See, e.g.,  
25 People v. Jones, 1 Cal. App. 5th 221, 229-30 (Cal. Ct. App. 2016) (Fourth District, Division 2  
26 finding the enhancement is not invalidated); People v. Ruff, 198 Cal. Rptr. 3d 704, 714 (Cal. Ct.  
27 App. 2016) (Fifth District finding same); People v. Williams, 199 Cal. Rptr. 3d 755, 759 (Cal. Ct.  
28 App. 2016) (Second District finding same). The issue is currently pending before the California  
Supreme Court. People v. Johnson, 8 Cal. App. 5th 111, 117 n.3 (Cal. Ct. App. 2017) (noting  
issue is currently pending review in the California Supreme Court).

1 denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). For the reasons set forth in this order, a  
2 substantial showing of the denial of a constitutional right has not been made in this case.

3 Therefore, no certificate of appealability should issue.


4 V. Plain Language Summary of this Order for a Pro Se Litigant

5 Your petition is being dismissed because the state court’s decision that the reclassification  
6 of your felonies does not invalidate the sentence enhancement does not state a federal claim.

7 Accordingly, IT IS HEREBY ORDERED THAT:

- 8 1. The request to proceed in forma pauperis (ECF No. 2) is granted.
- 9 2. Petitioner’s application for writ of habeas corpus (ECF No. 1) is dismissed for lack of  
10 jurisdiction.
- 11 3. This court declines to issue the certificate of appealability referenced in 28 U.S.C. §  
12 2253.

13 DATED: October 10, 2017

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15 ALLISON CLAIRE  
16 UNITED STATES MAGISTRATE JUDGE  
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