Federal-State Judicial Comity: A One-Way or Two-Way Street?

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Federal-State Judicial Comity: A One-Way or Two-Way Street?

By Russell M. Coombs

In July of 2011 the United States Court of Appeals for the Ninth Circuit handed down a decision in *United States v. Yepez*\(^1\) treating comity between federal and state courts as a one-way street on which only state courts receive comity, and federal courts receive its opposite. The *Yepez* decision requires federal district courts to give comity even to state courts’ decisions that purposefully obstruct applications of federal statutes governing sentencing in federal cases, and that thus give federal courts’ pending proceedings the opposite of comity.\(^2\) This Article describes the facts, procedural history, outcome, and judicial reasoning in *Yepez*; criticizes the Ninth-Circuit panel’s majority decision; applauds the wisdom of the United States Justice Department’s continuing opposition to this decision; and proposes legislation that would require federal courts to apply a more balanced and reasonable version than the Ninth Circuit’s of traditional doctrines of comity.

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\(^1\) 652 F.3d 1182 (2011).

\(^2\) *See generally* Minpeco, S.A. v. Conticommodity Services, Inc., 116 F.R.D. 517, 526 (S.D.N.Y. 1987) (referring to “the very opposite of comity”). The Ninth Circuit is widely perceived to be extremely favorable to criminal suspects, defendants and convicts in a variety of contexts. *See, e.g.*, Michael Mello, *Nine Scorpions in a Bottle*, 44 No. 1 CRIM. L. BULLETIN ART 1 (2008) (stating that in cases on criminal law and procedure “the Ninth continues to be the most reversed circuit in the land”); Gillian T. DiFilippo, *Tossing Its Hat in the Ring: With Summerlin v. Stewart, the Ninth Circuit Exposes the Harmful Ambiguity Caused by Ring v. Arizona*, 53 CATH. U. L. REV. 1091, 1120 n.194 (2004) (stating that “the Ninth Circuit has received criticism for its controversial rulings, and the Supreme Court has reversed a number of its decisions”). The *Yepez* case is not merely a typical example of decisions that might contribute to this perception. Instead, it is an unusually extreme example, one that this Article argues should be further challenged in the courts by the Justice Department, and now should be abrogated by enactment of a contrary federal statute.
The facts in Yepez underlie two criminal cases that originally were separate, but that the Ninth Circuit eventually consolidated for appellate consideration. In one case the defendant’s last name was Yepez, and in the other Acosta-Montes. The facts of these two cases were strikingly similar.\textsuperscript{3}

In each case the defendant was adjudged guilty in a state court of violating a California criminal statute, and the state judge sentenced the convict to probation. In each case, one of the conditions of probation was that the convict not commit another federal or state crime during the period of probation. Each convict soon violated this condition, by committing the federal felony of smuggling methamphetamine into the United States. Each convict was convicted of this new felony on a guilty plea in a federal district court within California. In Yepez’s case the quantity of methamphetamine was more than seven kilograms.\textsuperscript{4} In Acosta Montes’s case, it was about 3.3 kilograms.\textsuperscript{5} These large quantities of this extremely dangerous drug are legally very significant, because federal sentencing law by statute requires longer prison terms for large quantities than for smaller.\textsuperscript{6} In each of these two federal cases, a probation officer prepared a presentence report and provided it to the court and to the parties. Each presentence report correctly calculated the statutorily required prison term that would apply to the federal offender based largely on the nature and quantity of the smuggled drug -- at least ten years, instead of the much lower

\textsuperscript{3}The following description of the facts is based on the relevant parts of the opinion of the Yepez majority, 652 F.3d at 1185-99. The dissenter did not express substantial disagreement with the majority’s account of the facts of the case. \textit{Id.} at 1199-1202.

\textsuperscript{4}\textit{Id.} at 1185.

\textsuperscript{5}\textit{Id.} at 1187.

minimum sentence that would have been applicable had the quantity of this drug been much smaller.

When each of these convicts received the federal presentence report, he promptly went to state court to seek a retroactive termination of his state probation. He formally notified the state judge who had imposed the probation that, during its term, the convict had been convicted of a federal felony committed during the period of probation. The convict informed the state judge that under a federal statute, because of the state-court probation at the time the convict committed the federal felony, he was ineligible for application of a federal statute providing under specified circumstances what is known as “safety-valve relief” from the ten-year minimum term of imprisonment prescribed by statute for the methamphetamine felony. The convict asked the state judge to terminate the state-court probation retroactively to one day before the convict’s commission of the federal felony, expressly basing this request on such a state-court order’s perceived effect of mitigating the federal-court sentence otherwise required by the applicable

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7 Acosta-Montes went further. He even “sought and received a continuance of his [federal] sentencing date” as an aid to his seeking and obtaining the state judge’s order retroactively ending his probation. 652 F.3d at 1187.

8 This “safety-valve” provision is codified as 18 U.S.C. § 3553(f) (2006). It applies to a federal offender only when all of five requirements are satisfied, one of which is that “the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines . . . .” Thus it is crucial to application of this statutory provision that § 4A1.1 of the guidelines provides that “the total points from subsections (a) through (e) [of this guidelines section] determine the criminal history category in the Sentencing Table . . . .” and that subsection (e) requires that one “add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release . . . [or] work release . . . .” U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2010). The offender, not the Government, has the burden to prove entitlement to the benefit of the “safety value” by a preponderance of the evidence. See George H. Newman, Fighting for the Safety Value Reduction (Without Cooperation), 33 CHAMPION 24, 25 & n.15 (March 2009) (citing several decisions of federal courts of appeal).
federal statutes. Each state judge granted this request. Then each convict informed the federal judge of this retroactive termination of state probation, and requested a safety-valve sentence below the ten-year minimum.

In Acosta-Montes’s case, the federal district judge granted the convict’s request and sentenced him to only forty-six months in prison, rather than 120 months or more; the Government took an appeal to the Ninth Circuit. However, in Yepez’s case a different federal district judge refused the convict’s request, and sentenced him to what the judge deemed to be the applicable mandatory minimum of ten years in prison; the convict appealed to the Ninth Circuit. There the court consolidated the two cases. The three-judge panel to whom the two cases were assigned received briefing and argument, and then affirmed Acosta-Montes’s forty-six-month sentence and reversed Yepez’s ten-year sentence, ruling in favor of both of these convicts. The Ninth-Circuit panel thus created a precedent favorable to all offenders who later may come before federal district courts under similar circumstances.

The Ninth-Circuit panel’s majority of two judges provided the following explanation of its decision. “‘[C]omity between state and federal courts . . . has been recognized as a bulwark of the federal system.’”9 A California state statute gives a state judge supervising a state probationer “wide latitude”10 to terminate retroactively the term of probation previously set, and judges did so for the two offenders in this case. They did this after hearing the offenders’ arguments that denying such retroactive termination of state probation would maintain their exposure to severe federal sentences. Federal district courts “in calculating criminal history

9United States v. Yepez, 652 F.3d 1182, 1185 (9th Cir. 2011) (quoting Allen v. McCurry, 449 U.S. 90, 96 (1980)).

10United States v. Yepez, 652 F.3d 1182, 1185 (9th Cir. 2011).
points for purposes of safety valve eligibility must credit state orders terminating probationary sentences,” 11 the panel wrote. The only issue as to each of these two offenders is whether or not he was “on probation when he committed his federal offense.” 12 “[R]equiring federal district courts to credit state court orders terminating . . . ongoing state probationary sentences enhances sentencing discretion for those very [federal] courts,” by freeing each federal judge from compulsion to impose a mandatory minimum period of imprisonment that some judges deem “grossly excessive.” 13 Despite such federal comity for retroactive termination of state-court probation, some harsh federal sentences may be still imposed, either because state-court judges who approve of harsh federal sentences may therefore deny requests for retroactive termination, or because even in the face of such termination a federal judge can impose a harsh sentence though no statute requires it. 14 No provision of the Federal Sentencing Guidelines nor of their Application Notes includes treatment of the specific issue of retroactive termination presented in these cases. Neither are there precedents in the Ninth Circuit or in other circuits directly on point.

Under these circumstances and for these reasons, the Ninth-Circuit majority in Yepez chose to require federal-court comity for the state courts’ retroactive terminations benefiting these two offenders, reminding the reader that doing so gives federal judges “additional

11 Id.

12 Id. at 1188.

13 Id. at 1191.

14 Id.
sentencing discretion” to be lenient.\textsuperscript{15}

The panel’s dissenting judge disagreed with the outcome the majority produced, and with its reasons for that outcome. The dissenter found unpersuasive “the majority’s reliance on principles of comity and federalism,” wrote that the conduct of the attorneys for these two offenders “reeks of the ‘... odor of gaming the federal sentencing system ...’,” and noted that just as “federal courts should generally avoid interfering with state court proceedings ...,” [likewise] state courts should generally avoid interfering with federal court proceedings.”\textsuperscript{16} The dissenter criticized the majority’s view that state-court judges making decisions like the ones in this case can adequately evaluate the need for harsh federal sentences, by noting that “federal prosecutors may not be able to participate in the state court proceeding.”\textsuperscript{17}

This dissent is more than adequate to refute the analysis of the Yepez majority, but I add the following points that, in my view, make the refutation even stronger. First, if these two persons convicted of committing violations of state criminal law had felt worthy of having their periods of probation shortened, they could have made such requests to the state courts before committing their federal felonies, or after committing them but before being convicted of doing so and thus while still presumed innocent of the federal crimes, or at the latest after being convicted but before learning of the enhanced federal sentences they had earned. Their failure to take any of these steps makes it especially clear that these offenders and their attorneys sought the relief the state judges gave them not because they ever thought they had earned it, but only to

\textsuperscript{15}Id. at 1199. In the text here I mention only discretion to be lenient, because the kind of comity required by the Yepez precedent does not add discretion to be harsh.

\textsuperscript{16}Id. at 1200 (quoting United States v. Alba-Flores, 577 F.3d 1104, 1111 (2009)).

\textsuperscript{17}Id. at 1201.
prevent application of the federal statute requiring severe sentences.

Second, the authorities concerning comity that the Yepez majority cited, and others that it did not cite, include limitations the majority failed to apply or, usually, even to notice. For example the majority quoted, from the Supreme Court’s Younger v. Harris opinion, references to comity “in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government . . . will not unduly interfere with the legitimate activities of the States.” 18 These two references to states’ “legitimate” interests and activities hardly cover the state judges’ deviations in these two cases not only from respect for application of federal sentencing statutes, but also (for reasons explained below) from California law and practices on the consequences in the state’s own courts of committing and being convicted of crimes while on state probation.

As to the first of my two points, legal scholars have written that courts of one forum often deny comity to foreign judicial proceedings on bases such as the forum’s public policy and potential prejudice to the forum’s interests. 19 For example, Dr. D’Alterio of the University of Rome’s Faculty of Law wrote a long article making the following statements, among others. Comity must be “based upon mutual respect, hence the link between comity and the reciprocity principle.” 20 “[J]udicial comity would include a reciprocity principle or technique that that allows one system to apply the decision of a foreign judge, only when the judicial system of that

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18 Id. at 1190, quoting Younger v. Harris, 401 U.S. 37, 44 (1971).
judge recognizes and directly enforces the decisions (and the law) of the first system . . .”\(^{21}\)

Not only scholars, but also many courts have written about various limitations on comity. Comity is “reciprocal.”\(^{22}\) It should be afforded “unless there are good reasons” not to afford it.\(^{23}\) Comity is a “principle of *mutual* convenience whereby one state or jurisdiction will give effect to the . . . judicial decisions of another. [A party] is not entitled to the application of comity as a matter of right but only as a courtesy if the trial court in its discretion chooses.”\(^{24}\) “Comity allows the courts of one jurisdiction to give effect to laws [and resulting judicial orders] of another jurisdiction out of deference and respect, considering the interests of each [jurisdiction].”\(^{25}\) “Comity . . . [will be granted to] decisions of courts of [other jurisdictions] . . . if it be found that they do not conflict with the local law . . . or violate the public policy of [our own

\(^{21}\) *Id.* at 400. The parenthetical phrase “and the law” appears in the D’Alterio article itself; it was not added by the author of this article.

\(^{22}\) *Zerbst v. McPike*, 97 F.2d 253, 254 (5th Cir. 1938).


\(^{24}\) *New Process Steel Corp. v. Steel Corp. of Texas*, 638 S.W.2d 522, 524 (Tex. Ct. App. 1982) (emphasis added). *See also* *BP Oil Supply Company*, 317 S.W.3d 915, 918-20 (Tex. Ct. Appl. 2010) (stating that comity must be “mutual,” must be limited by the state’s “due regard to the rights of its own citizens,” does not include “the right of any other state to hinder its own sovereign acts or proceedings,” applies only “where the states agree about the public policy at issue,” and should not be extended “to another state so long as that state declines to extend comity to Texas or other states under the same or similar circumstances”); *Smith v. Firemens Ins. Co. of Newark, New Jersey*, 590 A.2d 24, 27 (Pa. Super. Ct. 1991) (stating that comity “is the principle that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state out of deference and mutual respect”); *BLACK’S LAW DICTIONARY* 284 (8th ed. 2004) (stating that comity is a “practice among political entities (as . . . courts of different jurisdictions), involving esp. mutual recognition of . . . judicial acts”).

Comity is appropriate “between states that observe such neighborly amenities. It implies mutuality and reciprocity.”

Because comity is grounded in cooperation and mutuality, Texas should extend comity by recognizing the laws and judicial decisions of other states unless: (1) the foreign state declines to extend comity to Texas or sister states under the same or similar circumstances; or (2) the foreign statute produces a result in violation of this state’s own legitimate public policy.”

In light of the many and varied limitations on the doctrine of comity, this doctrine “does not compel a particular course of action but, instead, constitutes an expression of a [jurisdiction’s] ‘entirely voluntary decision’ to defer to the policy of another jurisdiction . . ..”

“[S]tates do not acknowledge the right of any other state to hinder its own . . . proceedings.”

In my view, deferring to another jurisdiction’s policy and law is surely the opposite of deliberately obstructing their application the way the state judges did in favor of Yepez and Acosta-Montes, and then the Ninth Circuit did in its Yepez decision by requiring federal “comity” to these state judges’ decisions.

As to my second point, the extreme inappropriateness -- perversity may not be too strong a word -- of the Ninth Circuit’s extension of so-called comity in the circumstances of its Yepez decision becomes especially clear when one observes that the state trial-court decisions for which

27 Mosko v. Matthews, 284 P. 1021, 1023 (Colo. 1930).
the federal court of appeals required “comity” in this case not only interfered with application of federal statutory law, but also conflicted with the state courts’ application of the state’s own law and policy and with its courts’ normal practices. For the reasons presented just below, these state trial courts did not only engage in intentional obstruction of federal courts’ application of federal law and policy. These state trial courts also acted inconsistently with the state of California’s own law, policies, and normal practices.

As Professor LaFave and his co-authors write in a leading treatise on the law of criminal procedure, throughout the United States “one standard probation condition is that the defendant not commit another crime . . .” 31 This appears true of California law and practice, since a California court granting probation “has broad discretion to impose conditions of probation,” 32 and in California courts “[m]ost probation revocations result from new criminal conduct by the defendant.” 33 A California Rule of Court authorizes a state court that has placed a convicted offender on probation, when it learns that the offender has violated one of the important conditions such as refraining from committing another crime during the period of release, to “make any disposition of the case authorized by statute.” 34 Thus the court can revoke the release and confine the offender, or at least lengthen the probation and/or revise the conditions by

31WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.10(c) (2010).

32LAURIE L. LEVENSON, CALIFORNIA CRIMINAL PROCEDURE § 25.19 (2011). See also West’s ANN. CAL. PENAL CODE § 1203.1(a) (2012) (providing that “the court . . . in the order granting probation, may suspend the imposing or the execution of the sentence . . . for a period of time not exceeding the maximum possible term of the sentence, except as hereinafter set forth, and upon those terms and conditions as it shall determine”).

33LAURIE L. LEVENSON, CALIFORNIA CRIMINAL PROCEDURE § 25.29 (2011).

making them more restrictive of the offender’s conduct, and thus more punitive.\textsuperscript{35} A California statute does also provide that “[t]he court may at any time . . . terminate the period of probation, and discharge the person so held,” but it limits such authority to a case where “the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it.”\textsuperscript{36} Commission of an especially serious federal felony hardly fits within the phrase “good conduct and reform of the person so held on probation.”

Not only do these California laws exist, but the practice of California state courts has been very frequently not to reduce the length of time the release conditions apply to the offender, nor to reduce the restrictiveness of the conditions, as a consequence of the offender’s having violated the condition that he or she refrain from committing another crime during the period of release (or even violating a less vital condition). On the contrary the prevailing practice has been to lengthen the period of time, or to make the conditions more restrictive, or both -- or very often to revoke the probationary release and require the offender to serve a period of state confinement.\textsuperscript{37}

\textsuperscript{35}\textit{See} \textsc{West’s Ann. Cal. Penal Code} § 1203.2(a) (2012) (providing that “at any time during the probationary period . . . the court may revoke and terminate such probation if the interests of justice so require and the court . . . has reason to believe . . . that the person has violated any of the conditions . . . or has subsequently committed other offenses . . .”). \textit{See also} People v. Cookson, 820 P.2d 278, 281 (Cal. 1991) (stating that “a court may . . . extend the probationary term”).

\textsuperscript{36}\textsc{West’s Ann. Cal. Penal Code} § 1203.3(a) (2012). A closely related provision is that “upon . . . the fulfillment of all conditions of probation, probation shall cease at the end of the term of probation, or sooner, in the event of modification.” \textsc{West’s Ann. Cal. Penal Code} § 1203.1(j) (2012) (emphasis added).

For these reasons, the California state courts’ treatment of the two offenders in the Ninth Circuit’s Yepez case not only interfered with application to them of the federal sentencing statute, but also prevented application to them of the normally-applied law and practice of the state of California itself. Since a decision about comity often depends heavily on the reasonableness of the judicial decision for which comity is sought, the state courts’ decisions not merely to obstruct application of federal law, but also to refuse to apply the state’s own law and practices, greatly weaken any argument that the Ninth Circuit’s demonstration of “comity” on this occasion was appropriate.

The inference seems obvious and strong that the Ninth Circuit in Yepez ignored the Government’s appellate arguments, and the arguments of the court’s own dissenter -- and perhaps those I added above -- not in order to make a reasonable application of principles of comity or even a barely plausible one, but instead merely in order to block application of a federal sentencing statute that two federal appellate judges simply considered too harsh to suit their ideas of sound policy.

I do not blame these defendants’ attorneys for seeking such orders from the state courts, and then seeking the lenient federal sentences the Ninth Circuit required. A defense attorney has a duty to the client to seek the most favorable outcome that is plausible, and the Ninth Circuit’s
Yepez decision shows that the outcome obtained did indeed turn out to be even more than plausible, in fact if not legally. However, I blame the state courts for violating established principles of comity, which have treated it as a two-way street. I am even more critical of the Ninth Circuit majority in this case for ignoring the state courts’ own violations of comity related to these two offenders, and for thus using so-called “comity” to respect such state-court interference with the application of federal law. The Federal Sentencing Guidelines are only advisory, but federal statutes setting mandatory minima and maxima for sentences are legally binding. The Ninth Circuit violated the federal statutes applicable to the two cases it disposed of in Yepez.

The Justice Department has sought further review of this decision by the en banc Ninth Circuit. I hope that, if that request is denied, the Department will seek review by the Supreme Court.

One might imagine that such further review would be unimportant, perhaps based on the notion that cases with facts and outcomes like those in Yepez are very unlikely to recur. Indeed, neither the majority nor the dissent in Yepez cited any other case in which a convict had used the same method for the same purpose and with the same result, and my own research has not identified such a case.

However, existence of the Yepez precedent will invite defense attorneys to use the same methods in future cases in which there is comparable criminal conduct by convicted offenders on

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40 United States’ Pet. for Reh’g En Banc, United States v. Yepez et al., 09-50271 & 09-50409, 9/02/2011.
probation or other kinds of punitive release; it will invite state courts to reward such lawyering tactics; it will require federal district courts in the Ninth Circuit similarly to reward repeat offenders convicted of federal felonies so serious as to be covered by mandatory minima; and it will tempt federal district courts and courts of appeals in other circuits to follow the Ninth Circuit’s deplorable example.

These things can happen in very numerous cases. The federal statutes under which Yepez and Acosta-Montes were convicted, 21 U.S.C. §§ 952 and 960, impose mandatory minimum sentences for convictions involving specified quantities not only of methamphetamine, but also of various other drugs including heroin, cocaine, PCP, LSD, and marihuana. Also, §§ 952 and 960 are not the only federal criminal statutes prescribing mandatory minimum penalties to which the “safety valve” provisions apply. These provisions expressly apply also to the minimum penalties required in 18 U.S.C. §§ 841, 844, 846, and 963, each of which likewise covers a variety of drugs. More than that, under all these statutes the mandatory minima can be triggered not only by state probation as in Yepez’s and Acosa-Montes’s cases, but also by the offender’s being “under any criminal justice sentence, including [not only] probation [but also] parole, supervised release . . . [or] . . . work release . . .”

Each year there are very many federal prosecutions, convictions and sentences under all these statutes, and often the quantities of drugs make mandatory minimum sentences applicable to the offenders. In my research on this topic I have not found any state other than California in

41U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(d) (2010).

which the law of the state where the federal offender committed a previous crime -- some aspect of the sentence for which (such as, in the cases of Yepez and Acosta-Montes, their being still on probation at the time of their new federal crimes) contributed to the offender’s being subject to a federal mandatory minimum sentence -- permits the state court that imposed that state sentence to do something analogous to what the state judges did for Yepez and Acosta-Montes as a method of attempting to prevent application to the offender of the otherwise-applicable federal minimum sentence. However, California is an extremely populous state in which crime rates are high so, even if no other state copies its law on this point, the Yepez precedent interferes substantially with application of federal law.

To turn from blaming for past events, to improving American law and thus enhancing protection of the American public from future crimes, I propose enactment by Congress of a statute prescribing a standard for when federal courts will and will not afford comity to state judicial proceedings.43

This would not be the first federal statute or other binding legal rule prescribing the extent and/or limits of federal courts’ extensions of comity to judicial proceedings of other jurisdictions. For example, there is a federal statute prohibiting the bringing of certain kinds of federal and state judicial and administrative proceedings concerning specified kinds of firearms and ammunition, and including among the statute’s stated purposes preservation and protection of principles of comity between sister States.44 There also is a federal statute requiring each State or Territory to take specified steps regarding fugitives from the justice of another State or

43The statute probably should be broad enough to cover all federal judicial proceedings in civil as well as criminal cases, but this issue is beyond the scope of this Article.

Territory, and expressly relying on comity as a guide to interpretation of these requirements. Another federal statute limits judicial grants of prospective relief with respect to prison conditions according to “principles of comity” specified in the statute. A Federal Rule of Criminal Procedure imposes specified requirements on a federal magistrate judge when he or she modifies a previous release or detention order issued in another federal district, with an Advisory Committee Note explaining considerations of comity that underlie these requirements.

I suggest that consideration of enactment of a statute prescribing the extent and limits of extensions of comity by federal courts to state courts begin with introduction of a bill having the following language or words comparable to it: “Every court of the United States shall extend comity to the proceedings, decisions, orders and judgments of a court of a state if and only if doing so is reasonable under all the circumstances, including but not limited to the current, recent or past history of the extension of comity by the courts of the state to the laws, proceedings, decisions, orders and judgments of courts of the United States.”

This is just a draft of possibly appropriate statutory language. I hope that a committee or subcommittee of at least one House of Congress would hold hearings on the bill, and that legal experts and others would testify and perhaps suggest improvements to the above language. It thus may be desirable to revise this draft, and to create legislative history guiding its interpretation and application, before it is enacted. However, the Ninth Circuit has made it clear that a statute with this language or something quite similar is necessary.

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47 Fed. R. Crim. P. 40(c).
Some might question whether the Constitution gives Congress power to enact the statute I recommend. Congress quite clearly has very broad constitutional power, which it has exercised countless times, to regulate in many and varied ways numerous kinds of proceedings in and decisions of federal courts, as to substantive law, procedures, and remedies. However, one might imagine that the statute I recommend differs from many such existing federal statutes and rules in that, in a perhaps unusual way or to a perhaps unusual degree, it would place indirect pressure on state courts to perform their own legitimate functions in ways consistent with the language and interpretations of the proposed federal statute, so as not to risk rejections by federal courts of the results of the state courts’ performances of their functions.

In my opinion, the federal statute I propose falls well within congressional powers as traditionally understood, in part because many other federal statutes and rules can similarly tempt

48See, e.g., Paul Taylor, Congress’s Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today’s Congress and Courts, 37 PEPP. L. REV. 847 (2010). In the cited article, Mr. Taylor states with supporting authorities that “the Process Act of 1789, . . . enacted by the First Congress, dictated precisely what procedures would govern in federal courts, a power Congress was recognized as having under its legislative powers” (id. at 926); that this Process Act required federal-court procedures to correspond to the procedures “then in effect in the state courts of the state in which the federal court was situated” (id. at 885); and that “as the federal courts have said many times, the specific procedural rules employed can often dictate substantive results” (id. at 884). The creation from 1789 to the present of a very large number of federal statutes and rules prescribing substantive, procedural, and remedial law for application by federal courts makes it clear that Congress has plenary power to create such law (within other constitutional limits), that such law is no longer required to conform to the state law of the place where the federal court sits, and that such law nevertheless often includes crucial incorporations of state law. See, e.g., 18 U.S.C. §§ 1961-62 (2006) (federal substantive criminal prohibitions incorporating by reference state criminal laws, but also adding federal elements of the federal crimes); 18 U.S.C. §§ 3141-50 (2006) (prescribing substantive criteria for conditional release or detention of persons accused of federal crimes including the condition that the persons not commit a state crime during the period of conditional release, procedures for application of these criteria, and remedies for violations by such persons of federal laws and judicial orders, and making these prescriptions applicable also to criminal cases removed from state court to federal court).
state courts to make decisions in light of predictable consequences under federal law. For example, a federal criminal prohibition the elements of which expressly include specified state crimes can tempt state courts to interpret the state crimes narrowly so as to narrow the scope of the federal prohibition. Similarly, the federal statute requiring that one condition of a federal defendant’s release pending trial be not committing a state crime can tempt state courts to interpret state crimes narrowly to enhance the freedom of conditionally released federal defendants. Any perceived distinction between these existing laws and the statute I propose is insufficiently significant to support a conclusion that the proposed statute would exceed congressional power.

For all the reasons explained above, the Ninth Circuit created a clearly unsound and harmful precedent with its Yepez decision; the U.S. Justice Department should continue its commendable attempt to overturn that decision; and the Congress should enact legislation preventing another such decision, and otherwise codifying or even improving the law of federal-state judicial comity.

49 See, e.g., federal §§ 1961-62 cited in n.46 above.

50 See federal § 3142 cited in n.46 above.