Exhibit A

Case No. 16-10388

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, v. Gibran Richardo Figueroa-Beltran, Defendant-Appellant.	D.C. No. 2:15-cr-00176-KJD-GWF-1 (Las Vegas)

Appeal from the United States District Court
for the District of Nevada

Petition for Panel and En Banc Rehearing

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Statement in Support of Rehearing

The panel has asked the Nevada Supreme Court to decide the federal divisibility issue central to this appeal. This is unprecedented. This also violates the United States Supreme Court's clear directives.

In *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Supreme Court directed federal courts to apply a three-step analysis when assessing whether a state statute is divisible or indivisible. *Mathis* instructs federal courts to first consider the state's case law. *Id.* at 2256. If state case law does not "definitively answer[] the question," then federal courts are to consider the statutory language itself. *Id.* If the statutory language "fails to provide clear answers," federal courts may "peek" at the record documents. *Id.* at 2256-57. At the end of this inquiry, if federal courts still are not "certain" the statute provides alternative elements, the divisibility inquiry is over. *Id.* at 2257. *Mathis* does not mention—let alone provide as a step—certifying the divisibility inquiry to the state's highest court.

Violating *Mathis*, the panel sua sponte certified the divisibility inquiry in this appeal to the Nevada Supreme Court. *See United States v. Figueroa-Beltran*, --- F.3d ---, No. 16-10388, 2018 WL 2750775 (9th

Cir. June 6, 2018) (published order). The panel concluded Nevada case law on the divisibility of Nev. Rev. Stat. § 453.337 is "in conflict." *Id.* at *5. However, instead moving to *Mathis*'s second and third steps, the panel circumvented the divisibility inquiry and certified the entire inquiry to the Nevada Supreme Court.

The certification order violates *Mathis*'s three-step analysis, warranting panel rehearing. Fed. R. App. P. 40(a)(2). Rehearing en banc is warranted for the same reason. Fed. R. App. P. 35(a)(1), (b)(1)(A). The order also appears to be the first time a federal court has certified the divisibility inquiry to a state's highest court, presenting a question of exceptional importance. Fed. R. App. P. 35(a)(2).

Appellant Gibran Figueroa-Beltran requests the panel or en banc Court rehear this case and withdraw the certification order. *Klein v. United States*, 537 F.3d 1027, 1034 (9th Cir. 2008) (noting certification to a state's highest court is subject to "petitions for rehearing or rehearing en banc, or sua sponte calls for rehearing en banc, relating to" certification order); *see also Bassett v. Lamantia*, 858 F.3d 1201, 1204 (9th Cir. 2017) (noting certification of issue to state's highest order and stay of proceedings would be subject to a petition for rehearing).

Procedural History

Figueroa-Beltran appeals the sentence imposed after his illegal reentry conviction under 8 U.S.C. § 1326. Figueroa-Beltran's first claim challenges the district court's finding that his prior state conviction qualified as a "drug trafficking offense" and qualified for the sixteen-level sentencing enhancement in U.S.S.G. § 2L1.2(b)(1)(A) (2015). Specifically, he argues the district court erroneously concluded the statute of conviction, Nev. Rev. Stat. § 453.337, is divisible. OB, Dkt. #5, at 21-36; AB, Dkt. #15, at 9-22; RB, Dkt. #22, at 1-16; FRAP 28(j) Letters, Dkt. ##32, 33, 35, 36, 37.

The panel held oral argument and submitted the case for decision in August 2017. Dkt. #38. Almost ten months later, this panel issued an order certifying three questions to the Nevada Supreme Court. *Figueroa-Beltran*, 2018 WL 2750775, at *5. The certification order recognizes the panel "cannot say with confidence that the Nevada precedent definitively answers the question whether § 453.337 is divisible as to the identity of a controlled substance" because of a perceived conflict in Nevada case law. *Figueroa-Beltran*, 2018 WL 2750775, at *5. The order then asks the Nevada Supreme Court to

decide whether § 453.337 is divisible; whether *Sheriff v. Luqman*, 697 P.2d 107 (Nev. 1985), or *Muller v. Sheriff*, 572 P.2d 1245 (Nev. 1977) are reconcilable; and, if not, which case controls. *Figueroa-Beltran*, 2018 WL 2750775, at *5.

Analysis

Mathis provides the default position in cases like this: a prior conviction under an overbroad state statute does not qualify as a federal sentencing predicate unless the federal court is certain the offense is divisible. *Mathis* also provides this Court with clear steps to assess divisibility—none of which include certification. Instead, when the state law is not clear, the federal court's inquiry simply ends. The certification order deviates from this established path and should be withdrawn.

A. The certification order violates *Mathis* by terminating the divisibility inquiry at step one.

Supreme Court precedent makes clear that when federal courts cannot be certain an overbroad state statute is divisible, the divisibility inquiry ends and federal courts may not use that state offense to enhance a federal sentence. In *Mathis*, the Supreme Court provided a step-by-step analysis for federal courts to assess whether a state statute is divisible, i.e., provides alternative elements and therefore defines more than one crime. 136 S. Ct. at 2256-57. Federal courts should first determine whether "a state court decision definitively answers the question." *Id.* at 2256. If no such decision exists, federal courts then consider whether "the statue on its face" resolves the issue. *Id.* If the

statute "fails to provide clear answers," federal judges may consider how the offense is treated in state charging documents, plea agreements, judgments, and other pertinent judicial documents. *Id.* at 2256-57.

If these three sources of state law do not provide "certainty" that a state statute is divisible, then the divisibility inquiry ends with the conclusion that the state offense does not qualify as a predicate sentence-enhancing conviction. *Mathis*, 136 S. Ct. at 2257. *Mathis*'s "demand for certainty" is rooted in *Taylor v. United States*, 495 U.S. 575 (1990), the original Supreme Court decision setting forth the categorical approach. Thus, the law has been clear for almost 30 years that federal courts may not use a state conviction to enhance a federal sentence unless federal courts are "certain" the offense qualifies as a federal predicate.

The certification order violates *Mathis*'s instructions for assessing divisibility. The certification order recognizes *Mathis*'s three steps, but does not apply them. *Figueroa-Beltran*, No. 16-10388, 2018 WL 2750775, at *5. Rather, the certification order states the panel "cannot say with confidence that the Nevada precedent definitively answers the

question whether § 453.337 is divisible as to the identity of a controlled substance." *Id.*

Without a definitive answer from the Nevada Supreme Court, *Mathis* instructs this Court to move to the next step. Instead of assessing the statutory language, the panel stopped the inquiry altogether and certified the divisibility question to the Nevada Supreme Court. *Id.* By certifying the divisibility inquiry after finding a lack of certainty at step one, the certification order ignores the remainder of *Mathis*'s analysis. It also ignores the Supreme Court's default position: lack of certainty means the state offense does not qualify as a federal sentencing predicate.

United States v. Ochoa, 861 F.3d 1010 (9th Cir. 2017), demonstrates the certification order's material error. There, this Court faithfully applied all the *Mathis* steps to assess a federal statute's divisibility. *Ochoa* found the text of the statute did not indicate divisibility and this Court's precedent interpreting the statute was "ambiguous." 861 F.3d at 1017. "Faced with a lack of clarity" from the statutory text and case law, *Ochoa* considered the record documents, which indicated the statute was *not* divisible. *Id.* at 1017-18. *Ochoa*

further recognized that to the extent the record materials "do not 'speak plainly' enough, we cannot 'satisfy '*Taylor*'s demand for certainty' when determining whether a defendant was convicted of a generic offense.'" *Id.* at 1018. *Ochoa* therefore held the statute was not divisible, ending the *Mathis* analysis: "we do not proceed to the modified categorical approach." *Id.*

Notably, the *Ochoa* Court did not try to clear up the Circuit's ambiguous case law. It also did not ask the United States Supreme Court to resolve the ambiguity. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (recognizing federal circuit courts of appeal may certify questions to the Supreme Court). Instead, the *Ochoa* Court moved from the case law to the other *Mathis* steps, ultimately concluding it could not be certain the federal statute was divisible.

Chief Judge Thomas also has recognized *Mathis* "emphasized '*Taylor*'s demand for certainty' in determining whether the statute of conviction qualified as a predicate offense under applicable federal law." *United States v. Arriaga-Pinon*, 852 F.3d 1195, 1201 (9th Cir. 2017) (Thomas, C.J., concurring). Applying the *Mathis* analysis to the California criminal statute at issue in *Arriaga-Pinon*, Chief Judge

Thomas found: (1) "state law does not compel the conclusion that the statute is divisible," (2) "the statute itself is not a clearly elemental statute," and (3) the record documents "do not plainly speak to the elements." *Id.* at 1202-03. Chief Judge Thomas thus concluded: "when we apply the analytical framework set forth in *Mathis*, we cannot conclude, with the certainty that *Taylor* demands that [the California statute] is divisible. Therefore, for the purposes of federal law, we must treat it as an indivisible statute under *Mathis*." *Id.* at 1203.

Other circuits agree *Mathis* meant what it said.

Circuit	**"Certainty" holding**
First Circuit	"If, at the end of this review 'such record materials' do not 'speak plainly,' then 'a sentencing judge will not be able to satisfy '*Taylor*'s demand for certainty' when determining whether a defendant was convicted of a generic offense.'" *United States v. Faust*, 853 F.3d 39, 52 (1st Cir. 2017).

Fifth Circuit (En Banc)	"Should our dual forays into state law and the record leave the question of divisibility inconclusive, the tie goes to the defendant—because the [Armed Career Criminal Act] demands certainty that a defendant indeed committed a generic offense, any indeterminacy on the question means the statute is indivisible." *United States v. Herrold*, 883 F.3d 517, 522 (5th Cir. 2018) (footnotes omitted).
Eighth Circuit	"We have been instructed time and again that the categorical approach introduced by *Taylor* created a 'demand for certainty' when determining whether a defendant was convicted of a qualifying offense." *United States v. Horse Looking*, 828 F.3d 744, 748 (8th Cir. 2016). "But if none of those sources answers the question, we are told, then the court 'will not be able to satisfy '*Taylor*'s demand for certainty' when determining whether a defendant was convicted of a generic offense. . . .' In other words, while 'indeterminacy should prove more the exception than the rule,' . . . , an inconclusive inquiry means that the prior convictions do not qualify, and the sentencing enhancement does not apply." *United States v. Sykes*, 864 F.3d 842, 844 (8th Cir. 2017) (Colloton, J., dissenting from denial of rehearing en banc).

Tenth Circuit	"After considering the state-court opinions, the text of the statute, and the record of conviction, we remain uncertain on whether the locational alternatives constitute elements or means. In light of this uncertainty, we must regard the locational alternatives in Oklahoma's statute for second-degree burglary as means rather than elements." *United States v. Hamilton*, 889 F.3d 688, 692–93 (10th Cir. 2018).

No judge in any of the above cases suggested resolving uncertainty or breaking a tie by certifying the divisibility question to a state's highest court. Rather, they all agreed that if uncertainty remains after applying the *Mathis* three-part analysis, the divisibility inquiry is over.

The certification order conflicts with *Mathis*, Ninth Circuit precedent applying *Mathis*, and precedent in other Circuits applying *Mathis*. This warrants en banc rehearing.

B. *Mathis* declined to include certification as part of the divisibility analysis.

The Supreme Court in *Mathis* did not state, or even suggest, that federal courts uncertain about a state statute's divisibility should certify the question to the state's highest court. The parties in *Mathis* gave the Supreme Court an opportunity to endorse certification. The Court declined.

The Solicitor General's brief, for example, recognized Judge Hawkins previously suggested referring divisibility questions to state supreme courts. United States Brief, *Mathis v. United States*, 2016 WL 1165970 (U.S.), at 40 (citing *United States v. Ramirez-Macias*, 584 F. App'x 818, 820 (9th Cir. 2014) (unpublished) (Hawkins, J., concurring)). Mathis's counsel also suggested using certification when the case law, statutory text, and record documents are inconclusive: "If need be, the question can often be certified to the highest court of the relevant State." *See* Petitioner's Reply Brief, *Mathis v. United States*, 2016 WL 1554732 (U.S.), at 18.

The subject also came up at oral argument. The Assistant to the Solicitor General noted the government's concerns about burdening state courts with certified questions on the federal divisibility analysis:

> And if you're talking about sentencing judges who sentence every day and have to use the modified categorical approach, you know, certifying to the State courts, I think that really would be, you know, an extraordinary intrusion.

Transcript to Oral Argument, p. 49, *Mathis v. United States*, No. 15-6092 (Apr. 26, 2016).

The *Mathis* Court was well aware of the option to certify divisibility questions to state courts. Yet *Mathis* omitted certification as part of its three-part divisibility analysis. *Mathis*'s instructions are clear: consult state case law, the statutory text, and record documents; if those sources do not provide "certainty" that the state statute is divisible, then the federal divisibility inquiry ends. Period.

It makes sense that the Supreme Court declined to embroil state courts in the federal categorical world. Members of this Court have expressed frustration with these federal analyses as being more than difficult to apply and consuming federal judicial resources.

Judge O'Scannlain has expressed "puzzlement at how the categorical approach has come to be applied." *United States v. Valdivia-Flores*, 876 F.3d 1201, 1210 (9th Cir. 2017) (O'Scannlain, J., specially

concurring). Judge Owens has described the overly complicated categorical and modified categorical approaches as "more complicated than reconstructing the Staff of Ra in the Map Room to locate the Well of the Souls. . . . Raiders of the Lost Ark (Paramount Pictures 1981)." *United States v. Perez-Silvan*, 861 F.3d 935, 944 (9th Cir. 2017) (Owen, J., concurring).

Last year, in partially concurring and partially dissenting from an en banc decision about a California drug law's divisibility, Judge Bybee recognized he is "frustrated with the whole endeavor":

> In the twenty years since *Taylor* . . ., we have struggled to understand the contours of the Supreme Court's framework. Indeed, over the past decade, perhaps no other area of the law has demanded more of our resources.

United States v. Martinez-Lopez, 864 F.3d 1034, 1058 (9th Cir. 2017). Judge Bybee also could not conclusively state whether the California drug statute "identifies elements or means—which is not surprising, since the 'elements-means' distinction is largely a recent creation by the Court." *Id.* Thus, Judge Bybee concluded that "[h]aving failed to satisfy the 'demand for certainty' required to conclude that this statute

identifies elements, *Mathis*, 136 S. Ct. at 2257 . . ., the sentence enhancement cannot stand." *Martinez-Lopez*, 864 F.3d at 1059.

State courts should not be summoned to resolve questions regarding the categorical approach, which is entirely a creature of federal law. As Judge Bybee states, the divisibility analysis is a federal doctrine created by federal courts. The United States Supreme Court adopted the categorical, divisibility, and modified categorical approaches for federal courts to apply federal sentencing statutes and certain federal Guidelines provisions. Whether a defendant's federal criminal sentence should be enhanced because of a prior state conviction is for federal courts to determine.

The sentencing enhancements applied in federal criminal cases are not matters federal courts should ask the states to decide, as compared to, say, questions of state law that arise in a diversity jurisdiction lawsuit. *See, e.g.*, *Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 763 F.3d 1232, 1233 (9th Cir. 2014) (certifying question of Washington law to Washington Supreme Court in a diversity case brought under Washington state law); *Allstate Ins. Co. v. Alamo Rent-A-Car, Inc.*, 137 F.3d 634, 635 (9th Cir. 1998),

(certifying question of Hawaii law to Hawaii Supreme Court in diversity cases that raise insurance claims under Hawaii statutes).

Finally, state certification is not appropriate for categorical inquiries because not all states accept certified questions. Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. Legis. 157, 159 n.13 (2003) (noting forty-seven states permit some or all federal judges to certify a question to a state's highest court). North Carolina does not allow federal courts to certify state law questions to the North Carolina Supreme Court. Though Missouri has a statute permitting federal courts to certify questions to its supreme court, Mo. Ann. Stat. § 477.004, the Missouri Constitution does "not expressly or by implication grant the Supreme Court of Missouri original jurisdiction to render opinions on questions of law certified by federal courts." *Grantham v. Missouri Dep't of Corr.*, No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990) (declining

certification from federal district court for lack of constitutional jurisdiction).[1]

If this Court adopts certification as part of the divisibility analysis despite *Mathis*, it could not certify questions on Missouri or North Carolina statutes to their highest courts. This would result in disparate adjudication of similarly situated federal appellants.

Though the categorical approach "frequently" arise in both criminal and immigration appeals. *Almanza-Arenas v. Lynch*, 815 F.3d 469, 483-84 (9th Cir. 2016) (Watford, J., concurring in the judgment), the undersigned has not located any instance where a federal court has certified questions to a state's highest court about the categorical, divisibility, or modified categorical approaches. The certification order sets a precedent that, at least in the Ninth Circuit, panels may certify divisibility questions to some state courts, prolonging adjudication and inundating state courts with federal divisibility questions. *Barnes-Wallace v. City of San Diego*, 551 F.3d 891, 893 (9th Cir. 2008)

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[1] The Nevada Constitution similarly does not expressly grant the Nevada Supreme Court the jurisdiction to answer questions certified to it by federal courts. *See* Nev. Const. art. VI, § 4.

(O'Scannlain, J., dissenting from denial of rehearing en banc) (recognizing a published order certifying a question "constitutes a precedential decision"). The unprecedented nature of the certification order warrants en banc rehearing.

C. Properly applying *Mathis* reveals the Nevada drug statute is not divisible.

Properly applying *Mathis* to Nev. Rev. Stat. § 453.337 shows it is *not* divisible. But to the extent any uncertainty remains, that uncertainty must be resolved in Figueroa-Beltran's favor.

1. Nevada case law does definitively answer the divisibility question.

The certification order concludes the panel "cannot say with confidence that the Nevada precedent definitively answers the question whether § 453.337 is divisible as to the identity of a controlled substance." *Figueroa-Beltran*, 2018 WL 2750775, at *5. This conclusion follows from the premise that "*Luqman* and *Muller* seemingly stand in conflict." *Id.* However, this Court can address the perceived conflict between *Luqman* and *Muller* by looking to Nevada's established abrogation principles.

In Nevada, unsurprisingly, a statutory amendment can overrule case law interpreting the prior version of the statute. *Rodriguez v.*

State, 407 P.3d 771, 774 (Nev. 2017). *Muller* addressed Nevada's drug schedules in 1977 when they appeared in the Nevada Revised Statutes. 572 P.2d at 1245. In 1981, the Nevada Legislature removed the drug schedules from the Revised Statutes and delegated to the pharmacy board exclusive authority to set the drugs schedules in Nevada's Administrative Code. *Luqman*, 697 P.2d at 109. Thus, to the extent *Muller* addressed the divisibility issue, the 1981 statutory amendments overruled *Muller*. Or, at least, the amendment rendered *Muller* instructive on only the 1977 drug schedules as they appeared in the Revised Statutes.

Additionally, and also unsurprisingly, the en banc Nevada Supreme Court can overrule previously issued en banc decisions. *Crawford v. State*, 121 P.3d 582, 587 (Nev. 2005). Both *Luqman* and *Muller* are en banc decisions from the Nevada Supreme Court. Before 1999, the full Nevada Supreme Court decided every appeal: "Beginning in January of 1999, for the first time in history and in a move to dispose of cases more rapidly, the [Supreme Court] began to decide many of its cases by meeting in three-justice panels, with one panel in Carson City and one panel in Las Vegas." *See* Overview of Appellate Courts,

https://nvcourts.gov/Supreme/Court_Information/Overview_of_the_Supreme_Court_and_Court_of_Appeals/ (last visited June 20, 2018). *Luqman* was decided in 1985; *Muller* in 1977. To the extent the two decisions conflict, *Luqman* controls.

Nevada's abrogation principles instruct that *Luqman* controls over *Muller* on any conflict between the two. This Court can and should use these established, fundamental abrogation principles to resolve this appeal.

Along these lines, *United States v. Edling*, --- F.3d ---, No. 16-10457, 2018 WL 2752208 (9th Cir. June 8, 2018), shows how this Court assesses Nevada law under the categorical approach. In part, *Edling* addressed whether Nevada felony coercion qualifies as a crime of violence under the Guidelines. *Id.* at *5-*6. This question turned on the level of force required to commit felony coercion—a question of statutory construction Nevada courts had not definitively answered. *Id.* at *5.

Noting Nevada courts presume a word used in similar statutes generally carries the same meaning, *Edling* looked to Nevada courts' interpretation of the state's battery statute, which, like the coercion

statute, also contains the word "force." *Id.* Nevada case law holds the "force" required to commit battery does not need to be violent or cause bodily pain or harm. *Id.* Applying Nevada's statutory construction rules, the *Edling* Court reasoned it was "likely that Nevada courts would interpret the 'physical force' necessary to commit Nevada's felony coercion offense in the same manner as the 'force' necessary to commit battery—in other words, as not requiring the kind of violent physical force necessary." *Id.* Therefore, Nevada coercion did not qualify as a crime of violence. *Id.* at *6.

Edling did not certify the question of coercion's breadth to the Nevada Supreme Court. Instead, it reasonably consulted Nevada's available case law and principles of statutory construction to conclude coercion does not necessarily entail the required level of force.

Applying the same reasoning here, *Luqman* controls over *Muller*. Nevada case law definitively answers the divisibility question in Figueroa-Beltran's favor. And even accepting the panel's finding that it cannot be confident about the case law, the above analysis strongly suggests § 453.337 is *not* divisible.

2. The second and third Mathis steps require the conclusion that Nevada's drug statute is not divisible.

Mathis's next two steps further suggest this Court cannot be certain § 453.337 is divisible. The statute on its face does not resolve the issue. RB, Dkt. #22, at 14-16. The final *Mathis* step, the relevant judicial records, also fail to provide the necessary certainty that § 453.337 is divisible. RB, Dkt. #22, at 7-11. Because the Court cannot be certain § 453.337 is divisible, *Mathis* instructs Figueroa-Beltran's § 453.337 conviction cannot be used to enhance his sentence.

In the ten months between oral argument and the certification order, § 453.337's divisibility has been challenged and briefed in at least three other appeals pending before this Court. These cases provide additional arguments demonstrating that, under *Mathis*, this Court cannot be certain § 453.337 is divisible. *United States v. Jordan-McFeely*, 16-10456, OB at 21-40, AB at 8-20, RB at 1-16; *United States v. Cotton*, 16-10456, OB at 65-69, AB at 60-63, RB at 24-26; *United States v. Conway*, 16-10456, OB at 6-23, AB at 6-17, RB at 1-16.

Specifically, for step two, *Jordan-McFeely* provides a detailed analysis of Nevada Administrative Code language to show the controlled substances listed in the drug schedules are merely "illustrative

examples." *Mathis*, 136 S. Ct. at 2256; *Jordan-McFeely*, OB at 24-27. For step three, *Conway* highlights additional record documents that indicate the identity of the drug is simply a means of violating Nevada's drug statutes. *Conway*, RB at 15.

The Court "cannot say with confidence" that Nevada's case law holds Nev. Rev. Stat. § 453.337 is divisible. The other two *Mathis* steps fail to resolve the uncertainty and, instead, suggest the statute is not divisible. Therefore, Figueroa-Beltran's § 453.337 conviction cannot be used to enhance his sentence under U.S.S.G. § 2L1.2 (2015).

Conclusion

Figueroa-Beltran respectfully requests the Court grant rehearing and withdraw the order certifying the divisibility inquiry to the Nevada Supreme Court.

Updated Detention Status

On the date the panel issued its certification order, undersigned counsel learned Figueroa-Beltran completed the prison component of his sentence and was released from Bureau of Prisons' custody on May 25, 2018. Without notice to the Court or undersigned counsel, it

appears the government removed Figueroa-Beltran from the United States on June 1, 2018. Figueroa-Beltran is still subject to a three-year term of supervised release to complete his sentence.

Dated: June 20, 2018.

Respectfully submitted,

/s/ Cristen C. Thayer
Cristen C. Thayer
Assistant Federal Public Defender

/s/ Amy B. Cleary
Amy B. Cleary
Assistant Federal Public Defender

Certificate of Service

I certify that, on June 20, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants: Gibran Richardo Figueroa-Beltran.

/s/Brandon Thomas
Brandon Thomas
Federal Public Defender Employee

Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 16-10388

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

☒ Contains 4,035 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

☐ Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant: s/Cristen C. Thayer

Date: June 20, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

APPENDIX A

APPENDIX A

2018 WL 2750775
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Gibran Richardo FIGUEROA–BELTRAN,
Defendant-Appellant

No. 16-10388
|
Filed June 6, 2018

Synopsis

Background: Defendant who was convicted, following guilty plea, of being a deported alien found unlawfully in the United States, appealed the district court's application of 16-level enhancement for having a prior drug trafficking offense, as provided for in the federal Sentencing Guidelines.

Holdings: The Court of Appeals, Johnnie B. Rawlinson, Circuit Judge, held that:

[1] court would certify question to Nevada Supreme Court as to whether state statute prohibiting possession of certain controlled substances for purposes of sale was divisible as to controlled substance requirement;

[2] court would certify question to Nevada Supreme Court as to whether state precedent concludes that existence of a controlled substance is a "fact," rather than an "element" of statute prohibiting possession of certain controlled substances for purpose of sale, rendering the statute indivisible; and

[3] court would certify question to Nevada Supreme Court as to whether state precedent concludes that offenses under statute prohibiting possession of certain controlled substances for purpose of sale comprised distinct offenses requiring separate and different proof, rendering the statute divisible as to controlled substance requirement.

Ordered accordingly.

D.C. No. 2:15-cr-00176-KJD-GWF-1

Attorneys and Law Firms

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Dayle Elieson, Interim United States Attorney, Elizabeth O. White, Appellate Chief, and Nancy M. Olson, Assistant United States Attorney, District of Nevada, 501 Las Vegas Blvd. S., Suite 1100, Las Vegas, Nevada 89101, for Plaintiff-Appellee.

Before: Diarmuid F. O'Scannlain and Johnnie B. Rawlinson, Circuit Judges, and Sarah S. Vance,* District Judge.

* The Honorable Sarah S. Vance, United States District Judge for the Eastern District of Louisiana, sitting by designation.

ORDER CERTIFYING QUESTIONS TO THE NEVADA SUPREME COURT

Johnnie B. Rawlinson United States Circuit Judge, presiding

ORDER

The issue for decision in this case is whether Nevada Revised Statute § 453.337, which criminalizes conduct related to certain controlled substances identified by reference to the Nevada Administrative Code, is divisible under federal law for the purpose of applying the federal sentencing guidelines.[1] This question of law is determinative of the matter pending before this court and we are not aware of any clearly controlling precedent in the existing decisions of the Nevada Supreme Court. Accordingly, pursuant to Rule 5 of the Nevada Rules of Appellate Procedure,[2] we respectfully request that the Nevada Supreme Court determine whether, under Nevada law, § 453.337 is divisible.

1 Section 453.337 provides in pertinent part:
Except as otherwise authorized by the provisions of NRS 453.011 to 453.552, inclusive, it is unlawful for a person to possess for the purpose of sale flunitrazepam, gamma-hydroxybutyrate, any substance for which flunitrazepam or

gamma-hydroxybutyrate is an immediate precursor or any controlled substance classified in schedule I or II.

Nev. Rev. Stat. § 453.337 (2017).

[2] Rule 5(h) provides:

The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties and shall be res judicata as to the parties.

Nev. R. App. P. 5(h).

I. Factual and Procedural Background

In 2012, Gibran Figueroa-Beltran (Figueroa), a native of Mexico, was found in possession of one gram of cocaine and 5.8 grams of heroin during a traffic stop. He was convicted in the Eighth Judicial District Court of possession of a controlled substance with intent to sell in violation of § 453.337 and sentenced to 19 to 48 months' imprisonment. He was paroled approximately one year later, but subsequently arrested for selling a controlled substance, and removed to Mexico.

Within two years of his removal, Figueroa illegally reentered the United States, where he was once again arrested for selling a controlled substance. While those charges were pending, Figueroa was charged with 26 other counts of drug-related offenses, including receiving stolen property, receiving a stolen vehicle, being a prohibited person in possession of firearms, operating a place for the sale of controlled substances, possessing for sale Schedule I/II controlled substances, trafficking Schedule I controlled substances (28+ grams), conspiring to violate the federal Controlled Substances Act, and selling Schedule I or II controlled substances.

***2** A federal grand jury later indicted Figueroa for being a deported alien found unlawfully in the United States, in violation of 8 U.S.C. § 1326.[3] Figueroa pled guilty without a plea agreement and the district court imposed a low-end Guideline sentence of 41 months' imprisonment followed by a three-year term of supervised release. In calculating the 41-month sentence, the district court began with a base offense level of 8 and added a 16-level enhancement under United States Sentencing Guidelines (U.S.S.G.) § 2L1.2 due to Figueroa's 2012 conviction for possession of a controlled substance for sale. Figueroa objected to the enhancement, noting that his conviction for a violation of § 453.337 did not qualify as a drug trafficking offense.

[3] Section 1326 provides in pertinent part:

[A]ny alien who–

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act ...

8 U.S.C. § 1326.

Figueroa filed a timely appeal challenging the district court's application of the 16-level enhancement provided for in U.S.S.G. § 2L1.2.[4]

[4] Section 2L1.2 provided:

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

U.S.S.G. § 2L1.2 (2015).

II. Governing Federal Law

Section 2L1.2 applied to defendants who "unlawfully enter[ed] or remain[ed] in the United States." U.S.S.G. § 2L1.2. At the time of Figueroa's sentencing on August 24, 2016, Guideline § 2L1.2(b)(1)(A) provided for a base offense level of 8, plus a 16-level enhancement if the defendant was "previously ... deported" and had a previous conviction for a "drug trafficking offense" with a sentence exceeding 13 months. *Id.* § 2L1.2(b)(1)(A). The commentary to Guideline § 2L1.2 defined a "drug trafficking offense" as:

> an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

***3** *Id.* § 2L1.2, cmt. app. n.l (B)(iv) (2015).

[1]To assess whether a prior conviction under § 453.337 qualified as a drug trafficking offense under Guideline § 2L1.2, we employ a "three-step analysis." *United States v. Martinez-Lopez*, 864 F.3d 1034, 1038 (9th Cir. 2017) (en banc) (citation omitted). At the first step, "we ask whether [§ 453.337] is a categorical match with a federal drug trafficking offense." *Id.* (citation omitted). In so doing, "we look only to the statutory definitions of the corresponding offenses."[5] *Id.* (citation and internal quotation marks omitted). If § 453.337 "proscribes the same amount of or less conduct than that qualifying as a federal drug trafficking offense, then the two offenses are a categorical match," and the conviction under that statute "automatically qualifies as a predicate drug trafficking offense." *Id.* (citations and internal quotation marks omitted).

5 The federal comparator statute is the Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq.* *See Martinez-Lopez*, 864 F.3d at 1037 (comparing the CSA with California drug trafficking statute for the purpose of determining applicability of a sentencing enhancement pursuant to U.S.S.G. § 2L1.2). Similarly to § 453.337, the CSA cross-references federal drug schedules. *See* 21 U.S.C. § 802.

[2] [3] [4]If § 453.337 is not a categorical match, we proceed to the second step of the analysis. At this step, "we ask whether [§ 453.337] is a divisible statute which sets out one or more elements of the offense in the alternative" and "thereby defines multiple crimes." *Id.* at 1038–39 (citations, alterations, and internal quotation marks omitted). A statute is not necessarily divisible because it is couched in terms of a disjunctive list. Rather than relying on the disjunctive-list articulation, we "consult authoritative sources of state law to determine whether a statute contains alternative elements defining multiple crimes or alternative means by which a defendant might commit the same crime." *Id.* at 1039 (citation and internal quotation marks omitted). If "(1) a state court decision definitively answers the question, or (2) the statute on its face resolves the issue," our analysis ends. *Id.* (citation, alterations, and internal quotation marks omitted).

[5] [6]The elements of a statute "are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Mathis v. United States*, —— U.S. ——, 136 S.Ct. 2243, 2248, 195 L.Ed.2d 604 (2016) (citation and internal quotation marks omitted). In contrast, the means used to fulfill an element is "extraneous to the crime's legal requirements." *Id.* The facts underlying the means "need neither be found by a jury nor admitted by a defendant" for a conviction. *Id.* Our divisibility inquiry thus turns on whether the elements of a crime of conviction "are broader than those of a listed generic offense," without regard to "[h]ow a given defendant actually perpetrated the crime." *Id.* at 2251.

[7]If § 453.337 is divisible, we "proceed to the third step in our analysis and apply the modified categorical approach" in which "we examine judicially noticeable documents of conviction to determine which statutory phrase was the basis for the conviction." *Martinez-Lopez*, 864 F.3d at 1039 (citation omitted). "If the defendant pled or was found guilty of the elements constituting a federal drug trafficking offense, the prior state conviction [of violating § 453.337] may serve as a predicate offense under the sentencing guidelines." *Id.* (citation omitted). We may apply this approach only if § 453.337 is divisible.

***4** Section 453.337 prohibits the "possess[ion] for the purpose of sale ... any controlled substance classified in schedule I or II." Nev. Rev. Stat. § 453.337. To determine if the statute is a categorical match for its federal counterpart, we examine whether § 453.337 "proscribes the same amount of or less conduct" than the federally defined offense. *Martinez-Lopez*, 864 F.3d at 1038. As the government has conceded, the schedules referenced in §

453.337 criminalize more substances than are listed in the federal Controlled Substances Act. Consequently, as in *Martinez-Lopez*, "[t]his case ... turns on the second step of our analysis," whether § 453.337 is divisible and thereby susceptible to examination under the modified categorical approach. *Id.* at 1039. However, we are aware of no controlling Nevada precedent definitively resolving whether or not § 453.337 is a divisible statute.

III. Parties' Arguments

Figueroa contends that the Nevada Supreme Court decision of *Sheriff v. Luqman*, 101 Nev. 149, 697 P.2d 107 (1985), established that § 453.337 is not divisible as to the identity of the controlled substance possessed by the accused. According to Figueroa, *Luqman* established that, under Nevada's post-1981 statutory drug scheme, which encompasses § 453.337, the identity of the controlled substance is "merely a fact"—rather than an "element of the offense."

At issue in *Luqman* was the authority of the state board of pharmacy to "classify drugs into various schedules according to the drug's propensity for harm and abuse," thereby setting the penalties for violations of the relevant statutory provisions. 697 P.2d at 109–10. The Nevada Supreme Court explained:

> [T]he legislature can make the application or operation of a statute complete within itself dependent upon the existence of certain facts or conditions, the ascertainment of which is left to the administrative agency. In doing so the legislature vests the agency with mere fact finding authority and not the authority to legislate. ...

Id. (citations omitted). *Luqman* held that, "[a]lthough the legislature may not delegate its power to legislate," such authorization to the board properly "delegate[d] the power to determine the facts or state of things upon which the law makes its own operations depend," because the agency, by classifying controlled substances, was "only authorized to determine the facts which will make the statute effective." *Id.* (citations omitted). Figueroa seizes upon this language to describe the identity of the controlled substance as a "fact" rather than an "element" of § 453.337.

The government counters that the Nevada Supreme Court decision of *Muller v. Sheriff*, 93 Nev. 686, 572 P.2d 1245 (1977), establishes that § 453.337 is divisible as to its controlled substance requirement. In *Muller*, the defendant-appellant contended that where "the sale of [two] different controlled substances was consummated simultaneously in one transaction, his conduct d[id] not constitute two separate offenses for which he may be charged." 572 P.2d at 1245. The Nevada Supreme Court disagreed, holding that:

> The sale of heroin and the sale of cocaine are distinct offenses requiring separate and different proof. Here the record shows that two distinct offenses were (probably) committed since the sale of each controlled substance requires proof of an additional fact which the other does not, viz., the particular identity of the controlled substance sold.

Id. (citations, alterations, and internal quotation marks omitted).

The government relies on this language to assert that the *Muller* decision establishes the divisibility of § 453.337. The government distinguishes *Luqman* on the basis that *Luqman* "did *not* address whether the identity of a controlled substance is an element of Nevada controlled substance offenses."

***5** *Luqman* and *Muller* seemingly stand in conflict. *Luqman* suggests that the identity of a controlled substance is a non-elemental factual determination. In contrast, *Muller* appears to conclude that the sale of one controlled substance is an offense distinct from the sale of another, and proof of the identity of the controlled substance at issue is required. Without further guidance, we cannot say with confidence that the Nevada precedent definitively answers the question whether § 453.337 is divisible as to the identity of a controlled substance.

IV. Certified Questions and Further Proceedings

[8] [9]When engaging in a divisibility inquiry, we look to such authoritative sources of state law as state court decisions and the wording of the relevant state statute. *See Mathis*, 136 S.Ct. at 2256. If we cannot readily discern the nature of the statute from these sources, we may further look to the record documents—indictments, jury instructions, plea colloquies and plea agreements—for guidance. *See id.* at 2256–57 and n.7.

[10] [11] [12]With this framework, we respectfully certify the following questions of law to the Nevada Supreme Court:

> 1. Is Nev. Rev. Stat. § 453.337 divisible as to the controlled substance requirement?
>
> 2. Does the decision in *Luqman* conclude that the existence of a controlled substance is a "fact" rather than an "element" of § 453.337, rendering the statute indivisible? If so, can this conclusion be reconciled with *Muller*?
>
> 3. Does the decision in *Muller* conclude that offenses under § 453.337 comprise "distinct offenses requiring separate and different proof," rendering the statute divisible as to the controlled substance requirement? If so, can this conclusion be reconciled with *Luqman*?

[13]"Our phrasing of the questions should not restrict the Court's consideration of the issues involved. We acknowledge that the Court may reformulate the relevant state law questions as it perceives them to be, in light of the contentions of the parties ..." *Raynor v. United of Omaha Life Ins. Co.*, 858 F.3d 1268, 1273 (9th Cir. 2017) (citation and alternations omitted). We will abide by the decision of the Nevada Supreme Court, as specified in Nevada Rule of Appellate Procedure 5(h). *See Chapman v. Deutsche Bank Nat'l Trust Co.*, 651 F.3d 1039, 1048 (9th Cir. 2011). "If the Court determines that the questions presented in this case are inappropriate for certification, or if it declines the certification for any other reason, we will resolve the questions according to our best understanding of [Nevada] law." *Raynor*, 858 F.3d at 1273.

We accordingly direct the Clerk of this court to forward a copy of this order, under official seal, to the Nevada Supreme Court, together with copies of all briefs and excerpts of record that have been filed in this court, with a certificate of service on the parties.

We stay further proceedings involving this case pending a response from the Nevada Supreme Court. This appeal is withdrawn from submission and will be resubmitted following the conclusion of proceedings in the Nevada Supreme Court. The Clerk is directed to administratively close this docket, pending further order. We direct the parties to notify the Clerk of this court within one week after the Nevada Supreme Court accepts or rejects the certification, and if it accepts certification, again to notify this court within one week after that court renders its opinion. As required by Nevada Rule of Appellate Procedure 5(c)(5), the names and addresses of counsel appear in the appendix. *See Chapman*, 651 F.3d at 1048.

***6** It is so **ORDERED.**

All Citations

--- F.3d ----, 2018 WL 2750775, 18 Cal. Daily Op. Serv. 5516

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * *

GIBRAN RICHARDO FIGUEROA-BELTRAN, Appellant, vs. UNITED STATES OF AMERICA, Respondent.	Supreme Court Case No. 76038 Ninth Circuit Court of Appeals Case No. 16-10388

Motion to Stay Briefing on Certified Questions

In its Order dated July 18, 2018, this Court accepted certified questions from the United States Court of Appeals for the Ninth Circuit regarding Appellant Gibran Richardo Figueroa-Beltran's direct criminal appeal and issued a briefing schedule. *See* Docket No. 18-27455 (Order Accepting Certified Questions); 18-21957 (Order Certifying Questions). Mr. Figueroa-Beltran respectfully requests this Court stay this briefing schedule as the Ninth Circuit has not yet resolved his Petition for Panel and En Banc Rehearing, in which he requested rehearing on the Ninth Circuit's decision to certify questions to this Court. Ninth Circuit Case

No. 16-10388, Docket No. 45, Petition for Panel and En Banc Rehearing ("Petition"), attached as Exhibit A.

Mr. Figueroa-Beltran timely filed his Petition in the Ninth Circuit on June 20, 2018, after a three-judge panel certified several questions for this Court to resolve in an order published on June 6, 2018. *United States v. Figueroa-Beltran*, 892 F.3d 997 (9th Cir. 2018).[1] The Petition is the proper mechanism for Mr. Figueroa-Beltran to seek review in the Ninth Circuit of the panel's certification order. *See Klein v. United States*, 537 F.3d 1027, 1034 (9th Cir. 2008) (noting certification to a state's highest court is subject to "petitions for rehearing or rehearing en banc, or sua sponte calls for rehearing en banc"); *Bassett v. Lamantia*, 858 F.3d 1201, 1204 (9th Cir. 2017) (noting certification of issue to state's highest court and stay of proceedings would be subject to a petition for rehearing).

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[1] *See* Fed. R. App. P. 40 (stating petition for panel rehearing must be filed within 14 days after entry of judgment); Fed. R. App. P. 35 (stating petition for en banc determination must be filed within time prescribed by Rule 40). Because Mr. Figueroa-Beltran filed his Petition within 14 days of the Ninth Circuit panel's certification order, his Petition was timely filed.

In his Petition, Mr. Figueroa-Beltran asks the Ninth Circuit to reconsider the panel's decision to summon this Court to resolve questions implicated by the categorical approach—a federal doctrine that federal courts created to ascertain the appropriateness of federal sentencing enhancements. Petition, at 5-11. He argues the certification process the three-judge panel employed here appears unprecedented and a process the United States Supreme Court decidedly chose not to employ in *Mathis v. United States*, 136 S. Ct. 2243 (2016). Petition, at 12-18. The certification order thus sets a dangerous precedent that risks overburdening state courts with federal issues that federal courts are tasked with resolving. Petition, at 12-18. The Ninth Circuit has not resolved Mr. Figueroa-Beltran's Petition.

To ensure efficiency and avoid duplicative effort by this Court, Mr. Figueroa-Beltran asks this Court to stay the briefing schedule in this case. Until the Ninth Circuit resolves Mr. Figueroa-Beltran's Petition, undersigned counsel believes briefing on the certified questions is premature. Mr. Figueroa-Beltran is still in the process of seeking Ninth Circuit review of the certification order through his pending Petition.

After considering his Petition, the Ninth Circuit may withdraw its order certifying questions to this Court, rendering this case moot. The Ninth Circuit may also modify its order certifying questions to this Court, in which case this Court would need to reconsider whether to accept the certified questions as modified. Thus, Mr. Figueroa-Beltran requests this Court stay the briefing schedule in this case until the Ninth Circuit adjudicates his Petition.

On July 24, 2018, counsel for Mr. Figueroa-Beltran contacted counsel for Respondent, Assistant United States Attorney Elizabeth O. White, who advised that Respondent takes no position on this request.

Mr. Figueroa-Beltran respectfully asks this Court to stay the briefing schedule in this case, pending resolution of his Petition in the Ninth Circuit Court of Appeals.

Dated: July 25, 2018.

Respectfully submitted,

/s/ Cristen C. Thayer

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Certificate of Service

I certify that this document was filed electronically with the Nevada Supreme Court on July 25, 2018, electronic service of the foregoing **Motion to Stay Briefing on Certified Questions** shall be made in accordance with the Master Service List as follows:

Elizabeth Olson White
Appellate Chief, Assistant United States Attorney
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/s/ Cristen C. Thayer
Cristen C. Thayer
Assistant Federal Public Defender