IN THE SUPREME COURT OF THE STATE OF NEVADA

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GIBRAN RICHARDO FIGUEROA-BELTRAN, Appellant, vs. UNITED STATES OF AMERICA, Respondent.	Supreme Court No. 76638 Ninth Circuit Court of Appeals Case No. 16-10388

First Status Report

In its Order dated August 16, 2018, this Court suspended the briefing schedule in this case pending resolution of Appellant Gibran Richardo Figueroa-Beltran's petition for panel and en banc rehearing of the Ninth Circuit's certification order to this Court. *See* Docket No. 18-31669 (Order). This Court directed Mr. Figueroa-Beltran to file a report within 30 days of the August 16 order informing the Court of the status of the petition for panel and en banc rehearing.

A. Status of Ninth Circuit petition for panel and en banc rehearing.

Mr. Figueroa-Beltran advises the Ninth Circuit entered an order denying the petition for rehearing and petition for en banc rehearing on August 17, 2018.[1]

B. This case poses a federal question of national importance.

Mr. Figueroa-Beltran is now pursuing United States Supreme Court review of the Ninth Circuit's certification order. The Ninth Circuit panel's decision to certify divisibility questions to a state's highest court is unprecedented. The United States Supreme Court, through its recent decisions, has set out the analysis and framework by which federal courts are to assess the divisibility of a state statute. State court certification is not part of this process. And for good reason.

Divisibility is a uniquely federal doctrine related to the categorical analysis that federal sentencing courts use to calculate an advisory imprisonment range. *Gall v. United States*, 552 U.S. 38, 46

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[1] The Ninth Circuit issued a mandate relative to its denial on August 27, 2018, but recalled the mandate on September 11, 2018, noting it had issued the mandate in error.

(2007) (recognizing the range calculated from the Sentencing Guidelines is advisory in nature); *United States v. Edling*, 895 F.3d 1153, 1155-56 (9th Cir. 2018) (recognizing the categorical and divisibility approaches apply to calculating the advisory sentencing range). The certification that occurred in this case therefore raises an issue of national concern.

C. Utilizing certification will inundate state appellate courts and delay resolutions.

If this Court issues an opinion on the divisibility of Nev. Rev. Stat. § 453.337, federal courts across the country—at both the district and circuit court levels—may follow the Ninth Circuit's lead and seek to enlist state appellate courts in deciding questions of state law for federal sentencing purposes. *See e.g.*, Nev. R. App. Proc. 5(a) (providing that this Court may answer questions certified to it from any federal court); Del. Sup. Ct. R. 41(a)(ii) (providing that federal courts may certify questions to state supreme court if there is an important and urgent reason for an immediate determination and the certifying court has not decided the question). The resulting landslide of federal certification requests would pose a dual burden, simultaneously stalling

the federal criminal process for defendants seeking to resolve their cases while inundating already overtaxed state court systems. This is because the categorical approach and divisibility analyses frequently arise in both criminal and immigration cases, which make up a significant portion of the federal docket. *Almanza-Arenas v. Lynch*, 815 F.3d 469, 483-84 (9th Cir. 2016) (Watford, J., concurring in the judgment).

The number of cases that may be affected by the certification in this case is compelling even when considering just the potential impact on federal criminal appeals and excluding immigration cases and district court proceedings. According to the Administrative Office of the U.S. Courts, in the 12-month period ending on June 30, 2018, there were 9,614 new federal criminal appeals filed nationwide.[2] And, as of June 30, 2018, there remained 8,847 pending federal criminal appeals nationwide.[3] Even if only a fraction of these federal criminal appeals

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[2] *See* http://www.uscourts.gov/statistics/table/b-7/statistical-tables-federal-judiciary/2018/06/30 (last visited Sept. 10, 2018).

[3] *See* http://www.uscourts.gov/statistics/table/b-1/statistical-tables-federal-judiciary/2018/06/30 (last visited Sept. 10, 2018).

result in certification to state courts on state statutory divisibility questions, the result would cause substantial and unnecessary delay to the litigants and a misallocation of state court resources. This outcome would be particularly regrettable because the United States Supreme Court has already instructed federal courts how to resolve the divisibility analysis if they are unsure of the meaning of state law. *See Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016) (explaining that if federal court cannot determine with "certainty" that state statute is divisible, it should simply hold the statute is indivisible).

D. The United States Supreme Court has chosen not to employ certification to resolve divisibility questions.

Notably, the United States Supreme Court in *Mathis* had the opportunity to include certification as part of the process by which federal courts assess divisibility, yet it declined to do so. The parties in *Mathis* suggested to the Supreme Court that federal sentencing courts could use certification to determine the meaning of state law. *See* United States Brief, *Mathis v. United States*, 2016 WL 1165970 (U.S.), at *40 (recognizing Ninth Circuit Judge Hawkins had previously

suggested certifying divisibility questions to state supreme courts); Petitioner's Reply Brief, *Mathis v. United States*, 2016 WL 1554732 (U.S.), at *18 (suggesting 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.").

The possibility of certification also came up during oral argument in *Mathis*. The Assistant to the Solicitor General noted the government's concerns about burdening state courts with certified questions about the federal divisibility analysis:

> 13 And if you're talking about sentencing judges who
> 14 sentence every day and have to use the modified
> 15 categorical approach, you know, certifying to the State
> 16 courts, I think that really would be, you know,
> 17 an extraordinary intrusion.

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

The *Mathis* Court was therefore well aware of the option to certify divisibility questions to state courts. Yet *Mathis* omitted certification

from the three-part divisibility analysis it announced. *Mathis*'s instructions to the federal courts are clear: consult state case law, the statutory text, and record documents (e.g., indictments or jury instructions); if those sources do not provide "certainty" that the state statute is divisible, then the federal divisibility inquiry ends. 136 S. Ct. at 2256-57.

E. Certification of divisibility questions forces state courts to decide questions in a vacuum.

Certification of questions about federal sentencing is imprudent for another reason: it requires state courts to answer questions about the scope of the state's criminal statutes in a vacuum, without the facts of an actual case or controversy to place those questions in context. The federal categorical and divisibility analyses ask courts to assess the scope and elements of a criminal statute in the abstract. Courts are forbidden from examining what a defendant actually did to violate a statute. *See Descamps v. United States*, 570 U.S. 254, 261 (2013) ("Sentencing courts may look only to the statutory definitions—i.e., the elements—of a defendant's prior offenses, and *not* to the particular facts

underlying those convictions." (emphasis in original)). Indeed, the Supreme Court has said the actual facts of a defendant's conviction are "quite irrelevant." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013).

The federal categorical approach is therefore a poor candidate for the certification process, which relies on a rich factual record. Nevada Rule of Appellate Procedure 5(c)(2) states a certification order "shall set forth . . . [a] statement of all facts relevant to the questions certified." Rule 5 was adopted from the 1967 Uniform Certification of Questions of Law Act. *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749, 137 P.3d 1161, 1163 (2006). The uniform code instructs:

> The certification order in the statement of facts should present all of the relevant facts. The purpose is to give the answering court a complete picture of the controversy **so that the answer will not be given in a vacuum**.

Unif. Certification of Questions of Law Act § 3 [Contents of Certification Order] (1967) (emphasis added).

Additionally, the lack of a fact-bound case or controversy may lead state courts astray in deciding certified questions. Deciding the scope of criminal liability without real-world facts could lead to decisions that

open up unanticipated post-conviction litigation for state court defendants and, through habeas petitions, unanticipated federal litigation. For instance, if a state court interprets a statute more narrowly for federal sentencing purposes than that statute had historically been interpreted in a state prosecution, a state defendant convicted under the broader interpretation may seek post-conviction relief under the newly narrowed interpretation.

It is these types of unintended consequences that may have played a role in the United States Supreme Court's decision not to include certification in the three-step divisibility analysis. Therefore, Mr. Figueroa-Beltran will be filing a petition for writ of certiorari to the United States Supreme Court asking it to reverse the Ninth Circuit's decision to certify the divisibility question here.

F. Status of petition for certiorari in the United States Supreme Court.

Mr. Figueroa-Beltran has 90 days from the date the Ninth Circuit denied his petition for rehearing to file the petition for writ of certiorari. Rules of the Supreme Court Rule 13(1), (3). Mr. Figueroa-Beltran

intends to file his petition for writ of certiorari within the 90-day due date of the Ninth Circuit's August 17, 2018 denial, filing it on or before November 15, 2018. He therefore requests this Court continue the stay in this matter until the Supreme Court reviews and resolves his anticipated petition for certiorari.

Dated: September 11, 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 September 11, 2018, electronic service of the foregoing **First Status Report** shall be made in accordance with the Master Service List as follows:

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