

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown  
Clerk of Supreme Court

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

**Appellant Gibran Figueroa-Beltran's Response to  
Government's Motion for Judicial Notice**

On June 13, 2019, the government filed its Answering Brief in this certified question case. Document #19-25668. With its brief, the government also filed a Motion for Judicial Notice with exhibits the government relies on in its Answering Brief. Document #19-25670. Appellant Gibran Figueroa-Beltran submits this response in opposition to the government's judicial notice motion.

## Points and Authorities

The government asks this Court to take judicial notice of two groups of state judicial documents. The first is Figueroa-Beltran's plea agreement from the 2012 state prosecution for violating NRS 453.337. Motion for Judicial Notice, Exhibit A. The second are judicial records from other Nevada prosecutions for violating NRS 453.337. *Id.*, Exhibits B-H. Figueroa-Beltran requests the Court deny the government's motion as to both groups of documents.

**I. Under federal sentencing law, the government was required to place Figueroa-Beltran's state record documents into the record at the federal sentencing.**

In the federal context, Figueroa-Beltran's plea agreement from his state prosecution is called a "*Shepard* document," named after the Supreme Court decision *Shepard v. United States*, 544 U.S. 13, 26 (2005). *Shepard* addressed a federal defendant's conviction under a "divisible" statute—a statute that provided alternative elements, one set matching the federal generic offense and an alternative set that did not match the federal generic offense because it criminalized a broader range of conduct. 544 U.S. at 26. *Shepard* held that when dealing with a divisible statute, federal courts may consider the charging document,

the plea agreement, plea colloquy transcript, or a comparable judicial record to determine the precise elements the defendant was convicted under. *Id.* These “*Shepard* documents” may be relevant when federal courts are assessing a divisible state statute and applying the “modified categorical approach” to determine whether the defendant was convicted of the state statute’s alternative element that matched the federal generic definition at issue. *See Johnson v. United States*, 559 U.S. 133, 145 (2010).

Ninth Circuit binding authority requires the government to place *Shepard* documents into the record *at sentencing*. *United States v. Gomez-Leon*, 545 F.3d 777, 785 (9th Cir. 2008) (noting it is the government’s burden to prove a defendant’s prior state conviction qualifies for a federal sentencing enhancement); *United States v. Kelly*, 422 F.3d 889, 895 (9th Cir. 2005) (“**The sentencing court** determines whether the government has fulfilled its burden by looking to ‘documentation or judicially noticeable facts that clearly establish that the conviction is a predicate conviction for enhancement purposes.’”) (emphasis added). Indeed, the Ninth Circuit prohibits the government

from placing state court judicial documents into the record at the federal appellate stage. *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1193 (9th Cir. 2011) (“On appeal, the government urges us to consider the transcript of the state court plea colloquy. However, it did not present this document to the district court, and it is not part of the district court record. We decline to supplement the record on appeal.”).

The government provides no explanation for why it attempts to place Figueroa-Beltran’s plea agreement into the record for the first time before this Court, three years after Figueroa-Beltran was sentenced in federal court. More critically, permitting the government to introduce the plea agreement into the record years after sentencing would allow it to circumvent the federal sentencing and appellate process. The government should not be permitted to alter the federal record and achieve what it could not otherwise if the Ninth Circuit had not certified questions to this Court. This Court should decline to allow the government to now submit a document it was obligated to submit during Figueroa-Beltran’s original federal sentencing proceeding.

**II. The judicial records of other state prosecutions are relevant only to the federal divisibility inquiry, which further supports that the Ninth Circuit did not certify state questions to this Court.**

The government acknowledges this Court generally does not take judicial notice of records from different cases even if those case are connected to the case before it. Motion for Judicial Notice at 2-3. On this basis alone, the Court may deny the government's motion as to the state records from other state prosecutions. *See* Motion for Judicial Notice, Exhibits B-H.

But, the government's motion for judicial notice of these particular documents is telling. Judicial records from state prosecutions other than Figueroa-Beltran's can only be relevant to the *federal* divisibility inquiry. *Mathis v. United States*, 136 S. Ct. 2243, 2256-57 (2016). This Court, however, does not appear to consider the charging practices of state prosecutors to divine the Legislature's intent in crafting and passing a criminal statute.

The government's request thus supports Figueroa-Beltran's position that, though posed as questions of Nevada law, the Ninth Circuit improperly certified federal questions to this Court. Because

the judicial records are relevant only to a *federal* question, this Court should decline to consider them in this matter and reconsider whether the Ninth Circuit actually certified state questions to this Court.

### **III. Conclusion**

Figueroa-Beltran requests this Court deny the government's Motion for Judicial Notice.

Dated: July 3, 2019.

Respectfully submitted,

*/s/ Cristen C. Thayer*  
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## Certificate of Service

I certify that on July 3, 2019, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system. Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include: Elham Roohani and Nancy Olson, Assistant United States Attorneys.

*/s/ Cristen C. Thayer*

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