No.

IN THE SUPREME COURT OF THE UNITED STATES

MANUEL VEGA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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THE QUESTION PRESENTED

A prior drug conviction, if it is a federal "controlled substance offense," can increase a federal criminal sentence or result in an alien's deportation.

Petitioner's federal sentence was increased for a prior violation of California Health and Safety Code § 11378, which prohibits possession for sale of "a controlled substance," i.e., one listed in California's drug "schedules." At issue here was whether the statute describes several "means" of committing one crime (an "indivisible" statute), or whether it describes "elements" of several different crimes (a "divisible" statute). With a divisible statute, the sentencing court can look behind the fact of the prior conviction to see if the prior offense actually matches a crime prohibited by the federal Controlled Substances Act. If it does, it is a "controlled substance offense," and increases the sentence.

In *Mathis v. United States*, 136 S. Ct. 2243 (2016) this Court delineated how a court determines whether an alternatively phrased statute describes "elements" or "means." Among other things, a court should consider:

1. Does the statute identify what things must be *charged*? Those things are "elements." Something that need not be charged is a "means." *Id*. at 2256.
2. What things must the prosecution *prove*, and the jury *find*, to sustain a conviction? Those are "elements." *Id.* at 2248.
3. Do statutory alternatives carry different punishments? If so, "they must be elements." If the alternatives listed are "illustrative examples," they only describe the means to commit the crime. *Id*. at 2256.
4. Does a "state court decision" definitively answer the question? If so, "a sentencing judge need only follow what it says." *Ibid*.

Does a court fulfill the mandate of *Mathis* if it looks only to whether a state defendant can be punished more than once for possessing different *kinds* of drugs under a state statute that prohibits multiple punishments for multiple crimes, as long as the defendant's acts all have a single "objective"?

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IN THE UNITED STATES SUPREME COURT

MANUEL VEGA,

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PETITION FOR WRIT OF CERTIORARI

Manual Vega petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit, affirming the denial of his motion to correct his sentence pursuant to 28 U.S.C. § 2255.

OPINION BELOW

The decision of the Court of Appeals denying relief appears as Appendix A, and is unreported.

The Court of Appeals' order denying Vega's petition for rehearing appears as Appendix B, and is unreported.

The decision of the District Court appears as Appendix C, and is unreported.

JURISDICTION

The district court had jurisdiction of Petitioner's criminal case pursuant to 28 U.S.C. § 3231 as an offense against the laws of the United States. The district court had jurisdiction of Petitioner's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255.

The Court of Appeals had jurisdiction as an appeal from a final order in a § 2255 proceeding, pursuant to 28 U.S.C. § 2255 and § 2253(a).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1) as a petition to review a decision by a court of appeals.

The United States Court of Appeals decided the case on December 21, 2017. A timely petition for rehearing was denied April 19, 2018. This petition is filed within 90 days of that denial, and is timely pursuant to Rule 13.1 of this Court.

FEDERAL SENTENCING GUIDELINE INVOLVED: § 4B1.2(b)

The Base Offense Level for appellant's offense is found in U.S.S.G. § 2K2.1(a)(4)(A). The Level is increased if the defendant has a prior conviction for a "controlled substance offense." The Commentary to the Guideline states that the term "controlled substance offense" has the meaning found in § 4B1.2(b), which provides:

> (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

STATE STATUTES INVOLVED

California Health and Safety Code § 11378, effective at the time of Vega's 2013 offense, provided as follows:

§ 11378. Possession for sale

> Except as otherwise provided in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses for sale any controlled substance which is (1) classified in Schedule III, IV, or V and which is not a narcotic drug,

> except subdivision (g) of Section 11056, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, (5) specified in subdivision (d), (e), or (f), except paragraph (3) of subdivision (e) and subparagraphs (A) and (B) of paragraph (2) of subdivision (f), of Section 11055, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code.

Calif. Stats. 2011, ch. 15, § 172 (West's Calif. Legis. Service). The statute remains substantially the same today, with minor changes in wording and formatting.

The other parts of the Health and Safety Code referenced in this statute are "schedules" which describe specific drugs, such as methamphetamine, cocaine, heroin, and so on. Relevant to this appeal, California Health and Safety Code § 11055 lists methamphetamine as a Schedule II drug:

> **§ 11055. Schedule II; substances included**
>
> (a) The controlled substances listed in this section are included in Schedule II.
>
> * * *
>
> (d) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:
>
> * * *
>
> (2) Methamphetamine, its salts, isomers, and salts of its isomers.

Calif. Stats. 2008, ch. 292, § 1 (West's Calif. Legis. Service). The pertinent part of this statute is the same today as it was in 2013.

STATEMENT OF THE CASE

On November 5, 2014, Manuel Vega pled guilty to being a felon possessing a firearm and ammunition. App. C-1. His sentence was increased because he had a conviction for a 2013 violation of California Health and Safety Code § 11378, possession for sale of a controlled substance, which the sentencing court characterized as a "controlled substance offense" under U.S.S.G. § 2K2.1(a)(4)(A) of the Sentencing Guidelines, thereby increasing Vega's Base Offense Level from 14 to 20, and raising his sentencing range. App. C-6.

Six months later Vega filed a *pro se* motion to correct his sentence, pursuant to 28 U.S.C. § 2255, which the district court construed as a claim of ineffective assistance of counsel "for failure to challenge the 2013 state conviction as a prior drug felony conviction in establishing the base offense level under § 2K2.1 of the Sentencing Guidelines." App. C-3.

The district court denied Vega's motion, ruling that his prior conviction qualified as a federal "controlled substance offense," which meant the enhanced sentence was proper. App. C-12.

The district court first applied the "categorical approach," pursuant to *Taylor v. United States*, 495 U.S. 575, 60 (1990), to determine whether the conduct prohibited by the state statute was a categorical "match" with the conduct prohibited by its federal counterpart, namely, the federal Controlled Substances Act,[1] which would make it a "controlled substance offense." The Ninth Circuit had previously determined that "California's controlled substances schedules are broader than their federal counterparts," and for that reason a conviction for a violation of California Health and Safety Code § 11378 "cannot be a categorical controlled substance or drug trafficking offense under federal law." *United States v. Valdavinos–Torres*, 704 F.3d 679, 687 (9th Cir. 2012). App. C-8-9. The district

[1] Public Law 91-313, § 1 stated that the 1970 enactment which added Subchapter I to Title 21 "may be cited as the 'Controlled Substances Act.' "

court correctly concluded that "Vega's prior conviction under § 11378 does not categorically qualify as a controlled substance offense for purposes of applying a higher base offense level pursuant to U.S.S.G. § 2K2.1(a)(4)(A)." App. C-9-10.

The district court then considered whether § 11378 is a "divisible" statute, which would permit the court to employ the "modified categorical approach." App. C-10.

Descamps v. United States, 133 S.Ct. 2276 (2013) explained the distinction between the "categorical" and "modified categorical" approaches. When a court utilizes the "categorical" approach, it compares the elements of the statute forming the basis of the defendant's prior conviction with the elements of the federal "generic" crime, that is, the offense as commonly understood. The prior conviction qualifies as a "predicate" offense to increase subsequent punishment only if the statute's elements are the same as, or narrower than, those of the generic offense. *Id*. at 2281.

The "modified categorical approach" is used only when a statute sets out *elements* of the offense in the alternative, and permits a sentencing court to consult a limited class of documents, such as the indictment and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction. *Ibid*. Based on the principles underlying the court's prior decisions, the court disapproved the Ninth Circuit's practice of applying the "modified categorical approach" to *any* statute, *id*. at 2286, and said, "we hold that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." *Id*. at 2282. If the statute merely describes a single crime overbroadly, there is no "modification" to the categorical approach; rather, "the inquiry is over." *Id*. at 2286.

The district court in our case therefore considered whether § 11378 was a "divisible" statute. Relying on a Ninth Circuit opinion, *Coronado v. Holder*, 759 F.3d 977 (9th Cir. 2014), which addressed a similarly-structured statute, Health and Safety Code § 11377,[2] the district court concluded that § 11378 creates several different crimes, rather than separate means of committing one crime, and the statute was therefore "divisible." App. C-10

Applying the "modified categorical approach," the district court examined the state criminal complaint, which in Count 1 charged Vega with possession of a controlled substance, namely, methamphetamine, and the abstract of judgment, which showed Vega was convicted of Count 1. The district court concluded that Vega had committed the crime of possession for sale of methamphetamine, which is a controlled substance under the federal Controlled Substances Act, and the enhanced sentence was therefore proper. App. C-11-12.

Vega appealed, contending that California Health and Safety Code § 11378 describes a single crime of "possession for sale of a controlled substance," and the reference to the drug schedules merely describes several means to commit that crime. The district court therefore erred, he asserted, by applying the modified categorical approach.

The Court of Appeals affirmed the district court in a memorandum decision which tersely stated, "Because this court recently reaffirmed that section 11378 is divisible, *see United States v. Ocampo-Estrada*, 873 F.3d 661, 668 (9th Cir. 2017), the district court correctly concluded that Vega is not entitled to section 2255 relief." App. A-2.

The *Ocampo-Estrada* decision, in turn, relied upon a recent Ninth Circuit *en banc* decision, *United States v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017), which

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[2]*Coronado's* analysis is sparse, but it seems to have concluded that § 11377 stated "elements" rather than "means" merely because the schedules and statutes described in the statute were "listed in the disjunctive." 759 F.3d at 984.

held that the controlled substances referenced in a similarly-structured California drug statute, Health and Safety Code § 11352, "are treated as listing separate offenses, rather than merely listing separate means of committing a single offense." The court in *Ocampo-Estrada* concluded that the same reasoning applied to § 11378. *Ocampo-Estrada*, *supra*, 837 F.3d at 668.

The outcome in the case at bar, therefore, is a direct result of the decision in *United States v. Martinez-Lopez*, which, as an *en banc* decision, is binding precedent in the Ninth Circuit.

The *Martinez-Lopez* decision asserted, 864 F.3d at 1036, n. 1, that it was revisiting the Ninth Circuit's "entire line of cases" involving similar California drug statutes,[3] in response to this court's remand and instruction to reconsider the Ninth Circuit's decision in *Guevara v. United States*, 136 S.Ct. 2542 (1026) "in light of *Mathis v. United States*, 136 S.Ct. 2243 (2016)."

As we explain *infra*, the decision in *Martinez-Lopez* has at least two major defects. First, it did not apply the principles set forth in *Mathis*, for example, by examining what must be charged and what must be proved to obtain a California drug conviction. Second, the decision misinterpreted California law.

WHY THE PETITION SHOULD BE GRANTED

A.
The California Statutory Scheme for Drug Offenses

California Health and Safety Code § 11378 makes it illegal to possess for sale any "controlled substance" that meets certain criteria, namely, that the substance is "classified" in certain of California's "schedules" of prohibited drugs ["Schedule III, IV, or V"] or is "specified" in certain named sections or subdivisions of sections of the California Health and Safety Code, which is part

[3] Many of California's drug statutes, like § 11378, do not name specific prohibited substances themselves, but instead reference other statutes and subparts found in California's drug schedules.

of the California Uniform Controlled Substances Act. For example, § 11055(a) of the Code states, "The controlled substances listed in this section are included in Schedule II." Subparagraph (d) of that statute lists substances "having a stimulant effect on the central nervous system," and subparagraph (d)(2) lists "Methamphetamine, its salts, isomers, and salts of its isomers." Vega's possession of methamphetamine for sale, then, meets the criterion of being listed in §11055, and its possession for sale is therefore prohibited by §11378.

Federal drug laws have a similar structure. The Controlled Substances Act prohibits possession with intent to distribute "a controlled substance." 21 U.S.C. § 841 (A)(1). A "controlled substance" is defined by 21 U.S.C. § 802 as a drug "included in schedule I, II, III, IV or V of part B of this subchapter. Section 812 of the Code (which is part of Subpart B) lists as a Schedule II drug "any injectable liquid which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers." 21 U.S.C. § 812, Schedule II (c). The same statute lists as a Schedule III drug "any substance (except an injectable liquid) which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers." 21 U.S.C. § 812, Schedule III (a).

California, like other states, has adopted the Uniform Controlled Substances Act, which was modeled on federal law. *People v. Orozco*, 209 Cal.App.4th 726, 732, 146 Cal.Rptr. 3d 916, 920 (2012) [the California Uniform Controlled Substances Act (Health & Safety Code, § 11000 et seq.) "classifies controlled substances in accord with the five schedules of the federal and uniform Acts. . . ."]. For that reason the California schedules correspond in large part to the federal schedules found in the federal Act. However, the California schedules contain some drugs that are not prohibited by federal law. See *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078, n. 6 (9th Cir., 2007) [noting that Androisoxazole, Bolandiol, Boldenone,

Oxymestrone, Norbolethone, Quinbolone, Stanozolol, and Stebnolone are punishable only under California law. See Cal. Health and Safety Code § 11056(f)].

B.
Analysis of Prior Convictions: The "Categorical Approach" and the "Modified Categorical Approach"

Vega's federal sentence was enhanced because the sentencing court determined that his prior conviction for a violation of California Health and Safety Code § 11378 was a qualifying "controlled substance offense." The court applied a base offense level of 20, instead of 14, pursuant to U.S.S.G. § 2K2.1(a)(4)(A), which provides that a § 922(g)(1) offense has a base offense level of 20 if "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense." App. C-6.

To determine whether the prior conviction was a controlled substance offense, the court must compare the elements of the state statute under which Vega was convicted to the relevant definition under federal law. A series of Supreme Court cases, beginning with *Taylor v. United States*, *supra,* 495 U.S. 575 has established that a past conviction can increase a defendant's sentence for a current offense if, but only if, the statutory definition of the prior conviction's elements are the same as, or narrower than, the elements of the corresponding federal offense. *Mathis v. United States, supra 136* S.Ct. 2243, 2247, 195 L.Ed.2d 604, 610.

Because California Health and Safety Code § 11378 is broader than the federal Controlled Substances Act, it punishes conduct that both is, and is not, a crime under the federal Act. This means a prior conviction for violating California Health and Safety Code § 11378 is not on its face a federal

"controlled substance offense," because it is not a "categorical match." See *United States v. Ocampo-Estrada*, *supra* 873 F.3d 661, 667 [noting the parties do not dispute that § 11378 is "overbroad"].

Mathis v. United States, *supra* 136 S.Ct. 2243, 2248 explains that to determine whether a prior conviction is a "listed crime" that will enhance a federal sentence, the courts must first apply the "categorical approach," focusing solely on whether the elements of the prior crime of conviction sufficiently match the elements of the corresponding generic federal offense, without regard to the particular facts of the case. This approach is straightforward if the statute sets out a single (or "indivisible") set of elements defining a single crime. But a statute could also list "elements" in the alternative (a "divisible" statute), and thereby define multiple crimes. *Id*. at 2249.

When a statute is divisible, a sentencing court needs a way to figure out which of the alternative *elements* listed in the statute was the actual basis of the defendant's conviction. To address that need, the Supreme Court has approved the "modified categorical approach" for use with divisible statutes, that is, with statutes that list alternative *elements* of separate crimes. *Ibid*. Under the "modified categorical approach," the sentencing court can look at a limited class of documents from the earlier case (e.g., the indictment, jury instructions, or plea agreement) to determine what crime, with what elements, the defendant was convicted of. The court then compares that specific crime with the relevant "generic" federal offense. *Ibid*.

But there is an important distinction to keep in mind. If the statute of conviction merely specifies several alternative *means* of committing a single crime, a sentencing court has "no special warrant to explore the facts of an offense, rather that to determine the crime's elements and compare them with

the generic definition." *Mathis* at 2251. In the case of an "indivisible" statute "the categorical approach needs no help from its modified partner." *Descamps v. United States*, *supra* 133 S.Ct. 2276, 2286, 186 L.Ed. 2d 438 (2013). Rather, at that point, "the inquiry is over" and the conviction cannot be used as a predicate to enhance the sentence. *Ibid*.

Mathis teaches that the distinction between a "divisible" and "indivisible" statute is that the former lists *elements* in the disjunctive, creating separate crimes, while the latter lists the *means* of committing a single crime. *Mathis*, *supra* 1346 S.Ct. at 2248.

In the case at bar the issue is whether § 11378 is "divisible" or "indivisible." How does a court determine whether a statute that uses disjunctive phrasing is describing elements of separate crimes, or describing different means to commit a single crime?

Mathis tells us: Look at State court decisions to see what the State must charge and what it must prove, that is, consider "which things must be charged (and so are elements) and which need not be (and so are means"). 136 S.Ct. at 2256. Elements are also "the things the prosecution must prove to sustain a conviction." 136 S.Ct. at 2248.

The court can also look at the statute itself to see if it imposes different punishments for different alternatives. "If statutory alternatives carry different punishments, then under *Apprendi* [see *Apprendi v. New Jersey*, 530 U.S. 466 (2000)] they must be elements. Conversely, if a statutory list is drafted to offer 'illustrative examples,' then it includes only a crime's means of commission." *Mathis*, 136 S. Ct. at 2256 [citations omitted]; see also *Alleyne v. United States*, 133 S.Ct. 2151, 2163-2164, 186 L.Ed.2d 314 (2013) [any fact that increases the penalty "conclusively indicates that the fact is an element of a distinct and aggravated crime"].

C.
The *En Banc* Court in *Martinez-Lopez* Did Not Examine What Must Be Charged or What Must Be Proved to Obtain a Conviction. Instead It Looked to How California Punishes Defendants Convicted of Multiple Statutory Violations Which Are Part of a Single Course of Conduct.

In *Martinez-Lopez* the Ninth Circuit did not look at what must be charged or proved, nor did it consider that § 11378 imposes the same punishment regardless which substance is possessed. Instead, it looked at a California case that neither party had cited, *In re Adams*, 14 Cal.3d 629 (1975), because, the opinion says, *Adams* "definitively answers the question" whether California's drug statutes describe elements or means. *Martinez-Lopez*, *supra*, 864 F.3d at 1040. The court concluded that California defendants can be punished separately for each drug they possess, which means the statute in question "creates separate crimes, each containing an *element* not contained in the other. *Id*. at 1040 [italics in original]. Two paragraphs later, however, the court states that *Adams* only "implicitly held" that the controlled substances requirement is an element. *Id*. at 1041.

But *Adams* did not even *address* what must be charged or proved to obtain a California drug conviction, let alone answer the question. Indeed, the word "element" does not appear at all in the opinion. Rather, *Adams* addressed a sentencing issue based on a unique California statute, Penal Code § 654, which expresses a legislative policy that acts or omissions that are part of the same course of conduct having a single objective may not be punished under more than one provision of law.

How California Penal Code § 654 works was explained by the California Supreme Court in *People v. Latimer*, 5 Cal.4th 1203, 23 Cal.Rptr. 144, 858 P.2d 611 (1993). The court presented the issue thusly: "A person kidnaps his victim, drives her into a desert, then rapes her and leaves her behind. May he be punished for the kidnapping as well as the rape under

Penal Code section 654, which prohibits multiple punishment for '[a]n act or omission' that is punishable by different provisions of the code?" 5 Cal.4th at 1205.

If the majority's analysis in *Martinez-Lopez* were correct—multiple punishments are proof of multiple elements—then the answer should have been, "Yes, because the elements are obviously different. He committed two separate crimes." But the answer was no: "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." 5 Cal.4th at 1205, quoting *Neal v. State of California*, 55 Cal.2d 11, 19, 357 P.2d 839 (1960). "Elements" had nothing to do with whether the defendant could be punished for committing more than one crime as part of a single course of conduct. The only question was whether the defendant had a single objective.

In *Adams* the defendant was convicted of the sale of benzedrine, plus five separate counts of transporting illegal narcotics and drugs (all at the same time)—seconal, benzedrine, marijuana, heroin, and pantopon—with the intent to deliver them to another person. *Id*., 14 Cal.3d at 632. An "act," said the court in *Adams*, need not be a separate physical incident, but may be a course of conduct that violates the terms of more than one statute. Whether § 654 applies "depends upon the intent and objective of the actor, and if all offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one." *Id*. at 634. Because all five drugs were destined for one buyer, the defendant did not commit five separate acts of transportation, and the transaction should be viewed as "an indivisible course of conduct" that "results in a single punishable offense." *Id*. at 635.

Put another way, "only one 'act' of transportation took place," and "only one punishment may be exacted for that act." *Id*. at 636. The court ordered that execution of sentence under four of the counts of conviction be stayed, with the stay to become permanent when service of defendant's sentence under the other counts was completed. *Id*. at 637.

The court's reasoning in *Adams* does not support the conclusion that transportation of seconal, benzedrine, marijuana, heroin, and pantopon are five separate crimes. Rather, the court simply said transportation of the five drugs "results in a single punishable offense." *Id*. at 635 [italics added]. Where then did the Ninth Circuit in *Martinez-Lopez* get the idea it did?

The Ninth Circuit seized on language in *Adams*, not relating to the court's conclusion that the defendant's act of transporting several drugs was "a single punishable offense," but rather describing an argument made by the prosecution, where the State pointed to several intermediate appellate decisions which had "held that the simultaneous *possession* of different types of drugs properly may be multiply punished." *Id*. 14 Cal.3d at 635 [italics in original]. "By analogy," the State argued that "the 'act' of transportation of multiple types of drugs should not be deemed a single act." *Ibid*. In rejecting the argument, the *Adams* court said it "did not disapprove" of the cases cited by the State, which the *Adams* court characterized as meaning that "the defendant's possession may or may not have been motivated by a single intent and objective." *Adams*, 14 Cal.3d at 635.

Martinez-Lopez interpreted the *dictum* "we do not disapprove" to mean the court "implicitly approved" those cases. *Id*. at 1040. But saying "we do not disapprove" is not the same as saying "we approve." It means the court did not rule on, or even address, the issue one way or the other. The lack of debate, however, should not be mistaken for assent. "As is well established, a case is

authority only for a proposition actually considered and decided therein." *In re Chavez*, 30 Cal.4th 643, 656, 134 Cal.Rptr. 2d 54, 68 P.3d 347 (2003).

Perhaps just as important, those earlier cases made a distinction between possessing drugs of the same type and possessing drugs of *different* types. The *Adams* court pointed out how the State's argument was flawed, in a sentence that appears to have been overlooked by the Ninth Circuit: "This rule does not apply if the drugs possessed are 'all of one kind,' such as various derivatives of the drug opium." *Adams, supra, 14 Cal.3d at 635,* citing *People v. Schroeder*, 264 Cal.App.2d 217, 228, 70 Cal.Rptr. 491.

In *People v. Schroeder* the defendant was convicted of two counts of possession of different forms of opium and seven counts of possession of morphine compounds in different mixtures. *Id*., 264 Cal.App.2d at 223-224. If the Ninth Circuit's analysis and conclusion in *Martinez-Lopez* were correct that possession of several different drugs results in the commission of several different crimes, see 864 F.3d at 1040, Mr. Schroeder could have been convicted and punished for all nine offenses. But the California court ruled that there could be only two—not nine—convictions. Notably, the court applied considerations *similar* to those underlying Penal Code § 654, but reached its conclusion *independent* of that statute, which relates to punishment. The two counts of opium possession, said the court, "would constitute a single offense," and the seven morphine counts "would constitute another separate single offense." 264 Cal.App.2d at 228. The trial court should have stricken the remaining counts of conviction. *Id*. at 229.

The appellate court's decision in *Schroeder* was based on the fact that the narcotics in each of the two groups were "all of one kind."[4] *Id*. at 228. In the

[4] This is analogous to drugs being all in the same "schedule" under the current California Act.

other "earlier cases" cited in *Adams* the imposition of multiple punishments was justified because the drugs were all of different types.

The *Adams* court also cited *In re Hayes*, 70 Cal.2d 604, 74 Cal.Rptr. 790, 451 P.2d 430 (1969) as a case citing the rule under consideration with "apparent approval." 14 Cal.3d at 635. *Hayes* involved charges of driving on a suspended license and driving while intoxicated, and the court allowed punishment for both. But in *People v. Jones*, 54 Cal.4th 350, 358, 142 Cal.Rptr. 3d 561, 278 P.3d 821 (2012), the California Supreme Court overruled *Hayes*. This supports the conclusion that Penal Code § 654 is based on legislative policy, not on a rule defining the elements of a crime. Elements of a crime do not change unless the legislature changes them.

Martinez-Lopez, 864 F.3d at p. 1041, inferred from the *Jones* decision that the California Supreme Court was concerned with separate crimes, but *Jones* was careful to say its observations were about acts, not crimes, and only as those acts related to Penal Code § 654: "In some situations, physical acts might be simultaneous yet separate for purposes of section 654. For example, in *Hayes*, both the majority and the dissenters agreed that, to use Chief Justice Traynor's words, 'simultaneous possession of different items of contraband' are separate acts for these purposes." *Jones* at 358.

The fundamental flaw in the analysis of *Martinez-Lopez* is that Penal Code § 654 has nothing to do with determining the elements of a crime. As can be seen from *People v. Latimer*, *supra* 5 Cal.4th 1203, where the crimes were kidnapping and rape, elements never are at issue in a § 654 analysis. Whether one can be punished for violating more than one statute does not inform a federal court whether California's drug statutes (or any California statute) describe different elements or different means. Punishment under § 654 is based

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Drug "schedules" were not enacted in California until 1972. Before that, different kinds of drugs were listed in different subparagraphs of statutes.

on legislative policy, and policy has nothing to do with the definition of elements. Compare *Whalen v. United States*, 445 U.S. 684, 693-694 (1980) [Double Jeopardy Clause prevented defendant from being punished for offenses of rape and of killing the same victim in the perpetration of the rape, even though a conviction for killing in the course of a rape could not be had without proving all the elements of rape] with *Missouri v. Hunter*, 459 U.S. 359, 362 (1983) [defendant *could* be punished for robbery and robbery with a deadly weapon, because the Missouri legislature had clearly specified the latter punishment was "in addition to" the former].

Thus not only did the Ninth Circuit in *Martinez-Lopez* fail to follow this court's mandate in *Mathis v. United States* to examine what must be charged and what must be proved to obtain a conviction, it misinterpreted California law relating to both multiple convictions and multiple punishments for different statutory violations. *Adams* said no more than sometimes defendants can be given multiple punishments for possessing multiple drugs (if the drugs are different types), and sometimes they cannot (if they are the same type). That hardly satisfies "*Taylor*'s demand for certainty." *Mathis, supra at 257.*

Had the court in *Martinez-Lopez* looked to California case law addressing what must be charged and proved, it would have found that California Courts are unanimous that the only thing that must be charged is possession of "a controlled substance," and to obtain a conviction the State need only prove that the defendant possessed "a controlled substance." The prosecution does not need to charge or not prove which specific substance was possessed.

D.
California Case Law Is Unanimous That the Prosecution Need Only Plead and Prove That the Defendant Possessed a "Controlled Substance."

Every California case to address what a prosecutor must charge has agreed that the name of the specific controlled substance is not required.

In *Ross v. Municipal Court*, 49 Cal.App.3d 575, 577, 122 Cal.Rptr. 807 (1975), the defendant was charged with being "under the influence of a controlled substance" in violation of Calif. Health and Safety Code § 11550. This allegation was sufficient, said the California Court of Appeal, even though complaint did not tell the defendant "the means by which he committed the crime." Id. at 579.

Note the court's use of the term "means."

In *People v. Durazo*, 217 Cal.App.2d 647, 654, 357 P.2d 839 (1963) the court held that proof of possession of heroin instead of amidone, as charged, would be "immaterial" because an indictment "need not allege the particular mode or means employed in the commission of an offense" and particulars as to means need not be added to the statutory definition.

Another California court says the specific substance is the "means" of committing the crime.

In *People v. Gelardi,* 77 Cal.App.2d 467, 175 P.2d 855 (1946) the information charged the defendant with unlawfully selling a narcotic, without specifying which narcotic. *Id*. at 471. The name of the narcotic, said the appellate court, is "mere surplusage," because nothing beyond the language of the statute need be alleged. *Id*. at 472.

The court in *People v. Bryant*, 2007 Cal.App.Unpub. LEXIS 6695 at *5, 2007 WL 2356072 (unpub.) reached the same conclusion ["the information would

have been sufficient without any specification of the particular controlled substance"].[5]

These cases were all decided by intermediate appellate courts. Although the highest state court is the final authority on state law, it is still the duty of the federal courts, where state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State. "An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question." *Fidelity Union Trust Co. v. Field,* 311 U.S. 169, 177-178 (1940). This is because the applicable state law has been authoritatively declared by the highest courts to have ruled on the issue. Many rules of decision by intermediate courts are accepted and acted upon although the highest court of the state has never passed upon them. *West v. Am. Tel. & Tel. Co.*, *supra* 311 U.S. 223, 236. Moreover, in California, the State Supreme Court has declared that decisions of the California Courts of Appeal are binding on all California trial courts: "Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state." *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 20 Cal.Rptr. 321, 369 P.2d 937 (1962).

The California Supreme Court itself has spoken with regard to what the prosecution must *prove* in a drug case. In *People v. Davis*, 57 Cal.4th 353, 159 Cal.Rptr. 405, 303 P.3d 1179 (2013), the defendant was convicted of "possession

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[5] The Ninth Circuit has relied on unpublished California opinions to "lend support" to the contention that a reported case "accurately represents California law." *Beeman v. Anthem Prescription Mgmt., LLC*, 689 F.3d 1002, 1008, n. 2 (9th Cir., 2012) (en banc).

Unpublished decisions may actually be stronger evidence of what the law is, because they routinely state established undisputed law, with nothing new to add. See Rule 8.1105, Calif. Rules of Court [standards for publication of decisions].

of a controlled substance." The question before the high court was the sufficiency of the evidence "to prove a given material is a controlled substance." *Id*. at 356. The California Supreme Court reversed the conviction. Why? "The People proved that the blue pills defendant sold to the undercover police officer contained 3,4–methylenedioxymethamphetamine (MDMA), commonly known as Ecstasy, but it failed to prove that MDMA is a controlled substance." Id. at 362 (Chin, J., concurring).

Davis flatly refutes the conclusion in *Martinez-Lopez* that a California prosecutor must prove the specific controlled substance possessed, and makes clear the prosecutor must prove the defendant possessed "a controlled substance."

In *People v. Martin*, 169 Cal.App.4th 822, 86 Cal.Rptr. 3d 858 (2008) the defendant was charged with possession of cocaine base, a Schedule I drug, but the verdict found him guilty of "possession of a controlled substance, to wit, cocaine," *id*. at 824, which is a Schedule II drug. The court upheld the conviction because "he was charged with possession of a controlled substance, and the prosecution's case established he had a controlled substance." Id. at 826.[6]

In *People v. Nugent*, 2010 WL 4967932 (Cal.Ct. App. Dec. 8, 2010) [unpublished] an undercover officer asked the defendant to sell him "a 20," without further specification, and gave him a marked $20 bill. Defendant was arrested, but no drugs were found. The officer opined in court the defendant had offered to sell him *either* cocaine or heroin. The court upheld the conviction,

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[6] In *People v. Martin* the jury was correctly instructed in the oral instructions, but the written instructions were in error. This conflict does not negate the significance of *Martin*, because the decision did not turn on that conflict, nor should it have. See *People v. McLain*, 46 Cal.3d 97, 115 (1988) [if oral and written instructions conflict, "we presume the jury was guided by the written instructions"].

because the evidence was "sufficient to support the finding that appellant had offered to sell either cocaine or heroin." Id., at *3.

In *People v. Orozco*, No. H024112, 2003 WL 23100024 (unpub.), the defendant was charged with "possession of a controlled substance, to wit, cocaine," but the evidence showed he possessed heroin. The appellate court upheld the conviction. The prosecution was only required to prove "that it was *a* controlled substance." *Id*. at *4 [italics by the court].

Criminal statutes require the prosecution to prove beyond a reasonable doubt that "the defendant kn[e]w the facts that ma[d]e his conduct illegal." *Staples v. United States*, 511 U.S. 600, 605 (1994). In California the defendant need only know that the substance he possesses is a "controlled substance."

The California Supreme Court has repeatedly stated that a criminal defendant need only know the *character* of the substance, not its chemical composition. *People v. Williams*, 5 Cal.3d 211, 215, 95 Cal.Rptr. 530, 485 P.2d 1146 (1971) ["elements of possession of narcotics are physical or constructive possession thereof coupled with knowledge of the presence and narcotic character of the drug"]; *People v. Winston*, 46 Cal.2d 151, 158, 293 P.2d 40 (1956) [jury instruction was erroneous for failure to include "the essential element of knowledge of the narcotic character of the particular object possessed"]; *People v. Palaschak*, 9 Cal.4th 1236, 1242, 40 Cal.Rptr. 2d 722, 893 P.2d 717 (1995) [elements of possession of a controlled substance are dominion and control of a usable quantity with knowledge of its presence "and of its restricted dangerous drug character"]; *People v. Martin*, 25 Cal.4th 1180, 1184, 108 Cal.Rptr. 2d 599, 25 P.3d 181 (2001) [same]; *People v. Low*, 49 Cal.4th 372, 386, 110 Cal. Rptr. 3d 640 (2010) ["knowing possession of a controlled substance simply requires an awareness of both its physical presence and narcotic character."

Intermediate appellate courts have unanimously said the same thing. In *People v. Guy*, 107 Cal.App.3d 593, 165 Cal.Rptr. 463 (1980) the defendant was convicted of possession of phencyclidine (PCP) for sale in violation of Health and Safety Code § 11378. He contended that the jury should have been instructed the prosecution had to prove he knew the controlled substance he possessed was PCP. The court concluded that a conviction only requires "knowledge of the controlled nature of the substance and not its precise chemical composition." *Id*. at 600-601, citing *People v. Garringer*, 48 Cal.App.3d 827, 121 Cal.Rptr. 922 (1975); accord, *People v. Romero*, 55 Cal.App.4th 147, 157, 64 Cal.Rptr. 2d 16 (1997) [even if defendant thought he was trafficking only in marijuana, knowledge that he was dealing with a controlled substance was sufficient for a conviction under statutes applicable to cocaine]; *People v. Montero*, 155 Cal.App.4th 1170, 1176, 66 Cal.Rptr. 3d 668 (2007) [jury instruction correctly required jury "to find that the defendant knew of the substance's presence, and that he also knew the substance was a controlled substance"]; *People v. Rodriguez*, 222 Cal.App.4th 578, 593, 166 Cal.Rptr. 3d 187 (2014) ["possession of a controlled substance involves the mental elements of knowing of its presence and of its nature as a restricted substance"].

Finally, California's pattern criminal jury instruction, CALCRIM No. 2302, the instruction applicable to Vega's prior offense, states that "[t]he People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed"].

Our research has found no California case that required the State to prove a specific controlled substance to obtain a conviction.[7]

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[7] The majority in *Martinez-Lopez* cited a legal commentator to support its conclusion that the specific substance is the "element" of the offense. 2 Witkin & Epstein, Cal. Crim. Law (4th Ed. 2012) [Crimes Against Public Peace and Welfare] § 102. But the statement in Witkin is pure *ipse dixit*, with no cases cited anywhere in the treatise to support the statement—perhaps because no such cases exist.

E.
The Jury Does Not Fill in a Blank in the Jury Instructions Naming the Substance They Found the Defendant Possessed. That Blank Is Filled in by Counsel or the Judge *Before* the Instructions Are Read to the Jury.

The court in *Martinez-Lopez* made another baffling pronouncement when it stated that the jury fills in a blank in the jury instructions to identify the controlled substance in question, which, the court said, demonstrates "that the jury must identify and unanimously agree on a particular controlled substance." 864 F.3d at 1041.[8] But as all trial lawyers know, jury instructions do not contain any blanks by the time the judge approves them and reads them to the jury. Indeed, in California there are specific statutes and rules that say so. Counsel submits proposed instructions to the judge, in writing, Calif. Penal Code § 1127, before closing argument, Penal Code § 1093.5, and each proposed instruction must "[b]e prepared without any blank lines or unused bracketed portions, so that it can be read directly to the jury." Rule 2.1055(c)(3), California Rules of Court.[9]

The jury fills in *verdicts*, not jury instructions.[10]

There is a reason the pattern instructions contain a blank for the judge to fill with the name of the suspected controlled substance, but it is not because the jury must agree on a specific substance. The California Supreme Court explained

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[8] The opinion in *United States v. Ocampo-Estrada* repeats this error. 873 F.3d at 668.

[9] In the event of a dispute, the judge fills in the blanks.

[10] How the Ninth Circuit arrived at this *ipse dixit* pronouncement is unclear, because two of the litigants informed the court of the correct procedure. The briefs in the *Martinez-Lopez* case (available through PACER at the Ninth Circuit's on-line docket for Case No. 14-50014), show that the Government's Answering Brief (at pp. 14-15) [Docket Entry 25] informed the Circuit Court that the jury instructions "provide a blank for a prosecutor or judge to fill in" to describe the controlled substance the defendant is charged with. The *amicus* brief filed by the Los Angeles County Public Defender (at p. 10) [Docket Entry 60] also informed the court that California jury instructions "include blank lines for the court to insert 'type of controlled substance' involved in the underlying criminal action."

why in *People v. Davis*, *supra*, 57 Cal.4th 353, where the defendant sold two blue pills to an undercover agent at a rave party, and was charged with "possession of a controlled substance." 57 Cal.4th at 356. A chemist testified the pills contained MDMA, or Ecstasy (3,4–methylenedioxymethamphetamine), and the jury convicted the defendant of sale and possession of a controlled substance (Health and Safety Code § 11377, § 11379). *Id*. at 357.

But there was a problem: "The Health and Safety Code does not list MDMA, 3,4–methylenedioxymethamphetamine, or Ecstasy as a controlled substance." Id. at 358. This means the prosecution proved the pills contained MDMA, "but it failed to prove that MDMA is a controlled substance." *Id*. at 362 (Chin, J., concurring).

The court explained that the State *could* have proved that Mr. Davis violated the statute, because the Health and Safety Code also prohibits substances that meet the definition of an analog. *Id*. at 359. The State could have offered expert testimony of MDMA's chemical composition or its effects on the user, to show it was a prohibited analog, *ibid*., but it did not, so the defendants' conviction was reversed. *Id*. at 362.

The *Davis* court explained why identifying a specific drug in the jury instructions by filling in a blank simplifies the trial: If a substance is one specifically listed in the Health and Safety Code Schedules, the substance "is a controlled substance as a matter of law, and the jury need not make any further finding in that regard." 57 Cal.4th 353, 361, and n. 5.

In other words, instructing the jury what substance the defendant is alleged to have possessed merely makes the State's proof that he possessed "a controlled substance" easier.

CONCLUSION

United States v. Martinez-Lopez is binding precedent in the Ninth Circuit, and will affect hundreds, if not thousands, of defendants with prior California drug convictions who come before a federal court for imposition of sentence. The case will also affect countless noncitizens facing deportation. See *Marinelena v. Sessions*, 869 F.3d 780, 787 (9th Cir. 2017) [finding noncitizen with prior California drug conviction ineligible for cancellation of removal under *Martinez-Lopez*].

The *Martinez-Lopez* decision is powerful, but it is defective, because the court used the wrong methodology, and ignored the methodology announced by this court in *Mathis v. United States* to consider what must be charged and what must be proved. It merely analyzed whether, under a California statute expressing a particular *policy* adopted by the California legislature, a defendant can be punished more than once for violating more than one statute—something that has nothing whatever to do with the elements of the defendant's crime or crimes. Even then, when the court analyzed *In re Adams* for a "definitive answer" to determine when defendants can receive multiple punishments for drug crimes, the court overlooked that what *Adams* actually said was that sometimes a court can impose multiple punishments for multiple drug crimes (when the drugs are of the same type), and sometimes it cannot (when the drugs are of different types). "Sometimes" completely fails to inform a federal court (or any court) what constitutes an element—what must be charged and what must be proved—when it comes to California's drug offenses.

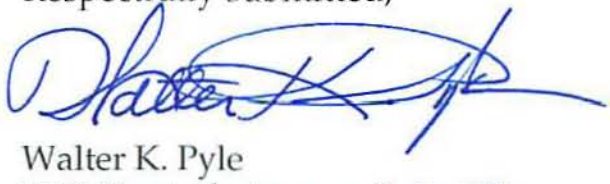
That *Martinez-Lopez* is a badly-reasoned decision is not a close question, even if one overlooks that the court thought California juries fill in their own jury instructions. The deficiencies in *Martinez-Lopez* are evidenced by a unanimous

array of California case decisions which state that the prosecution need only charge and prove that the defendant possessed a controlled substance.

The court should grant the petition for certiorari, examine what must be charged and what must be proved to obtain a drug conviction in California, and overrule *United States v. Martinez-Lopez*, in light of the numerous shortcomings described above.

In the alternative, the court should certify to the California Supreme Court, pursuant to Rule 8.548 of the California Rules of Court, the question whether the prosecution, to obtain a conviction pursuant to California Health and Safety Code § 11378, must charge and prove which specific substance the defendant possesses. See *Fiore v. White*, 528 U.S. 23, 25 (1999) [certifying in a habeas corpus case a question of state law to the Pennsylvania Supreme court, stating that the answer would "help determine the proper state-law predicate for the [Court's] determination of the federal constitutional questions raised in [the] case"]; see also *Fiore v. White*, 531 U.S. 225, 229 (2001) (per curiam) [following clarification from the Pennsylvania Supreme Court, reaching the "simple, inevitable conclusion" that the petitioner's conviction should be reversed].

Respectfully submitted,



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Appendix A

Memorandum Decision of the Court of Appeals Affirming District Court's Order Denying Petitioner's Motion to Correct His Sentence

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MANUEL VEGA, Defendant - Appellant.	No. 16-15913 D.C. Nos. 4:15-cv-02778-PJH 4:14-cr-00484-PJH MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, Chief Judge, Presiding

Submitted December 18, 2017**

Before: WALLACE, SILVERMAN, and BYBEE, Circuit Judges.

Manuel Vega appeals from the district court's judgment denying his 28 U.S.C. § 2255 motion challenging his sentence for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). We have jurisdiction under 28 U.S.C.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 2253. We review the denial of a section 2255 motion de novo, *see United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014), and we affirm.

Vega's section 2255 motion alleged that trial counsel was ineffective for failing to argue that Vega's prior conviction under California Health & Safety Code section 11378 was not a predicate controlled substance offense under U.S.S.G. § 2K2.1(a). In rejecting this claim, the district court concluded that section 11378 is a divisible statute, applied the modified categorical approach, and held that counsel was not constitutionally deficient because Vega's prior conviction properly subjected him to a base offense level of 20 under U.S.S.G. § 2K2.1(a)(4). Because this court recently reaffirmed that section 11378 is divisible, *see United States v. Ocampo-Estrada*, 873 F.3d 661, 668 (9th Cir. 2017), the district court correctly concluded that Vega is not entitled to section 2255 relief.

AFFIRMED.

Appendix B

Order of the Court of Appeals Denying Petition for Rehearing

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MANUEL VEGA, Defendant-Appellant.	No. 16-15913 D.C. Nos. 4:15-cv-02778-PJH 4:14-cr-00484-PJH Northern District of California, Oakland ORDER

Before: WALLACE, SILVERMAN, and BYBEE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Vega's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 40) are denied.

Appendix C

Decision of the District Court Denying Petitioner's § 2255 Motion

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
MANUEL VEGA,
Defendant.

Case No. 14-cr-00484-PJH-1

ORDER DENYING MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE

Before the court is the motion of defendant Manuel Vega, appearing pro se, for an order under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. The matter is suitable for decision without oral argument and is fully submitted on the briefs. For the reasons set forth below, the motion is DENIED.

BACKGROUND

Vega is currently serving a sentence imposed by this court. On September 18, 2014, a one-count information was filed charging Vega with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). Doc. no. 11. On November 5, 2014, Vega entered a guilty plea to the sole count of the information, having waived an indictment, pursuant to a plea agreement. Doc. no. 23 (Plea Agreement). In the plea agreement, the parties agreed that the base offense level under § 2K2.1(a)(4)(A) was 20 because Vega had a prior conviction for possession for sale of a controlled substance in violation of California Health and Safety Code § 11378. *Id*. ¶ 7. The government took the position that a four-level increase was warranted, pursuant to U.S.S.G § 2K2.1(b)(6)(B), because Vega used or possessed a firearm or ammunition in

connection with another felony offense, as Vega was in possession of narcotics packaged for sale. *Id.*; doc. no. 25 (Gov't Sentencing Memo.) at 4-5. However, the parties agreed to leave it to the court to determine whether the four-level enhancement applied. Doc. no. 23 ¶ 7. Further, the plea agreement stipulated to a three-level reduction for acceptance of responsibility, bringing the adjusted offense level to 17 (or 21). *Id.* The parties agreed to a sentencing range of 48 to 70 months. *Id.* ¶ 8.

At the time of sentencing, the Probation Office determined that the base offense level was 20, pursuant to U.S.S.G. § 2K2.1(a)(4)(A), because Vega had a prior conviction for a controlled substance offense. Amended Presentence Report ("PSR") ¶ 14. Probation stated that a four-level enhancement was warranted, pursuant to U.S.S.G § 2K2.1(b)(6)(B), because Vega used or possessed a firearm or ammunition in connection with another felony offense for possession of narcotics packaged for sale. PSR ¶ 15. Probation recommended a two-point reduction for acceptance of responsibility, and a further one point reduction for assisting authorities in the investigation or prosecution of Vega's own misconduct by timely notifying authorities of the intention to enter a guilty plea, bringing the adjusted offense level to 21. PSR ¶¶ 21, 22.

To calculate Vega's criminal history category, Probation determined that Vega's criminal convictions resulted in a criminal history score of thirteen. PSR ¶¶ 37-42. Because defendant committed the instant offense while under a criminal justice sentence for possession of a controlled substance for sale, two additional points were added, bringing the criminal history score to fifteen. PSR ¶ 44. A criminal history score of fifteen establishes a criminal history category of VI. PSR ¶ 45. Based on an offense level of 21 and criminal history category VI, Probation recommended a guideline range of 77 to 96 months imprisonment. PSR ¶ 75.

On January 28, 2015, the court adopted the findings in the PSR, but found that a four-level enhancement pursuant to § 2K2.1(b)(6)(B) did not apply, setting the base offense level as 17. Statement of Reasons at 1. Based on an offense level of 17 and a

criminal history category of VI, the applicable guideline range was 51 to 63 months. *Id.* The court sentenced Vega to 57 months of imprisonment, three years of supervised release and a special assessment of $100. Doc. no. 29 (Judgment).

On June 17, 2015, Vega filed a motion to vacate, set aside, or correct the sentence pursuant to § 2255. Doc. no. 37. Vega also filed a motion for appointment of counsel. Doc. no. 38. In his § 2255 motion, Vega asserted the following grounds for relief: (1) ineffective assistance of counsel for failure to give notice to the court about the ambiguities in the abstract of judgment pertaining to the prior state conviction which ultimately led to an offense level enhancement at sentencing; and (2) ineffective assistance of counsel for failure to argue for a sentence reduction based on the ambiguous abstract of judgment which does not indicate a prior conviction for possession of a controlled substance for sale, but rather simple possession of a controlled substance, as well as failure to argue that "the judgment must contain the critical phrase 'as charged in the information,'" based on the holding of *Medina-Lara v. Holder*, 771 F.3d 1106 (9th Cir. 2014). Doc. no. 37.

Although Vega presented these arguments as two separate grounds for relief for ineffective assistance of counsel, the court construed the arguments as a single claim of ineffective assistance of counsel for failure to challenge the 2013 state conviction as a prior drug felony conviction in establishing the base offense level under § 2K2.1 of the Sentencing Guidelines. Doc. no. 41. The court ordered the government to show cause as to Vega's § 2255 claim of ineffective assistance of counsel, and denied Vega's motion to appoint counsel. *Id.*

On October 15, 2015, Vega filed another § 2255 motion with an additional claim of ineffective assistance of counsel asserting that counsel failed to disclose to Vega relevant information necessary for him to make a knowing and intelligent decision to plead guilty to 18 U.S.C. § 922(g)(1) and that counsel failed to argue for dismissal on grounds that 18 U.S.C. § 922(g)(1) is "limited to the sending or receiving of firearms as part of an interstate transportation." Doc. no. 42. The government did not object to the second-filed

§ 2255 motion and responded to the newly raised claim. Because the government did not object to the second-filed § 2255 motion, the court liberally construes it as an amended § 2255 motion.

On December 18, 2015, the government filed its opposition to Vega's § 2255 motions. Doc. no. 51. Vega filed his reply on January 26, 2016. Doc. no. 52.

ISSUES

In his § 2255 motion, as amended, Vega asserts two claims of ineffective assistance of counsel. He contends: (1) that he was denied effective assistance of counsel when his trial counsel failed to give notice to the court about the ambiguities in the abstract of judgment pertaining to the prior state conviction which ultimately led to an offense level enhancement at sentencing; and (2) that he was denied effective assistance of counsel because his trial counsel failed to disclose relevant information to Vega necessary to make a knowing and intelligent decision to plead guilty to 18 U.S.C. § 922(g)(1) and counsel's failure to argue for dismissal on the ground that 18 U.S.C. § 922(g)(1) is "limited to the sending or receiving of firearms as part of an interstate transportation."

LEGAL STANDARD

Under 28 U.S.C. § 2255, a federal prisoner may file a motion to vacate, set aside, or correct a sentence on the grounds that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). A prisoner filing a claim for federal habeas relief under 28 U.S.C. § 2255 is entitled to an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003).

The Sixth Amendment right to counsel guarantees effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). A successful claim of

ineffective assistance has two components. First, a defendant must show that counsel's performance was deficient. *Id.* at 687. Deficient performance is representation that falls below an objective standard of reasonableness. *Id.* at 688. Second, having established deficient performance, the defendant must show he was prejudiced by counsel's errors; that is, there must be a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

In order to demonstrate deficient performance, a habeas petitioner is required to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See Strickland*, 466 U.S. at 687. The relevant query is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable. *See Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998). Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 689. To show prejudice in the context of guilty pleas, the petitioner must demonstrate that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *see also Strickland*, 466 U.S. at 694.

DISCUSSION

I. Failure to Challenge 2013 Conviction as Controlled Substance Offense

The Ninth Circuit has held that erroneous advice regarding the consequences of a guilty plea is insufficient to establish ineffective assistance; petitioner must establish a "'gross mischaracterization of the likely outcome' of a plea bargain 'combined with . . . erroneous advice on the probable effects of going to trial.'" *Sophanthavong v. Palmateer,* 378 F.3d 859, 868 (9th Cir. 2004) (citing *United States v. Keller*, 902 F.2d 1391, 1394 (9th Cir. 1990)). In *United States v. Roberts*, 5 F.3d 365 (9th Cir. 1993), the Ninth Circuit held that the defendant was not denied effective assistance of counsel based on alleged

failure to object to inaccuracies in the presentence report about the estimated amount of methamphetamine that could be made from the precursor chemicals that he purchased, as well as alleged failure to object to enhancements for firearms and leadership role. *Id.* at 371-72. The defendant in *Roberts* argued that phenylacetic acid was not a controlled substance at the time of his offense, and that the Sentencing Guidelines did not contain a conversion table for estimating the quantity of methamphetamine from phenylacetic acid. *Id.* at 372. The Ninth Circuit held that the ineffective assistance claim lacked merit, noting that although the guidelines did not provide a conversion table, they did provide for an approximation to be made, to arrive at the applicable offense level. *Id*. The court in *Roberts* also held that the enhancements for possession of firearms and leadership role were properly applied, but found that the sentencing court violated Rule 11 in accepting the guilty plea and vacated the sentence. *Id.* at 370-71.

Here, Vega contends that his counsel provided ineffective assistance by failing to give notice to the court about the ambiguities in the abstract of judgment for his 2013 state court conviction, which resulted in a base offense level under the sentencing guidelines that was six levels higher based on a prior conviction for a controlled substance offense. Doc. no. 37 at 5; doc. no. 38, Ex. A (Felony Abstract of Judgment). At sentencing, the court applied a base offense level of 20 pursuant to § 2K2.1(a)(4)(A), which provides that a § 922(g)(1) offense has a base offense level of 20 if "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense." Without a prior felony conviction of either a crime of violence or a controlled substance offense, the applicable base offense level for the firearms offense, pursuant to § 2K2.1(a)(6), would be 14, a difference of six offense levels. Vega asserts that his attorney failed to challenge the ambiguity of the state court abstract of judgment, which refers to "POSS. OF CONTROLLED SUBSTANCE" and lacks the critical phrase "for sale" as charged in the information. Doc. no. 52. He contends that § 2K2.1(a)(4)(A) does not apply because his prior conviction was not a "controlled substance offense" under the Federal Controlled

Substance Act. *Id*. Additionally, Vega argues that he "did not get sentenced to sales for 4 years as the 2013 plea agreement states but was sentenced to a 3 year split sentence for possession of a controlled substance," and that § 2K2.1(a) is not applicable to a prior conviction for simple possession of a controlled substance. *Id.*

A. Abstract of Judgment Is Not Ambiguous in Light of the Record

First, although the abstract of judgment truncates the description of the crime as "POSS. OF CONTROLLED SUBSTANCE," and does not specify possession for sale, it is not ambiguous as to Vega's conviction for violating Health & Safety Code § 11378, which expressly prohibits "a person who possesses for sale a controlled substance," including methamphetamine which is categorized as a Schedule II stimulant under Health & Safety Code § 11055(d). *See U.S. v. Valle-Montalbo*, 474 F.3d 1197, 1200 (9th Cir. 2007) ("The plain text of California Health & Safety Code § 11378 criminalizes only possession for sale."). The abstract of judgment states, "Defendant was convicted of the commission of the following felony: Count 01, Code HS, Section Number 11378." Doc. no. 38, Ex. A. The abstract of judgment specifies a conviction for Count 1, which was charged in the underlying criminal complaint as "the crime of POSSESSION FOR SALE OF A CONTROLLED SUBSTANCE, in violation of Section 11378 of the Health and Safety Code," alleging that Vega "did willfully and unlawfully possess for purpose of sale a controlled substance, to wit: methamphetamine." Doc. No. 51, Ex. B. In light of the record, the abstract of judgment is not ambiguous in identifying the conviction offense.

B. Prior Felony Conviction for Controlled Substance Offense

Second, Vega has not shown that he does not have a prior felony conviction for a controlled substance offense. The term "controlled substance offense" as used in U.S.S.G. § 2K2.1 has the meaning given in § 4B1.2(b) and application note 1 of the commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* § 2K2.1, cmt. n.1. Under § 4B1.2, a "controlled substance offense" is defined as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of 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." As reflected on the state court abstract of judgment, Vega's 2013 conviction was based on a violation of Health & Safety Code § 11378, which expressly prohibits "a person who possesses for sale a controlled substance." Under California law, the crime of possession for sale under § 11378 contains the common elements of all drug possession offenses, i.e., "(a) a specified controlled substance, in a sufficient quantity and in a usable form; (b) possession, which may be physical or constructive, exclusive or joint; and (c) knowledge of the fact of possession and of the illegal character of the substance," and "contains the additional element of proof of a specific intent to sell the substance." *People v. Montero*, 155 Cal. App. 4th 1170, 1175 (2007) (citations omitted).

To determine whether Vega's prior state court conviction under § 11378 qualifies as a controlled substance offense under federal law, the court must first take a categorical approach to compare the elements of the state statute under which Vega was convicted to the relevant definition under federal law. *See Taylor v. United States*, 495 U.S. 575, 60 (1990). "If the state statute criminalizes conduct that would not constitute a drug trafficking offense under federal sentencing law, then a prior conviction under that statute does not categorically qualify as a basis for enhancing a defendant's sentence." *United States v. Valdavinos–Torres*, 704 F.3d 679, 691 (9th Cir. 2012) (citation and internal marks omitted), *cert. denied,* 134 S. Ct. 1873 (2014). In *Valdavinos-Torres,* the Ninth Circuit recognized that "not all convictions under Section 11378 qualify as drug trafficking offenses because . . . not all substances punishable under California law are defined as controlled substances under federal law." 704 F.3d at 684. There, the Ninth Circuit determined that a drug conviction under § 11378 did not categorically qualify as an aggravated felony as defined by 8 U.S.C. § 1101(a)(43)(B), which classifies trafficking offenses as deportable "aggravated felonies." The court in *Valdavinos-Torres* reasoned that because "California's controlled substances schedules are broader than their federal

counterparts," a "prior conviction under Section 11378 cannot be a categorical controlled substance or drug trafficking offense under federal law." *Id*. at 687.

The court in *Valdavinos-Torres* also considered whether the defendant's prior § 11378 conviction was for a drug trafficking offense for purposes of triggering the sentencing enhancement under U.S.S.G. § 2L1.2(b)(1)(A), which sets forth a definition of a drug trafficking offense that is similar to the definition of a controlled substance offense as used in § 2K2.1(a)(4)(A). The court in *Valdavinos-Torres* held that § 11378 categorically qualified as a drug trafficking offense, referring to the fact that the defendant was convicted for possession of methamphetamine for sale, 704 F.3d at 691. That portion of the court of appeals' opinion is inconsistent with, and does not distinguish, its earlier reasoning that § 11378 did not satisfy the categorical approach, and is inconsistent with other Ninth Circuit cases holding that similar California drug statutes do not categorically qualify as a drug trafficking offense because the California statutes criminalize the possession of more substances than covered by federal law. *See U.S. v. Leal-Vega*, 680 F.3d 1160, 1171 (9th Cir. 2012) (holding that prior conviction under California Health & Safety Code § 11351 did not categorically qualify as a "drug trafficking offense" under U.S.S.G. § 2L1.2, but qualified under the modified categorical approach); *Mielewczyk v. Holder*, 575 F.3d 992, 995-96 (9th Cir. 2009) (California Health & Safety Code § 11352(a) does not "categorically establish a logical connection to a controlled substance as defined in section 102 of the CSA" but under the modified categorical approach, the prior drug offense was determined to involve heroin, which is covered by the federal definition of a controlled substance). *See also Ruiz-Vidal v. Lynch*, 803 F.3d 1049, 1052 (9th Cir. 2015) (on review of a removal order, the court applied the modified categorical approach to analyze the prior conviction under Health & Safety Code § 11377(a) and determine whether it involved a substance included in the CSA). Given the weight of authority recognizing that the California drug statutes criminalize possession of substances that are not covered by federal law, the court determines that Vega's prior conviction under § 11378 does not categorically qualify as a

controlled substance offense for purposes of applying a higher base offense level pursuant to U.S.S.G. § 2K2.1(a)(4)(A).

The court proceeds to consider whether the controlled substance element of § 11378 is divisible before applying the modified categorical approach. *Descamps v. U.S.,* 133 S. Ct. 2276, 2293 (2013) ("A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction."). In *Coronado v. Holder,* 759 F.3d 977 (9th Cir. 2014), *as amended, and cert. denied,* 135 S. Ct. 1492 (2015), the court reviewed the finding of inadmissibility by the Board of Immigration Appeals based on the petitioner's two prior convictions for possessing methamphetamine in violation of California Health & Safety Code § 11377(a). The court in *Coronado* held that § 11377, which prohibits unauthorized possession of a controlled substance, covered substances that do not fall within the Federal Controlled Substances Act ("CSA"), 21 U.S.C. § 802, and therefore was not categorically a removable offense. *Id.* at 983. The court of appeals determined that Health & Safety Code § 11377(a) is a divisible statute and proceeded to a modified categorical approach. *Id*. at 984-85. The court in *Coronado* reasoned that "Section 11377(a) identifies a number of controlled substances by referencing various California drug schedules and statutes and criminalizes the possession of any one of those substances. The statute thus 'effectively creates "several different ... crimes"' and not separate 'means of commission.'" *Id.* at 984 (quoting *Descamps*, 133 S. Ct. at 2285, 2291). With respect to the type of controlled substance prohibited by statute, there is no meaningful distinction between § 11377(a), which was discussed in *Coronado*, and § 11378, which is at issue here, because both statutes identify "a number of controlled substances by referencing various California drug schedules and statutes." *Coronado*, 759 F.3d at 985. Under the reasoning of *Coronado*, the court determines that the controlled substance element of § 11378 is divisible and proceeds with the modified categorical approach to determine whether Vega's prior conviction under § 11378 qualifies as a controlled substance offense for purposes of calculating the applicable

offense level under § 2K2.1. *See Medina-Lara v. Holder*, 771 F.3d 1106, 1112 (9th Cir. 2014) (assuming, without deciding, that the controlled substance element of Health & Safety Code § 11351, which prohibits possession or purchase for sale of designated controlled substances, was divisible and that the specific controlled substance, methamphetamine, is an element of the crime.).

Under the modified categorical approach, the court "conducts a limited examination of documents in the conviction record to determine if there is sufficient evidence to conclude [Vega] was convicted of the elements of the generically defined crime, even though Section 11378 is facially over-inclusive." *Valdavinos-Torres*, 704 F.3d at 687. The court may consider the record of Vega's conviction provided by the government here, which includes the criminal complaint, the plea agreement, and abstract of judgment. *Medina-Lara v. Holder*, 771 F.3d 1106, 1113 (9th Cir. 2014) (recognizing that the court may only consider "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information") (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005)). The court may rely "on an abstract of judgment in combination with a charging document to establish that the defendant pled guilty to a generic crime under the modified categorical approach." *Id.*

Vega cites *Medina-Lara* in support of his contention that the abstract of judgment for the § 11378 conviction "must contain the critical phrase 'as charged in the information,'" doc. no. 37 at 6, but the court in *Medina-Lara* expressly held that Ninth Circuit authority is not "so exacting as to require that the phrase 'as charged in the Information' appear on the abstract of judgment." 771 F.3d at 1113. Rather, the court in *Medina-Lara* required that "[w]hen a court using the modified categorical approach to determine whether an underlying conviction is a predicate offense relies solely on the link between the charging papers and the abstract of judgment, that link must be clear and convincing." *Id.* Here, the link between the state complaint, which charged Vega in

Count 1 with possession for sale of a controlled substance, namely, methamphetamine, in violation of § 11378, and the abstract of judgment specifying that Vega was convicted of Count 1 for violation of § 11378 is clear and unambiguous, particularly in light of the plea agreement which also specifies that Vega pled guilty to Count 1 for "HS 11378." *See U.S. v. Torre-Jimenez*, 771 F.3d 1163, 1169 (9th Cir. 2014) ("Where, as here, the abstract of judgment unambiguously specifies that Defendant pleaded guilty to a specific count, we look to the facts alleged in that count in the charging document."). The evidence in the record is clear and convincing that Vega was convicted of possession for sale of methamphetamine, which "of course, qualifies as a controlled substance under federal law." *Valdavinos-Torres*, 704 F.3d at 687. Under a modified categorical approach, Vega's 2013 conviction constitutes a controlled substance offense under U.S.S.G. § 4B1.2 because (1) it is an offense under state law; (2) that is punishable by imprisonment for a term exceeding one year; and (3) that prohibits the possession of a controlled substance with intent to distribute or dispense.

C. No Misstatement re: State Court Sentence

Third, Vega's contention that § 2K2.1(a) is not applicable because he served a three year split sentence instead of a four year sentence misreads the sentencing guideline and his 2013 plea agreement in state court. Section § 2K2.1(a)(4)(A), provides that a § 922(g)(1) offense has a base offense level of 20 if "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense." Under § 2K2.1(a), a "felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. U.S.S.G. § 2K2.1(a). Vega's 2013 plea agreement recognized that by pleading guilty to the § 11378 violation, he was facing a maximum term of imprisonment of 4 years (3-year maximum on the § 11378 charge plus 1-year maximum enhancement pursuant to Penal Code § 667.5(b) for prior term), but he was not sentenced to the

maximum 4-year term by the state court. Doc. No. 51, Ex. B. As reflected in the abstract of judgment, and as reported in the PSR, Vega was sentenced on the § 11378 violation to 11 months custody and 25 months supervision. Because Vega was convicted of an offense under state law, punishable by imprisonment exceeding one year, that prohibits possession of a controlled substance for sale, the 2013 state court conviction satisfied the requirements of a prior conviction for a controlled substance offense under § 2K2.1(a)(4)(A). *See* U.S.S.G. § 4B1.2.

In light of Vega's criminal history, the higher base offense level under § 2K2.1(a)(4)(A) was properly applied and Vega's attorney did not provide ineffective assistance by failing to make objections or give notice to the court about the ambiguities in the abstract of judgment pertaining to the prior state conviction. Vega's allegations of deficient performance are directly controverted by the record. *See Roberts,* 5 F.3d at 372 (rejecting ineffective assistance claim that the attorney failed to object to inaccuracies about drug quantity estimates underlying the offense level calculation). Defense counsel's failure to challenge the abstract of judgment was not an error or a "gross mischaracterization" of the likely outcome of the plea bargain because Vega's prior state court conviction for violation of Health and Safety Code § 11378 was properly characterized as a controlled substance offense.

Vega argues in his reply brief that even if the court determines that the 2013 conviction qualifies as a controlled substance offense under § 2K2.1(a) and merits the higher base offense level of 20, counsel failed to argue under U.S.S.G. § 5G1.3(b)(1) for a sentence reduction or adjustment for time served on the 2013 offense which was used to enhance the base offense level of the instant offense. The court previously addressed this argument in the order to show cause, finding that such a collateral challenge to the length of the sentence is barred by the plea agreement. Doc. no. 41.

Because Vega has not established deficient performance in counsel's failure to challenge the ambiguities in the abstract of judgment pertaining to his prior 2013 conviction, the court does not need to reach the prejudice prong of the *Strickland* test.

Therefore, Vega is not entitled to relief for counsel's alleged failure to object to the offense level enhancement.

II. Failure to Challenge Interstate Commerce Requirement

Vega contends that his attorney provided ineffective assistance of counsel by not arguing that 18 U.S.C. § 922(g)(1) does not reach intrastate transactions, and that even those transactions with an interstate nexus are limited to sending or receiving firearms as part of an interstate transportation. Vega fails to show that his counsel's performance was deficient because there was no basis in the record for challenging the interstate nexus. "The failure to raise a meritless argument does not constitute ineffective assistance of counsel." *Shah v. United States*, 878 F.2d 1156, 1162 (9th Cir. 1989).

Vega entered a guilty plea to a violation of 18 U.S.C. § 922(g)(1), which makes it unlawful for a convicted felon "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Vega cites *United States v. Bass*, 404 U.S. 336 (1971), for the proposition that the government failed to prove the specific element under § 922(g) that Vega had the firearm shipped through interstate commerce and then received it. Doc. no. 52. Vega misreads the holding of *Bass* to require the government to prove that the firearm travelled through interstate commerce before he received it, and ignores the cases following *Bass* that have not construed the interstate nexus so strictly. In *Bass,* the Court construed former 18 U.S.C. App. § 1202(a), making it a crime for a convicted felon to "receive[ ], possess[ ], or transport[ ] in commerce or affecting commerce . . . any firearm," to hold that the statutory phrase "in commerce or affecting commerce" applied to all three predicate offenses: "'possesses' and 'receives' as well as 'transports.'" 404 U.S. at 347. The Court in *Bass* was not presented with the question what would constitute an adequate nexus with commerce, but suggested that the listed offense of firearm possession by a felon "in commerce or affecting commerce" would be satisfied if "the gun was moving interstate or on an interstate facility" at the time of the offense, whereas the

separate listed offense of a felon receiving a firearm "in commerce or affecting commerce" would be satisfied if "the firearm received has previously traveled in interstate commerce." *Id.* at 350-51. In a subsequent decision, *United States v. Scarborough,* the Supreme Court recognized the limited holding of *Bass* and held that the firearm statute at issue required only a "minimal nexus that the firearm have been, at some time, in interstate commerce." 431 U.S. 563, 568, 575 and n.11 (1977).

Ninth Circuit authority establishes that the commerce nexus of § 922(g) is satisfied by evidence of a gun's foreign manufacture. *See United States v. Patterson,* 820 F.2d 1524, 1526 (9th Cir. 1987). In *Patterson,* the court held that the interstate commerce nexus of the felon in possession statute was satisfied by evidence that a handgun found in the defendant's possession in California bore an imprint that it had been manufactured in Florida, reasoning that the gun "could not have made the journey from Miami to Los Angeles without traveling in interstate commerce." *Id. See also United States v. Clawson*, 831 F.2d 909, 913 (9th Cir. 1987) (holding that evidence of foreign manufacture was sufficient to support the factual finding that the gun moved in interstate commerce). In *U.S. v. Beasley*, 346 F.3d 930, 936 (9th Cir. 2003), the Ninth Circuit rejected the defendant's argument that "the government was required to present evidence that the firearm *recently* moved in interstate commerce," holding that a one-time past connection to interstate commerce is sufficient under § 922(g)(1).

Here, the plea agreement specified the elements of 18 U.S.C. § 922(g)(1) as follows: "(1) I knowingly possessed a firearm; (2) that firearm had been shipped or transported from one state to another or between a foreign nation and the United States; and (3) at the time that I possessed the firearm, I had been convicted of a crime punishable by imprisonment for a term exceeding one year." Doc. no. 23 ¶ 1 (Plea Agreement). Vega admitted that on July 23, 2014, he knowingly possessed a firearm that was manufactured outside of California, he possessed it in the Northern District of California, and he had a 2013 felony conviction for possession of a controlled substance for sale, in violation of Health & Safety Code § 11378. *Id.* ¶ 2. Moreover, Probation

reported that the firearm was manufactured outside of California, and that it travelled in or affected interstate or foreign commerce. PSR ¶ 9. In light of the record, Vega's attorney did not provide ineffective assistance by failing to raise a meritless argument challenging a sufficient interstate nexus. *Shah*, 878 F.2d at 1162.

CONCLUSION

For the reasons set forth above, Vega's § 2255 motion, as amended by his second-filed § 2255 motion, is DENIED.

IT IS SO ORDERED.

Dated: April 18, 2016

PHYLLIS J. HAMILTON
United States District Judge