No. 18-5321

IN THE SUPREME COURT OF THE UNITED STATES

SALVADOR ORTIZ-URESTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner's prior Colorado conviction for possessing cocaine with intent to distribute, in violation of Colo. Rev. Stat. § 18-18-405 (Supp. 1996), constitutes a "drug trafficking offense" that qualifies as an "aggravated felony" under 8 U.S.C. 1326(b)(2).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is not published in the Federal Reporter but is reprinted at 721 Fed. Appx. 145.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2018. A petition for rehearing was denied on March 26, 2018 (Pet. App. B1-B2). On June 13, 2018, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 24, 2018. The petition for a writ of certiorari

was filed on July 18, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of illegal reentry after removal, in violation of 8 U.S.C. 1326. Judgment 1. He was sentenced to 48 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A10.

1. Petitioner is a Mexican citizen who entered the United States without authorization. In December 1999, he was convicted in Colorado state court, and sentenced to four years of imprisonment, for violating Colo. Rev. Stat. § 18-18-405(1)(a) (Supp. 1996). Presentence Investigation Report (PSR) ¶ 28. At the time, that statute made it unlawful to "manufacture, dispense, sell, distribute, possess, or to possess with intent to manufacture, dispense, sell, or distribute a controlled substance" and also covered attempt and conspiracy. Colo. Rev. Stat. § 18-18-405(1)(a) (Supp. 1996). The charging document specified that petitioner had "possess[ed] with intent to distribute * * * at least twenty five grams but less than four hundred fifty grams of * * * [c]ocaine." C.A. Supp. App. 7; see PSR ¶ 28. The mandatory minimum sentence for this crime was four years of imprisonment. Pet. App. A7.

Petitioner was subsequently removed from the United States. PSR ¶ 28. At some point thereafter, he illegally reentered the United States. PSR ¶ 55. In November 2015, he was arrested in Pennsylvania and admitted to police that he had reentered the United States without authorization. Ibid. He pleaded guilty to unlawfully reentering the United States after having been removed, in violation of 18 U.S.C. 1326(a) and (b)(2). PSR ¶¶ 1-2.

2. Section 1326(a) makes it unlawful for an alien to reenter the United States after having been removed unless he obtains the prior consent of the Attorney General. The base statutory maximum term of imprisonment is two years, which rises to ten years if the alien's removal followed a "felony" conviction and to 20 years if the removal followed a conviction for an "aggravated felony." 8 U.S.C. 1326(b)(1) and (2). An "aggravated felony" includes any "drug trafficking crime," which, in turn, includes any state-law offense prohibiting the "distribut[ion]" or "possess[ion] with intent to * * * distribute" a "controlled substance" that could be prosecuted as a felony under federal law. 8 U.S.C. 1101(a)(43)(B); 18 U.S.C. 924(c)(2); 21 U.S.C. 841(a)(1); Moncrieffe v. Holder, 569 U.S. 184, 188 (2013).

3. At petitioner's plea hearing, the district court informed petitioner that he faced a maximum sentence of 20 years because his prior state felony drug conviction qualified as an "aggravated felony." C.A. J.A. 23-24, 31-33. Petitioner agreed that he had previously been found guilty of "possession with intent

to deliver" and that his previous removal was the result of an aggravated felony. Ibid.

At sentencing, petitioner raised no objections to the "to the factual findings, guidelines calculation, criminal history category, or applicable statutory maximum" reported by the Probation Office. Pet. App. A3; C.A. J.A. 58. Petitioner's advisory Sentencing Guidelines range was 46 to 57 months, which did not depend on whether petitioner's Colorado conviction was an "aggravated felony." See PSR ¶¶ 18, 65. The district court sentenced petitioner to 48 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

4. The court of appeals affirmed in an unpublished decision. Pet. App. A1-A10.

For the first time on appeal, petitioner claimed that the Colorado statute under which he was convicted was "indivisible" -- meaning it set forth various means of committing a single offense, rather than elements of multiple offenses -- and was therefore too broad to qualify as an "aggravated felony." Pet. App. A4. The court of appeals reviewed that claim for plain error, requiring petitioner to "demonstrate: (1) an error; (2) that is clear or obvious; and (3) that affects his substantial rights," and that "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Ibid. (citation omitted).

The court of appeals recognized that to determine whether a prior state conviction under an indivisible statute qualifies as

an aggravated felony, the court would apply the categorical approach and ask "whether the state statute defining the crime of conviction categorically fits within the generic definition of a corresponding aggravated felony." Pet. App. A4-A5 (quoting Moncrieffe, 569 U.S. at 190). The court explained, however, that the "modified categorical approach" is available when the statute "is divisible, i.e., it 'sets out one or more elements of the offense in the alternative.'" Id. at A5 (citation omitted).

The court of appeals found the Colorado drug statute to be divisible. Pet. App. A5-A6. The court reasoned that "[b]ecause the [Colorado] statute can be violated by the distribution of many types of drugs and the type and amount of drugs can increase the punishment, the statute includes several alternative elements." Id. at A6. Applying the modified categorical approach, the court determined from petitioner's charging document that his conviction was for possessing with intent to distribute more than 25 grams of cocaine, which is punishable as a felony under federal law. Id. at A5-A6; see 21 U.S.C. 841(a)(1) and (b)(1)(C). Accordingly, petitioner's conviction was a drug trafficking offense and therefore an aggravated felony. Pet. App. A8.

ARGUMENT

Petitioner contends (Pet. 9-17) that his conviction under the former version of Colorado's drug statute, Colo. Rev. Stat. § 18-18-405(1)(a) (Supp. 1996), was not an "aggravated felony." The court of appeals correctly found no plain error in petitioner's

sentence, and its unpublished decision does not implicate or create any square conflict in binding circuit precedent. The ultimate question, moreover, turns on the construction of a state statute, which is not an issue that federal courts can definitively resolve. The petition should be denied.

1. The court of appeals correctly affirmed petitioner's sentence. As the court recognized (Pet. App. A4), petitioner forfeited his challenge to the aggravated-felony classification of his prior conviction and can therefore prevail only if he establishes the elements of plain-error review: an "error"; that is "clear" or "obvious"; and that affected his "substantial rights." United States v. Olano, 507 U.S. 725, 732 (1993) (citations omitted) (discussing the elements of plain error). If these prerequisites are satisfied, the court has discretion to correct the error based on its assessment of whether "the error seriously affects the fairness, integrity or public reputation of judicial proceedings." Ibid. (citation and brackets omitted). Petitioner cannot make the requisite showing.

a. Petitioner cannot show an "error" in the classification of his Colorado conviction, much less one that is "clear" or "obvious."

Federal courts typically apply one of two approaches in determining whether a defendant's prior conviction qualifies as an "aggravated felony." Under the "categorical approach," a court determines whether the statutory definition of the defendant's

prior offense "categorically fits within the 'generic' federal definition of a corresponding aggravated felony," without regard to the facts underlying the conviction. Moncrieffe v. Holder, 569 U.S. 184, 190 (2013). "Some statutes, however, have a more complicated (sometimes called 'divisible') structure" in which they "list elements in the alternative, and thereby define multiple crimes." Mathis v. United States, 136 S. Ct. 2243, 2249 (2016). When the statute of conviction is divisible, the sentencing court may apply the "modified categorical approach." Ibid. Under that approach, "a court may determine which particular offense the noncitizen was convicted of by examining" a limited class of documents, such as "the charging document," the "plea agreement," or "'some comparable judicial record' of the factual basis for the plea." Moncrieffe, 569 U.S. at 191 (citation omitted).

For the modified categorical approach to apply, the state statute must set out alternative elements (facts that the jury must find or the defendant must admit to sustain a conviction) rather than simply specifying alternative means ("various factual ways of committing some component of the offense" that "a jury need not find (or a defendant admit)" to convict). Mathis, 136 S. Ct. at 2249. "The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means." Id. at 2256. One indication that "the statute contains a list of elements, each one of which goes toward a separate crime," is if case documents such as the

charging instrument or plea agreement enumerate "one alternative term," that is, one way of violating the statute, "to the exclusion of all others." Id. at 2257.

That is precisely the case here. The charging document from petitioner's 1999 Colorado arrest expressly charges him with one count of "distribut[ing] * * * at least twenty-five grams but less than four hundred fifty grams of * * * a Schedule II Controlled Substance, to-wit: Cocaine"; a separate count of "possess[ing] with intent to distribute" the same; and still a third count of "conspir[acy] * * * to distribute a Schedule II Controlled Substance, to-wit: Cocaine." C.A. Supp. App. 6-8; see Pet. App. A7 & n.2. Petitioner was ultimately convicted of possession with intent to distribute. Pet. 6 (citing C.A. J.A. 38, 40). The charging document's explicitly dividing the various acts (distribution, possession with intent to distribute, and conspiracy, respectively) into three separate counts -- instead of simply charging petitioner with violating the statute generally -- is strong evidence that under Colorado law these are elements, not means, and that the statute is therefore divisible. And because possession with intent to distribute cocaine is undisputedly an "aggravated felony," the court of appeals correctly found that petitioner's sentence is not erroneous.

Petitioner argues (Pet. 15-17) that under Colorado case law the statute defines only a single crime and is thus indivisible. But the case on which petitioner primarily relies (Pet. 10-13),

Colorado v. Abiodun, 111 P.3d 462 (Colo. 2005), is inapposite because it is a double-jeopardy case. In the double-jeopardy context, two crimes can constitute the "same offence," U.S. Const. Amend. V, even if their elements differ in certain respects. Blockburger v. United States, 284 U.S. 299, 304 (1932). Two offenses may be treated as the "same," for example, when they each "require[] proof of a fact which the other does not," ibid., and the legislature has not otherwise indicated that it views the offenses as distinct, see Garrett v. United States, 471 U.S. 773, 778-781 (1985). Abiodun's holding, in the double-jeopardy context, that by listing the "series of acts" in a "one-sentence proscription" the Colorado drug statute intended to "'criminalize successive stages of a single undertaking'" such that the same transaction could not support convictions for both simple possession and distribution, 111 P.3d at 466-467 (citation omitted), thus does not foreclose the statute's divisibility. Even if the proof necessary to convict for, say, possession with intent to distribute would also suffice for simple possession (such that the offenses would be the same for double-jeopardy purposes), the former includes an additional element (intent) that the latter does not.

Indeed, when the Supreme Court of Colorado revisited the drug statute in Colorado v. Valenzuela, 216 P.3d 588 (2009) (en banc), it held that "the structure of the offense provision makes clear that three distinct categories of actions are criminalized." Id.

at 592. Therefore, the court held, some of the alternatives in the list of proscribed acts were susceptible to a sentencing enhancement, while others were not. Id. at 594-595. Valenzuela, which postdates Abiodun by four years, thus suggests that the Colorado drug statute is divisible. See Mathis, 136 S. Ct. at 2256. At a minimum, petitioner cannot show that the statute is "clear[ly] or obvious[ly]" indivisible, as he must on plain-error review.

b. In any event, any possible clear error did not affect petitioner's substantial rights because he would have received the same sentence even if his prior conviction were not an aggravated felony.

The immigration statutes increase the maximum sentence for unlawful reentry not just for prior "aggravated felony" convictions, but for prior "felony" convictions too. 8 U.S.C. 1326(b)(1). A "felony" is any crime punishable by a term exceeding one year. See Moncrieffe, 569 U.S. at 188. A violation of the Colorado drug statute is plainly punishable by more than one year of imprisonment. See Pet. App. A6 (citing Colo. Rev. Stat. Ann. §§ 18-18-405(2)(a)(I) and (3)(a) (1992)). In fact, petitioner's conviction carried a mandatory minimum sentence of four years. Id. at A7. It follows that even if petitioner's prior conviction is not an "aggravated felony," it is still a "felony." Accordingly, his maximum term of imprisonment would be ten years. 8 U.S.C. 1326(b)(1).

Petitioner's 48-month sentence for unlawful reentry is far less than this lower statutory maximum, which means any error could not have affected his substantial rights. The district court did not base its sentence on the statutory maximum, but instead on the factors in 18 U.S.C. 3553(a) and on the Guidelines range -- which petitioner concedes was correctly calculated and unaffected by the error he asserts here. The court never even mentioned the statutory maximum when imposing the sentence; it began its sentencing pronouncement by noting the 46-to-57-month Guidelines range, C.A. J.A. 64, and reiterated the Guidelines range immediately before pronouncing the 48-month sentence, id. at 66.

2. Petitioner errs in asserting (Pet. 9-12) a square conflict in the lower courts on the divisibility of the Colorado drug statute. Although courts of appeals have construed the statute's divisibility differently, the only decision petitioner asserts to conflict with the decision below, United States v. McKibbon, 878 F.3d 967 (10th Cir. 2017), focused on a different part of the statute. And in any event, neither the decision below nor similar decisions from the Fifth Circuit are published, so no conflict in binding authority exists.

McKibbon does not squarely conflict with the decision below. It focused on various ways of selling drugs, not the elements of the broader statute. The Colorado statute defines "sale" as "a barter, an exchange, or a gift, or an offer therefor." Colo. Rev. Stat. § 18-18-102(33) (2017) (emphasis added). Under Tenth

Circuit precedent, a "controlled substance offense" in Sentencing Guidelines § 4B1.2(b) does not include offers to sell a controlled substance. McKibbon, 878 F.3d at 973. McKibbon therefore viewed the various ways of selling (bartering, exchanging, giving a gift, and offering) as indivisible from each other, and thus concluded that the state statute was not a "controlled substance offense" under the Guidelines. Id. at 972. McKibbon did not hold that selling (as a whole) was indivisible from the other proscribed acts in the statute, such as simple possession or possession with intent to distribute -- which is the issue here. To the extent McKibbon suggested that the statute as a whole is indivisible, it relied only on Abiodun, the double-jeopardy case, and did not even cite (much less analyze) the Supreme Court of Colorado's more recent decision in Valenzuela. McKibbon, 878 F.3d at 974-976. And although McKibbon relied in part on the defendant's charging documents to support its conclusion about the indivisibility of "sale," petitioner's charging documents here show that the State treats possession and distribution, at least, as separate (and therefore divisible) offenses.

The other case petitioner identifies (Pet. 10) as part of an asserted conflict is an unpublished per curiam Fifth Circuit decision, United States v. Gomez, 706 Fed. Appx. 172 (2017), that rejected an indivisibility claim on plain-error review -- just as the court below here did. Gomez, unlike McKibbon, cited and discussed Valenzeula, concluding that it is not "clear" or

"obvious" that the various acts in the Colorado statute are means and not elements. Id. at 176-177. The Fifth Circuit has since followed Gomez's approach in a similar unpublished plain-error case. See United States v. Vega-Chaparro, 713 Fed. Appx. 317 (2018) (per curiam). Both are consistent with the decision below here. And any potential disagreement on this issue between unpublished Third and Fifth Circuit decisions and a published Tenth Circuit decision would not require this Court's intervention.

3. At all events, this case would be a poor vehicle for addressing the question presented because petitioner failed to raise the issue in the district court and therefore is limited to plain-error review. As noted above, any error in the court's divisibility analysis did not affect petitioner's sentence and would not warrant plain-error relief even if the question presented were resolved in his favor.

Furthermore, the divisibility of this outdated version of Colorado's drug statute is an issue of diminishing importance. The statute was amended more than 11 years ago to remove simple possession from the list of proscribed acts. 2007 Colo. Sess. Laws 1686. Over time, fewer and fewer aliens will have pre-2007 convictions. And although petitioner asserts (Pet. 13) that the statutes of other States are similar to Colorado's because they, too, derive from the same model statute, he does not assert that lower courts have disagreed about the divisibility of those statutes; present a sound reason why the state-law-specific

question of whether a particular state's version of a model statute is construed as setting forth means or elements must be resolved in identical fashion in every state; or explain why this petition -- which involves an outdated version of the Colorado statute -- would be an appropriate vehicle to address any such issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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