No. 18-5321

IN THE SUPREME COURT OF THE UNITED STATES

SALVADOR ORTIZ-URESTI,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

PETITIONER'S REPLY MEMORANDUM

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

PETITIONER'S REPLY MEMORANDUM

The brief in opposition advances three arguments: (1) Mr. Ortiz-Uresti's case is a poor vehicle for review; (2) the decision below does not conflict with the Tenth Circuit's holding in *McKibbon*; and (3) the decision below correctly found the Colorado statute divisible. None of these arguments survive scrutiny.

I. Mr. Ortiz-Uresti's case is a suitable vehicle for review.

The government argues that Mr. Ortiz-Uresti's case is a poor vehicle, primarily on the ground that the challenge was first raised in the Third Circuit and thus is subject to plain error review. Yet as discussed in the petition, the standard of review poses no impediment because the error resulted in a sentence exceeding the statutory maximum and is therefore subject to correction as plain error under Third Circuit law. *See* Pet. at 15 (citing *United States v. Lewis*, 660 F.3d 189, 192 (3d Cir. 2011) (stating that "[a] sentence that exceeds the statutory maximum constitutes plain error")); *accord United States v. Westbrooks*, 858 F.3d 317, 327 (5th Cir. 2017), *vacated on other grounds*, 138 S.Ct. 1323 (2018); *United States v. Gibson*, 356 F.3d 761, 766

(7th Cir. 2004); *United States v. Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2002)).[1] Implicitly confirming this rule, the opinion below denied relief only on the ground that there was no error, without holding in the alternative that any error was not plain. Accordingly, this Court's review will necessarily occasion further proceedings below in the event of reversal, making the case a suitable vehicle to reach the question presented.

With regard to the effect of the error, the government claims that Mr. Ortiz-Uresti "would have received the same sentence even if his prior conviction were not an aggravated felony" because the Colorado drug statute is a "felony" triggering the 10-year statutory maximum under 8 U.S.C. § 1326(b)(1). Opp. at 10. That is incorrect. Mr. Ortiz-Uresti specifically argued in the Third Circuit, *see* C.A. App. Br. 24-26, that the 10-year statutory maximum does not apply because the Colorado statute swept broader than the federal definition of a "felony" by covering multiple forms of conduct not punishable by more than one year's imprisonment under federal law, including simple possession, fraudulent offers, and inducements. *See United States v. Figueroa-Alvarez*, 795 F.3d 892, 895 (8th Cir. 2015) (need for "nationwide uniformity in federal sentencing and in administration of the federal immigration laws" requires that federal law determine what is a "felony" under § 1326(b)(1)); *United States v. Cordova-Arevalo*, 456 F.3d 1229, 1233 (10th Cir. 2006) ("felony" under § 1326(b)(1) is an "offense punishable by death or imprisonment for a term exceeding one year"). Because the Third Circuit panel wrongly concluded that the Colorado conviction qualified as an "aggravated felony" triggering the 20-

[1] There are multiple reasons for this rule, including that a district court has no jurisdiction to impose sentence above the statutory maximum and that such a sentence violates due process and constitutes a "miscarriage of justice." *United States v. Caruthers*, 458 F.3d 459, 471 (6th Cir. 2006) (collecting cases).

year statutory maximum, it never addressed this argument. Again, it did not offer the sort of alternative holding that would bear out the government's supposition of vehicle problems.

The government otherwise claims that the divisibility of the Colorado drug statute "is an issue of diminishing importance" because "[t]he statute was amended more than 11 years ago to remove simple possession from the list of proscribed acts." Opp. at 13. This argument misses the mark in two respects.

First, the divisibility of the amended Colorado statute remains of utmost importance because the statute still includes gifts of drugs, fraudulent offers, and solicitation, all of which fall outside the federal definition of an aggravated felony. *See* Colo. Rev. Stat. Ann. § 18-18-405(1)(a); *id.* § 18-18-403(1) (defining "[s]ale" to include "a gift, or an offer therefor"); *see also United States v. Price*, 516 F.3d 285, 287-89 (5th Cir. 2008) (Sentencing Guidelines' definition of "controlled substance offense," which is nearly identical to federal definition of aggravated drug felony, does not include "a mere offer to sell"); *Steele v. Blackman*, 236 F.3d 130, 135 (3d Cir. 2001) (federal definition of an aggravated drug felony does not include "transfer [of drugs] without consideration"); *United States v. Rivera-Sanchez*, 247 F.3d 905, 908-09 (9th Cir. 2001) (federal definition of aggravated drug felony does not include solicitation of drug activity).

Second, certiorari is warranted not only to clarify the divisibility of the Colorado drug statute, but also drug statutes in general. The Third Circuit panel's conclusion that a drug statute divisible as to quantity is also divisible as to conduct reflects a dangerous misunderstanding of how the categorical approach should apply to these unique statutes, which play a significant role in the criminal justice and immigration system. *See* Pet. at 12-14. Given the consequences that federal law makes turn on whether the statue is divisible, the government is also wrong to suggest the matter should be left for state courts to resolve. Opp. 6. The Third Circuit's decision

to part ways from the Tenth Circuit creates a conflict there is no reason to believe Colorado courts will independently engage. Moreover, the failure of the Third Circuit to defer to the Tenth Circuit's construction of a home state's law is symptomatic of the Third Circuit's broader, openly stated hostility to the categorical approach. *See* Pet. at 15-17.

II. The Third Circuit panel's decision is squarely in conflict with the Tenth Circuit's decision in *McKibbon*.

On the question presented, the government argues that the Third Circuit's decision does not actually conflict with the Tenth Circuit's holding *United States v. McKibbon*, 878 F.3d 967 (10th Cir. 2017), stating that *McKibbon* "focused on a different part of the statute." Opp. at 11. According to the government, *McKibbon* "focused on various ways of selling drugs, not the elements of the broader statute" and "therefore viewed the various ways of selling (bartering, exchanging, giving a gift, and offering) as indivisible from each other." Opp. at 12. The government insists that *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." *Id.*

The government misconstrues *McKibbon*, as the facts of that case show. The defendant there had been convicted under the Colorado drug statute "for distribution of a Schedule I or II controlled substance." 878 F.3d at 970. The Tenth Circuit held that the statute swept broader than the definition of a "controlled substance offense" under U.S.S.G. § 4B1.2(b), because it covered the "sale" of drugs, including "an offer" to sell, while a "controlled substance offense" did not. *Id.* at 971-74. Rejecting the argument that the Colorado statute "set[] forth the elements of multiple offenses, including manufacturing, dispensing, distributing, selling, or offering to sell," the Tenth Circuit held that the statute was "indivisible … setting forth one offense which can be committed by a variety of means." *Id.* at 974-75.

McKibbon thus reached a conclusion opposite the Third Circuit's based on the full range of conduct proscribed by the Colorado drug statute. The government's claim that the decision merely focused on the divisibility of "the various ways of selling" offers an imaginary gloss that fails to reconcile the Tenth Circuit's conclusion with the decision below. Indeed, the government's narrow reading of *McKibbon* would not even have resolved the question before the Tenth Circuit, as the defendant there had been charged with "distributing" drugs, not "selling" them. *See id.* at 970. The court therefore had to have concluded that all acts proscribed by the statute, including distribution, sale, dispensing, etc., were indivisible from each other, contrary to the Third Circuit.

III. Colorado law makes clear that its drug statute is indivisible, contrary to the conclusion of the Third Circuit panel.

The government otherwise contends that the Third Circuit panel correctly found that the Colorado drug statute was divisible. Yet tellingly, the government begins its divisibility argument by skipping over the "authoritative sources of state law" that this Court has said are dispositive of the issue. *Mathis v. United States*, 136 S.Ct. 2243, 2256 (2016). Instead, the government jumps straight to the charging document from Mr. Ortiz-Uresti's 1999 conviction, noting that it charged him in separate counts with distribution, possession with intent to distribute, and conspiracy. Opp. at 8. According to the government, this phrasing is "strong evidence" that "under Colorado law these are elements, not means, and that the statute is therefore divisible." *Id.*

The government's resort to what inferences might be drawn from the charging document demonstrates its circumvention of the proper approach to divisibility. This Court held in *Mathis* that the first source a court should consult when determining the divisibility of a state statute is

whether "a state court decision definitively answers the question." 136 S.Ct. at 2256. "When a ruling of that kind exists, a sentencing judge need only follow what it says." *Id.*

Here, multiple decisions of the Colorado Supreme Court state that the drug statute defines a single offense, making it indivisible. *See People v. Valenzuela*, 216 P.3d 588, 589, 591 (Colo. 2009) (en banc) (statute "enumerates a number of different ways the offense provision can be violated," thus "creat[ing] one offense"); *People v. Abiodun*, 111 P.3d 462, 464, 466-67 (Colo. 2005) (statute "defines a single offense … joining in a single proscription an entire range of conduct potentially facilitating or contributing to illicit drug traffic"). Colorado case law also holds that a jury need not unanimously agree on which proscribed act a defendant committed in order to return a conviction under the statute, further proof that it is indivisible. *See People v. Wright*, 678 P.2d 1072, 1075-76 (Colo. App. 1984) (rejecting defendant's argument that prosecution had to specify whether he engaged in "sale" or "dispensing" of drugs or else risk a non-unanimous verdict, since statute described "alternative means of committing the crime" and not "distinct offenses"); *see also Mathis*, 136 S.Ct. at 2256 (absence of unanimity requirement means statute is indivisible).

The government's attempts to diminish the significance of this Colorado precedent do not withstand scrutiny. First, the government claims that the holding in *Abiodun* "does not foreclose the statute's divisibility" because "it is a double jeopardy case." Opp. at 9. Yet *Abiodun* asked precisely the same question presented here: whether the Colorado drug statute's "one-sentence proscription … structured as a series of acts" defines different "statutory elements" "creat[ing] … separate offenses" or instead describes "alternative ways of committing a single crime." *Abiodun*, 111 P.3d at 465-67. The court answered that question clearly, holding that the statute defines a single offense:

> Nothing in the specific language of the statute or the history of its enactment suggests an intent to create a separate offense for each proscribed act. On the contrary, the scope and structure of the proscriptive provision, combined with sentencing provisions differentiating punishments on the basis of the quantum of drugs (rather than the act) involved, strongly points to the creation of a single crime.

Id. at 466-67. This holding squarely establishes that the Colorado drug statute is indivisible, as demonstrated by the numerous federal decisions relying on state court double-jeopardy holdings to determine divisibility. *See, e.g., Martinez v. Sessions*, 893 F.3d 1067, 1071 (8th Cir. 2018); *Raja v. Sessions*, 900 F.3d 823, 828-29 (6th Cir. 2018); *United States v. Martinez-Rodriguez*, 857 F.3d 282, 286 (5th Cir. 2017); *United States v. Edwards*, 836 F.3d 831, 836 (7th Cir. 2016); *Spaho v. United States Attorney General*, 837 F.3d 1172, 1178 (11th Cir. 2016); *United States v. Abbott*, 748 F.3d 154, 159 n.4 (3d Cir. 2014).

Second, the government argues that the Colorado Supreme Court's decision in *Valenzuela* "suggests that the Colorado drug statute is divisible," citing a line from the opinion stating that "the structure of the offense provision makes clear that three distinct categories of actions are criminalized." Opp. at 10 (quoting *Valenzuela*, 216 P.3d at 592). Yet this part of *Valenzuela* does not support the government's divisibility argument. To the contrary, *Valenzuela* reaffirmed *Abiodun*'s holding that the Colorado drug statute "creates one single offense." 216 P.3d at 592 (citing *Abiodun*, 111 P.3d at 466). In referencing the statute's "three distinct categories of actions," *Valenzuela* was merely describing the statute's layout, which this Court has said is not determinative of divisibility. *See Valenzuela*, 216 P.3d at 591 ("The offense provision … creates one offense, within which are three separate categories of proscribed actions, offset by the word 'or' and semicolons."); *see also Mathis*, 136 S.Ct. at 2251 (statute's "itemized construction" does not determine divisibility).

Only "if state law fails to provide clear answers" should a court consider taking "a peek at the [record] documents … for the sole and limited purpose of determining whether the listed items are elements of the offense." *Mathis*, 136 S.Ct. at 2256-57 (internal quotation marks omitted). Because state law does provide clear answers here – showing that the drug statute is indivisible – there is no cause to look to the charging document in Mr. Ortiz-Uresti's 1999 case. In *Mathis* itself, for example, this Court found that a state statute banning "unlawful entry into … any building, structure, [or] land, water, or air vehicle" was indivisible based on its analysis of state law, *id.* at 2250, 2256, even though the charging documents in the underlying case alleged only a "house and garage," *id.* at 2260 (Breyer, J., dissenting). On the government's approach, this happenstance could trump the state high court's construction of the statute to define a single offense. Obviously, that is not the law.

CONCLUSION

Mr. Ortiz-Uresti respectfully requests that the Court grant his petition for certiorari and resolve the question presented or, if deemed appropriate in light of the clarity of the error below and the circuit conflict it creates, vacate and remand for further consideration in light of *Mathis* and *Descamps v. United States*, 570 U.S. 254 (2013). *See* Pet. at 17-18.

Respectfully submitted,

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