No. _____

In the Supreme Court of the United States

Gibran Richardo Figueroa-Beltran,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari Before Judgment

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November 14, 2018

Question Presented For Review

When applying the federal divisibility doctrine to state statutes, may federal courts terminate the three-part test set forth in *Mathis v. United States*, 136 S. Ct. 2243 (2016), at the first step and delegate divisibility questions to state courts?

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Petition for Certiorari

Petitioner Gibran Richardo Figueroa-Beltran respectfully petitions for a writ of certiorari before judgment to the United States Court of Appeals for the Ninth Circuit.

Orders Below

The Ninth Circuit Court of Appeals' published order in *United States v. Figueroa-Beltran*, 892 F.3d 997 (9th Cir. 2018), certifying questions to the Nevada Supreme Court concerning the possible divisibility of Nev. Rev. Stat. § 453.337 is attached as Appendix A. The Ninth Circuit's order denying Figueroa-Beltran's request for rehearing and en banc rehearing is unpublished and attached as Appendix B.

The Nevada Supreme Court has accepted the Ninth Circuit's certified questions (Appendix C), but suspended proceedings temporarily at Figueroa-Beltran's request so that he may pursue the instant petition (Appendix D).

Jurisdictional Statement

The Ninth Circuit Court of Appeals certified questions to the Nevada Supreme Court on June 6, 2018 (Appendix A), and denied rehearing and en banc rehearing on August 17, 2018 (Appendix B). This petition is timely filed pursuant to Supreme Court Rule 13.1.

Figueroa-Beltran invokes this Court's jurisdiction pursuant to Supreme Court Rule 11. The Ninth Circuit's decision in *Figueroa-Beltran* stands as the watershed certification case.

This Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), provided federal courts a three-step test for resolving the possible divisibility of alternatively worded state statutes. To distinguish divisible and indivisible statutes, *Mathis* directed federal courts to first consider whether the state's case law definitively answers the divisibility question. *Id.* at 2256. If state case law fails to "definitively answer[] the question," federal courts must next consider the statutory language itself. *Id.* If that language "fails to provide clear answers," *Mathis* suggested federal courts may "peek" at "record documents" such as an indictment and jury instructions. *Id.* at 2256-57. If at the end of this inquiry federal courts are not "certain" the state statute is divisible into alternative elements, *Mathis* holds the divisibility inquiry ends with the conclusion that the statute is indivisible. *Id.*

The Ninth Circuit concluded Nevada case law does not definitively resolve whether Nev. Rev. Stat. § 453.337 is divisible—*Mathis*' first step. The Ninth Circuit did not, however, proceed to *Mathis*' second and third steps. Rather, it terminated the *Mathis* inquiry altogether and certified three divisibility questions to the Nevada Supreme Court.

Figueroa-Beltran appears to be the first federal circuit court decision to begin applying the *Mathis* divisibility test, find the divisibility question uncertain at the

first step, and then skip the second and third steps in favor of certifying federal divisibility questions to a state court. The Ninth Circuit's decision prompted intra- and inter-federal circuit certification requests to other state courts in direct appeals. Within three months of the Ninth Circuit's certification order to the Nevada Supreme Court, two other federal appellate panels certified divisibility questions to state courts—a separate Ninth Circuit panel certified questions to the Oregon Supreme Court and a Seventh Circuit panel certified questions to the Wisconsin Supreme Court. *See United States v. Lawrence*, 905 F.3d 653, 659-60 (9th 2018) (certifying divisibility questions on September 18, 2018); *United States v. Franklin*, 895 F.3d 954, 961-62 (7th Cir. 2018) (certifying divisibility questions on July 17, 2018).

Mathis' divisibility test does not include terminating the appellate process, certifying divisibility questions to state courts, and forcing the parties to litigate divisibility in state courts. Yet that is what the Ninth Circuit has done here.

The Ninth Circuit's decision to certify divisibility questions to the Nevada Supreme Court presents an imperative issue of public importance and justifies deviation from normal appellate practice, requiring immediate resolution by this Court. This Court thus has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(e).

Relevant Statutory and Sentencing Guidelines Provisions

Nev. Rev. Stat. § 453.337 provides:

Unlawful possession for sale of flunitrazepam, gamma-hydroxybutyrate and schedule I or II substances; penalties.

1. Except as otherwise authorized by the provisions of NRS 453.011 to 453.552, inclusive, it is unlawful for a person to possess for the purpose of sale flunitrazepam, gamma-hydroxybutyrate, any substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate precursor or any controlled substance classified in schedule I or II.

2. Unless a greater penalty is provided in NRS 453.3385, 453.339 or 453.3395, a person who violates this section shall be punished:

(a) For the first offense, for a category D felony as provided in NRS 193.130.

(b) For a second offense, or if, in the case of a first conviction of violating this section, the offender has previously been convicted of a felony under the Uniform Controlled Substances Act or of an offense under the laws of the United States or any state, territory or district which, if committed in this State, would amount to a felony under the Uniform Controlled Substances Act, for a category C felony as provided in NRS 193.130.

(c) For a third or subsequent offense, or if the offender has previously been convicted two or more times of a felony under the Uniform Controlled Substances Act or of any offense under the laws of the United States or any state, territory or district which, if committed in this State, would amount to a felony under the Uniform Controlled Substances Act, for a category B felony by imprisonment in the state prison for a minimum term of not less than 3 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $20,000 for each offense.

3. The court shall not grant probation to or suspend the sentence of a person convicted of violating this section and punishable pursuant to paragraph (b) or (c) of subsection 2.

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U.S.S.G. § 2L1.2 (2015) provides:

(a) Base Offense Level: **8**

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels if the conviction receives criminal history points under Chapter Four or by **12** levels if the conviction does not receive criminal history points;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels if the conviction receives criminal history points under Chapter Four or by **8** levels if the conviction does not receive criminal history points;

(C) a conviction for an aggravated felony, increase by **8** levels;

(D) a conviction for any other felony, increase by **4** levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

Statement of the Case

This petition arises from the Ninth Circuit's decision to delegate to the Nevada Supreme Court divisibility questions necessary to determining whether the district court properly applied a 16-level enhancement under the United States Sentencing Guidelines.

A. District Court Proceedings

Figueroa-Beltran pled guilty in the District of Nevada to unlawfully entering the United States under 18 U.S.C. § 1326. *Figueroa-Beltran*, 892 F.3d at 1000. In the Presentence Investigation Report, the probation officer proposed a base offense level of 8 and a 16-level enhancement under § 2L1.2 of the United States Sentencing Guidelines (U.S.S.G.) (2015).[1]

This enhancement applies to those previously deported or unlawfully remaining in the United States after being convicted of a felony "drug trafficking offense" where the sentence imposed "exceeded 13 months." U.S.S.G. § 2L1.2 (b)(1)(A)(i). The commentary to this guideline defines a "drug trafficking offense" as:

> an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell 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.

U.S.S.G. § 2L1.2, app. n.1(B)(iv).

[1] All references to the United States Sentencing Guidelines are to the 2015 version under which Figueroa-Beltran was sentenced.

The parties litigated the propriety of the 16-level enhancement. The government argued Figueroa-Beltran's 2012 conviction for possession of a controlled substance under Nev. Rev. Stat. § 453.337 warranted its application.[2] Figueroa-Beltran disagreed, arguing the categorical approach and this Court's decision in *Mathis* precluded its application.

Specifically, Figueroa-Beltran noted the text of Nev. Rev. Stat. § 453.337 criminalizes possession of more substances than those criminalized by the generic federal drug trafficking offense. This is because Nevada's drug Schedules I and II criminalize three substances not listed in any federal drug schedule. *Compare* Nev. Admin. Code §§ 453.510, 453.520 (2012), *with* 21 C.F.R. §§ 1308.11-.15 (2012). Nev. Rev. Stat. § 453.337 therefore criminalizes the possession with intent to sell of more substances than that criminalized by federal law.

Figueroa-Beltran also argued the modified categorical approach—which is applicable only to divisible statutes—did not apply because Nev. Rev. Stat. § 453.337 is not divisible as to the identity of the controlled substance. Section 453.337 sets forth a single "controlled substance" element, and the various drugs in Nevada's administrative code are alternative means of satisfying that element, rather than elements of separate crimes. As a result, Nev. Rev. Stat. § 453.337 is indivisible, and the modified categorical approach cannot be applied to narrow the criminalized conduct.

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[2] All references to Nev. Rev. Stat. § 453.337 cited herein are to the 2012 version of the statute under which Figueroa-Beltran was convicted.

Because Nev. Rev. Stat. § 453.337 is categorically broader than the federal generic drug trafficking offense, Figueroa-Beltran argued, the 16-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A) was improper. He did concede, however, that a four-level enhancement for having a prior felony conviction was appropriate under U.S.S.G. § 2L1.2(b)(1)(D).

The district court rejected Figueroa-Beltran's arguments and applied the 16-level enhancement based on his Nev. Rev. Stat. § 453.337 conviction. *Figueroa-Beltran*, 892 F.3d at 1000. The district court sentenced Figueroa-Beltran to 41 months in federal prison, followed by three years of supervised release. *Id.*

B. Ninth Circuit Proceedings

Figueroa-Beltran timely filed a notice of appeal to the Ninth Circuit Court of Appeals on September 8, 2016, challenging application of the 16-level enhancement. *See* D. Nev. Case No. 2:15-cr-00176-KDG-GWF-1, Dkt. 45. Appellate briefing was completed in March 2017, with each side contesting whether Nev. Rev. Stat. § 453.337 constituted a "drug trafficking offense" under the categorical approach and *Mathis*' three-step divisibility test. *See* Ninth Circuit Case No. 16-10388, Dkts. 5-6, 15-16, 22. A three-judge panel heard oral argument in August 2017. *Id.* at Dkt. 38. The parties submitted supplemental authority to the court both before and after argument. *Id.* at Dkts. 23, 26-27, 32-33, 35-37, 40-41.

1. Delegation of Decision Below: Certification to State Court

On June 6, 2018, the panel issued its published opinion in *Figueroa-Beltran* without resolving the divisibility question before it. The panel correctly summarized federal law governing the categorical approach and this Court's decision in *Mathis*. *Figueroa-Beltran*, 892 F.3d at 1001-04. However, after determining Nevada state case law does not clearly establish whether Nev. Rev. Stat. § 453.337 is divisible, the panel terminated its analysis at the first step of the *Mathis* inquiry and certified the divisibility question to the Nevada Supreme Court. *Id.* at 1003-04.[3]

Before certifying the case, the panel acknowledged Figueroa-Beltran's reliance on the Nevada Supreme Court's en banc decision in *Sheriff v. Luqman,* 697 P.2d 107 (Nev. 1985) (per curiam). *Figueroa-Beltran*, 892 F.3d at 1003. Figueroa-Beltran argued *Luqman* "established that § 453.337 is not divisible as to the identity of the controlled substance possessed by the accused." *Id.*

Luqman arose from a constitutional challenge to the Nevada state pharmacy board's control of Nevada's post-1981 drug schedules. *Figueroa-Beltran*, 892 F.3d at 1003 (citing *Luqman*, 697 P.2d at 109-10). The Nevada legislature's "stated intention" was to repeal the existing controlled substance schedules, i.e., Nev. Rev. Stat. §§ 453.161-453.201, and give Nevada's pharmacy board the power to classify

[3] The panel also stayed further proceedings pending a response from the Nevada Supreme Court, withdrew this appeal from submission until the conclusion of proceedings in the Nevada Supreme Court, and directed the Clerk to administratively close the appellate docket pending further order. *Figueroa-Beltran*, 892 F.3d at 1004.

new substances and schedules. *Luqman*, 697 P.2d at 109. The new regime gave the pharmacy board power to determine what substances Nevada criminalized and to list those prohibited substances in Nevada's administrative code. *Figueroa-Beltran*, 892 F.3d at 1003 (citing *Luqman*, 697 P. at 109-11).

The defendant in *Luqman* unsuccessfully argued Nevada's regime—which encompasses Nev. Rev. Stat. § 453.337—"unconstitutionally delegate[d] to the state board of pharmacy the legislative power to define the elements of a crime." *Luqman*, 697 P. at 108. The Nevada Supreme Court held the substances listed in Nevada's administrative code were simply "*facts or conditions*." *Id.* at 110 (emphasis added). The regime was thus constitutional because the pharmacy board was "only authorized to determine the facts which will make the statute effective." *Id.*; *see also id.* ("Although the legislature may not delegate its power to legislate, it may delegate the power to determine the facts or state of things upon which the law makes its own operations depend." (citing *State ex rel. Ginocchio v. Shaughnessy*, 217 P. 581 (Nev. 1923); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935); *Field v. Clark*, 143 U.S. 649, 694 (1892))); *accord McNeill v. Nevada,* 375 P.3d 1022, 1026 (Nev. 2016).

The panel also, however, pointed to a case cited by the government, *Muller v. Sheriff*, 572 P.2d 1245 (1977) (per curiam), which addressed a version of Nevada's drug statutes in effect in 1977, i.e., prior to the amended statutory and scheduling scheme in effect at the time of Figueroa-Beltran's conduct in 2012. In that case, defendant Muller was charged with one count of selling heroin under Nev. Rev.

Stat. §§ 453.321, 453.161, and one count of selling cocaine under Nev. §§ 453.321, 453.171. Muller argued that because "the sale of the different controlled substances was consummated simultaneously in one transaction, his conduct d[id] not constitute two separate offenses for which he may be charged." *Muller*, 572 P.2d at 1245. The Nevada Supreme Court stated "the sale of heroin and the sale of cocaine are distinct offenses requiring separate and different proof." *Id.* Moreover, "the record show[ed] that 'two distinct offenses were (probably) committed since the sale of each controlled substance "requires proof of an additional fact which the other does not," viz., the particular . . . identity of the controlled substance sold.'" *Id.* (ellipsis in original).

The statutory scheduling scheme at issue in *Muller* was replaced by the administrative scheduling regime analyzed in *Luqman*. *Figueroa-Beltran*, 892 F.3d at 1103. Nevertheless, the Ninth Circuit panel stated *Luqman* and *Muller* "seemingly stand in conflict." *Id.* The panel believed "*Luqman* suggests that the identity of a controlled substance is a non-elemental factual determination," and *Muller* suggests "the sale of one controlled substance is an offense distinct from the sale of another, and proof of the identity of the controlled substance at issue is required." *Id.* at 1003-04. It was the panel's belief that, "[w]ithout further guidance, [it could not] say with confidence that the Nevada precedent definitively answers the question whether § 453.337 is divisible as to the identity of a controlled substance." *Id.*

The panel did not seek "further guidance" by proceeding to the second and third steps of the *Mathis* inquiry. The panel instead terminated its inquiry and certified three questions to the Nevada Supreme Court:

> 1. Is Nev. Rev. Stat. § 453.337 divisible as to the controlled substance requirement?
>
> 2. Does the decision in *Luqman* conclude that the existence of a controlled substance is a "fact" rather than an "element" of § 453.337, rendering the statute indivisible? If so, can this conclusion be reconciled with *Muller*?
>
> 3. Does the decision in *Muller* conclude that offenses under § 453.337 comprise "distinct offenses requiring separate and different proof," rendering the statute divisible as to the controlled substance requirement? If so, can this conclusion be reconciled with *Luqman*?

Figueroa-Beltran, 892 F.3d at 1003.

2. Nevada Supreme Court: Acceptance of Certified Questions

The Nevada Supreme Court accepted the Ninth Circuit panel's certified questions. *Figueroa-Beltran v. United States*, Nev. Sup. Ct. Case No. 76038, Dkt. 18-27455. Briefing on these questions is temporarily stayed pending appellate review of the certification order. *Id.* at Dkt. 18-37827. The Nevada Supreme Court's order accepting the panel's certified questions is attached as Appendix C.

Reasons for Granting the Writ

Divisibility is a uniquely federal doctrine tied to the categorical analysis that federal sentencing courts use to calculate criminal sentences under federal law. *Mathis*, 136 S. Ct. at 2248 (applying divisibility categorical analyses to 18 U.S.C. § 924(e)(1)); *United States v. Schneider*, 905 F.3d 1088, 1090-91 (8th Cir. 2018) (applying divisibility and categorical analysis to Sentencing Guidelines). Federal district courts routinely apply the categorical analysis using the *Mathis* divisibility test to assess whether defendants' prior convictions may serve as qualifying predicate offenses to increase Sentencing Guidelines ranges and render defendants eligible for statutory mandatory minimum sentences.

For example, of the 55,178 federal criminal defendants sentenced in 2017, approximately 61% possessed a criminal history in categories II through IV.[4] Any defendant with a prior criminal conviction is potentially eligible for myriad federal sentencing enhancements or increased base offense levels based on the statutory scope the prior offense. *See, e.g.*, U.S.S.G. § 2K2.1 (stating a defendant with at least two felony convictions for either a crime of violence or a controlled substance offense is subject to a base offense level of 24). In 2017, 1,593 federal defendants were sentenced pursuant to the career offender enhancement,[5] meaning the sentencing

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[4] *See* https://www.ussc.gov/sites/default/ files/pdf/research-and-publications/annual-reports-and-sourcebooks /2017/Table14.pdf (Table 14) (last visited Nov. 14, 2018).

[5] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf (Table 20) (last visited Nov. 14, 2018).

court determined the charged offense was either a "crime of violence" or a "controlled substance offense," and the defendant possessed "at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1. Also in 2017, 13,804 federal criminal defendants received statutory mandatory sentences, which in many cases required the federal sentencing courts to find the defendants possessed qualifying predicates.[6] *See, e.g.,* 18 U.S.C. § 924(e) (requiring 15-year mandatory minimum sentence upon proof of requisite "serious drug offense" or "violent felony" predicates).

The panel's decision to certify divisibility questions to the Nevada Supreme Court thus raises an issue of national concern. Beyond violating this Court's precedent in *Mathis*, the panel has also stalled the appellate process for a litigant on direct appeal, embroiled the Nevada Supreme Court in litigation that will unnecessarily drain its resources, and asked that court to decide questions in an area of law with which it is unfamiliar. Worse, the panel's order has been the impetus for the filing of similar certifications in other state courts.

The panel's improvident certification order is unnecessary. *Mathis* provided the default position in cases like this: a prior conviction under an overbroad state statute does not qualify as a federal sentencing predicate unless the federal court is certain the offense is divisible. *Mathis* also provides clear steps to assess divisibility—of which certification is not one. Instead, when the state law is not

[6] *See* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf (Table 60) (lasted visited Nov. 14, 2018).

clear, the federal court's inquiry simply ends. The panel's certification order deviates from this established path and should be withdrawn.

A. The Ninth Circuit certification violates *Mathis* by terminating the divisibility inquiry at step one and delegating the inquiry to the state court.

This Court's precedent makes clear that when federal courts are not certain that an overbroad state statute is divisible, the divisibility inquiry must end, and federal courts may not use the underlying state offense to enhance a federal sentence. *Mathis*' "demand for certainty" is rooted in *Taylor v. United States*, 495 U.S. 575 (1990), in which this Court first set forth the categorical approach. This certainty requirement has been enshrined in the categorical analysis for nearly thirty years, prohibiting federal courts from using a state conviction to enhance a federal sentence unless federal courts are convinced the offense qualifies as a federal predicate.

The panel's certification order violates *Mathis*' instructions for assessing divisibility. Though the panel's certification order recognizes *Mathis*' three steps, it fails to apply them. *Figueroa-Beltran*, 892 F.3d at 1001-03. Instead, the panel claimed that, "[w]ithout further guidance," it could not "say with confidence that the Nevada precedent definitively answers the question whether § 453.337 is divisible as to the identity of a controlled substance." *Id.* at 1004. The panel then sought guidance and certainty from the Nevada Supreme Court. *Id.* at 1004-05.

The Nevada Supreme Court is not the proper source for guidance on whether application of the categorical approach (a federal doctrine) can be applied to find

with certainty that a Nevada statute is divisible (a federal doctrine) for purposes of a federal sentencing enhancement (a federal criminal procedure). This is because *Mathis* provides the panel guidance by directing the panel's next step in its analysis. If the panel was not persuaded by *Luqman*, *Muller*, or any other Nevada state case, *Mathis* directs the panel to next consider whether "the statute on its face" resolves the issue or, if it was inclined, to peek at the record documents in an attempt to resolve the divisibility issue. *Mathis*, 136 S. Ct. at 2256-57. If those steps did not provide certainty that Nev. Rev. Stat. § 453.337 is divisible, the panel's only choice was to conclude the statute was indivisible and could not be used to apply the 16-level enhancement.

Instead of assessing the statutory language or peeking at the record documents, the panel terminated its *Mathis* inquiry altogether and certified the divisibility question to the Nevada Supreme Court. *Figueroa-Beltran*, 892 F.3d at 1003-04. By certifying the divisibility inquiry after finding a lack of certainty at step one, the panel ignored the remainder of *Mathis*' analysis. It also ignored this Court's default position: lack of certainty means the state offense does not qualify as a federal sentencing predicate.

It is important that this Court address this issue because the domino effect from *Figueroa-Beltran*'s certification order has already begun.

Certification to Wisconsin Supreme Court in *United States v. Franklin*

One month after the *Figueroa-Beltran* certification order, in July 2018, the Seventh Circuit granted rehearing and issued a certification order to the Wisconsin Supreme Court to address divisibility questions. *Franklin*, 895 F.3d at 955, 961. On rehearing, the *Franklin* panel reconsidered whether a conviction under Wisconsin's burglary statute may serve as a predicate violent felony to increase the defendants' federal sentences under the ACCA. *Id*. at 955-60. At issue was whether subsections within Wisconsin's burglary statute set forth different means of committing a single burglary offense or instead elements of different crimes.[7]

The *Franklin* panel noted that in its prior opinion it could find "no definitive holding from the Wisconsin Supreme Court or other state courts, nor . . .

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[7] The Wisconsin statute provides:

> Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place is guilty of a Class F felony:
>
> (a) Any building or dwelling; or
>
> (b) An enclosed railroad car; or
>
> (c) An enclosed portion of any ship or vessel; or
>
> (d) A locked enclosed cargo portion of a truck or trailer; or
>
> (e) A motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or
>
> (f) A room within any of the above.

Wis. Stat. § 943.10(1m).

unmistakable signals in the statute itself, such as different punishments." *Franklin*, 895 F.3d at 955, 961. The panel found that "[w]ithout such clear signals, the choice between elements and means is more difficult." *Id.*

As to the third step available under *Mathis*—review of record documents—the panel noted its prior "observation in [*United States v. Edwards,* 836 F.3d 831, 837-38 (7th Cir. 2016)], that Wisconsin charging documents are not useful in distinguishing between means and elements." *Franklin*, 895 F.3d at 960. The defendants argued this was because "Wisconsin charging documents often include non-essential factual details and can even be amended after trial to conform to the evidence, which undermines the charging document's reliability in identifying the elements the prosecution must prove beyond a reasonable doubt." *Id.* (citing *Wisconsin v. Derango*, 613 N.W.2d 833 (Wis. 2000)); *see also Edwards*, 836 F.3d at 837 ("Under Wisconsin law the complaint and information, which are the documents that initiate proceedings against a criminal defendant, must allege every element of the crime charged, but they may also (and usually do) include additional facts that need not be proved to the jury beyond a reasonable doubt.").

The *Franklin* panel ultimately reversed its previous finding that the burglary statute set forth divisible elements, stating:

> . . . the question of State law is a close one. Specific guidance from State law is limited, and both sides offer good reasons for interpreting the available signs in their favor. In our panel opinion, we agreed with the government, but the petition for rehearing argues that our analysis did not give sufficient weight to the Wisconsin Supreme Court's decision in *Derango*, among other points. Upon further consideration, we view the question of State law as closer than our panel opinion did. The Wisconsin courts have considered similar questions in the context of

> other statutes and the felonious intent requirement of burglary, . . . but it is not clear which of the "competing cases" from these other contexts "should control the elements v. means question for the burglary statute" and its location subsections. . . . *In the end, only the Wisconsin Supreme Court can decide this issue definitively*.

Franklin, 895 F.3d at 961.

The *Franklin* panel then certified the following inquiry to the Wisconsin Supreme Court:

> Whether the different location subsections of the Wisconsin burglary statute, Wis. Stat. § 943.10(1m)(a)–(f), identify alternative elements of burglary, one of which a jury must unanimously find beyond a reasonable doubt to convict, or whether they identify alternative means of committing burglary, for which a unanimous finding beyond a reasonable doubt is not necessary to convict?

Franklin, 895 F.3d at 955, 961. One months later, the Wisconsin Supreme Court accepted these certified questions in a published opinion and ordered briefing on the issue. *United States v. Franklin*, Wis. Sup. Ct. Case No. 2018AP001346-CQ.[8]

Certification to Oregon Supreme Court in *United States v. Lawrence*

In September 2018, a separate Ninth Circuit panel certified divisibility questions in *United States v. Lawrence*, 905 F.3d 653 (9th Cir. 2018), to the Oregon Supreme Court. The *Lawrence* panel was asked to address whether Oregon's first-degree and second-degree robbery statutes "are 'divisible' for purposes of determining whether each is a 'crime of violence' or 'violent felony' under provisions of federal sentencing law." 905 F.3d at 655. After reviewing Oregon state law as *Mathis* instructs, the panel believed Oregon's case law and Uniform Criminal Jury

[8] Oral argument in *Franklin* has been scheduled for February of 2019.

Instructions for robbery conflicted as to whether Robbery I and Robbery II are divisible. *Id*. at 659. The panel believed that, "[w]ithout further guidance," it could not "say with confidence that Oregon precedent definitively answers the question whether Robbery I and II are divisible." *Id.*

Though the *Lawrence* panel recognized *Mathis* required review of authoritative state court decisions and the wording of the relevant statute, the panel failed to recognize *Mathis* also directed its inquiry to end when there is no certainty as to divisibly. 905 F.3d at 659. The *Lawrence* panel instead adopted the *Figueroa-Beltran* panel's approach. *Lawrence* terminated the *Mathis* inquiry at step one and sought further guidance from the Oregon Supreme Court, certifying three divisibility questions:

> 1. Is Oregon first-degree robbery, Or. Rev. Stat. § 164.415, divisible?
>
> 2. Is Oregon second-degree robbery, *id.* § 164.405, divisible?
>
> 3. Put another way, is jury unanimity (or concurrence) required as to a particular theory chosen from the listed subparagraphs of each statute?

Lawrence, 905 F.3d 653.

* * *

The extraordinary nature of the certification order to the Nevada Supreme Court in *Figueroa-Beltran*, whereby the Ninth Circuit asked the state court to apply federally created doctrines for purposes of federal sentencing law, is contrary to this Court's decision in *Mathis* and warrants certiorari in light of the other certification orders that have followed in its wake.

B. *Mathis* does not include certification to state courts as part of the divisibility analysis.

Notably, in *Mathis*, this Court did not state, or even suggest that federal courts uncertain about a state statute's divisibility should certify the question to the state's highest court. Though the parties in *Mathis* gave this Court an opportunity to endorse certification, the Court ultimately declined the invitation to do so.[9]

The Solicitor General's brief, for example, recognized a Ninth Circuit judge had previously suggested referring divisibility questions to state supreme courts. United States Brief, *Mathis v. United States*, 2016 WL 1165970 (U.S.), at 40 (citing *United States v. Ramirez-Macias*, 584 F. App'x 818, 820 (9th Cir. 2014) (unpublished) (Hawkins, J., concurring)). Mathis's counsel also suggested using certification when the case law, statutory text, and record documents are inconclusive: "If need be, the question can often be certified to the highest court of the relevant State." *See* Petitioner's Reply Brief, *Mathis v. United States*, 2016 WL 1554732 (U.S.), at 18.

The subject of certification also came up at oral argument. The Assistant to the Solicitor General noted the government's concerns about burdening state courts with certified questions on the federal divisibility analysis:

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[9] *See* Petition for Panel and En Banc Rehearing, Ninth Circuit Case No. 16-10388, Dkt. 45, pp. 12-13.

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

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

The *Mathis* Court was well aware of the option to certify divisibility questions to state courts. Yet *Mathis* omitted certification from its three-part divisibility analysis. *Mathis*' instructions are clear: consult state case law, the statutory text, and record documents; if those sources do not provide "certainty" that the state statute is divisible, then the federal divisibility inquiry ends.

C. Other federal courts of appeal heed *Mathis* and undertake the necessary divisibility without delegation to state courts.

Other federal circuits agree this Court meant what it said in *Mathis*. The lack of certainty as to a state statute's divisibility requires federal courts to find that statute overbroad and indivisible.[10]

[10] *See* Petition for Panel and En Banc Rehearing, Ninth Circuit Case No. 16-10388, Dkt. 45, pp. 10-11.

Circuit	"Certainty" holdings
First Circuit	". . . *Mathis* states that this need not be difficult. . . . If, at the end of [the *Mathis*] review 'such record materials' do not 'speak plainly,' then 'a sentencing judge will not be able to satisfy '*Taylor*'s demand for certainty' when determining whether a defendant was convicted of a generic offense.'" *United States v. Faust*, 853 F.3d 39, 52 (1st Cir. 2017).
Fifth Circuit (en banc)	"Should our dual forays into state law and the record leave the question of divisibility inconclusive, the tie goes to the defendant—because the ACCA demands certainty that a defendant indeed committed a generic offense, any indeterminacy on the question means the statute is indivisible." *United States v. Herrold*, 883 F.3d 517, 522 (5th Cir. 2018) (footnotes omitted).
Eight Circuit	"We have been instructed time and again that the categorical approach introduced by *Taylor* created a 'demand for certainty' when determining whether a defendant was convicted of a qualifying offense." *United States v. Horse Looking*, 828 F.3d 744, 748 (8th Cir. 2016). "But if none of those sources answers the question, we are told, then the court 'will not be able to satisfy '*Taylor*'s demand for certainty' when determining whether a defendant was convicted of a generic offense. . . .' In other words, while 'indeterminacy should prove more the exception than the rule,' . . . , an inconclusive inquiry means that the prior convictions do not qualify, and the sentencing enhancement does not apply." *United States v. Sykes*, 864 F.3d 842, 844 (8th Cir. 2017) (Colloton, J., dissenting from denial of rehearing en banc).

Tenth Circuit	"After considering the state-court opinions, the text of the statute, and the record of conviction, we remain uncertain on whether the locational alternatives constitute elements or means. In light of this uncertainty, we must regard the locational alternatives in Oklahoma's statute for second-degree burglary as means rather than elements." *United States v. Hamilton*, 889 F.3d 688, 692–93 (10th Cir. 2018).

No judge in any of the above cases suggested resolving uncertainty or breaking a tie by certifying the divisibility question to a state's highest court. Rather, they all agreed that if uncertainty remains after applying the *Mathis* three-step analysis, the divisibility inquiry is over.

The certification order in *Figueroa-Beltran* conflicts with *Mathis* and precedent in other circuits applying *Mathis*.

D. State courts are ill-equipped to decide federal questions.

Embroiling state courts in the federal categorical world would be unwise. State courts should not be enlisted to resolve questions regarding the categorical approach, which is entirely a creature of federal law. Federal courts thus use the categorical, divisibility, and modified categorical approaches in applying federal sentencing statutes and certain federal Guidelines provisions. Whether a

defendant's federal criminal sentence should be enhanced because of a prior state conviction based on these federal doctrines is for federal courts to determine.[11]

Certification of divisibility questions asks state courts to answer questions about the scope of the state's criminal statutes in a vacuum, without the facts of an actual case or controversy to place those questions in context. The federal categorical and divisibility analyses ask courts to assess the scope and elements of a criminal statute in the abstract. Courts are forbidden from examining what a defendant actually did to violate a statute. *See Descamps v. United States*, 570 U.S. 254, 261 (2013) ("Sentencing courts may look only to the statutory definitions—i.e., the elements—of a defendant's prior offenses, and *not* to the particular facts underlying those convictions." (emphasis in original)). Indeed, this Court has said the actual facts of a defendant's conviction are "quite irrelevant." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013).

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

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[11] *See* Petition for Panel and En Banc Rehearing, Ninth Circuit Case No. 16-10388, Dkt. 45, pp. 15-16.

Law to State Courts: A Theoretical and Empirical Study, 29 J. Legis. 157, 167 (2003). The uniform code instructs:

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

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

Additionally, the lack of a fact-bound case or controversy may lead state courts astray in deciding certified questions. Deciding the scope of criminal liability without real-world facts could lead to decisions that open up unanticipated post-conviction litigation for state court defendants and, through habeas corpus and post-conviction petitions, unanticipated litigation. For instance, if a state court interprets a statute more narrowly for federal sentencing purposes than courts had historically interpreted the statute in state prosecutions, state defendants convicted under the broader interpretation may seek post-conviction relief under the newly narrowed interpretation.[12] It is these types of unintended consequences that may have played a role in this Court's decision not to include certification in the three-step divisibility analysis.

[12] Relief under a new interpretation of the statute would be available to those defendants who can still timely file a petition for post-conviction relief. Defendants whose time for filing a petition for post-conviction relief has passed would need to successfully litigate retroactivity and, failing that, be subject to disparate treatment due solely to the timing of the new interpretation.

Certifying divisibility questions to state courts would also require state courts to review state statutes that have been amended or repealed. For instance, in this case, the certification order asks the Nevada Supreme Court to address *Muller*, a case involving Nevada's drug schedules and statutes from 1977—neither of which exist today or are at issue in this case. 572 P.2d at 1245. It would appear to serve no state interest, let alone a federal interest, to ask a state court to assess the divisibility of statutes that were amended more than three decades ago. To the extent state courts must delve into historical archives to assign meaning to repealed or amended statutes for divisibility purposes, it would be difficult to remove modern day context from any such interpretations. This, in turn, would call into question the legitimacy of new interpretations of laws that have been amended or repealed.

Sentencing enhancements applied in federal criminal cases are also not matters federal courts should ask the states to decide, as compared to perhaps questions of state law that arise in a diversity jurisdiction lawsuit. *See*, *e.g.*, *Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 763 F.3d 1232, 1233 (9th Cir. 2014) (certifying question of Washington law to Washington Supreme Court in a diversity case brought under Washington state law); *Allstate Ins. Co. v. Alamo Rent-A-Car, Inc.*, 137 F.3d 634, 635 (9th Cir. 1998) (certifying question of Hawaii law to Hawaii Supreme Court in diversity cases raising insurance claims under Hawaii statutes). While "the judicial policy of a state should be decided when possible by state, not federal, courts," *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007) (Gorsuch, J.), *answering certified question*, 183 P.3d 1001 (Okla.

2008), that comity interest is not present in the federal divisibility context. In contrast to diversity claims based on state law that are likely to arise in state court in a non-diversity case (or in cases not filed in or removed to federal court), federal categorical and divisibility questions will only arise in federal criminal and immigration cases.

Finally, state certification is not appropriate for categorical inquiries because not all states accept certified questions.[13] Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. Legis. at 159 n.13 (noting forty-seven states permit some or all federal judges to certify a question to a state's highest court). North Carolina does not allow federal courts to certify state law questions to the North Carolina Supreme Court. *See* Eric Eisenberg, *A Divine Comity: Certification (at Last) in North Carolina*, 58 Duke L.J. 69 (2008). Though Missouri has a statute permitting federal courts to certify questions to its supreme court, Mo. Ann. Stat. § 477.004, the Missouri Constitution does "not expressly or by implication grant the Supreme Court of Missouri original jurisdiction to render opinions on questions of law certified by federal courts." *Grantham v. Missouri Dep't of Corr.*, No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990) (declining certification from federal district court for lack of constitutional jurisdiction).

[13] *See* Petition for Panel and En Banc Rehearing, Ninth Circuit Case No. 16-10388, Dkt. 45, pp. 16-17.

Thus, if certification is permitted as part of the divisibility analysis despite *Mathis*, certification could not exist for questions on Missouri or North Carolina statutes. This would result in disparate adjudication of similarly situated federal defendants.

E. Properly applying *Mathis* reveals the Nevada drug statute is not divisible.

Divisibility is essential to application of the 16-level enhancement, as Nev. Rev. Stat. § 453.337 criminalizes the possession with intent to sell more substances that the federal offense of drug trafficking provided in the Controlled Substances Act (CSA). The elements of the federal drug offense, set forth at 21 U.S.C. § 841(a)(1), do not "match" the elements of Nev. Rev. Stat. § 453.337. While Nevada drug Schedules I and II criminalize possession of 1,4-Butanediol and Gamma butyrolactone in Schedule I, and Benzolyecgonine in Schedule II, *see* Nev. Admin. Code §§ 453.510, 453.520 (2012), neither of these drugs were federally scheduled in 2012. 21 C.F.R. §§ 1308.11-1308.15 (2012). Consequently, in 2012, a person could have been convicted under Nev. Rev. Stat. § 453.337 of felony possession with intent to sell Gamma butyrolactone. Yet that same person would not have been subject to a felony prosecution for that exact conduct under the CSA.

Properly applying *Mathis* to Nev. Rev. Stat. § 453.337 shows it is *not* divisible. But to the extent any uncertainty remains, that uncertainty should have been resolved in Figueroa-Beltran's favor.

The certification order concludes the panel "cannot say with confidence that the Nevada precedent definitively answers the question whether § 453.337 is divisible as to the identity of a controlled substance." *Figueroa-Beltran*, 892 F.3d at 1004. This conclusion follows from the premise that "*Luqman* and *Muller* seemingly stand in conflict." *Id.* However, the panel should have addressed any perceived conflict between *Luqman* and *Muller* by looking to Nevada's established abrogation principles.

In Nevada, unsurprisingly, a statutory amendment can overrule case law interpreting the prior version of the statute. *Rodriguez v. State*, 407 P.3d 771, 774 (Nev. 2017). *Muller* addressed Nevada's drug schedules in 1977 when they appeared in the Nevada Revised Statutes. 572 P.2d at 1245.[14] In 1981, the Nevada Legislature removed the drug schedules from the Revised Statutes and delegated to the pharmacy board exclusive authority to set the drugs schedules in Nevada's Administrative Code. *Luqman*, 697 P.2d at 109.[15] Thus, to the extent *Muller* addressed the divisibility issue, the 1981 statutory amendments overruled *Muller*. Or, at the very least, the amendment rendered *Muller* instructive on only the 1977 drug schedules as they appeared in the Revised Statutes.

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[14] *See* Petition for Panel and En Banc Rehearing, Ninth Circuit Case No. 16-10388, Dkt. 45, pp. 18-19.

[15] *See id.* at p. 19.

Additionally, and also unsurprisingly, the en banc Nevada Supreme Court can overrule previously issued en banc decisions.[16] *Crawford v. State*, 121 P.3d 582, 587 (Nev. 2005). Both *Luqman* and *Muller* are en banc decisions from the Nevada Supreme Court. Before 1999, the full Nevada Supreme Court decided every appeal. *See* Overview of Appellate Courts, https://nvcourts.gov/Supreme/Court_Information/Overview_of_the_Supreme_Court_and_Court_of_Appeals/ (last visited Nov. 14, 2018) ("Beginning in January of 1999, for the first time in history and in a move to dispose of cases more rapidly, the [Supreme Court] began to decide many of its cases by meeting in three-justice panels, with one panel in Carson City and one panel in Las Vegas."). *Luqman* was decided in 1985; *Muller* in 1977. To the extent the two decisions conflict, *Luqman* controls.

Nevada's abrogation principles instruct that *Luqman* controls over *Muller* on any conflict between the two. The *Figueroa-Beltran* panel should have used these available, established, fundamental abrogation principles to resolve this appeal as *Mathis* advises—not certify divisibility questions to the Nevada Supreme Court.

And even if abrogation principles alone did not suffice, the rule of lenity compels a finding in Figueroa-Beltran's favor without certification. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (citations omitted). Lenity "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or

[16] *See id.* at pp. 19-20.

subjected to punishment that is not clearly prescribed." *Id*. Certification to a state court to address federal divisibility questions because of the ambiguity in Nevada's law does not honor this fundamental principle. Applying lenity, Nevada's case law supports Figueroa-Beltran's position.

Mathis' next two steps further suggest Nev. Rev. Stat. § 453.337 is not divisible. The text of § 453.337 suggests the statute enumerates means rather than elements. Section 453.337 does not "itself identify which things must be charged (and so are elements) and which need not be (and so are means)." *Mathis*, 136 S. Ct. at 2256. Unlike the California statute cited in *Mathis*, § 453.337 does not specify what facts are "sufficient to allege" in an indictment for possessing drugs for purpose of sale. *See Mathis*, 136 S. Ct. at 2256 (citing Cal. Penal Code Ann. § 952 (2008) ("In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another.")). The text of § 453.337 does not indicate the identity of the particular substance a defendant possesses for sale is an element of the crime upon which the jury must unanimously agree. That is, nothing in the text prohibits the government from securing a conviction on a single § 453.337 count based on jurors' varying beliefs about exactly which controlled substance a defendant possessed.

Moreover, the "statutory alternatives" in § 453.337—that is, the various substances listed in the statute—do not "carry different punishments." *Mathis*, 136 S. Ct. at 2256; *see* Nev. Rev. Stat. § 453.337(2). The imposition of different punishments for different substances would require the conclusion that those

substances constituted elements, rather than means. *Mathis*, 136 S. Ct. at 2256. Section 453.337 imposes uniform sentences regardless of the particular substance involved, which indicates the substance involved is merely a means of committing the offense. Section 453.337's text thus indicates the substances listed are "illustrative examples," rather than alternative means. *Mathis*, 136 S. Ct. at 2256.

As to the record documents, the third step of the *Mathis* step, the divisibility argument is no stronger for the government. The government submitted two record documents for consideration: the information charging possession with intent to sell cocaine; and the final judgment revealing Figueroa-Beltran pled guilty to and was convicted of "possession with intent to sell (Category D Felony), in violation of NRS 453.337" without identifying any substance. The government failed to place any jury instructions into the record to demonstrate what a jury would be required to find to convict a defendant under Nev. Rev. Stat. § 453.337. *See Mathis*, 136 S. Ct. at 2257 (explaining that an indictment together with the "correlative jury instructions" could resolve the divisibility questions). The available record documents failed to meet the demand for certainty *Mathis* compels.

Therefore, Figueroa-Beltran's § 453.337 conviction cannot be used to enhance his sentence under U.S.S.G. § 2L1.2. The panel should have applied *Mathis* to vacate the enhancement and remand for resentencing long ago.

F. The panel's certification order has delayed other pending appeals.

Figueroa-Beltran's case is important as his case appears to be the first challenging the divisibility of Nev. Rev. Stat. § 453.337 to be "submitted" in the Ninth Circuit Court of Appeals. The Ninth Circuit has stayed numerous cases pending resolution of Figueroa-Beltran's case. *See, e.g., United States v. Cotton*, Ninth Cir. Case No. 17-10171 (argued 10-09-18, deferred pending *Figueroa-Beltran*); *United States v. Jordan-McFeely*, Ninth Cir. Case No. 16-10456 (argued 12-7-17, deferred pending *Figueroa-Beltran*); *United States v. Viramontes-Ruiz*, Ninth Cir. Case No. 17-10305 (deferred pending *Figueroa-Beltran*); *United States v. Conway*, Ninth Circuit Case No. 16-10456 (deferred pending *Jordan-McFeely).* As a result, the *Figueroa-Beltran* certification order has left defendants in those cases in legal limbo.

The delay in these deferred cases demonstrates the ripple effect of the panel's certification order—a delay that would become commonplace if this Court endorses certification. The resulting landslide of federal certification requests would pose a dual burden, simultaneously stalling the federal criminal process for defendants seeking to resolve their cases while inundating already overtaxed state court systems with briefing and argument by federal appellants. This is because the categorical approach and divisibility analyses frequently arise in both criminal and immigration cases, which make up a significant portion of the federal docket. *Almanza-Arenas v. Lynch*, 815 F.3d 469, 483-84 (9th Cir. 2016) (Watford, J., concurring in the judgment).

The number of cases likely to be affected by the certification in this case is compelling even when considering the potential impact on federal criminal appeals and excluding immigration cases and district court proceedings.[17] According to the Administrative Office of the U.S. Courts, in the 12-month period ending on June 30, 2018, there were 9,614 new federal criminal appeals filed nationwide.[18] And, as of June 30, 2018, there remained 8,847 pending federal criminal appeals nationwide.[19] Even if only a fraction of these federal criminal appeals result in certification to state courts on state statutory divisibility questions, the result would cause substantial and unnecessary delay to the litigants and a misallocation of state court resources. This outcome would be particularly regrettable as this Court has already instructed federal courts how to resolve the divisibility analysis if they are unsure of the meaning of state law. *See Mathis*, 136 S. Ct. at 2257 (explaining that if federal court cannot determine with "certainty" that state statute is divisible, it should simply hold the statute is indivisible).

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17 *See* Petition for Panel and En Banc Rehearing, Ninth Circuit Case No. 16-10388, Dkt. 45, pp. 15-16.

18 *See* http://www.uscourts.gov/statistics/table/b-7/statistical-tables -federal-judiciary/2018/06/30 (last visited Nov. 8, 2018) (Table B-7).

19 *See* http://www.uscourts.gov/statistics/table/b-1/statistical-tables -federal-judiciary/2018/06/30 (last visited Nov. 8, 2018) (Table B-1).

Conclusion

For the reasons set forth herein, Figueroa-Beltran requests the Court grant this petition for certiorari.

Respectfully submitted,

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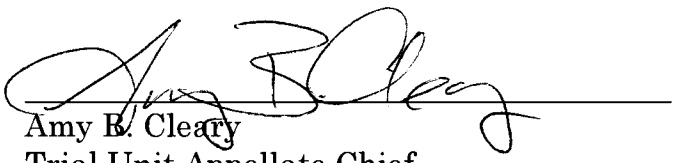

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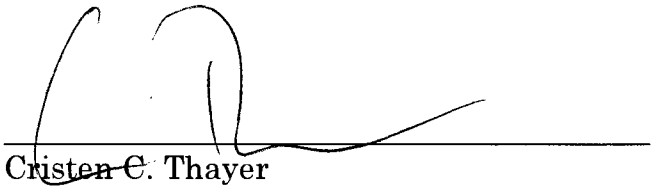

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