No. 18-6747

In The
Supreme Court of the United States

GIBRAN 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

BRIEF OF THE OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE CENTRAL DISTRICT OF CALIFORNIA AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

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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BRIEF OF THE OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE CENTRAL DISTRICT OF CALIFORNIA AS AMICUS CURIAE SUPPORTING PETITIONER

This brief is submitted on behalf of the Office of the Federal Public Defender for the Central District of California as amicus curiae.[1]

INTEREST OF THE AMICUS CURIAE

The Office of the Federal Public Defender for the Central District of California represents indigent criminal defendants in federal court pursuant to the Criminal Justice Act, 18 U.S.C. §3006A. A significant proportion of the clients of the Office of the Federal Public Defender are charged with immigration-related statutes, gun cases, drug offenses, and offenses that give rise to recidivist enhancements. Because all of these areas invoke the categorical approach with respect to guilt or sentencing liability, the Office of the Federal Public Defender has a strong interest in the correct development of the law on the *Taylor* categorical approach.

[1] No counsel for any party has authored this brief in whole or in part, and no person other than amicus or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief. Petitioner's letter consenting to the filing of amicus curiae briefs generally has been filed with the Clerk's office. Respondent's consent to the filing of this brief is being submitted concurrently herewith. The parties received timely notice of the intention to file this brief.

SUMMARY OF THE ARGUMENT

The petition for certiorari conveys the problems inherent in certifying divisibility questions, which are essentially questions of federal law, to state supreme courts. Amicus writes to raise three additional concerns and to urge this Court's intervention into the trend of certification requests in *Taylor* categorical approach cases.

1. First, certifying abstract questions of state criminal law to state supreme courts upsets the normal course of the development of the law. With good reason, the judicial system of the United States, and of the states, avoids advisory opinions, and instead favors the development of the law through the adjudication of fact-specific, non-hypothetical applications. In the normal course, important decisions of state criminal law are made against a backdrop of a concrete dispute, with a specific set of facts developed organically in a state trial court. There are two parties before the court with some investment in the long-term development in state criminal law, and experience in the day-to-day practice of that law. Where the federal court certifies a question about divisibility, however, there is no factual context, because *Taylor* demands abstraction from the facts of any particular case. Moreover, the parties before the state supreme court are likely to be federal criminal or immigration practitioners, attorneys who have little experience in the practice of state law, or loyalty to the correct development of that law. Asking state courts to make important decisions about the elements of state criminal offenses in a factless

environment, without any participation of state criminal law stakeholders, threatens to distort the development of state criminal jurisprudence.

2. Second, certification invites this intrusion into the development of state law without a significant corresponding benefit on the federal side. The categorical approach depends on the elements of the state offense as it was defined at the time of the defendant's disposition of his case. If the state supreme court breaks new ground – which it will almost certainly do in the context of a certification question – it will only prompt more federal litigation about whether the state's decision described the state of the law at the time of the defendant's plea or trial. Thus, a certification comes at a high cost to the state court, without clearly controlling the question on the federal side.

3. Finally, the certification of divisibility questions asks the state supreme court to weigh in, essentially, on questions of federal law. The "elements" of an offense and the requirements of juror unanimity have settled meaning under state law, but those meanings do not easily map onto the categorical approach, which is premised on an idiosyncratic federal definition of element. In this sense, asking the state court to translate its caselaw into federal-law concepts threatens to muddy the water on the state side, and may, in some cases, also muddy the water on the federal side.

Amicus shares Petitioner's concerns about the proliferation of certification orders in divisibility cases, and believes this Court's intervention is warranted.

For these reasons, Petitioner urges the Court to grant the writ in this case.

ARGUMENT

I. Certification of divisibility questions is a subversion of the normal decisional process and threatens to adversely affect the development of state criminal jurisprudence.

Central to the American system of law is that interpretation of legal principles occurs in the context of actual cases, with all of their factual nuances, and with lawyers who are incentivized to develop the law in ways that favor their clients. That fundament grounds the rule against advisory opinions. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("Federal courts may not . . . give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'") (internal quotation omitted, alteration in original). It also drives the legal doctrines of standing – that the person who brings the case must have a stake in how the case comes out. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Certifying questions of state criminal law subverts the typical process of judicial decision-making in three important ways.

1. The certification decision is made in a factless environment. This Court has often reminded that the *Taylor* categorical approach depends on the

elements of an offense, not the facts of any particular case. *E.g.*, *Descamps v. United States*, 570 U.S. 254, 261 (2013). Thus, when the certifying federal court asks the state court to decide whether a jury must be unanimous about the controlled substance at issue, as is the case here, or whether the various theories of robbery are elements, as is the case in the Oregon order discussed in the petition, those issues do not come to the state court organically. There is no factual record, derived after a trial or plea, developed by a prosecutor and defense attorney and a trial judge. Instead, the federal court asks the state court to make important decisions about the elements of state law crimes in a factless void.

There is good reason that judicial decisionmaking happens in factual context. Facts, said Justice Frankfurter in his criticism of advisory opinions, are the centerpiece of judicial analysis. Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002, 1003 (1924). And advisory opinions, which attempt to answer abstract legal questions without factual context, are "bound to result in sterile conclusions unrelated to actualities." *Id.* That same risk inheres when the state court accepts the federal court's invitation to decide a divisibility question – the court is prone to make important decisions with respect to its criminal law without doing justice to the factual and legal complexities the issue presents. *Sangamo Weston, Inc. v. Nat'l Sur. Corp.*, 414 S.E.2d 127, 130 (S.C. 1992) (refusing certified question from a federal court because the factual record was not developed sufficiently; the court would

not "issue advisory opinions and cannot alter precedent based on questions presented in the abstract"). Federal courts should not ask state courts to subvert their normal decisional process in service of an idiosyncratic federal analysis.

2. A certification order lacks the proper parties with interest in the appropriate development of state law. Not only does the certification of divisibility questions require the state court to opine on state criminal law in a fact-free environment, but it does so without parties that have an investment in the correct development of the law.

The parties to the certification order in this case are typical of the certification orders in *Taylor* cases – a federal prosecutor and a federal criminal defense attorney. Neither party is likely to be an expert in state criminal law. Neither is likely to have on-the-ground experience in how juries are instructed in courtrooms in Nevada, or how pleas are structured. Neither is likely to have a concept of how many cases would be affected by the rules they advocate, or how substantial the impact would be. Nor, as a practical matter, does either party have to live with the results of the certification order in front of state court juries or judges.

The federal prosecutor who goes to his state counterpart for guidance might find a tepid audience, because, as has been noted, the categorical approach forces parties to play against type. *United States v. Brown*, 879 F.3d 1043, 1051 (9th Cir. 2018) (Owens, J., concurring). After all, the federal government in this

case has argued that its state counterpart has an *additional* burden of proof – an additional element that the prosecutor must prove unanimously to the jury. The defense attorney, likewise, is forced to argue for *expanded* criminal liability for defendants in the state system. *Id.* Thus, not only are the parties to a certification order unlikely to be the ones in the best position to assist in the development of state law, they are unlikely to receive assistance from their natural allies who might otherwise safeguard the development of state law.

Both of these features make the certification of divisibility questions unlike the typical question certified to the state supreme court. Where a federal court certifies a question of state contract law or employment law in a diversity case, it does so because the parties before it have a dispute, and that dispute can be resolved by a clarification of state law. The concrete facts of that parties' dispute are before the court and inform the state supreme court decision. *E.g.*, *Keystone Land & Dev. Co. v. Xerox Corp.*, 353 F.3d 1093, 1094-96 (9th Cir. 2003) (setting out robust factual record before certifying question of whether a particular contract was permitted under Washington law).

Moreover, the parties (or perhaps more likely, the attorneys) who find themselves in federal court debating a point of state law on arbitrability or contract law one day may well find themselves in state court debating a similar point the next day. They would be more likely to have some practical handle on the question. They would be more likely to be members of a defense

or plaintiffs' bar with a vested stake in the question. In other words, the ingredients are present that help assure correct interpretation of state law.

Those safeguards simply aren't present in the context of certification of divisibility questions, and counsel against the proliferation of such orders.

3. A certification order lacks lower court vetting. The state supreme court lacks not only a factual context and the proper parties, but also the benefit of development in the state trial and intermediate appellate court. Litigants in Nevada do not have appeal of right to its highest court; the Nevada Supreme Court has discretion to grant or deny petitions for review. As such, when the Nevada Supreme Court grants a petition for review and decides to decide a question of state law, it does so with the trial and intermediate court decisions in that case, but often with the benefit of other intermediate court decisions fleshing out various viewpoints on the question. *Nevada v. Eighth Judicial Dist. Ct.*, 994 P.2d 692, 697 (Nev. 2000) (accepting review to consider split of authority among "various departments" of lower state courts). Such percolation is thought to improve the accuracy of decision-making by exposing the high court judges to a wide range of takes on the question.

This feature is absent in the certification process of many divisibility questions – or, at least, if it is present, it is by accident. Again, this case is the perfect example: Figueroa-Beltran's case raises a conflict between two decisions of the Nevada Supreme Court

from 1971 and 1985. *United States v. Figueroa-Beltran*, 892 F.3d 997, 1003 (9th Cir. 2018). Amicus has not located a single Nevada state decision that *cites* both of these cases, let alone makes any attempt to reconcile them. The state supreme court is set to decide the elements of its drug trafficking offense – no doubt a heavily prosecuted offense – without the benefit of any thinking other than the parties before it. Such conditions are hardly optimal to making a correct decision.

For all of these reasons, the certification of questions about state court criminal statutes, in service of federal court categorical analysis, is a dubious proposition that runs a serious risk of introducing error into state criminal law.

II. Certification is unlikely to answer the question in a manner that furthers federal litigation.

Given the significant risk of distortion, the process could only conceivably be worthwhile if there was a significant payoff on the federal side. In many cases of certification, the issue of state law may be crucial to the case, and the state's word would be decisive. All the federal court does is execute the analysis provided by the state supreme court. *E.g.*, *Reinkemeyer v. Safeco Insur. Co. of Amer.*, 166 F.3d 982, 984 (9th Cir. 1999). But that's not necessarily the case here. That is because the state supreme court's advisory opinion may only spawn further federal litigation about whether

the decision breaks new ground or whether it reflects the state of the law at the time of the plea.

Certification questions generally arise in a couple of different contexts: where the question is one of first impression under state law, where there is a conflict among the intermediate appellate courts, or where there is question about whether one state supreme court decision overruled another. *See* Frank Chang, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts*, 85 Geo. Wash. L.R. 251, 263-64 (2017). Under any of these circumstances, when a state supreme court answers a certified question, the court will almost necessarily break new ground.

In most instances of certification, that would not pose a problem – but here it does. That's because divisibility depends on the definition of the offense at the time of the defendant's plea or trial; if a statute is modified *after* that time, it does not affect the elements of the offense as the defendant admitted them or the jury found them. *United States v. Dahl*, 833 F.3d 345, 354 (3d Cir. 2016).

For that reason, the only divisibility analysis that will be decisive for *Taylor* purposes is one that confirms the elements as of the time of the defendant's plea or trial. It would seem to be the rare certification decision that would satisfy that standard. Again, the instant case demonstrates this problem. The basis for the instant certification order is that two Nevada Supreme Court decisions appear to conflict, and the federal

court wants to know which of the two correctly states the elements of the Nevada offense. However the Nevada Supreme Court describes the elements of the offense, it will not be clear that those were the elements at the time Mr. Figueroa-Beltran entered his plea – no more than it is clear to the federal court *today* what the statute requires.

Thus, while the Nevada Supreme Court's decision may head off questions about the elements of an offense in the future, it will be but a speed bump in the question about whether that particular element was necessarily part of the *defendant's* plea. The high cost to the state system, then, comes at little payoff to the federal court.

III. Divisibility requires application of concepts that do not map onto state law concepts.

Finally, this Court should have serious doubts that a state court is equipped to answer, essentially, a federal question. Put another way, asking state courts to wade into a federal analysis that has been labeled as a "Rube Goldberg jurisprudence of abstractions," *United States v. Tavares*, 843 F.3d 1, 19 (1st Cir. 2016), threatens to cause more problems than it solves.

This Court gave the word "element" a technical meaning for divisibility purposes; it is "what the jury must find beyond a reasonable doubt to convict the defendant, and . . . what the defendant necessarily admits when he pleads guilty." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). But that is not a universal

understanding of the term element among the states. *United States v. Martinez-Lopez*, 864 F.3d 1034, 1042 (9th Cir. 2017) (en banc) (relying on a California Supreme Court case that used the word "elements," though admitting that it "did not describe its decision" as having anything to do with "what 'the prosecution must prove' and what must be 'found by a jury or admitted by a defendant.'") (citations and alterations omitted); *see id.* at 1051-52 (Berzon, J., dissenting) (collecting California decisions using "elements" and "means" interchangeably); *United States v. Faust*, 853 F.3d 39, 56 (1st Cir. 2017) (declining to rely on state court decision describing the "elements" of an offense, because the state court had never equated "element" with juror unanimity); *United States v. Herrold*, 883 F.3d 517, 524 (5th Cir. 2018) (noting that the state court's use of the word "element" "is not imbued with any apparently legal significance" and did not denote a unanimity requirement).

As these cases demonstrate, in most states, the question of what is an "element" is tied up in a number of overlapping state law concepts that do not map easily on divisibility – in particular, notice requirements in charging documents, multiplicity and duplicity, the "unit of prosecution," jury unanimity, and the various uses and purposes to which states put the term "element." Asking the state court whether a certain factual variant is an "elements" – as the Ninth Circuit did in this case – may thus cause analytic misfires, if the state lacks the background to understand the meaning of the word in federal court. And certification requests

that simply ask whether the statute is "divisible" – a creature entirely of federal court making – run an even greater risk of error.

While a state court decision describing the "elements" of the offense might be of dubious value on the federal case, its effect on *state* cases will be worse. Declaring a particular fact an "element" of an offense has consequences, consequences that will certainly not be lost on individuals charged with those offenses in state court – or sitting in custody serving lengthy sentences for that offense.

In the end, federal courts, not state courts, are the only courts equipped to analyze the divisibility of state statutes for *Taylor* purposes. The federal courts should not delegate this important and difficult work to the state courts.

IV. This Court should arrest the flow of certification orders.

At first blush, these concerns might seem to suggest why a state court should decline certification requests, but it may not be clear why the federal courts should not *ask*. In fact, however, this Court should intervene to deter this practice.

For one thing, there is, if not pressure, at least strong encouragement for states to accept federal court requests for certification – as demonstrated by the rarity of state court refusal. James A. Parker et al., *Certification and Removal: Practices and Procedures*, 31

N.M. L. Rev. 161, 170 (2001) (noting that, of 284 requests by the federal courts for certification in a four year period, there were only seven refusals). Given the concerns outlined above and the state court's apparent reluctance to refuse certification, the federal courts should not lean on state courts to decide questions of divisibility – at great cost to the state system and little payoff for the federal court.

This is not the only reason to stop the proliferation of certification orders. As Petitioner notes, there are concerns about the uneven availability of this process; some state courts lack a certification process, some states rarely accept certified issues, and others regularly accept such questions. (Petition at 28.) This creates an area of unevenness in a system designed to promote federal uniformity. *Taylor v. United States*, 495 U.S. 575, 580 (1990).

The delay inherent in such processes is another reason for this Court to intervene. The last time that the Ninth Circuit certified a question to the Nevada Supreme Court, it took over two years for that Court to provide an answer. *Trustees of the Const. Indus. & Laborers Health and Welfare Trust v. Hartford Fire Insur. Co.*, 578 F.3d 1126, 1128 (9th Cir. 2009). That may be an acceptable delay in a civil dispute, but criminal defendants and detained immigrants should not be forced to sit in detention while waiting for the state court to conduct its protracted processes.

But just as important than any of these concerns, this Court has already told the lower federal courts

how to proceed in cases where there is uncertainty about the state law. In *Mathis*, this Court said that, when existing state law comes up short, "*Taylor*'s demand for certainty" is not met and the sentencing enhancement cannot be imposed. 136 S. Ct. at 2257. A federal court's conclusion that the matter must be certified to the state supreme court is tantamount to an admission that there is no point of state law that satisfies *Taylor*'s demand for certainty. That should be the end of the story.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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