

No. 18-6747

IN THE SUPREME COURT OF THE UNITED STATES

GIBRAN RICHARDO FIGUEROA-BELTRAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals faced with conflicting decisions of a state supreme court is foreclosed from certifying questions of state law to that court in order to assist the court of appeals in determining whether a defendant's prior state conviction qualifies as a "drug trafficking offense" under now-superseded Sentencing Guidelines § 2L1.2(b) (2015).

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OPINION BELOW

The order of the court of appeals (Pet. App. A1-A5) is reported at 892 F.3d 997.

JURISDICTION

The order of the court of appeals was entered on June 6, 2018. The court of appeals denied a petition for rehearing on August 17, 2018 (Pet. App. B1). The petition for a writ of certiorari was filed on November 14, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Nevada, petitioner was convicted of unlawful reentry into the United States, in violation of 8 U.S.C. 1326. Judgment 1. The district court sentenced petitioner to 41 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals certified three questions to the Supreme Court of Nevada and stayed proceedings pending a response. Pet. App. A1-A5.

1. Petitioner is a native and citizen of Mexico. Presentence Investigation Report (PSR) ¶ 6. In 2012, officers -- who recognized petitioner's vehicle from a recent narcotics investigation -- observed him engage in what they believed to be a narcotics transaction. PSR ¶ 27. The officers followed petitioner's vehicle and pulled him over after petitioner made an illegal lane change. Ibid. Petitioner informed the officers that he was present in the United States illegally and lacked a valid driver's license. Ibid. Petitioner was placed under arrest; his vehicle was searched; and officers found 21 individually packaged balloons containing cocaine, as well as 5.8 grams of heroin and \$913 in cash. Ibid. Petitioner was convicted in Nevada state court of possession of controlled substances -- cocaine and heroin -- with intent to sell, in violation of Nevada Revised Statutes

\$ 453.337 (2011). PSR ¶ 27. He was sentenced to 19 to 48 months of imprisonment. Ibid.

In June 2013, petitioner was removed to Mexico. He reentered the United States illegally in August 2014. PSR ¶ 8. In 2015, the Southern Nevada Heroin Task Force investigated a drug trafficking organization led by petitioner. PSR ¶ 32. As part of the investigation, officers made numerous purchases of heroin that were negotiated or carried out by petitioner. Following a warrant search, officers located within petitioner's home four firearms (including one stolen firearm), more than one and a half pounds of heroin, more than \$5000 in cash, marijuana, cocaine, and a digital scale. Ibid. Petitioner was charged with a number of state offenses, including receiving stolen property, receiving a stolen vehicle, possessing firearms as a prohibited person, operating a place for the sale of controlled substances, possessing controlled substances for sale, trafficking controlled substances, selling controlled substances, and conspiracy to violate the federal Controlled Substances Act (CSA), 21 U.S.C. 801 et seq. PSR ¶ 32.

While petitioner was being held in state custody, he encountered United States Immigration and Customs Enforcement (ICE) officers. PSR ¶ 7. ICE officers lodged a detainer against petitioner, and he was released into their custody. Ibid. After being advised of his rights, petitioner informed ICE officers that

he had illegally reentered the United States in August 2014. PSR ¶ 8.

2. A federal grand jury charged petitioner with unlawfully reentering the United States after having been removed, in violation of 8 U.S.C. 1326. Indictment 1. Petitioner pleaded guilty to that offense. PSR ¶ 2.

In advance of sentencing, the Probation Office prepared a presentence report. Section 2L1.2 of the Sentencing Guidelines provides a base offense level of eight for the offense of illegal reentry after deportation. Sentencing Guidelines § 2L1.2(a) (2015). Until November 1, 2016, the Guidelines provided that a defendant convicted of illegal reentry was subject to a 16-level enhancement if he had previously been convicted of a "drug trafficking offense for which the sentence imposed exceeded 13 months." Id. § 2L1.2(b)(1)(A)(i). The commentary to that provision defined a "drug trafficking offense" to include any "offense under federal, state, or local law that prohibits * * * the possession of a controlled substance * * * with intent to manufacture, import, export, distribute, or dispense." Id. § 2L1.2, comment. (n.1(B)(iv)).

Applying the 2015 Sentencing Guidelines, the Probation Office recommended a 16-level enhancement under Section 2L1.2(b)(1)(A)(i) because petitioner's conviction under Nevada Revised Statutes § 453.337 (2011) qualified as a "drug trafficking offense" for

which the sentence imposed was more than 13 months. PSR ¶¶ 15, 27. With that enhancement and other adjustments, petitioner's Guidelines offense level was 21 and his criminal history category was II, resulting in an advisory sentencing range of 41 to 51 months of imprisonment. PSR ¶¶ 23, 29, 51.

Petitioner objected to the application of the 16-level enhancement under former Section 2L1.2(b)(1)(A)(i), contending that his Nevada conviction was not for a "drug trafficking offense." D. Ct. Doc. No. 34, at 5-9 (Aug. 9, 2016). To determine whether a defendant's prior conviction qualifies as a "drug trafficking offense" under Sentencing Guidelines § 2L1.2(b)(1)(A)(i) (2015), courts apply the categorical approach adopted in Taylor v. United States, 495 U.S. 575 (1990), comparing the "statutory definition[]" in the state offense to that of the "generic" crime. Id. at 600. If the state statute covers conduct that corresponds to, or is a subset of, the conduct covered by the generic offense, then it is categorically a "drug trafficking offense." See, e.g., United States v. Martinez-Lopez, 864 F.3d 1034, 1038 (9th Cir.) (en banc), cert. denied, 138 S. Ct. 523 (2017). Even if it does not, if the state statute is divisible -- meaning that it "list[s] elements in the alternative, and thereby define[s] multiple crimes" -- then courts may apply the "modified categorical approach," under which they determine, based on a limited set of record documents, "what crime, with what elements" the defendant's previous conviction represents and then compare

those elements to the federal generic crime. Mathis v. United States, 136 S. Ct. 2243, 2249 (2016).

Petitioner contended that, at the first step of the analysis, his Nevada conviction for possession of controlled substances with intent to sell was not categorically a “drug trafficking offense,” because the Nevada statute covers “any controlled substance classified in [Nevada] schedule I or II,” but those schedules list some substances that are not controlled under federal law. D. Ct. Doc. No. 34, at 5-6 (emphasis omitted) (quoting Nev. Rev. Stat. § 453.337(1) (2011)).¹ Petitioner further argued that the modified categorical approach did not apply, on the theory that the state statute was not divisible into different crimes based on the need to prove the specific type of controlled substance as an element of the offense. Id. at 9. Petitioner thus contended that his conviction for possession of controlled substances with intent to distribute was not a “drug trafficking offense” because that crime could have been committed through possession of substances that were not controlled under federal law (even though the drugs he actually possessed, cocaine and heroin, are controlled under federal law). Ibid.

¹ The Ninth Circuit has held that a state drug statute categorically qualifies as a generic “drug-trafficking offense” if the substances controlled by the state statute are identical to, or a subset of, the substances controlled by the CSA. See United States v. Leal-Vega, 680 F.3d 1160, 1167 (2012), cert. denied, 568 U.S. 1145 (2013).

The district court denied petitioner's objection and sentenced him to 41 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. Petitioner appealed, and the court of appeals certified three questions to the Supreme Court of Nevada and stayed proceedings pending a response. Pet. App. A1-A5.

The court of appeals began its discussion by observing that a "'three-step analysis'" applied to determine whether petitioner's Nevada conviction qualified as a "drug trafficking offense." Pet. App. A3 (quoting Martinez-Lopez, 864 F.3d at 1038). At the first step, the court would determine whether the state statute was a categorical match with a federal drug trafficking offense, in which case it would qualify with no further inquiry required. If not, the court would determine at the second step whether the statute was divisible into separate crimes, at least some of which would qualify as drug trafficking offenses. Ibid. If the state statute was divisible, then the court would proceed to the third step, at which it would consult record documents from petitioner's prior conviction to determine whether petitioner was convicted of a qualifying variant of the Nevada offense. Ibid. Because the government did not dispute that Nevada's possession-within-intent-to-distribute statute covers substances not controlled by federal law, the court observed that the case "'turns on the second step of [the] analysis,'" i.e., "whether § 453.337 is divisible" as to controlled substance "and thereby susceptible

to examination under the modified categorical approach.” Ibid.
(citation omitted).

The court of appeals found “no controlling Nevada precedent definitively resolving whether or not § 453.337 is a divisible statute.” Pet. App. A3. Petitioner and the government each cited a Supreme Court of Nevada decision in support of their respective positions. Petitioner relied on Sheriff v. Lugman, 697 P.2d 107 (Nev. 1985) (per curiam), which upheld the authority of the state board of pharmacy to classify drugs into schedules, thereby setting the penalties for violations of drug provisions. See Pet. App. A3-A4. Lugman explained that while “the legislature may not delegate its power to legislate,” the authorization to the board instead “delegate[d] the power to determine the facts or state of things upon which the law makes its own operations depend.” Id. at A4 (quoting Lugman, 697 P.2d at 110) (brackets in original). Petitioner asserted that Lugman demonstrated that “the identity of the controlled substance is ‘merely a fact’” and not an element of the state offense. Ibid.

The government, however, pointed to Muller v. Sheriff, 572 P.2d 1245 (Nev. 1977) (per curiam), for the proposition that Section 453.337 is divisible as to the controlled substance involved. See Pet. App. A4. In Muller, the Supreme Court of Nevada rejected a defendant’s argument that the sale of two different controlled substances, consummated simultaneously in one transaction, could constitute only one offense. 572 P.2d at 1245;

see Pet. App. A4. The Supreme Court of Nevada explained that “[t]he sale of heroin and the sale of cocaine are distinct offenses requiring separate and different proof” -- “the particular identity of the controlled substance sold.” Pet. App. A4 (quoting Muller, 572 P.2d at 1245). The government thus contended that Muller identified the particular controlled substance as an element of the offense, while Lugman did not address that issue.

The court of appeals reasoned that “Lugman and Muller seemingly stand in conflict.” Pet. App. A4. In its view, “Lugman suggests that the identity of a controlled substance is a non-elemental factual determination,” while “Muller appears to conclude that 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.” Ibid. “Without further guidance,” the court could not “say with confidence that the Nevada precedent definitively answers the question whether § 453.337 is divisible as to the identity of the controlled substance.” Ibid.

The court of appeals therefore certified three questions to the Supreme Court of Nevada pursuant to a state rule of procedure that authorizes certification. Pet. App. A1 & n.2 (citing Nev. R. App. P. 5). The court of appeals asked: (1) whether Nevada Revised Statute § 453.337 (2011) is divisible as to the controlled substance requirement; (2) whether the decision in Lugman concluded that the existence of a controlled substance is a “fact”

rather than an “element” of Section 453.337, rendering the statute indivisible; and (3) whether the decision in Muller concluded that offenses under Section 453.337 comprise “distinct offenses requiring separate and different proof,” rendering the statute divisible as to the controlled substance requirement. Pet. App. A4-A5. The court of appeals stayed further proceedings on petitioner’s appeal until the Supreme Court of Nevada responded to those certified questions. Id. at A5.

4. The Supreme Court of Nevada accepted the certified questions. Pet. App. C1-C3. The court explained that “[i]n determining whether to accept a certified question,” it considers three factors: (1) whether the answer will be determinative in the federal case; (2) whether there is controlling Nevada precedent on point; and (3) whether the answer will help settle important questions of state law. Id. at C1. The court found those factors supported certification, and it therefore ordered briefing. Id. at C2. The court subsequently granted petitioner’s motion to stay the certification proceedings pending petitioner’s petition for rehearing en banc in the court of appeals. Id. at D1. Following the court of appeals’ denial of that petition, id. at B1, the Supreme Court of Nevada granted petitioner’s motion for a further stay of proceedings in that court pending petitioner’s petition for a writ of certiorari. Id. at D1-D2.

ARGUMENT

Petitioner contends (Pet. 13-35) that the court of appeals erred in certifying questions concerning the meaning of Nevada state law to the Supreme Court of Nevada. That contention arises in an interlocutory posture, implicates no disagreement with any decision of this Court or among the courts of appeals, and ultimately concerns the application of a provision of the advisory Sentencing Guidelines that has been superseded. The petition for a writ of certiorari should be denied.

1. This Court's review is unwarranted for the threshold reason that this case is in an interlocutory posture, which "alone furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); cf. Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court"). The court of appeals certified three questions to the Supreme Court of Nevada and stayed proceedings pending that court's response. Pet. App. A4-A5. If the Supreme Court of Nevada answers those questions in a manner favorable to petitioner, any disagreement he has with the certification procedure presumably would be moot. If the Supreme Court of Nevada answers the questions in a manner favorable to the government, and petitioner's sentence is affirmed, he will have an opportunity to raise the claim pressed here, in addition to any other claims arising from

that ruling, in a single petition for a writ of certiorari. See Hamilton-Brown Shoe Co., 240 U.S. at 258; see also Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting this Court's "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). Petitioner provides no sound reason to depart in this case from this Court's usual practice of awaiting final judgment.²

2. In any event, the court of appeals did not err in certifying to the Supreme Court of Nevada questions regarding Section 453.337's controlled-substance requirement.

a. In accord with Mathis v. United States, 136 S. Ct. 2243 (2016), the determination whether a prior state-law conviction constitutes a "drug trafficking offense" under Sentencing Guidelines § 2L1.2(b)(1)(A)(i) (2015), may require an analysis of whether the statute of conviction is "divisible" into multiple offenses. Mathis, 136 S. Ct. at 2249. In particular, where the

² Petitioner asserts (Pet. 16-21) that this case has created a "domino effect" because two other panels (one of the Seventh Circuit and one of the Ninth Circuit) have certified questions of state law to state supreme courts. Pet. 16. Even if those panels' actions could be attributed to the decision here, any or all of the relevant cases could be reviewed after the appellate proceedings conclude. And although petitioner notes (Pet. 34) that other cases involving the divisibility of Section 453.337 have been stayed pending this one, that development provides no basis for interlocutory review. Indeed, the delay in the state proceedings is due to petitioner's request that those proceedings be stayed pending his requests for interlocutory review; denial of this petition would presumably restart the proceedings and allow for the resolution of all the pending cases.

statute is "alternatively phrased" such that it criminalizes some conduct that would qualify as a drug trafficking offense under the Guideline and some conduct that would not, a court must determine "whether its listed items are elements" of separate offenses or instead are alternative "means" of committing a single offense. Id. at 2256. "If they are elements, the court should * * * review the record materials to discover which of the enumerated [offenses] played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime." Ibid. "But if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution," ibid., and the statute's criminalization of conduct outside the Guidelines' definition of a "drug trafficking offense" would preclude classifying a conviction under that statute as predicate conviction under Section 2L1.2(b)(1)(A)(i).

As this Court established in Mathis, and as the court of appeals acknowledged, Pet. App. A3, whether a state statute sets forth alternative "elements" or "means" is fundamentally a question of state law. Mathis, 136 S. Ct. at 2256. Where state law definitively answers that question, a federal court's inquiry is at an end. See ibid. ("Th[e] threshold inquiry -- elements or means? -- is easy in this case" because "a state court decision definitively answers the question."). Where state law appears to provide contradictory guidance on that question, however, no

reason exists invariably to bar federal courts from using recognized methods of construing state law, including certification to state courts where available, to resolve that ambiguity.

Nevada, like the vast majority of States, permits its state supreme court to address certified questions. Nevada Rule of Appellate Procedure 5 provides:

The Supreme Court [of Nevada] may answer questions of law certified to it by * * * a Court of Appeals of the United States * * * if there are involved in any proceeding before th[at] court[] questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or Court of Appeals of this state.

Nev. R. App. P. 5.

Faced with seemingly conflicting authority of the State's highest court on a determinative issue of state law, the court of appeals in this case determined, as an exercise of its discretion, that certification to the Supreme Court of Nevada was appropriate. Pet. App. A4-A5. The Supreme Court of Nevada agreed. In response to the court of appeals' certification request, the Supreme Court of Nevada determined that the factors favoring certification were met. Id. at C1-C2. The Supreme Court of Nevada therefore agreed to resolve the ambiguity in its prior decisions about whether the identity of a controlled substance is an element of an offense under Nevada Revised Statute § 453.337 (2011) or a means of the commission of a single indivisible crime. No reason exists for

this Court to grant interlocutory review of the court of appeals' discretionary determination to certify the questions that the Supreme Court of Nevada has agreed to review.

b. Petitioner's contrary arguments lack merit. Petitioner contends (Pet. 15) that the court of appeals' decision to certify questions of state law "violates Mathis' instructions for assessing divisibility." In particular, he argues that "[i]f the panel was not persuaded by Lugman, Muller, or any other Nevada state case," then Mathis required it to "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." Pet. 16 (citation omitted). Petitioner's argument overlooks that the court in this case was not simply "unpersuaded" by Lugman and Muller; it instead was of the view that those decisions "stand in conflict" on the divisibility question. Pet. App. A4. Nothing in Mathis forecloses a court of appeals faced with conflicting decisions of a state's highest court from seeking the guidance of that court.³

³ Petitioner contends (Pet. 30) that the court of appeals panel "should have addressed any perceived conflict between Lugman and Muller by looking to Nevada's established abrogation principles." Petitioner failed to make that argument in his opening or reply briefs, raising it for the first time in his petition for rehearing. See Pet. for Reh'g 18-20; Pet. C.A. Br. 29-33; Pet. C.A. Reply Br. 3-11. In any event, petitioner does not explain why the court of appeals was required to itself attempt to apply Nevada abrogation law and declare one state decision or another to be overruled, rather than invoking the State's established certification procedure.

Petitioner's assertion (Pet. 24) that certification improperly "enlist[s]" state courts to decide questions of federal law is mistaken: where, as here, a state supreme court agrees to accept certified questions, it is called upon to decide only questions of state law. See Mathis, 136 S. Ct. at 2256 (recognizing that divisibility depends on state law). Nor are petitioner (Pet. 26-29) and his amicus (Office of Fed. Pub. Defender Amicus Br. 4-13) correct that certifying divisibility questions to state supreme courts is always unwise because those courts will lack real-world context for the issue; will not receive briefing from interested parties such as state prosecutors; or will expend resources on questions unlikely to arise in the future in state court. At most, those arguments suggest that courts of appeals may decline to certify questions -- or that state supreme courts may decline to accept certification -- in particular cases.

c. Petitioner also is incorrect to suggest (Pet. 22-24) that the decision below implicates a division in the courts of appeals. Petitioner observes (ibid.) that other courts of appeals have resolved ambiguous questions of state law in defendants' favor when determining whether state statutes are divisible, without certifying questions to state courts. But none of those decisions states that certification is unavailable in that circumstance. Nor does any of the cited decisions address the situation here, where two decisions of the state supreme court appear to stand in conflict. See United States v. Hamilton, 889 F.3d 688, 694

(10th Cir. 2018) (determining that state court opinions did not address whether alternatives were elements or means, rather than that they were in conflict on the question); United States v. Herrold, 883 F.3d 517, 523 (5th Cir. 2018) (en banc) (stating that state court opinions had “repeatedly held” that statutory alternatives were means and not elements), petition for cert. pending, No. 17-1445 (filed Apr. 18, 2018), and petition for cert. pending, No. 17-9127 (filed May 21, 2018); United States v. Faust, 853 F.3d 39, 53-54 (1st Cir. 2017) (observing that government conceded that statute was not divisible in light of, inter alia, a “lack of clear state court decisions parsing the elements of the offense”); United States v. Horse Looking, 828 F.3d 744, 747, 749 (8th Cir. 2016) (determining that statute was divisible based on statutory language and structure, but that court could not be certain of the subsection under which the defendant previously had been convicted); see also United States v. Sykes, 864 F.3d 842, 843 (8th Cir. 2017) (Colloton, J., dissenting from the denial of rehearing en banc) (expressing the view that the panel’s analysis -- which did not result in certification -- was insufficient).

In this context, as in any other that turns on a question of state law, certification is a procedure that courts can -- but need not necessarily -- employ. Whether to do so is a discretionary decision that will turn on the particular circumstances of the case. Petitioner offers no sound reason for

a rule that would preclude courts of appeals from certifying state-law questions concerning divisibility.

3. Regardless, this case would be an inappropriate vehicle for considering petitioner's argument because the certified questions at issue relate to the application of a provision of the advisory Sentencing Guidelines that has since been superseded. Typically, this Court leaves issues of Guidelines application in the hands of the Sentencing Commission, which is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991). Given that the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions that implicate the interpretation or application of the Guidelines. See ibid.; see also United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.").

Indeed, the Guidelines provision at issue here exemplifies that process. Effective November 1, 2016, the Sentencing Commission adopted an amendment to Section 2L1.2 that eliminates any need to categorize a defendant's pre-removal conviction as a "drug trafficking offense." See Sentencing Guidelines App. C

Supp., Amend. 802 (Nov. 1, 2016). Section 2L1.2 now provides offense-level enhancements for prior convictions that are based primarily on the sentence imposed for those convictions. And should questions arise about the propriety of certifying questions to state courts for the purpose of making divisibility determinations for application of other Guidelines, the Commission could provide guidance on that issue. The Commission has also recently published a proposed amendment that would "establish that the categorical approach and the modified categorical approach do not apply in determining whether a conviction is a 'crime of violence' or a 'controlled substance offense'" under Sentencing Guidelines § 4B1.2, which would substantially reduce any prospective importance of the question presented in this context. 83 Fed. Reg. 65,400, 65,407 (Dec. 20, 2018).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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