No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

EDDIE RAY HALL — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

_____
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Eddie Ray Hall
(Your Name)

4004 E. Arkona Road
(Address)

Milan, MI 48160
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1) Whether the District and Circuit Courts erred in the denial of Hall's § 2241 Petition where, as here, Hall sufficiently demonstrated that the decision to treat his prior conviction of delivery of marijuana in Washington State Court as a "controlled substance offense" constituted a miscarriage of justice and a fundamental defect.

2) Whether the District and Circuit Courts erred in their determinations that Hall failed to show that his prior felony conviction no longer qualified as a predicate offense for purposes of the career offender enhancement and because his sentence would have been the same absent his career offender designation.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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Statutes and Rules (Cont.)

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 2018 U.S. App. LEXIS 6563 (6th Cir. 2018); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was JUNE 19, 2018.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

Petitioner pleaded guilty in the United States District Court for the Eastern District of Washington.

Petitioner's Base Offense Level for the Federal Sentencing Guidelines at the time of sentencing was 32. He was given a two point upward adjustment under U.S.S.G. § 3C1.2 for obstruction of justice for his conduct at the time of arrest. However, pursuant to U.S.S.G. § 3E1.1(a) and (b), Petitioner was given a three level downward adjustment for acceptance of responsibility. Id. at 8-9. This resulted in a Total Offense Level of 31.

The Presentence Investigation Report indicated that Petitioner was a career offender within the meaning of U.S.S.G. § 4B1.1(a), because of his prior Washington State convictions for Delivery of Marijuana, in violation of Wash. Rev. Code Ann. § 9A.52.025.

At Petitioner's sentencing on April 21, 2011, the judge observed that the Total Offense Level was 31 regardless of whether Petitioner was classified as a career offender or whether the obstruction of justice enhancement was applied. Counsel agreed. The range of incarceration for a Total Offense Level of 31, coupled with Petitioner's Criminal History Category of VI, was 188-235 months. The Court sentenced Petitioner to 195 months incarceration, five years of supervised release, a $100.00 special penalty assessment, and no fine or restitution.

The Ninth Circuit affirmed Petitioner's conviction and sentence on appeal. United States v. Hall, 473 F. App'x. 596, 597 (9th Cir. 2012).

Petitioner filed a motion for habeas corpus relief, construed as a motion to vacate sentence brought under 28 U.S.C. § 2255. It was denied. United States v. Hall, No. CR-09-0116-RHW-1, 2014 WL 12705133 (E.D. Wash. Jan. 8, 2014).

(See Attachment)

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Statement of the Case (Cont.)

Petitioner filed a motion for reduction of sentence; it, too, was denied. United States v. Hall, No. 09-CR-00116-RHW-1, 2016 WL 9132007 (E.D. Wash. Feb. 2, 2016), aff'd 671 F. App'x. 661 (9th Cir. 2016).

The United States Court of Appeals for the Ninth Circuit granted Petitioner permission to file a second motion to vacate sentence, in order to challenge his predicate conviction for residential burglary under Johnson v. United States, 135 S.Ct. 2551 (2015). Hall v. United States, No. 16-71751 (9th Cir. Jan. 24, 2017). The district court denied Petitioner's second motion to vacate sentence. United States v. Hall, No. 2:09-CR-116-RHW-1, 2017 WL 924468 (E.D. Wash. Mar. 8, 2017). The Ninth Circuit denied Petitioner a certificate of appealability. Hall v. United States, No. 17-35409 (9th Cir. Sept. 6, 2017); reconsideration den. No. 17-35409 (9th Cir. Oct. 4, 2017).

Petitioner thereafter filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 on the following ground: Is Petitionr entitled to re-sentencing as a result of the Supreme Court's decision in United States v. Mathis (and its progeny)? Hall thereafter filed two motions for leave to amend his § 2241 habeas petition, both of which were granted by the Court. On November 21, 2017, the District Court entered its opinion and order denying Petitioner's § 2241 petition. Petitioner thereafter timely filed his notice of appeal. On June 19, 2018, the Circuit Court issued is mandate denying Petitioner's appeal. This petition for the issuance of a Writ of Certiorari now follows.

REASONS FOR GRANTING THE PETITION

1) The District and Circuit Courts erred in the denial of Hall's § 2241 Petition where, as here, Hall sufficiently demonstrated that the decision to treat his prior conviction of delivery of marijuana in Washington State Court as a "controlled substance offense" constituted a miscarriage of justice and a fundamental defect.

Both the District and Circuit Court's conclusion in that the Sixth Circuit's decision in Hill v. Masters, 836 F.3d 591 (6th Cir. 2016) was determinative as to the propriety of Hall's ability to prosecute a § 2241 habeas petition was an improperly and overly narrow view that only the Hill decision could provide Hall with § 2241 relief. Rather, and as Hall has demonstrated, his actual innocence of being a career offender provides a proper basis for § 2241 relief as well. Certiorari review is necessary where, as here, an issue of significant constitutional import is under consideration.

Hall's initially filed § 2241 petition first begins with a recitation of this Court's decision in Mathis and its application in the instant case.

A. The United States Supreme Court's decision in Mathis does provide a valid legal basis for relief for Hall and Hall's Washington State "delivery of marijuana" conviction is an improper predicate based upon application of the modified categorized approach.

In Mathis v. United States, 579 U.S. -- 136 S.Ct. 2243, 2249 195 L.Ed. 604 (2006), the United States Supreme Court held that a modified categorized approach was permissible in determining the propriety of whether a predicate offense is properly to be considered under the ACCA, if the statute that classifies the predicate conviction is "divisible" (i.e. in which a single statute may list elements in the alternative, and thereby define multiple crimes).

In United States v. Madkins, 866 F.3d 1136, 1146 (10th Cir. 2017), the Tenth Circuit dealt with nearly the identical question presented by Hall. Madkins argued that the district court erred in concluding that his two prior Kansas convictions for possession with intent to sell cocaine and marijuana

(See Attachment)

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Reasons (Cont.)

are controlled substance offenses within the meaning of the Sentencing Guidelines. Based on this conclusion, the court designated Madkins as a career offender, which significantly increased his total offense level and corresponding guidelines sentencing range. Madkins asked for a vacation of his sentence and remand for resentencing without the career-offender enhancement. The Court stated as follows:.

> "We review challenges to the imposition of guidelines enhancements for clear error as to findings of fact and de novo as to questions of law. United States v. Irvin, 682 F.3d 1254, 1276-77 (10th Cir. 2012). Whether a prior conviction qualifies as a predicate offense for career-offender purposes is a question of law that we review de novo. See United States v. Karam, 496 F.3d 1157, 1166 (10th Cir. 2007).
>
> Section 4B1.1 of the Guidelines enhances the offense levels for defendants classified as career offenders. 3 The enhancement applies to a defendant convicted of a "controlled substance offense" who "has at least two prior felony convictions of either a crime of violence of a controlled substance offense." USSG § 4B1.1(a). The Guidelines define a controlled substance offense for purposes of the career-offender designation as:
>
> > an offense under federal or state law, punishable by imprisonment of a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of 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. USSG § 4B1.2(b). Federal law provides that for purposes of this definition, "distribute" means "to deliver...a controlled substance or listed chemical." 21 U.S.C. § 802(11); see also United States v. Cherry, 433 F.3d 698, 702 (10th Cir. 2005). The commentary to § 4B1.2 clarifies that a controlled substance offense includes "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." See USSG § 4B1.2 cmt. n.1.
>
> Before Madkins was sentenced, the presentence investigation report (PSR) designated him as a career offender based on his two prior Kansas state convictions for possession with intent to sell cocaine and marijuana. This designation raised Madkin's total offense level from 14 to 34, and his sentencing range from 37-46 months to 262-327 months. Madkins objected to the career-offender designation. He argued his offenses of conviction criminalize a broader swath of conduct than that described in § 4B1.2(b). Specifically, Madkins claimed that his Kansas statutes of conviction criminalized possession of a controlled substance with intent to merely offer for sale, whereas the Guidelines definition only extends to offense prohibiting possession with intent to distribute - i.e., to actually sell or deliver a controlled substance. Therefore, Madkins contended that neither conviction was a predicate offense for purposes of the career-offender enhancement. (6a)

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Reasons (Cont.)

Several cases from other circuit courts support the Madkins court's analysis. In United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016), for example, the Fifth Circuit held a prior Texas conviction for delivering heroin did not qualify as a controlled substance offense for purposes of the career-offender enhancement, because Texas law criminalized an offer to sell a controlled substance. Id. at 576-77. Hinkle's statute of conviction penalized a person who "knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance." Id. at 572. But a separate section of the statute defined "deliver" to include "offering to sell a controlled substance, counterfeit substance, or drug paraphernalia." Id. Accordingly, the Fifth Circuit held, "the 'delivery' element of Hinkle's crime of conviction criminalizes a 'greater swath of conduct than the elements of the relevant [Guidelines] offense.' This 'mismatch of elements' means that Hinkle's conviction for the knowing delivery of heroin was not a controlled substance offense under the Guidelines." Id. at 576 (quoting Mathis, 136 S.Ct. at 2251).

Similarly, in United States v. Savage, 542 F.3d 959 (2d Cir. 2008), the Second Circuit vacated and remanded the defendant's sentence where the defendant had pleaded guilty to a drug sale under a Connecticut statute penalizing "[a]ny person who manufactures, distributes, sells...[or] possesses with intent to sell...any controlled substance." Id. at 961. A separate provision of the statute defined "sale" to include "any form of delivery[,] which includes barter, exchange or gift, or offer therefore." Id. The Second Circuit first applied the categorical approach and held, "the Connecticut statute, by criminalizing a mere offer to sell, criminalizes more conduct than falls within the federal definition of a controlled substance offense." Id. at 966. Then the court applied the modified categorical approach,

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Reasons (Cont.)

The district court rejected Madkin's argument. Applying the modified categoirical approach, the Court determined Madkins was charged with and convicted of possession with the intent to sell - not intent to merely offer. And because the court concluded the elements of Madkin's prior convictions for possession with the intent to sell aligned with the elements in USSG 4B1.2(b), the court applied the career-offender enhancement and sentenced Madkins accordingly. On appeal, Madkins argues the district court erred, because Kansas's broad definition of "sale" takes his offenses of conviction outside the purview of the guidelines definition of a controlled substance offense.

In determining whether a prior conviction qualifies as a predicate offense for a career-offender enhancment, we apply the categorical of modified categorical approach. 4 United States v. Madrid, 805 F.3d 1207 (10th Cir. 2015), abrogated in part by Beckles v. United States, 137 S. Ct. 886, 197 L.Ed. 2d 145 (2017). Under the categorical approach, we "line[] up" the elements of the prior conviction alongside the elements of the predicate offense and see if there is a match. Mathis, 136 S.Ct. at 2248. But if the prior-conviction statute is divisible - that is, "effectively creates several different crimes" - we use the modified categorical approach to identify the crime of conviction in the particular case. Madrid, 805 F.3d at 1207. We then compare that crime's elements to the elements of a generic predicate offense. Id.

Here, we apply the modified categorical approach, because Madkins's prior conviction statutes are divisible. Madkins sustained his prior cocaine and marijuana convictions under the Kansas Uniform Controlled Substances Act. The Act prohibited possession with intent to sell cocaine as follows:

> [I]t shall be unlawful for any person to sell, offer for sale or have in such person's possession with intent to sell, deliver, or distribute; prescribe; administer; deliver; distribute; dispense or compound any opiates, opium or narcotic drugs, or any stimulant. K.S.A. 65-4161(a)(2001 version). Likewise, the Act prohibited possession with intent to sell marijuana:
>
> [I]t shall be unlawful for any person to sell, offer for sale or have in such person's possession with intent to sell, deliver, or distribute; cultivate; prescribe; administer; deliver; distribute; dispense or compound...any hallucinogenic drug. K.S.A. 65-4163(a)(3) (2001 version). In 2001, Madkins pleaded guilty to possession with intent to sell marijuana, in violation of K.S.A. 65-4163(a)(3).

Up to this point, then, we are in agreement with the district court: Madkins was convicted of possession with intent to sell cocaine and marijuana. But unlike the district court, we conclude the elements of Madkins's prior offenses of conviction do not categorically match the elements in § 4B1.2(b), because Kansas law defines "sale" to include an "offer to sell." And since an offer to sell is broader than distribution as defined in the Guidelines, Madkins's prior offenses are not controlled substance offenses for purposes of the career-offender enhancement."

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Reasons (Cont.)

In its response to Hall's § 2241 petition, the Respondent's contention that the Washington State drug offense at issue (RCWA 69.50.401) does not encompass a mere offer is not supported by Ninth Circuit case law precedent as the Respondent suggests. In fact, the Respondent's reliance on United States v. Burgos-Ortega, 777 F.3d 1047, 1053 (9th Cir. 2015) was misplaced.

The Burgos-Ortega decision held that the "Administration" of a controlled substance (as opined to a mere offer), was a "categorical match" for the generic offense.

At least on District Court in the Ninth Circuit has, in fact, held that delivery includes a mere offer to sell, further finding that such offer is not a categorical match for the generic offense. See Sandoval v. Sessions III, 866 F.3d 986; 2017 U.S. App. LEXIS 14564.

In Sandoval, the Court, confronted with the identical question presented in the instant case and in dealing with a state statute worded identically to the Washington State statute at issue herein, stated as follows:

> "To determine whether a state criminal conviction is an aggravated felony, we must follow the "categorical approach." See Descamps v. United States, 133 S.Ct. 2276, 2281, 186 L.Ed. 2d 438 (2013). Under the categorical approach, we "compare the elements of the statute forming the basis of the [petitioner's] conviction with the elements of the 'generic' crime - i.e., the offense as commonly understood." Id. Only if the elements in the petitioner's statute of conviction "are the same as, or narrower than, those of the generic offense" is the petitioner's conviction a categorical match. Id.
>
> Under the categorical approach, we first determine the definition of the generic offense - here, an aggravated felony. This requires us to navigate a "maze of statutory cross-references." Carachuri-Rosendo v. Holder, 560 U.S. 563, 567, 130 S.Ct. 2577, 177 L.Ed. 2d 68 (2010). We start with the definition of "aggravated felony" as used in 8 U.S.C. § 1101(a)(43).
>
> The term "aggravated felony" includes any "drug trafficking crime." 8 U.S.C. § 1101(a)(43)(B). Only felonies qualify as "drug trafficking crime[s]." See Lopez v. Gonzalez, 549 U.S. 47, 55, 60, 127 S.Ct. 625, 166 L.Ed. 2d 462 (2006); see also Carachuri-Rosendo, 560 U.S. at 581-82. A "felony" means an offense punishable by more than one year under federal

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Reasons (Cont.)

law. See 18 U.S.C. § 3559(a)(5); see also Moncrieffe v. Holder, 569 U.S. 184, 133 S.Ct. 1678, 1683, 185 L.Ed. 2d 727 (2013); Lopez, 549 U.S. at 60 ("In sum, we hold that a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law.").

Drug trafficking crimes include felonies punishable under the Controlled Substances Act. See 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C § 924(c)(2). Because heroin is a federally controlled substance, see 8 U.S.C. § 1101(a)(43)(B); 21 U.S.C. §§ 802(6), 812(c)(sched. I)(b)(10), knowingly distributing or possessing with intent to distribute heroin violates the Controlled Substances Act, see 21 U.S.C. § 841(a)(1). Doing so is a felony, i.e., a crime punishable by more than one year of imprisonment under federal law. See 21 U S.C. § 841(b)(1)(C). Accordingly, because distributing heroin is a drug trafficking crime, we must consider the meaning of "distribute."

The term "distribute" means "deliver." See 21 U.S.C. § 802(11). And "deliver" means "the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship." Id. § 802(8). Accordingly, one may commit a drug trafficking crime by actually delivering, attempting to deliver or possessing with intent to deliver heroin.

Because Sandoval argues the Oregon statute under which he was convicted criminalizes solicitation, we must next determine whether the meaning of "attempt" under the Controlled Substances Act includes solicitation. The Controlled Substances Act does not define the term "attempt." See 21 U.S.C. §§ 802, 846. Nevertheless, mere solicitation of controlled substances does not include "attempted" delivery under the Controlled Substances Act. See United States v. Rivera-Sanchez, 247 F.3d 905, 908-09 (9th Cir. 2001)(en banc), superseded on other grounds as stated in Guerrero-Silva v. Holder, 599 F.3d 1090, 1902 (9th Cir. 2010); see also Leyva-Licea v. INS, 187 F.3d 1147, 1150 (9th Cir. 1999); Coronado-Durazo, 123 F.3d at 1325-26. The Controlled Substances Act "does not mention solicitation," unlike "attempt" and "conspiracy." Rivera-Sanchez, 247 F.3d at 909 (quoting Leyva-Licea, 187 F.3d at 1150); see also Coronado-Durazo, 123 F.3d at 1325; 21 U.S.C. § 846 (prescribing felony punishment for attempting or conspiring to deliver a controlled substance). Although strongly corroborative of intent to commit a crime, offering to deliver a controlled substance does not cross the line between preparation and attempt for the purposes of the Controlled Substances Act. See Rivera-Sanchez, 247 F.3d at 908-09; see also United States v. Yossunthorn, 167 F.3d 1267, 1272-73 (9th Cir. 1999)(ordering drugs from a known supplier was not an attempt when there was no agreement as to essential details regarding the transaction).

Therefore, to qualify as an agrravated felony, a drug trafficking crime for delivery of heroin must satisfy the following elements: (1) knowing or intentional (2) delivery, attempted delivery, conspiracy to deliver or possession with intent to deliver (3) heroin. This offense may not be accomplished by merely soliciting delivery - i.e., offering delivery - of

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Reasons (Cont.)

heroin. The next question is whether Sandoval's Oregon statute of conviction matches this federal definition.

Sandoval was convicted of delivering a controlled substance. His indictment identifies the controlled substance as heroin and cites Oregon Revised Statutes § 475.992. The only portion of that statute proscribing delivery of heroin states:

> [I]t is unlawful for any reason to manufacture or deliver a controlled substance. Any person who violates this subsection with respect to: (a) A controlled substance in Schedule I, is guilty of a...felony. Or. Rev. Stat. § 475.992(1)(a) (1998). The term "deliver" means "the actual, constructive or attempted transfer" of a controlled substance from one person to another. Id. § 475.005(8) (1998). "A person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime." Id. § 161.405(1) (1998).

Under Oregon law, solicitation - even without possession - is a "substantial step toward committing the crime of attempted delivery under ORS 475.992(1)." State v. Sargent, 110 Ore. App. 194, 822 P.2d 726, 728 (Or. Ct. App. 1991); see also State v. Lawrence, 231 Ore. App. 1, 217 P.3d 1084, 1086 (Or. Ct. App. 2009). And, taking a substantial step toward committing the crime of attempted delivery by solicitation "constitutes delivery" in Oregon. Sargent, 822 P.2d at 728.

Sargent relied on State v. Self, 75 Ore. App. 230, 706 P.2d 975 (Or. Ct. App. 1985), concluding that mere solicitation statute, Oregon Revised Statutes § 161.435. See 706 P.2d at 977 The court set out the specific facts:

> At the time of the commission of the instant offense, defendant was serving a sentence in the Lane County Jail. While at that facility, he telephoned one Webb, whose foster daughter he knew, in an attempt to obtain Webb's help in securing $2,000 for the release from jail of a third party, Brown. Defendant made about six phone calls, the first two to the foster daughter. During the fourth call, when asked by Webb about collateral, defendant for the time said that, after his release, Brown would go to two places in Eugene and get the money to repay Webb. Then, as a further reward, Webb and Brown would go to San Francisco, where Brown would obtain and give Webb five kilos of cocaine. Id. Self was convicted of "solicitation of attempted delivery of an illegal substance." Id. The appellate court affirmed. See id.

That the appellate court in Sargent said the facts of Self were "illustrative" is telling. See Sargent, 822 F.2d at 728. Self did not possess or even offer to deliver cocaine. See Self, 706 P.2d at 977. Instead, he tried to arrange the release of a third party, promising that same third party would obtain cocaine in exchange for assistance in the third party's release. See id. There was no agreement to accomplish

Reasons (Cont.)

this scheme. See id. Further, the court recited no facts indicating the third party's willingness to perform the promised criminal acts. See id. Nevertheless, the appellate court in Sargent pointed to Self as the "illustrative" case supporting its conclusion that "delivery" under § 475.992(1)(a) includes solicitation. Sargent, 822 P.2d at 728. This holding has not been disturbed by later Oregon case law.

For example, in State v. Pollock, 189 Ore. App. 38, 73 P.3d 297 (Or. Ct. App. 2003), aff'd on other grounds, 337 Ore. 618, 102 P.3d 684 (Or. 2004) the court reversed a pretrial order suppressing evidence against a defendant charged under § 475.992 for delivery of a controlled substance. In Pollock, an officer has been told by witnesses that the defendant had tried to sell them ecstasy, a controlled substance. See id. at 298. The trial court found that "an offer to sell a controlled substance is, standing alone, insufficient to establish probable cause to believe that an attempted transfer has occurred." Id. at 299. The appellate court reversed:

> We conclude that offering to see a controlled substance constitutes a substantial step toward a completed transfer of that substance. As the court explained in State v. Walters, 311 Or. 80, 85, 804 P.2d 1164, cert. den., 501 U.S. 1209, 111 S.Ct. 2807, 115 L.Ed. 2d 979 (1991), "'to be a substantial step the act must be "strongly corroborative of the actor's criminal purpose,"'...i.e., [the] defendant's conduct must (1) advance the criminal purpose charged and (2) provide some verification of the existence of that purpose." (Citations omitted). An offer to sell a controlled substance meets the two-part test the court identified in Walters. It "substantially advances" the goal of completing the transaction. See id. An offer to sell goes beyond mere preparation and shows a commitment to completing the transfer if the offer is accepted. Additionally, the offer "provide[s] some verification of the existence of [defendant's criminal] purpose." See id. Taking defendant at his word, he would have immediately transferred the ecstasy to Andersen and Carver if they had accepted his offer. At a minimum, the officer reasonably could conclude from defendant's offer to sell a controlled substance that it was more likely than not that he had intentionally taken a substantial step toward the completed transfer of that substance. Id. at 300 (alterations in original)(emphasis added). Thus, under Oregon law, the offer to deliver a controlled substance is enough to complete a substantial step toward an intended transfer, i.e., offering to deliver a controlled substance is an attempt under Oregon law. See id. But the mere offer to deliver a controlled substance - i.e., the act of soliticing delivery - is not a drug trafficking crime under the Controlled Substances Act. See Rivera-Sanchez, 247 F.3d at 908-09. Accordingly, a statute that punishes the mere offer to deliver a controlled substance is not an aggravated felony under the categorical approach. See id. at 909.

The government contends a conviction under § 475.992(1)(a) requires more than simply offering to deliver a controlled substance. It relies on State v. Johnson, 202 Or. App. 478, 123 P.2d 304 (Or. Ct. App. 2005). We

Reasons (Cont.)

are not persuaded.

In Johnson, the defendant was convicted of both attempted murder and solicitation to commit murder. See id. at 306. During phone conversations and in online chats, the defendant asked a friend to kill both his wife and daughter, suggesting methods for the murders and offering to make sure the friend would "never want for anything" if she did as asked. See id. Because the state had no evidence of a "concrete" plan outlined for the murder of his wife and child, the defendant argued the evidence was insufficient to support a solicitation or attempt conviction. See id. at 307-08. The appellate court disagreed and affirmed his conviction on appeal. See id. at 310. The government contends Johnson stands for the proposition that mere solicitation - simply offering to deliver a controlled substance - is not enough to convict under § 475.992(1(a). We do not read it that broadly.

First, Johnson did not involve a controlled substance offense under Oregon law. See id. at 305. Instead, it dealt with attempted murder and solicitation to commit murder. See id. at 306. Thus, it is not clear whether Johnson is applicable here.

Second, even if Johnson is applicable, the standard the court outlined match those in Sargent:

> In State v. Sargent..., we held that, "if a person solicits another to engage in conduct constituting an element of the crime of delivery, e.g., to provide to the person a controlled substance for the purpose of distribution to third parties, the person has attempted delivery..." We see no reason to depart from that reasoning here, and we decline to hold that solicitation of a knowing agent is categorically disqualified as a "substantial step" under ORS 161.405. Rather, as the statute plainly states, solicitation requires a "substantial step." Solicitation of a guilty person qualifies as a "substantial step" if, under the facts, the defendant's actions exceed mere preparation, advance the criminal purpose charged, and provide some verification of the existence of that purpose. Id. at 309-10 (footnotes omitted). The appellate court's reasoning in Johnson was that solicitation is both strong evidence of criminal purpose and a substantial step toward accomplishing that purpose under Sargent. See id. Nothing in Johnson requires a defendant to take some affirmative act to further the goal of the requested criminal behavior or specify how the crime would take place. See id. at 308 ("[The] details of how the crime is to be committed need to be specified.") Johnson does not limit Sargent in any way.

In sum, the government's argument fails to acknowledge Sargent's and Pollock's explicit statements that a conviction under § 475.992(1)(a) may be supported by merely offering to deliver controlled substances. See Sargent, 822 P.2d at 728. ("We conclude that, if a person solicits another to engage in conduct constituting an element of the crime of delivery..., the person has taken a substantial step toward committing the crime of attempted delivery...[and] [u]nder that statute, the conduct constitutes delivery."); Pollock, 73 P.3d at 300 ("We conclude that

Reasons (Cont.)

offering to sell a controlled substance constitutes a substantial step toward a completed transfer of hat substance."). As we have repeatedly held, solicitation of controlled substances is not an aggravated felony under the Controlled Substances Act. See, e.g., Rivera-Sanchez, 246 F.3d at 909.

Because Oregon's definition of "delivery" includes solicitation, § 475.992(1)(a) is not a categorical match to a "drug trafficking crime." Therefore, Sandoval's conviction for delivery of heroin does not qualify as an aggravated felony under the categorical approach.

Our inquiry does not end here, however. We must next address whether the modified categorical approach may be used to determine whether Sandoval's conviction qualifies as an aggravated felony.

Only divisible statutes are subject to the modified categorical approach. See Lopez-Valencia v. Lynch, 798 F.3d 863, 867-69 (9th Cir. 2015) (holding Descamps divisibility analysis is applicable in the immigration context). "[D]ivisibility hinges on whether the jury must unanimously agree on the fact critical to the federal statute." Id. at 868-69. Such critical facts are "elements," which are the "things the 'prosecution must prove to sustain a conviction.'" Mathis v. United States, 136 S.Ct. 2243, 2248, 195 L.Ed. 2d 604 (2016) (quoting Black's Law Dictionary 634 (10th Ed. 2014)).

To resolve the question of whether statutory alternatives are either elements or means, a court looks first to the statute itself and then to the case law interpreting it. See id. at 2256-57; see also Almanza-Arenas v. Lynch, 815 F.3d 469, 479-82 (9th Cir. 2016)(en banc). If state law fails to answer the question, a court may look to Shepard documents, which may be helpful in determining divisibility. See Mathis, 136 S.Ct. at 2256-57; see also Descamps, 133 S.Ct. at 2284 (citing Shepard v. United States, 544 U.S. 13, 25-26, 125 S.Ct. 1254, 161 L.Ed. 2d 205 (2005)). But if the statute, case and Shepard documents fails to speak plainly as to whether statutory alternatives are elements instead of means, the statute is indivisible and the modified categorical approach has no application. See Mathis, 136 S.Ct. at 2257; see also In re Chairez-Castrejon, 26 I. & N. Dec. 819, 819-20 (BIA 2016)(holding Descamps and Mathis divisibilty analysis "applies in immigration proceedings nationwide to the same extent that it applies in criminal sentencing proceedings").

The government does not argue § 475.992(1)(a) is divisible. Instead, it urges us to remand to the BIA to determine whether § 475.992 is divisible. When an agency does not reach an issue for which it is owed Chevron difference, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." INS v. Ventura, 537 U.S. 12, 123 S.Ct. 353, 183, 186, 126 S.Ct. 1613, 164 L.Ed. 2d 358 (2006). But interpreting criminal law is not a matter placed primarily in agency hands. See Hoang, 641 F.3d at 1161. We owe no deference to the decision of the BIA on this issue and there is no reason to remand for the BIA to decide the issue of divisibility in the

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Reasons (Cont.)

first instance. See Rivera v. Lynch, 816 F.3d 1064, 1078 n.13 (9th Cir. 2016)("The question of [a state criminal statute's] divisibility 'requires neither factual development nor agency expertise' and is properly analyzed by this court." (quoting Chavez-Solis v. Lynch, 803 F.3d 1004, 1012 n.6 (9th Cir. 2015))).

Section 475.992(1)(a) does not list "solicitation" as an alternative method of accomplishing delivery. Nor is solicitation included in the express statutory definition of "deliver." See id. § 475.005(8). The inclusion of solicitation as a means of accomplishing delivery is a judicial interpretation of the word "attempt." Therefore, this is a circumstance where the divisibility analysis is "straightforward" because § 475.992(1)(a) "sets out a single (or 'indivisible') set of elements to define a single crime." Mathis, 136 S.Ct. at 2248. Solicitation is not an enumerated statutory alternative to delivery or attempt but is, instead, included within the meaning of those listed alternatives. See Sargent, 822 P.2d at 728. The statute is therefore indivisible with respect to whether an "attempt" is accomplished by solicitation.

The government argues we have previously held § 475.992(1)(a) could qualify as an aggravated felony under the modified categorical approach, citing United States v. Chavaria-Angel, 323 F.3d 1172, 1177-78 (9thCir. 2003). In that case, we affirmed the district court's conclusion that the defendant's § 475.992 offense for delivery of a controlled substance was and aggravated felony based on a review of uncertified Oregon state records. See id. at 1174, 1177-78. However, the decision rested on the method rejected in Descamps, 133 S.Ct. at 2282-83, 2286-91, and applied the modified categorical approach without performing any divisibility analysis. See Chavaria-Angel, 323 F.3d at 1177-78. The analysis improperly focused on what the defendant actually did as opposed to the crime of which the defendant was convicted. Compare id. (focusing on the evidence supporting a finding the defendant sold controlled substances), with Descamps, 133 S.Ct. at 2287 (calling this method a "modified factual" approach, which turns an "elements-based inquiry into an evidence-based one"). The opinion did not consider whether a jury, when convicting a defendant of delivery of a controlled substance, must unanimously choose between alternative methods of delivery, including solicitation. See Chavaria-Angel, 323 F.3d at 1177-78. Descamps and Mathis require these inquiries. See Mathis, 136 S.Ct. at 2256-57; Descamps, 133 S.Ct. at 2286-91. Chavaria-Angel, therefore, is not controlling here.

To summarize, §475.992(1)(a) is overbroad in its definition of "delivery," and the modified categorical apporach may not be applied because § 475.992(1)(a) is indivisible with respect to whether an "attempt" is accomplished by solicitation. Therefore, we hold a conviction for delivering heroin under § 475.992(1)(a) is not an aggravated felony. Sandoval's petition is granted."

Based upon the foregoing, Hall submits that Certiorari review is warranted

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Reasons (Cont.)

where, as here, Hall has established that his Washington State drug offense was **not** a categorical match for the overall offense and, herein, not a proper predicate to qualify for career offender status.

2) The District and Circuit Courts erred in their determinations that Hall failed to show that his prior felony conviction no longer qualified as a predicate offense for purposes of the career offender enhancement and because his sentence would have been the same absent his career offender designation.

During Hall's sentencing in the instant case, the District Court did not find or sentence Hall as a career offender. The District Court reasoned that Hall's sentencing guideline range was identical to that which would apply were the court to sentence Hall as a career offender. In that Hall was **not** sentenced as a career offender, he was clearly eligible for a later sentence reduction in the aftermath of the enactment of U.S.S.G. Amendment 782. The District Court's denial of Hall's subsequently filed § 3582 (motion for sentence reduction) was in error as well. Certiorari review is now necessary to correct this error of constitutional magnitude.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Eric Hubel

Date: 9-13-18