

No. _____

In the Supreme Court of the United States

JUAN CARLOS CASTELLANOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

**PARRISH KRUIDENIER DUNN BOLES GRIBBLE
GENTRY BROWN & BERGMANN L.L.P.**

Benjamin D. Bergmann
Counsel of Record
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: bbergmann@parrishlaw.com

Alexander Smith
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: asmith@parrishlaw.com
ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

Is a statute that includes simulated controlled substances, imitation controlled substances, and counterfeit controlled substances categorically a controlled substance offense?

Is an imitation controlled substance a counterfeit controlled substance?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Statutory Provisions	1
Statement of the Case	8
Reasons Relied on for Allowance of the Writ.....	18
I. The Eighth Circuit has decided an important federal questions in a way0 that conflicts with the relevant decisions of the United States Supreme Court by finding that a state drug-trafficking statute that punishes simulated controlled substances is categorically a controlled substance offense for a career offender enhancement	10
Conclusion	20
Appendix	
<u>United States v. Castellanos</u> , No. 19-1219 (unpublished)	App. 1
Judgment in a Criminal Case	App. 7
Sentencing Transcript	App. 14

TABLE OF AUTHORITIES

Cases	Page
<u>Descamps v. United States</u> , 133 S. Ct. 2276 (2013)	13-14
<u>Gall v. United States</u> , 552 U.S. 38 (2007)	11
<u>James v. United States</u> , 550 U.S. 192 (2007)	12
<u>Johnson v. United States</u> , 559 U.S. 133, 137 (2010)	13
<u>Mahn v. AG of the United States</u> , 767 F.3d 170 (3d Cir. 2014)	13
<u>Mathis v. United States</u> , 136 S. Ct. 2243 (2016)	14-15, 16, 19
<u>Moncrieffe v. Holder</u> , 133 S. Ct. 1678 (2013)	13-14, 18
<u>Shepard v. United States</u> , 544 U. S. 13 (2005)	15
<u>State v. Bratthauer</u> , 354 N.W.2d 774 (Iowa 1984)	20
<u>State v. Leiss</u> , 788 N.W.2d 397 (Iowa Ct. App. 2010)	19
<u>State v. Meyer</u> , 705 N.W.2d 676 (Iowa Ct. App. 2005)	20
<u>United States v. Barrientos</u> , 670 F.3d 870 (8th Cir. 2012)	11
<u>United States v. Brown</u> , 598 F.3d 1013 (8th Cir. 2010)	17, 19
<u>United States v. Brown</u> , 638 F.3d 816 (8th Cir. 2011)	15-16
<u>United States v. Ford</u> , 888 F.3d 922 (8th Cir. 2018)	19
<u>United States v. Pirani</u> , 406 F.3d 543 (8th Cir. 2005)	11
 Statutes	
Page(s)	
18 U.S.C. § 3231.....	1

18 U.S.C. § 3742(a)	1
21 U.S.C. § 841(b)(1)(a)	2, 8, 17
21 U.S.C. § 846.....	5, 8
28 U.S.C. § 1254(1)	1, 5
28 U.S.C. § 1291.....	1, 5
United States Sentencing Guidelines § 4B1.1(a)	6, 11, 20
United States Sentencing Guidelines § 4B1.2(b)	<i>passim</i>
Iowa Code § 124.101(6)	6, 16
Iowa Code § 124.101(16)	7
Iowa Code § 124.101(29)	7, 16
Iowa Code § 124.401(1)(b)(7)	7, 9
Iowa Code § 124.401(1)(c)(6)	8-9

OPINIONS BELOW

On April 15, 2020, the Eighth Circuit Court of Appeals affirmed the judgment of the District Court for the Southern District of Iowa. App. 1.

JURISDICTION

On January 24, 2019, the “JUDGMENT IN A CRIMINAL CASE” was entered by the Honorable Judge James Gritzner, in the United States District Court for the Southern District of Iowa. App. 7. On April 15, 2020, the Eighth Circuit affirmed the judgment of the District Court for the Southern District of Iowa. App. 1. Jurisdiction for the Eighth Circuit was pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

Jurisdiction for the Supreme Court is pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

18 U.S.C. § 3742(a)

(a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

21 U.S.C. § 841(b)(1)(a)

In the case of a violation of subsection (a) of this section involving—

(i)

1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii)

5 kilograms or more of a mixture or substance containing a detectable amount of—

(I)

coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II)

cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III)

ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV)

any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii)

280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv)

100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v)

10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi)

400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4-piperidiny l] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidiny l] propanamide;

(vii)

1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii)

50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence

under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree...

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the

Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

United States Sentencing Guidelines § 4B1.1(a)

A defendant is a career offender if

- (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
- (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense and
- (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

United States Sentencing Guidelines § 4B1.2(b)

The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, an offense under federal or state law, punishable by imprisonment for 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.

Iowa Code § 124.101(6)

“Counterfeit substance” means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance.

Iowa Code § 124.101(16)

“Imitation controlled substance” means a substance which is not a controlled substance but which by color, shape, size, markings, and other aspects of dosage unit appearance, and packaging or other factors, appears to be or resembles a controlled substance. The board may designate a substance as an imitation controlled substance pursuant to the board’s rulemaking authority and in accordance with chapter 17A. “Imitation controlled substance” also means any substance determined to be an imitation controlled substance pursuant to section 124.101B.

Iowa Code § 124.101(29)

“Simulated controlled substance” means a substance which is not a controlled substance but which is expressly represented to be a controlled substance, or a substance which is not a controlled substance but which is impliedly represented to be a controlled substance and which because of its nature, packaging, or appearance would lead a reasonable person to believe it to be a controlled substance.

Iowa Code § 124.401(1)(b)(7)

124.401 Prohibited acts — manufacture, delivery, possession — counterfeit substances, simulated controlled substances, imitation controlled substances — penalties.

1. Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance.

b. Violation of this subsection with respect to the following controlled substances, counterfeit substances, simulated controlled substances, or imitation controlled substances is a class “B” felony, and in addition to the provisions of section 902.9, subsection 1, paragraph “b”, shall be punished by a fine of not less than five thousand dollars nor more than one hundred thousand dollars:

(7) More than five grams but not more than five kilograms of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine, or any compound, mixture, or preparation which contains any quantity or detectable amount of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine.

Iowa Code § 124.401(1)(c)(6)

124.401 Prohibited acts — manufacture, delivery, possession — counterfeit substances, simulated controlled substances, imitation controlled substances — penalties.

1. Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance.

c. Violation of this subsection with respect to the following controlled substances, counterfeit substances, simulated controlled substances, or imitation controlled substances is a class “C” felony, and in addition to the provisions of section 902.9, subsection 1, paragraph “d”, shall be punished by a fine of not less than one thousand dollars nor more than fifty thousand dollars:

(6) Five grams or less of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine, or any compound, mixture, or preparation which contains any quantity or detectable amount of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine.

STATEMENT OF THE CASE

Mr. Castellanos pleaded guilty to Conspiracy to Distribute 500 Grams or More of a Mixture and Substance Containing Methamphetamine and 50 Grams or More of Actual Methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846.

App. 2. The initial presentence investigation report (“PSIR”) prepared in this case indicated that Mr. Castellanos was subject to the career offender enhancement because he had two prior felony convictions for a controlled substance offense under Iowa Code § 124.401. App. 2. Mr. Castellanos was convicted of Delivery of Methamphetamine in violation of Iowa Code § 124.401(1)(b)(7), a Class B Felony in the Iowa District Court for Marshall County; Dkt. # FECR076792. That statute prohibits trafficking in controlled substances, counterfeit substances, simulated controlled substances, or imitation controlled substances if the controlled substance, counterfeit substances, simulated controlled substances, or imitation controlled substances is methamphetamine and sets penalties depending on the amount. Mr. Castellanos was also convicted of Possession of Methamphetamine with Intent to Deliver in violation of Iowa Code § 124.401(1)(c)(6), a Class C Felony in the Iowa District Court for Marshall County; Dkt. #FECR076793. That statute prohibits trafficking in controlled substances, counterfeit substances, simulated controlled substances, or imitation controlled substances if the controlled substance, counterfeit substances, simulated controlled substances, or imitation controlled substance is methamphetamine and sets a different penalty than the prior conviction due to the lower amount.

Over his objection, the district court found that these prior convictions qualified Mr. Castellanos as a career offender. App. 2. Without the enhancement, Mr. Castellanos’s offense level would be 27 and his criminal history level would be VI, but with the career offender enhancement, his offense level is 34. App. 2. Applying the

career offender enhancement increased his recommended prison sentence from 130–162 months to 262–327 months. App. 2. Ultimately, the court district court sentenced Mr. Castellanos to 200 months’ imprisonment. App. 8.

Following oral argument, the Eighth Circuit Court of Appeals concluded that the offenses were controlled substances offenses under 8th Circuit precedent, as another panel of the Eighth Circuit previously held that the term “counterfeit” the purposes of § 4B1.2 included the Iowa definition of a “simulated controlled substance” because those substances are still required to be made “in imitation” or “with an intent to deceive.” App. 2.

This petition follows.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

- I. The Eighth Circuit has decided an important federal questions in a way that conflicts with the relevant decisions of the United States Supreme Court by finding that a state drug-trafficking statute that punishes simulated controlled substances is categorically a controlled substance offense for a career offender enhancement**

Under Rule of the Supreme Court of the United States 10(c), the Eighth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this court in finding that Mr. Castellanos qualifies as a career offender and is subject to the career offender enhancement under the sentencing guidelines. Mr. Castellanos does not qualify as a career offender because he does not have prior controlled substance convictions under the categorical approach. Rather, under the

categorical approach, the Iowa statute is broader and deals with both “simulated” controlled substances as well as controlled substances under the Controlled Substances Act. In addition, the Iowa statute is not divisible and enumerates various factual means of committing the offense, rather than listing multiple elements disjunctively.

The issue of whether Mr. Castellanos was subject to the career offender enhancement under U.S.S.G. § 4B1.1(a) is preserved for appeal. “To preserve an error for appellate review, an objection must be timely and must ‘clearly stat[e] the grounds for the objection.’” United States v. Pirani, 406 F.3d 543, 549 (8th Cir. 2005) (alteration in original). Mr. Castellanos lodged a written objection to the career offender enhancement in the initial PSIR, and continued that objection in his written sentencing memo and at the sentencing hearing until it was overruled by the district court. App. 25. The district court’s error is therefore preserved. See id.

“When reviewing the district court’s imposition of a sentence, we review ‘de novo the district court’s interpretation and application of the sentencing guidelines and statutes, and its fact-findings for clear error.’” United States v. Barrientos, 670 F.3d 870, 873 (8th Cir. 2012). This Court has recognized that improperly calculating the Guidelines range at sentencing constitutes significant procedural error. Id. (citing Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586, 597 (2007)).

A. Career Offender Enhancement

U.S.S.G. § 4B1.1(a) provides that a defendant is a career offender if the instant offense of conviction is a felony that is a controlled substance offense and the defendant

has at least two prior felony convictions of a controlled substance offense. U.S.S.G. § 4B1.2(b) defines a “controlled substance offense” as a state law offense 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.

B. The Categorical Approach

Neither of Mr. Castellanos’s convictions in FECR076792 and FECR076793 are controlled substance offenses. Under the required categorical approach, these convictions do not count as controlled substance convictions because they included “simulated” controlled substances in addition to counterfeit substances.

The Supreme Court uses the categorical approach to decide whether a crime fits the definition given of a “controlled substance offense.” In James v. United States, 550 U.S. 192, 202 (2007), a case dealing with the closely analogous Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), the Court explained what it meant by a "categorical approach":

Under this approach, we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction. That is, we consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender.

(cleaned up).

To determine if a crime is a controlled substance offense using the categorical approach, the court must examine the statute to determine if it defines a crime in

which a controlled substance offense necessarily inheres. Descamps v. United States, 133 S. Ct. 2276, 2281-82 (2013). The court asks “what offense the [defendant] was ‘convicted’ of, not what acts he committed.” Moncrieffe v. Holder, 133 S. Ct. 1678, 1685 (2013) (citation omitted).

The Court of Appeals for the Third Circuit described the steps of the categorical analysis:

Under the categorical approach, we compare the elements of the statute forming the basis of the defendant's conviction with the elements of the generic crime—i.e., the offense as commonly understood. In particular, we look to the elements of the statutory offense to ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the statute.

Mahn v. AG of the United States, 767 F.3d 170, 174 (3d Cir. 2014) (cleaned up). Moncrieffe explained that, “[b]ecause we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction ‘rested upon [nothing] more than the least of th[e] acts’ criminalized, and then determine whether even those acts are encompassed by the generic federal offense.” 133 S.Ct. at 1684 (quoting Johnson v. United States, 559 U.S. 133, 137 (2010)).

Under the categorical approach, if the statute defines a crime in which the conviction at issue necessarily inheres, the analysis ends. See Descamps, 133 S. Ct. at 2283 (discussing this analysis as it applies to the Armed Career Criminal Act). If the statute sweeps more broadly and encompasses both crimes that are a controlled substance offense and crimes that are not a controlled substance offense, the conviction cannot count as the underlying offense, even if the defendant actually committed a

controlled substance offense. Id. This is because the court is precluded from looking beyond the statute of conviction and must presume that the defendant committed “the least of the acts criminalized.” Moncrieffe, 133 S.Ct. at 1684.

The crime only counts if its elements are the same as, or narrower than, those of the generic offense. But if the crime of conviction covers more conduct than the generic offense, even if the defendant's actual conduct (i.e., the facts of the crime) fits within the generic offense's boundaries. Mathis v. United States, 136 S. Ct. 2243, 2248 (2016).

C. The Modified Categorical Approach

The modified categorical approach only applies when determining “which element[s] played a part” in the underlying conviction. Mathis v. United States, 136 S. Ct. 2243, 2253 (2016) (quoting Descamps, 133 S. Ct. at 2283-85). Furthermore, a divisible statute is one “that lists multiple elements disjunctively,” not a statute that “enumerates various factual means of committing a single element.” Id. at 2249. “Elements are the constituent parts of a crime’s legal definition – the things the prosecution must prove to sustain a conviction ... what the jury must find beyond a reasonable doubt to convict the defendant, ... and at a plea hearing, ... what the defendant necessarily admits when he pleads guilty.” Id. at 2248 (internal quotations omitted). Therefore, the Supreme Court concluded that “the modified approach serves – and serves solely – as a tool to identify the elements of the crime of conviction when a statute’s disjunctive phrasing renders one (or more) of them opaque.” Id. at 2253.

Under the modified categorical approach, when a statute is divisible, the court is

permitted to “look at a limited class of documents from the record of a prior conviction to determine what crime, with what elements, a defendant was convicted of before comparing that crime's elements to those of the generic offense.” Mathis v. United States, 136 S. Ct. 2243, 2245–46 (2016). These documents include the terms of the charging document, the terms of a plea agreement, or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or some comparable judicial record of the information. See, e.g., Shepard v. United States, 544 U. S. 13, 26 (2005).

D. The Eighth Circuit Opinion

The Eighth Circuit mostly got these issues right, but the panel was constrained by another panel opinion in United States v. Brown, 638 F.3d 816, 818-19 (8th Cir. 2011). That panel found that counterfeit substances under the Guidelines include the simulated controlled substances mentioned in section 124.401. By looking at the plain meaning of the word “counterfeit,” the court ruled that “if a substance is ‘made in imitation’ and ‘with an intent to deceive,’ the substance ‘is “counterfeit” for the purposes of § 4B1.2 and qualifies as a controlled substance offense under the career offender provision.”

Brown was decided before Mathis v. United States, 136 S. Ct. 2243 (2016). The Mathis decision changed the analysis sufficiently that a “simulated controlled substance” cannot meet the definition of a “counterfeit substance.” A “simulated controlled substance” does not need to be expressly represented to be a controlled or

counterfeit substance, but may be only impliedly represented to be a controlled substance. Iowa Code § 124.101(29). That is not a categorical match for a “counterfeit” substance, which requires “made-in-imitation and intent-to-deceive elements of ‘counterfeit’ for the purposes of § 4B1.2.” Brown, 638 F.3d at 819. A “simulated controlled substance” can either be expressly represented or impliedly represented to be a controlled substance, and therefore, constitute alternate indivisible means under Mathis v. United States, 136 S. Ct. 2243 (2016). An implied representation would not meet the intent to deceive element of “counterfeit” under § 4B1.2.

E. Analysis of the Convictions through the Categorical Approach

Relevant to both convictions are the various terms in the Iowa statutes that criminalize possession of other types of controlled substances. that Iowa Code § 124.101(29) defines a “simulated controlled substance” as a substance which is not a controlled substance but which is expressly represented to be a controlled substance, or is impliedly represented to be a controlled substance. Iowa Code § 124.101(6) defines a “counterfeit substance” as a controlled substance which bears the mark of a manufacturer or distributor other than the person who in fact manufactured or distributed the substance.

When comparing the two convictions to the U.S.S.G. § 4B1.2(b) definition of a “controlled substance offense”, (which includes both controlled substances and counterfeit substance) the issue becomes readily apparent: the Iowa statutes criminalize the delivery of not just controlled substances and counterfeit substances,

but also simulated controlled substances and imitation controlled substances.

The Eighth Circuit has previously ruled that Iowa's simulated controlled substance offense does not violate the federal Controlled Substances Act in other contexts. For the purpose of a federal sentencing enhancement, the Eighth Circuit found that prior convictions for delivery of a simulated controlled substance under Iowa law were not convictions for a "felony drug offense" under 21 U.S.C. §§ 841(b)(1)(A) and § 802(44). United States v. Brown, 598 F.3d 1013, 1015 (8th Cir. 2010). 21 U.S.C. § 802(44) is substantially similar to 18 U.S.C. § 924(c)(2) for this context. 21 U.S.C. § 802(44) defines a felony drug offense as an "offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 18 U.S.C. § 924(c)(2) defines a "drug trafficking crime" as any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46."

It is impossible to say that imitation controlled substances and simulated controlled substances are included in the U.S.S.G. definition of controlled substance. Even a broad phrase like "relating to" has limits. United States v. Brown, 598 F.3d 1013, 1016 (8th Cir. 2010). The 8th Circuit has found that there were several considerations that led them to conclude that an offense involving only simulated controlled substances was "not an offense that prohibits or restricts conduct relating to

narcotic drugs within the meaning of § 802(44).” Id. While there was categorical overlap in purpose between the Iowa statute and the federal Controlled Substances Act, “a person may violate the Iowa statute without ever possessing, distributing, or using a controlled substance and without having any involvement whatsoever with an actual narcotic drug.” Id. at 1017-18. The court therefore concluded that the convictions for delivering simulated controlled substances did not qualify as “felony drug offenses” within the meaning of 21 U.S.C. § 802(44). Id. at 1018. The statutory language is concerned with the regulation of actual controlled substances. Id. at 1016. Congress has never “regulated simulated or look-alike controlled substances.” Id.

It is impossible, categorically, to state that the statutes require conviction for just controlled substances or counterfeit substances. Rather, they allow conviction for a “controlled substance”, “counterfeit” controlled substance, but also “a simulated controlled substance, or an imitation controlled substance.”

The statute thus sweeps broadly and encompasses both crimes that are a controlled substance offense and crimes that are not controlled substance offenses, so the conviction does not count as a controlled substance offense categorically. The court is precluded from looking beyond the statute of conviction and must presume that the defendant committed “the least of the acts criminalized.” Moncrieffe, 133 S.Ct. at 1684.

There is also a realistic probability and not just a theoretical possibility that Iowa would apply its statute to conduct that falls outside the generic definition of a crime.” See Moncrieffe, 133 S.Ct. at 1684-85 (internal quotation marks omitted). The

convictions discussed in the 8th Circuit case prove that Iowa prosecutes and convicts persons for trafficking in simulated controlled substances and not just controlled substances under the federal Controlled Substances Act. See United States v. Brown, 598 F.3d 1013, 1014 (8th Cir. 2010). In addition, in State v. Leiss, 788 N.W.2d 397 (Table) (Iowa Ct. App. 2010) the defendant was convicted of violating the statute for possessing a simulated controlled substance (in a slightly different, later version of the statute).

F. Analysis of the Convictions through the Modified Categorical Approach

The court should not even proceed to a modified categorical approach. The statute is not divisible because it does not “list[] multiple elements disjunctively.” Mathis v. United States, 136 S. Ct. 2243, 2249 (2016). Rather, the statute “enumerates various factual means of committing a single element.” Id. For the requisite “substance” under the statute, the substance can be methamphetamine, or it can be counterfeit methamphetamine, but it could also be simulated or imitation methamphetamine. Iowa Code § 124.401(1)(c)(2)(b). The court’s analysis should end at the categorical approach.

In United States v. Ford, 888 F.3d 922 (8th Cir. 2018) the 8th Circuit got it partially incorrect. In that case, the court ruled that the statute was divisible because “different drug types and quantities carry different punishments.” United States v. Ford, 888 F.3d 922, 930 (8th Cir. 2018). However, the *particular substance* under the Iowa Controlled substance act is *not* an element of the offense. The statute is

violated “regardless of whether the substance possessed, delivered, or manufactured is a controlled substance, a counterfeit substance, or a simulated controlled substance.” State v. Meyer, 705 N.W.2d 676, 678 (Iowa Ct. App. 2005). Furthermore, Iowa law has never required unanimous verdicts on every single theory or means of committing the offense; they only require the jury to agree that they have found alternative ways to commit the crime that are consistent with and not repugnant to each other. State v. Bratthauer, 354 N.W.2d 774, 776 (Iowa 1984). If 6 jurors found that Mr. Castellanos was trafficking in an actual controlled substance, and 6 jurors found that Mr. Castellanos was trafficking in a simulated controlled substance, it would be immaterial. The jury could find him guilty even if they disagreed over the different manner in which he was guilty.

Therefore, the enhancement under U.S.S.G. § 4B1.1 did not apply in this case. The correct guideline calculation was a total offense level of 27 and a criminal history category VI, with a suggested guideline range in this case of 130 to 162 months.


CONCLUSION

Juan Carlos Castellanos respectfully requests that the Supreme Court grant his petition for a writ of certiorari for all the reasons stated herein.

**PARRISH KRUIDENIER DUNN BOLES GRIBBLE
GENTRY BROWN & BERGMANN L.L.P.**

BY: _____

Benjamin D. Bergmann
Counsel of Record
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: bbergmann@parrishlaw.com

BY: _____

Alexander Smith
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: asmith@parrishlaw.com
ATTORNEYS FOR PETITIONER