No. _____

In the Supreme Court of the United States

Devon Jordan-McFeely

Petitioner,

v.

United States of America,

Respondent.

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

Petition for a Writ of Certiorari

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Question Presented For Review

When a state statute is ambiguous as to its divisibility at the time of the defendant's state conviction, may a federal court certify the divisibility inquiry to state court and rely on the newly created judicial interpretation of state law to enhance a defendant's federal sentence?

Related Proceedings

1. *United States of America v. Devon Jordan-McFeely*, 3:16-cr-00011-HDM-VPC-1 (D. Nev. Oct. 21, 2016);

2. *United States of America v. Devon Jordan-McFeely*, 16-10456, 859 F. App'x 823 (9th Cir. July 6, 2021), *pet. for reh'g denied* (Aug. 18, 2021).

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Petition for Certiorari

Petitioner Devon Jordan-McFeely respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Orders Below

The Ninth Circuit Court of Appeals denied sentencing relief in an unpublished decision, *United States v. Jordan-McFeely*, 859 F. App'x 823 (9th Cir. 2021). *See* Pet. App. 1a-2a. Therein, the Ninth Circuit relied on the Nevada Supreme Court's recent response to certified questions posed by a different Ninth Circuit panel to deny Jordan-McFeely relief on his federal sentencing divisibility claim despite the Nevada statute's indisputable overbreadth and ambiguousness at the time of Jordan-McFeely's state conviction and federal sentencing. The Ninth Circuit's summary order declining panel rehearing and en banc review is unpublished. *See* Pet. App. 3a.

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order denying Jordan-McFeely's timely request for panel rehearing and en banc review on August 18, 2021. Pet. App. 3a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254. This petition is timely per Supreme Court Rule 13.3 because the petition is filed within 90 days of the lower court's order denying discretionary review.

Relevant Statutory and Sentencing Guideline Provisions

1. Nev. Rev. Stat. § 453.337 (1997) provides:

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

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

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

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

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

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

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

2. U.S.S.G. § 2K2.1 (2015) provides:

§2K2.1. <u>Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition</u>

(a) Base Offense Level (Apply the Greatest):

(1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20**, if —

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);

(6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18

U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(7) **12**, except as provided below; or

(8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1).

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

	Number of Firearms	Increase in Level
(A)	3-7	add **2**
(B)	8-24	add **4**
(C)	25-99	add **6**
(D)	100-199	add **8**
(E)	200 or more	add **10**.

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.

(3) If the offense involved—

(A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or

(B) a destructive device other than a destructive device referred to in subdivision (A), increase by **2** levels.

(4) If any firearm (A) was stolen, increase by **2** levels; or (B) had an altered or obliterated serial number, increase by **4** levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.

(5) If the defendant engaged in the trafficking of firearms, increase by **4** levels.

(6) If the defendant—

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

3. U.S.S.G. § 4B1.2 (2015) provides:

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

(b) The term "controlled substance offense" means 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.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Introduction

Since its inception, the federal categorical approach has required courts to engage a "backward-looking" analysis to determine the elements of prior convictions to assess the version of state law defendants were "actually convicted of violating." *McNeill v. United States,* 563 U.S. 816, 819-23 (2011) (citing *Taylor v. United States*, 495 U.S. 575, 602 (1990)). The Ninth Circuit, however, has shown a pattern of ignoring this most fundamental tenet, separating itself from Congress's goal to promote sentencing uniformity, this Court's long-standing precedent, and precedent from its sister circuits recognizing and upholding this necessary sentencing resolve.

The Ninth Circuit first separated from itself from precedential principles promoting sentencing uniformity by expanding the categorical approach's divisibility analysis in *United States v. Figueroa-Beltran*, 892 F.3d 997 (9th Cir. 2018) (*Figueroa-Beltran I*), *pet. for cert denied*, 139 S. Ct. 1445 (2019), *certified question answered*, *Figueroa-Beltran v. United States,* 467 P.3d 615 (Nev. 2020). *Figueroa-Beltran I* followed a long series of cases culminating in *Mathis v. United States* in which this Court concisely reiterated the proper divisibility analysis courts must undertake to ascertain whether it could "definitively answer" whether an overbroad, alternatively worded state statute is divisible. *Mathis v. United States*, 136 S. Ct. 2243, 2256-57 (2016) (setting out three-part inquiry); *Descamps v. United States*, 570 U.S. 254, 261 (2013) (limiting courts' analysis to statute, not actual underlying conduct); *Moncrieffe v. Holder*, 569 U.S. 184, 185 (2013) (citing *Johnson*

v. United States, 559 U.S. 133, 137 (2010)) (requiring courts to presume the conviction rested on the least criminalized conduct).

Mathis did not announce a new rule; it merely reiterated the divisibility inquiry. This inquiry has never involved stopping the federal proceedings to certify the inquiry to state courts. Rather, when courts cannot definitively answer the divisibility question through the provided process, that "ends the analysis" with the conclusion that defendant was not convicted of a generic federal offense. *Mathis*, 136 S. Ct. at 2255-57.

Yet, in *Figueroa-Beltran I*, the Ninth Circuit court halted the appellate proceedings to certify divisibility questions concerning an indisputably overbroad and ambiguous Nevada statute to the Nevada Supreme Court to resolve, Nevada Revised Statute § 453.337. 892 F.3d at 1002-04 (finding § 453.337 ambiguous); *Figueroa-Beltran*, 467 P.3d at 621-24. The Ninth Circuit deferred Jordan-McFeely's case for submission after his oral argument for 3½ years during that lengthy process. App. Dkt. 45.

In response, the Nevada Supreme Court agreed Nev. Rev. Stat. § 453.337's text was indeed ambiguous as to its elements, and neither Nevada's caselaw nor its legislative history resolved that ambiguity. *Figueroa-Beltran*, 467 P.3d at 621-24. A majority of the court was left to craft a new judicial interpretation of Nev. Rev. Stat. § 453.337 to address the statutory ambiguity. *Id.* It did so by analyzing Nevada's "unit of prosecution" for other drug statutes, Nevada's penalty structure, other recent Nevada state court decisions for non-drug-related crimes, and

California law. *Id.* Through its broad analysis, the Nevada Supreme Court responded to the certified questions by providing a new interpretation of state law and holding the identity of the drug in § 453.337 prosecutions is an element of the offense the State must prove beyond a reasonable doubt rather than a means. *Id.* 467 P.3d at 621-25.[1]

The Ninth Circuit next separated itself from precedential principles promoting sentencing uniformity by ignoring the "backward-looking" tenet integral to the categorical approach upon receipt of the Nevada Supreme Court's response. In *United States v. Figueroa-Beltran* 995 F.3d 724, 732-34 (9th Cir. 2021) (*Figueroa-Beltran II*), *pet. for reh'g denied*. The Ninth Circuit applied the Nevada Supreme Court's newly-created judicial interpretation of § 453.337—formed only after Figueroa-Beltran's long-final conviction—to enhance his federal sentence.

The Ninth Circuit continued its break from precedent in this case. It summarily applied and relied on the *Figueroa-Beltran* series to hold Jordan-McFeely's long-final Nevada conviction under Nev. Rev. Stat. § 453.337 sufficed to predicate a controlled substance offense enhancement under the federal Sentencing Guidelines as well. Pet. App. 2a. Doing so, the Ninth Circuit diverged from the time-honored precedent promoting sentencing uniformity by failing to review

[1] The dissent concluded otherwise, finding "the plain language of" § 453.337 reveals "the controlled substance's identity is not an element. There is no reference to, or identification of, a particular substance in this language. The identity of the specific type of substance is merely a means of satisfying the 'any controlled substance classified in schedule I or II' element." *Figueroa-Beltran*, 467 P.3d at 625 (Stiglich, J., dissenting, joined by Pickering, C.J.).

Jordan-McFeely's prior state conviction through the "backward-looking" lens and focus on only the law as it existed at the time of his state law conviction.

The Ninth Circuit also violated important policy considerations. First, as this Court recognized in *McNeill*, it would be improper to grant the States the power to eliminate a prior state conviction that otherwise might have served as a predicate for federal recidivist sentencing purposes by simply making "changes in state law" that post-date a defendant's state law conviction. 563 U.S. at 823. Doing so would permit the States to essentially rewrite a defendant's actual criminal history and any attendant culpability or dangerousness implications that federal recidivist sentences were intended to address. *Id.* Thus, barring exceptions such as exonerations that do not apply here,[2] caging the categorical approach to the law in effect at the time of a defendant's conviction prevents the States from changing the course of history by amending or reinterpreting a statute of conviction to alter federal sentencing purposes.

Second, and as this Court also recognized in *McNeill*, confining the categorical analysis to the version of law in effect at the time of a defendant's state conviction leads to consistent, predictable results. 563 U.S. at 823. In this way, state law effectually freezes—neither narrowing nor expanding—after a defendant's conviction. So frozen, future changes to the statutory language or judicial

[2] For example, "Congress has expressly directed that a prior violent felony conviction remains a 'conviction' unless it has been 'expunged, or set aside or [the] person has been pardoned or has had civil rights restored.'" *McNeill*, 563 U.S. at 823 (quoting 18 U.S.C. § 921(a)(20)).

interpretations of that language do not change the nature or the scope of the defendant's conviction. This, in turn, protects due process concerns by ensuring a state's amendments to, or new judicial interpretations of, state statutes do not impermissibly alter the scope of a defendant's original conviction under those statutes. *See* U.S. Const. amend. XIV. Post-conviction variability in state law altered by subsequent amendments or judicial interpretations, on the other hand, risks: (1) stripping defendants of knowing whether a particular federal enhancement would apply in the first instance; and (2) imposing "dramatically different federal sentences" on defendants with identical federal convictions who have identical prior state convictions simply because they are federally sentenced on different days. *McNeill*, 563 U.S. at 823.

The categorical analysis's backward-looking approach provides uniformity for both courts and defendants—the very constancy the categorical approach intended to achieve. *See Taylor v. United States*, 495 U.S. 575, 599-602 (1990) (explaining the Armed Career Criminal Act's (ACCA) legislative history demonstrated Congress intended courts to adopt a categorical approach in reviewing predicate offenses, not "engage in an elaborate factfinding process"). Indeed, this Court concluded Congress intended to apply a uniform categorical approach—relying on the state law as it existed at the time of the state law conviction despite its "use of present tense" definitions in recidivist statutes—"to refer to past convictions." *McNeill*, 563 U.S. at 821-22. Congress has not indicated otherwise in the more than thirty years since this Court undertook the categorical analysis by applying the state law in

effect at the time of the defendant's convictions. *Id.* at 821 (referencing *Taylor*, 495 U.S. at 578, n.1, and application of the categorical approach to burglary convictions in 1963 and 1971 under prior versions of Missouri's statutes.).

The Ninth Circuit's decision to certify divisibility questions concerning the overbroad and ambiguous text of Nev. Rev. Stat. § 453.337 to the Nevada Supreme Court falls outside the established framework for assessing divisibility. The result led it to rely on the Nevada Supreme Court's newly created judicial interpretation of Nev. Rev. Stat. § 453.337 that did not reflect the Nevada law at the time of Jordan-McFeely's conviction to affirm the federal sentencing enhancement. Given the Ninth Circuit's infringement on the very precepts of the categorical approach and its processes, and its apparent commitment to repeatedly to so, the question presented poses an imperative issue in federal criminal sentencing and warrants careful review by this Court. *See* Sup. Ct. R. 10(c).

Statement of the Case

I. The district court enhanced Jordan-McFeely's federal sentence based on his 2014 prior conviction under Nev. Rev. Stat. § 453.337 even though that statute did not define a generic federal offense at the time of his conviction.

At sentencing in federal district court, Jordan-McFeely argued Nev. Rev. Stat. § 453.337 could not be used as a predicate "controlled substance offense" to enhance his sentence under U.S.S.G. §§ 2K2.1(a)(2) and 4B1.2(b) because it is overbroad for criminalizing the possession of substances not prohibited by the federal Controlled Substances Act (CSA). 2-ER-ER-66–72. This overbreadth, he argued, meant the Nevada law was not a categorical match to the CSA, and a defendant prosecuted for distributing the substances listed in § 453.337 would not

be subject to federal prosecution. 2-ER-70. He also argued § 453.337 was indivisible, as the substances it covered constituted different factual *means* of committing a single offense, not different elements of separate crimes. 2-ER-70–72. Thus, resort to the modified categorical approach was impermissible, and the court's inquiry must end with the conclusion that § 453.337 is not a categorical match to the federal controlled substance offense. 2-ER-67–72.

Although Nev. Rev. Stat. § 453.337's list of "illicit substances" contains several "that are not included in the equivalent federal crime," the district court concluded the Nevada statute was divisible. ER 23. The court thus turned to the modified categorical approach and, after looking at the information and guilty plea in Jordan-McFeely's Nevada state case, found he pleaded guilty to possessing for purposes of sale MDMA, a substance listed in the CSA in 2014. ER 24. Based on this finding, the court applied a two-level enhancement under U.S.S.G. § 2K2.1, concluding the "controlled substance offense" definition in § 4B1.2 and the CSA matched Nev. Rev. Stat. § 453.337. 1-ER-43–45. This increased Jordan-McFeely's offense level from 21 to 25 and his imprisonment range from 51 to 71 months up to 84 to 105 months. 1-ER-43–45; U.S.S.G. § 2K2.1; Presentence Investigation Report (PSR), pp. 6-7; U.S.S.G. Ch. 5, pt. A, Sentencing Table.[3]

[3] It appears Jordan-McFeely's base offense level should have been no higher than 22 due to the existence of a prior crime of violence offense he was unsuccessful in challenging on appeal but does not challenge in this petition. *See* U.S.S.G. § 2K2.1(a)(3). After properly applying a two-level enhancement for possession of three firearms and a three-level reduction for acceptance of responsibility, his total offense level should have been 21. Within criminal history category IV, the corresponding sentencing range is 51 to 71 months' imprisonment. PSR, pp. 6-7.

In 2016, the court sentenced him to serve 96 months in prison, followed by three years of supervised release. 1-ER-45–49. Jordan-McFeely is still serving the imprisonment portion of his term and is not scheduled for release from the Bureau of Prisons until mid-2024.

II. The Ninth Circuit affirmed the federal sentencing enhancement reached after delegating its divisibility to the Nevada Supreme Court and applying its newly crafted judicial interpretation of Nev. Rev. Stat. § 453.337 to Jordan-McFeely's 2014 Nevada conviction.

A. The Ninth Circuit deferred Jordan-McFeely's case pending its resolution of *Figueroa-Beltran* when it could not discern Nev. Rev. Stat. § 453.337's divisibility.

Jordan-McFeely timely appealed to the Ninth Circuit challenging the propriety of the guideline enhancement based on Nev. Rev. Stat. § 453.337 serving as a predicate controlled substance offense. 1-ER-1–10; App. Dkt. 8, Opening Br., pp., 11-39; App. Dkt. 21, Reply Br., pp. 1-1. The day oral argument in Jordan-McFeely's case in December 2017, the Ninth Circuit deferred his appeal pending final resolution of the Ninth Circuit's decision in *Figueroa-Beltran* as the two cases were similar. App. Dkt. 45. Like Jordan-McFeely's. Like Jordan-McFeely, Figueroa-Beltran had a long-final, 2012 prior drug conviction under Nev. Rev. Stat. § 453.337 at the time of his federal sentence. *Figueroa-Beltran I*, 892 F.3d at 1001.[4]

[4] Thus, though the ultimate issue before *Figueroa-Beltran I and II* was whether Nev. Rev. Stat. § 453.337 qualified as a predicate "drug trafficking offense" under U.S.S.G. § 2L1.2 (2015), rather than whether it qualified as a "controlled substance offense" under U.S.S.G. §§ 2K2.1, 4B1.2 (2015), this is a distinction is irrelevant here. The Ninth Circuit relied on the Nevada Supreme Court's new judicial interpretation of Nev. Rev. Stat. § 453.337 to resolve the statute's elemental divisibility in both *Figueroa-Beltran II* and *Jordan-McFeely*. *See* Pet. App. 2a.

B. Though finding Nev. Rev. Stat. § 453.337 overbroad and concluding it could not definitively resolve its divisibility, the Ninth Circuit's certified its divisibility inquiry to the Nevada Supreme Court.

The *Figueroa-Beltran I* court determined Nev. Rev. Stat. § 453.337 was ambiguous because it was (1) overbroad for prohibiting possession of more controlled substances than those listed in the federal schedules, and (2) not clearly divisible as to the identity of the controlled substance. 892 F.3d at 1002-04. But *Figueroa-Beltran I* did not honor this Court's precedential processes for meeting "'*Taylor*'s demand for certainty" to assess Nev. Rev. Stat. § 453.337's divisibility as to its elements and means. *Mathis*, 136 S. Ct. 2256, 2256-57 (2016) (quoting *Shepard v. United States*, 544 U.S. 13, 21 (2005)). *Figueroa-Beltran I* instead sua sponte halted the appellate proceedings and delegated the divisibility inquiry to the Nevada Supreme Court through certified questions. 892 F.3d at 1004.

Figueroa-Beltran I did recite this Court's three-step process for assessing divisibility recently reiterated in *Mathis*. 892 F.3d at 1001-04. The court noted the first step required it to discern whether Nevada law was a categorical match to the corresponding generic federal drug offense by looking only to the statutory definitions. *Id.* at 1001-02 (cleaned up). At this step, it correctly recognized Nev. Rev. Stat. § 453.337 was not a categorical match because Nevada criminalized more drugs than the federal CSA. *Id.* at 1002-03.

As the second step, the court understood it was to discern if § 453.337 is indivisible or divisible. *Figueroa-Beltran I*, 892 F.3d at 1002. In making this

determination, the court recognized it could turn to the *Mathis*-identified "authoritative sources of state law," i.e., "state court decisions and the wording of the relevant state statute." *Id.* at 1004 (citing *Mathis*, 136 S. Ct. at 2256). The second step failed, however, to resolve the divisibility inquiry, leaving the court unable to "say with confidence that the Nevada precedent definitively answers the question whether § 453.337 is divisible as to the identity of a controlled substance." *Figueroa-Beltran I*, 892 F.3d at 1004.

But, contrary to this Court's directive in *Mathis*, the Ninth Circuit did not "end[] the analysis" with the conclusion that the defendant was not convicted of a generic federal offense. *Mathis*, 136 S. Ct. at 2255-57. It instead certified three questions concerning Nev. Rev. Stat. § 453.337's possible divisibility to the Nevada Supreme Court:

1. Is Nev. Rev. Stat. § 453.337 divisible as to the controlled substance requirement?

2. Does the decision in *Luqman* conclude that the existence of a controlled substance is a "fact" rather than an "element" of § 453.337, rendering the statute indivisible? If so, can this conclusion be reconciled with *Muller*?

3. Does the decision in *Muller* conclude that offenses under § 453.337 comprise "distinct offenses requiring separate and different proof," rendering the statute divisible as to the controlled substance requirement? If so, can this conclusion be reconciled with *Luqman*?

Figueroa-Beltran I, 892 F.3d at 1004.[5] After certifying those questions, the Ninth Circuit withdrew *Figueroa-Beltran* from submission pending the Nevada Supreme Court's response. *Id.*

C. The Nevada Supreme Court agreed Nevada law governing and interpreting Nev. Rev. Stat. § 453.337 at the time of Jordan-McFeely's state conviction was ambiguous.

The Nevada Supreme Court accepted the certified questions "[b]ecause the questions posed by the Ninth Circuit raise important questions of law *that are not currently answered by existing Nevada law*." *Figueroa-Beltran*, 467 P.3d at 619-20 (emphasis added). The Nevada Supreme Court thus had no choice but to craft a new interpretation of Nev. Rev Stat. § 453.337 in its effort to respond to the Ninth Circuit's certified questions: Nevada law simply did not already provide the answers. *Id.*

Though Nevada Supreme Court would not directly address divisibility as Nevada does not apply that concept to its criminal statutes, it confirmed Nev. Rev. Stat. § 453.337's text was ambiguous as to whether the identity of the controlled substance possessed for sale is an element of the statute or a means of committing the offense. *Id.* at 620-24. A court majority therefore created a new judicial interpretation of Nev. Rev. Stat. § 453.337, concluding "the particular identity of a substance must be proven to sustain a conviction." *Id.* at 623. It did so by

[5] *Luqman* referenced *Sheriff, Clark Cnty. v. Luqma*n, 697 P.2d 107 (Nev. 1985), which Figueroa-Beltran argued rendered NRS 453.337 indivisible; *Muller* referenced *Muller v. Sheriff*, *Clark Cnty.*, 572 P.2d 1245 (Nev. 1977), which the government argued rendered it divisible. *Figueroa-Beltran I*, 892 F.3d at 1003.

analyzing Nevada's "unit of prosecution" in other Nevada drug statutes, Nevada's penalty structure, and recent 2016 and 2018 state court decisions. *Id.* at 620-24.

D. *Figueroa-Beltran II* applied the Nevada Supreme Court's newly minted interpretation of Nev. Rev. Stat. § 453.337 without addressing this Court's decision in *McNeill v. United States*.

Figueroa-Beltran II noted the Nevada Supreme Court agreed Nevada law governing Nev. Rev. Stat. § 453.337 had been ambiguous prior to responding to the certified questions because the statutory phrase "any controlled substance" could mean one, some, or all of the controlled substances listed in Nevada's drug schedules. 995 F.3d at 733 (citation omitted). The Ninth Circuit concluded, however, that given the Nevada Supreme Court's new interpretation of § 453.337—requiring jury unanimity about the specific controlled substance possessed—the statute was no longer fatally overbroad and was divisible as to its elements for federal sentencing enhancement purposes. *Id.* The Ninth Circuit thus held the district court did not err in applying the modified categorical approach and examining the "charging document and judgment of conviction" to determine which drug Figueroa-Beltran was convicted of possessing. *Id.* at 729.

Critically and for reasons unknown, in affirming the enhancement, the Ninth Circuit failed to acknowledge or address Figueroa-Beltran's argument that this Court's decision in *McNeill* prohibited application of the Nevada Supreme Court's newly crafted interpretation to resolve a statute that was undeniably ambiguous at the time of his state conviction to enhance his federal sentence. *Compare Figueroa-Beltran II*, 995 F.3d 724 (failing to address *McNeill*), *with* Supp. Briefing, *United*

States v. Figueroa-Beltran, No. 16-10388, 2020 WL 5505813, *4-7 (9th Cir. Sept. 2, 2020) (addressing *McNeill* and discussing circuit cases applying law in effect at the time of the defendant's state law conviction under categorical approach*)*; *see also* Petition for Panel and En Banc Rehearing, *United States v. Figueroa-Beltran,* 16-10388, Dkt. 72, pp. 6-11 (9th Cir. May 11, 2021) (same).

E. The Ninth Circuit applied *Figueroa-Beltran II* here without addressing this Court's decision in *McNeill v. United States*.

The Ninth Circuit subsequently applied *Figueroa-Beltran II* and its unqualified adoption of the Nevada Supreme Court's new judicial interpretation of Nev. Rev. Stat. § 453.337 to Jordan-McFeely's Nevada prior Nevada conviction to affirm his sentencing enhancement. The Ninth Circuit did not address that, at the time of Jordan-McFeely's 2014 Nevada conviction, Nev. Rev. Stat. § 453.337 was ambiguous—a fact the Nevada Supreme Court has confirmed.

And though Jordan-McFeely (like Figueroa-Beltran) urged that the drug enhancement should not have applied given the ambiguity in Nevada law at the time of his state conviction, the Ninth Circuit did not address this Court's precedent in *McNeill*. *Compare United States v. Jordan-McFeely*, 859 F. App'x 823 (9th Cir. July 6, 2021), App. Dkt 69, Order denying rehearing and en banc review, *with* App. Dkt. 68, Petition for Panel and En Banc Rehearing (requesting rehearing under *McNeill*). The Ninth Circuit issued a summary order denying Jordan-McFeely's request for rehearing without addressing the court's ongoing conflict with *McNeill* given its adoption of the Nevada Supreme Court new interpretation of Nev. Rev. Stat. § 453.337 to long final state court convictions.

Reasons for Granting the Writ

A. Allowing federal courts to delegate their divisibility inquiry to the States' highest courts for purposes of applying federal sentencing enhancements violates Supreme Court precedent.

This Court's precedent makes clear that when federal courts are uncertain if an overbroad state statute is divisible, the divisibility inquiry must end, and federal courts may not use a conviction under that state statute to enhance a federal sentence. *Mathis* made clear the "demand for certainty" is rooted in *Taylor*, 495 U.S. 575, where this Court first set forth the categorical approach. This certainty requirement has been enshrined in the categorical analysis for more than three decades, prohibiting federal courts from using a state conviction to enhance a federal sentence unless federal courts are convinced that a conviction qualifies as a federal predicate.

Certification of a state statute's divisibility to a state's highest court for resolution violates the protocol for assessing divisibility. *Mathis* most recently provided federal courts the necessary guidance by directing the next step in the analysis if divisibility of a state statute is unclear. If the federal court finds state law is unclear, the court to next consider whether "the statute on its face" resolves the issue or, if it was so inclined, to peek at the record documents in an attempt to resolve the divisibility issue. *Mathis*, 136 S. Ct. at 2256-57. If those steps did not ensure that the state statute is divisible, the federal court must end its analysis with the conclusion the state statute is not a categorical match to a federal generic

offense because it is indivisible, and it cannot be used to enhance the defendant's federal sentence. *Mathis*, 136 S. Ct. at 2255-57.

State court is not the proper source for guidance on whether application of the categorical approach (a federal doctrine) can be applied to find with certainty that a state statute is divisible (also a federal doctrine) for purposes of imposing a federal sentencing enhancement (a federal sentencing procedure). Indeed, the Nevada Supreme Court specifically declined to address divisibility, despite the Ninth Circuit requesting it do so, and reframed the questions because Nevada law never "applied the federal concept of divisibility to [its] criminal statutes." *Figueroa-Beltran*, 467 P.3d at 620.

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

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

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

> 13 And if you're talking about sentencing judges who
> 14 sentence every day and have to use the modified
> 15 categorical approach, you know, certifying to the State
> 16 courts, I think that really would be, you know,
> 17 an extraordinary intrusion.

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

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

As federal courts continue to rely on the certification process to discern divisibility of state statutes and, as exhibited here,[6] continue to rely on the

[6] Of course, other federal circuits agree this Court meant what it said and have concluded the lack of certainty as to a state statute's divisibility requires federal courts to find that statute overbroad and indivisible. *See, e.g., United States v. Faust,* 853 F.3d 39, 52 (1st Cir. 2017) (". . . *Mathis* states that this need not be difficult. . . . If, at the end of [the Mathis] review 'such record materials' do not 'speak plainly,' then 'a sentencing judge will not be able to satisfy '*Taylor*'s demand for certainty' when determining whether a defendant was convicted of a generic

responses received to enhance defendants' federal sentences, a writ of certiorari is warranted to assess the propriety of this extension of *Mathis* and the divisibility inquiry.

B. State courts are ill-equipped to decide federal divisibility questions.

Embroiling state courts in the federal categorical world is imprudent. State courts should not be enlisted to resolve questions about the categorical approach, which is a creature of federal law. Federal courts use the categorical, divisibility, and modified categorical approaches in applying federal sentencing statutes and certain federal Sentencing Guidelines provisions. Whether a defendant's federal criminal sentence should be enhanced because of a prior state conviction based on these federal doctrines is for federal courts to determine.

Certification of divisibility questions asks state courts to answer questions about the scope of the state's criminal statutes in a vacuum, without the facts of an actual case or controversy to place those questions in context. The federal

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offense.'"); *United States v. Herrold*, 883 F.3d 517, 522 (5th Cir. 2018) (en banc) (footnotes omitted) ("Should our dual forays into state law and the record leave the question of divisibility inconclusive, the tie goes to the defendant—because the ACCA demands certainty that a defendant indeed committed a generic offense, any indeterminacy on the question means the statute is indivisible."); *United States v. Horse Looking*, 828 F.3d 744, 748 (8th Cir. 2016) ("We have been instructed time and again that the categorical approach introduced by *Taylor* created a 'demand for certainty' when determining whether a defendant was convicted of a qualifying offense."); *United States v. Hamilton*, 889 F.3d 688, 692–93 (10th Cir. 2018) ("After considering the state-court opinions, the text of the statute, and the record of conviction, we remain uncertain on whether the locational alternatives constitute elements or means. In light of this uncertainty, we must regard the locational alternatives in Oklahoma's statute for second-degree burglary as means rather than elements.").

categorical and divisibility analyses ask courts to assess the scope and elements of a criminal statute in the abstract. Courts are forbidden from examining what a defendant actually did to violate a statute. *See Descamps v. United States*, 570 U.S. 254, 261 (2013) ("Sentencing courts may 'look only to the statutory definitions'—i.e., the elements—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'" (quoting *Taylor*, 495 U.S. at 600). Indeed, this Court has said the actual facts of a defendant's conviction are "quite irrelevant." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013).

The federal categorical approach is therefore a poor candidate for the certification process, which relies on a rich factual record. For example, Nevada Rule of Appellate Procedure 5(c)(2)states a certification order "shall set forth . . . [a] statement of all facts relevant to the questions certified." Rule 5 was adopted from the 1967 Uniform Certification of Questions of Law Act, a uniform code many states have adopted in some form. *Volvo Cars of N. Am., Inc. v. Ricci*, 137 P.3d 1161, 1163 (Nev. 2006); Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. Legis. 157, 167 (2003). The uniform code instructs:

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

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

The lack of a fact-bound case or controversy may lead state courts astray in deciding certified questions. Deciding the scope of criminal liability without real-world facts could lead to decisions that open up post-conviction litigation for state court defendants and, through habeas corpus and post-conviction petitions, unanticipated litigation. For instance, if a state court interprets a statute more narrowly for federal sentencing purposes than it had historically interpreted the statute in state prosecutions—as Nevada did here—state defendants convicted under the broader interpretation may seek post-conviction relief under the newly narrowed interpretation.[7] This type of post-conviction litigation has already begun in Nevada state courts since the Nevada Supreme Court's decision in *Figueroa-Beltran,* 467 P.3d 615.[8] It is this type of unintended consequences that may have played a role in the *Mathis* Court's decision not to include certification in the three-step divisibility analysis.

Certifying divisibility questions to state courts would also require state courts to review state statutes that have been amended or repealed long ago. For

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

[8] *See, e.g.*, Petition for Review, *Walsh v. State Of Nevada,* No. 80794, 2021 WL 2711631 (Nev. Apr. 26, 2021) (arguing *Figueroa-Beltran*, 467 P.3d 615, created a new law and seeking reversal despite arguable procedural bar because jury was not instructed "a substance's identity [was] an element of the crime . . .the State must be able to establish the identity of the drug" that the State must prove beyond a reasonable doubt).

instance, in *Figueroa-Beltran I*, the certification order asked the Nevada Supreme Court to address *Muller*, a case involving Nevada's drug schedules and statutes from 1977—neither of which exist today or appeared to be at issue. 572 P.2d at 1245. It would appear to serve no state interest, let alone a federal interest, to ask a state court to assess the divisibility of statutes amended more than three decades ago, especially where a federal court already determined to be ambiguous for federal sentencing purposes. If state courts must delve into historical archives to assign meaning to repealed or amended statutes for divisibility purposes, it would be difficult to remove modern day context from any such interpretations. This, in turn, would cast doubt on the legitimacy of new interpretations of laws that have been amended or repealed.

Sentencing enhancements applied in federal criminal cases are also not matters federal courts should ask the states to decide, as compared to perhaps questions of state law that arise in a diversity jurisdiction lawsuit.[9] While "the judicial policy of a state should be decided when possible by state, not federal, courts," *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007) (Gorsuch, J.), *answering certified question*, 183 P.3d 1001 (Okla. 2008), that comity interest is not present in the federal divisibility context. Unlike diversity claims based on state

[9] *See, e.g., Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co., 763* F.3d 1232, 1233 (9th Cir. 2014) (certifying question of Washington law to Washington Supreme Court in a diversity case brought under Washington state law); *Allstate Ins. Co. v. Alamo Rent-A-Car, Inc.*, 137 F.3d 634, 635 (9th Cir. 1998) (certifying question of Hawaii law to Hawaii Supreme Court in diversity cases raising insurance claims under Hawaii statutes).

law that are likely to arise in state court in a non-diversity case (or in cases not filed in or removed to federal court), federal categorical and divisibility questions will only arise in federal criminal and immigration cases.

Finally, state certification is not appropriate for categorical inquiries because not all states accept certified questions.[10] North Carolina does not allow federal courts to certify state law questions to the North Carolina Supreme Court.[11] Though Missouri has a statute permitting federal courts to certify questions to its supreme court, Mo. Ann. Stat. § 477.004, the Missouri Constitution does "not expressly or by implication grant the Supreme Court of Missouri original jurisdiction to render opinions on questions of law certified by federal courts." *Grantham v. Missouri Dep't of Corr.*, No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990) (en banc) (declining certification from federal district court for lack of constitutional jurisdiction).

Thus, if certification were added to the federal divisibility analysis despite this Court's precedent, certification could not exist for questions in all states. This would result in disparate adjudication of similarly situated federal defendants.

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[10] Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, *supra*, at 159 n.13 (2003) (noting 47 states permit some or all federal judges to certify a question to a state's highest court).

[11] *See* Eric Eisenberg, *A Divine Comity: Certification (at Last) in North Carolina*, 58 Duke L.J. 69 (2008).

C. Proper application of the divisibility analysis in conjunction with *McNeill* revealed Nev. Rev. Stat. § 453.337 was not divisible at the time of Jordan-McFeely's Nevada conviction was final.

This Court's decision in *McNeill* prohibits the Ninth Circuit's application of *Figueroa-Beltran II* and the Nevada Supreme Court's newly constructed interpretation of Nev. Rev. Stat. § 453.337 in Jordan-McFeely's direct federal appeal to affirm the federal sentence enhancement U.S.S.G. §§ 2K2.1(a)(2), 4B1.2(b). Pet. App. 2a. Notably, the Ninth Circuit's decision in *Jordan-McFeely* does not cite *McNeill*. Rather, in *Jordan-McFeely*, the court ambivalently cites only to the final *Figueroa-Beltran II* opinion for the proposition that, under Nev. Rev. Stat. § 453.337, "possession of a specific controlled substance is an element of the crime." Pet. App. 2a.

The Ninth Circuit's decision in *Jordan-McFeely* is erroneous for ignoring *McNeill*. Had it done so, it would have been forced to acknowledge: (1) the very language it relied on from *Figueroa-Beltran II* post-dated the finalization of Jordan-McFeely's 2014 Nevada § 453.337 conviction by six years; (2) the Nevada Supreme Court conceded Nevada law was ambiguous as to § 453.337's elements, and neither Nevada's caselaw nor its legislative history resolved that ambiguity at the time of Jordan-McFeely's conviction in 2014; (3) the Nevada Supreme Court majority had to construct a new interpretation of § 453.337; and (4) the Nevada Supreme Court crafted its new judicial interpretation of § 453.337 by analyzing other Nevada drug statutes and cases, including those that did not affect a § 453.337 charge, cases involving Nevada's penalty structure and "unit of prosecution" issues, recent cases

addressing other crimes like child pornography offenses, and California's drug statutes. *Figueroa-Beltran*, 467 P.3d at 620-24.

By failing to even reflect on *McNeill*, the Ninth Circuit in *Jordan-McFeely*, just as *Figueroa-Beltran II* before it, did not even consider the impropriety of retroactively applying the Nevada Supreme Court's newly constructed interpretation, promulgated well after Jordan-McFeely's Nevada conviction was final. Pet. App. 2a. This Court's precedent does not support the Ninth Circuit's blind retroactive application of the Nevada Supreme Court's new interpretation of its state law in this way to enhance a federal sentence.

What *McNeill* requires in this scenario is that the Ninth Circuit accept the Nevada Supreme Court's admission when it received and accepted the certified questions in *Figueroa-Beltran I*: at the time of Jordan-McFeely's 2014 conviction under Nev. Rev. Stat. § 453.337, the divisibility of that statute and its exact elements were questions "not currently answered by existing Nevada law." *Figueroa-Beltran*, 467 P.3d at 619–20. Because analysis of state law for purposes of the categorical approach is determined by state law at the time of the state-law conviction, *McNeill*, 563 U.S. at 820, the divisibility analysis for anyone whose conviction was final before the Nevada Supreme Court issued its new interpretation must end with the conclusion that divisibility cannot be definitively answered, *Mathis*, 136 S. Ct. at 2256-57. This is the default position when a statute is ambiguous at the time of federal sentencing: an overbroad state statute like Nev. Rev. Stat. § 453.337 does not qualify as a federal sentencing predicate. *Id.*

D. This issue is one of national importance to the thousands of federal criminal defendants exposed to possible sentencing enhancements and the criminal and appellate courts obligated to review those enhancements.

For more than 30 years, federal district courts have routinely applied a categorical analysis to determine whether a prior conviction can enhance a defendant's federal sentence. *Taylor*, 495 U.S. 575. This analysis centrally ensures that, to serve federal sentencing goals, increases to federal sentences are uniformly imposed based on the actual elements of the underlying offenses necessary for conviction and not subject to the varying facts or conduct of a particular case. *Id.* at 599-602. Thus, whether a statute is divisible as to its elements is a uniquely federal question, inextricably tied to the categorical analysis that federal sentencing courts use to calculate criminal sentences under federal law every day in this country. *Mathis*, 136 S. Ct. at 2248 (applying divisibility categorical analyses to 18 U.S.C. § 924(e)(1)); *United States v. Schneider*, 905 F.3d 1088, 1090-91 (8th Cir. 2018) (applying divisibility and categorical analysis to Sentencing Guidelines).

For example, 66% of the 59,253 federal criminal defendants sentenced in fiscal year 2020 possessed a criminal history in categories II through IV.[12] This data means that each year tens of thousands of defendants are potentially eligible for any number of federal statutory sentencing enhancements and increased base offense levels and enhancements under the Sentencing Guidelines depending on the

[12] *See* U.S. Sentencing Commission, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf, p. 83, Table 23 (last visited Nov. 9, 2021).

how broadly or narrowly the statutes underlying their prior convictions are defined. *See, e.g.*, 18 U.S.C. § 924(e)(1) (requiring 15-year mandatory minimum sentence for those convicted of violating 18 U.S.C. § 922(g) with three previous convictions for a "violent felony" and/or a "serious drug offense"); 18 U.S.C. § 924(c)(1)(A) (requiring mandatory minimum sentences of 5, 10, or 15 years, respectively, for anyone convicted of using or carrying, brandishing, or discharging a firearm "during and in relation to any crime of violence or drug trafficking crime"); U.S.S.G. § 2K2.1 (2018) (providing heightened base offense levels for those convicted of violating 18 U.S.C. § 922(g) with prior felony convictions for either a "crime of violence" and/or "a controlled substance offense"); U.S.S.G.§ 2L1.2 (2018) (providing heightened base offense levels for those previously convicted of misdemeanor "crimes of violence or drug trafficking offenses").

Federal courts thus routinely apply the categorical approach as part of the federal criminal sentencing process. In fiscal year 2020, approximately 15,275 federal criminal defendants received statutory mandatory sentences, often requiring those courts to determine if those defendants possessed qualifying predicates such a crime of violence, violent felony, controlled substance offense, a serious drug offense, or a drug trafficking offense.[13] That same year, approximately 1,477 federal defendants were found to be eligible for the career offender or armed career criminal guideline enhancements,[14] meaning the sentencing court

[13] *Id.* at p. 195, Table A-7.

[14] *Id.*

determined the charged offense was either a "crime of violence" or a "controlled substance offense," and the defendant possessed "at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. §§ 4B1.1, 4B1.4.

The Ninth Circuit's decision in *Figueroa-Beltran I* to abdicate its obligation to adjudicate divisibility by certifying questions to the Nevada Supreme Court thus raises serious concerns. This especially true given the Ninth Circuit's failures to honor this Court's decision in *McNeill* in *Figueroa-Beltran II,* Jordan-McFeely's case, and elsewhere after certifying the divisibility inquiry. *See, e.g.*, *United States v. Cotton*, No. 17-10171, 2021 WL 3201073, at *1 (9th Cir. July 28, 2021) (applying *Figueroa-Beltran II* to finding Cotton's prior Nevada conviction a "controlled substance offense" under Nev. Rev. Stat. § 453.337 under U.S.S.G. § 2K2.1(a)(2) without discussing *McNeill*).

By stepping outside the divisibility protocol, the panel has also stalled the appellate process on direct appeal, embroiled the Nevada Supreme Court in litigation that will unnecessarily drain its resources, and asked that a state court decide questions in an area of law with which it is unfamiliar.

The Ninth Circuit has taken to the practice of routinely certifying similar questions in the last three years. *See Romero-Millan v. Barr*, 958 F.3d 844 (9th Cir. 2020) (certifying questions to Arizona Supreme Court, including whether Arizona's possession of drug paraphernalia and drug possession statutes were divisible as to drug type and whether jury unanimity or concurrence was required as to which

listed drug or drugs were involved in an offense under either statute); *United States v. Lawrence*, 758 F. App'x 624 (9th Cir. 2019) (noting it certified three questions to the Oregon Supreme Court regarding the divisibility of Oregon's robbery statutes but later vacated after the Oregon Supreme Court accepted the question after *Stokeling v. United States*, 139 S. Ct. 544 (2019)). At least one other circuit has followed suit. *See United States v. Franklin*, 895 F.3d 955, 960-61 (7th Cir. 2018) (certifying divisibility questions on rehearing the Wisconsin Supreme Court to determine whether Wisconsin's burglary statute set forth different means of committing a single burglary offense or instead elements of different crimes).

Federal courts' reliance on the certification process to resolve divisibility is improvident and unnecessary. *Mathis* provides clear steps to assess a state statute's divisibility, of which certification to a state's highest court is not one. *Mathis* also provides the default position when a court cannot definitively answer that state statute is divisible: the statute is not divisible, and the federal court's inquiry simply ends. The Ninth Circuit's abdication of its divisibility inquiry should be further scrutinized by this Court.

And even accepting the prerogative of a federal court to stop sentencing appellate proceedings in criminal cases to seek input from a state's highest court on the issues of divisibility, federal courts must still honor precedent applying the backward-looking application of the categorical analysis itself under *McNeill* upon receiving responses from state courts. Thus, when the state's highest court signifies the law at the time of the defendant's prior conviction was unclear but provides a

new judicial interpretation of the statute, the federal court must conclude the state statute was not divisible at the time of the defendant's conviction. The Ninth Circuit's failure to honor *McNeill* should also be further scrutinized by this Court.

Conclusion

For the reasons set forth herein, Jordan-McFeely requests the Court grant this petition for a writ of certiorari.

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