

No.

In the Supreme Court of the United States

Jermaine Mitchell,

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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Dated: May 12, 2022

Question Presented for Review

- I. When receiving a reduced sentence in 2020 for a crack-cocaine offense under the First Step Act, Petitioner Mitchell asked the district court to find he was no longer a career offender. The district court rejected the argument and applied the career offender enhancement, which tripled the guideline range. Mr. Mitchell had been previously convicted of a state offense in 1999, under Nevada Revised Statute (N.R.S.) § 453.337, at which time the statute's divisibility was ambiguous. The Ninth Circuit affirmed the sentence by relying on a state court opinion issued after Mr. Mitchell's resentencing—a non-retroactive Nevada Supreme Court opinion that impermissibly addressed federal categorical divisibility analysis. Mr. Mitchell asks this Court to review whether the Panel violated Mr. Mitchell's due process rights by: (1) misapplying the categorical analysis required to assess a state statute's divisibility; and (2) improperly relying on a non-retroactive, new state judicial interpretation of the state statute?

Related Proceedings

Petitioner Jermaine Mitchell was convicted in 2008 of two drug offenses, one involving crack-cocaine that at the time mandated a life imprisonment term. *United States v. Mitchell*, No. 3:04-cr-00010-HDM-VPC, Dkt. 166 (D. Nev. Jan. 10, 2008) (unpublished). Ten years later, Mr. Mitchell sought a sentence reduction due to the First Step Act of 2018’s retroactive changes to crack-cocaine sentencing. At resentencing, Mr. Mitchell argued he no longer qualified as a career offender because his 1999 Nevada conviction under N.R.S. § 453.337 involving possession for sale of a Nevada controlled substance is overbroad and indivisible, and thus is not a qualifying predicate offense. *United States v. Mitchell*, No. 3:04-cr-00010-HDM-VPC, Dkt. 241 (D. Nev. May 20, 2020) (unpublished). The district court granted the motion but rejected Mr. Mitchell’s career offender argument, reducing the previously mandatory life sentence to the low-end of the career offender range—360 months. *United States v. Mitchell*, No. 3:04-cr-00010-HDM-VPC, Dkt. 242 (D. Nev. May 21, 2020) (unpublished).

Mr. Mitchell appealed application of the career offender enhancement. The Ninth Circuit affirmed by finding the Nevada Supreme Court’s new interpretation of N.R.S. § 453.337—issued in 2020—was retroactive to Mitchell’s 1999 state conviction. *United States v. Mitchell*, No. 20-10196, 2021 WL 5881662, at *2 (9th Cir. Dec. 13, 2021). The Ninth Circuit declined to rehear the appeal en banc. *United States v. Mitchell*, No. 20-10196, (9th Cir. Feb. 11, 2022) (unpublished). Mr. Mitchell remains in federal prison with an estimated release date of April 27, 2030.

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Petition for Certiorari

Petitioner Jermaine Mitchell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit opinion denying appellate relief is not published in the Federal Reporter, but is reprinted at: *United States v. Mitchell*, No. 20-10196, 2021 WL 5881662 (9th Cir. Dec. 13, 2021), *pet. r'g denied*, No. 20-10196 (9th Cir. Feb. 11, 2022). Pet. App. A, B.

The district court's order reducing Mr. Mitchell's sentence in part, along with the original judgment and amended judgment are unpublished and not reprinted. *United States v. Mitchell*, No. 3:04-cr-00010-HDM-VPC, Dkts. 242, 241, 166 (D. Nev.) (unpublished); Pet. App. C, D, E.

Jurisdictional Statement

The Ninth Circuit entered the final order denying Mr. Mitchell's timely request for panel rehearing and en banc review on February 11, 2022. Pet. App. B. This Court's jurisdiction is invoked under 28 U.S.C. § 1254. This petition is timely under Supreme Court Rule 13.3 as it is filed within 90 days from the lower court's order.

Relevant Statutes and Sentencing Guideline Provisions

1. Nevada Revised Statute § 453.337 (1997) provides:

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. § 4B1.2 (2018) provides:

(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 murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(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

The Ninth Circuit has impermissibly expanded the categorical approach’s divisibility analysis. The Ninth Circuit now endorses certification to the state supreme courts to determine a statute’s divisibility, directly conflicting with this Court’s precedent culminating in *Mathis v. United States*, 579 U.S. 500, 516, 517–519 (2016). See *United States v. Figueroa-Beltran (Figueroa-Beltran I)*, 892 F.3d 997 (9th Cir. 2018), *cert denied*, 139 S. Ct. 1445 (2019), *certified question answered*, *Figueroa-Beltran v. United States (Figueroa-Beltran II)*, 467 P.3d 615 (Nev. 2020).

Mathis did not announce a new approach to categorical divisibility; it instead reiterated the long-standing divisibility inquiry. The categorical divisibility inquiry never involved stopping federal proceedings to certify the inquiry to state courts. When federal courts cannot definitively answer the divisibility question through the categorical process, that uncertainty “ends the analysis” with the conclusion that the defendant was not convicted of a qualifying offense. *Mathis*, 136 S. Ct. at 2255–57.

In analyzing the Nevada statute at issue here, the Ninth Circuit concluded the Nevada drug offense at N.R.S. § 453.337 was hopelessly ambiguous and overbroad. *Figueroa-Beltran I*, 892 F.3d at 1002–04. But instead of “end[ing] the analysis” as *Mathis* instructs, the Ninth Circuit court *sua sponte* halted the appellate proceedings to certify the divisibility analysis to the Nevada Supreme Court. *Id.* The established framework for categorical divisibility analysis does not permit such certification.

The Ninth Circuit’s certification process and infringement on the categorical approach is thus problematic for two reasons. First, it is improper to grant any state the power to eliminate a prior state conviction that otherwise might have served as a predicate for federal recidivist sentencing purposes by making “changes in state law” post-dating a defendant’s state law conviction. *McNeill v. United States*, 563 U.S. 816, 823 (2011). Doing so would permit the States to rewrite a defendant’s actual criminal history, undermining the purposes of federal recidivist sentencing law. *Id.* Second, as this Court also recognized in *McNeill*, confining categorical analysis to the version of the law in effect at the time of a defendant’s state conviction leads to consistent, predictable results. *Id.* Accordingly, the categorical divisibility analysis does not include certification to state supreme courts to resolve ambiguous statutes.

Nonetheless, even if this Court finds certification was appropriate, the Ninth Circuit has ignored this Court’s fundamental tenant requiring a “backward-looking” analysis under the categorical approach. This Court’s “backward-looking” categorical approach analyzes the prior conviction’s elements at the time of prior conviction to determine the offense the defendant was “actually convicted of violating.” *McNeill*, 563 U.S. at 821. Inconsistent with this precedent, the Ninth Circuit applies the Nevada Supreme Court’s newly constructed judicial interpretation of N.R.S. § 453.337—issued in 2020—to affirm use of this statute to enhance federal sentences, regardless of when the Nevada conviction occurred. *United States v. Figueroa-Beltran (Figueroa-Beltran III)*, 995 F.3d 724, 732–34 (9th

Cir. 2021), *pet. r'hg denied*, No. 16-10388 (9th Cir. June 11, 2021). The Ninth Circuit's approach violates due process rights, including the right to fair notice, reasonable reliance, and settled expectations for those with final convictions under the statute before the new interpretation was constructed.

Mr. Mitchell's case presents the unjust result. The Ninth Circuit relied on *Figueroa-Beltran III* (issued after Mr. Mitchell's 2020 resentencing) to hold Mr. Mitchell's long-final Nevada § 453.337 conviction from 1999 qualified as a controlled substance offense. Pet. App. A. In doing so, the Ninth Circuit perpetuated its improper analysis and diverged from this Court's time-honored precedent promoting sentencing uniformity and due process.

Mr. Mitchell requests this Court review the Ninth Circuit's application of the Nevada Supreme Court's newly constructed, non-constitutional judicial interpretation of a state statute—issued after Mr. Mitchell's resentencing—to affirm application of the career offender enhancement based on a 1999 state conviction. This Court's review is warranted because the Ninth Circuit's failure to adhere to this Court's precedent on the categorical approach will adversely affect many similarly situated defendants. *See* Sup. Ct. R. 10(c).

Statement of the Case

This petition arises from the Ninth Circuit's divergence from the categorical approach in determining whether Mr. Mitchell is a career offender under the United States Sentencing Guidelines.

I. District Court Proceedings

Mr. Mitchell's federal case began in 2008 with two convictions: possession with intent to distribute cocaine base under 21 U.S.C. § 841(a)(1) (Count One), and simple possession of marijuana under 21 U.S.C. § 844 (Count Two). The district court had no choice but to impose a mandatory life imprisonment term on Count One, and 90-days imprisonment on Count Two, run concurrently with each other. Pet. App. E.

Over ten years later, Mr. Mitchell sought a sentence reduction under the First Step Act of 2018's retroactive changes to crack-cocaine sentencing law. To support a reduction, Mr. Mitchell argued he no longer qualifies as a career offender under current sentencing law. Specifically, he argued that under *Figueroa-Beltran I*, 892 F.3d at 1003, the Ninth Circuit could not definitively resolve N.R.S. § 453.337's divisibility, thus ending the categorical analysis. At the time, the Ninth Circuit found it could not "say with confidence that the Nevada precedent definitively answers the question." 892 F.3d at 1004. Mr. Mitchell explained that because divisibility could not be resolved with certainty, his prior conviction under N.R.S. § 453.337 involving possession for sale of a Nevada controlled substance is overbroad and indivisible, and thus not a qualifying predicate offense. Therefore, Mr. Mitchell requested the district court apply a non-career offender guideline range (120 to 150 months) instead of a career offender guideline range (360 months to life). The district court denied Mr. Mitchell's request in part by applying the career offender enhancement to his sentencing guideline range. But the court did

reduce his sentence to the low-end of the career offender range—360 months followed by 10 years of supervised release. Pet. App. D. The district court declined to reduce his sentence any further.

II. Nevada constructs a new interpretation of N.R.S. § 453.337

After Mr. Mitchell’s resentencing, but before appellate briefing, the Nevada Supreme Court found N.R.S. § 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 II*, 467 P.3d at 621–24. Rather than deem the statute unconstitutional however, a majority of the court constructed a new judicial interpretation of N.R.S. § 453.337 to resolve the statutory ambiguity. *Id.* In this convoluted analysis, the Nevada Supreme Court looked to Nevada’s “unit of prosecution” for other state drug statutes, Nevada’s penalty structure, recent Nevada state court decisions for other crimes, along with California law—sources which did not all exist at the time of § 453.337’s enactment or when Mr. Mitchell was convicted in 1999. *Id.* Through this entirely new construction, the Nevada Supreme Court essentially revised the state statute by holding the drug identity in § 453.337 is not a means of the offense, but rather an element the State must prove beyond a reasonable doubt. *Id.* at 621–25.¹

¹ The dissent concluded otherwise, finding “the plain language of” N.R.S. § 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 II*, 467 P.3d at 625 (Stiglich, J., dissenting).

III. Ninth Circuit Proceedings

Mr. Mitchell appealed the district court's refusal to consider his current non-career offender status. In his appellate briefing, Mr. Mitchell argued his 1999 conviction did not qualify because: the Ninth Circuit could not conclude with certainty that N.R.S. § 453.337 was divisible after conducting the categorical analysis; and the state statute was ambiguous as to whether the identity of the controlled substance was an element of the offense or a means of committing the offense in 1999 when Mr. Mitchell was convicted.

Two months after Mr. Mitchell's appeal was fully briefed, the Ninth Circuit applied the Nevada Supreme Court's newly constructed judicial interpretation of N.R.S. § 453.337 to affirm Figueroa-Beltran's enhanced federal sentence. *Figueroa-Beltran III*, 995 F.3d at 732–34. Eight months later, in an unpublished opinion, the Ninth Circuit affirmed the district court's career offender resentencing ruling as to Mr. Mitchell. *United States v. Mitchell*, No. 20-10196, 2021 WL 5881662, at *2 (9th Cir. Dec. 13, 2021); see Pet. App. A.

In affirming Mr. Mitchell's sentence, the Ninth Circuit panel relied on the *Figueroa-Beltran* trilogy, as well as *City of Tacoma*, 332 F.3d 580, 580 (9th Cir. 2003). Pet. App. A. Specifically, the *Mitchell* panel found the Nevada Supreme Court's new interpretation of N.R.S. § 453.337 was retroactive to Mitchell's 1999 state conviction. *Id.* The Ninth Circuit denied rehearing en banc. Pet. App. B.

Mr. Mitchell remains in federal custody of the Bureau of Prisons, with an estimated release date of April 27, 2030.

Reasons for Granting the Petition

I. The Ninth Circuit violated this Court’s precedent and expanded the categorical approach by delegating its divisibility inquiry to the Nevada Supreme Court.

Federal courts must follow a three-step analysis when assessing a state statute’s divisibility under the categorical approach. *Mathis*, 579 U.S. at 516–19. First, the federal court must research whether “a state court decision definitively answers the question.” *Id.* at 517. Second, if no definitive state court decisions exist, the federal court must determine if “the statute on its face” resolves the issue. *Id.* at 518. Third, if the statute “fails to provide clear answers,” a federal court may, as a last resort, “peek” at the record documents for “the sole and limited purpose” of determining whether the listed items are elements of the offense. *Id.* The *Mathis* Court warned, however, “record materials will not in every case speak plainly, and if they do not,” they will not satisfy “‘*Taylor*’s demand for certainty’ when determining whether a defendant was convicted of a generic offense.” *Id.* at 519 (quoting *Shepard v. United States*, 544 U.S. 13, 21 (2005)); *Taylor v. United States*, 495 U.S. 575 (1990).

When the three-step analysis fails to provide “certainty” as to whether the state statute is divisible, the divisibility inquiry must end by concluding the state statute is not a qualifying offense. *Mathis*, 579 U.S. at 519. Because the state statute is overbroad and indivisible, it cannot be used to enhance the defendant’s federal sentence. *Id.* This “certainty” standard has been enshrined in the categorical analysis for over three decades. *Taylor*, 495 U.S. 575. The standard

prohibits federal courts from using a state conviction to enhance a federal sentence unless federal courts find with certainty that a conviction qualifies as a federal predicate.

The *Taylor* line of cases, including *Mathis*, do not permit certification to a state court as part of the divisibility analysis. The *Mathis* court was aware of the option to certify divisibility questions to state courts and chose not to do so.² *Mathis* thus directly clarified the present issue. Federal courts must consult existing state case law, the plain statutory text, and limited record documents; and if those sources do not provide “certainty” that the state statute is divisible, the federal divisibility inquiry ends, and the conviction does not qualify as an enhancement predicate. This Court specifically omitted state certification from the categorical approach. One policy reason for this omission is that state courts are ill-equipped to decide federal divisibility questions. The federal categorical analysis should not be delegated to state courts. Certifying such divisibility questions would require state courts to reinterpret long-standing state statutes, or even statutes that have been

² The parties in *Mathis* provided an opportunity to endorse certification and this Court declined the invitation. See 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) (unpublished) (Hawkins, J., concurring)) (recognizing a Ninth Circuit judge had previously suggested referring divisibility questions to state supreme courts); Petitioner’s Reply Brief, *Mathis v. United States*, 2016 WL 1554732 (U.S.), at 18 (“If need be, the question can often be certified to the highest court of the relevant State.”); Transcript of Oral Argument, p. 49, *Mathis v. United States*, No. 15-6092 (Apr. 26, 2016) (Assistant to the Solicitor General noting the government’s concerns about burdening state courts with certified questions on the federal divisibility analysis: “certifying to the State courts, I think that really would be, you know, an extraordinary intrusion.”).

repealed. For instance, in *Figueroa-Beltran I*, the Ninth Circuit’s certification order asked the Nevada Supreme Court to address *Muller v. Sheriff, Clark Cnty.*, 572 P.2d 1245 (Nev. 1977), a case involving Nevada’s drug schedules and statutes from 1977—neither of which exist today. It serves no identifiable state interest, let alone a federal interest, to ask a state court to assess the divisibility of statutes amended over three decades ago, especially where a federal court already determined the statute is categorically ambiguous for federal sentencing purposes. To answer the improper question, the Nevada court applied modern-day law and context to create a new interpretation of the statute, which casts doubt on the legitimacy of the new interpretations. The forced state determination of federal divisibility of state laws is thus untenable and legally unsound.

Further, state certification is not appropriate for categorical analysis because not all states accept certified questions.³ For example, North Carolina does not allow federal courts to certify state law questions to the North Carolina Supreme Court.⁴ Missouri is another example. 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

³ See Rebecca A. Cochran, *Federal Court Certification*, 29 J. Legis. 157, 159 n.13 (2003) (“Currently, Arkansas, New Jersey, and North Carolina have no state law certification procedures”).

⁴ See Eric Eisenberg, *A Divine Comity: Certification (at Last) in North Carolina*, 58 Duke L.J. 69, *69-72 (2008).

certified by federal courts.” *Grantham v. Missouri Dep’t of Corr.*, No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990). Thus, if certification is added to the categorical approach despite this Court’s precedent, certification cannot exist for state law questions in all states resulting in disparate adjudication of similarly situated federal defendants.

Other federal circuits agree this Court purposely omitted certification from the three-step *Mathis* test. See *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 offense.’”); *United States v. Herrold*, 883 F.3d 517, 522 (5th Cir. 2018) (“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.”) (footnotes omitted); *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. Sykes*, 864 F.3d 842, 844 (8th Cir. 2017) (Colloton, J., dissenting from denial of rehearing en banc) (“[I]f none of those sources answers the question, . . . then the court ‘will not be able to satisfy Taylor’s demand for certainty when determining whether a defendant was convicted

of a generic offense. . . . an inconclusive inquiry means that the prior convictions do not qualify. . . .”); *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.”).

The Ninth Circuit’s affirmance here rests on the erroneous *Figueroa-Beltran* trilogy, which violated this Court’s protocol for assessing divisibility by certifying the issue to the Nevada Supreme Court. *See Figueroa-Beltran I*, 892 F.3d at 1004. Only by impermissibly expanding the categorical approach beyond what this Court intended by using the certification process, could the Ninth Circuit affirm Mr. Mitchell’s sentence. Accordingly, the Ninth Circuit’s reliance on this binding case law requires review because the *Figueroa-Beltran* trilogy affects all future litigants within the Ninth Circuit unless this Court says otherwise.

Mathis provides the correct resolution of Mr. Mitchell’s case: a prior conviction under an overbroad state statute does not qualify as a federal sentencing predicate unless the federal court is certain the offense is divisible. *Figueroa-Beltran I* determined N.R.S. § 453.337’s divisibility was unclear. 892 F.3d at 1004 (“[W]e cannot say with confidence that the Nevada precedent definitively answers the question whether § 453.337 is divisible as to the identity of a controlled substance”). This Court’s precedent requires the categorical analysis to end there.

This Court should find, consistent with *Mathis*, that Mr. Mitchell’s 1999 conviction under N.R.S. § 453.337 is not a qualifying predicate offense under the career offender enhancement and does not preclude further sentence reduction under the First Step Act. Review is necessary to stop the domino effect of erroneous categorical analysis in the Ninth Circuit.

II. Proper application of this Court’s precedent under *McNeill* reveals N.R.S. § 453.337 was not divisible when Mr. Mitchell was convicted.

Even if it was appropriate for the Ninth Circuit to certify the divisibility question to the Nevada Supreme Court, this Court’s precedent prohibits the Ninth Circuit’s retroactive application of Nevada’s newly constructed interpretation of N.R.S. § 453.337 to affirm Mr. Mitchell’s sentencing enhancement.

Since the inception of the federal categorical approach, the Supreme Court requires courts to engage in a “backward-looking” analysis to determine the state law offense elements a defendant was “actually convicted of violating” at the time of the prior conviction. *McNeill*, 563 U.S. at 819–23 (citing *Taylor*, 495 U.S. at 602). This is a fundamental tenet of the categorical approach—analysis of the offense elements required at the time of conviction. The *Figueroa-Beltran* trilogy violates this fundamental tenet.

In *McNeill*, this Court reviewed a defendant’s prior state drug offense to determine whether it qualified as an ACCA predicate. 563 U.S. at 820. This Court held “[t]he only way to answer this backward-looking question is to consult the law that applied *at the time of that conviction*.” *Id.* (emphasis added). As recognized in *McNeill*, the States cannot make post-judgment “changes in state law” to render a

prior state conviction non-qualifying for federal recidivist sentencing. 563 U.S. at 823. If this were permitted, the States could change a defendant’s actual criminal history and undermine the culpability or dangerousness implications that federal recidivist sentences were intended to address. *Id.* Thus, applying the categorical approach to the law in effect at the time of a defendant’s prior conviction prevents the states from altering federal sentences.

The Ninth Circuit, however, did not address *McNeill* when affirming Mr. Mitchell’s sentence. Instead, the Ninth Circuit improperly relied on *Figueroa-Beltran* and *United States v. City of Tacoma*, to find that Nevada’s new interpretation of N.R.S. § 453.337 dated back to the statute’s inception. *Figueroa-Beltran III*, 995 F.3d at 733; *United States v. City of Tacoma*, 332 F.3d 574, 580 (9th Cir. 2003) (“The theory of a judicial interpretation of a statute is that the interpretation gives the meaning of the statute from its inception. . . .”). Even though Mr. Mitchell was convicted in Nevada, sentenced federally, and even resentenced federally before the new interpretation, the Ninth Circuit applied the new Nevada interpretation. Pet. App. A.

The Ninth Circuit’s reliance on *City of Tacoma*, 332 F.3d at 574, for the general proposition that judicial interpretations of statutes are generally retroactively applied to the date of enactment is misplaced. *City of Tacoma* relied on *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 308–11 (1994), a civil rights case in which this Court held Congress’s change to Section 101 of the 1991 Civil Rights Act, including discriminatory contract terminations, did not apply retroactively.

City of Tacoma's dissent noted the majority failed to address that *United States v. Donnelly*, 397 U.S. 286, 295 (1970), recognized there are instances where denying the retroactive effect of a statute is appropriate. *City of Tacoma*, 332 F.3d at 582 (Ferguson, C.J., dissenting). Specifically, "the general rule" of retroactively applying a new judicial interpretation "must give way to 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Id.* (quoting *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 270 (1994)).

Criminal statutes invoke special due process protections including the right to fair notice. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. . . ."); *Marks v. United States*, 430 U.S. 188, 191–92 (1977) (due process protects against judicial infringement of the "right to fair warning" that certain conduct creates criminal penalties); *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (trial court's construction of the term "arrest" to include a traffic citation and application of that construction to the defendant to revoke his probation was unforeseeable and violated due process). Federal courts must consider "whether the new provision attaches new legal consequences to events completed before its enactment." *United States v. Padilla-Diaz*, 862 F.3d 856, 863 (9th Cir. 2017) (citing *Landgraf*, 511 U.S. at 270). Because Nevada Supreme Court's new interpretation of N.R.S. § 453.337 would not comport with these due process considerations and affects reliance interests for final convictions like Mr. Mitchell's, retroactive

application is unsound. The Ninth Circuit’s application of *City of Tacoma* “to the facts of this case raises very significant finality concerns, as apparently all proceedings that the United States otherwise validated that preceded the [Nevada Supreme Court’s] decision” are now susceptible to challenge for failure to plead to, or prove to a jury, the necessary offense elements, even though the parties had relied on resolution of this issue for “decades.” *Id.* at 586 (Ferguson, C.J., dissenting).

The Ninth Circuit erred because state law effectively freezes—neither narrowing nor expanding—after a defendant’s conviction. The Ninth Circuit’s failure to apply *McNeill* when conducting the categorical analysis implicates Mr. Mitchell’s due process rights including his right to fair notice, reasonable reliance, and settled expectations. *See Lanier*, 520 U.S. at 266; *Marks*, 430 U.S. at 191–92; *Douglas*, 412 U.S. at 432. *McNeill* protects due process rights 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. *See* U.S. Const. amend. V. To permit otherwise risks: (1) stripping defendants of knowing, before plea or trial, whether a particular state offense triggers a federal enhancement; and (2) imposing “dramatically different federal sentences” on defendants with identical federal and state convictions simply because they are federally sentenced on different days. *McNeill*, 563 U.S. at 823.

Had the Ninth Circuit applied *McNeill*, it would have been obliged to acknowledge: (1) the very language it quoted in *Figueroa-Beltran II* post-dated the

finalization of Mr. Mitchell’s 1999 N.R.S. § 453.337 conviction by over 20 years; (2) the Nevada Supreme Court conceded Nevada law was ambiguous as to § 453.337’s elements at the time of Mr. Mitchell’s state conviction and federal resentencing; and (3) the Nevada Supreme Court majority used sources of law that did not exist when N.R.S. § 453.337 was enacted to create a new interpretation of the statute. *See supra* at pp. 7–10.

Because categorical analysis of state law is determined by the state law in effect at the time of the state-law conviction, *McNeill*, 563 U.S. at 820, this Court’s precedent and the Due Process Clause require this Court’s review. At the time of Mr. Mitchell’s 1999 conviction under N.R.S. § 453.337, the divisibility of that statute and its exact elements were questions “not currently answered by existing Nevada law.” *Figueroa-Beltran II*, 467 P.3d at 619–20. Mr. Mitchell’s conviction under N.R.S. § 453.337—an indivisible and overbroad state statute—does not qualify as a federal sentencing predicate. *Mathis*, 136 S. Ct. at 2256–57.

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*, 495 U.S. at 599-602. 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 to enhance a federal sentence, warranting review here.

III. This issue is of great import as it impacts thousands of federal criminal defendants subject to sentencing enhancements based on state priors.

This error is far reaching, and here frustrated the First Step Act's effort to equalize crack and powder cocaine sentences. For over 30 years, federal district courts applied the categorical analysis to determine whether a prior conviction can enhance a defendant's federal sentence. *Taylor*, 495 U.S. 575. Whether a statute is divisible as to its elements is a unique federal question that federal sentencing courts must determine daily. *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 (8th Cir. 2018).

The United States Sentencing Commission's statistics show the great impact of improper categorical analysis. In just 2021, 1,246 federal defendants were sentenced under the career offender criminal guideline at issue,⁵ meaning the sentencing court 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 erroneous holding impacts many federal defendants each year and must be righted to conform with this Court's precedent and ensure

⁵ See U.S. Sentencing Commission, 2021 Annual Report and Sourcebook of Federal Sentencing Statistics, p. 80 (Table 26) (2021), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf.

sentencing uniformity. This Court has previously granted certiorari on categorical analysis issues “because of the importance of the question for the administration of criminal justice in the federal courts.” *Kotteakos v. United States*, 328 U.S. 750, 752 (1946). Here review is warranted because the administration of justice is compromised by the Ninth Circuit’s precedent that jeopardizes sentencing uniformity and due process.

Conclusion

Petitioner Mitchell requests that the Court grant this petition for a writ of certiorari.

Dated: May 12, 2022.

Respectfully submitted,
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