FEDERAL PUBLIC DEFENDER
CENTRAL DISTRICT OF CALIFORNIA
321 EAST 2nd STREET
LOS ANGELES, CALIFORNIA 90012-4202
213-894-2854
213-894-0081 FAX

HILARY POTASHNER
Federal Public Defender
CHRISTOPHER W. DYBWAD
Chief Deputy

AMY M. KARLIN
Directing Attorney
Santa Ana Office
JEFFREY A. AARON
Directing Attorney
Riverside Office

Direct Dial: (213) 894-4784

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Molly C. Dwyer
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *United States v. Sergio Martinez*, CA No. 15-50245
Oral Argument Set August 4, 2016
Response to Court Order re: *Mathis v. United States*, 136 S. Ct. 2243 (2016)

Dear Ms. Dwyer,

Appellant hereby submits this supplemental brief regarding the effect of *Mathis v. United States*, on this appeal.

A. *Mathis* Requires This Court to Revisit the Divisibility of California Drug Statutes.

Shortly after the Supreme Court's 2013 decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), this Court considered whether the specific drug in a California controlled-substance offense constituted an "element" of the crime (such that the modified categorical approach applies), or a "means" of committing the offense (such that the record of conviction may not be consulted). *See Coronado v. Holder*, 759 F.3d 977 (9th Cir. 2014). Because the Supreme Court's decision in *Mathis* adopted a new framework for determining divisibility, this Court must revisit *Coronado*.

1. *Mathis* Set Forth a Three-Step Process for Determining Divisibility.

In *Mathis*, the Supreme Court confirmed that a prior conviction satisfies a generic federal definition "if, but only if, its elements are the same as, or narrower than, those of the generic offense." 136 S.Ct at 2248. The Court considered whether an exception to that rule exists where a statute "lists multiple, alternative means of satisfying one (or more) of its elements." *Id.* The answer was a resounding 'no': The mere fact that a statute contains an "itemized construction" provides a sentencing court "no special warrant to explore the facts of an offense." *Id.* at 2251.

Mathis set out the framework for deciding whether a statutory alternative is an element or a means. First, courts must look to state case law to determine whether a case can be found that "definitively answers the question." When such a case exists, "a sentencing judge need only follow what it says." *Id*. at 2256. Alternatively, "the statute on its face may resolve the issue"—for instance, if different alternatives carry different penalties, or if the statute offers "illustrative examples," or "identif[ies] which things must be charged." *Id*. If either state case law or the text of the statute provides a clear answer on what a jury must find, or a defendant must necessarily admit, the inquiry ends, and the court need go no further. *See id.* & n.7.

Mathis explained that "if state law fails to provide clear answers, federal judges have another place to look: the record of a prior conviction." *Id*. This "peek at the record documents" is *not* to determine what the defendant actually did. It is narrower, even, than the application of the modified categorical approach. The "sole and limited purpose" of this step is to determine whether the listed items bear the hallmark of elements -- that is, whether it is clear from the way cases are actually charged, or tried to juries, or settled via pleas that the particular item is an element. *Id*. at 2257 For instance, if "one count of an indictment and correlative jury instructions" reference multiple disjunctive alternatives, rather than narrowing the alternatives to a single option, this would suggest that "each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt." *Id*. The same would be true if the indictment and accompanying jury instructions "use a single umbrella term" to refer to several alternatives. *Id*.

But the Supreme Court was careful to warn that "such record materials will not in every case speak plainly." *Id*. *See also id*. (stating that the indictment and jury instructions "*could* indicate" that the statute contains alternative elements); *id*. at 2253 (cautioning that a defendant "may have no incentive to contest" statements of "non-elemental fact" because "their proof is unnecessary"). In that case, a court "will not be able to satisfy *Taylor*'s demand for certainty when determining whether a defendant was convicted of a generic offense." *Id*. at 2257 (internal quotations and citation omitted).

In sum, to determine whether a statutory alternative constitutes a means or an element, courts must first consider state case law and the statutory text. If these sources do not provide a clear answer, courts may cautiously consider documents from the record of conviction. But if none of these sources "plainly" resolves the issue, the court must assume that the statutory alternative is a means, rather than an element, and hold the statute indivisible.

2. *Mathis* Sets Forth a Different Divisibility Analysis Than *Coronado* and Its Progeny.

Mathis's framework undermines this Court's prior method of determining the divisibility of theCalifornia drug statutes.

Coronado focused primarily on the disjunctive wording of § 11377, assuming that because it "referenc[es] various California drug schedules and statutes," it necessarily "create[d] several different crimes." 759 F.3d at 985 (quotations, alterations, and citation omitted). *See also id.* at 984 (stating that California organizes its drug schedules into "five separate groups, which are listed in the disjunctive" and "lists potential offense elements in the alternative") (quotations, alteration, and citation omitted).

Coronado relied on a hypothetical example in *Descamps* that a statute prohibiting assault with any of eight specific weapons would allegedly be divisible, *see id.*—even though *Mathis* itself then clarified that such a statute would *not* be divisible. *Mathis*, 136 S.Ct at 2249. Moreover, *Coronado* did consider whether the conviction of different drugs carried different penalties or whether the statute itself "identif[ies] which things must be charged"—the other *Mathis* hallmarks of textual divisibility. *See id*. at 2256. In other words, *Coronado* largely relied on § 11377's disjunctive wording to find the drug schedule divisible, even though this is *precisely* the principle *Mathis* rejected.

In a footnote, *Coronado* rejected the petitioner's proffer of two California state cases to show that drug type is a means, concluding that "[n]either case he cites supports this contention." 759 F.3d at 989 n.4. Yet, under *Mathis*, the absence of caselaw does not make a statute divisible; state law must "definitively answer[] the question" of whether drug type was a means or an element for the statute to be divisible. *See Mathis*, 136 S.Ct at 2256. Moreover, *Coronado*'s footnote stated that the applicable California model jury instructions "also undermine Coronado's argument." *Id.* (citing CALCRIM No. 2304 and CALJIC 12.00). But these jury instructions simply state: "The controlled substance was *<insert type of controlled substance>*"—which mirrors the indeterminate jury instruction that would have applied to Mr. Mathis's Iowa burglary conviction, and which the Supreme Court (significantly) did *not* consider. *See* Iowa Crim. Jury Instruction 1300.2 ("The (describe place) was an occupied structure as defined in Instruction No. ___.").

Coronado's divisibility analysis bore little resemblance to *Mathis*'s. *Coronado* relied on the statute's disjunctive wording, did not rely on caselaw that "definitively" answered the question, and cited inconclusive jury instructions. Moreover, *Mathis*'s demand for certainty is nowhere reflected in *Coronado*'s analysis. *Mathis* has "undercut the theory or reasoning underlying [*Coronado*] in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). What's more, *every* published opinion to have considered the divisibility of a California controlled-substance statute since that time has cited *Coronado*, casting doubt on the entire line of cases.[1]

This failure to delve into California case law led one judge of this Court to remark that he had "doubts" as to "whether [*Coronado*] is correct." *United States v. Ramirez-Macias*, 584 F. App'x 818, 819 (9th Cir. 2014) (Hawkins, J., concurring). In *Ramirez-Macias*, Judge Hawkins wrote "not to state unequivocally that *Coronado* is wrong," but rather to "recognize the opposite could also be true" because the proposition "is fairly open to debate." *Id*. at 820**.** Judge Hawkins noted that "[b]oth sides

[1] *See Padilla-Martinez v. Holder*, 770 F.3d 825, 832 n.3 (9th Cir. 2014); *Medina-Lara v. Holder*, 771 F.3d 1106, 1112 (9th Cir. 2014) (noting the petitioner's concession that *Coronado* "forecloses his previous argument that § 11351's controlled substance element is indivisible"); *United States v. Torre-Jimenez*, 771 F.3d 1163, 1167 (9th Cir. 2014) ("As a three judge panel, we are bound by *Coronado*."); *United States v. Huitron-Rocha*, 771 F.3d 1183, 1184 (9th Cir. 2014) ("[t]here is no meaningful distinction, for purposes of divisibility, between section 11352(a) and the California drug laws at issue in *Coronado*"); *Garcia v. Lynch*, 798 F.3d 876, 880 (9th Cir. 2015); *Ruiz-Vidal v. Lynch*, 803 F.3d 1049, 1052 (9th Cir. 2015); *United States v. Vega-Ortiz*, __ F.3d __, 2016 WL 2610177, at *3 (9th Cir. May 6, 2016).

reasonably can marshal intermediate appellate case law in their favor" and observed that "[i]t does not appear the Supreme Court of California has yet said much on this subject." *Id.* Given that that "the magnitude of this issue is great" and the Court should "tread carefully as we interpret unclear areas of state law," Judge Hawkins suggested that the Court **"**may wish to consider these issues [en banc] or certify the jury unanimity question to the Supreme Court of California." *Id.*

As long as the Court continues to rely on *Coronado*, overlooking its patent legal error and failure to engage with California law under the *Mathis* standard, the matter will remain unsettled. The Court should apply *Mathis*'s framework to determine anew whether California drug statutes are indivisible.

3. Applying *Mathis* Shows That the Divisibility of California Drug Statutes Is Inconclusive.

Applying *Mathis*, the Court must conclude that § 11379 is indivisible. Under *Mathis*, the inquiry begins by looking to California case law. 136 S.Ct. at 2256. But in this case, that task is harder than it was in *Mathis*: as just noted, "[i]t does not appear the Supreme Court of California has yet said much on the subject." *Ramirez-Macias*, 584 F. App'x at 820.

California's intermediate appellate decisions create a strong case that the nature of the drug is a means, not an element. *See* Answering Brief at 47-53 (collecting cases). For instance, in *People v. Romero*, 64 Cal. Rptr. 2d 16 (Ct. App. 1997), the Court of Appeals discussed a prior appellate decision that considered whether a defendant who believed she was selling mescaline, but was actually selling LSD, could be charged with possession for sale of both. *Id.* at 21-22 (discussing *People v. Innes*, 93 Cal. Rptr. 829 (Ct. App. 1971). The court concluded, "In our view, [the defendant in *Innes*] was guilty of a single offense, sale of a controlled substance." *Id.* at 22. While there may be "sound reasons, related to due process, for the information to allege" a particular drug, this requirement "*does not transmute the offense of possession of a controlled substance into as many different offenses as there are controlled substances*." *Id*. at 22 (emphasis added). *See also People v. Huerta*, 306 P.2d 505, 507 (Ct. App. 1957) (stating that a mid-trial amendment changing the indictment charge of "marijuana" to "heroin" did not "change the nature of the offense").

As set out in his brief, Appellee believes these cases present the better statement on the subject than any that the government can marshal. But even if this Court believes that there is no smoking gun on this point -- if, as Judge Hawkins points out, both sides can marshal intermediate cases in their favor -- that lack of a definitive answer prevents this Court from finding that state law satisfies *Taylor*'s need for certainty.[2]

[2] This is particularly true under California's unique system of stare decisis. In the absence of a California Supreme Court decision on point, a state trial court faced with conflicting authority from the intermediate appellate courts can simply elect as between them. *Auto Equity Sales, Inc., v. Super. Ct.*, 57 Cal. 2d 450, 455 (1962). If any given court can find that *Romero* is more persuasive than conflicting authority and does not require that the substance is an element, it cannot be said that the identity of the controlled substances is necessarily an element of California law.

The text of the statute sheds little light on the subject. Section 11379 does not contain any of *Mathis*'s hallmarks of divisibility—it does not carry different penalties depending on the drug type or "identify which things must be charged." *Id*. at 2256. To the contrary, § 11379 resembles the example in *Mathis* in which a statute prohibiting assault with one of a list of eight specific weapons "merely specifies diverse means of satisfying a single element of a single crime." *Id.* at 2249. Thus, the text of the statute brings the Court no closer to certainty on the means/elements distinction.

Finally, in the absence of clear case law or textual certainty, *Mathis* permitted a cautious "peek" at record documents for the "sole and limited purpose of determining whether the listed items are elements of the offense." *Id.* at 2256. Notably, nothing in *Mathis* restricts this "peek" to the defendant's own documents. *See id.* (stating that federal judges may look at the record of "*a* prior conviction") (emphasis added). Indeed, limiting the inquiry to the defendant's own conviction documents would do exactly what Justice Breyer's dissent urged (and what the majority explicitly rejected)—it would turn an elements-based inquiry into a factual one by collapsing any distinction between the offense's elements and a prosecutor's factual allegations in one particular case. *See id.* at 2260 (Breyer, J., dissenting). More importantly, because the analysis is categorical in nature, a prosecutor's charging language in one case cannot dictate the elements of an offense -- an element is a thing that must be proved or admitted *in every case*. *Id.* at 2248.

With this in mind, California record documents do not definitively resolve the question of whether drug type is an element or a means. The complaint in this case -- typical of many -- describes the offense using the umbrella term ("The crime of Transportation of a Controlled Substance, a Felony, was committed. . .") and also the factual predicate ("who did unlawfully transport methamphetamine.") (GER 61.) The last clause, however, does not prove that methamphetamine is an element. For one thing, the Court in *Romero* said that it may be required -- or at least prudent -- to include the exact substance in the charging document as a matter of due process and to put the defendant on notice of the charges against him. *Romero*, 64 Cal. Rptr. 2d at 21 (citing *Sallas v. Mun. Ct.*, 86 Cal. App. 3d 737, 742-44 (1978). The presence in a charging document sheds little light on the means/element question if it is required for a reason that has nothing to do with jury unanimity. Second, an element is something that must be proved in every case, but California charging documents are not always narrowed to one specific substance. *See Ross v. Municipal Court of Los Angeles*, 122 Cal. Rptr. 807 (Ct. App. 1975) (charging document alleging a "controlled substance" provided the defendant fair notice and need not specify "the means by which he committed the crime") (emphasis added); *People v. Gelardi*, 175 P.2d 855, 857 (Ct. App. 1946) (defendant charged with selling "a narcotic, to-wit: Opiates," a category of substances, rather than one particular substance).

As noted above, *supra* at 3, California's model jury instructions call for the court to insert a controlled substance, but a nearly identical jury instruction did not save Iowa's jury instruction from indivisibility in *Mathis*. Under this Court's decision in *Chavez-Solis v. Lynch*, 803 F.3d 1004 (9th Cir 2015), this is correct: there, this Court held that a jury instruction with a list of options in brackets for the court to choose did not signify that each of those options represents a different offense. Rather, "[a]ll the model jury instructions reveals is that at least one [option] must be filled in so that the jury instruction will be complete." *Id.* at 1013. In this context, the jury instruction's <*insert type of controlled substance*> is essentially the equivalent of a bracketed list containing all the controlled substances in the California schedules.

In Mr. Martinez's case, as is many cases, no document but the complaint refers to a particular substance; the minute orders and abstract refer to the offense as transportation of a controlled substance. And, indeed, the BIA confronts situations where the record of conviction contains no reference to a particular substance whatsoever. *E.g.*, *In re Yolanda Medel-Navarro*, 2005 WL 698568, at *2 (BIA 2005) (noting that "the record in this matter fails to identify the controlled substance involved in the respondent's conviction"). As elements are things that must necessarily proved or admitted in every case, *Mathis*, 136 S.Ct. at 2248, such examples suggest that the identity of the controlled substance cannot be an element of the offense.

Because *Mathis* abrogates *Coronado*, and because state case law, the statutory text, and the record documents do not conclusively show that drug type is an element of § 11377, "*Taylor*'s demand for certainty" has not been met. *Id.* at 2257. As such, under *Mathis*, this Court may not assume that drug type is an element of the offense and must proceed with the assumption that the statute is indivisible.

Sincerely,

s/ Brianna Fuller Mircheff
Brianna Fuller Mircheff
Deputy Federal Public Defender

Attorney for Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and 28(j), I certify that this supplemental brief is proportionally spaced, has a typeface of 12 points or more, and, according to the word processor used to prepare this brief, contains 2,800 words.

DATED: July 22, 2016 /s/ *Brianna Fuller Mircheff*

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2016, I electronically filed the foregoing Supplemental Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: July 22, 2016 /s/ *Brianna Fuller Mircheff*