

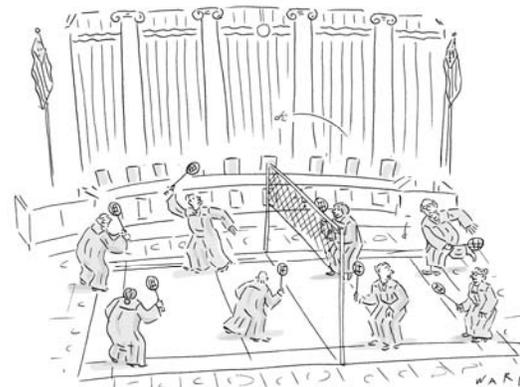
# Case o' the Week

*A little memo on a big case.*

From: Steven Kalar, Federal Public Defender, N.D. Cal. FPD      Date: Monday, Oct. 3, 2016  
Re: *United States v. Martinez-Lopez*, No-14-50014 (Ord., sua sponte, taking case *en banc*) (9th Cir. Sept. 26, 2016): **Sentencing**: Ninth to decide divisibility of § 1135

**Players:** Sua sponte *en banc* call announced by Chief Judge Thomas. Original appeal by CD Cal AFPDs Matthew Larsen and David Menninger. Original panel, filing order vacating submission of the case, Judges Reinhardt, Noonan and Nguyen. Related case, *United States v. Rosales-Aguilar*, stayed pending resolution of *Martinez-Lopez* by Judges Kozinski, O'Scannlain, and Bybee.

**Facts:** Martinez-Lopez pleaded guilty to illegal reentry, and was hit with the +16 OL increase for a "drug trafficking" prior under Cal. Health & Safety Code § 11352. *Appellant's Opening Brief, Dkt. 14-1* at 7 ("AOB"). Martinez-Lopez (unsuccessfully) contested the enhancement, arguing that under *Descamps*, 133 S.Ct. 2276 (2013), this statute was *not divisible*, and the modified categorical approach was thus verboten. *Id.* at 4. After oral argument in the Ninth, the panel stayed submission pending resolution of *United States v. Rosales-Aguilar*, No. 14-50315. Then, last August, there was a *sua sponte* call for *en banc* consideration of *Martinez-Lopez*. On September 26, 2016, *Martinez-Lopez* was ordered to be heard *en banc*: argument is scheduled for the week of January 17, 2017. The Court then granted Martinez-Lopez's motion to file supplemental briefing in light of *Mathis v. United States*, 136 S.Ct. 2243 (2016).



"But it's nice to have even teams, for once."  
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**Issue(s): (Narrow):** Is § 11352 a "divisible" statute, permitting a modified categorical analysis? **(Broad):** How will the Ninth Circuit approach the "divisibility" of statutes after the Supreme Court's decision in *Mathis*?

**Held:** ? We'll know in 2017 (or maybe 2018.) An earlier Ninth *en banc* effort on a similar issue took seventeen months from oral argument, to the arrival of the decision. See <http://circuit9.blogspot.com/2011/08/case-o-week-godot-arrives-and-wed.html> (*Aguila Montes de Oca* survived little longer than the deliberation: it was abrogated in two years by *Descamps*).

**Of Note:** What's an "element?" We've been debating that, well, "elemental" question since *Apprendi* and *Buckland*, 289 F.3d 558 (9th Cir. 2002) (*en banc*). Justice Kagan took another stab at the question in the *Mathis* decision, explaining what constitutes an "element" in the context of the ACCA. 136 S.Ct. 2243. Why the brouhaha? It's an important question, because if a statute provides mere *alternative means* of committing a crime (just facts illustrating how one can commit the crime), a district court can't rummage about an old conviction record with the modified categorical analysis. *Id.* at 2253. By contrast, if a statute requires different *elements* – requirements that must be proved to a unanimous jury for a conviction -- the modified categorical approach can be "used as a tool to identify the elements of the crime of conviction." *Id.* It makes a big difference: for Mr. Martinez Lopez, this categorization means years in federal custody. So, are the verbs of H&S § 11352 – transports, imports, sells, furnishes, administers, or gives away – "mere facts," or required elements, after *Mathis*? The State has been clear – for eighty years Cali D.A.'s have not needed jury unanimity on *how* a defendant violates § 11325 to earn a conviction (the classic requirement of an "element.") Will the Ninth honor what California has made clear: that H&S § 11352's verbs are "mere facts," not elements? Time will tell.

**How to Use:** If illegal reentry cases aren't on your docket, does *Martinez Lopez* matter? Yep. For example, *Johnson* litigators have argued that Ninth caselaw on the divisibility of the fed bank robbery statute is *pre-Mathis*. When correctly interpreted as a single crime with a single set of elements, § 2113(a) reaches non-violent conduct and is not a "crime of violence." See *United States v. Asim Daniels*, 11-CR-470 H (S.D. Cal. 2016) (reply brief of AFD Kara Hartzler). Potentially plenty of collateral impact, from this *en banc* case.

**For Further Reading:** Which Ninth jurist will have the biggest impact on the outcome of *Martinez Lopez*? Trick question: it is the as-yet-unknown Ninth – *Justice*. For musings on *Mathis* and the categorical analysis, see SCOTUS blog here: <http://www.scotusblog.com/2016/06/opinion-analysis-victory-for-the-categorical-approach-in-immigration-and-federal-criminal-sentencing-but-for-how-long/>