

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

United States Court of Appeals  
Fifth Circuit

**FILED**

January 6, 2017

Lyle W. Cayce  
Clerk

\_\_\_\_\_  
No. 14-60888  
\_\_\_\_\_

JOSE FLORES-LARRAZOLA, also known as Jose Maria Flores, also known  
as Jose Maria Flores-Larrazola,

Petitioner

v.

LORETTA LYNCH, U. S. ATTORNEY GENERAL,

Respondent

\_\_\_\_\_  
Petition for Review of an Order of the  
Board of Immigration Appeals  
\_\_\_\_\_

Before DAVIS, ELROD, and HIGGINSON, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is **DENIED**. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5<sup>TH</sup> CIR. R. 35), the Petition for Rehearing En Banc is **DENIED**.

In his petition, Flores-Larrazola argues that the relevant Arkansas statute – Ark. Code Ann. § 5-64-401(a) – is indivisible based upon the Supreme Court’s decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016). We

disagree. The Arkansas Supreme Court has held that Ark. Code Ann. § 5-64-401(a) is divisible,<sup>1</sup> and under *Mathis*, we must heed its command.<sup>2</sup>

*Spaho v. United States Attorney General*, 837 F.3d 1172, 1177 (11th Cir. 2016), also supports our holding. In that case, the Eleventh Circuit analyzed a Florida statute that provides in relevant part that “a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance.”<sup>3</sup> The court held that the statutory “text delineates six discrete alternative elements: sale, delivery, manufacture, possession with intent to sell, possession with intent to deliver, and possession with intent to manufacture. Accordingly, the statute is divisible.”<sup>4</sup>

Our divisibility analysis mirrors that of *Spaho*. Ark. Code Ann. § 5-64-401(a) renders it unlawful for any person to purposely, knowingly, or recklessly manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance. These twelve elements, like the six in *Spaho*, come together to create “several different crimes.”<sup>5</sup>

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<sup>1</sup> *Cothren v. State*, 42 S.W.3d 543, 547—49 (Ark. 2001) (holding that “manufacturing a controlled substance” and “possession of a controlled substance with the intent to deliver” are separate offenses that both fall within the purview of Ark. Code Ann. § 5-64-401(a)).

<sup>2</sup> *Mathis*, 136 S. Ct. at 2256; see *United States v. Howell*, 838 F.3d 489, 498 (5th Cir. 2016) (holding that a Texas statute is “clear[ly]” indivisible based upon a prior ruling of the Texas Court of Criminal Appeals).

<sup>3</sup> Fla. Stat. Ann. § 893.13(1)(a).

<sup>4</sup> *Spaho*, 837 F.3d at 1177.

<sup>5</sup> *Mathis*, 136 S. Ct. at 2254.