PARSING PRIOR CONVICTIONS: *MATHIS V. UNITED STATES* AND THE MEANS–ELEMENT DISTINCTION

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Legislatures often instruct judges to impose harsher punishments on people who have prior criminal convictions—for example, a conviction for a "crime of violence" or for a "crime involving moral turpitude." But how are judges to determine whether a person has such a conviction? In Mathis v. United States*, the Supreme Court clarified that judges can rely on only the legal "elements" of prior convictions, not the factual "means" the person employed in committing the prior offense. The* Mathis *dissenters predicted that this approach would prove a challenge for lower courts because state law is often unclear about whether statutory language lists alternative elements or alternative means.*

This Note surveys the court of appeals cases that applied Mathis *in the first fifteen months after it was decided. It finds that the* Mathis *rule has been more workable than the dissenters predicted, but also not straightforward to apply in all cases. The Note then identifies three aspects of prior-conviction doctrine that remain unsettled after* Mathis *and proposes solutions. First, courts should not feel obligated to resolve the means–element question when the record of prior conviction would not support an enhanced sanction under either interpretation. Second, courts should be permitted to impose prior-conviction enhancements even in the presence of some legal uncertainty about the nature of the prior conviction, so long as there is no factual uncertainty about what the defendant was convicted of. And third, facts alleged in indictments alone are never sufficient to establish factual certainty about the nature of a prior offense.*

INTRODUCTION

In December 1980, an Iowa prosecutor charged Richard Mathis with second-degree burglary, "committed as follows: . . . These men broke into an occupied structure and a place where something of value is kept, to-wit: the house and garage of Allen Harvey . . . ."[1] Mathis then pleaded guilty to second-degree burglary and was incarcerated.[2] This decades-old conviction took on new significance in 2014, when Mathis pleaded guilty

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1. Joint Appendix at 60, Mathis v. United States, 136 S. Ct. 2243 (2016) (No. 15-6092) [hereinafter *Mathis* Joint Appendix], 2016 WL 4524465.

2. Id. at 61.

to a federal charge of being a felon in possession of a firearm.[3] The sentencing judge had to determine whether Mathis's prior convictions made him an "armed career criminal" and therefore subject to a fifteen-year mandatory minimum penalty.[4]

The key point of contention was whether the prior convictions were for a burglary of a "building," which is required for the prior convictions to trigger the mandatory minimum in the Armed Career Criminal Act (ACCA).[5] At first the answer seems obvious: Mathis pleaded guilty to burgling the house of Allen Harvey. Houses are buildings, and therefore the prior conviction should qualify. But that is not quite right. Mathis did not plead guilty to burgling Allen Harvey's house or to any other specific facts; rather, the district court accepted his plea of guilty simply "to the charge of burglary in the 2nd degree."[6]

When statutes attach downstream consequences to a certain type of conviction, how should courts determine whether a defendant's prior conviction falls within the statutory definition? That question has persistently vexed courts asked to apply such statutes.[7] And the answer has enormous human consequences. ACCA provides a much-litigated example: While a first-time felon-in-possession is subject to a ten-year maximum sentence,[8] a defendant given the "career criminal" label faces a fifteen-year *minimum* sentence.[9] Similarly, courts must determine the nature of prior convictions in order to apply the federal sentencing guidelines' various criminal-history enhancements.[10] And deportation statutes require courts to consider whether a potential deportee has been convicted of an "aggravated felony" or a "crime involving moral turpitude."[11]

In each of these areas, a statute defines the types of offenses that qualify as predicates for a legal consequence. Federal judges must then

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3. Id. at 44, 58.

4. Id. at 23–24.

5. See *Mathis*, 136 S. Ct. at 2250–51 (describing the lower courts' opinions and the question presented).

6. *Mathis* Joint Appendix, supra note 1, at 61.

7. See, e.g., Taylor v. United States, 495 U.S. 575, 580 (1990) (describing the challenge of determining what qualifies as a prior conviction for "burglary"); see also infra Part I (tracing the development of federal courts' approaches to prior convictions).

8. 18 U.S.C. § 924(a)(2) (2012).

9. Id. § 924(e).

10. See, e.g., U.S. Sentencing Guidelines Manual § 2K2.1(a) (U.S. Sentencing Comm'n 2016) (increasing the applicable sentencing guidelines range if the defendant has "felony convictions of either a crime of violence or a controlled substance offense"); id. § 4B1.1 (describing the "career offender" enhancement).

11. See 8 U.S.C. § 1229b(a) (2012) (prohibiting the Department of Justice from canceling removal of a permanent resident who has been convicted of an aggravated felony); id. § 1229b(b) (prohibiting the Department of Justice from canceling removal of a nonpermanent resident who has been convicted of a crime involving moral turpitude).

examine records of prior convictions—records that reflect the varied criminal law and practice of all fifty states[12]—and determine whether those prior convictions fit the statutory definition.[13] The manner in which judges approach this task determines whether individuals are subject to serious consequences such as deportation or increased terms of incarceration.

This Note examines the Supreme Court's latest attempt to provide a framework for evaluating prior convictions, *Mathis v. United States*. In short, *Mathis* made clear that judges determining whether a prior conviction triggers a statutory consequence may examine only the legal elements of the prior conviction, not the factual means of commission.[14] The dissenters argued that this approach would be difficult to apply because state law is often unclear on which facts are "elements" and which are merely "means."[15] This Note adds four contributions to the debate. First, it finds that *Mathis* has proven workable in early applications of its approach, though it does often require federal judges to interpret ambiguous state law.[16] Second, it argues that the judicial burden of applying the *Mathis* rule can be lessened by rejecting dicta in the majority opinion that would treat this inquiry into state law as a "threshold" issue that must be resolved before examining the record documents of the defendant's prior conviction.[17] Third, it argues that courts should be permitted to impose prior-conviction enhancements even in the presence of some legal uncertainty about the nature of the prior conviction, so long as there is no factual uncertainty about whether

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12. See President's Comm'n on Law Enf't & Admin. of Justice, The Challenge of Crime in a Free Society 7 (1967), http://www.ncjrs.gov/pdffiles1/nij/42.pdf [http://perma.cc/2FQX-BEXC] ("Every village, town, county, city, and State has its own criminal justice system, and there is a Federal one as well. All of them operate somewhat alike. No two of them operate precisely alike.").

13. Alina Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N.Y.U. L. Rev. 1669, 1675–76 (2011) (describing such categorization in immigration cases); David C. Holman, Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act, 43 Conn. L. Rev. 209, 218 (2010) (describing such sentencing in ACCA cases); Doug Keller, Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases Are Unjust and Unjustified (and Unreasonable Too), 51 B.C. L. Rev. 719, 760–61 (2010) (describing such sentencing under the federal sentencing guidelines).

14. Mathis v. United States, 136 S. Ct. 2243, 2257 (2016) ("ACCA involves, and involves only, comparing elements. Courts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense. They may not ask whether the defendant's conduct—his particular means of committing the crime—falls within the generic definition.").

15. Id. at 2263 (Breyer, J., dissenting) ("The majority's approach, I fear, is not practical."); id. at 2268–69 (Alito, J., dissenting) (arguing it will be difficult for federal judges to make the means–element distinction because "state-court cases on the question are rare").

16. See infra section II.A.

17. See infra section III.A.

the defendant admitted or was convicted of conduct that would constitute a qualifying offense.[18] And fourth, this Note argues that facts alleged in indictments alone are never sufficient to establish factual certainty about the nature of a prior offense.[19]

Part I summarizes the Court's long-evolving approach to classification of prior convictions. Part II evaluates the court of appeals cases that applied *Mathis* in the six months after it was decided, reaching the finding that the majority's rule has proven workable, though not always straightforward in application. Part III presents recommended interpretive clarifications of *Mathis*.

I. THE CHALLENGE OF RECIDIVIST SENTENCING IN A FEDERAL SYSTEM

Recidivist sentencing rules are a familiar feature of the American criminal justice system, most famously exemplified by "three-strikes" laws.[20] Such sentencing rules impose longer sentences on offenders with a pattern of criminal behavior, reasoning that recidivists are more culpable[21] and that incarcerating habitual offenders is an effective way to decrease crime.[22] These rules raise a host of challenging policy questions.[23] This Note deals with a question of implementation that comes

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18. See infra section III.B.

19. See infra section III.C.

20. See 18 U.S.C. § 924(e)(2) (2012) (imposing enhanced penalties for felon-in-possession offenders with three qualifying prior convictions); Erwin Chemerinsky, Cruel and Unusual: The Story of Leandro Andrade, 52 Drake L. Rev. 1, 4–5 (2003) (noting that "[e]very state has some form of recidivist sentencing law" and that during the 1990s many states enacted more punitive statutes termed "'three strikes and you're out'" laws); Julian V. Roberts, The Role of Criminal Record in the Sentencing Process, 22 Crime & Just. 303, 310 (1997) (describing state "statutes that provide for enhanced sentences for offenders with prior convictions").

21. See Youngjae Lee, Repeat Offenders and the Question of Desert, *in* Previous Convictions at Sentencing 49, 49–51 (Julian V. Roberts & Andrew von Hirsch eds., 2010) (noting the federal sentencing guidelines partly justify their criminal-history enhancements on retributivist grounds and articulating a retributivist justification for such enhancements).

22. See Roberts, supra note 20, at 316–17 (describing the utilitarian justification that "previous criminal conduct is predictive of future offending").

23. Consider four such questions: (1) What sorts of past crimes predict future offending? See Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?, 5 Criminology & Pub. Pol'y 483, 483 (2006) (finding the predictive impact of prior convictions fades after about seven years); Michael S. Vigorita, Prior Offense Type and the Probability of Incarceration, 17 J. Contemp. Crim. Just. 167, 167–69, 186 (2001) (finding, in a sample of state cases, no effect of prior-offense similarity on the likelihood of discretionary incarceration). (2) How many offenses are necessary to indicate that a defendant is a habitual offender? See Davis Weisburd, Elin Waring & Ellen F. Chayet, White-Collar Crime and Criminal Careers 52–57 (2001) (finding marked differences in the demographic characteristics of "chronic offenders" with three or more arrests and "low-frequency offenders" with only one or two). (3) Are prior convictions a morally or legally improper

after judgments about which, if any, prior convictions should carry downstream consequences. That is, how does a sentencing judge know that a defendant has a qualifying prior conviction? After all, in a federal system, a defendant may have prior convictions under a variety of different state or federal criminal statutes. Many of these statutes seek to prevent similar conduct—for example, assault or robbery—but define violations of the law in slightly different ways.

There are three key contexts in which federal prior-offense categorization is repeatedly litigated: (1) sentencing under ACCA, (2) sentencing under the federal sentencing guidelines, and (3) cancellation of removal proceedings under 8 U.S.C. § 1229b.[24] In each context, the relevant text provides a different definition of the qualifying predicate offenses.[25] But the statutes and regulations leave unaddressed the important question of how sentencing judges should determine whether court records adequately establish that a defendant was convicted of a qualifying prior offense. This Part introduces the judicially created doctrine that has developed to enable such prior-offense categorization. Interestingly, courts employ the same approach in all three contexts[26] even though the Sixth Amendment does not constrain judicial fact-finding under advisory

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basis for enhancing sentences? See Evan Tsen Lee, *Mathis v. U.S.* and the Future of the Categorical Approach, 101 Minn. L. Rev. Headnotes 263, 274–77 (2016) [hereinafter Lee, Future of the Categorical Approach], http://www.minnesotalawreview.org/wp-content/uploads/2016/11/Lee-1.pdf [http://perma.cc/Y8UQ-LPY3] (suggesting that recidivist enhancements are multiple punishments for the same crime, raising double jeopardy concerns); Claudio Tamburrini, What's Wrong with Recidivist Punishments?, *in* Recidivist Punishments 63, 74–75 (Claudio Tamburrini & Jesper Ryberg eds., 2012) (rejecting classic arguments in favor of recidivist enhancements). (4) How large should recidivist enhancements be? See Amy Baron-Evans et al., Deconstructing the Career Offender Guideline, 2 Charlotte L. Rev. 39, 49 (2010) (arguing the career-offender guideline is "more severe than necessary to achieve the purposes of sentencing").

24. See supra notes 8–11 (citing these provisions); infra Part II (detailing recent cases in which federal courts have confronted the issue of prior-offense categorization).

25. See, e.g., 8 U.S.C. § 1229b(a)(3) (2012) ("aggravated felony"); 18 U.S.C. § 924(e) (2012) ("violent felony"); U.S. Sentencing Guidelines Manual § 4B1.1(a) (U.S. Sentencing Comm'n 2016) ("crime of violence or a controlled substance offense"). Similarly, 8 U.S.C. § 1229b(b)(1)(C) incorporates the definition of a "crime involving moral turpitude" from 8 U.S.C. §§ 1182(a), 1227(a)(2).

26. See Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (applying the categorical approach in the ACCA context); Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185–86 (2007) (applying the categorical approach in the immigration context); United States v. Giggey, 551 F.3d 27, 38–39 (1st Cir. 2008) (noting "circuits uniformly apply a categorical approach" in determining whether prior convictions trigger provisions of the federal sentencing guidelines). But see Nijhawan v. Holder, 557 U.S. 29, 36 (2009) (concluding, based on statutory differences, that certain aspects of an immigration statute require "circumstance-specific" rather than categorical treatment (internal quotation marks omitted)).

sentencing guidelines[27] and does not apply at all in immigration proceedings.[28]

Section I.A briefly describes two sentencing archetypes, conduct sentencing and conviction sentencing, to illuminate the policy trade-offs involved in charting a middle course. Section I.B describes the limits that Sixth Amendment doctrine imposes on sentencing policy. These sections provide the practical and constitutional background that has shaped the Court's doctrine of prior-conviction sentencing. Section I.C lays out the pre-*Mathis* evolution of that doctrine. It traces first the "categorical approach," in which courts determine only whether the statute defining a defendant's prior conviction necessarily (that is, "categorically") meets the definition that triggers a later penalty. It then turns to the "modified categorical approach," in which courts can examine certain documents from the prior conviction, using them to determine which subpart of a statute the defendant was convicted under. Finally, section I.D explores how courts determine when to use the pure categorical approach and when to use the modified categorical approach. Section I.D also examines the five opinions written in *Mathis*, which made various predictions about how the majority's rule would work in practice.

A. *Prior Conduct and Prior Convictions*

It is helpful at the outset to imagine two possible recidivist sentencing regimes: conduct sentencing and conviction sentencing.[29] Under a pure conduct-sentencing regime, the judge would impose a sentence based not only on the instant offense but also on prior-offense conduct. The practical downside of such a regime is obvious: It would entangle the parties in mini-trials over past conduct. Alternatively, imagine a pure conviction-sentencing regime. Under this system, the federal sentencing judge would not hear any evidence about prior convictions but would look only to the judgments entered in the previous cases. That is, the federal judge would not inquire into the real-world facts of what hap-

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27. See *Mathis*, 136 S. Ct. at 2252 (noting the Sixth Amendment prohibition on judicial fact-finding that increases the maximum possible sentence (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000))); United States v. Booker, 543 U.S. 220, 246 (2005) (Breyer, J., delivering the opinion of the Court in part) (applying the Sixth Amendment to render federal sentencing guidelines advisory).

28. See Ali v. Mukasey, 521 F.3d 737, 741 (7th Cir. 2008) (reasoning that because immigration proceedings "are not criminal prosecutions," *Apprendi* does not apply); Jennifer Lee Koh, The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime, 26 Geo. Immigr. L.J. 257, 276 (2012) (noting that in the immigration context, "the Sixth Amendment and other constitutional criminal protections do not apply," though characterizing the doctrine that deportation proceedings are noncriminal as "deeply criticized").

29. This section is substantially similar to Justice Breyer's description of "pure 'real offense'" and "pure 'charge offense'" sentencing in *Mathis*, 136 S. Ct. at 2263 (Breyer, J., dissenting).

pened in the prior cases but would consider only the legal facts of the defendant's prior convictions. If the prior convictions qualified as prior offenses under the recidivist sentencing provision, then the judge would enhance the sentence accordingly.

B. *The Sixth Amendment's Limits on Judicial Fact-Finding:* Apprendi *and* Almendarez-Torres

The Sixth Amendment serves as a critical backdrop to recidivist sentencing. In *Apprendi v. New Jersey*, the Court established that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[30] In *Apprendi*, the defendant had pleaded guilty to a firearm charge that carried a penalty of five to ten years, but then the sentencing judge independently found that the defendant had committed the crime with a purpose to intimidate a racial group and imposed a twelve-year sentence.[31] The Court described this as "an unacceptable departure from the jury tradition" and found it in violation of the Sixth and Fourteenth Amendments.[32]

As the first quote in the preceding paragraph indicates, there is an exception for prior convictions. In an earlier case, *Almendarez-Torres v. United States*, the Court upheld a sentence that the judge had imposed after independently finding that the defendant had a prior conviction for an "aggravated felony."[33] The baseline statute authorized a two-year sentence for illegal reentry after deportation but allowed a sentence of up to twenty years "if the initial 'deportation was subsequent to a conviction for commission of an aggravated felony.'"[34] In its reasoning, the Court explained that recidivism "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."[35]

C. *The Evolution of the Modified Categorical Approach*

1. *The Categorical Approach.* — The Supreme Court began articulating its modern doctrine of prior-offense categorization in *Taylor v. United States*.[36] There the Court held that federal courts should use a model that mostly embodies a conviction-sentencing regime.[37] Specifically, the Court explained that ACCA "mandates a formal categorical ap-

30. 530 U.S. 466, 490 (2000).
31. Id. at 468–71.
32. Id. at 497.
33. 523 U.S. 224, 227 (1998).
34. Id. at 226 (quoting 8 U.S.C. § 1326(b)(2) (1994)).
35. Id. at 243.
36. See 495 U.S. 575, 600 (1990).
37. See id.

proach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions."[38]

The Court reached this conclusion for three reasons. First, the statute refers to previous "convictions," not prior conduct that would constitute a violation of the law.[39] Second, the legislative history did not indicate that Congress contemplated the sort of in-depth fact-finding that would be necessary to examine the details of a defendant's prior conduct.[40] Third, the Court explained that "the practical difficulties and potential unfairness of a factual approach are daunting."[41] Though *Taylor* predates *Apprendi*, the Court also suggested that judicial imposition of a longer sentence based on independent review of the facts might abridge the right to a jury trial.[42]

The Court noted that the defendant's prior convictions might have occurred under statutes that were "narrower" or "broad[er]" than the language that Congress used to define a qualifying prior conviction.[43] A narrower definition is one that regulates conduct that necessarily fits within the federal definition. A broader definition is one that might have produced a conviction for conduct that Congress did not mean to include as a qualifying prior offense. In the latter case, the Court said that the categorical approach "may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of [the] generic [offense]."[44] For example, the Court explained of the burglary statute at issue in *Taylor*:

> [I]n a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.[45]

This investigation into the nature of a prior conviction was later termed the "modified categorical approach."[46]

2. *The Modified Categorical Approach.* — The Court's endorsement of a limited factual inquiry raised questions of how precisely judges should

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38. Id.
39. Id.
40. Id. at 601.
41. Id.
42. Id.
43. Id. at 599.
44. Id. at 602.
45. Id.
46. See, e.g., Tokatly v. Ashcroft, 371 F.3d 613, 620 (9th Cir. 2004).

conduct such inquiry, an issue addressed in *Shepard v. United States*.[47] The government had alleged that Reginald Shepard was a felon in possession of a firearm and subject to the ACCA enhancement due to four prior burglary convictions.[48] The parties agreed that the Massachusetts statute, under which Shepard had been previously convicted, punished a broader range of conduct than the ACCA predicates.[49] But the government argued that the convictions were necessarily for qualifying conduct under the modified categorical approach.[50] Because Shepard had pleaded guilty to the prior burglaries, there were no jury instructions available, and the government asked the district court to consider police reports as evidence that Shepard's prior convictions should qualify.[51]

The Court rejected the use of police reports, reasoning that it would open the door to the broader factual inquiries that *Taylor* meant to prevent.[52] Ultimately, the Court explained that the evidence judges could consider in applying the modified categorical approach to guilty pleas was "limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."[53]

D. *Alternative Elements and Alternative Means*

Though *Shepard* provided clear guidance on what documents courts could consider in applying the modified categorical approach, a further circuit split developed concerning when courts could reach the modified categorical approach at all.[54] Some courts held that they could employ the modified categorical approach whenever a statute criminalized a broader range of conduct than the federal generic offense.[55] Others held that when a statute was merely broad but did not set out a disjunctive list of alternative forms of violation, only the pure categorical approach was permissible.[56]

This circuit split rested on the difference between statutes that may simply be violated in various ways and those that are textually divisible. Conceptually, every criminal statute may be violated in a number of dif-

47. 544 U.S. 13, 16 (2005).

48. Id.

49. Id. at 17.

50. Id. at 16–17.

51. Id.

52. Id. at 22–23.

53. Id. at 26.

54. See Descamps v. United States, 133 S. Ct. 2276, 2283 & n.1 (2013) (noting the presence of this circuit split).

55. See, e.g., United States v. Armstead, 467 F.3d 943, 948 (6th Cir. 2006), abrogated by *Descamps*, 133 S. Ct. 2276.

56. See, e.g., United States v. Beardsley, 691 F.3d 252, 268–69 (2d Cir. 2012).

ferent ways. Take, for example, New York's third-degree assault statute, which provides that a defendant is guilty of the offense when "[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person."[57] A defendant might violate this statute by intentionally punching a victim or by intentionally shooting a victim; either would be sufficient for a conviction. As a result, for a later judge required to determine whether the defendant had a prior conviction involving the use of a firearm,[58] the bare fact of conviction would not reveal whether a New York third-degree assault conviction qualifies. Compare New York's second-degree assault statute, which provides that a defendant violates the statute when "[h]e recklessly causes physical injury to another person who is a child under the age of eighteen by intentional discharge of a firearm, rifle or shotgun."[59] The second-degree assault statute also provides numerous other ways in which it can be violated, but the presence of particular text specifying the involvement of a firearm makes it possible that the record of conviction will reveal whether the defendant's prior offense involved the use of a firearm.

In two recent cases, *Descamps v. United States* and *Mathis v. United States*, the Supreme Court decided first that only textually divisible statutes allow a sentencing judge to apply the modified categorical approach[60] and, second, that the different textual components must be not "means" but "elements."[61]

1. *Requiring a Textual Basis for Divisibility*—Descamps v. United States. — In *Descamps*, the Supreme Court resolved the circuit split outlined above, holding that the modified categorical approach was permissible only when a statute is "divisible."[62] The Court explained that a divisible statute "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile."[63] The Court acknowledged that indivisible statutes also implicitly set out a list of means of commission;[64] thus, the only conceptual difference between indivisible statutes and divisible ones is that the divisible statute's alternatives are explicit.[65] But the Court reasoned

57. N.Y. Penal Law § 120.00(1) (McKinney 2016).

58. Cf. 18 U.S.C. § 924(e)(2)(B) (2012) (defining an act of juvenile delinquency as a "violent felony" only if it involves "the use or carrying of a firearm, knife, or destructive device").

59. N.Y. Penal Law § 120.05(4–a).

60. *Descamps*, 133 S. Ct. at 2293.

61. Mathis v. United States, 136 S. Ct. 2243, 2247–48 (2016).

62. *Descamps*, 133 S. Ct. at 2293.

63. Id. at 2281.

64. Id. at 2289.

65. Id. A further example may help illuminate the distinction. Suppose that a court must determine whether a prior conviction "is burglary." Cf. 18 U.S.C. § 924(e)(2)(B)

that "only divisible statutes enable a sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime."[66] Indeed, the Court said, allowing the modified categorical approach for indivisible statutes "would altogether collapse the distinction between a categorical and a fact-specific approach" because the sentencing judge could always "imaginatively transform[]" a broader statute to cover a range of narrow factual alternatives.[67]

Justice Alito, dissenting, argued that it would often be difficult to determine whether a statute was divisible.[68] He observed that statutes often list alternatives even though the prosecution need not prove any particular one of these alternatives beyond a reasonable doubt.[69] He offered as an example a Michigan statute that "criminalizes assault with 'a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon'"[70] and noted that, despite this seemingly divisible list, Michigan courts have held that the prosecution merely needs to prove that a defendant used a dangerous weapon, not any particular weapon.[71] In a subsequent prosecution in which it was important whether the prior conviction involved use of a firearm, for example, it would be critical whether the statute listed alternative elements or alternative means. Consequently, Justice Alito argued, the *Descamps* majority would complicate lower courts' application of ACCA because "[t]he only way to be sure whether particular items are alternative elements or simply alternative means of satisfying an element may be to find cases concerning the cor-

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(2012) (defining "violent felony" to include any crime that "is burglary"). Suppose further that the defendant has a prior conviction for theft under Texas law, which means that he "unlawfully appropriate[d] property with intent to deprive the owner of property." Tex. Penal Code § 31.03(a) (2015). This statute *can* be violated by means that resemble burglary. See Rice v. State, 861 S.W.2d 925, 925 (Tex. Crim. App. 1993) (affirming simultaneous convictions for theft and burglary arising out of "the same transaction"). But the theft statute can also be violated in ways that would not satisfy the elements of burglary. Compare Tex. Penal Code § 30.02(a) (requiring, for a burglary conviction, entry to or remaining in a habitation or building), with Moron v. State, 779 S.W.2d 399, 401 (Tex. Crim. App. 1985) (affirming a theft conviction with no evidence that the defendant entered a building). Because there is no text in the theft statute that would allow a finder of fact to specify that it was violated by burglary-like means, the theft statute would be indivisible, such that the sentencing judge in a subsequent case could not employ the modified categorical approach to determine whether the prior conviction qualified as "burglary."

66. *Descamps*, 133 S. Ct. at 2290.

67. Id. at 2290–91.

68. Id. at 2301 (Alito, J., dissenting).

69. Id.

70. Id. (quoting Mich. Comp. Laws Ann. § 750.82(1) (West 2004)).

71. Id. (citing People v. Avant, 597 N.W.2d 864, 869 (Mich. Ct. App. 1999)).

rectness of jury instructions that treat the items one way or the other. And such cases may not arise frequently."[72]

Responding in a footnote, the majority wrote that it saw "no real-world reason to worry" about the difficulty of distinguishing between means and elements.[73] The Court elaborated,

> Whatever a statute lists (whether elements or means), the documents we approved in *Taylor* and *Shepard*—*i.e.*, indictment, jury instructions, plea colloquy, and plea agreement—would reflect the crime's elements. So a court need not parse state law in the way the dissent suggests: When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.[74]

The text of this footnote, referring to both elements and means, produced a further circuit split: Can a sentencing judge apply the modified categorical approach only when a statute lists alternative *elements*, or is a statute that lists alternative *means* sufficient, so long as they are reflected in the *Shepard* documents?[75]

2. *Requiring Alternative Elements, Not Just Means*—Mathis v. United States. — In *Mathis*, the Court resolved this circuit split by holding that "ACCA disregards the means by which the defendant committed his crime, and looks only to that offense's elements."[76] As a theoretical matter, it is straightforward to explain the difference between elements and means. As the *Mathis* Court put it:

> "Elements" are the "constituent parts" of a crime's legal definition—the things the "prosecution must prove to sustain a conviction." At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty. Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements. . . . They are "circumstance[s]" or "event[s]" having no "legal effect or consequence": In particular, they need neither be found by a jury nor admitted by a defendant.[77]

But as a practical matter, determining whether a given statute lists alternative elements or alternative means is more challenging. The question is one of state law, and one that most state courts approach as a

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72. Id. at 2301–02.

73. Id. at 2285 n.2 (majority opinion).

74. Id.

75. Mathis v. United States, 136 S. Ct. 2243, 2251 (2016).

76. Id. at 2256.

77. Id. at 2248 (citations omitted) (quoting Black's Law Dictionary 634, 709 (10th ed. 2014)).

question of legislative intent: That is, did the legislature intend to require proof beyond a reasonable doubt on that specific fact (in which case it is an element) or not (in which case it is merely a means)?[78] Legislatures often simply draft statutes in the alternative, without clearly indicating whether the alternatives are elements or means.[79]

The *Mathis* majority provided three sources of state law that courts could look to in making the means–element distinction: state-court decisions, the text of the statute, and the record of the prior conviction.[80] This Note will refer to these as the "*Mathis* tools," and the core project of Part II is determining how well these tools have served lower courts tasked with distinguishing statutory elements from means.

3. *Conflicting Predictions About the Workability of* Mathis. — *Mathis* produced five separate opinions: (1) Justice Kagan's majority opinion, signed by five members of the Court, (2) Justice Kennedy's concurrence, (3) Justice Thomas's concurrence, (4) Justice Breyer's dissent, joined by Justice Ginsburg, and (5) Justice Alito's dissent. The majority and concurring opinions reveal important differences about the justification for requiring alternative elements. And the dissenting opinions propose alternative methods of applying ACCA that they think are more workable and consistent with congressional purpose.

Justice Kagan offered three key rationales for limiting the modified categorical approach to elements: (1) ACCA's text refers to "convictions" rather than conduct, (2) judicial fact-finding would raise Sixth Amendment trial-by-jury concerns, and (3) non-elemental facts of prior convictions are unreliable because the defendant had little incentive to correct them.[81]

Justice Kennedy's concurrence rejected the second of these rationales, noting that he believes *Apprendi* was wrongly decided and "does not compel the elements based approach."[82] Justice Thomas, by contrast, explained that he believes the *Almendarez-Torres* exception to *Apprendi* is wrong, and thus the Sixth Amendment prohibits any form of judicial reliance on prior convictions.[83] He thus joined the majority approach

78. See, e.g., State v. Peterson, 230 P.3d 588, 591 (Wash. 2010) ("[T]here simply is no bright-line rule by which the courts can determine whether the legislature intended to provide alternate means of committing a particular crime. Instead, each case must be evaluated on its own merits." (internal quotation marks omitted) (quoting State v. Klimes, 73 P.3d 416, 422 (Wash. Ct. App. 2003))).

79. Jessica A. Roth, Alternative Elements, 59 UCLA L. Rev. 170, 180–83 (2011) (noting this trend in drafting and that "courts charged with deciding whether a particular statute or series of statutes create one or more than one offense will frequently reach different conclusions").

80. *Mathis*, 136 S. Ct. at 2256–57.

81. Id. at 2252–53.

82. Id. at 2258 (Kennedy, J., concurring).

83. Id. at 2258–59 (Thomas, J., concurring).

because it at least limits judges' ability to make such factual determinations.[84]

Justice Breyer rejected all three of the majority's rationales. In his view, ACCA's reliance on "convictions" was designed as a "practical" solution to allow sentencing judges to quickly determine whether prior convictions involved the sort of behavior that Congress wanted to target.[85] Justice Breyer therefore attacked the majority's approach primarily on the ground of workability, predicting that if courts must research whether a provision lists elements or means under state law, "[w]hat was once a simple matter will produce a time-consuming legal tangle."[86] He also rejected the *Apprendi* rationale, reasoning that a fact must be proven beyond a reasonable doubt if it was the only alternative that the prior prosecution charged.[87] Perhaps most controversially, Justice Breyer considered the charging document's allegation of a qualifying offense sufficient indication that the defendant's guilty plea necessarily produced a conviction for a qualifying offense.[88]

Justice Alito, having attacked the majority's baseline rationales in *Descamps*,[89] advanced two points at greater length in *Mathis*. First, to the majority's assertion that determining whether a statute listed alternative elements or alternative means would often be easy, Justice Alito bluntly replied, "Really?"[90] By contrast, Justice Alito argued that the majority's approach would require lower courts to delve into an area of state law that is notoriously uncertain.[91] Further, he argued that the Court's approach produced "results that Congress could not have intended."[92] Specifically, Justice Alito suggested that defendants who engaged in the same conduct would be treated differently depending on the drafting of the state statute under which they were convicted. Justice Alito characterized this result as the ultimate example of "pointless formalism."[93]

The differences between these five opinions motivate the questions that Part II explores. First, has the *Mathis* approach proved workable for lower courts to apply? And second, how have courts operationalized the three interpretive tools that *Mathis* suggests?

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84. Id. at 2259.

85. Id. at 2263 (Breyer, J., dissenting).

86. Id. at 2264.

87. Id. at 2265.

88. Id. at 2260 ("[T]he federal sentencing judge can look at the charging documents (or plea colloquy) to see whether 'the defendant was charged only with a burglary of a building.'" (quoting Taylor v. United States, 495 U.S. 575, 602 (1990))).

89. Descamps v. United States, 133 S. Ct. 2276, 2295–301 (2013) (Alito, J., dissenting).

90. *Mathis*, 136 S. Ct. at 2269 (Alito, J., dissenting).

91. Id. at 2269 n.3.

92. Id. at 2268.

93. Id. at 2271.

II. *MATHIS* IN PRACTICE

This Part examines the court of appeals cases that have applied the *Mathis* framework to determine whether a statute is divisible and reaches three conclusions. First, contrary to the dissenters' workability concerns, applying *Mathis* is within the core competencies of the federal judiciary, and the interpretive tools that it provides produce predictable results in most cases. Second, though the *Mathis* inquiry requires parsing of state law to determine whether a statute is divisible, a handful of court of appeals cases omit such analysis and make only a conclusory statement on the question of divisibility. Third, questions remain about how to apply portions of the *Mathis* opinion regarding the level of certainty required about the nature of the prior conviction and the use of record documents.

A. *Cases Illustrating the Workability of* Mathis

1. *Defining Workability.* — What precisely does it mean for a standard to be workable?[94] Justice Breyer criticized the *Mathis* majority's approach on the grounds that it would "produce a time-consuming legal tangle."[95] Further, Justice Breyer feared that the *Mathis* approach would prove to be "not practical" in part because "there are very few States where one can find authoritative judicial opinions that decide the means/element question."[96] Similarly, Justice Alito expressed concern that "[t]he Court's approach calls for sentencing judges to delve into pointless abstract questions" and that lower courts would struggle to apply the means–

94. The word "workable" appears only in Justice Breyer's *Mathis* dissent as a part of a quotation from Fourth Circuit Judge Paul Niemeyer. See id. at 2264 (Breyer, J., dissenting) (stating there are no "clear and workable standards" for applying the means–element distinction (quoting Omargharib v. Holder, 775 F.3d 192, 200 (4th Cir. 2014) (Niemeyer, J., concurring))). This Note uses "workable" throughout as a shorthand for the concerns that Justices Breyer and Alito expressed about lower-court judges' ability to determine whether a statute sets out alternative elements or alternative means. See infra notes 95–97.

95. *Mathis*, 136 S. Ct. at 2264 (Breyer, J., dissenting). Justice Breyer added that "lower court judges have criticized the approach the majority now adopts" and quoted Judge Niemeyer for the proposition that "[b]ecause of the ever-morphing analysis and the increasingly blurred articulation of applicable standards, [lower courts] are being asked to decide, without clear and workable standards, whether disjunctive phrases in a criminal law define alternative elements of a crime or alternative means of committing it." Id. (internal quotation marks omitted) (quoting *Omargharib*, 775 F.3d at 200 (Niemeyer, J., concurring)). In a similar vein, while on the First Circuit, then-Judge Breyer observed that the criminal justice system "must be administratively workable" and that "[t]he more the system recognizes the tendency to treat different cases differently, however, the less manageable the sentencing system becomes." Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest, 17 Hofstra L. Rev. 1, 13 (1988).

96. *Mathis*, 136 S. Ct. at 2263–64 (Breyer, J., dissenting).

element distinction in the frequent cases that raise the applicability of the modified categorical approach.[97]

To evaluate these arguments, one needs an account of what makes a standard "practical" or "workable." Though none of the opinions in *Mathis* provide such an account, the Court has directly confronted workability in the context of the political question doctrine, invoking the concept of "judicially discoverable and manageable standards."[98] Professor Richard Fallon observes that the Court applies this concept in other contexts as well and "sometimes expressly justifies its selection [of a judicial test] as more manageable than the alternatives."[99] Fallon identifies the following "practical desiderata" as probative on the issue of whether a standard is judicially manageable: (1) whether it has sufficient "analytical bite" to be rigorously applied, (2) whether it can generate predictable and consistent results, and (3) whether it requires the courts to make empirical judgments beyond their competence.[100] Finally, Fallon suggests that courts "ultimately make all-things-considered judgments" about which doctrinal test to adopt after considering the preceding indicia of manageability along with the other costs and benefits of the proposed rule.[101] The following section employs Fallon's "practical desiderata" to evaluate whether the *Mathis* rule has been workable as applied by the lower courts.

2. *The* Mathis *Tools Producing Principled Results.* — In most cases, the *Mathis* tools produce predictable results that rest on courts' core

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97. Id. at 2268 (Alito, J., dissenting).

98. Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (quoting Baker v. Carr, 369 U.S. 186, 217 (1963)); see also id. at 288 (concluding a proposed test for identifying impermissible partisan gerrymandering was "not judicially manageable").

99. Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1274, 1297–98 (2006); see also Armstrong v. Exceptional Child Ctr., 135 S. Ct. 1378, 1385 (2015) (invoking the "judicially unadministrable nature" of statutory text as a reason for adopting a construction of the statute that would not require judicial enforcement). Though the *Mathis* majority did not justify its selection of an elements-based approach based on its workability, it did feel the need to say that applying the test would be "easy" in many cases and would only rarely result in "indeterminacy." See *Mathis*, 136 S. Ct. at 2256–57.

100. Fallon, supra note 99, at 1285–96. This accounting simplifies Fallon's criteria in two respects. First, his article avers that, to be manageable, a standard must be capable of being understood. That cannot explain the disagreement in *Mathis*, as the majority and dissents alike treated the means–element distinction as intelligible. See *Mathis*, 136 S. Ct. at 2250 (explaining the difference between means and elements); id. at 2261 (Breyer, J., dissenting) (defining the difference between means and elements in the context of jury unanimity); id. at 2268 (Alito, J., dissenting) (noting "[t]he distinction between an 'element' and a 'means' is important in" the context of jury unanimity). Second, the above summary omits one factor relating to remedial formulation, which is not relevant in the context of prior-conviction consequences. In these decisions, the remedy is always straightforward: If the defendant was not necessarily convicted of a predicate offense, simply do not impose the enhanced sanction.

101. Fallon, supra note 99, at 1312–13.

competencies of statutory and common-law interpretation. Of the first 103 court of appeals decisions confronting the means–element distinction under the *Mathis* framework, only 12 produced split panels.[102] The modified categorical approach jurisprudence, for all its complexity, does provide a relatively rule-bound and predictable framework for decision.

Fallon describes the first practical consideration in the Supreme Court's workability analysis as requiring that a test provide "criteria sufficient to make nonarbitrary distinctions."[103] A test is not unworkable merely because it is difficult to apply but only if "it requires distinctions for which conceptual resources are lacking in too many instances."[104] This section finds that, in most cases, the *Mathis* tools—state cases, statutory text, and the record of conviction—have provided sufficient criteria to make nonarbitrary distinctions in court of appeals cases decided since *Mathis*.

First, state cases have provided guidance in about sixty percent of the court of appeals cases applying the *Mathis* framework.[105] It is important to understand the limitations of this quantitative finding and those that follow. Court of appeals cases do not directly capture how the *Mathis* tools function in the district courts,[106] which handle the bulk of

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102. See infra Appendix; see also Kari Hong, The Absurdity of Crime-Based Deportation, 50 U.C. Davis L. Rev. 2067, 2111–14 (finding a circuit on the side of the split that won out in *Mathis* was no more likely to have split-panel decisions than a circuit more broadly applying the modified categorical approach).

103. Fallon, supra note 99, at 1287.

104. Id. As a paradigmatic example of a test lacking sufficient analytical bite, Fallon points to the Supreme Court's now-discarded distinction between activities that directly affect interstate commerce and those that affect it only indirectly. Id.; see also United States v. Lopez, 514 U.S. 549, 555–56 (1995) (describing the Court's abandonment of the direct–indirect distinction).

105. See infra Appendix. These cases do not always offer explicit holdings about what facts a jury must find unanimously. Rather, the state cases have arisen in a wide variety of legal contexts. See, e.g., United States v. Ocampo–Estrada, 873 F.3d 661, 668 (9th Cir. 2017) (citing In re Adams, 536 P.2d 473, 479 (Cal. 1975)) (relying on a state case upholding multiple sentences under a single statute); Marinelarena v. Sessions, 869 F.3d 780, 786 (9th Cir. 2017) (quoting People v. Horn, 524 P.2d 1300, 1304 (Cal. 1974)) (relying on a state case requiring juries in conspiracy cases to be instructed on the elements of the alleged objects of the conspiracy); United States v. McMillan, 863 F.3d 1053, 1057 (8th Cir. 2017) (quoting State v. Witherspoon, No. A12–1247, 2013 WL 3284272, at *2 (Minn. Ct. App. July 1, 2013)) (relying on a state sufficiency-of-evidence case that described the elements of the offense); United States v. Hudson, 851 F.3d 807, 809 (8th Cir. 2017) (citing Yates v. State, 158 S.W.3d 798, 801–02 (Mo. Ct. App. 2005)) (relying on a state double jeopardy case that described the elements of the offense).

106. See Pauline T. Kim et al., How Should We Study District Judge Decision-Making?, 29 Wash. U. J.L. & Pol'y 83, 84–94 (2009) (observing that quantitative studies of trial courts often improperly assume "that judging at the trial court level is fundamentally the same as judging at the appellate level").

federal cases.[107] Similarly, in examining whether *Mathis* furnishes sufficiently clear criteria to resolve most cases, one should keep in mind that courts of appeals are likely to hear cases that are closer or more challenging than the average case.[108] Despite these limitations, the frequency with which courts of appeals have found state cases to guide their determination of the means–element distinction shows that such declarations of state law are perhaps not as rare as the *Mathis* dissenters feared.[109]

One example of such a case—an "easy" case in the words of the *Mathis* majority[110]—is *Gomez-Perez v. Lynch*.[111] Gomez-Perez sought cancellation of removal proceedings against him, a request that the immigration judge had denied, reasoning that his misdemeanor assault was a "crime of moral turpitude."[112] Though this case arose in an immigration proceeding, courts apply the same categorical approach to determine whether a prior conviction meets a statutory definition in the current proceeding.[113] Gomez-Perez was convicted under a Texas Penal Code provision that defines assault as "intentionally, knowingly, or recklessly cause[ing] bodily injury to another."[114] Only crimes committed with the mental state of intent qualify as crimes involving moral turpitude that make a nonpermanent resident ineligible for discretionary cancellation of removal.[115] In a one-paragraph analysis, the Fifth Circuit said this was not a difficult case under *Mathis* because "Texas law has definitively

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107. Lee Epstein, William M. Landes & Richard A. Posner, The Behavior of Federal Judges 208 (2013).

108. See George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1, 8, 13–17 (1984) (theorizing that parties are most likely to litigate when the dispute is a close case relative to the legal standard); see also Michael Heise, Federal Criminal Appeals: A Brief Empirical Perspective, 93 Marq. L. Rev. 825, 839–42 (2009) (noting selection effects unique to criminal cases, such as the fact that the Double Jeopardy Clause prevents the government from initiating appeals).

109. See Mathis v. United States, 136 S. Ct. 2243, 2268–69 (2016) (Alito, J., dissenting).

110. See id. at 2256 (majority opinion).

111. 829 F.3d 323 (5th Cir. 2016).

112. Id. at 325; see also 8 U.S.C. § 1229b(b)(1)(C) (2012) (preventing discretionary cancellation of removal for aliens convicted of crimes involving moral turpitude).

113. United States v. Mayer, 560 F.3d 948, 951 (9th Cir. 2009) (Kozinski, J., dissenting from the denial of reh'g en banc) ("The categorical approach . . . has been applied with remarkable uniformity to many areas of law. It's used for ACCA; it's used for immigration; it's used for the Sentencing Guidelines.").

114. *Gomez-Perez*, 829 F.3d at 325 (citing Tex. Penal Code Ann. § 22.01(a)(1) (West 2015)).

115. *Mathis*, 136 S. Ct. at 2253 n.3; see also *Gomez-Perez*, 829 F.3d at 325 (noting that Gomez-Perez "sought cancellation [of removal proceedings] as a nonpermanent resident").

answered the 'means or elements' question."[116] And indeed, the Court of Criminal Appeals of Texas has explicitly written:

> The legislature was apparently neutral about which of these three mental states accompanied the forbidden conduct because all three culpable mental states are listed together in a single phrase within a single subsection of the statute. There is no indication that the legislature intended for an "intentional" bodily injury assault to be a separate crime from a "knowing" bodily injury assault or that both of those differ from a "reckless" bodily injury assault. All three culpable mental states are strung together in a single phrase within a single subsection of the statute. All result in the same punishment. They are conceptually equivalent.[117]

Given such a clear interpretation that the different mental states are means, rather than elements, the *Mathis* test is straightforward for the federal sentencing judge to apply: The statute is indivisible.

Similarly, the D.C. Circuit resolved a case under the career-offender guideline[118] in part by reference to state law.[119] The district court had sentenced Dante Sheffield as a career offender in part due to a prior conviction for attempted robbery.[120] The District of Columbia's robbery statute can be violated by the use of force ("against resistance"), the threat of force ("by putting in fear"), or by means that do not involve the use of violent force against a person ("by sudden or stealthy seizure or snatching").[121] By contrast, the attempted robbery statute does not distinguish these separate forms.[122] Instead, as the D.C. Court of Appeals has explained, attempted robbery has only three elements:

> (1) [T]he defendant committed an act which was reasonably adapted to the commission of the offense of robbery, (2) at the time the act was committed, the defendant acted with the specific intent to commit the offense of robbery, and (3) the act went beyond mere preparation, and carried the project forward to within dangerous proximity of the criminal end to be sought.[123]

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116. *Gomez-Perez*, 829 F.3d at 327–28.

117. Landrian v. State, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008).

118. The courts of appeals also utilize the categorical approach articulated in ACCA cases to decide cases under the career-offender guideline. See United States v. Giggey, 551 F.3d 27, 39 (1st Cir. 2008).

119. See United States v. Sheffield, 832 F.3d 296, 314–15 (D.C. Cir. 2016).

120. Id. at 311.

121. D.C. Code § 22-2801 (2017).

122. See id. § 22-2802.

123. *Sheffield*, 832 F.3d at 315 (internal quotation marks omitted) (quoting Robinson v. United States, 608 A.2d 115, 116 (D.C. 1992)).

Thus, D.C. law makes clear that attempted robbery does not have any divisible form in which the jury would necessarily have to find attempted use of physical force, and the statute cannot categorically describe a crime of violence. As these two cases illustrate, state-court decisions do often provide sufficient information to make a nonarbitrary distinction between divisible and indivisible statutes.

This is not to say that parsing state law is always straightforward. In *United States v. Fogg*, the Eighth Circuit considered whether a Minnesota drive-by-shooting conviction was a crime of violence under ACCA.[124] The Minnesota statute contained two provisions, one specifying punishment for drive-by shootings and the other specifying greater punishment for such shooting that involved "firing at or toward a person."[125] Only the latter form would qualify as an ACCA predicate, which requires "use of physical force against the person of another."[126] The panel majority concluded that the second provision must be an additional element under *Apprendi* because it allowed higher punishment than otherwise permissible.[127] In dissent, Judge Myron Bright cited state precedent that the second provision was a separate "sentencing enhancement," and that a person thus could be convicted under the statute without proof of the second element.[128] The majority in turn responded that this was a "misread[ing]" of the state case and pointed to other Minnesota cases holding that sentencing enhancements must be proven beyond a reasonable doubt, thus rendering them elemental for ACCA purposes.[129]

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124. 836 F.3d 951, 954 (8th Cir. 2016).

125. Minn. Stat. § 609.66, subdiv. 1e (2016).

126. *Fogg*, 836 F.3d at 954 (internal quotation marks omitted) (quoting 18 U.S.C. § 924(e)(2)(B)(i) (2012)). In *Fogg*, as in many of the cases considered in this Note, the prisoner's prior convictions might once have been adjudicated crimes of violence under ACCA's "residual clause," which covered felony convictions that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." See 18 U.S.C. § 924(e)(2)(B)(ii). In *Johnson v. United States*, the Supreme Court held that ACCA's residual clause was unconstitutionally vague. 135 S. Ct. 2551, 2557 (2015). This residual clause once functioned as an alternative avenue for sentencing judges to conclude that prior convictions qualified as predicate offenses, and its invalidation accounts for much of the increased frequency of litigation over whether statutes are divisible in such a way that they could qualify as predicate offenses under the remaining provisions of the statute. See Welch v. United States, 136 S. Ct. 1257, 1262, 1268 (2016) (noting the "many offenders sentenced under the Armed Career Criminal Act before *Johnson* was decided" and remanding for consideration of whether the prisoner's prior convictions qualify under the elements clause of ACCA); United States v. Esprit, 841 F.3d 1235, 1237 (11th Cir. 2016) (describing how *Johnson* and *Mathis* had changed the analysis of whether the prisoner's convictions were crimes of violence); King v. United States, 202 F. Supp. 3d 1346, 1349–52 (S.D. Fla. 2016) (tracing the parties' arguments in response to recent ACCA decisions, including *Johnson*).

127. *Fogg*, 836 F.3d at 955.

128. Id. at 960–61 (Bright, J., dissenting) (citing State v. Hayes, 826 N.W.2d 799, 806 (Minn. 2013)).

129. Id. at 955 (majority opinion).

The foregoing discussion illustrates that the import of state law may not always be clear.[130] But parsing judicial decisions and statutory text is within the core competency of federal courts.[131] As *Fogg* illustrates, it is true that *Mathis* and the Supreme Court's other recent ACCA cases have required lower courts to examine new and challenging questions about whether given state statutes set out means or elements.[132] But, at least when state cases are available, construction of those cases provides adequate conceptual resources for courts to decide those new questions in a principled way.

The second *Mathis* tool, statutory text, provides further guidance for making the means–element distinction in the absence of state-court precedent. *Mathis* provides two ways in which the text of a statute could reveal whether an alternatively phrased statute sets out elements or means.[133] First, if alternatives carry different punishments, then they must

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130. For another example of a case in which parsing state law was somewhat challenging, see United States v. Tavares, 843 F.3d 1, 17 (1st Cir. 2016) (predicting, based on higher state and federal precedents, that the Massachusetts Supreme Judicial Court would not follow an intermediate appellate court's decision that certain facts distinguishing forms of assault and battery are nonelemental).

131. See Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (characterizing "careful examination of . . . textual, structural, and historical evidence" as "what courts do"); S.D. ex rel. Dickson v. Hood, 391 F.3d 581, 605 (5th Cir. 2004) ("[S]tatutory analysis does not 'strain judicial competence;' it is the sort of work in which courts engage every day." (quoting Blessing v. Freestone, 520 U.S. 329, 341 (1997)); Sims v. CIA, 642 F.2d 562, 572 (D.C. Cir. 1980) ("Construction of statutes is an area of special judicial competence.").

132. See Transcript of Sentencing Hearing at 13–15, United States v. Fogg, No. 0:14-cr-00249 (D. Minn. Sept. 2, 2015) [hereinafter *Fogg* Transcript of Sentencing Hearing] (characterizing inquiry into whether a fact is elemental as a "difficult issue" and noting that the Supreme Court's invalidation of the residual clause is "putting pressure on this issue in a way there's never been pressure on this issue before").

133. *Mathis* actually suggests a third textual indicator, that "a statute may itself identify which things must be charged," Mathis v. United States, 136 S. Ct. 2243, 2256 (2016), but no court of appeals case has since relied on such a methodology. For that reason, this Note does not examine how this third indicator affects the application of *Mathis*. Further, the proposition that anything that "must be charged" consequently is an element, id., seems questionable as a general statement of law. In support of the proposition, *Mathis* cites as an example of such a statute Cal. Penal Code § 952 (2016), which establishes that "[i]n charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another." And it is true that as a matter of California law those are the only two essential elements of theft. See Lopez-Valencia v. Lynch, 798 F.3d 863, 870 (9th Cir. 2015) (citing People v. Ashley, 267 P.2d 271, 279 (Cal. 1954)). Under New York law, by contrast, an indictment must also "assert[] facts supporting every element of the offense charged." N.Y. Crim. Proc. Law § 200.50(7)(a) (McKinney 2016). The pleading requirement that an indictment must include such supporting facts does not transform them into elements of the charged offense. See People v. Grega, 531 N.E.2d 279, 283–84 (N.Y. 1988) (stating the government is required to allege "a description of the conduct that resulted in the victim's death" though it is "not an element of the crime"). Perhaps this third textual indicator is more consistently accurate as a rule of exclusion rather than as a rule of inclusion—i.e., that any fact that statutorily need not be included in the

be alternative elements to comply with *Apprendi*.[134] In *United States v. Lopez–Jacobo*, the defendant appealed the district court's use of the modified categorical approach.[135] The Tenth Circuit concluded that the modified categorical approach was proper, explaining that "[b]ecause Illinois' statutory alternatives carry different punishments, the subsections reflect alternative elements."[136] Similarly, in *Singh v. Attorney General*, the Third Circuit found a drug statute divisible based on the type of drug, in part because different drugs carried different penalty ranges.[137]

Second, if a statute offers only "illustrative examples," then those examples are mere means rather than elements.[138] Courts of appeals have also used this tool to determine that statutes list alternative means rather than elements. In *United States v. Ritchey*, the Sixth Circuit considered prior convictions under a Michigan statute that criminalized breaking and entering into "a tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat, ship, shipping container, or railroad car."[139] Only if the defendant were convicted of burglary of a "building or other structure" could the prior convictions serve as ACCA predicates.[140] Emphasizing the word "other," the panel reasoned that the statute did not set out alternative elements but rather "non-exhaustive examples" of means that could fulfill a single locational element.[141] The Seventh Circuit conducted a strikingly similar analysis in *United States v. Edwards*, concluding that "[t]he statute's text and structure suggest that the components of each subsection are merely 'illustrative examples' of particular location types."[142] In *Edwards*, this textual analysis was particularly important because there was no controlling state precedent on the issue of whether the particular location burgled was an element or a means.[143]

Between state cases and the text of the statute, there are adequate resources to make a nonarbitrary means–element determination in most

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indictment *cannot* be an element of the offense. Cf. 42 Cecily Fuhr et al., Corpus Juris Secundum: Indictments § 168, Westlaw (database updated Sept. 2017) ("An indictment, information, or complaint is generally required to set forth the elements of the offense sought to be charged.").

134. *Mathis*, 136 S. Ct. at 2256.

135. 656 F. App'x 409, 413 (10th Cir. 2016).

136. Id. at 414.

137. 839 F.3d 273, 282 (3d Cir. 2016).

138. *Mathis*, 136 S. Ct. at 2256.

139. 840 F.3d 310, 315 (6th Cir. 2016) (quoting Mich. Comp. Laws Ann. § 750.110 (West Supp. 2016)).

140. Id. (citing Taylor v. United States, 495 U.S. 575, 598 (1990)).

141. Id. at 320 (internal quotation marks omitted) (quoting United States v. Howard, 742 F.3d 1334, 1348 (11th Cir. 2014)).

142. 836 F.3d 831, 837 (7th Cir. 2016) (quoting *Mathis*, 136 S. Ct. at 2256).

143. Id. at 836.

cases under *Mathis*. Though the preceding paragraphs have been framed in terms of Fallon's analytical-bite prong,[144] the same features of the *Mathis* tools that allow them to provide nonarbitrary criteria for judicial decisionmaking also produce substantial predictability and consistency. Though the categorical approach is complicated,[145] it is also relatively rule-bound.[146] This has continued to be true in the wake of *Mathis*. Only about twelve percent of court of appeals cases confronting the divisibility question after *Mathis* have produced dissents.[147] This is a slightly higher dissent rate than the eight pecent rate found in a random sample of published court of appeals decisions.[148] Nonetheless, the relatively high level of agreement among court of appeals judges in divisibility cases reveals that, in most cases, the *Mathis* tools produce consistent and predictable results.

Finally, the means–element inquiry satisfies Fallon's third practical indicator of workability because it does not require empirical judgments beyond courts' competence. On the contrary, it is an interpretive inquiry that judges are uniquely qualified to undertake.[149] Put another way, *Mathis* requires only that courts resolve a question of law, which raises no concerns about courts' institutional competence.[150] Thus the *Mathis* rule satisfies each of Fallon's practical indicia of workability.[151]

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144. Fallon, supra note 99, at 1287.

145. See United States v. Mayer, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, J., dissenting from the denial of reh'g en banc) (describing the categorical approach as "[c]omplex, to be sure").

146. See United States v. Redrick, 841 F.3d 478, 482 (D.C. Cir. 2016) (describing the categorical approach as "normally rather mechanical").

147. See infra Appendix.

148. See Epstein, Landes & Posner, supra note 107, at 255–56. This should be treated as a rough comparison, as the cases confronting divisibility in *Mathis* differ from the broader sample in a number of ways having nothing to do with the predictability of applying the *Mathis* tools. To mention just a few, the divisibility cases are not all selected for publication, are all from 2016 or 2017, are all criminal cases, and are all merits decisions rather than procedural terminations. Such sampling differences matter, as illustrated by the fact that the dissent rate for all court of appeals cases from 1990 to 2007 is just 2.7%. Id. at 265.

149. See supra note 131 and accompanying text.

150. See Rebecca Sharpless, Toward a True Elements Test: *Taylor* and the Categorical Analysis of Crimes in Immigration Law, 62 U. Miami L. Rev. 979, 985–93 (2008) (employing the law–fact distinction to defend the practice of allowing adjudicators to determine the legal fact of a defendant's prior conviction while barring them from finding historical facts about the conduct involved in the conviction); cf. Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1309 (1976) (noting the challenge for judges posed by cases that require "legislative and predictive factfinding").

151. This Note does not take up the next step that Fallon's analysis suggests—that is, whether the all-things-considered benefits of the rule are justified. See Fallon, supra note 99, at 1293–96. Indeed, the thrust of the dissenters' arguments against the *Mathis* rule was not that it is totally unworkable but rather that the costs of applying it are not worth the benefits that it produces. See, e.g., Mathis v. United States, 136 S. Ct. 2243, 2259 (Breyer,

B. *Cases Omitting a Full Discussion of Divisibility*

On the whole, the circuit courts have taken *Mathis* seriously and faithfully applied its instructions. There are a few cases, however, in which the opinion makes a conclusory statement that a statute is divisible based on its text alone. In *United States v. Madkins*, for example, a Tenth Circuit panel asserted, without analysis, that Kansas's controlled-substances statute was divisible.[152] Though it seems that the defense did not explicitly argue that the statute was indivisible,[153] the absence of more detailed element–means reasoning is surprising given the text of the statute, which listed alternatives in a single block:

> [I]t shall be unlawful for any person to sell, offer for sale or have in such person's possession with intent to sell, deliver, or distribute; prescribe; administer; deliver; distribute; dispense or compound any opiates, opium or narcotic drugs, or any stimulant.[154]

Without knowing more about Kansas law, it is not obvious whether this statute lists alternative means or separate crimes with separate elements. Indeed, other cases confronting similar issues have provided fuller discussions of state law.[155] Perhaps the panel's decision not to examine state law in any detail is understandable because it ultimately concluded that, even under the modified categorical approach, the prior conviction at issue did not qualify as a generic federal "controlled substance offense" because Kansas defined "'sale' to include an 'offer to sell.'"[156] Whether or not *Madkins* is correct about the divisibility of Kansas's statute,[157] its omission of the full analysis that *Mathis* would re-

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J., dissenting) (expressing concern that the *Mathis* rule would "unnecessarily complicate federal sentencing law"). *Apprendi* and *Almendarez-Torres* may not allow judicial fact-finding, no matter the practical benefits. In any event, *Mathis* conclusively resolved the current rule, so this Note focuses instead on how the rule can best be applied.

152. 866 F.3d 1136, 1145 (10th Cir. 2017) ("Section 609.582, subd. 3, is divisible . . . .").

153. See Appellant's Opening Brief and Required Attachments at 17, *Madkins*, 866 F.3d 1136 (No. 15-3299) (framing its argument as valid "[e]ven if these statutes are divisible").

154. *Madkins*, 866 F.3d at 1145 (alteration in original) (quoting Kan. Stat. Ann. § 65-4161(a) (2001)).

155. See, e.g., Chang-Cruz v. Attorney Gen., 659 F. App'x 114, 118 (3d Cir. 2016) (examining state cases and model jury instructions to determine whether "distribution" and "dispensing" are alternative means or alternative elements under New Jersey law); see also Swaby v. Yates, 847 F.3d 62, 67–68 (1st Cir. 2017) (examining state cases, the statutory text, and the indictment to determine whether Rhode Island controlled-substance offenses are divisible on the type of drug).

156. *Madkins*, 866 F.3d at 1145–48.

157. The Kansas pattern jury instructions that were current at the time of Madkins's prior conviction illustrate both the value and limitations of such instructions in the means–element inquiry. For example, the pattern instructions provided two separate entries for offenses under Kan. Stat. Ann. § 65-4161. The first instruction charged an

quire illustrates that the work of applying *Mathis* can be somewhat burdensome and ultimately irrelevant to the outcome of the case.

Similarly, in *United States v. Lara-Martinez*, the Fifth Circuit asserted, without discussion, that "[t]he modified categorical approach is appropriate because this statute has 'multiple alternative elements.'"[158] This lack of analysis is more concerning because the defendant's brief specifically argued that the statute did not set out alternative elements.[159] Lara-Martinez argued that his prior Missouri conviction for sexual misconduct involving a child did not qualify as a prior conviction for "sexual abuse of a minor," reasoning that the Missouri statute allowed conviction for conduct that did not involve an actual minor but rather a law enforcement officer pretending to be a minor.[160] The panel rejected this argument, finding first that the statute was divisible, and second that the provision under which Lara-Martinez was charged categorically required abuse of an actual minor.[161] Again, whether or not the court's divisibility determination is correct, it is striking that it cited *Mathis* without examining state precedent or statutory text, which the Supreme Court identified as the preferred tools for identifying whether a statute is divisible.[162] As in

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offense involving distribution, sale, and a number of similar terms. Kan. Judicial Council Advisory Comm. on Criminal Jury Instructions, Pattern Instructions for Kansas—Criminal § 67.13-B (3d ed. Supp. 2001), http://www.kansasjudicialcouncil.org/publications/Archived%20publications/PIK%20Crim/PIK%20Crim%20Supp%202001.pdf [http://perma.cc/7F45-7A9S]. The second instruction charged an offense involving possession with intent to sell or offering to sell. Id. § 67.13-C. This bifurcation at least suggests that these two forms of the offense would not be charged together and thus had different elements. Within each instruction, however, there are further alternatives. For example, the second instruction begins, "The defendant is charged with the crime of unlawfully (possessing) (offering to sell) [insert name of narcotic drug or stimulant] with intent to (sell) (deliver) (distribute)." Id. Are these parenthetical terms elements or means? The face of the instructions does not definitively answer that question. Cf. United States v. Titties, 852 F.3d 1257, 1281 (10th Cir. 2017) (Phillips, J., dissenting) (arguing that similar parentheses in Oklahoma's pattern instructions indicate they contain elements).

158. 836 F.3d 472, 475–76 (5th Cir. 2016) (citing Mathis v. United States, 136 S. Ct. 2243, 2249 (2016); United States v. Fierro–Reyna, 466 F.3d 324, 327 (5th Cir. 2006)).

159. Brief for Appellant at 15–16, *Lara-Martinez*, 836 F.3d 472 (No. 15-41497), 2016 WL 389865; see also Sheridan Green, The Fifth Circuit Holds that Missouri Sexual Abuse of a Minor Is "Crime of Violence" Under the U.S. Sentencing Guidelines, Sheridan Green Law PLLC: Blog (Oct. 12, 2016), http://www.greenvisalaw.com/single-post/2016/10/12/United-States-v-Lara-Martinez-No-15-41497-5th-Cir-Sept-6-2016 [http://perma.cc/39UF-9DGR] ("It is interesting that the Court, citing *Mathis*, resorted to the modified categorical approach without any analysis of whether a Missouri jury would be required to agree unanimously whether the defendant violated [one of the alternative provisions in the statute].").

160. See *Lara-Martinez*, 836 F.3d at 474–76.

161. Id. at 475–77.

162. Compare id. at 475–76 (citing *Mathis*, 136 S. Ct. at 2249), with *Mathis*, 136 S. Ct. at 2256–57 (explaining how a sentencing court should approach the "threshold" divisibility inquiry).

Madkins, the missing analysis provides some indication that it can be burdensome to perform.[163]

These cases highlight the downside of the *Mathis* approach: Whether a prior conviction qualifies as a predicate offense cannot be determined from the defendant's record of conviction alone. Rather, because the sentencing judge must determine whether the statute of conviction set out alternative elements or means, getting the right result requires examination of state law and textual analysis of the statute itself. The *Descamps* majority expressly claimed that looking beyond the record would not be necessary because the "indictment, jury instructions, plea colloquy, and plea agreement—would reflect the crime's elements. So a court need not parse state law [to determine whether a statute lists elements or means] . . . ."[164] But *Mathis* changed course, instead requiring sentencing judges to look to "authoritative sources of state law."[165] This necessarily increases the research burden on parties and the courts attempting to apply the categorical approach.[166] Some federal judges have, understandably, continued to object to this consequence of *Mathis*.[167]

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163. For a further example of a case that gives short shrift to the means–element distinction, see United States v. Mata, 869 F.3d 640 (8th Cir. 2017). The panel there concluded that a statute was divisible based largely on a state case stating the offense "can be committed by" any of three different acts. Id. at 643 (internal quotation marks omitted) (quoting State v. Leake, 699 N.W.2d 312, 323–24 (Minn. 2005)). That state case, however, does not expressly distinguish between means and elements; in fact, it describes the "essential element" as "force or coercion," *Leake*, 699 N.W.2d at 324 (emphasis added), thus suggesting that those two alternatives may be mere means.

164. Descamps v. United States, 133 S. Ct. 2276, 2285 n.2 (2013).

165. *Mathis*, 136 S. Ct. at 2256.

166. See id. at 2264 (Breyer, J., dissenting) ("That research [into whether a statute sets out alternative means or elements] will take time and is likely not to come up with an answer."); *Fogg* Transcript of Sentencing Hearing, supra note 132, at 13 ("It's a really hard issue to research because it gets tied up in the individual state statutes, so it's hard to kind of use Westlaw and Lexis to research this.").

167. See, e.g., United States v. Martinez-Lopez, 864 F.3d 1034, 1058 (9th Cir. 2017) (Bybee, J., concurring in part and dissenting in part) (declaring himself "frustrated with the whole endeavor" of the categorical and modified categorical approach); United States v. Tavares, 843 F.3d 1, 19 (1st Cir. 2016) (characterizing the federal law of prior convictions as "a Rube Goldberg jurisprudence of abstractions piled on top of one another in a manner that renders doubtful anyone's confidence in predicting what will pop out at the end"); United States v. Doctor, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J., concurring) ("[T]he purported administrative benefits of the categorical approach have not always worked as advertised. Judges have simply swapped factual inquiries for an endless [gantlet] of abstract legal questions."); United States v. Edwards, 836 F.3d 831, 838 (7th Cir. 2016) (noting the "practical difficulty that can arise in applying the *Mathis/Descamps* rule"); Almanza–Arenas v. Lynch, 815 F.3d 469, 482 (9th Cir. 2016) (Owens, J., concurring) ("We should no longer tinker with the machinery of *Descamps*."); United States v. Brown, No. 7:02-CR-024, 2016 WL 7441717, at *13 n.14 (W.D. Va. Dec. 23, 2016) ("Given the difficulties inherent in deciphering the distinction between elements and means, the court views the analysis in this case to be anything but, in *Mathis*' terms, 'easy.'" (quoting *Mathis*, 136 S. Ct. at 2256)); see also Doug Keller, Causing Mischief for

It is too early to say whether these critiques will lead to a judicial or legislative rejection of the *Mathis* rule.[168] But all should agree that greater clarity and consistency in this area would be valuable. The following section, therefore, turns to the third interpretive tool that the *Mathis* majority suggested, the record of the prior conviction,[169] identifying two ways in which its proper application is somewhat unclear.

C. *Unresolved Questions in Applying* Mathis

Mathis suggested a third tool to employ when "state law fails to provide clear answers."[170] Specifically, judges can take a "peek at the [record] documents" for the "sole and limited purpose of determining whether [the listed items are] element[s] of the offense."[171] The Court elaborated with two examples of what such a peek might reveal.[172] First, if "one count of an indictment and correlative jury instructions" list all the alternatives, then "[t]hat is as clear an indication as any that each alternative is only a possible means of commission."[173] Second, the indictment and jury instructions "could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime."[174] Then the Court

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Taylor's Categorical Approach: Applying "Legal Imagination" to *Duenas-Alvarez*, 18 Geo. Mason L. Rev. 625, 625 (2011) ("The categorical approach . . . has become the rule of perpetuities of criminal law."); Lee, Future of the Categorical Approach, supra note 23, at 266–68 ("It is undoubtedly true that many, perhaps most, federal judges are confused about this area . . . . [A]nd that confusion may well continue to a significant degree after *Mathis*."). These difficulties have likely been pushed to the forefront of judicial attention by the Supreme Court's decision to make its holding in *Johnson* retroactive on collateral review. See Welch v. United States, 136 S. Ct. 1257, 1265 (2016). That decision alone increased the number of cases against the United States by fifty-five percent during the federal judiciary's last reporting year. Chief Justice John Roberts, 2016 Year-End Report on the Federal Judiciary 12 (2016), http://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf [http://perma.cc/3654-X9UL]. In this large volume of cases, lower courts were sorting through the *Mathis* rule simultaneously with interrelated questions of retroactivity and habeas corpus review. See, e.g., Holt v. United States, 843 F.3d 720, 721–22 (7th Cir. 2016) (considering the interaction of retroactivity and divisibility issues); Traxler v. United States, No. 1:16-CV-747, 2016 WL 4536329, at *4 (W.D. Mich. Aug. 31, 2016) (noting that these issues arising from *Johnson* have divided lower courts), vacated, No. 16–2280, 2017 WL 4124880 (6th Cir. Mar. 7, 2017).

168. See Lee, Future of the Categorical Approach, supra note 23, at 266 (predicting "this disagreement [about workability] will persist for some time"); see also *Mathis*, 136 S. Ct. at 2258 (Kennedy, J., concurring) (expressing his view that "the elements based approach . . . is required only by the Court's statutory precedents, which Congress remains free to overturn").

169. See *Mathis*, 136 S. Ct. at 2256–57.

170. Id. at 2256.

171. Id. at 2256–57 (alteration in original) (quoting Rendon v. Holder, 782 F.3d 466, 473–74 (9th Cir. 2015) (Kozinski, J., dissenting from the denial of reh'g en banc)).

172. Id. at 2257.

173. Id.

174. Id.

added a crucial caveat, that "such record materials will not in every case speak plainly, and if they do not, 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."[175]

This passage raises two key questions. First, is "certainty" the standard for determining whether a statute is divisible? Second, under what circumstances could the charging of a single statutory alternative provide sufficient basis to conclude that a statute is divisible? Lower-court decisions reveal differing views on these questions, which complicates the application of *Mathis*.

1. *The Role of "Certainty."* — What should we make of "*Taylor*'s demand for certainty"? The language originated in *Shepard*, in which the Court characterized *Taylor* as requiring that "evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State."[176] In *Mathis*, the Court made clear that the modified categorical approach analysis requires two steps: First, determine whether the statute lists alternative elements or alternative means;[177] then, only if the alternatives are elements, determine whether the defendant necessarily admitted elements sufficient to categorically qualify as a predicate offense.[178] In *Shepard*, the "demand for certainty" language was applied at this second stage of modified categorical approach analysis,[179] but the language in *Mathis* can be read to apply to either stage, or both. On one hand, the *Mathis* opinion adverts to the "demand for certainty" in a section devoted to answering the means–element question.[180] On the other hand, the sentence in which *Mathis* quoted the language does not refer directly to the means–element distinction; it refers to the broader task of "determining whether a defendant was convicted of a generic offense."[181] The following sentence, however, says that "between [the record] documents and state law . . . indeterminacy should prove more the exception than the rule."[182] This language in particular suggests that the import of "certainty" is not limited to use of the record documents but also to the inquiry into "state law." Thus there are two possible readings of this language from the *Mathis* opinion: (1) A court may determine that a statute is divisible only

175. Id. (quoting Shepard v. United States, 544 U.S. 13, 21 (2005)).

176. *Shepard*, 544 U.S. at 23.

177. *Mathis*, 136 S. Ct. at 2256.

178. Id. at 2254–56.

179. See *Shepard*, 544 U.S. at 26 (making no mention of the means–elements distinction in its holding).

180. The section begins, "The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means." *Mathis*, 136 S. Ct. at 2256.

181. Id. at 2257.

182. Id.

if it is "certain" that it sets out alternative elements rather than means, or (2) certainty is required only in the second stage, when the court is determining what the defendant necessarily admitted.

The Eighth Circuit, in *United States v. Horse Looking*, took the second approach.[183] Horse Looking argued that his conviction under the statute was not for "a misdemeanor crime of domestic violence" because one of the alternatives listed in the statute did not require the use of force.[184] The panel concluded that a South Dakota domestic assault statute was divisible, without invoking the "demand for certainty."[185] During his plea colloquy, Horse Looking admitted that he had pushed his wife, and the victim had testified she had abrasions as a result.[186] The panel concluded that this record was consistent with a conviction under either a subsection of the statute requiring the use of violent force or a subsection requiring only "attempting by physical menace to put another in fear of imminent bodily harm."[187] The panel then quoted *Mathis*'s language about the demand for certainty and concluded that this record could not satisfy that demand:

> It is clear that Horse Looking admitted using physical force against his wife, and that he *could have been* found guilty of a crime that has, as an element, the use of force against his wife. But the judicial record does not establish that Horse Looking necessarily *was convicted* of an assault that has the required element. He was charged in the alternative with a non-qualifying assault, and the state court did not specify which alternative was the basis for conviction.[188]

This case certainly illustrates that the categorical approach can be blind to the actual conduct that produced a conviction, but that is by design.[189] For present purposes, the important takeaway is that the panel in *Horse Looking* did not apply the "demand for certainty" to its divisibility inquiry but only to its determination of whether the record showed the defendant necessarily admitted a certain statutory alternative.

The Sixth Circuit, however, has invoked the "demand for certainty" in conducting a divisibility inquiry. In *United States v. Ritchey*, the defendant argued that his Michigan breaking-and-entering convictions did not qualify as ACCA predicates because the statute criminalized burglary of

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183. See 828 F.3d 744, 747–49 (8th Cir. 2016).

184. See id. at 746.

185. See id. at 747–48.

186. Id.

187. Id. at 748.

188. Id. at 749.

189. See Descamps v. United States, 133 S. Ct. 2276, 2293 (2013) ("The modified approach does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one.").

not just buildings but also, "among other things, tents, boats, and railroad cars."[190] After concluding that state cases and the statute's text indicated that the alternative locations were means rather than elements, the panel found that consideration of the record documents produced the same conclusion.[191] Though Ritchey's charging documents did allege the specific locations that he broke into, the panel noted that other portions of the record suggested that the alternatives were mere means—for example, one charged entry of a "BARN/GARAGE," thus suggesting that the jury need not find that Ritchey broke into either specific location beyond a reasonable doubt.[192] Characterizing the record documents as "at the very most, inconclusive," the panel concluded that they could not satisfy *Taylor*'s demand for certainty.[193] The *Ritchey* opinion exemplifies an approach that treats the "demand for certainty" as relevant to the divisibility inquiry but only insofar as the record documents are used as evidence of divisibility. When parsing the statute and state-court interpretations thereof, the Sixth Circuit treated divisibility as an ordinary question of statutory interpretation not dependent on a finding of "certainty."[194]

The clearest illustration of differing applications of the "demand for certainty" comes from an Eleventh Circuit case, *United States v. Gundy*.[195] There, the panel majority concluded that the text of Georgia's burglary statute and state-court interpretations indicated that the statute was divisible.[196] The majority further reasoned that, even if state law were ambiguous, the record of Gundy's indictments was sufficient to "satisfy *Taylor*'s demand for certainty" because they alleged that he had burgled a "dwelling *house*" and a "business *house*."[197] In dissent, Judge Jill Pryor first reached the opposite conclusion about Georgia law.[198] Then her opinion turned to the record materials and observed that some of the indictments charged entry into a "business house," a term not found in the text of the statute.[199] Judge Pryor reasoned that a term not present in the text of the statute cannot be an element and said the majority had "misconceive[ed] the appropriate inquiry under *Mathis* at this stage of the analysis" by failing to frame the test in terms of whether the record showed the alternatives to be elements or means.[200] Importantly for the

190. 840 F.3d 310, 315 n.1 (6th Cir. 2016).
191. Id. at 319–21.
192. Id. at 321.
193. Id.
194. See id. at 318–20.
195. 842 F.3d 1156 (11th Cir. 2016).
196. Id. at 1166–68.
197. Id. at 1170.
198. Id. at 1172–77 (Pryor, J., dissenting).
199. Id. at 1178.
200. Id. at 1179.

present discussion, Judge Pryor then characterized the "'demand for certainty'" language in *Mathis* as requiring that statutes be found indivisible whenever "state law and the records of a conviction are inconclusive regarding a statute's divisibility."[201] Professor Evan Lee also advocates the use of a certainty standard for determining whether a defendant has a qualifying prior conviction[202] and suggests as a descriptive matter that such a certainty standard is what *Mathis* requires.[203] Despite the fact that *Mathis*'s text invites this reading, the weight of authority does not demand "certainty" in making the divisibility inquiry[204] but only in the use of the record documents.

2. *Record Documents as Proof of Divisibility.* — As the above cases illustrate, lower courts have read the "certainty" language in *Mathis* in a few different ways, each of which might produce different results. Part III takes up which of these readings is most consistent with the Court's jurisprudence. But *Gundy* also highlights the second key question that follows from *Mathis*: When can the record documents themselves provide sufficient basis to conclude that a statute is divisible? *Mathis* provided three hypothetical situations in which the record documents would help answer the means–element question, two of which indicate the statute is indivisible and one of which suggests that it is divisible. The table below summarizes this guidance, along with the case in which the record is unhelpful.[205]

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201. Id. (quoting Mathis v. United States, 136 S. Ct. 2243, 2257 (2016)).

202. Lee, Future of the Categorical Approach, supra note 23, at 276–77 (arguing the modified categorical approach should be abolished if defendants continue, after *Mathis*, to be "illegally punished for the same crime twice because courts are confused about whether statutes are divisible or indivisible").

203. Evan Lee, Opinion Analysis: Victory for the "Categorical Approach" in Immigration and Federal Criminal Sentencing—But for How Long?, SCOTUSblog (June 24, 2016), http://www.scotusblog.com/2016/06/opinion-analysis-victory-for-the-categorical-approach-in-immigration-and-federal-criminal-sentencing-but-for-how-long [http://perma.cc/D7BQ-FT9K] (summarizing the *Mathis* rule as, "If in doubt, it's out").

204. Very few of the court of appeals cases even quote the "demand for certainty" language. And even in *Fogg*, a case in which the judges disagreed about the proper reading of state law, the antidivisibility dissent did not invoke any "certainty" requirement, though it would have certainly strengthened the argument against finding divisibility. See United States v. Fogg, 836 F.3d 951, 960–62 (8th Cir. 2016) (Bright, J., dissenting).

205. *Mathis*, 136 S. Ct. at 2257 (quoting Shepard v. United States, 544 U.S. 13, 21 (2005)).

TABLE 1: *MATHIS*'S GUIDANCE FOR USING RECORD DOCUMENTS

Contents of Record	Result
The indictment and jury instructions list each of the alternatives from the statute. OR The indictment and jury instructions use a blanket term, like "premises," that encompasses alternatives.	"That is as clear an indication as any 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."
The indictment and jury instructions reference "one alternative term to the exclusion of all others."	That "could indicate . . . the statute contains a list of elements, each one of which goes toward a separate crime."
The record materials do not "speak plainly."	"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."

Two immediate observations are worth making about this text.[206] First, the Court states that the record sometimes provides a "clear . . . indication" that a statute is indivisible but that the record at most "could indicate" that a statute is divisible.[207] This suggests that the record is more powerful as a tool for ruling out divisibility than for finding divisibility. Second, each hypothetical assumes that there is both an indictment and "correlative jury instructions."[208] This casts doubt on the persuasiveness of arguments that are based on indictments alone.

In *Gundy*, the majority seemed to think that the record put the case in the second box above, because each indictment alleged a specific alternative in isolation.[209] By contrast, Judge Pryor concluded that the record did not speak plainly enough to satisfy the demand for certainty.[210]

206. Judge Pryor makes these two points in *Gundy*, 842 F.3d at 1177 n.9 (Pryor, J., dissenting).

207. *Mathis*, 136 S. Ct. at 2257.

208. Id.

209. *Gundy*, 842 F.3d at 1170 (majority opinion) ("We . . . conclude that the terms 'dwelling house' and 'business house' [in the indictments] satisfy *Taylor*'s demand for certainty that Gundy's convictions were for burglary of a building or other structure, which is a generic burglary.").

210. Id. at 1179 (Pryor, J., dissenting) ("The majority should acknowledge that the two terms found in Mr. Gundy's indictments—one of which cannot be found in the text of the

As discussed above,[211] most court of appeals cases applying *Mathis* conclude that the statute's text and state precedents answer the means–element question, so the stakes attached to reading the record of conviction are lower than in *Gundy*. Nonetheless, many cases use the third *Mathis* tool as confirmation of the conclusion from analysis of the first two. In *Chang-Cruz v. Attorney General*, for example, the Third Circuit noted that the judgments of conviction listed both of the alternatives, thus providing "clear . . . indication" that they were means rather than elements.[212] Similarly, the Eighth Circuit found that a statute was indivisible based in part on the fact that the defendant's charging document used a "single umbrella term."[213]

Courts have also invoked the record in support of a finding of divisibility. The Fifth Circuit, for example, reasoned that a judicial confession reciting the text of only one statutory subsection supported a finding that the defendant's conviction necessarily involved violation of that subsection.[214] And the Tenth Circuit has used the fact that an indictment cited only a particular subsection to bolster its conclusion that the statute's subsections set out divisible elements.[215] Finally, the Seventh Circuit opinion in *United States v. Edwards* provides an example in which the record was unhelpful in resolving divisibility; the court concluded that "in Wisconsin neither the charging documents nor a plea colloquy will necessarily reflect *only* the elements of a crime."[216]

To sum up, though *Mathis* provided some guidance on how to use record documents as part of divisibility analysis, lower courts have not adopted a uniform reading of that guidance. In particular, there is disagreement about what role "certainty" plays in the divisibility analysis and about when record documents are sufficient to themselves indicate that a

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statute and therefore cannot be an element—provide insufficient clarity to conclude that Georgia's burglary statute is divisible.").

211. See supra section II.A.2.

212. 659 F. App'x 114, 118 (3d Cir. 2016) (internal quotation marks omitted) (quoting *Mathis*, 136 S. Ct. at 2257).

213. United States v. McFee, 842 F.3d 572, 575–76 (8th Cir. 2016) (internal quotation marks omitted) (quoting *Mathis*, 136 S. Ct. at 2257).

214. United States v. Uribe, 838 F.3d 667, 669 (5th Cir. 2016); see also Ibanez-Beltran v. Lynch, 858 F.3d 294, 298 (5th Cir. 2017) (concluding that a "plea agreement, judgment, and [model] instructions are enough, without settled state law to the contrary, to hold" that a statute is divisible, when the documents list only a single alternative).

215. United States v. Lopez–Jacobo, 656 F. App'x 409, 414 (10th Cir. 2016) ("Moreover, 'an indictment . . . could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements.'" (alteration in original) (quoting *Mathis*, 136 S. Ct. at 2257)). Note the interesting placement of the ellipsis here, original to the Tenth Circuit opinion, omitting the words "and jury instructions." As Judge Pryor observes, the inclusion of those words in *Mathis* provides a basis to be skeptical of the claim that an indictment alone can furnish sufficient basis to find divisibility. *Gundy*, 842 F.3d at 1177 n.9.

216. 836 F.3d 831, 838 (7th Cir. 2016).

statute *is* divisible. As *Gundy* illustrates, the answers to these questions are critical for cases in which authoritative sources of state law prove inconclusive. Part III seeks to articulate solutions that are consistent with *Mathis* and the Court's other categorical-approach cases.

III. CLARIFYING *MATHIS*: HOW TO USE THE RECORD OF PRIOR CONVICTION

The above exploration produces two main findings about how *Mathis* has functioned in application. First, its state-law approach to divisibility is workable, but takes work. That is, the precedential and textual analysis that *Mathis* demands has not proven as indeterminate as its detractors predicted, but it does require sentencing judges to delve into state-law questions that do not always have obvious answers. Some cases are indeed "easy" because of state decisions that are clearly on point or because the statutory alternatives carry different punishments. But there remain challenging cases in which such decisions and dispositive text are absent. These are the cases in which the "peek" at the record documents *Mathis* authorizes takes center stage.

The opinion in *Mathis*, however, provided relatively little guidance on how to conduct this inquiry. For one, it did not precisely explain the relationship between "*Taylor*'s demand for certainty," the record documents, and the divisibility inquiry.[217] Also, by saying only that certain record documents "could indicate" that the statute sets out alternative elements,[218] *Mathis* did not fully explain when such documents *would* indicate divisibility. This Part advances three interpretive clarifications of *Mathis*.

A. *Treating Divisibility as a Threshold Inquiry—an Unnecessary Burden*

Whether a court "peeks" at the record or scrutinizes it fully, it should always see the same thing. *Mathis* describes the inquiry necessary for the modified categorical approach as a two-step process: (1) Determine whether statutory alternatives are elements or means; (2) only if they are elements, determine which element the defendant was necessarily convicted of.[219] The Court expressly described the means–element question as a "threshold inquiry" and resolving it as "[t]he first task for a sentencing court."[220] This section argues that, once one has exhausted the first two *Mathis* tools, this bifurcation is actually misleading about the analysis required and suggests an order-of-decision rule that imposes unnecessary analytical burdens on sentencing judges.

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217. See *Mathis*, 136 S. Ct. at 2256–57.

218. Id. at 2257.

219. Id. at 2256.

220. Id.

To see why the bifurcation is confusing, it is helpful to define precisely what the second step of the inquiry is. *Mathis* says that, once the sentencing court has determined that the alternatives are elements, the second step is to "review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime."[221] When employing the first two *Mathis* tools, this distinction is comprehensible. For example, one might find state precedent that a statute is divisible but that the record documents in the case do not identify which of the alternatives the defendant was actually convicted of. That, for example, is what the Third Circuit concluded in *Singh v. Attorney General*. At issue there was whether Singh's prior conviction under Pennsylvania's controlled-substances law qualified as an aggravated felony for immigration purposes.[222] The panel found state precedent demonstrating that the Pennsylvania statute was divisible on the type of drug involved.[223] However, because the charging documents in Singh's record did not actually identify the type of drug, the court concluded that, even applying the modified categorical approach, his prior convictions were not federal-law aggravated felonies.[224] In such a case, one can logically find that the statute is divisible, but that the prior conviction was not for a qualifying offense. The same is true when the court is performing textual analysis of divisibility.[225]

The language of *Mathis* makes clear that the Court intends this distinction to persist when examining the record documents. Indeed, the Court says that the "'peek at the [record] documents' is for 'the sole and limited purpose of determining whether [the listed items are] element[s] of the offense.'"[226] This "peek" remains a threshold inquiry, as indicated by the Court's language that "only if [the record documents show the alternatives are elements] can the court make further use of the materials."[227]

But when one considers the Court's three hypotheticals, it becomes apparent that this bifurcation makes no practical difference. In the first hypothetical, the indictment and jury instructions list all the alternatives listed in the statute. Though it is true that this is "clear indication" that the statute is indivisible, it is equally clear evidence that divisibility is ir-

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221. Id.

222. Singh v. Attorney Gen., 839 F.3d 273, 277–78 (3d. Cir. 2016).

223. Id. at 283–84.

224. Id. at 284–86.

225. See United States v. Tavares, 843 F.3d 1, 18–20 (1st Cir. 2016) (finding the statute divisible, but remanding for consideration of other issues, including whether the record documents show that the defendant was convicted under the qualifying alternative).

226. *Mathis*, 136 S. Ct. at 2256–57 (2016) (quoting Rendon v. Holder, 782 F.3d 466, 473–74 (9th Cir. 2015) (Kozinski, J., dissenting from the denial of reh'g en banc)).

227. Id. at 2257.

relevant, because the record furnishes no basis for determining *which* of the alternatives the defendant was actually convicted of. The same is true in the second hypothetical, involving record documents that use only an "umbrella term." The Court is surely right that such documents show the statute is indivisible, but—because they do not identify a particular alternative—they could not justify applying a prior-conviction enhancement even if the statute *were* divisible. In these hypotheticals, therefore, the "peek" can only ever produce the same result as a longer look.

The same is true of the third hypothetical peek at the record documents, in which they "referenc[e] one alternative term to the exclusion of all others."[228] If a sentencing judge concludes that such exclusive specification is indeed sufficient to indicate that the listed alternatives are elements rather than means, she will have necessarily found the answer to *Mathis*'s second step because the record indicates that the prior conviction was based only on the specified alternative.

If peeking at the record documents and using them to conduct the full modified categorical approach can only ever produce the same result, then why distinguish the two steps? The original suggestion for a "peek" at the record documents came from Judge Kozinski's opinion dissenting from the denial of rehearing en banc in *Rendon v. Holder*.[229] There, Judge Kozinski was trying to make sense of a footnote in *Descamps* that had read, "Whatever a statute lists (whether elements or means), the [*Shepard*] documents . . . reflect the crime's elements."[230] Though seemingly endorsing this portion of Judge Kozinski's opinion, *Mathis* is in some respects flatly inconsistent with the approach Judge Kozinski outlined. First, Judge Kozinski thought that the "peek" at the record documents provided a path to avoid "the laborious and often inscrutable exercise of parsing state law."[231] Such parsing, of course, is precisely what *Mathis* requires.[232]

Second, Judge Kozinski described the second step as an examination of the record documents to determine "whether a defendant committed a state crime falling within the ambit of the relevant federal statute."[233] *Mathis*, however, shows that even the modified categorical approach does not permit inquiry into the real-world fact of what crime the defendant "committed." Rather, as the Court explained,

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228. Id.

229. See id. at 2256–57 (quoting *Rendon*, 782 F.3d at 473–74).

230. *Rendon*, 782 F.3d at 473 (quoting Descamps v. United States, 133 S. Ct. 2276, 2285 n.2 (2013)).

231. Id. at 474.

232. See *Mathis*, 136 S. Ct. at 2256 (requiring inquiry into "authoritative sources of state law").

233. *Rendon*, 782 F.3d at 473.

> [T]he modified approach serves—and serves solely—as a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque. It is not to be repurposed as a technique for discovering whether a defendant's prior conviction, even though for a too-broad crime, rested on facts (or otherwise said, involved means) that also could have satisfied the elements of a generic offense.[234]

The modified categorical approach thus turns on conviction, not commission. With that understanding, a "peek" at the record documents can never produce a different result than the most detailed scrutiny of those documents. This follows from the fact that the second-stage inquiry is limited to elemental facts; that limitation renders the first stage of the inquiry superfluous.

If the "peek" at the record does not ever change the ultimate result, why require sentencing judges to take that step first? A better way of understanding *Mathis*'s guidance about the use of the record is as a reaffirmation of the limit on judicial fact-finding. One potential benefit is that it forces sentencing judges to expressly consider which facts of the prior conviction are elemental, thus serving to discourage the temptation of judicial fact-finding. But characterizing the means–element distinction as a threshold inquiry also has a significant downside. Specifically, it suggests that courts cannot dispose of cases by simply saying that, no matter whether a statute's alternatives are elements or means, the defendant's record does not show which alternative was involved in the prior conviction.

Treating the means–element distinction as a threshold question is somewhat akin to an approach that the Court rejected in the qualified immunity context. In *Saucier v. Katz*, the Court had required that courts deciding upon qualified immunity defenses must first determine whether the plaintiff has alleged facts that would establish violation of a constitutional right and only then determine whether that constitutional right was clearly established.[235] Eight years later, the Court receded from that rule, instead granting lower-court judges the discretion to decide the case on the second prong alone.[236] The Court reasoned that requiring the threshold determination "sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case."[237]

Much the same is true of the means–element distinction in *Mathis*. As explored above, the means–element issue is not always easy to re-

234. *Mathis*, 136 S. Ct. at 2253–54 (citation omitted).

235. 533 U.S. 194, 201 (2001).

236. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

237. Id. at 236–37.

solve.[238] But the requirement in *Mathis* that courts treat it as a threshold inquiry may contribute to decisions like *Horse Looking*, in which the court provided cursory analysis of divisibility and concluded that the record of conviction ultimately provided an insufficient basis to reveal which of the statutory alternatives the defendant was convicted of, even having found that they were elements.[239] If not for the instruction in *Mathis* to treat the means–element distinction as a threshold inquiry, *Horse Looking* could have simply said nothing about divisibility and resolved the case by observing that the record documents were inconclusive.

A better reading of *Mathis*, therefore, is as holding (1) that a sentencing court cannot conclude that a prior conviction involved a certain fact without first finding that fact to be elemental, but (2) that a sentencing court can conclude that a prior conviction *did not* include that fact by finding either that the fact is legally non-elemental or not necessarily found in the defendant's record. Indeed, a number of opinions have expressly declined to decide divisibility when the record documents do not speak clearly enough to support an enhancement.[240]

B. *The Proper Scope of "Certainty"*

A second question explored above is the meaning of the "certainty" language in *Mathis*. Court of appeals cases have offered three interpretations: (1) require that the divisibility of a statute be certain before moving to the second step of *Mathis*;[241] (2) require certainty in the exercise of

238. See supra notes 124–130 and accompanying text.

239. See United States v. Horse Looking, 828 F.3d 744, 748 (8th Cir. 2016).

240. United States v. Montanez-Trejo, No. 16-41088, 2017 WL 3887991, at *4 (5th Cir. Sept. 5, 2017) ("We need not decide whether the Nebraska statute at issue here is divisible because we conclude that, even if the district court did not plainly err in finding that it is divisible, the modified categorical approach does not clarify the subsection under which Montanez–Trejo was convicted."); United States v. Guillen-Cruz, 853 F.3d 768, 771 (5th Cir. 2017) ("[B]ecause Guillen-Cruz's prior offense is not an aggravated felony under either [the categorical or modified categorical] approach, we pretermit deciding which approach is applicable."); United States v. Arriaga-Pinon, 852 F.3d 1195, 1199 (9th Cir. 2017) ("[W]e need not reach [the question of divisibility] in this case because, even assuming [the statute is divisible], the conviction fails to satisfy the modified categorical test at stage three, and therefore is not a qualifying predicate offense."); United States v. Driver, 663 F. App'x 915, 919 (11th Cir. 2017) ("We need not [decide divisibility] because . . . there are no *Shepard* documents in the record that would enable us to apply the [modified categorical] approach to the particular false imprisonment conviction at issue in this case.").

241. See United States v. Martinez-Lopez, 864 F. 3d 1034, 1056 (9th Cir. 2017) (Berzon, J., dissenting); United States v. Sykes, 864 F.3d 842, 844 (8th Cir. 2017) (Colloton, J., dissenting from denial of reh'g en banc) ("[A]n inconclusive inquiry means that the prior convictions do not qualify, and the sentencing enhancement does not apply."); United States v. Titties, 852 F.3d 1257, 1272 n.19 (10th Cir. 2017) ("[U]ncertainty [about state law] favors [the defendant] because the Government bears the burden of proving a prior conviction qualifies under the ACCA, and we do not count a prior conviction if its ACCA qualification is suspect." (citation omitted) (citing United

using record documents to inform divisibility;[242] and (3) require certainty only in the second step, when determining whether a prior conviction necessarily rested on a particular element of a divisible statute.[243] As the preceding section shows, approaches (2) and (3) are functionally identical—if the record documents of a prior conviction are sufficiently certain to show that the statute was divisible, then they are necessarily certain enough to show that defendant's conviction rested on a particular statutory alternative.

Therefore, the only meaningful choice is between that approach and requiring certainty in the divisibility inquiry as a whole. The placement of the language in *Mathis* could support either approach. An en banc Ninth Circuit case, *United States v. Martinez-Lopez*,[244] illustrates how these two possibilities operate in practice. The controlled-substances statute there at issue prohibited a variety of acts including "importation, sale, furnishing, administration, etc."[245] The majority concluded that California law indicated the statute was divisible on the actus reus requirement, without mentioning the demand for certainty.[246] Then, in applying the modified categorical approach, the majority noted that during the plea colloquy, Martinez-Lopez had been asked, "[O]n or about December 31st, 1997, [did] you . . . sell cocaine base—.42 grams of cocaine base?"[247] He responded, "Yes."[248] The majority concluded, "Based on this exchange, we can say—with the certainty that *Taylor* demands"— that Martinez-Lopez had been convicted for selling cocaine.[249]

Judge Marsha Berzon, dissenting from this portion of the majority's opinion, adopted a different approach. In her view, "[D]etermining whether a disjunctively worded statute refers to alternative elements or alternative means is subject to the Court's more general 'demand for certainty when identifying a generic offense.'"[250] Further, she argued that the majority opinion "ignore[ed] the Court's repeated direction to focus

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States v. Delossantos, 680 F.3d 1217, 1219 (10th Cir. 2012))); Mathis v. United States, 136 S. Ct. 2243, 2257 (2016))); United States v. Gundy, 842 F.3d 1156, 1179 (11th Cir. 2016) (Pryor, J., dissenting).

242. See United States v. Ochoa, 861 F.3d 1010, 1018 (9th Cir. 2017) (invoking "certainty" only when examining record documents); United States v. Ritchey, 840 F.3d 310, 321 (6th Cir. 2016) (same).

243. See *Martinez-Lopez*, 864 F.3d at 1043 (en banc); *United States v. Horse Looking*, 828 F.3d 744, 748–49 (8th Cir. 2016).

244. 864 F.3d 1034.

245. Id. at 1041 (quoting People v. Patterson, 778 P.2d 549, 556 (Cal. 1989)).

246. Id. at 1041–43.

247. Id. at 1043 (alteration in original).

248. Id.

249. Id. (citing Mathis v. United States, 136 S. Ct. 2243, 2257 (2016)).

250. Id. at 1046 (Berzon, J., concurring in part and dissenting in part) (quoting Shepard v. United States, 544 U.S. 13, 21–22 (2005)) (citing *Mathis*, 136 S. Ct. at 2257).

only on what must be admitted or proven beyond a reasonable doubt to sustain a conviction."[251] Judge Berzon's opinion read *Mathis* to require that state law or the record "provide a definitive answer" to the divisibility inquiry.[252] In short, the majority demanded factual certainty about whether the defendant admitted qualifying conduct, but not legal certainty about whether the statute was divisible. Judge Berzon's opinion would have demanded legal certainty as a prerequisite to reaching the modified categorical approach.

The majority has the better of this methodological debate for three reasons. First, as a precedential matter, the "demand for certainty" language that *Mathis* cites originally appeared in a context discussing the propriety of using record documents to determine the elements of a prior conviction, not a broader inquiry into the divisibility of state law.[253] Further, *Mathis* said that "between [the record] documents and state law . . . indeterminacy should prove more the exception than the rule."[254] If the standard for divisibility is "certainty," this prediction from *Mathis* would turn out to be incorrect; courts would be required to find far more statutes indivisible due to uncertain state law. Though many courts of appeals have found guidance in state cases, those cases do not often "definitively" resolve the means–element inquiry.[255] Second, as a theoretical matter, whether a statute is divisible is a legal, not factual, determination.[256] Thus it does not raise the specter of judicial fact-

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251. Id.; see also id. at 1056 ("As I understand the line of cases culminating in *Mathis*, the certainty requirement cuts in a specific direction: Where there is indeterminacy after all the modes of inquiry prescribed in *Mathis* are exhausted, a federal court must treat the state statute as indivisible . . . ." (citing *Mathis*, 136 S. Ct. at 2257)).

252. Id. at 1048, see also id. at 1046 ("Our inquiry is over if 'a state court decision *definitively* answers the question' . . . ." (emphasis added) (quoting *Mathis* 136 S. Ct. at 2256)).

253. See *Mathis*, 136 S. Ct. at 2257 (quoting *Shepard*, 544 U.S. at 21). In *Shepard*, the sentence in which the "certainty" language originally appeared read: "[T]he Government pulls a little closer to *Taylor*'s demand for certainty when identifying a generic offense by emphasizing that the records of the prior convictions used in this case are . . . free from any inconsistent, competing evidence on the pivotal issue of fact separating generic from nongeneric burglary." *Shepard*, 544 U.S. at 21–22.

254. *Mathis*, 136 S. Ct. at 2257.

255. See supra note 105 (noting the wide variety of legal contexts in which state cases have arisen).

256. In some cases, distinguishing law from fact can be "vexing," Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) (citing Baumgartner v. United States, 322 U.S. 665, 671 (1944)). But divisibility is a pure question of statutory interpretation; resolving such a question produces what is archetypally "'law'—conclusions about the existence and content of governing legal rules, standards, and principles." Henry P. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 235 (1985); see also Douglas A. Berman, Conceptualizing Blakely, 17 Fed. Sent. R. 89, 92 (noting the presence of issues of pure law and pure fact in criminal sentencing).

finding in the way that does a resort to the record documents.[257] Courts regularly resolve questions of statutory interpretation against defendants without demanding certainty.[258]

Finally, requiring only factual certainty—that is, certainty about whether the defendant exclusively admitted (or was convicted of) conduct that constitutes a qualifying offense—would satisfy the practical rationale of *Mathis*. The Court there reasoned that "[s]tatements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary."[259] The Court elaborated, "At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he 'may have good reason not to'—or even be precluded from doing so by the court."[260] Requiring courts to determine with certainty that the defendant exclusively admitted (or that a jury found) qualifying facts ameliorates these concerns about inaccuracy in the record documents.[261] Such certainty could be established by an

257. The fact–law distinction often turns on whether "one judicial actor is better positioned than another to decide the issue in question." Miller v. Fenton, 474 U.S. 104, 114 (1985); see also United States v. Andrews, 808 F.3d 964, 969 (4th Cir. 2015) ("Issues of law do often arise in sentencing, and the standard of review for such issues is obviously de novo."). The prevalence of guilty pleas means the best-positioned actor, the state-court judge in the prior case, will probably not have resolved the divisibility issue. But the absence of clearly settled state law does not render federal courts incompetent to apply it when necessary. See United States v. Reyes, 866 F.3d 316, 321 n.4 (5th Cir. 2017) ("When, as here, a federal court must identify and apply state law in the absence of a clearly controlling state supreme court opinion, the analogous *Erie* inquiry calls on federal courts to 'guess' how a state supreme court 'would decide.'" (quoting Howe ex rel. Howe v. Scottsdale Ins. Co., 204 F.3d 624, 627 (5th Cir. 2000))).

258. See, e.g., Shaw v. United States, 137 S. Ct. 462, 469 (2016) (stating that the rule of lenity applies only when there is "a grievous ambiguity or uncertainty in the statute" (internal quotation marks omitted) (quoting Muscarello v. United States, 524 U.S. 125, 138–39 (1998))); Moskal v. United States, 498 U.S. 103, 108 (1990) (explaining that the Court has not "deemed a division of judicial authority automatically sufficient to trigger lenity" (citing United States v. Rodgers, 466 U.S. 475, 484 (1984))).

259. *Mathis*, 136 S. Ct. at 2253 (quoting Descamps v. United States, 133 S. Ct. 2276, 2288–89 (2013)).

260. Id.

261. One might respond that *Mathis* and *Descamps* established that the record can *never* establish non-elemental facts with certainty. See United States v. Martinez-Lopez, 864 F.3d 1034, 1045–46 (9th Cir. 2017) (Berzon, J., concurring in part and dissenting in part) ("[O]ver-eager deployment of the modified approach can lead to sentencing enhancements based on information that 'may be downright wrong,' and can 'deprive some defendants of the benefits of their negotiated plea deals.'" (quoting *Descamps*, 133 S. Ct. at 2289)). Remember, however, that the debate here is over whether certainty is required in determining whether a fact is non-elemental. When a court of appeals finds that the best reading of state law (even if not a *certain* reading) is that a statute sets out alternative elements, it is far less likely that the record will contain inaccuracies about those facts. Further, the government in *Descamps* and *Mathis* had sought inferences based on a defendant's silence rather than on a specific admission like that at issue in *Martinez-Lopez*. Compare *Mathis*, 136 S. Ct. at 2269–70 (Alito, J., dissenting) (describing uncontested allegations in the charging documents), and *Descamps*, 133 S. Ct. at 2282 (describing the defendant's failure to object to a prosecutor's description of the crime),

indictment and plea colloquy (or jury instructions) that "referenc[e] one alternative term to the exclusion of all others."[262]

C. *The Insufficiency of Indictments to Prove What a Defendant Necessarily Admitted*

The differing opinions in *Gundy* highlight that *Mathis*'s instruction that record documents must "speak plainly" to show that a fact was elemental is not self-defining. The panel majority thought the indictments spoke with sufficient clarity that entry of a building was elemental[263] while Judge Pryor characterized the documents as unclear and questioned whether indictments alone could ever satisfy the demand for

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with *Martinez-Lopez*, 864 F.3d at 1043 (describing the defendant's admission in a plea colloquy). The Supreme Court, therefore, has not held that legal uncertainty about the means–element question renders it unfair to rely on the defendant's own admissions.

Allowing a conviction when divisibility is less than certain may seem to raise the same practical concerns as a case in which a statute is plainly indivisible. That is, a defendant might lack incentives to challenge incorrect facts if state law is less than clear about whether they are required for conviction. However, much the same is true of elemental facts that do not affect the maximum sentence. For example, suppose the Ninth Circuit was correct in *Martinez-Lopez* that sale and offering for sale are distinct elements. See id. Even so, if the difference carries no sentencing consequences, "the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations." *Descamps*, 133 S. Ct. at 2289. Therefore, the additional convictions that this Note would allow to support enhancements are at least no more practically concerning than some convictions that *Mathis* has already found sufficient. If a future Congress seeks a more straightforward approach, it could key prior-crime enhancements to the length of the prior sentence. See Almanza–Arenas v. Lynch, 815 F.3d 469, 483 (9th Cir. 2016) (Owens, J., concurring) (advocating "a more objective standard, such as the length of the underlying sentence" to determine whether an offence is a crime involving moral turpitude). After all, the length of the sentence is almost guaranteed to be the focus of adversarial testing.

262. *Mathis*, 136 S. Ct. at 2257. The word "exclusion" is critical here. Though this Note concludes that the *Martinez-Lopez* majority has the right methodological approach, that is not an endorsement of its ultimate result. In fact, as Judge Berzon persuasively notes, the felony complaint against Martinez-Lopez "charged him with 'the crime of SALE/TRANSPORTATION/ OFFER TO SELL CONTROLLED SUBSTANCE.'" *Martinez-Lopez*, 864 F.3d at 1055 (Berzon, J., concurring in part and dissenting in part). Therefore, Martinez-Lopez's admission that he sold cocaine cannot rule out the possibility that his conviction was based only on an offer to sell, which would not be a qualifying predicate. Id. at 1037–38 & n.3 (citing United States v. Rivera-Sanchez, 247 F.3d 905, 909 (9th Cir. 2001) (en banc), superseded on other grounds by U.S. Sentencing Guidelines Manual § 2L1.2 cmt. n.4 (U.S. Sentencing Comm'n 2002)). Given the indictment, if Martinez-Lopez had gone to trial, presumably the government could have had the jury instructed that it need only find that the defendant made an offer to sell. Therefore, this is a case in which the defendant could have been convicted of a qualifying offense, but was not necessarily so convicted. Cf. United States v. Horse Looking, 828 F.3d 744, 749 (8th Cir. 2016) (reaching a similar conclusion). But cf. *Mathis*, 136 S. Ct. at 2270–71 (Alito, J., dissenting) (imagining a plea colloquy that would exclude conviction based on a non-qualifying means).

263. United States v. Gundy, 842 F.3d 1156, 1168–69 (11th Cir. 2016).

certainty.[264] This section argues that Judge Pryor's latter suggestion is correct—an indictment, without more, cannot form the basis of applying a prior-conviction enhancement.

In *Gundy*, the indictments each contained four components that shed some light on his conviction. They (1) alleged "burglary," (2) cited the Georgia Code provision defining burglary, (3) alleged that Gundy unlawfully entered a business house with intent to commit a theft therein, and (4) identified the specific location of the alleged theft.[265] Gundy then pleaded guilty "[u]pon the foregoing accusation, including each and every charge and count therein contained."[266] The *Gundy* majority considered the third component of the indictment sufficient indication that the "business house" location was elemental,[267] while Judge Pryor treated it as no different than the fourth element, alleging specific facts not essential to the ultimate conviction.[268]

This example highlights the importance of how one treats indictments. In the *Gundy* majority's view, when a defendant pleads guilty, a sentencing judge can "rely on the indictments, not pattern jury instructions never given."[269] Judge Pryor disagreed, saying that indictments do not answer "the determinative question: at trial, what must a Georgia jury find beyond a reasonable doubt to convict the defendant of burglary?"[270] The resolution of this question is critically important because most prior convictions result not from trials but from guilty pleas. Though *Mathis* treated the archetypal record documents as an "indictment and correlative jury instructions,"[271] in the vast majority of cases the record will contain no such jury instructions. Can the inclusion of facts in an indictment alone "speak plainly" that those facts are elemental?

Under *Mathis*, the answer to that question should be no. The Court said that the categorical approach focuses solely on elements, and then went on to define elements: "At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty."[272] The word "necessarily" is critical. An indictment may include facts that are not necessary to a conviction, facts that would not appear in the jury instructions if the defendant went to trial. Thus, the indictment

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264. Id. at 1177–78 & n.9 (Pryor, J., dissenting).

265. Id. at 1168–69 (majority opinion).

266. Supplemental Appendix at 8, *Gundy*, 842 F.3d 1156 (No. 14-12113-CC) (providing Gundy's original guilty-plea form).

267. See *Gundy*, 842 F.3d at 1170.

268. See id. at 1175–78 (Pryor, J., dissenting).

269. Id. at 1169 n.10 (majority opinion).

270. Id. at 1177 (Pryor, J., dissenting) (citing Mathis v. United States, 136 S. Ct. 2243, 2248 (2016)).

271. *Mathis*, 136 S. Ct. at 2257.

272. Id. at 2248 (citations omitted).

alone cannot conclusively show that a fact was elemental. Record documents produced from guilty pleas will often show that the defendant *actually* admitted certain facts but not that the defendant *necessarily* admitted those facts. To determine which of the admitted facts were elemental, the sentencing judge will need to parse state law to predict what facts a jury would have been required to find if the case had gone to trial. This further narrows the availability of the modified categorical approach, but any other reading is hard to square with the text of *Mathis* and with *Apprendi*'s bar on judicial fact-finding.

CONCLUSION

The Supreme Court's jurisprudence of prior convictions has undergone a long evolution, in which *Mathis* is probably just the latest step. Recent cases applying *Mathis* show that the decision provides sufficient tools to resolve most cases in a nonarbitrary way. In most cases, the federal judiciary can apply its core skills of common-law and statutory interpretation to identify whether an alternatively phrased statute lists elements or means. Gray areas remain, however, in courts' use of the record documents to define their divisibility analysis.

This Note suggests that courts should adopt three interpretive clarifications of *Mathis*. First, they should not read its characterization of the means–element distinction as a "threshold inquiry" to require that courts adjudicate the divisibility of a statute when the case could be disposed of on the simpler grounds that the record documents do not clearly identify which statutory alternative formed the basis of the defendant's conviction. Second, they should not apply "*Taylor*'s demand for certainty" to the legal question of divisibility but only to the factual question of whether the record shows that the defendant necessarily admitted (or was convicted of) a qualifying offense. And third, courts should not treat facts appearing only in the indictments as sufficient proof that a defendant "necessarily admitted" those facts, even if the defendant pleaded guilty to the indictment without qualification.

The Court's recent decisions have placed increasing pressure on the modified categorical approach. By adopting the constructions suggested here, courts can apply the modified categorical approach in a way that is faithful to *Mathis,* fair to defendants, and focuses judicial resources into the inquiries that most efficiently resolve cases.

APPENDIX: CIRCUIT DECISIONS

The following table identifies the cases considered in this Note. The criteria for inclusion were as follows: (1) the opinion cites *Mathis*, as reflected in the Westlaw database; (2) the opinion expresses a position on whether a statute is divisible, even if in dicta; (3) the opinion provides some independent reasoning for the divisibility determination that it reaches; and (4) the case was decided prior to October 2017. The third criterion means that the Note does not consider cases in which the court of appeals never conducted a divisibility inquiry because either the government or the defendant had conceded the point or because one party's position was foreclosed by circuit precedent.

The columns of the table indicate: (1) the name of the case, (2) the court that decided the case, (3) the date of decision, (4) the type of case in which the divisibility issue arose, (5) whether the court found the statute divisible, (6) whether the court imposed the prior-conviction sanction, (7) whether there was a dissent from the decision, (8) whether the court based its divisibility decision in part on state case law, and (9) whether the court based its divisibility decision in part on the record documents from the prior conviction.

Case Name	Court	Date	Context	Divisible	Imposed Sanction	Dissent	State Case	Record Documents
Gomez-Perez v. Lynch, 829 F.3d 323	5th Cir.	7/11/16	Immigration	No	No	No	Yes	No
United States v. Horse Looking, 828 F.3d 744	8th Cir.	7/11/16	18 U.S.C. § 922(g)(9)	Yes	No	No	No	No
United States v. Lopez–Jacobo, 656 F. App'x 409	10th Cir.	7/22/16	Guidelines	Yes	Yes	No	No	Yes
United States v. Headbird, 832 F.3d 844	8th Cir.	8/9/16	ACCA	No	No	No	Yes	No
United States v. Hinkle, 832 F.3d 569	5th Cir.	8/11/16	Guidelines	No	No	No	Yes	No
United States v. Sheffield, 832 F.3d 296	D.C. Cir.	8/12/16	Guidelines	No	No	No	Yes	No
Chang-Cruz v. Attorney Gen., 659 F. App'x 114	3d. Cir	8/24/16	Immigration	No	No	No	Yes	Yes
United States v. Alfaro, 835 F.3d 470	4th Cir.	8/29/16	Guidelines	Yes	Yes	No	No	Yes
United States v. Lara-Martinez, 836 F.3d 472	5th Cir.	9/6/16	Guidelines	Yes	Yes	No	No	No
United States v. Edwards, 836 F.3d 831	7th Cir.	9/8/16	Guidelines	No	No	No	No	Yes
United States v. Fogg, 836 F.3d 951	8th Cir.	9/8/16	ACCA	Yes	Yes	Yes	Yes	No

Case Name	Court	Date	Context	Divisible	Imposed Sanction	Dissent	State Case	Record Documents
Spaho v. Attorney Gen., 837 F.3d 1172	11th Cir.	9/19/16	Immigration	Yes	Yes	Yes	Yes	No
United States v. Howell, 838 F.3d 489	5th Cir.	9/22/16	Guidelines	No	Yes	No	Yes	No
United States v. Uribe, 838 F.3d 667	5th Cir.	10/3/16	Guidelines	Yes	Yes	No	Yes	No
United States v. Bryant, 669 F. App'x 238	5th Cir.	10/4/16	Guidelines	Yes	Yes	No	No	Yes
Singh v. Attorney Gen., 839 F.3d 273	3d Cir.	10/6/16	Immigration	Yes	No	No	Yes	Yes
Unites States v. De La O-Gallegos, 663 F. App'x 827	11th Cir.	10/7/16	Guidelines	Yes	Yes	No	No	No
United States v. Maldonado-Palma, 839 F.3d 1244	10th Cir.	10/25/16	Guidelines	Yes	Yes	No	No	No
United States v. Ritchey, 840 F.3d 310	6th Cir.	10/26/16	ACCA	No	No	No	Yes	No
United States v. Haney, 840 F.3d 472	7th Cir.	10/27/16	ACCA	No	No	No	No	No
In re McComb, 691 F. App'x 819	6th Cir.	11/3/16	Guidelines	Yes	Yes	No	No	No
United States v. Redrick, 841 F.3d 478	D.C. Cir.	11/8/16	ACCA	Yes	Yes	No	Yes	No

Case Name	Court	Date	Context	Divisible	Imposed Sanction	Dissent	State Case	Record Documents
United States v. Henderson, 841 F.3d 623	3d Cir.	11/8/16	ACCA	Yes	Yes	No	Yes	Yes
United States v. McFee, 842 F.3d 572	8th Cir.	11/17/16	ACCA	No	No	No	Yes	Yes
Garcia v. Lynch, 670 F. App'x 647	9th Cir.	11/18/16	Immigration	Yes	Yes	No	No	No
United States v. Cardena, 842 F.3d 959	7th Cir.	11/18/16	18 U.S.C. § 924(c)	Yes	Yes	No	Yes	Yes
United States v. Esprit, 841 F.3d 1235	11th Cir.	11/21/16	ACCA	No	No	No	Yes	No
United States v. Gundy, 842 F.3d 1156	11th Cir.	11/23/16	ACCA	Yes	Yes	Yes	Yes	Yes
United States v. Tavares, 843 F.3d 1	1st Cir.	12/1/16	Guidelines	Yes	Remand	No	Yes	No
United States v. Taylor, 672 F. App'x 860	10th Cir.	12/6/16	ACCA	No	Yes	No	No	No
United States v. Rocha-Alvarado, 843 F.3d 802	9th Cir.	12/12/16	Guidelines	Yes	Yes	No	No	No
United States v. Taylor, 843 F.3d 1215	10th Cir.	12/12/16	Guidelines	Yes	Yes	No	No	No
United States v. Bernel-Aveja, 844 F.3d 206	5th Cir.	12/13/16	Immigration	No	No	No	No	No

Case Name	Court	Date	Context	Divisible	Imposed Sanction	Dissent	State Case	Record Documents
United States v. Sykes, 844 F.3d 712	8th Cir.	12/21/16	ACCA	Yes	Yes	No	No	Yes
United States v. Starks, 674 F. App'x 580	8th Cir.	12/28/16	Guidelines	Yes	Yes	No	No	No
United States v. Parrow, 844 F.3d 801	8th Cir.	12/30/16	Guidelines	No	Yes	No	Yes	No
United States v. Harris, 844 F.3d 1260	10th Cir.	1/4/17	ACCA	Yes	Yes	Yes	No	No
Flores-Larrazola v. Lynch, 854 F.3d 732	5th Cir.	1/6/17	Immigration	Yes	Yes	No	Yes	No
United States v. Winston, 845 F.3d 876	8th Cir.	1/10/17	ACCA	Yes	Yes	No	No	No
Ibanez-Beltran v. Lynch, 858 F.3d 294	5th Cir.	1/11/17	Immigration	Yes	Yes	No	Yes	Yes
United States v. Garcia-Martinez, 845 F.3d 1126	11th Cir.	1/11/17	Guidelines	No	No	No	Yes	No
United States v. Tanksley, 848 F.3d 347	5th Cir.	1/18/17	Guidelines	No	No	No	Yes	No
United States v. Hertz, 673 F. App'x 606	8th Cir.	1/25/17	ACCA	No	No	No	No	No

Case Name	Court	Date	Context	Divisible	Imposed Sanction	Dissent	State Case	Record Documents
United States v. Solano-Hernandez, 847 F.3d 170	5th Cir.	1/26/17	Guidelines	Yes	Yes	No	Yes	No
Sandoval v. Sessions, 866 F.3d 986	9th Cir.	1/27/17	Immigration	No	No	No	No	No
Swaby v. Yates, 847 F.3d 62	1st Cir.	1/30/17	Immigration	Yes	Yes	No	Yes	Yes
United States v. Mendez-Henriquez, 847 F.3d 214	5th Cir.	1/30/17	Guidelines	Yes	Yes	Yes	Yes	Yes
United States v. Dozier, 848 F.3d 180	4th Cir.	1/30/17	Guidelines	Yes	Yes	No	No	Yes
United States v. Steiner, 847 F.3d 103	3d Cir.	2/1/17	Guidelines	No	No	No	Yes	Yes
Gatson v. United States, 2017 WL 3224851	11th Cir.	2/1/17	ACCA	Yes	Yes	No	Yes	Yes
United States v. Taylor, 848 F.3d 476	1st Cir.	2/8/17	ACCA	Yes	Yes	No	No	No
United States v. Lobaton-Andrade, 861 F.3d 538	5th Cir.	2/9/17	Guidelines	No	No	No	Yes	No
United States v. Delgado-Sánchez, 849 F.3d 1	1st Cir.	2/17/17	Guidelines	Yes	Yes	No	No	No

Case Name	Court	Date	Context	Divisible	Imposed Sanction	Dissent	State Case	Record Documents
United States v. Alexander, 680 F. App'x 388	6th Cir.	2/22/17	Guidelines	No	No	No	Yes	No
United States v. McArthur, 850 F.3d 925	8th Cir.	2/23/17	ACCA	No	No	No	Yes	No
United States v. Irons, 849 F.3d 743	8th Cir.	2/27/17	ACCA	Yes	Yes	No	No	No
United States v. Gooch, 850 F.3d 285	6th Cir.	3/2/17	18 U.S.C. § 924(c)	Yes	Yes	No	Yes	Yes
United States v. Gonzalez-Lince, 678 F. App'x 270	5th Cir.	3/8/17	Guidelines	Yes	Yes	Yes	No	No
Chavez-Alvarez v. Attorney Gen., 850 F.3d 583	3d Cir.	3/9/17	Immigration	No	No	No	Yes	No
United States v. Hudson, 851 F.3d 807	8th Cir.	3/21/17	Guidelines	Yes	Yes	No	Yes	No
United States v. Lynn, 851 F.3d 786	7th Cir.	3/24/17	Guidelines	Yes	Yes	No	Yes	No
United States v. Titties, 852 F.3d 1257	10th Cir.	3/24/17	ACCA	No	No	Yes	Yes	Yes
United States v. Faust (Mass. Resisting Arrest), 853 F.3d 39	1st Cir.	4/5/17	ACCA	No	No	No	No	Yes

Case Name	Court	Date	Context	Divisible	Imposed Sanction	Dissent	State Case	Record Documents
United States v. Faust (Mass. Assault and Battery on a Police Officer), 853 F.3d 39	1st Cir.	4/5/17	ACCA	Yes	Remand	No	Yes	Yes
United States v. Hall, 684 F. App'x 333	4th Cir.	4/7/17	ACCA	No	No	No	No	No
United States v. Tibbs, 685 F. App'x. 456	6th Cir.	4/10/17	Guidelines	Yes	Yes	No	Yes	No
United States v. Ama, 684 F. App'x. 736	10th Cir.	4/11/17	ACCA	No	No	No	No	No
Castendet-Lewis v. Sessions, 855 F.3d 253	4th Cir.	4/25/17	Immigration	No	No	No	Yes	Yes
United States v. Martinez-Rodriguez, 857 F.3d 282	5th Cir.	5/12/17	Guidelines	No	No	No	Yes	No
United States v. Harrison, 691 F. App'x. 440	9th Cir.	5/24/17	ACCA	No	No	No	Yes	No
Diego v. Sessions, 857 F.3d 1005	9th Cir.	5/26/17	Asylum	Yes	Yes	No	Yes	Yes
Lofties v. United States, 694 F. App'x. 996	6th Cir.	6/1/17	ACCA	Yes	Yes	No	No	No

Case Name	Court	Date	Context	Divisible	Imposed Sanction	Dissent	State Case	Record Documents
Moring v. United States, 2017 WL 4574491	6th Cir.	6/8/17	Guidelines	Yes	Yes	No	No	No
Ginter v. United States, 2017 WL 4570519	6th Cir.	6/12/17	ACCA	No	No	No	No	No
United States v. Rogers, 696 F. App'x 878	10th Cir.	6/13/17	Guidelines	Yes	Yes	No	Yes	No
Harbin v. Sessions, 860 F.3d 58	2d Cir.	6/21/17	Immigration	No	No	No	Yes	No
United States v. Goodson, 700 F. App'x 417	6th Cir.	6/26/17	Guidelines	Yes	Yes	No	Yes	No
United States v. Stitt, 860 F.3d 854	6th Cir.	6/27/17	ACCA	No	No	Yes	No	No
United States v. Perez-Silvan, 861 F.3d 935	9th Cir.	6/28/17	Immigration	Yes	Yes	No	Yes	No
United States v. Calvillo-Palacios (Texas Simple Assault), 860 F.3d 1285	9th Cir.	6/28/17	Guidelines	Yes	Yes	No	Yes	No
United States v. Calvillo-Palacios (Texas Aggravated Assault), 860 F.3d 1285	9th Cir.	6/28/17	Guidelines	No	Yes	No	Yes	No

Case Name	Court	Date	Context	Divisible	Imposed Sanction	Dissent	State Case	Record Documents
United States v. Reyes-Ochoa, 861 F.3d 582	5th Cir.	6/30/17	Guidelines	No	No	No	Yes	No
United States v. Ochoa, 861 F.3d 1010	9th Cir.	7/3/17	Immigration	No	No	No	Yes	Yes
Gordon v. Attorney Gen., 861 F.3d 1314	11th Cir.	7/10/17	Immigration	Yes	No	No	Yes	No
United States v. McMillan, 863 F.3d 1053	8th Cir.	7/24/17	Guidelines	No	No	No	Yes	No
United States v. Maldonado, 864 F.3d 893	8th Cir.	7/25/17	Guidelines	Yes	Yes	No	No	No
United States v. Diaz, 865 F.3d 168	4th Cir.	7/26/17	Mandatory Victims Restitution Act	No	No	No	Yes	No
United States v. Martinez-Lopez (Controlled-Substance Requirement), 864 F.3d 1034	9th Cir.	7/28/17	Guidelines	Yes	Yes	No	Yes	No
United States v. Martinez-Lopez (Actus Reus Requirement), 864 F.3d 1034	9th Cir.	7/28/17	Guidelines	Yes	Yes	Yes	Yes	No
United States v. Enoch, 865 F.3d 575	7th Cir.	7/28/17	18 U.S.C. § 924(c)	Yes	Yes	No	No	No
United States v. Reyes, 866 F.3d 316	5th Cir.	8/1/17	Guidelines	Yes	Yes	Yes	Yes	Yes

Case Name	Court	Date	Context	Divisible	Imposed Sanction	Dissent	State Case	Record Documents
United States v. Madkins, 866 F.3d 1136	10th Cir.	8/8/17	Guidelines	Yes	No	No	No	No
United States v. Pam, 867 F.3d 1191	10th Cir.	8/15/17	ACCA	Yes	Yes	No	No	Yes
United States v. Burtons, 696 F. App'x 372	10th Cir.	8/17/17	ACCA	Yes	Yes	No	Yes	No
United States v. Herrera-Serrano, 703 F. App'x 342	5th Cir.	8/21/17	Guidelines	Yes	Yes	No	Yes	No
United States v. Perlaza-Ortiz, 869 F.3d 375	5th Cir.	8/23/17	Guidelines	No	No	No	Yes	Yes
Marinelarena v. Sessions, 869 F.3d 780	9th Cir.	8/23/17	Immigration	Yes	Yes	Yes	Yes	No
United States v. Robinson, 869 F.3d 933	9th Cir.	8/25/17	Guidelines	No	No	No	Yes	No
United States v. Mata, 869 F.3d 640	8th Cir.	8/25/17	ACCA	Yes	Yes	No	Yes	No
United States v. Ocampo-Estrada, 873 F.3d 661	9th Cir.	8/29/17	21 U.S.C. § 841(b)(1)(A)	Yes	No	No	Yes	No
United States v. Reyes, 697 F. App'x 519	9th Cir.	9/8/17	Guidelines	Yes	Yes	No	No	No
Laryea v. Sessions, 871 F.3d 337	5th Cir.	9/12/17	Immigration	Yes	No	No	No	No
Totals				**60%**	**56%**	**12%**	**62%**	**26%**