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A MEANS TO AN ELEMENT: THE SUPREME COURT'S MODIFIED CATEGORICAL APPROACH AFTER *MATHIS V. UNITED STATES*

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INTRODUCTION

The Armed Career Criminal Act (hereinafter "ACCA") provides for higher penalties if an offender has three previous convictions for a "violent felony."[1] In the immigration context, any alien, including a lawful permanent

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[1] 18 U.S.C. § 924(e).

resident, is deportable if he or she is convicted of an "aggravated felony."[2] Both of these felony categories include state criminal convictions for the crimes that fall into these categories, like robbery, burglary, or arson.[3] Not all state criminal statutes are the same, however, and the elements of a given crime can vary across jurisdictions.[4]

This patchwork of definitions leads to some obvious difficulties for federal courts when it comes to determining whether an offender's previous convictions fit into these "violent" or "aggravated" categories and are thus predicates for enhanced criminal penalties or removal.[5] To help provide guidance in this area, the Supreme Court developed the "categorical approach," which requires any state criminal statute to be identical to or narrower in scope than the generic version.[6] There are times, however, where the elements of a state crime are written in a way that could criminalize two different courses of conduct, one that is a generic crime and one that is not. In these situations, the Supreme Court created the "modified categorical approach."[7] This approach allows a sentencing court, or an immigration judge, to look beyond the bare elements of the crime to a limited set of documents to determine whether the defendant or alien was convicted of the generic offense.[8]

While these approaches (and when to use them) are simple enough to understand in the abstract, they are difficult to apply in practice, often leading to inconsistent results among the lower federal courts.[9] Two recent Supreme Court cases, *Descamps v. United States*[10] and *Mathis v. United States*,[11] have attempted to resolve these issues in order to clarify when it is appropriate to use the modified approach while also giving clearer guidance to the lower courts. Yet, some questions and ambiguities still remain.

Part I of this comment will explain the difference between indivisible and divisible statutes, which is the basis for this particular issue of statutory interpretation. This part will also explain the categorical and modified

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[2] 8 U.S.C. § 1227(a)(2)(A)(iii).

[3] *See* 18 U.S.C. § 924(e); Nijhawan v. Holder, 557 U.S. 29, 41 (2009).

[4] *See* Taylor v. United States, 495 U.S. 575, 598 (1990).

[5] *See* Descamps v. United States, 133 S. Ct. 2276, 2290 (2013); *Nijhawan*, 557 U.S. at 41.

[6] *Taylor*, 495 U.S. at 598.

[7] *See* Shepard v. United States, 544 U.S. 13, 17 (2005); *Taylor*, 495 U.S. at 602.

[8] *Shepard*, 544 U.S. at 17; *Taylor*, 495 U.S. at 602.

[9] *See, e.g.*, United States v. Aguila-Montes De Oca, 655 F.3d 915, 917 (9th Cir. 2011) (en banc) (per curiam), *abrogated by Descamps*, 133 S. Ct. at 2286–92; United States v. Venzor-Granillo, 668 F.3d 1224, 1231 (10th Cir. 2012); United States v. Fife, 624 F.3d 441, 446 (7th Cir. 2010); United States v. Martinez-Hernandez, 422 F.3d 1084, 1086 (10th Cir. 2005).

[10] 133 S. Ct. 2276 (2013).

[11] 136 S. Ct. 2243 (2016).

categorical approaches to statutory interpretation to illustrate why the Supreme Court created these categories and how they have evolved over time. Part II will examine the Court's recent attempts to clarify and give guidance on these issues in *Descamps* and *Mathis*. Part III will discuss the issues that still remain after *Mathis* and what the Court could possibly do (and perhaps should do) next.

I. BACKGROUND

State criminal statutes can qualify as predicate offenses under federal law if the state criminal statute qualifies as a generic offense.[12] State criminal statutes that correspond to a majority of state criminal codes roughly correspond with generic offenses.[13] For example, the ACCA enhances sentences for defendants with three prior violent felony convictions.[14] The statute defines a "violent felony" as a crime that is both punishable by a year of imprisonment and "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[15] To qualify for violent felony status, a state criminal statute must contain the roughly similar elements as the generic offense.[16]

Complicating matters is that some statutes criminalize different types of conduct within the same section, so it is often unclear if the defendant was convicted of a generic offense. To determine whether a specific state criminal statute, written in the disjunctive, is a generic offense, the Supreme Court has created a two-step analysis: first, the sentencing court must determine if the offense is made up of a single set of "indivisible" elements, or if it has "divisible," alternative elements. If the statute is indivisible, the court can only use the "categorical" approach, where the court evaluates only the elements of the conviction statute to see if it is a generic offense. If the statute is divisible, the court uses the "modified categorical" approach, where it can look to a limited set of documents from the earlier conviction to determine whether the statute is a generic offense.

A. INDIVISIBLE V. DIVISIBLE STATUTES

As noted above, indivisible statutes are statutes that require a single set of elements to be met in order to convict a defendant of a crime, and divisible

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[12] *See* 18 U.S.C. § 924(e); Nijhawan v. Holder, 557 U.S. 29, 41 (2009).
[13] Taylor v. United States, 495 U.S. 575, 598 (1990).
[14] 18 U.S.C. § 924(e).
[15] *Id.*
[16] *Taylor*, 495 U.S. at 598.

statutes provide that a defendant can be convicted of a crime without one or more elements being met. The majority of criminal statutes the federal courts must evaluate are written as indivisible, while divisible statutes are rare.[17]

The distinction between the two statutes is best shown by example. Imagine a statute defining murder as "unlawful killing with intent to kill."[18] This statute has three elements: (1) someone is killed by another's actions; (2) the killing is unlawful (i.e., without justification or excuse); and (3) the actor intended to kill. An individual is then charged with shooting a gun at two people standing next to each other, killing one of them.

Here, the first two elements of the hypothetical statute are met: someone was killed by another's unlawful actions. As for the last element, two members of the jury could reasonably disagree who the defendant was aiming for. One juror thinks the defendant meant to shoot the victim while the other juror thinks the defendant meant to shoot the survivor and missed. In the end, this disagreement does not matter because both jurors agree that the shooter had the requisite *intent* as required by the element of the statute.[19] The statute is indivisible because all elements need to be met for an individual to be guilty.

For most state criminal statutes, when judges interpret them to see if they match a generic statute, the means used by a defendant to meet an element are irrelevant.[20] If the above hypothetical murder statute added

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[17] *See* United States v. Archer, No. 2:14-CR-00334, 2015 WL 3562549, at *2 (D. Utah June 4, 2015) (noting that the application of the modified approach in cases is rare).

[18] *See, e.g.*, D.C. Code § 22-2101; Cal. Pen. Code §§ 187–88 (defining murder as killing with malice aforethought and defining malice as a "deliberate intention [] to take away the life of a fellow creature"); Miss. Code § 97-3-19(1)(a); 720 ILCS 5/9-1; 18 Pa.C.S. § 2502(a); Michigan v. Aaron, 409 Mich. 672, 714 (1980).

[19] This is essentially the classic common law doctrine of transferred intent, where "a defendant who . . . [intends] to kill a certain person and [kills] a bystander instead is subject to the same criminal liability that would have been imposed had the fatal blow reached the person for whom intended." California v. Bland, 28 Cal. 4th 313, 321 (Cal. 2002); *see also* Lieutenant Colonel LeEllen Coacher & Captain Libby Gallo, *Criminal Liability: Transferred Intent and Concurrent Intent*, 44 A.F. L. REV. 227, 229 (1998) ("The doctrine of transferred intent exists when a defendant, who intends to kill one person but instead kills a bystander, is deemed the author for whatever kind of homicide would have been committed had he killed the intended victim." (internal quotation marks omitted)); Daniel J. Curry, Poe v. State*: The Court of Appeals of Maryland Limits the Applicability of the Doctrine of Transferred Intent*, 27 U. BALT. L. REV. 167, 167 (1997) ("The doctrine has been viable since the early English common law."); William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 652 (1967) ("The doctrine of "transferred intent" appeared first in criminal cases at a time when tort and crime were still merged in the trespass action.").

[20] *See* Descamps v. United States, 133 S. Ct. 2276, 2290 (2013) ("As long as the statute itself requires only an indeterminate 'weapon,' that is all the indictment must (or is likely to) allege and all the jury instructions must (or are likely to) mention. And most important, that is

another element to define murder as "unlawful killing with intent to kill *by use of a weapon*," it would not matter if the defendant used a knife, a gun, or a bike chain; as long as a weapon is used, the element would be met.[21] In the end, a prosecutor must prove a single group of elements for a jury to convict a defendant of the crime.[22]

The distinctive (but not dispositive) characteristic of divisible statutes is that they have an element written in the alternative. The crime itself has the same name attached to it, but the defendant need not satisfy every element listed to have committed the crime. The murder statute described above would become divisible if revised to say murder is "unlawful killing with intent to kill by use of a weapon *in a car or in a home*." Now the statutory elements are as follows: (1) someone was killed; (2) the killing was not permitted by law; (3) the killing was accomplished with a weapon; (4) the actor intended to kill; and (5) the killing was either in a (a) car *or* (b) home. This is what the Court meant when it referred to a divisible statute as "a [single] statutory provision that covers several different generic crimes."[23] The defendant can be guilty of murder whether he snuck into the victim's house and shot him or strangled him from the backseat of the victim's car with a piano wire.[24] A prosecutor need not prove that the defendant killed in both the car and the home to satisfy the last element. The alternative means at issue here would be the gun or the piano wire to commit the murder since either can be used as a weapon. The alternative *element* is the location of the murder.[25]

The distinction between indivisible and divisible statutes has a major effect on the way a court determines whether a state criminal statute is the same as a generic offense, and thus, whether the defendant's prior conviction carries ACCA or immigration consequences. Interpreting state criminal statutes to see if they are consistent with federal criminal statutes that would

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all the jury must find to convict the defendant. The jurors need not all agree on whether the defendant used a gun or a knife or a tire iron (or any other particular weapon that might appear in an imagined divisible statute), because the actual statute requires the jury to find only a 'weapon.'").

[21] *Id.*; *see* 79 Am. Jur. 2d Weapons and Firearms § 1 ("A 'weapon' is broadly defined as anything used or designed to be used in destroying, defeating, or injuring an enemy; it is an instrument of offensive or defensive combat.").

[22] *Descamps*, 133 S. Ct. at 2290.

[23] Nijhawan v. Holder, 557 U.S. 29, 41 (2009).

[24] THE GODFATHER (Paramount Pictures 1972).

[25] A statute written in the disjunctive, however, does not always mean the statute is divisible. As discussed further below, whether a statute is divisible or indivisible depends on whether the statute lists alternative means of conduct to satisfy the element or actual alternative elements. *Descamps*, 133 S. Ct. at 2285.

be predicates for sentence enhancement or removal is not as easy as looking at the labels affixed to each statute.[26] Thus, the Supreme Court, out of necessity, developed two different approaches to help resolve this issue.

B. CATEGORICAL APPROACH

In *Taylor v. United States*, the Supreme Court established the "formal categorical approach," through which courts interpret convictions under state criminal statutes as potential predicates for federal sentence enhancement."[27] The Court held that sentencing courts may only look at elements of the prior offense and not the facts of the underlying conviction.[28] If a state criminal statute is the same as (or narrower than) the generic crime, then it is a "violent felony" as defined by the ACCA.[29] Even if the conviction statute prohibits conduct that is narrower than a generic crime, it can be a violent felony.[30] However, if the state criminal statute criminalizes conduct that is broader than the generic crime, it cannot count as a violent felony as defined by the ACCA, even if the facts would show that the crime was committed according to the generic requirements.[31] Therefore, when sentencing, courts are only allowed to look to the elements of the statute and not the facts of the underlying case.[32]

C. MODIFIED CATEGORICAL APPROACH[33]

Taylor recognized that there were going to be cases where looking at "the charging paper and jury instructions" would be necessary.[34] Although the Court stressed that this "range of cases" would be particularly "narrow," this unnamed approach would make it permissible to look at some of the underlying documents when the statute has alternative elements, or, in other words, is divisible.[35] One element would be part of the generic offense and

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[26] The state criminal statute at issue in the Ninth Circuit case *Rendon v. Holder* is a prime example, as the California "burglary" statute criminalizes conduct that is greater than the generic offense of burglary. 764 F.3d 1077, 1090 (2014).

[27] 495 U.S. 575, 600 (1990).

[28] *Id.*

[29] *Id.* at 599.

[30] *Id.*

[31] *Id.*

[32] Taylor v. United States, 495 U.S. 575, 600 (1990).

[33] Although courts are still dissatisfied with the uninspired label for this approach, they have yet to come up with a better name. *See* Descamps v. United States, 133 S. Ct. 2276, 2281 (2013) ("We have previously approved a variant of this method—labeled (not very inventively) the 'modified categorical approach.'").

[34] *Taylor*, 495 U.S. at 602.

[35] *Id.*

the alternative element would not.[36]

The *Taylor* Court imagined a burglary statute that prohibits breaking into a car or a building.[37] The building is part of the generic offense of burglary because it is an element in a majority of state criminal codes. Cars, however, are not included in a majority of burglary codes. To convict a defendant for burglary, a prosecutor would need to charge and prove one element to the jury, while ignoring the other.[38] It is impossible to charge a defendant with simultaneously breaking into a building and a car since a person cannot physically be in two different places at the same time.[39]

According to the *Taylor* Court, one scenario—the building—involves all the elements of the generic crime of burglary.[40] The other scenario—the car—would not be an element of the generic crime of burglary because it criminalizes behavior broader than the generic crime of burglary.[41] While the building scenario is applicable to the ACCA for sentencing purposes, it is not clear, from just looking at the statute, that the defendant was convicted of the generic crime.[42] In *Taylor*'s example, it would be necessary for the sentencing court to look at a limited set of underlying documents, specifically the indictment or jury instructions, to see if the defendant was convicted of breaking into a house or into a car.[43]

Shepard v. United States was the first Supreme Court case to use this modified categorical approach.[44] Significantly, the Supreme Court first held that guilty pleas are just as applicable as jury verdicts for purposes of examining state criminal statutes as predicates for the ACCA.[45] It reasoned

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[36] *Id.*

[37] *Id.*

[38] *Id.* ("[I]f 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.").

[39] Assuming the car is not inside the building.

[40] *See Taylor*, 495 U.S. at 602.

[41] *Id.*; *see* Shepard v. United States, 544 U.S. 13, 17 (2005) ("Because statutes in some States (like Massachusetts) define burglary more broadly, as by extending it to entries into boats and cars, we had to consider how a later court sentencing under the ACCA might tell whether a prior burglary conviction was for the generic offense."); *see also* Jennifer Lee Koh, *The Whole is Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 311 (2012).

[42] *See Taylor*, 495 U.S. at 602.

[43] *Id.*

[44] 544 U.S. 13, 23 (2005).

[45] *Id.* at 20 ("In cases tried without a jury, the closest analogs to jury instructions would be a bench-trial judge's formal rulings of law and findings of fact, and in pleaded cases they would be the statement of factual basis for the charge . . . shown by a transcript of plea

that, in this context at least, there is no difference between a defendant admitting to all necessary elements of a charged offense and a jury finding beyond a reasonable doubt that all the necessary elements have been met.[46]

The *Shepard* Court next held that, when faced with a divisible statute, for a conviction to actually be a predicate for the ACCA, the defendant must still admit to the elements of a generic offense.[47] In this case, the burglary statute had an alternative element that provided for breaking into a building, car, or boat.[48] The guilty plea did not indicate whether the defendant broke into a building (satisfying the ACCA) or a boat or a car (which would not satisfy the ACCA).[49] The Court held that because of this ambiguity—and the fact the defendant confessed—the district court could look at the plea agreement or the plea colloquy, to see if the defendant pled guilty to the generic element or the alternative element, bringing the total amount of reviewable documents to four.[50] The Court reiterated that the modified approach does not permit looking at facts of the underlying conviction, but at the elements the defendant was convicted of to see if they comported with the general offense.[51]

The modified categorical approach, set forth in *Taylor* and *Shepard*, was given its name in *Nijhawan v. Holder*.[52] In *Nijhawan*, the Supreme Court analyzed a Massachusetts statute that prohibited breaking and entering at night in any of four alternative places: a "building, ship, vessel, or vehicle."[53] Only one of those places—the building—would qualify as a predicate for the ACCA.[54] The Court noted that when a single statute involves different crimes and not all of them fit into an ACCA definition, courts must determine which crime formed the basis of the conviction.[55] To do that, courts must look at

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colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea.").

[46] *Id.*

[47] *Id.* at 17.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 20.

[51] *Id.* at 26 ("We hold that enquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is 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.").

[52] 557 U.S. 29, 49 (2009).

[53] *Id.* at 35 (quoting Mass. Gen. Laws, ch. 266, § 16 (West 2006)).

[54] *Id.*

[55] *Id.* ("[A] court must determine whether an offender's prior conviction was for the violent, rather than the nonviolent, breaking that this single five-word phrase describes (e.g., breaking into a building rather than into a vessel).").

one of the limited set of documents permitted in cases like *Taylor* and *Shepard*.[56] The Supreme Court reiterated this in *Johnson v. United States*, holding that a court may not look to these documents to determine the underlying facts of the conviction, but only the "statutory phrase" that is the basis of conviction.[57]

II. WHEN A STATUTE IS DIVISIBLE AND WHEN IT IS NOT

Despite the directives and guidelines of *Taylor*, *Shepard*, *Nijhawan*, and *Johnson*, lower courts were still confused as to when and how to apply the modified approach.[58] This came to a head in *Descamps v. United States*,[59] where the Court considered whether "courts may also consult [the documents approved in *Taylor* and *Shepard*] when a defendant was convicted under an 'indivisible' statute . . . that criminalizes a broader swath of conduct than the relevant generic offense."[60] The Court held, emphatically, that it is not permissible for interpreting indivisible statutes, as the approach would allow courts to abuse their position by consistently looking past the fact of conviction to the underlying facts of the prior conviction, even if the elements are not a predicate under the categorical approach.[61]

Descamps also held that, for a statute to be divisible, the alternative elements must provide for different crimes within the same set of elements, while alternative means are only different ways of meeting one element in that set.[62] While the Court made this distinction, it left relatively little guidance as to identifying what are alternative elements and what are alternative means when reading a statute.[63]

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[56] *Id.*

[57] 559 U.S. 133, 144 (2010) ("[T]he 'modified categorical approach' . . . permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record . . . .").

[58] *See*, *e.g.*, United States v. Venzor-Granillo, 668 F.3d 1224, 1231 (10th Cir. 2012) (holding an ambiguity existed where the language in a state criminal statute criminalized broader conduct and that permitted the use of the modified approach).

[59] 133 S. Ct. 2276, 2281 (2013).

[60] *Id.* at 2281.

[61] *Id.* at 2281-82.

[62] *Id.* at 2285 n.2; *see also* United States v. Cabrera-Gutierrez, 756 F.3d 1125, 1137 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 124, 190 (2014) ("[U]nder Descamps, what must be divisible are the elements of the crime, not the mode or means of proving an element.").

[63] *E.g.*, *compare* Rendon v. Holder, 764 F.3d 1077, 1084–90 (9th Cir. 2014) (means/elements determined by whether jury must unanimously agree on phrasing, then documents can be consulted), *with* Rendon v. Holder, 782 F.3d 466, 466–473 (9th Cir. 2015) (denial of en banc review) (Graber, J., dissenting (joined by seven judges)) (courts *must* look at underlying documents to see if it is a predicate offense first) *and id.* at 473–474 (Kozinski, J., dissenting) (courts can take a "peek" at the documents to resolve means/elements dispute).

Three years later, in *Mathis v. United States*,[64] the Court again addressed this issue and attempted to answer the question of "whether ACCA makes an exception to [the] rule [of equal or narrower elements of the generic crime] when a defendant is convicted under a statute that lists multiple, alternative means of satisfying one (or more) of its elements."[65] The Court held that it does not,[66] but also tried to answer the question of when a statute lists means or elements.[67] To the Court, the answer largely depended on each jurisdiction's own interpretation or phrasing, but, if that was still not clear, it was permissible for federal sentencing courts to look to the *Taylor*/*Shepard* documents in order to answer the question.[68]

A. CORRECTING LOWER COURT APPLICATIONS OF THE MODIFIED APPROACH: *DESCAMPS*

Justice Kagan's majority opinion in *Descamps* is one of the best illustrations of the differences between the formal categorical approach and the modified categorical approach.[69] Matthew Robert Descamps was convicted of illegal possession of a firearm and had an extensive criminal history, which included three previous felony convictions.[70] One of these previous convictions was under California Penal Code § 459, which, as the Court described it, applies to: "A 'person who enters' certain locations 'with intent to commit grand or petit larceny or any felony is guilty of burglary.'"[71] Descamps's sentence under the possession statute would have only been ten years, but, if applicable, the ACCA would have increased his sentence to a minimum of fifteen years.[72]

The district court used the modified categorical approach and examined documents from the prior conviction—specifically the plea colloquy—to find that Descamps's burglary involved breaking and entering.[73] The court concluded that Descamps's § 459 conviction qualified as generic burglary and was within the definition of a violent felony under the ACCA.[74]

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[64] 136 S. Ct. 2243 (2016).

[65] *Id.* at 2248–49.

[66] *Id.*

[67] *Id.* at 2256–57.

[68] *Id.*

[69] Descamps v. United States, 133 S. Ct. 2276, 2283–86 (2013).

[70] United States v. Descamps, No. CR–05–104–FVS, 2012 WL 3144051, at *1 (E.D. Wash. Nov. 21, 2007).

[71] *Descamps*, 133 S. Ct. at 2282 (quoting Cal. Penal Code Ann. § 459 (West 2010)).

[72] *Id.*

[73] *Id.* at Appendix F, at 50a.

[74] *Id.*

The Ninth Circuit affirmed.[75] Relying on its previous decision in *United States v. Aguila-Montes de Oca*,[76] the court held that if a state criminal statute is categorically broader than the generic crime, a court is permitted to use the modified categorical approach to scrutinize certain conviction documents.[77] Descamps appealed to the Supreme Court, arguing that the California statute was broader than usual burglary statutes and therefore the conviction did not meet the standards for a violent felony.[78]

The Supreme Court reversed.[79] It clarified that the modified categorical approach is only used in limited circumstances where it is unclear which element in a divisible statute was met to bring about the conviction.[80] Citing *Taylor*, the Court ruled that the California statute did not meet the ACCA violent felony standard because it was too broad.[81] Further, it ruled that § 459 does not have divisible elements and covers simple shoplifting as well as burglary.[82] Since not all the elements of the generic crime of burglary needed to be proven at trial, the California statute was not a predicate ACCA offense.[83]

The Court based part of its reasoning on the text and history of the ACCA.[84] Because the statutory language specifically identifies convictions, and not merely commissions, Congress intended for courts to only look at the fact of conviction and not underlying facts giving rise to the convictions.[85] Other statutes may point to circumstances rather than convictions, but the ACCA's legislative history showed that Congress intended only the conviction to count for enhancement, and not for the enhancement to depend

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[75] United States v. Descamps, 466 F. App'x 563, 565–66 (9th Cir. 2012).

[76] 655 F.3d 915, 944 (9th Cir. 2011) (en banc) (per curiam), *abrogated by Descamps*, 133 S. Ct. at 2286–92.

[77] *Descamps*, 466 F. App'x at 565 ("Burglary under § 459 is categorically broader than generic burglary . . . . We therefore apply the modified categorical approach.").

[78] *Descamps*, 133 S. Ct. at 2282.

[79] *Id.* at 2293.

[80] *Id.* at 2285. ("The modified approach thus has no role to play in this case. The dispute here does not concern any list of alternative elements. Rather, it involves a simple discrepancy between generic burglary and the crime established in § 459.").

[81] *Id.* at 2285–86.

[82] *Id.* ("[Generic burglary] requires an unlawful entry along the lines of breaking and entering . . . . [§ 459] does not, and indeed covers simple shoplifting, as even the Government acknowledges . . . . [Therefore], § 459 define[s] burglary more broadly than the generic offense . . . . [B]ecause California, to get a conviction, need not prove that Descamps broke and entered—a § 459 violation cannot serve as an ACCA predicate." (internal citations and quotation marks omitted)).

[83] *Descamps*, 133 S. Ct. at 2285–86.

[84] *Id.* at 2287.

[85] *Id.*

on the facts of the case.[86]

The Court also reasoned that applying the modified categorical approach to indivisible statutes would allow a reviewing court to evaluate evidence, which is not appropriate in most circumstances.[87] This would give the reviewing court the power to determine what *facts* the jury relied upon to convict, or the judge accepted in a plea,[88] violating the Sixth Amendment.[89]

Moreover, according to the Court, facts in these underlying documents are often misleading and uncertain.[90] A defendant may have no incentive to challenge, and may be less likely to challenge, certain facts if they are not part of a charged element.[91] Trials often contain extraneous facts that have little or no bearing on the elements of the crime.[92] Defendants are also less likely to quibble with a court or prosecutors over factual allegations during a plea agreement.[93]

Lastly, the Court ruled that the Ninth Circuit's holding had (or could have) disastrous effects for defendants in plea agreements.[94] When agreeing to plea deals, defendants often plead guilty to lesser included offenses in exchange for lighter sentences.[95] The crime charged may qualify for enhancement under the ACCA, but the crime pled to may not qualify.[96] If later federal sentencing courts were allowed to use the modified approach on a much looser basis, defendants could be found to have pled to the qualifying crime for ACCA enhancement based on "extraneous statements in the

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[86] *Id.* ("Congress instead meant [for the] ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none.").

[87] *Id.* at 2289 ("[T]he Ninth Circuit's ruling flouts our reasoning—here, by extending judicial factfinding beyond the recognition of a prior conviction.").

[88] *See id.* ("But the Ninth Circuit's reworking authorizes the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct . . . . And there's the constitutional rub." (internal citation omitted)).

[89] *Id.* ("The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances.").

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *See id.* ("[Descamps] likely was not thinking about the possibility that his silence could come back to haunt him in an ACCA sentencing 30 years in the future. (Actually, he could not have been thinking that thought: [the] ACCA was not even on the books at the time of Descamps' burglary conviction.")).

[94] *Id.*

[95] *Id.*

[96] *Id.*

record."[97]

Descamps was a pushback against lower courts' expansion of the modified categorical approach. While *Taylor*, *Shepard*, and other cases made it clear that the modified approach was only appropriate for a narrow category of cases, lower courts misinterpreted those cases and applied the modified approach to improperly enhance sentences under the ACCA.[98] Those courts should only have used the formal categorical approach, which would have cut off all further inquiry. While both lower courts and the executive followed what they believed to be the proper interpretation of longstanding precedent, *Descamps* gave clear direction going forward to protect defendants from methods the Court viewed as going too far.

The Court, however, did not explicitly lay out a test for determining when a statute actually *is* divisible; that is, when it lists alternative elements, not alternative means. The Court did somewhat address this issue in footnote 2 of the opinion.[99] Responding to the dissent's point that "distinguishing between 'alternative elements' and 'alternative means' is difficult," the Court stated "[w]hen a state law is drafted in the alternative, the court merely resorts to the approved [*Taylor*/*Shepard*] documents and compares the elements revealed there to those of the generic offense."[100]

This reasoning presented a few problems. First, it seems to be wholly at odds with the policies articulated in the body of Justice Kagan's opinion, which clearly prohibit a court from considering these documents without first deciding whether the statute is divisible as a threshold issue. If the categorical approach was designed to foster an elements inquiry and to prevent judicial fact-finding based upon faulty documents, it does not follow that courts should be able to engage in fact-finding to determine the threshold issue of whether the statute is divisible. While some have characterized footnote 2 as a "clear instruction,"[101] it appeared to not be reconciled with the main text of the opinion. At the very least, this caused more confusion among the lower

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[97] *Id.* ("*Taylor* recognized the problem: If a guilty plea to a lesser, nonburglary offense was the result of a plea bargain . . . it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to generic burglary. That way of proceeding, on top of everything else, would allow a later sentencing court to rewrite the parties' bargain." (quoting Taylor v. United States, 495 U.S. 575, 601–602 (1990)) (internal quotation marks, citations, and alterations omitted)).

[98] *See* United States v. Aguila-Montes de Oca, 655 F.3d 915, 944 (9th Cir. 2011) (en banc) (per curiam) (abrogated by *Descamps*, 133 S. Ct. at 2286–92).

[99] *Descamps*, 133 S. Ct. at 2285 n.2.

[100] *Id.*

[101] Rendon v. Holder, 782 F.3d 466, 469–71 (9th Cir. 2015) (Graber, J., dissenting from the denial of en banc review).

courts.[102]

The question, thus, was still left largely unanswered: how is a court to determine when a statute lists divisible *elements* (two distinct sets of elements within the whole[103]) instead of simply different means by which to complete the same element? In other words, what test should courts use to determine when a statute is divisible?

B. WHEN A STATUTE LISTS MEANS OR ELEMENTS: *MATHIS*

The question of divisible statutes wound its way to the Court again three years after *Decamps* in *Mathis v. United States*.[104] On January 21, 2014, Richard Mathis pleaded guilty to being a felon in possession of a firearm in violation of the ACCA.[105] Mathis's previous felonies were for five prior burglary convictions in Iowa.[106] At sentencing, the prosecution requested a sentence enhancement like in *Descamps*, arguing his prior convictions were predicates under the ACCA.[107]

The Iowa burglary statutes in question prohibited unlawfully entering any "occupied structure,"[108] defined as "any building, structure, . . . vehicle, or similar place."[109] The district court found the Iowa statute to be divisible and applied the modified categorical approach to determine which elements Mathis was convicted of in order to further determine whether they were predicates for sentence enhancement.[110] The district court found these prior convictions were violent felonies and sentenced him to the mandatory minimum of fifteen years under the ACCA.[111]

The Eighth Circuit affirmed.[112] Even though the Eighth Circuit noted

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[102] *E.g.*, *compare* Rendon v. Holder, 764 F.3d 1077, 1080 (9th Cir. 2014) (holding that the means/elements distinction prevented looking at the *Taylor*/*Shepard* documents to resolve the divisibility issue), *with* United States v. Mathis, 786 F.3d 1068, 1069 (8th Cir. 2015), *rev'd*, Mathis v. United States, 136 S. Ct. 2243 (2016) (holding that *Descamps* expressly *rejected* a means/elements distinction and always allowed looking at the approved documents if the statute criminalized more conduct than the generic offense).

[103] *See Rendon*, 764 F.3d at 1086.

[104] 136 S. Ct. 2243 (2016).

[105] *Mathis*, 136 S. Ct. at 2250; *see* 18 U.S.C. § 922(g).

[106] *Mathis*, 136 S. Ct. at 2250.

[107] *Id.*; *see* 18 U.S.C. § 924(e).

[108] Iowa Code §§ 713.1 (defining burglary as unlawfully entering, remaining in, or breaking an occupied structure with "intent to commit a felony, assault, or theft therein"), 713.5 (defining second-degree burglary, in part, as burglary in an occupied structure).

[109] Iowa Code §§ 702.12 (defining "occupied structure").

[110] *Mathis*, 786 F.3d at 1070–71, *rev'd*, *Mathis*, 136 S. Ct. at 2243.

[111] *Id.* at 1071.

[112] *Id.* at 1076.

the Iowa statute "sweeps more broadly than generic burglary" due to the expanded definition of "occupied structure," it concluded this was "the exact type of divisibility contemplated in *Taylor* and later solved in *Shepard*."[113] Thus, the modified categorical approach was the "proper tool to determine whether Mathis's prior convictions are 'violent felonies.'"[114]

The Eighth Circuit rejected Mathis's argument that these were not alternative elements, but rather alternative means by which to satisfy the same element.[115] The circuit court reasoned that footnote 2 of *Descamps* actually *eliminated* a means/elements distinction and held that any disjunctive list within a criminal statute made the statute divisible.[116] Thus, whenever this type of list exists in a statute that sweeps broader than the generic offense, the court is allowed to look at the documents approved by the modified categorical approach to determine if the defendant was convicted of a "violent felony" under the ACCA.[117]

The Supreme Court reversed the Eighth Circuit in another majority opinion written by Justice Kagan.[118] The Court reaffirmed that "a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense" and "[h]ow a given defendant actually perpetrated the crime . . . makes no difference; . . . the mismatch of elements saves [him] from an ACCA sentence."[119] The Court also clarified that there indeed was a means/elements distinction, holding the existence of a disjunctive list "gives a sentencing court no special warrant to explore the facts of an offense, rather than to determine the crime's elements and compare them with the generic definition."[120]

The Court did address what it called "the first task of a sentencing court": figuring out whether a statute lists elements or means.[121] The Court, reasoning that a state is the final authority on the interpretation of its own laws, held that "authoritative sources of state law" on the matter are the first thing a sentencing court should look for.[122] Thus, if the state's courts have already interpreted the statute to contain alternative elements or means, "a

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[113] *Id.* at 1074.

[114] *Id.*

[115] *Id.*

[116] *Id.* at 1074–75.

[117] *Id.* at 1075. The Eighth Circuit's decision created a circuit split on this issue. Mathis v. United States, 136 S. Ct. 2243, 2251 (2016).

[118] *Mathis*, 136 S. Ct. at 2247, 2250.

[119] *Id.* at 2251.

[120] *Id.*

[121] *Id.* at 2256.

[122] *Id.*

sentencing judge need only follow what [such a ruling] says."[123] Another authoritative source is the face of the state criminal statute itself.[124] If the listed alternatives require different penalties, then they must be different elements.[125] On the other hand, if the statute merely gives "illustrative examples," they are means to commit the crime.[126] Finally, the statute itself may also indicate what is essential to be charged (elements) and what is not (means).[127]

In Mathis's case, the Iowa Supreme Court has previously interpreted the burglary statute at issue to list "alternative methods of committing the same offense, so that a jury need not agree whether the burgled location was a building, other structure, or vehicle."[128] Thus, the statutes that Mathis was previously convicted under were not divisible and the modified categorical approach was not applicable to the case.[129] Therefore, since the conduct criminalized by the Iowa burglary statutes was greater than the generic offense, none of Mathis's prior convictions could be used as predicates under the ACCA and his sentence could not be enhanced.[130]

The Court, albeit in dicta, also clarified the ambiguities *Descamps*.[131] If the sources of state law fail to clarify whether the listed alternatives are elements or means, the sentencing court should look to the approved *Taylor*/*Shepard* documents "for the sole and limited purpose of determining whether the listed items are elements of the offense."[132] The record would reveal what the prosecutor would have to prove beyond a reasonable doubt and what jurors could disagree on yet still find all the elements were

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[123] *Id.* (citing Schad v. Arizona, 501 U.S. 624, 636 (1991) (plurality) ("If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law.")).

[124] *Id.*

[125] *Id.* (citing Apprendi v. New Jersey, 530 U.S. 466, 468 (2000)); *see, e.g.*, ALASKA STAT. § 28.35.060 (requiring motorists in accidents to both provide their personal information and render reasonable assistance to any person injured (subsection (a)), but making it a misdemeanor to fail to provide information (subsection (b)) and a felony to fail to render reasonable assistance (subsection (c))).

[126] *Mathis*, 136 S. Ct. at 2256.

[127] *Id.*

[128] *Id.* (citing State v. Duncan, 312 N.W.2d 519, 523 (Iowa 1981)).

[129] *Id.* at 2253–54.

[130] *Id.* at 2257.

[131] *Id.* at 2251.

[132] *Id.* at 2256–57 (quoting Rendon v. Holder, 782 F.3d 466, 473–74 (9th Cir. 2015) (Kozinski, J., dissenting from the denial of reh'g en banc) (internal quotation marks and alterations omitted)).

proved.[133] In the unlikely event the documents do not resolve the inquiry, "*Taylor*'s demand for certainty" will never be satisfied and the offense should not be considered an ACCA predicate.[134] However, this last situation is likely to be extraordinarily rare.[135]

The sentencing court is still prohibited from using those record documents if it turns out the statute only lists means and not elements.[136] The Court explained it had no problem with a sentencing judge knowing the underlying facts of a previous conviction, so long as that judge did not use those facts to determine the previous conviction was a predicate offense if the elements did not match up.[137]

Justice Kennedy joined the majority opinion because it faithfully applied the Court's precedents, but wrote separately to express his reservations with the elements based approach.[138] To Justice Kennedy, the elements based approach is compelled by the Court's interpretation of Congress's statutes and, if Congress has a problem with this approach, it can overturn those precedents.[139] That being said, the majority opinion, to him, "is a stark illustration of the arbitrary and inequitable results produced by applying an elements based approach to this sentencing scheme."[140] To Justice Kennedy, Congress could never have intended for career offenders to be shielded from punishment or face "vast sentencing disparities" compared to defendants in other jurisdictions for the same exact conduct.[141] He reasoned, however, that it was not for the Court to overturn their own precedent (absent an appropriate case), but for Congress to fix on their own by amending the ACCA.[142]

Justice Breyer, joined by Justice Ginsburg, dissented, arguing that the elements/means distinction is an unnecessary complication to sentencing and causes more confusion among lower courts than it provides clarity.[143] To

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[133] *Id.*

[134] *Id.* (quoting Shepard v. United States, 544 U.S. 13, 21 (2005)).

[135] *Id.*

[136] *Id.* at 2257.

[137] *Id.* at 2251 ("In some cases, a sentencing judge knows (or can easily discover) that the defendant carried out a 'real' burglary, even though the crime of conviction also extends to other conduct. No matter. Under ACCA . . . it is impermissible for a particular crime [to] sometimes count towards enhancement and sometimes not, depending on the facts of the case.").

[138] *Id.* at 2258.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* at 2259.

Justice Breyer, the distinction between the two makes sense in the abstract, but the distinction does not make a difference in practical application at sentencing.[144] While this distinction is relevant to the state's own application of its criminal law, to Justice Breyer, it makes no sense to use it in federal sentencing.[145] The approach that uses this distinction is impractical or unworkable in real situations, and "will produce a time-consuming legal tangle" for lower courts to slog through.[146]

Justice Breyer argued what should really matter are the *facts* designated in the statute, not whether those facts are used by the state as elements or means.[147] He would do away with the elements/means distinction and instead allow prior convictions to serve as predicates if "(1) the *statute* at issue lists the alternative means by which a defendant can commit the crime . . . and (2) the *charging documents* make clear that the . . . jury or trial judge necessarily found . . . an alternative that matches the federal version of the crime."[148]

Justice Alito also dissented and heavily criticized the Court's precedent.[149] To Justice Alito, the Court's categorical/modified categorical approaches, indivisible/divisible inquiries, and now elements/means distinctions had created an unworkable and impractical way of determining whether previous convictions were indeed "violent felonies."[150] Justice Alito instead advocated for "[a] real-world approach [to] avoid the mess" produced by previous decisions which would allow the sentencing court to look at the record regardless of elements.[151] If it is clear the underlying facts support the previous conviction as a predicate for ACCA purposes, then it counts.[152] It would not count, however, "[i]f the record is lost or inconclusive."[153] To Justice Alito, the majority's approach rendered real-world facts irrelevant and instead advanced "pointless formalism."[154]

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[144] *Id.* at 2261.

[145] *Id.*

[146] *Id.* at 2264.

[147] *Id.*

[148] *Id.* at 2265 (emphasis in original). The majority responded to Justice Breyer by restating that the Court's precedents (such as *Taylor*, *Shepard* and even *Descamps*) dictated the use of the elements/means distinction. *Id.* at 2254–56.

[149] *Id.* at 2265–70.

[150] *Id.*

[151] *Id.* at 2269–70.

[152] *Id.* at 2270.

[153] *Id.*

[154] *Id.* at 2271. The majority responded to Justice Alito in much the same way it did to Justice Breyer. *See id.* at 2254 n.4.

III. DISCUSSION

The Supreme Court noted in *Taylor* and its progeny that, by specifically identifying certain crimes as predicates in statutes such as the ACCA, Congress created categories of offenses that excluded other offenses which did not fit the generic definition.[155] Congress intended both to prevent arbitrary limitations by state definition and to provide fundamental fairness to offenders.[156] According to the Court, sentence enhancement cannot turn "on whether the State of [an offender's] prior conviction happened to call [the] conduct" a particular offense.[157]

Thus, it is a matter of statutory interpretation when a court is faced with the question of whether a prior conviction is a predicate for sentence enhancement (or removal) or not. In other words, Congress has created these categories of generic crimes in a way that draws a line between predicate, generic offenses and non-predicate offenses.[158] The courts are not to exercise their own judgment as to whether the specific *facts* of the underlying conviction fit into these categories, but only to whether the *elements* of the state criminal statute at issue fit into a generic category.[159] Moreover, the Court, in adopting the categorical approach, highlights a preference to prevent judicial fact-finding into underlying convictions and to preserve jury fact-finding from being subverted.[160]

There are still giant ambiguities, however, when it comes to putting the approaches into practice. Justice Alito was correct that this area of interpretation is fraught with peril and misunderstanding among the lower courts. Historically, determining when the modified approach was

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[155] Taylor v. United States, 495 U.S. 575, 591 (1990). While the amendments at issue in *Taylor* eliminated a specific definition of burglary, the Court noted that "[w]ithout a clear indication that . . . [it] intended to abandon its general approach of using uniform categorical definitions to identify predicate offenses, we do not interpret Congress' omission of a definition of 'burglary' in a way that leads to odd results of [different application from state to state]." *Id.*

[156] *Taylor*, 495 U.S. at 582; *see also* S. Rep. No. 98–190, p. 20 (1983) ("Because of the wide variation among states and localities in the ways that offenses are labeled, the absence of definitions raised the possibility that culpable offenders might escape punishment [at the federal level] on a technicality. . . . [F]or purposes of this Act, such limitations are not appropriate. Furthermore, in terms of fundamental fairness [to the defendant], the Act should ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases.").

[157] *Taylor*, 495 U.S. at 591.

[158] Descamps v. United States, 133 S. Ct. 2276, 2283 (2013).

[159] *Id.*

[160] *See* Descamps v. United States, 133 S. Ct. 2276, 2282 (2013); Johnson v. United States, 559 U.S. 133, 144 (2010); Nijhawan v. Holder, 557 U.S. 29, 49 (2009); Shepard v. United States, 544 U.S. 13 (2005); Taylor v. United States, 495 U.S. 575, 600 (1990).

appropriate was immensely confusing for lower courts and led to inconsistent results, especially pre-*Descamps*. For instance, in *United States v. Aguila-Montes De Oca*, the Ninth Circuit held that the modified approach applied to an indivisible statute simply because it was broader than the generic crime.[161] In *United States v. Venzor-Granillo*, the Tenth Circuit held that the modified approach applied merely because the language in the statute was ambiguous through criminalizing broader conduct.[162] In contrast, the Seventh Circuit in *United States v. Fife* held that the statutory phrase "any felony" *required* a sentencing court to look *beyond the fact of conviction* to see what felony met the element.[163] And in *United States v. Martinez-Hernandez*, another Tenth Circuit case, the court stated "when the underlying statute reaches a broad range of conduct, some of which merits an enhancement and some of which does not, courts resolve the resulting ambiguity by consulting reliable judicial records, such as the charging document, plea agreement, or plea colloquy."[164] These holdings clearly confused the statutory interpretation function of the categorical and modified categorical approaches.

Even post-*Descamps*, this approach has still created confusion, often in the same jurisdiction.[165] In addition to being not particularly easy to determine, deciding the means or elements has been a source of frustration for the lower courts as well.[166]

Justices Kennedy, Breyer and Alito were also all correct in concluding that the approaches have caused arbitrary results for defendants and lawful permanent residents, as they could have their sentences enhanced or be sent to a different country depending on what judicial circuit they inhabit, rather than creating a consistent application of federal statutes across all federal jurisdictions. According to the *Taylor* Court, this is exactly what Congress did not want to happen (albeit with an eye to differing state criminal statutes).[167] As Kennedy noted, while this approach is dictated by the statute and is intended to create uniform application of federal sentencing law, in practice it becomes what it was intended to avoid: a patchwork of different

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[161] 655 F.3d 915, 917 (9th Cir. 2011) (en banc) (per curiam), *abrogated by* Descamps v. United States, 133 S. Ct. 2276, 2286–92 (2013).

[162] 668 F.3d 1224, 1231 (10th Cir. 2012).

[163] 624 F.3d 441, 446 (7th Cir. 2010).

[164] 422 F.3d 1084, 1086 (10th Cir. 2005).

[165] *See Mathis*, 136 S. Ct. at 2268. For an illustration, *compare* Rendon v. Holder, 764 F.3d 1077, 1084–90 (9th Cir. 2014), where the panel opinion held that looking at the *Taylor*/*Shepard* documents was inappropriate without first finding the statute is divisible, *with* its denial of en banc review, 782 F.3d 466, 466–474, where nine judges disagreed.

[166] *See Rendon*, 782 F.3d at 471 (describing the inquiry after *Descamps* as "notoriously uncertain" and leading to "uncertain results").

[167] *See Taylor*, 495 U.S. at 590–91.

results dependent upon where the conduct took place, regardless if it was targeted by the statute.[168]

Another complication in the means/elements determination is the tension between the rationale for the modified approach stated in *Descamps* and the method for determining whether a statute it divisible in *Mathis*. The *Descamps* Court clarified that the modified approach is only a tool that allows a court to determine what crime someone was convicted of when faced with several alternatives so that crime can be compared to the generic offense.[169] The Court has never held that it is an exception that allows those courts to look at the underlying facts from that previous conviction to decide for itself what facts supported the defendant's conviction.[170] The modified approach is only allowed when the defendant is convicted under a divisible statute that contains more than one offense within the same set of elements.[171] Even when the modified approach is used, a court is still only allowed to discover what elements the defendant was convicted of and not the underlying facts of the conviction.[172] The tight restrictions on its use illustrate the Court's preference for using it sparingly and only when necessary.

Mathis was a further tightening of the controls for when this approach can and cannot be used, but, curiously, the Court approved of a lower court crossing the threshold to make the determination of whether it can cross the threshold.[173] The Court appeared confident that a sentencing court—and, by extension, an immigration judge—would not use its knowledge of the true underlying facts when making the threshold determination of divisible or

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[168] *Mathis*, 136 S. Ct. at 2258.

[169] Descamps v. United States, 133 S. Ct. 2276, 2285 (2013).

[170] *Id.*; *see also* Michael R. Devitt, *Improper Deportation of Legal Permanent Residents: The U.S. Government's Mischaracterization of the Supreme Court's Decision in* Nijhawan v. Holder, 15 SAN DIEGO INT'L L.J. 1, 12 (2013); Cam Barker et al., *United States Supreme Court Update*, 26 APP. ADVOC. 72, 77 (2013).

[171] *Descamps*, 133 S. Ct. at 2285; *see also* Mario K. Castillo, *Immigration Consequences: A Primer for Texas Criminal Defense Attorneys in Light of* Padilla v. Kentucky, 63 BAYLOR L. REV. 587, 607 (2011); Nelson A. Vargas-Padilla, *The Immigration Consequences of Criminal Conduct*, 3 CRIM. L. BRIEF 24, 25 (2007).

[172] *Descamps*, 133 S. Ct. at 2285; Tokatly v. Ashcroft, 371 F.3d 613, 620 (9th Cir. 2004) ("[W]hen it is not clear from the statutory definition of the prior offense whether that offense constitutes a removable offense . . . we apply a 'modified' categorical approach under which we may look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including 'the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings.'" (quoting United States v. Rivera-Sanchez, 247 F.3d 905, 908 (9th Cir. 2001) (en banc))).

[173] *Mathis*, 136 S. Ct. at 2256–57.

indivisible.[174] As Justice Breyer alluded to,[175] this may make sense in an abstract sense, but—like much of the previous lower court decisions in this area—in practice it may lead to more confusion and misapplication at federal sentencing or removal proceedings. In this sense, Justice Alito's dissent could, in the end, serve as a template for overruling these cases and instead impose a "real-world [and practical] approach [to] avoid the mess" created by these lines of cases.[176]

CONCLUSION

In this area of statutory interpretation, the Court's decisions have all started with good intentions. They have all attempted to balance the requirements of the ACCA and other federal statutes with the protections afforded by the statutory text, other court precedent and the Constitution itself.[177] However, each Court opinion has left the lower courts scratching their heads in attempts to figure out which approach — categorical or modified categorical—is appropriate. *Mathis* has already been cited by a few different circuits, with somewhat inconsistent results.[178] Time will tell if the Court will have to address this issue again and whether it will attempt to resolve further ambiguities, or, as Justice Alito suggested, scrap it, turn the car around, and start all over again at the beginning.

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[174] *Id.* at 2251.

[175] *Id.* at 2261–62.

[176] *Id.* at 2269–70.

[177] *See id.* at 2259–60 (Thomas, J. concurring) (arguing that "depending on judge-found facts in Armed Career Criminal Act [] cases violates the Sixth Amendment and is irreconcilable with *Apprendi* [*v. New Jersey*, 530 U.S. 466, 468 (2000)]").

[178] *Compare* United States v. Edwards, 836 F.3d 831, 833 (7th Cir. 2016) ("recourse to state-court charging documents was improper" when answer to the question was on the statute's face) *with* United States v. Henderson, No. 15-1562, 2016 WL 6595945, at *6–7 (3d Cir. Nov. 8, 2016) (proper for sentencing court to look at charging documents even if state's own interpretation and the face of the statute confirm the statute lists elements and not means).