IMMIGRANT DEFENSE PROJECT

CHALLENGING DIVISIBILITY

LITIGATION STRATEGIES AND POST-*MATHIS* CASE LAW SURVEY

IMMIGRANT DEFENSE PROJECT

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WHO WE ARE

The Immigrant Defense Project (IDP) was founded 20 years ago to combat an emerging human rights crisis: the targeting of immigrants for mass imprisonment and deportation. As this crisis has continued to escalate, IDP has remained steadfast in fighting for fairness and justice for all immigrants caught at the intersection of the racially biased U.S. criminal and immigration systems. IDP fights to end the current era of unprecedented mass criminalization, detention and deportation through a multipronged strategy including advocacy, litigation, legal advice and training, community defense, grassroots alliances, and strategic communications.

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INTRODUCTION AND RESOURCE SUMMARY

Recent developments in categorical approach case law have complicated the defense of noncitizens charged with negative immigration consequences based on past convictions under overbroad criminal statutes. Now it has become more important than ever to resist government efforts to persuade adjudicators that such overbroad statutes are "divisible" into separate narrower crimes, at least one of which is a categorical match to a removal ground. In such cases, the noncitizen will want to make any available arguments to persuade the adjudicator that the overbroad statute is instead "indivisible" into multiple offenses and therefore cannot trigger the immigration consequence.

Indivisibility arguments are of ever-increasing importance in light of the continued attempts to weaken the categorical approach. For example, in *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021), the Supreme Court chipped away at the protection of the categorical approach in holding a noncitizen applying for relief from removal cannot rely on a record of conviction that is inconclusive as to which of the alternative offenses within a divisible statute the person was convicted of. However, a noncitizen still prevails if they are able to persuade the adjudicator that their statute of conviction is not divisible to begin with. Challenging divisibility can be a powerful tool for immigrant defense to avoid the negative implications of such categorical approach-eroding decisions now more than ever.

Divisibility analyses involve very high stakes for the noncitizen. Whether a noncitizen is removable, ineligible for relief, or subject to mandatory detention can be won or lost on the issue of divisibility. Fortunately, in defending against government divisibility arguments, immigrants continue to have a powerful weapon in the Supreme Court's earlier decision in *Mathis v. United States*, 579 U.S. 500 (2016), which set forth strict requirements before a criminal statute could be found divisible.

This resource is meant to assist in the legal representation of those noncitizens who are confronting, or expect to confront, divisibility arguments as to certain statutes of conviction within the application of the categorical approach.[1] The resource includes:

1. An overview of divisibility and the Supreme Court's decision in *Mathis*, a primer on important criminal law concepts related to case law research on divisibility, and a discussion of litigation tips and strategies in making indivisibility arguments; and

2. A survey of divisibility cases published in the Second, Third, Fifth, Ninth, and Eleventh circuits[2] post-*Mathis*. The resulting case chart covers cases arising in both the criminal and immigration contexts,[3] summarizes the analysis and conclusion reached in each case, and includes thoughts on case strengths or weaknesses, potential errors in analysis, and anything else of note that may be helpful to a practitioner in understanding the case or making indivisibility arguments.

IDP encourages litigants to contact us for technical assistance and amicus support in cases involving divisibility determinations. We can be reached at: litigation@immdefense.org, amelia@immdefense.org, or andrew@immdefense.org. Additional resources related to categorical approach litigation are on IDP's website at: https://www.immigrantdefenseproject.org/using-and-defending-the-categorical-approach-2/.

[1] This resource is intended for authorized legal counsel and is not a substitute for independent legal advice provided by legal counsel familiar with a client's case.

[2] At this time, the case law survey was limited to the circuits with larger noncitizen populations.

[3] The categorical approach also in criminal cases in addition to immigration cases, in contexts such as the application of sentencing enhancements in light of prior convictions, or the validity of prior removal orders in illegal reentry cases. This resource will refer to the immigration context generically, but it is important to note that criminal case law involving the categorical approach is also cited in immigration cases, and vice versa, so that decisions arising in both scenarios are relevant. *See, e.g. Mathis*, 579 U.S. at 510 n.2.

DIVISIBILITY OVERVIEW AND ANALYSIS UNDER *MATHIS V. UNITED STATES*

The categorical approach is the tool immigration authorities must use to determine whether a criminal conviction triggers a "conviction"-based ground of removal or other immigration consequence, such as mandatory detention or ineligibility for relief. Under this approach, an immigration adjudicator must determine whether there is a categorical match between the statute of conviction, and the removal ground triggering the immigration consequence. *Mellouli v. Lynch*, 575 U.S. 798, 805 (2015) ("Because Congress predicated deportation 'on conviction, not conduct,' the approach looks to the statutory definition of the offense of conviction, not to the particulars of [a noncitizen's] behavior.") (citations omitted). If the statute is a categorical match to the removal ground, the immigration consequence is triggered. "Conversely, if the statute criminalizes more conduct that the generic removal ground, it is considered "overbroad." Whether an overbroad statute triggers an immigration consequence depends on whether it describes a single offense or is "divisible" into multiple offenses.

If a divisibility analysis is conducted and the overbroad statute is "indivisible" in that it defines a single offense, the inquiry ends, and the immigration consequence is not triggered. *Descamps v. United States*., 570 U.S. 254 (2013); *Mathis*, 579 U.S. at 504-05. If, however, the statute is in fact divisible into more than one offense, the immigration adjudicator next applies the so-called modified categorical approach. Under the modified approach, the adjudicator may review a limited set of documents, referred to as the "record of conviction,"[4] for the sole purpose of determining which of the alternate offenses the person was necessarily convicted of. *Mathis*, 579 U.S. at 505.

Once it is clear which of the alternate offenses the conviction involves, the final question is whether that offense is also overbroad, or whether instead there is a categorical match and the immigration consequence is triggered. Where a statute is divisible, a noncitizen may of course still prevail if the record of conviction clearly shows that, of the alternate offenses, they were convicted of an overbroad offense. However, if the record reflects conviction for the removable elements or subsection of the statute, the immigration consequence is triggered.

In *Mathis*,[5] the Supreme Court clarified the limited circumstances in which a criminal statute is deemed divisible and subject to a modified categorical approach. The Court confirmed that, when confronting an alternatively-phrased statute, the statute is not divisible unless these alternatively-phrased facts are actual **elements** of distinct crimes, and not mere alternative **means** of committing a single crime. *Id*. at 505-06. Elements are those facts set forth in the statute of conviction that must be proven by the prosecution beyond a reasonable doubt and with juror unanimity in order to sustain a conviction, which is not required for mere means of commission. *Id*. at 504.

DIVISIBILITY IN PRACTICE

Consider the stakes in *Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017) for the immigration consequences of lower-level New York controlled substance offenses. The Second Circuit held that New York's definition of "controlled substance" is overbroad, because it criminalizes possession and sale of Human Chorionic Gonadotropin (HCG), whereas the federal drug schedule does not. If the statute were divisible as to the substance, the record of conviction could be consulted in each case to see if person was convicted of possession or sale of HCG as opposed to any other substance. But because the court found such statutes indivisible, the immigration consequences of these common convictions were limited significantly.

[4] These limited documents are referred to as the *Shepard/Taylor* documents, and include things such as plea colloquy transcripts, charging document plead to, and the judgment of conviction. *Shepard v. United States*., 544 U.S. 13 (2005); *Taylor v. United States*, 495 U.S. 575 (1990).

[5] For more information on *Mathis*, see https://www.immigrantdefenseproject.org/wp-content/uploads/2016/07/MATHIS-PRACTICE-ALERT-FINAL.pdf

Mathis explicitly instructs how to identify elements for purposes of categorical analysis:

1. Examine the text of the criminal statute itself and research state[6] case law.[7]

   State case law

   If there is a state court decision that answers whether the statutory alternative is a means or an element of the offense, the inquiry ends there. *See id*. at 517-18.

   Text of the Statute

   If different parts of the criminal statute carry different sentences, that definitively shows that they are elements. *Id*. (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

   The statutory text may also explicitly state what must be necessarily found by a judge or jury to sustain conviction, and thus what is an element of the offense. *Id*. The Court noted that "illustrative examples," such as the list of example locations included in the Iowa burglary statute at issue in the case, demonstrate that the prosecution need not prove a fact on such a list because it would not be an element of an offense. *Id*. at 518.

2. O*nly if* the above does not answer the question may the adjudicator "peek" at the record of conviction and any jury instructions from the noncitizen's criminal case at issue.

   As a measure of last resort, *Mathis* permits consultation of record of conviction documents for the limited purpose of seeking to identify the statute's elements. *Id*. at 518-19, n. 7 (permitting review of the record of conviction for this purpose *only* "when state law does not resolve the means-or-elements question"). The Court made clear that this "peek at the record documents" is for "the sole and limited purpose of determining whether [the listed items are] element[s] of the offense." *Id*. (quoting Judge Kozinski opinion in *Rendon v. Holder*, 782 F.3d 466, 473-474 (9th Cir. 2015)).

   Mathis then takes for example one count of an indictment and correlative jury instructions charging a defendant with burgling a "building, structure, or vehicle"—thus reiterating all alternative statutory terms of the Iowa law at issue in that case. Such a record would be "as clear an indication as any" that the alternatives are means. *Id*. at 519. The same is true for documents that "use a single umbrella term like 'premises': Once again, the record would then reveal what the prosecutor has to (and does not have to) demonstrate to prevail." *Id*. (citing *Descamps*, 570 U.S. at 272). On the other hand, the record "*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." *Id*. (emphasis added).[8]

3. If divisibility is not certain, the statute is indivisible.

   Importantly, *Mathis* concludes by stating that a statute is only divisible where statutory alternatives are clearly elements. Where an adjudicator must look to the record of conviction, and those documents in fact do not answer the question of whether the statutory alternative is a means or an element, "*Taylor*'s demand for certainty" is not satisfied, and the statute cannot be found divisible. *Id*. (citing *Shepard v. United States*, 544 U.S. 13, 21 (2005) (internal quotation omitted).

[6] If it is instead a federal statute at issue, then of course research would be under federal case law. For simplicity's sake, this resource will refer to state case law as the more common scenario.

[7] Neither *Mathis* nor the circuit case law reviewed necessarily impose a hierarchy between state case law and statutory interpretation. Generally both are considered simultaneously in order to determine whether either, or both, answer the divisibility question.

[8] For detailed arguments regarding the peek at the record of conviction and the categorical approach's requirement for certainty as to divisibility, see IDP's amicus briefs challenging *Matter of Laguerre*, 28 I&N Dec. 437 (BIA 2022) in *Brown v. Att'y Gen*., No. 22-1779 (3d Cir.), and *Gayle v. Att'y Gen*., No. 22-1811 (3d Cir.) at https://www.immigrantdefenseproject.org/using-and-defending-the-categorical-approach-2/.

TIPS AND STRATEGIES FOR RESEARCHING AND LITIGATING DIVISIBILITY

I. Know Your Circuit Law on Divisibility

A first step in challenging divisibility of a criminal statute is to research and know the particularities of how the Supreme Court's *Mathis* decision has been applied in your Circuit. Appendix A of this resource is a case chart with a summary of published post-*Mathis* decisions in the Second, Third, Fifth, Ninth, and Eleventh Circuits. For each case, the chart includes the divisibility conclusion, a summary of the divisibility analysis and, where relevant, additional comments, tips, and strategies specific to the case at issue. The survey for each circuit begins with decisions finding statutes indivisible, followed by decisions finding divisibility. A review of decisions in the relevant circuit should provide good insight into divisibility analyses of the particular court.

SELECTED OBSERVATIONS

Some Ninth Circuit decisions continue to cite to *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016) (en banc), a pre-*Mathis* case, rather than *Mathis* itself. In those decisions, the circuit looks to the record of conviction prior to contending with any case law, without acknowledging that *Mathis* allows that only as a last resort where divisibility is unclear from the statute and state case law. *See Diego v. Sessions*, 857 F.3d 1005, 1009 (9th Cir. 2017); *Gomez Fernandez v. Barr*, 969 F.3d 1077, 1089 (9th Cir. 2020).

II. Research State Case Law

Where a state court decision definitively resolves whether the relevant statutory alternative is a means or an element, no further inquiry is required. *Mathis*, 579 U.S. at 517-18. One challenge in making indivisibility arguments is determining under what contexts the means-elements issue may or may not have been decided within a state's criminal case law. States use different terminology to refer to similar concepts, and criminal law can be complex and state specific. Furthermore, relevant case law might not actually use the words "means" or "elements," and even where it does courts may use those terms in a different context that does not resolve divisibility.

This can make it very difficult for immigration law practitioners to do research and make arguments and can prove challenging to assess the validity of government arguments and adjudicator analysis. Reverse-engineering the issue with the help of a criminal trial or appellate practitioner can be extraordinarily helpful for determining under what contexts the means-elements distinction may arise in a particular state. An overview of some relevant criminal l concepts and associated practice tips follows.[9]

Of the circuits and cases surveyed, only the Ninth Circuit certified divisibility-related questions to the high court of the relevant state. See *Romero-Millan v. Garland*, 46 F.4th 1032 (9th Cir. 2022); *United States v. Figueroa–Beltran*, 892 F.3d 997 (9th Cir. 2018); *United States v. Lawrence*, 905 F.3d 653 (9th Cir. 2018). In general, certification is unusual, may not result in an answer from the applicable state court, and could involve significant delay. *See United States v. Martinez-Lopez*, 864 F.3d 1034, 1047 (9th Cir. 2017) ((Berzon, J., dissenting) (disagreeing with the majority's decision not to certify the divisibility question); *Ferreiras Veloz v. Garland*, 26 F.4th 129, 130 (2d Cir. 2022) (recognizing New York's decision to decline certification as to the breadth of conduct covered by the state's petit larceny statute).

[9] This list is non-exhaustive, and not a substitute for independent research particular to the state and statute at issue in any particular case.

A. Facial sufficiency of accusatory instruments, and the state's ability to amend a charging document or introduce different evidence later in the proceedings

Many states have minimum requirements as to what must be alleged in an accusatory instrument,[10] or in a later statement regarding the particulars of the commission of the offense at issue.[11] Such requirements serve to satisfy statutory and constitutional requirements, including alleging facts that would in fact satisfy each element of the offense, providing fair notice to the defendant as to the charges against them so that they may prepare a defense, and avoiding double jeopardy concerns by making out allegations with sufficient particularity. See *Harbin v. Session*s, 860 F.3d 58, 66 (2d Cir. 2017).

State court decisions finding that an accusatory instrument may be amended or contradicted by later evidence of a different statutory alternative without violating facial sufficiency requirements or otherwise invalidating the charging document could serve to prove indivisibility. If the change in statutory alternative does not change the nature of the offense, then the alternative is a means of commission and not an element. *See, e.g., People v. Gutierrez*, 48 Misc. 3d 1225(A) (NY Crim. Ct. 2015) (finding that a criminal complaint did not contravene the sufficiency requirements as, although a laboratory report showed the controlled substance was different from the substance alleged in the complaint, both were controlled under the state's public health law, and the defendant's ability to prepare a defense was not compromised, nor were the protections against double jeopardy).

B. Double Jeopardy, Multiplicity, and Duplicity

A summary of the concept of double jeopardy and its foundational case law, while complex, proves extremely useful to understanding divisibility arguments. Decisions related to divisibility often discuss double jeopardy case law directly or discuss its related concepts of duplicity (impermissibly charging multiple offenses in a single count), multiplicity (impermissibly charging a single offense in multiple counts), and merger (legality of separate sentencing for multiple counts). This section includes an explanation of these concepts followed by some tips for litigation of these issues.

i. Double Jeopardy

Blockburger v. United States, 284 U.S. 299 (1932) and its progeny relate to the federal constitutional prohibition on double jeopardy—that is, repeated prosecution or double punishment for a single act. Under *Blockburger*, the double jeopardy bar on charging multiple offenses in relation to a single act applies where the two offenses do not survive the **same elements test**. The question under the same elements test is "whether each provision requires proof of a fact which the other does not." *Id*. at 304. Each offense charged in response to a single criminal act must have at least one element that the other does not. If either offense's elements fall completely inside the other, punishment is allowed for only one offense.

For example, consider an incident where someone steals a purse while armed with a weapon. If the relevant theft statute prohibits the unlawful taking of property, and the relevant robbery statute prohibits the same plus the additional element of use or threatened use of force, punishment is allowed for only one of these offenses. The robbery statute includes an element distinct from the theft statute, but the theft statute is subsumed by the robbery statute. Therefore, punishment for both offenses that arose from this single act would violate the same elements test, and is prohibited.

[10] Such as a complaint, indictment, information, or any other charging document. *See, e.g*. New York Criminal Procedure Law § 100.15(3) ("The factual part of such instrument must contain a statement of the complainant alleging facts of an evidentiary character supporting or tending to support the charges."); Fla. R. Crim. P. 3.140(b) ("The indictment or information on which the defendant is to be tried shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.").

[11] *See, e.g.* Fla. R. Crim. P. 3.140(n) ("The court, on motion, shall order the prosecuting attorney to furnish a statement of particulars when the indictment or information on which the defendant is to be tried fails to inform the defendant of the particulars of the offense sufficiently to enable the defendant to prepare a defense.").

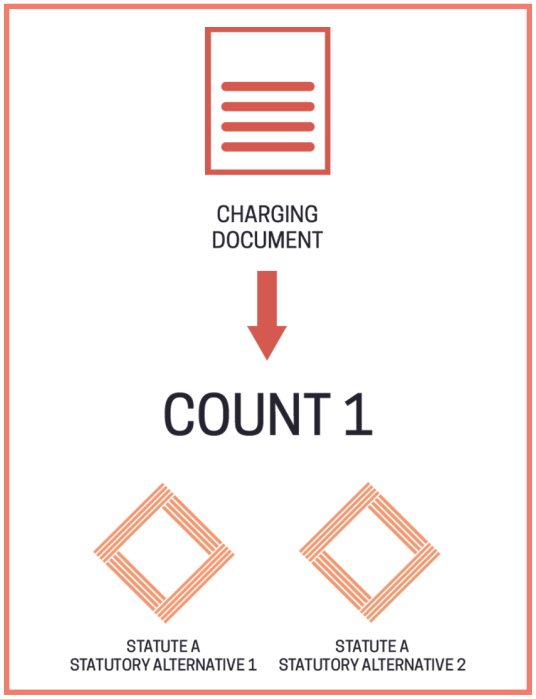
Because at its core double jeopardy asks whether one offense has the same elements as another, this line of cases may answer the question of whether a statutory alternative is a means or an element. *But see infra*, Section II(B) (v).

ii. Duplicity

Protection against duplicity in charges, which is related to protections against double jeopardy, prohibits charging multiple separate offenses within a single count. *See, e.g.* 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure 19.3(d) Duplicity (4th ed.); *United States v. UCO Oil Co*., 546 F.2d 833, 835 (9th Cir. 1976) ("Duplicity is the joining in a single count of two or more distinct and separate offenses."). Therefore, if state case law shows that multiple statutory alternatives may be charged within a single count without finding the charges to be duplicitous, that **affirmatively supports the idea that they are means** of committing a single generic offense. If the alternatives were in fact elements, the multiple offenses created would need to be charged in separate counts.

For example, consider a statute criminalizing possession of a weapon in a jurisdiction where the weapon definition includes both a firearm and a switchblade. If a document could charge the person with committing the offense with a firearm and/or a switchblade in a single count without it being duplicitous, then firearm and switchblade are alternative means. If instead that would be found to be duplicitous because it would result in a charge or conviction for multiple offenses within a single count, that shows that the particular weapon is an element of the offense, and the statute would therefore be divisible. The same argument can be made for controlled substance offenses where records show that no particular substance is identified, or where multiple substances are put forth (e.g. record of conviction documents charging possession of cocaine and/or heroin).

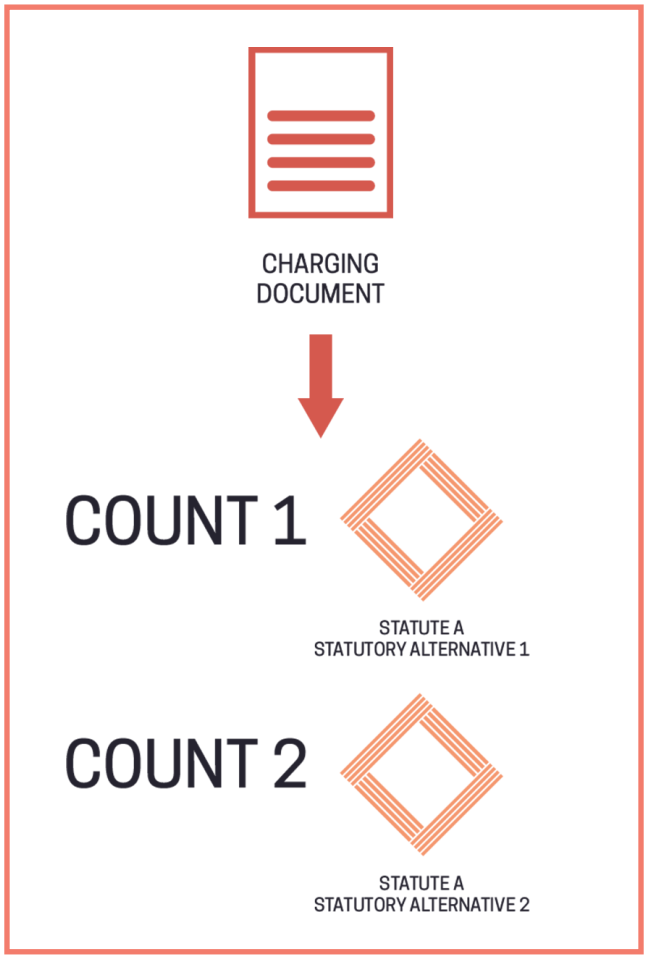
The Ninth Circuit conducted such a duplicity analysis in analyzing whether federal conspiracy for exporting defense articles without a license under 18 U.S.C. § 371, 22 U.S.C. § 2778 was divisible as to the munitions list. *United States.v. Ochoa*, 861 F.3d 1010 (9th Cir. 2017), *abrogated on other grounds by United States v. Palomar-Santiago*, 141 S. Ct. 1615 (2021). The count to which Mr. Ochoa had pleaded guilty alleged conspiracy to export both firearms and ammunition in a single count. *Id*. at 1018. The court found that charging both defense articles in a single count was "telling" in terms of the means-elements analysis, as a single count including two or more offenses is duplicitous, whereas there is no issue in listing several statutory alternatives where there are simply various ways to committing a single offense. *Id*.



A charging document that includes multiple statutory alternatives within a single count supports indivisibility. If the statutory alternatives were elements, two offense would be created, and such a charging document would be duplicitous, and therefore impermissible.

iii. Multiplicity

The prohibition against multiplicity of charges refers to protection against charging the same offense in more than one count. 5 Crim. Proc. At § 19.3(e) Multiplicity. Where multiple counts charge different statutory alternatives, that could indicate that those alternatives are elements of the offense. Such charges, if not found to be multiplicitous, are consistent with the statutory alternative being an element because then such charges do not charge the same offense in separate counts. However, further analysis is required, because the same charges are also consistent with charging multiple separate violations of a single indivisible statute. See *infra*, Section II(B)(v).



A charging document such as this could be acceptable EITHER because the statutory alternatives identified are elements OR because it charges multiple separate violations of an indivisible statute, each of which involve different facts (means). Such a charging document that is not found to be mulitplicitous is consistent with either explanation. Further research is required to determine the answer.

iv. Merger

Merger case law asks whether a defendant should have received separate sentences for multiple convictions. Like double jeopardy, merger is based on the principle that a defendant should not receive double punishment for a single, and therefore could provide insight into the elements of a particular offense. *But see infra*, Section II(B)(v). However, state merger approaches can also be more flexible, allowing for consideration of the specific facts of the case, and relate to the merger of sentences, rather than the validity of the convictions themselves, and therefore may be of limited utility. *See United States v. Butler*, 949 F.3d 230, 236 (5th Cir. 2020) (stating that "the *Prince* line of decisions requires merger of sentences, not of offenses.") (citing *United States v. Loniello*, 610 F.3d 488, 494 (7th Cir. 2010); *Diego v. Sessions*, 857 F.3d 1005, 1013-14 (9th Cir. 2017) (stating that the case cited by petitioner considered an anti-merger statute and did not consider the means-elements distinction); *Vasquez-Valle v. Sessions*, 899 F.3d 834, 842-43 (9th Cir. 2018) (explaining that state case referring to alternate ways of committing the offense relates to anti-merger statute, not divisibility).

v. Litigation Tips

There are clear **limitations to the utility of case law under double jeopardy and related concepts**. First, it is crucial to note where the *Blockburger* same-elements analysis is not implicated. Where multiple acts have been committed, those can be charged in separate counts, either under the same or different statutes. The same-elements test has no role to play in this instance, because the charges arise from different conduct. For example, if the same person in the above robbery example steals a purse from two different people, that person can be charged with two counts of either robbery or theft or one of each. The same elements test would prohibit charging both statutes for one of the individual acts, but where the person has committed two separate illegal acts they can be charged and convicted accordingly, without regard to the same-elements test. *Blockburger* itself found that two counts arising under the same statutory subsection could be charged separately because there were in fact two separate acts of a single offense committed. 284 U.S. at 301-02.[12]

For the same reason, **multiple counts under the same offense do not automatically require merger or create multiplicity concerns**. Just as multiple violations of a single offense do not implicate the same-elements test, they likewise do not merit any multiplicity analysis. Consider again a statute criminalizing possession of a weapon in a jurisdiction where the weapon definition includes both a firearm and a switchblade. If a person is charged under a single indictment for one count of possession of a weapon for possessing a firearm, and a second count of violating the same statute for possessing a switchblade, that says nothing about divisibility of the statute assuming the state considers possession of each type of weapon to be a separate and distinct violation or act. There is no multiplicity concern where multiple violations have been committed, regardless of whether the statute is divisible or not as to the particular weapon possessed.

Extra attention should be paid to this argument in cases where the divisibility of a controlled substance offense is at issue. Courts commonly point to charging documents charging possession or sale in multiple counts, each for a different controlled substance, in support of divisibility as to the particular substance. *See, e.g., Guillen v. Att'y Gen*., 910 F.3d 1174, 1182 (11th Cir. 2018) (citing a state case finding a defendant guilty of possession in two counts involving different controlled substances in support of finding a statute divisible as to the particular substance involved); *United States v. Henderson*, 841 F.3d 623, 626 (3d Cir. 2016) (citing to a state decision finding that possession of three different controlled substances supports separate criminal counts in support of divisibility finding). However, these analyses potentially fail to take into consideration whether the state considers the possession or sale of each drug to be a distinct act, just as with the simultaneous robbery of multiple people. For example, the state case cited by the Eleventh Circuit in *Guillen* found that the defendant was guilty of "possession of two separate drug substances, each of which constitutes in and of itself a *separate violation* of law." *Jenkins v. Wainwright*, 322 So.2d 477, 479 (Fla. 1975) (emphasis added). The Eleventh Circuit characterizes this as a same elements test analysis, but the case never even uses the word element, and instead clearly states that separate sentences are allowed because under Florida law each substance constitutes a separate violation of the statute despite being part of a single transaction. *Id*. (contrasting with other states that do in fact prohibit multiple or consecutive sentences for offenses resulting from a single transaction). The case says nothing about whether the individual substance at issue is a means or an element.[13]

For this reason, state decisions involving potentially duplicitous counts are more likely to answer the question of divisibility than cases involving merger or potentially multiplicitous counts. While multiple counts identifying different statutory alternatives have an alternate explanation that does not go to the means-elements distinction, multiple statutory alternatives in a single count would clearly be duplicitous if the alternatives were in fact elements. Returning to the example of possession of multiple controlled substances, state law could show that each substance

[12] The two counts at issue involved drug sales that were factually identical as to the type of substance sold and the parties involved. However, the Court determined that these were considered separate acts due to their separation in time, and therefore could be charged separately.

[13] The double jeopardy analysis was not the sole basis for the divisibility finding in *Guillen*, which cited other state case law in support of its holding. *Guillen* 910 F.3d at 1182-83.

could be charged in separate counts because each substance creates a separate violation of the law, which is true regardless of whether the statute is divisible. Conversely, a duplicity-related decision showing the validity of single count charging, for example, the possession of cocaine and/or heroin, does affirmatively support an indivisibility argument, as there is seemingly no alternate rationale for permitting the inclusion of two statutory alternatives within a single count.

Even where double jeopardy analysis is applicable, in that only a single act occurred in the applicable case law, it may not answer the divisibility question with sufficient certainty. Some states apply heightened double jeopardy protections, so the analysis may vary and affect whether the means-elements question is answered. *United States v. Herrold*, 883 F.3d 517, 528 (5th Cir. 2018) (*Judgment vacated*, 139 S. Ct. 2712 (2019), *divisibility section reinstated on remand*, 941 F.3d 173, 177 (5th Cir. 2019)).

III. Analyze the Text of the State Criminal Statute

As with a definitive state court decision, the text of the statute itself may resolve the issue on its own. *Mathis*, 579 U.S. at 518. The case chart at appendix A includes examples of statutory analysis in different circuits. In addition to following the guidelines laid out in *Mathis*, a case review is helpful in making arguments regarding indivisibility, including noting the absence of any indication of a requirement of juror unanimity, and the limitations of disjunctive phrasing. *See e.g. Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017) (finding no indication that a jury could not disagree on the substance involved, and no divisibility despite incorporating state drug schedules by reference); *Hillocks v. Att'y Gen.*, 934 F.3d 332 (3d Cir. 2019) (stating that a disjunctive "or" is insufficient to show divisibility, and that alternate elements must typically be explicitly identified in the statute's text, not read into its language); *United States v. Aviles*, 938 F.3d 503 (3d Cir. 2019) (finding that the statute appears to allow for juror disagreement as to the substance involved, and that a discretionary find that varies based on the substance(s) shows the statute contemplates a single conviction for acts involving more than one substance); *United States v. Lobaton-Andrade*, 861 F.3d 538 (5th Cir. 2017) (explaining that the fact that illustrative examples indicate indivisibility does not mean that a statute with no illustrative examples is automatically divisible).

IV. Fight Reliance on Pattern Jury Instructions Unless They Help

Mathis does not discuss pattern jury instructions as a source to resolve divisibility, and instead only refers to the examination of actual jury instructions in a case as part of the last-resort examination of the record of conviction. 579 U.S. at 518. Despite that, the reliance on pattern jury instructions, at least to confirm or bolster a conclusion already reached, is prevalent. *See, e.g. Harbin*, 860 F.3d at 67-68 (2d Cir. 2017); *United States v. Martinez-Lopez*, 864 F.3d 1034, 1041 (9th Cir. 2017) (en banc); *Guillen v. Att'y Gen.*, 910 F.3d 1174, 1183-84 (11th Cir. 2018). In some instances, those pattern instructions are in fact affirmatively helpful to an indivisibility argument. However, where they are not, it may also be helpful to note that they are generally advisory, non-binding interpretations of statutes,[14] have non-elemental factual allegations integrated into them for a variety of reasons not going to the means-elements distinction,[15] and, likely do not prove that the factual alternative is an element.[16]

V. Fight Divisibility Findings Based on a "Peek" at the Record of Conviction

In some instances, *Mathis* will allow a "peek" at the record of conviction due to uncertainty as to whether the statute of conviction is divisible even after looking to statutory language and state case law. Where the individual record

[14] *See, e.g. U.S. v. Tuan Ngoc Luong*, 965 F.3d 973, 983 (9th Cir. 2020) ("Pattern jury instructions are not authoritative legal pronouncements").
[15] *See infra,* Section V*; see also Harbin*, 860 F.3d at 66 ("But the values of fair notice and avoidance of double jeopardy often demand that the government specify accusations in ways unrelated to a crime's elements.").
[16] *See Harbin*, 860 F.3d at 68 ("Although the instructions include a blank with the word "specify" in it, allowing a judge to name the substances at issue in the case, the instructions do not say it is impermissible to identify more than one substance" or give a choice between multiple substances separated by an "or").

of conviction does in fact identify one statutory alternative to the exclusion of all others, there are likely still strong arguments against finding the statute to be divisible based solely on that fact.

There are many reasons why a statutory alternative might be identified in a record of conviction that are unrelated to any requirement for juror unanimity as to the alternative, and that therefore do not speak to the means-elements distinction. The inclusion of non-elemental facts in these documents occurs for a variety of reasons, including (1) requirements of sufficient notice to the defendant as to the allegations against them, (2) sufficient specification of the allegations against a defendant so as to avoid double jeopardy concerns, and (3) for the state to specify through what evidence they will prove a generic element of the offense at issue. See *Harbin*, 860 F.3d at 66.[17]

Highlighting these alternate rationales can bolster arguments related to the limitations of state case law,[18] pattern jury instructions,[19] and records of conviction that reference one statutory alternative to the exclusion of the others, all of which ultimately go to whether *Taylor*'s demand for certainty as to divisibility is met. The cases highlighted in Section VI, *infra*, show that cases can actually be decided based on lack of certainty as to divisibility, and strong briefing on these issues could be determinative to the outcome of a case, especially where there is no case law proving divisibility, but there may not be clear case law affirmatively showing that statutory alternatives are means.

Other textual clues in record of conviction documents may also bolster arguments that the applicable statute is indivisible, or at least call into question whether the documents can support divisibility with the certainty required by the categorical approach. Advocates can point to the use of umbrella terms, where present either on their own or in conjunction with a single statutory alternative, to argue that the single alternative is not actually identified "to the exclusion of all others." *Mathis*, 579 U.S. at 519. Record documents that specify the alternative after phrases such as "to wit" or "namely" can be said to use a "videlicet," which is used to separate the charged offense from supporting facts, and to point out, particularize, or render more specific that which has been previously stated in general language only. Videlicet, Black's Law Dictionary (11th ed. 2019). Such record documents support the idea that the statutory alternative at issue is an underlying fact (means) specified only in order to fulfill a generic element and comply with procedural protections.

The inherent difficulty in the *Mathis* peek at the record of conviction is that while a charging document that <u>does not</u> identify one statutory alternative to the exclusion of all others <u>does</u> directly support a finding of indivisibility, a charging document that does reference a single alternative only <u>might</u> support a finding of divisibility. The language in *Mathis* could be said to support this distinction by saying a record that either includes multiple statutory alternatives or uses an umbrella term is "as clear an indication as any" that the alternatives are means, whereas a record that specifies one alternative only "*could*" point to the statutory alternative being an element under state law. 579 U.S. at 519 (emphasis added). This is true for reasons similar to the fact that divisibility questions are more likely to be answered by case law on duplicity rather than multiplicity. See *supra*, Sections II(B)(ii), (v). A charging document that does not choose a single statutory alternative to the exclusion of all others supports indivisibility, whereas charging documents that do so have alternative reasons for that independent of any means-elements distinction. It can be argued, therefore, that the peek at the record works well in one direction, but requires further analysis in the other.

Finally, where your own client's record of conviction does identify a single statutory alternative to the exclusion of the others, consider whether there are records of conviction from other cases that do not and could be submitted in support of your legal conclusion of indivisibility. Divisibility analyses are meant to determine the universal statutory

[17] "The government first cites cases stating that, when a defendant is charged with selling controlled substances, prosecutors must describe the particular substances in question so that defendants (1) are on notice of charges, and (2) are not at risk of being later retried for the same incident...But the values of fair notice and avoidance of double jeopardy often demand that the government specify accusations in ways unrelated to a crime's elements."
[18] See Section II, *supra*.
[19] See Section IV, *supra*.

elements as required by state law, and not merely to point out what happens to be listed on any single record of conviction.[20] See *Vurimindi v. Att'y Gen*., 46 F.4th 134, 137 (3d Cir. 2022) (recognizing that in conducting a "peek" at records of conviction to ascertain means- or-elements, records other than those of the individual noncitizen are germane and therefore reviewable).

VI. Argue Divisibility Must Be Certain

As previously discussed, *Mathis* states that a statute is only divisible where statutory alternatives are clearly elements. Where the record of conviction can be consulted but in fact does not answer the question of whether the statutory alternative is a means or an element, "*Taylor's* demand for certainty" is not satisfied, and the statute cannot be found divisible. *Mathis*, 579 U.S. at 519 (citing *Shepard v. U.S*., 544 U.S. 13, 21 (2005) (internal quotation omitted)). This is an area that is ripe for litigation in many cases, both as to whether the statute and related case law definitively answer the question, as well as whether the record of conviction resolves any remaining ambiguity, and where strong arguments could really affect the outcome of the case.

The case survey at Appendix A shows that cases can actually be won on the issue of certainty, confirming that these are arguments to be zealously litigated. *See, e.g., Lopez-Marroquin v. Garland*, 9 F.4th 1067 (9th Cir. 2021)[21] (finding a California statute indivisible where case law was in conflict, as one case strongly suggested juror unanimity was not required, but another case gave jurors two separate instructions, and the record of conviction simply restated the statutory language); *United States v. Perlaza-Ortiz*, 869 F.3d 375 (5th Cir. 2017)[22] (finding a Texas statute indivisible after weighing clear but unpublished case law and the statute's legislative history that suggested but did not definitively show that the statutory alternatives were means, against a charging document that referenced one subsection to the exclusion of the others); *Alejos-Perez v. Garland*, 991 F.3d 642 (5th Cir. 2021)[23] (finding a Texas statute indivisible where one state decision read as if the alternative were an element, but double jeopardy cases did not answer divisibility questions with certainty, and the record of conviction did reference one alternative the exclusion of all others, but also referred to the drug penalty group as a whole).[24]

Other circuits have made similar decisions. See *Najera-Rodriguez v. Barr*, 926 F.3d 343 (7th Cir. 2019) (finding an Illinois controlled substance statute indivisible where the statute and case law did not answer the question, and the peek at the record showed a charging document that identified one substance in particular and a sentencing document that did not); *United States v. Hamilton*, 889 F.3d 688 (10th Cir. 2018) (finding an Oklahoma burglary statute indivisible where a peek at the record did not resolve the issue where a charging document specifying the locational element did not answer the question, as such documents often allege facts that are not elements of a crime); *United States v. Degeare*, 884 F.3d 1241, 1258 (10th Cir. 2018) ("[W]e need not decide which of the parties' competing interpretations of the charging documents is correct. We hold only that, whatever the charging documents might have to say about the means-or-elements question in this case, they don't say it 'plainly.'"); *United States v. Ritchey*, 840 F.3d 310, 321 (6th Cir. 2016) (finding a Michigan breaking and entering statute indivisible where one charge identified a locational element not listed in the statute, another charged breaking and entering into a "BARN/GARAGE," and the offense captions used the umbrella term "building").

[20] Consider the fact that the certificate of disposition for Mr. Harbin's conviction stated that the controlled substance in question was cocaine, and therefore identified one statutory alternative (cocaine) to the exclusion of all others (all other New York controlled substances). *See Harbin v. Sessions*, 860 F.3d 58, 62 (2d Cir. 2017). This is because (1) the particular substance appears in records for reasons not going to the means-elements distinction, *Id*. at 66, and (2) the evidence showed he sold one substance. A record of conviction for someone who possessed or sold multiple offenses would evidently show something supporting a finding of indivisibility even if resorting to a peek at the record were necessary.

[21] Appendix A at A1.

[22] Appendix A at A1.

[23] Appendix A at A1.

[24] See also *United States v. Ochoa*, 861 F.3d 1010 (9th Cir. 2017), *abrogated on other grounds by United States v. Palomar-Santiago*, 141 S. Ct. 1615 (2021) (finding a federal statute not divisible due to ambiguous circuit case law in which decisions describe the element in general terms, but jurors have been asked to specify the term, and a record of conviction that either affirmatively showed the terms were means or at least did not resolve the question with sufficient certainty); *Simpson v. Att'y Gen*., 7 F.4th 1046 (11th Cir. 2021) (finding Florida possession of a firearm by a felon not divisible where the statute, state case law, and pattern jury instructions all pointed to indivisibility, and at a minimum there was no certainty); *Rosa v. Att'y Gen*., 950 F.3d 67 (3d Cir. 2020) (remanding to supplement and review the record of conviction for a New Jersey statute where state cases suggesting indivisibility were not definitive, and a previous unpublished circuit case finding the statute indivisible was not binding).

CONCLUSION

Understanding the state of the law in your circuit and zealously litigating the outlined pressure points of divisibility issues at every level of litigation is of increasing importance. Additional resources on divisibility and the categorical approach include those found at https://www.immigrantdefenseproject.org/using-and-defending-the-categorical-approach-2/, and https://www.ilrc.org/how-use-categorical-approach-now-2021.

Please feel free to reach out to Amelia Marritz at amelia@immdefense.org for further discussion.