PRACTICE ALERT:

IN *MATHIS V. UNITED STATES*, SUPREME COURT REAFFIRMS AND BOLSTERS STRICT APPLICATION OF THE CATEGORICAL APPROACH[1]

July 1, 2016

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[1] Practice Alerts identify select substantive and procedural immigration law issues that attorneys, legal representatives, and noncitizens face. They are based on legal research and may contain potential arguments and opinions of the authors. Practice Alerts do NOT replace independent legal advice provided by an attorney or representative familiar with a client's case.

INTRODUCTION

On June 23, the Supreme Court in *Mathis v. United States*, No. 15-6092 (U.S. June 23, 2016), strongly reaffirmed the application of a strict, elements-based categorical approach for determining when a prior conviction will trigger adverse sentencing or immigration consequences. In doing so, the Court also clarified the limited circumstances in which a criminal statute is deemed "divisible" and subject to a *modified* categorical approach, thus protecting against the imposition of immigration consequences or sentencing enhancements based on facts never necessarily established in an underlying criminal case. **This Practice Alert reviews the legal reasoning in the *Mathis* decision, and discusses strategies that advocates can use to insulate noncitizens from adverse immigration consequences of criminal convictions under *Mathis*. As discussed further below, this Alert focuses on the distinction between factual means and elements the Court in *Mathis* has confirmed is central to the categorical approach inquiry.**

SUMMARY OF DECISION

The *Mathis* decision builds on the Court's history of consistent jurisprudence regarding the categorical approach in *Taylor v. United States*[2], *Shepard v. United States*[3], *Moncrieffe v. Holder*[4], and most relevantly its strict categorical approach holding three years ago in *Descamps. v. United States*, 133 S. Ct. 2276 (2013). In *Mathis*, the Court confirmed that under *Descamps* and its antecedents, an individual may not be deemed "convicted" of a generic crime triggering adverse federal criminal sentencing consequences unless the "elements" of the crime of conviction—which *Mathis* and *Descamps* establish as the facts set forth in the statute of conviction that have to be proven by the prosecution beyond a reasonable doubt and with juror unanimity in order to sustain a conviction—categorically match the elements of the generic crime referenced in the federal sentencing statute. And the Court again made clear that the categorical approach's focus on "elements" applies equally to, and functions precisely the same way in, immigration cases when parsing provisions of the immigration statute that are also based on a "conviction." Slip. op. 8, n.2 ("So too in our decisions applying the categorical approach outside the [sentencing] context—*most prominently, in immigration cases*.") (emphasis added).

Importantly, the *Mathis* decision clarifies a footnote from *Descamps* that the government has exploited in recent years to undermine the protections of the categorical approach. Based on that footnote, *Descamps*, 133 S. Ct. at 2285 n.2, the government has argued—in some jurisdictions successfully—that whenever a conviction statute lists alternative facts in the disjunctive, the statute is divisible into distinct crimes and an adjudicator may apply a modified

[2] 495 U.S. 575 (1990).

[3] 544 U.S. 13 (2005).

[4] 133 S. Ct. 1678 (2013).

categorical approach allowing reliance on facts indicated in certain criminal court records in order to establish the crime of conviction, regardless of whether the listed alternative facts actually set forth distinct crimes with separate elements that would have to be specifically proven in a prosecution. ***Mathis*** **now makes clear, however, that, when a statute lists alternative facts, the statute is not divisible and the modified categorical approach does not apply unless these facts are actual *elements* of distinct crimes, and not mere alternative *means* for committing a single crime** (see discussion regarding the decision below). In making this strict elements vs. means distinction, the Court rejected the contrary view of the Sixth, Eighth, and Tenth Circuits, *United States v. Mathis*, 786 F.3d 1068 (8th Cir. 2015) (case below); *United States v. Ozier*, 796 F.3d 597 (6th Cir. 2015); *United States v. Trent*, 767 F.3d 1046 (10th Cir. 2014), and sided with the Ninth and Fourth Circuits. *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014); *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014).

Here is a link to the Supreme Court's decision:
http://www.supremecourt.gov/opinions/15pdf/15-6092_1an2.pdf

ANALYSIS OF DECISION

In the 5-3 decision in *Mathis*, in which the government sought an enhanced sentence based on conviction of a prior state burglary, the Court majority first stated:

> To determine whether a prior conviction is for *generic* burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case. *Distinguishing between elements and facts is therefore central*.

Slip op. 2 (citations omitted) (emphasis added).

After explaining that "elements" are the "'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction,'" *id.*, the Court majority described how the comparison of elements required by the categorical approach is straightforward when a statute sets out a single (or "indivisible") set of elements to define a single crime, such as the burglary statute at issue in *Descamps*, which swept more broadly than generic burglary because it criminalized both lawful and unlawful entry into a location, with the intent to steal. Slip op. 3.

The Court then explained that the categorical analysis becomes more complicated when the statute sets forth *alternative* facts, which may constitute alternative elements and therefore distinct crimes, or merely alternative means of committing the same crime. Slip op. 3-4. To illustrate the point, the Court offered a hypothetical example: if the burglary statute at issue in

Descamps had set forth "the lawful entry or the unlawful entry" of a premises as two different offenses. If these two alternative facts are elements of distinct crimes and one of them must thus be chosen and specifically proven by the prosecution to sustain conviction, the statute may then be said to be "divisible" and an adjudicator may apply a modified categorical approach to determine which of the alternative elements listed was the basis for the conviction. Slip op. 4. As previously sanctioned by *Taylor*, *Shepard*, and *Descamps*, under the modified categorical approach the adjudicator may look to "*a limited class of documents* . . . to determine what crime, with what elements, a defendant was convicted of." Slip op. 4 (emphasis added). If the alternative facts are not elements of distinct crimes, however, and instead merely different factual means of committing a single element, the statute may not be said to be divisible and the adjudicator may not look beyond the statute to the record of conviction. Slip op. 16. This is so, *Mathis* clarifies, because the categorical approach "disregards the means by which the defendant committed his crime, and looks only to the offense's elements." *Id.* Thus "[t]he first task for a . . . court faced with an alternatively phrased statute is to determine whether its listed items are elements or means." *Id.* If "they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution," because the statute is simply categorically overbroad. *Id.*

Thus, after determining that the Iowa burglary statute at issue in *Mathis* went beyond generic burglary's requirement of unlawful entry into a "building or other structure" because it reached a broader range of places, i.e., "any building, structure, [or] land, water, water, or air vehicle," the Court went on to find that this list did not describe alternative elements of separate crimes, but instead laid out alternative ways of satisfying a single locational element of a single crime. Slip op. 5-6. The Court drew this conclusion by citing Iowa state court decisions. *Id.* Thus, the Court found, the statute was not divisible and the sentencing court was wrong to look to the conviction records that indicated that Mathis' burglary crimes in fact did involve unlawful entry into a building or other structure (garage). Slip op. 8 (an adjudicator "may look only to 'the elements of the [offense], not the facts of [the] defendant's conduct.") (alterations in original) (quoting *Taylor*, 495 U.S. at 601).

Notably, in supporting its elements-only inquiry, the Court relied in part on the need to avoid unfairness to the criminally accused:

> [A]n elements-focus avoids unfairness to defendants. Statements of "non-elemental fact" in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a defendant may "have no incentive to contest what does not matter under the law; to the contrary, he "may have good reason not to"—or even be precluded from doing so by the court. When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go

> uncorrected. Such inaccuracies should not come back to haunt the defendant many years down the road.

Slip op. 10-11 (citations omitted). To demonstrate the unfairness, the Court pointed to an example from the immigration context: a defendant charged under Tex. Penal Code Ann. §22.01(a)(1), a statute that criminalizes "intentionally, knowingly, or recklessly" assaulting another (as exists in many States), who has no apparent reason to dispute a prosecutor's statement that he committed the crime intentionally (as opposed to recklessly) if those mental states are interchangeable means of satisfying a single mens rea element, yet the statement, if treated as reliable by immigration authorities, "could make a huge difference" in later deportation proceedings. Slip op. 11, n.3 (citing a decision of the Board of Immigration Appeals in *In re Gomez-Perez*, No. AXXXXXX511 (BIA 2014).[5] The Supreme Court concluded by reiterating that under the categorical approach "[c]ourts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense. They may not ask whether the defendant's conduct—his particular means of committing the crime—falls within the generic definition. And that rule does not change when a statute happens to list possible alternative means of commission." Slip op. 18-19.

GUIDANCE FOR IMMIGRANT DEFENSE AND CRIMINAL DEFENSE PRACTITIONERS FOR USING *MATHIS* TO FIGHT IMMIGRATION CONSEQUENCES BASED ON CONVICTIONS UNDER STATUTES THAT LIST ALTERNATIVE FACTS

The Supreme Court's confirmation/clarification of the significance of this elements vs. means distinction, in combination with the Court's repeated enunciations of the "categorical approach's rigorous requirements[,]" *Luna-Torres v. Lynch*, 578 U.S. ___, n.10 (2016), that a factfinder should presume that a conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, *Moncrieffe*, 133 S. Ct. at 1684 (alterations in original) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)), provides bolstered ammunition for immigrants and their lawyers fighting removal and other negative immigration consequences based on a past conviction, as well as immigrants facing criminal charges. Following are some key points regarding the *Mathis* decision that immigrant defense and criminal defense practitioners, and immigrants themselves, should bear in mind:

- **The *Mathis* decision's strict elements-focused divisibility rule and explanation of the categorical approach applies to all removability provisions of the immigration laws that use**

[5] The Court also stated that a reckless assault does not involve moral turpitude. Slip op. 11, n.3. Although dicta, practitoners could argue that the Court is abrogating cases like *Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1996), that permit certain reckless assaults to be crimes involving moral turpitude.

the term "convicted." Slip op. 9, 11 ("use of the term 'convictions' . . . supports an elements-based inquiry"). This includes: 1) crimes involving moral turpitude; 2) controlled substance offenses; 3) most aggravated felonies[6]; 4) firearms offenses; 5) crimes of domestic violence; and 6) crimes of child abuse. The decision reaffirms existing arguments from *Descamps* and *Moncrieffe* that criminal statutes that punish a range of conduct—some of which corresponds to a federal immigration provision and some of which does not—are subject to a strict categorical approach and consequently cannot trigger adverse immigration consequences.

- **Similarly, *Mathis*'s divisibility rule and explanation of the categorical approach apply equally to contesting deportability, establishing eligibility for relief from removal, establishing admissibility, and establishing eligibility for other immigration benefits.** Slip op. 18 (advising that where there is no indication that the statute is divisible, then the adjudicator cannot go further with the inquiry and consequently the conviction is not for a generic offense). *See also, e.g.*, *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016) (addressing application of the modified categorical approach—recognized as a purely legal and not factual inquiry—in the context of the noncitizen's burden of proving eligibility for relief or other immigration benefits).

- **Practitioners and immigrants contending with criminal convictions in the context of removal proceedings, affirmative immigration applications, or plea negotiations under *Padilla v. Kentucky* (see additional guidance below) should aggressively investigate a threshold argument that under *Mathis*, a statute of conviction is overbroad and indivisible.** Specifically, practitioners and immigrants should look closely at a state statute of conviction and research state case law (see additional guidance below) regarding the means/elements distinction that *Mathis* and *Descamps* affirm as dispositive to the categorical approach inquiry.

- ***Mathis* explicitly instructs how to identify elements for purposes of categorical analysis.**

The first step is to examine the text of the criminal statute itself and to research state case law. Identifying a state case treating a particular fact as a means and not an element is the gold standard for counsel seeking to prevent an immigration adjudicator from applying the modified categorical approach to an overbroad statute. If there is a state court decision that identifies the elements of the offense, then that ends the inquiry. Slip op. 17.

Similarly, if different parts of the criminal statute carry different sentences, then 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. For example, the Iowa burglary statute at issue in *Mathis* includes a "similar place" as one of the locations that could be burgled. Iowa Code. § 702.12. The Court noted that such "illustrative examples" demonstrate that the prosecution need not prove a fact on such a list because it would not be an element of an

[6] *But see Nijhawan v. Holder*, 557 U.S. 29, 36 (2009) (construing certain provisions of the aggravated felony definition, such as the $10,000 loss requirement for a fraud offense to be deemed an aggravated felony, as "calling for a 'circumstance-specific,' not a 'categorical' interpretation").

offense. Slip op. 17. The Court cited to the language at issue in *United States v. Howard*, 742 F. 3d 1334, 1348 (11th Cir. 2014) (interpreting the word "includes" in Ala. Code § 13A–7–1(2)), and *United States v. Cabrera-Umanzor*, 728 F. 3d 347, 353 (4th Cir. 2013) (interpreting "includes, but is not limited to" in Md. Code, art. 27, § 35C(a)(6)(ii)(1)), as other "illustrative examples." Slip op. 17.

As a measure of last resort, Mathis permits consultation of the individual's record of conviction for the limited purpose of seeking to identify the statute's elements. Slip op. 17-18, 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." Slip op. 17 (quoting Judge Kozinski opinion in *Rendon v. Holder*, 782 F.3d 466, 473-474 (9th Cir. 2015)). In describing this step of the divisibility analysis, the Court again used the example of a burglary statute, and explained that if the record of conviction from a state burglary charged a defendant with "burgling a building, structure, or vehicle—thus reiterating all the terms of Iowa's law," then that "is as clear an indication as any that each alternative is only a means of commission, not an element." Slip op. 18 (internal quotation marks omitted). Although not citing to it explicitly, the Court apparently applied the rule against duplicity. *See Confiscation Cases*, 87 U.S. (20 Wall.) 92, 104 (1873). Conversely, the Court stated that, if an indictment and jury instructions referenced one alternative fact to the exclusion of all others, this could indicate that the statute contains a list of elements. Slip op. 18.

But if the record of conviction does not clearly identify any alternative facts set forth in the statute of conviction as elements, however, the statute may not be deemed divisible. See Slip op. 18 ("Of course, such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy 'Taylor's demand for certainty' when determining whether a defendant was convicted of a generic offense.").

As a final matter, it bears mention that the authorized "peek" at the record of conviction is ripe for confusion and improper application, and advocates should be prepared to contest the reliability of the contents of the record of conviction as dispositive of the means vs. elements question. For example, a prosecutor might decide to choose to allege a specific term to avoid potential juror confusion; in such a case, the record of conviction would not communicate what that state legislature and courts view as the elements of the offense of conviction. Earlier this year, the Supreme Court itself recognized that jury instructions and other *Shepard* documents can be erroneous, finding in *Musacchio v. United States*, 136 S. Ct. 709, 712-13 (2016) that a jury instruction erroneously added an element not required by law.

- ***Mathis* overrules prior decisions of the Sixth (*Ozier*), Eighth (*Mathis*, case below), and Tenth (*Trent*) Circuits regarding statutory divisibility.** It establishes a national rule regarding the divisibility of criminal statutes in immigration adjudications. The consequence is that for immigrants within the jurisdiction of any of these three Circuits in removal proceedings, seeking immigration benefits, or seeking immigration-safe plea dispositions, many statutes previously found divisible will now be subject to a strict rather than modified categorical

approach and will no longer trigger adverse immigration consequences. Immigrants within the jurisdiction of these Circuits should investigate newly available arguments for contesting removability, establishing eligibility for relief from removal, and establishing admissibility and eligibility for immigration benefits. If previously ordered deported based on a statute of conviction that is overbroad and indivisible under *Mathis*, immigrants may file a motion to reopen to either contest deportability or inadmissibility or establish eligibility for relief or other benefit previously barred.

- **In order to advise their immigrant defendant clients properly under *Padilla v. Kentucky* of the potential immigration consequences of a state criminal disposition, state criminal defense practitioners will need to assiduously investigate the potential divisibility of an overbroad criminal statute, and potentially work to control the contents of the record of conviction.**

If the facts comprising an overbroad statute are means rather than elements, the statute is indivisible and thus likely creates a plea that insulates a noncitizen from known "conviction"-based immigration consequences. Thus, researching state case law and examining the state criminal statute's text is an essential and critical first step to ascertaining whether a criminal statute is divisible and permits review of the record of conviction.

If neither the state case law nor the statutory text resolves the means vs. elements question, there remains a possibility under *Mathis* that an immigration adjudicator will be permitted to review the record of conviction to see if it identifies the offense's elements. For this reason, if advising an immigrant defendant to plead guilty under an overbroad statute whose divisibility is undetermined, craft the record of conviction to help to guard against a finding that the offense is divisible.

Finally, if conviction cannot be avoided under a statute that *is* divisible under *Mathis*, a criminal defense practitioner should take care to avoid references in the record of conviction—including any charging document, jury instructions, or plea colloquy—to the specific fact(s) listed in the statute of conviction that would conclusively establish conviction under the prong of the divisible statute that corresponds to the generic immigration offense.

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IDP and NIP-NLG will issue additional guidance on how immigrant and criminal defense practitioners can implement the *Mathis* decision and its antecedents in their representation of noncitizens facing possible immigration consequences of criminal convictions.