



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 circuits² 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 than 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 state⁶ 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. *Only 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.

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 law concepts and associated practice tips follows.⁹

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).

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. Sessions*, 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.”).

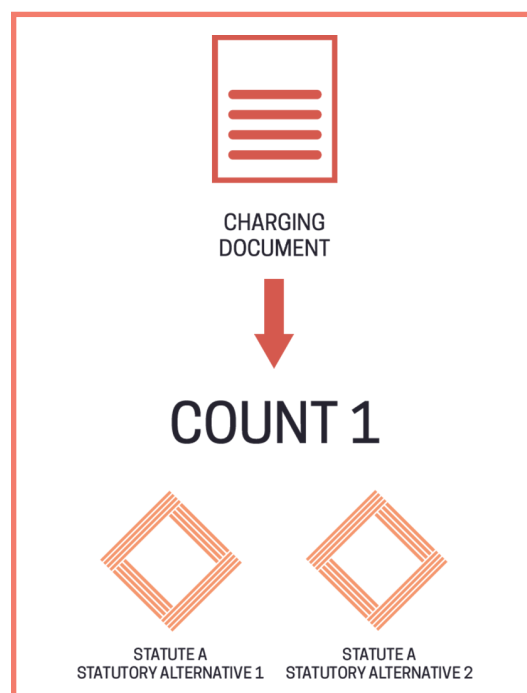
Because at its core double jeopardy asks whether one offense has the same elements as another, this line of cases may answer the question of whether a statutory alternative is a means or an element. *But see infra*, Section II(B) (v).

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. LaFare, 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).

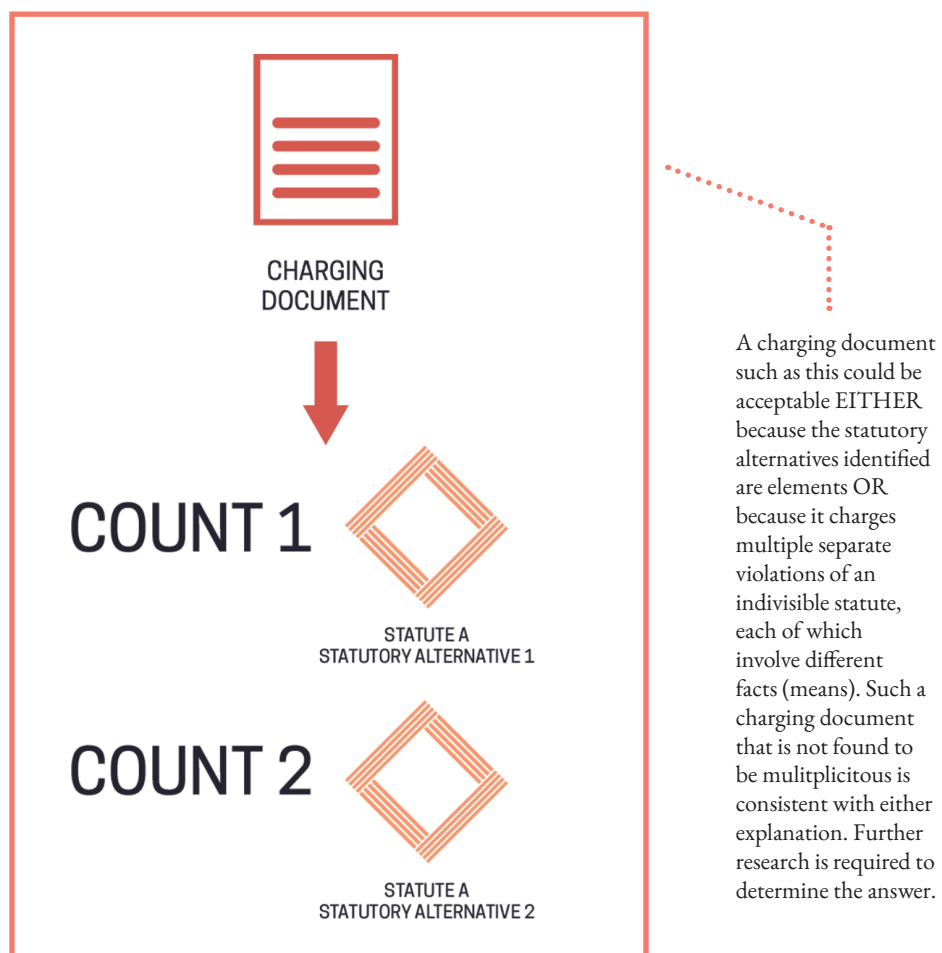
The Ninth Circuit conducted such a duplicity analysis in analyzing whether federal conspiracy for exporting defense articles without a license under 18 U.S.C. § 371, 22 U.S.C. § 2778 was divisible as to the munitions list. *United States v. Ochoa*, 861 F.3d 1010 (9th Cir. 2017), *abrogated on other grounds 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).



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).

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 does not identify one statutory alternative to the exclusion of all others does directly support a finding of indivisibility, a charging document that does reference a single alternative only might 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.



The background is a solid red color with a fine, dotted texture. Overlaid on this are several large, dark red, semi-transparent geometric shapes, including triangles and polygons, which create a layered effect. A prominent, thick, white wavy line runs horizontally across the middle of the page, passing behind the main title. In the top-left and bottom-right corners, there are faint, white, hand-drawn geometric sketches, including a star-like shape and a triangle with internal lines.

APPENDIX A

**CHART OF POST-MATHIS PUBLISHED
DIVISIBILITY CASES IN THE SECOND, THIRD,
FIFTH, NINTH, AND ELEVENTH CIRCUITS**

INTRODUCTION TO APPENDIX

This appendix consists of a survey of indivisibility and divisibility cases published in the Second, Third, Fifth, Ninth, and Eleventh Circuits after the Supreme Court’s decision in *Mathis v. United States*, 579 U.S. 500 (2016). It covers cases arising in both the criminal and immigration contexts, 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.

This appendix is meant to be used in tandem with the rest of the resource, which includes 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. With this appendix, IDP hopes 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.

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¹ At this time, the case law survey was limited to these circuits, which have larger noncitizen populations.

² The categorical approach applies in both federal criminal sentencing cases and in immigration cases. 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.

³ 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.

SECOND CIRCUIT

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
|---|---|---|---|
| <i>Harbin v. Sessions</i> , 860 F.3d 58 (2d Cir. 2017) | New York sale of a controlled substance in the fifth degree N.Y.P.L. § 220.31 | Not divisible as to the specific controlled substance. Statute <ul style="list-style-type: none"> No indication of divisibility despite incorporating state schedules by reference. Nothing to show jury couldn't disagree on substance, just like hypothetical statute discussed in Mathis. No change in penalty based on substance. Case law <ul style="list-style-type: none"> No basis for multiple counts based on interchangeable drugs. Furthermore, there are reasons that the specific drug gets identified that are unrelated to means/elements distinction (fair notice, avoidance of double jeopardy, establishing chain of custody). Jury instructions only if there is uncertainty after the above <ul style="list-style-type: none"> None exist in this record because it was a plea A review of pattern jury instructions here does not compel a different result. There is a blank space to fill in the substance at issue, but there is no reason the jury could not fill in more than one substance in the blank. | |
| <i>Chery v. Garland</i> , 16 F.4th 980 (2d Cir. 2021) | Connecticut illegal manufacture, distribution, sale, prescription, dispensing Conn. Stat. Gen. Ann. § 21a-277(a) | Divisible as to the specific controlled substance. Statute <ul style="list-style-type: none"> Suggests divisibility. Unlike the New York statute at issue in <i>Harbin</i>, this statute lists hallucinogenic substances and narcotic substances as discrete alternatives. Case Law <ul style="list-style-type: none"> State law shows a jury must find that <i>either</i> a hallucinogenic substance (other than marijuana) <i>or</i> a narcotic substance was involved. One state case says the state must prove beyond a reasonable doubt that the substance was a narcotic, and another says the state must prove beyond a reasonable doubt that the substance at issue was a hallucinogenic. | |
| <i>Santana-Felix v. Barr</i> , 924 F.3d 51 (2d Cir. 2019) | New York conspiracy in the second degree N.Y.P.L. § 105.15 | Divisible. The underlying felony is an element of the crime of conspiracy in NY. For inchoate crimes, consider only whether the object crime charged is an aggravated felony, since without proof of a specific intent to commit the object crime, an inchoate offense cannot lead to a conviction. | Fails to follow Mathis and circuit's own divisibility analysis process in Harbin by looking first to pattern jury instructions. |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
|--|--|---|--|
| <p><i>Santana-Felix v. Barr</i>, 924 F.3d 51 (2d Cir. 2019)</p> <p>(cont.)</p> | <p>New York conspiracy in the second degree</p> <p>N.Y.P.L. § 105.15</p> | <p>Jury instructions</p> <ul style="list-style-type: none"> Pattern instructions require that juries be charged as to both the specific object crime and that crime's statutory definition. <p>Case law</p> <ul style="list-style-type: none"> State must show that the agreement as to the conspiracy contemplated the elements of the substantive offense. Dismissed conspiracy charge where it was uncertain whether jury convicted under one or the other Class A drug sale, or based on aggregate weight of an unknown combination of lesser sales. | <p>Fails to follow Mathis and circuit's own divisibility analysis process in Harbin by looking first to pattern jury instructions.</p> |
| <p><i>United States v. Moore</i>, 916 F.3d 231 (2d Cir. 2019)</p> | <p>Federal armed bank robbery</p> <p>18 U.S.C. § 2113(a)</p> | <p>Divisible.</p> <p>Divisibility uncontested by parties and confirmed by court with brief analysis.</p> <p>Statute</p> <ul style="list-style-type: none"> Subsection delineates two methods of committing the crime of bank robbery. | <p>Divisibility not contested.</p> |
| <p><i>United States v. Ragonese</i>, 47 F.4th 106, 111 (2d Cir. 2022)</p> | <p>New York criminal sexual act in the first degree</p> <p>N.Y. Penal Law § 130.50</p> | <p>Divisibility uncontested.</p> | <p>Divisibility not contested.</p> |

THIRD CIRCUIT

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
|--|---|--|--|
| <i>Vurimindi v. Att’y Gen.</i> , 46 F.4th 134 (3d Cir. 2022) | Pennsylvania stalking 18 Pa. Cons. Stat. § 2709.1(a) | <p>Not divisible as to mens rea.</p> <p>Statute</p> <ul style="list-style-type: none"> Written disjunctively, but that is not dispositive. The phrase “an intent” is not repeated, suggesting that it is a single element that can be demonstrated in two ways. Uses the word “demonstrate,” which means to illustrate or explain with examples. In <i>United States v. Gonzalez</i>, 905 F.3d 165 (3d Cir. 2018), held that the different mental states in the similarly-constructed statute are alternate means, not elements. <p>Case law</p> <ul style="list-style-type: none"> Case cited by government involve sufficiency of evidence issues and when considered in context, actually support the petitioner’s argument. Other state cases also do not directly address the issue, but in discussing the elements of the offense refer to the mens rea as a singular intent element. <p>Record of Conviction</p> <ul style="list-style-type: none"> Case law does not directly answer the question, but a peek at record of conviction documents also supports indivisibility. Government argument that what it says is a reference to only one of the mens rea alternatives means it is an element is not supported by a survey of other Pennsylvania record of conviction documents. Survey of documents on the state court portal shows the same language is used regardless of the type of intent involved in the prosecution. | Includes an analysis of record of conviction documents from other state prosecutions to refute a government argument based on the petitioner’s own record of conviction documents. |
| <i>Hillocks v. Att’y Gen.</i> , 934 F.3d 332 (3d Cir. 2019) | Pennsylvania criminal use of communication facility 18 Pa. Cons. Stat. § 7512(a) | <p>Not divisible as to the object felony.</p> <p>Case law</p> <ul style="list-style-type: none"> Cases for analogous federal statute do not prohibit government from offering multiple underlying felonies to a jury nor jury members from disagreeing as to which felony it was. <p>Jury instructions</p> <ul style="list-style-type: none"> Just as with PA burglary decision and Second Circuit in Harbin, a blank for jury to fill in does not mean it is an element. Nothing here requires the jury to find one and only one alternative. <p>Statute</p> <ul style="list-style-type: none"> Alternate elements must typically be explicitly identified in the statute’s text, not read into its language. The disjunctive “or” is not enough, and at most separates into two offenses which are still both overbroad. Identical punishment. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
|---|--|--|--------------------------------|
| <i>United States v. Aviles</i> , 938 F.3d 503 (3d Cir. 2019) | <p>New Jersey maintaining or operating a controlled dangerous substance production facility</p> <p>N.J. Stat. Ann. § 2C:35-4</p> <p>Maryland possession of a dangerous substance with intent to distribute or manufacture</p> <p>Md. Crim. Code § 5-602</p> <p>New Jersey possession of a controlled dangerous substance with intent to distribute near a school zone</p> <p>N.J. Stat. Ann. § 2C:35-7</p> | <p>New Jersey 2C:35-4: Not divisible as to the particular substance.</p> <p>Case law</p> <ul style="list-style-type: none"> Case that references the drugs listed in the statute as “CDS” (controlled dangerous substance) does not definitively answer the issue. <p>Statute</p> <ul style="list-style-type: none"> Same punishment regardless of substance. Appears to allow for juror disagreement as to which substance. Discretionary fine that varies based on the substance(s) shows the statute contemplates a single conviction for acts involving more than one substance. <p>Maryland: Undecided. Even if it were divisible and the modified approach applied, there is no substance specified in the record of conviction. Ambiguity means not a predicate offense.</p> <p>New Jersey 2C:35-7: Undecided if divisible as to the particular substance, but footnote states that it appears divisible only into violations involving less than one ounce of marijuana versus all other substances, not further into which non-marijuana substance.</p> | |
| <i>United States v. Steiner</i> , 847 F.3d 103 (3d Cir. 2017) | <p>Pennsylvania burglary</p> <p>18 Pa. Cons. Stat. 3502(A) (1992)</p> | <p>Not divisible under 1992 version of the statute.</p> <p>Record of conviction</p> <ul style="list-style-type: none"> Charging document did not specify location. <p>Jury instructions</p> <ul style="list-style-type: none"> Model instructions do not require jury to agree on the nature of the location. <p>Case law</p> <ul style="list-style-type: none"> Discusses burglary’s broad scope as a single crime reaching multiple types of unlawful entry. | |
| <i>Chavez-Alvarez v. Att’y Gen.</i> , 850 F.3d 583 (3d Cir. 2017) | <p>Military code sodomy</p> <p>10 U.S.C. § 925</p> | <p>Not divisible</p> <p>Statute</p> <ul style="list-style-type: none"> Separate military sentencing manual guidelines regarding force does not constitute an element under the statute. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
|---|--|---|--|
| <i>Cabeda v. Att’y Gen.</i> , 971 F.3d 165 (3d Cir. 2020) | Pennsylvania involuntary deviate sexual intercourse 18 Pa. Cons. Stat. § 3123(a)(7) | Not divisible as to mens rea. In a footnote: Statute <ul style="list-style-type: none"> Statute refers to the mens rea sufficient to establish a material element, and therefore itself distinguishes between the elements of an offense and the alternative means of satisfying those elements. Case law <ul style="list-style-type: none"> State case law seems to say the same, citing a case that states that the Commonwealth must prove at least recklessness. | |
| <i>Rosa v. Att’y Gen.</i> , 950 F.3d 67 (3d Cir. 2020) | New Jersey school zone controlled substance offense N.J. Stat. Ann. § 2C:35-7 | Remand to supplement record in order to determine whether divisible as to distributing, dispensing or possessing with intent to distribute. Statute <ul style="list-style-type: none"> Without elaborating, states that statute does not answer the question. Case Law <ul style="list-style-type: none"> Some suggestion that may be alternate means, but nothing definitive. Previous unpublished case (<i>Chang-Cruz v. Att’y Gen.</i>, 659 F. App’x 114 (3d Cir. 2016) finding indivisible is not binding. Jury Instructions Inconclusive absent support from other <i>Shepard</i> documents Record of Conviction <ul style="list-style-type: none"> Because not answered by statute or case law, can look to a limited class of underlying documents to determine divisibility. Remand for the record to be supplemented. If the record cannot be supplemented to satisfy the demand for certainty, cannot be found to have committed an aggravated felony. | Can use to support requirement for certainty as to divisibility. |
| <i>Nunez v. Att’y Gen.</i> , 35 F.4th 134 (3d Cir. 2022) | New Jersey endangering the welfare of a child in the third degree N.J. Stat. Ann. § 2C:24-4(a)(1) | Divisible Divisibility uncontested by petitioner. Also points to prior unpublished decision in <i>Sanchez v. Att’y Gen.</i> , 757 F. App’x 142 (3d Cir. 2018) finding statute divisible: Statute <ul style="list-style-type: none"> Lists two sets of elements in disjunctive paragraphs, which even repeat some elements. Case law <ul style="list-style-type: none"> Cites unpublished state case in support, without further explanation. | Divisibility not contested. |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
|---|--|---|--|
| <i>United States v. Abdullah</i> , 905 F.3d 739 (3d Cir. 2018) | New Jersey third-degree aggravated assault with a deadly weapon N.J. Stat. Ann. § 2C:12-1(b)(2) | Divisible. Divisibility not contested. Statute <ul style="list-style-type: none"> Three alternate degrees with different sentencing. Third degree further divisible due to disjunctive language. Jury instructions <ul style="list-style-type: none"> Model instructions confirm third degree divisibility by detailing different elements. | Divisibility not contested. |
| <i>Singh v. Att’y Gen.</i> , 839 F.3d 273 (3d Cir. 2016) | Pennsylvania manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance 35 Pa. Stat. Ann. § 780–113(a)(30) | Divisible as to both the conduct and the particular substance. Petitioner conceded divisibility. Third circuit previously found the statute divisible in <i>United States v. Abbott</i> , 748 F.3d 154 (3d Cir. 2014) and <i>Avila v. Att’y Gen.</i> , 826 F.3d 662 (3d Cir. 2016), decided the same day as <i>Mathis</i> . Case law <ul style="list-style-type: none"> State double jeopardy case found same elements test not violated in charging multiple counts where defendant had two different substances in one vial. <i>Commonwealth v. Swavely</i>, 554 A.2d 946, 947 (Pa. Super. Ct. 1989). There is relevant opinion from Pennsylvania’s Supreme Court, so it is appropriate to rely on a state superior court case. Statute <ul style="list-style-type: none"> <i>Abbott</i> held that the particular substance is an element “insofar as it increases the possible range of penalties.” 748 F.3d at 159. | More recent state court decisions may call case law analysis into question. See <i>Commonwealth v. Ramsey</i> , 2019 PA Super 205, 214 A.3d 274, 278 (2019) (finding prosecution for two counts based on a mixture of heroin and fentanyl violated double jeopardy protections, and that <i>Swavely</i> does not control because it decided based on there being two separate offenses); <i>Commonwealth v. Beatty</i> , 2020 PA Super 21, 227 A.3d 1277 (2020) (finding in an appeal on a facial sufficiency argument that whether the substance was heroin or fentanyl is unimportant because both are controlled substances). |
| <i>United States v. Henderson</i> , 841 F.3d 623 (3d Cir. 2016) | Pennsylvania manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance for a Schedule I or II narcotic drug 35 Pa. Stat. Ann. § 780–113(f)(1) | Divisible as to the particular controlled substance. 35 Pa. Stat. Ann. § 780–113(a)(30) found divisible in <i>Singh</i> and rejects the argument that where sentenced under (f)(1), only divisible as to being a Schedule I or II narcotic drug, and not further divisible as to the particular substance. Case law <ul style="list-style-type: none"> Cites to same state superior court case cited in <i>Singh</i> and <i>Avila</i>, which found double jeopardy same elements test not violated in charging multiple counts where defendant had two different substances in one vial. Also cites to a state case finding that possession of three different controlled substances would support separate criminal counts. | See note under <i>Singh v. Att’y Gen.</i> , 839 F.3d 273 (3d Cir. 2016), <i>supra</i> . Analysis regarding peek at the record of conviction does not explain why the specification of a substance in the record documents means that the substance is an element. |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <p><i>United States v. Henderson</i>, 841 F.3d 623 (3d Cir. 2016)</p> <p>(cont.)</p> | <p>Pennsylvania manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance for a Schedule I or II narcotic drug</p> <p>35 Pa. Stat. Ann. § 780–113(f)(1)</p> | <p>Statute</p> <ul style="list-style-type: none"> Change in penalty dependent on substance. Not a list of illustrative examples, rather a disjunctive list of exhaustive options that create alternative definitions. <p>Record of conviction</p> <ul style="list-style-type: none"> Specifies heroin. | <p>See note under <i>Singh v. Att’y Gen.</i>, 839 F.3d 273 (3d Cir. 2016), supra.</p> <p>Analysis regarding peek at the record of conviction does not explain why the specification of a substance in the record documents means that the substance is an element.</p> |
| <p><i>Larios v. Att’y Gen.</i>, 978 F.3d 62 (3d Cir. 2020)</p> | <p>New Jersey terroristic threats</p> <p>N.J. Stat. Ann. § 2C:12-3(a)</p> | <p>Divisible</p> <p>Case law</p> <ul style="list-style-type: none"> Consists of three alternative offenses, each with the same actus reus and mens rea of either purpose or reckless disregard, but different, alternative causation elements, making it divisible. | |
| <p><i>United States v. McCants</i>, 952 F.3d 416 (3d Cir. 2020)</p> | <p>New Jersey robbery</p> <p>N.J. Stat. Ann. § 2C:15-1</p> | <p>Divisible into three subsections.</p> <p>Statute</p> <ul style="list-style-type: none"> Differences in punishment between subsections is to be used as an example of a clear statutory clue as to divisibility, not as the only permissible textual analysis. Cannot find indivisible solely because same punishment for all subsections. Subsections are separately enumerated disjunctive elements, not a list of example species of a single genus. <p>Case law</p> <ul style="list-style-type: none"> No contrary case law showing jurors could disagree as to the subsection. | <p>The court says there is no contrary case law showing jurors could disagree as to the subsection, but there is also seemingly nothing affirmatively supporting divisibility.</p> |
| <p><i>United States v. Ramos</i>, 892 F.3d 599 (3d Cir. 2018)</p> | <p>Pennsylvania second degree aggravated assault with a deadly weapon</p> <p>18 Pa. Cons. Stat. § 2702(a)</p> | <p>Divisible into by first and second degree, and into four alternative second degree offenses.</p> <p>Statute</p> <ul style="list-style-type: none"> Alternative degrees, which are subject to different maximum sentences. Within second degree, uses disjunctive language and sets out alternate offenses with distinct conduct setting forth different (but overlapping) elements. <p>Case law</p> <ul style="list-style-type: none"> Non-precedential case law showing jury can disagree as to the subsection is not definitive. Only shows that Pennsylvania does not overturn guilty verdicts based on flawed or imprecise charging documents when they nevertheless provided sufficient notice of the charges to the defendant. Contrary published cases state that the subsections do not share identical elements. <p>Jury Instructions</p> <ul style="list-style-type: none"> Pattern jury instructions list the separate alternatives and say that the jury must find those elements proven beyond a reasonable doubt. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>Grijalva Martinez v. Att’y Gen.</i> , 978 F.3d 860 (3d Cir. 2020) | New Jersey criminal sexual contact N.J. Stat. Ann. § 2C:14-3(b) | Divisible Statute <ul style="list-style-type: none"> Each subsection requires proof of some fact that is not required by another subsection, so they have separate elements. Jury instructions <ul style="list-style-type: none"> Model instructions list the four subsections in the alternative. | |
| <i>United States v. Bullock</i> , 970 F.3d 210 (3d Cir. 2020) | Federal assaulting, resisting, or impeding certain officers or employees of the United States 18 U.S.C. § 111 | Divisible , joining circuits 5, 6, 9, 10 and 11 in finding the same. Statute <ul style="list-style-type: none"> Subsections a and b carry different punishments. Case law <ul style="list-style-type: none"> Prior circuit case finding statute to consist of three separate offenses (simple assault, non-simple without dangerous weapon, non-simple with dangerous weapon). | |
| <i>Sasay v. Att’y Gen.</i> , 13 F.4th 291 (3d Cir. 2021) | Federal aggravated identity theft 18 U.S.C. § 1028A(a)(1) | Divisible Statute <ul style="list-style-type: none"> Incorporates several felonies enumerated under subsection c. Case law <ul style="list-style-type: none"> Jury could not convict under the statute without finding each element of the underlying felony and unanimously identifying it as the predicate felony for the offense. | |
| <i>United States v. Chapman</i> , 866 F.3d 129 (3d Cir. 2017) | Federal mailing threatening communications 18 U.S.C. § 876(c) | Divisible Statute <ul style="list-style-type: none"> Without further analysis, states that the statute sets out two alternate versions of the offense. | |
| <i>United States v. Peppers</i> , 899 F.3d 211 (3d Cir. 2018) | Pennsylvania robbery 18 Pa. Cons. Stat. § 3701(a) | Divisible Statute <ul style="list-style-type: none"> Alternative elements are clearly laid out. Different punishments are attached. | |
| <i>United States v. Williams</i> , 898 F.3d 323 (3d Cir. 2018) | Federal RICO 18 U.S.C. § 1962 | Divisible Statute <ul style="list-style-type: none"> Includes two alternative types of conduct (racketeering activity or the collection of unlawful debt). | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>Nunez v. Att’y Gen.</i> , 35 F.4th 134 (3d Cir. 2022) | New Jersey endangering welfare of children N.J. Stat. § 2C:24-4 | Divisibility not contested. Footnote points to previous unpublished case where the court found the statute divisible as to (1) sexual conduct with a minor or (2) abusing or neglecting a minor. In that case, the court stated that the statute includes two complete sets of elements in disjunctive paragraphs which repeat some elements, and that New Jersey case law distinguishes between the paragraphs. <i>Sanchez v. Att’y Gen.</i> , 757 F. App’x 142, 145 (3d Cir. 2018). | Divisibility not contested. |

FIFTH CIRCUIT

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <p><i>United States v. Herrold</i>, 883 F.3d 517 (5th Cir. 2018), <i>judgment vacated</i>, 139 S. Ct. 2712 (2019), <i>divisibility section reinstated on remand</i>, 941 F.3d 173, 177 (5th Cir. 2019)</p> | <p>Texas burglary</p> <p>Tex. Penal Code Ann. § 30.02(a)</p> | <p>Not divisible as to (a)(1) and (a)(3).</p> <p>Case law</p> <ul style="list-style-type: none"> This en banc decision overrules prior CA5 finding of divisibility. State cases relied upon in that decision discussed elements, but not in the way <i>Mathis</i> dictates. Cannot simply look at the word “element” and decide based on that. Must look at context in which it is used. One was a discussion of whether trespass was a lesser included offense of burglary. Spoke of different “ways” burglary can be committed in discussing the kinds of facts needed to prove burglary. The other was within a discussion about the rights of criminal defendants to notice of charges and did not examine means v. elements. While these two decisions are from the highest court and the case law relying on now is not, those cases did not in fact discuss the issue at hand so that is not relevant. Cases relied upon address the dispositive issue of juror unanimity head on. Multiple lower court decisions have plainly stated that a jury need not agree unanimously as to the subsection and that the subsections do not create multiple offenses. Double jeopardy case law limitations: <ul style="list-style-type: none"> SCOTUS did not list these types of cases as sources that would answer divisibility question. Double jeopardy tests vary between states, and do not automatically inform divisibility decisions. When statutory alternatives require proof of different facts, they lead to different outcomes under the <i>Blockburger</i> test. This does not tell us whether means vs. elements, because both alternative means and alternative elements necessarily entail factual differences. What we need to know is the legal effects of those factual differences, which these cases do not answer. <p>Statute</p> <ul style="list-style-type: none"> Does not answer the question. Indivisible statutes are not limited to those with illustrative examples. That is just one feature that may indicate indivisibility. Use of the word “or” does not answer the question, and limited judicial ability to decide means v. elements in statute through parsing language. Structural features of statute cannot outweigh a clear state court finding. | <p>Important discussions regarding considering the context of state court use of the word “element,” the <i>Mathis</i> instructions, and the limits of judicial examination of statutes.</p> <p>Also includes discussion about the limitations of double jeopardy case law.</p> |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <p><i>Alejos-Perez v. Garland</i>, 991 F.3d 642 (5th Cir. 2021)</p> | <p>Texas controlled substance</p> <p>Tex. Health & Safety Code Ann. § 481.1161</p> | <p>Not divisible as to particular substance due to lack of certainty on the issue.</p> <p>Statute</p> <ul style="list-style-type: none"> Does not definitively answer the question. Penalty structure is for amount, not type of substance. In list of substances, some list examples but the alternatives are written as an exhaustive list. <p>Case Law</p> <ul style="list-style-type: none"> Does not definitively answer. State case (<i>Watson</i>) reads as if element, but double jeopardy cases in Texas do not answer divisibility questions with certainty (citing <i>Herrold</i>). Intermediate court cases applying <i>Watson</i> do not control, and no case applying <i>Watson</i> to the subsection at issue. <p>Record of Conviction</p> <ul style="list-style-type: none"> Charging document mentions the drug and class to exclusion of others, but, along with the judgment, also refers to the penalty group as a whole. Therefore, record of conviction documents also fail to provide certainty as to divisibility, so must find indivisible. | <p>Decided based on lack of certainty rather than affirmative finding of indivisibility.</p> |
| <p><i>United States v. Hinkle</i>, 832 F.3d 569 (5th Cir. 2016)</p> | <p>Texas manufacture or delivery of controlled substance</p> <p>Tex. Health & Safety Code Ann. § 481.112(a)</p> | <p>Not divisible into possession with intent to deliver and mere delivery.</p> <p>Case law</p> <ul style="list-style-type: none"> Highest state criminal court found no error in a potentially non-unanimous verdict as to actual or constructive transfer, or an offer to sell, as these were alternate theories of a single offense. Government confuses state evidentiary and notice requirements with the statutory elements of the offense. Case cited shows that Texas permits the prosecution to charge multiple methods of delivery but does not require proof beyond a reasonable doubt as to each method. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>United States v. Tanksley</i> , 848 F.3d 347 (5th Cir. 2017) | Texas manufacture or delivery of controlled substance Tex. Health & Safety Code Ann. § 481.112(a) | Not divisible into possession with intent to deliver and mere delivery. Case law <ul style="list-style-type: none"> Cites same case from <i>Hinkle</i> that states that defendant can be convicted regardless of disagreement on delivery v. possession with intent to deliver so that a dealer can be held accountable no matter where along the course of delivery they are involved. In a supplemental decision while a government petition for en banc rehearing was pending, court stated that government's additional arguments regarding divisibility were taken from a plurality opinion with no effect on the state case relied upon in the original decision. <i>United States v. Tanksley</i>, 854 F.3d 284, 285 (5th Cir. 2017). | Issued after a motion for panel rehearing was filed post- <i>Mathis</i> and <i>Hinkle</i> . |
| <i>United States v. Rodriguez-Flores</i> , 25 F.4th 385 (5th Cir. 2022) | Texas sexual assault Tex. Penal Code Ann. §§ 22.011(a)(1) and 22.011(b) | Not divisible as to (b) subsections regarding types of lack of consent. Case law <ul style="list-style-type: none"> Clear and direct state case law finding that (b) subsections are alternatives means for the lack of consent element and do not constitute distinct offenses requiring juror unanimity. | |
| <i>United States v. Urbina-Fuentes</i> , 900 F.3d 687 (5th Cir. 2018) | Florida burglary Fla. Stat. Ann. § 810.02 | Not divisible as to curtilage or other location. Statute <ul style="list-style-type: none"> No indication of alternative elements. Case law <ul style="list-style-type: none"> State supreme court has stated that whether a defendant is in a building or in the curtilage makes no difference for a conviction Jury instructions <ul style="list-style-type: none"> Pattern instructions lists all location types within the single element. | |
| <i>United States v. Perlaza-Ortiz</i> , 869 F.3d 375 (5th Cir. 2017) | Texas deadly conduct Tex. Penal Code Ann. § 22.05 | Not divisible Case law <ul style="list-style-type: none"> Suggests not divisible, but not definitive. Unpublished decisions not precedential, but still helpful for analysis. Under state law, separate offenses should be charged in different counts, and different ways of committing an offense in separate paragraphs within a count. In the unpublished decisions, it was the latter. Legislative history <ul style="list-style-type: none"> Characterized as alternate conduct of a single offense. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>United States v. Perlaza-Ortiz</i> , 869 F.3d 375 (5th Cir. 2017) (cont.) | | Record of conviction <ul style="list-style-type: none"> Charging document references one subsection to the exclusion of others. However, state law is clear if unpublished, and on balance would at least not satisfy demand for certainty and must therefore be resolved in defendant's favor | |
| <i>United States v. Reyes-Ochoa</i> , 861 F.3d 582 (5th Cir. 2017) | Virginia burglary Va. Code Ann. §§ 18.2-90, 18.2-91 | Not divisible as to the locational element. Agree with Fourth Circuit analysis of the same offense. <i>See Castendet-Lewis v. Sessions</i> , 855 F.3d 253, 260–64 (4th Cir. 2017). Statute <ul style="list-style-type: none"> Provides a list of locations which on its face are means. Case law <ul style="list-style-type: none"> State supreme court appears to view the terms interchangeably. <i>Castendet-Lewis</i> state law citations omitted. Previous unpublished decision by this circuit does not require to find otherwise as it was issued pre-<i>Mathis</i> and did not analyze Virginia state case law. | <i>Castendet-Lewis</i> cites to a state law case where analysis as to whether the defendant had burgled any structure covered by the statute did not require a court finding or juror unanimity as to a particular structure, as any enumerated alternative would have been sufficient. 855 F.3d at 264. |
| <i>United States v. Martinez-Rodriguez</i> , 857 F.3d 282 (5th Cir. 2017) | Texas causing injury to a child Tex. Penal Code Ann. § 22.04(a) | Not divisible as to act versus omission. Case law <ul style="list-style-type: none"> Highest state criminal court addressed the precise issue and found that “act or omission” is means rather than an element on which the jury must be unanimous. A state double jeopardy decision also found that the alternatives were means of alleging the same offense. | |
| <i>United States v. Lobaton-Andrade</i> , 861 F.3d 538 (5th Cir. 2017) | Arkansas manslaughter Ark. Code Ann. § 5-10-104 | Not divisible as to mens rea. Case law <ul style="list-style-type: none"> Arkansas court of appeals has allowed instructions with more than one alternative manslaughter, apparently without requiring juror unanimity. State supreme court has described them as alternate grounds of committing manslaughter and stated that there are different ways of satisfying the single mens rea element. Where more than one subsection is charged, state courts have considered them collectively. Statute <ul style="list-style-type: none"> The fact that illustrative examples indicate indivisibility does not mean that a statute with no illustrative examples is automatically divisible. Record of conviction <ul style="list-style-type: none"> The charging document refers to different mens rea alternatives in different sections. Does not plainly show divisibility, so indivisible. | Can use to support requirement for certainty as to divisibility. |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>Gomez-Perez v. Lynch</i> , 829 F.3d 323 (5th Cir. 2016) | Texas assault Tex. Penal Code Ann. § 22.01(a)(1) | Not divisible as to mens rea. Case law <ul style="list-style-type: none"> Highest criminal court has said the three mens rea alternatives in the preceding subsection are “conceptually equivalent” and do not result in three separate offenses. <i>Mathis</i> actually cited the BIA decision in this very case in footnote 3 and recognized that the mental states are interchangeable. | |
| <i>United States v. Howell</i> , 838 F.3d 489 (5th Cir. 2016) | Texas family violence assault by strangulation Tex. Penal Code Ann. §§ 22.01(a)(1), (b)(2)(B) | Not divisible as to mens rea. Case law <ul style="list-style-type: none"> Highest criminal court has said the three mens rea options in the preceding subsection are “conceptually equivalent” and do not result in three separate offenses. No reason would analyze this subsection differently. | Although <i>Howell</i> found the statute indivisible, the court also found the statute to be a categorical crime of violence for sentencing enhancement purposes after finding a mens rea of recklessness sufficient. This decision has been abrogated by the Supreme Court’s decision in <i>Borden v. United States</i> , 141 S. Ct. 1817 (2021). See <i>United States v. Greer</i> , 20 F.4th 1071, 1075 (5th Cir. 2021). As such, the statute should now be considered indivisible <i>and</i> overbroad. |
| <i>United States v. Montiel-Cortes</i> , 849 F.3d 221 (5th Cir. 2017) | Nevada robbery Nev. Rev. Stat. Ann. § 200.380 | Not divisible Government did not argue divisible. | |
| <i>United States v. Lerma</i> , 877 F.3d 628 (5th Cir. 2017) | Texas aggravated robbery Tex. Penal Code Ann. § 29.03 | Divisible by subsection and further within subsection (2) as to whether uses or exhibits a deadly weapon. Subsection (3) is indivisible . Statute <ul style="list-style-type: none"> On its face, statute requires that a defendant commit robbery and meet one of several other requirements. Subsections are clearly different crimes. Subsection (2) is further divisible, as uses or exhibits a deadly weapon is not phrased as a means, but rather as an element. Phrasing in subsection 3 indicates means. Case law <ul style="list-style-type: none"> Double jeopardy case finding cannot be convicted of robbing same person twice at the same time, once by threat and once by force. However, that does not answer divisibility question and did not examine this statute. | Statutory analysis as to subsection 2 appears weak. Says clearly different elements due to phrasing, but fails to elaborate. Unclear why they reach the opposite conclusion for subsection (3). |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>Monsonyem v. Garland</i> , 36 F.4th 639 (5th Cir. 2022) | Texas injury to a Child, Elderly Individual, or Disabled Individual Tex. Penal Code Ann. § 22.04 | <p>Divisible as to the victim class.</p> <p>Statute</p> <ul style="list-style-type: none"> Does not answer the question but indicates divisible as it provides an affirmative defense for only class of victim. <p>Case law</p> <ul style="list-style-type: none"> State law suggests but does not confirm divisibility. Cases are routinely prosecuted by identifying one class of victim. <p>Jury instructions</p> <ul style="list-style-type: none"> Pattern jury instructions list the victim classes as separate, exclusive alternatives by using “or” and providing separate definitions for each class. <p>Record of conviction</p> <ul style="list-style-type: none"> References only one term, to the exclusion of the others. | The court states that case law showing that the state routinely prosecutes under one statutory alternative does not answer divisibility, but then relies on a peek at the record to find divisible, pointing only to the record’s identification of one of the alternatives. |
| <i>United States v. Garrett</i> , 24 F.4th 485 (5th Cir. 2022) | Texas simple robbery Tex. Penal Code Ann. § 29.02 | <p>Divisible into two offenses, robbery-by-injury and robbery-by-threat.</p> <p>Statute</p> <ul style="list-style-type: none"> Statute is divided into two numbered subdivisions separated by a semicolon. The alternatives are conceptually distinct. Causing bodily injury is clearly distinct from threatening or placing someone in fear. Different mens rea requirements. <p>Case Law</p> <ul style="list-style-type: none"> Related Texas assault statute, which contains analogous language, has been found by the state’s highest court to create three separate offenses. Lower state courts have not been consistent in addressing the issue, but as a whole they support divisibility or at least do not disprove it. Two lower courts have found that the statute contains two separate offenses and require juror unanimity. One lower court found that jury instructions allowing a conviction on a theory of either robbery-by-injury or robbery-by-threat did not violate the defendant’s right to jury unanimity on the verdict. But diminished authority in light of state high court decision and other lower court decisions. Other cases cited by petitioner are not persuasive. One is a double jeopardy case, and the circuit has already stated that double jeopardy decisions in Texas do not resolve divisibility with certainty. Another involved sufficiency of evidence, not juror unanimity. A third cases raised juror unanimity issues, but they were ultimately not decided by the court. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <p><i>United States v. Frierson</i>, 981 F.3d 314 (5th Cir. 2020)</p> | <p>Louisiana produce, manufacture, distribute, or dispense or possess with intent to produce, manufacture, distribute, or dispense, a controlled dangerous substance</p> <p>La. Stat. Ann. § 40:967</p> | <p>Divisible as to the particular substance.</p> <p>Case law</p> <ul style="list-style-type: none"> • Cites unpublished intermediate appellate court case stating that the state must prove the exact identity of the controlled substance as an essential element of the offense. <p>Statute</p> <ul style="list-style-type: none"> • Different penalties depending on the drug. | <p>Relies in part on an unpublished intermediate state court case with limited analysis.</p> <p>Subsections do proscribe different penalties, but only some of them are further narrowed by particular drug. Question if that alone proves further divisibility.</p> |
| <p><i>United States v. Butler</i>, 949 F.3d 230 (5th Cir. 2020)</p> | <p>Federal bank robbery</p> <p>18 U.S.C. § 2113</p> | <p>Divisible as to unlawful entry v. entry by force, violence, or intimidation.</p> <p>Statute</p> <ul style="list-style-type: none"> • There is a disjunctive “or” between the paragraphs and within them, and a comparison of the differences between these shows the paragraphs are meant to be different offenses with distinct elements, while the internal or indicates alternate means within each sub-offense. • Defendant does not point to any case holding that separate paragraphs of a statute describe different means of commission. That is logical, as a paragraph break often means a new thought is next. <p>Case law</p> <ul style="list-style-type: none"> • Confirms analysis of the statute’s grammar. • Circuit has recognized two traditionally distinct crimes with different elements. • Other circuits have found divisible, and usually not even contested. • Cases pointed to by defendant is about merger of sentences, not of offenses, and actually supports divisibility finding. | |
| <p><i>Fakhuri v. Garland</i>, 28 F.4th 623 (5th Cir. 2022)</p> | <p>Tennessee money laundering</p> <p>Tenn. Code Ann. § 39-14-903</p> | <p>Divisible</p> <p>Statute</p> <ul style="list-style-type: none"> • Statute is set out in five separate subsections, all of which have the same structure, and two of which specify distinct penalties. Since those with different penalties must be separate offenses, the structure shows each subsection is a different offense. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>United States v. Torres</i> , 923 F.3d 420 (5th Cir. 2019) | Texas assault Tex. Penal Code Ann. § 22.01 | Divisible as to the three subsections. Statute <ul style="list-style-type: none"> One subsection requires bodily injury, one only threat of bodily injury, and third requires offensive or provocative physical contact. Recklessness sufficient for only one subsection. Those are clearly independent groups of elements. Case law <ul style="list-style-type: none"> Highest state criminal court has stated the statute includes three separate offenses. | The court previously found that subsection (a)(1) of the statute was not further divisible as to mens rea. <i>Gomez-Perez v. Lynch</i> , 829 F.3d 323 (5th Cir. 2016). |
| <i>United States v. Reyes-Contreras</i> , 882 F.3d 113 (5th Cir. 2018), <i>on reh'g en banc</i> , 910 F.3d 169 (5th Cir. 2018) | Missouri voluntary manslaughter Mo. Ann. Stat. § 565.023 | Divisible Statute <ul style="list-style-type: none"> Only one of the subsections is listed as a lesser included offense of second-degree murder. Case law <ul style="list-style-type: none"> Jury must unanimously find the elements of subsection 1 without considering subsection 2. State case (unpublished) says a person commits the offense when each element of subsection 1 is satisfied, and makes no mention of subsection 2. | One state case cited is unpublished. Divisibility portion initial decision reinstated in the en banc decision. 910 F.3d at 175. |
| <i>United States v. Reyes</i> , 866 F.3d 316 (5th Cir. 2017) | Illinois aggravated battery 720 Ill. Comp. Stat. Ann. § 5/12-3.05 | Divisible by both main statute and further as to subsection (f). Case law <ul style="list-style-type: none"> State supreme court found statute contains at least two different crimes. Not just a statute supplemented with aggravating circumstances. Same case states that subsection 5/12-3.05(f) contains multiple offenses. In dicta, but federal court must give state dicta great weight, and the statement followed analysis of the relevant statutory language. State court case cited by the dissent is “(1) Illinois law on the permissibility of general verdicts where a defendant is charged with multiple and distinct offenses, and is unrelated to the present case where conviction matches the crime charged and satisfies federal sentencing requirements; (2) a mere intermediate state court opinion, (3) a case that did not consider the statute before us and was in fact decided before both Section 12-3.05 and its predecessor statute (discussed in <i>Cherry</i>) were ever enacted, and (4) a case simply not involving statutory language, design, or meaning.” 866 F.3d at 322. Statute <ul style="list-style-type: none"> Statute is complicated and has many subsections and nested paragraphs. Only one part of the subsection qualifies as violent offense against youth. Record of conviction <ul style="list-style-type: none"> Even if dissent were correct that no definitive answer in statute or case law, record of conviction confirms divisibility. Charged with subsection 12-3.05(f)(1) with no mention of the other 12-3.05(f) subsections. | The end of the decision that basis the holding on a record of conviction analysis in the alternative does not discuss the reasons that the particular subsection might be identified that do not go to any means-elements distinction . |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>Ibanez-Beltran v. Lynch</i> , 858 F.3d 294 (5th Cir. 2017) | Arizona transport for sale, import into this state or offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer marijuana. Ariz. Rev. Stat. Ann. § 13-3405(a)(4) | Divisible Case law <ul style="list-style-type: none"> Does not definitively resolve divisibility. Some cases indicate that it is divisible, but others go the other way, including finding that the legislature writes separate subparts where it intends to create separate crimes. State court also found similarly worded solicitation statute to consist of means, not elements. Record of conviction <ul style="list-style-type: none"> Can look to record because case law is unclear. Indictment lists all included conduct, but plea agreement and judgment treat as elements. Pattern jury instructions <ul style="list-style-type: none"> Finding reinforced by pattern instructions, which have separate instructions for sale and offer to transport for sale. | |
| <i>Flores-Larrazola v. Lynch</i> , 840 F.3d 234, 236 (5th Cir. 2016), <i>reh'g en banc denied</i> , <i>Flores-Larrazola v. Lynch</i> , 854 F.3d 732 (5th Cir. 2017) | Arkansas narcotics offense Ark. Code Ann. § 5-64-401(a) (Repealed in 2011) | Divisible into twelve different offenses. Statute <ul style="list-style-type: none"> 3 mens rea elements and 4 actus rea elements. First decision ends analysis there. Case law <ul style="list-style-type: none"> Addressed only in denial of petition for rehearing en banc. State decision holding that “manufacturing a controlled substance” and “possession of a controlled substance with the intent to deliver” are two separate offenses. Also supported by an 11th Circuit decision analyzing a similar Florida statute. | |
| <i>United States v. Mendez-Henriquez</i> , 847 F.3d 214 (5th Cir. 2017) | California shooting at inhabited dwelling house, occupied building, vehicle, or aircraft, or inhabited housecar or camper Cal. Penal Code § 246 | Divisible Case law <ul style="list-style-type: none"> No definitive decision, but state supreme court said “shooting at an inhabited house” was an element of the offense, to the exclusion of the other targets. Record of conviction <ul style="list-style-type: none"> Charged with shooting at motor vehicle, to the exclusion of other targets. | Contains minimal analysis to be able to find divisibility with certainty. |
| <i>Laryea v. Sessions</i> , 871 F.3d 337 (5th Cir. 2017) | Texas evading arrest or detention Tex. Penal Code Ann. § 38.04 | Divisible Statute <ul style="list-style-type: none"> Some subsections are felonies, some are misdemeanors, so statute is divisible. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>United States v. Smith</i> , 957 F.3d 590 (5th Cir. 2020) | Federal attempted murder 18 U.S.C. § 1114(3) | Divisible Statute <ul style="list-style-type: none"> Statute's plain language makes it clear that the murder or attempted murder may be accomplished through several enumerated offenses. Each offense provides separate elements and punishments. | |
| <i>United States v. Griffin</i> , 946 F.3d 759 (5th Cir. 2020) | Mississippi aggravated assault Miss. Code. Ann. § 97-3-7(2) | Divisible Case law <ul style="list-style-type: none"> Cites to a state decision without elaboration. State decision states that the statute delineates two separate offenses. | <i>Mason v. State</i> , 867 So. 2d 1058 (Miss. Ct. App. 2004), state decision cited and exclusively relied upon, may have been overruled by <i>Towles v. State</i> , 193 So. 3d 688 (Miss. Ct. App. 2016). |
| <i>United States v. Sanchez-Rodriguez</i> , 830 F.3d 168 (5th Cir. 2016) | Florida dealing in stolen property Fla. Stat. Ann. § 812.019 | Divisible Circuit states that the statute is divisible, but unclear whether divisible into its two subsections, and/or by alternate mens rea possibilities, and/or some other way. | Issued shortly after <i>Mathis</i> but does not cite to it or appear to follow the analysis laid out by the Supreme Court. |

NINTH CIRCUIT

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>Lopez-Marroquin v. Garland</i> , 9 F.4th 1067 (9th Cir. 2021) | California theft of a vehicle Cal. Veh. Code § 10851(a) | <p>Not divisible as to treatment of accessories after the fact. Overrules <i>Duenas-Alvarez v. Holder</i>, 733 F.3d 812 (9th Cir. 2013) as incompatible with Mathis, since it relied solely on the disjunctive phrasing of the statute.</p> <p>Statute</p> <ul style="list-style-type: none"> • Not dispositive, but supports indivisibility. • Statutory text is silent on whether principals or accessories after the fact must be charged as such. • Punitive structure does not differentiate between principals and accessories and does not require either alternative to be alleged, admitted by the defendant, or found by the jury, as it does for other types of enhancements. <p>Case law</p> <ul style="list-style-type: none"> • There are cases indicating both divisibility and indivisibility. • One case strongly suggests that juror unanimity as to the theory of liability is not required for a conviction. • Another case gave jurors two separate instructions, indicating accessory after the fact as a separate crime. <p>Record of conviction</p> <ul style="list-style-type: none"> • Record is ambiguous, as it just restates the statutory language. • Thus, demand for certainty is not met. <p>Pattern jury instructions</p> <ul style="list-style-type: none"> • Pattern instructions could be consistent with either type of liability. | Can use to support requirement for certainty as to divisibility. |
| <i>United States v. Robinson</i> , 869 F.3d 933 (9th Cir. 2017) | Washington second degree assault Wash. Rev. Code Ann. § 9A.36.021 | <p>Not divisible. Overrules previous decision issued pre-<i>Mathis</i> (and pre-<i>Decamps</i>) finding subsection to be a violent felony without a divisibility analysis.</p> <p>Statute</p> <ul style="list-style-type: none"> • Nothing in the language that answers divisibility. • Same punishment scheme for whole statute. <p>Case law</p> <ul style="list-style-type: none"> • State supreme court, in an en banc decision, stated specifically that the statute articulates a single criminal offense with six subsections that include alternative means of committing the offense. • Later case law confirms, and cases cited by the government in fact support finding that it is not divisible. Once case cited in fact concluded that charging a defendant with violations of multiple subsections creates double jeopardy concerns, and the other explicitly stated that juror unanimity is not required so long as separate means are supported by “substantial evidence,” which is not the test for means v. elements. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <p><i>United States v. Robinson</i>, 869 F.3d 933 (9th Cir. 2017)</p> <p>(<i>cont.</i>)</p> | <p>Washington second degree assault</p> <p>Wash. Rev. Code Ann. § 9A.36.021</p> | <p>Jury instructions</p> <ul style="list-style-type: none"> • Pattern jury instructions confirm indivisibility. • According to the instruction, a jury can convict a defendant of assault in the second degree without unanimously agreeing on whether the defendant violated subsection (1)(a) (intentional assault which recklessly inflicts substantial bodily harm) or subsection (1)(c) (assault with a deadly weapon). | |
| <p><i>United States v. Ochoa</i>, 861 F.3d 1010 (9th Cir. 2017), <i>abrogated on other grounds by United States v. Palomar-Santiago</i>, 141 S. Ct. 1615 (2021)</p> | <p>Federal conspiracy for exporting defense articles without a license</p> <p>18 U.S.C. § 371 22 U.S.C. § 2778</p> | <p>Not divisible as to the munitions list.</p> <p>Statute</p> <ul style="list-style-type: none"> • No real analysis. <p>Case law</p> <ul style="list-style-type: none"> • No known binding case law. • Court's own decisions describe the element in general terms, but jurors have been asked to specify, so case law is ambiguous. <p>Record</p> <ul style="list-style-type: none"> • Unclear, so can peek at the record. • Multiple defense articles were charged in a single count, indicating means of commission because presumably not duplicitous. <p>Certainty</p> <ul style="list-style-type: none"> • Even if this does not definitively answer the question, <i>Taylor's</i> demand for certainty is not met, so cannot find divisible. | <p>Abrogated on other grounds.</p> <p>Can use to support requirement for certainty as to divisibility.</p> |
| <p><i>Maie v. Garland</i>, 7 F.4th 841 (9th Cir. 2021)</p> | <p>Hawaii fourth degree theft</p> <p>Haw. Rev. Stat. Ann. § 708-833</p> | <p>Not divisible</p> <p>Statute</p> <ul style="list-style-type: none"> • Haw. Rev. Stat. Ann. § 708-835 specifically states that a jury need not decide which subsection was violated in order to sustain a conviction. <p>Case Law</p> <ul style="list-style-type: none"> • State supreme court case affirms convictions without specifying which subsection the evidence supported. • Does not allow for multiple convictions for actions with same property, describing eight "ways" of committing theft. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>United States v. Graves</i> , 925 F.3d 1036 (9th Cir. 2019) | California unauthorized possession of controlled substances in prison, camp, jail, etc. Cal. Penal Code § 4573.6 | Not divisible as to the particular substance, in contrast to other California controlled substance offenses. Statute <ul style="list-style-type: none"> Unlike other CA controlled substance offenses, statute refers to plural controlled substances, as opposed to singular, which suggests that contemporaneous possession of multiple substances is a single crime under this statute. Statute is part of a completely different code than the health and safety statutes, and aimed at different problems, so not determined by previous cases analyzing those statutes. Case law <ul style="list-style-type: none"> Appellate division court has explicitly held that contemporaneous possession of two or more substances at the same location constitutes a single offense. | |
| <i>Villavicencio v. Sessions</i> , 904 F.3d 658 (9th Cir. 2018) | Nevada conspiracy Nev. Rev. Stat. Ann. § 199.480 Nevada drugs which may not be introduced into interstate commerce Nev. Rev. Stat. Ann. § 454.351 (West) | Not divisible as to both statutes. <u>Conspiracy</u> Citing <i>United States v. Garcia-Santana</i> , 774 F.3d 528, 534 at N. 3 (9th Cir. 2014), a pre- <i>Mathis</i> case finding conspiracy not divisible in a footnote, stating only that the statute does not list potential offenses in the alternative. <u>Interstate drugs</u> Case law <ul style="list-style-type: none"> No authoritative state court decision addressing the issue. In Nevada, a jury may generally convict without being unanimous as to the underlying means of commission of the offense. Statute <ul style="list-style-type: none"> Nothing in the language of the statute that suggests that the alternative phrasing indicates alternative elements. Listed alternatives carry the same punishments. Mere fact that phrased in the disjunctive does not mean divisible. Jury instructions <ul style="list-style-type: none"> There are no pattern instructions for the statute. Because there is nothing to indicate divisibility beyond disjunctive phrasing, cannot find divisible. | |
| <i>United States v. Valdivia-Flores</i> , 876 F.3d 1201 (9th Cir. 2017) | Washington manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance Wash. Rev. Code Ann. § 69.50.401 | Not divisible as to principal or accomplice liability. Case law <ul style="list-style-type: none"> State law is clear that jurors need not unanimously agree as to principal v. accomplice liability. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>Sandoval v. Sessions</i> , 866 F.3d 986 (9th Cir. 2017) | Oregon manufacture or deliver a controlled substance Or. Rev. Stat. Ann. § 475.992(1)(a) <i>Now codified under</i> Or. Rev. Stat. Ann. § 475.752 | Not divisible as to actus reus. Statute <ul style="list-style-type: none"> Straightforward analysis shows not divisible. Solicitation is not listed as an alternative method of delivery in the statute and is not included in the express statutory definition for delivery. Solicitation included through judicial interpretation of attempt. Case law <ul style="list-style-type: none"> Circuit's previous law used analysis rejected in <i>Descamps</i>. | |
| <i>Valdez v. Garland</i> , 28 F.4th 72 (9th Cir. 2022) | California rape of an unconscious person Cal. Penal Code § 261(a)(4) | Not divisible as to manner of unconsciousness. Court states that the jury need not specify under which circumstances a victim be unconscious of the nature of the act, without further elaboration or citation. | |
| <i>Valenzuela Gallardo v. Barr</i> , 968 F.3d 1053 (9th Cir. 2020) | California accessory to felony Cal. Penal Code § 32 | Not divisible Statute <ul style="list-style-type: none"> Stating in footnote only that statute does not list elements in the alternative, so is not divisible. | |
| <i>Menendez v. Whitaker</i> , 908 F.3d 467 (9th Cir. 2018), <i>abrogated on other grounds</i> | California lewd or lascivious acts Cal. Penal Code § 288(c)(1) | Not divisible States without further elaborating that the statute contains a single, indivisible set of elements. | |
| <i>Lopez-Aguilar v. Barr</i> , 948 F.3d 1143 (9th Cir. 2020) | Oregon third degree robbery Or. Rev. Stat. Ann. § 164.395 | Not divisible Government did not argue was divisible. | Government did not argue was divisible |
| <i>United States v. Garcia-Lopez</i> , 903 F.3d 887 (9th Cir. 2018) | California robbery Cal. Penal Code § 211 | Not divisible 9th Circuit pre- <i>Mathis</i> case, <i>United States v. Dixon</i> , 805 F.3d 1193 (9th Cir. 2015), which found not divisible after reviewing jury, is controlling. No further elaboration or reexamination post- <i>Mathis</i> . <i>Dixon</i> cited jury instructions as well as state case law without further explanation. | |
| <i>United States v. Walton</i> , 881 F.3d 768 (9th Cir. 2018) | California robbery Section 211 | Not divisible 9th Circuit pre- <i>Mathis</i> case, <i>United States v. Dixon</i> , 805 F.3d 1193 (9th Cir. 2015), which found not divisible, is controlling. <i>Dixon</i> cited jury instructions as well as state case law without further explanation. Government cites are pre- <i>Johnson</i> and discuss a different statute. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>United States v. Bankston</i> , 901 F.3d 1100 (9th Cir. 2018) | California robbery Cal. Penal Code § 211 | Not divisible 9th Circuit pre- <i>Mathis</i> case, <i>United States v. Dixon</i> , 805 F.3d 1193 (9th Cir. 2015), which found not divisible, is controlling. No further elaboration or reexamination post- <i>Mathis</i> . <i>Dixon</i> cited jury instructions as well as state case law without further explanation. | |
| <i>United States v. Vederoff</i> , 914 F.3d 1238 (9th Cir. 2019) | Washington second degree murder Wash. Rev. Code Ann. § 9A.36.021 | Not divisible Statute <ul style="list-style-type: none"> Plain language does not resolve. Case law <ul style="list-style-type: none"> State decisions clearly state it is a single offense with multiple alternative means of commission. | |
| <i>Ramirez-Contreras v. Sessions</i> , 858 F.3d 1298 (9th Cir. 2017) | California driving in willful or wanton disregard for safety of persons or property while fleeing from pursuing police officer Cal. Veh. Code § 2800.2 | Not divisible Statute <ul style="list-style-type: none"> Clearly indivisible. Jury instructions <ul style="list-style-type: none"> Consistent with reading of indivisibility. | |
| <i>United States v. Reinhart</i> , 893 F.3d 606 (9th Cir. 2018) | California Possession or control of matter depicting minor engaging in or simulating sexual conduct Cal. Penal Code § 311.11 California sexual exploitation of a child Cal. Penal Code § 311.3(a) | Not divisible as to sexual conduct for either statute. <u>Cal. Penal Code § 311.11</u> Case law <ul style="list-style-type: none"> <i>Pre-Mathis</i> decision in <i>Chavez-Solis v. Lynch</i>, 803 F.3d 1004 (9th Cir. 2015) analyzed a related statute and found not divisible as to definition of sexual conduct. <i>Chavez-Solis</i> pointed state case law specifically showing that a jury need not be unanimous as to the particular type of sexual conduct. Jury instructions <ul style="list-style-type: none"> <i>Chavez-Solis</i> also looked at model jury instructions and found that the parentheses around the list of acts that qualify as sexual conduct does not mean each is an element. <u>Cal. Penal Code § 311.3(a)</u> Statute <ul style="list-style-type: none"> Different definition than the statute in <i>Chavez-Solis</i>, but similar statute. Reference to sexual conduct does not create different crimes, just lists numerous ways in which an image may be considered to depict sexual conduct. Disjunctive wording does not mean the jury is required to agree as to the particular type of sexual conduct depicted. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <p><i>United States v. Reinhart</i>, 893 F.3d 606 (9th Cir. 2018)</p> <p>(<i>cont.</i>)</p> | <p>California Possession or control of matter depicting minor engaging in or simulating sexual conduct</p> <p>Cal. Penal Code § 311.11</p> <p>California sexual exploitation of a child</p> <p>Cal. Penal Code § 311.3(a)</p> | <p>Case law</p> <ul style="list-style-type: none"> In a footnote, notes that pattern jury instructions not provided, and the court could not locate any, but case law shows that not required to instruct <i>sua sponte</i> on the meaning of different types of sexual conduct, and that generic jury instructions listing various types of conduct upheld. | |
| <p><i>Barrera-Lima v. Sessions</i>, 901 F.3d 1108 (9th Cir. 2018)</p> | <p>Washington indecent exposure</p> <p>Wash. Rev. Code Ann. § 9A.88.010(1)</p> | <p>Not divisible</p> <p>Case law</p> <ul style="list-style-type: none"> Cites to one case stating elements of the offense. <p>Jury Instructions</p> <ul style="list-style-type: none"> Cites to pattern jury instructions as confirmation, without further explanation. | |
| <p><i>Lara-Garcia v. Garland</i>, 49 F.4th 1271 (9th Cir. 2022)</p> | <p>California receiving stolen property</p> <p>Cal. Penal Code § 496(a)</p> | <p>Divisibility undecided, but likely not divisible.</p> <p>Statute</p> <ul style="list-style-type: none"> Statute makes no mention of mens rea with respect to deprivation of property, so almost certainly is not divisible. Unnecessary to decide the issue in this case. | |
| <p><i>Cordero-Garcia v. Garland</i>, 44 F.4th 1181 (9th Cir. 2022)</p> | <p>California intimidation of witnesses and victims</p> <p>Cal. Penal Code § 136.1</p> | <p>Divisibility not argued.</p> <p>Footnote stating no analysis as to divisibility, as it was not argued.</p> | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <p><i>Romero-Millan v. Garland</i>, 46 F.4th 1032 (9th Cir. 2022)</p> <p>and</p> <p><i>Romero-Millan v. Barr</i>, 958 F.3d 844 (9th Cir. 2020)</p> | <p>Arizona possession, manufacture, delivery and advertisement of drug paraphernalia</p> <p>Ariz. Rev. Stat. Ann. § 13-3415</p> <p>Arizona possession, use, administration, acquisition, sale, manufacture or transportation of narcotic drugs</p> <p>Ariz. Rev. Stat. Ann. § 13-3408</p> | <p>Divisible as to particular substance under both statutes</p> <p>First decision in <i>Romero-Millan v. Barr</i>, 958 F.3d 844 (9th Cir. 2020)</p> <p><u>§ 13-3415 paraphernalia statute</u></p> <ul style="list-style-type: none"> Petitioners point to plain language and state case law finding that jury need not agree as to the drug, and that not divisible as to drug type. Government points to sentencing guidelines, pattern jury instructions, and state case law. <p><u>§ 13-3408 possession statute</u></p> <ul style="list-style-type: none"> Petitioners point to plain language, state case law stating that not required to prove which particular drug, and pattern jury instructions. Government points to appeal courts allowing multiple convictions for different types of drugs. <p><u>State court certification</u></p> <ul style="list-style-type: none"> Is § 13-3415 divisible as to drug type? Is § 13-3408 divisible as to drug type? Put another way, is jury unanimity required as to which drug was involved under either of these statutes? <p>State court decision in <i>Romero-Millan v. Barr</i>, 253 Ariz. 24, 507 P.3d 999 (2022)</p> <p><u>Decline to answer the first two questions</u></p> <ul style="list-style-type: none"> “Divisibility” pertains solely to federal law and is not addressed by Arizona courts. <p><u>Decline to answer juror unanimity question as to § 13-3415</u></p> <ul style="list-style-type: none"> Intermediate court decision on double jeopardy indicates unanimity not required, as court concluded defendant committed only one violation of the statute by simultaneously possessing different drugs and a scale because the statute does not refer to a specific type of drug crime. However, no appeal and they prefer to examine in context of an actual case, so circuit should decide. <p><u>Juror unanimity required under § 13-3408</u></p> <p>Statute</p> <ul style="list-style-type: none"> Text is ambiguous, but sentencing scheme depends on drug because threshold amount varies depending on drug. Because the threshold amount finding precludes probation as a sentencing option and increases the mandatory minimum punishment, it becomes an additional element the state must prove, and the jury must find it beyond a reasonable doubt. <p>Case law</p> <ul style="list-style-type: none"> Arizona allows multiple convictions for contemporaneous violations involving multiple narcotic drugs. Legislative history also confirms, as does “unit of prosecution” case law. | <p>Questions certified to state supreme court. Circuit found paraphernalia statute divisible after state court declined to answer, but pointed to intermediate state court decision indicating juror unanimity as to particular drug not required. Despite that, circuit finds divisible, ultimately relying on a cursory peek at the record of conviction.</p> |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <p><i>Romero-Millan v. Garland</i>, 46 F.4th 1032 (9th Cir. 2022)</p> <p>and</p> <p><i>Romero-Millan v. Barr</i>, 958 F.3d 844 (9th Cir. 2020)</p> <p>(<i>cont.</i>)</p> | <p>Arizona possession, manufacture, delivery and advertisement of drug paraphernalia</p> <p>Ariz. Rev. Stat. Ann. § 13-3415</p> <p>Arizona possession, use, administration, acquisition, sale, manufacture or transportation of narcotic drugs</p> <p>Ariz. Rev. Stat. Ann. § 13-3408</p> | <p>Post-certification decision in <i>Romero-Millan v. Garland</i>, 46 F.4th 1032 (9th Cir. 2022)</p> <p><u>§ 13-3408 possession statute</u></p> <ul style="list-style-type: none"> Based on Arizona's answer, divisible as to drug. <p><u>§ 13-3415 paraphernalia statute</u></p> <p>Statute</p> <ul style="list-style-type: none"> On its face, the language of does not specify whether the type of is an element. <p>Case law</p> <ul style="list-style-type: none"> Arizona case law does not establish whether a jury must agree on which drug was involved. Court of appeals decisions seem to point both ways. Published decision specifically stating jury need not agree as to drug. Unpublished decision upholding two counts under the statute based on possession of a single scale with remnants of two drugs. In context of a different statute, state court found meaning in statute's use of "a drug" as opposed to "any drug." This supports finding that drug is an element but does not require it. Jury instructions and sentencing guidelines An exception under sentencing guidelines that relates to offenses involving methamphetamine Meaning of pattern jury instructions is unclear, but they indicate that name of drug should be included as a necessary factual finding on which the jury must unanimously agree. <p>Record of conviction</p> <ul style="list-style-type: none"> Peek at the record shows that cocaine identified exclusively, so divisible. | <p>Questions certified to state supreme court. Circuit found paraphernalia statute divisible after state court declined to answer, but pointed to intermediate state court decision indicating juror unanimity as to particular drug not required. Despite that, circuit finds divisible, ultimately relying on a cursory peek at the record of conviction.</p> |
| <p><i>Walcott v. Garland</i>, 21 F.4th 590 (9th Cir. 2021)</p> | <p>Arizona transport for sale, import into this state or offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer marijuana</p> <p>Ariz. Rev. Stat. Ann. § 13-3405(a)(4)</p> | <p>Divisible</p> <p>Statute</p> <ul style="list-style-type: none"> Suggests divisibility because written in the alternative. <p>Record of conviction</p> <ul style="list-style-type: none"> Indictment charges "unlawfully offered to transport marijuana for sale" and therefore refers to one alternative to the exclusion of all others. <p>Case law</p> <ul style="list-style-type: none"> State law "suggests" divisibility. Cases show that the various alternatives are charged in separate counts. State case cited petitioner does not support indivisibility. That case involved a narcotics sale statute and relied on the fact that the heading of that statute included sale of narcotic drugs, but not transfer or offer to sell or transfer. The court concluded that sale and transfer are different ways of committing a single offense, but that sale and transportation are not. | <p>Cites principally to <i>Almanza-Arenas v. Lynch</i>, 815 F.3d 469 (9th Cir. 2016) rather than <i>Mathis</i> and considers record of conviction before examining case law.</p> <p>Same outcome as <i>Ibanez-Beltran v. Lynch</i>, 858 F.3d 294 (5th Cir. 2017) but different case law analysis.</p> |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>Dominguez v. Barr</i> , 975 F.3d 725 (9th Cir. 2020) | Oregon manufacture or delivery a controlled substance Or. Rev. Stat. Ann. § 475.752 | <p>Divisible between “manufacture” and “delivery” terms.</p> <p>Statute</p> <ul style="list-style-type: none"> • Uses disjunctive language. • Separate definitions for each term. • That manufacture and delivery could potentially carry different punishments strongly indicates they are alternative elements defining distinct offenses. <p>Case law</p> <ul style="list-style-type: none"> • Confirms what statute indicates. • Dicta in one case says that delivery is a distinct offense. • State courts allow convictions for both manufacture and delivery arising out of the same conduct. These multiple charges out of a single act indicate the statute is divisible. <p>Record of conviction</p> <ul style="list-style-type: none"> • Confirms divisibility even if the previous discussions do not. • Charging documents indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements (count 1-manufacture). | Includes a multiplicity analysis in case law discussion, although does not use that term. |
| <i>United States v. Martinez-Lopez</i> , 864 F.3d 1034 (9th Cir. 2017) | California transportation, sale, giving away, etc., of designated controlled substances Cal. Health & Safety Code § 11352 | <p>Divisible as to the specific substance and actus reus. En banc decision reaffirms divisibility findings from pre-<i>Mathis</i> decisions.</p> <p><u>Substance</u></p> <p>Discussion of pre-<i>Mathis</i> cases</p> <ul style="list-style-type: none"> • Statute and its disjunctive phrasing already considered in pre-<i>Mathis</i> cases finding divisible. See <i>Rendon v. Holder</i>, 764 F.3d 1077 (9th Cir. 2014); <i>United States v. Huitron-Rocha</i>, 771 F.3d 1183 (9th Cir. 2014); <i>Coronado v. Holder</i>, 759 F.3d 977, 984 (9th Cir. 2014). • These cases emphasized disjunctive phrasing rather than authoritative sources of state law. <p>Case law</p> <ul style="list-style-type: none"> • Definitively answers. • Defendant can receive multiple <u>sentences</u> for simultaneous transportation of different types of drugs where there are multiple criminal objectives (e.g., multiple buyers). • State case law also implicitly approves multiple <u>convictions</u> even with a single criminal objective. Defendants routinely get multiple convictions under a single statute for single acts as they relate to multiple controlled substances. <p>Jury instructions</p> <ul style="list-style-type: none"> • Pattern instructions also support this finding as they require a jury to fill in a controlled substance in the singular. <p>Legal scholarship</p> <ul style="list-style-type: none"> • Leading commentator on California law has stated that the specific substance is an element of California drug offenses. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <p><i>United States v. Martinez-Lopez</i>, 864 F.3d 1034 (9th Cir. 2017)</p> <p>(cont.)</p> | <p>California transportation, sale, giving away, etc., of designated controlled substances</p> <p>Cal. Health & Safety Code § 11352</p> | <p><u>Actus Reus</u></p> <p>Case law</p> <ul style="list-style-type: none"> • Unequivocal controlling state case law holding that actus reus is an element which creates separate crimes. • Cases cited by defendant do not actually conflict. Those that do are either unpublished, have been overruled by the controlling case, or are from a lower court. | |
| <p><i>United States v. Ocampo-Estrada</i>, 873 F.3d 661 (9th Cir. 2017)</p> | <p>California possession of certain controlled substances for sale</p> <p>Cal. Health & Safety Code § 11378</p> | <p>Divisible</p> <p>Case law</p> <ul style="list-style-type: none"> • Logic from <i>United States v. Martinez-Lopez</i>, 864 F.3d 1034 (9th Cir. 2017) applies equally to this similarly structured statute. • State case law shows that the particular substance is treated as an element, as it allows for multiple convictions under a single act where multiple substances are involved. <p>Jury instructions</p> <ul style="list-style-type: none"> • Pattern instructions tell jury to fill in a singular controlled substance. <p>Legal scholarship</p> <ul style="list-style-type: none"> • Leading commentator on California law has stated that the specific substance is an element of California drug offenses. | |
| <p><i>United States v. Murillo-Alvarado</i>, 876 F.3d 1022 (9th Cir. 2017)</p> | <p>California possession or purchase for sale of designated controlled substances</p> <p>Cal. Health & Safety Code § 11351</p> | <p>Divisible as to the particular substance.</p> <p>Case law</p> <ul style="list-style-type: none"> • Differs from <i>United States v. Martinez-Lopez</i>, 864 F.3d 1034 (9th Cir. 2017) only in that the statute at issue here does not include cocaine base as Cal. Health & Safety Code § 11352 does. • Same reasoning applies, plus there is a state court case involving § 11351 where the court of appeals upheld multiple convictions resulting from a single act with different substances. <p>Jury Instructions</p> <ul style="list-style-type: none"> • Pattern instructions tell jury to fill in a singular controlled substance. | |

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| <i>Lazo v. Wilkinson</i> , 989 F.3d 705 (9th Cir. 2021) | California possession of designated controlled substances Cal. Health & Safety Code § 11350 | <p>Divisible as to the particular substance.</p> <p>Statute</p> <ul style="list-style-type: none"> No meaningful difference between the relevant text of this statute and the one analyzed in <i>United States v. Martinez-Lopez</i>, 864 F.3d 1034 (9th Cir. 2017). <p>Case law</p> <ul style="list-style-type: none"> Analysis in <i>Martinez-Lopez</i> applies equally to this statute. <p>Jury instructions</p> <ul style="list-style-type: none"> Pattern jury instructions analysis in <i>Martinez-Lopez</i> applies equally to this statute. | |
| <i>United States v. Tagatac</i> , 36 F.4th 1000 (9th Cir. 2022) | Hawaii second degree robbery Haw. Rev. Stat. § 708-841 | <p>Divisible into subsections.</p> <p>Case law</p> <ul style="list-style-type: none"> Hawaii supreme court stated elements of subsection (a), which did not include the conduct described in the other subsections. Therefore, they must be alternative elements. <p>Jury instructions</p> <ul style="list-style-type: none"> Although juries may be required to be unanimous as to non-elements in certain instances, these instructions confirm what the case law shows. | |
| <i>Marinelarena v. Sessions</i> , 869 F.3d 780 (9th Cir. 2017), <i>divisibility analysis reincorporated in Marinelarena v. Garland</i> , 6 F.4th 975 (9th Cir. 2021) | California conspiracy Cal. Penal Code § 182 | <p>Divisible as to the target crime.</p> <p>Case law</p> <ul style="list-style-type: none"> State cases stating that jury must agree as to which felony defendant conspired to commit, and must find that defendant had specific intent to commit the elements of the target offense. Intermediate court case that caused uncertainty as to the jury unanimity requirement for multipurpose conspiracy convictions does not change analysis, as circuit bound by decisions of highest state court and California's Supreme Court has never recognized a jury unanimity exception for multipurpose conspiracies. In <i>Marinelarena v. Garland</i>, 6 F.4th 975 (9th Cir. 2021), declined to certify the question, finding that California's Supreme Court has already provided a clear answer. <p>Jury Instructions</p> <ul style="list-style-type: none"> Must direct the jury to the elements of the underlying crime. Instructions for underlying crime here (Cal. Health & Safety Code § 11352) require the judge to identify, and the jury to find, a specific drug. | Unclear why look to 11352 jury instructions here rather than just citing to <i>United States v. Martinez-Lopez</i> , 864 F.3d 1034 (9th Cir. 2017). |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <p><i>United States v. Figueroa-Beltran</i>, 995 F.3d 724 (9th Cir. 2021)</p> <p>and</p> <p><i>United States v. Figueroa-Beltran</i>, 892 F.3d 997 (9th Cir. 2018)</p> | <p>Nevada unlawful possession for sale of flunitrazepam, gamma-hydroxybutyrate and schedule I or II substances</p> <p>Nev. Rev. Stat. Ann. § 453.337</p> | <p>Divisible as to the particular substance.</p> <p>Case law</p> <ul style="list-style-type: none"> • In first decision on this case, <i>United States v. Figueroa-Beltran</i>, 892 F.3d 997 (9th Cir. 2018) reviewed state case law. • One state case suggested that the identity is a means of commission, but another stated that the sale of two controlled substances in a single act was two separate offenses • Since the decisions appeared to be in conflict, certified three questions to the Nevada Supreme Court. <p>State court certification</p> <ul style="list-style-type: none"> • (1) Is the statute divisible? • (2) If the first state decision discussed means the statute is indivisible, how can that be reconciled with the second decision? • (3) If the second decision means it is divisible, how can that be reconciled with the first decision? • State court reframed them into one question asking whether the identity of the substance is an element of the offense, and answered that yes, it is an element. • The court said the first decision referenced did not relate to any means-element distinction and instead involved special circumstances regarding legislative delegation of power. <p>Post-certification decision in <i>United States v. Figueroa-Beltran</i>, 995 F.3d 724 (9th Cir. 2021)</p> <ul style="list-style-type: none"> • Given Nevada's answer, the statute is clearly divisible. | <p>Prior discussion of case law is in <i>United States v. Figueroa-Beltran</i>, 892 F.3d 997 (9th Cir. 2018). Certified a question to state supreme court where it found two cases to be in conflict.</p> |
| <p><i>United States v. Buck</i>, 23 F.4th 919 (9th Cir. 2022)</p> | <p>Federal assault or robbery of a mail carrier</p> <p>18 U.S.C. § 2114</p> | <p>Divisible into basic and aggravated offenses; aggravated offense is further divisible.</p> <p>Statute</p> <ul style="list-style-type: none"> • Parties and other circuit courts agree and statute confirms that divisible into basic and aggravated offenses, as those are subject to different punishments. • There are three items in the aggravated clause that require substantively different elements and concern different conduct that requires different proof. <p>Record of conviction</p> <ul style="list-style-type: none"> • If any further proof is required, a peek at the record confirms divisibility of the aggravated offense. • Charging documents alleged the commission of a specific aggravated offense—placing a mail carrier's life in jeopardy by the use of a dangerous weapon. • District court gave jury instructions as to that specific aggravated offense. | |

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| <p><i>United States v. Furaha</i>, 992 F.3d 871 (9th Cir. 2021)</p> | <p>Federal possession of a firearm in furtherance of a drug trafficking crime</p> <p>18 U.S.C. § 924(c)</p> | <p>Divisible as to carrying a firearm v. drug trafficking crime elements.</p> <p>Statute</p> <ul style="list-style-type: none"> Does not answer the question (cites to 8th circuit case stating the same) <p>Case law</p> <ul style="list-style-type: none"> In one case, defendant found to have advanced one part (element) of a two-part (element) crime Requires prosecution to prove a defendant committed a specific drug trafficking crime, not just any drug trafficking crime. <p>Record of conviction</p> <ul style="list-style-type: none"> Peek at the record confirms divisibility. Indictment charges two different drug trafficking crimes. Count three charges with firearm during drug trafficking crimes in prior two counts. <p>Jury Instructions</p> <ul style="list-style-type: none"> Pattern jury instructions foreclose defendant's argument that indivisible because jury could convict under count three without unanimity as to during which count he possessed a firearm. The instructions mandate juror unanimity. | |
| <p><i>United States v. Jones</i>, 951 F.3d 1138 (9th Cir. 2020)</p> | <p>Colorado second degree burglary</p> <p>Colo. Rev. Stat. Ann. § 18-6-203</p> | <p>Divisible into subsections 1 and 2, as well as 2(a) and 2(b).</p> <p>Not divisible with respect to different structures that may constitute a dwelling, but also definition is not overbroad.</p> <p>Statute</p> <ul style="list-style-type: none"> Different penalties apply to subsections 1 and 2, so divisible. <p>Record of conviction and jury instructions</p> <ul style="list-style-type: none"> Defendant's complaint and pattern jury instructions confirm subsection 2 is further divisible, as 2(a) and 2(b) contain alternative elements | <p>Divisibility of 2(a) and 2(b) just states divisible based on jury instructions and record, but no actual analysis and says nothing of statute itself or case law.</p> |
| <p><i>Myers v. Sessions</i>, 904 F.3d 1101 (9th Cir. 2018)</p> | <p>Federal traveling in interstate commerce to facilitate an unlawful activity</p> <p>18 U.S.C. § 1952(a) (3)</p> | <p>Divisible as to the underlying unlawful activity.</p> <p>Case law</p> <ul style="list-style-type: none"> 9th Circuit case law finding that the underlying unlawful activity is an element of the federal offense 5th Circuit, where petitioner was convicted, appears to have found the same Cases cited by noncitizen do not lead to a different conclusion, as they discussed the sufficiency of evidence as opposed to any failure to specify the underlying unlawful activity <p>Record of conviction</p> <ul style="list-style-type: none"> Charging document and plea agreement show that unlawful activity was specified. The record was consulted for the means v. elements question only and did not conflate conduct with elements. | |

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| <i>Myers v. Sessions</i> , 904 F.3d 1101 (9th Cir. 2018) (cont.) | Federal traveling in interstate commerce to facilitate an unlawful activity 18 U.S.C. § 1952(a) (3) | Jury instructions <ul style="list-style-type: none"> Pattern instructions cited by petitioner are not precedent and do not supersede circuit decisions, nor do they support his argument. The fact that, in referring to unlawful activities, they say the “appropriate one(s)” does not mean multiple can be charged together. | |
| <i>United States v. Perez-Silvan</i> , 861 F.3d 935 (9th Cir. 2017) | Tennessee aggravated assault Tenn. Code Ann. § 39-13-102 | Divisible as to mens rea. Case law <ul style="list-style-type: none"> State law cited by defendant shows not divisible as to the element regarding commission of simple assault, but does not relate to the means-elements distinction as to mens rea. Same case does refer to generic “mens rea” element. However, case also indicates intentional/knowing and reckless are separate offenses because it determined the indictment adequately alleged the mens rea element by stating it was committed intentionally and knowingly, and never discussed the reckless subsection. Other case relied on by defendant also does not show indivisibility, as the state court observed that recklessness is necessarily included in a knowing offense, but the reverse is not true. The court’s discussion of different mens rea options as being stated in the alternative, it was discussing the statute in general terms and not in terms of means v. elements. Statute <ul style="list-style-type: none"> Clearly divisible, as the subsections carry different punishments. | |
| <i>United States v. Rocha-Alvarado</i> , 843 F.3d 802 (9th Cir. 2016) | Oregon sexual abuse in the first degree Or. Rev. Stat. Ann. § 163.427 | Divisible into subsections (1)(a) and (1)(b). In a footnote, summarily states they are separate elements. Parties agreed divisible into two subsections. | Divisibility not contested. |
| <i>Diego v. Sessions</i> , 857 F.3d 1005 (9th Cir. 2017) | Oregon sexual abuse in the first degree Or. Rev. Stat. Ann. § 163.427 | Divisible between (1)(a) and (1)(b), as found in <i>United States v. Rocha-Alvarado</i> , 843 F.3d 802 (9th Cir. 2016) and also further divisible within subsection (1)(a). Statute <ul style="list-style-type: none"> Disjunctive phrasing, which suggests three separate offenses: sexual contact (1) with a victim under 14 years old, (2) through forcible compulsion, or (3) with a victim incapable of consent for specified reasons. Record of conviction <ul style="list-style-type: none"> References one subsection to the exclusion of all others. | Cites principally to <i>Almanza-Arenas v. Lynch</i> , 815 F.3d 469 (9th Cir. 2016) rather than <i>Mathis</i> , and considers record of conviction before confirming with case law. Analysis of state case cited by petitioner seems to rely heavily on use of word “element” without consideration of context. |

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| <p><i>Diego v. Sessions</i>, 857 F.3d 1005 (9th Cir. 2017)</p> <p>(cont.)</p> | <p>Oregon sexual abuse in the first degree</p> <p>Or. Rev. Stat. Ann. § 163.427</p> | <p>Case law</p> <ul style="list-style-type: none"> State decisions refer to element of forcible compulsion. State case cited by petitioner does not lead to a different conclusion. That case was considering anti-merger statute and found that the state legislature did not intend to punish for three separate violations if the defendant engaged in a single act of sexual abuse that happened to include elements of each subparagraph. That analysis was not a consideration of means-elements distinction, and in fact referred to “three alternative <i>elements</i>.” | <p>Cites principally to <i>Almanza-Arenas v. Lynch</i>, 815 F.3d 469 (9th Cir. 2016) rather than <i>Mathis</i>, and considers record of conviction before confirming with case law.</p> <p>Analysis of state case cited by petitioner seems to rely heavily on use of word “element” without consideration of context.</p> |
| <p><i>Diaz-Flores v. Garland</i>, 993 F.3d 766 (9th Cir. 2021)</p> | <p>Oregon first degree burglary</p> <p>Or. Rev. Stat. § 164.225</p> | <p>Divisible into dwelling or non-dwelling.</p> <p>Statute</p> <ul style="list-style-type: none"> Appears divisible by plain text but must look to more. <p>Case law</p> <ul style="list-style-type: none"> State case law clearly treats “dwelling” as an element that must be proven beyond a reasonable doubt. <p>Jury Instructions</p> <ul style="list-style-type: none"> Pattern instructions separately identify alternative elements, and in fact there are separate instructions for the two different crimes. | |
| <p><i>Mendoza-Garcia v. Garland</i>, 36 F.4th 989 (9th Cir. 2022)</p> | <p>Oregon first degree burglary</p> <p>Or. Rev. Stat. § 164.225</p> | <p>Divisible into dwelling or non-dwelling, as found in <i>Diaz-Flores v. Garland</i>, 993 F.3d 766 (9th Cir. 2021), but not further as to type of dwelling.</p> <p>Cites approvingly to pre-<i>Mathis</i> decision in <i>United States v. Cisneros</i>, 826 F.3d 1190 (9th Cir. 2016) finding not further divisible as to type of dwelling.</p> | |
| <p><i>Gomez Fernandez v. Barr</i>, 969 F.3d 1077 (9th Cir. 2020)</p> | <p>California second degree murder</p> <p>Cal. Penal Code § 187(a)</p> | <p>Divisible as to whether involved a human being or a fetus.</p> <p>Statute</p> <ul style="list-style-type: none"> Uses disjunctive “or,” which does not decide the issue but indicates separate elements. Statute also includes exceptions for certain circumstances around death of a fetus only. They are distinct statutory terms with no overlapping meaning, unlike various types of weapons, for example. <p>Record of conviction</p> <ul style="list-style-type: none"> Referenced one term to the exclusion of the other. <p>Case law</p> <ul style="list-style-type: none"> Under state case law, killings involving a fetus require separate showings (age of fetus). Killings of a fetus have no lesser included offenses, as with killings of human beings. <p>Jury instructions</p> <ul style="list-style-type: none"> Pattern instructions require that the jury select either human being or fetus and provide additional instructions if the killing involved a fetus. | <p>Cites principally to <i>Almanza-Arenas v. Lynch</i>, 815 F.3d 469 (9th Cir. 2016) rather than <i>Mathis</i>, and considers record of conviction before confirming with case law.</p> |

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| <p><i>United States v. Ankeny</i>, 798 F. App'x 990 (9th Cir. 2020)</p> <p>and</p> <p><i>United States v. Lawrence</i>, 905 F.3d 653 (9th Cir. 2018)</p> | <p>Oregon second degree robbery</p> <p>Or. Rev. Stat. § 164.405</p> | <p>Divisible as to second degree, per an unpublished opinion considering response to request for state certification.</p> <p>First decision in <i>United States v. Lawrence</i>, 905 F.3d 653 (9th Cir. 2018)</p> <p>Case law</p> <ul style="list-style-type: none"> • Government points to a case finding that instructions that did not require the jury to unanimously agree on the alternative element of aggravated murder was contrary to Oregon's unanimous verdict requirement. • Lawrence points to a state merger decision in support of indivisibility. • Court finds ambiguous and certifies questions to Oregon. <p>Response to state certification request in <i>United States v. Lawrence</i>, 364 Or. 796, 799 (2019).</p> <ul style="list-style-type: none"> • Questions <ul style="list-style-type: none"> • Is Oregon first-degree robbery, Or. Rev. Stat. § 164.415, divisible? • Is Oregon second-degree robbery, id. § 164.405, divisible? • Put another way, is jury unanimity (or concurrence) required as to a particular theory chosen from the listed subparagraphs of each statute? • Only second-degree robbery remains at issue <ul style="list-style-type: none"> • Another case altered overbreadth analysis, so <i>Lawrence</i> appeal dismissed by parties • Only consolidated case <i>Ankeny</i> remains • Decline to answer certified questions, as have already spoken sufficiently to the issue <ul style="list-style-type: none"> • State decision finding that jury is required to agree as to the theory of second-degree robbery <p>Second decision in <i>United States v. Ankeny</i>, 798 F. App'x 990 (9th Cir. 2020) after Oregon certification response</p> <ul style="list-style-type: none"> • Ankeny conceded divisibility after Oregon's response. | <p>Second degree offense found divisible in an unpublished opinion after Oregon declined certification by saying it already spoke sufficiently to the issue, citing a case confirming juror unanimity required.</p> |
| <p><i>Cortes-Maldonado v. Barr</i>, 978 F.3d 643 (9th Cir. 2020)</p> | <p>Oregon delivery of marijuana for consideration</p> <p>Or. Rev. Stat. § 475.860 (repealed)</p> | <p>Divisible as to consideration.</p> <p>Statute</p> <ul style="list-style-type: none"> • Divisibility undisputed by the parties due to different punishments depending on whether there was consideration. | <p>Divisibility not contested.</p> |

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| <i>Vasquez-Valle v. Sessions</i> , 899 F.3d 834 (9th Cir. 2018) | Oregon witness tampering Or. Rev. Stat. § 162.285 | Divisible Statute <ul style="list-style-type: none"> Statute criminalizes different conduct and requires different elements for conviction. Case law <ul style="list-style-type: none"> Case law shows the subsections are not charged interchangeably. One case specified different facts under each of the subsections. A court of appeals case held that “witness” had a broader meaning under subsection (a) than under subsection (b). State case that refers to alternate ways of committing the offense relates to anti-merger statute, not divisibility. | |
| <i>Altayar v. Barr</i> , 947 F.3d 544 (9th Cir. 2020) | Arizona basic assault Ariz. Rev. Stat. Ann. § 13-1203 Arizona aggravated assault Ariz. Rev. Stat. Ann. § 13-1204 | Divisible as to both the basic and aggravated assault provisions. Case law <ul style="list-style-type: none"> Consistent with 9th Circuit pre-<i>Mathis</i> cases finding aggravated assault to be divisible. Statute <ul style="list-style-type: none"> Subsections in each of the statutes create different punishments. | Divisibility not contested. |
| <i>Syed v. Barr</i> , 969 F.3d 1012 (9th Cir. 2020) | California attempt to contact a child with intent to commit a sexual offense Cal. Penal Code § 288.3 | Divisible as to the offense that serves as the specific intent element. In a footnote: Statute <ul style="list-style-type: none"> Enumerates 15 different offenses. Jury instructions <ul style="list-style-type: none"> Pattern instructions show all jurors must agree on the same specific intent element of the offense. Cites to a prior circuit case stating that need not go beyond pattern jury instructions to determine elements of the offense. | Relies on cursory statutory analysis and <i>Almanza-Arenas v. Lynch</i> , 815 F.3d 469 (9th Cir. 2016) rather than <i>Mathis</i> . |
| <i>United States v. Dominguez</i> , 954 F.3d 1251 (9th Cir. 2020) | Federal robbery 18 U.S.C. § 1951 | Divisible Footnote stating without further elaboration that this is a divisible statute criminalizing both robbery and extortion. | |
| <i>Cornejo-Villagrana v. Whitaker</i> , 912 F.3d 479 (9th Cir. 2017) | Arizona assault Ariz. Rev. Stat. Ann. § 13-1203 | Divisible State Law <ul style="list-style-type: none"> Citing various state cases stating that the statute includes distinct offenses. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>United States v. Edling</i> , 895 F.3d 1153 (9th Cir. 2018) | Nevada assault with a deadly weapon Nev. Rev. St. § 200.471 Nevada coercion Nev. Rev. St. § 207.190 | Divisible as to both statutes. <u>Assault with a deadly weapon</u> Stating without further explanation that the statute is divisible into multiple offenses as defined in subsection 2. <u>Coercion</u> Statute <ul style="list-style-type: none"> Misdemeanor and felony punishable by different penalties. Need not decide whether further divisible within those two offenses. | |
| <i>United States v. Adkins</i> , 883 F.3d 1207 (9th Cir. 2018) | Hawaii unlawful imprisonment Haw. Rev. Stat. § 707-721(1)(a) | Divisible Statute <ul style="list-style-type: none"> No clear answer. Case law <ul style="list-style-type: none"> No state case law that offers guidance. Record of conviction <ul style="list-style-type: none"> Shows he plead under subsection (1)(a), so can employ modified categorical approach. | Peek at the record not conducted in accordance with <i>Mathis</i> . Rather than looking to the documents to determine whether the alternatives are means or elements, the court simply says the record shows which statute he pled to, and they therefore apply the modified categorical approach. |
| <i>United States v. Watson</i> , 881 F.3d 782 (9th Cir. 2018) | Federal armed bank robbery 18 U.S.C. § 2113(a) and (d) | Divisible Case law <ul style="list-style-type: none"> Case law shows divisible into at least two separate offenses (bank robbery and bank extortion). Cites two 9th circuit cases without further explanation. | |
| <i>Conejo-Bravo v. Sessions</i> , 875 F.3d 890 (9th Cir. 2017) | California hit and run Cal. Veh. Code § 20001(a) | Divisible Applies pre-Mathis decision in <i>Cerezo v. Mukasey</i> , 512 F.3d 1163 (9th Cir. 2008) without further elaboration. | |
| <i>United States v. Werle</i> , 877 F.3d 879 (9th Cir. 2017) | Washington felony harassment Wash. Rev. Code Ann. § 9A.46.020 | Divisible as to felony harassment. Case law <ul style="list-style-type: none"> State case law requires a unanimous jury to find a threat to kill beyond a reasonable doubt. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
|---|--|--|--------------------------------|
| <i>United States v. Calvillo-Palacios</i> , 860 F.3d 1285 (9th Cir. 2017) | <p>Texas assault</p> <p>Tex. Penal Code Ann. § 22.01</p> <p>Texas aggravated assault</p> <p>Tex. Penal Code Ann. § 22.02</p> | <p>Divisible as to 22.01(a). Not divisible as to 22.02(a).</p> <p>Parties agree</p> <p>Case law</p> <ul style="list-style-type: none"> State court of criminal appeals has held that 22.02(2) provides two means of bodily assault. Court has also found that 22.01(a) lists three separate and distinct assault crimes. | Divisibility not contested |
| <i>United States v. Prigan</i> , 8 F.4th 1115 (9th Cir. 2021) | <p>Federal robbery</p> <p>18 U.S.C. § 1951(b)(1)</p> | <p>Divisibility not argued within subsection.</p> <p>Stating in a footnote and without further elaboration that neither the government nor any circuit has suggested that Hobbs Act robbery under this subsection is divisible.</p> | Divisibility not contested |
| <i>Lozano-Arredondo v. Sessions</i> , 866 F.3d 1082 (9th Cir. 2017) | <p>Idaho petit theft</p> <p>Idaho Code Ann. §§ 18-2403, 18-2408(3)</p> | <p>Divisibility assumed but undecided by court due to respondent's concession.</p> | Divisibility not contested |

ELEVENTH CIRCUIT

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
|---|---|--|--------------------------------|
| <i>Simpson v. Att'y Gen.</i> , 7 F.4th 1046 (11th Cir. 2021) | Florida possession of a firearm by a felon Fla. Stat. Ann. § 790.23(1) | <p>Not divisible as to the prohibited item.</p> <p>Statute</p> <ul style="list-style-type: none"> • If the offenses prescribed were divisible, the statute would set out seven or more separate possession crimes, and six or more separate concealed carrying crimes. • There is nothing in the text to suggest this is the case, and in fact the text suggests the opposite. • Uniform punishment scheme. <p>Case law</p> <ul style="list-style-type: none"> • Double jeopardy decisions resolve any remaining ambiguity. Defendant cannot be separately convicted for possessing several of the listed items at the same time. • Florida applies “same elements” test from <i>Blockburger</i>. All intermediate state courts have stated that multiple convictions and sentences under the statute for the simultaneous possession of different prohibited items violates double jeopardy. • State cases that discuss the elements of the offense do not appear to list the prohibited item as an element. <p>Jury Instructions</p> <ul style="list-style-type: none"> • Clear answer from state court, but even if were to consult pattern instructions the conclusion does not change, as the instructions state that the enumerated offenses contain two elements, and then list the prohibited item as part of the second element, and not a separate additional element. <p>Certainty</p> <ul style="list-style-type: none"> • At a minimum, there is no certainty, so must find indivisible. | |
| <i>United States v. Gillis</i> , 938 F.3d 1181 (11th Cir. 2019) | Federal kidnapping 18 U.S.C. § 1201(a) | <p>Not divisible</p> <p>Statute</p> <ul style="list-style-type: none"> • Text is strongly suggestive of indivisibility. • Alternative means of establishing the first element are described as a single offense and punished in the same way. • Several of the listed means are synonymous examples. <p>Case law</p> <ul style="list-style-type: none"> • This circuit has characterized the alternatives as means and has used the terms as interchangeable synonyms. <p>Record of conviction</p> <ul style="list-style-type: none"> • Indictment also suggests indivisible, as it listed various alternatives rather than choosing one term to the exclusion of all others. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
|--|--|--|--------------------------------|
| <i>Cintron v. Att'y Gen.</i> , 882 F.3d 1380 (11th Cir. 2018) | Florida trafficking in illegal drugs Fla. Stat. Ann. § 893.135(1)(a) | <p>Not divisible as to “sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of.”</p> <p>Statute</p> <ul style="list-style-type: none"> Strongly suggests indivisible, as alternative methods were denominated as a single offense. Unlike statute here, § 893.13, which was found divisible in <i>Spabo v. Att'y Gen.</i>, 837 F.3d 1172 (11th Cir. 2016), lacks any language indicating that the six methods of commission are to be treated as a single offense. <p>Case law</p> <ul style="list-style-type: none"> Intermediate appellate court said state not required to prove that conspirators both agreed to commit the same trafficking act, stating that trafficking in cocaine can be committed in a variety of ways. Another intermediate court reached a similar conclusion. Other cases discuss alternate forms of conduct included in the offense. Case cited by government does not support its position. Jury instructions did not require jury to agree on mode of commission. Cases involving § 893.13(1)(a) show the statutes are distinct, as case law shows that under that statute state could charge both with possession with intent to sell and sale of that same controlled substance without violating double jeopardy, because they are two separate crimes and not alternative means. <p>Jury instructions</p> <ul style="list-style-type: none"> Pattern instructions only reinforce the distinction we have identified between this statute and § 893.13(1)(a). | |
| <i>Francisco v. Att'y Gen.</i> , 884 F.3d 1120 (11th Cir. 2018) | Florida trafficking in illegal drugs Fla. Stat. Ann. § 893.135(1)(b)1 | <p>Not divisible as to actus reus.</p> <p><i>Cintron</i> holding controls due to the substantively identical language of the two statutes, so indivisible despite parties' prior agreement that statute was divisible.</p> | |
| <i>United States v. Conage</i> , 976 F.3d 1244 (11th Cir. 2020) | Florida trafficking in illegal drugs Fla. Stat. Ann. § 893.135(1)(b)1 | <p>Not divisible</p> <p><i>Cintron</i> holding controls due to the substantively identical language of the two statutes.</p> | |
| <i>United States v. Garcia-Martinez</i> , 845 F.3d 1126 (11th Cir. 2017) | Florida second degree burglary Fla. Stat. Ann. § 810.02(3) | <p>Not divisible</p> <p>Case law</p> <ul style="list-style-type: none"> State case finds that there is no crime called burglary of a curtilage, as jurors not required to agree whether entered a building or just its curtilage. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>United States v. Esprit</i> , 841 F.3d 1235 (11th Cir. 2016) | Florida burglary Fla. Stat. Ann. § 810.02(1)(b)(1) | Indivisibility not contested Post- <i>Mathis</i> , the government agrees statute is indivisible. State law <ul style="list-style-type: none"> State case finds that there is no crime called burglary of a curtilage, as jurors not required to agree whether entered a building or just its curtilage. | Government did not dispute divisibility post- <i>Mathis</i> |
| <i>Vassell v. Att’y Gen.</i> , 839 F.3d 1352 (11th Cir. 2016) | Georgia theft by taking Ga. Code Ann. § 16-8-2 | Indivisibility not contested. Statute <ul style="list-style-type: none"> Government did not argue divisible, and statute seems to confirm. Although statute uses the word “or” between takings with or without consent, the entire phrase is modified by the language “regardless of the manner in which the property is taken or appropriated.” | Government did not dispute indivisibility |
| <i>Daye v. U.S. Att’y Gen.</i> , 38 F.4th 1355 (11th Cir. 2022) | Virginia transporting controlled substances into the Commonwealth Va. Code Ann. § 18.2-248.01 | Divisibility not argued prior to supplemental briefing. Government only argued divisibility in supplemental briefing. Court declined to consider the arguments as they were not raised previously. IJ found indivisible, and the BIA did not address or disturb the IJ ruling. | |
| <i>United States v. Davis</i> , 875 F.3d 592 (11th Cir. 2017) | Alabama first degree sexual abuse Ala. Code § 13A-6-66 | Divisible as to sexual abuse by forcible compulsion and sexual abuse of a person incapable of consent. Not further divisible within sexual abuse by forcible compulsion. Statute <ul style="list-style-type: none"> On its face, statute lists two separate crimes, sexual abuse by forcible compulsion, and sexual abuse of a person incapable of consent. Case law <ul style="list-style-type: none"> Under Alabama case law, the jury does not need to agree on which type of forcible compulsion a defendant used. | |
| <i>Guillen v. Att’y Gen.</i> , 910 F.3d 1174 (11th Cir. 2018) | Florida distribution of controlled substance Fla. Stat. Ann. § 893.13 | Divisible as to the particular substance. Statute <ul style="list-style-type: none"> Does not provide a clear answer. Uses a general term that is defined by a list provided in another section of the Florida code. This is compatible with either conclusion, so must look at case law, Case law <ul style="list-style-type: none"> State case rejected a double jeopardy challenge and held that the defendant was guilty of possession of two separate substances, each of which constitutes a separate violation. | Case law review of double jeopardy decision does not take into account the possibility of multiple acts allowing for separate counts, with a different factual basis for each, as opposed to the creation of separate crimes. However, the court did not rely solely on the double jeopardy case law. |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <p><i>Guillen v. Att’y Gen.</i>, 910 F.3d 1174 (11th Cir. 2018)</p> <p>(cont.)</p> | <p>Florida distribution of controlled substance</p> <p>Fla. Stat. Ann. § 893.13</p> | <p>Case law (cont.)</p> <ul style="list-style-type: none"> Intermediate appellate courts rejected separate sentencing for possession of marijuana and possession of hashish, and state that possession of the same substance in different forms is the same crime, whereas possession of two different substances is not. Courts of Appeal overturned convictions because the substance named in the charging document differed from the one shown to have been involved in the offense. These decisions differ from the New York cases analyzed by the Second Circuit in <i>Harbin</i>, which lead to a different conclusion unlike other circuit decisions. <p>Jury instructions</p> <ul style="list-style-type: none"> Pattern instructions are not binding, but under Florida law they are presumed to be correct interpretations of Florida law. Must specify the substance involved in two places, including under what the prosecution must prove beyond a reasonable doubt. | <p>Case law review of double jeopardy decision does not take into account the possibility of multiple acts allowing for separate counts, with a different factual basis for each, as opposed to the creation of separate crimes. However, the court did not rely solely on the double jeopardy case law.</p> |
| <p><i>Farah v. Att’y Gen.</i>, 12 F.4th 1312 (11th Cir. 2021)</p> | <p>Minnesota fifth degree possession of a controlled substance</p> <p>Minn. Stat. Ann § 152.025(2)(a)(1)</p> | <p>Divisible as to the particular substance, following the same reasoning in <i>Rendon v. Barr</i>, 952 F.3d 963 (8th Cir. 2020).</p> <p>Statute</p> <ul style="list-style-type: none"> Statute makes it a crime to possess “a controlled substance.” The use of the singular shows that the statute authorizes separate prosecutions for trafficking each of the various controlled substances. <p>Case law</p> <ul style="list-style-type: none"> Minnesota Court of Appeals affirmed a conviction of seven counts under this statute where the defendant possessed many different controlled substances, explaining that the possession of multiple controlled substances at the same time and place, for personal use, is not a single criminal act. State Supreme Court stated that proof of the actual identity of the substance is required. Even if this is dicta, as suggested by petitioner, provides insight into the state’s thinking. Case law discussing “to wit” does not stand for the idea that anything after that phrase is not an element of a crime, contrary to petitioner’s argument. One state case cited by petitioner involves an unrelated question of state constitutional law and whether the legislature can delegate its power to schedule controlled substances. One state case cited by petitioner involves the mens rea required for the defendant and does not answer the means/elements question. | <p>In support of divisibility, the court cites to case law that states that simultaneous possession of multiple substances is not a single act. This should in fact support a finding of indivisibility instead, as it provides a rationale for allowing multiple counts that does not relate to any means-elements distinction.</p> |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
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| <i>United States v. Gundy</i> , 842 F.3d 1156 (11th Cir. 2016) | Georgia burglary Ga. Code Ann. § 16-7-1 | Divisible as to the locational element. Statute <ul style="list-style-type: none"> Unlike Iowa statute in <i>Mathis</i>, text of this statute does not use a single locational element. Statute does not contain a definition with a non-exhaustive list of other locations. Statute also does not use the term “includes.” Statute uses three subsets of alternative locational elements, creating separate crimes Case law <ul style="list-style-type: none"> Court of appeals has held that a burglary indictment must charge the particular place or premises burgled and the specific location of that place or premises. Prosecutor must select and identify the locational element of the place burgled. Georgia Supreme Court set aside a burglary conviction where the indictment did not charge that the vehicle was designed for use as a dwelling, as that was an essential element that must be alleged. | Dissent argues that the divisibility analysis ignores Supreme Court guidance and the plain meaning of the statute, and does not analyze state law properly. Also states that even if divisibility were ambiguous, a peek at the record here confirms the statute is indivisible. |
| <i>United States v. Oliver</i> , 962 F.3d 1311 (11th Cir. 2020) | Georgia terroristic threats Ga. Code Ann. § 16-11-37(a). | Divisible Statute <ul style="list-style-type: none"> Statute sets out an exhaustive list of three types of threats, with no illustrative examples. Case law <ul style="list-style-type: none"> No definitive answer provided by state case law. Record of Conviction <ul style="list-style-type: none"> Because no clear answer, peek at record of conviction. Indictment identifies one alternative to the exclusion of others, which shows element and divisible. | There is no analysis of state case law other than a bare assertion that there is no definitive answer provided by cases. There is no discussion of reasons a statutory alternative would be identified in the indictment that do not go to the means-elements distinction. |
| <i>Morfa Diaz v. Mayorkas</i> , 43 F.4th 1198 (11th Cir. 2022) | New York criminal sale of a controlled substance in the third degree N.Y. Penal Law § 220.39 | Divisible as to the particular substance. Statute <ul style="list-style-type: none"> Each subsection lists specific combinations of controlled substances and weights, any one of which must be charged and proven to obtain a conviction. Crucial textual differences between this statute at the statute at issue in <i>Harbin v. Sessions</i>, 860 F.3d 58 (2d Cir. 2017) | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
|---|--|---|--------------------------------|
| <i>Spaho v. Att'y Gen.</i> , 837 F.3d 1172 (11th Cir. 2016) | Florida drug trafficking Fla. Stat. Ann. § 893.13(1)(a) | Divisible as to sale, delivery, manufacture, possession with intent to sell, possession with intent to deliver, and possession with intent to manufacture. Statute <ul style="list-style-type: none"> The text lays out six discrete alternative elements: sale, delivery, manufacture, possession with intent to sell, possession with intent to deliver, and possession with intent to manufacture. Case law <ul style="list-style-type: none"> State can charge both with possession with intent to sell and sale of that same controlled substance without violating double jeopardy. | |
| <i>Gordon v. Att'y Gen.</i> , 861 F.3d 1314 (11th Cir. 2017) | Florida drug trafficking Fla. Stat. Ann. § 893.13(1)(a) | Divisible , following <i>Spaho</i> , 837 F.3d 1172. | |
| <i>Choizilme v. Att'y Gen.</i> , 886 F.3d 1016 (11th Cir. 2018) | Florida drug trafficking Fla. Stat. Ann. § 893.13(1)(a) | Divisible , following <i>Spaho</i> , 837 F.3d 1172. | |
| <i>Lauture v. Att'y Gen.</i> , 28 F.4th 1169 (11th Cir. 2022) | Florida burglary Fla. Stat. Ann. § 810.02(3) | Divisible into first-, second-, and third-degree offenses, and subsection (3) second degree further divisible into its subsections. Statute <ul style="list-style-type: none"> Subsections of main statute carry different penalties, so divisible into the three different offense degrees. The subsections within the second-degree offense under subsection (3) each carry different requirements, and that statutory structure shows they are elements. Record of conviction <ul style="list-style-type: none"> Peek at the record confirms divisibility. Memorandum of sentencing lists the requirements under subsection (3)(b) only. | |
| <i>United States v. Morales-Alonso</i> , 878 F.3d 1311 (11th Cir. 2018) | Georgia aggravated assault Ga. Code Ann. § 16-5-21(a) | Divisible as to the aggravator component. State law <ul style="list-style-type: none"> State law finds that an indictment is required to allege the element that aggravates the crime to one above simple assault. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
|---|---|---|--------------------------------|
| <i>United States v. Moss</i> , 920 F.3d 752 (11th Cir.), <i>reh'g en banc granted, opinion vacated on other grounds</i> , 928 F.3d 1340 (11th Cir. 2019), <i>vacated</i> , 4 F.4th 1292 (11th Cir. 2021), and <i>opinion reinstated</i> , 4 F.4th 1292 (11th Cir. 2021) | Georgia simple assault Ga. Code Ann. § 16-5-20(a) | Divisible Statute <ul style="list-style-type: none"> On its face, the statute lists two separate crimes. | |
| <i>Talamantes-Enriquez v. Att'y Gen.</i> , 12 F.4th 1340 (11th Cir. 2021) | Georgia simple battery Ga. Code Ann. § 16-5-23(a) | Divisible as to insulting contact battery or physically harmful battery. Statute <ul style="list-style-type: none"> Text shows divisible because lays out two sets of alternative elements that effectively define different crimes. Case law <ul style="list-style-type: none"> State cases note the distinction between the two types of harm. It is error to instruct the jury on simple battery based on insulting or provoking contact if actual charge is based solely on physical harm, unless the jury is also given a limiting instruction. Simple battery with physical harm must be charged specifically. Defendant can be convicted for the same conduct of two separate counts of simple battery, one based on (a)(1) and the other based on (a)(2). | |
| <i>Gordon v. Att'y Gen.</i> , 962 F.3d 1344 (11th Cir. 2020) | Georgia possession of a controlled substance Ga. Code Ann. § 16-13-30(b) | Divisible as to the particular substance. Statute <ul style="list-style-type: none"> Does not provide a definitive answer. Case law <ul style="list-style-type: none"> Georgia Supreme Court has held that it is permissible to convict someone in separate counts for simultaneous possession of three different Schedule II substances. Specifically rejected the argument that this amounted to a single offense. | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
|---|---|---|--------------------------------|
| <i>United States v. Bates</i> , 960 F.3d 1278 (11th Cir. 2020) | Federal assault on an officer 18 U.S.C. § 111 | Divisible Affirming a pre- <i>Mathis</i> decision finding that the statute establishes three separate crimes, the third of which is in the enhanced penalty provision. No additional analysis provided. | |
| <i>United States v. Sanchez</i> , 940 F.3d 526 (11th Cir.) | New York second degree murder N.Y. Penal Law § 125.25 | Divisible Statute <ul style="list-style-type: none"> Statute divisible on its face. The five subsections are not simply different means. Each requires different elements, including differences in the required mens rea, and in whether there is a particular affirmative defense. Case law <ul style="list-style-type: none"> Divisibility confirmed in case law, which refers to some of these differences as “elements.” | |
| <i>United States v. Deshazor</i> , 882 F.3d 1352 (11th Cir. 2018) | Florida sexual battery Fla. Stat. Ann. § 794.011 | Divisible Case Law <ul style="list-style-type: none"> Stating that Florida courts treat the various sections and distinct crimes. Cites to one case identifying different elements for sexual battery and sexual battery of a physically helpless victim. Jury Instructions <ul style="list-style-type: none"> Pattern jury instructions provide different instructions for different sections. | |
| <i>United States v. Vereen</i> , 920 F.3d 1300 (11th Cir. 2019) | Florida felony battery Fla. Stat. Ann. § 784.03(1)(a) Florida aggravated battery Fla. Stat. Ann. § 784.045(1)(a) | Divisible as to both statutes between “touching or striking” and “intentionally causing bodily harm.” Case law <ul style="list-style-type: none"> Florida courts examining the statutes have treated these as alternative elements. Cites to two state cases referring to one or both alternatives as elements. Jury Instructions <ul style="list-style-type: none"> Cites to pattern jury instructions without any further explanation. | |
| <i>Lukaj v. Att’y Gen.</i> , 953 F.3d 1305 (11th Cir. 2020) | Florida aggravated battery Fla. Stat. Ann. § 784.045(1)(a) | Divisible Indivisibility argument is foreclosed by <i>United States v. Vereen</i> , 920 F.3d 1300 (11th Cir. 2019). | |

| CASE | STATUTE AT ISSUE | DIVISIBILITY AND ANALYSIS | COMMENTS, STRATEGIES, AND TIPS |
|---|---|--|---|
| <i>United States v. White</i> , 837 F.3d 1225 (11th Cir. 2016) | Alabama first degree possession of marijuana Ala. Code § 13A-12-213(a) | Divisible , as it alternatively criminalizes (1) possession of marijuana for other than personal use and (2) possession of marijuana for personal use after a prior qualifying conviction. Noted in a footnote without further analysis. | Notes divisibility in a footnote without any analysis. |
| <i>United States v. Fields</i> , 44 F.4th 490, 507 (6th Cir. 2022) | Kentucky unlawful possession of a methamphetamine precursor Ky. Rev. Stat. Ann. § 218A.1437 Kentucky trafficking in controlled substance in first degree Ky. Rev. Stat. Ann. § 218A.1412 | Divisibility not contested as to substance. Noted in a footnote that divisibility finding by district court was not challenged. | Divisibility not contested. |
| <i>United States v. Gandy</i> , 917 F.3d 1333 (11th Cir. 2019) | Florida felony battery Fla. Stat. Ann. § 784.03(1)(a) | Divisibility not contested between “touching or striking” and “intentionally causing bodily harm.” | Divisibility not contested. Subsequently found divisible in <i>United States v. Vereen</i> , 920 F.3d 1300 (11th Cir. 2019) |
| <i>Alvarado-Linares v. United States</i> , 44 F.4th 1334 (11th Cir. 2022) | Federal violent crimes in aid of racketeering activity 18 U.S.C. § 1959 | Divisible . Divisibility not contested. Statute <ul style="list-style-type: none"> Stating that the statute lists multiple acts that each qualify as a crime. | Divisibility not contested. |



CHALLENGING DIVISIBILITY

HOW TO USE IDP'S LITIGATION TIPS & CASE LAW SURVEY.



What is included in this resource?

- 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 post-*Mathis*. The resulting case chart covers cases arising in both the criminal and immigration contexts, 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.

Why does divisibility matter?

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.

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.

What is this resource meant to do?

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.

What should I do if I need assistance?

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.

Where can I find additional resources?

Additional resources related to categorical approach litigation are on IDP's website at: <https://www.immigrantdefenseproject.org/using-and-defending-the-categorical-approach-2/>.