



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
<p><i>Harbin v. Sessions</i>, 860 F.3d 58 (2d Cir. 2017)</p>	<p>New York sale of a controlled substance in the fifth degree N.Y.P.L. § 220.31</p>	<p>Not divisible as to the specific controlled substance.</p> <p>Statute</p> <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. <p>Case law</p> <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). <p>Jury instructions only if there is uncertainty after the above</p> <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. 	
<p><i>Chery v. Garland</i>, 16 F.4th 980 (2d Cir. 2021)</p>	<p>Connecticut illegal manufacture, distribution, sale, prescription, dispensing Conn. Stat. Gen. Ann. § 21a-277(a)</p>	<p>Divisible as to the specific controlled substance.</p> <p>Statute</p> <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. <p>Case Law</p> <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. 	
<p><i>Santana-Felix v. Barr</i>, 924 F.3d 51 (2d Cir. 2019)</p>	<p>New York conspiracy in the second degree N.Y.P.L. § 105.15</p>	<p>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.</p>	<p>Fails to follow Mathis and circuit's own divisibility analysis process in Harbin by looking first to pattern jury instructions.</p>

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
<p><i>Vurimindi v. Att’y Gen.</i>, 46 F.4th 134 (3d Cir. 2022)</p>	<p>Pennsylvania stalking 18 Pa. Cons. Stat. § 2709.1(a)</p>	<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. 	<p>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.</p>
<p><i>Hillocks v. Att’y Gen.</i>, 934 F.3d 332 (3d Cir. 2019)</p>	<p>Pennsylvania criminal use of communication facility 18 Pa. Cons. Stat. § 7512(a)</p>	<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. Abdullab</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. Swavelly</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>Swavelly</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), supra. 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
<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
<p><i>Grijalva Martinez v. Att’y Gen.</i>, 978 F.3d 860 (3d Cir. 2020)</p>	<p>New Jersey criminal sexual contact N.J. Stat. Ann. § 2C:14-3(b)</p>	<p>Divisible</p> <p>Statute</p> <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. <p>Jury instructions</p> <ul style="list-style-type: none"> Model instructions list the four subsections in the alternative. 	
<p><i>United States v. Bullock</i>, 970 F.3d 210 (3d Cir. 2020)</p>	<p>Federal assaulting, resisting, or impeding certain officers or employees of the United States 18 U.S.C. § 111</p>	<p>Divisible, joining circuits 5, 6, 9, 10 and 11 in finding the same.</p> <p>Statute</p> <ul style="list-style-type: none"> Subsections a and b carry different punishments. <p>Case law</p> <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). 	
<p><i>Sasay v. Att’y Gen.</i>, 13 F.4th 291 (3d Cir. 2021)</p>	<p>Federal aggravated identity theft 18 U.S.C. § 1028A(a)(1)</p>	<p>Divisible</p> <p>Statute</p> <ul style="list-style-type: none"> Incorporates several felonies enumerated under subsection c. <p>Case law</p> <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. 	
<p><i>United States v. Chapman</i>, 866 F.3d 129 (3d Cir. 2017)</p>	<p>Federal mailing threatening communications 18 U.S.C. § 876(c)</p>	<p>Divisible</p> <p>Statute</p> <ul style="list-style-type: none"> Without further analysis, states that the statute sets out two alternate versions of the offense. 	
<p><i>United States v. Peppers</i>, 899 F.3d 211 (3d Cir. 2018)</p>	<p>Pennsylvania robbery 18 Pa. Cons. Stat. § 3701(a)</p>	<p>Divisible</p> <p>Statute</p> <ul style="list-style-type: none"> Alternative elements are clearly laid out. Different punishments are attached. 	
<p><i>United States v. Williams</i>, 898 F.3d 323 (3d Cir. 2018)</p>	<p>Federal RICO 18 U.S.C. § 1962</p>	<p>Divisible</p> <p>Statute</p> <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
<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
<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 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
<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
<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
<p><i>United States v. Perlaza-Ortiz</i>, 869 F.3d 375 (5th Cir. 2017)</p> <p>(cont.)</p>		<p>Record of conviction</p> <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 	
<p><i>United States v. Reyes-Ochoa</i>, 861 F.3d 582(5th Cir. 2017)</p>	<p>Virginia burglary</p> <p>Va. Code Ann. §§ 18.2-90, 18.2-91</p>	<p>Not divisible as to the locational element.</p> <p>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).</p> <p>Statute</p> <ul style="list-style-type: none"> Provides a list of locations which on its face are means. <p>Case law</p> <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. 	<p><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.</p>
<p><i>United States v. Martinez-Rodriguez</i>, 857 F.3d 282 (5th Cir. 2017)</p>	<p>Texas causing injury to a child</p> <p>Tex. Penal Code Ann. § 22.04(a)</p>	<p>Not divisible as to act versus omission.</p> <p>Case law</p> <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. 	
<p><i>United States v. Lobaton-Andrade</i>, 861 F.3d 538 (5th Cir. 2017)</p>	<p>Arkansas manslaughter</p> <p>Ark. Code Ann. § 5-10-104</p>	<p>Not divisible as to mens rea.</p> <p>Case law</p> <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. <p>Statute</p> <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. <p>Record of conviction</p> <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. 	<p>Can use to support requirement for certainty as to divisibility.</p>

CASE	STATUTE AT ISSUE	DIVISIBILITY AND ANALYSIS	COMMENTS, STRATEGIES, AND TIPS
<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
<p><i>Monsonyem v. Garland</i>, 36 F.4th 639 (5th Cir. 2022)</p>	<p>Texas injury to a Child, Elderly Individual, or Disabled Individual</p> <p>Tex. Penal Code Ann. § 22.04</p>	<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. 	<p>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.</p>
<p><i>United States v. Garrett</i>, 24 F.4th 485 (5th Cir. 2022)</p>	<p>Texas simple robbery</p> <p>Tex. Penal Code Ann. § 29.02</p>	<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
<i>United States v. Frierson</i> , 981 F.3d 314 (5th Cir. 2020)	Louisiana produce, manufacture, distribute, or dispense or possess with intent to produce, manufacture, distribute, or dispense, a controlled dangerous substance La. Stat. Ann. § 40:967	Divisible as to the particular substance. Case law <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. Statute <ul style="list-style-type: none"> • Different penalties depending on the drug. 	Relies in part on an unpublished intermediate state court case with limited analysis. Subsections do proscribe different penalties, but only some of them are further narrowed by particular drug. Question if that alone proves further divisibility.
<i>United States v. Butler</i> , 949 F.3d 230 (5th Cir. 2020)	Federal bank robbery 18 U.S.C. § 2113	Divisible as to unlawful entry v. entry by force, violence, or intimidation. Statute <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. Case law <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. 	
<i>Fakhuri v. Garland</i> , 28 F.4th 623 (5th Cir. 2022)	Tennessee money laundering Tenn. Code Ann. § 39-14-903	Divisible Statute <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
<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
<p><i>Ibanez-Beltran v. Lynch</i>, 858 F.3d 294 (5th Cir. 2017)</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>Case law</p> <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. <p>Record of conviction</p> <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. <p>Pattern jury instructions</p> <ul style="list-style-type: none"> Finding reinforced by pattern instructions, which have separate instructions for sale and offer to transport for sale. 	
<p><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)</p>	<p>Arkansas narcotics offense</p> <p>Ark. Code Ann. § 5-64-401(a) (Repealed in 2011)</p>	<p>Divisible into twelve different offenses.</p> <p>Statute</p> <ul style="list-style-type: none"> 3 mens rea elements and 4 actus rea elements. First decision ends analysis there. <p>Case law</p> <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. 	
<p><i>United States v. Mendez-Henriquez</i>, 847 F.3d 214 (5th Cir. 2017)</p>	<p>California shooting at inhabited dwelling house, occupied building, vehicle, or aircraft, or inhabited housecar or camper</p> <p>Cal. Penal Code § 246</p>	<p>Divisible</p> <p>Case law</p> <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. <p>Record of conviction</p> <ul style="list-style-type: none"> Charged with shooting at motor vehicle, to the exclusion of other targets. 	<p>Contains minimal analysis to be able to find divisibility with certainty.</p>
<p><i>Laryea v. Sessions</i>, 871 F.3d 337 (5th Cir. 2017)</p>	<p>Texas evading arrest or detention</p> <p>Tex. Penal Code Ann. § 38.04</p>	<p>Divisible</p> <p>Statute</p> <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
<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
<p><i>Lopez-Marroquin v. Garland</i>, 9 F.4th 1067 (9th Cir. 2021)</p>	<p>California theft of a vehicle</p> <p>Cal. Veh. Code § 10851(a)</p>	<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 <i>Mathis</i>, 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. 	<p>Can use to support requirement for certainty as to divisibility.</p>
<p><i>United States v. Robinson</i>, 869 F.3d 933 (9th Cir. 2017)</p>	<p>Washington second degree assault</p> <p>Wash. Rev. Code Ann. § 9A.36.021</p>	<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
<p><i>United States v. Robinson</i>, 869 F.3d 933 (9th Cir. 2017)</p> <p>(cont.)</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
<p><i>United States v. Graves</i>, 925 F.3d 1036 (9th Cir. 2019)</p>	<p>California unauthorized possession of controlled substances in prison, camp, jail, etc.</p> <p>Cal. Penal Code § 4573.6</p>	<p>Not divisible as to the particular substance, in contrast to other California controlled substance offenses.</p> <p>Statute</p> <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. <p>Case law</p> <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. 	
<p><i>Villavicencio v. Sessions</i>, 904 F.3d 658 (9th Cir. 2018)</p>	<p>Nevada conspiracy</p> <p>Nev. Rev. Stat. Ann. § 199.480</p> <p>Nevada drugs which may not be introduced into interstate commerce</p> <p>Nev. Rev. Stat. Ann. § 454.351 (West)</p>	<p>Not divisible as to both statutes.</p> <p>Conspiracy</p> <p>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.</p> <p>Interstate drugs</p> <p>Case law</p> <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. <p>Statute</p> <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. <p>Jury instructions</p> <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. 	
<p><i>United States v. Valdivia-Flores</i>, 876 F.3d 1201 (9th Cir. 2017)</p>	<p>Washington manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance</p> <p>Wash. Rev. Code Ann. § 69.50.401</p>	<p>Not divisible as to principal or accomplice liability.</p> <p>Case law</p> <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
<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
<p><i>United States v. Bankston</i>, 901 F.3d 1100 (9th Cir. 2018)</p>	<p>California robbery Cal. Penal Code § 211</p>	<p>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.</p>	
<p><i>United States v. Vederoff</i>, 914 F.3d 1238 (9th Cir. 2019)</p>	<p>Washington second degree murder Wash. Rev. Code Ann. § 9A.36.021</p>	<p>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. </p>	
<p><i>Ramirez-Contreras v. Sessions</i>, 858 F.3d 1298 (9th Cir. 2017)</p>	<p>California driving in willful or wanton disregard for safety of persons or property while fleeing from pursuing police officer Cal. Veh. Code § 2800.2</p>	<p>Not divisible Statute <ul style="list-style-type: none"> Clearly indivisible. Jury instructions <ul style="list-style-type: none"> Consistent with reading of indivisibility. </p>	
<p><i>United States v. Reinhart</i>, 893 F.3d 606 (9th Cir. 2018)</p>	<p>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)</p>	<p>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. </p>	

CASE	STATUTE AT ISSUE	DIVISIBILITY AND ANALYSIS	COMMENTS, STRATEGIES, AND TIPS
<p><i>United States v. Reinhart</i>, 893 F.3d 606 (9th Cir. 2018)</p> <p>(cont.)</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
<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
<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>(cont.)</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
<p><i>Dominguez v. Barr</i>, 975 F.3d 725 (9th Cir. 2020)</p>	<p>Oregon manufacture or delivery a controlled substance</p> <p>Or. Rev. Stat. Ann. § 475.752</p>	<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). 	<p>Includes a multiplicity analysis in case law discussion, although does not use that term.</p>
<p><i>United States v. Martinez-Lopez</i>, 864 F.3d 1034 (9th Cir. 2017)</p>	<p>California transportation, sale, giving away, etc., of designated controlled substances</p> <p>Cal. Health & Safety Code § 11352</p>	<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
<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. 	

CASE	STATUTE AT ISSUE	DIVISIBILITY AND ANALYSIS	COMMENTS, STRATEGIES, AND TIPS
<p><i>Lazo v. Wilkinson</i>, 989 F.3d 705 (9th Cir. 2021)</p>	<p>California possession of designated controlled substances</p> <p>Cal. Health & Safety Code § 11350</p>	<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. 	
<p><i>United States v. Tagatac</i>, 36 F.4th 1000 (9th Cir. 2022)</p>	<p>Hawaii second degree robbery</p> <p>Haw. Rev. Stat. § 708-841</p>	<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. 	
<p><i>Marinelarena v. Sessions</i>, 869 F.3d 780 (9th Cir. 2017), <i>divisibility analysis</i> reincorporated in <i>Marinelarena v. Garland</i>, 6 F.4th 975 (9th Cir. 2021)</p>	<p>California conspiracy</p> <p>Cal. Penal Code § 182</p>	<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. 	<p>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).</p>

CASE	STATUTE AT ISSUE	DIVISIBILITY AND ANALYSIS	COMMENTS, STRATEGIES, AND TIPS
<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. 	

CASE	STATUTE AT ISSUE	DIVISIBILITY AND ANALYSIS	COMMENTS, STRATEGIES, AND TIPS
<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. § 18-4-203</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. 	

CASE	STATUTE AT ISSUE	DIVISIBILITY AND ANALYSIS	COMMENTS, STRATEGIES, AND TIPS
<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	<p>Divisible as to mens rea.</p> <p>Case law</p> <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. <p>Statute</p> <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	<p>Divisible into subsections (1)(a) and (1)(b).</p> <p>In a footnote, summarily states they are separate elements. Parties agreed divisible into two subsections.</p>	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	<p>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).</p> <p>Statute</p> <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. <p>Record of conviction</p> <ul style="list-style-type: none"> • References one subsection to the exclusion of all others. 	<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>

CASE	STATUTE AT ISSUE	DIVISIBILITY AND ANALYSIS	COMMENTS, STRATEGIES, AND TIPS
<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>

CASE	STATUTE AT ISSUE	DIVISIBILITY AND ANALYSIS	COMMENTS, STRATEGIES, AND TIPS
<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>

CASE	STATUTE AT ISSUE	DIVISIBILITY AND ANALYSIS	COMMENTS, STRATEGIES, AND TIPS
<i>Vasquez-Valle v. Sessions</i> , 899 F.3d 834 (9th Cir. 2018)	Oregon witness tampering Or. Rev. Stat. § 162.285	<p>Divisible</p> <p>Statute</p> <ul style="list-style-type: none"> Statute criminalizes different conduct and requires different elements for conviction. <p>Case law</p> <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	<p>Divisible as to both the basic and aggravated assault provisions.</p> <p>Case law</p> <ul style="list-style-type: none"> Consistent with 9th Circuit pre-<i>Mathis</i> cases finding aggravated assault to be divisible. <p>Statute</p> <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	<p>Divisible as to the offense that serves as the specific intent element.</p> <p>In a footnote:</p> <p>Statute</p> <ul style="list-style-type: none"> Enumerates 15 different offenses. <p>Jury instructions</p> <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	<p>Divisible</p> <p>Footnote stating without further elaboration that this is a divisible statute criminalizing both robbery and extortion.</p>	
<i>Cornejo-Villagrana v. Whitaker</i> , 912 F.3d 479 (9th Cir. 2017)	Arizona assault Ariz. Rev. Stat. Ann. § 13-1203	<p>Divisible</p> <p>State Law</p> <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
<p><i>United States v. Edling</i>, 895 F.3d 1153 (9th Cir. 2018)</p>	<p>Nevada assault with a deadly weapon</p> <p>Nev. Rev. St. § 200.471</p> <p>Nevada coercion</p> <p>Nev. Rev. St. § 207.190</p>	<p>Divisible as to both statutes.</p> <p><u>Assault with a deadly weapon</u></p> <p>Stating without further explanation that the statute is divisible into multiple offenses as defined in subsection 2.</p> <p><u>Coercion</u></p> <p>Statute</p> <ul style="list-style-type: none"> • Misdemeanor and felony punishable by different penalties. <p>Need not decide whether further divisible within those two offenses.</p>	
<p><i>United States v. Adkins</i>, 883 F.3d 1207 (9th Cir. 2018)</p>	<p>Hawaii unlawful imprisonment</p> <p>Haw. Rev. Stat. § 707-721(1)(a)</p>	<p>Divisible</p> <p>Statute</p> <ul style="list-style-type: none"> • No clear answer. <p>Case law</p> <ul style="list-style-type: none"> • No state case law that offers guidance. <p>Record of conviction</p> <ul style="list-style-type: none"> • Shows he plead under subsection (1)(a), so can employ modified categorical approach. 	<p>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.</p>
<p><i>United States v. Watson</i>, 881 F.3d 782 (9th Cir. 2018)</p>	<p>Federal armed bank robbery</p> <p>18 U.S.C. § 2113(a) and (d)</p>	<p>Divisible</p> <p>Case law</p> <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. 	
<p><i>Conejo-Bravo v. Sessions</i>, 875 F.3d 890 (9th Cir. 2017)</p>	<p>California hit and run</p> <p>Cal. Veh. Code § 20001(a)</p>	<p>Divisible</p> <p>Applies pre-<i>Mathis</i> decision in <i>Cerezo v. Mukasey</i>, 512 F.3d 1163 (9th Cir. 2008) without further elaboration.</p>	
<p><i>United States v. Werle</i>, 877 F.3d 879 (9th Cir. 2017)</p>	<p>Washington felony harassment</p> <p>Wash. Rev. Code Ann. § 9A.46.020</p>	<p>Divisible as to felony harassment.</p> <p>Case law</p> <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)	Texas assault Tex. Penal Code Ann. § 22.01 Texas aggravated assault Tex. Penal Code Ann. § 22.02	Divisible as to 22.01(a). Not divisible as to 22.02(a). Parties agree Case law <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)	Federal robbery 18 U.S.C. § 1951(b)(1)	Divisibility not argued within subsection. 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.	Divisibility not contested
<i>Lozano-Arredondo v. Sessions</i> , 866 F.3d 1082 (9th Cir. 2017)	Idaho petit theft Idaho Code Ann. §§ 18-2403, 18-2408(3)	Divisibility assumed but undecided by court due to respondent's concession.	Divisibility not contested

ELEVENTH CIRCUIT

CASE	STATUTE AT ISSUE	DIVISIBILITY AND ANALYSIS	COMMENTS, STRATEGIES, AND TIPS
<p><i>Simpson v. Att’y Gen.</i>, 7 F.4th 1046 (11th Cir. 2021)</p>	<p>Florida possession of a firearm by a felon</p> <p>Fla. Stat. Ann. § 790.23(1)</p>	<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. 	
<p><i>United States v. Gillis</i>, 938 F.3d 1181 (11th Cir. 2019)</p>	<p>Federal kidnapping</p> <p>18 U.S.C. § 1201(a)</p>	<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
<p><i>Cintron v. Att’y Gen.</i>, 882 F.3d 1380 (11th Cir. 2018)</p>	<p>Florida trafficking in illegal drugs</p> <p>Fla. Stat. Ann. § 893.135(1)(a)</p>	<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). 	
<p><i>Francisco v. Att’y Gen.</i>, 884 F.3d 1120 (11th Cir. 2018)</p>	<p>Florida trafficking in illegal drugs</p> <p>Fla. Stat. Ann. § 893.135(1)(b)1</p>	<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>	
<p><i>United States v. Conage</i>, 976 F.3d 1244 (11th Cir. 2020)</p>	<p>Florida trafficking in illegal drugs</p> <p>Fla. Stat. Ann. § 893.135(1)(b)1</p>	<p>Not divisible</p> <p><i>Cintron</i> holding controls due to the substantively identical language of the two statutes.</p>	
<p><i>United States v. Garcia-Martinez</i>, 845 F.3d 1126 (11th Cir. 2017)</p>	<p>Florida second degree burglary</p> <p>Fla. Stat. Ann. § 810.02(3)</p>	<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
<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
<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
<i>United States v. Gundy</i> , 842 F.3d 1156 (11th Cir. 2016)	Georgia burglary Ga. Code Ann. § 16-7-1	<p>Divisible as to the locational element.</p> <p>Statute</p> <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 <p>Case law</p> <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).	<p>Divisible</p> <p>Statute</p> <ul style="list-style-type: none"> • Statute sets out an exhaustive list of three types of threats, with no illustrative examples. <p>Case law</p> <ul style="list-style-type: none"> • No definitive answer provided by state case law. <p>Record of Conviction</p> <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. 	<p>There is no analysis of state case law other than a bare assertion that there is no definitive answer provided by cases.</p> <p>There is no discussion of reasons a statutory alternative would be identified in the indictment that do not go to the means-elements distinction.</p>
<i>Morfa Diaz v. Mayorcas</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	<p>Divisible as to the particular substance.</p> <p>Statute</p> <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
<p><i>United States v. Moss</i>, 920 F.3d 752 (11th Cir.), <i>reh'g en banc granted</i>, <i>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)</p>	<p>Georgia simple assault</p> <p>Ga. Code Ann. § 16-5-20(a)</p>	<p>Divisible</p> <p>Statute</p> <ul style="list-style-type: none"> On its face, the statute lists two separate crimes. 	
<p><i>Talamantes-Enriquez v. Att’y Gen.</i>, 12 F.4th 1340 (11th Cir. 2021)</p>	<p>Georgia simple battery</p> <p>Ga. Code Ann. § 16-5-23(a)</p>	<p>Divisible as to insulting contact battery or physically harmful battery.</p> <p>Statute</p> <ul style="list-style-type: none"> Text shows divisible because lays out two sets of alternative elements that effectively define different crimes. <p>Case law</p> <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). 	
<p><i>Gordon v. Att’y Gen.</i>, 962 F.3d 1344 (11th Cir. 2020)</p>	<p>Georgia possession of a controlled substance</p> <p>Ga. Code Ann. § 16-13-30(b)</p>	<p>Divisible as to the particular substance.</p> <p>Statute</p> <ul style="list-style-type: none"> Does not provide a definitive answer. <p>Case law</p> <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. 	

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<p><i>United States v. Bates</i>, 960 F.3d 1278 (11th Cir. 2020)</p>	<p>Federal assault on an officer 18 U.S.C. § 111</p>	<p>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.</p>	
<p><i>United States v. Sanchez</i>, 940 F.3d 526 (11th Cir.)</p>	<p>New York second degree murder N.Y. Penal Law § 125.25</p>	<p>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.” </p>	
<p><i>United States v. Deshazor</i>, 882 F.3d 1352 (11th Cir. 2018)</p>	<p>Florida sexual battery Fla. Stat. Ann. § 794.011</p>	<p>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. </p>	
<p><i>United States v. Vereen</i>, 920 F.3d 1300 (11th Cir. 2019)</p>	<p>Florida felony battery Fla. Stat. Ann. § 784.03(1)(a) Florida aggravated battery Fla. Stat. Ann. § 784.045(1)(a)</p>	<p>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. </p>	
<p><i>Lukaj v. Att’y Gen.</i>, 953 F.3d 1305 (11th Cir. 2020)</p>	<p>Florida aggravated battery Fla. Stat. Ann. § 784.045(1)(a)</p>	<p>Divisible Indivisibility argument is foreclosed by <i>United States v. Vereen</i>, 920 F.3d 1300 (11th Cir. 2019).</p>	

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 • Stating that the statute lists multiple acts that each qualify as a crime.	Divisibility not contested.