NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

RICHARD ANTHONY TRENT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In Mathis v. United States, this Court addressed when the statute of conviction for a prior offense claimed to be an Armed Career Criminal Act predicate is divisible, allowing the use of the "modified categorical approach" to determine the nature of the conviction. This Court made clear that a "demand for certainty" applies to identifying the elements of such a statute. Where there is no such certainty that the statute contains alternative element sets, it cannot be held to be divisible.

The question presented here involves the application of the demand for certainty. Specifically,

> **Is the demand for certainty satisfied where, after a survey of relevant, state-law materials, the federal court can only say what is "suggestive" and what "appears" from those materials, and where the federal court then looks to policy reasons identified by this Court in interpreting a federal statute as an indication of how the state statute should be read?**

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PRAYER

Petitioner, Richard Anthony Trent, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on March 6, 2018.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, United States v. Trent (Trent II), 884 F.3d 985 (10th Cir. 2018), is found in the Appendix at A1. The Tenth Circuit denied rehearing on May 23, 2018. See A15. The Tenth Circuit's decision on Mr. Trent's direct appeal, see United States v. Trent (Trent I), 767 F.3d 1046 (10th Cir. 2014), is found in the Appendix at 16. The decision of the United States District Court for the Western District of Oklahoma, which denied Mr. Trent's motion under 28 U.S.C. § 2255, and whose appeal resulted in the decision in Trent II, the judgment on which review is sought, is found in the Appendix at A34.

JURISDICTION

The United States District Court for the Western District of Oklahoma had jurisdiction pursuant to 28 U.S.C. § 2255. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). Justice Sotomayor has extended the time in which to petition for certiorari to, and including, October 22, 2018, see A43, so this petition is timely.

STATUTORY PROVISION INVOLVED

This case involves the Armed Career Criminal Act, 18 U.S.C. § 924(e). That provision provides, in relevant part, as follows:

> **(e)(1)** In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> **(2)** As used in this subsection —

(A) the term "serious drug offense" means —

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

* * * *

18 U.S.C. § 924(e).

STATEMENT OF THE CASE

This case poses an issue about the "demand for certainty" that this Court discussed in Mathis v. United States, 136 S.Ct. 2243, 2257 (2016). That case dealt with what is an "element" of a claimed predicate offense under the Armed Career Criminal Act (ACCA). It held that only elements in the traditional sense of what a jury must unanimously find to convict count. Id. at 2251-55. Alternative means of satisfying an element do not. Id. at 2254-55.

If the statute has a single element set, a court uses the "categorical approach" to determine whether a prior conviction is an ACCA predicate. It asks whether that element set sufficiently matches the generic version of a listed, ACCA predicate. Id. at 2248. If the statute instead has alternative element sets -- that is, if it is "divisible" into such different element sets -- a court can use the "modified categorical approach." It first determines, through the use of certain approved documents, under which element set the defendant was convicted. It then assesses whether that element set is a categorical match for a listed, ACCA predicate. Id.

This Court stressed that the latter approach is available only if it can be said with certainty that the statute has alternative element sets. Id. at 2257; see also id. at 2256 (requiring "clear answer[]"). For otherwise, there is a risk that what is being considered are alternative means, that is, the facts of how an offense is committed. Id. at 2248. And as the ACCA looks to the elements of a prior conviction, it "cares not a whit about" facts. Id.

The Tenth Circuit recognized that Mathis abrogated one approach it took in Mr. Trent's direct appeal in determining that his Oklahoma drug conspiracy qualified as a "serious drug offense" under the ACCA, see 18 U.S.C. § 924(e)(1)(A)(ii), and was therefore an ACCA predicate. But the Tenth Circuit seriously erred in how it applied Mathis to the alternative rationale on which it upheld Mr. Trent's ACCA sentence.

The decision in Trent I

An ACCA sentence, which has a minimum term of fifteen years in prison, 18 U.S.C. § 924(e)(1), requires that there be at least three qualifying predicate convictions. The claimed predicate implicated here was Mr. Trent's 2007 conviction in Comanche County, Oklahoma, for a violation of Oklahoma's general conspiracy statute, see 21 Okla. Stat. § 421. If that

conviction is not an ACCA predicate, Mr. Trent was wrongly sentenced to 196 months in prison, as the maximum, non-ACCA sentence for his felon-in-possession conviction would then be only ten years. See 18 U.S.C. § 922(g).

The dispute in Mr. Trent's earlier, direct appeal boiled down to whether Oklahoma's general conspiracy statute is divisible. As the Tenth Circuit recognized, if the statue is not divisible -- that is, if the "specific object of the conspiracy in not an element of the conspiracy," Trent I, 767 F.3d at 1058; A28 -- Mr. Trent's conspiracy conviction would not qualify as an ACCA predicate. Id.

The Tenth Circuit, deciding the appeal before Mathis, held the statute to be divisible. It recognized that, under this Court's law, the statute could be divisible only if the object of the conspiracy were an element of the crime. Id. But the Tenth Circuit read that law, and particularly Descamps v. United States, 133 S.Ct. 2276 (2013), not to use "element" in this context in "the traditional sense." Trent, 767 F.3d at 1058-61; A28-31. Rather, it held, the statute is divisible, and the modified categorical approach can be

used, if the statute sets out alternative means of committing the crime. Id. at 1059-61; A29-31.

That is what the Tenth Circuit considered to be the case as to Mr. Trent's 2007 Comanche County conviction for a general conspiracy. The alternative means of committing that crime are agreements to commit the range of offenses under Oklahoma law. Id. at 1055-57; A25-27. And as the charging document specified the crime as to which there was an agreement as the manufacture of methamphetamine, the court of appeals concluded the statute was divisible. Id. at 1057; A27. It then held that Mr. Trent's 2007 conspiracy conviction was, under the modified categorical approach, for a "serious drug offense" as defined in the ACCA, and was an ACCA predicate. Id. at 1057-58; A27-28.

The Tenth Circuit also engaged in an alternative analysis. Id. at 1061; A31. It did so in case it "misconstrued Descamps," and thus if the object of the conspiracy had to be an element in the traditional sense. Id.

In making the divisibility determination under that alternative approach, the Tenth Circuit court relied on what *seemed to be* the law in Oklahoma. The court first stated it had not found any Oklahoma case

explicitly stating that the jury must unanimously agree beyond a reasonable doubt on the object of the agreement that constitutes the conspiracy." Id. The best it could find -- citing two cases, one of which was from 1919 -- were decisions "suggestive" of that result. Id. Based on those cases, and on the Oklahoma pattern jury instructions, the Tenth Circuit wrote that "it *appears* that an Oklahoma jury must agree unanimously on the crime the defendant has conspired to commit." Id. at 1062; A32 (emphasis added).

The court of appeals court buttressed its resolution of the issue by referring to this Court's construction of the federal, continuing-criminal-enterprise statute in Richardson v. United States, 526 U.S. 813 (1999). See Trent I, 767 F.3d at 1062; A33. There, this Court said that if the jurors did not have to agree on the series of violations, there could be wide disagreement about what the defendant did, and this would risk the jurors not focusing on the factual detail, but instead concluding "'from testimony, say, of bad reputation, that where there is smoke there must be fire.'" Id. (describing and quoting Richardson, 526 U.S. at 819). That this could also be said of the Oklahoma conspiracy statute, the Tenth Circuit reasoned,

supported reading that state statute as making the object of the conspiracy an element in the traditional sense. Id. at 1062-63; A32-33.

This Court's decision in Mathis v. United States

This Court in Mathis later rejected the conclusion reached in Trent that the word "elements" in this context was not used in the traditional sense. Mathis, 136 S.Ct. at 2243, 2251-54, 2257. This Court stressed that it had long insisted that a statute can only divisible if it has different element sets, with "elements" taking on its usual meaning. Id. at 2251-54; see also id. at 2249. In that case, and only in that case, can a federal sentencing court use the modified categorical approach by looking to appropriate documents to determine on which of the element sets the conviction was based. Id. at 2253.

This Court explained that the "first task" in deciding whether a statute is divisible is "to determine whether its listed items are elements or means." Mathis, 136 S.Ct. at 2256. If state law does not supply "clear answers" that the listed items are elements, and if record materials do not either, then "'Taylor's demand for certainty'" is not satisfied, and the statute must be treated as indivisible. Id. at 2257 (quoting Shepard v.

United States, 544 U.S. 13, 21 (2005)) (referring to Taylor v. United States, 495 U.S. 575 (1990)); see also United States v. Arriaga-Pinon, 852 F.3d 1195, 1201 (9th Cir. 2017) (Thomas, C.J., concurring) ("focus of Mathis" was need for certainty).

Mr. Trent's argument in his § 2255 appeal

Mr. Trent filed a motion to vacate his sentence under 28 U.S.C. § 2255, which was pending when this Court decided Mathis. The district court ultimately denied relief and granted Mr. Trent a certificate of appealability. It is this second appeal that raises the question presented in this petition.

Mr. Trent argued to the Tenth Circuit that Mathis was an intervening change in the law with respect to Trent I, both as to Trent I's means-as-elements holding and as to its alternative holding. He urged that this freed the panel from the law-of-the-case doctrine, and permitted it to reach a different conclusion than had the prior panel. Mr. Trent's position as to the alternative holding in Trent I is what is at issue in this petition, as the Tenth Circuit agreed that "[i]n Mathis, th[is] Court specifically abrogated Trent I's first rationale." Trent II, 884 F.3d at 990; A6.

As to the alternative holding, Mr. Trent argued that although Mathis flowed directly from this Court's cases like Taylor in demanding certainty as to what is an element, and was therefore not a new rule in this Court, it was a new rule *for the Tenth Circuit*. It was, in this regard, no different from the holding in Mathis that an element has its traditional meaning, which also flowed directly from Taylor and its progeny, see Mathis, 136 S.Ct. at 2251-54, and which also changed Tenth Circuit law.

Mr. Trent also insisted that the Tenth Circuit had not, in Trent I, determined the Oklahoma conspiracy statute to be divisible with the certainty that this Court had required in Mathis. To the contrary, the decision in Trent I made clear that the panel was unable to hold with the required certainty that the statute was divisible. This inability established that the 2007 Oklahoma general-conspiracy conviction was not an ACCA predicate, and that Mr. Trent was wrongly sentenced to more than the maximum, ten-year term for a violation of § 922(g).

The panel in Trent I had not discovered any Oklahoma case holding that a jury must unanimously agree on the object of the conspiracy in order to convict. With nothing on point, the panel relied on what was *suggested*

by a couple of cases (one almost a century old) and what it *appears* is required in Oklahoma. Indeed, it supported its conclusion by relying on why this Court in Richardson had held that the continuing-criminal-enterprise statute should be read to require jury unanimity on the series of violations necessary under that statute.

The decision in Trent II

The Tenth Circuit in the § 2255 appeal held that Mathis was not an intervening decision that freed it to revisit the issues decided in Trent I. It did so by noting that Mathis was derived from cases like Taylor and Shepard. As the Tenth Circuit put it, "Mathis did not create a certainty standard that differed from Taylor and Shepard." Trent II, 884 F.3d at 996; A12. The court of appeals noted how this Court had invoked Taylor's demand for certainty in Shepard. Id. And it then said that "Mathis comports with the Taylor certainty standard." Id.

In the course of this discussion, the Tenth Circuit also stated that it had "followed and applied the Taylor certainty standard." Id. It cited only a single case -- United States v. Huizar, 688 F.3d 1193 (10th Cir. 2012) -- as showing this. Trent II, 884 F.3d at 996; A12. That case, as Mr. Trent would

point out in an unsuccessful rehearing petition, did not involve what was an element of an offense.

The Tenth Circuit also held that it had not, in issuing its alternative holding in Trent I, run afoul of the certainty that Mathis demands. Id. at 997; A13. In this regard, the court of appeals focused largely on what materials inform the elements determination. Id. at 997 & n.12; A13 & n.12. Apart from this, the Tenth Circuit said only the following:

> The Trent I court's cautious language does not depart from Taylor or Mathis. It analyzed Mathis-approved materials to arrive at a conclusion.

Id. at 997; A13.

REASONS FOR GRANTING THE WRIT

This Court should grant review to clarify how the "demand for certainty" should be applied in determining whether a statute is divisible, an important question for administration of the Armed Career Criminal Act, and one that Tenth Circuit misapplied here and that has led to divided decisions in other circuits.

This Court's recent decision in Mathis provided much-needed guidance on how to determine when statutes are divisible, allowing use of the modified-categorical approach to determine the nature of a defendant's prior convictions. This Court held that what matters for this inquiry is whether something is an element in the traditional sense. If a statute consists of different element sets, then it is divisible. If instead it contains alternative means of satisfying an element, then it is not divisible. Mathis v. United States, 136 S.Ct. 2243, 2251-54 (2016).

This conclusion, this Court stressed, followed from a long line of cases tracing back to Taylor v. United States, 495 U.S. 575 (1990). See Mathis, 136 S.Ct. at 2251-54. The Tenth Circuit in this case properly recognized that this aspect of Mathis overturned the means-as-elements approach of Trent I.

But the Tenth Circuit failed to pay heed to another important part of Mathis, one whose roots also extend back to Taylor. This Court explained that Taylor contains a "demand for certainty" that requires the conclusion that a statute is not divisible, preventing resort to the modified categorical approach, unless it can be said with certainty that the statute contains alternative elements in the traditional sense. Id. at 2257. This aspect of Mathis will help ensure that the decision's elements holding is given its proper play.

The Tenth Circuit, in its alternative holding, ran afoul of the certainty test of Mathis. Its decision will weaken how that test is applied. As the divisibility question has proven more difficult than this Court predicted in Mathis, this Court's review is warranted.

A. The Tenth Circuit misapplied the demand for certainty, and the divided decisions of other circuits highlights the need for this Court's intervention.

The Tenth Circuit determined that its prior opinion "analyzed Mathis-approved materials to arrive at a conclusion." Trent II, 884 F.3d at 977; A13. Mr. Trent does not quarrel with the state materials the Tenth

Circuit considered in its prior opinion. Rather, his complaint is how certain the Tenth Circuit was in reaching that conclusion.

It is not just the "cautious" language the Tenth Circuit used in its 2014 decision on Mr. Trent's direct appeal that shows it did not reach its conclusion with the certainty called for by Mathis, id., though that is certainly a part of it. Words like "suggestive" and "appears," Trent I, 767 F.3d at 1061-62; A31-32, do not typically bespeak a firmness of belief.

Nor does the context in which they were used do so here. The court in Trent I first noted that it could not find any case by any Oklahoma court that required a unanimous jury finding on the object of a conspiracy, so as to make the object an element in the traditional sense. Id. at 1061; A31. In looking to what was "suggestive" in the Oklahoma cases on this score, it identified only two such cases, one from ninety-nine years ago. Id. And after considering as well the Oklahoma jury instructions, the prior panel was still only able to say that "it *appears* that an Oklahoma jury must agree unanimously on the crime the defendant has conspired to commit." Id. at 1062; A32 (emphasis added).

So, even when it came time to express its ultimate conclusion, the court in Trent I did not evince firmness. That is, its "collective assessment of case law and other materials," Trent II, 884 F.3d at 997; A13, did not permit it to announce its conclusion with certainty. That it arrived at a conclusion by considering materials deemed relevant in Mathis, id., is not enough.

That the court in Trent I lacked sufficient certainty is shown by its invoking Richardson v. United States, 526 U.S. 813 (1999), to "support[]" its conclusion. Trent I, 767 F.3d at 1062; A32. Richardson is far afield. It does not involve Oklahoma law at all. Instead, it concerns what are elements for purposes of the federal, continuing-criminal-enterprise statute. The policy reasons this Court gave in Richardson for reaching its holding, see id. (discussing Richardson), might, as the Tenth Circuit in Trent I believed, id., be a good reason for an Oklahoma court to read the Oklahoma conspiracy statute to make the object of the conspiracy an element. But it says nothing at all about how Oklahoma courts *have* read the conspiracy statute. And that is what matters for determining what are the elements of the state-law offense.

The very fact that the court in Trent I saw fit to look to Richardson as support for its holding shows that Oklahoma law is *not* in fact clear that the object of a conspiracy is an element of the offense. It confirms that the court in Trent I did not reach its decision as to what Oklahoma law required with the certainty that Mathis demands. And that the Tenth Circuit in Trent I had scoured Oklahoma law going back a century and still did not do so, shows that it could not in fact do so.

This means that the demand for certainty was not met, and that the object of the conspiracy cannot be considered an element of Oklahoma's general-conspiracy statute. The statute must, under Mathis, therefore be treated as indivisible. Accordingly, only the categorical approach can be used. And as the Tenth Circuit recognized in Trent I, Mr. Trent's conspiracy conviction "would not be a conviction of a serious drug offense" under the categorical approach, id. at 1052; A22, and he would not be subject to the fifteen-year, mandatory minimum of the ACCA.

The decision in this case waters down in the Tenth Circuit what this Court insisted upon in Mathis. Everything in Trent I points to a conclusion only weakly and uncertainly reached. The Tenth Circuit nevertheless

brushed aside not only the language used in Trent I and its context, but also that opinion's reliance on policy reasons this Court used in reading a federal statute to predict how an Oklahoma court would interpret, as a matter of state law, a very different statute.

Although this Court said that in many cases the elements-or-means question would be an "easy" one, Mathis, 136 S.Ct. at 2256, that prediction appears to have been too optimistic. The question has produced several fractured decisions in the courts of appeals, with accusations that Mathis is not being faithfully applied. See United States v. Reyes, 866 F.3d 316, 328-29 (5th Cir. 2017) (Owens, J. dissenting) (criticizing concurrence for its "guess" under Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), as to how state supreme court would rule if put to the test, and majority opinion for also not showing with "assurance" the elements of state offense); United States v. Martinez-Lopez, 864 F.3d 1034, 1048 (9th Cir.) (en banc) (Berzon, J., concurring in part and dissenting in part) (arguing that state decision on which majority relied used a test that "is dissimilar, in several fundamental ways, from the elements-only approach [this] Court has prescribed as the only way to meet 'Taylor's demand for certainty'") (quoting Mathis, 136

S.Ct. at 2257), cert. denied, 138 S.Ct. 523 (2017); United States v. Gundy, 842 F.3d 1156, 1175-76 (8th Cir. 2016) (Jill Pryor, J., dissenting) (arguing that Georgia case law does not in fact support majority's conclusion), cert. denied, 138 S.Ct. 66 (2017).

The Tenth Circuit's troubling application of Mathis on a matter central to its vitality is good reason to accept this case for review. The availability of a mandatory-minimum sentence of fifteen years, as opposed to a ten-year maximum for being a felon in possession of a gun, can often turn on the divisibility question. And the courts of appeals are not finding it easy to implement Mathis's demand for certainty in deciding whether a statute is divisible. Accepting this case for review will give this Court the chance to clarify how the demand for certainty is to be applied.

B. The Tenth Circuit's conclusion that Mathis was not an intervening change in the law as to its alternative holding is deeply flawed, and is not a basis for declining to accept this case for review.

The Tenth Circuit concluded that, with respect to its alternative holding, Mathis was not an intervening change in the law that would allow it to reach a different result than the one reached on direct appeal. But in

demanding certainty before a statute could be held to be divisible, Mathis *did* change Tenth Circuit law. The Tenth Circuit's decision to the contrary is seriously misguided, and should not dissuade this Court from granting review.

To be sure, Mathis is not a new rule in this regard for purposes of this Court's jurisprudence. This Court was at pains to note in Mathis that its main holding followed from a line of decisions originating with Taylor. Mathis, 136 S.Ct. at 2251, 2251-52, 2254, 2257. Likewise, this Court stressed that the demand for certainty came from Taylor, and had long been part of this Court's law. Id. at 2257.

The Tenth Circuit did acknowledge that Mathis abrogated Trent I's holding that, for purposes of divisibility analysis, alternative means of violating a statute are "elements." Trent II, 884 F.3d at 987, 990; A3, 6. It implicitly recognized that the alternative-means holding could not be used to defeat Mr. Trent's collateral challenge to his ACCA sentence. It thus treated the elements holding of Mathis as an intervening change as to Tenth Circuit law, even though it was not an intervening change as to this Court's law.

But the Tenth Circuit refused to do likewise with respect to the demand-for-certainty holding. It first said that "Mathis did not create a new standard for 'certainty,'" as the certainty standard "derives from Taylor v. United States." Id. at 996; A12. Next, the Tenth Circuit said that it had followed the same approach. Id. The lone case it offered as an example, United States v. Huizar, 688 F.3d 1193 (10th Cir. 2012), see Trent II, 884 F.3d at 996; A12, however, did not involve the issue of what the elements of a prior offense were, and so, whether the modified-categorical approach could be used. Instead, it concerned what certainty is required *after* a determination of divisibility is made. After holding that the modified-categorical approach was to be used, Huizar concluded that the record documents did not show the basis of the conviction with enough clarity.

The Tenth Circuit made one of two problematic errors in concluding that Mathis was not an intervening change in the law with respect to the prior panel's alternative holding. One was to look to whether Mathis changed this Court's law -- which it did not -- rather than to whether Mathis changed circuit law as to the certainty required. It is only the latter

that matters for purposes of the binding effect of a prior *circuit court* decision. If circuit law was based on an incorrect view of this Court's law (as it was here), a decision by this Court that makes this clear works a change in circuit law.

The Tenth Circuit's other possible error was to consider the fact that it had required certainty on the post-divisibility inquiry (whether record documents showed on which aspect of a divisible statute the conviction rested) to be the same as having demanded certainty in deciding whether a statute was in fact divisible. The Tenth Circuit's decision in Trent I shows that it did not require certainty on the latter, threshold question. And its inability in Trent II to cite a single case in which it had done so confirms this.

Either way, the Tenth Circuit committed a serious error in thinking Mathis was not an intervening change in the law with respect to its alternative holding. Its conclusion in this regard should not prevent this Court from reaching the important question that this petition poses about Mathis's demand for certainty.

CONCLUSION

This Court should grant Mr. Trent a writ of certiorari.

Respectfully submitted,

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