No. _____

IN THE

Supreme Court of the United States

IBRAHIM MCCANTS,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of this Court's recent decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), should this Court grant certiorari, vacate the judgment of conviction, and remand to the United States Court of Appeals for further consideration where the government did not establish Petitioner's knowledge of the "status element" of 18 U.S.C. § 922(g)(1), one of the two counts of conviction?

2. Does an anonymous tip providing minimal physical and location descriptors and alleging ongoing domestic violence that is not corroborated when police respond within minutes of the call suffice to support a stop and frisk based on "circumstances common to domestic violence calls"?

3. Whether the Third Circuit's approach to determining that New Jersey's second degree robbery statute is divisible is contrary to *Mathis v. United States* when it ignores state law sources and relies on the layout of the statute and the fact that different subsections require different proof?

PARTIES TO PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. United States of America
2. Ibrahim McCants

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NO:_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019

IBRAHIM McCANTS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ibrahim McCants respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

DECISION BELOW

The United States Court of Appeals for the Third Circuit affirmed Petitioner's conviction and sentence with a precedential opinion issued on April 5, 2019. Petitioner's Appendix ("Pet. Appx.") C. The opinion is available at 920 F.3d 169 (3d Cir. 2019).

JURISDICTION

The United States District Court for the District of New Jersey (D.N.J. No. 15-CR-551) exercised jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The Third Circuit Court of Appeals (No. 17-3103) had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The United States Court of Appeals for the

Third Circuit entered judgment on April 5, 2019. Pet. Appx. C1–3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition is timely filed within 90 days of the entry of judgment, as extended by the Court on June 28, 2019 under Docket No. 18A1368, making the petition due on or before August 5, 2019.

RELEVANT STATUTORY PROVISIONS

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. IV.

The New Jersey robbery statute provides:

> a. Robbery defined. A person is guilty of robbery if, in the course of committing a theft, he:
> (1) Inflicts bodily injury or uses force upon another; or
> (2) Threatens another with or purposely puts him in fear of immediate bodily injury; or
> (3) Commits or threatens immediately to commit any crime of the first or second degree.
> ....
> b. Grading. Robbery is a crime of the second degree, except that it is a crime of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon.

N.J.S.A. 2C:15-1.

STATEMENT OF THE CASE

A. Background

Around 2:30 p.m. on June 28, 2015, an unknown woman called 911, asked for the number to the East Orange Police Department, and said, "[i]t's [an] emergency." Joint Appendix ("JA") 13–14.[1] After the operator asked what the problem was, the caller said, "[t]his guy is out here beating up his girlfriend. He's about to kill her." JA14. She said the man was on "Grove and, and, like Williams Street" and described him as wearing "a red hat, with braids." *Id.* She told the operator "he is beating her up really bad right now" but never explained exactly what he was doing or asked for an ambulance. *Id.* The caller repeated, "he's beating her up really badly." *Id.* As the operator began broadcasting the message to police, the caller said, "I think he has a gun" and hung up. *Id.*

The operator dispatched the following message:

> Grove and William, Grove and William, right now from a caller, it's a male beating a female really badly, male has braids with a red hat . . . . Now she is saying she believes he has a gun . . . Alright, the caller disconnected.

Id. Within seconds, the responding officers determined Mr. McCants was the man described in the tip and detained him. JA25. They stopped and frisked him, and recovered a firearm and drugs. JA15. The officers never found any evidence of the violent assault alleged by the anonymous caller. JA74–92.

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[1] The Joint Appendix refers to the appendix filed in the United States Court of Appeals for the Third Circuit.

The responding officers filed six different incident reports describing their response to the anonymous 911 call. JA74–92. Officers Cory Patterson, Stephen Rochester, and Moses Sangster were the first to notice Mr. McCants. JA15, 76. Rochester reported that "[u]pon arrival to 146 N. Grove street [he] observed a black male with dreads, wearing a red baseball hat . . . speaking with a black female." JA78. Sangster said he saw Mr. McCants "walking . . . with a female." JA76. Patterson and Rochester "immediately engaged" Mr. McCants and "[d]ue to the nature of the call for service" conducted a "pat down for weapons." JA15, 78. Officer Crystal Singleton arrived around the same time. JA85. When she noticed Mr. McCants and a woman, later identified as Chelsea Fulton, they were "approaching the driveway of 146 N. Grove St." JA85. She questioned Ms. Fulton while Patterson and Rochester frisked Mr. McCants. JA86. Singleton observed that Ms. Fulton "did not have any signs of injuries." JA85–86. Detective Jalessa Wreh also spoke to Ms. Fulton and confirmed "she did not display any signs of injuries or pain." JA82. Although Ms. Fulton admitted to both Singleton and Wreh that she and Mr. McCants were arguing, she said, "at no point did the argument get physical." JA70, 82, 86. After arresting Mr. McCants, the officers checked Ms. Fulton for active warrants and released her. JA75.

Mr. McCants was indicted on two counts: possession with intent to distribute heroin, in violation of 21 U.S.C. § 841(a) and (b)(1)(C), and unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). JA38–39. He filed a motion to suppress the firearm and drugs because the officers did not reasonably suspect he was engaging in criminal activity before stopping and frisking him. JA42–

61, 128–139. The district court denied Mr. McCants's request for an evidentiary hearing and motion to suppress in a written opinion. JA13–30.

B. Stipulated trial

Mr. McCants proceeded to a stipulated bench trial. As relevant to the instant petition, he and the United States stipulated to the following:

> 1. On or about June 28, 2015, in East Orange, New Jersey, the defendant knowingly possessed (i) a black Hi-Point .380 caliber semi-automatic handgun ("the Handgun") and (ii) a mixture or substance containing a detectable amount of heroin.
>
> 2. The Handgun is a "firearm" within the meaning of 18 U.S.C. §§ 921(a)(3) and 922(g).
>
> 3. The Handgun was not manufactured in New Jersey. Before the defendant possessed the Handgun on or about June 28, 2015, the Handgun moved in and affected interstate commerce.
>
> 4. Prior to June 25, 2015, the defendant was convicted of at least one crime punishable by imprisonment for a term exceeding one year in a court in the State of New Jersey, including a 2004 conviction in Essex County Superior Court for robbery, in violation of N.J.S.A. 2C:15-1.

See Presentence Investigation Report ("PSR") ¶¶10–13 (reciting stipulations).[2]

Mr. McCants was found guilty of both charges in the indictment. JA169–193.

C. Sentencing

Mr. McCants objected to the PSR's determination that his advisory guideline range was 168 to 210 months under the career offender guideline, U.S.S.G. § 4B1.1. PSR ¶32. Mr. McCants argued that he did not qualify as a career offender because the two alleged career offender predicates—second degree robbery under N.J.S.A. 2C:15-

[2] The other stipulations pertained to the drug count.

1—did not qualify as crimes of violence under U.S.S.G. § 4B1.2(a). Sealed Appendix ("SA") 2–12.

Mr. McCants argued that N.J.S.A. 2C:15-1 is an indivisible statute and cited state court decisions demonstrating that N.J.S.A. 2C:15-1 sets out a single offense with two elements: (1) theft and (2) injury/force, which can be satisfied by any of the factual means listed in subsections (a)(1)–(3) of the statute. SA5–7, 79. Applying the categorical approach, Mr. McCants argued that the elements of N.J.S.A. 2C:15-1 swept more broadly than the United States Sentencing Guidelines' (the "Guidelines") definition of a crime of violence. SA7–10.

The district court concluded that his prior robbery offenses were crimes of violence subjecting him to the career offender enhancement. JA270.

D. Appeal

On December 18, 2018, a panel of the United States Court of Appeals for the Third Circuit (Hardiman, Krause, and Bibas, J.J.), issued a precedential opinion affirming the judgment and conviction. Pet. Appx. A. Specifically, the panel affirmed the denial of the motion to suppress and the determination that the prior robbery convictions were crimes of violence under the career offender guideline. Pet. Appx. A15. On the crime of violence issue, the panel concluded that the New Jersey robbery statute is divisible because each subsection requires different proof to sustain a conviction and because the statute is clearly laid out into three subsections. Pet. Appx. A17–18.

Mr. McCants sought rehearing on the basis that this "different proof"

requirement conflicted with *Mathis v. United States*, 136 S. Ct. 2243 (2016). The panel granted the petition for rehearing, Pet. Appx. B, and issued a new opinion reaching the same conclusion. Pet. Appx. C.

E. Post-Appeal

After the Third Circuit issued its decision, this Court issued its opinion in *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

REASONS FOR GRANTING THE WRIT

I. IN LIGHT OF THIS COURT'S OPINION IN *REHAIF V. UNITED STATES*, 139 S. CT. 2191 (2019), THIS COURT SHOULD GRANT MR. MCCANTS'S PETITION FOR CERTIORARI, VACATE THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AND REMAND TO THAT COURT FOR FURTHER PROCEEDINGS.

This Court ruled in *Rehaif v. United States* that in order to convict a defendant of an offense listed in 18 U.S.C. § 922(g), "the Government . . . must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." 139 S. Ct. 2191, 2195 (2019). *See id.* at 2196 ("We see no basis to interpret 'knowingly' as applying to the [possession] element but not the [status element]."). The dissent recognized the significance of this ruling, noting that it overturned "the long-established interpretation of an important criminal statute, 18 U.S.C. § 922(g), an interpretation that has been adopted by every single Court of Appeals to address the question." *Id.* at 2201 (Alito, J. dissenting). The dissent also recognized the potential significance to other pending and completed cases. *See id*. at 2212–13 (Alito, J., dissenting) (noting "[t]ens of thousands of prisoners are currently

serving sentences for violating 18 U.S.C. § 922(g)" and that "every one of those prisoners will be able to seek relief by one route or another"). Of particular relevance to Mr. McCants's case is the dissent's statement that "[t]hose for whom direct review has not ended will likely be entitled to a new trial." *Id.* at 2213 (Alito, J., dissenting).

This case is one of those contemplated by the dissent. Mr. McCants was indicted for possessing a firearm after having been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. § 922(g)(1). Mr. McCants proceeded to a stipulated bench trial after his motion to suppress evidence was denied. Mr. McCants stipulated to his knowledge of the "possession element" of the statute but not to his knowledge of the "status element." PSR, ¶¶10–13. The government therefore did not meet its burden of establishing every element of the offense beyond a reasonable doubt. Because direct review has not ended, he "will likely be entitled to a new trial." *Rehaif*, 139 S. Ct. at 2213.

For this reason, Mr. McCants respectfully requests that this Court grant Mr. McCants's petition for certiorari, vacate the opinion of the United States Court of Appeals for the Third Circuit, and remand to that Court for further proceedings.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE THIRD CIRCUIT'S REASONING IMPROPERLY PERMITS AN EXCEPTION FOR ANONYMOUS TIPS ALLEGING DOMESTIC VIOLENCE WITHOUT REQUIRING RELIABLE INDICIA OF ILLEGALITY, CONTRARY TO THE FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Improperly extending *Navarette v. California*, 572 U.S. 393 (2014), a panel of the United States Court of Appeals for the Third Circuit fashioned an "anonymous report of domestic violence" exception to the Fourth Amendment and approved a stop and frisk despite an utter absence of indicia that the allegation of illegality was reliable.

Five years ago, the dissent in *Navarette v. California* characterized the majority opinion as a "freedom-destroying cocktail consistent of two parts patent falsity[.]" 572 U.S. 393, 413 (2014) (Scalia, J., dissenting). The first part—"that anonymous 911 reports of traffic violations are reliable so long as they correctly identify a car and its location"—is relevant to the instant case. *Id.* (Scalia, J. dissenting). And the dissent's concern about erosion of the standard for evaluating reasonable suspicion based on anonymous tips is even more pronounced.

In *Navarette*, an anonymous informant described the make, model, license plate, and location of a truck. *Id.* at 399. The anonymous caller also alleged that the truck had driven her car off the road. *Id.* Responding police officers found a truck matching the description, but despite following the car for five minutes, observed no indicia of reckless or intoxicated driving. *Id.* at 403. Nevertheless, police stopped the truck. *Id.* at 396. The majority found the "claimed eyewitness knowledge of the alleged dangerous driving," the detailed description of the truck, the timeline of the call and the confirmation of the truck's location, and the caller's use of the 911 system, "taken

together, justified the officer's reliance on the information reported in the 911 call." *Id.* at 399–401.

Having reviewed these indicia of reliability regarding the tip, the Court still needed to evaluate whether the tip "create[d] reasonable suspicion that 'criminal activity may be afoot.'" *Id.* at 401 (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). The Court concluded the allegation itself was sufficiently specific that the Court could not "say that the officer acted unreasonably under these circumstances in stopping a driver whose alleged conduct was a significant indicator of drunk driving." *Id.* at 403. The absence of any independent observations by the officer to support the suspicion of drunk driving did nothing to "dispel" that reasonable suspicion. *Id.*

In the instant case, the Third Circuit improperly extended *Navarette* to anonymous allegations of domestic violence. The caller in this case provided a bare minimum of physical descriptors—man and woman, red hat and braids on the man—and a physical location. She alleged that the man was "beating [the woman] up really badly," and then added that she thought the man had a gun, but provided no basis for that latter claim. JA14. When the first police officer arrived "within one minute," and two more arrived "within minutes after hearing the call," they saw a man who matched this bare-bones description and "'immediately engaged' McCants and frisked him due to the 'nature of the call for service.'" Pet. Appx. C6–7 (citation to record omitted).

Not a single officer reported seeing any signs of the beating the caller alleged to have seen. One officer "reported that he observed McCants 'speaking with a black female.'" Pet. Appx. C7, 8. Two other officers "reported that Fulton showed no signs of

injury." *Id.* Again, these observations were made within one and several minutes after the officers heard the dispatched call.

Under the Third Circuit's gaze, the bare-bones description became "a highly specific and accurate description of the suspect's location, clothing, and hair." Pet. Appx. C11. The panel also cited the caller's use of the 911 system, the speed with which the officers responded to the call, and the corroboration of this "detailed description" in support of its conclusion. Pet. Appx. C15.

Most significantly, however, the panel employed *Navarette* to excuse the utter absence of any corroboration of the substance of the caller's report—the allegation of illegal activity—by reference to the highly general considerations of "circumstances common to domestic violence calls." Pet. Appx. C14. Specifically, the panel cited a Seventh Circuit opinion involving a police response "to an anonymous report that a tall, black male wearing a black jacket and blue jeans was arguing with his girlfriend and had drawn a gun at a specific location." Pet. Appx. C14 (citing *United States v. Wooden*, 551 F.3d 647, 648 (7th Cir. 2008)). When the police arrived, they found the couple "chatting amicably" but "conducted a pat-down" anyway. *Id.* (citing *Wooden*, 551 F.3d at 648, 650). The Seventh Circuit upheld the stop on the ground that "the report implied the need for a hasty response" and on its understanding of the nature of domestic violence. *Id.* (citing *Wooden*, 551 F.3d at 650). Specifically, the Third Circuit panel noted the *Wooden* Court's observation that "'domestic violence comes and goes' and there is a 'risk that an armed man may threaten the woman with him' with future violence if she does not remain calm when police arrive." *Id.* (quoting *Wooden*, 551 F.3d

at 650).

This reasoning turns the value of corroboration and predictive information upside down. First, it dismisses the fact that the couple was "chatting amicably" when the police arrive did *not* support the allegation of domestic violence. *See Wooden*, 551 F.3d at 650. Then, it affirmatively supplies utter speculation that the amicable chatting could be masking the woman's duress caused by the man's threat of future violence should she reveal the abuse to the police. *See id.* Under the Seventh Circuit's framework, the absence of corroboration supports rather than dispels reasonable suspicion.

The Third Circuit followed and applied this reasoning. In the panel's view, at least with respect to anonymous allegations of domestic violence, it was not the presence of indicia of domestic violence that supported the officers' determination of reasonable suspicion. Indeed, there was none. Mr. McCants and Ms. Fulton were seen "speaking," not fighting and, mere minutes after the report, Ms. Fulton showed no signs of injury from the claimed beating. Rather, as in *Wooden*, it was the very absence of indicia of domestic violence, and the supplied speculation that this absence masked the violence, that supported the officers' decision to stop and frisk Mr. McCants.

When both the presence and the absence of indicia of domestic violence are used to support the reliability of an allegation of domestic violence, it is difficult to know what would *not* have justified a stop and frisk in this case. A hat of a different color? Differently styled hair? If the man and woman had walked a block away in the minute between the call and the first officer's arrival? This approach comes as close as it could

possibly get to making an anonymous caller's purportedly contemporaneous report of domestic violence per se sufficient to justify a stop and frisk, and it raises the same concerns that Justice Scalia expressed in *Navarette*. As Justice Scalia wrote, "[T]he issue is not how [the caller] claimed to know, but whether what she claimed to know was true." *Navarette*, 572 U.S. at 407 (Scalia, J., dissenting). The panel in this case ignored that issue, supplying speculation about "circumstances common to domestic violence calls" to support the officers' actions. Pet. Appx. C14.

The panel's decision improperly extends *Navarette,* raises precisely the concerns set forth in Justice Scalia's dissent in *Navarette*, and is contrary to the Fourth Amendment of the Constitution of the United States. This Court's review is necessary to safeguard the protections of the Fourth Amendment.

III. CERTIORARI IS WARRANTED BECAUSE THE THIRD CIRCUIT'S APPROACH TO DETERMINING THAT NEW JERSEY'S SECOND DEGREE ROBBERY STATUTE IS DIVISIBLE IS CONTRARY TO *MATHIS V. UNITED STATES*, 136 S. CT. 2243 (2016).

The Third Circuit found that two of Mr. McCants's prior convictions for second-degree robbery in New Jersey qualified as crimes of violence under Section 4B1.2(a) (the career offender provision) of the Sentencing Guidelines. Pet. Appx. C25. In reaching this determination, the panel found the New Jersey robbery statute divisible. Pet. Appx. C18-21. Certiorari is warranted because the Third Circuit's approach to making the divisibility determination is contrary to the analytical framework set forth in *Mathis v. United States*, 136 S. Ct. 2243 (2016).

The robbery statute provides:

> a. Robbery defined. A person is guilty of robbery if, in the course of committing a theft, he:
> (1) Inflicts bodily injury or uses force upon another; or
> (2) Threatens another with or purposely puts him in fear of immediate bodily injury; or
> (3) Commits or threatens immediately to commit any crime of the first or second degree.
> ....
> b. Grading. Robbery is a crime of the second degree, except that it is a crime of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon.

N.J. STAT. ANN. § 2C:15-1.

In *Mathis*, the Supreme Court announced the analytical framework courts must use to determine whether a conviction under an alternatively phrased statute is a

predicate offense for the Armed Career Criminal Act.[3] 136 S. Ct. at 2256. The same analysis is required to determine whether a prior conviction is a crime of violence under the career offender definition, U.S.S.G. § 4B1.2. *See United States v. Brown*, 765 F.3d 185, 189 & n.2 (3d Cir. 2014) (noting Third Circuit has "consistently applied the categorical approach to determinations under the career offender enhancement"). The first step when faced with an alternatively phrased statute is "to determine whether its listed items are elements or means." *Mathis*, 136 S. Ct. at 2256. Elements are the constituent parts of an offense that a jury must unanimously find beyond a reasonable doubt to convict the defendant. *Id.* at 2248. Means are merely the factual ways in which in which a crime can be committed, and they need not be unanimously found by the jury. *Id.* at 2249.

If a statute's alternatives are merely means of committing a unitary offense, the statute is indivisible and courts use the categorical approach to compare the offense of conviction to the requirements of the ACCA or the Guidelines. *Id.* at 2253. In contrast, if the statute lists alternative elements, it defines multiple offenses and the sentencing court must use the "modified categorical approach" to determine which of the multiple offenses was the offense of conviction. *Id.* at 2249; *Descamps v. United States*, 570 U.S. 254, 257 (2013).

Sometimes the "threshold inquiry—elements or means?"—is easy because a state court decision definitively answers the question. *Mathis*, 136 S. Ct. at 2256. The

[3] Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e).

inquiry is also easy when statutory alternatives carry different punishments, making them elements under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Id.* If state law provides no clear answer to the inquiry, the court may "peek" at the *Shepard* documents of a prior conviction for "the sole and limited purpose of determining whether the listed items are elements" or means. *Id.* at 2256–57 (alterations and citation omitted).

As its first step in determining whether Mr. McCants's second degree robbery convictions qualified as career offender predicates, the panel endeavored to analyze whether the statute was divisible. The panel concluded that "[s]ubsections (a)(1)–(3) are elements" based on the structure of the statute and "because each [subsection] requires different proof beyond a reasonable doubt to sustain a second-degree robbery conviction." Pet. Appx. C18. It then proceeded to apply the modified categorical approach. Pet. Appx. C21–25.

The "different proof" test is not part of the *Mathis* analysis but is the *Blockburger* test for double jeopardy analysis. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932). This test has no bearing on the divisibility analysis set out in *Mathis*. Whenever a statute includes a disjunctive list (whether elements or means), each item requires proof of something that the others do not, but that does nothing to distinguish means from elements. *Mathis* made clear that courts must distinguish elements from means and that the test for doing so is juror unanimity, not *Blockburger*. *Mathis*, 136 S. Ct. at 2249.

After citing "different proof" as a basis for divisibility, the panel invoked one of

this Court's pre-*Mathis* decisions in support of its divisibility analysis:

> This analysis parallels our decision in *United States v. Blair*, 734 F.3d 218 (3d Cir. 2013), where we held that Pennsylvania's similar robbery statute was divisible because of its "clearly laid out alternative elements." *Id.* at 225. . . . Because N.J. STAT. ANN. § 2C:15-1 lays out alternative elements upon which prosecutors can sustain a second-degree robbery conviction, we hold that the statute is divisible.

Pet. Appx. C19–21.

The panel rejected Mr. McCants's argument that *Blair* had been abrogated by *Mathis*, noting that the Court "reaffirmed that the Pennsylvania robbery statute is divisible" earlier this year in *United States v. Peppers*, 899 F.3d 211, 232 (3d Cir. 2018), which cited both *Mathis* and *Blair*. Pet. Appx. C19. But to the extent that *Peppers* "reaffirmed" *Blair* it did so only in dictum. Moreover, *Peppers* cannot trump *Mathis*'s guidance that that disjunctive phrasing and statutory layout are not the criteria for divisibility. Both means and elements are listed disjunctively in statutes, and courts must look to juror unanimity to determine whether the alternatives are elements.

The Third Circuit has employed *Mathis* correctly, *i.e.*, by considering state law and, if necessary, the record of a prior conviction to determine whether statutory alternatives are elements or means. *Mathis*, 136 S. Ct. at 2256–57. In *United States v. Steiner*, for example, the Court considered model jury instructions and state court precedent to determine that a Pennsylvania burglary statute listed alternative means, not elements. 847 F.3d 103, 119 (3d Cir. 2017). See also *United States v. Henderson*, 841 F.3d 623, 628–29 (3d Cir. 2016) (considering state case law and model jury instructions in determining divisibility of statute). Consistent with *Mathis* and this

Third Circuit precedent, Petitioner pointed to state case law, charging documents, and Model Jury Instructions showing that the alternatives in N.J. STAT. ANN. §2C:15-1 do not require juror unanimity and thus are means, not elements. Brief for Appellant at 38–41, *United States v. McCants*, 911 F.3d 127 (3d Cir. 2018) (No. 17-3103) (citing state cases, the fact that subsections (a)(1)–(3) all carry the same punishment, and the model jury instructions in support of argument that subsections are means rather than elements). The panel failed to consider any of these sources, relying instead on the different proof test and the layout of the statute—neither of which is consistent with *Mathis*.

Review by this Court is warranted here so that the Court can properly compare Petitioner's convictions to the requirements of the career offender guideline. If the statute is indivisible, the most innocent conduct supporting a conviction does not qualify under the career offender guideline's force clause or its enumerated offenses clause. *Id.* at 46–48 (arguing breadth of subsection (a)(3) precludes finding that statute constitutes crime of violence). Moreover, review by this Court is necessary because of the critical importance of divisibility analysis in determining criminal sentences. Petitioner therefore respectfully requests that the Court grant *certiorari* in this matter.

CONCLUSION

Based on the foregoing, Petitioner Ibrahim McCants respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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