No. 20-

IN THE

Supreme Court of the United States

JAMES AVERY, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state burglary statute that disjunctively lists places that may be burgled under the statute is divisible for purposes of a sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. §924(e), even though the statutory list is not exclusive and does not require the jury to agree that the defendant burgled any particular listed place.

RELATED PROCEEDINGS

1. United States District Court (M.D. Fla.):

A. *United States* v. *Avery*, No. 6:05-cr-00144-JA-KRS (Mar. 24, 2006) (judgment after sentencing).

B. *Avery* v. *United States*, No. 6:08-cv-00022-JA-KRS (Apr. 2, 2010) (judgment denying first section 2255 motion).

C. *Avery* v. *United States*, No. 6:16-cv-01143-JA-KRS (Aug. 22, 2018) (judgment denying successive 2255 motion).

2. United States Court of Appeals (11th Cir.):

A. *United States* v. *Avery*, No. 06-12058 (Dec. 18, 2006) (judgment on direct appeal).

B. *Avery* v. *United States*, No. 10-14361 (Dec. 8, 2011) (order dismissing appeal from denial of first section 2255 motion).

C. *In re James Avery, Jr.*, No. 16-12733 (June 15, 2016) (order authorizing successive section 2255 motion).

D. *Avery* v. *United States*, No. 18-14430 (June 30, 2020) (judgment affirming denial of successive 2255 motion).

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

PETITION FOR A WRIT OF CERTIORARI

James Avery, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion (App. 1a-8a) is unreported, as are the district court's opinion and order (App. 9a-22a).

JURISDICTION

The Eleventh Circuit entered judgment on June 30, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Armed Career Criminal Act, 18 U.S.C. §924(e), and Georgia Code §26-1601 (1977) are reproduced in the appendix to this petition.

INTRODUCTION

This case implicates an acknowledged and entrenched circuit conflict about whether Georgia's burglary statute is "divisible" for purposes of determining whether a conviction under it qualifies as a "violent felony" that would enhance a sentence under the Armed Career Criminal Act, 18 U.S.C. §924(e) ("ACCA"). Adhering to a prior published decision (while acknowledging the circuit conflict), the Eleventh Circuit held here that the Georgia statute is divisible and thus can be the basis for such an enhancement. Another circuit has reached the opposite conclusion, while a third has agreed with the Eleventh Circuit's conclusion but rejected most of its analysis.

This circuit conflict—on a recurring and important question of federal law—reflects more general disagreement among the courts of appeals about how to conduct the divisibility analysis, despite this Court's clear instructions on that issue in *Mathis* v. *United States*, 136 S. Ct. 2243 (2016). This case thus presents the opportunity not only to redress the inconsistent treatment of prior convictions under the Georgia burglary statute, but also to provide further guidance to ensure uniform treatment of prior convictions under other state statutes. Such guidance would have far-reaching effects, both because the Georgia law's salient features appear in many other statutes and because the divisibility analysis is used not just under ACCA, but in other contexts in criminal and immigration law.

STATEMENT

A. Sentence Enhancement Under The Armed Career Criminal Act

1. ACCA imposes a 15-year mandatory minimum prison sentence for any person who is convicted, under 18 U.S.C. §922(g), of being a felon in possession of a firearm and who has "three previous convictions … for a violent felony or serious drug offense." *Id.* §924(e)(1). By contrast, a person who violates §922(g) without three such prior convictions faces a *maximum* sentence of 10 years' imprisonment. *See id.* §924(a)(2).

As relevant here, "the term 'violent felony' means any … burglary, arson, or extortion" (state or federal) that is "punishable by imprisonment for a term exceeding one year." 18 U.S.C. §924(e)(2)(B)(ii). In listing "burglary, arson, or extortion," this Court has held, "Congress referred only to their usual or (in [the Court's] terminology) generic versions—not to all variants of the offenses." *Mathis*, 136 S. Ct. at 2248 (citing *Taylor* v. *United States*, 495 U.S. 575, 598 (1990)).

"To determine whether a prior conviction is for [the] generic [version of a] listed crime" and therefore may qualify as an ACCA predicate offense, federal sentencing courts "apply what is known as the categorical approach." *Mathis*, 136 S. Ct. at 2248. Under this approach, courts "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the] generic [offense], while ignoring the particular facts of the case." *Id.* Hence, a conviction for burglary, arson, or extortion counts as an ACCA predicate offense only if "its elements are the same as, or narrower than, those of the generic offense," regardless of "the defendant's actual conduct (*i.e.*, the facts of the crime)." *Id.* (emphasis omitted).

The distinction between "elements" and "facts," this Court has explained, is thus "central to ACCA's operation." *Mathis*, 136 S. Ct. at 2248. Elements are "the things the prosecution must prove to sustain a conviction"—that is, "what the jury must find beyond a reasonable doubt to convict the defendant" or "what the defendant necessarily admits when he pleads guilty." *Id.* (quotation marks omitted). Facts, on the other hand, describe the "circumstance[s]" or "event[s]" but are "extraneous to the crime's legal requirements." *Id.* (alterations in original).

2. To account for variations in how crimes are defined, this Court has developed further rules for ascertaining the elements of a prior conviction. If the statute under which a defendant was previously convicted "sets out a single (or 'indivisible') set of elements to define a single crime," the "comparison of elements that the categorical approach requires is straightforward." *Mathis*, 136 S. Ct. at 2248. The court merely "lines up that crime's elements alongside those of the generic offense and sees if they match." *Id.*

The categorical approach is also used if a criminal statute "specifies diverse *means* of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense." *Mathis*, 136 S. Ct. at 2249 (emphasis added). That would be the situation if, for example, "a statute requires use of a 'deadly weapon' as an element of a crime and further provides that the use of a 'knife, gun, bat, or similar weapon' would all qualify." *Id.* In that circumstance, there is still only one offense, meaning the statute is indivisible and the categorical approach applies. *Id.* at 2253, 2256.

If, however, the statute of conviction "list[s] *elements* in the alternative," then it "define[s] multiple crimes" and is said to be "divisible." *Mathis*, 136 S. Ct. at 2249 (emphasis added). And if "at least one, but not all of th[e multiple] crimes" alternatively defined in a divisible statute "matches the generic version" of the offense, *id.* at 2254 n.4, then courts must use the "modified categorial approach" to discern which alternative crime the defendant was convicted of, i.e., "which of the alternative elements listed … was necessarily found or admitted," *id.* at 2249. To do this, the "sentencing court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy)." *Id.* (These documents are sometimes called *Shepard* documents, after *Shepard* v. *United States*, 544 U.S. 13, 26 (2005).) As with the categorical approach, the "focus" of the modified categorical approach is "on the elements, rather than the facts, of a crime." *Mathis*, 136 S. Ct. at 2254 n.4. Sentencing courts then compare, "as the categorical approach commands," the specific alternative crime of conviction "with the relevant generic offense," to determine whether the conviction qualifies as an ACCA predicate. *Id.* at 2249.

In sum, a criminal statute that lists alternative *elements* is divisible and requires use of the modified categorical approach, whereas a criminal statute that lists alternative *means* of committing a single defined set of elements (i.e., a single offense) is indivisible and requires use of the categorical approach. Accordingly, "[t]he first task for a sentencing court faced with an alternatively phrased statute is … to determine whether its listed items are elements or means." *Mathis*, 136 S. Ct. at 2256.

3. In *Mathis*, this Court provided guidance on how sentencing courts are to go about performing that

"first task." 136 S. Ct. at 2256. A criminal statute that offers alternatives, the Court explained, specifies *elements* (and thus is divisible) if (1) the "statutory alternatives carry different punishments," (2) the jury must "agree" on a single alternative, or (3) the prosecutor "must … charge[]" a single alternative. *Id.* If instead the "statutory list is drafted to offer illustrative examples, then it includes only a crime's means of commission," and the statute is indivisible. *Id.* (quotation marks omitted).

In conducting this inquiry, sentencing courts should begin with "authoritative sources of state law." *Mathis*, 136 S. Ct. at 2256. Thus, if "a state court decision definitively answers the question, … a sentencing judge need only follow what it says." *Id.* But absent such guidance, sentencing courts should examine "the statute on its face." *Id.* And if the statute "fails to provide clear answers, federal judges have another place to look: the record of a prior conviction itself." *Id.* In particular, courts may take a "peek at the [*Shepard*] documents"—not to determine which alternative was found by the jury or admitted by the defendant (as would occur under the modified categorical approach), but for "the sole and limited purpose of determining whether [the listed items are] element[s] of the offense" or means by which the offense may be committed. *Id.* at 2256-2257 (alterations in original). "Only if the answer is" that the listed items are elements can sentencing courts then "make further use of the [*Shepard*] materials," i.e., only then can courts apply the modified categorical approach. *Id.* at 2257.

For example, a defendant's record of conviction would provide "as clear an indication as any that each alternative is only a possible means of commission" if "one count of an indictment and correlative jury in-

structions charge a defendant" with burgling multiple places in the statute's list of alternative locations or "if those documents use a single umbrella term like 'premises.'" *Mathis*, 136 S. Ct. at 2257. "Conversely, an indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime." *Id.*

If the "record materials" that a court can properly consult do not "speak plainly," then the court "will not be able to satisfy [the] 'demand for certainty' when determining whether a defendant was convicted of a generic offense," and thus must conclude that the statute is indivisible. *Mathis*, 136 S. Ct. at 2257 (quoting *Shepard*, 544 U.S. at 21).

4. Applying the foregoing framework, this Court in *Mathis* determined that the alternatively phrased list of places in the Iowa statute at issue was not divisible (and hence the modified categorical approach could not be used). The statute defined burglary in terms of entering "an occupied structure." Iowa Code §713.1 (1989). And a separate Iowa statute defined "occupied structure" with an alternatively phrased list, namely, "any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value." *Id.* §702.12 (1989), *cited in Mathis*, 136 S. Ct. at 2250. The Court concluded that "those listed locations" were alternative means rather than alternative elements because the Iowa Supreme Court had held that each location "served as an 'alternative method of committing the single crime' of burglary, so that a jury need not agree on which of the

locations was actually involved." *Mathis*, 136 S. Ct. at 2250 (quoting *State* v. *Duncan*, 312 N.W.2d 519, 523 (Iowa 1981)); *see also id.* at 2256.

B. Proceedings Below

1. In 2005, Petitioner James Avery, Jr., was convicted in Florida of being a felon in possession of a firearm in violation of 18 U.S.C. §922(g)(1). App. 2a. The district court imposed a sentence enhancement under ACCA based on Mr. Avery's prior convictions. App. 3a.

After additional proceedings in the district court and the Eleventh Circuit (proceedings that are not relevant to this petition), Mr. Avery moved under 28 U.S.C. §2255 to vacate his sentence on the ground that he did not qualify for an ACCA sentence enhancement. App. 4a. The district court denied the motion, finding in pertinent part that Mr. Avery had three prior convictions that qualified as predicate "violent felon[ies]" for purposes of ACCA enhancement—one of which was a conviction for burglary under Georgia law. App. 5a-6a, 16a-20a.

2. On appeal, Mr. Avery raised several issues. As relevant here, he argued that his Georgia burglary conviction is not a predicate ACCA violent felony because the Georgia statute under which he was convicted is "categorically too broad to satisfy the [generic] definition of burglary." App. 6a-7a. That statute provided:

> A person commits burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, aircraft, watercraft, or other such structure designed for use as the

> dwelling of another, or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof.

Ga. Code §26-1601 (1977) (codifying Ga. L. 1977 Sess. No. 377 (Sen. Bill No. 310) §1).[1]

Mr. Avery contended that the Georgia statute is "indivisible" because its alternatively phrased list of places merely provides "illustrative examples of how burglary can be committed," not "alternative elements." Appellant's C.A. Br. 24-25. Further, he explained, because some items in the statute's "expansive" list are not within the scope of the generic burglary offense, the statute defines a non-generic crime, which cannot qualify as a "violent felony" under ACCA. *Id.*

The Eleventh Circuit affirmed in an unpublished opinion. The panel "acknowledge[d] that the Fourth Circuit recently" agreed with Mr. Avery's contention, holding that "Georgia's burglary statute is categorically overbroad and therefore not a valid ACCA predicate." App. 7a n.6 (citing *United States* v. *Cornette*, 932 F.3d 204, 213-215 & n.2 (4th Cir. 2019)). But the court determined that Mr. Avery's argument was foreclosed by the Eleventh Circuit's divided panel decision in *United States* v. *Gundy*, 842 F.3d 1156 (11th Cir. 2016). There, the Eleventh Circuit conceded that Georgia's burglary statute is "broader than the generic definition of burglary." App. 7a; *see also Gundy*, 842 F.3d at 1165 (Georgia statute "criminalized conduct broader than ACCA's generic definition of burglary"). But *Gundy*

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[1] Mr. Avery was convicted in 1978, *see, e.g.*, App. 2a, 7a, but the parties agree that he was convicted under the statute as amended in March 1977, *see* Appellant's C.A. Br. 21-22 & n.6; Appellee's C.A. Br. 2, 5, 47; Dist. Ct. ECF #19-8, at 3.

then concluded, over a dissent, that the statute's alternatively phrased list of places "sets out separate crimes based on the location the defendant entered (a dwelling, building, railroad car, vehicle, or watercraft)"—i.e., concluded that the list of locations specifies alternative *elements* rather than *means*, and thus that the statute was divisible. App. 7a; *see also Gundy*, 842 F.3d at 1167. In reaching that conclusion, *Gundy* purported to "apply the principles and tools outlined in *Mathis*": It examined state-court decisions and statutory text, and then took a "peek" at the *Shepard* documents, ruling that all three "clear[ly]" or "plainly" showed that the statute's list of locations specifies elements rather than means. 842 F.3d at 1166-1170.

Judge Jill Pryor dissented in *Gundy*. She agreed with the panel majority that the Georgia burglary statute "sweeps more broadly than the generic crime of burglary." 842 F.3d at 1170. But she would have held that the statute was indivisible and therefore that a conviction for burglary under the statute "cannot be a violent felony under ACCA." *Id.* at 1171. In Judge Pryor's view, both the Georgia statute's text and state-court decisions interpreting it show "unambiguously" that the statute's list merely specified "the different types of locations that can be burglarized, … not separate elements." *Id.* at 1171, 1173. Judge Pryor's dissent also explained that the *Shepard* documents did not speak to the issue as clearly as *Mathis* and *Taylor* require, because one of the "locational terms" stated in the indictment did "not even appear in Georgia's burglary statute." *Id.* at 1171.

"[B]ound to follow" *Gundy*, App. 7a n.6, the Eleventh Circuit here applied the modified categorical approach. Based on Mr. Avery's indictment, which charged him with entering a "building and liquor stor-

age room," Dist. Ct. ECF #19-8, at 3, the court concluded that Mr. Avery's "Georgia burglary conviction qualified as an ACCA predicate," App. 7a-8a.

REASONS FOR GRANTING THE PETITION

The circuits have expressly disagreed over whether the Georgia burglary statute is divisible given its disjunctively phrased list of places—and in the course of doing so, have disagreed about how to conduct the divisibility analysis prescribed by *Mathis*. In the Eleventh Circuit's view, the Georgia statute's text, state-court decisions interpreting it, and burglary indictments under it show that the statute's list specifies alternative elements and thus is divisible. *Gundy*, 842 F.3d at 1166-1168. In *Richardson* v. *United States*, 890 F.3d 616 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 349 (2018), the Sixth Circuit reached the same conclusion but agreed only with the Eleventh Circuit's reading of Georgia indictments; the Sixth Circuit considered the statute's text and state-court decisions inconclusive. *Id.* at 623-629. And in *Cornette*, the Fourth Circuit fully disagreed with both the Eleventh Circuit and the Sixth Circuit, concluding that both the statute's text and state-court decisions showed the statute to be *in*divisible. 932 F.3d at 213-215 & n.2.[2]

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[2] These cases involved different versions of the Georgia burglary statute, but the differences are immaterial to this case. Mr. Avery was convicted under the 1977 version, *see supra* note 1, a version "virtually identical" to the 1980 version considered in *Gundy* and by the Sixth Circuit. App. 7a; *accord* Appellee's C.A. Br. 47 (labeling the two versions "substantively identical"). The Fourth Circuit, meanwhile, addressed the 1968 version, which was likewise substantively identical to the 1977 and 1980 versions. *See Cornette*, 932 F.3d at 214. The most significant difference among the three versions is whether "aircraft" is (or was) included in the

A proper application of this Court's precedent shows that the Georgia burglary statute is indivisible largely for the reasons given by the Fourth Circuit, and hence that the Sixth and Eleventh Circuits erred in concluding otherwise. In summary, the Court's precedent teaches that: a list's disjunctive phrasing generates rather than resolves the question of divisibility; whether a list appears in the main provision of a statute or instead is incorporated by reference is irrelevant; even if a statute does not use the term "includes," other catchalls (e.g., "other" structures or buildings) can show a statute to be indivisible, especially when the alternative places do not carry different penalties; and whereas prosecutors' ability to charge multiple listed places alternatively reveals a statute to be indivisible, prosecutors' ability to charge a single listed place reveals nothing.

Whether the Georgia burglary statute is divisible is critical to determining whether a conviction under it exposes a defendant who is later convicted of unlawfully possessing a firearm to a much lengthier prison sentence—specifically, a 15-year mandatory minimum rather than a 10-year maximum. If the Georgia statute is indivisible, as the Fourth Circuit holds, then a conviction under it cannot qualify as an ACCA predicate. But if, as the Sixth and Eleventh Circuits hold, the statute is divisible, then under certain circumstances a conviction under it can qualify as such a predicate. Because of the acknowledged circuit conflict, some defendants will receive markedly longer sentences under ACCA by the

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list of places. (The statute was revised again in 2012 and 2017, but "the relevant language … did not change from the pre-July-2012 version to the 2012-2017 version." *Richardson*, 890 F.3d at 627 & n.6.)

sheer fortuity of geography. That outcome contradicts Congress's and this Court's efforts to establish a uniform approach to sentence enhancements.

The disagreement about the divisibility of the Georgia burglary statute also has wider ramifications. The statute's salient features appear in other criminal statutes (which have been interpreted by numerous state cases) and consequently the treatment of the Georgia statute's divisibility will guide the divisibility analysis of other statutes. That will affect not only ACCA cases, but also cases arising in other sentencing contexts as well as immigration cases.

I. THE DECISION BELOW ENTRENCHES A CLEAR AND ACKNOWLEDGED CIRCUIT CONFLICT

The courts of appeals are avowedly divided over whether the Georgia burglary statute under which Mr. Avery was convicted is divisible for ACCA purposes. The Sixth and Eleventh Circuits have held that the statute's list of locations specifies distinct elements and thus defines a set of distinct crimes, some of which conform to the generic burglary offense. In contrast, the Fourth Circuit has held that the list merely identifies alternative means of satisfying a single element of the offense and hence defines a single crime, one that is broader than the generic burglary offense. In reaching these opposite conclusions, moreover, the circuits' analyses of the statute under *Mathis* have diverged in several respects. Indeed, even the Sixth and Eleventh Circuits, though reaching the same result, disagreed on all but one aspect of the analysis.

A. The first court of appeals case to address the question presented after *Mathis* was *Gundy*. There, the Eleventh Circuit concluded, over Judge Jill Pryor's dissent, that all three sources *Mathis* identified as per-

missible bases for determining whether a disjunctive statutory list specifies elements or means—state-court decisions, the statutory text, and the record of conviction—show the Georgia burglary statute's list of locations to be elements, making the statute divisible. *Gundy*, 842 F.3d at 1161-1170.

Starting with the statutory text, the Eleventh Circuit reasoned that "[i]n contrast to Iowa's statute in *Mathis*, … the text of the Georgia burglary statute … does not use a single locational element (like 'occupied structure' or 'building') [or] contain a definition elsewhere that provides a non-exhaustive laundry list of other places or locations." 842 F.3d at 1166. The court also noted that the Georgia statute "does not use the term 'includes.'" *Id.* "Rather," the court asserted, "the plain text of the Georgia statute has three subsets of different locational elements, stated in the alternative and in the disjunctive": (1) "the dwelling house of another"; (2) "any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another"; and (3) "any other building, railroad car, aircraft, or any room or any part thereof." *Id.* at 1166-1167 (emphasis omitted). In the court's view, "[e]ach of the three subsets enumerates a finite list of specific structures in which the unlawful entry must occur to constitute the crime of burglary[,] … effectively creating several different crimes." *Id.* at 1167.

The court next deemed its reading of the statute confirmed by Georgia cases that (in its view) have held that "a prosecutor must select, identify, and charge the specific place or location that was burgled." 842 F.3d at 1167. For example, the court noted, the Georgia Court of Appeals stated in one case "that 'where the defendant is charged with burglary, the indictment must specify the location of the burglary' and conclud[ed] that the

indictment was sufficient where it charged [an identified] 'building.'" *Id.* (quoting *Morris* v. *State*, 303 S.E.2d 492, 494 (Ga. Ct. App. 1983)). And in another case, the Eleventh Circuit added, the Georgia Supreme Court "set aside the defendant's burglary conviction because the indictment did not charge that the vehicle was 'designed for use as a dwelling,'" yet having a "'vehicle … designed as a dwelling was an *essential element of the offense* which must be alleged.'" *Id.* at 1168 (quoting *DeFrancis* v. *Manning*, 271 S.E.2d 209, 210 (Ga. 1980)).[3]

Finally, the Eleventh Circuit stated that, even "if the Georgia law is not clear as to elements or means," the court would hold the statute divisible based on "*Mathis*'s 'peek at the record.'" *Gundy*, 842 F.3d at 1170. In particular, the court explained that the relevant indictments' specification of a "house" (a "dwelling house" in some indictments, a "business house" in others) "satisf[ied] *Taylor*'s demand for certainty that Gundy's convictions were for burglary of a building or other structure, which is a generic burglary." *Id.*

B. The next court of appeals to consider the question presented was the Sixth Circuit, which reached the same conclusion as the Eleventh Circuit (i.e., that the Georgia statute is divisible), but "disagree[d] with" much of *Gundy*'s reasoning. *Richardson*, 890 F.3d at 628. The Sixth Circuit agreed with *Gundy* that the Georgia statute does not "use the broad term 'includes,'" and distinguished the Iowa statute interpreted in *Mathis* on the ground that "Georgia's burglary stat-

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[3] *Gundy* also relied on a pre-*Mathis* Fifth Circuit decision holding the Georgia burglary statute divisible. *See* 842 F.3d at 1168 (citing *United States* v. *Martinez-Garcia*, 625 F.3d 196, 198 (5th Cir. 2010)).

ute does not use a single locational term such as 'occupied structure,'" "which is then separately defined by means of 'illustrative examples.'" *Id.* at 623. But whereas the Eleventh Circuit treated those points as indicative of a divisible statute, the Sixth Circuit deemed "this inquiry [into the statutory text] of no help." *Id.*

The Sixth Circuit (again in contrast to the Eleventh) also regarded the Georgia statute's disjunctive structure as unilluminating. Indeed, *Richardson* dismissed "*Gundy*'s conclusion that the statute's structure supports finding that the locations are elements [a]s problematic," because "'*Mathis* makes clear that alternative phrasing is a necessary—but by no means sufficient—condition to read a statute as setting out alternative elements.'" 890 F.3d at 623 (quoting *Gundy*, 842 F.3d at 1174 (Pryor, J., dissenting)).

Finally, the Sixth Circuit disagreed with the Eleventh Circuit's reading of Georgia case law, deeming that case law inconclusive. Specifically, the Sixth Circuit stated that the Georgia appellate decision in *Morris* (on which *Gundy* relied) dealt "with notice to the accused and double jeopardy," and did "not address the elements of the burglary statute." *Richardson*, 890 F.3d at 625-626 (citing *Gundy*, 842 F.3d at 1176 (Pryor, J., dissenting)). Similarly, the Sixth Circuit explained that the issue in *DeFrancis* (a Georgia Supreme Court decision on which *Gundy* also relied) was "'not whether the burglary occurred in a truck versus a building, but rather whether the truck met the statute's requirement that it be designed for use as a dwelling.'" *Id.* at 624 (quoting *Gundy*, 842 F.3d at 1176-1177 (Pryor, J., dissenting)).

The Sixth Circuit therefore took a *Mathis* "peek" at "Richardson's indictments—the only available record documents"—and, like the Eleventh Circuit, concluded that they showed that "the alternative locations are elements and the statute is divisible as to the locations that can be burglarized." *Richardson*, 890 F.3d at 628-629. "Each indictment," the court said, "references only one of the several alternative locations listed in Georgia's burglary statute"; two charged Richardson with burglarizing a "dwelling house," while the third referred to a "building, to wit: [a café]." *Id.* at 629 (alteration in original). Consequently, the Sixth Circuit concluded, the Georgia statute is divisible. *Id.*

C. The Fourth Circuit reached the opposite conclusion in *Cornette*, holding the Georgia statute indivisible based on both the statutory text and state-court decisions. The court "recognize[d] that [its] conclusion puts [it] at odds with" *Gundy* and *Richardson*, but stated that it did "not find the reasoning of [its] sister circuits persuasive." *Cornette*, 932 F.3d at 213 n.2.

The Fourth Circuit initially observed that, although "the statute's disjunctive language sets up a divisibility question, it does not answer" that question. 932 F.3d at 212. Specifically, the court stated that "the statute's language suggests that it consists of alternative means as opposed to alternative elements" because the list appeared to be "illustrative examples" and the statute neither "contain[s] different penalties based on the type of location burgled" nor "require[s] prosecutors to charge the type of location burgled." *Id.* The court also echoed the Sixth Circuit's criticism of the Eleventh Circuit's reasoning on that point. *Id.* at 213 n.2.

Turning to case law, the Fourth Circuit explained that "Georgia courts have repeatedly upheld jury instructions where a jury was entitled to find entry into either a 'dwelling house or building,' with no unanimity requirement on those alternatives." *Cornette*, 932 F.3d at 212. For example, the court observed, a Georgia appellate decision held "that such a jury instruction was 'sufficient to inform the jury of the essential elements of the offense,'" *id.* (quoting *Hart* v. *State*, 517 S.E.2d 790, 792-793 (Ga. Ct. App. 1999)). The Fourth Circuit also noted that, contrary to the Eleventh Circuit's view, the state appellate decision in *Morris* does not indicate that the statute is divisible because, although it requires prosecutors "to charge 'the specific location' burgled, … there is no analogous requirement that prosecutors charge or prove the *type* of location burgled." *Id.* (quoting *Morris*, 303 S.E.2d at 494). Finally, the Fourth Circuit concluded (as the Sixth Circuit had in *Richardson*) that "[a]ll *DeFrancis* tells us is that burglary requires a dwelling." *Id.* at 213.

The Fourth Circuit then parted ways with both the Sixth and Eleventh Circuits on the lesson to draw from the "peek" at the conviction record. Returning to the Georgia Court of Appeals' decision in *Hart*, the Fourth Circuit explained that "even an indictment that includes a specific type of statutory location cannot establish that the location type is an element of the charged offense because a jury could properly have been instructed with finding entry into either a 'dwelling house or building.'" 932 F.3d at 213 n.2 (citing *Hart*, 517 S.E.2d at 792-793).

Having held the statute indivisible, the Fourth Circuit applied the categorical approach and determined that the Georgia burglary statute is "overbroad compared to the generic burglary crime in the enumerated

clause of the ACCA." *Cornette*, 932 F.3d at 215. Consequently, the court concluded, the prior conviction under that statute did not qualify as "a 'violent felony' for purposes of the ACCA sentencing enhancement." *Id.*

D. This case—the first court of appeals decision on the question presented after the Fourth Circuit rejected the Eleventh and Sixth Circuit's position—entrenches the circuit conflict. The Eleventh Circuit here "acknowledge[d] that the Fourth Circuit recently disagreed with *Gundy*," but held that it was "bound to follow *Gundy*." App. 7a n.6. Accordingly, the court concluded that the Georgia burglary statute, "though broader than the generic definition of burglary, sets out separate crimes based on the location the defendant entered (a dwelling, building, railroad car, vehicle, or watercraft), some of which qualify as ACCA predicates." App. 7a.

II. THE DECISION BELOW IS WRONG

The Sixth and Eleventh Circuits erred in concluding that the Georgia burglary statute under which Mr. Avery was convicted is divisible; the statute "defines one crime, with one set of elements … while specifying multiple means of fulfilling its locational element," *Mathis*, 136 S. Ct. at 2250. Indeed, each of the three sources that courts may consider under *Mathis* shows that the Georgia burglary statute is indivisible—or at a minimum, lacks the clarity required to find the statute divisible. The Eleventh Circuit therefore should have applied the categorical approach here rather than the modified categorial approach. Had it done so, it would have concluded that Mr. Avery's Georgia burglary conviction is not a predicate "violent felony" for purposes of the ACCA sentencing enhancement, because there is no dispute that the statute's definition of burglary is

"broader than the generic definition of burglary." App. 7a.

A. Georgia case law supports the conclusion that the statute is indivisible, by making clear that, in order to convict under the state's burglary statute, "a jury need not find (or a defendant admit) any particular" location, *Mathis*, 136 S. Ct. at 2249. In *Hart*, for example, although the indictment charged entry into a "dwelling house," the jury instruction defined the crime in terms of entry into "a building or dwelling house." 517 S.E.2d at 792. The Georgia court held that "[t]hese instructions were sufficient to inform the jury of the essential *elements of the offense*." *Id.* at 792-793 (emphasis added); *see also Cornette*, 932 F.3d at 212 (citing cases). There was no need for the jury unanimously to choose one option or the other in order to convict.

Gundy did not address *Hart* or similar Georgia cases, even though they were cited by the dissent, *see* 842 F.3d at 1173 (opinion of Pryor, J.). Instead, the Eleventh Circuit cited *Morris* and other cases for the proposition that "a burglary indictment must charge the particular place or premises burgled and the specific location of that place or premises." *Id.* at 1167 (majority opinion). As the Sixth Circuit pointed out, however, those cases dealt "with notice to the accused and double jeopardy," not the elements of burglary. *Richardson*, 890 F.3d at 626. The Eleventh Circuit also purported to find support in *DeFrancis*, but there the Georgia Supreme Court reversed the conviction because the state failed to prove that the entered vehicle—the location at issue—was "designed for use as the dwelling of another," as the statute required, 271 S.E.2d at 210. The Georgia court said nothing about whether the jury had to agree on the specific type of location. *See Gundy*, 842 F.3d at 1177 (Pryor, J., dissenting).

More generally, the Eleventh Circuit erred in inferring divisibility—that is, the elements the prosecution must *prove*—solely from what the prosecution may *charge*. As *Mathis* makes clear, for purposes of determining whether a statute of conviction is divisible, the "only" question is "what a jury 'necessarily found' to convict a defendant (or what he necessarily admitted)." 136 S. Ct. at 2255 (quoting *Descamps* v. *United States*, 570 U.S. 254, 272 (2013)). Although an indictment *combined* with jury instructions "could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements," *id.* at 2257, an indictment by itself is not a sound basis for ascertaining what a jury is required to find.

That is because prosecutors are not required to include the specific type of place where an alleged crime occurred; an indictment need contain only facts sufficient to fairly inform the defendant of the charge against him and to enable him "to plead an acquittal or conviction [as a] bar of future prosecutions for the same offense," *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). Thus the fact that a particular indictment happened to allege burglary of a specific place—e.g., "defendant burgled a house at 122 Maple Road," *Mathis*, 136 S. Ct. at 2255—does not mean that the indictment was *required* to plead such detail, much less that that detail was an element required to be proven beyond a reasonable doubt. In fact, in *Gundy* itself, some of the indictments did not recite *any* of the statute's locational items, using a different locational term altogether. *See* 842 F.3d at 1178 (Pryor, J., dissenting). Moreover, defendants often "have no incentive to contest what does not matter under the law; to the contrary, [they] may have good reason not to—or even be precluded from doing so by the court." *Mathis*, 136 S. Ct. at 2253 (quo-

tation marks omitted); *see also Descamps*, 570 U.S. at 278 (Kennedy, J., concurring) ("certain facts in the documents approved for judicial examination in *Shepard* … may go uncontested because they do not alter the sentencing consequences of the crime"). Indeed, this Court has explained, an indictment's "statements of fact … may be downright wrong." *Descamps*, 570 U.S. at 270. And even when an indictment identifies a single item from a disjunctive statutory list, it is often still permissible to instruct the jury with more than one item from the list—as is the case in Georgia, *see Hart*, 517 S.E.2d at 793. An indictment alone, therefore, shows "[a]t most" that the defendant "hypothetically *could have been* convicted under a law criminalizing [the alleged] conduct." *Descamps*, 570 U.S. at 268. But "that is just what [this Court] said, in *Taylor* and elsewhere, is not enough" for the conviction to qualify as a predicate offense under ACCA. *Id.*

In short, to the extent an indictment by itself is revealing on the question of divisibility, it is only as a rule of exclusion, i.e., to establish that the statute of conviction is *indivisible* where the indictment recites a disjunctive list.

B. The text of the Georgia burglary statute also explicitly treats the list of locations as means rather than elements. For example, the "statutory alternatives" do not "carry different punishments." *Mathis*, 136 S. Ct. at 2256. Nor does the statute "itself identify" the locations as individual "things [that] must be charged." *Id.* It instead uses the list as the "[c]onverse[]": "illustrative examples" of the "crime's means of commission." *Id.*

This conclusion is confirmed by the statute's use of the sweeping phrases "*other* such structure[s]" and

"any *other* building, railroad car, aircraft." Ga. Code §26-1601 (emphasis added). These references to indeterminate "places" make clear that the statutory list identifies examples, not elements. *Mathis*, 136 S. Ct. at 2256; *see also Gundy*, 842 F.3d at 1175 (Pryor, J., dissenting) ("[t]he phrase 'other such structure[s]' cannot be part of a finite list"). In this respect, the Georgia burglary statute parallels the Iowa statute that this Court held indivisible in *Mathis*. The Iowa statute said that "[a]n 'occupied structure' is any building, structure, appurtenances to buildings and structures, land, water or air vehicle, *or similar place* adapted for overnight accommodation of persons." Iowa Code §702.12 (emphasis altered).

The Eleventh Circuit's contrary conclusion cannot be reconciled with this Court's precedent. The court of appeals deemed it significant that the Georgia statute's list of locations is "stated in the alternative and in the disjunctive." *Gundy*, 842 F.3d at 1167. But that was true of the Iowa statute in *Mathis* as well: "Iowa's burglary law … itemize[s] the various places that crime could occur as *disjunctive* factual scenarios rather than separate elements." 136 S. Ct. at 2249 (emphasis added). Indeed, the United States argued in *Mathis* (Br. 24-25) that "a statute is divisible, and therefore amenable to use of the modified categorical approach, if it is phrased in the 'disjunctive.'" This Court, however, rejected that position. *See* 136 S. Ct. at 2249. *Mathis* thus leaves no doubt that a disjunctive list is merely the precondition for inquiring whether the list specifies elements or means, not an indication that the items on the list are elements.

Gundy also emphasized that the Georgia burglary statute "does not use the term 'includes.'" 842 F.3d at 1166. But the Eleventh Circuit ignored the significance

of the statutory phrases "other such structure[s]" and "any other building, railroad car, aircraft." As explained, those phrases "serve[] essentially the same function" as terms like "includes," *id.* at 1175 (Pryor, J., dissenting): They create an open-ended, indeterminate set, of which the enumerated items are merely illustrative examples, not elements of alternative crimes.

Gundy likewise went astray in focusing on the fact that the Georgia statute, unlike the Iowa statute at issue in *Mathis*, "does not use a single locational element (like 'occupied structure' or 'building')" that is defined "elsewhere" in the statute with a "laundry list of other places or locations." 842 F.3d at 1166. That structural difference "proves nothing." *Id.* at 1175 (Pryor, J., dissenting). The Iowa statute was indivisible not because it used a single locational element initially but because it defined the crime in terms of an illustrative list of multiple means that could establish the single locational element. And this Court's statutory reading did not rest on the fact that the list was in a separate definitional provision, nor is there any reason to believe the Court would have reached a contrary conclusion had the list been stated in the principal burglary provision.

Lastly, the Eleventh Circuit's perception of "three subsets of different locational elements" in the Georgia burglary statute confirms the error of its textual analysis. The statute does not break down its locational items into subsections, nor would it matter if it did, *see, e.g.*, *United States* v. *Edwards*, 836 F.3d 831, 834-838 (7th Cir. 2016) (Wisconsin burglary statute that lists locations in disjunctive subsections is indivisible). Moreover, the third supposed "locational element[]" *Gundy* identified—"any other building, railroad car, aircraft, or any room or any part thereof," 842 F.3d at 1166-1167—is incoherent. A prosecutor could not

charge, a jury could not find, and a defendant could not commit a distinct crime of entering "any *other* building, railroad car, [or] aircraft."

C. Because Georgia case law and the burglary statute's text "provide clear answers" regarding the statute's indivisibility, *Mathis*, 136 S. Ct. 2256, there is no need to "peek" at the *Shepard* documents. But even if there were, those documents would not establish that the Georgia burglary statute is divisible.

In *Gundy*, the Eleventh Circuit determined that prior indictments revealed the statute to be divisible because each indictment referred to only one type of location: Some referred to a "dwelling house" while others referred to a "business house." 842 F.3d at 1170. The Sixth Circuit made a similar determination. *Richardson*, 890 F.3d at 629. But as discussed, an indictment's inclusion of a single location from a statutory list—as in Mr. Avery's Georgia indictment, *see* Dist. Ct. ECF #19-8, at 3 ("building and liquor storage room")—proves nothing about what a jury must find (or what a defendant must admit) under state law.

In fact, as Judge Pryor's dissent observed, the term "business house" "cannot be found in the text of the statute and therefore cannot be an element." 842 F.3d at 1178-1179. Thus, the "business house" indictments in *Gundy* show that a jury need not agree upon a single particular item from the Georgia burglary statute's disjunctive list. At a minimum, however, the indictments are insufficiently clear to establish the statute's divisibility, given "*Taylor*'s 'demand for certainty' when determining whether a defendant was convicted of a generic offense," *Mathis*, 136 S. Ct. at 2257 (quoting *Shepard*, 544 U.S. at 21).

In short, the Eleventh and Sixth Circuit's decisions holding the Georgia burglary statute divisible cannot be reconciled with *Mathis* or this Court's other pertinent precedent.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT BOTH IN THE ACCA CONTEXT AND BEYOND

Even if the issues raised in this case were limited to the divisibility of Georgia's burglary statute, the question presented would be an important and recurring one, warranting this Court's review. As Judge Pryor warned in her dissent in *Gundy*, the Eleventh Circuit's "misinterpretation of Georgia law will decide the fate of countless individuals who stand to serve unjustly expanded prison terms as a result." 842 F.3d at 1170.

The question presented, however, has ramifications well beyond the Georgia statute, as proper application of *Mathis*'s elements-or-means inquiry affects whether many other statutes may qualify as ACCA predicates. Moreover, divisibility decisions have broad application in the immigration as well as the criminal contexts, which reinforces the far-reaching implications of the flaws in the Eleventh Circuit's analysis.

A. The circuits' division over whether the Georgia burglary statute is divisible will result in unfair and improper disparate treatment of numerous ACCA defendants, based solely on the jurisdiction in which they are sentenced. Within the Sixth and Eleventh Circuits, there have already been many cases in which a prior Georgia burglary conviction was used as an ACCA predicate offense. *See Vowell* v. *United States*, 938 F.3d 260, 270 (6th Cir. 2019); *United States* v. *Brundidge*, 708 F. App'x 608, 611 (11th Cir. 2017) (per curi-

am); *United States* v. *Baxley*, 2017 WL 3439204, at *1-2 (N.D. Fla. Aug. 10, 2017), *aff'd*, 714 F. App'x 985 (11th Cir. 2018) (per curiam); *United States* v. *Pearsey*, 701 F. App'x 773, 775-776 (11th Cir. 2017) (per curiam); *Perry* v. *United States*, 2019 WL 4202000, at *3-4 (N.D. Ala. Sept. 5, 2019); *Williams* v. *United States*, 2018 WL 771336, at *12-13 (S.D. Ga. Feb. 7, 2018) (report and recommendation), *adopted*, 2018 WL 1528575 (S.D. Ga. Mar. 28, 2018); *O'Neal* v. *United States*, 2017 WL 1028575, at *4-6 (S.D. Ga. Mar. 16, 2017) (report and recommendation), *adopted*, 2017 WL 1382917 (S.D. Ga. Apr. 11, 2017); *Creekmore* v. *United States*, 2017 WL 386660, at *6-8 (N.D. Ala. Jan. 27, 2017). And more such cases are likely. Moreover, courts in other circuits that confront the question will necessarily sentence ACCA defendants under a regime that differs from the ACCA sentencing regime in at least one other circuit. *See Bullock* v. *United States*, 2018 WL 1702388, at *3-4 (E.D. Mo. Apr. 6, 2018); *United States* v. *Stevenson*, 2017 WL 2688231, at *1-2 (W.D. Va. June 22, 2017).

Such irrational sentencing disparities are undesirable in any context, but are particularly problematic in the context of ACCA, through which Congress sought to create a uniform approach to sentencing enhancements, avoiding "the vagaries of state law" and "protect[ing] offenders from the unfairness of having enhancement depend upon the label employed by the State of conviction." *Taylor*, 495 U.S. at 588-589; *see also Mathis*, 136 S. Ct. at 2258 (Kennedy, J., concurring) ("Congress … could not have intended vast sentencing disparities for defendants convicted of identical criminal conduct in different jurisdictions."). Similarly, this Court has explained, ensuring that "defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under feder-

al law … was *Taylor*'s chief concern in adopting the categorical approach." *Moncrieffe* v. *Holder*, 569 U.S. 184, 205 n.11 (2013).

B. The circuit conflict over the question presented also implicates more general issues about the proper application of the framework set forth in *Mathis* for determining whether an alternatively phrased statute lists elements or means, i.e., whether it is divisible.

As explained, the Fourth, Sixth, and Eleventh Circuits are analytically divided—sometimes three ways—regarding several aspects of divisibility analysis, notably the importance of: a statutory list's disjunctive nature; the absence of different punishments for the different items in the list; the absence of words like "including" to introduce the list; the placement of the list in the primary provision defining the crime rather than in a separate statutory provision that defines a single locational element found in the primary provision; and an indictment that names only one locational item from the list.

This analytical disagreement will affect not only cases involving convictions under the Georgia burglary statute, but also cases involving convictions under other statutes, because disjunctive statutory lists are common, as are indictments naming only one item from such a list. As decisions from around the country demonstrate, moreover, other salient features of the Georgia burglary statute are likewise common in criminal statutes with disjunctively phrased lists. *See, e.g.*, *United States* v. *Naylor*, 887 F.3d 397, 401 (8th Cir. 2018) (en banc) (Missouri burglary statute's definition of locational term in separate section did not clarify "the means-elements issue"); *United States* v. *Reyes-Ochoa*, 861 F.3d 582, 586-588 (5th Cir. 2017) (Virginia

burglary statute that disjunctively lists locations without using "including" to introduce the list, and places the list in the primary provision, was indivisible); *Edwards*, 836 F.3d at 834-838 (Wisconsin burglary statute that lists locations in disjunctive subsections, does not use "including" to introduce subsections, and places subsections in the primary provision was indivisible). Answering the question presented here would thus bring substantial clarity regarding ACCA sentencing beyond the context of the Georgia burglary statute.

C. Finally, the effects of the circuit split will be felt beyond the ACCA context, and indeed beyond the criminal context. As the government has recognized, whether any given criminal statute lists elements or means affects application of the sentencing guidelines in criminal cases, as well as immigration cases. *See* Pet.-Stage U.S. Br. 22-23, *Mathis*, No. 15-6092 (U.S. Dec. 17, 2015) ("U.S. *Mathis* Pet.-Stage Br.").

Courts use the categorical and modified categorical approaches under the sentencing guidelines, to determine whether defendants have prior felony convictions for a "crime of violence" or a "controlled substance offense." *E.g.*, U.S. Sentencing Guidelines §§4B1.1, 4B1.2; *see also* U.S. *Mathis* Pet.-Stage Br. 22. And courts have looked to *Mathis*'s elements-or-means analysis in making such determinations. *See, e.g.*, *United States* v. *Urbina-Fuentes*, 900 F.3d 687, 694-696 (5th Cir. 2018) (Florida attempted burglary conviction); *Reyes-Ochoa*, 861 F.3d at 586-588 (Virginia burglary conviction); *United States* v. *Steiner*, 847 F.3d 103, 118-120 (3d Cir. 2017) (Pennsylvania burglary conviction); *Edwards*, 836 F.3d at 834-838 (Wisconsin burglary conviction).

In the immigration context, meanwhile, courts use the categorical and modified categorical approaches to determine "whether an alien has been convicted of an offense that triggers civil or criminal immigration-related consequences." U.S. *Mathis* Pet.-Stage Br. 22. For example, the Immigration and Nationality Act provides for removal of aliens convicted of certain types of crimes. *Id.* (citing, e.g., 8 U.S.C. §§1182(a)(2) & 1227(a)(2)). And an alien convicted of an "aggravated felony" (a removable offense) faces a higher statutory maximum if the alien illegally reenters the country after removal and is prosecuted for that crime. *Id.* at 22-23 (citing 8 U.S.C. §1326(b)(2)). This Court has itself applied this type of statutory analysis in the immigration context. *See Moncrieffe*, 569 U.S. at 190-194.

The courts of appeals that have done likewise in recent years have looked to the analysis in *Mathis*—and, in the Eleventh Circuit, in *Gundy*. For example, in *Pruteanu* v. *U.S. Attorney General*, 713 F. App'x 945 (11th Cir. 2017) (per curiam), the Eleventh Circuit affirmed an alien's removal because, under *Gundy*, his prior Georgia burglary convictions qualified as aggravated felonies (which made him ineligible for discretionary relief from removal), *id.* at 946-948. On the other hand, the Fourth Circuit has applied *Mathis* to find disjunctively phrased burglary statutes indivisible. *See United States* v. *Pena*, 952 F.3d 503, 507-511 (4th Cir. 2020) (holding Texas's burglary statute indivisible because a jury need not unanimously find one statutory alternative); *Castendet-Lewis* v. *Sessions*, 855 F.3d 253, 260-264 (4th Cir. 2017) (holding Virginia's burglary statute indivisible because "neither the court nor the jury had to find that a particular structure was broken into" to sustain a conviction).

The importance in various criminal and immigration contexts of determining the divisibility of a criminal statute amplifies the importance of having a uniform approach to whether a statutory list identifies elements or means. The arbitrariness that results from the circuit conflict discussed above is widespread and confirms the need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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