No. _____

In the

Supreme Court of the United States

SCOTT NATHAN WEHMHOEFER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

Mr. Wehmhoefer is serving a life sentence under the rarely invoked Federal Three Strikes statute, 18 U.S.C. § 3559(c). The strikes alleged here were violations of Texas's aggravated robbery statute, a statute that in both its simple and aggravated form can be committed by reckless conduct. Ignoring the government's suggestion that the Court hold the case pending this Court's decision in *Borden v. United States*, 19-5410, the Ninth Circuit, instead, affirmed the denial of Mr. Wehmhoefer's petition. Over the dissent of one its members, the panel found that Texas simple robbery was indivisible. While recognizing that Texas's highest court had held that the relevant statutory alternatives "are different methods of committing the same offense," the Ninth Circuit held that that holding did not undermine its conclusion that the statute was divisible. And it ignored numerous Texas cases actually charging multiple variants of Texas robbery in a single count, and instructing the jury as to multiple variants without requiring unanimity—markers that this Court has called "as clear an indication as any" that a statute is not divisible. *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016). In other words, the same Ninth Circuit that this Court once chastised for flouting this Court's precedents on divisibility—"[d]ismissing everything we have said on the subject" and choosing an analysis that has "no roots in our precedents," *Descamps v. United States*, 570 U.S. 254, 265-66 (2013)—is at it again.

The question presented is whether the life sentence imposed in this case pursuant to 18 U.S.C. § 3559(c) is invalid, because Texas aggravated robbery, which can be committed by reckless conduct, is not a serious violent felony after *Johnson v. United States*, 576 U.S. 591 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), because it is indivisible and overbroad.

Statement of Related Proceedings

- *United States v. Scott Nathan Wehmhoefer,* 2:98-cr-00682-RAP-1 (C.D. Cal. Apr. 21, 2000)
- *United States v. Scott Nathan Wehmhoefer,* 00-50253 (9th Cir. Jul. 31, 2001)
- *United States v. Scott Nathan Wehmhoefer,* 01-7067 (S.Ct. Jan. 7, 2002)
- *Scott Nathan Wehmhoefer v. United States,* 2:16-cv-04622-TJH (C.D. Cal. Jun. 21, 2018)
- *Scott Nathan Wehmhoefer. v. United States*, 18-55830 (9th Cir. Nov. 17, 2020)

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Petition for Writ of Certiorari

Scott Nathan Wehmhoefer petitions for a writ of certiorari to review the memorandum decision entered by the United States Court of Appeals for the Ninth Circuit affirming the denial of Mr. Wehmhoefer's motion under 28 U.S.C. § 2255.

Opinions Below

The Ninth Circuit's memorandum disposition affirming the denial of Mr. Wehmhoefer's 28 U.S.C. § 2255 motion was not published. (App. 2a-12a.) The district court issued a written order denying Mr. Wehmoefer's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, (App. 15a-19a,) and granting his request for a certificate of appealability (App. 13a-14a.)

Jurisdiction

The Ninth Circuit issued its memorandum disposition affirming the denial of Mr. Wehmhoefer's 28 U.S.C. § 2255 motion on November 17, 2020. (App. 2a-4a.) A timely petition for panel rehearing was denied on January 13, 2021. (App. 1a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved

18 U.S.C. § 3559 provides:

(c) Imprisonment of Certain Violent Felons.

(1) Mandatory life imprisonment.—Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if—

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of—
(i) 2 or more serious violent felonies; or
(ii) one or more serious violent felonies and one or more serious drug offenses

* * *

(2) Definitions.
For purposes of this subsection—

(F) the term "serious violent felony" means—

* * *

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than

involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.

Texas Penal Code 29.02 states:

Robbery

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

(b) An offense under this section is a felony of the second degree.

Statement of the Case

In 1998, Mr. Wehmhoefer was charged with a federal assault under 18 U.S.C. § 113. The government filed an Information charging an enhancement under the Three Strikes provision of 18 U.S.C. § 3559(c). The provision, used only a handful of times in the Ninth Circuit, states that an individual who has certain prior convictions must be sentenced to mandatory life without the possibility of release. In Mr. Wehmhoefer's case, the enhancement depended on his prior convictions for Texas aggravated robbery, which the government alleged were serious violent felonies under § 3559. The district court agreed, and imposed a life sentence.

In 2016, after the Supreme Court's decision in *Johnson v. United States*, Mr. Wehmhoefer filed a petition arguing that his life sentence should be struck because Texas robbery no longer satisfied the serious violent felony standard under § 3559(c). Section § 3559(c) has a residual clause similar to the one struck down in *Johnson*, and other robbery statutes had been found to fall under that provision. *See* Appellant's Opening Brief, at 15-19. If that clause were struck, he argued, none of the remaining provisions of § 3559 provided an alternative basis for upholding the enhancement. Texas robbery can be sustained based on reckless conduct, and reckless conduct does not satisfies the elements clause under current law in the Ninth Circuit. On this basis, Mr. Wehmhoefer asked that the district court order his resentencing. And he raised

those same argument in the Ninth Circuit after the district court denied his motion.

The government raised a number of procedural and substantive hurdles to the motion. But by the time of oral argument, a number of the key questions were no longer on the table. The procedural defenses were foreclosed to the government by *Allen v. Ives*, 950 F.3d 1184, 1189-90 (9th Cir. 2020), which held that one could be actually innocent of a sentencing enhancement. And whether recklessness was beyond the scope of crime-of-violence definition was pending in this Court's case *Borden v. United States*, 19-5410. Thus, at argument, the government suggested that the Court should hold the case pending finality in *Allen v. Ives*, or this Court's decision in *Borden*. Government counsel said:

> In preparation for argument, it became more clear to me that, in fact, this case should be stayed both for *Allen* and for *Borden*. . . . A lot of the arguments on the merits does depend on whether or not reckless conduct can satisfy the . . . violent felony definition. . . .The most conservative way to proceed would be to stay it for both cases.

Oral Argument, at 8:15-9:30.

After oral argument, the Court denied the government's petition for rehearing in *Allen v. Ives*, and the United States did not seek certiorari in that case. That decision is final. And this Court heard argument but has not, as of this filing, decided *Borden*. Though neither case has resolved in the

government's favor, the panel issued its decision affirming. The two-judge majority recognized that, under *Allen v. Ives*, Mr. Wehmhoefer's claims were not procedurally foreclosed if he prevailed on the merits. (App. 5a.) It denied his claim, then, solely on the ground that Texas simple robbery was divisible as between a statutory alternative that encompasses recklessness and the one that does not. *Id.* at *2-3.

The panel majority provided three bases for its terse decision: *First*, it said that "[d]iffering mens rea requirements are a hallmark of divisibility." (App. 7a.) *Second*, it recognized that Texas had held that "causing bodily injury or threatening the victim are different methods of committing the same offense," (App. 7a (quoting *Burton v. State*, 510 S.W.3d 232, 237 (Tex. App. 2017)).) The panel stated, however, in summary terms, that *Burton* "does not undermine our conclusion that Texas Penal Code § 29.[02] is divisible." (App. 7a n.2.) Its analysis concluded by stating that "indivisible statutes are indivisible precisely because the jury need not agree on anything past the fact that the statute was violated. As long as the defendant's conduct violates the statute, the jury can disagree as to how[.]" (App. 7a (quoting *Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014)).)

Judge Orrick, sitting by designation, dissented. In his view, while the statute "gives the appearance of divisibility," Texas caselaw makes clear that simple robbery is indivisible, and Texas juries are instructed as to both

statutory alternatives with no requirement of unanimity. (App. 10a-12a (Orrick, J., dissenting).) Because these markers of divisibility both point in the same direction, Judge Orrick would have concluded that Texas simple robbery is indivisible.

Reason for Granting the Writ

Eight years ago, this Court decided *Descamps v. United States*, and issued a course correction to the Ninth Circuit, which had gone rogue in applying this Court's categorical analysis. The Ninth Circuit had "dismiss[ed] everything we have said on the subject as 'lacking conclusive weight.'" *Descamps*, 570 U.S. at 265. It had propounded an analysis that had "no roots in [this Court's] precedents. *Id.* Its analysis ran "headlong into . . . congressional choice" that only the elements of an offense are relevant to the analysis. *Id.* at 268. Because the Ninth Circuit had so thoroughly strayed from this Court's instructions on the question, the Court stepped in to set the analysis straight.

Once again, however, the Ninth Circuit has gone astray. The Court cited three reasons, each of which contradict this Court's guidance on how to decide whether a statute is divisible. The Ninth Circuit's analysis is so far wrong that the Court should take the rare step of summarily reversing and remanding for an analysis in line with this Court's precedent. If it will not, it should grant the

writ of certiorari to clarify that the Ninth Circuit's analysis has, once again, "struck out swinging."

A. The Ninth Circuit's analysis flouts this Court's instructions with respect to divisibility.

1. In *Descamps*, the Court said that the only facts relevant to the categorical approach are elements, those things found by a jury, unanimously and beyond a reasonable doubt. 570 U.S. at 269. Any fact that the jury does not need to find unanimously is merely a "legally extraneous circumstance[]" and has no place in the categorical approach. *Id.*

The question presented here is whether the two theories of Texas simple robbery—robbery-by-threat and robbery-by-injury—are two different offenses such that the jury would have to unanimously select one of the two to return a guilty verdict, or whether they are merely means of committing the offense. Under Texas law, simple robbery is committed where one,

> in the course of committing theft . . . and with the intent to obtain or maintain control of the property, []:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
>
> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury.

Tex. Penal Code § 29.02. Applying *Mathis* to this case demonstrates that this is a straightforward divisibility question.

In *Mathis*, the Court said that the first step in deciding divisibility is to look to "authoritative sources of state law." *Mathis*, 136 S. Ct. at 2256. For example, as was the case in *Mathis* itself, where a state court decision holds that the jury need not unanimously agree as between two particular statutory alternatives, the analysis "is easy"—the federal court "need only follow what it says." *Id.* Where the holdings of state law doesn't answer the question, then the Court can look at the record of a prior conviction to see whether it illuminates the question. *Id.* at 2256-57. For example, *Mathis* says, where indictments charge multiple alternatives in a single count or where the jury instructions include multiple alternatives without requiring unanimity, that is "as clear an indication as any that each alternative is only a possible means of commission, not an element." *Id.* at 2257.

Those rules make this case, like *Mathis*, "easy." In *Cooper v. State*, 430 S.W.3d 426 (Tex. Ct. Crim. App. 2014),[1] the Court considered the "unit of prosecution" for Texas's aggravated robbery statute. It concluded that robbery-by-injury and robbery-by-threat "are simply alternative methods of committing a robbery" and cannot be charged as separate offenses. *Id.* at 434; *see also id.*

[1] The Texas Court for Criminal Appeals is the highest state court for criminal appeals.

at 439.[2] Following *Cooper*, Texas courts have read the decision to make that a defendant has no right to juror unanimity when charged with robbery-by-threat and robbery-by-injury, because the two factual variants "are different methods of committing the same offense." *Burton v. State*, 510 S.W. 3d 232, 237 (Tex. Ct. App. 2017). And, under Texas law, where "alternate theories involve commission of the 'same offense,'" a trial court "may submit a disjunctive jury change and obtain a general verdict" without running afoul of the rules requiring jury unanimity. *Id.*

Given *Burton*'s holding, it is puzzling that the panel concluded that *Burton* did not "undermine [its] conclusion" that Texas robbery is divisible. (App. 7a.) *Descamps* says the jury unanimity is the crucial dividing line between a elements and means, and between a statute that is divisible and one that is not. It cannot be said, then, that a decision saying Texas law does not require juries to be unanimous as between robbery-by-threat and robbery-by-injury does not undermine the conclusion that the two alternatives are divisible. The dissent is right to say that there is nothing unclear about *Burton*'s impact on this case. (App. 11a (Orrick, J., dissenting).)

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[2] *Cooper* is a divided decision, but four judges agreed on the conclusion at issue here, if not on the reasoning. *See id.* at 439 (Cochran, J., concurring) ("I agree with Presiding Judge Keller that "the 'threat' and 'bodily injury' elements of . . . robbery are simply alternative methods of committing . . . a robbery.").

The first premise of the Ninth Circuit's analysis flouts this Court's instructions in *Mathis*.

2. But even if caselaw were not clear, a "peek at the record" would resolve any ambiguity in Mr. Wehmhoefer's favor. *See Mathis*, 136 S. Ct. at 2256. Defendants in Texas are routinely charged as to both theories in a single count. *E.g., Martin v. State*, 03-16-198-CR, 2017 WL 5985059, at *3 (Tex. Ct. App. Dec. 1, 2017) (describing count 1 of the indictment as charging defendant with robbery by "either: (1) causing him bodily injury or (2) threatening or placing him in fear of imminent bodily injury"); *Randle v. State*, 05-12-641-CR, 2013 WL 3929208, at *1 (July 26, 2013) (describing charging document alleging both theories of robbery in one count). Two statutory alternatives charged in a single count is, in this Court's words, "as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove beyond a reasonable doubt." *Mathis*, 136 S. Ct. at 2257.

And juries in Texas are routinely instructed that they can return a guilty verdict if they find robbery-by-threat *or* robbery-by-injury, without any requirement that they be unanimous as between the two. *Burton*, 510 S.W. 3d at 237; *Alexander v. State*, 02-15-406-CR, 2017 WL 1738011, at *7 (Tex. Ct. App. May 4, 2017) (reciting jury instructions permitting jury to return general verdict for offense of robbery, without unanimously selecting robbery-by-threat or robbery-by-injury); *Sidney v. State*, 560 S.W.2d 679, 680 (Tex. Ct. Crim. App.

1978) (en banc) (affirming conviction where jury was instructed that they could convict if they found "the defendant . . . did . . . intentionally or knowingly cause[] bodily injury to said owner or intentionally or knowingly threatened or placed said owner in fear of imminent bodily injury"); *Owens v. State*, 01-96-1037-CR, 1999 WL 111494, at *4 (Tex. Ct. App. 1999) (affirming conviction with similar jury instruction); *Morrison v. State*, 02-11-61-CR, 2012 WL 1432591, at *2 (Tex. Ct. App. 2012) (affirming similar jury instruction). The second premise of the panel majority's decision is that indivisible statutes are indivisible "precisely because the jury need not agree on anything past the fact that the statute was violated. As long as the defendant's conduct violates the statute, the jury can disagree as to how." (App. 6a.) That's true, but it undermines the Court's conclusion here. As just set out, Texas juries are routinely instructed that they only need to agree that the defendant violated § 29.02, and do not need to unanimously decide *how* the statute was violated. This makes the statute indivisible.

Thus, by every test stated by the *Mathis* Court—and even the test the panel majority stated—Texas simple robbery is not divisible. The second reason given by the panel also flouts this Court's instructions.

3. Finally, the panel majority stated that "[d]iffering mens rea requirements are a hallmark of divisibility." (App. 7a.) This statement finds no

foundation in this Court's law or Ninth Circuit's precedent, but, in any event, is irrelevant to the question presented here.

The panel cited *Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014), as support for this startling premise. But *Rendon* says nothing of the sort—and in fact, *Rendon* says the opposite. The only portion of *Rendon* to mention mens rea is its discussion of a BIA's decision, an analysis of a Utah statute that involved discharge of a firearm with "intent, knowledge, or recklessness." *Id.* at 1088. Though the mental states were written in the disjunctive in the Utah statute, the BIA recognized that disjunctive phrasing was not the test for divisibility under *Descamps*. Instead, the BIA asked—properly, in *Rendon*'s view—whether "Utah law requires jury unanimity regarding the mental state with which the accused discharged the firearm." *Id.* If "Utah does not require such jury unanimity, then it follows that intent, knowledge, and recklessness are merely alternative 'means' by which a defendant can discharge a firearm, not alternative 'elements' of the discharge offense." *Id.*

As *Rendon* makes clear, this Court's precedents do not countenance a different divisibility test for mens rea and for other kinds of elements; the question, in every case, is what the jury must decide to decide to return a guilty verdict under state law. Applying that test often means that different mens reas are indivisible, because state law does not require the jury to unanimously agree on the mens rea that the defendant had while committing the offense.

E.g., *Ramirez v. Lynch*, 810 F.3d 1127, 1138 (9th Cir. 2016) (jury need not unanimously decide whether defendant acted with intent or negligence, and thus statute not divisible); *United States v. Andrade-Calderon*, 638 F. App'x 622, 626 (9th Cir. 2016) (21 U.S.C. § 841(c)(2) not divisible with respect to mens rea, because jury unanimity not required); *United States v. Savath*, 300 F. Supp. 3d 1215, 1225 (D. Ore. 2018) (Oregon assault statutory provision for "intentionally, knowingly, or recklessly" causing injury indivisible because state law does not require unanimity with respect to mental state). The panel majority's statement that mens rea is a hallmark of divisibility is incorrect.

But even if it were true, this case is not about divisibility a statutory provision containing different mens reas. (It would be, for example, if the divisibility question was whether *intentional* robbery-by-injury and *reckless* robbery-by-injury were different crimes and whether the jury had to be unanimous between those choices.) The question here is whether robbery-by-injury and robbery-by-threat are different offenses, whether the jury would have to unanimously agree that the perpetrator used intimidation to frighten his victim, or used some force resulting in injury. So even taking the panel's statement on its own terms, that different mens reas are the "hallmark of divisibility," it would do nothing to further the panel's analysis here.

Quite simply, the Ninth Circuit's analysis of this question is indefensible in light of this Court's precedents.

B. The rarely used tool of summary reversal is appropriate here.

This Court has recognized that summary reversal is appropriate where a lower court's judgment reflects a clear misapprehension of the governing legal standards in light of the this Court's precedents. *See Tolan v. Cotton*, 572 U.S. 650, 659 (2014) ("And while 'this Court is not equipped to correct every perceived error coming from the lower federal courts,' we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents.") (citations omitted)); *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) ("We exercise our summary reversal procedure here simply to correct a clear misapprehension of the qualified immunity standard."); *Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam) (summarily reversing an opinion that could not "be reconciled with the principles set out" in this Court's jurisprudence). This Court has, in fact, applied such summary treatment to cases where the lower courts have, without any legal support, botched the proper application of the categorical approach. *See Salinas v. United States*, 547 U.S. 188, 188 (2006) (summarily vacating in light of clear misapplication of the plain language of the career offender guideline's definition of "controlled substance offense," U.S.S.G. § 4B1.2(b), to defendant's prior conviction for simple possession); *Kyle v. United States*, 504 U.S. 980 (1992) (summarily vacating a judgment of the Fifth Circuit with instructions to correctly apply its

own precedent on remand).

This is the appropriate case for this rare remedy. First, this is a case where the error is beyond cavil. It is plain that the Ninth Circuit resolved the threshold divisibility inquiry, and consequently applied the modified categorical approach, in a way that conflicts with this Court's precedents and is far outside the accepted and usual course of judicial proceedings. *See* Sup. Ct. R. l0(a), (c). No aspect of the decision finds support in this Court's caselaw.

Second, the error was dispositive in this case. The Ninth Circuit acknowledged that the procedural defenses collapse into the merits of the claim, meaning that if his Texas robbery were not a serious violent felony, no procedural bar would preclude relief. (App. 5a.) And should *Borden* be resolved such that recklessness does not satisfy the elements clause of the crime-of-violence definition, this threshold divisibility finding is the only credible hurdle between Mr. Wehmhoefer's claim and relief. That is because it is clear that both Texas simple robbery and Texas aggravated robbery can be committed by reckless conduct, and the government conceded, below, that the circumstances that elevate Texas robbery to aggravated robbery are indivisible.

Third, the stakes in this case could not be higher. Mr. Wehmhoefer is serving a mandatory life sentence without any possibility of parole--the most severe sentence, short of the death penalty, that a court can impose. Special solicitude should be paid to sentences like Mr. Wehmhoefer's that condemn a

man to die in prison. Certainly, it unjust where the sentence is premised on such clear error. Accordingly, this Court should grant certiorari, summarily reverse the Ninth Circuit's threshold divisibility determination, and remand for further proceedings.

If it will not, the Court should grant the writ of certiorari so that it can address the Ninth Circuit's confusion regarding the analysis to be applied under *Mathis*.

Conclusion

For the foregoing reasons, Mr. Wehmhoefer respectfully requests that this Court grant his petition for writ of certiorari, summarily reverse the Court's divisibility holding, and remand for further proceedings.

Respectfully submitted,

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DATED: June 7, 2021

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