No. 21-_____

IN THE
Supreme Court of the United States

KIRK L. FLOYD,

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

W. MATTHEW DODGE
Counsel of Record
FEDERAL DEFENDER PROGRAM, INC.
101 Marietta Street, NW
Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
Matthew_Dodge@FD.org

QUESTION PRESENTED

The district court sentenced Mr. Floyd under the Armed Career Criminal Act because before he possessed the firearm in this federal case, he had three times been convicted under Georgia's burglary statute. The Eleventh Circuit, bound by its own precedent, affirmed the sentence and held that because the Georgia burglary statute is divisible, Mr. Floyd's own convictions are ACCA violent felonies. Yet that flawed precedent misapplied this Court's prescription in *Mathis v. United States* and undermined—indeed, betrayed—the categorical approach. The Sixth Circuit, in measuring the Georgia burglary statute, has disagreed with most of the Eleventh Circuit's *Mathis* methodology, although it reached the same result. And, finally, the Fourth Circuit rejected the others entirely and held that the Georgia burglary statute is indivisible and, therefore, is categorically not an ACCA violent felony.

This three-way circuit split presents the following question:

The Georgia burglary statute disjunctively lists locations that may be burgled. The text makes plain that the list is not exclusive, Georgia's case law does not require a jury to agree that the defendant burgled any particular place on that illustrative list, and because a Georgia indictment may, but need not, name a specific location, the *Shepard* documents alone, the *Mathis*-approved "peek," can never establish that the location is an element. Under *Mathis* and the ACCA's categorical approach, then, is the Georgia statute indivisible and, therefore, not an ACCA violent felony?

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Pages

Cases

Statutes

PETITION FOR A WRIT OF CERTIORARI

Kirk L. Floyd petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION & ORDERS BELOW

The unpublished opinion of the Eleventh Circuit affirming Mr. Floyd's judgment is included in the appendix. Pet. App. 1a. The district court did not issue an order on the question presented.

JURISDICTION

On December 14, 2021, the Eleventh Circuit affirmed the district court's sentence. The original deadline to file this petition was March 14, 2022, *see* Supreme Court Rules 13(3) and 13.1, but Justice Thomas extended the deadline to April 13, 2022. Therefore, this petition is timely. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The **Armed Career Criminal Act**, set forth **in 18 U.S.C. § 924(e)**, states in part:

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

(2)(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

The version of the Georgia burglary statute in effect at the time of Mr. Floyd's own convictions, **O.C.G.A. § 16-7-1(a)**, provides the following:

A person commits the offense of burglary when, without authority and with intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, 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. A person convicted for the offense of burglary, for the first such offense, shall be punished by imprisonment for not less than one nor more than 20 years. . . .

INTRODUCTION

When is a burglary not a burglary? Put another way, how is a court to decide whether a "burglary" under state law, like Georgia's, is categorically a generic "burglary" under the ACCA? This Court has grappled with this topic before. *See Taylor v. United States*, 495 U.S. 575, 588-589 (1990); *Descamps v. United States*, 570 U.S. 254, 272 (2013), and *Mathis v. United States*, 579 U.S. 500, 136 S. Ct. 2243 (2016). But even the most recent prescription, *Mathis*, has brought us neither uniformity nor predictability. A consistent method of analysis—the very purpose of the categorical approach—has proved elusive. The Georgia burglary statute, for one, continues to flummox the circuit courts and the time has come for this Court to intervene and to calibrate the categorical approach in a way that will not only quiet the ACCA unrest on this statute, but will provide guidance on other statutes and in other criminal and civil contexts.

The Court should grant the petition for a writ of certiorari for several reasons:

First, the question presented here illuminates a three-way circuit split about whether Georgia's burglary statute is indivisible for purposes of determining whether a such a conviction is a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"). The Eleventh Circuit applied *Mathis* and labeled the crime an ACCA predicate offense. Another circuit rejected most of the Eleventh Circuit's *Mathis* analysis but reached the same conclusion. One final circuit applied the very same *Mathis* template to hold that a Georgia burglary conviction is categorically *never* an ACCA violent felony.

Second, this question is one of national importance that arises frequently in the lower courts. Many criminal defendants sprinkled over districts across the country face harsh ACCA enhancements based upon a Georgia burglary conviction. Indeed, we find cases depending upon this very question in at least four circuits. But the topic's importance is not limited to this burglary statute or even to the ACCA. The question presented—the proper application of *Mathis* to a criminal statute listing alternative definitions—will impact criminal cases in other contexts (such as enhancements under the Sentencing Guidelines) and even in civil immigration cases.

Third, this case is a strong vehicle for the Court to answer the question presented. The facts are undisputed. Mr. Floyd raised the question before the district and appeals courts, and both resolved Mr. Floyd's case based upon the question presented here. There are no jurisdictional hurdles for the Court to navigate.

The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

A. The Armed Career Criminal Act and the categorical approach.

1. The federal crime of possession of a firearm by a convicted felon, defined in 18 U.S.C. § 922(g), generally carries a maximum sentence of ten years in prison. 18 U.S.C. § 924(a)(2). However, select § 922(g) defendants are funneled to the Armed Career Criminal Act, which carries an enhanced penalty of fifteen years to life imprisonment, because they have three or more prior convictions that qualify as serious drug offenses or violent felonies. 18 U.S.C. § 924(e)(1). The term "violent felony" includes any felony that is "burglary, arson, or extortion." 18 U.S.C. § 924(e)(2)(B)(ii). Through that enumerated list of crimes, "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*, 495 U.S. at 598).

In making the comparison between a defendant's prior conviction and the generic federal version of that crime, federal courts apply the categorical approach. *Mathis*, 136 S. Ct. at 2248. This method requires that 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.* So, a state conviction for burglary 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.*

The distinction between "elements" and "facts," this Court has explained, is "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.* Facts, on the other hand, describe the "circumstance[s]" or "event[s]" but are "extraneous to the crime's legal requirements." *Id.*

2. The means-versus-elements query is crucial in this categorical exercise. 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.*

A court must "examine what the state conviction necessarily involved, not the facts underlying the case, [and] must presume that the conviction rested upon nothing more than the least of the acts criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 190-191 (2013). In this way, the categorical approach "is under-inclusive by design: It expects that some violent acts, because charged under a law applying to non-violent conduct, will not trigger enhanced sentences." *Borden v. United States*, 141 S. Ct. 1817, 1832 (2021). In the end, if any one of the means listed in an indivisible statute falls outside the generic definition of that crime, then the conviction cannot be an ACCA violent felony.

But what if the statute of conviction lists, rather than means, elements in the alternative? Then it "define[s] multiple crimes" and is said to be "divisible." *Mathis*, 136 S. Ct. at 2249. And if "at least one, but not all of th[e multiple] crimes" alternatively defined in that 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, that is, "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.*[1] As with the categorical approach, the "focus" of the modified categorical approach is "on the elements, rather than the facts, of a crime." *Id.* 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.

3. "The 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. 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

---

[1] These documents are generally known as *Shepard* documents. *See Shepard v. United States*, 544 U.S. 13, 26 (2005).

a crime's means of commission," and the statute is indivisible. *Id.*

Mathis instructs sentencing courts to begin with "authoritative sources of state law." 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. "Only if the answer is" that the listed items are elements may a sentencing court then "make further use of the [*Shepard*] materials," that is, only then can courts apply the modified categorical approach. *Id.* at 2257.

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.

B. Mr. Floyd's prosecution and ACCA sentence.

Over a span of one month—ending on June 21, 2012—a group of men, including Kirk Floyd, planned the armed

robbery of a drug stash house in Atlanta, Georgia. Yet the stash house did not exist—it was a fiction authored by federal agents and their confidential informants. At the hour of the intended robbery, the agents arrested the group, including Mr. Floyd, who carried a shotgun lent to him by a co-defendant. Several years earlier, a Georgia court had convicted Mr. Floyd of three burglaries.

A federal jury later convicted Mr. Floyd of four crimes: conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951; carrying a firearm during and in relation to a crime of violence—the conspiracy to commit Hobbs Act robbery—in violation of 18 U.S.C. § 924(c)); conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a), 846; and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g).

The district court sentenced Mr. Floyd to serve a total sentence of 300 months in prison, including concurrent terms of 120 months in prison on the conspiracy and drug crimes, a concurrent term of 180 months in prison on the § 922(g) crime (the mandatory minimum under the Armed Career Criminal Act), plus a consecutive term of 120 months on the § 924(c) crime. Mr. Floyd filed a direct appeal and the Eleventh Circuit affirmed. *United States v. Floyd*, 626 Fed. Appx. 959 (11th Cir. 2015) (unpublished).

Following the Supreme Court's opinion in *Johnson v. United States*, 576 U.S. 591 (2015), Mr. Floyd filed a motion to vacate his sentence under 28 U.S.C. § 2255, in which he challenged the § 924(c) conviction and argued that the underlying offense—conspiracy to commit Hobbs Act robbery—did not qualify as a crime of violence under § 924(c) because the statute's residual clause is void for

vagueness. The district court denied the § 2255 motion based upon then-binding circuit precedent. However, while Mr. Floyd's appeal was pending, this Court issued an opinion in *United States v. Davis*, 139 S. Ct. 2319, struck down the § 924(c) residual clause. The Eleventh Circuit then issued an opinion vacating Mr. Floyd's § 924(c) conviction and remanding the case for a fresh resentencing hearing on the remaining counts. *Floyd v. United States*, 803 Fed. Appx. 385, 386 (11th Cir. 2020) (unpublished).

At the resentencing hearing, the court calculated Mr. Floyd's sentencing guideline range. On the drug count, the adjusted offense level was Level 34. On the § 922(g) count, the ACCA guideline, U.S.S.G. § 4B1.4, led to the same adjusted offense level, but induced a higher criminal history category of VI, resulting in a range of 262-327 months in prison. Without the ACCA enhancement, the range would have been merely 235-293 months in prison.

Before and during the hearing, Mr. Floyd objected to the application of the ACCA enhancement. He argued that the three Georgia burglary convictions were categorically not violent felonies under the ACCA because the state statute is indivisible and because its definition of burglary is broader than a federal generic burglary. He conceded that binding Eleventh Circuit case law, *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016), required the district court to overrule the objection—and it did so.

The district court imposed a sentence of 262 months in prison on the three surviving counts, including the Hobbs Act conspiracy (120 months), the drug conspiracy (262 months), and the § 922(g)/ACCA count (262 months). The overall sentence landed at the low end of the ACCA-

induced guideline range. Mr. Floyd objected to the sentence and preserved the ACCA claim.

On appeal, Mr. Floyd carried forward his objection to the ACCA enhancement. He argued that although the *Gundy* rule was binding precedent, it was wrong. On this issue, the panel wrote this:

> Floyd argues that his sentence is procedurally unreasonable because the district court erred in applying the ACCA enhancement as his Georgia burglary convictions do not qualify as violent felonies under the ACCA. Nevertheless, Floyd acknowledges that his claim is squarely foreclosed by our decision in *Gundy*, in which we held that a Georgia burglary conviction, like the convictions at issue in Floyd's case, categorically qualified as a violent felony under the ACCA's enumerated crimes clause. 842 F.3d at 1169. Under the prior panel precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this [C]ourt sitting en banc."
>
> Accordingly, in light of *Gundy*, the district court did not err in applying the ACCA enhancement, and we affirm.

(Pet. App. at 8-9).

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 doing so, have also 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 that statute, and a defendant's own burglary indictments all establish that the statute's list of locations specifies alternative elements and, thus, is divisible. *Gundy*, 842 F.3d at 1166-1168. In *Richardson v. United States*, 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. 890 F.3d 616, 623-629 (6th Cir. 2018). And in *United States v. 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 indivisible. 932 F.3d 204, 213-215 & n.2 (4th Cir. 2019).[2]

This Court's precedent teaches that a list's disjunctive phrasing generates rather than resolves the question of divisibility; that whether a list appears in the main provision of statute or instead is incorporated by reference

---

[2] The Georgia legislature penned the modern burglary statute in 1968, then amended it in 1977, in 1980, in 2012, and finally in 2017. Mr. Floyd committed his three burglaries in 2007 and 2008, under the 1980 version of the statute, the same version considered in *Gundy* and by the Sixth Circuit in *Richardson*. The Fourth Circuit, meanwhile, addressed the 1968 version, which was substantively identical to the 1980 variant, with differences that are immaterial to the question presented here. *Cornette*, 932 F.3d at 214.

is irrelevant; that 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 that while a prosecutor's ability to charge multiple listed places alternatively reveals a statute to be indivisible, a prosecutor's ability to charge a single listed place reveals nothing. A proper application of *Mathis*, then, shows that the Georgia burglary statute is indivisible for the reasons given by Judge Jill Pryor in her *Gundy* dissent and by the Fourth Circuit. The Sixth and Eleventh Circuits erred in concluding otherwise.

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 harsh ACCA prison sentence. 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 by a fluke of geography. That disparity contradicts Congress's and this Court's efforts to establish a uniform approach to sentence enhancements.

1. The question here—whether the Georgia burglary statute is divisible for ACCA purposes—is the subject of a fractured circuit split.

We have a three-way circuit split. The Sixth and Eleventh Circuits have held that the Georgia burglary

statute is divisible. They say that the list of locations names distinct elements (that is, it defines a set of distinct crimes), and that some fit within the generic definition of burglary. Although these circuits reached the same destination, they traveled by different routes and applied *Mathis* very differently. Indeed, the Sixth Circuit expressly rejected much of the Eleventh Circuit's *Mathis* analysis. On the other hand, the Fourth Circuit held that the list of locations merely identifies alternative means of satisfying a single element of the burglary offense and, per *Mathis*, defines but a single crime, a crime that is categorically broader than a generic burglary offense. The outcomes in the three circuits varied so starkly because, most of all, the courts disagree on how best to apply *Mathis*.

A. The Eleventh Circuit was the first court of appeals to address the Georgia burglary statute after *Mathis*. In *Gundy*, the panel's majority, over Judge Jill Pryor's dissent, held that all three sources that *Mathis* identified for deciding whether a disjunctive statutory list specifies elements or means—state-court decisions, the statutory text, and the defendant's record of conviction—prove that the list of locations are elements and, for that reason, the statute is divisible. *Gundy*, 842 F.3d at 1161-1170.

The *Gundy* majority began with the statute's text: "In 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 majority insisted, "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 *Gundy* majority next declared that its reading of the statute's text was confirmed by Georgia case law that (again, in its view) 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 once stated "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 *Gundy* panel 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)).

Finally, the Eleventh Circuit panel addressed the third *Mathis* prong: 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. The court explained that because the appellant's own indictments named a "dwelling house" in some indictments and a "business house" in others, this "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 apply *Mathis* to the Georgia burglary statute was the Sixth Circuit. In *Richardson*, that court agreed with the Eleventh Circuit that the Georgia statute is divisible, but "disagree[d] with" much of *Gundy's* reasoning. 890 F.3d at 628. (Indeed, it embraced much of Judge Jill Pryor's *Gundy* dissent along the way.) The Sixth Circuit agreed with *Gundy* that the statute does not "use the broad term 'includes,'" and distinguished the Iowa statute in *Mathis* on the ground that "Georgia's burglary statute 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 this is where the common ground ended. While the Eleventh Circuit treated those characteristics as proof of a divisible statute, the Sixth Circuit deemed "this inquiry [into the statutory text] of no help." *Id.*

The Sixth Circuit, in contrast to the Eleventh, viewed 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 (Jill Pryor, J., dissenting)).

In contrast to the *Gundy* panel, the Sixth Circuit deemed the state case law inconclusive. The *Richardson* panel pointed out that *Morris* (the Georgia decision on which *Gundy* relied) dealt "with notice to the accused and double jeopardy," and did "not address the elements of the burglary statute." 890 F.3d at 625-626 (citing *Gundy*, 842 F.3d at 1176 (Jill Pryor, J., dissenting)). In the same way, the Sixth Circuit explained that the issue in *DeFrancis* (another Georgia opinion embraced by *Gundy*) 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)).

After finding the text and case law unhelpful, the Sixth Circuit took a *Mathis* "peek" at Richardson's indictments—"the only available record documents"—and, like the Eleventh Circuit in *Gundy*, concluded that the indictments established that "the alternative locations are elements and the statute is divisible as to the locations that can be burglarized." *Richardson*, 890 F.3d at 628-29. "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). In the end, the Sixth Circuit held, the Georgia statute is divisible, and the convictions qualified as ACCA violent felonies. *Id.*

C. The most recent circuit to measure the Georgia burglary statute against the *Mathis* template rejected both *Gundy* and *Richardson* and held outright that the crime is categorically not an ACCA violent felony at all. In *Cornette*, the Fourth Circuit held that the Georgia statute is 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 remarked that it simply did "not find the reasoning of [its] sister circuits persuasive." 932 F.3d at 213 n.2.

The Fourth Circuit began with the observation that although "the statute's disjunctive language sets up a divisibility question, it does not answer" that question. *Cornette*, 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 echoed the Sixth Circuit's criticism of the Eleventh Circuit's reasoning on that very point. *Id.* at 213 n.2.

Turning to the state case law, the Fourth Circuit read those same precedents differently. It noted 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, one Georgia appellate decision held "that such a jury instruction [with either/or alternatives] 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 prove that the statute is divisible because, although the decision 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," but not that the dwelling be a particular type of structure. *Id.* at 213.

The Fourth Circuit then engaged in the requisite *Mathis* "peek" at the conviction record. There, too, it parted ways with both the Sixth and Eleventh Circuits. Returning to the Georgia Court of Appeals' opinion in *Hart*, the *Cornette* panel 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). So, even when a defendant's own indictment specifies a particular type of structure (e.g., "dwelling house"), it need not do so under Georgia law, so the indictment is not conclusive evidence that the location is an element of the offense.

In *Cornette*, the Fourth Circuit held that the burglary statute is indivisible, applied the categorical approach, and concluded that the Georgia burglary statute is "overbroad compared to the generic burglary crime in the enumerated clause of the ACCA." 932 F.3d at 215. In this way, a

Georgia burglary conviction does not qualify as "a 'violent felony' for purposes of the ACCA sentencing enhancement." *Id.*

The Eleventh Circuit now stands alone in both its *Mathis* analysis (per the Sixth Circuit) and in its outcome (via the Fourth Circuit). This three-way circuit split merits this Court's intervention.

2. The Eleventh Circuit rule in *Gundy* is wrong.

The Eleventh Circuit has wrongly concluded that the Georgia burglary statute is divisible and, therefore, an ACCA violent felony. 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 the *Mathis* template shows that the Georgia burglary statute is indivisible—or at a minimum, that it lacks the clarity required to find the statute divisible. The Eleventh Circuit in *Gundy* should have applied the categorical approach here rather than the modified categorial approach. And under the categorical approach, a Georgia burglary conviction is not an ACCA violent felony because there is no dispute that the statute's definition of burglary is broader than the generic definition of burglary. *Gundy*, 842 F.3d at 1165.

A. Georgia case law demonstrates that the burglary statute is indivisible because in order to convict, "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 more widely

as an 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). In order to convict, there was no need for the jury unanimously to choose one option or the other.

The *Gundy* majority did not address *Hart* or similar Georgia cases, even though they were highlighted by the dissent. 842 F.3d at 1173 (Jill Pryor, J., dissenting). Instead, the majority 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). And yet, as the Sixth Circuit noted, those cases dealt with another question entirely, "with notice to the accused and double jeopardy," rather than the elements of burglary. *Richardson*, 890 F.3d at 626. The *Gundy* majority also purported to find support in *DeFrancis*, but there the Georgia Supreme Court reversed the conviction only because the state failed to prove that the 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 at all* about whether the jury had to agree on the specific type of location. *Gundy*, 842 F.3d at 1177 (Jill Pryor, J., dissenting).

The Eleventh Circuit erred, too, in inferring divisibility—that is, the elements the prosecution must prove—solely from cases defining what the prosecution *may* charge, rather than what it *must* 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. 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 Georgia 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). The fact, then, that a particular indictment, like Mr. Floyd's, 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 *Gundy* itself, some of the defendant's indictments did not recite any of the statute's locational items, using a different locational term altogether. 842 F.3d at 1178 (Jill 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. Indeed, an indictment's "statements of fact . . . may be downright wrong." *Descamps*, 570 U.S. at 270. And even when an indictment's author chooses to identify a single location 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 the end, any Georgia burglary indictment cannot and does not, by itself, prove the statute divisible.

B. The text of the Georgia burglary statute also explicitly treats the list of locations as means rather than elements. To begin with, 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[]," that is, as "illustrative examples" of the "crime's means of commission." *Id.*

We know this because of the statute's use of two sweeping phrases "*other* such structure[s]" and "*any other* building, railroad car, aircraft." O.C.G.A. § 16-7-1 (emphasis added). These references to indeterminate "places" make clear that the statutory list identifies illustrative examples (that is, means), not elements. *Mathis*, 136 S. Ct. at 2256; *see also Gundy*, 842 F.3d at 1175 (Jill Pryor, J., dissenting) ("[t]he phrase 'other such structure[s]' cannot be part of a finite list"). In this way, 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 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. Yet that was true of the Iowa statute in *Mathis*: "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. Indeed, although 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 rejected that position. 136 S. Ct. at 2249. *Mathis* leaves no doubt that a disjunctive list is merely the precondition for inquiring whether the list specifies elements or means, not proof that the items on the list are elements.

The *Gundy* majority 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 (Jill Pryor, J., dissenting). They create an open-ended, indeterminate set, of which the enumerated items are merely illustrative examples, not elements of alternative crimes.

Finally, the *Gundy* panel mistakenly focused on the fact that the Georgia statute, unlike the Iowa statute 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 is true, but it "proves nothing." *Id.* at 1175 (Jill Pryor, J., dissenting). The Iowa statute was indivisible not because it segregated its locational definition in another sub-statute, but instead because it defined the crime in terms of an illustrative list of multiple means that could establish the single locational element.

C. Because Georgia case law and the burglary statute's text "provide clear answers" regarding the statute's indivisibility, there is no need to "peek" at the *Shepard* documents. *Mathis*, 136 S. Ct. 2256. The inevitable truth established by the text and case law—that the burglary statute here is indivisible—should be the end of the inquiry. But even if these sources do not adequately resolve the question, the state indictments alone cannot establish that the Georgia burglary statute is divisible.

In *Gundy*, the Eleventh Circuit held that the indictments revealed the statute to be divisible because each referred to only one type of location: Some a "dwelling house," and others a "business house." 842 F.3d at 1170. The Sixth Circuit made a similar mistake. *Richardson*, 890 F.3d at 629. But as Judge Jill Pryor and the Fourth Circuit have shown, and as we discussed above, an indictment's inclusion of a single location from a statutory list proves nothing about what a jury must find (or what a defendant must admit) under state law.

In her *Gundy* dissent, Judge Jill Pryor observed that 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 item from the Georgia burglary statute's disjunctive list. At a minimum, 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 the end, the Eleventh and Sixth Circuits' decisions holding the Georgia burglary statute divisible cannot be reconciled with *Mathis*.

3. This question is of national importance and this case is an excellent vehicle for the Court to answer it.

One might argue that this question about a single state's burglary statute is simply too parochial to merit this Court's attention. But even if the question was so narrow (it is not), this would be an important and recurring one, warranting this Court's review. As Judge Pryor cautioned 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.

And yet, the topic is so much wider than that. The question presented goes well beyond this one Georgia statute. It addresses the proper scope of this Court's elements-or-means inquiry in *Mathis*, one that affects the ACCA status of statutes all over the nation. And so, too, it applies in other criminal contexts, such as the Sentencing Guideline's crime-of-violence enhancements, and civil contexts, including immigration law's aggravated-felony inquiry.

A. The circuits' three-way division over whether the Georgia burglary statute is divisible will result—indeed has already resulted—in disparate treatment of many ACCA defendants, a disparity based solely on geography. In the Sixth and Eleventh Circuits, but also in other courts, including this Court, a prior Georgia burglary conviction is often used as an ACCA predicate offense. *See, e.g., Wooden v. United States*, 142 S. Ct. 1063, 1071 (2022); *United States v. Coats*, 8 F.4th 1228, 1243 (11th Cir. 2021); *Waagner v. United States*, 971 F.3d 647, 661 n.17 (7th Cir. 2020); *Davis v. Ortiz*, 2020 WL 2189376, at *2 (D.N.J. May 6, 2020); *Anderson v. Mackleberg*, 2020 WL 8713668, at *2 (D.S.C. Feb. 13, 2020); *Vowell v. United States*, 938 F.3d 260, 270 (6th Cir. 2019); *United States v. Baxley*, 714 Fed. Appx. 985 (11th Cir. 2018); *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); *O'Neal v. United States*, 2017 WL 1028575, at *4-6 (S.D. Ga. Mar. 16, 2017); *Creekmore v. United States*, 2017 WL 386660, at *6-8 (N.D. Ala. Jan. 27, 2017); *United States v. Martinez-Garcia*, 625 F.3d 196, 198 (5th Cir. 2010)).

Such irrational sentencing disparities are always troublesome, but especially so in the context of the ACCA, through which Congress sought to create a uniform approach to sentencing enhancements, to avoid "the vagaries of state law" and to "protect 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."). This Court

has long sought to ensure that "defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law . . . was *Taylor's* chief concern in adopting the categorical approach." *Moncrieffe*, 569 U.S. at 205 n.11. This geographical disparity here obstructs these very goals.

B. This circuit conflict is about the Georgia burglary statute, yet the question implicates more generally the proper application of the *Mathis* framework. The Fourth, Sixth, and Eleventh Circuits are analytically divided three ways regarding several aspects of the *Mathis* analysis, notably the degree of weight a court must ascribe a statute's text, the state case law interpreting that statute, and the "peek" at an individual defendant's own indictments. The Eleventh Circuit in *Gundy* relied most of all on the *Mathis* "peek" rule, but misapplied that rule, as both the dissent there and the Fourth Circuit made plain. Indeed, the "peek" rule approved by *Mathis* has bedeviled the federal courts, no more so than here. This case presents the Court with a fine opportunity to clarify that rule once and for all.

The post-*Mathis* experience has taught us that a liberal use of the "peek" rule, one favored by the Sixth and Eleventh Circuits, violates both the spirit and the letter of this Court's time-honored prescription of the categorical approach. In *Taylor*, this Court commanded lower courts to employ the categorical approach to determine whether a state conviction matches a generic federal crime. 495 U.S. at 600; *see Mathis*, 136 S. Ct. at 2257 (citing *Taylor's* demand for "certainty"). Under this rubric, a federal judge is forbidden from looking behind the veil of the state statute to the defendant's specific form of that crime. *Id.* If,

and only if, a judge concludes that a state conviction falls within the boundaries of the generic crime, may she use the modified categorical approach. *Shepard*, 544 U.S. at 16. And only then may a judge peer into the record documents, including the indictment, from the defendant's state conviction. *Id.* The "peek rule," at least as the Eleventh Circuit applies it, turns the *Taylor-Shepard* protocol upside down. We are now told that we must peer into state court documents to determine whether to apply the modified categorical approach and, if yes, we must again peer into those very same state court documents to see what form of crime this defendant committed. This circularity undermines the sacrosanct categorical approach.

Federal judges have made expressed a deep philosophical unease with the "peek" rule. For example, we witnessed above Judge Jill Pryor's thoughtful misgivings about the entire exercise in her *Gundy* dissent. 842 F.3d at 1178 ("If I were to conclude that Georgia's burglary statute is divisible solely on the language in Mr. Gundy's indictment, I fear we would be violating the [categorical approach's] foundational precept.") The Fourth Circuit panel in *Cornette* expressed the same views and refused to allow the "peek" rule—and the facts inscribed into a defendant's burglary indictment—to subsume the categorical approach. 932 F.3d at 215.

Beyond the Georgia burglary statue, federal courts are finding it difficult to apply in practice the "peek" rule to the cases before them. The Seventh Circuit, for one, expressed dissatisfaction with the "peek" rule as it measured Wisconsin's similar burglary statute. In *United States v. Edwards*, the panel began by noting the rule: "The [Supreme] Court explained in *Descamps* (and reiterated in

Mathis) that these documents will likely 'reflect the crime's elements.'" 836 F.3d 831, 837 (7th Cir. 2016). Not so, said the court with a hint of exasperation:

> The *Shepard* documents are of little use here. . . . Under Wisconsin law the complaint and information, which are the documents that initiate proceedings against a criminal defendant, must allege every element of the crime charged, but they may also (and usually do) include additional facts that need not be proved to the jury beyond a reasonable doubt. . . . The upshot of these rules is that in Wisconsin neither the charging documents nor a plea colloquy will necessarily reflect only the elements of the crime.

Id. at 837-838. Thus, the "peek" rule contributed nothing. "In short, the record materials simply do not speak to whether 'building' and 'dwelling' are elements or means." *Id.*[3] The federal courts, then, are in disarray over the proper use of the "peek" rule.

We must remember, too, that this analytical disagreement over *Mathis* will affect not only cases involving convictions under the Georgia burglary statute, but also cases involving convictions under other statutes,

---

[3] *See also United States v. Brown*, 2016 WL 7441717, at *13 n.13 (W.D. Va. Dec. 23, 2016) ("While the indictment's reference to an address as a residence suggests that the location involved was a dwelling house, it provides no clue helpful to deciphering whether the listed location is a means or an element."); *United States v. Hamilton*, 2017 WL 368512, at *11 (N.D. Okla. Jan. 25, 2017) ("Due to the reality that facts/elements/means overlap in charging documents, the Court finds the specificity in the charging documents of little assistance in answering the elements/means question.")

because disjunctive statutory lists are common, as are indictments naming only one item from such a list.

As decisions from around the country demonstrate, other salient features of the Georgia burglary statute are likewise common in other 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 clarity regarding ACCA sentencing beyond the context of the Georgia burglary statute.

The effects of this circuit split will be felt beyond the ACCA context. Federal courts use the categorical and modified categorical approaches under the Sentencing Guidelines to determine whether a defendant's prior conviction counts as a "crime of violence" or a "controlled substance offense." U.S.S.G, §§ 4B1.1, 4B1.2. The categorical analysis applies, too, to immigration cases. 8 U.S.C. §§ 1182(a)(2) & 1227(a)(2)) (determining whether determine whether a non-citizen has been convicted of an offense that triggers removal from the country); *Moncrieffe*, 569 U.S. at 190-194.

C. The legality of an ACCA-enhanced sentence is a high stakes question. The punishment here is so steep that a court may, and should, apply the categorical approach cautiously. *Cf. Wooden*, 142 S. Ct. at 1086–87 (Gorsuch, J., concurring in the judgment) ("The rule of lenity has a critical role to play in cases under the [ACCA's] Occasions Clause. The statute contains little guidance, and reasonable doubts about its application will arise often. When they do, they should be resolved in favor of liberty.").

In the end, this case is an excellent vehicle for the Court to answer the question presented. Mr. Floyd pressed the issue in both the district and appeals courts, and these courts passed judgment based upon this very question.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

W. MATTHEW DODGE
Counsel of Record
FEDERAL DEFENDER PROGRAM
101 Marietta Street, NW
Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
Matthew_Dodge@FD.org

April 13, 2022