No. _____

In the

Supreme Court of the United States

_____

David Matthews,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

1. In Texas, a thief is guilty of robbery if he "intentionally or knowingly threatens or *places another in fear of* imminent bodily injury or death." Texas Penal Code § 29.02(a)(2) (emphasis added). To "place another in fear," the thief need not communicate a threat nor even interact with the victim.

Does this crime "ha[ve] as an element the . . . threatened use of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B)(i)?

2. Where a state's highest court has "definitively" held that a jury must agree which of two statutory alternatives was proven at trial, then it "is easy" for a federal court to determine divisibility: "a sentencing judge need only follow what" that state court decision "says." *Mathis v. United States*, 579 U.S. 500, 518 (2016). But the ACCA's categorical approach demands "certainty," and any "indeterminancy" should be resolved in the defendant's favor. *Id.* at 519.

In the absence of a definitive ruling from a state's highest court, and where intermediate state appellate decisions conflict with one another, may a federal court resolve the divisibility question against the defendant?

PARTIES TO THE PROCEEDING

Petitioner is David Matthews who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. David Matthews*, 4:17-CR-121, United States District Court for the Northern District of Texas. Judgment and sentence were entered on February 14, 2018.

2. *United States v. David Matthews*, No. 18-10235, 2022 WL 317667 (5th Cir. Feb. 2, 2022), Court of Appeals for the Fifth Circuit. The judgment affirming the conviction and sentence was entered on February 2, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Matthews seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was not published but is available at *United States v. David Matthews*, No. 18-10235, 2022 WL 317667 (5th Cir. Feb. 2, 2022), and is reprinted on pages 1a–2a of the Appendix. A previous unpublished opinion of the Court of Appeals can be found at 799 F. App'x 300, and is reprinted on pages 5a–6a of the Appendix.

JURISDICTION

The Fifth Circuit entered judgment on February 2, 2022. Petitioner timely filed a petition for rehearing en banc, which was denied March 24, 2022. App., *infra*, 3a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1). That statute provides, in pertinent part:

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

> (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

This case also involves Texas Penal Code § 29.02:

> Sec. 29.02. 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

Texas has an unusually broad statutory definition of "robbery." In most jurisdictions, a "robbery" is a prototypically violent crime: taking property *from* the person or presence of the victim *by means of* actual or threatened force. From the beginning, the ACCA has always included such true robberies as predicates. *See Stokeling v. United States*, 139 S. Ct. 544, 551–52 (2019). But Texas has chosen to define "robbery" in terms of the harm or fear *caused by* a thief. As this Court recently recognized, the Texas definition of "robbery" reaches conduct that "few would" describe as "violent felonies." *Borden v. United States*, 141 S. Ct. 1817, 1831 (2021)

(discussing *Craver v. State*, 2015 WL 3918057, *2 (Tex. App., June 25, 2015)). After *Borden*, the Government conceded (and the Fifth Circuit held) that a Texas robbery committed by causing bodily injury is not a violent felony—"robbery can be committed recklessly." *United States v. Garrett*, 24 F.4th 485, 488–89 (5th Cir. 2022).

This case is about the *other* way to prove robbery in Texas: the defendant "intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." Tex. Pen. Code § 29.02(a)(2). Mr. Matthews pressed two arguments below that are relevant to this petition: that a thief can "place[ ] another in fear of imminent bodily injury" without threatening to use force against the victim, and that "causing bodily injury or threatening the victim are different methods of committing the same offense," *Burton v. State*, 510 S.W.3d 232, 237 (Tex. App. 2017), making the crime indivisible.

1. In March of 2017, police found a shotgun in the trunk of Petitioner David Matthews's car. He pleaded guilty to possessing a firearm after felony conviction in violation of 18 U.S.C. § 922(g)(1). App., *infra*, 6a. Normally, that crime carries a maximum possible sentence of ten years in prison. 18 U.S.C. § 924(a)(2). But if the defendant has three prior convictions for "violent felonies" committed on separate occasions, the mandatory minimum sentence becomes fifteen years in prison, and the ACCA authorizes any sentence up to life in prison. § 924(e)(1). The district court applied the ACCA over Mr. Matthews's objection, ordering him to serve 265 months in prison followed by five years of supervised release. App., *infra*, 6a–7a.

2. According to the lower courts, Mr. Matthews had *four* "violent felony" convictions. Two were for Texas burglary, and two were for Texas robbery. App. 4a–5a. This petition focuses on the two robbery convictions.

3. Years ago, the Fifth Circuit decided that § 29.02(a) did not have the use, attempted use or threatened use of physical force as an element because the statute "does not define 'robbery' in terms of the use or threat of force." *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 379 (5th Cir. 2006). Texas robbery was instead deemed violent under the ACCA's *residual* clause: "a violation of the Texas robbery statute poses a substantial risk of violent confrontation." *United States v. Davis*, 487 F.3d 282, 287 (5th Cir. 2007).

4. After this Court struck down the ACCA's residual clause in *Johnson v. United States*, 576 U.S. 591 (2015), then, one would expect Texas's unusually broad robbery offense to fall outside the reach of "violent felony." But this was extremely controversial within the Fifth Circuit. *See*, e.g., *United States v. Burris*, 896 F.3d 320, 331–32 (5th Cir. 2018), as revised (Aug. 3, 2018), opinion withdrawn, 908 F.3d 152 (5th Cir. 2018), on reh'g, 920 F.3d 942 (5th Cir. 2019), cert. granted, judgment vacated, 141 S. Ct. 2781 (2021), on remand, 856 F. App'x 547 (5th Cir. 2021).

5. This case was caught up in that *intra*-Fifth-Circuit debate. When the Fifth Circuit first decided Petitioner's appeal, it was bound by the June 2019 opinion *United States v. Burris*, 920 F.3d 942 (5th Cir. 2019), which held that all ways to commit Texas robbery satisfied the ACCA's elements clause. The court affirmed the

sentence. *United States v. Matthews*, 799 F. App'x 300, 301 (5th Cir. 2020), reprinted, App., *infra*, 4a–5a.

5. In *Borden*, this Court overruled *Burris* and even cited a Texas robbery prosecution as an example of a non-violent reckless crime. 141 S. Ct. at 1831 (discussing *Craver v. State*, No. 02-14-00076-CR, 2015 WL 3918057, *2 (Tex. App., June 25, 2015)). After *Borden*, the Government conceded (and the Fifth Circuit held) that a Texas robbery *committed by causing bodily* is not a violent felony. *See Burris*, 856 F. App'x 547; *see also United States v. Garrett*, 24 F.4th 485, 489 (5th Cir. 2022), reprinted at App., *infra*, 15a (recognizing that Texas "robbery can be committed recklessly"). This Court vacated the Fifth Circuit's earlier decision for reconsideration in light of *Borden*. *Matthews v. United States*, 141 S. Ct. 2782 (2021).

6. On remand, Mr. Matthews urged the Fifth Circuit to hold that robbery committed by causing "fear" did not satisfy the elements clause, either. *Borden* explained that the ACCA's elements clause requires a "targeting" of the victim. 141 S. Ct. at 1825 ("The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual.'"). He explained that "a threat is not actually required to establish robbery" in Texas because of the placing-in-fear language. Matthews C.A. Supp. Br. 17 (5th Cir. filed Sept. 17, 2021) (quoting *Cooper v. State*, 430 S.W.3d 426, 433–34 n.47 (Tex. Crim. App. 2014) (Keller, P.J., concurring)). In fact, Texas's highest criminal court has held that a defendant can be convicted of robbery even if he never *interacted with* the victim. *Howard v. State*, 333 S.W.3d 137, 137–38 (Tex. Crim. App. 2011).

7. Alternatively, Mr. Matthews argued that bodily-injury robbery and fear-robbery were indivisible means of committing a single offense. In support of this contention, he pointed to several state appellate decisions: *Cooper*, 430 S.W.3d at 434 (Keller, P.J., concurring); *id.* at 439 (Cochran, J., concurring); *Burton v. State*, 510 S.W.3d 232, 237 (Tex. App. 2017); *Martin v. State*, No. 03-16-00198-CR, 2017 WL 5988059, at *3 (Tex. App. 2017).

8. While Mr. Matthews's case was pending, the Fifth Circuit decided both questions against him in a hastily briefed appeal, *United States v. Garrett*, 24 F.4th 485 (5th Cir. 2022). That decision is reprinted on pages 11a–17a. *Garrett* held that the Texas simple robbery statute is divisible into two crimes, and robbery-by-fear qualifies as a violent felony under the elements clause. Based on *Garrett,* the Fifth Circuit again affirmed Mr. Matthews's ACCA sentence. App., *infra*, 1a–2a. The court also denied his petition for rehearing en banc. App., *infra*, 3a.

REASONS TO GRANT THIS PETITION

I. This Court should grant the petition because the Fifth Circuit's interpretation of "threatened use of physical force" conflicts with this Court's decision in *United States v. Taylor*.

Just yesterday, this Court issued its decision in *United States v. Taylor*, No. 20-1459, ___ S. Ct. ___ (June 21, 2022). *Taylor*'s analysis unequivocally overrules the Fifth Circuit's decision here and in *Garrett*. Texas explicitly upholds convictions for robbery, even where there was no threat at all—simply a frightened victim. This Court should grant certiorari and decide the merits of the issue or, in the alternative, grant, vacate, and remand for further consideration in light of *Taylor*.

A. Texas simple robbery allows for conviction when the defendant places another in fear, which Texas courts have explicitly distinguished from making a threat.

The Texas statute defining simple robbery provides two ways for a person to commit the offense:

> (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.

Tex. Penal Code § 29.02(a) (1994). As noted above, subsection (a)(1) allows conviction for recklessly causing injury, which no longer qualifies as a violent felony after *Johnson* and *Borden*. But the Fifth Circuit has held that a conviction under subsection (a)(2) does count for ACCA purposes. *See Garrett*, 24 F.4th at 491.

Texas courts have made clear that "threaten[ing]" and "plac[ing] another in fear" of imminent bodily injury or death have two distinct meanings. *See,* e.g., *Williams v. State*, 827 S.W.2d 614, 616 (Tex. App. 1992) ("The general, passive requirement that another be 'placed in fear' cannot be equated with the specific, active requirement that the actor 'threaten another with imminent bodily injury.'"); *Jackson v. State*, No. 05-15-00414-CR, 2016 WL 4010067, at *4 (Tex. App. 2016) ("This is a passive element when compared to the dissimilar, active element of threatening another."). Placing another in fear does not require a threat at all. *See Williams*, 827 S.W.2d at 616 ("The factfinder may conclude that an individual perceived fear or was 'placed in fear,' in circumstances where no actual threats were conveyed by the accused."); *see also Cooper*, 430 S.W.3d at 433–34 & n.47 (Keller, P.J., concurring) (citing the unanimous view of the courts of appeals that "a threat is not actually required to establish robbery" because the statute allows conviction for placing another in fear).

The Texas Court of Criminal Appeals has interpreted the passive "places another in fear" aspect in very broad terms. In *Howard v. State*, the court decided that the defendant committed robbery without even *interacting* with the victim—there was no evidence that the defendant even knew of the victim's existence. The victim, a convenience store clerk, hid in a back office and watched the theft on a video screen. *Howard*, 333 S.W.3d at 137–38. There was "no evidence in the record showing that [Howard] was aware of" the victim. *Id.* Yet the court affirmed his conviction. The Court reasoned that the term "knowingly" in the phrase "knowingly . . . places

another in fear" does not "refer to the defendant's knowledge of the actual results of his actions, but knowledge of what results his actions are reasonably certain to cause." Thus, "robbery-by-placing-in-fear does not require that a defendant know that he actually places someone in fear, or know whom he actually places in fear." *Id.* at 140. Howard never "threatened" the clerk but he was guilty of robbery. Thus, the threatened use of physical force cannot be an element of Texas robbery.

Similarly, the facts of *Burgess v. State* demonstrate that an actual threat is not required. There, the defendant entered a car parked outside of a post office and stole a purse. *Burgess v. State*, 448 S.W.3d 589, 595 (Tex. App. 2014). A child was seated in the car and ran away screaming when the defendant entered the vehicle. *Id.* The court held that Burgess was guilty of "robbery" under subsection (a)(2) because, even if the defendant did not know a child was in the car as he approached, he learned of her presence when he entered the vehicle and took the purse. *Id.* at 601. He did not communicate anything to the child, and thus he did not "threaten" the child. That didn't matter. It didn't matter that he was oblivious to the child's presence until after entering the vehicle and grabbing the purse. The child's fear resulting from his presence in the vehicle was enough for conviction. *See id.*

Still, the Fifth Circuit held that Texas robbery by threat or placing in fear qualifies as a violent felony. *Garrett*, 24 F.4th at 491.

B. The Fifth Circuit's decision conflicts with this Court's decision in *United States v. Taylor*, ___ S. Ct. ___ (June 21, 2022).

The Fifth Circuit's holding cannot be squared with this Court's just-issued decision in *Taylor*, __ S. Ct. __ , 2022 WL 2203334 (June 21, 2022). *Taylor* held that

a conviction for attempted Hobbs Act robbery does not qualify as a crime of violence under 18 U.S.C. § 924(c) because it lacks an element of the use, attempted use, or threatened use of force. *Id.* at *4. *Taylor* distinguished between a defendant's *intention* to take property by force or threat and an actual threat. *Id.* The Court specifically rejected the government's argument that a threat is just an "objective or abstract risk." *Id.* at *6. A threatened use of force "require[es] a communicated threat." *Id.* It cannot simply be "conduct that poses an abstract risk to community peace and order, whether known or unknown to anyone at the time." *Id.*

That is exactly what the Texas robbery statute criminalizes—placing another in fear, regardless of whether the defendant actually threatened the victim or whether the defendant and victim interacted at all. *See Howard*, 333 S.W.3d at 137–38; *Burgess*, 448 S.W.3d at 601. The Fifth Circuit's ruling stands in stark conflict with *Taylor*.

C. In the alternative, this Court should grant, vacate, and remand in light of *Taylor*.

When the Fifth Circuit rejected the argument that placing in fear does not equate to a threat of force, it did not have the benefit of this Court's analysis in *Taylor*. But *Taylor* makes clear that threat of force is an actual, communicated threat. The Texas robbery statute, on the other hand, allows for conviction when no threat is made. This case involves an important question affecting a significant number of ACCA sentences. At the very least, this Court should grant, vacate, and remand for further consideration in light of *Taylor*.

II. This Court should grant the Petition to resolve the conflict over determining divisibility when some state court decisions favor the defendant.

In *Mathis v. United States*, this Court tackled the essential question for determining whether the modified categorical approach applies. 579 U.S. 500, 517 (2016). Are the alternatives listed in the statute true elements that the jury must unanimously agree on in order to convict? Or are they mere alternative means of committing a single offense? To resolve the elements versus means conundrum, this Court laid out four methods for courts to apply, stating the inquiry will be "easy" in many cases. *Id.* at 517.

First, a state court decision may definitively answer the question by ruling that a jury must, or need not, unanimously agree on a particular alternative listed in the statute in order to convict. *Id.* at 517. That was the case in *Mathis*—the Iowa Supreme Court held that the alternatives listed in the Iowa burglary statute were "'alternative method[s]' of committing one offense, so that a jury need not agree whether the burgled location was a building, other structure, or vehicle." *Id.* at 517–518. Second, the statute itself may provide an answer, such as when the statutory alternatives carry different punishments. *Id.* at 518. Third, if state law fails to provide "clear answers," courts may "'peek at the [record] documents" for "the sole and limited purpose of determining whether [the listed items] are element[s] of the offense.'" *Id.* (quoting *Rendon v. Holder*, 782 F.3d 466, 473 (9th Cir. 2015) (Kozinski, J., dissenting from denial of reh'g en banc)). And fourth, if none of these sources provides a clear answer, "a sentencing judge will not be able to satisfy '*Taylor*'s demand for certainty'

when determining whether a defendant was convicted of a generic offense." *Id.* at 519 (quoting *Shepard v. United States*, 544 U.S. 13, 21 (2005)). A court cannot apply a sentencing enhancement when the law or records do not "speak plainly" about whether an overbroad statute is divisible. *Id.*

Because the *Mathis* approach to divisibility seemed straightforward, this Court predicted that indeterminacy would prove more the exception than the rule. *Id.* But in practice, courts are getting stuck on step one: what to do when state court decisions conflict? When faced with this dilemma, the circuits have come up with divergent solutions. This Court should grant certiorari to settle the matter.

A. The circuits are divided over the second question presented.

Where a state Supreme Court decision resolves the jury unanimity question, it is "easy" to determine divisibility. But the lower courts are divided over what to do when state appellate decisions conflict with one another.

When faced with conflicting and "inconsistent" state court decisions, the Tenth Circuit resolved the dispute in the defendant's favor. *Jimenez v. Sessions*, 893 F.3d 704, 712 (10th Cir. 2018) ("Colorado case law demonstrates that the intended crime is not an element, *although we acknowledge the jurisprudence is somewhat mixed*.") (emphasis added). Noting that Colorado courts have been inconsistent in their use of the term "elements," the Tenth Circuit ultimately concluded that the majority of state court decisions favored indivisibility. *Id.* at 714–716 ("Decisions from Colorado's intermediate appellate court and decisions that pre-date *Williams* do not persuade us to deviate from its holding."). In *United States v. Cantu*, 964 F.3d 924 (10th Cir.

2020), the court acknowledged that it could only hold a state statute divisible if the state-court decisions gave rise to *certainty*. *Id.* at 930 (vacating ACCA sentence when "Oklahoma case law makes it impossible to say with certainty that the Oklahoma statute is divisible by drug.").

The Eighth Circuit followed the same procedure when analyzing state-court decisions in *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018) (en banc). Although "Missouri courts have not yet decided the precise issue," the court determined many state courts resolved cases "in a manner consistent with" indivisibility. *Id.* at 402–403. The court dismissed a conflicting Missouri Supreme Court decision as dicta. *Id.* at 404. It had to "grapple with" decisions that pointed in both directions. *Id.* at 407 (Colloton, J., concurring). "Missouri law is patently unclear on whether the statutory terms are means or elements." *Id.* at 410–411 (Shepherd, J., dissenting). Yet the defendant prevailed.

The Seventh and the Ninth Circuits took a different approach: they certified unanimity questions to state courts. In *United States v. Franklin*, 895 F.3d 954 (7th Cir. 2018), the Seventh Circuit was tasked with determining whether the Wisconsin burglary statute was divisible between the places listed in the statute. *Id.* at 956 (citing Wis. Stat. § 943.10(1m), which lists burglary of a building or dwelling, enclosed railroad car, enclosed portion of any ship or vessel, locked enclosed cargo portion of a truck or trailer, a motor home or motorized type of home, or a room within any of the above). With no state supreme court opinion directly on point, the parties argued the relevance of Wisconsin Supreme Court decisions on a similar statute and the

decisions of state intermediate courts of appeal, which pointed to different results. *Id.* at 960. Rather than parse through the conflicting case law, the Seventh Circuit asked the Wisconsin Supreme Court to step in and listed two reasons for certifying the question. *Id.* at 961. First, the question of state law was close with "both sides offer[ing] good reasons for interpreting the available signs in their favor." *Id.* Second, the issue of state law is important for both the federal and state court systems and the answer will have significant practical effects on numerous prosecutions. *Id.* (discussing concerns of federal sentencing, state jury instructions, state double-jeopardy protections, and prosecutor charging decisions). Based on the response from the Supreme Court of Wisconsin, the Seventh Circuit held the Wisconsin burglary is indivisible and overbroad. *United States v. Franklin*, 772 F. App'x 366, 367 (7th Cir. 2019).

The Ninth Circuit likewise certified a question to the Oregon Supreme Court in *United States v. Lawrence*, 905 F.3d 653, 658–59 (9th Cir. 2018). Rather than choose which line of cases was more persuasive, the 9th Circuit certified three questions to the Oregon Supreme Court. *Id.* at 659 ("Without further guidance, we cannot say with confidence that Oregon precedent definitively answers the question whether Robbery I and II are divisible.").[1]

[1] After the Supreme Court of Oregon accepted the certified questions, this Court issued its decision in *Stokeling v. United States*, 139 S. Ct. 544 (2019), and the defendant in *Lawrence* successfully moved to dismiss his appeal in the Ninth Circuit. *United States v. Lawrence*, 441 P.3d 587, 588 (Or. 2019) (en banc). As a result, the Ninth Circuit modified its certification order to the extent that its questions involved Lawrence's case. *Id.* The Supreme Court of Oregon subsequently declined certification of the remaining questions. *Id.*

The Fifth Circuit took a very different approach in *Garrett*. It denied Garrett's motion to certify the unanimity question to the Texas Court of Criminal Appeals. And the court ultimately resolved conflicting caselaw *against* the defendant. *Garrett* decided that Texas Penal Code § 29.02(a)(1) (robbery-by-injury) & (2) (robbery-by-threat or placing-in-fear) created two separate offenses, rather than a single indivisible offense. *Garrett* began with its own analysis of the statutory text, concluding that causing injury and threatening or causing fear were "conceptually distinct" alternatives with different mental state requirements. 24 F. 4th at 489–90.[2] *Garrett* next looked to the way both Texas and federal courts analyzed "a related state statute"—§ 22.02(a), assault—which creates multiple, divisible crimes. *Id.* (discussing *United States v. Torres*, 923 F.3d 420 (5th Cir. 2019), and *Landrian v. State*, 268 S.W.3d 532 (Tex. Crim. App. 2008)).

Only then did *Garrett* consider, "perhaps only parenthetically," how Texas's intermediate courts had interpreted *Landrian* when considering jury unanimity challenges to *robbery* prosecutions. *Id.* at 490. Although multiple intermediate courts have held that juries need not be unanimous as to whether the defendant committed robbery by injury or by threat, the Fifth Circuit found a Texas Court of Criminal Appeals decision on assault and the minority position among the intermediate appellate courts most persuasive:

[2] This Court has provided two examples of when the text of the statute resolves the divisibility question: when the statutory alternatives carry different punishments and when a statutory list is drafted to offer illustrative examples. *Mathis*, 579 U.S. at 518. Neither is present here.

> There is, unsurprisingly, more than one interpretation among the Texas courts of appeal. For example, in *Burton v. State*, 510 S.W.3d 232, 236–37 (Tex. App. 2017), the court found that jury instructions allowing a conviction on a theory of either robbery-by-injury or robbery-by-threat did not violate the defendant's right to jury unanimity on the verdict. There are other cases cited by Garrett, but we think they are either inapposite or unpersuasive. Although state appellate court decisions are not unanimous, we conclude, as we have said, that lower court cases considered as a whole are supportive of the notion that simple robbery is divisible into separate crimes[.]

Id. at 490 & n. 6. Despite state court decisions to the contrary, the Fifth Circuit chose its own interpretation of state law and ruled in favor of applying the ACCA.

To satisfy *Taylor*'s demand for certainty, the other circuits require more. The Seventh and Ninth Circuits have certified questions to the state supreme court to resolve conflicting decisions. The Eighth and Tenth Circuits resolve divisibility questions in the defendant's favor when state law is insufficiently certain. Unlike other areas where regional courts must construe state law, the ACCA's categorical approach requires doubt about state law to be resolved in favor of the defendant. In *Mathis*, this Court held that a sentencing judge must treat a statute as indivisible (and non-generic) unless the relevant materials— including state court decisions— "speak plainly." 579 U.S. at 519. The circuit courts need guidance on whether the demand for certainty may be satisfied by the federal court's own interpretation of a state statute, especially where there are multiple reasoned state court opinions pointing the other way.

B. Given the strength of state authority Mr. Matthews cited below, this case would be an ideal vehicle to address this question.

Mr. Matthews cited state appellate decisions directly addressing juror unanimity and recognizing that bodily-injury robbery and threat robbery were indivisible means of proving a single crime. *See Burton*, 510 S.W.3d at 237; *Martin*, 2017 WL 5988059, at *3. He also cited concurring opinions joined by four Texas Court of Criminal Appeals judges. *Cooper*, 430 S.W.3d at 434 (Keller, P.J., concurring); *id.* at 439 (Cochran, J., concurring). The Fifth Circuit rejected that authority in favor of an older, alternative interpretation of a different statute as creating two distinct crimes. And the court refused to certify the question to the Texas Court of Criminal Appeals.

Under *Mathis*, the question is not whether the Fifth Circuit correctly predicted how the Court of Criminal Appeals would rule on the unanimity question. The question is whether state law provides "certainty." The court resolved the issue against Mr. Matthews.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. In the alternative, he asks that the Court grant, vacate, and remand for further consideration in light of *United States v. Taylor*, No. 20-1459, ___ S. Ct. ___ (June 21, 2022).

Respectfully submitted,

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