

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

TOMAS GALVAN-FUENTES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), Petitioner Tomas Galvan-Fuentes asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in the United States District Court and on appeal to the United States Court of Appeals for the Fifth Circuit.

Date:
December 22, 2017

Respectfully submitted,

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Southern District of Texas
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A handwritten signature in blue ink, appearing to read "John Parras", followed by the word "for" in a cursive script.

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QUESTION PRESENTED

In Mathis v United States, 136 S. Ct. 2243 (2016), this Court clarified the divisibility analysis that must be conducted when applying the categorical approach to prior state convictions underlying federal sentencing enhancements. Under Mathis, a statute of conviction that lists alternative elements giving rise to separate crimes is divisible—and thus subject to the modified categorical approach—whereas a statute that lists only multiple means of committing a single offense is indivisible. “Elements” are “the things the prosecution must prove to sustain a conviction,” they are “what the jury must find beyond a reasonable doubt to convict the defendant . . . and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty.” Id. at 2248 (citations omitted). A state crime whose elements are broader than a generic federal sentence-enhancing crime cannot serve as a predicate conviction permitting enhancement under federal law. Id.

In Mathis, this Court held that to distinguish between elements and means in a state statute of conviction, federal sentencing courts should look to “authoritative sources of state law,” such as “a state court decision [that] definitively answers the question” of whether a particular statutory alternative must be proved to a jury, or the state statute’s text and structure. See id. at 2256.

- I. In making the post-Mathis means-or-elements divisibility determination, are federal courts bound to follow authoritative state court decisions concerning jury unanimity?
- II. Is the Texas crime of burglary of a habitation, Texas Penal Code § 30.02(a), a crime of violence under USSG § 2L1.2 (2014)?

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

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PRAYER

Petitioner Tomas Galvan-Fuentes prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINION AND ORDER BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in petitioner's case is attached to this petition as Appendix A. The order denying rehearing is attached as Appendix B.

JURISDICTION

The judgment and opinion was entered on May 30, 2017. See Appendix A. Mr. Galvan-Fuentes's timely petition for rehearing was denied on July 27, 2017. See Appendix B. On October 16, 2017, Justice Alito granted Mr. Galvan-Fuentes's application for an extension of time to file a petition for a writ of certiorari, and extended the time to and including December 22, 2017. This petition is filed within that deadline. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

1. USSG § 2L1.2 (2014) provides in pertinent part:

§ 2L1.2. Unlawfully Entering or Remaining in the United States

- (a) Base offense level: **8**
- (b) Specific Offense Characteristic

- (1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

a conviction for a felony that is . . . (ii) a crime of violence. . . increase by 16 levels if the conviction receives criminal history points under Chapter 4. . . .

* * *

Application Notes:

* * *

1. Application of Subsection (b)(1).—

(B) Definitions.—For purposes of subsection (b)(1):

* * *

(iii) “Crime of violence” means any of the following under federal, state or local law: . . . burglary of a dwelling. . . .

2. Texas Penal Code § 30.02(a) (2001) provides:

§ 30.02 Burglary

- (a) A person commits an offense if, without the effective consent of the owner, the person:
- (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
- (2) remains concealed, with intent to commit a felony, theft, or an assault,

in a building or habitation; or

- (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

STATEMENT OF THE CASE

Petitioner Tomas Galvan-Fuentes pleaded guilty to illegally reentering the United States in violation of 8 U.S.C. § 1326(a) and (b)(1). At sentencing, the district court assessed a 16-level “crime of violence” enhancement under USSG § 2L1.2(b)(1)(A)(ii) (2014) based on Mr. Galvan-Fuentes’s 2003 Texas conviction for burglary of a habitation under Tex. Penal Code § 30.02(a)(1) and (a)(3). The enhancement was based on the determination that the prior offense qualified as a crime of violence under § 2L1.2 because it was equivalent to the enumerated offense of “burglary of a dwelling.” With the enhancement, Mr. Galvan-Fuentes was subject to a Guidelines imprisonment range of 77 to 96 months. Mr. Galvan-Fuentes objected to application of the 16-level enhancement, arguing that the Texas burglary statute is indivisible and broader than generic “burglary of a dwelling.” His prior conviction, therefore, could not be narrowed to a qualifying “crime of violence” conviction using the modified categorical approach.

At sentencing, defense counsel argued, among other things, that (1) Texas Penal Code § 30.02(a) is not a divisible statute, and thus prior-conviction documents could not be used to narrow Mr. Galvan-Fuentes’s conviction; and (2) viewed categorically, § 30.02(a) was not a “crime of violence” because not every violation of § 30.02(a) qualifies as a “crime of violence.” The court overruled the objection and sentenced Mr. Galvan-Fuentes to 90 months of imprisonment and three years of supervised release.

Mr. Galvan-Fuentes timely appealed and reurged his challenge to the 16-level enhancement. He argued that the Texas burglary statute was indivisible and broader than burglary of a dwelling, but he also recognized that his challenge was foreclosed by the

Fifth Circuit's post-Mathis opinion in United States v. Uribe, 838 F.3d 667, 670 (5th Cir. 2016), cert. denied, 137 S. Ct. 1359 (2017), which held that the Texas burglary statute was divisible. The Government filed a motion for summary disposition, arguing that the issue was foreclosed on appeal. The Fifth Circuit subsequently affirmed the district court, relying on its decision in Uribe. See United States v. Galvan-Fuentes, No. 16-40516, slip op. (5th Cir. 2017) (unpublished) (attached as Appendix A).

Mr. Galvan-Fuentes seeks to have this Court review the Fifth Circuit's opinion that the Texas burglary statute is divisible and therefore subject to the modified categorical approach.

BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

- I. The Fifth Circuit Court of Appeals, in its application of the divisibility analysis of *Mathis* to the Texas crime of burglary of a habitation, has decided an important federal question in a way that conflicts with relevant decisions of this Court and authoritative sources of state law.

The 16-level “crime of violence” enhancement in this case rests on a determination that Mr. Galvan-Fuentes’s 2003 Texas burglary conviction is equivalent to the enumerated offense of “burglary of a dwelling” in USSG § 2L1.2 comment. (n.1(B)(iii)) (2014). The Texas statute is not equivalent, however, because, although it includes conduct that is equivalent to the generic offense, it also includes conduct that the Fifth Circuit has recognized is broader than the generic “burglary” offense. See United States v. Constante, 544 F.3d 584, 587 (5th Cir. 2008) (regarding “burglary” in 18 U.S.C. § 924(e)). The “crime of violence” determination depends, therefore, on whether Texas’s burglary statute is divisible post-Mathis, that is, whether the statutory alternatives regarding the mens rea element define separate crimes or, as Mr. Galvan-Fuentes argues herein, they provide alternative manners and means of establishing one necessary mens rea element.

In Mathis v. United States, 136 S. Ct. 2243 (2016), this Court provided clear instructions for lower courts about how to conduct the divisibility analysis of the categorical approach. Id. at 2256-57. Mathis clearly holds that in order for a statute to be divisible it must set forth alternative “elements,” and elements are “the things the prosecution must prove to sustain a conviction.” Id. at 2248. Mathis emphasizes the primary role of state law in making the elements-versus-means determination. When “a state court decision definitively answers the question . . . a [federal] sentencing judge need

only follow what it says.” Id. at 2256.

Texas case law answers the elements-versus-means question for Texas burglary. State appeals court opinions addressing the issue specifically and unanimously hold that the various subsections in Texas’s burglary statute describe alternative manners and means of satisfying a single mens rea element and do not define separate crimes. Texas state court decisions do not require a jury to unanimously agree on which subsection, (a)(1), (a)(2), or (a)(3), of the burglary statute a defendant committed when multiple subsections of the statute are charged. Despite these state opinions, the Fifth Circuit has held that Texas’s burglary statute continues to be divisible post-Mathis. See United States v. Galvan-Fuentes, No. 16-40516, slip op. at 2 (5th Cir. 2017) (citing United States v. Uribe, 838 F.3d 667, 670-671 (5th Cir. 2016), cert. denied, 137 S. Ct. 1359 (2017)). The Fifth Circuit’s approach here and in Uribe disregards the instructions of Mathis and ignores relevant state case law regarding jury unanimity and double jeopardy, two important indicators illuminating the important distinction between the statute’s elements and its manners and means of establishing the necessary mens rea. For these reasons, the Fifth Circuit’s misapplication of Mathis and its failure to accord relevant Texas case law any significance, this Court should grant this petition.

- A. The Texas burglary statute includes conduct that is broader than the generic offense of burglary of a dwelling.

The substantive crime of burglary of a habitation is defined in Texas Penal Code § 30.02(a):

- (a) A person commits an offense if, without the effective consent of the

owner, the person:

- (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
- (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
- (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

The Fifth Circuit has long held that an offense under Texas Penal Code § 30.02(a)(1) qualifies as generic burglary, while an offense under § 30.02(a)(3) does not, because (a)(3) lacks the element of specific intent to commit a theft or a felony at the time of the unprivileged entry. See United States v. Constante, 544 F.3d 584, 587 (5th Cir. 2008); United States v. Castro, 272 Fed. Appx. 385, 386 (5th Cir. 2008) (unpublished); United States v. Beltran-Ramirez, 266 Fed. Appx. 371, 372 (5th Cir. 2008) (unpublished); accord United States v. Herrera-Montes, 490 F.3d 390, 392 (5th Cir. 2007) (applying same analysis to Tennessee burglary statute); United States v. McArthur, 850 F.3d 925, 939 (8th Cir. 2017) (applying same analysis to Minnesota burglary statute). This Court's definition of generic burglary in Taylor v. United States, 495 U.S. 575, 598 (1990), as well as Model Penal Code § 221.1, require intent to commit a crime at the time of entry. See Herrera-Montes, 490 F.3d at 392. Professor LaFave's treatise makes clear that the theory of burglary described in Texas Penal Code § 30.02(a)(3) is exceedingly uncommon among state burglary laws, and that the requirement of contemporaneous intent to commit a crime has always been understood as critical to a burglary conviction. See Wayne R. LaFave, Substantive Criminal Law, § 21.1(e) (October 2017 Update).

Most states have now expanded burglary to reach a defendant who entered with the owner's permission (such as when a business was open to the public), but then hid himself until the business closed and everyone else had left. *Id.* at § 21.1(b) (discussing “the case of a bank customer who hides in the bank until it closes and then takes the bank's money”). These states preserved the contemporaneous intent requirement, but the unlawful intent had to exist at the moment the defendant surreptitiously “remained.” *Id.* Texas law includes both the classic form of burglary, Texas Penal Code § 30.02(a)(1), and the very common statutory expansion for someone who “remains concealed, with intent to commit a felony, theft, or an assault.” *Id.* § 30.02(a)(2).

Texas, in subsection (a)(3), has codified a third theory for committing burglary which, unlike classic burglary, does not require any unlawful intent at the time of the entry or remaining. Under this third theory, it is sufficient that the defendant committed or attempted to commit a qualifying crime within the structure, regardless of his intent at the time of entry. *Id.* § 30.02(a)(3). Just five states, including Texas, have adopted this unusual definition. LaFave, *supra* § 21.1(e) & n.5. The Fifth Circuit is thus correct to recognize that the unusual theory in Texas Penal Code § 30.02(a)(3) describes a non-generic burglary. See, e.g., *Constante*, 544 F.3d at 586; *Herrera-Montes*, 490 F.3d at 391-392.

- B. The Fifth Circuit ignored the directives of *Mathis* and relevant Texas law regarding jury unanimity in determining that, post-*Mathis*, the Texas burglary statute is divisible.

Because the Texas burglary statute includes some conduct that does not qualify as generic burglary and some conduct that does qualify, the applicability of the 16-level enhancement turns on whether the statute is divisible between the alternative subsections,

and thus whether a modified categorical analysis may be used to narrow the prior conviction to a qualifying subsection. If Texas Penal Code § 30.02(a) defines only one crime of burglary, with the three subsections containing alternative manners and means of committing a single burglary offense, then the statute is indivisible and it can never be a categorical match with generic burglary of a dwelling under USSG § 2L1.2.

In Mathis, this Court emphasized the indispensable role of state law jury unanimity requirements in determining whether statutory alternatives are means or elements. “Elements are the constituent parts of a crime’s legal definition—the things the prosecution must prove to sustain a conviction. At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant.” Mathis, 136 S. Ct. at 2248 (quotations and citations omitted). Because Iowa’s Supreme Court established that “a jury need not agree” on which location a defendant burgled in Mathis, this Court easily found that the Iowa burglary statute was indivisible as to the locational element. See id. at 2256.

Yet in contravention of Mathis, the Fifth Circuit ignored relevant Texas opinions from Texas courts of appeal which specifically hold that a jury is not required to unanimously agree on which subsection of burglary a defendant committed when multiple subsections are charged. In affirming Mr. Galvan-Fuentes’s sentence, the Fifth Circuit relied on its prior decision in Uribe. See Galvan-Fuentes, slip op. at 2; Uribe, 838 F.3d at 670-671. In Uribe, the Fifth Circuit determined that Texas Penal Code § 30.02(a) was divisible between subsections (a)(1), (a)(2), and (a)(3). This conclusion rested on two grounds. First, the court deemed significant that, unlike the Iowa statute at issue in Mathis, § 30.02(a) does not provide a list of “illustrative examples” or “outline multiple ways to

satisfy a single element.” Uribe, 838 F.3d at 670. Second, the Court cited statements by the Texas Court of Criminal Appeals, made outside of the jury-unanimity context, describing the alternatives under § 30.02(a) as “ways” of committing burglary, or “elements.” See id. at 670-71 (citing DeVaughn v. State, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988) (“three distinct ways”), and Day v. State, 532 S.W.2d 302, 305-06 (Tex. Crim. App. 1975) (“the elements of the three types”), abrogated on other grounds, Hall v. State, 225 S.W.3d 524, 527-31 (Tex. Crim. App. 2007)).

Uribe ignored Mathis’s primary teaching: the elements-or-means inquiry must give controlling weight to state law decisions that specify whether a statute’s alternative subsections must be unanimously agreed upon by a jury, not state court decisions describing statutory alternatives in tangentially relevant contexts. Numerous Texas intermediate appellate court decisions have expressly held that the disjunctive subsections of § 30.02(a) represent alternative manners and means of satisfying a single mens rea element, they are not alternative elements that must be proved unanimously. See, e.g., Martinez v. State, 269 S.W.3d 777, 783 (Tex. App.—Austin 2008, no pet.) (holding that § 30.02(a)(1) and (3) “are essentially **alternative means of proving a single mens rea element** and not separate offenses” and finding that unanimity is not required if both subsections are charged in the disjunctive) (citations omitted, emphasis added); see also Stanley v. State, No. 03-13-00390-CR, 2015 WL 4610054, at *7 (Tex. App.—Austin July 30, 2015, pet. ref’d) (unpublished) (same); Ramos v. State, No. 04-05-00543-CR, 2006 WL 1624230, at *1 (Tex. App.—San Antonio June 14, 2006, pet. ref’d) (unpublished) (same); Yates v. State, No. 05-05-00140-CR, 2005 WL 3007786, at *3 (Tex. App.—Dallas

Nov. 10, 2005, no pet.) (unpublished) (same). Texas caselaw regarding double jeopardy supports the proposition that the statutory alternatives in (a)(1) through (a)(3) support one crime per actus reus (entry), not per mens rea. See Ex Parte Cavazos, 203 S.W.3d 333, 337 (Tex. Crim App. 2006) (finding that “the allowable unit of prosecution in a burglary is the unlawful entry” and that a double-jeopardy violation occurred when a defendant “was punished multiple times for a single unlawful entry.”).

Just as in Mathis, where “a state court decision definitively answer[ed] the question” by specifying that “a jury need not agree on whether the burgled location was a building, other structure, or vehicle,” Mathis, 136 S. Ct. at 2256, Texas intermediate appellate court decisions plainly hold that when both subsections, (a)(1) and (a)(3), are charged, the jury need not unanimously decide which means of proving the mens rea element of burglary the defendant committed. Compare State v. Duncan, 312 N.W.2d 519, 523 (Iowa 1981) (holding that the listed locations in Iowa’s burglary law are “alternative method[s]” of committing one offense, so that a jury need not agree on which location a defendant burgled) (cited in Mathis, 136 S. Ct. at 2256), with Martinez, 269 S.W.3d at 783 (holding that Texas Penal Code § 30.02(a)(1) and (3) “are essentially alternative means of proving a single mens rea element and not separate offenses,” and that a jury need not agree on which subsection a defendant violated).

Rather than engaging in the jury-unanimity analysis set forth in Mathis, the Fifth Circuit observed: “Important to this means-elements inquiry is also whether a state’s highest court has **described** the statute as constituting means or elements.” Uribe, 838 F.3d at 670 (emphasis added). Focusing on a court’s description of a statute, however, does not

illuminate the fundamental nature of a statute's necessary elements. A state court's casual reference to a statute's listed alternatives as elements is insufficient to establish that a defendant was necessarily convicted of a generic offense. The Mathis inquiry requires a more substantive basis for discerning a statute's elements. The divisibility analysis is an inquiry into substantive legal requirements: whether a jury is required to find the particular statutory alternative unanimously for conviction. See Mathis, 136 S. Ct. at 2256. And Texas intermediate appellate court decisions addressing the issue, see supra at p. 13 (Martinez, Stanley, Ramos, and Yates), authoritatively establish that the alternatives in subsection (a) are means that a jury need not unanimously agree on for conviction.

In sum, the Fifth Circuit has misapplied Mathis to the Texas burglary statute. The opinion in this case and in Uribe ignore authoritative state court decisions holding that the statute's alternative subsections need not be found unanimously when charged simultaneously. Under a faithful application of Mathis, the Texas courts' unanimity decisions establish that Tex. Penal Code § 30.02(a) is an indivisible statute that lists alternative means of committing a single burglary offense. The district court, therefore, erred by using the modified categorical approach.

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari to clarify the application of the divisibility analysis of Mathis. Given the Fifth Circuit's disregard of the directive of Mathis, this Court may determine that summary reversal is warranted.

Date: December 22, 2017

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