

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NOEL LERMA,
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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QUESTION PRESENTED

In Mathis v. United States, 136 S. Ct. 2243 (2016), this Court clarified that a prior state statute of conviction is “indivisible,” and thus immune to the “modified categorical approach,” if it sets forth alternative means of committing an offense, rather than separate elements that must be found unanimously by a jury, and it instructed federal courts to defer to state court decisions answering this threshold “elements or means?” question. Texas state court decisions squarely hold that the items listed in the Texas robbery and aggravated robbery statutes constitute mere alternative means, not separate elements. Dismissing these Texas authorities as “not helpful,” the Fifth Circuit in this case held that the Texas robbery statutes are divisible, and thus applied the modified categorical approach to uphold petitioner’s 15-year mandatory minimum sentence enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

The question presented is:

Did the Fifth Circuit err—to the point of warranting summary reversal—in applying the modified categorical approach to a predicate Texas aggravated robbery conviction when Texas state court decisions have construed the Texas robbery statutes as setting forth alternative means of committing a single offense?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Noel Lerma respectfully petitions for 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 United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-15a) is reported at 877 F.3d 628. The memorandum opinion and order of the district court denying petitioner's motion to vacate, set aside, or correct his sentence and granting a certificate of appealability (Pet. App. 16a-25a) is unreported but available at 2016 WL 10935644.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 2017, and a timely petition for panel rehearing was denied on January 18, 2018. This petition is filed within 90 days of that date and therefore is timely. See Sup. Ct. R. 13.1 and 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act, 18 U.S.C. § 924(e), 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 * * * 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

* * * *

INTRODUCTION

Petitioner's case presented the following issue to the Fifth Circuit: whether a prior conviction for the Texas offense of aggravated robbery "has as an element the use, attempted use, or threatened use of physical force against the person of another," and thus qualifies as a predicate "violent felony" under force clause of the Armed Career Criminal Act. 18 U.S.C. § 924(e)(2)(B)(i). Because the relevant Texas statutes defining the offense of aggravated robbery are phrased in the alternative, petitioner's case implicated the threshold "divisibility" inquiry outlined by this Court in Mathis v. United States, 136 S. Ct. 2243 (2016). If the Fifth Circuit deemed the Texas statutes "indivisible," the formal "categorical approach" would control, requiring the court to assess whether the force clause covers the least culpable conduct punishable under any of the relevant statutory alternatives. Finding the statutes "divisible," in contrast, would allow the court to employ the "modified categorical approach" and limit its analysis to only those alternatives reflected in petitioner's prior conviction materials.

The answer to this threshold question mattered a great deal in petitioner's case, because the alternatives listed in the Texas robbery statutes cover a wide range of conduct, some of which is forceful, but some of which is not. For instance, a person is guilty of simple robbery in Texas if, after an aborted theft, his or her reckless driving causes a car wreck that results in injury. And that robbery is "aggravated" if the injured motorist is either over age 65 or disabled, or simply because Texas classifies driving the car as the use or exhibition of a deadly weapon. As such, viewed categorically, the minimum conduct punishable as aggravated robbery in Texas implicates two important issues over which the circuits are deeply

divided: (1) whether (and if so, when) force clauses like the ACCA’s extend to crimes that may be committed with a mental state of recklessness; and (2) whether the causation of injury necessarily constitutes a “use” of physical force “against the person” of another for purposes of these force clauses.¹

Given the Fifth Circuit’s stance on the second question, see note 1, application of the categorical approach would have produced a decision in petitioner’s favor. Unfortunately, a clear misapplication of this Court’s precedent, specifically Mathis, led the Fifth Circuit to modify the categorical approach and thereby dispose of petitioner’s case in a way that evaded this result.

Mathis instructed federal courts performing the divisibility inquiry to defer to state court decisions establishing that statutory items constitute either alternative *means* of committing some component of the predicate offense (the hallmark of indivisibility) or separate *elements* the prosecution is required prove to sustain a conviction (the necessary ingredient for divisibility). This Court stated plainly that, “[w]hen a ruling of that kind exists,” a federal

¹ Some circuits hold that the force clause extends to all reckless offenses, e.g., United States v. Mendez-Henriquez, 847 F.3d 214, 221 (5th Cir.), cert. denied, 137 S. Ct. 2177 (2017); United States v. Verwiebe, 874 F.3d 258, 262-64 (6th Cir. 2017), cert. pending, No. 17-8413 (filed Apr. 3, 2018); United States v. Pam, 867 F.3d 1191, 1207-08 (10th Cir. 2017), while others hold that reckless offenses fall outside the force clause, e.g., United States v. Windley, 864 F.3d 36, 39 (1st Cir. 2017). The Fifth Circuit draws a hard distinction between causing bodily injury and using physical force, see United States v. Reyes-Contreras, 882 F.3d 113, 122-23 (5th Cir. 2018), while other circuits reject any such distinction, e.g., United States v. Ontiveros, 875 F.3d 533, 537-38 (10th Cir. 2017), cert. pending, No. 17-8367 (filed Apr. 4, 2018). And, a subset of circuits occupy a middle ground between both of these positions. See United States v. Middleton, 883 F.3d 485, 492 (4th Cir. 2018) (holding that while intentionally or knowingly causing injury satisfies the force clause, recklessly causing injury does not); United States v. Calvillo-Palacios, 860 F.3d 1285, 1291 & n.9 (9th Cir. 2017) (acknowledging circuit’s adherence to same distinction); compare United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017) (reckless discharge of a firearm satisfies the force clause), with United States v. Fields, 863 F.3d 1012, 1015-16 (8th Cir. 2017) (reckless driving resulting in injury does not).

court “need only follow what it says.” 136 S. Ct. at 2256. And, with respect to both the Texas robbery and aggravated robbery statutes, rulings of that kind do exist. Published decisions of Texas appellate courts hold that the Texas robbery statutes set forth alternative means of committing and aggravating the same offense, and that a Texas jury therefore need not unanimously agree as to which method of committing robbery, or which aggravating fact, was present in the defendant’s case.

Rather than defer to these Texas decisions, as Mathis dictates, the Fifth Circuit panel below dismissed them as “not helpful in the divisibility determination,” Pet. App. 11a n.4, deferring instead to its own interpretation of the Texas statutes’ disjunctive phrasing as reflecting divisible elements comprising at least four separate aggravated robbery offenses. Having found license to modify the categorical approach, the panel consulted petitioner’s prior conviction materials and determined that he had in fact committed his prior offenses in a way that involved the threatened use of force.

The Fifth Circuit’s divisibility determination is manifestly wrong. By ignoring Texas decisions interpreting the Texas robbery statutes as setting forth alternative means, not distinct elements requiring juror unanimity, the Fifth Circuit’s reasoning not only conflicts with, but is diametrically opposed to, the divisibility standard outlined in Mathis. The result is an Armed Career Criminal classification premised on a threshold conclusion that is contrary to the decisions of this Court, Texas law, the decisions of all the courts of appeals to apply Mathis, and other decisions of the Fifth Circuit. Moreover, the effects of the Fifth Circuit’s refusal to adhere to the Court’s clearly defined standard for assessing divisibility go beyond

the existence of anomalous precedent. Numerous federal defendants within the Fifth Circuit have already been denied relief from ACCA-enhanced sentences by district courts relying on the erroneous divisibility conclusion in petitioner's case.

This Court should grant certiorari because the decision below directly conflicts with past decisions of this Court and represents a serious departure from the accepted and usual course of judicial proceedings. Sup. Ct. R. 10(a), (c). In light of the clear conflict and because of the importance of ensuring proper application of the categorical and modified categorical approaches, this is a rare case in which summarily reversing the Fifth Circuit's divisibility determination is appropriate.

STATEMENT

1. A defendant convicted of being a felon in possession of a firearm is ordinarily subject to imprisonment for zero to ten years and no more than three years of supervised release. 18 U.S.C. §§ 922(g), 924(a)(2), and 3583(b)(2). The Armed Career Criminal Act (ACCA) increases those penalties to a minimum term of 15 years and maximum term of life in prison, and up to five years of supervised release, if the defendant has three or more prior convictions for a “violent felony.” 18 U.S.C. §§ 924(e)(1), 3583(b)(1). As relevant here, the Act’s “force clause” defines the term violent felony to include “any crime punishable by imprisonment for a term exceeding one year” that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” § 924(e)(2)(B)(i). The phrase “physical force” means “*violent* force—that is, force capable of causing physical pain or injury to another person.” Johnson v. United States, 559 U.S. 133, 140 (2010) (emphasis in original).

Determining whether a prior conviction qualifies as a violent felony under the ACCA requires application of the “categorical approach.” Taylor v. United States, 495 U.S. 575, 600 (1990). Under that approach, “courts may ‘look only to the statutory definitions’—i.e., the elements—of a defendant’s prior offenses, and not ‘to the particular facts underlying those convictions.’” Descamps v. United States, 570 U.S. 254, 261 (2013) (quoting Taylor, 495 U.S. at 600). If the statute’s elements encompass conduct that falls outside the relevant ACCA provision—here, the force clause—then the defendant’s conviction cannot serve as a predicate for enhancement. Id.; e.g., Johnson, 559 U.S. at 138-43.

Where a prior statute of conviction is “divisible”—meaning that it “list[s] elements in the alternative, and thereby define[s] multiple crimes”—this Court has approved use of a “modified categorical approach.” Mathis v. United States, 136 S. Ct. 2243, 2249 (2016). Under the modified approach, sentencing courts may consult “a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, the defendant was convicted of,” thus narrowing the focus of the categorical inquiry to that alternative crime. Id. Importantly, though, the fact that a statute is phrased in the alternative does automatically render it divisible. If the listed alternatives merely constitute various factual means of committing a single element, rather than separate elements that must be found unanimously by a jury (or admitted by the defendant in pleading guilty) then the statute is “indivisible” and the categorical approach controls. See id. at 2253-56.

As such, this Court has instructed that the “first task” for lower courts confronted with an alternatively phrased statute is “to determine whether its listed items are elements or means.” Id. at 2256. And this “threshold inquiry” is controlled by state law: if a state court decision holds that the listed statutory items are “alternative methods of committing one offense, so that a jury need not agree” as to which method the defendant made use of, then the inquiry is over—the federal court “need only follow what [the state decision] says.” Id. (cleaned up).

2. a. In 1979 in Corpus Christi, Texas, petitioner Noel Lerma, age 16 at the time, acted as the getaway driver for two gas-station robberies committed by an adult acquaintance who

brandished a gun during the offenses. Record on Appeal (ROA.) 195, 390. For his part, petitioner was adjudicated in Texas on two counts of engaging in delinquent conduct by committing the Texas offense of aggravated robbery, and he was committed to the custody of a state juvenile detention center. ROA.195, 390. In 1990, petitioner again acted as the getaway driver to a robbery involving a firearm and was later convicted, this time as an adult, of Texas aggravated robbery. Id. 378, 391-92. In 1991, Corpus Christi police investigated a convenience-store robbery by a knife-wielding assailant. Id. 392. Petitioner, whose fingerprints were found on a soda can left on the counter during the robbery, was later indicted for the offense in 1995—while he was in prison for the prior robbery charge—and arrested shortly after his release in 1996. Id. 391-92. Petitioner pleaded guilty in 1997 and was thus again convicted of Texas aggravated robbery. Id. 374, 392.

b. The Texas offense of aggravated robbery is comprised of two alternatively phrased statutes. The aggravated robbery statute provides that:

(a) a person commits [aggravated robbery] if he commits robbery as defined in Section 29.02 [of the Texas Penal Code], and he:

(1) causes serious bodily injury to another;

(2) uses or exhibits a deadly weapon; or

(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:

(a) 65 years of age or older; or

(b) a disabled person.

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

Tex. Penal Code § 29.03.² The cross-referenced robbery statute, in turn, provides that:

- (a) a person commits [robbery] if, in the course of committing theft . . . 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.

Tex. Penal Code § 29.02.

Texas's highest criminal court, the Texas Court of Criminal Appeals, has not had occasion to decide whether the alternatives listed in these statutes are subject to juror unanimity when charged together in a single count. Texas intermediate appellate courts have, however, grappled with that issue.

In Woodard v. State, 294 S.W.3d 605 (Tex. App. 2009), the First District Court of Appeals in Houston applied Texas juror-unanimity law to the aggravated robbery alternatives. The defendant's indictment and the corresponding jury charge alleged all three aggravating factors in a single count of conviction. Id. at 607-08. The court of appeals held that the aggravating factors "are simply descriptions or means" and that "unanimity as to [them] was not required." Id. at 609. The "jury could convict [the defendant] of aggravated robbery if each juror concluded that at least one of the aggravating factors of section 29.03 was proved." Id. Thus, the jury's general guilty verdict stood.

² Only petitioner's two adult convictions implicate subsection (a)(3) above. The juvenile adjudications occurred before the statute was amended to include that provision. See Tex. Penal Code § 29.03(a) (1974).

And, in Burton v. State, 510 S.W.3d 232 (Tex. App. 2017), the Second District Court of Appeals in Fort Worth applied Texas juror-unanimity law to the simple robbery alternatives. The defendant was charged with a single count of aggravated robbery, and the indictment and the jury charge alleged both forms of simple robbery—by causing bodily injury, § 29.02(a)(1), and by threatening or placing in fear, § 29.02(a)(2)—in the disjunctive. Id. at 236 & n.2. The court of appeals held that submitting the two robbery alternatives disjunctively in this way did not infringe the defendant’s right to a unanimous verdict, “because causing bodily injury or threatening the victim are different methods of committing the same offense.” Id. at 237. As in Woodard, the jury’s general guilty verdict stood.

3. a. In 1998, pursuant to a plea agreement, petitioner pleaded guilty to one count of being a felon in possession of a firearm. 18 U.S.C. § 922(g). Pet. App. 2a. After the plea, but before sentencing, the government notified petitioner that it intended to seek an enhanced statutory range under the ACCA, based on its belief that petitioner’s four past convictions for the Texas offense of aggravated robbery were qualifying “violent felonies.” ROA.54-55. Petitioner acquiesced to a modified plea agreement, wherein the parties agreed that he would be sentenced as an Armed Career Criminal but would receive the minimum sentence of 15 years. Pet. App. 2a. The district court accepted the modified agreement and sentenced petitioner to 180 months’ imprisonment and five years of supervised release. Id. Petitioner has since completed his 15-year sentence, but he remains in federal custody, serving a 20-year consecutive sentence for unrelated drug charges, and has not begun to serve his five-year term of supervision. Id.

b. In June of 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, 2556-57 (2015), that the “residual clause” of the ACCA’s definition of “violent felony,” 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutional. Petitioner subsequently filed a timely motion, pursuant to 28 U.S.C. § 2255(a), to vacate, set aside, or correct his ACCA-enhanced sentence. Pet. App. 2a. In the motion, petitioner contended that his prior aggravated robbery convictions only previously counted as ACCA predicates under the now-void residual clause and did not alternatively qualify under the force clause.³ Pet. App. 3a.

The district court denied the motion. Pet. App. 25a. Applying the modified categorical approach, the court noted that the charging instruments for each of petitioner’s prior convictions alleged robbery by threat or placing in fear, Tex. Penal Code § 29.02(a)(2), aggravated by the use or exhibition of a weapon, § 29.03(a)(2). Pet. App. 18a-21a. Concluding that this method of accomplishing Texas aggravated robbery required proof of an implicit threat to use physical force against the person of another, the district court held that petitioner remained an Armed Career Criminal under the force clause. Id. 23a-24a. The district court recognized, however, that the status of Texas aggravated robbery as an ACCA predicate post-Johnson was an open question in the Fifth Circuit, and thus granted petitioner a certificate of appealability as to that question. Id. 24a.

³ Prior to Johnson, Fifth Circuit precedent had only classified Texas robbery as an ACCA predicate under the residual clause, pretermitted the question whether it also satisfied the force clause. See United States v. Davis, 487 F.3d 282, 285-87 (5th Cir. 2007).

3. a. In the Fifth Circuit, the parties recognized that the threshold question of the divisibility or indivisibility of the Texas robbery statutes was critically important because, under Fifth Circuit precedent, statutes that reach causing or threatening injury, like the Texas robbery statutes, do not necessarily require the use or threatened use of violent force, and are thus beyond the reach of force clauses like the ACCA's. Reyes-Contreras, 882 F.3d at 122-23; United States v. Rico-Mejia, 859 F.3d 318, 322-23 (5th Cir. 2017). As such, pointing primarily to Woodard and Burton, petitioner argued that the Texas statutes were indivisible, that the categorical approach controlled, and that the Fifth Circuit's injury-force distinction required reversal of the district court's judgment. Petitioner's CA5 Br. 15-18, 23-29; Petitioner's CA5 Reply 6-10.⁴

b. For its part, the government originally maintained that both statutes were divisible and that petitioner was an Armed Career Criminal under the modified categorical approach, because his offenses involved using or exhibiting a weapon while placing another in fear of injury. Gov. CA5 Br. 27-33. However, the government later conceded at oral argument that the Texas aggravated robbery statute is indivisible in light of Woodard (though it maintained its stance that the robbery statute was divisible). Oral Argument at 18:57–19:12, United States v. Lerma, No. 16-41467 (Aug. 2, 2017). As such, the government focused its energy on its foreclosed argument that the Fifth Circuit's injury-force distinction was in conflict with this Court's decisions in United States v. Castleman, 134 S. Ct. 1405 (2014), and Voisine v.

⁴ Petitioner also preserved his position—only recently foreclosed in the Fifth Circuit, see note 1, *supra*—that the force clause does not encompass crimes committed recklessly, and that his convictions thus were not qualifying ACCA predicates for this reason, too. Petitioner's CA5 Br. 18-23.

United States, 136 S. Ct. 2272 (2016). See Gov. CA5 Br. 37-54.

c. In a published opinion, the Fifth Circuit affirmed the district court. Pet. App. 1a-15a. Dismissing the Texas decisions petitioner brought to its attention, including Woodard and Burton, as “not helpful in the divisibility determination,” id. 11a n.4, the court of appeals held that the Texas aggravated robbery statute is divisible into four separate offenses in light of the statute’s disjunctive language and form. Id. 9a-11a & 15a. The court then determined that the aggravated robbery “offense” reflected in petitioner’s prior conviction materials satisfied the force clause, reasoning that the aggravating factor of using or exhibiting a deadly weapon elevated a robbery accomplished by placing another in fear of injury to one that necessarily entails a threatened use of physical force. Id. 11a-14a.

4. Petitioner sought panel rehearing. Petitioner maintained that the panel’s decision to eschew Texas cases bearing directly on the means-elements question, and instead place dispositive weight on alternative phrasing, conflicted with the divisibility standard outlined (and the result) in Mathis. Reh’g Pet. 4-14. Petitioner further pointed out that the panel’s decision conflicted with Texas law, explaining that the necessary implication of the panel’s divisibility holding—that the Texas robbery statutes list alternative elements, thereby creating separate crimes subject to juror unanimity—is directly contrary to the Texas courts’ own interpretation of Texas law. Id. 14-17.

The panel summarily denied the petition. Pet. App. 26a.

REASONS FOR GRANTING THE PETITION

The categorical approach is an important federal doctrine. Applied properly, it avoids “serious Sixth Amendment concerns” arising from courts “making findings of fact that properly belong to juries” to “increase a defendant’s maximum sentence,” Descamps v. United States, 570 U.S. 254, 269, 270 (2013), and “works to promote efficiency, fairness, and predictability in the administration of [criminal and] immigration law,” Mellouli v. Lynch, 135 S. Ct. 1980, 1987 (2015). This Court should grant certiorari because, in petitioner’s case, the Fifth Circuit applied the categorical approach (or rather, modified it) in a way that conflicts with past decisions of this Court and represents a serious departure from the accepted and usual course of judicial proceedings. Sup. Ct. R. 10(a), (c). Because the conflict is direct and readily apparent from the lower court’s rationale, and because ensuring proper application of the categorical and modified categorical approaches is important, this is a rare case in which a “summary disposition on the merits” is appropriate. Sup. Ct. R. 16.1.

- I. The Fifth Circuit’s threshold decision to modify the categorical approach conflicts with this Court’s relevant precedents and seriously departs from the accepted and usual course of judicial proceedings.

In making the threshold determination that the Texas robbery and aggravated robbery statutes are divisible, and thus subject to the modified categorical approach, the Fifth Circuit ignored Texas decisions interpreting those statutes as setting forth alternative means, not distinct elements requiring juror unanimity. As a result, the Fifth Circuit’s divisibility determination conflicts with this Court’s precedent, Texas law, the decisions of all the other courts of appeals, and even its own precedent.

A criminal statute is “divisible” for ACCA purposes, and thus susceptible to the modified categorical approach, only if it “sets out one or more *elements of the offense* in the alternative.” Descamps, 570 U.S. at 257 (emphasis added). In Mathis v. United States, 136 S. Ct. 2243 (2016), this Court resolved a split in the circuits that had arisen as to whether courts could treat all statutory items separated by the word “or” as divisible elements, even if state law treated the items as mere alternative means of committing a single offense. In no uncertain terms, this Court confirmed that when it said “elements,” it “meant just that and nothing else.” Mathis, 136 S. Ct. at 2255. “Elements,” the Court reminded, are the “constituent parts” of a crime that must be either found unanimously by a jury at trial or necessarily admitted by the defendant at a guilty plea. Id. at 2248-49; accord Richardson v. United States, 526 U.S. 813, 817 (1999) (noting that a “jury . . . cannot convict unless it unanimously finds that the Government has proved each element” of the offense). Therefore, even when phrased in the disjunctive, a statute of conviction is “indivisible” (and the modified categorical approach unavailable) if its listed items represent alternative “means”—i.e., “various factual ways of committing some component of the offense”—such that “a jury need not find (or a defendant admit) any particular item.” Mathis, 136 S. Ct. at 2249; see also id. at 2255-56.

Mathis provided clear instructions for assessing divisibility. The “first task” for a court “faced with an alternatively phrased statute,” the Court explained, is to “determine whether its listed items are elements or means.” Id. at 2256. And in conducting this “threshold inquiry,” the Court made clear that federal courts must defer to state court decisions answering the elements-or-means question: “When a ruling of that kind exists, a sentencing

judge [or a court of appeals] need only follow what it says.” Id. Indeed, this Court did exactly that. Iowa courts held that the state’s burglary law set forth “‘alternative method[s]’ of committing one offense, so that a jury need not agree whether” one or the other was involved in the defendant’s offense, id. (citation omitted), and this Court took the Iowa courts at their word. See id. at 2257 (“Because the elements of Iowa’s burglary law are broader than those of generic burglary, Mathis’s convictions under that law cannot give rise to an ACCA sentence.”).

Although Mathis demands deference to state court decisions, the Fifth Circuit panel below did the opposite. The two Texas intermediate court decisions described above (at 10-11), squarely answer the question whether Texas’s robbery statutes list elements or means. A conviction for a single count of Texas aggravated robbery may stand, one decisions says, even if both underlying simple robbery alternatives are charged in the disjunctive, and the jury returns a non-unanimous general verdict. Burton v. State, 510 S.W.3d 232, 236-37 (Tex. App. 2017). The same is true, says the other, of a conviction for a single count charging all three alternative aggravators. Woodard v. State, 294 S.W.3d 605, 607-09 (Tex. App. 2009).

For purposes of the divisibility inquiry outlined in Mathis, these Texas cases could not supply a more definitive answer: the items listed in the Texas robbery statutes represent “alternative methods,” Burton, 510 S.W.3d at 237, and “descriptions or means,” Woodard, 294 S.W.3d at 609, of committing and aggravating the same offense, and “a jury need not find (or a defendant admit) any particular item[.]” Mathis, 136 S. Ct. at 2249. Nevertheless, the Fifth Circuit panel below declined to take these cases at their word, as Mathis dictates.

Rather, in a footnote, the panel inexplicably dismissed both cases as “not helpful in the divisibility determination.” Pet. App. 11a n.4. According to the panel, “Woodard used the term ‘means’ in a different way than the Mathis court,” and “it is unclear whether the [Burton] court was referring to the elements of a crime, the means of satisfying a single element, or the crimes set forth by a statute under a Mathis analysis.” Id.

That is simply and wrong. Both Texas cases held that items listed in Texas’s robbery statutes are not subject to juror unanimity, and that is exactly the line this Court drew between “means” and the “elements of a crime” in Mathis. The items listed in Iowa’s burglary statute were means, not elements, *because* the Iowa cases established that the items were “‘alternative method[s]’ of committing one offense, *so that a jury need not agree*” as to any single item. Mathis, 136 S. Ct. at 2256 (emphasis added).

That is what Burton and Woodard establish. When a defendant is charged with aggravated robbery, Burton holds, Texas jurors need not unanimously agree that the underlying robbery was accomplished by causing injury, threatening injury, or placing another in fear of injury, as long as each juror finds that the robbery was accomplished by one of those means. Burton, 510 S.W.3d at 237. And under Woodard, a Texas jury need not agree that a robbery was aggravated by causing serious bodily injury, using or exhibiting a deadly weapon, or the victim’s status as over 65 or disabled; it may “convict [] of aggravated robbery if each juror concluded that at least one of the[se] aggravating factors . . . was proved.” Woodard, 294 S.W.3d at 609. There is simply no room for debate that both of these Texas courts referred to “alternative methods” and “means” in the Mathis sense.

By refusing to defer to Texas decisions interpreting the Texas robbery statutes as setting forth alternative means, not distinct elements requiring juror unanimity, the Fifth Circuit's decision not only conflicts with, but is diametrically opposed to, the divisibility standard this Court outlined in Mathis. Indeed, even apart from Mathis, this Court's precedents required the Fifth Circuit to defer to these Texas intermediate court decisions interpreting Texas law: "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." West v. Am. Tel. & Tel. Co., 311 U.S. 223, 237 (1940). And the Fifth Circuit panel below pointed to no reason to believe that the Texas Court of Criminal Appeals would reach a result contrary to that of the Woodard and Burton courts.⁵

The Fifth Circuit's actual divisibility analysis further illustrates how divorced its rationale is from this Court's decision in Mathis. Assuming the absence of a definitive state court decision, Mathis instructed federal courts to investigate several other sources of state

⁵ Nor could it have, because no Texas CCA authority casts doubt on these decisions, much less the degree of doubt necessary to prospectively disregard them under West. To the contrary, the only Texas CCA decision bearing remotely on the elements-or-means question here, Cooper v. State, 430 S.W.3d 426 (Tex. Crim. App. 2014), persuasively suggests that the intermediate courts got it right. As the Burton court accurately summarized, "In Cooper, . . . the court of criminal appeals held that separate convictions for aggravated robbery based on the two underlying methods of robbery—causing bodily injury to or threatening the same victim during a home invasion—violated double jeopardy." Burton, 510 S.W.3d at 237 (citing Cooper, 430 S.W.3d at 427). "The two concurring opinions issued by the court agreed that aggravated robbery causing bodily injury and aggravated robbery by threat are alternative methods of committing the offense of aggravated robbery." Id. (citing Cooper, 430 S.W.3d at 434 (Keller, P.J., concurring), 439 (Cochran, J., concurring)).

law for clues in answering whether the defendant's statute of conviction lists means or elements. See Mathis, 136 S. Ct. at 2256-57. For example, alternatives are by definition separate elements if they carry different punishments; while items clearly listed as "illustrative examples" of a broader element are necessarily means. Id. at 2256. In petitioner's case, however, the Fifth Circuit cited none of these other sources. Instead, its inquiry proceeded in two parts. First, the panel determined that the aggravated robbery statute, Tex. Penal Code § 29.03(a), was divisible "based on the language of the statute," relying exclusively on its reading of the statute's disjunctive structure as setting out four separate aggravated robbery crimes.⁶ Pet. App. 8a-10a. Second, and only after conducting this textual-divisibility analysis, the panel concluded that petitioner was incorrect to suggest that Texas law rebutted its reading of the aggravated robbery statute. Id. 10a-11a & n.4.

This procedure is exactly backwards. Nowhere in Mathis did this Court approve of a lower court first assuming that a statute is divisible based solely on the statute's disjunctive text and structure, and then treating its perception of state court decisions as not conclusively rebutting that reading as confirmation of the statute's divisibility, as the Fifth Circuit did here. Rather, Mathis makes clear that state law guides the determination whether a statute lists means or elements from the outset, and if state law and a "peek" at the prior conviction record

⁶ In doing so, the panel *assumed* that the incorporated robbery statute was also divisible, *without any further analysis or explanation*. See Pet. App. 9a ("On its face, the Texas aggravated robbery statute requires that a defendant commit robbery **and** meet one of several other requirements to be convicted of aggravated robbery"; "robbery . . . is an element as set forth in the first paragraph" of the aggravated robbery statute (original emphasis)); see also id. 13a (confining substantive analysis to the simple robbery alternative reflected in petitioner's charging documents, i.e., § 29.02(a)(2)).

ultimately fail to provide clear answers, then the lower court must err on the side of indivisibility. Id. at 2257. The Fifth Circuit erroneously turned this around by (incorrectly) deeming state law unclear and effectively breaking the tie in favor of “textual” divisibility.

Of course, there was no need to invoke the Mathis tiebreaker here. The Texas state court decisions “definitively answer[ed]” the elements-or-means question. Id. at 2256. And even if the Fifth Circuit was unsatisfied that these decisions were sufficiently definitive as a substantive matter, the decisions nevertheless represent concrete examples of convictions for a single count of Texas aggravated robbery premised on “indictments and correlative jury instructions” charging the defendants with each form of robbery (Burton) and each aggravating factor (Woodard), and thus “reiterating all the terms of [Texas’s] law[s].” Id. at 2257. Examples of this kind are, as this Court put it, “as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt.” Id.

In short, there is simply no legal support for the Fifth Circuit’s determination that it was permitted to use the modified categorical approach in petitioner’s case. Indeed, its conclusion that the Texas robbery statute is divisible into two separate robbery crimes, and that the Texas aggravated robbery statute is divisible into four separate aggravated robbery crimes, is directly contrary to authoritative decisions of the Texas courts applying Texas unanimity and double jeopardy law to these Texas statutes, see Burton, 510 S.W.3d at 236-37; Cooper, 430 S.W.3d at 427; id. at 434, 439 (Keller, P.J., and Cochran, J., separately concurring); Woodard, 294 S.W.3d at 609, and applying unanimity law to a similarly structured

statute. See Landrian v. State, 268 S.W.3d 532, 533 (Tex. Crim. App. 2008) (holding that the aggravating factors of causing serious bodily injury or using or exhibiting a deadly weapon, listed alternatively in Texas’s aggravated assault statute, Tex. Penal Code § 22.02(a), are not subject to jury unanimity because they represent alternative means).

Moreover, the Fifth Circuit’s dismissal of state court decisions holding that jurors need not unanimously agree is contrary to its own post-Mathis precedent. See United States v. Martinez-Rodriguez, 857 F.3d 282, 285-87 (5th Cir. 2017); United States v. Howell, 838 F.3d 489, 497-98 (5th Cir. 2016); United States v. Hinkle, 832 F.3d 569, 575-76 (5th Cir. 2016); Gomez-Perez v. Lynch, 829 F.3d 323, 327-28 (5th Cir. 2016).⁷ Likewise, each and every other court of appeals has interpreted Mathis to require deference to state court decisions bearing on whether alternatives are subject to jury unanimity. See Swaby v. Yates, 847 F.3d 62, 67-68 (1st Cir. 2017); Harbin v. Sessions, 860 F.3d 58, 67 (2d Cir. 2017); United States v. Henderson, 841 F.3d 623, 628-29 (3d Cir. 2016), cert. denied, 138 S. Ct. 210 (2017); Castendet-Lewis v. Sessions, 855 F.3d 253, 262 (4th Cir. 2017); United States v. Ritchey, 840 F.3d 310, 319 (6th Cir. 2016); United States v. Lynn, 851 F.3d 786, 797 (7th Cir. 2017); United States v. McArthur, 850 F.3d 925, 938 (8th Cir. 2017); United States v. Calvillo-Palacios, 860 F.3d 1285, 1289 (9th Cir. 2017); United States v. Degeare, 884 F.3d 1241, 1252 (10th Cir. 2018); United States v. Davis, 875 F.3d 592, 600 (11th Cir. 2017); United States v.

⁷ The en banc Fifth Circuit recently underscored that, “[u]nder Mathis, when state law does not require jury unanimity between statutory alternatives, the alternatives cannot be divisible,” and that “where there is controlling [state] case law, [the court’s divisibility] inquiry is at an end.” United States v. Herrold, 883 F.3d 517, 523, 525 (5th Cir. 2018) (en banc). Herrold issued just over a month after the panel below denied petitioner’s request for panel rehearing.

Sheffield, 832 F.3d 296, 315 (D.C. Cir. 2016).

This Court has recognized that summary reversal is appropriate where a lower court's judgment reflects a clear misapprehension of the governing legal standards in light of the this Court's precedents. See Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014) ("And while 'this Court is not equipped to correct every perceived error coming from the lower federal courts,' we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents." (citations omitted)); Brosseau v. Haugen, 543 U.S. 194, 198 n.3 (2004) ("We exercise our summary reversal procedure here simply to correct a clear misapprehension of the qualified immunity standard."). This Court has also previously intervened when the Fifth Circuit has reached a conclusion without any legal support. See Salinas v. United States, 547 U.S. 188 (2006) (summarily vacating in light of clear misapplication of the plain language of the career offender guideline's definition of "controlled substance offense," USSG § 4B1.2(b), to defendant's prior conviction for simple possession); Kyle v. United States, 504 U.S. 980 (1992) (summarily vacating a judgment of the Fifth Circuit with instructions to correctly apply its own precedent on remand).

Both of these circumstances are present here. It is plain that the Fifth Circuit resolved the threshold divisibility inquiry, and consequently applied the modified categorical approach, in a way that conflicts with this Court's precedents and is far outside the accepted and usual course of judicial proceedings. See Sup. Ct. R. 10(a), (c). Accordingly, this Court should grant certiorari, summarily reverse the Fifth Circuit's threshold divisibility determination, and remand for further consistent proceedings.

II. Correcting the Fifth Circuit’s misapplication of the modified categorical approach is important, and this case is a good vehicle for doing so.

“A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.” Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J. dissenting) (quoting Schweiker v. Hansen, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)). This is such a case. There are no disputed facts; and the divisibility question here was not a close call: Mathis plainly instructed the courts of appeals to follow state law decisions establishing that disjunctive statutory alternatives are not subject to jury unanimity, and the Texas cases speak clearly on that matter. Indeed, the government expressly conceded below that, at a minimum, the state court decisions compel the conclusion that the Texas aggravated robbery statute is indivisible. Oral Argument at 18:57–19:12, United States v. Lerma, No. 16-41467 (Aug. 2, 2017).

Correcting the Fifth Circuit’s error is also important. This Court’s persistent work in construing the limits of ACCA illustrates the importance it places on ensuring proper application of the Act’s enhanced penalties, so much so that a string cite is hardly necessary. The Court’s recent opinions in Descamps and Mathis further make clear that strict adherence to the categorical approach is critical to safeguarding the statutory, practical, and constitutional interests described at length in those cases. Mathis, 136 S. Ct. at 2252-53; Descamps, 570 U.S. at 267-71. And these interests similarly compel fidelity to the elements-based focus of the categorical approach in the immigration context. See Mellouli, 135 S. Ct. at 1986-87.

Moreover, the error implicates serious constitutional concerns. The upshot of the Fifth Circuit's modification of the categorical approach is that petitioner was held subject to the ACCA's enhanced, mandatory prison term based on the judicial assessment of the *factual means* by which he committed his prior Texas robbery offenses, a result that is contrary to the Sixth Amendment right to have a jury, not a judge, find the facts necessary to trigger an enhanced statutory penalty range. See Mathis, 136 S. Ct. at 2252; see also id. at 2258-59 (Thomas, J., concurring). And this untenable result will not remain isolated to petitioner's case. The Fifth Circuit's published decision, if left undisturbed, will resign many other defendants with the same or similar predicate Texas offenses to the same fate.

That the Fifth Circuit's decision will have this injurious effect is not mere conjecture, either. To the contrary, it already has. Numerous similarly situated defendants have, like petitioner, had their § 2255 motions for habeas relief denied—and thus, their classifications as Armed Career Criminals cemented—as a direct result of a district court's reliance on the Fifth Circuit's divisibility holding in petitioner's case. See Cantu v. United States, No. 3:07-CR-197-K, 2018 WL 1173974, at *5 (N.D. Tex. Mar. 5, 2018) (denying motion “with prejudice”); Rodriguez v. United States, No. 3:10-CR-223-K-(1), 2018 WL 276337, at *3 (N.D. Tex. Jan. 2, 2018) (same); Joiner v. United States, No. A-12-CR-0014-SS, 2018 WL 814021, at *3-*4 (W.D. Tex. Feb. 9, 2018) (denying motion and denying certificate of appealability); Hardeman v. United States, No. A-10-CR-027-SS, 2018 WL 795168, at *3 (W.D. Tex. Feb. 7, 2018) (same). This is, therefore, not a case of a single anomalous precedent that stands to have little impact beyond petitioner.

This Court's intervention is also appropriate because Texas really does broadly apply its robbery statutes to non-forceful conduct. Of course, in this case, the Court need only address and reverse the Fifth Circuit's threshold divisibility determination, and that is all that petitioner requests. The salient point here, however, is simply that petitioner's claim of categorical overbreadth has merit, particularly under the law of his home circuit. Two examples make the point.

First, Texas courts have upheld an aggravated robbery conviction where the defendant never encountered the victim that he placed in fear. See Howard v. State, 333 S.W.3d 137, 138-40 (Tex. Crim. App. 2011). In Howard, the defendant entered an empty convenience store, masked and armed, and stole the absentee store clerk's wallet. Id. at 138. Unbeknownst to the defendant, the clerk was on break in a back room and observed him on a video screen and through a one-way window. Id. at 140. The Texas Court of Criminal Appeals affirmed the defendant's conviction because he caused the clerk to fear injury. Id. And it did not matter that the defendant did so from another room, with no interaction, and that "[t]here [wa]s no evidence in the record showing that [the defendant] was aware of" the clerk. Id. at 138.

In other words, in Texas, a defendant who commits theft while displaying a weapon is guilty of aggravated robbery if someone he does not know is present sees him and is afraid. See id. at 140 ("[R]obbery-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."). The defendant's behavior in Howard is troubling, to be sure; but that behavior simply did not involve—and more importantly, Howard shows that the Texas prosecutor did not have to prove—either an

actual “use” of violent force, or the purposeful communication of a “threat” to use such force, “against” the clerk or anyone else.

Texas also applies the bodily-injury form of robbery to non-forceful conduct. In one case petitioner is aware of, a jury convicted a defendant of aggravated robbery based on an indictment that, as relevant here, alleged the defendant “intentionally, knowingly, or recklessly cause[d] bodily injury” to the victim “by striking the motor vehicle occupied by the victim, with a motor vehicle occupied by the said defendant,” and “use[d] or exhibit[ed] a deadly weapon, to wit: a motor vehicle.” See Indictment, Count 3, State v. Carlos Alberto Montelongo, Case No. cr-1706-08-H (Crim. Dist. Ct. No. 389, Hidalgo Co., Tex. Apr. 22, 2008).⁸ This shows that a person may be guilty of robbery in Texas based on recklessly fleeing an attempted theft scene and causing a wreck resulting in bodily injury to another motorist (in this particular case, a pursuing police officer); and that robbery may be “aggravated” simply because, by driving a car, the defendant has used or exhibited a deadly weapon.⁹

This scenario falls outside the force clause in two ways. First, causing a vehicle to impact another vehicle entails, at most, force applied to the other motorist’s *property*, not

⁸ Incidentally, this indictment further confirms the indivisibility of the Texas aggravated robbery statute. In a second paragraph of the same count (count 3), the indictment disjunctively charged the defendant with the serious-bodily-injury variant of aggravated robbery by “causing the motor vehicle he was occupying to strike the vehicle occupied by the victim.” Id. The jury returned a general verdict of “guilty, of the offense of aggravated robbery, as charged in the indictment.” See Judgment, Count 3, State v. Carlos Alberto Montelongo, Case No. cr-1706-08-H (Crim. Dist. Ct. No. 389, Hidalgo Co., Tex. July 7, 2008).

⁹ This case did not generate an appeal, and thus there is no reported decision accessible through a commercial database memorializing its existence or describing the facts. Indeed, petitioner first discovered Mr. Montelongo’s case only after the Fifth Circuit had already decided his own. However, the events of the offense did generate some local news coverage describing the facts, as gleaned from the police report. See Zack Quaintance, *Judge arraigns suspects after police chase*, The Monitor (Oct. 25, 2007), http://www.themonitor.com/news/local/article_8fa91bb2-f453-5135-9eba-62b6d6114e2a.html (last accessed Apr. 16, 2018).

“against” his *person*. Second, the motorist’s injuries result from a reckless application of force that recklessly results in injury. As noted above (at 4 n.1), several circuits, and importantly for petitioner’s purposes, the Fifth Circuit, interpret the ACCA’s force clause and others like it to exclude prior offenses that reach the reckless causation of injury, particularly those that premise criminal liability on injury resulting from reckless driving. E.g., United States v. Reyes-Contreras, 882 F.3d 113, 122-23 (5th Cir. 2018) (any causation of bodily injury); United States v. Windley, 864 F.3d 36, 38 (1st Cir. 2017) (reckless causation of injury); United States v. Fields, 863 F.3d 1012, 1015 (8th Cir. 2017) (reckless driving causing injury). And while this Court has held that crimes encompassing reckless applications of force are sufficient to trigger the prohibition on firearm possession by persons previously convicted of a “misdemeanor crime of domestic violence,” Voisine v. United States, 136 S. Ct. 2272, 2278-79 (2016); 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9), it has never held that such an offense qualifies as the kind of “violent felony” capable of triggering the ACCA’s 15-year mandatory minimum enhancement. See Begay v. United States, 553 U.S. 137, 146-47 (2008) (discussing reasons why the ACCA’s purpose and context strongly suggest that Congress did not intend to bring crimes involving strict liability, negligence, or recklessness within its scope).

Several additional considerations make petitioner’s case a suitable vehicle for summary disposition. The divisibility question was squarely addressed by the Fifth Circuit panel below, and the conflict with this Court’s decision in Mathis is readily apparent from the

panel's rationale. Moreover, the government would not be prejudiced by summary disposition of the threshold divisibility question without full briefing. Both parties agreed below that the Texas aggravated robbery statute is indivisible in light of Texas law, and, in another case decided on the same day as petitioner's, the government did not contest the defendant's position that Texas's simple robbery statute was indivisible. See United States v. Hall, 877 F.3d 800, 807 (8th Cir. 2018) ("Hall contends the statute [Tex. Penal Code § 29.02] is indivisible (the government does not suggest otherwise), and both parties agree that we should apply the categorical approach.").¹⁰

Nor would summary reversal on the threshold divisibility question fully divest the government of its interest in litigating in favor of affirmance of petitioner's ACCA sentence. With knowledge that the modified categorical approach is unavailable, on remand the Fifth Circuit must still determine whether the *elements* of petitioner's prior robbery convictions (as opposed to the means it relied on below) necessarily entail the use or threatened use of violent force within the meaning of the ACCA.

It is true, as petitioner has discussed, that current Fifth Circuit precedent likely dictates a negative answer to that question. But the government has waged a persistent war against that precedent in petitioner's case and others, and it is fully capable of asking the en banc Fifth Circuit to reconsider that precedent, or petitioning for this Court's full review, in the event of an adverse result on remand. The point is, however, that summary disposition on the

¹⁰ In Hall, the Eighth Circuit determined that Texas robbery qualifies as an ACCA predicate under the force clause. Id. at 807-08. As noted (at 4 n.1), the Eighth Circuit does not adhere to the Fifth Circuit's distinction between causing injury and using force.

divisibility issue does not leave the government without recourse to litigate the other important issues underlying the question whether Texas aggravated robbery is a qualifying ACCA predicate. And it ensures that petitioner has his ACCA eligibility judged according to the elements of his prior convictions, not their underlying facts, as the law requires.

Finally, as an alternative to full on summary reversal, this Court may wish to consider granting the petition, vacating the Fifth Circuit's judgment, and remanding petitioner's case for reconsideration in light the Fifth Circuit's en banc decision in Herrold, 883 F.3d 517.

In fact, this Court recently vacated and remanded two cases arising out of the Eighth Circuit in light of intervening en banc authority. See Brown v. United States, — S. Ct. —, No. 17-6344 (Apr. 16, 2018) (summarily vacating the Eighth Circuit's judgment and remanding “for further consideration in light of that Court's opinion in United States v. Naylor, — F.3d — (CA8 2018)"); Sykes v. United States, — S. Ct. —, No. 16-9604 (Apr. 16, 2018) (same). The petitioners in both Brown and Sykes had asked this Court to review the Eighth Circuit's conclusion (in petitioner Sykes' direct appeal) that the Missouri second-degree burglary statute was divisible with respect to whether the burglary occurred in a “building or inhabitable structure,” Mo. Rev. Stat. § 569.170. See United States v. Sykes, 844 F.3d 712 (8th Cir. 2016). The Eighth Circuit panel in Sykes, much like the Fifth Circuit panel in petitioner's case, resolved the divisibility question solely by reference to the text of the Missouri statute, reasoning only that “the statute contains at least two alternative elements: burglary ‘of a building’ and burglary of ‘an inhabitable structure,’ separated in the text by the disjunctive ‘or.’” Id. at 715.

In Naylor, however, the Eighth Circuit, sitting en banc, overruled Sykes. See United States v. Naylor, — F.3d —, 2018 WL 1630249, at *1 (8th Cir. Apr. 5, 2018) (en banc). This time, consistent with Mathis, the en banc court looked to Missouri case law first. The court found that while no Missouri case directly decided the unanimity question, multiple intermediate court decisions, and a newly issued Supreme Court of Missouri opinion addressing the second-degree burglary statute in other contexts, taken together leaned persuasively in favor of the defendant’s claim that Missouri law treats the terms “building” and “inhabitable structure” as alternative means, not elements. See id. at *4-*6. As a result, the court concluded that “Missouri law provide[d] a clear answer” and thus held that the “Missouri second-degree burglary statute is indivisible as to the phrase ‘building or inhabitable structure.’” Id. at *7.

As discussed above (at 22 n.7), the en banc Fifth Circuit issued its decision in Herrold after the panel below denied petitioner’s request for rehearing. The en banc majority’s divisibility analysis defers to the decisions of Texas intermediate courts explicitly holding that the disjunctive items listed in Texas’s burglary statute represent alternative means that need not be found unanimously by a jury. See Herrold, 883 F.3d at 523-25. Thus, like Naylor, Herrold is faithful to Mathis.

Petitioner acknowledges, as he must, that the circumstances in which the Court acted in Brown and Sykes are different, given that, in those cases, the Court vacated and remanded in light of subsequent en banc authority that either expressly overruled the panel decision below (petitioner Sykes’ case), or expressly overruled the decision relied upon by the panel

below (petitioner Brown's case). Herrold, in contrast, did not overrule the panel decision in petitioner's case or abrogate any authority the panel below relied upon in making the divisibility determination. Rather, the Herrold court simply correctly applied the divisibility analysis outlined by Mathis, whereas the panel's divisibility rationale is directly contrary to Mathis. Still, in this way, the panel's divisibility rationale is also contrary to Herrold. As such, this Court may wish to consider granting the petition, summarily vacating the Fifth Circuit's judgment, and remanding for further consideration in light of Herrold, as it did in Brown and Sykes in light of Naylor.

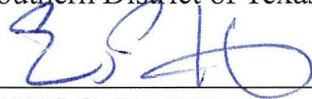
Irrespective of which avenue the Court prefers, the result should be the same: the Fifth Circuit's threshold decision to modify the categorical approach is in conflict with this Court's relevant precedents, represents a serious departure from the accepted and usual course of judicial proceedings, and warrants correction. The petition should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41467

United States Court of Appeals
Fifth Circuit

FILED

December 14, 2017

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

NOEL LERMA,

Defendant – Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Before DAVIS, GRAVES, and COSTA, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

The question presented in this case is whether a conviction under the Texas aggravated robbery statute, Texas Penal Code § 29.03, qualifies as a “violent felony” under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e). Concluding that the statute is divisible, and that the crime for which appellant, Noel Lerma, was convicted previously at least three times is a “violent felony” under the ACCA, we AFFIRM.

I.

The ACCA provides for a 15-year mandatory minimum term of imprisonment and a five-year maximum term of supervised release for those defendants convicted of being a felon in possession of a firearm following three

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prior convictions for a “violent felony.” § 924(e)(1). Absent that sentence enhancement, the felon-in-possession statute sets a 10-year maximum prison sentence and a three-year maximum supervised release term. *See* § 924(a)(2); 18 U.S.C. § 3583(b)(2).

In 1998, Lerma entered into a plea agreement with the United States wherein he admitted to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). In a subsequent modified plea agreement, Lerma agreed to be sentenced to 15 years in prison “as an Armed Career Offender pursuant to 18 U.S.C. § 924(e).” Lerma did not appeal his sentence, and, in fact, he completed his 15-year prison term in 2013. However, Lerma has not begun to serve his five years of supervised release because he remains in federal prison, serving a 20-year consecutive sentence for unrelated drug charges.

Lerma now seeks to vacate, set aside, or correct his ACCA sentence pursuant to 28 U.S.C. § 2255 based upon the following. In 2015, the Supreme Court struck down the ACCA’s “residual clause” as void for vagueness in *Johnson v. United States*, --- U.S. ---, 135 S. Ct. 2551 (2015). Pre-*Johnson*, the ACCA defined the term “violent felony” as any crime punishable by a term of imprisonment exceeding one year that also:

- (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.

§ 924(e)(2)(B). The “residual clause” is the last phrase of § 924(e)(2)(B)(ii): “otherwise involves conduct that presents a serious potential risk of physical injury to another.”

Johnson did “not call into question application of the Act to the four enumerated offenses” listed in § 924(e)(2)(B)(ii), nor did it call into question

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any aspect of § 924(e)(2)(B)(i), also known as the “force clause.” 135 S. Ct. at 2563. Thus, post-*Johnson*, the ACCA defines the term “violent felony” as any crime punishable by a term of imprisonment exceeding one year¹ that also:

- (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, extortion, or involves the use of explosives.

In 2016, the Supreme Court held that its decision in *Johnson* announced a substantive rule that applies retroactively on collateral review. *Welch v. United States*, --- U.S. ---, 136 S. Ct. 1257, 1265 (2016). Lerma, therefore, argues that his sentence imposed under the ACCA cannot stand.² His argument is three-fold. First, he asserts that his sentence could not have constitutionally rested upon the residual clause in light of *Johnson* and *Welch*. Second, he contends that his prior convictions were not for burglary, arson, or extortion, nor did they involve the use of explosives, as required by § 924(e)(2)(B)(ii). Third, he argues that the Texas aggravated robbery statute, Texas Penal Code § 29.03, does not satisfy the force clause because it does not have “as an element the use, attempted use, or threatened use of physical force against the person of another.” See § 924(e)(2)(B)(i).

The Government concedes that Lerma’s sentence could not have constitutionally rested upon the residual clause in light of *Johnson* and *Welch*. The Government also concedes that Lerma’s prior convictions were not for any

¹ There is no dispute that Lerma’s prior convictions for aggravated robbery under Texas Penal Code § 29.03 carried prison terms exceeding one year. See TEX. PENAL CODE § 29.03(b) (noting that aggravated robbery “is a felony of the first degree”); TEX. PENAL CODE § 12.32(a) (“An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years.”).

² Lerma is potentially entitled to § 2255 relief with respect to the supervised release portion of his sentence, as well as the date for his ultimate release from prison.

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of the four enumerated offenses listed in § 924(e)(2)(B)(ii). The only question then is whether Lerma's sentence can be sustained pursuant to the ACCA's force clause. That is, does the crime under the Texas aggravated robbery statute for which Lerma was previously convicted at least three times "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another"?

The district court answered that question in the affirmative and denied Lerma's § 2255 motion. From that denial, and the district court's subsequent issuance of a certificate of appealability pursuant to 28 U.S.C. § 2253, Lerma now appeals.³ As set forth below, we also conclude that the crime under Texas Penal Code § 29.03 for which Lerma was previously convicted at least three times qualifies as a violent felony under the force clause of the ACCA because it has as an element the use, attempted use, or threatened use of physical force against the person of another.

II.

A.

The issue presented by this case requires us first to determine the elements of aggravated robbery under Texas Penal Code § 29.03. The Supreme Court instructs that "[e]lements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Mathis v. United States*, --- U.S. ---, 136 S. Ct. 2243, 2248 (2016) (internal quotation marks and citation omitted). "At a trial, they are what the jury must

³ Although Lerma has completed the 15 years of imprisonment imposed as part of his sentence under the ACCA, he remains in prison serving the 20 years of imprisonment imposed as part of his sentence for federal drug-related crimes. Upon his release, Lerma must complete five years of supervised release as part of his sentence under the ACCA. Under these circumstances, Lerma is considered "in custody" for his ACCA conviction, and this Court, thus, has jurisdiction under § 2255 to consider on collateral review Lerma's challenge to his ACCA sentence.

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find beyond a reasonable doubt to convict the defendant.” *Id.* at 2248 (citations omitted). “[A]t a plea hearing, they are what the defendant necessarily admits when he pleads guilty.” *Id.* (citation omitted).

An element of a crime must be distinguished from the means of satisfying a single element. *See id.* at 2249-51. For example, a statute may require the use of a “deadly weapon” as an element of a crime. The statute may then further list as potential deadly weapons a knife, gun, bat, or similar weapon. That “list merely specifies diverse means of satisfying a single element of a single crime.” *Id.* at 2249. A jury need not find any particular weapon in the list was used in order to convict, so long as all of the jurors agreed that the defendant used a deadly weapon. *See id.*

B.

Criminal statutes are indivisible or divisible. An indivisible statute sets out a single set of elements to define a single crime. In contrast, a divisible statute “list[s] elements in the alternative, and thereby define[s] multiple crimes.” *Id.* at 2249. If a statute is indivisible, the sentencing court must apply the “categorical approach.” *See id.* at 2248. This approach requires the sentencing court, when determining whether a crime qualifies as a violent felony under the force clause, to focus solely on whether the elements of the crime of conviction include the use, attempted use, or threatened use of physical force against the person of another. *See id.* The sentencing court is not permitted to review the particular facts of the case. *Id.*

When a statute is divisible, however, the sentencing court may use the “modified categorical approach” to determine which elements played a part in the defendant’s conviction. *Id.* at 2253. The modified approach serves “as a tool to identify the elements of the crime of conviction when a statute’s disjunctive phrasing renders one (or more) of them opaque.” *Id.* (citation omitted). Under that approach, the sentencing court is allowed to look “to a

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limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of.” *Id.* at 2249 (citations omitted). The court can then determine, in deciding whether the crime satisfies the force clause, if one of those elements included the use, attempted use, or threatened use of physical force against the person of another.

In this case, the district court began its analysis by noting that the parties had “agreed that the Texas aggravated robbery statute was a divisible statute for which the modified categorical approach was appropriate.” The district court then went on to analyze the statute as a divisible statute, implicitly determining that the statute was divisible.

C.

Review of the district court’s divisibility determination would generally represent a question of law that we would review de novo. *See United States v. Olvera*, 775 F.3d 726, 729 (5th Cir. 2015). The Government, however, asserts that “Lerma invited any error” as to the district court’s divisibility analysis and that, consequently, we should review the district court’s determination for only manifest injustice.

The invited error doctrine stands for the basic proposition that “[a] defendant may not complain on appeal of errors that he himself invited or provoked the district court to commit.” *See United States v. Salazar*, 751 F.3d 326, 332 (5th Cir. 2014). “Statements amounting to invited error are a species of waiver” and generally evince an “intent” by the speaker to convince “the district court to do [something that] it would not otherwise have done.” *See United States v. Rodebaugh*, 798 F.3d 1281, 1304 (10th Cir. 2015) (internal quotation marks and citations omitted). *Compare United States v. Morales-Rodriguez*, 788 F.3d 441, 443 n.3 (5th Cir. 2015) (holding that a defendant did not invite error as to his sentence even though he failed to object to it in the

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district court and even though he stated that his PSR was correct), *with United States v. Roussel*, 705 F.3d 184, 193 (5th Cir. 2013) (holding that a defendant invited error regarding the issuance of a Rule 404(b) jury instruction because he requested the introduction of the prior acts evidence necessitating issuance of the instruction). “Invited error imposes an even higher standard than does plain-error review: We will not reverse on the basis of invited error, absent manifest injustice.” *Salazar*, 751 F.3d at 332.

As stated above, the district court began its opinion by noting that the parties had agreed at the § 2255 hearing that the Texas aggravated robbery statute was divisible and that, thus, the modified categorical approach could be applied. A transcript of the hearing reads as follows:

THE COURT: Now the parties agreed that the statute is divisible?

THE GOVERNMENT: Yes, Your Honor.

THE COURT [referring to defense counsel]: Do you agree with that?

DEFENSE COUNSEL: The robbery – or the aggravated robbery statute?

THE COURT: Both of them. Robbery and aggravated robbery.

DEFENSE COUNSEL: Your honor, I looked through that last night and I was looking at the *Mathis* case. I think [the Texas aggravated robbery statute, by virtue of its incorporation of the Texas robbery statute,] would probably be divisible under *Mathis*.

...

THE COURT: Okay. Government agree?

THE GOVERNMENT: Yes, Your Honor.

We do not construe defense counsel’s equivocal concession as inviting error. *See United States v. Franklin*, 838 F.3d 564, 567 n.1 (5th Cir. 2016) (“We

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narrowly construe counsel's statements in applying the invited error doctrine."). Indeed,

A defendant's failure to object to a district court's proposed jury instruction, or even the affirmative statement, "No, Your Honor," in response to the court's query "Any objection?", is not the same as a defendant who proffers his or her own instruction, persuades the court to adopt it, and then later seeks to attack the sufficiency of that instruction [on appeal].

United States v. Harris, 695 F.3d 1125, 1130 n.4 (10th Cir. 2012). Because Lerma did not invite any alleged divisibility error, we review the district court's divisibility analysis de novo. *See Olvera*, 775 F.3d at 729.

III.

A.

The Texas aggravated robbery statute provides, in pertinent part:

(a) A person commits [aggravated robbery in Texas] if he commits robbery as defined in [Texas Penal Code] Section 29.02, **and** he:

(1) causes serious bodily injury to another;

(2) uses **or** exhibits a deadly weapon; **or**

(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, **if the other person is:**

(A) 65 years of age or older; **or**

(B) a disabled person.

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

TEX. PENAL CODE § 29.03 (emphases added).

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The Texas robbery statute, which is incorporated into the first paragraph of the aggravated robbery statute, provides the following:

- (a) A person commits [robbery in Texas] if, in the course of committing theft . . . 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.

TEX. PENAL CODE § 29.02(a).

On its face, the Texas aggravated robbery statute requires that a defendant commit robbery **and** meet one of several other requirements to be convicted of aggravated robbery. The first paragraph of the statute is not alternatively phrased, but rather requires robbery **plus** something else to commit aggravated robbery. Specifically, a defendant may be convicted of aggravated robbery under § 29.03(a)(1) if he commits robbery **and** causes serious bodily injury to another. Both robbery and serious bodily injury are elements because both are required to obtain a conviction for aggravated robbery under § 29.03(a)(1). Thus, the aggravated robbery statute sets forth one crime under § 29.03(a)(1), requiring robbery and serious bodily injury. *See* Appendix, “Crime No. 1” under § 29.03(a)(1).

Under § 29.03(a)(2), robbery is again an element as set forth in the first paragraph. The additional requirement is that the defendant “uses **or** exhibits a deadly weapon.” § 29.03(a)(2) (emphasis added). This provision is alternatively phrased, so the issue becomes whether the alternatives are elements of a crime under § 29.03(a)(2) or the means of satisfying a single element. *See Mathis*, 136 S. Ct. at 2249, 2256. On the face of the statute, the

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alternatives of “using” a deadly weapon or “exhibiting” a deadly weapon cannot be means because they are not listed as ways of satisfying a single element. Rather, they each are alternative elements under § 29.03(a)(2). Thus, § 29.03(a)(2) sets forth two crimes: aggravated robbery in which the defendant commits robbery and uses a deadly weapon, and aggravated robbery in which the defendant commits robbery and exhibits a deadly weapon. *See* Appendix, “Crime No. 2” and “Crime No. 3” under § 29.03(a)(2).

Finally, under § 29.03(a)(3), robbery is again an element as set forth in the first paragraph. The additional requirement in order to commit aggravated robbery under § 29.03(a)(3) is the status of the victim (“the other person”). Specifically, the victim of the robbery must be “65 years of age or older; **or** a disabled person.” § 29.03(a)(3)(A) & (B). This provision is alternatively phrased, so the issue again becomes whether the alternatives are elements or means of satisfying a single element. On the face of the statute, the alternatives are listed as the means of satisfying the single element of the status of the victim under § 29.03(a)(3). Thus, § 29.03(a)(3) of the aggravated robbery statute sets forth one crime requiring robbery and the status of the victim. *See* Appendix, “Crime No. 4” under § 29.03(a)(3).

Based on the language of the statute, and applying the definitions of “elements of a crime” and “means of an element” as set forth by the Supreme Court in *Mathis*, we conclude that the Texas aggravated robbery statute is divisible.

Lerma submits, however, that Texas law provides otherwise. He asserts that *Cooper v. State*, 430 S.W.3d 426 (Tex. Crim. App. 2014), establishes that the Texas aggravated robbery statute is indivisible. In *Cooper*, the Texas Court of Criminal Appeals held that two of the defendant’s five aggravated robbery convictions violated the double jeopardy clause of the Fifth Amendment. *See* 430 S.W.3d at 427. However, *Cooper* did not interpret the Texas aggravated

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robbery statute. *Cooper* simply held that a defendant cannot be convicted of robbing the same person twice at the same time – once by threat and once by force. *Cooper* did not address the question that we now face: whether the Texas aggravated robbery statute is a divisible statute, setting forth alternative elements and thereby defining multiple crimes.⁴

Because the Texas aggravated robbery statute is divisible, we proceed to apply the modified categorical approach.

B.

The modified categorical approach “permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record.” *Johnson v. United States*, 559 U.S. 133, 144 (2010) (*Johnson II*). The court may refer to the “charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms.” *Id.* (citations omitted). In this case, the record contains Lerma’s juvenile order of commitment wherein Lerma was “found to have engaged in delinquent conduct.” Specifically, Lerma was found to have:

while in the course of committing theft of beer and money, hereinafter called “the property,” from [victim], with intent to obtain and maintain control of the property, using and exhibiting

⁴ Contrary to Lerma’s assertions, the decisions from the Texas Court of Appeals in *Woodard v. State*, 294 S.W.3d 605 (Tex. App.—Houston [1st Dist.] 2009, pet. refd), and *Burton v. State*, 510 S.W.3d 232 (Tex. App.—Fort Worth 2017, no pet.), are not helpful in the divisibility determination. The court in *Woodard* used the term “means” in a different way than the *Mathis* court. Specifically, the court concluded that the “aggravating factors [of § 29.03] are simply descriptions or means by which the underlying offense of robbery by causing bodily injury can be committed.” See *Woodard*, 94 S.W.3d at 609. When the court used the word “means,” it did not do so in relation to satisfying a single element of a crime, as *Mathis* requires. Rather, the *Woodard* court appears to have used the word “means” to describe the various crimes set forth in the aggravated robbery statute. See, e.g., Appendix (setting forth various crimes constituting aggravated robbery under § 29.03). In *Burton*, the court held that “causing bodily injury or threatening the victim are different methods of committing the same offense.” 510 S.W.3d at 232. It is unclear whether the court was referring to the elements of a crime, the means of satisfying a single element, or the crimes set forth by a statute under a *Mathis* analysis.

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a deadly weapon, namely, a gun, knowingly and intentionally threaten and place [victim] in fear of imminent bodily injury or death . . . on or about February 11, 1979.

The Order of Commitment further provides that Lerma was found to have:

On or about February 17, 1979, while in the course of committing theft of beer and money, hereinafter called “the property,” from [victim], with intent to obtain and maintain control of the property, using and exhibiting a deadly weapon, namely, a gun, knowingly and intentionally threaten and place [victim] in fear of imminent bodily [injury] or death.

The indictment charging Lerma with his first aggravated robbery as an adult alleged the following:

On or about July 10, 1990, . . . [Lerma] did then and there while in the course of committing theft of property and with the intent to obtain and maintain control over the property, intentionally and knowingly threaten [victim] with and place her in fear of imminent bodily injury and death by using and exhibiting a deadly weapon, namely a firearm.

Lerma’s subsequent judicial confession and stipulation tracked the exact language of the indictment.

The indictment charging Lerma with his second aggravated robbery as an adult alleged the following:

On or about March 4, 1991, . . . [Lerma] did then and there while in the course of committing theft of property and with the intent to obtain and maintain control over the property, intentionally and knowingly threaten [victim] with and place him in fear of imminent bodily injury and death by using and exhibiting a deadly weapon, namely a knife, which in the manner of its use and intended use was capable of causing death and serious bodily injury.

Lerma’s subsequent judicial confession and stipulation tracked the exact language of the indictment.

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Each of Lerma's prior convictions involved his commission of a robbery (intentionally and knowingly threatening the victim with **and** placing the victim in fear of imminent bodily injury and death), and his using **and** exhibiting a deadly weapon. These elements are the same elements of aggravated robbery under § 29.03(a)(2). *See* Appendix, "Crime No. 2" and "Crime No. 3" under § 29.03(a)(2). Thus, under the modified categorical approach, we determine that Lerma's prior convictions were based on § 29.03(a)(2) of the Texas aggravated robbery statute. The only question remaining is whether aggravated robbery under § 29.03(a)(2) "has as an element the use, attempted use, or threatened use of physical force against the person of another" such that it qualifies as a "violent felony" under the force clause of the ACCA. *See* § 924(e)(2)(B)(i).

The Supreme Court has instructed that the meaning of "physical force" in the ACCA's force clause "is a question of federal law, not state law." *Johnson II*, 559 U.S. at 138. In *Johnson II*, the Court provided the meaning of "physical force" under the force clause of the ACCA. Specifically, the Court held that "physical force" means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140 (citation omitted).

There can be no question that a crime under Texas Penal Code § 29.03(a)(2), that is, threatening someone with imminent bodily injury or death, or placing someone in fear of such, while using or exhibiting a deadly weapon in the course of committing theft with intent to obtain or maintain control of the property, has as an element the threatened use of physical force against the person of another. *See United States v. Ovalle-Chun*, 815 F.3d 222, 227 (5th Cir. 2016) (holding that "a person who intends to, and does, place another in fear of imminent physical injury by displaying what appears to be a deadly weapon has communicated an intent to inflict physical harm and, thus, threatened the use of force"). Therefore, Lerma's prior convictions for

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aggravated robbery under Texas Penal Code § 29.03(a)(2) qualify as “violent felonies” under the force clause of the ACCA.

Lerma argues, however, that under Texas law, the defendant’s use or exhibition of the deadly weapon need not play any part in accomplishing the threat or placing the victim in fear, as shown by the court’s decision in *Boston v. State*, 410 S.W.3d 321, 326-27 (Tex. Crim. App. 2013). In *Boston*, the victim of the aggravated robbery testified that “she never saw the firearm” used by the offender. However, a video of the crime showed that the offender “briefly pointed [the firearm] at the [victim], and set it on the counter pointed at the [victim].” *Boston*, 410 S.W.3d at 323. Under such circumstances, the crime of aggravated robbery under § 29.03(a)(2) would still qualify as a violent felony under the force clause, for there can be no question that pointing a gun at someone is an attempt to use physical force against the person of another. Thus, even under the scenario presented in *Boston*, the crime of aggravated robbery under § 29.03(a)(2) “has as an element the use, attempted use, or threatened use of physical force against the person of another.” See § 924(e)(2)(B)(i).

Based on the foregoing, Lerma’s prior convictions for aggravated robbery under Texas Penal Code § 29.03(a)(2) qualify as violent felonies under the force clause of the ACCA. Consequently, Lerma is not entitled to any relief under 28 U.S.C. § 2255. The district court’s judgment is AFFIRMED.

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APPENDIX

Aggravated Robbery, Texas Penal Code § 29.03	Crime No. 1 § 29.03(a)(1)	Robbery	
		Serious Bodily Injury	
	Crime No. 2 § 29.03(a)(2)	Robbery	
		Uses a Deadly Weapon	
	Crime No. 3 § 29.03(a)(2)	Robbery	
		Exhibits a Deadly Weapon	
	Crime No. 4 §29.03(a)(3)	Robbery	
		Status of the Victim	65 or Older OR Disabled

ENTERED

October 07, 2016

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

v.

NOEL LERMA,
Defendant/Movant.

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2:98-CR-233

(2:16-CV-112)

**MEMORANDUM OPINION AND ORDER DENYING MOTION TO VACATE,
SET ASIDE, OR CORRECT SENTENCE AND GRANTING A
CERTIFICATE OF APPEALABILITY**

Noel Lerma (Lerma) filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. D.E. 48. After full briefing by the parties (D.E. 53, 54, 55), and a hearing on Lerma's claims, the Court denies Lerma's § 2255 motion. D.E. 48. The Court grants Lerma a Certificate of Appealability.

I. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

II. FACTUAL BACKGROUND AND PROCEEDINGS

Lerma was indicted in July 1998 for violating Title 18, §§ 922(g) and 924(a)(2) by possessing two firearms after he was convicted of a felony offense. D.E. 1. He was appointed counsel and denied bond. D.E. 2. In August 1998, Lerma pleaded guilty to the indictment pursuant to a plea agreement with the government. D.E. 7, 8. During preparation of the Presentence Investigation Report (PSR), the Probation Department determined that Lerma qualified as an armed career criminal pursuant to § 924(e). Lerma

moved to withdraw his guilty plea. D.E. 10. After several hearings, Lerma withdrew his motion to withdraw his plea.

The PSR calculated Lerma's base offense as an armed career criminal at 34 with the adjusted level after credit for acceptance of responsibility of 31. D.E. 31, ¶¶ 13-23. The predicate offenses considered were two juvenile aggravated robberies and two adult convictions for aggravated robbery. *Id.*, ¶¶ 21-23. Lerma's actual criminal history points (12) resulted in a criminal history category V, but due to his conduct in the instant offense, his criminal history was category was increased to VI. *Id.*, ¶ 36 (U.S.S.G. § 4B1.4(c)(2)). His sentencing range was 188 to 235 months, with a statutory minimum of 15 years, and supervised release of 3 to 5 years.

At sentencing, the Court imposed a sentence of 180 months to be followed by supervised release of five years. There were no objections to the use of any of the predicate offenses. D.E. 57, pp. 3-7, 10-11. Judgment was entered on the docket November 23, 1998. D.E. 35. Lerma did not appeal.

III. MOVANT'S ALLEGATIONS

Lerma seeks resentencing, claiming that his predicate convictions no longer qualify after *Johnson v. United States*, 135 S.Ct. 2551 (2015). *Johnson* was made retroactive by *Welch v. United States*, 136 S.Ct. 1257 (2016).

IV. ANALYSIS

A. 28 U.S.C. § 2255

There are four cognizable grounds upon which a federal prisoner may move to vacate, set aside, or correct his sentence: (1) constitutional issues, (2) challenges to the district court's jurisdiction to impose the sentence, (3) challenges to the length of a sentence in excess of the statutory maximum, and (4) claims that the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255; *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996). “Relief under § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice.” *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992).

B. *Johnson Claim*

At the hearing on Lerma’s *Johnson* claim, the parties agreed that the Texas aggravated robbery statute was a divisible statute for which the modified categorical approach was appropriate. The Court considered the exhibits previously filed by the government, D.E. 53-4, 53-5, and 53-7, which include Lerma’s juvenile Order of Commitment after two aggravated robberies on separate dates, 79-JUV-59, in Nueces County, Texas; No. 95-CR-3087 State v. Lerma in the 28th District Court of Nueces County, Texas; and 90-CR-1429 State v. Lerma in the 347th District Court of Nueces County, Texas.

The Armed Career Criminal Act (ACCA) provides that a defendant convicted under § 922(g) who “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” Violent felony is defined as:

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*

18U.S.C. § 924(e)(1)(B) (emphasis added). *Johnson* invalidated the residual clause in subsection (B)(ii) shown in italics. The issue before the Court is whether Lerma’s predicate offenses, Texas aggravated robberies, have as an element “the use, or threatened use of physical force against the person of another.” § 924(e)(1)(B)(i).

The elements of aggravated robbery by threat pursuant to § 29.03(a)(2) of the Texas Penal Code (which incorporates the elements of robbery pursuant to § 29.02) are: that the defendant in the course of committing theft and with intent to obtain or maintain control of the property 1) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death, and 2) uses or exhibits a deadly weapon. *See Ex parte Denton*, 399 S.W.3d 540, 547 (Tex. Crim. App. 2013); *see also United States v. Davis*, 487 F.3d 282, (5th Cir. 2007). The parties agree that “threatens” and “places in fear” are

alternate means of committing the same offense. *See Mathis v. United States*, 136 S.Ct. 2243, 2253 (2016).

The categorical approach looks to the statutory elements of the prior offense rather than the defendant's underlying conduct, but if the statute is divisible, the Court may consider certain documents in order to determine which portion of the statute was charged. *Id.*;¹ *Descamps v. United States*, 133 S.Ct. 2276, 2281 (2013); *United States v. Garcia-Arellano*, 522 F.3d 477, 480–81 (5th Cir. 2008).

Lerma's two juvenile aggravated robbery offenses are described in the Order of Commitment as follows:

while in the course of committing theft of beer and money . . . from Mary Franco, with intent to obtain and maintain control of the property, using and exhibiting a deadly weapon, namely a gun, knowingly and intentionally threaten and place Mary Franco in fear of imminent bodily injury or death . . . on or about February 11, 1979.

¹ [T]he court below erred in applying the modified categorical approach to determine the means by which Mathis committed his prior crimes. ACCA, as just explained, treats such facts as irrelevant: Find them or not, by examining the record or anything else, a court still may not use them to enhance a sentence. And indeed, our cases involving the modified categorical approach have already made exactly that point. “[T]he only [use of that approach] we have ever allowed,” we stated a few Terms ago, is to determine “which *element[s]* played a part in the defendant’s conviction.” *Descamps*, 570 U.S., at —, —, 133 S.Ct., at 2283, 2285 (emphasis added); *see Taylor*, 495 U.S., at 602, 110 S.Ct. 2143 (noting that the modified approach may be employed only to determine whether “a jury necessarily had to find” each element of generic burglary). In other words, the modified approach serves—and serves solely—as a tool to identify the elements of the crime of conviction when a statute’s disjunctive phrasing renders one (or more) of them opaque.

Id. (emphasis in original).

D.E. 53-4, p. 1, ¶ 1. The second aggravated robbery is described in identical terms except for the date and identity of the victim. *Id.*, ¶ 2. The language describes an aggravated robbery by threat “using or exhibiting” a gun pursuant to § 29.03(a)(2). Lerma’s aggravated robbery in Cause No. 90-CR-1429 also charged him with aggravated robbery by threat.² His 1995 Indictment was worded similarly and charged Lerma with aggravated robbery pursuant to § 29.03(a)(2), but using a knife, not a gun.

Defense counsel argued that the least culpable means of committing aggravated robbery by threat is for the perpetrator to carry a deadly weapon, which under Texas law still constitutes use. In that context, defense counsel argued that aggravated robbery by threat does not include as an element the use or threatened use of force. Counsel cited a number of Texas cases for the proposition that the defendant does not have to even show his weapon to the victim to “use” it for aggravated robbery nor does the defendant have to say anything to be found to have threatened the victim. *Boston v. State*, 410 S.W.3d 321, 326 (Tex. Crim. App. 2013); *Howard v. Texas*, 333 S.W.3d 137 (Tex. Crim. App. 2011); *Cranford v. Texas*, 377 S.W.2d 957 (Tex. Crim. App. 1964); *Reed v. Texas*, 2012 WL 662327 (Tex. App.—Waco 2012, pet. ref’d.)

² [O]n or about July 10, 1990, in Nueces County, Texas, did then and there while in the course of committing theft of property and with the intent to obtain and maintain control over the property, intentionally and knowingly threaten Frances Hill with and place her in fear of imminent bodily injury and death by using and exhibiting a deadly weapon, namely a firearm

Counsel for the government argued that the aggravated robbery statute includes as an element the “threatened use of force” because that phrase is imbedded in the statute as one of the methods or means by which robbery may be carried out.

Defense counsel’s argument is undercut by the same Texas cases on which he relies. The *Howard* court explained that an implicit threat is sufficient to place a victim in fear “So long as the defendant’s actions are of such nature as in reason and common experience is likely to induce a person to part with his property against his will, any actual or perceived threat of imminent bodily injury will satisfy this element of the offense.” *Howard*, 333 S.W.3d at 138; *see also Houston-Randle v. State*, --- S.W.3d ---, 2016 WL 4045557 at *2 (Tex. App.—Houston [14th Dist.] July 26, 2016) (slip op.). Moreover, “placing in fear” is not generalized fear but fear of imminent bodily injury or death resulting from the acts of the defendant. *See Howard*, 333 S.W.3d at 138; *Vaughn v. State*, 634 S.W.2d 310, 312 (Tex. Crim. App. 1982) (aggravated robbery can be committed by either threatening or by placing another in fear of imminent bodily injury or death). Furthermore, a threat can be communicated without words by action or, conduct. *McGowan v. State*, 664 S.W.2d 355, 357 (Tex. Crim. App. 1984); *Fagan v. State*, 362 S.W.3d 796, 799 (Tex. App.-Texarkana 2012, pet. denied) (pointing loaded gun at individual is threatening conduct); *Rodriguez v. State*, 955 S.W.2d 171, 174 (Tex. App.-Amarillo 1997, no pet.) (pointing gun at supposed victim sufficient evidence of threat).

The Fifth Circuit has not yet decided whether aggravated robbery by threat or placing in fear has as an element the use, attempted use or threatened use of force. The most recent discussion of aggravated robbery as a predicate offense for ACCA enhancement is in *United States v. Davis*, in which aggravated robbery was properly considered a predicate offense under the residual clause, but the court did not discuss whether the “use of force” clause applied. 487 F.3d at 284-87. In *United States v. Gore*, 636 F.3d. 728 (5th Cir. 2011), the court held that conspiracy to commit aggravated robbery qualified as a violent felony for ACCA purposes, but it too was considered under the residual clause. *Id.* at 741.

The Court finds that the aggravated robbery by threat requires the defendant to “intentionally or knowingly threaten[] or place[] another in fear of imminent bodily injury or death,” and therefore “has as an element the use, attempted use, or threatened use of physical force against the person of another” as required for a violent felony used as a predicate offense under the ACCA.³ Aggravated robbery in Texas may be proven either by threat of imminent bodily injury or death or by placing in fear of imminent bodily injury or death. The element of threatened use of physical force is clear as to the threat portions but defense counsel argues it is not an element as to the second method of proof. But the Texas cases compel the conclusion that it is the defendant’s conduct that must cause the fear and that conduct is an implicit threat of imminent bodily injury or

³ The Fifth Circuit recently decided a vagueness challenge to 18 U.S.C. § 16(b) in light of *Johnson* and discussed the risk of physical force rather than the element of physical force this Court addressed. *United States v. Gonzalez-Longoria*, No. 15-40041 (5th Cir. August 5, 2016) (en banc) (slip op.).

death. Lerma's predicate offenses were properly used to enhance his status pursuant to § 924(e).

V. CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253 (c)(1)(A). A COA, however, "may issue. . .only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2)."The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Although this Court has found against Lerma, the issue is not decided in this Circuit. Accordingly, Lerma is granted a certificate of appealability on his claim that his aggravated robbery convictions are no longer properly sued as violent felonies to enhance his conviction.

VI. CONCLUSION

For the foregoing reasons, Lerma's motion to vacate, set aside or correct his sentence (D.E. 48) is DENIED. Lerma is GRANTED a Certificate of Appealability on his claim that aggravated robbery is not a proper predicate offense under the use of force clause of the ACCA.

It is Ordered this 6th day of October, 2016.


HAYDEN HEAD
SENIOR U.S. DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41467

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

NOEL LERMA,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

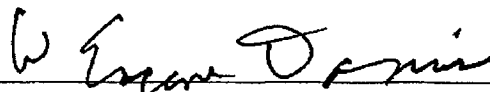
Before DAVIS, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is

denied

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE