

**Elizabeth Montano & Rebecca Sharpless, “Divisibility Redux: ‘Alternatively Phrased Statutes’ and State Law in the Post-*Mathis* Categorical Approach. 2 AILA Law J \_\_\_\_ (2019)**

**My Notes**

- This discussion occurs at the intersection of immigration and criminal law, where it is necessary to determine whether an individual’s conviction of a crime under a particular State law counts as a deportable offense under the INA.
- SCOTUS has clarified that the so-called “categorical approach” (IOW, how one “categorizes” an offense) must depend on a jury’s findings, NOT on facts that lie outside that conviction (such as charging documents).
- What gets confusing is when statutes suggest alternatives or use disjunctive language (“or”): are we looking at
  - Different *elements* of distinct offenses, or
  - Different *means* (“factual ways”) of committing the same offense?
- SCOTUS in *Mathis v. United States*, 136 S. Ct. 2243 (2016) laid it out like this:
  - If you’re seeing different *means* (“factual ways”) to commit a crime listed in a State statute, then the statute is **indivisible**.
    - Further, if the **indivisible State statute** goes further than the federal law (is “**broader**”), then there is no match: the individual can’t be held accountable for breaking the federal law.
  - If you’re seeing different *elements*—really, different possible distinct crimes—listed in the State statute, then the statute is **divisible**. You can examine each part separately.
    - Then, if the divisible statute is broader than the federal law’s definition of a crime, the adjudicator is allowed to look at the record of conviction to narrow down which of the alternatives was the offense of conviction and see if it matches the federal definition. (This is the **modified categorical approach**.)
    - The record of conviction doesn’t necessarily come into the picture when a jury pronounces its verdict: they must focus on the crime’s legal definition, not the specific circumstances (the means) by which the law was broken.
    - Rule of thumb: State statute **broader AND divisible**? Then **modified categorical approach** applies.
  - For a State offense, state law controls what the statute of conviction contains (means, elements, or a mix). You have to do some keen analysis of the law in that jurisdiction, maybe looking at things like double jeopardy, state sentencing enhancements, and the “one act, one crime” rule to get this right.

## Article Notes

### Error #1: Relying on State Law with No “Definitive Answer”

- Trying to figure out whether it’s a **means** or **elements** distinction? Research state law to see if this question is **definitively answered**.
- When is it **definitively answered**? “*only* if the highest court of the state has issued an opinion that directly addresses **whether juror unanimity among the relevant statutory alternatives is required**.” (3)
- “In the absence of definitive state authority establishing that a statute is divisible, the ambiguity must be resolved in favor of the immigrant or defendant and the statute must be treated as indivisible.” (3)
- *Mathis* court relied on an IA SC decision that explained that “the jury was not required to unanimously agree regarding the ‘mode of commission of the crime’ because the different locations listed in the statute were ‘alternative method[s] of committing a single crime[.]’” (3) [Therefore, statute was **indivisible**.] Jury didn’t have to agree “whether the burgled location was a building, other structure, or vehicle.” (Just had to agree on “was the location burgled?”)
- Some courts *think* they’ve found definitive answers in state court opinions when they haven’t. The key is to look for the requirement of **juror unanimity among the relevant statutory alternatives**.
- “State cases involving issues of double jeopardy, while not always dispositive, are particularly helpful in the search for definitive answers. . . . To determine whether two offenses violate the Double Jeopardy Clause, courts analyze whether each offense contains an element that the other does not according to the test the Supreme Court announced in *Blockburger v. United States*. If all elements are the same, and the separate convictions arise from the same act or transaction, then the convictions violate double jeopardy.” (4) (IOW, indivisible.) (But note that mere *discussion* of double jeopardy, w/o a *Blockburger* analysis, doesn’t fit the bill.)

### Error #2: “Sneaking a Peek” at the Record of Conviction

- Dicta in *Mathis* that added to confusion here: inconsistent suggestion that it’s okay to look at the record if the state law is ambiguous re. divisibility. Judges should **ONLY** get to look at the record if the statute is both **divisible** and **broader** than a federal law (so they can use the **modified categorical approach**).
- “The elements-versus means inquiry is legal, not factual. What is listed in a particular record of conviction is a question of fact that has no bearing on the legal question of whether state law treats the alternatives as means or elements.” (5)

- The notice of conviction, with all of its details, is necessary to inform the defendant of charges and to avoid double jeopardy. It is not in itself a commentary on the divisibility of the relevant statute, so don't use it that way.
- **“In the absence of definitive state law that treats the alternatives as separate elements, statutory alternatives must be construed as means (thus making the statute indivisible).”** (6)
- **“Put another way, any ambiguity in state law regarding whether juror agreement is needed should be resolved in favor of the immigrant facing deportation or the defendant facing enhanced sentencing without conducting any ‘peek’ into the record of conviction.”** (6)

### **Error #3: Mistaking the Prosecutor’s Charge of One Alternative for Divisibility**

- Only one crime can be charged in a single count. So if the record of conviction reiterates ALL of the statute’s listed alternatives, those alternatives should be considered distinct means of the same crime (rather than elements of separate crimes).
- But if the charging documents only list *one* alternative, you can’t assume that this indicates the statute is divisible. This data is indeterminate. “Because the choice to list a single means is discretionary, no definitive inference about divisibility can be drawn.” (6)
- So if you’re down to making the call from the charging document, the listing of one alternative must be construed as ambiguous re. the divisibility of the statute—and “the inquire must be resolved in favor of the defendant or immigrant, such that the statute will be considered indivisible.” (6)

### **Error #4: Improper Reliance on the “Face” of the Statute**

- Some courts have relied on the structure of the statute to determine divisibility.
- In *Mathis* the Court noted that some statutes can resolve the divisibility issue on their face—meaning, if they explicitly clarify that what they are listing constitutes means or elements, or show that different offenses merit different punishments or enhance punishments.
  - “Any fact that increases punishment, in other words, must be an element rather than a means.” (8)
- “some courts have interpreted this language as sanctioning the inference that listed alternatives are elements, at least in the absence of contrary authority.” (7)

### **Error #5: Mistaking Divisibility Between Two Alternatives for Divisibility Between Other Alternatives**

- “Courts have also misapplied the *Mathis* test for divisibility by assuming that divisibility in one portion of a statute means that another portion must also be divisible.” (8)
- Sometimes there are multiple alternatives in a statute, and SOME of them are divisible (elements) while others merely describe indivisible means of committing same crime. (8)
- “When it comes to a statute with more than two alternatives, divisibility is not all-or-nothing.” (8)

#### **Error #6: Citing to Overruled Pre-*Mathis* Precedent**

- Courts have made the mistake of relying on cases that employed the wrong test for a divisible statute—leaning on outdated precedent.
- “Prior to *Mathis*, some circuit courts held that any statute containing alternatives was divisible, justifying review of the record of conviction under the modified categorical approach.” (9)
- *Singh v. Attorney General*, 839 F.3d 273, 282-85 (3d Cir. 2016): “The Third Circuit considered whether the ‘controlled substance’ requirement of a Pennsylvania drug statute was divisible, such that the record of conviction could be reviewed to determine whether the drug involved in the state conviction qualified as a federal controlled substance. In holding the statute divisible, the court cited to its pre-*Mathis* precedent even though the case, and the cases it cited, did not use the juror unanimity test.” (10)
- “Similarly, the Third Circuit in *United States v. Heng Khim* relied on a 2013 opinion finding divisibility, even though that pre-*Mathis* case relied on the structure of the statute rather than the elements-versus-means test.” (10)

#### **Conclusion**

- “If state law provides a ‘definitive answer,’ the analysis must end. If state law is unclear, the ambiguity should be resolved in favor of the defendant or immigrant. Adjudicators and courts exceed their boundaries when they move past the state law to ‘peek’ at the record of conviction.” (11)
- “the categorical approach is a purely legal inquiry, not a factual one” (11)
- “Advocates should assert this argument but also recognize that adjudicators are likely to continue following the mistaken practice.” (11)
- “When *Mathis* held that the juror agreement test is the proper test to apply, it overruled the prior practice of relying on the structure of the statute to determine divisibility.” (11)
- “Properly applying the post-*Mathis* categorical approach is critical for the zealous representation of defendants and immigrants, as well as the fair adjudication of their cases.” (11)