FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICARDO A. LOPEZ-MARROQUIN, AKA Ricardo Lopez, *Petitioner*, v. MERRICK B. GARLAND, Attorney General, *Respondent.*	No. 18-72922 Agency No. A044-286-222 OPINION

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted June 3, 2020
Pasadena, California

Filed August 18, 2021

Before: Consuelo M. Callahan and Jacqueline H. Nguyen, Circuit Judges, and Yvette Kane,[*] District Judge.

Opinion by Judge Nguyen;
Dissent by Judge Callahan

[*] The Honorable Yvette Kane, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

SUMMARY[**]

Immigration

Granting in part Ricardo Lopez-Marroquin's petition for review of a decision of the Board of Immigration Appeals, and remanding, the panel held that vehicle theft under California Vehicle Code § 10851(a) is indivisible in its treatment of accessories after the fact, and therefore, is not an aggravated felony theft offense under 8 U.S.C. § 1101(a)(43)(G). In so concluding, the panel overruled *Duenas-Alvarez v. Holder*, 733 F.3d 812 (9th Cir. 2013), on the ground that it was irreconcilable with *Mathis v. United States*, 136 S. Ct. 2243 (2016).

An immigration judge and the BIA concluded that Lopez-Marroquin was ineligible for cancellation of removal and asylum on the ground that his § 10851(a) conviction was an aggravated felony. The panel noted that this court has held, and the parties did not dispute, that § 10851(a) is overbroad because it extends liability to accessories after the fact, while the generic offense does not. Thus, whether Lopez-Marroquin had been convicted of an aggravated felony turned on whether the statute is divisible as between principals and accessories after the fact. The panel explained that a statute is divisible if it sets out *elements* of the offense in the alternative, effectively containing multiple offenses, while a statute is indivisible if it only lists alternative *means* of committing a single crime.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Applying the framework the Supreme Court provided in *Mathis*, the panel held that § 10851(a) is indivisible in its treatment of accessories after the fact. The panel observed that the statutory text is silent on whether principals or accessories after the fact must be charged as such, and that § 10851(a)'s punitive architecture fails to differentiate principals and accessories, and fails to require either alternative to be alleged in the pleading, admitted by the defendant, or found by the jury. Observing that several California cases include discussion relevant to divisibility, the panel determined that none is dispositive. Because the answer to the question of divisibility was not clear from state law, the panel, as instructed by *Mathis*, took a "peek" at the record of conviction for the limited purpose of determining whether the listed items are elements, but concluded that the documents were ambiguous at best. Thus, the panel concluded that state law sources and a "peek" at the record did not satisfy the "demand for certainty" required by the Supreme Court in deciding if a defendant was necessarily convicted of a generic offense.

The panel concluded that it was required to overrule *Duenas-Alvarez*, which held—three years before *Mathis*—that § 10851(a) was divisible as between principals and accessories after the fact. Observing that *Duenas-Alvarez* relied solely on the disjunctive phrasing of the statute, the panel concluded this approach was clearly irreconcilable with *Mathis*, which instructs courts not to assume that a statute lists alternative elements simply because it contains a disjunctive list.

Having found § 10851(a) overbroad and indivisible, the panel concluded it can never serve as a predicate offense, and therefore, Lopez-Marroquin had not been convicted of an aggravated felony. The panel thus remanded to the

agency for consideration of his requests for asylum and cancellation. In a concurrently filed memorandum disposition, the panel denied the petition as to his requests for withholding of removal and relief under the Convention Against Torture.

Dissenting, Judge Callahan wrote that this case was yet another example of the legal gyrations required by the modified categorical approach which leave few the wiser. Judge Callahan wrote that the majority's convoluted path through controlling precedents obscured that, under California law, auto theft and accessory after the fact are distinct offenses with distinct elements. Judge Callahan also wrote that she did not read *Mathis* as compelling a finding of indivisibility, and to the extent that it could be read so, such a determination should be made by an en banc panel. Judge Callahan would follow *Duenas-Alvarez* and hold that application of the modified categorical approach supports the BIA's determination that Lopez-Marroquin committed the aggravated felony of auto theft as a principal under § 10851(a).

COUNSEL

Hannah Comstock (argued), Emily Chertoff (argued), Munmeeth Kaur Soni, and Caitlin Anderson, Immigrant Defenders Law Center, Los Angeles, California; for Petitioner.

Joseph A. O'Connell (argued), Attorney; Bryan S. Beier, Senior Litigation Counsel; Cindy S. Ferrier and John W. Blakeley, Assistant Directors; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

Jessica Karp Bansal and Ahilan T. Arulanantham, ACLU of Southern California, Los Angeles, California, for Amicus Curiae ACLU of Southern California.

OPINION

NGUYEN, Circuit Judge:

Ricardo Lopez-Marroquin, a native and citizen of El Salvador, challenges the Board of Immigration Appeals' ("BIA") finding that his conviction for theft of a vehicle under California Vehicle Code § 10851(a) is an aggravated felony, which renders him ineligible for certain forms of relief. We have held, and the parties do not dispute, that § 10851(a) is overbroad because it criminalizes a broader swath of conduct than the generic theft offense. *See United States v. Vidal*, 504 F.3d 1072, 1077 (9th Cir. 2007) (en banc) ("[W]hereas the generic theft offense encompasses only principals, accomplices, and others who incur liability on the basis of pre-offense conduct, section 10851(a) also reaches accessories after the fact."). We must therefore decide whether § 10851(a) "sets out a single (or 'indivisible') set of elements to define a single crime," or rather, "list[s] elements in the alternative, and thereby define[s] multiple crimes." *Mathis v. United States*, 136 S. Ct. 2243, 2248–49 (2016). Applying the framework described in *Mathis*, we hold that § 10851(a) is indivisible in its treatment of accessories after the fact. Because § 10851(a) does not categorically match the generic theft offense, a conviction under § 10851(a) is not an aggravated felony.

We previously held otherwise in *Duenas-Alvarez v. Holder*, 733 F.3d 812 (9th Cir. 2013), but that case is clearly

irreconcilable with the Supreme Court's subsequent decision in *Mathis*. Accordingly, we grant Lopez-Marroquin's petition in part and deny in part.[1]

BACKGROUND

Lopez-Marroquin came to the United States in the 1980s after his mother received asylum, and he became a legal permanent resident ("LPR") in the early 1990s. In October 2000, he pleaded guilty to vehicle theft in violation of California Vehicle Code § 10851(a). Twelve years later, the Department of Homeland Security served him with a Notice to Appear and charged him with removability in connection with different convictions. In 2017, Lopez-Marroquin applied for LPR cancellation of removal. He also amended his previously submitted application for asylum, withholding of removal, and relief under the Convention Against Torture.

In February 2018, the immigration judge ("IJ") determined that his § 10851(a) conviction constituted an aggravated felony. The IJ reasoned that although § 10851(a) is overbroad, it is divisible, relying on our opinion in *Duenas-Alvarez*, 733 F.3d 812. The IJ next determined Lopez-Marroquin's record of conviction shows he necessarily committed the offense as a principal, not as an accessory after the fact, so he committed an aggravated felony. The IJ denied Lopez-Marroquin's applications for

[1] We grant the petition on the issue of whether Lopez-Marroquin's conviction under Cal. Veh. Code § 10851(a) qualifies as an aggravated felony for purposes of eligibility for asylum and cancellation of removal. Lopez-Marroquin also applied for withholding of removal and relief under the Convention Against Torture, which we address in a concurrently filed memorandum disposition that denies the petition in part.

cancellation of removal and asylum. Lopez-Marroquin appealed to the BIA, which affirmed the IJ's decision.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over final orders of removal under 8 U.S.C. § 1252. We review de novo whether a particular offense constitutes an aggravated felony under the Immigration and Nationality Act. *Sareang Ye v. I.N.S.*, 214 F.3d 1128, 1131 (9th Cir. 2000). Divisibility, like element identification, is reviewed de novo. *Medina-Lara v. Holder*, 771 F.3d 1106, 1117 (9th Cir. 2014).

DISCUSSION

I.

A lawful permanent resident is statutorily ineligible for cancellation of removal if he has been convicted of an aggravated felony. 8 U.S.C. § 1229b(a)(3). Similarly, a noncitizen is ineligible for asylum if he has been convicted of a particularly serious crime, 8 U.S.C. § 1158(b)(2)(A)(ii), and for purposes of asylum, an aggravated felony is automatically a particularly serious crime, 8 U.S.C. § 1158(b)(2)(B)(i). "The term 'aggravated felony' [includes] . . . a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G).

Here, the agency applied these statutory bars to deny Lopez-Marroquin relief based on its finding that a conviction under § 10851(a) is an aggravated felony.

A. Divisibility Hinges on Whether Statutory Alternatives Are Elements or Means.

To determine whether a California Vehicle Code § 10851(a) conviction is an aggravated felony, we apply the three-step process set out in *Descamps v. United States*, 570 U.S. 254 (2013). *See Mathis*, 136 S. Ct. at 2248–49. First, applying the categorical approach established by *Taylor v. United States*, 495 U.S. 575 (1990), we compare the elements of the offense with the elements of a generic offense—"i.e., the offense as commonly understood." *Sandoval v. Sessions*, 866 F.3d 986, 988 (9th Cir. 2017). This step considers statutory definitions only, not the actual conduct underlying the conviction. *Descamps*, 570 U.S. at 261 ("The key, we emphasized, is elements, not facts."). When the elements of the state offense are the same as, or narrower than, those of the generic offense, the petitioner's conviction is a categorical match. *Id.* However, if the elements of the state offense are broader than those of the generic offense—meaning the state offense criminalizes conduct that the generic offense does not—then there is no categorical match. *Mathis*, 136 S. Ct. at 2248–49.

If the state statute is "overbroad," the question of divisibility arises. *Lopez-Valencia v. Lynch*, 798 F.3d 863, 867–68 (9th Cir. 2015). A statute is divisible if it sets out elements of the offense in the alternative, effectively containing multiple possible offenses. *Romero-Millan v. Barr*, 958 F.3d 844, 847–48 (9th Cir. 2020). A statute is indivisible if it only lists alternative means of committing a single crime. *Id.* If the statute is indivisible, the inquiry ends. *See Mathis*, 136 S. Ct. at 2257; *Lopez-Valencia*, 798 F.3d at 868 (quoting *Medina-Lara v. Holder*, 771 F.3d at 1112 ("a conviction under an indivisible, overbroad statute can *never* serve as a predicate offense")).

Determining whether a particular statute's disjunctive phrasing sets forth alternative elements or alternative means is not always easy. *See* Dissent n.1. "Although we properly articulated the elements-based test before *Mathis* was decided, . . . our prior decisions . . . often put undue emphasis on the disjunctive-list rationale criticized in *Mathis*." *United States v. Martinez-Lopez*, 864 F.3d 1034, 1039 (9th Cir. 2017) (en banc) (citation omitted) (collecting cases). *Mathis* emphasized "the importance of the abstract comparison of elements" and "reiterated that the Supreme Court meant what it said" in *Descamps*. *Id*.

The Supreme Court in *Mathis* provided a clear framework to assist courts in analyzing a statute's divisibility. *Mathis*, 136 S. Ct. at 2249, 2256. *Mathis* instructs us to consult "authoritative sources of state law" including state court decisions that "definitively answer[]" the question of whether a statute contains alternative elements or means. *Id.* at 2256 ("When a ruling of that kind exists, a [court] need only follow what it says."). If no such decision exists, the text of the statute may also "resolve the issue." *Id.* For example, alternatives that carry different punishments are necessarily elements. *See id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). If "state law fails to provide clear answers," courts may take a "peek" at the record of conviction for the "sole and limited purpose of determining whether the listed items are elements of the offense." *Id.* at 2256–57 (alterations omitted) (quoting *Rendon v. Holder*, 782 F.3d 466, 473–74 (9th Cir. 2015) (Kozinski, J., dissenting from denial of reh'g en banc)). If such records do not "plainly" demonstrate that the alternatives are elements rather than means, the statute is indivisible. *Id.*

Only in the "narrow range of cases" where an overbroad statute is divisible do we proceed to the third *Descamps* step, the "modified categorical approach." *Id.*; *Villavicencio v. Sessions*, 904 F.3d 658, 664 (9th Cir. 2018). "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." *Mathis*, 136 S. Ct. at 2253.

B. California Vehicle Code § 10851(a) Is Indivisible as to Its Treatment of Accessories after the Fact.

Turning to this case, we must decide whether vehicle theft under § 10851(a) categorically matches the generic theft offense, which is an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(G). The parties agree that § 10851(a) is overbroad because it extends liability to accessories after the fact. *United States v. Arriaga-Pinon*, 852 F.3d 1195, 1199 (9th Cir. 2017) ("Section 10851(a) does not match the elements of the generic theft offense because it applies not only to the principals and accomplices, but also to accessories after the fact.") (citing *Vidal*, 504 F.3d at 1074–75). Applying *Mathis*, we consider whether state authoritative sources—the statutory text and case law—"definitively answer[] the question" of whether the defendant's role is an alternative element or means. *See Mathis*, 136 S. Ct. at 2256.

Turning first to the statutory text, it is silent on whether principals or accessories after the fact must be charged as such, so it gives us no clue on the question of divisibility. *See id.* (noting a statute that "identif[ies] which things must be charged (and so are elements) and which need not be (and so are means)" is an "authoritative source[] of state law" on this question). Section 10851(a) provides:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, *or* any person who is a party *or* an accessory to *or* an accomplice in the driving or unauthorized taking or stealing[.]

Cal. Veh. Code § 10851(a) (emphasis added).

But "[i]f statutory alternatives carry different punishments, then under *Apprendi* they must be elements." *Mathis*, 136 S. Ct. at 2256. Here, under subdivision (b) of § 10851, the penalties are enhanced for theft of certain vehicles (an ambulance, a marked law enforcement vehicle, or a vehicle modified for the use of disabled persons), and subdivision (d) requires the aggravating facts in subdivision (b) to be "alleged in the accusatory pleading, and either admitted by the defendant in open court, or found to be true by the jury . . . ." Cal. Veh. Code §§ 10851(b), (d). Section 10851's punitive architecture fails to differentiate principals and accessories, and fails to require either alternative to be alleged in the accusatory pleading, admitted by the defendant, or found by the jury. This suggests the alternatives between principals and accessories are means, or "illustrative examples," because they need not be specifically charged. *See Mathis*, 136 S. Ct. at 2256.

In sum, although not dispositive, we conclude that the statutory text and structure tend to support Lopez-Marroquin's view that role in the offense (whether as a principal or an accessory after the fact) is a means of

committing a single offense of vehicle theft under § 10851(a).

The parties debate whether state case law aids in the divisibility analysis. It does not. As Chief Judge Thomas observed, there "is no example of a California case that defines a separate set of elements under section 10851 for those convicted as a principal . . . and those convicted as an accessory after the fact." *Arriaga-Pinon*, 852 F.3d at 1202 (Thomas, C.J., concurring) (collecting cases). And while several California cases include discussion relevant to divisibility, none is dispositive.

For example, *People v. Clark* considered the proof necessary to sustain a § 10851(a) conviction where the evidence showed the defendant was merely a passenger in the vehicle and reasoned that the conviction "must rest on the theory that [the defendant] was 'a party or accessory to or an accomplice in the driving.'" 60 Cal. Rptr. 58, 62 (Cal. Ct. App. 1967) (quoting Cal. Veh. Code § 10851(a)). *Clark* then held that under these circumstances, the defendant "must have known that the vehicle had been unlawfully acquired and must have had that knowledge at a time when he could be said to have, in some way, aided or assisted in the driving." *Id.* This discussion in *Clark* strongly suggests that juror unanimity as to the theory of liability is not required for a conviction under § 10851(a).

On the other hand, in an earlier case, *People v. Slayden*, the trial court gave the jury two separate instructions for a § 10851(a) charge, one pertaining to any person "who shall take or drive" a vehicle, and a second pertaining to "any person who assists in, or is a party or an accessory to, or an accomplice in" the former. 166 P.2d 304, 304–05 (Cal. Ct. App. 1946). That decision suggests that the court viewed

accessory after the fact as a separate crime on which the jury must unanimously agree.[2]

Although we find that the statute itself suggests that the alternative listing of roles in the offense set out examples of means rather than elements, the answer is not clear, as evidenced by the conflicting state court opinions. We therefore take a "peek" at the record of conviction for the limited purpose of ascertaining whether the alternatives are means or elements. *Mathis*, 136 S. Ct. at 2256 ("And if state law fails to provide clear answers, federal judges have another place to look: the record of a prior conviction itself.").

The documents here are ambiguous at best. As in *Vidal*, the information "merely recites the language of the statute," which is "insufficient to establish the offense as generic." 504 F.3d at 1088. Moreover, the California Criminal Jury Instructions ("CALCRIM") could be consistent with principal *or* accessory after the fact liability. CALCRIM 1820 (2020) ("To prove that the defendant is guilty of this crime, the People must prove . . . 1. The defendant drove someone else's vehicle without the owner's consent; AND 2. When the defendant drove the vehicle, (he/she) intended

[2] Recent unpublished cases likewise do not provide a clear answer. *Compare People v. Queen*, 2002 WL 1360673, at *4–5 (Cal. Ct. App. June 24, 2002) (holding the trial court "properly instructed" the jury that a finding the defendant was merely a passenger "would not *foreclose* a conviction, *provided* the jury found *all of the elements of the crime were met*"), *and People v. Venegas*, 2012 WL 734094, at *11 (Cal. Ct. App. Mar. 6, 2012) (finding the jury was properly given instructions in a multidefendant case, which did not require role differentiation), *with People v. Umanzor*, 2009 WL 604921, at *2–3 (Cal. Ct. App. Mar. 10, 2009) (upholding an amendment to an information that added a "charge of accessory after the fact (Pen. Code § 32)").

to deprive the owner of possession or ownership of the vehicle for any period of time."). True, under *Mathis* the "exclusion" of any reference to the term accessory or to the actions of an accessory after the fact "could indicate" the alternatives are elements, *Mathis*, 136 S. Ct. at 2257, but California prosecutors "regularly employ generic charging language . . . when prosecuting 10851(a) offenses," *Vidal*, 504 F.3d at 1088 n.27. Accordingly, the record here does not "speak plainly." *Mathis*, 136 S. Ct. at 2257.

We hold that § 10851(a) is indivisible. State law sources and a "peek" at the record do not satisfy "*Taylor's* demand for certainty" when deciding if a defendant was necessarily convicted of a generic offense. *Id.* (citing *Shephard v. United States*, 544 U.S. 13, 21 (2005)). Our inquiry ends here, because § 10851(a) is both overbroad and indivisible, so it "can *never* serve as a predicate offense." *Medina-Lara v. Holder*, 771 F.3d at 1112.

II.

Three years before *Mathis*, we considered in *Duenas-Alvarez* whether § 10851(a) is divisible. 733 F.3d 812. We held that § 10851(a) "is divisible in that it imposes criminal liability in the alternative on principals as well as on accessories after the fact." *Id.* at 814.

We consider whether *Mathis* requires us to overrule *Duenas-Alvarez*. A three-judge panel may not overrule circuit precedent unless a Supreme Court case has "undercut the theory or reasoning underlying the . . . precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). The clearly irreconcilable requirement is "a high standard." *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013). "It is not enough for there to be 'some tension'

between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to 'cast doubt' on the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (internal citation omitted) (quoting *United States v. Orm Hieng*, 679 F.3d 1131, 1140–41 (9th Cir. 2012) and *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011) (per curiam)).

In holding that § 10851(a) is a divisible statute, *Duenas-Alvarez* relied solely on the disjunctive phrasing of the statute. *See* 733 F.3d at 814 ("California Vehicle Code section 10851(a) is divisible in that it imposes criminal liability in the alternative on principals as well as on accessories after the fact."). This approach is clearly irreconcilable with *Mathis*, which "instruct[s] courts not to assume that a statute lists alternative elements and defines multiple crimes simply because it contains a disjunctive list." *Martinez-Lopez*, 864 F.3d at 1039. As the Supreme Court explained in *Mathis*, in analyzing the divisibility question, we must look to the text and structure of the statute as well as to state case law. *Mathis*, 136 S. Ct. at 2256–57. "And if state law fails to provide clear answers, [we] have another place to look: the record of a prior conviction itself." *Id.* at 2256. Without the benefit of the guidance provided in *Mathis*, *Duenas-Alvarez* failed to look beyond the disjunctive phrasing in the statute. *Duenas-Alvarez* is therefore clearly irreconcilable with *Mathis*, both in its logic and its result. We overrule *Duenas-Alvarez* and hold that § 10851(a) is indivisible in its treatment of accessories after the fact. Because there is no categorical match in the elements of Lopez-Marroquin's § 10851(a) conviction with the elements of a generic theft offense, he has not been convicted of an aggravated felony.

CONCLUSION

We remand to the agency for consideration of Lopez-Marroquin's requests for asylum and cancellation of removal. Because § 10851(a) is not an aggravated felony, the agency's determination that it is *per se* a particularly serious crime ("PSC") no longer stands. 8 U.S.C. § 1158(b)(2)(A)(ii), (b)(2)(B)(i). That does not end the inquiry, however, because convictions that are not aggravated felonies may nevertheless constitute PSCs that bar asylum. *See Delgado v. Holder*, 648 F.3d 1095, 1105–06 (9th Cir. 2009) (en banc). We do not decide whether Lopez-Marroquin's conviction constitutes a PSC because the agency did not conduct that analysis in the asylum context.[3]

PETITION GRANTED IN PART.

CALLAHAN, Circuit Judge, dissenting:

This case is yet another example of the legal gyrations required by the modified categorical approach which leave few the wiser.[1] I dissent because the majority's convoluted

[3] Although the agency determined that Lopez-Marroquin's conviction was a PSC in the withholding context, it did so with the assumption that the conviction was an aggravated felony. That determination—which is discretionary and case-by-case, *Anaya-Ortiz v. Holder*, 594 F.3d 673, 678 (9th Cir. 2010), and hinges in part on the "nature" or elements of the offense, *id.*—may differ on remand.

[1] *See Menendez v. Whitaker*, 908 F.3d 467, 475 (9th Cir. 2018) (Judge Callahan concurring, joined by Judge Owens); *Almanza-Arenas v. Lynch*, 815 F.3d 469, 483 (9th Cir. 2016) (en banc) (Judge Owens concurring, joined by Judges Tallman, Bybee, and Callahan).

path through controlling precedents obscures that, under California law, auto theft and accessory after the fact are distinct offenses with distinct elements. Accordingly, applying the modified categorical approach, the record shows that Lopez-Marroquin committed the aggravated felony of auto theft as a principal under California Vehicle Code § 10851(a).

In *United States v. Vidal*, 504 F.3d 1072, 1077 (9th Cir. 2007) (en banc), we held that California Vehicle Code § 10851(a) is broader than generic theft because it covers an "accessory after the fact."[2] That is, unlike the federal generic definition of an "aggravated felony," § 10851(a) extends liability to accessories after the fact. *United States v. Arriaga-Pinon*, 852 F.3d 1195, 1199 (9th Cir. 2017) ("Section 10851(a) does not match the elements of the generic theft offense because it applies not only to the principals and accomplices, but also to accessories after the fact.").

In *Duenas-Alvarez v. Holder*, 733 F.3d 812, 814 (9th Cir. 2013), we held that § 10851 was divisible "in that it imposes criminal liability in the alternative on principals as well as on accessories after the fact." Accordingly, we applied the "modified categorical approach to determine whether Petitioner was convicted as a principal, instead of as an accessory after the fact." *Id*. at 814–15. We examined "a charging paper in combination with other documents in the record, including the abstract of judgment," and determined

[2] I continue to think that the better reading of § 10851(a) is that it is categorically a theft offense, *see Vidal*, 504 F.3d at 1091–99 (Callahan, J. dissenting), but recognize that the contrary en banc opinion is the law of the circuit until and unless we again take up the issue en banc, the Supreme Court directs otherwise, or California modifies its statute.

that the petitioner was "clearly and unambiguously charged . . . as a principal who personally drove or took the vehicle of another without consent to deprive the owner of it." *Id*. at 815. We noted that Count 1 of the information charged petitioner with the crime of taking a vehicle without the owner's consent and "omitted any mention of, or text from the portion of the statute that refers to accessories after the fact." *Id*.

As the facts in this case are almost identical to those in *Duenas-Alvarez*, that decision should be controlling. The majority, however, construes *Mathis v. United States*, 136 S. Ct. 2243 (2016), as intervening controlling authority that compels the conclusion that, contrary to our decision in *Duenas-Alvarez*, § 10851(a) is "indivisible." Maj. at 14. I disagree. I do not read *Mathis* as compelling a finding of indivisibility, and to the extent that it could be so read, such a determination should be made by an en banc panel.[3]

[3] In *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011), we reiterated:

> For a three-judge panel to hold that an intervening Supreme Court decision has "effectively overruled" circuit precedent, the intervening decision must do more than simply "cast doubt" on our precedent. Rather, it must "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

See also Aleman v. Gonzalez v. Barr, 955 F.3d 762,768–69 (9th Cir. 2020); *Murray v. Mayo Clinic*, 943 F.3d 1101, 1105 (9th Cir. 2019); *In re Gilman*, 887 F.3d 956 (9th Cir. 2018).

The relevant issue in *Mathis* was whether the defendant's conviction under an Iowa burglary statute constituted a "violent felony" for purposes of determining his sentence under the Armed Career Criminal Act (ACCA). The state statute covered more than a generic burglary because it included unlawful entry into "any building, structure, *[or] land, water, or air vehicle*." *Mathis*, 136 S. Ct. at 2250. The Court explained that under the categorical approach the focus was solely "on whether the elements of the crime of conviction sufficiently match the elements of the generic burglary while ignoring the particular facts of the case. *Id*. at 2248.

Elements "are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction,'" "what the jury must find beyond a reasonable doubt to convict," and "what the defendant necessarily admits when he pleads guilty." *Id*. (internal citations omitted).

Sometimes the comparison of elements is straightforward when a statute sets forth a single set of elements to define a single crime. But some statutes are more complicated.

> A single statute may list elements in the alternative, and thereby define multiple crimes. Suppose, for example, that the California law noted above had prohibited

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Even if the majority's approach were the better approach, our prior opinions skirting the issue indicate that *Duenas-Alvarez*, 733 F.3d 812, is not "clearly irreconcilable" with *Mathis*. *See, e.g.*, *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016); *Arriaga-Pinon*, 852 F.3d 1195. Accordingly, if we are to adopt the majority's approach, we should do so in an en banc opinion.

> "the lawful entry or the unlawful entry" of a premises with intent to steal, so as to create two different offenses, one more serious than the other. If the defendant were convicted of the offense with unlawful entry as an element, then his crime of conviction would match generic burglary and count as an ACCA predicate; but, conversely, the conviction would not qualify if it were for the offense with lawful entry as an element. A sentencing court thus requires a way of figuring out which of the alternative elements listed—lawful entry or unlawful entry—was integral to the defendant′s conviction (that is, which was necessarily found or admitted). *See* [*Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013)]. To address that need, this Court approved the "modified categorical approach" for use with statutes having multiple alternative elements. *See, e.g., Shepard v. United States*, 544 U.S. 13, 26 (2005).

Id. at 2249 (parallel citations omitted).

The Court further explained:

> [S]uppose a statute requires use of a "deadly weapon" as an element of a crime and further provides that the use of a "knife, gun, bat, or similar weapon" would all qualify. *See Descamps*, 133 S. Ct. at 2289; *Richardson*, 526 U.S., at 817. Because that kind of list merely specifies diverse means of satisfying a single element of a single crime—or

> otherwise said, spells out various factual ways of committing some component of the offense—a jury need not find (or a defendant admit) any particular item: A jury could convict even if some jurors "conclude[d] that the defendant used a knife" while others "conclude[d] he used a gun," so long as all agreed that the defendant used a "deadly weapon." *Ibid.*; *see Descamps*, 133 S. Ct. at 2288 (describing means, for this reason, as "legally extraneous circumstances").

Id. at 2249 (parallel citations omitted).

A critical aspect of the examples cited by the Supreme Court is that the underlying core "element" remains the same. Whether the defendant lawfully or unlawfully enters a premises the state must prove an intent to steal. Whether a defendant uses a gun or a bat, the state must prove that he intended to harm or intimidate using a deadly weapon.

But under California law, principals and accessories after the fact are mutually exclusive roles that inherently require different elements of proof. *See, e.g.*, *People v. Prado*, 136 Cal. Rptr. 521, 524 (Cal. Ct. App. 1977) ("[Principals and accessories involve] mutually exclusive states of mind and give rise to mutually exclusive offenses."); *In re Eduardo M.*, 44 Cal. Rptr. 3d 875, 880 (Cal. Ct. App. 2006) ("California long has recognized that a principal to a felony cannot become an accessory to that felony by attempting to make his own escape."); *People v. Boatwright*, 248 Cal. Rptr. 3d 800, 805 (Cal. Ct. App. 2019) ("[C]onviction as an accessory requires that someone other than the accused, that is, a principal, must have committed a specific, completed felony . . . ." (internal quotations, emphasis, and citation

omitted)). Thus, § 10851(a) should be read as setting forth alternative offenses requiring different elements, rather than alternative means of committing the same offense.

Interpreting accessory liability under § 10851(a) as an alternative offense requiring different elements, rather than an alternative means, also makes sense as a matter of logic. The elements of a § 10851(a) violation under a principal liability theory are (1) "the defendant took or drove someone else's vehicle without the owner's consent," and (2) "*when the defendant did so*, (he/she) intended to deprive the owner of possession or ownership . . . ." CALCRIM No. 1820 (emphasis added); *see also Almanza-Arenas v. Lynch*, 815 F.3d 469, 476 (9th Cir. 2016). An accessory after the fact cannot satisfy these elements, at least with respect to the principal's same charged conduct. An accessory is defined as one "who, *after a felony has been committed*, harbors, conceals, or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof . . . ." *Boatwright*, 136 Cal. Rptr. at 805 (emphasis added) (quoting Cal. Pen. Code § 32). In other words, an accessory engages in entirely different behavior with a different mental state at a different point in time than a principal. *See Prado*, 136 Cal. Rptr. at 523 (noting, for this reason, an accessory after the fact "commits an offense separate and distinct from the crime of the principal").

We recognized as much in *Vidal*, 504 F.3d 1072, when we held that "accessory," as used in § 10851(a), must mean "accessory after the fact" and explained that "one who is convicted as an accessory after the fact to theft *cannot* be said to have committed all elements of generic theft, which

includes the element of criminal intent to deprive the owner of rights and benefits of ownership." *Id*. at 1080 (emphasis added, quotations and citation omitted). Such language cannot be squared with the position that accessory liability under § 10851 is simply an alternative means of violating the statute and can be satisfied by sufficient proof and juror unanimity on the aforementioned elements of principal liability under § 10851(a). Indeed, in *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014), we cited *Duenas-Alvarez*, 733 F.3d 812, as an example of a case where "it was impossible for the state to allege and the jury to find that the defendant violated the alternative parts of the statute simultaneously." *Id*. at 1087 n.11.

In *Vidal*, we also observed that if the state proceeded on "an accessory after-the-fact-theory, the jury would be given a modified instruction defining accessories after the fact." 504 F.3d at 1084 (citing *People v. Slayden*, 166 P.2d 304 (Cal. Ct. App. 1946)); *see also id*. at 1084 n.20. That makes sense. Moreover, the requirement of such a separate jury instruction can also indicate a statute's divisibility. *See Mathis*, 136 S. Ct. at 2257; *Rivera v. Lynch*, 816 F.3d 1064, 1079 (9th Cir. 2016).

An appreciation of the distinct offenses of auto theft and accessory after the fact also explains the majority's inconclusive review of California law.[4] First, it is not surprising that the statute is silent on whether principals or accessories after the fact must be charged as such because any prosecutor will appreciate the distinct elements for the

[4] The majority seems to confuse the tools the Supreme Court referred to in *Mathis*, "the statutory text and case law," Maj. at 10, with the underlying inquiry—identifying the "elements" of the statutory offense.

distinct offenses. Second, the majority cites Chief Judge Thomas's observation in his concurrence in *United States v. Arriaga-Pino*, 852 F.3d 1195, 1202 (9th Cir. 2017), that "[t]here is no example of a California case that defines a separate set of elements under section 10851 for those convicted as a principal under the statute and those convicted as an accessory after the fact." But this is because, as Judge Kozinski noted in his dissent in *Vidal*, in § 10851's 84-year history there is no case of the state using § 10851 to punish an individual who was merely an accessory after the fact. *Vidal*, 504 F.3d at 1099.

Third, the majority's reference to *People v. Clark*, 60 Cal. Rptr. 58 (Cal. Ct. App. 1967), overstates the import of that case. The state appellate court was not required to differentiate between an accomplice (which is within the generic definition[5]) and an accessory after the fact (which is not) because it found insufficient evidence that Clark knew that the vehicle had been unlawfully acquired or "in some way, aided or assisted in the driving." *Id*. at 62. Nothing in *Clark* is inconsistent with the earlier case, *Slayden*, 166 P.2d 304, which the majority recognizes "viewed accessory after the fact as a separate crime on which the jury must unanimously agree." Maj. at 12–13.

Finally, contrary to what the majority saw when it "peeked" at the record of conviction, the underlying documents confirm that Lopez-Marroquin was convicted as a principal. Count 1 of the information charged Lopez-Marroquin as follows:

[5] *See Vidal*, 504 F.3d at 1077–78 (explaining that the category of accessory after the fact is distinct from first-degree principals, second-degree principals, and accessories before the fact).

> On or about August 17, 2000, in the County of Los Angeles, the crime of UNLAWFUL DRIVING OR TAKING OF A VEHICLE, in violation OF VEHICLE CODE SECTION 10851(a), a Felony, was committed by RICARDO ALEJANDRO LOPEZ, who did unlawfully drive and take a certain vehicle, to wit, 1989 TOYOTA CAMRY, LICENSE #2MFF703, then and there the personal property of [another individual] without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.

Lopez-Marroquin initially pled not guilty to Count 1 and to two other counts. However, he then withdrew his not-guilty plea and pled guilty to Count 1. He was sentenced to one year and four months in prison for "unlawful driving or taking of a vehicle." As in *Duenas-Alvarez*, "the information omitted any mention of, or text from, the portion of the statute that refers to accessories after the fact." 733 F.3d at 815. Thus, a "peek" at the record of conviction confirms that Lopez-Marroquin was convicted as a principal for auto theft under § 10851(a), which is an aggravated felony.

I dissent because I agree with, and am bound by, our precedent holding that § 10851(a) is divisible. I would hold that the application of the modified categorical approach supports the Board of Immigration Appeals' determination that Lopez-Marroquin's conviction for auto theft under § 10851(a) is an aggravated felony.