NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES MYERS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

I. Do the principles regarding a statute's divisibility announced in *Mathis v. United States*, 136 S. Ct. 2243 (2016), apply both to offenses analyzed under the "force clause" of 18 U.S.C. § 924(e)(2)(B)(i) and those analyzed as "enumerated offenses" under § 924(e)(2)(B)(ii)?

II. Does the offense of first-degree terroristic threatening under Ark. Code Ann. § 5-13-301(a)(1)(A) qualify as a violent felony under the Armed Career Criminal Act?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

TABLE OF CONTENTS

Page

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Model Jury Instructions

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OPINION BELOW

On July 23, 2018, the court of appeals entered its opinion and judgment affirming the judgment of the district court sentencing James Myers to 188 months imprisonment under the Armed Career Criminal Act ("ACCA"). *United States v. Myers*, 896 F.3d 866 (8th Cir. 2018). A copy of the opinion is attached at Appendix ("App.") A.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2018. A petition for en banc or panel rehearing was timely filed on August 6, 2018. On August 29, 2018, an order was entered denying the petition for rehearing. *See* App. B. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following statutory provisions:

18 U.S.C. § 924(e)(2):

> As used in this subsection—
>
> ***
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . 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 . . . .

Ark. Code Ann. § 5-13-301(a):

(1) A person commits the offense of terroristic threatening in the first degree if:

(A) With the purpose of terrorizing another person, the person threatens to cause death or serious physical injury or substantial property damage to another person; or

(B) With the purpose of terrorizing another person, the person threatens to cause physical injury or property damage to a teacher or other school employee acting in the line of duty.

(2) Terroristic threatening in the first degree is a Class D felony.

STATEMENT OF THE CASE

1. James Myers pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), and was sentenced to 188 months in prison after being found to be an armed career criminal under 18 U.S.C. § 924(e). The district court found Myers's convictions for first-degree terroristic threatening and second-degree battery in Arkansas state court to be qualifying violent felonies under the ACCA. (Myers did not contest that he had one prior conviction that qualified as a "serious drug offense" for ACCA purposes.) Myers argued on appeal that the district court committed procedural error by sentencing him as an armed career criminal. He asserted that neither his terroristic threatening nor his battery conviction qualified as predicate ACCA offenses. If the court had agreed with him as to just one of these convictions, Myers would not have qualified for an enhanced sentence under the ACCA.

2. Mr. Myers appealed his sentence to the Eighth Circuit Court of Appeals. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which gives it jurisdiction over all final decisions of the district courts of the United States. The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231.

Myers argued that first-degree terroristic threatening under Ark. Code Ann. § 5-13-301(a)(1)(A) is not a violent felony for ACCA purposes because it can be committed by communicating a threat to cause substantial property damage, and therefore does not necessarily have as an element the actual, attempted, or threatened use of violent physical force against the person of another.[1] While Myers acknowledged that the Eighth Circuit had previously stated in *United States v. Boaz*, 558 F.3d 800 (8th Cir. 2009), that § 5-13-301(a)(1)(A) is divisible and subject to application of the modified categorical approach, he asserted that this Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), required reconsideration of *Boaz*. The analysis mandated by *Mathis* was not performed by the Eighth Circuit in *Boaz*. The *Mathis* analysis, Myers argued, leads to the conclusion that § 5-13-301(a)(1)(A) is indivisible because it contains a list of different means by which a single offense may be committed rather than a list of elements constituting multiple distinct offenses. When a statute contains a list of alternative elements, it is divisible;

[1] As was noted by Mr. Myers in his briefing, this offense cannot be considered a violent felony under the ACCA's "residual clause," found at 18 U.S.C. § 924(e)(2)(B)(ii), because that portion of the statute was found to be unconstitutionally vague by this Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

when it contains a list of alternative means, it is not. *See United States v. McMillan*, 863 F.3d 1053, 1056 (8th Cir. 2017). The offense of first-degree terroristic threatening under § 5-13-301(a)(1)(A) involves the element of communication of a qualifying threat; the types of threats which may be communicated constitute the various means by which this element may be met. A defendant may commit the offense by communicating either a threat to cause death, or a threat to cause serious physical injury, or a threat to cause substantial property damage to another person.

3. In its opinion, the Eighth Circuit stated that *Mathis* "did not address the ACCA's force clause," and found that it accordingly does not require reconsideration of *Boaz*. *Myers*, 896 F.3d at 869 (quoting *United States v. Lamb*, 847 F.3d 928, 930 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 1438 (2018)); App. A. The court went on to conclude that, even if it were to undertake an analysis under *Mathis*, the same result would apply—i.e., it would find the statute to be divisible. *Id.* The court determined that the text of the statute itself "does not provide helpful guidance" as to whether it contains a list of alternative elements or means. *Id.* The court found Arkansas case law to be "similarly unhelpful," and found the Arkansas jury instructions to be "ambiguous." *Id.* at 870. Because Arkansas law failed to provide "clear answers," it decided that it could look to "the record of a prior conviction itself." *Id.* at 871 (quoting *Mathis*, 136 S. Ct. at 2256). Instead of looking to the record of conviction for clues as to whether the statute listed means or elements, however, the court proceeded directly to application of the modified categorical approach. *Id.* According to the court, "[a] review of permissible materials shows Myers was

convicted of threatening to kill his girlfriend." *Id.* Therefore, the court concluded, his conviction qualified as a violent felony because it had as an element the threatened use of physical force against the person of another. *Id.* The court also determined that Myers's prior conviction for second-degree battery was a violent felony, noting that post-*Mathis* Eighth Circuit case law had already determined the relevant Arkansas statute to be divisible. *Id.* at 872 (citing *United States v. Rice*, 813 F.3d 704 (8th Cir. 2016)). The court held that the district court properly sentenced Myers as an armed career criminal.

Mr. Myers filed a timely petition for rehearing that was denied on August 29, 2018. App. 8a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. This Court should resolve a circuit split and declare that the principles regarding divisibility announced in *Mathis* apply to the analysis of all potential ACCA "violent felonies," whether under the "force clause" or the "enumerated offenses clause."

The Eighth Circuit has held that "the Supreme Court's decision in *Mathis* . . . did not address the ACCA's force clause," and has therefore determined that it does not have to apply *Mathis*'s principles regarding the divisibility of a statute in analyzing whether a prior conviction will qualify as a violent felony under 18 U.S.C. § 924(e)(2)(B)(i). *Myers*, 896 F.3d at 869 (quoting *Lamb*, 847 F.3d at 930). This holding has created a circuit split, as at least four other circuits have held that *Mathis* applies to the analysis of offenses under the ACCA's force clause. *See United States v. Lerma*, 877 F.3d 628 (5th Cir. 2017); *Raines v. United States*, 898 F.3d 680 (6th Cir. 2018); *United States v. Titties*, 852 F.3d 1257 (10th Cir. 2017); *United States v.*

Davis, 875 F.3d 592 (11th Cir. 2017). This Court should grant certiorari to resolve this circuit split and clarify the scope of applicability of the *Mathis* decision.

The definitive issue in this case was whether Ark. Code Ann. § 5-13-301(a)(1)(A) is divisible or indivisible, yet the Eighth Circuit summarily concluded that the *Mathis* analysis should not apply to this question. As pointed out by the Eighth Circuit in *Lamb*, this Court in *Mathis* "resolved a circuit conflict regarding the meaning of the term 'divisible.'" *Lamb*, 847 F.3d at 931. *Mathis* is controlling authority as to the issue of whether a statute is divisible or indivisible for ACCA purposes, yet the Eighth Circuit declared that it was not required to follow it. Although it is true that *Mathis* involved the question of whether Iowa burglary qualified as a violent felony as an enumerated offense under § 924(e)(2)(B)(ii), and the instant case involves the question of whether Arkansas first-degree terroristic threatening qualifies under the force clause of § 924(e)(2)(B)(i), there is no reason for a court to employ a different analysis in determining whether to apply the modified categorical approach in each of these situations. The modified categorical approach is applied to the determination of whether an offense defined by a divisible statute qualifies as an ACCA predicate, regardless of whether a court is considering if the offense qualifies as an enumerated offense or if it qualifies under the force clause. *Compare, e.g.*, *United States v. Shockley*, 816 F.3d 1058, 1063 (8th Cir. 2016) (applying the modified categorical approach to a divisible statute to determine whether an offense qualifies as a violent felony under the force clause), *and United States v. Eason*, 829 F.3d 633, 642 (8th Cir. 2016) (same), with *Lamb*, 847 F.3d at

932-34 (applying the modified categorical approach to a divisible statute to determine whether an offense qualifies as a violent felony as an enumerated offense). No matter which type of predicate offense is being analyzed, the same analysis applies to the determination of whether the statute at issue is divisible or not—the divisibility analysis is a preliminary inquiry which is made before the modified categorical approach may be applied. The Eighth Circuit's conclusion that *Mathis* does not apply to this question is erroneous, and appears to make it an outlier among the circuits which have considered the question.

The Tenth Circuit, for example, was confronted with a case in a very similar posture as Mr. Myers's. *See Titties*, 852 F.3d 1257. The defendant there challenged his ACCA-enhanced sentence that had been based on a prior conviction under an Oklahoma statute that the Tenth Circuit had previously held to be divisible. *See id.* at 1262. He argued that the Tenth Circuit was required to reexamine its prior holding in light of *Mathis*, and the court agreed. *Id.* at 1269. The court found that its prior decision, *United States v. Hood*, 774 F.3d 638 (10th Cir. 2014), had "bypassed the means/elements question and applied the modified categorical approach." *Titties*, 852 F.3d at 1269. "But *Mathis* shows we erred in *Hood* to the extent we failed to consider whether [the statute's] disjunctive phrases are means or elements." *Id.* The court applied the *Mathis* analysis and determined that the statute defining the offense of feloniously pointing a firearm was actually indivisible. *Id.* at 1272. The court then applied the categorical approach to determine whether a conviction under the statute qualified as an ACCA predicate under the force clause of § 924(e)(2)(B)(i).

Id. The court concluded that the statute could be violated in a way that did not involve the threatened used of physical force against the person of another, and that the defendant's prior conviction did not count as an ACCA predicate. *Id.*

The Eighth Circuit should have reached the same conclusion—i.e., that *Mathis* required reconsideration of *Boaz*, as that decision likewise bypassed the means/elements question and erred by failing to consider whether § 5-13-301(a)(1)(A)'s disjunctive phrases were means or elements. This Court should grant review to resolve this conflict between the circuits to ensure that *Mathis* is applied appropriately and consistently among them going forward.

II. The Eighth Circuit's decision is contrary to this Court's precedent, as it failed to properly apply the *Mathis* divisibility analysis in its examination of the offense of first-degree terroristic threatening under Ark. Code Ann. § 5-13-301(a)(1)(A).

The Eighth Circuit held in the alternative that, even if it applied the *Mathis* divisibility analysis, it would reach the conclusion that the statute is divisible and that Mr. Myers was convicted of a version of the crime that qualified as an ACCA predicate. However, the court performed the *Mathis* analysis incorrectly. Its decision is therefore directly contrary to this Court's precedent, and certiorari should be granted to correct this error. If the Eighth Circuit's error goes uncorrected, numerous other future defendants may be incorrectly sentenced as armed career criminals who do not actually qualify under *Mathis*.

In its alternative *Mathis* analysis, the Eighth Circuit ignored a key argument advanced by Mr. Myers that mandated the conclusion that Ark. Code Ann. § 5-13-301(a)(1)(A) is indivisible. Myers's argument was based directly on this Court's

statement in *Mathis* that the inclusion of a list of all of the statutory alternatives in a charging documents "is as clear an indication as any that each alternative is only a possible means of commission, not an element that a prosecutor must prove to a jury beyond a reasonable doubt." *Mathis*, 136 S. Ct. at 2257. The court's opinion quotes from the charging document at issue from Myers's prior conviction, which alleged that, "with the purpose of terrorizing another person, [Myers] threatened to cause *death or serious physical injury or substantial property damage* to another person, in violation of ACA § 5-13-301 . . . ." *Myers*, 896 F.3d at 871 (emphasis added). The record of Myers's prior conviction plainly presents the exact situation contemplated by this Court in *Mathis*. When this Court discussed what a court should look for when taking a "peek" at the record of a prior conviction to determine whether a statute is divisible, the *very first thing* mentioned was looking at the charging document to see if it contained a list of all of the statutory alternatives. *Mathis*, 136 S. Ct. at 2256-57. If a charging document does contain such a list, then the statutory alternatives are means rather than elements, the statute is indivisible, and the modified categorical approach may not be applied.[2] A very straightforward analysis of the prior court record under this prong of *Mathis*, then, mandates the conclusion

[2] The Tenth Circuit case discussed above also involved this exact issue—when the court looked to the documents from the record of the prior conviction, it found that the charging instrument included a list of several of the statutory alternatives. *See Titties*, 852 F.3d at 1271-72. The court noted *Mathis*'s explanation that this was "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 the jury beyond a reasonable doubt," and reached the correct conclusion that the statute is indivisible. *Id.*

that the statute Myers was charged with violating is indivisible and the modified categorical approach may not be applied.

In this part of the *Mathis* opinion, this Court was clearly instructing lower courts to examine the record of a prior conviction for the purpose of determining whether anything can be gleaned from that record that contributes to the required divisibility analysis. *See Mathis*, 136 S. Ct. at 2256 (emphasizing that a "peek at the [record] documents" is permitted for "the sole and limited purpose of determining whether [the listed items are] element[s] of the offense") (quoting *Rendon v. Holder*, 782 F.3d 466, 473-74 (9th Cir. 2015) (opinion dissenting from denial of reh'g en banc)). Instead of following this directive, the Eighth Circuit skipped ahead a step and prematurely applied the modified categorical approach without first determining whether the charging document shed any light on the divisibility analysis. *See Myers*, 896 F.3d at 871 ("Thus, under either the modified categorical approach (as *Boaz* directs this court to apply) or the *Mathis* analysis (which Myers argues applies), this court must look to the record of conviction to determine whether Myers' conviction for terroristic threatening is a crime of violence."). The court simply looked at the charging document and sentencing order, noted that these indicated that Myers had threatened his girlfriend, and found his conviction to be a violent felony. *Id.* Again, the *Mathis* analysis does not permit a court to jump ahead to application of the modified categorical approach without first determining if the prior record of conviction reveals anything about the divisibility of the statute, but that appears to

be just what the Eighth Circuit did in this case. This misapplication of *Mathis* should not be allowed to go uncorrected.

Furthermore, the Eighth Circuit took a "peek" at the charging document after concluding that Arkansas state law failed to provide "clear answers" on whether § 5-13-301(a)(1)(A) is divisible or indivisible. *Myers*, 896 F.3d at 869-71. Mr. Myers continues to assert that an examination of Arkansas state law supports the conclusion that the relevant statute is indivisible, and that the Eighth Circuit erred in its conclusion to the contrary. In particular, Myers contends that the relevant Arkansas model jury instruction supports the conclusion that the statute is indivisible, despite the Eighth Circuit's finding that it is "ambiguous" on this point. *Id.* at 870. The relevant jury instruction requires a jury to find that, with the purpose of terrorizing another person, the defendant "threatened to cause (death to) (or) (serious physical injury to) (or) substantial damage to the property of)" another person in order to convict him/her of first-degree terroristic threatening. AMI Crim. 2d 1310. As the Eighth Circuit noted, "[e]ach parenthetical word or phrase may be included or excluded based on the evidence." *Myers*, 896 F.3d at 870. The court correctly summarized Myers's argument that "the instruction could direct the jury to determine whether a defendant 'threatened to cause death to or serious physical injury to or substantial damage to the property of another person,'" and that if a jury were so instructed, they would not have to agree unanimously on whether the defendant made threats to injure a person or damage property. *Id.* at 870-71. This suggests that the statute lists alternative means of committing a single element of

the crime of first-degree terroristic threatening, and that the statute is accordingly indivisible.

The court continued:

> On the other hand, the instruction could direct the jury to determine whether a defendant "threatened to cause death to or serious physical injury to another person." Stated this way, the jury instruction would set out the alternates disjunctively, allowing the court to choose which is applicable. This suggests the alternatives are elements, not means.

Id. at 871. The court made an error of logic in reaching this conclusion. While the court is of course correct that a trial court may select which of the statutory alternatives are included in the instruction (something it would do in an effort to match the instruction to the evidence presented to avoid potential jury confusion), only if the instruction were written so as to *require* the court to choose between the alternatives would it be an indication that the alternatives were elements, with each separate element corresponding to a distinct offense. If the instruction required a court to choose only one of the alternatives, the word "or" would have been omitted, because it would never actually be expected to appear in the final instruction. If the statute actually listed separate elements, the parentheticals containing the alternative threats would have simply appeared next to one another, without being separated by the word "or", to communicate to the instructing court that it should choose only one. The mere fact that it is allowable for a court to include all of the alternatives in a single instruction, separated by "or," dictates that the alternatives can *only* be means rather than elements. The Arkansas model jury instruction is not ambiguous, and the Eighth Circuit erred in its conclusion to the contrary. The

statutory alternatives in § 5-13-301(a)(1)(A) are means, not elements, and the statute is accordingly indivisible. Pursuant to *Mathis*, the modified categorical approach should not have been applied, and Mr. Myers's prior conviction does not qualify as an ACCA predicate. Myers was improperly sentenced as an armed career criminal.

CONCLUSION

For all of the foregoing reasons, Petitioner James Myers respectfully requests that this Court grant the petition for a writ of certiorari, and accept this case for review.

DATED: this 26th day of November, 2018.

Respectfully submitted,

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