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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QUESTION PRESENTED FOR REVIEW

May a court properly apply the divisibility analysis prescribed in *Mathis v. United States*, 136 S. Ct. 2243 (2016), without considering the question of jury unanimity?

LIST OF PARTIES

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

LIST OF DIRECTLY RELATED PROCEEDINGS

United States v. James Myers, No. 5:16-cr-50055, U.S. District Court for the Western District of Arkansas. Judgment entered June 14, 2017.

United States v. James Myers, No. 17-2415, U.S. Court of Appeals for the Eighth Circuit. Judgment entered July 23, 2018, later vacated by order entered May 13, 2019, in U.S. Supreme Court Case No. 18-6859. Following remand, judgment entered July 2, 2019.

James Myers v. United States, No. 18-6859, U.S. Supreme Court. Judgment entered May 13, 2019, and issued June 17, 2019.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The most recent decision of the Eighth Circuit Court of Appeals, in which it again affirmed the judgment of the district court sentencing James Myers to 188 months imprisonment under the Armed Career Criminal Act (the "ACCA"), is reported at 928 F.3d 763 (8th Cir. 2019). Petitioner's Appendix ("Pet. App.") 1a-5a. The Eighth Circuit's order denying rehearing is not reported. *Id.* at 6a.

The Eighth Circuit's prior opinion in this matter is reported at 896 F.3d 866 (8th Cir. 2018). Pet. App. 7a-13a. This Court's opinion granting Mr. Myers's previously filed petition for writ of certiorari, vacating the judgment of the Eighth Circuit, and remanding for further consideration is reported at 139 S. Ct. 1540 (2019). Pet. App. 14a-15a.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2019. On July 11, 2019, an order was entered granting Mr. Myers until July 23, 2019 to file a petition for rehearing. A petition for en banc or panel rehearing was timely filed on July 23, 2019. On August 22, 2019, an order was entered denying the petition for rehearing. *See* Pet. App. 6a. 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*,

[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).

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; 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 to another person either a threat to cause death, or a threat to cause serious physical injury, or a threat to cause substantial property damage.

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*. *United States v. Myers*, 896 F.3d 866, 869 (8th Cir. 2018), *vacated*, 139 S. Ct. 1540 (2019) (hereinafter "*Myers I*") (quoting *United States v. Lamb*, 847 F.3d 928, 930 (8th Cir. 2017)); Pet. App. 10a. 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; Pet. App. 11a. 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); Pet. App. 12a. 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)); Pet. App. 13a. The court held that the district court properly sentenced Myers as an armed career criminal.

4. Following the denial of a timely petition for rehearing, Mr. Myers sought a writ of certiorari from this Court, arguing that the Eighth Circuit had failed to correctly apply the divisibility analysis that is required by this Court's decision in *Mathis*. *See* Petition for Writ of Certiorari, *Myers v. United States*, 139 S. Ct. 1540 (2019) (No. 18-6859), at pp. 8-13. The Government agreed that the *Mathis* analysis

was incorrectly applied and suggested that remand would be appropriate. *See* Response Brief for the United States, *Myers*, 139 S. Ct. 1540 (No. 18-6859), at pp. 9-11. This Court agreed, vacated the judgment of the Eighth Circuit, and remanded for further consideration in light of the Solicitor General's position. *Myers v. United States*, 139 S. Ct. 1540 (2019); Pet. App. 14a.

5. In the *Mathis* analysis contained in its first opinion, the Eighth Circuit panel found Arkansas case law to be "unhelpful" to its determination of whether the terroristic-threatening statute is divisible or indivisible. *See Myers I*, 896 F.3d at 870; Pet. App. 11a. Following remand, however, the court of appeals found Arkansas case law to be dispositive—and did so without offering any real explanation for this change in its conclusion. *United States v. Myers*, 928 F.3d 763, 766 (8th Cir. 2019) (hereinafter "*Myers II*"); Pet. App. 4a. The court of appeals again affirmed the judgment of the district court sentencing Mr. Myers as an armed career criminal. *Id.* at 767; Pet. App. 5a.

Mr. Myers filed a timely petition for rehearing that was denied on August 22, 2019. Pet. App. 6a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court should declare that courts applying the *Mathis* analysis regarding the divisibility of criminal statutes must consider the issue of jury unanimity in determining whether such statutes list means or elements.

Mr. Myers continues to assert that he has been incorrectly sentenced as an armed career criminal based in part upon his prior conviction for first-degree terroristic threatening under Arkansas law. A person commits this offense when,

"[w]ith the purpose of terrorizing another person, the person threatens to cause death or serious physical injury or substantial property damage to another person . . . ." Ark. Code Ann. § 5-13-301(a)(1)(A). Myers asserts that, under the analysis required by this Court's decision in *Mathis*, the statute is indivisible, as "death or serious physical injury or substantial property damage" is a list of multiple means by which a single offense can be committed, and not a list of elements constituting multiple distinct offenses. Because this offense can be committed by communicating a threat to cause substantial property damage, it is not a violent felony under the ACCA, as it does not necessarily have as an element the actual, attempted, or threatened use of violent physical force against the person of another. When Myers made this argument to the Eighth Circuit in his initial appeal, the court misapplied the *Mathis* analysis and found that the statute was divisible. When Myers sought a petition for a writ of certiorari from this Court, the Government agreed that the Eighth Circuit had erred in its *Mathis* analysis (although it maintained that the court had still reached the correct conclusion); based on the Government's position, this Court vacated the Eighth Circuit's opinion and remanded for reconsideration.

A. The Importance of Jury Unanimity in the *Mathis* Analysis

On remand, the Eighth Circuit once again misapplied the *Mathis* analysis, this time by completely ignoring perhaps its important facet: jury unanimity. Other circuits to have answered the means-or-elements question post-*Mathis* have put this issue at the forefront of their respective divisibility analyses of criminal statutes. *See, e.g.*, *Haynes v. United States*, 936 F.3d 683, 688 (7th Cir. 2019); *United States v.*

Degeare, 884 F.3d 1241, 1252 (10th Cir. 2018); *United States v. Robinson*, 869 F.3d 933, 938-40 (9th Cir. 2017); *United States v. Starks*, 861 F.3d 306, 316 (1st Cir. 2017); *Harbin v. Sessions*, 860 F.3d 58, 65-67 (2d Cir. 2017); *United States v. Steiner*, 847 F.3d 103, 119 (3d Cir. 2017); *United States v. Howell*, 838 F.3d 489, 498-99 (5th Cir. 2016); *see also United States v. Fuertes*, 805 F.3d 485, 498 (4th Cir. 2015) (utilizing a jury-unanimity-focused approach to answering the means-or-elements question pre-*Mathis*). Myers submits that the Eighth Circuit's opinion in his case, which holds that the relevant statute is divisible based solely on state case law that does not address the jury-unanimity question, is in conflict with these other decisions, and with *Mathis* itself. Review by this Court is now necessary to ensure that *Mathis* is correctly and consistently applied among the circuits.

"*Mathis* makes jury unanimity the touchstone of the means-or-elements inquiry." *Degeare*, 884 F.3d at 1251. The Tenth Circuit describes *Mathis*'s emphasis on jury unanimity:

> First, in illustrating the distinction between these two concepts [i.e., means and elements], *Mathis* describes a hypothetical statute that requires using a deadly weapon but "spells out various factual ways of committing [that] component of the offense," e.g., using a knife, gun, or bat. 136 S. Ct. at 2249. Because "[a] jury could convict" a defendant under this hypothetical statute "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,'" *Mathis* explains, these alternatives constitute "legally extraneous circumstances"—i.e., means. *Id.* (alterations in original) (first quoting *Richardson v. United States*, 526 U.S. 813, 817 [ ] (1999); then quoting *Descamps* [*v. United States*, 570 U.S. 254, 270 (2013)]). Next, *Mathis* goes on to apply the distinction illustrated by this hypothetical to the real-world question before the Court: it holds that the statutory alternatives at issue constitute means rather than elements precisely because a state-court decision establishes that those alternatives are

> merely different ways "of committing one offense, *so that a jury need not agree*" on one or more of those alternatives to convict. *Id.* at 2250, 2256 (emphasis added).

863 F.3d at 1251-52. The *Degeare* court cited numerous cases from its sister circuits that also reflected adoption of "a unanimity-focused approach to the means-or-elements question" under *Mathis*. *Id.* at 1252. These courts have looked to sources of state law (statutes, cases, jury instructions, etc.) to determine whether jury unanimity is required as to the statutory alternatives in question. The court noted that, when state law does not require a jury to unanimously agree on certain statutory alternatives in order to convict, the means-or-elements question is "definitively" resolved, and those alternatives are means rather than elements. *Id.*

In a recent case, the Seventh Circuit simply summarized this approach: "In *Mathis*, the Supreme Court offered an 'easy' answer for some cases. If controlling judicial precedent holds that jurors need not agree on a given proposition, then that proposition is not an element." *Haynes*, 936 F.3d at 688. Likewise, the Fifth Circuit noted: "The decision in *Mathis* instructs that there is a difference between alternative elements and alternative means of satisfying a single element. Elements must be agreed upon by a jury." *United States v. Hinkle*, 832 F.3d 569, 575 (5th Cir. 2016). And the First Circuit recognized: "Following *Mathis*, we have identified the elements of a crime by determining what facts the state supreme court requires a jury to find unanimously." *Starks*, 861 F.3d at 316. Mr. Myers asserts that *Mathis*, and the circuits to have applied the analysis it prescribes, have strongly focused on the issue of jury unanimity in answering the means-or-elements question. The

Eighth Circuit in the instant case, however, has improperly and incorrectly resolved this question based entirely on case law that has nothing to do with the issue of jury unanimity. *Mathis* does not authorize a court to base its answer to the means-or-elements question on a review of controlling judicial precedent that does not address jury unanimity. The Eighth Circuit's analysis of the divisibility of the Arkansas first-degree terroristic threatening statute is accordingly contrary to *Mathis*.

B. The Arkansas Case Law Relied Upon by the Eighth Circuit Does Not Address Jury Unanimity

In its opinion following remand in the instant case, the Eighth Circuit concluded that Arkansas case law "definitively" answers the means-or-elements question.[2] However, unlike the state court decision that resolved the question in *Mathis*, none of the Arkansas state court cases cited by the court addressed the issue of jury unanimity. To date, it does not appear that any Arkansas state court decision has directly addressed the issue of whether jury unanimity is required as to the type of threat that must be communicated to support a conviction for first-degree terroristic threatening. The Court in *Mathis*, addressing a prior conviction under the Iowa second-degree burglary statute, looked to a case in which the Iowa Supreme Court held that, in order to sustain a conviction under that statute, the jury did not have to unanimously agree as to which of the listed types of premises the defendant had entered. *See Mathis*, 136 S. Ct. at 2256 (citing *State v. Duncan*, 312 N.W.2d 519,

[2] It bears repeating that, in its prior opinion, the same panel of the court found the very same Arkansas cases to be "unhelpful" to its analysis. It is unclear to Mr. Myers how the same case law can go from "unhelpful" to "definitive" on such a crucial question without explanation.

523 (Iowa 1981) (holding that the jury did not have to agree on the question of whether the defendant had entered a boat or a marina)).

In its opinion in the instant case, the panel recognized that it may look to "authoritative sources of state law" to answer the means-or-elements question, including state court decisions interpreting the statute. *Myers II*, 928 F.3d at 766; Pet. App. 4a. The panel first cited a decision of the Arkansas Court of Appeals, *Walker v. State*, 389 S.W.3d 10 (Ark. Ct. App. 2012), in which the court there stated that "the offense of first-degree terroristic threatening required the elements of threatening to cause the death of the victim and the purpose of terrorizing the victim." *Id.* According to the panel opinion, "[t]his shows that Arkansas law treats 'death or serious physical injury' and 'substantial property damage' as alternative elements, with the jury instructed on one or the other." *Myers II*, 928 F.3d at 766; Pet. App. 4a. However, *Walker* did not address the issue of whether a jury must unanimously agree that a defendant communicated a threat to cause death or serious physical injury or substantial property damage in order to convict him of first-degree terroristic threatening. Instead, it involved a comparison of first-degree terroristic threatening to the offense of aggravated robbery to determine if the former was a lesser-included offense of the latter. *Walker*, 389 S.W.3d at 15. The *Walker* case factually involved a threat of death, which appears to be why the court only mentioned that statutory alternative and called it an element. "But simply calling a statutory alternative an element doesn't make it so." *Degeare*, 884 F.3d at 1255. The fact that the court referred to only one statutory alternative as an "element" is not dispositive, especially

because that label was not necessary to its decision of the case. The court of appeals in *Walker* could have instead listed all of the statutory alternatives (rather than only a threat of death) as part of the communication-of-a-threat element of first-degree terroristic threatening and still reached the same conclusion—i.e., that aggravated robbery involves distinguishable elements, and first-degree terroristic threatening is accordingly not a lesser-included offense.

Contrary to the Eighth Circuit's opinion, the *Walker* decision does not indicate that the jury *must be* instructed on one alternative or the other. At most, it suggests that a court *may* instruct a jury as to only one alternative. A court may only conclude that multiple statutory alternatives are elements rather than means when an instructing court is *required* to choose among them, but not when it merely *may* choose among them based on the evidence presented. As discussed in more detail below, the Arkansas model jury instructions plainly allow for the jury in a terroristic threatening case to be instructed to convict if it finds 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. When a jury may be so instructed, these alternatives *cannot be elements*, and must instead be means.

The Eighth Circuit next cited *Mason v. State*, 206 S.W.3d 869 (Ark. 2005), as an example of a case in which the Arkansas Supreme Court "held that the elements of the statute were satisfied where a defendant threatened to cause death or serious physical injury to another person, without any proof of a threat to cause substantial

property damage." *Myers II*, 928 F.3d at 766; Pet. App. 4a. While it appears to be true that there was no proof of a threat to cause substantial property damage in *Mason*, this misses the point of the *Mathis* analysis entirely. The court in *Mason* clearly stated that "[a] person commits first-degree terroristic threatening if, with the purpose of terrorizing another person, he or she threatens to cause death or serious physical injury *or substantial property damage* to another person." 206 S.W.3d at 873-74 (emphasis added). The court did nothing to distinguish among these alternatives as separate elements; on the contrary, the listing of them all together in this manner suggests that it was describing a single crime that can be committed in multiple ways. The fact that the proof in the case did not support every possible type of threat does nothing to assist a court in answering the means-or-elements question. The Eighth Circuit's conclusion regarding *Mason* is puzzling, and appears to underscore its misunderstanding and misapplication of the *Mathis* analysis.

The Eighth Circuit is simply incorrect in its conclusion that *Mason* "shows that the state must establish, as an element of the offense, that the defendant *either* threatened to cause death or serious physical injury *or* threatened to cause substantial property damage to another person." *Myers II*, 928 F.3d at 766; Pet. App. 4a. Nothing in the *Mason* case indicates that the state was required to prove one alternative to the exclusion of another, only that the underlying facts of that particular case apparently supported the conclusion that the defendant committed the offense via one means and not the other. If there had been some evidence introduced that the defendant made a threat of death and other evidence indicating

that he threatened to cause substantial property damage, the evidence could have all supported a single charge of first-degree terroristic threatening. For example, the state could present evidence from Witness A that a defendant threatened to kill the victim, and evidence from Witness B that the defendant threatened to burn down the victim's house. All of this evidence could go toward proving a single offense of terroristic threatening; some jurors could believe Witness A, the rest could believe Witness B, and they could still unanimously convict the defendant of a single count of first-degree terroristic threatening.

As in *Walker*, there was no discussion in *Mason* of jury unanimity. The issue presented to the court was whether the evidence was sufficient to support Mason's conviction, not whether the Arkansas terroristic threatening statute listed separate elements or only different means by which a single element could be committed. The court concluded that substantial evidence had been presented to support the conviction "because there is substantial evidence that the necessary threat was made, as well as an intent that the victim be terrorized by the threat." *Mason*, 206 S.W.3d at 874. This framing of the elements of the offense in *Mason* is in line with that suggested by Mr. Myers; he maintains that the elements of Arkansas first-degree terroristic threatening are (1) the communication of a qualifying threat (2) with the purpose of terrorizing another person. This formulation of the elements of the offense also appears in *Adams v. State*, 435 S.W.3d 520, 524 (Ark. Ct. App. 2014) ("What is prohibited is the communication of a threat with the purpose of terrorizing another

person.").[3] The issue of whether the statutory alternatives in the first-degree terroristic threatening statute are means or elements was simply not before the court in *Mason*.

The Eighth Circuit finally listed certain other Arkansas cases in which reference to "substantial property damage" is omitted. *Myers II*, 928 F.3d at 766 (citing *Ta v. State*, 459 S.W.3d 325, 328 (Ark. 2015); *Foshee v. State*, No. CR-13-934, 2014 WL 2159326, at *2 (Ark. Ct. App. 2014); and *Johnson v. State*, 25 S.W.3d 445, 450-51 (Ark. Ct. App. 2000)[4]); Pet. App. 4a. None of these cases involve or rely upon a determination of whether the statutory alternatives are means or elements. In fact, none of these cases even refer to the threat of death or serious physical injury as an "element" of first-degree terroristic threatening. Even if they had, it makes sense that a court would refer only to the particular means of committing an offense that is pertinent based on the proof presented in a given case. Such shorthand references are not legal conclusions arrived at via the adversarial process and cannot be relied upon in resolving the means-or-elements question presented in the instant case. This is especially so when—as is the situation here—none of these cases address the issue of jury unanimity.

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[3] *Adams* was cited and discussed by the Eighth Circuit in *Myers I* in support of its conclusion that Arkansas case law was "unhelpful" in answering the means-or-elements question. 896 F.3d at 870; Pet. App. 11a. In *Myers II*, however, the court completely omitted *Adams* from its discussion of Arkansas case law. *See* 928 F.3d at 766; Pet. App. 4a.

[4] It appears from the citation to Ark. Code Ann. § 5-13-301(b)(1) that this case actually involved second-degree terroristic threatening. *Johnson*, 24 S.W.3d at 450.

Mr. Myers contends that Arkansas case law actually supports the conclusion that the first-degree terroristic threatening statute lists means rather than elements. Although there are a handful of cases that omit reference to "substantial property damage," there are plenty of others that list all of the statutory alternatives ("death or serious physical injury or substantial property damage") as part of a single offense. *See, e.g.*, *Green v. State*, 386 S.W.3d 413, 417 (Ark. 2012); *Mason*, 206 S.W.3d at 874; *Sanders v. State*, 932 S.W.2d 315, 317 (Ark. 1996); *Stockstill v. State*, 511 S.W.3d 889, 893 (Ark. Ct. App. 2017); *Armour v. State*, 509 S.W.3d 668, 670 (Ark. Ct. App. 2016); *Adams*, 435 S.W.3d at 523; *Campbell v. State*, 432 S.W.3d 673, 680 (Ark. Ct. App. 2014); *Tatum v. State*, 381 S.W.3d 124, 127 (Ark. Ct. App. 2011); *Hagen v. State*, 886 S.W.2d 889, 891 (Ark. Ct. App. 1994); *Davis v. State*, 670 S.W.2d 472, 474 (Ark. Ct. App. 1984) (abrogated on other grounds). When multiple alternatives are listed in this manner as part of a single offense, the *Mathis* analysis would suggest that they are means rather than elements, because a jury would not have to agree on just one alternative to convict. The panel's conclusion that Arkansas case law definitively shows that Ark. Code Ann. § 5-13-301(a)(1)(A) contains a list of elements rather than means is unsupported.

By ignoring the issue of jury unanimity, the Eighth Circuit's decision is in clear conflict with *Mathis*. If it had properly analyzed the existing Arkansas case law, it would have noted that none of it expressly addresses the issue of whether a jury must agree on a single statutory alternative in order to convict, and that the multiple Arkansas cases that list all of the statutory alternatives at least suggest that the

statute is indivisible. The court should have then moved on to an examination of other sources of state law through the lens of jury unanimity, as directed by *Mathis*.

C. Application of the *Mathis* Analysis to Other Sources of State Law

When state case law does not provide a definitive answer, *Mathis* suggests that a court look elsewhere. As even the Eighth Circuit has recognized, a state's model jury instructions may be consulted as part of the means-or-elements inquiry. *See United States v. McMillan*, 863 F.3d 1053, 1057 (8th Cir. 2017) (citing *United States v. Lamb*, 847 F.3d 928, 932 (8th Cir. 2017)). Mr. Myers continues to assert that the relevant Arkansas model jury instruction supports the conclusion that the first-degree terroristic threatening statute is indivisible. The relevant 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. Each parenthetical word or phrase in the instruction may be included or excluded based on the evidence presented. *See Anderson v. State*, 108 S.W.3d 592, 607 (Ark. 2003) (noting that, when a phrase in the model criminal jury instructions is a parenthetical, its inclusion is optional). An Arkansas trial court could therefore lawfully instruct 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" with the purpose of terrorizing another person. If a jury were so instructed, its members would not have to agree unanimously as to whether the defendant made threats to injure a person or damage

property in order to convict him of first-degree terroristic threatening. Accordingly, the statute lists alternative means of committing a single element of the crime of first-degree terroristic threatening, and it is indivisible.[5]

This Court in *Mathis* also suggested that a "peek" at the documents from the record of prior conviction may aid in the determination of whether statutory alternatives are means or elements. 136 S. Ct. at 2256-57. In the instant case, the Eighth Circuit quoted the pertinent charging document in its opinion; the information charges that "with the purpose of terrorizing another person, [Myers] threatened to cause *death or serious physical injury to substantial property damage* to another person, in violation of ACA § 5-13-301 . . . ." *See Myers II*, 928 F.3d at 766; Pet. App. 4a. This charging document clearly contains a list of all of the statutory alternatives from § 5-13-301(a)(1)(A). This Court addressed this exact situation in *Mathis*, noting that the inclusion of a list of all of the statutory alternatives in a

[5] It should be noted that, while a court may omit certain of the statutory alternatives from the instruction (something it might do in an effort to match the instruction to the evidence presented to avoid potential jury confusion), this does not change the conclusion that the alternatives are means rather than elements. 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", which would communicate to the instructing court that it should choose only one. The mere fact that it is permissible 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, because such an instruction would allow a jury to convict without agreeing as to which statutory alternative was satisfied.

charging document "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; *see also Descamps v. United States*, 570 U.S. 254, 272 ("A prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives."). If a charging document contains a list of all of the statutory alternatives, as it does in Mr. Myers's case, then this Court has said (in *Mathis*) that those statutory alternatives are means rather than elements, the statute is indivisible, and the modified categorical approach may not be applied. A straightforward analysis of the prior court record as suggested by this Court in *Mathis* mandates the conclusion that the statute Myers was charged with violating is indivisible and the modified categorical approach may not be applied.

When all sources of Arkansas state law are examined through the lens of jury unanimity, it becomes clear that the offense of first-degree terroristic threatening does not require that an Arkansas jury unanimously agree as to whether a defendant made threats to cause death or serious physical injury or substantial property damage. Therefore, these statutory alternatives are means, not elements, and the statute is accordingly indivisible. Pursuant to *Mathis*, the modified categorical approach should not have been applied, and Mr. Myer's prior conviction does not qualify as an ACCA predicate. By failing to properly consider the key issue of jury unanimity, the Eighth Circuit again misapplied the *Mathis* analysis and reached the wrong conclusion about the divisibility of Ark. Code Ann. § 5-13-301(a)(1)(A). This

Court should grant review to correct the Eighth Circuit's continued misapplication of binding precedent, and to ensure consistent application of *Mathis* among the circuits going forward.

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.

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Respectfully submitted,

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