NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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those of state or local governments.") (internal quotation marks omitted). Furthermore, 40 C.F.R. § 1506.1(a) cannot "create a right that Congress has not," Alexander, 532 U.S. at 286, 121 S.Ct. 1511, and thus cannot be used as the grounds for the LPA's cause of action. Therefore, the LPA has no cause of action through which it could state a plausible claim.

[5] Even if a Limehouse-like action had been appropriate at the time of the Council's motion to dismiss, any such action is now moot. We are "without power" to decide cases in which "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Carson v. Pierce, 719 F.2d 931, 933 (8th Cir. 1983) (internal quotation marks omitted). If the entire purpose of the action was to prevent "eviscerat[ing]" a future federal remedy, Limehouse, 549 F.3d at 331, that purpose no longer exists: the very federal remedy the district court sought to preserve is the very remedy the LPA declined to seek, an APA challenge to the ROD. Because there is no longer any federal remedy available, there is no cause of action to imply to protect it. It is the FTA who enters the final ROD, see 23 C.F.R. 771.127, and without the FTA present, the Council cannot itself invalidate the ROD and reinitiate environmental review. The LPA failed to cite any case in which a state agency, as the sole defendant in a lawsuit, was ordered to reconduct environmental review. Therefore, the LPA has no live controversy for us to resolve, and we lack jurisdiction over the matter.

Because we hold that the LPA does not have a viable cause of action, we need not address the claim on the merits. We reverse and remand with instructions to dismiss the case.

UNITED STATES of America
Plaintiff - Appellee

v.

James Dwayne MYERS Defendant - Appellant

No. 17-2415

United States Court of Appeals,
Eighth Circuit.

Submitted: June 21, 2019

Filed: July 2, 2019

Rehearing and Rehearing En Banc Denied August 22, 2019

Background: Defendant pled guilty in the United States District Court for the Western District of Arkansas, Robert T. Dawson, J., to being a felon in possession of a firearm, and was sentenced under Armed Career Criminal Act (ACCA) to 188 months' imprisonment. Defendant appealed. The Court of Appeals, Benton, Circuit Judge, 896 F.3d 866, affirmed. Defendant appealed. The Supreme Court, 139 S.Ct. 1540, granted petition for writ of certiorari, vacated judgment, and remanded to Court of Appeals.

Holding: On remand, the Court of Appeals, Benton, Circuit Judge, held that defendant's conviction under Arkansas law for first-degree terroristic threats was a crime of violence.

Affirmed.

1. Criminal Law ⚿1139

The Court of Appeals reviews de novo the District Court's determination that a conviction is a violent felony under the Armed Career Criminal Act (ACCA). 18 U.S.C.A. § 924(e)(1).

2. Sentencing and Punishment ⚿1262

To determine whether a prior conviction is a violent felony for purposes of

Armed Career Criminal Act (ACCA), courts apply a categorical approach, looking to the statute of conviction to determine whether that conviction necessarily has, as an element, the use, attempted use, or threatened use of physical force against the person of another. 18 U.S.C.A. § 924(e)(2)(B).

3. Sentencing and Punishment ⚿1262

If there is a realistic probability a statute encompasses conduct that does not involve use or threatened use of violent force, the statute sweeps more broadly than the Armed Career Criminal Act's (ACCA) definition of violent felony. 18 U.S.C.A. § 924(e)(2)(B).

4. Sentencing and Punishment ⚿1262

If the statute of conviction defines more than one crime by listing alternative elements, courts apply the modified categorical approach, to determine which of the alternatives was the offense of conviction, in order to determine if it was violent felony under Armed Career Criminal Act (ACCA). 18 U.S.C.A. § 924(e)(2)(B).

5. Sentencing and Punishment ⚿1262

Under the modified categorical approach, a court looks to a limited class of documents, such as an indictment, jury instructions, or a plea agreement and colloquy, to determine what crime, with what elements, a defendant was convicted of, and the court can then determine if conviction is a crime of violence for purposes of Armed Career Criminal Act (ACCA). 18 U.S.C.A. § 924(e)(2)(B).

6. Sentencing and Punishment ⚿1285

Under the modified categorical approach, defendant's conviction under Arkansas law for first-degree terroristic threats was a crime of violence, as required to sentence him under the Armed Career Criminal Act (ACCA) after he pled guilty to being a felon in possession of a firearm, where the information charged defendant with threatening to kill his girlfriend, and sentencing order confirmed that defendant was convicted of threatening his girlfriend. 18 U.S.C.A. § 924(e)(2)(B); Ark. Code Ann. § 5-13-301.

Appeal from United States District Court for the Western District of Arkansas - Fayetteville

Denis Dean, U.S. ATTORNEY'S OFFICE, Western District of Arkansas, Fort Smith, AR, for Plaintiff-Appellee.

John B. Schisler, Assistant Federal Public Defender, Christopher Aaron Holt, FEDERAL PUBLIC DEFENDER'S OFFICE, Fayetteville, AR, for Defendant-Appellant.

James Dwayne Myers, Coleman, FL, pro se.

Before LOKEN, BENTON, and ERICKSON, Circuit Judges.

BENTON, Circuit Judge.

This case is on remand from the Supreme Court of the United States. *See Myers v. United States*, —— U.S. ——, 139 S. Ct. 1540, 204 L.Ed.2d 211 (2019). James D. Myers pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The district court [1] sentenced him as an armed career criminal to 188 months' imprisonment. He appealed the ACCA designation. This court affirmed. *See United States v. Myers*, 896 F.3d 866, 872 (8th Cir. 2018). The Supreme Court vacated the judgment and remanded

1. The Honorable Robert T. Dawson, United States District Judge for the Western District of Arkansas.

"for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed on March 21, 2019." *Myers*, 139 S. Ct. at 1540. For the following reasons, this court again affirms.[2]

[1] The Armed Career Criminal Act (ACCA) enhances sentences for those who possess firearms after three convictions for a "violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). The district court sentenced Myers as an armed career criminal based on one prior serious drug conviction and two prior violent felonies under Arkansas law—first-degree terroristic threatening and second-degree battery. Myers appeals, arguing neither one is a violent felony. This court reviews de novo the determination that a conviction is a violent felony under the ACCA. *See United States v. Keith*, 638 F.3d 851, 852 (8th Cir. 2011).

I.

Myers maintains his Arkansas first-degree terroristic threatening conviction is not a violent felony under the ACCA. The parties agree Myers was convicted under Arkansas Code Annotated § 5-13-301(a)(1)(A). At the time of his conviction, it said:

> (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
>
> . . . .

Ark. Code Ann. § 5-13-301(a)(1)(A) (1995). Myers argues this section is "overbroad" because it "criminalizes the making of threats to cause 'substantial property damage' in addition to threats 'to cause death or serious physical injury,' " and "does not . . . necessarily involve an element of physical force against the *person* of another."

[2–4] A violent felony under the ACCA includes "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." 18 U.S.C. § 924(e)(2)(B). To determine whether a prior conviction is a violent felony, courts apply a categorical approach, looking to the statute of conviction to determine whether that conviction necessarily has, as an element, the use, attempted use, or threatened use of physical force against the person of another. *See United States v. Castleman*, 572 U.S. 157, 168, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014). "If there is a realistic probability that the statute encompasses conduct that does not involve use or threatened use of violent force, the statute sweeps more broadly than the ACCA's definition of violent felony." *Martin v. United States*, 904 F.3d 594, 596 (8th Cir. 2018) (internal quotation marks omitted). However, "[i]f the statute of conviction defines more than one crime by listing alternative elements," this court applies the "modified categorical approach, to determine which of the alternatives was the offense of conviction." *United States v. Winston*, 845 F.3d 876, 877 (8th Cir. 2017) (internal quotation marks omitted).

The parties disagree whether the categorical or modified categorical approach applies. This depends on whether A.C.A. § 5-13-301(a)(1)(A) lists alternative elements or means and is, therefore, divisible

2. Much of this opinion is taken directly from this court's initial opinion in this case. *See Myers,* 896 F.3d at 866-871.

or indivisible. *See Mathis v. United States*, —— U.S. ——, 136 S. Ct. 2243, 2248, 195 L.Ed.2d 604 (2016) ("Distinguishing between elements and facts is therefore central to ACCA's operation."). " 'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.' " *Id.*, *quoting* Black's Law Dictionary 634 (10th ed. 2014). "At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Id.* (internal citation omitted). Means are "[h]ow a given defendant actually perpetrated the crime." *Id.* at 2251. They "need neither be found by a jury nor admitted by a defendant." *Id.* at 2248.

A.

Determining whether a statute lists elements or means, courts may look to "authoritative sources of state law," including state court decisions interpreting the statute. *See id.* at 2256. Here, "state court decision[s] definitively answer[ ] the question" and this court "need only follow what [they] say." *Id.* In *Walker v. State*, for example, the court said that "[a]s charged and instructed to the jury, 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." *Walker*, 2012 Ark. App. 61, 389 S.W.3d 10, 15 (2012). This 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. Similarly, in *Mason v. State*, 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 substantial property damage. *Mason*, 361 Ark. 357, 206 S.W.3d 869, 873-74 (2005). This 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. *See Ta v. State*, 2015 Ark. App. 220, 459 S.W.3d 325, 328 (2015) (omitting the element of substantial property damage and stating that "[a] person commits the offense of first-degree terroristic threatening if, with the purpose of terrorizing another person, he threatens to cause death or serious physical injury to another person"); *Foshee v. State*, 2014 Ark. App. 315, 2014 WL 2159326, at *2 (2014) (same); *Johnson v. State*, 71 Ark. App. 58, 25 S.W.3d 445, 450-51 (2000) (same).

[5] Because A.C.A. § 5-13-301(a)(1)(A) lists alternative elements, the statute is divisible, and the modified categorical approach applies. Under the modified categorical approach, this court "looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Mathis*, 136 S. Ct. at 2249. The court then can determine if that conviction is a crime of violence. *See id.*

B.

[6] A review of permissible materials shows Myers was convicted of threatening to kill his girlfriend. The "Felony Information" charges:

> with the purpose of terrorizing another person, he threatened to cause death or serious physical injury or substantial property damage to another person, in violation of ACA § 5-13-301, **to-wit**: The Defendant threatened to kill his girlfriend while holding a knife to her throat, against the peace and dignity of the State of Arkansas.

The "Sentencing Order" confirms that Myers was convicted of threatening his girlfriend. This conviction is a violent felony under § 924(e) because it "has as an element the . . . threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). *See United States. v. Rice*, 813 F.3d 704, 705 (8th Cir. 2016) ("Since the violation 'has as an element the use, attempted use, or threatened use of physical force against the person of another,' U.S.S.G. § 4B1.2, we conclude that it was a crime of violence."). The district court properly counted Myers' first-degree terroristic threatening conviction as a violent felony.

II.

Myers also agues his Arkansas second-degree battery conviction is not a violent felony under the ACCA. The Supreme Court's remand in *Myers*, 139 S. Ct. at 1540, does not alter this court's prior holding that Myers' second-degree battery conviction is a violent felony. *See Myers*, 896 F.3d at 872.

* * * * * * *

The judgment is affirmed.

KEY NUMBER SYSTEM

UNITED STATES of America
Plaintiff - Appellee

v.

Kevin James PETROSKE Defendant - Appellant

No. 18-1572

United States Court of Appeals,
Eighth Circuit.

Submitted: March 14, 2019

Filed: July 2, 2019

Rehearing and Rehearing En Banc Denied September 10, 2019

Background: Following denial of his motion in limine to exclude audio portion of videos, 2017 WL 3311210, defendant was convicted in the United States District Court for the District of Minnesota, Patrick J. Schiltz, J., of production or attempted production of child pornography and possession of child pornography, and his post-verdict motions for judgment of acquittal or new trial were denied, 2018 WL 672505. Defendant appealed.

Holdings: The Court of Appeals, Erickson, Circuit Judge, held that:

(1) probative value of audio content of videos defendant surreptitiously recorded of minors in their own homes was not substantially outweighed by danger of unfair prejudice;

(2) evidence was sufficient to support conviction for attempted production of child pornography;

(3) evidence was sufficient to support conviction for production of child pornography; and

(4) defendant waived any challenge to introduction of character evidence.

Affirmed.

1. Criminal Law ⚿1153.1, 1153.15

Appellate court reviews a district court's evidentiary rulings, including its rulings on motions in limine, for an abuse of discretion.

2. Criminal Law ⚿1165(1)

Appellate court will not reverse a conviction if an error was harmless.

3. Criminal Law ⚿1168(1)

Test for harmless error is whether the erroneous evidentiary ruling had a substantial influence on the jury's verdict.

4. Criminal Law ⚿338(7)

Rule governing exclusion of relevant evidence for prejudice does not offer pro-

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2415

United States of America

Appellee

v.

James Dwayne Myers

Appellant

Appeal from U.S. District Court for the Western District of Arkansas - Fayetteville
(5:16-cr-50055-RTD-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 22, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appellate Case: 17-2415 Page: 1 Date Filed: 08/22/2019 Entry ID: 4822196

ing sentence in revocation proceeding was substantively reasonable where district court determined that supervisee who asked his daughter to assault someone "pose[d] a risk to the public safety"). *Martinez* does not support Thorne's argument.

McMannus is also unavailing. In that case, we remanded for resentencing where the district court granted a substantial downward variance to a defendant, Sheri Brinton, based primarily on her light criminal history, a fact already captured by her Guidelines range. 436 F.3d at 875. We also held that the substantial downward variance her codefendant, Patrick James McMannus, received was not supported by the record. *Id.* However, this holding was based on pre-*Gall* authority that required an "extraordinary" variance to be supported by "extraordinary circumstances." *Id.* at 874 (quoting *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005)). Post-*Gall*, that rule no longer obtains. *United States v. McGhee*, 512 F.3d 1050, 1052 (8th Cir. 2008) (per curiam) ("[W]e understand the Court's opinion in *Gall* also to preclude a requirement of 'extraordinary circumstances' to justify an 'extraordinary variance' . . . ."); *see United States v. McMannus*, 262 F. App'x 732, 733 (8th Cir. 2008) (per curiam) (affirming sentence imposed upon Patrick James McMannus on remand, which was identical to original sentence, based on *Gall*'s deferential standard). Therefore, *McMannus* provides no grounds for reversal.

Finally, we address Thorne's argument that his sentence was substantively unreasonable because even if he had been placed in the highest criminal history category, the resulting Guidelines range would have been lower than the 120 months he received. *See* U.S.S.G. Ch. 5, Pt. A (sentencing table). According to Thorne, this demonstrates that his criminal history did not support such a substantial upward variance. However, as discussed, the court relied on several other sentencing factors in fashioning Thorne's sentence.

The district court had "considerable discretion" in weighing the sentencing factors. *United States v. Ruelas-Mendez*, 556 F.3d 655, 658 (8th Cir. 2009). The court's decision to weigh them in favor of a lengthy sentence, given the facts of this case, is a "permissible exercise" of that discretion. *Id.* Accordingly, we conclude that Thorne's sentence was substantively reasonable.

III. *Conclusion*

We affirm the judgment of the district court.[3]

UNITED STATES of America, Plaintiff–Appellee

v.

James Dwayne MYERS, Defendant–Appellant

No. 17-2415

United States Court of Appeals, Eighth Circuit.

Submitted: February 16, 2018

Filed: July 23, 2018

Rehearing and Rehearing En Banc Denied August 29, 2018

Background: Defendant pled guilty to being a felon in possession of a firearm. The United States District Court for the Western District of Arkansas sentenced

3. Because remand is not appropriate in this case, we do not address Thorne's argument that the district court demonstrated bias against him and that his case should therefore be assigned to a different judge.

defendant to 188 months under the Armed Career Criminal Act (ACCA). Defendant appealed.

Holdings: The Court of Appeals, Benton, Circuit Judge, held that:

(1) state law was ambiguous as to whether conviction for first-degree terroristic threatening under Arkansas law was a crime of violence;

(2) defendant's conviction under Arkansas law for first-degree terroristic threats was a crime of violence; and

(3) defendant's conviction under Arkansas law for second-degree battery was a crime of violence.

Affirmed.

1. Sentencing and Punishment ⚿1262

To determine whether a prior conviction is a violent felony for purposes of the Armed Career Criminal Act (ACCA), courts apply a categorical approach, comparing the elements of the crime of conviction with the elements of the generic crime. 18 U.S.C.A. § 924(e)(2)(B).

2. Sentencing and Punishment ⚿1262

If the elements of a crime of conviction criminalize a broader range of conduct than the generic crime, the conviction is not a violent felony for purposes of the Armed Career Criminal Act (ACCA). 18 U.S.C.A. § 924(e)(2)(B).

3. Sentencing and Punishment ⚿1262

If a statute of conviction defines more than one crime by listing alternative elements, courts apply the modified categorical approach to determine which of the alternatives was the offense of conviction in order to determine if it was a violent felony under the Armed Career Criminal Act (ACCA). 18 U.S.C.A. § 924(e)(2)(B).

4. Sentencing and Punishment ⚿1262

Under the modified categorical approach, a court looks to a limited class of documents from the record of conviction to determine what crime, with what elements, a defendant was convicted of, and the court can then determine if that conviction is a crime of violence for purposes of the Armed Career Criminal Act (ACCA). 18 U.S.C.A. § 924(e)(2)(B).

5. Sentencing and Punishment ⚿1285

State law was ambiguous as to whether conviction for first-degree terroristic threatening under Arkansas law was a crime of violence, and therefore, Court of Appeals would look to record of conviction for purposes of determining if defendant could be sentenced under the Armed Career Criminal Act (ACCA) after he pled guilty to being a felon in possession of a firearm; statute was not clear as to whether it provided alternative means of commission or alternative elements of the crime, state case law was not consistent, and state jury instructions were ambiguous. 18 U.S.C.A. § 924(e)(2)(B)(i); Ark. Code Ann. § 5-13-301(a)(1)(A).

6. Sentencing and Punishment ⚿1285

Under the modified categorical approach, defendant's conviction under Arkansas law for first-degree terroristic threats was a crime of violence, as required to sentence him under the Armed Career Criminal Act (ACCA) after he pled guilty to being a felon in possession of a firearm, where the information charged defendant with threatening to kill his girlfriend, and sentencing order confirmed that fact. 18 U.S.C.A. § 924(e)(2)(B)(i); Ark. Code Ann. § 5-13-301.

7. Sentencing and Punishment ⚿1285

Under the modified categorical approach, defendant's conviction under Arkansas law for second-degree battery was a crime of violence, as required to sentence him under the Armed Career Criminal Act (ACCA) after he pled guilty to being a felon in possession of a firearm; statute required a showing of physical injury. 18

U.S.C.A. § 924(e)(2)(B)(i); Ark. Code Ann. § 5-13-202(a).

Appeal from United States District Court for the Western District of Arkansas–Fayetteville

Counsel who presented argument on behalf of the appellant was Christopher Aaron Holt, Research and Writing Specialist, FPD Office, Fayetteville, AR. The following attorney(s) appeared on the appellant brief; John B. Schisler, AFPF, of Fayetteville, AR.

Counsel who presented argument on behalf of the appellee was Denis Dean, AUSA, of Fort Smith, AR.

Before LOKEN, BENTON, and ERICKSON, Circuit Judges.

BENTON, Circuit Judge.

James D. Myers pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The district court [1] sentenced him as an armed career criminal to 188 months' imprisonment. He appeals. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

The Armed Career Criminal Act (ACCA) enhances sentences for those who possess firearms after three convictions for a "violent felony or a serious drug offense." **18 U.S.C. § 924(e)(1)**. The district court sentenced Myers as an armed career criminal based on one prior serious drug conviction and two prior violent felonies under Arkansas law—first-degree terroristic threatening and second-degree battery. Myers appeals, arguing neither one is a violent felony. This court reviews de novo the determination that a conviction is a violent felony under the ACCA. *See* ***United States v. Keith***, 638 F.3d 851, 852 (8th Cir. 2011).

I.

Myers maintains his Arkansas first-degree terroristic threatening conviction is not a violent felony under the ACCA. The parties agree Myers was convicted under Arkansas Code Annotated § 5-13-301(a)(1)(A). At the time of his conviction, it said:

> (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
>
> . . . .

Ark. Code Ann. § 5-13-301(a)(1)(A) (1995). Myers argues this section is "overbroad" because it "criminalizes the making of threats to cause 'substantial property damage' in addition to threats 'to cause death or serious physical injury,' " and "does not . . . necessarily involve an element of physical force against the *person* of another."

[1–3] A violent felony under the ACCA is "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." **18 U.S.C. § 924(e)(2)(B)**. To determine whether a prior conviction is a violent felony, courts apply a categorical approach, comparing "the elements of the crime of conviction . . . with the elements of the generic crime." ***Descamps v. United States***, 570 U.S. 254, 257, 133 S.Ct. 2276, 186 L.Ed.2d

1. The Honorable Robert T. Dawson, United States District Judge for the Western District of Arkansas.

438 (2013). If the elements criminalize a broader range of conduct than the generic crime, the conviction is not a violent felony. ***Id.*** ("The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense."). However, "[i]f the statute of conviction defines more than one crime by listing alternative elements," this court applies the "modified categorical approach, to determine which of the alternatives was the offense of conviction." ***United States v. Winston***, 845 F.3d 876, 877 (8th Cir. 2017) (internal quotation marks omitted).

The parties disagree whether the categorical or modified categorical approach applies. This depends on whether A.C.A. § 5-13-301(a)(1)(A) lists alternative elements or means and is, therefore, divisible or indivisible. *See* ***Mathis v. United States***, —— U.S. ——, 136 S.Ct. 2243, 2248, 195 L.Ed.2d 604 (2016) ("Distinguishing between elements and facts is therefore central to ACCA's operation."). " 'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.' " ***Id.***, *quoting* **Black's Law Dictionary** 634 (10th ed. 2014). "At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." ***Id.*** (internal citation omitted). Means are "[h]ow a given defendant actually perpetrated the crime." ***Id.*** at 2251. They "need neither be found by a jury nor admitted by a defendant." ***Id.*** at 2248.

A.

[4] In *United States v. Boaz*, this court held § 5-13-301(a)(1)(A) defines separate elements, is divisible, and requires the modified categorical approach. ***U.S. v. Boaz***, 558 F.3d 800, 807 (8th Cir. 2009) ("The underlying state statute defines two separate offenses: threats of death or serious bodily injury and threats to property."). *See* ***Walker v. State***, 389 S.W.3d 10, 15 (Ark. App. 2012) ("As charged and instructed to the jury, 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, *elements* that are not necessary to prove aggravated robbery.") (emphasis added). Although *Boaz* was decided before *Mathis*, "the Supreme Court's decision in *Mathis* . . . did not address the ACCA's force clause," and, therefore, does not require reconsideration of the otherwise controlling *Boaz* decision. *See* ***United States v. Lamb***, 847 F.3d 928, 930 (8th Cir. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 1438, 200 L.Ed.2d 720 (2018). Under the modified categorical approach then, this court "looks to a limited class of documents [from the record of conviction] to determine what crime, with what elements, a defendant was convicted of." ***Mathis***, 136 S.Ct. at 2249. The court can then determine if that conviction is a crime of violence. *See* ***id.***

B.

[5] Even if this court undertook a *Mathis* analysis, the same result would apply. *Mathis* held that in determining whether a statute lists elements or means, courts look to a number of sources. ***Id.*** at 2256-57. "[T]he statute on its face" or state court decisions interpreting it "may resolve the issue." ***Id.*** at 2256. A court also can look to "a state's model jury instructions to 'reinforce' " its interpretation. ***United States v. McMillan***, 863 F.3d 1053, 1057 (8th Cir. 2017), *citing* ***Lamb***, 847 F.3d at 932. *See* ***Mathis***, 136 S.Ct. at 2257. If none of these provides "clear answers," the court may "peek" at the records of conviction. ***Mathis***, 136 S.Ct. at 2256.

The text of the Arkansas statute " 'does not provide helpful guidance' " on "whether the phrase 'person or property' lists alternative means or alternative elements because 'there is, for example, a uniform punishment for commission of' " first-degree terroristic threatening. *See* ***McMillan***, 863 F.3d at 1057, *quoting* ***United States v. McArthur***, 850 F.3d 925, 938 (8th Cir. 2017). The fact that the word "or" separates "serious physical injury" from "substantial property damage" is not determinative: "As *Mathis* recognizes ... the use of the word 'or' in a statute merely signals that we must determine whether the alternatives are elements or means." ***Id.*** at 1058, *citing* ***Mathis***, 136 S.Ct. at 2248-49.

Arkansas case law is similarly unhelpful. In *Adams v. State*, the Arkansas Court of Appeals said that "the State bore the burden to prove that appellant acted with the purpose of terrorizing Karen and threatened to cause death or serious physical injury or substantial property damage to Karen.... What is prohibited is the communication of a threat with the purpose of terrorizing another person." ***Adams v. State***, 435 S.W.3d 520, 523-24 (Ark. App. 2014). Myers argues this statement shows the statute has two indivisible elements: (1) the purpose of terrorizing; and (2) threatening to cause death or serious physical injury or property damage. But, in *Mason v. State*, 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 substantial property damage. ***Mason v. State***, 361 Ark. 357, 206 S.W.3d 869, 873-74 (2005). This suggests 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. *See* ***Ta v. State***, 459 S.W.3d 325, 328 (Ark. App. 2015) (omitting the element of substantial property damage and stating that "[a] person commits the offense of first-degree terroristic threatening if, with the purpose of terrorizing another person, he threatens to cause death or serious physical injury to another person"); ***Knight v. State***, 25 Ark. App. 353, 758 S.W.2d 12, 14 (1988) ("Under our statute it is an element of the offense that the defendant act with the purpose of terrorizing another person, i.e., it must be his 'conscious object' to cause fright.").

The Arkansas jury instructions also are ambiguous. The jury instructions say:

> _____ (Defendant(s)) [is] [are] **charged with the offense of terroristic threatening in the first degree. To sustain this charge the State must prove beyond a reasonable doubt that _____ (defendant(s)), with the purpose of terrorizing _____ (another person):**
>
> [threatened to cause (death to) (or) (serious physical injury to) (or) (substantial damage to the property of) _____ (another person);]
>
> [or]
>
> [threatened to cause (physical injury) (property damage) to a (teacher) (_____) other school employee) acting in the line of duty.]

AMI Crim. 2d 1310 (emphasis in original). Each parenthetical word or phrase may be included or excluded based on the evidence. *See* ***Anderson v. State***, 353 Ark. 384, 108 S.W.3d 592, 607 (2003) (noting that a parenthetical in the criminal jury instructions indicates its inclusion is optional).

Myers argues the instruction could direct the jury to determine whether a de-

fendant "threatened to cause death to or serious physical injury to or substantial damage to the property of another person." If so instructed, the jury apparently would not have to agree unanimously on whether the defendant made threats to injure a person or damage property. According to Myers, this suggests the statute lists alterative means of committing one element of the crime. 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 alternates are elements, not means. *See* ***Lamb***, 847 F.3d at 932 ("referencing one alternative term to the exclusion of all others" demonstrates "that the statute contains a list of elements, each one of which goes toward a separate crime"), *quoting* ***Mathis***, 136 S.Ct. at 2257.

Because under the *Mathis* analysis, Arkansas state law fails to provide "clear answers" on whether the categorical or modified categorical approach applies, this court may look to "the record of a prior conviction itself." ***Mathis***, 136 S.Ct. at 2256. *Cf.* ***United States v. Naylor***, 887 F.3d 397, 406 (8th Cir. 2018) (en banc) (holding that "Missouri law provides a clear answer" to the elements/means inquiry and the court "need not resort to taking a 'peek at the record documents' "), *quoting* ***Mathis***, 136 S.Ct. at 2256. 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.

C.

[6] A review of permissible materials shows Myers was convicted of threatening to kill his girlfriend. The "Felony Information" charges:

> with the purpose of terrorizing another person, he threatened to cause death or serious physical injury or substantial property damage to another person, in violation of ACA § 5-13-301, **to-wit**: The Defendant threatened to kill his girlfriend while holding a knife to her throat, against the peace and dignity of the State of Arkansas.[2]

The "Sentencing Order" confirms that Myers was convicted of threatening his girlfriend. This conviction is a violent felony under § 924(e) because it "has as an element the . . . threatened use of physical force against the person of another." **18 U.S.C. § 924(e)(2)(B)(i)**. *See* ***Boaz***, 558 F.3d at 807. *See also* ***United States. v. Rice***, 813 F.3d 704, 705 (8th Cir. 2016) ("Since the violation 'has as an element the use, attempted use, or threatened use of physical force against the person of another,' U.S.S.G. § 4B1.2, we conclude that it was a crime of violence."). The district court properly counted Myers' first-degree terroristic threatening conviction as a violent felony.

2. In *Nance v. State,* the Arkansas Supreme Court said: " '[W]here but one offense is charged but the several modes provided by the statute by which it may be committed are charged in the disjunctive, the indictment is good. The reason is that the charge is based upon one offense, and the different modes of committing it provided in the statute are based upon the same transaction.' " ***Nance v. State***, 323 Ark. 583, 918 S.W.2d 114, 123 (1996), *quoting* ***Kirkpatrick v. State***, 177 Ark. 1124, 9 S.W.2d 574, 575 (1928). This statement does not change the conclusion here. First, the court was discussing the capital murder, not terroristic threatening, statute. Second, this is not a case where "several modes provided in the statute . . . are charged in the disjunctive."

II.

[7] Myers also argues his Arkansas second-degree battery conviction is not a violent felony under the ACCA. The parties agree Myers was convicted under subsection (a)(1). At the time of his conviction, Arkansas Code Annotated § 5-13-202(a) said:

> (a) A person commits battery in the second degree if:
>
> (1) With the purpose of causing physical injury to another person, the person causes serious physical injury to any person;
>
> (2) With the purpose of causing physical injury to another person, the person causes physical injury to any person by means of a deadly weapon other than a firearm;
>
> . . . .

Ark. Code Ann. § 5-13-202(a) (2007). Post *Mathis*, this court held that "the Arkansas second degree battery statute is divisible," and the modified categorical approach applies. ***Rice***, 813 F.3d at 705. Post *Mathis*, this court also held that a conviction under subsection (a)(2)—identical to subsection (a)(1) except requiring use of "a deadly weapon other than a firearm"—is a violent felony under the ACCA. *See* ***Winston***, 845 F.3d at 878.

Myers argues *Winston* is distinguishable because subsection (a)(2) requires the use of a deadly weapon. However, *Winston* did not hold that a conviction under subsection (a)(2) was a violent felony because it required the use of a deadly weapon. Rather, it held that the statute required a showing of physical injury, which is equivalent to physical force. ***Id.*** Because subsection (a)(1), like subsection (a)(2), "has as an element the use, attempted use, or threatened use of physical force" against another person, 18 U.S.C. § 924(e)(2)(B)(i), it is a violent felony under the ACCA. *See* ***id.*** The district court properly counted Myers' second-degree battery conviction as a violent felony.

* * * * * * *

The judgment is affirmed.

DAVIS NEUROLOGY PA, on behalf of itself and all other entities and persons similarly situated, Plaintiff-Appellant,

v.

DOCTORDIRECTORY.COM LLC; Everyday Health Inc., Defendants-Appellees,

John Does, 1-10, intending to refer to those persons, corporations or other legal Entities that acted as agents, consultants, Independent contractors or representatives, Defendants.

No. 17-1820

United States Court of Appeals, Eighth Circuit.

Submitted: January 11, 2018

Filed: July 23, 2018

Background: Recipient filed putative class action in state court alleging that marketing services company and others sent it unsolicited facsimile, in violation of Telephone Consumer Protection Act (TCPA). After removal, the United States District Court for the Eastern District of Arkansas, Brian S. Miller, J., 2017 WL 1528769, entered judgment on pleadings in defendants' favor, and recipient appealed.

Holding: The Court of Appeals, Colloton, Circuit Judge, held that company failed to timely file notice of removal.

Vacated and remanded.

neously flooding the courts with last-minute, meritless filings. And this practice would harm victims. Take Bessie Lynn, Bill's widow who witnessed his horrific slaying and was herself attacked by petitioner. She waited for hours with her daughters to witness petitioner's execution, but was forced to leave without closure. See Alabama, Running Out of Time, Halts Execution of Sword and Dagger Killer of Pastor," CBS News, (Apr. 12, 2019), https://www.cbsnews.com/news/alabama-sword-dagger-killer-christopher-lee-price-execution-halted-pastor-bill-lynn/ (all Internet materials as last visited on May 9, 2019); Execution Called Off for Christopher Price; SCOTUS Decision Allowing It Came Too Late (Apr. 11 2019), https://www.al.com/news/birmingham/2019/04/christopher-price-set-to-be-executed-thursday-evening-for-1991-slaying-of-minister.html. This "injustice, in the form of justice delayed," *ibid.*, would become the norm if the Court were to regularly delay resolution of emergency applications.

Of course, the dissent got its way by default. Petitioner's strategy is no secret, for it is the same strategy adopted by many death-row inmates with an impending execution: bring last-minute claims that will delay the execution, no matter how groundless. The proper response to this maneuvering is to deny meritless requests expeditiously. The Court instead failed to issue an order before the expiration of the warrant at midnight, forcing the State to "cal[l] off" the execution. *Price*, 587 U. S., at ——, 139 S.Ct., at 1314. To the extent the Court's failure to issue a timely order was attributable to our own dallying, such delay both rewards gamesmanship and threatens to make last-minute stay applications the norm instead of the exception. See *Bucklew*, 587 U. S., at ——, 139 S.Ct., at 1114.

Perhaps those who oppose capital punishment will celebrate the last-minute cancellation of lawful executions. But "[t]he Constitution allows capital punishment," *id.*, 587 U. S., at ——, 139 S.Ct., at 1122, and by enabling the delay of petitioner's execution on April 11, we worked a "miscarriage of justice" on the State of Alabama, Bessie Lynn, and her family. Governor Ivey Releases Statement on Stay of Execution for Death Row Inmate Christopher Lee Price, (Apr. 12, 2019), https://governor.alabama.gov/statements/governor-ivey-releases-statement-on-stay-of-execution-for-death-row-inmate-christopher-lee-price.

James MYERS

v.

UNITED STATES

No. 18-6859.

Supreme Court of the United States.

Decided May 13, 2019

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed on March 21, 2019.

Chief Justice ROBERTS, with whom Justice THOMAS, Justice ALITO, and Justice KAVANAUGH join, dissenting.

I dissent from the Court's decision to grant the petition, vacate the judgment, and remand the case. Nothing has changed since the Eighth Circuit held that Myers's conviction for first-degree terroristic threatening qualifies as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e). The Government continues to believe that classification is correct, for the same reasons that it gave to the Eighth Circuit. But the Solicitor General asks us to send the case back, and this Court obliges, because he believes the Eighth Circuit made some mistakes in its legal analysis, even if it ultimately reached the right result. He wants the hard-working judges of the Eighth Circuit to take a "fresh" look at the case, so that they may "consider the substantial body of Arkansas case law supporting the conclusion that the statute's death-or-serious injury language sets forth an element of the crime," and then re-enter the same judgment the Court vacates today. Brief for United States 9, 11.

I see no basis for this disposition in these circumstances. See *Machado v. Holder*, 559 U.S. 966, 130 S.Ct. 1236, 176 L.Ed.2d 175 (2010) (ROBERTS, C.J., dissenting); *Nunez v. United States*, 554 U.S. 911, 912, 128 S.Ct. 2990, 171 L.Ed.2d 879 (2008) (Scalia, J., dissenting). Unless there is some new development to consider, we should vacate the judgment of a lower federal court only after affording that court the courtesy of reviewing the case on the merits and identifying a controlling legal error. This case does not warrant our independent review. If the Government wants to ensure that the Eighth Circuit does not repeat its alleged error, it should have no difficulty presenting the matter to subsequent panels of the Eighth Circuit, employing the procedure for en banc review should it be necessary.

I would deny the petition.