No. 19-6720

IN THE SUPREME COURT OF THE UNITED STATES

JAMES DWAYNE MYERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

AMANDA B. HARRIS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's Arkansas conviction for terroristic threatening in the first degree, Ark. Code Ann. § 5-13-301(a)(1)(A) (2013), qualifies as a conviction for a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(B)(i).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 928 F.3d 763. A prior opinion of the court of appeals (Pet. App. 7a-13a) is reported at 896 F.3d 866.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2019. A petition for rehearing was denied on August 22, 2019 (Pet. App. 6a). The petition for a writ of certiorari was filed on November 20, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Arkansas, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 188 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-7a.

1. In 2016, petitioner sold methamphetamine to two different confidential informants a few weeks apart. Presentence Investigation Report (PSR) ¶¶ 11, 13. Each time, he was armed. PSR ¶¶ 11, 13, 15a, 18. After the second sale, police arrested petitioner and executed a search warrant for his home. PSR ¶¶ 16-17. The search revealed a pistol and sawed-off shotgun, both loaded, as well as ammunition, "several bags of methamphetamine," drug distribution paraphernalia, a marijuana-grow operation, and a stolen car. PSR ¶¶ 17-19. Petitioner pleaded guilty to one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). PSR ¶ 7.

A conviction for violating 18 U.S.C. 922(g)(1) carries a default statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, a defendant has at least three prior convictions for "a violent felony or a serious drug offense," the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range

of 15 years to life imprisonment. 18 U.S.C. 924(e)(1). The ACCA's "elements clause" defines "'violent felony'" to include, among other things, "any crime punishable by imprisonment for a term exceeding one year" that "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)(i).

To determine whether an offense falls within the elements clause, courts generally apply a "categorical approach." See, e.g., Stokeling v. United States, 139 S. Ct. 544, 555 (2019). As this Court explained in Mathis v. United States, 136 S. Ct. 2243 (2016), under that approach, a court "focus[es] solely" on "the elements of the crime of conviction," not "the particular facts of the case." Id. at 2248. "Some statutes, however, have a more complicated (sometimes called 'divisible') structure" in which they "list elements in the alternative, and thereby define multiple crimes." Id. at 2249 (citation omitted). When a defendant's statute of conviction is divisible, the sentencing court may apply the "modified categorical approach." Ibid. Under that approach, a court may "look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant was convicted of." Ibid.; see Shepard v. United States, 544 U.S. 13, 26 (2005).

For the modified categorical approach to apply, the state statute must set out alternative elements (facts that the jury

must find or the defendant must admit for a conviction) rather than alternative means ("various factual ways of committing some component of the offense" that "a jury need not find (or a defendant admit)" with specificity for conviction). Mathis, 136 S. Ct. at 2249. "The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means." Id. at 2256. That determination may be resolved by examining "authoritative sources of state law." Ibid. For example, a "statute on its face may resolve the issue," as when "statutory alternatives carry different punishments," indicating that those alternatives "must be elements." Ibid. If "state law fails to provide clear answers," however, courts may "'peek at the record documents'" from the prior conviction, such as the charging instrument or plea agreement. Ibid. (brackets and citation omitted). One indication that "the statute contains a list of elements, each one of which goes toward a separate crime," is if those documents list "one alternative term," that is, one way of violating the statute, "to the exclusion of all others." Id. at 2257.

The Probation Office recommended that petitioner be sentenced under the ACCA because he had at least three prior convictions for a violent felony or serious drug offense. PSR ¶¶ 78, 122. The Probation Office identified three qualifying predicate Arkansas convictions: a 2002 conviction for possession with intent to deliver marijuana, a 2008 conviction for battery in the second

degree, and a 2013 conviction for terroristic threatening in the first degree. PSR ¶¶ 64, 71, 73. Petitioner did not dispute that the marijuana conviction qualifies as a "serious drug offense" under the ACCA, see Sent. Tr. 5-6, but he argued that neither of the others was a "violent felony," see, e.g., id. at 9-14. The Arkansas offense of battery in the second degree prohibits intentionally "caus[ing] serious physical injury to any person." Ark. Code Ann. § 5-13-202(a)(1) (Supp. 2007). The Arkansas offense of terroristic threatening in the first degree prohibits "threaten[ing] to cause death or serious physical injury or substantial property damage to another person" "[w]ith the purpose of terrorizing [that] person." Id. § 5-13-301(a)(1)(A) (2013). Petitioner argued that neither crime categorically involves "physical force" within the meaning of that term in the ACCA's elements clause. Sent. Tr. 9-14; see D. Ct. Doc. 27, at 7-12 (June 6, 2017) (petitioner's sentencing memorandum). The district court rejected that argument and sentenced petitioner to 188 months of imprisonment, the bottom of petitioner's advisory guidelines range. Sent. Tr. 30, 38-39.

2. The court of appeals affirmed. Pet. App. 7a-13a.

As relevant here, petitioner argued for the first time on appeal that his prior conviction for terroristic threatening falls outside the elements clause on the theory that the statutory provision under which he was convicted encompasses "threats to cause 'substantial property damage,'" which would go beyond

threats "of physical force against the person of another," as described in the ACCA's elements clause. Pet. C.A. Br. 17. The court of appeals rejected that new argument.

The court of appeals reviewed the categorical and modified categorical approaches, Pet. App. 3a-4a, and identified the critical question as whether the Arkansas statute "lists alternative elements or means" when it identifies both persons and property as potential objects of the threat, id. at 10a. The court cited its prior decision in United States v. Boaz, 558 F.3d 800 (8th Cir. 2009), which had determined that the Arkansas terroristic-threatening statute was divisible and thus permitted the modified categorical approach. Pet. App. 10a; see Boaz, 558 F.3d at 807 (holding that the "state statute defines two separate offenses: threats of death or serious bodily injury and threats to property"). The court then stated that this Court's decision in Mathis, which clarified the proper method for applying the modified categorical approach, did not abrogate Boaz because Mathis did not directly involve the ACCA's elements clause, but instead involved another portion of the ACCA's "violent felony" definition. Pet. App. 10a-12a.

The court of appeals alternatively concluded that "[e]ven if [it] undertook a Mathis analysis, the same result would apply." Pet. App. 10a; see id. at 10a-12a. Summarizing Mathis, the court identified the sources it could consult to determine whether the statute was divisible: the statute, state court decisions, model

jury instructions, and the records of petitioner's prior conviction. Id. at 10a. The court found the statute's text "not determinative" and viewed state court decisions as "unhelpful." Id. at 11a. The court considered the state jury instructions "ambiguous," on the view that they are unclear whether a court must instruct juries as to only one option (person or property) or may instruct about both in the alternative. Ibid.; see id. at 11a-12a. The court then reasoned that because the charging document and sentencing order in petitioner's prior conviction were specific as to the nature of his crime -- a threat to kill his then-girlfriend -- his conviction satisfied the elements clause. Id. at 12a.

3. This Court granted a writ of certiorari, vacated the judgment of the court of appeals, and remanded the case for further proceedings. Pet. App. 14a-15a.

In his petition for a writ of certiorari, petitioner renewed his argument that his conviction for terroristic threatening in the first degree is not a violent felony under the ACCA. 18-6859 Pet. 5-13. In response, the government took the view that the Court should grant the petition, vacate the judgment, and remand, because the court of appeals had "appeared to consult the record of petitioner's prior conviction to determine the offense-specific conduct * * * without first examining that record for the threshold purpose of determining whether the statute is divisible as a general matter." 18-6859 Gov't Br. in Opp. 10. But as the

government further explained, "it is not clear that the court of appeals actually needed to peek at the record documents to determine the terroristic-threatening statute's divisibility" because "Arkansas case law support[s] the conclusion that the statute's death-or-serious-injury language sets forth an element of the crime." Id. at 11. The Court granted the petition, vacated the judgment, and remanded the case to the court of appeals "for further consideration in light of the position asserted by the Solicitor General." Pet. App. 14a.

The Chief Justice dissented. Pet. App. 15a. Writing for four Justices, the Chief Justice saw "no basis for" vacating the judgment, given that the "Government continues to believe that [the] classification" of Myers's prior conviction for first-degree terroristic threatening as a violent felony "is correct." Ibid. The Chief Justice additionally observed that "[t]his case does not warrant [the Court's] independent review." Ibid.

4. On remand, the court of appeals affirmed petitioner's ACCA sentence. Pet. App. 1a-5a.

The court of appeals recognized that whether petitioner's prior conviction for Arkansas terroristic threatening qualifies as a violent felony under the ACCA depends on whether the Arkansas statute "lists alternative elements or means and is, therefore, divisible." Pet. App. 3a-4a. The court thus looked to Arkansas law, and determined that Arkansas "state court decisions

definitively answer the question." Id. at 4a (quoting Mathis, 136 S. Ct. at 2256) (brackets omitted).

The court of appeals observed that in Walker v. State, 389 S.W.3d 10 (Ark. App. 2012), the Arkansas appellate court had described the jury instructions on first-degree terroristic threatening as "requir[ing] the elements of threatening to cause the death of the victim and the purpose of threatening the victim." Pet. App. 4a (citation omitted). The court of appeals explained that the language of those instructions "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." Ibid. The court then observed that other Arkansas cases supported the same conclusion, including Mason v. State, 206 S.W.3d 869 (Ark. 2005), 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 substantial property damage." Pet. App. 4a. The court accordingly determined from its survey of those and other Arkansas appellate decisions that under Arkansas law, "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." Ibid.

The court of appeals thus found the Arkansas terroristic threatening statute divisible. Pet. App. 4a. The court also found

that the statutory alternative involving "threat[s] to cause * * * serious physical injury * * * to another person," Ark. Code Ann. § 5-13-301(a)(1)(A) (2013), is a violent felony under the ACCA because it has as an element the "threatened use of physical force against the person of another," Pet. App. 5a (citation omitted). The court then reviewed the "permissible materials" from petitioner's record of prior conviction, and found that petitioner "was convicted of threatening his girlfriend." Id. at 4a-5a. And the court therefore determined that the "district court properly counted [petitioner's] first-degree terroristic threatening conviction as a violent felony." Id. at 5a.

ARGUMENT

Petitioner renews his contention (Pet. 6-20) that his prior conviction for Arkansas terroristic threatening in the first degree is not a violent felony under the ACCA. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. a. The court of appeals correctly interpreted and applied Mathis v. United States, 136 S. Ct. 2243 (2016), to determine that Arkansas terroristic threatening in the first degree qualifies as a violent felony under the ACCA. The court recognized that its task was to identify the elements of that offense, and more specifically, determine whether the different statutory alternatives were elements or means. That is precisely

what Mathis instructs. See Pet. App. 3a-4a; Mathis, 136 S. Ct. at 2256 ("The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means."). And in undertaking that task, the court relied on the tools that Mathis identified -- namely, state court decisions and jury instructions. See Pet. App. 4a; Mathis, 136 S. Ct. at 2256-2257.

Applying a proper Mathis framework, the court of appeals correctly determined that under Arkansas case law, the Arkansas statute lists alternative elements rather than means because "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." Pet. App. 4a. For example, in the context of a double-jeopardy challenge, the state appellate court in Walker v. State, 389 S.W.3d 10 (Ark. App. 2012), stated 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." Id. at 15. Walker thus treats the object of the threat (person or property) as divisible, with the jury instructed on only one option (there, person). Other Arkansas cases similarly describe the elements of the offense without mentioning property damage. E.g., Mason v. State, 206 S.W.3d 869, 873-874 (Ark. 2005); Ta v. State, 459 S.W.3d 325, 328 (Ark. App. 2015); Foshee v. State, 2014 Ark.

App. 315, at *2; Cauffiel v. State, 2013 Ark. App. 642, at *4; Johnson v. State, 25 S.W.3d 445, 450 (Ark. App. 2000).

Petitioner contends (Pet. 10-17) that those decisions are not relevant because none of them directly addresses "jury unanimity," which he asserts is "the touchstone of the means-or-elements inquiry," Pet. 8 (citation omitted). That contention is unsound. Jury unanimity is not a freestanding part of a Mathis inquiry; it is merely another way to express the difference between means and elements. A jury must unanimously find an element, but need not agree on the means used to satisfy that element. See Mathis, 136 S. Ct. at 2256. Therefore, if a particular item in a disjunctively phrased statute is an "element," the item must be found by a jury beyond a reasonable doubt -- and vice versa. So when Walker, for example, stated that "threatening to cause the death of the victim and the purpose of terrorizing the victim" are two of the "elements" of the offense "[a]s charged and instructed to the jury," it necessarily means that the jury must be unanimous as to those two circumstances. 389 S.W.3d at 15 (emphasis added). The term "elements," standing alone, makes clear the requirement of jury unanimity; explicitly referring to "jury unanimity" would be redundant.

b. Petitioner's reliance (Pet. 17-18) on the Arkansas model jury instruction for terroristic threatening in the first degree is similarly misplaced. That instruction reads:

> _____ (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.]

Ark. Model Jury Instr. (AMI) Crim. 2d 1310 (Matthew Bender 2018) (brackets in original, boldface removed). Petitioner contends (Pet. 18 n.5) that the use of the word "or" to separate "death to," "serious physical injury to," and "substantial damage to the property of" in the model instruction demonstrates that the three alternatives are means, not elements. That contention is incorrect. The instruction itself uses "or" to separate the crime of threatening to cause serious physical injury to another person from the distinct crime of threatening to cause physical injury to a teacher. AMI Crim. 2d 1310. Thus, the word "or," standing alone, is not an indicator that two alternatives are simply means of committing a single crime.

Also, petitioner overlooks that each of the "or"s in the terroristic-threatening instruction -- as well as the three alternatives -- are surrounded by parentheses. Parentheses and brackets are used throughout the model instructions to identify

standalone options. For example, the Arkansas model aggravated-assault instruction uses no brackets or parentheses around the various "or"s when describing alternative means of committing one particular and distinct form of that offense, by "imped[ing] or prevent[ing] * * * respiration or blood circulation by applying pressure on the throat or neck or blocking the nose or mouth." AMI Crim. 2d 1304 (emphasis added); see Ark. Code Ann. § 5-13-204(a)(3) (2013). By contrast, that instruction separates standalone options with "(or)" in parentheses or brackets. AMI Crim. 2d 1304 (listing as an element that the defendant "purposely displayed a firearm in such a manner that created a substantial danger of (death) (or) (serious physical injury) to" the victim); see Ark. Code Ann. § 5-13-204(a)(2). Similarly, the use of parentheses around the "(or)"s separating "(death to)," "(serious physical injury to)," and "(substantial damage to the property of)" in the model instruction for terroristic threatening support that they are elements of different crimes, not means of committing the same crime. AMI Crim. 2d 1310.

Finally, petitioner errs in contending (Pet. 18-19) that the charging document in his case shows that the various alternatives in the terroristic threatening statute are means, not elements. The relevant portion of the felony information here reads in its entirety:

> Count 6: 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.

Gov't C.A. Br. Addendum 16. After reciting the statutory language, the charging document uses "to-wit" to limit the charge to "threaten[ing] to kill [petitioner's] girlfriend." Ibid. That limitation indicates that the specific charged crime is a "threat[] to cause death * * * to another person," Ark. Code Ann. § 5-13-301(a)(1)(A) (2013), not some more generalized offense that individual jurors could find to have been committed in multiple ways.

2. Petitioner does not contend that any other court of appeals has found the Arkansas terroristic-threatening statute to be indivisible. Although the Fifth Circuit had previously held that the Arkansas statute is not a violent felony under the ACCA, see United States v. Rico-Mejia, 859 F.3d 318, 322-323 (2017), it did so based on its view that the ACCA requires a predicate conviction to have involved direct, as opposed to indirect, physical force, id. at 323 -- a view that the Fifth Circuit has subsequently abandoned, see United States v. Reyes-Contreras, 910 F.3d 169, 180-182 (2018) (en banc) (overruling Rico-Mejia). No Fifth Circuit decision has held that the Arkansas statute is indivisible under Mathis; to the contrary, that court appears to have assumed that the statute is divisible. Rico-Mejia, 859 F.3d at 322; United States v. Johnson, 286 Fed. Appx. 155, 156 (2008) (per curiam), overruled by Reyes-Contreras, supra. Accordingly,

there is no division of authority on the question of the Arkansas statute's divisibility that would warrant this Court's review.

To the extent petitioner suggests (Pet. 7-10) a circuit conflict on whether state case law must explicitly address jury unanimity, that suggestion is incorrect. For example, petitioner cites the Tenth Circuit's decision in United States v. Degeare, 884 F.3d 1241 (2018), as having adopted "'a unanimity-focused approach to the means-or-elements question' under Mathis." Pet. 9 (citation omitted). But Degeare itself acknowledged that the Eighth Circuit was among "our sister circuits [that] have done the same," citing (among other cases) the decision in United States v. McMillan, 863 F.3d 1053 (8th Cir. 2017). 884 F.3d at 1252. The court of appeals here did not purport to overrule its prior decision in McMillan. As described above, jury unanimity is simply another way of describing the means-elements distinction, so state case law that directly identifies statutory alternatives as "elements" -- as Walker and other Arkansas cases do here -- need not redundantly invoke jury unanimity.

At all events, petitioner's ultimate disagreement is with the court of appeals' interpretation of state law as to whether a state statute is divisible. Pet. 10-17. This Court generally does not grant certiorari to review a lower court's determination of a state statute's divisibility. See, e.g., Lamb v. United States, cert. denied, No. 17-5152 (April 2, 2018); Gundy v. United States, cert. denied, No. 16-8617 (Oct. 2, 2017); Rice v. United States, cert.

denied, No. 15-9255 (Oct. 3, 2016). Moreover, this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004); see Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."). No sound reason exists to depart from that "settled and firm policy" here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

AMANDA B. HARRIS
Attorney

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