NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD DALE INGRAM, JR.,
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,

BRUCE D. EDDY
FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF ARKANSAS

Anna M. Williams
Assistant Federal Public Defender
Counsel of Record
112 W. Center Street, Ste. 300
Fayetteville, Arkansas 72701
(479) 442-2306
anna_williams@fd.org

QUESTION PRESENTED FOR REVIEW

Whether the Eighth Circuit Court of Appeals incorrectly applied the divisibility analysis prescribed in *Mathis v. United States*, 136 S. Ct. 2243 (2016), to the Arkansas firs-degree terroristic threatening statute?

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. Ingram, 793 F. App'x 462 (8th Cir. 2020).

United States v. Myers, 928 F.3d 763 (8th Cir. 2019).

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

On February 12, 2020, the court of appeals entered its opinion and judgment affirming the district court's finding that Richard Dale Ingram Jr.'s previous Arkansas conviction for first-degree terrorist threatening constituted a "crime of violence" under U.S.S.G. § 2K2.1(a)(2). *United States v. Ingram*, 793 F. App'x 462 (8th Cir. 2020). A copy of the opinion is attached at Appendix ("App.") 1a-3a.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 2020. This petition is timely submitted as this Court granted an extension of time to file such petitions in light of the COVID-19 pandemic to 150 days from the date of the lower court judgment. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

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

Ark. Code Ann. § 5-13-301(a)-(b):

> (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.
>
> (b)(1) A person commits the offense of terroristic threatening in the second degree if, with the purpose of terrorizing another person, the person threatens to cause physical injury or property damage to another person.
>
> (2) Terroristic threatening in the second degree is a Class A misdemeanor.

STATEMENT OF THE CASE

1. Richard Dale Ingram Jr. 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 110 months in prison after the court determined that his prior Arkansas conviction for first-degree terrorist threatening was a "crime of violence" under U.S.S.G. § 2K2.1(a)(2). (Mr. Ingram did not contest that he had one prior conviction that qualified as a "serious drug offense.") Mr. Ingram argued on appeal that the district court committed procedural error by sentencing him based on a guideline base-offense level that included this conviction as a "crime of violence." If the court had agreed with him, Mr. Ingram's base-offense level under the United States Sentencing Guidelines would have been 20, rather than 24, and his guideline range would have been 77 to 96 months in prison, rather than 110 to 120 months.

2. Mr. Ingram 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.

Mr. Ingram argued that first-degree terroristic threatening under Ark. Code Ann. § 5-13-301(a)(1)(A) is not a "crime of violence," as defined by U.S.S.G. § 4B1.2(a)'s force clause 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. While Mr. Ingram acknowledged that the Eighth Circuit had previously stated in *United States v. Myers*, 928 F.3d 763 (8th Cir. 2019), *petition for cert. filed*, (U.S. Nov. 22, 2019), that § 5-13-301(a)(1)(A) is divisible and subject to application of the modified categorical approach, he asserts that this conflicts with this Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016).

The *Mathis* analysis, Mr. Ingram 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 § 5-13-301(a)(1)(A) "is divisible between threats 'to cause death or serious physical injury' and threats 'to cause substantial property damage.'" *United States v. Ingram*, 793 F. App'x 462, 463(8th Cir. 2020). It found that it was bound by its precedent in *Myers*, in which it determined that the modified categorical approach applied and it "may look to authoritative sources of state law, including state court decisions interpreting the

statute." 928 F.3d at 766 (citing *Walker v. State*, 389 S.W. 3d 10 (Ark. Ct. App. 2012); *Mason v. State*, 206 S.W. 3d 869 (Ark. 2005); *Ta v. State*, 459 S.W. 3d 325 (Ark. Ct. App. 2015); *Foshee v. State*, No. CR-13-934, 2014 Ark. App. 315 (2014); *Johnson v. State*, 25 S.W. 3d 445 (Ark. Ct. App. 2000).

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court should declare that the Eighth Circuit Court of Appeals incorrectly applied the *Mathis* analysis regarding the divisibility of criminal statutes when considering whether the Arkansas first-degree terroristic threatening statute listed means or elements.

Mr. Ingram continues to assert that he has been incorrectly sentenced as his base-offense level under the Guidelines was based in part upon the lower court's determination that his prior Arkansas conviction for first-degree terroristic threatening qualified as a "crime of violence" under U.S.S.G. § 4B1.2(a)(1). 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). A prior felony conviction qualifies as a "crime of violence" if it:

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm as described in 26 U.S.C. § 5845 or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2(a). First-degree terroristic threatening must fall under § 4B1.2(a)(1), the "force clause."

Mr. Ingram 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 "crime of violence" under the Guidelines, 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 Mr. Ingram made this argument to the Eighth Circuit, the court misapplied the *Mathis* analysis and found that the statute was divisible.

A. The Arkansas first-degree terroristic threatening statute is indivisible and requires analysis under the categorical approach.

The Arkansas first-degree terroristic threatening statute is indivisible, and because it includes crimes against property, it is overbroad and does not qualify as a "crime of violence." To determine whether a prior conviction qualifies as a "crime of violence," a court must employ a categorical approach, which involves looking to the statutory definition of a prior offense and not to the particular facts underlying the commission of the offense. *See United States v. Pate*, 754 F.3d 550, 554 (8th Cir. 2014) (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)). Under this approach, a sentencing court is "generally prohibit[ed] . . . from delving into particular facts disclosed by the record of conviction, thus leaving the court normally to 'look only to the fact of conviction and the statutory definition of the prior offense.'" *Shepard v. United States*, 544 U.S. 13, 17 (2005) (quoting *Taylor*, 495 U.S. at 602). Under the categorical approach, an offense will only qualify as a "crime of violence" if all of the criminal conduct covered by the statute, "including the most innocent conduct," qualifies as a "crime of violence." *United States v. Salmons*, 873 F.3d 446, 448 (4th Cir. 2017) (applying the categorical approach to determine if a prior conviction qualified as a "crime of violence" under the Guidelines).

If a statute is found to be "divisible"—meaning that it comprises multiple, alternative versions of a crime—the court uses a modified categorical approach to determine "which statutory phrase, contained within a statute listing several different crimes, cover[s] a prior conviction." *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013) (internal citation omitted). When applying the modified categorical approach, a court "may examine some items in the state-court record, including charging documents, jury instructions, and statements made at guilty plea proceedings," to determine if the defendant committed a qualifying version of the crime. *Id.* at 2296 (citing *Shepard*, 544 U.S. at 20; *Taylor*, 495 U.S. at 602).

On July 5, 2006, Mr. Ingram was convicted of first-degree terroristic threatening in violation of Ark. Code Ann. § 5-13-301. The relevant Arkansas statute provides:

> (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. . . .

Ark. Code Ann. § 5-13-301(a)(1)(A). Mr. Ingram concedes that Ark. Code Ann. § 5-13-301 is divisible to an extent; for example, subsections (a) and (b) define the separate crimes of first- and second-degree terroristic threatening. He also concedes that he was convicted of a violation of § 5-13-301(a)(1)(A). Mr. Ingram argues, however, that the crime described in subsection (a)(1)(A) is not itself divisible. Because subsection (a)(1)(A) criminalizes the making of threats to cause "substantial

property damage" in addition to threats "to cause death or serious physical injury," it does not meet the definition of a "crime of violence" under § 4B1.2(a) as it does not necessarily involve an element of physical force against the *person* of another. In other words, § 5-13-301(a)(1)(A) is overbroad.

Mr. Ingram argues that the Eighth Circuit in *Myers*, 928 F.3d 763 (the case upon which the Eighth Circuit based its decision in the instant case) contains no significant analysis regarding the divisibility of the Arkansas statute, and *Mathis*, 136 S. Ct. 2243, compels a different conclusion. In *Mathis*, this Court reaffirmed that the categorical approach involves an analysis of the elements of an offense, which are defined as "the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.'" *Mathis*, 136 S. Ct. at 2248 (quoting *Black's Law Dictionary* 634 (10th ed. 2014)). Elements 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.* (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999); *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). A divisible statute is one that lists elements in the alternative, and therefore "define[s] multiple crimes." *Id.* at 2249. By contrast, a statute is *not* divisible if it "enumerates various factual means of committing a single element" instead of "list[ing] multiple elements disjunctively." *Id.* A jury does not have to unanimously agree on the means by which an offense was committed in order to convict a defendant—instead, a jury could convict even if some jurors believed the

offense was committed in one way and others believed it was committed in another. *Id.*

Mathis also provides guidance as to how a court should determine whether a statute lists elements or merely means. *Id.* at 2256. A court may generally look at state law, at the wording of the statute itself and the punishment(s) that may be imposed thereunder, and in some cases at the records of a prior conviction to make this determination. *Id.* at 2256-57. Such an examination in the instant case leads to the conclusion that § 5-13-301(a)(1)(A) lists alternative means by which the offense of first-degree terroristic threatening may be committed. Whether a threat is made to cause injury to a person or damage to property is immaterial; the focus of the offense is on the making of the threat. *See 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."); *Lewis v. State*, 44 S.W.3d 759, 763-64 (Ark. Ct. App. 2001) (Bird, J., concurring) (noting that the gravamen of the offense of terroristic threatening is the communication of a threat). In *Adams*, the Arkansas Court of Appeals explained that "the State bore the burden to prove that appellant acted with the purpose of terrorizing [the victim] and threatened to cause death or serious physical injury or substantial property damage to [the victim]," and that the statute requires "that the defendant intend to fill the victim with intense fright." 435 S.W.3d at 523 (citing *Knight v. State*, 758 S.W.2d 12 (Ark. Ct. App. 1988)). The communication of a threat with the requisite mental state is the essence of the

offense, and the types of threats listed in the statute are merely alternative means by which the crime can be committed.

An examination of § 5-13-301 as a whole is also instructive. Although subsection (b) of the statute clearly defines a different offense—namely second-degree terroristic threatening, a Class A misdemeanor—a defendant convicted under subsection (a) commits first-degree terroristic threatening, a Class D felony, regardless of whether he is found to have made threats to a person or to property. The wording and structure of the statute itself accordingly supports the conclusion that subsection (a)(1)(A) is not divisible.

Moreover, a court is also allowed to take a "peek" at the state court record of the prior conviction for the limited purpose of determining whether the listed items are elements of the offense. *Mathis*, 136 S. Ct. at 2256-57. In the felony information charging Mr. Ingram with terroristic threatening, it is alleged that, "with the purpose of terrorizing another person, he threatened to cause death or serious physical injury or substantial property damage to another person . . . ." (App. 10a). When multiple alternatives are listed in the charging documents in this manner, this "suggest[s] they are means rather than elements." *Mathis*, 136 S. Ct. at 2257). This provides even more support for the conclusion that § 5-13-301(a)(1)(A) is indivisible.

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

The Eighth Circuit did not consider 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*). Mr. Ingram 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 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*, 570 U.S. at 270, 133 S. Ct. 2276). 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).

884 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.*

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. Ingram 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*.

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

In *Myers*, which is the basis for the decision in the instant case, the Eighth Circuit concluded that Arkansas case law "definitively" answers the means-or-elements question. 928 F.3d at 766. 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, 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 *Myers* opinion, 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. 928 F.3d at 766; App. 7a. 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*, 928 F.3d at 766. 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 court's reference 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*, 928 F.3d at 766. 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. 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. 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.

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. Ingram; 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. 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*. *See also Adams*, 435 S.W.3d at 524 ("What is prohibited is the communication of a threat with the purpose of terrorizing another person.").

The Eighth Circuit also listed other Arkansas cases in which reference to "substantial property damage" is omitted. *Myers*, 928 F.3d at 766 (citing *Ta*, 459 S.W.3d at 328; *Foshee v. State*, No. CR-13-934, 2014 WL 2159326, at *2 ; and *Johnson*, 25 S.W.3d at 450-51[1]); App. 7a. 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 none of these cases address the issue of jury unanimity.

Mr. Ingram contends that Arkansas case law actually supports the conclusion that the first-degree terroristic threatening statute lists means rather than elements.

[1] It appears from the citation to Ark. Code Ann. § 5-13-301(b)(1) that this case actually involved second-degree terroristic threatening. *Johnson*, 25 S.W.3d at 450.

Although there are a handful of cases that omit reference to "substantial property damage," there are a number 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 suggests 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 § 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*.

D. Application of the *Mathis* Analysis to Arkansas Model Jury Instructions and *Shepard* documents

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 McMillan*, 863 F.3d at 1057 (citing *United States v. Lamb*, 847 F.3d 928, 932 (8th Cir. 2017)). Mr. Ingram 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 and phrase contained in this jury instruction is optional and may be included or excluded depending upon the evidence and arguments of counsel. Accordingly, the instruction could direct the jury to determine, for example, whether the defendant "threatened to cause serious physical injury to or substantial damage to the property of" another person. If a jury were so instructed, its members would not have to unanimously agree on whether the defendant made threats to injure a person or threats to damage property in order to convict him of terroristic threatening in the first degree. Therefore, communication of a threat to cause death, communication of a threat to cause serious physical injury, and communication of a threat to cause substantial property damage are all different means by which a defendant may commit the "communication of a threat" element of

first-degree terroristic threatening. These different types of threats are not elements of distinct crimes.[2]

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 pertinent charging document charges that "with the purpose of terrorizing another person, [Mr. Ingram] threatened to cause *death or serious physical injury to substantial property damage* to another person, in violation of ACA § 5-13-301 . . . ." *See* App. 10a. 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 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*, 570 U.S. at 272 ("A prosecutor charging a violation of a divisible statute must generally select

[2] 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. 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.

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. Ingram'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 Mr. Ingram was charged with violating is indivisible and the modified categorical approach may not be applied.

When all sources of Arkansas state law are examined, it becomes clear that 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. Ingram's prior conviction does not qualify as a "crime of violence." Thus, the Eighth Circuit 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 ensure consistent application of *Mathis* among the circuits going forward.

CONCLUSION

For the foregoing reasons, Petitioner Richard Dale Ingram, Jr. 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,

BRUCE D. EDDY
Federal Public Defender
Western District of Arkansas

/s/ *Anna M. Williams*

Anna M. Williams
Assistant Federal Public Defender
Office of the Federal Public Defender
112 W. Center Street, Ste. 300
Fayetteville, Arkansas 72701
(479) 442-2306
anna_williams@fd.org

Counsel for Petitioner