

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD DALE INGRAM, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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793 Fed.Appx. 462 (Mem)

This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1, generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 8th Cir. Rule 32.1A.
United States Court of Appeals, Eighth Circuit.

UNITED STATES of America Plaintiff-Appellee

v.

Richard Dale INGRAM, Jr., also known as Mane Defendant-Appellant

No. 19-1189

|
Submitted: January 13, 2020

|
Filed: February 12, 2020

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

Attorneys and Law Firms

Lloyd Vance Stone, Assistant United States Attorney, U.S. Attorney's Office, Western District of Arkansas, Fort Smith, AR, for Plaintiff-Appellee





Richard Dale Ingram, Jr., Pro Se


Anna Marie Williams, Assistant Federal Public Defender, Federal Public Defender's Office, Fayetteville, AR, for Defendant-Appellant

Before SMITH, Chief Judge, LOKEN and GRUENDER, Circuit Judges.

[Unpublished]

PER CURIAM.

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  924(a)(2). At sentencing, the district court ¹ determined his base-offense level to be 24 under  U.S.S.G. § 2K2.1(a)(2), which prescribes this base-offense level for certain firearms-related crimes (such as the crime to which Ingram pleaded guilty) when the defendant has at least two prior felony convictions “of either a crime of violence or a controlled substance offense.” The district court based this determination in part on Ingram’s prior Arkansas conviction for first-degree terroristic threatening, which it concluded was a conviction for a “crime of violence.” A four-level enhancement and a three-level reduction resulted in a total offense level of 25. Given his criminal history category VI and a statutory maximum of 10 years’ imprisonment, *see*  18 U.S.C. § 924(a)(2), Ingram’s advisory sentencing guidelines range was 110 to 120 months’ imprisonment, *see* U.S.S.G. ch. 5, pt. A; *id.* § 5G1.1(c)(1). The district court sentenced Ingram to 110 months’ imprisonment.

On appeal, Ingram argues the district court erred in two ways in treating his first-degree terroristic threatening conviction, *463 *see* Ark. Code § 5-13-301(a)(1)(A), as a conviction for a “crime of violence” under  U.S.S.G. § 2K2.1(a)(2).² We review *de novo* the district court’s interpretation and application of the guidelines, *United States v. Garcia*, 946 F.3d 413, 417

(8th Cir. 2019), and its determination that a conviction constitutes a crime of violence, *United States v. Roman*, 917 F.3d 1043, 1045 (8th Cir. 2019).

First, Ingram argues that his terroristic threatening conviction cannot be a crime of violence because the subsection of the Arkansas statute under which he was convicted is indivisible and overbroad insofar as it criminalizes threats against property in addition to threats against persons. See Ark. Code § 5-13-301(a)(1)(A). A statute is indivisible if it lists only one set of elements for a single crime, even if the statute lists alternative means of satisfying those elements, whereas a statute is divisible if it lists alternative elements creating different crimes. *United States v. Crumble*, 878 F.3d 656, 661 (8th Cir. 2018). When a statute is indivisible, we apply the “categorical approach.” *Id.* Under this approach, if the state statute “criminalizes more conduct than the federal definition of a ‘crime of violence,’ ” a conviction under that statute does not count as a conviction for a crime of violence. *United States v. Barthman*, 919 F.3d 1118, 1121 (8th Cir. 2019). Ingram thus argues that: (1) in listing “death or serious physical injury or substantial property damage,” Arkansas Code section 5-13-301(a)(1)(A) merely identifies alternative means of satisfying one of the elements of the singular crime of first-degree terroristic threatening and so is indivisible; and (2) under the categorical approach, a conviction under section 5-13-301(a)(1)(A) is not a conviction for a crime of violence because the statute criminalizes more conduct than just threats against persons (the only kind of threats included within the federal definition of crime of violence).

Our recent decision in *United States v. Myers* forecloses this argument, as we held there that section 5-13-301(a)(1)(A) is divisible between threats “to cause death or serious physical injury” and threats “to cause substantial property damage.” 928 F.3d 763, 766 (8th Cir. 2019), petition for cert. filed, — U.S.L.W. — (U.S. Nov. 22, 2019) (No. 19-6720). *Myers* binds us. See *United States v. Hellems*, 866 F.3d 856, 863 n.3 (8th Cir. 2017) (noting that a panel of this court is bound by and cannot overrule an earlier decision by another panel of this court). Ingram does not dispute that he was convicted under the statute for threats to cause death or serious physical injury. Under *Myers*, this counts as a crime of violence under the modified categorical approach. See 928 F.3d at 766-67.




Second, Ingram argues that, even under the modified categorical approach, the divisible portion of the statute under which he was convicted is not a crime of violence because it does not require the use or threatened use of “violent force.” See *United States v. Thomas*, 838 F.3d 926, 929 (8th Cir. 2016) (noting that “violent force” means “force capable of causing physical pain or injury to another person”). Once again, Ingram’s argument is foreclosed by controlling precedent. In *United States v. Boaz*, we held that a conviction under *464 section 5-13-301(a)(1)(A) for “threats of death or serious bodily injury” constituted a conviction for a “violent felony” under the Armed Career Criminal Act (“ACCA”). 558 F.3d 800, 807 (8th Cir. 2009). This means it also counts as a conviction for a crime of violence under the sentencing guidelines. See *United States v. Parker*, 929 F.3d 940, 942 (8th Cir. 2019) (noting that “violent felony” under the ACCA and “crime of violence” under the guidelines are “interchangeable” in meaning). Even if *Boaz* did not control, Ingram’s contention that “a threat of physical injury or death” under section 5-13-301(a)(1)(A) does not require the threatened use of “violent force”—because, for instance, “a person could be convicted of terroristic threatening under Arkansas law for threatening to poison another person”—fails in light of *Rice*, where we concluded that this kind of indirect force counts as “violent force” under the guidelines. 813 F.3d at 706.

In summary, the Arkansas terroristic threatening statute under which Ingram was previously convicted is divisible, and a conviction under that statute for threatening to cause death or serious physical injury counts as a crime of violence under the guidelines because such threats necessarily involve the use or threatened use of violent force. Therefore, we affirm Ingram’s sentence.

All Citations

793 Fed.Appx. 462 (Mem)

Footnotes

- 1 The Honorable Timothy L. Brooks, United States District Judge for the Western District of Arkansas.
- 2 “Crime of violence” as it appears in  § 2K2.1(a)(2) is defined in § 4B1.2(a), *see*  U.S.S.G. § 2K2.1 Application Note 1, to mean, as relevant here, “any offense under ... state law, 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,” *id.* § 4B1.2(a)(1). “Physical force” means “violent force.”  *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016).

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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 reinstate 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 re-

quired 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 court¹ 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 argues 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.



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-



IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS

STATE OF ARKANSAS

- COUNT 1:** ACCOMPLICES TO A
TERRORISTIC ACT
(B FELONY)
- COUNT 2:** THEFT BY RECEIVING
(C FELONY)
- COUNT 3:** T E R R O R I S T I C
THREATENING
(INGRAM ONLY)
(D FELONY)
- COUNT 4:** BATTERY IN THE SECOND
DEGREE
(INGRAM ONLY)
(D FELONY)

FILED FOR RECORD
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WASHINGTON CO AR
CIRCUIT CLERK
B. STAMPS

VS. No. CR 2006- 852-1

RICHARD DALE INGRAM

DOB: [REDACTED] (1)
SSN: [REDACTED]
SID: [REDACTED]

JOSHUA A. SPENCER

DOB: [REDACTED] (2)
SSN: [REDACTED]
SID: [REDACTED]

FELONY INFORMATION

I, Terry D. Jones, Prosecuting Attorney within and for the Fourth Judicial District of the State of Arkansas, of which Washington County is a part, in the name and by the authority of the State of Arkansas, on oath, accuse the Defendant, **RICHARD DALE INGRAM AND JOSHUA A. SPENCER**, of the crime of **COUNT 1: ACCOMPLICES TO TERRORISTIC ACT - (B**

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FELONY); COUNT 2: - THEFT BY RECEIVING (C FELONY); COUNT 3: - TERRORISTIC THREATENING (INGRAM ONLY) (D FELONY); COUNT 4: - BATTERY IN THE SECOND DEGREE (INGRAM ONLY) (D FELONY), committed as follows: The said Defendant on or between March 18 - 20, 2006, in Washington County, Arkansas, unlawfully and feloniously:

Count 1: with the purpose of promoting or facilitating the commission of an offense they aided the other person in committing while not in the commission of a lawful act, they shot with the purpose of causing injury to persons or property at an occupiable structure, in violation of ACA §5-13-310 and §5-2-403, **to-wit:** on or about 03/19/06, defendants drove by a residence and fired numerous shots into it, against the peace and dignity of the State of Arkansas.

Count 2: received, retained or disposed of stolen property of another person, knowing that it was stolen or having good reason to believe it was stolen, in violation of ACA §5-36-106, **to-wit:** on or about 03/19/06, defendants were in possession of a stolen 12 gauge shotgun, against the peace and dignity of the State of Arkansas.

Count 3: (Ingram only) 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:** on or about 03/20/06, after having previously fired shots into the victims residence, defendant threatened to kill her and her mother, against the peace and dignity of the State of Arkansas.


Count 4: (Ingram only) with the purpose of causing physical injury to another person, he caused physical injury to any person, in violation of ACA §5-13-202, **to-wit:** on or about 03/18/06, defendant struck another person in the head with a bottle, causing injury, against the peace and dignity of the State of Arkansas.

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TERRY D. JONES
Prosecuting Attorney, 4th Judicial District

By: 
Matt Durrett
Deputy Prosecuting Attorney

Sworn and subscribed to before me this 21st day of April, 2006.


Notary Public

My Commission Expires:

4-12-2011

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