No. 18-6859

IN THE SUPREME COURT OF THE UNITED STATES

JAMES 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

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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 "violent felony" under the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(B)(i).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 896 F.3d 866.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2018. A petition for rehearing was denied on August 29, 2018 (Pet. App. 8a). The petition for a writ of certiorari was filed on November 26, 2018. 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 was indicted on two counts of drug distribution and one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). PSR ¶¶ 1-3. Under a plea agreement, petitioner pleaded guilty to the firearm charge and the government dismissed the drug charges. 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. 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 these 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, 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 § 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 requires "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.

3. The court of appeals affirmed. Pet. App. 1a-7a.

As relevant here, petitioner argued for the first time on appeal that his prior conviction for terroristic threatening falls outside the elements clause because the statutory provision under which he was convicted encompasses "threats to cause 'substantial property damage,'" and thus goes 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 4a. 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. 4a; 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. 4a.

The court of appeals alternatively concluded that "[e]ven if [it] undertook a Mathis analysis, the same result would apply." Pet. App. 4a; see id. at 4a-6a. 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 4a. The court found the statute's text "not determinative" and state court decisions "unhelpful." Id. at 5a. The court likewise found the state jury instructions "ambiguous" because 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 5a-6a. 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 6a.

ARGUMENT

Petitioner renews his argument (Pet. 5-13) that his conviction for terroristic threatening in the first degree is not a violent felony under the ACCA. For the reasons set forth below, this Court should grant the petition, vacate the judgment of the court of appeals, and remand for reconsideration of that question.

1. Petitioner first contends (Pet. 5-8) that the court of appeals' decision creates a circuit conflict on whether Mathis v. United States, 136 S. Ct. 2243 (2016), applies to the ACCA's

elements clause, 18 U.S.C. 924(e)(2)(B)(i). That contention does not warrant this Court's review.

The court of appeals recognized that it had previously held in United States v. Boaz, 558 F.3d 800 (8th Cir. 2009), that the Arkansas terroristic-threatening statute "defines separate elements, is divisible, and requires the modified categorical approach." Pet. App. 4a (citing Boaz, 558 F.3d at 807). That decision would bind the panel unless it had been abrogated by this Court's subsequent decision in Mathis. The court of appeals stated that "'the Supreme Court's decision in Mathis . . . did not address the ACCA's [elements] clause,' and, therefore, does not require reconsideration of the otherwise controlling Boaz decision." Pet. App. 4a (quoting United States v. Lamb, 847 F.3d 928, 930 (2017), cert. denied, 138 S. Ct. 1438 (2018) (No. 17-5152)); see Martin v. United States, 904 F.3d 594, 597 (8th Cir. 2018) (discussing the decision here). Although that statement indicates the panel's view that Mathis did not abrogate Boaz's holding, it cannot be taken as an indication that the Eighth Circuit does not apply Mathis in elements-clause cases. The Eighth Circuit has applied Mathis in other elements-clause cases, see, e.g., United States v. McFee, 842 F.3d 572, 575 (2016), demonstrating that it correctly recognizes Mathis's applicability in that context.

In any event, the court of appeals in this case undertook the Mathis analysis in its alternative holding, see Pet. App. 4a-6a, so any possible mistake in the court's view of Mathis's

applicability to the elements clause is immaterial to the outcome here. Petitioner's first question presented thus would not independently warrant this Court's review.

2. Petitioner separately contends (Pet. 8-13) that the Court should grant the petition to resolve whether an Arkansas conviction for terroristic threatening in the first degree is divisible under Mathis. He does not identify any circuit conflict on that issue, and 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."). In accord with that practice, 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, No. 17-5152 (cert. denied April 2, 2018); Gundy v. United States, No. 16-8617 (cert. denied Oct. 2, 2017); Rice v. United States, No. 15-9255 (cert. denied Oct. 3, 2016). In this particular case, however, the court of appeals -- although correctly describing the proper analysis under Mathis, see Pet. App. 4a -- applied that analysis in a manner that is inconsistent with this Court's decision. The appropriate course would therefore be to grant the petition, vacate the judgment below, and remand for a fresh application of Mathis.

Mathis explains that when the statutory text and case law do not "provide clear answers" about divisibility, a sentencing court may "'peek at the record documents'" to find those answers. 136 S. Ct. at 2256 (brackets and citation omitted). But such a "peek" must be for "the sole and limited purpose of determining whether the listed items are elements of the offense." Id. at 2256-2257 (brackets and citation omitted). "Only if the answer is yes can the court make further use of the materials" in applying the modified categorical approach to determine which divisible offense the defendant was convicted of violating. Id. at 2257.

Here, the court of appeals' analysis appears to have conflated those distinct purposes and steps. Having adopted the view that state law "fail[ed] to provide 'clear answers' on whether the categorical or modified categorical approach applies," the court recognized that it could peek at "'the record of [the] prior conviction itself.'" Pet. App. 6a (citation omitted). But it then suggested that the inquiries "under either the modified categorical approach * * * or the Mathis analysis" are identical, and appeared to consult the record of petitioner's prior conviction to determine the offense-specific conduct at issue in his case without first examining that record for the threshold purpose of determining whether the statute is divisible as a general matter. Ibid. After quoting the charging document from petitioner's prior conviction stating that petitioner "'threatened to kill his girlfriend while holding a knife to her throat,'" the court

observed that the sentencing order "confirms that [petitioner] was convicted of threatening his girlfriend" -- and thus concluded that petitioner's prior conviction "is a violent felony under" the ACCA. Ibid. (citation omitted). That conclusion presumes that the modified categorical approach applies, but does not explicitly address that antecedent question.

At the same time, 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. That final step of the Mathis inquiry is necessary only when other sources of state law are unilluminating. See 136 S. Ct. at 2256. A remand would permit the court of appeals to 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.

For example, in the context of a double-jeopardy challenge, 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). In addition, a conviction under the statute is expressly ineligible for expungement in Arkansas because it is deemed a "violent or sexual" felony offense under state law. State v. Brown, 2010 Ark. 483, at *4. Given the court of appeals' primacy on issues of state law, see Newdow, 542 U.S. at 16, that court should consider these and other "authoritative sources of state law," Mathis, 136 S. Ct. at 2256, in the first instance on remand.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further proceedings in light of the position expressed in this brief.

Respectfully submitted.

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