NO. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

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William Leroy Sanders - Petitioner,

vs.

United States of America - Respondent.

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

(1) Whether Mr. Sanders was improperly denied 28 U.S.C. § 2255 relief from his fifteen-year Armed Career Criminal Sentence, pursuant to *United States v. Johnson v. United States*, 135 S. Ct. 2551 (2015), where a properly conducted *Mathis v. United States*, 136 S. Ct. 2243 (2016), analysis demonstrates that his predicate conviction for Iowa "interference with official acts" was pursuant to an indivisible statute that is categorically overbroad as an 18 U.S.C. § 924(e)(2)(B)(i) "violent felony."

## PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

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The petitioner, William Leroy Sanders, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 19-3009, entered on October 5, 2020. Mr. Sanders' petition for panel and en banc rehearing was denied on December 14, 2020.

## OPINION BELOW

On October 5, 2020, a panel of the Eighth Circuit Court of Appeals summarily affirmed the district court's denial of Mr. Sanders's 28 U.S.C. § 2255 petition, which challenged his status as an Armed Career Criminal, pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015).

## JURISDICTION

The United States District Court for the Southern District of Iowa had original jurisdiction over Mr. Sanders's case under 18 U.S.C. § 3231. Within one year of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Sanders challenged his status as an Armed Career Criminal by filing a 28 U.S.C. § 2255 petition. The district court denied § 2255 relief on September 3, 2019, but issued a certificate of appealability. (App. A). The Eighth Circuit affirmed the district court's denial of § 2255 relief on October 5, 2020 (App. B), and denied Mr. Sanders's petition for panel or en banc rehearing on December 14, 2020. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2255:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

18 U.S.C. § 924 (2011). Penalties. Subsection (e) . . .

> (2) As used in this subsection . . .
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another. . . .

## STATEMENT OF THE CASE

In 2014, Mr. Sanders pled guilty to being a felon in possession of ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (Crim. Doc. 14).[1] His plea was pursuant to a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement with the government, wherein he agreed the appropriate sentence in the case was 180 months' imprisonment, pursuant to 18 U.S.C. § 924(e), the Armed Career Criminal Act ("ACCA"). (Crim. Doc. 45, ¶ 13).

Mr. Sanders's ACCA status was based on two prior convictions for "serious drug offenses," and one prior conviction for a "violent felony," namely, a 2002 Iowa conviction for interference with official acts (PSR ¶ 51). (PSR ¶ 23). On September 23, 2014, the district court accepted the parties' Rule 11(c)(1)(C) plea agreement and, without any discussion of the ACCA, sentenced Mr. Sanders to 180 months incarceration and three years of supervised release. (Crim. Doc. 62, pp. 2–3). Mr. Sanders did not appeal.

In 2015, the United States Supreme Court held that "imposing an increased sentence under the residual clause [18 U.S.C. § 924(e)(2)(B)(ii)] of the Armed Career Criminal Act violates the Constitution's guarantee of due process." *Johnson v.*

[1] In this brief, references to documents from Mr. Sanders's criminal court case, S.D. Iowa Case No. 4:14-cr-7, will be referred to as "Crim. Doc.," followed by the district court's docket entry number. References to the § 2255 proceedings underlying the present appeal, S.D. Iowa Case No. 4:16-cv-135, will be referred to as "Civ. Doc.," followed by the district court's docket entry number. Additionally, "PSR" refers to the presentence report (Crim. Doc. 59), and "Sent. Tr." refers to the transcript of Mr. Sanders's sentencing hearing (Crim. Doc. 68).

*United States*, 135 S. Ct. 2551, 2563 (2015); *see also Welch v. United States*, 136 S. Ct. 1257 (2016) (holding *Johnson* is retroactive on collateral review). Mr. Sanders thereafter timely filed a 28 U.S.C. § 2255 petition, arguing he was improperly sentenced as an Armed Career Criminal because his 2002 Iowa interference with official acts conviction only qualified as a "violent felony" under the ACCA's now-void for vagueness residual clause. (Civ. Doc. 3). On September 3, 2019, the district court entered an Order concluding that Mr. Sanders "fail[ed] to show the Court relied on the residual clause in deciding the 2002 conviction was a predicate ACCA offense." (App. A, p. 43). The district court granted a certificate of appealability, however, finding that Mr. Sanders had made "[a] substantial showing . . . 'that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" (App. A, p. 44) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (some internal quotation marks omitted)).

On September 16, 2019, Mr. Sanders filed a timely notice of appeal from the district court's order denying relief. (Civ. Doc. 23). The Eighth Circuit Court of Appeals affirmed without analysis on October 5, 2020, summarily concluding that Mr. Sanders "did not meet his burden to show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement. App. B. The Eighth Circuit denied Mr. Sanders's petition for panel and en banc rehearing on December 14, 2020.

## REASONS FOR GRANTING THE WRIT

In the instant case, the district court rejected the petitioner's claim that he is entitled to relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), finding that the sentencing judge did not necessarily rely on the ACCA's residual clause to subject him to enhanced penalties. When a proper *Mathis v. United States,* 136 S. Ct. 2243 (2016), analysis is conducted, however, it is obvious that Mr. Sanders's prior Iowa conviction for interfering with official acts is pursuant to an indivisible statute that is categorically overbroad as an ACCA "violent felony." Since Mr. Sanders is not, in fact an armed career criminal, a writ of certiorari is necessary to prevent him from being forced to serve a sentence that is five years longer than the statutory maximum applicable to his offense.

### I. ALTHOUGH PETITIONER SHOULD NOT BE REQUIRED TO "AFFIRMATIVELY PROVE" THAT THE SENTENCING COURT RELIED ON THE RESIDUAL CLAUSE, HE NONETHELESS SATISFIED THAT BURDEN, AND IS ENTITLED TO *JOHNSON* RELIEF.

In denying Mr. Sanders's claim for relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), the district court relied on the Eighth Circuit's decision in *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018). (App. A, p. 36). It determined that under *Walker*, Mr. Sanders failed to establish that the sentencing court necessarily relied on the ACCA's residual clause to determine that his 2002 Iowa conviction for interference with official acts qualified as a predicate violent felony. (*Id.*). The Eighth Circuit affirmed the district court's decision without analysis. (App. B).

In *Walker*, as in the instant case, the record was silent as to whether the district court relied on the ACCA's residual, enumerated, or elements clause to determine that prior convictions constituted qualifying predicate "violent felonies" under the ACCA. *Walker*, 900 F.3d at 1014. The Eighth Circuit held that a § 2255 claimant "bears the burden of showing that he is entitled to relief under § 2255."[2] To satisfy this burden, the claimant cannot simply point to the "mere possibility that the sentencing court relied on the residual clause." *Id.* Instead, he must "show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement." *Id.*

### A. The Eighth Circuit's *Walker* approach conflicts with other Circuits, and should be rejected.

The *Walker* Court recognized that "[o]ur sister circuits disagree on how to analyze this issue." *Walker*, 900 F.3d at 1014. In particular, the Third, Fourth, and Ninth Circuits hold that a claim "'relies on' *Johnson*'s new rule and satisfies § 2255 if the sentencing court 'may have' relied on the residual clause." *Id.*; *see United States v. Peppers*, 899 F.3d 211, 221 (3d Cir. 2018) ("In our view, § 2255(h) only requires a petitioner to show that his sentence may be unconstitutional in light of a new rule of constitutional law made retroactive by the Supreme Court. Peppers met that standard by demonstrating that he may have been sentenced under the residual clause of the ACCA.") *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir.

[2] *Walker* arose in the context of a successive § 2255 petition. The Eighth Circuit, however, applies the same standard at the merits stage for an initial § 2255 petition. *See Golinveaux v. United States*, 915 F.3d 564, 567 (8th Cir. 2019).

2017) (drawing an analogy to the rule in *Stromberg v. California*, 283 U.S. 359 (1931), that a conviction must be set aside if a jury verdict may have rested on an unconstitutional basis); *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) ("We will not penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony.").

The First, Fifth, Sixth, Tenth, and Eleventh Circuits, by contrast, "require a movant to show that it is more likely than not that the residual clause provided the basis for an ACCA sentence." *Walker*, 900 F.3d at 1014 ("These courts emphasize that a § 2255 movant bears the burden of showing that he is entitled to relief and stress the importance of the finality of convictions[.]"); *see United States v. Clay*, 921 F.3d 550, 558–59 (5th Cir. 2019); *Dimott v. United States*, 881 F.3d 232, 243 (1st Cir. 2018); *United States v. Potter*, 887 F.3d 785, 788 (6th Cir. 2018); *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018); *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017).

The *Walker* court opted to adopt the majority approach, which denies a § 2255 petitioner relief unless he first "show[s] by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement." *Walker*, 900 F.3d at 1015. According to the Eighth Circuit, the "mere possibility that the sentencing court relied on the residual clause is insufficient to satisfy this burden[.]" *Id*.

Mr. Sanders submits that the majority approach adopted by the Eighth

Circuit in *Walker* is flatly incorrect, and that the approach of the Third, Fourth, and Ninth Circuits is the only one that adequately protects a § 2255 petitioner's entitlement to relief under this Court's decision in *Johnson*. A petitioner seeking habeas relief should not be required to make an affirmative showing that the district court more likely than not relied on the residual clause before being granted *Johnson* relief. Indeed, such a showing will often be impossible where, as here, the record is silent on the issue. Rather, if the evidence shows that the district court *may have* relied on the residual clause, fundamental fairness precludes penalizing a § 2255 petitioner for the sentencing court's "discretionary choice not to specify under which clause of § 924(e)(2)(B) an offense qualified as a violent felony." *Winston*, 850 F.3d at 682; *see also United States v. Taylor*, 873 F.3d 476, 481–82 (5th Cir. 2017) (declining to adopt a specific position, but noting that "this court will not hold a defendant responsible for what may or may not have crossed a judge's mind during sentencing"). It also underlies the Ninth Circuit's decision in *Geozos*, that a claim "'relies on' the constitutional rule announced in *Johnson*" if the district court "may have" relied on the residual clause in its ACCA determination.

### B. A proper *Mathis* analysis establishes that Mr. Sanders only qualified for ACCA penalties because of the residual clause.

The district court acknowledged that the sentencing record is silent as to which clause of the ACCA it relied upon, as there was "no reason for the Court to specify whether Sanders's conviction for Interference With Official Acts was a predicate offense under the enumerated, elements, or residual clause of the

ACCA," given the parties' Rule 11(c)(1)(C) plea agreement. (App. A, p. 37). To assess whether the residual clause led it to find that Sanders's prior conviction was a qualifying "violent felony," the district court thus turned to an examination of the case law and the sentencing record. After conducting an improper analysis, the district court reached an erroneous conclusion that the statute under which Mr. Sanders was convicted, Iowa Code § 719.1(1), was divisible, and that his conviction of the Class D version of the offense required proof of an alternative *element* involving violent force, namely that he "inflict[ed] or attempt[ed] to inflict serious injury," as opposed to merely "display[ing] a dangerous weapon" *or* "[being] armed with a firearm." (App. A, pp. 40–44).

**1. *Iowa Code § 719.1(1) (2001) is indivisible.***

At the time of Sanders's 2002 conviction, Iowa's interference with official acts statute provided in relevant part:

> A person who knowingly resists or obstructs anyone known by the person to be a peace officer . . . in the performance of any act which is within the scope of the lawful duty or authority of that officer . . . commits a simple misdemeanor. In addition to any other penalties, the punishment imposed for a violation of this subsection shall include assessment of a fine of not less than two hundred fifty dollars. However, if a person commits an interference with official acts, as defined in this subsection, and in so doing inflicts bodily injury other than serious injury, that person commits an aggravated misdemeanor. If a person commits an interference with official acts, as defined in this subsection, and in so doing inflicts or attempts to inflict serious injury, or displays a dangerous weapon, as defined in section 702.7, or is armed with a firearm, that person commits a class "D" felony.

Iowa Code § 719.1(1) (2001).

To determine whether a prior conviction qualifies as a "violent felony" under the ACCA, sentencing courts apply the categorical approach. *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). This approach requires courts to "look only to the statutory definitions – *i.e.*, the elements – of a defendant's [offense] and *not* to the particular facts underlying [the offense]" in determining whether the offense qualifies as a "violent felony." *Descamps*, 133 S. Ct. at 2283 (quotation marks and citation omitted); *United States v. Swopes*, 886 F.3d 668, 670 (8th Cir. 2018) (en banc).

The United States Supreme Court has ruled that in a narrow range of cases involving divisible statutes, sentencing courts may need to use a "modified categorical approach" to determine the specific elements underlying a defendant's prior conviction. *Descamps,* 133 S. Ct. at 2283. A divisible statute is defined as a statute that "sets out one or more elements of the offense in the alternative." *Id.* at 2281–82. But not all alternatively worded statutes are divisible. *Mathis v. United States,* 136 S. Ct. 2243 (2016). "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. If they are elements, the court may employ the modified categorical approach and look beyond the statutory elements to a restricted set of materials, such as plea agreements or transcripts of plea colloquies, to determine which element formed the basis for defendant's conviction. *Id.* If the alternatives are means, however, "the court has no call to decide which of the

statutory alternatives was at issue in the earlier prosecution." *Id.* "Given [the categorical approach's] indifference to how a defendant actually committed a prior offense," the court may ask only whether the elements of the state crime necessarily require the use, attempted use, or threatened use of physical force against the person of another. *Id.* at 2256.

Alternatives are "means" if they do not need to be found unanimously by a jury. *United States v. Boman,* 873 F.3d 1035, 1040–41 (8th Cir. 2017). To determine whether alternatives in a statute are elements or means, courts may consider, among other things, the plain language of the statute, whether the alternatives carry different punishments, applicable jury instructions, and relevant state case law. *See Mathis*, 136 S. Ct. at 2256. If state law does not provide "clear answers," the court can "peek" at the records underlying the conviction itself, "but only for the 'sole and limited purpose of determining whether the listed items are elements of the offense.'" *United States v. Naylor*, 887 F.3d 397, 401 (8th Cir. 2018) (quoting *Mathis*, 136 S. Ct. at 2256–57). "If the record materials do not speak plainly on the means-elements issue, we will be unable to meet the 'demand for certainty' required of any determination that a conviction qualifies as a violent felony under the ACCA." *Id.* (citing *Mathis*, 136 S. Ct. at 2257). Indeed, an "inconclusive inquiry" as to whether a categorically overbroad statute is divisible "means that [a defendant's] prior conviction do[es] not qualify, and the [ACCA] sentencing enhancement does not apply." *United States v. Sykes*, 864 F.3d 842, 844

(8th Cir. 2017) (quoting *Mathis*, 136 S. Ct. at 2257).

In assessing whether § 719.1(1) (2001) is divisible, the district court started its analysis by taking a "peek" at the records underlying Sanders's conviction. *See Naylor*, 887 F.3d at 401 (quoting *Mathis*, 136 S. Ct. at 2256–57). In so doing, it correctly determined that "Sanders was charged with 'Interference With Official Acts in violation of Iowa Code section 719.1(1), a Class D felony' without reference to any subsection of the felony clause." (A, p. 42). It then observed that the Iowa Court of Appeals "refers to the subsections of [the] Iowa Code § 719.1(1) felony clause as elements." (App. A, p. 42). With no further analysis, it summarily concluded: "The Court has found no definitive Iowa case stating whether the subsections of the statute are means or elements. Because Iowa courts have referred to the subsections of the offense as elements, however, the court finds the statute is divisible." (App. A, p. 43).

The district court's analysis is faulty, and its conclusion that the Class D felony alternatives in § 719.1(1) are elements rather than means is incorrect. The court's divisibility finding turns *entirely* on three unpublished Court of Appeals decisions.[3] *See* Iowa App. R. 6.904(2)(c) ("Unpublished opinions or decisions shall

[3] Iowa Pattern Jury Instruction 1910.1, cited by the district court, is not particularly relevant to the analysis because, while it does list several alternatives in brackets, it does not specify that the jury must be instructed on only *one* of them, rather than several of them. And, although not discussed by the district court, it should be noted that the fact that § 719.1(1) lists alternatives using the disjunctive "or" also does not support a finding of divisibility. Indeed, that fact is "not determinative one way or the other"; rather, it "merely signals that that we must

not constitute controlling legal authority."). In *State v. Hall*, No. 15-1467, 2016 WL 4543891 *1 (Iowa Ct. App. Aug. 31, 2016), the defendant was specifically accused of violating the "dangerous weapon" alternative of the statute and the court analyzed whether the record provided an adequate factual basis for that "element." Likewise, in *State v. Campbell-Scott*, No. 16-0472, 2017 WL 512590 *2 (Iowa Ct. App. Feb. 8, 2017), the defendant was specifically accused of violating the "armed with a firearm" alternative of the statute, and the court referred to evidence in relation to that "element." In *State v. Chestnut*, No. 12-0040, 2012 WL 4900477 *1 (Iowa Ct. App. Oct. 17, 2012), the Court of Appeals merely stated in its factual recitation that the defendant had been accused of the "dangerous weapon" alternative; there is no further discussion of the charge and no use of the word "element" in relation to it. Significantly, the Iowa Court of Appeals did not consider in *any* of these cases the substantive question at issue in this case, probably because the question of means versus alternatives was not even remotely relevant to the appellate issues being considered. As such, these inapposite decisions should not even be deemed persuasive authority. Given the importance of the divisibility question to the ACCA analysis, it is unjust to interpret throw-away word choices in unpublished opinions as having a determinative meaning that the Iowa Court of Appeals clearly did not intend.

The fact that the defendants in each of the three Court of Appeals cases were

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determine whether the alternatives are elements or means." *Naylor*, 887 F.3d at 401 n.4 (quoting *United States v. McMillan*, 863 F.3d 1053, 1057 (8th Cir. 2017)).

charged with one specific alternative is also not determinative, or even particularly helpful to analyzing whether § 719.1(1) is divisible. When a defendant is charged with a Class D felony under the statute, a third element is required for conviction. But the alternatives listed in § 719.1(1) demonstrate that prosecutors can charge that third element in a variety of ways. The mere fact that prosecutors sometimes, or even often, opt to list only a single *means* of committing the third element, does not imply that doing so is *required*. Nor does it imply that an offense *cannot* be charged by listing multiple alternative means of violating the Class D element, or no alternative means at all. In fact, the amended charge that Mr. Sanders pled guilty to in his 2002 case provides a clear and indisputable example where a prosecutor did *not* charge even one specific alternative in the charging document. Thus, Mr. Sanders's own case demonstrates that no "legal imagination" is required to believe that Iowa courts will apply § 719.1(1) in a way that permits conviction for the Class D version of the offense without identification of any specific *means* of violation. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

The fact that the amended trial information charged Mr. Sanders broadly with "Interference With Official Acts, 719.1(1), a Class D Felony," supports a conclusion that the statute is internally indivisible.[4] Had Mr. Sanders proceeded to

[4] That the penalty for all three Class D felony alternatives is the same also weighs in favor of a conclusion that that the statute's alternatives are means, rather than elements. *See Mathis*, 136 S. Ct. at 2256 ("If statutory alternatives carry different punishments, then under *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] they must be elements.").

trial on the amended charge, the government would have been free to premise its theory of guilt on any, or even *all*, of the three alternative bases for the Class D violation. The Iowa Supreme Court recognized in *State v. Smithson*, that, "[i]f a trial information simply charges a violation of a statute in general terms without specifying the manner in which the offense was committed, the State may prevail by showing that the evidence is sufficient under *any available theory*." *State v. Smithson*, 594 N.W.2d 1, 3 (Iowa 1999) (emphasis added). By contrast, if a trial information lists only one specific alternative, the state must prove that the defendant committed the offense "in the manner charged." *Id.* Iowa case law also demonstrates that, had the state proffered at trial multiple alternative means by which the jury could find that Mr. Sanders committed the Class D version of the offense, the jury would *not* have had to unanimously agree *which* of those alternatives Mr. Sanders violated. This is because the Iowa Supreme Court has expressly recognized that "[i]n this jurisdiction prosecutors have long been allowed to allege facts in the alternative to meet the contingencies of proof." *State v. Duncan*, 312 N.W.2d 519, 523 (Iowa 1981).

In *Duncan*, the state introduced "substantial evidence" of two different theories of second degree burglary: first, that Duncan had burgled an occupied structure (a boat), and second, that he had burgled the marina where the boat was docked, "an area enclosed in a matter as to provide a place for the keeping of valuable property secure from theft." *Id.* The trial court listed both theories as

alternative methods of satisfying a single element required for conviction. *Id.* (instructing the jury that the first element required proof that "the defendant either broke or entered . . . a boat owned by one Marcus Low *or* the premises known as the Lindsey Yacht Club") (emphasis added). Duncan objected that it was improper for the state to "charge one incident, alleging the marina and the boat in a single count." *Id.* The Iowa Supreme Court disagreed, analyzing Duncan's claim as follows:

> The first question is whether the State could properly charge one incident, alleging the marina and the boat in a single count. In this jurisdiction prosecutors have long been allowed to allege facts in the alternative to meet the contingencies of proof. *State v. Aldrich*, 231 N.W.2d 890, 896 (Iowa 1975); *Powers v. McCullough*, 258 Iowa 738, 747–48, 140 N.W.2d 378, 385 (1966); *State v. Hochmuth*, 256 Iowa 442, 445–47, 127 N.W.2d 658, 659 (1964); *State v. Watrous*, 13 Iowa 489, 493-95 (1862); *State v. Cooster*, 10 Iowa 453, 454–56 (1860); *see also Smith v. State*, 241 Ind. 1, 4–7, 168 N.E.2d 199, 201–02 (1960) (acts need not be simultaneous); *Brogan v. State*, 199 Ind. 203, 205, 156 N.E. 515, 517 (1927) (four railroad cars involved–no duplicity); 42 C.J.S. Indictments and Informations s 166, at pp. 1121–22 (1944) ("(W)here a statute makes either of two or more distinct acts connected with the same general offense and subject to the same measure and kind of punishment indictable separately and as distinct crimes when each shall have been committed by different persons and at different times, they may, when committed by the same person and at the same time, be coupled in one count as together constituting but one offense; and this is true, although a disjunctive particle is not employed in the statute, but a conjunction is used which is disjunctive in sense"). Rule 6(1) of the Rules of Criminal Procedure, which requires separate counts for "more than one public offense" arising out of the same transaction or occurrence, does not nullify the principle. Citation of rule 6(1) begs the question; the very question is whether the one occasion involving the marina and the boat may be considered a single burglary or must be considered separate burglaries. The State does not charge that defendant, while in the marina or boat, also stole or robbed or raped. We hold that the occasion involving burglary of the marina and the boat could be charged as one

> burglary consisting of the marina and boat conjunctively or alternatively and could be correspondingly submitted to the jury.
>
> The second question is whether the jury had to be unanimous on guilt with respect to the boat or with respect to the marina, or whether the jury could find defendant guilty of burglary by a combination of votes respecting the marina or the boat. A unanimous verdict is of course required in this kind of case. Iowa R. Crim. P. 21(5). At this point another principle intervenes. "It is not necessary that a jury, in order to find a verdict, should concur in a single view of the transaction disclosed by the evidence. If the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon another." *People v. Sullivan*, 173 N.Y. 122, 127, 65 N.E. 989, 989 (1903). Stated differently, "(I)f substantial evidence is presented to support each alternative method of committing a single crime, and the alternatives are not repugnant to each other, then unanimity of the jury as to the mode of commission of the crime is not required." *State v. Arndt*, 12 Wash. App. 248, 252, 529 P.2d 887, 889 (1974). See also 75 Am.Jur.2d Trial s 884, at 760 (1974) ("A conviction will not be set aside because of an instruction which permits a conviction notwithstanding a difference between jurors as to which of two contradictory facts, each consistent with guilt, is established by the evidence.").

*Id*.

*Duncan* is, of course, ultimately consistent with *Mathis*'s holding that Iowa's burglary statute does not qualify as an ACCA predicate because it contains a locational element that can be satisfied by alternative means that are broader than what is required for generic burglary. *See Mathis*, 136 S. Ct. at 2257. But Iowa courts apply the same principles regarding jury unanimity even when a statute lists alternatives in separate statutory subsections. For instance, in *State v. Conger*, the jury was instructed on both theft by taking, in violation of Iowa Code § 714.1(1) (1987), and theft by exercising control over stolen property, in violation of Iowa

Code § 714.1(4) (1987). *State v. Conger*, 434 N.W. 2d 406, 409 (Iowa Ct. App. 1988). Recognizing that Iowa Code § 714.1 actually contains *eight* different subsections defining theft, the Court of Appeals nonetheless found that "[t]hese subparagraphs clearly define alternative conduct that in a single occurrence can result in only one conviction of crime." *Id*. It continued:

> The second step of the inquiry is to determine if the alternative modes are consistent with and not repugnant to each other. This step involves application of the constitutional test to ensure that it is not a denial of due process for the legislature to equate the concepts as alternate ways of establishing the actus reus of a single crime.
>
> The two alternatives used in this case are consistent in that they merely describe different situations that are considered theft. Subparagraph (1) is relevant if the person took the property with the intent to deprive the owner thereof. Subparagraph (4) involves the person who exercises control over the stolen property, that is one who has the property at some point beyond the initial taking. A person cannot commit theft by taking without also exercising control over the property, so the two are not inconsistent. The legislature has determined that both situations are worthy of criminal sanctions. These two alternatives are not inconsistent or repugnant in that they represent different points of time within one crime.
>
> Finally, substantial evidence was presented to support each alternative. . . . A reasonable juror could conclude either the defendant took the vehicle himself or exercised control over it, knowing it was stolen. Therefore, we find the jury was properly instructed on the alternative methods of committing theft.

*Id*. at 409–10; *see also State v. Silva*, 918 N.W.2d 503 (Table), 2018 WL 1858294, at *3–4 (Iowa Ct. App. Apr. 18, 2018) (holding juror unanimity not required where defendant was alleged to have committed third degree sexual abuse in two alternative ways: by performing a sex act by force or against the victim's will, in

violation of Iowa Code § 709.4(1)(a), *or* by performing a sex act while the victim was mentally or physically incapacitated or physically helpless, in violation of § 709.4(1)(d)).

Iowa Code § 719.1(1) (2001) requires proof of only two elements for a conviction for simple misdemeanor interference with official acts: (1) the defendant knew the officers were peace officers performing official duties; and (2) he knowingly resisted or obstructed the officers in performing those official duties. Iowa Crim. Jury Inst. 1910.1. To qualify as a Class D felony, one additional element must be proved: that the defendant *either* inflicted or attempted to inflict serious injury, displayed a dangerous weapon, or was armed with a firearm. Iowa Code § 719.1(1) (2001). The statute thus provides "alternative means of committing a single offense," i.e., Class D felony interference with official acts. *See State v. Tovar*, 924 N.W.2d 877 (Table), 2018 WL 6132269, at *6 (Iowa Ct. App. Nov. 21, 2018) (finding that no jury unanimity was required because each of the alternative theories submitted "seek to prohibit sexual conduct when one party is unable to consent to the conduct"). Here, the government could not have obtained *three* Class D convictions against Mr. Sanders based on his conduct in 2002.[5] And, "one could

[5] The statute's language indicates that the state *could* charge multiple counts of interference if there are multiple objects of the offense, i.e., when a defendant interferes with the official acts of multiple officers, or potentially if law enforcement engages in multiple discrete acts and a defendant takes independent actions to interfere with each. Iowa Code § 719.1(1) (2001) ("A person who knowingly resists . . . *anyone* . . . in the performance of *any* act . . . ."); *see, e.g.*, *State v. Velez*, 829 N.W.2d 572, 581–85 (Iowa 2013) (exploring when a defendant's conduct can and cannot support multiple charges); *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003)

imagine a scenario where a person" interferes with official acts while armed with a firearm, which he displays to the officers, and then actually uses to inflict or to attempt to inflict serious injury. *See id.* Put another way, the Class D felony alternatives in § 719.1(1) (2001) "are not always mutually exclusive of each other," and thus are "consistent and not repugnant to each other" because all three alternatives seek to prohibit interfering with official acts under circumstances that create a heightened risk of violence or serious injury. *Id.*

Ultimately, the district court appears not to have appreciated the important distinction between its authority to "peek" at underlying materials and its authority to review many of those same materials for purposes of the modified categorical approach. Case law makes clear that the former "peek" at the records is *only* for purposes of determining whether the statute is divisible in the first instance. *Naylor*, 887 F.3d at 401 (8th Cir. 2018) (quoting *Mathis*, 136 S. Ct. at 2256–57). The latter look at records, by contrast, only comes into play *after* a statute has been deemed divisible, and even then, only for purposes of determining *which* alternative elements applied to the defendant's conviction. *Descamps,* 133 S. Ct. at 2283;

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(recounting that the defendant "fought [several officers] before being restrained" and was charged with "three counts of interference with official acts"). But the statutory language also indicates that a defendant's resistance to *an* act by law enforcement will itself ordinarily constitute a single course of conduct, such that the state could not separately charge one count of interference with infliction of serious injury, one count of interference with display of dangerous weapon, and one count of interference while armed with a firearm, based on a defendant's course of resistance to an individual act or officer. Iowa Code § 719.1(1) (referring not to individual acts by a defendant, but to his "resist[ance]" or "obstruct[ion]" generally); *see Velez*, 829 N.W.2d at 581–85.

*Mathis*, 136 S. Ct. at 2256. Here, the district court conflated the analyses, and in both components, improperly focused and relied on what it believed to be Mr. Sanders's *actual* conduct. (App. A, p. 43) ("Sanders's *conduct* fits within the force clause of the ACCA because *it* had as an element the use, attempted use, or threatened use of physical force against the person of another." (emphasis added)).

Mr. Sanders respectfully submits that there is ample support in the case law and the record for a conclusion that § 719.1(1) (2001) is indivisible. If not, it can at best be said that this case is the unusual "exception" recognized by *Mathis* where neither the record materials nor the case law "speak plainly" as to whether the alternatives in the statute are means or elements. *Mathis*, 136 S. Ct. at 2257. Under these circumstances, the proper resolution was not to deem the statute divisible; it is to find that Mr. Sanders's 2002 conviction pursuant to § 719.1(1) does not "satisfy '*Taylor*'s demand for certainty'" and the "inconclusive inquiry" necessarily "means that [his] prior conviction do[es] not qualify, and the [ACCA] sentencing enhancement does not apply." *Sykes*, 864 F.3d at 844 (8th Cir. 2017) (quoting *Mathis*, 136 S. Ct. at 2257).

**2. *Iowa Code § 719.1(1) (2001) is categorically overbroad.***

The Iowa simple misdemeanor offense of interference with official acts requires proof of only two elements for conviction: (1) the defendant knew the officers were peace officers performing official duties; and (2) he knowingly resisted or obstructed the officers in performing those official duties. *See* Iowa Crim. Jury

Ins. 1910.1. Neither of these elements necessarily involves the use, attempted use, or threatened use of force against the person of another, as required by the force clause in § 924(e)(2)(B)(i). Iowa's Pattern Jury Instructions provide that "'[r]esist' means to oppose intentionally, interfere, or withstand," and "'[o]bstruct' means to hinder intentionally, retard or delay." Iowa Crim. Jury Inst. 1910.2. Thus, the act of interference can be accomplished without any force at all, for example by fleeing, barring a door, or shining a flashlight in an officer's eyes. *See, e.g.*, *State v. Brecunier*, 564 N.W.2d 365, 369 (Iowa 1997). Use of force against property, rather than "against the person of another" as required by § 924(e)(2)(B)(i), would also qualify.

The alternative aggravating factors, as required by the class D felony version of the offense, also do not necessarily involve the use, attempted use, or threatened use of physical force against the person of another. Importantly, however, because the Class D felony clause is indivisible, the statute must be deemed categorically overbroad if *any* of the three alternative means of committing the offense do not require the requisite level of force against the person of another. *See Mathis*, 136 S. Ct. at 2251.

The least culpable means of committing the Class D felony form of the offense is to do so "while armed with a firearm." If the statute is indivisible, then, the entirety of it is categorically overbroad because interfering with official acts while merely being armed with a firearm does not implicate a use of force in any way. "To

be armed means that the defendant had a firearm on his person at the time of the crime. It is not necessary the firearm was used, displayed or represented as being in his possession." *See* Iowa Crim. Jury Inst. 200.23; *State v. Phanhsouvanh*, 494 N.W.2d 219, 222 (Iowa 1992) (recounting jury instruction given in case); *see also United States v. Bong*, 913 F.3d 1252, 1266 (10th Cir. 2019) (concluding that "nothing about [a] defendant's mere possession of a firearm (or another deadly weapon) would . . . necessarily cause[ a] crime to involve 'the use, attempted use, or threatened use of violent force against the person of another.'"); *United States v. Jones*, 2016 WL 4186929, at *4 (D. Minn. Aug. 8, 2016) (same).

Likewise, interfering with official acts while "display[ing] a dangerous weapon" does not categorically require the use, attempted use, or threatened use of force against the person of another. Under Iowa law, a dangerous weapon is "displayed" if it is held "in a manner so it could be seen by others." *Hall*, 2016 WL 4543891, at *2. There is no requirement that the weapon be used, wielded, or even displayed in a manner that another person could perceive as threatening. *See, e.g.*, *State v. Mott*, No. 00-575, 2001 WL 433395, at *2 (Iowa Ct. App. Apr. 27, 2001) (finding sufficient proof that the defendant "used or displayed" a dangerous weapon where he stabbed a calculator, walked around an office with the knife, and stabbed a desk that was not located near the victim); *United States v. Rico-Mendoza*, 548 F. App'x 210, 214 (5th Cir. 2013) (concluding that an Iowa statute that requires "use[] or display[ of] a dangerous weapon in connection with [an] assault" does not

implicate the force clause because it does "not require use of the weapon, threatened use of the weapon, touching another person with the weapon, or even that a victim be aware that the weapon is pointed or displayed toward them").

Finally, although admittedly subject to more dispute, Class D interference by "inflict[ing] or attempt[ing] to inflict serious injury" does not qualify as a violent felony under the ACCA's force clause. Iowa case law provides that "inflict" means to "deal out or mete out (something punishing or burdensome); impose . . . [the] term connotes an intentional directed act on the part of the actor." *State v. Dudley*, 810 N.W.2d 533 (Table), 2012 WL 170738, at *5 (Iowa Ct. App. Jan. 19, 2012). It is axiomatic that one can "inflict" a punishment or something burdensome on another without using "physical force." For instance, a parent can "inflict" a grounding on a child, or a regulatory agency can "inflict" a professional license suspension.

The fact that Iowa Code § 719.1(1) requires that the thing "inflicted" be serious injury, does not undermine the premise. "Serious injury" is defined under Iowa law as including not only physical injuries, but also "disabling mental illness." Iowa Code § 702.18. "A disabling mental illness means an illness or condition which cripples, incapacitates, weakens or destroys a person's normal and usual mental functions." *State v. Holmes*, 276 N.W.2d 823, 828 (Iowa 1979). Thus, the plain language of the statutory definitions would be satisfied if a defendant resists arrest and, in so doing, hurts an officer's K9, or smashes a physical object the officer holds dear, resulting in a weakening of the officer's normal and usual mental functions, or

some other disabling mental illness. And, because Iowa case law establishes that the definition of "serious injury" in § 702.18 is internally indivisible, it makes no difference whether a defendant's actions inflict a disabling mental illness rather than a bodily injury. *See, e.g.*, *State v. McKee*, 312 N.W.2d 907, 912 (Iowa 1981) ("Four possible kinds of serious injury are included in the section 702.18 definition[.]"); *Houk v. State*, 898 N.W.2d 202, 2017 WL 514402, at *3 (Iowa Ct. App. 2017) (approving a definition of serious injury that included "disabling mental illness . . . and/or bodily injury"); *State v. Carter*, 843 N.W.2d 477 (Table), 2014 WL 69755, at *2 (Iowa Ct. App. Apr. 8, 2014) ("Serious injury" is a term of art in Iowa criminal law. It is defined as *either* "disabling mental illness" or "bodily injury which does any of the following . . . ." (emphasis added)).

#### 3. *Even if Iowa Code § 719.1(1) (2001) is divisible, the district court misapplied the modified categorical approach.*

The district court relied on the modified categorical approach to conclude that Mr. Sanders "was convicted of interference with official acts by inflicting or attempting to inflict serious injury." (App. A, p. 43). The state court records, however, do not establish *which* Class D felony alternative of § 719.1(1) formed the basis of Mr. Sanders's conviction. They provide *only* that on June 10, 2010, the Trial Information was amended to charge Mr. Sanders generally with "Interference With Official Acts 719.1(1), a Class D felony," and he pled guilty to that charge. (Civ. Doc. 3-1, pp. 4–5; App. 38–39). The Plea and Judgment entries in the case contain nearly identical wording. (Civ. Doc. 3-1, pp. 6–7; App. 40–41).

Apparently recognizing that governing legal documents in the case demonstrate *only* that Mr. Sanders pled guilty to a general Class D felony version of § 719.1(1), the district court premised its modified categorical analysis on the caption of the offense and factual narrative contained in paragraph 51 of the PSR, which is attributed simply to unidentified "judicial records." PSR ¶ 51. It acknowledged that, under the modified categorical approach, it is ordinarily improper to rely on facts in the PSR unless such facts come from qualifying documents. (App. A, p. 39); *see Shepard v. United States*, 544 U.S. 13, 13–14 (2005) (holding that a determination of whether a defendant pled guilty to a qualifying ACCA predicate must be made by reference to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between the judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information"); *Taylor v. United States*, 495 U.S. 575, 602 (1990). It nonetheless concluded that since Sanders did not object to most of the factual narrative in PSR ¶ 51, did not object to the characterization of his 2002 offense in the PSR as "Interference With Official Acts Causing Serious Injury,"[6] and conceded ACCA status, he had "relieved the government of its

[6] The district court seems to have given significant weight to the fact that Mr. Sanders did not object to his 2002 conviction being captioned "Interference With Official Acts Causing Serious Injury," even though the PSR *also* states that he was convicted of "interference with official acts 719.1(1), a Class D felony." (App. A, pp. 7, 9); PSR ¶ 51. Even if it is permissible to consider information in the PSR, it should be observed that "Interference With Official Acts *Causing* Serious Injury" would constitute only a simple misdemeanor under § 719.1(1) (2001), because heightened penalties under the 2002 version of the statute require a defendant to

obligation to introduce at sentencing the documentary evidence *Taylor* or *Shepard* requires." (App. A, p. 39) (quoting *United States v. McCall*, 439 F.3d 967, 974 (8th Cir. 2006) (en banc), and *United States v. Garcia-Longoria*, 819 F.3d 1063, 1067 (8th Cir. 2016)). It thus determined that "the record [in the PSR] established the key facts underlying Sanders' currently contested predicate ACCA convictions," and that his "*conduct* fits within the force clause of the ACCA," such that the court had no reason to rely on the residual clause at sentencing. (App. A, pp. 39–40, 44) (emphasis added).

Even if the district court was correct that the statute is divisible, *and* that it could rely on the characterization of the statute of conviction and factual narrative in the PSR, its conclusion that Sanders pled guilty to a qualifying ACCA predicate offense is still erroneous. Indeed, the only "facts" deemed proven by the district court relevant to a § 719.1(1) conviction are that "when police tried to arrest [Sanders] for [an] assault, he confronted them with an axe and a Rottweiler and ordered the Rottweiler to attack the officers." (App. A, p. 40). Even if these facts are true, it still cannot be discerned whether Mr. Sanders actually pled guilty to the "inflicts or attempts to inflict serious injury" or the "displays a dangerous weapon"

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"inflict" injury in some form, not merely to "cause" it. *See, e.g.*, *State v. Dudley*, 810 N.W.2d 533 (Table), 2012 WL 170738, at *4 (Iowa Ct. App. Jan. 19, 2012) (observing that "inflict" as used in the interference statute requires "an intentional, directed action on the part of the actor," and that if the "legislature intended a *resulting* injury to be sufficient, it could have used the terms 'causes' or 'resulting in' as it has in other statutes."); *cf.* Iowa Code § 719.1(1) (2017) (providing that interference with official acts will be an aggravated misdemeanor if it "results in serious injury").

alternative of the offense, as both are implicated. The display a dangerous weapon alternative, in particular, for reasons discussed *supra*, clearly does not necessitate the use, attempted use, or threatened use of physical force against the person of another. Thus, since it still cannot be determined *which* alternative underlies Mr. Sanders's conviction, the "certainty" required by *Mathis* and *Taylor* is lacking.

The district court's reliance on information from the PSR was *not* an appropriate application of the modified categorical approach. The district court relies on *McCall* for the proposition that when a PSR describes offense conduct "without stating its sources," failure to object relieves the government of its burden to introduce *Shepard* documents at sentencing. (App. A, p. 39). Notably, however, the en banc *McCall* court actually *declined* to rely on the PSR facts, even though the defendant did not object to them, because they were attributed to "'police reports' and parole board 'records,' documents that may not be used to establish a violent felony under the modified categorical approach." *McCall*, 439 F.3d at 974.

As in *McCall*, the information in Mr. Sanders's PSR is not unsourced; rather, the source of the information is attributed to "judicial records." PSR ¶ 51. In that regard, the case is virtually identical to *United States v. Shockley*, wherein the Eighth Circuit found it improper to rely on unobjected-to facts in the PSR that were based on "court records." 816 F.3d 1058, 1063 (8th Cir. 2016) (citing *United States v. Ossana*, 638 F.3d 895, 903 (8th Cir. 2011), for the principle that courts cannot rely on presentence reports for the modified categorical approach, "even if the

defendant failed to object to the reports – where the source of the information might have been from a non-judicial source").

## CONCLUSION

For the foregoing reasons, Mr. Sanders respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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