NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2016

Jonathon Lamb - Petitioner,

vs.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Heather Quick
Assistant Federal Public Defender
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
TELEPHONE: 319-363-9540
FAX: 319-363-9542

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

(1) Whether the categorical approach, as detailed in *Mathis v. United States*, 136 S. Ct. 2243 (2016), requires courts to determine whether an alternatively phrased statute presents alternative means or alternative elements, and pursuant to this analysis, Michigan unarmed robbery is indivisible and overbroad because it does not require violent force, and therefore does not qualify as a predicate prior conviction under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1)?

(2) Whether pursuant to *Mathis*, Wisconsin burglary is broader than generic burglary and therefore does not qualify as a predicate prior conviction under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1)?

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The petitioner, Jonathon Lamb, 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. 15-2399, entered on February 3, 2017, after remand from the U.S. Supreme Court pursuant to *Mathis v. United States*, 136 S. Ct. 2243 (2016). Mr. Lamb's petition for rehearing en banc and petition for rehearing by the panel were denied on April 12, 2017.

OPINION BELOW

On February 3, 2017, after remand from the U.S. Supreme Court, a panel of the Court of Appeals entered its ruling affirming the judgment of the United States District Court for the Southern District of Iowa. The decision is published and available at 847 F.3d 928.

JURISDICTION

The Court of Appeals entered its judgment on February 3, 2017, and denied Mr. Lamb's petition for rehearing en banc and petition for rehearing by the panel on April 12, 2017. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1) (2012):

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under § 922(g).

18 U.S.C. § 924(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 an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; . . .

Wis. Stat. § 943.10(1m) (2005)

> Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place is guilty of a Class F felony:
>
> (a) Any building or dwelling; or
>
> (b) An enclosed railroad car; or
>
> (c) An enclosed portion of any ship or vessel; or
>
> (d) A locked enclosed cargo portion of a truck or trailer; or
>
> (e) A motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or
>
> (f) A room within any of the above.

Mich. Penal Code § 750.530 (2000)

> Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years.

STATEMENT OF THE CASE

Mr. Lamb is a prohibited person due to his felony convictions. On September 16, 2014, he was indicted in the Southern District of Iowa on one count of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1) and one count of possession of a stolen firearm in violation of 18 U.S.C. § 922(j). (DCD 12).[1] Pursuant to a plea agreement, Mr. Lamb pled guilty to possession of a firearm by a felon, and the stolen firearm count was dismissed. (DCD 25).

Sentencing was thereafter contested over the applicability of the Armed Career Criminal Act. At the district court, Mr. Lamb asserted that his two Michigan unarmed robbery convictions and his Wisconsin burglary conviction did not constitute predicate violent felonies. (PSR p. 7; PSR Addendum pp. 1-2; Sent. Tr. pp. 3-5). The trial court found that Mr. Lamb was an Armed Career Criminal under 18 § U.S.C. 924(e). (Sent. Tr. pp. 14-15). In finding that Mr. Lamb's Wisconsin burglary conviction was a predicate offense, the district court utilized the modified categorical approach to determine that Mr. Lamb had burglarized a building. (Sent. Tr. pp. 14-15). The district court sentenced Mr. Lamb to 180 months of imprisonment. (DCD 41).

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[1]In this petition, the following abbreviations will be used:
"DCD" - district court clerk's record, followed by docket entry and page number, where noted;
"PSR" - presentence report, followed by the page number of the originating document and paragraph number, where noted; and
"Sent. Tr." – Sentencing hearing transcript, followed by page number.

Mr. Lamb challenged his Armed Career Criminal status on appeal. Relying on *Descamps v. United States*, 133 S. Ct. 2276 (2013), Mr. Lamb argued that Wisconsin burglary was broader than generic burglary and could not qualify as a predicate offense. He also asserted his Michigan unarmed robbery convictions did not meet the "force clause" requirements. The Eighth Circuit Court of Appeals affirmed Mr. Lamb's sentence, holding that his Michigan unarmed robbery convictions and his Wisconsin burglary conviction qualified as predicate convictions. *United States v. Lamb*, 638 F. App'x 575 (8th Cir. 2016). In doing so, the Eighth Circuit relied on its reasoning from *United States v. Mathis*, 786 F.3d 1068 (8th Cir. 2015) and noted that the Wisconsin burglary statute at issue in Mr. Lamb's case was similar to the statute at issue in *Mathis*.

Mr. Lamb then filed a petition for rehearing, noting that the U.S. Supreme Court had granted a petition for certiorari in *Mathis*. The Eighth Circuit denied the petition. Shortly thereafter, this Court decided *Mathis*. Mr. Lamb filed a petition for writ of certiorari to the U.S. Supreme Court, arguing his case needed to be reevaluated in light of *Mathis*. The U.S. Supreme Court remanded his case back to the Eighth Circuit for reconsideration.

The Eighth Circuit reopened Mr. Lamb's case. The panel did not request supplemental briefing, but issued a new opinion. *United States v. Lamb*, 847 F.3d 928 (8th Cir. 2017). The panel adopted its initial decision regarding Mr. Lamb's Michigan unarmed robbery conviction (which held that it was an ACCA predicate)

and determined that the *Mathis* analysis did not apply to this statute. *Id.* at 930. The panel, however, did analyze Wisconsin burglary and determined that the alternative locations presented alternative elements, not alternative means. *Id*. at 931-33. The panel then applied the modified categorical approach to determine Mr. Lamb's Wisconsin burglary conviction was an ACCA predicate, finding that "building or dwelling" was not broader than "building or structure" under generic burglary. *Id.* Mr. Lamb filed a petition for rehearing en banc and petition for rehearing by the panel, which the Eighth Circuit denied.

REASONS FOR GRANTING THE WRIT

Mr. Lamb respectfully asserts that he was wrongly designated as an Armed Career Criminal based on his Wisconsin burglary conviction and Michigan unarmed robbery convictions. After remand from the U.S. Supreme Court for further consideration in light of *Mathis*, the Eighth Circuit Court of Appeals rejected Mr. Lamb's argument that his convictions were no longer predicates. This was error and conflicts with this Court's clear, and repeated instructions on how to determine whether a prior conviction is an ACCA predicate.

First, the Eighth Circuit incorrectly determined that *Mathis* had no application to the Michigan unarmed robbery statute, an alternatively phrased statute. This Court has repeatedly stated that courts must determine the elements of the offense under the categorical approach. *Mathis v. United States*, 136 S. Ct. 2243, 2251-52 (2016). Michigan's unarmed robbery statute requires a divisibility analysis consistent with *Mathis*, specifically to determine whether "by force and violence, or by assault or putting in fear" are alternative means or elements. Using the proper *Mathis* analysis, it is clear that these represent alternative means. Because of the failure to determine whether these are means or elements, the circuit's force clause analysis is flawed. Further, the circuit relied on pre-*Johnson* force-clause case law. *See Johnson v. United States*, 559 U.S. 133, 140 (2010) (holding that force equals "violent force").

Second, the Eighth Circuit incorrectly applied *Mathis* to the Wisconsin burglary statute. Specifically, the circuit erred in determining that the alternative locations are elements, not means, and therefore the statute is divisible. The Eighth Circuit's opinion conflicts with the analysis by the Seventh Circuit in *United States v. Edwards*, 836 F.3d 831 (7th Cir. 2016).

A. Under the categorical approach, it is necessary to determine whether Michigan's unarmed robbery statute presents alternative means or alternative elements. The statute presents alternative means, and is therefore indivisible and overbroad.

After remand from this Court, the Eighth Circuit did not reevaluate whether Mr. Lamb's two prior convictions for Michigan unarmed robbery were violent felonies. The Court simply reinstated the analysis from the prior decision, finding this was a question of the application of the force clause, not divisibility. *Lamb*, 847 F.3d at 930. This is wrong.

A court still must determine whether the "elements of the crime of conviction sufficiently" meet the definition of an ACCA predicate. *Mathis*, 136 S. Ct. at 2248. As *Mathis* made clear, this requires determining whether alternatives are means or elements, as "[d]istinguishing between elements and facts is . . . central to ACCA's operation." *Id.* In Mr. Lamb's case, this required a determination of whether the alternatives— robbery by use of (1) force or violence, (2) assault, or (3) putting in fear—are elements or means. If they are means, the question is whether all of the means satisfy the force clause, as robbery is not an enumerated offense. Here, they are alternative means, and they do not all satisfy the force clause. However,

because the Eighth Circuit skipped this part of the analysis and went straight to the force clause, their decision was in error.

Mr. Lamb was convicted under Michigan Penal Code §750.530 (2000), which states:

> Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years.

"Force or violence, assault, or putting in fear" are not alternative elements, as Michigan state law makes clear. Michigan appellate courts have stated that these represent alternative means of committing the offense. *People v. Tolliver*, 207 N.W.2d 458, 460 (Mich. Ct. App. 1973); *People v. Walker*, 2015 WL 213228, at *3 (Mich. Ct. App. Jan. 15, 2015). Further, the punishment for all three alternatives is the same. *See Mathis*, 136 S. Ct. at 2256. Finally, a peek at the *Shepard* documents supports they are alternative means, as Mr. Lamb's indictment lists every alternative. *Id*. at 2256-57.

The next question is whether these alternatives all satisfy the force clause. The force clause requires that a prior conviction "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). Physical force means violent force. *Johnson v. United States*, 559 U.S. 133, 140 (2010) (hereinafter *Johnson I*). Violent force is "force

capable of causing physical pain or injury to another person." *Id*. The force used must be "substantial." *Id*.

As one federal district court judge has recognized, Michigan case law makes clear that nonviolent conduct can satisfy this element. *United States v. Ervin*, 2016 WL 4073052, at *9 (D. Mont. July 28, 2016). For example, in *Hicks*, a defendant argued the evidence was insufficient to establish "force and violence, assault, or putting in fear." *People v. Hicks*, 675 N.W.2d 599, 608 (Mich. Ct. App. 2003). The Michigan Court of Appeals rejected this argument, stating:

> Viewing the evidence in a light most favorable to the prosecution, the testimony reflects that the victim felt a tug on her purse strap, was pulled backward, reflexively lurched forward, and tried to turn her body to maintain possession of her purse. Additionally, the victim testified that the struggle aggravated her tendonitis. [Another witness] testified that defendant and [the victim] struggled over the purse. The evidence supports a conclusion that defendant took the purse by force and violence.

Id. (emphasis added); *see also People v. Passage,* 743 N.W.2d 746, 748 (Mich. Ct. App. 2007) ("'Force' is nothing more than the exertion of strength and physical power."). Other Michigan cases indicate that this element is satisfied by minimal force. *Ervin*, 2016 WL 4073052, at *9 (compiling cases). Because the lowest level of conduct that could meet the statute does not satisfy the force clause, Mr. Lamb's Michigan unarmed robbery conviction is not a violent felony. *Moncrieffe v. Holder,* --- U.S. ---, 133 S.Ct. 1678, 1684 (2013).

The "put in fear" alternative also does not satisfy the force clause. For example, in *People v. Laker*, 151 N.W.2d 881 (Mich. Ct. App. 1967), the Michigan

Court of Appeals found the "put in fear" alternative satisfied because "[t]he circumstances here of a waitress alone in the early morning hours, and in a man ordering her to hand over money and lie on the floor, were enough to induce fear." No threat of violent force was present in this case, yet the alternative was satisfied.

Finally, the assault alternative does not satisfy the force clause. Under Michigan law, an assault is an attempted battery or conduct placing another in fear of battery, and battery is defined as "an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *People v. Reeves*, 580 N.W.2d 433, 435, n.4 (Mich. 1998). Because this could include an "offensive touching," the offense does not encompass the use, attempted use, or threatened use of "violent force."

The Eighth Circuit relied upon *People v. Randolph*, 648 N.W.2d 164, 167 (Mich. 2002), to support its conclusion that the force required under this element meets the definition of violent force. According to the panel, because *Randolph* discussed the requirement of force, the violent force requirement is met. A statute's mere use of the word "force," however, does not answer whether the statute requires violent force under *Johnson I. Ervin*, 2016 WL 4073052 at *10 (rejecting argument that *Randolph* indicates Michigan unarmed robbery satisfies the force clause). While "Michigan law does not define a 'forceful act,'" *id.*, as the panel noted in the original opinion, the statute "adopted the common-law definition of robbery . . . ."

Lamb, 638 F. App'x at 576. However, "[t]he common law held this element of 'force' to be satisfied by even the slightest offensive touching." *Johnson I*, 559 U.S. at 139.

The majority also relied upon *United States v. Tirrell*, 120 F.3d 670, 680 (7th Cir. 1997), to find that unarmed robbery in Michigan is a violent felony. "But Tirrell was decided 13 years before the Supreme Court, in *Johnson I*, defined the quantum of force required to meet the" force clause. *Ervin*, 2016 WL 4073052, at *10 (holding that Michigan unarmed robbery does not satisfy the force clause). Also, *Tirrell* obviously does not discuss the implications of *Mathis*. *Tirrell* is no longer persuasive.

The only other circuit to determine whether Michigan unarmed robbery satisfies the force clause post-*Mathis*, the Sixth Circuit in a 2-1 decision, conducted the same faulty analysis as the Eighth Circuit, relying on *Lamb*. *See United States v. Matthews*, ---F. App'x ---, 2017 WL 1857265, at *4 (6th Cir. 2017). The Sixth Circuit only analyzed the "put in fear" alternative and did not conduct any sort of divisibility analysis. *Id.* The court determined that "put in fear" required fear of *injury*, and therefore this satisfied the force clause. *Id.* However, as the dissent noted, the majority's determination that Michigan unarmed robbery required fear of injury was not supported by Michigan case law. *Id.* at *6-7 (Merritt, J. dissenting).

The Eighth Circuit failed to follow the clear instruction from *Mathis* and relied on case law in conflict with *Johnson I*. Other circuits are now relying on this case. This Court should grant the writ to correct the Eighth Circuit's error.

B. Wisconsin burglary is overbroad because the listed locations are alternative means, not alternative elements.

The Eighth Circuit also incorrectly applied *Mathis* to determine that Wisconsin Statute § 943.10(1m) is divisible and allows courts to employ the modified categorical approach. Wisconsin Statute § 943.10(1m) (2005) states:

> Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place is guilty of a Class F felony:
>
> (a) Any building or dwelling; or
>
> (b) An enclosed railroad car; or
>
> (c) An enclosed portion of any ship or vessel; or
>
> (d) A locked enclosed cargo portion of a truck or trailer; or
>
> (e) A motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or
>
> (f) A room within any of the above.

Wisconsin burglary includes locations that are broader than "building or structure" for purposes of generic burglary. The divisibility analysis for this statute presents two separate questions: (1) Do subsections (a)-(f) of § 943.10(1m) present alternative means or alternative elements?[1]; and (2) If these represent alternative elements, does "building or dwelling" under § 943.10(1m)(a) present alternative means or elements? The panel incorrectly decided both questions.

i. Section 943.10(1m)(a)-(f) present alternative means.

[1] This question is currently pending before the Seventh Circuit Court of Appeals in *United States v. Sahm*, 16-1872 & 16-1580.

First, the Eighth Circuit erred in finding that subsections (a)-(f) present alternative elements and that the modified categorical approach can be applied. Wisconsin case law does not definitively answer whether the locations are alternative means or elements. To answer this question, the circuit relied on a district of Minnesota case that held these were alternative elements. *Lamb,* 847 F.3d at 932 (citing *United States v. Jones*, 2016 WL 4186929, at *3 (D. Minn. Aug. 8, 2016)). However, *Jones* contains virtually no analysis of whether these represent means or elements, as required by *Mathis*. *Jones*, 2016 WL 4186929, at *3. *Jones* essentially held that because the statute listed out the alternative locations, they are alternative elements. *Id*. at *3 n.2. This directly contradicts this Court's statement in *Mathis* that a "fortuity of legislative drafting" does not control the divisibility analysis. *Mathis*, 136 S. Ct. at 2255.

In fact, the Wisconsin legislature's decision to create subsections within Wisconsin Statute § 943.10(1m) is not meaningful—it is just the legislature's drafting style. The Wisconsin criminal code shows that the legislature generally errs on the side of itemized subsections. In the first substantive chapter, Chapter 940, the following contain itemized alternatives within the definition of substantive criminal offenses: Wis. Stat. §§ 940.04(2), 940.05(1) & (2)(g), 940.09(1), 940.201, 940.225(1) & (2), 940.25(1), 940.285(2), 940.295(3), 940.302(2), 940.31(1), 940.315(1), 940.32(2m) & (3), 940.43, 940.44, and 940.45. In Chapter 943, in which burglary appears, an even greater percentage of statutes are written in this way. Some of

these alternatives may well be legal elements, but the mere fact that they are itemized does not aid in resolving the means versus elements question. *See State v. Derango*, 613 N.W.2d 833, 839–41 (Wis. 2000) (holding that the itemized subsections of the state's child-enticement statute are not elements).

The panel also cited multiple Wisconsin cases that indicate a defendant was convicted of burglarizing a specific location. *Lamb*, 847 F.3d at 932. This is unhelpful to the question of whether the location is a legal element. For example, in Iowa, state appellate courts will refer to the "elements" of burglary by listing the specific location at issue in that case. *See, e.g,. State v. Schiefer*, 2011 WL 3115992, at *1 (Iowa Ct. App. July 27, 2011) (stating that one of the elements of the offense was that it occurred in an apartment). However, as *Mathis* made clear, in Iowa, the actual location alternative is not a legal element—occupied structure is the element. Whatever may have been marshaled to the jury in a specific case is not necessarily a legal element for purposes of the categorical approach.

Instead, the strongest indicator that the locations present alternative means is that there is no separate penalty depending on the location – it is always a Class F felony. Wis. Stat. § 943.10(1m); *Mathis*, 136 S. Ct. at 2252. However, the Wisconsin legislature did make it a separate offense, with a higher penalty, when a defendant steals a weapon during a burglary. Wis. Stat. § 943.10(2). Because the location alternative makes no actual or practical difference in the penalty or

classification, a defendant like Lamb would have no need to dispute whether the burglary was of a building or a motor home. *Mathis*, 136 S. Ct. at 2253.

Further, the panel's decision is inconsistent with the Seventh Circuit's decision in *United States v. Edwards*, 836 F.3d 831 (7th Cir. 2016), which analyzed Wisconsin burglary post-*Mathis*. While *Edwards* did not analyze whether Wisconsin burglary was divisible as to the subsections listed in (a) through (f), it did discuss how to properly analyze whether location alternatives are elements or means for purposes of Wisconsin burglary in general.

In *Edwards*, the question was limited to whether § 943.10(1m)(a) was internally divisible. *Edwards*, 836 F.3d at 837. In finding that these represented alternative means, not alternative elements, the court noted that the alternatives were "similar." *Id.* According to the court in *Edwards*, if the alternatives are merely synonymous terms, it does not make sense that they would be competing elements. *Id.* The court stated: "There's no plausible argument that the Wisconsin legislature intended to create a distinct offense for entering a 'ship' as opposed to a 'vessel,' a 'truck' as opposed to a 'trailer,' or a 'motor home or other motorized home' as opposed to a 'trailer home.'" *Id.*

And just as there is overlap within each subsection, there is significant overlap among the subsections. While subsection (1m)(a) covers any "building or dwelling," every other subsection involves locations that can potentially be used as dwellings—motor homes, ships, railroad cars, and truck trailers. And even

"building" overlaps to some extent with the other subsections; for example, the Wisconsin Supreme Court has held that a mobile home is a "building." *State v. Kuntz*, 467 N.W.2d 531, 538 (Wis. 1991). Even more significantly, the final subsection criminalizes entry into "any room within any of the above." Wis. Stat. § 943.10(1m)(f). That means that any violation of subsections (a)-(e) will necessarily involve at least one violation of subsection (f). The notion that treating these as legal elements—so that jurors would have to agree on whether, for example, a defendant burglarized a trailer home or a building or a room within a trailer home or a room within a building—is nonsensical.

Thus, to mirror the language in *Edwards*, just as there is "no plausible argument" that the legislature intended to create a distinct offense for entering a "ship" as opposed to a "vessel," there is no plausible argument that the legislature intended to create a distinct offense for entering a dwelling that is also a ship; and there is no plausible argument that the legislature intended to create a distinct offense for burglarizing each room within any of the given locations. Stated another way, in the words of this Court, the locations are just "illustrative examples" of places that can be involved with a single, indivisible statute that is called burglary. *See Mathis*, 136 S. Ct. at 2256. This is also consistent with Wisconsin case law, which notes "[i]f the [statutory] alternatives are similar, one crime was probably intended." *Manson v. State*, 304 N.W.2d 729, 734 (Wis. 1981).

The panel's reliance on the indictment to support that the location is an element also conflicts with *Edwards*. The court in *Edwards* noted that, in Wisconsin "[t]he *Shepard* documents are [of] little use . . . ." *Edwards*, 836 F.3d at 837.

> Under Wisconsin law the complaint and information, which are the documents that initiate proceedings against a criminal defendant, must allege every element of the crime charged, but they may also (and usually do) include additional facts that need not be proved to the jury beyond a reasonable doubt. *See State v. Baldwin*, 304 N.W.2d 742, 746 (Wis. 1981) ("[W]hile a charging document must always allege facts necessary to support a conviction, it does not follow that a conviction requires proof of every fact alleged in a complaint."). Similarly, the recitation of a crime's elements during a plea colloquy may include as much or as little factual detail as necessary for the defendant to understand the nature of the charges against him. *See State v. Brown*, 716 N.W.2d 906. Indeed, the Wisconsin Supreme Court has "encourage[d] circuit court judges to translate legal generalities into factual specifics when necessary to ensure the defendant's understanding of the charges." Id. The upshot of these rules is that in Wisconsin neither the charging documents nor a plea colloquy will necessarily reflect only the elements of a crime.

Id. at 837-38.

The model jury instructions also do not support that the locations are alternative elements. The persuasive authority of Wisconsin's model jury instructions is limited, as the instructions are not approved by any branch of government; they are published and copyrighted by the state university. Wis. Law Library, http://blog.wilawlibrary.gov/2013/01/how-to-find-wisconsin-jury-instructions.html. Regardless, the model instruction does not suggest that Wisconsin Statute § 943.10(1m)'s subsections describe distinct offenses. It uses the

term "building," and notes that courts should substitute an alternative term or phrase for other locations. Wis. J.I.—Crim. § 1424 n.2. That is just stating the obvious: if a case is about a houseboat, the trial court should not call it a "building." Perhaps the court would call it a "dwelling," or maybe "ship or vessel"; or, given that courts can tailor the instructions for each case, it might call it a "houseboat docked at Alma Marina." Indeed, the model instruction also notes that trial courts should specify which felony a burglary defendant is alleged to have intended, Wis. J.I.—Crim. § 1424 & n.7, but Wisconsin law is clear that it is not something about which jurors have to be unanimous. *State v. Hammer*, 576 N.W.2d 285, 287 (Wis. App. 1997).

ii. Section 943.10(1m)(a) is not internally divisible and is overbroad.

Even if the statute is divisible between § 943.10(1m)(a)-(f), the statute is not internally divisible between § 943.10(1m)(a). The panel assumed without deciding that "building or dwelling" presented alternative means, and noted that *Edwards* had decided these were alternative means. For the reasons already discussed, and for the reasons stated in *Edwards*, "building or dwelling" represent alternative means. Therefore, both must meet the generic definition of "building or structure."

In *United States v. Grisel*, the Ninth Circuit Court of Appeals analyzed the scope of the phrase "building or structure" as used in *Taylor v. United States*, 495 U.S. 575 (1990). 488 F.3d 844, 848-50 (9th Cir. 2007). *Grisel* determined that "[i]n using the term 'building or structure,' the [U.S. Supreme Court in Taylor]

encapsulated the common understanding of the word 'building' – a structure designed for occupancy that is intended for use in one place." *Id*. at 848. The panel rejected the argument that dwelling is broader than "building or structure." The panel determined that any argument that dwelling is overbroad is speculative. However, a conclusion that dwelling is broader than "building or structure" is supported by Wisconsin statutes. See Wis. Stat. § 943.13(1e)(ar) (2005) (defining "dwelling unit" under trespass offense as a "structure or that part of a structure which is used or intended to be used as a home, residence or sleeping place . . . to the exclusion of all others."); Wis. Stat. § 943.11 (2005) (proscribing "entry into locked vehicle" as a misdemeanor offense).

Additionally, "building" for purposes of § 943.10(1m)(a) is also broader than "building or structure." Wis. Stat. § 941.20, a section of the "Weapons" subchapter, states: "'Building' as used in this paragraph does not include any tent, bus, truck, vehicle or similar portable unit." This limitation is not present in the definition of building for § 943.10(1m)(a). If the Wisconsin legislature wished for the same limitation present in § 941.20 to apply to the definition of building in § 943.10(1m)(a), it would have so stated. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)).

When properly applying *Mathis*, it is clear that Wisconsin burglary is overbroad and cannot qualify as an ACCA predicate. Because of this flawed analysis, which is inconsistent with the Seventh Circuit's analysis, this Court should grant the writ.

CONCLUSION

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

RESPECTFULLY SUBMITTED,

Heather Quick
Assistant Federal Public Defender
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
TELEPHONE: 319-363-9540
FAX: 319-363-9542

ATTORNEY FOR PETITIONER

APPENDIX

Judgment of the Eighth Circuit Court of Appeals 4-5-2016

Decision of the Eighth Circuit Court of Appeals 4-5-2016

Eighth Circuit Court of Appeals Order Denying Motion to Hold Petition for Rehearing in Abeyance 4-25-2016

Eighth Circuit Court of Appeals Order Denying Petition for Rehearing En Banc 5-16-2016

Supreme Court Order Granting Remand 12-30-2016

Judgment of the Eighth Circuit Court of Appeals 2-3-2017

Decision of the Eighth Circuit Court of Appeals 2-3-2017

Eighth Circuit Court of Appeals Order Denying Petition for Rehearing En Banc 4-12-2017