NO. _____

OCTOBER TERM, 2017

IN THE SUPREME COURT OF THE UNITED STATES

_____

TIMOTHY EDMUN JOHNSON, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

_____

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

_____

PETITION FOR A WRIT OF CERTIORARI

_____

WILLIAM P. EARLEY
ASSISTANT FEDERAL PUBLIC DEFENDER
Oklahoma Bar Association No. 11293
OFFICE OF THE FEDERAL PUBLIC DEFENDER
Western District of Oklahoma
215 Dean A. McGee, Suite 109
Oklahoma City, Oklahoma 73102
Telephone: 405-609-5930
Facsimile: 405-609-5932
E-Mail: william_earley@fd.org
COUNSEL FOR PETITIONER
TIMOTHY EDMUN JOHNSON

(a) The Questions Presented for Review Expressed in the Terms and Circumstances of the Case.

Through the Armed Career Criminal Act, 18 U.S.C. §924(e) (hereinafter ACCA), Congress prescribed significantly increased punishment for defendants convicted of possessing a firearm after conviction of a felony whose criminal histories included at least three convictions for crimes of violence and serious drug offenses "committed on occasions different from one another."

The questions presented here are:

1. Is Oklahoma's crime of drug distribution a "serious drug offense" under the ACCA when state law defines "distribution" to include "transport with intent to distribute or dispense" a controlled substance?

2. Can convictions be lawfully determined to have been "committed on occasions different from one another" when, as here, two convictions are based on activity resulting from a continuation of a single drug deal, negotiated at the same time, between the same parties?

(b) List of all Parties to the Proceeding

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) Table of Contents and Table of Authorities

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

FEDERAL RULES

CONSTITUTIONAL PROVISIONS

None.

SENTENCING GUIDELINES

MISCELLANEOUS

None.

(d) Reference to the Official and Unofficial Reports of any Opinions

United States v. Johnson, No. 17-6228, 2018 WL 2058181 (10th Cir. filed May 2, 2018).

(e) Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.

(i) Date of judgment sought to be reviewed.

The Order and Judgment of which review is sought was filed May 2, 2018.

(ii) Date of any order respecting rehearing.

Rehearing was not requested;

(iii) Cross Petition.

Not applicable;

(iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, §1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

(v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

(f) The Constitutional Provisions, Statutes and Rules which the Case Involves.

(1) Constitutional Provisions:

None.

(2) Statutes Involved:

Title 18, United States Code, §924(e)(2)(A)(i) and (ii)

(2) As used in this subsection –

(A) the term "serious drug offense means –

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

Oklahoma Statutes, tit. 63, §2-401(A)(1)

A. Except as authorized by the Uniform Controlled Dangerous Substances Act, it shall be unlawful for any person:

1. To distribute, dispense, transport with intent to distribute or dispense, possess with intent to manufacture, distribute, or dispense, a controlled dangerous substance or to solicit the use of or use the services of a person less than eighteen (18) years of age to cultivate, distribute or dispense a controlled dangerous substance.

(3) Rules Involved:

None.

(g) Concise Statement of the Case.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of a judgment entered by a United States Court of Appeals. The jurisdiction of the district court below was based originally on alleged violations of the laws of the United States. The United States District Court for the Western District of Oklahoma has original jurisdiction over offenses against the laws of the United States which occur in that district. Title 18, United States Code, Section 3231.

Facts Material to Consideration of Question Presented

Timothy Edmun Johnson was named as the only defendant in a two count indictment returned by a federal grand jury in the Western District of Oklahoma. The Indictment alleged two violations of 18 U.S.C. §922(g)(1), felon in possession of firearms, on two separate dates. Mr. Johnson entered pleas of guilty to the offenses.

The government filed notice it was seeking enhanced punishment under the ACCA. The ACCA increases the punishment from a maximum of ten years' imprisonment to a minimum mandatory sentence of 15 years' imprisonment and a maximum of life if a defendant convicted of violating 18 U.S.C. §922(g) has sustained

three or more prior convictions for violent felonies and/or serious drug offenses "committed on occasions different from one another . . .." *18 U.S.C. §924(e)(1)*. The ACCA defines a serious drug offense to include "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. §924(e)(2)(A)(ii).

The Presentence Report advised Mr. Johnson's prior convictions under Oklahoma law for three "serious drug offenses" qualified him for the enhanced ACCA punishment. The violations cited as predicate offenses were violations of Okla. Stat. tit. 63, §2-401(A)(1). At the time each of the predicate offenses were committed §2-401(A)(1) provided:

> A. Except as authorized by the Uniform Controlled Dangerous Substances Act, it shall be unlawful for any person:
>
> 1. To distribute, dispense, transport with intent to distribute or dispense, possess with intent to manufacture, distribute, or dispense, a controlled dangerous substance or to solicit the use of or use the services of a person less than eighteen (18) years of age to cultivate, distribute or dispense a controlled dangerous substance.[1]

[1] Okla. Stat., tit. 63, §2-401 has been amended several times. For purposes of this matter the statutory language in subsection (A)(1) is identical under both the 2001 and 2005 versions of the statute. A violation of §2-401(A)(1) carried a maximum term of imprisonment of ten years or more at the time Mr. Johnson suffered the convictions. The Oklahoma legislature recently reduced the penalty for a violation of this subsection to a maximum of seven years for a first offense effective November 1, 2018. *See* 2018 Okla. Sess. Law Serv. Ch. 130 (S.B. 793) (West). A first offense will

Mr. Johnson objected to sentencing pursuant to the ACCA arguing the controlled substances convictions did not qualify as predicate offenses because the Oklahoma statute prohibited conduct beyond the scope of a "serious drug felony" as defined by the ACCA. Specifically, Okla. Stat. tit. 63, §2-401(A)(1) includes as a means of violating the statute transportation of a controlled substance with intent to distribute. The ACCA definition of serious drug offense does not include a prohibition on transportation of a controlled substance with intent to distribute. Because the Oklahoma statute is broader in its prohibitions than the offenses designated as serious drug offenses in 18 U.S.C. §924(e)(2)(A)(ii), the convictions do not qualify as predicates for the ACCA.

In addition, Mr. Johnson argued two of the three drug convictions did not count as separate convictions for purposes of the ACCA because they were not "committed on occasions different from one another." The facts reported in the Presentence Report were taken from the affidavits of probable cause attached to the charging documents in Oklahoma County cases CF-2005-3321 and CF-2005-4795.

The charge in CF-2005-4795 involved an undercover investigator attempting to purchase an ounce of crack cocaine from Mr. Johnson on June 2, 2005. The probable cause affidavit filed in support of the charge alleged:

---

no longer qualify as a predicate for the ACCA.

> On June 2, 2005, about 4:20 p.m. an undercover investigator met with the defendant in order to purchase crack cocaine. The investigator advised the defendant that he was interested in purchasing an ounce of crack cocaine; however, the defendant advised that it would be "a while" before he could have an ounce delivered, but he would charge $1,000.00 per ounce. The defendant also advised that he could cook the cocaine powder into crack cocaine if the cocaine was received in powder form. The defendant advised that he had three grams of crack cocaine in his possession at that time, and the investigator agreed to purchase the three grams for $150.00. The defendant was supposed to call the investigator once the ounce of cocaine was ready.

In CF-2005-3321, the probable cause affidavit filed in support of the charge alleged:

> On June 3, 2005, at about 7:15 p.m., a traffic stop was conducted on a vehicle being driven by the defendant. The defendant's child's mother, Tameka Lavonne Johnson, was a passenger. After discovering the defendant did not have a driver's license, officers placed the defendant under arrest. A search of the vehicle was subsequently conducted, resulting in the discovery of 13 grams of cocaine base, 5.5 grams of marijuana, and a set of digital scales. The arrest report noted that the plastic bag containing the cocaine base was still wet and the cocaine had a wax-like consistency, possibly indicating that the cocaine had just been "cooked" and was in the hardening process.

The district court overruled Mr. Johnson's objections. The Tenth Circuit Court of Appeals affirmed the district court's sentence. On the issue of the breadth of the Oklahoma statute compared to the definition of serious drug offense under the ACCA, the Tenth Circuit held:

> Mr. Johnson contends that the federal definition of "serious drug offense" does not encompass the transportation of drugs. We disagree. It is true that the federal definition does not include the word

> "transportation." But the federal definition does use the term "possessing," and "the transportation of drugs necessarily implies their possession." (citations omitted)

Johnson, 2018 WL 2058181 at *1.

On the issue of the 2005 convictions being committed on occasions different from one another, the Tenth Circuit stated:

> Two offenses are "committed on occasions different from one another" when they are "committed at distinct, different times." *United States v. Johnson*, 130 F.3d 1420, 1431 (10th Cir. 1997) (internal quotation marks omitted). If the defendant decided to continue with a criminal course of conduct after "a meaningful opportunity" to stop, the crimes will be considered distinct. *United States v. Delossantos*, 680 F.3d 1217, 1220 (10th Cir. 2012).

Johnson, 2018 WL 2058181 at *2. The Tenth Circuit held that because activity underlying the 2005 convictions "took place at 'distinct, different times'" and because "Mr. Johnson had 'a meaningful opportunity' to stop his criminal course of conduct after selling three grams to the undercover investigator" the offenses were distinct. *Id*. at 2-3.

(h) Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.

Categorical approach or modified categorical approach

Initially, a court must determine whether to employ the categorical approach or the modified categorical approach to determine if a conviction for violating Okla. Stat. tit. 63, §2-401(A)(1) qualifies as a "serious drug offense" under the ACCA. A

sentencing court is limited to the "categorical approach" when determining whether a defendant's prior conviction qualifies as a predicate offense for the ACCA. *See Mathis v. United States*, 136 S.Ct. 2243, 2245 (2016). This inquiry asks "whether the elements of the offense forming the basis for the conviction sufficiently match the elements" of the predicate offense. *Id*..

The focus is on the elements of the offense, those "things the prosecution must prove to sustain a conviction…[or] [a]t a trial, … what the jury must find beyond a reasonable doubt to convict[.]" *Mathis*, 136 S.Ct. 2243, 2248 (2016). Should the statute of offense encompass conduct more broad than the generic crime, "a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." *Descamps v. United States*, 570 U.S. 254, 261 (2013).

In certain circumstances, a sentencing court may employ the modified categorical approach. Under this variation of the categorical approach, a sentencing court may review limited specific documents of conviction to determine whether the offense contains the elements of the generic crime in 18 U.S.C. §924(e)(2)(A)(ii). The modified categorical approach is appropriate only when the statute of conviction is "divisible," meaning it has multiple alternative elements – some of which encompass behavior outside the scope of the generic crime. *Descamps*, 570 U.S. at 261; *Shepard*

v. United States, 544 U.S. 13, 26 (2005). When the modified categorical approach applies, it permits the court to review "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between 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." *Shepard*, 544 U.S. at 26.

Okla. Stat. tit. 63, §2-401(A)(1) is divisible into a "distribution" element and a "solicitation" element

The divisibility of the statute into a "distribution" element and a "solicitation" element was not challenged by the government before the Tenth Circuit. *United States v. Johnson*, Case No. 17-6228, Brief of Plaintiff-Appellee, Doc. 01019963506, p. 9 fn. 3. Section 2-401(A)(1), Okla. Stat. tit. 63, is divisible because it has two alternative elements. The statute can be violated by committing one of the means of "distribution" described in the statute or by committing one of the means of "soliciting the services" of a person less than 18 years old to commit the offense. The history of the statute bears this out. Prior to 1990, Okla. Stat. tit. 63, §2-401(A)(1) made it unlawful to "distribute, dispense, transport with intent to distribute or dispense, possess with intent to manufacture, distribute, or dispense, a controlled dangerous substance." The Oklahoma legislature added "or to solicit the use of or use the services of a person less than eighteen (18) years of age to cultivate, distribute or

dispense a controlled dangerous substance" in an amendment to the statute pursuant to 1990 Okla. Sess. Law Serv. Ch. 232, §6 (West) (emerg. eff. May 18, 1990).

The "distribution" element can be violated by alternative means, to include distribution or *transporting* with intent to distribute, or possessing with intent to distribute a controlled substance. The "solicitation" element can be violated by alternative means, to include soliciting the use of, or using the services of, a minor to cultivate, distribute a controlled substance.

Mr. Johnson's convictions did not involve the solicitation/use of a minor. Thus, Mr. Johnson's convictions in each case fall under the "distribution" element of Okla. Stat. tit. 63, §2-401(A)(1). Lining up the elements of the violation of the Oklahoma "distribution" statute alongside the elements of 18 U.S.C. §924(e)(2)(A)(ii), shows the Oklahoma statute encompasses conduct more broad than the generic crime covered by 18 U.S.C. §924(e)(2)(A)(ii). The Oklahoma statute encompasses "*transport* with intent to distribute or dispense" a controlled substance as one means of committing the offense and such conduct is not encompassed by the generic offense of "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute." The over breadth of the Oklahoma statute penalizing activity beyond that specified in the ACCA means these violations do not qualify as controlled substance offenses under the ACCA.

The Tenth Circuit ignored the statutory means of transportation by conflating "transportation" with "possession." In doing so, the Tenth Circuit rendered meaningless a provision of the Oklahoma statute, contrary to a court's duty to give effect to every clause and word of a statute. *See Marx v. General Revenue Corp.*, 568 U.S. 371, 385 (2013). The transportation with intent to distribute portion of the distribution prong is a separate means of violating the statute and is not subsumed by the prohibition of possession with intent to distribute. Case law from the Oklahoma Court of Criminal Appeals and the Oklahoma Supreme Court supports this conclusion.

In *King v. State*, 182 P.3d 842 (Okla. Crim. App. 2008), the Oklahoma Court of Criminal Appeals considered the issue whether agents with the State's Bureau of Narcotics and Dangerous Drugs Control possessed the authority to make traffic stops as a means of enforcing the Uniform Controlled Dangerous Substances Act. The Oklahoma Court of Criminal Appeals found the agents could make traffic stops as they were empowered to enforce the Act and the Act prohibited, among other "actions," "transporting a controlled substance with the intent to distribute." *King*, 182 P.3d at 845; *see also State ex rel. Dept. of Public Safety v. 1985 GMC Pickup*, 898 P.2d 1280 (Okla. 1995) (statute authorizing forfeiture of conveyances used in violations of the Uniform Controlled Dangerous Substances Act "upholds the intended

objective of the statute: to deter the transportation of controlled dangerous substances intended for sale or distribution.")

Moreover, the Tenth Circuit's holding that transportation of drugs with the intent to distribute is encompassed in §924(e)(2)(A)(ii)'s crime of possessing with intent to distribute expands the scope of the federal statute beyond the limits of its clear and unambiguous language.

The effect of the term "involving" in 18 U.S.C. §924(e)(2)(A)(ii)

The ACCA's definition of serious drug offense under state law includes offenses "*involving* manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . .." 18 U.S.C. §924(e)(2)(A)(ii) (emphasis added). The Tenth Circuit held "transportation of drugs with intent to distribute is a crime "involving . . . possessing with intent to manufacture or distribute." *Johnson*, 2018 WL 2058181 at *2.

The inclusion of "transport with the intent to distribute or dispense" as a means of committing a violation of Okla. Stat. tit. 63, §2-401(A)(1) criminalizes activity beyond that defined in 18 U.S.C. §924(e)(2)(A)(ii). Transport is not the equivalent of possess nor is it necessary to possess an object to be liable for its transportation. *See e.g., United States v. Newson*, 531 F.2d 979, 981 (10th Cir. 1976) (In prosecution for interstate transportation of stolen property "[t]here is no requirement of actual

physical transportation by a defendant and it is sufficient that a defendant cause" the transportation of the item).

The Oklahoma statute penalizes activity beyond that specified in the definition of serious drug offense in the ACCA. As a result, Mr. Johnson's convictions under Okla. Stat. tit. 63, §2-401(A)(1) do not qualify as serious drug offenses under the ACCA.

The district court erred by finding Mr. Johnson's 2005 convictions for possession of a controlled dangerous substance with intent to distribute and distribution of a controlled dangerous substance were committed on occasions different from one another and thus countable as two separate convictions for purposes of the ACCA

Section §924(e)(1) of the ACCA provides, in pertinent part that the previous convictions be "committed on occasions different from one another. . .." In the context of drug offenses, the Tenth Circuit uses the "single criminal episode" rule. The result is that drug offenses committed at "distinct, different times" will be treated as separate predicate offenses for purposes of § 924(e)(1) . *United States v. Johnson*, 130 F.3d 1420, 1431 (10th Cir. 1997).

The Tenth Circuit adopted the "single episode rule" for multiple drug offenses in *United States v. Johnson*, 130 F.3d 1420, 1431 (10th Cir. 1997), on the basis of its analysis of crimes of violence. *Johnson*, 130 F.3d 1420, 1430, *citing United States v. Tisdale*, 921 F.2d 1095, 1098-99 (10th Cir.1990). Unlike crimes of violence, which

are generally discrete criminal acts, drug offenses often involve continuing courses of conduct without a delineated beginning and end. As a result, less can be inferred from the date of a drug offense than from the date of a crime of violence. In this respect, the determination whether offenses are "separate" is different for "serious drug offenses" as opposed to "violent felonies."

It is clear from the facts of the two convictions at issue that the two incidents stem from a continuation of a single drug deal, negotiated at the same time, between the same parties. On June 2, 2005, Mr. Johnson struck a deal with the undercover officer to provide an ounce of crack for $1,000.00. Mr. Johnson advised he would cook the cocaine into crack if needed. Mr. Johnson advised he would call the undercover officer when he got the cocaine. In the near term, Mr. Johnson provided the undercover officer three grams of crack cocaine he had on hand.

A little more than 24 hours later Mr. Johnson apparently obtained nearly an ounce of cocaine, cooked it up, and was transporting it to a location when he was stopped. The only act he was unable to accomplish to complete the deal he struck with the undercover officer the day before was call the officer to set up a meeting. The traffic stop prevented the deal from being consummated. Two drug offenses that were a part of a single negotiated drug deal within a 24 hour period do not warrant enhanced punishment simply because they are the subject of separate convictions.

Because the burden of establishing the applicability of the ACCA is on the government, ambiguity inures to Mr. Johnson's benefit. Where the record does not "satisfy *Taylor*'s demand for certainty," the defendant prevails. *Mathis*, 136 S.Ct. at 2257. Mr. Johnson submits each of these convictions arose from a single criminal episode. The facts underlying each of these convictions show the relationship. These facts distinguish the instant case from Tenth Circuit decisions holding convictions are countable separately if each is comprised of acts that are clearly distinct in time. *See United States v. Johnson*, 130 F.3d 1420, 1431 (10th Cir. 1997) and *United States v. Delossantos*, 680 F.3d 1217 (10th Cir. 2012). The convictions in CF-2005-3321 and CF-2005-4795 are not separate predicate offenses for purposes of § 924(e)(1)(ii).

Mr. Johnson acknowledges "related cases" for purposes of the career offender enhancement and "committed on occasions different from one another" for purposes of the ACCA are interpreted differently. *See* USSG §4B1.2(c). However, both the career offender provision in the sentencing guidelines and the ACCA are directed at enhancing punishment for a class of recidivist who, having been prosecuted and convicted, repeatedly commits violent offenses or drug trafficking offenses. *See* 28 U.S.C. §994(h) (stating Congress' directive that career offenders receive a term of imprisonment "at or near the maximum term authorized . . .") and S. Rep. No. 585, 97th Cong., 2d Sess. 3 (1982) at 62-63 (Concerning the ACCA, "the idea was that

once the career criminal had become a 'three time loser,' the only reasonable disposition is permanent incarceration.") *quoted* in *United States v. Balascsak*, 873 F.2d 673, 680 (3rd Cir. 1989). Mr. Johnson's prior drug convictions should not count as separate predicate offenses.

At a minimum, a defendant should be given a meaningful opportunity to change his behavior before offenses committed close in time and adjudicated in a single court proceeding can be used to enhance his punishment. It is the individual who does not discontinue his unlawful behavior after being convicted and punished that is the hallmark of a *career* criminal and to whom enhanced penalties are directed. Given the facts of the 2005 drug convictions, Mr. Johnson did not have a meaningful opportunity to change his behavior before the commission of the second drug offense. Application of the ACCA under the facts of this case was error.

(i) Appendix.

(i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Johnson, No. 17-6228, 2018 WL 2058181 (10th Cir. filed May 2, 2018).

(ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

(iii) Any order on rehearing:

None;

(iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

None;

(v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

(vi) Other appended materials:

None.

CONCLUSION

For the foregoing reasons, Mr. Timothy Edmun Johnson respectfully requests a Writ of Certiorari issue to review the Order and Judgment filed May 2, 2018, of the United States Court of Appeals for the Tenth Circuit in Case Number 17-6228.

Respectfully submitted,

s/William P. Earley
WILLIAM P. EARLEY, OBA# 11293
Assistant Federal Public Defender
Suite 109, 215 Dean A. McGee Avenue
Oklahoma City, Oklahoma 73102
(405) 609-5930 FAX (405) 609-5932
COUNSEL FOR PETITIONER
TIMOTHY EDMUM JOHNSON