NO. 18A443

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

Vernon Webster - 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

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QUESTIONS PRESENTED

(1) Whether the locations under Wisconsin's burglary statute are alternative means—a question pending resolution from the Wisconsin Supreme Court—making Wisconsin burglary broader than generic burglary and therefore not a qualifying prior conviction under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1)?

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The petitioner, Vernon Webster, 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. 17-2758, entered on July 11, 2018. Mr. Webster filed a petition for rehearing en banc and petition for rehearing by the panel, as well as a motion to stay pending the Wisconsin Supreme Court's resolution of the matter. Mr. Webster's motion to stay was denied on August 6, 2018. Mr. Webster's petition for rehearing en banc and petition for rehearing by the panel were denied on August 28, 2018. Mr. Webster requested an extension to file a petition for writ of certiorari. Justice Neil Gorsuch granted the request, extending the deadline to January 25, 2019.

OPINION BELOW

On July 11, 2018, a panel of the Court of Appeals entered its ruling affirming the judgment of the United States District Court for the Northern District of Iowa. The decision is unpublished and available at 730 F. App'x 396.

JURISDICTION

The Court of Appeals entered its judgment on July 11, 2018, and denied Mr. Webster's petition for rehearing en banc and petition for rehearing by the panel on August 28, 2018. 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; . . .

Wisconsin Statute § 943.10(1) (1989, 1993, 1994):

> (1) 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 C 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.

STATEMENT OF THE CASE

On January 25, 2017, Mr. Webster was indicted in the Northern District of Iowa on one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. §§ 922(g)(1) & 924(a)(2). (DCD 2).[1] Eventually, Mr. Webster pled guilty to the offense. (DCD 17).

Sentencing was contested over the applicability of the ACCA. The presentence investigation report (PSR) determined that Mr. Webster was an Armed Career Criminal. (PSR ¶ 19). The PSR asserted Mr. Webster had three separate convictions for Wisconsin burglary and that these were violent felonies under the

[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.

ACCA. (PSR ¶¶ 24, 26, 27). The PSR also asserted that Mr. Webster's Wisconsin conviction for possession with intent to distribute cocaine was a serious drug offense under the ACCA. (PSR ¶ 28).

Mr. Webster objected to PSR's finding that he was an Armed Career Criminal. (DCD 25, 26). Specifically, he challenged that his Wisconsin burglary convictions were Armed Career Criminal predicates. (DCD 25, 26). He argued that Wisconsin burglary was indivisible and broader than generic burglary, and that the Eighth Circuit's decision in *United States v. Lamb,* 847 F.3d 928 (8th Cir. 2017), which held otherwise, was wrongly decided. (DCD 25, 26).

At sentencing, the district court found that Mr. Webster was an Armed Career Criminal, as *Lamb* was controlling precedent. (Sent. Tr. p. 5). The court sentenced Mr. Webster to 180 months of imprisonment. (Sent. Tr. p. 13). Mr. Webster appealed. The panel affirmed and acknowledged that *Lamb* was binding. (App'x 2).

Mr. Webster filed a petition for rehearing and rehearing en banc with the Eighth Circuit. He also filed a motion to stay the petition for rehearing and rehearing en banc. Mr. Webster noted that six days after the Eighth Circuit's decision in his case, the Seventh Circuit had granted a petition for rehearing en banc to determine whether the locations under Wisconsin's burglary statute were alternative means or alternative elements. *United States v. Franklin,* 895 F.3d 954 (7th Cir. 2018). As part of the grant, the Seventh Circuit certified the

means/elements question to the Wisconsin Supreme Court. *Id.* Mr. Webster asked the Eighth Circuit to stay resolution of the petition for rehearing, because the Wisconsin Supreme Court's decision on the matter would be binding upon the Eighth Circuit. The Eighth Circuit denied the request for stay on August 6, 2018, and then denied the petition for rehearing and rehearing en banc on August 28, 2018. (App'x 5-6). Mr. Webster requested an extension of time to file a petition for writ of certiorari. Justice Neil Gorsuch granted the request, and allowed Mr. Webster until January 25, 2019 to file a petition for writ of certiorari. (App'x 7).

REASONS FOR GRANTING THE WRIT

In recent years, federal courts have had to decide whether each of the nation's myriad burglary statutes is an Armed Career Criminal Act "violent felony," by determining whether each statute corresponds with the Supreme Court's definition of "generic burglary." This was necessitated by *Descamps v. United States,* 133 S. Ct. 2276 (2013), and *Mathis v. United States,* 136 S. Ct. 2243 (2016), which restricted how the courts analyze burglary statutes for ACCA purposes, and *Johnson v. United States*, 135 S. Ct. 2251 (2015), which eliminated ACCA's residual clause as an alternative basis for labeling burglary a violent felony.

This case turns on "divisibility"—whether statutory alternatives are elements or means, *i.e.* whether jurors would have to unanimously agree on which alternative applies. Specifically, this case turns on whether Wisconsin jurors need to agree on whether a burglary defendant entered a "building or dwelling," versus another of

the statute's alternatives (e.g. "ship or vessel," "room within any of the above"). This inquiry requires federal judges to delve into state law—to predict how the Wisconsin Supreme Court would decide the question.

The Eighth Circuit affirmed that Mr. Webster was an armed career criminal, because the court's prior decision in *United States v. Lamb*, 847 F.3d 928 (8th Cir. 2017), held that the locations were alternative elements based on the panel's assessment of Wisconsin case law.

Six days after the Eighth Circuit's affirmance of Mr. Webster's sentence, the Seventh Circuit Court of Appeals granted a petition for rehearing en banc to determine if Wisconsin burglary is an ACCA predicate. *United States v. Franklin*, 895 F.3d 954 (7th Cir. 2018). As part of that grant, the Seventh Circuit certified the means/elements question to the Wisconsin Supreme Court. *Id*. (certifying the question to the Wisconsin Supreme Court and citing *Lamb* to note the implications of the decision). Therefore, all federal courts will soon have a definitive answer on the means/elements question. *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016) (holding that state law controls on the means/elements question).

This Court should grant this petition for writ of certiorari, because the Seventh Circuit and Eighth Circuit Court of Appeals are at odds with their resolution of the Wisconsin burglary question. At the very least, this Court should stay ruling on the petition for writ of certiorari pending the Wisconsin Supreme Court's resolution of the means versus elements question.

I. THE LOCATIONS UNDER WISCONSIN'S BURGLARY STATUTE ARE ALTERNATIVE MEANS—A QUESTION PENDING RESOLUTION FROM THE WISCONSIN SUPREME COURT—MAKING WISCONSIN BURGLARY BROADER THAN GENERIC BURGLARY AND THEREFORE NOT A QUALIFYING PRIOR CONVICTION UNDER THE ARMED CAREER CRIMINAL ACT (ACCA), 18 U.S.C. § 924(E)(1).

On remand after *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Eighth Circuit Court of Appeals considered whether Wisconsin burglary was still an Armed Career Criminal predicate. *Lamb*, 847 F.3d at 930. In *Lamb*, the Court analyzed whether the locations in the Wisconsin burglary statute were means or elements, to determine if Wisconsin burglary was broader than generic burglary. *Id.* The Court held that each separate location under Wisconsin burglary was an element, and therefore the statute was divisible as to location. *Id.* Stated another way, the panel believed that the Wisconsin legislature intended to create six different burglary statutes. *Id.* The Court held that the modified categorical approach was appropriate. *Id.*

This Court should grant the petition for writ of certiorari. *Lamb* incorrectly applied *Mathis* to determine that Wisconsin burglary is divisible.

Wisconsin Statute § 943.10(1) (1989, 1993, 1994) states:

> (1) 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 C 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 generic burglary.[2] The question is then whether subsections (a)-(f) of § 943.10(1m) present alternative means or alternative elements. Wisconsin case law does not specifically answer whether the locations are alternative means or elements.[3] However, in *Lamb* the Eighth Circuit relied on an abrogated Wisconsin case, and improperly rejected Wisconsin's leading jury-unanimity case, *State v. Derango,* 613 N.W.2d 833 (Wis. 2000), to find that the locations were alternative elements. Under the analysis laid out by in *Derango*, it is clear that the locations are alternative means.

In *Derango*, the court held that with the state's child-enticement statute, jurors need not agree on the purpose of the enticement; the alternative purposes listed in the statute's six subsections, which listed alternative motivations for luring the child, are means, not elements. *Id.* at 839-40. The court reasoned that:

(1) Luring a child to a secluded place (not the specific purpose) is the "evil" addressed by the statute:

(2) An early version of the statute referred generally to an intent to "commit a crime against sexual morality," rather than listing alternatives, and there

[2] This Court's recent decision in *United States v. Stitt,* 139 S. Ct. 399 (2018), does not defeat Mr. Webster's claim.

[3] The Wisconsin Supreme Court's response to the Seventh Circuit's certified question should definitively answer this question. *United States v. Franklin*, 895 F.3d 954 (7th Cir. 2018).

was "no indication in the legislative history that the legislature intended to take what was once a single crime and replace it with six";

(3) The alternatives do not involve acts that are "separate in time or are significantly different in nature";

(4) A defendant could commit a single act of enticement with multiple mental states, and "multiple punishments" for that single act "would not be appropriate."

Derango's reasoning fits burglary perfectly:

(1) Burglary statutes are aimed at the evil of nonconsensual entry with the intent to commit a crime, not the specific location. *See* Wayne R. LaFave, Substantive Law § 21.1(g).

(2) Wisconsin's burglary statute used to have general language regarding locations, *Champlin v. State,* 267 N.W.2d 295, 297 (Wis. 1978), and there is no indication in the legislative history that the legislature intended to take what was once a single crime and replace it with six." *Derango,* 613 N.W.2d at 839-40.

(3) The burglary statute's location alternatives do not involve separate acts that are different in nature.

(4) A single act of burglary could implicate multiple alternatives (e.g. dwelling and ship, building and room), and it would "not be appropriate" to impose multiple sentences for the single act of breaking into a houseboat, or entering multiple rooms of a building.

Lamb disregarded *Derango* by claiming that it conflicted with much older state case law, *State v. Baldwin,* 304 N.W.2d 742 (Wis. 1981), and then assuming that *Baldwin*, not *Derango*, was good law. *Lamb*, 847 F.3d at 932, n. 2. The Court then stated: "We know of no rational way to decide which of these state court decisions should govern the elements/means question that controls ACCA

divisibility in this case." *Id.* An analysis of Wisconsin case law makes clear that this is incorrect and that *Derango*, not *Baldwin*, controls.

First, *Baldwin* did not say that the itemized alternatives in the statute at issue (second-degree sexual assault) were distinct offenses—that was not an issue in the case—the state supreme court merely mused (in dicta) that the alternatives seemed distinct. 304 N.W.2d at 748-49. In any event, *Derango* explicitly abrogated this musing. 618 N.W.2d at 841. *Derango* said that *Baldwin* addressed the "conceptually distinct" theory of jury unanimity, which the Supreme Court had since rejected. 613 N.W.2d at 746. Therefore, there is no doubt that *Derango* controls the means/elements question. *See, e.g., State v. Hendricks,* 906 N.W.2d 666, 677 (Wis. 2018) (using *Derango* to decide whether statutory alternative is an element). Regardless, a court should not assume that a theoretical tie should favor the government. *United States v. Herrold,* 883 F.3d 517, 522 (5th Cir. 2018) (en banc) ("Should our dual forays into state law and the record leave the question of divisibility inconclusive, the tie goes to the defendant—because the ACCA demands certainty that a defendant indeed committed the generic offense, any indeterminacy on the question means the statute is indivisible.").

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

After rejecting *Derango*, the *Lamb* Court 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 are alternative elements is that the locations are in separate subsections. However, 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. 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 Derango*, 613 N.W.2d at 839–41 (holding that the itemized subsections of the state's child-enticement statute are not elements). Regardless of drafting style, Wisconsin case law makes clear that "[i]f the [statutory] alternatives are similar, one crime was probably intended." *Manson v. State,* 304 N.W.2d 729, 734 (Wis. 1981). Therefore, Wisconsin burglary is overbroad.

CONCLUSION

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

RESPECTFULLY SUBMITTED,

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