

No. 18-7572

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IN THE SUPREME COURT OF THE UNITED STATES

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VERNON MONTRELL WEBSTER, PETITIONER

v.

UNITED STATES OF AMERICA

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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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BRIEF FOR THE UNITED STATES IN OPPOSITION

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# QUESTION PRESENTED

Whether petitioner's prior convictions for burglary, in violation of Wis. Stat. 943.10(1)(a) (1989, 1993), qualify as convictions for generic burglary under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-3) is not published in the Federal Reporter but is reprinted at 730 Fed. Appx. 396

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2018. A petition for rehearing was denied on August 28, 2018 (Pet. App. 6). On October 26, 2018, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including January 25, 2019, and the petition was filed on January

23, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Iowa, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 2-3.

1. In July 2015, petitioner sold a stolen gun and a bulletproof vest to a confidential informant. Presentence Investigation Report (PSR) ¶¶ 4-6, 13. Petitioner has multiple prior felony convictions, PSR ¶¶ 24-36, including three for burglary, PSR ¶¶ 24, 26, 27. Petitioner was indicted on, and eventually pleaded guilty to, one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2; D. Ct. Doc. 23, at 1-2 (April 6, 2017).

A conviction for violating 18 U.S.C. 922(g)(1) carries a statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, a defendant has at least three prior convictions for "a violent felony or a serious drug offense," the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. 18 U.S.C. 924(e)(1). Felony burglary is one type of "violent felony." 18 U.S.C. 924(e)(2)(B)(ii).

To qualify as a “burglary” under the ACCA, the definition of the crime underlying the prior conviction must “substantially correspond[] to ‘generic’ burglary” or a subset thereof. Taylor v. United States, 495 U.S. 575, 602 (1990). Generic burglary is an “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” Id. at 599. To determine whether a crime meets that definition, courts generally apply a “categorical approach.” See, e.g., United States v. Stitt, 139 S. Ct. 399, 405 (2018). As this Court explained in Mathis v. United States, 136 S. Ct. 2243 (2016), under that approach, a court “focus[es] solely” on “the elements of the crime of conviction,” not “the particular facts of the case.” Id. at 2248. Sometimes, the statute underlying the prior conviction has a so-called “‘divisible’” structure, in which it “list[s] elements in the alternative, and thereby define[s] multiple crimes.” Id. at 2249 (citation omitted). When the statute of conviction is divisible, the sentencing court may apply the “modified categorical approach,” under which a court may “look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant was convicted of.” Ibid.; see Shepard v. United States, 544 U.S. 13, 26 (2005).

For the modified categorical approach to apply, the state statute must set out alternative elements (facts that the jury must find or the defendant must admit to sustain a conviction)

rather than alternative means ("various factual ways of committing some component of the offense" that "a jury need not find (or a defendant admit)" for conviction). Mathis, 136 S. Ct. at 2249. "The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means." Id. at 2256. That determination may be resolved by examining "authoritative sources of state law," including state court decisions. Ibid.

2. In this case, the Probation Office recommended that petitioner be sentenced under the ACCA because he had four prior Wisconsin convictions that qualified as ACCA predicates: a 1998 conviction for possession with intent to distribute cocaine, and 1989, 1993, and 1994 convictions for burglary. PSR ¶¶ 24, 26-28. Petitioner's burglary convictions all involved violations of Wis. Stat. § 943.10(1)(a) (1989, 1993). At the time of petitioner's convictions, Section 943.10(1), now renumbered Section 943.10(1m), provided:

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.

Id. § 943.10(1) (1989, 1993). Petitioner objected to his ACCA classification, asserting that Wisconsin's burglary statute is overbroad and indivisible. PSR ¶¶ 24, 26-27. He acknowledged, however, that the Eighth Circuit previously had determined in United States v. Lamb, 847 F.3d 928 (2017), cert. denied, 138 S. Ct. 1438 (2018) (No. 17-5152), that the statute was divisible. PSR ¶¶ 24, 26-27. The district court overruled petitioner's objections and sentenced petitioner to 180 months of imprisonment. Sent. Tr. 5-6; Judgment 2.

3. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 2-3. The court recognized that, as petitioner himself had acknowledged, petitioner's challenge to the classification of his burglary convictions as ACCA predicates was foreclosed by Lamb. Id. at 3.

Shortly after the court of appeals affirmed petitioner's sentence, the Seventh Circuit granted panel rehearing in United States v. Franklin, 895 F.3d 954 (2018), in which the panel earlier had agreed with Lamb and found the Wisconsin statute divisible, United States v. Franklin, 884 F.3d 331, 336 (7th Cir. 2018). The Seventh Circuit certified the question of the statute's divisibility to the Supreme Court of Wisconsin. Franklin, 895 F.3d at 955-956.

Following the Seventh Circuit's certification, petitioner sought to hold his case in abeyance pending the Supreme Court of Wisconsin's decision, but the Eight Circuit denied that request, Pet. App. 5, and then denied petitioner's request for panel rehearing or rehearing en banc, id. at 6. Meanwhile, the Supreme Court of Wisconsin accepted the certified question and, following briefing in which the State also participated, held argument on February 11, 2019. United States v. Franklin, No. 2018AP1346. That court has not yet issued a decision.

#### ARGUMENT

Petitioner renews his contention (Pet. 6-13) that Wisconsin burglary is indivisible and therefore too broad to qualify as generic burglary under the ACCA. The Supreme Court of Wisconsin soon will decide that state-law divisibility question. Accordingly, plenary review in this Court is unnecessary and unwarranted. If it wishes, however, the Court could hold the petition pending the Supreme Court of Wisconsin's forthcoming ruling.

The question presented does not warrant this Court's plenary review. As petitioner recognizes (Pet. 7), the question is one of state law. See Mathis, 136 S. Ct. at 2256. In accord with its general practice on questions of state law, this Court typically does not grant certiorari to review a lower court's determination of a state statute's divisibility. See, e.g., Gundy v. United States, cert. denied, No. 16-8617 (Oct. 2, 2017); Rice v. United



States, cert. denied, No. 15-9255 (Oct. 3, 2016). Indeed, the Court denied certiorari in the very case on which the decision below relied. Lamb v. United States, No. 17-5152 (April 2, 2018). Petitioner identifies no circuit conflict on the question presented; to the contrary, both courts of appeals to have considered the issue have agreed that the statute is divisible. United States v. Lamb, 847 F.3d 928, 930 (8th Cir. 2017), cert. denied, 138 S. Ct. 1438 (2018) (No. 17-5152); United States v. Franklin, 884 F.3d 331, 336 (7th Cir.), reh'g granted, 895 F.3d 954 (2018).

Moreover, the relevant state high court is poised to issue a conclusive ruling on the statute's divisibility. See United States v. Franklin, No. 2018AP1346 (argued Feb. 11, 2019). If the petition were denied and that court definitively interpreted the state statute as indivisible, it is possible that petitioner could seek postconviction relief under 28 U.S.C. 2255.

Alternatively, if this Court wishes, it could defer consideration of the petition pending the Supreme Court of Wisconsin's decision in Franklin, and dispose of it as appropriate thereafter in light of that decision. See Stephen M. Shapiro et al., Supreme Court Practice § 5.9, at 340 (10th ed. 2013).

## CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, if the Court wishes, it could defer consideration of the petition pending the Supreme Court of Wisconsin's decision in United States v. Franklin, No. 2018AP1346 (argued Feb. 11, 2019), and dispose of it as appropriate thereafter.

Respectfully submitted.

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