

No.

IN THE SUPREME COURT OF THE UNITED STATES

JAMES STEVEN MAXWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

Under the Armed Career Criminal Act (“ACCA”) (18 U.S.C. § 924(e)), three qualifying previous felony convictions invokes a minimum sentence of 15 years for the offense of felon in possession of a firearm (18 U.S.C. § 922(g)(1)). In district court, the Petitioner’s motion pursuant to 18 U.S.C. § 2255 was rejected for the reason that two of his prior convictions qualified under the ACCA’s elements clause. The clause requires an element of force capable of causing physical pain or injury. On appeal, the court of appeals held that the Petitioner did not qualify for a certificate of appealability because his claim that two of his prior convictions did not meet the force standard of the elements clause was foreclosed by *United States v. Taylor*, 843 F.3d 1215 (10th Cir. 2016). *Taylor* held that the State of Oklahoma offense of assault and battery with a dangerous weapon qualified under the elements clause of USSG § 4B1.2(a)(1), which is identical to the elements clause of the ACCA. Under Oklahoma law, battery can be committed by lightly touching another person, and a dangerous weapon includes a sword cane, a loaded cane, and a hand chain.

Question presented: does *Taylor*’s holding, that Oklahoma’s offense of assault and battery with a dangerous weapon meets the force standard in the elements clause (force capable of causing physical pain or injury), incorrectly apply *Mathis v. United States*, 136 S. Ct. 2243 (2016), which held that an

overbroad offense cannot be divided during categorical analysis if the overbroad terms consist of means, where the Oklahoma offense can be committed by lightly touching another person with a sword cane, loaded cane, or hand chain?

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PREVIOUS OPINIONS AND ORDERS

In *United States v. Maxwell*, 743 F. App'x 255 (10th Cir. 2018) (unpublished), the United States Court of Appeals for the Tenth Circuit issued an Order Denying Certificate of Appealability wherein James Maxwell, the Petitioner herein, was the Appellant/Defendant. *See* Attachment 1 (attached hereto). This Petition seeks issuance of a writ of certiorari to the Tenth Circuit Court of Appeals in regard to the Order.

The Order dismissed the Petitioner's attempt to appeal an Opinion and Order, along with a Judgment, that were filed in the United States District Court for the Northern District of Oklahoma, in *United States v. James Maxwell*, Case No. 10-CR-190-JHP. *See* Attachments 2 and 3 (attached hereto).

JURISDICTION

The Tenth Circuit considered the Petitioner's request for a Certificate of Appealability under the authority of 28 U.S.C. § 2253(c)(1)(B). On November 20, 2018, the Tenth Circuit filed the Order and Judgment now presented for review. Attachment 1 (attached hereto). Neither party requested a rehearing.

Jurisdiction for a writ of certiorari lies in this Court pursuant to 28 U.S.C. §1254(1), applicable to cases in the courts of appeals, which permits a writ of certiorari to be "granted upon the petition of any party to any civil or criminal

case, before or after rendition of judgment or decree." Mr. Maxwell was the Appellant in the case now submitted for review.

APPLICABLE LEGAL PROVISIONS

18 U.S.C. § 924(e):

(1) In the case of a person who violates section 922(g) of this title [18 USCS § 922(g)] and has three previous convictions by any court referred to in section 922(g)(1) of this title [18 USCS § 922(g)(1)] 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 section 922(g) [18 USCS § 922(g)].

(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; 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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Okla. Stat. tit. 21, § 645 (1991):

Every person who, with intent to do bodily harm and without justifiable or excusable cause, commits any assault, battery, or assault and battery upon the person of another with any sharp or dangerous weapon, or who, without such cause, shoots at another, with any kind of firearm or air gun or other means whatever, with intent to injure any person, although without the intent to kill such person or to commit any felony, upon conviction is guilty of a felony punishable by imprisonment in the penitentiary not exceeding ten (10) years, or by imprisonment in a county jail not exceeding one (1) year.

Okla. Stat. tit. 21, § 1272.A (1991):

A. It shall be unlawful for any person to carry upon or about his or her person, or in a purse or other container belonging to the person, any pistol, revolver, shotgun or rifle whether loaded or unloaded or any blackjack, loaded cane, billy, hand chain, metal knuckles, or any other offensive weapon, whether such weapon be concealed or unconcealed[.]

STATEMENT OF THE CASE

1. District Court Proceedings

An Indictment filed in the Northern District of Oklahoma charged James Maxwell, in Counts One and Two, with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). A jury found him guilty as charged. He had three prior convictions that a Presentence Investigation Report (“PSR”) characterized as violent felonies, which led to the conclusion that the Armed Career Criminal Act (“ACCA”) applied. *Id. See* 18 U.S.C. § 924(e). Two of the convictions were Assault with a Dangerous Weapon, and Assault and Battery with a Dangerous Weapon, imposed by state district courts in Oklahoma. The third was Use of a Firearm During a Drug Trafficking Crime--a federal conviction.

At sentencing, Mr. Maxwell objected to use of his assault with a dangerous weapon conviction to invoke the ACCA. The district court overruled the objection. In result, a statutory minimum sentence of 15 years applied to Mr. Maxwell (per 18 U.S.C. § 924(e)), as well as a Sentencing Guideline range of 188-235 months. In each count, the district court imposed a sentence of 188 months in federal custody, to be served concurrently. Mr. Maxwell is now serving his sentences in the U.S. Bureau of Prisons.

2. Direct Appeal

Mr. Maxwell timely appealed to the Tenth Circuit. Aside from issues relating to his convictions, he challenged the status of his Assault with a Dangerous Weapon conviction as an ACCA predicate. He argued, as he did in district court, that (1) the conviction was invalid because he was not informed by counsel before his guilty plea in state court that a conviction could enhance a future sentence; and (2) the conviction was a misdemeanor, whereas the ACCA requires a felony. Both claims failed, and the district court's judgment was affirmed. *See United States v. Maxwell*, 492 F. App'x 860 (10th Cir. 2012).

3. Section 2255 Motion

On June 27, 2016, Mr. Maxwell filed a motion to vacate his sentences, relying on 28 U.S.C. § 2255. In the motion and its supporting brief, he relied on *Johnson v. United States*, 135 S. Ct. 1551 (2015), to claim that the residual clause of the ACCA was unconstitutionally vague, rendering his ACCA sentences un-constitutional. He argued that neither of his two assault convictions qualified for the ACCA after *Johnson*, leaving only one qualifying conviction.

In an Opinion and Order, the district court observed that timeliness of the § 2255 motion was undisputed. Attachment 2 at 6. The court agreed. Turning to the merits, the court observed that if the ACCA's residual clause was the sole

support for enhancement at the time of sentencing, the assault convictions would not be valid predicates. *Id.* at 7. The court added that if the ACCA’s “elements clause” applied to the prior convictions, any error would be harmless. *Id.* Ultimately the court found that the issue was resolved by *United States v. Taylor*, 843 F.3d 1215 (10th Cir. 2016), which held that the same penal statute underlying Mr. Maxwell’s assault convictions—Okla. Stat. tit. 21, § 645—qualified for the “elements clause.” Attachment 2 at 9-10. The district court further found that a third ACCA-qualifying prior conviction existed. *Id.* at 11-12. Concluding that any error in applying the residual clause was harmless, the court denied the § 2255 motion. *Id.* at 12. In addition, the court denied a certificate of appealability. *Id.* at 13. The court issued a Judgment in the government’s favor as to the § 2255 motion. Attachment 3.

4. Second Appeal

Mr. Maxwell timely appealed to the Tenth Circuit. He filed an opening brief which contained a request for a certificate of appealability. He conceded that under *Taylor*, Tenth Circuit law required the reviewing panel to hold that his Oklahoma convictions involving a dangerous weapon qualified under the ACCA’s “elements clause.” Pointing to this concession, the Tenth Circuit held that Mr. Maxwell did not meet the standard for obtaining a certificate of appealability. The court cited *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003),

which held that to be able to make a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253(c)(2), a movant must establish that “reasonable jurists could debate whether (or, for that matter, agree that) the [motion] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further”.

Attachment 1 at 2, *quoting Miller-El*, 537 U.S. at 336 (quotation marks omitted).

Mr. Maxwell’s opening brief presented the same argument that is presented in this petition, which is that *Taylor* was wrongly decided. The gist of the argument was (and is) that *Taylor* did not correctly apply Supreme Court cases that address the ACCA.

REASON FOR GRANTING A WRIT

Certiorari is appropriate when “a... United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.” S. Ct. R. 10(c). This basis for review is presented here because the issue in this case is an important federal question that conflicts with a relevant decision of this Court: *Mathis v. United States*, 136 S. Ct. 2243 (2016)

In denying Mr. Maxwell’s § 2255 motion, the district court stated that *Taylor* foreclosed Mr. Maxwell’s arguments. Attachment 2 at 9. *Taylor* held that a conviction of assault and battery with a dangerous weapon as set out in Okla. Stat. tit 21, § 645, qualified as a crime of violence under USSG § 4B1.2(a)(1). As the district court correctly noted, *Taylor*’s analysis is applicable to the ACCA, which contains wording that is identical to § 4B1.2(a)(1). Attachment 2 at 9, n. 3.

Mr. Maxwell’s state court convictions of assault with a dangerous weapon, and assault and battery with a dangerous weapon, stemmed from the same statute that was involved in *Taylor*. *Taylor* controls the analysis of Mr. Maxwell’s assault and battery with a dangerous weapon conviction because the

same offense and statute were addressed in that case. *Taylor* also controls the analysis of the assault with a dangerous weapon conviction because the main rationale of the decision was that assault with a dangerous weapon involved the level of physical force that the elements clause required. 843 F.3d at 1223-24.

Mr. Maxwell submits that *Taylor* was wrongly decided, and his ACCA sentences are constitutionally invalid. Accordingly, the standard for issuance of a certificate of appealability is satisfied in this case.

A. The Law in *United States v. Taylor*

Like the ACCA does, USSG § 4B1.2(a)(1) contains a clause that describes an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another[.]” This is called the elements clause. *Welch v. United States*, 136 S. Ct. 1257, 1261 (2016). In order to determine whether the prior conviction at issue qualified under the Sentencing Guidelines’ elements clause, *Taylor* initially recognized that modified categorical analysis applied to the statute underlying the conviction-- Okla. Stat. tit. 21, § 645. 843 F.3d at 1222-23. Proceeding with that analysis, the panel reviewed the charging information and found that Mr. Taylor had been convicted of assault and battery with a dangerous weapon.

Framing Mr. Taylor’s conviction in terms of the applicable penal statute, the *Taylor* court “reduced” the offense to “assault [and battery] upon the person of another with any dangerous weapon with intent to do bodily harm and without justifiable or excusable cause.” *Id.* at 1223, quoting *United States v. Mitchell*, 653 F. App’x 639 (10th Cir. 2016) (unpublished). Next, the panel separately defined assault and battery. *Id.* Assault, per Okla. Stat. tit. 21, § 641, was defined as “any willful and unlawful attempt or offer with force or violence to do a corporal hurt to another[.]” *Id.* Battery was defined as “any willful and unlawful use of force or violence upon the person of another[.]” *Id.*, citing Okla. Stat. tit. 21, § 642.

Next, the discussion set out to determine whether the offense necessarily involved the level of force required by § 4B1.2(a)(1). *Id.* As *Johnson v. United States*, 559 U.S. 133, 140 (2010) (hereinafter *Johnson* II) established, the standard is “violent force,” defined as “force capable of causing physical pain or injury to another person.” *Taylor* acknowledged that under Tenth Circuit precedent, Oklahoma’s offense of battery does not satisfy the definition of violent force because battery could consist of slight touching. 843 F.3d at 1223, citing *United States v. Smith*, 652 F.3d 1244, 1247 (10th Cir. 2011).

In reaching the conclusion that assault and battery with a dangerous weapon met the violent force standard, *Taylor* heavily focused on the assault aspect of the offense. Tracking the analysis in *Mitchell* (which did not involve a battery element), *Taylor* recognized two types of assault: apprehension-causing assault and attempted battery assault. *Id.* The panel concluded that either one, when perpetrated with a dangerous weapon, met the violent force requirement of the elements clause. *Id.*

Next, *Taylor* turned to Oklahoma's definition of dangerous weapon. The panel quoted *Mitchell* as follows:

The statute here criminalizes an intentional attempt or threat to commit violence on another—that is, either an attempted-battery assault or an apprehension-causing assault—with a weapon capable of causing great bodily harm. In other words, a conviction under this portion of § 645 categorically requires proof of the attempted use or threatened use of violent force. Following our precedent, a conviction under these elements of § 645 “is categorically a crime of violence under all circumstances.” *Madrid*, 805 F.3d at 1207.

Taylor, 843 F.3d at 1224, quoting *Mitchell*, 653 F. App'x at 645.

While *Taylor* agreed with the appellant that Oklahoma's definition of a dangerous weapon consisted of a series of means, not elements, the court rejected his claim that the means could not be considered during modified categorical analysis pursuant to *Mathis v. United States*, 136 S. Ct. 2243

(2016). *Taylor*, 843 F.3d at 1224. *Taylor* concluded that “regardless of how the ‘dangerous weapon’ element is satisfied in a particular case, the ‘dangerous weapon’ element always operates in the manner described in *Mitchell*[.]” *Id.* Although the issue in *Taylor* involved Oklahoma’s version of assault, the panel extended its conclusion to battery, saying: “regardless of the type of ‘dangerous weapon’ that is employed by a particular defendant, the use of a ‘dangerous weapon’ during an assault or battery always ‘constitutes a sufficient threat of force to satisfy the elements clause’ of § 4B1.2(a)(1).” *Id.* at 1224-25, quoting *Mitchell*, 653 F. App’x at 645.

Ultimately, *Taylor* concluded that no error existed as to the Sentencing Guideline enhancement, and affirmed the district court’s denial of the § 2255 motion.

B. Assault and Battery With a Dangerous Weapon Does Not Include the Definition of Standalone Assault

Assuming *arguendo* that the *Taylor* court correctly concluded that assault with a dangerous weapon met the elements clause, the court mistakenly used that conclusion to hold that assault and battery with dangerous weapon met the elements clause. Under Oklahoma law, the definition of assault (which is key to

the rulings in *Mitchell* and *Taylor*) is not part of battery, or assault and battery.

It is irrelevant to the crime of assault and battery with a dangerous weapon.

Under Oklahoma law, “[b]attery’ includes assault, but ‘assault’ does not include battery. When the assault culminates in a battery, the offense is assault and battery, and the prosecution should be commenced for that grade of assault and battery which is reasonably supported by the state's evidence.” *Hall v. State*, 309 P.2d 1096, 1100 (Okla. Crim. App. 1957).

Oklahoma's uniform jury instructions reflect this law. The basic instruction for the crime of assault and battery is Oklahoma Uniform Jury Instructions-Criminal (2nd Ed.) No. 4-26. In this instruction the elements are “willful, unlawful, use of force or violence, upon another person.” *United States v. Mason*, 709 F. App’x 898, 904 (10th Cir. 2017) (unpublished). Under Oklahoma law, as presented to juries in legal instructions, “[O]nly the slightest touching is necessary to constitute the 'force or violence' element of battery.”” *Steele v. State*, 778 P.2d 929, 931 (Okla. Crim. App. 1989). No separate instruction for the offense of battery exists in Oklahoma’s uniform instructions.

The Tenth Circuit summarized the crucial point in *Mason* as follows: “a battery or an ‘assault and battery’ is a completed assault; the assault merges with the battery.” 709 F. App’x at 904. Quite simply, under Oklahoma law,

assault and battery never requires proof of assault. That is, it never requires proof of “willful and unlawful attempt or offer with force or violence to do a corporal hurt to another[.]” *See Taylor*, 843 F.3d at 1223 (quoting Oklahoma’s assault statute, Okla. Stat. tit. 21, § 641).

Since the Oklahoma definition of assault is not part of the Oklahoma definition of assault and battery, the definition of assault likewise is not part of the definition of assault and battery with a dangerous weapon. Regarding level of violence, assault and battery with a dangerous weapon can be based on gently touching someone with a weapon, and a state court defendant cannot demand proof that he attempted or offered to hurt another through force or violence.

This revelation of Oklahoma law clearly shows that *Taylor* missed the mark. The panel found that the level of violence required by the elements clause was present in the two types of Oklahoma assault--apprehension-causing assault and attempted battery assault. But in legal terms, no assault is involved in Oklahoma’s assault and battery. The only relevant inquiry is whether battery with a dangerous weapon, which can be done with mere unconsented touching, necessarily involves the level of violence required by the elements clause.

Taylor, at the end of its analysis, provided an answer to whether battery with a dangerous weapon involves the requisite level of force. After lengthy discussion about assault, the panel said: “regardless of the type of ‘dangerous weapon’ that is employed by a particular defendant, the use of a ‘dangerous weapon’ during an assault *or battery* always ‘constitutes a sufficient threat of force to satisfy the elements clause’ of § 4B1.2(a)(1).” 843 F.3d at 1224-25, quoting *Mitchell*, 653 F. App’x at 645 (emphasis added). Mr. Maxwell contends that the conclusion regarding battery was not supported by the analysis (and was not rooted in any other Tenth Circuit precedent).

C. Mere Touching With a Sword Cane, a Loaded Cane, or a Hand Chain Does Not Constitute Violent Force

Battery with a dangerous weapon does not necessarily involve the level of violence required by the elements clause, because slight touching with a dangerous weapon does not necessarily involve force capable of causing physical pain or injury to another person. Categorical analysis requires a focus on the “least of the acts criminalized[.]” *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013). Consideration of the least dangerous weapon in the definition of dangerous weapon leads to the conclusion that the elements clause is not necessarily met by battery with a dangerous weapon.

Oklahoma Criminal Uniform Jury Instruction No. 4-28 defines dangerous weapon as “Any pistol/revolver/dagger/(bowie/dirk/switch-blade/spring-type knife)/(sword cane)/(knife having a blade which opens automatically)/blackjack/(loaded cane)/billy/(hand chain)/(metal knuckles)/(implement likely to produce death or great bodily harm in the manner it is used or attempted to be used).” *See* <http://www.okcca.net/online/oujis/oujisrvr.jsp?oc=OUJI-CR%204-28>. See Attachment 4. The instruction cites Okla. Stat. tit. 21, § 1272, which sets forth the same list of items in subsection A.

One of the listed items is a sword cane. Oxford English Dictionary defines “sword-cane” as a “hollow cane or walking-stick containing a steel blade which may be drawn or shot out and used as a sword.” *See* www.oed.com. By this definition, a steel blade is concealed in a hollow cane or walking stick, and is only apparent after being drawn or shot out. Oklahoma law has no requirement that the sword be drawn, shot out, or used in order to complete a battery. The offense can occur by touching someone with a cane that contains a sword unseen by the victim. To conclude that the hidden sword is a dangerous weapon, it need not be proved that touching with the sword occurred. Of course, battery requires touching. Mere unconsented touching

with a cane that conceals a sword does not necessarily involve force capable of causing physical pain or injury to another person.

Another means by which a dangerous weapon exists is “loaded cane.” A dictionary definition is elusive, but the term’s meaning is apparent: a cane that has been loaded with something (i.e. metal) to increase its weight and make it effective when used as a weapon. Merely touching someone with a loaded cane would not amount to force capable of causing physical pain or injury. A loaded cane would appear as an ordinary cane, and merely touching someone with such an item would inflict no more force than touching with the usual implement of battery--a hand.

Nor do battery with a sword cane or loaded cane present the threat of such physical pain or injury. When the minimum conduct for battery occurs, i.e., mere touching, a victim is not in a position to apprehend a threat; he knows that the perpetrator merely touched, and did not strike. And since the innocuousness of the item would not signal to a typical victim that the cane contains a sword, or that it is loaded, the threat that accompanies touching presents no threat beyond a light tap with an object--which is commonly done to simply draw someone’s attention.

Other means constituting a dangerous weapon fall short of posing the level of violence *Johnson* II requires. A hand chain, like sword cane and loaded cane, is not an apparent weapon. Merely touching someone with a hand chain does not present a threat, or possibility, of pain or injury. A blackjack, billy, or metal knuckles is in a different category, because each is a recognizable weapon, but it remains true that mere touching with any of them would not inflict pain or injury. And since assault and battery in Oklahoma means a completed battery, i.e., as little force as light touching, there is no requirement of a threat of pain or injury. With assault and battery committed by mere touching with a hand chain, blackjack, billy, or metal knuckles, the victim knows for certain that no greater force is threatened, inasmuch as the force has occurred, and it has been without pain or injury.

However, an object may be considered to be dangerous under Oklahoma law if it is used or attempted to be used in a manner that is likely to produce death or great bodily harm. This likelihood of death or great bodily injury would meet the violent force standard. At this point, *Mathis* is instrumental. *Mathis* instructs that: “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. If... they are means, the court has no call to decide which of

the statutory alternatives was at issue in the earlier prosecution.” 136 S. Ct. at 2256. *Mathis* addressed a hypothetical statutory definition of dangerous weapon similar to Oklahoma’s, and opined that the definition consisted of means which could not be divided for ACCA purposes. 136 S. Ct. at 2249.

Oklahoma’s assault with a dangerous weapon offense is established in one statute, and the list of dangerous weapons is established in another (and also in case law). *See* Okla. Stat. tit. 21, §§ 645, 1272, and *Sherburn v. State*, 787 P.2d 1282, 1284 (Okla. Crim. App. 1990)). Oklahoma’s offense is functionally identical to the *Mathis* hypothetical. Location of the definition of dangerous weapon in both a definitional statute and case law confirms that the definition is a matter of “brute facts[.]” *Mathis*, 136 S. Ct. at 2248. The open-ended nature of the definition (any implement likely to produce death or great bodily harm in the manner it is used or attempted to be used) further confirms this conclusion. A jury in Oklahoma would not have to unanimously agree on what item was used. It would only have to agree that a dangerous weapon was used. The element of dangerous weapon is not divisible, because means cannot be divided under *Mathis*.

Since the components of the dangerous weapon definition are means, and cannot be divided in the way elements can be divided, then any one component of the definition that does not necessarily fulfill the violent force standard

signifies that the elements clause is inapplicable. This is the case with the sword cane, loaded cane, and hand chain components of the definition of dangerous weapon, which are not designed to be weapons, and do not inherently appear to be weapons. These items exemplify the least culpable forms of the offense. Any one of them establishes that the offense of assault and battery with a dangerous weapon encompasses conduct that does not necessarily qualify for the elements clause. *Taylor* reached the opposite conclusion and should be overruled.

Mr. Maxwell has shown that reliance on the ACCA's elements clause to qualify his dangerous weapon convictions as violent felonies was improper. This establishes that reliance on the ACCA residual clause at sentencing was not harmless. Mr. Maxwell's § 2255 motion was meritorious. By following *Taylor* to reach the conclusion that Mr. Maxwell did not qualify for a certificate of appealability, the Tenth Circuit applied law that is incompatible with *Mathis*. That is, reasonable jurists could debate whether, or agree that, the motion should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *See Miller-El*, 537 U.S. at 336. The standard is met because Mr. Maxwell's claim is meritorious.

CONCLUSION

Mr. Maxwell asks this Court to grant his petition for certiorari, and ultimately reverse the Tenth Circuit's Order and remand with instructions to grant a certificate of appealability and proceed with appellate review in accordance with *Mathis* and the opinion rendered on this petition.

Respectfully submitted,

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ATTACHMENT 1:

United States v. Maxwell, 743 F. App'x 255
(10th Cir. 2018) (unpublished)

United States v. Maxwell

United States Court of Appeals for the Tenth Circuit

November 20, 2018, Filed

No. 18-5074

Reporter

743 Fed. Appx. 255 *; 2018 U.S. App. LEXIS 32786 **; 2018 WL 6074369

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JAMES STEVEN MAXWELL, Defendant - Appellant.

Prior History: [**1] (D.C. Nos. 4:16-CV-00402-JHP-JFJ and 4:10-CR-00190-JHP-1). (N.D. Okla.).

United States v. Maxwell, 2018 U.S. Dist. LEXIS 84779 (N.D. Okla., May 21, 2018)

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Leena Alam, Office of the United States Attorney, Northern District of Oklahoma, Tulsa, OK.

For JAMES STEVEN MAXWELL, Defendant - Appellant: Barry L. Derryberry, Office of the Federal Public Defender, Northern and Eastern Districts of Oklahoma, Tulsa, OK.

Judges: Before BACHARACH, MURPHY, and MORITZ, Circuit Judges.

Opinion by: Michael R. Murphy

Opinion

[*256] ORDER DENYING CERTIFICATE OF APPEALABILITY

This matter is before the court on James Steven Maxwell's counseled request for a certificate of appealability ("COA"). Maxwell seeks a COA so he can appeal the district court's denial of his 28 U.S.C. § 2255 motion. 28 U.S.C. § 2253(c)(1)(B). Because Maxwell has not "made a substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2), this court **denies** his request for a COA and **dismisses** this appeal.

Maxwell "was convicted by a jury of two counts of being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). He was sentenced to 195 months of imprisonment." *United States v. Maxwell*, 492 F. App'x 860, 862 (10th Cir. 2012). On appeal, this court affirmed Maxwell's convictions and sentence. *Id.* at 869. In so doing, this court rejected Maxwell's contention that the district court erred in imposing upon [**2] him an enhanced sentence pursuant to the Armed Career Criminal Act ("ACCA"). *Id.* at

868-69. Thereafter, Maxwell filed the instant § 2255 motion, asserting an entitlement to relief under the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (holding that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §§ 922(g), 924(a)(2), and 924(e)(1), is unconstitutionally vague). The district court denied Maxwell's § 2255 motion, concluding this court's decision in *United States v. Taylor*, 843 F.3d 1215 (10th Cir. 2016), precluded granting post-conviction relief in Maxwell's favor. In particular, the district court ruled that given the decision in *Taylor*, Maxwell's 1981 and 1985 Oklahoma state convictions for assault and battery with a dangerous weapon, Okla. Stat. tit. 21, § 645, qualified as predicate offenses under the elements clause¹ for purposes of the enhanced penalties set out in the ACCA. Thus, even assuming Maxwell's Oklahoma state convictions were treated as violent felonies under the ACCA's residual clause at the time of the original sentencing hearing, any such error was harmless because the relevant convictions qualified as violent felonies under the ACCA's elements clause.²

Maxwell seeks a COA so he can appeal the district court's denial of his *Johnson*-based [*257] § 2255 motion. In his counseled request for a COA, [***3] however, Maxwell candidly and correctly concedes this court's "ruling in *Taylor* is on point and will require the panel to deny this appeal." Appellant Br. At 6. Thus, according to Maxwell, his "request for a COA is made in the interest of preserving [his] argument for purposes of filing a petition for writ of certiorari in the Supreme Court or other possible appellate avenues." *Id.* That being the case, Maxwell is not entitled to a COA. *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing § 2253(c)(2) for the proposition that to be entitled to a COA, a movant must make "a substantial showing of the denial of a constitutional right" and holding that to make the requisite showing, the movant must demonstrate "reasonable jurists could debate whether (or, for that matter, agree that) the [motion] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further" (quotations omitted)).

For those reasons set out above, this court **DENIES** Maxwell's request for a COA and **DISMISSES** this appeal.

ENTERED FOR THE COURT

¹ The ACCA's elements clause, which was left undisturbed by the Supreme Court's invalidation of the residual clause in *Johnson*, *see United States v. Harris*, 844 F.3d 1260, 1262 (10th Cir. 2017), defines the term "violent felony" to include any felony that "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).

² It is perfectly reasonable and judicially efficient for a district court to assume a movant's sentence was enhanced under the ACCA's residual clause when it is clear the movant is not, in any event, entitled to relief because the relevant convictions qualify as violent felonies under the ACCA's elements clause. Nevertheless, it is worth again emphasizing that, to be entitled to relief under *Johnson*, it is the movant's burden to demonstrate by a preponderance of the evidence that the district court relied on the residual clause in arriving at the movant's original sentence. *United States v. Washington*, 890 F.3d 891, 894-97 (10th Cir. 2018).

Michael R. Murphy

Circuit Judge

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ATTACHMENT 2:
Opinion and Order of the District Court

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)

Plaintiff,
v.
JAMES STEVEN MAXWELL,
Defendant.

Case No: 10-CR-190-JHP

OPINION AND ORDER

Before the Court is Defendant James Steven Maxwell’s (“Defendant”) amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Dkt. 90). Defendant contends his detention pursuant to the Judgment and Sentence of the United States District Court for the Northern District of Oklahoma, in Case No. 10-CR-190-JHP, is unlawful. Defendant has filed a separate Brief in Support of his Motion. (Dkt. 94). Plaintiff the United States of America (“Government”) filed a Response in Opposition to Defendant’s Motion (Dkt. 57), and Defendant filed a Reply (Dkt. 98). The Government subsequently filed a Notice of Supplemental Authority (Dkt. 101). For the reasons cited herein, Defendant’s Motion pursuant to § 2255 is

BACKGROUND

On December 7, 2010, a federal Grand Jury indicted Defendant with being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1) (Counts One and Two). (Dkt. 7 (Indictment)). On March 29, 2011, Defendant was convicted by a jury of both Counts One and Two. (Dkt. 47 (Jury Verdict)).

In advance of sentencing, the United States Probation Office prepared a Presentence Investigation Report (“PSR”) as to Defendant, in which it was recommended he be classified as an Armed Career Criminal (“ACC”) under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (“ACCA”). (PSR ¶ 19). Defendant’s ACC classification was based on his having committed the § 922(g)(1) offense after sustaining three prior convictions for a violent felony or serious drug offense. Defendant’s predicate ACC convictions were two convictions for Assault with a Dangerous Weapon, in violation of 21 Okl. St. § 645 (Texas County, Oklahoma Case No. CRF-81-294; Tulsa County Case No. CRF-85-644), and one conviction for Use of a Firearm During a Drug Trafficking Crime (Northern District of Oklahoma Case No. 94-CR-103-001-E). (See PSR ¶¶ 19, 23, 26, 30). As an ACC, Defendant faced a fifteen-year mandatory minimum sentence. (PSR ¶ 57).

Defendant objected to his ACC classification, challenging the use of his two assault convictions as predicates to enhance his sentence (Dkt. 51). In his Objections to the PSR, Defendant argued his assault convictions were improper ACC predicates because he was never informed during those guilty pleas that such convictions could later be used as sentencing enhancements. (Dkt. 51). As a result, Defendant argued those guilty pleas were not freely and voluntarily made and therefore were invalid as a matter of law. (*Id.*). He further challenged use of the 1981 Texas County assault conviction on the ground it was not a felony. (Dkt. 56). Defendant did not contest the applicability of his Use of a Firearm During a Drug Trafficking Crime conviction. The Government opposed Defendant's objections. (Dkt. 58).

At sentencing, the Court overruled Defendant's objections and found Defendant to be an ACC. (Dkt. 70 (Sent. Tr.), at 21-23). The Court sentenced Defendant to imprisonment for 195 months on each Count, to run concurrently with each other and with any sentence in Tulsa County Case No. CF-2010-4393. (Dkt. 61 (Judgment & Commitment)).

Defendant appealed his convictions and sentence. Defendant presented his previous objections to use of his 1981 assault conviction as an ACCA predicate. The Tenth Circuit affirmed the convictions and sentence imposed by this Court.

United States v. Maxwell, 492 F. App'x 860 (10th Cir. 2012). Defendant did not petition for a writ of certiorari with the United States Supreme Court, and he did not file a § 2255 motion or other collateral challenge prior to the present proceeding.

Defendant has now filed an amended motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. (Dkt. 90). Defendant raises a single ground in his motion, that his ACCA sentence violates due process based on *United States v. Johnson*, 135 S. Ct. 2551 (2015) (Dkt. 90, at 4). Defendant also filed a Brief in Support of his Motion (Dkt. 94). The Government filed a Response in Opposition (Dkt. 97), and Defendant filed a Reply (Dkt. 98). The Government also filed a Notice of Supplemental Authority, notifying the Court of the Tenth Circuit's opinion in *United States v. Taylor*, 843 F.3d 1215 (10th Cir. 2016). (Dkt. 101). The pending motion is now fully briefed and ripe for this Court's review.

DISCUSSION

I. Ground One: Relief Pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015)

In Ground One of his § 2255 motion, Defendant argues his ACCA sentence violates due process, based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). Defendant argues that under *Johnson*, his two prior convictions for assault with a dangerous weapon are no longer ACCA predicates, because those convictions were

supported by the ACCA's "residual clause." Without those convictions, Defendant asserts his ACCA sentence is supported by only one valid predicate conviction, which is insufficient to support the enhancement.

The ACCA provides an enhanced sentence for a person who is convicted as a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), and has three prior convictions for violent felonies or serious drug offenses. 18 U.S.C. § 924(e)(1). The ACCA defines "violent felony," in relevant part, to mean any crime punishable by imprisonment for a term exceeding one year that (1) "has an element the use, attempted use, or threatened use of physical force against the person of another" (the "elements clause"); (2) "is burglary, arson, or extortion, involves use of explosives" (the "enumerated offenses clause"); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). 18 U.S.C. § 924(e)(2)(B)(i)-(ii).

In *Johnson*, the United States Supreme Court held the enhanced sentence could not be imposed pursuant to the ACCA's residual clause. 135 S. Ct. at 2563. The Supreme Court found the residual clause violated the Due Process Clause of the Fifth Amendment to the United States Constitution, because it was impermissibly vague on its face. *Id.* at 2557. While the Court concluded the residual clause was void in its entirety, the Court explicitly noted that application

of the first two “violent felony” definition clauses of the ACCA—the elements clause and the enumerated offenses clause—remained intact. *Id.* at 2563.

A. Timeliness

As an initial matter, it is undisputed, and the Court agrees, that Defendant’s § 2255 motion is timely pursuant to 28 U.S.C. § 2255(f)(3). This provision permits a § 2255 motion to be filed within one year from the date when the asserted right was initially recognized by the Supreme Court. Here, the Supreme Court in *Johnson* initially recognized the ACCA’s residual clause was unconstitutional on June 26, 2015, and Defendant filed his § 2255 motion on June 27, 2016. *See* Fed. R. Civ. P. 6(a).¹ Further, § 2255(f)(3) permits such claims brought under that section if the right asserted is “made retroactively applicable to cases on collateral review.” The Supreme Court has clarified that its decision under *Johnson* applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016). Accordingly, Defendant’s § 2255 motion is timely.

B. Merits

1. Assault With a Dangerous Weapon Offenses

Defendant argues the now-defunct residual clause supported the determination that his two assault convictions were ACCA predicates. At

¹ The one-year deadline expired on June 26, 2016, which was a Sunday. Under Federal Rule of Civil Procedure 6(a)(1), if the deadline falls on a Sunday, the period continues to run until the following day that is not a legal holiday.

Defendant's sentencing, this Court did not identify the specific basis for finding the assault convictions were proper ACCA predicates. (*See* Dkt. 70 (Sent. Tr.), at 21-23). If those convictions were supported only by the residual clause, then they are no longer valid ACCA predicates under *Johnson*, and the Court committed constitutional error in sentencing him under the residual clause. These convictions plainly do not fall within ACCA's enumerated crimes. Accordingly, the Court must determine whether the assault convictions were also supported by ACCA's elements clause. If so, then the error is harmless, as Defendant's convictions still support an ACCA sentence.

When Defendant committed the 1981 assault with a dangerous weapon offense and the 1985 assault and battery with a dangerous weapon offense, the statute of conviction read, in relevant part:

Every person who, with intent to do bodily harm and without justifiable or excusable cause, commits any assault, battery, or assault and battery upon the person of another with any sharp or dangerous weapon, or who, without such cause, shoots at another, with any kind of firearm or air gun or other means whatever, with intent to injure any person, although without the intent to kill such person or to commit any felony, is punishable by imprisonment in the penitentiary not exceeding five (5) years

21 Okl. St. § 645 (1981).²

² The 1985 version of the statute materially differs from the 1981 version only in that it contains a maximum sentence of 10 years, rather than 5 years of imprisonment.

Defendant argues a conviction under this statute would readily satisfy the residual clause's standard of conduct involving "a serious potential risk of physical injury to another." Defendant points to the Tenth Circuit's opinion in *United States v. Sandoval*, 696 F.3d 1011 (10th Cir. 2012) as support for his argument. In *Sandoval*, the defendant challenged reliance on his conviction for second degree assault as a predicate under the ACCA. The relevant Colorado statute provided that an offender commits the offense if "[w]ith intent to cause bodily injury to another person, he or she causes such injury to any person by means of a deadly weapon." *Id.* at 1014. The Tenth Circuit assessed whether the crime fit the residual clause by examining (1) whether the offense presents a serious potential risk of physical injury to another and (2) whether the offense is roughly similar, in kind as well as degree of risk posed, to the enumerated crimes (burglary, arson, extortion, or involves use of explosives). *Id.* at 1015-16. The *Sandoval* panel concluded that the crime at issue satisfied the residual clause. Based on this reasoning, Defendant argues the residual clause supported his assault convictions as violent felonies under the ACCA.

The Government concedes that an Oklahoma conviction for simple assault and battery no longer qualifies as a violent felony under ACCA's elements clause, because Oklahoma battery does not require "violent force—that is, force capable

of causing physical pain or injury to another person,” as opposed to mere touching. *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). *See United States v. Smith*, 652 F.3d 1244, 1247 (10th Cir. 2011). Nonetheless, the Government argues the Tenth Circuit has stated that a conviction for assault and battery with a dangerous weapon under 21 Okl. St. § 645 satisfies the “elements” clause of § 4B1.2 of the United States Sentencing Guidelines (“USSG”), which is identical to ACCA’s “elements” clause. *See United States v. Mitchell*, 653 F. App’x 639, 642-45 (10th Cir. 2016).

Defendant contends that under *Mathis v. United States*, 136 S. Ct. 2243 (2016), issued only a few days before *Mitchell*, the assault convictions cannot be considered violent felonies. Defendant argues *Mathis* effectively nullifies the “dangerous weapon” element of his assault crime, thereby rendering the conviction an improper ACCA predicate. However, the Tenth Circuit has since foreclosed this argument, in *United States v. Taylor*, 843 F.3d 1215 (10th Cir. 2016). The panel in *Taylor* addressed whether 21 Okl. St. § 645 satisfied the elements clause of the Career Offender sentencing enhancement, USSG § 4B1.2(a)(1).³ The defendant in *Taylor* challenged the district court’s treatment of his prior conviction under § 645 as a crime of violence in light of *Mathis*, arguing that the principles

³ The elements clause of § 4B1.2 is identical to the elements clause of ACCA. *See United States v. Crump*, 674 F. App’x 802, 803 (10th Cir. 2017). Therefore, the analysis in *Taylor* applies to Defendant’s ACCA sentence enhancement.

outlined in *Mathis* prevent consideration of the “dangerous weapon” element of § 645, thereby rendering the conviction invalid as a Career Offender predicate. *Id.* at 1221. The *Taylor* panel rejected this argument, concluding the additional element of a dangerous weapon during an assault or battery would always satisfy the required violent force necessary to fall within the elements clause. *Id.* at 1224-25 (citing *Mitchell*, 653 F. App’x at 645).

The Tenth Circuit recently reaffirmed its decisions in *Taylor* and *Mitchell*, finding a defendant’s Oklahoma state court convictions for assault with a dangerous weapon and assault and battery with a dangerous weapon under § 645 remained violent felonies under the ACCA. *United States v. Schubert*, 694 F. App’x 641, 646 (10th Cir. 2017) (“[A]ssaults under § 645 categorically require proof of the attempted use or threatened use of violent force and therefore satisfy the ACCA’s definition of violent felony.”). *Schubert* also expressly rejected an objection to this conclusion based on *Mathis*, finding *Taylor* addressed the role of *Mathis* and held firm to *Mitchell*’s conclusion that § 645 falls within the elements clause. *Id.*

In light of this clear and consistent authority from the Tenth Circuit, the Court concludes that Defendant’s convictions under § 645 each qualify as violent felonies under the ACCA’s elements clause. As explained above, the ACCA’s

elements clause was unaffected by *Johnson*. Therefore, Defendant has at least two qualifying ACCA predicates.

2. Third ACCA Offense

The Court further finds Defendant has a third qualifying ACCA offense. The Government contends Defendant has two other qualifying ACCA predicate convictions: (1) Feloniously Pointing a Weapon (Texas County Case No. CRF-82-324) and (2) Possession of a Controlled Drug With Intent to Distribute (Tulsa County Case No. CF-1994-826). (*Id.*). For unexplained reasons, the Government no longer urges that the third qualifying ACCA predicate used in Defendant's PSR—Use of a Firearm During a Drug Trafficking Crime—remains a valid ACCA predicate. (*See* Dkt. 97, at 1-2). In his Reply brief, Defendant states he has no objection to reliance on the drug possession conviction in place of the Use of Firearm conviction as a third ACCA predicate. (Dkt. 98, at 8).⁴

The Court is satisfied that the 1994 Possession of a Controlled Drug offense would qualify as an ACCA predicate in place of the 1994 Use of Firearm conviction. (*See* PSR ¶ 31). *Johnson* did not address the “serious drug offense” category of ACCA predicates, which is defined, in relevant part, as “an offense under State law, involving manufacturing, distributing, or possessing with intent to

⁴ Although Defendant has no specific objection to use of his 1982 Oklahoma conviction for Feloniously Pointing a Weapon, the Tenth Circuit recently ruled that such a conviction does not qualify as an ACCA offense. *United States v. Titties*, 852 F.3d 1257, 1272 (2017). Therefore, the Court will not count this conviction as a qualifying ACCA predicate.

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). In 1994, Defendant was found guilty of possession of a controlled drug (methamphetamine, a Schedule II controlled dangerous substance) with intent to distribute, in violation of 63 Okl. St. § 2-401, and he received a 25-year sentence. (*See* Dkt. 97-4 (Charging Information, Judgment and Sentence in Case No. CF-94-826)). At the time of Defendant’s conviction, the crime carried a maximum sentence of life imprisonment. 63 Okl. St. § 2-401(B)(2) (1994); 63 Okl. St. § 2-206(C)(1) (1994). Accordingly, Defendant’s 1994 drug conviction qualifies as a “serious drug offense” under ACCA, even after *Johnson*.

Defendant has three qualifying ACCA predicate convictions, meaning that he remains subject to the enhanced ACCA sentence. Any potential error in Defendant’s sentencing was harmless. Therefore, Defendant’s § 2255 motion is denied.

EVIDENTIARY HEARING

This Court is required by § 2255 to hold an evidentiary hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b). *See also United States v. Marr*, 856 F.2d 1471, 1472 (10th Cir. 1988). With this standard as a guide, the Court has

thoroughly reviewed the pleadings, files, and record in this case, and from that review, the Court finds the record conclusively shows that Defendant is entitled to no relief on his claims and an evidentiary hearing is unnecessary.

CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing Section 2255 Proceedings instructs that “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Pursuant to 28 U.S.C. § 2253, the court may issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right,” and the court “indicate[s] which specific issue or issues satisfy [that] showing.” A petitioner can satisfy that standard by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). After considering the record in this case, the Court concludes a certificate of appealability should not issue, as Defendant has not made a substantial showing of the denial of a constitutional right. The record is devoid of any authority suggesting that the Tenth Circuit Court of Appeals would resolve the issues in this case differently.

CONCLUSION

For the reasons cited herein, Defendant James Steven Maxwell's amended Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody brought pursuant to 28 U.S.C. § 2255 (Dkt. 90) is **DENIED**.

IT IS SO ORDERED this 21st day of May, 2018.



James H. Payne
United States District Judge
Northern District of Oklahoma

ATTACHMENT 3:
Judgment of the District Court

Appellate Case: 18-5074 Document: 010110031873 Date Filed: 08/02/2018 Page: 177

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
JAMES STEVEN MAXWELL,)
Defendant.)

FILED
May 21 2018
Mark C. McCarrt, Clerk

Case No: 10-CR-190-JHP

JUDGMENT

In accordance with the order denying the Defendant's amended motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, the Court hereby enters judgment in favor of the Government and against the Defendant.

IT IS SO ORDERED this 21st day of May, 2018


James H. Payne
United States District Judge
Northern District of Oklahoma

ATTACHMENT 4:

Oklahoma Criminal Uniform Jury Instruction No. 4-28

OCCA Online

Oklahoma Uniform Jury Instructions

Criminal 2nd Edition (including 1997, 2000, 2003, and 2005 thru 2018 supplements)

To copy any individual Jury Instruction into a WORD/WORDPERFECT document navigate to the desired instruction, highlight the content of that instruction, right mouse click and select COPY. Navigate to a WORD/WORDPERFECT document, right mouse click and select PASTE. This will insert the content of the selected Jury Instruction into your WORD/WORDPERFECT document.

OUJI-CR 4-28

ASSAULT, BATTERY, ASSAULT AND BATTERY - DEFINITIONS

Dangerous Weapon - Any pistol/revolver/dagger/(bowie/dirk/switch-blade/ spring-type knife)/(sword cane)/(knife having a blade which opens automatically)/ blackjack/(loaded cane)/billy/(hand chain)/(metal knuckles)/(implement likely to produce death or great bodily harm in the manner it is used or attempted to be used).

References: Wilcox v. State, 13 Okl. Cr. 599, 166 P. 74 (1917); 21 O.S. 2001, § 1272.

Deadly Weapon - Any instrument designed or constructed to cause death or great bodily injury. A pistol/revolver/dagger/(bowie/dirk/switch-blade/spring-type knife)/(sword cane)/(knife having a blade which opens automatically)/blackjack/ (loaded cane)/billy/(hand chain)/(metal knuckles) is a deadly weapon.

References: Beeler v. State, 1959 OK CR 9, 334 P.2d 799; 21 O.S. 2001, § 1272.

Decrepit - Physically impaired by old age, physical defects, or infirmities.

Reference: Herrington v. State, 1960 OK CR 45, 352 P.2d 931.

Execution of Legal Process - Carrying out or enforcement of a judgment, decision, or order of a court.

References: Black's Law Dictionary 510 (5th ed. 1979); 15A Words and Phrases 265; 34 Words and Phrases 245.

Firearm - Weapon from which a shot or projectile is discharged by force of a chemical explosive such as gunpowder. An airgun, such as a carbon dioxide gas-powered air pistol, is not a firearm within the meaning of the definition.

References: 21 O.S. 2001, §§ 1289.3 et seq.; Black's Law Dictionary 570 (5th ed. 1979); Thompson v. State, 1971 OK CR 328, ¶ 8, 488 P.2d 944, 947, overruled on other grounds, Dolph v. State, 1974 OK CR 46, ¶ 10, 520 P.2d 378, 380-81.

Force - Any touching of a person regardless of how slight may be sufficient to constitute force. Such touching may be brought about directly or indirectly by defendant.

Reference: R. Perkins, Criminal Law 80 (2d ed. 1969).