No. 19-7003

IN THE SUPREME COURT OF THE UNITED STATES

QUINTIN WRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's Arkansas conviction for terroristic threatening in the first degree, Ark. Code Ann. § 5-13-301(a)(1)(A) (2006), qualifies as a conviction for a "violent felony" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i).

2. Whether petitioner's Arkansas conviction for domestic battery in the second degree, Ark. Code. Ann. § 5-26-304(a)(4) (Supp. 2011), qualifies as a conviction for a "violent felony" under the ACCA.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (8th Cir.):

Wright v. United States, No. 18-2397 (Sept. 12, 2019)

United States District Court (E.D. Ark.):

Wright v. United States, No. 16-cr-274 (June 25, 2018)

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OPINION BELOW

The opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 776 Fed. Appx. 931.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2019. The petition for a writ of certiorari was not filed until December 16, 2019, and is out of time under Rule 13.1 of the Rules of this Court. 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 Eastern District of Arkansas, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Amended Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals affirmed. 776 Fed. Appx. 931, 931-932.

1. On March 11, 2016, the Pulaski County, Arkansas, sheriff's office received a call that shots had been fired from a white Dodge Durango in a residential area. Presentence Investigation Report (PSR) ¶ 5. Deputies responding to the call found the Durango parked at a convenience store, and saw a baggie of marijuana on the middle console and a handgun on the passenger seat. Ibid. They found and detained the driver and petitioner, who was a passenger in the Durango, in the store. Ibid. The driver told the officers that he and petitioner had been shooting guns out of the window. Ibid. A search of the Durango revealed two firearms, two baggies of marijuana, drug paraphernalia, and ammunition. PSR ¶ 6.

Petitioner pleaded guilty to one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). See PSR ¶¶ 1, 9. A conviction for violating 18 U.S.C. 922(g)(1) carries a default 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," committed on different occasions, the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), specifies a statutory sentencing range of 15 years to life imprisonment. Ibid. The ACCA's "elements clause" defines "'violent felony'" to include "any crime punishable by imprisonment for a term exceeding one year" 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).

To determine whether an offense falls within the elements clause, courts generally apply a "categorical approach." See, e.g., Stokeling v. United States, 139 S. Ct. 544, 555 (2019). 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. Some criminal statutes have a somewhat "complicated (sometimes called 'divisible') structure" in which they "list elements in the alternative, and thereby define multiple crimes." Id. at 2249 (citation omitted). When a defendant's statute of conviction is divisible, the sentencing court may apply the "modified categorical approach." Ibid. Under that approach, 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 for 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)" with specificity 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." Ibid. For example, a "statute on its face may resolve the issue," as when "statutory alternatives carry different punishments," indicating that those alternatives "must be elements." Ibid. If "state law fails to provide clear answers," however, courts may "'peek at the record documents'" from the prior conviction, such as the charging instrument or plea agreement. Ibid. (brackets and citation omitted). One indication that "the statute contains a list of elements, each one of which goes toward a separate crime," is if those documents list "one alternative term," that is, one way of violating the statute, "to the exclusion of all others." Id. at 2257.

The Probation Office determined that petitioner was subject to sentencing under the ACCA because he had three prior convictions

for violent felonies: a 2012 conviction for terroristic threatening in the first degree, a 2012 conviction for domestic battering in the second degree, and a 2014 conviction for aggravated assault on a family or household member, all in violation of Arkansas law. PSR ¶¶ 17, 26, 27, 29; see Ark. Code Ann. § 5-13-301(a)(1)(A) (2006) (terroristic threatening), § 5-26-304(a)(4) (Supp. 2011) (domestic battery), and § 5-26-306 (2013) (aggravated assault). Petitioner did not dispute that his aggravated-assault conviction qualified as an ACCA predicate, but argued that the Arkansas terroristic-threatening and domestic-battery statutes were overbroad -- on the ground that neither categorically requires the use or threatened use of "physical force" against a "person," 18 U.S.C. 924(e)(2)(B)(i) -- and indivisible under Mathis. See Sent. Tr. 3-8. The district court rejected those arguments and sentenced petitioner to 180 months of imprisonment. Amended Judgment 2; see Sent. Tr. 5-9.

2. The court of appeals affirmed in an unpublished per curiam order. 776 Fed. Appx. at 931-932. On appeal, petitioner renewed his arguments that his terroristic-threatening and domestic-battery convictions were not for violent felonies under the ACCA because the Arkansas statutes were overbroad and indivisible. See id. at 932. The court rejected those arguments, explaining that it already had found the Arkansas terroristic-threatening statute to be divisible in Martin v. United States, 904 F.3d 594 (8th Cir. 2018), and United States v. Myers, 928 F.3d

763 (8th Cir. 2019), petition for cert. pending, No. 19-6720 (filed Nov. 20, 2019), and that petitioner's prior conviction was for the discrete crime of "threatening to injure a person." 776 Fed. Appx. at 932. The court further explained that in United States v. Thompson, 721 Fed. Appx. 565 (8th Cir. 2018) (per curiam), it had "held that Arkansas second-degree battery is a violent felony," 776 Fed. Appx. at 932, and in United States v. Eason, 907 F.3d 554 (8th Cir. 2018), it "also ha[d] held that Arkansas third-degree domestic battery is divisible and is a violent felony," 776 Fed. Appx. at 932. Applying those binding precedents, the court determined that the Arkansas second-degree domestic-battery statute, Ark. Code Ann. § 5-26-304(a) (Supp. 2011), also is divisible, and that petitioner's conviction under paragraph (4) of that statute for "knowingly causing physical injury to a family or household member" involved the use of physical force against a person. 776 Fed. Appx. at 932 (brackets and citation omitted).

ARGUMENT

Petitioner renews his contentions (Pet. 7-17) that his prior convictions for terroristic threatening and domestic battery do not qualify as violent felonies under the ACCA. Even if this Court elects to disregard the untimeliness of the petition for a writ of certiorari, those contentions do not warrant further review. The court of appeals' unpublished decision is correct, and does not conflict with any decision of this Court or another court of appeals.

1. The petition for a writ of certiorari is untimely, and should be denied on that ground alone. The court of appeals entered its decision on September 12, 2019, and the 90-day deadline for filing a petition for a writ of certiorari began to run on that date. See Sup. Ct. R. 13.1, 13.3. Petitioner did not seek rehearing in the court of appeals and did not seek from this Court an extension of the time within which to file a petition for a writ of certiorari. Cf. Sup. Ct. R. 13.5. Thus, the time for filing a petition for a writ of certiorari expired on Wednesday, December 11, 2019. The petition was not filed until December 16, 2019, and is therefore out of time. Although this Court has discretion to consider an untimely petition for a writ of certiorari in a criminal case, see Schacht v. United States, 398 U.S. 58, 63-65 (1970), petitioner -- who is represented by counsel -- offers no explanation or justification for his untimeliness, and none is apparent from the record. This Court therefore should not exercise its discretion to entertain the petition.

2. Petitioner contends (Pet. 10-13) that his prior conviction for Arkansas terroristic threatening, Ark. Code Ann. § 5-13-301(a)(1)(A) (2006), was not for a "violent felony" under the ACCA because the statute is indivisible and overbroad. For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Myers v. United States, No. 19-6720 (filed Nov. 20, 2019), a copy of which the government is serving on petitioner, that contention lacks merit, and no further

review is warranted. See Br. in Opp. at 10-17, Myers, supra (No. 19-6720).

3. Petitioner further contends (Pet. 13-16) that his prior conviction for Arkansas domestic battering in the second degree, Ark. Code Ann. § 5-26-304(a)(4) (Supp. 2011), also is not a violent felony under the ACCA, on the theory that the state statute is indivisible. That contention is incorrect, and it does not warrant this Court's review.

The relevant Arkansas statute provides:

> A person commits domestic battering in the second degree if:
>
> (1) With the purpose of causing physical injury to a family or household member, the person causes serious physical injury to a family or household member;
>
> (2) With the purpose of causing physical injury to a family or household member, the person causes physical injury to a family or household member by means of a deadly weapon;
>
> (3) The person recklessly causes serious physical injury to a family or household member by means of a deadly weapon; or
>
> (4) The person knowingly causes physical injury to a family or household member he or she knows to be sixty (60) years of age or older or twelve (12) years of age or younger.

Ark. Code Ann. § 5-26-304(a)(4) (Supp. 2011). The statute's division into four separately numbered paragraphs strongly suggests that each of those paragraphs defines a separate crime. Cf. Mathis v. United States, 136 S. Ct. 2243, 2249 (2016) (observing that a statute "that lists multiple elements disjunctively" is divisible). That inference is reinforced by the

repetition of the subject (the "person") and prohibited act ("causing physical injury" or "causes physical injury") in each numbered paragraph, as opposed to unifying them in a single phrase or phrases and employing subclauses only to specify the variances, cf. id. at 2256 (observing that a statutory list of "'illustrative examples'" may describe "a crime's means of commission") (citation omitted). And each numbered paragraph contains its own mens rea requirement ("[w]ith the purpose of," "recklessly," or "knowingly"), further suggesting that each defines a separate crime.

Arkansas cases likewise indicate that the second-degree domestic-battery statute defines not a single omnibus crime, but instead four distinct crimes, each identified by its specific paragraph number. E.g., Allen v. State, 567 S.W.3d 93, 97 (Ark. App. 2018) (describing "second-degree domestic battery" by referring only to paragraph (1) of the statute); Vines v. State, 562 S.W.3d 246, 248 (Ark. App. 2018) (same); Jefferson v. State, 532 S.W.3d 75, 80-81 (Ark. App. 2017) (describing second-degree domestic battery by referring only to paragraph (4)); N.L. v. State, 519 S.W.3d 360, 362 (Ark. App. 2017) (same); Geelhoed v. State, 515 S.W.3d 139, 140 n.1 (Ark. App. 2017) (same). And although Arkansas does not appear to have a pattern jury instruction for second-degree domestic battery in particular, the pattern jury instruction for the similarly worded second-degree battery statute lists each of the four statutory alternatives as

a complete sentence surrounded by brackets, indicating that a court should instruct the jury on only one of the alternatives, not all of them (because otherwise the resulting instruction would be grammatically awkward). See Ark. Model Jury Instr. Crim. 2d 1302 (Matthew Bender 2018).

Petitioner's reliance (Pet. 14-15) on Brown v. State, 1981 WL 1048 (Ark. App. May 20, 1981) is misplaced. As petitioner recognizes (Pet. 15), Brown interpreted a 1977 Arkansas battery statute, not the second-degree domestic-battery statute under which petitioner was convicted. And given the more recent Arkansas case law discussed above, the unpublished 1981 decision in Brown would at most suggest that Arkansas case law "fails to provide clear answers" on divisibility, Mathis, 136 S. Ct. at 2256. It would not undermine the statutory text or the model jury instruction -- or the record documents from petitioner's conviction, which identified "one alternative term to the exclusion of all others," id. at 2257; see id. at 2256 (permitting a "peek" at the defendant's own records to determine divisibility when other sources of state law are unclear) (citation omitted); see also D. Ct. Doc. 25-1, at 2 (June 19, 2018) (copy of 2012 Arkansas felony information charging petitioner with "knowingly caus[ing] physical injury to [the victim], a family or household member he knew to be sixty (60) years of age or older").

Because the Arkansas statute is divisible and petitioner does not dispute that he was convicted under paragraph (4), which

criminalizes "knowingly caus[ing] physical injury to a family or household member," Ark. Code Ann. § 5-26-304(a)(4) (Supp. 2011), petitioner's conviction "has as an element the use * * * of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i). It therefore qualifies as a violent felony under the ACCA regardless of whether, as petitioner maintains (Pet. 16), an offense under paragraph (3) would be overbroad on the theory that a crime with a mens rea of recklessness cannot qualify as a violent felony. Accordingly, the Court need not hold this petition for Borden v. United States, cert. granted, No. 19-5410 (Mar. 2, 2020), which presents the question whether such a crime can satisfy the ACCA's elements clause.

Petitioner does not contend that any other court of appeals has found the Arkansas second-degree domestic-battery statute to be indivisible. Instead, as with his argument about the terroristic-threats statute, petitioner simply disagrees with the court of appeals' interpretation of state law as to whether the Arkansas statute is divisible. This Court generally does not grant certiorari to review a lower court's determination of a state statute's divisibility. See, e.g., Lamb v. United States, cert. denied, No. 17-5152 (April 2, 2018); Gundy v. United States, cert. denied, No. 16-8617 (Oct. 2, 2017); Rice v. United States, cert. denied, No. 15-9255 (Oct. 3, 2016). Moreover, this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which

the State is located." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004); see Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."). No sound reason exists to depart from that "settled and firm policy" here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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