

APPENDIX "A"

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

April 8, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JASON MITCHELL ABBO,

Defendant - Appellant.

No. 18-6081
(D.C. Nos. 5:16-CV-00722-M and
5:11-CR-00385-M-1)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before PHILLIPS, McKAY, and BALDOCK, Circuit Judges.

Before the court is Jason Abbo's application for a certificate of appealability (COA). Abbo, a federal prisoner, is serving a 180-month sentence on his felon-in-possession-of-a-firearm conviction. Relying on *Johnson v. United States*, 135 S. Ct. 2551 (2015), he filed a motion under 28 U.S.C. § 2255 to vacate his sentence, contending that the district court erred by enhancing his sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). The district court denied both the motion and the application for a COA. As explained below, we conclude that reasonable jurists could not find Abbo's claims debatable, so we too deny his application for COA.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

BACKGROUND

In 2012, a jury convicted Abbo on a charge of being a felon in possession of a firearm. *See* 18 U.S.C. § 922(g)(1). At sentencing, Abbo did not object to the Presentence Investigation Report (PSR), which had recommended sentencing under the ACCA after identifying at least three predicate felony offenses. The PSR referenced the following convictions from Oklahoma state courts:

1. A 2002 conviction, as a juvenile, for “Possession of a controlled dangerous substance with intent to distribute,” Case No: JDL-02-1119;
2. a 2004 conviction, as an adult, for “Possession of a controlled dangerous substance with intent to distribute” and “Conspiracy for unlawful distribution of controlled dangerous substance,” Case No: CF-2004-5069;
3. a 2007 conviction for “Domestic abuse by strangulation” and “Burglary, first degree,” Case No: CF-2007-189; and
4. a 2008 conviction for “Burglary, first degree” and “Domestic assault and battery,” Case No: CR-2007-3486.

The district court adopted the PSR and sentenced Abbo to 180 months of imprisonment, the minimum term allowed by statute. Abbo appealed, but on non-ACCA grounds, and in 2013 we affirmed. *United States v. Abbo*, 515 F. App’x 764 (10th Cir. 2013).

In 2016, after the Supreme Court’s decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), struck down the ACCA’s residual clause as void for vagueness, Abbo moved under 28 U.S.C. § 2255 to vacate his sentence. He argued, under *Johnson*, that his sole ACCA-qualifying felony conviction was his 2004 adult conviction for “possession

of a controlled dangerous substance with intent to distribute.” The district court denied both his motion to vacate and his application for a certificate of appealability.¹

Abbo now seeks a certificate of appealability from this court. We will issue a COA only where “the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(1)(B), (c)(2). To make such a showing, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

DISCUSSION

The ACCA imposes enhanced sentences on offenders found to have at least three predicate convictions for any combination of violent felonies or serious drug offenses.

See 18 U.S.C. § 924(e). In determining whether prior convictions count as violent felonies or serious drug offenses, courts employ the “categorical approach.” Under that approach, we “compar[e] the elements of the crime of conviction to the ACCA.” *United States v. Titties*, 852 F.3d 1257, 1265 (10th Cir. 2017). But when the statute of conviction is divisible, meaning that “it contains more than one crime,” we apply the “modified categorical approach,” which “reveals the relevant elements for the comparison under the categorical approach.” *Id.* Although *Johnson* struck down § 924(e)(2)(B)’s “residual clause” as unconstitutionally vague, the “enumerated-offenses clause” and the “elements”

¹ Abbo initially appealed before securing a COA, so we remanded for the district court to determine in the first instance whether a COA should issue.

clauses both remain valid bases for defining a “violent felony.”² *See United States v.*

Degeare, 884 F.3d 1241, 1245 (10th Cir. 2018) (citing *Johnson*, 135 S. Ct. at 2563).

To prove a *Johnson* claim, a petitioner has the burden to establish “that the sentencing court, more likely than not, relied on the residual clause to enhance his sentence under the ACCA.” *United States v. Driscoll*, 892 F.3d 1127, 1135 (10th Cir. 2018). When the sentencing record is silent or ambiguous about which clause the district court relied on, we look to the “relevant background legal environment” to aid in determining whether the district court relied on the residual clause. *See United States v. Snyder*, 871 F.3d 1122, 1130 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1696 (2018). If the law at the time would have permitted the district court to rely on either the elements clause or the enumerated-offenses clause, then the petitioner will normally fail to meet this burden. *See United States v. Washington*, 890 F.3d 891, 899 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 789 (2019).

Here, Abbo fails in his brief to mount any arguments that the district court in fact relied on the residual clause. Notwithstanding this failure, we have reviewed the sentencing record ourselves and found it silent on which clause of the ACCA the district

² “[T]he 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[.]” 18 U.S.C. § 924(e)(2)(B).

court in fact relied on. Therefore, to prevail on his *Johnson* claim, Abbo must establish that the relevant background legal environment makes it more likely than not that the district court relied on the residual clause. *See Snyder*, 871 F.3d at 1130.

As mentioned, Abbo concedes that his 2004 conviction for possession, with intent to distribute, a controlled substance qualifies as a “serious drug offense.” Beyond that, Abbo invites us into the thicket of his extensive criminal history, but we need go no further than his two felony burglary convictions. Because they qualify as “violent felonies,” those convictions, combined with his conceded serious drug offense, require the ACCA sentence he received.

A. The 2007 conviction for “Burglary, first degree”

For this offense, the judgment of conviction states that Abbo violated 21 O.S. § 1431, which in 2007 read as follows:

Every person who breaks into and enters the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein, either:

1. By forcibly bursting or breaking the wall, or an outer door, window, or shutter of a window of such house or the lock or bolts of such door, or the fastening of such window or shutter; or
2. By breaking in any other manner, being armed with a dangerous weapon or being assisted or aided by one or more confederates then actually present; or
3. By unlocking an outer door by means of false keys or by picking the lock thereof, or by lifting a latch or opening a window, is guilty of burglary in the first degree.

Id. at § 1431 (2007). The statute does not list separate crimes with separate elements, but rather lists various factual means by which a defendant can commit the “breaking and entering” element. *See id.* The statute is therefore indivisible. *See Mathis v. United States*,

136 S. Ct. 2243, 2251 (2016). Abbo argues that this crime covers more conduct than generic burglary³ because it defines burglary as breaking and entering into a “dwelling house,”⁴ which, he says, could include locations that are not structures, such as a mobile home. Abbo’s Br. at 24. This argument gets Abbo nowhere.

Our court has previously held that Oklahoma first-degree burglary is a violent felony. *See United States v. Bennett*, 108 F.3d 1315, 1317 (10th Cir. 1997). This holding is reinforced by the recent case of *United States v. Stitt*, where the Supreme Court held that generic burglary “includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation.” 139 S. Ct. 399, 403–04 (2018). Simply put, Oklahoma’s first-degree burglary matches the definition of federal generic burglary. *See id.* Therefore, Abbo’s 2007 conviction qualifies as a “violent felony” under the enumerated-offenses clause of the ACCA, and reasonable jurists could not debate the point. *See Slack*, 529 U.S. at 484.⁵

³ “[T]he generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.” *Taylor v. United States*, 495 U.S. 575, 598 (1990).

⁴ At the time, Oklahoma law defined “dwelling house” as “includ[ing] every house or edifice, any part of which has usually been occupied by any person lodging therein at night, and any structure joined to and immediately connected with such a house or edifice.” 21 O.S. § 1439 (2007).

⁵ We need not decide whether Abbo’s associated felony conviction for “domestic abuse by strangulation” would qualify as an independent violent felony, because Abbo’s other convictions establish the ACCA’s conditions.

B. The 2008 conviction for “Burglary, first degree”

For the reasons given in support of the 2007 first-degree burglary conviction’s counting as a violent felony, so too does his 2008 burglary conviction. Oklahoma did not redefine the crime of first-degree burglary between 2007 and 2008. *See 21 O.S. § 1431* (2008). And reasonable jurists could not debate this. *See Slack*, 529 U.S. at 484.⁶

CONCLUSION

Because Abbo had a qualifying serious drug offense and two qualifying violent felonies, he qualified for enhanced sentencing under the ACCA. Accordingly, we deny his application for a COA and dismiss this appeal.

Entered for the Court

Gregory A. Phillips
Circuit Judge

⁶ Again, we need not decide whether Abbo’s associated felony conviction for “domestic assault and battery” would qualify as an independent violent felony, because Abbo’s other convictions establish the ACCA’s conditions.

APPENDIX "B"

UNITED STATES OF AMERICA, Plaintiff-Respondent, vs. JASON MITCHELL ABBO,
Defendant-Movant.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

2018 U.S. Dist. LEXIS 34397

Case No. CR-11-385-M,(CIV-16-722-M)

March 2, 2018, Decided

March 2, 2018, Filed

Editorial Information: Prior History

United States v. Abbo, 515 Fed. Appx. 764, 2013 U.S. App. LEXIS 11051 (10th Cir. Okla., May 30, 2013)

Counsel {2018 U.S. Dist. LEXIS 1}For United States of America, Plaintiff: Ashley L Altshuler, Travis D Smith, US Attorney's Office-OKC, Oklahoma City, OK.

Judges: VICKI MILES-LaGRANGE, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: VICKI MILES-LaGRANGE

Opinion

ORDER

Defendant-Movant Jason Mitchell Abbo ("Abbo"), a federal prisoner, filed a Motion to Vacate Sentence under 28 U.S.C. § 2255 on June 25, 2016. On August 22, 2016, plaintiff-respondent United States of America filed its response, and on October 29, 2016, Abbo filed his reply.

I. Introduction

On December 13, 2011, a grand jury returned an Indictment charging Abbo with felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Following a jury trial, the jury returned a verdict of guilty. On June 21, 2012, the United States Probation Office released its revised presentence investigation report ("PSR"). The PSR stated that Abbo qualified as an armed career criminal under the Armed Career Criminal Act ("ACCA") based upon the following prior convictions: (1) Oklahoma County District Court Juvenile Division Case No. JDL-02-1119 - possession of a controlled dangerous substance with intent to distribute in violation of Okla. Stat. tit. 63, § 2-402; (2) Oklahoma County District Court Case No. CF-2004-5069 - possession of a controlled dangerous substance{2018 U.S. Dist. LEXIS 2} with intent to distribute (methamphetamine) in violation of Okla. Stat. tit. 63, § 2-401(B)(1), and conspiracy for unlawful distribution of controlled dangerous substance in violation of Okla. Stat. tit. 63, § 2-408; (3) Oklahoma County District Court Case No. CF-2007-189 - domestic abuse by strangulation in violation of Okla. Stat. tit. 21, § 644(H), and burglary in the first degree in violation of Okla. Stat. tit. 21, § 1431; and (4) Oklahoma County District Court Case No. CF-2007-3486 - domestic abuse (assault and battery) in violation of Okla. Stat. tit. 21, § 644(C). On September 6, 2012, this Court sentenced Abbo to 180 months of imprisonment under the ACCA. Abbo filed a notice of appeal, and on May 30, 2013, the United States Court of Appeals for the Tenth Circuit affirmed Abbo's conviction and sentence.

II. Discussion

In his § 2255 motion, Abbo asserts that in light of the United States Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), he no longer qualifies as an armed career criminal under the ACCA sentencing enhancement and that his sentence should be vacated. While Abbo agrees that his conviction in Oklahoma County District Court Case No. CF-2004-5069 is a "serious drug offense" and qualifies as one predicate offense for purposes of the ACCA enhancement and that his conviction in Oklahoma County District Court Case No. CF-2007-189 qualifies{2018 U.S. Dist. LEXIS 3} as one predicate offense for purposes of the ACCA enhancement, Abbo contends that neither one of his other two convictions qualifies as a predicate offense for purposes of the ACCA enhancement.

The ACCA provides:

(e)(1) 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 section 922(g).

(2) As used in this subsection -

(A) the term "serious drug offense" means -

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

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled{2018 U.S. Dist. LEXIS 4} Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(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.18 U.S.C. § 924(e).1

In *Johnson*, the United States Supreme Court held "that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." *Johnson*, 135 S. Ct. at 2563. However, the Supreme Court held that "[t]oday's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition{2018 U.S. Dist. LEXIS 5} of a violent felony." *Id.* It also does not affect the ACCA's definition of a serious drug offense.

Abbo asserts that his juvenile conviction for possession of a controlled dangerous substance with

intent to distribute does not qualify as a predicate offense for purposes of the ACCA enhancement because it was a juvenile conviction. Abbo, however, cites to no case law supporting his assertion that juvenile convictions cannot qualify as serious drug offenses under the ACCA. Further,

[this] position is . . . contrary to the plain language of the ACCA, which provides a mandatory 15-year sentence based on three previous convictions "for a violent felony or serious drug offense." 18 U.S.C. § 924(e)(1). The definition of serious drug offense contains no exceptions for juveniles; it is based entirely on the maximum term of imprisonment prescribed by law. See *id.* § 924(e)(2)(A). In contrast, "violent felony" is defined as "any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use of or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, [involving physical force or certain specific crimes]."² {2018 U.S. Dist. LEXIS 6} *Id.* § 924(e)(2)(B).

... The ACCA's differing definitions show that Congress knows how to include or exclude juvenile status when it so desires. It made a choice, when defining violent felonies, to include juvenile delinquencies only when they involve certain dangerous weapons, thereby excluding schoolyard brawls and other unarmed altercations that could be prosecuted as violent felonies if committed by adults. In contrast, juvenile convictions for serious drug offenses do not need special treatment because the requirement that they be punishable by 10 years' imprisonment - ten times the sentence length for a violent felony - ensures they are sufficiently grave to justify the ACCA's 15-year minimum sentence. *United States v. Coleman*, 656 F.3d 1089, 1092-93 (10th Cir. 2011). See also *Smith v. United States*, No. 16-1122, 2016 U.S. App. LEXIS 23586, 2016 WL 9413661, at *2 (6th Cir. Sept. 15, 2016) ("Juvenile convictions may qualify as predicate offenses under the ACCA."); *United States v. Johnson*, 570 F. App'x 852, 857 (11th Cir. 2014) ("prior convictions during the defendant's adolescence still count under the ACCA"). Additionally, to support his position, Abbo relies on United States Sentencing Guidelines § 4A1.1(b). By its own terms, however, this provision is not relevant to whether Abbo's juvenile conviction is a predicate offense under the ACCA; whether an offense merits a criminal history point under the Sentencing Guidelines is a separate question from whether it is recognized{2018 U.S. Dist. LEXIS 7} under the ACCA.

Accordingly, the Court finds that Abbo's juvenile conviction for possession of a controlled dangerous substance with intent to distribute does qualify as a predicate offense for purposes of the ACCA enhancement and that Abbo, therefore, would have three qualifying convictions and would be an armed career criminal under the ACCA.² The Court, thus, finds that Abbo is not entitled to relief.

III. Evidentiary Hearing

As set forth above, Abbo's motion does not set forth a basis for relief from his conviction or sentence. Because that determination is conclusively shown from the motion, files, and record, the Court finds there is no need for an evidentiary hearing on this motion. See 28 U.S.C. § 2255; *United States v. Kennedy*, 225 F.3d 1187, 1193 (10th Cir. 2000).

IV. Conclusion

Accordingly, for the reasons set forth above, the Court DENIES Abbo's Motion to Vacate Sentence under 28 U.S.C. § 2255.

IT IS SO ORDERED this 2nd day of March, 2018.

/s/ Vicki Miles-LaGrange

VICKI MILES-LAGRANGE

UNITED STATES DISTRICT JUDGE

Footnotes

1

The italicized language has come to be known as the ACCA's residual clause.

2

Because the Court has found that Abbo has three qualifying convictions, the Court declines to address whether his conviction in Oklahoma County District Court Case No. CF-2007-189 for domestic abuse (assault and battery) would qualify as a predicate offense for purposes of the ACCA enhancement.

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

January 3, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JASON MITCHELL ABBO,

Defendant - Appellant.

No. 18-6081
(D.C. No. 5:16-CV-00722-M)
(W.D. Okla.)

ORDER

Before PHILLIPS, McKAY, and BALDOCK, Circuit Judges.

This matter is before us on appellant Jason Abbo's *Motion for Reconsideration*, which per our order dated September 16, 2019, was construed as a petition for panel rehearing and accepted for filing. *See* Fed. R. App. P. 40.

Upon consideration, and as construed, the request for panel rehearing is granted in part and only to the extent that the Order Denying Certificate of Appealability issued on April 8, 2019 is VACATED, and the attached and revised Order Denying Certificate of Appealability shall issue in its place. The Clerk is directed to file the amended decision

effective the date of this order. Any other relief requested in the *Motion for Reconsideration* is denied.

Entered for the Court,



CHRISTOPHER M. WOLPERT, Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

January 3, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JASON MITCHELL ABBO,

Defendant - Appellant.

No. 18-6081
(D.C. No. 5:16-CV-00722-M &
5:11-CR-00385-M-1)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before PHILLIPS, McKAY, and BALDOCK, Circuit Judges.

In September 2012, after being convicted of being a felon in possession of a firearm, Mr. Abbo was sentenced to a 180-month term of imprisonment under the Armed Career Criminal Act (ACCA). *See* 18 U.S.C. § 924(e)(1). On June 25, 2016, relying on *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), his counsel filed in the district court a motion to vacate his sentence, under 28 U.S.C. § 2255. Though acknowledging that the district court had treated his three drug convictions as “serious drug offenses” under § 924(e)(2)(A), Mr. Abbo’s counsel argued that three other felonies could no longer be considered “violent felonies” under § 924(e)(2)(B)—specifically his Oklahoma

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felony convictions for First-Degree Burglary, 21 Okla. Stat. § 1431; Domestic Abuse by Strangulation, 21 Okla. Stat. § 644; and Domestic Abuse (Assault and Battery), 21 Okla. Stat. § 644. In doing so, Mr. Abbo's counsel assumed that the sentencing court had relied on the violent-felony definition's residual clause, later struck down in *Samuel Johnson* as unconstitutionally vague. He claimed without any analysis that none of the three convictions could satisfy § 924(e)(2)(B)(i)-(ii)'s enumerated-offense clause or the element-of-force clause. But Mr. Abbo offered no supporting legal or record analysis, just a bare conclusion.

On March 2, 2018, the district court issued an order denying Mr. Abbo's Motion to Vacate Sentence. On July 2, 2018, Mr. Abbo's counsel filed in the district court an application for a certificate of appealability. Mr. Abbo's sole argument for the certificate of appealability was that his juvenile conviction for possession with intent to distribute a controlled dangerous substance should not have counted as a serious drug offense under the ACCA. On July 23, 2018, the district court issued a one-page order denying Mr. Abbo a certificate of appealability.

On December 4, 2018, Mr. Abbo's counsel filed an appellate brief in our court. On April 8, 2019, we issued an Order Denying Certificate of Appealability. We did not evaluate all of Mr. Abbo's felony convictions for whether they qualified as violent felonies or serious drug offenses under the ACCA. *United States v. Abbo*, 767 F. App'x 675 (10th Cir. 2018). Instead, we relied on two of Mr. Abbo's drug felonies and two violent felonies—two Oklahoma first-degree burglary convictions. *Id.* at 678–79. But we now see that we were mistaken in attributing two first-degree burglary convictions to Mr.

Abbo. Though twice charged with that offense, the state dismissed one of those charges.¹ Accordingly, we must determine whether any of Mr. Abbo's other felonies provide the needed third predicate ACCA conviction under § 924(e)(2)(A)-(B). As explained below, we still conclude that Mr. Abbo qualifies as an armed career criminal and that reasonable jurists could not find his contrary claims debatable. Otherwise stated, Mr. Abbo has a combination of at least three qualifying serious drug offenses or violent felonies under § 924(e), which requires his statutory mandatory-minimum sentence.

BACKGROUND

In 2012, a jury convicted Mr. Abbo of being a felon in possession of a firearm. *See* 18 U.S.C. § 922(g)(1). At sentencing, Mr. Abbo did not object to the probation officer's sentencing recommendation set out in the Presentence Investigation Report (PSR), that is, a statutory-minimum sentence of 15 years' imprisonment under the ACCA. The PSR did not identify which of Mr. Abbo's convictions qualified as predicate violent felonies or serious drug offenses under the ACCA. In fact, the PSR mistakenly referenced U.S.S.G. § 4B1.2 (career offender) as the operative law on ACCA liability, not 18 U.S.C. § 924(e).

¹ In Mr. Abbo's brief in our court, his counsel noted that in the district court "[t]he government's response argued that 'his ACCA predicate convictions do not rely on the residual clause,' but, that 'he has two predicate convictions for serious drug offenses as defined under the ACCA and two convictions for burglary in the first degree that categorically qualify as violent felonies under the ACCA.'" Appellant's Br. at 7 (emphasis added). We took the government's position as recounted by Mr. Abbo as true. But with Mr. Abbo's felony-conviction documents in hand, we see that Mr. Abbo was convicted of one count of Oklahoma first-degree burglary, but obtained a dismissal of the other first-degree burglary charge in a separate prosecution.

After reviewing the PSR and the parties' briefs, we evaluate these felony convictions:

1. A 2002 conviction, as a juvenile, for "Possession of a controlled dangerous substance with intent to distribute," Case No: JDL-02-1119;
2. Two 2004 convictions, as an adult, first, for "Possession of a controlled dangerous substance with intent to distribute," and, second, for "Conspiracy for unlawful distribution of controlled dangerous substance,"² Case No: CF-2004-5069;
3. A 2007 conviction for "Domestic abuse by strangulation" Case No: CF-2007-189; and
4. Two 2008 convictions charged together, first, for "Burglary, first degree," and, second, "Domestic assault and battery," Case No: CR-2007-3486.

Facing no objection from Mr. Abbo, so without identifying which of his felony convictions it relied on, the district court generally concluded that he qualified for an enhanced sentence under the ACCA. The district court adopted the PSR and sentenced Mr. Abbo to 15 years' imprisonment. Mr. Abbo appealed, but on non-ACCA grounds, and we affirmed. *United States v. Abbo*, 515 F. App'x 764 (10th Cir. 2013).

Having lost his bid for a COA in the district court, Mr. Abbo has appealed. We will issue a COA only where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1)(B), (c)(2). To make such a showing, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

² The parties did not address whether the conspiracy charge counts independently as a serious drug offense, so we do not reach the issue since Mr. Abbo qualifies as an armed career criminal either way..

DISCUSSION

The ACCA imposes enhanced sentences on defendants convicted under 18 U.S.C. § 922(g)(1)—felon in possession of a firearm or ammunition—if they have any combination of at least three violent felonies or serious drug offenses. *See* 18 U.S.C. § 924(e)(1). In determining whether prior convictions count as violent felonies or serious drug offenses, courts employ the “categorical approach.” Under that approach, we “compar[e] the elements of the crime of conviction to the ACCA.” *United States v. Titties*, 852 F.3d 1257, 1265 (10th Cir. 2017). But when the statute of conviction is divisible, meaning that “it contains more than one crime,” we apply the “modified categorical approach,” which “reveals the relevant elements for the comparison under the categorical approach.” *Id.* Though *Samuel Johnson* struck down § 924(e)(2)(B)’s “residual clause” as unconstitutionally vague, it left the “enumerated-offense” and the “elements” clauses in force for measuring what felony convictions qualify as a “violent felony.”³ *See United States v. Degeare*, 884 F.3d 1241, 1245 (10th Cir. 2018) (citing *Johnson*, 135 S. Ct. at 2563).

³ “[T]he 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[.]” 18 U.S.C. § 924(e)(2)(B).

To prove a *Samuel Johnson* claim, a petitioner has the burden to establish “that the sentencing court, more likely than not, relied on the residual clause to enhance his sentence under the ACCA.” *United States v. Driscoll*, 892 F.3d 1127, 1135 (10th Cir. 2018). When the sentencing record is silent or ambiguous about which clause the district court relied on, we look to the “relevant background legal environment” to aid in determining whether the district court relied on the residual clause. *See United States v. Snyder*, 871 F.3d 1122, 1130 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1696 (2018). If the law at the time would have permitted the district court to rely on either the elements clause or the enumerated-offenses clause, then the petitioner will normally fail to meet this burden. *See United States v. Washington*, 890 F.3d 891, 899 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 789 (2019).

Before us, Mr. Abbo fails to identify his basis for asserting that the district court relied on § 924(e)(2)(B)(2)’s residual clause to categorize any of his felonies as “violent felonies.” Notwithstanding this failure, we have reviewed the sentencing record and found it silent on which clause of the ACCA the district court relied on. So to prevail on his *Samuel Johnson* claim, Mr. Abbo must establish that the relevant background legal environment makes it more likely than not that the district court relied on the residual clause than the other clauses to categorize any conviction as a violent felony. *See Snyder*, 871 F.3d at 1130. He has failed to do so.

In denying Mr. Abbo a COA, we point to three of his felony convictions that are beyond his *Samuel Johnson* challenge. As noted, we do not address three other felonies, which might also qualify as violent felonies or serious drug offenses.

A. The 2004 Conviction for “Possession of a Controlled Dangerous Substance with Intent to Distribute”

To begin, as the first required qualifying ACCA predicate felony offense, Mr. Abbo concedes that his 2004 conviction for possession, with intent to distribute, a controlled substance qualifies as a “serious drug offense.”

B. The 2007 conviction for “Burglary, First Degree”

For this offense, the judgment of conviction states that Mr. Abbo violated 21 O.S. § 1431, which in 2007 read as follows:

Every person who breaks into and enters the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein, either:

1. By forcibly bursting or breaking the wall, or an outer door, window, or shutter of a window of such house or the lock or bolts of such door, or the fastening of such window or shutter; or
2. By breaking in any other manner, being armed with a dangerous weapon or being assisted or aided by one or more confederates then actually present; or
3. By unlocking an outer door by means of false keys or by picking the lock thereof, or by lifting a latch or opening a window, is guilty of burglary in the first degree.

The statute does not list separate crimes with separate elements, but rather lists various factual means by which a defendant can commit the “breaking into and entering” element. *See id.* The statute is therefore indivisible. *See Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016). Mr. Abbo argues that this crime covers more conduct than generic

burglary⁴ because it defines burglary as breaking into and entering a “dwelling house,”⁵ which, he says, could include locations that are not structures, such as a mobile home. Appellant’s Br. at 24.

But our court has held that Oklahoma first-degree burglary is a crime of violence under U.S.S.G. § 4B1.2 (requiring that the burglary be of a dwelling). *See United States v. Bennett*, 108 F.3d 1315, 1317 (10th Cir. 1997). We noted that the defendant was charged with breaking into and entering a dwelling house and that “the statutory definition of first-degree burglary requires that the burglary be of a ‘dwelling.’” *Id.* Mr. Abbo’s argument is also undermined by the recent case of *United States v. Stitt*, in which the Supreme Court concluded that generic burglary “includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation.”⁶ 139 S. Ct. 399, 403–04 (2018). Simply put, in view of these cases, Oklahoma’s first-degree

⁴ “[T]he generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.” *Taylor v. United States*, 495 U.S. 575, 598 (1990).

⁵ At the time, Oklahoma law defined “dwelling house” as “includ[ing] every house or edifice, any part of which has usually been occupied by any person lodging therein at night, and any structure joined to and immediately connected with such a house or edifice.” 21 O.S. § 1439 (2007).

⁶ The Supreme Court announced its decision in *Stitt* on December 10, 2018, six days after Mr. Abbo filed his appellate brief. In his appellate brief, Mr. Abbo argued that his Oklahoma first-degree-burglary conviction should not qualify as a violent felony under the ACCA, because of what he termed its broad definition of “dwelling house.” Appellant’s Br. at 24. But *Stitt* soon defeated Mr. Abbo’s argument on this point, ruling that generic burglary includes burglaries of “vehicles designed or adapted for overnight use. . . .” 139 S. Ct. at 407.

burglary offense meets the requirements of federal generic burglary. *See id.* Therefore, Mr. Abbo's 2007 first-degree burglary conviction qualifies as a "violent felony" under the enumerated-offenses clause of the ACCA. We conclude that reasonable jurists could not debate the point. *See Slack*, 529 U.S. at 484.⁷

C. The Juvenile Conviction for "Possession of a Controlled Dangerous Substance with Intent to Deliver"

Mr. Abbo argues that this offense is not properly counted as a serious drug offense under 18 U.S.C. §924(e)(2)(A)(ii), because the government never showed that it involved a maximum sentence of at least 10 years of imprisonment. If pursued on direct appeal, this argument might have carried some force. But Mr. Abbo cannot rely on *Samuel Johnson* to challenge the ACCA-qualifying status of convictions for reasons beyond the district court's use of the violent-felony's residual clause, found at 18 U.S.C. § 924(e)(2)(B)(ii). *See United States v. Copeland*, 921 F.3d 1233, 1243 (10th Cir. 2019). Because this is so, this juvenile conviction counts as a serious drug offense—the third needed ACCA predicate conviction, together with his adult serious drug offense and his violent-felony conviction for Oklahoma first-degree burglary.⁸

⁷ We need not decide whether Mr. Abbo's associated felony conviction for "domestic abuse by strangulation" would qualify as an independent violent felony. Mr. Abbo's other convictions suffice to establish the ACCA's conditions.

⁸ Accordingly, we do not need to decide Mr. Abbo's § 924(e)(1) argument that two of his felonies were not "committed on occasions different from each other": (i) Abbo's felony conviction for Domestic Abuse by Strangulation under 21 Okla. Stat. §644(H) (2007) and (ii) his above-noted felony conviction for First-Degree Burglary. Even so, we do note that the responding officer in his probable-cause affidavit recounted that Mr. Abbo first forced his way into a residence and hit and

CONCLUSION

Because Mr. Abbo's Oklahoma first-degree-burglary conviction remains a violent felony after *Samuel Johnson*, and because he has two serious drug offenses not properly challengeable under that decision (obviously, neither involves the residual clause of the "violent felony" definition), he qualifies for enhanced sentencing under the ACCA. Accordingly, we deny his application for a COA and dismiss this appeal.

Entered for the Court

Gregory A. Phillips
Circuit Judge

choked his girlfriend, then was physically removed by another person, and then kicked in the door to the residence and began assaulting his girlfriend again.

For the same reason, we need not decide whether Mr. Abbo's 2008 felony conviction for Domestic Abuse Assault and Battery counts as a violent felony under the ACCA.

APPENDIX "D"

OKLAHOMA CITY POLICE DEPARTMENT CRIME REPORT

Reported Date: 03/20/06 Time: 12:52 Case: 06-024589 (000) Page: 1
Code: 21-644.H SS Crime: DOM AB STRANG Class: 050112
Occurrence Date: 03/20/06 Day: MONDAY - Time: 12:52-
Status: Closing Officer:
Location: 7 NW. 113TH PL., OK RD: 5.98

INVOLVED PERSONS

VICTIM-01: [REDACTED] DOB: [REDACTED] Race: [REDACTED] Sex: [REDACTED]
Apt: [REDACTED] State: [REDACTED] Zip: [REDACTED] Phone: [REDACTED] Adu/Juv: [REDACTED]
POB: [REDACTED] Hair: [REDACTED] Eye: [REDACTED] Hgt: [REDACTED] Wgt: [REDACTED] Bld: [REDACTED]
Business Name: [REDACTED] Phone: [REDACTED]

VICTIM-02: [REDACTED] DOB: [REDACTED] Race: [REDACTED] Sex: [REDACTED]
Apt: [REDACTED] State: [REDACTED] Zip: [REDACTED] Phone: [REDACTED] Adu/Juv: [REDACTED]
POB: [REDACTED] Hair: [REDACTED] Eye: [REDACTED] Hgt: [REDACTED] Wgt: [REDACTED] Bld: [REDACTED]
Business Name: [REDACTED] Phone: [REDACTED]

INVOLVED VEHICLES

IMPOUNDED: License: [REDACTED] State: [REDACTED] Type: [REDACTED] Expires: [REDACTED]
Year: [REDACTED] Make: [REDACTED] Model: [REDACTED] Style: [REDACTED] Color: [REDACTED]
Identifiers: [REDACTED]
Vin: [REDACTED] Disposition: [REDACTED]

SUSPECTS/ARRESTS

ARRESTED: ABBO JASON MITCHELL DOB: 03/06/1986 Race: W Sex: M
6512 EASTWOOD CI., OK
Apt: [REDACTED] State: OK Zip: 73132 Phone: 405 721-7811 Adu/Juv: A
POB: OKC, OK Hair: BRO Eye: GRN Hgt: 603 Wgt: 210 Bld: LRG
Business Name: MORTGAGE
Phone: 405 812-2350

Driver License: 080569843

Social Security: [REDACTED]

CII: [REDACTED] FBI: [REDACTED]

Booking Number: [REDACTED]

CRIME ANALYSIS ELEMENTS

Age: 20 Build: LRG

NARRATIVE

HEFNER DIVISION TELEPHONE REPORT

CHARGES:

AR ABBO

1. FIRST DEGREE BURGLARY 21-1431
2. VIOLATION OF DOMESTIC ABUSE BY STRANGULATION 21-644.H

RELEASE BY RECORDS
Oklahoma City Police Department
Capt. Taylor Dinh
Supt. Of Records

MAY 30 2019

RELEASED BY [Signature]

BODY OF REPORT

ON TODAYS DATE I RECEIVED A CALL TO 77 NW. 113TH PLACE IN REFERENCE TO A FIRST DEGREE BURGLARY WHERE AR ABBO KICKED IN THE FRONT DOOR OF VI [REDACTED] RESIDENCE. THEY GAVE A DESCRIPTION OF A [REDACTED] WITH [REDACTED] AND [REDACTED] THAT LEFT THE SCENE. I SPOTTED THE VEHICLE IN THE 7200 BLOCK OF NW. EXPRESSWAY AND STOPPED IT.

I MADE CONTACT WITH AR ABBO. I ESCORTED AR ABBO BACK TO 77 NW. 113TH PLACE FOR BOTH VI [REDACTED] AND VI [REDACTED] TO IDENTIFY. THEY BOTH IDENTIFIED AR ABBO AS THE SUBJECT WHO KICKED IN THE FRONT DOOR.

I INTERVIEWED VI [REDACTED] AND SHE STATED AR ABBO WAS LIVING WITH HER FOR THE LAST MONTH AND HAD BEEN IN THE PROCESS OF MOVING OUT. HE CAME OVER LAST NIGHT AND SPENT THE NIGHT AT THE HOUSE ON [REDACTED]. SHE GOT UP THIS MORNING AND DECIDED SHE DID NOT WANT ANYTHING ELSE TO DO WITH HIM SO SHE DROVE TO VI [REDACTED] HOUSE, WHICH IS A COUPLE OF BLOCKS AWAY. AR ABBO WOKE UP AND FOUND HER GONE SO HE WENT DOWN TO VI [REDACTED] RESIDENCE, KNOWING SHE WOULD BE THERE, AND STARTED BEATING ON THE DOOR. VI [REDACTED] OPENED THE DOOR TO MAKE CONTACT WITH AR ABBO TO TELL HIM TO LEAVE AND HE FORCED HIS WAY INTO THE HOUSE AND STARTED AN ARGUMENT WITH VI [REDACTED] AND THEN STARTED ASSAULTING HER BY HITTING HER IN THE HEAD CAUSING A SWELLING BY HER RIGHT TEMPLE, THEN, GRABBING HER FROM BEHIND PUTTING HIS ARM AROUND HER NECK AND CHOKING HER. VI [REDACTED] GOT AR ABBO OFF OF VI [REDACTED] AND PUSHED HIM OUT OF THE DOOR AND TOLD VI [REDACTED] TO SHUT THE DOOR AND LOCK IT.

VI [REDACTED] WAS OUTSIDE WITH AR ABBO AND TOLD HIM TO LEAVE AND WAIT UNTIL THEY HAD CALMED DOWN TO COME BACK. AR ABBO TOLD VI [REDACTED] HE WAS NOT LEAVING AND KICKED IN THE FRONT DOOR. HE AGAIN STARTED ASSAULTING VI [REDACTED] AND CHOKING HER. THIS TIME, VI [REDACTED] BIT AR ABBO ON THE ARM CAUSING A BITE MARK ON HIS LEFT BICEP. THEY THEN GOT HIM BACK OUT THE DOOR AND HE LEFT.

VI [REDACTED] WANTED TO PRESS CHARGES FOR FIRST DEGREE BURGLARY AND I PLACED DOMESTIC ABUSE VIOLATION OF STRANGULATION CHARGES ON AR ABBO BECAUSE HE WAS LIVING WITH VI [REDACTED] FOR THE LAST MONTH.

I WANT TO NOTE THERE TWO MINOR CHILDREN IN THE HOUSE THAT SAW THIS DOMESTIC VIOLENCE, ONE BEING VI [REDACTED] CHILD AND ONE BEING VI [REDACTED] CHILD.

ARROW WRECKER SERVICE WAS CALLED TO IMPOUND AR ABBO'S VEHICLE.

L.T. RATELIFF, #0585, WAS CALLED AND SIGNED THE PROBABLE CAUSE AFFIDAVIT AND TOOK PHOTOGRAPHS OF VI [REDACTED] INJURIES AND OF THE FRONT DOOR OF VI [REDACTED] HOME.

VI [REDACTED] INJURIES WERE SWELLING ON HER RIGHT TEMPLE AND SCRAPES ON HER RIGHT ARM AND LEG AND A BRUISE UNDER HER RIGHT ARM.

AR ABBO WAS TRANSPORTED TO THE OKLAHOMA COUNTY JAIL WITHOUT FURTHER INCIDENT.

END OF REPORT

RELEASE BY RECORDS
Oklahoma City Police Department
Capt. Taylor Dinh
Supt. Of Records

OKLAHOMA CITY POLICE DEPARTMENT REPORT TRAILER

MAY 30 2010

Reporting Officer: SCHWARZ, RICK Number: 001005 Date: 03/20/06 Time: 12:52
Typed by: PD0565 Number: PD0565 Date: 03/20/06 Time: 15:53
Approving Officer: PD0565 Number: PD0565 Date: 03/21/06 Time: 19:12