No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Anthony Lamont Mason, II,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

APPENDIX
TO
PETITION FOR A WRIT OF CERTIORARI

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CASE NO. 21-CR-270-SJM
ANTHONY LAMONT MASON II, Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
SEPTEMBER 2, 2022
BEFORE THE HONORABLE STEPHEN J. MURPHY III

SENTENCING HEARING

A P P E A R A N C E S

MS. CHANTELLE DIAL and MR. GEORGE JIANG, United States Attorney's Office, 110 West 7th Street, Suite 300, Tulsa, Oklahoma, 74119, Assistant United States Attorneys, Northern District of Oklahoma, appeared on behalf of the plaintiff.

MS. CARLA RENAE STINNETT, Stinnett Law, 404 East Dewey Avenue, Suite 100, Sapulpa, Oklahoma, 74066, appeared on behalf of the defendant.

US DISTRICT COURT - NDOK
REPORTED BY: LESLIE K. RUIZ, CSR, RPR, RMR

PROCEEDINGS:

THE COURT: Want to call the case, Lisa?

THE DEPUTY COURT CLERK: This is Case No. 21-cr-270-SJM-1, United States of America versus Anthony Lamont Mason II.

Counsel, would you please make your appearances.

MS. DIAL: Good afternoon, Your Honor. Chantelle Dial and George Jiang for the United States.

THE COURT: Welcome.

MS. STINNETT: Carla Stinnett on behalf of Anthony Lamont Mason II, and he is present in custody.

THE COURT: Okay. Welcome to you as well.

And everybody may be seated. So the defendant, Mr. Mason, is here today to be sentenced on his trial conviction on assault by a former intimate -- strangling, suffocating, and attempting to strangle and suffocate, as well as first-degree burglary. Both acts having been committed in Indian Country.

And let me ask Mr. Mason directly, sir, have you had an opportunity to review the pre-sentence report that came out in the case along with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. All right. Thank you very much.

There are two objections to the report that I would like to speak about. I'll go through my analysis of the objections and my rulings on them and then give both of the lawyers an

opportunity to say anything if they want. I don't think we need to have a formal hearing on this for a couple of reasons.

The first being that Ms. Stinnett actually wrote a very fine sentencing memorandum in which she laid out her objections to the pre-sentence report. Subsequent to that, I asked Ms. Dial to respond in kind, which she did. And I also have some recommendations from the probation officer as well as the -- as well as the work of my fine staff, Ms. Long, who's here with us today.

The first objection deals with mandatory minimums. And this is tricky because the Oklahoma assimilated statute, 21, Sections 1431 and 1436, apparently prescribe mandatory minimum and maximum sentences, but Ms. Stinnett argues that 1431 of the Oklahoma Code does not prescribe a true mandatory minimum or maximum sentence under 1436 because the state court could not otherwise impose a suspended or deferred sentence using Oklahoma sentencing schemes in the sentencing statutes, which are 22 Oklahoma Statute, Sections 991 a through c and following.

And Ms. Stinnett, as well, relies on the New Mexico sentencing scheme, which is similar but not the same, as well as *United States versus Jones*, which is a 10th Circuit case from 2019, 921 F.3d 932 at 939, in which the Tenth Circuit said that the New Mexico scheme did not prescribe a true mandatory minimum sentence because of state court discretion in

sentencing in that particular state.

So if that were true, we would avoid any mandatory term in this particular case, and the seven-year, looks like mandatory minimum, would not -- would not apply. That is the penalty under Oklahoma law for first-degree burglary section under 21 Oklahoma, Sections 1431 and 1436.

So with that in mind, I did look at all this statutory material which was, as I said, tricky and a bit complex, but I believe the objection should be overruled in a very straightforward fashion because there are large differences between, as I stated earlier, the Oklahoma and New Mexico sentencing schemes.

The Tenth Circuit looked at this precise issue in *Jones* at 932, or I should say 942 of their opinion, and *Jones* found, in essence, that an Oklahoma statute at issue in a prior case known as *United States versus Wood* contained a traditional mandatory minimum sentence, whereas the New Mexico statutory scheme, in fact, does not have a true mandatory or minimum, and that was *Jones*'s explicit finding in that ruling that the Tenth Circuit made in 2019.

So where as I think that the objection is well-taken, it should have been made, and I'm glad that it was. It seems to me that my analysis here is controlled by the Tenth Circuit's work in *United States versus Jones* and *United States versus Wood*, that Oklahoma Statute, Sections 1431 and 1436 do, in

fact, prescribe true mandatory minimum and maximum sentencings and that the defendant here is subject on Count 2 to a term not less than seven years or more than 20 years. So that would be my ruling on Objection No. 1.

Any commentary or response or further argument as to the objection only, Ms. Dial?

MS. DIAL: No, Your Honor.

THE COURT: Okay.

Ms. Stinnett?

MS. STINNETT: No, Your Honor.

THE COURT: All right. Thank you both very much.

With regard to Objection No. 2, this is a little more straightforward. And the question revolves around Paragraph 19 and the application of USSG, Section 2A2.2(b)(6). I am not an expert in Oklahoma law, as you can probably tell from my explication of the law underlying Objection No. 1.

But with regard to Objection No. 2, I feel like I have a pretty good experience in handling on this. Question is whether or not Mr. Mason should have a two-level enhancement under the guideline section that I just read because he -- I believe he engaged in the criminality that was set forth in the indictment four days after a protective order had initially expired.

That is true. And -- and indeed the protective order that the victim, N. T., had obtained against Mr. Mason had expired

in Wyoming." *Id.* However, it does not necessarily follow there was an insufficient record to address Plaintiff Frank's overbreadth challenge based in part on the statute's application to property owners. As Plaintiff correctly points out, he did present evidence that state actors had enforced the statute against individuals for speech on their own property. For example, an employee of the Laramie County Clerk's Office testified that a campaign sign on private property within a buffer zone violates the law. She testified that she has asked homeowners to remove such signs, and if the homeowners are not there, poll workers will remove the signs themselves. A representative of the Secretary of State's Office confirmed this general practice. Thus, there was a factual record to consider the merits of Plaintiff's claim that the statute was unconstitutionally overbroad because, among other reasons, it captured campaign signs on private property.

Rather than consider this claim in the first instance, we remand to the district court. *See Apartment Inv. & Mgmt. Co.* v. *Nutmeg Ins. Co.*, 593 F.3d 1188, 1198 (10th Cir. 2010).

VII

We **AFFIRM** the district court's rulings that Defendants are not entitled to sovereign immunity and Plaintiff has Article III standing.

We **REVERSE** both the district court's ruling that the geographic scope of the 300-foot buffer zone at election-day polling places is unconstitutional, and its holding on the display of bumper stickers within that zone. That election-day regulation, too, is constitutional.

We **VACATE** the district court's ruling on the constitutionality of the 100-foot absentee polling place buffer zone. On remand, the district court should consider in the first instance whether this buffer zone passes constitutional muster. It should do so after considering both the geographic *and the temporal scope*, as well as the conduct proscribed within.

We also **REMAND** for the district court to consider in the first instance Plaintiff's overbreadth claim.

UNITED STATES of America,
Plaintiff - Appellee,

v.

Anthony Lamont MASON, II,
Defendant - Appellant.

No. 22-5083

United States Court of Appeals,
Tenth Circuit.

FILED October 24, 2023

Background: Defendant was convicted in the United States District Court for the Northern District of Oklahoma, Stephen J. Murphy, III, J., of assault of an intimate or dating partner by strangulation and affiliated Oklahoma offense of first-degree burglary. Defendant appealed.

Holdings: The Court of Appeals, Kelly, Circuit Judge, held that:

(1) assimilated offense, under Indian Major Crimes Act (IMCA), of first-degree burglary under Oklahoma law, carried mandatory minimum sentence of seven years, and thus, 84 months was guideline sentence for offense, and

(2) prior case that discussed differences between New Mexico's and Oklahoma's sentencing scheme, for pur-

poses of federal sentencing on affiliated state crimes, was not non-binding dicta.

Affirmed.

1. Indians ⚿311

Sentencing and Punishment ⚿34, 651

A state's minimum sentence for a crime not defined and punished by federal law, under the Indian Major Crimes Act (IMCA), supersedes the Sentencing Guideline range only if it is a mandatory minimum. 18 U.S.C.A. § 1153(b); U.S.S.G. § 5G1.1(b).

2. Criminal Law ⚿1139

Court of Appeals reviews legal questions under Sentencing Guidelines de novo.

3. Indians ⚿311

Sentencing and Punishment ⚿652

Under the Indian Major Crimes Act (IMCA), an assimilated state offense becomes a federal offense punishable under federal law, such that federal sentencing law applies, including the guidelines; the incorporation of state law is limited to the maximum and minimum penalties for the assimilated offense and does not extend to state sentencing schemes. 18 U.S.C.A. §§ 1153(b), 3551(a).

4. Burglary ⚿49

Indians ⚿311

Sentencing and Punishment ⚿34, 652

Assimilated offense of first-degree burglary under Oklahoma law, under Indian Major Crimes Act (IMCA), carried mandatory minimum sentence of seven years, and thus, 84 months was guideline sentence for offense, and not advisory guideline range of 51 to 63 months imprisonment; statute of conviction provided that first-degree burglary was punishable for "not less than seven (7) years," which deprived sentencing court of authority to suspend or defer any portion of sentence. 18 U.S.C.A. § 1153(b); 21 Okla. Stat. Ann. § 1436(1); U.S.S.G. § 5G1.1(b).

5. Courts ⚿92

Prior case that discussed differences between New Mexico's sentencing scheme, for purposes of conviction on assimilated charges, under Indian Major Crimes Act (IMCA), for driving while intoxicated (DWI) and child abuse that did not impose mandatory minimum terms of imprisonment, and Oklahoma sentencing schemes that imposed mandatory minimum sentences of "not less than" enumerated term, was not nonbinding dicta, for purposes of defendant's challenge to 84-month sentence on affiliated offense of first-degree burglary, based on Oklahoma statute providing for sentence of "not less than seven (7) years" for offense; Court of Appeals' examination of Oklahoma law in prior case was essential to its holding that affiliated New Mexico offenses did not carry mandatory minimum sentences, and therefore were not guideline sentences. 18 U.S.C.A. § 1153(b); U.S.S.G. § 5G1.1(b).

6. Courts ⚿92

"Dicta" are statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case at hand.

See publication Words and Phrases for other judicial constructions and definitions.

7. Criminal Law ⚿1042.3(1)

Defendant waived claim on direct appeal that Oklahoma statute providing for sentence of "not less than seven years" for first-degree burglary did not constitute mandatory minimum sentence, and thus was not guideline sentence on assimilated offense, under Indian Major Crimes Act (IMCA), because Oklahoma court had previously deferred his sentence one convic-

tion under statute that also provided for sentence of "not less than" enumerated term, where he did not raise claim with district court. 18 U.S.C.A. § 1153(b); 21 Okla. Stat. Ann. § 1436(1); U.S.S.G. § 5G1.1(b).

8. Criminal Law ⚿1028

Arguments raised for first time on appeal are waived.

9. Criminal Law ⚿1043(3)

Waiver doctrine applies to a new theory raised on appeal that falls under the same general category as an argument that was pursued in the trial court.

Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 4:21-CR-00270-SJM-1)

O. Dean Sanderford, Assistant Federal Public Defender, (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant - Appellant.

Leena Alam, (Clinton J. Johnson, United States Attorney, and George Jiang, Assistant United States Attorney, on the brief), Tulsa, Oklahoma, for Plaintiff - Appellee.

Before HARTZ, KELLY, and MATHESON, Circuit Judges.

KELLY, Circuit Judge.

Defendant-Appellant Anthony Lamont Mason appeals from the district court's sentence of 84 months. He was convicted by a jury of assault of an intimate or dating partner by strangulation, 18 U.S.C. §§ 1153(a), 113(a)(8), as well as Oklahoma first-degree burglary, 18 U.S.C. § 1153(b); Okla. Stat. tit. 21, §§ 1431, 1436. I R. 208, 283–84. Our jurisdiction arises under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) and we affirm.

Background

[1] Mr. Mason was tried and sentenced in federal court under the Indian Major Crimes Act (IMCA), which "assimilates" the minimum and maximum sentences under state law for crimes that are "not defined and punished by Federal law." 18 U.S.C. § 1153(b). A state's statutorily required minimum sentence that exceeds the high end of the Sentencing Guideline range becomes the guideline sentence. U.S.S.G. § 5G1.1(b). A minimum sentence supersedes the guideline range only if it is a "mandatory minimum." Koons v. United States, —— U.S. ——, 138 S. Ct. 1783, 1787, 201 L.Ed.2d 93 (2018).

The Presentence Report (PSR) initially calculated an offense level of 22 and a criminal history category of III, resulting in an advisory guideline range of 51 to 63 months' imprisonment. III R. 38. But when a statutorily required minimum sentence is greater than the maximum of the guideline range, as was the case here, the statutorily required minimum is the guideline sentence. U.S.S.G. § 5G1.1(b). For convictions of first-degree burglary, Oklahoma state law imposes a sentence "not less than seven (7) years." Okla. Stat. tit. 21, § 1436. Accordingly, the PSR recommended a sentence of 84 months' imprisonment, 21 months more than the initial advisory guideline range. III R. 38.

Mr. Mason objected to the PSR, arguing that his eligibility for a suspended or deferred sentence under the Oklahoma sentencing scheme meant that it did not impose a "true mandatory minimum." See Okla. Stat. tit. 22, §§ 991a(A)(1), (C) (2020) (amended 2022), 991c(A), (H)–(I); I R. 215; II R. 544. Considering itself bound by United States v. Jones, 921 F.3d 932 (10th Cir. 2019), and United States v. Wood, 386 F.3d 961 (10th Cir. 2004), the district court overruled Mr. Mason's objection and sen-

tenced him to 84 months. II R. 544–46, 578. Regardless, were it not for the 84-month sentence, the district court indicated that it would have varied upward beyond 63 months but not beyond 84 months. Id. at 575–77.

In Jones, we held that a New Mexico "basic sentence" was not a mandatory minimum because the sentencing scheme provided several avenues for state courts to alter the sentence. 921 F.3d at 939. We distinguished the "basic sentence" from the Oklahoma sentencing statute's imposition of a term of imprisonment "not less than (2) years," which we concluded imposed a mandatory minimum. Id. at 941–42 (discussing Wood, 386 F.3d at 962–63).

On appeal, Mr. Mason reiterates that the sentencing statute imposes no mandatory minimum and that our distinction between the two sentencing schemes in Jones was plainly dicta. Aplt. Br. at 9–17. The government responds that if Mr. Mason prevails, it would require us to "overrule" our previous decision in Wood, Aplt. Br. at 14, but of course, one panel cannot overrule another "absent en banc consideration." Arostegui-Maldonado v. Garland, 75 F.4th 1132, 1142 (10th Cir. 2023).

Discussion

[2, 3] We review legal questions under the guidelines de novo. United States v. Martinez, 1 F.4th 788, 789 (10th Cir. 2021). Under the IMCA, Mr. Mason's assimilated state offense "becomes a federal offense punishable under federal law." Id. at 790. Federal sentencing law applies, including the guidelines. 18 U.S.C. § 3551(a). Our "[i]ncorporation of state law is limited to the maximum and minimum penalties for the offense and does not extend to 'state sentencing schemes.' " Martinez, 1 F.4th at 790 (quoting Jones, 921 F.3d at 937–38).

For example, in Wood we declined to incorporate a portion of the Oklahoma sentencing scheme that provided for the suspension of judgments and sentences. 386 F.3d at 963. But we affirmed the district court's incorporation of the Oklahoma mandatory minimum for second-degree burglary requiring a term of imprisonment "not less than two (2) years."[1] Id. at 962–63. We reasoned: "Under § 1436(2), Defendant's offense was punishable by imprisonment between two and seven years. Because the maximum of Defendant's guideline range fell below the minimum of her statutory range, the district court properly sentenced Defendant to the two year minimum." Wood, 386 F.3d at 963. We performed no further analysis to determine whether the sentencing scheme imposed a "true mandatory minimum," or expressly prohibited suspension or deferment. The statute's mandatory language was sufficient.

After our decision in Wood, we rejected the idea that a district court could grant a conditional discharge, Martinez, 1 F.4th at 790–91, or apply a broader, state safety-valve provision, United States v. Polk, 61 F.4th 1277, 1280–81 (10th Cir. 2023). In our view, each of these state sentencing options conflicted with federal sentencing policy, which provides for probation, a fine, or imprisonment. Polk, 61 F.4th at 1280–81; Martinez, 1 F.4th at 791; Wood, 386 F.3d at 963.

Unlike the cases above, our decision in Jones did not concern the application of a state sentencing procedure. Rather, it focused on whether the New Mexico sentencing scheme imposed a mandatory minimum sentence — in which case it would

1. After Wood, Oklahoma updated the statute at issue to remove the "not less than" language. Compare Okla. Stat. tit. 21, § 1436(2) (effective Nov. 1, 2018), with id. (effective July 1, 1999).

apply to the defendant — or a non-mandatory, discretionary sentence. Jones, 921 F.3d at 939–42. We concluded that the scheme — which imposed a "basic sentence" — did not require the court to incorporate a mandatory minimum in sentencing the defendant for his assimilated conviction. Id. at 939, 942.

First, distinguishing the New Mexico statute from the Oklahoma statute in Wood — which provided an "express minimum mandatory sentence" — we reasoned that the New Mexico statute contained no language requiring a criminal defendant to serve "not less than" a specified term of imprisonment. Id. at 938, 941. Second, the New Mexico sentencing scheme authorized the sentencing court to reduce, suspend, or defer the sentence, and in some instances, the defendant might avoid incarceration entirely. Id. at 939–41. Third, we found that the New Mexico Supreme Court did not interpret state law to impose a mandatory minimum "in every instance," but only where the sentencing scheme expressed that the sentence "could not be suspended, deferred or taken under advisement." Id. at 941 (discussing State v. Martinez, 126 N.M. 39, 966 P.2d 747 (1998)). That language was absent from the sentencing statute, providing further support for us to find no mandatory minimum. Id. at 941–42.

Mr. Mason urges us to perform the same depth of analysis here to find that the Oklahoma sentencing statute does not impose what he calls a "true mandatory minimum." Aplt. Br. at 9–14. First, relying upon Jones, Mr. Mason argues that the presence of state sentencing procedures allowing the court to suspend or defer the sentence, and the absence of statutory language prohibiting suspension or deferment, makes the sentence non-mandatory. Id. at 7, 10–11. To Mr. Mason, only the legislature's express prohibition of suspension or deferment constitutes a "true mandatory minimum." Id. at 10–11.

[4] But here the sentencing statute already reflects Oklahoma's desire to impose a mandatory minimum. We performed an in-depth analysis in Jones precisely because the statutory language traditionally associated with a mandatory minimum — "not less than" — was absent from the New Mexico sentencing statute. In contrast, the presence of that exact language here renders the state court's ability to suspend or defer the sentence irrelevant.[2] Okla. Stat. tit. 21, § 1436(1).

Similarly, Mr. Mason cannot rely upon the absence of express language prohibiting a suspension or deferment. We relied upon its absence in Jones only because the basic sentence at issue provided insufficient guidance. 921 F.3d at 941. Accordingly, we looked further to state-court interpretation. In New Mexico, a state sentence imposes a mandatory minimum only when suspension or deferment is expressly prohibited. Id. Mr. Mason attempts to turn our discrete analysis of New Mexico law into a categorical rule. Because we have no need to consult the Oklahoma courts' interpretation of its sentencing scheme, we refuse to incorporate that analysis here.

[5–9] Second, Mr. Mason urges us to disregard as dicta our distinction in Jones between the Oklahoma sentencing statute and New Mexico sentencing scheme.[3] Aplt. Br. at 14–17. He argues that our failure to undertake a full analysis of Oklahoma law

2. Because we find the Oklahoma state court's ability to suspend or defer irrelevant, we will not speculate as to whether Mr. Mason would have qualified for either procedure in state court. See Aplt. Br. at 12–14.

3. Mr. Mason also argues that Oklahoma law does not require imposition of the statutory minimum because an Oklahoma state court previously deferred his sentence for a conviction under a sentencing statute using the same language as the one in this case ("not

proves it was unessential to the decision. Id. at 16. "[D]icta are statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case at hand." United States v. Titties, 852 F.3d 1257, 1273 (10th Cir. 2017) (quoting In re Tuttle, 291 F.3d 1238, 1242 (10th Cir. 2002)).

While Mr. Mason is correct that we are not bound by a prior panel's dicta, id., our distinction in Jones was essential. It was "because of the differences between the New Mexico and Oklahoma sentencing schemes" that we held there was "no mandatory minimum for a federal sentencing court to incorporate." Jones, 921 F.3d at 939 (emphasis added). And our brief examination of Oklahoma law was the very reason it was necessary to our holding. We had no need to perform an in-depth examination of the Oklahoma sentencing statute because it already imposed a "traditional mandatory minimum" of "not less than (2) years." Id. at 942. Even assuming our discussion of the Oklahoma sentencing statute was dicta, our decision in Wood provides us with ample support to conclude that a mandatory minimum applies given the statute's "not less than" language.

Because the statute's "not less than" language unambiguously states a mandatory minimum, we hold that the district court properly assimilated the 84-month mandatory minimum for first-degree burglary.

AFFIRMED.

CHASE MANUFACTURING, INC., Plaintiff - Appellant,

v.

JOHNS MANVILLE CORPORATION, Defendant - Appellee.

United States of America, Amicus Curiae.

No. 22-1164

United States Court of Appeals, Tenth Circuit.

FILED October 25, 2023

Background: Competitor that had entered market for calcium silicate, an insulation product, brought action against sole domestic manufacturer of calcium silicate, alleging claims under the Sherman Act for monopolization and tying and alleging a disparagement claim under the Lanham Act. The United States District Court for the District of Colorado, Michael E. Hegarty, United States Magistrate Judge, 601 F. Supp. 3d 911, granted summary judgment to manufacturer. Competitor appealed summary judgment on its monopolization and tying claims.

Holdings: The Court of Appeals, Phillips, Circuit Judge, held that:

(1) competitor established that manufacturer had monopoly power, one element of competitor's monopolization claim;

(2) genuine issues of material fact over whether manufacturer made exclusion-

less than''). See Okla. Stat. tit. 21, § 1436(2) (2012); Aplt. Br. at 11–12. Mr. Mason failed to raise this argument at the district court. ''[A]rguments raised for the first time on appeal are waived.'' Little v. Budd Co., Inc., 955 F.3d 816, 821 (10th Cir. 2020). While this theory supports the same broad argument we address in this appeal (as opposed to an entirely new argument), waiver is equally applicable to ''a new theory on appeal that falls under the same general category'' as an argument pursued in the trial court. Id. at 821.

FILED
United States Court of Appeals
Tenth Circuit

January 24, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANTHONY LAMONT MASON, II,

Defendant - Appellant.

No. 22-5083
(D.C. No. 4:21-CR-00270-SJM-1)
(N.D. Okla.)

ORDER

Before **HARTZ**, **KELLY**, and **MATHESON**, Circuit Judges.

This matter is before the court on Appellant's Petition for Rehearing En Banc, Appellee's Response to Petition for Rehearing En Banc, and Appellant's Reply to Response for Rehearing En Banc. Upon consideration thereof, the Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk