

NO. \_\_\_\_\_  
October Term, 2017

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IN THE SUPREME COURT OF THE UNITED STATES

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TRAVONN LEON BURTONS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

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**PETITION FOR A WRIT OF CERTIORARI**

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(a) **The Question Presented for Review Expressed in the Terms and Circumstances of the Case.**

Whether a predicate prior conviction under the Armed Career Criminal Act, 18 U.S.C. § 924(e), is divisible for purposes of the modified categorical approach when the offense does not require juror unanimity on the method of commission.

(b) **List of all Parties to the Proceeding**

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) **Table of Contents and Table of Authorities**

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**(d)    Reference to the Official and Unofficial Reports of any Opinions**

The order and judgment of the United States Court of Appeals for the Tenth Circuit is unpublished. *United States*

*v. Burtons*, No.16-6091, 696 Fed.Appx. 372 (10th Cir. Aug. 20, 2017).

(e) **Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.**

- (i) Date of judgment sought to be reviewed.

The unpublished Order and Judgment of the Tenth Circuit of which review is sought was filed August 17, 2017;

- (ii) Date of any order respecting rehearing.

The Order denying rehearing was filed September 15, 2017;

- (iii) Cross Petition.

Not applicable;

- (iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, Section 1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

- (v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

(f) **The Constitutional Provisions, Statutes and Rules which the Case Involves.**

(1) Constitutional Provisions:

None.

(2) Statutes Involved:

18 U.S.C. § 924(e):

(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 possession with intent to manufacture or distribute, a controlled substance (as defined in Section 201 of the Controlled 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.

OKLA. STAT. tit. 21, § 652(C) (1994):

Any person who commits any assault and battery upon another by means of any deadly weapon, or by such other means or force as is likely to produce death, or in any manner attempts to kill another, or in resisting the execution of any legal process, shall upon conviction be punished by imprisonment in the State Penitentiary not exceeding twenty (20) years.

(3) Rules Involved: None.

(4) Other:

Instruction No. 4-6, OUJI-CR(2d):

Assault and Battery - Assault and Battery with a Deadly  
Weapon - Elements

No person may be convicted of assault and battery with a deadly weapon unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an assault and battery;

Second, upon another person; and

Third, with a deadly weapon.

Instruction No. 4-7, OUJI-CR(2d):

Assault and Battery  
By Means or Force Likely to Produce Death

No person may be convicted of assault and battery by means or force likely to produce death unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an assault and battery;

Second, upon another person;

Third, with force likely to produce death;

Instruction No. 4-8, OUJI-CR(2d):

#### Any other Attempt to Kill

No person may be convicted of an attempt to kill another unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an attempt to kill;

Second, another person;

Third, by (performing an act)/(omitting to perform an act when a duty to do so exists);

Fourth, with the (intent to cause)/(belief that it would cause) death.

Instruction No. 4-9, OUJI-CR(2d):

#### Assault and Battery

#### Resisting the Execution of Legal Process - Elements

No person may be convicted of assault and battery committed while avoiding legal process unless the State has

proved beyond a reasonable doubt each element of the crime. These elements are:

First, an assault and battery;

Second, upon another person;

Third, while resisting the execution of any legal process.

**(g) Concise Statement of the Case.**

*Basis of Jurisdiction in Court of First Instance*

This Petition seeks review of an order entered by a United States Court of Appeals, affirming the denial of relief under Title 28, United States Code, Section 2253. The jurisdiction of the District Court was invoked pursuant Title 28, United States Code, Section 2255. Mr. Burtons sought review of the District Court's order denying Section 2255 relief. The Tenth Circuit Court of Appeals granted a Certificate of Appealability under Title 28, United States Code, Section 2253(c)(2). This petition is timely filed pursuant to Supreme Court Rule 13.1.

*Facts Material to Consideration of Question Presented*

After proceedings not relevant to the consideration of this petition, Mr. Burtons waived jury trial and pled guilty to a single count of possessing three firearms and ammunition after having been convicted of a felony, in violation of Title 18, United States Code, Section 922(g)(1) on July 1, 2013. The Presentence Investigation Report

concluded Mr. Burtons qualified as an Armed Career Criminal as defined in Title 18, United States Code, Section 924(e)(2). It relied upon four separate Oklahoma offenses for ACCA enhancement. However, only one predicate offense is relevant to the instant petition: Assault and Battery with a Deadly Weapon in violation of OKLA. STAT. tit. 21, § 652(C) (1994).<sup>1</sup>

The district court agreed and sentenced Mr. Burton to 180 months incarceration. Mr. Burtons unsuccessfully appealed his judgment and sentence to the Tenth Circuit Court of Appeals. *United States v. Burtons*, 590 Fed.Appx. 761 (10th Cir. 2014) (unpublished).

On November 27, 2015, Mr. Burtons filed a Motion to Vacate his sentence pursuant to Title 28, United States Code, Section 2255 arguing *Johnson v. United States*, 135 S.Ct. 2551 (2015) retroactively applied to his case on collateral review and required resentencing. The district court denied relief. Mr. Burtons appealed the district court's order and the Tenth Circuit Court of Appeals granted a Certificate of Appealability.

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<sup>1</sup>Mr. Burtons has two other serious drug offenses that remain valid predicates after *Johnson v. United States*, 135 S.Ct. 2551 (2015). His Aggravated Eluding a Police Officer conviction under OKLA. STAT. tit. 21, § 540(A) (2000) does not qualify without the now-void residual clause and was not used in denying Mr. Burtons' request for Section 2255 relief.

After oral argument and presentation of supplemental authority, the Tenth Circuit Court of Appeals affirmed the district court's denial of relief in an unpublished Order and Judgment on August 17, 2017. *United States v. Burtons*, 696 Fed.Appx. 372 (10th Cir. Aug. 17, 2017) (unpublished).

In relevant part, the Tenth Circuit Court of Appeals rejected Mr. Burtons' argument that Assault and Battery with a Deadly Weapon was not divisible under the principles of *Mathis v. United States*, 136 S.Ct. 2243 (2016). Mr. Burtons submitted the statute included different means by which the offense could be committed without the necessary violent physical force of Title 18, United States Code, Section 924(e)(2)(B)(i) as explained in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). For example, the statute included assault and battery in resisting the execution of legal process. Moreover, Mr. Burtons argued Oklahoma case law permitted a jury to find a defendant guilty of Assault and Battery with a Deadly Weapon without requiring unanimity on the specific method.

In its Order affirming the denial of relief, the Tenth Circuit disagreed the statute contained different means. After assuming without deciding that *Mathis* applied retroactively to Mr. Burtons' petition, it discounted *Goree v. State*, 163 P.3d 583 (Okla. Crim. App. 2007) and *Davis v. State*, 354 P.2d 466 (Okla. Crim. App. 1960). *Burtons*, 696 Fed.Appx. at 377-78. Mr. Burtons submitted these cases suggested

Oklahoma treated the different alternatives of Section 652 as “means” or “ways.” The appellate court also declined to rule upon a central argument advanced by Mr. Burtons – because Oklahoma permits a jury to convict on different factual means of an offense without unanimity, the classification of Section 652’s methods as separate crimes is not dispositive of the divisibility question. The Tenth Circuit Court of Appeals considered this argument waived because it was not raised until oral argument. *Burtons*, 696 at 387 n.3.

In his petition for rehearing en banc, Mr. Burtons argued the panel decision failed to properly account for the certainty required by *Taylor v. United States*, 495 U.S. 575 (1990). He also pointed out the jury unanimity argument was not a separate claim subject to waiver analysis, but an extension of the *Mathis* divisibility argument squarely addressed by the panel. The Tenth Circuit Court of Appeals denied Mr. Burtons’ petition for rehearing.

Mr. Burtons’ current projected release date is May 11, 2024.

**(h) Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.**

This case presents an example in which a Court of Appeals failed to properly apply *Mathis v. United States*, 136 S.Ct. 2243 (2016). While petitions for a writ of certiorari are rarely granted when the error deals with misapplication of a properly stated rule of law, Mr. Burtons submits his case is of particular importance because

Oklahoma's lack of juror unanimity requirement on the factual means for a conviction directly implicates the driving principle of *Mathis*. In addition, sentencing courts need as much guidance as possible from this Court with respect to proper application of the modified categorical approach.

#### Assault and Battery with a Deadly Weapon

In this case, Mr. Burtons challenged the use of his prior conviction for Assault and Battery with a Deadly Weapon under OKLA. STAT. tit. 21, § 652(C) as a predicate felony for enhancement under the ACCA in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015). The focus was on whether Section 652(C) was divisible.

Section 652(C) provides four different ways in which the offense can be committed: an assault and battery upon another (1) by means of any deadly weapon; (2) by such other means or force as is likely to produce death; (3) in any manner attempts to kill another; (4) or in resisting the execution of any legal process. Each of these methods include a separate jury instruction. See Instruction Nos. 4-6, 4-7, 4-8, and 4-9, OUJI-CR(2d).<sup>2</sup> The fourth method does not have, as an element, the use, attempted use, or threatened use of physical force as required by the elements clause of the ACCA. See 18 U.S.C. § 924(e)(2)(B)(i); *Curtis Johnson*, 559 U.S. at 140 (explaining the force requirement of Section 924(e)(2)(B)(i)); see also *Burtons*, 696

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<sup>2</sup>Available at <http://www.okcca.net/online/oujis/oujisrvr.jsp> (last accessed Dec. 13, 2017).

Fed.Appx. at 377 (“We agree with Burtons that OKLA. STAT. ANN. tit. 21, § 652(C) (1994)’s fourth alternative doesn’t appear to satisfy the elements clause.”).

### Mathis and Divisibility

For Mr. Burtons’ conviction to qualify as a violent felony, Section 652(C) must be divisible such that a sentencing court may review the relevant record documents to determine under which elements Mr. Burtons violated the statute. *See, e.g., Mathis* 136 S.Ct. at 2245-46; *Descamps v. United States*, 133 S.Ct. 2276, 2285 (2013). However, if Section 652(C) is not divisible, then Mr. Burton’s conviction does not qualify because it contains conduct outside the scope of the ACCA. This inquiry requires “certainty.” *Mathis*, 136 S.Ct. at 2257. *See also Shepard v. United States*, 544 U.S. 13, 21 (2005) (noting “*Taylor*’s demand for certainty”); *United States v. Titties*, 852 F.3d 1257, 1268 (10th Cir. 2017) (instructing that if the means/elements question remains unanswered after application of *Mathis*, “a court will not be able to satisfy *Taylor*’s demand for certainty that the offense qualifies as an ACCA conviction.”).

The wrinkle presented in this case is that Oklahoma permits juries to convict on a single offense without requiring unanimity on the factual means of commission. This is precisely the concern elucidated in Mathis. A sentencing court must be sure different methods of committing an offense are separate and discrete elements to be

found by a unanimous jury beyond a reasonable doubt. A discussion of *Mathis* confirms the paramount importance and driving principle of jury unanimity.

*Mathis* explained the proper test for determining whether a particular offense is divisible for purposes of apply the modified categorical approach.<sup>3</sup> Applying its long-standing precedents, including *Taylor v. United States*, 495 U.S. 575 (1990), *Shepard v. United States*, 544 U.S. 13 (2005), *James v. United States*, 550 U.S. 192 (2007), and *Sykes v. United States*, 564 U.S. 1 (2011), the Court explained the modified categorical approach is inapplicable when the statute of conviction lists different “means” of committing the offense, rather than different “elements.” *Mathis*, 136 S.Ct. at 2257. Elements of an offense “are the constituent parts of a crimes legal definition – the things the prosecution must prove to sustain a conviction.” *Id.* at 2248 (internal quotations omitted). Means, on the other hand, are different factual scenarios “extraneous to the crime’s legal requirements.” *Id.* This Court explained that an “ACCA penalty may be based only on what a jury” necessarily found to convict a defendant (or what he necessarily admitted).” *Mathis*, 136 S.Ct. at 2255 (quoting *Descamps*, 133 S.Ct. at 2287, 2290).

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<sup>3</sup>The Tenth Circuit assumed without deciding *Mathis* applied retroactively. This is a sound assumption in light of the principle that when this Court “construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law.” *In re Adams*, 825 F.3d 1283, 1286 (11th Cir. 2016) (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n. 12 (1994)).

To determine what the elements are (or what the jury must necessarily find to convict a defendant) in a particular statute, *Mathis* instructs to begin with the statute itself. Importantly, if the different statutory alternatives provide different punishments, “then under *Apprendi* [v. *New Jersey*, 530 U.S. 46 (2000)], they must be elements.” *Mathis*, 136 S.Ct. at 2256. Statutes may also provide “illustrative examples,” thereby setting forth different means of the offense. *Mathis*, 136 S.Ct. at 2256. The statute may also state what things must be charged and those that need not be. *Mathis*, 136 S.Ct. at 2256. Additionally, state court decisions may provide the answer. *Id.*

Failing clear answers from state law, *Mathis* permits a sentencing court to review portions of the record of the prior conviction. *Mathis*, 136 S.Ct. at 2256. This “peek” at the record is different from the modified categorical approach in that it “is for the sole and limited purpose of determining whether the listed items are elements of the offense.” *Id.* Should the charging instrument or jury instruction include alternative terms, the record provides a clear indication the alternatives are means. *Id.* at 16. In contrast, the inclusion of one term to the exclusion of all others suggests the alternatives may be elements of the offense. *Id.*

*Mathis* requires a conclusive answer to the means/elements inquiry before a defendant's prior conviction may qualify as one of the three requisite strikes to ACCA enhancement. *See id.* at 2257 (describing demand for certainty).

### Oklahoma and Jury Unanimity

Under Oklahoma law, a jury may disagree on the underlying factual basis of an offense, yet still convict a defendant. These different factual bases can include separate offenses. In *Davis v. State*, 354 P.2d 466 (Okla. Crim. App. 1960), the Oklahoma Court of Criminal Appeals reviewed an indictment that included various means of committing Assault and Battery with a Dangerous Weapon. Importantly, the indictment included both “by means of a deadly weapon” and “by force as is likely to produce death.” *Id.* at 471. The Court explained the inclusion of these two different methods was not fatal to the indictment, but that inclusion of an element from a different statute was sufficiently confusing.

*Goree v. State*, 163 P.3d 583 (Okla. Crim. App. 2007) also discussed Section 652(C). A concurring judge described the state as including “four different ways to commit assault and battery upon another.” *Id.* at 585 (J. Lumpkin concurring). The majority opinion described Section 652(C) as listing separate criminal offenses. *Id.* at 584 n.5. However, that the different methods are considered separate criminal offenses with discrete jury instructions does not resolve the divisibility issue because

Oklahoma permits juries to disagree on the specific method when convicting a defendant, even when those different methods may be considered separate offenses with individualized jury instructions.

For example, Oklahoma law acknowledges a single jury conviction for First Degree Manslaughter can include multiple methods under Title 21, Oklahoma Statutes, Section 711. This is evident in cases in which the jury was instructed on more than one method of First Degree Manslaughter. Oklahoma cases make clear a jury can be instructed on various methods under Section 711, so long as the evidence supports the instructions. For example, in *Cipriano v. State*, 32 P.3d 869, 875-76 (Okla. Crim. App. 2001), the Oklahoma Court of Criminal Appeals affirmed the trial court's decision not to instruct on both heat of passion manslaughter and misdemeanor manslaughter not because the theories were legally inconsistent or exclusive, but because the evidence presented at trial did not support the additional instruction. *See also Nickelberry v. State*, 521 P.2d 879, 883-84 (Okla. Crim. App. 1974) (same, but evidence failed to support heat of passion manslaughter); *Hancock v. Trammell*, 798 F.3d 1002, 1023 (10th Cir. 2015) (on habeas, reviewing ineffective assistance of counsel claim for failure to secure both heat of passion and resisting criminal attempt manslaughter instructions); *see also Wingfield v. State*, 160 P.2d 945 (Okla. Crim.

App. 1945) (jury instructed on both “heat of passion” and “resisting criminal attempt manslaughter.”).

Oklahoma also permits a conviction for first degree murder under the alternative theories of felony murder and premeditated murder, without requiring jury unanimity on the method. Though considered separate criminal offenses, Oklahoma’s felony murder and premeditated murder are separate offenses under the first degree murder statute. *Goree v. State*, 2007 OK CR 27, ¶ 4 n.5, 163 P.3d 583, 584. *See also* OKLA. STAT. tit 21, § 701.7 (2012) (providing elements of felony murder and premeditated murder). Yet Oklahoma permits a conviction for first degree murder without a unanimous verdict on either theory of first degree murder. In *Crawford v. State*, 840 P.2d 627 (Okla. Crim. App. 1992) *abrogated on other grounds by Malone v. State*, 168 P.3d 185 (Okla. Crim. App. 2007), the defendant argued the alternative theories of first degree murder by felony murder or premeditated murder permitted a guilty verdict without a unanimous verdict on the underlying factual basis of the offense. The Oklahoma Court of Criminal Appeals saw no error, holding “Our constitutional guarantee of a unanimous verdict does not require the jury to indicate the factual basis upon which the finding of guilt was made.” *Id.* at 640. Moreover, the different methods of committing first degree murder were factual means:

Here, there is a single crime charged, that of first degree murder. Whether or not it was committed with malice aforethought, or during the

commission of a felony goes to the factual basis of the crime. The jury verdict was unanimous that the Appellant committed the crime. Such a verdict satisfies due process.

*Id.* See also *Neill v. State*, 896 P.2d 537, 552-53 (Okla. Crim. App. 1994) (same); *Powell v. State*, 906 P.2d 765, 775-76 (Okla. Crim. App. 1995) (same); *Spears v. State*, 900 P.2d 431, 442 (Okla. Crim. App. 1995) (same); *Primeaux v. State*, 88 P.3d 893, 909 (Okla. Crim. App. 2004) (same).

Also, in another context, Oklahoma law permits jurors to render a guilty verdict without unanimity on the particular means of the offense. In *Gilson v. State*, the Oklahoma Court of Criminal Appeals affirmed a conviction in which the jury instructions permitted the jury to return a “divided as to underlying theory guilty verdict.” 8 P.3d 883, 900 (Okla. Crim. App. 2000). The issue in *Gilson* was whether a jury must unanimously determine one manner in which the defendant committed first degree murder; whether child abuse murder by permitting child abuse or child abuse murder by the commission of child abuse. *Id.* at 901. The Court concluded commission of child abuse and permitting child abuse to be alternative means by which a defendant can commit the crime of first degree murder by child abuse. *Id.* at 902. In important part, the Oklahoma court reasoned, “[t]he constitutional requirement of a unanimous jury verdict applies only to the ultimate issue of the appellant’s guilt or innocence of the crime charged, not the alternative means by

which the crime was committed.” *See also Blackwell v. State*, 663 P.2d 12, 16 (Okla. Crim. App. 1983) (“The unanimity guaranteed by the constitution is required only with respect to the ultimate issue of the appellant’s guilt or innocence of the crime charged and not with respect to alternative means by which the crime was committed.”).

In sum, Oklahoma permits internal jury disagreement between factual means of an offense. Without requiring jury unanimity on an offense, the statute of conviction is not divisible. That the statute lists “separate offenses” does not resolve the divisibility question. *See, e.g., In re: Vera Sama*, No. A076-581-488-BAL, 2015 WL 4761234, at \*3-4 (DCBABR July 17, 2015) (unpublished) (determining theft conviction under Section 7-104 of the Maryland Criminal Code was not divisible despite “five discrete, separately titled, subsections” where Maryland courts permit a jury to return a guilty verdict without unanimous agreement on the method of theft committed).

### *Conclusion*

The Court should grant the writ to review the Tenth Circuit’s application of federal sentencing law. Based on the significance of the issues presented in this petition and the potential to affect many defendants, Mr. Burtons respectfully requests

a Writ of Certiorari issue to review the order and judgment entered August 17, 2017, of the United States Court of Appeals for the Tenth Circuit in Case Number 16-6091.

(i) **Appendix.**

- (i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

*United States v. Burtons*, No.16-6091, 696 Fed.Appx. 372 (10th Cir. Aug. 17, 2017) (unpublished).

- (ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

- (iii) Any order on rehearing:

*Order denying Rehearing, United States v. Burtons*, No. 16-6091 (10th Cir. Sept. 15, 2017);

- (iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

*Order*, dated March 1, 2016, United States District Court for the Western District of Oklahoma, CR-11-126-R; CIV-15-1314-R (Docket Number 11);

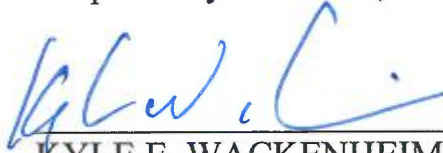
- (v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

- (vi) Other appended materials:

None.

Respectfully submitted,



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