

No. 17-7199

IN THE SUPREME COURT OF THE UNITED STATES

TRAVONN LEON BURTONS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

DAVID B. GOODHAND
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether Okla. Stat. Ann. tit. 21, § 652(C) (West Supp. 1994) is divisible into four offenses with separate elements for purposes of analyzing whether a conviction under that statute qualifies as a conviction for a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2) (B) (i).

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-7199

TRAVONN LEON BURTONS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9-26) is not published in the Federal Reporter but is reprinted at 696 Fed. Appx. 372. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 590 Fed. Appx. 761. The order of the district court (Pet. App. 1-8) is not published in the Federal Supplement but is available at 2016 WL 843388.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2017. A petition for rehearing was denied on September 15, 2017 (Pet. App. 27). The petition for a writ of certiorari was

filed on December 14, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Oklahoma, petitioner was convicted of possession of firearms and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). 2/14/12 Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by four years of supervised release. Id. at 2-3. The judgment was vacated on collateral review, D. Ct. Doc. 70, at 5 (Mar. 15, 2013), and he subsequently entered another (conditional) guilty plea to the same charge, 10/1/13 Judgment 1. He was again sentenced to 180 months of imprisonment, to be followed by four years of supervised release. Id. at 2-3. The court of appeals affirmed. 590 Fed. Appx. 761. Petitioner later filed a motion to vacate his sentence under 28 U.S.C. 2255, which the district court denied. Pet. App. 1-8. The court of appeals granted a certificate of appealability (COA) and affirmed. 16-6091 C.A. Order 1 (Aug. 22, 2016) (Order); Pet. App. 11-26.

1. Drug Enforcement Agency (DEA) agents suspected that petitioner was storing the proceeds of drug activity at a storage facility. D. Ct. Doc. 84 ¶ 8 (Sept. 11, 2013) (PSR). On October 7, 2010, DEA agents detained petitioner when he arrived at the facility to access his storage unit. PSR ¶ 9. Petitioner stated that he had a gun in his car, and a drug-sniffing dog alerted to

the presence of narcotics inside the vehicle. Ibid. Agents subsequently searched the car and found a pistol. Ibid. They also obtained a search warrant for petitioner's storage unit, where they found two rifles, ammunition, and \$39,849 in cash. PSR ¶ 10.

A federal grand jury in the Western District of Oklahoma indicted petitioner on one count of possession of firearms and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. After the district court denied petitioner's motion to suppress, D. Ct. Doc. 24, at 1-12 (June 15, 2011), petitioner pleaded guilty, 2/14/12 Judgment 1. The court sentenced petitioner to 180 months of imprisonment, to be followed by four years of supervised release. Id. at 2-3.

2. a. Petitioner filed a motion for collateral relief under 28 U.S.C. 2255, arguing that his trial counsel had rendered ineffective assistance by failing to preserve his right to appeal the denial of his motion to suppress. D. Ct. Doc. 66, at 7 (Feb. 8, 2013). The district court granted petitioner's motion and vacated his conviction and sentence. D. Ct. Doc. 70, at 5. Petitioner subsequently entered a conditional guilty plea to the count charged in the indictment, reserving the right to appeal the denial of his motion to suppress. Plea Agreement ¶ 8(a); 10/1/13 Judgment 1.

b. A conviction for possession of a firearm or ammunition by a felon, in violation of Section 922(g)(1), has a default statutory sentencing range of zero to ten years of imprisonment.

See 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. See 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as:

any crime punishable by imprisonment for a term exceeding one year * * * 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). The first clause of that definition is commonly referred to as the "elements clause," and the portion beginning with "otherwise" is known as the "residual clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

The Probation Office classified petitioner as an armed career criminal under the ACCA based on his prior Oklahoma convictions, including a 1996 conviction for assault and battery with a deadly weapon, in violation of Okla. Stat. Ann. tit. 21, § 652(C) (West Supp. 1994). PSR ¶¶ 23, 31, 37. At the time of his offense, that statute provided:

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.

Okla. Stat. Ann. tit. 21, § 652(C) (West Supp. 1994).

Petitioner did not object to his classification as an armed career criminal. PSR 24-25 (Addendum). The district court sentenced petitioner to 180 months of imprisonment, to be followed by four years of supervised release. 10/1/13 Judgment 2-3. The court of appeals affirmed. 590 Fed. Appx. 761.

3. In 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, that the ACCA's residual clause is unconstitutionally vague. Id. at 2557. Petitioner subsequently filed a motion to vacate his sentence under 28 U.S.C. 2255, claiming that Johnson's invalidation of the residual clause meant that his prior Oklahoma conviction for assault and battery with a deadly weapon no longer qualified as a violent felony. D. Ct. Doc. 101, at 4 (Nov. 27, 2015).

The district court denied petitioner's motion. Pet. App. 1-8. The court determined that Okla. Stat. Ann. tit. 21, § 652(C) (West Supp. 1994) "'sets out one or more elements of the offense in the alternative' and is, accordingly, a divisible statute" that defines multiple separate crimes. Pet. App. 6 (citation omitted). Applying the "modified categorical approach" to determine the particular crime of conviction, the court consulted the relevant state-court judgment and found that petitioner was convicted of assault and battery with a deadly weapon. Ibid. (citation

omitted). The court determined that assault and battery with a deadly weapon qualifies as a violent felony under the ACCA's elements clause and accordingly denied relief. Id. at 7-8. The court declined to issue a COA. D. Ct. Doc. 114, at 1-2 (Apr. 7, 2016).

4. The court of appeals granted a COA and affirmed in an unpublished, nonprecedential decision. Order 1; Pet. App. 11-26.

The court of appeals found that neither state-court decisions nor the "'statute on its face'" resolved the question whether Okla. Stat. Ann. tit. 21, § 652(C) (West Supp. 1994) sets forth "alternative means" or "alternative elements." Pet. App. 16-21 (citation omitted). The court observed, however, that "Oklahoma's jury instructions don't 'reiterat[e] all the terms of' Okla. Stat. Ann. tit. 21, § 652(C) (1994) in one instruction, but rather 'referenc[e] one alterative term to the exclusion of all others' in each of several separate instructions." Id. at 22 (second set of brackets in original) (quoting Mathis v. United States, 136 S. Ct. 2243, 2257 (2016)). The court found that those instructions "indicate[d] that Okla. Stat. Ann. tit. 21, § 652(C) (1994) 'contains a list of elements, each one of which goes toward a separate crime.'" Ibid. (quoting Mathis, 136 S. Ct. at 2257). Accordingly, the court determined that the district court did not err "in treating Okla. Stat. Ann. tit. 21, § 652(C) (1994) as divisible and applying the modified categorical approach." Ibid. The court of appeals, like the district court, further determined

that "the specific offense [petitioner] was convicted of" -- namely, assault and battery with a deadly weapon -- qualified as a violent felony under the ACCA's elements clause. Id. at 23-26.

ARGUMENT

Petitioner contends (Pet. 14-23) that the court of appeals erred in its determination that Okla. Stat. Ann. tit. 21, § 652(C) (West Supp. 1994) is divisible into multiple offenses. The court's resolution of that state-law question is correct, and its unpublished decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Under the elements clause of the ACCA, a "violent felony" is any felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e) (2) (B) (i). To determine whether a prior conviction constitutes a "violent felony" under the elements clause of the ACCA, a court generally applies the "categorical approach." See Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); Taylor v. United States, 495 U.S. 575, 602 (1990). Under the categorical approach, courts "focus solely" on "the elements of the crime of conviction," not "the particular facts of the case." Mathis, 136 S. Ct. at 2248. If, however, the statute of conviction lists multiple alternative elements, it is "'divisible'" into different offenses, and a court may apply the "'modified categorical approach'" and "look[] to a limited class of documents (for

example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant was convicted of.” Id. at 2249 (citation omitted). A statute is not divisible if it merely enumerates “various factual means of committing a single element.” Ibid.

Petitioner does not dispute that, if Okla. Stat. Ann. tit. 21, § 652(C) (West Supp. 1994) is divisible, his prior conviction under that statute would qualify as an ACCA predicate. The record materials for that conviction demonstrate that the conviction was for assault and battery with a deadly weapon, D. Ct. Doc. 110-1, at 1 (Feb. 17, 2016), which the lower courts determined to “ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another,” 18 U.S.C. 924(e)(2)(B)(i); see Pet. App. 7, 23-26. Petitioner does not challenge that determination, but instead disputes only the threshold question of divisibility. Although federal courts must decide that question in the context of applying the ACCA, it is fundamentally a question of state law. See Mathis, 136 S. Ct. at 2256 (recognizing that a state-court decision would be dispositive of a state law’s divisibility). As such, it does not warrant this Court’s review. This Court has a “settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law,” and petitioner provides no reason to deviate from that practice in this case. Bowen v. Massachusetts, 487 U.S. 879, 908

(1988); see also, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004).

Review is particularly unwarranted here, where the decision below is not precedential and petitioner does not allege that it conflicts with a decision from any other court of appeals. The court of appeals found that petitioner had forfeited one argument that could potentially be raised by a future defendant. See Pet. App. 19 n.3. No court of appeals has held that Okla. Stat. Ann. tit. 21, § 652(C) (West Supp. 1994) is not divisible, and petitioner does not argue that the courts of appeals are divided regarding similar state-law provisions or that the courts below misunderstood the governing federal legal standards. See Pet. 16-23.

2. a. In any event, the court of appeals' determination was correct. At the time of petitioner's offense, Okla. Stat. Ann. tit. 21, § 652(C) (West Supp. 1994) prohibited "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." Ibid.

The court of appeals correctly determined that the statute's alternative phrasing creates "alternative elements, not alternative means." Pet. App. 16. The relevant Oklahoma uniform jury instructions -- which "shall be used unless the [trial] court determines that [they] do[] not accurately state the law," Flores

v. State, 896 P.2d 558, 560 (Okla. Crim. App.) (first set of brackets in original; citation omitted), cert. denied, 516 U.S. 1002 (1995) -- indicate that "each alternative" is "an element that the prosecutor must prove to a jury beyond a reasonable doubt," Mathis, 136 S. Ct. at 2257; see Pet. 9-11 (reproducing the relevant Oklahoma uniform jury instructions). For example, the uniform jury instruction on assault and battery with a deadly weapon requires the prosecution to prove (1) "an assault and battery" (2) "upon another person" (3) "with a deadly weapon." Pet. 9 (quoting Okla. Uniform Jury Instructions Crim. 4-6 (2d ed. 1996)). A separate uniform jury instruction on assault and battery by means or force likely to produce death requires the prosecution to prove (1) "an assault and battery" (2) "upon another person" (3) "with force likely to produce death." Pet. 9-10 (quoting Okla. Uniform Jury Instructions Crim. 4-7 (2d ed. 1996)). The fact that Oklahoma's uniform jury instructions do not "reiterate[] all the terms of" Okla. Stat. Ann. tit. 21, § 652(C) (West Supp. 1994), but rather "referenc[e] one alternative term to the exclusion of all others," indicates that "the statute contains a list of elements, each one of which goes toward a separate crime." Mathis, 136 S. Ct. at 2257.

The record of petitioner's prior conviction further supports the court of appeals' determination that the statute is divisible. See Mathis, 136 S. Ct. at 2256-2257 (permitting a federal court to "peek at the record documents" for "the sole and limited purpose

of determining whether the listed items are elements of the offense") (brackets and citation omitted). The state-court judgment states that petitioner pleaded guilty to "Assault and Battery with a Deadly Weapon," D. Ct. Doc. 110-1, at 1, suggesting that each alternative set forth in Okla. Stat. Ann. tit. 21, § 652(C) (West Supp. 1994) is an alternative element defining a separate offense.

b. The state-court decisions petitioner cites (Pet. 19-23) are not to the contrary. Davis v. State, 354 P.2d 466 (Okla. Crim. App. 1960), involved an earlier version of Okla. Stat. Ann. tit. 21, § 652, and although Davis "at one point refers to the[] statutory alternatives as 'means,' it later appears to describe one of them as 'an essential element.'" Pet. App. 18 (citation omitted) (quoting Davis, 354 P.2d at 470-471). Likewise, although the concurring opinion in Goree v. State, 163 P.3d 583 (Okla. Crim. App. 2007), described the statute as setting forth different "ways" of committing assault and battery, id. at 585 (Lumpkin, J., concurring in results), the court in that case described the statute as prohibiting "separate[] * * * crimes," id. at 584 n.5 (majority opinion). As the court of appeals correctly determined, neither Davis nor Goree definitively answers whether Okla. Stat. Ann. tit. 21, § 652(C) (West Supp. 1994) sets forth alternative elements or means. Pet. App. 18-19.

Petitioner also relies (Pet. 20-23) on Cipriano v. State, 32 P.3d 869 (Okla. Crim. App. 2001); Gilson v. State, 8 P.3d 883

(Okla. Crim. App. 2000), cert. denied, 532 U.S. 962 (2001); and Crawford v. State, 840 P.2d 627 (Okla. Crim. App. 1992), abrogated on other grounds, Malone v. State, 168 P.3d 185 (Okla. Crim. App. 2007). None of those decisions, however, involved Okla. Stat. Ann. tit. 21, § 652(C) (West Supp. 1994). Rather, each involved a conviction for first-degree murder. See Cipriano, 32 P.3d at 871; Gilson, 8 P.3d at 895; Crawford, 840 P.2d at 632. And those decisions merely confirm that when a statute does, in fact, set forth “‘alternative methods’ of committing [an] offense,” “a jury need not agree” on which alternative the defendant committed. Mathis, 136 S. Ct. at 2256 (brackets omitted). In Gilson, for example, the court determined that because Oklahoma’s first-degree murder statute “set[s] forth alternative means of committing the crime of child abuse murder,” juror unanimity is not required with respect to the means employed. 8 P.3d at 903. The decisions petitioner cites therefore do not address the proper construction of the different state law at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

DAVID B. GOODHAND
Attorney

MARCH 2018