UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS
MEETING AGENDA

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
October 3, 2018 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome, Introduction, and Approval of Minutes	Discussion / Action	Tab 1	Judge Blanch
12:10	Assault Instructions: - *Continued discussion regarding mens rea for "cohabitant" element of domestic violence offenses*	Discussion / Action	Tab 2	Sandi Johnson
12:40	Proposed Committee Note re: Controlled Substance Instructions	Discussion / Action	Tab 3	Nathan Phelps
12:50	HB 102 – Use of Force Amendments - *Review new instruction prior to publication: Defense of Self or Others*	Discussion / Action	Tab 4	Judge Blanch
1:00	Object Rape / Definition of Penetration - *CR1607. Object Rape* - *CR1608. Object Rape of a Child* - *State v. Patterson*	Discussion / Action	Tab 5	Judge Blanch
1:20	Imperfect Self-Defense Instruction - *State v. Lee* - *State v. Ramos*	Discussion	Tab 6	Judge Blanch
1:30	Adjourn			

COMMITTEE WEB PAGE: https://www.utcourts.gov/utc/muji-criminal/

UPCOMING MEETING SCHEDULE:
Meetings are held at the Matheson Courthouse in the Judicial Council Room (N301), on the first Wednesday of each month from 12:00 noon to 1:30 p.m. (unless otherwise specifically noted):

Nov 7, 2018	Feb 6, 2019	May 1, 2019	Oct 2, 2019
Dec 5, 2018	Mar 6, 2019	Jun 5, 2019	Nov 7, 2019
Jan 9, 2019	Apr 3, 2019	Sept 4, 2019	Dec 4, 2019

UPCOMING ASSIGNMENTS:
1. Sandi Johnson = Assault; Burglary; Robbery
2. Judge McCullagh = DUI; Traffic
3. Karen Klucznik & Mark Fields = Murder
4. Stephen Nelson = Use of Force; Prisoner Offenses
5. Judge Jones = Wildlife Offenses

TAB 1

Minutes from September 12, 2018 Meeting

NOTES:

UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS
MEETING MINUTES

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
September 12, 2018 – 12:00 p.m. to 2:00 p.m.

DRAFT

MEMBERS:	**PRESENT**	**EXCUSED**
Judge James Blanch, *Chair*	•	
Jennifer Andrus	•	
Mark Field	•	
Sandi Johnson	•	
Judge Linda Jones	•	
Karen Klucznik		•
Judge Brendan McCullagh		•
Stephen Nelson		•
Nathan Phelps	•	
Judge Michael Westfall		•
Scott Young	•	
VACANT – Criminal Defense Attorney		
VACANT – Criminal Defense Attorney		
VACANT – Criminal Law Professor		

GUESTS:

None

STAFF:

Michael Drechsel
Minhvan Brimhall (recording secretary)

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting. Michael Drechsel was introduced to the committee as the new staff attorney from the AOC.

The committee considered the minutes from the June 6, 2018 meeting. It was proposed that the draft minutes be amended to show that Judge Linda Jones was present at that meeting. Nathan Phelps moved to approve the draft minutes, with the previously identified amendment. Sandi Johnson seconded the motion. The motion passed unanimously.

(1A) COMMITTEE NOTE RE: CONTROLLED SUBSTANCE INSTRUCTIONS

Judge Blanch entertained a request from a committee member to consider an issue that was not on the agenda for today's meeting. Nathan Phelps introduced a proposed committee note regarding the MUJI instructions related to controlled substances (found in the 1200-series of the MUJI Criminal Instructions), as follows:

> The MUJI committees are charged with creating jury instructions that are accessible to lay jurors while also accurately stating the law. Consistent with that charge, the Criminal Jury Instruction Committee drafted this instruction so that a jury is asked to find whether the defendant possessed (or distributed) the specific controlled substance at issue in his case rather than any controlled substance. While the law does not require this specificity and so the drafted instruction increases the prosecution's burden, the Committee believed that in the mine run of cases this higher burden would be insignificant because generally defendants do not contest the identity of the controlled substance involved or their knowledge of the identity of the controlled substance.
>
> If, however, a defendant contested the identity of the controlled substance or his knowledge of its identity (e.g. he believed it was heroin and not fentanyl), it would be appropriate to change this instruction so that it requires that jury only to find that the defendant possessed (or distributed) a controlled substance, and then separately instruct the jury that whatever substance is at issue in the case is a controlled substance as appropriate. See CR1201.

After introducing the proposed committee note, Nathan explained that, apparently, in federal immigration proceedings (both in Utah and out of Utah), some of the MUJI criminal instructions regarding controlled substances are being referenced as authority related to what state-court convictions may have entered against a federal defendant. Nathan explained that the proposed committee note would seek to clarify that these MUJI criminal instructions were designed to require the prosecution to prove the actual controlled substance at issue in that particular charge (i.e., heroin, hydrocodone, etc.) in addition to the category of the controlled substance (i.e., Schedule II, Schedule IV, etc.). This level of proof (regarding the specific substance), as outlined in the MUJI instructions, is not legally required in order to sustain a conviction.

The committee discussed the reasons weighing for and against the proposed committee note. Of particular importance to members of the committee was that the model instructions are not intended to have any effect on outcomes, collateral or otherwise, in unrelated matters. The committee experimented with language for a revised proposed committee note, including the following:

> The MUJI committees are charged with creating jury instructions that are accessible to lay jurors while also accurately stating the law. Consistent with that charge, the Criminal Jury Instruction Committee drafted this instruction so that a jury is asked to find whether the defendant possessed (or distributed) the specific controlled substance at issue in his case rather than any controlled substance. The law does not require this specificity.

After significant discussion, the committee was unable to settle on any particular form of the committee note. The committee, therefore, took no action on the matter at this meeting. The matter will be considered again at the October meeting. Between now and then, committee members will spend additional time considering the need to include a clarifying committee note to the relevant MUJI instructions.

(2) ASSAULT INSTRUCTIONS:

The committee resumed discussion regarding the mens rea, if any, that should be included for the cohabitant relationship involved in MUJI instructions related to domestic violence offenses. Sandi Johnson presented her efforts to address this question. The committee had lengthy discussion regarding proposed language, and even whether such mens rea proof was required for the cohabitant component of the domestic violence instructions. The committee discussed State v. Barela, 2015 UT 22. The committee also analyzed other types of enhancing components of cases, such as drug-free zone enhancements, offenses the level of which hinge on the age of the victim (i.e., sexual offenses against children), and other similar offenses. The committee discussed whether, in those types of cases, the prosecution needs to prove a mens rea beyond a reasonable doubt. The committee was unable to arrive at a consensus on that question.

During the meeting, the committee attempted to draft language that would address a mens rea requirement for the cohabitant component of the case (highlighted):

> ---
> CR____. Simple Assault [DV]. Draft 9/12/18

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);

2. Intentionally, knowingly, or recklessly;
   a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
   b. Committed an act with unlawful force or violence that
      i. caused bodily injury to (VICTIM'S NAME); or
      ii. created a substantial risk of bodily injury to (VICTIM'S NAME).

3. REGARDING THE COHABITANT STATUS:
   a. [(DEFENDANT'S NAME) intended, knew, or was reckless that (VICTIM'S NAME) was a cohabitant at the time of the offense;] **OR ALTERNATIVELY (WITHOUT MENS REA)**
   b. [(DEFENDANT'S NAME) and (VICTIM'S NAME) were cohabitants at the time of this offense;]

4. [That the prosecution has proven beyond a reasonable doubt that the defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code §76-5-102
Utah Code §77-36-1
Utah Code §77-36-1.1

Committee Note(s)
In domestic violence cases, practitioners should decide whether to include element #3 in this instruction or to use a special verdict form.

Utah law has not clearly articulated whether the cohabitant relationship between the defendant and the alleged victim requires proof of an associated *mens rea* (intentional, knowing, or reckless). Practitioners should review *State v. Barela*, 2015 UT 22, and other related caselaw when preparing this jury instruction.

After significant discussion, the committee agreed to spend additional time considering how to address this situation in the instructions. This matter will be addressed again at the October meeting.

(3) USE OF FORCE AMENDMENTS:

This matter was not considered by the committee during the meeting. It is anticipated that this matter will be addressed at the October meeting.

(4) OBJECT RAPE / DEFINITION OF PENETRATION:

This matter was not considered by the committee during the meeting. It is anticipated that this matter will be addressed at the October meeting.

(5) IMPERFECT SELF-DEFENSE INSTRUCTION:

This matter was not considered by the committee during the meeting. It is anticipated that this matter will be addressed at the October meeting.

(6) REVIEW 2019 MEETING DATES:

Mr. Drechsel reviewed committee meeting dates for the 2019 calendar year. The committee determined that the January 2, 2019 meeting would be moved to January 9, 2019. In addition, the meetings for July 3, 2019, and August 7, 2019, are canceled by the committee. Jennifer Andrus made motion, which was seconded by Mark Field. The motion passed unanimously.

(7) ADJOURN

The meeting adjourned at approximately 1:35 p.m. The next meeting will be held on October 3, 2018, starting at 12:00 noon.

TAB 2

Assault Instructions

NOTES: At the September 12 meeting, the committee devoted significant time to discussing the *mens rea* (if any) that should legally be included in a jury instruction where an offense involves a "cohabitant." The committee worked through various combinations of language, but was not able at that time to resolve the matter.

The draft minutes from the September 12 meeting contain the most evolved version of the language that the committee created during the last meeting (see Tab 1, above).

TAB 3

Proposed Committee Note re: Controlled Substance Instructions

NOTES: Nathan Phelps introduced this item at the September 12 meeting. The committee previously explored possible language for a proposed committee note, but was also entertaining the possibility that no note is necessary. A copy of Nathan's proposed committee note follows, as well as a simplified version of the same proposed note that was modified by the committee during the meeting.

ORIGINAL VERSION:

The MUJI committees are charged with creating jury instructions that are accessible to lay jurors while also accurately stating the law. Consistent with that charge, the Criminal Jury Instruction Committee drafted this instruction so that a jury is asked to find whether the defendant possessed (or distributed) the specific controlled substance at issue in his case rather than any controlled substance. While the law does not require this specificity and so the drafted instruction increases the prosecution's burden, the Committee believed that in the mine run of cases this higher burden would be insignificant because generally defendants do not contest the identity of the controlled substance involved or their knowledge of the identity of the controlled substance.

If, however, a defendant contested the identity of the controlled substance or his knowledge of its identity (e.g. he believed it was heroin and not fentanyl), it would be appropriate to change this instruction so that it requires that jury only to find that the defendant possessed (or distributed) a controlled substance, and then separately instruct the jury that whatever substance is at issue in the case is a controlled substance as appropriate. See CR1201.

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SIMPLIFIED VERSION:

The MUJI committees are charged with creating jury instructions that are accessible to lay jurors while also accurately stating the law. Consistent with that charge, the Criminal Jury Instruction Committee drafted this instruction so that a jury is asked to find whether the defendant possessed (or distributed) the specific controlled substance at issue in his case rather than any controlled substance. The law does not require this specificity.

A short introduction to the categorical approach

Frequently in federal proceedings, judges and attorneys must look to state law to determine the significance of a person's past conviction. Often this examination will be categorical in nature, asking what a conviction necessary entailed based on the crime's elements rather than the asking what a defendant actually did.

There are legal reasons for doing this. The U.S. Supreme Court named three in *Mathis v. United States*. First, sometimes federal statutes require this narrow elements-only examination.[1] Second, in criminal proceedings, the Sixth Amendment places limits on judicial fact-finding. By focusing on the elements alone, courts steer clear of *Apprendi* issues. And third, sometime an incorrect fact will be alleged against a defendant, but because it does not go to any element of the crime, neither he nor his attorney will have any reason to correct the allegation. So, out of fairness to the defendant, future tribunals will not rely on facts he had no incentive to correct.

There is also a practical reason using the categorical approach. Because it focuses on "minimum criminal conduct necessary for conviction under a particular statute" by examining the elements of a crime, it avoids tricky factual issues that might arise if a tribunal was asked to determine what a defendant did in a far off time in a faraway jurisdiction. The prospect of a mini-trial on some ancient matter is eliminated.

Even under the categorical approach, hard questions will arise. Sometimes it will be difficult to determine whether a state statute sets out different elements (and thus different crimes) or different means (and thus different ways to commit one crime). A good example of this last sort of crime in Utah law comes with the various statutes prohibiting "indecent liberties." MUJI instruction deals with this by placing an "or" between all the different means these sexual offenses can be committed. *See, e.g.*, CR1602. Jury unanimity is not required.

When a federal tribunal is trying to distinguish between elements and means, one things they are authorized to look at is jury instructions. Examples with differing results are included in the following materials.

[1] It appears that the true sometimes in Utah law, too. *See In re Discipline of Steffensen*, 2018 UT 35, ¶¶ 53–56.

Proposed comment:

For stylistic reasons, this jury instruction was drafted to require the jury to find that the defendant possessed a specifically named controlled substance rather than any controlled substance. However, it is not clear whether Utah statutes require such specificity. If appropriate, this instruction could be modified so that the jury need only find that the defendant possessed a controlled substance.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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3373 Pepper Lane
Las Vegas, NV 89120

Name: [redacted] **A** [redacted]

Date of this notice: 4/27/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

Userteam: Docket

File: [redacted] – Las Vegas, NV

Date: APR 27 2017

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Skyler Anderson, Esquire

ON BEHALF OF DHS: Lisa P. Durant
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

Lodged: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Termination of proceedings; Convention Against Torture

The respondent appeals the Immigration Judge's December 19, 2016, decision finding him removable as charged, and denying his application for deferral of removal under the Convention Against Torture, 8 C.F.R. §§ 1208.16-.18 (2017). The appeal will be dismissed.

On appeal, the respondent disputes the Immigration Judge's decision finding him removable as charged based on his December 1, 2015, conviction for the offense of possession with intent to distribute a controlled substance in violation of Utah Code Annotated section 58-37-8(1)(a)(iii) (I.J. at 2-5; Exhs. 2, 4, and 5). First, the respondent asserts that the Immigration Judge erred in finding the Department of Homeland Security ("DHS") met its burden in establishing his removability because it did not meet its burden in demonstrating that his conviction was obtained under subsection (iii), rather than subsection (i), of Utah Code Annotated section 58-37-8(1)(a) (I.J. at 5; Exh. 2). *See* Respondent's Brief at 9-13. According to the respondent, the conviction records are confusing and ambiguous as to the subsection involved in the conviction (Exh. 2). *See id.*

Next, the respondent contends that, even if the conviction documents show he was convicted under section (iii), the Immigration Judge erred in finding the conviction to be an aggravated felony under section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B), and a controlled substance violation, for purposes of his removability (I.J. at 2-5; Exh. 2). *See* Respondent's Brief at 13-22. According to the respondent, because the statute carries different punishments for different controlled substances, the controlled substance involved is an "element" of the offense and the statute is divisible. *See id.* at 14-15.

[redacted]

Because he was charged with a Class A misdemeanor, the respondent asserts his offense must have involved a substance listed in Utah under "schedule V," which does not include methamphetamine, the substance listed in the conviction documents, and therefore the conviction documents fail to identify the exact substance involved. *See id.* The respondent further alleges that a Class A misdemeanor involving a "schedule V" substance is not punishable as a felony under the CSA such that it is not an aggravated felony under section 101(a)(43)(B) of the Act.[1] *See id.* at 15-17. The respondent also argues the DHS has not established that all of Utah's "schedule V" substances are federally controlled and has thus not established his offense is a controlled substances violation. *See id.* at 17-22.

Notwithstanding the respondent's contentions on appeal, we find no reason to disturb the Immigration Judge's ultimate decision finding him removable as charged on the basis of his conviction (I.J. at 2-5). *See* 8 C.F.R. § 1003.1(d)(3)(ii) (de novo review). In this regard, we agree with the Immigration Judge and the DHS that the evidence in the record regarding the respondent's conviction establishes by clear and convincing evidence he was convicted under subsection (iii) of section 58-37-8(1)(a) of the Utah Code Annotated (I.J. at 5; Exh. 2). However, we also find that the Immigration Judge did not properly apply the United States Supreme Court's decision in *Mathis v. United States*, 136 S.Ct. 2243 (2016), in considering the respondent's removability although his ultimate conclusion that the respondent is removable as charged is correct (I.J. at 2-5).

As to the whether the conviction documents establish that the respondent was convicted under subsection (iii) of the statute, rather than subsection (i), we note that subsection (i) prohibits "knowingly and intentionally ... produc[ing], manufactur[ing], or dispens[ing], or [] possess[ing] with intent to produce, manufacture, or dispense, a controlled or counterfeit substance." *See* Utah Code Ann. § 58-37-8(1)(a)(i) (2015). Subsection (iii), on the other hand, prohibits "knowingly and intentionally ... possess[ing] a controlled or counterfeit substance with intent to distribute." *See* Utah Code Ann. § 58-37-8(1)(a)(iii) (2015).

The judgment in this case indicates the respondent was charged, according to the amended information, with "poss w/ intent to dist c/substance (amended) – Class A Misdemeanor Plea: No Contest" (Exh. 2 p. 5). The amended information, which contains handwritten notes by the prosecutor, shows the respondent was charged in Count I with "possession of methamphetamine with intent to distribute, a Class A misdemeanor, in violation of Utah Code Ann § 58-37-8(1)(a)(i) ... the Defendant did knowingly and intentionally possess with intent to distribute,

[1] The respondent does not argue that his conviction cannot be an aggravated felony because it is classified as a State misdemeanor, which is apparently how the Immigration Judge understood his argument. *See* Respondent's Brief at 15-16 n. 16. Rather, he argues that the "elements" of a Class A misdemeanor under the Utah statute do not match the "elements" of any offense punishable under the federal Controlled Substances Act ("CSA"). *See id.* However, in deciding the "elements" of the respondent's offense, we determine the "elements" of the statute under which the respondent was convicted (section 58-37-8(1)(a)(iii)), not the "elements" of a Class A misdemeanor.

[redacted]

Methamphetamine, a schedule II controlled substance" (Exh. 2 pp. 8-9).[2] The minutes of the conviction indicate the respondent was charged with Count I "58-37-8(1)(A)(III) – poss w/ intent to dist c/ substance 1st Degree Felony (amended) to Class A misdemeanor" to which he pled "no contest" (Exh. 2 p. 14). The documents also indicate that on October 21, 2015, the charge of "58-37-8(2)(A)(I)" was amended to "58-37-8(1)(A)(III)" (Exh. 2 p. 30). Under these circumstances, we agree the evidence is clear that the respondent was convicted under subsection (iii) of the statute and not subsection (i). *See* Respondent's Brief at 9-13.

We now turn to whether the respondent's offense renders him removable as charged and, in that regard, we apply the Supreme Court's decision in *Mathis*, which further explained the "divisibility" analysis it set forth previously in *Descamps v. United States*, 133 S.Ct. 2276 (2013). *See* Respondent's Brief at 13-22. To decide whether a prior conviction qualifies as a removable offense under *Mathis*, we must first determine which words or phrases in the statute are *elements* of the crime; that is, those parts of the statute which the State must prove beyond a reasonable doubt. *See Mathis v. U.S.*, *supra*, at 2248 (emphasis added). A conviction does not qualify as an offense if its elements are broader than those of the listed generic offense.[3] *See id.* The only items of consequence are the "elements of the statute of conviction." *Id.* The particular facts underlying the conviction, e.g., the *means* by which the crime was committed are irrelevant in the analysis. *Id.* Thus, "when a statute, instead of merely laying out a crime's elements, lists alternative means of fulfilling one (or more)" elements, we consider only whether the elements satisfy the generic definition and do not apply the modified categorical approach to the list of means. *Id.*

We have determined that the respondent was convicted under section 58-7-8(1)(a)(iii) of the Utah Code which prohibits "knowingly and intentionally ... possess[ing] a controlled or

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[2] Count I originally read "possession of a controlled substance with intent to distribute in a drug free zone, in concert with two or more persons, a First Degree Felony, in violation of Utah Code Ann § 58-37-8(1)(a)(i) ... the Defendants did while in a drug free zone ... knowingly and intentionally possess with intent to distribute, Methamphetamine, a schedule II controlled substance" (Exh. 2 pp. 8-9). Although the subsection in the charge is listed as (i), the substance of the charge does not reflect an offense under subsection (i) but, rather, an offense under subsection (iii) with an enhancement for, *inter alia*, being in a "drug free zone" (Exh. 2 pp. 8-9).

[3] In his decision, the Immigration Judge found the decision in *Mathis* irrelevant to his analysis because he found the respondent's conviction is a "categorical" aggravated felony and controlled substances violation (I.J. at 6). Because he found the offense to be a "categorical" match to both grounds of removability, the Immigration Judge concluded that *Mathis* did not apply because he need not utilize the modified categorical approach (I.J. at 6). However, we point out that the decision in *Mathis* sets forth the proper analysis for determining whether an offense is a "categorical" match to the "generic" definition of the relevant ground of removability, as well as, whether the statute is overbroad and the modified categorical approach may be applied. Thus, the Immigration Judge should have used the analysis set forth in *Mathis* to determine the "elements" of the respondent's offense, whether those elements fall within the "generic" definition of the offense and, if not, whether the modified categorical approach may be applied.

[redacted]

counterfeit substance with intent to distribute." According to the Utah jury instructions, in order to obtain a conviction under Utah Code § 58-37-8(1)(a)(iii), the State must prove beyond a reasonable doubt the defendant: (1) intentionally and knowingly; (2) possessed [name of controlled substance/counterfeit substance]; (3) a schedule [I] [II] [III] [IV] [V] [controlled substance] [counterfeit substance]; (4) with intent to distribute that substance[; and], (5) the defense of ____ does not apply]. *See* Criminal Model Utah Jury Instructions, Second Edition, CR1204, Possession With Intent to Distribute (2014).[4]

The specific controlled substance involved in the offense is an "element" that the State must prove. *See State v. Ashcraft*, 349 P.3d 664, 667 (Utah 2015) (where defendant found with six different controlled substances, he was charged with six counts of possession with intent to distribute, a count for each specific substance); *State v. Carlson*, 635 P.2d 72, 73 (Utah 1981) (two counts of possession with intent to distribute, one for each substance involved). Because the controlled substance involved in the offense is an element, the modified categorical approach applies. The conviction documents show that the substance involved in the respondent's conviction was methamphetamine (Exh. 2). Therefore, we agree that the respondent is removable as charged. *See also Mellouli v. Lynch*, 135 S.Ct. 1980 (2015).

Finally, notwithstanding the respondent's contentions on appeal, we find no reason to disturb the Immigration Judge's decision denying his application for deferral of removal under the Convention Against Torture (I.J. at 10-11). *See Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012) (determinations as to the likelihood of future events are reviewed for clear error). The respondent's claim is based on generalized evidence of violence and crime in Guatemala which is not particular to him and does not meet the standard for protection under the Convention Against Torture. *See Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1152 (9th Cir. 2010).

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD

[4] The DHS submitted a "clarification" in which it indicates its belief that the Utah proposed jury instructions "remain proposed and have not been adopted as final." *See* DHS's Statement of Clarification of Authority. However, according to the standing committee on jury instructions of the Utah Judicial Council (formed by the Utah Supreme Court) the model jury instructions (MUJI 2d) are a continual work in progress, with new and amended instructions published periodically. *See* https://www.utcourts.gov/resources/muji/index.asp. In order to provide the best instructions possible, the Criminal Model Jury Instructions Committee adopted the practice of accepting formal comments on each instruction. According to the website, the particular jury instruction involved here was open for comment until February 18, 2017. *See id.* But, it, along with many others, has been published. *See* https://www.utcourts.gov/utc/muji-comment/.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MATHIS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15–6092. Argued April 26, 2016—Decided June 23, 2016

The Armed Career Criminal Act (ACCA) imposes a 15-year mandatory minimum sentence on a defendant convicted of being a felon in possession of a firearm who also has three prior state or federal convictions "for a violent felony," including "burglary, arson, or extortion." 18 U. S. C. §§924(e)(1), (e)(2)(B)(ii). To determine whether a prior conviction is for one of those listed crimes, courts apply the "categorical approach"—they ask whether the elements of the offense forming the basis for the conviction sufficiently match the elements of the generic (or commonly understood) version of the enumerated crime. See *Taylor* v. *United States*, 495 U. S. 575, 600–601. "Elements" are the constituent parts of a crime's legal definition, which must be proved beyond a reasonable doubt to sustain a conviction; they are distinct from "facts," which are mere real-world things—extraneous to the crime's legal requirements and thus ignored by the categorical approach.

When a statute defines only a single crime with a single set of elements, application of the categorical approach is straightforward. But when a statute defines multiple crimes by listing multiple, alternative elements, the elements-matching required by the categorical approach is more difficult. To decide whether a conviction under such a statute is for a listed ACCA offense, a sentencing court must discern which of the alternative elements was integral to the defendant's conviction. That determination is made possible by the "modified categorical approach," which permits a court to look at a limited class of documents from the record of a prior conviction to determine what crime, with what elements, a defendant was convicted of before comparing that crime's elements to those of the generic offense. See, *e.g.*, *Shepard* v. *United States*, 544 U. S. 13, 26. This case involves a

Syllabus

different type of alternatively worded statute—one that defines only one crime, with one set of elements, but which lists alternative factual means by which a defendant can satisfy those elements.

Here, petitioner Richard Mathis pleaded guilty to being a felon in possession of a firearm. Because of his five prior Iowa burglary convictions, the Government requested an ACCA sentence enhancement. Under the generic offense, burglary requires unlawful entry into a "building or other structure." *Taylor*, 495 U. S., at 598. The Iowa statute, however, reaches "any building, structure, [or] land, water, or air vehicle." Iowa Code §702.12. Under Iowa law, that list of places does not set out alternative elements, but rather alternative means of fulfilling a single locational element.

The District Court applied the modified categorical approach, found that Mathis had burgled structures, and imposed an enhanced sentence. The Eighth Circuit affirmed. Acknowledging that the Iowa statute swept more broadly than the generic statute, the court determined that, even if "structures" and "vehicles" were not separate elements but alternative means of fulfilling a single element, a sentencing court could still invoke the modified categorical approach. Because the record showed that Mathis had burgled structures, the court held, the District Court's treatment of Mathis's prior convictions as ACCA predicates was proper.

Held: Because the elements of Iowa's burglary law are broader than those of generic burglary, Mathis's prior convictions cannot give rise to ACCA's sentence enhancement. Pp. 7–19.

(a) This case is resolved by this Court's precedents, which have repeatedly held, and in no uncertain terms, that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense. See, *e.g.*, *Taylor*, 495 U. S., at 602. The "underlying brute facts or means" by which the defendant commits his crime, *Richardson* v. *United States*, 526 U. S. 813, 817, make no difference; even if the defendant's conduct, in fact, fits within the definition of the generic offense, the mismatch of elements saves him from an ACCA sentence. ACCA requires a sentencing judge to look only to "the elements of the [offense], not to the facts of [the] defendant's conduct." *Taylor*, 495 U. S., at 601.

This Court's cases establish three basic reasons for adhering to an elements-only inquiry. First, ACCA's text, which asks only about a defendant's "prior convictions," indicates that Congress meant for the sentencing judge to ask only whether "the defendant had been convicted of crimes falling within certain categories," *id.*, at 600, not what he had done. Second, construing ACCA to allow a sentencing judge to go any further would raise serious Sixth Amendment concerns because only a jury, not a judge, may find facts that increase

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the maximum penalty. See *Apprendi* v. *New Jersey*, 530 U. S. 466, 490. And third, an elements-focus avoids unfairness to defendants, who otherwise might be sentenced based on statements of "non-elemental fact[s]" that are prone to error because their proof is unnecessary to a conviction. *Descamps* v. *United States*, 570 U. S. ___, ___.

Those reasons remain as strong as ever when a statute, like Iowa's burglary statute, lists alternative means of fulfilling one (or more) of a crime's elements. ACCA's term "convictions" still supports an elements-based inquiry. The Sixth Amendment problems associated with a court's exploration of means rather than elements do not abate in the face of a statute like Iowa's: Alternative factual scenarios remain just that, and thus off-limits to sentencing judges. Finally, a statute's listing of disjunctive means does nothing to mitigate the possible unfairness of basing an increased penalty on something not legally necessary to a prior conviction. Accordingly, whether means are listed in a statute or not, ACCA does not care about them; rather, its focus, as always, remains on a crime's elements. Pp. 7–16.

(b) The first task for a court faced with an alternatively phrased statute is thus to determine whether the listed items are elements or means. That threshold inquiry is easy here, where a State Supreme Court ruling answers the question. A state statute on its face could also resolve the issue. And if state law fails to provide clear answers, the record of a prior conviction itself might prove useful to determining whether the listed items are elements of the offense. If such record materials do not speak plainly, a sentencing judge will be unable to satisfy "*Taylor*'s demand for certainty." *Shepard*, 544 U. S., at 21. But between the record and state law, that kind of indeterminacy should prove more the exception than the rule. Pp. 16–18.

786 F. 3d 1068, reversed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and SOTOMAYOR, JJ., joined. KENNEDY, J., and THOMAS, J., filed concurring opinions. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined. ALITO, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 15–6092

RICHARD MATHIS, PETITIONER *v.* UNITED STATES

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

[June 23, 2016]

JUSTICE KAGAN delivered the opinion of the Court.

The Armed Career Criminal Act (ACCA or Act), 18 U. S. C. §924(e), imposes a 15-year mandatory minimum sentence on certain federal defendants who have three prior convictions for a "violent felony," including "burglary, arson, or extortion." To determine whether a past conviction is for one of those offenses, courts compare the elements of the crime of conviction with the elements of the "generic" version of the listed offense—*i.e.,* the offense as commonly understood. For more than 25 years, our decisions have held that the prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense. The question in this case is whether ACCA makes an exception to that rule when a defendant is convicted under a statute that lists multiple, alternative means of satisfying one (or more) of its elements. We decline to find such an exception.

I

A

ACCA prescribes a 15-year mandatory minimum sentence if a defendant is convicted of being a felon in posses-

sion of a firearm following three prior convictions for a "violent felony." §924(e)(1). (Absent that sentence enhancement, the felon-in-possession statute sets a 10-year *maximum* penalty. See §924(a)(2).) ACCA defines the term "violent felony" to include any felony, whether state or federal, that "is burglary, arson, or extortion." §924(e)(2)(B)(ii). In listing those crimes, we have held, Congress referred only to their usual or (in our terminology) generic versions—not to all variants of the offenses. See *Taylor* v. *United States*, 495 U. S. 575, 598 (1990). That means as to burglary—the offense relevant in this case—that Congress meant a crime "contain[ing] the following elements: an unlawful or unprivileged entry into . . . a building or other structure, with intent to commit a crime." *Ibid.*

To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case. See *id.,* at 600–601. Distinguishing between elements and facts is therefore central to ACCA's operation. "Elements" are the "constituent parts" of a crime's legal definition—the things the "prosecution must prove to sustain a conviction." Black's Law Dictionary 634 (10th ed. 2014). At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, see *Richardson* v. *United States*, 526 U. S. 813, 817 (1999); and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty, see *McCarthy* v. *United States*, 394 U. S. 459, 466 (1969). Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements. (We have sometimes called them "brute facts" when distinguishing them from elements. *Richardson*, 526 U. S., at 817.) They are "circumstance[s]" or "event[s]" having no "legal effect

[or] consequence": In particular, they need neither be found by a jury nor admitted by a defendant. Black's Law Dictionary 709. And ACCA, as we have always understood it, cares not a whit about them. See, *e.g., Taylor,* 495 U. S., at 599–602. A crime counts as "burglary" under the Act if its *elements* are the same as, or narrower than, those of the generic offense. But if the crime of conviction covers any more conduct than the generic offense, then it is not an ACCA "burglary"—even if the defendant's actual conduct (*i.e.,* the facts of the crime) fits within the generic offense's boundaries.

The comparison of elements that the categorical approach requires is straightforward when a statute sets out a single (or "indivisible") set of elements to define a single crime. The court then lines up that crime's elements alongside those of the generic offense and sees if they match. So, for example, this Court found that a California statute swept more broadly than generic burglary because it criminalized entering a location (even if lawfully) with the intent to steal, and thus encompassed mere shoplifting. See *id.,* at 591; *Descamps* v. *United States*, 570 U. S. ___, ___–___ (2013) (slip op., at 5–6). Accordingly, no conviction under that law could count as an ACCA predicate, even if the defendant in fact made an illegal entry and so committed burglary in its generic form. See *id.,* at ___–___ (slip op., at 22–23).

Some statutes, however, have a more complicated (sometimes called "divisible") structure, making the comparison of elements harder. *Id.,* at ___ (slip op., at 5). A single statute may list elements in the alternative, and thereby define multiple crimes. Suppose, for example, that the California law noted above had prohibited "the lawful entry or the unlawful entry" of a premises with intent to steal, so as to create two different offenses, one more serious than the other. If the defendant were convicted of the offense with unlawful entry as an element,

then his crime of conviction would match generic burglary and count as an ACCA predicate; but, conversely, the conviction would not qualify if it were for the offense with lawful entry as an element. A sentencing court thus requires a way of figuring out which of the alternative elements listed—lawful entry or unlawful entry—was integral to the defendant's conviction (that is, which was necessarily found or admitted). See *id.,* at ___ (slip op., at 6). To address that need, this Court approved the "modified categorical approach" for use with statutes having multiple alternative elements. See, *e.g., Shepard* v. *United States*, 544 U. S. 13, 26 (2005). Under that approach, a sentencing court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of. See *ibid.*; *Taylor*, 495 U. S., at 602. The court can then compare that crime, as the categorical approach commands, with the relevant generic offense.

This case concerns a different kind of alternatively phrased law: not one that lists multiple elements disjunctively, but instead one that enumerates various factual means of committing a single element. See generally *Schad* v. *Arizona*, 501 U. S. 624, 636 (1991) (plurality opinion) ("[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes"). To use a hypothetical adapted from two of our prior decisions, suppose a statute requires use of a "deadly weapon" as an element of a crime and further provides that the use of a "knife, gun, bat, or similar weapon" would all qualify. See *Descamps*, 570 U. S., at ___ (slip op., at 16); *Richardson*, 526 U. S., at 817. Because that kind of list merely specifies diverse means of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense—a jury need not find

(or a defendant admit) any particular item: A jury could convict even if some jurors "conclude[d] that the defendant used a knife" while others "conclude[d] he used a gun," so long as all agreed that the defendant used a "deadly weapon." *Ibid.*; see *Descamps*, 570 U. S., at ___ (slip op., at 14) (describing means, for this reason, as "legally extraneous circumstances"). And similarly, to bring the discussion back to burglary, a statute might—indeed, as soon discussed, Iowa's burglary law does—itemize the various places that crime could occur as disjunctive factual scenarios rather than separate elements, so that a jury need not make any specific findings (or a defendant admissions) on that score.

The issue before us is whether ACCA treats this kind of statute as it does all others, imposing a sentence enhancement only if the state crime's elements correspond to those of a generic offense—or instead whether the Act makes an exception for such a law, so that a sentence can be enhanced when one of the statute's specified means creates a match with the generic offense, even though the broader element would not.

B

Petitioner Richard Mathis pleaded guilty to being a felon in possession of a firearm. See §922(g). At sentencing, the Government asked the District Court to impose ACCA's 15-year minimum penalty based on Mathis's five prior convictions for burglary under Iowa law.

Iowa's burglary statute, all parties agree, covers more conduct than generic burglary does. See Brief for Petitioner 36; Brief for United States 44. The generic offense requires unlawful entry into a "building or other structure." *Taylor*, 495 U. S., at 598; *supra*, at 2. Iowa's statute, by contrast, reaches a broader range of places: "any building, structure, *[or] land, water, or air vehicle*." Iowa Code §702.12 (2013) (emphasis added). And those listed

locations are not alternative elements, going toward the creation of separate crimes. To the contrary, they lay out alternative ways of satisfying a single locational element, as the Iowa Supreme Court has held: Each of the terms serves as an "alternative method of committing [the] single crime" of burglary, so that a jury need not agree on which of the locations was actually involved. *State* v. *Duncan*, 312 N. W. 2d 519, 523 (Iowa 1981); see *State* v. *Rooney*, 862 N. W. 2d 367, 376 (Iowa 2015) (discussing the single "broadly phrased . . . element of place" in Iowa's burglary law). In short, the statute defines one crime, with one set of elements, broader than generic burglary—while specifying multiple means of fulfilling its locational element, some but not all of which (*i.e.,* buildings and other structures, but not vehicles) satisfy the generic definition.

The District Court imposed an ACCA enhancement on Mathis after inspecting the records of his prior convictions and determining that he had burgled structures, rather than vehicles. See App. 34–35. The Court of Appeals for the Eighth Circuit affirmed. 786 F. 3d 1068 (2015). It acknowledged that Iowa's burglary statute, by covering vehicles in addition to structures, swept more broadly than generic burglary. See *id.,* at 1074. But it noted that if structures and vehicles were separate elements, each part of a different crime, then a sentencing court could invoke the modified categorical approach and look to old record materials to see which of those crimes the defendant had been convicted of. See *id.,* at 1072–1074. And the Court of Appeals thought nothing changed if structures and vehicles were not distinct elements but only alternative means: "Whether [such locations] amount to alternative elements or merely alternative means to fulfilling an element," the Eighth Circuit held, a sentencing court "must apply the modified categorical approach" and inspect the records of prior cases. *Id.,* at 1075. If the court

found from those materials that the defendant had in fact committed the offense in a way that satisfied the definition of generic burglary—here, by burgling a structure rather than a vehicle—then the court should treat the conviction as an ACCA predicate. And that was so, the Court of Appeals stated, even though the elements of the crime of conviction, in encompassing both types of locations, were broader than those of the relevant generic offense. See *id.,* at 1074–1075. In this circumstance, the court thus found, ACCA's usual elements-based inquiry would yield to a facts-based one.

That decision added to a Circuit split over whether ACCA's general rule—that a defendant's crime of conviction can count as a predicate only if its elements match those of a generic offense—gives way when a statute happens to list various means by which a defendant can satisfy an element.[1] We granted certiorari to resolve that division, 577 U. S. ___ (2016), and now reverse.

II

A

As just noted, the elements of Mathis's crime of conviction (Iowa burglary) cover a greater swath of conduct than the elements of the relevant ACCA offense (generic burglary). See *supra,* at 5–6. Under our precedents, that undisputed disparity resolves this case. We have often held, and in no uncertain terms, that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense. See, *e.g., Taylor*, 495 U. S., at 602. How a given defendant actually perpetrated the crime—what we have referred to as the "underlying

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[1] Compare 786 F. 3d 1068 (CA8 2015) (case below) (recognizing such an exception); *United States* v. *Ozier*, 796 F. 3d 597 (CA6 2015) (same); *United States* v. *Trent*, 767 F. 3d 1046 (CA10 2014) (same), with *Rendon* v. *Holder*, 764 F. 3d 1077 (CA9 2014) (rejecting that exception); *Omargharib* v. *Holder*, 775 F. 3d 192 (CA4 2014) (same).

brute facts or means" of commission, *Richardson,* 526 U. S., at 817—makes no difference; even if his conduct fits within the generic offense, the mismatch of elements saves the defendant from an ACCA sentence. Those longstanding principles, and the reasoning that underlies them, apply regardless of whether a statute omits or instead specifies alternative possible means of commission. The itemized construction gives a sentencing court no special warrant to explore the facts of an offense, rather than to determine the crime's elements and compare them with the generic definition.

Taylor set out the essential rule governing ACCA cases more than a quarter century ago. All that counts under the Act, we held then, are "the elements of the statute of conviction." 495 U. S., at 601. So, for example, the label a State assigns to a crime—whether "burglary," "breaking and entering," or something else entirely—has no relevance to whether that offense is an ACCA predicate. See *id.,* at 590–592. And more to the point here: The same is true of "the particular facts underlying [the prior] convictions"—the means by which the defendant, in real life, committed his crimes. *Id.,* at 600. That rule can seem counterintuitive: In some cases, a sentencing judge knows (or can easily discover) that the defendant carried out a "real" burglary, even though the crime of conviction also extends to other conduct. No matter. Under ACCA, *Taylor* stated, it is impermissible for "a particular crime [to] sometimes count towards enhancement and sometimes not, depending on the facts of the case." *Id.,* at 601. Accordingly, a sentencing judge may look only to "the elements of the [offense], not to the facts of [the] defendant's conduct." *Ibid.*

That simple point became a mantra in our subsequent ACCA decisions.[2] At the risk of repetition (perhaps down-

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[2] So too in our decisions applying the categorical approach outside the

right tedium), here are some examples. In *Shepard*: ACCA "refers to predicate offenses in terms not of prior conduct but of prior 'convictions' and the 'element[s]' of crimes." 544 U. S., at 19 (alteration in original). In *James* v. *United States*: "[W]e have avoided any inquiry into the underlying facts of [the defendant's] particular offense, and have looked solely to the elements of [burglary] as defined by [state] law." 550 U. S. 192, 214 (2007). In *Sykes* v. *United States*: "[W]e consider [only] the *elements of the offense*[,] without inquiring into the specific conduct of this particular offender." 564 U. S. 1, 7 (2011) (quoting *James*, 550 U. S., at 202; emphasis in original). And most recently (and tersely) in *Descamps*: "The key [under ACCA] is elements, not facts." 570 U. S., at ___ (slip op., at 5).

Our decisions have given three basic reasons for adhering to an elements-only inquiry. First, ACCA's text favors that approach. By enhancing the sentence of a defendant who has three "previous convictions" for generic burglary, §924(e)(1)—rather than one who has thrice committed that crime—Congress indicated that the sentencer should ask only about whether "the defendant had been convicted of crimes falling within certain categories," and not about what the defendant had actually done. *Taylor*, 495 U. S., at 600. Congress well knows how to instruct sentencing judges to look into the facts of prior crimes: In other statutes, using different language, it has done just that. See *United States* v. *Hayes*, 555 U. S. 415, 421 (2009) (concluding that the phrase "an offense . . . committed" charged sentencers with considering non-elemental facts); *Nijhawan* v. *Holder*, 557 U. S. 29, 36 (2009) (construing an

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ACCA context—most prominently, in immigration cases. See, *e.g.*, *Kawashima* v. *Holder*, 565 U. S. 478, 482–483 (2012) (stating that a judge must look to the "formal element[s] of a conviction[,] rather than to the specific facts underlying the crime," in deciding whether to deport an alien for committing an "aggravated felony").

immigration statute to "call[] for a 'circumstance-specific,' not a 'categorical' interpretation"). But Congress chose another course in ACCA, focusing on only "the elements of the statute of conviction." *Taylor*, 495 U. S., at 601.

Second, a construction of ACCA allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns. This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. See *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000). That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. See *Shepard*, 544 U. S., at 25 (plurality opinion); *id.*, at 28 (THOMAS, J., concurring in part and concurring in judgment) (stating that such an approach would amount to "constitutional error"). He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about "what the defendant and state judge must have understood as the factual basis of the prior plea" or "what the jury in a prior trial must have accepted as the theory of the crime." See *id.*, at 25 (plurality opinion); *Descamps*, 570 U. S., at ___ (slip op., at 14). He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.

And third, an elements-focus avoids unfairness to defendants. Statements of "non-elemental fact" in the records of prior convictions are prone to error precisely because their proof is unnecessary. *Id.*, at ___ (slip op., at 15). At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he "may have good reason not to"—or even be precluded from doing so by the court. *Ibid.* When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncor-

rected. See *ibid.*[3] Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.

Those three reasons stay as strong as ever when a statute, instead of merely laying out a crime's elements, lists alternative means of fulfilling one (or more) of them. ACCA's use of the term "convictions" still supports an elements-based inquiry; indeed, that language directly refutes an approach that would treat as consequential a statute's reference to factual circumstances *not* essential to any conviction. Similarly, the Sixth Amendment problems associated with a court's exploration of means rather than elements do not abate in the face of a statute like Iowa's: Whether or not mentioned in a statute's text, alternative factual scenarios remain just that—and so remain off-limits to judges imposing ACCA enhancements. And finally, a statute's listing of disjunctive means does nothing to mitigate the possible unfairness of basing an increased penalty on something not legally necessary to a prior conviction. Whatever the statute says, or leaves out, about diverse ways of committing a crime makes no difference to the defendant's incentives (or lack thereof) to contest such matters.

For these reasons, the court below erred in applying the

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[3]To see the point most clearly, consider an example arising in the immigration context: A defendant charged under a statute that criminalizes "intentionally, knowingly, or recklessly" assaulting another—as exists in many States, see, *e.g.*, Tex. Penal Code Ann. §22.01(a)(1) (West Cum. Supp. 2015)—has no apparent reason to dispute a prosecutor's statement that he committed the crime intentionally (as opposed to recklessly) if those mental states are interchangeable means of satisfying a single *mens rea* element. But such a statement, if treated as reliable, could make a huge difference in a deportation proceeding years in the future, because an intentional assault (unlike a reckless one) qualifies as a "crime involving moral turpitude," and so requires removal from the country. See *In re Gomez-Perez*, No. A200–958–511, p. 2 (BIA 2014).

modified categorical approach to determine the means by which Mathis committed his prior crimes. 786 F. 3d, at 1075. ACCA, as just explained, treats such facts as irrelevant: Find them or not, by examining the record or anything else, a court still may not use them to enhance a sentence. And indeed, our cases involving the modified categorical approach have already made exactly that point. "[T]he only [use of that approach] we have ever allowed," we stated a few Terms ago, is to determine "which *element[s]* played a part in the defendant's conviction." *Descamps*, 570 U. S., at ___, ___ (slip op., at 5, 8) (emphasis added); see *Taylor*, 495 U. S., at 602 (noting that the modified approach may be employed only to determine whether "a jury necessarily had to find" each element of generic burglary). In other words, the modified approach serves—and serves solely—as a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque. See *Descamps*, 570 U. S., at ___ (slip op., at 8).[4] It is not to be repurposed as a technique for discovering whether a defendant's prior conviction, even though for a too-broad crime, rested on facts (or otherwise said, involved means) that also could have satisfied the elements of a generic offense.

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[4] *Descamps* made the point at some length, adding that the modified categorical approach "retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates 'several different . . . crimes.' If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of. That is the job, as we have always understood it, of the modified approach: to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense." 570 U. S., at ___ (slip op., at 8) (citation omitted).

B

The Government and JUSTICE BREYER claim that our longtime and exclusive focus on elements does not resolve this case because (so they say) when we talked about "elements," we did not really mean it. "[T]he Court used 'elements,'" the Government informs us, "not to distinguish between 'means' and 'elements,'" but instead to refer to whatever the statute lists—whether means *or* elements. Brief for United States 8; see *id.,* at 19. In a similar vein, JUSTICE BREYER posits that every time we said the word "element," we "used the word generally, simply to refer to the matter at issue," without "intend[ing] to set forth a generally applicable rule." *Post*, at 11–12 (dissenting opinion).

But a good rule of thumb for reading our decisions is that what they say and what they mean are one and the same; and indeed, we have previously insisted on that point with reference to ACCA's elements-only approach. In *Descamps*, the sole dissenting Justice made an argument identical to the one now advanced by the Government and JUSTICE BREYER: that our prior caselaw had not intended to distinguish between statutes listing alternative elements and those setting out "merely alternative means" of commission. 570 U. S., at ___ (slip op., at 7) (opinion of ALITO, J.).[5] The Court rejected that contention,

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[5] In another solo dissent, JUSTICE ALITO today switches gears, arguing not that our precedent is consistent with his means-based view, but instead that all of our ACCA decisions are misguided because all follow from an initial wrong turn in *Taylor* v. *United States*, 495 U. S. 575 (1990). See *post*, at 2–3. To borrow the driving metaphor of his own dissent, JUSTICE ALITO thus locates himself entirely off the map of our caselaw. But that is not surprising; he has harshly criticized the categorical approach (and *Apprendi* too) for many years. See, *e.g., Johnson* v. *United States*, 576 U. S. ___, ___–___ (2015) (ALITO, J., dissenting) (slip op., at 8–13); *Descamps*, 570 U. S., at ___–___ (ALITO, J., dissenting) (slip op., at 4–5); *Moncrieffe* v. *Holder*, 569 U. S. ___, ___–___ (2013) (ALITO, J., dissenting) (slip op., at 10–11); *Chambers* v.

stating that "[a]ll those decisions rested on the explicit premise that the laws contain[ed] statutory phrases that cover several different crimes, not several different methods of committing one offense"—in other words, that they listed alternative elements, not alternative means. *Id.,* at ___, n. 2 (slip op., at 9, n. 2) (ellipsis and internal quotation marks omitted)*;* see, *e.g., Johnson* v. *United States*, 559 U. S. 133, 144 (2010); *Nijhawan*, 557 U. S., at 35. That premise was important, we explained, because an ACCA penalty may be based only on what a jury "necessarily found" to convict a defendant (or what he necessarily admitted). *Descamps*, 570 U. S., at ___, ___ (slip op., at 11, 17). And elements alone fit that bill; a means, or (as we have called it) "non-elemental fact," is "by definition[] *not* necessary to support a conviction." *Id.,* at ___, n. 3, __ (slip op., at 11, n. 3, 15); see *supra,* at 2.[6] Accordingly,

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United States, 555 U. S. 122, 132–134 (2009) (ALITO, J., concurring in judgment); see also *Hurst* v. *Florida*, 577 U. S. ___, ___ (2016) (ALITO, J., dissenting) (slip op., at 2); *Alleyne* v. *United States*, 570 U. S. ___, ___–___ (2013) (ALITO, J., dissenting) (slip op., at 1–2).

[6]JUSTICE BREYER's dissent rests on the idea that, contrary to that long-accepted definition, a jury sometimes does "necessarily ha[ve] to find" a means of commission, see *post*, at 6 (quoting *Taylor*, 495 U. S., at 602)—but *Descamps* specifically refuted that argument too. In that case, JUSTICE ALITO made the selfsame claim: A jury, he averred, should be treated as having "necessarily found" any fact, even though non-elemental, that a later sentencing court can "infer[]" that the jury agreed on "as a practical matter." 570 U. S., at ___ (ALITO, J., dissenting) (slip op., at 15). The Court rejected that view, explaining that its ACCA decisions had always demanded that a jury necessarily agree *as a legal matter*—which meant on elements and not on means. See *id.,* at ___, n. 3 (slip op., at 10, n. 3). The requirement, from the Court's earliest decisions, was that a judge could impose a 15-year sentence based only on a legal "certainty," not on his inference (however reasonable in a given case) about what a prior factfinder had thought. *Shepard*, 544 U. S., at 23; see *Taylor*, 495 U. S., at 602; *supra,* at 10. Or otherwise said, the relevant question was whether a defendant *was* legally convicted of a certain offense (with a certain set of elements), not whether a sentencing judge believes that the factfinder *would have*

Descamps made clear that when the Court had earlier said (and said and said) "elements," it meant just that and nothing else.

For that reason, this Court (including JUSTICE BREYER) recently made clear that a court may not look behind the elements of a generally drafted statute to identify the means by which a defendant committed a crime. See *Descamps,* 570 U. S., at ___ (slip op., at 2). Consider if Iowa defined burglary as involving merely an unlawful entry into a "premises"—without any further elaboration of the types of premises that exist in the world (*e.g.,* a house, a building, a car, a boat). Then, all agree, ACCA's elements-focus would apply. No matter that the record of a prior conviction clearly indicated that the defendant burgled a house at 122 Maple Road—and that the jury found as much; because Iowa's (hypothetical) law included an element broader than that of the generic offense, the defendant could not receive an ACCA sentence. Were that not so, this Court stated, "the categorical approach [would be] at an end"; the court would merely be asking "whether a particular set of facts leading to a conviction conforms to a generic ACCA offense." *Id.*, at ___ (slip op., at 19). That conclusion is common ground, and must serve as the baseline for anything JUSTICE BREYER (or the Government) here argues.

And contrary to his view, that baseline not only begins but also ends the analysis, because nothing material changes if Iowa's law further notes (much as it does) that a "premises" may include "a house, a building, a car, or a boat." That fortuity of legislative drafting affects neither the oddities of applying the categorical approach nor the

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convicted him of that offense had it been on the books. See *Carachuri-Rosendo* v. *Holder*, 560 U. S. 563, 576 (2010) (rejecting such a "hypothetical" approach given a similar statute's directive to "look to the conviction itself").

reasons for doing so. On the one hand, a categorical inquiry can produce the same counter-intuitive consequences however a state law is written. Whether or not the statute lists various means of satisfying the "premises" element, the record of a prior conviction is just as likely to make plain that the defendant burgled that house on Maple Road and the jury knew it. On the other hand (and as already shown), the grounds—constitutional, statutory, and equitable—that we have offered for nonetheless using the categorical approach lose none of their force in the switch from a generally phrased statute (leaving means implicit) to a more particular one (expressly enumerating them). See *supra,* at 11. In every relevant sense, both functional and legal, the two statutes—one saying just "premises," the other listing structures and vehicles—are the same. And so the same rule must apply: ACCA disregards the means by which the defendant committed his crime, and looks only to that offense's elements.

C

The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means. If they are elements, the court should do what we have previously approved: review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime. See *ibid.* But if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution. Given ACCA's indifference to how a defendant actually committed a prior offense, the court may ask only whether the *elements* of the state crime and generic offense make the requisite match.

This threshold inquiry—elements or means?—is easy in this case, as it will be in many others. Here, a state court decision definitively answers the question: The listed

premises in Iowa's burglary law, the State Supreme Court held, are "alternative method[s]" of committing one offense, so that a jury need not agree whether the burgled location was a building, other structure, or vehicle. See *Duncan,* 312 N. W. 2d, at 523; *supra,* at 6. When a ruling of that kind exists, a sentencing judge need only follow what it says. See *Schad*, 501 U. S., at 636 (plurality opinion). Likewise, the statute on its face may resolve the issue. If statutory alternatives carry different punishments, then under *Apprendi* they must be elements. See, *e.g.,* Colo. Rev. Stat. §18–4–203 (2015); Vt. Stat. Ann., Tit. 13, §1201 (Cum. Supp. 2015); see also 530 U. S., at 490 (requiring a jury to agree on any circumstance increasing a statutory penalty); *supra,* at 10. Conversely, if a statutory list is drafted to offer "illustrative examples," then it includes only a crime's means of commission. *United States* v. *Howard*, 742 F. 3d 1334, 1348 (CA11 2014); see *United States* v. *Cabrera-Umanzor*, 728 F. 3d 347, 353 (CA4 2013). And a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means). See, *e.g.,* Cal. Penal Code Ann. §952 (West 2008). Armed with such authoritative sources of state law, federal sentencing courts can readily determine the nature of an alternatively phrased list.

And if state law fails to provide clear answers, federal judges have another place to look: the record of a prior conviction itself. As Judge Kozinski has explained, such a "peek at the [record] documents" is for "the sole and limited purpose of determining whether [the listed items are] element[s] of the offense." *Rendon* v. *Holder*, 782 F. 3d 466, 473–474 (CA9 2015) (opinion dissenting from denial of reh'g en banc).[7] (Only if the answer is yes can the court

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[7] *Descamps* previously recognized just this way of discerning whether a statutory list contains means or elements. See 570 U. S., at ___, n. 2 (slip op., at 8–9, n. 2). The Court there noted that indictments, jury

make further use of the materials, as previously described, see *supra,* at 12–13.) Suppose, for example, that one count of an indictment and correlative jury instructions charge a defendant with burgling a "building, structure, or vehicle"—thus reiterating all the terms of Iowa's law. That is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt. So too if those documents use a single umbrella term like "premises": Once again, the record would then reveal what the prosecutor has to (and does not have to) demonstrate to prevail. See *Descamps*, 570 U. S., at ___ (slip op., at 17). Conversely, an indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime. Of course, such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy "*Taylor*'s demand for certainty" when determining whether a defendant was convicted of a generic offense. *Shepard*, 544 U. S., at 21. But between those documents and state law, that kind of indeterminacy should prove more the exception than the rule.

III

Our precedents make this a straightforward case. For more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements. Courts must ask whether the crime of

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instructions, plea colloquies and plea agreements will often "reflect the crime's elements" and so can reveal—in some cases better than state law itself—whether a statutory list is of elements or means. *Ibid.* Accordingly, when state law does not resolve the means-or-elements question, courts should "resort[] to the [record] documents" for help in making that determination. *Ibid.*

conviction is the same as, or narrower than, the relevant generic offense. They may not ask whether the defendant's conduct—his particular means of committing the crime—falls within the generic definition. And that rule does not change when a statute happens to list possible alternative means of commission: Whether or not made explicit, they remain what they ever were—just the facts, which ACCA (so we have held, over and over) does not care about.

Some have raised concerns about this line of decisions, and suggested to Congress that it reconsider how ACCA is written. See, *e.g., Chambers* v. *United States*, 555 U. S. 122, 133 (2009) (ALITO, J., concurring in judgment); *Descamps*, 570 U. S., at ___ (slip op., at 2) (KENNEDY, J., concurring). But whether for good or for ill, the elements-based approach remains the law. And we will not introduce inconsistency and arbitrariness into our ACCA decisions by here declining to follow its requirements. Everything this Court has ever said about ACCA runs counter to the Government's position. That alone is sufficient reason to reject it: Coherence has a claim on the law.

Because the elements of Iowa's burglary law are broader than those of generic burglary, Mathis's convictions under that law cannot give rise to an ACCA sentence. We accordingly reverse the judgment of the Court of Appeals.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 15–6092

RICHARD MATHIS, PETITIONER *v.* UNITED STATES

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

[June 23, 2016]

JUSTICE KENNEDY, concurring.

The Court's opinion is required by its precedents, and so I join it, with one reservation set forth below.

In no uncertain terms, the Court has held that the word "burglary" in the Armed Career Criminal Act (ACCA) "refers to the elements of the statute of conviction, not to the facts of each defendant's conduct." *Taylor* v. *United States*, 495 U. S. 575, 601 (1990). An enhancement is proper, the Court has said, if a defendant is convicted of a crime "having the elements" of generic burglary, "regardless of its exact definition or label" under state law. *Id.,* at 599. See also *Descamps* v. *United States*, 570 U. S. ___, ___ (2013) (slip op., at 8) ("[T]he categorical approach's central feature [is] a focus on the elements, rather than the facts, of a crime"). In the instant case, then, the Court is correct to conclude that "an elements-based approach remains the law." *Ante.* at 15. And it is correct to note further that it would "introduce inconsistency and arbitrariness into our ACCA decisions by here declining to follow its requirements," without reconsidering our precedents as a whole. *Ibid.*

My one reservation to the Court's opinion concerns its reliance on *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). *Ante* at 10. In my view, *Apprendi* was incorrect and, in any event, does not compel the elements based approach. That approach is required only by the Court's statutory

precedents, which Congress remains free to overturn.

As both dissenting opinions point out, today's decision is a stark illustration of the arbitrary and inequitable results produced by applying an elements based approach to this sentencing scheme. It could not have been Congress' intent for a career offender to escape his statutorily mandated punishment "when the record makes it clear beyond any possible doubt that [he] committed generic burglary." *Post*, at 6 (opinion of ALITO, J.). Congress also could not have intended vast sentencing disparities for defendants convicted of identical criminal conduct in different jurisdictions.

Congress is capable of amending the ACCA to resolve these concerns. See, *e.g., Nijhawan* v. *Holder*, 557 U. S. 29, 38 (2009) (interpreting the language Congress used in 8 U. S. C. §1101(a)(43)(M)(i) as requiring a "circumstance-specific" rather than categorical approach). But continued congressional inaction in the face of a system that each year proves more unworkable should require this Court to revisit its precedents in an appropriate case.

SUPREME COURT OF THE UNITED STATES

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[June 23, 2016]

JUSTICE THOMAS, concurring.

I join the Court's opinion, which faithfully applies our precedents. The Court holds that the modified categorical approach cannot be used to determine the specific means by which a defendant committed a crime. *Ante,* at 11–12. By rightly refusing to apply the modified categorical approach, the Court avoids further extending its precedents that limit a criminal defendant's right to a public trial before a jury of his peers.

In *Almendarez-Torres* v. *United States*, 523 U. S. 224, 246–247 (1998), the Court held that the existence of a prior conviction triggering enhanced penalties for a recidivist was a fact that could be found by a judge, not an element of the crime that must be found by a jury. Two years later, the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" is an element of a crime and therefore "must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000); see *id.,* at 489–490. But *Apprendi* recognized an exception for the "fact of a prior conviction," instead of overruling *Almendarez-Torres*. See 530 U. S., at 490. I continue to believe that the exception in *Apprendi* was wrong, and I have urged that *Almendarez-Torres* be reconsidered. See *Descamps* v. *United States*, 570 U. S. ___, ___ (2013) (THOMAS, J., concurring in judgment) (slip op., at 2).

Consistent with this view, I continue to believe that depending on judge-found facts in Armed Career Criminal Act (ACCA) cases violates the Sixth Amendment and is irreconcilable with *Apprendi*. ACCA improperly "allows the judge to 'mak[e] a finding that raises [a defendant's] sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant.'" *Descamps, supra,* at ___–___ (opinion of THOMAS, J.) (slip op., at 1–2) (brackets in original; internal quotation marks omitted). This Sixth Amendment problem persists regardless of whether "a court is determining whether a prior conviction was entered, or attempting to discern what facts were necessary to a prior conviction." *Id.,* at ___ (slip op., at 2) (citation omitted).

Today, the Court "at least limits the situations in which courts make factual determinations about prior convictions." *Ibid.* As the Court explains, the means of committing an offense are nothing more than "various factual ways of committing some component of the offense." *Ante,* at 4. Permitting judges to determine the means of committing a prior offense would expand *Almendarez-Torres*. Therefore, I join the Court's opinion refusing to allow judges to determine, without a jury, which alternative means supported a defendant's prior convictions.

SUPREME COURT OF THE UNITED STATES

No. 15–6092

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[June 23, 2016]

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

The elements/means distinction that the Court draws should not matter for sentencing purposes. I fear that the majority's contrary view will unnecessarily complicate federal sentencing law, often preventing courts from properly applying the sentencing statute that Congress enacted. I consequently dissent.

I

The federal statute before us imposes a mandatory minimum sentence upon a person convicted of being a felon in possession of a firearm if that person also has three previous convictions for (among several other things) "burglary." 18 U. S. C. §924(e)(2)(B)(ii). The petitioner here has been convicted of being a felon in possession, and he previously was convicted of three other crimes that qualify him for the federal mandatory minimum if, but only if, those previous convictions count as "burglary." To decide whether he has committed what the federal statute calls a "burglary," we must look to the state statute that he violated.

The relevant state statute, an Iowa statute, says that a person commits a crime if he (1) "enters an occupied structure," (2) "having no right . . . to do so," (3) with "the intent to commit a felony." Iowa Code §713.1 (2013). It then

goes on to define "occupied structure" as including any (1) "building," (2) "structure," (3) "land" vehicle, (4) "water" vehicle, or (5) "air vehicle, or similar place." §702.12. The problem arises because, as we have previously held, see *Taylor* v. *United States*, 495 U. S. 575, 602 (1990), if the structure that an offender unlawfully entered (with intent to commit a felony) was a "building," the state crime that he committed counts under the federal statute as "burglary." But if the structure that the offender unlawfully entered was a land, water, or air vehicle, the state crime does not count as a "burglary." Thus, a conviction for violating the state statute may, or may not, count as a "burglary," depending upon whether the structure that he entered was, say, a "building" or a "water vehicle."

Here, if we look at the court documents charging Mathis with a violation of the state statute, they tell us that he was charged with entering, for example, a "house and garage." App. 60–73 (charging documents). They say nothing about any other structure, say, a "water vehicle." Thus, to convict him, the jury—which had to find that he unlawfully entered an "occupied structure"—must have found that he entered a "house and garage," which concededly count as "building[s]." So why is that not the end of this matter? Why does the federal statute not apply?

Just to be sure, let us look at how we previously treated an almost identical instance. In *Taylor*, a state statute made criminal the "breaking and entering [of] a building, booth, tent, boat, or railroad car." 495 U. S., at 579, n. 1. We explained that breaking into a building would amount to "burglary" under the federal statute, but breaking into a railroad car would not. But the conviction document itself said only that the offender had violated the statute; it did not say whether he broke into a building or a railroad car. See *id.,* at 598–602. We said that in such a case the federal sentencing judge could look at the charging papers and the jury instructions in the state case to try to

determine what the state conviction was actually for: building, tent, or railroad car. We wrote that

> "in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement." *Id.,* at 602.

(We later added that where a conviction rests upon an offender's guilty plea, the federal judge can look to the facts that the offender admitted at his plea colloquy for the same purpose. See *Shepard* v. *United States*, 544 U. S. 13, 20–21 (2005).)

So, again, what is the problem? The State's "burglary statut[e] include[s] entry" of a vehicle as well as a "building." *Taylor*, 495 U. S., at 602. The conviction document might not specify what kind of a structure the defendant entered (*i.e.,* whether a building or an automobile). But the federal sentencing judge can look at the charging documents (or plea colloquy) to see whether "the defendant was charged only with a burglary of a building." *Ibid.* And here that was so. In addition, since the charging documents show that the defendant was charged only with illegal entry of a "building"—not a tent or a railroad car—the jury, in order to find (as it did) that the defendant broke into an occupied structure, would "necessarily [have] had to find an entry of a building." *Ibid.* Hence, "the Government should be allowed to use the conviction for enhancement." *Ibid.*

The majority, however, does not agree that the two cases I have described are almost identical. To the contrary, it notes correctly that our precedent often uses the word "element" to describe the relevant facts to which a

statute refers when it uses words such as "building," "tent," "boat," or "railroad car." See, *e.g., ante,* at 8–9. It points out that, here, the Iowa Supreme Court described those words as referring, not to "elements" of a crime, but rather to "means" through which a crime was committed. See *ante,* at 5–6. And that fact, in the majority's view, makes all the difference. See *ante,* at 13–16. But why? I, of course, see that there is a distinction between means and elements in the abstract, but—for sentencing purposes—I believe that it is a distinction without a difference.

II

I begin with a point about terminology. All the relevant words in this case, such as "building," "structure," "water vehicle," and the like, are statutory words. Moreover, the statute uses those words to help describe a crime. Further, the statute always uses those words to designate *facts*. Whether the offender broke into a building is a fact; whether he broke into a water vehicle is a fact. Sometimes, however, a State may treat certain of those facts as elements of a crime. And sometimes a State may treat certain of those facts as means of committing a crime. So far, everyone should agree. See *Richardson* v. *United States*, 526 U. S. 813, 817 (1999) (describing both "elements" and "means" as "facts"). Where we disagree is whether that difference, relevant to the application of state law, should make a difference for federal sentencing purposes.

III

Whether a State considers the statutory words "boat" or "building" to describe elements of a crime or a means of committing a crime can make a difference for purposes of applying the State's criminal law, but it should not make a difference in respect to the sentencing question at issue here. The majority, I believe, reasons something like this:

Suppose the jury unanimously agreed that the defendant unlawfully entered some kind of structure with felonious intent, but the jury is deadlocked six to six as to whether that structure is (1) a "boat" or (2) a "house." If the statute uses those two words to describe two different elements of two different crimes—*i.e.,* (1) breaking into a boat, and (2) breaking into a house—then the defendant wins, for the jury has not found unanimously each element of either crime. But if the statute uses those two words to describe two different means of committing the same crime—*i.e.,* breaking into an occupied structure that consists of either a house or a boat—then the defendant loses, for (as long as the jury decides unanimously that the defendant broke into an occupied structure of whichever kind) the jury need not decide unanimously which particular means the defendant used to commit the crime. See *ante,* at 2–5.

I accept that reasoning. But I do not see what it has to do with sentencing. In the majority's view, the label "means" opens up the possibility of a six-to-six jury split, and it believes that fact would prevent us from knowing whether the conviction was for breaking into a "building" or a "boat." See *ante,* at 4–5. But precisely the same is true were we to use the label "element" to describe the facts set forth in the state statute. The federal sentencing judge may see on the defendant's record a conviction for violating a particular provision of the state criminal code; that code may list in a single sentence both "buildings" and "boats"; the State may interpret the two words as separate elements of two separate crimes; and the federal judge will not know from the simple fact of conviction for violating the statute (without more) which of the two crimes was at issue (that is, was it the one aimed at burglaries of buildings, or the one aimed at burglaries of boats?). That is why the Court said in *Taylor* that in such a case the federal judge may look to the "indictment or information and jury instructions" to determine whether

"the jury necessarily had to find an entry of a building," rather than a boat, "to convict." 495 U. S., at 602. If so, the federal judge may count the conviction as falling within the federal statutory word "burglary" and use it for sentencing.

In my view, precisely the same is true if the state courts label the statute-mentioned facts ("building," "boat," etc.) as "means" rather than "elements." The federal judge should be able to "look . . . to" the charging documents and the plea agreement to see if "the jury necessarily had to find an entry of a building," rather than a boat, "to convict." *Ibid.* If so, the federal judge should be able to count the conviction as a federal-statute "burglary" conviction and use it for sentencing.

Of course, sometimes the charging documents will not give us the answer to the question. But often they will. If, for example, the charging document accuses Smith of breaking and entering into a house (and does not mention any other structure), then (1) the jury had to find unanimously that he broke into a "house," if "house" is an element, and (2) the jury had to find unanimously that he broke into a "house," if "house" is the only means charged. (Otherwise the jury would not have unanimously found that he broke into an "occupied structure," which is an element of the statutory crime.)

Suppose, for example, that breaking into a "building" is an element of Iowa's burglary crime; and suppose the State charges that Smith broke into a building located in Des Moines (and presents evidence at trial concerning only a Des Moines offense), but the jury returns its verdict on a special-verdict form showing that six jurors voted for guilt on the theory that he broke into a building located in Detroit—not Des Moines. The conviction would fail (at least in Iowa), would it not? See, *e.g., State* v. *Bratthauer*, 354 N. W. 2d 774, 776 (Iowa 1984) ("*If substantial evidence is presented to support each alternative method of commit-*

ting a single crime, and the alternatives are not repugnant to each other, *then* unanimity of the jury as to the mode of commission of the crime is not required. At the root of this standard is the principle that the unanimity rule requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged" (emphasis added; citation, brackets, and internal quotation marks omitted)). Similarly, we would know that—if the charging documents claim only that the defendant broke into a house, and the Government presented proof only of that kind of burglary—the jury had to find unanimously that he broke into a house, not a boat. And that is so whether state law considers the statutory word "house" to be an element or a means. I have not found any non-fanciful example to the contrary.

IV

Consider the federal statute before us—the statute that contains the word "burglary"—from a more general sentencing perspective. By way of background, it is important to understand that, as a general matter, any sentencing system must embody a host of compromises between theory and practicality. From the point of view of pure theory, there is much to be said for "real offense" sentencing. Such a system would require a commission or a sentencing judge to determine in some detail "the actual conduct in which the defendant engaged," *i.e.,* what the defendant really did now and in the past. United States Sentencing Commission (USSC), Guidelines Manual ch. 1, pt. A, p. 5 (Nov. 2015). Such a system would produce greater certainty that two offenders who engaged in (and had previously engaged in) the same real conduct would be punished similarly. See *ibid.*

Pure "real offense" sentencing, however, is too complex to work. It requires a sentencing judge (or a sentencing

commission) to know all kinds of facts that are difficult to discover as to present conduct and which a present sentencing judge could not possibly know when he or she seeks to determine what conduct underlies a prior conviction. Because of these practical difficulties, the USSC created Guidelines that in part reflect a "charge offense" system, a system based "upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted." *Ibid.*

A pure "charge offense" system, however, also has serious problems. It can place great authority to determine a sentence in the hands of the prosecutor, not the judge, creating the very nonuniformity that a commission would hope to minimize. Hence, the actual federal sentencing system retains "a significant number of real offense elements," allowing adjustments based upon the facts of a defendant's case. *Id.,* at 6. And the Commission is currently looking for new ways to create a better compromise. See, *e.g.,* USSC, Amendments to the Sentencing Guidelines, at 24 (Apr. 2016) (effective Nov. 1, 2016) (creating a "sentence-imposed model for determining" whether prior convictions count for sentence-enhancement purposes in the context of certain immigration crimes).

With this background in mind, turn to the federal statute before us. The statute, reflecting the impossibility of knowing in detail the conduct that underlies a prior conviction, uses (in certain cases involving possession of weapons) the fact of certain convictions (including convictions for burglary) as (conclusive) indications that the present defendant has previously engaged in highly undesirable conduct. And, for the general reasons earlier described, it is practical considerations, not a general theory, that would prevent Congress from listing the specific prior conduct that would warrant a higher present sentence. Practical considerations, particularly of administration, can explain why Congress did not tell the courts

precisely how to apply its statutory word "burglary." And similar practical considerations can help explain why this Court, in *Taylor* and later cases, described a modified categorical approach for separating the sheep from the goats. Those cases recognize that sentencing judges have limited time, they have limited information about prior convictions, and—within practical constraints—they must try to determine whether a prior conviction reflects the kind of behavior that Congress intended its proxy (*i.e.,* "burglary") to cover.

The majority's approach, I fear, is not practical. Perhaps the statutes of a few States say whether words like "boat" or "building" stand for an element of a crime or a means to commit a crime. I do not know. I do know, however, that many States have burglary statutes that look very much like the Iowa statute before us today. See, *e.g.,* Colo. Rev. Stat. §§18–4–101, 18–4–202, 18–4–203 (2015); Mont. Code Ann. §§45–2–101, 45–6–201, 45–6–204 (2015); N. H. Rev. Stat. Ann. §635.1 (2015); N. D. Cent. Code Ann. §§12.1–22–02, 12.1–22–06 (2012); Ohio Rev. Code Ann. §§2909.01, 2911.11–2911.13 (Lexis 2014); 18 Pa. Cons. Stat. Ann. §§3501, 3502 (2015); S. D. Codified Laws §§22–1–2, 22–32–1, 22–32–3, 22–32–8 (2006); Wyo. Stat. Ann. §§6–1–104, 6–3–301 (2015); see also ALI, Model Penal Code §§221.0, 221.1 (1980); cf. *Taylor*, 495 U. S., at 598 ("burglary" in the federal statute should reflect the version of burglary "used in the criminal codes of most States"). I also know that there are very few States where one can find authoritative judicial opinions that decide the means/element question. In fact, the Government told us at oral argument that it had found only "two States" that, in the context of burglary, had answered the means/elements question. Tr. of Oral Arg. 45; see *id.,* at 37.

The lack of information is not surprising. After all, a prosecutor often will charge just one (*e.g.,* a "building") of

several statutory alternatives. See *Descamps* v. *United States*, 570 U. S. ___, ___ (2013) (slip op., at 6). A jury that convicts, then, would normally have to agree unanimously about the existence of that particular fact. See *Richardson*, 526 U. S., at 818 ("Our decision [whether something is an element or a means] will make a difference where . . . the Government introduces evidence that the defendant has committed more underlying drug crimes than legally necessary to make up a 'series'"). Hence, it will not matter for that particular case whether the State, as a general matter, would categorize that fact (to which the statute refers) as an "element" or as a "means."

So on the majority's approach, what is a federal sentencing judge to do when facing a state statute that refers to a "building," a "boat," a "car," etc.? The charging documents will not answer the question, for—like the documents at issue here—they will simply charge entry into, say, a "building," without more. But see *ante,* at 17–18 (suggesting that a defendant's charging documents *will* often answer the question). The parties will have to look to other state cases to decide whether that fact is a "means" or an "element." That research will take time and is likely not to come up with an answer. What was once a simple matter will produce a time-consuming legal tangle. See, *e.g., State* v. *Peterson*, 168 Wash. 2d 763, 769, 230 P. 3d 588, 591 (2010) ("'There is simply no bright-line rule by which the courts can determine whether the legislature intended to provide alternate means of committing a particular crime. Instead, each case must be evaluated on its own merits'" (brackets omitted)); *State* v. *Brown*, 295 Kan. 181, 192, 284 P. 3d 977, 987 (2012) (the "alternative means" definition is "mind-bending in its application"). That is why lower court judges have criticized the approach the majority now adopts. See, *e.g., Omargharib* v. *Holder*, 775 F. 3d 192, 200 (CA4 2014) (Niemeyer, J., concurring) ("Because of the ever-morphing analysis and

the increasingly blurred articulation of applicable standards, we are being asked to decide, without clear and workable standards, whether disjunctive phrases in a criminal law define alternative elements of a crime or alternative means of committing it . . . . I find it especially difficult to comprehend the distinction" (emphasis deleted)).

V

The majority bases its conclusion primarily upon precedent. In my view, precedent does not demand the conclusion that the majority reaches. I agree with the majority that our cases on the subject have all used the word "element" in contexts similar to the present context. But that fact is hardly surprising, for all the cases in which that word appears involved elements—or at least the Court assumed that was so. See *Descamps*, 570 U. S., at ___, n. 2 (slip op., at 8, n. 2). In each of those cases, the Court used the word generally, simply to refer to the matter at issue, without stating or suggesting any view about the subject of the present case. See, *e.g., id.*, at ___ (slip op., at 5) ("Sentencing courts may look only to the statutory definitions—*i.e.,* the elements—of a defendant's prior offenses" (internal quotation marks omitted)); *Shepard*, 544 U. S., at 16–17 (using the terms "statutory definition" and "statutory elements" interchangeably); *Taylor*, 495 U. S., at 602 ("[A]n offense constitutes 'burglary' for purposes of [the Armed Career Criminal Act] if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary").

The genius of the common law consists in part in its ability to modify a prior holding in light of new circumstances, particularly where, as Justice Holmes said, an existing principle runs up against a different principle

that requires such modification. See Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). *A fortiori*, we should not apply this Court's use of a word in a prior case—a word that was not necessary to the decision of the prior case, and not intended to set forth a generally applicable rule—to a new circumstance that differs significantly in respect to both circumstances and the legal question at issue.

Does *Apprendi* v. *New Jersey*, 530 U. S 466 (2000), require the majority's result here? There we held that any fact ("[o]ther than the fact of a prior conviction") that must be proved in order to increase the defendant's sentence above what would otherwise be the statutory maximum must be proved to a jury beyond a reasonable doubt. *Id.,* at 490. Where, as here, the State charges only one kind of "occupied structure"—namely, entry into a "garage"—that criterion is met. The State must prove to the jury beyond a reasonable doubt that the defendant unlawfully entered a garage. And that is so, whether the statute uses the term "garage" to refer to a fact that is a means or a fact that is an element. If the charging papers simply said "occupied structure," leaving the jury free to disagree about whether that structure was a "garage" or was, instead, a "boat," then we lack the necessary assurance about jury unanimity; and the sentencing judge consequently cannot use that conviction as a basis for an increased federal sentence. And that is true whether the state statute, when using the words "garage" and "boat," intends them to refer to a fact that is a means or a fact that is an element.

What about *Descamps*? The statute there at issue made it a crime to "ente[r] certain locations with intent to commit grand or petit larceny or any felony." 570 U. S., at ___ (slip op., at 3) (internal quotation marks omitted). The statute made no distinction between (1) lawful entry (*e.g.,* entering a department store before closing time) and (2)

unlawful entry (*e.g.,* breaking into a store after it has closed). See *ibid.* The difference matters because unlawful entry is a critical constituent of the federal statute's version of "burglary." If the entry is lawful, the crime does not fall within the scope of that word.

We held that a conviction under this statute did not count as a "burglary" for federal purposes. We reasoned that the statute required the Government only to prove "entry," that there was no reason to believe that charging documents would say whether the entry was lawful or unlawful, and that, "most important[ly]," even if they did, the jury did not have to decide that the entry was unlawful in order to convict (that is, any description in the charging document that would imply or state that the entry was illegal, say, at 2:00 in the morning, would be coincidental). *Id.,* at ___ (slip op., at 18); see *id.,* at ___ (slip op., at 14).

Here, by way of contrast, the charging documents must allege entry into an "occupied structure," and that "structure" can consist of one of several statutory alternatives. Iowa Code §§713.1, 702.12. The present law thus bears little resemblance to the hypothetical statute the majority describes. That hypothetical statute makes it a crime to break into a "premises" without saying more. *Ante,* at 15–16. Thus, to apply the federal sentencing statute to such a nonspecific, hypothetical statute would require sentencing judges to "imaginatively transfor[m]" "every element of [the] statute . . . so that [the] crime is seen as containing an infinite number of sub-crimes corresponding to 'all the possible ways an individual can commit'" the crime—an impossibly difficult task. *Descamps*, 570 U. S., at ___–___ (slip op., at 18–19).

But the Iowa statute before us contains explicit (not hypothetical) statutory alternatives, and therefore it is likely (not unlikely) that the charging documents will list one or more of these alternatives. Indeed, that is the case

with each of Mathis' charging documents. See App. 60–73. And if the charging documents list only one of these alternatives, say, a "building," the jury normally would have to find unanimously that the defendant entered into a building in order to convict. See *Bratthauer*, 354 N. W. 2d, at 776. To repeat my central point: In my view, it is well within our precedent to count a state burglary conviction as a "burglary" within the meaning of the federal law where (1) the *statute* at issue lists the alternative means by which a defendant can commit the crime (*e.g.,* burgling a "building" or a "boat") and (2) the *charging documents* make clear that the state alleged (and the jury or trial judge necessarily found) only an alternative that matches the federal version of the crime.

Descamps was not that kind of case. It concerned a statute that did not explicitly list alternative means for commission of the crime. And it concerned a fact extraneous to the crime—the fact (whether entry into the burgled structure was lawful or unlawful) was neither a statutory means nor an element. As the Court in that case described it, the fact at issue was, under the state statute, a "legally extraneous circumstanc[e]" of the State's case. 570 U. S., at ___ (slip op., at 14). But this case concerns a fact necessary to the crime (regardless of whether the Iowa Supreme Court generally considers that fact to be a means or an element).

Precedent, by the way, also includes *Taylor*. And, as I have pointed out, *Taylor* says that the modified categorical approach it sets forth may "permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary." 495 U. S., at 602. *Taylor* is the precedent that I believe governs here. Because the majority takes a different view, with respect, I dissent.

SUPREME COURT OF THE UNITED STATES

No. 15–6092

RICHARD MATHIS, PETITIONER *v.* UNITED STATES

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

[June 23, 2016]

JUSTICE ALITO, dissenting.

Sabine Moreau lives in Solre-sur-Sambre, a town in Belgium located 38 miles south of Brussels. One day she set out in her car to pick up a friend at the Brussels train station, a trip that should have taken under an hour. She programmed her GPS and headed off. Although the GPS sent her south, not north, she apparently thought nothing of it. She dutifully stayed on the prescribed course. Nor was she deterred when she saw road signs in German for Cologne, Aachen, and Frankfurt. "I asked myself no questions," she later recounted. "I kept my foot down."[1]

Hours passed. After crossing through Germany, she entered Austria. Twice she stopped to refuel her car. She was involved in a minor traffic accident. When she tired,

[1] For accounts of the journey, see, *e.g.,* Waterfield, GPS Failure Leaves Belgian Woman in Zagreb Two Days Later, The Telegraph (Jan. 13, 2013), online at http://www.telegraph.co.uk/news/worldnews/europe/belgium/9798779/GPS-failure-leaves-Belgian-woman-in-Zagreb-two-days-later.html (all Internet materials as last visited June 22, 2016); Grenoble, Sabine Moreau, Belgian Woman, Drives 900 Miles Off 90-Mile Route Because of GPS Error, Huffington Post (Jan. 15, 2013), online at http:// www.huffingtonpost.com/2013/01/15/sabine-moreau-gps-belgium-croatia-900-miles_n_2475220.html; Malm, Belgian Woman Blindly Drove 900 Miles Across Europe As She Followed Broken GPS Instead Of 38-Miles To The Station, Daily Mail, (Jan. 14, 2013), online at http:// www. dailymail.co.uk/news/article-2262149/ Belgian-woman-67-picking-friend-railway-station-ends-Zagreb-900-miles-away-satnav-disaster.html.

she pulled over and slept in her car. She crossed the Alps, drove through Slovenia, entered Croatia, and finally arrived in Zagreb—two days and 900 miles after leaving her home. Either she had not properly set her GPS or the device had malfunctioned. But Ms. Moreau apparently refused to entertain that thought until she arrived in the Croatian capital. Only then, she told reporters, did she realize that she had gone off course, and she called home, where the police were investigating her disappearance.

Twenty-six years ago, in *Taylor* v. *United States*, 495 U. S. 575, 602 (1990), this Court set out on a journey like Ms. Moreau's. Our task in *Taylor*, like Ms. Moreau's short trip to the train station, might not seem very difficult—determining when a conviction for burglary counts as a prior conviction for burglary under the Armed Career Criminal Act (ACCA), 18 U. S. C. §924(e). But things have not worked out that way.

Congress enacted ACCA to ensure that violent repeat criminal offenders could be subject to enhanced penalties—that is, longer prison sentences—in a fair and uniform way across States with myriad criminal laws. See *Descamps* v. *United States*, 570 U. S. ___, ___–___ (2013) (ALITO, J., dissenting) (slip op., at 13–14). ACCA calls for an enhanced sentence when a defendant, who has three or more prior convictions for a "violent felony," is found guilty of possession of a firearm. §924(e)(1). And ACCA provides that the term "violent felony" means, among other things, "any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary." §924(e)(2)(B). In other words, "burglary" = "violent felony."

While this language might seem straightforward, *Taylor* introduced two complications. First, *Taylor* held that "burglary" under ACCA means offenses that have the elements of what the Court called "generic" burglary, defined as unlawfully entering or remaining in a building or structure with the intent to commit a crime. 495 U. S.,

at 598. This definition is broader than that of the common law but does not include every offense that States have labeled burglary, such as the burglary of a boat or vehicle. Second, *Taylor* and subsequent cases have limited the ability of sentencing judges to examine the record in prior cases for the purpose of determining whether the convictions in those cases were for "generic burglary." See, *e.g., Shepard* v. *United States*, 544 U. S. 13, 26 (2005). We have called this the "modified categorical approach." *Descamps*, *supra*, at ___–___ (slip op., at 1–2).

Programmed in this way, the Court set out on a course that has increasingly led to results that Congress could not have intended.[2] And finally, the Court arrives at today's decision, the upshot of which is that all burglary convictions in a great many States may be disqualified from counting as predicate offenses under ACCA. This conclusion should set off a warning bell. Congress indisputably wanted burglary to count under ACCA; our course has led us to the conclusion that, in many States, no burglary conviction will count; maybe we made a wrong turn at some point (or perhaps the Court is guided by a malfunctioning navigator). But the Court is unperturbed by its anomalous result. Serenely chanting its mantra, "Elements," see *ante*, at 8, the Court keeps its foot down and drives on.

The Court's approach calls for sentencing judges to delve into pointless abstract questions. In *Descamps*, the

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[2] In *Descamps* v. *United States*, 570 U. S. ___ (2013), the decision meant that no California burglary conviction counts under ACCA. See *id*., at ___ (ALITO, J., dissenting) (slip op., at 14). In *Moncrieffe* v. *Holder*, 569 U. S. ___ (2013), where the Court took a similar approach in interpreting a provision of the immigration laws, the Court came to the conclusion that convictions in about half the states for even very large scale marijuana trafficking do not count as "illicit trafficking in a controlled substance" under a provision of the immigration laws. *Id.,* at ___ (ALITO, J., dissenting) (slip op., at 9).

Court gave sentencing judges the assignment of determining whether a state statute is "divisible." See 570 U. S., at ___ (slip op., at 23). When I warned that this novel inquiry would prove to be difficult, the opinion of the Court brushed off that concern, see *id.,* at ___ (slip op., at 8–9, n. 2) ("[W]e can see no real-world reason to worry"). But lower court judges, who must regularly grapple with the modified categorical approach, struggled to understand *Descamps*. Compare *Rendon* v. *Holder*, 764 F. 3d 1077, 1084–1090 (CA9 2014) (panel opinion), with 782 F. 3d 466, 466–473 (CA9 2015) (eight judges dissenting from denial of reh'g en banc), and *id.,* at 473–474 (Kozinski, J., dissenting from denial of reh'g en banc). Now the Court tells them they must decide whether entering or remaining in a building is an "element" of committing a crime or merely a "means" of doing so. I wish them good luck.

The distinction between an "element" and a "means" is important in a very different context: The requisite number of jurors (all 12 in most jurisdictions) must agree that a defendant committed each element of an offense, but the jurors need not agree on the means by which an element was committed. So if entering or remaining *in a building* is an element, the jurors must agree that the defendant entered or remained in a *building* and not, say, a boat. But if the element is entering or remaining within one of a list of places specified in the statute (say, building, boat, vehicle, tent), then entering or remaining in a building is simply a means. Jurors do not need to agree on the means by which an offense is committed, and therefore whether a defendant illegally entered a building or a boat would not matter for purposes of obtaining a conviction.

In the real world, there are not many cases in which the state courts are required to decide whether jurors in a burglary case must agree on the building vs. boat issue, so the question whether buildings and boats are elements or means does not often arise. As a result, state-court cases

on the question are rare. The Government has surveyed all the state burglary statutes and has found only one—Iowa, the State in which petitioner was convicted for burglary—in which the status of the places covered as elements or means is revealed. See Brief for United States 43, and n. 13. Petitioner's attorneys have not cited a similar decision from any other State.

How, then, are federal judges sentencing under ACCA to make the element/means determination? The Court writes: "This threshold inquiry—elements or means?—is easy in this case, as it will be in many others." *Ante*, at 17. Really?[3] The determination is easy in this case only because the fortified legal team that took over petitioner's representation after this Court granted review found an Iowa case on point, but this discovery does not seem to have been made until the preparation of the brief filed in this Court. Brief for United States 43, and n. 13. "Petitioner's belated identification of a relevant state decision confirms that the task is not an easy one." *Ibid*. And that is not the worst of it. Although many States have burglary statutes like Iowa's that apply to the burglary of places other than a building, neither the Government nor petitioner has found a single case in any of these jurisdictions resolving the question whether the place burglarized is an element or a means.

The Court assures the federal district judges who must apply ACCA that they do not need such state-court decisions, that it will be easy for federal judges to predict how state courts would resolve this question if it was ever presented to them. *Ante*, at 16–18. But the Court has not shown how this can be done. The Government's brief cites

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[3] In *Rendon* v. *Holder*, 782 F. 3d 466, 466–473 (CA9 2014) (dissent from denial of rehearing), eight circuit judges addressed the question of the difficulty of this determination. They described it as "a notoriously uncertain inquiry" that will lead to "uncertain results." *Id.,* at 471.

numerous state statutes like Iowa's. Brief for United States 42, n. 12. If this task is so easy, let the Court pick a few of those States and give the lower court judges a demonstration.

Picking up an argument tossed off by Judge Kozinski, the Court argues that a federal sentencing judge can get a sense of whether the places covered by a state burglary statute are separate elements or means by examining the charging document. *Ante*, at 17–18 (citing *Rendon*, *supra*, at 473–474 (Kozinski, J., dissenting from denial of reh'g en banc)). If, for example, the charging document alleges that the defendant burglarized a house, that is a clue, according to the Court, that "house" is an element. See *ibid*. I pointed out the problem with this argument in *Descamps*. See 570 U. S., at ___–___ (dissenting opinion) (slip op., at 13–14). State rules and practices regarding the wording of charging documents differ, and just because something is specifically alleged in such a document, it does not follow that this item is an element and not just a means. See *ibid*.

The present case illustrates my point. Petitioner has five prior burglary convictions in Iowa. In Iowa, the places covered are "means." See *ante*, at 13. Yet the charging documents in all these cases set out the specific places that petitioner burglarized—a "house and garage," a "garage," a "machine shed," and a "storage shed." See Brief for Petitioner 9.

A real-world approach would avoid the mess that today's decision will produce. Allow a sentencing court to take a look at the record in the earlier case to see if the place that was burglarized was a building or something else. If the record is lost or inconclusive, the court could refuse to count the conviction. But where it is perfectly clear that a building was burglarized, count the conviction.

The majority disdains such practicality, and as a result it refuses to allow a burglary conviction to be counted even

when the record makes it clear beyond any possible doubt that the defendant committed generic burglary. Consider this hypothetical case. Suppose that a defendant wishes to plead guilty to burglary, and the following occurs in open court on the record at the time of the plea:

> PROSECUTOR: I am informed that the defendant wishes to plead guilty to the charge set out in the complaint, namely, "on June 27, 2016, he broke into a house at 10 Main Street with the intent to commit larceny."
>
> DEFENSE COUNSEL: That is correct.
>
> COURT: Mr. Defendant, what did you do?
>
> DEFENDANT: I broke into a house to steal money and jewelry.
>
> COURT: Was that the house at 10 Main St.?
>
> DEFENDANT: That's it.
>
> COURT: Now, are you sure about that? I mean, are you sure that 10 Main St. is a house? Could it have actually been a boat?
>
> DEFENDANT: No, it was a house. I climbed in through a window on the second floor.
>
> COURT: Well, there are yachts that have multiple decks. Are you sure it is not a yacht?
>
> DEFENDANT: It's a little house.

PROSECUTOR: Your Honor, here is a photo of the house.

COURT: Give the defendant the photo. Mr. Defendant, is this the place you burglarized?

DEFENDANT: Yes, like I said.

COURT: Could it once have been a boat? Maybe it was originally a house boat and was later attached to the ground. What about that?

DEFENSE COUNSEL: Your honor, we stipulate that it is not a boat.

COURT: Well, could it be a vehicle?

DEFENDANT: No, like I said, it's a house. It doesn't have any wheels.

COURT: There are trailers that aren't on wheels.

DEFENSE COUNSEL: Your Honor, my client wants to plead guilty to burglarizing the house at 10 Main St.

PROSECUTOR: Your Honor, if necessary I will call the owners, Mr. and Mrs. Landlubbers-Stationary. They have lived there for 40 years. They will testify that it is a building. I also have the town's tax records. The house has been at that location since it was built in 1926. It hasn't moved.

COURT: What do you say, defense counsel? Are those records accurate?

> DEFENSE COUNSEL: Yes, we so stipulate. Again, my client wishes to plead guilty to the burglary of a house. He wants to take responsibility for what he did, and as to sentencing, ...
>
> COURT: We'll get to that later. Mr. Defendant, what do you say? Is 10 Main St. possibly a vehicle?
>
> DEFENDANT: Your Honor, I admit I burglarized a house. It was not a car or truck.
>
> COURT: Well, alright. But could it possibly be a tent?
>
> DEFENDANT: No, it's made of brick. I scraped my knee on the brick climbing up.
>
> COURT: OK, I just want to be sure.

As the Court sees things, none of this would be enough. Real-world facts are irrelevant. For aficionados of pointless formalism, today's decision is a wonder, the veritable *ne plus ultra* of the genre.[4]

Along the way from *Taylor* to the present case, there have been signs that the Court was off course and opportunities to alter its course. Now the Court has reached the legal equivalent of Ms. Moreau's Zagreb. But the Court, unlike Ms. Moreau, is determined to stay the course and continue on, traveling even further away from the intended destination. Who knows when, if ever, the Court will call home.

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[4]The Court claims that there are three good reasons for its holding, but as I explained in *Descamps*, none is substantial. The Court's holding is not required by ACCA's text or by the Sixth Amendment, and the alternative real-world approach would be fair to defendants. See 570 U. S., at ___, ___–___ (ALITO, J., dissenting) (slip op., at 4, 9–11).

649 Fed.Appx. 597 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Guillermo VERA–VALDEVINOS, aka Guillermo Vera–Valdovinos, Petitioner,
v.
Loretta E. LYNCH, Attorney General, Respondent.

No. 14–73861.
|
Argued and Submitted April 15, 2016.
|
Filed May 11, 2016.

Attorneys and Law Firms

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On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. AXXX–XX1–885.

Before: NOONAN, BEA, and CHRISTEN, Circuit Judges.

MEMORANDUM [*]

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Cir. R. 36–3.

****1** Guillermo Vera–Valdevinos, a lawful permanent resident, appeals from the Board of Immigration Appeals ("BIA")'s dismissal of his appeal of an immigration judge's decision finding him removable under section 237(a)(2)(B)(i) of the Immigration and Nationality Act ("INA") for a controlled substance violation and denying cancellation of removal under INA § 240A(a). We review constitutional ***598** claims and legal questions de novo. We grant the petition to review.

First, this Court considers whether Vera–Valdevinos is removable. Vera–Valdevinos was convicted of violating Ariz.Rev.Stat. § 13–3408, which prohibits the possession, selling, manufacturing, administering, procuring, transporting, importing, and offering to transport a "narcotic drug." Ariz.Rev.Stat. § 13–3408(1)-(7). Under INA § 237(a)(2)(B)(i), an alien is deportable if he is "convicted" of a violation "relating to a controlled substance (as defined in section 802 of Title 21)." At oral argument, the government conceded that Ariz.Rev.Stat. § 13–3408 is overbroad because Arizona prohibits criminal possession of two substances, Benzylfentanyl and Thenylfentanyl, which are not on the Federal Controlled Substance Schedule. *Compare* Ariz.Rev.Stat. § 13–3401(20)(n), (cccc), *with* 21 U.S.C. § 802. Accordingly, for the purpose of this disposition, this Court finds that under the categorical approach, [1] Ariz.Rev.Stat. § 13–3408 is not a ground for deportation.

[1] Ariz.Rev.Stat. § 13–3408 is indivisible. "[A] statute is indivisible if the jury may disagree on the fact at issue yet still convict." *Lopez–Valencia v. Lynch,* 798 F.3d 863, 869 (9th Cir.2015) (internal quotation marks omitted). Arizona's jury instructions do not require the jury to make a finding of fact regarding the specific substance at issue. *See* Rev. Ariz. Jury Instructions (Criminal), 34.0871 (3d ed.) ("The crime of [transporting narcotic drugs for sale] [importing narcotic drugs into this state] [selling narcotic drugs] [transferring narcotic drugs] requires proof of the following: 1. The defendant knowingly [transported a narcotic drug for sale] [imported a narcotic drug into this state] [sold a narcotic drug] [transferred a narcotic drug]; *and* 2. The substance was in fact a narcotic drug.").

Second, this Court considers whether a conviction under Ariz.Rev.Stat. § 13–3408(A)(7) is an aggravated felony under INA § 101(a)(43)(B)

("illicit trafficking in a controlled substance) (as defined in section 802 of Title 21") when examined under the categorical method. Because this Court finds that Ariz.Rev.Stat. § 13–3408 is overbroad due to Arizona's regulation of two substances not on the Federal Controlled Substance Schedule, by definition a conviction under Ariz.Rev.Stat. § 13–3408(A)(7) cannot be for illicit trafficking in a federally controlled substance.

The government requests that this case be remanded so that the BIA may reassess Vera–Valdevinos's removability and relief from removal. According to the government, the agency failed to apply the categorical and modified categorical approaches when determining removability.

A court of appeals generally should remand a case to an agency for decision of a matter placed primarily in agency hands by statute. *I.N.S. v. Orlando Ventura,* 537 U.S. 12, 16, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002). This Court, however, generally does not remand to the BIA to apply the categorical or modified categorical approach where: (1) "only legal questions remain and these questions do not invoke the Board's expertise;" (2) "all relevant evidence regarding the conviction had been presented to the BIA in earlier proceedings;" and (3) "the BIA had already once determined that the offense fell within the generic definition of the crime, even if only at the categorical stage." *Flores–Lopez v. Holder,* 685 F.3d 857, 865 (9th Cir.2012) (internal quotation marks omitted); *Fregozo v. Holder,* 576 F.3d 1030, 1039 (9th Cir.2009). All three factors are present here, which makes remand unnecessary.

****2** The government's motion to remand is denied.

***599 PETITION FOR REVIEW GRANTED.**

All Citations

649 Fed.Appx. 597 (Mem), 2016 WL 2731951

2018 WL 566824
Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

UNITED STATES of America, Plaintiff,
v.
4. Marco CASTRO-CRUZ, a/k/a Juan Ramirez-Perez, a/k/a Manuel Castro-Cruz, a/k/a Rogelio Martinez-Escalante, a/k/a Guero, Defendant.

Criminal Action No. 14-cr-00144-CMA-4
|
Signed 01/25/2018

Attorneys and Law Firms

Guy Till, U.S. Attorney's Office, Denver, CO, for Plaintiff.

ORDER DENYING THE GOVERNMENT'S MOTION IN LIMINE

CHRISTINE M. ARGUELLO, United States District Judge

***1** The case is before the Court on the Government's Motion asking for "A Ruling That the Defendant's 2006 Arizona Conviction Under A.R.S.13-3041 and 13-1308 Is a Prior Conviction for a 'Felony Drug Offense' for Purposes of Title 21 U.S.C. § 841(b) and Title 21 U.S.C. § 851" ("Motion"). (Doc. # 1967). Defendant Marco Castro-Cruz ("Defendant") filed a Response (Doc. # 2008) and the Government filed a Reply (Doc. # 2012). After reviewing the pleadings and the applicable law, the Court denies the Government's Motion.

I. BACKGROUND

Defendant is scheduled for sentencing in this case due to his entry of a guilty plea on February 5, 2108. In 2006, Defendant was convicted in the Superior Court of Arizona, Maricopa County in case number CR 2000-041188 of a narcotic drug violation ("Arizona conviction"). The Government argues that Defendant's sentence should be enhanced pursuant to 21 U.S.C. § 841(b) because his Arizona conviction constitutes a prior "felony drug offense." Defendant admits to incurring the Arizona conviction but contests that it qualifies as a prior "felony drug offense" for purposes of 21 U.S.C. § 841(b).

To determine whether Defendant's Arizona conviction qualifies as a predicate offense for purposes of a 21 U.S.C. § 841(b) sentence enhancement, the Court first analyzes the Arizona conviction under a "categorical approach." Under limited circumstances, the Court can utilize a "modified categorical approach" analysis. *United States v. Madkins*, 866 F.3d 1136, 1144-45 (10th Cir. 2017).

II. ANALYSIS

A. CATEGORICAL APPROACH

The categorical approach requires the Court to compare the scope of the conduct covered by the elements of the state statute, in this case A.R.S. § 13-3408, with 21 U.S.C. § 802(44)'s definition of a "prior state felony conviction," to determine whether A.R.S. § 13-3408 criminalizes a broader range of conduct than that conduct criminalized by 21 U.S.C. § 841(b). A state statute criminalizes a broader range of conduct than the federal statute if its elements are broader than the elements of the federal statute, or if the state statute allows a conviction on the proof of fewer elements than the elements that the federal statute requires for conviction. *Descamps v. United States*, 133 S.Ct. 2276, 2283 (2013). Thus, the Court compares the elements of the prior state conviction with the elements of the federal predicate offense to see if there is a match. *Id.* If the elements of the state conviction are the same as or narrower than the elements of the federal offense, then the state crime is a categorical match and the conviction qualifies as a sentence enhancer. *See Taylor v. United States*, 495 U.S. 575, 599 (1990).

Applying the categorical approach, this Court concludes that Defendant's Arizona conviction is not available to enhance his sentence in this

case because A.R.S. § 13-3408's "narcotic drug" element criminalizes possession of Benzylfentanyl and Thenylfentanyl, which are not on the Federal Controlled Substance Schedule. As such, it criminalizes conduct more broadly than 21 U.S.C. § 841(b). *See Vera-Valdevinos v. Lynch*, 649 Fed. Appx. 597 (9th Cir. 2016) (not selected for publication) (noting that "[a]t oral argument, the government conceded that Ariz. Rev. Stat. § 13-3408 is overbroad because Arizona prohibits criminal possession of two substances, Benzylfentanyl and Thenylfentanyl, which are not on the Federal Controlled Substance Schedule."); *United States v. Tavizon-Ruiz*, 196 F.Supp.3d 1076, 1079 (N.D. Cal. 2016) (noting that "[t]he government ... agrees that convictions under A.R.S. Section 13-3408 no longer qualify as aggravated felonies for purposes of the immigration laws" based on the application of *Vera-Valdevinos*.)

B. MODIFIED CATEGORICAL APPROACH

***2** The Government asserts that the Court should analyze Defendant's conviction using the "modified categorical approach," that is, by reviewing the documents in the Defendant's Arizona conviction file to confirm that the conviction qualifies as a sentence enhancement. The Court may utilize the modified categorical approach if, under a categorical approach analysis, a conviction is not available as an enhancer, *Descamps,* 133 S.Ct. at 2285, and the state criminal statute of the conviction is divisible, *Madkins,* 866 F.3d at 1145. The Court cannot utilize the modified categorical approach if it concludes that the state criminal statute is indivisible. *United States v. McKibbon*, 878 F.3d 967, 974 (10th Cir. 2017). In that instance, the Court's determination under the categorical approach that the state conviction is unavailable for enhancement of the Defendant's sentence becomes final.

The Government argues that the Court should find that A.R.S.13-3408 is divisible. Such a determination would require this Court to disregard the conclusion of the court in *Vera-Valdevinos*, 649 Fed.Appx. at 597, that A.R.S.13-3408 is indivisible.

A state criminal statute is divisible if it sets forth the elements of different criminal offenses rather than simply different means by which a person commits a single criminal offense. *Mathis v. U.S.*, 136 S.Ct. 2243 (2016).

A.R.S. § 13-3408 states in relevant part:

> A. A person shall not knowingly:
>
> 7: Transport for sale, import into this state, offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer a narcotic drug.; and
>
> B. A person who violates:
>
> 7: Subsection A, paragraph 7 of this section is guilty of a class 2 felony.

One example of an indivisible statute is a statute that requires that a jury find the use of an indeterminate "weapon" to convict a defendant, even if they did not agree on the particular weapon used, rather than requiring that a specific weapon be charged and agreed upon by them. *Descamps*, 133 S.Ct. at 2290. "[A] statute is indivisible if the jury may disagree on the fact at issue yet still convict." *Lopez-Valencia v. Lynch*, 798 F.3d 863, 869 (9th Cir. 2015).

Revised Arizona Jury Instruction 34.0871 (3d ed.), which outlines the elements necessary for a jury to convict under A.R.S. § 13-3408 provides: "The crime of [transporting narcotic drugs for sale] [importing narcotic drugs into this state] [selling narcotic drugs] [transferring narcotic drugs] requires proof of the following: 1. The defendant knowingly [transported a narcotic drug for sale] [imported a narcotic drug into this state] [sold a narcotic drug] [transferred a narcotic drug]; *and* 2. The substance was in fact a narcotic drug."

The Court in *Vera-Valdevinos* determined that, although Jury Instruction 34.0871 includes the element "narcotic drug," which the jury must unanimously find has been proven in order to convict a defendant, it does not require the jury to find that a specific narcotic drug has been proven to convict. Thus, different members of a

jury could conclude that a defendant possessed different drugs, e.g., benzylfentanyl versus cocaine versus heroin, but still convict the defendant if they unanimously agreed that he possessed a "narcotic drug." *See Vera-Valdevinos,* 649 Fed.Appx. at 599, n. 1. As such, the *Vera-Valdevinos* court concluded that A.R.S. § 13-3408 was indivisible because it identified different means by which a person can commit a single offense, not alternative elements for different offenses.

This Court finds no reason to disregard this analysis and conclusion of the *Vera-Valdevinos* court. Accordingly, it would be inappropriate for this Court to apply the modified categorical approach in this case.

III. CONCLUSION

***3** For the foregoing reasons, the Court DENIES the Government's Motion (Doc. # 1967) and finds that Defendant's 2006 Arizona conviction of violation of A.R.S. § 13-3408 is not available to enhance his sentence in this case.

All Citations

Slip Copy, 2018 WL 566824

876 F.3d 1022
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Daladier MURILLO-ALVARADO, AKA Domingo Arredondo, AKA Daladier Murillo, AKA Daladier Alvarado Murillo, Defendant-Appellant.

No. 14-50354
|
Submitted July 8, 2016 * Pasadena, California
|
Filed December 4, 2017

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Synopsis

Background: Defendant pled guilty in the United States District Court for the Central District of California, No. 5:14-cr-00014-VAP-1, Virginia A. Phillips, Chief Judge, to illegal reentry, and he appealed.

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

California statute prohibiting possession or purchase for sale of designated controlled substances was divisible, and

defendant's prior California conviction of possession or purchase for sale of designated controlled substances was predicate "drug trafficking offense."

Affirmed.

***1024** Appeal from the United States District Court for the Central District of California, Virginia A. Phillips, Chief District Judge, Presiding, D.C. No. 5:14-cr-00014-VAP-1

Attorneys and Law Firms

James H. Locklin, Deputy Federal Public Defender; Hilary L. Potashner, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California.

Abigail W. Evans, Assistant United States Attorney; Lawrence S. Middleton, Chief, Criminal Division; United States Attorney's Office, Riverside, California; for Plaintiff-Appellee.

Before: Richard R. Clifton, Michelle T. Friedland, Circuit Judges, and Edward M. Chen, ** District Judge.

** The Honorable Edward M. Chen, United States District Judge for the Northern District of California, sitting by designation.

OPINION

CLIFTON, Circuit Judge:

The primary question presented by this appeal is whether section 11351 of the California Health and Safety Code ("Possession or purchase for sale of designated controlled substances") is a divisible statute, as discussed in *Mathis v. United States*, —— U.S. ——, 136 S.Ct. 2243, 2249, 195 L.Ed.2d 604 (2016), such that a conviction under that statute may be held to be a drug trafficking offense under the United States Sentencing Guidelines ("USSG" or "Sentencing Guidelines"), applying the modified categorical approach. We previously held that section 11351 is divisible with regard to its controlled substance requirement. *United States v. Torre-Jimenez*, 771 F.3d 1163, 1167 (9th Cir. 2014). In *Guevara v. United States*, —— U.S. ——, 136 S.Ct. 2542, 195 L.Ed.2d 866 (2016), however, the Supreme Court vacated and remanded a decision by this court, relying on that precedent, that section 11351 is divisible, directing us to reconsider the issue in light of *Mathis*.

In *United States v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) (en banc), we held that section 11352 of the California Health and Safety Code ("Transportation, sale, giving away, etc. of designated controlled substances"), a very similar statute, ***1025** is divisible under *Mathis*. *Id.* at 1039–41. Based on the same reasoning we applied in that decision, we conclude that section 11351 is similarly divisible. Because the government established that Murillo-Alvarado was previously convicted of possessing cocaine for sale, which qualifies as a drug trafficking offense under the Sentencing Guidelines, we affirm.

I. Background

In 2001, Defendant-Appellant Daladier Murillo-Alvarado was convicted of a violation of section 11351. Specifically, in count 1 of a criminal information, he was charged with "violation of Section 11351 of the [California] Health and Safety Code (POSSESSION FOR SALE OF A CONTROLLED SUBSTANCE), a FELONY." Count 1 specified that "[o]n or about May 29, 2001, [Murillo-Alvarado] ... did willfully and unlawfully possess for sale and purchase for sale a controlled substance, to wit, COCAINE." Murillo-Alvarado pled guilty to count 1.

Murillo-Alvarado was later deported but then returned to the United States without authorization. In 2013, immigration authorities found Murillo-Alvarado in California. He was indicted on a charge of illegal reentry in violation of 8 U.S.C. § 1326. The indictment also charged that he had been previously convicted for the violation of section 11351 described above. Murillo-Alvarado pled guilty to the charge of illegal reentry, without a plea agreement.

The district court sentenced Murillo-Alvarado to imprisonment for 60 months. In determining the sentence, the district court concluded, over objection by Murillo-Alvarado, that his prior conviction under section 11351 was for a "drug trafficking offense," which increased his offense level by 16 levels pursuant to U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A) (U.S. Sentencing Comm'n 2014) (amended 2016). Murillo-Alvarado timely appealed.

II. Discussion

At the time that Murillo-Alvarado was sentenced, the Sentencing Guidelines provided for sentence enhancements when a defendant had previously been convicted of various predicate offenses under federal, state, or local law, including a "drug trafficking offense." *See, e.g.*, USSG § 2L1.2(b)(1)(A). The Sentencing Guidelines define a "drug trafficking offense" to be:

> an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Id. § 2L1.2, Application Notes (1)(B)(iv).

Section 11351 specifies punishment for "every person who possesses for sale or purchases for purposes of sale ... any controlled substance" specified in a list of cross-referenced code provisions. Cal. Health & Safety Code § 11351. [1] To be covered under the section, the involved ***1026** substance must be one of the substances on one of the cross-referenced lists.

1 Section 11351 reads, in full:

> Except as otherwise provided in this division, every person who possesses for sale or purchases for purposes of sale (1) any controlled substance specified in subdivision (b), (c), or (e) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment pursuant to subdivision

> (h) of Section 1170 of the Penal Code for two, three, or four years.

We apply a three-step analysis to determine whether a prior conviction under state law qualifies as a predicate drug trafficking offense under the Sentencing Guidelines. First, we ask whether the state law is a categorical match with a federal drug trafficking offense. *See Taylor v. United States*, 495 U.S. 575, 599–600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). At this step, we look only to the "statutory definitions" of the corresponding offenses. *Id.* at 600, 110 S.Ct. 2143. If a state law "proscribes the same amount of or less conduct than" that qualifying as a federal drug trafficking offense, then the two offenses are a categorical match. *United States v. Hernandez*, 769 F.3d 1059, 1062 (9th Cir. 2014). In that scenario, a conviction under state law automatically qualifies as a predicate drug trafficking offense, ending our analysis. *See Taylor*, 495 U.S. at 599, 110 S.Ct. 2143.

Second, if the state law is not a categorical match, we ask whether the statute of prior conviction is divisible. *Mathis*, 136 S.Ct. at 2249. A statute is divisible when it "list[s] elements in the alternative, and thereby define[s] multiple crimes." *Id.*

If the statute of prior conviction is divisible, the third step is to determine whether the conviction is a match to the federal drug trafficking offense under the modified categorical approach. At this step, we examine judicially noticeable documents of conviction "to determine which statutory phrase was the basis for the conviction." *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 2285, 186 L.Ed.2d 438 (2013) (quoting *Johnson v. United States*, 559 U.S. 133, 144, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010)). In this case, the question would be whether the conviction of Murillo-Alvarado involved a substance that appeared on the federal list of controlled substances. If so, the prior conviction may serve as a predicate offense under the Sentencing Guidelines. *See Shepard v. United States*, 544 U.S. 13, 16, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).

A. The Divisibility of Section 11351

The parties do not dispute that in this case the state law at issue, section 11351, is not a categorical match with a federal drug trafficking offense. We have already held that section 11351 is not a categorical match with a federal drug trafficking offense because California's list of controlled substances includes some that are not on the federal list. *United States v. Leal-Vega*, 680 F.3d 1160, 1162 (9th Cir. 2012). Thus, our focus here is whether, at step two of the analysis, section 11351 is a divisible statute.

A statute is not divisible when it "contains ... alternative means by which a defendant might commit the same crime." *Martinez-Lopez*, 864 F.3d at 1039 (citing *Mathis*, 136 S.Ct. at 2256). A statute is divisible when it "list[s] elements in the alternative, and thereby define[s] multiple crimes." *Mathis*, 136 S.Ct. at 2249. We review the divisibility of a statute de novo. *Almanza-Arenas v. Lynch*, 815 F.3d 469, 477 (9th Cir. 2016) (en banc).

Murillo-Alvarado argues that the controlled substance requirement in section 11351 is not divisible because the controlled substances enumerated in the cross-referenced statutes are means by which a defendant commits a singular controlled-substance offense, not elements of separate crimes. [2] In its supplemental brief, ***1027** the Government contends that *Martinez-Lopez* requires us to hold that those controlled substances are elements, and that the controlled substance requirement is therefore divisible.

2 Murillo-Alvarado has not argued that the actus reus requirement in section 11351 is not divisible. Therefore, any such argument is waived. *See Miller v. Fairchild Indus.*, 797 F.2d 727, 738 (9th Cir. 1986) (noting that this court "will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief") (citing *Int'l Union of Bricklayers and Allied Craftsman Local No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985)).

We addressed a very similar question in our recent en banc opinion in *Martinez-Lopez*, in which we held that California Health and Safety Code section 11352 was divisible. *See Martinez-Lopez*, 864 F.3d

at 1039–41. Section 11352 contains a list of cross-referenced substances nearly identical to the list in section 11351. The list in section 11351 differs from the list in section 11352 only in that section 11352 includes cocaine base and section 11351 does not. *Compare* Cal. Health & Safety Code § 11351 *with id.* § 11352(a) (listing the same subsections and subparagraphs, with one addition, subparagraph (f)(1) of Section 11054); *see id.* § 11054(f)(1) (cocaine base). Thus, the list in section 11351 is just a subset of the list in section 11352.

Our reasoning in *Martinez-Lopez* guides us here.[3] In *Martinez-Lopez*, we noted that *In re Adams*, 14 Cal.3d 629, 122 Cal.Rptr. 73, 536 P.2d 473 (1975), and its progeny establish that "defendants are routinely subjected to multiple convictions under a single [California] statute for a single act as it relates to multiple controlled substances." *Martinez-Lopez*, 864 F.3d at 1040. Relevantly here, in *People v. Monarrez*, 66 Cal.App.4th 710, 78 Cal.Rptr.2d 247 (1998), the California court of appeal upheld separate convictions for possession of cocaine for sale and possession of heroin for sale under section 11351 based on a single incident. *Id.* at 248. This holding establishes that the controlled substances incorporated in section 11351 are elements establishing separate offenses and not means by which to commit the same offense.

3 Indeed, our opinion in that case referred to the Supreme Court's remand of *Guevara*, a case which involved a prior conviction under section 11351, and stated that "we respond to the Supreme Court's instruction by revisiting the entire line of cases." *Martinez-Lopez*, 864 F.3d at 1036 n.1. We have already relied on *Martinez-Lopez* to hold that two other sections of the California Health and Safety Code are divisible with respect to their controlled substance requirements. *See United States v. Ocampo-Estrada*, 873 F.3d 661, 668 (9th Cir. 2017) (Cal. Health & Safety Code § 11378); *United States v. Barragan*, 871 F.3d 689, 715 (9th Cir. 2017) (Cal. Health & Safety Code § 11379).

Further, similar to section 11352, the jury instructions for section 11351 "require a jury to fill in a blank identifying 'a controlled substance'—i.e., only one—demonstrating that the jury identify and unanimously agree on a particular controlled substance." *Martinez-Lopez*, 864 F.3d at 1041; *see* Judicial Council of California Criminal Jury Instructions CALCRIM No. 2302 (2017 edition). The jury instructions thus treat the particular controlled substance as an element, not a means.

In light of how it is interpreted by California courts, we hold that section 11351—like section 11352—is divisible as to its controlled substance requirement.

B. Application of the Modified Categorical Approach

Because section 11351 is a divisible statute, we now turn to step three, in which we examine judicially noticeable documents of prior conviction to determine whether it is clear which statutory phrase was the basis for the conviction. If the defendant pled or was found guilty of the elements constituting ***1028** a federal drug trafficking offense, the prior state conviction may serve as a predicate offense under the Sentencing Guidelines.

Murillo-Alvarado argues that, at step three, the government failed to meet its burden to prove by clear and convincing evidence that Murillo-Alvarado's prior conviction was a "drug trafficking offense." *See United States v. Valdavinos-Torres*, 704 F.3d 679, 691 (9th Cir. 2012). "We review de novo the classification of a defendant's prior conviction for purposes of applying the Sentencing Guidelines." *United States v. Coronado*, 603 F.3d 706, 708 (9th Cir. 2010) (citation omitted).

In this case the question is whether the government established that Murillo-Alvarado's section 11351 conviction was for a substance that was a controlled substance under federal law. The government presented a certified copy of the guilty plea form which contained a handwritten factual basis in which Murillo-Alvarado admitted that on May 29, 2001, he "possessed cocaine to be used for purposes of sale." The government also provided certified copies of the criminal information, the court's minute order, and the abstract of judgment.

"Where the minute order or other equally reliable document specifies that a defendant pleaded guilty to a particular count of a criminal complaint,

the court may consider the facts alleged in the complaint." *Coronado v. Holder*, 759 F.3d 977, 986 (9th Cir. 2014) (citation omitted). Here, the government provided reliable documents that clearly specified that Murillo-Alvarado pled guilty to count 1 of the criminal information. The guilty plea form stated that Murillo-Alvarado pled guilty to count "1 of the information." The form further specified that count 1 was for a violation of "H & S 11351." Likewise, the court's minute order reflected that Murillo-Alvarado pled guilty to "11351 HS as charged in count 1" of the "[o]riginal information." The abstract of judgment stated that Murillo-Alvarado pled guilty to count "1A" for violating "HS" "11351." All of these sources indicated a plea date of December 7, 2001, and they all referred only to a single count. Count 1 of the information charged that, on May 29, 2001, Murillo-Alvarado "possess[ed] for sale and purchase[d] for sale a controlled substance, to wit, COCAINE." Thus, these documents conclusively established that Murillo-Alvarado pled guilty to a May 29, 2001 offense involving the possession of cocaine for purposes of sale. It is undisputed that cocaine was and is a controlled substance under federal law.

Murillo-Alvarado argues that the abstract of judgment created doubt about the plea because it referenced a plea to count "1A" rather than count "1." He cites *Medina-Lara v. Holder*, 771 F.3d 1106, 1113–15 (9th Cir. 2014), where we held that the record was insufficient to establish that the plea was to the offense originally charged. In that case the government presented only two documents to meet its burden: (1) an amended complaint alleging in count "003" that the defendant possessed cocaine for sale, and (2) an abstract of judgment reflecting that the defendant pled guilty to count "3A," without identifying the controlled substance involved. *Id.* at 1113–14. The immigration judge and government attorney openly speculated that the original charge had been amended, but the government failed to produce additional documents to clarify the record. *Id.* at 1114, 1118. "Against this backdrop, we [were] hard-pressed to say that there [was] a 'clear and convincing' link between the '3A' in the abstract and the '3' in the amended complaint." *Id.* at 1115. In reaching that result, however, we acknowledged other cases where the record clearly reflected ***1029** that the plea was to a particular count "as charged in the information." *Id.* at 1113 (quoting *United States v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007) (en banc)).

This case is different because the district court here had a more substantial record. The court had a handwritten factual basis on the guilty plea form in which Murillo-Alvarado admitted that on May 29, 2001, he possessed cocaine to be used for purposes of sale. The guilty plea form and the minute order both clearly indicated that Murillo-Alvarado was pleading guilty to count 1 as charged in the information. Count 1 was the only count, and it expressly charged Murillo-Alvarado with possessing cocaine for sale. Taken together, the documents demonstrated that Murillo-Alvarado pled guilty to possession of cocaine for sale, a drug trafficking offense supporting the 16-level sentencing enhancement. The reference to "1A" in the abstract of judgment does not, standing alone, nullify those admissions or create sufficient ambiguity.

III. Conclusion

California Health and Safety Code section 11351 is divisible as to its controlled substance requirement. Murillo-Alvarado's specific conviction involving cocaine under section 11351 qualifies as a drug trafficking offense for purposes of the Sentencing Guidelines. The trial court properly applied a 16-level enhancement in its Sentencing Guidelines calculation.

AFFIRMED.

All Citations

876 F.3d 1022, 17 Cal. Daily Op. Serv. 11,559, 2017 Daily Journal D.A.R. 11,482

TAB 4

HB 102 – Use of Force Amendments

NOTES:

CR____. Defense of Self or Other. Approved 3/7/18

You must decide whether the defense of Defense of Self or Other applies in this case. Under that defense, the defendant is justified in using force against another when and to the extent that the defendant reasonably believes that force is necessary to defend [himself] [herself], or a third party, against another person's imminent use of unlawful force.

The defendant is justified in using force intended or likely to cause death or serious bodily injury only if the defendant reasonably believes that:

1. Force is necessary to prevent death or serious bodily injury to the defendant or a third person as a result of another person's imminent use of unlawful force; or,
2. To prevent the commission of [Forcible Felony], the elements of which can be found under jury instruction [_____].

The defendant is not justified in using force if the defendant:

1. Initially provokes the use of force against another person with the intent to use force as an excuse to inflict bodily harm upon the assailant;
2. Is attempting to commit, committing, or fleeing after the commission or attempted commission of [Felony], the elements of which can be found under jury instruction [_____]; or
3. Was the aggressor or was engaged in a combat by agreement, unless the defendant withdraws from the encounter and effectively communicates to the other person the defendant's intent to do so and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

The following do not, by themselves, constitute "combat by agreement":

1. Voluntarily entering into or remaining in an ongoing relationship; or
2. Entering or remaining in a place where one has a legal right to be.

References
Utah Code § 76-2-402(1), and (5)

USE OF FORCE AMENDMENTS

2018 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brian M. Greene

Senate Sponsor: Jacob L. Anderegg

LONG TITLE

General Description:

This bill modifies criminal provisions related to use of force.

Highlighted Provisions:

This bill:

- addresses when a person is not justified in using force.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

76-2-402, as last amended by Laws of Utah 2010, Chapters 324 and 361

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **76-2-402** is amended to read:

76-2-402. Force in defense of person -- Forcible felony defined.

(1) (a) A person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person's imminent use of unlawful force.

(b) A person is justified in using force intended or likely to cause death or serious bodily injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person's imminent use

of unlawful force, or to prevent the commission of a forcible felony.

(2) (a) A person is not justified in using force under the circumstances specified in Subsection (1) if the person:

(i) initially provokes the use of force against the person with the intent to use force as an excuse to inflict bodily harm upon the assailant;

(ii) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony, unless the use of force is a reasonable response to factors unrelated to the commission, attempted commission, or fleeing after the commission of that felony; or

(iii) was the aggressor or was engaged in a combat by agreement, unless the person withdraws from the encounter and effectively communicates to the other person his intent to do so and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

(b) For purposes of Subsection (2)(a)(iii) the following do not, by themselves, constitute "combat by agreement":

(i) voluntarily entering into or remaining in an ongoing relationship; or

(ii) entering or remaining in a place where one has a legal right to be.

(3) A person does not have a duty to retreat from the force or threatened force described in Subsection (1) in a place where that person has lawfully entered or remained, except as provided in Subsection (2)(a)(iii).

(4) (a) For purposes of this section, a forcible felony includes aggravated assault, mayhem, aggravated murder, murder, manslaughter, kidnapping, and aggravated kidnapping, rape, forcible sodomy, rape of a child, object rape, object rape of a child, sexual abuse of a child, aggravated sexual abuse of a child, and aggravated sexual assault as defined in Title 76, Chapter 5, Offenses Against the Person, and arson, robbery, and burglary as defined in Title 76, Chapter 6, Offenses Against Property.

(b) Any other felony offense which involves the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury also constitutes a forcible felony.

(c) Burglary of a vehicle, defined in Section 76-6-204, does not constitute a forcible felony except when the vehicle is occupied at the time unlawful entry is made or attempted.

(5) In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors:

(a) the nature of the danger;

(b) the immediacy of the danger;

(c) the probability that the unlawful force would result in death or serious bodily injury;

(d) the other's prior violent acts or violent propensities; and

(e) any patterns of abuse or violence in the parties' relationship.

TAB 5

Object Rape / Definition of Penetration

NOTES: The materials under in this tab include the current versions of MUJI Criminal Instruction 1607 ("Object Rape") and 1608 ("Object Rape of a Child"). These two instructions should be reviewed in light of the Utah Court of Appeals' decision in State v. Patterson, 2017 UT App 194, which is also attached under this tab.

CR1607 Object Rape.
(DEFENDANT'S NAME) is charged [in Count ___] with committing Object Rape [on or about DATE]. You cannot convict [him][her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly caused the penetration, however slight, of ([VICTIM'S NAME][MINOR'S INITIALS])'s genital or anal opening, by any object or substance other than the mouth or genitals;
3. The act was without ([VICTIM'S NAME] [MINOR'S INITIALS])'s consent;
4. (DEFENDANT'S NAME) acted with intent, knowledge or recklessness that ([VICTIM'S NAME] [MINOR'S INITIALS]) did not consent; and
5. (DEFENDANT'S NAME) did the act with the intent to:
    a. cause substantial emotional or bodily pain to ([VICTIM'S NAME] [MINOR'S INITIALS]); or
    b. arouse or gratify the sexual desire of any person.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-402.2
State v. Barela, 2015 UT 22

Committee Notes
This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

If there was a prior conviction or serious bodily injury, a special verdict form may be necessary. *See* SVF 1617, Sexual Offense Prior Conviction or SVF 1618, Serious Bodily Injury.

Amended Dates:
September 2015

CR1608 Object Rape of a Child.
DEFENDANT'S NAME) is charged [in Count ___] with committing Object Rape of a Child [on or about DATE]. You cannot convict [him][her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly caused the penetration or touched the skin, however slight, of (MINOR'S INITIALS)'s genital or anal opening with any object or substance that is not a part of the human body;
3. With the intent to:

a. cause substantial emotional or bodily pain to (MINOR'S INITIALS); or
b. arouse or gratify the sexual desire of any person; and

4. (MINOR'S INITIALS) was under the age of 14 at the time of the conduct.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-402.3
Utah Code § 76-5-407
State v. Martinez, 2002 UT 60
State v. Martinez, 2000 UT App 320

Committee Notes
This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

If there was a prior conviction or serious bodily injury, a special verdict form may be necessary. *See* SVF 1617, Sexual Offense Prior Conviction or SVF 1618, Serious Bodily Injury.

Amended Dates:
September 2015

407 P.3d 1002
Court of Appeals of Utah.

STATE of Utah, Appellee,
v.
Cory R. PATTERSON, Appellant.

No. 20150791-CA
|
Filed October 19, 2017

Synopsis
Background: Defendant was convicted in the Fourth District Court, Provo Department, No. 141403037, Derek P. Pullan, J., of object rape. Defendant appealed.

[Holding:] The Court of Appeals, Michele M. Christiansen, J., held that jury reasonably inferred that defendant **penetrated** victim's vagina with his fingers to support defendant's conviction.

Affirmed.

West Headnotes (11)

[1] **Criminal Law**
Construction of Evidence
Criminal Law
Inferences or deductions from evidence

When the Court of Appeals reviews a challenge to the sufficiency of the evidence, it reviews the evidence and all inferences that may reasonably be drawn from it in the light most favorable to the jury's verdict.

Cases that cite this headnote

[2] **Criminal Law**
Weight and sufficiency
Criminal Law
Construction of Evidence
Criminal Law
Reasonable doubt

The Court of Appeals will vacate a conviction on sufficiency grounds only when the evidence, viewed in the light most favorable to the verdict, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime; to conduct this analysis, the Court of Appeals first reviews the elements of the relevant statute and then considers the evidence presented to the jury to determine whether evidence of every element of the crime was adduced at trial.

Cases that cite this headnote

[3] **Sex Offenses**
Bodily contact; **penetration**

Jury reasonably inferred that defendant **penetrated** victim's vagina with his fingers to support defendant's conviction for object rape, although victim's testimony was susceptible to two interpretations, including one in which defendant did not **penetrate** victim's vagina; victim's testimony was not equally consistent with both interpretations as she testified that defendant's actions when he tried to put his fingers up victim's vagina "really hurt" and that she "had never felt anything like that before," and defendant confessed that he had been attempting to **penetrate** victim's vagina. Utah Code Ann. § 76-5-402.2(1).

Cases that cite this headnote

[4] **Sex Offenses**
Object, weapon, or device

"**Penetration**" under the statute governing object rape means entry between the outer folds of the labia. Utah Code Ann. § 76-5-402.2(1).

Cases that cite this headnote

[5] **Criminal Law**
Weight and sufficiency

To determine whether sufficient evidence was presented at trial, the Court of Appeals must scrutinize the testimony elicited at trial.

Cases that cite this headnote

[6] **Criminal Law**
Innocence
Criminal Law
Weight of Evidence in General

Notwithstanding the presumptions in favor of the jury's decision, the Court of Appeals still has the right to review the sufficiency of the evidence to support the verdict; the fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt.

Cases that cite this headnote

[7] **Criminal Law**
Construction of Evidence
Criminal Law
Inferences or deductions from evidence

In fulfillment of its duty to review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict, a reviewing court will stretch the evidentiary fabric as far as it will go, but this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict.

Cases that cite this headnote

[8] **Sex Offenses**
Sex Offenses
Sex Offenses
Weight and Sufficiency

Sex crimes are defined with great specificity and require concomitant specificity of proof.

Cases that cite this headnote

[9] **Criminal Law**
Elements of offense in general

The state has the burden of proving by evidence every essential element of the charged crime.

Cases that cite this headnote

[10] **Criminal Law**
Presumptions
Criminal Law
Inferences from evidence

The difference between a permissible inference and impermissible speculation by a jury in a criminal trial is a difficult distinction for which a bright-line methodology is elusive; an "inference" is a conclusion reached by considering other facts and deducing a logical consequence from them whereas "speculation" is the act or practice of theorizing about matters over which there is no certain knowledge.

Cases that cite this headnote

[11] **Criminal Law**
Inferences from evidence

A jury's inference is reasonable if there is an evidentiary foundation to draw and support the conclusion but is impermissible speculation when there is no underlying evidence to support

the conclusion; put another way, an inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistency from the circumstances in proof.

Cases that cite this headnote

***1003** Fourth District Court, Provo Department, The Honorable Derek P. Pullan, No. 141403037

Attorneys and Law Firms

Dustin M. Parmley, Attorney for Appellant

Sean D. Reyes and Tera J. Peterson, Attorneys for Appellee

Judge Michele M. Christiansen authored this Opinion, in which Judges Gregory K. Orme and Jill M. Pohlman concurred.

Opinion

CHRISTIANSEN, Judge:

¶1 Defendant Cory R. Patterson challenges his conviction on one count of object rape, arguing that the evidence was insufficient to support the jury's verdict. He does not challenge his convictions on two counts of forcible sexual abuse, stemming from the same incident. We conclude that the evidence adduced at trial was sufficient for the jury to find every element of object rape, and we therefore affirm.

[1] [2]¶2 When we review a challenge to the sufficiency of the evidence, we review the evidence and all inferences that may reasonably be drawn from it in the light most favorable to the jury's verdict. *State v. Pullman*, 2013 UT App 168, ¶ 4, 306 P.3d 827. We will vacate the conviction only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime. *Id.*; *see also State v. Hamilton*, 827 P.2d 232, 236 (Utah 1992). To conduct this analysis, we first review the elements of the relevant statute. We then consider the evidence presented to the jury to determine ***1004** whether evidence of every element of the crime was adduced at trial.

[3] [4]¶3 Defendant was charged with object rape. A person is guilty of object rape when the person, "without the victim's consent, causes the **penetration**, however slight, of the genital or anal opening of another person who is 14 years of age or older,[1] by any foreign object, substance, instrument, or device, including a part of the human body other than the mouth or genitals, with intent to cause substantial emotional or bodily pain to the victim or with the intent to arouse or gratify the sexual desire of any person." Utah Code Ann. § 76-5-402.2(1) (LexisNexis Supp. 2016). "**Penetration**" in this context means "entry between the outer folds of the labia." *State v. Simmons*, 759 P.2d 1152, 1154 (Utah 1988). On appeal, Defendant's sole claim is that the State did not present evidence that he caused such **penetration**.

[5]¶4 To determine whether sufficient evidence was presented, we must scrutinize the testimony elicited at trial. And because we review evidence in the light most favorable to the jury's verdict, *State v. Holgate*, 2000 UT 74, ¶ 2, 10 P.3d 346, we rely primarily on Victim's account of what happened to her, which the jury apparently credited.

¶5 Victim met Defendant at their workplace; Defendant was 23 and Victim was 17. While working together, Defendant regaled her with stories of his military training and his plans to get a concealed carry permit. Victim testified that, after their shifts, Defendant asked Victim if he could walk her to her car. When they got to her car, Defendant told Victim that he wanted to kiss her. He then kissed her for "about a couple minutes" before pushing her into the back seat of her car. Once inside the car, Defendant continued to talk to Victim, who was "start[ing] to get scared, frightened, and ... was still unsure of what to do or how to act." Victim testified that she did not think about running away at that point, explaining, "[I]n the moment when it's so traumatic, you don't know what to do. You're not really in control of your body." She also testified that she was concerned about "what he said about the military [training] before and about his conceal[ed] carry permit." Defendant then resumed kissing Victim.

¶6 Victim testified that, after about five minutes, "[t]he kissing got more intimate, and then he undid my pants, and he put his hand down my pants and started touching my vagina and moving his hand around that area." Victim further testified, "[W]hen he started trying to put his fingers up my vagina I told him to stop, and he kept

saying, 'No, no, it's okay. It's okay.' " Victim repeated her plea for Defendant to stop, and "he kind of moved his fingers back and just started touching around the area instead of putting his fingers up, instead of **penetrating**."

¶7 Defendant then opened his pants and "used [his] hand to grab my hand, and caress his penis and move it up and down." Victim testified that whenever she tried to let go, Defendant would "put[ ] my hand back onto his penis. After a while he noticed that I didn't want to do that; and after I told him to stop, he just noticed that. So he finished himself off. Then he had lifted up my shirt and moved my bra up and touched my breast."

¶8 At this point in Victim's testimony, the prosecutor asked Victim to provide more detail about the earlier touching. Specifically, the prosecutor asked Victim to "describe where on your vagina he touched." Victim testified, "He touched the general area. Then when he was trying to put his fingers up he separated the labia" using "[j]ust one hand, his two fingers." Victim further testified, "It really hurt. I had never felt anything like that before."

[6] [7] [8]¶9 The question before us is whether a reasonable jury, after hearing this testimony, could find beyond a reasonable doubt that Defendant caused "**penetration**, however slight, of [Victim's] genital ... opening." *See* Utah Code Ann. § 76-5-402.2(1) (LexisNexis Supp. 2016). We therefore review the evidence ***1005** in detail, bearing in mind that the evidence presented to the jury must speak to every element of the offenses charged to ensure that the jury's verdict does not rest on speculation:

> [N]otwithstanding the presumptions in favor of the jury's decision[,] this Court still has the right to review the sufficiency of the evidence to support the verdict. The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt. In fulfillment of its duty to review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict, the reviewing court will stretch the evidentiary fabric as far as it will go. But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict.

State v. Shumway, 2002 UT 124, ¶ 15, 63 P.3d 94 (first alteration in original) (citation and internal quotation marks omitted). "Sex crimes are defined with great specificity and require concomitant specificity of proof." *State v. Pullman*, 2013 UT App 168, ¶ 14, 306 P.3d 827; *accord People v. Paz*, 10 Cal.App.5th 1023, 1030–31, 217 Cal.Rptr.3d 212 (2017) (certified for partial publication at 217 Cal.Rptr.3d 212) ("In all sex-crime cases requiring **penetration**, prosecutors must elicit precise and specific testimony to prove the required **penetration** beyond a reasonable doubt." (citing *Pullman*, 2013 UT App 168, ¶ 14, 306 P.3d 827)).

¶10 The Utah Supreme Court's decision in *State v. Simmons* is instructive to our analysis. *See generally* 759 P.2d 1152 (Utah 1988). There, the supreme court considered the crime of unlawful sexual intercourse which, like object rape, has "**penetration**" as an element. *Id.* at 1154. The supreme court held that a victim's testimony that the defendant "put the tip of his penis 'on' her labia" was insufficient to support conviction when the victim failed to "testify that [the defendant] put his penis between the outer folds of her labia." *Id.* (noting that the jury may have been confused by testimony regarding prior incidents where the defendant *did* "place his penis between [the victim's] outer labial folds" and "**penetrated** the vaginal canal").

¶11 Similarly, in *State v. Pullman*, this court vacated a defendant's conviction for sodomy on a child because the victim's testimony "describ[ing] a sexual act involving Pullman's penis and her buttocks" did not satisfy the statutory element of "touching the anus." 2013 UT App 168, ¶ 16, 306 P.3d 827 (emphasis, citation, and internal quotation marks omitted). This court explained that the victim's testimony that "Pullman 'tried to take [her] panties off and stick his dick into [her] butt' and that 'it hurt' " was " 'sufficiently inconclusive ... that reasonable minds must have entertained a reasonable doubt' as to whether Pullman's act involved the touching of her anus." *Id.* (alterations in original) (citation omitted).

[9]¶12 Here, the testimony does not explicitly describe the challenged element of the offense—"**penetration**, however slight." *See* Utah Code Ann. § 76-5-402.2(1). Victim testified that Defendant was "trying to put his fingers up" her vagina until she repeated her plea for him to stop. Victim further testified that, at that point, Defendant "started touching around the area instead of putting his fingers up, instead of **penetrating**." And when asked by the prosecutor to "describe where on your vagina he touched," Victim responded that Defendant had touched "the general area" and that he "separated the labia" using "[j]ust one hand, his two fingers." But the State did not elicit Victim's testimony as to whether

Defendant's fingers actually **penetrated** between her labia, however slightly.[2]

***1006** ¶13 Because Victim's testimony did not explicitly establish that Defendant **penetrated** Victim, we consider next whether the jury could have reasonably inferred that Defendant **penetrated** Victim. The State asserts that the jury could have inferred from her testimony that "Defendant's fingers entered, however slight[ly], between the outer folds of [Victim's] labia." (First alteration in original) (citation and internal quotation marks omitted). Defendant argues that such a finding amounted to speculation and was therefore not a reasonable inference.

[10] [11]¶14 The resolution of this issue turns on the difference between a permissible inference and impermissible speculation. "This is a difficult distinction for which a bright-line methodology is elusive." *Salt Lake City v. Carrera*, 2015 UT 73, ¶ 12, 358 P.3d 1067. "An inference is a conclusion reached by considering other facts and deducing a logical consequence from them" whereas "speculation is the act or practice of theorizing about matters over which there is no certain knowledge." *Id.* (citation and internal quotation marks omitted). Thus, a jury's inference is reasonable "if there is an evidentiary foundation to draw and support the conclusion" but is impermissible speculation when "there is no underlying evidence to support the conclusion." *Id.* Put another way, "an inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistency from the circumstances in proof." *See United States v. Finnerty*, 470 F.2d 78, 81 (3d Cir. 1972) (emphasis, citation, and internal quotation marks omitted).

¶15 There is no question that **penetration** is an essential element of the crime of object rape; indeed, it is the critical element distinguishing object rape from forcible sexual abuse. *Compare* Utah Code Ann. § 76-5-402.2(1) (LexisNexis Supp. 2016), *with id.* § 76-5-404(1) (LexisNexis 2012). Therefore, we must consider whether the two scenarios Victim's testimony might have described—**penetration** or non-**penetration**—"may be drawn with equal consistency" from that testimony. *See Finnerty*, 470 F.2d at 81 (emphasis, citation, and internal quotation marks omitted).

¶16 Victim testified that Defendant attempted to **penetrate** her using two fingers to "separate[ ]" her labia. This might describe separation by insertion (**penetration**) or separation by stretching the skin adjacent to the labia (not **penetration**). Victim also testified that, after she repeatedly asked him to stop, Defendant "kind of moved his fingers back and just started touching around the area." Again, this might describe Defendant removing his fingers from Victim after **penetrating** her or Defendant pulling his hand away from her vagina and labia without having **penetrated** Victim. And Victim testified that, "[i]t really hurt. I had never felt anything like that before." Arguably, this testimony might describe physical pain from **penetration** or emotional trauma from Defendant's forcible sexual abuse of Victim. Thus, each of these pieces of testimony may plausibly be interpreted as describing either a **penetrative** scenario or a non-**penetrative** scenario.

¶17 However, while Victim's testimony was susceptible to two interpretations, it was not *equally consistent* with both. *See Finnerty*, 470 F.2d at 81. When viewed as a whole, rather than examining each statement in artificial isolation, Victim's testimony more consistently described actual **penetration** than it did mere attempted **penetration**. For example, given their context, Victim's statements that "[i]t really hurt" and that she "had never felt anything like that before" seem more likely to relate to bodily pain than emotional injury. And such a description of pain suggests that Defendant's separation of Victim's labia was accomplished by digital **penetration**. This is especially true given Victim's testimony that it was when Defendant was "trying to put his fingers up," that he "separated the labia." Indeed, Defendant himself described **penetration** as a goal he was unable to accomplish rather than testifying that he had been trying to merely separate ***1007** Victim's labia, as an objective in its own right:

> Q: Did you ever **penetrate** her vagina?
>
> A: I did not.
>
> Q: Was that because of the—what you've described as the tight quarters, or was there another reason?
>
> A: It was the tight quarters.

Thus Defendant's concession that he had been attempting to **penetrate** Victim casts doubt on the possible inference that he spread Victim's labia by stretching the skin around it rather than by **penetrating** it with his fingers. In other words, Defendant's admission as to his intent largely dispels the alternative possibility that he was, for some reason, merely trying to separate Victim's labia, one from the other, by stretching the skin and without **penetrating** between them.

¶18 Victim's testimony that, after putting his hand into her pants and trying to **penetrate** her vagina, Defendant "kind of moved his fingers back and just started touching around the area" could mean that his fingers had been on

Victim's labia or that his fingers had been between Victim's labia. But these interpretations are not equally consistent with the evidence adduced. Specifically, because Victim testified about the pain she suffered, the total evidentiary picture is more consistent with the interpretation that Defendant had **penetrated** Victim before "mov[ing] his fingers back."

¶19 Considering these pieces of testimony together, we cannot conclude that an inference of non-**penetration** "may be drawn with equal consistency" as an inference of **penetration** from the evidence adduced at trial. *See Finnerty*, 470 F.2d at 81 (emphasis, citation, and internal quotation marks omitted). Therefore, there was an evidentiary basis for the jury's adoption of one inference over the other. *See Carrera*, 2015 UT 73, ¶ 12, 358 P.3d 1067. And because the jury's adoption rested on an evidentiary basis, we conclude that the jury made a reasonable inference rather than an impermissible speculation.

¶20 Affirmed.

All Citations

407 P.3d 1002, 850 Utah Adv. Rep. 24, 2017 UT App 194

Footnotes

1 A separate statute criminalizes object rape of a person younger than 14. *See* Utah Code Ann. § 76-5-402.3 (LexisNexis Supp. 2016).

2 We recognize that testifying about a sexual assault is traumatic for the victim. But the State has the burden of "proving by evidence every essential element" of the charged crime. *See Carella v. California*, 491 U.S. 263, 266, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) (per curiam); *see also In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (holding that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). We urge prosecutors to adduce specific testimony regarding each and every element of such crimes to ensure that a jury's guilty verdict rests not on speculation but on clear evidence sufficient to find beyond a reasonable doubt that the defendant committed the crime charged. *Cf. People v. Paz*, 10 Cal.App.5th 1023, 1030–31, 217 Cal.Rptr.3d 212 (2017) (certified for partial publication at 217 Cal.Rptr.3d 212) ("We caution prosecutors not to use vague, euphemistic language and to ask follow-up questions where necessary.").

TAB 6

Imperfect Self-Defense Instruction

NOTES: Two cases are included to inform the committee's discussion regarding an Imperfect Self-Defense instruction. The cases are:

State v. Lee, 2014 UT App 4 (focusing on ¶¶ 19-45); and
State v. Ramos, 2018 UT App 161.

318 P.3d 1164
Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Joseph Logan LEE, Defendant and Appellant.

No. 20110707–CA.
|
Jan. 9, 2014.

Synopsis

Background: Defendant was convicted in the Second District Court, Ogden Department, Michael D. Lyon, J., of murder, unlawful possession of a firearm, and failure to stop at command of a police officer. Defendant appealed.

Holdings: The Court of Appeals, Christiansen, J., held that:

[1] remand was not required for development of record on ineffective assistance claims;

[2] any deficiency in counsel's failure to timely file motion in limine did not prejudice defendant and thus was not ineffective assistance;

[3] trial counsel's introduction of evidence of defendant's prior incarceration and past crimes was reasonable trial strategy and thus not ineffective assistance; and

[4] counsel's deficiency in failing to object to jury instruction which improperly placed burden on defendant to prove affirmative defense of imperfect self-defense manslaughter beyond a reasonable doubt did not prejudice defendant and thus was not ineffective assistance.

Affirmed.

J. Frederic Voros, Jr., J., concurred and filed opinion.

West Headnotes (16)

[1] **Criminal Law**
Remission to lower court for correction of defects

A remand for development of the record for an ineffective assistance claim is not necessary if the facts underlying the ineffectiveness claim are contained in the existing record. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B.

4 Cases that cite this headnote

[2] **Criminal Law**
Remission to lower court for correction of defects

Remand was not required for development of record as to defendant's claims of ineffective assistance based on trial counsel's failure to object to jury instructions on murder and self-defense, where all jury instructions at issue appeared in record, and trial transcript contained all relevant discussions between court and counsel regarding instructions. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B.

Cases that cite this headnote

[3] **Criminal Law**
Remission to lower court for correction of defects

Remand was not required for development of record as to defendant's claims of ineffective assistance based on trial counsel's failure to timely file a motion in limine, where record included transcripts of hearings in which the untimely motion in limine was discussed, the motion itself, all supporting and responsive briefing, and the trial court's ruling on the motion. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B.

Cases that cite this headnote

[4] **Criminal Law**

Remission to lower court for correction of defects

Remand was not required for development of record as to defendant's claims of ineffective assistance based on trial counsel's opening statement, where opening statement was part of trial transcript in record. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B.

Cases that cite this headnote

[5] **Criminal Law**

Remission to lower court for correction of defects

To obtain a remand for development of the record on an ineffective assistance claim, a defendant must not only submit affidavits specifying who the uncalled witnesses are and that they are available to testify at an evidentiary hearing, he must ordinarily submit affidavits from the witnesses detailing their testimony. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B.

1 Cases that cite this headnote

[6] **Criminal Law**

Remission to lower court for correction of defects

To show that counsel's failure to investigate resulted in prejudice as a demonstrable reality and not a speculative matter, a defendant who moves for remand to develop the record on an ineffective assistance claim must identify exculpatory testimony or evidence that his attorney failed to uncover. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B.

1 Cases that cite this headnote

[7] **Criminal Law**

Remission to lower court for correction of defects

Remand was not required for development of record as to defendant's claim of ineffective assistance based on failure to investigate case and failure to call a witness, where defendant did not support his motion for remand with an affidavit from the witness, and defendant did not identify any particular evidence that counsel did not uncover. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B.

2 Cases that cite this headnote

[8] **Criminal Law**

Presentation of witnesses

Reviewing court would assume that trial counsel's failure to call particular witness to testify at murder trial was not deficient and thus not ineffective assistance, where defendant did not provide an affidavit from witness detailing her testimony. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[9] **Criminal Law**

Suppression of evidence

Any deficiency in counsel's failure to timely file motion in limine did not prejudice murder defendant, and thus was not ineffective assistance, where trial court nevertheless considered the motion on the merits and partially granted it. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[10] **Criminal Law**

Other offenses and prior misconduct

Trial counsel's introduction of evidence of murder defendant's prior incarceration and past crimes was reasonable trial strategy, and thus not ineffective assistance; defendant testified at trial, and because State was generally permitted to impeach defendant with such evidence, introduction of evidence up front could be sound strategic decision, and defendant's testimony that he had been incarcerated with victim lent support to defendant's self-defense theory.

1 Cases that cite this headnote

[11] **Criminal Law**

Instructions

Defendant's affirmative waiver of any objection to jury instructions precluded plain error review of such instructions on appeal.

2 Cases that cite this headnote

[12] **Criminal Law**

Construction and Effect of Charge as a Whole

Criminal Law

Instructions

On appeal, reviewing court looks at the jury instructions in their entirety and will affirm when the instructions taken as a whole fairly instruct the jury on the law applicable to the case.

3 Cases that cite this headnote

[13] **Criminal Law**

Objecting to instructions

Even if one or more of the jury instructions, standing alone, are not as full or accurate as they might have been, counsel is not deficient in approving the instructions as long as the trial court's instructions constituted a correct statement of the law.

1 Cases that cite this headnote

[14] **Homicide**

Requisites and sufficiency in general

Trial court's giving of separate jury instructions on murder and self-defense was not error, despite argument that instructions could have led jury to determine that defendant was guilty of murder without realizing that proof of lack of self-defense beyond reasonable doubt was essential element, after defendant raised some evidence of self-defense; jury was instructed not to single out one instruction alone but to consider the instructions as a whole, and self-defense was central theme of defense at trial, making it unlikely that jury would have convicted defendant of murder without considering his self-defense claim.

4 Cases that cite this headnote

[15] **Criminal Law**

Objecting to instructions

Homicide

Apprehension of danger

Instruction providing that in order to convict defendant of imperfect self-defense manslaughter rather than murder, jury needed to find that it was proven beyond a reasonable doubt that defendant acted under a reasonable belief that his actions were legally justifiable, was incorrect statement of law, and thus counsel's failure to object to instruction was deficient, as would support ineffective assistance claim; instruction improperly placed burden upon defendant to prove affirmative defense beyond a reasonable doubt.

5 Cases that cite this headnote

[16] **Criminal Law**

Objecting to instructions

Counsel's deficiency in failing to object to jury instruction which improperly placed burden on defendant to prove affirmative defense of imperfect self-defense manslaughter beyond a reasonable doubt did not prejudice defendant and thus was not ineffective assistance, in murder prosecution in which defendant alleged that he shot victim after victim threatened defendant with gun; while there was evidence of perfect self-defense, there was no evidence to suggest that defendant used excessive force in reasonably responding to a threat from victim, and thus jury could not have concluded that defendant caused victim's death under circumstances constituting imperfect self-defense. U.S.C.A. Const.Amend. 6.

5 Cases that cite this headnote

Attorneys and Law Firms

***1166** Randall W. Richards, for Appellant.

Sean D. Reyes, Karen A. Klucznik, and John J. Nielsen, for Appellee.

Judge MICHELE M. CHRISTIANSEN authored this Opinion, in which Judge GREGORY K. ORME concurred. Judge J. FREDERIC VOROS JR. concurred, with opinion.

Opinion

***1167** CHRISTIANSEN, Judge:

¶ 1 Joseph Logan Lee appeals from his conviction for murder, a first degree felony, and for unlawful possession of a firearm and for failure to stop at the command of a police officer, both third degree felonies. We affirm.

BACKGROUND

¶ 2 Lee met with the victim, T.H., on June 1, 2006, to settle a drug debt owed to T.H. by a friend of Lee's.[1] At some point during the exchange, T.H. was leaning through the open driver's window of Lee's car when Lee pulled out a handgun. While the parties dispute what happened next, Lee ultimately fired two shots, one of which struck T.H. and killed him almost instantly. Lee fled the scene but later that day was identified and pursued by police, who apprehended Lee after his vehicle struck a median and was disabled. Subsequent to Lee's arrest, police found two speed-loaders for a .357 magnum revolver on Lee's person and a .357 magnum revolver on the driver's floorboard of Lee's car. Lee was charged by information based on the shooting and his flight from police.

1 "On appeal, we recite the facts from the record in the light most favorable to the jury's verdict." *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 3, 82 P.3d 1064 (citation and internal quotation marks omitted).

¶ 3 Lee retained private counsel (Trial Counsel) to represent him. Trial Counsel entered his appearance at a May 10, 2007 hearing and notified the trial court that he would be filing a motion in limine seeking to admit the testimony of a proposed defense witness. Trial Counsel had difficulty timely filing the motion and requested additional time on at least three occasions. Trial Counsel ultimately filed the motion approximately ten days after the final deadline given by the trial court, but the trial court allowed briefing and oral argument on the motion to proceed and ruled on the merits of the motion, granting it in part.

¶ 4 The case proceeded to trial, and Lee argued that he had shot T.H. in self-defense. In support of this theory, Lee introduced testimony that he had met T.H. while the two men were incarcerated at the Utah State Prison, that T.H. often carried a gun, and that Lee was paying off the drug debt because T.H. had threatened a friend of Lee's. Lee testified that just before the shooting he handed the gun to T.H. as a showing of good faith, that T.H. turned the gun on Lee, and that Lee wrestled the gun away from him. Lee testified that he then shot T.H. because he believed T.H. was reaching behind his back for another gun. T.H.'s girlfriend, the only other eyewitness to the shooting, testified for the State that T.H. was unarmed and was not threatening Lee at the time of the shooting. At the close of trial, the court instructed the jury as to both self-defense and imperfect self-defense at Lee's request. The jury found Lee guilty of murder, and he appeals.

ISSUES AND STANDARDS OF REVIEW

¶ 5 As an initial matter, Lee requests a remand for an evidentiary hearing under rule 23B for the development of the record and the entry of factual findings necessary for this court's review of his ineffective assistance of counsel claim. *See* Utah R.App. P. 23B. A remand under rule 23B will only be granted "upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective." *See id.*

¶ 6 Lee claims that he was denied effective assistance of counsel due to multiple alleged deficiencies on the part of Trial Counsel. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Ott*, 2010 UT 1, ¶ 22, 247 P.3d 344 (citation and internal quotation marks omitted).

¶ 7 Lee also argues that the trial court erroneously instructed the jury as to the elements of murder and manslaughter in light of Lee's claim of self-defense. "Claims of erroneous jury instructions present questions

of law that we review for correctness." *State v. Jeffs,* 2010 UT 49, ¶ 16, 243 P.3d 1250.

***1168** ANALYSIS

I. Lee's Rule 23B Motion Is Not Adequately Supported to Warrant Remand for an Evidentiary Hearing.

¶ 8 Lee asserts that a remand for an evidentiary hearing is appropriate to address all of the claims of Trial Counsel's alleged deficiencies that Lee raises on appeal. However, remand under rule 23B is available only upon a motion that alleges nonspeculative facts that do not appear in the record and is accompanied by affidavits setting forth those facts. *See* Utah R.App. P. 23B(a), (b). To succeed on the motion, Lee must "allege facts that if true would show (1) 'that counsel's performance was so deficient as to fall below an objective standard of reasonableness' and (2) 'that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.' " *State v. King,* 2012 UT App 203, ¶ 18, 283 P.3d 980 (quoting *State v. Hales,* 2007 UT 14, ¶ 68, 152 P.3d 321).

A. Claims Based on Record Evidence

[1] **[2]** **[3]** **[4]** ¶ 9 Lee argues that Trial Counsel performed deficiently because he did not object to the jury instructions on murder and self-defense, did not comply with the trial court's orders to timely file a motion in limine, and introduced the fact of Lee's prior incarceration during his opening statement and examination of witnesses. However, Lee does not identify any evidence that is not already in the record on appeal to support these claims of ineffective assistance. "A [rule 23B] remand is not necessary if the facts underlying the ineffectiveness claim are contained in the existing record." *State v. Johnston,* 2000 UT App 290, ¶ 9, 13 P.3d 175 (per curiam).

¶ 10 Here, all of the jury instructions at issue appear in the record. The trial transcript contains all of the relevant discussions between the court and counsel regarding the jury instructions and Trial Counsel's waiver of objections to the final jury instructions. The record also includes transcripts of the hearings in which the untimely motion in limine were discussed, the motion itself, all supporting and responsive briefing, and the trial court's ruling on the motion. Finally, Trial Counsel's opening statement in which he referred to Lee's prior incarceration is part of the trial transcript in the record. As a result, Lee has not demonstrated that any additional non-record evidence is available to support these claims on appeal, and remand is therefore inappropriate. *See id.*

B. Claims Based on Non–Record Evidence

[5] **[6]** **[7]** ¶ 11 Lee also argues that Trial Counsel performed deficiently because he failed to adequately investigate the case and to call a witness who Lee claims would have supported his self-defense claim (the Witness). However, a rule 23B motion must include "affidavits alleging facts not fully appearing in the record on appeal that show the claimed deficient performance of the attorney" and show "the claimed prejudice suffered by the appellant as a result of the claimed deficient performance." Utah R.App. P. 23B(b). "[T]o obtain a Rule 23B remand, a defendant must not only submit affidavits specifying who the uncalled witnesses are and that they are available to testify at an evidentiary hearing, he must ordinarily submit affidavits from the witnesses detailing their testimony." *Johnston,* 2000 UT App 290, ¶ 11, 13 P.3d 175. To show that counsel's failure to investigate resulted in prejudice "as a demonstrable reality and not a speculative matter," a rule 23B movant must identify exculpatory testimony or evidence that his attorney failed to uncover. *See State v. Bryant,* 2012 UT App 264, ¶ 23, 290 P.3d 33 (citation and internal quotation marks omitted) (concluding that no prejudice resulted from trial counsel's failure to investigate because defendant did not identify any evidence that his trial counsel allegedly failed to discover).

¶ 12 Here, Lee did not support his rule 23B motion with an affidavit from the Witness. Lee also has not identified any particular evidence, other than his proffer of the Witness's potential testimony, that Trial Counsel failed to uncover. Lee offered affidavits only from his mother and a member of his appellate counsel's staff averring that Trial Counsel did not hire a private investigator and may not have adequately reviewed ***1169** the Witness's statement. However, Lee cannot meet his burden by merely pointing out what counsel did not do; he must bring forth the evidence that would have been available in the absence of counsel's deficient performance. *See id.; Johnston,* 2000 UT App 290, ¶ 7, 13 P.3d 175 ("The purpose of Rule 23B is for appellate counsel to put on evidence he or she now has, not to amass evidence that might

help prove an ineffectiveness of counsel claim."). Absent affidavits demonstrating a likelihood that further review of the Witness's testimony or inquiry by an investigator would have uncovered evidence sufficient to support Lee's claims, remand for an evidentiary hearing is not appropriate. We therefore deny Lee's motion for a remand under rule 23B.[2]

[2] Lee's motion also states that Trial Counsel "was in the middle of his disbarment proceedings at the time leading up to and during the trial," and an exhibit to the motion includes excerpts from the *Utah Bar Journal* detailing disciplinary sanctions entered against Trial Counsel for his failure to comply with the Utah Rules of Professional Conduct in other cases. However, Lee fails to explain how this evidence would support any of his claims in this case if remand were granted to enter this exhibit into the record.

II. Lee Has Not Demonstrated That Trial Counsel Was Ineffective.

¶ 13 Lee argues that Trial Counsel was ineffective by failing to adequately investigate the case, failing to call the Witness at trial, failing to comply with the trial court's deadlines for filing a motion in limine, and introducing the fact of Lee's prior incarceration in opening statements and witness examination. To succeed on a claim of ineffective assistance of counsel, a defendant must show both "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish that counsel's performance was deficient, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. This showing requires the defendant to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689, 104 S.Ct. 2052 (citation and internal quotation marks omitted; *see also* *State v. Larrabee*, 2013 UT 70, ¶ 19, 321 P.3d 1136, 2013 WL 6164424). To establish the prejudice prong of an ineffective assistance of counsel claim, the "defendant must show that a reasonable probability exists that, but for counsel's error, the result would have been different." *State v. Millard*, 2010 UT App 355, ¶ 18, 246 P.3d 151; *accord* *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "In the event it is 'easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,' we will do so without analyzing whether counsel's performance was professionally unreasonable." *Archuleta v. Galetka*, 2011 UT 73, ¶ 42, 267 P.3d 232 (quoting *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052).

A. Failure To Investigate and Call the Witness

[8] ¶ 14 Lee argues that Trial Counsel's performance was deficient for failure to investigate the case prior to trial. The only evidence Lee identifies that Trial Counsel allegedly failed to uncover in his investigation is the testimony of the Witness. Accordingly, we consider this claim together with Lee's claim that Trial Counsel's performance was deficient for failing to call the Witness.

¶ 15 Lee asserts that the Witness was present at the time of the shooting and that if Trial Counsel had investigated and called the Witness, she would have offered testimony that contradicted the testimony of T.H.'s girlfriend. However, because we are unable to grant a rule 23B remand due to Lee's failure to include an affidavit from the Witness detailing her testimony, *see supra* ¶ 12, there is nothing in the record before this court upon which we can evaluate the merits of Trial Counsel's decision not to call the Witness. "Where the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively." *State v. Litherland*, 2000 UT 76, ¶ 17, 12 P.3d 92. We therefore must assume that Trial Counsel's decision regarding this witness was not deficient performance. ***1170** Because Lee has not demonstrated that Trial Counsel performed deficiently, we conclude that Trial Counsel was not ineffective on this basis.

B. Failure To Comply with Deadlines for Filing a Motion in Limine

[9] ¶ 16 Lee next argues that Trial Counsel performed deficiently in failing to file a motion in limine in compliance with the trial court's deadlines for filing of the motion. While the record shows that Trial Counsel repeatedly failed to submit the motion within the time allowed by the trial court, the record also shows that the trial court nevertheless considered the motion on the merits and partially granted it. Though we agree that Trial Counsel's repeated failure to timely file the motion in limine was likely deficient performance, Lee has not demonstrated that he was prejudiced by Trial Counsel's late filing of the motion. Rather, Lee frankly concedes that "the effect on the outcome of the trial is admittedly somewhat speculative." However, "proof of ineffective

assistance of counsel cannot be a speculative matter but must be a demonstrable reality." *State v. Munguia,* 2011 UT 5, ¶ 31, 253 P.3d 1082 (citation and internal quotation marks omitted). Specifically, Lee has not demonstrated how a more timely filing would have led to a different result in either the trial court's ruling on the motion or the jury's ultimate verdict. Absent a showing that Lee was prejudiced by Trial Counsel's alleged error, we conclude that Lee is not entitled to relief on this basis.

C. Introduction of Lee's Prior Incarceration

[10] ¶ 17 Lee also argues that Trial Counsel performed deficiently in raising the issue of Lee's prior conviction and incarceration during his opening statement and examination of witnesses. Lee argues that by introducing the evidence of Lee's prior crimes and incarceration, Trial Counsel inappropriately called the jury's attention to Lee's criminal background and damaged his credibility as a witness. In evaluating whether counsel was deficient, we will not "second-guess trial counsel's legitimate strategic choices," *State v. Franco,* 2012 UT App 200, ¶ 7, 283 P.3d 1004 (citations and internal quotation marks omitted). Rather, if there is a "conceivable tactical basis for counsel's actions," *id.* (citation and internal quotation marks omitted), the defendant must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy," *Strickland v. Washington,* 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (citation and internal quotation marks omitted). *Accord State v. Larrabee,* 2013 UT 70, ¶ 19, 321 P.3d 1136.

¶ 18 Lee has not overcome the presumption that Trial Counsel had a legitimate strategic basis for his decision to introduce to the jury information regarding Lee's prior convictions and incarceration. Indeed, "many experienced counsel always tell the jury of the convictions their client has suffered. This tends to take the wind out of the sails of the prosecutor." *United States v. Larsen,* 525 F.2d 444, 449 (10th Cir.1975). Because the State is generally permitted to impeach a testifying defendant with evidence of his prior convictions, *see* Utah R. Evid. 609(a), introduction of such prior convictions up front is often a sound strategic decision to build credibility for the defendant and minimize the prejudicial impact of the convictions, *see Larsen,* 525 F.2d at 449; *Swington v. State,* 97–KA–00591–SCT, ¶ 25, 742 So.2d 1106 (Miss.1999). Further, Lee's testimony that he had been incarcerated with T.H. lent support to Lee's self-defense theory by informing the jury that T.H. himself was a felon. While Lee argues that there were "alternative methods of establishing that Lee was afraid of [T.H.] and that he had some dealings with [T.H.] in the past to bolster this fear," this argument itself suggests that Trial Counsel in fact had a conceivable tactical basis for introducing evidence of Lee's incarceration, even if Lee would now prefer some alternative approach. *See Franco,* 2012 UT App 200, ¶ 7, 283 P.3d 1004. Accordingly, we conclude that Trial Counsel did not perform deficiently and therefore did not render ineffective assistance of counsel on this basis.

III. Trial Counsel Was Not Ineffective for Failing To Object to the Challenged Jury Instructions.

¶ 19 Finally, Lee argues that the jury instructions for the charges of murder (Instruction ***1171** 15) and manslaughter (Instruction 16) did not correctly instruct the jury on the State's burden to prove that Lee did not act in self-defense. Because Lee did not preserve this claim for appeal by objecting to the jury instructions at trial, he asks this court to review the jury instructions on the basis of plain error or ineffective assistance of counsel. "When a party fails to preserve an issue for appeal, we will address the issue only if (1) the appellant establishes that the district court committed plain error, (2) exceptional circumstances exist, or (3) in some situations, if the appellant raises a claim of ineffective assistance of counsel in failing to preserve the issue." *State v. Low,* 2008 UT 58, ¶ 19, 192 P.3d 867 (citations and internal quotations marks omitted).

A. Plain Error

[11] ¶ 20 Lee argues that the trial court's instructions to the jury constituted plain error and that this court should reverse to avoid a manifest injustice. To obtain appellate relief under this standard, Lee must show that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome." *State v. Casey,* 2003 UT 55, ¶ 41, 82 P.3d 1106 (citation and internal quotation marks omitted). However, invited error precludes appellate review of an issue under the plain error standard. *State v. McNeil,* 2013 UT App 134, ¶ 24, 302 P.3d 844.

¶ 21 Here, the trial court asked Trial Counsel, "Does the defense waive any objections to the instructions?" and Trial Counsel responded, "Yes." This affirmative

representation to the court that there was no objection to the jury instructions forecloses Lee from "tak[ing] advantage of an error committed at trial" because Trial Counsel "led the trial court into committing the error." *State v. Hamilton,* 2003 UT 22, ¶ 54, 70 P.3d 111 (alteration in original) (citation and internal quotation marks omitted). Thus, Trial Counsel's waiver of any objection to the finalized jury instructions precludes our review of those instructions for plain error.

B. Ineffective Assistance of Counsel

¶ 22 Lee also contends that Trial Counsel was ineffective due to his failure to object to the self-defense and imperfect self-defense instructions given by the trial court. To prevail, Lee must show that Trial Counsel's performance was deficient and that Lee was prejudiced by the deficient performance. *Gregg v. State,* 2012 UT 32, ¶ 19, 279 P.3d 396. Failure to object to jury instructions that correctly state the law is not deficient performance. *See State v. Chavez–Espinoza,* 2008 UT App 191, ¶ 15, 186 P.3d 1023.

[12] **[13]** ¶ 23 Lee argues that the jury instructions were erroneous because the murder and manslaughter instructions did not include as an element of the offense that the prosecution had the burden to prove that Lee did not act in self-defense. He claims that Trial Counsel's failure to object and propose "adequate" instructions was deficient performance. On appeal, "we look at the jury instructions in their entirety and will affirm when the instructions taken as a whole fairly instruct the jury on the law applicable to the case." *See State v. Maestas,* 2012 UT 46, ¶ 148, 299 P.3d 892 (citation and internal quotation marks omitted). Thus, even if "one or more of the instructions, standing alone, are not as full or accurate as they might have been," counsel is not deficient in approving the instructions "as long as the trial court's instructions constituted a correct statement of the law." *See State v. Garcia,* 2001 UT App 19, ¶ 13, 18 P.3d 1123 (citations and internal quotation marks omitted).

1. Murder Instruction

[14] ¶ 24 Lee contends that the jury instructions on murder were erroneous because the trial court instructed the jury separately as to the State's burden to disprove his self-defense claim rather than incorporating that burden as an element of the murder instruction. Our review of the jury instructions confirms that Instruction 15 properly instructed the jury as to the elements of murder. *See* Utah Code Ann. § 76–5–203(2) (LexisNexis Supp.2006); *State v. Knoll,* 712 P.2d 211, 214 (Utah 1985) ("Absence of self-defense is not an element of a homicide offense."). In addition, the jury was separately ***1172** and accurately instructed that "if you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, then you must find him not guilty" of murder or manslaughter. Taken together, these instructions fairly instructed the jury on the burden of proof relative to Lee's claim of self-defense and are a "correct statement of the law" applicable to the case. *See Garcia,* 2001 UT App 19, ¶ 13, 18 P.3d 1123 (citation and internal quotation marks omitted).

¶ 25 Lee argues that because the jury was instructed on murder separately from and prior to the instruction on self-defense, it is "highly likely" that these instructions led the jury to determine that he was guilty of murder "without realizing that proof of the lack of self-defense beyond a reasonable doubt is an essential element of the charge of murder." However, the jury was instructed "not to single out one instruction alone as stating the law" but to "consider the instructions as a whole," giving the order of the instructions "no significance as to their relative importance." We "presume that a jury ... follow[ed] the instructions given it" unless the facts indicate otherwise. *See State v. Nelson,* 2011 UT App 107, ¶ 4, 253 P.3d 1094 (citation and internal quotation marks omitted). Particularly in this case, where self-defense was the central theme of Lee's defense at trial, and given the intuitive effect of a self-defense claim on a charge of murder, it is unlikely that the separate instruction on self-defense led the jury to convict Lee of murder on the basis of Instruction 15 without considering his self-defense claim. Because the jury was correctly instructed on the charge of murder, Trial Counsel did not perform deficiently in failing to object or propose an alternate murder instruction. *See Chavez–Espinoza,* 2008 UT App 191, ¶ 15, 186 P.3d 1023.

2. Manslaughter Instruction

[15] ¶ 26 Lee also challenges Instruction 16, which instructed the jury to find Lee guilty of manslaughter if it found that he caused T.H.'s death under circumstances constituting imperfect self-defense. *See* Utah Code Ann. § 76–5–203(4) (providing that a charge of murder is reduced to manslaughter if the defendant caused the death "under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the

existing circumstances"). Lee argues that the instruction failed to properly instruct the jury as to the State's burden to disprove an imperfect self-defense claim beyond a reasonable doubt. We agree.

¶ 27 Because the burden of proof for an affirmative defense is counterintuitive, instructions on affirmative defenses "must clearly communicate to the jury what the burden of proof is *and* who carries the burden." *State v. Campos,* 2013 UT App 213, ¶ 42, 309 P.3d 1160 (citations and internal quotation marks omitted). "[O]nce a defendant has produced some evidence of imperfect self-defense, the prosecution is required to disprove imperfect self-defense beyond a reasonable doubt." *Id.* ¶ 38. Instruction 16 provides, in relevant part,

> Before you can convict the defendant of the lesser included offense of manslaughter ... you must find from the evidence, *beyond a reasonable doubt,* all of the following elements of the crime:
>
> (1) That defendant, Joseph Logan Lee;
>
> (2) Committed a homicide which would be murder, but the offense is reduced because the defendant caused the death of [T.H.]:
>
> ...
>
> (ii) Under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.
>
> If you believe that the evidence established each and all of the essential elements of the offense *beyond a reasonable doubt,* it is your duty to convict the defendant. On the other hand, if the evidence failed to establish one or more of said elements, it is your duty to find the defendant not guilty.

(Emphases added.) *See* Utah Code Ann. § 76–5–203(4). Thus, the jury was instructed ***1173** that in order to convict Lee of imperfect self-defense manslaughter rather than murder, it needed to find that all of the listed elements were proven beyond a reasonable doubt, including that Lee acted under a reasonable belief that his actions were legally justifiable. This instruction improperly placed the burden upon Lee to prove his affirmative defense beyond a reasonable doubt rather than correctly placing the burden on the State to *disprove* the defense beyond a reasonable doubt. *See Campos,* 2013 UT App 213, ¶ 42, 309 P.3d 1160. Trial Counsel had a duty to object to such a fundamentally flawed instruction and to ensure that the jury was properly instructed on the correct burden of proof. *See id.* ¶ 45. We see no conceivable tactical basis for Trial Counsel's approval of such a flawed instruction and conclude that Trial Counsel performed deficiently in failing to object to Instruction 16.

[16] ¶ 28 However, our inquiry does not end with our determination that Trial Counsel performed deficiently in not objecting to the erroneous instruction. Lee must also demonstrate that "but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different." *State v. Smith,* 909 P.2d 236, 243 (Utah 1995). Lee argues that the facts of this case are analogous to *State v. Garcia,* 2001 UT App 19, 18 P.3d 1123, where this court concluded that the defendant was prejudiced by a jury instruction that did not clearly place the burden of proof for self-defense on the State. *Id.* ¶ 19. There, we noted that "some evidence was introduced by Garcia that he acted in self-defense," including corroboration of his testimony by another witness. *Id.* We observed that had the jury been correctly instructed as to the burden of proof, "it is reasonably likely that the jury could have entertained a reasonable doubt as to whether Garcia acted in self-defense, thus requiring acquittal." *Id.* Accordingly, we reversed Garcia's conviction and remanded for a new trial. *Id.* ¶¶ 20–21.

¶ 29 However, in this case, neither the State nor Lee introduced evidence that would support Lee's theory that he caused T.H.'s death under a reasonable, but legally mistaken, belief that his use of deadly force was justified. The testimony elicited by the State demonstrated that T.H. was unarmed and was not threatening Lee when Lee shot him. The jury could not have found that Lee acted reasonably or with legal justification in shooting T.H. under these circumstances. The State's evidence therefore supports Lee's conviction for murder. Conversely, the evidence put forth by Lee supports his acquittal on the basis of perfect self-defense. Lee testified that T.H. was the first aggressor when he pointed the gun at Lee and that after Lee regained possession of the gun, he fired only when he believed T.H. was reaching for another gun. If the jury believed Lee's version of events, then he would have been justified in using deadly force to defend himself and been entitled to an acquittal on the charge of

murder. However, there is no basis on this evidence for the jury to find that Lee acted reasonably but without legal justification.

¶ 30 This case is unlike our decision in *State v. Spillers,* 2005 UT App 283, 116 P.3d 985, *aff'd,* 2007 UT 13, 152 P.3d 315, where we determined that the trial court's failure to give an instruction on imperfect self-defense was in error. *Id.* ¶ 26. There, Spillers shot the victim after the victim had struck Spillers once in the head with the butt of a handgun and was attempting to strike him again. *Id.* ¶ 20. The state argued that the evidence gave rise to only two interpretations—that Spillers' actions rose to the level of perfect self-defense because he was about to suffer death or serious bodily injury from being struck with the butt of the gun or that Spillers had not acted in self-defense and was guilty of murder. *Id.* ¶ 25. However, we concluded that the evidence supported other interpretations, specifically "an interpretation that [Spillers] was entitled to defend himself against an attack by [the victim] but not entitled to use deadly force" because the jury could have concluded that the victim's strikes with the butt of the gun did not threaten Spillers with serious bodily injury or death. *Id.* We reversed and remanded for a new trial on the basis of the trial court's failure to give the requested imperfect self-defense instruction, *id.* ¶ 26, and the Utah Supreme Court affirmed, ***1174** *State v. Spillers,* 2007 UT 13, ¶ 23, 152 P.3d 315. Unlike in *Spillers,* however, as explained above, there is no evidence in this case to suggest that Lee used excessive force in reasonably responding to a threat from T.H., or that Lee's actions were otherwise reasonable but legally unjustifiable.

¶ 31 We also do not read our supreme court's decision in *State v. Low,* 2008 UT 58, 192 P.3d 867, as requiring a reversal in this case. In *Low,* the supreme court reviewed the trial court's decision to include, over the defendant's objection, an imperfect self-defense instruction requested by the state. *Id.* ¶ 31. The supreme court held that the imperfect self-defense instruction was appropriate, explaining that "when a defendant presents evidence of perfect self-defense, he necessarily presents evidence of imperfect self-defense because 'for both perfect and imperfect self-defense, the same basic facts [are] at issue.' " *Id.* ¶ 32 (alteration in original) (quoting *Spillers,* 2007 UT 13, ¶ 23, 152 P.3d 315). However, this conclusion was based on the court's observation that "perfect self-defense and imperfect self-defense require the defendant to present the same evidence: that the defendant had a reasonable belief that force was necessary to defend himself." *Id.* It is therefore clear that the supreme court was considering only the evidence necessary for an imperfect self-defense claim to be "put into issue" such that an instruction on the affirmative defense was properly given to the jury. *Id.* ¶¶ 34, 45 (citation and internal quotation marks omitted). The court went on to recognize that there is a fundamental difference between the two defenses, specifically, "whether the defendant's conduct was, in fact, 'legally justifiable or excusable under the existing circumstances.' " *Id.* ¶ 32 (quoting Utah Code Ann. § 76–5–203(4)(a)(ii) (LexisNexis Supp.2007)).

¶ 32 Thus, *Low* stands for the proposition that once evidence is introduced by either party that the defendant reasonably believed that he was justified in using force, the trial court must instruct the jury on both self-defense and imperfect self-defense upon the request of a party, and that its failure to do so would be error. *See id.; see also Garcia,* 2001 UT App 19, ¶ 8, 18 P.3d 1123 (explaining that an instruction on self-defense must be given when there is a reasonable basis in the evidence to do so, irrespective of "whether the evidence is produced by the prosecution or by the defendant"). It does not, however, stand for the proposition that any time a defendant presents evidence that he reasonably believed that his use of force was justified, the complete evidentiary picture before the jury would *necessarily* support a conviction for imperfect self-defense manslaughter. Rather, in the absence of evidence from which a jury could find that the defendant's belief was reasonable, but his conduct was not "legally justifiable or excusable under the existing circumstances," a conviction for imperfect self-defense manslaughter would not be supported by the evidence. *See Low,* 2008 UT 58, ¶ 32, 192 P.3d 867 (citation and internal quotation marks omitted).

¶ 33 There is no evidence in this case to suggest that Lee used excessive force in reasonably responding to a threat from T.H. or that Lee's actions were otherwise reasonable but legally unjustifiable. Because the jury could not have concluded that Lee caused T.H.'s death under circumstances constituting imperfect self-defense, there is no reasonable probability that the jury would have returned a more favorable verdict for Lee if properly instructed. Thus, while Trial Counsel performed deficiently by not objecting to the erroneous Instruction 16, Lee has not demonstrated that he was prejudiced by

that deficient performance, and is therefore not entitled to relief on this basis.

CONCLUSION

¶ 34 We deny Lee's motion to remand for an evidentiary hearing because Lee did not adequately support the motion with affidavits alleging nonspeculative facts. Lee has failed to demonstrate that the jury instruction on murder was erroneous. While the jury instruction on imperfect self-defense manslaughter was erroneous, Lee has not demonstrated that he was prejudiced by Trial Counsel's failure to object to the erroneous instruction under the circumstances. Lee has also failed to demonstrate that Trial ***1175** Counsel was ineffective on any other basis. Accordingly, we affirm Lee's convictions.

VOROS, Judge (concurring):

¶ 35 I concur in the majority opinion. I write only to clarify why, in my judgment, Lee was not prejudiced by the erroneous instruction on imperfect self-defense on the facts of this case and under controlling statutory law.

¶ 36 The interplay between perfect self-defense and imperfect self-defense is subtle. Perfect self-defense is a complete defense to any crime. *See State v. Knoll,* 712 P.2d 211, 214 (Utah 1985) ("[S]elf-defense is a *justification* for killing and a defense to prosecution." (citation and internal quotation marks omitted)); *see also State v. Spillers,* 2007 UT 13, ¶ 23, 152 P.3d 315 (referring to this first type of self-defense as "perfect self-defense"). It is available to one who reasonably believed that force was necessary to defend against unlawful force:

> A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force.

Utah Code Ann. § 76–2–402(1) (LexisNexis 2003). But this general rule is subject to a crucial corollary: the use of lethal force is justified only in the reasonable belief that it is "necessary to prevent death or serious bodily injury ... or to prevent the commission of a forcible felony." *Id.* [3]

[3] For purposes of this statutory section, a forcible felony includes aggravated assault, most homicides, kidnapping, many sex crimes, and any other felony involving "the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury." Utah Code Ann. § 76–2–402(4) (LexisNexis 2003). An assault is aggravated if the actor uses a dangerous weapon or "other means or force likely to produce death or serious bodily injury." *Id.* § 76–5–103(1). A dangerous weapon is "any item capable of causing death or serious bodily injury" or, under certain circumstances, a facsimile or representation of the item. *Id.* § 76–1–601(5).

¶ 37 In contrast, imperfect self-defense is a partial defense, reducing a charge of murder or attempted murder to manslaughter or attempted manslaughter. *State v. Low,* 2008 UT 58, ¶ 22, 192 P.3d 867. It is available to one who reasonably *but incorrectly* believed that his use of lethal force was legally justified:

> It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another ... under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

Utah Code Ann. § 76–5–203(4)(a), (a)(ii) (LexisNexis Supp.2006).

¶ 38 In *State v. Low* our supreme court identified the factor distinguishing perfect self-defense from imperfect self-defense: "whether the defendant's conduct was, in fact, 'legally justifiable or excusable under the existing circumstances.' " 2008 UT 58, ¶ 32, 192 P.3d 867 (quoting Utah Code Ann. § 76–5–203(4)(a)(ii) (LexisNexis Supp.2007)). In other words, if, under the facts as he reasonably believed them to be, the defendant's conduct was legally justifiable, he then acted in perfect self-defense. If, under the facts as he reasonably believed them to be, he reasonably but incorrectly believed his actions were legally justifiable, he acted in imperfect self-defense.

¶ 39 Ordinarily "for both perfect and imperfect self-defense, 'the same basic facts [are] at issue.' " *Spillers,* 2007

UT 13, ¶ 23, 152 P.3d 315 (alteration in original) (quoting *State v. Howell*, 649 P.2d 91, 95 (Utah 1982)). So when would a person ever reasonably but incorrectly believe he was entitled to use force to defend himself? *Spillers* suggests the answer.

¶ 40 Spillers shot a man who, Spillers testified, had struck him with a gun on the back of the head and was poised to strike again. *Id.* ¶ 3. The State argued that the evidence permitted the jury to reach one of only two results: either Spillers had committed murder or he had acted in perfect self-defense. *Id.* ¶¶ 21–23. But the supreme court concluded that the evidence was amenable to a ***1176** third interpretation: Spillers was entitled to defend himself against his assailant, but not with lethal force. *Id.* ¶ 23. In other words, where Spillers's assailant was using his gun as a club, a jury might find that Spillers reasonably but incorrectly believed that lethal force was "necessary to prevent death or serious bodily injury ... or to prevent the commission of a forcible felony." Utah Code Ann. § 76–2–402(1) (LexisNexis 2003). Accordingly, the court held that the trial court erred in denying Spillers an imperfect self-defense instruction. *Spillers*, 2007 UT 13, ¶ 23, 152 P.3d 315.

¶ 41 We learn from *Spillers* that a defendant is entitled to an instruction on imperfect self-defense if a jury could conclude from the evidence that he reasonably but incorrectly believed he was justified in using lethal force against a non-lethal attack. Stated more generally, imperfect self-defense applies when a defendant makes a reasonable mistake of *law*—when he acts "under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances." Utah Code Ann. § 76–5–203(4)(a)(ii) (LexisNexis Supp.2006). On the other hand, perfect self-defense applies when a defendant makes a reasonable mistake of *fact*—when his conduct was justifiable under the facts as he reasonably believed them to be. [4]

[4] Of course, perfect self-defense also applies when a defendant makes neither a mistake of law nor a mistake of fact.

¶ 42 We can distill *Low* and *Spillers* into a two-part inquiry. To determine whether either version of self-defense is available, we assess both the defendant's understanding of the facts and the defendant's understanding of the law. If the defendant's understanding of the facts is correct (or incorrect but reasonable) and the defendant's understanding of the law is correct, perfect self-defense is available. If the defendant's understanding of the facts is correct (or incorrect but reasonable) and the defendant's understanding of the law is incorrect but reasonable, imperfect self-defense is available. And if either the defendant's understanding of the facts is unreasonable or the defendant's understanding of the law is incorrect and unreasonable, neither perfect self-defense nor imperfect self-defense is available.

¶ 43 Here, Lee argues in effect that his understanding of the facts was incorrect but reasonable. He testified that, as the altercation escalated, T.H. pointed Lee's own gun at him, Lee grabbed it back, and T.H. reached behind him for what Lee believed was "another gun." If this version of events was true, Lee reasonably but incorrectly believed that T.H. was about to employ lethal force against him, justifying his own use of lethal force. Lee thus qualified for a perfect self-defense instruction because his understanding of the facts was reasonable and his understanding of the law was correct—if T.H. had a gun and intended to use it, Lee was legally entitled to respond with lethal force.

¶ 44 But Lee did not qualify for an imperfect self-defense instruction, because he never claimed that his understanding of the law was reasonable but incorrect; he never claimed that, under the circumstances as he reasonably believed them to be, he reasonably but incorrectly believed he had a right to respond with lethal force. One can imagine a scenario where imperfect self-defense would have been available. Had Lee testified that he shot T.H. because he believed T.H. was pulling, say, brass knuckles out of his back pocket, Lee may have been entitled to an instruction on imperfect self-defense. In that situation, he could argue that he reasonably believed that the circumstances justified his use of lethal force when in fact they justified only his use of non-lethal force.

¶ 45 In short, this case presents the very factual dichotomy that *Spillers* did not: the testimony at Lee's trial allowed only two options—that Lee was "either guilty of murder or [entitled to acquittal] under a [perfect] self-defense theory." *See* 2007 UT 13, ¶ 23, 152 P.3d 315. Accordingly, I conclude that Lee was not prejudiced by trial counsel's ***1177** failure to object to the erroneous jury instruction on imperfect self-defense.

All Citations

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2018 WL 4016577

Court of Appeals of Utah.

STATE of Utah, Appellee,
v.
Harlin Argelio RAMOS, Appellant.

No. 20160075-CA
|
Filed August 23, 2018

Third District Court, Salt Lake Department, The Honorable James T. Blanch, No. 141904935

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Judge David N. Mortensen authored this Opinion, in which Judges Jill M. Pohlman and Diana Hagen concurred.

Opinion

MORTENSEN, Judge:

***1** ¶1 "*Please don't kill me. I have kids.*" Victim's plea was in vain, as Defendant Harlin Argelio Ramos stabbed him eight times, including a fatal thrust to the heart. After fleeing the scene, police located and arrested Ramos. In his interview, Ramos alleged that Victim had been the aggressor and that he had only acted in self-defense. The State charged Ramos with murder. At trial, the judge instructed the jury on both perfect and imperfect self-defense, and on the lesser-included offense of imperfect-self-defense manslaughter. One of those instructions was flawed, but the error was not prejudicial. The jury convicted Ramos as charged, and he timely appeals. We affirm.

BACKGROUND

The Murder

¶2 Shortly after 1:00 a.m. on a mid-April morning, Victim and Friend had just finished watching a late movie at a movie theater. Because they had driven separately, Victim walked Friend to her car and she drove him back to his own. Before parting ways, the two talked in the car. While they conversed, Friend noticed two men—Ramos and his accomplice (Accomplice)—walk in front of her car and look at her in a way that "made [her] very uncomfortable." The men's behavior alarmed her so much that she removed her Taser from the glove compartment and rested it on the center console. Victim, however, seemed unconcerned about the men and continued their conversation.

¶3 Just as Victim was about to exit the vehicle, Ramos suddenly opened the passenger door and thrust his "whole arm" inside. Friend thought Ramos was reaching for her keys in an attempt to rob her. Victim pushed Ramos away and the two struggled outside of the car. Meanwhile, Friend closed her passenger door and went to call 911, but accidentally dropped her phone on the car floor. She then locked her car doors, honked her horn, screamed for help, and tried to find her phone.

¶4 When Friend looked back up, Victim and Ramos were no longer within eyesight, so she opened her door and stepped out of her car to find them. She heard Victim screaming "Please don't kill me. I have kids. Please don't kill me." Friend then grabbed her Taser and ran around to the front of her car. She found Victim on the ground with Ramos straddling Victim's lower abdomen and upper legs. She thought that Ramos was punching Victim, so she approached Ramos from behind and applied her Taser to the back of his pant leg, but it had no effect.

¶5 Realizing that the Taser needed to contact skin, Friend pulled down the collar of Ramos's jacket and applied the Taser to the back of his neck. Ramos tried to fight her off, and she ran back to her car, locked her car doors, began honking her horn and screaming for help. Having located her phone, she then dialed 911. Ramos and Accomplice then fled the scene on foot and were soon thereafter picked up by a taxi driver.[1] As Friend waited for someone to answer her 911 call, she saw Victim stagger in front of her

car and fall near her door. Friend opened her door and heard Victim say, "I'm dying. Please help me."

[1] The taxi driver (Taxi Driver) and Ramos were well-acquainted: Ramos used Taxi Driver's service regularly, getting rides approximately "two to three times a week," and Taxi Driver allowed Ramos to use Taxi Driver's home address to purchase a cell phone because Ramos lacked a permanent address. The day before the murder, Taxi Driver also paid for Ramos's room at the motel where Ramos was later arrested by police.

***2** ¶6 As the 911 operator answered, an off-duty paramedic (Paramedic) responded to Friend's cries for help. Paramedic testified that, as he approached, he saw Ramos "cross in front of him and look directly at him." Paramedic rolled Victim onto his back to triage and treat his injuries, and soon thereafter he started CPR.

¶7 Meanwhile, Witness, whose apartment overlooks the crime scene, was watching television at home when he heard a woman screaming for help. From his vantage point, Witness saw two men assaulting another man and pinning him to the ground. Thinking that a robbery was in progress, Witness went to help, but by the time he arrived, Paramedic had already begun treatment. Police and on-duty paramedics soon arrived and took over, but Victim had already passed away.

¶8 Victim suffered nine sharp-force injuries: three to his chest, two to his upper back, two to his abdomen, one to his armpit, and one to the back of his right hand that was consistent with a defensive injury. All wounds were likely inflicted by a single-edged knife. The blade had entered Victim's chest and penetrated completely through his heart, "fully perforat[ing]" his "right ventricle." This was "a lethal injury" that stopped Victim's heart "within minutes." Victim's left lung was punctured twice, once from the front and once from the back, which hastened his death.

The Arrest

¶9 Before police arrived, Ramos and Accomplice[2] fled the scene as Victim bled out. On arrival, police found two backpacks on site, one of which contained a cell phone receipt with Ramos's name on it, as well as his identification card. Police eventually located Ramos at a motel and arrested him. In the motel room, police found a t-shirt, a black jacket, and black athletic pants—all bloodstained—in the trash can in Ramos's room. DNA testing revealed Victim's blood on the t-shirt, jacket, and pants. Additionally, Ramos's fingerprint was on the front passenger door of Friend's car.

[2] Accomplice never contacted police about the case, nor were the police ever able to find him.

¶10 Ramos was given his *Miranda* warnings[3] and agreed to be interviewed by police. He informed police that he did not speak English, so the interview was conducted in Spanish. His interview resulted in several conflicting accounts. Initially, Ramos said that he and Accomplice had planned to meet a "taxi" from "someone who had a white sedan" and had mistaken Friend's car for the taxi. He further alleged that as he approached the door, Victim had jumped out and started hitting him in the head, grabbed his throat, and lifted him completely off of the ground. Ramos stated that as Victim hit him, Ramos said " 'sorry, sorry,' and 'no problem,' " in English, but Victim continued to choke Ramos until he "became desperate" because he was "being asphyxiated." Ramos said he exclaimed, "Help me, help me, he is going to kill me," and then pulled out his knife and stabbed Victim.

[3] *See generally* *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

¶11 When a detective told Ramos to "tell the truth," Ramos responded by claiming he was "confused" and maintained that he was attacked by Victim. But he then stated that he believed that Victim was somehow associated with a violent street gang and feared that they had come to harm him.

¶12 When the detective again asked Ramos to tell the truth, Ramos gave yet another version of the events, claiming that he had approached the vehicle because "he was selling drugs and he thought the people in the car wanted some." He continued to state that Victim had exited the car, began hitting and choking him, and because Ramos had drugs in his mouth that night, he spit them out when he was choked. But police did not recover any drugs at the murder scene or in Ramos's backpack or motel room. Ramos also told police initially that he dropped the knife as he fled the scene, but later said that he "may have thrown it away" with his clothing. Despite a thorough search, police did not find a knife in the area.

The Taxi Driver

***3** ¶13 Three days after the murder, the police interviewed Taxi Driver. He also testified at trial, but his two accounts differ significantly. During his police interview, Taxi Driver told police that Ramos called him "around 1:00 a.m., 1:30 a.m., or 1:40 a.m." But when police asked to see Taxi Driver's phone log, he said that he had deleted it. A review of Ramos's phone records showed no outgoing calls to Taxi Driver during the 1:00 a.m. hour. Instead, Ramos's log showed only that Taxi Driver had called him at 1:08 a.m. that morning. Taxi Driver testified that after he got Ramos's call, it took him "fifteen or twenty minutes to drive from his West Valley home to [the murder scene], and that he parked and waited another fifteen or twenty minutes before [Ramos] and [Accomplice] 'arrived.' " Taxi Driver also initially told police that he did not see the fight and that Ramos claimed to have been hit, but did not mention being strangled.

¶14 Taxi Driver testified differently at trial. There, he stated that he operated a private taxi service and that on the night of the murder, Ramos called him in the early morning for a ride. Taxi Driver claimed that he saw both Ramos and Accomplice getting into a car. He then saw an angry man get out of that car and heard Ramos say in Spanish, "This isn't the right car, sorry."[4] Taxi Driver said that the man refused to accept the apology and fought with Ramos. Taxi Driver further testified that he never saw Ramos with a knife but did see a woman try to tase Ramos. Taxi Driver stated that Ramos looked "dizzy" and fell, and that he "was bleeding all over [the left side of] his face," but photographs taken upon Ramos's arrest show only one abrasion on his forehead and no other injury to his face.

4 Taxi Driver arrived in his car, a white Nissan Versa. The Versa was a hatchback without tinted windows. Friend's car was a white four-door Toyota Corolla sedan with tinted rear windows.

¶15 When asked about the discrepancies in his accounts, Taxi Driver testified that he was "nervous" during the police interview and "might have omitted a few details here and there." Taxi Driver asserted that he had testified to "the truth"—that he witnessed the fight, including Ramos being choked, and that Ramos had asked for help because the man was "killing him."

The Strangulation Evidence

¶16 Ramos suffered minor injuries. At the time of his arrest, he had scratches on his neck, a scrape on his forehead, and one abrasion above his left clavicle. At trial, two experts testified to his injuries, Defense Expert and Medical Examiner. Medical Examiner testified that he did not see evidence of petechial hemorrhaging[5] or other signs of strangulation, and opined that "[y]ou'd expect to see damage both externally as well as internally" if a person were lifted completely off the ground by their neck. In contrast, Defense Expert testified that Ramos showed signs of strangulation—abrasions on his neck and petechiae on his skin.[6] Her opinion was founded on her review of police photographs taken when they arrested Ramos, as well as her own examination and interview of Ramos more than thirteen months after the murder. However, Defense Expert conceded that the scratches could have been consistent with having been tased on the neck by Friend.

5 Petechial hemorrhaging is caused by significant strangulation. *State v. Lopez*, 789 P.2d 39, 41 n.2 (Utah Ct. App. 1990). "High pressure arterial blood continues to pump into the head from the heart while blood is unable to leave the head through the veins because of the ligature. As the pressure builds, blood vessels burst, resulting in hemorrhaging in the skin and the whites of the eyes." *Id.*

6 When medical personnel examined him the day of his arrest, Ramos did not mention, much less complain, that he had been strangled. He also showed no difficulty eating or drinking and never asked police for any medical treatment.

Summary of Proceedings

¶17 The State charged Ramos with one count of murder. At trial, Friend testified that she heard Victim screaming, "Please don't kill me. I have kids. Please don't kill me." Thereafter, the prosecutor asked Friend what kind of cell phone Victim had and whether she knew "what was on the screen of his cell phone?" Friend responded, "He had a picture of his two little boys." When the prosecutor asked,

"A picture of his two little boys?" Friend nodded her head affirmatively. The prosecutor never introduced the picture of Victim's two boys.

***4** ¶18 The judge then instructed the jury on both perfect and imperfect self-defense, and on the lesser-included offense of imperfect-self-defense manslaughter. While the imperfect-self-defense instruction correctly instructed the jury on the State's burden of proof, both parties agree that the instruction on imperfect-self-defense manslaughter misstated that burden. [7] Instruction 34, which defined the elements of imperfect-self-defense manslaughter, contradicted Instruction 48 and misinformed the jury about the State's burden to disprove imperfect self-defense. Instruction 34 incorrectly told the jury that it could convict Ramos of imperfect-self-defense manslaughter only if it found, beyond a reasonable doubt, that the defense applied. The instruction stated,

> You may consider the lesser included offense of "Manslaughter Involving a Dangerous Weapon." To do so you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense. That on or about April 19, 2014, in Salt Lake County, Utah:
>
> 1. The defendant ... individually or as a party to the offense;
>
> 2. Either:
>
> (a) Recklessly caused the death of [Victim]; or
>
> (b) Caused the death of [Victim] under circumstances where the defendant reasonably believed the circumstances provide a legal justification or excuse for his conduct, although the conduct was not legally justifiable or excusable under the existing circumstances; and
>
> 3. A dangerous weapon was used in the commission or furtherance of this act.
>
> After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY of Manslaughter Involving a Dangerous Weapon. On the other hand, if you are not convinced that one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY of Manslaughter Involving a Dangerous Weapon.

[7] The State concedes that Instruction 34 was flawed. The three other related instructions were correctly given. First, Instruction 33 correctly stated the elements instruction for murder, informing the jury that to convict Ramos of murder, the State had to prove beyond a reasonable doubt that Ramos intentionally or knowingly killed Victim without any legal justification. Second, Instruction 39 correctly explained the State's burden to disprove self-defense, stating, "Once self-defense is raised by the defendant, it is the prosecution's burden to prove beyond a reasonable doubt that the defendant did not act in self-defense." Instruction 39 continued, "The defendant has no particular burden [of] proof but is entitled to an acquittal if there is any basis in the evidence sufficient to create reasonable doubt." Finally, Instruction 48 correctly instructed the jury on the State's burden of proof on imperfect self-defense. It explained that the defense applies when a "defendant caused the death of another while incorrectly, but reasonably, believing that his conduct was legally justified or excused." It also explained that if the State did not carry its burden, Ramos could "only be convicted of Manslaughter Involving a Dangerous Weapon."

¶19 The jury was further instructed that it could consider the offense of manslaughter under Ramos's imperfect-self-defense theory only if it found "from all of the evidence and beyond a reasonable doubt each and every one of the ... elements of that offense." These statements impermissibly shifted the burden to Ramos because they either infer that the burden rests upon Ramos or they are vague concerning which party bears the burden of proof. [8]

[8] Jury instructions should, at all times, clearly express that the State bears the burden of proof. *See* *State v. Lee*, 2014 UT App 4, ¶ 27, 318 P.3d 1164.

***5** ¶20 The jury convicted Ramos of murder, and he timely appeals.

ISSUES AND STANDARDS OF REVIEW

¶21 Ramos brings two claims on appeal. He first contends that his trial counsel was constitutionally ineffective for failing to object (1) to the erroneous imperfect-self-defense manslaughter jury instruction and (2) to the prosecutor's

questions regarding photos of Victim's children on his cell phone. "When a claim of ineffective assistance of counsel is raised for the first time on appeal, there is no lower court ruling to review and we must decide whether the defendant was deprived of the effective assistance of counsel as a matter of law." *Layton City v. Carr*, 2014 UT App 227, ¶ 6, 336 P.3d 587 (cleaned up).

¶22 Ramos also argues that the cumulative effect of trial counsel's error "should undermine this Court's confidence in the jury's verdict." "Under the cumulative error doctrine, we will reverse only if the cumulative effect of the several errors undermines our confidence that a fair trial was had." *State v. Kohl*, 2000 UT 35, ¶ 25, 999 P.2d 7 (cleaned up).

ANALYSIS

I. Ramos's Counsel Was Not Constitutionally Ineffective

¶23 "To ensure a fair trial, the Sixth Amendment of the U.S. Constitution guarantees the right to effective assistance of counsel." *State v. Campos*, 2013 UT App 213, ¶ 23, 309 P.3d 1160; *see also* U.S. Const. amend. VI. To prevail on an ineffective assistance of counsel claim, a defendant must (1) "identify specific acts or omissions demonstrating that counsel's representation failed to meet an objective standard of reasonableness," and (2) show that "but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different." *State v. Montoya*, 2004 UT 5, ¶¶ 23–24, 84 P.3d 1183 (cleaned up). In other words, to show constitutional ineffectiveness, Ramos must prove both deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687–89, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92. [9]

[9] Ramos also argues that the court's failure to ensure proper jury instruction constitutes plain error. But a party to an appeal cannot take advantage of an error that it invited the trial court to commit. *See Pratt v. Nelson*, 2007 UT 41, ¶ 17, 164 P.3d 366. Thus, "a jury instruction may not be assigned as error even if such instruction constitutes manifest injustice if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction." *State v. Geukgeuzian*, 2004 UT 16, ¶ 9, 86 P.3d 742 (cleaned up). Here, Ramos did not merely fail to object; he agreed to the instruction. When the court discussed the proposed jury instruction for imperfect-self-defense manslaughter, trial counsel stated, "We don't have an issue with this instruction, Judge." Counsel therefore invited the error in the instruction and precluded any plain error review.

A. Failure to Object to the Flawed Jury Instruction

¶24 Because imperfect self-defense is an affirmative defense, Ramos was entitled to the benefit of it—reduction of a murder conviction to manslaughter—unless the State proved beyond a reasonable doubt that the defense did not apply. *See State v. Low*, 2008 UT 58, ¶ 45, 192 P.3d 867; *State v. Lee*, 2014 UT App 4, ¶ 27, 318 P.3d 1164; *Campos*, 2013 UT App 213, ¶ 38, 309 P.3d 1160. The State concedes that sufficient evidence exists in the record to support the trial court's giving of a self-defense instruction. Thus, Ramos was entitled to a proper self-defense instruction. Accordingly, Ramos contends that his trial counsel was constitutionally ineffective by failing to object to the flawed jury instruction.

***6** ¶25 A court need not review the deficient performance element before examining the prejudice element. *See State v. Galindo*, 2017 UT App 117, ¶ 7, 402 P.3d 8. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Id.* (cleaned up). Here, we follow that course because Ramos cannot carry the heavy burden of demonstrating that the erroneous instruction prejudiced him.

¶26 To prove prejudice, Ramos must demonstrate "a reasonable probability" that but for counsel's performance, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Thus, even when a jury instruction is erroneous, the error may nevertheless be harmless given the evidence. *See State v. Hutchings*, 2012 UT 50, ¶¶ 24–28, 285 P.3d 1183; *see also Green v. Louder*, 2001 UT 62, ¶ 17, 29 P.3d 638 (noting that an erroneous jury instruction is harmless if "we are not convinced that without this instruction the jury would have reached a different result").

¶27 Ramos argues that we must presume prejudice because there is "a reasonable basis for the jury to conclude that imperfect self-defense applied," and therefore "there is necessarily a reasonable probability ...

that, but for counsel's error, the result would have been different." (quoting *State v. Garcia*, 2016 UT App 59, ¶ 25, 370 P.3d 970, *aff'd in part, rev'd in part,* 2017 UT 53, —— P.3d ——). When assessing the "reasonable probability that the jury would have returned a more favorable verdict ... if properly instructed," *Lee*, 2014 UT App 4, ¶ 33, 318 P.3d 1164, the court must "consider the totality of the evidence" before the jury, *see Hutchings*, 2012 UT 50, ¶ 28, 285 P.3d 1183. When we consider the totality of the evidence here, we do not find a reasonable probability that the result would have been different had the jury been properly instructed.

¶28 In *State v. Garcia*, 2017 UT 53, —— P.3d ——, our supreme court held that, based on the totality of the evidence, the defendant was not prejudiced by a similarly worded, erroneous imperfect-self-defense instruction. *Id.* ¶ 45 ("When we examine the record as a whole, counsel's error does not undermine our confidence in the jury's verdict finding [Defendant] guilty of attempted murder rather than attempted manslaughter. The evidence [in favor of attempted murder] overwhelmed the evidence that [Defendant] acted in imperfect self-defense.").

¶29 Like Ramos's jury instruction, the instruction in *Garcia* incorrectly stated that the jury "needed to find beyond a reasonable doubt that imperfect self-defense did not apply in order to convict [Defendant] of attempted manslaughter." *Garcia*, 2016 UT App 59, ¶ 11, 370 P.3d 970. This instruction was erroneous because it "improperly placed the burden upon [Defendant] to prove his affirmative defense beyond a reasonable doubt rather than correctly placing the burden on the State to *disprove* the defense beyond a reasonable doubt." *See State v. Lee*, 2014 UT App 4, ¶ 27, 318 P.3d 1164.

¶30 But on appeal, our supreme court concluded that the defendant suffered no prejudice because counsel's error did not undermine the court's confidence in the jury's verdict. "The evidence that [Defendant] was motivated by a desire to kill ... overwhelmed the evidence that [Defendant] acted in imperfect self-defense." *Garcia*, 2017 UT 53, ¶ 45. Said another way, just because there was enough evidence to justify giving the imperfect-self-defense instruction does not mean that the jury would have found that it applied. The State's evidence against Garcia was so overwhelming that even had the proper instruction been given, there was not a reasonable probability that the outcome would have been different, since the jury could not "reasonably have found that Garcia acted in imperfect self-defense such that a failure to instruct the jury properly undermines confidence in the verdict." *Id.* ¶¶ 42–44.

***7** ¶31 Similarly, Ramos suffered no prejudice because there was no reasonable probability that but for his counsel's performance, "the result of the proceeding would have been different" such that the error "undermine[s] [our] confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Lee*, 2014 UT App 4, ¶¶ 29–33, 318 P.3d 1164 (holding that even erroneous affirmative-defense instructions do not cause prejudice where overwhelming evidence against the defendant demonstrates that there is no reasonable probability that the jury would have found that defendant acted reasonably or with legal justification).

¶32 The evidence against Ramos was so overwhelming that there was no "reasonable probability" that but for counsel's performance regarding the jury instruction, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Ramos alleged imperfect self-defense, but several factors weigh heavily against his claim. Victim was stabbed not once, but nine times; Ramos was not alone, but attacked Victim with the help of Accomplice; Ramos's injuries, in comparison to Victim's, were minimal; and after repeatedly and fatally stabbing Victim, Ramos did not seek or await law enforcement, but instead fled. Finally, when Ramos was apprehended and talked to law enforcement, he gave significantly inconsistent stories about what happened.

¶33 Furthermore, because Instruction 48 more plainly and separately outlines the burden of proof, it is not reasonably likely that the jury was confused as to the burden of proof, such that the outcome of the case would have been different. Instruction 48 read,

> Imperfect self-defense is a partial defense to the charge of Murder. It applies when the defendant caused the death of another while incorrectly, but reasonably, believing that his conduct was legally justified or excused. The effect of the defense is to reduce the crime of Murder to Manslaughter Involving a Dangerous Weapon.
>
> The defendant is not required to prove that the defense applies. Rather, the State must prove beyond a

reasonable doubt that the defense does not apply. The State has the burden of proof at all times. If the State has not carried this burden, the defendant may only be convicted of Manslaughter Involving a Dangerous Weapon.

¶34 Where the instructions contained an express statement correctly identifying the party who bore the burden of proof, we find it unlikely that the jury misapplied the law. In the parlance of *Strickland*, we do not believe that the misstatement of the law changed the outcome in this case and we remain unpersuaded that correcting the instruction would likely change the result here.

¶35 Ramos's contention that he was prejudiced based solely on his entitlement to a correctly drafted imperfect-self-defense instruction fails. Because Ramos has not shown any error that undermines our confidence in the jury's verdict, we conclude that he did not receive ineffective assistance of counsel.

B. Failure to Object to Questioning Regarding Victim's Children

¶36 Ramos also argues that his trial counsel was constitutionally ineffective by failing to object to Friend's testimony that Victim had a picture of his two sons on his cell phone. As discussed, to show that his counsel was ineffective, Ramos must prove both that his counsel performed deficiently and that he was prejudiced as a result. *See* *Strickland v. Washington*, 466 U.S. 668, 687–89, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Because there were multiple strategic reasons not to object, Ramos cannot demonstrate that no reasonable attorney would have failed to object, and his contention fails.

***8** ¶37 First, counsel could have reasonably concluded that the testimony was relevant. Evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Utah R. Evid. 401(a). Counsel could have reasonably concluded that the testimony that Victim had a picture of his boys on his cell phone cleared this low threshold by helping corroborate Friend's account of the stabbing, including her testimony that Victim begged for his life because he had children.

¶38 Second, trial counsel could have reasonably concluded that the testimony about the cell phone picture was cumulative. The jury already knew from Friend's testimony that Victim was a father. Therefore, trial counsel could have reasonably chosen not to object based on the fact that the information was not new to the jury.

¶39 In sum, counsel had valid reasons not to object to the testimony Ramos now claims counsel should have opposed. Ramos therefore has not rebutted the presumption that his counsel's performance was objectively reasonable. *See* *Strickland*, 466 U.S. at 687–89, 104 S.Ct. 2052. Because he fails to demonstrate deficient performance, we need not address prejudice, and his argument fails.

II. Cumulative Error Doctrine Is Unavailing

¶40 Ramos' final contention is that because "the evidence that [he] was guilty of murder ... was not overwhelming" the cumulative errors in his trial undermine the jury verdict. We are not persuaded, having concluded that the only error that occurred at trial was harmless.

¶41 The cumulative error doctrine applies only when "collective errors rise to a level that undermine[s] [an appellate court's] confidence in the fairness of the proceedings." *See* *State v. Perea*, 2013 UT 68, ¶ 105, 322 P.3d 624. Here, we have not found any prejudicial error, and therefore the application of the cumulative error doctrine is inapplicable. *See* *State v. Killpack*, 2008 UT 49, ¶ 56, 191 P.3d 17, *abrogated on other grounds by* *State v. Wood*, 2018 UT App 98, —— P.3d ——.

CONCLUSION

¶42 Ramos's trial counsel did not provide constitutionally ineffective assistance in failing to object to the flawed imperfect-self-defense manslaughter jury instruction. Further, counsel did not provide ineffective assistance in not objecting to testimony regarding the picture of Victim's children on his cell phone. Finally, based on the lack of multiple errors, the requirements of the cumulative error doctrine have not been met.

¶43 Affirmed.

2018 UT App 161

All Citations

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