

IN THE SUPREME COURT OF THE
STATE OF OREGON

UNITED STATES OF AMERICA,
Plaintiff,

v.

CHRISTOPHER ROBERT LAWRENCE,
Defendant.

(United States Court of Appeals for the Ninth Circuit
No. 1730061); (SC S066187)

UNITED STATES OF AMERICA,
Plaintiff,

v.

KELLY DAVID ANKENY, SR.,
Defendant.

(United States Court of Appeals for the Ninth Circuit
No. 1735138)

En Banc

On certified question from the United States Court of Appeals for the Ninth Circuit; certification order dated September 18, 2018; certification accepted November 8, 2018; motion to hold in abeyance filed February 8, 2019; considered and under advisement April 23, 2019.

Elizabeth G. Daily, Assistant Federal Public Defender,
Portland, for defendants.

No appearance *contra*.

WALTERS, C. J.

On reconsideration, the Oregon Supreme Court declines to answer the certified questions.

WALTERS, C. J.

In these consolidated cases, the United States Court of Appeals for the Ninth Circuit certified three questions to this court concerning how predicate Oregon convictions for first- and second-degree robbery should be treated for certain issues that arise under federal sentencing law. Those questions were:

“1. Is Oregon first-degree robbery, [ORS] 164.415, divisible?^[1]”

“2. Is Oregon second-degree robbery, [ORS] 164.405, divisible?^[2]”

“3. Put another way, is jury unanimity (or concurrence) required as to a particular theory chosen from the listed subparagraphs of each statute?”

This court accepted certification by order in November 2018. In January 2019, the United States Supreme Court decided *Stokeling v. United States*, 586 US ___, 139 S Ct 544, 202 L Ed 3d 512 (2019), which concerned a similar issue involving how to treat a predicate Florida robbery for federal sentencing purposes. Thereafter, defendant Lawrence successfully moved to dismiss his appeal in the Ninth Circuit, and the Ninth Circuit accordingly modified its certification order to the extent that its questions concerned defendant Lawrence’s case, leaving only the *Ankeny* case and the second question and one aspect of the third question before us. On our own motion, we have re-evaluated the questions presented in

¹ ORS 164.415 provides:

“(1) A person commits the crime of robbery in the first degree if the person violates ORS 164.395 and the person:

“(a) Is armed with a deadly weapon;

“(b) Uses or attempts to use a dangerous weapon; or

“(c) Causes or attempts to cause serious physical injury to any person.

“(2) Robbery in the first degree is a Class A felony.”

² ORS 164.405 provides:

“(1) A person commits the crime of robbery in the second degree if the person violates ORS 164.395 and the person:

“(a) Represents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon; or

“(b) Is aided by another person actually present.

“(2) Robbery in the second degree is a Class B felony.”

light of the above-described developments. On reconsideration, we decline certification of the remaining questions, for several reasons.

Before turning to our reasoning, we give a brief description of the underlying issues. In the *Lawrence* case, defendant raised an issue on appeal in the Ninth Circuit concerning whether the district court had correctly calculated his sentence, under the federal sentencing guidelines, when it determined that Lawrence's prior Oregon conviction for first-degree robbery constituted a "crime of violence" as defined by United States Sentencing Guidelines section 4B1.2(a). In the *Ankeny* case, defendant was sentenced under the Armed Career Criminal Act (ACCA), based in part on the district court's conclusion that his prior Oregon conviction for second-degree robbery was a "violent felony" under 18 USC section 924(e), and defendant appealed to the Ninth Circuit, raising an issue concerning the use of the prior Oregon conviction.

The Ninth Circuit, in its certification to this court, explained that, to determine whether a defendant's prior conviction is a "crime of violence" under the federal sentencing guidelines or a "violent felony" under the ACCA, the court must first look to whether the elements of the Oregon offenses sufficiently match the elements of the "generic" crime of robbery. If a statute criminalizes a broader range of conduct than the "generic" crime, it is deemed "overbroad." And if a statute is deemed "overbroad," then the court next asks whether the statute is "divisible," that is, whether it contains multiple alternative elements that are functionally separate crimes, which is determined by assessing whether a jury must concur as to which alternative has been proved. If the statute is "divisible," then the court then must determine which alternative was proved to the jury; if that alternative falls within the "generic" crime, then the conviction may qualify as a "crime of violence" or a "violent felony" under the federal sentencing guidelines or the ACCA. The Ninth Circuit further explained that defendant Lawrence was arguing on appeal that Oregon's first-degree robbery statute was not divisible. It added in a footnote that the parties in the *Ankeny* case "concede that Robbery II is divisible" but "offer no substantive discussion" on that issue. The

Ninth Circuit therefore sought clarification as to whether first- and second-degree robbery are divisible, and whether jury concurrence is required on the elements of those crimes that are charged and proved.

When the United States Supreme Court decided *Stokeling* in January of this year, it appears to have significantly altered the legal landscape about how predicate robbery offenses are treated for purposes of federal sentencing. As noted, after that decision, the parties in *Lawrence* dismissed their appeal in the Ninth Circuit. Both parties in *Ankeny* also sought to have the Ninth Circuit withdraw its certified questions from this court, with the government taking the position that much of the Ninth Circuit's prior case law concluding that robbery statutes were "overbroad" was undermined by *Stokeling*, and Ankeny arguing that he had not raised the question of "divisibility" in his appeal to the Ninth Circuit but in fact had conceded that the second-degree robbery statute was divisible. The Ninth Circuit withdrew its certified questions insofar as they pertained to Lawrence and first-degree robbery, but it did not withdraw its questions insofar as they pertain to the *Ankeny* case and second-degree robbery. The Ninth Circuit maintained that its precedent remained good law after *Stokeling* and that a question remained as to whether Oregon's second-degree robbery statute was "divisible" and whether jury concurrence on particular elements of that statute was required.

For several reasons, we conclude that the two questions that remain and affect the *Ankeny* case are not subject to review on certification. In *Western Helicopter Services, Inc. v. Rogerson Aircraft Corp.*, 311 Or 361, 811 P2d 627 (1991), this court discussed various non-discretionary statutory factors, as well as discretionary factors, to be considered when deciding to accept certification of a question pursuant to ORS 28.200. Several of those factors weigh against this court addressing the remainder of the Ninth Circuit's certified questions in this case.

First, one of the statutory factors is whether the question presented is one of Oregon law. *Id.* at 365. The second certified question, whether Oregon's second-degree

robbery statute is “divisible,” involves a federal sentencing concept that does not turn exclusively on Oregon law.

Another factor, which we have described as “one of the most important factors—perhaps the most important one,” *id.* at 366, is whether there exists Oregon precedent that addresses the certified question. Given that the only remaining aspect of the third question certified by the Ninth Circuit in this case concerns whether jury concurrence is required on particular elements of the second-degree robbery statute, we conclude that an Oregon Court of Appeals decision provides sufficient guidance as to what remains of that question. *See State v. Gaines*, 275 Or App 736, 365 P3d 1103 (2015) (jury required to concur as to what theory of second-degree robbery has been proven).

On reconsideration, the Oregon Supreme Court declines to answer the certified questions.