
No.

EDWARD JEWELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

EDWARD JEWELL
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QUESTIONS PRESENTED

* Does this Court's holding in *Mathis v. United States* apply to determinations under the United States Sentencing Guidelines of Whether a prior conviction is a "controlled substance offense"?

* Does this Court's holding in *Class v. United States* entitle Petitioner to challenge the constitutionality of the Statute of conviction on Direct Appeal?

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND NOW, comes the Petitioner, Edward Jewell, pro se, and petitions this Court for a Writ of Certiorari, to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The Order of the Court of Appeals for the Sixth Circuit granting the government's motion to dismiss Petitioner's appeal appears at Appendix A.

JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1). The Court of Appeals granted the government's motion to dismiss on July 6, 2018. There were no petition for Court of Appeals panel rehearing and en banc review filed in this case.

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

Ohio Revised Code § 2925.03(A)(2) states:

"(A) No person shall do any of the following: (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person."

U.S.S.G. § 4B1.2 defines the term "controlled substance offense" as:

The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of 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."

STATEMENT OF THE CASE

On January 17, 2017, the federal government filed a Complaint against Petitioner Edward Jewell. The Complaint alleged that the Appellant had committed a violation of 21 U.S.C. § 841(a)(1), possession with intent to distribute herion, and 21 U.S.C. § 846, conspiracy to possess with intent to distribute herion.

An affidavit attached to the Complaint detailed the investigation that law enforcement conducted before arresting the Appellant and his co-Defendant. Specifically, on January 12, 2017, postal management officials contacted Postal inspectors about a suspicious parcel that had been received. This parcel was identified as USPS parcel number 9505 5100 5357 7010 0558 67 and it was addressed to an Ashley Young at 1410 E. 53rd, Cleveland Ohio 44103. Moreover, the parcel had a return address of Anthony Young, 210 East Flamingo Rd Unit 106, Las Vegas, NV 89159.

A postal inspector retrieved the package and checked the names to determine if they were fictitious. He learned that neither name was associated with the respective addresses. He subsequently put the subject package in lineup with blank parcels and had a trained K-9 examine the lineup. The K-9 alerted to the subject package indicating that the odor of an illegal drug was emanating from the package. The inspector then obtained a federal search warrant and recovered approximately 3 kilograms of herion concealed in clear plastic containers and bubble mailer envelopes.

On January 13, 2017, Postal Inspectors and Cleveland Police conducted a controlled delivery of the package. All but 5 grams of herion were removed from the package and a "beeper" device was placed inside the package. An Inspector then delivered

the package to the front porch of the residence located at 1410 East 53rd Street, Cleveland, OH 44103 where it was kept under surveillance.

At 1:08pm a white Nissan sedan was observed pulling into the driveway of the residence and a man later identified as the co-Defendant retrieved the package. The car then left the driveway and was followed by law enforcement to a marathon gas station located on the corner of Superior Ave and East 55th street. While the car was at the gas station a Postal Inspector saw that the beeper device had indicated that the package had been opened. Moreover, the driver of the car (the Petitioner) was seen exiting the Nissan and throwing the box into a dumpster.

Law enforcement covered on the gas station and found Jewell inside the station itself where he was taken into custody. The co-Defendant tried to run but was caught after a brief foot pursuit. The package was recovered and a search of the Nissan resulted in the recovery of a plastic tub containing the 5 grams of herion and the parcel's original mailing receipt.

On February 15, 2017, Jewell and his co-Defendant were indicted in a one-count indictment alleging violations of 21 USC §§ 841 and 846. He was arraigned on February 23, 2017 and entered a not guilty plea to the court against him. Jewell appeared before the district court for a change of plea hearing on June 14, 2017 and entered a plea of guilty to the charge contained in the indictment. The district court referred Jewell to the U.S. Probation Office for a Pre-Sentence Investigation Report (PSR) and scheduled his sentencing for September 21, 2017. Moreover, a plea agreement was entered into that same day.

The district court subsequently rescheduled Jewell's sentencing hearing on its own motion to October 10, 2017. Jewell appeared for his sentencing hearing that day. In the meantime, the U.S. Probation Office had determined after an investigation that Jewell qualified as a career offender because of two separate drug trafficking convictions that he had on his record.

Both the Government, and Jewell's trial counsel filed motions regarding the finding that Jewell was a career offender. The district court heard the arguments of both sides and then rendered its decision regarding Jewell's sentencing. The district court determined that Jewell was a career offender and sentenced him accordingly. Specifically, the district court found Jewell's adjusted offense level to be a 31 and that he was a Criminal History Category 6. This resulting in a sentencing range of 188-235 months. The district court then imposed a sentence of 188 months on Jewell and assessed this mandatory \$100.00 special assessment. Thereafter, a timely appeal was taken on November 1, 2017.

On July 6, 2018, the Sixth Circuit Court of Appeals entered an order denying the appeal in its entirety. As pertinent to this petition, the court held that Jewell's appeal argument is foreclosed on appeal as it is allegedly within the scope of his appellate waiver. See (Appendix A)

REASONS FOR GRANTING THE WRIT

1. **This Court's decision in Mathis v. United States applies to a district determination of whether a prior conviction is a "controlled substance offense" under the Sentencing Guidelines.**

Petitioner Jewell submits that this Court should grant certiorari review to resolve a circuit split on whether this Court's pronouncement in Mathis v. United States, 136 S.Ct. 2243 (2016) applies to a determination of whether a prior offense qualifies as a controlled substance offense under the federal Sentencing Guidelines.

A defendant may be found to be a "career offender" under § 4B1.1 of the United States Sentencing Guidelines if he has two prior convictions for a "crime of violence" or a "controlled substance offense." In Mathis v. United States, 136 S.Ct. 2243 (2016), this Court set forth a test to analyze prior offenses for purposes of the Armed Career Criminal Act, to determine whether prior offenses met the definition of "violent felony". Since Mathis, circuits have uniformly applied this test to the Guidelines "crime of violence" determination. See United States v. Steiner, 847 F3d 103, 118 (3d Cir. 2017); United States v. Lynn, 851 F3d 786, 796 (7th Cir. 2017).

However, a question dividing the circuits is whether the Mathis analysis applies to a determination of controlled substance offense predicates under the Guidelines. Jewell submits that Mathis controls as to these prior convictions as well, and as a result, the Sixth Circuit's determination in this case must be reversed.

A. The circuit split

Pursuant to Rule 10, this Court may grant certiorari review where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." S.Ct. Rule 10. Such a conflict exists in this case, as the Fifth and Sixth Circuit courts of appeal have come to differing conclusions on whether *Mathis v. United States* applies to the determination of whether a prior conviction is a "controlled substance offense."

In *Mathis v. United States*, 136 S.Ct. 2243 (2016), this Court delineated the differences between elements and means in the context of determining whether a prior conviction constitutes a "violent felony" under the ACCA. Elements are the "constituent parts of a crime's legal definition - the things that the prosecution must prove to sustain a conviction." 136 S.Ct. at 2248. By contrast, means are merely the "brute facts" or "circumstances" of the offense. *Id.* The Court held that under the ACCA, when a state offense uses different means to commit a element of the offense, some of which means qualify as the generic form of the offense, and some of which do not, the offense cannot be an enumerated offense under the ACCA. *Id.* at 2250. The Court set forth three factors to evaluate to determine whether a list of ways of committing the offense were means or elements. First, do the statutory alternatives carry different punishments? Second, do the state court decision treat the alternative means as one offense? And third, does the prior state record for the offense in question provide for an answer? *Id.* at 2256-2257

In *United States v. Hinkle*, the Fifth Circuit applied *Mathis* to invalidate a defendant's career offender enhancement under U.S.S.G. 4B1.1(b). 832 F3d 569, 571 (5th Cir. 2016) As the Fifth Circuit noted: "the primary focus of the Court's decision in *Mathis* was how to determine whether a statute is "divisible" and therefore whether the modified categorical approach can be used to determine, when a statute defines more than one offense, of which offense a defendant was convicted. The decision in *Mathis* clarified when and how the modified categorical approach is applied in the context of federal sentencing. With exceptions not relevant to this appeal, we have generally used the categorical and modified categorical approaches in applying the federal sentencing Guidelines. The *Mathis* decision is controlling regarding the methodology of the modified categorical approach, and we must apply its holdings." *Id.* at 574.

By contrast, the Sixth Circuit, in this case, has chosen to not apply *Mathis*'s rationale to the "controlled substance offense" setting. The failure to apply *Mathis* to this prior offenses determination creates a circuit split which must be addressed by this Court by way of the grant of certiorari in this case.

B. *Mathis* as applied to the Ohio statute

Once the rationale of *Mathis* is applied to this case, it is clear that Jewell's prior Ohio offenses captures means of committing the offense that are beyond the generic form of a "controlled substance offense."

The Sentencing Guidelines (U.S.S.G. § 4B1.2) define the term "controlled substance offense" as:

an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, distribution, or dispensing of a controlled substance (or counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, distribute, or dispense.

At issue in this Case was Jewell's 2010 and 2013 Ohio convictions under Ohio Revised Code § 2925.03(A)(2), which statute reads as follows:

"(A) No person shall do any of the following: (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog, is intended for sale or resale by the offender or another person."

Thus, Ohio statute differs significantly, from the Guidelines definition of controlled substance offense in that it allows convictions for sale, shipping the drugs, transporting the drugs, delivering the drugs, preparing the drugs for distribution, or distributing a controlled substance . These six ways of violating the statute are alternative elements for committing the offense and not simply different means. Since the statute creates alternative elements for conviction, the statute is divisible and the modified categorical approach must be used to determine if it qualifies as a controlled substance offense. Mathis, 136 S.Ct. at 2249.

The Fifth Circuit's analysis in Hinkle is instructive in this regard. 832 F3d 569 (5th Cir. 2016). In Hinkle, the district court used the defendant's prior conviction for delivery of a controlled substance under Tex. Health and Safety Code § 481.112(a) as a predicate offense and categorized Hinkle as a career offender. Id. But the Fifth Circuit found that Mathis supported Hinkle's argument that his convictions under Texas law were not subject to the modified categorical approach, as the Texas law was indivisible. Id. at 574. Like in Mathis, there was also a Texas state court decision which stated that the method of delivering a controlled substance not an element of the crime, thus supporting the conclusion that the statute was indivisible. Id. at 575; Lopez v. State, 108 S.W. 3d 293 (Tex. Crim. App. 2003).

Following Mathis, the Fifth Circuit found that it was clear that the Texas law contained various means of committing the offense of delivery, not separate offenses. Id. at 574. Texas law criminalized a broader array of conduct than the generic offense, making it improper for use as predicate offense. Id. Because the Texas law prohibited knowingly manufacturing, delivering or possessing with intent to deliver a controlled substance, and the statutory definition of delivery including offering to sell a controlled substance (where no actual substance need be present), a conviction under this statute may not be used a predicate offense for career offender enhancement. Id. at 576. The court therefore found it improper to use Hinkle's conviction to enhance his sentence as a career offender. Id.

The Fifth Circuit reaffirmed their application of Mathis to controlled substance predicate offenses in United States v. Tanksley, 838 F3d 347 (5th Cir. 2017). Tanksley had prior convictions under the same Texas law as in Hinkle, and at sentencing the court found that the conviction was a controlled substance offense

under the Guidelines. Id at 349. Following Hinkle's analysis and conclusion that a conviction under this law cannot be used as a predicate offense because it is broader than the Guidelines offense, the court found that Tanksley's conviction was not a controlled substance offense under the Guidelines. Id at 352.

In contrast, the Sixth Circuit in the present case has declined to find Mathis applicable to controlled substance offenses under the career offender enhancement. Here, a comparison between Ohio Revised Code § 2925.03(A)(2) and the definition of a controlled substance offense in USSG § 4B1.1 shows that Ohio's statute contains the extra element of "delivery." It is this extra element that must be reviewed if it makes the Ohio drug trafficking statute.

Jewell would assert that since Ohio's statute includes the element of "delivery" that it fails to qualify as a career offender predicate. This is because the term "delivery" encompasses a greater swath of conduct than is required by the career offender guideline thereby making Ohio Revised Code § 2925.03(A)(2) overbroad. Therefore, the Appellant's two drug trafficking convictions cannot be used as career offender predicates. As such, Jewell's prior offenses are broader than that captured by the Guidelines "controlled substance offenses" and could not be used to increase the Guidelines range.

Moreover, Ohio's drug trafficking statute criminalizes controlled substances that are not controlled substances under federal law thereby making Ohio's statute overbroad. For instant, Ohio's statute criminalizes substances such as naloxone under Ohio Revised Code § 3719.42, alphaprodine, § 3719.41, Schedule II (B)(2), anilerdine, Id. at Schedule II (B)(3), and bezitramide, Id. at Schedule II (B)(4).

Under Ohio law a "controlled substance" is defined under Ohio Revised Code § 3719.01(C) as a drug, compound, mixture, preparation, or substance that is listed in scheduled I,II,III,IV, or V. Furthermore, Ohio Revised Code § 3719.41 provides a list of controlled substances broken down into various schedules whose delivery, distribution, delivery, or sale is illegal under Ohio Revised Code § 2925.03(A)(2).

The definition of a "controlled substance offense" under the career offender guidelines is limited to those defined under federal law. USSG § 4B1.2(b). The term "controlled substance" is defined to include "a drug or other substance, or immediate precursor, included in schedule I,II,III,IV, or V." 21 USC § 802(6). This list of controlled substances under these schedules is provided for in 21 C.F.R. § 1308.11 through 1308.15.

In *Vera-Valdevinos v. Lynch*, 649 F. Appx 597 (9th Cir. 2016), the Ninth Circuit dealt with an immigration case that involved the removal of lawful permanent resident who had been convicted of a controlled substance violation. At issue was whether or not the defendant's criminal conviction under Arizona law constituted a controlled substance violation. *Id.* at 598. The Arizona statute was found to be overbroad because it criminalized the possession of two substances, Benzylfentanyl and Thenylfentanyl, that were not listed on the federal controlled substance schedule. *Id.* Thus, the conviction could not serve as grounds for the defendant's deportation.

Furthermore, in *United States v. Barrow*, 230 F.Supp.3d 116 (E.D.N.Y. 2017), the district court found that New York's statute for sale of drugs could not serve as a predicate offense under U.S.S.G. § 2K2.1. The district court found that the defendant's sentence could not be enhanced because the New York statute criminalized the sale of a substance that was not criminalized under federal law. *Id.* at 123-124.

Since the Ohio statute criminalizes substances that are not controlled substances under federal law, the statute is overbroad. Thus, Jewell's convictions do not qualify as predicate offenses under the career offender guidelines.

2. Does this Court's holding in Class v. United States, 138 S.Ct. 798 (2018) entitle Petitioner to challenge the constitutionality of the Statute of conviction on Direct Appeal?

Petitioner Jewell submits that this Court should also grant certiorari review to resolve whether this Court's pronouncement in Class v. United States, 138 S.Ct. 738, 200 L.Ed.2d 37, 2018 WL 987347 (2018) entitles him to challenge the constitutionality of the statute of conviction on direct appeal.

In Class, the defendant raised constitutional challenges to the statute of conviction at a preliminary hearing, but ultimately entered a guilty plea pursuant to a written agreement. 200 L.Ed.2d 37, Id. at *2. Under the terms of his plea agreement Class waived a number of appellate rights and preserved several others. 200 L.Ed.2d 37, Id. at *3. The agreement was silent on the issue of constitutional challenges. Id. The Supreme Court held that such silence did not constitute his right to appeal the District Court's constitutional determinations simply by pleading guilty." 200 L.Ed.2d 37, Id. at *4.

Like Class, the constitutional arguments Jewell mounts "challenge the district court's finding that a crime (i.e. prior conviction) qualifies as a predicate offense for career-offender designation. Accordingly, Jewell's guilty plea "does not bar a direct appeal in these circumstances." Accordingly, pursuant to this Class's instructions, this Court should hold that Jewell did not waive his constitutional arguments.

CONCLUSION

WHEREFORE, Jewell requests that this Court grant certiorari, reverse the Sixth Circuit's decision, and remand for resentencing.

Respectfully submitted,



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DATE: 9-18-18