

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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MALACHI M. GLASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

---

On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals For The Third Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

MIELE & RYMSZA, P.C.  
Edward J. Rymsza, Esq.  
Counsel of Record for Petitioner  
125 East Third Street  
Williamsport, PA 17701  
(570) 322-2113  
(570) 322-8813 (facsimile)  
Rymsza@comcast.net

**QUESTION PRESENTED**

1. WHETHER THE BROADER PENNSYLVANIA DELIVERY OF A CONTROLLED SUBSTANCE STATUTE, 35 PA. C.S.A. § 780-113(A)(30), QUALIFIES AS A “CONTROLLED SUBSTANCE OFFENSE” UNDER U.S.S.G. § 4B1.2(b)?

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

Petitioner, Malachi M. Glass, by and through his undersigned attorney, respectfully petitions for a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Third Circuit.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit appears in the Appendix.

## JURISDICTION

On August 22, 2018, the Court of Appeals entered its Judgment affirming the conviction and sentence. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

The pertinent statutory provisions include 18 U.S.C. § 3742, and 28 U.S.C. § 2106.

## STATEMENT OF THE FACTS

On October 23, 2013, a one-count Indictment was returned in the Middle District of Pennsylvania charging Mr. Glass with Distribution of Cocaine Hydrochloride (crack cocaine), in violation of 21 U.S.C. § 841(a)(1). After reaching a negotiated plea agreement, on November 30, 2015, Mr. Glass entered a guilty plea to the single count in the Indictment. As part of that plea agreement, Mr. Glass agreed to a conditional appeal waiver and reserved the right to appeal if the district court designated him a career offender, pursuant to U.S.S.G. § 4A1.2.

The Pre-sentence Report (the “PSR”) determined that Mr. Glass had two prior state court predicate drug offenses and consequently satisfied the requirements for a career offender. Those two prior convictions were under Pennsylvania’s Controlled Substance, Drug, Device and Cosmetic Act Section 780-

113(a)(30). Several objections to the PSR were lodged on behalf of Mr. Glass, including one objecting to the application of the career offender designation. The district court overruled Mr. Glass's objection to the career offender designation.

On June 13, 2016, a sentencing hearing was held before the district court. Mr. Glass contended, among other things, that the career offender guidelines were overstated and argued for a non-guideline sentence based on the 18 U.S.C. § 3553(a) factors. The court did impose a variance and imposed a sentence of 132 months. A timely appeal was filed.

On appeal, newly appointed counsel filed an Anders motion and brief pursuant to Anders v. California, 386 U.S. 738 (1967). Pursuant to his obligations under Anders, appellate counsel reviewed the record to ascertain whether there was anything in the record to support an appeal. Counsel identified a potential issue for appeal, namely, whether Mr. Glass was improperly designated a career offender. (Appellant Br. at 12, Oct. 24, 2016). Nevertheless, in his brief, counsel requested leave to withdraw alleging the issues raised on appeal, including any attack on the career offender designation, lacked arguable merit. (Appellant Br. Oct. 24, 2016). The Government filed its own brief supporting appellate counsel's Anders brief and the purported lack of merit of Mr. Glass's issues. Mr. Glass opposed the Anders motion. See Glass Pro-se Supplemental Br. March 9, 2017.

On July 26, 2017, a three-judge panel of the Third Circuit denied the Anders motion. In doing so, the court found two independent reasons denying Anders relief. Among them, the court held that Mr. Glass's 2001 state court drug delivery

conviction from Dauphin County may not be a countable predicate offense because the state statute's use of the term "delivery" was perhaps broader than the United States Sentencing Guidelines' definition of a "controlled substance offense" found in U.S.S.G. § 4B1.2(b). See United States v. Glass, No. 16-2906, 2017 WL 3169033, at \*1 (3d Cir. July 26, 2017). On August 10, 2017, the Third Circuit appointed the undersigned to represent Mr. Glass on the appeal.

On August 22, 2018, the same three-judge panel of the Third Circuit that denied the original Anders motion (the "Panel") affirmed. See United States v. Glass, No. 16-2906 (3d Cir. August 22, 2018). In that opinion, the Panel held that the Pennsylvania drug distribution statute (35 Pa. C.S.A. § 780-113(a)(30) qualifies as a predicate "controlled substance offense" under U.S.S.G. § 4B1.2(b).

On September 4, 2018, Mr. Glass filed a petition for rehearing en banc. On September 28, 2018, the Third Circuit entered an order denying en banc review. A formal judgment was issued on October 9, 2018.

#### **REASONS FOR GRANTING THE PETITION**

- I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE WELL-DEVELOPED CONFLICT AMONG THE CIRCUITS AS TO WHAT CONSTITUTES A "CONTROLLED SUBSTANCE OFFENSE" FOR CAREER OFFENDER PURPOSES AND WHETHER PENNSYLVANIA'S DELIVERY OF A CONTROLLED SUBSTANCE STATUTE, 35 PA C.S.A. § 780-113(a)(30), QUALIFIES AS A "CONTROLLED SUBSTANCE OFFENSE" UNDER THE UNITED STATES SENTENCING GUIDELINES § 4B1.2(b).

Several circuits have held that a "controlled substance" offense under the Sentencing Guidelines refers solely to those substances controlled by federal law under the Controlled Substance Act ("CSA"). See United States v. Townsend, 897

F.3d 66 (2d Cir. 2018); United States v. Gomez-Alvarez, 781 F.3d 787, 793-94 (5th Cir. 2015); United States v. Leal-Vega, 680 F.3d 1160, 1166-67 (9th Cir. 2012); United States v. Sanchez-Garcia, 642 F.3d 658, 661 (8th Cir. 2011). A controlled substance under the CSA is “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV or V of part B of this subchapter.” 21 U.S.C. § 802(6); § 812(c) (schedules of controlled substances). Thus, U.S.S.G. § 4B1.2 requires that a controlled substance must be a federally controlled substance. See Townsend, 897 F.3d at 68.

In Pennsylvania a “controlled substance” is defined as “a drug, substance, or immediate precursor included in Schedules I through V of this act.” 35 Pa. C.S.A. § 780-102. The Pennsylvania schedules are found at 35 Pa. C.S.A. § 780-104. Pennsylvania’s schedule includes more than one substance that does not appear in the federal schedule under 21 U.S.C. § 812(c).<sup>1</sup> As a result, the Pennsylvania Statute is broader because it penalizes more substances than that on the federal schedules. See Rojas v. Attorney General, 728 F.3d 203 (3d Cir. 2013) (noting Pennsylvania criminalizes substances that are not illegal under federal law); United States v. Al-Akili, 578 F. App’x 107, 110 (3d Cir. 2014) (non precedential); see also, United States v. Sanchez-Fernandez, 669 F. App’x 415 (9th Cir. 2016) (non precedential) (reversing where prior Arizona conviction for possession of narcotics for sale was not a categorical match with the federal generic definition because it

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<sup>1</sup> While there may be several distinctions, one such popular example is the substance human chorionic gonadotropin or “HCG.” HCG is a hormone that is naturally produced by pregnant women and used by men as an anabolic steroid. See 35 Pa. C.S.A. § 780-104(3)(vii)(1).

criminalizes possession for sale of certain substances that are not federally controlled). As such, it should not qualify as a predicate controlled substance offense under 4B1.2(b). See United States v. Townsend, 897 F.3d 66 (2d Cir. 2018) (New York’s criminal sale of a controlled substance is not a controlled substance offense under U.S.S.G. § 4B1.2(b)).

Second, the Pennsylvania delivery statute by virtue of its own definition of “delivery” is broader because it criminalizes the mere transfer of possession without any consideration. Pennsylvania defines “delivery” as the “actual, constructive or attempted transfer from one person to another . . . . 35 Pa. C.S.A. § 780-102. By juxtaposition, the federal equivalent does not include simply a “transfer.” See U.S.S.G. § 4B1.2; see also United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977) (transfer of a drug between users would not constitute felony intent to distribute charge).

Consequently, the Third Circuit panel’s decision is inconsistent with the definition of a “controlled substance offense” provided in § 4B1.2(b) and conflicts with persuasive decisions of other circuit courts.

### **CONCLUSION**

WHEREFORE, based on the foregoing arguments and authorities, this Court should grant the petition for writ of certiorari.

Dated: November 14, 2018

MIELE & RYMSZA, P.C.

By: s/Edward J. Rymsza  
Edward J. Rymsza, Esq.  
Counsel of Record for Petitioner  
125 East Third Street  
Williamsport, PA 17701  
(570) 322-2113  
(570) 322-8813 (fax)  
Rymsza@comcast.net

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**CERTIFICATE OF SERVICE**

I, Edward J. Rymsza, hereby certify that on this 14<sup>th</sup> day of November 2018, I served copies of the Motion for Leave to Proceed in Forma Pauperis and the Petition for a Writ of Certiorari in the above-captioned case were mailed, first class postage prepaid to the following:

Noel Francisco  
Solicitor General  
United States Department of Justice  
950 Pennsylvania Avenue  
Washington, D.C. 20530

Patricia S. Dodszuweit, Clerk  
United States Court of Appeals  
for the Third Circuit  
601 Market Street  
Room 21400  
Philadelphia, PA 19106-1790

Stephen Cerutti, II, Esq.  
Office of the United States Attorney  
228 Walnut Street  
Harrisburg, PA 17108

Malachi Glass  
Reg. No. 72053-067  
FCI McKean  
P.O. Box 8000  
Bradford, PA 16701

I certify that all parties required to be served have been served.

Dated: November 14, 2018

MIELE & RYMSZA, P.C.

By: s/Edward J. Rymsza  
Edward J. Rymsza, Esq.  
Counsel of Record for Petitioner  
125 East Third Street  
Williamsport, PA 17701  
(570) 322-2113  
(570) 322-8813 (fax)  
[Rymsza@comcast.net](mailto:Rymsza@comcast.net)

## CERTIFICATIONS

I, Edward J. Rymsza, Esq., hereby certify that:

1. I am a member of the bar of the Supreme Court of the United States,
2. the text of the electronic brief e-mailed to the Court is identical to the text of the other paper copies mailed to the Court,
3. Symantec anti-virus has been run on the electronic brief e-mailed to the Court and no virus was detected,
4. on the date below, one copy of the foregoing Petition for Writ of Certiorari was placed in the United States mail, first class, postage pre-paid addressed to:

Stephen Cerutti, Esq.  
Assistant United States Attorney  
Office of the United States Attorney  
United States Courthouse  
P.O. Box 11745  
Harrisburg, PA 17108

5. on the date below, ten copies of the same were placed in the United States mail, first class, postage pre-paid, addressed to:

Supreme Court of the United States  
Office of Clerk  
One First Street NE  
Washington, D.C. 20543

Dated: November 14, 2018

MIELE & RYMSZA, P.C.

By: s/ Edward J. Rymsza  
Edward J. Rymsza, Esq.  
Pa. I.D. No. 82911  
Attorney for Appellant  
125 East Third Street  
Williamsport, PA 17701  
(570) 322-2113  
(570) 322-8813 (fax)  
rymsza@comcast.net