No. 18-7915

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Arthur Sean Warner — PETITIONER
(Your Name)

vs.

United States Of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeals"fOURTH CIRCUIT"
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Arthur Sean Warner
(Your Name)
P.O.BOX-1000
(Address)
Loretto, PA 15940-0000
(City, State, Zip Code)
N/A
(Phone Number)

QUESTIONED PRESENTED

1. Did the District Court and the Fourth Circuit Court Of Appeals findings result in a decision that was(1) Unreasonable in light of the evidence presented and(2) Contrary to clearly established U.S.Supreme Court opinions in Mathis And Descamps.

2. Can a prior conviction under a state crimianl statue,whose(s) plain terms sweep in more conduct than a corresponding Federal statue,be a Categorical Match with the Federal Statue.

3. Is School property and school buses in New Jersey statue, N.J.Stat Ann 2C-35-2 " Alternative Locational Elements or Means , and is School Property used for school purposes in 2C-35-7 " Broader " than real property, comprising a school as defined under 21 U.S.C. 860, In light of Mathis.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

ARTHUR SEAN WARNER

VS

UNITED STATES OF AMERICA

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at 2017 US Dist Lexis 83821 (4th 2017); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the N/A court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 01-23-2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 01-23-2018, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was N/A. A copy of that decision appears at Appendix N/a.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated.

1. Course of proceedings in the section 2255 case now before this court.

On December 04,2014, the course then pending in the U.S. District Court for the Northern District Of West Virginia entitled United States-V-Arthur Sean Warner, Criminal NO. 1:14-CR-81, Petitioner plead guilty on an indictment of one Count charging violation of Possession Of Controlled Substance.

On April 09,2015. the District Court entered judgement and petitioner was sentenced to 151 months imprisonment on count one.

On September 18,2015, Petitioner filed the motion on the case at bar under 28 USC 2255 ,to Vacate,Set-Aside or Correct his sentence(DKT no.1).

On April 29, 2016, petitioner filed a motion to amend his 2255 in light of Mathis-V-United States,136 S.Ct 2243(2016); Descamps-v-United States,133 S.ct 2276(2013); and a fifth circuit opinion in United States-v-Hinkle,832 F.3d 569(5th Cir 2016): and a third Circuit" Unpublished" opinion in Chang-Cruz-V-United States,659 Fed Appx 114 (3rd Cir 2016).

On November 21,2016, Petitioner filed a motion to supplementt 2255, again asserting Mathis, Descamps, and Hinkle, asserting that his " Arizona" prior state offensee" No-longer" qualified as a

predicate offense for Career Offender enhancement as defined under 4B1.1.

On February 09,2017, Petitioner filed yet another motion too supplement 2255 again asserting that in light of Mathis, Descamps and Hinkle ,his" New Jersey" prior offense" No-Longer" qualified as a predicate offense for Career Offender enhancement as defined under 4B1.1.

--On June 01, 2017, the District court dismissed petitioners 2255 motion, Grants his motion to Supplement in Light of Mathis and Descamps(DKT 19,21 and 23) Denies his motion to amend his petition(DKT no.15) adopts the portions of the magistrate judge Report and Recommendation to which petitioner did not object(DKT 16) overrules petitioners petition with prejudice(DKT no.1 and denies petitioner a Certificate of appealability.

On June 01,2017, Petitioner filed a Notice Of Appeal on the Diustrict Courts denial of his 2255 to the Court Of Appeals for the Fourth Circuit.

On November 15,2017,The Court Of Appeals entered an order denying Petitioners Appeal.

Subsequently Petitioner filed a timely Petition for rehearing En banc.

REASON(S) FOR GRANTING THE WRIT

II. Relevant Facts Concerning The Underlying Sentence For being a Career Offender Pursuant To 4B1.1

The relevant facts are contained in petitioner's motion under 28 U.S.C. 2255, and his Supplemental Pleadings.

During Petitioner's 2255 criminal proceedings, The government offered that petitioner had four(4) prior controlled substance convictions that potentially qualified as predicate offenses and that Petitioner's counsel was not ineffective for failing to object to the application of the Career Offender enhancement, sserting that " despite Petitioners claims that one of his predicate offenses " The Arizona" offense should not count as he was serving a probationary sentence for that offense at the time he was convicted on the instant charge. " That even without that conviction he had been convicted of at least two other serious felony drug offenses being the prior 2003" New Jersey" conviction and the 2009 Maryland conviction.

On August 24,2016, The magistrate judge adopted the governments contentions(DKT no.10) concluding that Petitioners counsel had not been deficient in his represention by failing to object to his classification as a Career Offender 4B1.1.

Petitioner objected to the Report and recommendation by the magistrate judge(DKT no.18) contending that he was not a Career Offender because(1) his prior"Arizona" conviction was not a predicate offense(2) he was on probation on the "Arizona" when he was arrested on the instant Federal offense.

While the report and recommendation was pending review, petitioner filed three(3) motions(DKY 19,21,and 23) seeking to

supplement his 2255 petition to add arguments that the decisions of this court in Mathis-V-United States, 136 S.Ct 2243(S.Ct 2016), furthe supported his claims that his " Arizona" Prior conviction(s) were not predicate offenses, and that the third Circuit in an " Unpublished opinion in Chang-Cruz-V-AG United States,659 Fed Appx 114(3rd Cir 2016) supported his claim that the " New Jersey" Statue forming the basis of his " New Jersey" prior conviction N.J.S.A. 2C:35-7 for possession with intent to Distribute/Dispense Cocaine within 1,000 Ft of a school property or bus did not qualify as a predicate offense(DKT no.21-1: DKT no.23-1)..

The District Court below Granted Petitioners motion(s) to supplement 2255(DKT no, 19,21, and 23) on June 01,2017,

The District Court in disposing of petitioners motion under section 2255 contrary to the court's opinion in Mathis and DFescamps and other U.S. Supreme Court opinion(s) and Circuit Court Opinion)s) held .

It is clear from the sentencing transcript that the Court informed Warner he had four prior controlled substance convictions that potenially quilified as predicate offenses.

The four prior convictions were 1) a 2003 conviction in New Jersey, 2) a 2009 conviction in Maryland,3) an Arizona conviction in 2010,and 4) an Arizona conviction in 2011.

1. Warner's 2003 New Jersey Conviction

1. Warner's 2003 New Jersey Conviction

On February 10, 2003, **Warner** was arrested in New Jersey and charged with eight drug related crimes (dkt. no. 21-1 at 2). On June 8, 2004, he pleaded guilty to a violation of N.J.S.A. § 2C:35-7, for possession with intent to distribute cocaine within 1,000' of a school property or bus. That statute provides in pertinent part:

> Any person who violates subsection a. of N.J.S.2C:35-5 by distributing, dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog while on any school property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of such school property or a school bus, or while on any school bus, is guilty of a crime of the third degree and shall, except as provided in N.J.S.2C:35-12, be sentenced by the court to a term of imprisonment.Subsection a. of N.J.S.A. 2C:35-5 provides in pertinent part that:
>
> . . . [I]t shall be unlawful for any person knowingly or purposely:
>
> (1) To manufacture, distribute or dispense, or to possess or have under his control with intent to manufacture, distribute or dispense, a controlled dangerous substance or controlled substance analog; or
>
> (2) To create, distribute, or possess or have under his control with intent to distribute, a counterfeit controlled dangerous substance.

The definition of controlled substance offense under the U.S.S.G. is defined as:

> 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.U.S.S.G. § 4B1.2(b).

It is clear from this statutory language that Warner's New Jersey conviction "qualifies as [a predicate offense] [because] the statute's elements are the same as, or narrower than, those of the [guideline definition]." Descamps, 133 S. Ct. at 2281. Indeed, there are no elements that **Warner** could have satisfied to be found guilty of the New Jersey statute that would not also fall within the guideline definition. Id.

Warner, however, argues that pursuant to the Third Circuit's decision in Chang-Cruz his New Jersey conviction does not qualify as a predicate offense. That argument, however, is meritless. Chang-Cruz analyzed whether a defendant's violation of N.J.S.A. § 2C:35-7(a) was a "violent felony" as defined in the Immigration and Nationality Act that would have allowed the government to deport the defendant. Here, whether Warner's New Jersey conviction is a violent felony is immaterial; the relevant question is whether his New Jersey conviction qualifies as a controlled substance violation under federal sentencing guidelines, which the Court finds that it does. Chang-Cruz, therefore, does not apply.

2. Warner's 2009 Maryland Conviction

On February 6, 2009, **Warner** was arrested in Baltimore, Maryland, and charged with possession with intent to distribute marijuana in violation of Md. Crim. Law § 5-602. That statute provides:

> Except as otherwise provided in this title, a person may not:
>
> (1) distribute or dispense a controlled dangerous substance; or
>
> (2) possess a controlled dangerous substance in sufficient quantity reasonably to indicate under all circumstances an intent to distribute or dispense a controlled dangerous substance.Both subsections (1) and (2) fall squarely within the guideline definition of a controlled substance

offense. There are no elements that **Warner** could satisfy to be found guilty of Md. Crim. Law § 5-602 that are not also elements of U.S.S.G. § 4B1.2(b). Therefore, Warner's prior Maryland conviction qualifies as a predicate offense.

3. Warner's 2010 and 2011 Arizona Convictions

On April 21, 2010, and July 8, 2011, respectively, **Warner** was charged with two separate violations of Arizona criminal statute A.R.S. § 13-3405, which provides that:

> A. A person shall not knowingly:
>
> 1. Possess or use marijuana.
>
> 2. Possess marijuana for sale.
>
> 3. Produce marijuana.
>
> 4. Transport for sale, import into this state or offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer marijuana.

On review, this statutory language establishes that a defendant could be found guilty of offering to sell marijuana, an element not present in the guideline definition. Further, as A.R.S. § 13-3405 is clearly divisible into four distinct criminal subsets, the Court may apply the modified categorical approach to attempt to "figur[e] out which of the alternative elements listed . . . was integral to the defendant's conviction." Mathis, 136 S. Ct. at 2249.

Looking at the 2010 judgment of conviction (dkt. no. 19-1 at 2), it is evident that **Warner** pleaded guilty to "Possession of Marijuana for Sale," a violation of A.R.S. § 13-3405(A)(2). The federal guideline definition of a controlled substance offense encompasses the elements contained in the statute under which **Warner** was convicted in 2010, and it therefore constitutes another predicate offense - his third - for purposes of his career offender status.

Turning to Warner's 2011 conviction (dkt. no. 19-1 at 4), he pleaded guilty to "Transportation of Marijuana," which is a violation of A.R.S. § 13-3405(A)(4). As noted, that subsection of A.R.S. § 13-3405 contains as an alternative element the act of offering to sell marijuana, which is not explicitly contained in the guideline definition. Notwithstanding this omission, Application Note 1. to U.S.S.G. § 4B1.2 provides further definition: "For purposes of this guideline - 'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." (emphasis added).

Relying on **United** States v. Hinkle, 832 F.3d 569 (5th Cir. 2016), **Warner** contends that, because A.R.S. § 13-3405 contains offering to sell marijuana as an element, it is broader than the guideline definition and cannot qualify as a predicate offense. In Hinkle, the Fifth Circuit held that a similar Texas statute, which also contained an offer to sell element, albeit as part of the definition of "delivery," was broader than the guideline definition.2 Here, unlike the Texas statute, an "offer" is an element rather than a "means" of satisfying an element and, as such, subsection 4. of A.R.S. § 13-3405 is not further divisible. Consequently, the Court may only apply the categorical approach to that subsection.

In the Court's opinion, "offering to sell" marijuana is indistinguishable from "attempting" to sell marijuana as defined in Application Note 1., which would place the offer to sell element of A.R.S. § 13-3405(A)(4) within the guideline definition. As such, Warner's 2011 Arizona conviction likely qualifies as a predicate offense for purposes of establishing his career offender status. Nevertheless, even without his 2011 Arizona conviction, **Warner** qualifies as a career offender by use of any two of his three other prior predicate offenses.3

IV. CONCLUSION

Warner was correctly sentenced as a career offender because he had at least two prior qualifying controlled substance offenses under U.S.S.G. 4B1.2(b). Further, Warner's claim of ineffective assistance of counsel based on allegations that his attorney failed to object to his career offender classification fail.

III. Existence Of Jurisdiction Below

Petitioner was convicted in the District Court for the Northern District Of West Virginia.

Petitioner also received a Chapter four enhancement for being a Career Offender 4B1.1.

A section 2255 motion was appropriately made in that Court,and duly appealed to the Fourth Circuit Court Of Appeals.

IV. The Court Of Appeals For the Fourt Circuit has decided a Federal question in a way in conflict with the applicable decisions of this court and with other Circuits.

This is a sentence enhancement case whereas the District Court imposed a Career Offender enhancement from a maximum U.S. Sentencing Commission Guideline range, finding that petitioner had at least two prior convictions that qualify as controlled substance offenses under 4B1.1 of the sentencing guidelines.

Petitioner's Prior " Arizona" conviction

Citing the Supreme Court decisions in Descamps-V-United States, 133 S.ct 2276,2281, 186 L.Ed 2d 438(2013) Warner asserts that the District Court and the Court Of Appeals, could not consider underlying documents in order to determine whether his conviction of " Offering To Sell " a controlled substance.

Warner also asserts that the Arizona statue under which he was convicted does not qualify as a controlled substance under the guidelines because it criminalizes conduct that is" Not " included within the guidelines definition of a controlled substance offense.

This Court issued an opinion in Mathis-V-United States,136 S.Ct 2243,195 L.Ed 2d 604(2016) which set forth how a court determines whether a statue is divisible and therefore whether in employing the modified categorical approach, Documents pertaining to the prior conviction may be used if that conviction comes within the definition of an offense or has the elements of an enumerated offense. the decision in Mathis plainly and unmistakably leads to the conclusion that the definition of " Offer To Sell " in 13-3405(A)(4) as authoritatively interpreted by the Arizona Court Of Appeals sets forth various " Means " of committing an offense and does not set forth in the disjunctive seperate offenses.

The district Court and the Court Of Appeals for the Fourth Circuit contrary tyo the U.S. Supreme Court opinions in Mathis and Descamps, claims that the Arizona statue for " Offer To Sell " 13-3405(A)(4) is indistinguishable from"attempting to sell Marijuana" which would place the "Offer To Sell" element of ARS 13-3405(A)(4) within the guidelines definition.

Petitioner's 2003 New Jersey Prior

This is a sentence enhancement case whereas the District Court imposed a career Offender enhancement from the maximum U.S. sentencing Commission guidelines range.

Relying on this courts opinion in Mathis-V- United states,136 S.ct 2243(S.Ct 2016); Descamps-V-United States,136 S.Ct 2276(S.Ct 2013) and a " unpublished "Third Circuit opinion in Chang-Cruz-V-AG U.S. 659 Fed Appx 114(3rd Circuit 2016) Where the Third Circuit relying on the U.S. Supreme Court's opinion in Mathis, asserted:

Mathis requires that, when "faced with an alternatively phrased statute," we must "determine whether its listed items are [alternative] elements," which must be unanimously found by a jury (or found by a judge at a bench trial) beyond a reasonable doubt to sustain a conviction, or instead are alternative "means" that a jury need not unanimously find. *Id.* at 2256. To make this determination, we consider whether the relevant jurisdiction's courts have spoken on the issue; whether the statutory alternatives carry different minimum or maximum punishments (in which case the alternatives are elements under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and its progeny); or whether there is some other clear indication in the statute. *Mathis*, 136 S. Ct. 2256. Absent any such indication, we may take a "peek" at parts of the record, such as the indictment or jury instructions. *Id.* (quoting *Rendon v. Holder*, 782 F.3d 466, 473-74 (9th Cir. 2015) (Kozinski, J., dissenting from denial of reh'g en banc)). These sources might "indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of *elements*," or else charge several of the statutory alternatives, which "is as clear an indication as any that each alternative is only a possible *means* of commission." *Id.* (emphasis added). If the statute, case law, and record do not "speak plainly," then the record "will not be able to satisfy [the] 'demand for certainty' [needed] when determining whether a defendant was convicted of a generic offense." *Id.* (quoting *Shepard v. United States*, 544 U.S. 13, 21, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005)).

Turning to the statutes before us, the Government concedes that if *Mathis* applies**{659 Fed. Appx. 118}** (which it does3), we cannot conclude that Chang-Cruz was convicted of an aggravated felony because it is not "certain[]," *see id.*, whether "distribution" and "dispensing" in § 2C:35-7 constitute alternative elements or alternative means. *See* Oral Arg. at 23:05 (argued July 12, 2016). If they are both elements, we may apply the modified categorical approach to determine the elements of Chang-Cruz's conviction. If they are both means, there is one element satisfied by either distribution or dispensing, in which case § 2C:35-7 sweeps more broadly than § 860, which criminalizes distribution but not dispensing.4

We agree with the Government. First, neither we nor the parties have uncovered any case clearly holding that distribution and dispensing are alternative elements, but we have found suggestions to the contrary-namely, cases that appear to treat distribution and dispensing as alternative means of fulfilling a single element. *See, e.g.*, *State Maldonado*, 137 N.J. 536, 645 A.2d 1165, 1185 (N.J. 1994) (upholding, on other grounds, a jury stating that, "to find against [the defendant] on this element, the State must prove knew that it was cocaine and intended to *distribute or dispense* it to [another]" (em added)); *State v. Wilkinson*, 126 N.J. Super. 553, 316 A.2d 6, 8 (N.J. App. Div. 1973) (concluding that was sufficient evidence to prove that the defendant was guilty of "possession of marijuana with intent to distribute or dispense it").

Second, Chang-Cruz's judgments of conviction indicate that he was convic "DISPENS[ING]/DISTRIBUT[ING]" drugs within 1000 feet of a school, J.A. 91, while his indictments charge him with "dispens[ing] or distribut[ing] marijuana" a "possess[ing] with intent to dispense or distribute marijuana," J.A. 93, 96. This is clear an indication as any that each alternative," distribution and dispensing, "is on possible means of commission, not an element that the prosecutor must prove to a beyond a reasonable doubt," *Mathis*, 136 S. Ct. at 2257.

Petitioner contends that the District Court was not permitted to apply the Modified Categorical Approach, whereas, the third Circuit in Chang-Cruz, provided a clear answer that 2C:35-7 of the New jersey Statue " Dispensing and distribution of drugs " wihtin" 1000 feet of a school property or a school bus or while on any school bus " Is a possible " Means " of commission, not an element that the prosecutor must prove beyond a reasonable doubt,Mathis, 136 S.ct at 2257. Thus, Petitioner contends that the District Court violated Mathis, when it Peeked at the record documents for the sole and purpose of determing whether the listed items[136 S.ct 2257] are elements of the offense.

In Descamps, This court further stated that a Statue is not divisible if it simply provides alternative " Means " of satifying an element of the crime, see mathis 136 S.ct at 2251, also Chang-Cruz 659 Fed Appx 118, Distribution and Dispensing " Is a Possible " means" of commission, not an element" Mathis, 136 S.Ct at 2257.

In reference to the " Arizona " conviction " It was concluded" by the District Court Judge , that Petitioner was convicted of a statue that provides an " Offer To Sell ' elements ARS 13-3405 (A)(4) which is a means of commission of the offense.

It is conceded by the government that because Petitioner was on probation on the Arizona prior offense, when he committed the instant offense, the Arizona prior may not be a prior for Career Offender enhancement.

In reference to the "New Jersey " prior conviction. it was well settlet and a clear indication by the third Circuit that distribution and dispensing drugs within 1000 feet of a school property or aschool bus or while on any school bus are possible means of commission of the offense,not alternative elements that the government must prove to a beyond a reasonable doubt, Mathis, 136 S.ct at 2257.

It is clear that because the " State " Law ,as well as the Third Circuit, clearly provides tha 2C:35-7 is "Indivisible", The District Court may not apply the Modified Categorical Approach, Descamps, 136 S.Ct at 2282[186 L.Ed 2d 461]; Mathis,136 S.Ct at 2251 provides:

> 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 **{136 S. Ct. 2257}** are] element[s] of the offense." *Rendon* v. **{195 L. Ed. 2d 620}** *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 make further use of the materials, as previously described, see *supra,* at ___ - ___, 195 L. Ed. 2d, at 616-617.) 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 ___, 133 S. Ct. 2276, 186 L. Ed. 2d 438, 458-459. 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, 125 S. Ct. 1254, 161 L. Ed. 2d 205. But between those documents and state law, that kind of indeterminacy should prove more the exception than the rule .

It is also well settled that the prior offenses are indivisible and set forth " Means" of commission and do not remove them from the protection of the privilege for the petitioner in a criminal case and deprives petitioner of due process of law, if his sentence is found in whole or in part upon Indivisible or overbroad statues, without regard to the precedent set by this court in

Mathis and Descamps, and where there is ample evidence to support petitioners claims.

In reaching it's decisions to affirm, The Courts below decided that these settled prociples were not to be applied to this case because:

(1) unlike the statue in texas 481.002(8) , an offer to sell is an alternative element rather than a alternative means .

2. In the courts opinion offering ti sell is indistinguishable from attempting to sell, as defined in application note.1 which would place the offer to sell element of A.R.S. 13-3405(A)(4) within the guidelines definition of a controlled substance.

3. Even without the 2011 Arizona conviction Petitioner qualifies as a Career Offender by use of any two of the three other prior predicate offenses.

4. In reference to the 2003 New Jersey prior offense the District court erred when it concluded that the Change-Cruz argument is meritless finding that defendants violation of N.J.S.A. 2C:35-7 was for violant felonies only and not a controlled substance case.

Petitioner asserts that the District Court incorrectly stated that the Chang-Cruz court found that his conviction under 2C:35-7 qualified as a controlled substance under Federal Sentencing guidelines, Whereas, the Court actually found " As in petitioners case" that the record does not satify the demand for certainty" necessary to conclude that Chang-Cruz was convicted of distribution or possessing with intent to distribute instead of dispensing or possessing with intent to dispense,Mathis, 136 S.Ct at 2257,and therefore we cannot conclude that he was convicted of a generic federal offense, Chang-Cruz,659 Fed Appx 119.

Petitioner is entitled to a Certificate Of appealability and respectfully urges that all aspects of the lower courts are erroneous and at variance with this court's decisions as explained in the arguments below.

Warner contends that the courts below erred in affirming the sentence on the basis that he was correctly sentenced as a Career Offender,because he had at least two prior qualifying controlled substance Offenses, as defined under 4B1.2(b).

In violation Of Petitioners 5th and 14th Amendment(s) to the United States Constitution.

PETITIONERS PRIOR "ARIZONA" CONVICTION

The facts that because " A.R.S. 13-3405 contains "Offer To sell" as an element, it is "Broader " than the guidelines definition and cannot qualify as a predicate offense, Mathis 136 S.ct at 2251, Descamps,L.ED HR 21.

PETITIONERS PRIOR NEW JERSEY CONVICTION

The fact that the third Circuit " Who has relevant Jurisdiction on this issue" has spoken on the issue and concluded " That a conviction for" Distribution and Dispensing a controlled substance on any school propperty or within 1000feet of such school property or a school bus,or while on any school bus, constitutes "Alternative Means" of fulfilling a single element, not an element that the prosecutor must prove to a beyond a reasonable doubt,Mathis, 136 S.Ct at 2257.

The fact that the case law in Chang-Cruz satifies the demand for certainty[needed] when determing whether a defenadnt was convicted of a generic offense, Quoting Shepard-V-United States,125 S.Ct 1254(2005), Also see Chang-Cruz 659 Fed Appx 119. Id.

The fact that the state law provides clear answers , the District Court" Should Not" have peeked at the record of the prior conviction for the purpose and limited purpose of determining whether the listed items are elements of the offense, Mathis 136 S.ct 2257, Also,see, Chang-Cruz 659 Fed Appx 118, Citing, State-V-Maldonado, 137 N.J. 536,645 A 2d 1165,1185(N.J. 1994); State-V-Wilkinson,126 N.J. Super 553,316 A.2d 6,8,(N.J. App Div 1973),

Both establishing that "Distribution and Dispensing" as "alternative Means" of fulfilling a single element, Descamps 570 U.S. at 136 S.Ct 2276 ,458-459 [L.Ed HR 22].

The fact that N.J. 2C:35-7 is" Indivisible " and set forth alternative "means" the District Court could not apply the Modified Approach for determing if prior conviction qualifies as a predicate felony Descamps [LEd HR 24].

V. The Court Of appeals erred in affirming the sentence by finding that Petitioners 28 U.S.C. 2255 motion should be dismissed and accordingly denied a Certificate Of Appealability.

In it's opinion The Court Of Appeals seems to hold that Petitioner has not shown a substantial showing of the denial of a Constitutional Right, This is clearly erroneous in light of this Courts decisions in Mathis-V-United States,136 S.Ct 2243,2253-54 (2016); Descamps-V-United states,133 S.ct 2276(S.Ct 2013).

The Distrcit Court below decided that the Arizona Statue A.R.S. 13-3405" Possession To Sale and offer To Sell Marijuana" is "divisible"rather that " Indivisible" The Court also found that " offer To Sale" under Arizona Statue " contrary" to this Courts decisions are " Alternative Elements" rather than " Alternative Means" of comnmission of the offense.

A. The Categorical and Modified Categorical Approaches

In determining whether a prior conviction is a predicate offense triggering an enhancement under the sentencing guidelines, the Court "approach[es] the issue categorically, looking 'only to the fact of conviction and the statutory definition of the prior offense.'" **United** States v. Dozier, 848 F.3d 180, 183 (4th Cir. 2017) (quoting **United** States v. Cabrera-Umanzor, 728 F.3d 347, 350 (4th Cir. 2013) (quoting in turn Taylor v. **United** States, 495 U.S. 575, 602, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990))). Under this categorical approach, the Court looks solely at the elements of the state criminal law, not at the defendant's actual conduct in committing the crime. Id. A prior conviction is a predicate offense if the elements of the relevant statute "'correspond[] in substance' to the elements of the enumerated offense." Id. (alteration in original) (quoting Taylor, 495 U.S. at 599). In addition, if the statute of prior conviction provides various "means" of satisfying an element, some of which would fall within the guideline definition, and at least one other that would not, it is broader than the guideline definition and is not categorically a predicate offense. See Mathis v. **United** States, 136 S. Ct. 2243, 2253-54, 195 L. Ed. 2d 604 (2016).

Accordingly, "[t]he prior conviction qualifies as [a predicate offense] only if the statute's elements are the same as, or narrower than, those of the [guideline definition]." Descamps, 133 S. Ct. at 2281. That is to say, if a defendant could be guilty of a violation of the statute of prior conviction by satisfying an element not present in the guideline or generic definition, it is not a predicate offense. Mathis, 136 S. Ct. at 2251 ("[A] state crime cannot qualify as [a] predicate if its elements are broader than those of a listed generic offense.").

If the statute of prior conviction is "divisible," that is, it "list[s] elements in the alternative[ ] and thereby define[s] multiple crimes," the Court may apply the modified categorical approach. Id. (quoting Mathis, 136 S. Ct. at 2249) (second alteration in original). Under this approach, courts may "consult 'a limited class of documents'-otherwise known as Shepard documents-'to determine what crime, with what elements, a defendant was convicted of.'"1 Id. (quoting Mathis, 136 S. Ct. at 2249). The modified categorical approach, however, should be used only in the limited circumstances where the statute of prior conviction lists elements in the alternative, thereby creating a question as to which alternative element formed the basis of the conviction. Id. (citing Decamps. v. **United** States, 133 S. Ct. 2276, 2283, 186 L. Ed. 2d 438 (2013). A statute is not divisible if it simply provides alternative "means" of satisfying an element of the crime. See Mathis, 136 S. Ct. at 2251.

ARIZONA PRIOR

In it's opinion , The Court Of Appeals , seem to hold "Contrary" to this Courts decision in Mathis and Descamps, " If a State Statue of a prior conviction provides various" Means" of satifying a element, and even if the statue is " Broader" than the guidelines definition , it is categorically a predicate offense, Mathis,136 S.ct at 2251.

NEW JERSEY PRIOR

In it's opinion ,The Court Of Appeals seem to hold " Contrary" to this courts opinion, that a State Statue is " Divisible" if it simply provides " alternative Means " of satisfying an element of the crime, Descamps,133 S.Ct 2276(2013); Mathis, 136 S.ct at 2251.

The District Court as-well as the Court Of Appeals erred when they decided that Petitioner was correctly sentenced as a Career Offender, because he had at least two prior qualifying controlled substance Offense under 4B1.2(b). This is very close after the fact reasoning concerning a Constitutional Claim, Petitioner can find no other authority that has so limited the thrust of Descamps and Mathis.

VI. The U.S. Supreme Court issued it's opinion in Mathis-V-United States, 136 S.Ct 2243(2016). That opinion sets forth how a Court determines whether a statue is Divisible or indivisible and therefore whether in employing the Modified Categorical Approach, Documents pertaining to the prior conviction may be used to ascertain if that conviction comes within a federal definition of an offense or has the elements of an enumerated offense.

The decision in Mathis plainly and unmistakable leads to the conclusion that the definition of " Offer To Sell ' in A.R.S. 13-3405 as authoritatively interpeted by the Arizona court of Appeals Rosas-Castaneda,655 F.3d 875(9th Cir 2010) sets forth varies "Means" of committing an offense and does not set forth in the disjunctive seperate offenses.

The U.S.Supreme Court in Mathis,136 S.Ct 2243(2016);Chang-Cruz 659 Fed Appx 114(3rd Cir 2016); State-V-Maldonado,137 N.J. 536 645 A.2d 1165, 1185(N.J. 1994); and State-V-Wilkinson,126 N.J.Super 553,316 A.2d 6.8.(N.J. App Div 1973) leads to a clear answer that each alternative Distribution and Dispensing marijuana under 2C-35-7 are both "Possible Means" of commission ,not an element that the Prosecutor must prove to a beyond a reasonable doubt, see Cruz [659 Fed Appx 118] ,see also Mathis,136 S.Ct at 2257, Therefore, the District Court" Could not " look to the record" documents to determine whether the listed items[136 S.Ct 2257] are elements of the offense.

The New jersey court has established that 2C-35-7 sets forth Alternative phased law,not one that list multiple elements disjunctively, but instead one that enumerates varies factual means

of committing a single element, see generally Schad-V-Arizona, 501 U.S. 624,636,111 S.Ct 2491,115 L.Ed 2d 555(1991); Mathis 136 S.ct 2249,Id " legislature frequently enumerate alternative means of committing a crime without intending to define seperate elements or seperate crimes'In Mathis the Court explained that:

> 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, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (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 **{195 L. Ed. 2d 612}** qualify. See *Descamps*, 570 U. S., at ___, 133 S. Ct. 2276, 186 L. Ed. 2d 438, 458; *Richardson*, 526 U. S., at 817, 119 S. Ct. 1707, 143 L. Ed. 2d 985. 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 ___, 133 S. Ct. 2276, 186 L. Ed. 2d 438, 457 (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.
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> **{136 S. Ct. 2250}** 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.

That in the case at bar, Warner 's 2003 New Jersey Conviction was based on a violation of N.J.S.A. 2c-35-7 for " Possession with intent to distribute Cocaine within 1000 feet of a school property or bus. the statue provides that:

> Any person who violates subsection a of N.J.S 2C:35-5 by distributing, dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog " While " on any school property used for school purposes which is owened by or leased to any elementary or secondary school or school board,or within 1,000 feett of such property or a school bus or while on any school bus, is guilty of a crime of third degree and shall ,except as provided in N.J.S 2C:35-12 be sentenced by the court to a term of improsonment.

Warner contends that this is exactly the kind of situation stated in Mathis [195 L.Ed 2d 612] and Descamps.570 at____133 S.Ct 2276,186 L.ed 2d 438,458,Richardson,536 US at 817,119 S.Ct 1707,143 L.Ed 2d 985. That because New Jersey statue also list the offense is carried out while " Within 1,000 feet of a school or bus" Not only is it " Broader" than the guidelines definition of a controlled substance it merely specifies a diverse " means" of satifying a single element of a single crime or otherwise spells out various factual ways of committing some component of the offense, see Mathis, Citing Descamps 570 U.S. at____133 S.ct 2276,186 L.Ed 2d 438,457 describing "means" for this reason,as legally extraneous circumstances and similary to bring the discussion back to Burglary, A statue might indeed,as soon discussed . Iowa burglary law. As well as in the case at bar' The New jersey law" does itemize the various places that crime could occur, suc as a school property or school bus, as disjunctive factual scenarios rather that seperate elements

That in Petitioners case the District Court Judge stated " It is clear from this statutory language that Warner's New Jersey conviction qualifies as a predicate offense, because the New Jersey statues elements are the same as or narrower than those of the guidelines definition ,citing Descamps 133 S.Ct at 2281.

Warner contends that the Mathis case points to a different view surrounding his situation, see Mathis, Id,where the court held:

> 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 ___ - ___, 195 L. Ed. 2d, at 612. Under our precedents, that undisputed disparity resolves this case. **{LEdHR7}**[7] 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, 110 S. Ct. 2143, 109 L. Ed. 2d 607. How a given defendant actually perpetrated the crime-what we have referred to as the ``underlying brute facts or means" of commission, *Richardson,* 526 U. S., at 817, 119 S. Ct. 1707, 143 L. Ed. 2d 985-makes no difference; even if his conduct fits within the generic offense, the mismatch of elements saves the defendant from an ACCA sentence. Those **{195 L. Ed. 2d 614}** 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.

Warner contends that this Court " as it did " in Mathis should avoid any inquiry into the underlying facts of the particular offense and look solely to the elements of New jersey's statue 2C-35-5, as defined by State law, Mathis.136 S.Ct 2252, and most recently in Descamps, The key is elements , not facts, 570 US at____ 133 S.Ct 2276, 186 L.Ed 2d 438.451.

Warner contends that because the elements of New Jersey Statue 2C-35-7 are " Broader" than those of the controlled Substance definition ,his conviction under that statue or law cannot give rise to a Career Offender Sentence, Mathis, Id.

CAREER OFFENDER 4B1.1

(a) a defendant is a Career Offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction(2) the instant offense is a felony that is either a crime of violence or a controlled substance offense and (3) the Defendant has at least two prior felony conviction of either a crime of violence or a controlled substance.

In fact because Warner's Arizona conviction and his 2003 New Jersey prior offense are not Controlled Substances as definded by 4B1.1, the District Court and the Court Of Appeals rendered a unfair conclusion under the facts of this case.

Although Warner's counsel failed to object to the use of the priors(Petitioner did indeed object to the use of the Priors to establish him as a Career Offender).

Warner and his counsel never deliberately allowed these priors in evidence as a deliberate design or as a strategic trial choice. Their admissions was vigoraously objected to on the grounds that in light of Mathis and Descamps, and given the State of law as it had been laid down in the aforementioned cases. This was the only reasonable objection(s) that could be made to their admission at the time of filing a 2255 pleading.

VII. THE QUESTION(S) RAISED IN THIS PETITIONARE IMPORANT AND UNSESOLVED.

(1) Did the District Court and the Fourth Circuit Court Of Appeals findings result in a decision that was (1) Unreasonable in light of the evidence presented and(2) Contrary to clearly established Federal law as determined by the U.S.Supreme Court in Mathis And Descamps.

(2) Can a Prior conviction under state criminal statue(s) whose(s) plain terms sweep in more conduct than a corresponding Federal Statue be a "Categorical Match With That Federal Offense.

(3) Is school property and School buses in New Jersey Statue N.J.Stat Ann 2C-35-2 " alternative Locational elements or Means and is School Property used for school Purposes in 2C-35-7" Broader " than real Property Comprising a school as defined under 21 U.S.C. 860, in light of Mathis

(4) Does this petition present a more fundamental question for review- May a prior convcition that is based on a state statue that is " Indivisible " " Overbroad " and that provides varies " Means " of satifying an element be a predicate offense,and can a court use the prior state conviction to trigger an enhancement under the sentencing guidelines.

This court has always held in the negative, and the decision of the Fourth Circuit is sufficiently unusal that it is important that this court reiterate this principle by applying Mathis and Descamps to this case.

CONCLUSION

The Judgement below is a unique departure from decision(s) of this court that require that prior convictions based on "Indivisible" and " Overbroad " state statues can not qualify as predicate offenses to trigger an enhancement under the guidelines ,as such, it represents to the Constitution and the decisions of this court that were designed to protect a citizen from being convicted by the government threw the use of Non-qualifying prior State Offenses..

The Petition For Writ Of Certiorari should Be GRANTED.

Respectfully Submitted

Arthur Warner

Arthur Sean Warner, petitioner

Date April 15,2018