18-7966

IN THE SUPREME COURT OF

THE UNITED STATES

Original Case No. 2:17-CV-10992GCS MLM

No. 17-1663

DEMOND SMITH,

Petitioner,

v.

J.A. TERRIS,

Respondent.

ON THE WRIT OF CERTIORARI TO THE

SIXTH CIRCUIT COURT OF APPEALS

PURSUANT PETITIONER'S 28 U.S.C. § 2241

QUESTIONS FOR REVIEW

Whether the ACCA's definition of a "serious drug offense" imposes a sentence enhancement or make an exception when a state's definition of "delivery and manufacture" makes a match with its generic offense by its use of specified means to satisfy its element without constitutional violations?

Whether the ACCA imposes a sentence enhancement when a state's prior crime of conviction criminalizes "attempt" and "delivery" disjunctively in satisfying its relevant offense? Yet still create a match within the generic offense when the conduct itself is criminalized under its statute to a five-year maximum sentence without violating Petitioner's constitutional rights?

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CITATIONS OF OPINIONS AND ORDERS IN CASE

Petitioner recently challenged the imposition of his federal sentencing enhancement under the Armed Career Criminal Act pursuant to 28 U.S.C. § 2241. In 2013, Petitioner plead guilty to being a felon in possession under 18 U.S.C. § 922(g), thus subject to a 15-year minimum penalty under the ACCA (United States v. Smith, 2:12-CR-20103). Petitioner filed an appeal; the Sixth Circuit dismissed the appeal as untimely (ECF No. 62). He thus petitioned the court in the form of a Motion to Vacate his sentence under 28 U.S.C. § 2255, which the court also denied (ECF No. 84). Smith thus filed a Motion to Amend or Correct under Rule 59(e) (ECF No. 87), and also a Certificate of Appealability, which also both were denied (ECF No. 94). The appeals court granted a COA for Petitioner, and thus while pending, Smith sought to amend his 28 U.S.C. § 2255 to assert his newly based claims based upon Mathis v. United States, 136 S. Ct. 2243, 195 L.Ed.2d 604 (2016). The court construed it as a request for a second and successive motion (ECF No. 97). On March 13, 2017, the Sixth Circuit Court of Appeals dismissed the request (ECF No. 99). Petitioner thus raised the instant and same claim here as he did in the initial 28 U.S.C. § 2241 that in this court decision, post-Mathis, it invalidates his sentence enhancement based upon the non-qualifying prior predicate conviction of the Michigan statute "unlawful delivery/manufacture."

Opinion and Order dismissing without prejudice the petition of Habeas Corpus - Smith v. Terris, 2017 U.S. District Lexis 25966 (6th Cir. 2017)

Opinion and Order dismissing petition for Writ of Habeas Corpus - Smith v. Terris, 2017 U.S. Dist. Lexis 73922 (6th Cir. 2017)

Order denying appeal of 28 U.S.C. § 2241 - Smith v. Terris, 2018 U.S. App. Lexis 2785 (6th Cir. App. 2018)

Order denying Petition for Rehearing and Rehearing En Banc - Smith v. Terris, 2018 U.S. App. Lexis 19240 (6th Cir. App. 2018)

JURISDICTIONAL STATEMENT

The judgment of the U.S. Court of Appeals for the Sixth Circuit Court was entered on February 2, 2018, regarding Petitioner's initial 28 U.S.C. § 2241. Both rehearing and rehearing en banc petitions were filed with the court. See, Smith v. Terris, 2018 U.S. App. Lexis 2785 and 2018 U.S. App. Lexis 19240 (6th Cir. Appls. 2018). Petitioner thus invokes the jurisdiction of the Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amendment VI

18 U.S.C. § 922(g), felon in possession

18 U.S.C. § 924(e), ACCA

Michigan CSA 333.7401(1) and 333.7401(2)(a)(4)

M.C.L. 750.92, attempt statute

U.S.S.G. §§ 4B1.1/4B1.2, Career Offender statute

STATEMENT OF THE CASE

I. Course of proceedings in the 28 U.S.C. § 2241 case now before the Court.

In March of 2017, in a case pending in the U.S. District Court for the Sixth Circuit, Petitioner, post-Mathis v. United States, 136 S. Ct. 2243, 2016, submitted a 28 U.S.C. § 2241 stating his innocence of the ACCA enhancement due to the unconstitutional imposition of the "modified categorical approach" leading past the ten-year maximum sentence of 18 U.S.C. § 922(g). This was thus due to the prior offense of (MCL 333.7401) delivery/manufacturing conviction no longer qualifying as a "serious drug offense" and non-divisible as an element into the generic offense to satisfy his sentence enhancement under the ACCA. The district court thus forwarded to the Court of Appeals where Petitioner again reiterated his issue in light of Mathis and the structured frameworks of the Fifth Circuit Court of Appeals case precedent of United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016). He further petitioned the court to amend based on what he thus discovered as the element of "attempted delivery" of the Michigan statutes to thus be broader in its prior use to enhance Defendant past ten years. Petitioner was thus denied February 2, 2018, both rehearing and rehearing en banc were sought and no judge of panel rendered a vote in Petitioner's favor and was thus denied July 12, 2018, where Petitioner states he is exhausting his final decision to the hands of this Court, where he seeks through a Writ of Certiorari the relief of the ACCA enhancement to a sentence at or thus under the ten-year maximum of 18 U.S.C. § 922(g), felon in possession. Petitioner further humbly requests the Court to review this Petition in a manner less stringent than if a qualified attorney presented this motion, citing Haines v. Kerner, 404 U.S. 519, 520 L.Ed.2d 652 (1972).

II. Relevant facts concerning the underlying unconstitutional conviction of the ACCA.

Petitioner states that the conflict of interest lies in the Sixth Circuit's opinion that the definition of a "serious drug offense" creates a match to the Michigan Controlled Substance Act of "delivery/manufacturing" to create an enhancement for the ACCA despite its unconstitutional use of "means" to satisfy its elements. The Sixth Circuit's analysis of a qualifying prior predicate offense for the ACCA inverts the statutory interpretation of Mathis and Descamps in what Petitioner believes to be a non-bearing impact in that circuit in its ability to distinguish elements from means in a definition's listings of a serious drug offense. United States v. Mathis, 136 S. Ct. 894; 193 L.Ed.2d 788 (2016); also, Descamps v. United States, 133 S. Ct. 2276 (2013). Mathis plainly and unmistakably leads to the conclusion that the definition of "unlawful delivery/manufacturing" (333.7401(2)(a)(4)) as authoritatively interpreted by Michigan "jury instructions" and "case law" sets forth various multi-theory means of committing the offense and does not set forth separate disjunctive elements of the offense. The longstanding principals of this Court in Mathis states that, "in no uncertain term that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense." Taylor v. United States, 495 U.S. 602, 110 S. Ct. 2143, 109 L.Ed.2d 607. How a defendant actually perpetrated the crime what we have referred to as the underlying "brute facts or means" of commission, Richardson, 526 U.S. 817, 119 S. Ct. 1707, 143 L.Ed.2d 95, makes no difference; even if his conduct fits within the generic offense, the mismatch of elements saves him from an ACCA enhancement. Petitioner further argued under the same structure and same basis of Mathis and Descamps that Michigan courts treat its "delivery" elements in violation of the generic offense of delivery or any listed serious drug offense by treating its alternative elements as factual means, or as the state defines them as multi-theory ways of committing the offense. It allows a jury to avoid any

discussion of the specific factual details of each violation which covers up a wide range of disagreements amongst jurors about what the defendant did or did not do and thus as discussed allows prosecution to prove multiple violations. Schad v. Arizona, 501 U.S. 624, 115 L.Ed.2d 555. Petitioner states that the relevant element of the offense of conviction "unlawful delivery/manufacturing" of MCL 333.7401(1) creates an indivisible statute when the jury need not agree on anything past the fact that the statute was violated. Any statutory phrase that explicitly refers to multiple alternative means of commission must be regarded as indivisible. And, only when the law requires that in order to convict the defendant, the jury must unanimously agree that he committed a particular substantive offense contained within a disjunctively worded statute is a court able to conclude that the statute contains alternative elements and not means. The Sixth Circuit further fails to realize or yet just acknowledge that the alternate elements must create at least one category or form of an offense that matches up to the elements of the generic federal offense in question. After reading the stated facts, the Court will see that the listed acts of delivery/manufacturing does not require the necessary "jury unanimity" required and a person is charged with three multi-theories of committing the broader offenses of delivery, that Michigan laws distinctively separate its list of crimes into two categories in order to convict and determine the rights of one person as far as jury unanimity goes in the court of law. Petitioner states he has thus included authoritative sources of state law that shows Michigan's application to the use of that statute includes a "general intent crime" which under "delivery/manufacturing" offenses a jury need not find the elements unanimously agreed upon to the finding of a single offense in its statute and further use of the Michigan Criminal Jury Instructions for determining what has and what has not to be proven to convict under the listed prior

predicate offenses of "delivery/manufacturing", MCL 333.7401(2)(a)(4). Further relevant facts concerning Petitioner's conviction is that the alternative element of "delivery" itself criminalizes thus broader conduct than its generic offense by its criminalizing the use of attempt (attempted delivery) and also "sharing" based on facts that attempted delivery and sharing under Michigan's laws disjunctively charge a defendant with separate elements to define and satisfy its statutory definition of "delivery." Attempt is criminalized by its own separate statute (750.92) and is subsumed in the definition of delivery and when combines creates a maximum penalty of five years. To find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state's statute's language. It requiers a realistic probability, not a theoretical possibility, that the state would apply its statute to conduct that falls outside the generic definition of a crime. People v. Schultz, 246 Mich. App. 695, 704, 635 N.W. 2d 491 (2001)(sharing a controlled substance in a social setting can satisfy the delivery element); People v. Brown, 163 Mich. App. 273, 413 N.W. 2d 766 (1987). The court found that the statutory definition of delivery was satisfied by the social sharing of a drug, evidence of delivery was sufficient to support a bind over. Petitioner factually believes the lower courts applied the modified categorical approach without engaging in the two-part analysis thus contravening this Court's repeated structure to consider the elements of the offense. Mathis, 136 S. Ct. at 2252. Under Michigan law, a defendant can be held liable for an attempt due to mere preparation or other preliminary acts such as substantial steps toward completion of any crime that constitutes "attempt"; but even then, all listed acts are means, nothing directly categorized to any controlled substance act of Michigan law. Petitioner states it could thus be concluded that Michigan delivery is not a categorical match for the generic definition of delivery or any other listed offense.

Existance of Jurisdiction

III. Petitioner states that jurisdiction exists in the above matter sought under U.S.C. § 1254(1)(2), also under Part III Rule 10(a)(c) under the jurisdiction on Writ of Certiorari, under what Petitioner believes to be thus compelling reasons for review:

The Sixth Circuit Court of Appeals rendered an opinion in Petitioner's 28 U.S.C. § 2241 Habeas petition in a manner that conflicts with the structured opinion in Mathis v. United States, 136 S. Ct. 2243 (2016), by rendering Petitioner's prior predicate offense as qualifying as a "serious drug offense" under the § 924(e) ACCA enhancement by the relevant offense of the Michigan Controlled Substance Act "unlawful delivery and manufacturing" where the Petitioner has shown the state convicts a person under those listed offenses by the use of alternative factual means of committing the offense under the scope of the modified categorical approach, bearing a thus substantial conflict to Petitioner's Sixth Amendment rights allowing him to be sentenced past the statutory maximum of § 922(g) to a sentence of ten years or less. The Sixth Circuit further opined in the final decision of Petitioner's § 2241 that his offense of delivery qualifies as a predicate offense to support his ACCA sentence enhancement post-Mathis based no upon Mathis, but United States v. Tibbs, 685 F. App'x 456, 459, 462-63 (6th Cir.), a case based upon the career offender advisory guidelines, U.S.S.G. § 4B1.2, allowing the Sixth Circuit to be still in violation of what is structured by the Court for properly applying the "modified categorical approach" to determine under the definition of a serious drug offense if Petitioner's prior predicate lawfully saves him from an enhanced sentence.

The Sixth Circuit court's application of the modified categorical approach as instructed by the Court to determine an elements-or-means offense for determining what qualifies as a "serious drug offense" is very out of line with normal

judicial standards. Petitioner believes that Supreme Court instruction is required being there lies no unified ruling that the Sixth Circuit is willing to adopt outside its non-published opinion in Tibbs. The Sixth Circuit is in conflictive error with Michigan state laws based upon how the authoritative sources of law criminalize a vast majority of controlled substance offenses by the use of means to satisfy the elements. The Sixth Circuit remains in a dispute with the Fifth Circuit Court of Appeals in United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016), which also defined an identical "delivery" element as being overly broad by its use of means after Mathis and could not be applied to an enhanced sentence. They further used the analysis of Mathis in determining that the identically phrased statute used means and thus did not categorically match under the instructed use of the modified categorical approach, rendering its relevant offense broader than the generic offense, the exact basis of Petitioner's § 2241 surrounding his decision based upon Mathis and the analysis of Hinkle, upon which Petitioner believes entitles the Court to the greater existance of jurisdiction to instruct the lower courts on a unified decision of the categorical finding of a "serious drug offense" under the § 924(e) ACCA enhancement, where failure to do so he believes will continuously affect the fairness and reputation of judicial proceedings of this Court.

IV. The Court of Appeals has decided the federal questions in a way that conflicts with the applicable decisions of the Court after Mathis being that Mathis is based upon the correct application of the "modified categorical approach." The Sixth Circuit seems to believe that not only under the erroneous application of the "modified categorical approach" but under the § 4B1.2 Career Offender statute based on a non-published case law of United States v. Tibbs, 685 F. App'x 456 (6th Cir. 2012), does Petitioner's prior predicate for the ACCA

enhancement for a "serious drug offense" qualify. See panel's opinion, Smith v. Terris, 2018 U.S. App. Lexis 2785 (6th Cir. 2018). When compared to the definition of a "controlled substance offense" (§ 4B1.2), Petitioner states there lies a difference of opinions and believe the Court will agree also with the conflict of interest here where there lies a difference in the statutory definition of § 924(e) "serious drug offense" versus the guideline's definition. In Tibbs, he attacks the Michigan Controlled Substance Act as a whole based upon the inclusion of "create", thus made to say 333.7401 is not divisible and renders it overbroad in relation to the guideline's definition of a "controlled substance." Tibbs, ignoring the statutory definition of § 924(e)'s "serious drug offense", gives comparison to what has also resulted in a circuit conflict to United States v. Hinkle, 832 F.3d 569, 570, 576 (5th Cir. 2016), stating that as Petitioner argues, the court reasoned that the relevant portion of the statute was indivisible because the definition of "delivery" sets out various means of committing the singular offense of delivering a controlled substance rather than distinct elements of separate offenses, thus forth criminalizing a greater swath of conduct under the "advisory guidelines career offender" provision, all which was determined to be applied to the instructions of Mathis' court. The Tibbs court states he cited no Michigan law declaring that the relevant portion of 333.7401 provides alternative means rather than elements and secondly acknowledges Hinkle's court addressed only the word "deliver" and its definition. The conflict of the Sixth Circuit further lies right there where they believe Mathis nor Hinkle has no affect on Tibbs, nor the determination of identifying a prior predicate conviction under the definition of a "delivery" offense that would categorically fit within the generic offenses. The panel's opinion marks a substantial departure from the Court's prior practice of the modififed categorical approach, resulting in an incorrect outcome when determining the qualifying

offenses of a serious drug offense. Other circuits themselves have adopted Hinkle's decision for applying the relevant element of a state statute agreeing that Mathis is controlling in its use of identifying a "controlled substance" or "serious drug offense" even under the Career Offender Statute and Mathis is an ACCA offense. United States v. Madkins, 866 F.3d 1136 (10th Cir. App. 2017); United States v. Glass, 701 Fed. App'x 108 (3rd Cir. App. 2017); Perry v. Werlich, 2018 U.S. District Lexis 60693 (7th Cir. 2018); United States v. Thomas, 886 F.3d 1274 (8th Cir. App. 2018). Under Curney v. United States, 2017 U.S. Dist. Lexis 76546 (6th Cir. App. 2017), the Sixth Circuit recognized the same argument that Petitioner has been arguing that the Hinkle court concluded that the method used to "deliver" a controlled substance was a means, not an element, of the offense used to commit the Texas crime. And that the Hinkle court held, due to a mismatch of elements, his conviction criminalizes a greater swath of conduct. They acknowledged that the Hinkle decision rested upon the Texas definition of "delivery" compared to the generic federal definition but its further use of means. (Petitioner cites the same opinion of court in Tibbs, 685 Fed. App'x 456.) Petitioner states that the Sixth Circuit Court of Appeals and district courts have a continuing and erroneous understanding of the law for a prior predicate for the use of an ACCA enhancement past the statutory maximum of felon in possession. Petitioner states that the fact that neither courts has stated any authoritative case law or opinion directed precisely to Petitioner's arguments regarding the ACCA, being that no circuit can overturn another circuit's opinion or case precedent other than the circuit itself or the Supreme Court itself, Petitioner humbly pleads and prays the Court vacate and remand Petitioner's sentence and remand to the lower court with an instructed opinion thus identifying the merits of Petitioner's claim as to his Sixth Amendment violation by the state's use of means to satisfy its elements, based upon Mathis v. United States, 136 S. Ct. 2243 (2016).

ARGUMENTS FOR ALLOWANCE OF WRIT

Ground One

I. The Sixth Circuit Court of Appeals erred in allowing the affirmation of Petitioner's conviction of "delivering/manufacturing" on the basis that they allowed outside the ACCA § 924(e)'s definition of a "serious drug offense" an exception to the qualification of its statutory rules by performing an erroneous modified categorical approach resulting in an enhancement past the ten-year statutory maximum of 18 U.S.C. § 922(g). The use of Petitioner's prior predicate convictions by itself stands to be non-qualifying and thus unconstitutional in its use under the ACCA's definition of a "serious drug offense." The relevant offense of conviction delivery/manufacture under Michigan's Controlled Substance Act statute lists multi-theories (means) of satisfying its alternative element knowingly or "unlawful delivery" based upon the opinion of Mathis v. United States, 136 S. Ct. 2243 (2016), under its list of related crimes, Congress urges courts to compare in this matter to the elements of the federal generic offense of "delivery." Petitioner's prior offense of "delivery" lists the same exact list of elements the generic offense lists: "the actual, constructive or attempted transfer[.]" The relevant offense of the Michigan statute when compared consists of "means" to satisfy its element. This Court in Mathis stated in a statutes listing of "means" the relevant offense is thus to be considered broader in comparison to a federal generic statute. Petitioner states to solidify the elements of "unlawful delivery/manufacturing." 18 U.S.C. § 921(a)(20) states that what constitutes a conviction for a crime under § 924(e) shall be determined in accordance with the laws of the jurisdiction in which the proceedings were held (emphasis). Petitioner followed by the opinion of Mathis distinctly deferred to state laws in determining that his conviction for "delivery" did not apply to an ACCA enhancement,

along with the alternative element of "manufacturing." Elements are the constituent parts of a crime's legal definition -- the things the prosecution must prove to sustain a conviction. At trial, they are what the jury must find beyond a reasonable doubt to convict the defendant. Citing, Richardson v. United States, 526 U.S. 813, 119 S. Ct. 1707 L.Ed.2d 985 (1999). As found in Mathis' reversal of his enhancement, Petitioner firmly argues that to satisfy the generic element of "delivery/manufacturing" at a trial, a defendant has no constitutional right to "jury unanimity" and thus under federal law its prior does not entitle Petitioner to an enhanced sentence nor does it categorically qualify under the ACCA's definition of a "serious drug offense." To apply as a categorical offense to the enhancement, the court must focus on whether the elements of the crime of conviction sufficiently match the elements of generic delivery only with the use of authoritative sources of state law or thus Shepard documents. See, Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254, 161 L.Ed.2d 205 (2005). Also, Descamps, where the court found that his conviction rested upon facts satisfying the elements of the generic offense. The court thus allowed the permitting of consulting extra-statutory documents, but only to assess whether the defendant was convicted of the particular statutory definition that corresponds to the elements of the generic offense. Descamps v. United States, 133 S. Ct. 2276, 2281 (2013).

Jury Unanimity

Post-Mathis' interpretation statutorily of a court's use of the modified categorical approach and determination of elements and means, M.C.L. 333.7401(1) does not allow "delivery/manufacturing" to list multiple elements disjunctively leading to the separate criminalizing of crimes, but the fact legislatures chose to enumerate factual means of committing the alternative elements saves Petitioner from an enhancement. See, Schad v. Arizona, 501 U.S. 624, 111 S. Ct. 2491 (1991).

Michigan law requires the prosecution to prove all the elements of "delivery/ manufacturing" separately to a jury, that all essential elements to the crimes listed have been proven beyond a reasonable doubt. Petitioner states he does now as he did for the lower courts, provide a list of authoritative sources of state law to allow the court to readily determine the nature of Michigan's alternatively-phrased list of statute's factual means of satisfying the delivery element by use of cited case laws of Michigan courts and Michigan Criminal Jury Instructions. The court in People v. Maleski, 220 Mich. App. 518, 560 N.W. 2d 71, 1996 (Appendix A), when it gave jury instructions that states it relies upon legislature's distinction in criminal cases by its use of "specific intent crimes" where it involves a particular criminal intent beyond the act done meaning it has separate elements to be found by a judge or jury beyond reasonable doubt. While delivery is a "general intent" crime that involves merely to just do the intended physical act, meaning a jury has no reason to agree on which act of transference of a controlled substance was committed. See, People v. Beaudin, 417 Mich. 570, 339 N.W. 2d 461 (1983). The court thus stated in People v. Edwards, 107 Mich. App. 767, 309 N.W. 2d 607 (1981); also, People v. Steele, 429 Mich. 13, 412 N.W. 2d 206; that "any act of transference" found satisfies the element of unlawful delivery. The same court thus ruled in People v. Tate, 134 Mich. App. 682, 352 N.W. 2d 297 (1984), that there was no manifest injustice where defendant sustained a conviction for delivery under the instructions of a "general intent crime." As a listed offense of M.C.L. 333.7401(1), a defendant is not charged before a jury with separate elements of a crime, but merely three separate theories (means) of satisfying the broader than the generic offense's elements. Elements at trial are what the jury must find beyond a reasonable doubt to convict a defendant, thus elements are the constituent parts of a crime's legal definition. In particular, "means" need neither be found by a jury nore admitted by a defendant. And, in no uncertain

terms, a state crime cannot qualify as an ACCA predicate if its elements are broader than those of the listed generic offense. Richardson v. United States, 526 U.S. 813, 143 L.Ed.2d 985 (1999). A state offense is a categorical match with a generic federal offense only if a conviction of a state offense would necessarily involve proving facts that would establish a violation of the generic federal offense. When a state criminalizes offenses that fall outside the federal generic definition, there is not a categorical match. Unlawful delivery instructs nothing as Maleski describes in its definition or the provision provided to a jury regarding any part of the actor's intent to be proven as an element apart from the act of delivery. Notice Criminal Jury Instructions, Chapter 12, Appendix B, under "Unlawful Delivery of a Controlled Substance" (CJ12d 12.2), the judge is to inform the jury in No. 7 that "delivery" means that a defendant transferred or attempted to transfer the substance to another person. The mere use of the disjunctive "or" in the definition of a crime does not automatically make or render it divisible. Only when the law requires that in order to convict the defendant, the jury must unanimously agree that he committed a "particular substantive offense" contained within the disjunctively-worded statute are we able to conclude that the statute contains alternative elements and not means. The alternative elements must create at least one category or form an offense that matches up to the elements of the generic federal offense in question. The distinct instructions of "unlawful manufacturing" (CJ12d 12.1) state that an allegation of manufacturing is acquired by its list of "specific acts" being more than one equal to a statute's means. Defendant Rhodus (People v. Rhodus, 477 Mich. 1034, 727 N.W. 2d 608 (2007)) was thus convicted under the "general intent" acts of M.C.L. 333.7401 under its relevant elements of "delivery/manufacturing" (See Appendix C). The court thus ruled "jury unanimity" is not required with regard to the alternate theory. Reliance upon this opinion is

based upon People v. Cooks, 466 Mich. 503, 511 N.W. 2d 275 (1994), where it was stated, "a trial court is not required to give a more detailed (specific) unanimity instructions merely because a single charge could be based on more than one underlying event." The critical inquiry is whether either party has presented evidence that materially distinguishes any of the alleges multiple acts from the others. In other words, where materially identical evidence is presented with respect to each act, and there is no juror confusion, a "general unanimity" instruction will suffice. (Id. at 512-513) Being that the statute's CSA 333.7401 lists multi-theory statutes, the Cooks court found them to be analytically distinct and falls actually in compliance with Richardson and Mathis courts that when a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternative theory. Cooks, supra at 515 n.16 (quoting People v. Johnson, 187 Mich. App. 621, 468 N.W. 2d 307 (1991). If the court looks at the other listed offense of "possession with intent to deliver," it distinctively prescribes that offense to be proven with a "specific intent." See, CJ12d 12.3 (use note 3)(Appendix B) noting a prosecutor must prove an element beyond the mere act of "delivery." Upon a peek of the documents, it should be clearly established that Michigan's drug statute lists "delivery/ manufacturing" as a "general intent" crime, and under state law proven to not be categorically divisible into the federal generic offense due to legislature's choice of means to satisfy its alternative elemetns in a jury trial. Petitioner further inverts the matter of opinion of the lower courts when they stated the Hinkle case has no bearing affect on Tibbs' case law precedent for the Sixth Circuit. Well at a peek of the jury instructions, even as Hinkle was invalidated by the broader means of "offering to sell," a further peek at CJ12d 12.2 "unlawful delivery" instructions commentary, it verifies that the alternative

element of 'M.C.L. 333.7401 can be satisfied by [sharing] the social sharing of a drug. When the defendant gave drugs to a prostitute for sex, it stated evidence of delivery was satisfied to support a conviction." See, People v. Brown, 163 App. 273, 413 N.W. 2d 766 (1987). Petitioner also enlightens the Court again with authoritative law showing the element of the offense further criminalizes a broader swath of conduct if you look at the Court of Appeal's decision in People v. Schultz, 246 Mich. App. 695, 704, 635 N.W. 2d 491 (2001), where it again was thus decided that "sharing of a controlled substance in a social setting can also satisfy the delivery element." Petitioner states that he has shown a clear as any indication that each alternative that was used to enhance him lists only possible means of committing those crimes, not an element that a jury must find unanimously. Between the documents shown and state law, it should be thus granted relief from the ACCA enhancement whereas if not as stated by the Court, it refuses to introduce inconsistency and arbitrariness into the ACCA qualifications, and Petitioner humbly asks that this Court continue to follow its requirements under the opinion of Mathis and state law to a sentence without an ACCA enhancement, whereas failure to do so will continuously result in an error sufficiently grave to be deemed a miscarriage of justice or a fundamental defect.

Imposing Violations of Sixth Amendment Rights

Petitioner firmly believes that this illegal imposition of the modified categorical approach by the use of a prior predicate offense of the ACCA's criminalizing a broader swath of conduct imposed by the Sixth Circuit's erroneous understanding of the law in its ability to separate means from elements in a statute brings into a violation of his Sixth Amendment rights under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). The only approach allowed for use of the modified categorical approach was to determine what crime with what elements played a part disjunctively, and to allow nothing

more than to determine if a jury necessarily had to find each element of the offense of delivery/manufacture and not as a means for discovering facts or means that possibly could have satisfied the elements of a generic offense. Descamps v. United States, 133 S. Ct. 2276 (2013). A further violation of the Petitioner's Sixth Amendment rights was developed by the courts when they used in their opinion to affirm his conviction for an ACCA enhancement, they used the non-qualifying application of the Career Offender Statute's § 4B1.2 definition of a controlled substance to satisfy lower courts' use of the modified categorical approach of the § 924(e)'s definition of Petitioner's listed non-qualifying "serious drug offense." Under the guidelines manual (2012 Nov. 1), looking at the Armed Career Criminal § 4B1.4, it specifically states at commentary application note 1: "It is to be thus noted that the definitions of 'violent felony' and 'serious drug offense' in 18 U.S.C. § 924(e) are not identical to the definitions of 'crime of violence' and 'controlled substance offenses' used in § 4B1.4 (Career Offender)." The lower courts apply their own two-step categorical approach: (1) the court identifies the state offense in its list of elements as the whole statute (333.7401(1)); (2) it then thus identified either the "serious drug offense" or "controlled substance offenses", then determines the two matches categorically if they have the same listed offenses and says it is thus considered to be divisible and thus the elements of the offense of conviction are the same as or narrower than the generic offenses. Sixth Circuit seems to support an inferrence that Congress intended the sentencing courts to look only in reference to the § 924(e) enhancement based upon a person whom has **committed** three serious drug offenses rather than being **convicted** of three serious drug ofenses. To be "convicted" rather than "committed" means a crime falls within certain categories by its use of matching elements of the offense of conviction not matching Controlled Substance statutes list of offenses,

leaving Petitioner as he previously stated, in violation of his Sixth Amendment rights. Even further, when a court refuses to look into the statutory definition of a prior offense to determine whether a jury was actually required to find all the elements of a prior offense and compare them to the elements of the generic offense under Taylor v. United States, 109 L.Ed.2d 607, 495 U.S. 575. Taylor gives cause in the matter to mean as to "delivery" - the offense relevant in this case. Congress meant a crime "containing the following elements: actual, constructive or attempted transfer." The court must focus solely on whether those elements of the crime of conviction sufficiently match those listed elements of "generic delivery" while ignoring the particular facts of the case. The fact that the crime of Petitioner's conviction covers more conduct than the generic offense, it is not an ACCA "delivery or manufacturing" even when delivery's actual conduct is listed within the generic offense's boundaries.

Ground Two

II. The Sixth Circuit Court of Appeals erred in allowing the district court to use a non-qualifying prior predicate offense proven to be broader than the elements of a generic offense in order to apply a sentence outside the ACCA's meaning of a "serious drug offense." Petitioner relies on Mathis v. United States, 136 S. Ct. 2243, stating that under Michigan state laws, "unlawful delivery" (M.C.L. 333.7401(2)(a)(4)) serves as an unqualifying statutory predicate offense under the federal generic version of the definition of delivery, due to the facts that the Michigan statute criminalizes conduct that is not included within its generic definition. This Court stated in Apprendi, "If statutory alternatives carry different punishments, then they must be elements." Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000). A prior crime also qualifies as an ACCA predicate if, but only if, its elements

are the same as or narrower than those of the generic offense; and, in no uncertain circumstances can a state crime qualify as an ACCA predicate if its elements are broader than those of a listed generic offense, even if his conduct fits within the generic offense. The mismatch of elements saves the Petitioner from an ACCA enhancement. Taylor v. United States, 495 U.S. 575, 110 S. Ct. 2143 (1990); also, Richardson v. United States, 526 U.S. 813, 119 S. Ct. 1707 (1999). Under Michigan law, "knowingly deliver" criminalizes "attempted delivery" of an element that creates two distinct, separate offenses in its own category. When comparing the state offense to the generic element of "delivery", 21 U.S.C. § 802(8) or § 924(e), in their definitions they do themselves criminalize "attempt" as a separate and distinctive offense leading to the separation of crimes. Michigan's statute M.C.L. 750.92 of attempt offenses has a penalty of its own elements of the offense to a five-year maximum penalty. The broader element of "attempt" is subsumed in its Michigan definition of "unlawful delivery."

"Attempt" is a Broader Swath of Conduct

To understand the broadness of its elements, Petitioner seeks to break down his analysis of his petition by starting with the meat of his argument based upon the qualifications of the ACCA enhancement under its qualifying definition of a "serious drug offense" 18 U.S.C. § 924(e)(2)(a)(2), stated in its three qualfying parts:

> An offense involving manufacturing, distributing, or possessing with intent to manufacture, or distribute a controlled substance (as defined in Section 102 of the Controlled Substance Act (21 USC 802)) for which a term of ten years or more is prescribed by law.

Title 18 U.S.C. § 921(a)(20) states the initial qualification of a conviction to qualify for an enhancement of the ACCA: "What constitutes a

conviction of such a crime shall be determined in accordance with the laws of the jurisdiction in which the proceedings were held." Relating to Michigan laws first off, there lies not any listed or enumerated offense for "attempted delivery" as being an element or as "involving" a controlled substance act under law. Second, "attempt" (750.92) is not defined anywhere in 21 U.S.C. § 802 where Michigan law not only defines by lists its elements of attempt (See MCL 750.92). Third, "attempt" nor "attempted delivery" under state law is prescribed a maximum term of ten years or more, but is penalized to a five-year maximum. Wayne Co. Prosecutor v. Recorders Court Judge, 177 Mich. App. 762, 442 N.W. 2d 771 (1989); also, People v. Kamin, 405 Mich. 482, 275 N.W. 2d 777 (1979). To identify its broader element of "delivery", Petitioner implicates that Michigan's element "attempted delivery" in itself is listed as two separate elements that lead toward reasonable inferences of identifying the single element of "knowingly deliver." Fact being that a convictino for "attempted deliver" can be obtained under the Michigan statute, it was argued firmly by Petitioner that prosecution must prove each element beyond a reasonable doubt, but if the question arose at trial by a jury's lack of understanding to each element or conduct performed by one defendant regarding "attempted delivery," the court would be forced by law to read to the jury the broader elements of M.C.L. 750.92 "attempt" disjunctive from "delivery", and that is not how that element is described in the generic version of delivery's definition. Petitioner satisfies that theory with Michigan case law (emphasis), People v. Alexander, 188 Mich. App. 96, 469 N.W. 2d 10 (Mich. Ct. App. 1991), where a jury asked "whether the conduct of delivery by a third party was considered a delivery?" The appeals court stated that the court properly responded by reading the statutory definition of the "attempted" statute disjunctively with "delivery." Right there alone invalidates further use of the modified categorical approach

and further prevent any further violation of Petitioner Smith's Sixth Amendment rights. The lower court was right to no longer be allowed to go any further to determine if Petitioner was convicted of "knowingly deliver" as he states it is but yet a non-qualifying element of the ACCA's definition of a "serious drug offense." For the "attempt" statute, M.C.L. 750.92, to not be considered broader under the generic definition, Congress would have had to list "attempt" as a separate offense or criminalized it separately from its generic definition, but only if it was their intent. Congress tied the ACCA's harsh mandatory minimum sentence to state offenses "involving" manufacturing, distributing, or possession with intent to manufacture or distribute a controlled substance. Michigan's "attempt" statute is saying nothing in its definition other than the commission of a crime, none specific to "involving" of a controlled substance act under Michigan law and especially of a "serious drug offense." Nothing states Congress intended the ACCA's statutory phrase to sweep broadly enough to encompass conduct for which "attempt" disjunctively criminalizes its element, nor penalizes disjuctively to a maximum term of ten years or more, forbit the facts that "attempted delivery" of the Michigan statute falls in the generic definition, as a standing factor to a serious drug offense, under federal laws "attempted delivery" is read conjunctively as a separate crime or alternative element used to satisfy the element of its offense "delivery." But, under state law, "attempt" is subsumed under its definition of "delivery" and considered as two separate elements that when read conjunctively act as none other than a means of satisfying its element of the offense, thus proven to be as "criminalizing a broader swath of conduct" than the ACCA's generic version. There lies no other constitutional way to compare the two offenses, if Congress thought enough to include it as a separated element or enumerated offense of distribution, it very well could just as it did in 18 U.S..C § 924(e)(2)(a)(1) in

its definition of crimes of violence. As stated in prior opinnions of United States v. Russello, 464 U.S. 16, 104 S. Ct. 296 (1983), where Congress includes limiting language in one section of a statute but omits it in another section of the same statute. It is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. And, thus, as the statute 18 U.S.C. § 924(e)(2)(a)(1) & (2) is read together, the court's other cited opinion should thus apply when said; "it refused to conclude that the 'differing language' in two statutory provisions has the same meaning." Thus stated by Petitioner when the statutory provisions are read together, it states nothing indeterminate of either statute criminalizing its use of "attempt offenses" or the element of "attempted delivery." To classify attempt by itself in a statute as a whole versus the state's classification as a separate distinctive offense would render Congress's intentions vague or thus as this Court said just that: "What they say is what they mean." The fact that Congress declined to use the inclusion of "attempt" elsewhere other than § 924(e)(2)(B)(2), Taylor and Descamps order the court to see if a person could be convicted for conduct that would not qualify under the ACCA enhancement. Taylor v. United States, 495 U.S. 575, 109 L.Ed.2d 607 (1990); also, Descamps v. United States, 133 S. Ct. 2276, 186 L.Ed.2d 438 (2013). Michigan law does state that the offense of "attempted delivery" may be charged only by reference to M.C.L. Section 333.7401 in conjunction with its statute in order to convict with. People v. Marji, 180 Mich. App. Ct. 525 N.W. 2d 835 (1989); also, People v. Wright, 74 Michigan App. 297 N.W. 2d 739 (1977). There is no general or simple charge of "attempt" to commit any illegal acts. (emphasis) People v. Stapf, 155 Michigan App. 191, 400 N.W. 2d 656 (1986); People v. Kamin, 405 Mich. 482, 275 N.W. 2d 777 (1979). Michigan's (750.92) attempt statute is not a divisible statute, nor does it list separate elements of an offense by definition nor is

it comprised of multiple alternative elements or versions of the crime so that the modified categorical approach version applies to it as an offense involving a serious drug offense. A statute is divisible "only if at least one of the categories in which the statute may be divided constitutes 'by its elements' an offense involving a seriosu drug offense." No single category of attempt constitutes by its elements nor by its penalty to a five-year maximum sentence as a serious drug offense. It does not set forth a stand alone crime, the crime of attempt does not exist in the abstract but in the relation to other unrelated drug offenses also. It would be thus imprudent to analyze the statutory language in complete isolation, whereas here Defendant was convicted of the "delivery" statute which among it subsumes by state law the generic "attempt" statute which embraces all substantive crimes outside a serious drug offense. So, to determine whether under the Mathis approach an "elements only inquiry" the Court must determine whether attempt qualifies as a serious drug offense. Petitioner asks the Court to keep in mind that Congress stated the wording "involving" as defined in Section 102 and carries a ten-year maximum or more, but Section 102 lacks a definition of "attempt" in its use of a serious drug offense. It can never categorically comport with the terms of an ACCA predicate offense in comparing attempt to a non-existing definition of a serious drug offense; and, secondly, identifying it as a categorical match for the ACCA, given its critical analysis, the Court should see that the subsumption of the offense can be determined to sweep more broadly than the generic offense by its criminalizing of broader elements in its defition Mathis v. United States, 136 S. Ct. 2243 (2016); also, Descamps v. United States, 133 S. Ct. 2276, 186 L.Ed.2d 438 (2013). See definition of Attempt.

Attempt to Commit a Crime

Any person who shall attempt to commit an offense prohibited by law shall and in such manner attempt or shall do any acts toward the commission of such offenses but shall fail in the perpetration or shall be interrupted or prevented in the execution of the same when no express provision is made by law for the punishment shall be punished under MCL 750.92.

Petitioner thus humbly seeks reversal of the Sixth Circuit's opinion and seeks a sentence at or below the statutory maximum of ten years under 18 U.S.C. § 922(g), remand with further proceedings overturning the court's prior decision in Tibbs based upon facts shown under Mathis, 136 S. Ct. 2243, that the Michigan statute of "unlawful delivery" MCL 333.7401(2)(a)(4) is no longer a qualifying predicate offense that satisfies the definition of a "serious drug offense" resulting in Petitioner's enhancement, whereas failure to do so will result in a continuous miscarriage of justice on the Defendant.

CONCLUSION

In conclusion, Petitioner states that the Court of Appeals for the Sixth Circuit states that he has not shown how he has benefitted from Mathis. He begs to differ and hopes this Court sees the continuous ongoing manifest injustice being further in violation of his Sixth Amendment by the unqualifying use of a prior predicate conviction used to enhance Petitioner under the ACCA. The alternatively-phrased statute of Michigan 333.7401(1) lists the alternative elements of "delivery/manufacturing" each one defining one crime with alternative elements broader than the definition of its generic offenses of a "serious drug offense" by its use of specified "means" (multi-theories) of fullfilling its acts and not disjunctively having elements to satisfy its generic definition. A statute's listing of disjunctive means does nothing to mitigate the possible unfairness of being an increased sentence enhancement on something not legally necessary to a prior conviction. And, for these reasons, the lower cort erred in applying the modified categorical approach to determine by the use of means which offense Petitioner committed under delivery/manufacture. Petitioner thus stresses the fact that the Sixth Circuit continuously uses the inapplicable case precedent of United States v. Tibbs, 685 F. App'x 456, 459 (6th Cir. 2017), an umpunlished opinion that based upon either the Armed Career or the Career Offender statute. His argument still invalidates the opinion of Tibbs as ruling that certain elements of MCL 333.7401(1) qualifies for an enhancement after Mathis. He states that only a court of its own jurisdiction can overturn its case law or the Supreme Court where Petitioner has shown that the Michigan statute criminalizes broader elements of "delivery/manufacturing." He asks of this Court to exercise Its judicial power in the matter where Petitioner believes the Sixth Circuit, even under review of Mathis, will still stand on its belief that Tibbs overrules Mathis and Hinkle only as a judicial reference to the same exact statute and merits of Petitioner's

argument will still result in an unresolved circuit conflict or split where thus failure to do so will lessen the results of his request to the reverse and remanding of his sentence to one at the advisory guidelines of 18 U.S.C. § 922(g) of ten years or less where failure to do so will result in the continuing violation of his Sixth Amendment rights.

Respectfully submitted,

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