

NO. 18-8320

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

APRIL TERM, 2019

DARIUS ANDRE HOLMES,
PETITIONER,

- VS -

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

ISSUE I

Whether the Eleventh Circuit's rejection of the categorical approach in the determination of "serious drug offenses" under the Armed Career Criminal Act is reconcilable with the law of *Taylor v. United States*, 495 US 575(1990), and its progenies?

ISSUE II

Whether the Eleventh Circuit Court of Appeals erred when it departed from the established rule in *Buford v. United States*, 523 US 59(2001), and whether there was a reasonable probability that absent these errors(counsel error as well), the result would have been different?

LIST OF PARTIES

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

PETITION FOR WRIT OF CERTIORARI

Darius Andre Holmes, respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered in Case No. #: 18-10608 in that court on January 2nd., 2019, denying said judgment and/or sentence entered by the United States District Court for the Southern District of Georgia.

OPINION BELOW

An opinion of the United States Court of Appeals for the Eleventh Circuit, dated October 29th., 2018 denying Mr. Holmes, his motion for a certificate of appealability and leave to proceed in forma pauperis pursuant to his 28 U.S.C. § 2255 motion, is attached as: Appendix A. A subsequent order dated January 2nd., 2019, denying Mr. Holmes, motion for reconsideration and/or rehearing en banc, is also attached as Appendix B to this Petition.

JURISDICTION

The Court of Appeals filed its Opinion's in this matter on October 29th., 2018 and January 2nd., 2019, denying such motion's. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

STATUTORY PROVISIONS INVOLVED

This petition involves the application of 18 U.S.C. §924(e), the Armed Career Criminal Act, which provides in pertinent part:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. §924(e)(1).

As used in this subsection-

(A) the term "serious drug offense" means-

(i) an offense under the Controlled Substances Act(21 U.S.C. 801 et. seq.), the Controlled Substances Import and Export Act(21 U.S.C. §951 et. seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distribute, or possessing with intent to manufacture or distribute, a controlled substance(as defined in section 102 of the Controlled Substances Act(21 U.S.C. §802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. §924(e)(2).

GEORGIA STATUTE INVOLVED

"Except as authorized by this article, it is unlawful for any person to Manufacture, Deliver, Distribute, Dispense, Administer, Sell, or Possess with the Intent to Distribute any controlled substance."

Georgia Statute §16-13-30.

UNITED STATES CONSTITUTION INVOLVED

provides: "No person shall be...deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

The Fifth Amendment.

provides: "In all criminal prosecutions, the accused shall enjoy the right to...be informed of the nature and cause of the accusation;...and to have the assistance of counsel for his defense."

The Sixth Amendment.

The statute under which Petitioner sought habeas corpus relief was 28 U.S.C. §2255 which states in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct sentence. Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make finding of fact and conclusions of law with respect thereto. If the courts finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set aside the judgement aside and shall discharge the prisoner or sentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

In March 2016, a federal jury convicted Holmes for two counts of distribution of heroin, in violation of 21 U.S.C. §841(a)(1), §841(b)(1)(C)(Count 1-2); and possession of firearms by a convicted felon (an armed career criminal), in violation of 18 U.S.C. §922 (g)(1), §924(e)(Count 3)(CR Docs, 50, 85.). He qualified for the enhanced penalties of the Armed Career Criminal Act(ACCA), 18 U.S.C. §924(e), because he had been previously convicted of aggravated assault (eight counts committed on the "same occasion", -the ACCA requires that each violent felony or serious drug offense be committed "on occasions different from one another". 18 U.S.C. §924(e)(1)). Therefore, only one of Holmes's aggravated assault convictions could be used as an ACCA predicate; sale of cocaine(six counts committed on different occasions) and possession with intent to distribute cocaine(once). PSI¶ 42, 46, 49, 50, 53.).

Neither Holmes nor defense counsel objected to the Presentence Investigation Report,- At the sentencing hearing, the Court asked Mr. Holmes if he or his counsel had any objections to the PSR, and Holmes said "no Sir".(CR Doc. 118-Pg.4.)(PSI, Addendum.).

The Court sentenced Holmes to 240 months imprisonment on Counts 1-2 and 262 month's imprisonment on Counts 3, to be served concurrent, (CR Doc.106-Pg.2.). Written judgment was entered on June 10, 2016.(Id.).

On Appeal Holmes argued that there was insufficient evidence to sustain his convictions and the district court erred by refusing to give an entrapment defense jury instruction, The Eleventh Circuit affirmed his convictions. See United States v. Holmes, 681 F.App'x 811(11th.Cir.2017).

Holmes subsequently filed the instant, timely §2255 motion, his first, on August 8th., 2017. (CV Doc.1). He raised as ground one that both his trial counsel and appellate counsel were ineffective for failing to investigate his prior convictions and argue that his prior drug and aggravated-assault convictions were not qualifying predicates supporting his sentence under the ACCA. In ground two he claimed that both his trial and appellate counsel should have relied on the holding in Samuel Johnson v. United States, 135 S.Ct. 2551(2015), to challenge his ACCA enhancement, and that his appellate counsel should have also relied on Mathis v. United States, 136 S.Ct. 2243(2016)-decided before his appellate brief was filed- to challenge his ACCA driven sentence. (CV Doc. 1-Pg. 21.).

On October 6th., 2017 the government replied in opposition to Holmes 28 U.S.C. §2255 motion, requesting the Court to deny Holmes §2255 motion. (CV 417-147, Doc.3.). Therefore, Mr. Holmes, filed his reply in opposition to the government's reply, and standing firm on all claims raised in his initial §2255 motion.

On or about December 7th., 2017, the Magistrate Judge filed its Report and Recommendation pursuant to 28 U.S.C. §636(b)(1)(B), to the district judge requesting the denial of Mr. Holmes §2255 because Mr. Holmes ACCA conviction meet the threshold for enhancement pursuant to the ACCA, and counsel was not ineffective. Mr. Holmes, shortly within the 14 days filed his objections to the Magistrate Judges' R&R, standing firm on all issues and/or claims raised.

On or about January 31st., 2018, the District Court Judge submitted his order adopting the R&R(Doc.@5), as being the opinion in Mr. Holmes case, and denying Mr. Holmes §2255. (Doc.@9).

Shortly, after Mr. Holmes, submitted his notice of appeal to the United States Court of Appeals for the Eleventh Circuit, and moving for a certificate of appealability.

On or about October 29th., 2018 the Eleventh Circuit Court of Appeals issued their order denying Mr. Holmes application for a COA. Subsequently, Mr. Holmes, requested the impaneling of the Eleventh Circuit Court Judges en banc and/or Panel Rehearing.

On January 2nd., 2019, the Eleventh Circuit Court of Appeals denied Mr. Holmes, motion for reconsideration.

Now Mr. Holmes, pursues his actions or/and claims in the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the circuit court departed from the established rule of *Taylor v. United States*, 495 US 575(1990)), requiring a categorical approach to determine whether a prior state law conviction constitutes a predicate offense under a federal enhancement statute or guideline. The law of the Eleventh Circuit Court of Appeals represents a radical departure from *Taylor* and its progenies on questions of extreme importance. The Eleventh Circuit failed to recognize that, as in *Taylor*, the statutory definition of "serious drug offense" and guideline definition of "controlled substance offense" set forth classes of enumerated qualifying state offenses requiring a categorical approach. The circuit court's rejection of the categorical approach was erroneous and unsettling, since Georgia drug convictions support enhanced sentences in many cases. Certiorari review is necessary to enforce the rule of this Court and maintain uniformity of decisions among the circuit courts.

A. Conflict with *Taylor*.

1. "Serious drug offenses" under the ACCA.

(a) This Court always employs a categorical approach in the determination of qualifying offenses under the ACCA.

The Armed Career Criminal Act(ACCA) provides enhanced penalties for defendants with three prior qualifying offenses, including "violent felonies" and "serious drug offenses." The term "serious drug offense" is defined as:

an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance(as defined in section 102 of the Controlled Substances Act(21 U.S.C.§802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. § 924(e)(2)(A)(ii). The term "violent felony" includes the following enumerated offenses if punishable by more than one year in prison: burglary, arson, extortion, and offenses involving use of explosives. 18 U.S.C. § 924(e)(2)(B)(ii).

In *Taylor v. United States*, 495 US 575(1990), this Court held that in defining the term "violent felony" Congress referred to the enumerated offenses of burglary, arson, etc. in the generic sense. The crime of "burglary" "must have some uniform definition independent of the labels employed by the various States' criminal codes." *Id.* at 592.

We believe that Congress meant by "burglary" the generic sense in which the term is now used in the criminal codes of most States.

Id. at 598(citations omitted). The Court thereafter concluded that the "generic contemporary meaning of burglary" contains the elements of "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598(citations omitted).

The Court then described a "formal categorical approach" for determining whether a prior conviction constituted a generic burglary (or other enumerated offense) under the ACCA. The sentencing court must look only to the statutory definitions of the prior offense, and not to the particular facts underlying the prior conviction. *Id.* at 600.

We think the only interpretation of 18 U.S.C. § 924(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense.

Id. at 602(emphasis added). The Court therefore held that an offense constitutes "burglary" under the ACCA "if either its

statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." Id. at 602.

In subsequent decisions, the Court clarified and refined the characteristics of the categorical approach. In *Shepard v. United States*, 544 US 13(2005), the Court applied the categorical approach in the context of plea cases. There, the Court approved the use of a "modified categorical approach" where the charged offense could have been committing in a variety of ways. In *Shepard*, the charged burglary could have been committed by unlawful entry into a building, ship or vehicle. Only the unlawful entry into a building would establish a generic burglary. In *Shepard*, the Court held that a sentencing court may look to a limited class of documents, i.e., charging document, plea agreement, transcript of plea colloquy confirming the factual basis for the plea, or "some comparable judicial record of this information," to determine that the defendant necessarily pleaded guilty to a generic burglary offense. Id. at 26.

In *Descamps v. United States*, 133 S.Ct. 2276(2013), the Court clarified that the courts may employ the modified categorical approach only where the charged offense sets forth alternative elements rather than alternative means of committing an offense such as burglary. A statute which sets forth alternative elements is described as "divisible." If the jury (or fact-finder) is not required to choose which statutory alternative was committed by the defendant, the statute is "indivisible" and the sentencing court may not employ the modified categorical approach. In *Descamps*, the California statute proscribed burglary by lawful,

as well as unlawful, entry. Id. at 2282. Under California law, however, the fact-finder (whether jury or judge) was not required to determine the method of entry. Id. at 2293. The statute was therefore indivisible and the modified categorical approach did not apply. Id.; see also Mathis v. United States, 136 S.Ct. 2243(2016)(Iowa burglary statute proscribing unlawful entry to building, structure, or land, water or air vehicle, indivisible where jury not required to agree on which of the locations was actually involved). The applicability of the categorical approach is well established in the decisions of this Court.

(b) The Eleventh Circuit Court of Appeals rejected the categorical approach in the determination of "serious drug offense" under the ACCA.

In the proceedings below, and in United States v. Smith, 775 F.3d. 1262(11th.Cir.2014), the circuit court departed from the categorical approach applied uniformly by this Court. The circuit court did not "misapply" the categorical approach; it rejected the categorical approach, holding the categorical approach did not apply to the determination of "serious drug offenses" under the ACCA. Smith, 775 F.3d. at 1267. This Court's principal decisions, described above, applied the categorical approach in the context of "violent felonies" under the ACCA. This Court has not yet applied the categorical approach in the determination of a "serious drug offense" under the ACCA. There is, however, no logical basis to suggest that the Court would not apply the same analysis in the context of a "serious drug offense" under the ACCA. In Taylor, the Court noted that the categorical approach applied to the determination of a violent felony "like the rest of the enhancement statute." Taylor, 495 US at 602. In contrast

to the Eleventh Circuit, the Eighth Circuit Court of Appeals held that courts apply the categorical approach to determine whether a prior conviction qualifies as a "serious drug offense" under the ACCA. *United States v. Bynum*, 669 F.3d. 880, 885(8th.Cir.2012)(citing *Taylor v. United States*, 495 US at 602)).

In an analogous immigration context, this Court held that the determination of an "aggravated felony," defined as "an offense that...involves fraud or deceit" refers to crimes generically defined. *Nijhawan v. Holder*, 557 US 29, 36(2009)(emphasis added). Similarly, in *James v. United States*, 550 US 192(2007), overruled on other grounds, *Johnson v. United States*, 135 S.Ct. 2551(2015), the Court held that the categorical approach applies to determine whether a conviction for attempted burglary "involves conduct that presents a serious potential risk of physical injury to another" under the (now discredited) residual clause of the ACCA. *Id.* at 201-02(emphasis added).

The qualifying "serious drug offenses" under the ACCA present a similar construct, i.e., offenses under state law involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance..." 18 U.S.C. §924(e)(2)(A)(ii). Like the "violent felony" construed in *Taylor*, "serious drug offense" is defined in terms of an enumerated list of generic crimes. The circuit courts generally recognize that the term "serious drug offense" includes a list of enumerated generic crimes to be judged under the categorical approach. See *United States v. Whindleton*, 797 F.3d. 105, 108(1st.Cir.2015); *United States v. Trent*, 767 F.3d 1046, 1052(10th.Cir.2014); abrogated on other grounds by *Mathis v. United States*, 136 S.Ct. 2243(2016); *United States v. Tucker*, 703

F.3d. 205, 209-10(3rd.Cir.2012); United States v. Bynum, 669 F.3d. 880, 885-86(8th.Cir.2012); United States v. Washington, 629 F.3d. 403, 408(4th.Cir.2011); United States v. Winbush, 407 F.3d. 703, 707-08(5th.Cir.2005)("serious drug offense" includes an entire class of enumerated offenses); United States v. Alexander, 331 F.3d. 116, 131(D.C.Cir.2003)("serious drug offense" includes an entire class of state offenses); United States v. Allen, 282 F.3d. 339(5th.Cir.2002).

The Eleventh Circuit is the only circuit to have specifically rejected the categorical approach in the determination of "serious drug offenses" under the ACCA.

We need not search for the elements of "generic" definitions of "serious drug offense"...because [the term is] defined by a federal statute...

Smith, 775 F.3d. at 1267.

No element of mens rea with respect to the illicit nature of the controlled substance is expressed or implied by [the] definition.

Smith, 775 F.3d. at 1267.

The ACCA's definition of "serious drug offense," however, contains no such examples of "federal analogue" or other enumerated offenses. See 18 U.S.C. §924(e)(2)(A)(ii); [Donawa v. United States Att'y Gen., 735 F.3d. 1275, 1281(11th.Cir.2013)]. The question of whether §893.13 qualifies as a "generic" offense is inapplicable, because §924(e)(2)(A)(ii) is self-defining without reference to any "generic" or otherwise enumerated offenses. See 18 U.S.C. §924(e)(2)(A)(ii).

United States v. Samuel, 580 F.App'x 836, 843(11th.Cir.2014)(unpublished).

(c) The rejection of the categorical approach by the Eleventh Circuit Court of Appeals can not be reconciled with the law of this Court and of the other Circuit Courts of Appeals.

Since the decision in Taylor, this Court has consistently applied the categorical approach in the determination of qualifying state offenses under the ACCA, and in a variety of other contexts. The Eleventh Circuit Court of Appeals, however, has expressly rejected the categorical approach for the determination of "serious drug offenses" under the ACCA. The Eleventh Circuit's rejection of the categorical approach lacks a principled basis because the ACCA sets forth a list of enumerated generic drug offenses which qualify as "serious drug offenses," just as it sets forth a list of enumerated generic felony offenses which qualify as "violent felonies." The position adopted by the Eleventh Circuit violates the rule established by Taylor and reinforced by subsequent decisions such as Descamps and Mathis. The law of the Eleventh Circuit also places it in conflict with the law of the other circuits. Certiorari review is warranted to resolve these conflicts.

B. The conflict involves important and recurring questions of statutory and guidelines construction.

(a) Georgia drug convictions are frequently used to enhance sentences under the ACCA and the sentencing guidelines.

The conflict presented here involves important and recurring questions regarding the interpretation of the ACCA and the sentencing guidelines. The questions presented here occur regularly. Since the enactment of Georgia Statute §16-13-30(1990-2012), every drug conviction under that statute or/and chapter, is obtained without a finding (by judge or jury) of mens rea on the part of the defendant, i.e., knowledge of the illicit nature of the substance, or the subsections. Since the volume of controlled substance convictions is great, the government frequently relies on them to support sentencing enhancement under

the ACCA and the sentencing guidelines.

(c) Only this Court can resolve the conflicts existing among the Circuit Courts of Appeals and ensure compliance with its prior decisions.

The conflicts described above should be resolved by this Court. Only this Court can resolve the conflict existing among the Circuit Courts of Appeals on these important and recurring questions of statutory and guideline interpretation. In addition, this Court has an interest in enforcing compliance with its prior decisions. Certiorari review is warranted because the circuit courts are divided on important and recurring questions of statutory and guidelines interpretation. *Clay v. United States*, 537 US 522, 524(2003); *Shapiro v. United States*, 335 US 1, 4(1948).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the circuit court departed from the established rule of *Buford v. United States*, 523 US 59(2001), requiring that the appellate courts should utilize a deferential standard of review (as opposed to de novo review), when reviewing a lower court's determination that prior offenses were consolidated and thus related for purposes of calculating the criminal history, or the applicability of the Career offender provisions.

In *Buford v. United States*, 523 US 59(2001), the Supreme Court held that the appellate courts should utilize a deferential standard of review, as opposed to de novo review, when reviewing a lower court's determination that prior offenses were consolidated and thus related for purposes of calculating the criminal history, or the applicability of the career offender provisions. This deferential standard of review applies even where the facts relating to the prior crimes and the imposition of the prior sentences are not disputed. The appellate court also utilizes a "due deference" standard of review when considering whether a trial court properly grouped multiple counts. *United States v. Bradford*, 277 F.3d. 1311(11th.Cir.2002); *United states v. Williams*, 340 F.3d. 1231(11th.Cir.2003)(due deference is essentially a legal, de novo standard of review when reviewing a district court's grouping decision).

In 2005, the Supreme considered whether the sentencing judge may consider other types of information to determine whether the prior offense qualified as a recidivist-triggering offense. *Shepard v. United States*, 125 S.Ct. 1254(2005). The defendant in *Shepard* was arguably eligible for sentencing under the armed

career criminal act, because he had several prior convictions. However, one of the convictions was for burglary, and it was unclear on the surface of the prior conviction whether it qualified as a "generic" burglary in the sense envisioned by Taylor v. United States, 495 US 575(1990). The prior conviction, moreover; stemmed from a guilty plea, so there was no trial transcript to consider. The question in Shepard was whether the same limitation on the type of evidence that could be considered in evaluating the nature of the prior offense applied when the prior offense resulted from a guilty plea, as when it resulted from a conviction at trial. The Supreme Court held that the same limitation applied. Therefore, the federal sentencing court may not consider police reports and other extraneous information in evaluating the nature of a prior conviction. The sentencing court is limited to the terms of the charging documents, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information. See also United States v. Day, 465 F.3d. 1262(11th.Cir.2006)(though charging documents identified prior offense as generic burglary, the defendant entered plea to a lesser included offense that was not necessarily a generic burglary; trial court erroneously relied on charging document in concluding that prior offense was generic burglary). See: also United States v. Aguilar-Ortiz, 450 F.3d. 1271, 1274 n.4(11th.Cir.2006)(discussing whether Booker has an impact on Shepard's limitations on what may be considered in making guideline determinations).

Therefore, the absences of the Appellate Court applying the proper standard of review, along with defense counsels ineffective performance are issues necessitating jury debatability; Miller-El v. Cockrell, 537 US 322(2003); 28 U.S.C. §2253(c)(2). Addition, defense counsel neglected and/or forfeited objections subjected the defendant to a longer term of imprisonment, therefore; absent these errors there could of been a reasonable probability that the result would have been different. Certiorari review is warranted because of the lower court departures from the established rules of this Court.

CONCLUSION

For the reasons stated herein, this Honorable Court should grant the writ.

Respectfully submitted on this 8th day of FEB 2019.

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