

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2018

DOMENICK JAMES HOWARD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED

The Ninth Circuit failed to analyze Petitioner's increased statutory penalty argument, holding firm to its precedent that has been undermined by this Court in *Mathis v. United States*, ____ U.S. ___, 136 S. Ct. 2243 (2016) and *Lockhart v. United States*, ____ U.S. ___, 136 S. Ct. 958, 964 (2016) and that conflicts with the Seventh Circuit. Against this background the question presented is:

WHETHER A PRIOR SEXUAL ASSAULT CONVICTION SHOULD BE USED TO INCREASE THE STATUTORY PENALTY WHERE THE PRIOR STATE CONVICTION IS OVER-INCLUSIVE *VIS-A-VIS* A FEDERAL “SEXUAL ACT” OR FEDERAL “SEXUAL CONTACT” CRIME PURSUANT TO *MATHIS* AND THE DISSENT IN *LOCKHART*.

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Petitioner, Domenick James Howard, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

1. The memorandum disposition of the Ninth Circuit Court of Appeals styled as *United States v. Howard*, 696 Fed.Appx. 241 (9th Cir. 2017) is unreported. A copy of it is attached in the Addendum to this petition at page 1.

2. No written decision of the federal district court denying Petitioner's objection which was affirmed by the Ninth Circuit exists.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's memorandum disposition was filed on February 13, 2019 (Addendum at page 1). Petitioner did not file a petition for rehearing. This Court's jurisdiction arises under 28 U.S.C. §1254(1). Petitioner's petition is timely because it was placed in the United States mail, first class postage pre-paid, on May 14, 2019, within the 90 days for filing under the Rule of this Court (*see* Rule 13, ¶1).

FEDERAL STATUTORY PROVISION INVOLVED

This case involves the increased statutory penalty that is triggered when a defendant has a prior sexual offense under 18 U.S.C. §2252A(b)(2), which states:

Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

STATEMENT OF THE CASE

(A) General case overview.

1. On October 26, 2016, the United States indicted Petitioner on Count I, receipt of child pornography and Count II, possession of child pornography. Petitioner appeared and was arraigned on November 17, 2016. He was ordered detained and remanded to the custody of the United States Marshal. The Federal Defenders of Montana was appointed to represent him at the arraignment.

2. After a hearing on a pretrial motion, Petitioner agreed to plead guilty to Count II, possession of child pornography. In exchange, the government agreed to dismiss Count I of the Indictment as well as to permit Petitioner to argue at sentencing that his prior sexual assault offense should not qualify as a predicate to increase his statutory penalty.

3. Petitioner and the government both filed sentencing memoranda detailing specific sentencing requests. The district court heard arguments about Petitioner's predicate offense and overruled his objection.

4. Ultimately, the district court sentenced Petitioner to 120 months imprisonment, followed by lifetime supervision. Had Petitioner's argument not been overruled, Petitioner's statutory penalty would have been less than ten years and more in line with his advisory sentencing guideline range of 87 to 108 months. Petitioner timely appealed to the Ninth Circuit Court of Appeals.

(B) The Ninth Circuit’s decision.

5. The Ninth Circuit affirmed the district court, indicating that the district court did not err in applying the sentencing enhancement because such a decision was pursuant to the Ninth Circuit’s own precedent in *United States v. Sinerius*, 504 F.3d 737 (9th Cir. 2007). The Ninth Circuit specifically noted that it had “no power to overrule circuit precedent.” (Addendum at page 1).

STATEMENT OF FACTS

1. Petitioner faced his Indictment having been previously convicted of sexual assault in Montana’s Twenty-First Judicial District Court, Ravalli County. In particular, he was convicted under Mont. Code Ann. §45-5-502(3). The government’s Notice Regarding Enhancement Penalties advised Petitioner that, if convicted, he would face imprisonment of not less than 15 years to no more than 40 years for Count I. For Count II, the possible penalty was not less than 10 years and not more than 20 years imprisonment.

2. Petitioner agreed to plead guilty to Count II, possession of child pornography, with his plea agreement stating as follows in a footnote:

The Defendant has a prior conviction for sexual assault, in violation of Mont. Code Ann. § 45-5-502 (the “Montana sexual assault statute”). Pursuant to *U.S. v. Sinerius*, 504 F.3d 737 (9th Cir. 2007), Howard’s prior conviction under Montana law for sexual assault constitutes a conviction of “sexual abuse” for purposes of increasing the statutory penalty. However, Howard retains the right to argue to the sentencing Court that the prior sexual assault conviction should not qualify as a predicate to enhance the statutory penalty.

3. At his sentencing hearing, Petitioner argued that his prior sexual assault conviction should not be used to increase the statutory penalty in his case. The government contended that this Court’s decision in *Mathis*, ___ U.S. ___, 136 S. Ct. 2243, did not apply because that case dealt with the armed career criminal act and because it concerned a determination as to whether a state burglary conviction was over-inclusive of criminal conduct. Moreover, the government contended that the Ninth Circuit’s decision in *Sinerius* still controlled wherein Montana’s sexual assault statute was encompassed by 18 U.S.C. §2252A.

4. The district court addressed Montana case law discussing the touching of intimate parts. In doing so, the district court distinguished the decisions and overruled Petitioner’s objection, finding that Montana case law does not construe sexual contact so extensively that it is not encompassed by the federal statute.

REASONS FOR GRANTING THE WRIT

Although the Ninth Circuit Panel cannot overrule its own precedent, this Court may do so. This is especially true in light of this Court’s decision in *Mathis*, this Court’s decision in *Lockhart v. United States*, ___ U.S. ___, 136 S. Ct. 958 (2016), and the circuit split between the Ninth and the Seventh Circuit as it concerns the increased statutory penalty Petitioner received.

The Ninth Circuit in *Sinerius* addressed whether a conviction under Montana’s sexual assault statute met the definition of a predicate sex offense under

18 U.S.C. §2252A(b). In doing so, the *Sinerius* Court relied on the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990).

The goal of the categorical approach is to determine whether a defendant convicted of a prior state offense was “necessarily guilty of all the generic crime’s elements.” *Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276, 2283 (2013) (quoting *Taylor v. United States*, 495 U.S. 575, 599 (1990) (alterations omitted)). When a state crime penalizes conduct that does not fall under the generic offense, it can serve as a predicate only if it falls within a narrow range of divisible statutes. *Id.* A statute is “divisible” when it lists multiple alternative elements. *Id.*

This Court in *Mathis* held that the defendant’s prior state crime of conviction covered a greater “swath of conduct” than the elements of the generic Armed Career Criminal Act (ACCA) predicate offense. *Id.* at 2251. That was true because the defendant’s state crime of conviction enumerated various alternative factual means of satisfying a single element such that the state crime of conviction had a broader locational element than the generic federal predicate offense. *Id.* at 2246.

This Court indicated a sentencing court may employ the modified categorical approach only when it can determine with certainty a statute’s listed alternatives are elements, not means. Elements “are the constituent parts of a crime’s legal definition,” which must be proved beyond a reasonable doubt. *Id.* at 2248 (internal quotations omitted). Means are facts, “mere real-world things” that are “extraneous

to the crime's legal requirements." *Id.* In using the modified categorical approach a court consults three different sources: (1) state case law; (2) the text of the statute; and (3) certain conviction records. *Id.* at 2256-2257.

For Petitioner's case, Montana's statutory definition of sexual assault contains constituent parts that must be proven beyond a reasonable doubt such that the statute's listed alternatives are elements. In Montana a person commits the offense of sexual assault when a person "knowingly subjects another person to any sexual contact without consent." Mont. Code Ann. §45-5-502(1). "Sexual contact" means "touching of the sexual or other intimate parts of the person of another, directly or through clothing, in order to knowingly or purposely: (a) cause bodily injury to or humiliate, harass, or degrade another; or (b) arouse or gratify the sexual response or desire of either party." Mont. Code Ann. §45-2-101(67). That is, in Montana, sexual contact includes the "sexual" or "other intimate parts" of a person.

In *Sinerius*, the defendant argued that the federal definition of "sexual act" and "sexual contact" proscribed a narrower range of conduct than required under Montana's law. In particular, "sexual act" is defined, federally, as "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. §2246(2)(D). "Sexual contact" includes the "intentional touching, either directly or through the clothing,

of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. §2246(3).

These definitions reveal that sexual contact in a federal context restricts offensive sexual touching to very particular parts of the human body—that is, the genitalia, anus, groin, breast, inner thigh or buttocks. Montana’s definition of sexual contact, however, covers a greater swath of conduct. That is, the federal definitions include erogenous zones whereas Montana’s definitions include more than erogenous zones.

The Ninth Circuit in *Sinerius* believed the defendant to argue that §2252A(b) required the court to define “sexual abuse” by reference to “sexual abuse” under 18 U.S.C. §2242. *See Sinerius*, 504 F.3d at 742. The Ninth Circuit refused to do so, indicating that it had “never defined predicate sex offenses under §2252A by cross reference to the federal provisions.” *Id.* The *Sinerius* Court continued, using an ordinary and common definition of “sexual abuse” as the “generic offense.” *Id.* at 743.

The Ninth Circuit’s holding in *Sinerius*, however, has been called into question by this Court’s decision in *Lockhart*, ____ U.S. ___, 136 S. Ct. at 964. Indeed, in the *Lockhart* dissent, Justices Kagan and Breyer strongly suggest that Congress’s reference to “aggravated sexual abuse,” “sexual abuse” and “sexual

abuse of a minor or ward” in 18 U.S.C. §2252A(b)(2) “mirror precisely the order, precisely the divisions, and nearly precisely the words” set forth in 18 U.S.C. §§2241, 2242 and 2243. Moreover, the Seventh Circuit uses the federal statutory definition of “abusive sexual conduct involving a minor.” *United States v. Osborne*, 551 F.3d 718 (7th Cir. 2009); *Gaiskov v. Holder*, 567 F.3d 832 (7th Cir. 2009). The fact that Petitioner, had he been sentenced in the Seventh Circuit, would have faced a substantially less sentence is reason enough for this Court to set this case down for further briefing.

Petitioner’s prior state conviction for sexual assault does not qualify as the generic form of “sexual abuse” as defined *vis-a-vis* the precise words set forth in the federal statutes since the state offense has broader elements—namely, any sexual touching of sexual or other intimate parts—than does the federal definition. Montana’s statutory offense of sexual assault and its corresponding definition of sexual contact delineates the elements that must be proven beyond a reasonable doubt. *See Mathis*, 136 S. Ct. at 2246. Under a modified categorical approach, the text of Montana’s statute and Montana’s case law confirm that the state crime of sexual assault is broader than the federal generic crime.

Petitioner’s prior state conviction should not have been used to enhance the statutory penalty in his case because it was not an offense “relating to . . . sexual

abuse.” The statutory range applicable in Petitioner’s should have been “not more than 10 years” imprisonment. *See* 18 U.S.C. §2252A(b)(2).

CONCLUSION

WHEREFORE, the Court should grant this petition and set the case down for full briefing.

Respectfully submitted this 14th day of May, 2019.



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