No. 19-5037

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Gilberto Villanueva jr. — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Eleventh Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gilberto Villanueva jr.
(Your Name)

P.O. Box 5000, 2525 Haley Barbour Pkwy.
(Address)

Yazoo City, Ms. 39194
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Should the District Court be allowed to find the facts necessary in order to qualify defendant as an Armed Career Criminal or should precedent such as Johnson/Descamps or Alleyne/Apprendi be applied when determining those facts?

Should the United States Attorney be made to present to a grand jury and subsequently prove beyond a reasonable doubt at trial the mens rea requirement of criminal law to the felon-in-possession statute 18 U.S.C. § 922(g)?

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:

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OTHER

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/B to the petition and is

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[X] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is Destroyed in Hurricane Michael

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[ ] is unpublished.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[ ] is unpublished.

The opinion of the _____ 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[ ] is unpublished.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 May 17, 2019.

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

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

[ ] 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 _____. A copy of that decision appears at Appendix _____.

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

[ ] 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATUTORY PROVISION INVOLVED

This argument 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 99(g) of this title and has three previous convictions by any court referred to 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 then 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 sunsection --
>
> (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, 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).

STATEMENT OF THE CASE

Villanueva was indicted by a federal grand jury in the Southern District of Florida and charged with one count of being a felon in possession of firearms and ammunition.

This was said to come under Title 18 of the United States Code subsection 922(g)(i).

The United States Attorney's Office (USAO) also violated the Double Jeopardy Clause by charging a separate count of possessing an unregistered firearm, which they kindheartedly agreed to dismiss in exchange for a guilty plea to count one.

The Probation Office ultimately calculated an advisory guideline imprisonment range of 135 to 168 months based on an offense level of 30 and criminal history category of IV. But the PSR noted that Villanueva qualified as an armed career criminal subject to a mandatory term of 15 years (180 months), pursuant to 18 U.S.C § 924(e)(1) in the Revised PSI pp. 60-61.

At the sentencing hearing, the district court rubber-stamped the Probation Officer's contention that Villanueva qualified as an armed career criminal and ordered him to be in prison for a term of 180 months.

Originally, Villanueva's base offense level was 26 pursuant to USSG § 2K2.1(a)(1)(A)(i) and (B), for his violation of 18 U.S.C. § 922(g)(1).

The Probation Office reset the offense level to 33, however, pursuant to USSG § 4B1.4(a) and (b)(3)(B) and 18 U.S.C. § 924(e). The Probation Office cited the following prior convictions: 1)

possession with intent to distribute cocaine, case no. 8:07-CR-211-T-30 EAJ; 2) armed trafficking in cocaine, case no. 07-CF-011776 and, 3) delivery of cocaine, case no. 07-CF-011747.

After a 3-point reduction for acceptance of responsibility the offense level was reduced to 30.

With eight criminal history points for his prior convictions, Villanueva's guidelines range was 135-168 months. Without the Armed Career Offender designation, the offense level was 26. That guideline range would have been 92-115 before the acceptance reduction and 70-87 after. Villanueva received 180 months as a result of the mandatory minimum penalty in 18 U.S.C. § 924(e). With 180 months minus the 70 months he should have received, this results in him being imprisoned for 110 months (9 years) too long.

REASONS FOR GRANTING THE PETITION

The United States Supreme Court is called upon to exercise its supervisory authority to direct the lower courts as to the application of Apprendi, and its very many progenies, in regard to a prior criminal conviction.

To wit: "Other than the fact of a prior conviciton, any fact that increases the penalty for a crime beyond the maximum must be submitted to a jury and proved beyond a reasonable doubt ... unless admitted by the defandant." Apprendi, 147 L. Ed. 2d 435, 436 (2000).

The operational phrase in question is "other than the fact of a prior conviction." Petitioner believes that this phrase means that the judge can only use the fact that a prior conviction exists. Judge found facts as to the offense conduct, state statutory law, and necessary elements of those laws when considering factors beyond the fact of the prior convictin is unconstitutional. Especially where a defendant, in a federal case, is having his prior conviction considered where that conviction was obtained through a plea agreement or any stipulations of factual basis from the state offense are not usually before the federal court. Even had they been, it is still not up to a federal judge to interpret state law or guess at the elements or reasoning behind the state conviction.

In the instant matter, the district court possessed nothing more than the presentence report from the state offenses. The PSR did not so much as refer to any state plea deals or on what

basis the previous conviction was founded. The U.S. DIstrict Court merely looked at the state offense and maybe the state statute. From that information, the Court determined the prior conviction was because the Petitioner had violated what the federal court deems to be a "serious drug offense" pursuant to 18 U.S.C. § 924(e).

The U.S. District Courts struggled for years at the Armed Career Criminal statue's residual clause. Thousands of Americans served illegal sentences becase federal judges misinterpreted state statutes and their elements in regard to what was a "violent felony." Not until the Supreme Court in Johnson threw out the residual clause did the district courts quit handing down illegal sentences.

Petitioner claims his case is no different that Johnson in that the district court handed down an illegal sentence after determining on scant evidence that a prior conviction was a serious drug offense.

Petitioner's sentence must be vacated solely upon this reason. Petitioner's sentence under 18 U.S.C. § 924(e)(2)(A)(ii) is illegal simply because he did not have the required three prior predicate offenses.

In Taylor v. United States, 109 L. Ed. 2d 607 (1990), the Supreme Court established the method by which sentencing courts are to determine when a defendant's prior state convictions qualify as predicates for enhancement under 924(e)(2)(A)(ii), the Armed Career Criminal Act (ACCA).

Under Taylor, if a statute of conviction has the same ele-

ments as the federal generic offense, then the prior state conviction can serve as an ACCA predicate. On the other hand, if a state statute sweeps more broadly than the generic offense, criminalizing conduct not covered in the generic definition, a conviction under that statute cannot act as an ACCA predicate... even if the defendant committed the state offense in the federal generic form. The Supreme Court stressed that it is the key component to a correct analysis to compare elements of the federal generic offense with those of the elements in the state statute of conviction... without consideration of any underlying facts of how the state offense was committed. Id. at 627-28. The first step in determining whether a conviction qualifies as either a serious drug offense or a violent felony is to analyze the statute of conviction under the categorical approach set forth in Taylor. Under this approach, courts look no further than the statute forming the basis of the defendant's conviction and the federal generic definition involved. United States v. Howard, 742 F.2d 1334, 1335 (11th Cir. 2014).

The categorical approach is nothing more than a straightforward comparison of elements.

On some occasions, however, where a state statute sets forth the elements of more than one offense, known as a "divisible" statute, courts must then employ the modified categorical approach. A statutory scheme that is divisible promotes selection of which elements should be considered. See Descamps v. United States, 186 L. Ed. 2d 438, 441 (2013).

In Mathis v. United States 195 L. Ed. 2d 604, 608-09 (2016),

the Supreme Court reiterated the three basic reasons why sentencing courts must adhere to an elements-only inquiry:

> First, ACCA's text, which asks only about a defendant's prior convictions, indicates that Congress meant for the sentencing judge to ask only whether the defendant had been convicted of crimes falling within certain categories, Taylor at 600, not what he had done. Second, construing ACCA to allow a sentencing judge to go any further would raise serious Sixth Amendment concerns because only a jury, not a judge, may find facts that increase the maximum penalty. See Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Third, an elements-focus avoids unfairness to defendants, who otherwise might be sentenced based on statements of non-elemental facts that are prone to error because their proof is unnecessary to a conviction.
>
> Descamps at 457.

The Supreme Court cases from Taylor to Mathis have dealt almost exclusively with the determination of what constitutes a "violent felony." However, there has been no indication from the court that a different constitutional standard or some other process of analysis should be used in applying § 924(e)(2)(A), and specifically subsection (ii), in determining a "serious drug offense" for ACCA application. Accordingly, the same standard and process of analysis must apply in defining a "serious drug offense."

Section (ii) defines a "serious drug offense" 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 Substance Act (21 U.S.C. § 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

To be able to compare the above federal generic definition to a state statute of conviction requires isolating the elements of that generic definition. Movant submits that those elements are "manufacturing," "distributing," "or possessing with intent

to manufacture or distribute" a controlled substance.

In turn, section 802 provides the definitions for those terms as,

> Distribute: to deliver (other than by administering or dispensing) a controlled substance or a listed chemical.
> Deliver: the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship.

Clearly, the definition Congress provided for the term "distribute" is a narrow one.

Petitioner's relevant state prior convictions, all of which occurred in florida, are as follows:

1. Possession with intent to distribute and distribution of cocaine;

2. Armed trafficking in cocaine; and

3. Delivery of cocaine.

As for Petitioner's first two convictions above, it is not possible to determine whether those convictions were based on the offense of possession with intent to distribute, to distribute, or to sell or deliver cocaine under Florida Statute § 893.13.

Section 893.13 is, Petitioner submits, a divisible statute, setting forth numerous controlled substance offenses, of which "possession with intent to distribute, with intent to sell, and intent to deliver are separate and distinct criminal offenses.

Henceforth, under Florida law, a conviction under 893.13 can occur by merely offering to sell a controlled substance. Accordingly, a conviction under 893.13 for "possession with intent to sell," since the "to sell" is the root of the offense, does not necessarily involve the actual, constructive, or attempted

transfer of a controlled substance.

However, Petitioner acknowledges, as he must, that the Eleventh Circuit Court of Appeals, along with other circuits, has interpreted § 924(e)(2)(A)(ii) as having no specific elements ... not even a mens rea requirement. Instead, the Eleventh Circuit has held,

> This "involving" language [in 924(e)(2)(A)(ii)] makes clear that the term "serious drug offense" may include even those state offenses that do not have as an element the manufacture, distribution, or possession with the intent to manufacture or distribute. See United States v. James, 430 F.3d 1150, 1155 (2005).

In United States v. McKenney, 450 F.3d 39, 43 (2006), the First Circuit stated,

> Congress used the term "involving" the manufacture, distribution, or possession of, with intent to distribute, a controlled substance. By using "involving" Congress captured more offenses than just those that "are in fact" the manufacture, distribution, or possession of, with intent to distribute, a controlled substance.

To warrant this expansive meaning of the term "involving" in 924(e)... the McKenny court found that Congress' use of "involves" in the now abolished "residual clause" of 924(e) indicated Congressional intent was not to limit the definition of a "serious drug offense" to only those offenses that "have an element of" manufacturing or distributing a controlled substance. Id. Adopting this position put forth by the government, the court stated, "That Congress likewise intended the word 'involves' in the 'serious drug offenses' category [like the 'violent felony' category], which is codified in the very same statutory subsection [as the 'violent felony' residual clause], to mean something broader that 'is' or 'has as an element.'" Id. Thus, the defini-

tion of a "serious drug offense" was tied to the application of the "violent felony" residual clause.

In applying the standardless expanded application of § 924 (e)(2)(A)(ii), there appears to be very few, if any, state drug offenses the federal Appellate Courts have chosen to exclude from the expanded definition. Apparently aware of the real and potential problems involved, the McKenny Court stated,

> We add observation: while the term "involving" under 18 U.S.C. § 924(e)(2)(A)(ii) is not to be too narrowly read, it also is not to be too broadly read. Not all offenses bearing any sort of relationship with drug manufacturing, distribution, or possession with intent to manufacture or distribute will qualify as predicate offenses under the ACCA. The relationship must not be too remote or tangential. We need not decide today where that line is. (emphasis added)

Almost a decade later the same court in United States v. Whindleton, 797 F.3d 105, 110-11 (1st Cir. 2015) still utilized the same standardless application of 924(e)(2)(A)(ii) stating, "While the term 'involving' may be expansive, it is not limitless." They still do not know where the line is having sentenced hundreds of American citizens to imprisonment all the while.

By construing the federal generic definition of a "serious drug offense" to have no specific elements for comparison, federal courts have been able to ignore and cast aside all the procedures and safeguards set forth in Taylor and its progeny.

Petitioner respectfully submits that this standardless application has produced some very disturbing results.

The Eleventh Circuit's decision in James v. United States, 430 F.3d 1150 (2005) is indeed a prime example of what is wrong with this unworkable hybrid approach.

In James, the defendant had been previously convicted of a violation of § 893.13 Fla. Statute, Trafficking in Cocaine. That prior conviction was for "possession" UNDER the trafficking statute. The district court had found that the defendant's trafficking conviction did not qualify as a predicate for ACCA. The district court based its conclusion on the Florida Supreme Court's decision in Gibbs v. State, 698 SO.2d 1206 (Fla. 1997), wherein Florida's highest court held that simple possession of a controlled substance and trafficking possession of a controlled substance have the same elements. The only difference between the two offenses is the amount of drugs possessed. Since simple possession is not a predicate offense for ACCA enhancement, the district court reasoned that the trafficking possession could not be a "serious drug offense" either. However, the Eleventh Circuit disagreed.

On appeal, the Eleventh Circuit found that Florida, like Georgia, has a three-tier offense level involving "possession" of a controlled substance, i.e. simple possession, possession with intent to distribute (any amount), and trafficking possession (28 grams or more of cocaine). Citing a prior decision in United States v. Madera-Madera, 333 F.3d 1228 (11th Cir. 2003), wherein the court had "inferred" the intent to distribute in the Georgia trafficking statute.

Consequently, the court "added" the "intent to distribute" to the defendant's trafficking possession conviction to make his offense conform to the expanded definition of a "serious drug offense" for ACCA enhancement.

What is potentially the most troubling aspect of the James decision is the Court's sua sponte addition of the "missing element" of the "intent to distribute" to the defendant's prior trafficking possession. The James panel cited United States v. Bain, 736 F.2d 1480, 1484 (11th Cir. 1984), as its authority for "inferring" the intent to distribute into the Florida trafficking statute.

Bain involved a drug conspiracy charge under Title 21 U.S.C. § 955c. An offense charged within the overall conspiracy had three elements: 1) knowing; 2) possession of a controlled substance; and 3) with the intent to distribute. Thus, the federal offense charged already had the element of "intent to distribute" included in it. It was one of three elements the government was required to prove at trial beyond a reasonable doubt.

The holding in Bain was that it was permissible for the jury, in deciding the defendant's innocence or guilt on the intent to distribute based upon the quantity of drugs he possessed. Bain, 736 F.2d at 1486.

Therefore, the authority to "infer" the intent to distribute established in Bain was conferred on the jury, not on a federal court. Moreover, neither Bain, nor any other federal case, has ever conferred the authority on a federal court to "add" any elements to a state statute of conviction, to make that prior conviction fit the definition of an ACCA predicate offense. And, not only is adding in an otherwise "missing element" to a criminal statute a violation of all Supreme Court precedent decisions regarding the application of the ACCA, but no federal court can

take such action without violating the Sixth Amendment. Because, other than the fact of a prior conviction itself, "any fact that increases the penalty of a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." See Apprendi v. New Jersey, 147 L. Ed. 2d 436, 459 (2000) (emphasis added).

In applying the expanded defintion of a "serious drug offense" in section 924(e)(2)(A)(ii), federal courts are more likely than not to determine facts that were extraneous to a defendant's prior state conviction, in violation of the Sixth Amendment. Apprendi, supra.

> The Sixth Amendment contemplates that a jury--not a sentencing court--will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury found are those constituting elements of the offense --as distinct from amplifying legally extraneous circumstances. See e.g., Richardson v. United States, 526 U.S. 813, 817, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999). Descamps at 455.

It appears clear that the proper interpretation or application of the ACCA's serious drug offense provision is long overdue.

MENS REA

The duty of the courts below to follow precedent sometimes results in a mistake. Unfortunately, this is that sort of case. The courts below have considered 18 U.S.C. § 922(g) and 924(a) and their collective rule forbidding felons from possessing guns, ultimately holding that the only knowledge required for a criminal conviction is the knowledge that the thing possessed is a firearm. See United States v. Capps, 773 F.3d 350 (10th Cir. 1996).

Villanueva is, and has been, confused at the mens rea (criminal intent/guilty intent). Section 922(g) states, it shall be

unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to possess in or affecting commerce, any firearm or ammunition....

One of the elements would be, for the government to prove, is that the defendant was a convicted felon and knew he was a convicted felon. Second, would be that the firearm possessed had an "effect" on interstate commerce.

Nobody made Villanueva aware of any elements nor how they affected his decision to plead guilty or go to trial. It is because of the precedent spoken of above that the only reqruirement for a jury to find is that Villanueva possessed a firearm.

Villanueva's indictment also included 18 U.S.C. § 924(a)(2), which proscribes any penalty for the 922(g) conviction.

In other words, a judge may only determina a sentence for violating 922(g) if the condition of 924(a)(2) are met.

Title 18 U.S.C. § 924(a)(2) states, whoever "knowingly" violates subsection...(g)...shall be fined as provided in this title, imprisoned not more than 10 years, or both.

When the current statute's language is clear, it must be enforced just as Congress wrote it. See Lamie v. U.S. Trustee, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (it is well established that when the statute's language is plain, the sole function of the courts...is to enforce it according to its terms.

By their express terms, §§ 922(g) and 924(a)(2) do not authorize the government to imprison Villanueva and people like him unless and until the government can show they knew of their felon

statuts at the time of the alleged offense. Or...that the interstate commerce aspect was knowingly violated. The government never even made the mention this would be their burden.

The Supreme Court has also long recognized a "presumption" grounded in our common law tradition that a mens rea requirement attaches to "each of the statutory elements that criminalize otherwise innocent conduct." See United States v. X-Citement Video, Inc., 513 U.S. 64, 72, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994); see also Staples v. United States, 511 U.S. 600, 610-12, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994).

Together §§ 922(g) and 924(a)(2) operate to criminalize the possession of any kind of gun. But gun possession is often lawful and sometimes even protected as a matter of constitutional right.

Villanueva asserts there are two elements separating innocent gun possession from criminal conduct in 922(g) and 924(a) which are a prior felony conviction and the gun's effect on interstate commerce. So the presumption that the government must prove mens rea applies with full force. See Staples at 613-14. See also the three dissenting judges of the tenth circuit in the Gomex-Perez case at 695 F.3d 1104 (2012).

Three more dissenting judges in the D.C. Circuit in United States v. Burwell, 690 F.3d 500 (2012) concluded that Staples demanded proof the defendant knew the weapon he carried was a machine gun.

That the government doesn't have to prove a defendant knew he was a felon or that the firearm affected interstate commerce

simply can't be squared with the text of the relevant statutes. Section 922(g)(1) makes unlawful the possession of a gun when three elements are met: (1) Villanueva was previously convicted of a felony, (2) Villanueva later possessed a firearm, and (3) the possession was in or affecting interstate commerce.

But, § 922(g) does not send anyone to prison for violating its terms. That job is left to § 924(a)(2), which authorizes prison terms for "whoever knowingly violates § 922(g). Despite this, the government would have one believe the word "knowingly" as "leapfrogging over the very first 922(g) element and touching down only at the second." Gomes-Perez, supra. (Gorsuch dissent)

This interpretation defies linguistic sense--and not a little grammatical gravity. "Ordinarily, after all, when a criminal statute introduces the elements of a crime with the word "knowingly," we apply that word to each element." Flores-Figueroa v. Unites States, 556 U.S. 646, 129 S. Ct. 1886, 1891, 173 L. Ed. 2d 853 (2009). Even though the third element is a jurisdictional hook, the government should still be made to prove that not only did the firearm affect interstate commerce, once upon a time and therefore forever has an effect on interstate commerce, no matter how many times it was bought and sold in a single state or even if the firearm is 100 years old....but; also must prove the defendant knew his firearm affected interstate commerce, and perpetually.

Villanueva requests the Supreme Court resolve the splits not only among circuits but the justices who sit in the same circuit. Title 18 U.S.C. § 922(g)(1) and 924(a)(2) must be ruled as requiring a mens rea showing, especially as to the knowing of being a felon at the time of the gun possession.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: June 15, 2019