

No. 19-5303

ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES



MARIO BENITEZ-PINEDA — PETITIONER  
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MARIO BENITEZ-PINEDA #80217-083  
(Your Name)

FCI COLEMAN PO. BOX. 1032  
(Address)

COLEMAN, FLORIDA 33521 - 1032  
(City, State, Zip Code)

(Phone Number)

**QUESTION(S) PRESENTED**

1. Whether 21 U.S.C. § 841 et. seq., is unconstitutional because it contains no penalty provision ?

## LIST OF PARTIES

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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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

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

**OPINIONS BELOW**

For cases from **federal courts**:

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

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district 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 is unpublished.

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 is unpublished.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 is unpublished.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 November 26, 2018.

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: 02/05/2019, and a copy of the order denying rehearing appears at Appendix B.

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**

### **AMENDMENT 5**

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

According to the record, Petitioner plead guilty to a violation of federal drug laws 21 U.S.C. § 841 (a), et seq. and was sentenced in the United States District Court after cooperating with federal authorities to procure prosecution against other defendant's in this case.

The Petitioner filed a 28 U.S.C. § 2255 then - arguing that 21 U.S.C. § 841(a) was unconstitutional, and that was dismissed in the district court. The United States Court of appeals issued an order denying certificate of appealability. See United States v. Pineda, 742 Fed. Appx. 792 (4th Cir. 11/26/2018). Att A.

Petitioner argued in the lower court that ... 21 U.S.C. § 841(a) is unconstitutional because it does not prescribe sentencing provisions and that § 841(a) combined with § 841(b), creates a scheme which allows the judge to make a decision that now determines the statutory sentencing maximums by a preponderance of the evidence. However the Fourth Circuit articulated that § 841 merely defines the crime and stipulates guidelines for penalty ranges. See United States v. McAllister, 272 F.3d 228 (4th Cir 2001).

## REASONS FOR GRANTING THE PETITION

Petitioner claims that because "841(b) clearly failes to lis a penalty provision for subsection (a)(2) of the statute - it fails to give - ordinary people fsir notice of the conduct it punishes. If § 841(a)(2) is unconstitutional, then § 841 et seq, is unconstitutionallu vague and violated due proces s rights guaranteed by the Fifth Amendment.

### I.

#### 21 U.S.C. § 841(a) IS UNCONSTITUTIONAL BECAUSE IT CONTAINS NO PENALTY PROVISION

Recently, the United States Supreme Court has defined Federal felony offenses are offenses punishable by a term of imprisonment exceeding one year. Moncrieffe v. Holder, 133 S.Ct. 1678, 1685 (2013).

Petitioner asserts that because Section 21 U.S.C. § 841(a) contains no penalty as set from the offense elements such statute cannot be said to state a Federal felony offense. United States v. Norby, 225 F.3 1053, 1059 (9th cir. 2000)(holding that Section § 841(a) contains no penalty

provision); United States v. Vazquez, 271 F.3d 93, 112 (3rd 2001)(concurring, J., Becker)("[A]lthough § 841 is entitled 'unlawful acts', this subsection alone does not define a complete offense because it includes no punishment").

After careful review of Section 841(a) this court will immediately conclude that such a provision provides only an "Unlawful Act" with no punishment for violating that Act. The Statute now, and always has been structured by defining the offense in subsection (a) and the penalties in subsection (b).<sup>(1)</sup> See, e.g., comprehensive drug abuse prevention and control not of 1970, Pub.L. No.91-513, § 401, 84 Stat. 1260 (codified, as amended, at 21 U.S.C. § 841). The legislative history of the statute clearly differentiates between violations and criminal penalties. See H.R. Rep.No.91-1444 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4570, 4575. Particularly telling is that, in describing the penalties section, the legislative history notes that, "the foregoing sentencing procedures give maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as a fine, to the circumstances involved in the individual case." Id. at 4576 (emphasis added).

In 1970, the penalties depended on the type of drugs, rather than the amount of drugs. Pub.L.No.91-513 § 401; see also H.R. Rep. No. 91-1444 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4576 (stating that the penalties vary,

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(1) The Petitioner asserts that § 841(a) failed to require drug type and quantity to be proven as an offense element to sustain a conviction, even well before the 1986 amendments of § 841(b). United States v. Smith, 725 F.2d 641, 643 (11th cir. 1984) ("Section § 841(a) makes it a crime for a person to possess with intent to distribute a controlled substance...The crime can be proved without any consideration of the amount involved...").

"depending upon the danger of the drugs involved"). In 1983, however, Congress recognized that, "while it is appropriate that the relative dangerousness of a particular drug should have a bearing on the penalty for its importation or distribution, another important factor is the amount of the drug involved." S.Rep. No.98-225, at 255 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3437. Congress therefore amended § 841 to provide greater penalties for offenses involving larger amounts of drugs. Id. at 258, reprinted in 1984 U.S.C.C.A.N. 3182, 3440. The drug quantity determination, therefore, was placed in the penalties section. Which Congress had already described as containing sentencing procedures for the judge. 11 Ct. H.R. Rep. No.101-681(1), at 110 (1990), reprinted in 1990 U.S.C.C.A.N. 6472, 6517-15 (noting the need for judges to have "flexibility when fashioning a sentence under § 841(b)).

In Mathis, the court began its analysis by stating that "[t]o determine whether a prior conviction is for generic burglary (as defined under the ACCA) courts must apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case". Id. Citing Taylor v. United States, 495 U.S. 575, 600-601 (1990). That is, because distinguishing between elements and facts are central to the ACCA's operation. "Elements" are the "constituent parts" of a crimes legal definition--the things the "prosecution must prove to sustain a conviction", Id., citing Black's Law

Dictionary 534 (10th ed. 2014).

At a trial, "Elements" are what a jury must find beyond a reasonable doubt to convict a defendant. See Richardson v. United States, 526 U.S. 813, 817 (1999); and at a plea hearing, "Elements" are what a defendant necessarily admits when he pleads guilty, see McCarthy v. United States, 394 U.S. 459, 466 (1969). Facts, by contrast, are nothing more than real-world things--extraneous to the crime's legal requirements. Richardson, 526 U.S. at 817 (distinguishing "brute facts" from offense elements). Facts are "circumstances" or "events" which have no legal effect [or] consequence. In particular, "facts" need neither be found by a jury nor admitted by a defendant. Black's Law Dictionary 709. As the Mathis court reiterated, "facts" are something that the ACCA cares not a whit about. Id. citing Taylor, 495 U.S. at 599-602.

The Eleventh Circuit has held that "[a] violation of § 841(a)(1) occur when the Government provides beyond a reasonable doubt that defendant possessed and intended to distribute a controlled substance and the nature and quantity of a controlled substance is only relevant to the sentencing provision within § 841(b))". United States v. Sanders, 668 F.3d 1298, 1309 (11th cir. 2012); United States v. Clay, 376 F.3d 1296, 1298 (11th cir. 2004); but see United States v. Vazquez, 271 F.3d 93, 112 (3rd cir. 2000)(Becker, J., concurring) ("Although § 841(a) is entitled 'Unlawful Acts', this subsection alone does not define a complete offense because it include no punishment. A jury verdict finding only the defendant had committed the acts described in subsection(a),

without more, would not render the defendant guilty of a crime requiring any ascertainable punishment"), comparing Almendarez-Torres v. United States, 523 U.S. 227, 140 L.Ed.2d 350, 118 S.Ct. 1219 (1998) (construing 8 U.S.C. § 1326(b)(2) as a sentencing factor where an earlier portion of the Statute-- § 1326(a)--already provided for specific penalties), with Jones v. United States, 526 U.S. 227, 143 L.Ed.2d 311, 119 S.Ct. 1215 (1999) (construing the provisions of 18 U.S.C. § 2119(2)-(3) as elements where the prefatory statutory text did not provide for penalties but only described prohibited conduct).

To further support the argument that § 841(a) can never be said to be a "federal" felony offense as such provision, from its offense elements alone, fails to include any penalty provision at all. The Petitioner will point to the oral arguments of Edwards v. United States, 96-8732 (S.Ct.), held before the United States Supreme Court on February 23, 1998, of an exchange involving Solicitor General Edward C. DuMont and the late Justice Antonin Scalia regarding the lack of a penalty provision with § 841(a). The exchange went as follows:

Edward C. DuMont

...Now, Section 846, which is on pages 1 and 2 of the appendix in the blue brief, says any person who attempts or conspires to commit any offense defined in this sub chapter shall be subject to the same penalties, and so on. The offenses are defined by the other sections in that portion of the United States Code.

If you then look at § 841, which is the object defense here, § 841(a) defines the offense, and the offense is either possession or...with the intent to distribute, or distribution--

**Antonin Scalia**

--Well, it can't define the offense if, indeed, as you just read, you are to be punished with the same penalties as those prescribed for the offense.

There are no penalties prescribed for § 841(a). When you read § 841(a) you have no idea what the penalties are, so that cannot be the offense--

**Edward C. DuMont**

--Well--

**Antonin Scalia**

--referred to in § 846

**Edward C. DuMont**

--Well, with respect, we would obviously disagree with that. What you know from § 846 is that you're looking for an object offense. The Object offense is defined in § 841(a), which says, unlawful acts, except as authorized and so on you may not distribute, or possess--

**Antonin Scalia**

Right.

**Edward C. DuMont**

--with intent to distribute controlled substances.

**Antonin Scalia**

Right, and if all I had before me was § 841, I would agree.

But you have before you § 846, which you just read, which say any person who attempts or conspires to commit any offense defined in this chapter shall be subject to the same penalties as those prescribed for the offense. There are no penalties prescribed for the offense of violating § 841(a).

**Edward C. DuMont**

Well--

**Antonin Scalia**

I can read you § 841(a) and you can't tell me what penalty is prescribed for that.

**Edward C. DuMont**

--Well, with respect--

**Antonin Scalia**

You have to go down to (b) to figure it out.

**Edward C. DuMont**

--With respect, I can, because what I'll say is, you look down to (b) which prescribes the penalties for the offense defined in (a).

**Antonin Scalia**

Fine.

I'm willing to accept (b).

Then (b) becomes part of the offense.

**Edward C. DuMont**

We disagree about that.

**Antonin Scalia**

That's fine.

See Oral arguments in Edwards v. United States, No. 96-8732 (S.Ct.), at pgs. 26-28

The exchange taken before the Supreme Court makes clear that § 841(a) and § 841(b) are totally unrelated in defining offense elements. While the Supreme Court recently indicated that such Keystone of Sections §§ 841(a) and (b) being totally unrelated when it comes to defendant's guilty should be removed.

Alleyne v. United States, 133 S.Ct. 2152 (2013)(holding that 'the core crime and the fact triggering the minimum mandatory sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury"); see also United States v. Dado, 759 F.3d 550 (6th cir. 2014)(Merrit, J., dissenting)(noting that post-Alleyne Section § 841(a) and (b) must be proven together when a mandatory minimum sentence comes to play).

Prior to Descamps and Mathis it would be no problem in determining the Statutory maximum in a § 841(a) case because the court could simply apply the modified categorical approach and then determine the specific drug quantity or specific controlled substance involved in the case. United States v. Martin, 215 F.3d 470, 472-75 (4th cir. 2000)(the determination of whether an offense is a "crime of violence" for purposes of § 4B1.1 is properly decided under the categorical analysis in cases of both prior and current offenses)(quoting Taylor v. United States, 495 U.S. 575 (1990)); United States v. Picolo, 441 F.3d 1084, 1087 (9th cir. 2005)(insisting on the use of modified categorical approach for the instant conviction).

However, what makes the use of the categorical and modified categorical approach problematic following Descamps v. United States, 728 F.3d 347, 353 (4th cir. 2013)(finding that the use of the modified categorical approach in determining whether acts within sexual abuse statute were indivisible under Descamps was unauthorized, where such acts were not elements of the offense). As a result, the court must determine whether the involvement in the least culpable "controlled substance" involved in § 841(a) crime constitutes a Federal drug trafficking crime [i.e., § 841(b)(3)]? The answer is simply "no" it does not. See United States v. Tucker, 703 F.3d 205, 213 (3rd cir. 2014)(finding that because the jury instructions never limited the term "drug" to any particular controlled substance as an element of the offense. A violation of 18 PA. Cons. Stat. Ann. § 903 app. at 156-61 was not a felony "serious drug offense" as defined within § 924(e) following Descamps); see also United States v. Lipsey, 40 F.3d 1200, 1201 (11th cir. 1994) ("A court should look at the elements of the convicted offense, not the conduct underlying the conviction...").

As the issue in Tucker, because of the quantity or type of the "controlled substance" is not an offense element of § 846 or § 841(a), the use of the modified categorical approach may not be applied and the court must assume that Petitioner's offense conduct does not meet the definition of a "Federal Felony Offense," post-Moncrieffe and Mathis. Lipsey, 40 F.3d at 1201.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mario BENITEZ-Pineda

Date: 7-11