

No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 2020

GENESIS JAVON WHITE,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE(S)

I. WHETHER THE DISTRICT COURT ERRED IN CLASSIFYING MR. GRIFFIN AS AN ARMED CAREER CRIMINAL WHERE HIS PRIOR CONVICTIONS DID NOT QUALIFY AS “SERIOUS DRUG OFFENSES” UNDER THE ARMED CAREER CRIMINAL ACT (ACCA).

II. WHETHER THE DISTRICT COURT ERRED BY MAKING THE FACTUAL FINDING AT MR. WHITE’S 2019 SENTENCING THAT HIS THREE (3) 2010 STATE CONVICTIONS OCCURRED ON OCCASIONS DIFFERENT FROM ONE ANOTHER.

LIST OF PARTIES

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

TABLE OF CONTENTS

PAGE

OPINION BELOW	iv
JURISDICTION	v
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	vi
STATEMENT OF THE CASE	1
REASON(S) FOR GRANTING THE PETITION.....	3
CONCLUSION	8

INDEX OF APPENDICES

APPENDIX A: Decision of the Eleventh Circuit Court of Appeals

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v.

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**On Petition for Writ of Certiorari to the
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for the Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, **Genesis Javon White**, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on September 21, 2020.

OPINION BELOW

The Opinion of the Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-6a) is unpublished.

JURISDICTION

This is a Direct Appeal of a Judgment in a Criminal Case and the Sentence imposed by the United States District Court for the Middle District of Florida after an Imprisonment Sentence of 195 Months. The District Court had original jurisdiction in Mr. White's Criminal proceedings under 18 U.S.C. § 3231. Accordingly, this Court's jurisdiction over this Appeal is predicated upon 18 U.S.C. § 3742, and 28 U.S.C. §§ 1254 (1) 1291, 1294.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall be held to answer for a capital, or infamous crime, unless on 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 offense 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.

Fifth Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. Sixth Amendment to the United States Constitution.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Eighth Amendment to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Course of the Proceedings and Dispositions in the Court Below¹

Charge(s) and Conviction(s)

The Appellant was the Defendant in the District Court Case and will be referred to by name or as the Defendant. The Appellee, United States Of America, will be referred to as the Government or United States. The Record will be noted by reference to the Document Number, followed by the Page Number.

The Defendant, Genesis Javon White, is incarcerated and serving a Sentence of One Hundred Ninety-five (195) months imprisonment after being committed to the United States Bureau Of Prisons on November 21, 2019.

(Doc. 53)

Course of the Proceedings and Dispositions in the Court Below²

A. The Charge(s) and Plea Colloquy

On January 17, 2019, a Federal Grand Jury in the Middle District of Florida, Jacksonville Division, returned a One Count Indictment against Mr. White, charging him with possession of a firearm by a convicted Felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). (PSI ¶ 1) See also, Doc. 1.

¹ Most of the facts were adopted from the PSR unless where Defendant objected; the facts were tailored to the issue(s) on Appeal. Additionally, the following facts are supported by the Record on Appeal, but, are not necessarily conceded as true by Mr. White. (PSI dated 11/12/2019) [Doc. 48]

B. The Pre-Sentence Investigation Report (PSI)

The Probation Officer classified Mr. White as an Armed Career Criminal pursuant to U.S.S.G. §1B1.11, based upon the following Felony convictions: Three convictions for Sale or Delivery of Cocaine; and, one conviction for Aggravated Assault. This classification resulted in a Chapter Four Enhancement of 34, See U.S.S.G. §2K2.1(a)(2); U.S.S.G. §4B1.4(b)(3)(A) (PSI, Doc. 48, ¶ 24). Three Levels were deducted for pleading guilty, giving Mr. White a Total Offense Level of 31, (PSI, Doc. 48, ¶ 27). With a Criminal History Category of VI, Mr. White's Advisory Guideline Range was 188-235 Months. (PSI, Doc. 48 ¶ 58), (PSI, Doc. 48, ¶ 105)

C. The Sentencing

Mr. White filed written objections to the PSI, objecting to his classification as an Armed Career Criminal. (Doc. 40). Specifically, Mr. White asserted that his prior drug convictions were not "serious drug offenses." He reiterated those objections at his Sentencing Hearing (Doc. 61). Mr. White stated he was raising these objections to preserve the issues for further review. (Doc. 61 at 113-115).

The District Court overruled Mr. White's objections, finding that he qualified as an Armed Career Criminal, with an Advisory Guideline Range of 188- 235 Months. (Doc. 62 at 5-7). After considering the factors set forth in 18 U.S.C. §3553(a), the district Court Sentenced Mr. White within the Advisory Guideline Range, imposing a sentence of 195 months imprisonment followed by a five year term of supervised release. (Doc. 62 at 15). Mr. White renewed his objections to the

use of the prior convictions to classify him as Armed Career Criminal. (Doc. 62 at 17-18)

REASON(S) FOR GRANTING THE PETITION

ISSUES

I. The District Court erred in classifying Mr. White as an Armed Career Criminal where his prior drug convictions did not qualify as “serious drug offenses” under the Armed Career Criminal Act (ACCA)

The District Court classified Mr. White as an Armed Career Criminal primarily based upon three felony drug convictions: Sale or delivery of Cocaine; However, all of these drug convictions - Sale or delivery of Cocaine are not serious drug offenses. Because none of the convictions were predicate offenses under the ACCA, Mr. White should not have been sentenced as an Armed Career Criminal.

1. Florida Drug Offenses

The Probation Officer classified Mr. White’s convictions for sale or delivery of Cocaine as “serious drug offenses” under the ACCA. (PSI, Doc. 48 ¶ 23) At his Sentencing, Mr. White objected to the use of his Florida drug convictions as ACCA predicates because Florida Law does not require an element of *mens rea* regarding the illicit nature of the controlled substance. (Doc. 61 at 113-115); (Doc. 62 at 17-18). See also, Doc. 40. Mr. White acknowledged that the Law of The Eleventh Circuit was contrary to his position (Doc. 40), and the District Court overruled Mr. White’s objection. (Doc. 62 at 15)

In United States v. Smith, 775 F.3d 1262, 1268 (11th Cir. 2014), The Eleventh Court held that Florida drug offenses constitute “serious drug offenses” under the ACCA despite the absence of an element of *mens rea*. Accordingly, Mr. White preserved this issue for further review.²

II. The District Court erred by making the factual finding at Mr. White’s 2019 Sentencing that his three (3) 2010 State Convictions occurred on occasions different from one another.

To preserve for purposes of further review, Mr. White objected to the application of ACCA because it violated his Fifth and Sixth Amendment Rights. The Government did not charge in the Indictment “three (3) prior convictions” for a “serious drug offense” that were committed on occasions different from one another,” and such ACCA requirements were not proven beyond a reasonable doubt or admitted at the Plea Hearing, however, as a result of the ACCA, Mr. White’s Mandatory-minimum Sentence became over fifteen (15) years minimum mandatory in prison, exceeding the ten (10) year statutory maximum that would normally have applied to his §922(g) offense. 18 U.S.C. §924(a)(2), (e).

As the Supreme Court has held, any fact that increases the statutory mandatory minimum or maximum penalty is an “element” that must be charged in an Indictment and proven to a Jury beyond a reasonable doubt. Alleyne v. United States, 570 U.S. 99, 103 (2013); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); White v. United States, 526 U.S. 227, 243 n.6 (1999). Thus far, the Supreme Court has excepted the “fact of a prior conviction” from this Constitutional requirement.

² The Eleventh Circuit has recently sought direction from the Florida Supreme Court on a related issue. See; United States v. Conage, --- F.3d ---, 2020 WL 5814501, at *14 (11th Circuit 2020)

Alleyne, 570 U.S. at 111 n.1; Almendarez-Torres v. United States, 523 U.S. 224 (1998); Apprendi 530 U.S. at 490; White, 526 U.S. at 243 n.6. Relying upon this exception, Courts have sentenced Defendants under the ACCA based on their own findings concerning the “fact of a prior conviction,” whether the prior conviction constituted a “serious drug offense,”³ and whether the offenses were “committed on occasions different from one another.”⁴

Mr. White respectfully maintained that his sentence violated the Fifth and Sixth Amendments, because each of the ACCA’s requirements was not charged in an Indictment nor admitted to by him at his Plea Hearing (or proven to a Jury beyond a reasonable doubt). *See* Shepard v. United States, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring in part in the Judgment). However, Mr. White acknowledged the effect of Almendarez -Torres, 532 U.S. at 226-27, on foreclosing his arguments.

Mr. White also objected to the implication that the ACCA applied because the conduct resulting in the prior convictions occurred “on occasions different from one another.” 18 U.S.C. §924(e)(1); USSG §4B1.4. The government bears the burden of proving that the prior offenses were committed on different occasions.

To avoid the Sixth Amendment violation of a Court sentencing a Defendant above the otherwise applicable statutory maximum based upon facts that were not charged in an Indictment and proven to a Jury beyond a reasonable doubt (or necessarily admitted by the Defendant in pleading guilty) in the prior proceeding,

³ *See, e.g.,* United States v. Smith, 775 F.3d 1262, 1266 (11th Cir. 2014)

⁴ *See* United States v. Longoria, 874 F.3d 1278, 1283 (11th Cir. 2017)

the Supreme Court has limited the Government and Sentencing Courts to the elements of the prior offenses in ACCA Cases. Descamps v. United States, 570 U.S. 254, 269-71 (2013) (referencing Shepard, 544 U.S. at 24-26); Mathis v. United States, 136 S. Ct. 2243, 2251-56 (2016). The Supreme Court has made clear that a District Court may not “rely on its own finding about a non-elemental fact to increase a Defendant’s maximum sentence.”⁵ Descamps, 570 U.S. at 270; See Mathis, 136 S. Ct at 2251-56. Here, the date (of commission of the alleged crimes) is not an element of any of the Florida prior offenses relied upon in paragraph 23 of the PSR. The PSR therefore necessarily relied upon non-elemental facts (the dates of prior offenses) in seeking an ACCA Sentence and did not meet the burden consistent with Descamps and Mathis. To the extent the ACCA depended on findings of fact that go beyond the elements of the prior offense, including whether the offenses were committed on different occasions, Mr. White submits that his Sixth Amendment Rights were violated.⁶

Mr. White acknowledged that the Eleventh Circuit Court had stated that “t[he existence of both ‘prior convictions and the factual nature of those convictions, including whether they were committed on different occasions,’ may be determined by District Courts ‘so long as they limit themselves to Shepard approved documents.” United States v. Longoria, 874 F.3d 1278, 1281 (11th Cir. 2017) (quoting United States v. Weeks, 711 F.3d 1255, 1259 (11th Cir. 2013), abrogation

⁵ Circumstance-specific facts may not serve as a basis for sentencing enhancements unless they are alleged in an Indictment and proven to a Jury beyond a reasonable doubt. See Nijhawan v. Holder, 557 U.S. 29, 40 (2009) (recognizing potential Constitutional problems in a criminal prosecution); See, also, Ovalles v. United States, 905 F.3d 1231, 1250 (11th Cir. 2018) (en banc) (acknowledging and addressing the Constitutional concerns).

⁶ See, e.g., United States v. Thompson, 421 F.3d 278, 292-95 (4th Cir. 2005) (Wilkins, J., dissenting); United States v. Thomas, 572 F.3d 945, 952-53 (D.C. Cir. 2009) (Ginsburg, J., concurring in part).

on other grounds recognized by United States v. Esprit, 841 F.3d 1235 (11th Cir. 2016)). Mr. White respectfully submitted, however, that this aspect of Longoria, conflicts with the Supreme Court's decisions in Descamps and Mathis.

Accordingly, Mr. White objected to the District Court finding non-elemental facts of the prior, predicate offenses in order to make the "different occasions" determination (i.e., the date and time of the prior serious drug offense)⁷ However, Mr. White acknowledged current Eleventh Circuit precedent, See, e.g., Longoria, 874 F.3d at 1283; Weeks, 711 F.3d at 1259, 1260 (holding that "District Courts may determine the factual nature of prior convictions, including whether they were committed on different occasions, so long as they limit themselves to Shepard-approved sources").⁸ Given the Supreme Court and Eleventh Circuit Court precedent, Mr. White preserved these legal issues for further review, but submitted that the Government must still prove the application of the enhancement.

Mr. White objected to the factual narratives describing his prior offenses and asked that those narratives be stricken. (Doc. 40); (Doc 48 at 33-37). To the extent that the Government sought to enhance Mr. White's Guideline Range or Statutory Sentence based on his prior convictions, Mr. White objected to the Government's reliance on any facts that were not directly derived from Court documents approved by the United States Supreme Court in Shepard.

⁷ In addition, Mr. White objected to the factual narratives describing his prior offenses and any reliance on facts that were not directly derived from Court documents approved by the United States Supreme Court in Shepard, See *infra*; See also United States v. Canty, 570 F.3d 1251, 1255 (11th Cir. 2009).

⁸ Mr. White disagreed and submitted that the Sentencing Court may rely on "Shepard-approved documents" only to determine the elements of the prior convictions when using the modified categorical approach. See Descamps, 570 U.S. at 254; See also Mathis, 136 S.Ct. At 2243.

The Sentencing Court may only rely on the elements of the prior convictions taken from "Shepard-approved documents." Descamps, 133 S. Ct. at 2276; *See also Mathis*, 136 S. Ct. at 243.

CONCLUSION

Mr. White's Sentence should be vacated and the cause remanded for re-sentencing to a different District Judge with instructions to apply the guidelines Constitutionally and with due regards for the precedent set by the United States Supreme Court and the Eleventh Circuit.

Respectfully submitted,
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