

NO. _____
October Term, 2020

IN THE SUPREME COURT OF THE UNITED STATES

MALCOLM ELBRAY TRAYWICKS, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(a) **The Question Presented for Review Expressed in the Terms and Circumstances of the Case.**

Does the Congressional delegation of power to the Attorney General permitting scheduling of substances under the Controlled Substance Act violate due process when the Attorney General is vested with prosecuting offenses concerning the same scheduling of substances?

(b) **List of all Parties to the Proceeding**

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) **Table of Contents and Table of Authorities**

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(d) **Reference to the Official and Unofficial Reports of any Opinions**

The order and judgment of the United States Court of Appeals for the Tenth Circuit is unpublished. *United States v. Traywicks*, No.19-6173, 827 Fed.Appx. 889 (10th Cir. 2020) (unpublished).

(e) **Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.**

- (i) Date of judgment sought to be reviewed.

The unpublished Order and Judgment of the Tenth Circuit of which review is sought was filed September 21, 2020;

- (ii) Date of any order respecting rehearing.

Not applicable;

- (iii) Cross Petition.

Not applicable;

- (iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, Section 1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

- (v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

The Constitutional Provisions, Statutes and Rules which the Case Involves.

(1) Constitutional Provisions:

U.S. CONST. art. I:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

(2) Statutes Involved:

18 U.S.C. § 924(e):

(e)(1) 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 a 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).

(2) 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, distributing, or possession with intent to manufacture or distribute, a controlled substances (as defined in Section 201 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;

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

21 U.S.C. § 802(6):

The term “controlled substance” means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, V of part B of this subchapter. [...]

21 U.S.C.A. § 811(a):

(a) Rules and regulations of Attorney General; hearing

The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e), the Attorney General may by rule--

(1) add to such a schedule or transfer between such schedules any drug or other substance if he--

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed;
or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

(3) Rules Involved:

None.

(4) Other:

None.

(g) Concise Statement of the Case.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of the judgment entered by a United States Court of Appeals. The jurisdiction of the District Court was invoked pursuant Title 18, United States Code, Section 3231. Review in the Court of Appeals was sought under Title 28, United States Code, Section 1291. The Court of Appeals denied Mr. Traywicks's appeal on September 21, 2020. Review in this Court is sought under Title 28, United States Code, Section 1254. This petition is timely filed pursuant to Supreme Court Rule 13.1 and the Court's Order of March 19, 2020 permitting up to 150 days to file a petition for writ of certiorari. (589 U.S. ____).

Concise Statement of the Case

On April 2, 2019, Mr. Traywicks was charged in a single count Indictment with possession of a firearm after previous conviction of a felony offense, in violation of 18 U.S.C. § 922(g). (ROA, Vol. 1, at 6). Mr. Traywicks waived jury trial and entered a plea of guilty. (ROA, Vol. 1, at 11). The United States Probation Office filed a Presentence Investigation Report (“PSR”) in which it concluded Mr. Traywicks qualified for an enhanced penalty under 18 U.S.C. § 924(e). (ROA, Vol. 3, at 4-5). In support of this conclusion, the PSR cited the following Oklahoma County, Oklahoma convictions:

Conspiracy to distribute a controlled dangerous substance and Distribution of a controlled dangerous substance (CF-1990-5680), in violation of OKLA. STAT. tit. 63, § 2-401 (1989) (ROA, Vol. 3, p. 6 at ¶ 24);

Possession of a controlled dangerous substance with intent to distribute (CF-1991-3667) in violation of OKLA. STAT. tit. 63, § 2-401 (1990) (ROA, Vol. 3, p. 7 at ¶ 25);

Possession of a controlled dangerous substance with intent to distribute (CF-2002-116) OKLA. STAT. tit. 63, § 2-401 (2002) (ROA, Vol. 3, p. 9 at ¶ 29);

Possession of a controlled dangerous substance with intent to distribute (CF-2002-2411) OKLA. STAT. tit. 63, § 2-401 (2002) (ROA, Vol. 3, p. 9 at ¶ 30).

These convictions contained small amounts of marijuana or cocaine. *See, e.g.*, ROA, Vol. 3, at p. 9 at ¶ 29 (2.8 grams of marijuana and 2 grams of cocaine base).

Mr. Traywicks filed objections to the application of the ACCA. (ROA, Vol. 3, at pp. 25-26). Mr. Traywicks argued his prior convictions did not qualify because, as relevant to this petition, Oklahoma's drug schedule was broader than the federal schedule.

In his sentencing memorandum, Mr. Traywicks attached the relevant documents relating to his prior convictions. (ROA, Vol. 1, at pp. 34-45). He identified two substances included in Oklahoma's present drug schedule that are not included in the federal schedule. In response, the Government argued Mr. Traywicks qualified for an enhanced sentence under the Armed Career Criminal Act ("ACCA"). The Government argued the two substances identified by Mr. Traywicks were added to the Oklahoma schedule after Mr. Traywicks' conviction. (ROA, Vol. 1 at p. 71). It also argued the statute was divisible such that a reviewing court is permitted to review certain court documents and determine the type of drug involved is part of the federal schedule. (ROA, Vol. 1, at pp. 71-73). At sentencing, the district court overruled Mr. Traywicks' objections to application of the ACCA. (Tr. at 3-4).

After hearing argument from counsel, the district court imposed the statutory minimum sentence of 180 months imprisonment, followed supervised release for a term of three years. (Tr. at 13-14, ROA, Vol. 1, at 90). Mr. Traywicks filed a notice of appeal. (ROA, Vol. 1, at 97).

While his case was on direct appeal, the Tenth Circuit Court of Appeals decided *United States v. Cantu*, 964 F.3d 924 (10th Cir. 2020). *Cantu* raised the same issue as Mr. Traywicks, namely that Oklahoma's drug schedule was overbroad and indivisible such that a sentencing court was precluded from using the modified categorical approach to determine the substance at issue. At the time of the defendant's predicate drug offense convictions in *Cantu*, Oklahoma included at least three substances that were not on the federal schedule. *Id.* at 928. The Tenth Circuit surveyed Oklahoma law and determined the offense of possession with intent to distribute under OKLA. STAT. tit. 63, § 2-401(A)(1) was not divisible. *Id.* at 928-34. Accordingly, the defendant's ACCA sentence in *Cantu* was error and the matter was remanded for resentencing. *Id.* at 936.

Mr. Traywicks acknowledged that the substances identified in *Cantu* that were absent from the federal schedule were not part of the Oklahoma drug schedule at the time of his predicate offenses. However, he identified other substances, such as 4-methoxyamphetamine and cyclohexamine, that were not codified in the United States Code, but were merely included in the Code of Federal Regulations (CFR). 21 C.F.R. § 1308.11. The Tenth Circuit acknowledged that those substances were not included in original federal schedules, but that Congress had delegated authority to the Attorney General to revise the schedules. *Traywicks*, 827 Fed.Appx. at 892.

Petitioner argued such delegation was an unconstitutional delegation of authority to the Attorney General. Bound by precedent, the Tenth Circuit cited *United States v. Barron*, 594 F.2d 1345 (10th Cir. 1979) to summarily dispose of the argument. As a result, the Tenth Circuit affirmed Petitioner's sentence. *Traywicks*, 827 Fed.Appx. at 892.

(h) **Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.**

This presents an example of an egregious application of the Armed Career Criminal Act to a defendant whose past conduct would not qualify him under the statute if committed today. Petitioner's prior drug convictions, consisting of small quantities of crack cocaine and marijuana distribution, unquestionably would fail to qualify as serious drug offenses if committed today in Oklahoma. Nonetheless, the Tenth Circuit affirmed his ACCA sentence concluding the timing of his convictions rendered them serious drug offenses. It cited old law to summarily conclude Congress's delegation of power did not violate the Constitution.

This Court should grant the petition to address the delegation of powers issue presented in this case.

(i) Congressional delegation of power to list chemicals on federal schedules violates due process

But for Congress's delegation of power to the Attorney General to list substances on the as scheduled under the Controlled Substances Act, Petitioner would not have the three required predicate serious drug offenses to qualify him as an Armed Career Criminal.

The Tenth Circuit Court of Appeals held the assignment of authority to the Attorney General to list controlled substances under 21 U.S.C. § 811 was not an unconstitutional delegation of power pursuant to Section 1 of Article I of the United States Constitution. *Traywicks*, 827 Fed.Appx. at 892. In support, the Court of Appeals relied on a case from 1979. *Id.* (citing *United States v. Barron*, 594 F.2d 1345, 1352 (10th Cir. 1979)). Petitioner submits investing the Attorney General with the power to both define and enforce criminal statutes offends the separation of powers and due process principles.

In brief, the authority invested to the Attorney General under 21 U.S.C. § 811 permits the Executive Branch to list substances as controlled under Title 21 of the United States Code. Subject to the rule making requirements of the Administrative Procedures Act, *see* 5 U.S.C. § 551 *et seq.*, the Attorney General may seek to add, remove, or reschedule a substance after complying with certain requirements. 21 U.S.C. § 811(b). In general, these requirements direct the Attorney General to

secure a scientific and medical evaluation and make findings concerning the substance after considering specific factors. 21 U.S.C. §§ 811(b) & (c). There is no requirement for Congressional approval. *Compare with* 28 U.S.C. 994(p) (directing United States Sentencing Commission to submit proposed Sentencing Guidelines amendments to Congress to permit congressional approval or modification) and *Mistretta v. United States*, 488 U.S. 361, 379-80 (1989) (holding the United States State Sentencing Commission's authority did not violate the delegation of authority).

However, here, the Attorney General is vested with the prosecutorial authority of the United States. *E.g.*, 28 U.S.C. §§ 503, 547. That prosecutorial duty includes enforcement of the Controlled Substances Act. The Attorney General is granted authority to list substances on the CSA and then prosecute individuals for violations of the CSA. This is an unconstitutional combination of the legislative and executive functions of government. There has been a growing concern about this balance on the Court.

More than thirty years ago, the Court briefly addressed this concern in the context of the Congressional delegation of power in the Controlled Substances Act. *Touby v. United States*, 500 U.S. 160 (1991). Specifically, *Touby* reviewed the accelerated scheduling procedures afforded the Attorney General in cases dealing with temporary listing of substances. 21 U.S.C. § 811(h). *Touby*, 500 U.S. at 162. That

decision no longer carries the same persuasive force. Stare decisis does not mandate adherence to *Touby*. The doctrine is at its “weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.” *Agostini v. Felton*, 521 U.S. 203, 235 (1997). It is not an “inexorable command.” *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

Petitioner in *Touby* did not contest the “intelligible principle” requirement in Congressional delegation. *See, e.g., J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (Congressional delegation permissible if “Congress ‘lay [s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.’”). *Touby* left open the specific question of whether regulations that include criminal sanctions pose a heightened risk to individual liberty and therefore require more guidance from Congress. *Touby*, 500 U.S. at 166. The Court concluded the CSA was sufficiently specific, even if the regulations demanded greater specificity. *Id.* at 165.

The Court completely discounted the Petitioner’s argument that permitting the Attorney General to both schedule the drugs and prosecute individuals who manufacture those drugs violated the separation of powers. *Touby*, 500 U.S. at 167-

68. For the majority, this argument dealt with distribution of powers within a branch of government. *Id.* In his concurrence, Justice Marshall discussed that due process might limit the extent to which prosecutorial and other functions could be combined in a single actor. *Touby*, 500 U.S. at 170-71 (Marshall, J., concurring). However, no such due process claim was raised and it was left undecided. This claim is presented in this petition.

Here, the Attorney General has been given two core separated functions – the power to define a crime and the power to prosecute it. As stated by James Madison and highlighted by Justice Gorsuch in *Gundy v. United States*, “[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.” 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) (quoting *The Federalist* No. 47, at 302 (Madison)).

The Court’s recent decision in *Gundy* does not address the issue presented in this petition. *Gundy* addressed the delegation of powers in the context of the Attorney General’s directive to determine the applicability of the Sex Offender Registration and Notification Act to pre-enactment offenders. Central to the Court’s holding was the Court’s interpretation of SORNA’s delegation of a directive to the Attorney General to implement a system to encompass all pre-Act registrants. *Gundy*, 139 S.Ct. at 2129 (“[Congress] instructed the Attorney General to apply SORNA’s registration

requirements to pre-Act offenders as soon as feasible[.]”). Here, however, there is no specific directive to list specific substances on the schedules. The Attorney General is afforded wide discretion to choose which substances to consider and whether to pursue listing of those substances, all without Congressional oversight.

The Court’s fractured opinion in *Gundy* indicates a willingness to reconsider Congressional delegation of authority. For example, Justice Alito signaled on openness to revisit the approach taken by the Court for the prior 84 years. *Gundy*, 139 S.Ct. at 2131-32 (Alito, J., concurring). Justice Gorsuch, joined by Chief Justice Roberts and Justice made clear their readiness to overhaul delegation of authority to the Attorney General. *See Gundy*, 139 S.Ct. at 2131-48 (Gorsuch, J., dissenting). The *Gundy* dissent highlighted the problem inherent in assigning the authority to outline the contours of criminal offenses to the same individual tasked with prosecuting those same crimes. *Id.* at 2144-45 (“To unite the legislative and executive powers in the same person would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands.”) (cleaned up).

This conflict is particularly evident when considering the unique case of marijuana. It is clear the Attorney General does not uniformly adhere to his role and

function. Section 811 mandates the Attorney General to “apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter.” 21 U.S.C.A. § 811(a). This directive includes adding or removing substances from a schedule or transferring substances between schedules. 21 U.S.C.A. §§ 811(a)(1) & (2).

Even with this clear directive, marijuana remains a Schedule I substance, despite wide spread acceptance as both a medicinal and recreational substance throughout the United States. *See, e.g.,* Joseph Hartunian, *Getting Back on Schedule: Fixing the Controlled Substances Act*, 12 ALB. GOV’T L. REV. 199, 215-16 (2019) (“As of March 2016, twenty-three states had recognized “medical marijuana” in some capacity, four states and the District of Columbia had approved the use of recreational marijuana, and thirteen states had passed statutes recognizing the medical value of cannabiniol (CBD).”). That number has only grown since.

At present, under the CSA, marijuana is considered to have “no currently accepted medical use in treatment in the United States” and “a lack of accepted safety for use of the drug or other substance under medical supervision.” 21 U.S.C. § 812(b)(1)(B) & (C). The failure to relist the substance can only be explained by the prosecutorial directive of the Attorney General. It is past time marijuana was

rescheduled or removed. See Grace Wallack & John Hudak, *Marijuana Rescheduling: A Partial Prescription for Policy Change*, 14 OHIO ST. J. CRIM. L. 207, 208 (2016) (“Reform advocates argue that marijuana should be placed on a different schedule that better reflects the medical, safety, chemical, and pharmacological realities of the substance.”). The failure of the Attorney General to remove marijuana from the controlled substance schedule (or at least transfer to another schedule) is a clear indication of the conflict between its responsibility to enforce and prosecute individuals and the mandate to carefully consider each substance’s inherent danger and medicinal value. It is a prime example of the “tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands.”

Conclusion

Mr. Traywicks sustained convictions for selling petty amounts of marijuana and cocaine decades ago. Yet, the operation of the Armed Career Criminal Act served to impose a mandatory minimum sentence of 15 years, far greater than necessary to comply with the directives in 18 U.S.C. § 3553(a). Had he sustained those Oklahoma convictions after 2008, he would not qualify for the enhanced sentence. Even so, the Oklahoma drug schedule in effect at the time of Mr. Traywicks prior convictions included substances not included in the United States Code. That they were included

in the accompanying federal regulations does not resolve the issue. The regulations are a product of an unconstitutional scheme permitting the Attorney General to both list substances on a controlled schedule and prosecute those individuals.

The petition should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. E. Wackenheim', is written over a horizontal line.

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(i) **Appendix.**

- (i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Traywicks, No.19-6173, 827 Fed.Appx. 889 (10th Cir. 2020) (unpublished).

- (ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

- (iii) Any order on rehearing:

None;

- (iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

None;

- (v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

- (vi) Other appended materials:

None.