

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

JOSEPH CROCCO,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

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

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. Contrary to the government’s contention, Petitioner does not ask this Court to determine the Guidelines definition of “controlled substance offense”.

The government argues that the Court does not act to review decisions interpreting the Sentencing Guidelines, because the Sentencing Commission is charged with amending the Guidelines to “eliminate any conflict and correct error” (Government’s Brief in Opposition, 7-9). The government misapprehends Petitioner’s argument. Petitioner is not asking this Court to resolve the conflict in the Circuits regarding the definition of “controlled substance”. (Government’s Brief at 8). Petitioner is asking this Court to review the First Circuit decision that there was no plain error below even though every possible iteration of the various circuit court’s definition of “controlled substance offense” would result in relief for Petitioner. This Court frequently reviews, delineate and resolves the parameters of plain error review. United States v. Olano, 507 U.S. 725 (1993), Henderson v. United States, 570 U.S. 254 (2013).

Moreover, the government is incorrect when it asserts that Braxton v. United States, is authority for the rule that “This Court ordinarily does not review decision interpreting the Sentencing Guidelines”. (Government’s Brief at 7). Braxton clearly states that “A principal purpose for which we

use our certiorari jurisdiction ...is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." The Court further stated that while Congress and agencies can make "clarifying amendments" to statutes and regulations, "Ordinarily, however, the task is initially and primarily ours." Braxton v. United States, 500 U.S. 342, 348 (1991). It is true that the Court in Braxton chose not to resolve the guideline issue in that case. But that was only because "the Commission has already undertaken a proceeding that will eliminate the circuit conflict" and because "the specific controversy before us can be decided on other grounds". Braxton at 348. That is not the situation in the present case.

The government argues the issue of the split in the circuits over the definition of "controlled substance" 'has emerged only recently" and therefore should not be resolved by this Court. (Government's brief at 9). It is well past time for this issue to be resolved. As the government points out the Sentencing Commission is still short of a quorum (Government's brief at 9) And as this Court points out, it has been short of a quorum for three and half years. Guerrant, 142 S. Ct. at 640-641 (Sotomayor, J. respecting the denial of certiorari). Every day, due to the lack of a functioning Sentencing Commission, defendants are subject to far higher terms of

imprisonment for the same offenses as compared to similarly situated defendants in other Circuits. United States v. Crocco, 15 F.4th 20, 23-25 (1st Cir. 2021) (“The career offender designation can have significant implications is setting the base guideline range – here, it raised Crocco’s guideline range from 77-96 months to 210-240 months”), Guerrant v. United States, 142 S. Ct. at 640, 641 (2022) (Sotomayor, J., respecting the denial of certiorari) (“The resultant unresolved divisions among the Courts of Appeals can have direct and severe consequences for defendants’ sentences.”), Longoria v. United States, 141 S. Ct. 979 (2021)(Sotomayor, J., respecting the denial of certiorari), (“The effect of a one level reduction can be substantial. For the most serious offenses, the reduction can shift the Guideline range by years, and even make the difference between a fixed term and a life sentence.”). And because Petitioner’s claim is that his marijuana conviction is not a controlled substance offense under any Circuit Court’s definition of the term, this case is a perfect vehicle for this Court to review the different Circuits’ definitions of “controlled substance”.

II. Contrary to the government’s claim, Petitioner’s 2012 conviction is not a controlled substance offense under the ordinary meaning of that term.

Argument

The government argues that Petitioner’s 2012 conviction “fell squarely within the ordinary meaning of controlled substance” (Government’s Brief at 11). Citing Ruth, 966 F.3d at 654, the government argues the Random House dictionary definition of “controlled substance”, as “any of a category of behavior-altering or addictive drug, such as heroin or cocaine, whose possession are restricted by law.” encompasses Petitioner’s 2012 conviction. Ruth, 966 F.3d at 654, (Government’s brief at 11).

Under Virginia law in 2012, Petitioner could have been convicted for possession of hemp. Hemp is not a psychoactive substance; a substance that is behavior-altering or addictive. Congressional Research Service, “Defining Hemp: A fact Sheet, March 22, 2019, (“Hemp and marijuana are genetically distinct forms of cannabis that are distinguished by their use and chemical composition.” Hemp has no more than 0.3% delta-9 THC; meaning it is nonpsychoactive). United States v. Bautista, 989 F.3d at 698, 704 (Unlike marijuana, hemp contains “only trace amounts of the THC

contained in marijuana varieties grown for psychotropic use"). Therefore, contrary to the government's contention, Petitioner's Virginia state conviction does not "fall squarely within the ordinary meaning of "controlled substance" (Government's brief at 11). Under the categorical approach, the elements of Petitioner's 2012 Virginia conviction are categorically broader than The Random House dictionary definition of "controlled substance" as a behavior-altering or addictive drug. Thus, the conviction is not a valid predicate for a career offender enhancement. Deschamps v. United States, 570 U.S. 254, 257 (2013). Nor is the conviction a valid predicate under any other definition of "controlled substance offense". (Petitioner's Brief, 18-24). Thus, it was plain error for the district court to impose the career offender enhancement.

III. Contrary to the government’s claim the split in the Circuit concerning plain error, warrants further review by this Court and in this case.

The government’s brief does not even address the questions underlying the split in the circuits concerning plain error where circuit precedent is unsettled, and other courts of appeals disagree on the issue. (Government’s Brief at 14). Instead, the government merely states that question “does not warrant further review in this case” because of other unresolved issues beyond the circuit conflict. (Government’s Brief at 14). United States v. Crocco, 15 F.4th 20, 23-25 (1st Cir.2021). There are no “unresolved issues” in this case which prevent this Court’s review. In Crocco, the First Circuit examined every circuit court decision defining “controlled substance”, most of which were raised in Petitioner’s original and supplemental brief. Crocco, 15 F.4th at 22-24. The First Circuit in its detailed review of the legal landscape failed to recognize that in Petitioner’s case, all roads led to Damascus and that Petitioner’s Virginia conviction did not qualify as a controlled substance offense under any circuit definition. Instead, the court relied on the “general principle” that a split in the circuits and unsettled law in the First circuit, “thwarts the claim of plain error”. Crocco, 15 F.4th at 24.

Contrary to the government's contention, this case is perfect vehicle for this Court's review, because the facts underlying Petitioner's prior conviction illustrate exactly why the First, Fourth, Fifth, Sixth and Eleventh Circuit's plain error rule is incorrect. United States v. Olano clearly sets out the criteria for plain error review. 507 U.S. 725, 734 (1993). Petitioner has met all Olano's criteria for plain error. Olano, at 735-36. (Plain error review requires an error that is "plain and affect[s] substantial rights" and that "seriously affects the fairness, integrity, or public reputation of judicial proceedings"). "Plain" is synonymous with "clear or, equivalently, "obvious". Id. at 734. The error in this case was clear or obvious because Petitioner's Virginia conviction was clearly not a "controlled substance offense" under any of the circuit court's definition. Yet because of this sudden death plain error rule, superimposed onto this Court's holdings in Olano and Henderson, by five circuit courts, Petitioner was prohibited from obtaining relief even though it was clear or obvious, at the time of appellate review, that it was error to impose the career offender enhancement.

United States v. Olano, 507 U.S. 725, 735-36 (1993), Henderson v. United States, 570 U.S. 254, 279 (2013). Petitioner's predicate conviction included the possession of hemp. At the time of appellate review, hemp, under any

definition, in any circuit, does not fit the definition of a “controlled substance”. (Petitioner’s Brief 15-25).

Although of questionable relevance to the split in the circuit’s discussion, the government asserts that Petitioner “has not identified...any court that has found that the asserted guideline error at the center of this case can justify plain-error relief.” (Government’s Brief at 14). The plain error rule in question is not specific to use in a particular guideline. The rule is employed in multiple contexts. But importantly, the context of this case, clearly shows how the operation of the rule is incorrect.

Moreover, the government’s assertion is incorrect. The asserted guideline at the center of this case is USSG §4B1.2(b), the definition of “controlled substance offense”. Petitioner cites United States v. Bautista in his petition. (Petitioner’s Brief at 19). In that case the Ninth Circuit examined the various definitions of the phrase “controlled substance” as used in USSG §4b1.2(b) and concluded that the term meant “a substance listed in the Controlled Substance Act (CSA)”. Bautista, 989 F.3d at 702. Even though the defendant had not objected to the enhancement in district court, the Ninth Circuit concluded that it was plain error for the district court to impose the enhancement. Defendant’s prior state law conviction was not a controlled substance offense because the Arizona law “contained

no textual exclusion for hemp or for cannabis plants of low THC" and thus it was plain error for the district court to impose the enhancement. United States v. Bautista, 989 F.3d 698, (9th Cir. 2021).

CONCLUSION

For the above reasons, this Court should grant the Petition for a Writ of Certiorari.

Dated at Portland, Maine this 6 day of June 2022.

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