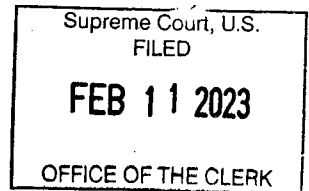


22-6839 **ORIGINAL**  
No. \_\_\_\_\_

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_



MICHAEL O. BROWN — PETITIONER  
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Michael O. Brown  
(Your Name)

U.S. Penitentiary McCreary, P.O. Box 3000  
(Address)

Pine Knot, Kentucky 42635  
(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

## QUESTIONS PRESENTED

- I. WHETHER THE COURT ERRED IN FAILING TO GRANT APPELLANT RELIEF FROM HIS SENTENCE ENHANCEMENT BASED UPON HIS PRIOR STATE CONVICTIONS AFTER MATHIS AND WHETHER THE COURT'S RULING CONFLICTS WITH THE EN BANC DECISION IN HAVIS AND SEVERAL OTHER SIXTH CIRCUIT COURT OF APPEALS DECISIONS AFTER HAVIS.
- II. WHETHER THE COURT ERRED WHEN IT FAILED TO GRANT RELIEF ON APPELLANT'S CLAIM THAT HIS CONSPIRACY CONVICTION DOES NOT QUALIFY FOR CAREER OFFENDER ENHANCEMENT UNDER U.S.S.G. 4B1.1.

## 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☒ is unpublished.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 B 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☒ is unpublished.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☐ is unpublished.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 September 15, 2022.

☐ 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: November 15, 2022, and a copy of the order denying rehearing appears at Appendix C.

☐ 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

The issues before the court in this Writ implicate the 14th Amendment right to equal protection and due process. The lower court's decision has so far departed from prior panel decisions of the Court of Appeals for the Sixth Circuit and sanctioned such a departure by the trial court, as to call for the exercise of the Supervisory authority of this Court. Also, the issues present involve a departure from current controlling decisions for the Six Circuit Court of Appeals.



## STATEMENT OF THE CASE

The case before the court involved a cocaine conspiracy in Lincoln County, Tennessee. (R. 15, Indictment, pg. Id # 24-35). The case was tried on March 3, 4, and 6 of 2015 to a guilty verdict. (R. 576, verdict, pg. Id # 2301-2303). The sentencing hearing was held on 7-16-2015. (R. 632, pg. Id # 2643).

Only 12 days prior to sentencing, the Government filed a Second Amended Notice For Enhancement of sentence under 21 U.S.C. § 851. (R. 628, 630, 2nd Amended Notice of Enhancement, pg. Id # 2625-2642). This post-trial notice included two prior convictions from Lincoln County, Tennessee. The Court enhanced Appellant's sentence based upon the Second Amended Notice For Enhancement of Sentence and sentenced the Appellant to life imprisonment. (R. 551, 552, Notice and Amended Notice of Enhancement, pg. Id # 1883-1884, # 1889-1890); (R. 628, 630, 2nd Amended Notice of Enhancement, pg. Id # 2625-2642).

## REASONS FOR GRANTING THE PETITION

I. WHETHER THE COURT ERRED IN FAILING TO GRANT APPELLANT RELIEF FROM HIS SENTENCE ENHANCEMENT BASED UPON HIS PRIOR STATE CONVICTIONS AFTER MATHIS AND WHETHER THE COURT'S RULING CONFLICTS WITH THE EN BANC SIXTH CIRCUIT'S DECISION IN HAVIS AND SEVERAL OTHER SIXTH CIRCUIT COURT OF APPEALS DECISIONS AFTER HAVIS,

1. The Trial Court Erred When It Failed To Address Appellant's Mathis Claim and The Lower Appeals Court for the Sixth Circuit Committed Procedural Error When it Failed to Grant Relief Based Upon Appellant's Mathis Claim in light of *United States v. Havis*, 997 F.3d, 382 (6th Cir. 2019).

The Appellant raised his Mathis Claim in his initial 2255 after the Court of Appeals denied Appellant's pro se motion to supplement his brief on direct appeal while his appeal was still pending in that court. In his 2255, Appellant raised the claim that his prior Tennessee convictions under T.C.A. § 39-17-417 did not qualify as controlled substances under the Sentencing Guidelines after Mathis because under the Tennessee Statute, "a person could be convicted for a mere offer for sale or an attempted delivery of a controlled substance." (4:18-cv-00060, Doc. #5, pg. Id. #72).

As a result, the Tennessee statute penalizes more conduct and a broader swath of conduct than the Sentencing Guidelines generic controlled substance offenses and also 21 U.S.C. § 841(a)(1) offenses. In the case of *Havis*, the Court of Appeals for the Sixth Circuit upon rehearing *Havis* en banc, concluded that Section 39-17-417 is broader than a generic controlled substance under the Sentencing Guidelines because it also criminalizes "attempted delivery" of a controlled substance, *United States v. Havis*, 927 F.3d 382, 387 (6th Cir. 2019) (en banc).

In the case of *Mathis*, this Court held that where a statute provides "various factual means of committing a single element," as opposed to multiple elements, a Court may not apply the modified categorical approach to determine which of the factual means defendant's used. *Mathis* broke new ground by holding that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense, *Mathis*, 136 S.Ct. at 2247. Because the elements of Tennessee's controlled substance law are broader than those of generic controlled substance under the sentencing guidelines, Appellant's convictions under State law cannot give rise to a career offender sentence. After *Mathis* and in light of the Sixth Circuit Court of Appeals en banc decision in *Havis*, Appellant's status as a career offender based upon his prior state convictions should be vacated.



## II. WHETHER THE COURT ERRED WHEN IT FAILED TO GRANT APPELLANT RELIEF ON APPELLANT'S CLAIM THAT HIS CONSPIRACY TO DISTRIBUTE CONVICTION DOES NOT QUALIFY FOR CAREER OFFENDER ENHANCEMENT UNDER U.S.S.G. 4B1.1.

In the court below, Appellant filed a motion for leave of court to supplement motion for issuance of certificate of appealability (No. 21-6131, Doc. #11). Appellant claims in the motion that after *Mathis*, Appellant's life sentence is void because the career offender enhancement under U.S.S.G. 4B1.2 is not applicable in a conspiracy to distribute controlled substance case because conspiracy is neither a crime of violence or a controlled substance offense, a requirement necessary to satisfy the criteria to qualify as a career offender under U.S.S.G. 4B1.1. Appellant invoked *Mathis* because would be retroactively applicable to Appellant's case because his direct appeal was still pending in the Court of Appeals when the Supreme Court made its *Mathis* ruling.

However, after the Sixth Circuit Court of Appeals en banc ruling in *Havis*, Appellant should have benefitted from that ruling because Appellant's initial 2255 was still pending in the district court. The Court of Appeals made procedural error when it denied relief in light of the recent case law from that court that supports the ruling in *Havis* that attempt crimes does not qualify for career offender enhancement under the sentencing Guidelines after the court's decision in *Havis*. See *United States v. Cordero*, 993 F.3d 603 (6th Cir. 2020).

United States v. Gentry, 2020 U.S. App. Lexis 29061, September 11, 2020, United States v. Minter, 2020 U.S. App. Lexis 6127, February 27, 2020, United States v. Johnson, 2020 U.S. App. Lexis 9793, March 3, 2020.

## CONCLUSION

The petition for writ of certiorari should be granted for all the reasons stated herein.

Respectfully Submitted

Michael O. Brown