

NO. _____

IN THE UNITED STATES SUPREME COURT

TOMMY LEE HUBBARD, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

By April of 2019 both the state of Tennessee and the federal government excluded low-THC (delta-9 tetrahydrocannabinol) marijuana from the definition of illegal “marijuana” as a controlled substance. That resulted in the proliferation of legal, low-THC marijuana products (often termed “hemp” by statute), which look, smell, and function the same as the illegal, high-THC variant of the same plant.

The question presented here is:

Can the federal courts rely exclusively upon circumstantial evidence to decide that a marijuana substance is illegal, when the circumstances surrounding use of illegal marijuana are identical to the circumstances surrounding use of legal marijuana?

PARTIES TO THE PROCEEDINGS

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

RELATED CASES

There are no related cases.

All relevant opinions below are included in the Appendix filed herewith.

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JURISDICTIONAL STATEMENT

Tommy Hubbard was sentenced to serve 60 months of imprisonment for being a felon in possession of a firearm pursuant to 18 U.S.C. § 922(g)(1). That sentence was enhanced based on the district court's conclusion that Mr. Hubbard also possessed illegal marijuana. Mr. Hubbard filed a timely notice of appeal from that judgment on December 21, 2021, and the United States Court of Appeals for the Sixth Circuit affirmed his sentence on January 19, 2023.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Pursuant to Rule 13 of the Supreme Court the time for filing a petition for certiorari review is 90 days from the judgment of the Court of Appeals. Accordingly, this petition is timely filed.

Pursuant to Rule 29.4(a), appropriate service is made to the Solicitor General of the United States and to Assistant United States Attorney Brian Samuelson, who appeared in the United States Court of Appeals for the Sixth Circuit on behalf of the United States Attorney's Office, a federal office which is authorized by law to appear before this Court on its own behalf.

PRAYER FOR RELIEF

Petitioner, Tommy Hubbard, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 802(16)(A):

Subject to subparagraph (B), the terms “marihuana” and “marijuana” mean all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

21 U.S.C. § 802(16)(B)(i):

The terms “marihuana” and “marijuana” do not include--(i) hemp, as defined in section 1639o of Title 7

7 U.S.C. § 1639o(1):

The term “hemp” means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

Tenn. Code Ann. § 39-17-402(16)(A):

“Marijuana” means all parts of the plant cannabis, whether growing or not; the seeds of the plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, including concentrates and oils, its seeds or resin

Tenn. Code Ann. § 39-17-402(16)(C):

“Marijuana” also does not include hemp, as defined in § 43-27-101

Tenn. Code Ann. § 43-27-101(3):

“Hemp” means the plant cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol (THC) concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis

STATEMENT OF THE CASE AND FACTS

Tommy Hubbard was at a friend’s home when law enforcement arrived to arrest him on an outstanding warrant. (Pet. Appx, at 1a-2a.) The apartment’s resident answered the door and gave consent for law enforcement to search the apartment. (*Id.* at 2a.) Inside the bathroom closet officers found a gun along with baggies that appeared to contain marijuana. (*Id.*) Mr. Hubbard voluntarily surrendered to law enforcement and later gave a statement where he admitting to possessing “weed,” but not identifying whether the marijuana was legal or illegal. (*Id.* at 2a, 8a.) Law enforcement also spoke to the resident, who stated that when officers knocked on the door, Mr. Hubbard ran onto the balcony, then over to the “bathroom area” where both the gun and marijuana were located. (*Id.* at 2a.)

Based on this incident, Mr. Hubbard later pled guilty in federal court to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (*Id.*) That guilty plea, which was not based on a plea agreement nor otherwise waived his right to appeal, triggered a sentencing hearing and the calculation of the applicable guidelines range. The United States Sentencing Guidelines (“U.S.S.G.”) provides a recommended range of incarceration for individuals convicted of federal crimes. This guideline range is the federal judge’s starting point and “lodestar” when determining the appropriate sentence. *Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016). As such, the Guidelines have a dramatic impact on an individual’s ultimate sentence. *Id.*

The applicable guideline for convictions under § 922(g) is U.S.S.G. § 2K2.1. The guideline starts out at a base offense level of 14, which can be increased if various enhancements are applied. One such enhancement is U.S.S.G. § 2K2.1(b)(6)(B), which increases the base offense level by 4-points if the district court finds that the firearm was

possessed “in connection with another felony offense.” Here, the United States Probation Office recommended application of this enhancement based on the presence of the marijuana substance in proximity to the firearm. (Pet. Appx. at 2a-3a.) That 4-point enhancement increased his base offense level from a 17 to a 21, and when combined with his criminal history category of V increased his guideline range from 46 to 57 months to a range of 70 to 87 months. (Pet. Appx. at 2a-3a.) In other words, the enhancement added 2-years onto Mr. Hubbard’s guideline range.

Mr. Hubbard objected to this enhancement, arguing that a lab test was required to determine whether the substance was in fact illegal—as opposed to legal—marijuana given the identical characteristics of both. But his objection was overruled, as the district court concluded it could determine the illegality of the substance based on Mr. Hubbard’s actions. (*Id.* at 1a, 3a.) On appeal he maintained that objection, arguing that due to the unique relationship between illegal marijuana and its legal counterpart, circumstantial evidence was insufficient as a matter of law conclude that the substance was illegal—particularly where, as here, law enforcement recovered the marijuana substance and was fully capable of conducting a lab test but inexplicably chose not to. (*Id.* at 4a-7a; Appellant Br., at 13-22; Reply, at 1-9.) But, the Sixth Circuit held that a lab test was not required, relying upon case law addressing other street drugs to hold that circumstantial evidence was also sufficient in the legal versus illegal marijuana context. (Pet. Appx. at 8a-9a 8-9 (citing *United States v. Malone*, 846 F. App’x 355, 361 (6th Cir. 2021) (addressing powder cocaine); *United States v. Schrock*, 855 F.2d 327, 334 (6th Cir. 1988) (addressing methamphetamine); *United States v. Swift*, 276 F. App’x 439, 442 (6th Cir. 2008) (addressing crack cocaine).)

REASONS FOR GRANTING OF THE WRIT

I. The Sixth Circuit's approach is wrong.

A. The physical characteristics and method of use of legal and illegal marijuana make the two substances indistinguishable absent a lab test.

In Tennessee, and under federal law, it is legal to possess cannabis with a THC (delta-9 tetrahydrocannabinol) concentration of 0.3% or less (“legal marijuana”). Tenn. Code Ann. § 39-17-402(16)(C); Tenn. Code Ann. § 39-17-403(f)(1); Tenn. Code Ann. § 43-27-101(3); 21 U.S.C. § 802(16); 7 U.S.C. § 1639o(1). By contrast, cannabis with a THC concentration higher than 0.3% is a controlled substance by statute in both jurisdictions (“illegal marijuana”). 21 U.S.C. § 812; 21 U.S.C. § 802(16); Tenn. Code Ann. § 39-17-415(a)(1). Thus, possession of illegal marijuana with intent to distribute is a felony offense, while possession of legal marijuana, having 0.3% THC or less is not a crime at all—and certainly not a felony. *See* Tenn. Code Ann. § 39-17-417(a)(4) and (g)(1); 21 U.S.C. § 841(a)(1) and (d). This has only been true since April of 2019.

The only difference between legal and illegal marijuana is the concentration of THC—the two substances are derived from the same plant and are otherwise identical. “It’s a common misconception that hemp [legal marijuana] and [illegal] marijuana are two different species of plant,” but “[t]hey’re just two different names for cannabis, a type of flowering plant in the *Cannabaceae* family.” Ferguson, Sian, *Hemp vs. Marijuana: What’s the Difference?*, Healthline (Aug. 27, 2020)¹ While “[l]egally, the key difference between the two is

¹ Available at <https://www.healthline.com/health/hemp-vs-marijuana> (last visited June 22, 2023).

tetrahydrocannabinol (THC),” “science doesn’t differentiate between ‘hemp’ and ‘marijuana’” *Id.*

This is a sharp difference between marijuana and street drugs such as heroin, cocaine, or methamphetamine. Unlike illegal marijuana, none of these other illegal drugs has a corresponding legal variant that not only looks identical but is also *used identically*. Thus, the circumstantial evidence relied upon by the Sixth Circuit when addressing heroin, cocaine, or methamphetamine does not work the context of legal versus illegal marijuana. Circumstantial evidence is less probative of illegality in the marijuana context to such a large degree that its use should be rejected entirely. Unlike heroin, cocaine, or methamphetamine, a lab test is necessary to determine illegality.

B. The Sixth Circuit’s test for determining the illegality of a substance through circumstantial evidence does not work in the context of legal versus illegal marijuana.

The Sixth Circuit concluded that the marijuana involved here was illegal based exclusively on circumstantial evidence and based on caselaw addressing other, distinguishable, street drugs. That test is neither effective nor sufficient in the unique context of illegal versus legal marijuana.

In *United States v. Wright*, 16 F.3d 1429, 1439 (6th Cir. 1994), the Sixth Circuit discussed six circumstantial factors that indicate a substance is in fact an illegal drug. Those are:

- (1) evidence of the physical appearance of the substance involved in the transaction,
- (2) evidence that the substance produced the expected effects when sampled by someone familiar with the illicit drug,

- (3) evidence that the substance was used in the same manner as the illicit drug,
- (4) testimony that a high price was paid in cash for the substance,
- (5) evidence that transactions involving the substance were carried on with secrecy or deviousness, and
- (6) evidence that the substance was called by the name of the illegal narcotic by the defendant or others in his presence.

16 F.3d at 1439 (quoting *United States v. Scott*, 725 F.2d 43, 45-46 (4th Cir. 1984)). Taken in turn, each of these factors is either entirely meaningless in the unique context of legal versus illegal marijuana, or its probative value is dramatically reduced. This means that lab testing is necessary to adequately distinguish between the legal and illegal variants.

The first factor, “evidence of the physical appearance of the substance involved in the transaction,” is completely meaningless in the legal/illegal marijuana context, because the legal and illegal marijuana variants look and smell identical. Indeed, Mr. Baldwin, the agent who testified at Mr. Hubbard’s sentencing, stated that in order to tell the difference between unpackaged legal and illegal marijuana the substance “would have to be submitted to the lab for determination.” (TR Sent., Dist. Ct. R. 36, PageID #223.) Thus, this factor cannot support a conclusion that cannabis was illegal marijuana.

The second factor, “evidence that the substance produced the expected effects when sampled by someone familiar with the illicit drug,” is arguably the only meaningful evidence that could support a finding (absent a lab test) that marijuana contained a sufficient THC quantity and was therefore illegal. But, even this factor is significantly undermined in the legal versus illegal marijuana context, because there is no accurate way to determine that the physical effects of the cannabis in fact reflect a THC quantity of 0.31% instead of 0.3%.

Unlike fake cocaine or methamphetamine for example, which is unlikely to cause any physical reaction similar to the actual illegal drug, legal marijuana is used for the same reasons as illegal marijuana, precisely for its ability to relax one's anxieties, or as pain management. *See* Megan Brenan, Gallup, Wellbeing, "14% of American Say They Use CBD Products" (Aug. 7, 2019) (reporting that most users of legal marijuana used CBD for pain, anxiety or sleep).² At the same time, even if this fact was relevant, there is no evidence here as to the physical effects the marijuana substance had on a person.

The third factor, "evidence that the substance was used in the same manner as the illicit drug," is also completely useless here, because illegal marijuana and legal marijuana are used in exactly the same way—both are smoked, vaped or baked into snacks. This factor cannot support a conclusion that marijuana is illegal instead of legal.

The fourth factor, "testimony that a high price was paid in cash for the substance," is similarly meaningless here. First, there is no testimony as to the price paid for the marijuana substance at issue—in fact there was no evidence of any actual instances of distribution. There were no controlled buys, nor any witness testimony as to purchases from or sales to Mr. Hubbard. But, second, even if there was such evidence, and even if it can be assumed that illegal marijuana is more expensive than its legal counterpart, the seller and buyer could readily be *wrong* as to the actual THC quantity. And, it is not a crime, and certainly not a felony to

² Available at <https://news.gallup.com/poll/263147/americans-say-cbd-products.aspx> (last visited June 22, 2023)).

sell (or buy) low-THC, legal marijuana *even if one thinks it's illegal marijuana.*³ So, even if illegal marijuana costs substantially more than designer hemp (legal marijuana), that goes only to show what the parties to the sale *believed* they were distributing. But, because no one can tell the THC level of a marijuana substance by its physical characteristics alone, what a buyer or seller thought they were exchanging tells us nothing about what the actual substance was. It tells us nothing as to whether the substance was illegal marijuana or not.

The fifth factor, “evidence that transactions involving the substance were carried on with secrecy or deviousness,” suffers from the same flaws as the fourth factor—even if the people involved in the transaction believe they are distributing illegal marijuana, they could easily be mistaken. Moreover, they are not actually doing anything illegal (let alone felony conduct) if the substance is in fact legal marijuana.

³ The sale of low-THC cannabis by an individual such as Mr. Hubbard does not garner felony criminal charges, as Tennessee does not even require a license to sell hemp flower or oils. TN Dept. of Agriculture, Resources for Producers, “Hemp FAQ—Do I need a license to sell hemp flower or oil?”, available at <https://www.tn.gov/agriculture/farms/hemp-industry/hemp/getting-started> (last visited June 22, 2023). At the same time, the Tennessee Department of Agriculture has promulgated an administrative rule prohibiting individuals from “[m]arket[ing] or represent[ing] hemp or hemp products to be marijuana or any illicit substance in any form,” *See* Tenn. Comp. R. & Regs. 0080-06-28-.07 (2021). But, while criminal penalties apply to some violations (such as culpable *production* of illegal high-THC marijuana), undersigned was unable to find any criminal penalty for representing low-THC marijuana to be illegal, high-THC marijuana. Nor does legal marijuana fall under either the Tennessee or federal statutes prohibiting the sale of counterfeit substances. *See* Tenn. Code Ann. § 39-17-423(a)(3); 21 U.S.C. § 802(7); *United States v. Thomas*, 939 F.3d 1121, 1124-25 (10th Cir. 2019) (explaining that under federal law the term “counterfeit substance” is limited to a *controlled substance*, such as a pharmaceutical, that has been mislabeled or misbranded fraudulently or without authorization (citation omitted)).

And, finally, the sixth factor, “evidence that the substance was called by the name of the illegal narcotic by the defendant or others in his presence,” is similarly unhelpful because the terms “marijuana” and “weed” are regularly used to mean cannabis—regardless of the THC content—and can refer to both illegal and legal forms of it. Merriam-Webster, “Weed,”⁴ Merriam-Webster, “Marijuana.”⁵ The terms “marijuana” and “weed” are thus unlike “cocaine,” “methamphetamine,” “heroin” or even “speed,”⁶ because each of those terms refers only to illegal substances. Thus, the circumstantial evidence test applied by the Sixth Circuit does not work in the marijuana context.

To illustrate, when someone is snorting or injecting a substance for recreational purposes, it is logical to assume that the substance is in fact an illegal drug. But when someone is recreationally smoking a green, leafy substance that smells like marijuana, it could just as readily be legal low-THC marijuana. Unlike with cocaine, methamphetamine, or heroin use is not logical to assume that the green, leafy substance is illegal, because there is an equally valid—and entirely legal—explanation for the exact same conduct. The only way to prove that one is engaged in illegal conduct in the marijuana context, is by testing the THC quantity.

⁴ Available at <https://www.merriam-webster.com/dictionary/weed> (last visited June 22, 2023).

⁵ Available at <https://www.merriam-webster.com/dictionary/marijuana> (incorporating into the definition of “marijuana” the definition of low THC “hemp,” and vice versa) (last visited June 22, 2023).

⁶ The Merriam-Webster dictionary defines “speed” in the context of physical substances as only “METHAMPHETAMINE” or “a related stimulant drug and especially an amphetamine.” It does not encompass any legal substances. Merriam-Webster, “Speed” (available at <https://www.merriam-webster.com/dictionary/speed> (last visited June 22, 2023)).

At the same time, in the context of other drugs like methamphetamine, cocaine, and heroine, a defendant's own belief about whether he possesses an illegal substance *is* a reasonable, even determinative, indication that he is doing something illegal. For those drugs, (1) it is highly unlikely that the defendant will be mistaken, precisely because there are no legal alternatives that look and function the same way, and (2) it *is* a felony to distribute or possess with intent to distribute a counterfeit substance that resembles an illegal Schedule I, II, III or IV substance (marijuana falls under none of these schedules). Tenn. Code Ann. § 39-17-423(a)(3); Tenn. Code Ann. § 39-17-415(a)(1).

In short, while circumstantial evidence can be a reliable way to determine whether individuals were distributing or possessing other illegal drugs, it is not reliable in the new, post-2019 marijuana context. A lab test was necessary here. And it is inexplicable that the government failed to order one when they had the marijuana substance in their possession.

II. This is a widespread and consistently recurring question of exceptional importance.

The specific guideline enhancement at issue here—for possessing a firearm in furtherance of another felony (U.S.S.G. § 2K2.1(b)(6)(B))—is perhaps one of the most frequently applied enhancements in all of federal sentencing. In fiscal year 2021 alone, the enhancement was applied in 2,264 cases, many of which undoubtedly involved a marijuana substance. Sentencing Commission, Use of Guidelines and Specific Offense Characteristics, Guideline Calculation Based at 131 (Fiscal Year 2021).⁷

⁷ Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2021/Ch2_Guideline_Based.pdf (last visited June 22, 2023).

Moreover, a Gallop poll from 2019 found that 14% of Americans use CBD (*i.e.* “hemp” or “legal marijuana”) products, including hemp flower. Megan Brenan, Gallup, Wellbeing, “14% of American Say They Use CBD Products” (Aug. 7, 2019).⁸ That would equate to approximately 46,892,863 Americans today. United States Census Bureau, U.S. and World Population Clock (June 22, 2023) (listing the US population at 334,949,023).⁹ Thus, not only are countless people in the federal system receiving enhancements based on their possession of a marijuana substance which could be purely legal, but the general public is using legal low-TCH products on an increasingly regular basis. The continued application to the marijuana context of an outmoded set of assumptions surrounding circumstantial evidence risks subjecting thousands, if not millions of Americans engaged in legal conduct to wrongful convictions or wrongfully enhanced sentences.

⁸ Available at <https://news.gallup.com/poll/263147/americans-say-cbd-products.aspx> (last visited June 22, 2023).

⁹ Current population numbers available at <https://www.census.gov/popclock/> (last visited June 22, 2023).

CONCLUSION

In consideration of the foregoing, Mr. Tommy Hubbard submits that the petition for certiorari should be granted so the Court can address this exceptionally important issue.

Respectfully submitted,

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