
No.

in the
Supreme Court
of the
United States

Term,

LONG PHI PHAM,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

DEBORAH L. WILLIAMS
Federal Public Defender Southern District of Ohio

Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
250 E. Fifth St. Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

QUESTION PRESENTED

A defendant's sentence under the Armed Career Criminal Act may be enhanced to 15 years to life if the defendant has at least three qualifying convictions for a "serious drug offense" or "violent felony" that were "committed on occasions different from one another." Should prior federal convictions for conspiracy to distribute drugs and distribution of those same drugs be considered to have been committed on occasions different from one another?

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The Petitioner, Long Phi Pham, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on October 3, 2017.

OPINION BELOW

The Sixth Circuit's opinion in this matter was published at 872 F.3d 799, and is attached hereto as Appendix 1.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on October 3, 2017. This petition is timely filed. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1291 and Supreme Court Rule 12.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 924(e)(1) states:

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).

STATEMENT OF THE CASE

In 2004, Petitioner Long Phi Pham pled guilty to a five count indictment charging him with one count of conspiracy to possess with the intent to distribute ecstasy and methamphetamine, and four substantive counts of possession of either ecstasy or methamphetamine. In the indictment, the conspiracy charge named the substantive counts as overt acts in furtherance of the conspiracy. Further, the plea agreement set forth as the factual basis for these offenses:

From October 1, 2003 to February 28, 2004, in the Western District of Kentucky, Jefferson County, the defendants, Long Phi Pham and Tammy Tran conspired to possess with the intent to distribute and to distribute approximately 2705.9 grams of a mixture or substance containing a detectable amount of methylenedioxymethamphetamine (MDMA), commonly known as ecstasy, and methamphetamine. In furtherance of this conspiracy, on February 12, 2004, a confidential informant purchased 10.1 grams of a substance containing ecstasy and methamphetamine from Long Phi Pham and Tammy Tran. On February 28, 2004, officers executed a search warrant at Pham and Tran's residence and recovered 220.8 grams of a substance containing ecstasy and methamphetamine. Additionally, during the above-mentioned conspiracy period, Pham and Tran received approximately 9900 tablets (2475 grams) of ecstasy tablets which were distributed to others.

The basic facts of this conviction were that Pham sold ecstasy and methamphetamine to an informant on February 12, 2004. On February 28, a search warrant was executed on Pham's residence, and his stash was found. Pham was sentenced to 51 months incarceration for these offenses.

Pham served his time, and was released to begin his supervised release term. On May 8, 2014, Pham received a package at his home that contained approximately 3.6 pounds of marijuana. Officers had intercepted the package while in UPS custody and knew of its contents, and upon delivery, executed an anticipatory search warrant on Pham's residence. There they found not only the package of marijuana, but also three firearms.

As a result of this conduct, Pham was indicted by a grand jury sitting in the Western District of Kentucky on a one count indictment charging him with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). After a motion to suppress was denied, Pham entered a guilty plea as to the one count indictment, without the benefit of a plea agreement. During the plea hearing, the parties agreed to disagree as to whether Pham was an Armed Career Criminal pursuant to 18 U.S.C. § 924(e). Pham had a 2003 Tennessee conviction for conspiracy to deliver ecstasy, which the parties agreed counted as a qualifying conviction for purposes of the ACCA. The defense contended that Pham's 2004 federal convictions should all be considered one offense, while the United States argued that they occurred on different occasions for purposes of the ACCA.

At the sentencing hearing held on January 12, 2017, the district court agreed with the United States, and imposed a sentence under the ACCA. The court held that:

there does not appear to be any Sixth Circuit authority particularly on point, so the Sixth Circuit has not yet addressed this issue. And I don't know whether the Sixth Circuit would go along with it or not, that will be up to them, but there is an Eighth Circuit case that speaks to the issue. It is *United States v. Melbie, M-E-L-B-I-E*. It is at 751 F.3d 586. It is a 2004 decision by the Eighth Circuit. In this case they had a conspiracy and an underlying affirmative substantive count within the conspiracy, all serious drug offenses. The Court in that case found that where the underlying substantive offense was what they called a punctuated occurrence with a limited duration, which I think would fit the controlled buy that formed the basis for Counts 2 and 3 in this case, clearly drug dealing in its traditional form, they found that the Court could count both the underlying conspiracy conviction and the separate conviction that occurred in furtherance of that conspiracy and within the time period of that conspiracy. Now, one could argue as to whether or not the rationale of that case squares with the test that has been articulated in the *Paige* and the *Hill* cases, specifically, is it possible to discern the point at which the first offense is completed and the subsequent point at which the second offense begins, which is part of the *Hill* test, and I'm not sure. Anyway, I don't need to answer that question because I'm not relying on the Eighth Circuit case, but I point that out simply as some authority from a different circuit on what to do with the situation where you have a conspiracy charge and within it substantive offenses clearly in furtherance of the conspiracy, but substantive offenses which occurred on separate occasions and which is clearly the requirement of 924(e), because they were committed on occasions different from one another.

As a result of this findings, Pham was found to qualify for the ACCA enhancement, and a sentence of 188 months was imposed.

On appeal to the Sixth Circuit, Pham raised one issue: whether his prior 2004

federal convictions for conspiracy and substantive drug offenses were committed “on occasions different from one another” so as to qualify for enhancement under the ACCA. On October 3, 2017, the Sixth Circuit issued a published decision finding that they were separate offenses under the ACCA. The Court held that:

Because Pham’s 2004 possession-with-intent-to-distribute convictions stemmed from discrete offenses with limited durations during the conspiracy—one a sale on February 12 and the other possession on February 28—they occurred on different occasions under the ACCA. Accordingly, the district court properly enhanced Pham’s sentence under the statute.

(Appendix 1, p.5)

REASON FOR GRANTING THE WRIT

1. **For purposes of the Armed Career Criminal Act, a conspiracy conviction cannot be counted separately from substantive drug offenses where the offenses all occurred at the same time, the substantive offenses were listed as overt acts of the conspiracy charge, and there was no ability to end one offense before beginning the other**

Petitioner Pham submits that this Court should grant certiorari to correct the Sixth Circuit's erroneous interpretation of the phrase "committed on occasions different from one another" as set forth in the Armed Career Criminal Act. Where a defendant has two prior offenses which include a substantive drug trafficking offense and a conspiracy which subsumes that substantive offense, those may only be counted as one prior conviction under the plain language of the Armed Career Criminal Act.

The Armed Career Criminal Act (18 U.S.C. § 924(e)) allows for an enhancement of a defendant's statutory range from 0 to 10 years to 15 years to life if the defendant has three "violent felonies" or "serious drug offenses" which were "committed on occasions different from one another." Although this Court has spent an abundance of time dissecting what constitutes a "violent felony" (see *Johnson v. United States*, --- U.S. ---, 135 S. Ct. 2551, 2556 (2015)(collecting cases)) and has helped to further define what constitutes a "serious drug offense" (*United States v. Rodriguez*, 553 U.S. 377, 128 S. Ct. 1783 (2008)), the Court has not had

occasion to determine the contours of the phrase “occasions different from one another” within this statute.

Pham submits that the plain language of the statute requires a finding that his 2004 convictions for possession with the intent to distribute drugs and conspiracy to possess those same drugs were, for ACCA purposes, only one prior offense. However, if the plain language of the statute does not lead to that result, then Pham contends that the rule of lenity works to obtain the same result. As such, Pham must be resentenced without the ACCA enhancement.

This Court made clear that any review of a statute must begin with the language contained in the text of the statute itself. *Sebelius v. Cloer*, – U.S.–, 133 S. Ct. 1886, 1893 (2013). A court is to start with the assumption that the ordinary meaning of the statutory language expresses Congress’ intent. *Marx v. General Revenue Corp.*, – U.S.–, 133 S. Ct. 1166, 1173 (2013). Words or phrases which are not defined in a statute are given their ordinary meaning. *Burrage v. United States*, – U.S.–, 134 S. Ct. 881, 887 (2014).

Here, the plain language of the statute requires, at a minimum, that the offenses not occur at the same time. The language in the statute “committed on occasions different from one another” would seem to require this as a baseline for determining whether the offenses were separate or the same.

And indeed, the various circuits have almost universally promulgated a “separate criminal episodes” test to determine whether crimes were committed on

occasions different from one another. As set forth by the Fourth Circuit in *United States v. Linney*, 819 F.3d 747 (4th Cir. 2016), offenses are “separate criminal episodes” where they have a distinct “beginning and an end,” and constitute “an occurrence unto themselves.” *Id.* at 751. The Tenth Circuit similarly reviews whether the episodes were “distinct in time” and whether one episode ended before the other began. See *United States v. Tisdale*, 921 F.2d 1095, 1099 (10th Cir. 1990). The circuits also take into consideration whether “defendant at each step had the opportunity to stop and proceed no further.” *United States v. Elliott*, 703 F.3d 378, 383 (7th Cir. 2012).

Using the straightforward language of the statute, as well as the standard promulgated by the various circuits, a substantive drug trafficking offense and a conspiracy to commit that same offense could never be two separate countable offenses under the ACCA. The offenses occur simultaneously, are not separated by an ability to “stop and proceed no further”, and are not an “occurrence unto themselves.”

Applying this test to the facts of this case, it is clear that Pham’s 2004 convictions should only have been counted as one offense under the ACCA. The indictment charged a conspiracy lasting from October 1, 2003 to February 28, 2004. In the indictment and at the plea hearing, itself, the Government alleged that “[i]n furtherance of this conspiracy, on February 12, 2004, a confidential informant

purchased 10.1 grams of a substance containing ecstasy and methamphetamine” from Pham. These cannot be separate offenses under the above test.

Despite this straight forward reading of the statute, however, each Circuit to pass on this particular dilemma (including the Sixth Circuit in this case) has come to the opposite conclusion. For instance, the Eighth Circuit has found that a prior state conviction for distribution of methamphetamine was distinct for ACCA purposes from a federal conviction for conspiracy to distribute methamphetamine, even though the dates overlapped. *United States v. Melbie*, 751 F.3d 586, 588 (8th Cir. 2014). The Eighth Circuit concluded that “for application to a conspiracy and a related offense, the ‘punctuated’ nature and limited duration of the related offense rather than the absence of a ‘time lapse’ defines whether the offense is sufficiently distinct for the purpose of applying § 924(e)(1).” *Id.* at 589.

Most recently, the Eleventh Circuit, in *United States v. Longoria*, 874 F.3d 1278 (11th Cir. 2017), determined that a prior convictions for conspiracy with the intent to distribute cocaine and two counts of distribution of cocaine were separate offenses. “[A] drug conspiracy and a substantive drug offense occurring within its span may have been ‘committed on occasions different from one another’ under the ACCA. Here, the facts of Longoria's case make this determination simple. Longoria's three predicate crimes are temporally distinct. His two distribution offenses occurred at clear and obvious points in time separated by nine days—November 24, 2008 and

December 3, 2008—and were discrete episodes in the series of events constituting his participation in the drug conspiracy.” *Id.* at 1282.

And finally, in the present case, the Sixth Circuit found that “Pham’s 2004 possession-with-intent-to-distribute convictions stemmed from discrete offenses with limited durations during the conspiracy—one a sale on February 12 and the other possession on February 28—they occurred on different occasions under the ACCA. Accordingly, the district court properly enhanced Pham’s sentence under the statute.” (Appendix 1, p.5)

At least two circuits, however, have cautioned that conspiracies may subsume substantive offenses. The Tenth Circuit (in the context of 21 U.S.C. § 851) has advised that it is difficult to distinguish conspiracy and the substantive underlying offense as separate offenses. “Whether two acts constitute ‘separate criminal episodes’ is not always self-evident. For example, two qualifying convictions, one for conspiracy to distribute drugs and one for the substantive offense underlying the conspiracy conviction would present a difficult case. [] A conspiracy and an underlying substantive offense can be viewed as ‘separate,’ to the extent that ‘[c]onspiracy is a crime separate from the substantive violation.’ [] But insofar as a defendant can be convicted of both a one-day conspiracy to distribute drugs and the actual distribution of drugs that same day, [] , such convictions do not obviously arise from separate ‘episodes.’ *United States v. Beckstrom*, 647 F.3d 1012, 1018 (10th Cir. 2011).

In *United States v. Sims*, 683 F.3d 815 (7th Cir. 2012), the Seventh Circuit considered whether the crimes of possession of drugs and distribution of drugs, occurring a week apart, constituted one ongoing “episode”. The court mused that “in order for us to conclude that his two crimes must be collapsed into one ‘occasion,’ we would at a minimum have to be satisfied that Sims's possession offense was based on the same drug stash from which he drew the product that he sold.” *Id.* at 817.

This Court should adopt the construct of the Seventh and Tenth Circuits, as the plain language of the ACCA mandates a finding that a conspiracy to distribution drugs and distribution of those same drugs cannot occur “on occasions different from one another.” As such, Pham is entitled to resentencing.

In the alternative, if this Court find that the language cannot be read the in the straightforward way as set forth by the Petitioner, then the rule of lenity requires that the statutory language be read in a way which favors Pham.

“The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.” *United States v. Santos*, 553 U.S. 507,514 (2008). “[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.” *United States v. Bass*, 404 U.S. 336,347 (1971). “When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the

ambiguity should be resolved in favor of lenity.” *Bell v. United States*, 349 U.S. 81,83 (1955).

Here, any ambiguity in how to treat substantive and conspiracy offenses in this context must be resolved in Pham’s favor. As such, on this alternative basis, Pham is entitled to resentencing.

CONCLUSION

Pham requests that this Court grant certiorari, and remand this case for resentencing.

Respectfully submitted,

DEBORAH L. WILLIAMS
Federal Public Defender

Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
Appellate Director
250 E. Fifth St.
Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

APPENDIX

1. COURT OF APPEALS ORDER October 3, 2017

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0229p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LONG PHI PHAM,

Defendant-Appellant.

No. 17-5096

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 3:14-cr-00067-1—Charles R. Simpson III, District Judge.

Decided and Filed: October 3, 2017

Before: COLE, Chief Judge; ROGERS and GRIFFIN, Circuit Judges.

COUNSEL

ON BRIEF: Kevin M. Schad, FEDERAL PUBLIC DEFENDER, Cincinnati, Ohio, for Appellant. Terry M. Cushing, UNITED STATES ATTORNEY’S OFFICE, Louisville, Kentucky, for Appellee.

OPINION

COLE, Chief Judge. Long Phi Pham appeals his sentence for being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). He argues the district court improperly enhanced his sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (“ACCA”). Because the enhancement was warranted, we affirm Pham’s sentence.

I. BACKGROUND

Pham pleaded guilty to one count of being a felon in possession of a firearm under § 922(g)(1).

At sentencing, the government argued that Pham was subject to the ACCA. The ACCA imposes a fifteen-year minimum sentence on anyone convicted as a felon in possession of a firearm who has “three previous convictions by any court” for a “serious drug offense” “committed on occasions different from one another.” § 924(e)(1). The government cited the following three sets of convictions as qualifying offenses: 1) a 2003 Tennessee conviction for conspiring to deliver ecstasy; 2) two 2004 federal convictions for possessing with intent to distribute methamphetamine and ecstasy, respectively, each based on a February 12, 2004, sale to a confidential informant at Pham’s residence; and 3) two 2004 federal convictions for possessing with intent to distribute methamphetamine and ecstasy, respectively, each based on a February 28, 2004, search of Pham’s residence.

Pham objected to the application of the ACCA based on a further 2004 federal conviction, this one for conspiring to possess with intent to distribute 50 grams or more of methamphetamine and ecstasy from October 1, 2003 to February 28, 2004. He argued that this conviction subsumed the other 2004 offenses because he committed them to further the conspiracy. Pham contended this left just two qualifying offenses under the ACCA—the 2003 Tennessee conviction and the 2004 federal conspiracy conviction.

The district court found the ACCA applicable because Pham had committed the offenses cited by the government on different dates. Factoring in the fifteen-year minimum required by the ACCA, the court sentenced Pham to 188 months of imprisonment and 5 years of supervised release.

Pham asks us to vacate his sentence and remand for resentencing without the ACCA enhancement under the same theory he offered at sentencing. This requires us to determine whether the 2004 convictions the district court counted as qualifying offenses under the ACCA occurred on different occasions under the statute.

II. ANALYSIS

A. Standard of Review

“We review de novo a district court’s conclusion that two offenses were committed on occasions different from one another” under the ACCA. *United States v. Barbour*, 750 F.3d 535, 538–39 (6th Cir. 2014) (internal quotation marks and citations omitted). The government bears the burden of proving by a preponderance of the evidence that they were. *Id.* at 545–46. Further, it must use *Shepard* documents to do so, which include the “terms of a plea agreement” and “comparable judicial record[s] of this information.” *United States v. Fraker*, 458 F. App’x 461, 464 (6th Cir. 2012) (quoting *Shepard v. United States*, 544 U.S. 13, 26 (2005)).

In this circuit, two offenses were committed on different occasions under the ACCA if 1) it is possible to discern when the first offense ended and the subsequent point at which the second offense began; 2) the offender could have withdrawn from crime after the first offense ended and not committed the second offense; or 3) the offenses were committed at different residences or business locations. *United States v. Paige*, 634 F.3d 871, 873 (6th Cir. 2011); *see, e.g., United States v. Hill*, 440 F.3d 292, 298 (6th Cir. 2006) (finding “[a]ll three indicia of separate offenses” where defendant burglarized one business and then crossed the street to burglarize another). The government prevails if it meets even one of the tests. *See United States v. Southers*, 866 F.3d 364, 369 (6th Cir. 2017).

The 2004 convictions that the district court counted as qualifying offenses under the ACCA easily meet the second *Paige* test if we compare them directly to one another rather than to the conspiracy conviction. Pham admitted to selling methamphetamine and ecstasy on February 12. He also admitted to being caught with methamphetamine and ecstasy on February 28. By these facts alone, Pham could have withdrawn from crime after the February 12 sale and not possessed additional quantities of the drugs more than two weeks later. Thus, the government has met its burden.

Pham cites the Seventh Circuit’s statement that to overcome this result, a defendant must at a minimum show that he made the initial sale from the same stash that was discovered on the later date. *See United States v. Sims*, 683 F.3d 815, 817 (7th Cir. 2012) (“Although it is possible

that the drugs found on January 18 were already in his possession as early as January 11, it is at least equally likely that they were not. For all we know, Sims sold the last of his January 11 drug supply to the officer that day and then acquired additional cocaine before his arrest on January 18.”). But Pham fails to contend, much less show, that he possessed the drugs confiscated on February 28 as early as February 12. *See, e.g.*, Def. Br. 11 (citing *Sims* without tying it to this case); Reply 2 (“[U]nder these particular facts, two drug convictions, one consisting of a sale and the other of finding of the stash from that sale, warrant a finding of one criminal episode.”); *see Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008) (holding a party waives an argument made for the first time on reply).

Pham does, however, make the more complex argument that his 2004 conspiracy conviction subsumes the possession-with-intent-to-distribute offenses from that same year, which he committed to further the conspiracy. But we have long recognized offenses that are “part of a series” or “related to [an] entire course of events” as “distinct in time” under the ACCA so long as they “form[] a separate unit within the whole” and are “punctuated occurrence[s] with a limited duration.” *United States v. Roach*, 958 F.2d 679, 684 (6th Cir. 1992) (internal quotation marks and citation omitted).

These separate offenses may include crimes committed during and in furtherance of a conspiracy. *See United States v. Melbie*, 751 F.3d 586, 587 (8th Cir. 2014) (holding that conspiracy and possession-with-intent-to-deliver offenses occurred on different occasions under the ACCA where they overlapped in time and the latter advanced the conspiracy, but was a “discrete episode” within it); *United States v. Noel*, 488 F. App’x 928, 932–33 (6th Cir. 2012) (denying argument that conviction for conspiring to distribute cocaine during a certain period subsumed, for ACCA purposes, offenses for distributing cocaine on different dates within that period); *United States v. Taft*, 250 F. App’x 581, 581–82 (4th Cir. 2007) (per curiam) (rejecting the notion that convictions for selling drugs on different dates “should be treated as one offense [under the ACCA] because a conspiracy charge was brought at the same time and . . . the conspiracy enveloped the two substantive offenses” (citing *United States v. Letterlough*, 63 F.3d 332, 337 (4th Cir. 1995))); *United States v. Doshier*, 112 F. App’x 716, 717–18 (10th Cir. 2004)

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(treating conspiracy offense and possession-with-intent-to-distribute offense during it as offenses occurring on different occasions under the ACCA).

Because Pham's 2004 possession-with-intent-to-distribute convictions stemmed from discrete offenses with limited durations during the conspiracy—one a sale on February 12 and the other possession on February 28—they occurred on different occasions under the ACCA. Accordingly, the district court properly enhanced Pham's sentence under the statute.

III. CONCLUSION

For the foregoing reasons, the district court correctly applied the ACCA to Pham and we thus affirm his sentence.