

No.

IN THE SUPREME COURT OF THE UNITED STATES

EULIS ELLSWORTH ALLEN,

PETITIONER,

VS.

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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QUESTION PRESENTED FOR REVIEW

Whether *McNeill v. United States*, 563 U.S. 816 (2011), which directs a federal court to apply the “version of state law that the defendant was actually convicted of violating” for purposes of determining his eligibility for an enhanced sentence due to a prior state conviction, requires the court to consult state judicial rulings interpreting the offense statute during the time frame of the prior conviction, even if the judicial interpretation of the statute has changed since the date of the state conviction?

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Petitioner Eulis Ellsworth Allen (“Petitioner”) respectfully prays that a writ of certiorari will issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit entered in Case No. 17-3230 on October 17, 2017.

OPINION BELOW

On October 17, 2017, a three-judge panel of the United States Court of Appeals for the Sixth Circuit filed its opinion and order affirming Petitioner’s sentence for conspiracy to possess with intent to distribute 100 or more grams of heroin. (App. 1a). By order filed November 28, 2017, the court of appeals denied a petition for rehearing en banc. (App. 12a)The opinion and order are

unpublished. The United States District Court entered its criminal judgment without opinion on February 27, 2017. (App. 5a).

JURISDICTION

Petitioner seeks review of the opinion and order of the United States Court of Appeals for the Sixth Circuit entered on October 17, 2017. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Ohio Revised Code § 2925.03. Trafficking, aggravated trafficking in drugs:

- (A) No person shall knowingly do any of the following:
 - (1) Sell or offer to sell a controlled substance . . . ;
 -

STATEMENT OF THE CASE

The Career Offender Guideline prescribes an enhanced advisory imprisonment range for an adult offender who stands convicted of a federal felony “controlled substance offense” after having previously been convicted of **two** or more felony “controlled substances offenses.” U.S.S.G. §4B1.1(a). A “controlled substance offense” includes a federal or state felony crime involving the distribution or attempted distribution of a controlled substance. U.S.S.G. §4B1.2(b) & comment. (n. 1).

Allen pled guilty to conspiracy to distribute 100 or more grams of heroin. The presentence investigation report designated him as a Career Offender on the basis of a prior federal conviction in 2006 for distributing crack cocaine, and prior Ohio convictions in 1996 for aggravated trafficking.

Allen conceded his 2006 federal conviction qualified as a controlled substance offense. But he objected to the Career Offender designation on ground that the Ohio aggravated trafficking statute did not qualify as a controlled substance offense under state judicial rulings in effect during the time frame of his convictions in 1996.

The district court overruled the objection. It reasoned that a state supreme court decision in 2008 significantly narrowed the scope of the Ohio statute, and that as a result, it now satisfies the Guideline definition of a controlled substance offense.

The Career Offender designation had a dramatic impact on Petitioner's sentence. The district court used a post-departure, advisory Guideline imprisonment range of 168 to 210 months to sentence him to a 168-month prison term. If Petitioner had not been designated a Career Offender, his post-departure advisory range (assuming the same degree of downward departure) would have been 37 to 46 months.

Petitioner appealed the district court's ruling. Citing this Court's opinion in *McNeill v. United States*, 563 U.S. 816 (2011), Petitioner argued that when deciding whether a prior state conviction can be used to expose a defendant to an

enhanced federal sentencing range, the district court must consult state judicial rulings interpreting the offense statute in effect during the time frame of the prior conviction. The court of appeals disagreed, and affirmed Petitioner's sentence.

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

WHEN DETERMINING WHETHER A DEFENDANT IS SUBJECT TO AN ENHANCED SENTENCING RANGE FOR A FEDERAL OFFENSE DUE TO A PRIOR STATE CONVICTION, THE DISTRICT COURT MUST CONSULT STATE JUDICIAL RULINGS INTERPRETING THE OFFENSE STATUTE DURING THE TIME FRAME OF THE PRIOR CONVICTION, EVEN IF THE INTERPRETATION OF THE STATUTE HAS CHANGED SINCE THE DATE OF THE PRIOR CONVICTION.

In *McNeill*, this Court has described the process of assessing the nature of a prior state conviction, for federal sentence enhancement purposes, as a “backward-looking question” that can be resolved only by “consult[ing] the law that applied *at the time of that conviction*.” *Id.*, 563 U.S. at 820 (emphasis supplied). In many instances, this “backward-looking question” can be answered by simply examining the plain language of the offense statute in effect at the time of the prior conviction. *Id.* at 822 (directing the federal sentencing court to look to the “historical statute of conviction.”)

The task of ascertaining the law in effect at the time of the prior conviction becomes more difficult in instances where the language of the statute has not changed, but its interpretation by the state courts has. This is the precise scenario presented by this petition.

Trafficking statutes in several states, including Ohio, make it a crime to “offer to sell” a controlled substance, even in instances where no transfer of drugs actually occurs. In *United States v. Evans*, 699 F.3d 858 (6th Cir. 2012), the Sixth Circuit drew a distinction between a state statute punishing a *bona fide* “offer to sell” drugs ” (*i.e.* an offer made with actual intent to sell drugs to the buyer), and one that criminalizes any “offer to sell” drugs, including a scam or flim-flam.

Under *Evans*, a statute that punishes only a *bona fide* “offer to sell” drugs qualifies as controlled substance offense under the Career Offender Guideline.” *Id.* 699 F.3d at 867 (emphasis supplied). The *Evans* panel reasoned that the act of making the offer to a prospective buyer “is properly considered an attempt to transfer a controlled substance, which is a ‘controlled substance offense’ under the Guidelines.” *Id.* In contrast, a fraudulent “offer to sell” is not a true attempt because the offender lacks “the mental culpability to commit a substantive narcotics offense.” *Id.* at 867.

The plain language of Ohio’s trafficking statute, Ohio Revised Code §2925.03, does not specify whether an intent to transfer a controlled substance must accompany an “offer to sell.” Until 2008, Ohio appellate cases had uniformly interpreted the trafficking statute as not requiring proof of a *bona fide* offer to sell narcotics. See *Mendieta-Robles v. Gonzales*, 226 Fed. Appx. 564, 570 (6th Cir. 2007) (collecting cases).¹

¹The *Mendieta-Robles* panel cited, in support, the Ohio Supreme Court opinions in *State v. Chandler*, 846 N.E.2d 1234, 1236-37 (Ohio 2006); *State v. Mughni*, 514 N.E.2d 870, 872 (Ohio 1987), and *State v. Scott*, 432 N.E.2d 798, 799 (Ohio 1982) (“The proscribed conduct is offering to sell a controlled substance, not

But according to *Evans*, the Ohio Supreme Court re-interpreted the trafficking statute when it decided *State v. Cabrales*, 886 N.E.2d 181, 188 (Ohio 2008) in 2008. Under *Cabrales*, the Ohio trafficking statute “does not encompass fraudulent offers to sell— *i.e.*, an offer to sell a controlled substance when the defendant has no intention of carrying out the sale.” *Id.* 699 F.3d at 867.

The “categorical approach” requires a federal court to presume that the defendant’s prior conviction “‘rested upon [nothing] more than the least of th[e] acts’ criminalized, and then determine whether even those acts are encompassed by the generic federal offense.” *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013), quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010). As noted, Petitioner’s state convictions for aggravated trafficking occurred in 1996. Under state judicial

offering the controlled substance.”).

Ohio’s intermediate courts of appeals had consistently followed this line of state supreme court authority. See *State v. McKenzie*, No. 96-JE-2, 1996 WL 529520, at *2 (Ohio Ct. App. Sept. 12, 1996) (affirming trafficking conviction “[e]ven though appellant states that his intent was to steal money and not sell drugs it is clear that his means to steal was by an offer to sell drugs.”); *State v. Aldrich*, No. CA2006-10-044, 2008 WL 757523, at * 3 (Ohio Ct. App. Mar. 24, 2008) (rejecting “appellant’s assertion that the undercover officer’s charging decision was flawed and his trial testimony unreliable because appellant took the \$160 in cash, and the officer took that theft ‘personally.’”) *State v. Burkhart*, No. 83990, 2005 WL 315409, at *1-2 (Ohio Ct. App. Feb. 10, 2005) (defendant offered to sell ounce of cocaine to undercover detective, “then took the cash and disappeared with the money,” conviction affirmed) *State v. Sandlin*, No. 87-12-107, 1988 WL 102583, at *2 (Ohio Ct. App. Sept. 30, 1988) (affirming conviction even though defendant “may not have intended to complete the deal.”); *State v. Stanik*, No. 63963, 1993 WL 497067, at *2 (Ohio Ct. App. Dec. 2, 1993) (defendant’s intention to “rip off a junkie” was no defense to trafficking charge); *State v. Henton*, 700 N.E.2d 371, 373 (Ohio Ct. App. 1997) (affirming conviction of defendant who offered to sell crack cocaine to undercover detective, took his payment, “walked into a nearby bar and did not return. No drugs were sold.”)

precedent in effect before the 2008 *Cabreles* ruling, Petitioner's prior convictions would not qualify as a second conviction for a controlled substance offense under the Career Offender Guideline.

Thus, the question squarely posed by Allen's certiorari petition is whether a federal sentencing court, when considering whether an offender qualifies for an enhanced sentence due to a prior conviction, must apply state appellate rulings interpreting and enforcing the offense statute *at the time* of a defendant's prior conviction, even if judicial interpretation of the statute had changed since the date of the prior conviction?

The Sixth Circuit answered this question in the negative and affirmed Petitioner's sentence. It reached this result by applying a thinly-veiled version of the *Erie v. Tompkins* doctrine employed in civil diversity of citizenship cases in which the role of the federal court is simply to defer to state law. *See Erie Ry. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.") The panel felt the 2008 opinion of the Ohio Supreme Court in *Cabrales* "is an authoritative statement of what the statute meant before and as well as after the decision," and that "the buck stops there." (App. 4a, internal citations omitted)

Petitioner believes the reasoning of this Court's decision in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) compels a different outcome. In that case, the Court explained that a federal sentencing court must undertake a *de facto*

approach when deciding whether “a state statute creates a crime outside the generic definition of a listed crime in a federal statute.” *Id.* at 193. It stated that a defendant may demonstrate that a state statute of conviction sweeps more broadly than the federal definition by pointing to “other cases in which the state courts *in fact* did apply the statute in the special (nongeneric) manner for which he argues.” (Emphasis supplied)

As cogently stated in the concurring opinion in *United States v. Seabrooks*, 839 F.3d 1326, 1351, n. 5 (11th Cir. 2016) (emphasis supplied):

It’s generally true that when a court interprets a statute it tells us what the statute has always meant. But here our interest is not about divining the true meaning of [the state statute of conviction]. Rather, our interest is in understanding what conduct could have resulted in [the defendant’s prior] convictions under the statute, *even if [the state] courts were misinterpreting the statute at that time.*

In Petitioner’s appeal, the Sixth Circuit was more concerned with “divining the true meaning” of the Ohio trafficking statute. Instead, its mission should have been to determine whether Ohio courts “*in fact* did apply the statute in the special (nongeneric) manner for which [Petitioner] argues,” *Duenas-Alvarez*, to wit, criminalizing fraudulent offers to sell drugs.

The Sixth Circuit’s approach will lead to anomalous results. In *McNeill*, the petitioner insisted he should be given the benefit of an amendment to the offense statute that was enacted after his state court conviction but prior to his federal sentencing under the Armed Career Criminal Act (“ACCA”). Under the amended version, he would no longer have qualified for an enhanced sentence.

This Court was unpersuaded by his argument. Writing for a unanimous Court, Justice Thomas reasoned:

McNeill’s interpretation would make ACCA’s applicability depend on the timing of the federal sentencing proceeding. McNeill cannot explain why two defendants who violated §922(g) on the same day and who had identical criminal histories—down to the dates on which they committed and were sentenced for their prior offenses—should receive dramatically different federal sentences solely because one’s §922(g) sentencing happened to occur after the state legislature amended the punishment for one of the shared prior offenses. In contrast, the interpretation we adopt permits a defendant to know even before he violates §922(g) whether ACCA would apply.

Id. 563 U.S. at 823.

In a like vein, Petitioner’s penalty should not have depended on “the timing of his federal sentencing proceeding.” If he had been sentenced for his federal offense prior to 2008, his Ohio aggravated trafficking conviction would not have qualified as a controlled substance offense, and he would not have been subject to an enhanced sentencing as a Career Offender. The difference between his actual enhanced prison term (168 months) and the non-Career Offender range (37 to 46 months) surely fits the description of “dramatic.”

If the Ohio legislature had amended the trafficking statute in 2008 by adding language expressly excluding fraudulent offers to sell, *McNeill* unquestionably would require a federal district court to disregard the amendment and apply the version of the statute in effect at the time of Petitioner’s state conviction. There is no principled reason for following a different path when the identical change in state law is accomplished by a judicial opinion rather than by the legislature. A uniform rule requiring a district court to apply judicial

precedent in effect at the time of a state conviction eliminates such disparities in outcomes.

The issue posed by this petition is one that is likely to resurface in future appeals involving state statutes that have been judicially re-interpreted over the years. *See United States v. Faust*, 869 F.3d 11, 12 (1st Cir. 2017) (mem. opinion dissenting from denial of rehearing) (“It is far from clear whether *McNeill* should govern the analysis in a case like *Faust*, in which the text of the [state] statute remains unchanged and only judicial interpretations of that statute have developed over time. . . The Supreme Court has yet to squarely address this question.”) It is one of exceptional importance and certainly one meriting review by this Court.

CONCLUSION

For the foregoing reasons, Petitioner asks this Court to grant a writ of certiorari and order full briefing and oral arguments on the merits.

Respectfully submitted,

Dated: January 6, 2018

s/Dennis C. Belli
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