

No. \_\_\_\_\_

In The  
Supreme Court of the United States

October Term 2017

Clifford Wood,  
Petitioner,

v.

United States of America,  
Respondent.

On Petition For A Writ Of Certiorari  
To The United States Court of Appeals  
For The Third Circuit

Petition For Certiorari

Clifford Wood  
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## Question Presented

The Third Circuit Dismissed Wood's first appeal based on a waiver that specifically permitted a challenge if the sentence exceeded the "applicable statutory limits." The question in this case settles on whether the "applicable statutory limits" are based upon the initial charge -- 18 U.S.C. § 922(g)(1) -- or the ACCA that was determined after Wood pleaded guilty. Did the Third Circuit err in enforcing the waiver under the circumstances above, thereby denying Wood a specific proceeding?

## Table of Contents

|                                                                                                                               |                             |
|-------------------------------------------------------------------------------------------------------------------------------|-----------------------------|
| Question presented                                                                                                            | -i-                         |
| Table of Contents                                                                                                             | -ii-                        |
| Table of Authorities                                                                                                          | -iii-                       |
| Opinion[s] below                                                                                                              | -1-                         |
| Jurisdiction                                                                                                                  | -1-                         |
| Constitutional Provisions involved                                                                                            | -2-                         |
| Statement of the Case                                                                                                         | -2, 3, 4 -                  |
| Reason[s] for Granting Certiorari                                                                                             | -4, 5-                      |
| <br>A. This Court's Decsion in Mathis And<br>Pennsylvania Supreme Court Establish<br>That A Miscarriage Of Justice exists.    | <br><br><br>-5-             |
| <br>1. Actual innocence cannot mean "factual<br>innocence" in challenge to enhancements<br>imposed based on prior convictions | <br><br><br>-6, 7, 8, 9, 9- |
| <br>Conclusion                                                                                                                | <br>-10-                    |

## Table of Contents

|                                                                  |          |
|------------------------------------------------------------------|----------|
| <u>Bousley v. United States</u> , 523 U.S. 614 (1998)            | 6, 7, 8, |
| <u>Bradshaw v. Stumpf</u> , 545 U.S. 175 (2005)                  | 4        |
| <u>Cuevas v. United States</u> , 778 F.3d 267 (1st Cir. 2015)    | 8        |
| <u>Custis v. United States</u> , 511 U.S. 485 (1994)             | 8        |
| <u>Davis v. United States</u> , 417 U.S. 333 (1974)              | 7        |
| <u>Descamps v. United States</u> , 133 S.Ct. 2276 (2013)         | 7        |
| <u>Dretke v. Haley</u> , 541 U.S. 386 (2004)                     | 6        |
| <u>Jackson v. Virginia</u> , 443 U.S. 307 (1979)                 | 10       |
| <u>Johnson v. United States</u> , 544 U.S. 295 (2005)            | 8, 9,    |
| <u>Lee v. United States</u> , 137 S.Ct. 1958 (2017)              | 5        |
| <u>Mathis v. United States</u> , 136 S.Ct. 2243 (2016)           | 3, 5, 9  |
| <u>Purvis v. United States</u> , 662 F.3d 939 (7th Cir. 2011)    | 8        |
| <u>Stewart v. United States</u> , 646 F.3d 856 (11th Cir. 2011)  | 8        |
| <u>Taylor v. United States</u> , 495 U.S. 575 (1990)             | 7        |
| <u>Thompson v. Louisville</u> , 362 U.S. 199 (1960)              | 10       |
| <u>United States v. Cox</u> , 83 F.3d 336 (10th Cir. 1996)       | 8        |
| <u>United States v. Doe</u> , 239 F.3d 473 (2d Cir. 2001)        | 8        |
| <u>United States v. LaVilla</u> , 175 F.3d 1106 (9th Cir. 1999)  | 8        |
| <u>United States v. Nicholas</u> , 30 F.3d 35 (5th Cir. 1994)    | 8        |
| <u>United States v. Pettiford</u> , 612 F.3d 270 (4th Cir. 2010) | 8        |
| <u>Wainwright v. Sykes</u> , 433 U.S. 72 (1977)                  | 10       |

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To The Chief Justice And Associate  
Justices Of The Supreme Court:

Clifford Wood ("Wood"), seeks a writ of certiorari to the  
Court of Appeals For The Third Circuit, and in support states:

Opinion[s] Below

The opinion from the Third Circuit enforcing the plea  
waiver was issued September 18, 2017; and the petition for re-  
hearing was denied October 20, 2017, both are reproduced as  
Exhibit-A.

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1).

## Constitutional Provisions Involved

The Equal Protection Clause Provides:

nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

The Due Process Clause Provides:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

## Statement of the Case.

A federal grand jury sitting in Western District of Pennsylvania returned a one-count indictment charging Wood with violating 18 U.S.C. § 922(g)(1), which carried with it a ten-year statutory maximum. Included, however, the reference to the Armed Career Criminal Act (ACCA), which would take Wood's penalty from that ten-year maximum to a minimum of 15-years and end up with a statutory maximum of life.

As is in most federal cases, the defense attorney in this case advised Wood to accept a plea under Rule 11(c)(1)(C). Wood is informed that in order to arrive at this plea the agreement entailed a waiver of appeal, that was limited to certain circumstances. Including if the sentence exceeds the otherwise applicable statutory maximum. It was Wood's understanding that § 922(g)(1) carried a ten-year statutory maximum and should the sentencing court determine that the ACCA applied that provision

would be appealable, but only to the extent that the ACCA was mis-applied because the prior convictions do not support such a penalty. During the plea colloquy, Wood specifically acknowledged that he was waiving his rights, but as explained by the court:

You may file an appeal from the judgement of the this Court and the sentence of this Court only, if the United States files an appeal from the sentence; or two, if the sentence exceeds the applicable statutory limits set forth in the United States Code; or three, the sentence unreasonably exceeds the United States Sentencing Guidelines. Understand?

Wood promptly replied. "YES, sir." This appeared to be exacting what counsel had told him, that is, if the ACCA triggering mechanism, i.e., the prior convictions, did not count Wood be free to appeal the sentence. In that vein, the Court imposed the ACCA sentence even in light of this Court's recent decision in Mathis v. United States, 136 S.Ct. 2243 (2016), and Wood filed an appeal in which he intended to argue that his prior Pennsylvania convictions could not trigger the ACCA, which he was advised would not call for an enforcement of waiver.

Immediately, the Government moved to enforce the waiver and stay the briefing schedule, arguing that the waiver was enforceable because the the sentence of 180-month penalty did not exceed the applicable statutory maximum. The applicable maximum was the very issue that would have been argued. In other words, the issue on appeal was whether the ACCA applied and if did not then the otherwise applicable statutory maximum is ten-

years is exceeded and outside the waiver. But the Government viewed it very differently. In that, it ostensibly believed that since the penalty did not exceed the ACCA's life that the waiver was fully enforceable. Under any reading that position would be absurd. That is, if that was the proper reading then there is no chance for an appeal at all, under any circumstances. After-all the statutory maximum for the ACCA is life and therefore the maximum can never be exceeded.

In all, however, on September 18, 2017, the Third Circuit enforced the waiver finding that Government's reading constituted a full waiver, and Wood could not appeal the sentence. The vagueness of the waiver is what calls upon Wood to petition this Court for guidance that is much needed regarding appeal waivers where significant rights are foregone in lieu of pleading guilty.

#### Reason[s] For Granting Certiorari

The significance of a voluntary waiver is paramount to a valid plea. As this Court observed in Bradshaw v. Stumpf, 545 U.S. 175 (2005), "[a] guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences." Id. at 183. In this case, defense counsel mis-advised Wood on the phrase "applicable statutory limits" in the plea agreement. The "applicable statutory limit" would be 10-years without the ACCA, and 15 years to life if the ACCA applies. That is where the debate lies.

The Government's position, and success in having Wood's appeal dismissed deprived him of a right to which he did not waive. The significance of Wood's claim spilled over in a case concerning ineffective assistance that this recently decided. Lee v. United States, 137 S.Ct. 1958 (2017). In the case of Jae Lee, the issue was, in Wood's view, the breath of the term "outcome." Id. at 1965 ("But in this case counsel's deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself."). Wood was deprived of a portion of his appeal that he did not bargain out of, and the Court below -- or its clerks -- dismissed the appeal erroneously.

The Government's arguments below rest entirely on decisions addressing the Federal Sentencing Guidelines, and none of which address the ACCA. Wood recognizes that he has more than a plausible claim regarding ineffective assistance of counsel, but that does not further his deprivation of the denial of his excepted right to appeal. Wood specifically reserved the right to address the applicability of the ACCA, that means whether the statutory maximum was correct. If Wood had demonstrated its inapplicability, the sentence imposed exceeded the applicable ten-year maximum and Wood was sentenced to a term that Congress did not intend for an offender such as himself.

- A. This Court's decision in Mathis And Pennsylvania Supreme Court Establish That A Miscarriage Of Justice Exists.

1. Actual Innocence Cannot Mean "Factual Innocence"  
In Challenges To Enhancements Imposed Based On  
Prior Convictions.

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The waiver enforce in the Third Circuit would also not have occurred had Wood been provided an opportunity to show that a miscarriage of justice results in that outcome. In that vein, this Court has had an opportunity to address this type of issue, but reversed on a different ground. See Dretke v. Haley, 541 U.S. 386 (2004). While this decision was reversed on the ground of ineffective assistance of counsel, it was granted, initially, on whether the actual innocence exception applies to non-capital sentencing. While the arguments in Haley surrounded "factual innocence" of the prior conviction, recent developments from this Court establish that actual innocence cannot mean "factual innocence" when discussing the validity of a prior conviction.

Instead, the appropriate question in a collateral challenge to an enhancement based on prior convictions is whether an intervening change in statutory interpretation establishes that the predicates cannot support the enhancement. In other words, the question is whether an intervening change establishes that the prisoner is "innocent" of the kind of prior conviction the enhancement is intended to punish so that the sentence could not have been lawfully imposed. This approach -- rather than Bousley v. United States, 523 U.S. 614 (1998)'s test -- is proper for three reasons.

First, Wood's approach harmonizes the "actual innocence" test with the underlying principle that a person should not be punished for conduct outside the scope of statutory prohibition. Bousley, 523 U.S. at 620; Davis v. United States, 417 U.S. 333, 346 (1974). The ACCA enhancement is a statutory directive that rests entirely on the defendant possessing at least three violent crime or serious drug offenses.

Second, as explained, this Court has repeatedly emphasized that sentencing courts must consider "the elements, rather than the facts, of a crime" when assessing whether a prior conviction qualifies as a predicate. Descamps v. United States, 133 S.Ct. 2276 (2013); Taylor v. United States, 495 U.S. 575, 601 (1990) ("[T]he practical difficulties and potential unfairness of a factual approach are daunting."). When a prior conviction is based on a statute that sweeps more broadly than the crime targeted by the enhancements the conviction cannot support the enhancement. Descamps, 133 S.Ct. at 2286. Indeed, it makes no difference whether the defendant actually engaged in or admitted to the conduct the enhancement intends to capture. Id. (emphasis supplied).

Given that sentencing courts are barred from applying an enhancement based on the facts underlying a prior conviction, it makes little sense to condition relief from an unlawfully imposed enhancement on a showing of "factual innocence." If the relevant question for purposes of applying an enhancement is

the legal definition of the crime, the legal definition should likewise be the starting point for a collateral attack.

Finally, focusing on the legal significance of a predicate is consistent with this Court's longstanding assumption that "a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated." Johnson v. United States, 544 U.S. 295, 303 (2005); Daniels v. United States, 532 U.S. 574, 582 (2001); Custis v. United States, 511 U.S. 485, 497 (1994). No fewer than eight different courts of appeals have followed the Court in holding or assuming that a prisoner "successful in attacking [his] state sentences may "apply for reopening of any federal sentence enhanced by the state sentences." Custis, 511 U.S. at 497; See e.g., Cuevas v. United States, 778 F.3d 267, 274 (1st Cir. 2015); Purvis v. United States, 662 F.3d 939, 942 (7th Cir. 2011); Stewart v. United States, 646 F.3d 856, 864 (11th Cir. 2011); United States v. Pettiford, 612 F.3d 270, 276 (4th Cir. 2010); United States v. Doe, 239 F.3d 473, 475 (2d Cir. 2001); United States v. LaVaille, 175 F.3d 1106, 1108 (9th Cir. 1999); United States v. Cox, 83 F.3d 336, 339 (10th Cir. 1996); United States v. Nicholas, 30 F.3d 35, 36 (5th Cir. 1994)(per curiam).

That vacatur is the basis for relief from a sentencing enhancement shows that "factual innocence" cannot be the rule. After all, vacatur is purely a matter of legal insufficiency -- it has nothing to with factual innocence. Cf. Bousley, 523 U.S. at 623-24. Johnson offers a vivid illustration. The petitioner

in that case sought relief under section 2255 after the state court vacated seven of his prior convictions on the ground that the state was unable to produce transcripts to show that he had knowingly and intelligently waived his right to counsel. See 544 U.S. at 300-01. Johnson may have committed every one of those offenses, yet this Court assumed that he would be entitled to a reduction of his federal sentence. Id. at 303. Factual innocence is beside the point in a challenge to a sentencing enhancement.

While Wood's prior Pennsylvania convictions have not been vacated, that is simply a distinction without a difference; the effect on Wood's eligibility for the ACCA enhancement is identical. In other words, his prior convictions are not the kind of offense[s] for which Congress intended the enhanced penalty to mandate for Armed Career Criminals. The result would be exactly the same if all of Wood's prior convictions had been vacated. There is, therefore, no distinction between Wood's position before this Court and the defendants who have advanced claims on the basis of state court vacatur of their prior convictions. The only difference is the procedural vehicle; while vacatur constitutes a "new" fact for purposes of § 2255(f)(4), see Johnson, 544 U.S. at 302, the legal change that came by way of Mathis entitled Wood's to relief had he been permitted to prosecute his appeal.

Plainly, Wood could have demonstrated that there is a miscarriage of justice of this case. Wood would have shown that he was not and is not an ACCA offender, and it would, therefore, followed inexorably that Wood has been denied due process of law. Thompson v. Louisville, 362 U.S. 199 (1960); Jackson v. Virginia, 443 U.S. 307 (1979). And because that constitutional error plainly resulted in the imposition of an unauthorized sentence, it also follows that Wood is a "victim of a miscarriage of justice," Wainwright v. Sykes, 433 U.S. 72, 91 (1977), and was entitled to immediate relief from the ACCA provision.

#### Conclusion

This Court should grant certiorari, vacate the judgment and remand with instructions to allow Wood to prosecute his first direct appeal, where he will demonstrate that Pennsylvania drug convictions, in this case, cannot trigger the ACCA penalty.

Filed this 26th day of December 2017 under the penalty of perjury and placed in the internal prison mail system with first class postage.

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Clifford Wood