

IN THE
SUPREME COURT
OF THE
UNITED STATES

PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

JOHNNY ROY TARVER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CASE NO. _____
(APPELLATE CASE NO. 17-13398-D)

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QUESTIONS PRESENTED

1. Whether this Court's holding in Mathis v. U.S., 136 S.Ct. 894 (2016), applies retroactively for purposes of a federal inmate's motion pursuant to 28 U.S.C. § 2255 and, therefore, Petitioner's Sec. 2255 Motion was not untimely.

LIST OF PARTIES

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

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OPINION BELOW

Petitioner, JOHNNY ROY TARVER, respectfully prays that a writ of certiorari issue to review the judgment below. The opinion/order of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to this petition and, to Petitioner's knowledge, is unpublished.

Further, the order of the United States District Court appears at Appendix B to this petition and, to Petitioner's knowledge, is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Eleventh Circuit decided the case was on or about November 3, 2017. No petitioner for rehearing was timely file in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment 6

U.S. Constitution, Amendment 8

28 U.S.C. § 2255(f)(3)

TABLE OF AUTHORITIES

Bable v. U.S., 2017WL2181099 (S.D.Ga. 2017)	2
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21 U.S.C. § 846	vi
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Fla. Stat. § 893.13	3, 4, 5

STATEMENT OF THE CASE

Petitioner initially pled guilty in the United States District Court for the Southern District of Florida under 21 U.S.C. §§ 841(a)(c) and 846. At sentencing, however, Petitioner was determined by the district court to be a "career offender" and was, as a result, sentenced to a 180 month prison sentence.

Subsequently, Petitioner filed a motion for relief from the imposed sentence under 28 U.S.C. § 2255 arguing that this Court's holding in Mathis v. U.S., 136 S.Ct. 2243 (2016), was retroactively applicable to his case because the underlying predicate offenses upon which the district court based its determination of "career offender" status ran afoul of Mathis. The district court denied Petitioner's Section 2255 motion and, as well, denied a certificate of appealability to the Eleventh Circuit Court of Appeals. The Eleventh Circuit, on or about November 3, 2017, denied issuance of a certificate of appealability.

Petitioner now requests this Court issue a writ of certiorari to the Eleventh Circuit Court of Appeals to review both its decision not to issue a certificate of appealability and the district court's initial denial of the Section 2255 motion based upon a conflict amongst the

Circuit Courts of Appeals as to the retroactivity and application of this Court's holding in Mathis. Due to this conflict, district courts around the country are arriving at differing results for the same situation in multiple cases and it is incumbent upon this Court to rectify the Circuit Court conflict.

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Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

COMES NOW, Petitioner, JOHNNY ROY TARVER, pro se, and files this request for this Honorable Court to issue a writ of certiorari for review of the opinion/order of the United States Court of Appeals for the Eleventh Circuit. Petitioner is a layman of the law, unskilled in the law, and requests that his Petitioner for Writ of Certiorari be construed liberally. Haines v. Kerner, 404 U.S. 519 (1972).

Procedural Background

Petitioner brought a motion for relief from his imposed prison sentence of 180 months pursuant to 28 U.S.C. Section 2255(f)(3). In that motion, Petitioner contended he was entitled to relief because the district court violated his constitutional rights when it determined he was a "career offender" contrary to this Court's holding in Mathis v. U.S., 136 S.Ct. 894 (2016). Petitioner asserted that the holding of Mathis was retroactively applicable to his sentencing because it represented a substantial change in the law and,

as such, may be brought under Section 2255(f)(3). The district court, however, denied the motion based upon the Eleventh Circuit's holding in Bable v. U.S., 2017WL2181099, *4 (S.D.Ga. 2017), which held that Mathis was not given retroactive application, and deemed Petitioner's motion untimely. The Eleventh Circuit denied issuance of a certificate of appealability after the district court denied the same.

Legal Argument

In Mathis v. U.S., 136 S.Ct. 894 (2016), this Court reiterated its holding in Descamps v. U.S., 133 S.Ct. 2276 (2013) that when a defendant's prior convictions are utilized for sentencing purposes and those convictions are under an indivisible statute, the categorical approach must be applied to determine whether it meets the criteria as a predicate for enhancement purposes. Under the categorical approach to determine whether a prior conviction can qualify, the reviewing court must first "compare the elements of the statute forming the basis of the defendant's conviction with elements of the generic crime." Descamps, at 2281. If the elements of the prior conviction are either "the same as, or narrower than, those of the generic offense," then any conviction under the statute counts. Id. If, however, the elements of the conviction are overbroad, then courts must assume that the conviction rested upon nothing more than the least

of the acts criminalized, and then determine whether even those acts were encompassed by the general offense. Moncrieffe v. Holder, 133 S.Ct. 1678 (2013).

In Mathis, this Court went even further and held that state statutes that provide for alternative means to committing an element of a crime do not qualify defendants for sentencing enhancements. The court specifically distinguished statutes that list multiple elements disjunctively from statutes that enumerate various factual means of committing a single element. In light of the holding in Mathis, Petitioner asserts that the modified categorical approach was erroneously applied to classify his prior state convictions under Florida Statute Section 893.13(1)(a) as controlled substance offenses for enhancement purposes and that Mathis, as a substantial change in the law, should have been applied by the district court retroactively to correct this error.

To that end, Petitioner notes that (as set forth in the district court's order in Appendix B) the trial court's determination that Petitioner "qualified as a Career Offender" was based solely on the Pre-Sentence Investigation Report completed by the probation officer. App'x B, at ¶ 2. Reliance solely upon a Pre-Sentence Report is contrary to this Court's holding in Shepard v. U.S., 544 U.S. 13 (2005). At no time did the government introduce any specific Shepard documentation to support the determination of

career offender status. It is clear that Petitioner's counsel was ineffective for failing to object to the enhancement absent Shepard documentation and, in itself, should have been grounds for the district court to grant Petitioner's Section 2255 motion if it were to have been deemed timely under § 2255(f)(3) due to the Mathis decision.

Without the appropriate Shepard documentation, however, the modified categorical approach mandated by Mathis also demonstrates the erroneous career offender designation. In short, Fla. Stat. § 893.13(1)(a) at the least act criminalized is a misdemeanor punishable by a term of imprisonment not exceeding one (1) year and, thus, is not a "controlled substance offense" as defined by U.S.S.G. § 4B1.2(b). Specifically, Fla. Stat. § 893.13(1)(a) is indivisible and, without Shepard documentation to establish anything to the contrary, the least act criminalized should have been applied in Petitioner's case.

At the time of Petitioner's convictions, Fla. Stat. § 891.13(1)(a) read as follows:

Except as authorized by this chapter and Chapter 499, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver a controlled substance.

Thereafter, penalties are listed in numerical order in relation to specific controlled substances. Those listed in Section "1" constitutes a felony in the second degree; those

in Section "2" constitute a felony of the third degree; and those listed in Section "3" constitute a misdemeanor of the first degree. It cannot be honestly argued that the three sections of § 893.13(1)(a) list alternative means for the same element without requiring jurors to pick which one applies to the defendant. As a result, it is not a divisible statute within the meaning of Descamps and the categorical approach should have been utilized in Petitioner's case.

To determine whether Petitioner's prior convictions were "controlled substance offenses" under this analysis, the plain language definition of that term is "an offense under federal or state law, punishable by imprisonment for a term exceeding one year...." U.S.S.G. § 4B1.2(b). See also, U.S. v. Duran, 596 F.3d 1283, 1291 (11th Cir. 2010) (courts are to look at the plain language of the definitions to determine elements). Given that a "controlled substance offense has, as an element, punishment by imprisonment in excess of one year, Fla. Stat. § 893.13(1)(a) cannot qualify. As a result, in this case, the trial court was required to assume Petitioner's convictions were for possession with intent to sell, manufacture, or deliver the least penalized substance under Section "3" of the statute, thereby disqualifying the prior convictions from utilization for sentencing enhancement purposes.

The district courts under the Eleventh Circuit, however, have been holding that this Court's ruling in Mathis is not a substantial change in the law such that it would be retroactively applicable under 28 U.S.C. § 2255(f)(3). In contrast, other district courts and, more importantly, circuit courts of appeal are holding the inapposite, namely that Mathis is retroactively applicable. See, e.g., U.S. v. Solomon, No. 16-7350 (4th Cir. Aug. 2, 2017); Holt v. U.S., 2016 U.S. App. LEXIS 22136 (7th Cir. Dec. 13, 2016); U.S. v. Ballard, No. 03-810 (E.D.Pa. Jul. 7, 2017); U.S. v. Collins, No. CR-03-51 S (D.R.I. Nov. 2, 2016); U.S. v. Sabetta, No. 00-CR-135-S-PAS (D.R.I. Oct. 24, 2016); U.S. v. Gambill, No. 1:10-CR-13 (W.D.Va. Oct. 7, 2016); U.S. v. James, No. 2:15-CV-9479-JWL (D.Ks. Jul. 16, 2016). Had the district court in this case and/or the Eleventh Circuit Court of Appeals addressed Petitioner's Section 2255 motion as timely pursuant to § 2255(f)(3) and Mathis, Petitioner should have had his "career offender" enhancement deemed unconstitutional and vacated, since he has shown that there was a reasonable probability he would have been sentenced to a different sentence under the correct range. Molina-Martinez v. U.S., 136 S.Ct. 1338 (2016).

Conclusion

There can be no doubt that, in light of the numerous cases holding that Mathis is applicable retroactively. jurists

of reason would have been able to reach a different result than the district did in this case, and, as such, a certificate of appealability should have been issued. Moreover, under the specific circumstances of Petitioner's case, the sentence imposed violated his Sixth and Eighth Amendment rights not to be incarcerated based upon an unconstitutionally enhanced sentence premised upon the district court's erroneous determination that Petitioner was a "career offender." It is incumbent upon this Court to remedy the conflict within the circuit courts of appeal as to whether this Court's holding in Mathis is retroactively applicable and his Section 2255 motion should have been granted.

WHEREFORE, Petitioner, JOHNNY ROY TARVER, respectfully requests this Honorable Court issue a writ of certiorari to the Eleventh Circuit Court of Appeals to review its order in this matter, and for any and all other relief this Court deems just and proper.

Respectfully Submitted,

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