

IN THE SUPREME COURT
OF THE UNITED STATES

CASE NO. _____

FRANK COLLINS, III,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

By:
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QUESTIONS PRESENTED

1. Whether the Eighth Circuit Court of Appeals' opinion in this matter erred in conflict with other United States Courts of Appeals in holding that this Court's holding in Mathis v. U.S., 136 S.Ct. 2243 (2016), is not a substantial change in the law made retroactive and, therefore, disallowed in a first habeas corpus motion brought pursuant to 28 U.S.C. Sec. 2255(f)(3).

LIST OF PARTIES

All parties with an interest in this Petition are listed and named in the caption.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A to this Petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to this Petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was January 16, 2018. No petition for rehearing was filed in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amend. V

U.S. Constitution, Amend. VI

U.S. Constitution, Amend. VIII

28 U.S.C. Sec. 2255

STATEMENT OF THE CASE

Petitioner was arrested and, ultimately, pled guilty in the Western District of Missouri to charges of violating 21 U.S.C. Sec. 941(a)(1) and Sec. 846. As a result, he was sentenced to 220 months imprisonment in the custody of the Federal Bureau of Prisons.

Petitioner pursued a motion under 28 U.S.C. § 2255, which was denied by the district court and the appellate court.

Petitioner brings this Petition for the issuance of a Writ of Certiorari to the Eighth Circuit Court of Appeals based upon a circuit conflict which exists between the Eighth Circuit and other sister circuits as to the applicability of Mathis v. U.S., 136 S.Ct. 2243 (2016), in a first Sec. 2255 motion.

REASONS FOR GRANTING THE PETITION

Petitioner understands that the Honorable U.S. Supreme Court has discretion to entertain this Petition and issue a Writ of Certiorari. However, Petitioner asserts it is a question of national interest based upon the fact that this Court's holding in Mathis v. U.S., 136 S.Ct. 2243 (2016), is not being applied uniformly amongst the circuit courts of appeals and their respective subordinate district courts.

The Eighth Circuit Court of Appeals, as in the case at bar, holds that Mathis is inapplicable in raising an argument under a first Sec. 2255 motion. This holding is also the precedent within the Eleventh Circuit Court of Appeals jurisdiction. In contrast, the Seventh Circuit, for example, holds that Mathis may be used in a first Sec. 2255 motion. See, e.g., Holt v. U.S., 843 F.3d 720 (7th Cir. 2016); U.S. v. Haney, 840 F.3d 472 (7th Cir. 2016).

As a result, this Court's holding in Mathis as a substantial change in the law is not being applied uniformly across the nation. Petitioner, therefore, respectfully requests that the Honorable U.S. Supreme Court grant this Petition and issue a Writ of Certiorari to the Eighth Circuit Court of Appeals to resolve the inter-circuit conflict regarding the Mathis holding.

LEGAL ARGUMENT

ARGUMENT ONE

The Eighth Circuit Court of Appeals Erred
In Holding That Mathis is Not A Substantial
Change In The Law In Conflict With
Its Sister Circuits

Petitioner is currently serving an illegal and unlawful sentence, according to this Court's holding of Mathis v. U.S., 136 S.Ct. 2243 (2016), which is a substantial change in the law as related to Petitioner's first motion brought under 28 U.S.C. Sec. 2255(f)(3). Petitioner never waived his constitutional rights to be sentenced unconstitutionally and his sentence is unconstitutional because his prior state drug convictions were premised upon overbroad state statutes which do not meet the Federal Control Substance Act in 21 U.S.C. §§ 841(b)(1)(C), 841(b)(1)(B), or 841(b)(1)(A) when viewed and analyzed under the guidelines expounded in Mathis. The language related to delivery in Missouri's state Controlled Substance Act in the case at bar was overbroad, ambiguous, and do not constitute controlled substance offenses when applied to the federal statute. This overbreath and ambiguity, thus, cannot be applied and utilized under the Career Offender and/or Armed Career Offender Acts, or even Petitioner's Sec. 851 enhancement. They are also not controlled substance offenses when applied to U.S.S. Guidelines §§ 4B1.2, 4B1.3, 4B1.4, or 21 U.S.C. § 851. Neither delivery nor sale applies nor qualifies as a controlled substance offense. They are not elements, but only ways and means of committing these offenses through

various conduct. Various means of committing an offense does not set forth in these disjunctive separate offenses of the Missouri Controlled Substance Act.

Missouri's Act, as it was applied in the case at bar, is an indivisible statute that lists several different means for committing the offense of delivery, sale, and drug distribution. When this Court's holdings in Mathis, Descamps v. U.S., 133 S.Ct. 2275 (2013), Taylor v. U.S., 495 U.S. 575 (1990), and Shepard v. U.S., 544 U.S. 13 (2005), are applied to the instant case, it is clear that Petitioner's convictions do not qualify as controlled substance offenses. Missouri's Act punishes and criminalizes conduct that is not included within the U.S.S. Guideline definitions of the above-stated §§ 4B1.2, 4B1.3, 4B1.4 Controlled Substance Acts. As noted herein, Petitioner's state prior convictions with which the sentencing court enhanced Petitioner's sentence under the Career Offender status, Armed Career Offender status, and/or Sec. 851, are not elements but only various means of committing the offenses and these various means do not set forth disjunctive separate offenses.

The lower court spoke of other state prior convictions, but they were not utilized for enhancement at sentencing and cannot be used now. The other state prior convictions also violate the Mathis, Descamps, Taylor, and Shepard requirements and governmental obligations. In the instant case, no Shepard documentation was introduced by the government or reviewed by

the sentencing court. No analyses were conducted utilizing the categorical approach, modified categorical approach, or divisible/indivisible element approach. See, Mathis, Dscamps, Taylor. Absent these steps, the sentencing court committed reversible error in enhancing Petitioner's sentence. The need for these steps to be followed is to avoid Sixth Amendment rights violations by sentencing courts making findings of fact which are properly the purview of the jury since it is a jury that must determine facts which may increase a defendant's sentence, other than a prior conviction. See, Apprendi v. New Jersey, 530 U.S. 466 (2000). The reason for the "prior conviction" exception is that, during the earlier criminal proceeding, the defendant either had a jury or waived his constitutional right to one. Id., at 488. In regards to sentencing enhancements, though, the "only facts the court can be sure the jury ... found [beyond a reasonable doubt] are those constituting elements of the offense. Id. Similarly, "when a defendant pleads guilty to a crime, he waives the right to a jury determination of only that offense's elements." Id. As such, any findings by a sentencing court considering enhancements beyond the elements of the offense would exceed the prior conviction exception established.

In Mathis, this Court reaffirmed that reasoning. The categorical approach is tied strictly to the elements of the offense such that a statute is not divisible even if there are

alternative means of satisfying an element. It was made clear that holding rested in large part on the Sixth Amendment.

Thus, to comply with Apprendi, "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed the offense." Mathis, at 2252. The judge "is prohibited from conducting such an inquiry himself, and so too is he barred from making a disputed determination about what the defendant and state judge must have understood as the factual basis of the prior plea or what the jury in a prior trial must have accepted as the theory of the crime." Id. "He can do no more ... than determine what crime, with what elements, the defendant was convicted of." Id.

As noted previously, the government in this case failed in its obligation to provide the requisite documentation for the sentencing court's review pursuant to Shepard. Courts are limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented. Id., at 15. These documents are "conclusive records made or used adjudicating guilt." Id., at 21. This accords with their function in the modified categorical approach, namely to permit the court to identify the elements (and only the elements) for which the defendant was convicted. Descamps, at 2284. A sentencing court's reliance solely upon a Presentence Investigation Report to justify a

sentencing enhancement under the Career Offender Act, Armed Career Offender Act, and/or Sec. 851 violated the Sixth Amendment rights of the defendant because the Presentence Investigation Report is not an approved Shepard document. Not only is such a Report not a "conclusive record made or used in adjudicating guilt," it was never a part of the underlying state criminal proceedings whatsoever given that it was not generated until ordered by the sentencing court. It does not communicate the elements of the offense for which the defendant was convicted; it only communicates extraneous factual information thus encouraging impermissible speculation by the sentencing court as to "what a trial showed, or a plea proceeding revealed about the defendant's underlying conduct." Descamps, at 2288. Regardless of whether objections were lodged with regards to the Presentence Investigation Report, its use by the sentencing court has constitutional significance as it violates a defendant's right to have a jury make the necessary factual determinations beyond a reasonable doubt during the earlier criminal proceedings.

In the instant case, Petitioner is serving an unconstitutional sentence due to the sentencing court's violations of Mathis, Descamps, Taylor, and Shepard thereby impinging and violating Petitioner's Fifth Amendment right to due process not to be incarcerated based on false pretense of a sentence that Mathis states is wholly unconstitutional. His

Sixth Amendment rights are violated in regards to the elements clause and a jury determination of facts beyond a reasonable doubt. His Eighth Amendment rights are violated so long as Petitioner remains incarcerated based on a sentence predicated upon the sentencing court's failure to adhere to the requirements under Mathis, Descamps, Taylor, and Shepard.

Given the analysis as to the unconstitutionality of Petitioner's sentence and this Court's holding in Mathis, Petitioner brought a motion before the court pursuant to 28 U.S.C. § 2255(f)(3) premised upon the Mathis holding being a substantial change in the law. Petitioner's contention was premised upon holdings of several courts throughout the country which have held that Mathis is a substantial change in the law for a first § 2255 motion. See, Holt v. U.S., 843 F.3d 720 (7th Cir. 2016); U.S. v. Haney, 840 F.3d 472 (7th Cir. 2016); U.S. v. Solomon, 694 Fed. Appx. 186 (4th Cir. 2017); U.S. v. Collins, No. CR-03-51 S (R.I.D. Nov. 2, 2016); U.S. v. Sabetta, No. 00-CR-135-S-PAS (R.I.D. 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. July 16, 2016); U.S. v. Ballard, No. 03-810 (E.D.Pa. July 7, 2017).

In contrast, the Eighth Circuit Court of Appeals (and the district court below) both denied Petitioner relief on his § 2255(f)(3) motion based upon this Court's holding of Mathis despite the motion being timely and accurate. Spe-

cifically, the Eighth Circuit holds diametrically inapposite with the Seventh Circuit and Fourth Circuit (as well as numerous district courts), thereby creating a split among the circuits which this Court need address. As it stands, some individuals convicted and sentenced in some federal courts are being provided relief from unconstitutional sentences solely based upon geographic location. It is incumbent upon this Honorable Supreme Court to address this split and provide the necessary guidance to the circuit and district courts as to whether Mathis may be applied in the context of a § 2255 motion. Given that Petitioner's sentence was unconstitutionally imposed and that the district and circuit courts have, effectively, barred Petitioner from seeking relief, relief which other defendants might obtain, Petitioner respectfully requests that this Honorable Supreme Court issue a Writ of Certiorari to the Eighth Circuit Court of Appeals for review of this matter of national importance.

CONCLUSION

Petitioner hopes and prays that his Petition for issuance of a Writ of Certiorari will be granted, and Petitioner be resentenced for all of the reasons stated herein.

DATED: 4-8-18

Respectfully Submitted,

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