

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

PRESTION LEE JOHNSON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Under the Sixth Amendment, and in light of Mathis v. United States, 136 S. Ct. 2243, 2253 (2016), may a district court consult the undisputed facts contained in a Presentence Investigation Report to determine whether a prior conviction qualifies as a predicate offense under the Armed Career Criminal Act (18 U.S.C. § 924(e)(1)) when the government fails to present any Shepard-document establishing the conviction?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Eleventh Circuit Court of Appeals include the United States of America and Petitioner Preston Lee Johnson, Jr.. There are no parties to the proceedings other than those named in the petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Preston Lee Johnson, Jr., respectfully petitions this Court for a writ of certiorari to review the *Opinion* rendered by the Eleventh Circuit Court of Appeals on May 30, 2018. See Appendix A.

OPINIONS BELOW

The *Opinion* rendered by the Eleventh Circuit Court of Appeal is attached as Appendix A.

JURISDICTION

The order of the Eleventh Circuit Court of Appeal was rendered on May 30, 2018. (App.A) This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) (2018).

Specifically, Petitioner invokes this Court's jurisdiction under Rule 10(a), because Eleventh Circuit entered a decision which conflicts with decisions of the Second and Fifth Circuits on the same important matter. See United States. v. Reyes, 691 F.3d 453 (2d Cir. 2012); same United States v. Gonzalez-Chavez, 432 F.3d 334, 338 (5th Cir. 2005).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI.

“In the case of a person who violates section 922(g) of this title [18 USCS § 922(g)] and has three previous convictions by any court referred to in section 922(g)(1) of this title [18 USCS § 922(g)(1)] 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) [18 USCS § 922(g)].” 18 U.S.C. § 924(e)(1) (2018).

“A prisoner in custody under sentence of a court established by Act of Congress claiming... that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.” 28 U.S.C. § 2255(a).

STATEMENT OF THE CASE

In the proceeding below, the Eleventh Circuit held that a district court, in using the modified categorical approach, is permitted to consult an undisputed Presentence Investigation Report (PSR) to determine the statutory basis for a prior state conviction under the Armed Career Criminal Act where the government fails to present any Shepard-document to establish the prior conviction.

Previously, Mr. Johnson was convicted following a jury trial of possession of a firearm and ammunition by a convicted felon in violation of 18 U.S.C. §§ 921(g)(1) and 924(e). (App.A p2) The district court sentenced Mr. Johnson to 200-months imprisonment. (App.A p.2)

Thereafter, Mr. Johnson moved to vacate, set aside, or correct his sentence, and argued that he was entitled to be resentenced in light of Johnson v. United States, 135 S. Ct. 2551 (2015). (App.A p.4-5) Specifically, Mr. Johnson argued that he was entitled to be resentenced because Johnson dictated that his Florida burglary conviction no longer qualified as a violent felony under the Armed Career Criminal Act (ACCA). (App.A p.4-5)

However, the district court held that Mr. Johnson still possessed the requisite three felony convictions to qualify under ACCA even if his burglary convictions no longer qualified as violent felonies. According to the district court, Mr. Johnson's convictions for sale of cocaine, resisting arrest with violence, and battery on a law

enforcement officer qualified as either a serious drug offense or a violent felony. (App.A p.4-5) While finding that the battery on a law enforcement officer did not qualify as a violent felony under ACCA applying the categorical approach, the district court found that the offense qualified as a violent felony under the modified categorical approach because the PSR cited Mr. Johnson “actually or intentionally touched or struck State Correctional Officer Sandra Davis causing bodily harm to her while the officer was conducting a security check”. (App.A p.16) Applying the modified categorical approach and relying on the PSR’s undisputed statements, the district court determined Mr. Johnson’s Florida conviction for battery on a law enforcement officer qualified as a violent felony under ACCA. (App.A p.4-5)

The Eleventh Circuit granted a Certificate of Appealability. (App.B) In the *Order*, the court found that Mr. Johnson possessed two predicate convictions (resisting an officer with violence and sale of cocaine), but was unsure if the battery convictions still qualified as violent felonies. (App.B p.3) Citing that “the Shepard-approved documents are not available for review”, the Eleventh Circuit granted a certificate of appealability on the following issue:

Whether the district court erred in denying Johnson’s 28 U.S.C. § 2255 motion on the basis that Johnson had three qualifying convictions under ACCA following Johnson.

(App.B p.5)

Ultimately, the Eleventh Circuit affirmed the decision of the district court:

This Court has repeatedly held that, in addition to Shepard-documents, a court may consider the PSI's undisputed facts in determining whether a prior conviction qualifies as an ACCA predicate offense, including which elements of a divisible statute formed the basis for the prior conviction under the modified categorical approach.

...

Here, the PSI's description indicates that Johnson not only touched or struck an officer, but also caused bodily harm to an officer. Specifically, according to the undisputed facts in the PSI, state court records showed that Johnson 'actually and intentionally touched or struck' the officer, 'causing bodily harm to her...' Thus, the PSI demonstrates that regardless of whether Johnson was convicted of touching the officer or striking the officer, he was also convicted under § 784.03(1)(a)(2) of causing the officer bodily harm."

(App.A p.16-17) This petition for a writ of certiorari on this important question of federal law now follows.

REASONS FOR GRANTING THE WRIT

- I. Under the Sixth Amendment, and in light of Mathis v. United States, 136 S. Ct. 2243, 2253 (2016), may a district court consult the undisputed facts contained in a Presentence Investigation Report to determine whether a prior conviction qualifies as a predicate offense under the Armed Career Criminal Act (18 U.S.C. § 924(e)(1)) when the government fails to present any Shepard-document establishing the conviction?

Question Presented

The question presented in this petition is whether the Sixth Amendment, as interpreted by this Court in Mathis v. United States, 136 S. Ct. 2243, 2253 (2016), permits a district court to consult an undisputed Presentence Investigation Report (PSR) to determine whether a prior conviction qualifies as a predicate offense under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(1) (2018), when the government fails to present any Shepard¹-document for the conviction. In agreement with the First, Third, and Eighth Circuits², the Eleventh Circuit found in the affirmative below. However, the Second and Fifth Circuits have held that a district court is not permitted to rely on a PSR's characterization of a defendant's prior offense for enhancement purposes. See United States v. Rosa, 507 F.3d 142, 156 (2d Cir. 2007); United States v. Garza-Lopez, 410 F.3d 268, 274 (5th Cir. 2005).

¹ Shepard v. United States, 544 U.S. 13 (2005).

² United States v. Turbides-Leonardo, 468 F.3d 34, 39 (1st Cir. 2006); see also United States v. Siegel, 477 F.3d 87, 93-94 (3d Cir. 2007); United States v. Webster, 636 F.3d 916, 919 (8th Cir. 2011).

But whether such a practice is permissible is unclear following this Court's opinion in Mathis:

Statements of “non-elemental fact” in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he “may have good reason not to”—or even be precluded from doing so by the court. When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. **Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.**

136 S. Ct. at 2253. (Internal citation omitted; emphasis added.)

Proceeding Below

In the proceeding below, Petitioner, PRESTON LEWIS JOHNSON, JR., petitioned the district court to vacate, set aside, or correct his sentence in light of Samuel Johnson v. United States, 135 S. Ct. 2551 (2015). Specifically, Mr. Johnson argued that he was entitled to resentencing, as Samuel Johnson dictated that his Florida burglary conviction no longer qualified as a violent felony under the Armed Career Criminal Act (ACCA). (App.A p.2-5)

However, the district court held that Mr. Johnson still possessed the requisite three felony convictions to qualify under ACCA, even if his burglary convictions no longer qualified as violent felonies. According to the district court, Mr. Johnson's convictions for sale of cocaine, resisting arrest with violence, and battery on a law enforcement officer qualified as either a serious drug offense or a violent felony.

While finding that the battery on a law enforcement officer did not qualify as a violent felony under ACCA applying the categorical approach (“elements clause”), the district court found that the offense qualified as a violent felony under the modified categorical approach because the PSR cited Mr. Johnson “actually or intentionally touched or struck State Correctional Officer Sandra Davis causing bodily harm to her while the officer was conducting a security check”. The government did not provide Shepard-documents to establish the basis for the conviction. Applying the modified categorical approach, the district court determined Mr. Johnson’s Florida conviction for battery on a law enforcement officer qualified as a violent felony under ACCA. (App.A p.4-5)

When Mr. Johnson appealed to the Eleventh Circuit, the order granting a Certificate of Appealability cited that “the Shepard-approved documents are not available for review” regarding the battery on a law enforcement officer conviction. (App.B p.5) But the panel *Opinion* of the Eleventh Circuit held that, “in addition to Shepard documents, a court may consider the PSI’s undisputed facts in determining whether a prior conviction qualifies as an ACCA predicate offense, including which element of a divisible statute formed the basis for the prior conviction under the modified categorical approach.” (App.A p.16) The panel *Opinion* of the Eleventh Circuit makes no mention of this Court’s directive in Mathis.

Circuit Conflict

Reaching an opposite conclusion from the Eleventh Circuit, the Second and Fifth Circuits have held that a district court is not permitted to rely on a PSR's characterization of a defendant's prior offense for enhancement purposes. See United States v. Rosa, 507 F.3d 142, 156 (2d Cir. 2007); United States v. Garza-Lopez, 410 F.3d 268, 274 (5th Cir. 2005); see also Shepard, 544 U.S. 13, 26 ("evidence of generic conviction be confined to records of the convicting court ...")

Along with the Third and Eighth Circuit, the First Circuit held that "a presentence report in a subsequent case ordinarily may not be used to prove the details of the offense conduct that underlies a conviction", it also held that an undisputed PSR may be a permissible source of information about a prior conviction for sentencing purposes. United States v. Turbides-Leonardo, 468 F.3d 34, 39 (1st Cir. 2006); see also United States v. Siegel, 477 F.3d 87, 93-94 (3d Cir. 2007); United States v. Webster, 636 F.3d 916, 919 (8th Cir. 2011).

But unlike the Eleventh Circuit, the First, Third, and Eighth Circuits rendered these decisions prior to Mathis and it is unclear whether such position is still valid in light of this Court's binding opinion. See 136 S. Ct. at 2253. Although Mathis does not specifically reference a PSR, it seems to imply that a PSR is not an acceptable means of establishing the conduct forming the basis of a prior conviction: "Statements of 'non-elemental fact' in the records of prior convictions are prone to

error precisely because their proof is unnecessary.” See id. Mathis also seems to contemplate that a criminal defendant may have strategic reasons for not challenging the PSR’s account of a prior conviction: “At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he ‘may have good reason not to’—or even be precluded from doing so by the court.” See id.

Indeed, the PSR at issue in this case states only that the probation officer obtained the information about Mr. Johnson’s 1995 state conviction for battery on a law enforcement officer from “Court records” but does not state which records were consulted. See App.D p.13. Potentially, the probation officer could have consulted the police report or warrant affidavit to obtain the information which is not permitted under Shepard. See 544 U.S. at 15. Whether the undisputed factual basis of a *prior* state conviction contained in a *subsequent* federal PSR can be consulted to “trigger[] a lengthy mandatory sentence”, especially where the government fails to present any Shepard-document to establish the basis for conviction, is an important question of federal law that should be decided by this Court.

CONCLUSION

When applying the modified categorical approach, the circuit courts of appeal are not in agreement as to whether a court may consider a *subsequent* federal PSR's undisputed facts in determining whether a *prior* state conviction qualifies as an ACCA predicate offense, resulting in an uneven application of evidentiary requirements. It is equally unclear whether such is permitted in light of this Court's opinion in Mathis. Mr. Johnson calls upon this Court to settle the division among circuits and decide this important question of federal law. Accordingly, Mr. Johnson requests that this Court grant a writ of certiorari and award him any and all further relief to which he is entitled.



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