No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

TERRY DIXON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

1. In a federal proceeding wherein the defendant is charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), in determining whether the underlying "felony" offense is a "crime punishable by imprisonment for a term exceeding one year," is the sentencing exposure as to that underlying "felony" offense determined or limited by prosecutorial discretion, in light of *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Terry Dixon ("Dixon") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming Dixon's conviction and sentence is styled: *United States v. Terry Dixon,* 724 F. App'x 334 (5th Cir. 2018).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the Petitioner's conviction and sentence was announced on May 29, 2018 and is attached hereto as Appendix A. Petitioner's Petition for Panel Rehearing was denied June 19, 2019 and the order of denial is attached hereto as Appendix B. Pursuant to Supreme Court Rule 13.3, this petition has been filed within 90 days of

the date of the denial of the petition for panel rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Federal Statutes

Title 18 U.S.C. § 922(g)(1)

(g) It shall be unlawful for any person-

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; ...

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Title 18 U.S.C. § 921(a)(20)

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include –

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights

expressly provides that the person may not ship, transport, possess or receive firearms.

Statement of the Case

Dixon was convicted by a jury of the felony offense of possession of a firearm by a convicted felon. The district court sentenced him to 60 months in prison, three years of supervised release, and no fine. The jurisdiction of the federal district court was invoked pursuant to Title 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."). Dixon was convicted of violating Title 18 U.S.C. § 922(g)(1).

Dixon had previously (in 2007) been placed on Texas "deferred" adjudication supervision for a state jail felony offense ("abandoning/endangering a child – criminal negligence"). This was the conduct relied upon by the Government as the predicate conviction for Dixon's § 922(g)(1) charge. Deferred adjudication is not a conviction under Texas law.[1] An individual placed on state jail felony deferred adjudication, can potentially, if convicted be sentenced to up two years

[1] *Ex Parte White,* 506 S.W.3d 39, 45 n. 30 (Tex. Crim. App. 2016); Tex. Crim. Proc. Code Ann. art. 42.12 § 5(a) *Texas Criminal Codes & Rules Annotated* (Texas Lawyer Press 2006-2007).

imprisonment in a state jail facility.[2] However, a state jail felony conviction can also result in a maximum sentence of one year in the county jail if the prosecutor makes such a recommendation and the trial court follows the recommendation.[3] At the time Dixon's guilt was actually adjudicated (i.e., he was actually convicted) as to the predicate offense, his sentencing exposure had been reduced by a plea bargain with the state prosecutor, limiting his maximum term of incarceration to nine months in the county jail.

Dixon filed a motion to dismiss the instant indictment in the district court, arguing that the "felony" conviction relied upon by the Government as a predicate for the felon-in-possession charge was not a conviction "punishable by imprisonment for a term exceeding one year," as required by § 922(g)(1), given that he was sentenced under Texas law as a misdemeanant. The motion was denied.

Dixon argued on appeal (among other things), citing *Carachuri-Rosendo v. Holder,* 560 U.S. 563 (2010), that because prosecutorial

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[2] Tex. Penal Code Ann. § 12.35(a).
[3] Tex. Penal Code Ann. § 12.44(a) *Texas Criminal Codes & Rules Annotated* (Texas Lawyer Press 2006-2007).

discretion was the basis for Dixon's reduced sentencing exposure to that of a misdemeanor at the time he was convicted of the predicate offense, this prior conviction was not in fact a felony, and therefore could not properly serve as a predicate to his felon-in-possession conviction. The Government argued that *Carachuri-Rosendo* was inapposite because it involved prosecutorial discretion as to charging – not sentencing. Dixon responded in his reply brief by citing language from *Carachuri-Rosendo* for the proposition that the opinion applied to prosecutorial sentencing discretion, as well as charging discretion. The Fifth Circuit however completely ignored that parties' arguments regarding the *Carachuri-Rosendo* opinion (making no mention of it in the panel opinion), and affirmed Dixon's conviction based on Fifth Circuit case law that predated *Carachuri-Rosendo.* Dixon filed a petition for panel rehearing, arguing that the panel (1) was not free to disregard Supreme Court precedent, and (2) had an obligation to evaluate the legal issues presented by Dixon's argument. The panel denied the petition for panel rehearing.

Reason for Granting the Writ: The Fifth Circuit's holding is contrary to the Supreme Court's holding in *Carachuri-Rosendo v. Holder*.

The Fifth Circuit panel relied on two Fifth Circuit cases[4] predating *Carachuri-Rosendo*, both holding that if the defendant is prosecuted for a felony but punished for a misdemeanor, the predicate offense nonetheless constitutes a felony for purposes of § 922(g)(1).

In *Carachuri-Rosendo v. Holder,* 560 U.S. 563 (2010), the petitioner faced deportation based on two Texas misdemeanor drug possession offenses. *Id.* at 566. The Fifth Circuit Court of Appeals held that these convictions constituted "aggravated felonies" (which require a maximum term of imprisonment of more than one year) for purposes of the Immigration and Nationality Act because, under federal law, if the individual has a prior conviction, he *could be* punished with a prison sentence of up to two years. *Id.* at 567-68. The Government argued to the Supreme Court that if the petitioner had been prosecuted in federal court instead of state court, "he *could have been* prosecuted as a felon and

[4] *United States v. Rivera-Perez*, 322 F.3d 350, 352 (5th Cir. 2003); *United States v. Harrimon*, 568 F.3d 531, 533 n.3 (5th Cir. 2009).

received a 2–year sentence based on the fact of his prior simple possession offense." *Id.* at 570. The Court then summarized the issue before it:

> We now must determine whether the mere possibility, no matter how remote, that a 2–year sentence might have been imposed in a federal trial is a sufficient basis for concluding that a state misdemeanant who was not charged as a recidivist has been "convicted" of an "aggravated felony[.]"

Id. at 570. The Court held that "mere possibility" was not enough:

> The mere possibility that the defendant's conduct, coupled with facts outside of the record of conviction, could have authorized a felony conviction under federal law is insufficient to satisfy the statutory command that a noncitizen be "convicted of a[n] aggravated felony" before he loses the opportunity to seek cancellation of removal.

Id. at 582. The following comments are instructive:

> Although Texas law, like federal law, authorized a sentencing enhancement if the prosecutor proved that Carachuri–Rosendo had been previously convicted of an offense of a similar class, *the State did not elect to seek an enhancement based on his criminal history.* (emphasis added)

Id. at 571.

> Many state criminal codes, like the federal scheme, afford similar deference to prosecutorial discretion when prescribing recidivist enhancements. Texas is one such State. . . . And, in this case, the prosecutor specifically elected to "[a]bandon" a recidivist enhancement under state law. . . . Were we to

> permit a federal immigration judge to apply his own recidivist enhancement after the fact so as to make the noncitizen's offense "punishable" as a felony for immigration law purposes, *we would denigrate the independent judgment of state prosecutors to execute the laws of those sovereigns.* (emphasis added)

Id. at 579-80.

The Supreme Court in *Carachuri-Rosendo* repeatedly made reference to the need to *defer to prosecutorial discretion* exercised as to the conduct forming the basis of the prior conviction:

> For a subsequent simple possession offense to be eligible for an enhanced punishment, *i.e.,* to be punishable as a felony, the Controlled Substances Act *requires that a prosecutor charge* the existence of the prior simple possession conviction before trial, or before a guilty plea. (emphasis added)

Carachuri-Rosendo v. Holder, 560 U.S. at 568.

> On review, the Court of Appeals affirmed the BIA's decision in Carachuri–Rosendo's case, reading our decision in *Lopez* as dictating its outcome. "[I]f the *conduct* proscribed by the state offense *could have been prosecuted* as a felony" under the Controlled Substances Act, the court reasoned, then the defendant's conviction qualifies as an aggravated felony. (emphasis added)

Id. at 572.

> For federal law purposes, a simple possession offense is not "punishable" as a felony *unless a federal prosecutor first*

> *elects* to charge a defendant as a recidivist in the criminal information. (emphasis added)

Id. at 578.

> [T]he *United States Attorney's Manual* places decisions with respect to seeking recidivist enhancements on par with the filing of a criminal charge against a defendant. (Emphasis added)

Id. at 579.

And the Court went on to use language suggesting that deference to prosecutorial discretion extended to sentencing decisions – not just charging decisions:

> the Government suggests, because the only statutory text that matters is the word "punishable" in 18 U.S.C. § 924(c)(2): Whatever conduct might be "punishable" as a felony, *regardless of whether it actually is so punished or not*, is a felony for immigration law purposes. But for the reasons just stated, the circumstances of Carachuri-Rosendo's prosecution were not identical to those hypothesized by the Government. (emphasis added)

Id. at 578. This language is directly at odds with the Fifth Circuit notion that an offense prosecuted as a felony remains a felony for purposes of § 922(g)(1), even if the prosecutor chooses to enter into a plea bargain calling for a misdemeanor sentence.

Conclusion

For the foregoing reasons, Petitioner Dixon respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing petition for writ of certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 17th day of July, 2018.

/s/ John A. Kuchera
John A. Kuchera, Attorney for
Petitioner Terry Dixon