

ORIGINAL

No. 18-7067

FILED
NOV 20 2018

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

DERRICK JOHNSON — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS - EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DERRICK JOHNSON
(Your Name)

POST OFFICE BOX 9 - F.C.I. MENDOTA
(Address)

MENDOTA, CALIFORNIA [93640]
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

- I. WHETHER PETITIONER'S "PRIOR STATE DRUG OFFENSES" QUALIFIED AS ENUMERATED OFFENSES UNDER THE "CAREER CRIMINAM" PROVISION OF THE UNITED STATES SENTENCING GUIDELINES?
- II. WHETHER THE DISTRICT COURT IDENTIFIED A "BASE LEVEL" FOR THE OFFENSE OF CONVICTION AND ADJUSTED THAT LEVEL TO ACCOUNT FOR CIRCUMSTANCES SPECIFIC PETITIONER'S CASE? ROSALES-MIRELES V. UNITED STATES.
- III. WHETHER THE DISTRICT COURT EMPLOYED A PROPER ANALYSIS OF A DIVISIBLE STATUTE - UNDER THE MODIFIED CATEGORICAL APPROACH - IN DETERMINING WHETHER PETITIONER'S PRIOR STATE CONVICTIONS CONSTITUTED "QUALIFYING OFFENSES" UNDER THE CAREER OFFENDER PROVISION OF THE UNITED STATES SENTENCING GUIDELINES? MATHIS V. UNITED STATES.
- IV. WHETHER THE DISTRICT COURT COMMITTED "PLAIN ERROR" WHEN SENTNECING PETITIONER AS A "CAREER OFFENDER" BASED ON STATUTE(S) WHICH HAVE BEEN DECLARED "DIVISIBLE" WITHOUT CONDUCTING A PROPER "MODIFIED CATEGORICAL ANALYSIS" AND THEREFORE CALCULATING PETITIONER UNDER AN INCORRECT OFFENSE LEVEL UNDER THE GUIDELINES?

LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Rosales-Mireles v. United States, 138 S.Ct. 1897, 201 L.Ed.2d 376 (2018).....	6,7,9
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FOR THE EIGHTH CIRCUIT [DIRECT APPEAL]
(FILED AUGUST 24, 2018)

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 24, 2018.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES SENTENCING GUIDELINES

18 U.S.C. § 3553(a)

RULE 52(b) "PLAIN ERROR"

FIFTH AMENDMENT - DUE PROCESS OF LAW

STATEMENT OF THE CASE

Petitioner Johnson [herein "Petitioner"] was indicted on July 20, 2016, and charged [along with another individual] with conspiracy to distribute [at least 500 grams] of methamphetamine. On October 7, 2016, Petitioner [without a plea agreement] entered a plea of guilty to the charge - Conspiracy to Distribute methamphetamine - listed in the indictment.

It was determined - based on the amount of substance listed in the indictment [at least 500 grams] along with the fact that he had qualifying prior state convictions - that Petitioner would be sentenced at criminal history category VI, and Offense Level 37.

It was determined, at sentencing, that Petitioner would be sentenced as a "career offender" [USSG § 4B1.1]. Under such provision of the Guidelines, the resulting sentence was 360 months to life imprisonment.

At sentencing, however, although the District Court determined that Petitioner qualified as a "career offender" it varied downward from the advisory guideline range and sentenced Petitioner to a term of 300 months imprisonment.

On Direct Appeal Petitioner challenged the Court's determination that his "Prior State Convictions" qualified as enhancing priors under the United States Sentencing Guidelines. Petitioner challenged the District Court's failure to apply the "Modified Categorical Analysis" prior to making the determination that his

"prior state convictions" qualified as enhancing predicates under the Guidelines." The Ninth Circuit Court of Appeals had already determined the relevant "prior state convictions" to be "divisible." In the Court's Order/Memorandum - in addressing such issue - the Court stated, "the district court would have imposed the same sentence had it not relied upon the invalid factor or factors," the "misapplication of the guidelines is harmless." The Court further concluded that, "therefore, any possible error in the application of the career offender guideline to Johnson was harmless."

With respect to the specific statutes involved in Petitioner's prior state convictions [California Health and Safety Code section(s) 11351 & 11379(a)] the Ninth Circuit found that both statutes "regulate the possession and sale of more substances than are regulated under federal law. "See, Cheuk Fung S-Yong v. Holder, 600 F.3d 1028 (9th Cir. 2010); and United States v. Torre-Jiminez, 771 F.3d 1163 (9th Cir. 2014). Both courts then found each statute divisible and therefore applied the "modified categorical approach."

In Petitioner's case, the Government, as well as the Court, have determined/concluded that looking to the PSR [under the "modified categorical approach] to determine whether or not the "prior state conviction(s)" qualifies as "controlled substance offenses" under the "Career Offender Guidelines" was sufficient. It is, however, the contention of Petitioner, that the Government's/Court's reliance on the PSR, in order to make such determination, was in error.

REASONS FOR GRANTING THE PETITION

Petitioner contends that the United States District Court "incorrectly" sentenced him as a "Career Offender" when qualifying his prior state convictions as predicate controlled substance offenses under the Guidelines, without applying the proper "modified categorical analysis approach."

The United States District Court committed "Plain Error" when qualifying Petitioner as a "Career Offender" and subsequently calculating his Guideline Offense Level - as well as his Criminal History Category - accordingly.

See, Rosales-Mireles v. United States, 138 S.Ct. 1897, 201 L.Ed.2d 376 (2018), wherein the United States Supreme Court held that "A district court has the ultimate responsibility to ensure that the U.S. Sentencing Guidelines Manual range it considers is correct and the failure to calculate the correct Guidelines range constitutes procedural error." The Rosales Court also stated, "A plain U.S. Sentencing Guidelines Manual error that affects a defendant's substantial rights is precisely the type of error that ordinarily warrants relief under Fed.R.Crim.P. 52(b).

The U.S. Supreme Court has recognized that when a defendant is sentenced under an incorrect U.S. Sentencing Guidelines range whether or not the defendant's ultimate sentence falls within the correct range the error itself can and most often will be sufficient to show a reasonable probability of a different out-

come absent the error. In other words an error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than necessary to fulfill the purposes of incarceration. See, Rosales-Mireles, *Id.* "The possibility of additional jail time thus warrants serious consideration in a determination whether to exercise discretion under Fed.R.Crim.P. 52(b)."

In the instant case, the District Court improperly calculated Petitioner's Sentencing Guideline Range, prior to sentencing him to a 300-month sentence. Courts have consistently held that when a sentence is determined based on a court's "failure to calculate the correct guideline range" the affect is a "procedural error."¹ See also, Rosales-Mireles, *Id.* Lower Courts have also held that Rosales-Mireles was addressed in the context of whether or not an error in the calculation of the guidelines can be considered "plain error" on direct appeal, not in the context of a § 2255 motion.

Because Petitioner properly contested the "error" in the Court's calculation of his Sentencing Guidelines range - in his Direct Appeal Brief - the holding in Rosales Mireles, *Id.* would therefore apply concerning the "Plain Error" committed during

¹. *United States v. Twitty*, U.S. Dist. LEXIS 160881 (September 20, 2018), the Court stated, "This court agrees that, if Defendant were on direct appeal or a timely § 2255 motion, and could show a miscalculation of the Guidelines, Molina-Martinez and Rosalez-Mireles would not require a showing of prejudice; *United States v. Augustin-Garcia*, 2018 U.S. App. LEXIS 26139 (5th Cir.... 2018), Rosales-Mireles dictates that we should exercise our discretion in this case to remand for resentencing; "based on the corrected guidelines range; *United States v. Scott*, 2018 U.S. App. LEXIS 23435 (2018), "because the district court is itself responsible for guidelines calculations and its errors are easily corrected on remand, the Supreme Court recently noted that a

his sentencing hearing.

It is the contention of Petitioner that the Sentencing Court failed to conduct a proper "modified categorical analysis approach" to determine whether his prior state convictions qualified as controlled substance offenses under the Career Offender Guidelines. See, United States v. McGowan, 743 F.Supp. 2d 1084 (8th Cir. 2010)(citing Olmsted v. Holder, 588 F.3d 556, 559 (8th Cir. 2009)). The Court stated that, "In ² Shepard, the Supreme Court held that a court may not look beyond the terms of the charging document, the terms of a plea agreement, or transcript or colloquy between the judge and the defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information, in determining whether a crime of violence occurred. See McGowan, *Id.* Each of Petitioner's prior state convictions were the result of plea agreements entered into by Petitioner.

Both California State Statutes [California Health & Safety Code(s) 11351 and 11379(a)] have been found - by the Ninth Circuit - to be "divisible" because each statute "regulates the possession and sale of more substances than are regulated under federal law." See, Cheuk Fung S-Yong v. Holder, 600 F.3d 1028 (9th Cir. 2010); and United States v. Torres-Jiminez, 771 F.3d 1163 (9th Cir. 2014).

1.(cont.) guidelines miscalculation creates a "risk of unnecessary deprivation of liberty [that] particularly undermines the fairness, integrity, or public reputation of judicial proceedings. (citing Rosales, *Id.*).

2. United States v. Shepard, 544 U.S. 13, 161 L.Ed.2d 205, 125 S.Ct. 1245 (2005).

With respect to the "Modified Categorical Analysis Approach" that is required when a statute has been determined to be divisible, the Mathis Court explained what is required at sentencing. In Beckles v. United States, 197 L.Ed.2d 145, 137 S.Ct. 886 (2016), the Supreme Court stated, "Take the career-offender guideline at issue here. We explained in Johnson that the identically worded provision in the ACCA created 'pervasive disagreement' among courts imposing sentences as to 'the nature of the inquiry' that they were required to conduct." In Mathis v. United States, 136 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), the Supreme Court stated, "Under the ACCA the U.S. Supreme Court has approved the modified categorical approach for use with statutes having multiple alternative elements. Under that approach a sentencing court looks to a 'limited class of documents' (for example, the indictment, jury instructions or plea agreement and colloquy) to determine what, with what elements, a defendant was convicted of. The court can then compare that crime as the categorical approach commands with the relevant generic offense.

Although the United States Supreme Court is clear when referring to the "limited class of documents" which may be look to in determining what elements a defendant was convicted of, in Petitioner's case, the Court looked "only" to the PSR in making its determination as to whether his prior state "drug related" convictions qualified as predicates under the "Career Offender" provision of the United States Sentencing Guidelines. Although the United States District Court has justified any possible

error with respect to the "Career Offender" provision as having been "harmless error." Petitioner respectfully disagrees.

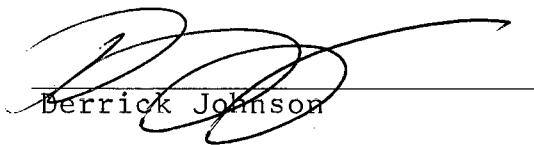
Finally, in Rosales-Mireles, Id., the Court stated, "... except in the extraordinary case, miscalculation requires reversal under plain error review." Because the District Court used the "incorrect guidelines range" in calculating Petitioner's sentence, the court further held that, "a guidelines miscalculation creates a 'risk of unnecessary deprivation of liberty [that] particularly undermines the fairness, integrity, or public reputation of judicial proceedings.' See Rosales-Mireles v. United States, 138 S.Ct. 1897, 1908, 201 L.Ed.2d 376 (2018).

The United States District Court, in Petitioner's case, committed "plain error" at sentencing and the case should be remanded back to the District Court for further proceedings consistent with the holdings in the United States Supreme Court addressed above, in the interest of justice, and for good cause established herein.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Derrick Johnson

Date: November 20, 2018