
In the Supreme Court of the United States

KENNETH DANIELS,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Kenneth Daniels respectfully requests a 60-day extension of time, to and including July 7, 2019, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. The Third Circuit issued its decision on February 7, 2019. Unless extended, the time to file a petition for a writ of certiorari will expire on May 8, 2019. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

A copy of the Third Circuit's opinion is attached.

1. Applicant entered a guilty plea to one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e), while reserving his right to appeal on the question of whether a violation of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act (35 Pa. Stat. Ann. § 780-113(a)(30)) qualifies as a "serious drug offense" under the Armed Career Criminal Act (ACCA). Slip op. 1-3. If, as the lower court held, applicant's prior conviction qualifies, then Section 924(e) trig-

gers a 180-month mandatory minimum sentence and allows for up to 210 months' imprisonment under the Sentencing Guidelines. Slip op. 4. Otherwise, applicant's sentencing range under the Guidelines would have been 92 to 115 months. *Ibid.*

During sentencing, the government alleged that applicant qualified as an armed career criminal because he had at least three prior convictions for possession with intent to deliver narcotics under Pennsylvania law. Slip op. 3. Applicant, in turn, contended that the elements of the state drug statute were broader than those under federal law. Slip op. 4. Specifically, applicant argued that "Pennsylvania's treatment of solicitation and mere offers to sell" as criminal attempts in some cases made Pennsylvania law broader than federal law—and thus that the state offenses were not ACCA predicate offenses under the categorical approach. *Ibid.*

The district court rejected that argument and sentenced him to 180 months' imprisonment in accordance with the ACCA's mandatory minimum. Slip op. 4.

2. The court of appeals affirmed. Slip op. 3. The court recognized that the appeal turned on two issues: *first*, whether the ACCA's "definition of a 'serious drug offense' encompasses attempts (as defined under federal law)"; and *second*, and if so, whether "the scope of attempt * * * liability under Pennsylvania law is coextensive with [that] under federal law." Slip op. 2-3.

Considering the first question, the court observed that the ACCA defines a "serious drug offense" as, among other things, "an offense under the Controlled Substances Act." Slip op. 5 (quoting 18 U.S.C. § 924(e)(2)(A)). Reasoning from there, the court held that the ACCA's definition of a "serious drug offense" encompasses attempts, and further that mere solicitation of a sale of a controlled substance can qualify as an attempt for the purposes of the CSA. Slip op. 9, 28-30.

Moving to the second question, the court observed that Pennsylvania law likewise “treat[s] some solicitations as attempts.” Slip op. 28. It thus determined that “the scope of attempt * * * liability under Pennsylvania law is coextensive with [that] under federal law.” Slip op. 9.

Thus, “answer[ing] both questions in the affirmative,” the court affirmed applicant’s sentence. Slip op. 3.

3. As the court below recognized, however, the courts of appeals are divided on the question whether solicitation can, by itself, constitute an attempt under the federal Controlled Substances Act.

The Ninth Circuit has held that “offering to deliver a controlled substance does not cross the line between preparation and attempt for the purposes of the [federal] Controlled Substances Act.” Slip op. 29 (quoting *Sandoval v. Sessions*, 866 F.3d 986, 990 (9th Cir. 2017)). See also *United States v. Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001); *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999).

The Third Circuit reached the opposite conclusion in *Martinez v. Attorney General*, 906 F.3d 281, 286 (3d Cir. 2018), where it held that “[s]olicitation, like any number of other acts, can amount to a federal attempt” under the CSA. Applying that precedent below, the Third Circuit thus “expressly disagreed with” the Ninth Circuit’s decision in *Sandoval*. Slip op. 29-30 (citing *Martinez*).

For its part, the government has taken inconsistent positions. In *United States v. Ibarra-Luna*, 628 F.3d 712 (5th Cir. 2010)—a U.S. Sentencing Guidelines case—the government favorably cited the Ninth Circuit’s decision in *Rivera-Sanchez* for the proposition that “the Controlled Substances Act neither mentions solicitation nor contains any broad catch-all provision that could even arguably be read to cover solicitation.” See U.S. Br. at 14, *United States v. Ibarra-Luna*, 2010 WL 5066884 (5th

Cir. 2010). The Fifth Circuit's opinion recognized that concession, ruling on that basis that "mere offer to sell, without evidence of possession or transfer, is tantamount to solicitation and is not proscribed by the Controlled Substances Act" and reversing the imposition of an enhanced sentence. *Ibarra-Luna*, 628 F.3d at 716.

Yet in this case, the government took the opposite view, insisting that, assuming that the state-law offense here covers "solicitation to commit a drug offense, a violation of that section would still be a 'serious drug offense' as defined in ACCA." U.S. Br. at 30, *United States v. Daniels*, 2018 WL 3020098 (3d Cir. 2018).

4. As the petition will show, the significant practical importance of the question presented weighs further in favor of certiorari. ACCA mandatory minimum sentences are common. In every year since 2010, more than 5,000 people in federal prison were serving sentences under the ACCA. William H. Pryor Jr. et al., *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System*, U.S. Sentencing Comm'n, 46 (Mar. 2018), perma.cc/GL2A-Q6P4. And notwithstanding the possibility of relief from the mandatory minimum under 18 U.S.C. 3553(e) for providing substantial assistance to the government in the investigation of another prosecution, the vast majority of those convicted of an ACCA offense faced the full 180-month mandatory minimum. See *id.* at 47.

This case illustrates the practical effect of the split in each case in which it arises. Had the Third Circuit interpreted federal law consistently with the Ninth Circuit, applicant would have faced a Guidelines range of 92-115 months. But because he had the misfortune of living in the Third Circuit, he is now serving a mandatory 180-month minimum.

5. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. Undersigned counsel was retained to prepare the petition in this

case only recently and has not yet had an opportunity to familiarize himself with the full trial or appellate record. Undersigned counsel also has several other matters with proximate due dates before this Court, including a reply in support of certiorari due in *Hall v. Idaho*, No. 18-679, on April 9, 2019; a reply in support of certiorari due in *Shabo v. Sessions*, No. 18-827, due on April 16, 2019; a reply in support of certiorari due in *Renteria v. United States*, No. 18-1052, on April 29, 2019; and the merits briefing in *Kansas v. Garcia*, No. 17-834, for which a briefing schedule is currently being negotiated.

For the foregoing reasons, the application for a 60-day extension of time, to and including July 7, 2019, within which to file a petition for a writ of certiorari should be granted.

March 29, 2019

Respectfully submitted.



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