

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2018

ERIC T. RODEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

WHETHER A CRIMINAL DEFENDANT CAN EVER WAIVE A
CORRECTLY CALCULATED GUIDELINES RANGE FOR USE
AT A FEDERAL SENTENCING HEARING.

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Petitioner, Eric T. Roden, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's April 18, 2019 Order terminating and dismissing petitioner's appeal in that court is unpublished and set forth in the Addendum to this petition. (Addendum at page 1).

The ruling of the district court denying petitioner's objection to a six point increase in his guidelines range under USSG §2K2.1(a)(4)(B)(i)(I) is neither written nor published but the sentencing transcript which contains the district

court's oral ruling is set forth in the Addendum to this petition as well. (Addendum at pages 2-28).

Inasmuch as the Ninth Circuit never addressed petitioner's sentencing objection, since it dismissed petitioner's appeal based on an appeal waiver, the substance of the objection is not before this Court. However to understand the nature of the objection the undersigned commends the Court's attention to the published district court decision styled as *United States v. English*, 333 F.Supp.3d 1311 (Dist. Ct. M.D. Alabama) (2018) upon which petitioner relied. The *English* decision is in the Addendum at pages 29-33.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's order dismissing petitioner's appeal was filed on April 18, 2019 (Addendum at page 1). Petitioner did not file a petition for rehearing. This Court's jurisdiction arises under 28 U.S.C. §1254(1). Petitioner's petition is timely because it was placed in the United States mail, first class postage pre-paid, on July 10, 2019 and filed with the Court electronically within the 90 days for filing under the Rules of this Court (*see* Rule 13, ¶1).

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the Due Process clause set forth in the Fifth Amendment to the U.S. Constitution which provides in relevant part:

Fifth Amendment Due Process Clause

No person shall be . . . deprived of life, liberty, or property, without due process of law.

FEDERAL STATUTORY PROVISIONS INVOLVED

This petition involves 18 U.S.C. §3553(a) which in part provides:

18 U.S.C. §3553(a)

- (a) **Factors to be considered in imposing a sentence.**— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider —
- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (2) the need for the sentence imposed —
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
 - (3) the kinds of sentences available;

- (4) the kinds of sentence and the sentencing range established for–
- (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –
- (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(Emphasis added)

FEDERAL SENTENCING GUIDELINES INVOLVED

This Petition also involves the following aspect of USSG §2K2.1:

§ 2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

- (a) Base Offense Level (Apply the Greatest):

....

(4) 20, if –

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

....

(6) 14, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense;

....

STATEMENT OF THE CASE

On September 6, 2016 appellant's truck was noticed by a Montana Highway Patrol trooper without a front license plate. Getting behind the vehicle the trooper ran a registration check, which revealed that the truck belonged to appellant but that appellant's driver's license had been revoked.

During the ensuing traffic stop the trooper issued appellant a no insurance ticket and sought permission to search the vehicle. Appellant volunteered that there was a .22 caliber long rifle on the floorboard behind the passenger seat. Having failed to gain appellant's permission to search the truck the trooper ordered the

vehicle seized. The next day (September 7, 2016) a search warrant was obtained and executed on the truck yielding the following:

- Glock, Model 22, .40 caliber pistol, serial number: EVD415US
- Ruger 10-22 rifle, serial number: 0005-01358
- Russian model SKS, serial number: VT451
- 1 35 round 7.62 x 39 caliber magazine, filled to capacity
- 2 Ruger magazines containing .22 caliber ammunition
- 1 box Winchester .22 long rifle ammunition
- 1 box Tul-Ammo 7.62 caliber ammunition

See PSR p. 5, ¶21

In due course appellant was indicted for unlawful possession of these firearms, since he had been previously convicted of a felony crime (*See* Indictment, Addendum at pages 34-35). In his statement of acceptance of responsibility appellant wrote that he knew that the firearms listed above were in his vehicle at the time of the traffic stop on September 6, 2016.

At first the probation office calculated appellant's base offense level at 22 under USSG §2K2.1(a)(3) due to appellant's previous conviction for a "crime of violence" *and* because one of the firearms he possessed was a semiautomatic, capable of accepting a high capacity magazine. At the sentencing hearing however the court sustained appellant's objection that his previous felony was not a "crime of violence" so that is not an issue in this petition. (Addendum at page 8).

Under USSG §2K2.1(a)(4)(B)(i)(I) however the district court awarded appellant a 6-point increase in his guidelines range because one of the firearms appellant possessed was a semiautomatic, capable of accepting a high capacity

magazine. Absent this 6-point increase appellant's guideline base offense level would have been 14 under USSG §2K2.1(a)(6), instead of 20 under USSG §2K2.1(a)(4)(B)(i)(I). At the sentencing hearing petitioner argued through counsel the gist of the decision styled as *United States v. English*, 333 F.Supp.3d 1311 (Dist. Ct. M.D. Alabama) (2018) and specifically the fact that SKS rifles can be purchased lawfully. (Addendum at pages 1 and 41-42).

THE DISTRICT COURT ARTICLE III JUDGE'S DECISION

In the face of petitioner's claim that his guidelines were overstated under the *English* decision the district court ruled that "based on the criminal history, that the guidelines accurately capture the offense conduct and the issues that I'm supposed to address." (Addendum at page 21).

Moreover, at the conclusion of the sentencing hearing the district judge advised petitioner as follows:

THE COURT:	Mr. Roden, you have waived your right of appeal, but if you think I've done something wrong here this morning and you wish to attempt to appeal, you will have 14 days from the date of entry of judgment in which to appeal. Judgment will be entered today, so that means you would have 14 days from today's date. Do you understand that, sir?
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THE DEFENDANT:	Yes, Your Honor.
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Transcript of Sentencing at page 25, lns. 13-19
(Addendum at page 26)

THE NINTH CIRCUIT DECISION

On the government's motion, which petitioner opposed, the Ninth Circuit dismissed petitioner's appeal based on petitioner's plea agreement waiver. (Addendum at page 1).

REASONS FOR GRANTING THE WRIT

The Court should grant the petition and issue the writ and remand the case to the Ninth Circuit for appellate review because the decision to dismiss petitioner's appeal decides, erroneously, important questions of federal law that have not been but should be decided by this Court. Moreover the lower court ruling also conflicts with relevant decisions of this Court.

The guidelines are advisory and courts may vary from them, even based on the idea that a particular guideline fails to properly reflect the considerations set forth in 18 U.S.C. §3553(a). *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). Moreover, considering that the assault weapons ban expired as explained in *United States v. English*, 333 F.Supp.3d 1311 (Dist. Ct. M.D. Alabama) (2018) we submit that possession of a semiautomatic weapon with a large capacity magazine, without more, cannot and should not warrant a 6-point increase in an individual's base offense level. Under 28 U.S.C. §994(c) the Sentencing Commission is supposed to be guided by the following in framing a guideline that governs imprisonment as a sanction:

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents [incidence] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

- (1) the grade of the offense;
- (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;
- (3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;
- (4) the community view of the gravity of the offense;
- (5) the public concern generated by the offense;
- (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
- (7) the current incidence of the offense in the community and in the Nation as a whole.

See 28 U.S.C. §994(c)

Examining these factors in light of the history of the assault weapons ban, as recounted in the *English* decision, there is no factor or set of factors as listed in 28

U.S.C. §994(c) warranting a 6-point increase in offense level for semiautomatic firearms with high capacity magazine. Possession of same cannot be considered a free standing aggravating factor, since such weapons are lawful for non-felons and do not suggest inherent danger. Nor are there circumstances in this record which suggest intended violence for the offense of conviction. Next, no harm to person or property occurred. And as for “community view”, “public concern” and/or “deterrent effect” (§994(c)(4), (5) & (6)) the assault weapons ban expired, which resolves those concerns.

If Congress allowed the assault weapons ban to expire rendering possession of such by non-felons lawful there is no justification for effecting a disproportionate increase of 6 points for a felon who possesses such firearms, absent some independent aggravating factor. Seeing none in this record appellant argues that his sentence is unreasonable. At a base offense level 14 with 2 added points for number of firearms, less 3 points for acceptance, appellant’s guidelines range would have been 24-30 months.

In paragraph 7 of his plea agreement petitioner agreed with the government that the guidelines needed to be calculated and applied correctly in order to determine a reasonable sentence:

7. **Sentencing Guidelines:** Although advisory, the parties agree that the U.S. Sentencing Guidelines must be applied, and a calculation determined, as part of the protocol of sentencing to determine what sentence will be reasonable.

(Addendum at page 41)

Nevertheless based on paragraph 8 of the plea agreement the Ninth Circuit dismissed petitioner's appeal:

8. **Appeal Waiver:** The defendant understands that the law provides a right to appeal and collaterally attack the sentence imposed in this case. 18 U.S.C. § 3742(a); 28 U.S.C. §§ 2241, 2255. Based on the concessions made by the United States; the defendant knowingly waives any right to appeal or collaterally attack any aspect of the sentence, including conditions of probation or supervised release. This waiver includes challenges to the constitutionality of any statute of conviction and arguments that the admitted conduct does not fall within any statute of conviction. This waiver does not prohibit the right to pursue a collateral challenge alleging ineffective assistance of counsel.

(Addendum at pages 41-42)

Petitioner did not intentionally waive or abandon his right to a correct guidelines calculation. In fact under paragraph 7 of his plea agreement he bargained for and agreed that an accurate guidelines calculation was central to his receipt of a reasonable sentence. Thus petitioner's waiver of his sentence appeal in paragraph 8 of his plea agreement did not embrace his bargained for guideline calculation in paragraph 7. *See Garza v. Idaho*, 139 S.Ct. 738, 744 (2018) (valid appeal waiver only captures claims that fall within its scope).

Furthermore, under this Court's recent decisions in *Class v. United States*, 138 S.Ct. 798 (2018) and *Molina-Martinez v. United States*, 136 S.Ct. 1338 (2016) a defendant in a federal criminal case cannot waive an accurate guidelines range calculation. *Also see United States v. Olano*, 507 U.S. 725, 733 (1993) (whether right is waivable depends on right at stake). Put another way an accurate guidelines range calculation is so central to the sentencing process it cannot be captured by an appellate waiver no matter how expansive.

When entering a plea agreement a defendant has a reasonable expectation that the guidelines will be calculated correctly. Also, as the Court's decision in *Molina-Martinez* recognizes "[t]he Guidelines are complex, and so there will be instances when a district court's sentencing a defendant with the framework of an incorrect Guidelines range goes unnoticed." 136 S.Ct. at 1342-1343. It is therefore the prerogative and obligation of the appellate court to assess that issue and order corrective action.

Petitioner's plea agreement contemplated that the guidelines would be calculated correctly. And the Ninth Circuit has held that "[o]bviously improper deviations [from the guidelines] are not within the [district] court's discretion [therefore defendants] reserve[] the right to appeal such deviations." *United States v. Khaton*, 40 F.3d 309, 311 (9th Cir. 1994). Moreover, the Ninth Circuit's decision in this case to dismiss petitioner's sentencing appeal violates this Court's rule in

United States v. Ruiz, 536 U.S. 622, 628 (2002) which holds that to determine appellate jurisdiction it is sometimes necessary to address the merits. The Ninth Circuit failed to do that here.

CONCLUSION

Wherefore, the Court should grant this petition and set the case down for full briefing and argument.

Respectfully submitted this 10th day of July, 2019.



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