No. 20-5321

In the

Supreme court of the united states

Michael Wayne Wadena, - Petitioner,

vs.

United states, Respondent(s)

On petition for a writ of certiorari to the united states court of Appeals for the Eighth Circuit.

Petition for writ of Certiorari

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Questions Presented for Review

Does 924(e)'s "Serious Drug offense" mandate that courts consider both statutes when sentencing

Could hypothetical aggravating sentencing factors be considered when determing the "Maximum term of imprisonment".

Does Eighth circuit court of Appeals have jurisdiction to hear a certificate of Appealability.

List of Parties

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

Related cases.

Table of content

Index to Appendices

Table of Authorities cited Page.

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

The opinion of the united states court of appeals appears at Appendix A to the petition

The opinion of the united states district court appears at Appendix D to the petition

Jurisdiction

The date on which the united states court of Appeals decided my case was April 3, 2020

A timely petition for rehearing was denied by the united states court of Appeals on the following date: May 7th, 2020, and a copy of the order denying rehearing appears at Appendix A

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

Constitutional and statutory provisions

A defendant has a substantial legitimate expectation under the "Fourteenth Amendment" to be deprived of his liberty only to the extent determined by the trier of fact in the exercise of its statutory discretion

"Serious drug offense", in relevant part, as "an offense under state law, involving ... distribution of a controlled ~~sb~~ substance..., for which a maximum term of imprisonment of ten years or more is prescribed by law

statement of the case

On August 8, 2016, petitioner pled guilty to count 1 of the information filed on June 2, 2016. On may 11, 2017, petitioner was sentenced to a term of 180 months imprisonment. Count 1 charged petitioner with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). The court adopted the presentence report and found petitioner to be eligible for enhanced penalties pursuant to Armed career criminal Act outlined in 18 U.S.C 924 (e)

Reasons for Granting the Petition

Court of Appeals are divided on whether 924(e) Serious Drug offense allows courts to use a hypothetical approach.
Also, it is in conflict with other appellate courts on this issue.

Petitioners state charge was "improperly" determined to be a serious drug offense.

Petitioner was sentenced to a fifteen year Mandatory Minimum sentence pursuant to the ACCA. This fifteen year is affected when a felon unlawfully possesses a firearm "and has three previous convictions by any court for a violent felony or a serious drug offense or both" 18 U.S.C. 924(e) Petitioner was sentenced to the fifteen years, in part, because his previous May 9th 2013, Conviction in Minnesota State court for fourth degree drug poss. 1/2/3/ Except Marijuana with intent to sell was "improperly" determined to be a "serious drug offense" Petitioner now challenges whether his prior Minnesota conviction qualifies as a Serious drug offense.

Federal law defines a "Serious drug offense", in relevant part, as "an offense under state law, involving ... distribution ... [of] a controlled substance..., for which a maximum term of imprisonment of ten years or more is prescribed by law" 18 U.S.C. 924(e)(2)(A)(ii)

Petitioner challenges whether courts are able to use hypothetical sentencing when determing whether it is a maximum term of imprisonment of ten years or more prescribed by law"

As the maximum term of imprisonment prescribed was indeed less than ten years for the conviction, petitioner previous conviction was not a serious drug offense

To determine whether petitioners prior Minnesota conviction qualifies as a serious drug offense first requires review of Minnesota specific sentencing scheme. see, e.g., U.S. v. Jefferson, 822 f.3d 477, 480-81 (8th Cir. 16) (Reviewing the Illinois sentencing scheme to determine whether prior conviction qualified as a serious drug offense); U.S. v. Newbold 791 f.3d 455; (Reviewing the North Carolina sentencing scheme to determine whether prior convictions qualifies as a serious drug offense...

Like the federal system, Minnesota, uses sentencing guidelines to determine criminal sentences. see generally Minn. ~~stat~~ Sent Guidelines. Also, like the federal system, the Minnesota system also uses a sentencing grid.

The vertical axis of the grid represents the severity of the offense and is arrayed into eleven severity levels. The horizontal axis represents the defendants criminal history score, comprised of prior convictions, applicable juvenile record and custody status at the time of the current offense. The grid provides for a presumptive fixed sentence and, for those sentences which are presumptively execute a presumptive sentencing range. Any prison sentence outside the presumptive range constitutes a departure and requires the judge and jury to provide written reason.

see Minnesota v. Shattuck, 704 N.W. 2d 131, 139 (Minn. 2005)

Generally, sentencing to the Minn. sent. guideline presumptive sentence "is mandatory". Minnesota law permits departure from the presumptive sentence "only if" aggravating or mitigating circumstances are present; if such circumstances are not present, "the trial court has no discretion to depart" Minn. v. Best 449 N.W.2d 426, 427 (Minn. 1989) see also, Shattuck, 704 N.W.2d at 140-41 ("The district court is required to impose the presumptive sentence set out in the sentencing grid absent additional findings)...... Stated another way, under the Minn. Sentencing scheme, "For felonies other than first degree murder, the presumptive sentence prescribed by Minnesota sentencing guidelines is the maximum sentence a judge may impose solely on the basis of facts inflected in the jury verdict or admitted by defendant; Shattuck 704 N.W. 2d at 141

Petitioner was convicted of Minn. fourth degree poss. 1/2/3/ Except marijuana with intent to sell in 2013. When sentenced in 2013, the base level offense for petitioners conviction was a level 4. As a level 4 conviction, however, petitioner could never have faced a presumptive sentence of at least ten years no matter how many prior convictions. Indeed sentence for level 4 conviction are capped at 28 months. Because the presumptive sentence is the maximum sentence permissible by law in Minnesota See Shattuck, 704 N.W 2d at 141 Also see, Newbold 791 f.3d at 462-63 Accordly, where the state court judgment contains no aggravating factors supporting a sentencing with the aggravating range. The presumptive term controls Id. at 463

Because the presumptive sentence for level 4 offenses caps below 10 years, sentencing to 10 years would require an aggravating factual finding see Best, 449 N.W.2d at 427 but an aggravating finding must either be found by a jury or admitted by the defendant in his/her plea Cf. Shattuck (An upward durational departure from the presumptive sentence, based on findings made by the district court violates the Sixth Amendment right to trial by jury (citing Apprendi v. New Jersey 530 U.S. 466, 490 (2000); Blakely v. Washington U.S. 542 U.S 296 (2004). However, there is no evidence such aggravating factors were found against or admitted by petitioner. Accordingly, an aggravating sentence of at least 10 years against petitioner was not possible Id. Because the maximum term of imprisonment prescribed by law was less then ten years, the conviction was/is not a predicate offense for ACCA purposes. Absent counting this conviction as a serious drug offense sentencing petitioner subject to ~~ACC~~ ACCA enhanced penalty of fifteen year was improper.

In Haltiwanger, the defendant was convicted for conspiracy to distribute a controlled substance. 637 F.3d at 882. The defendant was previously convicted of "failure to affix a drug tax stamp in violation of Kansas Statutes 79-5204" Id. The district court invoked a mandatory minimum 240 months sentence by concluding the drug tax stamp conviction was a prior felony drug conviction because some defendants could be sentence to a term of imprisonment in excess of one year. Id. the Eighth circuit originally affirmed, id., but the decision was vacated and remanded by this Court for additional consideration in light of Carachuri-Rosendo v. Holder 560 U.S. 563 (2010) See Haltiwanger 637 F.3d. at 882. After additional review, the Eighth circuit concluded the defendant prior Kansas conviction did not qualify as a prior felony drug conviction Id. at 884. the Eighth circuit found Kansas used sentencing guidelines Id. 882 under the Kansas sentencing guideline Haltiwanger was in criminal history category I, and the offense level for failure to affix a drug tax stamp was 10 Id. The Eighth circuit found the maximum sentence able to be imposed on Haltiwanger was 7 months - a sentence that did not qualify as a prior felony drug offense. The Eighth circuit reached this conclusion by rejecting the hypothetical approach - the approach of determing the maximum sentence that could be imposed against a hypothetical defendant - and instead inquired into the defendants specific characteristics as required under

Carachuri-Rosendo, Halthwanger this is proper reading of U.S. v. Rodriquez 553 U.S. 377 (2008) and Carachuri-Rosendo has also been adapted by sister circuits see, eq. U.S. v. Brooks 751 f3d 1204 (10th cir. 2015) (Holding, "in determing whether a state offense was punishable by a certain amount of imprisonment the maximum amount of time a particular defendant could have received controls, rather than the amount of time the worst imaginable recidivist could have received" See U.S. v. Simmons 649 f.3d 237 (4th cir 2011) en banc); ~~ees~~

Carachuri-Rosendo; Halthwanger control the case at bar. Petitioner was ~~[illegible]~~ convicted of an offense where a hypothetical defendant could be sentenced to a term of imprisonment in excess of ten years if a multi-convicted felon, "And if" an aggravating departure was made for jury determined reasons see Minn. Stat. 152.024 (2)(2). But while a hypothetical defendant could have received a serious drug offense, petitioner could not. There is clearly no evidence petitioners Minnesota Sentencing guidelines calculation permitted a Sentence 10 years or more. Because Sentencing above petitioners pres-umptive Sentence would not have been permissible under Minnesota law ab-sent additional factual findings not made or entered into evidence it is petitioners specific Sentencing guidelines inquiry that is relevant, not a hypothetical defendants hypothetical sentence because the relevant mandatory presumptive guideline sentence falls under 10 years, petitioners conviction does not qualify as a serious drug offense to nevertheless count it as an ACCA predicate would violate due process rights under the 14th Amend. and the rule of Simmons, 649, also see Newbold, 791 f.3d 455 which teaches that "federal courts should not apply hypothetical sentencing enhancements". thereby "Lumping all defendants - and virtually all crimes - into the same category for the purposes of federal sentencing 649 f.3d at 249-50

~~Every~~ Even since Simmons overruled Harp, where there are no aggravating factors, courts consider the presumptive term to be the maximum applicable punishment.

The absence of any aggravating factors in the record may have been sufficient to support petitioners sentence under State law, but it can not change courts real inquiry under Simmons and Halthwanger for federal sentencing purposes such an approach would return us to the inexorable problem of the hypothetical, worst-case defendant" Simmons, Haltiwanger, and Carachuri-Rosendo before it, court should not measure a defendants maximum punishment based on a hypothical charge, a hypothical criminal history, or other facts out-side record of conviction "Valdovinos 760 F.3d at 327; Lockett 782 F.3d at 352 (Reasoning that the alleged federal predicate offense could only be evaluated in light of the actual sentence imposed, where the record of conviction did not contain findings of recidivism enhancements)

Minnesota law was more materially restrictive than it was at the time of relevant events in Rodriquez under Minnesota law when petitioner was convicted the sentencing court could not deviate from the statutory sentencing range unless it found aggravating circumstances. It is plain from the state criminal judgment that the sentencing court did not find any circumstances, so the sentencing court was bound by the statutory sentencing range. In other words the top sentence of the guidelines range was the maximum possible statutory punishment see, U.S. v. Rockymore 909 f.3d 167 (Quoting Rockymore, because the state of Tennessee did not seek a higher range when prosecuting Rockymore, he accordingly was never subject to the ~~ea~~ enhancements. Therefore, the maximum term of imprisonment that could have received was the [the maximum term defined by the statutory sentencing guidelines] that distinction - between (as here) statutorily defined factual circumstances and (As in Rodriquez) an open ended inquiry into any potential factual circumstances is important because it defines the maximum possible punishment assigned by the legislature See id. at 171 (Holding that, to determine the maximum term of imprisonment under Tenn. law and Rodriquez, the court <u>Must</u> look to the mandatory sentencing scheme, including the offender-based attributes.

This Courts recent cases require an examination of the maximum sentence possible under the States mandatory sentencing guidelines see Brooks 751 f.3d 1204; Halthwanger 637 f.3d 881.

The ACCA mandates that courts consider both statutes. under the ACCA-a serious drug offense require a "maximum term of imprisonment.. ~~prescr~~ prescribed by law" And both the felony-based statute and range-based statute set out the relevant law. Rodriquez 553 U.S. at 382-82

Now courts must look at all there relevant "law" that Minnesota applies to sentencing 553 U.S. at 382-83

The Eighth circuit court of appeals did have jurisdiction to hear the certificate of appealability. Fed. R. App. P, Rule 4(a)(1)(B)

Feb. 2, 2020, petitioner's motion filed Dec. 4, 2019, requesting court to reopen the time to file notice of appeal was granted and time was extented to March 18, 2020 <u>see</u> attached copy of order appendix E

On March 11, 2020 petitioner filed a notice of appeal. The clerk of court transmitted a notice of appeal in said matter in accordance with Rule 24(a), federal Rules of appellate procedure the

appeal was docketed under number 20-1513.
see attached copy in appendix f

The district court granting extention to time to file notice of appeal gave the Eighth Circuit court of appeals Jurisdiction and for them to dismiss for lack of jurisdiction is dripriving petitioner due process rights by a competent court. Review should of been granted and not dismissed as untimely nor lack of jurisdiction.
The proper steps was took by petitioner
District court of denied a certificate of appealability. I petitioner may then proceeded to seek a Certificate of appealability from the Eighth circuit court appeals under Rule 22(b) of the federal Rules of appellate procedure

Conclusion

For these foregoing reasons, petitioner believes that this Honorable court should grant petition for a writ of certiorari.

Respectfully submitted,
S/ [signature]
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