

No. 22-6497

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

"In Re: Timothy Kendrick, PRO SE,
Petitioner

VS
United States of America,
Respondent

FILED
DEC 02 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Timothy M. Kendrick, #09128-029

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QUESTIONS PRESENTED

- 1) Does the struckdown 18 USC §924 (e)(2)(B)(ii) residual under Johnson(2015) as applied to "ACCA" equally apply to Mandatory Guideline USSG §4B1.2 (a) (ii) Career Offender cases?
- 2) Does a Count 3(ORS811.540) and Count 2 ("DUI") State prior conviction qualify as a "crime of violence" under §4B1.2 (a) (ii) "otherwise" residual for enhancement purposes?
- 3) Does the Eighth Circuit application of ORS §811.540 as presented herein qualify a non-violent crime as a crime of violence?
- 4) Does the application of ORS§811.540 as applied in the Eighth Circuit (herein) prove the "Categorical Approach" "FAULTY" if all the prior conviction counts are unaddressed during Due Process?

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STATUTES AND RULES

1. Oregon Rev. Stat. §811.540 (1997)

(1) A person commits the crime of fleeing or attempting to elude a police officer if:

- (a) the person is operating a motor vehicle; and
- (b) A police officer is in uniform and prominently displaying the police officer's badge of office or operating a vehicle approximately marked showing it to be an official police vehicle gives a visual or audible signal to bring the vehicle to a stop, including any signal by hand, voice, emergency light or siren, and either;

- (A) The person, while still in the vehicle, knowingly flees or attempts to elude a pursuing police officer; or
- (B) The person gets out of the vehicle and knowingly flees or attempts to elude the police officer.
(Appellate Case No.16-2605, Page 15, (4/2017),
(8th Cir. Court of Appeals.)

2. 18 USSG §4B1.2 (a) (ii)--"crime of violence"; '...otherwise involves conduct that presents a serious potential risk of physical injury to another.' Appellate Case No.04-3256, Page 30, filed 12/15/2004).

3. 18 USC §924(e) (2) (B) (ii)--"crime of violence"; '...any felony that otherwise involves conduct that presents a serious potential risk of physical unjury to another.'

4. U.S. Sentencing Guidelines (2004), USSG §4B1.2 (a)--

"...the use, attempted use, or threatened use of physical force against the person of another."

5. U.S.S.G. app. C supp. Amendment 798-- (eliminating the residual clause from the crime of violence definition at USSG §4B1.2(a)(ii)).
6. U.S. Constitution-- 430.Career Offender; 431.Crime of Violence; and 433.Felony Fleeing (all KENDRICK, 423 F3d 803, respectively.)

CONSTITUTIONAL PROVISIONS

1. Sixth Amendment- "the likelihood of a different result must be substantial."
2. Fifth Amendment- "effects only the actions of the federal government."
3. Eighth Amendment- "cruel and unusual punishment."
4. Fourteenth Amendment- "Due Process Clause"; "protects the accused against conviction except proof beyond a reasonable doubt of every fact necessary to constitute the crime charged."

STATUTORY PROVISIONS

1. 18 USSG §4B1.2(a)(ii)
2. 18 USC §924(e)
3. 18 USC §924(e)(2)(B)(ii)
4. U.S. Sentencing Guideline §851
5. Oregon Rev. Stat. §811.540
6. U.S.S.G. app. C supp. Amendment 798
7. 28 USC §2241
8. 28 USC §2255

STATEMENT OF THE CASE

In 2004, petitioner received an enhanced sentence using the "otherwise" residual of USSG §4B1.2(a)(ii) and applied the "Categorical Approach" to classify a State Prior Conviction, (Or. Rev. Stat. §811.540), as a "crime of violence" that was a categorical mismatch in direct definition. The predicate prior ORS §811.540 herein has an included charge of "DUI" (Driving Under the Influence of Intoxicants, here, and throughout), factor that has gone unaddressed to date from the initial raised ISSUE 2 of petitioner's Direct Appeal. (Defense Counsel, same as Trial Counsel) poorly represented this claim regarding ORS §811.540, and the US Court of Appeals, ¹ when addressing the U.S. Court of Appeals (8th Cir)

ORS §811.540, overlooked the "ISSUE 2" of "operating while intoxicated", but addressed the "INTENT" factor of "level of risk" instead. Petitioner has filed numerous post-conviction motions for relief of sentence to address the "DUI" factor as a PRO SE applicant in his second Motion. A 28 USC §2241 filed in the 9th Circuit, (Case No. 2:11-cv-05798, 12/6/2011, 9th Circuit), the same circuit ORS §811.540 is from (the State of Oregon) was denied.

Petitioner herein humbly and prayerfully requests an unobstructed procedural redress by the US Supreme Court attention to ORS §811.540 as a "crime of violence" including the "DUI" factor attached to the ORS §811.540 State Conviction predicate prior which was a superceding indictment added to each Count of Conviction for enhancement purposes that did not receive a seperate hearing, post trial conviction, or Direct Appeal address regarding Leocal v. Ashcroft.

The US Supreme Court has applied KENDRICK, 423 F3d 803 (2005) to constitutional law under the "US CONSTITUTION: 430. Career Offender; 431. Crime of Violence; and 433. Felony Fleeing, (respectively,) without any address of the "DUI" factor. This application of law is in conflict, contrast, and opposition to the Direct Appeal "Issue 2", Leocal v Ashcroft, 2004 US Lexis 7511 (U.S., Nov. 9, 2004) (operating while under the influence of intoxicants is not a crime of violence"), Begay v United States, 170

LED 2D 490, 553 US 137 (decided April 16, 2008) ("DUI" is a "strict liability" crime; removes the "culpable state of mind" addressing "INTENT"), and numerous Ninth Circuit "ACCA" (Armed Career Criminal Act, here and throughout), cases regarding ORS §811.540 enhancements which have been remanded under JOHNSON(2015), 18 USC §924 (e)(2)(B)(ii) struckdown residual which is "interchangable" with USSG §4B1.2(a)(ii) "otherwise" residual unequally applied, and without any "DUI" consideration of factor, as well as no career offender redress to date amongst more than half-dozen post-conviction relief of sentence Motion(s) filed,

Petitioner hereby humbly and prayerfully requests the U.S. Supreme Court use its descretionary powers of authority, with this Court of Appeals dis-approved Certificate for Writ of Certiorari authorized under Rule 20 by 28 USC §1651(a) because the Great Writ will be in aid of the Eighth Circuit Appellate Court's jurisdictionary review, and because adequate relief under the U.S. Constitution Law cannot be obtained in any other form or from any other Court.

REASONS FOR GRANTING THE WRIT

1. The "DUI" factor included with ORS §811.540 was not addressed during trial by either party.
2. Defense Counsel, (both Trial and Direct Appeal Counsel, Mr. Charles H. Nadler, here, and throughout), raised "Issue 2" in Appellate Case No.04-3256 "operating while under the influence is not a crime of violence" and failed to relate it to ORS §811.540.
3. Issue 2 of Direct Appeal, the Leocal v Ashcroft decision issued by the U.S. Supreme Court was issued two months after trial and before the U.S. Court of Appeals for the Eighth Circuit ruled on the Direct Appeal.
4. The US Court of Appeals for the Eighth Circuit neglected, refused, or overlooked the address of the Issue 2 raised by defense counsel in petitioner's Direct Appeal No. 04-3256.
5. In January of 2008 petitioner filed a 28 USC §2255 Motion to the District Court in the Eighth Circuit including an "opinion" out of the Ninth Circuit showing an "ACCA" case was remanded regarding ORS §811.540. (Jonathan Bradley Peterson v United States, 2009 US Applexis 23869, No. 07-30465) (Attempting to Elude a Police Officer is not categorically a crime of violence).
6. On July 15, 2008, HONORABLE LINDA R. READE, DENIED #5 (above) ruling (1) Application to Proceed In Forma Pauperis;

(2) 28 USC §2255 MOTION; and (3) Certificate of Appealability-- "DENIED".

7. Petitioner did not file a Certificate of Appealability for reasoning shown in #6 (above) (See Case No. 6:08-cv-02004-LRR, (Filed 7/15/08)).
8. On July 14, 2011, petitioner filed a 28 USC §2241 Motion in the Ninth Circuit in the Central District of California raising Leocal, Begay, and Peterson (mentioned herein) regarding ORS §811.540 (and other trial issues.) ORS §811.540 is located in the State Of Oregon (9th Circuit).
9. The Ninth Circuit avoided address of the 28 USC §2241 Motion denying it by "lack of jurisdiction" reasoning. (See Case No. 2:11-cv-05798, 12/6/2011, (9th cir.)).
10. Conflict begins in the Eighth Circuit and Ninth Circuit regarding ORS §811.540 post-conviction relief regarding Peterson (9th Cir.) and Kendrick, (8th Cir.) (2008)
11. Petitioner attempts to address the ORS §811.540 and "DUI" convictionin 28 USC §2241 Motion in #9 (above) using Leocal, Begay, & Peterson regarding "state of mind" and "definition of". (2011)
12. At this time niether Circuit addresses the accompanying "DUI" inclusion or the "definition of" ORS §811.540 and its relation to federal law.
13. In 2014, petitioner refiled a 28 USC §2255 Motion

~~§811.540 is located in the State Of Oregon~~

(after transfer), No.14-1644, seeking review with the inclusion of the §2241 Motion (above) using the Saviings Clause" and the "Request For Reconsideration" Supplemental Brief which was sent before the decision was declared.

14. Petitioner raised numerous ORS §811.540 reversals in Begay, Snyder, Crews, and Rodriguez. (See "Table of Authorities").
15. Petitioner, to this date, filed all initial pleadings PRO SE and was always denied except for the Appellate Case No.16-2605. Where I was represented by appointed counsel, Mr. James Whalen, (2015), (here, and throughout).
16. In 2016, petitioner timely filed under JOHNSON(2015), Appellate Case No. 16-2605, and was GRANTED permission for a successive §2255 Motion and appointed Mr. James Whalen as Appellate Counsel. (8th Cir.)
17. Mr. Whalen addressed the "categorical mismatch" of ORS §811.540 and the relativity of the §924(e) and §4B1.2(a)(ii) residual, (and Cal.Pen. Code §459, Burglary, regarding §851 enhancement). (Appellate Case No.16-2605)(8th Cir.).
18. Appellate Case No.16-2605 DENIED under Beckles, and "Advisory Guideline Case". (2017)
19. Today, petitioner presents facts not just overlooked, but also facts unavailable at trial. This Motion should prove facts unavailable to date regarding Circuit conflict, U.S.Supreme Court precedent(s) rulings, and a detrimental

clear error by the lower courts which prove a "faulty" categorical approach" when due process and attention to detail are disregarded, also proving grounds of compelling reasoning(s) to GRANT and ISSUE a Writ of Certiorari by this Honorable Court, excorsizing its authoritative power to correct this scenario erroneously attended due this petitioner.

Previously, the new FACTS unavailable for consideration are as follows:

(A) There is a "DUI" Count(2) included in the predicate prior ORS§811.540 Count(3) sentenced together where the U.S. Supreme Court has issued two Supreme Court precedents. Retroactivity is not needed and petitioner is not "time barred" because the Leocal issue was raised on Direct Appeal by defense counsel which preserves this issue for collateral review. Begay supports Leocal. Together, Leocal ("operating while intoxicated a vehicle") and Begay ("DUI" has no 'culpable state of mind'; removing 'intent'; and "DUI" is a 'strict liability' crime and not a 'criminal' crime), negating ORS§811.540 with a "DUI" factor "null and void" for any "crime of violence" application of law under federal regulations. These two Supreme Court precedents negates ORS§811.540 as a crime of violence by direct definition of, and negates ORS§811.540 as a "crime of violence" for enhancement purposes; and

(B) Under the CONSTITUTION Law, specifically: "430. Career Offender; 431. Crime of Violence; and 433. Felony Fleeing--as defined by KENDRICK, 423 F.3d 803", hereby constitutes a subject matter for discretionary review by the U.S. Supreme Court for this request for the issuance of the "Certificate of Extra-ordinary Writ of Certiorari" under 28 USC §1651(a) because the case law, KENDRICK, 423 F.3d 803 under the CONSTITUTION #'s 430, 431, and 433 not only misrepresents the above mentioned facts, but misapplies this case due to unmitigated issues regarding "DUI" and

§924(e)(2)(B)(ii)/ §4B1.2(a)(ii) relativity isssues causing judicial conflict between Circuits and Statutes. The following presented conflicts are presented below to verify the compelling reasons for GRANTING of the Extraordinary Writ of Certiorari:

CONFLICT I

(A) Definition of O.R.S. §811.540 in comparrison to U.S.S.G. §4B1.2(a)(ii); (interchangability):

USSG §4B1.2(a)(ii) -- definition of a "crime of violence is "(2) is a burglary of a swelling, arson, extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." (Underlined portion is used during sentencing at trial and filed Motions.)

Oreg. Rev. Stat. §811.540 (1997) definition states:

"(1) A person commit(s) the crime of fleeing or attempting to elude a police officer if: (a) the person is operating a motor vehicle; and (b) A police officer is in uniform and prominently displaying the police officer's badge of office or operating a vehicle approximately marked showing it to be an official police vehicle gives a visual or audible signal to stop the vehicle, including any signal by hand, voice, emergency light or siren, and either: (A) The person,

while still in the vehicle, knowingly flees or attempts to elude a pursuing police officer; or (B) The person gets out of the vehicle and knowingly flees or attempts to elude the police officer."

Oregon Rev. Stat. §811.540 (1997)

as depicted, (quoting Appellate Case No.16-2605, Page 15, 4/2017)(8th Cir. Court of Appeals).

This presentation shows the First Extraordinary Circumstance because the wording of O.R.S. §811.540 definition is a "categorical mismatch" when compared to USSG §4B1.2(a)(ii) or 18 USC §924(e)(2)(B)(ii) "otherwise" residual definition; and

CONFLICT II

A multiple count State Prior Conviction is requiring redress after a U.S. Supreme Court ruling intervenes petitioner's Trial and Direct Appeal Due Process proceedings which are poorly represented.

During the sentencing hearing of petitioner's trial, (Case No. CR-02-2039-2-LRR, Page 9) states "The United States believes Mr. Kendrick qualifies as a career offender based on that conviction for fleeing and eluding." Further,

(on Pages 14-15,) it states "We believe that this is a case that under the "otherwise" clause of §4B1.1 qualifies as a "crime of violence". Finally, (on Page 24,) "The Court did find that under the "otherwise" clause this qualifies as a crime of violence", and, (on Page 14,) the Court refers to "risk" and neglected to address any other State mitigating factors because the priors were admitted to instead of following proper inclusion of that predicate priors additional Counts when there is ~~obvious~~ reason for address. Such as a drug conviction accompanied by a DUI. Unfortunately, Trial/Direct Appeal counsel failed to make this connection, and the U.S. Court of Appeals for the Eighth Circuit failed to address the "Issue 2" raised in that Petition which raised the "DUI" Issue in LEOCAL. (Exhibits presented herein - Records)

Two months post-trial, on Nov. 9, 2004, the U.S. Supreme Court "decided under similar language that operating while intoxicated is not a crime of violence", as identically presented in petitioner's Direct Appeal (Appellate Case No.04-3256, Filed on 12/15/2004.) The U.S. Court of Appeals for the Eighth Circuit on Direct Appeal addressed ORS§811.540 as a "crime of violence" under the "otherwise" clause referring to Issue 2, yet neglected to comment or refer to the U.S. Supreme Court precedent raised on Direct Appeal (because it was not out of the Eighth Circuit or for other reasoning, as speculated by Defense Counsel.)

This showing that ORS§811.540 as a "crime of violence" including the "DUI" factor is in conflict with the two U.S. Supreme Court precedents regarding LEOCAL and BEGAY as mentioned previously.

Wherefore, KENDRICK, 423 F.3d 803, (2004), should not be a controlling case for any application of law without addressing the unmitigated issue of the "DUI" inclusion with ORS §811.540 as it currently stands.

This is the SECOND Extraordinary Circumstance showing the "DUI" factor under Leocal and Begay is in direct conflict here when addressing the two U.S. Supreme Court precedent(s) decision(s) in comparative relativity to KENDRICK, 423 F3d 803, as it stands; and

CONFLICT III

"Due Process" concerns prove that the "Categorical Approach" could be "FAULTY" if mitigating issues are overlooked, ignored, or avoided.

The Eighth Circuit Courts supports the "crime of violence" ruling using the "categorical approach" of the career offender provision, (USSG §4B1.2(a)(ii)), applying three sister circuit cases:

- 1) UNITED STATES V MARTIN, ____ F.3d ___, 2004 WL 1687924 (6th Cir., July 29, 2004)(Michigan crime of fleeing and eluding is a crime of violence);
- 2) UNITED STATES V HOWZE, 343 F.3d 919, (7th Cir. 2003)(Wisconsin crime of fleeing from an officer is a crime of violence under §924(e));
- 3) UNITED STATES V JAMES, 337 F.3d 387, (4th Cir. 2003)(South Carolina fleeing from an officer is a crime of violence under 18 USC §924(e)), (as shown in Direct Appeal Exhibits herein, Appellate Case No. 04-3256).

Regarding the "categorical approach", the First Issue here is that petitioner has no gun in his case at all. Therefore, cross applying statutes to support an enhancement is illegal when the applied enhancement in any case has its own definition used. A Court cannot use a gun case enhancement to support an enhancement of a non-gun case, when that applied statute has its own definition for enhancement purposes. Specifically referring to §924(e)(2)(B)(ii) and §4B1.2(a)(ii) "otherwise residual", which Courts treat as being "interchangable" when applying increased punishment proves erroneous because, as shown here, post conviction relief the "interchangability" is segregated.

The Second Issue is that even considering a comparative State statute, all the additional included (if any) State Conviction Indicted Convictions must be considered either during pre-conviction or post-conviction proceedings in order to fulfill "Due Process" concerns or in honoring U.S. Supreme Court precedent(s).

Here, KENDRICK, 423 F.3d 803, as the controlling example of a "crime of violence" for "Felony Fleeing" or "Attempting to Elude a Police Officer" which still has unlitigated factor(s) making this case an incomplete case because of the "DUI" factor which involves U.S. Supreme Court precedent(s), Circuit conflict(s), and Statute conflict(s) which must be addressed in order to have a sound conviction for enhancement purposes and future case law referral. Because this case is yet to be completed, KENDRICK, 423 F.3d 803 SHOULD NOT be used as a controlling-anything, when referring to federal law application enhancing sentences.

This presentation is the THIRD Extraordinary Circumstance because this case is showing blatant obvious conflict(s) that need to be addressed and only this U.S. Supreme Court has the authority and jurisdiction to attend these issues, which proves positive for granting the "Writ of Certiorari;" and

CONFLICT IV

The U.S. Supreme Court has now followed the Eighth Circuit lead, (as well as almost all the Circuits in the United States), and has/have applied KENDRICK, 423 F.3d 803 in the lawbooks as an example of a "crime of violence" as labeled in the CONSTITUTION: 430.Career Offender; 431. Crime of Violence; and 433. Felony Fleeing. Petitioner, must declare that this application of petitioner's case is applied in error. All the avenues are not yet closed because petitioner has not yet received an unobstructed, fair, procedural hearing at attending the "DUI" inclusion with ORS §811.540 which is in conflict with multiple applications under federal ruling, to date, as provided in petitioner's Direct Appeal, (multiple filed post-conviction relief of sentence Motions ~ approximately six to date), which address Direct Appeal Issue 2 using Leocal v Ashcroft because Due Process was interrupted by poor Court Appointed Counsel's representation of Issue 2 coinciding with the oversight of the Eighth Circuit U.S. Court of Appeals Direct Appeal address that obviously avoids the "DUI" factor addressed herein.

The representation to the United States Constitutional Law using KENDRICK, 423 F.3d 803, while ignoring an unaddressed

"DUI" factor already ruled upon by the U.S. Supreme Court, which is now used to enhance sentences and cause conflict in between Circuits and Statutes is a violation of my Constitutional Right of "Due Process" and risks unsound doctrine as because of the unlitigated "DUI" factor (married, or included) with ORS §811.540 as the representative of a "crime of violence" which now calls for the discretionary authority of the United States Supreme Court's discretionary authoritative powers in view and in light of JOHNSON (2015), SNYDER, SYKES, LEOCAL, AND BEGAY, (all "ACCA" cases), and KENDRICK, (a career offender case), where conflict and discrepancies regarding Oregon Rev. Stat. §811.540 is applied with an inclusion "DUI" factor, not yet ruled upon or addressed by any Court.

This is the FOURTH Extraordinary Circumstance because U.S. Supreme Court precedent(s) are now in conflict, as well as "ACCA" and "Career Offender" Statutes, as well as Circuit application of ORS§811.540, and CONSTITUTION Law, which support this seeking of the granting of the Great Writ of Certiorari due to the extraordinary compelling reasons stated herein this petition.

Due to the conflicting issues presented above by this PRO SE petitioner, I request this Honorable U.S. Supreme Court issue a Certificate of an Extraordinary Writ of Certiorari for the compelling reasons listed herein.

CONCLUSION

For the reasons listed herein, and because of the U.S. Supreme Court precedent(s) as applied to this case, petitioner hereby requests review and ruling by the U.S. Supreme Court, ^{to be} VACATED in part, and REMAND in part for resentence without the "enhancements" in accord with the enclosed sentencing transcripts (provided herein), which calls for the resentence of the third alternative sentence of 87 months on each Count, run concurrent, as ordered by the trial judge with credit for time served and immediate release (because the exclusion of the "crime of Violence" also removes the "relevant conduct" drug amount see sentencing transcripts), which proves the Eighth Circuit lower courts have had ample opportunities to address this issue and have not done so to date, and that with the application of the U.S. Supreme Court precedent(s) applied, petitioner is currently incarcerated illegally because of the unaddressed "DUI" factor and the "struckdown" "otherwise" residual clause under JOHNSON(2015), and USSG app. C Amndt. 798, LEOCAL, and BEGAY, which are all previous rulings which need verification on, clarification on, and application of by this U.S. Supreme Court's authoritative powers.

PRAYERFULLY, SINCERELY, AND RESPECTFULLY SUBMITTED ON
THIS day of December.

I/M Timothy M. Kendrick # 09128-029

I/M Timothy Martin Kendrick
Reg. # 09128-029
PRO SE REPRESENTATION

ABBREVIATIONS

1. ORS, O.R.S., Or.Rev. Stat.Oregon Revised Statute
2. ACCAArmed Career Criminal Act
3. USSCUnited States Sentencing Commision
4. "DUI"Driving Under the Influence of Intoxicants
5. S. Ct. U.S. Supreme Court
6. USSGUnited States Sentencing Guidelines