

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 2018

JENNIFER SANDERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

JENNIFER SANDERS
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QUESTIONS PRESENTED

- I) IS THE DEFENDANT ENTITLED TO PLAIN ERROR REVIEW ON A ERRONEOUSLY COMPUTED SENTENCE, EVEN IF SHE WAIVED HER RIGHT TO APPEAL?
- II) WHETHER A NEW MEXICO STATUTE FOR CONSPIRACY TO COMMIT DISTRIBUTION OF A COUNTERFEIT SUBSTANCE, MEETS THE DEFINITION OF A CONTROLLED SUBSTANCE OFFENSE TO SUPPORT ENHANCEMENT AS A CAREER OFFENDER?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Jennifer Sanders respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, rendered and entered in case number 17-2122 in that court on November 21, 2017, which Denied a Certificate of Appealability, and affirmed the judgment and commitment of the United States District Court for the District of New Mexico.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Tenth Circuit, which denied a certificate of appealability, and affirmed the judgment and commitment of the United States District Court for the District of New Mexico, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on November 21, 2017. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following United States Sentencing Guideline and applicable definition:

U.S.S.G. § 4B1.1. Career Offender

- (a) "A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

and

"controlled substance offense"

- (2) "A 'Controlled substance offense' includes any federal or state offense that is substantially similar to any of those listed in subsection(2) of the guideline. These offenses include manufacturing, importing, ~~disseminating~~ distributing, dispensing, or possession with intent to manufacture, import, distribute, or dispense, a controlled substance (or a counterfeit substance). This definition also includes aiding and abetting, conspiring, or attempting to commit such offenses, and other offenses that are substantially equivalent to the offenses listed."

U.S.S.G. (Nov. 1, 2015)

STATEMENT OF THE CASE

On March 19, 2014, a federal grand jury in New Mexico returned a superseding indictment charging Ms. Jennifer Sanders, with the following: Count 1, Conspiracy, specifically, distribution of 50 grams and more of methamphetamine, in violation of 21 U.S.C. § 846, 841(a)(1) and (b)(1)(A); in Counts 4, 5, and 6: Distribution of Methamphetamine and Aiding and Abetting, in violation of 21 USC §§ 841(a)(1) and (b)(1)(B) and 18 USC § 2; and in Counts 7, 8, 9 and 10: Distribution of Methamphetamine and Aiding and Abetting, in violation of 21 USC §§ 841(a)(1) and (b)(1)(A) and 18 USC § 2.

Four months later, on July 18, 2014, Jennifer Sanders pled guilty to all eight charges listed in the Superseding indictment, pursuant to a written plea agreement.

In the plea agreement, Ms. Sanders admitted responsibility for approximately 790 grams of pure methamphetamine. The plea agreement contained a waiver to appeal the conviction and any sentence, which included any fine, at or under the maximum statutory penalty authorized by law, including any collateral attack to Ms. Sanders' conviction pursuant to 28 USC § 2255, except for the issue of counsel's ineffective assistance in negotiating or entering this plea or this waiver"

The United States Probation Officer was instructed to complete a presentence report. The probation office calculated a base level offense at 34. Because Ms. Sanders was at least 18 years old at the time of the instant offense of conviction, the instant offense was a controlled substance offense, and Ms. Sanders had been previously

convicted of at least two controlled substance offenses, the United States Probation Officer determined that Ms. Sanders was a career offender under the provisions of USSG § 4B1.1, which increased her base level offense to level 37. This provision is the subject of request for this writ, along with the waiver provision. Ms. Sanders received a 3-level reduction for accepting responsibility, which lowered her total offense to level 34. The probation office calculated a total criminal history score at seven; because Ms. Sanders was determined to be a career offender, her criminal history category was VI. Based on a Total Offense Level of 34 and a Criminal History Category of VI, the advisory guideline sentencing range of imprisonment was 262 to 327 months. The United States Attorney filed a Sealed Ex Parte Motion for Downward Departure, pursuant to USSG § 5K1.1 and 18 USC § 3553(e), based on the substantial assistance provided by Ms. Sanders in the prosecution of a co-defendant in the case.

THE SENTENCING

On March 8, 2016, the Ms. Sanders appeared before Honorable Robert C. Brack for sentencing. Judge Brack granted the United States Motion for Downward Departure and he departed downward five levels, reducing Ms. Sanders total offense level to 29. With a criminal history category of VI, Sanders sentencing guideline range was 151 to 188 months. Judge Brack, sua sponte, granted an additional two-level sentencing/variance departure based on Ms. Sanders significant post-arrest rehabilitation, accomplishments, and sobriety. This reduced Sander's total offense level to 27 and a new guideline range of 130 to 162 months. Jennifer Sanders was sentenced to 130 months.

She was sentenced to a five year term of supervised release on each count to run concurrently. Ms. Sanders' attorney did not challenge the career offender status.

POST CONVICTION PROCEEDINGS

On September 2, 2016, Ms. Sanders filed a Motion Pursuant to 28 USC § 2255 to Vacate, Set Aside, or Correct Sentence by a person in custody. On September 7, 2016, the District Court ordered the United States to respond to the defendant's motion. The United States Attorney requested an extension and was granted an additional 60 days to respond, the Court ordering a response by November 29, 2016. The government response basically outlined that Sanders waived her right to collaterally attack her sentence, and the government requested the court to enforce the provision. On January 3, 2017 Ms. Sanders filed a response to the government. On April 18, 2017 the district court filed Proposed Findings of Fact and Recommended Disposition, which suggested that the waiver provisions should stand. Ms. Sanders filed Objections to Magistrate Judge Report on May 1, 2017. The court found in favor of the government, without an evidentiary hearing. Jennifer Sanders filed a timely Notice of Appeal and Request for Certificate of Appealability.

On November 21, 2017 the Tenth Circuit Court of Appeals denied Jennifer Sanders request for COA, on the following grounds:

(1) The Tenth Circuit stated that Ms. Sanders claim that counsel was ineffective for failing to "investigate her career offender enhancement and file a direct appeal" did not fall outside the scope of the waiver provision, because, this issue relates to sentencing and not plea negotiations; (2) The Tenth Circuit looked at whether the waiver provisions were entered knowingly and voluntarily and found that Sanders entered into a valid waiver provision;

(3) That the district court concluded that enforcing the appeal waiver wouldn't result in a miscarriage of justice. The Tenth Circuit Court of Appeals noted : " Sanders mainly asserts that the sentencing court incorrectly classified her as a career offender because at least one of her prior convictions shouldn't have counted as a controlled substance offense (and that her counsel was ineffective for not pursuing this point at sentencing).. But because Sanders' sentence doesn't exceed the statutory maximum, we aren't otherwise concerned with the lawfulness of her sentence; instead, we are concerned only with the validity of her collateral attack waiver". The Court of Appeals went on to say that "...the sentencing court may have misapplied the career-offender provision is irrelevant in the face of Sanders' knowing and voluntary waiver of her right to collaterally attack her sentence.

REASON FOR GRANTING WRIT

IS THE DEFENDANT ENTITLED TO PLAIN ERROR REVIEW ON A ERRONEOUSLY COMPUTED SENTENCE, EVEN IF SHE WAIVED HER RIGHT TO APPEAL?

Ms. Sanders believes that the Tenth Circuit is incorrect, when it failed to issue a Certificate of Appealability for review of a 'misapplied' sentencing enhancement, because she signed a waiver of appeal and a waiver to collaterally attack her sentence. Ms. Sanders believes that the waivers should not be held, because entering a waiver begins with the premise that a criminal defendant will be sentenced correctly. Enhancement to career offender impacts substantial rights, because it increased her sentencing exposure, and the classification of a career offender makes her ineligible for other benefits such as retroactive sentencing amendments.

The Tenth Circuit stated that Sanders didn't specifically mention that a miscarriage of justice would be the result if the waiver of appeal was upheld. She did however, mention that her status of 'career offender' due to her erroneously applied enhancement significantly impacted her sentence, and but for this error, she would not have been sentenced to an incorrect term of imprisonment. The Tenth Circuit then went on to state that "...because Sanders' sentence doesn't exceed the statutory maximum, we aren't otherwise concerned with the lawfulness of her sentence". Upon entering the plea agreement, she begins with the assumption that the sentence will be lawful, and if it isn't a lawfully applied sentence then she is permitted an appeal, for plain error review. No criminal defendant 'waives their right' to be sentenced unlawfully.

Most courts have taken the position that the Sixth Amendment right to reasonably effective assistance of counsel, permits a criminal defendant at least a cursory review despite a waiver of appeal. The failure to perfect a direct appeal, in derogation of a defendant's actual request, is a per se violation of a Sixth Amendment Right. Sanders believes that such violation occurs without regard to the probability of success on appeal; because such a failure on the attorney's part deprives the defendant or any counsel whatsoever, for purposes of the Strickland analysis. This court has stated that a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court. *United States v Marin*, 961 F 2d 493, 496 (4th Cir. 1992).

The courts are split on the rationale for review when a waiver of appeal, or a waiver of collateral attack exist within a plea agreement. Most take a view that only if a sentence exceeds the statutory maximum, that an appellate review can take place, despite the waiver provisions. *United States v Bushert*, 997 F. 3d 1350. Others use the term, as in this case, a Miscarriage of justice, which appears to invoke the doctrine of contract law. Sanders does not argue that her sentence exceeds the statutory maximum. She argues that her exposure to a term of imprisonment, should not hinge on an erroneously or misapplied sentencing factor, which cannot be reviewed because of waiver, increasing her time of incarceration.

In other words, the Tenth Circuit will not take a plain error review of the sentencing issue or § 2255, in the face of a waiver because the waiver is the threshold issue. The waiver must now

pass an entirely different test, one that examines its knowing and voluntary nature and asks whether its enforcement would work a miscarriage of justice.

Sanders is of the opinion that a defendant has a right to plain error review on an erroneously or misapplied sentencing factor, that subjects her to any amount of additional time of incarceration.

Sanders sentence was computed by counting two prior convictions and subjecting them to the federal definition of a controlled substance offense. The US Probation officer then enhanced Sanders' from a Base Level of 34 to a Level 37. Sanders attorney did not object to the sentence at the time. But Sanders requested discretionary review by the Tenth Circuit. Sanders attorney never filed a direct appeal and thus she had to proceed to \$ 2255. Both the district court and appellate courts denied discretionary review, citing the appellate waiver. Sanders believes that the denial of discretionary review is out of line with Supreme Court precedent under Roe-Flores, and out of line with the ruling of other circuits. Sanders had no review at all of this significant sentencing error.

Sanders' humbly request that a review should be granted to establish a consistent precedent on sentencing errors and plain error review.

REASON FOR GRANTING THE WRIT
WHETHER A NEW MEXICO STATUTE FOR CONSPIRACY TO COMMIT DISTRIBUTION
OF A COUNTERFEIT SUBSTANCE, MEETS THE DEFINITION OF A
CONTROLLED SUBSTANCE OFFENSE TO SUPPORT ENHANCEMENT AS A CAREER OFFENDER?

Ms. Sanders has argued to the Tenth Circuit that her prior New Mexico State conviction for Conspiracy to Commit Distribution of a Counterfeit Substance [CR-2008-00029] does not meet the definition of a controlled substance offense predicate, which can be used to enhance her as a career offender. This is because the state statute NM § 30-31-22 reaches conduct not covered within the federal definition of a controlled substance offense.

Under United States Sentencing Guidelines § 4B1.1 a criminal defendant can be enhanced to a career offender if:

- (a)(1): "...the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

The United States Sentencing Guidelines define a Controlled Substance Offense as:

- " A 'Controlled Substance Offense' includes any federal or state offense that is substantially similar to any of those listed in subsection (2) of the guideline. These offenses include manufacturing, importing, distributing, dispensing or possession with intent to manufacture, import distribute, or dispense, a controlled substance or a (counterfeit substance).

If a prior conviction meets this definition of a controlled substance offense, then the sentencing court may enhance the criminal defendant classifying her a career offender and increasing her

sentence. Ms. Sanders believes that her 2008 New Mexico conviction for Conspiracy to Commit Distribution of a Counterfeit Substance under NM § 30-31-22 does not meet the controlled substance definition, and should not have been used to enhance her as a career offender.

The New Mexico Statute § 30-31-22 reads:

"It is unlawful for a person to intentionally distribute or possess with intent to distribute a controlled substance or a controlled substance analog..."

Separate statutes define distribute and delivery. § 30-31-2 reads:

"Distribute" means to deliver other than by administering or dispensing a controlled substance or controlled substance analog;

"Delivery" means the actual, constructive or attempted transfer from one person to another of a controlled substance or controlled substance analog, whether or not there is an agency relationship.

Sanders argues that the offense of Conspiracy to Commit Distribution is broader than the Guidelines' definition of a controlled substance offense because the New Mexico offense criminalizes "offers to sell" while the federal definition does not include such an offense. But her New Mexico charge does not state that Sanders intentionally distributed or possesses with intent to distribute. It charged Sanders with 'conspiracy to commit distribution' also not covered in the federal definition of a controlled substance violation, purportedly by offers to sell.

Jennifer Sanders though was convicted of Conspiracy to Commit Distribution of a Counterfeit Substance. It is her position that an attempt to commit a crime requires the intent to commit the crime and overt acts in furtherance of that intent. She argues that a person can offer a controlled substance for sale without having the intent to actually complete the sale, a conviction for an offer

to sell can be broader than a conviction for an attempt to sell, or conspiracy to commit.

The United States Supreme Court stated in Mathis v United States, 195 LED 2D 604, ___ US ___ (2017) that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense. see. e.g., Taylor, 495 U.S. at 602. The Supreme Court made clear that sentencing judges are to look only to "the elements of the [offense], not to the facts of [the] defendant's conduct." Taylor, 495 U.S., at 601, 110 S.Ct. 2143, 109 L. Ed. 2d 607. Sanders does not state that she is sentenced under the ACCA. Sanders is sentenced under the sentencing guidelines as a career offender. However, the state crimes she has been convicted of, Conspiracy to Commit Distribution of a Counterfeit substance, and her second conviction of Trafficking" ², were not discussed at sentencing, nor were they objected to by her attorney, which Sanders raised as a ground of ineffective assistance of counsel in § 2255, because, she believes that neither should have have been used as predicate offenses to support a career offender enhancement. Had Sanders not been enhanced as a career offender her sentencing range would have been a starting point of 34, rather than the starting base level of 37. After a reduction for accepting responsibility, and 5K1 reduction, along with the post conviction rehabilitation adjustment, Sanders guideline range would have looked more, in the range of 100 months. But at sentencing her counsel did not look for justification for the enhancement. There was no examination of of the elements of the offense of the prior convictions.

² Sanders did not raise the second conviction of trafficking in the lower court, and this argument is not preserved or addressed herein.

To address the need of examining a predicate offense, the Supreme Court approved a modified categorical approach for use with statutes having multiple alternative elements. Shepard v United States, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). Under the approach this Court instructed a sentencing court to look to limited class of documents (the indictment, jury instruction or plea agreements and colloquy) to determine what crime, with what elements, a defendant was convicted of. Taylor, 495 U.S. at 602, 110 S. Ct. 2143, 109 L. Ed. 2d 607. The sentencing court may then compare that crime, as the categorical approach commanded with the generic offense and sentence appropriately. None of these steps were done in Jennifer Sanders case.

Courts have distinguished between a conviction for possession of a controlled substance with intent to sell or deliver, and a conviction for sale or delivery of a controlled substance without the possession element. Sanders was convicted of conspiracy to commit distribution. Compare to § 30-31-22 wording: "It is unlawful to intentionally distribute [or] possess with intent to distribute..." Sanders did not have possession, nor can her conviction of conspiracy to commit distribution, be construed to be the same as 'to intentionally distribute'. Conspiracy to commit distribution is more akin to 'attempt to'. Nevertheless, the sentencing court has never looked to the documents required in Shepard. Finally, the Tenth Circuit wording in its denial of Certificate of Appealability would suggest that Jennifer Sanders has an argument which should be heard and resolved by the court. The Tenth Circuit noted, "That the sentencing court may have misapplied the career-offender provisions is irrelevant in the face of Sanders' knowing and voluntary waiver of her right to collaterally attack her sentence. "

Sanders believes that an illegal sentence, one such as hers, when a career offender enhancement maybe misapplied, deserves plain error review despite a valid waiver of appeal or waiver to collaterally attack a sentence. This is because the waiver provisions first assume that the criminal defendant would be sentenced correctly in the beginning. When a valid argument exist that a 'sentencing error' has occurred, the career offender enhancement misapplied, then the waiver to challenge a sentence should not be upheld, because the premise of the waiver is a correct sentence intitially. criminal defendants begin with the assumption that they will be sentenced correctly, then they are willing to waive their rights to appeal or collaterally attack their sentence.

Sanders request this court to grant a writ on this subject matter.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

A handwritten signature in cursive script that reads "Jennifer Sanders". The signature is written in dark ink and is positioned below the typed name.

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