No. 09-676

In the Supreme Court of the United States

JASON EDWARD SIMMONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
DANIEL S. GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, in determining whether a prior state offense was "punishable by imprisonment for more than one year" for purposes of the definition of "felony drug offense" under the Controlled Substances Act, 21 U.S.C. 802(44), a court should consider the offense-specific maximum sentence or the lower maximum sentence for the particular offender under a mandatory state determinate sentencing scheme.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 09-676

JASON EDWARD SIMMONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is not published in the *Federal Reporter* but is reprinted in 340 Fed. Appx. 141.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2009. A petition for rehearing was denied on September 1, 2009 (Pet. App. 24). The petition for a writ of certiorari was filed on November 25, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the entry of a guilty plea in the United States District Court for the Western District of North Carolina, petitioner was convicted on one count of conspiracy to distribute at least 100 kilograms of marijuana,

in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) and 846; one count of possession of at least five kilograms of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D); and one count of possession of at least 20 kilograms of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D). Petitioner was sentenced to concurrent terms of 120 months of imprisonment on each count, to be followed by eight years of supervised release. The court of appeals affirmed. Pet. App. 1-10.

1. On July 2, 2007, co-defendant Samuel Isaac Wolfe purchased approximately 5.35 kilograms of marijuana from petitioner and observed approximately 50 pounds of high-grade marijuana stored in two duffel bags in petitioner's residence in Chandler, North Carolina. Presentence Investigation Report (PSR) ¶ 16. Three days later, agents executed a federal search warrant at petitioner's residence and found 44 pounds of marijuana, $256,566 in cash, a machine for counting currency, digital scales, vacuum sealers and bags, and books and DVDs relating to the cultivation of marijuana. Pet. App. 2; PSR ¶¶ 17-18. Wolfe told agents that he had purchased more than 200 pounds of marijuana from petitioner since 2005 and that petitioner had several other customers. *Id.* ¶ 22. The agents determined that petitioner was responsible for more than 110 kilograms of marijuana, based solely on the amount of marijuana seized from his residence and the amount that he sold to Wolfe. *Id.* ¶ 24.

2. Under the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, a person who is convicted of conspiracy to possess 100 kilograms or more of marijuana with the intent to distribute it is subject to a statutory minimum sentence of five years of imprisonment. 21 U.S.C.

841(b)(1)(B) and 846. That minimum sentence increases to ten years, however, if the defendant had previously been convicted of a "felony drug offense," 21 U.S.C. 841(b)(1)(B), which is defined as, *inter alia*, a state drug offense "punishable by imprisonment for more than one year." 21 U.S.C. 802(44). The United States must file an information stating the prior conviction before a court may impose the enhanced sentence based on a prior "felony drug offense." 21 U.S.C. 851.

Similarly, a person who is convicted of possessing less than 50 kilograms of marijuana with the intent to distribute it is subject to a statutory maximum sentence of five years of imprisonment, but that maximum sentence increases to ten years if the defendant had previously been convicted of a "felony drug offense." 21 U.S.C. 841(b)(1)(D). Again, the United States must file an information stating the prior conviction for the enhanced sentence to apply. 21 U.S.C. 851.

Under North Carolina's Structured Sentencing Act, a particular offender's sentencing range is determined by three factors: the class of the offense of conviction, the offender's criminal history, and the presence of aggravating or mitigating factors. See N.C. Gen. Stat. § 15A-1340.17 (2009). For a Class I felony such as possession of a schedule VI controlled substance (marijuana) with the intent to sell it, the maximum term of imprisonment is 15 months. See *id.* § 15A-1340.17(c) and (d); see also *id.* §§ 90-94(1), 90-95(a)(1) and (b)(1).

3. A grand jury in the Western District of North Carolina charged petitioner with conspiring to possess 100 or more kilograms of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) and 846 (Count 1); possessing at least five kilograms of marijuana with the intent to distribute it, in

violation of 21 U.S.C. 841(a)(1) and (b)(1)(D) (Count 2); and possessing at least 20 kilograms of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D) (Count 3). The government then filed an information pursuant to 21 U.S.C. 851, alleging that petitioner had a prior conviction for a felony drug offense— namely, his 1996 conviction in North Carolina state court for possession of marijuana with the intent to distribute it. Information 1; Pet. App. 2-3. Petitioner pleaded guilty to the three counts in the indictment without a plea agreement. Pet. App. 3, 12.

The PSR determined that petitioner's 1996 North Carolina conviction qualified as a "felony drug offense" and that petitioner therefore faced a statutory mandatory minimum sentence of ten years of imprisonment on his drug conspiracy conviction and a maximum sentence of ten years of imprisonment on the possession with intent to distribute counts. PSR ¶¶ 44, 64. As a result, the PSR determined that petitioner's advisory Guidelines range was 120 months of imprisonment. *Id.* ¶¶ 64-65.

Petitioner objected to the use of his prior drug conviction to enhance his penalty for the federal convictions on two grounds. First, he contended that his prior drug conviction could not be used to enhance his sentence because it was obtained in violation of his right to the effective assistance of counsel. PSR Addendum, Obj. 3. Second, he contended that his prior offense was not a "felony drug offense" under 21 U.S.C. 802(44) because he could not have received a sentence in excess of one year under the state sentencing guidelines for that offense, based on his particular criminal record and the absence of any aggravating factors. Resp. to Gov't Bill of Information 4-6; 4/24/08 Sent. Tr. 10. The district court overruled petitioner's objections to the sentence

enhancement and sentenced him to concurrent terms of 120 months of imprisonment on each count, to be followed by eight years of supervised release. 4/24/08 Sent. Tr. 9, 13, 19, 21-22; Pet. App. 14-16 (Judgment).

4. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1-10. As relevant here, the court rejected petitioner's argument that his 1996 felony conviction under North Carolina law was not a "felony drug offense" within the meaning of 21 U.S.C. 802(44) because he was subject to a maximum term of imprisonment of one year or less on that conviction under North Carolina's determinate-sentencing scheme. Pet. App. 4-9. Relying on its earlier decisions in *United States* v. *Jones*, 195 F.3d 205 (4th Cir. 1999), cert. denied, 529 U.S. 1029 (2000), and *United States* v. *Harp*, 406 F.3d 242 (4th Cir.), cert. denied, 546 U.S. 919 (2005), the court held that petitioner's prior conviction qualifies as a prior felony drug offense because a "defendant charged with that crime could receive a sentence of more than one year." Pet. App. 6 (quoting *Harp*, 406 F.3d at 246). In so holding, the court rejected petitioner's contention that the relevant maximum sentence is the maximum sentence the particular defendant could receive, rather than the maximum aggravated sentence any defendant could receive. *Id.* at 5-7.

The court of appeals added that this Court's decision in *United States* v. *Rodriquez*, 553 U.S. 377 (2008), supported its conclusion, because *Rodriquez* requires courts to look at the maximum statutory penalty for the offense, not at the maximum penalty for an individual defendant. Pet. App. 7-8.[*]

---

[*] The court of appeals also rejected petitioner's argument that his 1996 conviction could not be used to enhance his sentence because he

ARGUMENT

Petitioner renews his contention (Pet. 4-7) that, in determining whether a prior state conviction was "punishable by imprisonment for more than one year" for purposes of the "felony drug offense" definition in 21 U.S.C. 802(44), the relevant maximum sentence is the maximum for the particular offender under a mandatory state sentencing guidelines scheme. The court of appeals' decision is correct, and there is no disagreement in the circuits on that question. Moreover, this Court has repeatedly denied review on the issue. Further review is therefore unwarranted.

1. The court of appeals correctly held that, for purposes of the "felony drug offense" definition in the CSA, 21 U.S.C. 802(44), the relevant maximum is the maximum sentence provided by statute for the offense, rather than the lower maximum for the particular offender under a mandatory state sentencing guidelines scheme. Section 802(44) defines a "felony drug offense" as a drug "offense that is punishable by imprisonment for more than one year" under state, federal, or foreign law. 21 U.S.C. 802(44). That language directs a court to look to the maximum term of imprisonment for the offense; it does not contemplate a different maximum term of imprisonment for every offender.

Contrary to petitioner's contention (Pet. 5-6), this Court's recent decision in *United States* v. *Rodriquez*, 553 U.S. 377 (2008), strongly supports the conclusion that the relevant maximum sentence for purposes of the

---

received ineffective assistance of counsel. Pet. App. 9-10. The court explained that such a collateral attack was "plainly barred by the five-year statute of limitations in 21 U.S.C. § 851(e)." *Id.* at 9. Petitioner does not challenge that holding before this Court.

"felony drug offense" definition is the offense-specific maximum for any offender sentenced under a guidelines sentencing system. In *Rodriquez*, the Court held that a state drug-trafficking offense had a "maximum term of imprisonment of ten years or more," and therefore qualified as a "serious drug offense" for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(A)(ii), because the defendant was a repeat offender and the maximum term of imprisonment for the offense was ten years for such offenders. *Rodriquez*, 553 U.S. at 383-384.

As is relevant here, the Court specifically rejected the contention that, for purposes of the definition of "serious drug offense," the applicable "maximum term of imprisonment" for the prior offense was the maximum to which the defendant had been subject under the State of Washington's mandatory sentencing guidelines scheme. *Rodriquez*, 553 U.S. at 390-392. The Court reasoned that "the top sentence in a guidelines range is generally not really the 'maximum term . . . prescribed by law' for the 'offense' because guidelines systems typically allow a sentencing judge to impose a sentence that exceeds the top of the guidelines range under appropriate circumstances." *Id.* at 390. *Rodriquez* thus focused on the offense-specific statutory maximum, rather than a lower sentence that a guidelines system might provide.

The Court reinforced that point by noting that "the concept of the 'maximum' term of imprisonment or sentence prescribed by law was used in many [federal] statutes that predated the enactment of ACCA * * * and in all those statutes the concept necessarily referred to the maximum term prescribed by the relevant criminal statute, not the top of a sentencing guideline range."

Rodriquez, 553 U.S. at 391. In light of that "established pattern," the Court concluded that "Congress meant for the concept of the 'maximum term of imprisonment' prescribed by law for an 'offense' to have [the] same meaning in ACCA." *Id.* at 392. There is no reason to distinguish between Section 924(e)(2)(A)(ii) and the provision at issue here, Section 802(44): In either subsection, the relevant maximum sentence for a prior offense is the offense-specific maximum.

For that reason, since *Rodriquez*, this Court has denied several petitions in which defendants contended that their prior convictions for drug offenses under North Carolina law were not "punishable by imprisonment for more than one year" under the CSA, 21 U.S.C. 802(44), because they had been subject to maximum terms of imprisonment for those offenses of one year or less under North Carolina's mandatory determinate-sentencing scheme. See *Jones* v. *United States*, 129 S. Ct. 158 (2008) (No. 07-11421); *Patrick* v. *United States*, 128 S. Ct. 2498 (2008) (No. 07-6955); *Watson* v. *United States*, 128 S. Ct. 2498 (2008) (No. 07-6692); see also *Stewart* v. *United States*, cert. denied, No. 09-745 (Feb. 22, 2010) (denying petition in which the defendant claimed that a prior offense was not "punishable by imprisonment for a term exceeding one year" under the ACCA, 18 U.S.C. 924(e)(2)(B), because he was subject to a maximum sentence of ten months under North Carolina's mandatory sentencing guidelines scheme); *Carr* v. *United States*, 129 S. Ct. 54 (2008) (No. 07-10646) (denying petition in which the defendant claimed that a prior offense was not "punishable by imprisonment for a term exceeding one year" under the federal felon-in-possession statute, 18 U.S.C. 922(g)(1), because he was subject to a maximum sentence of 12

months for that offense under Washington's mandatory sentencing guidelines scheme). The same result is warranted here.

2. a. Petitioner claims, however, that the holding in *Rodriquez* does not apply to the North Carolina sentencing scheme because "there is *no* factor or circumstance that can increase a person's sentence outside of the sentencing block" in North Carolina's guidelines and because "there is no 'statutory maximum' other than the sentence set forth in the sentencing grid." Pet. 6. But *Rodriquez* does not hold, and nothing in the CSA suggests, that the maximum term of imprisonment under a mandatory determinate-sentencing scheme like North Carolina's must be found for the specific offender as opposed to any offender eligible to be sentenced for that offense under the guidelines. Indeed, North Carolina itself treats "the maximum sentence [as] that which could be imposed if the defendant were in the highest criminal history category and the offense were aggravated." *State* v. *Lucas*, 548 S.E.2d 712, 730 (N.C. 2001), overruled in part on other grounds by *State* v. *Allen*, 615 S.E.2d 256 (N.C. 2005). Moreover, despite petitioner's attempt to distinguish North Carolina's sentencing scheme, N.C. Gen. Stat. § 15A-1340.17(d) expressly sets forth maximum sentences for Class I felony offenses. Thus, the logic of *Rodriquez* applies in this context.

b. Petitioner also contends (Pet. 6-7) that the decision below conflicts with *United States* v. *Pruitt*, 545 F.3d 416 (6th Cir. 2008). In *Pruitt*, the Sixth Circuit considered whether a defendant's prior convictions for drug offenses under North Carolina law were "punishable by * * * imprisonment for a term exceeding one year" under the federal career-offender guideline, Sentencing Guideline § 4B1.1. 545 F.3d at 417-418. The

court held that a prior state conviction qualifies only "if the state court could have sentenced a hypothetical defendant with the same prior record level as the defendant's prior record level to a term exceeding one year." *Id.* at 419. The court reasoned that, under a mandatory determinate-sentencing scheme like North Carolina's, a defendant's "state prior record level dictates his sentencing exposure" and therefore "must be considered in determining whether [that defendant's] convictions were 'punishable' for a term exceeding one year." *Id.* at 423.

Review is not warranted based solely on *Pruitt*, which addressed the proper construction of Sentencing Guideline § 4B1.1 rather than the CSA, 21 U.S.C. 802(44). Congress has charged the Sentencing Commission with "periodically review[ing] the work of the courts, and * * * mak[ing] whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991); see *United States* v. *Booker*, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."). Because the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error in their construction, this Court ordinarily will not review decisions interpreting and applying the Guidelines. See *Braxton*, 500 U.S. at 347-349.

That practice is particularly appropriate here because three courts of appeals have held that the relevant maximum sentence for a predicate felony under 18 U.S.C. 922(g)(1)—which contains language similar to that in Section 802(44)—is the offense-specific maximum sentence, not the lower maximum sentence for the par-

ticular defendant under a mandatory state sentencing guidelines scheme. See *United States* v. *Hill*, 539 F.3d 1213, 1218-1221 (10th Cir. 2008); *United States* v. *Murillo*, 422 F.3d 1152, 1153-1154 (9th Cir. 2005), cert. denied, 547 U.S. 1119 (2006); *United States* v. *Jones*, 195 F.3d 205, 206-207 (4th Cir. 1999), cert. denied, 529 U.S. 1029 (2000). In *Hill*, for example, the court concluded that "[f]ocusing on the maximum sentence for the predicate crime of conviction," rather than the defendant's particular guidelines maximum, "is mandated by the Supreme Court's analysis in *Rodriquez*." 539 F.3d at 1220. The court noted that *Rodriquez* rejected the proposition that, under the ACCA, mandatory guidelines systems that cap sentences can decrease the maximum term of imprisonment. *Ibid.* There is thus no conflict on any statutory issue, and the Sixth Circuit itself may confine *Pruitt* to the Guidelines context, in which the Commission, rather than this Court, is well-positioned to address the matter.

c. Finally, petitioner contends (Pet. 8-13) that treating his 1996 offense as a "felony drug offense" for purposes of enhancing his federal offense would violate the Sixth Amendment because any facts that would make him eligible for a sentence of more than one year were not found by the jury beyond a reasonable doubt in the state proceeding. He is mistaken. The actual punishment that a sentencing court may constitutionally impose on a particular defendant under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004), is a separate question from whether a crime is punishable by imprisonment for more than one year under the Controlled Substances Act. The Court's decision in *Rodriquez* makes that clear. The Court noted that guidelines systems do not define the

maximum term for an offense because "guidelines systems typically allow a sentencing judge to impose a sentence that exceeds the top of the guidelines range under appropriate circumstances." 553 U.S. at 390. In so stating, the Court necessarily rejected the view that Congress had implicitly foreseen *Apprendi* and *Blakely* and had intended the procedural rules in those decisions to limit its understanding of a "maximum term." Accordingly, as explained at pp. 6-8, *supra*, the maximum sentence available for the *offense* is not limited by the circumstances of the particular *offender*. Petitioner asserts no disagreement in the circuits on this point. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
DANIEL S. GOODMAN
Attorney

APRIL 2010