

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_ \* \_\_\_\_\_

OMAR MONTOYA,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

\_\_\_\_\_ \* \_\_\_\_\_

On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit

\_\_\_\_\_ \* \_\_\_\_\_

Omar Montoya, Petitioner  
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QUESTIONS PRESENTED FOR REVIEW

- 1). Whether the District Court reversibly erred in Denying to Reduce and Appropriate Outcome when the Subsequent Sentencing Range has been Lowered by the Sentencing Commission?
- 2). Whether the District Court abused its Descretion by not Reducing Petitioner Sentence based on a Subsequent Sentencing Range that has been Lowered by the Sentencing Commision, Pursuant to 18 U.S.C. § 3582(c)(2) and 3553(a) factors?
- 3). Whether the District Court abused its Descretion in Denying Petitioner Montoya Request for Reduction of Sentence as Untimely due to Circumstances and Issues beyond his control?

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OPINIONS BELOW

On January 24, 2018, the district court denied petitioner Omar Montoya's request for Resentencing Under Amendment 782 under 18 U.S.C. § 3582(c)(2). Petitioner timely filed his motion due to circumstance and issues beyond his control. On February 20, 2018, Petitioner Montoya's timely filed notice of appeal was docketed, after his motion was announced on January 24, 2018 by the district court. On April 23, 2018, the Fifth Circuit Court of Appeals entered its judgment and mandate and dismissed petitioner Montoya's motion for want of prosecution for failure to timely file brief and pat fee.

### STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction of this criminal case under 18 U.S.C. § 3231. The United States Court of Appeals for the Fifth Circuit had subject matter jurisdiction over this matter under 28 U.S.C. § 1291.

On April 23, 2018, The Fifth Circuit ... affirmed the rulings of the District Court in Case No. 18-40090. Petitioner Montoya's did not file a motion for rehearing. Cases in the Court's of Appeals may be reviewed by this Court by 'Writ of Certiorari' upon the petition of any party to a criminal case. This Honorable Court has jurisdiction of this appeal under 28 U.S.C. § 1254(1).

## II District Court Procedural History.

According to Petitioner Omar Montoya's Presentence Investigation Report herein after ["PSR"], alleged that Petitioner was held accountable for 26.4 kilograms of powder Cocaine. Therefore, the guideline for violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A) is found in U.S.S.G. § 2D1.1(a)(5) which is governed by the Drug Quantity Table. Because the Petitioner was allegedly responsible for a net weight of cocaine totaling 26.4 kilograms, pursuant to the "[D]rug Quantity Table, at lease 15 to 50 kilograms of cocaine, calls for a base offense level of 34. Therefore, based on a total offense level of 34 and a Criminal History Category of I, the Guideline Range for Petitioner was set at 151 to 188. Montoya was sentenced to 168 months imprisonment.

Petitioner Omar Montoya had no criminal history points ... placing him in a criminal history category of I. Petitioner moved for a reduction of his sentence in the District Court for the Southern District of Texas, pursuant to 18 U.S.C. § 3582(c)(2) and 3553(a) factors. The sentencing Commission issued a retroactive amendment to the Guidelines to remedy the significant disparity between the penalties for cocaine base and powder cocaine offenses. "[I]n a plurality, the Court determined that reversal was warranted because (1) a district court had authority to entertain 18 U.S.C. § 3582(c)(2) motions when sentences were imposed in light of the Guidelines, even if the defendant was found guilty by jury, or entered into a Fed. R. Crim. P. 11(c)(1)(C) agreement, and (2) the district court's decision was "based on" the applicable Guidelines range since the district court expressed its independent judgment that the sentence was appropriate in light of that range. Section 3582(c)(2) called for an inquiry into the reasons for the judge's sentence, not the reasons that motivated or informed the parties. The Sentencing Reform Act of 1984, 18 U.S.C. § 3551 et seq., calls for the creation of Sentencing Guidelines to inform judicial discretion in order to reduce unwarranted disparities in federal sentencing.

"[T]he Act ... 'allowed retroactive amendments to the Guidelines for cases where the Guidelines becomes a cause of inequality, and not a bulwark against it. Therefore, when a retroactive Guideline amendment is adopted, 18 U.S.C. § 3582(c)(2) permits a defendant's sentenced on a "Guideline Sentencing Range," that has been modified to now move for reduction of sentence based on a sentencing range that has been lowered.

In every case the District Court Judge must exercise discretion to impose an appropriate sentence. This discretion, in turn, is framed by the Sentencing Guidelines. And the Guidelines must be consulted, in the regular course, "[W]hether the case is one in which the conviction was after a jury trial or after a plea of guilty, pursuant to an agreement that recommends a particular sentence. Because the district court judge's decision to impose a sentence may therefore be based on the Guidelines even if the defendant was found guilty or agrees to plead guilty under Fed. R. Crim. P. 11(c)(1)(C). Thus, where the decision to impose a sentence is based on a range that is later subject to a retroactive amendment, 18 U.S.C. § 3582(c)(2), permits a sentence reduction as in the case of petitioner Montoya. In his request for a reduction of sentence, pursuant to 18 U.S.C. § 3582(c)(2) and 3553(a) factors, this section "[em]powers district court judge's to correct sentences that depends on frameworks that later prove 'unjustified.' There is no reason to deny § 3582(c)(2) relief to a defendant who now lingers in prison, pursuant to a sentence that would not have been imposed but for a ["since-rejected"], excessive range.

However, Federal courts are forbidden, as a general matter, to modify a term of imprisonment once it has been imposed, 18 U.S.C. § 3582(c); but the rule of finality is subject to a few narrow exceptions. One exception is contained in a statutory provision enacted to now permit defendants whose Sentencing Guidelines ... 'sentencing range has been lowered by the Sentencing Commission's retroactive amendment to move for a sentence reduction if the terms of the statute are met.

### III. Fifth Circuit Procedural History.

In his appeal, Petitioner **Omar Montoya** argues that the District Court failed to meet its burden to prove that ["Montoya"] was not ... "[e]ntitled to a two-level reduction of his sentence, pursuant to 18 U.S.C. § 3582(c)(2) and 3553(a) factors, in which provides: ... "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission, pursuant to 28 U.S.C. § 994(o) ... the court may reduce the term of imprisonment, after considering the factors set forth in section § 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

As a general matter, courts may not alter a term of imprisonment once it has been imposed. United States v. Leniear, 574 F.3d 668, 673 (th Cir. 2009), citing United States v. Hicks, 472 F.3d 1167, 1169 (9th Cir. 2007). However, Section 3582(c)(2) authorizes district courts to modify an imposed sentence "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), based on Amendment 782 and 788, and ["USSG § 1B1.10"].

Petitioner **Omar Montoya** appeals the denial of his motion and request for a reduction of his sentence, pursuant to 18 U.S.C. § 3582(c)(2) and 3553(a) factors. "[I]n Amendment 782 and 788 to the United States Sentencing Guidelines, effective November 1, 2014, the Sentencing Commission lowered the penalties for most drug offenders by reducing most of the offense levels on the USSG § 2D1.1 Drug Quantity Table by 2 Levels. Therefore, pursuant to Amendment 782 and 788 may be applied retroactively to previously sentenced inmates, as Petitioner **Omar Montoya**.

"[T]he United States Sentencing Guidelines Manual § 1B1.10 instructs the district court in modifying a sentence to substitute only the retroactive amendment and then leave all original Guidelines determinations in place. U.S. Sentencing Guidelines Manual [pg. 522 § 1B1.10(b)(1)]. Therefore, in other words, the policy statement seeks to isolate whatever marginal effect the since-rejected Guideline had on the defendant's Montoya sentence. Thus, the purpose of 18 U.S.C. § 3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement. Therefore, the Court's opinion was that ... 'this is the only rule consistent with the governing policy statement that rests on the premise that a Guideline range may be one of many factors that determine the sentence imposed.

Although, the district court's authority is limited; and the Courts of Appeals, and ultimately the U.S. Supreme Court, can ensure that district courts do not overhaul trial verdicts of guilty or plea agreements, thereby abusing their authority under § 3582(c)(2). therefore, Petitioner Omar Montoya's sentence should be reviewable for abuse of discretion.

"[I]n USSG § 1B1.10, the Sentencing Commission has articulated the district court's authority to reduce a sentence based on a retroactive amendment to the sentencing guidelines, including Amendment 782 and 788. [USSG § 1B1.10(a)(1) provides: "In the case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). United States v. Dunn, 728 F.3d 1151, 1155 (9th Cir. 2013). And as required, any such reduction in the defendant's term of imprisonment shall be consistent with the policy statement.

The law is clear that a sentencing court has the jurisdiction to reduce a term of imprisonment based on an Amendment 782 and 788 Guideline range that has subsequently been lowered by the Sentencing Commission for most offenses or penalties for drugs on the USSG § 2D1.1 Drug Quantity Table by 2 Levels. And reduce his guideline range of imprisonment from 168 to 188 months, to 121 to 151 months imprisonment and a criminal history category I. Therefore, a reduction of his sentence is warranted 'because of the operation of another guideline or statutory provision. United States v. Johnson, 560 Fed. Appx. 822 824 (11th Cir. 2014). Therefore, Petitioner Omar Montoya's case should be reversed and remanded for resentencing.

#### REASONS FOR GRANTING THE WRIT

There is a conflict among the Circuits on the exact point involved in this case. The Fifth Circuit and the Eleventh Circuit has a long line of cases brought in (propria persona) holding that the failure of the Court to point out and articulate its authority to reduce a sentence based on a retroactive amendment by the Sentencing Commission, pursuant to USSG § 1B1.10 to the Sentencing Guidelines, under 782 and 788 USSG § 1B1.10(a)(1). In the text and purpose of the three relevant sources ... 'the statute, the Rule, and the governing policy statements require the conclusion that the district court has authority to entertain Petitioner Montoya's 18 U.S.C. § 3582(c)(2) motion where his sentence was imposed in light of the Sentencing Guidelines, even if the defendant was found guilty by a jury or entered into a plea agreement, Fed. R. Crim. P. 11(c)(1)(C). Petitioner Montoya was found guilty by jury. This Court should review the error of law of the lower court and vacate petitioner's sentence and remand the case for resentencing.

Therefore, Petitioner Omar Montoya argues that he is, among other things, that he is entitled to a reduction in his sentence based on a retroactive amendment to the sentencing guidelines range that has subsequently been lowered by the Sentencing Commission as a re-

sult of Amendment 782 and 788, as required by 18 U.S.C. § 3582(c)(2) and 3553(a). And if such a reduction in the petitioner Montoya's sentence and term of imprisonment is consistent with applicable policy statement. However, the court found that Petitioner Montoya's motion and request for such a reduction was "[un]timely filed.

"[P]etitioner Montoya's sentencing hearing transcript reveals that the District Court expressed its independent judgment that the sentence was appropriate in light of the applicable Guidelines range. And does not discharged the district court's independent obligation to exercise its discretion. In the usual sentencing, whether following a trial or plea agreement, the judge's reliance on the Guidelines will be apparent when the judge uses the Guidelines range as the starting point in the analysis and imposes a sentence within the range. Gall v. United States, 552 U.S. 38, 49, 128 S.Ct. 586, 169 L.Ed.2d 445. Even where the judge varies from the recommended range, *id.*, at 50, 128 S. Ct. 586, 169 L.Ed.2d 445, if the judge uses the sentencing range as the beginning point to explain the deviation, the the Guidelines are in a real sense a basis for the sentence.

Therefore, this approach finds further support in the policy statement applicable to § 3582(c)(2) motions, which instructs the district court in modifying a sentence to substitute the retroactive amendment, but to leave all other original Guidelines determinations in place, § 1B1.10(b)(1)...'Pg., 180 L.Ed.2d, at 529-530. "[C]onversely, the Eleventh Circuit has ruled that the same circumstances do result in a conflict among the Circuits. See United States v. Torrez, 612 Fed. Appx. 561 (11th Cir. 2015), as shown in United States v. lpoez, 264 F.3d 527 (5th Cir. 2001). The Eleventh Circuit law on this point is correct and more consistent with constitutional mandated requirement of law.

"[T]he sentencing guidelines are the engine which runs the ever-expanding train which is the nation's criminal justice system. The guidelines are the sentencing map which the Court's uses to impose very long sentences in a mechanistic way. The cost is longer ....

case dockets and the need for prison space. Therefore, the stated benefit is for some "uniformity" in sentencing. And where the goal of such ... "[uni]formity requires this Court to resolve this conflict between the circuits. Thus, this issue is likely to recur, as to 'Section 3582(c)(2) empowers district court judges' have to correct sentences that depend on the frameworks that later prove unjustified. Because there are many similar contexts where sentences are greatly enhanced by the existence or non-existence of facts or evidence to determine a reduction of sentence, and many more like them that creates vast swings in the sentences imposed. This Court has the power to ["Grant"] Petitioner Montoya's petition for relief, and assure that he meets the criteria under 18 U.S.C. § 3582(c)(2) and 3553(a) factors to a defendant who may linger in prison unjustly pursuant to Amendment 782 and 788 retroactive guideline range in sentencing. And the provisions in the U.S. Sentencing Guidelines § 1B1.10 and § 1B1.10(a)(1).

I. Whether the District Court Reversibly Erred in Denying to Reduce Petitioner Omar Montoya's Sentence and Appropriate Outcome when the Subsequent Sentencing Range has been Lowered by the Sentencing Commission.

The District Court erred in failing to consider the § 3553(a) factors as it misunderstood their duty to "[re]evaluate the § 3553(a)..factors when considering whether or not a sentence reduction was warranted. United States v. Henderson, \_\_\_ F.3d\_\_\_ (5th Cir. 2011) No. 08-30998. The Court's has jurisdiction to reduce the petitioner's term of imprisonment subject to Title 18 U.S.C. § 3582(c)(2), pursuant to Amendment 782 and 788 retroactive amendments under USSG § 1B1.10, and the Fair Sentencing Act of 2010 S. 1789. Moreover, in general ... "USSG § 1B1.10(b)(1) prescribes the procedures to be followed to determine and to what extent whether a reduction of sentence is warranted under 18 U.S.C. § 3582(c)(2) and the policy statement and range that would be applicable to the defendant if the amendments to the guidelines listed had been in effect at the time defendant was sentenced.

Therefore, in making such a determination, the court should review the motion and facts of the case under § 3553(a) factors that were applied when the petitioner Montoya was sentenced and shall leave all other guideline application decisions ["un]affected." Moreover, in Amendment 782 to the United States Sentencing Guidelines, effective and implemented on November 1, 2014 ... 'the Sentencing Commission lowered the penalties for drug offenses by reducing the levels on the USSG § 2D1.1 Drug Quantity Table by 2 levels, pursuant to Amendment 782 and 788 that is applied retroactively to previously sentenced defendants. Therefore, under USSG § 1B1.10 the Sentencing Commission has articulated to the district court's authority to reduce a sentence and/or term of imprisonment based on a retroactive amendment to the sentencing guidelines.

Additionally, the "[A]ct aims to create a comprehensive sentencing scheme in which those who commit crimes of similar severity under similar conditions receive similar sentences. See 18 U.S.C. § 3553(a)(6). Thus, Section 3582(c)(2) contributes to the goal by ensuring that district courts may adjust sentences imposed pursuant to a range that the Commission concludes are too "[s]evere, out of step with the seriousness of the crime and the sentencing ranges of analogous offenses, and inconsistent with the Act's purposes.

## II. Whether the District Court abused its Discretion in Denying Petitioner Montoya's Request for Sentence Reduction as Untimely Due to Circumstance and Issues Beyond His Control.

The question before this Court is "[w]hether Petitioner Montoya's Pro Se motion seeking a reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 782 and 788 retroactive amendment was timely filed as to the denial by the courts. Petitioner argues that he submitted his motion seeking a reduction of his sentence to prison officials in the institutions' prison legal mail system during the course of "Institutional Lockdowns" and issues regarding contraband found in the common areas of various units. Which in fact was situations beyond Petitioner Montoya's control.

Therefore, this Court has jurisdiction to reverse and remand the case for resentencing under 18 U.S.C. § 3582(c)(2) and 3553(a) factors. And grant his motion filed in either court as "[t]imely filed." United States v. Lopez, 562 F.3d 1309, 1311-13 (11th Cir. 2009), Eberhart v. United States, 546 U.S. 12, 19, 126 S.Ct. 403, 407, 163 L.Ed.2d 14 (2005).

"[A] pro se prisoner is deemed filed motion timely on the date the petitioner delivers it to the prison authorities for mailing or places it in the prison mail system. See Fed. R. App. P. 4(c); Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 2385, 101 L.Ed.2d 245 (1988); Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009). In this Court's review of the facts and denial of Petitioner Montoya's motion for reduction of sentence, must recognize the internal institutional problems and issues regarding the repeated 'Lockdowns and Shakedowns' in the housing units due to hard contraband found in the common areas of the institution and the loss of a firearm some-where within the complex, resulting in the implementation of movement restriction.

Therefore, Petitioner Montoya's motion filed on January 25, 2018, for reconsideration, and the district courts order on February 15, 2018, where it denied his request for 'In Forma Pauperis' and notice seeking reduction of sentence. The Court denied relief in Montoya's motion as not taken in good faith. The April 23, 2018 denial of his § 3582(c) (2) motion by the Fifth Circuit Court of Appeals as being "[un]timely filed and failure to pay fee, should have been submitted as timely filed.

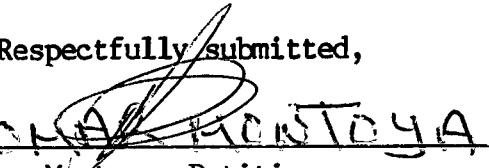
For all these reasons, Petitioner Montoya's motion for reduction of sentence was timely filed as the Court's denial of April 23, 2018 request under § 3582(c)(2) motion. The district court failed to properly recalculate his guideline range using a criminal history category I. This Court should grant Montoya relief in this case.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant his request for writ of certiorari.

DATED: This 25 Day of June, 2018

Respectfully submitted,

  
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