No. _____

IN THE SUPREME COURT OF THE UNITED STATES

VICTORIANO VEGA-JIMENEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT, NO. 18-10550-E

PETITION FOR WRIT OF CERTIORARI

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Dated: 07/30/2018

Victoriano J Vega

QUESTION PRESENTED

Whether the United States Court of Appeals for the Eleventh Circuit Has Entered a Decision that Is in Conflict with Its Own Precedent and the Decisions of Other United States Court of Appeals on the Same Issue of Eligibility for Reduction of Sentence Pursuant to the USSG Amendment 782 when at the Orinal Sentencing Hearing No Drug Amount Was Specifically Found by the Sentencing Court? 18 U.S.C. § 3582(c)(2).

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner Victoriano Vega-Jimenez prays that a writ of certiorari issue to review the judgment below:

The Opinion of the United States Court of Appeals for the Eleventh Circuit, along with final order whereunder denying reconsideration from the prior judgment appears at Appendix "A" to the petition and it is unpublished.

The Opinion of the United States District Court for the Northern District of Georgia appears at Appendix "B" to the petition and it is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided the foregoing case was on June 29, 2018.

The date on which the United States District Court issued its judgment order was January 26, 2018.

SUMMARY OF THE ARGUMENT

In this case, the Petitioner hereby asserts that the United States Court of Appeals for the Eleventh Circuit (the "Court") has erred in agreeing with the United States District Court for the Northern District of Georgia's finding that the Petitioner is not eligible for reduction of sentence pursuant to the USSG Amendment 782 and under 18 U.S.C. § 3582(c)(2). In reaching such decision, the Court has evidently ignored not only its own precedent authority but also other appellate circuit courts' precedent.

As further developed infra, the United States District Court for the Northern District of Georgia (the "district court") at the original sentencing proceeding did not make any specific findings on the record as to any particular drug amount that it would use to determine the applicable base offense level or sentencing range applicable. Instead, the district court guided its sentencing determination upon the threshold amount of 1.5 kilograms of "Ice" which pre-Amendment 782 triggered the maximum drug amount offense level 38. Because the district court's imposition of sentence was based upon the maximum applicable offense level rather than on a specifically determined drug amount, the district court committed substancial error in denying the Petitioner's eligibility for reduction of sentence. In consequence, the Court erred in supporting and affirming such district court's incorrect decision as a matter of law.

STATEMENT OF THE CASE

On April 06, 2005, a federal indictment was filed in the District Court for the Northern District of Georgia. The indictment listed six accusation (Counts One through Six) of violating federal law: Count One charged that on or about March 7, 2005, the Defendant, Victoriano Vega Jimenez, did knowingly and intentionally conspire with other individuals to violate Title 21 U.S.C. § 841(a)(1), that is, to knowingly and intentionally possess with intent to distribute a Schedule II Controlled Substances, i.e., at least five hundered grams of a mixture and substances containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(A)(viii). Count Two charged that on or about March 7, 2005, the defendant, Victoriano Vega Jimenez, did knowingly and intentionally attempt to violate Title 21 U.S.C. § 841(a)(1), i.e., to knowingly and intentionally distribute a Schedule II Controlled Substance that involved 500 grams of a substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(viii). Count Three also charged that the defendant, Victoriano Vega Jimenez, did knowingly and intentionally possess with intent to distribute a Schedule II Controlled Substance, i.e., at least five hundred grams of a mixture and substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 841(b)(a)(A)(iii). Count Four charged that the defendant did knowingly maintain a place, that is, a residence located at 624 Horse Ferry Road, Lawrenceville, Georgia, for the purpose of distributing a Schedule II controlled substance, i.e., at leat five hundred grams of a mixture and substance containing a detectable amount of methamphetamine, in violating of 21 U.S.C. § 856(a)(a). Count Five

charged that the defendant, Victoriano Vega-Jimenez, did knowingly possess firearms in furtherance of a drug trafficking crime for which the defendant may be prosecuted in federal court of the United States; that is a violation of 21 U.S.C. § 841(a)(1) as set forth in Count Two of the indictment, all in violation of 18 U.S.C. § 924(c). Count Six charged the defendant that after having previously been convicted of a crime punishable by imprisonment of a term exceeding one-year did knowingly possess a firearm, i.e., a 12 gauge shotgun, a .45 caliber handgun, and a 9mm handgun in affecting interestate and foreign commernce, in violation of 18 U.S.C. § 924(g).

STATEMENT OF THE FACTS

On April 12, 2006, the Petitioner appeared before the Honorable Orinda D. Evans, United States Circuit Judge, for sentencing proceedings. The Honorable Judge sentenced the Petitioner to a term of 250 months imprisonment on Counts 1, 2, and 3; a term of 240 months imprisonment on Count 4; and, in addition, the Honorable Judge also sentenced the Petitiner to a term of 240 months imprisonment on a pending charge from the district of New Jersey, the Honorable Judge ordered that all three sentences would run concurrent with each other. Please see Appendix "A" (sentencing transcript).

At the sentencing hearing on April 12, 2006, the Honorable Judge sentenced the Petitioner to 250 months on the drug trafficking offenses. At the time of sentencing, level 38 applied to a threshold amount of 1.5 kilgrams or more of "Ice." The Honorable Judge did not make specific findings on the record as to any particular quantity of "Ice" and only made clear mentions that due to the large amount of "Ice" level 38 applied. Also, the Honorable Judge did not on the record adopted the drug quantity recommendation in the PSR.

ARGUMENT AND AUTHORITIES

I. Legal Standard

As a federal rule, a criminal sentence is final upon completion of direct review, and the sentencing court thereafter lacks authority to revisit it. Dillon v. United States, 560 U.S. 817, 824 (2010). Section 3582(c)(2) states that a limited exception to this rule exists providing that:

> [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), upon motion of the defendant or the Direction of the Bureau of Prisons, or on its own motion, 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 reduction is consistent with the applicable policy statements issued by the Sentencing Commission. § 3582(c)(2).

The provisions referenced in this statute, 28 U.S.C. § 994(o), authorizes the Commission to periodically review and revise the Sentencing Guidelines. Pursuant to such statutory authority, on April 30, 2014, the Commission promulgated Amendment 782. Amendment 782 generally revised the Drug Quantity Table in USSG § 2D1.1 and reduced by two levels the offense level applicable to most drug trafficking offenses.

Amendment 782 modified the base offense level for drug trafficking offenses that involved methamphetamine/"Ice." ("Ice"). While the previous applicable guideline did set a base offense level 38 for any federal drug felony involving 1.5 kilograms or more of "Ice," the new guideline after Amendment 782 sets a base offense level 36 for federal drug felonies involving at least 1.5 but less than 4.5 kilograms of "Ice." After Amendment 782, base offense level 38 is now reserved to any federal drug felonies involving 4.5 or more kilograms of "Ice." On July 18, 2014, upon vote of the Sentencing

Commission Amendment 782 became retroactive and available to defendants sentenced prior to April 30, 2014.

II. Issue Presented on Direct Appeal

Whether the District Court for the Northern District of Georgia committed substantial error in denying the Petitioner's motion for reduction of sentence filed under 18 U.S.C. § 3582(c)(2) and pursuant to USSG Amendment 782.

In denying the Petitioner's eligibility for reduction of sentence, the district court found that: "The court originally sentenced the Defendant on April 12, 2006, to an imprisonment term of 250 months. At the sentencing hearing the court found that Defendant's base offense level was 38, and the guideline for his offense was 240-293 months. Defendant's presentence report ("PSR") stated he was responsible for 535 kilograms of methamphetamine/Ice but the court did not on the record during sentencing proceedings adopted such recommendantion." See District court's order issued on January 26, 2018, Appendix "B." In its judgment order denying the Petitioner's request for reduction of sentence, the district court does acknowledge the fact that it did not make a specific finding, on the record, during the sentencing proceeding, as to any specific quantity of Ice that was attributable to the Petitioner or that the court was using to determine the applicable sentencing range. At the end of the district court judgment oreder, the court finds that an appeal to the court's judgement would not be taken in good faith and therefore denied leave to proceed in forma pauperis on direct appeal.

On May 08, 2018, the Court of Appeals for the Eleventh Circuit issue a ruling whereby denying the Petitioner's motion for leave to proceed in forma pauperis because the appeal was frivolous. The

Petitioner subsequently filed with the Court of Appeals his petition for reconsideration of the Court's order denying leave to proceed in forma pauperis. On June 29, 2018, the Court of Appeals also denied such petition because the Petitioner did fail to offer new evidence or arguments of merit. The Petitioner hereby asserts the Court of Appeals committed error in denying relief because it failed to follow its own precedent, as well as the precedent of other circuits court of appeals. Both precedent from the Fifth Circuit and other circuits appear to support the Petitioner's claim that he is eligible for reduction of sentence under 3582(c)(2) because the district court at the original sentencing proceeding failed to make specific findings, on the record, regarding the drug quantity it was using to calculate the applicable sentencing range and only relied on the maximum available offense level 38, triggered, prior Amendment 782, by a drug quantity of 1.5 kilograms or more of "Ice."

"In a § 3582(c)(2) proceeding,' all original sentencing determinations reamin unchanged with the sole exception of the guideline range that has been amended since the original sentencing'; de novo resenteing is not premitted. United States v. Bravo, 203 F.3d 778, 781 (11th Cir. 2000)(emphasis omitted). As a result, if at the original sentence hearing the district court determined the drug quantity attributable to the defendant, during the § 3582(c)(2) proceeding it is not permitted to make a new finding about drug quantity that is inconsitent with the original finding. See United States v. Hamilton, 715 F.3d 328, 339-40 (11th Cir. 2013); United States v. Cothran, 106 F.3d 1560, 1563 & n.5 (11th Cir. 1997)." See also United States v. Mercado-Moreno, 869 F.3d 942 (9th Cir. 2017)("In those cases where a sentencing court's quantity finding is ambiguous or incomplete,

a district court may need to identify the quantity attributable to the defendant with more precision to compare it against the revised drug quantity threshold under the relevant Guidelines amendment." (citing United States v. Hamilton, 715 F.3d 328, 340 (11th Cir. 2013). See also United States v. Peters, 843 F.3d 572 (4th Cir. 2016)("[D]istrict courts may make additional findings on the drug quantities attributable to defendants in § 3582(c)(2) proceedings. Such findings must be supported by the record and consistent with earlier findinds."), cert. denied, 137 S. Ct. 2267, 198 L. Ed.2d 704 (U.S. 2017); United States v. Wyche, 741 F.3d 1284, 1293, 408 U.S. App. D.C. 229 (D.C. Cir. 2014).

In the Petitioner's case, as stated above, the district court did not make specific findings as to any particular drug quantity and only relied on the threshold amount of 1.5 kilograms of Ice to determine that offense level 38 applied. Please see district court's judgment order at appendix "B." The district court did commit error in denying the Petitioner's eligibility for reduction of sentence under § 3582(c)(2) and pursuant to the USSG Amendment 782. "We review for abuse of discretion a district court's decision to grant or deny a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). United States v. Hamilton, 715 F.3d 238, 337 n.8 (11th Cir. 2013). 'The district abuses its discretion if it fails to apply the proper legal standard or to follow proper procedures in making its determination.'" United States v. Jules, 595 F.3d 1239, 1242 (11th Cir. 2010)(quotation and alteration omitted.

III. Petitioner Is Eligible for Reduction of Sentence

Petitioner asserts that at the sentencing hearing on April 12, 2006, the district court did actually used the threshold amount of

1.5 kilograms of Ice to sentence him. The Petitioner based upon the sentencing transcript asserts that during the sentencing hearing the district court did not expressly or implicitly, as admitted by own district court, at any time during the proceeding found or expressed its finding regarding a particular quatity of "Ice" that it would use to determine the applicable sentencing range under the Guidelines, § 2D1.1(c). Moreover, as the sentencing record shows, the district court did not expressly or implicitly adopted the PSR and only made vague comments regarding the quantity of "Ice" mentioned in the PSR recommendations. See United States v. Sherbak, 950 F.2d 1095, 1099 (5th Cir. 1992)("Because we have held that, under circumstances such as those now before us, Fed. R. Crim. P. 32 requires the sentencing court to make explicit findings of fact, on the record, of the quantity of drug upon which the sentence imposed is based, we have no option but to vacate Sherbak's sentence and remand his case to the district court for resentencing in compliance with Rule 32."). See also United States v. Carreon, 11 F.3d 1225, 1231 (5th cir. 1994); United States v. Brito, 136 F.3d 397, 415-17 (5th Cir.), cert. denied, _____U.S. _____, 118 S. Ct. 1817 (1998).

CONCLUSION

WHEREFORE, the Petition for certiorari should be granted because the Petitioner has shown that the decision of the United States Court of Appeals for the 11th Circuit affirming the district court's finding the Petitioner is not eligible for sentence reduction is conflicting with Fifth Circuit precedent, fully cited supra, and also in conflict with other circuits precedent, i.e., Fourth, Seventh, and Nine Circuits.

Respectfully submitted this July 20, 2018.