No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GESNER DELVA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT, NO. 16-2531-cr

PETITION FOR WRIT OF CERTIORARI

Gesner Delva
Pro se Litigant, # 75498-053
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Dated: 3/22/2018

Gesner Delva

QUESTIONS PRESENTED

Whether the Court of Appeals for the Second Circuit Contrary to Its Own Precedent Affirmed the District Court's Judgment Order Whereby Denying the Petitioner's Eligibility for Sentence Reduction Under § 3582(c)(2). Although No Drug Quantity Was Ever Used to Determine the Petitioner's Sentence, the District Court Found that the Petitioner Was Not Eligible under 18 U.S.C. § 3582.

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The Petitioner Gesner Delva prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix "A" to the petition and it is unpublished.

The opinion of the United States District Court for the Eastern District of New York appears at Appendix "B" to the petition and it is unpublished.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 08/22/2017.

The date on which the United States Court of Appeals denied a timely petition for rehearing was 01/31/2018. A copy of the order denying rehearing appears at Appendix "C" of this petition.

STATEMENT OF THE CASE

In 2008, the Petitioner Gesner Delva (hereinafter "Petitioner") was charged with various drug related offenses pursuant to a superseding indictment in the Eastern District of New York. Count One alleging a violation of 21 U.S.C. §§ 963, 960(b)(1)(B)(ii): Conspiracy to import five kilograms or more or more of cocaine; Count Two alleging a violation of 21 U.S.C. §§ 846, 841(b)(1)(A)(ii)(II): Conspiracy to possess with intent to distribute five kilograms or more of cocaine; Count Three alleging a violation of 21 U.S.C. §§ 952(a)-(1) and 960(b)(1)(B)(ii).

The Petitioner's case was tried before a jury and at the end of trial the jury returned a verdict finding the Petitioner guilty of Count One of the Superseding Indictment, to wit: conspiracy to import five kilograms or more of cocaine.

On October 9, 2009, the Petitioner appeared before the court for sentencing proceeding and pursuant to the United States Guidelines Manual the district court imposed a term of 293 months imprisonment. 293 months being the higher end of the applicable guideline range.

On November 19, 2014, the Petitioner filed with the district court a Pro se Motion for Reduction of Sentence under 18 U.S.C. § 3582(c)(2) and pursuant to the USSG Amendment 782; a USSG amendment that was made retroactively applicable and reduced the offense level by two to most drugs in the drug quantity table. On January 8, 2015, the district court denied the Petitioner's motion for reduction of sentence and on June 28, 20016, the district court too denied a Petitioner's motion for reconsideration that was filed after the district court had denied the original motion filed under § 3582(c)(2).

On July 11, 2016, the Petitioner filed with the district court

a timely notice of appeal. The district court appointed Alan M. Nelson to represent the Petitioner on direct appeal.

On August 22, 2017, the Court of Appeals for the Second Circuit denied the direct appeal and affiremed the district court's judgment order. On September 8, 2017, the Court of Appeals granted the court appointed counsel's motion to withdraw and also granted leave to file a Pro se petition for panel rehearing, such petition had to be filed with the Court by October 10, 2017. On January 31, 2018, the Court of Appeals denied the Petitioner's Pro se petition for panel rehearing.

REASONS FOR GRANTING THIS PETITION

Contrary to its own precedent, the United States Court of Appeals for the Second Circuit affirmed the United States District Court for the Eastern District of New York's denial of the Petitioner's motion for reduction of sentence under 18 U.S.C. § 3582(c)(2) and pursuant to the United States Sentencing Guidelines Amendment 782, made retroactively applicable by the Sentencing Commission.

As a generl rule, a criminal sentence is final upon completion of direct appeal 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 a limited exception ot the rule 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 Director 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 a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

The provision referenced in this statute, 28 U.S.C. § 994(o), authorizes the Commission to periodically review and revise the Sentencing Guidelines. Pursuant to this statutory authority, on April 30, 2014, the Commission promulgated Amendment 782, which generally revised the Drug Quantity Table in USSG § 2D1.1 and reduces by two levels the offense level applicable to many drug trafficking offenses. With respect to cocaine, the Amendment increase the minimum quantity of cocaine necessary to trigger level 38 to 450 kilograms or more of cocaine. The range of 150 to 450 kilograms of cocaine after the Amendment has an offense level of 36 and so forth. In this case, because the district court did not specifically stated either in writing or verbally the drug amount upon which the sentence pronounced was based, and only made reference to the applicable offense level triggering such sentence of 293 months, level 38, the Petitioner has argued before the district court and thereafter before the Court of Appeals that he is and should be eligible for and benefit from the USSG Amendment 782.

ARGUMENT AND AUTHORITIES

At his original sentence proceeding, the Petitioner delva was sentenced to a term of 293 months of imprisonment. Although the Presentence investigation report recommended that the Petitioner had trafficked in at least 600 kilograms of cocaine, the district court did not expressly or actually adopted such recommendation. In fact, the following protocol by the district court followed:

"Let's now turn to the requisite advisory guideline calculation. That's contained on page 12 (PSR). We have a base offense level 38 because of the large amount of cocaine. "The defendant is held accountable for 600 kilogrma of cocaine, [s]o that he really goes

by the 150 mark and then some, doesn't he?" (Sentencing Transcript at pg. 12, ln. 10-15).

Here, it is obvious in the record from the sentencing proceeding that the district court did emphasized about the applicable offense level 38 because of the large amount of cocaine. The district court, however, did not expressly or actually pronouced it had or was dopting the Presentence Investigation Report. The district court did not make any specific reference to a particular drug amount and only stated "We have a base offense level 38 because of the large amount of cocaine." The district court went on further and without expressly adopting the 600 kilograms of cocaine recommended in the presentence investigation report, the district court found that the threshold amount of cocaine triggering base offense level 38 was 150 kilograms of cocaine. The district court further stated that "so that he really goes by the 150 mark and then some, doesn't he?" (Sentencing Transcript at pg. 12, ln. 14-15).

The Petitioner asserts that in terms of the own district court's dialog the actual Petitioner's sentence was supported by the base offense level 38 which at that time had a sentencing range of 235-293 months. The Petitioner therefore, should be eligible to benefit from Amendment 782 because now after the amendment the applicable offense level should be reduced to 36 which consequently calls for a sentencing range of 188-235 months.

Petitioner therefore hereby asserts that the Court of Appeals for the Second Circuit ruling against it own precedent affirmed the district court's judgment denying the Petitioner the reduction of sentence requested pursuant to the USSG Amendment 782. United States v. Ahders, 622 F.3d 115 (2nd Cir. 2010), United States v. Cavera,

550 F.3d 180 (2d Cir. 2008); United States v. Berkhoglyad, 516 F.3d 122, 127 (2d Cir. 2008)(quoting United States v. Fernandez, 443 F.3d 19, 26 (2d Cir. 2006)).

The Petitioner hereon asserts the Court of Appeals should have not affirmed the district court's ruling because the district court abused its discretion in denying the Petitioner's eligibility for reduction of sentence pursuant to the USSG Amendment 782. At the original sentencing hearing the district court did fail to make clear and unambiguous specific findings as to the actual drug amount to which the Petitioner was being held responsible for. The district court, as shown above, concentrated its attention in determining the applicalbe base offense level and the applicable sentencing range rather than determining the actual drug amount applicable. "A district court must begin the sentencing process by calculating the advisory Guideline range before proceeding to an independent, individualized consideration of the sentence to impose. Gall, 552 U.S. at 49-50; Cavera, 550 F.3d at 189. "A district court must make 'specific findings,' by a preponderance of the evidence, to support any sentencing enhancement under the guidelines." See United States v. Espinoza, 514 F.3d 209, 212 (2d Cir. 2008)(quoting United States v. Molina, 356 F.3d 269, 275 (2d Cir. 2004)). Conversely, a district court need not specifically recite all the facts relevant to its Guideline calculation; rather, it is sufficient for the district court to adopt the findings in the presentence report -- if those findings are adequate to support the sentence imposed, e.g., United States v. Carter, 489 F.3d 528, 540 (2d Cir. 2007)(holding that "the district court's reliance on the inadequate findings of the PSR, without more, constituted plain error."); United States v. Eyman, 313 F.3d 741, 745

(2d Cir. 2002). The district court is required to rule on controverted matters that will affect sentencing, Fed. R. Crim. P. 32(i)(3), but it may do so by adopting the recommendations of the presentence report. United States v. Prince, 110 F.3d 921, 924 (2d Cir. 1997).

As argued above, the facts on the record from the original sentencing hearing support the Petitioner's contention that the district court committed substantial error when it abused its discretion and denied reduction of the Petitioner's sentence notwithstanding the facts of the case at sentencing supported such reduction. It is not the Petitiner's fault that the district court failed to make specific findings as to the actual drug amount it was considering and later use in determining the Petitioner's applicable sentence. The district court did not on the record adopt the Presentence report and only judged that base offense level 38 applied and that the Guidelines' sentencing range of 235 to 293 months was sufficient and adequate due to the large amount of cocaine involved. As such, and based upon the record, the Petitioner reasserts he should be eligible for reduction of his federal sentence pursuant to the USSG Amendment 782.

CONCLUSION

The Petitioner Delva respectfully asks this most Honorable Supreme Court of the United States grant the foregoing petition for a writ of certiorari.