

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ADOLFO LOPEZ GARCIA,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE SEVEN CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Adolfo Lopez-Garcia
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QUESTION(S) PRESENTED

- I. Whether the District Court Committed substantive error when failed to impose a sentence that was sufficient but not greater than necessary to comply with the statutory directive set forth in 18 U.S.C. § 3553(a).
- II. Whether there is frivolous issue with regard to Mr. Lopez's sentence.
A review the district court's decision whether to reduce a sentence under §3582(c)(2).
- III. The disparities of sentence between Mr. Lopez-Garcia and his Co-defendants
- IV. The District Court Abused its discretion in reducing Appellant's sentence to 135 months rather than 108 months pursuant to the motion for Reduction of Sentence under 18 U.S.C. § 3582(c) where:
 - (A) Appellant is qualified for such a reduction pursuant to Amendment 782-788;
 - (B) the District Court violated the provision of § 3553(a) by imposing a sentence longer than necessary and creating unwarranted sentence disparities among the defendants with similar record who have been found guilty of similar conduct; and
 - (C) Appellant's sentence of 135 months is both procedurally erroneous and substantively unreasonable. (in alternative the court should had reduced the sentence a list to 120 months regarding the mandatory minimum)

PARTIES

Adolfo Lopez-Gracia, is the Petitioner; he was the defendant-appellant below.

The United States of America is the Respondent; it was the plaintiff-appellee below.

CO-DEFENDANTS

Antonio Mendoza, (leader organizer) was sentenced to term of 135 months in prison and his sentence was reduced pursuant to the amendment 782. (released)

Roberto Sandoval Velazco, (the driver) was sentenced to a term of 135 months in prison and his sentence was reduced pursuant to the Amendment 782. (released)

Corey Scott, was sentenced to a term of 120 months in prison.

Gonzalo Lopez-Garcia, (brother) was sentenced to a term of 96 months and was transferred to finish his sentence in Mexico. (released).

Manuel Chavez, (fugitive)

RELATED CASE

Askia Eubanks. Docket No.: 10CR00362. (Scott driver).

Catherine D. O'Daniel, Defense Counsel.

Stephen P. Baker/ Megan C. Church, Assistant U.S. Attorney.

Sarah Kiekhafer, U.S. Probation Officer.

James B. Zagel, U. S. District Judge.

Ronald A. Guzman, U.S. District Judge.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Adolfo Lopez-Garcia, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit..

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Tenth Circuit is captioned as United States v. Adolfo Lopez-Garcia, No. 17-3501 and is provided in the Appendix to the Petition. [APPX, A]. The district court entered judgment 27th day of November, 2017, which the judgment is attached as an Appendix. [APPX.B]

JURISDICTIONAL STATEMENT

The petition is filled within 90 days of an opinion affirming the judgment, which was entered on May 17, 2018. *See* Sup. Ct. R. 13.1. The Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

21 U.C. § 846 Provides in part:

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in case arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Trial Court Proceedings

This is a criminal case on denied motion 782 appeal. On April 27, 2010, a complain was filed in the Northern District of Illinois charging that, from on or about February 2010, Antonio Mendoza, Roberto Sandoval-Velazco, Adolfo Lopez-Garcia, and Corey Scott conspired to possess with intent to distribute, and distributed, five kilograms or more of cocaine; in violation of 21 U.S.C. § 846. On the same date, arrested by the agents with the Drug Enforcement Administration (DEA).

On July 14, 2010,, defendant was appeared before the Honorable Susan E. Cox and entered a plea of not guilty as Counts 1, 5, 6,,7, and 14 of the indictment. entered plea of not guilty to all counts. On February 2, 2012, Lopez-Garcia plead guilty to Count one of the indictment to conspiracy to to knowingly and intentionally possess with intent to distribute and to distribute a controlled substance, namely, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 846. On April 25, 2012, was sentenced to **135** months. Mr. Lopez-Garcia, did not appeal.

On November 14, 2017, Mr. Lopez-Garcia submitted second supplemental submission in support of motion for reduction of sentence pursuant to 18 U.S.C. § 3582 (c)(2). On November 27, 2017, the district court enter an order denied of such motion. On December 4, 2017, Mr. Lopez-Garcia entered a motion to appeal.

Title 18 U.S.C. § 3582(c)(2) permits a District Court to reduce the sentence

of an Appellant's "who has been sentenced to a term of Imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." *Id.* U.S.S.G. § 1B1.10(A)(1); The District Court may reduce a defendant's sentence based only upon a subsequently enacted amendment to the U.S.S.G., but only if the U.S.S.C. made the amendment retroactively applicable by listing it in Appendix C. Amendment 782 has actually lowered Appellant's guidelines range in this case and it is listed in Appendix C. (See § 1B1.10(c) (2014). Therefore, Mr. Lopez-Garcia is eligible for relief and the District Court had jurisdiction to grant that relief under § 3582(c)(2).

B. Circuit Court Proceedings

Mr. Lopez-Garcia appealed the order of denied motion or modification of sentence pursuant 18 U.S.C. § 3582(c)(2) and new amendment 782. Once it is established that an amendment to the Sentencing Guidelines Applies, the Seventh Circuit reviews a District Court's decision not to reduce a sentence pursuant to 18 U.S.C. § 3582(c)(2) "*de novo*." *United States v. Graham* 704 F.3d 1275, (10 Cir. 2013). This Court reviews a district court's interpretation of a statute or the Guidelines *de novo*. *United States v. Smartt* 129 F.3d 539 (10th Cir.1997). The Court of appeals affirmed that the district court acknowledge that Lopez-Garcia's applicable guideline range had been lowered to 151 to 188 months' imprisonment, but concluded that Lopez-Garcia was ineligible for a further reduction because he already had been sentenced below the amended guidelines range. Petitioner noted that in *Apprendi*, Justice Thomas wrote a concurring opinion in which he stated that he had "succumbed" to an "error" in joining the majority in *Almendarez-Torres*. See *Apprendi*, 466 at 520 (Thomas, J., concurring).

The court of appeals summarily reviewed and affirmed. See Appx. A

REASON FOR GRANTING THE WRIT

This court should use this case to answer the reoccurring, important question whether all the facts including the -- fact that all Co-defendants are released, including one -- one of them that was charged as an organizer. In the --- In the plea agreement requires a mandatory minimum--- of 120 months. Furthermore, to increase a defendant's--- sentence must be pleaded in the indictment and either----- admitted by defendant or Proven to a jury beyond a----- reasonable doubt? and also at the sentencing hearing the Honorable did not charged petitioner to be an organizer-- at sentencing the petitioner was sentenced at base level-- of 33 and Criminal History Category of 1 a 135 to 168 range.

Introduction.

Petitioner was subjected to an enhancement sentence under U.S. Sentencing Guidelines Manual § 3B1.1, cmt., application n. 2 provides that to qualify for an adjustment under this section, a defendant must have been the organizer, leader, manager, or supervisor of one or more other participants, at sentencing hearing the honorable did not charged petitioner as organizer and did not increase the 3 levels, at sentencing petitioner was sentenced base offense level of 33 and criminal history category of 1. Petitioner's sentence thus depends on the judge's ability to find the existence, and to use to increase the statutory maximum. This power was affirmed affirmed in Amendariz-Torres v. United States, 523 U.S. 224 (1998), which held that the

enhanced maximums of 21 U.S.C. § 846 represent sentencing factors rather than elements of an offense, and that they may be constitutionally determined by judges rather than juries. See Almendariz-torrez, 553, U.S. At 244.

This Court, however, has repeatedly limited Almendarez-Torres. See Alleyne v. United States, 133 S. Ct. 2151, 2151, 2160 n. 1 (2013))(characterizing Almendarez-Torres as a narrow exception to the general rule that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond reasonable doubt); Decamps v. United States, 133 S. Ct. 2276, 2295 (2013) (Thomas, J., concurring) (stating that Almendarez-Torres should be over turned); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (stressing that Almedarez-Torres represented “a narrow exception” to the prohibition on judicial fact-finding to increase a defendant’s sentence); Shepard v. United States, 544 U.S. 13 (2005) (Souther, J., controlling plurality opinion) (“while the disputed fact here can be described as a fact about as organizer.

In Alleyne, this Court applied Apprendi's rule to mandatory minimum sentences, holding that any fact that produces a higher sentencing range—not just a sentence above the mandatory maximum—must be proved to a jury beyond a reasonable doubt. 133, S. Ct. at 2162---63. In its opinion, the Court apparently recognized that Almendarez-Torres's holding remains subject to Fifth and Sixth Amendment attack, Alleyne characterized Almendarez-Torres as a “ narrow exception to the general rule” that all facts that increase punishmenttt must be alleged in the indictment and proved to a jury beyond a reasonable doubt. *Id.* At 2160 n. 1. But because the parties in Alleyne did not change Almendarez-Torres, This court said that would “ not revisit it for purpose of [its] decisions today.” *Id.*

See Almendarez-Torres, 523 U.S. At 243-44; see also Apprendi, 530 U.S. At 490 (“Other than the fact of conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”) Apprendi tried to explain this difference by pointing out that, unlike other facts, recidivism “does not relate to the commission of the offense itself[.]” 530 U.S. At 496 (quoting Almendarez-Torres, 523 U.S. At 230).

However, by refusing to reduce the sentence of imprisonment in Appellant in this case, the District Court helped to create the very unwarranted disparities which the Supreme Court sought to avoid, and made his sentence substantively unreasonable. Furthermore, taking the § 3553(a) factors as a whole, the Court of Appeals can only conclude that Appellant's sentence in this case is procedurally erroneous and substantively unreasonable and that the district court was wrong in imposing it.

Undoubtedly, a district court has great discretion in balancing the § 3553(a) factors. Still, it must afford some weight to the factors in a manner that is at least loosely commensurate with their importance to the case, and in a way that would achieve the purposes of sentencing stated in § 3553(a). However, if a district court instead commits a clear error of judgment in weighting the sentencing factors and arrives at a sentence beyond the range of reasonable sentences, as have the District Court in this case, the Court of Appeals is duty bound to vacate and remand for re-sentencing; and that is what Petitioner's requires of this Court.

Title 18 U.S.C. § 3582(c)(2) permits a District Court to reduce the sentence of an Appellant's “who has been sentenced to a term of Imprisonment based on a sentencing

range that has subsequently been lowered by the Sentencing Commission.” *Id.* U.S.S.G. § 1B1.10(A)(1); The District Court may reduce a defendant's sentence based only upon a subsequently enacted amendment to the U.S.S.G., but only if the U.S.S.C, made the amendment retroactively applicable by listing it. Amendment 782 has actually lowered Appellant's guidelines range in this case and it is listed in Appendix C. (See § 1B1.10(c) (2014). Therefore, Appellant is eligible for relief and the District Court had jurisdiction to grant that relief under § 3582(c)(2).

If this Court were to determine that Constitution limits Petitioner's statutory range of imprisonment to 108 months, or in the alternative 120 months that was stipulate in the plea agreement, then clearly such constitutional error substantially prejudiced Petitioner as evidenced by his 135 months of sentence.

CONCLUSION

Petitioner respectfully prays that this Honorable Court grant certiorai, and reverse the judgment below, and /or vacate the judgment and remand for reconsideration in light of any relevant forthcoming.

Respectfully submitted this 2nd day of July 2018.

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