

18-7918
No. _____

Supreme Court, U.S.

FILED

JUL 09 2018

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

RUTILIO HERNANDEZ,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Rutilio Hernandez
Reg No. 60998-097
Pro-Se Litigant
Adams County Facility
P. O. Box 1600
Washington, MS 39190

ORIGINAL

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)

Whether there is frivolous issue with regard to Mr. Hernandez's sentence.

A review the district court's decision whether to reduce a sentence under §3582(c)(2).

A district court abuse its discretion by filing to apply the proper legal standard by failing to follow proper procedures.

Whether Mr. Hernandez's sentence was unconstitutional because Mr. Hernandez's sentence based in *18 U.S.C. § 924 (c)* was imposed by the sole testimony of Denis Jackson.

PARTIES

Rutilio Hernandez, 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

Denis W. Jackson
Donna Jean Broussard
Jose rigoberto Topete
Maria Hernandez
Robert W. Fansler
Ruben Balderas
Russel Broussard
Santos Topete
Sebastian Salazar
Susan M. Jacson

Joseph H. Gay Jr., Assistant US Attorney.
William Wayne Justice, The Honorable

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rutilio Hernandez, Pro-Se¹ and hereby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit..

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Tenth Circuit is captioned as United States v. Rutilio Lopez, No. 17-50758 and is provided in the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 filed within 90 days of an opinion affirming the judgment, which was entered on May 02, 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.

¹ *Haines v. Kerner*, 404 U.S. 519 (1972), "Pro SE litigants pleadings are to be construed liberally and held to less stringent standard than formal pleadings drafted by lawyers; if court can reasonably read pleadings to state valid claim o which litigant could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax, and sentence construction, or litigants unfamiliarity with the pleading requirements.

21 U.S.C. § 952 Provides in part A:

§ 952. Importation of controlled substances

(a) Controlled substances in schedule I or II and narcotic drugs in schedule III, IV, or V; exceptions. It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of title II, or any narcotic drug in schedule III, IV, or V of title II, or ephedrine, pseudoephedrine, or phenylpropanolamine, except that--

- (1) such amounts of crude opium, poppy straw, concentrate of poppy straw, and coca leaves, and of ephedrine, pseudoephedrine, and phenylpropanolamine, as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and
- (2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States--
- (A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate,
- (B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 303 [21 USCS § 823], or
- (C) in any case in which the Attorney General finds that such controlled substance is in limited quantities exclusively for scientific, analytical, or research uses, may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

21 U.S.C. § 960 Provides in part A:

(a) Unlawful acts. Any person who--

- (1) contrary to section 305, 1002, 1003, or 1007 [21 USCS § 825, 952, 953 or 957], knowingly or intentionally imports or exports a controlled substance,
- (2) contrary to section 1005 [21 USCS § 955], knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or
- (3) contrary to section 1009 [21 USCS § 959], manufactures, possesses with intent

to distribute, or distributes a controlled substance, shall be punished as provided in subsection (b).

(b) Penalties.

(G) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana; or

(H) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.[]

the person committing such violation shall be sentenced to a term of imprisonment of not less than **10 years** and not more than life and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than 20 years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

(2) In the case of a violation of subsection (a) of this section involving--

18 U.S.C. § 1956 Provides in part A:

§1956. Laundering of monetary instruments

(a) (1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A) (i) with the intent to promote the carrying on of specified unlawful activity; or
(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986 [26 USCS § 7201 or 7206]; or

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than \$500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in sub paragraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in sub paragraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

18 U.S.C. § 924 (c) (1) (A) & (o) Provides in part:

§ 924. Penalties [Caution: See prospective amendment notes below.]

(a) (1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929 [18 USCS § 929], whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter [18 USCS §§ 921 et seq.] to be kept in the records of a person licensed under this chapter [18 USCS §§ 921 et seq.] or in applying for any license or exemption or relief from disability under the provisions of this chapter [18 USCS §§ 921 et seq.];

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

18 U.S.C. § 982: U.S.C. Provides in part:

§ 982. Criminal forfeiture

(a) (1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title [18 USCS § 1956, 1957, or 1960], shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

18 U.S.C. § 853 Provides in part:

§ 853. Criminal forfeitures

(a) Property subject to criminal forfeiture. Any person convicted of a violation of this title or title III punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

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 witness 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 . On February 28, 2002, a complain was filed in the Western District of Texas charging that, Santos Topete, Jose Rigoberto Topete, Sebastian Salazar, Denis W. Jackson, Susan M. Jackson Donna Broussard, Russel Broussard, Ruben Balderas, Maria Hernandez, and Robert W. Fansler conspired to possess with intent to distribute marijuana, and conspired to import marijuana, conspired to launder monetary instruments and conspired to use firearm in relation to drug trafficking crime, in violation of 21 U.S.C. § 846, 952(A), 960 (A)(1)&(B)(1), 963 and 18 U.S.C. § 1956(A)(2)(A)&(H) and 924(C)(1)(A)&(o)

The Government charged Rutilio Hernandez, by indictment with the following counts: (1) conspiracy to possess with intent to distribute more than 1000 kilograms of marijuana, (2) conspiracy to import more than 1000 kilograms marijuana, (3, 4, 5) three counts of conspiracy to launder monetary instruments, and (6) conspiracy to possess a firearm in furtherance of a drug trafficking crime. The charges arose out of the elaborate drug trafficking operation of Robert W. Fansler. According to the Government, Hernandez and Fansler orchestrated and financed a multi-million dollar {457 F.3d 420}marijuana distribution enterprise. The indictment alleged, *inter alia*, that Appellants' co-conspirators smuggled marijuana, currency, and firearms between Mexico and the United States. The jury convicted on all counts. After the verdict, Appellants moved to dismiss and for a new trial on grounds of speedy trial right violations and ineffective assistance of counsel. The district court denied the motions.

As to sentencing, the court adopted the presentence reports' guideline applications. Appellant Maria Hernandez's Guideline range was 235 to 293 months imprisonment. Appellant Rutilio Hernandez's Guideline range was 360 months to life imprisonment. However, the court indicated that it would impose sentences "below the guideline range" based on the "Court's own departure." It sentenced Maria Hernandez to six concurrent terms of 204 months imprisonment and Appellant Rutilio Hernandez to six concurrent terms of 240 months imprisonment. This appeal followed.

On August 17, 2017, the district court enter an order denied of such motions. On August 25, 2017, Rutilio Hernandez, entered a motion to appeal.

Title18 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 Amendment 782 has actually lowered Rutilio Hernandez, guidelines range in this case. (See § 1B1.10(c) (2014). Therefore, Rutilio Hernandez is eligible for relief and the District Court had jurisdiction to grant that relief under § 3582(c)(2).

B. Circuit Court Proceedings

Rutilio Hernandez's appealed the order of denied motion or modification of sentence pursuant 18 U.S.C. § 3582(c)(2) and new amendment 782. and Motion for down departure. On November 16, 2017, Rutilio Hernandez submitted a second

supplemental submission in support of motion for reduction of sentence pursuant to 18 U.S.C. § 3582 (c)(2). And a motion for down departure or reduction of sentence pursuant 18 U.S.C. §. 924(C) Once it is established that an amendment to the Sentencing Guidelines Applies, the Fifth 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 Rutilio Hernandez's applicable guideline range had been lowered to 235 to 293 months' imprisonment, but concluded that Rutilio Hernandez's 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 the indictment had stared In Maria Trinidad Peña and Rudy. Mr Roberts Fransler send a \$ 125 U.S. Dollar to Maria Trinidad Peña. Mr. Roberts Frnasler and Maria Trinidad at that time they had a relationship and by a mistake my wife, Maria Hernandez, was indicted then after 10 years in prison my wife Maria Hernandez was exonerated it was very clear that it was a plain error, and my charges against 18 U.S.C. § 1956 are unconstitutional because the witness at that time Denis W.

Jackson had testified that he came to the address more than one time comes to that house and pick-up fire arms, but he never said that Mr. Hernandez's was the person to give him the firearms, Mr. Hernandez use to live in such address but he had nothing to do with the fire-arms, the other wrongful conviction is the use a firearm in relation to the drug trafficking crime, the same is the conspiracy to import the marijuana is very clear that Mr. Hernandez were erroneous convicted. The sentence must be pleaded in the indictment or admitted by defendant or Proven to a jury beyond a reasonable doubt?

Introduction.

Defendant's first claim is that the district court erred by denying their post-trial motions to dismiss the charges on speedy trial grounds. Appellants make arguments under both the Speedy Trial Act, 18 U.S.C. §§ 3161-74, and under the Sixth Amendment. Under both authorities, this claim fails 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 *Almendariz-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 *Almenárez-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) (Souter, 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 punishment 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 purpose 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.

Recently in *Rosales-Mireles*, Case No. 12-126, this court had ruled on July 18, 2018 that an error in calculating the sentencing guidelines is an error that must be addressed by re-sentencing the defendant even if no one noticed the error when it occurred the court might correct the mistake, even if the sentence imposed falls within the correct guidelines range.

Petitioner's, argues, and the government should concede, that his conviction on Counts 2,3, 4, 5 and 6 of the indictment must be vacated. Count One charged petitioner with conspiracy to possess with intent to distribute marijuana. Because conspiracy is a lesser included offense of the continuing criminal enterprise charged in Count 2,3,4,5, and 6, his conviction on Count One violates double jeopardy. See *Rutledge v.*

United States, 517 U.S. 292, 307, 134 L. Ed. 2d 419, 116 S. Ct. 1241 (1996); *United States v. Dixon*, 132 F.3d 192, 196 (5th Cir. 1997). Here, Petitioner was sentenced to 240 months for Counts 1,2,3,4,5, and 6 with the terms to run concurrently. Because Petitioner's trial counsel did not object to the failure to give a specific instruction requiring unanimity, this Court reviews for plain error. *United States v. Harris*, 104 F.3d 1465, 1471 (5th Cir.), cert. denied, 139 L. Ed. 2d 57, 118 S. Ct. 103 (1997).

Petitioner's points out that he was charged with laundering monetary instruments under 19 U.S.C. §§ 1956(a)(2)(A) and (h) which proscribes transporting, transmitting, and transferring a monetary instrument or funds from or to the United States with the intent to carry on specified unlawful activity. Petitioner was wrongfully convicted for charges that he have never committed.

Petitioner's argues that the record does not show that the government proved any of the specified conduct. He contends that the government produced no evidence that Petitioner possessed any marijuana on those specific dates. Rather, the government produced witnesses who testified to the loads that they, as co-conspirators, handled over the years.

To convict for possession with intent to distribute, the government must prove (1) knowing, (2) possession, (3) with intent to distribute. *United States v. Lopez*, 74 F.3d 575, 577 (5th Cir.), cert. Denied 517 U.S. 1228, 116 S. Ct. 1867, 134 L. Ed. 2D 964 (1996). Possession may be joint. *United States v. Skipper*, 74 F.3d 608, 611 (5th Cir. 1996). A party to a conspiracy may be held responsible for a substantive offense that a co-conspirator commits in furtherance of the conspiracy even if the party did not participate in or have

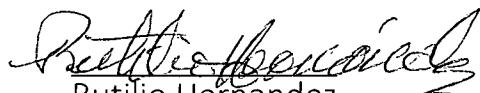
any knowledge of that offense. *Pinkerton v. United States*, 328 U.S. 640, 647, 90 L. Ed. 1489, 66 S. Ct. 1180 (1946). Thus, once the conspiracy and the defendant's knowing participation therein is proved beyond a reasonable doubt, a defendant is guilty of the substantive acts his partners committed in furtherance of the conspiracy. *United States v. Garcia*, 917 F.2d 1370, 1377 (5th Cir. 1990). Here, the evidence is sufficient under these theories.

Petitioner's argues that he was improperly convicted of money laundering. For the government to convict him, it must prove that he transferred money to or from the United States with the intent of promoting or carrying on of marijuana distribution. See 18 U.S.C. § 1956(a)(2). He contends that there is insufficient evidence showing that he knew that house was being used for illegal activity.

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 9nd day of July 2018.


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