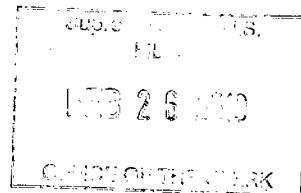


18-8269 **ORIGINAL**

No. _____



IN THE

SUPREME COURT OF THE UNITED STATES

ALEJANDRO Casillas Prieto — PETITIONER
(Your Name)

vs.

United States Of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE FIFTH CIRCUIT COURT OF APPEAL

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Alejandro Casillas Prieto
(Your Name)

P.O. BOX 26030

(Address)

Beaumont, Texas 77720

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

In July 5, 2017, Alejandro Casillas Prieto (Movant) file a motion with the United States District Court, Eastern District of Texas, for a reduction of sentence, pursuant to 18 U.S.C. §3582(c)(2) and Amendment-782 of the United States Sentencing Guidelines (USSG). The United States (Appellee) replied in opposition to the reduction stating, "Although Amendment-782 reduced the guideline range applicable in many cases involving crack cocaine, it did not change the base offense level applicable in this case." "When combined with the other guideline applications, the defendant's guide range at the original sentencing was LIFE IMPRISONMENT. Applying the revised guidelines with the other guideline applications made at the original sentencing result in a final offense level of 43 under the revised guidelines. At the established criminal history category of I, this results in a sentencing range of Life Imprisonment, the same as applied at the defendant's original sentence." (See Doc. 604). The district court entered a final order on August 30, 2017 denying Movant's motion. Movant then file a notice of appeal with the Fifth Circuit Court of Appeals, where court affirmed the district court's order:

- 1) Does the sentencing judge's oral pronouncement of the offense level 43 control?
- 2) Is the sentencing judge require to give notice, to Chapter 5, Part A, Commentary Note 2 of the U.S.S.G, when the Guideline range is above level 43 to defendants?
- 3) Is Commentary Note 2, of Chapter 5, Part A of the U.S.S.G vague as it does not give notice to its advisory or mandatory nature?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Solicitor General Of The United States

United States Attorney's Office

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 31, 2018.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §3553(a)

(a) Factors to be considered in imposing a sentence: The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider

- (1) the nature and circumstance of the offense and history and characteristic of the defendant;
- (2) the need for the sentence imposed;
- (3) the kind of sentence available;
- (4) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines;
- (5) any pertinent policy statement;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

18 U.S.C. §3582(c)(2)

- (c) Modification of an imposed term of imprisonment. The court may not modify a term of imprisonment once it has been imposed except that;
- (2) 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).

STATEMENT OF THE CASE

Honorable Court,

COMES NOW, Alejandro Casillas Prieto, Movant in pro se capacity, and respectfully file this petition for a writ of certiorari. In support, herein, Movant states the following:

LIBERAL CONSTRUCTION

Movant petitions honorable court to liberally construe this motion under the provisions and guidelines in *Haines v. Kerner*, 404 U.S. 519 (1972)(Where this court held, "A pro se pleadings are to be held to a less stringent standard than formal pleadings drafted by attorneys.") See also, *United States v. Scher*, 2011 U.S. Dist. LEXIS 108222 (5th Cir. 2011)(a pro se complaint, however, inartfully plead, must be held to a less stringent standards); *Franklin v. Rose*, 765 F.2d 82 (5th Cir. 1985)(that liberal construction allows active interpretation of a pro se pleadings to encompass any allegation which may raise a claim for relief.

BACKGROUND

In July 11, 2012, Movant was sentenced to a term of life imprisonment for one count of conspiracy to possess, with intent to distribute methamphetamine, 21 U.S.C. § 846. Preceding the sentencing, the Pre-Sentence Report fPSR held that Movant was responsible for the quantity of two (2) kilograms of methamphetamine (actual).

Applying the applicable guidelines as they existed on the date Movant was sentenced, the methamphetamine translated into a Base Offense level of 38.

Amendment 782 of the USSG, revised the "Drug Quantity Table" to a two-level adjustment of the Base Offense level for controlled

substance. Moreover, Amendment 782 was made retroactive by the Sentencing Commission, pursuant to USSG §1B1.1D(C), effective November 1, 2014.

(A) In 7/5/17, Movant filed a motion under 18 U.S.C. § 3582(c) (2) to have his sentence corrected pursuant to Amendment 782. Movant affirm that after the appropriate adjustments, his offense level for purpose of resentencing is a guideline range of 41. Movant's Criminal History Computation remains the same Category I. Offense level 41, with Criminal History Category I, place Movant in a 324-405 months imprisonment. Movant moved the district court to resentence him to the low end of the adjusted guideline range. Moreover, Movant asked the district court to take into consideration his favorable post-sentence conduct.

(B) In July 25, 2017, the United States file its response to Movant's motion for reduction of sentence under 18 U.S.C. § 3582(c) (2) based on Amendment 782 to the USSG Manual. The government assertion was that because the amendment does not change the offense level in this case, the United States opposes the motion. Moreover, the government further asserted that Amendment 782 does reduce the guideline range in many cases involving crack cocaine, it did not change the base offense level applicable in this case. When combined with the other guidelines applications, Movant's guideline range at the original sentence was Life imprisonment, and applying the revised guidelines, couple with the other applications made at the original sentence, the result is the same with a final offense level of 43.

It was further stated, "Movant is correct that the base offense level would now be 36. However, at the original sentence he received a 7 level increase from the base offense level: Two for possession

of a weapon; three for offense role; and two for obstruction of justice. Therefore, a total offense level of 45 at the original sentence. However, due to Application Note 2, Chapter 5, Part A, of the 2011 Sentencing Guidelines, the Guideline level was cap at level 43, because an offense level of more than 43 "is to be treated as an offense level 43."

(C) In August 11, 2017, Movant replied to Government's motion in opposition for a sentence reduction. Movant concede seven (7) levels were add for specific offense characteristics, for a total offense level of 45. However, Movant argued, that the district court does not have the inherent authority to reduce the defendant's sentence, based solely on the plain language of the statute: § 3582(c)(2), "the court may reduce the term of imprisonment after taking into account the factors set forth in Title 18 U.S.C. § 3553(a)."

Furthermore, Movant moved the district court not to use the "advisory guideline range" embraced by the PSR, but what was orally pronounced during sentencing.

(D) In August 30, 2017, the United States District Court for the Eastern District of Texas-Sherman Division, entered a final order denying the 18 U.S.C. § 3582(c)(2) without briefing. In September 11, 2017, Movant filed a timely Notice of Appeal with aforementioned court.

(E) In February 27, 2018, Movant filed his appeal from the United States District Court. The Statement of the issue was, whether the district court committed reversible error in determining that defendant is not eligible for sentence reduction, pursuant to the retroactive amendment to section 2D1.1 of the USSG based upon its belief that defendant's sentencing guideline range was level 45.

On appeal, Movant, declared that denial of 18 U.S.C. § 3582(c)(2) motion for sentence reduction is reviewed for abuse of discretion. United States v. Henderson, 636 F.3d 713 (5th Cir. 2011) ("A district court abuses its discretion if it bases its decision on an error of law or clearly erroneous assessment of the evidence.").

Section 3582(c)(2), authorizes a court to modify a 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. § 944(o). See, United States v. Chopane, 603 Fed. Appx. 325 (5th Cir. 2014).

Amendment 782 and 788 became effective on November 1, 2014 and retroactively lowered the base offense level in USSG § 2D1.1. The district court has authority to entertain a § 3582(C)(2) motion when sentences are imposed in light of the guideline. Freeman v. United States, 562 U.S. 522 (2011).

In Movant's case, the USPO determined that defendant was accountable for 2.07 kilograms of methamphetamine, which at the time equaled to a base offense level of 38. However, the PSR recommended defendant received an increase of 7 levels from the base offense level. There, defendant's total offense level was 45 with Criminal History Category of I. In chapter five (5), Part A, Note Two (2), of the USSG, states: "In rare case, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

At sentencing the Judge stated: "Based upon a preponderance of the evidence presented and the fact in the report, while viewing the Sentencing Guidelines as advisory, the court concluded that the

offense level was 43, Criminal History level I, after taking the § 3553(a) factors into account, which provides for an advisory guideline range of life imprisonment."

F) In April 11, 2018, the United States file its brief on appeal from the district court. The government's argument is that the district court did not err denying Movant's Section 3582(C)(2) motion because his guideline sentence range was not affected by Amendment 782.

It was also stated, "In Movant's PSR the USPO determined that he was responsible for 2.03 kilograms of methamphetamine. That quantity triggered a base offense level of 38 under the sentencing guideline then in effect." Movant's offense level was increased by two under USSG § 2D1.1(b)(1) because he possessed a dangerous weapon during the offense and he received a three-level increase under USSG § 3B1.1(b) because he was a manager or supervisor of the criminal activity, and also received a two-level adjustment under § 3C1.1 for Obstruction of Justice. Nevertheless, under USSG § Chapter 5, Part A, Cmt. N.2 Offense level 43 was used because that was the highest level on the sentencing table."

The Government's response point out that the revised drug guidelines and the other adjustment made at Movant's § 3582(C)(2) motion resulted in a final offense level of 43, which yielded the same as Movant's original sentencing of life imprisonment. It was further stated that the Sentencing Commission identifies amendments that may be applied retroactively and articulates the proper procedure for implementing them in USSG § 1B1.10. And cited, Dillion v. United States, 560 US 817 (2010)(where this court set out a two-step approach for considering a motion under section 3582(C)(2)).

Moreover, the Government also stated that the analysis conducted revealed that Movant's amended guideline were not effected and there was no change.

G) In May 25, 2018, Movant filed his reply to the Government's response. Movant argued the Circuit Court to reject the Appellee's position that the district court did not err in denying Appellant's motion for reduction of sentence under 18 U.S.C. § 3582(c)(2).

Movant expressed his assessment that Appellee reliance on this court decision in *Dillion v. United States*, 560 US 817 (2010), to argue that he is not entitled to a sentence reduction was of. *Dillon*, which announced a two-step process did not resolve the factual dispute in the record of Appellant's case. This was because it is well settled law, that when sentencing a defendant, a district court's oral pronouncement controls any sentencing decisions. On the record at no point did the district court orally express the numeric enhancement level concerning any of the specific offense characteristic enhancements, or the reliance of USSG § Chapter 5, Part A, Comt. Note 2.

Moreover, following this court's seminal case on the topic of *Booker v. United States*, 543 U.S. 220 (2005), the federal sentencing guidelines were made advisory given a district judge the discretion to depart from any findings as to where a defendant was placed on the sentencing grid. *United States v. Howza*, 254 Fed. Appx. 188 (4th Cir. 2007).

H) In August 31, 2018, the United States Court of Appeals for the Fifth Circuit rendered its decision denying Movant's appeal. The court held, "the district court correctly determined that the revised total offense level for Casillas Prieto's drug trafficking

conviction was 43. Amendment 782 consequently results in no change in Casillas Prieto's drug trafficking sentence because, even factoring in the Amendment's reduction of the base offense level, Casillas Prieto's has total offense level that corresponds to a guideline range of life imprisonment, i.e., the guideline range that applied at the time of the initial sentence.

REASONS FOR GRANTING THE PETITION

1. The district court Judge's oral pronouncement of the offense level 43 control.

The district court erred and abused its discretion in finding that Movant was not entitled to a two-level reduction under Amendment 782. The Fifth Circuit Court of Appeal erred when it failed to address Movant's argument that the oral pronouncement of level 43 controls.

Both aforementioned courts fail to factor into its analysis that the sentencing judge never verbally expressed that Movant's overall offense level topped out at level 45. Instead, the sentencing court went on to state that after adopting the PSR that:

"while viewing the sentencing guidelines as advisory, and taking into account the § 3553(a) factors, the court concludes that the total offense level is 43, the Criminal History level is 1, which provides for an advisory guideline range here of life imprisonment."

Movant's argument cannot be refuted because the sentencing judge has used her discretion to go over the offense level table 43. See Exhibit 1 and 2. In Movant's sentencing, Exhibit 1, it was made clear that the sentencing judge confirmed that the base offense level was only 43. (Sentencing transcripts Doc. 458, filed on 7/3/12).

Only twenty-three months later, Exhibit 2, the same sentencing judge, Marcia Crone, and same trial attorney, De La Garza, engaged in the sentencing of defendant, Munoz, in case No. 4:11-CR-00259-MAC-ALM. (Sentencing transcript Doc. 998, filed on 6/18/14). It is

clear from Mr. Munoz's record that the judge can use her discretion and use a higher base offense level when the facts of the case requires, using the guidelines as only advisory, and considering the § 3553(a) factors. In Munoz's sentencing it was made clear that the judge disregarded USSG Chapter 5, Part A, Commentary Note 2 and place Munoz in base offense level 44.

The attempts of the government, and assessment of both courts to insert that "under USSG Chapter 5, Part A, Commentary Note 2 [mandate] offense level 43 [to be] used because that was the highest level on the sentencing table, cannot rule the day.

This is because the sentencing court made no mention of this Commentary Note 2, and simply "concluded" that Movant's total offense level [was] 43, and its the court's oral pronouncement that controls. See, Martinez, 250 F.3d 941 (5th Cir. 2001). Therefore, without any clear indication of whether the district court was following USSG Chapter 5, Part A, Commentary Note 2, or simply utilized its discretionary authority to invoke the advisory guidelines rendered reliance on Dillon misplaced in light of its oral pronouncement that Movant's "total offense level [was] 43."

In conclusion, this court should reject the government's position and assessments of both courts, and remand this case to the district court with direction to reduce Movant's total offense level from 43 to a level 41 resentencing him within the sentencing range of 324 to 405 months imprisonment.

2. The Sentencing Judge was required to give notice of the use of Chapter 5, Part A, Commentary Note 2 when the base offense level is above the Guideline range of 43.

When sentencing Movant, the judge was mandated to explain to Movant that his base offense level was cap at level 43, per USSG Chapter 5, Part A, Commentary Note 2. Although post-Booker, the guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the guidelines sentencing range. See *United States v. Pampa*, 715 Fed. Appx. 421 (5th Cir. 2018)(citing *United States v. Gall*, 552 US 38 (2007)).

3. Commentary Note 2, of Chapter 5, Part A of the United States Sentencing Guidelines is vague as it does not give notice to its advisory or mandatory nature.

Because the guidelines are now advisory, district courts may not apply them as if they were mandatory or treat the guidelines range as presumptively reasonable. See *United States v. Davis*, 2018 U.S. App. LEXIS 13052 (11th Cir. 2018)(citing *United States v. Hill*, 643 F.3d 807 (11th Cir. 2011)).

By now inferring that Chapter 5, Part A, Commentary Note 2 was mandatory in Movant's Sentencing, the district court and the Fifth Circuit Court of Appeals err ... as this assessment of the guidelines is in direct violation of Booker. Fatally vague guideline provisions necessarily result in both "arbitrary enforcement by [courts]" and denial of "fair notice." Moreover, vague Guideline provision violate the Due Process Clause's void-for-vagueness doctrine. In *United States v. Johnson*, 135 S.Ct 2251 (2015), this court held, "It is a violation of the due process for a court to rely on a criminal sentencing scheme "so vague that it fails to give ordinary people fair notice ... or so standardless that it invites arbitrary enforcement."

in conclusion for reasons 2 and 3, this court must conduct a review, that district judges must give fair notice to Chapter 5, part A, Commentary Note 2 of the Guidelines and if Commentary Note 2 is vague as it does not give fair notice to its advisory or mandate.

Respectfully submitted,

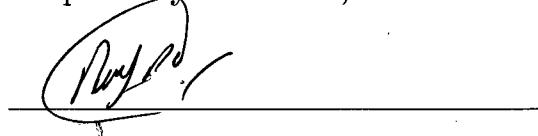


Alejandro Casillas Prieto
18154-078
United States Penitentiary
P.O. Box 26030
Beaumont, TX 77720

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ray P.", is written over a solid horizontal line.

Date: February, 15 - 2019