

18-8352

Supreme Court, U.S.  
FILED

DEC 03 2018

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

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LINO HERNANDEZ,

*Petitioner*

v.

UNITED STATES OF AMERICA

*Respondent*

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ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lino Hernandez  
Reg No. 13743-097  
Pro-Se Litigant  
Adams County Facility  
P. O. Box 1600  
Washington, MS 39190

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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).
- II. Whether there is frivolous issue with regard to Mr. Hernandez sentence. A review the district court's decision whether to reduce a sentence under §3582(c)(2).
- III. The disparities of sentence between Mr. Hernandez and his Co-defendants
- IV. The District Court abused its discretion in reducing Appellant's sentence to 292 months rather than 188 months pursuant to 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 292 months is both procedurally erroneous and substantively unreasonable. (in alternative the court should had reduced the sentence a list to 188 months regarding the mandatory minimum)

## PARTIES

Lino Hernandez, is the Petitioner; he was the defendant-appellant below.

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

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Lino Hernandez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit..

### OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Tenth Circuit is captioned as United States v. Lino Hernandez, No. 17-10518 and is provided in the Appendix to the Petition. [APPX, A]. The district court entered judgment 27<sup>th</sup> 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 September 12, 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.S.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.

21 U.S.C. § 841 Provides in part:

§ 841(A,1) (C,2)

§

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(c) Offenses involving listed chemicals. Any person who knowingly or intentionally--

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title;

shall be fined in accordance with title 18, United States Code, or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or

(2) involving a list I chemical, or both.

**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 782 appeal. On May 10, 2002, a complain was filed in the Eastern District of California charging reasonable cause to believe, that it would be used to manufacturing methamphetamine. The charges are because it was a "*BELIEVE*" but was not affirmed.

On August 12, 2003, Mr. Hernandez was to appear at the sentencing hearing before the Honorable England Jr. and was sentenced to term of 292 months for counts 1-3 and 240 months for count 6 the sentences should be served concurrently and also a term of supervision of 60 months for counts 1-3 and 36 months for count 6.

On May 15, 2017, Mr. Lino Hernandez submitted a Motion for Modification or 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. Hernandez entered a motion to appeal. The United States Court of Appeals affirmed the decision of the U.S. District Court and the mandate was filed on September 12, 2018.

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. Therefore, Mr. Hernandez is eligible for relief and the District Court had jurisdiction to grant that relief under § 3582(c)(2).

## B. Circuit Court Proceedings

Mr. Hernandez 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 Ninth 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 (10<sup>th</sup> Cir.1997). The Court of appeals affirmed that the district court acknowledge that Mr. Hernandez applicable guideline range had been lowered to 188 to 235 months' imprisonment, but concluded that Mr. Hernandez 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 38 and Criminal History Category of 1 a 235 to 293 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 38 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 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 Almendarez-Torres should be over turned); Appredi 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.<sup>133</sup> 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 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 188 months.

### 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 3<sup>rd</sup> day of December 2018.

  
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