

ORIGINAL

18-9734

No. _____

IN THE
SUPREME COURT of the UNITED STATES

FILED
JUN 11 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

UNITED STATES OF AMERICA,

v.

HECTOR DOMINGUEZ-GABRIEL

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER THE LOWER COURT(S) ABUSED ITS DISCRETION
WHEN IT DENIED APPELLANT SECTION 3582(c)(2) RELIEF?

LIST OF PARTIES

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

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix "A" to the petition.

The opinion of the United States District Court appears at Appendix "B" to the petition.

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CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. Art. III §2, cl. 3

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have committed; but when not committed within any State, the Trial shall be at such Place or Places as Congress may by Law have Directed.

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases 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 to the same offence to be twice put in jeopardy of life or limb; 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.

U.S. Const. Amend. VI

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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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JURISDICTION

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

STATEMENT OF THE CASE

Appellant Hector Dominguez-Gabriel (hereinafter "Appellant"), appeals an order entered on July 14, 2016 in the United States District Court for the Southern District of New York, by the Honorable Deborah A. Batts, United States District Judge, denying his motion for reduction of sentence pursuant 18 U.S.C. § 3582(c)(2).

The indictment in this case was filed on January 10, 2012, it charged Appellant in three counts. Count One charged him with conspiracy to launder the proceeds of narcotics transactions in violation of 18 U.S.C. § 1956(h). Count Two charged him with conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 846. Count Three charged him with conspiracy to import into the United States five kilograms or more of cocaine, in violation of 21 U.S.C. § 963.

On December 14, 2010, following a jury trial, Appellant was convicted of all three counts of the indictment. On August 11, 2011, Honorable Robert P. Patterson, United States District Judge, calculated his sentencing range pursuant to the U.S. Sentencing Guidelines to be 324 to 405 months imprisonment and sentenced him principally to a below-Guidelines sentence of 240 months' imprisonment. The conviction and sentence was affirmed in United States v. Dominguez-Gabriel, 511 F. App'x 17 (2nd Cir. 2013).

On February 24, 2015, Appellant filed a pro-se motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). On May 11, 2016, the U.S. Probation Office for the Southern District of New York issued a memorandum recalculating Appellant's Guidelines range as 262-to-327 months' imprisonment. The Probation Office concluded that he was not eligible for a reduction in sentence because his original sentence was below the low end of this recalculated Guideline range. As a result, on

on July 14, 2016, Judge Batts denied Appellant's motion. Appellant is currently serving his sentence and now appeals the matter.

RELEVANT FACTS

At sentencing on August 11, 2011, Judge Patterson determined (over Appellant's objections) that he was responsible for the distribution of approximately 78 Kilograms of cocaine. Based on the then-existing Drug Quantity Table set forth in U.S.S.G. § 2D1.1 this quantity of cocaine yielded a base offense level of 36. Because Appellant was convicted of a money laundering offense, two level were added to the base offense level for the narcotics offenses pursuant to U.S.S.G. § 2S1.1 (b)(2)(B). Judge Patterson also determined that Appellant was a manager of the ^{1]} criminal organization, warranting an additional three-level increase, and yielding a total offense level of 41. At Criminal History Category I, Appellant's Guidelines sentence was 324 to 405 months. Judge Patterson sentenced Appellant to a term of 240 months imprisonment, 240 months on Count One, and 120 months' on Count Two and Three, running concurrently.

ARGUMENT

"A district court may not generally modify a term of imprisonment once it has been imposed". Cortor-real v. United States, 486 F. 3d 742, 744 (2nd Cir. 2007). However, 18 U.S.C. § 3582(c)(2) grants district courts limited authority to modify a term of imprisonment once it has been imposed. Specifically, district courts may reduce a prison term if the defendant's sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission ... if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

1]. Notably, the manager role applied only to the money laundering count; and there was no drugs seized in this case, the money was effectively converted into drug quantity for the base offense level. See, Sentencing Transcripts, page 64.

In the case at bar, Judge Batts incorrectly determined that Appellant was not eligible for a sentence reduction. In this case, Amendment 782 reduced the base offense level applicable to Appellant's money laundering and narcotics convictions from level 36 to 34, which correspondingly reduced his total offense level from 41 to 39. As a result, the amendment lowered the applicable Guidelines range from 324 to 405 months' imprisonment to 262 to 327 months' imprisonment. If this Court calculate the extent of Appellant's available sentencing reduction using the same downward variance of 84 months that it applied at the initial sentencing, the new sentence would be 178 months imprisonment.

The version of the Guidelines that applied when Appellant was sentenced, section 1B1.10(b)(2)(B) read in relevant part: "if the original term of imprisonment imposed was less than the term of imprisonment provided by the Guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range ... may be appropriate." The policy was ambiguous about whether the "applicable: guideline range used for calculating the extent of an available sentencing reduction included a variance or departure applied at sentencing. The Second Circuit interpreted section 1B1.10 to allow a district court to re-apply a variance or departure when reducting a defendant's sentence pursuant to section 3582(c)(2). See United States v. Rivera, 662 F. 3d 166, 177 (2nd Cir. 2011)(discussing a circuit split on the issue of whether a variance or departure could be re-applied when reducing a sentence).

Failure to apply the version of the Guidelines when Appellant was sentenced would clearly be a violation of the Ex Post Facto Clause of the United States Constitution.

**I. THE LOWER COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT
SECTION 3582(c)(2) RELIEF**

A. LEGAL STANDARD:

Defendant moves for a reduction in his sentence pursuant to 18 U.S.C. § 3582(c)(2), which provides that a court may modify a term of imprisonment

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... after considering the factors set forth in [18 U.S.C. §] 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 Supreme Court has established a two-step inquiry to guide a district court in its consideration of a Section 3582(c)(2) motion.

See Dillion v. United States, 560 U.S. 817, 826 (2010). First, the district court must determine whether the defendant in question is 'eligible' for a reduction in sentence. Second, if a defendant is eligible for resentencing, the court must consider any applicable factors under 18 U.S.C. § 3553(a) to determine whether the authorized reduction is warranted in whole or in part under the particular circumstances of the defendant's case. Dillion, 560 U.S. at 827.

A defendant is eligible for a reduction when he or she was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2); see Dillion, 560 U.S. at 827 (recognizing that Section 3582(c) requires a court "to follow the [Sentencing] Commission's instructions in § 1B1.10 to determine the prisoner's eligibility for a sentence modification") U.S.S.G. § 1B1.10(a) ("In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual...,"

the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).")

Recently, in Hughes v. United States, No. 17-155 (June 6, 2018) the Supreme Court held that prisoners who: (1) pled guilty to a drug offense, and (2) entered into a plea agreement under Rule 11(c)(1)(C) (which means if the sentencing court accepts the agreement, the court is required to impose the agreed-upon sentence) are for the most part able to benefit from retroactive guideline changes.

The court explained that this is due to the fact that in considering a Rule 11(c)(1)(C) plea agreement, the sentencing court has to: (1) calculate the guideline range, and (2) evaluate whether to accept the plea agreement in light of that guideline range. Thus, generally a plea agreement is "based on", the guidelines. Retroactive guideline changes can be applied in cases that were based on the guidelines.

The issues in Hughes were whether a defendant may seek relief under § 3582(c)(2) if he entered a plea agreement specifying a particular sentence under Federal Rule of Criminal Procedure 11 (c)(1)(C).

In a Rule 11(c)(1)(C) agreement the Government and a defendant "agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply," and "such a recommendation or request binds the court once the court accepts the plea agreement". Rule 11(c)(1)(C). When the Government and a defendant enter a Rule 11(c)(1)(C) agree-

ment, the district court has three choices: It "may accept the agreement, reject it or defer a decision until the court has reviewed the presentence report". Rule 11(c)(3)(A). If the court rejects the agreement, the defendant may withdraw his guilty plea. Rule 11(c)(5)(B).

In Hughes, the agreement stipulated that Hughes would receive a sentence of 180 months, but it did not refer to any particular guideline range. At the sentencing hearing, the district court accepted the agreement and sentenced Hughes to 180 months in prison.

Less than two months after the district court sentenced Hughes, the Sentencing Commission adopted Amendment 782 to the Guidelines. The Amendment reduced the base offense level by two levels for most drug offenses. As a result, Hughes filed a motion for a reduced sentence under § 3582(c)(2). The district court denied the motion, concluding that Hughes is ineligible for relief; and the Court of Appeals affirmed. Both courts concluded that Hughes was ineligible for a reduced sentence because his plea agreement did not expressly rely on a Guidelines range.

The United States Supreme Court reversed the judgement of the court of appeal and remanded the case back. Noting, "there is no reason a defendant's eligibility for relief should turn on the form of his plea agreement". Hughes Supra. ("What is at stake in this case is a defendant's eligibility for relief, not the extent of that relief").

The Supreme Court rejected the Government's position that allowing courts to reduce the sentences of defendants like Hughes would be inconsistent with the Commission's policy statement in U.S.S.G. § 1B1.10, which provides that when a district court

modifies a sentence under § 3582(c)(2) it "shall substitute only the [retroactive] amendments listed in subsection (d) for the corresponding guidelines provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected". U.S.S.G. § 1B1.10(b)(1). According to the Government, no "guidelines provisions" are applied when a defendant enters a Rule 11(c)(1)(C) agreement because at the moment of sentencing that is, after the court has already accepted the agreement; Rule 11 prohibits the court from imposing any sentence other than the one the parties bargained for.

The Supreme Court noted, that the Government's arguments failed for two (2) reasons. First, "the Government's interpretation of § 1B1.10 depends on an artificial distinction between a court's decision to accept a Rule 11 agreement and its decision to impose the agreed-upon sentence. And second, the Commission's policy statement "seeks to isolate whatever marginal effect the since-rejected Guidelines had on the defendant's sentence." "Accordingly, relief under § 3583(c)(2) should be available to permit the district court to reconsider a prior sentence to the extent the prisoner's Guidelines range was a relevant part of the framework the judge used to accept the agreement or determining the sentence."

Hughes Supra.

B. THE GUIDELINES WERE USED IN DETERMINING THE INSTANT SENTENCE:

Under the Sentencing Reform Act of 1984, the United States Sentencing Commission establishes Sentencing Guidelines based on the seriousness of a defendant's offense and his criminal history. Dillion v. United States, 560 U.S. 817, 820 (2010). In combination,

those two factors yeilded a range of potential sentences for a district court to choose from in sentencing a particular defendant. In the typical sentencing case there will be no questoin that the defendant's Guidelines range was a basis for his sentence. Molina-Martinez v. United States, 136 S. Ct. 1338 (2016) ("The Sentencing Guidelines provide the framework for the tens of thousands of federal senencing proceedings that occur each year") Id. at 1342

A principal purpose of the Sentencing Guidelines is to promote "uniformity in sentencing imposed by different federal courts for similar criminal conduct." Id. The court must consider sentencing factors listed in 18 U.S.C. § 3553(a), including "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" § 3553(a)(6).

The Act requires the Commission to review and revise the Guidelines from time to time. 28 U.S.C. § 994(o). When the Commission amends the Guidelines in a way that reduces the Guidelines range for "a particular offense or category of offenses," the Commission must "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." § 994(u).

If an amendment applies retroactively, the Act authorizes district courts to reduce the sentences of prisoners who were sentenced "based on" a Guidelines range that would have been lower had the amendment been in place when they were sentenced.

A district court imposes a sentence that is "based on" a Guidelines range if the range was a basis for the court's excercise of discretion in imposing a sentence. To "base" means "to make from or serve as a foundation for", or "to use (something) as the thing

from which something else is developed". Likewise, a "base" is the starting point or foundational part of something," or "a point, part, line, or quantity from which a reckoning or conclusion proceeds." See Hughes v. United States, U.S. No. 17-155 (June 4, 2018) (Where the Supreme Court defined "based on"). In the case at bar, it is undisputed that relevant sentence was developed from, and "based on" the Guidelines. "Even if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence".

Molina-Martinez, 136 S.Ct at 1345. In general, 18 U.S.C. § 3582(c) (2) allows district courts to reconsider a prisoner's sentence based on a new starting point -- that is, a lower Guidelines range -- and determine whether a reduction in the prisoner's sentence is appropriate.

Thus, a sentence imposed pursuant to a Pre-sentencing Investigations Report (PSI) is no exception to the general rule that a defendant's Guidelines range is both the starting point and a basis for his ultimate sentence. cf., Hughes, Supra, ("The Sentencing Guidelines prohibit district courts from accepting type-C agreements without first evaluating the recommended sentence in light of the defendant's Guidelines range").

In sum, the judges decision to accept the recommended PSI and impose the recommended sentence in this case was clearly based on the Guidelines. Declining to allow the defendant to move for a reduction contravenes the purpose of new Amendment, 18 U.S.C. § 3582(c)(2), and the "offense of conviction" which was intended to eliminate a systemic injustice of sentences being imposed far in excess of the mandatory minimum ranges provided by statute. See,

the plurality's opinion in Freeman v. United States, 131 S. Ct. 2685, 2695 (2011)(authored by Justice Kennedy) explaining that denying a sentence reduction may create an arbitrary distinction between similar defendants based on the terms of their plea agreements [or PSI]. Id at 2695.

C. "BASED ON":

In this case, the defendant was sentenced under § 2S1.1 of the Guidelines, but the sentencing range was determined by the Drug Quantity Table. Therefore, the guidelines range applicable the defendant was subsequently lower as a result of Amendment 782. And, the district court's conclusion that it lacked authority to the defendant's sentence was in error. Because it was based on the guidelines.

The Hughes court, makes clear that § 3582(c)(2) modification proceedings should be available to permit the court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence in this case. "If the judge uses the [calculated] sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence". Freeman v. United States, 564 U.S. at 529 (2011); and Hughes, Supra. (same)

Here, the sentencing court independently calculated the defendant's applicable Guidelines range before it adopted the PSR's recommendation as the government's urged, and it rejected the defendant's objection to the government's position. (See Attachments). See United States v. Leonard, 844 F.3d 102, 109-10 (2nd Cir 2016)(Stating that Freeman's plurality "appeared to recognize the possibility that a sentence can be based on the Guidelines even if departing or varying from the applicable Guideline's range"). See also, Freeman, 564 U.S. at 54

(Stating that "judges decision to accept the [11(c)(1)(c)] plea [or the PSR] and impose the recommended sentence is likely to be based on the Guidelines").

The facts of this case makes clear that the basis for the Government's requested sentence was the identified Guidelines range, with an upward departure specifically authorized by the Guidelines.

In urging otherwise, the Government suggests that the sentence is based on a crime not charged or proven recommended by the PSR.

D. "APPLICABLE TO":

When a defendant (like the one in this case) is found guilty puruant to an indictment handed down by the Governement, his applicable Guidelines range for purposes of determining § 3582(c)(2) eligibility is that determined by the court as set-forth in the Guidelines.

To be clear, had the defendant been sentenced under the Guidelines as amended, the recommended new range of punishment would "subsequently lower". 782 reduced his sentence for both the drug and money-laundering offenses. The court erred in not recognizing that his money-laundering was subject to the same reduction as were the drug offense.

Because the defendant was sentenced to a term of imprisonment based on a subsequently lowered sentencing range and because the subsequent amendment lowered his applicable Guidelines ranges he is eligible for a sentence reduction under § 3582(c)(2).

Thus, it must be stressed that the Government through its ability to craft indictments, is the master of the scope of the charged crime. It is the prosecution which sets the parametars to which a 21 U.S.C. § 841(a)(1) sentence must be confined. Having set the stage, the Government must be satisfied with the limits of its

creation.

There is considerably more legal force or practical effect to the thesis that there is no reason for petitioner's eligibility for relief in this case to turn on the form of his PSR. As explained in Hughes, "the Government's interpretation of § 1B1.10 depends on an artificial distinction between a Court's decision to accept a [PSR] and its decision to impose the agreed-upon sentence". It is undisputed, in this case, that the defendant's Guidelines range was a relevant part of the framework used to determine the sentence. Allowing the Government to use this artificial distinction, would deprive the defendant of "uniformity in sentencing imposed by different federal courts for similar criminal conduct" Molina-Martinez, 136 S. Ct. 1342.

Recently, In Rosales-Mireles v. United States, No. 16-9493, 2018 U.S. LEXIS 3690 (2018), the Supreme Court held that the Court must correct an error in the guidelines computation even if the error was not preserved at sentencing. The Court held that the Sentencing Guideline miscalculation must be corrected if the error was plain. The Court said, Federal Sentencing law requires that a sentence be "sufficient, but not greater than necessary" to achieve the goal of sentencing. Using a sentencing guideline range that is too high; creates a danger that the sentence will be "greater than necessary" keeping people in prison longer than necessary in turn threatens the "fairness, integrity, or public reputation of the judicial proceeding". Id.

EX POST FACTO CLAUSE

The United States Constitution forbids the Federal Government from enacting any "ex post facto law". U.S. Const. Art. I, § 9, cl. 3. The "touchstone" of the inquiry into whether the ex post facto clause has been violated is "whether a given change in law presents a sufficient risk of increasing the measure of punishment attached to the covered crimes." Peugh v. United States, 133 S. Ct. 2072, 2082 (2013). The inquiry into whether a change in law creates a disadvantage is "a matter of degree" that cannot be narrowed to a "single formula." Id. at 2082.

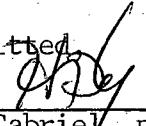
The Supreme Court made clear in Peugh that District Courts must begin their sentencing analysis with the Guidelines in effect at the time of the offense and use them to calculate the sentencing range correctly; and those Guidelines will anchor both the district court's discretion and the appellate review process in all of the ways we have described. The newer Guidelines, meanwhile, will have the status that is simply not equivalent for ex post facto purposes. Id. Thus, because the 2011 Guidelines were in effect at the time of Appellant's crime, the Court should use the 2011 Guidelines to calculate Appellant's range and not the recently published 2018 version.

Under 18 U.S.C. § 3553(a)(4)(A)(ii), district courts are instructed to apply the Sentencing Guidelines issued by the United States Sentencing Commission that are "in effect on the date the defendant is sentenced." The Sentencing Guidelines reiterate that statutory directive, with the proviso that "[i]f the Court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the Court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." U.S.S.G. § 1B1.11(a),(b)(1).

CONCLUSION

For all the reasons stated herein, the petition for writ of certiorari should be granted.

Respectfully Submitted,


Hector Dominguez-Gabriel, pro-se