

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

JUN 7 2019

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AMANDO VILLARREAL HEREDIA,  
AKA Gordo, AKA Gordo Villareal, AKA  
Amando Villareal Heredia, AKA Armando  
Villareal Heredia,

Defendant-Appellant.

No. 18-50276

D.C. No. 3:10-cr-03044-WQH-1  
Southern District of California,  
San Diego

ORDER

Before: LEAVY, BEA, and N.R. SMITH, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See Fed. R. App. P. 35.*

Heredia's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 19) are denied.

No further filings will be entertained in this closed case.

NOT FOR PUBLICATION

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UNITED STATES OF AMERICA,

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AMANDO VILLARREAL HEREDIA,  
a.k.a. Gordo, a.k.a. Gordo Villareal, a.k.a.  
Amando Villareal Heredia, a.k.a. Armando  
Villareal Heredia,

Defendant-Appellant.

No. 18-50276

D.C. No. 3:10-cr-03044-WQH-1

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
William Q. Hayes, District Judge, Presiding

Submitted March 12, 2019\*\*

Before: LEAVY, BEA, and N.R. SMITH, Circuit Judges.

Amando Villarreal Heredia appeals pro se from the district court's order denying his motion for a sentence reduction under 18 U.S.C. § 3582(c)(2). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

On remand from this court, the district court determined that Heredia's offenses involved more than 45 kilograms of methamphetamine mixture and, therefore, that Amendment 782 to the Sentencing Guidelines did not lower his base offense level. Because Heredia's Guidelines range was not lowered, the district court concluded that he was ineligible for a sentence reduction. Heredia contends that the district court erred in its drug quantity determination, and that he is eligible for a reduction. We review the district court's eligibility determination de novo, and its drug quantity calculation for clear error. *See United States v. Mercado-Moreno*, 869 F.3d 942, 953 (9th Cir. 2017).

The court's quantity finding is amply supported by the facts contained in the plea agreement and the presentence report ("PSR"). Contrary to Heredia's contention, the district court was not precluded from relying on the uncontested facts in the PSR to determine drug quantity. *See id.* at 957. That the district court adopted the plea agreement's Guidelines calculation at sentencing, rather than the calculation stated in the PSR, does not change this conclusion. Moreover, because the plea agreement stated that the conspiracy involved *more than* 1.5 kilograms of pure methamphetamine, the district court's quantity determination did not conflict with the plea agreement, and the government did not breach the plea agreement by arguing for an amount greater than 1.5 kilograms. The district court did not clearly err in its drug quantity determination; thus, it correctly concluded that Heredia was

ineligible for a sentence reduction. *See* 18 U.S.C. § 3582(c)(2); U.S.S.G.

§ 2D1.1(c)(1) (2014).

**AFFIRMED.**

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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
9

10 UNITED STATES OF AMERICA,

11 Plaintiff,

10cr3044WQH

12 v.

ORDER

13 AMANDO VILLARREAL HEREDIA (1),

14 Defendant.

HAYES, Judge:

15 The matter before the Court is the order denying Defendant's motion for a  
16 sentence reduction under 18 U.S.C. § 3582(c)(2) on remand from the United States  
17 Court of Appeals for the Ninth Circuit. (ECF No. 2396).

18 **FACTUAL BACKGROUND**

19 On March 12, 2018, the United States Court of Appeals for the Ninth Circuit  
20 remanded this case for the Court to "reconsider its quantity determination in light of  
21 *Mercado-Moreno* [and] determine whether it is more likely than not that Heredia is  
22 responsible for the new quantity threshold of 4.5 kilograms of actual methamphetamine  
23 or 45 kilograms of methamphetamine mixture . . . and assess Heredia's eligibility for  
24 a sentencing reduction accordingly." (ECF No. 2396). The Court ordered further  
25 briefing. (ECF No. 2395).

26 On April 4, 2018, Plaintiff United States filed a supplemental response in  
27 opposition to Defendant's motion for reduction of sentence under 18 U.S.C. §  
28 3582(c)(2). Plaintiff United States asserts that the facts admitted by the Defendant in

1 the plea agreement and the uncontested facts in the Presentence Report establish that  
2 Defendant exercised direct control and supervision over the entirety of the drug  
3 distribution of the RICO conspiracy and narcotics distribution conspiracy charged by  
4 the grand jury in this case. Plaintiff United States contends that the conspiracy was  
5 responsible for more than 45 kilograms of methamphetamine mixture and Defendant  
6 is not eligible for a sentence reduction under Amendment 782.

7 On June 27, 2018, Defendant filed a reply to the Government's supplemental  
8 response in opposition to Defendant's motion to reduction of sentence under 18 U.S.C.  
9 § 3582(c)(2). Defendant asserts that the application of more than "1.5 kilograms of  
10 actual methamphetamine" in his case undermine the purpose of the plea bargaining.  
11 (Plea Agreement, ECF No. 2041 at 7.).

### 12 **RULING OF THE COURT**

13 Defendant agreed in the factual basis of his plea agreement that he "acted as an  
14 organizer and leader in the charged methamphetamine importation and distribution  
15 conspiracy, an offense which involved five or more participants." (ECF No. 2041 at 7).  
16 Defendant agreed that he "knew that members of the FSO would, during the time frame  
17 of the above-noted conspiracy, import and distribute more than 1.5 kilograms of actual  
18 methamphetamine." *Id.* At the time of the sentencing in this case, the Guidelines  
19 required only a finding of 1.5 kilograms of actual methamphetamine to trigger the  
20 maximum base offense level.

21 At sentencing, the Court made the following findings,

22 With respect to the Advisory Sentencing Guidelines, the Court does find  
23 with respect to the methamphetamine importation distribution conspiracy  
24 that the base offense level is a 38 pursuant to Section 2D1.1(c)(1).  
Importation of methamphetamine, plus two, pursuant to Section  
2D1.1(b)(5).

25 There is a plus four for the role, aggravated role, pursuant to Section  
26 3B1.1(a). The adjusted offense level is 44. And then under the murder  
27 conspiracy, it starts at a 33, pursuant to Section 2A1.5, plus four for the  
role, pursuant to Section 3B1.1(a), which is an adjusted offense level 37.  
That results in the base offense level of 44. It only scores half a point.

28 There is a three-level reduction for acceptance of responsibility. Total  
offense level is 41. Mr. Villareal has one criminal history point from a

1 Health and Safety Code conviction in 1999 at the time he was 21.

2 . . . -- that places him in a Criminal History Category 1. The guideline  
3 range is 324 to 405 months.

4 Under the 3553 factors, the nature and circumstances of the offense are  
5 aggravated. It is really hard to come up with a situation, a drug case, that  
6 can be more aggravated than this one. Certainly this is a gentleman whose  
7 role was significant. He was a leader or organizer. He qualified -- clearly  
8 qualifies for an aggravated role.

9 In addition to significant amounts of dangerous narcotics, the defendant  
10 was involved in a conspiracy to commit murder. It is hard to imagine what  
11 is worse than using violence to engage and further the activities of a  
12 significant drug trafficking organization.

13 It does appear certainly from the presentence report that this is an  
14 individual who's been involved in the drug business for an extended period  
15 of time. He's approximately 35 years of age. There is really not even a real  
16 suggestion in the presentence report that he's been involved in any legal  
17 employment, other than the drug business -- any legal employment at all,  
18 really in his life.'

19 And it does appear that his life really had been dedicated to furthering the  
20 activities of this drug conspiracy or others. He's been involved in it  
21 basically, it looks like, his whole life, and it has been a significant amount  
22 of drugs have been distributed, and they've used threats of violence and  
23 actual violence in order to further the ends of the drug trafficking  
24 organization.

25 So it is hard to come up with anything that is a case that would be more  
26 aggravated than this, and certainly this -- Mr. Heredia's role is a significant  
27 one, and that is why he qualifies for the aggravated role adjustment . . . ,  
28 he is here because of his participation in a massive drug conspiracy that  
was violent.

The need for the sentence to reflect the seriousness of the offense, promote  
respect for the law, and provide just punishment, as the parties have  
indicated -- both lawyers have indicated that they have -- they are  
recommending a sentence of 360 months in custody, which is a significant  
sentence by anybody's definition. It is a recommendation that I'll follow.  
I think it is a reasonable one.

(ECF No. 2177 at 13-14). The Court entered judgment imposing a term of  
imprisonment of 360 months on the RICO conspiracy count and the narcotics  
distribution count to be served concurrently in addition to a 5 year term of supervised  
release on each count. (ECF No. 2068).

On December 28, 2015, this Court entered an order denying Defendant's request  
for resentencing under Amendment 782 to the United States Sentencing Guidelines.  
The order stated,

Defendant requests resentencing under the United States Sentencing Guidelines as amended on November 1, 2014. Defendant contends that his base offense level of 38 at the time of sentencing was based upon distribution of more than 1.5 kilograms of actual methamphetamine. Defendant contends that the new amendments to the United States Sentencing Guidelines result in a base offense level of 36 for an offense level involving 1.5 kilograms of actual methamphetamine.

The Government opposes any reduction in Defendant's sentence pursuant to the November 1, 2014 amendments to the United States Sentencing Guidelines. The Government contends that the base offense level remains at 38 under the 2014 amendments to the Sentencing Guidelines. The Government further asserts that the Court should exercise its discretion and deny any reduction in this case, even if the 2014 amendment changed the applicable base offense level.

In the Plea Agreement the admitted factual basis provided in part:

Given his personal participation in the affairs of the FSO, defendant Armando Villareal Heredia knew that members of the FSO would, during the time frame of the above-noted conspiracy, import and distribute more than 1.5 kilograms of actual methamphetamine. . . .

Defendant Armando Villareal Heredia acted as an organizer and leader in the charged RICO conspiracy, an offense which involved more than five participants. Defendant Armando Villareal Heredia also acted as an organizer and leader in the charged methamphetamine importation and distribution conspiracy, an offense which involved five or more participants.

(ECF No. 2041 at 7). The stipulated facts in the plea agreement state that Defendant was the "an organizer and leader" in a conspiracy involving more than five participants and the uncontested facts in the pre sentence report established that "[d]uring the course of the investigation, agents seized at least 100 pounds of methamphetamine, 2,765 pounds of cocaine, 40,300 pounds of marijuana and more than one dozen firearms." (ECF No. 2014 at 7; ECF No. 2048 at 9).

Amendment 782 to the United States Sentencing Guidelines, effective November 1, 2014, lowered the penalties for drug offenses by reducing the offense level in the § 2D1.1 Drug Quantity Table by two levels. The Amended Guidelines require that a base offense level of 38 requires an offense involving 45 kilograms or more of methamphetamine or 4.5 kilograms of actual methamphetamine. In this case, the uncontested drug quantities seized during the narcotics distribution conspiracy for which Defendant acted as an organizer and a leader involved "at least 100 pounds of methamphetamine" which is more than 45 kilograms of methamphetamine. The Court concludes that the base offense level under the uncontested drug quantities seized during the narcotics distribution conspiracy for which Defendant acted as an organizer and a leader remains a level 38. The Court concludes that Defendant is not entitled to resentencing under Amendment 782.

ECF No. 2264 at 5-6.



1 In remanding this case, the Court of Appeals stated:

2 Heredia contends that he is eligible for a sentence reduction under  
3 Amendment 782, which increased the quantity of actual methamphetamine  
4 required to trigger the maximum base offense level from 1.5 kilograms to  
5 4.5 kilograms. See U.S.S.G. § 2D1.1(c)(1) (2014). He argues that he no  
6 longer qualifies for the maximum level because he admitted to conspiring  
7 to distribute only 1.5 kilograms. Contrary to this contention, the plea  
8 agreement reflects that Heredia admitted to conspiring to distribute “more  
9 than 1.5 kilograms of actual methamphetamine.” The district court did not  
10 need to, and did not, make a more specific quantity determination at  
11 sentencing. Under these circumstances, the district court properly  
12 attempted to determine the total drug quantity attributable to Heredia in  
13 order to determine his eligibility for a sentence reduction. See *United*  
14 *States v. Mercado-Moreno*, 869 F.3d 942, 957-58 (9th Cir. 2017).

15 *Id.* In *United States v. Mercado-Moreno*, 869 F.3d 942 (9th Cir. 2017), the Court of  
16 Appeals held that “a district court in § 3582(c)(2) proceedings may make supplemental  
17 findings of drug quantity if they are necessary to determine the defendant's eligibility  
18 for a sentence reduction in light of a retroactive Guidelines amendment.” *Id.* at 953-  
19 954. The Court of Appeals stated, “In those cases where a sentencing court's quantity  
20 finding is ambiguous or incomplete, a district court may need to identify the quantity  
21 attributable to the defendant with more precision to compare it against the revised drug  
22 quantity threshold under the relevant Guidelines amendment. . . . [D]istrict courts in §  
23 3582(c)(2) proceedings may make additional findings on the drug quantity attributable  
24 to a defendant if those findings are necessary to determine the defendant's eligibility for  
25 a sentence reduction. Such findings must be supported by the record and cannot  
26 contradict any findings made by the original sentencing court.” *Id.* at 954-55.

27 Having fully considered the facts admitted by the Defendant in the Plea  
28 Agreement and the uncontested fact in the Presentence Report, the Court makes the  
supplemental finding that Defendant exercised direct control and supervision over the  
entirety of the drug distribution of the RICO conspiracy and narcotics distribution  
conspiracy charged by the grand jury in this case and that the Defendant was  
responsible for more than 45 kilograms of methamphetamine mixture. The stipulated  
facts in the plea agreement state that Defendant was the “an organizer and leader” in a  
conspiracy involving more than five participants and the uncontested facts in the pre

1 sentence report established that “[d]uring the course of the investigation, agents seized  
2 at least 100 pounds of methamphetamine, 2,765 pounds of cocaine, 40,300 pounds of  
3 marijuana and more than one dozen firearms.” (ECF No. 2014 at 7; ECF No. 2048 at  
4 9). This is relevant conduct that must be considered in determining whether Defendant  
5 is eligible for a sentencing reduction in light of Amendment 782. The Court finds that  
6 Defendant personally “counseled, commanded, induced, procured, or willfully caused”  
7 the distribution of more than 45 kilograms of methamphetamine mixture during the  
8 course of the conspiracy. U.S.S.G. § 1B1.3, cmt. n.2 (2014). This finding is necessary  
9 for this Court to determine whether Defendant is entitled to a sentence reduction under  
10 Amendment 782 of the Sentencing Guidelines and does not contradict any findings  
11 made by this Court in the sentencing hearing.<sup>1</sup>

12 Based upon the supplemental finding, the Court concludes that Defendant is not  
13 eligible for a sentence reduction under Amendment 782. Defendant’s motion for a  
14 sentence reduction under 18 U.S.C. § 3582(c)(2) is denied.

15 DATED: August 7, 2018

16 *William Q. Hayes*  
17 **WILLIAM Q. HAYES**  
18 United States District Judge  
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27 <sup>1</sup> Even if Amendment 782 resulted in a change to the applicable base offense  
28 level, the Court would exercise its discretion to not lower the Defendant’s sentence  
based upon the Defendant’s aggravated role in the offenses stated at the time of  
sentencing. (ECF No. 2177 at 13-14).