

No. _____

In the Supreme Court of the United States

Michael Ingram,

Petitioner,

v.

United States of America

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Shelley A. Goff* La. Bar Roll # 33688
Goff & Goff Attorneys
PO Box 2050
Ruston, LA 71273
(318) 255-1760
(318) 255-7745 (Fax)

*CJA Appointed Counsel of Record

QUESTION PRESENTED

Where the United States Sentencing Commission publishes a report summarizing the geographic disparities in the application of the 21 U.S.C. §851 enhancement, but the true extent of the disparities are not reported until years later, when does the one-year time limit found in 28 U.S.C. §2255(f)(4) for bringing claims begin to run?

LIST OF PARTIES

MICHAEL INGRAM, Petitioner

UNITED STATES OF AMERICA, Respondent

**LIST OF ALL PROCEEDINGS IN STATE, FEDERAL, AND APPELLATE
COURTS DIRECTLY RELATED TO THIS CASE:**

Court	Docket Number	Caption	Date of Judgment
United States District Court for the Northern District of Iowa.	5:07-cr-0456-LTS-KEM-2	United States v. Michael Ingram	Sentencing deferred until after USA appeal
United States Court of Appeals for the Eighth Circuit	08-2563	United States v. Michael Ingram	February 2, 2009/ amended on February 13, 2009
United States District Court for the Northern District of Iowa	5:07-cr-0456-LTS-KEM-2	United States v. Michael Ingram	May 12, 2009
United States Court of Appeals for the Eighth Circuit	09-2121	United States v. Michael Ingram	February 10, 2010
United States Supreme Court	09-11569	Michael Ingram v. United States	October 4, 2010
United States District Court for the Northern District of Iowa	5:14-cv-4071-LTS-KEM	Michael Ingram v. United States	October 31, 2017
United States Court of Appeals for the Eighth Circuit	17-3409	United States v. Michael Ingram	August 2, 2019

TABLE OF CONTENTS

Question presented.....	II
List of parties	II
List of all proceedings in state, federal, and appellate courts directly related to this case:.....	III
Table of authorities.....	V
Petition for writ of certiorari.....	1
Opinions below	1
Jurisdiction	1
Statement pursuant to Rule 14(1)(e)(v).....	1
Statutes/provisions involved	1
Statement of the case.....	3
Reasons for granting this petition.....	10
CERTIORARI SHOULD BE GRANTED BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS RELEVANT DECISIONS OF THIS COURT.	10
Conclusion.....	12
Index to appendix	12

TABLE OF AUTHORITIES

CASES

<i>Batson v. Kentucky</i> , 476 U.S. 79, 95-97 (1985)	11
<i>Davila v. Davis</i> , 137 S.Ct. 2058 (2107).	10
<i>Ingram v. United States</i> , 296 F.Supp 3d 1076, (ND Iowa 2017)	1
<i>Ingram vs. United States</i> , No. 17-3409, 932 F.3d 1084 (8 th Cir. 2019)	1
<i>International Brotherhood of Teamsters v. United States</i> , 431 U.S. 324, 339 (1977).	11
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987)	11
<i>Murray v. Carrier</i> , 477 U.S. 478, 488 (1986).	10
<i>United States v. Young</i> , 960 F.Supp.2d 881 (N.D. Ia. 2013)	6, 7
<i>Wainwright v. Sykes</i> , 422 U.S. 72, 84 (1977)	10

STATUTES

21 U.S.C. §851	passim
28 U.S.C. § 1254(1)	1
28 U.S.C. §2255	10
28 U.S.C. §2255(f)(4)	ii, 2

OTHER AUTHORITIES

Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System	5
---	---

RULES

RULE 14(1)(E)(V)-----	1
-----------------------	---

CONSTITUTIONAL PROVISIONS

U.S.CONST. amend V-----	2, 7
-------------------------	------

PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael Ingram, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Ingram vs. United States*, No. 17-3409, 932 F.3d 1084 (8th Cir. 2019).

OPINIONS BELOW:

The Eighth Circuit decision in *Ingram vs. United States*, No. 17-3409, 932 F.3d 1084 (8th Cir. 2019) is attached as Appendix 1. The district court order denying Mr. Ingram's petition, *Ingram v. United States*, 296 F.Supp 3d 1076, (ND Iowa 2017) is attached as Appendix 2.

JURISDICTION

The decision of the Eighth Circuit Court of Appeals affirming the District Court's opinion was filed on August 2, 2019. There was no request for rehearing. This petition is, therefore, timely. The jurisdiction of this court is invoked under Title 28 U.S.C. § 1254(1).

STATEMENT PURSUANT TO RULE 14(1)(E)(V)

This petition will be served upon the Solicitor General of the United States at Room 5616, Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530-000.

STATUTES/PROVISIONS INVOLVED

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 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 for the same offence 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. U.S.CONST. amend V.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence....A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—...the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. §2255(f)(4).

No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior

convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence. 21 U.S.C. §851(a)(1)

STATEMENT OF THE CASE

Michael Ingram was charged and convicted by a jury in United States District Court, Northern District of Iowa sitting in Sioux City, Iowa, of conspiracy to possess and distribute crack cocaine for his role in a drug conspiracy that operated out of an apartment in South Sioux City, Nebraska, and had ties to some transactions across the river in Iowa.¹

¹ South Sioux City, Nebraska, and Sioux City, Iowa, are separated only by the Missouri River and connected by a bridge. The federal courthouse sits in Sioux City,

While Ingram had prior drug felonies, they were not significant:²

- a. 2001 possession with intent to deliver less than 1 gram of cocaine. He was sentenced to 18 months probation.
- b. 2004 possession of controlled substance (6.8 grams of marijuana). He received a deferred judgment and 1-year probation.
- c. 2005 possession of a controlled substance(approximately 6 grams of marijuana). He received two days in jail.

At the time he was charged in this case, Ingram had previously been incarcerated for a total of only two days, and on probation for three years.

Despite the fact that Ingram had been a relatively low-level offender, the government filed a notice under 21 U.S.C. §851 to seek enhanced penalties, thereby doubling the mandatory minimum sentence for the crime from 10 years to 20 years, trumping the advisory guideline range of 168-210 months. This effectively blocked the sentencing court's ability to exercise discretion in sentencing Ingram to less than 20 years, even though his guideline range was much less. Ingram appealed, but the Eighth Circuit Court of Appeals affirmed the conviction and sentence and this court denied his Petition for Certiorari in 2010.

Iowa sits less than a mile from the opposite riverbank on the South Sioux City, Nebraska side of the river.

² Criminal history portion of Ingram's presentence report.

On October 11, 2011 the United States Sentencing Commission published a study of drug offenses and mandatory minimum penalties during the years 2006, 2008 and 2009. (Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Commission's 2011 Report)). The Report, over 360 pages long, not including appendices, contained a brief, ten-page analysis of the application of the §851 enhancement across districts. The report "revealed significant variation between judicial districts in the manner in which the [§851] enhancement was applied." It identified the Northern District of Iowa was one of only six judicial districts where more than 75% of eligible defendants received the §851 enhancement. It also noted that by contrast, in eight districts, NONE of the eligible defendants received the §851 enhancement. (App 23)

Intrigued by the Commission's finding that application of the enhancement was not consistent across all federal districts, Judge Mark W. Bennett, undertook a study of the problem utilizing the raw data on which the Commission based its conclusion as well as interviews of local stakeholders in the sentencing process. In order to complete the study, he had to request the raw data set from the Commission because it was not included in the Report.³ He then "re-analyzed and reformatted the raw data in several significant ways that go far beyond the Commission's analysis." (Appendix 4

³ The raw data set was not (and still is not) publicly available. Judge Bennett received the data set through a special request available to judges only. *Telephone call by the undersigned with Rachel at the Sentencing Commission's help line on October 25, 2019.*

p 23) He published his findings and conclusions in a sentencing opinion in the case of *United States v. Young*, 960 F.Supp.2d 881 (N.D. Ia. 2013) ("The Young Study") (App 25-51). The Young Study found that defendants unlucky enough to be sentenced in the Northern District of Iowa, were 626% more likely to be subject to a §851 enhancement compared to the national median application of the enhancement and 311% more likely to be subject to a §851 enhancement compared to average eligible defendant nationwide. The study also reported that compared to the District of Nebraska, with a border only a few miles from the federal courthouse in Sioux City, Iowa, where this court sits, a defendant was 2,532 % more likely to receive the enhancement in the Northern District of Iowa, than in the District of Nebraska, and a defendant sentenced in the District of South Dakota, also with a border just miles from the Sioux City Federal Courthouse was one-twentieth as likely to receive the enhancement as compared to one who was sentenced in the Northern District of Iowa. (App 36)

At least some of the conduct for which Ingram was sentenced occurred in South Sioux City, Nebraska. Therefore, he could have been prosecuted in the District of Nebraska, where he was unlikely to receive the §851 enhancement. The doubling of his mandatory minimum to 20 years was a pure result of the geographic location in which he was charged and sentenced. Furthermore, even defendants that would be safety valve eligible, or receive motions for downward departure by the government, receive the

enhancement in the Northern District of Iowa, so his putting the government to proof at trial was not the reason for the imposition of the enhancement. (App. 31).

On August 27, 2014 Ingram filed his Pro Se Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. §2255. Ingram alleged that he had been unconstitutionally sentenced to a double mandatory minimum sentenced based on the §851 enhancement for two reasons. First, that such a sentence was a violation of the Eighth Amendment's prohibition against cruel and unusual punishment because if he had been sentenced in another district, he would not have received the enhancement. Second, that the imposition of the §851 enhancement ran afoul of the Due Process clause because of the lack of uniformity of its application across districts. Ingram was able to provide the court with three comparators who had similar crimes and either similar or greater criminal histories that had been sentenced in other districts and had not received the §851 enhancement.

The District Court found that Ingram's petition was timely as he had filed his §2255 motion within one year of learning of the *Young* decision. It found that Ingram had overcome the procedural default because, while the Sentencing Commission issued its Report in 2011, Ingram's claim did not become apparent until the publication of *Young*, where the compared the Northern District of Iowa, where Ingram was charged and sentenced, was

directly compared to other districts.⁴ The district court found that Ingram overcame the prejudice prong also, finding that there is a reasonable probability of a different result because “removal of the improper selective application of the §851 enhancement ... would have resulted in a halving of his mandatory minimum sentence and a significant reduction of his sentence to one within his advisory Sentencing Guidelines range.” However, the District Court denied Ingram's Eighth Amendment claim, explaining that because Ingram's sentence was within the statutory range applicable to his crime of conviction, and therefore not grossly disproportionate, he was not entitled to relief under the Eighth Amendment. (App. 16-17).

The District Court also denied Ingram’s Equal Protection/Selective Prosecution claim, finding that Ingram’s comparators were not similarly situated because all three of the comparator’s had been convicted pursuant to plea agreements rather than trial, one’s criminal history was not similar enough to Ingram’s and on one Ingram had not provided enough information of the nature, date or punishment regarding the predicate offense, so a comparison could not be made. Further, even if Ingram’s comparators were similar enough, the District Court said. Ingram could not show a lack of rational basis for the disparity. It concluded that the USAO for the district is entitled to pursue policies to address differences in the needs of its district. Ingram has a prior drug conviction, the enhancement serves the legitimate

⁴ While the Sentencing Commission Report touched on the geographic disparity, it did not detail the statistics necessary for Ingram to develop factual basis for his claim. Only the study detailed in *Young* provided such a factual basis.

purpose of punishing recidivism, and therefore it found that Ingram cannot show a lack of rational basis. The court, however, found that reasonable jurists may disagree, and therefore issued a Certificate of Appealability on this issue. (App. 17-18)

Ingram appealed to the Eighth Circuit Court of Appeals regarding the denial of his Equal Protection/Selective prosecution claim. The Eighth Circuit affirmed the District Court finding that it was the Sentencing Commission Report, not the *Young* decision that triggered the time limit for filing the §2255 motion, and therefore Ingram was too late and his claim was barred. It did not address Ingram's Equal Protection/Selective prosecution claim. (App. 5-7)

RECAP OF THE TIMELINE

1. October 4, 2010, Ingram's appeals in his criminal case were exhausted by denial of writ of certiorari by this court.
2. October 4, 2011, Ingram's limitation period pursuant to 28 U.S.C. 2255(f)(4) expired.
3. October 11, 2011, the United States Sentencing Commission publishes "Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System"
4. August 13, 2013, the opinion in *United States v. Young* was filed.
5. August 27, 2014 Ingram filed his §2255 motion.

REASONS FOR GRANTING THIS PETITION

Certiorari should be granted because the Eighth Circuit Court of Appeals has decided an important question of federal law in a way that conflicts relevant decisions of this court.

This court has consistently held that procedural default can be overcome by a showing that failure to meet a procedural requirement, such as the time limit for filing a claim pursuant to 28 U.S.C. §2255 based on cause and prejudice. The petitioner must show "cause" to excuse the failure and "actual prejudice resulting from the alleged constitutional violation." See *Wainwright v. Sykes*, 422 U.S. 72, 84 (1977), *Davila v. Davis*, 137 S.Ct. 2058 (2107). The "cause" must be some objective factor external to the defense that impeded the petitioner's ability to comply with the requirement. *Murray v. Carrier*, 477 U.S. 478,488 (1986).

Ingram discovered the statistics⁵ necessary to form the basis of his claims when he found out about the *Young* decision. Nothing in the record shows he knew the extent of the huge disparity across districts in the application of §851 until then. Further, even assuming he knew or should have known about the Commission Report, the Report did not give enough

⁵ Discriminatory intent and purpose may be shown by statistics. See *Batson v. Kentucky*, 476 U.S. 79, 95-97 (1985) (statistics used to challenged racially motivated peremptory strikes during jury selection); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (statistics used in equal protection challenge to the application of the death penalty based on Statistics "have served and will continue to serve an important role" in cases where existence of discrimination is an issue. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977).

information upon which to base a claim. The *Young* study was based on statistics that Ingram did not have access to. Judge Bennett noted in the *Young* opinion that even the Assistant United States Attorney that he questioned during the sentencing in *Young* was unaware of the extent of the disparity:

Finally, when I showed the AUSA in [the *Young* case] some of the evidence of disparities in the application of the §851 enhancements in this district compared to neighboring districts—presented above—during *Young*'s sentencing hearing, the AUSA admitted he had not seen such information. He also stated that he had only known, from contact with individual AUSAs in neighboring districts that for example, the D. of Nebraska rarely imposed §851 enhancements unless the defendant actually went to trial. He stated that he was "a little bit shocked that [neighboring districts] don't hardly ever apply [851 enhancements] based on what they – what I've heard in talking to them. But again, I didn't pull the statistics. They are new to me." On the other hand, he was only "surprised" at the extent of the disparities. Specifically, he said, "I don't know if shock's the right word because—but yes, it surprises me to see that kind of difference in how they are applying [§ 851] and how we are applying it. (App. 48)

If the Assistant United States Attorney in the *Young* case was unaware of the extent of the disparities, how can it be that an incarcerated individual, such as Ingram, was to have known about the extent of the statistically significant (and, frankly, shocking) disparity between the application of §851 across districts earlier than the publication of the opinion in *Young*?

The statistics showing the disparity were solely in the possession of the Sentencing Commission until Judge Bennett requested them and then conducted the in-depth analysis he published in the *Young* case.

Therefore, equitable tolling should apply to Ingram's case, and the Eighth Circuit's decision otherwise conflicts with this court's decisions.

CONCLUSION

For the foregoing reasons, Michael Ingram respectfully requests that this Court issue a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

Respectfully Submitted

Shelley A Goff* La.Bar Roll # 33688
Goff & Goff, Attorneys
PO Box 2050
Ruston LA 71273
318-255-1760
CJA Appointed Counsel of Record

Index to Appendix

	Page
1. Eighth Circuit Opinion	1-7
2. District Court Opinion	8-19
3. Portions of the United States Sentencing Commissions 2011 Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System	20-24
4. Portions of the opinion in <i>United States v. Young</i> , 960 F.Supp.2d 881 (N.D.Ia. 2013)	25-51