

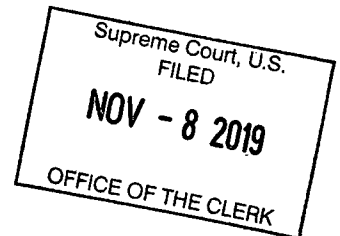
19-7118

No. \_\_\_\_\_

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



\_\_\_\_\_  
CALVIN BUFFINGTON — PETITIONER  
(Your Name)

vs.

\_\_\_\_\_  
UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

\_\_\_\_\_  
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Calvin Buffington, Pro-Se  
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Federal Correctional Institution  
P.O. Box 800  
Herlong, California 96113

## QUESTION(S) PRESENTED

1. Whether the district court's failure to find a drug quantity when adopting PSR in its entirety authorized it to select a new quantity as a basis for the denial of a section 3582(c)(2) motion.
2. Whether it was a judicial fact-finding violation for the district court to use a drug quantity different from that established at petitioner's original sentencing hearing to deny petitioner a reduction of sentence under section 3582(c)(2).

## LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ 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:

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### STATUTES AND RULES

18 U.S.C. section 3553(a)(2)

18 U.S.C. section 3582(c)(2)

18 U.S.C. section 924(c)

21 U.S.C. sections 841(b) and (b)(1)(a)(1)

21 U.S.C. section 846

28 U.S.C. 1254(1)

U.S.S.G. section 1B1.10

U.S.S.G. section 2D1.1

U.S.S.G. section 3E1.1(a)

U.S.S.G., amendment 782

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**

☒ 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,  
☒ is unpublished.

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

☒ reported at Buffington v. United States, 2017 U.S. Dist. Lexis 55688 (N.D. Ill. Apr. 12, 2017)  
☐ 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 May 1, 2019

☒ 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**

The Fifth Amendment to the United States Constitution provides, in pertinent part, that " ... [n]or shall any person be deprived of life, liberty, or property without due process of law ..."

The Sixth Amendment to the United States Constitution provides, in relevant part, that " ... and to be informed of the nature and cause of the accusation; and to have the assistance of counsel for his defense."



## STATEMENT OF THE CASE

In October 2009, Mr. Buffington entered a plea of guilty to conspiracy to possess and distribute cocaine and heroin, in violation of 21 U.S.C. sections 841(a)(1) and 846; and possession of a firearm in relation to a drug trafficking offense, in violation of 18 U.S.C. section 924(c). The plea was accepted by the district court and a presentence report (PSR) was developed.

Upon completion of the PSR, and its submission to the court for Mr. Buffington's sentencing hearing on March 9, 2011, the court adopted the PSR in its entirety. Importantly, the offense level was calculated at 38 based on 150 kilograms or more of cocaine, under U.S.S.G. section 2D1.1 Drug Table. After several adjustments, Mr. Buffington's adjusted offense level was 39. The court sentenced Mr. Buffington to 238 months' of imprisonment, the low-end of the guideline range, for the drug offense and 60 consecutive months for the firearm violation -- a total sentence of 298 months.

On March 5, 2017, Mr. Buffington filed a pro-se motion pursuant to 18 U.S.C. section 3582(c)(2), seeking a reduced sentence based on Amendment 782. The district court denied that motion on April 12, 2017. Mr. Buffington then filed for an application for a Certificate of Appealability to the United States Court of Appeals for the Seventh Circuit. On May 1, 2019, the Seventh Circuit denied Mr. Buffington's COA application.

## REASONS FOR GRANTING THE PETITION

The Supreme Court held that the imposition of an enhanced sentence under the guidelines based upon the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant violated the Sixth Amendment. The erroneous holding by the court through judicial fact-finding that allowed the court to determine Mr. Buffington was guilty of 978 kilograms of cocaine instead of the 364 kilograms that he pleaded to is a constructive amendment of the indictment and a Fifth Amendment Due Clause violation, undermining the fairness in meeting the sentencing purpose to avoid unwarranted disparities and plain error doctrine infringements.

The error has worked to the detriment of Mr. Buffington and it does not meet the crucial section 3553(a)(2) factors. By virtue of Mr. Buffington having zero criminal points and no prior criminal history at all because a defendant's prior criminal record reflects he is more culpable than a first time offender and deserving of greater punishment. And general deterrence of future criminal conduct dictates that a message be sent to society that repeated criminal behavior will be enhanced punishment to protect the public. It is a miscarriage of justice, therefore, to deny the reduction of sentence based on Amendment 782.

Mr. Buffington asserts a claim of abuse of discretion by the district court in its constructive amendment of the indictment. The court committed approximately three plain errors in the review of Mr. Buffington's section 3582(c)(2) motion.

First, the offense charged in the indictment under Title 21, United States Code, section 846 was materially altered and differed substantially during the subsequent review and denial of Mr. Buffington's 3582 motion. In 2014, the Sentencing Commission formulated Amendment 782, which subsequently lowered the offense level by two levels for certain drugs. The Commission also made the amendment retroactively applicable to defendants who had already been convicted and sentenced. In raising the threshold drug quantity, a defendant must now be responsible for at least 450 kilograms of cocaine in order to have an offense level of 38. Thus, defendants, like Mr. Buffington, who had 364 kilograms of cocaine, their offense level dropped to 36. Mr. Buffington was in criminal history category I. Therefore, Mr. Buffington is eligible for a sentence reduction under Amendment 782.

However, the argument presented seemingly is being subverted due to plain error committed by the court during the original sentencing hearing, by the court's failure to make a clear holding on the drug quantity; and again during the review of the 3582 motion. When the district court calculated the drug quantity using judicial fact-finding to constructively amend the indictment. And by the court's omission of the 364 kilograms of cocaine that the PSR stated was the approximate quantity of cocaine in the conspiracy.

In Mr. Buffington's litigation pursuant to Amendment 782, the maximum quantity of drugs that the court was authorized to utilize in calculating the decrease in sentence was 364 kilograms of cocaine and 1800 grams of heroin. The proper drug quantity range on the date of Mr. Buffington's sentencing was base offense level 38 for 150 to 450

kilograms of cocaine, not the 978 kilograms and 1800 grams of heroin the district court used in its review of Mr. Buffington's sentence reduction motion.

When a federal court utilizes judicial fact-finding in the court procedures in establishing the drug quantity of a defendant, and then imposes a sentence that unconstitutionally exceeds the statutory maximum, it is a clear violation of the defendant's Sixth Amendment right under the Constitution.

The purported facts supporting the finding of drug quantity have neither been admitted by the accused nor been charged in the indictment nor found by a jury. Thus, the judge was not vested with the authority to set drug quantity by a preponderance of evidence based solely upon a recommendation inside a PSR because drug quantity is an element of the offense. And it increases the penalty provision beyond the prescribed statutory minimum.

Regardless of whether or not the judge depends on a finding of specific assertions, presumptions alleged in the PSR, hearsay evidence, or a finding of his own aggravated facts, it is the jury's verdict alone or the admission of a defendant that can authorize a drug quantity and sentence. Consequently, the judge in this case should not have been able, after so many years, to make a new drug determination when reviewing the facts for the 3582 motion.

Importantly, at the original sentencing hearing, the court asked both parties -- the government and the defense -- if either disputed the drug quantity found in the PSR. The Assistant U.S. Attorney did not object or dispute the PSR findings, which showed

a finding of 364 kilograms of cocaine and 1800 grams of heroin.

Mr. Buffington and his attorney agreed to the same quantities.

Now many years later when Mr. Buffington sought to have his sentence reduced under Amendment 782, the district court denied the motion utilizing three different quantities and types of drugs. Therefore, Mr. Buffington's due process rights were violated when the court decided that 978 kilograms of cocaine the appropriate amount of drugs distributed during the conspiracy.

This drug quantity determination violates the Fifth and Sixth Amendments because Mr. Buffington's base offense level should have reduced to 36 under Amendment 782, based on the drug quantity found at the original sentencing hearing.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

  
\_\_\_\_\_

Date: 11-5-19