

19-8412

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LENROY Mclean — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS SECOND CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lenroy Mclean #61524-054

(Your Name)

805 N. ave F.

(Address)

Post, Texas 79356

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

QUESTION I

Should the Second Circuit Court of Appeals exercise it's discretion to correct the forfeited error of Petitioner's miscalculated guideline sentence that has affected his substantial rights with previous factual decision intact?

QUESTION II

Does words mean things and/or they have specific definitions, especially in arguable basis either in law or in facts of a forfeited plain error sentencing?

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:

On Appeal:

Attorneys for the Government

1) Sarah Kathleen Eddy (AUSA)

2) Michael D. Lockard (AUSA)

U.S. attorney's office

one St. Andrew's Plaza

New York, New York 10007

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION.....	8

INDEX TO APPENDICES

APPENDIX A.....	Rehearing Denial
APPENDIX B.....	Appeals Court Denial
APPENDIX C	
APPENDIX D	
APPENDIX E	
APPENDIX F	

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Williams v United States, 117 Led 2d 341, 365.....	4
Alleyne v United States, 133 S.ct 2151,186 Led 2d 314(2013)....	4
Hughes v United States, 138 S.ct 1765(2018).....	6
United States v Rosales-Mireles, 138 S.ct 1897(2018).....	7
United States v Rios, 765 F.3d 133, 138 (2 cir 2014).....	7
United States v Adams, 104 F.3d 1028, 1031 (8 cir 1997).....	7
United States v Davis, 682 F.3d 596, 612 (7 cir 2012).....	7
Molina-Martinez v United States, 578 U.S.____,____(2016).....	7
Planned Parenthood v Case, 505 U.S. 833(1992).....	7
Vermilya-Brown Co. v Connell, 335 U.S. 377, 399(1949).....	8
Shapiro v United States, 335 U.S. 1(1948).....	8
Singer v United States, 323 U.S. 338, 346(1945).....	8

STATUTES AND RULES

21 U.S.C § 846 provides:

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt of conspiracy.

28 U.S.C §1254 provides:

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: 1) By writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendering of judgment or decree.

28 U.S.C § 2106 provides:

The Supreme Court or any court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order or a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C § 3582(c)(2) provides:

The court may not modify a term of imprisonment once it has been imposed except that...in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has been subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C § 994(o), upon a motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the sentencing commission.

OTHER continuation...

Fed. R. Crim. P. 52 (b) provides:

A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Amendment 782 section 2D1.1 (c)(1) provides:

If---the defendant was convicted under 21 U.S.C. § 860A of manufacturing or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides.

Amendment 782 section 2D1.1 (a)(3) provides:

30--if the defendant is convicted under 21 U.S.C § 841(b)(1)(E) or 21 U.S.C. § 960 (b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense.

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 _____ 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 _____; or,
☒ 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 December 5th, 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: March 10th, 2020, and a copy of the order denying rehearing appears at Appendix A.

☐ 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

Fifth Amendment to the 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 be compelled in any criminal case to be a witness against himself, not be deprived of Life, Liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

Ninth Amendment to the Constitution provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Fourteenth Amendment to the Constitution provides:

All persons born to the naturalized in the United States, and subject to the reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Petitioner stands convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846, the District court had a quantity at the time of Petitioner's trial and instructed the jury that "...you do not need to determine the precise quantity of drugs involved in the conspiracy. Rather, you must decide whether the conspiracy involved more than five kilograms of cocaine" (T.T. pg. 1563 line 18-24).

In this case the drug quantity was never established by the jury to trigger the appropriate or mandatory guideline range of petitioner. See Willams v United States, 117 L.ed 2d 341,365

Petitioner's PSR report asserted that "the guideline for a violation of said statute (21 U.S.C. § 846) is found in § 2D1.1(a)(3). As noted in the offense conduct section, Mclean (Petitioner) distribute and/or intend to distribute approximately 300 kilograms of cocaine. The offense level specified in the drug quantity table under § 2D1.1(c)(1) set a base offense level of 38" (PSR report paragraph #24)-Petitioner moved for an objection of such, because the evidence at trial further demonstrated that petitioner was completely unaware of the amount of cocaine imported or sold, let alone had any involvement in as much as 300 kilograms of cocaine.

The District court veer the PSR report assertion without any supported facts of petitioner's knowledge and found that, Petitioner has met the threshold of 150 kilograms and fixed the base offense level at 38 points and applied a two-level hencement for weapons possessed by coconspirators [Alleyne v United States, 133 S.ct 2151, 186 Led. 2d 314(2013) requires any fact, apart from criminal history-that triggers or increases the mandatory minimum to be found by the jury or in the case of a plea, admitted by the defendant.]. Petitioner was sentenced between 150 to 450 kilograms of cocaine to 228 months and a five years term of supervise released.

Petitioner filed his appeal from a motion for sentence reduction under 18 U.S.C. § 3582(c)(2), which was denied by the District court on the 24th of April 2019. The District court's had miscalculated the guideline range when they sentenced petitioner between 150 to 450 kilograms-an error that affected Petitioner's substantial rights that warranted a sentencing modification, because such was lowered by the Amendment 782 and the threshold of 150 kilograms of cocaine with a base offense level of 34 with a 168 to 210 months period, below the 228 months sentenced he had received.

The United States Court of appeal for the second circuit denied petitioner's appeal with an obfuscated ruling of such been "lack an arguable basis either in law or in fact".

This petition for writ of certiorari seeks review of the denial of such that "lack an arguable basis either in law or in fact" dated December 5, 2019-Petitioner timely filed a motion for rehearing en-banc which was summarily denied on March 10th, 2020.

REASONS FOR GRANTING THE PETITION

Question I

Should the Second Circuit court of appeals exercise it's discretion to ~~correct the~~ forfeited error of Petitioner's miscalculated guideline sentence that has affected his substantial right with previous factual decision intact?

The facts of the case gyrated around petitioner's base offense level that was lowered by the amendment 782, under 18 U.S.C. § 3582(c)(2)-the provision authorizes a district court to reduce petitioner's sentence if the petitioner has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the USSG commission. To base means to make, form or serve as a foundation for or to use (something) as the thing from which something else is developpe. Likewise, a base is the starting point or quantity from which a reckoning or conclusion proceeds. Hughes v United States, 138 S.ct 1765 (2018).

Here, the district court made a required preponderance of the evidence findings as to the drug quantity to justify a sentencing based on 150 kilograms of cocaine, after the jury was instructed on the strating point of "more than five kilograms of cocaine" at trial. Petitioner puts emphasis on the fact that, the end of a runway (threshold) was 150 kilograms and with the help of the jury-the district court established a starting point of five kilogram.

Such placed petitioner on the U.S.S.G tables between 50 to 150 kilograms of cocaine with a base offense level of 36 within a 168 to 210 months bracket-with the amendment of 782, petitioner's base offense level would have change to 34. The District court had sentenced petitioner between 150 to 450 kilograms of cocaine which carries a much hefty penalty on the U.S.S.G table a plain U.S. sentencing guideline manual error that affects petitioner's substantial rights that is precisely the type of error that ordinarily warrants relief under Fed. R. Crim. P. 52(b).

A miscalculation of a U.S.S.G sentencing guidelines that has been determined to be plain and to affect petitioner's substantial rights calls for a court of appeals to exercise its discretion under Fed. R. Crim. P. 52(a). See *United States v Rosales-Mireles*, _____ U.S. _____, 138 S.Ct 1897 201 Ld. 2d 376 (2018).

Petitioner is aware of the fact that the district court in petitioner's §3582(c)(2) proceeding cannot make finding inconsistent with that of the original sentencing court. See *United States v Rios*, 765 F.3d 133, 138 (2nd cir 2014); See also *United States v Adams*, 104 F.3d 1028, 1031 (8th cir 1997) (holding that it is implicit in a § 3582 proceeding that the "district court is to leave all of its previous factual (decision intact)". But "[n]othing prevents a district court from making new findings of facts when ruling on a § 3582(c)(2) motion, so long as those findings are not inconsistent with those made at the original sentencing". *United States v Davis*, 682 F.3d 596, 612 (7th cir 2012). The second circuit court of appeals retained a broad discretion in determining whether a remand for resentencing is necessary. See *Molina-Martinez v United States*, 578 U.S. _____, _____, 136 S.Ct. 1338, 194 Ld 2d 444, 458 (2016).

Question II

Does words mean things and/or they have specific definitions, especially in arguable basis either in law or in facts of a forfeited plain error sentencing error?

The district promulgate that "...I think clearly that 150 kilogram threshold has been met" (Sentencing Trans. pg. 27, line 15-16)-as in 150 kilograms of cocaine, but not more than 150 kilograms.

The Webster's universal encyclopedic dictionary (Barnes and Nobles books) define threshold as been-"end, boundary; specifically the end of a runway" and the Merriam-Webster's collegiate dictionary 11th edition define met is past tense of meet which means to confirm to especially with exactitude and provision [a concept to--all requirements].

It is these definitions and our abiding by uniform definitions that allow for the rule of law--absent that--the use of arbitrary and capricious. See *Planned Parenthood v Case*, 505 U.S. 833 (1992).

There the court noted "no judicial system could do society's work if it eyed each issue afresh in every case that raised it". In *Vermilya-Brown Co. v Connell*, 335 U.S. 377, 399(1949) the court stated, "neither should we embark upon a course of making the same naked words mean one thing in one act and something else in another". In *Shapiro v United States*, 335 U.S. 1. Fn.5(1948) the court cited *Carrol, Through The Looking Glass*, Ch.6 "The question is, said Alice''whether you can make words mean so many different things"". (Pointing out the adsurdity of varying definitions for the same words). Also see *Singer v United States* 323 U.S. 338, 346(1945) "...words means what they say".

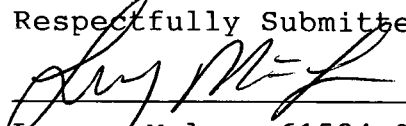
Certainly the lower courts error prejudice the Petitioner and their abuse of discretion violated his Due Process under the Fifth and fourteenth amendment-Because the commission amended section 2D1.1(c)(1) and 2D1.1(a) (3) of the U.S.S.G. guidelines, effectively reducing the base offense level and 2) Petitioner would have received a much lower sentence determine by the permissive of Fed. R. Crim. P. 52(b) correction of a forfeited error, of the mathematical formula asserted herein as in 150 kilograms of cocaine-bot not more than 150 kilograms with a strating point of five kilograms-that had affected his substantial rights of a base offense level of 34 on the U.S.S.G. table of 168 to 210 months.

CONCLUSION

For the foregoing reasons and based on the afore cited authority, Petitioner prays that this court grant certiorari to review the judgment of the lower courts.

Date: 4-21-2020

Respectfully Submitted


Lenroy Mclean 61524-054