

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HECTOR VALDEZ, a/k/a Arnaldo Lopez, a/lc/a Jose
Ocasio, a/k/a Jose Altagracia, a/k/a Jorge Figueroa,
a/k/a Hector Nunez, a/k/a Jesus Perez, a/k/a Ramon
a/k/a Boli,

v.

UNITED STATES OF AMERICA
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

If a defendant waives the right to appeal a sentence and the waiver takes place before the passage of the First Step Act and the defendant is sentenced after the passage of the First Step Act is the waiver applicable to claims raised based on the passage of the First Step Act?

LIST OF PARTIES

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I CITATION TO THE REPORT OF THE OPINION OF THE CASE,

The case below was decided by the United States Court of Appeals for the First Circuit in United States v. Valdez, 964 F.3d 117 (1St Cir. 2020), rehearing and rehearing en banc denied (August 27, 2020). The District Court sentenced the defendant on January 18, 2019.

II. BASIS FOR THE JURISDICTION OF THIS COURT The

opinion of the Court of Appeals was entered on July 9, 2020.

The Court of Appeals denied a timely filed petition for rehearing and rehearing en banc on August 27, 2020.

This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. § 1254.

VII. STATUTORY PROVISIONS INVOLVED

Section 401(a)(1) of the "First Step Act" amends 21 USC 802 by adding the following:

(57) The term 'serious drug felony' means an offense described in section 924(e)(2) of title 18, United States Code, for which—

 "(A) the offender served a term of imprisonment of more than 12 months; and

"(B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

Section 401(a)(2) amends 21 USC 841(b)(1) as follows:

(A) in subparagraph (A), in the matter following clause (viii)—

(i) by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years" and inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years"; and

(ii) by striking "after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release" and inserting the following: "after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years"; and

(B) in subparagraph (B), in the matter following clause (viii), by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final" and

inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final".

The First Step Act, Title IV, section 401(c) makes these sections applicable to this case, stating:

This section and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this act if a sentence for the offense has not been imposed as of such date of enactment.

First Step Act, section 401 (c).

IV. STATEMENT OF THE CASE

The defendant was charged with two counts in a multi count, multi-defendant indictment. Count one charged the defendant with knowingly and intentionally conspiring to distribute and to possess with intent to distribute controlled substances, to wit, one kilogram or more of heroin, and also substances containing fentanyl, cocaine base and cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 21 U.S.C. §846. Count four charged the defendant with illegal reentry in violation of 8 U.S.C. §1326(a) and (b)(2).

The Government alleged that three brothers, Juan Valdez, Claudio Valdez, and this defendant, Hector Valdez, led what it characterized as the Valdez Drug Trafficking Organization (DTO). Psr7. The Government alleged the organization distributed kilogram quantities of heroin and other drugs. in Connecticut, Rhode Island, and Massachusetts. The arrests followed a long-term investigation including months of wiretaps. The defendant and many other codefendants were arrested in April 2017.

On May 2, 2018, the defendant signed a plea agreement. United States v. Valdez, 964 F.3d at 119; A: 3, 4. On May 18, 2018, the defendant pled guilty to the two counts with which he was charged. Id. On

January 18, 2019, the defendant was sentenced to a term of 108 months imprisonment and a term of three years supervised release on each of the two counts, with the sentences to be concurrent.

The plea agreement contained an agreement by the defendant to cooperate with the government. Subject to the defendant's compliance with the terms of the agreement, the Government agreed to file a motion under United States Sentencing Guideline § 5K1.1 asking the court to impose a sentence under the mandatory minimum of 20 years. The government also agreed to file only one prior conviction under 21 U.S.C. § 851, limiting the enhancements to which the defendant would be exposed.

The plea agreement further contained a provision that the defendant's right to appeal would be waived if the sentence imposed by the court was 20 years or less. At the hearing on the change of plea, the court specifically asked the defendant if he understood that as a result of the plea agreement he was waiving any right to appeal the sentence imposed if it was within or below the guideline range. The defense notes that at the time of the change of plea the guideline range was 20 years because of the mandatory minimum sentence.

The defense concedes that the sentence imposed was less than 20 years.

The defendant cooperated both before and after the signing of the plea agreement. The government provided a summary of the defendant's cooperation at the sentencing hearing. Tr. of sentencing at 15 — 16. The Government said, "Quite frankly, he hit a homerun as a cooperator." Tr. of sentencing at 15.

The plea agreement in this case was signed on May 2, 2018. The change of plea hearing took place on May 18, 2018. The final presentence report was docketed on November 21, 2018. The government filed its Motion for Downward Departure Based on Substantial Assistance to Authorities on November 27, 2018.¹ Both these documents were filed before the enactment of the First Step Act on December 21, 2018. See "The First Step Act of 2018," Pub. L. No. 115-391, 132 Stat. 5194. United States v. Valdez, 964 F.3d at 120. The defendant's response to the Government Motion for

¹ Though the final presentence report was filed six days before the Government's motion, the motion appears to respond to an earlier version of the presentence report. The motion was based on a Level 35/category II assessment while the final presentence report found a Level 33/Category II guideline calculation.

downward departure was filed on January 11, 2019, and the sentencing of the defendant took place on January 18, 2019.

The Court of Appeals held the appeal waiver controlled and dismissed the appeal. *Id.* at 122.

IV. REASONS FOR GRANTING THE WRIT

In May 2018, the petitioner, the defendant Hector Valdez, signed a plea agreement and entered a plea of guilty to two counts, one involving drug offenses and the other involving the illegal entry into the United States. The agreement between the government and the defendant had a number of provisions but the most pertinent of them are the following. In return for the defendant's guilty plea and cooperation with the government the government would only file one conviction as the potential enhancement to the drug charge and the government would file a motion for downward departure pursuant to United State Sentencing Guideline 5K. The defendant agreed to plead guilty to the two counts and continue his cooperation with the government. He also agreed to waive his right to appeal any sentence of 20 years or less. At the change of plea hearing on May

18, 2018 the District Court incorrectly stated that the waiver was if the sentence imposed was "within or below the guideline range." This difference in the wording of the waiver is not an issue, as the government noted in its brief to the Court of Appeals. Government brief at 4 to 5. At the time of the plea, the guideline range was 20 years because of the mandatory minimum sentence. *Id.*

In November 2018, the government filed a motion for downward departure and recommended a sentence of 10 years to serve. The next month, December 2018, the First Step Act became law, but the government did not change its recommended sentence. At the sentencing hearing in January 2019 the government again made a recommendation of 10 years to serve. It specifically declined to make a lower recommendation based on the First Step Act. In fact, the government essentially said that 10 years was a fair amount to serve and that its recommendation would not be swayed by the new act.

At the sentencing hearing² the government explained how it arrived at its recommendation. It said, "The structure of the plea agreement was

² The sentencing hearing was not sealed. The transcript of that hearing was originally sealed. The order sealing the transcript was thereafter modified to allow the transcript to be part of the sealed addendum to the appellant's brief

simply a mechanism to provide some structure to what we're doing here this morning." Tr. of sentencing at 13. It went on to state that the starting point was 20 years, the same as the defendant's brothers, while acknowledging that the defendant, while in the upper echelons of the drug trafficking organization was perhaps the least culpable of the brothers. Tr. of sentencing at 11, 13. Still, the government said it started its analysis of the defendant's sentencing at the 20 year mark, the same as his brothers. Id. at 15. The government also said, "The change in the law was unanticipated and we would have found another mechanism to start the counting at 20." Id. at 17. Shortly thereafter the prosecutor went on to say, "Simply put, what was fair then is fair now despite all of our gyrations and changes in the law." Id. at 17. A little later, the court said it was clear the government was going to always get to 120 [months]and found ways to arrive at the endpoint desired. The government agreed. Id. at: 17, 18. Later, the government stated:

Ten years is fair. 10 years is fair considering that his brothers got 20. Ten years is fair considering what all the other Defendants received here. How we arrived at that

in the Court of Appeals and, "to be otherwise used and referenced by the parties as needed in the appellate process." See defendant's assented to District Court Motion, document 253, filed on September 5, 2019, and text order granting the motion entered on September 9, 2019. The transcript has been frequently cited by the parties and the defense has no objection to unsealing the transcript.

point was based on the law as we believe it existed when we entered into these agreements.

So my recommendation doesn't change but I still think that it is a fair sentence.

Id. at 18.

At the time of sentencing the District Court judge explained that he was considering a multitude of factors in imposing the sentence. Included among the factors he identified were the guideline range, the First Step Act, the defendant's cooperation, and the recommendation of the government. This becomes a critical point. The issue is not whether the District Court judge considered the First Step Act. He explicitly did so. He also expressly considered the recommendation of the government. That recommendation did not take into account the First Step Act. Rather it reflected the prosecution's own sense of what was appropriate and its equally clear decision not to take into account the First Step Act.

The government has no right to ignore the law because it conflicts with the government's own perception of what is appropriate. The First Step Act was clearly an ameliorative statute which sought to reduce some of the penalty provisions of the federal drug laws. Its applicability to this defendant was clear. Prior convictions which would have counted as predicates under 21 USC

851 no longer counted. The length of enhancements decreased. The defendant stood to face less time under the new act. The First Step Act was also explicit that it applied to all cases in which the defendant had not yet been sentenced.

This Court has held that the Guidelines established the "essential framework" for sentencing proceedings. Molina-Martinez v. United States, 136 S. Ct. 1338, 1345 (2016). Even in cases where there is a variance, this Court has noted the role of the Guidelines, stating:

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:*' *Id.*, at [redacted], 133 S. Ct. 2072, 2083, 186 L.E.2d 84, 99.

Molina-Martinez v. United States, 136 S. Ct. at 1345 (2016), citing Peugh v. United States, 133 S. Ct. 2072 (2013).

Molina-Martinez v. United States goes on to hold that:

In most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, [**456] higher Guidelines range has demonstrated a reasonable probability of a different outcome. And, again in most cases, that will suffice for relief if the other requirements of Rule 52(b) are met. There may be instances when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist. „Indeed, in the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher

Guidelines range and the sentence he received thereunder. Absent unusual circumstances, he will not be required to show more.

Molina-Martinez v. United States, 136 S. Ct. at 1346, 1347 (2016).

In this case not only did the court consider the sentencing guidelines, but it also considered the recommendation of the government. That recommendation was rooted in an incorrect application of the guidelines because the government explicitly made its recommendation without regard to the First Step Act. As chronicled above the First Step Act affected the guideline calculations in this case. Among other things it affected the mandatory minimums and the predicate offenses for a section 851 enhancement. At sentencing the government made the same recommendation for a downward departure that it made before the First Step Act was enacted. The defendant might well receive a lesser sentence had the government made a different recommendation. In the District Court the defense offered different ways the guidelines might have been calculated in light of the First Step Act. One example of what the government might have logically done is to recommend a five-year sentence which would be half of the mandatory minimum. When the mandatory minimum was 20 years the ten year recommendation the government made represented half the mandatory minimum. That surely could have affected the sentence the

judge imposed, particularly in a case like this where the issue was how much of a downward departure should be given based on cooperation and that question is usually left to the discretion of the trial judge. The trial judge noted that in cooperation cases he often deferred to the recommendation of the government because of their involvement and interest in the whole cooperation process. Transcript of sentencing at 32. Here a factor in how the trial judge executed his discretion was the recommendation of the government which completely and indisputably ignored changes to the guidelines resulting from the First Step Act.

VI. CONCLUSION

The petition for a writ of certiorari should be granted for the reasons set forth above.

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