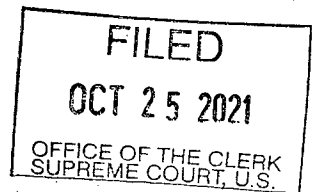


In the  
SUPREME COURT OF THE UNITED STATES OF AMERICA

21-6803

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



JAVIER ROSALES,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

On petition for a writ of certiorari  
to the United States Court of Appeals for the Fifth Circuit

Appeal No. 20-10648 / Cause No. 4:09-cr-00160-A-3  
in the United States District Court for the Northern  
District of Texas, Judge John McBryde presiding

Javier Rosales, pro se  
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### JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 21, 2021. Rehearing was not sought. This Court recognizes extenuating circumstances posed to prisoners filing pro se pleadings during the current COVID-19 pandemic for the purpose of allowing for modest delays, and Petitioner has requested consideration therefor by separate motion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit erred in deciding that the District Court's order denying relief under 18 U.S.C. § 3582(c)(2) did not comprise an abuse of discretion, in contravention of precedential decisions of this Court and in conflict with rulings of its sister Courts of Appeals, where the District Court (a) invented speculative extra-record material to effectively offset the otherwise-applicable reduction under Amendment 782 to the U.S. Sentencing Guidelines Manual, and (b) failed to provide full and fair opportunity for either party to present their positions as to the issue invented by the Court.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The matter before this Court involves individual rights secured by the Fifth Amendment to the United States Constitution, particularly due process and degree of punishment by revocation of personal liberty. The issue is based in 18 U.S.C. § 3582(c)(2) and Amendment 782 to the U.S. Sentencing Guidelines, i.e., the "all drugs minus two" retroactive act by the Sentencing Commission and reduction of sentence under § 3582(c)(2).

## STATEMENT OF THE CASE

In 2009, Mr. Rosales (hereinafter Petitioner, or Rosales) was listed as one of several co-conspirators in an indictment alleging violations of 21 U.S.C. §§ 841(a)(1), (b)(1)(B); 846, to wit, conspiracy to distribute a controlled substance. He was arrested on October 21, 2009, promptly pled guilty, and was sentenced in June of 2010.

Subsequently, the U.S. Sentencing Commission unanimously passed Amendments 782 and 788 to the U.S. Sentencing Guidelines Manual, providing for retroactive reduction of sentences like Mr. Rosales's to correct for a systemic over-reliance on the quantity of drugs involved. See USSG § 1B1.10(d).

Accordingly, on or about May 7, 2020, Mr. Rosales moved for relief pursuant to 18 U.S.C. § 3582(c)(2). This Court has set forth clear directives for judges processing such motions, including plainly defining the scope of courts' discretion to encompass the limited effect of the Amendment (all as discussed below). Judge John McBryde, U.S. District Court for the Northern District of Texas, denied that motion by order filed May 11, 2020. Doc. 401. See APPENDIX A.

Mr. Rosales timely moved for reconsideration by motion dated June 5, 2020. The District Court denied that motion by order filed June 12, 2020. Doc. 404. See APPENDIX B.

Mr. Rosales timely appealed to the U.S. Court of Appeals for the Fifth Circuit. That appeal (following briefing) resulted in affirmation of the District Court's order on June 21, 2021. See APPENDIX C.

Following delayed opportunity to prepare his pro se pleadings due to the pandemic's effect on prison conditions, this petition is submitted.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision is erroneous and fails to provide Rosales with due process of law where it ignores the nature of his claim that the District Court exceeded the scope of its discretion, as defined by this Court in Dillon v. United States, 560 U.S. 817, 825 (2010), in ordering the denial of Rosales's motion for relief under U.S.S.G. Amendment 782 and 18 U.S.C. § 3582(c)(2).

In essential part, the Court of Appeals held:

The district court concluded, as a matter of discretion, that Rosales should not receive a reduction in sentence. Both in its original order and the order denying the motion for reconsideration, the court explained the reasons it would not reduce Rosales's sentence, which focused on the seriousness of Rosales's conduct. The district court reviewed all the relevant facts and materials, considered the request in light of the 18 U.S.C. § 3553(a) factors, and declined to grant a reduction.

Slip Op., at 2.

But although it may be so that the District Court's "reasons ... focused on the seriousness of ... conduct," the conduct addressed by the Court was not that of Rosales.

Instead, the District Court described its general feeling that, after Rosales's arrest and original sentencing hearing, additional and amorphous wrongs were committed in natures similar to the relevant conduct in Rosales's conspiracy case. The Court did not cite to any specific event and did not impute any of its concerns to Rosales or to the conspiracy in particular; it simply justified the status quo by claiming that, should it have the opportunity to sentence Rosales anew today, it would "probably" sentence him not to the low end of the Guidelines range, as originally, but to the high end -- thereby nearly perfectly offsetting whatever reduction might be justifiably applicable

under the law.

Upon a re-review of the material the court had before it when it imposed Rosales's sentence in June 2010, the court is inclined to think that the sentence of imprisonment for 324 months probably was not sufficient, particularly taking into account the probable harm in Mexico that the tremendous quantity of weaponry smuggled by Rosales and those associated with him into Mexico undoubtedly ended up causing.

Order (Doc. 401), at 2.

This decision is plainly the height of arbitrary caprice. According to the dictate of this Court in Dillon, district courts processing motions under § 3582(c)(2) are not conducting a "plenary resentencing," but a proceeding "extremely limited" in scope, United States v. Hernandez, 645 F.3d 709, 712 (5th Cir. 2011). Courts are to replace the amended Guidelines range as the new "starting point" under § 3553(a), and leave all other sentencing determinations "unaffected," Dillon, 560 U.S. at 825.

In addition to contradicting the precedential opinion by this Court, the Fifth Circuit's action below conflicts with the posture of other Circuit Courts of Appeals. Cf., e.g., United States v. Cromartie, 649 Fed. App'x 965, 969 (11th Cir. 2016) ("a § 3582(c)(2) motion is not a vehicle to revisit findings made at the initial sentencing" and a motion to reduce sentence "does not run the risk of increasing a sentence"); United States v. Stansel, 786 Fed. App'x 180, 185 (11th Cir. 2019) (quoting United States v. Adams, 104 F.3d 1028, 1030 (8th Cir. 1997)) (a "district court is to leave all of its previous factual decisions intact 'when considering a motion for sentence reduction ... [a party] may not, decades later, raise factual objections that [it] did not deem worthy to raise at the time simply because they are now beneficial"). The District Court below overran all of these precepts.



By using its vague idea of what "probable harm" relevant conduct "undoubtedly ended up causing," despite having the same information at its ready during the original sentencing proceeding, the District Court deprived Rosales of a meaningful opportunity to be heard. Indeed, the Court below did not even ask the Government's position as to the motion submitted by the pro se Defendant, but simply unilaterally decided that it would decline to afford full and fair consideration for reasons unclear and unfair.

This Court, in Gall v. United States, 552 U.S. 38, 49-50 (2007), held that courts "must make an individualized assessment" of the appropriate sentence, sufficiently explained on record to afford meaningful appellate review. But the Fifth Circuit, on appeal from the District Court's Order, did not hold the lower Court to this plain standard.

In United States v. Yong Lee, 725 F.3d 1159, 1165 (9th Cir. 2012), the Ninth Circuit found error where "the district court employed precisely the converse procedure to that which it was required to follow." Since this Court has clearly asserted that a § 3582(c)(2) proceeding is designed "to isolate whatever marginal effect the since-rejected Guideline [e.g., Sec. 2D1.1, U.S.S.G., circa 2010, two levels higher than today's] had on the defendant's sentence," Freeman v. United States, 564 U.S. 522, 530 (2011), the District Court's Order is manifestly insufficient under Gall. Instead of addressing the effect of Amendment 782, the Court espoused its theory about why people like Rosales -- not Rosales per se -- should get nothing good.

Here, as in Yong Lee, "the record demonstrates that the district court did not use the guidelines range as a starting point whatsoever.

Instead, the court chose a desired sentence, the one [it had imposed before the flawed policy had been rejected], and worked backward," 725 F.3d at 1165 n.6. See also, e.g., United States v. Rusher, 966 F.2d 868, 883 (4th Cir. 1991) (finding error where the "court essentially bypassed the [proper Guidelines process] entirely in its desire to impose a particular sentence," stating: "I just think we have a defendant who needs substantial punishment and that his conduct warrants it," and remanding where "the court's conclusory statements that [the defendant] committed sufficient [additional criminal harms] to warrant [the imposed outcome] do not allow us to meaningfully review" the decision, citing 18 U.S.C. § 3742).

As in those cases from the Ninth and Fourth Circuits, the Fifth Circuit should have remanded Rosales's case for comprehensive review under § 3582(c)(2). Cf., e.g., United States v. Washington, 714 F.3d 1358, 1361-62 (11th Cir. 2013) ("where the defendant has not had the opportunity to rebut the evidence ... he must be afforded that opportunity").

The Guidelines' whole foundation, their "structure and procedures," United States v. Harrison, 58 F.3d 115, 120 (4th Cir. 1995) (Niemeyer, C.J., dissenting), is the guidance of discretion; the District Court below "exercise[d] unguided discretion," id. "Attempts, in effect, to manipulate the Guidelines in order to achieve the 'right result' in a given case are inconsistent with the Guidelines' goal of creating uniformity in sentencing," United States v. Harriott, 976 F.2d 198, 202-03 (4th Cir. 1992).

Although Rosales is not entitled to the sentence reduction suggested by the Sentencing Commission's intent in unanimously passing Amendment 782, he is entitled to consideration under the established legal framework to ensure that the decision below is based on the limited adjustment effected

by Amendment 782 "in isolation," leaving "all other guideline application decisions unaffected," § 1B1.10(b)(1). See, e.g., United States v. Sabillon-Umana, 772 F.3d 1328, 1331-32 (10th Cir. 2014):

We do not question the distinguished judge's intuition that [the defendant] was a minor player in the drug conspiracy, or that his sentence should reflect as much. But in our legal order properly found facts drive sentencing decisions, not the other way around. ... When that process is reversed ... we risk sending defendants to prison for more time than the law fairly permits.

Id.

At bottom, the District Court in this case improperly speculated about conduct not in evidence. Cf., e.g., United States v. Bradley, 628 F.3d 394, 401 (7th Cir. 2010) (per curiam). Therein, the government had attempted to prop up the district court's "prediction about future conduct based on rank speculation" by saying that the judge had used "specific evidence" to make an "individualized determination." Notwithstanding the government's lip service, the Seventh Circuit held that "that contention is not supported by the record," id.

Such extrapolation to "probable" or "potential" effects "cannot survive" a "due process challenge," id. Cf. United States v. Newman, 614 F.3d 1232, 1238-39 (4th Cir. 2010) (remanding where sentencing court concluded, without record support, that defendant brought his son to Middle East because he would be more difficult to find there); United States v. England, 555 F.3d 616, 623 (7th Cir. 2009) (remanding where evidence "in equipoise" failed to support district court's finding that defendant would have attempted to commit crime if he had been out on bond); United States v. Miller, 601 F.3d 734, 740 (7th Cir. 2010) (vacating sentence as substantively unreasonable).

Because the District Court "may not speculate about the existence



of a fact that would result in a higher sentence," United States v. Barrington, 648 F.3d 1178, 1197 (11th Cir. 2011), the Fifth Circuit's failure to remand contravenes this Court's mandates and the postures of its sister Courts.

CONCLUSION

Therefore, the petition for a writ of certiorari should be granted, and the case should be summarily vacated and remanded.

Respectfully submitted,

  
JAVIER ROSALES

INDEX TO APPENDICES

APPENDIX A: Order by the District Court dated May 11, 2020.

APPENDIX B: Order by the District Court dated June 5, 2020.

APPENDIX C: Order by the Court of Appeals dated June 21, 2021.