23-6466 ORIGINAL

In the

Supreme Court of the United States

Edgar Lerma Flores

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEAL

FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Edgar Lerma Flores

10474-027

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QUESTIONS PRESENTED FOR REVIEW

Can the disparity in Guideline ranges for offenses involving pure methamphetamine and those involving a mixture of methamphetamine be considered as an extraordinary compelling reason warranting reduction pursuant to 18 U.S.C. § 3582?

Is the Sixth Circuit abusing its discretion by relying on the purity equals culpability scheme for the 10-to-1 methamphetamine disparity if abuse of discretion occurs when a district relies on erroneous findings of fact. United States v Pembrook, 609 F 3d 381, 382 (6th Cir. 2010).

PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were party to the case in the United States Court of Appeals for the Sixth Circuit and The United States District Court for the Eastern District of Kentucky.

None of the parties, are a company, corporation, or subsidiary of any company or corporation.

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The opinion of the Sixth Circuit Court of Appeals whose, Judgement is herein sought to be reviewed, was entered on September 18, 2023, in an unpublished decision in United States V Edgar Lerma Flores, No. 23-5192, 2023 U.S. App. LEXIS 24752 (6th Cir. Sept. 18, 2023) is represented in the separate Appendix A to this petition.

The opinion of the Eastern District of Kentucky, was entered on Feb. 14, 2023, in and unpublished decision in United States V Flores, 2023 U.S. Dist. LEXIS 24628, 2023 WL 1999843 (E.D. KY., Feb. 14, 2023) and is reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 2023. The jurisdiction of this court is invoked under Title 28 U.S.C. § 1654 (a) and 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Compassionate Release statute in 18 U.S.C. § 3582 has essentially become the Safety Valve used by courts for extra ordinary and compelling reasons. That statute authorizes a district court to reduce a sentence if it finds that (1) "extraordinary and compelling reasons warrant such a reduction" (2) the "reduction is consistent with applicable policy statements issued by the Sentencing Commission" and (3) the § 3553(a) factors, to the extent that they apply, support the reduction. 18 U.S.C. § 3582(c)(1)(A).

STATEMENT OF THE CASE

On June 6, 2016 a Grand Jury sitting in the Easter District of Kentucky returned a Seven count Indictment against Edgar Flores, and Five other defendants. On October 7th 2015, Flores appeared in District Court for a Rearraingment hearing. Flores pled guilty to Counts One and Two of the Indictment which charged Flores with Conspiracy to Distribute Five Kilograms or more of Cocaine in violation of 21 U.S.C. § 846, and Conspiracy to Distribute Five Hundred Grams or More of Methamphetamine, Flores plea of guilt was pursuant to a written plea agreement.

On January 27, 2016 at sentencing the District Court imposed an above the Guidelines Sentence of 300 Months on Counts One and Two to be followed a Five year term of Supervised release. On January 29th 2016 the District Court entered Judgement in conformity with its holdings at the Sentencing Hearing. Flores filed a timely notice of Appeal on February 5th 2016.

The Appellate Court rejected Flores Appeal and entered Judgement. Flores timely filed a § 2255 on Aug. 3, 2018. In an Opinion and Order the district court rejected his claims.

Ultimately Flores filed relief pursuant to § 3582 that was denied on Feb 8, 2021. Flores again filed for relief pursuant to § 3582 and the district court denied. Flores filed a timely appeal. The Sixth Circuit Court of Appeals denied his motion finding the District Court did not abuse its discretion. This Writ follows in a timely manner.

STATEMENT OF THE FACTS

The changes outlined in the indictment all relate to an investigation by federal and local enforcement into drug trafficking in the Lexington, KY. area. That investigation began in April of 2015 when under cover informants made three, monitored, purchases totaling approximately seventeen ounces of methamphetamine from individuals other than the Petitioner. After concluding the third purchase on May 13, 2015, law enforcement stopped a Tahoe pickup truck seen leaving a residence belonging to Romero Beltron Duran. Petitioner was one of four individuals in the vehicle. After a search of the vehicle, officers were able to uncover an amount of cocaine. After a subsequent search of the home an additional amount of methamphetamine was discovered, which later served as the basis for the current proceedings.

REASONING FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE SIXTH CIRCUIT COURT OF APPEALS WRONGLY DECIDED THAT A DISPARATE SENTENCE COULD NOT BE GROUNDS FOR AN EXTRAORDINARY & COMPELLING REASON WARRANTING REDUCTION

AND THAT THE DISPARITY IN SENTENCES CREATED BY METHAMPHETAMINE GUIDELINES COULD NOT AMOUNT TO AN EXTRAORDINARY & COMPELLING REASON

Supreme Court Rule 10 provides relevant parts as follows:

Rule 10

CONSIDERATIONS GOVERNING REVIEW

ON WRIT OF CERTIORARI

(1)A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons, therefore, The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort;] or has so far departed from the accepted and usual course of

judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a ... United States court of appeals has decided an important question of federal law which has not been but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.

Id. Supreme Court Rule 10.1(a), (c).

QUESTION PRESENTED

I CAN THE DISPARITY IN GUIDELINE RANGES FOR OFFENSES INVOLVING SUBSTANCE CONTAINING METHAMPHETAMINE AND THOSE INVOLVING A PURE METHAMPHETAMINE BE CONSIDERED AS AN EXTRAORDINARY AND COMPELLING REASON WARRANTING REDUCTION PURSUANT TO 18 U.S.C. § 3582 (c)(1)(A) AFTER THE SENTENCING COMMISSIONS CHANGES ON NOV. 1, 2023?

Edgar Lerma Flores, appealed the district courts order denying his 18 U.S.C. § 3582. That appeal was raised largely in part due to the district court abusing it's discretion by ruling that the methamphetamine pure/ methamphetamine substance containing disparity could not amount to an extraordinary and compelling reason warranting reduction.

A) FEDERAL COURTS HAVE THE JURISDICTION AND POWER TO REDUCE AN EXISTING SENTENCE

The district always had the power to adjust Flores sentence. At the time of Petitioners filing the district court no longer needed a motion from the B.O.P. to resentence him as a federal prisoner under the compassionate release provisions of 18 U.S.C. § 3582 (c)(1)(A). The district court had the discretion to resentence Petitioner after he exhausted his administrative remedies. At the time of the instant motion's filing the reasons that could justify resentencing were no longer limited to medical, age, family, or even simply extraordinary and compelling reasons. At the time of the instant filing the district court had the discretion to resentence Flores if he could demonstrate that § 1B1.13 applies, Even more importantly the Appellate court in anticipation to the Nov. 1, 2023 Sentencing Commission changes to § 1B1.13 had the discretion to find that Policy disagreement could amount to an extraordinary and compelling reason. Specifically in the instant proceedings an unusually long sentence, where the defendant had served at least 10 years and a gross disparity between the sentence being served, and the sentence likely to be imposed if Petitioner was sentenced to simple methamphetamine as the indictment changes, as opposed to actual methamphetamine or Ice.

(1). HISTORICAL FRAMEWORK OF 18 U.S.C. § 3582

Congress first enacted the compassionate release provisions in 18 U.S.C. § 3582 as part of the Comprehensive Crime Control Act of 1984. That legislation provided that a district court modify a final term of imprisonment when extraordinary and compelling reasons warrant such a reduction. 18 U.S.C. § 3582 (c)(1)(A)(1). In 1984, this provision was conditioned on the Bureau of

Prisons (BOP) filing a motion in the sentencing court. Absent a motion by the B.O.P. a sentencing court had no jurisdiction to modify an inmates sentence. Congress did not define what constitutes and "extraordinary and compelling reason", but the legislative history recognized that the statute was intended in part, to abolish and replace federal parole. Rather than have the parole board review for rehabilitation only, congress authorized review for changed circumstances:

> "The committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of sever illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defendant was convicted have been later amended to proved a shorter term of imprisonment S. Rep. No 98-225 at 55-56 (1983)".

18 U.S.C. § 3582 was intended to act as a "Safety Valve " for the "modification of sentences" that would previously have been addressed through the former parole system. Id at 121. The provision was intended "to assure the availability of specific review and reduction of a term of imprisonment for "extraordinary and compelling reasons" and would allow courts to respond to changes in the guidelines and law" Id. Thus, sentencing courts have the power to modify sentences for extraordinary and compelling reasons.

2). SECTION 3582 (c)(1)(A) IS NOT LIMITED TO MEDICAL, ELDERLY OR CHILDCARE CIRCUMSTANCES.

Congress initially delegated the responsibility for determining what constitutes "extraordinary and compelling reason" of the United States Sentencing Commission. 28 U.S.C. § 994 (t) (the commission ... shall describe what should be considered "extraordinary and compelling reason" fore sentence, including the criteria to be applied and a list of specific examples) "Congress provided on limitation to that authority". Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason 28 U.S.C. § 994 (t). Rehabilitation could, however, be considered with other reasons to justify a reduction.

In 2007 the Sentencing Commission defined "extraordinary and compelling reasons" as follows.

(A). Extraordinary and Compelling Reasons. Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under an of the following circumstances:

(i) The defendant is suffering from a terminal illness.

(ii) The defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.

(iii) The death or incapacitation of the defendants only family member capable if caring for the defendants minor children or child.

(iv) As determined by the director of the Bureau of Prisons, there exists in the defendants case an extraordinary and compelling reason for purposes of subdivisions (1)(A) U.S.C. § 1B1.13, Application Note 1.

As we will see, with the passage of the First Step Act, Subparagraph (iv) is no longer limited by what the B.O.P. decides is extraordinary and compelling.

Historically , the B.O.P. rarely filed motions under § 3582 (c)(1)(A), even when the inmates met the objective criteria for modification. see U.S. Dept. of Justice office of the Inspector General The Federal Bureau of Prisons Compassionate Release Program. (Apr. 2023). The office of the Inspector General also found that the B.O.P. failed to provide adequate guidance to staff on the criteria for compassionate release, failed to set time lines for review of compassionate release, failed to create formal procedures for informing prisoners about compassionate release requests. Id at i-iv.

Congress heard those complaints and in late 2018 enacted the First Step Act.

(3). IMPACT OF THE FIRST STEP ACT ON 18 U.S.C. § 3582 (c)(1)(A) DISCRETION

The First Step Act, P.L. 115-391, 132 State. 5194, at (Dec. 21, 2018), among other things, transformed the process for compassionate release. Id. at § 603. Now, instead of depending upon the B.O.P. to determine the inmates eligibility for extraordinary and compelling reasons and the filing of the

motion by the B.O.P., a court can resentence "upon the motion of the defendant". A defendant can file an appropriate motion if he or she has exhausted all administrative remedies or the "lapse of 30 days from the receipt of such a request by the warden of the defendants facility, whichever is earlier". 18 U.S.C. § 3582 (c)(1)(A). The purpose and effect of this provision is to give federal courts the ability to hear and resentence a defendant even in the absence of a B.O.P. motion. Congress labeled this change "Increasing The Use and Transparency of Compassionate Release". 164 Cong. Rec. H10346 H10358 (2018) Senator Cardin noted in the record that the bill "expands Compassionate release under the Second Chance Act, and expedites compassionate release applications 164 Cong. R, 199 at S7774 (Dec. 18, 2018). In the house, Representative Nadler noted that the First Step Act includes "a number of very positive changes, such as... improving application of compassionate release, and providing other measures to improve the welfare of federal inmates". 164 Cong. R. H10346-04 (Dec. 20, 2018).

Per the First Step Act, once an inmate has exhausted their administrative remedies through the B.O.P., the sentencing court then had jurisdiction and the authority to reduce a sentence if it found "extraordinary and compelling reasons" existed to warrant such a reduction.

(4). SIXTH CIRCUIT 18 U.S.C. § 3582 (c)(1)(A) DISCRETION

The Sixth Circuit deploys a three step inquiry in determining whither a sentence reduction is appropriate under a § 3582 (c)(1)(A). Before granting relief, the court must; (1) find that extraordinary and compelling reasons

exist; (2) ensure that a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and (3) consider all relevant sentencing factors listed in 18 U.S.C. § 3582 (a). United States v Elias, 984 F. 3d 516, 518 (6th Cir. 2021) "Congress provided no statutory definition of "extraordinary and compelling reasons" instead delegating that task to the United States Sentencing Commission". Id. (citing 28 U.S.C. § 994 (t)).

The Sixth circuit was mindful that after the First Step Act the non updated U.S.S.G. § 1B1.13 was no longer an applicable policy statement for compassionate release motions brought by defendants. United States v Elias, 984 F. 3d 516 (6th Cir. 2021) "Thus district courts have discretion to define extraordinary and compelling reasons on their own initiative Id. at 519-20.

The Appellate courts review of a defendants motion for a reduction in his sentence is one that is for an abuse of discretion. United States v Ruffin, 978 F. 3d 1000, 1005 (6th Cir. 2020) The Sixth Circuit Court of Appeals notes that an abuse of discretion occurs when the district court "relies on clearly erroneous findings of fact", applies the law improperly, or uses an erroneous legal standard". United States v Pembrook, 609 F. 3d 381, 383 (6th Cir. 2010) Flores's argument was based on the fact, that reliance on the methamphetamine actual sentencing scheme of 10 to 1 created a finding of reliance on erroneous findings of fact. Thus creating a disparity if the court relied upon? would be an abuse of discretion.

(5). EXPANSION OF U.S.S.G. § 1B1.13 FOR 18 U.S.C. § 3582 (c)(1)(A). (EFFECTIVE Nov. 1, 2023).

U.S.S.C. § 1B1.13 for 18 U.S.C. § 3582 (c)(1)(A). (Effective Nov. 1, 2023)

In 2023 the Sentencing Commission updated the policy statement in regard to § 1B1.13 for sentence reduction pursuant to 18 U.S.C. § 3582 (c)(1)(A). For the sake of brevity and clarity the amendments added to the original 1B1.13 will follow;

1B1.13. Reduction in Term of Imprisonment Under 18 U.S.C. 3582(c)(1)(A) (Policy Statement)

(a) In General - Upon motion of Director of the Bureau of Prisons or the defendant under 18 U.S.C. 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. 3553(a), to the extent that they are applicable, the court determines that;

(1) (A) extraordinary and compelling reasons warrant the reduction; or

(B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. 3559(c) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in ±8 U.S.C. 3142(g); and

(3) the reduction is consistent with this policy statement.

(b) EXTRAORDINARY AND COMPELLING REASONS. Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof:

1) MEDICAL CIRCUMSTANCES OF THE DEFENDANT.

(A) The defendant is suffering from a terminal illness (i.d., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ASL), end-stage organ disease, and advanced dementia.

(B) the defendant is

(i) suffering from a serious physical or medical condition,

(ii) suffering from a serious functional or cognitive impairment. or

(iii) experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(C) The defendant is suffering from a medical condition that requires long-term or specialized medical care that is not being provided and without which the defendant is at risk or serious deterioration in health or death.

(D) The defendant presents the following circumstances,

(i) the defendant is housed at a correctional facility affected or at imminent risk of being affected by (I) an ongoing outbreak of infectious disease, or (II) an ongoing public health emergency declared by the appropriate federal, state, or local authority;

(ii) due to personal health risk factors and custodial status, the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or the ongoing public health emergency described in clause (i); and

(iii) such risk cannot be adequately mitigated in a timely manner.

(2) AGE OF THE DEFENDANT. The defendant (A) is at least 65 years old ; (B) is experiencing a serious deterioration in physical or mental health because of the aging process; and (C) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.)*

(B) The incapacitation of the the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(C) the incapacitation of the defendant's parent when the defendant would be the only available caregiver for the parent.

(D) The defendant establishes that circumstances similar to those listed in paragraphs (3)(A) through (3)(C) exist involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member, when the defendant would be the only available caregiver for such family member or individual. For purposes of this provision, "immediate family member" refers to any of the individuals listed in paragraphs (3)(A) through (3)(C) as well as a grandchild, grandparent, or sibling of defendant.

(4) VICTIM OF ABUSE. The defendant, while in custody serving the term of imprisonment sought to be reduced, was a victim of:

(A) sexual abuse involving a "sexual act," as defined in 18 U.S.C. 2246(@) (including the conduct described in 18 U.S.C. 2246(2)(D) regardless of the age of the victim); or

(B) physical abuse resulting in "serious bodily injury," as defined in the Commentary to 1B1.1 (Application Instructions);

that was committed by, or at the direction of, a correctional officer, an employee or contractor of the Bureau of Prisons, or any other individual who

who had custody or control over the defendant.

For purposes of the provision, the misconduct must be established by a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding, unless such proceedings are unduly delayed or the defendant is in imminent danger.

(5) OTHER REASON. The defendant presents any other circumstance or combination of circumstances that, when considered by themselves or together with any of the reasons described in paragraphs (1) through (4), are similar in gravity to those described in paragraphs (1) through (4).

(6) UNUSUALLY LONG SENTENCES. If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the Guidelines Manual that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances.

(c) LIMITATIONS ON CHANGES IN LAW. Except as provided in subsection (b)(6), a change in the law (including an amendment to the Guidelines Manual that has not been made retroactive) shall not be considered for purposes of determining whether and extraordinary and compelling reason exists under this policy statement. However, if a defendant otherwise establishes that extraordinary and compelling reasons warrant a sentence reduction under this policy statement, a change in the law (including an amendment to the Guidelines Manual that has not been made retroactive) may be considered for purposes of determining the extent of any such reduction.

(d) REHABILITATION OF THE DEFENDANT. Pursuant to 28 U.S.C. 994(t), rehabilitation of the defendant is not, by itself, on extraordinary and compelling reason of this policy statement. However, rehabilitation of the defendant while serving the sentence may be considered in combination with other circumstances in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted.

(e) FORESEEABILITY OF EXTRAORDINARY AND COMPELLING REASONS. For purpose of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.

1. Interaction with Temporary Release for Custody Under 18 U.S.C. 3622 ("Furlough"). A reduction of a defendant's term of imprisonment under this policy statement is not appropriate when releasing the defendant under 18 U.S.C. 3622 for a limited time

adequately addresses the defendant's circumstances.

2. Notification of Victims. Before granting a motion pursuant to 18 U.S.C. 3582(c)(1)(A), the Commission encourages the court to make its best effort to ensure that any victim of the offense is reasonably, accurately, and timely notified, and provided, to the extent practicable, with an opportunity to be reasonably heard, unless any such victim previously requested not to be notified.

Background. The Commission is required by 28 U.S.C. 994(a)(2) to develop general policy statements regarding application of the guidelines or other

(d) REHABILITATION OF THE DEFENDANT. Pursuant to 28 U.S.C. 994(t), rehabilitation of the defendant is not, by itself, on extraordinary and compelling reason of this policy statement. However, rehabilitation of the defendant while serving the sentence may be considered in combination with other circumstances in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted.

(e) FORESEEABILITY OF EXTRAORDINARY AND COMPELLING REASONS. For purpose of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.

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Background. The Commission is required by 28 U.S.C. 994(a)(2) to develop general policy statements regarding application of the guidelines or other

aspects of sentencing that in the view of the Commission would further the purposes of sentencing (18 U.S.C. 3553(a)(2)), including, among other things, the appropriate use of the sentence modification provisions set forth in 18 U.S.C. 3582(c). In doing so, the Commission is authorized, required by 28 U.S.C. 994(t) to "describe what should be considered extraordinary and compelling reason for sentence reduction, including the criteria to be applied and a list of specific examples." This policy statement implements 28 U.S.C. 994(a)(2) and (t). 5H OP. 20

Movant had made an attempt to have his circumstances reviewed in light of the First Step Acts changes to § 3582 in the past to no avail. However with the amendments just listed and the commissions vote for these changes to be considered retroactively Movant is eligible for relief pursuant to 1B1.13(b)(6) Unusually Long Sentences. The fact that Movant is serving a sentence for twice the amount he would be serving if sentenced today provides such a gross disparity as to warrant a reduction.

III. Exhaustion

Movant Filed a Request for Compassionate Release/Sentence Reduction with the Bureau of Prisons on October 2, 2023. Mr Rucker has met the exhaustion requirement of 18 U.S.C. § 3582, and now is able to file in this court, as it has jurisdiction.

IV Mr. Rucker's Predicate "Simple Possession" Drug Charges No Longer Constitute, Or Are Covered Offenses To Trigger § 851 is Harsh Enhancement.

In Mr. Rucker's original proceedings the United States filed an "Information and Notice of Prior Conviction", listing Rucker's seven prior narcotics-related offenses and advising the court and Rucker that he was subject to an increased Statutory Maximum sentence under 21 U.S.C. §§ 841(b) and 851. Doc.

(B). METHAMPHETAMINE DISPARITY

When indicted Petitioner faced a 10 year mandatory minimum sentence under 21 U.S.C. § 841 (a) and 841 (b)(1)(A)(viii). Specifically, the indictment alleged 500 grams or more of a detectable amount of methamphetamine, or simple methamphetamine. The argument Flores maintains is that the district court and the appellate court relied on "clearly erroneous facts" when those courts upheld the disparity between the simple methamphetamine offense level in the Guidelines and the actual methamphetamine offense level in the Guidelines, and this could be an extraordinary & compelling reason for reduction.

As a laymen in the law Petitioner quoted a historical "Memorandum Opinion of Sentencing" authored by the Honorable Christine M. Arguello in U.S. v Pereda, No. 18-cr-00220-CMA, that decision is relevant here:

"The current guidelines establish base offense levels for methamphetamine offenses that depend of the drug's purity. (The Guidelines treat methamphetamine greater than (80%) pure as "pure" methamphetamine, or "ICE". U.S.S.G. § 2D1.1 (c), n. (c)) For example, a Defendant whose offense involves (15) Kilograms of a methamphetamine mixture and another Defendant whose offense involves (1.5) Kilograms - ten times less - of actual/pure methamphetamine would both have a base offense level of 36. U.S.S.G. § 2D1.1 (c)(2) (2016). The current guidelines treat both those amounts for sentencing purposes as equivalent to (30,000) Kilograms of marijuana. Id.

This was not always the case. The 1987 guidelines treated (1.5) Kilograms of methamphetamine as equivalent to (600) Kilograms of marijuana. SEE U.S.S.G. § 2D1.1 (1987). (The 1987 guidelines treated (1) gram of methamphetamine as equivalent to (2) grams of cocaine of (0.4) grams of heroin. U.S.S.G. § 2d1.1 cmt. 10, Drug Equivalency Tables (1987). Thus, the 1987 guidelines treated (1.5) Kilograms of methamphetamine as equivalent to (3) kilograms of cocaine or (600) grams of heroin, which would result in a baser offense level of (28) (the same base offense level for an offense involving (600) kilograms or marijuana.)

The 1987 guideline's Drug Quantity Table did not differentiate actual/pure methamphetamine for methamphetamine mixtures, but provided that "purity of the controlled substance ... may be relevant in the sentencing process because it is probative of the Defendant's role or position in the chain of distribution". Id. ; 2D1.1 cmt. 9.

In 1988, Congress establishes mandatory minimum sentences for methamphetamine offenses. Anti-Drug Abuse Act of 1988. Pub. L. No. 100-690, S.6470 (g)-(h), 102 Stat. 4181, 4378 (codified at 21 U.S.C. § 841 (b)(1)). Those mandatory minimums had a 10-to-1 ratio based on purity. An offense involving (100) grams of a methamphetamine mixture or (10) grams of actual/pure methamphetamine had a (5) year mandatory minimum sentence; and an offense involving (1) kilogram of a methamphetamine mixture or (100) grams of actual/pure methamphetamine had a (10) year mandatory minimum sentence.

The following year, in 1989, the United States Sentencing Commission revised the Drug Quantity Table in § 2D1.1 by incorporating the statutory penalties and by differentiating between actual/pure methamphetamine mixture

and (1.5) kilograms of actual/pure methamphetamine each as being equivalent to (15,000) kilograms of marijuana. See U.S.S.G. § 2D1.1 (c)(4) (1989). A Defendant with a criminal history category of (1) convicted of an offense involving just enough methamphetamine to trigger a statutory mandatory minimum under the Anti-Drug abuse Act of 1988 would have received under the 1989 guidelines a recommended sentence consistent with the statutory mandatory minimum. For example, an offense involving (100) grams of a methamphetamine mixture of (10) grams if actual/pure methamphetamine would have resulted in a (5) year mandatory minimum and yielded a base offense level of (26), yielding a guideline range of 63-78 months of imprisonment. Id. § 2D1.1 (c)(9); Id. Ch.5, Pt. A. Similarly, an offense involving (1) kilogram of a methamphetamine mixture of (100) grams of actual/pure methamphetamine would have resulted in a (10) year mandatory minimum and an offense level of (32), yielding a guideline range of 121-151 months. Id. § 2D1.1 (c)(6); Id. Ch 5, Pt. A.

Most recently, in 1989, Congress amended the statutory penalties for methamphetamine offenses by cutting in half the amounts that trigger the respective mandatory minimum sentences. Methamphetamine trafficking penalty Enhancement Act of 1989, Div. E. § 2, Pub. L. No. 105-277, 112 Stat. 2681, 2681-759. Shortly thereafter, the Commission again followed Congress's lead and accordingly increased the base offense levels for methamphetamine offenses. U.S.S.G. § 2D1.1 (c)(4), (7) (2000). Consequently, today an offense involving (50) grams of methamphetamine mixture or (5) grams of actual/pure methamphetamine triggers a (5) year mandatory minimum. 21 U.S.C. § 841 (b)(1)(B)(viii). The same offense yields a base offense level of (24), which for a Defendant with a criminal history category of (1) yields a range of 51-63

months imprisonment. U.S.S.G. § 2D1.1 (c)(B); Id. Ch.5 Pt. A. And, an offense involving (500) grams of a methamphetamine mixture or (50) grams of actual/pure methamphetamine triggers a (10) year mandatory minimum. 21 U.S.C. § 841 (b)(1)(A)(viii). That offense yields a base category of (1) yields a range of 97-121 months imprisonment. U.S.S.G. § 2D1.1 (c)(5); Id. Ch. 5, Pt. A.

To summarize, the Commission twice amended the guidelines for methamphetamine offenses so that the base offense level (for a Defendant with a criminal history category of (1)) would exactly align with the mandatory minimum sentences - and the Commission did so each time right after Congress created or changed the minimum sentences".

Since the enactment of the methamphetamine 10 to 1 sentencing ratio this court has held that the Guidelines are Just "one factor among several" that courts must consider in determining an appropriate sentence, Kimbrough v United States, 552 U.S. 85,105 (2007). While the Guidelines must serve as the "starting point and the initial benchmark" of this inquiry, the Sentencing Court "may not presume that the guideline range is reasonable". Gall v United States, 552 U.S. 38, 49-50 (2007). The courts task is to impose a sentence that is "sufficient, but not greater than necessary", to comply with the purpose set forth in 18 U.S.C. § 3553 (a)(2).

Generally the trust courts place in the sentencing commission is based on that body's "diligent research which lead to determinations based on empirical data and national experience, guided by professional staff with appropriate expertise". Kimbrough v United States, 552 U.S. at 108-09 (2007) "In the ordinary case, the commissions recommendation of a sentencing range will reflect a rough approximation of sentences that might achieve § 3553 (a)'s

objectives". Id. at 109, but "the Sentencing Commission departed from the empirical approach when setting the Guidelines ranges for drug offenses, and simply Keyed the guidelines to the statutory mandatory minimum sentences that congress established for such crimes". Gall v United States, 552 U.S. 38, 46 (2007). The Supreme Court has addressed in numerous instances the Guidelines as they relate to crack cocaine offenses, such as in Booker, Kimbrough, Gall, and Rita, but never once has this court addressed the disparity in methamphetamine offenses.

Ironically, to date "no United States Circuit Court of Appeals has provided guidance to district courts to reject the methamphetamine guidelines, presumably because of the District Courts wide discretion to decide the weight of the guidelines". United States v Nawanna, No. 17-4019. 2018 U.S. Dist. LEXIS 72676, 2018 WL2021350, at * 4 (N.D. Iowa May 1, 2018), and the appellate court in Petitioners circumstances is no exception.

(a) THE METHAMPHETAMINE DISPARITY BETWEEN SUBSTANCE CONTAINING AND ACTUAL METHAMPHETAMINE CREATES UNWARRANTED "SENTENCE DISPARITIES AMONG DEFENDANTS WITH SIMILAR RECORDS WHO HAVE BEEN FOUND GUILTY OF SIMILAR CONDUCT". 18 U.S.C. § 3553 (a)(6).

The Appellate Court notes that because "the guidelines expressly distinguish between offenses involving pure meth and a mixture containing methamphetamine, Flores did not identify a disparity amongst defendants who have been found guilty of similar conduct" (Doc 11 1 at 3). This is an arbitrary statement because Flores argued that it was the guidelines or the

Notes and Commentary to the Guidelines that created the disparity in the first place and thus lenity should apply.

It is in U.S.S.G. § 2D1.1 Notes to Drug Quantity Table "B" that we find the first over reach of the sentence commission, that creates the disparity. The Notes instruct for the methamphetamine to be considered "ICE" it needs to be 80% pure, so if the beginning weight is 10 grams only 8 grams need be pure to trigger the "ICE" or actual determination. Oddly, the guideline text itself tracks methamphetamine mixtures all the way to 45 kilograms or more. The reason this is important to note is because either the guideline text 45 kilogram weight is an useless insertion or the sentencing commissions interpretation in the notes sweep more broadly then the guidelines themselves?

The notes essentially assume methamphetamine can be reduced without any action on the part of the defendant and there fore will be. Following the notes and commentary, 1 kilogram will always be enough methamphetamine to trigger a level 38 offense, for ICE and completely nullify simple methamphetamine from the guidelines completely. This means the government has complete control over the charged type of drug in relation to purity (actual/detectable amount) and the amount. A prosecution has control over the tpye and amount and rarely do the facts matter. All things equal between defendants with two exact same criminal records, and 100 grams of methamphetamine. Both indicted for substance containing methamphetamine under 841 (b)(1)(A)(viii). All things equal except that the government can choose to not reduce the same amount of methamphetamine to pure or "ICE" in one instance, while doing so in the other. Often resulting in drastic sentence differences.

(2). Lower Court Disparities

"A growing body of case law suggests the distinction between actual methamphetamine and methamphetamine mixture is no longer appropriate because it is not based on empirical data, does not serve as an accurate proxy for culpability, and creates unwarranted sentencing discrepancies between methamphetamine and other drugs" United States v Celestine, No. 21-125, 2023 U.S. Dist. LEXIS 25406, (E.D.L. Feb 15, 2023). This decision is indicative of Flores assertion that the methamphetamine disparity creates a scenario that could create an extraordinary and compelling reason warranting reduction. Celestine ultimately found that it would "grant defendant's motion for downward variance based on policy grounds. "The court will apply the methamphetamine mixture guidelines to all methamphetamine cases moving forward, regardless of whether the defendant requests the court to do so" Id. at 5.

This decision isn't isolated but does paint a picture of the reality that the methamphetamine disparity has created.

District courts have further found that there is no "empirical basis for the Sentencing Commissions 10 to 1 weight disparity between actual methamphetamine and methamphetamine mixture. United States v Nawanna, 321 F. Supp. 3d 943 (N.D. Iowa 2018). Other circuits have found the same. See United States V Hartle, No. 4:16-cv-233-BLW, 2017 U.S. Dist. LEXIS 93367, 2017 WL 260 8221, at * 2 (D. Idaho June 15, 2017) (I have tried to determine whether there is any empirical data from the Sentencing Commission or in the academic literature which would justify the ratio. I have found none".); United States v Johnson, 379 F Supp. 3d. 1213, 1223-24 (M.D. Ala. 2019)("Just as courts have

criticized the link between drug quantity and the offenders role, they have also debunked the guidelines assumed connection between drug purity and criminal role".) Id. at 1226 ("In sum this court joins other district courts in rejecting the methamphetamine guidelines 10 to 1 ratio because it is based on a flawed assumption that methamphetamine purity is a proxy for role in the offense".) This flawed assumption is the basis of Petitioners Writ. In the absence of actual facts to support a sentencing scheme, at minimum extraordinary and compelling reason should apply.

Courts have even moved outside mere policy disagreements to state the methamphetamine sentencing scheme is "divorced from reality". United States v Ibarra-sandoval, 265 F. Supp. 3D 1249,1255 (D.N.M. 2017) and more importantly the guidelines establish a "false uniformity" by allowing purity of drugs to mask all other factors" United States v Cabrera, 567 F. Supp. 2D 271,271 (D. Mass. 2008). The issue has become such mainstream that the Sentencing Commission has recently found that "given the on-the-ground reality in methamphetamine cases, the better way to determine culpability is to examine all of the circumstances of the defendants case and life seeing the defendant as a "whole person", as the Supreme Court just instructed in Concepcion, 142 S. Ct. (2022). There are enhancement available for leader, organizers, or managers of criminal enterprises. If the defendants case warrants, those enhancements should be applied. In the context of methamphetamine though, purity is no longer probative of the defendants culpability" United States v Robinson, No. 3:21-CR-14-CWR-FKB-2, U.S. Dist. LEXIS 231041, (S.D.M. Dec 23, 2022).

Flores, maintains that the district court and by extension the Appellate court had the discretion to consider the methamphetamine disparity as a fact

that gave leave for the disparity to be an extraordinary and compelling reason warranting reduction pursuant to 18 U.S.C. § 3582 (c)(1)(A).

Finally, there is one appellate court that has recently found that purity or type of methamphetamine is an element of the offense. United States v Himmelberger, No. 21-11284, U.S. App. LEXIS 3370, (11th Cir. Feb 7, 2022) (where... actual methamphetamine was an element of his crimes, and it was changed in his indictment and found beyond a reasonable doubt by the jury".

This court has found that other than a prior conviction, any fact that increases the statutory minimum or maximum penalty of a crime is an element that must be submitted to a jury and proven beyond a reasonable doubt, Apprendi v New Jersey, 530 U.S. 446, 490 (2000); Alleyne v United States, 570 U.S. 99, 103 (2013). Alleyne error does create a situation that could warrant an extra ordinary and compelling reason.

Conclusion

In conclusion abuse of discretion occurs when a court relies on "erroneous findings of fact" United States v Pembrook 609 F. 3d. 381, 383 (6th Cir. 2010). Court after court has found that the methamphetamine guidelines that distinguishes between purity is in error not based on facts. As such at minimum the disparity created could indeed be grounds for extraordinary and compelling reasons warranting reduction. The appellate court found Flores distributed amounts of methamphetamine, and none of those findings are erroneous, but the 10-to-1 ratio creates a question of the amount involved, because purity presents a scenario where the sentence and amount could be exponentially

enhanced. Flores was indicted for 4.5 kilograms of a substance containing a detectable amount of methamphetamine.

The indictment specifically named a weight and a type or purity. The commentary to § 2D1.1 Application Note 5, "Determining Drug Types and Drug Quantities", reads "Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level" 1B1.3 (a)(2). The interpretation of this commentary has allowed courts and the government to sentence defendants like Flores to "ICE" when he was indicted for a "detectable amount". But the reading is clear when read correctly. Types and Quantities "not" specified can be considered at sentencing. But Flores indictment was clear and specified the purity and weight. Thus the government has violated § 2D1.1's directive, and in so doing lenity should apply, warranting an extraordinary and compelling reason. Since the inception of the crack cocaine 100-to-1 sentencing scheme court after court has found that, that drug has drastically impacted urban African American communities, and rightly so. Those same courts have found that the ratio is a gross disparity that every court has the discretion to disagree with, as the Guidelines are advisory. Presumably also, District courts have the discretion to assume a policy disagreement could qualify as an "extraordinary and compelling reason", and reduce a sentence pursuant to § 3582 (c)(1)(A) based on that policy disagreement. The Sixth Circuit expressly found that "Flores failed to identify an extraordinary and compelling reason for granting compassionate release", (Doc 11-1 at 3) and in doing so was ruling that policy disagreements with methamphetamine disparity could not serve as an "extraordinary and compelling reasons", as well as lenity.

Further, the distinction found between "ICE" and a substance containing is no different then the distinction between crack and powder cocaine, and the Appellate court's position that Flores could not invoke 3553 (a)(6) as a basis for disparity is misplaced. This court has found that a district court may disagree with the guideline range indicated by the drug quantity table where the resulting sentence would be "greater than necessary to achieve § 3553 (a)'s purposes" Kimbrough 2007 552 U.S. at 110 (2007). The court must not presume that the guideline range is reasonable, Gall, 552 U.S. at 49-50 2007 in the methamphetamine scheme, and a "categorical disagreement with a variance from the guidelines is not suspect" Spears v United States, 555 U.S. 261, 264 (2009). The Sixth Circuit is essentially saying that because the Guidelines distinguish between methamphetamine (ICE) and methamphetamine (substance containing) a defendant cannot identify a disparity among defendants, and further cannot identify an extraordinary and compelling reason warranting reduction. The Sixth Circuit is in error, and Advisory Guideline disagreements should serve as a basis for an "extraordinary and compelling reason, and the District Court abused its discretion when it failed to consider Flores individual circumstances. Concepcion v United States, 142 S. Ct. 2389, 2399, 213 L. Ed. 2d. 731 (2022) (It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue).

Finally, Flores was found guilty of less than 4.5 kilograms of methamphetamine. The sentencing court noted the purity but never established it was above 80% pure to trigger the actual purity sentencing scheme. Flores

criminal history was calculated to be category II from one driving violation that was still under proceedings. This rendered 1 point under § 4A1.1 (c) and 2 points for being under a prior sentence (A driving infraction). The offense level was determined to be 36 for ICE with a 4 point leadership enhancement or 40 points. Had Flores been sentenced according to the type of drug on his indictment or "substance containing a detectable amount of methamphetamine" he could have expected an initial offense level of 33 with the four point enhancement or level 37, and then a 3 point reduction for acceptance of responsibility, and a 210-262 month sentence. Instead he was sentenced to 300 months... nearly 60 months above the average murder sentence. That above the guideline sentence is based largely in part on Flores being from Mexico. Not on his criminal history nor on the instant conduct. Over and over the court at sentencing allowed § 3553 (a) to be driven by Flores race and place of birth. The court noted he was here "illegally" (S.T. 97 at 22) and it was a negative factor on 3553 (a), that he had no respect for the law because he was from Mexico. The court based other § 3553 factors on the fact Flores might have more relatives in Mexico than America (S.T, 100 at 11-13), and that other Mexicans would take note of the exorbitant sentence Flores would receive and think twice about dealing drugs in Kentucky (S.T. 103 at 1), and hopefully all Mexicans would know within an hour the sentence Flores got and know not to come to Kentucky. (S.T. 103 at 3-8). The court further based Flores sentence on the courts understanding of market prices for drugs and how Mexicans were undercutting the Market (S.T. 105 at 1). The court continuously based it's § 3553 factors on race, stating Flores should be "banished and "exiled" from the United States (S.T. 110 at 2) and that he is here illegally and he should start

a new life in Mexico because that's "where he should be anyway" (S.T. 110 at 6-8). The court and prosecution was so blatant in basing Flores § 3553 (a) factors on his race that it is offensive. His 300 month above the guideline sentence is less about him and more about the courts hatred of Mexican Nationals, and the fact that the court sees "Mexicans" in general as a problem in the United States. Mr. Flores had a singular driving infraction and the court based it's sentencing on Kingpins in Mexico instead of his limited criminal history. In totality, the Appellate Court was aware of the Nov 1, 2023 sentencing Commission Changes to § 1B1.12 and by extension to § 3582, and simply ignored the possibility or impact of those changes to Flores proceedings. A disparate Sentence arising from policy disagreements can serve as a basis for an extraordinary and compelling reason. Further, Flores implores this court to consider this very important question of methamphetamine disparity. A defendant sentenced in 100's of district courts can expect lenity and be sentenced to the lesser methamphetamine while other courts hand down much more sever sentences. This court should intervene and provide guidance at least on whether the methamphetamine disparity can serve as a reason for extraordinary and compelling reduction, and if district courts have discretion to consider them as such.

Done this 11th, day of December 2023

Edgar Flores

Pro-se

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