

No. 17-6861

IN THE SUPREME COURT OF THE UNITED STATES

JESUS ENRIQUE MORENO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, which determined that petitioner was properly denied a mitigating-role reduction under Sentencing Guidelines § 3B1.2(b) even if a post-sentencing amendment to that guideline's commentary were considered, erred in concluding that it was not required to consider that amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is not published in the Federal Reporter but is reprinted at 696 Fed. Appx. 886.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2017. A petition for rehearing was denied on August 21, 2017 (Pet. App. 24a). The petition for a writ of certiorari was filed on November 20, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Kansas, petitioner was convicted of possessing with intent to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Judgment 1. He was sentenced to 168 months of imprisonment, to be followed by two years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. 1a-23a.

1. In June 2013, petitioner and his brother were traveling on an interstate in Kansas when a patrol officer stopped their vehicle for an illegal lane change. Pet. App. 2a; Gov't C.A. Br. 2. Petitioner, the driver, informed the officer that his license was suspended and that a friend had rented the vehicle. Pet. App. 2a; Gov't C.A. Br. 2-3. He also said that he and his brother were traveling from Phoenix, Arizona, to tour Fort Hays State University in Hays, Kansas. Pet. App. 2a; Gov't C.A. Br. 2.

Because the brothers had passed the university several hours earlier and appeared nervous, the officer doubted their story. Pet. App. 2a; Gov't C.A. Br. 2-3. The officer cited petitioner for driving with a suspended license and then sought and received petitioner's consent to search the vehicle. Pet. App. 2a; Gov't C.A. Br. 3. The officer also called for a drug-sniffing dog, which alerted to the vehicle. Ibid. Officers searched the vehicle and found 6.605 kilograms of 100% pure methamphetamine hidden inside the driver's side rear interior corner panel. Ibid.

Petitioner initially denied any knowledge of the methamphetamine but eventually admitted to knowing the drugs were in the vehicle. Pet. App. 2a; Gov't C.A. Br. 3. He said he was to be paid \$3000 for the trip and had transported drugs on two prior occasions. Ibid. Petitioner explained that "a guy" would bring the drugs from Mexico to Arizona; petitioner would arrange for a "friend" to rent a car for him; petitioner would drop the car off "somewhere"; and when petitioner returned for the car, it would be loaded with drugs. Pet. App. 2a-3a; Gov't C.A. Br. 3. Petitioner would then drive the drugs from Phoenix to a house in Kansas City, where he would leave the car with the drugs and depart in a different vehicle left for him. The next day, he would retrieve the original vehicle, without the drugs, and return to Arizona. Pet. App. 3a; Gov't C.A. Br. 3.

2. A grand jury in the District of Kansas indicted petitioner for possession with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). He pleaded guilty without a plea agreement. Pet. App. 3a.

3. The United States Probation Office prepared a Presentence Investigation Report (PSR) using the 2014 edition of the Sentencing Guidelines. PSR ¶ 27. The PSR calculated a base offense level of 38 based on petitioner's possession of 6605 grams of methamphetamine. PSR ¶ 28. It added two levels because the offense involved the importation of methamphetamine, subtracted

two levels pursuant to the safety-valve reduction, and subtracted three levels for acceptance of responsibility. PSR ¶¶ 29-30, 36-37. Based on a total offense level of 35 and a criminal history category of I, the PSR reported that the advisory Guidelines range was 168 to 210 months of imprisonment. PSR ¶¶ 38, 45, 74; see also Pet. App. 3a-4a.

Petitioner objected to the PSR's Guidelines computations, arguing that he played only a minor role in the offense and thus merited a two-level downward adjustment under Sentencing Guidelines § 3B1.2(b). PSR (Addendum) ¶¶ 98-111. Section 3B1.2(b) allows a judge to reduce a defendant's offense level by two if he "was a minor participant in any criminal activity." Sentencing Guidelines § 3B1.2. At the time of petitioner's sentencing, the commentary to Section 3B1.2 explained that the guideline "provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant." Id. comment. (n.3(A)). It described a "minor participant" as a defendant "who is less culpable than most other participants, but whose role could not be described as minimal." Id. comment. (n.5).

Petitioner argued that his role in the offense was minor compared to other participants in his drug organization because he did not own the drugs and his fee for transporting them was a small fraction of their total value. PSR (Addendum) ¶¶ 98-111; see also Pet. App. 4a; Gov't C.A. Br. 4-5. The government and the Probation

Office opposed petitioner's request for a minor-role reduction, arguing that the evidence showed that petitioner was a long-term, trusted member of the drug-trafficking organization, was aware of the scope and structure of the organization, and was in contact with several members of the organization. PSR (Addendum) ¶¶ 115-130; see also Gov't C.A. Br. 6-9.

4. The district court denied petitioner's request for a minor-role reduction, Pet. App. 25a-31a, noting, among other things, that petitioner transported drugs "a considerable distance" "at least three times" and that petitioner "appeared to have direct contact with co-conspirators at both ends of [his] route," id. at 28a-29a.

The district court sentenced petitioner to 168 months of imprisonment. Judgment 2. If petitioner had received a Section 3B1.2(b) reduction, he would also have received a four-level reduction under Sentencing Guidelines § 2D1.1(a)(5) and been entitled to elimination of the importation enhancement under Sentencing Guidelines § 2D1.1(b)(5). See Pet. App. 4a n.3; Gov't C.A. Br. 5-6. His advisory Guidelines range would have been 70 to 87 months. See Pet. App. 4a; Gov't C.A. Br. 6 n.5.

5. After petitioner's sentencing, the Sentencing Commission promulgated Amendment 794, which amended the commentary to Section 3B1.2. See Sentencing Guidelines App. C Supp., Amend. 794 (Nov. 1, 2015). That amendment resolved a disagreement among the circuits by providing that a defendant's relative culpability

should be determined by comparison to the average participant in the same criminal activity, rather than to a broader universe of individuals participating in similar crimes. See ibid. (Reason for Amendment); see also Sentencing Guidelines § 3B1.2, comment. (n.3(A)) (2015) (“[The guideline] provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.”); id. comment. (n.5) (describing a “minor participant” as a defendant “who is less culpable than most other participants in the criminal activity”).

Amendment 794 also added a non-exhaustive list of factors for courts to consider in deciding whether to apply an adjustment. Those factors include: (1) the degree to which the defendant understood the scope and structure of the criminal activity, (2) the degree to which the defendant participated in planning or organizing the criminal activity, (3) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority, (4) the nature and extent of the defendant’s participation in the offense, and (5) the degree to which the defendant stood to benefit from the criminal activity. Sentencing Guidelines App. C Supp., Amend. 794; see also Sentencing Guidelines § 3B1.2, comment. (n.3(C)).

6. The court of appeals affirmed in an unpublished opinion, rejecting petitioner’s argument that the district court had erred

in denying him a minor-role reduction under Sentencing Guidelines § 3B1.2(b). Pet. App. 1a-23a.

a. The court of appeals first determined that it was not required to apply Amendment 794 to petitioner's case. Pet. App. 4a-9a. The court observed that courts considering a sentencing appeal normally apply the version of the Sentencing Guidelines in effect at the time of sentencing, with an exception for Guidelines amendments that are "clarifying." Id. at 7a (citing Sentencing Guidelines § 1B1.11(b)(2)). The court stated that, "[g]enerally, an amendment is clarifying if 'it does not overrule existing precedent, it revises a commentary note rather than a guideline, and the authors characterized it as clarifying.'" Ibid. (quoting United States v. Gigley, 213 F.3d 503, 506 n.3 (10th Cir. 2000)).

The court of appeals reasoned that only the second factor -- the amendment's alteration of the commentary rather than the text of the guideline -- weighed in favor of finding the amendment clarifying rather than substantive. Pet. App. 8a. With regard to the first factor, the court observed that the amendment overruled circuit precedent that instructed courts to compare defendants to typical participants in similar crimes, id. at 5a (citing United States v. Caruth, 930 F.2d 811, 815 (10th Cir. 1991)), "eliminating one of the comparisons [the court] looked to in determining whether a defendant was entitled to a mitigating role adjustment," id. at 8a. The court found that change to be "substantive." Ibid. With regard to the third factor, "[t]he Commission did not characterize

the amendment as clarifying,” as it has in other amendments. Ibid. The court also noted that the Sentencing Commission can specifically designate an amendment as retroactive in Sentencing Guidelines § 1B1.10 but that it had not done so for Amendment 794. Pet. App. 7a n.6.

The court of appeals recognized that other circuit courts have found Amendment 794 to be clarifying, but found that fact “[n]ot surprising” because “Amendment 794 did not substantively overrule precedent in those circuits.” Pet. App. 9a n.7.

b. The court of appeals subsequently concluded that the district court had not erred in denying petitioner a minor-role reduction. Pet. App. 9a-20a.

The court of appeals first observed that the district court had “implicitly” compared petitioner’s conduct to that of other participants in the criminal activity. Pet. App. 10a. The court pointed to the district court’s consideration of petitioner’s “knowledge of the details of the overall operation, his repeated drug trips from Phoenix to Kansas City (long distance and high value cargo -- 6.6 kilograms of 100% pure methamphetamine), and his association with those who would qualify for an ‘aggravating role’ in the operation at both ends of the trips.” Ibid. “This internal comparison of roles revealed [petitioner] to be closely associated with the movers and shakers and not substantially less culpable than co-participants.” Id. at 11a.

The court of appeals then conducted its own review of the record, examining the “specifics of this case, concentrating on the internal comparison” of petitioner to other participants in the drug-trafficking organization. Pet. App. 13a. In concluding that petitioner was not substantially less culpable than the average participant in the criminal activity, the court observed that petitioner “knew the scope of the [drug-trafficking organization] and several key players, he was a trusted member of the organization (given the number of trips and the amount of drugs involved), and he was paid well for his services.” Id. at 18a.

The court of appeals also stated that, although it had determined that Amendment 794 did not apply, “consideration of the factors outlined in it is a worthy pursuit” and that “[d]oing so does not alter our conclusion.” Pet. App. 19a. The court noted that petitioner “was aware of the scope and structure of the drug-trafficking activity”; “had some planning and decision-making responsibilities”; was a “trusted and valued member of the drug-trafficking organization,” as evidenced by the “extent and nature of his participation”; and “benefitted from the criminal activity.” Id. at 19a-20a.

ARGUMENT

Petitioner contends (Pet. 2-3, 16-17) that this Court’s review is necessary because the court of appeals’ decision creates a circuit conflict on the question whether Amendment 794 is clarifying or substantive. The court of appeals’ unpublished

opinion, however, does not give rise to a conflict warranting this Court's review. Indeed, despite having reasoned that Amendment 794 is substantive, the court of appeals found that the district court had implicitly applied the substance of the amendment (a comparison of petitioner to other participants in his own offense), and it then concluded on its own review of petitioner's conduct compared to his compatriots' that petitioner was correctly denied a minor-role reduction under Sentencing Guidelines § 3B1.2(b), with or without the benefit of the amendment. Petitioner also contends more generally (Pet. 13-16, 17-19) that the courts of appeals disagree on how to determine whether a Guidelines amendment is clarifying or substantive. That issue, on which the Court has previously denied certiorari, see Sanchez v. United States, 655 Fed. Appx. 806 (11th Cir. 2016) (per curiam), cert. denied, 137 S. Ct. 2114 (2017), is of limited importance and does not warrant this Court's review.

1. Whether a court of appeals should consider an amendment to the Sentencing Guidelines, "even though it was not effective at the time of sentencing," depends on whether the amendment substantively changes or merely clarifies the meaning of a guideline. United States v. Nissen, 928 F.2d 690, 695 (5th Cir. 1991) (per curiam); see also, e.g., United States v. Jerchow, 631 F.3d 1181, 1184-1185 (11th Cir. 2011); United States v. Geerken, 506 F.3d 461, 465 (6th Cir. 2007); United States v. Morgan, 376 F.3d 1002, 1010 (9th Cir. 2004); United States v.

Crudup, 375 F.3d 5, 8-9 (1st Cir. 2004); United States v. Marmolejos, 140 F.3d 488, 491 (3d Cir. 1998); United States v. Mondaine, 956 F.2d 939, 942 (10th Cir. 1992); cf. Sentencing Guidelines § 1B1.11(b)(2) (stating that “if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes”).

Amendment 794 revised the commentary to Sentencing Guidelines § 3B1.2 but not the language of the Guidelines provision itself. See Sentencing Guidelines App. C Supp., Amend. 794. The amendment made several revisions. First, it resolved circuit disagreement by providing that a defendant’s culpability should be assessed relative to other participants in the same criminal activity. Ibid. (Reason for Amendment). Second, it added a “non-exhaustive list of factors” that courts should consider in determining whether to apply a minor-role adjustment. Ibid. And third, it added language indicating that “[t]he fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative.” Ibid.

Several courts of appeals have held that Amendment 794 is clarifying. See United States v. Sanchez-Villarreal, 857 F.3d 714, 721 (5th Cir. 2017); United States v. Cruickshank, 837 F.3d 1182, 1192-1194 (11th Cir. 2016), cert. denied, 137 S. Ct. 1435 (2017); United States v. Quintero-Leyva, 823 F.3d 519, 522-524

(9th Cir. 2016); see also United States v. Carter, 662 Fed. Appx. 342, 349 (6th Cir. 2016) (unpublished).

2. Petitioner contends (Pet. 2-3, 16-17) that the court of appeals' decision creates a conflict as to whether Amendment 794 is substantive or clarifying and that this Court's review is necessary to resolve that conflict. The unpublished decision below, however, cannot create a conflict with those decisions warranting this Court's review because it is not binding precedent. See 10th Cir. R. 32.1.

In any event, the court of appeals' nonprecedential conclusion that it was not required to apply Amendment 794 did not affect the outcome of this case. The court found that the district court had "implicitly" conducted the analysis required by Amendment 794 by "focusing on facts highlighting [petitioner's] deep involvement in this drug transaction, as well as his participation in the larger operation." Pet. App. 10a. "This internal comparison of roles" -- the comparison called for by Amendment 794 -- "revealed [petitioner] to be closely associated with the movers and shakers and not substantially less culpable than co-participants." Id. at 11a.

The court of appeals also conducted its own lengthy analysis of the record in determining whether the district court clearly erred. Pet. App. 11a-20a. In doing so, the court of appeals, despite having opined that Amendment 794 is substantive, applied the amendment's guidance and factors. See id. at 12a-20a

(describing petitioner's role relative to other participants in the drug-trafficking organization); id. at 13a ("We now turn to the specifics of this case, concentrating on the internal comparison."). Indeed, the court explicitly considered the factors listed in Amendment 794 and noted that "[d]oing so does not alter our conclusion." Id. at 19a.

Because the lower courts conducted an intraconspiracy analysis in accord with Amendment 794, and the court of appeals explicitly considered the factors in Amendment 794 and determined that petitioner would not benefit from their application, this Court's review is unwarranted.

3. Petitioner contends more generally (Pet. 13-16, 17-23) that the courts of appeals disagree on the factors that render a post-sentencing Guidelines amendment substantive or clarifying. But, although there is some disagreement on that issue, the question of how to treat an amendment that is promulgated after sentencing but while a case is on direct appeal is of limited importance. The Court has previously denied certiorari on that issue, see Sanchez, 137 S. Ct. at 2114, and should follow the same course here.

The Sentencing Commission always retains the power to ensure retroactive application of an amendment by listing it in Section 1B1.10(d). See Braxton v. United States, 500 U.S. 344, 348 (1991) ("Congress has granted the Commission the unusual explicit power to decide whether and to what extent its amendments reducing

sentences will be given retroactive effect.”) (emphasis omitted) (citing 28 U.S.C. 994(u)). Congress has expressly authorized the Sentencing Commission to determine the retroactivity of guidelines amendments. See 18 U.S.C. 3582(c)(2) (permitting a court to “reduce the term of imprisonment” of “[a] defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission,” by retroactive amendment listed in Section 1B1.10(d)). Section 3583(c)(2) may apply to any previously sentenced defendant, including a defendant whose case is on direct appeal.

For that reason, petitioner’s contention (Pet. 24-28) that review is necessary to clarify the Sentencing Commission’s authority lacks merit. Furthermore, any disagreement about the proper treatment of an amendment not listed in Section 1B1.10(d) becomes irrelevant to sentences imposed going forward once the new amendment becomes effective. Nor does any disagreement over retroactivity affect appellate review of sentences in circuits that had already resolved the issue consistent with a given amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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