

No.

IN THE
SUPREME COURT OF THE UNITED STATES

No.

IN THE SUPREME COURT OF THE UNITED STATES

FRANCISCO BERNABE GONZALES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

When a sentencing appeal is remanded for further consideration in light of intervening changes in the law, does 18 U.S.C. § 3742(g) require the sentencing court to ignore intervening changes to the United States Sentencing Guidelines?

II.

What is the proper standard circuit courts should apply to determine the retroactivity of Sentencing Guideline Amendments, including Amendment 798?

PARTIES

Mr. Gonzales is the petitioner, who was the defendant-appellant below. The United States of America is the respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Francisco Bernabe Gonzales, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Francisco Bernabe Gonzales*, No. 16-11292 (5th Cir. December 11, 2017), and is provided in the Appendix to the Petition. [Appx. A]. The opinion can also be found at *United States v. Gonzales*, 2017 U.S. App. LEXIS 24891 (5th Cir. Dec. 11, 2017). Copies of the district court sentencing hearing and its pre-hearing order are reprinted in the Appendix. Pet. app. 10-40. Additionally, this Court's prior remand order and the Court of Appeals prior remand order. Pet. app. 8-9.

JURISDICTION

The judgment and order of the United States Court of Appeals for the Fifth Circuit were filed on January 2, 2018. Pet. app. 1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This petition concerns the interpretation and application of 18 U.S.C. § 3742(g) and U.S.S.G. Amendment 798, which is reprinted in the Appendix. Pet. app. 41.

STATEMENT OF THE CASE

A. Facts and Proceedings Below

This is the second time that this matter has been before the Court. In the original district court proceedings, Petitioner plead guilty to knowingly possessing methamphetamine with the intent to distribute it in violation of 21 U.S.C. § 841(b)(1)(C) and § 846. The original presentence report recommended sentencing under the career-offender guideline U.S.S.G. § 4B1.1, based on Petitioner's two prior Texas convictions for burglary of a habitation and evading arrest while using a vehicle. The district court determined that the evading-in-a-vehicle conviction was a "crime of violence" under the residual clause of U.S.S.G. § 4B1.2. The resulting career-offender guideline range was 188 to 235 months, based on the 2013 United States Sentencing Guidelines. The district court assessed a sentence of 235 months' imprisonment. Pet. app. 3.

The United States Court of Appeals affirmed Petitioner's sentence. Pet. app. 3. Petitioner then petitioned the Court for review; the Court "remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Johnson v. United States*, 576 U.S. ____ (2015)." See Pet. app. 8. After accepting briefing on the issue of whether *Johnson* applied to the residual clause of the sentencing guidelines, the Court of Appeals for the Fifth Circuit in turn remanded the case to the district court without comment. See Pet. app. 9.

On remand, a presentence report addendum originally recalculated Petitioner's advisory guideline range to 151-188 months, finding that pursuant to *Johnson v. United States*, 576 U.S. ___, the career offender provision no longer applied. The government objected, urging the district court to use the United States Sentencing Guidelines effective on the date of sentencing, which would result in a guideline range of 121-151 months. Pet. app. 4, 14-15.

Thereafter, the district court issued an order positing that at the time, *Johnson* did not address the Career Offender provision of the Sentencing Guidelines. It rejected the notion that the mandate rule required it to resentence Petitioner by applying the holding in *Johnson* to the residual clause of § 4B1.2. The district court addressed the arguments set forth by both parties that the November 2015 sentencing guidelines should apply, and explicitly cited 18 U.S.C. § 3742(g)(1) in finding that the court would use the guidelines that were in effect on the date of Petitioner's original sentencing hearing. Moreover, the district court appeared to interpret U.S.S.G. § 1B1.11 as disallowing any reference to subsequent amendments to the Guidelines. Pet. app. 36-40. The district court did not consider the amendments to the Career Offender provision in effect on August 19, 2016, when it sentenced Petitioner after the case was remanded. Pet. app. 25-26.

A subsequent addendum to the PSR incorporated the legal findings of the district court in its order discussed above. The fourth iteration of the PSR re-

calculated the guidelines once again – and reinstituted the original calculations used prior to the first appeal based on the 2013 version of the sentencing guidelines and utilizing the career offender provision.

At sentencing, Petitioner argued that if the prior sentence had not been imposed in violation of the law or as an incorrect application of the guidelines (pursuant to 18 U.S.C. § 3742 (a)(1) or (a)(2)), the rationale set forth by the district court in its order citing 18 U.S.C. § 3742(g)(1) did not apply and the guidelines in effect on the date of the re-sentencing (August 19, 2016) should apply. The guidelines in effect on the date of sentencing did away with both bases for Petitioner's prior Career Offender classification – first, his evading arrest conviction did not qualify because the residual clause was removed from § 4B1.2 effective August 1, 2016. Second, his burglary conviction did not qualify because burglary was removed from the enumerated offenses in the amendments.

On remand, the district court cited 18 U.S.C. § 3742(g)(1) in stating that it would both use the guidelines in effect on the date of Petitioner's original sentencing and would consider only the guidelines amendments that were effective at the original sentencing, notwithstanding the Court's remand and the intervening changes in the guidelines. Pet. app. 36-40. The district court imposed the same 235-month sentence, based on the 2013 guidelines. Pet. app. 26. A few months later, this Court held that the residual clause in U.S.S.G. § 4B1.2 was not subject to a void-for-

vagueness challenge in *Beckles v. United States*, 137 S.Ct. 886 (2017). At no time did the district court ever acknowledge the Guideline amendments promulgated after Petitioner’s original sentencing hearing or its authority (or lack thereof) to consider them. It appears that the district court believed, pursuant to 18 U.S.C. § 3742(g), that it could only consider the Guidelines in effect at Petitioner’s original sentencing, notwithstanding the remand orders from this Court and the appellate court. Pet. app. 36-40.

Petitioner argued on appeal that the case had not been remanded pursuant to 18 U.S.C. § 3742(a)(1) or (a)(2), that § 3742(g) did not apply, and the district court should have used the guidelines in effect on the date of resentencing. The Court of Appeals in its decision implicitly found that the district court had violated the mandate rule, but that the error was harmless. The court stated that the “district court did not err by reading our mandate as a remand for a sentence imposed in violation of law,” but that its error in “interpreting its duty” on remand was harmless. *United States v. Gonzales*, No. 16-11292, slip op. at 5-6 (5th Cir. Dec. 11, 2017), Pet. app. 6-7. The appellate court, like the district court, merely pointed to § 3742(g) and stated that the 2013 Guidelines applied when Petitioner was sentenced the second time; it did not address whether the district court could have (or could not have) considered the post-2013 Guideline amendments in conjunction with any analysis of the factors pursuant to 18 U.S.C. § 3553(a). *Id.*

In affirming Petitioner’s conviction, the Court of Appeals for the Fifth Circuit found the provisions of Amendment 798 to be substantive and thus not retroactive. As the decision did not cite to any prior Fifth Circuit case law on that point, it appears to have been decided as an issue of first impression on the merits. *Id.* at p. 6 (5th Cir. 2017). The court noted:

This has none of the characteristics of a change that, according to our case law, is retroactive rather than substantive. *United States v. Solis*, 675 F.3d 795, 797-98 (5th Cir. 2012) (noting that the following are evidence that an amendment is clarifying and therefore retroactive: the Sentencing Commission has expressly stated it is clarifying, the amendment is listed in U.S.S.G. §1B1.10(c) as being retroactively applicable, and the “amendment alters the language of commentary to a guideline rather than the language of the guideline itself”. (citation omitted)). Gonzales cannot avail himself of Amendment 798.

Id. In finding Amendment 798 was substantive and not clarifying, the court cited to three factors to consider in making this determination and noted its precedent of *United States v. Solis*, 675 F.3d 795 (5th Cir. 2012). The three factors generally are: (1) if the Commission stated the amendment was clarifying; (2) if the amendment is listed in §1B1.10(c); and (3) whether the amendment alters the commentary or the guideline itself. *Id.* (citing *United States v. Huff*, 370 F.3d 454, 466 (5th Cir. 2004) and *United States v. Davidson*, 283 F.3d 681, 684 (5th Cir. 2002)).

Notably, the appellate court’s opinion ignored a fourth factor that it previously used to determine retroactivity of a Guidelines amendment. In *United States v. Sanchez-Villarreal*, 857 F.3d 714 (5th Cir. 2017), the court also considered whether the

amendment was designed to address a circuit split; if the amendment *was* designed to address a circuit split, it weighed in favor of considering the amendment substantive and therefore not retroactive. If the amendment *was not* designed to address a circuit split, however, it weighed in favor of considering the amendment clarifying and therefore retroactive. *Id.* at 719-920.

REASONS FOR GRANTING THE PETITION

I. The Court should grant the petition to resolve the question of when a sentencing appeal is remanded for further consideration in light of intervening changes in the law, does 18 U.S.C. § 3742(g) require the sentencing court to ignore intervening changes to the United States Sentencing Guidelines?

A. The courts of appeals take conflicting approaches on this question of federal law.

The driving factors in federal sentences are set forth in 18 U.S.C. § 3553(a). *See United States v. Booker*, 543 U.S. 220, 245-246 (2005). Included in the factors that district courts are required to consider are Guidelines and Policy Statements issued by the United States Sentencing Commission. *See* 18 U.S.C. § 3553(a). The Commission's role is particularly important due to its work in extensively researching empirical data; striving to achieve sentencing consistency; complying with congressional instructions; and receiving input from stakeholders including law enforcement, judges, prosecutors, defenders, civil liberties groups and other experts. *See Rita v. United States*, 551 U.S. 338, 349-351 (2007). As noted by the Court, the Sentencing Commission's work, as well as the guidelines themselves, continuously

evolve; the Commission’s ability to revise them promotes reasonableness based on its continuous research. *Id.*; *Kimbrough v. United States*, 552 U.S. 85, 108-109 (2007).

Indeed, the Commission’s ability to recognize the need for revisions when the Guidelines produce “disproportionately harsh sanctions” has, at points, resulted in revised ranges for reasonable discretionary variances by district courts. *See Kimbrough*, 552 U.S. at 109 (discussing the crack/powder cocaine disparity and commenting on district courts’ discretion to conclude that the disparity would lead to greater-than-necessary sentences, even in mine-run cases) (citations omitted). As such, alterations of Guidelines can “alter a district court’s ultimate choice of a discretionary sentence” in the post-*Booker* era. *United States v. Godin*, 522 F.3d 133, 136 (1st Cir. 2008). Several courts have recognized that Guideline amendments are particularly relevant to district courts’ analyses of the “nature and circumstances” and “seriousness” of offenses and reasonableness of sentences under 18 U.S.C. § 3553(a). *United States v. Taylor*, 648 F.3d 417, 426 n. 3, 426-27 (6th Cir. 2001) (citing *United States v. Rodriguez*, 630 F.3d 39, 42 (1st Cir. 2010); *United States v. Gilmore*, 599 F.3d 160, 166 (2nd Cir. 2010); *United States v. Angle*, 598 F.3d 352, 360 (7th Cir. 2010)). In *Godin*, the Court of Appeals for the First Circuit has thus remanded when the Commission has proposed a relevant – and non-retroactive – amendment while a case was on direct appeal. *United States v. Godin*, 522 F.3d at 136.

The Court of Appeals for the Sixth Circuit has stated that a district court should indeed consider a defendants’ “arguments regarding how postsentencing amendments to the Guidelines relate to the determination of an appropriate sentence under § 3553(a),” and suggested that even non-retroactive Guideline amendments may be considered by district courts in their discretion. *United States v. Taylor*, 648 F.3d at 425, 429. In the Seventh Circuit, the appellate court has stated that “[E]ven though § 3742(g) precluded the district court from applying [later-in-time Guidelines on remand], the statute did not bar the court from consulting the Sentencing Commission’s current views as a guide to its exercise of *Booker* discretion.” *United States v. Angle*, 598 F.3d at 360. This is so even though the court in the Seventh Circuit has held that subsequent Guideline amendments are not grounds for *reopening* sentences imposed before amendments went into effect. *United States v. Alexander*, 553 F.3d 591 (7th Cir. 2009). In *Angle*, the court stated, “even though § 3742(g) precluded the district court from *applying* the 2006 guidelines, the statute did not bar the court from *consulting* the Sentencing Commission’s current views as a guide to its exercise of *Booker* discretion.” *Id.* (emphasis in original) (citing *United States v. Johnson*, 427 F.3d 423, 427 (7th Cir. 2005); *United States v. Coe*, 220 F.3d 573, 578 (7th Cir. 2000)). In the Eighth Circuit, cases may be remanded to the district court “when it would be beneficial for the district court to consider an alternative.” *United States v. McMillan*, 863 F.3d 1053, 1058-59 (8th Cir. 2017) (remanding a case to the district court for

determination of whether a prior conviction qualified as a ‘crime of violence’ under the residual clause of § 4B1.2 and if so, “whether the district court should consider the proposed amendment to U.S.S.G. § 4B1.2(a)(2).”).

The approach taken by other circuit courts regarding the consideration of guideline amendments centers around the clarifying/substantive nature of the amendment (discussed below) and indicates that district courts may *only* consider amendments that are clarifying, rather than substantive. *See, e.g., United States v. Sanchez-Villarreal*, 857 F.3d at 719-720 (discussing Amendment 794 and discussing its longstanding precedent that post-sentencing guideline amendments may be considered “if they are intended to only clarify.” (citations and quotations omitted).

B. This conflict merits the Court’s attention.

The conflict between the approaches among the courts of appeals results in some courts considering Guideline Amendments in conjunction with the courts’ §3553 review, regardless of whether the amendments are retroactive, clarifying or substantive. Other courts do not so consider the amendments in § 3553 analyses, instead ignoring intervening changes to the Sentencing Guidelines. The latter approach, used in Petitioner’s case, stymies the Sentencing Commission’s goal to promote uniformity by affording different treatment to defendants. *Cf. Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) (“...selective application of new rules violates the principle of treating similarly situated defendants the same.”). Indeed, as noted by

Justice Sotomayor in her concurring opinion in *Beckles*, most cases like Petitioner’s – that were remanded pursuant to *Johnson* and prior to *Beckles* – resulted in reduced sentences. *Beckles v. United States*, 580 U.S. ___, (J. Sotomayor, concurring), slip op. at 5, n. 1. Finally, this issue is a recurring one, as reflected in the Sentencing Commission’s annual amendments as well as the body of case law discussing various amendments.

II. The Court should grant the petition to resolve how circuit courts determine the retroactivity of Guideline Amendments, including Amendment 798.

A. The circuit courts are divided over both Amendment 798’s retroactivity and the test for determining if amendments are retroactive.

The United States Sentencing Guidelines provide that a district court shall use the Guidelines Manual that is in effect on the date of sentencing unless doing so violates the Ex Post Facto Clause of the United States Constitution. U.S.S.G. §1B1.11(a) & (b)(2). In that case, a court shall consider subsequent amendments only “to the extent that such amendments are clarifying rather than substantive changes.” U.S.S.G. §1B1.11(b)(2). The Guidelines, however, fail to define a clarifying or substantive amendment, and even when the Commission indicates that a particular amendment is to be considered one or the other, courts do not always follow the Guidelines’ pronouncements. *See, e.g., United States v. Fones*, 51 F.3d 663, 669 (7th Cir. 1995) (noting that the Commission’s classification may be given deference, but is

certainly not binding on courts).

Because the Guidelines fail to provide clarity, current law demonstrates confusion between the circuits on this issue. In *United States v. Capers*, 61 F.3d 1100, 1110 (4th Cir. 1995), the Court of Appeals for the Fourth Circuit held that an amendment which resolved a circuit split was substantive because it worked a substantive change in the operation of the Guideline in that circuit. In *United States v. Morgan*, 376 F.3d 1002, 1013-14 (9th Cir. 2004), however, the Court of Appeals for the Ninth Circuit held that an amendment was clarifying even where the Government argued that it changed the substantive law in the circuit.

Additionally, in cases where an amendment is adopted in part to address a circuit split, the circuits disagree over whether this fact weighs in favor of the amendment being retroactive. As noted above, in *United States v. Solis*, 675 F.3d at 798, the Court of Appeals for the Fifth Circuit noted that “a statement that an amendment addresses a circuit conflict indicates that it is substantive” and therefore not retroactive. In *United States v. Christensen*, 598 F.3d 1201, 1205 (9th Cir. 2010), however, the Ninth Circuit found that “where an amendment was made for the express purpose of resolving a conflict among the circuits that resulted from reasonable though differing interpretations of the Guidelines, retroactive application is appropriate.” In *United States v. Jerchow*, 631 F.3d 1181 (11th Cir. 2011), the Eleventh Circuit Court followed the Ninth Circuit by holding that a Guideline amendment was

clarifying in part because “[t]he amendment aimed to address a circuit split that arose from differing resolutions of conflicting language in the Guidelines commentary.” *Id.* at 1187.

The most recent example of the recurring problem with interpretation of Guideline amendments is visited in this case, regarding Amendment 798. In ruling that the amendment was not retroactive, Fifth Circuit reaffirmed a circuit split with the Sixth Circuit which has found Amendment 798 to be retroactive. In *United States v. Kennedy*, 683 Fed. Appx. 409 (6th Cir. 2017), the defendant unsuccessfully challenged the use of a predicate conviction for raising his base offense level under U.S.S.G. §2K2.1 based on Amendment 798. In deciding whether Amendment 798 clarified or substantively altered a Guideline provision, the Sixth Circuit noted that in adopting the Amendment, “the Sentencing Commission was merely seeking to simplify and clarify the language of §4B1.2 with respect to enumerated offenses. Although the amendment changed the language of both the guideline and the commentary, the change was merely to consolidate the two, not to make substantive revisions to either.” *Id.* at 418-19. The court thus concluded that Amendment 798 was clarifying and therefore retroactive. *Id.* at 419. *Accord*, *United States v. Yates*, 866 F.3d 723, 732 (6th Cir. 2017). In contrast, the Fifth Circuit other circuit courts have found that Amendment 798 is not retroactive. *United States v. Wurie*, 867 F.3d 28, 36-37 (1st Cir. 2017); *United States v. Adkins*, 2018 U.S. App. LEXIS 5559 at *12 (9th Cir. March 5,

2018); *United States v. Johnson*, 665 Fed.Appx. 788, 793 (11th Cir. 2016).

B. This divide is indicative of a larger divide for all Amendments and merits the Court's attention.

The issue of an amendment's retroactivity in pending cases is an acutely recurring legal problem. As the Commission promulgates amendments to the guidelines annually, there are hundreds of cases each year which become embroiled in this question of retroactivity while on direct review. While the provisions of U.S.S.G. §1B1.10 have addressed this issue for purposes of relief under 18 U.S.C. §3582(c), there has been no such clear rule in the applicability for cases pending on direct review. Indeed, each circuit has its own factors to examine when determining whether a guideline amendment should apply retroactively.

In *United States v. Sanchez-Villarreal*, 857 F.3d at 714, the Court of Appeals for the Fifth Circuit set forth its test: (1) whether the Commission expressly characterized the amendment as clarifying; (2) whether the Amendment addressed a circuit split; (3) whether it was listed in U.S.S.G. §1B1.10; and (4) whether the amendment altered the language of the commentary or the Guideline itself. In contrast, the Sixth Circuit Court looks at only two of these four factors (the Commission's characterization and whether the Amendment language changed the commentary or the guideline itself) -- not considering U.S.S.G. §1B1.10 or whether the Amendment addressed a circuit split. *United States v. Kennedy*, 683 Fed.Appx. at 418. The Sixth Circuit also considers whether the amendment resolves an ambiguity in the original wording of the

Guideline. *Id.* (quoting *United States v. Monus*, 356 F.3d 714, 718 (6th Cir. 2004)). The Eleventh Circuit considers: (1) whether the Amendment language altered was the commentary or the Guideline itself; and (2) whether the change can be thought of as clarifying or substantive. *United States v. Strevig*, 663 Fed.Appx. 908, 914 (11th Cir. 2016).

The conflicting standards for determining if a Guideline Amendment is retroactive, along with the specific inconsistency seen with this determination in the courts' treatment of Amendment 798, show that the circuits have compromised the efforts of the Commission to promote sentencing uniformity. Rather than allowing geography or the timing of a particular Amendment to play such a role in the determination of federal sentencing, this Court should ensure the rules are applied consistently as it did in *Griffith v. Kentucky*, 479 U.S. 328, 323 (1987) (holding in part "...selective application of new rules violates the principle of treating similarly situated defendants the same"). Doing so would also ensure district courts and defendants have the benefit of the extensive empirical research examined and applied by an expert institution. See *Rita v. United States*, 551 U.S. 338, 349 (2007) (noting the extensive work done by the Commission).

Circuit conflict concerning Amendments to the Guidelines and their retroactive or non-retroactive application is an untenable situation. Leaving the determination of whether an Amendment is clarifying or substantive -- and therefore retroactive or

non-retroactive -- undermines the goal that this Court has laid out after *United States v. Booker*, 543 U.S. 220 (2005) to achieve uniformity in the federal sentencing process. *Peugh v. United States*, 569 U.S. 530, 541 (2013). It further results in disparate treatment of federal criminal defendants who are similarly situated but for the fact that they have been prosecuted in different circuits across the country. This Court should grant certiorari to resolve this essential question and determine that justice for criminal defendants is uniform as to Guideline amendments.

CONCLUSION

Petitioner respectfully prays that this Honorable Court grant certiorari, reverse the judgment below, and/or vacate the judgment and remand for reconsideration in light of any relevant forthcoming authority.

Respectfully submitted this 2nd day of April, 2017.

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner requests leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), without prepayment of costs and to proceed *in forma pauperis*. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in both the United States District Court for the Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 2nd day of April, 2018.

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PROOF OF SERVICE

I certify that on April 2, 2018, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served. I have served the Supreme Court of the United States via Federal Express, Overnight. The Solicitor General, Assistant United States Attorney Wes Hendrix, and the Petitioner were each served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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