

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

CHAD EDWARD NOZISKA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

KATHERINE STACK
STACK & KOTTKE, PLLC
234 E. Pine Street
Missoula, MT 59802
(406) 284-1860
katy@stackandkottke.com
Counsel of Record

QUESTION PRESENTED

In the federal district court below, Petitioner filed an unopposed motion for sentence reduction relief under 18 U.S.C. § 3582(c)(2) and USSG Amendment 780 and 782. Both the district court and the Ninth Circuit Court of Appeals ruled that petitioner was ineligible for such relief. The question presented is:

Whether the United States Sentencing Commission has the authority to resolve an intercircuit conflict and grant offenders who provided substantial assistance the opportunity for sentence reduction under 18 U.S.C. § 3582(c)(2) as the Fourth Circuit has ruled, or not, as the Ninth Circuit has ruled. Compare *United States v. Williams*, 808 F.3d 253 (4th Cir. December 14, 2015), and decisions cited therein, with *United States v. Noziska*, 696 Fed. Appx. 253 (9th Cir. 2017).

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, Chad Edward Noziska, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

1. The Opinion of the Ninth Circuit Court of Appeals is styled as *United States v. Noziska*, 696 Fed. Appx. 253 (9th Cir. 2017) (unpublished). A copy of it is attached in the Addendum to this petition at pages 1-2.

2. The written decision of the federal district court denying sentence reduction under 18 U.S.C. § 3582(c)(2) issued on March 9, 2015, which was affirmed by the Ninth Circuit, is in the Addendum at page 3.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's Opinion was filed on August 17, 2017 (Addendum at pages 1-2). Petitioner filed a petition for rehearing or rehearing *en banc*. That petition was denied on January 26, 2018 (Addendum at page 4). This Court's jurisdiction arises under 28 U.S.C. § 1254(1). Petitioner's petition is timely because it was electronically filed and placed in the United States mail, first class postage pre-paid, on or before April 26, 2018, within the 90 days for filing under the Rule of this Court (*see* Rule 13, ¶1).

FEDERAL STATUTORY AND UNITED STATES SENTENCING GUIDELINES PROVISIONS INVOLVED

This case involves the following federal statutory and United States Sentencing Guidelines provisions:

- (1) 21 U.S.C. § 841(a)(1)
- (2) 21 U.S.C. § 841(b)(1)(A)
- (3) 18 U.S.C. § 3582(c)(2):
- (4) 18 U.S.C. § 3553(e)
- (5) USSG § 1B1.10 (Effective November 1, 2014)
- (6) USSG § 5G1.1 and § 5G1.2
- (7) USSG § 5K1.1
- (8) USSG Amendment 780
- (9) USSG Amendment 782

All of the relevant aspects of these provisions are set forth in the Addendum to this petition at pages 7-37.

STATEMENT OF THE CASE

(A) General Case Overview

1. In a 2011 drug case (methamphetamine) arising in the District of Montana, Petitioner's guideline range was 121-151 months, based on a total offense level of 29 and a criminal history category of IV. However, because of Petitioner's qualifying prior convictions, the statutory minimum sentence increased to 20 years. Petitioner entered a written plea agreement with the government which permitted petitioner to potentially avoid the mandatory 20 years in prison pursuant to 18 U.S.C. § 3553(e) and USSG § 5K1.1.

2. At his sentencing hearing, government's counsel recommended that Petitioner be granted a sentence of 204 months, pursuant to a motion filed under 18 U.S.C. § 3553(e). After considering the government's recommended sentence, the district court imposed a sentence of 210 months, six months longer than the sentence suggested by the government.

3. In 2015, Petitioner moved the district court *pro se* to reduce his sentence under 18 U.S.C. § 3582(c)(2) and Amendment 782 to the United States Sentencing Guidelines, promulgated by the United States Sentencing Commission. Amendment 782 lowered all of the weights in the drug Guidelines Table (§ 2D1.1) by two levels.

(B) The District Court's decision on Petitioner's § 3582(c)(2) motion

4. The district court entered the following written order denying petitioner's § 3582(c)(2) motion:

A district court may reduce an already-imposed sentence if the sentence was “based on a sentencing range that has subsequently been lowered by the Sentencing Commission” and if the reduction is “consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(2). Based on the Court's review of the record, however, the terms of 18 U.S.C. § 3582(c)(2) are not met here. Defendant's sentence was based on 21 U.S.C. § 841(b)(1)(A) The record clearly indicates that the sentencing judge's decision about the extent of the . . . departure was not based on or affected by the guideline range that would have applied in the absence of a statutory mandatory minimum. See, e.g., Statement of Reasons (Doc. 37 at 4); Sentencing Tr. (Doc. 45 at 6-7, 31-35). See also *Freeman v. United States*, ___ U.S. ___, 131 S.Ct. 2685, 2690-95 (2011); *id.* at 2697-98 (Sotomayor, J., concurring in the judgment); *United States v. Jackson*, 577 F.3d 1032, 1033, 1035-36 (9th Cir. 2009). Consequently, the extent of the sentencing court's departure established, in effect, a new mandatory minimum sentence. See *Jackson*, 577 F.3d at 1036 (following *United States v. Auld*, 321 F.3d 861, 866-67 (9th Cir. 2003)). Because Defendant's sentence was not based on a guideline range affected by Amendment 782, Defendant is not eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2). Motions to reconsider will not be entertained. See D. Mont. L.R. CR 47; cf. L.R. 7.3(b). If Defendant believes the reduction should apply, the only recourse is to appeal this decision.

(Addendum at 3).

(C) The Ninth Circuit's Opinion

5. The Ninth Circuit affirmed the district court in an unpublished opinion and held that the sentence imposed was for “reasons unrelated to the guideline range lowered by Amendment 782.” *United States v. Noziska*, 696 Fed. Appx. 253

(Addendum at page 2). The Ninth Circuit determined that Petitioner is ineligible

for a sentence reduction because his sentence was not “based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” *Id.* The Ninth Circuit then cited to *United States v. Rodriguez-Soriano*, 855 F.3d 1040 (9th Cir. 2017), which is a published opinion issued after oral argument deciding similar issues raised in Petitioner’s case. *Id.*

In *Rodriguez-Soriano*, the Ninth Circuit held that because the defendant’s “initial guideline range ‘played no role’ in the district court’s determination of the appropriate sentence” his sentence was not “based on” that range. 855 F.3d at 1045. The Ninth Circuit further held that despite USSG Amendment 780, which eliminates the effects of USSG § 5G1.1 and § 5G1.2, Rodriguez-Soriano remained ineligible for sentence reduction because Amendment 780 does not resolve the issue of whether his original sentence was “based on” the guideline range the district court initially calculated. *Id.* at 1046.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit’s opinions in Petitioner’s case and in *Rodriguez-Soriano* conflict with the Fourth Circuit’s analysis of this issue set forth in *United States v. Williams*, 808 F.3d 253 (4th Cir. 2015). The *Williams* Court discussed “the impact of [USSG] Amendment 780” on *United States v. Hood*, 556 F.3d 226 (4th Cir. 2009).¹ See *Williams*, 808 F.3d at 260. *Hood* is the Fourth Circuit’s equivalent of the Ninth

¹Superseded by statute as stated in *United States v. Williams*, 808 F.3d 253, 260 (4th Cir. 2015).

Circuit's decision in *United States v. Jackson*, 577 F.3d 1032 (9th Cir. 2009). *Williams* holds that USSG Amendment 780 "altered the course we followed in *Hood*." 808 F.3d at 260. *Williams* overruled *Hood* by finding that under governing decisions of this Court, the Sentencing Commission is authorized to determine the proper application of the guidelines where substantial assistance negates a statutory mandatory minimum sentence. If USSG Amendment 780 altered the course that the Fourth Circuit followed in *Hood*, the same should hold true for the Ninth Circuit's analysis in *Jackson*.

The Ninth Circuit also erred in its analysis of the sentencing guidelines. Under 18 U.S.C. § 3582(c)(2) the sentencing court is required to apply the relevant policy statements from the guidelines in determining a sentence reduction motion. The Montana district court was required to use the version of the policy statement for § 1B1.10 that was in effect when the court considered the sentence reduction motion. (*See* USSG 1B1.10 cmt. n. 8, first paragraph). USSG Amendment 780 became effective on November 1, 2014, and the district court determined Petitioner's sentence reduction eligibility on March 9, 2015. Petitioner was within the timeframe of the change set forth in § 1B1.10 by USSG Amendment 780.

The Ninth Circuit's interpretation of § 3582(c)(2) is also too narrow. Nowhere in this statute does it state that it is the "initial" guidelines range that must be reduced. Section 3582(c)(2) qualifies an applicant for sentence reduction relief if he was sentenced "based on a sentencing range that has subsequently been lowered by

the Sentencing Commission” (Addendum at page 8). Nothing in this language limits the discussion to the sentencing range “initially” calculated as the Ninth Circuit holds. The statute does not state that only the initial guidelines range must be reduced. Section 3582(c)(2) permits sentence reduction if a defendant was sentenced “based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” (Addendum at page 8). The plain language of the statute does not limit the discussion to the sentencing range “initially” calculated as the Ninth Circuit holds.

United States v. Davis lays out a three-step analytical framework in supporting the plurality opinion in *Freeman*:

First, “[f]ederal sentencing law requires the district judge” to impose sentences that comply with “the purposes of federal sentencing, in light of the Guidelines and other § 3553(a) factors.” Thus, by statute, a sentencing judge's discretion is always framed by the Guidelines.

Second, Justice Kennedy looked to the district court's authority under Rule 11(c)(1)(C). Although the Rule “permits the defendant and the prosecutor to agree on a specific sentence,” it preserves “the district court's independent obligation to exercise its discretion” and review the proposed sentence. *Id.* Because judges “use the Guidelines range as the starting point,” they serve in a “real sense [as] a basis for the sentence,” “[e]ven where the judge varies from the recommended range.” *Id.*

Third, the Guidelines policy statements that apply to Rule 11(c)(1)(C) plea agreements and § 3582(c)(2) motions support the plurality's approach. Once a district court accepts a Rule 11(c)(1)(C) plea agreement, the parties' recommended sentence is binding on the court.

825 F.3d at 1026.

Applying this framework to Petitioner's case, the Ninth Circuit erred in affirming the district court. First, the district court considered the guidelines in

Petitioner's case and determined the range to be 121-151 months absent the mandatory minimum 240-month sentence. The Ninth Circuit in effect held that this initial consideration does not matter because it is required by statute and so does not satisfy § 3582(c)(2)'s "based on" language. This holding contradicts the second step in *Davis*, where the Court specifically held that "because judges use the Guidelines as a starting point, they serve in a real sense as a basis for the sentence, even where the judge varies from the recommended range." *Davis*, 825 F.3d at 1026.

Under *Davis*'s second step, examining the district court's authority under § 851 and the government motions filed in Petitioner's case, the district court has considerably more ability to exercise its discretion and rely on the guidelines under these statutes than under Rule 11(c)(1)(C). A (c) plea binds the court to a particular sentence if the court accepts the plea agreement. It is the type of sentencing hearing that gives a district court the least amount of discretion in determining a sufficient sentence. And yet, defendants in those situations are eligible for sentence reduction pursuant to *Davis*, whereas defendants who provided substantial assistance to waive a mandatory minimum sentence are not. To say that a court who fashions an appropriate sentence where a mandatory minimum is waived somehow bases the sentence on the guidelines less than when the court accepts a (c) plea where the sentence is pre-determined verges on the absurd.

The district court, in this case, discussed its authority under Section 851 and how that authority coincides with the government's motions at the sentencing

hearing. The parties agreed that once the mandatory minimum was waived by the government's motions, the Court was free to fashion an appropriate sentence as usual—by considering the guidelines and the § 3553(a) factors. The district court did exactly that: “The guideline range, in absence of the 851 information, would be 121 to 151 months, and the mandatory minimum sentence here is 240 months.” The district court went on to note that because the mandatory minimum was no longer in play, the court could sentence below the mandatory minimum. The district court specifically stated that it “considered the factors of 18 U.S.C. 3553(a) and the United States Sentencing Guidelines” in imposing judgment. These statements show that the district court considered the guidelines both initially and after hearing the parties' allocution and argument.

The third step in *Davis* requires the court to examine the relevant Guidelines policy statements. Here, those statements relate to USSG Amendments 780, 782, and § 1B1.10(c). Those policy statements do not support the Panel's decision here, as discussed previously. The Panel performed an end-run around this step by going back to the “based on” language of § 3582(c)(2). This is an oversimplified analysis of a complex issue that ignores the clear framework set forth in *Davis*.

The Ninth Circuit's interpretation of *Freeman* also fails to consider the circumstantial differences between *Freeman* and Petitioner's case. Petitioner's is a drug case involving a mandatory minimum that was set aside after the court granted the government's motion. Neither of those factors was at issue in *Freeman* so USSG

Amendment 780 was not a consideration. *Freeman* is therefore distinguishable from this case and the Ninth Circuit's opinion fails to take into account this critical distinction.

The *Freeman* plurality recognizes that in considering sentence modification under § 3582(c)(2) the "binding policy statement" forbids "below Guidelines modifications in a §3582(c)(2) proceeding [] *except where the original sentence was itself a [substantial assistance] downward departure.*" *Freeman*, 564 U.S. at 531 (emphasis added). Thus, Defendants who provide substantial assistance are the only inmates eligible for consideration of sentence reduction under § 3582(c)(2) and USSG § 1B1.10. This policy is confirmed in a section to USSG Amendment 780 entitled Reason For Amendment where the Sentencing Commission opines, in part:

[Amendment USSG 780] generally adopts the approach of the Third Circuit in *Savani* and the District of Columbia Circuit in *In re Sealed Case*. It amends §1B1.10 to specify that, if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of §1B1.10 the amended guideline range shall be determined without regard to the operation of §5G1.1 and §5G1.2. The amendment also adds a new application note with examples.

This clarification ensures that defendants who provide substantial assistance to the government in the investigation and prosecution of others have the opportunity to receive the full benefit of a reduction that accounts for that assistance. See USSG App. C. Amend 759 (Reason for Amendment). As the Commission noted in the reason for that amendment: "*The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when*

defendants who are otherwise similar (but did not provide substantial assistance) are subject to a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing.” Id.

(USSG Supplement to Appendix C (November 1, 2016)
(Emphasis added) at page 56, Addendum at page 26).

The Sentencing Commission explicitly adopted the holdings of the District of Columbia Circuit in *In re Sealed Case*, the Third Circuit in *Savani*, and the Fourth Circuit in *Williams*. This petition should therefore be granted to resolve the conflict between this case and the *Williams* case, and to conform with this Court’s decisions in *Braxton v. United States*, 500 U.S. 344 (1991) and *Dillon v. United States*, 560 U.S. 817 (2010) (Sentencing Commission can resolve intercircuit disputes and those decisions are binding on the courts when framed as guidelines policy statements).

CONCLUSION

The Court should grant this petition and set the case down for full briefing and argument to relieve the unwarranted sentencing disparities being caused by the Ninth Circuit’s decision.

Respectfully submitted,

/s/ Katherine Stack

KATHERINE STACK

Counsel of Record

April 25, 2018