No. ____________

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT AGUILAR,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a reviewing court must remand when the record indicates a district court may have relied on clearly erroneous facts in denying a motion to reduce sentence under 18 U.S.C. § 3582(c)(2).

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Petitioner Robert Aguilar respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on March 6, 2018.

I. JURISDICTION

Petitioner moved the district court to reduce his prison sentence under 18 U.S.C. § 3582(c)(2) and U.S.S.G. Amendments 782 and 788. The district court denied the motion. Reviewing the district court's ruling under 28 U.S.C. § 1291, the Ninth Circuit affirmed in an unpublished disposition. See *United States v. Aguilar*, __ F. App'x ___, 2018 WL 1165000 (9th Cir. 2018) (attached to this petition as Appendix A). This Court has jurisdiction to review the Ninth Circuit's decision under 28 U.S.C. § 1254(1).

II. STATUTORY PROVISIONS[1]

18 U.S.C. § 3553(a)

18 U.S.C. § 3582(c)

U.S.S.G. app. C amend. 782

U.S.S.G. app. C amend. 788

III. STATEMENT OF THE CASE

A. Petitioner's conviction and sentencing.

Petitioner had been romantically involved with one of his codefendants, whom he had assisted in distributing methamphetamine. They were living together at the time of their arrest. During the course of their relationship, other drug dealers robbed Petitioner's girlfriend of her drugs while her 16-year-old son was in the home.

Petitioner later pled guilty to conspiracy to distribute methamphetamine. During his plea, he admitted that he conspired to distribute at least 1.5 kilograms of methamphetamine. Those responsible for the robbery were also charged in the same indictment, but the government (correctly) never alleged that Petitioner himself was involved in robbing his own girlfriend.

Petitioner had prior convictions from when he was a juvenile and some misdemeanor convictions as an adult. He had no prior adult felony convictions,

[1] The full text of relevant provisions are attached at Appendix B.

and no convictions that scored for criminal history purposes. Petitioner was involved with a gang as a teenager, but left at age 18.

Petitioner was sentenced on August 4, 2014. The prosecution and defense filed sentencing summary charts arguing for the same Guidelines calculations. Both parties agreed that the then-current 2013 Guidelines applied: base offense level 34 under U.S.S.G. § 2D1.1(c)(3), with a three-level reduction for acceptance of responsibility under § 3E1.1(b). In Criminal History Category I, the resulting range was 108 to 135 months. Both parties recommended a low-end sentence of 108 months.

The sentencing hearing was short. The court announced at the beginning of the hearing that it would adopt the joint recommendation as to the Guidelines. Defense counsel explained that Petitioner had a serious drug addiction, but that, while on bond, he had gotten treatment, was getting drug tested and was "doing terrific."

The court said that it had presided over the trial of a codefendant in the case and noted that Petitioner was "just a cog." The court explained, "I heard the trial in this case. The drugs come across from Mexico. Then they're passed off to someone like you, who then gives them to somebody else in smaller quantities." The court ultimately adopted the parties' recommendation and sentenced Petitioner to 108 months' imprisonment.

B. The guideline change.

On November 1, 2014, just a few months after the court had sentenced Petitioner, the Sentencing Commission amended the Guidelines to reduce the base offense level for most drug offenses. *See* U.S.S.G. app. C amend. 782 (2014). The Commission also made the change retroactive, meaning defendants like Petitioner were eligible for a reduction in sentence under 18 U.S.C. § 3582(c)(2). *See* U.S.S.G. app. C amend. 788 (2014). The base offense level for an offense involving between 1.5 and 5 kilograms of methamphetamine dropped from 34 to 32. *Cf.* U.S.S.G. § 2D1.1(c)(4)(2013) with U.S.S.G. § 2D1.1(c)(3)(2014).

C. Petitioner's motion for a sentencing reduction.

Petitioner filed a motion requesting that the court reduce his sentence based on the amended Guidelines. He argued that the amended Guidelines resulted in an 87-to-108 month range and asked the court to reduce his sentence to the low end of 87 months. He argued that since the Sentencing Commission had determined that the prior sentencing range was greater than necessary to achieve the goals of sentencing in drug cases, a reduction was appropriate. Two of his codefendants, also filed similar, separate motions.

The government opposed the reduction, addressing the motions by Petitioner and his two co-defendants in a single response. The government agreed with the amended Guidelines calculation in Petitioner's case, but argued that the court should not reduce his sentence for public safety reasons. The government argued that Petitioner was selling large quantities of drugs and provided at least one handgun to another conspirator. The government also claimed that Petitioner was a gang member.

The government provided separate reasons why the reduction should be denied for the two codefendants. As to one, the government said that he was a distributor of methamphetamine who sold large quantities of drugs to his own customer base.

As to the other, the government argued he was involved with moving large quantities of methamphetamine into the United States from Mexico. The government also explained that he orchestrated a robbery against Petitioner's girlfriend to steal her drug stash. There were a number of people involved with the robbery, but, again, the government did not allege that Petitioner had participated.

The court heard Petitioner's motion at a joint hearing to resolve all three motions to reduce sentence. Defense counsel argued that the amount of drugs was a surrogate for the seriousness of the offense and that the Sentencing Commission—based on years of research, analysis, and public hearings—had determined that the old Guidelines were too high. The defendants, he argued, deserved the benefit of that empirical study and the resulting amendment to the Guidelines.

The court did not agree, citing several reasons unrelated to Petitioner's case. First, the court mistakenly referenced other trials involving the Mexican Mafia (a prison gang) that may have touched on the same conspiracy, but those defendants had not gone to trial; there had been only one trial stemming from Petitioner's indictment. Next, the court said that despite the low drug amounts alleged in Petitioner's case, the offense involved a "pretty serious" drug-trafficking organization tied to the Mexican Mafia.

The prosecutor responded by noting that he was not present at the trial and recognized that the district court alone was familiar with the unique facts of the case. He specifically directed his comments to Petitioner's co-defendant specifically, arguing "this is not a basic border bust." The prosecutor remarked that the co-defendant's case had also involved a robbery—the robbery of Petitioner's girlfriend.

The court agreed with the prosecutor. The court recalled that the trial included testimony about the robbery. The court was troubled that an innocent, 16-year-old was present when the robbery took place. The court explained that a Guidelines sentence under the amended Guidelines would not be an appropriate sentence under § 3553(a). The court denied the co-defendant's motion and then immediately said "the same applies" for Petitioner.

Defense counsel argued more about Petitioner's case, pointing out that Petitioner did not have an aggravated criminal history and was not a public danger. Defense counsel also addressed the government's argument that Petitioner was a gang member. He argued that gang affiliation should not preclude a reduction; so many inmates have gang involvement at the time they begin their sentences that a nationwide sentencing reduction certainly took into account gang involvement. As described in the presentence report, Mr. Aguilar was involved with a gang as a teenager until age 18. He was 34 at the time of sentencing.

The court provided two reasons for its concern about public safety in Petitioner's case. First, the court commented "drugs and guns don't mix." Second, the district court relied on the robbery *in which Petitioner was not involved*. The court said:

> Petitioner wasn't just a courier. This was a case where they - it was a stash house robbery involving firearms and also involving this 16-year-old young boy. I think Petitioner actually got a pretty good deal when I sentenced him to 108 months. So the answer is, I'm not reducing his sentence.

The court later issued a written order denying Petitioner's motion for a sentencing modification. The order stated:

> The underlying offense involved a large drugs distribution conspiracy involving a great deal more than 500 grams of methamphetamine of relevant conduct and the Mexican mafia, as well as firearms. Having considered the §3553(a) factors and the nature and seriousness of the danger to the community if the sentence were reduced, a reduction in the term of imprisonment is not warranted.

Petitioner timely appealed.

D. Appeal to the Ninth Circuit

On appeal, Petitioner argued that the district court had abused its discretion in denying his motion to reduce sentence. First, Petitioner argued that the district court had erred by relying on clearly erroneous facts, specifically, that Petitioner had been involved in the stash house robbery. Second, he argued that the district court erred by conducting a joint hearing for him and his co-defendants.

After oral argument, the Ninth Circuit affirmed. The panel rejected Petitioner's argument that the joint hearing was unreasonable. The panel ruled that the district court's procedure had not deprived Petitioner of notice and had not resulted in fact-finding inconsistent with Petitioner's original sentencing hearing.

Rejecting Petitioner's other claim that district court had relied on clearly erroneous facts, the panel wrote:

> Aguilar argues that the denial should be reversed because the district court relied on a mistaken belief that Aguilar was personally involved in a robbery against co-defendant Laura Cruz. But we conclude there was no reversible error under either abuse of discretion or plain error review. To the extent that the district court may have relied on an erroneous fact—that Aguilar was the perpetrator of the robbery—Aguilar's counsel failed to object, which might have clarified the situation.

Appendix A (citations omitted).

IV. REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve a circuit split regarding the review of the denial of sentencing reductions under 18 U.S.C. § 3582(c). All the Circuits agree that a district court may not rely on clearly erroneous facts, but the Circuits are split on how to resolve cases with ambiguous records. The First and Seventh Circuits have ruled that, where the record presents the possibility that the district court relied on clearly erroneous facts, the appellate court must remand to clarify the record and ensure the proper resolution of the motion. Breaking from that reasoned rule, the Ninth Circuit (as exemplified by Petitioner's case) has ruled that no remand is required unless the record clearly indicates the district court relied on clearly erroneous facts. In other words, in the Ninth Circuit, the possibility of error is not worth correction.

This Court should grant certiorari to resolve this split in authority. As indicated by the Court's recent decision to review in *Chavez-Meza*, the proper procedure to adjudicate motions under § 3582(c)(2) is a ripe and important issue warranting this Court's attention and guidance. Moreover, the Ninth Circuit erred in affirming the denial of Petitioner's motion, and this case is the perfect vehicle to resolve the circuit split.

A. The Circuits Are Intractably Split Regarding How to Resolve Cases in Which the Denial of a Motion to Reduce Sentence May Have Relied on a Clearly Erroneous Fact

"A federal court generally 'may not modify a term of imprisonment once it has been imposed.' " *Dillon v. United States*, 560 U.S. 817, 819 (2010) (quoting 18 U.S.C. § 3582(c)). One exception to this rule is "in the case 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." *See* 18 U.S.C. § 3582(c)(2). Provided such a defendant is eligible for a sentencing reduction under U.S.S.C. § 1B1.10, a court "may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

This Court has explained that a hearing on a motion to reduce sentence under § 3582(c)(2) is not a plenary resentencing proceeding. *Dillon*, 560 U.S. at

827. Rather, in adjudicating a motion to reduce sentence, the district court must "consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized by reference to the policies relevant at step one is warranted in whole or in part under the particular circumstances of the case." *Id.* Accordingly, the Circuits unanimously agree that the denial of a motion to reduce sentence under the § 3553(a) factors is reviewed for abuse of discretion. *United States v. Rodríguez-Peña*, 470 F.3d 431, 432 (1st Cir. 2006) (per curiam); *United States v. Rios*, 765 F.3d 133, 137 (2d Cir. 2014); *United States v. Rodriguez*, 855 F.3d 526, 529 (3d Cir. 2017); *United States v. Muldrow*, 844 F.3d 434, 437 (4th Cir. 2016); *United States v. Quintanilla*, 868 F.3d 315, 319 (5th Cir. 2017); *United States v. Curry*, 606 F.3d 323, 327 (6th Cir. 2010); *United States v. Purnell*, 701 F.3d 1186, 1189 (7th Cir. 2012); *United States v. Banderas*, 858 F.3d 1147, 1149 (8th Cir. 2017); *United States v. Mercado-Moreno*, 869 F.3d 942, 953 (9th Cir. 2017); *United States v. Battle*, 706 F.3d 1313, 1317 (10th Cir. 2013); *United States v. White*, 305 F.3d 1264, 1267 (11th Cir. 2002); *United States v. Wyche*, 741 F.3d 1284, 1291-92 (D.C. Cir. 2014). Further, under an abuse of discretion test, a district court abuses its discretion if it relies on clearly erroneous facts. *See, e.g.,* U*nited States v. Washington,* 584 F.3d 693, 695 (6th Cir. 2009).

The Circuits' unanimity disappears, however, in reviewing records with ambiguous factual determinations. The First and Seventh Circuits have ruled that where the record indicates a district court *may* have relied on clearly erroneous facts, the reviewing court must remand. *See United States v. Torres-Rivera*, 874

F.3d 40 (1st Cir. 2017) ("Because of the presently quite plausible possibility that the government's wording led the district court astray on a point directly relevant to a section 3553(a) factor, we opt not to guess what the district court was thinking. Instead, we vacate the denial of Torres's motion and remand to provide the government the opportunity to clarify the record and to provide the district court with the benefit of the record so clarified."); *United States v. Neal*, 611 F.3d 399, 402 (7th Cir. 2010) ("If the judge is mistaken about Neal's conduct in prison, reconsideration is in order."). The Ninth Circuit, on the other hand, does not reverse when the record is unclear, holding any ambiguity against the defendant. *See App'x A* (affirming despite the possibility that "the district court may have relied on an erroneous fact").

1. *The First and Seventh Circuits Reverse the Denial of a Motion to Reduce Sentence When the Record Evidences a Possibility that the District Court Relied on Clearly Erroneous Facts*

In *Torres-Rivera*, the First Circuit vacated the denial of a motion to reduce sentence based on an ambiguous factual record. 874 F.3d at 44. There, the defendant had filed a motion to reduce sentence based on amended drug Guidelines. *Id.* at 43. The government opposed the motion based in part on allegations that the defendant had suffered multiple sanctions for misconduct while in prison. *Id.* The defendant—rightly, as the First Circuit recognized—contested the government's allegations, explaining that he had not suffered multiple sanctions and had a "clear" prison record since sentencing. *Id.* The district court nonetheless denied the motion to reduce sentence, noting "conduct at the Bureau of Prisons." *Id.*

In reversing, the First Circuit explained that the record did not make clear which version of the defendant's "conduct" the district court took into account. *Id.* at 43-44 ("the record presents something of a puzzle in the form of the district court's elaboration that it was relying, in part, on Torres's conduct in prison.") If it had relied on the government's version, "then the district court would have based its decision on a falsely inflated view of the relevant conduct," warranting reversal. *Id.* at 44. If it had relied on the defendant's version, the court "would likely affirm." *Id.* Given that the record "point[ed] ambiguously in two different ways," the First Circuit ruled, "we opt not to guess what the district court was thinking [and] remand to provide the government the opportunity to clarify the record and to provide the district court with the benefit of the record so clarified." *Id.*

Similarly, the Seventh Circuit vacated the denial of a motion to reduce sentence when the record indicated the district court might have relied on erroneous facts. *Neal*, 611 F.3d at 402-03. In *Neal*, the district court had also relied on an allegation of misconduct in prison. Unlike the defendant in *Torres-Rivera*, the defendant in *Neal* had no opportunity to contest the allegation, and the appellate court could not confirm or dispel its accuracy. *Id.* at 402. But the court nonetheless ruled, "*If* the judge is mistaken about Neal's conduct in prison, reconsideration is in order." *Id.* (emphasis added). Like the First Circuit, the Seventh Circuit was unwilling to guess what the district court was thinking and remanded for further proceedings—the mere possibility of reliance on erroneous facts required reversal.

2. The Ninth Circuit Does Not Remand Even When the Record Indicates the District Court May Have Relied on Clearly Erroneous Facts

The Ninth Circuit, in resolving Petitioner's case, has taken a position wholly opposed to the First and Seventh. Petitioner argued that the denial of his motion should be reversed because the district court had relied on a clearly erroneous fact: that Petitioner was the perpetrator of a robbery. App'x A. On appeal, the government conceded that Petitioner had not participated in the robbery but contested whether the district court made such a finding. The Ninth Circuit recognized the ambiguity, noting that an objection "might have clarified the situation." *Id.*

But "[t]o the extent that the district court may have relied on an erroneous fact," the Ninth Circuit concluded that "there was no reversible error under either abuse of discretion or plain error review." *Id.* In other words, whereas the ambiguity in the record required reversal in *Neal* and *Torres-Rivera*, the ambiguity in the record led to affirmance in Petitioner's case. Despite the court's recognition that the record could be clarified to eliminate any fact-finding error, it affirmed even under abuse-of-discretion review.

B. This Issue Is Ripe for Review

The Sentencing Commission has retroactively amended the Guidelines dozens of times, but perhaps no amendment has had such wide affect as

Amendment 782. By reducing the drug guidelines across the board, the amendment instantly made tens of thousands of federal prisoners eligible for sentence reductions. In light of the flood of litigation that followed Amendment 782, it has never been more important for the Court to clarify the procedure requisite to a proper exercise of discretion under U.S.S.G. § 1B1.10. In fact, the likelihood of a future retroactive Guideline amendment makes it all the more urgent to resolve this important question before the courts are again swarmed by tens of thousands of motions requiring adjudication.

This Court's recent grant of certiorari in *Chavez-Meza* illustrates the importance of these issues. *Chavez-Meza*, Case No. 17-5639, asks what is the minimum amount of explanation required to justify denying a motion under § 3582(c). This case presents a similar procedural question: upon what factual record may a district court properly deny a motion under § 3582(c)? That question deserves the same attention from this Court.

C. This Case is a Good Vehicle for Resolving the Question Presented

This case presents the perfect opportunity for resolution of the question presented. The Ninth Circuit below conceded the record was ambiguous as to whether the district court had relied on clearly erroneous facts. That is the precisely the situation the First and Seventh Circuits faced in *Torres-Rivera* and *Neal*. The Ninth Circuit's disparate, dispositive ruling on whether remand is required in that circumstance presents a clean vehicle for this Court to address the question presented.

D. The Ninth Circuit Was Wrong to Affirm the District Court's Denial of Petitioner's Motion to Reduce Sentence

The Ninth Circuit should not have blessed the district court's adjudication of Petitioner's motion. The district court decided itself to hear three related but distinct motions at the same time. As a result, it mixed up the facts of the three cases and, inserting extra-record facts from other trials, wrongly pinned a robbery on Petitioner. The record was at the very best ambiguous as to whether and how much the district court relied on that erroneous fact to deny Petitioner's motion. Under the majority rule, the Ninth Circuit should have reversed.

The Ninth Circuit seemed to rely on Petitioner's lack of objection to justify affirming the district court. *See* App'x A ("Aguilar's counsel failed to object, which might have clarified the situation."). But the court's emphasis on the lack of objection had nothing to do with the standard of review; indeed, the Ninth Circuit ruled that there was no reversible error under *either* abuse of discretion or plain error review. *Id.* Instead, the court was merely explaining that the lack of objection left the record unclear, a state held *against* Petitioner in resolving his appeal.

That ruling was wrong. The district court below, much like the district court in *Neal*, relied on extra-record facts to reach its ruling. The district court cited testimony it heard at separate trials and relied on a fact never alleged by the government in its response to Petitioner's motion: namely, that Petitioner had committed a robbery. Since neither the prosecutor nor defense counsel had participated in those trials, the district court, as the prosecutor admitted at sentencing, was the only person at the hearing with any familiarity about the facts of those cases. Thus, Petitioner had no genuine opportunity to contest the district court's alleged facts, which it sprung on defense counsel without notice (Petitioner did not appear at the hearing). Indeed, his appellate lawyer, with sufficient time to review the record, caught the error and presented it to the appellate court.

The Ninth Circuit nevertheless affirmed the district court's denial of Petitioner's motion, ruling that "[t]he onus was not on the district court to provide express notice to the defendant that the information from those trials might be considered relevant." That may be so. *See, e.g.*, *Neal*, 611 F.3d at 401 ("Judges need not release what amount to preliminary opinions or send up trial balloons.") But the question of whether Petitioner had *notice* is immaterial to deciding whether the district court relied on clearly erroneous facts. As the Seventh Circuit explained in *Neal*, "the problem is not lack of notice . . . [t]he problem is that the judge may not have his facts straight." *Neal*, 611 F.3d 399.

When a circuit court—as the Ninth Circuit did here—begins a sentence "To the extent that the district court may have relied on an erroneous fact . . ." App'x A, the logical next phrase must always be "reconsideration is in order," *Neal*, 611 F.3d at 402. The Ninth Circuit here was wrong to affirm despite the possibility of erroneous facts animating the district court's ruling.

V. CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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