No. 99-7101

In The

Supreme Court of the United States

Jack D. Holloway,

Petitioner,

v.

United States of America,

Respondent

REPLY OF THE PETITIONER

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March 8, 2000

REPLY OF THE PETITIONER

The long and short of the certiorari determination in this case is that every court of appeals except the Ninth Circuit asserts jurisdiction over appeals from district court decisions refusing to modify sentences under 18 U.S.C. § 3582(c)(2). No other circuit has agreed with the Ninth Circuit's decision in United States v. Lowe, 136 F.3d 1231 (9th Cir.), cert. denied, 525 U.S. 972 (1998), on which the panel below relied in holding that it lacked jurisdiction over Petitioner's appeal. In the two years since Lowe was decided, it has become apparent that (a) this jurisdictional issue recurs frequently, and (b) that other circuits have continued their longstanding practice of reviewing district courts' application of Section 3582(c)(2). Certiorari therefore should be granted.

1. Respondent does not dispute that the Ninth Circuit stands completely alone in holding that it lacks jurisdiction to consider whether a district court abused its discretion in refusing to alter a defendant's sentence under Section 3582(c)(2). No other court of appeals has held that it lacks jurisdiction over such an appeal in the nearly fifteen years since Section 3582(c)(2) was enacted. To the contrary, a Lexis search for appellate decisions addressing that statute reveals hundreds of cases in other circuits. There is, accordingly, no doubt that this issue recurs frequently and that every other circuit would have considered the merits of Petitioner's appeal.

2. Respondent's principal argument is that the district court's order on Petitioner's motion for reconsideration makes it clear that the district court did not abuse its discretion in denying Petitioner a reduction in sentence. BIO 8 ("In this case, the district court made a discretionary decision, based on the facts and circumstances of this case, not to reduce

petitioner's sentence under Section 3582(c). The district court stated that it was 'aware that it [had] authority to grant such a reduction' but denied petitioner's motion 'due to the enormity of this case.'"); id. 11 ("Nothing in the record suggests the district court failed to give adequate consideration to petitioner's motion.") But Respondent's further argument that the district court's decision" for that reason "is not reviewable on appeal," id. 8, is a non sequitur. In every other circuit, Respondent would have to make its argument to the court of appeals. Every circuit but the Ninth thus regularly reviews such decisions for abuse of discretion, including when the district court's brief order denying a reduction in sentence refers to such things as the "enormity" of the defendant's offense. Other courts thus recognize that although "[i]t is plain that, under this paradigm, most resentencing battles will be won or lost in the district court, not in an appellate venue," the courts of appeals are not thereby stripped of jurisdiction. United States v. Labonte, 70 F.3d 1396, 1411 (1st Cir. 1995); see also, e.g., United States v. Vautier, 144 F.3d 756, 759 n.3, 763 (11th Cir. 1998) ("We review a district court's decision to reduce a sentence pursuant to 18 U.S.C. § 3582(c)(2). * * * In summary, although the district court's order ruing on Vautier's motion is brief, a review of the entire record demonstrates that the district court properly undertook the two-step inquiry in deciding not to reduce Vautier's sentence. Consequently, we conclude that the district court did not abuse its discretion in denying Vautier's motion to reduce his sentence."), cert. denied, ___ S. Ct. ___ (199_); United States v. Cothran, 106 F.3d 1560, 1562 (11th Cir. 1997) (accepting the government's "conten[tion] that the district court has discretion under § 3582(c)(2) whether to modify a defendant's sentence at all and that the factors listed in § 3553(a) merely inform the court whether to exercise its discretion or not," yet reviewing on appeal whether district court abused its discretion); United States v. Adams, 104 F.3d 1028, 1031 (8th Cir. 1997) ("The law asks a court to consider the factors of § 3553(a) 'to the extent . . . applicable.' We are satisfied that the

court int his case, by mentioning several considerations that are found in § 3553(a), was aware of the entire contents of the relevant statute."); United States v. Levay, 76 F.3d 671, 673 (5th Cir. 1996) ("The decision to reduce a sentence [under Section 3582(c)(2)] is discretionary; therefore, we review the district court's determination for abuse of discretion."); United States v. Whitebird, 55 F.3d 1007, 1009-10 (5th Cir. 1995) ("[W]e review only for an abuse of that discretion. * * * * Because [the district court] gave due consideration to the motion as a whole, and implicitly to the factors set forth in § 3553(a), the district court did not abuse its discretion.").

Respondent's attempted distinction of United States v. Wyatt, 115 F.3d 606 (8th Cir. 1997), is particularly unpersuasive. Respondent argues that because in Wyatt the district court "issued only a summary rejection without giving any reasons beyond adoption of the government's arguments, it was unclear whether the court's identification of the sentence it would have imposed under the amended Guidelines might have affected the exercise of its discretion." BIO 14-15. But the same is true in this case, as the district court's order does not indicate whether it considered the sentence Petitioner would have received under the amended guideline. In particular, because the amended guideline would have reduced Petitioner's sentence by up to eight years, see BIO 5, there is a substantial argument to be considered on appeal that the district court – which never discussed the issue even indirectly – failed in its statutory obligation to consider the effect of the amended guideline. Even more important, Petitioner at the very least has the right to have his argument considered on appeal. In other words, Respondent's attempted distinction of Wyatt goes only to the merits of Petitioner's appeal rather than the court of appeals' jurisdiction, which is the relevant issue in determining whether a circuit conflict exists. Respondent fails to offer any theory at all on which the Eighth Circuit would have considered the appeal in Wyatt but would refuse to assert jurisdiction in this

case.

3. In an attempt to suggest that the circuits are not truly divided, Respondent points to inapposite decisions from other courts of appeals refusing to assert jurisdiction over unrelated sentencing issues. But not a single case cited by Respondent involves the statute in question here – 18 U.S.C. § 3582(c)(2) – and Respondent pointedly does not contend otherwise. In point of fact, as the just-cited decisions make clear, no court of appeals has extended the decisions cited by Respondent to the context of Section 3582(c)(2).

ERIK INSERT ON CASES IN FOOTNOTES.

Respondent also contends that, notwithstanding that every circuit other than the Ninth asserts jurisdiction over appeals under Section 3582(c)(2), there is no conflict with the decision below because other circuits have not expressly addressed the issue of their jurisdiction. BIO __. Even if Respondent's description of other circuits' case law were correct (and it is not), Respondent's point would lack force. In the first instance, the cases cited above establish that other circuits would have considered the merits of Petitioner's appeal, and the court of appeals' conflicting treatment of such appeals falls within the heartland of this Court's certiorari jurisdiction. In addition, Respondent cannot escape the fact that it is a party to all the cases in question. Respondent either (a) has not been urging other courts of appeals to adopt the Ninth Circuit's decision in Lowe, or (b) has been pressing that argument but not succeeding. In either event, the court of appeals' divergent approaches of the issue is manifest and requires this Court's attention.

Furthermore, Respondent's assertion that other courts of appeals have not addressed their jurisdiction over appeals under Section 3582(c)(2) is just wrong. Thus, the Tenth Circuit in United States v. Telman, 28 F.3d 94 (1994), expressly concluded that it had "jurisdiction pursuant to 18 U.S.C. 3742" over a defendant's appeal from the denial of a reduction in sentence

under Section 3582(c)(2). On the merits, the court concluded that it could not "say the court abused its discretion" given that "[i]n denying Defendant's motion for a sentence reduction, the district court considered a number of these factors, including Defendant's post-amendment guideline range, and decided that due to Defendant's personal and offense characteristics, Defendant did not merit a sentence reduction." Id. at 97. See also, e.g., United States v. Stonner, 165 F.3d 16 (2d Cir. 1998) (holding that court lacked jurisdiction over some of defendants' claims due to lack of certificate of appealability but that jurisdiction existed for claim that district court "abuse[d] its discretion in denying Stonner relief under" Section 3582(c)(2)), cert. denied, ___ S. Ct. ___ (199_). For its part, another panel of the Tenth Circuit has "exercise[d] jurisdiction pursuant to 28 U.S.C. § 1291" in such appeals. United States v. Trujeque, 100 F.3d 869 (1996). The court in that case expressly considered and rejected the government's argument that "we lack jurisdiction to review Mr. Trujeque's sentence," explaining:

> [T]his is not a direct appeal of Mr. Trujeque's sentence, nor is it a collateral attack under 28 U.S.C. § 2255. Rather, Mr. Trujeque has filed a motion under 18 U.S.C. § 3582(c)(2), and the viability of his motion depends entirely upon that statute. Our appellate jurisdiction over final decisions extends as far as to consider the district court's denial of Mr. Trujeque's § 3582(c)(2) motion. See 28 U.S.C. § 1291.

Id. at 870.

4. Respondent's final argument in opposing certiorari is that this Court also denied certiorari in the Ninth Circuit's Lowe decision, on which the panel below relied in this case. But at the time the Ninth Circuit decided Lowe it was not at all clear whether that decision would be applied broadly, whether other circuits would follow it, or whether the question would recur frequently. In the subsequent two years it has become plain that all of those considerations favor granting certiorari. Thus, the Ninth Circuit (and only the Ninth Circuit) recently has

refused to hear numerous other appeals challenging district courts' refusals to amend sentences under Section 3582(c)(2). See United States v. Prue, No. 98-56718, 2000 U.S. App. LEXIS 1550 (9th Cir. Jan. 18, 2000); United States v. Aguilar, No. 98-10288, 1999 U.S. App. LEXIS 5076 (9th Cir. Mar. 19, 1999); United States v. Piantadosi, No. 98-55381, 1998 U.S. App. LEXIS 29591 (9th Cir. Nov. 18, 1998); United States v. Aispuro, No. 97-50373, 1998 U.S. App. LEXIS 24103 (9th Cir. Sept. 24, 1998); United States v. Gamboa, No. 97-50318, 1998 U.S. App. LEXIS 8473 (9th Cir. Apr. 29, 1998); United States v. Hearron, No. 97-10401, 1998 U.S. App. LEXIS 8449 (9th Cir. Apr. 28, 1998); United States v. Castro, No. 96-50306, 1998 U.S. App. LEXIS 5295 (9th Cir. Mar. 13, 1998).[1]

CONCLUSION

For the foregoing reasons as well as those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[1] In fact, Respondent itself successfully made this point in acquiescing to certiorari in Baral v. United States, despite the fact that this Court had denied Respondent's own petition for certiorari on the identical issue in 1998. See No. 98-1667, Balar v. United States, Br. of the United States 14 n.3 (maintaining that certiorari should be granted because the "conflict in the circuits persists * * * and remains of continuing importance" despite the denial of certiorari in New York Life Ins. Co. v. United States, 118 F.3d 1553 (Fed. Cir. 1997), cert. denied, 523 U.S. 1094 (1998)). It is worth noting that the jurisdiction question presented by this case recurs far more frequently than the limited tax issue presented in Balar.

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