UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	15-3702-cr
v.	AFFIRMATION OF COUNSEL IN SUPPORT OF MOTION TO WITHDRAW PREVIOUSLY FILED *ANDERS* BRIEF AND MOTION TO BE RELIEVED AS COUNSEL
MIGUEL MIRANDA, Defendant-Appellant.	

JOHN MERINGOLO, an attorney in good standing admitted to practice before this Court, affirms under penalty of perjury as follows:

1. On July 15, 2016, the Court appointed me to represent Miguel Miranda on the direct appeal of the district court's (Siragusa, J.) denial of his *pro se* motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) and United States Sentencing Guidelines Amendment 782 (2014).

2. On January 31, 2017, I filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), concluding that the district court's reasoning for its denial of Mr. Miranda's *pro se* motion for resentencing pursuant to 18 U.S.C. § 3582(c)(2) was correct and that there were no non-frivolous grounds to challenge the district court's Order.

3. Simultaneously, I moved to be relieved as counsel to Mr. Miranda.

4. During a conversation with AUSA Frank T. Pimentel on April 20, 2017, it was brought to my attention that my Guidelines calculations in the filed *Anders* brief were incorrect and that Mr. Miranda may indeed be eligible for a sentence reduction as a matter of law.

5. In order to allow the district court to consider this matter in the first instance and to simultaneously preserve Mr. Miranda's appellate rights, I therefore respectfully move this Court:

a. For leave to withdraw the *Anders* brief and motion to be relieved as counsel filed on January 31, 2017;

b. To remand this case to the district court for appointment of CJA counsel admitted in the Western District of New York and for reconsideration of Mr. Miranda's motion for resentencing pursuant to 18 U.S.C. § 3582(c)(2); and

c. For leave to re-file a brief on behalf of Mr. Miranda following the district court's ruling after reconsideration.

6. As discussed below, I now realize that there may indeed be a non-frivolous issue on appeal. It appears that the district court erred as a matter of law in determining that application of Sentencing Guidelines Amendment 782 (effective November 1, 2014) would not lower Mr. Miranda's applicable Guidelines range.

7. On February 23, 2010, Mr. Miranda pled guilty pursuant to a plea agreement to Counts I, IV, and V of the indictment, charging him respectively with violations of 21 U.S.C. § 841(a)(1), 18 U.S.C. § 1951(a), and 18 U.S.C. § 924(c)(1). *See generally* A-16-63 (Change of Plea Hearing held on Feb. 23, 2010); A-64-65 (Plea Agreement filed Feb. 23, 2010).[1] As is relevant herein, Mr. Miranda admitted that, on or about October 17, 2007, he had knowingly possessed cocaine and heroin. The total marijuana equivalent of the drugs involved was between 100 and 400 kilograms. A-58.

8. On October 28, 2011, the district court sentenced Mr. Miranda to a total of 168 months of imprisonment—108 months to run concurrently on Counts I and IV and a consecutive 60-month sentence on Count V. *See generally* A-97-127 (Sentencing Hearing held Oct. 28, 2011); A-128-134 (Judgment entered Nov. 2, 2011). The sentence of 168 months, the low end of

[1] "A-" citations refer to pages of the Joint Appendix filed on January 31, 2017.

level 35 in Criminal History Category I, was recommended by the government pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e). *See* A-87; A-120-21.

9. The government reached the requested 168-month sentence by first calculating a Guidelines range of 168-210 (CHC I, level 35) on Counts I and IV, and then adding the 60-month mandatory minimum sentence on Count V to reach an aggregate sentence of 228-270 months of imprisonment. A-87. Although the 228-270 month range is not a Guidelines range within the sentencing table, both the government and the district court equated it to a level 36 (188-235 months), the range that encompassed the low-end of the aggregate range (i.e., 228 months). Pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e), the government then recommended a one-level downward departure and imposition of a sentence at the low-end of level 35 (168 months). A-87.

10. The district court adopted the government's calculations at the sentencing hearing. A-101. It then acknowledged Mr. Miranda's substantial assistance as discussed in the government's §5K1.1 letter and the government's recommendation that the district court depart one level downward to a total offense level of 35 (168-210 months). Accordingly, the district court imposed a sentence of 168 months, apportioned as 108 months on Counts I and IV and 60 months (consecutive) on Count V. A-102; A-120-22. Mr. Miranda filed no direct appeal.

11. On December 22, 2014, the Western District of New York docketed Mr. Miranda's *pro se* motion for a modification or reduction of his sentence pursuant to 18 U.S.C. § 3582(c)(2) and Guidelines Amendment 782. A-135-36. Mr. Miranda's motion stated that his total offense level at sentencing had been 35 (CHC I) with an applicable Guidelines range of 168 to 210 months, and asked the district court to reduce that level to 33 (i.e., a Guidelines range of 135 to 168 months). *Id*.

12. On October 19, 2015, the district court denied the motion for resentencing in a single-sentence decision reading, "The defendant's motion is denied because the amendment does not have the effect of lowering the defendant's applicable guideline range." A-137. Mr. Miranda's notice of appeal from that denial was timely filed on November 16, 2015. A-138.

13. To the best of counsel's understanding, it appears that the district court reached this conclusion by calculating the revised "aggregate guidelines range" that would have been applicable to Mr. Miranda, had he been sentenced pursuant to the reduced offense level under U.S.S.G. § 2D1.1 as amended by Amendment 782, determining that that new range still fell within level 35, and denying the motion on that basis.

14. Specifically, the district court appears to have calculated that, under the 2014 Guidelines, taking the 2-level reduction implemented by Amendment 782 into consideration, the base offense level for the same quantity of marijuana would be 24. U.S.S.G. § 2D1.1(c)(8) (2014 ed.). After grouping Counts I and IV, the combined adjusted offense level (again, without the upward adjustment) would be 26. (Notably, Mr. Miranda would not get the full benefit of Amendment 782 because, with the Guideline lowered to 24 for Count I (the narcotics conviction), he would receive a 2-point increase pursuant to the grouping analysis in U.S.S.G. § 3D1.4 rather than the 1-point increase he had received under the 2010 Guidelines). After the 11-point upward adjustment stipulated in the plea agreement, and minus three points for acceptance of responsibility, Mr. Miranda's base offense level on Counts I and IV would, therefore, have been 34. In CHC I, he would have faced a sentence of 151-188 months before any reduction pursuant to § 5K1.1 or the addition of the 60-month sentence on Count V.

15. Adding the consecutive 60-month sentence to the low end of 151 months results in an "aggregate guideline range" (the term used by the district court in the sentencing hearing)

of 211-248 months. The district court appears to then have concluded, using the same method of analysis as applied at the original sentencing hearing, that, because the low end of the new "aggregate guideline range" of 211 months still falls within level 36 (i.e., within 188-235 months), giving Mr. Miranda the benefit of Amendment 782 would still result in a one-level departure from level 36 to level 35 and imposition of the same aggregate sentence of 168 months.

16. In the *Anders* brief filed on January 31, 2017, counsel adopted the district court's Guidelines calculation, including use of level 36 as the starting point for the analysis. It appears, however, that the district court's analysis and counsel's approach in the *Anders* brief was flawed as a matter of law.

17. First, there is a non-frivolous argument to be made that the district court erred as a matter of law by using an "aggregate sentencing range" of 228-270 months as the starting point in its Guidelines analysis, given that no such range appears on the Sentencing Table within the Sentencing Guidelines. *See*, *e.g.*, *Gall v*. *United States*, 552 U.S. 38, 49, 51 (2007) (The sentencing court must "correctly calculat[e] the applicable Guidelines range," and "failing to calculate (or improperly calculating) the Guidelines range" is reversible error.).

18. Second, even if the district court's adoption of level 36 as the starting point for its analysis was correct, its determination that Amendment 782 would have no effect on Mr. Miranda's applicable sentencing range was mathematically incorrect. Amendment 782, effective November 1, 2014, relates to sentences imposed for narcotics convictions, and lowers the guidelines ranges for narcotics offenses under U.S.S.G. § 2D1.1 by two levels. *See* U.S.S.G., Supp. to App. C, Amend. 782. Amendment 788, which also took effect in 2014, provided for retroactive application of Amendment 782. *See id*. at Supp. to App. C, Amend. 788.

19. As discussed in the *Anders* brief at pages 31-34, the parties agreed at sentencing that, under the 2010 Guidelines, the base offense level for Count I (accounting for possession with intent to distribute the equivalent of between 100 and 400 kilograms of marijuana) was 26. *See also* A-69 at ¶ 7; U.S.S.G. § 2D1.1(c)(7) (2010 ed). As a result, the grouped offense level for Counts I and IV (before the agreed-upon 11-level upward departure pursuant to U.S.S.G. § 5K2.21) was 27.

20. As discussed in paragraph 14, above, under the 2014 Guidelines, Mr. Miranda's base offense level on Counts I and IV would have been 34. In CHC I, he would have faced a sentence of 151-188 months before any reduction pursuant to § 5K1.1 or the addition of the 60-month sentence on Count V.

21. It has now been brought to counsel's attention that, when imposing sentence, although the district court stated that it was departing by one level from the "aggregate range" that it equated to Guidelines level 36 and then imposed the low end of the range to which it had departed, the sentence imposed on Counts I and IV actually constituted a 4-level reduction, i.e., from the low end of level 35 (168-210) to level 31 (108-135).

22. Now, therefore, it follows that Mr. Miranda would be eligible for a comparable 4-level reduction on Counts I and IV from a low end of 151 months (CHC I level 34) to a low end of 97 months (CHC I level 30). Including the 60-months consecutive sentence on Count V, he would be eligible for a reduction from a total of 168 months of imprisonment to a total of 157 months of imprisonment. *See* U.S.S.G. § 1B1.10(b)(2)(B) (in a motion for sentence reduction pursuant to 18 U.S.C. § 3582, where the defendant has been granted a departure after providing substantial assistance under § 5K1.1, he may receive a comparable reduction from the new Guidelines sentencing range). *See also United States v. Erskine*, 717 F.3d 131, 134 (2d Cir.

2013) (defendants who provided substantial assistance to the government may be eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) to a term of imprisonment below the minimum of the amended Guideline range).

23. The decision whether or not to grant this reduction is left to the discretion of the district court. However, it appears that the district court's denial of Mr. Miranda's *pro se* motion for resentencing was based on a legally incorrect initial Guidelines analysis and an erroneous assumption that Amendment 782 would have no effect on his applicable Guidelines range. In the *Anders* brief, counsel mistakenly made the same erroneous assumption by analyzing the aggregate sentencing range rather than the range for the narcotics conviction alone.

24. Mr. Miranda's case should, therefore, be remanded to allow the district court to consider the foregoing analysis and to determine on that basis whether Mr. Miranda's sentence should be reduced from 168 to 157 months of imprisonment.

25. Based on my conversation with AUSA Pimentel, it is my understanding that the government does not object to this motion and, in fact, agrees that remand to the district court for reconsideration would be an appropriate course of action.

WHEREFORE, I respectfully ask the Court to grant these motions and issue an Order:

a. Withdrawing the *Anders* brief and motion to be relieved as counsel filed on January 31, 2017;

b. Remanding this case to the district court for appointment of CJA counsel admitted in the Western District of New York and for reconsideration of Mr. Miranda's motion for resentencing pursuant to 18 U.S.C. § 3582(c)(2); and

c. Granting leave to re-file a brief on behalf of Mr. Miranda following the district court's ruling after reconsideration.

Dated: April 26, 2017
Brooklyn, New York

/s/John Meringolo

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