CASE NO _____

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OPF AMERICA)

Respondent)

v.)

)

HAGOP DEMIRJIAN)

Petitioner)

_____/

INFORMAL PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Court of Appeals Docket #: 18-1446

HAGOP DEMIRJIAN 10028-424

P.O. Box 5010

Oakdale, La. 71463

Table of Contents

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix **"E"** to the petition and is [ ] reported at; or, [ ] has been designated for publication but is not yet reported; or, [X] is unpublished.

The opinion of the United States district court appears at Appendix **"A"** to the petition and is [ ] reported at ; or, [ ] has been designated for publication but is not yet reported; or, [X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was .

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: , and a copy of the order denying rehearing appears at Appendix .

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Basis for Granting Petition

One of the primary functions of the Supreme Court of the United States is to ensure that laws are interpreted uniformly among intermediate courts of appeal. Unless the legislature takes action, the United States Supreme Court is the only source of resolution for conflicts among intermediate courts of appeal.[1] Consequently, the existence of a circuit split may be a key factor when the Supreme Court decides whether to accept a case. Although the Court always maintains discretion over whether it should grant review of a case, the Rules of the Supreme Court of the United States specifically state that the existence of a circuit split is one of the factors the Court considers when deciding whether to grant review. Sup. Ct. R. 10(a) (2013) [2]

[1] *Wright v. North Carolina*, 415 U.S. 936, cert. den. (Douglas, J., dissenting) ("We are, of course, the only source of resolution for this conflict and it is our obligation to provide uniformity on such important federal constitutional questions.").

[2] Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

Statement of the Case

Petitioner, was convicted of complicity with others, including Juan Almonacid, the kingpin of the organization. Petitioner, was convicted of transporting and storing the cocaine for Almonacid in a home he rented for Almonacid and the purpose for storage of the drugs. Judge Zagel denied Petitioners §2255 Motion, holding as stated below:

Conviction Background [3]

- **United States District Court, N.D. Illinois, Eastern Division.**
-
- **No. 02 C 6672, (97 CR 789). (N.D. Ill. Nov 26, 2007)**

DEMIRJIAN V. U.S

HAGOP DEMIRJIAN, PETITIONER, V. UNITED STATES OF AMERICA, RESPONDENT.

NO. 02 C 6672, (97 CR 789).

UNITED STATES DISTRICT COURT, N.D. ILLINOIS, EASTERN DIVISION.

NOVEMBER 26, 2007

MEMORANDUM OPINION AND ORDER

JAMES ZAGEL, District Judge

The § 2255 petition in this case is as unavailing as the defense at trial. The petition is denied without an evidentiary hearing for the reasons below.

The petitioner was one of a number of people charged with a large scale cocaine conspiracy in which the seized drugs weighed several hundred pounds. The prosecution had obtained

[3] By inclusion of the SEC Complaint, Petitioner does not concede as to the factual basis, but includes the Complaint for transparency in this Petition, as Petitioner incorporates the "Notice of Distribution of SEC Settlement Fund", as ***Attachment "A"***, annexed hereto.

considerable evidence of his guilt. Petitioner was storing the seized cocaine, and his fingerprints were also found on some of the drug packaging. Additionally, two people that worked for the petitioner, as well as his own fiancé, testified against him. He even confessed at length to the FBI after receiving his *Miranda* warnings. At trial, petitioner testified that he had in fact performed the drug crimes described in the indictment, but sought to excuse himself on the grounds that he was coerced by threats from another conspirator named Moreno. This defense may have suffered from an inherent lack of jury appeal, because Moreno's threats were apparently motivated by the petitioner's failure to pay a large drug debt. In essence, the petitioner admitted his significant involvement in the *22 drug trade. His complaint here is not that the coercion defense itself was a mistake,[1] but that his counsel did not do a good enough job in offering evidence to support the coercion claim.

1.

It was not a mistake to offer this defense. The evidence of petitioner's performance of acts of drug trading was so strong that the only possible defenses were those which conceded the actions but disputed the existence of a criminal mental state.

Petitioner's complaint about the ineffectiveness of his defense counsel stems from injuries petitioner sustained in April of 1996. At that time, four men wearing masks beat him badly and locked him in the trunk of a car. Although he somehow escaped the trunk, he then lapsed into a four-day coma at a hospital. Petitioner objects to his attorney's failure to present sufficient evidence about this beating. However, the attack petitioner is talking about is already clear from the trial record, and he offers no description of any evidence other than that which already emerged at trial. Also, the 1996 beating is, at best, a minuscule part of the coercion evidence that was offered. The majority of the evidence was petitioner's own testimony that Moreno had threatened his family and forced him to deal in drugs over a long period of time.

The problem with this incident, which occurred more than a year before the events charged in the indictment, is the complete absence of evidence that Moreno played any role in it. Petitioner is convinced that Moreno was behind the beating, but his suspicion is inadmissible opinion evidence. No reasonable jury could find that Moreno had perpetrated or commissioned the beating. I allowed petitioner to testify about how badly he had been beaten and also that, regardless of whoever might have done it, the beating made him particularly vulnerable to Moreno's later threats. Unless he was able to offer some actual evidence that Moreno was responsible for the attack, the petitioner was not *33 entitled to discuss the incident further.[2] At this point he still has not put forth any additional evidence for his claims.

2.

The respondent thinks that I let in too much evidence and petitioner received more leeway than he was entitled to have. The duress defense is governed by a standard requiring that the threat be enough to force a reasonable person, objectively judged, to commit the offense. *See United*

States v. Willis, 38 F.3d 170, 175(7th Cir. 1994). At the time of trial I thought that standard for this defendant would include a reasonable person who had been badly beaten once before and, as a result, was more susceptible to threats. In retrospect, the standard should have been an reasonable person who had been badly beaten once before by the same person who is currently threatening him. Since petitioner only had a subjective belief that Moreno had beaten him, he could not have met that more appropriate standard. Therefore I do not find that defense counsel was mistaken in failing to push for more evidence of the beating. Petitioner has already had the opportunity to present more evidence than he was entitled to present, since the beating was not actually relevant. Even assuming that defense counsel inexcusably failed in some way to push for admission of more evidence about the beating, there was no prejudice within the meaning of *Strickland. See Lockhart v. Fretwell,*506 U.S. 364 (1993). In actuality, if more detailed emphasis was put on the earlier attack, without evidence of Moreno's involvement, the fundamental inadmissibility of the whole incident might have become more clear both to myself and to the prosecutor, who did not object to some of the testimony.

The respondent points out an undeveloped claim that evidence of the beating might have affected petitioner's physical or mental ability to stand trial. This claim is meritless. Judging both from his demeanor during trial as well as his extensive testimony, petitioner gave no indicia of a lack of competence. If counsel for either side had asked for an evaluation of his competency at any point during the trial, I would have found no *bona fide* doubt of competence.

Next, petitioner claims that defense counsel should have made an issue out of his understanding of English. Petitioner's first language is not English. He learned the language after many years in this country and spoke with a pronounced accent and imperfect grammar. At trial, defense counsel decided that, despite any slight imperfections, it was better for the petitioner to testify in the language of the jury rather than through an interpreter. If counsel had raised the question of petitioner's familiarity with English before trial, I might have just automatically called for an interpreter, as most judges do. However, by the time petitioner testified, it was quite clear that he *44 did not need an interpreter. I also fail to see what difference an interpreter would have made. His testimony was not credible in English and there is no reason to believe the jury would have found him credible when speaking Armenian instead. In light of the petitioner's actual performance on the witness stand and his remarks at sentencing, he has not shown any prejudice from the lack of an interpreter at trial.

Petitioner claims that his sentence is unconstitutional because it is disproportionate when compared to the sentences of others involved in the conspiracy. Neither counsel at trial nor counsel on appeal can be faulted for making this argument. Various opinions contain language that can be patched together to support a disproportional sentencing claim, but the holdings of the decided cases have yet to actually open a door to this argument. *See Harmelin v. Michigan,* 501 U.S. 957 (1991); *Ewing v. California,* 538 U.S. 11 (2003). The sentences in this case are not disproportionate, because the law allows the courts to impose lower sentences in return for cooperation. The defendant closest in culpability received a sentence of about two-

thirds of the sentence given to petitioner. However, that defendant was less culpable than the petitioner and also had a lower Criminal History Category. If the defendant Catano had been brought into this jurisdiction, tried, and received a lower sentence than petitioner, then there might be some moral force to petitioner's argument, but that did not occur. At the time I sentenced petitioner, I thought that the Guideline was too high. I still believe that it was, but the sentence that I would have given (about 25 years) would still have been greater than that of any other defendant I sentenced. There is neither deficient conduct by counsel nor prejudice to petitioner.

The next to last claim is based on the unconstitutionality of the Guidelines. This claim was not raised in petitioner's original § 2255 petition and is untimely. I do not need to consider it, but I will note briefly that it is without merit. The appeal of this conviction finished in the fall of 2001. Defense counsel cannot be faulted for failing to anticipate the decisions voiding sentencing guidelines *55 almost three years later. Perhaps an argument could be made that after *Blakely* was decided in 2004, but before *Booker* was decided in 2005, a reasonable trial or appellate lawyer should have challenged the Guidelines, but the same argument does not apply in 2001. Additionally, the petitioner is barred from raising the issue now because *Booker* does not apply to cases after the appeal becomes final. *See United States v. Ceja,* No. 04-C899,2005 U.S. Dist. LEXIS 4506, at *20 (N.D. Ill. Feb. 7, 2005).[3]

3.

A related issue is compliance with *Apprendi v. New Jersey,* 530 U.S. 466 (2000). Counsel on appeal noted the possibility of an *Apprendi* issue in seeking to withdraw. The Court of Appeals, in fact, did instruct that the claim would be hopeless, even though *Apprendi* was not honored at trial. As the Court of Appeals noted in confirming his conviction and sentencing, the petitioner was convicted on three counts. *Apprendi* does not restrict the imposition of consecutive sentences. As a result, the petitioner could have received a maximum sentence of 60 years of imprisonment.

Finally, there is the claim that petitioner confessed after indictment, when the rule in *Massiah v. United States,* 377 U.S. 201 (1964) applied. *See Fellers v. United States,* 540 U.S. 519 (2004). *Massiah,* in contrast to*Miranda,* applies to non-custodial interrogations. This attack on the confession and the inadequacy of counsel to raise the issue at trial is both untimely and wrong. There was some doubt about this during the 1960s and 1970s, but it is now settled law that *Miranda* waivers are also *Massiah* waivers. *See Patterson v. Illinois,* 487 U.S. 285, 298-300 (1988). The trial established that *Miranda* warnings were given and the petitioner waived his rights. Defense counsel would have been wrong to raise this issue.

The petition to vacate the sentence is denied.

Petitioner filed a *Motion for Reduction of Sentence* pursuant to a retroactive amendment to the federal guidelines. (see **Appendice "A"**)

The district court, now having retired from the bench, Judge Zagel had the Clerk enter the order below:

> "This docket entry was made by the Clerk on Wednesday, February 21, 2018: MINUTE entry before the Honorable Manish S. Shah: As to Defendant Hagop Demirjian: Defendant Demirjian's motion to reduce sentence 271 is denied. Defendant invokes Amendment 782, and he filed a motion under the same amendment in 2014. See 244. The court denied the motion, 258, and defendant's untimely appeal was dismissed. See 265. Defendant availed himself of his one opportunity to request a sentence reduction under Amendment 782, and "he now must accept the district court's decision." United States v. Beard, 745 F.3d 288, 292 (7th Cir. 2014). The current motion is a prohibited successive motion. Id. Mailed notice (ep,)"

Petitioner filed a timely *Notice of Appeal* and this case is properly before the Court pursuant to Title 28 U.S.C. §1292

Statement of Facts

Petitioner filed his original §3582 Motion, predicated upon Amendment 782. Likewise, Petitioners co-defendant, JUAN ALMONACID filed his Motion, which curiously went *unopposed* by the Government. (see **Appendice "B"**)

Judge Zagel affirmed the sentence reduction of Mr. Almonacid. (see **Appendice "C"**)

Petitioner filed his second §3582 Motion, which Judge Zagel, on his exit as a federal judge, entered the above minute order denying this Motion.

Petitioner filed his Notice of Appeal in a timely fashion thereafter.

On June 25, 2018, the Court of Appeals affirmed the district court. This Petition is timely filed in this Court.

Issue #1 THERE IS A DIVISION AMONG THE CIRCUITS REGARDING ANY STATUTORY PRECLUSION FOR SUCCESSIVE §3582 MOTIONS, EMPLOYING *U.S. v. Beard*, 745 F.3d 288 (7th Cir. 2014)

First, there is no express jurisdictional limitation prohibiting Demirjian's renewed § 3582(c)(2) motion and there is conflict among the several circuits..

As the Eleventh Circuit Court of Appeals held in *US v. Anderson*, 772 F. 3d 662 - Court of Appeals, (2014) § 3582(c)(2) "contains no language that places a limitation on the district court's jurisdiction to consider successive motions based on the same amendment to the Sentencing Guidelines." 772 F.3d at 667. *Anderson* held that it would be improper to read a jurisdictional limitation on successive motions into the § 3582(c)(2) statute. **Id.**

Anderson is consistent with Supreme Court precedent that requires Congress to "clearly state[] that a threshold limitation on a statute's scope shall count as jurisdictional" before a court can treat the limitation as such. See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16, 126 S. Ct. 1235, 1245 (2006). Recognizing this "bright line" test, other circuits have similarly held that the § 3582(c)(2) statute does not contain an explicit jurisdictional limitation on successive § 3582(c)(2) motions based on the same amendment. See *United States v. May*, 855 F.3d 271, 274-75 (4th Cir. 2017); *United States v. Taylor*, 778 F.3d 667, 670 (7th Cir. 2015);[8] *United States v. Trujillo,* 713 F.3d 1003, 1006-07 (9th Cir. 2013); *United States v. Weatherspoon*, 696 F.3d 416, 421-22 (3d Cir. 2012).

The Supreme Court in *Dillon v. United States* clarified how § 3582(c)(2) provides only a narrow exception to the general rule of finality. See *Dillon v. United States,* 560 U.S. 817, 824-28, 130 S. Ct. 2683, 2690-92 (2010). "By its terms, § 3582(c)(2) does not authorize a sentencing or resentencing proceeding. Instead, it provides for the `modification of a term of imprisonment'

by giving courts the power to `reduce' an otherwise final sentence in circumstances specified by the Commission." Id. at 825, 130 S. Ct. at 2690 (alterations omitted).

The Supreme Court explained that the statute's text, "together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." Id. at 826, 130 S. Ct. at 2691. Thus, the Supreme Court explained that "a district court proceeding under § 3582(c)(2) does not impose a new sentence in the usual sense." Id. at 827, 130 S. Ct. at 2691.

Further, under § 3582(c)(2), "the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. § 3582(c)(2). "Any [§ 3582(c)(2)] reduction must be consistent with applicable policy statements issued by the Sentencing Commission." *Dillon*, 560 U.S. at 821, 130 S. Ct. at 2688 (citing 18 U.S.C. § 3582(c)(2)). The Supreme Court in Dillon also concluded that, because § 3582(c)(2) "sentence-modification proceedings . . . are not constitutionally compelled," those proceedings "do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt." Id. at 828, 130 S. Ct. at 2692.

Finally, because § 3582(c)(2) only authorizes the reduction of sentences that are "based on a sentencing range that has subsequently been lowered," if a defendant receives a sentence modification under § 3582(c)(2), subsequent reduction based on the same amendment to the Guidelines is not available—the modified sentence is no longer based on the outdated Guidelines range. [4]

In this case, Petitioner received no benefit from Amendment 782, whatsoever.

[4] *US v. CARABALLO-MARTINEZ*, No. 16-11772 (11th Cir. Aug. 4, 2017).

In 2015, this Court addressed the *jurisdictional* approach to §3582, as the district court did in this case. In doing so, this Court held: [5]

"In the other line of cases, however, we have treated the statutory criteria of § 3582(c)(2) as non-jurisdictional. In *United States v. Beard*, 745 F.3d 288, 291-92 (7th Cir. 2014), we explained that § 3582(c)(2)'s statutory criteria create a "nonjurisdictional case processing rule" that does not deny district courts subject-matter jurisdiction to evaluate and deny repeat motions. 745 F.3d at 291. That description applies equally to any § 3582(c)(2) motion. And in an opinion involving a different Mr. Taylor, we said explicitly that a district court has subject-matter jurisdiction to deny a § 3582(c)(2) motion even if the inmate is statutorily ineligible. *United States v. Taylor*, 627 F.3d 674, 675-76 (7th Cir. 2010).

While the difference will rarely have much practical significance, we take this opportunity to resolve the conflicting case law and to clarify that district courts have subjectmatter jurisdiction over—that is, the power to adjudicate—a § 3582(c)(2) motion even when authority to *grant* a motion is absent because the statutory criteria are not met. See generally *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (defining subject-matter jurisdiction as the constitutional or statutory *power* to adjudicate a matter); *United States v. Ceballos*, 302 F.3d 679, 690-92 (7th Cir. 2002) (explaining that "judges and legislators sometimes use the term jurisdiction to erroneously refer to a court's authority to issue a specific type of remedy, rather than to the court's subject-matter jurisdiction").

Our clarification here comports with *Beard*, 745 F.3d at 291-92, and *Taylor*, 627 F.3d at 675-76, as well as decisions from other circuits that distinguish between subject-matter jurisdiction to decide a § 3582(c)(2) motion and a defendant's eligibility for relief. See *United States v. Anderson*, 772 F.3d 662, 666-68 (11th Cir. 2014); *United States v. Johnson*, 732 F.3d 109, 116 n.11 (2d Cir. 2013); *United States v. Moore*, 541 F.3d 1323, 1326-27 (11th Cir. 2008). The D.C. Circuit has tentatively signaled its agreement. *United States v. Smith*, 467 F.3d 785, 788 (D.C. Cir. 2006) (Supreme Court's holding that time limits on post-trial motions were not jurisdictional calls into question a jurisdictional reading of § 3582), citing *Eberhart v. United States*, 546 U.S. 12 (2005).

Still other circuits, however, have seen the issue in jurisdictional terms. See *United States v. Graham*, 704 F.3d 1275, 1279 (10th Cir. 2013) (concluding that § 3582(c)(2) motion should have been dismissed for lack of subject-matter jurisdiction because defendant was ineligible for reduced sentence); *United States v. Austin*, 676 F.3d 924, 930 (9th Cir. 2012) (stating that district court "lacked jurisdiction" to reduce sentence when statutory criteria of § 3582(c)(2) were not satisfied); *United States v. Williams*, 607 F.3d 1123, 1125-26 (6th Cir. 2010) (citing our decision in *Poole*, 550 F.3d at 678, as support for treating limits of § 3582(c)(2) as jurisdictional); *United States v. Garcia*, 606 F.3d 209, 212 n.5 (5th Cir. 2010); *United States v. Auman*, 8 F.3d 1268, 1271 (8th Cir. 1993)."

[5] *US v. Taylor*, No. 13-2978 (7th Cir. Feb. 11, 2015).

In other words, the Court of Appeals, in 2015, clarified that §3582 has no statutory prohibitions on filing a successive §3582 motion, except in cases where the movant had already received benefit of a Guideline Reduction or Rule 35(a) modification, neither of which apply in this case. However, the Seventh Circuit now finds that an offender has a singular

> "Undeterred, Demirjian filed a second § 3582(c)(2) motion, which is the subject of this appeal. In it, he argued for the first time that he should have received the same sentence reduction that a codefendant received. Judge Shah denied the motion, explaining that only one motion per retroactive Guidelines amendment is permitted.
>
> On appeal, Demirjian argues that no *jurisdictional* limit exists on a district court's ability to consider a successive § 3582(c)(2) motion. Although he is correct, *see United States v. Taylor*, 778 F.3d 667, 669–70 (7th Cir. 2015), he misunderstands the district court's ruling in his case. Without invoking "jurisdiction," the court properly concluded that Demirjian already had used his one chance to pursue a sentence reduction under Amendment 782". *See United States v. Beard*, 745 F.3d 288, 292 (7th Cir. 2014); *United States v. Redd*, 630 F.3d 649, 651 (7th Cir. 2011).

The district court erred and the Court of Appeals affirmed, in contemplating *Beard* as a lack of subject-matter jurisdiction and summary denial, despite Petitioner providing evidence that the Government, via unopposed motion in Juan Almonacid's similar motion, had created a sentencing disparity, along with conflicting reasoning and application of Amendment 782. [6]

6

02/21/2018	273	MINUTE entry before the Honorable Manish S. Shah: As to Defendant Hagop Demirjian: Defendant Demirjian's motion to reduce sentence 271 is denied. Defendant invokes Amendment 782, and he filed a motion under the same amendment in 2014. See 244. The court denied the motion, 258, and defendant's untimely appeal was dismissed. See 265. Defendant availed himself of his one opportunity to request a sentence reduction under Amendment 782, and "he now must accept the district court's decision." United States v. Beard, 745 F.3d 288, 292 (7th Cir. 2014). The current motion is a prohibited successive motion. Id. Mailed notice (ep,) (Entered: 02/21/2018)

Issue #2 THE DISTRICT COURT CREATED A SENTENCE DISPARITY IN DENYING PETITIONER'S MOTION, WHILE GRANTING JUAN ALMONACID'S MOTION PURSUANT TO §3582 AND *AMENDMENT 782*, WITHOUT RECOURSE TO THE PETITIONER.

In light of the above, there was never a meaningful consideration upon the merits, in part, due to the Government's concession to the application in Mr. Almonacid's case, while fervently challenging application in Petitioner's case. Further, it should be noted, that there was no admission by the Government contained in its *opposition* to Petitioner receiving the benefit of Amendment 782. (see **Appendice "D"**)

Further, the handling of Petitioner's *pro se* motion for reduction, conflicted in the General Order issued by the Chief Judge for the Northern District of Illinois, in several regards. [7]

First, the U. S. Attorney never initiated any internal consideration for Petitioner, but only after retained counsel for Mr. Almonacid, did the Government contend application to Petitioner's codefendant, while opposing similar application to Petitioner.

In granting relief in Mr. Almonacid's case, where the Relevant Conduct is identical, yet opposing application to Petitioner, created a sentencing disparity. Whether or not Judge Zagel had recollection of granting Mr. Almonacid's motion, when denying Petitioner's motion, is left only to conjecture at this point and Judge Zagel is no longer sitting.

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[7] **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF ILLINOIS
SECOND AMENDED GENERAL ORDER
14 - 0023
In Re: Petitions for Reduction of Imposed Sentences for Retroactive Application of Amendment 782 Reducing Drug Quantity Table in USSG 2D1.1

CONCLUSION

Congress has not chosen to limit "one bite at the apple" in regards to §3582(c)(2) statutory provisions and the Supreme Court has warned intermediate courts to not create any such language into appellate decisions. The Supreme Court in *Dillon v. United States* clarified how § 3582(c)(2) provides only a narrow exception to the general rule of finality. See *Dillon v. United States*, 560 U.S. 817, 824-28, 130 S. Ct. 2683, 2690-92 (2010). "By its terms, § 3582(c)(2) does not authorize a sentencing or resentencing proceeding. Instead, it provides for the `modification of a term of imprisonment' by giving courts the power to `reduce' an otherwise final sentence in circumstances specified by the Commission." Id. at 825, 130 S. Ct. at 2690 (alterations omitted). The Supreme Court explained that the statute's text, "together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." Id. at 826, 130 S. Ct. at 2691. Thus, the Supreme Court explained that "a district court proceeding under § 3582(c)(2) does not impose a new sentence in the usual sense." Id. at 827, 130 S. Ct. at 2691.

Further, under § 3582(c)(2), "the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. § 3582(c)(2). "Any [§ 3582(c)(2)] reduction must be consistent with applicable policy statements issued by the Sentencing Commission." Dillon, 560 U.S. at 821, 130 S. Ct. at 2688 (citing 18 U.S.C. § 3582(c)(2))

This Seventh Circuit Court of Appeals, in *Taylor*, recently changed the *Beard* controls in stating:

"We conclude that the better view is stated in *Beard* and *Taylor* and that a district court has subject-matter jurisdiction to consider a motion for relief under 18 U.S.C. § 3582(c)(2) regardless of whether the moving defendant is actually eligible for such discretionary relief."

In *US v. May*, 855 F.3d 271 (2017), the Fourth Circuit Court of Appeals held as follows:

"Eleventh Circuit Court of Appeals held in *US v. Anderson*, 772 F. 3d 662 and the several circuits are in direct conflict regarding the ability for an offender to seek successive relief under §3582. The Supreme Court requires Congress to "clearly state[] that a threshold limitation 275*275 on a statute's scope shall count as jurisdictional" before a court can treat the limitation as such. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). But the prohibition on § 3582(c)(2)-based motions for reconsideration is not based on a limitation that Congress has clearly ranked as jurisdictional. Rather, it is implied from § 3582(c)(2)'s silence on a district court's authority to grant motions for reconsideration, coupled with sentence finality interests and "the clear intent of § 3582 ... to *constrain* postjudgment sentence modifications." *Goodwyn*, 596 F.3d at 235-36. We therefore conclude that the implied prohibition on § 3582(c)(2)-based motions for reconsideration, as recognized in *Goodwyn*, is non-jurisdictional.[2]

Our conclusion comports with the decisions of at least four of our sister circuits. *See United States v. Anderson*, 772 F.3d 662, 666-67 (11th Cir. 2014); *United States v. Beard*, 745 F.3d 288, 291-92 (7th Cir. 2014); *Trujillo*, 713 F.3d at 1006-08; *United States v. Weatherspoon*, 696 F.3d 416, 421-22 (3d Cir. 2012). Some of these decisions admittedly dealt with purely successive motions for relief premised on a single retroactive Guidelines amendment, rather than with motions for reconsideration, but § 3582(c)(2) does not expressly authorize nor prohibit either type of motion. Thus, the rule is the same for both purely successive § 3582(c)(2) motions and § 3582(c)(2)-based motions for reconsideration: A defendant cannot obtain relief on the basis of such motions, but this prohibition is non-jurisdictional and thus subject to waiver".

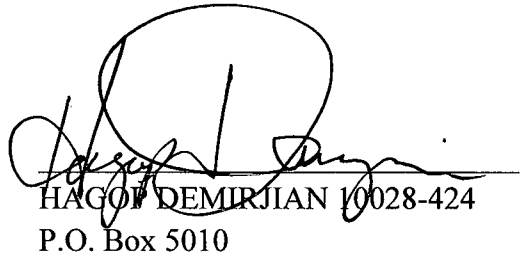
Further, some courts have held *the law of the case doctrine* as a means to deny a successive motion, or in the alternative, that once a §3582(c)(2) motion has been denied by a district court, that Rule 35 and its time constraints on such a successive motion, is controlling. *US v. Caraballo-Martinez*, 866 F.3d 1233 (11th Cir. 2017).

A bright line rule is needed from the Supreme Court, defining §3582(c)(2) motions as permitting successive motions, unless or until Congress makes the statute otherwise in wording and limitations.

Further, that such motions cannot create a sentence disparity between similarly situated offenders, which in this case, as a codefendant and managing coconspirator, Juan Almonacid, which went unopposed by federal prosecutors.

The Supreme Court should grant *certiorari*, vacate the finding and affirmation by the Seventh Circuit Court of Appeals, appoint counsel so as to more fully develop and brief the issue or issues and settle the division among the circuits regarding the jurisdictional nature of §3582(c)(2), permitting successive motions relating to the identical Guideline Amendment.

Dated this 20th day of July, 2018.

By: 

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