No. _____

CRIMINAL CASE

IN THE

SUPREME COURT OF THE UNITED STATES

_____

EUSEBIO ESCOBAR DE JESUS — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the First Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

EUSEBIO ESCOBAR DE JESUS #03903-069
(Your Name)
Federal Correctional Complex-USP Coleman II
P.O. Box 1034
(Address)

Coleman, FL. 33521
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1.) Whether the Appeals Court erroneously concluded Petitioner failed to state a claim, reasoning for want of a substantial question...he asserts that (Judgment) is **UNDERMINED** by, Rosales-Mireles v. United States, 138 S.Ct. 1897 (2018), and Molina-Martinez v. United States, 136 S.Ct. 1338 (2016).

2.) Whether the District Court abused its discretion when the records of the sentencing transcripts show that Petitioner was not sentenced under Guidelines Section §2A1.1 in separate count; the court committed significant procedural error, such as improperly calculating the Guideline range. Rosales-Mireles v. United States.

3.) Whether the final sentence decision of the sentencing transcript controls or the recommendation of the Pre-Sentence Report, its not consistant with Supreme Court remedial opinion in Gall v. United States, 169 L. Ed. 2d 445, (2007).

4.) Whether it was improper to increase Defendant's offense level by four levels under Guideline Section §2D1.5 to level 40. Thus, even though Amendments 505 and 782 reduce the maximum base offense level in Guideline Section §2D1.1 from 38 to 36.

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:

Eusebio Escobar De Jesus
Federal Registration No: 03903-069
Federal Correctional Complex
USP Coleman II
P.O. Box 1034
Coleman, FL. 33521

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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

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

The opinion of the United States court of appeals 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.

The opinion of the United States district court 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.

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

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was July 10, 2018.

[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).

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

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1.) The Fifth Amendment of the Constitution.

2.) The Sixth Amendment of the Constitution.

3.) Under the Due Process Clause of the Fifth Amendment and the Notice and Jury Trial Guarantees of Sixth Amendment.

STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the District of Puerto Rico, Petitioner was convicted on one count of engaging a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848(a) and (c); two counts of assaulting a Customs Service officer with a deadly weapon, in violation of 18 U.S.C. § 111 (a) (1) and (b); one of possessing a machine gun, in violation of 18 U.S.C. § 922 (o) (1); one count of aiding and abetting the possession of 80 kilograms of cocaine with the intent to distribute it, in violation of 21 U.S.C. § 841 (a) (1); three counts of aiding and abetting interstate travel with the intent to promote unlawful activity, in violation of 18 U.S.C. § 1952; one count of causing an international killing while engaged in a CCE, in violation of 21 U.S.C. § 848 (e); two counts of being a felon in possession of a firearm, in violation of 21 U.S.C. § 922 (g) (1); four counts of using a communications device to facilitate the importation of cocaine, in violation of 21 U.S.C. § 843 (b); and one count of aiding and abetting an attempt to import 320 kilograms of cocaine, in violation of 21 U.S.C. §952, 960 and 963. Petitioner was sentenced to life inprisonment. The Court of Appeals affirmed. United States v. Escobar-de-Jesus, 187 F.3d 148, 157 & n.1 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000).

On May 14, 1993...It should be April 14, defendant Eusebio Escobar-de-Jesus was found guilty as to counts 1, 5, 6, 7, 10, 11, 12, 15 through 20, both inclusive, 23, 24, and 33 of the indictment in criminal case 90-130, which charge a series of

STATEMENT OF THE CASE

violations including Section 848(a) and (c) of Title 21, Section 848(e)(1)(A), Section 963, 841(a)(1), 843(b), all of Title 21 and Title 18 United States Code section, 111 A, and B, 1114, 922(g)(1), 922(o), 1952 A-3, and B-1, and 2.

Based on the **fact that** the nature of the overall offense conduct involved a continuing criminal enterprise the provisions of the United States Sentencing Guidelines Section 2D1.5 establish that the appropriate base offenses level of the underlying drug offense. S.H.T.P. 27-28.

The court grouped together all counts of conviction include the murder convictions under 21 U.S.C. § 848(e) which the court treated together because the total offense level of group 2 really is nonconsequential for the purpose of the sentence. S.H.T. P. 13. Under Sentencing Guidelines §2D1.5, the offense level for Petitioner's murder conviction was 43. S.H.T.P. 27, 30. Under Guidelines § 2D1.5, the offense level for violation of Section 848(a) was four plus the offense level for the underlying drug offense--i.e., his convictions under 21 U.S.C. 841(a), 843(b) and 963--was 44. Because 500 to 1500 kilograms of cocaine were involved, the base offense level for violationg 21 U.S.C. §841(a), 843(b), and 963 was 40. S.H.T.P. 28; see Sentencing Guidelines 2D1.5 (1989).

The possession of a dangerous weapon during a drug offense and the use of an aircraft other than a regularly scheduled

STATEMENT OF THE CASE

commercial flight resulted in an additional four level increase. Resulting in an base offense level of 48 for the Section 848(a) offense treated together. S.H.T.P. 13, 27, under Guideline 2D1.5. Escobar's §3582(c)(2) motion pursuant to Amendment 782.

In November 2014, Escobar filed a §3582(c)(2) motion requesting the two level reduction provided by Amendment 782 and 599 (DE 1255). a magistrate judge filed a report and recommendation stating that Escobar **"may be eligible for a sentence reduction"** pursuant to Amendment 782 and 599 and recommend that the district court consider the sentence reduction request (Appendix B at 3)(emphasis in original).

The government opposed Escobar's §3582(c)(2) motion arguing that he is not eligible for a sentence reduction under Amendment 782 because his Guideline calculation was based on U.S.S.G. §2A1.1, not U.S.S.G. §2D1.1(d)(1). (DE 1278 Appendix C). The U.S. Probation Officer likewise recommended that the district court deny the motion because at sentencing the court adopted the presentence report without change which established the total offense level based on U.S.S.G. §2A1.1 (DE 1286 Appendix D). Escobar responded to the government's opposition and the U.S. Probation Officer's recommendation to deny, stating that his Guideline sentence was determined under U.S.S.G. §2D1.5 and not §2A1.1. In accordance with the sentencing transcript.

After the assistant attorney abandoned the petition, nothing having been filed, the district court denied Escobar's §3582(c)(2)

STATEMENT OF THE CASE

motion. [1287 Appendix E]. The Petitioner appeals to the Appeals Court for the First Circuit with the questions; whether the records of the sentencing transcript show that the Appellant was sentenced under Guideline section §2A1.1 in seperate count. And whether the final sentencing transcript controls or the recommendation of the Pre-Sentence Report (PSR). The Appeals Court entered a Judgment on July 10, 2018, and stated: The February 5, 2016 Order denying Appellant's Motio For Sentence Reduction under 18 U.S.C. §3582(c)(2) is summarily affirmed for want of a substantial question. See, 1st Cir. R. 27.0(c). Petitioner asserts that (Judgment) is undermined by Rosales-Mireles and Molina-Martinez.

REASONS FOR GRANTING THE PETITION

1.) This court should grant the writ of certiorari and use this case as a vehicle to resolve the split among the circuits. See; Supreme Court Rule 10. The government is misleading this Honorable Court. First, the petitioner never was sentenced under Guideline Section 2A1.1 instead he was sentenced under Guideline Section 2D1.5 where, the records do not lie that the petitioner was sentenced under the Guideline Section 2D1.5 in Counts 1, 10 ,12, 20 In Count One and Grouped Count One. See; Appendix Mark as "G".

2). Rosales-Mireles v. United States, 138 S.Ct. 1897 (2018) narrowed the scope of Guideline Section §2A1.1 to decriminalize certain individuals who would otherwise have been aggravated violators under Guideline Section §2D1.5--it alters the "class of person that the law punishes." Petitioner has completely decriminalized uncharged Guideline section §2A1.1 and Section §3D1.2 and 4 , also under Federal Rules of Criminal Procedure Rule 32(h), ("No one, not criminal defendants, not judicial system, not society as a whole is benefited by a judgement providing a man shall tentatively go to jail today but tomorrow and every day thereafter his continued incarceration for 30 years, shall be subject to fresh litigation.").

The government and the district court miscalculated the change of retroactive sentencing Guideline Amendment applicable to this case, Amendment 782, that resulted in a combined

REASONS FOR GRANTING THE PETITION

Guideline offense level of 40. (Passim), the sentencing calculation motion under 18 U.S.C. Section 3582(c)(2). See: Appendix "H" and also Martinez Molina v. United States, (April 20, 2016). For the reason that this case is one in which Petitioner can benefit from a favorable holding in Gall v. United States and Martinez Molina, 194 L. Ed 2d 444 (2016).

3) In Peugh v. United States No: 12:62 the Supreme Court stated: "Concluding that the Ex Post Facto clause is violated when a defendant is sentenced under guidelines promulated after he committed his criminal acts and the new version provides a higher sentencing range than the version in place at the time of the offense." PP. 413, 15, 20. Petitioner Escobar was convicted of 14 counts for conduct that occurred in 1986 and 1989. At sentencing the court sentenced under the Ex Post Facto clause requiring that he be sentenced under the 1989 version of the Federal Sentencing Guidelines in effect at the time of his offense rather thatn under the 1993 version. The 1989 version provides a base offense level of 36 rather than 40 in the 1993 Guidelines version. See United States v. Roberts, 1992 U.S. App. Lexis 20528(1st Cir. 1992 N. 2). See also government's opposition at pg. 12-13 , for the reason Peugh v. united States applies to this case.

Mr. Escobar's case presents an ideal for this court to resolve Congress' intention and the correct interpretation.

REASONS FOR GRANTING THE PETITION

4.) Glover v. United States, 531 U.S. 198 at 204 (2001) enlarges the scope which allows the grouping of "counts involving substantially the same harm"; who would otherwise be aggravated violators under Guideline Section §2D1.5, -- it alters the "class of person that the law punishes." Petitioner has completely decriminalized under Guideline Section §3D1.2 and 4. This is not a case where trial strategies, in retrospect, might be criticized for leading to a harsher sentence. Glover Id. at 204. See App. G.

Mr. Escobar's case presents an ideal for this court to resolve Congress' intention and the correct interpretation. Also, a vehicle to resolve the split among herein circuits. For the reasons given, as well as those presented in the petition, the court should grant the Petitioner a Writ of Certiorari. Or reversed in light of the case, Rosales-Mireles.

SUMMARY OF THE ARGUMENT

Escobar is eligible for a reduction under 18 U.S.C. §3582(c)(2), because Amendment 782 does have the effect of lowering his applicable Sentencing Guideline range in accordance with magistrate judge. The District Court at the sentencing hearing stated: But I am not going to sentence him as part of the grouping, but the sentence in Counts 5 and 6 will be concurrent. See, [S.H.T.P.11]. The court: I am not going to do that, because the total offense level calculated is calculated on the basis of Group 1, of related counts which include the CCE, and therefore in the second group I am not imposing a two level increase for a manager. See, [S.H.T. P.12]; So it really, the total offense level of Group 2 really is **nonconsequential** for the purpose of the sentence, but what you state is correct, and thereofore the total offense level in Group 2 will be 43. I will not give the role in the offense adjustment; I was just reminded by the probation officer if I do not give the 2 level increase for role in the offense in the Group 2, then the total offense level in Group 1 is 49, not 50. [S.H.T. P.13-14]; Based on the fact that the overall offense conduct involves a continuing criminal enterprise the provisions of the United States Sentencing Guidelines section §2D1.5 establish that the appropriate base offense level. [S.H.T. P. 27]; The provisions of Guideline section §2D1.5 preclude the application of the role adjustment as a conviction under 21 U.S.C. §848(a) inherently considers the element of controlled and exercised authority over serious ongoing criminal activities. See, [S.H.T. P.28]. This court

should reject the United States Attorney's and Federal Probation Officer's holding, because it is not correct in light of the controlling records of the sentencing transcript. The statutory authority weighs in favor of the petitioner's request, that this Supreme Court exercise its discretion to granted and send this case to the Appeals Court under abuse of discretion standard. Furthermore, in order to resolve the split among hearing circuits, and eliminates the confusion created by Guideline Section §2D1.5. (Quoting in Nixon v. United States, 918 F.2d 895, 909, N. 13 (11th Cir. 1990).

See also, United States v. Joyner, 201 F.3d 61 at 75(2nd Cir. 1999).

The Appeals Court cannot answer a simple question; Whether the Petitioner was sentenced under Guideline Section §2D1.5 rather than Guideline Section §2A1.1, in accordance with the Sentencing Transcript. The Judgment on July 10, 2018 was clearly erroneous strike the Appeals Court more than just maybe or probably wrong, it strikes the Appeals Court as wrong with the force of a five week old, unrefrigerated dead fish and would work a miscarriage of justice. See, Rosales-Mireles v. United States.

THE NATURE OF THE SPLIT IN QUESTIONS ONE AND TWO

The government and the appeals court invite the United States Supreme Court to ignore this discrepancy and to focus on the recommendation of the Pre-Sentence Report, page 23, rather than the sentencing transcript. Ordinarily this court should accept such an invitation. "Where...[a] district court's oral pronouncement of sentence and the recommendation of the Pre-Sentence Report; there is a variance between both, the oral sentence generally controls."

Nearly all of the other circuits have reached similar conclusions, although there has been some variation in the exact phrasing of this doctrine. See, e.g., United States v. DeMartino, 112 F.3d 75, 78 (2nd Cir. 1997). ("If there is a variance between the oral pronouncement of the sentence and the written judgement of the conviction, the oral sentence generally controls."); United States v. Faulks, 201 F.3d 208, 211 (3rd Cir. 2000)("A long line of cases provides that when the two sentences are in conflict the oral pronouncement prevails over the written judgement."); United States v. Morse, 344 F.2d 27, 29 N.1 (4th Cir. 1995)("To the extent of conflict between [a] written order and [an] oral sentence the latter is controlling."); United States v. Martinez, 250 F.3d 941, 942 (5th Cir. 2001)("When there is conflict between a written sentence and an oral pronouncement, the oral pronouncement controls."); United States v. Becker, 36 F.3d 708, 710 (7th Cir. 1994)("If an inconsistancy exists an oral and the later written

sentence pronounced from the bench controls."); United Stats v. Glass, 720 F.2d 21, 22 N.2 (8th Cir. 1983)("Where an oral sentence and the written judgement conflict, the oral sentence controls."); United States v. Hicks, 997 F.2d 594, 597 (9th Cir. 1993)("In cases where there is a direct conflict between an unambiguous oral pronouncement of sentence and the written Judgement and Committment this court has informally held that the oral pronouncement, as correctly reported, must control.")(Quoting United States v. Munoz De La Rosa, 495 F.2d 253, 256 (9th Cir. 1974)); United States v. Marquez, 337 F.3d 1203, 1207 N.1 (10th Cir. 2003)("An oral pronouncement of sentence from the bench controls over other written language..."). Accordingly, the court concludes that where the conditions of supervised release anounced at the sentencing hearing conflict in a material way with the conditions of supervised release in the written sentencing order, the oral conditions control. See also, United States v. Melendez-Santana, 353 F.3d 193, 100 (1st Cir. 2003); ("held that the oral sentence constitutes the judgement of the court and it is the authority for the execution of the court's sentence. This court noted that the touchstone was the intention of the district court.

The failure of the sentencing court to announce the Guideline Section §2A1.1 at the sentencing hearing created a material conflict between the Pre-Sentence Report recommendation. The court imposed a potentially significant new burden on the petitioner-permitting a probation officer to have authority to override this fact. Thus, the constitution prohibits the retrospective application of criminal

laws to the prejudice of a defendant. U.S. Const. Art. 1, §9, cl, 3.

United States v. Cotto-Negron, (845 F.3d 434 2017) Cotto-Negron plead guilty to one count of committing a Hobbs Act Robbery in violation of 18 U.S.C. §1951(a) and was sentenced to a prison term of 120 months. On appeal, he challenged his sentence as both procedurally and substantively unreasonable. The court agreed that the sentence was procedurally unreasonable because it was premised on factual findings that were not supported by any evidence in the record. Accordingly, the court vacated the sentence and remanded the case for resentencing.

United States v. Hearns, 845 F.3d 641, 645 (2017) Hearns was convicted of one count of conspiracy to commit bank fraud. The district court attributed to Hearns loss amounts from nine additional transactions that allegedly occurred within the same scheme to defraud mortgage lenders when calculating her advisory range under the Sentencing Guidelines. On this record, the district court clearly erred when it relied on the PSR to include the loss amounts for the six properties in its calculation of Hearns's base offense level. The PSR provided no information or evidence to support the loss attributable to...[the] conspiracy.

This court should review for plain error. United States v. Rivera, 676 Fed. Appx. 2; 2017 U.S. App. LEXIS 821 (2nd Cir. 2017). The despositive is thus whether the application of an in correct Guideline Section in determining Escobar's new sentence constitutes plain error warranting remand. This court should conclude that it does.

THE NATURE OF THE SPLIT IN QUESTION THREE

In Nixon v. United States, 918 F.2d 895, at 909, Note 13 (11th Cir. 1990) the Eleventh Circuit held:

At Note 13, it should be noted that Section 2D1.5 has been amended yet again, in November 1989, and the newest version should prevent many of the Guideline application problems encountered in this case. See, U.S.S.G. App. C (Amendment 139). Most important, the new Guideline eliminates the confusion created by previous versions that purported to offer a base offense level for CCE counts while at the same time directing the sentencing court to the Drug Quantity Table to determine the offense level. The new version provides as follows:

(a) Base offense level (Apply the greater)

(1) 4 plus the offense level from the [Drug Quantity Table] applicable to the underlying offense; or

(2) 38 U.S.S.G. §2D1.5

In United States v. Joyner, 201 F.3d 61 at 75 (2nd Cir. 1999), the Second Circuit held that because U.S.S.G. §2D1.5 provides that a defendant convicted of a CCE will be assigned the greater of two offense levels-either 4 plus the offense level under Section §2D1.1 was lower than 34. Carter's offense level would still be 38.

In United States v. Bafia, 949 F.2d 1465 at 1474, Note 1 (7th Cir. 1991), the Appeals Court held that: We note that under §2D1.5

of the Guidelines the district court is prohibited expressly from enhancing the CCE adjusted offense level for Camppas' "role in the offense" because the substance of the CCE offense embraces the notion that the defendant supervised a large-scale criminal operation.

In United States v. Gonzalez Balderas, 1997 U.S. App. Lexis 12677 (5th Cir. 1997). The Court stated:

We agree with Gonzalez Balderas that directs that his offense level should not be enhanced by any adjustment from Chapter Three, par B of the Guidelines. We believe however, that specific offense characteristics do apply to enhance his offense level. Gonzalez Balderas's error stems from the fact that he does not consider the specific offense characteristics of §2D1.1. As noted above §2D1.5 (a)(1)-the applicable Guideline for a continuing criminal enterprise conviction-cross references §2D1.1 indetermining the applicable offense level. Gonzalez Banderas, however, cross references only the drug quantity table set forth in §2D1.1(c), and not the specific characteristics of §2D1.1(b).

We think, however, that §2D1.5(a)(1) references §2D1.1 in its entirety, i.e., the specific offense characteristics of §2D1.1(b), as well as the base offense level provided for in the drug quantity table of 2D1.1(c). Our conclusion is supported by two distinct rationales. First, the text of §2D1.1(a)(1) instructs the sentencing court to apply "4 plus the offense level from §2D1.1 applicable to the underlying offense." Notably it does not specify , "4 plus the [base] offense level from §2D1.1(c), applicable to the underlying offense."

Thus, although there are no specific offense characteristics listed directly under §2D1.5, they apply in this instance, by reference to §2D1.1.

ARGUMENT

The District Court at the sentencing hearing selected Guideline Section §2D1.5 in all of the counts. In accordance with the Court of Appeals opinions regarding this case that the District Court committed a lot of errors at the Petitioner's sentencing hearing those errors thus creating a material conflict between the recommendations and the sentencing transcript. The Court of Appeals has uniformly held that the oral pronouncement, as correctly reported, must control. That defect involves the amount of discretion that the court delegates to the probation officer to decide whether Escobar was sentenced under Guideline Section §2D1.5. See, Appendix C and D.

Article III of the Constitution vests responsibility for resolving cases and controversies with the courts. As Justice Kennedy observed during his tenure on the Ninth Circuit, this responsibility requires "both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law" to maintain "the essential, constitutional role of the judiciary". The Judiciary's "essential role" can be eroded just as easily through improvident delegation as through interference by another branch. Therefore, seperation of powers forbids courts from delegating their Article III responsibilities like the District Court did here with the Probation Office. The prior's decision was clearly erroneous strike the district court and the United States Attorney's Opposition more than just maybe or probably wrong. It strikes the district court as wrong with the force of a five week old, unrefrigerated dead fish and would work a miscarriage of justice.

At sentencing the district court improperly applied Section 2D1.5 to sentence Appellant for a conviction under 21 U.S.C. Section 848(e)(1)(A) for the first degree murder on count twelve (12) and improperly given jury instructions. See United States v. Eusebio-DeJesus, 187 F.3d 148 at 159[1]. note 5 (1st Cir. 1999).

Also, the district court improperly applied Section 2D1.5, rather than 2D1.6, to sentence the Petitioner to an offense of conviction under 21 U.S.C. Section 843(b) for counts 19, 23, 24 and 25.

Furthermore, the court improperly applied Section 2D1.5, rather than 2K2.1, to sentence Petitioner to a weapons offense under count seven (7) Section 922(o)(1); counts 15, 16 in violation of Section 922(g)(1). Likewise the district court erred by improperly applying Section 2D1.5, rather than Section 2E1.4, in counts 11, 17, and 18 for violation of the Rico Act, under Title 18 U.S.C. Section 1952(a)(3) & (b)(1).

Footnote 1

II. The Jury Instructions

A. Continuing Criminal Enterprise

Section 848, often referred to as the "kingpin" statute, makes it a crime to engage in a "continuing criminal enterprise." The statute provides:

> [A] person is engaged in a continuing criminal enterprise if-
>
> (1) he violates any provision of [the federal drug laws, i.e.,] this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is part of a continuing series of violations of [the federal drug laws, i.e.,] this subchapter or subchapter II of this chapter -
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer [or supervisor or manager] and
>
> (B) from which such person obtains substantial income or resources.21 U.S.C. § 848(c). In this case, the jury convicted **Escobar** of Count 1, charging that he had engaged in a continuing criminal enterprise ("CCE") from on or about April 1986 until the date the indictment was filed, in violation of 21 U.S.C. § 848(a) & (c); and of Count 12, charging that he had caused the killing of Martin Matos-Cruz while engaged in the CCE, in violation of 21 U.S.C. § 848(e)(1)(A). 5

The district court grouped together all counts including count 12 under Sentencing Commission Guidelines Manual §3D1.2[2] and 4 which allows a grouping of "counts involving substantially the same harm". See, Glover v. United States, 531 U.S. 198 (2001).

Finally, improper grouping of all the above under count one, the statutory index for Section §2D1.5 which does not enumerate any of the above statutes; Thus, warranting application of Amendment 782 and 599.

In Peugh, the United States Supreme Court made clear that sentencing a defendant under a version of the United States Sentencing Guidelines that was promulgated after he committed his crime and increased the applicable range of incarceration and violated ex post facto clause.

Clearly the ruling in Peugh was grounded upon the facts that under 18 U.S.C. Section 3553(a)(4)(ii), district courts are to apply the version of the Guidelines that are "in effect on the date the defendant is sentenced." The Guidelines also add the provision that "if the court determines that the use of the

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Footnote 2

§3D1.2. Groups of Closely Related Counts

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level. The Guideline Section §2A1.1 are not listed under this subsection. Instead Guideline Section §2D1.5 are listed, the one the court selects. See Amendment 45.

Guideline Manual in effect on the date the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guideline Manual in effect on the date the offense of conviction was committed." U.S.S.G. Sections 1B1.11(a) and (b)(1).

In the instant case, Petitioner argued that applying the Guideline Section 2A1.1 provisions constituted an ex post facto violation of the sort that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed." Calder v. Bull, 3 U.S. (3 Dall) 386 (1878).

In Molina-Martinez v. United States, the Supreme Court held the Guidelines central role in sentencing means that as errors relate to the Guidelines can be particularly serious. A district court that "improperly calculates" a defendant's Guideline Range, for example, has committed a "significant procedural error". Gall, Supra at 51. That same principal explains the court's ruling that a "retrospective increase in the Guideline Range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an ex post facto violation." Peugh, 569 U.S. at (Slip Op at 13). Same, Escobar, the errors of the Guidelines have effected the defendant's substantial rights, and shows more than a reasonable probability that, but for the errors, the outcome of the proceedings would have been different under Amendment of the Guideline (782).

This case is similar to, United States v. Gray, 405 F.3d 227, III (4th Cir. 2005), where the court vacated a criminal sentence and remanded for resentencing in accordance with Fed. R. Crim. P. 52(b).

Under this standard of review, where the district court imposed the sentence mandated by the Sentencing Guidelines based in part upon a fact that was not found by the jury (concluding that application of sentencing enhancement based on Judge-found facts was "errors" that was "plain"). Same, Mr. Escobar's the district court jury instructions were based under 21 U.S.C. §848(a) and sentenced under §2D1.5 rather than §2A1.1. See, Molina-Martinez v. United States, 194 L.Ed 2d 444-49 (2016). Also see, United States v. Cotto-Negron, 845 F.3d 434 at II (1st Cir. 2017); The court agreed that the sentence was procedurally unreasonable because it was premised on factual findings that were not supported by any evidence in the record. Accordingly, the court vacated the sentence and remanded the case for resentencing.

Furthermore, see, Swaby v. Yates, 847 F.3d 62 at 68 (1st Cir. 2017)(quoting Mathis v. United States) explains that even where "district court fails to provide clear answers, the appeals court has another place to look: the record. [A]n indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes towards a seperate crime." Id. at 2257. An indictment in Escobar's case did exactly this, specifying that Mr. Escobar's district court jury instructions were based under 21 U.S.C. §848(a) and sentenced under Guideline Section §2D1.5, rather than Guideline Section §2A1.1.

In the case of Escobar, on remand the Supreme Court should whether or not he is eligible by deciding whether the original

sentence was based on the Guideline §2D1.5 and, if the answer is affirmative, the Escobar too is eligible for resentencing, but otherwise not.

THE GOVERNMENT IS PRECLUDED FROM RAISING FOR THE FIRST TIME ON APPEAL OTHER'S ISSUE WHEN THE PARTIES DISCUSSED ONLY THE CONTENT OF DEFENDANT'S PRESENTENCE REPORT GUIDELINE §2A1.1 INSTEAD OF §2D1.5 SEE, UNITED STATES V. HOGAN, 782 F.3D 55 AT 62(1ST. CIR. 2013).

As part of his argument, Government alleges for the first time that Amendment 782 and 599 did not subsequently lower Escobar's applicable Guideline sentencing range. Also failing to answer the question of whether the records of the sentencing transcript show that Appellant was sentenced under Guideline section §2A1.1 in a seperate count. Furthermore, it waived the argument of Guideline section 2D1.1(b)(2) used a private airplane. The 1986 date conceded by the government in their prior response to Petitioner's. See original brief at page 7 and Exhibit F. Ultimately, at the outset, the Government waives all of those arguments and allegations, except the only matter in question that it was insofar as defendant's sentencing Guideline was determined pursuant to USSG §2A1.1 instead of section §2D1.1, see pre-sentence report, page 23, (quoting Docket Entry 1278)(Appellee's Brief: pp 9, 13-16). This argument should be deemed waived. Government could have raised but failed to make such a claim in the appeal of the first §3582 Reduction Motion. When a Government could have raised the issue at a previos stage of the litigation in a first appeal, and does not, it is deemed that he waived such argument in a subsequent appeal.

United States v. Nagra, 147 F.3d 875, 882 (9th Cir. 1998)(when a Government could have raised an issue in a prior appeal, but did not, a court later hearing the same case need not consider the matter and the argument is deemed waived). See United States v. Adesida, 129 F.3d 846 (6th Cir. 1997)(the issue is deemed waived because "'[i]t would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards to the law of the case than one who had argued and lost.'"). Nor did the Government raise this claim before the district court in the instant §3582 Reduction Motion. The failure to properly preserve and present a sentencing claim the district court precludes a Government from raising it for the first time on appeal. See United States v. Falu-Gonzalez, 205 F.3d 436, 440 (1st Cir. 2000); United States v. Slade, 980 F.2d 27, 30 (1st Cir. 1992)("It is a bedrock rule that when a party has not presented an argument to the district court, he may not unveil it in the Court of Appeals.") Since the the Government failed to previously raise the claim, this court is foreclosed from entertaining all of Government's arguments and allegations except only the matter in question. On remand the court should order a new Pre-Sentence Report to correct all of the clerical errors ("PSR"). The remaining components of the plain error test. Prejudice to the Petitioner and the threat of a miscarriage of justice are also satisfied here.

THE GOVERNMENT IS INCORRECT IN IT'S CALCULATION OF ESCOBAR'S SENTENCING APPLICABLE GUIDELINE AND SENTENCING RANGE.

The Government (Appellee's Brief: pp 12-13 Appendix F) stated: under group one, which included the counts relating to the CCE conviction, Escobar had a BOL of 40 under U.S.S.G. §2D1.1(c)(1). It should be calculated under section §2D1.5, the CCE has its own table; The Amendment 66 collect for base offense level of 36. The Amendment 139 collect for offense level of 38. Under Government contention its misunderstanding that the CCE base offense level should not be extracted from the Guideline §2D1.1. See (S.H.T. P. Add. 27). Thus, the correct offense level is 36. Also, the district court reduced two points under Amendment 505, see, Appendix "H"

The Government (Appellee's Brief: pp 15, N.8 Appendix F) stated: In any event, Amendment 599 clarified under what circumstances a defendant sentenced for a violation of 18 U.S.C. §924(c) (quoting United States v. Hickey, 280 F.3d 65, 6 (1st Cir. 2002).

In fact the Government mistakenly charged the Petitioner with the specific following counts 21 and 22 of the indictment which were dismissed; However, the Appeals Court for the First Circuit stated that: In United States v. Escobar De Jesus, 187 F.3d 148 N."6"[3] (1st Cir. 1999). Also that Amendment 599 directs that no Guideline weapon enhancement should be applied when determining the sentence for the crime of violence or drug trafficking offense underlying the 18 U.S.C. §924(c) or 18 U.S.C. §922(g) conviction. Thus, the two point reduction applies to the Petitioner. The Government waived the argument of enhancement for the use of an aircraft.

Now, the appellant petitioner contends that the district court and the government erred by increasing his offense level by two levels under U.S.S.G. §2D1.1(b)(2) for the use of a private plane on April 14, 1986 in importing the alleged cocaine. Whether the district court erred in its construction and interpretation of section § 2D1.1(b)(2). And, in any event, the aircraft conduct, as alleged by the government, occured prior to the 1987 amendment to the Guidelines which then created the section §2D1.5 (aircraft use), and thus, could not be retroactively applied to the Petitioner. Furthermore, the jury found appellant not guilty on counts 3 and 4. The 1986 date conceded by the government in their response to Petitioner. In the instant case, Petitioner argued that applying the 1986 Guideline enhancement provision constituted an ex post facto violation of the sort that "changes" the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. See Peugh v. United States, 569 U.S. ___ (2013). See also Appendix "F". For the reasons stated the enhancement is inapplicable. To this point the appellant shows that the total

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Footnote 3

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We arrive at the number ten after having done our best to untangle the discrepancies between the indictment and the court's jury instructions concerning which separately charged offenses could be considered as predicate violations, and after sorting through problems in the indictment itself (none of which are raised by Escobar on appeal and are therefore deemed waived). Specifically, Count 1 of the indictment (the CCE count) alleges that the following separately charged offenses could serve as predicate offenses: Count 2 (conspiracy); Count 3 (the April 1986 importation); Count 4 (the April 1986 possession with intent to distribute); Counts 8 and 9 (charging co-defendant Faccio with drug-related offenses); Count 10 (the November 1989 possession with intent to distribute); Counts 11 and 18 (charging Escobar with aiding and abetting his co-defendants' illegal interstate travel in violation of 18 U.S.C. § 1952); Counts 19, 23, 24, and 26 (telephone facilitation); Counts 21 and 22 (charging Escobar and co-defendants with weapons offenses); and Counts 25 and 27-31 (charging Escobar's co-defendants with drug-related offenses).

In its instructions to the jury concerning which separately charged offenses it could consider as predicate violations for the purposes of the CCE count, the district court omitted several of the counts listed above (namely, counts 21 and 22, which were dismissed,

offense level for Mr. Escobar should be "41".

ENHANCEMENT UNDER GUIDELINE SECTION §3D1.1(a) IS INAPPLICABLE WHERE THE DISTRICT COURT CONTRADICTS IT'S OWN DECISION. TO MODIFY IT'S OPINION IS A MATERIAL ERROR OF LAW WHICH CONSTITUTES ABUSE OF DISCRETION.

In the sentencing transcript the district court, in an Order given by the district court the court stated: I am not going to do that, because the total offense level calculated is calculated on the basis of group 1 of related counts which include the CCE, and therefore in the second group I am not imposing a two level increase for a manager. See, (S.H.T. pp. 11-13 Appendix G). The court then stated: The total offense level of group two really is "nonconsequential" for the purposes of the sentence, but what you state is correct, and therefore the total offense level in group two will be "43". I will not give the role in the offense adjustment.

Furthermore, the commentary statutory provision 21 U.S.C. §848(a), application notes stated: Do not apply adjustment from chapter, par. "B" ("Role in the offense")(Under §3B1.1(a) Less-(4)).

Under such circumstances the district court nor the government cannot compute given the application of four (4) level aggravating role adjustment. To modify the district court opinion in the first 18 U.S.C. §3582(c)(2) is a material error of law which constitutes abuse of discretion. See Appendix "H".

In Nixon v. United States, 918, at 909, Note 13 (11th Cir. 1990) the Eleventh Circuit held:

At Note 13, it should be noted that Section 2D1.5 has been amended yet again, in November 1989, and the newest version should prevent many of the Guideline application problems encountered in this case. See, U.S.S.G. App. C (Amendment 139). Most important, the new Guideline eliminates the confusion created by previous versions that purported to offer a base level offense for CCE counts while at the same time directing the sentencing court to the Drug Quantity Table to determine the offense level. The new version provides as follows:

(a) Base offense level (Apply the greater)

(1) 4 plus the offense level from the (Drug Quantity Table) applicable to the underlying offense; or

(2) 38 U.S.S.G. §2D1.5

After this Supreme Court carefully reviews the sentencing transcripts, prior opinions, including direct appeal, Appendix's, the jury instructions in 21 U.S.C. 841(a)(1) and §848(e) in, United States v. Escobar De Jesus, 187 F.3d 148, Footnote 5 and 6 then this Honorable Court is going to find that the Petitioner is entitled to be resentenced. The same finding that the magistrate judge found, that Escobar "may be eligible" for a reduced sentence. This court can likely reach the same conclusion.

MR. ESCOBAR'S SENTENCING CALCULATION WAS A PLAIN ERROR AND THAT IT AFFECTED ESCOBAR'S SUBSTANTIAL RIGHTS. (passim APPENDIX).

The Probation Office's Presentence Report Investigation mistakenly counted two Base Offense Levels, one in the Guideline Section 2D1.1 and assigned a Base Offense Level of 40, and in the second Base Offense Level they used Guideline Section 2D1.5 assigning a Base Offense Level of 44. See, (S.H.T. P. 28); that violated the ex post facto clause of the United States Constitution. **(2)** Mistakenly counted two points under Guideline Section 2D1.1(b)(2) used a private airplane, the 1986 date conceded by the government in the prior response to Petitioner. See, Exhibit F. **(3)** Mistakenly counted two points under 18 U.S.C. 924(c) where Counts 21 and 22 which were dismissed. See, United States v. Escobar De Jesus, 187 F.3d 148, Note "6" (1st Cir. 1999). **(4)** Mistakenly given the application of two points of the Manager Role Level the court stated: "I am not going to do that, because the total offense level calculated, is calculated on the basis of Group One (1) of related counts which include the CCE, and therefore in the second group I am not imposing a two level increase for a manager." The court then stated: "The total offense level of Group 2 really is "**nonconsequential**" for the purposes of the sentence, I will not give the role in the offense adjustment. See, (S.H.T. PP. 11-13). **(5)** On May 24, 2000, the District Court reduced two points under Amendment 505. To modify that opinion is a material plain error of law which constituted abuse of discretion and "seriously affects the fairness,

integrity of public reputation of judicial proceedings". (6) Furthermore, the Magistrate pointed out that the Appeals Court for the First Circuit in his opinion held that the jury instructions errors were plain and stated that the jury instruction for the 21 U.S.C. 848(a) Count One and 21 U.S.C. 848(e) Count Twelve were the same jury instructions, where constituted that the Guideline 2A1.1 was not applicable for the court. That is one of the reasons why the District Court sentenced the Appellant under Guideline Section 2D1.5 in all (13) Counts in Group One including Count Twelve. A miscalculation of a Guidelines Sentencing Range that has been determined to be plain error and to affect a defendant's substantial rights for a Court of Appeals to exercise its discretion under Rule 52(b) to vacate the Petitioner's sentence in the ordinary case. See, Rosales-Mireles, PP. 6, 15.

Escobar's Guideline Range on remand would be 235 to 293 months. The Petitioner has served more than ten (10) years beyond the applicable Guideline Range. This Court of Appeals exercise its discretion to correct the forfeited errors in light of the recent Supreme Court case, Rosales-Mireles v. United States.

Reversing Rosales-Mireles would, as a practical matter, control, but for the same reasons that this case is a suitable vehicle for resolving a question about the proper construction of the Guideline Section §2D1.5(a)(1), this case is one in which Petitioner can benifit from a favorable holding in Rosales-Mireles this court should reverse this case.

CONCLUSION

The petition for a Writ of Certiorari be granted.

On this 18th day of July, 2018.

Respectfully Submitted,

Eusebio Escobar De Jesus