

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ARTIS RYAN MILLER — 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 FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Artis Ryan Miller
(Your Name)

Federal Correctional Institution P.O. BX 1500
(Address)

El Reno, Oklahoma 73036
(City, State, Zip Code)

(Phone Number)

LIST OF PARTIES

- 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:

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4-5
REASONS FOR GRANTING THE WRIT	6-13
CONCLUSION.....	13

INDEX TO APPENDICES

APPENDIX A Opinion of the U.S. Court of Appeals for the Fifth Cir.
2018 U.S. App. Lexis 3547 U.S. v. Miller . Dismissal.

APPENDIX B Opinion of the U.S. District, Southern District of Texas, No.
5:08-CR-347-2. (7-13-17). Denial of § 3582(c)(2) motion.

APPENDIX C Order from the United States Court of Appeals for the Fifth Cir.
Denying Petition for Rehearing. Undated.

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
APPELLATE COURT CASES	
GONZALES V. TAYLOR, 695 FED. APPX. 731 (CA5 2017).....	6
U.S. PUIG-INFANTE, 19 F.3d 929 (CA5 1994).....	8,10
U.S. V. PUMA, 937 F.2d 151 (CA5 1991).....	8
U.S. V. TORRES, 856 F.3d 1059 (CA5 2017).....	7,9
U.S. V. WORTERS, 885 F.2d 1266 (CA5 1989).....	9
WRIGHT LLC V. KITE BROS. LLC LEXIS 823 (CA5 2018).....	6
U.S. CASE CITES	
MOLINA-MARTINEZ V. U.S., 136 S.CT. 1338 (2016).....	7,9,10,11,12,
ROSALES-MIRELES V. U.S., 16-9493 (6-18-18).....	11,12,13
U.S. V. DOMINQUEZ-BENITEZ, 542 U.S. 74 (2004).....	10
STATUTES AND RULES	
STATUTES	
§ 3582(c)(2).....	6,8,9
§ 1B1.3(a)(1).....	6,8,9,10,11
RULES	
RULE 52(b).....	11
GUIDELINES AMENDMENTS	
AMENDMENT 782.....	8,10
OTHER	

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 A to the petition and is

reported at 2018 U.S. App. Lexis 3547 U.S. v. Miller; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

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

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was 2-15-18, Rehearing Denied 5-4-18 (date received, order not dated).

- 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: Undated, Received 5-4-18, and a copy of the order denying rehearing appears at Appendix C.
- 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).

STATEMENT OF THE CASE

On or about February 17, 2016, Petitioner filed his motion for reduction in his sentence pursuant to 18, U.S.C. § 3582(c)(2).

On or about May 24, 2016, Petitioner filed an amendment to his §3582(c)(2) motion with program certificates.

On or about July 13, 2017, the district court entered an order denying Petitioner's motion for reduction in sentence, based on retroactive Amendment 782.

In denying Appellant's motion for reduction in sentence, just as it did during Petitioner's initial sentencing proceedings, the district court failed to make an individualized finding as to the amount of marijuana reasonably foreseeable to Petitioner during the course of the conspiracy. Instead, the court relied on an ambiguous amount of marijuana, an absconding from law enforcement, that lacked an indicia of reliability, and an unsupported claim that Petitioner provided false testimony during trial, to support the court's decision that a reduction in sentence was not warranted at that time.

On or about September 19, 2017, Petitioner appealed the denial of his § 3582 (c)(2) motion.

On or about February 15, 2018, the Fifth Circuit Court of Appeals Denied Petitioner's IFP motion and Dismissed his appeal as frivolous.

On or about March 23, 2018, Petitioner filed his motion for Hearing or rehearing en banc

On or about April 5, 2018, Petitioner received a letter from the Court Clerk notifying him of a deficiency in his petition for rehearing.

On or about April 11, 2018, Petitioner complied with the Clerk's instruction

REASONS FOR GRANTING THE PETITION

QUESTION ONE

WHETHER THE APPELLATE COURT ERRED IN DISMISSING PETITIONER'S APPEAL AS FRIVOLOUS?

Petitioner would ask this Honorable Court to determine whether the appellate court committed a clear and obvious error when it dismissed Petitioner's appeal as frivolous. Petitioner believed that he presented at least one meritorious claim on appeal that warranted the appellate court's attention, and the appellate court committed a serious error in law when the court declined to grant appellate review based on a frivolity determination. In Issue One of his appeal, Petitioner challenged the district Court's authority for abuse of the court's discretion in denying Petitioner's § 3582(c)(2) motion based in part on an incorrect guidelines calculation that clearly affected the district court's determination to deny a reduction in sentence. See App. Br. Id at 2-11. The Appellate Court's assertion that the issue of drug quantity determination was "resolved at his original sentencing hearing" is simply not true. Petitioner objected to drug quantity and failure to make a specific finding as to foreseeability, and the record clearly reflects that the sentencing court never attempted to resolve this issue. See App. Brief Id at 8. Because §1B1.3(a)(1) requires the district court to make individualized findings as to the amount of drugs reasonably foreseeable to defendants involved in drug conspiracies, if this amount was erroneously calculated during the sentencing proceedings, and somehow affected the district court's decision to deny a reduction in sentence, this would obviously be an issue that would warrant the appellate court's attention and therefore, could never be deemed a "frivolous" issue. See *Wright LLC v. Kite Bros. LLC*, Lexis 823 (CA5 2018). "An appeal can (only) be considered frivolous when an

QUESTION TWO

WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING PETITIONER'S § 3582(c)(2) MOTION BASED IN PART ON DRUG DETERMINATIONS FOR THE ENTIRE CONSPIRACY, WHEN CLEARLY ESTABLISHED CIRCUIT PRECEDENT REQUIRES SENTENCING COURTS TO MAKE SPECIFIC FINDINGS AS TO THE AMOUNT OF DRUGS A DEFENDANT INVOLVED IN A CONSPIRACY IS RESPONSIBLE FOR DURING THE COURSE OF THE CONSPIRACY?

The primary issue raised on appeal was whether the district court abused its discretion by failing to follow statutory guidelines procedures established in § 1B1.3(a)(1) of the United States Sentencing Guidelines and the Commentary and Application Notes to § 1B1.3(a)(1), which requires that when determining a defendant's criminal culpability in drug conspiracies (relevant conduct), to only determine the amount of drugs "reasonably foreseeable" to the defendant during the course of the criminal activity. Because the district relied exclusively on the amount of Marijuana for the entire conspiracy to determine Petitioner's base offense level an error occurred during the sentencing proceedings that affected the determination of his § 3582(c)(2) motion for reduction in sentence, which Petitioner filed years later. See App. Brief Id at 2-11. Petitioner clearly explained to the appellate Court the significance of the sentencing error and the need to correct this error before any determination could be made on whether or not Petitioner was entitled to a reduction in his sentence. See Appeal Brief. Id at 5-8. In addition, the record clearly reflects, the only finding by the district court as to the amount of drugs involved in the criminal activity was the amount attributed to the conspiracy as a whole. See App. Brief, Id at 3. the correct drug quantity is a requisite before determining a defendant's eligibility pursuant to retroactive Amendment 782 as well as the correct guidelines range to impose at initial sentencing. see Amendment 782 to the United States Sentencing Guidelines. Also see *United States v. Puig-Infante*, 19 F.3d 929, 942 (CA5 1994). "For a particular defendant however, "reasonable foreseeability does not follow automatically," *United States v. Puma*, 937 F.2d 151, 160 (5th Cir. 1991). cert denied 177 L.Ed. 2d 412, 112 S. Ct. 1165

(1992). "the reasonable foreseeability required [under the Guidelines] requires a finding separate from a finding that the defendant was conspirator," Id. (citing **United States v. Warters**, 885 F.2d 1266, 1273 (5th Cir. 1989)). Thus for a sentencing court to attribute to a defendant a certain quantity of drugs, the court must make two findings: (1) the quantity of drugs in the entire conspiracy, and (2) the amount which each defendant knows or should have known was involved in the conspiracy **Id. at 159-60.**" In the instant case, although the district court adopted the finding by the PSR report that the conspiracy involved "in excess of 1,000 kilograms of Marijuana", there was absolutely no finding by the district court of the amount of marijuana that was reasonably foreseeable to Petitioner during the course of the criminal activity, as required by §1B1.3(a)(1). The PSR simply states that "the defendant will be held accountable for conspiring to possess with intent to distribute in excess of 1,000 kilograms of marijuana pursuant to § 1B1.3.". See **App. Brief Id at 8.** This is obviously a miscalculation of the sentencing Guidelines by the district court, and although the error was forfeited by Petitioner when he failed to raise it on direct appeal, Because the forfeited error directly effects determination by the district court during § 3582(c)(2) proceedings, and the record is silent as to what the district court would have done had it considered the correct range it may be noticed and corrected on appeal if the error seriously effects the fairness, integrity and public reputation of the judicial proceedings. See **United States v. Torres**, 856 F.3d 1095 (CA5 2017). "We therefore, consider whether the error affected Torres substantial rights, **Id.** Where the record is silent as to what the district court might have done had it considered the correct Guidelines range, the reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights. **Molina-Martinez**, 136 S. Ct. at 1347." Had Petitioner's sentence been correctly calculated under §1B1.3(a)(1), his Guidelines range would have been 151-188 months of imprisonment. because the correct

guidelines range is necessary in order for a sentencing court to determine whether a defendant is eligible for a reduction in sentence under retroactive amendment 782, remand is necessary so that the district court can determine the amount of Marijuana that was reasonably foreseeable to Petitioner during the course of the criminal conspiracy. *Puig-Infante, 19 F.3d 992, 994, (CA5 1994)*.

QUESTION THREE

WHETHER THIS COURT'S DECISION IN MOLINA-MARTINEZ V. UNITED STATES, 136 S. Ct. 1338, 1347 (2016), REQUIRES PETITIONER'S CASE TO BE REMANDED BACK TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS?

In establishing what criteria must be met under plain error review, the Supreme Court announced in its landmark decision, *Molina-Martinez, 136 S. Ct. 1338, 1347 (2016)*, that "Olano instructs that a court of appeals has discretion to remedy a forfeited error provided certain conditions are met. First, there must be an error that has not been intentionally relinquished or abandoned. *id.* at 732-733, 113 S. Ct. 1770, 123 L. Ed. 2d 508. Second, the error must be plain, that is to say clear and obvious. *id.* at 734, 113 S. Ct. 1770, 123 L. Ed. 2d 508. Third, the error must have affected the defendant's substantial rights, *Ibid*, which in the ordinary case means he or she must "show a reasonable probability that but for the error" the outcome of the proceedings would have been different, *United States v. Dominguez-Benitez, 542 U.S. 74, 76, 82 124 S. Ct. 2333, 159 L. Ed. 2d 508 (brackets omitted)*." (Of course, the bar for satisfying the last part of the plain error test in the Fifth Circuit is so high that it is virtually impossible to meet). Petitioner filed timely objections to the improper calculation of his drug quantity determination during his initial sentencing proceedings. See *Sen Hearing transcript Doc # 176 Id at 14-23*, but due to no fault of his own Petitioner's attorney did not raise the issue of drug quantity determination on appeal. Therefore the error was not "intentionally relinquished. Secondly, the district court admittedly stated that it was not utilizing 1B1.3(a)(1), but instead would rely solely on the amount of drugs involved in the entire conspiracy, to determine the amount of marijuana reasonably foreseeable

district court determined that Petitioner was not eligible for a reduction in his sentence because of "Defendant's involvement in multiple loads of marijuana". See Order denying Sentence Reduction Doc. # 283 Id at 2. Because the decision to deny a reduction in sentence was based in part on an incorrectly calculated guidelines range from his initial sentence, in light of the Rosales-Mireles decision Petitioner is entitled to have his sentence vacated, because the clear and plain error affected Petitioner's substantial rights. See App. Brief Id at 5-8. Just as in Rosales-Mireles, Petitioner's sentence was tainted by an incorrect sentencing Guidelines range, which affected the amount of time he received at his initial sentencing proceedings. Because the district court ultimately relied on this incorrect guidelines range in making the court's final determination as to whether a reduction in sentence was warranted, the error affected the fairness, integrity, and public reputation of the judicial process itself. As the Rosales-Mireles Court noted, "That the risk of Unnecessary depreviation of liberty particularly undermines the fairness, integrity, and public reputation of judicial proceedings in the context of a plain Guidelines error because Guidelines miscalculations ultimately result from judicial error, as the district court is charged in the first instance with ensuring the Guidelines range it consideres is correct". Unlike Rosales-Mireles, the incorrectly calculated Guidelines range was outside the guidelines range that Petitioner should have received , even more so affecting the fairnes, integrity and public reputation of the judicial proceedings. Petitioner's current guidelines range was mistakenly miscalculated at 235-293 months of imprisonment. Because the record is "silent as to what the district court might have done had it considered the correct Guidelines range, the reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substancial rights". Molina-Martinez, 136 S. Ct at 1347. And the appellate court should have remanded Petitioner's case back to the district court to determine the correct sentencing guidelines range

before determining whether or not a reduction in sentence is warranted.

Therefore, in order to be consistent with this Court's decision announced in *Rosales-Mireles*, remand to the lower court is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Otis Ryan Miller

Date: July 3 2018