No. 18-7348

IN THE
SUPREME COURT OF THE UNITED STATES

Edgar Arnold Garcia,

Petitioner,

v.

United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER, DILLON v. UNITED STATES, 560 U.S. 817 (2010), REQUIRES A DISTRICT COURT TO REEVALUATE ITS ORIGINAL SENTENCING METHODOLOGY IN STEP TWO OF THE TWO-STEP INQUIRY ESTABLISHED IN SENTENCE MODIFICATION PROCEEDINGS UNDER TITLE 18 U.S.C. § 3582(c)(2), WHERE THE ORIGINAL METHODOLOGY EMPLOYED AT SENTENCING CONSTITUTES LEGAL ERROR THAT RESULTED IN A SENTENCE THAT ECXEEDS THE STATUTORY MAXIMUM, AND THE DISTRICT'S DENIAL OF § 3582(c)(2) RELIEF RELIES SOLELY ON THAT ERROR

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in this case are those who appear in the caption on the cover of this petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

May it Please the Court:

Edgar Arnold Garcia, Petitioner, appearing pro se, respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The judgment for which Petitioner seeks review is the Eleventh Circuit's February 23, 2018, unpublished order affirming the denial of Petitioner's **§ 3582(c)(2)** Motion for Reduction of Sentence, and is found in the appendix (herein "App.") at App. 1.

JURISDICTION

The decision for which Petitioner seeks review was rendered on February 23, 2018. Order, U.S. Court of Appeals. App. 1. Petitioner's request for re-hearing was untimely and was not heard. Petitioner sought, and this Court granted on May 22, 2018, an extention of time to file a petition for a writ of certiorari, extending the time to and including July 23, 2018. Garcia v. U.S., SC #17A1279.

This petition is timely filed within the time set by the Court, pursuant to the prisoner's mail box rule. See, Proof of Service.

This Court has jurisdiction to review the February 23, 2018, order affirming the denial of Petitioner's **§ 3582(c)(2)** Motion for Reduction of Sentence pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF CASE

In July of 1992 Petitioner was charged in a three count indictment alleging marijuana and weapons offenses. Indictment (App. 63). In July of 1997 Petitioner

pled guilty to Counts I and III of the indictment: Count I - conspiring in marijuana with intent to distribute in violation of 21 U.S.C. §§ 841 and 846; and, Count II - use of a firearm during the commission of a drug trafficking crime in violation of 18 U.S.C. § 924(c). Plea Hearing Trans., p. 4 (App. 67). On October 3, 1997, Petitioner was sentenced to 300 months on Count I[1] and 60 months consecutive on Count III for a total term of 360 months. Judgment and Commitment, p. 2 (App. 71).[2] Petitioner appealed.

On April 10, 2000, the appellate court affirmed. **United States v. Garcia, 208 F.3d 1258 (11th Cir. 2000).** Petitioner sought certiorari.

On January 8, 2001, this Court vacated and remanded the case for further consideration in light of **Apprendi v. New Jersey, 530 U.S. 466 (2000).**[3] **Garcia v. United States, 531 U.S. 1062 (2001).**

On March 9, 2001, on remand from this Court, the appellate court reinstated its prior opinion affirming Petitioner's conviction ~~conviction~~ and sentence for appellate counsel's failure to brief the **Apprendi**-type indictment error in the opening brief. **United States v. Garcia, 251 F.3d 160 (11th Cir. 2001).** And, on

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1. The 300 month sentence on Count I (the marijuana offense) representing a substantial upward departure - exceeding the statutory maximum of the offense as charged - for the uncharged murder of a coconspirator, which has been the subject of litigation for decades.

2. Relevant to the understanding of this petition is that although the indictment charged a § 841 marijuana offense (Indictment, p. 1 (App. 63)), and Petitioner pled guilty to a § 841 marijuana offense (Plea Hearing Trans., p. 4 (App. 67)), the district judge constructively amended the indictment on the J & C to a § 841(b)(1)(B) marijuana offense (Judgment and Commitment, p. 1 (App. 70)); thus, raising the statutory penalty range. Cf., Burrage v. United States, 571 U.S. 204, ——, 187 L.Ed 2d 715, 722 (2014) (identifying the three statutory penalty ranges for § 841 drug cases - i.e., § 841(b)(1)(A), § 841(b)(1)(B), and § 841(b)(1)(C): specifically, 10 to life, 5 to 40, and 0 to 20 years, respectively).

3. In Apprendi this Court held that "any fact" other than a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 489.

November 20, 2001, the appellate court denied rehearing and rehearing en banc. **United States v. Garcia, 273 F.3d 1008 (11th Cir. 2001)** (Circuit Judges, Tjoflat and Barkett, dissenting from the denial of rehearing en banc). Petitioner timely sought collateral review.

On Motion to Vacate per **28 U.S.C. § 2255** Petitioner raised, inter alia, appellate counsel's failure to brief/raise the indictment error, which was properly preserved at sentencing (i.e., that punishing Petitioner for murder in his marijuana case violated **due process**).[4] The magistrate recommended the claim be denied because appellate counsel "could not be faulted for failing to anticipate **Apprendi**." Petitioner "objected on the grounds that the magistrate misconstrued the claim as one for failing to raise an unpreserved claim, whereas [Petitioner's] claim was the failure to raise a preserved claim." Opening Brief, p. 13 (App. 52) (discussing the magistrate's recommendation and Petitioner's objection on the **ineffective assistance** of appellate counsel claim).

On June 8, 2006, the district judge denied the Motion to Vacate. In doing so the district judge did not rule on the objection and did not rule on the claim. Ibid. (App. 52) (citing, Petitioner's Rule 60(b) Motion and Petitioner's Motion for Judicial Recusal).[5]

In July of 2015 Petitioner moved for a reduction in sentence pursuant to **18 U.S.C. § 3582(c)(2)** for retroactive application of **Amendment 782** of the

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4. Petitioner's Opening Brief below demonstrates that he "raised extensive objections" at sentencing that punishing Petitioner for the "then-pending murder" (charged and pending in Florida State court) in his marijuana case (the murder uncharged in the federal indictment), "violated due process." Opening Brief, pp. 9-10, n. 7 (App. 48-49).

5. See also, Opening Brief, pp. 13-14, and n. 9 (App. 52-53) (discussing Petitioner's numerous attempts to "wrest" a ruling out of the district judge on the ineffective assistance of appellate counsel claim which would have yielded re-sentencing within § 841's default catch-all provision - i.e., § 841(b)(1)(C)'s 0 to 20 year penalty range).

Sentencing Guidelines which reduced generally by 2 levels the base offense level on all drug cases. **Amendment 782** (App. 76).

On November 4, 2015, the district judge, relying on the same historical facts and law underlying the uncharged murder adjustment (i.e., the indictment error), denied the motion. Order (App. 16). Specifically, the district judge believed **Amendment 782** did not allow him "to revisit the facts and circumstances of the sentencing" (Order, p. 4 (App. 19)), while relying on those same facts and circumstances in denying the motion. Id., p. 3 (App. 18). Petitioner appealed.

On February 23, 2018, the appellate court affirmed. Order (App. 1). In doing so the appellate court, like the district judge, relied on the historical facts and law underlying the indictment error (i.e., the district's determinations supporting the uncharged murder adjustment), while holding that the district judge "was not required to reevaluate its original [sentencing] methodology." Order, p. 14 (App. 14).

This Petition for a Writ of Certiorari follows.

STATEMENT OF FACTS

This is a marijuana case that comes from the early 90s when Petitioner conspired in marijuana between Texas and Florida (the conspiracy ending when the buyer absconded with the final shipment and went into hiding). Opening Brief, pp. 7-8 (App. 46-47). A confrontation between Petitioner and the coconspirator occurred (Opening Brief, p. 8 (App. 47)), whereat the coconspirator became belligerent and went for his weapon to kill Petitioner. Reply, p. 1 (App. 25). Petitioner panicked and fired multiple gun shots causing his death. Opening Brief, p. 8 (App. 47). The State of Florida charged and prosecuted the murder. Id., pp. 2-3, and n. 3 (App. 41-42) (Petitioner pleading guilty in State court to the reduced offense of 2nd Degree Murder with a Firearm for 17 yrs in exchange

for Petitioner foregoing trial).

At sentencing the district judge departed upward 5 levels (after adjustments) for the then-pending State murder without conducting a hearing into the facts and circumstances of the shooting or to make related conclusions of law. Opening Brief, pp. 9-10, n. 7 (App. 48-49) (noting that witnesses were not called and neither Petitioner's state of mind nor the degree of murder were determined). Petitioner lodged extensive **due process** objections to the upward departure. Supra, p. 2, n. 4. The objections were overruled.

Finding that the crime of murder was relevant within the meaning of § 1B1.3 (Relevant Conduct)[6] to the crime of conspiring in marijuana, the district judge sentenced Petitioner to 300 months on the marijuana offense (the 300 months representing a 5 level increase from Level 34 with a sentencing range of 151-188 months to Level 39 with a sentencing range of 262-327 months for a Category I Offender). Opening Brief, pp. 9-10, and n. 7. In reaching his decision to depart to Level 39 the district judge, finding that no guidelines applied to the facts of this case,[7] embarked on a comparison of guidelines that do not apply (i.e., § 2D1.1(a)(2) for death resulting from the use of drugs, and § 2A1.1 for first degree murder) and found a middle ground therein.[8] Opening

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6. The question of whether the crime of murder is relevant within the meaning of § 1B1.3 (Relevant Conduct), is not the subject of this petition. However, the resulting sentence in excess of the statutory maximum (i.e., the indictment error) for the marijuana offense and the district judge's refusal to reevaluate its original sentencing methodology, is: specifically, the district judge's reliance on the facts and law supporting the initial murder departure when denying Petitioner § 3582(c)(2) relief, and his counterbelief that the same facts and law could not be revisited in support of § 3582(c)(2) relief.

7. Petitioner believes otherwise. That is, the Guidelines do take into account homicides. Reply, p. 2 (App. 26) (demonstrating that the offense conduct for homicides is found at §§ 2A1.1 to 2A1.4 - i.e., 1st Degree Murder, 2nd Degree Murder, Manslaughter, and Involuntary Manslaughter). However, the government did not charge murder. The State of Florida did. In other words, the reason why the district did not find guidelines to cover the shooting was because the shooting was not charged in the indictment at bar.

Brief, p. 17 (App. 56). On this construction the district judge invoked § 5K2.1 (Death)[9] and departed upward.

On direct appeal Petitioner raised several grounds which are not relevant to the understanding of this petition. However, crucial to its understanding is appellate counsel's failure to raise Petitioner's properly preserved claim that punishing Petitioner for the uncharged murder in his marijuana case violated **due process**. Opening Brief, p. 13 (App. 52) (arguing that there was "no justification" for appellate counsel's failure to raise the "properly preserved" constitutional claim on appeal) (i.e., the **effective assistance** claim).

On certiorari this Court vacated and remanded for further consideration in light of **Apprendi**. On remand from this Court the Eleventh Circuit reinstated its prior opinion affirming Petitioner's conviction and sentence because appellate counsel failed to raise in the appeal briefs the properly preserved **due process** claim - i.e., the **Apprendi**-type indictment error. Opening Brief, p. 12 (App. 51).

On motion to vacate pursuant to **§ 2255** Petitioner raised, as established above, appellate counsel's failure to raise on appeal the preserved **due process**

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8. The district judge's comparison of two guidelines that did not apply - i.e., § 2D1.1(a)(2) (Death Resulting From the Use of Drugs) and § 2A1.1 (First Degree Murder) - and finding a middle ground therein when making his murder departure decision, as with the propriety of the district's application of § 1B1.3 (Relevant Conduct) (supra, n. 7) is, likewise, not the subject of this petition. Instead, it is the district judge's exclusive reliance on that methodology when denying § 3582(c)(2) relief while refusing to reevaluate that same methodology in support of § 3582(c)(2) relief, that is the subject of this petition. See, e.g., Reply, p. 7 (App. 31) (discussing the district judge's belief that Petitioner was "not entitled" to § 3582(c)(2) relief because of the murder departure which was based on a comparison of §§ 2A1.1 and 2D1.1(a)(2)); and, Order, p. 4 (App. 19) (the district judge believing that Amendment 782 did "not allow [him] to revisit the facts and circumstances of the sentencing").

9. Although the district invoked § 5K2.1 (Death) to justify the murder departure, he did not conduct a hearing (supra, n. 7), as instructed by the commentary of that guideline. Nonehtheless, the district judge's invocation of § 5K2.1, like the propriety of the judge's applications of § 1B1.3, § 2A1.1, and

claim: that punishment for the uncharged murder in Petitioner's marijuana case violated **due process.**[10] Supra, p. 3. The magistrate recommended the claim be denied because appellate counsel could not be faulted for failing to anticipate **Apprendi**. Opening Brief, p. 13 (App. 52). Petitioner objected on the grounds that the claim as raised in Petitioner's motion to vacate was appellate counsel's failure to raise on appeal a properly preserved claim - not, as misapprehended by the magistrate, the failure to predict the future (i.e., an unpreserved claim). The district judge did not rule on the objection and did not rule on the claim. Resolution of the claim would have mandated resentencing within the statutory limitations of § 841(b)(1)(C)'s 0-20 year range. Ibid. Numerous attempts to wrest a ruling from the district judge on the claim were unsuccessful. Opening Brief, pp. 13-14, n. 9 (App. 13-14). The claim – i.e., the **effective assistance** on appeal claim – to date, remains, unresolved.

In the wake of the retroactive announcement of **Amendment 782,** Petitioner moved for a reduction of sentence pursuant to **§ 3582(c)(2)** for retroactive application of **Amendment 782.** In denying the motion the district judge relied exclusively on its original sentencing methodology when departing upward for the uncharged murder (Order, p. 2 (App. 17)), but concomitantly held that he could not reevaluate his original sentencing methodology in favor of the motion. Order, p. 4 (App. 19) (the district judge believing that **"Amendment 782"** did "not allow [him] to revisit the facts and circumstances of the sentencing"). As such the district judge mistakenly believed that **Amendment 782** relief turned on entitlement rather than eligibility. Explaining his reasoning the district

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§ 2D1.1(a)(2), are not the subject of this petition. Supra, nn. 6 and 8.

10. Petitioner's motion to vacate raised several grounds which are not necessary to the understanding of this petition save the due process claim - i.e., the indictment error (appellate counsel's failure to brief the preserved claim that punishment for murder in Petitioner's marijuana case violated due process).

judge stated:

> Because the offense level of 39 appears to have been based primarily on the murder and a comparison of the offense levels associated with § 2A1.1 and § 2D1.1(a)(2) [Petitioner] is not entitled to a [**§ 3582(c)(2)**] sentence reduction.

Order, p. 3 (App. 18).

On appeal the 11th Circuit (i) agreed with the district judge and held that the court "was not required to reevaluate its original [sentencing] methodology (Order, p. 14 (App. 14)), and (ii) found no fault or legal error with the district judge's belief that **§ 3582(c)(2)** relief turned on "entitlement" rather than "eligibility."[11] Order, pp. 14-15 (App. 14-15).

SUMMARY OF ARGUMENT

In the case at bar the district judge denied Petitioner's **§ 3582(c)(2)** motion for reduction of sentence, for retroactive application of **Amendment 782** of the Guidelines, based solely on his original sentence for uncharged conduct that now clearly constitutes legal error (i.e., a sentence that exceeds the statutory maximum of the offense as charged). Morever, the district judge, concomitantly believed that that same construction (the illegal sentence), could not be revisited in support of the reduction. On appeal the Eleventh Circuit affirmed and held that the district judge "was not required to reevaluate its original [sentencing] methodology" in consideration of Petitioner's motion for reduction of sentence.

Petitioner, however, contends that (a) no construction of law renders an

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11. The appellate court avoiding the district judge's comments and belief that the murder departure rendered Petitioner ineligible for § 3582(c)(2) relief, while stating, falsely (Petitioner believes), that regardless of the district's "ambiguous comments" about the murder departure, that he (the district judge) "did not find [Petitioner] ineligible for relief based on the § 5K2.1 departure." Order, pp. 14-15 (App. 14-15).

illegal sentence "consistent" with **§ 3553(a)**, as required in step two of **§ 3582(c)(2)** proceedings, where the error (as here) was preserved below at sentencing, was not defaulted on collateral review, and was affected by the guideline amendment in question; and (b) that the district judge and the appeals court were both incorrect in law in determining that **§ 3582(c)(2)** - (i) did not allow the district judge to "revisit the facts and circumstances of the sentencing" error (Order, p. 4 (App. 19)), and (ii) that the district judge was not "required to reevaluate" the sentencing error (i.e., his "original [sentencing] methodology").[12] Order, p. 14 (App. 14).

The manner in which both the district judge and the appellate court adjudicated Petitioner's **§ 3582(c)(2)** motion (whether erroneous or not) is just one approach in a multitide of varying and conflicting directions the lower and appellate courts have taken in **§ 3582(c)(2)** proceedings where the amended guideline and the guidelines initially employed in the case yield confusion consequent to guideline errors committed historically in the case.

Petitioner believes, as many courts have noted and likewise believe, that this Court should resolve the confusion.

THE INDICTMENT ERROR BELOW

At sentencing Petitioner preserved/lodged extensive **5th Amendment** objections that punishing Petitioner for the uncharged murder in his marijuana case violated **due process.** Supra, p. 3, n. 4. The district judge did not agree and sentenced Petitioner to 25 yrs on the marijuana offense based primarily on the uncharged murder - the appellate court in this case recognizing that the

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12. Neither the district or appellate court dispute that legal error exists in this case. Nor has the government ever denied the existence of the error throughout this or any of the prior proceedings that the error infected. Infra, p. 10.

uncharged murder was "the main driver" of Petitioner's marijuana sentence. Order, p. 14 (App. 14).

On direct appeal counsel failed to raise the **due process** claim in the appeal brief. On certiorari this Court vacated and remanded for further consideration in light of **Apprendi**. On remand from this Court the appellate court, however, reinstated Petitioner's 30 yr sentence - i.e., 25 for the marijuana offense and 5 consecutive for the weapon - for appellate counsel's failure to raise the **due process** claim (dubbed indictment-error and/or **Apprendi**-error) in the appeal briefs. Supra, p. 6.

On **§ 2255** motion to vacate Petitioner raised appellate counsel's failure to raise/brief the preserved **due process** claim on appeal (the indictment error). The magistrate misconstrued the claim as the failure to raise an unpreserved claim and recommended it be denied. Petitioner objected. Thje district judge did not rule on the objection and did not rule on the claim. Nor could Petitioner wrest a ruling on the claim out of the judge on reconsideration and Rule 60(b), supra, pp. 6-7, which would have yielded resentencing within § 841(b)(1)(C)'s 0-20 yr statutory range, consistent with the marijuana offense as charged. Opening Brief, pp. 11-13 (App. 50-52); Reply, pp. 3-5 (App. 27-29).

THE EFFECT OF THE INDICTMENT ERROR AT BAR

As an initial matter it must be noted that neither the district judge nor the appeals court dispute the existence of legal error in this case. Instead, each believe that the facts and law underlying the error form properly the basis for denying Petitioner **§ 3582(c)(2)** relief while concomitantly holding that the same facts and law cannot be considered in support of **§ 3582(c)(2)** relief. Supra, pp. 4, and 7-8.

Specifically, the district judge found: (i) that Petitioner was not

"entitled" to **§ 3582(c)(2)** relief because Petitioner's marijuana sentence was based "primarily on the murder" (i.e., the indictment error); while holding (ii) that the guideline amendment in question did not "allow" him to "revisit the facts and circumstances of the [original] sentencing" (i.e., the indictment error). Order, pp. 3 and 4 (App. 18 and 19). And, the appellate court: (i) acknowledged that Petitioner's marijuana sentence "was based primarily on the murder" (i.e., the indictment error); which it found (ii) formed properly a "[]reasonable" basis to deny **§ 3582(c)(2)** relief; and (iii) that the district judge "was not required to reevaluate" his "original [sentencing] methodology" (i.e., the indictment error). Order, p. 14 (App. 14).

Petitioner contends, however, that **§ 3553(a)** per **Dillon v. United States, 560 U.S. 817 (2010)**, commands a different result. In **Dillon** this Court determined that **§ 3582(c)(2)** "establishe[d] a two-step inquiry" where courts must (i) "first determine that a reduction is consistent with **§ 1B1.10**" (the relevant policy statement governing **§ 3582(c)(2)** proceedings), before it (ii) "consider[s] whether the authorized reduction is warranted, either in whole or in part, according to the factors set forth in **§ 3553(a)**." **Dillon, 560 U.S. at ——, 177 L.Ed 2d at 284.** In other words, Petitioner contends, **Dillon** commands adherence to **§ 3553(a)** in sentence modification proceedings, just as adherence to **§ 3553(a)** is commanded at sentencing proceedings. **Cf., Hicks v. United States, 198 L.Ed 2d 718, 719 (2017)** (for "experience surely teaches that a defendant [is] entitled to a sentence consistent with **18 U.S.C. § 3553(a)'s** parsimony provision").

Hence, "working backwards from this purpose" the **§ 3582(c)(2)** proceeding below should have been available to "permit" the district judge to "revisit" his original sentencing methodology relevant to his **§ 3582(c)(2)** analysis. **Freeman v. United States, 564 U.S. 522 (2011).**

The **Freeman** Court explained.

> Working backwords from this purpose, § 3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence.

Freeman, 564 U.S. at ——, 180 L.Ed 2d at 530.

Had the district judge understood properly his role and authority in § 3582(c)(2) proceedings he would have known that the indictment error was implicated at step two of the **Dillon** inquiry which requires per § 3553(a), at the least, a sentence within statutory limitations. **18 U.S.C. § 3553(a)(4)(A)** (the "sentencing range established for the applicable category of offense"). App. 72.

Further, the district judge was free - indeed compelled - to revisit his original sentencing methodology insofar as it was integral to his § 3582(c)(2) determination. **Freeman**. Further, the district judge was free to notice and take into consideration (i) that the indictment error was preserved at sentencing, (ii) that the rule of **Apprendi** was announced and available to Petitioner on direct review for cases not yet final, **Griffith v. Kentucky, 479 U.S. 314, 328 (1987)**, and (iii) that appellate counsel's **6th Amendment** failure to raise the **due process** claim (the indictment error) on appeal was cognizable and properly raised on collateral review (the **effective assistance** on appeal claim), **Evitts v. Lucey, 469 U.S. 387, 396 (1985)**, for which the district judge was required to take action on. **Blackledge v. Allison, 431 U.S. 63, 72 (1977)** (discussing the "purpose" of the writ and its role in history to "safeguard a person's freedom from detention in violation of constitutional guarantees").

Moreover, the appeals court, being fully informed of the same in Petitioner's briefs, made no mention of these crucial facts, but rather, stated off-the-cuff that Petitioner "unsuccessfully pursued post-conviction relief," Order, p. 4 (App. 4), when in fact it was the district judge himself who chose deliberately not to rule on the appellate counsel error claim in order to not

grant Petitioner post-conviction relief to remedy, according to law, the indictment error by resentencing Petitioner within the statutory limitations of § 841(b)(1)(C)'s 0-20 yr range. Supra, p. 3. And, by relying on the same set of historical facts and law underlying the error in denying **§ 3582(c)(2)** relief the district judge ~~did~~ assured the government its third windfall. First, by allowing the government to punish above the statutory maximum for an uncharged murder in Petitioner's marijuana case. Second, by not correcting the preserved sentencing/indictment error on collateral review, as required by law. And, third, by denying **§ 3582(c)(2)** relief based on these historical errors. **E.g., Blakely v. Washington, 542 U.S. 296, 306-07 (2004)** (discussing the absurdity of allowing the State to charge a random criminal act as a "mere preliminary ... into the facts of the crime the State actually seeks to punish"). Indeed Justice Gorsuch explained that the "lone peril" in refusing to grant relief where relief is due is that it "might permit the government to deny someone his liberty longer than the law permits," **Hicks, 198 L.Ed 2d at 720**, which is exactly the case here, and which is exactly why **§ 3553(a)** at step two of the **§ 3582(c)(2)** proceedings below compelled the district judge to at least take notice of and re-visit his own historical errors insorfar as they related to the guidelines affected by **Amendment 782.**

Instead, the indictment error, which was not defaulted on collateral review, had the effect of barring **§ 3582(c)(2)** relief for the district judge's belief that his sentencing error (i.e., the indictment error) formed properly a basis for the denial, while concomitantly holding that the error could not be considered or re-visited in support of relief.

And, the appellate court erroneously sanctioned as proper this result.

REASONS FOR GRANTING THE WRIT

SUBSTANTIAL CONFUSION HAS ARISEN IN § 3582(c)(2) SENTENCE MODIFICATION PROCEEDINGS FOR RETROACTIVE GUIDELINE AMENDMENTS AMONGST THE LOWER COURTS FROM THE LACK OF INSTRUCTION FROM THIS COURT AND THE GOVERNING POLICIES IN CASES WHERE HISTORICAL GUIDELINE ERRORS ARE AFFECTED BY THE AMENDED GUIDELINE, THUS NECESSITATING GUIDANCE FROM THE COURT TO RESOLVE THE APPARENT CONFUSION CREATED BY COMPETING AUTHORITIES BELOW

Petitioner submits that his case is not a lone duck in the sea of **§ 3582(c)(2)** jurisprudence where historical guideline errors are implicated by the amended guideline, but rather, one of many The authorities below vary from cases where the historical error was not taken into consideration (the genesis of the error not being collaterally available to the defendant), to cases where the historical error was historically corrected on remand (the genesis of the error being collaterally available to the defendant) and the sentence reduction granted was based on the historically corrected sentence. And, from cases where the historical error was not held against the defendant, to cases where the historical error was held against the defendant but reversed for holding that error against him, and where the historical error was not considered at all. For instance.

In **Rawls** the defendants alleged that they were eligible for **§ 3582(c)(2)** reductions notwithstanding their career offender adjustments because post-**Apprendi** their offense levels would be commensurate to statutory maximums of 20 years rather than life. The appeals court disagreed noting that **Apprendi** was "not retroactively applicable" to cases, like theirs, that "became final before [**Apprendi**] was decided." **United States v. Rawls, 690 F.Appx 866, 867 (5th Cir. 2017).**

In **Ortiz** the defendant, who was originally sentenced pre-**Apprendi** to 262

months, but was resentenced to 240 months post-**Apprendi** on remand from the court of appeals, was granted **§ 3582(c)(2)** relief based on the universe of his "amended (post-**Apprendi**) guideline range." **United States v. Ortiz, 2009 USDist LX64147 (D.Conn. July 17, 2009).**

In **Foster** the district judge failed to apply an otherwise applicable career offender adjustment and 851 enhancement. In light of the historical sentencing error the government opposed **§ 3582(c)(2)** relief. The district judge, however, noted the lack of authority and instruction from **Dillon** and **§ 1B1.10** in this arena; and, left with nothing but "competing policy language and case law regarding errors in the initial guidelines calculations," examined and took into consideration the error, but declined to hold it against the defendant, and granted **§ 3582(c)(2)** relief. **United States v. Foster, 216 F.Supp 3d 655, 659-62 (E.D.N.C. 2016).**

In **Ortiz-Vega** the district judge erred initially at sentencing by failing to apply an otherwise applicable mandatory minimum then found the **§ 3582(c)(2)** applicant ineligible for a reduction at step two of the **Dillon** inquiry consequent to **§ 1B1.10's** instruction that an applicant is not eligible if the amendment in question does not have the effect of lowering the applicable range due to the operation of a statutory mandatory minimum. In reversing the appeals court declined to accept the government's position that it "should act as if the mandatory minimum were actually applied," and disagreed with the district judge's belief that to grant the modification would only serve to "perpetuate the error by overlooking the mandatory minimum twice." Remanding to proceed with the discretionary question the appeals court noted that "as odd as it may seem, perpetuating an error is exactly what is required by **Dillon** in a case like this." **United States v. Ortiz-Vega, 744 F.3d 869, 873-74 (3rd Cir. 2014)** (alterations and internal quotations omitted).

In **Calhoun** the defendant's claim that his historical mandatory minimum was erroneously applied was not considered by the district judge. **United States v. Calhoun, 2008 USDist LX 36675 (S.D.Ala. May 5, 2008).**

Hence, Petitioner contends, the multitudinous treatments below arising when historical sentencing errors are impacted by the amended guideline in question,[13] demonstrate the need for this Court to provide guidance to resolve the confusion and conflicting interpretations that exist in this area of law.

CONCLUSION AND RELIEF SOUGHT

Petitioner prays the Court grant the petition and resolve the confusion below. Or, to summarily remand with instructions for the district judge to conduct anew its step-two of the **Dillon** inquiry and revisit its original sentencing methodology for the reasons discussed herein. Or, any other relief the Court deems proper.

Dated: July 20, 2018

Respectfully Submitted:

Edgar Arnold Garcia

13. See, e.g., United States v. Duvall, 705 F.3d 479, 490 (D.C. Cir. 2013) (frustrated over the majority's opinion, Judge Williams, opined, that it "cannot be that Dillon applies only to thwart corrections that favor the defendant, but allows retroactive reconfigurations of the sentence actually imposed, to imagine a sentencing that might have occurred, a whole alternate universe, in order to deny [§ 3582(c)(2)] relief for a defendant whose sentence was, by hypothesis, 'based on' a retroactively amended guideline") (Williams, Senior Circuit Judge, concurring in judgment); and, United States v. Mayes, 567 F.Appx 411, 414 (6th Cir. 2014) (dismayed over the majority's reliance on a historical 10-year mandatory minimum error in its § 3582(c)(2) denial, Judge Merritt, explained, that despite the majority's belief, Freeman actually "support[ed]" the defendant's "position that the old 10-year minimum instead of the new 5-year minimum was erroneously used as a part of the 'analytical framework used to determine the sentence'") (quoting, Freeman, 18 L.Ed 2d at 530).