No. 19-5036

ORIGINAL

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

Craig Alan Toaz — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

From the Sixth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE DISTRICT AND CIRCUIT COURTS ERRONEOUSLY DISMISSED PETITIONER'S HABEAS PETITION UNDER PROCEDURAL GROUNDS, AND IF SO THEN;

II. WHETHER THE DISTRICT COURT HAD THE AUTHORITY TO MODIFY PETITIONER'S SENTENCE PURSUANT TO USSG §5G1.3 THROUGH A HABEAS PROCEEDING ONCE IT HAD BEEN DISCOVERED THAT THE DISTRICT COURT HAD ERRONEOUSLY IMPOSED CONCURRENT SENTENCING FOR TWO FEDERAL CONVICTIONS THAT WERE IMPOSED AT DIFFERENT TIMES IN DIFFERENT COURTS; BUT BOTH OFFENSES WERE FOR THE SAME CRIMINAL CONDUCT.

LIST OF PARTIES

[xx] 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:

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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 D 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[X] is unpublished.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 C 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[X] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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 March 19, 2019.

[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 PROVISION INVOLVED

Petitioner was deprived of his First Amendment Right to petition the Government for redress of grievances where the District and Circuit Courts denied his 28 USC §2255 motion on procedurally default grounds.

Furthermore, Petitioner was deprived of his Fifth Amendment Right to Due Process where the District Court failed to modify his sentence under USSG §5G1.3 that would reflect concurrent sentences on both of his Federal convictions that were based on a conspiracy offense and an underlying substantial offense for the same criminal conduct as Congress mandated concurrent sentences under 28 USC §994(1) 2 and (v).

PRELIMINARY STATEMENT

The Instant Petition presents an unprecedented question of law which this Court has not yet decided.

First, whether the Rules of a Second or Successive 28 USC §2255 motion apply when the claim is based on the recent modification of sentence pursuant to a sentence guideline amendment and secondly, whether the Petitioner was challenging the imposition of sentence in his §2255 motion or was he challenging the execution of his sentence that had previously been decided unlawful through a 28 USC §2241 motion where Petitioner did in fact challenge the execution of his sentence.

Finally, "whether a district court had the legal authority to resentence a defendant pursuant to the United States Sentencing Guideline Section 5G1.3 to reflect concurrent sentencing based on two separate federal convictions, after it had been determined that the District's original sentence order to run both convictions concurrently was unlawfully imposed, especially where one of the offenses was the underlying substantial offense within the overall conspiracy."

STATEMENT OF CASE

Petitioner Toaz was convicted by a jury in January 2000 of Conspiracy to Commit offenses against the United States; Conspiracy to Distribute and Possess with Intent to Distribute Methamphetamine in violation of 21 USC §841(a)(1) and 846; Sale or Receipt of Stolen Goods, Securities, Moneys or Fraudulent State Tax Stamps; and Felon in Possession of a Firearm. As reflected by the Presentence Investigation Report, the offense level was controlled by Count 2, the drug conspiracy offense. At sentencing, the Court determined that Toaz was responsible for 20 pounds, or 9 kilograms, of methamphetamine. This fell within base offense level 36 under the 2000 sentencing guidelines. With other adjustments, the original guideline calculation was as follows:

Total Offense Level: 44
Criminal History Category: VI
Guideline Range: Life

Count 1 carried a statutory maximum sentence of five years, see 18 USC §371(2000), and Counts 3 and 7 carried statutory maximum sentences of ten years each, see 18 USC §2315, 18 USC §922(g)(1). On June 14, 2000, the Court imposed a sentence of five years on Count 1, life on Count 2, and ten years on Counts 3 and 7, all to run concurrently. Additionally, the District Court directed that Toaz's sentence to be run concurrently with a sentence for Interstate Commerce of a Controlled Substance imposed in the Northern District of Indiana in case 2:94-cr-87-12. (See App. A)[1]

Toaz's sentence was imposed under the mandatory sentencing guidelines before the Supreme Court's decisions in Apprendi v. New Jersey, 530 US 466 (June 26, 2000), and United States v. Booker , 543 US 220 (2005).

Footnote 1: See App _____ designated the section of the record within the attached Appendix.

Toaz filed a pro se motion for modification or reduction of sentence under 18 USC §3582 and Amendment 782 on February 23, 2015. The motion was held in abeyance until October 27, 2015. At that time, Counsel was appointed and the Probation Office was directed to prepare an SMR. The Probation Office determined that Toaz is eligible for a sentence reduction, and correctly applied base level of 34. Although the SMR incorrectly states that Mr. Toaz was responsible for 20 pounds, or 9 kilograms of the substance -- it appears that Probation selected the correct offense level despite its error. Base offense level 34 covers the range from 5 to 15 kilograms of methamphetamine, and therefore is correctly applied here. Thus, the amended guideline range calculation is as follows:

Total Offense Level: 42
Criminal History Category: VI
Guideline Range: 360 Months to Life

Probation recommends a sentence of 360 months, composed of 360 months on Count 1 and 2 and 120 months on Counts 3, and 7, all to run concurrently. Count 1 carries a statutory maximum of five years or 60 months, so a sentence of 360 months on that count is not appropriate. Besides the error on Count 1, the SMR's calculations appear to be correct.

When imposing an amended sentence, Toaz requests that the District Court clarify its ruling that this sentence run concurrently with his federal sentence of imprisonment out of the Northern District of Indiana in case 2:94-cr-87-13, which Mr. Toaz began serving nearly five years prior to the imposition of the instant sentence, as District Court stated in the Judgment that the two sentences of incarceration should run concurrently, but the Bureau of Prisons will not compute the sentence with credit for the time that had already been served. In fact, prior to the Court's imposing Toaz's amended sentence, Toaz had filed a §2241 motion in the Middle District of Florida addressing this issue, Toaz v. Warden FCC Coleman 5:15-cv-102. On April 2018 the Florida District

Court denied Toaz's §2241 requesting that both his federal convictions be run concurrently as ordered by the Court. (See App. B).

On Toaz's motion for modification for sentence, he argued that because his Northern District of Indiana sentence was imposed for the same criminal conduct to the sentence in this case and was undischarged at the time he was sentenced in this case, the Court must adjust the sentence it imposes to account for the time that will not be credited by the Bureau of Prisons, under USSG §5G1.3. That guideline provision dictates that the Court shall adjust the sentence down to account for the time already served on the undischarged sentence of imprisonment and run then the remainder of the two sentences concurrently. In this case, the Court may determine that a sentence of 360 months is appropriate, and then must adjust that sentence downward by 55 months.[2] See USSG §5G1.3, comment (n.2 (C)-(D)). This is not a downward departure that would be prohibited by §1B1.10(b)(2)(A).

Upon resentencing, the District Court stood silent as to whether it had the authority to further lower Toaz's sentence by 55 months in order to incorporate the relevant conduct alleged in both of Toaz's federal drug convictions. Nor did the Court determine whether it had the legal authority to force the BOP to run both convictions concurrently as pre-ordered in this Court's original Judgment Order.

Toaz did challenge the BOP's failure to run both federal convictions concurrently on direct appeal immediatly after his resentencing Case No. 16-1548. However, the Sixth Circuit declined to rule on the issue claiming that Toaz should challenge this issue in a 28 USC §2241 motion, which at the time is still pending in the Eleventh Circuit Court of Appeals.

2: Toaz was sentenced to 60 months in prison on case 2:94-cr-87 on November 14, 1995. The sentence in this case was imposed on June 14, 2000. Thus, Toaz had served 55 months on the Northern District of Indiana Sentence when he received the life sentence in this case. Thus, under USSG §5G1.3(b), the Court must give "Credit" for 55 months and run the remaining five months concurrently.

Petitioner did file for a writ of Certiorari to the Supreme Court after this Court affirmed his 30 years sentence modification, which it appears the Supreme Court never received.

Subsequently Toaz filed a 28 USC §2255 petition claiming that both his federal convictions were for the same criminal conduct and that his modified sentence should have been adjudictated by 55 months to achieve a reasonable sentence since it had been determined through Toaz's 28 USC §2241 motion that the District Court has jurisdiction to run both of Toaz's federal sentences concurrently as the Court had originally imposed. The District Court denied Toaz's §2255 motion without requiring the Government to respond. (See App. C). Basically the Court claims that the issue of whether both of Toaz's federal sentences could run concurrently was decided by the Florida District Court and that Toaz was challenging the exectuion to his sentence, which a §2255 was not the proper forum to do so. The District Court further held that Toaz's §2255 motion was a second or successive 2255 motion and that had failed to seek permission from the Court of Appeals prior to having filed the petition even though his §2255 motion is premised entirely on his modification of sentence.

Petitioner Toaz filed a timely notice of appeal to the Sixth Circuit along with a motion for issuance of Certificate of Appealability (COA) Case No. 19-044. The Circuit Court denied Toaz application for a COA on March 19, 2019 (See Appx. D).

Therefore Toaz respectfully moves this Court to grant his writ of Certiorari in order to determine whether the District Court errored in modifying his sentence under (USSG §5G1.3).

RESASONS FOR GRANTING PETITION

Both the District and Circuit Courts dismissed Toaz's Habeas petition under procedural grounds. First, that Toaz's petition was a second or succesive §2255 motion subjected to the limitations provided in the Anti-Effective Death

Penalty Act of 1996 (AEDPA) and second that Toaz was challenging his execution of sentence which is properly brought under a 28 USC §2241 motion verses a challenge to his Federal conviction/sentence which should be filed to the Court of conviction under 28 USC §2255.

A. Procedural default Rules

This Court should grant Petitioner's request for a writ of Certiorari to determine whether Toaz's §2255 motion was subjected to the AEDPA of 1996 limitation on the grounds as to whether his Habeas petition was a second or successive motion. It is the Petitioner's position that because his Habeas petition was premised on issue related directly to his modification of sentence in 2016 and to the Florida District Court decision and opinion upholding the Bureau of Prisons (BOP) refusal to run both of Toaz's Federal convictions concurrently as the Sentencing Court had originally ordered that was decided on April 11, 2018.

Because the instant §2255 motion was based on Toaz's new modified sentence and the Florida Court subsequent decision affecting the new modified sentence, Toaz's habeas petition would not fall in the category of a second or successive §2255 motion under the restrictions of the AEDPA of 1996. In essence, the underlying facts were not available to be argued at any previous date because (1) the issue of whether both of Toaz's sentences could be legally run concurrently was a moot issue prior to his sentence becoming modified from Life to 30 years nad (2) Toaz cahllenge to the BOP calculation to this sentence was recently ruled on by the Florida District Court which ultimately proved that the District Court did not have the authority to impose concurrent sentence, which posed the legal question: "was the sentencing court, when it imposed Toaz's modified sentence required under 28 USC §994(1)(2) and (v) to adjust Toaz's modified sentence by reducing it by 55 months that would reflect concurrently sentences

for both his convictions [the first for the substantial drug offense and the second for the conspiracy to the substantial offense)] that were imposed by different courts at different times.

Therefore, this Court should grant Certiorari in order to determine whether the lower courts erroneously concluded that Toaz's habeas petition was a second or successive petition subject to the restriction under the AEDPA of 1996.

B. Challenging Imposition of Sentence Versus Execution of Sentence

The Second procedural default rule that both the District and Circuit Courts dismissed Petitioner's Habeas petiton was under the assumption that Toaz was challenging the exectuion of this sentence specifically the BOP failure to calculate both of his federal convictions to run concurrenly. However, after the Florida Court had decided Toaz's §2241 motion (which did challenge the execution of this sentence) Toaz then subsequently submitted his §2255 on the basis that the District Court had imposed an unlawful sentence by ordering that both of Toaz's federal convictions to run concurrently to one another when the Florida decision appears to prove that the Michigan Court lacked the authority to do so. Therefore, Toaz was challenging the imposition of his sentence, not the execution of it, which had been previously decided by the Florida Court. Clearly, the lower courts have misconstrued that Toaz is challenging the Michigan Court's authority to impose concurrent sentences and the alternative to correct this sentencing error is for the Court to adjust Toaz's sentence pursuant to USSG §5G1.3 that would allow for a modification to a federal sentence where to separate sentences are imposed by different courts for the same criminal conduct; which will be discussed further below.

Therefore this Court should grant Certiorari in order to determine whether the District and Circuit courts erroneously dismissed Petitioner's habeas petition on the grounds that he was challenging the execution of sentence

rather than the imposition to his modified federal sentence.

C. Denial of a COA under Procedural Default Rules

To obtain a COA under §2253(c) a petitioner must (1) make a substantial showing of the denial of a Constitutional right and demonstration of grounds under Barefoot v. Estelle, 463 US 880, 894 (1983) which includes showing that reasonable jurists could debate whether (or for that matter agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. Also see Slack v. McDaniel, 529 US 473 (2000); and (2) that Jurists of Reason would find it debatable whether the underlying habeas petition, in light of the grounds alleged to support Appellant's request for a COA clearly states a valid claim of the denial of constitutional rights.

Recently, however, this Court in Buck v. Davis, 580 US _____ 137 S.Ct. 759 197 LEd.2d 1 (2017) held, that [if] a "reviewing court invented the statutory order of operations by deciding the merits or an appeal and then denying the COA based on adjudication of the actual merits, it placed too heavy a burden on the prisoner at the COA stage."

As this Court has time and time again held and reiterated in Buck v. Davis at 16; a state or federal prisoner whose petition for writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal. Federal law requires that he first obtain a COA from a circuit justice or judge. 28 USC §2253(c)(1). A COA may issue "only if the application has made a substantial showing of the denial of a constitutional right." §2253(c)(2). Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case. Miller-El v. Cockrell, 537 US 322, 336 S.Ct. 1029, 154 L.Ed. 2d 931 (2003).

The Supreme Court however, elaborated that there are certain limitations into the COA inquiry, which held:

> The COA inquiry, we have emphasized, is not coeextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reasons could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Id., at 327, 123 S.Ct. 1029, 154 L.Ed.2d 931. This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." Id, at 336, 123 S.Ct. 1029, 154 L.Ed, 2d 931. "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." Id. at 336-337, 123 S.Ct. 1029, 154 L.Ed.2d 931. See also Buck at 16.

This Court went on to state, "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Miller-El, 537 US, at 338, 123 S.Ct. 1029, 154 L.Ed.2d 931. The statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then -- if it is -- an appeal in the normal course. We do not mean to specify what procedures may be appropriate in every case. But whatever procedures are employed at the COA stage should be consonant with the limited nature of the inquiry. Id. at 18.

In Buck, the question for the Fifth Circuit was not whether Buck had "shown extraordinary cirucmstances" or "shown why [Texas's broken promise] would justify relief from the judgment." Those are ultimate merits determinations the panel should not have reached. "We reiterate what we have said before: A "court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable." Miller-El, 537 US, at 327, 348, 123 S.Ct. 1029, 154 L.Ed.2d 931.

Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing

that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court inverts the statutory order of operations and "first decid[es] the merits of an appeal, ...then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner at the COA stage. Miller-El 537 US at 336-337, 123 S.Ct. 1029, 154 L.Ed.2d 931. Miller-El flatly prohibits such a departure from the procedure prescribed by §2253. Ibid.

In the instant case the Sixth Circuit declined to issue a COA based on procedural grounds. Specifically, the Court agreed with the District Court that Section 2255 was not a proper vehicle for Petitioner to be challenging whether the sentencing court should have further modified pursuant to USSG 5G1.3 once it had been determined through Petitioner's §2241 decided in the Florida District Court.

What is bewildering here is that the actual merit of the issue presented in Petition is an issue of first impressions that has never been decided by any federal circuit court. Specifically, "whether a district court has the legal authority to modify under USSG §5G1.3 after it had been determined (through a §2241 motion under the execution of sentence standard) that the district court did not have the authority to run two federal sentences concurrently as the court has initially ordered in its Judgment and Commitment Order, because the second sentence was imposed after the first sentence had expired.

Unquestionably, the merits of the issue that was presented in Petitioner's habeas motion is clearly debatable between Jurists of Reason since no circuit court has ever decided the underlying issue here. Therefore, the Circuit Court of Appeals erroneously declined to issue a COA in the instant case.

WHETHER THE DISTRICT COURT
HAD THE AUTHORITY TO GRANTE PETITIONER'S
HABEAS MOTION TO MODIFY HIS SENTENCE
PURSUANT TO USSG §5G1.3

The responsibilities delegated to the sentencing commission pursuant to 28 USC §994(1)(2) holds in pertinent part;

> (1) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect...
>
> (2) The general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

Furthermore, Congress went on to instruct the Sentencing Commission in subsection (v) of 28 USC §994 that;

> The Commission shall ensure that the general policy statement promulgates pursuant to subsection (a)(2) to include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

In considering the above mandate by Congress it is clear that the Sentencing Commission composed Section 5G1.3 of the Sentence to compensate for unforseen circumstances where two different circuits impose different sentences at different times for the same criminal conduct by a single defendant.

Section 5G1.3 of the Sentencing Guidelines addresses undischarged imprisonment. USSG §5G1.3. In particular, subsection (d) of §5G1.3 discusses cases involving undischarged terms of imprisonment to achieve a reasonable punishment for the instant offense." USSG §5G1.3(d). Application nte 4(A) to §5G1.3 provides further guidance, noting that a sentencing court should consider:

> (i) the factors set forth in 18 USC §3584 (referencing 18 USC §3553(a));
>
> (ii) the type (e.g. determinate, indeterminate/parolable) and length of the prior undischarged sentence;
>
> (iii) the time served on the undischarged sentence and the time likely to be served before release;
>
> (iv) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and

(v) any other circumstances relevant to the determination of an appropriate sentence for the instant offense USSG §5G1.3 cmt. n.4(A).

Moreover, an adjustment to a sentence may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of §5G1.3...would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. USSG §5K2.23 (2013). Section 5G1.3(b), in turn, currently would provide for an adjustment in cases involving "a term of imprisonment [that] resulted from another offense that is relevant conduct to the instant offense of conviction." USSG §5G1.3(b) (2015).

In the instant case, Toaz's Indiana and Michigan federal convictions were part of the same criminal scheme. Spectacularly, the evidence in the Indiana case held that Toaz was purchasing methamphetamine from McCarver Drug organization located in Hammond, Indiana, and would then transport these drugs to Kalamazoo, Michigan for resale. In fact, there is no evidence established whatsoever that Toaz sold any drugs to anyone within the State of Indiana. That is why the Indiana indictment charged Toaz with the Travel Act under 18 USC §1952, which was part of the underlying conspiracy charged in the Michigan case.

Additionally, if Toaz would have chosen to proceed to trial in the Indiana case, the US Attorney would have subpoenaed David Porter, Kathy Stepenwolf, Ellen and Debbie Reyes and several others who testified for the Government at Toaz's Michigan trial; in order to establish where the drugs that Toaz purchased from McCarver were being distributed to, therefore establishing the similarity and the regularity (or repetitions) to both offenses.

Moreover, David Porter testified to the Grand Jury that he began purchasing methamphetamine from Toaz in 1988 and continued to do so up until his arrest

in May of 1994. During trial, Deb Reyes further testified that she had further purchased methamphetamine from Toaz at his house on Mt. Olevet Street. Toaz sold that house in the summer of 1990, which clearly established that Reyes had purchased drugs from Toaz during the Indiana Conspiracy, which Porter's and Reyes' testimony certainly proves that there was not time interval between the Indiana and the Michigan conspiracies. Therefore, there is no question as to whether relevant conduct has been established between Toaz's Indiana conviction under the Travel Act and his Michigan drug conspiracy conviction.

As the Application Notes in USSG §5G1.3 makes clear:

> A. In General -- Subsection (b) applies in cases in which all the prior offense is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of 1B1.3 (Relevant Conduct). Cases in which only part of the offense is relevant conduct to the instant offense are covered under Section (d) (See Application Note 2).

It is certainly clear that the Indiana offense for "Interstate and Foreign Travel or Transportation in aid of Racketeering Enterprise in violation of 18 USC §1952 was part of the overall conspiracy charged in the Michigan Federal Prosecution, as Section 1B1.3(a)(2) to the USSG addresses "conduct or common scheme or plans as the offense as the instant offense. Accordingly, Section 1B1.3(a)(2) addresses "conduct that is 'part of the same course of conduct or common scheme or plan as the offense of conviction.'" United States v. Henry, 819 F.3d 856, 864 (6th Cir. 2016)(citing USSG §1B1.3(a)(2)). To qualify as a "common scheme or plan," the relevant actions must be "substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi. United States v. Hodge, 805 F.3d 675, 683 (6th Cir. 2015)(quoting United States v. Hill, 79 F.3d 1477, 1481 (6th Cir. 1996)). Relatedly, a defendant's actions form the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode

spree, or ongoing series of offenses.'" Id. (quoting USSG §1B1.3(a)(2), comment. (n.9)(B))1. "Three factors guide this analysis: 'the degree of similarity of the offenses, the regularity (repitions) of the offenses, and the time interval between the offenses.'" Id. (quoting Hill, 79 F.3d at 1481-82). explicitly established from the evidence produced during the Michigan trial where Toaz would purchase methamphetamine for several sources outside of Michigan then transport the drugs back to michigan for resale in the Kalamazoo area; which the sale of drugs course of conduct charged in the Michigan conspiracy. Therefore, pursuant to 28 USC 994(1)(2) both convictions are required to be run concurrently no matter what date each sentence was imposed.

In essence, by allowing the Government to charge and convict Toaz of two different times and in different Federal Courts which clearly related to one another will cause Toaz to serve an additional 55 months in prison that he would not have received had he been convicted of both offenses at the same time, by the same court.

Furthermore, because it was determined by the Florida District Court after the Michigan Court had modified Toaz's sentence pursuant to Guideline Amendment 782; that the Michigan Court could not legally run both of Toaz's Federal convictions concurrently. Then the only alternative would be to adjust his sentence under 5G1.3 under relevant conduct, which would decrease Toaz's sentence by 55 months; the instant case is one of those rare cases that the sentencing commission had in mind when addressing sentences imposed at different times in different courts based on the same criminal conduct. Furthermore, after the Court had determined that a sentence of 360 months was appropriate under Amendment 782, the Court now had the authority to adjust Toaz's sentence downward by 55 months pursuant to USSG §5G1.3, comment (n-2 (C)-(D)). This is not a downward dparture that would be prohibited by §1B1.10(b)(2)(A).

CONCLUSION

In the denial of Petitioner's 28 USC §2241 Motion, where Florida District Court clearly articulated that both of Petitioner's Federal convictions could not legally run concurrently to one another because Toaz was sentenced on the second conviction after his first sentence had expired. The Florida Court's conclusion set in motion the legal question as to whether the original sentencing court has the legal authority to modify Petitioner's sentence pursuant to USSG §5G1.3 [through a Habeas proceeding] in order to reflect concurrent sentence once it had been discovered that the District Court erred in ordering both of Petitioner's Federal convictions to run concurrently even though the offenses were for the same criminal conduct, which concurrent sentencing are basically require pursuant to 28 USC 994(1)(2) and (v).

The above legal question has never before been presented to this Honorable Court which provides for compelling circumstances why this Court should grant Petitioner's request for a writ of Certiorari.

Therefore, for the above given reasons this Court should grant Petitioner's application for a writ of Certiorari and Order further briefing on all issues presented herewithin the instant motion.

Respectfully Submitted,

Craig Toaz
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