19-5856

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

AMANDO VILLARREAL HEREDIA — PETITIONER
(Your Name)

vs.

THE UNITED STATES OF AMERICA RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

AMANDO VILLARREAL HEREDIA # 33526-298
(Your Name)

FCI SAFFORD, P.O. BOX 9000
(Address)

Safford, Arizona, 85548.
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

QUESTION # 1: In a " Modification Proceeding pursuant to 18 U.S.C.- § 3582(c)(2)," as to a retroactively applicable amendment to the U.S. Sentencing Guidelines, may a district court " make ' new findings of fact,' to ' recalculate drug-quantity '" beyond the " high-end ceiling 'sentencing - cliff " of the agreed upon Guidelines range embedded in a written plea agreement pursuant to Fed.R. Crim. P.- 11(c)(1)(B) to which was accepted by the court at the original sentencing, as " the basis for it's sentence, " as opposed to the affirmatively rejected presentence report ?

QUESTION # 2: Did the district court effectively transform a Modification proceeding pursuant to 18 U.S.C. § 3582(c)(2) into a " full re-sentencing proceeding " in violation of this Court's decisions in Dillon V. United States (2010), and Houghes V. United States (2018), when it made " new-findings of fact " to which aggrandized the " drug - quantity " beyond the threshold of agreed upon Guidelines range in a written plea agreement pursuant to Fed. R. Crim.- P. 11(c)(1)(B), to which was accepted by the sentencing court in the " original sentencing " as the basis for it's sentence as opposed to the affrimatively rejected PSR, as now, in said modification proceeding, " making use " of said PSR to deny relief ?

QUESTION # 3: Does Fed. R. Crim. P. 32 apply to a modification proceeding pursuant to 18 U.S.C. § 3582(c)(2) to which are " not-full resentencing proceedings ? "

QUESTION # 4: Did the Government and the district court breach a plea agreement entered into by the parties pursuant to Fed.- R. Crim P. 11(c)(1)(B) and the specific language therein as to a " recommended Guidelines range "to which was accepted by the court in the original sentencing as the specific basis for it's sentence as opposed to the PSR, only to " make new findings,' and aggrandize the drug-quantity not specified in the plain language of such " during a " sentence modification proceeding pursuant to 18 U.S.C. § 3582(c)(2) ? "

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:

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FEDERAL STATUTES:

FEDERAL RULES OF CRIMINAL PROCEDURE

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 8 to the petition and is

[X] reported at 2019 U.S. App. LEXIS 7805, 9th Cir.; 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 7 to the petition and is

[X] reported at 2018 U.S. Dist. LEXIS 133903; 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

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

The date on which the United States Court of Appeals decided my case was March 15, 2019.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 7, 2019, and a copy of the order denying rehearing appears at Appendix 9.

[ ] 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

I. 18 U.S.C. § 3582(c)(2) (See Full Text at Appendice # 1)

II. Article in Amendment V, of the Constitution of the United States, i.e., the Fifth Amendment. (See Full Text at Appendice # 2)

III. Article in Amendment VI, of the Constitution of the United States, i.e., the Sixth Amendment. (See Full Text at Appendice # 3)

IV. Federal Rules of Criminal Procedure 11(c)(1)(B), i.e., (Fed. R. Crim. P-(c)(1)(B)) (See Full Text at Appendice # 11)

V. Federal Rules of Criminal Procedure 32, i.e., (Fed. R. Crim. P.-Rule 32) (See Full Text at Appendice # 12)

VI. United States Sentencing Guidelines § 2D1.1(c)(1), and (2), i.e.,-USSG § 2D1.1(c)(1), and (2) (See Full Text at Appendice # 13)

STATEMENT OF THE CASE

COMES NOW, AMANDO VILLARREAL HEREDIA, (hereinafter referred to as - " Petitioner), acting Pro se, respectfully petitioning this Honorable Supreme Court for a writ of certiorari as to issues related to " modification proceedings " pursuant to 18 U.S.C. § 3582(c)(2).

This as to the lower U.S. Courts of Appeals, including the U.S. District courts, have authorized the " recalculation of drug quantities " beyond the threshold " sentencing cliffs " embedded in Base Offense Levels ("BOL"), established by the U.S. Sentencing Guidelines ("USSG'S") in USSG - § 2D1.1(c), outside of the jury's fact finding, or what has been admitted to (or agreed to) in a written plea agreement, after full and fair exchange through plea negotiations.[1]

This has essentially created " re-sentencing's " in violation of the clearly established ruling's by this Honorable Court in Dillon V. United States, 560 U.S.___ (2010), and Houghes V. United States, 138 S.Ct. 1765 (2018), as opposed to mere " modification proceedings."

As this petition emanates from a sentence rendered by the U.S. District Court for the Southern District of California, to which was the result of a " written plea agreement " and the stipulations of fact and Guidelines calculations therein accepted by the court in the first instance as opposed to the calculations and finding's of the affirmatively rejected presentence-

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n.1: Please take note that this case has not had the privilege to be examined under this Honorable court's ruling in United States V. Haymond, - 588 U.S.___ (2019), S. Ct. No. 17-1672 (June 26, 2019)

Nor, the Ninth Circuit's decision in United States V. Jauregui, 918 F.- 3d. 1050 (9th Cir. March 22, 2019)

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... report ("PSR"). This to a " drug quantity calculation of ' 50 grams or more ' of methamphetamine,' and a ' relevant conduct calculation that [Petitioner] knew others in the [organization] ...would import, and distribute ' more than ' 1.5 kilograms of actual methamphetamine ' which created a BOL at the time of the maximum possible offense level of 38.

Coupled with other specifically stipulated Guidelines enhancements to include Petitioner's being a " Leader and organizer, " and " importation of controlled substances, in exchange for the dismissal of other counts in the indictment, consideration of reduction of the BOL for the acceptance of responsibility, including a discount for other possible Guidelines applications, and an " agreed to stipulated sentence " of a middle of the amended BOL of 360 months. (i.e. BOL 324-405 months) this of which was accepted by the court as it's basis for sentencing.

later, after the U.S. Sentencing Commission ("USSC") made amendments to the USSG's pursuant to Amendment 782 (788), commonly coined as " All Drugs Minus Two," this Petitioner moved for modification of sentence pursuant to 18 U.S.C. § 3582(c)(2). After a denial of such, as to the court's use and application of the original PSR rejected by the court and additional application of an " astronomical quantity of drugs " therein, the Ninth Circuit Court of Appeals vacated and remanded under it's decision in United States V. Mercado-Moreno, 869 F. 3d. 942 (9th Cir. 2017) for a determination of " what portion of this quantity ' if any ' was the result of [Petitioner's] direct involvement or ' reasonably forseeable to him ' as within the scope of the conspiracy in which he participated.'"

Upon remand, it directed that the court should determine whether " it is more likely than not that [Petitioner] is responsible for the ...

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... " **new quantity** ' threshold of 4.5 kilograms of actual methamphetamine ' or 45 kilograms of methamphetamine mixture " and assess [Petitioner's] eligibility for a sentence reduction accordingly.

After remand and briefing, the Government, and the U.S. District Court again made use of the rejected **PSR** to establish that this Petitioner was now in fact responsible for **" more than 45 kilograms of methamphetamine mixture,"** as to it's assertion that " during the course of the investigation agents seized " at least ' **100 lbs. of methamphetamine, 2,765 pounds of cocaine, 40, 300 pounds of marijuana and more than a dozen firearms.'"**

It cited therewith a **District of Columbia** Court of Appeals decision in **United States V. Wyche, 741 F. 3d. 1284, 1293 U.S. App. D.C. 229 (D.C Cir. 2014)** to support it's contention that, because Petitioner admitted to being a leader and organizer, " the court found that defendant personally ' counseled, commanded, induced, procured, or wilfully caused the distribution of more than **45 kilograms of methamphetamine mixture** ' during the course of the conspiracy, citing **U.S.S.G. § 1B1.3, cmt. n.2 (2014).**

It cited therewith, that somehow, " this did not contradict any ' findings made by [the] court in the sentencing hearing.'"

Petitioner cites therewith, that this **" use of the rejected PSR "** in the modification proceeding, with which the district court applied to aggrandize the sentencing ledger from the agreed to **50 grams or more,** and **" knowledge of 1.5 or more kilograms of methamphetamine "** beyond the new threshold of **150 grams or 4.5 kilograms** of methamphetamine agreed to in the written plea agreement as accepted by the court in the first instance, effectively transformed the modification proceeding pursuant to **18 U.S.C. §-3582(c)(2)** into a full re-sentencing in violation of **Dillon and Houghes ...**

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... which breached the parameters of the admitted to facts and " agreed to sentencing Guidelines range " (at the time) in the plain language of the written plea agreement. This to which is not only a breach of the plea agrement, but a violation of rights guaranteed by and through the Fifth and Sixth Amendment.

This Honorable Supreme court should **GRANT** certiorari as to the difficulties that have arose as the result in the U.S. Courts of Appeal Nation wide, which are contrary to this Courts holding's in the landmark decisions regarding sentence modification proceedings pursuant to **18 U.S.C. § 3582(c)(2). See United States V. Wyche, 741 F. 3d. 1284, 1293 (D.C. Cir. 2014), United States V. Rios, 765 F. 3d. 133, 138 (2d. Cir. 2014), United States V. Peters, 843 F. 3d. 572, 577 (4th Cir. 2016), United States V. Valentine, 694 F. 3d. 665, 671 (6th Cir. 2012), United States V. Hall, 600 F. 3d. 872, 876 (7th Cir. 2010), United States V. Moore, 706 F. 3d. 926, 929 (8th Cir. 2013), United States V. Mercado-Moreno, 869 F. 3d. 942, 955 (9th Cir. 2017), United States V. Battle, 706 F. 3d. 1313, 1319 (10th Cir. 2013), and United States V. Hamilton, 715 F. 3d. 328, 340 (11th Cir. 2013)**

In particular, these decisions run afaoul to the clearly established precedence by this Honorable Court in **Dillon,** and absent a clear directive U.S. District Courts will continue to hold kangaroo hearings to which impermissibly make " **additional findings of fact** " outside of a grand jury indictment, a petit jury's finding's, also **to which a criminal defendant did not admit to in his protestation of guilt embedded in his acceptance of guilt offered as stipulation of fact** between the government's attorney and adjudicated by the court of first instance.

Petitioner will thereby and herewith make this prayer and petition to wit;

I. PROCEDURAL HISTORY AND FACTUAL BASIS IN SUPPORT OF PETITION FOR CERTIORARI

(i): INDICTMENT:

On July 29, 2010, a grand jury sitting in the Southern District of California returned an indictment charging Petitioner and 43 other codefendants with participating in a conspiracy to conduct enterprise affairs through a pattern of racketeering activity **(RICO Conspiracy),** in violation of **Title 18, of the United States Code, Section 1962(d). (See Criminal Case No. 3:10-cr-03044-WQH-1, S.D. Cal., Crim. Dkt. # 82)**[2]

On April 28, 2011, the grand jury returned a Superseding indictment, to which charged the same **RICO** offense and added a charge of conspiracy to distribute controlled substances, in violation of **Title 21, of the United States Code, section 846, and 841(a)(1). (DKT. # 644)**

As there was in fact an arrest warrant issued for this Petitioner's person, he was subsequently apprehended in Mexico and placed into the custody of the Mexican authorities.

Upon presentment of the Federal Bureau of Investigation's case agent's **AFFIDAVIT IN SUPPORT OF REQUEST FOR EXTRADITION,** and the detailed allegations of the offense conduct therein, this Petitioner did in fact agree to extradition, and was subsequently arrested on **5-23-2012. (DKT. #'s 1687, and 2399-3)** [3]

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n.2: Note, that all references in this Petition to the Original case number, will be refered to as " Crim. DKT. #, " or " DKT. #."

n.3: DKT. # 2399, is the record of the Government's " Supplemental Response " to the remand from the Ninth Circuit Court of Appeals in this modification proceeding pursuant to 18 U.S.C. § 3582(c)(2), to which appended three documents; (1) The written plea agreement;(2) the sentencing transcripts;(3) the Extradition Affidavit. (There was no PSR)

(ii) PLEA AGREEMENT:

Thereafter, Petitioner's counsel presented to him what was represented as a " written plea agreement " from the government, to which was to his knowledge, as to the " facts embedded in the Special Agent's Extradition Affidavit, ' coupled with the drug quantity's and allegations therein. (see DKT. # 's 2014, and 2399, at EXH. A)

The express terms of the Written Agreement, pertinent hereto are as follows:

> " [Defendant] agrees to plead guilty to counts 1 and 2 of the Second Superseding Indictment in Criminal Case no.10CR3044-WQH."

(See Id. DKT. # 2399-1, EXH. A, at I, pg. 2)

The document went further to detail the Counts charged and the facts overviewed as the elements and allegations therein;

> " Count 1 charges [Defendant] with participating in a conspiracy to conduct enterprise affairs through a pattern of racketeering activity, in violation of Title 18, United States Code § 1962(d)."

(id. pg.'s 2-3)

> " Count 2 charges [defendant] with conspiring to distribute controlled substances, in violation of Title 21, United States Code, § 841-(a)(1), 841(b)(1)(A)(ii), 841(b)(1)(A)(vii), 841(b)(1)(A)(viii),& 846."

It went on to explain the " specific charges " as follows:

> " Begining in or about November 2008, and continuing up to and including July 22, 2010, within the Southern District of California, and elsewhere, the defendant AMANDO VILLARREAL HEREDIA and other persons, did knowingly and intentionally conspire together and with eachother to distribute 5 kilograms or more of cocaine, a Schedule II controlled substance, 1,000 kilograms or more of marijuana, a Schedule I controlled substance, and ' 50 grams or more of methamphetamine (actual,' a Schedule II Controlled substance; in violation of Title 21, United States Code §§ 841(a)(1), 841(b)(1)(A)(ii), 841(b)(1)(A)(vii), 841 (b)(1)(viii), and 846."

(id. pg. 3)

The document thereafter, detailed the " elements of the charges in count's 1 and 2," in continuing;

B. ELEMENTS UNDERSTOOD AND ADMITTED-FACTUAL BASIS:

> " Defendant fully discussed the **facts of this case** with defense counsel. Defendant has commited **each of the elements of the crime** and admits there is a **factual basis** for his guilty plea. Defendant **stipulates and agrees** that the facts set forth in the numbered paragraphs below occurred. Defendant **stipulates and agrees** that if this case were to proceed to trial, the Government could prove the following **facts beyond a reasonable doubt** by competent evidence: "

(id. at pg. 4)

Pertinent to this Petitioner, the " factual Basis at # 3 cited: "

> **" 3. Pursuant to his agreement to participate in the affairs of the FSO, defendant Armando Villarreal Heredia was aware that the FSO's racketeering activity included the commission of the crimes specified above in the preceeding paragraph, including the crimes of: (a) ' Conspiracy to import and distribute over 50 grams of (pure) methamphetamine; ' and; (b) ' Conspiracy to Commit murder.'"**

(id. at 5-6)

> **" In furtherance of his agreement to participate in the affairs of the FSO, defendant Armando Villarreal Heredia committed numerous racketeering offenses, including (a)' conspiracy to import and distribute, more than 50 grams of actual methamphetamine' and (b) conspiracy to commit murder."**

(id. at 7, cl. 5 of the Plea Agreement)

This " factual basis " continued as pertinent herein this Petition,

> **" 6. Given his personal participation in the affairs of the FSO, defendant Armando Villarreal Heredia knew that members of the FSO would, during the time frame of the above noted conspiracy, import and distribute more than 1.5 kilograms of actual methamphetamine.** Further, defendant Armando Villrreal Heredia personally performed several **overt acts** in furtherance of a conspiracy to commit murder on behalf of the FSO."

(id.)

> **" 7. Defendant Armando Villarreal Heredia acted as an Organizer and leader in the charged RICO conspiracy, an offense which involved more than five participants. Defendant Armando ...**

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> **... Villarreal Heredia also acted as an organizer and leader in the charged methamphetamine importation and distribution conspiracy, an offense which involved five or more participants."**

(id. at 7)

The documentation spelled out the penalty provisions to each count of conviction, both which carried a statutory maximum of **life imprisonment. (id. pg. 8, III-PENALTIES, for count(s) 1amd 2)**

A waiver of rights provsion **(id. 9, at IV, and V)** a provision that acknowledged a " knowing and voluntary plea." **(id. 10, at VI)** Also, other provisions not pertinent herein. Nevertheless, this " agreement " began to become more complex as the pages turned, where it explained the **APPLICABILITY OF THE SENTNECING GUIDELINES ELEMENT. (id. 11, at VIII)**

> " Defendant understands the sentence imposed will be based on the factors set forth in **18 U.S.C. § 3553(a).** Defendant understands further that in imposing a sentence, the sentencing judge must **consult the United States Sentencing Guidelines (Guidleines)** and take them into **account.** Defendant has discussed the Guidelines with defense counsel and understands the guidelines are only advisory, not mandatory, and the court **may** impose a sentence more severe or less severe than otherwise applicable under the Guidelines, up to the maximum in the statute of conviction. Defendant understands further that the sentence cannot be determined until a **presentence report** as been prepared by the U.S. Probation Office and defense counsel and the Government have had an opportunity to review and challenge the presentence report. Nothing in this plea agreement shall be construed as limiting the goverment's duty to provide a complete and accurate **facts** to the district court and U.S.-Praobation Office.

(id. 11-12)

This vague and ambiguous presentation did not stop there as it proceeded, it depicted a " seemingly non-binding stipulation " therewith;

> " This plea agreement is made pursuant to the federal Rules of Criminal Procedure 11(c)(1)(B). Defendant understands that the sentence is within the sole discretion of the sentencing judge.

Cont'd

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> ...The government has not made and will not make any representations as to **what sentence the defendant will receive.** Defendant understands that the sentencing judge may impose the maximum sentence imposed by styatute, and is also aware that any estimate of the **probable sentence is a prediction,** and not a promise, and is **not binding upon the court. Likewise, the recomendation made by the government is not binding on the court,** and it is uncertain at this timewhat the defendant's sentence will be. Defendant has also been advised and understands that if the sentencing judge does not follow any of the parties' sentencing recomendations defendant nevertheless, has no right to withdraw the plea.

(id. 12, XI.)

In the face of this clear and unambigous statement, the document then presented the " **PARTIES ' SENTENCING RECOMMENDATIONS, " and " SENTENCING GUIDELINE CALCULATIONS " presented by the Government as to " the facts in the FACTUAL BASIS therein." (id. 13)**

This to where it entered into " **specifics** " concrning such and stated:

> " Although the parties understand that the Guidelines are only advisory and just one of the factors the court will consider under **18 U.S.C. § 3553(a)** in imposing a sentence, the parties will **jointly recommend the following ' base offense level,' Specific offense characteristics, Adjustments and Departures:**

1. BOL (Count 1) [§§ 2D1.1(b)(5),(c)(1)]	**40**
2. BOL (Count 2) [§§ 2D1.1(b)(5),(c)(1)]	**40**
3. Role [§ 3B1.1]	**+4**
4. Grouping Offenses [§ 3D1.4]	**+0**
5. Acceptance of Responsibility [§ 3E1.1]	**-3**
TOTAL OFFENSE LEVEL	**41**

(id. at 13)

It was this calculation " agreed upon by the parties " that Petitioner believed was the premise of his plea of guilt and subsequent sentence. This to which was unambiguous. Nevertheless, the document continued at the " **FURTHER ADJUSTMENTS AND SENTENCE REDUCTIONS INCLUDING THOSE UNDER 18 U.S.C.- § 3553: "**

Cont'd

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" ... The parties agree not to request any other adjustments and/ or departures, including any sentence variances under **18 U.S.C.-3553.**"

(id. 14)

It also deleniated yet another block entitled " **FACTUAL BASIS AND - 'RELEVANT CONDUCT ' INFORMATION:**"

" The parties **agree** that the **facts in the ' factual basis ' paraaph** of this agreement are true, and may be considered ' relevant-conduct ' under **USSG § 1B1.3** and as to the nature and circumstances of the offense under **18 U.S.C. § 3553(a)(1).**"

(id.)

As the **Base Offense Level ("BOL")** of **41** and (no criminal History Category) produced a **Guidelines sentencing range** under the **U.S. Sentencing Guidelines** of **324 to 405 months,** the parties therewith made a **" recommendation of a 360 month sentence." (See id. at 14, F.)**

This was the " express terms of this purported agreement " pursuant to **Fed. R. Crim. P. 11(c)(1)(B),** and Petitioner proceeded to sentencing thereto.

(iii) <u>SENTENCING</u>**:**

After a colloquy was held, and this Petitioner plead guilty, he thereafter proceeded to sentencing. In the interim, the **U.S. Probation Department** prepared a " **Presentencing Report " (hereinafter referred to as the " PSR")** and to which Petitioner's counsel filed objections. **(DKT. #'s 2048 & 2052)**

Petitioner's counsel also filed a document entitled " **Guidelines calculations by Amando Villarreal Heredia." (DKT. # 2057)** Therewith, on **12-09-2013** the Petitioner's counsel too filed a " **Sentencing Memorandum** " coupled with " **sentencing recommendations and requests** " thereto. **(DKT. #'s 2060 & 2061)**

On 12-09-2013, the PSR writter filed an **Addendum** to the **PSR.(DKT. #-2062),** and that very day the government's attorney filed a " **Sentencing memorandum,**" coupled with a " **Sentencing Summary Chart.**" **(DKT. # 2065-2066)**

On 12-16-2013, The **U.S. District Court** held the Sentencing proceeding, to where at the outset, the court immeidately addressed the **PSR** and the " written objections, and sentencing matters. " This to which most pertinent herein this petition, it " **affirmatively rejected the PSR, and ' adopted the written plea agreement,'** as the factual premise and basis for sentencing: "

> " **THE COURT:** All right. Counsel, I have reviewed the presentence report,' **the defense objections to the presentence report,** the addendum to the presentence report, the defense **guideline calculations,** the sentencing memo, and the government's senencing memo."

(See DKT. #'s 2068, 2204-2, 2399-2, pg. 2, ln.'s 15-19)

In addressing the **PSR** the court stated **specifically** as to the objections thereto;

> " **THE COURT:** Okay. First, with the objections to the presentence report, ' **I am inclined to follow the--or to follow the guidelines calculations that are set forthin the plea agreement,...'"**

(see id. at pg. 3, ln.'s 9-14, with an adjusted offense level of 44)

The court went on regarding this **procedure** and explanation of it's reliance on the " **Plea Agreement, " and rejecting the PSR, where it stated:**

> " **THE COURT:** You made some other objections, and we'll cover those now. Your objection **A** is Mr. Villarreal's name I think has been corrected." ... The with respect to some of the other ' **factual-allegations or factual statements** ' --and I understand that the Probation Department took a number of those statements from the charging documents. ' **With respect to the facts that I am relying on and obviously** this is not the first gentleman that I've sentenced in this case, and--but **with respect to the particular facts of his involvement, I am relying on the plea agreement and what he admitted to in the plea agreement.'"**

(id. at pg.'s 3-4, ln.'s 1-25)

The court thereafter inquired of the attorney's if they had any objections to that **procedure,** and clarified:

" **MR. REXRODE:** No. The objections were necessary predicate to my Guideline objection. "

(id. pg. 4, ln.'s 22-23)

" **THE COURT:** All right. I understand. So now with respect to -- is it fair to say that with respect to the Guidelines-- to the remaining **factual objections, the fact that the court is going to --has concluded that the** Base Offense Level would start at 44, **and keeping in mind that the court is going to rely on the plea agreement with respect to the particular acts that your client committed, are the remaining objections moot ?"**

(id. 4-5, ln.'s 1-7)

" **MR. REXRODE:** Yes. "

" **THE COURT:** All right. Is it fair to say then that the court-- that you agree that the court does not have to address your objections **B,C, or D ? "**

" MR. REXRODE: yes."

The court then went to speaking about the objections as to the fine in the **PSR** and therewith, the court reiterated the plea agreement's value and spoke again about the " objections to the **PSR:**

" **THE COURT:** Now, other than ruling on your objections to the fine, have I now ruled on all of the objections that you are requesting the court to rule on with respect to the **presentencing report ?"**

" MR. REXRODE: I was just double checking. Yes, you have. "

The government was thence given it's opportunity to make objections to the **PSR** and the court's procedure, where it stated:

" **MR. ROBINSON:** Your Honor, with respect to the statements that have been made here in court today, **the only factual disagreement the government has is that Mr. Villarreal did not act out of ignorance.**

(id. pg.'s 9-10)

Against this backdrop, and the process and procedure therein, it then pointed back to the plea agreement and the recommendations therein stating;

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" MR. ROBINSON:...' we would urge the court to follow the joint recommendation of 30 years.'"

The court thereto began to render it's sentence, begining by setting forth the parameters and " factual basis of the plea agreement" for the basis

" THE COURT: All right. Thank you. In this instance, as set forth in the plea agreement, between the time period of November2008 and July 22, 2010, defendant Armando Villarreal Heredia entered into an agreement with other individuals named in a RICO conspiracy to participate in the affairs of the Fernando Sanchez Organization, as association in fact enterprise as defined in Title 18, United States Code, Section 1964. Defendant Armando Villarreal Heredia agreed that a member of the FSO would commit at least two racketeering acts.

In furtherance of his agreement to participate in the affairs of the FSO, defendant armando Villarreal Heredia committed numerous racketeering offenses, including conspiracy to import and distribute more than 50 grams of methamphetamine and conspiracy to commit murder.

Given his personal participation in the affairs of the FSO, defendant Armando Villarreal Heredia knew that members of the FSO would during the time frame above noted conspiracy import and distribute more than one and one half kilograms of methaphetamine.

Further, defendant Armando Villrreal Heredia personally performed several overt acts in furtherance of the conspiracy to commit murder on behalf of the FSO.

Defendant Armando Villarreal Heredia acted as an Organizer and leader in the charged methamphetamine importation and distribution conspiracy, and offense with involved five or more participants.

With respect to the advisory Sentencing Guidelines , the court does find with respect to the methapmphetamine importation and distribution conspiracy, that the Base Offense Level is 38 pursuant to Section 2D1.1(c)(1). Importation of methamphetamine plus two pursuant to Section 2D1.1(b)(5). There is a plus four for the Role, aggravated Role pursuant to Section 3B1.1(a). The conspiracy starts at 33, pursuant to 2A1.5, plus four for the aggravated role pursuant to Section 3B1.1(a), which is an adjusted offense level of 37. That results in an offense level of 44. It only scores half a point.

There is a three level reduction for acceptance of responsibility The total Offense Level is 41. Mr. Villarreal has one criminal history point from a health and Safety Code conviction in 1999 at the time he was 21.

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> With respect to the--that places him in Criminal History Category I. The **Guidelines Range** is **324-405 months.**

(id. pg.'s 10-12)

The court thereafter, went on to sentence Petitioner to " the **agreed upon 360 month Guidelines sentence.** " **(id. Pg. 14)** [4]

II. THE PROCEEDING'S HERE ON REVIEW PURSUANT TO 18 U.S.C. § 3582(c)(2):

(a) INITIAL MOTION FOR MODIFICATION:

On December 16, 2014, Petitioner filed a habeas petition pursuant to **28 U.S.C. § 2255.** There, was too a request that his sentence be reduced pursuant to the recent amendment's to the **U.S. Sentencing Guidelines ("USSG'S")** at **Amendment 782. (788)(DKT. # 2171, at pg.'s 8-9)**

The request was therewith characterized as " in effect " a motion made pursuant to **18 U.S.C. § 3582(c)(2). On May 28, 2015,** the court entered an order requring the Government to file a response to Petitioner's motion. Upon response, however, the government failed to address the aspect of the motion requesting modification. **(DKT. # 2189)**

On December 28, 2015, the court entered an **Order** denying Petitioner's habeas claims, also his request for modification (reduction) of sentence under **Amendment 782. (DKT. # 2264)** Therein the court concluded that Petitioner was " **not eligible** " for modification under **18 U.S.C. § 3582(c)(2)** and the amendment, by citing:

> " **The stipulated facts in the plea agreement state that,** the defendant was an ' **organizer and leader** ' in a conspiracy invloving five or more participants and the ' **uncontested facts in the presentencing report' establish that,** '[d]uring the course of the investigationagents seized **at least 100 pounds of methamphetamine 2,765 pounds of cocaine, 40,300 pounds of marijuana and more than**
>
> ...

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n.4: **Not only was this Petitioner's sentence " based on a Guidelines Range," but also, clearly upon the " written plea agreement " and not on the " affirmatively rejected PSR." (id. Sent. Tr.)**

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> ...a dozen firearms.'" (Citing ECF No. 2014 at 7; ECF No. 2048 at 9) The amended Guidelines requirethat a Base Offense Level of 38 require that an offense involving ' 45 kilograms or more of methamphetamine or 4.5 kilograms of actual methaphetamine.' In this case, 'the uncontested drug quantities seized ' during the narcotics distribution conspiracy for which [defendant] acted as AN organizer and leader ' involved at least 100 pounds of methamphetamine' which is ' more than 45 kilograms of methamphetamine.' The kcourt concludes that the Base Offense level under the 'uncontested drug quantities seized during the narcotics conspiracyfor which the Defendant acted as an organizer or leader remains 38. The court concludes that [defendant] is not entitled to a resentencing under amendment 782.

(DKT. # 2264, Appendix # 4)

(b) FIRST APPEAL TO THE DENIAL OF MODIFICATION UNDER 18 U.S.C.§ 3582:

Petitioner appealed this decision to the Ninth (9th) Circuit Court of Appeals and therewith, the 9th Cir. issued a remand, directing that the district court " reconsider it's quantity determination " in light of United States V. Mercado-Moreno, 869 F. 3d. 942 (9th Cir. 2017), which was decided after the district court's decision to deny relief pursuant to 18 U.S.C. § 3582(c)(2). This where the 9th Cir. specifically stated:

> " While the district court observed that ' at least 100 pounds of - methamphetamine was seized by investigators, it did not determine ' what portion of that quantity, if any,' was the result of [Heredia's] direct involvement or reasonably forseeable to him as 'within the scope of the conspiracy in which he participated.' See U.S.S.G. § 1B1.3(a)(1), cmt. n.2 (2014); Mercado-Moreno, 869-F.3d. at 959-60. Upon remand, the court shall determine whether ' it is more likely than not [Heredia] is responsible for the new quantity threshold of 4.5 kilograms of actual methamphetamine or 45 kilograms of methamphetamine mixture,' see Mercado-moreno, 869 F. 3d. at 957, and assess [Heredia's] eligibility for a sentence reduction accordingly. "

(DKT. # 2396, 9th Cir. Ct. of Appls No. 17-50202, pg.'s 3-4, Appx. # 5)

On March 19, 2018, the district court entered an order directing the government to " file a ' supplemental response ' to the motion for sentencing reduction,' including ' any additional documents or transcripts relevant to this motion.'" (DKT. # 2395, Appx. # 6)

This order did allow for the supplemental briefing by the [Petitioner] to include a reply, but purportedly expounded the original briefing. **(id.)**

On April 4, 2018, the government filed the supplemental response as directed, and therwith " **the additional documents and transcripts** " in support thereof. **(DKT. # 2399, 1-3; See also, supra, at n. 3)**

Therein, the government attempted, painstakingly to convince the court that Petitioner was " **not eligible for relief** " under **18 U.S.C. § 3582(c)(2).** This by presenting a " **new factual basis** " of the before mentioned factual basis leading up to the plea agreement by the parties to which was " **accepted by the court at the original sentencing proceeding.**" This by now presenting the " **presentencing report ("PSR")** as it's basis for such, and ' therewith, stating that ' somehow against the facts presented herein and in the record ' that this **PSR was ' uncontested.'" (id. at pg.'s 4-5)**

Therewith, the Government referred to it's appended exhibit's and cited to the **Special Agent's (investigator's) " Affidavit of Extradition " ("EXHBIT-C")** and the " **Stipulated Facts** " in the " **Plea Agreement** " **("EXHIBIT-A").** Nonetheless, it thereto intertwined the " factual basis of the' **PSR** ' therewith. **"(id. pg. 5)** This by stating in a footnote, that:

> " Although [he] filed numerous objections to the PSR, the [Defendant-**Villarreal-Heredia**] contested none of the **facts** set forth herein." 5

It therewith relied upon the " finding of ' an **Organizer-Leader** '" **role** in the charged offense, and accepted as " **fact** " in the record, that;

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n.5: The government did not mention the fact that, it too did not make any " objections " when the court gave NOTICE and specifically relied upon the facts in the " written plea agreement " as opposed to the PSR in the " original sentencing proceeding." (id. DKT. # 2399-2, pg.'s 1-4, &-9-10)

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" Given his high-level supervisory position within one of the most prolific drug trafficking operations operating in Mexico during this time period,' it is self evident that the entire scope of the FSO's drug trafficking activities were forseeable to [defendant-Villarreal-Heredia] (citing U.S.S.G. § 1B1.3, cmt. n. 2(2014), and United States v. Wyche, 741 F. 3d. 1284, 1292 (D.C.Cir.-2014)("If the defendant plays a managerial role in a drug conspiracy and shares in the conspiracies profits, he may be held responsible for the entire quantity attributable to the conspiracy during the time he was a participant.")

(id. pg. 6)

The government went further by stating that;

" However, for purposes of his Guidelines, the Government is only seeking to hold [Villarreal Heredia] accountable 'for what amounts to be a small portion of the FSO's drug activity during the time period of his involvement' in that criminal organization."

(id.)

It then methodically introduced the presentence report's (PSR)

" facts and basis " into the proceeding when it continued stating:

"Indeed, the PSR notes, that during the course of the investigation law enforcement officer's seized ' at least 100 pouns of methamphetamine, 2,765 pounds of cocaine, 40,300 pounds of marijuana, and more than a dozen firearms.'" (citing the PSR at pg. 9, ¶ 20)

" The uncontested drug quantities seized during the investigation, all of which are 'properly attributable to [defendant Villarreal-Heredia' under both 'the terms of the agreement and the uncontested facts of this case, establish a base offense level of 38 under the amended Guidelines." (Citing USSG § 2D1.1,cmt. n. 5 (2014)-(" Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level.")

" However, looking solely to the ' uncontested amount of methamphetamine ' from the FSO ' during the investigation (at least-100 pounds)' defendant Villarreal Heredia's base offense level is ' properly calculated at level 38." (citing U.S.S.G. § 2D1.1(c)(1)(2016)(" eastablishing a BOL of 38 for 45 kilograms or more of -methamphetamine)

" Using just the methamphetamine seized during the investigation of the FSO is an exceedingly conservative approach in calculating the Defendant Villarreal Heredia's base offense level."

(id. pg.'s 6-7)

The government went on in this matter wholly outside of the " plea agreement arrived at ' through the negotiations process ' and to what is known in ' contractual terms ' as ' **full and fair exchange** ' with consideration attached thereto in the first instance," where it stated:

> " Also, not being taken into consideration with the approach suggested above are **the other drugs** which were trafficked by the FSO (and seized by law enforcement) under the supervision of Villarreal Heredia, the **'2,765 pounds of cocaine, 40,300 pounds of marijuana.'"**

(id. at 7-8)

And continued;

> " As such, the FSO's drug related activitties were not just merely ' **reasonably forseeable** ' to Villarreal Heredia, they are activities to which he exercised ' direct supervision.' Thus, the court **should find** that [Defendant Villarreal Heredia] is responsible for ' **more than 45 kilograms of methamphetamine mixture** ' and he is therefore ' **not eligible for a sentence reduction in light of Amendment 782.'"**

(id. at 8) [6]

On June 27, 2018, this Petitioner filed a " pro se **Supplemental Reply Brief."** (DKT. # 2410)

Therein, this Petitioner quickly pointed to the fact that:

> "...the government's positions were misplaced and per the ' **express-terms of the written agreement,**' and '**the Spirit of the agreement** ' any additional quantities of drugs which would take this Petitioner to an additional offense level, would take away the ' **consideration of which was offered through full and fair exchange,**' in the plea negotiations process as a whole.'"

(id. DKT. # 2410, Reply at pg. 1)

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n.6: Note, these advocacies for " drug quantities and facts " outside of the stipulated plea agreement, accepted by the district court in the first instance, were clamied therewith a " breach of the plea agreement."

Petitioner acknowledged the fact that the lable of the agreement and some of the language therein as as to the **Federal Rules of Criminal Procedure 11(c)(1)(B)(Fed.R.Crim.P. 11(c)(1)(B))**, however, " offers of express stipulation's " therein to which amounted to " **express Guidelines range recommended by the parties,"** to which was accounted " **based upon the express provisions in the ' factual basis embeded in the plea agreement'** to whcih was **based upon**

> **" In furtherance of ' his agreement '** to participate in the affairs of the FSO, Defendant Villarreal Heredia committed numerous racketeering offenses, including **(a) conspiracy to import and distribute ' more than 50 grams (actual) of methamphetamine,' and (b) conspiracy to commit murder."**
>
> **The agreement further cited:**
>
> **" Given his personal participation** in the affairs of the FSO, defendant Amando Villarreal Heredia ' **knew that members of the FSO would during the time frame above--noted conspiracy, import and distribute more than 1.5 kilograms of (actual) methamphetamine.'"**

(id. at pg. 4, Citing the Written Plea Agreement at pg. 7, cl. #'s 6-8)

Petitioner posited the procedural nature of the plea agreement, and the " acceptance of such by the court in the first instance," as " **the basis for it's sentencing,"** and to the fact that as the district court " **affirmatively-rejected the ' presentence report ("PSR") "** and sentenced " **based upon the plea agreement." (id. pg. 5)**

Therewith, as the 9th Circuit had issued a remand for a " re-calculation of drug quantity," it could not in " this proceeding pursuant to **18 U.S.C. § 3582(c)(2) ' make use of the the PSR and it's basis '** for additional drug quantities of controlled substances that were outside of the parameters of the written plea agreement accepted by the court in the first instance.

Petitioner cited further, that;

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" Not only is this against the plain language of the ' written plea-agreement accepted by the court at the original sentencing,'but, it is against ' the Spirit of the agreement,' that the parties reached through ' full and fair exchange.' And thus, any **additional quantities,' not stipulated to in exchange for the concessions reached throughout the course of the plea negotiations process,'** would be a ' **material breach of such,'** and would void the perfected document and process therewith.'"

(id. pg. 8)

Petitioner pointed to that, unlike the situation in the **Mercado-Moreno** decision used by the 9th Circuit, the " **application of additonal quantity of methamphetamine** ' would seriously undermine the purposes of plea bargaining." [7]

Therewith Petitioner explained further, that;

" That as to the ' more than 50 grams of **methamphetamine** that was **agreed to,' and charged in the indictment,** and the ' more than 1.5 kilograms of **methampphetamine** that **[Petitioner] knew that other members would import and distribute** in the course of the conspiracy,' is the quantity that he believed was ' **based on the Investigative Agent's EXTRADITION AFFIDAVIT** ' that of which was used as the basis for his arrest and presentment on the action against him, and was ' **not the quantity of which he accepted responsibility for,'** to which not only was not embedded in the ' plain language of the written plea agreement,' **but also as appendded to the government's** ' Supplemental Response to Request for denial of 3582(c)(2) relief,' **Petitioner continued to argue that ' any application of quantity to which is outside of such, takes away from the knowing and intelligent entry of the [contract] to which the parties accepted as the basis for such.'"**

(id.)

Petitioner, therewith, asserted on this position that, "[he] was **' eligible for modification '** pursuant to **18 U.S.C. § 3582(c)(2)** as to the amendment's to the **Guidelines range that was accepted by the court at the ...**

n.7: The court in United States V. Mercado-Moreno, 869 F. 3d. 942 (9th Cir.-2017), in fact accepted the presentence report ("PSR") in the original sentencing proceeding, thus, upon remand it was free to " make use of such as a ' basis for it's recalculation of drug quantity ' in the ' modification proceeding ' pursuant to 18 U.S.C. § 3582(c)(2)." See id. 869 F.3d. at 951.

Continued from page Twenty Three

... ' original sentencing proceeding.'" (id.)

Petitioner therewith, pointed to the fact that as the 9th Circuit's remand allowed for the determination " to find what portion of the '100 pounds' of methamphetamine " alleged by the government (and Court) was the result of [Petitioner's] direct involvement, or ' reasonably forseeable to him ' as within the scope of the conspiracy to which he participated.'" (Citing USSG-§1B1.3(a)(1), cmt. n. 2 (2014) That, the quantity could be " held directly attributable to [Petitioner] " was " the quantity to which he'd agreed to as to the ' investigator's direct evidence ' of the ' 4.75 pounds of methamphetamine' alleged in the " Extradion Affidavit, " or " two kilos. " (id. at 13-14, Citing the Extradition Affidavit at DKT. # 2399,1-3)

This to which would certainly be in line with the " agreed to ' more than 50 grams (charge in the indictment),' and the ' more than 1.5 kilograms, he agreed to have knowledge of' embedded in the specific language of the written plea agreement, and accepted by the court in the first instance."

Therewith, Petitioner called the court's attention to the Seventh Circuit's decision in United States V. Davison, 761 F. 3d. 683 (7th Cir.2014) regarding this very issue.[8]

Petitioner too pointed to the fact that " simple knowledge, approval or acquiescence in the object of the conspiracy, ' without intention and agreement ' is insufficient to support a charge of conspiracy. " (Citing United States V. Lennick, 18 F.3d. 814, 818 (9th Cir. 1994) rightfully, therewith, Petitioner questioned if the " knowledge of the ' more than 1.5 ...

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n.8: In Davis, the Honorable Justice Posner opined that " equating ' jointly-undertaken activity ' under § 1B1.3, to conspiracy is incorrect." Conspiracy liability, as defined in Pinkerton V. United States, 328 U.S. - 640, 646-48, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), is generally much broader than ' jointly undertaken criminal activity under 1B1.3.'"

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... kilograms ' that others would mport and distribute ' was even accountable ? " (id.) (The " direct acceptance was ' more than 50 grams at BOL 38)

Nevertheless, " 100 pounds of methamphetamine " at this " modification proceeding " was certainly not applicable, and as to such, cited that " the additur of any quantity beyond the ' 4.4 kilogram sentencing cliff,' would be a material breach of the the terms of the agreement as to the quantity element." (id. pg.'s 15 & 16)

During the pendency of the motion, Petitioner filed a document entitled " Judicial Notice and Supplemental Authority," to the court as to Judicial decisions that were made public post-filing of the response, to which beared direct concern to the issues raised in the pleadings. This to which was a D.C. Circuit Appellate decision in United States V. Stoddard, N. 15-2060 (D.C. Cir. June 15, 2018) [9]

This to be sgarely in line in making determination's as to the 9th Cir. directive to determine " what portion of the 100 pound quantity ' if any ' [Petitioner] was liable." (id. DKT. # 2396, pg.'s 3-4, Appx. #

On July 6, 2018, Petitioner again made " Judicial Notice and Supplemental Authority " to the district court regarding a case handed down in the 9th Cir. in United States V. Vera, No.'s 16-50364, and 16-50366 (9th Cir. June 25 2018) (DKT. # 's 2414, & 2415)

These to which were relevant to the pleading's and arguments as set forth by Petitioner regarding the governments " offer of facts ' in plea agreements,' in exchange for benefits ' in the form of ' drug quantity ' ...

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n.9: The Stoddard court cited a 9th Circuit decision in United States V. Banuelos, 322 F. 3d. 700, 704-06 (9th Cir. 2003) which dealt with an issue of " an individualized approach " in sentencing on the basis of drug - quantity. Also the 7th Cir.'s decision in Davis, supra, regarding the " Pinkerton Liability." (id.)

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... determinations,' and evidence that bears and ' indicia of reliability.'" (citing U.S.S.G. § 6A1.3(a))

(c) DENIAL OF § 3582(c)(2)-(JUDGMENT HERE ON REVIEW):

On August 7, 2018, the district court denied relief under 18 U.S.C. §-3582(c)(2) as to the U.S. Sentencing Commission's amendments to the U.S. Sentencing Guidelines at Amendment 782 (788)(DKT. # 2420, Appx. # 7)

It did so by recognizing all of the above mentioned, aside from the request's for Judicial Notice for which it made no mention. It did however, adopt " verbatim the government's position," to which it now too relied upon the " presentnece investigation report ("PSR") as the basis for it's ' new findings.'" This in complete controvention of the " acceptance of the plea agreement as ' the basis for sentencing ' in the original sentencing proceeding.'" (id. pg.'s 2-3)

It too recognized the directive of the 9th Cir. as to it's remand under the Mercado-Moreno decision, however, continued in again stating;

> " Having fully considered the facts admitted by the [Defendant] in the plea agreement, and the 'uncontested facts in the presentence Report,' 'the court makes the supplemental finding' that the defendant exercised 'direct control and supervision over the entirety of the drug distribution of the RICO conspiracy and narcotics conspiracy ' charged by the grand jury ' in the case that the defendant was responsible for ' more than 45 kilograms of methamphetamine mixture' the stipulated facts in the plea agreement state that [Defendant] was the organizer and leader in a conspiracy involving five or more participants and ' the uncontested facts in the presentence report establish that' [d]uring the course of the investigation agents seized ' at least 100 pounds of methamphetamine , 2,765 pounds of cocaine, 40,300 pounds of marijuana and more than a dozen firearms."

(id. Citing ECF No. 2014, ECF No. 2048 at 9)

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The court went on in this matter stating: [10]

" This is ' **relevant conduct** ' that must be considered in determining whether the [defendant] is **eligible** for a sentencing reduction in light of Amendment 782. "

also;

" The court **finds** that the ' defendant personally ' counseled, commanded, induced, procured or wilfully caused the distribution of ' **more than 45 kilograms of methamphetamine mixture** ' during the course of the conspiracy. " **USSG § 1B1.3, cmt. n. 2 (2014)**

It therewith capped off this " **new finding** " with the statement that;

" This **finding** is necessary for this court to determine whether the defendant is entitled to a sentence reduction under Amendment 782 of the Sentencing Guidelines and **does not contradict any ' findings made by the court in the sentencing hearing.'"**

On August 17, 2018, Petitioner filed a notice of appeal to the **Ninth Circuit. (See U.S. Court of Appeals Case No. 18-50276, DKT. # 2)**

(d) SECOND APPEAL TO THE SECTION 3582(c)(2) DECISON HERE ON REVIEW:

Upon briefing schedule, Petitioner made the claims that:

ISSUE # 1: The district court clearly errored in denying eligibility for a sentence modification pursuant to 18 U.S.C. § 3582(c)(2), by Aggrandizing the Drug Quantity to which was agreed to in the Written Plea Agreement, and Accepted by the court at the original sentencing proceeding, and to which was the basis for the sentence imposed as factual basis threin as opposed to the presented as objected to Presentence Report. This by now " making use of said PSR as uncontested " as the basis to deny relief.

(Id. Ninth Circuit Case No. 18-50276, DKT # 4)

n.10: This assertion of " uncontested facts in the PSR " connote that the PSR was not originally objected to, however, as presented herein, the court unambiguously rejected the PSR and it's " factual basis " in favor of the "written plea agreement," and to which ruled the objection's moot. Also, the Mercado-Moreno decision to which the 9th Cir. issue the remand under, and rejected the proposition that Fed. R. Crim. P. 32, and USSG § 6A1.3 apply in this modification proceeding and apply only in " original sentencing proceedings." id. 869 F.3d. at 956. This however, is in direct controvention to yet another 7th Cir. decision in United States V. Neal, 611 F.3d 399, 402-03 (7th Cir. 2009) and is a " Circuit-split " therewith.

On 1-28-2019, Petitioner notified the 9th Cir. of a " non-response " from the government as to it's scheduling order. **(id. App. DKT. # 's 13 & 16)**

Thereafter, Petitioner received the government's response, with an additional envelope inside purporting to be the original which was " sent back " for lack of postage. This however, was inconceivable, for there was zero postage appended thereto, and no postmark. **(id. DKT. # 14)** As to such, the 9th Cir. **GRANTED** permission for an extension of time to file a **REPLY** brief. **(id. DKT # 14)**

As the government argued virtually the same as the district court, Petitioner pointed to the " erroneous calculation's, " and the **3582(c)(2)** proceeding was " **not a full-resentencing under Dillon** " and the fact that as pointed herein at **n. 9, supra,** the **Mercado-Moreno** decision stated that **Fed. R. Crim. P., nor USSG § 6A1.3** applied in these proceeding's, and thus, if the PSR was " rejected in this first instance, ' **it could not be ressurected in the modification proceeding.**'" Thus, the government was mistaken as to it's understanding of the nature of the **3582(c)(2)** proceeding's. **(id. DKT. # 15,- Reply at pg.'s 1-11)**

Also, the Petitioner's case were distinguished from the decision in **Mercado-Moreno,** as the analytical framework thereof were not on all fours. **(id. at 11-18)** This for as cited in the 9th Cir. decision, the district court " **adopted the PSR in the first instance** " **(i.e. At the original sentencing proceeding)** Thus, was able to " make use of such " in the modification proceeding as a basis for it's decision. **(id. 11, Citing Mercado-Moreno, - 869 F. 3d. at 951)**

(e) DECISION OF THE NINTH CIRCUIT HERE ON REVIEW (CERTIORARI):

On March 12, 2019, The 9th Cir. affirmed. In accepting the government's and the district court's position, it stated therewith, that;

> " The court's quantitiy finding is amply supported by the facts contained in the plea agreement ' and the presentence report- ("PSR").' Contrary to Heredia's contention, the district court was not precluded from relying on the uncontested facts in the PSR to determine drug quantity. (Citing Mercado-Moreno, at 957) That the district court adopted the plea agreement's Guidelines calculation at sentencing, rather than the calculation stated in the PSR, does not change this conclusion."

(See United States V. Heredia, 758 Fed. Appx. 625 (9th Cir. 2019)(Appx. # 8)

(f) PETITION FOR PANEL REHEARING (EN BANC):

On 4-02-2019, Petitioner filed a " petition for panel rehearing." (App-DKT. # 19) Therein, Petitioner basically posited that, by allowing for the resurrection of the PSR which was rejected in the original sentencing proceeding, in favor of the " stipulated Guideline sentence embedded in the plea agreement," during a " modification proceeding," and to which disallows USSG-§ 6A1.3 (and Fed. R. Crim. P. 32) has effectively turned said proceeding into a " full resentencing " and runs afoul of " clearly established Supreme Court decision," including the " Ninth Circuit's decision towhich the original remand was issued. See United States V. Mercado-Moreno, 869 F. 3d. 942, 957. (9th Cir. 2017)(quoting Dillon V. United States, 560 U.S. 817, 826, 130 S.Ct. 2683, 177 L.Ed. 2d. 271 (2010)), and Houghes V. United States, 138 S.Ct. 1765, 201 L.Ed. 2d. 72 (2018).

On 6-17-2019, the panel voted to deny the petition. (App. DKT. # 20) (Appx. # 9) and on 6-17-2019, the 9th Cir. issued it's mandate in the matter (App. DKT. # 21, Appx. # 10)

As to such, Petitioner respectfully presents this Petition for certiorari, for judges Nation wide are making " new finding's " during modification proceeding's beyond the scope of written plea agreements, and and finding's by juries, this practice must cease;

REASONS FOR GRANTING THE PETITION

Petitioner presents herein a matter of **National Importance** for district, and appellate courts accross the Country have employed the practice of recalculating " **drug quantity** " beyond the ceiling (" **sentencing cliff** ") of the subsequent or additional **Guideline base offense level** embedded in **USSG § 2D1.1(c)** in " **modification proceedings** " **pursuant to 18 U.S.C. § 3582(c)(2).**[11] This in violation of clearly established decisions rendered by this Honorable Court regarding the very issues therein. See **Dillon V. United States, 560 - 560 U.S. 817, 130 S.Ct. 2683, 177 L.Ed. 2d. 271 (2010).**

This recalculation of drug quantity, is being effectuated, " without a finding by a jury," **(after a case of trial by jury),** and outside of the " stipulated Guidleines ranges (and facts therewith) established by valid plea agreement(s) to which are accepted by the court of first instance, as a " basis for it's original sentence." **(in the case of a plea agreement).**

This " recalculation process " to which recalculated drug quantity beyond the sentencing range as established by a district court of first instance in the modification proceeding pursuant to **§ 3582(c)(2),** effectively transforms the proceeding into a " **full resentencing proceeding,**" to which was condemned by this Honorable Supreme Court in **Dillon, supra, at 826.** where it stated:

> " **By it's terms, 3582(c)(2) ' does not authorize a sentencing or a resentencing proceeding.' Instead, it provides for the' [m]odification of a term of imprisonment by giving the courts the power to reduce an otherwise final sentence in circumstances specified by the Commission.'"**

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n.11: Title 18 of the United States Code, at Section 3582(c)(2) states: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequntly been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o),...the court may reduce the term of imprisonment, after considering the factors set for-

Cont'd

The Court also stated therewith, that;

> **" Any reduction must be consistent with applicable policy statements issued by the Sentencing Commission. 'The relevant policy statement USSG § 1B1.10, instructs courts proceeding under § 3582(c)(2) to substitute the amended Guideline range while leaving all other guideline application decisions unaffected.'"**

Id. at 827.

Thus, there are essentially " **two prongs** " one must meet in order to be considered for a " **modification of sentence:" (1)** " the sentence must be based on a ' **sentencing range** ' that has been lowered by the Sentencing Commission," and **(2)** " such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Id.

This is widely known as the " **Two-Step Dillon approach ' to determine what is known as ' eligibility for a sentence reduction under Section 3582(c)(2).'"**

A. BASED ON A " SENTENCING RANGE " IN THE PLEA AGREEMENT CONTEXT:

This Honorable Court has had the opportunity to explain the " **based on a sentencing range,** " in the context of a written plea agrement, in it's landmark decision in **Freeman V. United States(2011)** Therein, the Court cited that " a defendant who enters into an **11(c)(1)(C) agreement,** is ' **eligible** ' to seek a reduction in sentence pursuant to **18 U.S.C. § 3582(c)(2),** based on the reduction to the ' **Sentencing Guidelines range.'" 131 S.Ct. at 2695.**

However, as the plurality of the Court actually stated that a sentence was " **based on a range that was subsequently lowered, ' if the Guidelines were part of the analytical framework the judge used to determine the sentnece.'"** Freeman, **131 S.Ct. at 2692-93 (Kennedy,J. Plurality Opinion)**

... **th in section 3553(a) to the extent that they are applicable, if such a reduction in consistent with applicable policy statements issued by the Sentencing Commission." Id. 18 U.S.C. § 3582(c)(2), at Appx. # 1)**

As a Four Justice plurality had made that analysis, **Justice Sotomayor** concurred in the judgement, however, stating that as " the term of imprisonment would be ' **based on the agreement,**' it would ' bar a defendant seeking relief under § 3582(c).'" **Id. at 2692-97.** However, **Justice Sotomayor** carved two exceptions where a sentence issued pursuant to a **(C)** agreement is nevertheless, " **based on a sentencing Guidelines range.'" id. 2697-98. ((1) where the agrement itself calls for a sentence to be " within a particular Guidelines range, ' which the court then accepts;' and (2) a plea agreement provides for a specific term of impirsonment, ' such as a number of months, and makes clear that the basis for the specified term is a Guidelines sentencing range,'" this to which is evident.)**

The Ninth Circuit (from which this Petitioner's case is derived) originally adopted this approach, See United States V. Austin, **676 F. 3d. 924, 927 (9th Cir. 2012)(Citing Marks V. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed. 2d. 260(1977))**

However, in **2016,** the 9th Cir. **overruled** it's holding in Austin and adopted the plurality's opinion. See United States V. Davis, **825 F. 3d. 1014, 1022 (9th Cir. 2016)(" ...[we]** adopt the analysis of the D.C. Circuit in **Epps,** that there was no common denominator in **Freeman '** because the plurality and concurring opinions do not share common reasoning whereby one analysis is a logical subset of the other.")(**Citations omitted)**

It therewith applied the plurality's approach, citing "[We] hold that **Davis ' is eligible for relief '** under § 3582(c)(2) because,' the distr-ict court's decision to ' **accept the plea agreement and impose the recommended sentence '** was ' **based on the Guidelines.'" Id. 825 F. 3d. at - 1027(Quoting Freeman, 564 U.S. at 534)(Plurality Opinion)**

AS to the Circuit splits over this issue, this Honorable Court once again addressed this issue, and clarified. See Houghes V. United States, 138-S.Ct. 1765, 201 L.Ed. 2d. 72 (2018). This by citing, " to resolve uncertainty from this Court's divided decision in **Freeman,** the Court now holds,' a **sentence imposed pursuant to a Type-C agreement is Based-on the [defendant's] Guidelines range** ' so long as the range was ' **part of the analytical framework the district court relied on in imposing the sentence** or **accepting the agreement.'"** Id.

B. Petitioner's Plea Agreement is Not a C-Type Agreement, it is a Type-B, however, is rooted and grounded in the Express Guidelines Provisions (Recommendation's) therein to which were Accepted as the " Basis of the sentence " as Opposed to the Presentence report ("PSR") and is thus, the Specific Guidelines range therewith, is " the analytical framework of the sentencing ledger," and thus, Petitioner's sentence is " Based on-the Guidelines range pursuant to USSG § 2D1.1(c)(1) which has a threshold quantity range of " more than 1.5 kilograms of methamphetamine, to which has now been amended to § 2D1.1(c)-(2) to which has contains a threshold ceiling of 4.5 kilograms. Any additur beyond this 4.5 kilo ceiling during this " modification proceeding, " without specifying such in the plain language of the written plea, or found by a jury, in the original sentencing procceding is an impermissible use of 18 U.S.C. §-3582(c)(2), and in violation of this Court's decision in Dillon V. United States, (2010), and rights Guaranteed by and through the Fifth and Sixth Amendment, too a material breach of the written plea, agreed to by the parties in the first instance.

Petitioner's " plea agreement " has a clause stating that it is a **Rule-11(c)(1)(B) agreement. " ("Not Binding Upon the Court," see, supra, Cl. IX, pg. 12)** Nevertheless, there are " **specific provisions (i.e., Stipulations)"** therein that " **specifically established** " a specific **recommended Guidelines range,"** that was subsequently accepted by the Court as the basis for it's " original Guidlines sentencing range. " See USSG § 1B1.2(a); also Braxton-V. United States, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed. 2d. 385 (1991).

As " plea agreements amount to contracts," See Puckett V. United States 556 U.S. 129, 137 (2009)(Citing Mabry V. Johnson, 467 U.S. 504, 508, 104 S.Ct. 2543, 81 L.Ed. 2d. 437 (1984)), the should be interpreted as, a contract under state law. " See Kernan V. Cuero, 583 U.S.___, (2017)(Citing Ricketts V. Adamson, 483 U.S. 1,5, n.3, 107 S.Ct. 2680, 97 L.Ed. 2d. 1 (1987))

The 9th Cir. has made clear that," In assessing the scope of the facts established beyond a reasonable doubt by a guilty plea, [we] must look at what the defendant actually agreed to-that is, ' **what was actually established beyond a reasonable doubt.'"** See United States V. Jauregui, 918 F. 3d. 1050, 1056 (9th Cir. 2019)(" **Our analysis depends on what facts Jauregui admitted to when he entered his guilty plea")** It went further therein to state, " When sentencing results from a guilty plea, ' [t]he government has the burden at the plea colloquy to seek an **explicit admission of any unlaful conduct which it seeks to attribute to the defendant ' at sentencing.'" Id. (Citations omitted).**

Here, the " **express Guidelines provisions, ' specifically established ' by the written plea agreement ' and accepted by the court as the basis for it's sentence, '** in the first instance (i.e., Original Sentencing) were as to the " **Drug Quantity of more than 50 grams of methamphetamine (Actual) in the " charges in the indictment," (See supra, at I, cl. (ii), pg.** 10) **and " knowledge of more than 1.5 kilograms of ' others in the conspiracy would import and distribute,'" (see id. pg. 10)** the commensurate Guidelines range " specifically established under § **1B1.2(a) " at the time, was Base Offense Level 38. (See id. pg. 12 as USSG § 2D1.1(c)(1)(2012)(See also Appx # 13)**

This Honorable Supreme Court has made perfectly clear with the procedural nature of the district court's " **acceptance of a plea of guilty,**" that: " **A plea of guilty and the ensuing conviction comprehend ' all of the factual elements necessary to sustain a binding judgment of guilt and a lawful sentence.'**" See United states V. Broce, **488 U.S. 563, 569, 109 S.Ct.-757, 102 L.Ed. 2d. 927 (1989)**

Though the nature of the non-binding **Rule 11 plea** under **(c)(1)(B),** was contemplated by the parties, the district court subsequently accepted such as the " **basis for it's judgment and sentence,**" and " **rejected the PSR** " therefore, the Petitioner's original sentence is " **based upon the written plea agreement, and the express provisions therein,**" **to which the analytical framework as this** Court's decision in Freeman **and** Houghes has made perfectly clear, this Petitioner is eligible for a reduction in sentence under **18 U.S.C. § 3582(c)(2),** and any amendment, to the original sentence and it's written agreement therein as to the " **Drug quantity** " is an impremissible breach of the " original sentencing ledger," and effectively transforms the " modification proceeding " into a " **full re-sentencing** " in violation of this **Court's** decision in Dillon, **supra.**

C. Recalculating Drug Quantity in a " modification proceeding " pursuant to Section 3582(c)(2) by making " New Finding's " that were not originally made, effectively transform the modification proceeding into a " Full re-sentencing " inviolation of this Court's decision in Dillon V. United States (2010), and this violative practice should cease;

Over the last decade, U.S. District Courts and Appellate Courts the same have allowed for the " **new fact finding** " by judges during the **3582(c)(2)** proceeding's for purposes of " **drug quantity calculations** " to satisfy the court's determination's whether an individual defendant is ...

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... ' **eligible** ' for modification and for relief pursuant to amendment's to the **U.S. Sentencing Guidelines,** made by the **U.S. Sentencing Commission."** [12]

However, as contrary to the Petitioner's case herein, in virtually everyone of these decision's, they too specified that these " **finding's** " may not be " inconsistent with the ' **finding's at the original sentencing proceeding's.'"** Therewith, and also, as contrary to this case, virtually every one of those decision's, whether by jury or by plea agreement, have had the court " **adopt the finding's of the pre-sentencing report ("PSR")** at the original sentencing," and were a part of the original record.

This Petitioner's sentence (original) relied solely upon the " **written plea agreement,** and affirmatively ' **rejected the PSR therewith.'"**

This Honorable Supreme court held in **Dillon,** that: " By it's terms, 3582 (c)(2) ' **does not authorize a sentencing or a resentencing proceeding.**' Instead, it provides for the '[m]**odification of a term of imprisonment,**' by giving the court's power to reduce an otherwise final sentence in circumstances specified by the Commission." **Dillon, 817 U.S. at 826.**

Therewith, it made clear:

> " **Any reduction must be consistent with applicable policy statements issued by the sentencing Commisson.' The relevant policy statement, USSG § 1B1.10, instructs courts proceeding under § 3582(c)(2) to 'substitute the amended Guidelines range, while leaving all other guideline application decisions unaffected.'"**

Id. at 827.

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n.12: See United States V. Wyche, 741 F.3d. 1284, 1293 (D.C Cir. 2014)(" If the original sentencing court failed to make a ' specific drug quantity calculation,' the resentencing court may ' have to make it's own quantity finding ' in order to determine the defendant's guidelines range."), United States V. Rios, 765 F. 3d. 133, 138 (2d. Cir. 2014) ("...nothing prevents a district court from making ' new findings of fact ' when ruling on a § 3582(c)(2) motion,...")...

Thus, the only procedure for the court to make based upon § 3582(c)(2) per the express language in the statute, including this Court's decision in **Dillon,** was to identify the " express finding's in the original sentencing proceeding, and it's basis for such. " Here this was **" more than 50 grams of actual methamphetamine (charge in the indictment), and ' knowledge that others would import and distribute more than 1.5 kilograms...'" (id. pg. 10, supra)**

This more than statement is commonly found where " at the time this may be connected to the highest possible Offense Level under **USSG § 2D1.1(c)(1)** at 38 to which was applicable here. However, these were the express Guidelines provisions as to " **drug quantity** " in regards to plea negotiations through full and fair exchange in the " original proceeding." This also, is what the court " expressly relied on in making it's original sentence."

Thus, any additur to any specific quantiy, not found by the court, nor expressly embedded in the plain language of the plea agreement **(Not the PSR)** for the **PSR** was rejected in favor of the the written plea, including it's factual basis and it's Guideline range. " **(id. pg.'s 14-16, supra)**

These contain ceilings after it's base of **50 grams (to 150 grams USSG §-2D1.1(c)(5) Level 30), or 1.5 kilograms (to 4.5 Kilograms USSG § 2D1.1(c)(2)-BOL 36) applicable here.** Thus, any additur in reality beyond the **150 grams, must** have been based upon it's finding's of what is known as " relevant

... **United States V. Peters, 843 F. 3d. 572, 577 (4th Cir. 2016)(".. district courts may make additional findings on drug quantities attributable to defendants in § 3582(c)(2) proceedings.") United States V. Valentine,-694 F. 3d. 665, 670 (6th Cir. 2012)(" if the record does not reflect a specific quantity ' finding ' but rather a finding or a ' defendant's admission ' that the defendant was responsible for ' at least ' or more-than, ' a certain amount, then modification court ' must make supplemental findings based on the available record,..") United States V. Hall-**

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... conduct " under **USSG § 1B1.3,** to which was agreed to in the plain language of the plea agreement accepted by the district court.(**id. pg. 13)** Therefore, under the " relevant conduct " of others in furtherance of this agreed to activity, the **1.5 kilograms,** at the time had no ceiling an it's highest offense level attached thereto of **BOL 38.** Nevertheless, this **1.5 kilograms, now** contains a ceiling of **4.5 kilograms. Id. USSG § 2D1.1(c)(2).**

Under **§ 3582(c)(2),** and **Dillon,** all that there is to do, procedurally is to identify the original Guidelines range, and " **substitute** " such, leaving all other applicable Guidelines ranges unaffected. **Id. at 827, supra.** Any additur to a " specific quantity, " beyond the **4.5 (or 4.4 cliff)** would be an impermissible use of the " modification mechanism " under **3582(c)(2),** and effectively transform the proceeding into a full-resentncing and run afoul of this Court's ruling in **Dillon.**

Furthermore, in a case of a " **written plea agreement** " accepted by the court in the fist instance, any additur of " **drug quantity** " not specified in the plain language in the four corners of the contract, during a " modification proceeding," is a material breach of such. **See Santobello V. New York, 404 U.S. 257, 262 (1971).**

There is **also,** now serious **Fifth and Sixth Amendment** consequences per-

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... 600 F. 3d. 872, 876 (7th Cir. 2010)(" nothing prevents this court from making ' new findings' that are supported by the record.."), United States V. Moore, 706 F. 3d. 926, 929 (8th Cir. 2013)("[we] have agreed that district courts may make supplemental findings in a § 3582(c)(2) proceeding..") United States V. Mercado-Moreno,869 F. 3d. 942, 954-55-(9th Cir. 2017)(" In those cases where the sentencing court's quantity finding is ambiguous or incomplete, a district court may need to identify the the quantity to a defendant with more precision,..") United States V. Battle, 706 F. 3d. 1313, 1319 (10th Cir. 2013), and United States V. Hamilton, 715 F. 3d. 328, 340 (11th Cir. 2013)

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... the dissenting decision in Dillon, as **Justice Stevens** put it, " **new findings** in the modification proceeding ' create an unacceptable risk of depriving a defendant's long-settled constitutional protections.'" **Id. (Citing Apprendi V. New Jersy, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed. 2d. 435 (2000)... Ring V. Arizona, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed. 2d. 556 (2002);... Blakely V. Washington, 542 U.S. 296, 304, 124 S.Ct. 2531, 159 L.Ed. 2d. 403 (2004))**

This court has now clarified this fundamental principle yet again, in it's holding in United States V. Haymond, 588 U.S.___(2019)**(Slip Op. at 7)(Quoting Blakely, supra, " Because the Constitution's guarantees cannot mean less today than they did when they were adopted, it remains the case taoday that ' a jury must find beyond a reasonable doubt every fact ' which ' the law makes essential to [a] punnishment' that a judge might later seek to impose." Id. 542 U.S. at 304 (quoting Bishop § 87, at 55))**

Thus, per **Apprendi, Blakely and Haymond,** the additur of the " drug quantity calculation," not found by a jury or " admitted by this Petitioner in the express provisions of the written plea agreement " is a violation of the Fifth and Sixth Amendments to the U.S. Constitution, including a material breach of the plea agreement, and most certainly this " **new finding** " runs afoul of this Court's rulling in **Dillon,** for this effectively transformed this modification proceeding into a " full resentencing," to which this Court has made clear it is not.

Therefore, the court erred in making " new finding's " during the § 3582(c)(2) proceeding, based upon the finding's in the **presentence investigation report ("PSR")** to which was affrimatively rejected in favor ...

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... of the written plea agreement, that of which disallowed an amendment to the Guidelines ledger that of which was specifically established therein, at more than 1.5 kilograms of methamphetamine at USSG § 2D1.1(c)(1), now which is 1.5 to 4.5, and an Amendment thereto USSG § 2D1.1(c)(2), and a Base Offense Level of 36 (as opposed to 38), and this Petitioner is in fact " eligible " for relief under 18 U.S.C. § 3582(c)(2), and the U.S. Sentencing Commission's Amednment's to the U.S. Sentencing Guidelines at Amendment 782.

For the district court to inject the PSR and it's vague and conjectured statements into the " modification proceeding " to which contained astronomical quantities of controlled substances therein " and somehow lable them as " uncontested " when it's ruling in Mercado-Moreno, supra, does not allow for the " objections " to be made thereto under Rule 32, or USSG § 6A1.3, id. 869 F. 3d. at 956, gave the court carte blanch to make new finding's during a modification proceeding, this practice must cease.

CONCLUSION:

WHEREFORE, the district court (affirmed by the 9th Circuit Court of Appeals) impermissibly made " new finding's of drug quantity " beyond the threshold (ceiling) of more than 1.5 kilograms of methamphetamine specifically established " by the written plea agreement accepted by the court at the " original sentencing proceeding " as the " basis for it's sentence " during a modification proceeding pursuant to 18 U.S.C. § 3582(c)(2), comitted error and as Court's accross this Great Nation have adopted this practice as common, this Honorable Court should GRANT certiorari herewith to clarify it's meaning in it's decision in Dillon to condemn this practice therewith. Also to clarify the " Circuit-split " between the 7th Cir. decsion in Neal,supra, and the 9th. Cir. decision in Mercado-Moreno, supra, respectfully.

PETITIONER, PRO SE AMANDO VILLARREAL HEREDIA

8-12-2019