No. 19-6067

IN THE

SUPREME COURT OF THE UNITED STATES

FRANCISCO SUAREZ, — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

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(Your Name)

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QUESTION(S) PRESENTED

I. WHETHER THE CIRCUIT AND DISTRICT COURT COMMITTED CONSTITUTIONAL PROCEDURAL ERROR BY FAILING TO WEIGH THE MANDATED PUBLIC SAFETY CONCERN, VIOLATING THE SPIRIT OF U.S.S.G. § 1B1.10(b)(1), COMMENTARY NOTE 1(B)(ii) CAUSING: AN INTRA-CIRCUIT CONFLICT WITH UNITED STATES V. SMITH, AND CONFLICTS WITH THE EIGHTH CIRCUIT COURT IN UNITED STATES V. DARDEN?

II. WHETHER THE APPELLATE COURT ERRED BY APPLYING AN INCORRECT LEGAL STANDARD OF LAW ON THE DISPARITY RULING WHEN IT RELIED ON UNWARRANTED SIMILARITIES AMONG PETITIONER'S DIFFERENTLY SITUATED CODEFENDANTS AS OPPOSED TO COMPARING PETITIONER TO SIMILARLY SITUATED DEFENDANTS CAUSING A DECISION THAT CONFLICTS WITH THIS COURT'S DECISION IN GALL V. UNITED STATES?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] 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:

Abraham, Timothy J.

Aldazabal, Mauricio Lopez

Almon, Jr., Thomas Franklin

Athas, William Leonard

Avila, Anibal

Brady, Jr., Robert J.

Brown, Hon. Stephen T.

Casuso, Louis

Docobo, Richard Douglas

Dube, Hon. Robert L.

Fajardo Orshan, Ariana

Feigenbaum, Martin Alan

Ferrer, Wifredo A.

Flores, Hector L.

Flynn, Vincent Joseph

Galler, Brandy Brentari

Garber, Hon. Barry L.

Gardey, David

LIST OF PARTIES (CONT'D)

Gonzalez, Francisco

Greenberg, Benjamin G.

Gutierrez, Julio

Hanson, Mark Graham

Hoffman, Andrea G.

Jimenez, Julio E.

Jimenez, Marcos Daniel

Kassner, Steven Hunter

Kaufman, Allen Stewart

Lewis, Guy A.

Medina, Jose R.

Mendez, Marisa Tinker

Moore, Hon. K. Michael

O'Sullivan, Hon. John J.

Palermo, Hon. Peter R.

Quintero, Jr., Frank

Reynoso, Walker A.

Rodriguez Jose Rafael

Rubino, Mark

Ruiz, Humberto

Saldana, Alfonso M.

Schumacker, Howard J.

Scott, Hon. Thomas E.

Sedar, Steven

Senior, Robert K.

LIST OF PARTIES (CONT'D)

Sicard, Luis Fernando

Simms, Gerardo M.

Simonton, Hon. Andrea M.

Sloman, Jeffrey H.

Smachetti, Emily M.

Stein, Elizabeth Ruf

Suarez, Suarez

Suarez, Omar

Torres-Rodriguez, Hiram

Vila, George J.

Watson, Robert Thomas

Weinsten, David Stuart

Zamora, Alejandro Antonio

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals appears at Appendix A, to the petition and is an unpublished opinion. The opinion of the district court appears at Appendix B, as unpublished.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit decided this case on May 23, 2019. Jurisdiction to review this petition is conferred by Rule 13 of the Rules of the Supreme Court of the United States filed within ninety (90) days of the opinion. Additionally, the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVLOLVED

I. Fifth Amendment, Constitution of the United States—Due Process

STATEMENT OF THE CASE

On June 16, 2000, a jury convicted Francisco Suarez on a reverse sting operation for conspiracy to possess a detectable amount of cocaine (Count 1) in violation of 21 U.S.C.A. §§ 841(a)(1) and 846. (DE-276)

On September 29, 2000, District Judge K. Michael Moore, sentenced Petitioner to life imprisonment, a $10,000 dollar fine, and a special assessment of $100; with 10 years of supervised release. (DE-385)

Roughly 14 years after Mr. Suarez's sentencing, on July 18, 2014, the Sentencing Commission amended the drug quantity tables effective November 2014. The retroactive amendment 782 changed the weight equivalency thresh-hold to diverse drug types, lowering by two levels in the guidelines in some cases. See United States Sentencing Guidelines Manual Amendment 782.

On February 28, 2017, and based on Amendment 782, Mr. Suarez filed a pro se motion to reduce his sentence. (DE-681) Specifically, Mr. Suarez argued that the application of amendment 782 had the operative availability of reducing his sentence from life to 360-to-life and asked the district court to reduce his sentence to 360 months'. (Id at p. 3-4) He argued his conduct did not involve the use of firearms or violence and the fact that he would be deported, he emphasized, the court had the authority to consider dangerousness to the community and post sentencing conduct factors. (Id at p. 4)

Mr. Suarez also set out the factors under 18 U.S.C. § 3553(a) that warranted consideration in deciding the 3582(c)(2) motion. (Id at p. 4-11) See 18 U.S.C. § 3582(c)(2) (requiring the district court to consider the Section 3553(a) factors in deciding whether, and the extent to which, a 3582(c)(2) motion should be granted).

The Petitioner pointed out that he had a supportive family, including his daughter, three siblings and his Mother. (Id at p. 6) Mr. Suarez demonstrated that, even while in custody, he had taken full advantage of the BOP's educational opportunities by completing his GED and participating in many other classes, attaching a print-out as Exhibit A. (Id). He conveyed that he has not given up his faith in God, or in a justice system founded on those same principles that he believed in and professed to transitioning into a born again Christian, latched on to Bible studies, orates to other inmates at the Christian services, growing closer to his faith. (Id at p. 6-7) He argued that recidivism rates decreased sharply as inmates age, and while he was 37 years old when he went into custody, he was then 54 years old—a significantly different risk. (Id at p. 7-8)[2] His conduct while in prison has been extraordinary: Mr. Suarez has been put in positions of leadership within the prison working for the BOP's Trust Fund Department as a commissary employee close to 3 years; with "Outstanding" Institutional work history evaluations and has conducted himself as a model prisoner.

[2] As of the filing of this Writ of Certiorri, he is now 56 years old.

Mr. Suarez did not argue that his health warranted consideration under Section 3553(a): however, he would like to notice this Court that he has since been diagnosed as having contracted hepatitis C, and has been treated with the medication to combat the disease. He also argued that considerations of his remorse and sincere act of contrition, acceptance of responsiblity; and disparity in sentencing warranted the reduction, given that individuals with like conduct, for role, and enhancements received the reduction in light of amendment 782. (Id at p. 8, 9-11)

The government opposed the motion. It argued that a reduction was unwarranted because Appellant Suarez was the leader who directed other defendants who operated stash houses that contained cocaine and firearms, that since the court gave all three co-defendants that proceeded to trial the high-end of their guideline sentence, the court need not reduce Suarez's sentence because the high-end of his guideline sentence range is life imprisonment—the gist being that a reduction to 360 months (the low-end guideline range) imprisonment would create an unwanted sentence disparity with his less culpable co-defendants.

Appellant Suarez filed his reply to the government's opposition for the sentence reduction. He refuted all arguments in the government's opposition motion. Specifically, he argued against the government's assertions dealing with leadership for role and how the conduct was already considered; and also argued against the government's unwanted disparity argument if the Court reduced

Petitioner's sentence to the low-end of the guideline to 360 months, by invoking the rule of lenity and arguing that the low-end sentence of 360 months was the just outcome. See (DE-688, at p. 5-6

The district court denied the motion for reduction of sentence. Siding with the Government's rationale, the court concluded the reduction was unwarranted in light of the history and characteristics of Petitioner such as, his role for leadership and further concluded a sentence reduction would create a sentencing disparity when compared with his less culpable codefendants. In so doing, the court did not decide whether the denial of the reduction motion would create a sentencing disparity when compared against similarly situated defendants nationwide—as the Petitioner had argued in the reduction motion—a distinguished argument on disparity. Petitioner appealed the district court's decision in a timely fashion.

On appeal the Petitioner argued that the district court committed procedural error when it failed to evaluate public safety considerations in violation of U.S.S.G. § 1B1.10(b)(1), Commentary Note 1(B)(ii); Point One; and that the district court committed legal error when it applied an incorrect legal standard of law on the disparity ruling, Point Two; And that the district court erred in failing to consider whether the rule of lenity applied to U.S.S.G. Manual Ch. 5, Part A, Sentencing Table.

THE JUDGEMENT OF THE ELEVENTH CIRCUIT COURT OF APPEALS

Though Petitioner claimed the language of U.S.S.G. §1B1.10(b)(1), Commentary Note 1(B)(ii) uses the word "shall" in a commanding manner mandating that: "[t]he Court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction,..". . The Court of Appeals for the Eleventh Circuit decided "it was not required to do so." See (2019 U.S. App. LEXIS 15284 at p. 6.)

The Petitioner avers that a Writ of Certiorari is warranted for the procedural error outlined in Point I, because the decision rendered in Petitioner's case has caused an intra-circuit conflict with United States v. Smith, 568 F.3d 923, 927 (11th Cir. 2009) and conflicts with the Eighth Circuit Court in United States v. Darden, 910 F.3d 1064 (8th Cir. 2018). The Smith and Darden courts both have held that the dangerousness to the community consideration must be evaluated separate and apart from the 3553(a) factors, a consideration that was not weighed in Petitioner's case. Inferior courts also follow the clear dictates of Comm. N. 1(B)(ii). See United States v. Ayala, 540 F. Supp. 2d 676, 679 (W.D. Va., 2/26/08)

Secondly, the Court of Appeals relied on Gall v. United States, 552 U.S. 38 (2007), when it opined in Petitioner's case that "the need to avoid unwarranted sentencing disparities can also mean 'the

need to avoid unwarranted similarities among other coconspirators who were not similarly situated.' " See (2019 U.S. App. LEXIS 15284 at p. 4) However, the Appellate Court did not consider Petitioner's comparable defendant claim that was brought to the court's attention and did not consider his argument of the need to avoid an unwarranted nationwide disparity among similarly situated defendants. A Writ of Certiorari is warranted because the Appellate Court's decision conflicts with this Court's decision in Gall, (Id at p. 56) when it noted that "neither the Court of Appeals nor the Government has called our attention to a comprable defendant []", hinting at a possible standard of law deviation by the court's incorrect application of the legal standard in the instant case.

Therefore, the Petitioner respectfully requests this Court reviews the judgement of the Eleventh Circuit Court of Appeals due to the intra-circuit conflict in the Eleventh Circuit and conflicts with the Eighth Circuit pursuant to Rule 10(a); and because the disparity decision in Point II conflicts with this Court's decision in Gall v. United States pursuant to Rule 10(c).

SUMMARY OF THE ARGUMENT

POINT I.

Petitioner contends that the district court and the Eleventh Circuit Court of Appeals procedurally erred by failing to evaluate the dangerousness to the community—public safety concern because it violates the express dictates of established circuit precedent, U.S.S.G. §1B1.10(b)(1), Commentary Note 1(B)(ii) and prejudiciously affected Petitioner's outcome. Though circuit precedent and Commentary Note 1(B)(ii)'s public safety consideration utilizes mandating consideration language such as, "the court shall consider", the Eleventh Circuit Court ruled that it "was not required to do so." Thus, the decision of the Circuit Court in Petitioner's case created an intra-circuit conflict and conflicts with the Eighth Circuit Court of Appeals.

POINT II.

Petitioner contends that the Eleventh Circuit Court of Appeals entered a decision utilizing an incorrect legal standard of law on the disparity ruling. Therein, the Circuit Court relied on unwarranted similarities among Petitioner's differently situated codefendants, despite Petitioner having brought the court the attention of a similarly situated comparable defendant in the form of charges, conduct and sentence who had received the relief Petitioner requested. Thus, the Eleventh Circuit Court of Appeals has decided an important federal question which conficts with this Court's decision in Gall v. United States, against Congress' intent with regard to nationwide disparity.

REASONS FOR GRANTING THE PETITION

I. WHETHER THE CIRCUIT AND DISTRICT COURT COMMITTED CONSTITUTIONAL PROCEDURAL ERROR BY FAILING TO WEIGH THE MANDATED PUBLIC SAFETY CONCERN, VIOLATING THE SPIRIT OF U.S.S.G. § 1B1.10(b)(1), COMMENTARY NOTE 1(B)(ii) CAUSING: AN INTRA-CIRCUIT CONFLICT WITH UNITED STATES V. SMITH, AND CONFLICTS WITH THE EIGHTH CIRCUIT COURT IN UNITED STATES V. DARDEN?

A. INTRACIRCUIT CONFLICT

Petitioner avers that the Eleventh Circuit's affirmation of his modification of sentence motion pursuant to 18 U.S.C. §3582(c)(2) was erroneous and contrary to its binding circuit holding in United States v. Smith, 568 F.3d 923 (11th Cir. 2009) and U.S.S.G. §1B1.10 (b)(1), commentary note 1(B)(ii).

Commentary Application Note 1(B)(ii) states in relevant part:

> "Public Safety Consideration—The Court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction,..".

U.S.S.G. §1B1.10(b)(1), CMT N. 1(B)(ii).

"The commentary and application notes of the Sentencing Guidelines are authoritive, unless they are plainly erroneous, inconsistent with the regulation they interpret, or contrary to the Constitution or federal law." Smith, supra, at p. 927 n. 1. (quoting Stinson v. United States, 508 U.S. 36 (1993); United States v. Torrealba, 339 F.3d 1238, 1242 (11th cir. 2003)).

In Smith the Court held:

> "[] [I]n determining whether to reduce a defendant's term of imprisonment and to what extent, a district court...(2) shall consider the nature and seriousness of the danger to any person or the community that may

be posed by the reduction." (citing) U.S.S.G. § 1B1.10(b)(1), Commentary Note 1(B).

Smith, Supra, at p. 927.

Relying on this passage in Smith, Petitioner contends the Eleventh Circuit affirmed his reduction motion contrary to Smith's holding circuit precedent, and commentary note 1(B)(ii).

In support of the denial of Appellant's reduction motion the district court mentioned only two considerations, "the history and characteristics of defendant" and the disparity with his less culpable codefendants." See (D.E. 695) While the history and characteristics of defendant and the disparity assessment are appropriate factors to consider under Section 3553(a)(1), (a)(6), and commentary application note 1(B)(i), they were not the only relevant factors here. The Court failed procedurally to mention, let alone analyze, the public safety consideration (CMT N. 1(B)(ii)) despite the fact that the pro se motion implored the court to do so. Petitioner contends this was error and ask this Court to exercise their judicial discretion and remand his reduction motion utilizing Supreme Court Rule 10(a) for the Eleventh Circuit's departure from the accepted and usual course of proceedings due to their inaction to answer the Statutory and Constitutional questions in the instant case. See New York City Transit Authority v. Beazer, 440 U.S. 568 (1979)

The Petitioner has been prejudiced procedurally by the district court's specific consideration of his leadership role as the basis to deny Appellant's reduction motion standing alone,

without evaluating the public safety consideration as outlined in commentary application note 1(B)(ii) at this re-sentencing stage doubly penalizing Appellant since that offense conduct was already incorporated into the guideline calculations. And the amended guidelines provided a mechanism for consideration of his role when it arrived at the new offense level 42. As such, the Circuit and district court's failure to analyze the public safety exposure violated the spirit of U.S.S.G. §1B1.10, commentary note 1(B)(ii).

Noteworthy, is the fact that the record of the original sentencing hearing is devoid of public safety considerations and we can assume at this re-sentencing stage that the district court's denial order absence of citation to cmt. n. 1(B)(ii), the roles impact on the public safety consideration was not analyzed as mandated. And the Eleventh Circuit simply stated that analyzing the "public safety considerations; [] was not required to do so." See Judgement at p. 6, (citing) Smith, 568 F.3d at p. 927. The government's response also did not present evidence of such nexus between Appellant's role and public safety, to demonstrate that reducing his term of imprisonment or "to what extent" may cause danger to the community. The government only cited to cmt. n. 1(B)(i), mandating the district court review the 3553(a) factors in its response. (DE-684 at p. 4) Additionally, though the government cited §3553(a), it did not set forth the §3553(a) factors in its opposition response at the lower district court level. Moreover, the government's response in opposition at the district court

failed to cite or set forth U.S.S.G. §1B1.10, App. N. 1(B)(ii). Petitioner's pro se motion below also did not set forth §3553(a) nor the policy statement 1(B)(ii). See 28(j) letter filed in the Eleventh Circuit Court of Appeals.

Moreover, the Eleventh Circuit Court's opinion in Petitioner's case failed to consider his supplemental of authority letter pursuant to Fed.R.App.Proc. 28(j), a distinct procedural error supporting a remand due to the opinion's intra circuit conflict with United States v. Douglas, 576 F.3d 1216, 1219-1220 (11th Cir. 2009).

Because the district court's denial Order does not reflect that the public safety consideration was analyzed in Appellant's reduction motion, this case should be remanded so that the Appellate Court can evaluate the lack of danger posed to the community by Petitioner's expected deportation, lack of violence, his acceptance of responsibility, and his post conviction rehabilitation. For those reasons, this Court should remand this case to the appellate court for further consideration of Mr. Suarez's reduction motion.

B. THE ELEVENTH CIRCUIT'S DECISION RENDERED IN THE INSTANT CASE CONFLICTS WITH THE EIGHTH CIRCUIT COURT OF APPEALS.

In affirming the district court's denial of Petitioner's reduction motion in this case, the Eleventh Circuit's decision conflicts with the Eighth Circuit Court of Appeals where the public safety concerns was weighed against Darden's reduction motion. See United States v. Darden, 910 F.3d 1064 (8th Cir. 2018)

The district court denied Darden's motion. In deciding whether to exercise its discretion to reduce Darden's sentence, the court noted that, had the victim died before Darden's original sentencing, the "underlying" murder, not narcotics distribution, would have determined his racketeering sentence. And Darden would have been ineligible for relief under those circumstances.

In deciding Darden's case, the Eighth Circuit Court held the district court must also weigh public safety concerns, (citing) 1B1.10 CMT N. 1(B)(ii). See (2018 U.S. App. LEXIS 5-6) It concluded that by specifically authorizing courts to take into account safety concerns, the Guidelines arguably open the door to the consideration of other post-sentencing facts as well. Id.

Thus, the court held because the district court gave more weight to the sentencing objectives, including providing just punishment and protection of the public, it affirmed the district court's judgement on safety concerns.

Therefore, the comparison between the Petitioner's judgement conflicts with the decision rendered in the Eighth Circuit Court of Appeals since: (a) the government waived opposition at the lower court on grounds that the nature of the underlying conviction was extremely serious by violent nature and that Appellant Suarez posed a serious risk to public safety. Nor did the government assert Suarez displayed violent behavior during his incarceration. In fact, the government's Answer Brief failed to refute and "did not present evidence of such nexus between Appellant's [leadership] role, [and gun enhancement] to demonstrate that

reducing his term of imprisonment may cause [future] danger to the community," even after being deported. (Opening Brief at p. 12) The government at the lower court's response and in its Answer Brief failed to offer a basis on which this Court could conclude that the district court's reference to his leadership role was related to an evaluation of his future dangerousness in determining "the extent of such reduction." 1B1.10(b)(1), CMT N. 1(B)(ii). It also failed to offer a basis of a future danger resulting from the criminal conduct convicted of, regardless of Appellant's request in his reduction motion for the government's and the court's late stage consideration of his acceptance of responsibility. (DE-681 at p. 8); And (b) the Eleventh Circuit's opinion in Petitioner's case concludes that the district court did not fail to follow proper procedure by not addressing public safety considerations because: "it was not required to do so." (Judgement Opinion at p. 6) The Appellat Court commingles Smith's (supra) holding— non-requirement to explicitly address all of the 3553(a) factors— bifurcating its other holding that weighing the public safety concern is unequivocally required and in about face claims that it is not required to do so in Petitioner's case.

Therefore the comparison between the Darden opinion against the decision rendered in Petitioner's case conflicts with the Eighth Circuit Court of Appeals. Petitioner states that the decision of this case falls within the ambit of the consideration this Court reviews on Certiorari pursuant to Rule 10(a), because of the manner in which the Eleventh Circuit decided an important question in a way that conflicts with the Darden decision.

II. WHETHER THE APPELLATE COURT ERRED BY APPLYING AN INCORRECT LEGAL STANDARD OF LAW ON THE DISPARITY RULING WHEN IT RELIED ON UNWARRANTED SIMILARITIES AMONG PETITIONER'S DIFFERENTLY SITUATED CODEFENDANTS AS OPPOSED TO COMPARING PETITIONER TO SIMILARLY SITUATED DEFENDANTS CAUSING A DECISION THAT CONFLICTS WITH THIS COURT'S DECISION IN GALL V. UNITED STATES?

Mr. Suarez argued in his reduction motion the need to avoid unwanted sentencing disparity with similar situated defendants in support of a reduction of his sentence within his §3582(c)(2) motion. See (DE-681 at p. 9-11) On appeal to the Eleventh Circuit Court of Appeals Petitioner again argued that failure to receive a reduction would cause disparate treatment against the comparison of the opinion and judgement in Whitt v. United States, LEXIS 186992 at ft. n. 2 (N.D. Ind., 11/13/2017; See also Appendix C, attached: Amended Judgement of Samuel L. Whitt, case number 95 CR 33 (N.D. Ind., 11/16/2015). The striking resemblence of the facts on Whitt, made the case for Petitioner's argument. For example, Whitt was sentenced to "life", was responsible for more than 150 kilograms of cocaine, was enhanced for leadership role and gun possession, and his criminal history landed him at a category IV (a greater category than Petitioner's category II). As Petitioner, Whitt was sentenced at level 43 of the U.S.S.G's. See LEXIS 186992 at (2017 U.S. Dist. LEXIS 2) In essence, Whitt was a similarly situated comparator to Petitioner in the form of conduct, charges and sentence. However, after Whitt filed his reduction motion pursuant to Amendment 782, his guideline level dropped from level 44 to 42 yielding a range of 360 to life. The district court reduced Whitt's sentence to 360 months', the low-end guideline range. Petitioner Suarez had

attached Whitt's amended judgement to the Appellate Court brief as evidence in support of the prejudice suffered from the disparate treatment from an equal comparator. However, the judgement of Petitioner's case in the lower courts committed legal error when it compared him to his codefendants after Petitioner presented both courts' attention to a comparable defendant (e.g., Whitt, supra) whom received a reduction from life to 30 years. On appeal in Petitioner's opinion, the Court reasoned that Gall v. United States, 552 U.S. 38, 54-55 (2007), held that: "[t]he need to avoid unwarranted sentencing disparities can also mean 'the need to avoid unwarranted similarities among other co-conspirators who were not similarly situated.' " See (Judgement at p. 4)

As in this case, the Eleventh Circuit Court of Appeals has implemented Galls consideration of "the need to avoid unwarranted similarities among other co-conspirators who were not similarly situated. See United States v. Clark, 289 Fed. Appx. 44 (11th Cir. 2008) citing Gall, 128 S. Ct. at 600.

Nevertheless, the Eleventh Circuit Court nor any Circuit Court has answered a question of competing interest of the like the Petitioner raises herein where the Court incorrectly considers the unwarranted similarities between Petitioner and his codefendants, but does not also consider the need to avoid unwarranted sentencing disparities among similarly situated defendants nationwide—despite having called the court's attention to a comparable defendant.

The Eleventh Circuit has found: "[a]bsent a similar situated comparator, [one] cannot show an unwarranted sentencing disparity." See United States v. Summersett, 504 Fed. Appx. 789 (11th Cir. 2012) (citing) United States v. Spoerke, 568 F.3d 1236, 1252 (11th Cir. 2009) ("A well-founded claim of disparity...assumes that apples are being compared to apples.")(quotation marks omitted).

Here, the Eleventh Circuit Court ruled citing Gall that Petitioner: "misses the point—it is the lack of similarity in their criminal conduct that warrants a longer sentence for [Petitioner]." See Judgement at p. 6, citing Gall, 552 U.S. at 54-55. Noteworthy, the Appellate Court did not consider the comparable defendant argument presented by Petitioner. Secondly, it is simply appaling to read this conclusion when Petitioner specifically argued that his sentence would be more honerous than all of his codefendants were he received the low-end sentence of 360 months' on Count one. See Initial Brief at p. 16. Reminding this Court that codefendants Sicard and Omar Suarez both were reduced their sentences to 293 months' on Count one and codefendant Avila received a rduced sentence of 262 months'. See (DE-677, 685 and 710 respectively.) Petitioner also argued then that he was not similarly situated compared to his codefendants, did not have "similar records" or were not "found guilty of similar conduct." See Id., at p. 16.

The Eleventh Circuit Court's reasoning in support of the denial goes contrary to Congress' primary goal in its enactment of §3553(a)(6) which was to promote national uniformity in sentencing rather than uniformity among codefendants in the same case. See United States v. Ronga, 682 Fed. Appx. 849, 859-60 (11th Cir. 2017).

B. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN SETTLED BY THIS COURT, AND WHICH CONFLICTS WITH THIS COURT'S DECISION IN GALL V. UNITED STATES.

In affirming the denial of Petitioner's reduction motion, the Eleventh circuit's decision conflicts with this Court's decision in Gall v. United States, supra. Petitioner claims though the Gall Court hinted that a court may consider unwarranted similarities among other co-conspirators. See Gall, 552 U.S. 54-56 The Gall Court did not decide whether a defendant (as Petitioner) that specifically presented a similarly situated "comparable defendant" to the courts attention, must the court consider the disparate treatment of the comparable defendant over the differently situated codefendants in his case? The Petitioner believes the answer was briefly touched upon but not directly answers the question in this Court's passage of the Gall Court: "that neither the Court of Appeals nor the Government has called our attention to a comparable defendant who received a more severe sentence." Id. at p. 56.

As a demonstration of prejudice, Petitioner argued in his appeal that had the lower courts applied the correct legal standard on the disparity ruling to comparable defendants as he has consistently argued throughout all proceedings, an outcome lowering his sentence from life to 360 months' may have ensued avoiding disparate treatment. See Initial Brief at p. 17-19. The Petitioner avers that a Writ of Certiorari is warranted because answering the proposed question that this Court has left unanswered in the Gall opinion has left open the door for the court of appeals to disregard Congress' primary goal to promote national uniformity in sentencing.

In light of the above, Petitioner invokes Rule 10(c) of the Supreme Court, states that this is an exceptional case for this Court to excercise it's supervisory power due to Eleventh Circuit's decision which conflicts with the Gall court, and the Appellate Court's failure to answer the Constitutional violation question regarding the nationwide disparity ruling. See New York City Transit Authority v. Beazer, 440 U.S 568 (1979).

Petitioner avers that proper consideration of sentencing disparity among similarly situated defendants may enlighten the district court to utilize it's discretion upon review of the string citation demonstrating how different courts reduced sentences after their guidelines level had lowered (in light of diverse amendments) from level 44 to 42; or level 46 to level 42,

reducing sentences from life to 360 months'. See primarily, Whitt v. United States, supra; United States v. Toledo-Yin, LEXIS 97202, (S.D. Ohio 11/19/2008)(same); United States v. Dukes, LEXIS 41149 (D. S.C. 4/27/2010)(same); and United States v. Tape, district court case number 88-28-cr-Ftm-10 (M.D. Fla., 6/3/2008), at docket entry 654, (same). See Initial Brief at p. 17-19.

This case should be remanded to the Eleventh Circuit Court of Appeals for a proper analysis using the correct legal standard of law in light of the above.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Francisco J. Duarez

Dated: 08-19-2019