NO._____

IN THE
SUPREME COURT
OF THE
UNITED STATES

2019-2020 TERM

JERRY BROWDY

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

I.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED BROWDY'S CONVICTIONS WHERE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT BROWDY'S CONVICTION AND THEREFORE, BROWDY'S MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

II.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED BROWDY'S SENTENCE WHERE THE DISTRICT COURT COMMITTED SENTENCING ERRORS.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iv
Opinion of the Court Below	2
Jurisdiction	2
Constitutional Provisions	2
Statement of the Case:	
1. Course of Proceedings	3
2. Statement of Facts	4
3. Facts Pertaining to BROWDY'S Sentence and Sentencing Hearing	15
Reasons for Granting the Petition:	
I. CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED BROWDY'S CONVICTIONS WHERE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT BROWDY'S CONVICTION AND THEREFORE, BROWDY'S MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED	22
II. CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED BROWDY'S SENTENCE WHERE THE DISTRICT COURT COMMITTED SENTENCING ERRORS	30

Conclusion 36

Certificate of Service 37

Appendices:

1. United States of America v. Jerry Browdy No: 17-15664-GG (11th Circuit, December 20, 2019) (unpublished)

2. Order Denying Browdy's Petition for Rehearing and Petition for Rehearing *En Banc* (March 11, 2020)

TABLE OF AUTHORITIES

Cases	**Pages**
Gall v. United States, 552 U.S. 38, 128 S.Ct. 586 (2007)	35
Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995)	29
Koon v. United States, 518 U.S. 81 (1996)	33,34
Rita v. United States, 551 U.S. 338, 127 S.Ct. 2456 (2007)	34
United States v. Avila-Dominguez, 610 F.2d 1266 (5th Cir. 1980)..	23,25-26,27
United States v. Bennett, 472 F.3d 825(11th Cir. 2006)	35
United States v. Bonilla, 579 F.3d 1233 (11th Cir. 2009)	35
United States v. Booker, 543 U.S. 220, 125 S.Ct. 738 (2005)	35
United States v. Brantley, 68 F.3d 1283 (11th Cir. 1995)	23,24
United States v. Charles, 313 F.3d 1278 (11th Cir. 2002).....	26
United States v. Eckhardt, 466 F.3d 938 (11th Cir. 2006)	20
United States v. Ellington, 348 F.3d 984 (11th Cir. 2003).....	28
United States v. Evans, 473 F.3d 1115 (11th Cir. 2006)	20
United States v. Garcia, 405 F.3d 1260 (11th Cir. 2005)	21
United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 2313 (1995).	21,28,29
United States v. Goetz, 746 F.2d 705 (11th Cir. 1984)	29
United States v. Guerra, 293 F.3d 1279 (11th Cir. 2002).....	25,26,27
United States v. Hamaker, 455 F.3d 1316 (11th Cir. 2006)	20

Table of Authorities
(Continued)

Cases (Cont.)	**Page**
United States v. Hasson, 333 F.3d 1264 (11th Cir. 2003)	23
United States v. Kim, 435 F.3d 182 (2nd Cir. 2006)	26
United States v. Livesay, 525 F.3d 1081 (11th Cir. 2008)	35
United States v. Moran, 778 F.3d 942 (11th Cir. 2015)	24
United States v. Morris, 20 F.3d 1111 (11th Cir. 1994)	26
United States v. Ndiaye, 434 F.3d 1270 (11th Cir. 2006)	20
United States v. Olano, 507 U.S. 725, 113 S.Ct. 1770 (1993)	36
United States v. Perez-Tosta, 36 F.3d 15527 (11th Cir. 1994)	26
United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008)	35,36
United States v. Rodriguez, 398 F.3d 1291 (11th Cir. 2005)	36
United States v. Saac, 632 F.3d 1203 (11th Cir. 2011)	35,36
United States v. Salman, 378 F.3d 1266 (11th Cir. 2004)	23,28,29
United States v. Thomas, 446 F.3d 1348 (11th Cir. 2006)	35,36
United States v. Toler, 144 F.3d 1423 (11th Cir. 1998)	23
United States v. Vera, 701 F.2d 1349, 1357 (11th Cir. 1983)	23
United States v. Williams, 390 F.3d 1319 (11th Cir. 2004)	26
United States v. Woodruff, 296 F.3d 1041 (11th Cir. 2002)	29

Table of Authorities
(Continued)

Cases (Cont.) **Page**

United States v. Yates, 438 F.3d 1307 (11th Cir. 2006)..... 28

Statutes

18 U.S.C. §3553(a) 22,31,34,36

18 U.S.C. §3553(a)-(f) 22

21 U.S.C. §841 18

21 U.S.C. §841(a)(1) 3

21 U.S.C. §841(b)(1)(A)(viii) 3

21 U.S.C. §841(c)(1) 18

21 U.S.C. §846 23

21 U.S.C. §851 17,18,19

28 U.S.C. §1254 2

Federal Sentencing Guidelines

U.S.S.G §2D1.1(a)(5) 15

U.S.S.G §2D1.1(b)(1) 15

U.S.S.G §2D1.1(b)(15)(A) 15,30

U.S.S.G §3B1.1 30

U.S.S.G §3B1.1(b) 16

Table of Authorities
(Continued)

Federal Sentencing Guidelines (Cont.) **Page**

U.S.S.G.§5H1.4..... 17,32

U.S.S.G. §5K2.0..... 34

Federal Rules of Criminal Procedure

Rule 29 28

Rule 29(b)..... 23,28

Rule 29(c)(2) 28

Rules of the United States Supreme Court

Rule 10.1 2

Rule 13.1 2

United States Constitution

Amendment V 2,21

Amendment VI..... 3,21,28

Other Authorities

"Soft Words of Hope": Giglio, Accomplice Witnesses, and the Problem of Implied Inducements, 98 N.W.U.L. Rev. 1129, 1130 (2004). 27

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The Petitioner, JERRY BROWDY (hereinafter "BROWDY"), by and through his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in the proceedings on December 20, 2019.

OPINION OF THE COURT BELOW

The Court of Appeals for the Eleventh Circuit entered a non-published opinion affirming the District Court's Conviction and Sentence, *United States of America v. Jerry Browdy,* on December 20, 2019. *Appendix 1*.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals affirming the Judgment of the United States District Court was entered on December 20, 2019. The Eleventh Circuit Court of Appeals entered its Order Denying BROWDY'S Petition for Rehearing and Petition for Rehearing *En Banc* on March 11, 2020. *Appendix 2*. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254 and Rule 10.1, Rules of the Supreme Court. This Petition for Writ of Certiorari is filed pursuant to Rule 13.1, Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT V

The Fifth Amendment to the Constitution provides, in relevant part that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person … be deprived of life, liberty, or property, without due process of law…."

UNITED STATES CONSTITUTION, AMENDMENT VI

The Sixth Amendment to the Constitution provides in relevant part that: "In all criminal prosecutions, the accused shall enjoy the right … to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

STATEMENT OF THE CASE

1. Course of Proceedings

On July 6, 2016, a federal grand jury issued a one count indictment against Brown Laster, Jr., BROWDY, Wesley Petiphar and William Rollerson charging them with knowingly and willfully combining and conspiring with each other to possess with intent to distribute and to distribute 500 or more grams of a mixture or substance containing a detectable amount of methamphetamine in violation of 21 U.S.C. §841(a)(1) and §841(b)(1)(A)(viii). (DE: 3).

The matter went to trial on June 2, 2017 and lasted seven (7) days. (DE:289-295). The jury was adjourned on June 12, 2017 to deliberate. On June 13, 2017, the District Court announced that the jury was unable to reach a verdict and the jury was adjourned. BROWDY remained incarcerated pending the new trial. (DE:224).

BROWDY again went to trial on July 19, 2017. (DE:387-393). The trial lasted seven (7) days. The jury returned its verdict on July 28, 2017, finding BROWDY guilty as to Count I. (DE:350; 393:23-24).

On November 3, 2017, BROWDY filed his Motion for Judgment of Acquittal or Motion for New Trial. (DE:412). The government filed their response on November 20, 2017. (DE:426). BROWDY'S Motion was denied on December 1, 2017. (DE:440).

BROWDY'S sentencing hearing was continued to December 19, 2017. The District Court overruled all of BROWDY'S objections and denied his request for a variance and departure. (DE:479).

On December 19, 2017, the District Court sentenced BROWDY to life imprisonment, followed by 10 years of supervised release together with a special assessment of $100.00 and a fine of $50,000.00. (DE:479:33-37;453;502). BROWDY timely filed his Notice of Appeal and is confined. (DE:458).

On December 20, 2019, the Eleventh Circuit affirmed BROWDY'S convictions and sentence. On March 11, 2020, the Eleventh Circuit denied BROWDY'S Petition for Rehearing and Rehearing *En Banc*.

2. <u>Statement of the Facts</u>.

The matter went to trial on June 2, 2017 and lasted seven (7) days. (DE:289-295). The jury was adjourned on June 12, 2017 to deliberate. On June 13, 2017, the

District Court announced that the jury was unable to reach a verdict and the jury was adjourned. BROWDY remained incarcerated pending the new trial. (DE:224).

BROWDY again went to trial on July 19, 2017. (DE:387-393). The trial lasted seven (7) days. The jury returned its verdict on July 28, 2017, finding BROWDY guilty as to Count I. (DE:350; 393:23-24). BROWDY is currently incarcerated.

The government's first witness was Billy Feltz ("Feltz"). (DE:388:35) Feltz testified that he met BROWDY, Brown Laster ("Laster") and Wesley Petiphar ("Petiphar") at a party and that he "was doing shipping or making labels for Rooster [Laster]". (DE:388:38). He testified that he learned that he was helping to ship methamphetamine from Laster. (DE:388:40). Feltz testified that he received $8,500.00 from DEA for his testimony at the trial and as a confidential informant for the DNA. He continued to testify and stated he also received another $3,000.00 from DEA. (DE:388:47-48)

Feltz testified that he met Laster while Dooney (Herbert Battle) was in jail and that when he met Laster, Laster paid him $1,500.00 in cash and told him that Laster was Dooney's boss and that he started working for Laster. (DE:388:66-68). He testified that Laster would text him the information to his burner phone that Laster provided and that the only cell phone he had was for Laster. (DE:388:70) He

testified that he shipped the packages for Laster to different locations in Florida, Alabama, Georgia, Louisiana and other states. (DE:388:76).

Feltz testified that he made the labels for Dooney from September 2014 to December 2014 and then he came back late March or April 2015. He further testified that he made labels for Laster from July 2015, through November 2015 and then for William Rollerson. (DE:388:88-89).

Feltz testified that he met Battle (Dooney) through Ana Velez in Port Charlotte at the mansion party. (DE:388:155). Feltz also testified that Dooney introduced Feltz to William Rollerson and that Dooney asked Feltz to make a couple of labels for Rollerson. (DE:388:163). He testified that the group of people he went to California with was Battle (Dooney), Trevor and the guy who got shot in the head. (DE:388:165).

Feltz further testified that he briefly saw BROWDY at Port Charlotte the day after the mansion party and Laster brought BROWDY to Feltz' house one other time and that BROWDY was merely present when Feltz had conversations with someone else and that BROWDY never asked him to make labels and that Feltz never saw him in possession of any methamphetamine and that BROWDY never talked to Feltz about any drug business. (DE:388:166-167).

Feltz further testified that it was Battle who threatened to shoot him and that it was Battle who gave him money, marijuana and computers. (DE:388:172, 179).

He confirmed that the day he met Special Agent Phil Muollo, that Battle was also at his residence and that he later found out that Battle arranged Special Agent Muollo to meet with Feltz. (DE:388:174). Feltz also testified that Battle was shipping drugs before Feltz began making the labels and that Feltz made them money because he knew how to circumvent the shipping costs. (DE:388:180-181).

The government then called Special Agent Phil Muollo, who is a special agent with the Drug Enforcement Administration. (DE:388:190). Special Agent Muollo testified that the investigation began with him being interested in a Defendant named Bradley Wegert and that he received a call from another attorney who advised him that his client, Battle might speak with him. Battle also introduced Agent Muollo to Feltz who agreed to cooperate and told Special Agent Muollo about some packages and that he was making labels for William Rollerson. (DE:388:197-205).

Special Agent Muollo testified that he went over the spreadsheet with Feltz and Feltz advised him what shipments belonged to what person and whether it was a label for "Mr. Battle, Brown Laster or William Rollerson." (DE:388:209).

Special Agent Muollo further testified that he spoke with Deborah Scott who was recruited by Laster to arrange for people to sit in the hotel rooms to receive the packages. (DE:389:12).

Special Agent Muollo also testified about a rental car and agreement showing that Wesley Petiphar rented vehicles from Hertz during the time of the conspiracy.

Special Agent Muollo also testified about flight information regarding a flight on American Airlines taken by Laster from San Francisco to Tampa in December 2013. (DE:389:47-70). Special Agent Muollo also testified about the business known as Blazay Squazay, wherein Laster was shown as the registered agent and Laster as the manager. (DE:389:70-76).

Special Agent Muollo testified that most of the information he had on BROWDY was about activities that "people were telling . . . [him] about had occurred in the past" (DE:389:136). Special Agent Muollo confirmed there was no video of BROWDY going to pick up any methamphetamine and that he never saw BROWDY in possession of any methamphetamine and that there were no fingerprints or DNA of BROWDY and that the only "evidence" against BROWDY is what his daughter told Agent Muollo. (DE:389:136-137). Special Agent Muollo testified that BROWDY voluntarily turned himself in and that the Exhibit 234 was a hot list showing a range of dates of when phone calls were made, but it does not say who is using the phone or any other information. (DE:389:141).

The government then called Teresa Mahoney, who testified that she was contacted by Deborah Scott who hired her to pick up packages at a motel. (DE:389:184). Ms. Mahoney testified that she got the package and that a man came to the room to retrieve the package from her. When asked if the man who came and retrieved the package was sitting at the defense table, she said "no" and said the man

was a "stocky Spanish looking guy". (DE:389:187). Ms. Mahoney testified that a couple of days later she did another pick up of a package in Fort Myers and that a white guy came by and picked up the package and left $10,000.00 which Ms. Mahoney gave to Deborah Scott. Ms. Mahoney testified that Ms. Scott used her and that she never knew what was in the packages. (DE:389:189-192).

The government then called Deborah Scott who was a co-conspirator who testified that she was cooperating with law enforcement and that her benefit for cooperating was that she "received an amended charge for instead of the conspiracy to traffic methamphetamine, I was charged with intent to distribute methamphetamines." (DE:390:15).

Deborah Scott testified that she met all three defendants in mid-January 2015 because Brown Laster (who also is known as AB) called her and asked her if she wanted to make some money. As a result of that call she met with all three of them at her house and Laster talked to her about some transactions he was doing and asked if she wanted to become involved. (DE:390:25). She confirmed that it was Laster who was talking to her about the shipments. (DE:390:26).

Deborah Scott testified that Laster asked her to recruit someone to pick up the packages and she testified that she recruited Terry Mahoney to do it and that she would make $400.00. Deborah Scott also testified that Laster purchased her a cell phone to use. (DE:390:30).

Deborah Scott testified that it was Laster who told her to use nice hotels and gave her instructions. She also testified that Laster called her to tell her where to deposit the monies and that she deposited the monies in a Wells Fargo account. (DE:390:36-38).

Deborah Scott testified that she was only in touch with Laster, via telephone, after she eluded the police when they raided them on one of the drops and before she was arrested. She also testified that she saw BROWDY once or twice before the incident, but not after the incident. (DE:390:48, 55).

During Deborah Scott's testimony BROWDY'S counsel moved for a mistrial arguing that there was one too many questions regarding how Deborah Scott knew BROWDY and the other defendants. The argument that was made by defense counsel was: "the government has met with this witness who knows how many times. They knew the issue because they're the ones that brought it to the Court's attention not to go there"[1]. . .. "They have an obligation and I'm sure they talked to her, don't go into the realm of incarceration, selling drugs and so forth. They could have fashioned a question that would have not elicited that kind of a response. It didn't happen in the last trial. Based on that I don't think you can cure the fact that

[1] There was a sidebar wherein the attorneys discussed whether Deborah Scott could testify about her drug buying in the past from the defendants and that that was how they knew each other. The District Court advised that Deborah Scott could be asked about knowing the defendants but nothing about past drug use or purchase.

this witness has stated that my client was incarcerated. It's highly prejudicial. . . . she couldn't maintain contact. It was asking the question, did you maintain contact, no. why not? Because my client was in jail. It definitely didn't elicit a response the government should have known she was going to say that." (DE:390:21-22). The District Court denied the motion for a mistrial. (DE:390:23).

On cross examination, Deborah Scott admitted that she lied to the police and that she lied to the court while under oath. (DE:390:78). She also admitted that she did not accept responsibility and that when the incident occurred, she allowed her boyfriend to be arrested and that she never turned herself in voluntarily to help her boyfriend. (DE:390:85).

The government then called William Rollerson, who is also a co-defendant that took a plea instead of going to trial. (DE:390:119). Mr. Rollerson also agreed to accept responsibility and cooperate with the government in hope of receiving a lesser sentence. (DE:390:120).

Mr. Rollerson testified that it was Herbert Battle who connected him with Bill, the ghost who was the one who would make the labels. (DE:390:124). Mr. Rollerson was asked if he recognized any of the defendants sitting at the table and he could not and that he only heard the name AB (Brown Laster) from a woman named Sonya. (DE:390: 125). He confirmed that he never heard the nickname JB

(BROWDY) and that he had never seen BROWDY and he didn't know his name or nickname. (DE:390:129, 138).

The government then recalled Special Agent Muollo. During cross examination, Special Agent Muollo testified that as to BROWDY, he did not request his tax returns, his W-9's, 1099's and that there was no forensic audit conducted regarding BROWDY'S income. (DE:391:79) Special Agent Muollo also testified that although they knew that BROWDY gambled at the Hard Rock Casino and other casinos, that no information was obtained regarding his winnings or losses. (DE:391:79-81). Special Agent Muollo confirmed that he did not interview any of the tellers at the Bank of America nor did he show BROWDY'S picture to anyone in the bank. (DE:391:89). Special Agent Muollo confirmed that because a lot of the deposits into BROWDY'S account were cash, he assumed it was from the monies earned through the methamphetamine conspiracy even though he knew BROWDY gambled and he had no records from the casinos. (DE:391:91).

The government then called Devonta Chisholm ("Chisholm"), who was the boyfriend of BROWDY'S daughter. Chisholm testified that he met BROWDY around April 2, 2015 at a gas station in Sebring Florida. (DE:391:143-144).

Chisholm testified that he and BROWDY'S daughter, Vontisha Scott went to the Holiday Inn because he was told to go to the hotel to pick up a package and that he was told to do that by Vontisha Scott. He testified that he thought the package

they were picking up were shoes. (DE:391:146-147). Chisholm testified that he picked up the package and "drove to Sebring, Florida to Chili's and I met this guy that I never seen, gave him the box." (DE:391:149,153)

Chisholm testified that he never met BROWDY between his meeting the unknown man in the parking lot and the hotel stay. (DE:391:153). Chisholm testified he never thought about what was in the packages he was picking up until the day he was arrested. (DE:391:155).

On cross examination, Chisholm confirmed that he was on probation and that he violated probation because he tested positive for marijuana. (DE:391:163). Chisholm testified he was in love with Vontisha Scott and would do anything she asked him to do. He confirmed that it was Vontisha Scott who told him to get the packages and that he never spoke with BROWDY and that BROWDY never told him to get the packages and that he only met BROWDY once about six months after he and Vontisha Scott started dating. He also confirmed that he went in to get the packages not Vontisha Scott and that the packages had his name on them. Chisholm confirmed he did not know if Vontisha was getting messages and if she was who she was getting messages from. Chisholm again confirmed that the man he met to give the packages to was not BROWDY or any of the other co-defendants. (DE:391:168-178)

Chisholm confirmed that he never met with BROWDY other than the first meeting, never called BROWDY that BROWDY never called him. (DE:391:180-182). He confirmed the next time he saw BROWDY was at the Hard Rock Casino and they talked but not about picking up packages or about methamphetamine. (DE:391:186).

The government then called James Mills, who is a law enforcement officer for the Okeechobee County Sheriff's Office. (DE:391:189). Officer Mills testified that he did not know BROWDY and that he did not see BROWDY at the hotel during the bust. (DE:391:203).

The government then called Vontisha Scott, who is the daughter of BROWDY. (DE:391:218). Vontisha Scott testified that BROWDY asked her to pick up a package at a hotel in Okeechobee, but he didn't tell her what was in it. (DE:391:222). She testified she was in contact with BROWDY through text and phone calls. (DE:391:228). She confirmed that she received a text from BROWDY giving her his new number and asking her not to give it to anyone else and then she text BROWDY Mr. Chisholm's name. (DE:391:232).

Vontisha Scott then testified about a text message from BROWDY where they were talking about going to Miami to get new Jordan shoes. (DE:391:236). Vontisha Scott then testified that she did not know BROWDY'S number by heart and that BROWDY called her out of the blue and asked her to pick up a package which she

thought were shoes. (DE:391:251). Vontisha Scott testified that Herbert Battle is married to her stepsister and that she was testifying at court to get a reduction in her sentence and would receive a benefit as a result of her testifying at trial. (DE:391:253)

The government recalled Special Agent Muollo who testified about another possible co-conspirator, Daqawn Hodges whose name appeared on the spreadsheet created by Mr. Feltz and introduced at the trial. (DE:391:261-280). Special Agent Muollo testified that he did not speak to Daqawn Hodges and that Daqawn Hodges never told Special Agent Muollo that he was picking up packages for BROWDY. (DE:391:282).

The government then read into the record the previous trial testimony of Dawn Cimmino pursuant to the District Court's ruling that she was unavailable. (DE:392:19-88). Ms. Cimmino testified that she never picked up any drugs for BROWDY (DE:392:68)

3. <u>Facts Pertaining to BROWDY'S Sentence and Sentencing Hearing.</u>

The probation officer who prepared BROWDY'S PSI set his base offense level at 38 pursuant to U.S.S.G.§2D1.1(a)(5). (PSI:36) BROWDY'S base offense level was enhanced by 2 levels pursuant to U.S.S.G.§2D1.1(b)(1), because there was a dangerous weapon involved. (PSI:37). BROWDY'S base offense level was also enhanced by 2 levels pursuant to U.S.S.G.§2D1.1(b)(15)(A) for aggravating role

because BROWDY recruited his daughter. (PSI:38). BROWDY'S base was further enhanced by 3 levels pursuant to U.S.S.G.§3B1.1(b) for being a manager or supervisor of criminal activity that involved five or more participants. (PSI:40) As such, BROWDY'S total offense level was 45, however, pursuant to Chapter 5, Part A, when the total offense level is calculated in excess of 43, the offense level will be treated as a level 43. (PSI:42, 45). BROWDY had a criminal history category of IV. (PSI:111). BROWDY'S guideline range was life imprisonment. (PSI:111).

BROWDY filed his objections to the PSI on October 16, 2017 (DE:403). BROWDY objected to the two-level enhancement for a dangerous weapon being possessed because no testimony or evidence was given to show that BROWDY had the dangerous weapon or that he even had knowledge of same. BROWDY also objected to the three-level enhancement for him being a manager or supervisor. Probation found that Rollerson was the manager or supervisor of the conspiracy and not BROWDY. (PSI:31). Therefore, BROWDY'S base offense should not have been enhanced by three levels. As such, BROWDY argued that this adjusted offense level should only be 40 and not 45. (DE:403).

BROWDY also objected to his criminal history category. BROWDY argued that because several of the charges used to determine his criminal history score were more than ten years prior to these charges and because he was out of incarceration more than five years prior to these charges, that said charges should have not been

considered and therefore, BROWDY'S criminal history category is overstated. BROWDY also filed his objection to the enhancement pursuant to 21 U.S.C. §851. (DE:403,441).

In his Sentencing Memorandum, BROWDY sought both a departure and a variance in his sentence. (DE:405). BROWDY sought a variance because of his apparent severe drug addiction and his obligation to support his family. (DE:405). The fact that BROWDY suffers from a severe drug addiction, wishes to receive drug treatment and that he acknowledges that his "life has always been surrounded by drugs" supported his request for a variance to his sentence. (PSI: 98-103) BROWDY also sought a downward departure pursuant to U.S.S.G. §5H1.4, which provides that "physical condition and drug and alcohol dependence 'may be relevant in determining whether a departure is warranted' if the characteristic 'is present to an unusual degree and distinguishes the case from typical cases covered by the guidelines'." (DE:405)

BROWDY'S first sentencing hearing was held on November 30, 2017, where his factual objections were heard and ruled upon. (DE:435). In addition, at said hearing, BROWDY advised the District Court that he would be filing objections to the government's 21 U.S.C. §851 notice. (DE:435). BROWDY'S sentencing hearing was continued to December 19, 2017, where his objections to the enhancements and his request for a variance and departure were ruled upon.

(DE:479). At the hearing, BROWDY'S counsel argued his factual objections to the PSI and his request for a departure and variance due to his drug addiction. (DE:479).

The District Court found, over BROWDY'S objections and argument, that BROWDY was responsible for 5.317 kilograms of methamphetamine and therefore his base offense level is 38. (DE:479:8). The District Court also overruled BROWDY'S objection to the 2-level enhancement for "fear, impulse, friendship, affection or some other combination to involve another individual in the illegal purchase . . ." (DE:479:9-11).

The District Court then discussed BROWDY'S objection to the enhancement for the use of a firearm or dangerous weapon and the enhancement for being a manager. (DE:479:13-14). The District Court overruled both objections. (DE:479:14). Accordingly, The District Court ruled that BROWDY'S total offense level would be 43. (DE:14).

The District Court then addressed BROWDY'S objection to the 21 U.S.C. §851 enhancement for his "October 8, 2012, adjudication of guilt for possession of a controlled substance without a prescription." (DE:479:14). Although BROWDY admitted being convicted of the crime, BROWDY argued that the conviction did not fall within the meaning of 21 U.S.C. §841 and that pursuant to 21 U.S.C. §841(c)(1), he was entitled to a hearing. (DE:441:4;479:15-16). The District Court overruled BROWDY'S objection and found that the particular offense was a felony offense

and that he was adjudicated guilty of that offense and that said offense did qualify for the 21 U.S.C. §851 enhancement. (DE:479:17). Based upon the above, the District Court found that BROWDY'S total offense level was 43 and his criminal history category to be a 6 and "[t]hat the advisory sentence of life, followed by ten years of supervised release. Restitution is not applicable, but there is a fine that can be levied of anywhere between 50,000 and $20 million, and a $100 special assessment, based upon the one count you were convicted of." (DE:479:19).

BROWDY'S counsel then argued for the variance and downward departure and asked the District Court to sentence BROWDY to the statutory minimum mandatory of twenty (20) years taking into account his written arguments and the fact that the has a family to support. (DE:479:21-24).

On December 19, 2017, the District Court sentenced BROWDY to a term of life imprisonment, followed by 10 years supervised release. (DE:479:33-37; 453;502). In addition, the District Court ordered a $100.00 special assessment and a fine of $50,000.00 and granted the government's forfeiture request and made it final. (DE:479:33-37;453;502). BROWDY'S counsel objected to the District Court's denial of BROWDY'S objections and "[w]e would object to the Court's findings of fact at the prior hearing, of the Court's overruling of our objections that we made in writing, without re-articulating those, as well as we would respectfully object to the Court's overruling all the objections that were dealt with today as well.

We would also object to the actual sentence of life. We find, we would say, at least now that the sentence is unreasonable, based upon the facts of the specific case, and we would object to a fine that was applied in the case for the aforementioned reasons." (DE:479:37).

A. BROWDY'S Conviction Should Not Have Been Affirmed Where the Evidence the Government Introduced Was Insufficient to Support BROWDY'S Convictions.

Challenges to the sufficiency of the evidence in a criminal case are reviewed *de novo*. *United States v. Evans*, 473 F.3d 1115, 1118 (11th Cir. 2006). When making a *de novo* review of the sufficiency of the evidence, the reviewing court examines the evidence in a light most favorable to the prosecution with all reasonable inferences and credibility determinations being in the government's favor. *United States v. Hamaker*, 455 F.3d 1316, 1332 (11th Cir. 2006). The reviewing court must ask whether any reasonable fact finder could conclude that the evidence demonstrates the guilt of the defendant beyond a reasonable doubt. *United States v. Eckhardt*, 466 F.3d 938, 944 (11th Cir. 2006). In order for BROWDY'S conviction to be upheld, there had to be sufficient evidence to prove all of the elements of the crimes charged. *United States v. Ndiaye*, 434 F.3d 1270, 1294 (11th Cir. 2006). BROWDY argues that the evidence does not support his conviction. The affirming of BROWDY'S conviction by the Eleventh Circuit allowed

BROWDY to be convicted in violation of his due process rights. Accordingly, BROWDY'S Petition for Writ of Certiorari must be granted.

The Fifth and Sixth Amendments to the United States Constitution, guarantee that "criminal convictions [will] rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt". *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 2313 (1995). Therefore, "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged". *United States v. Gaudin*, 115 S.Ct at 2314.

It is quite clear that in reviewing the evidence and testimony presented by the government that the elements required to support BROWDY'S conviction, were not proven beyond a reasonable doubt. Therefore, BROWY'S motion for judgment of acquittal should have been granted. *United States v. Garcia*, 405 F.3d 1260 (11th Cir. 2005). Accordingly, the failure of the Eleventh Circuit to reverse the denial of BROWDY'S motion for judgment of acquittal justifies the granting of BROWDY'S Petition for Writ of Certiorari.

B. BROWDY'S Sentence Should Not Have Been Affirmed by The Eleventh Circuit Where the District Court Committed Sentencing Errors.

The denial of BROWDY'S objections to the enhancements and the denial of his request for a downward departure and variance by the District Court should not

have been affirmed by the Eleventh Circuit due to BROWDY'S arguments and personal history. In conclusion, BROWDY'S sentence was unreasonable in light of the sentencing factors listed in 18 U.S.C. §3553(a)-(f) and the totality of the circumstances. Moreover, the sentence was not minimally sufficient, but greater than necessary to comply with the purposes of sentencing under 18 U.S.C. §3553(a). Therefore, the District Court did in fact err in sentencing BROWDY to life imprisonment, and because of this, the Eleventh Circuit should not have affirmed BROWDY'S sentence. Based on the above, BROWDY'S Petition for Writ of Certiorari must be granted.

REASONS FOR GRANTING THE PETITION

I.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED BROWDY'S CONVICTION WHERE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT BROWDY'S CONVICTION AND THEREFORE, BROWDY'S MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

At trial, the evidence presented by the government was not sufficient to establish the offense charged in the indictment as to BROWDY'S role in the conspiracy and his involvement in the sell and distribution of heroin. In other words,

"[a] conviction must be reversed, if a reasonable jury must necessarily entertain a reasonable doubt as to the defendant's guilt". *United States v. Vera*, 701 F.2d 1349, 1357 (11th Cir. 1983). Accordingly, the District Court should have granted a judgment of acquittal under Fed.R.Crim.P. 29(b) and because the District Court did not, this Court must reverse the convictions. *United States v. Salman*, 378 F.3d 1266 (11th Cir. 2004).

The Eleventh Circuit in affirming BROWDY'S conviction found he was involved because of the testimony of his daughter. However, the Eleventh Circuit failed to consider the other evidence that clearly supported a verdict of not guilty as to BROWDY'S involvement in the conspiracy. Because of the error by the Eleventh Circuit, BROWDY'S Petition for Writ of Certiorari must be granted.

"[T]he elements of the offense of conspiracy under 21 U.S.C. §846 are: (1) an agreement between the defendant and one or more persons, (2) the object of which is to do either an unlawful act or a lawful act by unlawful means." *United States v. Toler*, 144 F.3d. 1423, 1426 (11th Cir. 1998). Although the government may prove a conspiracy by circumstantial evidence, "[o]nce the existence of the conspiracy is established there must be substantial evidence that each alleged conspirator knew of, intended to join and participated in the conspiracy". *United States v. Avila-Dominguez*, 610 F.2d 1266, 1271 (5th Cir. 1980); s*ee generally, United States v. Hasson*, 333 F.3d 1264, 1270 (11th Cir. 2003); *United States v. Brantley*, 68 F.3d

1283 (11th Cir. 1995). In other words, for the conviction to be upheld, the government had to prove that there was an agreement by two or more persons to commit an unlawful act and that BROWDY knew of the plan and was willing to participate in it. *United States v. Moran*, 778 F.3d 942 (11th Cir. 2015). The government failed to prove this element of the conspiracy and therefore BROWDY'S conviction as to Count One should have been vacated not affirmed by the Eleventh Circuit.

It is a known fact that mere presence is not enough to uphold a conviction for conspiracy. *United States v. Brantley*, 68 F.3d 1283 (11th Cir. 1995). A person who does not know about a conspiracy but happens to act in a way that advances some purpose of a conspiracy, does not automatically become a conspirator. Nothing supports a finding that BROWDY was involved in a large-scale drug trafficking conspiracy or that he intended to distribute and possess with intent to distribute the drugs. In reviewing the transcripts, it seems that although there may have been a conspiracy going on with the other defendants, specifically, Herbert Battle, Bradley Wergert and William Rollerson, most if not all of the testimony and evidence was about all the other defendants and their involvement and not about BROWDY.

The government's main witness, Feltz' only testimony about BROWDY was that he briefly saw BROWDY at Port Charlotte the day after the mansion party and Laster brought BROWDY to Feltz' house one other time. Feltz confirmed that

BROWDY was merely present when Feltz had a conversation with someone else and that BROWDY never asked him to make labels, that Feltz never saw him in possession of any methamphetamine and that BROWDY never talked to Feltz about any drug business or anything illegal. (DE:388:166-167). Therefore, although Feltz tied the conspiracy to the other co-defendants, his testimony clearly did not support a finding that BROWDY was in any way involved in the conspiracy.

Even the testimony of Special Agent Muollo brings doubt to BROWDY'S involvement in the conspiracy. Agent Muollo testified that when Feltz decided to cooperate, that Agent Muollo and Feltz went over the spreadsheet created by Agent Muollo and Feltz advised him what shipments belonged to what person and whether it was a label for "Mr. Battle, Brown Laster or William Rollerson." (DE:388:209). No mention of BROWDY was made.

The government must prove that BROWDY knew of the conspiracy and voluntarily participated in it. *United States v. Guerrra*, 293 F.3d 1279 (11th Cir. 2002). And, that BROWDY intended to be involved in a conspiracy to commit bank fraud for a profit. The evidence did not support such a finding. Because the evidence as to the actual involvement of BROWDY in the conspiracy and his position is based upon the evidence of the other co-conspirator's connections and actions and their testimony, the government failed to prove BROWDY'S knowing and intentional participation in the conspiracy by substantial evidence. *See, United*

States v. Avila-Dominguez, 610 F.2d 1266, 1271 (5th Cir. 1980); *see also, United States v. Guerra*, 293 F.3d 1279, 1285 (11th Cir. 2002) (the government must prove that the defendant knew of the conspiracy and voluntarily participated in it).

Furthermore, based on the testimony presented, it is clear that the evidence against BROWDY was circumstantial at best. *United States v. Kim*, 435 F.3d 182, 183 (2nd Cir. 2006). Where the government's case is based on circumstantial evidence, "reasonable inferences, and not mere speculation, must support the jury's verdict". *United States v. Charles*, 313 F.3d 1278, 1284 (11th Cir. 2002) [quoting, *United States v. Perez-Tosta*, 36 F.3d 1552, 1557 (11th Cir. 1994)]. For the above reasons, BROWDY'S conviction should have been vacated, but instead the Eleventh Circuit affirmed said conviction. Based on this, BROWDY'S Petition for Writ of Certiorari must be granted.

Therefore, based on the testimony presented, the evidence was circumstantial at best. *United States v. Kim*, 435 F.3d 182, 183 (2nd Cir. 2006). Where the government's case is based on circumstantial evidence, "reasonable inferences, and not mere speculation, must support the jury's verdict". *United States v. Charles*, 313 F.3d 1278, 1284 (11th Cir. 2002) [*quoting, United States v. Perez-Tosta*, 36 F.3d 1552, 1557 (11th Cir. 1994)]. *See generally, United States v. Williams*, 390 F.3d 1319 (11th Cir. 2004); *United States v. Morris*, 20 F.3d 1111 (11th Cir. 1994).

The government must prove that BROWDY knew of the conspiracy and voluntarily participated in it. *United States v. Guerra*, 293 F.3d 1279 (11th Cir. 2002). And, that BROWDY intended to be involved in a conspiracy. However, there was nothing but circumstantial and speculative evidence tying BROWDY to the conspiracy. It is quite clear that the government failed to prove BROWDY'S knowing and intentional participation in the conspiracy by substantial evidence. *See, United States v. Avila-Dominguez*, 610 F.2d 1266 (5th Cir. 1980); *see also, United States v. Guerra*, 293 F.3d 1279 (11th Cir. 2002). Everything was circumstantial at best.

At trial, the evidence was legally insufficient to support BROWDY'S conviction. It is quite clear that the testimony was inconclusive, inconsistent and untrustworthy, particularly when you consider that the witnesses who testified about BROWDY'S involvement were co-conspirators and or witnesses getting paid to do work for the police. It is "widely accepted" that where the prosecution has "condition[ed] leniency" on cooperation in criminal cases, the situation "is ripe with the potential for abuse". R. Michael Cassidy, *"Soft Words of Hope": Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 N.W.U.L. Rev. 1129, 1130 (2004). Not only is there a potential for abuse, statistics have shown that abuse is prevalent.

As such, the District Court should have granted a judgment of acquittal under Federal Rule of Criminal Procedure 29(b). *United States v. Salman*, 378 F.3d 1266, 1268 (11th Cir. 2004). Pursuant to Fed.R.Crim.P. 29(c)(2), "[i]f the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal", if there is insufficient evidence to convict. *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

In deciding a Rule 29 motion for judgment of acquittal, a District Court must determine whether viewing all the evidence in a light most favorable to the government and drawing all reasonable inferences and credibility choices in favor of the jury's verdict, a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. The District Court's decision on sufficiency of the evidence in determining a motion for judgment of acquittal is entitled to no deference by the Appellate Court which reviews the denial of a motion for acquittal *de novo*. *United States v. Ellington*, 348 F.3d 984 (11th Cir. 2003). Accordingly, a defendant's motion for judgment of acquittal must be granted if the evidence was insufficient to support the conviction. *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

The Fifth and Sixth Amendments to the United States Constitution guarantee that "criminal convictions [will] rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt". *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 2313 (1995).

Therefore, "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged". *United States v. Gaudin*, 115 S.Ct at 2314.

The government bears the burden of proving beyond a reasonable doubt all the elements of the crime charged. *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310 (1995). No element may be removed from the jury's consideration. *United States v. Goetz*, 746 F.2d 705 (11th Cir. 1984). Furthermore, the law requires that a criminal act be performed voluntarily and intentionally and not because of mistake or accident. *United States v. Woodruff*, 296 F.3d 1041 (11th Cir. 2002). At trial, the evidence presented by the government was not sufficient to establish the offense charged in the indictment against BROWDY

Accordingly, the District Court should have granted BROWDY'S Motion. *United States v. Salman*, 378 F.3d 1266 (11th Cir. 2004); *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995). However, the District Court denied BROWDY'S Motion and the Eleventh Circuit affirmed said denial. Therefore, in the interest of justice, BROWDY'S Petition for Writ of Certiorari must be granted.

II.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED BROWDY'S SENTENCE WHERE THE DISTRICT COURT COMMITTED SENTENCING ERRORS.

The Eleventh Circuit only addressed one of BROWDY'S arguments as to why the District Court committed sentencing errors and why his sentence was not reasonable. Therefore, BROWDY argues that the Eleventh Circuit erred in affirming his sentence and therefore BROWDY'S Petition for Writ of Certiorari.

The Eleventh Circuit in affirming BROWDY'S sentence failed to consider the fact that the District Court erred in overruling BROWDY'S objection to the 2-level enhancement for "fear, impulse, friendship, affection or some other combination to involve another individual in the illegal purchase . . ." U.S.S.G. §2D1.1(b)(15)(A) was the section that probation used for the enhancement, but the District Court erred and cited to §3B1.1., which is incorrect. So, the District Court was incorrect in its ruling as it misconstrued the section and therefore, could not have properly ruled in connection with said enhancement. Based on this, BROWDY'S sentence should have been vacated and not affirmed.

Furthermore, said enhancement should not have been overruled based upon the fact that BROWDY'S daughter did not receive money for her involvement. The

District Court alludes to this, but then rejects said requirement. Accordingly, the District Court abused its discretion in overruling BROWDY'S objection and the Eleventh Circuit in affirming said denial of BROWDY'S objection allowed BROWDY to be sentenced in violation of his due process rights and the factors of 18 U.S.C. §3553(a).

The same is true for the fact that BROWDY'S objection to the two-level enhancement for a dangerous weapon being possessed was overruled by the District Court. There was no testimony or evidence to support a finding that BROWDY had a dangerous weapon or that he even had knowledge of same. In fact, Feltz, who was the one threatened to continue doing the labeling, testified that it was Battle who threatened to shoot him and that it was Battle who gave him money, marijuana and computers. (DE:388:172, 179). Also, said violence occurred before BROWDY was allegedly involved in the conspiracy and therefore there could be no "spilling over" to BROWDY. No one testified about BROWDY having a weapon or even knowing about the alleged threats to Feltz.

Again, the same is true for the denial of BROWDY'S objection to the three-level enhancement for him being a manager or supervisor. Probation found that Rollerson was the manager or supervisor of the conspiracy and not BROWDY. (PSI:31). Therefore, BROWDY should not be classified as a manager or supervisor. Again, there was no evidence or testimony to show he was in control or was in any

way a manager or supervisor. The granting of the enhancement by the District Court was not supported by competent and substantial evidence. Because the District Court erred in denying said objections, BROWDY'S sentence should have been vacated and not affirmed. Because the Eleventh Circuit affirmed BROWDY'S life imprisonment sentence, BROWDY'S Petition for Writ of Certiorari must be granted.

As to BROWDYS' request for a downward departure and variance, the District Court and the Eleventh Circuit failed to consider U.S.S.G. §5H1.4. U.S.S.G. §5H1.4 provides that "physical condition and drug and alcohol dependence 'may be relevant in determining whether a departure is warranted' if the characteristic 'is present to an unusual degree and distinguishes the case from typical cases covered by the guidelines'." U.S.S.G. §5H1.4, Authors' Discussion, Section 1. It is quite evident that BROWDY suffers from substance abuse and has for some time. (PSI: 98-103) As such, BROWDY'S addiction is "present to an unusual degree" as is evidenced by the recommendation by Probation that he participate in a substance abuse treatment program. (PSI: 128) Therefore, it is quite clear that BROWDY'S sentence is unreasonable and clearly greater than necessary considering the facts of this case and his addiction. Accordingly, the Eleventh Circuit should have vacated BROWDY'S sentence but failed to do so. Based on this and all of BROWDY'S other arguments, BROWDY'S Petition for Writ of Certiorari must be granted.

In determining whether an aggravating or mitigating circumstance was adequately considered by the Sentencing Commission in formulating the guidelines, the sentencing Court can only consider the applicable guidelines, policy statements and commentary. The United States Sentencing Commission intends the District Courts to view each guideline as carving out a "heartland", *i.e.* a set of difficult cases embodying the conduct that each guideline describes. *See*, United States Sentencing Guidelines, Chapter I, Part A, Introductory Comment 4(B). In other words, a "heartland" represents a general run of cases for which the Commission did not envision departure in writing by guideline. Generally speaking, downward departures are warranted where the circumstances are of a "kind" not adequately taken into account in the guidelines and where the circumstances are present to a "degree" not adequately taken into consideration in the guidelines. *Koon v. United States*, 518 U.S. 81, 91 (1996).

When the Court finds an "atypical" case, *i.e.* one to which particular guidelines linguistically apply, but in which the conduct significantly differs from the norm, the Court may consider whether departure is warranted. United States Sentencing Guidelines, Chapter I, Part A, Introductory Comment 4(B). The Supreme Court in *Koon* provided that any case that has atypical or unusual features, *i.e.* which falls outside of the applicable guidelines heartland, is a candidate for departure. *See, Koon, supra* (factors that may make case atypical provides a

potential basis for departure). Because of BROWYD'S substance addiction, it is quite clear that BROWDY'S case is unusual and warranted a departure. Departures may be appropriate because a combination of characteristics or circumstances makes this case differ significantly from the heartland of cases covered by the applicable guidelines. U.S.S.C. §5K2.0.

In *Koon v. United States*, 518 U.S. at 95, the Court stated that if the special factor is a discouraged factor, the Court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from ordinary cases in which the same factor is present. With the United States Sentencing Guidelines now advisory, the Court can now sentence below the otherwise applicable guideline range by using prohibitive and discouraged factors within the 18 U.S.C. §3553(a) framework. Even when a traditional departure is not justified, a non-guideline sentence can be appropriate "because the Guidelines sentence itself fails properly to reflect 18 U.S.C. §3553(a) considerations, or perhaps because the case warrants a different sentence regardless". *Rita v. United States*, 551 U.S. 338, 351, 127 S.Ct. 2456 (2007).

Based on the above argument, BROWDY'S Petition for Writ of Certiorari must be granted in order to assure that BROWDY'S due process rights are protected and to correct the miscarriage of justice that occurred by the Eleventh Circuit affirming BROWDY'S sentence of life imprisonment.

The same is true with BROWDY'S request for a variance. BROWDY'S request for a variance comported with the sentencing procedures that have evolved since the Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), and *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586 (2007). *See, United States v. Livesay*, 525 F.3d 1081, 1089-90 (11th Cir. 2008) (summarizing current sentencing procedures in Eleventh Circuit); *United States v. Pugh*, 515 F.3d 1179, 1188-91 (11th Cir. 2008).

BROWDY argues that the District Court committed plain error by sentencing him to life imprisonment. "This standard requires that there be error, that the error be plain, and that the error affect a substantial right." *United States v. Bennett*, 472 F.3d 825, 831 (11th Cir. 2006). "A substantial right is affected if the appealing party can show that there is a reasonable probability that there would have been a different result had there been no error." *United States v. Bennett*, 472 F.3d at 831-32. In considering all of BROWDY'S arguments, it is clear that BROWDY has met his burden of demonstrating that the sentence imposed by the District Court was substantially unreasonable and that the sentence should have been vacated and not affirmed by the Eleventh Circuit. *United States v. Thomas*, 446 F.3d 1348 (11th Cir. 2006); *see also, United States v. Saac*, 632 F.3d 1203 (11th Cir. 2011). *See also, United States v. Bonilla*, 579 F.3d 1233 (11th Cir. 2009).

Because of the above, the sentence imposed by the District Court should have been vacated by the Eleventh Circuit as there was a "definite and firm conviction that the District Court committed a clear error of judgment in weighing the 18 U.S.C. §3553(a) factors". *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008). Accordingly, the Eleventh Circuit should have reversed the sentence and because it did not, BROWDY'S Petition for Writ of Certiorari must be granted.

In considering all of BROWDY'S arguments, it is clear that BROWDY has met his burden of demonstrating that the sentence imposed by the District Court was substantially unreasonable and that the sentence should have been vacated. *United States v. Thomas*, 446 F.3d 1348 (11th Cir. 2006); *see also, United States v. Saac*, 632 F.3d 1203 (11th Cir. 2011). Because BROWDY'S sentence was affirmed by the Eleventh Circuit, his Petition for Writ of Certiorari must be granted.

CONCLUSION

This Court should explicitly adopt BROWDY'S position based upon law and equity. The upholding of his conviction and sentence by the Eleventh Circuit seriously affects the fairness, integrity and public reputation of the judicial proceedings. *See generally, United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005); *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993). For all of these reasons and in the interest of justice, the Petitioner, JERRY BROWDY, prays that this Court will issue a Writ of Certiorari and reconsider the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 3rd day of April, 2020, to the SOLICITOR GENERAL OF THE UNITED STATES, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

By /S/ David J. Joffe
DAVID J. JOFFE, ESQUIRE