No. 21-8111

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

LEO CONTRERA,

Petitioner,

v.

UNITED STATES OF AMERCIA,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the First Step Act (FSA) of 2018, under § 404 of the act, when a district court finds a defendant has a "covered offense" making him/her eligible for a discretionary modification of that sentence, is the district court authorized to review "non-covered" offenses that are part of an aggregate sentencing package under the U.S. Sentencing Guidelines for a potential discretionary modification of all sentences imposed in that aggregate sentencing package?

2. Whether a district court, when considering a FSA motion and finds a defendant has a potential discretionary modification of the sentence associated with that offense, has the authority and potentially an obligation to consider all factors under 18 U.S.C. § 3553(a), including but not limited to, favorable changes in evolving caselaw decisions, favorable amendments and/or clarifications of the U.S. Sentencing Guidelines, and a defendant's post-sentencing conduct, in arriving at a decision whether to impose a modified sentence?

3. Whether a district court, when considering a FSA motion and finds a defendant has a "covered offense" making him/her eligible for a potential discretionary modification of the sentence(s) associated with that offense, has the authority and potentially an obligation to ensure that the original, or a new, U.S. Sentencing Guidelines calculation was/is correct for the "covered offense" and all "non-covered" offenses that together form an aggregate sentencing package?

4. Whether a district court, when considering a FSA motion and finds a defendant has a "covered" offense" making him/her eligible for a potential discretionary modification of the sentence(s) associated with that offense, has an obligation, pursuant to this Court's decision in Molina-Martinez v. United States, 136 S. Ct. 1358 (2016), to correct any U.S. Sentencing Guidelines errors in an original, or in a new, calculation of a guidelines sentencing range?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Contents	ii
Appendix Schedule	iv
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional & Statutory Provisions Involved	1
Statement of the Case	3
Preliminary Statement	3
The Legal Landscape For FSA Motions in the Second Circuit	16
The Legal Landscape For FSA Motion in Other Federal Circuits	21
Correction of Sentencing Guidelines Errors in Relation to a FSA Motion	26
The Sentencing Guidelines Calculation for Count 8, Murder in Aid of Racketeering, is Incorrect	27
Substantive Sentencing Guidelines Errors Must be Corrected	41
Reasons Why The Court Should Grant the Writ	51
1. The Court should grant the writ to resolve a split between the Federal Circuit Courts of Appeals involving the range of relief a district court is authorized to grant in a motion filed under the First Step Act 2018, § 404.	51
II. The Court should grant the writ to resolve a split between the Federal Circuit Courts of Appeals	

involving the correction of substantive Sentencing Guidelines errors by a court when considering a motion filed under the First Step Act 2018, § 404. 52

Conclusion..... 55

APPENDIX

A. Memorandum of Law in Support of a Motion for Reduction of Sentence Pursuant to the First Step Act of 2019, 18 U.S.C. §3582(c)(1)B), September 20, 2020.

B. Government's Letter Response, October 28, 2020.

C. Defendant's Letter Reply to Government's Response, October 31, 2020.

D. District Court's Memorandum and Order, November 30, 2020.

E. Defendant's Initial Appellant Brief, May 2021.

F. Government's Appellate Reply Brief, August 16, 2021.

G. Defendant's Appellate Rely Brief, September 7, 2021.

H. Summary Order, Second Circuit Court of Appeals, February 2, 2022,

I. Motion to Correct Clerical Error or Mistake in Presentence Investigation Report Pursuant to Federal Rule of Criminal Procedure 36, January 2021.

J. District Court's Summary Order, February 2, 2021.

K. Defendant's Initial Appellate Brief, June 14, 2021.

L. Government's Appellate Reply Brief, September 21, 2021.

M. Defendant's Presentence Investigation Report, March 13, 1996.

TABLE OF AUTHORITIES

CASE	PAGE NO.
Gall V. United States, 522 U.S. 38 (2007)	42,43
Molina-Martinez v. United States, 136 S. Ct/ 1338 (2016)	Passim
Rita v. United States, 551 U.S. 336 (2007)	43
Rosales-Mireles, 138 S. Ct. 1897 (2018)	12,42,43,46,50
United States v. Booker, 543 U.S. 220 (2005)	9,39,43,47,49
United States v. Boulding, 960 F.3d 774 (6h Cir. 2020)	24,45,47
United States v. Brown, 974 F/3d 1137 (10th Cir. 2020)	23,40
United States v. Concepcion, 991 F.3d 279 (1st Cir. 2021)	21
United States v. Contrera, 2022 U.S. App. LEXIS 2984 (2d Cir. 2022)	19
United States v. Denson, 963 F.3d 1080 (11th Cir. 2020)	21
United States v. Dodd, 372 F. Supp. 3d 795 (S.D. Iowa 2019)	16
United States v. Ferguson, 246 F.3d 129 (2d Cir. 2001)	29
United States v. Gee, 843 Fed. Appx. 215 (11th Cir. 2021)	21
United States v. Gravatt, 953 F.3d 258 (4th Cir. 2020)	22,23
United States v. Holloway, 956 F.3d 660 (2d Cir. 2020)	5,14
United States v. Huberfeld, 968 F.3d 224 (2d Cir. 2020)	48

United States v. Hudson,
967 F.#d 605 (7th Cir. 2020)..... 8,10,12,21,23,26

United States v. Landrum,
2021 U.S. App. LEXIS 32482..... 44,46,47

United States v. Litos,
847 F.3d 906 (7th Cir. 2017)..... 22

United States v. Jones,
2019 U.S. Dist. LEXIS 173430 (D.Conn. 2019)..... 4,16

United States v. Mack,
2018 U.S. Dist. LEXIS 122653 (DC/NJ 2019)..... 16

United States v. MacKay,
No. 13-10521 (5th Cir. 6/26/2014)..... 40

United States v. Martin,
974 F.3d 124 (2d Cir. 2020)..... 14

United States v. Moore,
975 F.3d 84 (2d Cir. 2021)..... 14

United States v. Murphy,
998 F.3d 540 (4th Cir. 2021)..... 44,45,46,47

United States v. Padilla,
961 F.2d 323 (2d CIr. 1992)..... 18,28,33

United States v. Sabillon-Umana,
772 F.3d 1328 (10th Cir. 2014)..... 43

United States v. Smith,
2020 U.S. Dist. LEXIS 119789 (E.D. Mich. 2020).. 16

United States v. Wilson,
827 Fed. Appx. 473 (6th Cir. 2020)..... 46,47

United States v. Young,
998 F.3d 43 (2d Cir. 2021)..... Passim

STATUTES	PAGE
18 United States Code	
§ 1111	9
§ 844(1)	Passim
§ 924(c)	3
§ 944(f)	43
§ 1959(a)(1)	Passim
28 United States Code	
§ 2255	30
42 United States Code	
§ 841(b)(1)(A)(i)	3
§ 841(b)(1)(A)(iii)	3
§ 842(i)	8
§ 846	8
Federal Criminal Procedure	
§ 3551	3,29.31
§ 3553	Passim
§ 3582	7,16,22,24
Federal Rules Of Criminal Procedure	
Rule 36	11
United States Sentencing Guidelines	
§ 1B1.2	Passim
§ 2A1.1	9,17,33,38
§ 2E1.3	Passim
First Step Act of 2018	3-5,7-8
§ 404	Passim
United States Sentencing Guidelines Amendment 591	10,18,39
New York State Penal Laws	
§ 125.25(1)	29
§ 125.25(3)	29
§ 150.20	29

PETITION FOR WRIT OF MANDAMUS

Leo Contrera respectfully petitions for a Writ of Certiorari to compel a review and determination of an appeal from the U.S. Court of Appeals for the Second Cicuit.

OPINION BELOW

On February 2, 2022, the Second Circuit Court of Appeals issued a "Summary Order," wherein the appellate court affirmed the decisions of the district court's denials of a motion pursuant to the First Step Act 2019, and a motion filed pursuant to Federal Rule of Criminal Procedure 36, the two matters having been consolidated for decisions by the appellate court.

JURISDICTION

Pursuant to 28 U.S.C.§ 1254(1) the Court has the authority to issue the Writ of Certiorari to review the decision of the Second Circuit Court of Appeals in affirming the district court's decision in a motion pursuant to the First Step Act of 2018, § 404, to not review a "non-covered" offense for potential discretionary sentence modification.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Fifth Amendment:

Due Process Clause

No person...shall be deprived of life, liberty or property, without due process of law...

First Step Act of 2018, § 404(a-c).

STATEMENT OF THE CASE

PRELIMINARY STATEMENT

My name is Leo Contrera, and I am the Petitioner, a pro se litigant, and I will herein refer to myself first-person pronouns.

I was convicted, following a jury trial before the Honorable Charles P. Sifton, U.S. District Court, Eastern District of New York, of one count (count seven) of arson, in violation of Title 18, U.S.C., §§ 844(i), 2 and 3551 et seq; one count (count eight) of murder in aid of racketeering, in violation of Title 18, U.S.C.,, §§ 1959(a)(1), 2 and 3551 et seq; one count (count ten) of using and carrying a firearm in connection with a crime of violence, in violation of Title 18, U.S.C., §§ 924(c) and 3551 et seq; and one count (count forty seven) of narcotics distribution conspiracy, in violation of Title 21, U.S.C., §§ 846, 841(b)(1)(A)(i) and 841(b)(1)(A)(iii) and Title 18, U.S.C., §§ 3551 et seq. (App. A, Defendant's Motion pursuant to the First Step Act, 2019, pg. 1-2).

On August 4, 1996, I was sentenced to: on count seven (arson)--20 years incarceration plus a three year period of supervised release; on count eight (murder in aid of racketeering--lifetime incarceration to be followed by a five year period of supervised release, if I am released; count ten (using and carrying a firearm in commission of a violent crime)--5 years incarceration to be served consecutive to all other counts, plus a three year period of supervised release; and on

court forty seven (narcotics distribution conspiracy)--lifetime incarceration to run concurrently to the other sentences imposed, to be followed by 5 year period of supervised release. Id. pg. 2.

On or about September 20, 2020, following an appointment of counsel by the district court, Honorable Kiyo A. Matsumoto, appointed counsel filed a motion pursuant to the First Step Act of 2019. (App. A). In that motion, counsel asked that district court to grant a sentence reduction for count forty seven, narcotics distribution count, because that count was a "covered offense" under the First Step Act ("FSA"). Id. pg. 2-14.

Counsel also requested and argued for the court to consider a reduction of my life sentence in count eight, murder in aid or racketeering. Id. pg. 15-22. Counsel argued:

> Contrera's Racketeering, arson and drug charges were all litigated at the same trial and stemmed from accusations made in one indictment. His probation report combined the offenses in order to determine his guidelines range and his conviction for participating in a crack cocaine conspiracy raised his total offense level. P.S.R. pgs. 7-8) The Racketeering and cocaine violation were addressed together as part of a single sentencing package and are inextricably linked. Therefore the Court has the authority to reduce Contrera's entire sentence under the First Step Act. United States v. Lyle Jones, 2019 U.S. District Lexis 173430 (D. COnn. 2019).

Id. 15-16.

On October 28, 2020, the Government submitted a letter reply to the district court, wherein the Government agreed that

count 47, narcotic distribution conspiracy, was a "covered offense" under the FSA. (App. B, pg. 5). However, the Government argued that count eight, murder in aid of racketeering, was not a "covered offense," and therefore the court could not give any consideration or review of the life sentence on count eight. Id.

On October 31, 2020, counsel filed a letter reply, wherein counsel did not address the Government's argument relative to the court authority to consider or review my life sentence on count eight. (App. C).

On November 30, 2020, the district court entered a decision. (App. D). The district court found that count forty seven was a "covered offense" under the FSA, and the court found that the life term for that count should be reduced to time served. Id. 20-22 The district court did not order a new PSR, but instead the court made its own recalculation of the relevant Sentencing Guidelines for count forty seven. Id.

As to count eight, the district court held that "Mr. Contrera is ineligible for relief for his murder in the aid of racketeering conviction, and consequently, his life sentence on that conviction remains unchanged." Id. pg. 22.

The district court's rationale in denying any consideration for relief on count eight was grounded in the Second Circuit's decision in United States v. Holloway, 956 F.3d 660 (2d Cir. 2020). The court stated:

> [C]onsistent with the Second Circuit's direction that the court must look to the statutes of conviction to determine whether it has authority to modify a sentence under the First Step Act, this court finds that it lacks the authority to modify the sentence imposed by Judge Sifton for Mr. Contrera's murder in aid of racketeering conviction. That offense cannot be understood to be a "covered offense." (emphasis added).

Id. pg. 18.

As to my argument that my sentence for count eight was not properly calculated under the applicable Sentencing Guidelines, the district court stated: "the court finds that[...]the instant motion is not the proper procedure for challenging a the propriety of a sentence[.]" Id. In a footnote to this finding, the district court stated:

> The Second Circuit has stated that it 'do[es] not read the limited procedural vehicle provided by the First Step Act as requiring a district court to broadly revisit every aspect of a criminal sentence[.]'

Id. pg. 18, footnote 1.

Although the district court did not order a new PSR, the court however went on to make a finding that the original PSR had properly calculated the life term for murder in aid of racketeering, a conviction under 18 U.S.C. § 1959(a)(1), by using 18 U.S.C. § 844(i), the arson statute, as cross reference to reach the life term imposed. Id. pg. 19.

Because of substantial disagreements with appointed counsel on his efforts in my behalf, he was allowed to withdraw, and moved on to appeal pro se. After filing a timely notice of

appeal, my initial appellate brief was filed on or about May 2021. (App. E).

On appeal, I presented two issues for consideration:

> I. Pursuant to § 404 of the First Step Act of 2018, a District Court has the authority to modify a defendant's sentence for a non-covered offense which is part of a single aggregate sentencing package that also includes a covered offense.

Id. pgs. 11-33.

> II. The District Court has the authority to correct, pursuant to a First Step Act § 404 motion filed pursuant to 18 U.S.C. § 3582(c)(1)(B), a Sentencing Guideline error imposed when the guidelines were mandatory, that affects the substantive rights of the defendant.

Id. pgs. 33-45.

I argued on appeal that because the U.S. Probation combined count forty seven, drug conspiracy, count seven, arson, count eight, murder in aid of racketeering, and count 10, possession of firearm in commission of a felony, into one aggregate sentencing calculation, the district court had the authority, because count forty seven was a "covered offense" under the FSA, to consider potential reduction of sentence, specifically the life term imposed in count 8, murder in aid of racketeering. Id. pgs.12-13

Prior to, and during this appeal, trial courts in the Second Circuit had found that § 404 bestowed extraordinary authority to district courts reviewing FSA motions. Accordingly, those district courts, when finding a defendant had a covered offense

under the FSA, and the covered offense was part of an aggregate guidelines package, then the defendant could be considered for a potential sentence reduction on other sentences that were part of that aggregate package. Id. pgs. 13-27

At the time of my appeal, there was no definitive caselaw from the Second Circuit regarding the FSA. Therefore, on appeal I relied heavily upon United States v. Hudson, 967 F.3d 605 (7th Cir. 2020). Id. In Hudson, the Seven Circuit held that pursuant to a FSA motion, if a defendant had a "covered offense" that was part of an aggregate sentencing package, then all other sentences in that aggregate sentencing package could be considered for potential sentence reduction. Id. 27-28.

I also argued on appeal that the district court had an obligation under § 404(b) and this Court's decision in Molina-Martinez v. United States, 136 S. Ct. 1338 (2016) to correct certain Sentencing Guidelines errors in my PSR. Id. 33-45.

In count seven I was convicted of arson in violation of 18 U.S.C. § 844 (i). In count eight I was convicted of murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)91).

Under 18 U.S.C. § 1959, murder in aid racketeering, an essential element of that charge requires the government to prove a premeditated or deliberate intent to commit murder. That was neither proven or argued in my case.

Instead, the Government alleged that the murder was the "result" of the arson in count seven. Thus, the Government was

allowed to argue, under a hybrid theory of murder in aid of racketeering, that the death of the victim, one Jesus Salcedo, amounted to "felony murder in aid of racketeering." to wit:

> Ladies and Gentlemen, I want you to understand here, we are not arguing there was 'intent to kill' Jesus Salcedo that night and you don't have to find there was intent to commit that arson and that death resulted.

Id. pg. 34, citing Government's closing arguments, Tr. Trans. pg. 7048.

When preparing the PSR, U.S. Probation combined and consolidated counts seven and eight, to wit:

> **Counts 7 and 8 (Arson at 3002 Fulton Street/Murder of Jose DeJesus Salcedo**
>
> 25. Base Offense Level: the guideline which most closely corresponds with the offense conduct concerning the arson as charged, is 2K1.4. However, in a cross reference, the latter guideline instructs that if death resulted from the arson, the most analogous guideline from Chapter 2, Part A (Offenses against a Person) should be employed if it results in an offense level greater than that produced by Guideline 2K1.4. In this instance, Jose DeJesus Salcedo was killed during the arson (Count 8). Since 18 USC [§] 1111(a) includes in the definition of first degree murder any killing committed in the perpetuation of an arson, Guideline 2A1.1(a) is employed. That guideline provides a base offense level of 43, which is greater than the resulting offense level from Guideline 2K1.4. (emphasis added).

Id. 35-36

On appeal I argued that combining counts seven and eight was error under a proper application of the Sentencing Guidelines, especially since at the time of my sentencing the guidelines were mandatory. United States v. Booker, 543 U.S. 220 (2005). Id. pg. 35-36

From the inception of the Sentencing Guidelines in 1987, the Guideline Statutory Index must be used as the starting point for guidelines calculation. In this case, murder in aid of racketeering, count eight, was a violation of 18 U.S.C. § 1959. Thus, as I argued, any guidelines calculation for this offense had to begin with the corresponding guideline, in this case § 2E1.3, in the Statutory Index. However, as shown, that did not occur. In fact, no where in the PSR guidelines calculation was murder in aid of racketeering even mentioned. Id. pg. 33-34

Moreover, Sentencing Guidelines Amendment 591, which was effective November 1, 2000, specifically prohibited the use of relevant conduct to determine the offense base level. Id. pg.35

Therefore, in light of this Court's decision in Molina-Martinez v. United States, 136 S. Ct. 1338 (2016), when the district court was made a aware of this substantial guidelines error via the FSA motion, it was incumbent upon the court to correct that error. Id. pg. 43-44

During the pendency of my appeal, the Second Circuit held in United States v. Young, 998 F.3d 43 (2d Cir. 2021), that other than a "covered offense," a reviewing district court had no authority to consider any non-covered offense, even if that sentence was part of an aggregate sentencing package.

Therefore, on appeal, the government argued that Young was controlling and that the district court had no authority to review my life term in count eight. (App. F, pg. 13-16).

As to my alleged Sentencing Guidelines error, the Government argued that Young also prohibited the district court from any consideration of my sentence in count eight. Id. pg. 16-18

Alternatively, the Government argued that "there was no error in he calculation of Contrera's sentence" in count eight. Id. pg. 18

During the pendency of my appeal, I filed a motion in the district court pursuant to Federal Rule of Criminal Procedure 36, which allows a district court "at any time [to] correct a clerical error in a judgment, order, or other parts of the record arising from oversight or omission." Id. (App. I).

In that Rule 36 motion, I made virtually the same argument I made in the FSA appeal, that the district court had an obligation to correct the Sentencing Guidelines errors having to do with count eight. Id. 9-10

I also argued that the PSR had incorrectly assigned "2 points" for obstruction of justice, that was specifically contrary to the district court's oral pronouncement of sentence. Id.

On February 5, 2021, the district court denied the Rule 36 motion, holding that Rule 36 was not the proper vehicle for correcting "substantive calculations relevant to sentencing. (App. J). In the alternative, the district court found that there was no guidelines error in that calculation for count eight. The court held that it was proper for the sentencing court to use the guideline for arson instead of the guideline

for murder in aid of racketeering,"because it carried an offense level greater than 12[.]" Id.

As to the 2 point enhancement for obstruction of justice, the district court held, even though that 2 point enhancement remains in the PSR, the sentencing court did not apply that 2 point enhancement. Id.

I filed a timely notice of appeal to the district court's denial of the Rule 36 motion, and on or about June 14, 2021, I filed my initial brief in that appeal. ((App. K)

In that appeal, I argued that pursuant to the Sentencing Guidelines Statutory Index, Second Circuit caselaw in effect at the time of sentencing, namely United States v. McCall, 915 F.2d 811 (2d Cir. 1990), the sentencing court erred by not applying § 2E1.3 as the starting point for determining a guideline range for count 8. Id. pg. 12-17

I also argued that the 2 point enhancement contained in the PSR and reflected in the written judgment was an error that required correction. Id. pg. 17

Finally I argued that regardless of all other considerations, according to this Court's decision in Molina-Martinez v. United States, 136 S. Ct. 194 (2016), and Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018), the district court, when presented with PSR errors that adversely affect a defendant's substantive rights, the district court is required to consider and, if need be, to correct those PSR errors. Id. 19-20

On or about September 21, 2021, the Government filed a reply brief in the Rule 36 appeal. (App. L). First, the Government argued that Rule 36 was not the proper vehicle for correcting substantive PSR errors. Id. pg. 16 In the alternative, the Government again argued that there was no guideline error relative to count eight. Id. pg. 18 The Government contended that it was correct to use the guideline for arson, and not the guideline for murder in aid of racketeering. Id. The Government offered no caselaw decision from the Second Circuit, or any other federal circuit court of appeals, to support its argument.

The Government, in the reply, made no mention of the guideline error relative to the 2 point enhancement that was disallowed by the sentencing court but remained part of the PSR.

Because the FSA motion and the Rule 36 motion were related in several ways, the Second Circuit Court of Appeals consolidated both appeals for a final determination. The Second Circuit issued an opinion on February 2, 2022, affirming the district court's decisions denying relief in both cases. (App. H).

As to the FSA motion, the appellate court stated:

> The District Court concluded that Count 47 is a 'covered offense" under Section 404 of the First Step Act, but that Count 8 is not. As he did below, on appeal, Contrera now argues that even if Count 8 is not a covered offense, his sentence on that count was "part of a single aggregate sentencing package which also include[d] [a] covered offense[]"--namely, Count 47--thus making his sentence in Count 8 also eligible for reduction. Def. Br. 10. This argument, however, is squarely foreclosed by our recent

decision in United States v. Young, 998 F.3d 43 (2d Cir. 2021), in which we rejected a defendant's argument that he was eligible for resentencing under Section 404 as to non-covered offense on the basis that it was 'grouped with [a covered offense] for sentencing purposes and formed a legally interdependent sentencing package with [the covered offense].' ID. at 49. As we explained there, 'a court may not resentence a defendant on any count of conviction without direct statutory authorization to do so.' Id. see also [United States v.] Holloway, 956 F.3d [660] at 666 [(2d Cir. 2020)]. ('A [First Step Act] motion falls within the scope of § 3582(c)(1)(B), which provides that a 'court may modify an imposed term of imprisonment to the extent otherwise espressly permitted by statute.''). Indeed, 'where an inmate is imprisoned upon multiple sentences that are aggregated for administrative purposes, courts require specific modification authorization...for each term of imprisonment contained in an otherwise final judgment of conviction.' Young, 998 F.3d at 55 (quoting United States v. Martin, 974 F.3d 124, 137 (2d Cir. 2020). Because Count 8 is not a covered offense under the First Step Act, there exists no specific modification authorization to allow the District Court to modify Contrera's sentence for Count 8[.]

Contrera further challenges the District Court's November 30, 2020 order on the grounds that it failed to correct what he argues was an error in the Guidelines calculation in his PSR. The First Step Act 'does not require plenary resentencing or operate as a surrogate for collateral review, obliging a court to reconsider all aspects of an original sentencing.' United States v. Moore, 975 F.3d 84, 90 (2d Cir. 2021). Rather, the statute provides a 'limited procedural vehicle' and does not 'requir[e] a district court to broadly revisit every aspect of a criminal sentence.' Id. at 92. We then conclude--as the District Court did--that Contrera's challenge to the alleges errors in his PSR were not appropriately raised in his Section 404 motion.

Id. pg. 4

As to the Rule 36 motion appeal, the Second Circuit held:

> We easily conclude that the District Court's denial of Contrera's Rule 36 motion was proper. Contrera alleges that the PSR (and the District Court at the time of his sentencing) applied an incorrect base offense level to Counts 7 and 8, and that the PSR improperly included a Guidelines enhancement for obstruction of justice and related factual allegations not adopted by the District Court at the time of sentencing. Any alleged errors concerning the base offense levels for Counts 7 and 8 were **substantive**, and not merely of the type of 'mechanical' errors within the purview of Rule 36. C.f. United States v. Williams, 777 F.3d 909, 910 (7th Cir. 2015) (per curiam) (affirming denial of Rule 36 motion asserting errors in PSR because '[w]hether the author of the report accurately understood the nature of one of [defendant's] older convictions (which affects whether he is a career offender) is a substantive matter"). Similarly, correcting any putative errors concerning the inclusion of factual allegations related to obstruction of justice and an accompanying offense-level increase would involve more than the 'mechanical' correction of a clerical error. (emphasis added).

Id.

THE LEGAL LANDSCAPE FOR FSA MOTIONS IN THE SECOND CIRCUIT

When the district courts within the Second Circuit were first reviewing FSA motions, the majority of those district courts took an expansive view of the sentencing modifications that were available to a defendant under § 404 of the act. "Unlike prior sentence reductions under 18 U.S.C. § 3582(a)(2), 'Section 404(b) of the First Step Act contains a broader grant of authority to impose a reduced sentence as if section 2 and 3 of the Fair Sentencing Act of 2010 were in effect.'" United State v. Mack, 2018 U.S. Dist. LEXIS 122653 (DC/NJ 2019) (quoting United States v. Dodd, 372 F. Supp. 3d 795, 797 (SD. Iowa 2019).

Those district courts were also holding that, when a defendant was found to have a "covered" offense under § 404(b) of the act, making him/her eligible for a potential sentence modification, all sentences, whether "covered" offenses or not, that formed an aggregate sentencing package, were also eligible for a potential modification. See United States v. Jones, 2019 U.S. Dist. LEXIS 173430 (D/Conn. 2019).

However, the district court in this case, relying on United States v. Smith, 2020 U.S. Dist. LEXIS 119789 (E.D./Mich. 2020), held that because my drug offense, count 47, the "covered" offense under § 404(b), was not charged as a RICO drug conspiracy, the murder in aid of racketeering offense, count 8, was not connected to the "covered" offense in count 7. Thus,

the district court held that it did not have the authority to consider the murder in aid of racketeering offense in count 8 for potential sentence modification, because it was not a "covered offense." (App. D, pg. 11-17).

In my FSA motion, appointed counsel also brought up the fact that the application of the Sentencing Guidelines as to count 8 was incorrect. (App. pg. 18-21). Even though the district court held that it was without authority to consider or review the application of the Sentencing Guidelines as to count 8, the court held that the sentencing "court correctly found 'the most analogous guideline' cross referenced by 18 U.S.C. § 844(i) [arson] for a death resulting from arson based on a general jury verdict is 'the guideline for first degree murder, U.S.S.G. § 2A1.1." (App. D. pg. 19).

During the pendency of the appeal of this case, the Second Circuit decided United States v. Young, 998 F.3d 43 (2d Cir. 2021). In Young, the Second Circuit took an extremely narrow view of the potential relief provided by the FSA. The appellate court held that a district court had the discretion to grant a sentence modification only to "covered" offenses. Non covered offenses, even though they were part of an aggregate sentencing package under the Sentencing Guidelines calculation, could not be considered in any way for modification or correction. Id. pg. 11-14.

Citing the Sentencing Guidelines § 1B1.2, Statutory Index, which requires the sentencing court to apply the offense

guideline referenced in the Statutory Index for the statute of conviction, United States v. McCall, 915 F.2d 811 (2d Cir. 1990) and United States v. Padilla, 961 F.2d 323 (2d Cir. 1992), both cases decided prior to my sentencing, holding that § 2E1.3 must be used for a violation of 18 U.S.C. § 1959, and Sentencing Guidelines Amendment 591, which was made retroactive, and which was a "clarification" of § 1B1.2, the Statutory Index, which requires a sentencing court to use § 2E1.3 in calculating an offense under 18 U.S.C. § 1959, I argued the guidelines used in calculating the offense level for count 8, murder in aid racketeering, under 18 U.S.C. § 1959(a)(1), was incorrect. Instead of using § 2E1.3 for count 8, the Probation Department used § 2K1.4, the guideline used in the Statutory Index for arson, a violation of 18 U.S.C. § 844(i), by combining counts 7 and 8. No mention whatsoever was made in the PSR about murder in aid of racketeering, and there was no mention of the conduct that formed the basis for that offense. The offense level for count 8, murder in aid of racketeering, was based entirely on the "offense conduct concerning the arson charged" in count 7. (App. E, pg. 34-42).

During the pendency of my FSA motion appeal, I filed a Federal Rule of Criminal Procedure 36 motion, wherein I alleged the same Sentencing Guideline error set forth above. Also, I alleged that I was incorrectly assessed 2 points for obstruction of justice that was denied by the sentencing court. (App. J, pg. 9).

On February 2, 2021, the district court denied the Rule 36 motion. (App. J). The district court held that I was seeking "substantive calculations relevant to his sentencing," such a correction was beyond the scope of Rule 36. Id.

Alternatively, the district court took the same position taken in the denial of my FSA motion, that using the Sentencing Guideline for arson, count 7, was correct for calculating a guideline range for murder in aid of racketeering, count 8. The district court did not cite any authority for making this determination. Id. As to the 2 point enhancement for obstruction of justice, the court held that I was not prejudiced by leaving that incorrect enhancement in the PSR, because that enhancement had no affect on the sentence I received. Id.

Returning to my appeal of the denial of my FSA motion, I argued because I made the district court aware of a substantive Sentencing Guidelines error, that court had an obligation under this Court's decision in Molina-Martinez v. United States, 136 S. Ct. 1338 (2016), to correct that guidelines error. (App. E 43-45).

On February 2, 2022, the Second Circuit, in United States v. Contrera, 2022 U.S. App. LEXIS 2984 (2d Cir. 2022), in a consolidated order/opinion on the appeals of my FSA motion and Rule 36 motion, affirmed the district court's decision denying all relief. As to the FSA motion, the Second Circuit, relying on its decison in Young, supra, held that the district court was without authority to consider and/or review the life term I

received in count 8, murder in aid of racketeering. Id. pg. 2. However, the appellate court's decision made no mention whatsoever of the alleged Sentencing Guidelines error made in calculating a guideline range for count 8, or the district court's obligation to correct such an guidelines error, pursuant to this Court's decision in Molina-Martinez, supra.

As to the Rule 36 appeal, the Second Circuit, without any discussion of the two alleged guidelines errors, simply held that Rule 36 was not the proper vehicle for the alleged errors. Id. pg. 3.

THE LEGAL LANDSCAPE FOR FSA MOTIONS IN OTHER FEDERAL CIRCUITS

At least two additional federal circuit courts have taken a similar narrow view expressed in United States v. Young, 998 F.3d 43 (2nd Cir. 2021), regarding the relief available to defendants pursuant to a FSA motion. See United States v. Concepcion, 991 F.3d 279 (1st Cir. 2021), and United States v. Denson, 963 F.3d 1080 (11th Cir. 2020), and United States v. Gee, 843 Fed. Appx. 215 (11th Cir. 2021). The overarching view in these cases is that relief from a FSA motion is strictly limited to only a "covered" offense. In these cases, a trial court may not consider modification of any other non-covered offense, even though that other sentence or sentences are part of an aggregate sentencing package that includes the covered offense. This narrow view prevents a trial court from correcting a Sentencing Guidelines error(s) occurring in the calculation of a non-covered offense, even though the error affected the guidelines range for the aggregate sentencing package.

Of course, the denial of my appeal was the product of the Second Circuit's decision in Young, supra. However, in my appeal I argued that Young was decided wrongly. I argued that the Seventh Circuit's decision in United States v. Hudson, 967 F.3d 605 (7th Cir. 2020), a decision that offered a broader view of relief available pursuant to a FSA motion was correct, to wit:

> Excluding non-covered offenses from the ambit of First Step Act consideration would, in effect, impose an extra-textual limitation on the Act's applicability. In Section 404(c), the Act sets forth two express limitations on its applicability. In Section

404(c), the Act sets forth two express limitations on its applicability. First, a court cannot consider a defendant's motion if that defendant already reaped the benefits of the Fair Sentencing Act's amendments or received the benefit of a "complete review" of a previous motion to reduce a sentence under the section 404 of the First Step Act, § 404(c). Second, Congress made clear that a court is not "require[d]...to reduce a sentence" under the Act. Id. If Congress intended the Act not to apply when a covered offense is grouped with a non-covered offense, it could have included that language. It did not. And "we decline to expand the limitations crafted by Congress." [United States v.] Gravatt, 953 F.3d [258] at 264 [(4th Cir. 2020)].

In addition, a court's consideration of the term of imprisonment for a non-covered offense comports with the manner in which sentences are imposed. Sentences for covered offenses are not imposed in a vaccum hermetically sealed off from sentences imposed for non-covered offenses. Nor could they be. Multiple terms of imprisonment are treated under federal law as a single, aggregate term of imprisonment, 18 U.S.C. § 3584(c), and we've recognized "a criminal sentence is a package composed of several parts." United States v. Litos, 847 F.3d 906, 909 (7th Cir. 2017). Indeed, the Guidelines require a court to group similar offenses, U.S.S.G. § 3D1.3, and to assign a combined offense level for all counts.

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In sum, a court is not limited under the text of the First Step Act to reducing a sentence solely for a covered offense. Instead, a defendant's conviction for a covered offense is threshold requirement of eligibility for resentencing on an aggregate penalty. Once past that threshold, a court may consider a defendant's request for a reduced sentence, including for non-covered offenses that are grouped with the covered offenses to produce the aggregate sentence. (emphasis added).

Hudson, at pgs. 6-7.

Two other federal circuit courts of appeals have come to similar decisions in line with Hudson, supra. See United States v. Brown, 974 F.3d 1137 (10th Cir. 2020), and United States v. Gravatt, 953 F.3d 258 (4th Cir. 2020).

In Gravatt, the district court found that the defendant had a "covered" offense involving crack cocaine, but found the defendant was also convicted for a drug conspiracy involving 5 kilograms of powder cocaine. Like the case at bar, the district court concluded it did not have the authority to consider modifying the sentence for an non-covered offense. However, the Fourth Circuit held, like Hudson, that when a district court determines a defendant has at least one covered offense, then any non-covered offense included in an aggregate sentencing package could also be considered for modification. Id. pg. 8.

Brown deals with a more nuanced application of the FSA. The defendant had originally been sentenced as a career offender under the applicable Sentencing Guidelines. However, during the course of the defendant's incarceration, one of the underlying crimes used as a predicate "violent offense" for career offender designation was found not to be a "violent offense." Thus, under that intervening caselaw decision, the defendant no longer qualified as a career offender under the guidelines. Id. pgs. The district court refused to consider that intervening caselaw involving the defendant's career offender status. Id.

On appeal, the Tenth Circuit held, like both Hudson and Gravatt, that ;

> [T]he application exception is § 3582(c)(1)(B), which authorizes modification "to the extent otherwise expressly permitted by statute..." § 3582(c)(1)(B). Because we conclude that § 404(b) operates through the mechanism of § 3582(c)(1)(B), § 404(b) provides an exception to the rule of finality only "to the extent otherwise expressly permitted by statute." Id.

Id. pg. 9.

Thus, § 404(b) acts to open the door for the exercise of a district court's discretion to modify a sentence for a covered and a non-covered offense.

Another aspect of continuity of the above three cases, is the fact that the FSA contemplates a baseline of process that must include an accurate amended guidelines calculation and renewed consideration of the § 3553(a) factors. See also United States v. Boulding, 960 F.3d 774, 776 (6th Cir. 2020).

In this case, the court appears to have considered the factors in § 3553(a) in making a discretionary decision to modify my life term in count 47. However, the district court did not order an amended PSR. (App. D, pgs. 20-23). And although the district court held that it had no authority to review and/or consider a reduction of my life term for count 8, and as to my alleged guidelines error in count 8, the district court held that the original PSR was correct in combining count 7, arson, and count 8, murder in aid of racketeering, and then using the arson statute, 18 U.S.C. § 844(i), to hand down a life term in count 8, murder in aid of racketeering, a violation of 18 U.S.C. § 1959(a)(1). Id. pg. 19.

In denying the Rule 36 motion regarding the same alleged guidelines error relative to counts 7 and 8, the district court again held that using 18 U.S.C. § 844(i), arson, was correct in determining a life sentence in count 8, murder in aid of racketeering, under 18 U.S.C. § 1959(a)(1).

As to the alleged PSR error relative to the 2 point enhancement for obstruction of justice, the district court held that because the sentencing court did not apply the 2 point enhancement at sentencing, even though that 2 point enhancement remained part of the PSR, I suffered no prejudice therefrom. Id.

Interestingly, when the Second Circuit affirmed the district court's denial of any consideration of a discretionary modification of my life sentence in count 8, the appellate court did not in any way address the alleged errors in the PSR. (App. H). Thus, the appellate court did not affirm the correctness of the district court's determination of the alleged guidelines errors.

Consequently, although the district court did reduce my life term in count 47, I remain in prison on the remaining life term in count 8. And I remain sentenced under an incorrect sentencing guidelines calculation in count 8, murder in aid of racketeering, and my PSR still reflects a 2 point enhancement for obstruction of justice.

CORRECTION OF SENTENCING GUIDELINES ERRORS IN RELATION TO A FSA MOTION

It is an undisputed fact that I had a "covered" offense under the FSA §404. Thus, it is my position, citing the Seventh Circuit's decision in Hudson, supra, that the district court had the authority to consider reducing my life term in count 8, murder in aid of racketeering, a non-covered offense, because the sentence in count 8 was the result of a combined Sentencing Guidelines calculation, forming an aggregate sentencing package. The district court, even before the Second Circuit's decision in Young, supra, held that the court did not have the authority to consider a modification of the sentence in count 8. And on appeal, the Second Circuit, bound by its prior decision in Young, affirmed the district court's decision.

I argued in the district court, and in my appeal to Second Circuit, that my life term in count 8 was the result of an incorrect Sentencing Guidelines calculation as to count 8, and that my PSR incorrectly indicated a 2 point enhancement for obstruction of justice.

Although the district court held it had no authority to review my life term in count 8, the court did say that there was no error in the guidelines calculation for count 8. (App. D, pgs. 18-19). The district court did not address the alleged incorrect 2 point enhancement for obstruction of justice that remained in my PSR.

In denying my Rule 36 motion, the district court again held that there was no error in the guidelines calculation of count

8. And for the first time addressing the alleged incorrect 2 point enhancement that remains part of my PSR, the court held that because the sentencing court did not use that enhancement in passing sentence, I suffered no prejudice. (App. J).

Although the Second Circuit affirmed the district court's decisions in denying relief as to my FSA motion and Rule 36 motion, the appellate court did not address in any way the alleged guidelines errors. (App. H).

THE SENTENCING GUIDELINES CALCULATION FOR COUNT 8, MURDER IN AID OF RACKETEERING, IS INCORRECT

Under the United States Sentencing Guidelines (USSG), in beginning a calculation for an offense level, the calculation must start with the "Statutory Index," § 1B1.2(a). The Statutory Index sets forth a list of criminal law statutes and the corresponding guidelines section to be used in calculating an offense base level for a violation of that criminal law statute. In this case, murder in aid of racketeering, was/is a violation of 18 U.S.C. § 1959(a)(1), and the Statutory Index provides that § 2E1.3 is the guidelines section where any violation of § 1959(a)(1) must begin.

In United States v. McCall, 915 F.2d 811 (2d Cir. 1990), a case decided some six years before my sentencing in 1996, held that it was reversible error to have used an incorrect guideline section to calculate a conviction under 18 U.S.C. § 1959. The PSR, and in turn the district court, had relied upon "relevant conduct" to determine the applicable guidelines section.

> That fact is irrelevant to selecting the application Guidelines section, however, because that section must be determined by the offense of conviction. See U.S.S.G. § 1B1.2(a) (as amended Nov. 1, 1989)(select Guidelines section "most applicable to the offense of conviction" i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted). (emphasis added).

Id. pgs. 814-815.

Some two years later, the Second Circuit again weighed in on this same issue in United States v. Padilla, 961 F.2d 322 (2d Cir. 1992).

> The statutory index lists guideline section 2E1.3 as the most applicable guideline for convictions under § 1959. In keeping with the wide range of crimes punishable under section 1959, § 2E1.3 directs the court to apply either the crime or level applicable to the underlying crime or racketeering activity," whichever is greater. U.S.S.G. § 2E1.3.
>
> Thus, no matter what the underlying crime on which the § 1959 charge is based, the district court **will always have to find the guidelines section appropriate to that crime** in order to determine the proper base offense level. Section 2E1.3 merely provides that in no event may the base level fall below 12. Since § 2E1.3 does not finally answer the question of what is the most applicable guideline section, we determined in McCall that "underlying crime," as used in § 2E1.3, meant "underlying crime charged in the information". McCall, 915 F.2d. at 814. Any other result would have conflicted with the command of § 1B1.2 to base selection of the most applicable Guidelines section on the conduct charged in the relevant section of the underlying indictment. (emphasis added).

Id. pgs. 326-27.

In count 8, I was charged under 18 U.S.C. § 1959(a)(1), to wit:

COUNT EIGHT
(Murder in Aid of Racketeering)

On or about January 24, 1993, within the Easter District of New York, the defendant LEO CONTRERA, as consideration for a promise or agreement to pay something of pecuniary value from the Mora Organization, an enterprise engaged in racketeering activity, did cause the death of Jose DeJesus Salcedo, knowingly and intentionally, in violation pf Section 125.25(1) and 20.00 of the New York Penal Law, and in the course of and in furtherance of committing arson, in violation of Sections 150.20, 125.25(3) and 20.00 of the New York Penal Law. **(Title 18 U.S.C., Sections 1959(a)91), 2 and 3551 et seg.)** (emphasis added).

(App. G, pg. 15).

To prove a charge under § 1959(a)(1), the Government was required to prove that I received a "promise or agreement to pay something of pecuniary value from the Mora Organization" and that I killed Mr. Salcedo "knowingly and intentionally." Id.

As to payment, the Government offered the testimony of only a single witness, Bruce Ashely. However, when the issue of payment was raised on direct appeal, the Government admitted that "Ashely reiterated time and again that he did not know how much money William Mora gave Contrera, or what that money was for." (App. G. pg. 18).

In United States v. Ferguson, 246 F.3d 129, 136-37 (2d Cir. 2001), a decision affirming a district court's ruling on a "pecuniary gain motion" vis a vis § 1959(a)(1), it was noted in Ferguson that the Government's witness "did not know the amount of the payment or its purpose" and "no evidence was offered as to any dicussions--preceding, contemporary, or after the payment

as to what the money was for." The Second Circuit affirmed the district court's determination that the Government failed to prove the element of payment for the § 1959(a)(1) offense. (App. G, pg. 18).

Based solely upon the testimony given at my trial by Bruce Ashely, the Government obviously failed to prove the element of payment for in count 8. Id.

Further proof that the Government failed to prove the payment element comes from the Order from the district court denying relief under 28 U.S.C. § 2255. I again addressed the issue of the failure to prove payment. In denying relief, the trial judge stated:

> Here, the evidence produced at trial established that petitioner had teamed up with the Mora gang to distribute drugs, that their endeavors were being thwarted by a rival Dominican gang who was stealing their customers, and that as a result, petitioner burned down the bodega where the rival gang was believed to be headquartered. The evidence also showed that immediately after petitioner committed the arson, he went to the Mora brothers to announce that he was successful in his endeavor. Under these circumstances, it was fair for the jury to infer that petitioner committed the arson murder **FOR HIS PECUNIARY GAIN** because the Dominican gang's failure to sell drugs at the Fulton spot, be out of fear or lack of supply, **WOULD TRANSLATE INTO INCREASED REVENUES FOR PETITIONER**. (emphasis added).

(App. G, pg. 31).

Thus, the trial judge's assessment of the proof for the § 1959(a)(1), that I "teamed up with the Mora gang" and received

my "pecuniary gain" from subsequent increased drug sales, demonstrates without any doubt that there was no evidence presented at trial that I was hired and paid by William Mora to burn down the Fulton Street bodega, essentials elements for murder in aid of racketeering under § 1959(a)(1).

In count 7 I was charged with arson, under 18 U.S.C. § 844(i).

COUNT SEVEN
(Arson)

On or about January 24, 1993, within the Eastern District of New York, the defendants WILLIAM MORA, a/k/a "Little Will," LEO CONTRERA and others knowingly and maliciously damage and destroy, by means of fire, certain property located in Brooklyn, New York, to wit: a grocery store and the overheard premises located at 3002 Fulton Street, Brooklyn, New York, which property was engaged in an activity affecting interstate and foreign commerce. (Title 18 U.S.C., Sections 844(i), 2, and 3551 et seq.)

As shown above, I was charged in count 8 with "knowingly and intentionally" causing the death of Mr. Salcedo. However, the Government completely abandoned that essential element of the § 1959(a((1) offense. Instead, the Government argued that the jury need not fine me guilty in count 8 with knowingly and intentionally killing Mr. Salcedo, to wit:

> Now, the charges in connection with this incident, racketeering acts, counts 7 through 10. Again, Leo Contrera is not charged with racketeering, not charged with being a member of the Mora gang. So as to racketeering act part of this, these charges, only Willie Mora is charged. Leo Contrera is charged in separate counts.
>
> The racketeering act charges an arson conspiracy, an arson and a felony murder. Felony murder, as Judge Sifton will eplain, is the killing of someone in the course of specified felony which includes arson. Doesn't matter if there was intent to kill.

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> And Leo Contrera and Willie Mora are both charged with felony murder in aid of racketeering. Leo Contrera is charged with committing that violent crime in aid of racketeering for the purpose of getting something of value from the gang, a racketeering enterprise and you have evidence of Willie Mora's payment to Leo Contrera from the testimony of Bruce Ashley. (emphasis added).

(App. G, pg. 21).

Therefore, instead of proving the charge alleged in count 8, murder in aid of racketeering, the Government constructively amended the charge in count 8 to the unintentional death of Mr. Salcedo as a result of the arson charged in count 7. Moreover, there was no proof of an agreement or, even more importantly, no proof of any payment from Willie Mora to me. As the Government came to admit, Bruce Ashely had no knowledge of any amount of money paid to me, or what that payment might have been for.

Thus, I was convicted of a hybrid offense which the Government identified as "felony murder in aid of racketeering" and not the offense charged in count 8. And just as obviously, the jury believed, as the Government led them to believe, that Bruce Ashley's testimony was sufficient to prove the payment element. It was, of course, not.

Consequently, the jury entered a general verdict of guilt as to count 8.

As shown supra, the PSR combined counts 7 (arson, 18 U.S.C. § 844(i)) and 8 (felony murder in aid of racketeering, 18 U.S.C. § 1959(a)(1), for a Sentencing Guidelines calculation. (App. M, pg.). No where in the calculation was murder in aid of racketeering, § 1959(a)(1), or the elements of that offense

set forth or even mentioned. And shown above, the Sentencing Guidelines calculation for count 8, for murder in aid of racketeering, 18 U.S.C. § 1959(a)(1), had to begin with guidelines section 2E1.3, as per the Sentencing Guidelines Statutory Index § 1B1.2(a), and binding Second Circuit caselaw in United States v. McCall, 915 F2d 811 (2d Cir. 1990) and United States v. Padilla, 961 F.2d 322 (2d Cir. 1992).

That did not occur. Instead, the PSR used count 7, arson, 18 U.S.C. § 844(i), and went to the guidelines section for that offense, § 2K1.4. Thus, the PSR only associated the death of Mr. Salcedo with count 7, arson, and not with count 8, murder in aid of racketeering. The PSR then used § 2K1.4, arson, and the death of Mr. Salcedo as a result of that arson, to a cross-reference guideline's section 2A1.1, Homicide. Id.

Thus, although the PSR alleged to have combined counts 7 and 8, the guidelines calculation rendered in the PSR was specifically limited to count 7, arson, and death resulting from that arson. There was no Sentencing Guidelines calculation for count 8, murder in aid of racketeering.

Because I was not charged in count 7, arson, with the felony murder of Mr. Salcedo, even though the cross-reference to § 2A1.1 called for a life sentence (level 43), the trial court was unable to hand down a life term in count 7. See United States v. Ferranti, 928 F. Supp. 206 (ED/NY 1996). Therefore, when the trial court ultimately passed sentence, the court had no Sentencing Guideline calculation for count 8.

The PSR stated that the arson death of Mr. Salcedo was done "unintentionally." (App. pg.). And of course, the Government argued to the jury that the death of Mr. Salcedo was unintentional, therefore, felony murder.

But at sentencing, the district court held, again without any sentencing guidelines calculation for count 8, that:

> With respect to the argument that this is not a case in which the murder that occurred in he arson should be looked on as intentional or having occurred so recklessly, as a result of such reckless behavior that it justifies the treatment as the equivalent of intentional murder, having taken into account and being refreshed as to the circumstances of the Salcedo arson, as it's come to be called, there's no question in my mind that this is the most serious type of murder, in which the murder, if not intended, was such an overwhelming probable consequence of the conduct that it's appropriately treated as the equivalent or equal to intentional murder.

(App. G. 26).

Following this statement, the district court handed down a life sentence for count 8.

The issue herein presented is that the Sentencing Guidelines calculation for count 8 was in error because it did not begin with guidelines section 2E1.3. However, because the district court rendered the above opinion to hand down a life term on count 8, it is necessary to show the district court had the opposite opinion of the same arson death in sentencing another defendant.

In the above referenced sentencing hearing statement by the district court, the judge said that opinion was the result of "being refreshed as to the circumstances of the Salcedco arson[.]" However, the facts in this case show that only <u>one</u>

person testified that he had personal knowledge of how that arson took place...Daniel Guerrero. Thus, only Guerrero could have been the judge's source of information how that arson occurred.

Guerrero, the young boy who New York Detective David Carbon threatened and coerced into lying about my involvement in the arson, resulting in state charges against me to be thrown out, changed his story about how that arson occurred numerous times in both the state and federal proceedings against me. After Guerrero was interrogated by federal authorities, evidence came to light that it was actually Guerrero who was responsible for starting the arson fire, including splashing gasoline on the premises before throwing the matches that ignited the fire.

Guerrero thereafter was allowed to plead guilty to a "superseding information" to a single count of arson, 18 U.S.C. § 844(i), a charge that started the "fire that resulted in the death of another person, to wit: Jose DeJesus Salcedo." (App. G, pgs. 26-27).

All the proceedings regarding Guerrero were "sealed," a fact that prevented my attorney from obtaining any knowledge of how the Government and the court handled Guerrero's case. In fact, it has only been during the last several years that I have been able to obtain documents related to Guerrero's case, obtaining those documents from the "archives." The documents present some very significant facts relative to how the judge handed down my life term for the same offense.

In Guerrero's PSR, under "Arson, Resulting in Death," ¶41, it was stated:

> During the evening of January 24, 1993, Guerrero and others entered the building with their faces concealed, Contrera kept a gun on one of the workers in the store and one of the perpetrators splashed gasoline on the floor, shelves, and food items of the bodega. Gasoline was also splashed on Jose Dejesus Salcedo, a sixty-three year old, who had been sitting on a milk crate talking to one of the store's workers. Guerrero lit a match, and the bodega erupted in flames. Mr. Salcedo was set ablaze and burned alive. (emphasis added).

Additionally, the PSR acknowledged that Guerrero was well known to be a liar.

> Contrera was [originally] arrested for this arson by [NY] state authorities [Detective David Carbone] in February 1993, based in part on information suppled by Guerrero. Guerrero informed police, and later testified before grand jury that he was outside the bodega and had seen Contrera and others go into the store with loaded containers of gasoline and saw Contrera and others flee after the fire started. Immediately prior to the start of the state trial scheduled in October Of 1993, however, Guerrero informed the Assistant State District Attorney prosecuting the case in New York Supreme Court that when called as a witness, he would testify that the information which he had previously provided had been lies which were coerced from him [by Detective Carbone], and that Contrera had no involvement in the arson. Guerrero was called as a witness during the state trial, and, in fact, testified to that effect. Consequently, the state had no choice but to ask charges be dismissed against Contrera as there remained no credible case against Contrera. (emphasis added).

(App. G., pg. 27-28).

Guerrero's PSR also stated that there would be "[n]o role adjustment warranted for Guerrero's involvement in the arson and resulting loss of life." Therefore, even though Guerrero was the one splashing gasoline around the store, and he was the one who tossed the matches that ignited the store and Mr. Salcedo,

the Probation Department saw no reason for a "role adjustment" for Guerrero in the arson or death of Mr. Salcedo. Id.

Guerrero entered a plea of guilty on December 20, 1994, in a "sealed proceeding" before the trial court. Mark Ressler, the AUSA who prosecuted my case represented the Government at that sealed proceeding. In accepting Guerrero's plea, the trial court stated:

> Now, the accusation to which I understand you intend to plead guilty says that on January 24, 1993, you, acting either alone or with other people, destroyed a grocery store at 3002 Fulton Street by fire, that you did this intentionally, not accidentally, and knowing what you were and with--you did it knowingly, that is, not accidentally, you did it intentionally, that is, with the purpose to destroy or damage the grocery store.
>
> It also says, although this is something that you may not--this accusation also says, although you may not have been aware of this, that this property engaged in a business that affected interstate commerce. It also says--**AND AGAIN, YOU MAY NOT HAVE BEEW AWARE OF THIS AND YOU MAY NOT HAVE INTENDED IT, BUT THAT THIS FIRE RESULTED IN THE DEATH OF SOMEBODY NAMED JOSE DEJESUS SALCEDO**. (emphasis added).

(App. G., pg. 29).

Subsequently, the trial court sentence Guerrero to an eight(8) in prison for the arson and felony murder of Mr. Salcedo.

The incongruity between the trial court's depiction of the arson and death of Mr. Salcedo at my sentencing, and the trial court's depiction of that same arson and death of Mr. Salcedo when accepting Guerrero's plea is so diametrically opposite that one would have to assume the trial court could not have been talking about the same set of circumstances. In fact, it flies

in the face of all reason and fundamental fairness that the trial court, faced with the identical set of facts regarding the arson and death of Mr. Salcedo, could, in my case, find that my conduct would satisfy the equivalent or equal treatment of intentional murder, and Guerrero's conduct, which included splashing gasoline around the store and onto Mr. Salcedo and then throwing the matches that ignited both the store and Mr. Salcedo, was so much less egregious that the trial court stated that Guerrero **"may not have been aware of this, and you may not have intended it, but that this fire resulted in the death of somebody named Jose DeJesus Salcedo."** (App. G, pgs. 29-30).

Had the trial court used § 2E1.3 as it was required to do to calculate a guideline range for count 8, murder in aid of racketeering, § 2E1.3 would have directed the court to guidelines § 2A1.1(a), Homicide. Moreover, since the charge was unintentional felony murder that occurred as a result of the arson, the court would have been directed to § 2E1.3(a)(2)(B), Felony Murder. Under that subsection, the trial court would have been able to grant a downward departure, or, in the alternative, the trial court would have been required to explain why a downward departure was not appropriate. Therefore, whether or not a downward departure might have been appropriate must be looked at, not what the court said at my sentencing, but what the court said at Guerrero's sentencing. Nevertheless, I should have been accorded the opportunity to be considered for a

downward departure under a correct application of the Sentencing Guidelines, guidelines that were mandatory at the time of my sentencing, United States v. Booker, 543 U.S. 220 (2005), whether that downward departure was granted or not.

Sentencing Guidelines Amendment 591, effective November 1, 2000, which was made retroactive, was a clarification of the Sentencing Guidelines Statutory Index, § 1B1.2(a), mandating that the offense of conviction must be cross-referenced to the correct guidelines section, and forbidding the use of relevant conduct to make such a guidelines calculation. Amendment 591 simply clarifies the original intent of § 1B1.2(a), and shows that there is no doubt whatsoever that § 2E1.3 was the Sentencing Guidelines section that should have been used as a starting point for guidelines calculation for count 8, murder in aid of racketeering, under 18 U.S.C. § 1959(a)(1).

In denying relief on this same alleged Sentencing Guidelines error in a Rule 36 motion, the district court acknowledged that the alleged error was "substantive calculations relative to his sentencing," which of course they are. However, even if this "substantive error" was beyond the limits of Rule 36, as I will show infra, once the district court was made aware of this substantive guidelines error, the court had an obligation to correct that substantive guidelines error.

In addition, I also showed the court in my Rule 36 motion that, even though the district court had found the 2 point

enhancement for obstruction of justice was not warranted, that 2 point enhancement remained part of my PSR. The district court held that because the sentencing judge did not rely on that 2 point enhancement in handing down my sentences, I suffered no prejudice.

> Like a judgment, the PSR determines the rights and obligations of the defendant going forward. As the Eight Circuit observed, the PSR "not only affects the length of sentence, but might also determine the defendant's place of incarceration, chances for parole, and relationships with social service and correctional agencies after release from prison". United States v. Brown, 715 F.2d 387, 389 n.2 (8th Cir. 1983). (emphasis added).

United States v. MacKay, No. 13-10521 (5th Cir. 6/26/2014).

Again, the alleged error has and continues to cause me prejudice and was due to be corrected under Rule 36.

SUBSTANTIVE SENTENCING GUIDELINES ERRORS MUST BE CORRECTED

I respectfully submit that there is no doubt whatsoever that the Sentencing Guidelines errors revealed to the district court, in a FSA motion and in a Rule 36 motion, were due to be corrected by that court. However, the district court first held that it had no authority to review the alleged errors in the FSA motion, and alternatively, that it was not error for the sentencing court to disregard the guidelines Statutory Index § 1B1.2(a), which prescribed using § 2E1.3 for count 8, felony murder in aid racketeering under 18 U.S.C. § 1959(a)(1), and instead to use the offense in count 7, arson under 18 U.S.C. § 844(i), and the guidelines section for that criminal offense, § 2K1.4, to begin the calculation for a Sentencing Guidelines range for count 8.

In the Rule 36 motion, the district court held that Rule 36 was not the proper vehicle to correct the alleged "substantive errors. Alternatively, the court again held that there was no error at all in the sentencing court's calculation for count 8, and the 2 point enhancement for obstruction of justice that was incorrect and remained in the PSR, caused me no prejudice.

The Second Circuit, relying on its decision in United States v. Young, 998 F.3d 43 (2d Cir. 2021), affirmed the district court's decison to deny any consideration of a potential sentence modification in count 8, because the lower court lacked the authority to do so. However, the Second Circuit did not in any

way address the district court's assessment of the alleged Sentencing Guidelines errors.

It is my position, and the position of a number of other federal circuit courts of appeals, that this Court's decision in United States v. Molina-Martinez, 136 S. Ct. 1338 (2016), and United States v. Rosales-Mireles, 138 C. Ct. 1897 (2018), mandates and obligates a district court to correct substantive Sentencing Guidelines errors, like those alleged in this case, when revealed or discovered under the review of a FSA motion, or when presented via a Rule 36 motion.

> The Federal Sentencing Guidelines first enter the sentencing process when the United States Probation Office prepares a presentence report containing, as relevant here, an advisory Guidelines range based on the seriousness of a defendant's offense and the extent of his criminal history.
>
> [T]he Guidelines are not only the starting point for most sentencing proceedings but also the **lodestar.** The Guidelines inform and instruct the district court's determination of an appropriate sentence. In this unusual case, then, the systemic function of the selected Guidelines range will affect the sentence.
>
> The Guidelines' central role in sentencing means that an error related to the Guidelines can be particularly serious. A district court that "improperly calculat[es]" a defendant's Guidelines range, for example, has committed a "significant procedure error." Gall [v. United States], [522 U.S. 38] 52, 128 S. Ct. 586, 169 L. Ed 2d 445 (2007).

Molin-Martinez, 136 S.Ct, at 1339, 1345-46.

> Before a court of appeals can consider the substantive reasonableness of a sentence,

"[I]t must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range." Gall, 552 U.S., at 51, 128 S. Ct. 586, 169 L. Ed. 2d 445.

Ensuring the accuracy of Guidelines determinations also serves the purpose of "providing certainty and fairness in sentencing" on a greater scale. 28 U.S.C. § 944(f); see also § 911(b)(1)(B); United States v. Booker, 543 U.S. [220] at 264, 125 S. Ct. 738, 160 L. Ed. 2d 621 [2005]...To realize those goals, it is important that sentencing proceedings actually reflect the nature of the offense and criminal history of the defendant, because the United States Sentencing Commission relies on data developed during sentencing proceedings, including information in the presentence investigation report, to determine whether revisions to the Guidelines are necessary. Rita [v. United States], 551 U.S. 336] at 350, 127 S. Ct. 2456, 168 L. Ed. 2d 203 [(2007)]. When sentences based on incorrect Guidelines go uncorrected, the Commission's ability to make appropriate amendments is undermined.

In board strokes, the public legitimacy of our justice system relies on procedures that are "neutral, accurate, consistent, trustworthy, and fair," and that "provide opportunities for error correction." (citations omitted)...in considering claims like Rosales-Mireles', then, "what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?" United States v. Sabillon-Umana, 772 F.3d 1328, 1333-1334 (CA 10 2014) (Gorsuch, J.)...[The error here] was based on a mistake by the Probation Office, a mistake that can be remedied through a relatively inexpensive resentencing proceeding. (emphasis added).

Rosales-Mireles, 201 L. Ed. at 387-88, 389.

As shown above, the Second Circuit, relying on its prior decision in United States v. Young, 998 F.3d 43 (2d Cir. 2021), held that the district court had no authority to review a non-covered offense for any reason at all. And even though the district court in this case did hold that there was no error in the Sentencing Guidelines calculation for count 8, the Second Circuit made no attempt to address the alleged guidelines errors, including the 2 point enhancement for obstruction of justice that remains part of my PSR to date.

However, other federal circuit courts of appeals, namely the Fourth Circuit, Sixth Circuit, and District of Columbia Circuit, have all held that motions brought under the FSA, while not requiring plenary resentencing, do require a district court to consider sentencing factors set forth in 18 U.S.C. § 3553(a) in making any potential decision to modify a sentence under the Act. And these circuit courts have all agreed that the first-step under § 3553 for a district court is to make sure a defendant was sentenced under a correct application of the Sentencing Guidelines.

In United States v. Murphy, 998 F.3d 540 (4th Cir. 2021) and United States v. Landrum, 2021 U.S. App. LEXIS 32482 (4th Cir. 2021), the defendants sought relief pursuant to the FSA. In both cases the district court found the defendants each had "covered" offenses making them potentially eligible for a sentence reduction. In both cases the district courts reduced the sentences for the covered offenses, but refused to

recalculate and correct alleged Sentencing Guidelines errors. In both cases the defendants alleged that pursuant to intervening caselaw decisions, neither defendant qualified for sentencing as a career offender under a recalculation of the guidelines. The defendants appealed.

In Murphy, the Fourth Circuit held that "we again join the Sixth Circuit's conclusion that a resentencing under § 404(b) [FSA] 'includes an accurate calculation of theamended guidelines range at the time of resentencing and thorough renewed consideration of the § 3553(a) factors.' (emphasis added) (quoting United States v. Boulding, 960 F.3d 774, 784 (6th Cir. 2020). Indeed, one of the § 3553(a) factors is the applicable Guidelines sentencing range. See 18 U.S.C. § 3553(a)(4)(A). It stands to reason, then, that a 'renewed consideration of the § 3553(a) factors" **must include an accurate Guidelines calculation 'at the time of resentencing.'"** (emphasis added) (citation omitted). Murphy, pg. 955.

In Murphy, the Fourth Circuit found that the dictates of § 3553(a)(2), when considering "the need for the sentence imposed...to reflect the serious of the offense, to promote respect for the law, and to provide just punishment for the offense" as well as "to protect the public from further crimes of the defendant." Id. Without a correct guidelines application, the appellate court held that a "district court potentially could impose a sentence 'greater than necessary,' in violation of §

3553(a), if it does not accurately calculate the Guidelines range at resentencing." Id. As such, the Fourth Circuit held that the district court had erred by not recalculating the defendant's guidelines range, which would have shown the defendant no longer qualified to be sentenced as a career offender. Id. pg. 956.

In Murphy, the Government argued that the application of incorrect guidelines calculation was "harmless error," because the error would not effect the defendant's sentence. Id. pg. 559.

Citing this Court's decision in Molina-Martinez, the Fourth Circuit held "[w]hen a defendant is sentenced under an incorrect Guidelines range-whether or not the defendant's ultimate sentence falls within the correct range-the error itself, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." Id. (quoting Molina-Martinez, 136 S. Ct. at 1345). Consequently, the appellate court found the Sentencing Guidelines error was not harmless, and reversed the decision of the district court. Id.

The Fourth Circuit made the same determination in Landrum, finding that failing to correct a Sentencing Guidelines error constituted "plain error" "that affected Landrum's substantial rights." Id. The appellate court reversed the district court's decision not to correct the guidelines error, citing this Court's decisions in Molina-Martinez and Rosales-Mireles as the basis for that reversal.

In United States v. Wilson, 827 Fed. Appx. 473 (6th Cir. 2020), another case involving a district court's failure to

correct an erroneous guidelines calculation when considering a FSA motion. This case is important to the argument being presented because, like the case at bar, it involves a Sentencing Guidelines error pre-Booker, at a time when the Sentencing Guidelines were mandatory.

> When reviewing Wilson's sentence under the First Step Act and after Booker, the district court should not have perpetuated an incorrect application of the Sentencing Guidelines to Wilson's predicate offenses. "While 'complete review' [of a motion seeking relief under the First Step Act] does not authorize plenary resentencing, a resentencing predicated on an erroneous or expired guideline calculation would seemingly run afoul of Congressional expectations." United States v. Boulding, 960 F.3d 774, 784 (6th Cir. 2020).

Wilson, LEXIS 26.

Like the Fourth Circuit's decisions in Murphy and Landrum, the Sixth Circuit decision in Wilson cited this Court's decisions in Molina-Martinez and Rosales-Mireles as mandating the correction of Sentencing Guidelines errors in the context of a FSA motion. Id. LEXIS 25-26. Again like the Fourth Circuit decisions cited, the Wilson court stressed that the § 3553(a) vis a vis a FSA motion "contemplates a baseline of process that must include an accurate amended guideline calculation and renewed consideration of the 18 U.S.C. § 3553(a) factors..." Id. LEXIS 25.

In United States v. Long, 997 F.3d 347 (DC Cir. 2021), a case dealing with a FSA motion for compassionate release, the

appellate court held that before considering even a request for compassionate release, a district court is required, under § 3553(a), to ensure that the defendant's sentence(s) were correctly calculated under the Sentencing Guidelines. Id. pg. 360. Relying on the authority of this Court's decision in Molina-Martinez, the D.C. Circuit held that, when considering a FSA motion for compassionate release, Sentencing Guidelines errors must be corrected by a district court before the court could begin applying the other § 3553(a). Id.

Although the Second Circuit relied on its narrow decision in Young, even though the defendant in that case alleged no Sentencing Guidelines error, to deny relief in the instant case, even though I did allege two substantive Sentencing Guidelines errors, the Second Circuit has shown that it recognizes the need to correct Sentencing Guidelines errors almost identical to the error I presented.

In United States v. Huberfeld, 968 F.3d 224 (2d Cir. 2020), in a direct appeal, the Second Circuit held that a district court errs when the court fails to consult the guidelines Statutory Index, § 1B1.2(a), to determine the guidelines section that applies to the statutory offense of conviction. Citing this Court's decision in Molina-Martinez as authority, the Second Circuit stated that "[t]he district court was obligated to use the fraud guideline as 'the offense guideline section...apllicable to the offense of conviction.' U.S.S.G. § 1B1.2(a).'" (emphasis added) Id. pg. 232.

I respectfully submit that there is no doubt whatsoever that two substantive Sentencing Guidelines errors are present in this case. In calculating a Sentencing Guidelines range for count 8, felony murder in aid of racketeering, under 18 U.S.C. 1959(a)(1), the sentencing court did not use guidelines § 2E1.3 as required by the Statutory Index § 1B1.2(a). In fact, because the Probation Department combined count 7, arson, under 18 U.S.C. § 844(i) with count 8, and then used exclusively the guidelines section assigned to the arson statute, guidelines section 2K1.4, to set a Sentencing Guidelines range for count 8, felony murder in aid of racketeering, there was in effect no Sentencing Guidelines calculation at all for count 8, only count 7. Therefore, that Sentencing Guidelines error led me to be sentenced to a life term for the count 8 conviction without any guidelines calculation whatsoever for that offense. (App. M). I submit that there could be no more egregious Sentencing Guidelines error than this, especially since this occurred pre-Booker, when the Sentencing Guidelines were mandatory.

In the PSR (App. M), the Probation Department added a 2 point enhancement for obstruction of justice. That 2 point enhancement increased my Sentencing Guidelines points to 50. However, the sentencing court specifically held that the 2 point enhancement was not supported by any evidence and denied that enhancement. However, the PSR was not amended to reflect the sentencing court's determination, and that 2 point enhancement remains part of my PSR to date. And that 2 point enhancement

has been, and continues to be, used by the Bureau of Prisons in my classification, security scoring, designation to BOP institutions, designation in housing within an institution, job assignments, etc. Therefore, I have been, and continue to be, unfairly prejudiced by the erroneous inclusion of the 2 point obstruction of justice enhancement remaining in my PSR.

These are the sort of substantive Sentencing Guidelines errors this Court has held in Molina-Martinez and Rosales-Mireles must be corrected when the opportunity is available. And as shown above, a number of federal circuit courts of appeals have determined that a FSA motion provides that sort of opportunity. In fact, their is agreement among these circuit courts that the first thing a district court must do, after determining a defendant has a "covered" offense under FSA § 404(b), is to order an amended Sentencing Guidelines calculation as required by § 3553(a). This must be done before a district court can apply the other factors set forth in § 3553(a).

REASONS WHY THE COURT SHOULD GRANT THE WRIT

I. The Court should grant the writ to resolve a split between the Federal Circuit Courts of Appeals involving the range of relief a district court is authorized to grant in a motion filed under the First Step Act 2018, § 404.

As shown in this Petition, there exists a split between the Federal Circuit Courts of Appeals regarding the range of available relief that may be provided to defendants pursuant to a motion filed under the First Step Act 2018, § 404.

As shown above, the Second Circuit and the Eleventh Circuit are holding that relief is limited to potentially reducing a sentence only for a "covered" offense under § 404(b). No relief whatsoever is available for any "non-covered" offense, even when that non-covered offense is part of an aggregate sentencing package that includes the covered offense.

Also as shown above, the Fourth Circuit, Sixth Circuit, and Seventh Circuit are holding that once a district court determines that a defendant has a "covered" offense, all sentences, even for non-covered offenses, that are part of the same aggregate sentencing package with the covered offense, are subject to potential modification under § 404(b).

Hundreds if not thousands of defendants have filed FSA motions seeking relief under §404, and it is reasonable to assume that additional defendants have yet to file such motions. And because the range of potential relief available for such defendants is so dramatically different, depending on which

appellate circuit a defendant may be required to file in, defendants in those federal circuits allowing relief limited to only a "covered" offense are, or will be, denied the same relief defendants filing in those circuit allowing more expanded relief under § 404(b), to include potential modification of any non-covered offense that is part of an aggregate sentencing package that includes a covered offense.

Therefore, assuming that the circuit courts offering more expanded relief under FSA § 404(b) are correct in their legal determinations, defendants is those circuits that offer relief only to a "covered" offense, are, or will be, suffering potentially irreparable harm, necessarily serving prison sentences longer than those prescribed by the correct application of the law.

This Court has the inherent authority and power to resolve this very significant Federal Circuit Court split. It is therefore respectfully submitted that this Court should exercise its jurisdictional authority, grant the writ, and resolve this circuit split.

II. The Court should grant the writ to resolve a split between the Federal Circuit Courts of Appeals involving the correction of substantive Sentencing Guidelines errors by a court when considering a motion filed under the First Step Act 2018, § 404.

As shown in this Petition, there exists a split between the Federal Circuit Courts of Appeals regarding the range of

relief available provided to defendants pursuant to a motion filed under the First Step Act 2018, § 404.

These circuit courts, including the Second Circuit and Eleventh Circuit, have offered potential relief to only "covered" offenses under § 404(b). The decisions of these circuit courts are so narrow and restrictive that a district court reviewing a FSA motion cannot consider potentially modifying any other sentence a defendant might have, even if that sentence or sentences are part of the same aggregate sentencing package with the covered offense. Moreover, this limitation of relief provided under a FSA § 404 motion extends to a district court being unable to review and/or correct alleged errors in the Sentencing Guidelines calculations.

Other circuits, including the Forth Circuit, Sixth Circuit, and the Seventh Circuit, that have taken a more expansive view of the relief available under § 404(b), have held that once a district court has determined a defendant has a "covered" offense, before that court can apply any of the factors in § 3553(a), the court must first order the preparation of an amended PSR, to determine that a defendant's sentence(s) have been correctly calculated under the Sentencing Guidelines. Only then, under a correct guidelines calculation, can a district court apply and/or consider the remaining § 3553(a) factors.

Of course, should a district court determine that a defendant's original sentence was the product of an erroneous guidelines calculation, a district court reviewing a FSA motion

is obliged, pursuant to this Court's decisions in Molina-Martinez and Rosales-Mireles, to correct all substantive guidelines errors, regardless of whether the district court grants or denies any sentence modification(s).

As shown above, the federal circuits are split as to the range of relief available under § 404(b). Additionally, the narrow view of relief under § 404(b) is also preventing district courts in those circuits from reviewing and/or correcting any Sentencing Guidelines errors. While at the same time, those district courts located in the circuits that offer more expanded relief under § 404(b) must, pursuant to Molina-Martinez and Rosales-Mireles, correct any substantive guidelines error discovered from an amended PSR.

The split in the Federal Circuit Courts of Appeals, that include those circuit courts that offer only relief to a "covered" offense, extend to those circuit courts preventing the district courts from correcting Sentencing Guidelines errors when reviewing FSA motions. And, of course, those circuit courts offering expanded relief under the FSA, require the district courts considering a FSA motion to correct substantive Sentencing Guidelines errors when same are found. As such, defendants in those circuits where limited relief is offered, are, as in my case, serving sentences under incorrect applications of the guidelines.

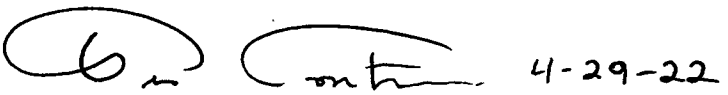
This Court has the inherent authority and power to resolve this very significant Federal Circuit Court split. It is

therefore respectfully submitted that this Court should exercise its jurisdictional authority, grant the writ, and resolve this circuit split.

CONCLUSION

WHEREFORE, for all the foregoing reasons, and for good cause shown, I respectfully request the Court to grant the writ of certiorari.

Respectfully submitted,



4-29-22

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