

In the
Supreme Court of the United States

EDWAR RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether certiorari review should be granted where the Eleventh Circuit erred in affirming the district court's denial of Rodriguez' objection to the drug quantity he was held accountable for.
2. Whether certiorari review should be granted where the Eleventh Circuit erred in affirming the district court's denial of Rodriguez' objection to the dangerous weapon enhancement.
3. Whether certiorari review should be granted where the Eleventh Circuit erred in affirming the district court's denial of Rodriguez' request for a departure due to his criminal history being overstated was unsupported by the facts.
4. Whether certiorari review should be granted where the Eleventh Circuit erred in affirming Rodriguez' sentence where Rodriguez' sentence was unreasonable in light of the statutory sentencing factors listed in 18 U.S.C. § 3553(a)-(f) and principles applied by the advisory federal sentencing guidelines.

LIST OF PROCEEDINGS

United States Court of Appeals for the Eleventh Circuit
No. 20-14681

United States of America, *Plaintiff-Appellee*, v.
Edwar Rodriguez, a.k.a. Domi, a.k.a. Brooklyn,
Defendant-Appellant

Date of Final Opinion: May 12, 2022

Date of Rehearing Denial: August 4, 2022

United States District Court Middle District of Florida

Case Number: 8:20-cr-30-T-36TGW

United States of America, v.
Edwar Rodriguez, a.k.a. Domi, a.k.a. Brooklyn

Date of Final Judgment: December 3, 2020

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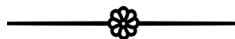
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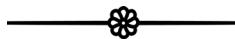
PETITION FOR A WRIT OF CERTIORARI

The Petitioner, EDWAR RODRIGUEZ, (hereinafter “Rodriguez”), 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 May 12, 2022.



OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit dated May 12, 2022 is included at App.1a. This opinion was designated “PUBLISH” by the Eleventh Circuit. The Judgment of the United States District Court Middle District of Florida on December 3, 2020 is included at App.27a. The decision of Magistrate Judge on August 31, 2020 is included at App.37a.



JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals affirming the Judgment of the United States District Court was entered on May 12, 2022. (App.1a). The Eleventh Circuit Court of Appeals entered its Order Denying Rodriguez’ Petition for Rehearing and Petition for Rehearing *En Banc* on August 4, 2022. (App.39a). 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 INVOLVED

U.S. Const., amend. V

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 subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. XIV § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



STATEMENT OF THE CASE

A. Course of Proceedings

On January 22, 2020, a federal grand jury issued a one (1) count indictment against EDWAR RODRIGUEZ (“Rodriguez”), CHRISTIAN SANTIAGO RONDON, VICTOR SANTIAGO RONDON, OLGA PATRICIA JACKSON, JORGE RAMIREZ and CARLO BIRIS MARTINEZ, charging them all with conspiracy to distribute and possess with intent to distribute controlled substances, including cocaine and heroin in violation of 21 U.S.C. § 841(b)(1)(A)(viii), 21 U.S.C. § 846 and 21 U.S.C. § 841(b)(1)(C) (Count One); and a forfeiture count. (DE:1)¹.

On August 31, 2020, Rodriguez pled guilty to Count I, conspiracy to distribute and possess with intent to distribute controlled substances, including cocaine and heroin in violation of 21 U.S.C. § 841(b)(1)(A)(viii), 21 U.S.C. § 846 and 21 U.S.C. § 841(b)(1)(C). (DE:138, DE:151).

On December 3, 2020, the District Court sentenced Rodriguez to 135 months of incarceration followed by three (3) years of supervised release with an assessment of \$100.00. The District Court granted Rodriguez’ request to recommend he be enrolled in UNICOR or HVAC. (DE:199; DE:226:75-81). Rodriguez filed a timely Notice of Appeal and is confined. (DE:204).

On May 12, 2022, the Eleventh Circuit affirmed Rodriguez’ sentence. On August 4, 2022, the Eleventh

¹ “DE” refers to the docket entry number from the district court. Middle District of Florida, No. 8:20-cr-00030-CEH-TGW-1.

Circuit denied Rodriguez' Petition for Rehearing and Rehearing *En Banc*.

B. Statement of the Facts

1. The Offense Conduct

Beginning on an unknown date, but not later than on or about January 1, 2018, and continuing through on or about April 23, 2019, a Florida drug trafficking organization (DTO) distributed hundreds of kilograms of methamphetamine, as well as a smaller amount of cocaine, within the Middle District of Florida. A Mexican drug cartel supplied the DTO, which was led by Juan Carlos Arias Castillo (Castillo) and Adan Barajas Maldonado (Maldonado) (PSI at 7).

On January 9, 2018, law enforcement officers in Baldwin County, Alabama, conducted a traffic stop on a vehicle travelling from Texas, which was later determined to contain approximately 12 kilograms of methamphetamine and a firearm. *Post-Miranda*, the occupants of the vehicle gave statements to law enforcement in Dallas, Texas, that they purchased multiple kilograms of methamphetamine and then deliver it to Castillo at 11100 Monarch Drive in Spring Hill, Florida. At least one of the vehicle's occupants indicated they had been paid by Castillo on at least four occasions to deliver methamphetamine imported from a Mexican cartel based in Michoacan, Mexico, through Dallas, Texas, to Castillo in Florida. (PSI at 8)

One of the vehicle's occupants continued to cooperate with law enforcement and explained that Castillo was distributing kilogram quantities of methamphetamine several times monthly, between January 2018 and October 2018, and that Castillo stored, unpacked, cleaned in acetone, and repackaged multi-

kilogram quantities of methamphetamine into smaller pound-size parcels for distribution from 11100 Monarch Drive. The cooperating individual reported to law enforcement that Castillo possessed numerous firearms within the Spring Hill residence to protect his cash and drug supply. The cooperating individual reported that couriers working for Castillo picked up methamphetamine and delivery instructions from Castillo at 11100 Monarch Drive, delivered the methamphetamine throughout Florida, returned drug sale proceeds to Castillo, and used commercial wire services to send proceeds to individuals in Michoacan. The utilities at 11100 Monarch Drive were in the names of Victor Santiago Rondon (V. Rondon) and Christian Santiago Rondon (C. Rondon). (PSI at 9)²

Law enforcement conducting surveillance at the Elgin Boulevard stash house noted that numerous individuals visited the residence, but the property was limited in who was allowed inside near the drug supply. Generally, couriers and lower-level dealers were met in the front yard of the residence; however, Castillo, Maldonado, Rodriguez, V. Rondon, and C. Rondon had access to the stash houses. Law enforcement established that couriers regularly were involved in the transfer-in and transfer-out of bags containing suspected drugs from the residence. (PSI at 14)

The probation officer who prepared Rodriguez' PSI at set his base offense level at 38, pursuant to U.S.S.G. § 2D1.1, U.S.S.G. § 2D1.1(a)(5) and U.S.S.G. § 2D1.1

² Concurrently with the filing of this petition, Rodriguez has moved to file a supplemental appendix under seal which contains his Pre-Sentencing Investigation Report (PSI). The facts discussed herein with reference to the PSI are not confidential.

(c)(1). (PSI at 34) The probation office gave Rodriguez a two-level enhancement pursuant to U.S.S.G. § 2D1.1 (b)(1) for a dangerous weapon being possessed and a two-level enhancement pursuant to U.S.S.G. § 2D1.1 (b)(5) for importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine. (PSI at 35-36). The probation office gave Rodriguez a three-level decrease for acceptance or responsibility, pursuant to U.S.S.G. § 3E1.1(a) and U.S.S.G. § 3E1.1(b). (PSI at 42-43) Accordingly, the probation officer set Rodriguez' total offense level at 39. (PSI at 44)

The probation office found that Rodriguez had a total offense level of 39 and a criminal history category of III. As such, the guideline imprisonment range was 324 to 405 months. (PSI at 98)

Rodriguez filed his Sentencing Memorandum and Motion for Variance on November 30, 2020. Rodriguez objected to the presentence report regarding the enhancements to his total offense level and sought a mitigating role reduction, a downward departure of his criminal history because his criminal history category “substantially overrepresents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes” and a downward variance due to his personal history and because he accepted responsibility immediately and in fact provided substantial assistance to the government. *United States v. Whitehead*, 532 F.3d 991 (9th Cir. 2008). (DE:192).

Rodriguez' sentencing hearing was held on December 3, 2020. (DE:226).

Rodriguez testified he had no knowledge of who was the head of the conspiracy and never met anyone who was the head of the conspiracy and that he had no knowledge of how much drugs he was picking up or how much Mr. Castillo or Mr. Maldonado paid for the drugs and that he had no involvement in setting the rates for the drugs or had any involvement with organizing the delivery of the drugs, what drugs they were selling and that he had no knowledge of how they packaged the methamphetamine and other than being paid for the tasks asked of him, that he did not have any financial interest in the success of the drug deals. (DE:226:26-29).

Rodriguez further testified that he distanced himself from the conspiracy and that he was asked to wire monies to Mr. Castillo's wife and mother and another family member. (DE:226:33).

The District Court sustained Rodriguez' objection to Paragraph 38, the adjustment in Rodriguez' role in the offense and Paragraph 46, the juvenile adjudications. (DE:226:62-63). Rodriguez' counsel then argued that because of the role objection being granted, that the enhancement for the importation would not apply and probation agreed. Therefore, Rodriguez' total offense was to be reduced to 31 and his criminal history remained a category III, bringing his guideline sentence to be 135 to 168 months. (DE:226:63-64). Accordingly, the District Court found that "[t]he Total Offense Level is Level 31. The Criminal History Category is Category III. The advisory guidelines range for incarceration is 135 to 168 months' imprisonment with 2 to 5 years supervised release." The District Court also found that Rodriguez was eligible for safety

valve and therefore the minimum term of imprisonment no longer applied. (DE:226:66-67).

The District Court sentenced Rodriguez to “the low end of the guidelines of 135 months . . . So I am denying . . . [his] request for a downward variance, but pursuant to Title 18, United States Code Sections 3551 and 3553, it is the judgment of the Court that the Defendant Edwar Rodriguez is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 135 months. Upon release from imprisonment, Mr. Rodriguez, you shall serve a three-year term of supervised release . . . Based upon your financial status, the Court waives the imposition of a fine, but you are ordered to pay to the United States a special assessment. That is in the amount of \$100 and it is due immediately.” (DE:226:76-77) Rodriguez requested to be housed in the Coleman facility, to self-surrender and be placed in the UNICOR job and learning heating, ventilation and air-conditioning, HVAC. (DE:226:78-79). Rodriguez’ request to self-surrender was denied and his other requests were granted. (DE:226:78-81).

2. Facts Pertaining to Rodriguez’ Sentence

The probation officer who prepared Rodriguez’ PSI set his base offense level at 38, pursuant to U.S.S.G. § 2D1.1, U.S.S.G. § 2D1.1(a)(5) and U.S.S.G. § 2D1.1(c)(1). (PSI at 34) The probation office gave Rodriguez a two-level enhancement pursuant to U.S.S.G. § 2D1.1(b)(1) for a dangerous weapon being possessed and a two-level enhancement pursuant to U.S.S.G. § 2D1.1(b)(5) for importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine. (PSI at 35-36). The pro-

bation officer gave Rodriguez a three-level decrease for acceptance or responsibility, pursuant to U.S.S.G. § 3E1.1(a) and U.S.S.G. § 3E1.1(b). (PSI at 42-43) Accordingly, the probation officer set Rodriguez' total offense level at 39. (PSI at 44)

The probation office found that Rodriguez had a total offense level of 39 and a criminal history category of III. As such, the guideline imprisonment range was 324 to 405 months. (PSI at 98)

Rodriguez filed his Sentencing Memorandum and Motion for Variance on November 30, 2020. Rodriguez objected to the presentence report regarding the enhancements to his total offense level and sought a mitigating role reduction, a downward departure of his criminal history because his criminal history category "substantially overrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes" and a downward variance due to his personal history and because he accepted responsibility immediately and in fact provided substantial assistance to the government. *United States v. Whitehead*, 532 F.3d 991 (9th Cir. 20008). (DE:192).

Rodriguez' sentencing hearing was held on December 3, 2020 (DE:226). At the sentencing hearing, defense counsel argued Rodriguez' objections to the PSI, his request for a minor role reduction a downward departure and his request for a variance and his other objections. (DE:226:7-73) As such, the District Court sentenced Rodriguez to 135 months of incarceration followed by three (3) years of supervised release and the payment of a \$100.00 assessment. (DE:199; 226:75-81). As a result of the sentence that was imposed, Rodriguez

timely filed his notice of appeal and is incarcerated. (DE:204)

3. Rodriguez' Sentencing Hearing

Rodriguez' sentencing hearing was held on December 3, 2020. (DE:226).

Rodriguez' counsel further argued Rodriguez' objections to the presentence investigation report. (DE:226:6-67).

Rodriguez' counsel argued Rodriguez' objection to the quantity of drugs he is being held accountable for arguing that "he should be accountable for the drugs he personally was involved in, not the entire conspiracy, and what the presentence report does is lump him with the other drivers for the entire quantity that was brought from Texas to the Middle District of Florida. (DE:226:8-9). Counsel continued to argue that "Mr. Maldonado in his debriefing identified Mr. Rodriguez in the transportation of 11 kilos from Texas to a ledger that he—apparently he kept a ledger, . . . trafficking portion of bringing it to—from Texas to the Middle District is the 11 kilos . . . The presentence report lumps it, all 200 kilos roughly that Christian Rondon and Victor Rondon and as the presentence report notes is seven drivers at least used in the conspiracy were brought they're holding Mr. Rodriguez for . . ." (DE:226:9-10). That is—which is where we came up with our desire to—that the appropriate range is 15 to 45 kilos of methamphetamine . . ." (DE:226:11).

Rodriguez' counsel then argued Rodriguez' objection to the enhancement regarding the firearm and argued that "Mr. Rodriguez disputes selling the fire-

arm to Mr. Castillo. He says it's simply not accurate" As such, Rodriguez testified that he did not sell the firearm to Mr. Castillo, and he never saw Mr. Castillo with a firearm. (DE:226:13-14). Furthermore, counsel argued that "[i]n the debriefings, I don't see any information about when the guns were involved in the conspiracy other than the date of the search warrant" and that the day the guns were found Rodriguez was working his regular job. (DE:226:19). The District Court acknowledged Rodriguez' objections to Paragraphs 21 and 36 of the presentence report and Rodriguez' counsel then argued Rodriguez' objection to Paragraph 37 regarding importation. (DE:226:21). Counsel argued that Rodriguez was objecting to the two-level enhancement for importation as it is "unconstitutional" to "enhance only methamphetamine two levels if it comes from out of the country and no other drug." (DE:226:21-22).

Rodriguez' counsel then argued Rodriguez' objection to Paragraph 39, the role offense. (DE:226:22). Counsel argued "Mr. Rodriguez was a driver. He did a transportation of a load from Texas to Middle District of Florida. . . . He himself made deliveries and he wired approximately \$65,000 to various places directed by Mr. Castillo. He was under the impression some of those were for family . . . He had no interest in the drugs. He had no proprietary interest in the drugs." (DE:226:22). Counsel argued the elements to obtain a role reduction, arguing that "[h]e had no decision-making authority. He was merely 'do the task'. He went where Castillo told him to go and drove there and he wired whatever money he told him to wire to whoever he told him to wire it to. His participation again was merely as a driver . . . so he's

not—doesn't have a huge ability to benefit from the criminal activity, so under the five criteria and given the example the guidelines put forth, we think he's entitled to a two level role reduction" (DE:226:24-25).

Rodriguez testified he had no knowledge of who was the head of the conspiracy and never met anyone who was the head of the conspiracy and that he had no knowledge of how much drugs he was picking up or how much Mr. Castillo or Mr. Maldonado paid for the drugs and that he had no involvement in setting the rates for the drugs or had any involvement with organizing the delivery of the drugs, what drugs they were sell and that he had no knowledge of how they packaged the methamphetamine and other than being paid for the tasks asked of him, that he did not have any financial interest in the success of the drug deals. (DE:226:26-29).

Rodriguez further testified that he distanced himself from the conspiracy and that he was asked to wire monies to Mr. Castillo's wife and mother and another family member. (DE:226:33).

Rodriguez' counsel objected to Paragraph 46 – the juvenile adjudications and argued it was a civil infraction. (DE:226:35-36). After the AUSA explained the terminology and how New York views said offense, the District Court held that "that one needs to be removed . . ." (DE:226:56). The District Court overruled Rodriguez' objections to Paragraphs 21, 22 and 35 and therefore overruled his objection to the "offense conduct and base offense level, as to the objection to being held accountable for more than 200 kilograms of methamphetamine, the Court is going to overrule the Defendant's objection with regard to that." The District Court also overruled Rodriguez' objection to

Paragraphs 21 and 36 regarding the firearm and Paragraph 37 regarding importation of methamphetamine importation. (DE:226:60-62)

The District Court sustained Rodriguez' objection to Paragraph 38, the adjustment in Rodriguez' role in the offense and Paragraph 46, the juvenile adjudications. (DE:226:62-63). Rodriguez' counsel then argued that because of the role objection being granted, that the enhancement for the importation would not apply and probation agreed. Therefore, Rodriguez' total offense was to be reduced to 31 and his criminal history remained a category III, bringing his guideline sentence to 135 to 168 months. (DE:63-64). Accordingly, the District Court found that “[t]he Total Offense Level is Level 31. The Criminal History Category is Category III. The advisory guidelines range for incarceration is 135 to 168 months' imprisonment with 2 to 5 years supervised release.” The District Court also found that Rodriguez was eligible for safety valve and therefore the minimum term of imprisonment no longer applied. (DE:226:66-67).

Rodriguez' counsel then argued that Rodriguez was entitled to a variance due to the fact that his criminal history was “overrepresented” and that under the factors of 3553 he is entitled to a variance because he was always working a legitimate job, has strong support from his family and that because the way the conspiracy was structured he cannot fully cooperate with the government, but did provide what information he could. Therefore, counsel asked the District Court “to consider a variance from the otherwise applicable range just recognizing his criminal history and employment.” Counsel argued that “[a] reduction of one level in a criminal history over would be 121 to

151, and 108 to 105 would be one more level for the lack—the potential that he won’t come back and re-offend, so we ask the Court for 108 months.” (DE:226:72-73). The government requested 135 months—the low end of the guidelines. (DE:226:73-75).

The District Court sentenced Rodriguez to “the low end of the guidelines of 135 months . . . So I am denying Mr. Fitzgerald’s request for a downward variance, but pursuant to Title 18, United States Code Sections 3551 and 3553, it is the judgment of the Court that the Defendant Edwar Rodriguez is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 135 months. Upon release from imprisonment, Mr. Rodriguez, you shall serve a three-year term of supervised release . . . Based upon your financial status, the Court waives the imposition of a fine, but you are ordered to pay to the United States a special assessment. That is in the amount of \$100 and it is due immediately.” (DE:226:76-77) Rodriguez requested to be housed in the Coleman facility, to self-surrender and be placed in the UNICOR job and learning heating, ventilation and air-conditioning, HVAC. (DE:226:78-79). Rodriguez’ request to self-surrender was denied and his other requests were granted. (DE:226:78-81).

a. The Eleventh Circuit Erred in Affirming the District Court’s Denial of Rodriguez’ Objection to the Drug Quantity He Was Held Accountable For.

The affirming of the District Court’s denial of Rodriguez’ objection to the amount of drugs he was

accountable for was in error based upon the facts of the case and his actual involvement in the conspiracy.

b. The Eleventh Circuit Erred in Affirming the District Court's Denial of Rodriguez' Objection to the Dangerous Weapon Enhancement.

The affirming of the District Court's denial of Rodriguez' objection to the two-level enhancement for the dangerous weapon was in error where he testified that he did not sell the weapon to anyone and the government had no evidence to rebut his testimony.

c. The Eleventh Circuit Erred in Affirming the District Court's Denial of Rodriguez' Request for a Departure Due to His Criminal History Being Overstated.

Based on Rodriguez' arguments and caselaw, his criminal history clearly was overstated and therefore the denial of his request for a departure should not have been affirmed by the Eleventh Circuit.

d. Rodriguez' Sentence Should not Have been Affirmed by the Eleventh Circuit where Rodriguez' Sentence was Not Substantively Reasonable Considering 18 U.S.C. § 3553(A)-(F).

A sentence will be found to be "substantively reasonable" if when considering the totality of the circumstances, the purposes of 18 U.S.C. § 3553(a) are met by the District Court. *United States v. Pugh*, 515 F.3d at 1191.

Rodriguez' sentence was unreasonable in light of the sentencing factors listed in 18 U.S.C. § 3553(a)-(f) and the totality of the circumstances; more particularly, the fact that Rodriguez took immediate acceptance of responsibility, and his criminal history was grossly overstated. Moreover, the sentence was not minimally sufficient or "appropriate" as the District Court alluded to, but greater than necessary to comply with the purposes of sentencing under 18 U.S.C. § 3553(a). In reviewing the totality of the circumstance, Rodriguez' sentence was far too severe.



REASONS FOR GRANTING THE PETITION

I. CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF RODRIGUEZ' OBJECTION TO THE DRUG QUANTITY HE WAS HELD ACCOUNTABLE FOR.

The government has the burden to establish drug quantity by a preponderance of the evidence. *United States v. Rodriguez*, 398 F.3d 1291, 1296 (11th Cir. 2005).

A member of a drug conspiracy is liable not only for his own acts, but also for the acts of others “in furtherance of the activity that the defendant agreed to undertake and that are reasonably foreseeable in connection with that activity.” *United States v. Ismond*, 993 F.2d 1498, 1499 (11th Cir. 1993). This rule applies to drug quantity determinations. See U.S.S.G. § 1B1.3(a)(1)(B) & cmt. n. 2. In such cases, the District Court must make individualized findings as to a defendant’s scope of involvement, and then determine the drug quantities “reasonably foreseeable” to that defendant given his level of participation. *Ismond*, 993 F.2d at 1499.

In the case at hand, the District Court found that Rodriguez was a minor participant and was only involved for about a year. Also, the evidence clearly supported a finding that Rodriguez “quit” working for the conspiracy before the search warrant was executed which also supports Rodriguez’ argument that he should only be accountable for the drugs he actually delivered. (DE:226:62-63, 57). The District Court clearly

erred in denying Rodriguez' objection and finding that Rodriguez was accountable for 200 kilos of methamphetamine. (PSI at 22). Because the facts did not support said finding, the Eleventh Circuit should not have affirmed Rodriguez' sentence as it is clearly unreasonable and greater than necessary based upon the totality of the circumstances.

Furthermore, as previously argued, it is clear that there was no "accurate" evidence or testimony to determine the actual amount of drugs that Rodriguez is in fact accountable for. In fact, the District Court pointed out that the government's position as to the amount of drugs attributable to Rodriguez was pure "speculation". (DE:226:44). Although the District Court questioned the amount that the government was alleging to be attributable to Rodriguez, the District Court agreed with the government's position and overruled Rodriguez' objection. (DE:59). However, the amount was based on mere speculation and not facts. Again, the District Court must make individualized findings as to a defendant's scope of involvement, and then determine the drug quantities "reasonably foreseeable" to that defendant given his level of participation. *Ismond*, 993 F.2d at 1499. And, because the ruling by the District Court was based on "speculation", the Eleventh Judicial Circuit should have vacated Rodriguez' sentence and remanded it back to the District Court for a new sentencing hearing. The fact that the District Court surmised that the conspiracy was a "jointly undertaken criminal activity as opposed to a number of separate criminal activities" and agreed with the government's assumptions supports Rodriguez' argument that the Eleventh Judicial Circuit erred

in affirming Rodriguez' sentence and therefore his Petition for Writ of Certiorari review must be granted.

II. CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF RODRIGUEZ' OBJECTION TO THE DANGEROUS WEAPON ENHANCEMENT.

A District Court's determination of facts that support enhancements under the Sentencing Guidelines are findings of fact subject to the clearly erroneous standard. *See United States v. Singh*, 291 F.3d 756, 763 (11th Cir. 2002). The application of the Sentencing Guidelines to the facts as found by the District Court is a question of law that is reviewed *de novo*. *See United States v. Yates*, 990 F.2d 1179, 1182 (11th Cir. 1993). Whether a particular guideline applies to a given set of facts is a question of law subject to *de novo* review. *See United States v. Kirkland*, 985 F.2d 535, 537 (11th Cir. 1993). Because the facts of this case do not support Rodriguez' sentence, his Petition for Writ of Certiorari review must be granted.

In both the District Court and at the appellate level, Rodriguez objected to the increase in Rodriguez' offense level by two levels pursuant to U.S.S.G. § 2D1.1(b)(1) for possession of a dangerous weapon (PSI at 35). Rodriguez argued that he did not sell the weapon to anyone and therefore said enhancement is unsupported by the facts. (DE:226:14).

Applying U.S.S.G. § 2D1.1(b)(1) it is clear that there is a requirement that Rodriguez had possession of the firearm, not just that a firearm was used during the conspiracy. Furthermore, the allegations against Rodriguez were that Rodriguez "sold a Taurus

9mm semiautomatic pistol to one of the conspiracy leaders, Joan Carlos Arias Castillo, during the conspiracy, which was the same pistol that law enforcement seized . . . ” (PSI. at 35). It is clear from the evidence and testimony at the sentencing hearing, that Rodriguez had no knowledge of the pistol, nor did he ever have possession of it and therefore did not sell it to anyone. *United States v. Gallo* requires that the government prove that the defendant was in possession of the weapon, was a co-conspirator, that the co-conspirator’s possession of the weapon was in furtherance of the conspiracy, that Rodriguez was a member of the conspiracy, and that possession of the weapon by the co-conspirator was foreseeable by Rodriguez. *United States v. Gallo*, 195 F.3d 1278 (1999).

In reviewing the evidence and testimony, there was absolutely no evidence or testimony that Rodriguez knew or could foresee that one of his co-conspirators had a weapon. What the evidence did show was that Rodriguez never really had access to the residence where the weapon was seized and never had possession of the weapon. Furthermore, the District Court found he was a minimal participant in the conspiracy and therefore he was not as “actively involved” in the conspiracy as his other co-defendants. Just based on the above, it is unclear how either the District Court or the Eleventh Circuit could find that Rodriguez could “foresee” that a weapon would be involved in the conspiracy. The issue is what did “Rodriguez foresee” not what is usually the case in a drug conspiracy action. Therefore, Rodriguez’ objection should have been granted and the two-level enhancement vacated. Vacating said two-level enhancement would have made Rodriguez’ sentence more reasonable and therefore,

not greater than necessary. After all, the District Court failed, as did the Eleventh Circuit, to take into account that Rodriguez accepted responsibility and was a minimal participant in the conspiracy. As such, since Rodriguez sentence was unreasonable and the Eleventh Circuit affirmed said unreasonable sentence, this Court must grant Rodriguez' Petition for Writ of Certiorari review in order to avoid another miscarriage of justice.

**III. CERTIORARI REVIEW SHOULD BE GRANTED
WHERE THE ELEVENTH CIRCUIT ERRED IN
AFFIRMING THE DISTRICT COURT'S DENIAL OF
RODRIGUEZ' REQUEST FOR A DEPARTURE DUE TO
HIS CRIMINAL HISTORY BEING OVERSTATED.**

The District Court has the discretion to grant a downward departure based upon the overrepresentation of a defendant's criminal history. *United States v. Fayette*, 895 F.2d 1375 (11th Cir. 1990). If reliable information indicates that a defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted. U.S.S.G. § 4A1.3(b)(1). *United States v. Gibson*, 434 F.3d 1234 (11th Cir. 2006). Accordingly, when you take into account that one of the charges occurred when he was nineteen years of age and over twelve (12) years ago, the District Court clearly had the discretion to find that Rodriguez' criminal history category was clearly an overrepresentation of his criminal past. Because there was "reliable information [to] indicate . . . that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that he

will commit other crimes, a downward departure was warranted" and because same was denied and said denial was affirmed by the Eleventh Judicial Circuit, Rodriguez' Petition for Writ of Certiorari must be granted.

IV. CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING RODRIGUEZ' SENTENCE THAT WAS NOT SUBSTANTIVELY REASONABLE CONSIDERING 18 U.S.C. § 3553(A)-(F).

In reviewing Rodriguez' sentence for substantive reasonableness, this Court must consider whether the factors of 18 U.S.C. § 3553(a) support his sentence based upon the facts of this case. *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586 (2007); *see also, United States v. Johnson*, 485 F.3d 1264 (11th Cir. 2007). Rodriguez argues that the District Court abused its discretion when it failed to give proper weight and consideration to the factors enumerated in 18 U.S.C. § 3553(a) and instead entered the sentence basing it on "impermissible factors". *United States v. Sarras*, 575 F.3d 1191, 1219 (11th Cir. 2009). And that the Eleventh Circuit failed to consider said argument.

Although the District Court may have discretion in deciding the weight of said factors, said discretion is not unbridled and the District Court must assure that a just and reasonable sentence is given. *See, United States v. Williams*, 456 F.3d 1353 (11th Cir. 2006). It is clear that the sentence imposed by the District Court in this case, was both procedurally and substantially unreasonable. Therefore, said sentence should not have been affirmed; but reversed.

Because of the sentence imposed, Rodriguez was denied his right to due process of law and a reasonable sentence pursuant to the dictates of *Booker*, *Gall* and *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558 (2007). Rodriguez' sentence did not promote the administration of justice nor law. It did not provide just punishment considering the fact that Rodriguez pled guilty and accepted responsibility and had a minimal role in the conspiracy. Considering the above facts and the sentence that Rodriguez received, the Eleventh Circuit should have vacated the sentence, not affirmed it. *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996); *United States v. Livesay*, 525 F.3d 1081 (11th Cir. 2008). Based on the errors of both the District Court and the Eleventh Circuit, this Court must grant Rodriguez' Petition for Writ of Certiorari to prevent a further miscarriage of justice. *See also*, *United States v. Bonilla*, 579 F.3d 1233 (11th Cir. 2009).

It is quite clear that the strict application of the advisory sentencing guidelines produced a sentence greater than necessary for punishment under Section 3553(a) for Rodriguez. The statutory factors set forth in Section 3553(a) weigh strongly in favor of a sentence outside of and below the advisory sentencing guidelines. Case law is clear that where circumstances warrant, a District Court can impose sentences that vary downward significantly from the advisory guidelines range and the Appellate Court will affirm such sentences as reasonable. *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558 (2007); *see also*, *United States v. Phaknikone*, 605 F.3d 1099 (11th Cir. 2010).

Because of the above, the sentence imposed by the District Court should have been reversed 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 § 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, Rodriguez’ Petition for Writ of Certiorari must be granted.

In considering all of Rodriguez’ arguments, it is clear that Rodriguez 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 Rodriguez’ sentence was affirmed by the Eleventh Circuit, his Petition for Writ of Certiorari must be granted.



CONCLUSION

This Court should explicitly adopt Rodriguez' position based upon law and equity. The upholding of his 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, Edwar Rodriguez, prays that this Court will issue a Writ of Certiorari and reconsider the decision below.

Respectfully submitted,

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