No. 22-6502

IN THE SUPREME COURT OF THE UNITED STATES

JERRY JOSEPH HIGDON, JR.,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARY TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JERRY JOSEPH HIGDON, JR
PRO SE REPRESENTATION
REG. NO. 11167-002
F.C.I. TALLADEGA
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TALLADEGA, AL 35160

QUESTIONS PRESENTED

I. IS THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT USING ITS PROCEDURAL BAR RULES IN A MANNER INCONSISTENT WITH THE UNITED STATES CONSTITUTION AND WITH ITS OWN PRECEDENT?

II. WHETHER PETITIONER'S MOTION TO EXONERATE DUE TO LACK OF JURISDICTION WAS TIME BARRED?

III. WHETHER PETITIONER'S 1,380 MONTH SENTENCE OF IMPRISONMENT IS UNREASONABLE (GREATER THAN NECESSARY) TO SERVE THE PURPOSE OF SENTENCING UNDER THE PROVISIONS OF 18 U.S.C. §3553(a)?

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was MAY 12, 2022.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: AUGUST 9, 2022, and a copy of the order denying rehearing appears at Appendix F.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

INDICTMENT WAS JURISDICTIONALLY DEFECTIVE (FIFTH AMENDMENT)
18 U.S.C. §36(a)
18 U.S.C. §2

UNREASONABLENESS OF SENTENCE
18 US.S.C. §3553(a)
18 U.S.C. §3582(c)(2)

ELEVENTH CIRCUIT PANEL OVERLOOKED THE JURISDICTIONAL ISSUE
Stirone v. U.S., 361 US 212 (1960)

STATEMENT OF THE CASE

A. BACKGROUND.

On January 28, 2003 Mr. Higdon was arrested on a complaint of conspiracy to distribute, and possess with the intent of distribute ice methanphetamine. A ten-count Grand Jury Indictment was subsequently returned on February 23, 2003.

A five-day jury trial, from May 5 through May 9, 2003, was held as to Mr. Higdon before the Honorable Mark E. Fuller, United States District Judge for the middle District of Alabama. On May 9, 2003, a jury verdict acquitting Higdon as to Counts I (Conspiracy Count), V, VI, VII, VIII, and IX and a finding of guilty as to Count II (Distribution of 7.0 grams of ice methanphetamine), Count III (Distribution of 7.0 grams of ice methamphetamine), Count IV (Distribution of 6.9 grams of ice methamphetamine). and Count X (Drive by shooting).

On August 8, 2003, eventhough that the jury had found Mr. Higdon guilty of the distribution of a total of 20.9 grams of ice methamphetamine, the District Court sentenced Higdon to 480 months to each Count of distribution (Counts II, III, & IV), to be run consecutively and 300 months as to Count X, to be run consecutively, thus amount to the draconian total sentence of One Thousand Seven Hundred and Forty (1,740) months of confinement in the custody of the United States Federal Bureau of Prisons.

On August 23, 2003, Mr. Higdon timely filed his Notice of Appeal from the Final Judgment and Sentence as to Counts II, III, IV, & X. The Conviction was affirmed on September 28, 2004. Before the Decision of the Appeal Court was issue the U.S. Sentencing

Guidelines were made advisory by the Supreme Court in **Booker**, Mr. Higdon filed a Supplemental brief raising this issue but his conviction was affirmed nevertheless. Rehearing en banc was denied on July 8, 2005.

On October 3, 2005 the United States Supreme Court granted Mr. Higdon Writ of certiorari and **VACATED** his conviction and **REMANDED** the case to the Eleventh Circuit.

On December 13, 2005 the Eleventh Circuit reinstated their opinion affirming Mr. Higdon's sentence.

On 2014 Amendment 782 which reduced by two (2) levels the base offense level for most drug quantities in U.S.S.G. §2D1.1(c) and was made retroactive effective November 1, 2014, so as to lower sentences qualifying previously sentence defendants as Mr. Higdon.

On 2018, Mr. Higdon filed a PRO SE motion requesting the District Court to modify his sentence under the provisions of 18 U.S.C. §3582(c)(2), arguing that Amendment 782 applied retroactively and reduced his sentence.

On June 3, 2021 the District Court, after more than 3 years, found that Amendment 782 indeed applied retroactively to Mr. Higdon case and reduced his sentence from 145 years to 115 years of imprisonment. The District Court in order to reach this draconian unreasonable sentence, sentenced Mr. Higdon to 360 Months for each of the Distribution counts (II, III, & IV) and held them to be run consecutively with each other and with the 25 years as to count X.

On June 3, 2021 the District Court also Order the Denial of Mr. Higdon's PRO SE motion to Exonerate Due to Lack of Jurisdiction, in its order the District Court held that Mr. Higdon's arguments were frivolous.

On June 14, 2021 Mr. Higdon timely filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit from the Memorandum Opinion and Order in where reduce his 145-year sentence to an unreasonable and draconian sentence of 115 years of imprisonment. And from Order 201 denying his Motion to Exonerate as frivolous The District Court denied Mr. Higdon's Motion to Exonerate on Document 190, however, he never received the District Court's Order, thus it evident by the fact that Mr. Higdon filed several motion requesting the status of such motion and the District Court never responded to his inquiries until June 2, 2021 (Document 201), as consequence Mr. Higdon Notice of Appeal in regard to this matter was done at the earliest date from which he was informed about the District Court's denial of his PRO SE Motion to Exonerate Due to Lack of Jurisdiction.

On July 22, 2021 Mr. Higdon filed his Appellant's Brief in where he presented Two Issues for review, (I) Whether the District Court abuse its discretion when impose an unreasonable sentence of 1,380 months which was greater than necessary to serve the purpose of sentencing under 18 U.S.C. §3553(a); and (II) Whether the District Court abuse its discretion when denied as frivolous Higdon's arguments related to his motion to exonerate due to lack of jurisdiction when the record demonstrates that any jurist of reason would have found that the arguments presented by Higdon are arguable. On May 12, 2022 the United States Court of Appeals for the Eleventh Circuit Affirmed the District Court's Opinion.

On May 25, 2022 Mr. Higdon filed a Petition for Rehearing en banc. In such petition Higdon argued that Panel Overlooked the Jurisdictional Issue. Mr. Higdon contended that the Eleventh

Circuit is using its Procedural Bar Rules in a manner inconsistent with the United States Constitution and with its own precedent. On August 9, 2022 the Eleventh Circuit denied Higdon's Petition for Rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. IS THE ELEVENTH CIRCUIT USING ITS PROCEDURAL BAR RULES IN A MANNER INCONSISTENT WITH THE UNITED STATES CONSTITUTION AND WITH ITS OWN PRECEDENT?

It is a **Stare Decisis** that a question of Jurisdiction must be addressed no matter how it is brought before the Court, yet the District Court and the Eleventh Circuit in Petitioner's Case seems to not be able or willing to review this issue despite the fact that any jurist of reason could find that **"no one could aid and abet himself"**. Claims of Jurisdictional Error have historically been recognized as fundamental, therefore the doctrine of Procedural Default does not apply to such claims. The Supreme Court held in Arizona Christian School Tuition v. Winn, 562 US 125, 131 S.Ct 1436, 179 L.Ed.2d 523(2011) that a Potential Jurisdictional Defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed. When questions of jurisdiction have been passed on in prior decision subsilentio the United States Supreme Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before it. The Supreme Court held in Hamer v. Neighborhood Housing Services of Chicago, 583 US ___, 138 S.Ct 13, 199 L.Ed.2d 249 (2017) that "[t]he jurisdictional defect is not subject to waiver or forfeiture and **may be raised at any time in the court of first instance and on direct appeal.** See, Kontrick v. Ryan, 540 US 443, 455, 124 S.Ct 906, 157 L.Ed.2d 867 (2004)(emphasis added).

The Honorable Judge Barkett from the Eleventh Circuit, 17 years ago reach to this conclusion, "I believe, as I did in Levy, that this Circuit [Eleventh] is applying it's Procedural Bar Rule

in a manner inconsistent with the U.S. Constitution, Pursuant to Griffith v. Kentucky, and inconsistent with the goals of efficiency and conservation of Judicial and Parajudicial Resources that our Procedural Bar Rules serve". (Citations Omitted, Emphasis Added). As it did 17 years ago the Eleventh Circuit Panel inexplicably overlooked in its entirety the jurisdictional issue.

In only three circumstances has the U.S. Court of Appeals for the Eleventh Circuit determined that a defect in the indictment was jurisdictional. An indictment contains jurisdictional defect when it affirmatively alleges, (1) a crime that simply does not exist in the U.S. Code, (2) Conduct that undoubtedly fell outside the sweep of the charging statute, (3) or a violation of a Regulation that was not intended to be a law for purposes of Criminal Liability.

Circumstance (1) as recognized by the Eleventh Circuit, "a crime that simply does not exist in the U.S. Code." In U.S. v. Martin, 747 F.2d 1104 (11th Cir. 1994), the Eleventh Circuit declared that "Aiding and abetting oneself is an action not known to law." Horizontal Stares Decisis for the Eleventh Circuit is set. Counts of conviction 2, 3, and 4 in Mr. Higdon's trial are shown in comparison of Martin for the Court.

Comparison of Martin and Higdon

Martin: Charged in Counts 1 & 2 of 18 U.S.C. §2 and 21 U.S.C. §841(a)(1).

Higdon: Charged in Counts 2, 3, & 4 of 18 U.S.C. §2 and 21 U.S.C. 841(a)(1).

Martin: Only one named in Counts 1 & 2.

Higdon: Only one named in Counts 2, 3, & 4.

Martin: Shown as the only actor involved in Counts 1 & 2.

Higdon: Shown as the only actor involved in Counts 2, 3, &4.

Martin: Trial Judge gives Jury Instruction that Martin had to instruct "other persons" to be found guilty of 18 U.S.C. §2.

Higdon: Trial Judge gives Jury Instruction that Higdon had to instruct "other persons" to be found guilty of 18 U.S.C. §2.

Martin: Counts 1 & 2 overturned as Action Not Known to Law.

Higdon: Sitting in Prison wondering why Horizontal Stare Decisis has not been upheld.

Jurisdictional Defect: (1) As recognized by the Eleventh Circuit. "Aiding and Abetting oneself is a crime that simply does not exist in the U.S. Code." Again, Jurisdictional Error is by nature of such a "Fundamental Character", as to render proceedings Irregular or Invalid.

Circumstance (2) as recognized by the Eleventh Circuit, "Conduct that undoubtedly fell outside the sweep of the Charged Statute." In Count X of the Indictment, Higdon and Medley were charged with 18 U.S.C. §36(b). During the course of the trial it was shown that none of the prongs of 18 U.S.C. §36(b) were met. At most Mr. Medley could have been charged with discharging a weapon into an unoccupied vehicle.

Prongs not met:

(1) **Must** be done in furtherance or to avoid detection of "Major Drug Trafficking Offense." Mr. Higdon has never been to the place of offense and Mr. Medley had only been there to shoot up the cars. **NO** drug offense was ever involved.

(2) **Must** knowingly and willingly fire a weapon into a group of two or more persons. Again, Mr. Higdon has never been there and

Mr. Medley shot a three Chevrolet Caprices that were unoccupied and parked. Mr. Medley actions, even if they would have been requested by Mr. Higdon clearly feel outside the sweep of 18 U.S.C. 36(b).

Therefore the Eleventh Circuit Panel that reviewed Petitioner's Appeal inexplicably overlooked this jurisdictional issues and denied to reviewed in a Rehearing En Banc. This action is contrary to what is held by the Supreme Court in Henderson v. Shinseki, 562 US 428, 434, 131 S.Ct 1197, 179 L.Ed.2d 159 (2011) when held that "[i]n contrast to the ordinary operation of our adversarial system, court are **obliged to notice jurisdictional issues and raise them on their own initiative.** The Supreme Court has also held that a defendant has a substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such **Basic Right** is far to serious to be treated as nothing more than a variance and then dismissed as a harmless error. Strirone v. U.S., 361 US 212, 217, 80 S.Ct 270, 4 L.Ed.2d 252 (1960)(reversing a defendant's conviction because the jury may have based its verdict on acts not charged in the indictment).

The Authorities cited above and the argument presented by the Petitioner clearly demonstrates that the United States Court of Appeals for the Eleventh Circuit are not willing to remedy the Miscarriage of Justice that Mr. Higdon has suffered for almost twenty (20) years. Petitioner prays to this Honorable Supreme Court to correct this and to Vacated and Remanded the case with specific instructions regarding to the Jurisdictional Defect of the Indictment and Conviction against him.

II. WHETHER PETITIONER'S MOTION TO EXONERATE DUE TO LACK OF JURISDICTION WAS TIME BARRED?

On June 2018 Petitioner filed a PRO SE Motion to Exonerate due to Lack of Jurisdiction, in where he made two claims: 1) that Counts 2, 3, and 4 of his criminal indictment (CR. No. 03-43-N), charged him with Distribution (Counts 2 & 3), or Possession (Count 4) with the intent to deliver, ice methamphetamine, in violation of 18 U.S.C. §841(a)(1), and that the Indictment reflected that he was the only person charged in these counts. Such Motion contained Authorities and Case Laws which supported his argument and held that **A person cannot aid and abet** (18 U.S.C. §2) **himself.** See, U.S. v. Martin, 747 F.2d 1404 (11th Cir. 1984); 2) that Count 10 of the Indictment charged Higdon and John Gabriel Medley with violation 21 U.S.C. §841(a)(1), in violation of 18 U.S.C. §36(b). Higdon argues that Count 10 failed to state an offense or a penalty under the statutory definition of §36(a) which states that "Major Drug Offense" means acts punishable by (1) 21 U.S.C. §848, (2) 21 U.S.C. §846, or (3) 21 U.S.C. §841(b)(1)(A), due to the fact that none of these elements were charged or mentioned in Count 10.

A careful evaluation of the record by any Jurist of reason would have found that Petitioner's arguments related to his conviction for **Aiding and Abetting Himself** is definitively arguable. Several jurist around the nation, including in the Eleventh Circuit have agreed that **"a person cannot aid and abet himself"**. See, Martin, 747 F.2d at 1407; U.S. v. Smith, 2001 U.S.App.LEXIS 30211 (5th Cir. 2001)(Smith's argument that one cannot aid and abet oneself is no doubt true"); U.S. V. Canders, 417 F.3d 958 (8th Cir. 2005)("A person cannot aid and abet himself

in a commission of a crime"); U.S. v. Brown, 7 F.3d 1155 (5th Cir. 1993)("A conviction based solely on aider and abetting an offense to require the involvement of at least two persons since one cannot aid and abet oneself"): U.S. V. Winsnieski, 978 F.2d 274 (2d Cir. 1973)("Obviously one cannot aid and abet in commission of a crime unless there is another who has committed the offense. One is guilty as an aider and abetter when he consciously shares in any criminal intent"). However, The Eleventh Circuit Panel were not willing to review Mr. Higdon's argument in relation to this issue.

Any Jurist of reason would have also found that Petitioner's arguments related to his conviction for Dive by Shooting is supported by the statutory definition of 18 U.S.C. §36(a). In his Motion Petitioner argued that the District Court lacked jurisdiction because the Indictment on Count 10 failed to state an offense under the statutory definition of a **"Major Drug Offense"** and that the record showed that neither individual on Count 10, Jerry Joseph Higdon Jr. (Petitioner) and/or John Gabriel Medley, ever committed a drug offense of any magnitude related to the "drive by shooting", or fired a weapon into a group of two or more persons. This fact was supported by the Testimony of Medley at Petitioner's trial in where he testified that he fired a weapon at three unoccupied vehicles (T.Tr. @ Pg. 223 L. 11-15). The Testimony at trial of Detective Scott Thompson, M.P.D. was that "it looked like someone stood there and shot up the cars" (T.Tr. @ Pg. 281 L. 12-22), thus corroborating Medley's testimony. Based on these facts there is no violation of 18 U.S.C. §36(b). In addition the Statutory definition of a term excludes unstated meanings of

that term. See, U.S. v. Wallace, 178 Fed.Appx 76 (6th Cir. 2006)(Defendant's drive-by-shooting offense under 18 U.S.C. §36(b)(2) was a crime of violence that necessarily included use, carrying, and discharge of weapon, and fact that involved same firearm in offense of possessing firearm in relation to a crime of violence). The fact that the **statutory definition** of 18 U.S.C. §36(a) supported Petitioner's arguments along with the record of the case clearly demonstrate that existed a jurisdictional defect in the indictment, as consequence exist the reasonable probability that the jury at Petitioner's trial may have based its verdict of conviction, on acts not charged in the indictment. Thus in a clear violation of his constitutional right to be tried on charges presented in an indictment returned by a Grand Jury. See Strirone, 216 U.S. at 217.

Moreover, Petitioner was not convicted of any firearms neither related to a drug trafficking offense or any offense charged at the indictment, nor was a major drug offense when he was convicted of only 20.9 grams of "**ice**" methamphetamine, which at no point whatsoever are related to the events mentioned at Count 10, and not 50 grams or more as the Statute requires, therefore there is no factual basis for Petitioner's conviction, as consequence follows inexorably that Mr. Higdon has been denied **Due Process of Law**. See, Thompson v. Louisville, 362 US 199, 4 L.Ed.2d 654, 80 S.Ct 624 (1960); Jackson v. Virginia, 443 US 307, 61 L.Ed.2d 560, 99 S.Ct 2781 (1979). Such Constitutional Error clearly resulted in the imposition of an unauthorized sentence. consequently resulted that Mr. Higdon is a victim of a severe and flagrant miscarriage of justice, See Wainwright v. Skyes, 443 US

72, 91 L.Ed.2d 594, 97 S.Ct 2497 (1977). The Eleventh Circuit Panel once again decide to maintain its subsilentio attitude and perpetuate the Manifest injustice to which Petitioner has suffered for the last twenty (20) years of his life Arizona Christian School Tuition Org. v. Winn, 563 US at 125 (When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed. When questions of jurisdiction have been passed on in prior decision subsilentio the United States Supreme Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before it).

In addition the record obviously demonstrates that Higdon's trial judge stated tha he was unprepared for the task; See, Trial Transcripts Page 4 Lines 14-18 ("I am Judge Fuller and I told everyone I have not yet been on the federal bench for six months and if anything can go wrong it's going to go wrong so bear with us and we are going to get through this case."). For some unexplainable reason Petitioner's presence at an essential part of the trial was waived, which related "suspiciously" to a question made by the jury in relation to Count X, See Tr.T. Pg. 628 L. 2-3 ("The defendant's presence is waived for this portion"). The third question made by the jury concerns Count 10, see Tr.T. Pg. 628 L.22-23 ("The third question, does count ten hinge solely on the conspiracy charge mentioned in count one?"); A.U.S.A. Feage made his first request for a constructive amendment of the indictment, See. Tr.T. P. 635 L. 5-10 ("Your honor, the only thing we would ask the Court to do is modify this slight change because of the question they asked, the other question, instead of saying

conspiracy to distribute controlled substances punishable under 21 U.S.C. §846."). The Court declares that Count 8-9 and 10 only have 21 U.S.C. §841(a)(1) charges, See Tr.T. 635 L. 15-21 ("MR. FEAGA: Yes sir. Well, actually there are two, potentially three, because the others contained within the charges eight, nine and ten." "THE COURT: Okay, I see what you are saying. You have got one in count one, which is an 846 offense, and then as part of eight, nine and arguably ten they are part of 841. A.U.S.A. Feaga made a second attempt to constructively amend the indictment, See Tr.T. P. 635 L. 22-25 ("Yes, sir. Your Honor. And again to avoid confusion because of the way we have done this case if we could say any conspiracy to distribute controlled substance punishable under 21 United States Code Section 846"; Petitioner's counsel Mr. Peterson informs the Court that count ten is improperly charged, See, Tr.T. P. 636 L. 6-13 ("If your Honor were to read the definition of drug trafficking on -- drug trafficking offense from 18 U.S.C. §36, then I would prefer that Your Honor read the statute as written and not as revised by the government. If the government wishes to rely upon the statutory definition then they should rely upon the statutory definition as it's written and not as they wish to revise it for the situation at hand."), Consequently A.U.S.A. Faega made a third attempt to have the Court constructively amend the indictment, See Tr.T. P. 636 L. 19-25 & P. 637 L. 1-3 ("Your Honor perhaps if the Court is inclined to go with the definition in 36 rather than the definition that we gave them before they began their deliberation and the one that we originally discussing giving to them, then perhaps if we are going to go to that definition we should still say through a major drug trafficking

which is a conspiracy to distribute controlled substances punish -- a conspiracy is -- rather than a conspiracy to distribute controlled substances punishable under Title 21 846."). The the Court attempts to constructively amend the indictment and then notices that there is **no major drug offense charge in Count ten**, See, Tr.T. P. 637 8-16 ("THE COURT: What about 36(a)(3), offenses under 841(b)(1)(A)? MR. FAEGA: Your Honor, we didn't charge that. THE COURT: I see that, you are right, you have A and then C offenses; is that right? MR. FAEGA: Pardon me, Your Honor? THE COURT: You have A and then C offenses charged, but not the B set of offenses. I am with you, you are right, I misspoke. You just have A offenses."). The Court mislead the Jury because Count Ten was about an unindicted individual robed of one pound of marijuana, and there is no count in the indictment charging any amount of marijuana, moreover neither of the indicted individuals charged in Count ten ever committed a drug offense in connection with the events in count ten, See, Tr.T. P. 638 L. 1-3 ("I will reread the charge regarding count ten. And in short answer inform them that it does not necessarily limit them to the charges in count one."). At that point Petitioner's counsel Mr. Peterson preserved the position of the defense, See, Tr.T. P. 639, L. 6-13 ("The defense would also like to put on the record its objection to the Court's answer to question two. Spelling it out, as I believe -- as I raised earlier, we were discussing it, the defense's position is to reread the instruction for conspiracy and to reread the instruction for count ten. I just want to preserve that.. THE COURT: That's in regards to question three,. MR. PETERSON: Yes, Your Honor."). The record clearly shows that trial

judge leaves the jury confused and unanswered, See, Tr.T. P. 643 L. 9-25 ("The Defendant is charged in the indictment with distributing and with possession with the intent of distribute and conspiracy to distribute and conspiracy to possess with the intent to distribute a certain quantity of weight of the alleged controlled substance, ice methamphetamine and methamphetamine. However, you may find the Defendant guilty of the crime for the offense if the quantity of the controlled substance for which he should be responsible is less than the amount or weight as charged. Thus, the verdict from prepared with respect to the Defendant, as I explained to you yesterday, will require if you fin the Defendant guilty to specify on the verdict your unanimous finding concerning the weight of the controlled substances attributable to the Defendant. Does that answer the jury's question as to that issue? THE FOREPERSON: No, Sir.")

These defects on the indictment and the unprofessional manner in the way the trial Court handled Petitioner's trial, are not a harmless error, rather a flagrantly prejudice to Mr. Higdon, whom as consequence of such defects received initially a 145 years sentence of imprisonment, and now its was reduced to a new draconian sentence of 115 years of imprisonment.

A Jurisdictional Error, as the one that has been perpetuated by the Eleventh Circuit in Petitioner's case, has historically been recognized as fundamental and for which collateral relief has accordingly been available. See, U.S. v. Addonizio, 442 US 178, 99 S.Ct 2235 (1979); Kontrick v. Ryan, 540 US at 455 (The jurisdictional defect is not subject to waiver or forfeiture and may be raised at any time in the Court of first instance and on

direct appeal"). Since Jurisdictional Error implicates a Court's power to adjudicate the matter before it, such error can never be waived by parties to litigation. See, Louisville & Nashville Railroad Co. v. Motley, 211 US 149, 152, 53 L.Ed 126, 29 S.Ct 42 (1908)(Ordering case dismissed for lack of jurisdiction despite absence of objection from either party to trial court's previous adjudication of merits); Henderson v. Shinseki, 562 US at 434 (In contrast to the ordinary operation of our adversarial system, **courts are obliged to notice jurisdictional issues and raise them on their own initiative**)(Emphasis Added). However the Eleventh Circuit held that "because Higdon's post-conviction "motion to exonerate" sought to invalidate his underlying convictions, it should have been construed as a §2255 motion." "Yet as a §2255 motion, it was a successive one the district court lacked jurisdiction to consider, because the district court had already denied Higdon's earlier §2255 motion on the merits, and he did not receive **our authorization** to proceed with a new §2255 motion." "Thus, the district court lacked jurisdiction to consider his motion, and we affirm, **construing the district court denying his motion** "to exonerate as a dismissal without prejudice for lack of jurisdiction." The Eleventh Circuit Panel decision is contrary to what has been established by the Supreme Court and decide to as is they seek to construe pleadings always in detriment of Mr. Higdon.

The Government argued that "even if were a defect in the indictment, Higdon made no showing that it was harmless". The Eleventh Circuit Panel affirmed this in its decision. However, the record demonstrates that not only Petitioner made a showing

of the harm of the defects in the indictment, when its due such defects that Petitioner receive initially an unreasonable sentence of 145 years of imprisonment, but also because such defects had not been corrected he once again received a draconian sentence of 115 years of imprisonment. A sentence that is far more than ninety (90) years longer than the average sentence for murder nationwide in the Federal Justice System. The Government and the Eleventh Circuit Panel failed to explain how this fact is harmless. The United States Supreme Court has stated that a defendant has a substantial to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such Basic Right is far to serious to be treated as nothing more than a variance and then dismissed as a harmless error. Strirone, 361 US at 217.

The Eleventh Circuit Panel decision to treat Petitioner's Motion to exonerate due to lack of jurisdiction as a successive §2255 motion in order to then hold that the District Court lacked jurisdiction to review the motion is contrary to the Fairness of the adversarial system. As previously argued in this Petition and was argued in the appellate proceedings, namely Appellant's brief, Reply Brief and Petition for Rehearing En Banc, **a jurisdictional issue that challenges the District Court Subject Matter Jurisdiction over Petitioner's case cannot be waived or procedurally defaulted.** However, that is what the Eleventh Circuit panel chose to do. Thus contrary to the United States Supreme Court decision in Henderson v. Shinseki, 562 US at 434 that establish that "in contrast to the ordinary operation of our adversarial system, courts **are obliged** to notice jurisdictional

issues ans **raise them on their own initiative.**" Even the Eleventh Circuit's own precedents are in contrast with its decision in Petitioner's case. See, U.S. v. Peter, 310 F.3d 709, 712-13 (11th Cir. 2002). Is clear then that Petitioner's Motion to Exonerate due to Lack of Jurisdiction was not time barred and should have been reviewed on the merits.

III. WHETHER PETITIONER'S 1,380 MONTH SENTENCE OF IMPRISONMENT IS UNREASONABLE (GREATER THAN NECESSARY) TO SERVE THE PURPOSE OF SENTENCING UNDER THE PROVISIONS OF 18 U.S.C. §3553(a)?

District Court's Discretion

The Government argued that Petitioner's sentences were ordered to run consecutively at his original sentencing" a reduction of 30 years "was the most relief the District Court was permitted to give to Higdon". Contrary to this the Eleventh Circuit note in Dell v. U.S., 710 F.3d 1267, 1279 (11th Cir. 2013) that Kinmbrough v. U.S., 552 US 85, 128 S.Ct 558, 169 L.Ed.2d 481 (2003) "empowered district courts to depart from the guidelines when a substance-related disparity yielded a sentence greater than necessary to achieve the aims of §3553." In Petitioner's case the Eleventh Circuit panel did not acted accordingly.

If Petitioner were being sentenced for the First time, U.S.S.G. §5G1.2(d) would not apply. When Petitioner was initially sentenced, his guideline was life, and due to the fact that the Maximum Statutory Sentence on the most serious count was 40 years, U.S.S.G. §5G1.2(d) required the sentences to run consecutively to reach the appropriate sentence as determined by the guidelines, which at that time were also compulsory. Under the new guideline range of 360 months to life, consecutive sentences are no longer

necessary to achieve a guideline punishment, which now are advisory. But as the Eleventh Circuit did after this Honorable Supreme Court granted Petitioner's writ of certiorary after Brooker and Vacated his conviction and Remanded the case on December 13, 2005, once again ignore the United States Supreme Court decisions and continue to perpetuate Petitioner's manifest injustice.

However, the District Court has the discretion to impose a sentence sufficient but not greater than necessary to comply with the purposes of sentencing. If the District Court would have appropriately used such discretion could have found that: (1) the guidelines were now advisory; and (2) that U.S.S.G. §5G1.2(d) would not longer apply to Petitioner and made Petitioner's sentences to run concurrently with each other as the guidelines now advised, and pursuant to the provisions of the sentencing factors set forth in Title 18 United States Code Section 3553(a) reduced Petitioner's sentence from a draconian sentence of 145 years to 30 years, a reduction of 115 years, not the other way around. Such sentence, despite of the Jurisdictional Defect raised on the previous arguments in this Petition, would have been sufficient but not greater than necessary to comply with the purpose of sentencing under §3553. The Government acknlowledged this fact on a footnote "despite that this Court has never explicitly addressed whether a reduction in the guideline range allows a district court to reconsider the imposition of consecutive allows the district court to reconsider the imposition of consecutive sentences under U.S.S.G. §5G1.2(d)" the Seventh Circuit "has ruled that the district judge may consider whether

to run sentences such as Higdon's concurrently." See, U.S. v. Robinson, 812 F.3d 1130, 1131 (7th Cir 2016) (In reducing the sentence from 100 to 80 years, the district judge was under the impression that he had to make the sentences on the three counts consecutive - that he could not make them concurrently. **He was mistaken.**")(Emphasis Added). Such is the same in Petitioner's case. The District Court, The Government and subsequently the Eleventh Circuit had in their hands the opportunity to remedy the Severe and Flagrant Miscarriage of Justice suffered by Petitioner, and they decided to do nothing.

The outcome of this case demonstrate the difference between a "**Department of Prosecutions** and a Department of Justice", becuase "a prosecutor who says nothing can be done about an unjust sentence because all appeals and collateral challenges have been exhausted is actually choosing to do nothing about Petitioner's unjust sentence. See, U.S. v. Holloway, 68 F.Supp.3d 310, 315-17 (E.D. N.Y. 2014)("It shows the Department of Justice as the government's representative in every federal criminal case has the power to walk into courtrooms and ask judges to remedy injustice"). But the misuse of this prosecutorial power over the last 40 years has resulted in a significant number of federal inmates, who are serving grotesquely severe sentence, including many serving multiple decades, as Petitioner (115 years), and even life without parole for narcotics offense that involved no physical injury to others. Any jurist of reason would agree that Petitioner's 115 year sentence of imprisonment remain unjustly severe, with the exception of the Eleventh Circuit. This fact demonstrates that instead of fulfilling with their Constitutional

and remedy such unreasonable sentence, they choose be deliberately indifferent to such miscarriage of justice. Such unexplicable actions should be vacated.

18 U.S.C. §3553(a)

Under the particular facts and circumstances of Petitioner's case, the 1,380 month sentence of imprisonment (115 years) imposed by the District Court and Affirmed by the Eleventh Circuit, after the District Court found that Petitioner was eligible for a sentence reduction is far more greater than necessary to fulfill the purposes of a criminal sentence under 18 U.S.C. §3553(a).

According to statistics from the United States Sentencing Commission in 2019 the average sentence for robbery was 109 months; **for murder 255 months**; for child pornography 103 months; and for extortion/racketeering 32 months. See, Table 15, Sentence Imposed by Type of Crime, at https://www.ussc.gov/2019-Annual-Report-and-Sourcebook(2019 Sourcebook). This means that Petitioner who was guilty for 2 counts of distribution of ice methamphetamine (Count 2 - 7.0 grams of ice methamphetamine)(Count 3 - 7.o grams of ice methamphetamine), and 1 count of Possession with the Intent to Distribute ice methamphetamine (Count 4 - 6.9 grams of ice methamphetamine), and 1 count of a drive by shooting, will serve five (5) times more of imprisonment (ninety-three (93) years more than the time of imprisonment of the average sentence for murder nationwide in the Federal justice system. Therefore, Petitioner's sentence is **unreasonably 93 years greater than necessary.**

Congress has instructed sentencing courts to impose sentences that are sufficient, but not greater than necessary, to comply among other things certain basic objectives, including the need

for just punishment, deterrence, protection of the public, rehabilitation. See, 18 U.S.C. §3553(a)(2); **Dean v. U.S.**, 581 US ___, 137 S.Ct 1170, 197 L.Ed.2d 490(2017); **Pepper v. U.S.**, 562 US 476, 491, 493, 131 S.Ct 1229, 179 L.Ed.2d 196(2011).

Higdon's 115-year sentence after taking into consideration all the sentencing factors set forth in 18 U.S.C. §3553(a) is greater than necessary to accomplish the statutory objectives of a sentence. This Honorable Court should review the reasonableness of Higdon's sentence under the abuse of discretion standard. See, **Gall**, 552 US at 41: **U.S. v. Kolla**, 819 Fed.Appx 739(11th Cir. 2020). If the trial court follows **proper** procedures and gives **adequate** consideration to all the sentencing factors, then the question is whether the Court's chosen sentence was reasonable or whether the judge instead abused his discretion in determining that the 18 U.S.C. §3553(a) factors supported the sentence imposed. See, **Holguin-Hernandez v. U.S.**, 589 US ___, 140 S.Ct 762, 206 L.Ed.2d 95(2020); **Gall**, 552 at 49-50(noting the district court's **obligation to consider all of the §3553(a) factors to determine the appropriate sentence**)(emphasis added); **U.S. v. Booker**, 543 US 220, 261-262, 125 S.Ct 738, 160 L.Ed.2d 621(2005).

UNREASONABLENESS OF HIGDON'S 115-YEAR SENTENCE

This Honorable Supreme Court to determine if a sentence is reasonable use a two-step approach, **U.S. v. Brown**, 2020 U.S.App.LEXIS 28688(11th Cir. 2020), where the Court first review to ensure that the district court committed no significant procedural error such as selecting a sentence based on clearly erroneous facts. **U.S. v. SHaw**, 560 F.3d 1230, 1239(11th Cir. 2009). If this Honorable Court concludes that the sentence is

procedurally sound, the second step is to review the substantive reasonableness of the sentence, which requires this Honorable Court the totality of the circumstances. See, **U.S. v. Alfaro-Moncada,** 607 F.3d 720, 735(11th Cir. 2010)A district court abuses its considerable discretion and imposes a substantively unreasonable sentence when it (fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight t an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors. See, **U.S. v. Rosales-Bruno,** 789 F.3d 1249, 1256(11th Cir. 2015); **Irey** 612 F.3d at 1189(en banc).

Mr. Higdon's sentence is an unusually long sentence, this fact is supported by the fact that the national average length of a federal sentence for a violent crime as murder over the past decade is approximately 22 years, far less than 1/5 (93 years) less than of what Higdon was sentenced. See. U.S. Sentencing Commission, Federal Sentencing Statistics (2011-2020)(annual reports), available at https://www.ussc.gov/topic/data-reports. The effect is that Higdon, will end up serving 93 years more for his offenses than the median of the persons (defendants) sentenced for murder. This reality cannot be ignored. **U.S. v. Cruz,** 2021 U.S.Dist.LEXIS 68857(D.Conn. April 9, 2021).

AVOIDING UNWARRANTED SENTENCING DISPARITIES

In fiscal year 2020, the national average length of a federal sentence for murder was approximately 21 years, and the median sentence was approximately 19 years. See, U.S. Sentencing Commission, Preliminary For Year("FY") 2020 4th Quarterly Sentencing Update (Jan 4, 2021). The numbers are not significantly

different for FY2019. In that year, sentences for murder average 21 years nationally, and the median was 20 years. See, U.S. Sentencing Commission, 2019 Federal Sentencing Statistics. 11 (2020); See also, **U.S. v. Hightower,** 2021 U.S.Dist.LEXIS 24359(E.D. Wis. Feb. 9, 2021); **U.S. v. Quinn,** 467 F.Supp.3d 824, 828(N.D. Cal. 2020)(noting in the context of granting a motion for compassionate release, that the median sentence in 2019 for murder was 20 years, for sexual abuse 15 years, for kidnapping 10 years); **U.S. v. Haynes,** 2021 U.S.Dist.LEXIS 21964(C.D. Ill. Feb. 4, 2021)(reducing defendant's 105-year sentence based on "massive disparity" created by the First Step Act Amendments, in part because "the national average sentence impose for murder is approximately 21 years" and "while Defendant's multiple armed robbery crimes were undeniably serious, the courts doubts any reasonable person would suggest they are deserving of a sentence 5 times the length of the average sentence for murder. Defendant's case is one illustrating how severe sentencing mandates can create outcomes wholly divorced from our notions of Justice")(105-year sentence reduced to 30 years and 1 day).

In Mr. Higdon's case the offenses for which he was convicted, while very serious, were far less serious than murder. If a 21-year sentence for murder serves to reflect the seriousness of that offense, to promote respect for the law, to provide just punishment for the offense, and to deter others from committing murder, then Higdon's 115-year sentence in indeed 5 times greater than necessary to comply with the purpose of sentencing. As consequence Higdon's 1,380-month sentence of imprisonment is unreasonable and constitutes an abuse of discretion and should be

vacated.

SECTION 3553(a) FACTORS

In Higdon's case the district court abused its discretion because failed to afford consideration to the relevant §3553(a) factors that were due significant weight, gave significant weight to an improper factor, as consequence committed a clear error of judgment in consider the proper factors.**U.S. v. Macli,** 842 Fed.Appx.549 (11th Cir. Feb. 3, 2021). Despite that the district court found that Higdon was elegible for a sentence reduction and reduce his 145-year sentence to a 115-year sentence. However in its decision the district court, due to its clear error in consider the proper §3553(a) factors, continued the miscarriage of justice against Higdon, and its results is an draconian an unreasonable 115-year sentence.

Section 3553(a) requires the court, upon considering seven factors, to impose a sentence that is sufficient, but not greater than necessary, to comply with the purposes of a criminal sentence set forth in §3553(a)(2). Under the particular facts and circumstances of Mr. Higdon's case, the 115-year sentence imposed by the District Court against Higdon is far more than necessary to fulfill the purpose of a criminal sentence.

1) The first §3553(a) factor is "the nature and circumstances of the offense and the history and characteristics of the defendant. 18 U.S.C. §3553(a)(1).

Nature and Circumstances of the Offense

Counts II, III, and IV are violations of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 (affirmately included in the indictment), Count X is in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 (not

affirmately included in the indictment) and 18 U.S.C. §36(b). The quantity of drug combined of counts II, III, and IV amounts to 20.9 grams of methamphetamine sold to a Confidential Informant ("CI") being paid by the Drug Enforcement Agency ("DEA") (Trial TR @ Pg. 65 L. 2-5("Q. All right. Is there any other reasons that you are willing to work with law enforcement in making this transaction. A. Halasz pays pretty good.")) and affirmative charge of aiding and abetting (indictment counts II, III, IV). The court gave Jury instructions from the 11th Circuit Pattern Instructions (Trial Tr @ Pg. 612 L.23 - Pg. 613 L.1-5) that the defendant must procure other persons to do something that he himself could have done. Defendant is the only person named in counts II, III, IV and is proven in trial that he committed these act himself. Thus committing actions not known to law i.e. aiding and abetting himself. Defendant was initially sentenced to 120 years for these three offenses and Honorable Judge W. Keith Watkins seems to feel that they still warrant 90 years.

Count X requires that the act must be done in the furtherance of a "major Drug Trafficking Offense" and 18 U.S.C. §36(a) actually gives definitions of such act, this element is not present in the indictment or the trial. Although the defendant is but a poor layman he feels that if either the "Panel" or the Court whom are presumed to know the law would have questioned this. Evidently not.

Defendant's History and Characteristics

Mr. Higdon was arrested for the first time in his life at the age of 39. He has no previous convictions, moreover no previous arrests that could have been used for determine his criminal

history points, therefore his Criminal History Points were **none (0)**. The fact that Mr. Higdon was a first time offender and that at the time of his arrest he was working as a network administrator for the Alabama Department of Transportation and had been employed since the young age of 15, hardly the criminal element, has never been properly considered, neither by the sentencing judge, nor by Judge W. Keith Watkins when determine Higdon's resentence.

Higdon's Post sentencing Conduct

Mr. Higdon despite the fact that he was serving a draconian sentence of 145 years of imprisonment, has maintained always a positive and respectfull attitude, he has been steady employed in the different facilities that he has been housed in the BOP since his incarceration. In his more than 18 years of imprisonment Higdon has received only two incidents report, which amount to an extraordinary disciplinary record for a person that is sentenced to spend his natural life behinds bars. Higdon successfully completed a 50 hour non-residential drug program. Higdon has been given letters of recommendation for use upon release and most notably Higdon was recently recommended for Home Confinement by Warden Cheron Y. Nash at F.C.I Talladega, Alabama. Obviously the people that know him do not think he belongs in prison.

Higdon's exemplary post-sentencing conduct may be taken as the most accurate indicator of his present purposes and tendencies and significantly to suggest the period of restrain and the kind of discipline that out to be imposed upon him. See, **Pepper**, 179 L.Ed.2d at 215 (citing Pennsylvania ex re. Sullivan v. Ashe, 302 US 51, 55, 58 S.Ct 59, 82 L.Ed 43 (1937)). Accordingly, evidence

of Higdon's post-sentencing rehabilitation bears directly on the District Court's overaching duty to impose a sentence sufficient, but not greater than necessary to serve the purposes of sentencing.

Higdon's post-sentencing conduct provides the most-up-to-date picture of his History and Characteristics. See, **Pepper**, 562 US at 492. The District Court's Memorandum Opinion and Order clearly demonstrates that this factor was not taken into consideration when resentence Higdon to serve a 115-year sentence.

2) The second §3553(a) factors requires consideration of the need for a sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense" and "to afford adequate deterrence to criminal conduct." 18 U.S.C §3553(a)(2)(A)-(B). The second §3553(a) factor also requires the court to consider the need to "protect the public from further crimes of the defendant" and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." Id. at §3553(a)(2)(C)-(D).

Need for a Sentence to Reflect the Seriousness of the Offense

To put this in perspective its needed to compare the sentences between Higdon and his two codefendants.

Mr. Higdon went to trial and was acquitted by the jury of the conspiracy charge (Count I), one count of possession with the intent to distribute .76 grams of ice methamphetamine (count V), one count of distribute 2 grams of ice methamphetamine (Count VI), and three counts of (§924(c) Firearms in furtherance of a drug trafficking crime (counts VII, VIII, and IX), and was only found

guilty by the jury of possession with the intent to distribute a total of 20.9 grams of ice methamphetamine (counts II, III, and IV) and one count of Drive by Shooting, and was sentenced to 145 years of imprisonment.

His codefendant John Gabriel Medley pleaded guilty to the conspiracy and to a §924(c) charge and was sentenced to serve just 10 years of imprisonment.

His other codefendant Tammy Kincaid Porter also pleaded guilty to the conspiracy charge and was sentenced to serve just 24 months of imprisonment.

To be put mildly, it only seems to be serious if the defendant decide to exercise his constitutional right to a jury trial. If Mr. Higdon had taken the plea bargain that was offered **NO ONE** would have to plead to an 18 U.S.C. §36(b) charge.

To Promote Respect for the Law

Mr. Higdon has great respect for not only the law, but also those who uphold it, unfortunately he has not seen one of those people in the Middle District of Alabama. Myriad examples for lack of respect for the law are evident in his trial. Most of them were committed by the Government. For example A.U.S.A. Feaga stating at sentencing "**WE** adduced the facts at trial" it was Mr. Higdon's belief that the Jury was the finder of fact? See, T.Tr. @ Pg. 5, L. 12-17). In addition A.U.S.A. stated "whatever the Juries decision" Is the Sixth Amendment no longer in force in the United States? Also prevalent was the use of a perjurer's statements to enhance Mr. Higdon's sentence.

Mr. Higdon's exemplary post-sentencing conduct sheds light on the likelihood thet he will not engage in future criminal conduct,

a central factor that district courts must assess when imposing sentence. Evidently the District Court did not give proper consideration to this factor when decide Higdon's sentence.

To Provide Just Punishment

Just punishment it could be defined as a sentence sufficient but not greater than necessary to fulfill the purpose of a criminal sentence. A careful evaluation of the particular facts, evidence and record of Higdon's case, clearly demonstrates that the 115-year sentence imposed by the District Court against him after decided that he was entitled for a sentence reduction, is far more than necessary to fulfill the purpose of a just punishment.

According to statistics from U.S. Sentencing Commission, in 2019, the average sentence imposed for robbery was 109 months; for murder255 months; for child pornography 103 months; and for extortion/racketeering, 32 months. See, Table 15; Sentence Imposed by Type of Crime, at https://www.ussc.gov/2019-Annual-Report-and-Sourcebook (2019 Sourcebook). This mean that Higdon who was found guilty for 2 counts of distribution of Ice Methamphetamine (count 2 - 7 grams of ice methamphetamine), (count 3 - 7 grams of ice methamphetamine), 1 count of possession with the intent to distribute ice methamphetamine (count 4 - 6.9 grams of ice methamphetamine), and 1 count for a drive by shooting (count 10), will serve 5 times more than the national average federal sentence for murder. Obviously not a just punishment.

To Afford Adequate Deterrence to Criminal Conduct

As consequence of his eligibility to a sentence reduction due to the retroactive application of Amendment 782, Higdon's total

offense level was reduced an a new sentencing range went in effect, 360 months to Life (Level 42), which previously was only Life (Level 43). To afford adequate deterrence the district court could have impose a sentence of 360 months of imprisonment, instead of an outrageous sentence of 1,380 months of imprisonment.

It bears to mention that if a 21-year sentence for murder serves to reflect the seriousness of that offense, to promote respect for the law, to provide just punishment for the offense, and to deter others from committing murder, then a 30-year sentence surely does the same for drug trafficking offense (especially for only 20.9 grams of methamphetamine) and a drive by shooting offense.

To Protect the Public from Further Crimes of the Defendant

Mr. Higdon is currently 59 years of age, this was his first and only conviction. His exemplary post-sentencing conduct is the most indicator of the likelihhod that he will no would engage in other criminal activities. In the recidivism evaluation made by the Federal Bureau of Prisons, and documented in the BOP Pattern Score , reflects that Higdon have a very low if any possibility of recidivism, See, BOP Pattern Score. Obviously the district court did not take these facts into consideration at the time when select Higdon's 115-year sentence.

Higdon has two public safety factors that are recognized by the BOP, a) Length of Sentence, b) Greatest Severity. Both of these factors are a result of the government's preponderance of the evidence standard conclusions. But again even a cursory investigation by the panel or the court in the 6 years it took to come to this decision would have shown quite a lot.

The statutory minimum and maximum sentence for each of Higdon's three drug trafficking convictions, based on their drug quantities (7. grams , 7. grams, and 6.9 grams of ice methamphetamine), are 5 years to 40 years. And for the Drive by shooting the maximum statutory sentence is 25 years. It is important to mention that nowhere in the statutes neither for the drug trafficking offenses nor for the drive by shooting offense, states that the sentence have to be imposed consecutive. While at the time of his sentence the U.S. Sentencing Guidelines were considered mandatory, at the time the district court impose Higdon's new sentence the Guidelines were advisory. In addition at the time of his original sentence his Guideline range was life, and as consequence the district court at that time stacked the statutory maximum of each offense for which he was found guilty in order to reach a life sentence, as a result imposed a draconian 145-yearsentence. However, at the time that the district court made its decision to reduce Higdon's sentence, his new Guideline range is from 360 months to life. The sentences for each of the drug offenses not need to be stacked in order to get a 360-month sentence. While his drive by shooting sentence have not received a reduction due to Amendment 782, the statutory maximum of such offense is 25-years and nothing in the statute states that such sentence is mandatory to be serve consecutive with other sentences. See, 18 U.S.C. §36.

The District Court's Memorandum Opinion and Order clearly demonstrates that the district court improperly considered these factors. Under the particular facts of Higdon's case a sentence of 30-years, which would be the low-end of his Guideline range (360-

months), is sufficient but no greater than necessary to accomplish the goals of sentencing.

4) The sixth §3553(a) factor is the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct. 18 U.S.C. §3553(a)(6).

This factor favors a sentence lower than the one imposed by the district court due to the extreme disparity between Higdon's 115-year sentence and sentences imposed after the enactment of Amendment 782 on similar defendants with similar records. A defendant convicted today of the charges as Higdon would face a Guideline range sentence of 360 months a sentence of 1,020 months lower than the one imposed by the district court after reduced Higdon's sentence. The disparity between the sentence Higdon receive not only at his original sentence (145-years) but also in his resentence (115-years) and the sentences now imposed on similarly situated defendants is unquestionally relevant under §3553(a)(6) and strongly supports Higdon's argument that the district court abused its discretion when it imposed a 115-year sentence, a sentence that is clearly greater than necessary to accomplish the purpose of his criminal sentence. This factor therefore supports a sentence of 360 months of imprisonment, a sentence that will be 85 years lower than the "reduced" sentence given to Higdon.

5) Finally, a sentence reduction is appropriate only if the defendant "is not a danger to the safety of any other person or to the community."

A careful evaluation of the record will reveal that: 1)Higdon's lack of any violent infractions while in prison, 2) his

exemplary post-sentencing rehabilitation efforts, and 3) his family support make it unlikely that he will reoffend after his release. This fact is supported by the BOP **FSA** (First Step Act) **Recidivism Risk Assessment** which categorized Higdon as a Minimum Risk Level of recidivism with a Scoring of -8 in the general category and -1 in the violent category. See Document Attached.

It is evident that the district court did not also take this factor into consideration when select Higdon's unreasonable and draconian 115-year sentence of imprisonment.

Mr. Higdon's sentence is procedurally unreasonable, the district court improperly calculated the Guideline range, treated the Guideline range as mandatory and as mandatory that each sentence should be imposed to run consecutively with each other, failed to afford proper consideration as to the relevant 18 U.S.C §3553(a) factor that were due significant weight and selected a draconian 115-year sentence based on clearly erroneous facts. If the Panel and District Judge W. Keith Watkins had done due diligence on this case they could have resolved some of the miscarriage of justice done to Mr. Jerry Joseph Higdon, Jr. 18 years ago by reducing his sentence to 30 years rather than perpetuating the fraud by leaving his sentence "maxed and stacked".

The district court by imposition of a 115-year sentence against Mr. Higdon, a sentence that is indeed greater than necessary and unreasonable. Thus constitutes and abuse of discretion and Higdon's sentence should be **Vacated.**

CONCLUSION

On July 8, 2005 on the Eleventh Circuit review of Petitioner's Direct Appeal in its opinion the Panel quote in reference to the Supreme Court remands after Booker "Those Boilerplate orders come out in **bushel baskets full, there is no implication in the standard language of the orders that Court of Appeals is to do anything** except reconsider the case." **We have never felt constrained to read anything** into such routine remands." "these remands **in no way direct how this Court is to apply Booker**." See, U.S. v. Higdon, 418 F.3d 1136 (11th Cir. 2005) footnote no.7. In other words, unless this Honorable Court when granted Petitioner's writ of certiorary give specific instructions the Eleventh Circuit will do as it pleases.

In closing, why Petitioner, whom at the time of this Petition is sitting 45 miles from his home, beg to be transferred 1,000's of miles away to a Circuit that upholds the Laws of this nation instead of one that does as it pleases.

As Lord Kames stated in 1777 while seated on the Court of Sessions in the case of Joseph Knight "The law of Jamaica in this case, will not be supported by the Court: because it is repugnant to the First Principles of Morality and Justice".

What the United States Court of Appeals for the Eleventh Circuit has done to the Rule of law is also repugnant. Lord Kames told his colleagues on this case "we sit here to enforce right, not to enforce wrong". AS it is evident in Petitioner's case **wrong has been enforced for 20 years**. It is past time for Right to be enforced, and that this Petitioner to be freed as Joseph Knight was.

WHEREFORE based on the arguments and authorities cited above, **JERRY JOSEPH HIGDON, JR.**, very respectfully **PRAYS** to this Honorable Supreme Court that this Petition for a writ of certiorari should be **GRANTED.**

RESPECTFULLY SUBMITTED.

Date:

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