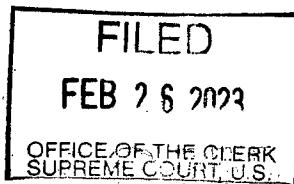


22-6982



IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term 2023

DOCKET NO. \_\_\_\_\_

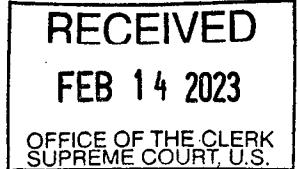
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DIOGENES DE JESUS SIERRA  
Petitioner-Appellant,

-----  
-against-

-----  
UNITED STATES OF AMERICA,  
Respondent-Appellee,

-----  
On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI  
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DIOGENES DE JESUS SIERRA  
FCI FORT DIX  
P.O. BOX 2000  
FORT DIX, NEW JERSEY 08640

QUESTION PRESENTED

WHETHER MANDAMUS REVIEW ON ISSUE OF FIRST IMPRESSION SHOULD HAVE BEEN APPLIED TO CLAIM THAT WAS CREATED BY WAY OF INTERVENING CHANGE OF FIRST STEP ACT LAW AND FACTS, WHICH ALTERED AND PLAIN ERROR STANDARD OF REVIEW.

WHETHER THE CIRCUITPLIT GOVERNING WHETHER INCHOATE CONSPIRACY CRIMES CAN CONSTITUTE A DRUG OFFENSE REQUIRED TO TRIGGER U.S.S.G. § 4B1.2(b), THE CAREER OFFENDER STATUTE

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APPENDIX B--SOUTHERN DISTRICT COURT OF NEW YORK, FEBRUARY 2, 2012-  
COMPASSIONATE RELEASE DENIAL (Judge Victor Marrero.)

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI  
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Petitioner Diogenes De Jesus Sierra, respectfully request that a Writ of Certiorari be issued to review a summary order of the United States Court of Appeals for the Second Circuit, entered in the above-captioned proceeding, on January 17, 2023. The Order of the Court of Appeals affirmed Motion for Reduction under the First Step Act of 2018 and Compassionate Release. 18 U.S.C. § 3582(c)(1)(A). The United States District Court, Southern District of New York (Hon. Victor Marrero, U.S.D.J.), following two Jury Trial. Sierra was sentenced principally to 30 years (365 months) incarceration. By Separate motion submitted herewith, Petitioner is requesting that this Court grant him permission to file the instant petition in forma pauperis.

OPINION BELOW

The unpublished summary order of the Court of Appeals is reproduced in the appendix hereto.

STATEMENT OF SUBJECT MATTER  
JURISDICTION AND APPELLATE JURISDICTION

This Appeal is from a final judgment of the United States Court of Appeals for the Second Circuit which had jurisdiction pursuant to 18 U.S.C. § 3231. This United States Supreme Court has jurisdiction to review pursuant to 28 U.S.C. § 1254(1). The Order of the Second Circuit Court of Appeals was entered on January 17, 2023, and this Petition is timely made within 90 days of that date.

#### Statement of Issues Presented For Review

This appeal focuses on the following questions:

- (1) Whether Certiorari should be granted to determine whether Circuit Courts Mandamus Review's dealing with "issues of First Impression" should be applied when waiver surrounded an intervening change of Law and/or fact which alter's the Plain Error of standard of review;
- (2) Certiorari is warranted to address whether the split in circuit law across the country, governing whether inchoate crimes like conspiracy can constitutes a drug trafficking offense needed to trigger U.S.S.G. § 4B1.2(b) Career Offender Enhancement.

#### Statement of the Case

On June 12, 2012, a Grand Jury sitting in the Southern District of New York charged Petitioner by indictment with one count of knowingly and intentionally possessing with the intent to distribute One-Kilogram or more of Heroin, in violation of Title 21, United States Code, Section 846; Count two, intentionally and knowingly distributed and possessing with intent to distribute heroin in violation of 21 U.S.C. § 841(b)(1)(C). Count Two, fell

within under the umbrella Count One's charged 846 Conspiracy. On July 9, 2012, the government filed prior felony information pursuant to 21 U.S.C. § 851 enhancement, doubling petitioners mandatory minimum from 10 years to 20 years for violation of 21 U.S.C. § 841(b)(1)(A).

During the July 16, 2012, trial. After four day jury trial, the jury declared a mistrial based on the juries deadlock in deliberations. A re-trial was held on October 18, 2012, to which petitioner was found guilty on all counts.

Petitioner filed a timely appeal, which was denied on November 24, 2015, (629 Fed. Appx' 99 (2d Cir. 2015)). Petitioner thereafter filed a Motion to Vacate and/or Set Aside Judgement pursuant to 28 U.S.C. § 2255. The 2255 motion was denied on March 22, 2019 (372 F. Supp.3d 187 (S.D.N.Y. 2019)).

Petitioner was also subjected to Career Offender enhancement under U.S.S.G. § 4B1.2(b), based on 3 prior drug convictions.

January 13, 1996, Criminal Sale of a Controlled Substance on School Grounds in the Third Degree;

January 18, 1996, Criminal Possession of Controlled Substance in the Third Degree;

November 13, 1996, Criminal Sale of Controlled Substance in the Third Degree.

#### SUMMARY OF ARGUMENT

On or about March 21, 2022, Petitioner filed a timely notice of appeal based on the District Courts 3582(c)(1)(A) motion to reduce

sentence pursuant to Compassionate Release and the First Step Act of 2018.

It was claimed by the Second Circuit that petitioner waived the argued claims because he failed to raise them in his initial motion (Issues of First Impression) to the lower District Court. As a result the Second Circuit denied the Appeal and failed to use it's Mandamus Power to address petitioner claims even though the claims derived from an intervening change of law and/or facts as held in United States v. Concepcion, 142 S. Ct. 2389 (June 2022), which was decided after petitioner's initial Compassionate Release filing and filing of appeal. In addition based on the facts of the case, Petitioner has met all Plain Error standards surrounding the Concepcion proposition.

On February 17, 2023, The Second Circuit denied petitioner's Compassionate Release/First Step Act Appeal. See Appendix.

#### REASON FOR GRANTING THE WRIT

##### POINT ONE

WHETHER MANDAMUS REVIEW ON ISSUE OF FIRST IMPRESSION SHOULD HAVE BEEN APPLIED TO CLAIM THAT WAS CREATED BY WAY OF INTERVENING CHANGE OF FIRST STEP ACT LAW AND FACTS, WHICH ALTERED AND PLAIN ERROR STANDARD OF REVIEW.

Petitioner asserts herein that Certiorari review is warranted because the First Step act has held since Concepcion v. United States, 142 S. Ct. 2389 (June 2022) that intervening change in law

and facts can constitute a reduction of sentence based on "exceptional circumstances". This holding was handed down after petitioner's Motion to Reduce Sentence and it's subsequent Appeal.

In fact, during the pendency of petitioner's initial first step act filing and subsequent appeal. The United States Supreme Court handed down Concepcion, which holds that "District Court may consider intervening changes of law or facts as "exceptional circumstances" in adjudicating First Step Act motion. The Concepcion holding became an "issue of first impression" and an intervening change of law and facts pursuant to the First Step Act of 2018.

The claims raised by petitioner in the district court, fall squarely within the Concepcion standard:

- (i) Whether De Jesus Sierra instant Conspiracy under 21 U.S.C. § 846 qualifies as a controlled substances under U.S.S.G. § 4B1.2(b) the career offender provision;
- (ii) If Petitioner De-Jesus Sierra was Sentenced today pursuant to 21 U.S.C. § 851, the 20 year mandatory minimum imposed as a result would have been reduced to 15 years per the First Step Act of 2018.

Thus, the Second Circuit's January 17, 2023, denial held "because petitioner failed to make the above arguments to the district courts in the initial motion, claims are subject to review only for plain error".

However, even reviewing petitioner's claim under plain error standard. The claims would still prevail. That is, the intervening change in law pursuant to Concepcion now allows inchoate crimes to no longer qualify as career offender enhancements.

Likewise, the First Step Act of 2018, laws and facts have changed to now holding that, prior felony enhancements under 851, if enhanced, would no longer be raised from the mandatory minimum of 10 to 20 years but 10 to 15 years. These claims are clear errors and the are plain. Meaning but for the above errors, the outcome of the proceedings would have been different. Greer v. United States, 141 S. Ct. 2090, 2096 (2021).

REASONS FOR GRANTING THE WRIT  
POINT TWO

WHETHER THE CIRCUIT SPLIT GOVERNING WHETHER INCHOATE CONSPIRACY CRIMES CAN CONSTITUTE A DRUG OFFENSE REQUIRED TO TRIGGER U.S.S.G. § 4B1.2(b), THE CAREER OFFENDER STATUTE.

Because Mandamus is an "extraordinary" remedy, the "touchstones" of which constitute the presence of an issue of "first impression" as a result of the Concepcion standard. See Generally, Schlagenhauf v. Holder, 379 U.S. 104 (1964)(concluding that the Court of Appeals should have exercised it's mandamus power over "issues of first impression" in order to settle new and important problems).

Petitioner, De-Jesus Sierra herein respectfully request that certiorari be granted to review the above issue. Petitioner asserts that there is a circuit split, which warrants certiorari review to resolve the unresolved Circuit split.

Henceforth, just recently the 11th Cir., held in United States v. Dupree, No. 19-13776 (11th Cir. Jan. 18, 2023), En-Banc, that the definition of controlled substance offense in U.S.S.G. §

4B1.2(b) does not include inchoate offenses under the career offender enhancement.

The problem arises as to whether the commentary to the Guideline is controlling is an issue that has generated a significant split among Circuit Courts. The Third, Fourth, Sixth, and DC Circuits, all hold that inchoate crimes (conspiracy and attempts) does not qualify as controlled substance offenses for career offender purposes.

The First, Second, Seventh, Eight and Ninth have all reached opposite conclusions. Even the Fifth Circuit recently vacated it's decision on the same above issue and will address the question en banc as well. United States v. Vargas, 35 F.4TH 936, (5th Cir. reh en banc granted opinion vacated, 45 F.4TH 1083 (5th Cir. 2022)).

Thus petitioner respectfully request that this Court grant certiorari so as to settle this unresolved circuit split. If this Court determines that petitioner's instant offense of conspiracy is an inchoate crime and can no longer support a career offender U.S.S.G. § 4B1.2(b) enhancement. Such factors creates "exceptional circumstances" warranting a reduction of Sentence under Concepcion and curing the prejudice that petitioner has thus suffered as a result.

CONCLUSION

WHEREFORE, for the foregoing reasons, De Jesus Sierra's petition for a writ of certiorari should be granted.

DATED: FORT DIX, NEW YORK  
JANUARY 31, 2023

Respectfully submitted,  
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