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NO._____

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IN THE SUPREME COURT
OF THE
UNITED STATES

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2024-2025 TERM

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JONATHAN GARDUNO

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

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

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QUESTIONS PRESENTED

I.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN DISMISSING GARDUNO'S APPEAL.

II.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DENIALS OF GARDUNO'S OBJECTION REGARDING THE DISPARITY OF SENTENCES BY DISMISSING GARDUNO'S APPEAL.

III.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING GARDUNO'S SENTENCE WHERE GARDUNO'S 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 BY DISMISSING GARDUNO'S APPEAL.

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The Petitioner, JONATHAN GARDUNO, (hereinafter "GARDUNO"), 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 August 27, 2024.

OPINION OF THE COURT BELOW

The Court of Appeals for the Eleventh Circuit entered an unpublished opinion affirming the District Court's Sentence, *United States of America v. Jonathan Garduno,* on August 27, 2024. *Appendix 1*.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals affirming the Judgment of the United States District Court was entered on August 27, 2024. The Eleventh Circuit Court of Appeals entered its Order Denying GARDUNO'S Petition for Rehearing and Petition for Rehearing *En Banc* on October 15, 2024. *Appendix 2*. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254 and Rule 10.1, Rules of the Supreme Court. This Petition for Writ of Certiorari is filed pursuant to Rule 13.1, Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT V

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

UNITED STATES CONSTITUTION, AMENDMENT VI

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

STATEMENT OF THE CASE

1. Course of Proceedings

On August 24, 2022, a federal grand jury issued a nine (9) count indictment against JONATHAN GARDUNO ("GARDUNO") and Kimberly Haywood, charging them with conspiracy to distribute and possess with intent to distribute controlled substances in violation of 21 U.S.C. §841(b)(1)(A) and 21 U.S.C. §846 (Count Six); and also charging GARDUNO with knowingly and intentionally distributing a controlled substance in violation of 21 U.S.C. §841(b)(1)(C) and 21 U.S.C. §841(a)(1) (Counts One, Two and Three, Five and Nine); charging GARDUNO with knowingly and intentionally distributing a controlled substance in violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §841(b)(1)(A) (Count Four); charging GARDUNO with knowingly and intentionally attempting to possess with intent to distribute a controlled substance in violation of 21 U.S.C. §841(b)(1)(A) and 21 U.S.C. §846 (Counts Seven and Eight) and a forfeiture count. (DE:1).

On August 31, 2023, GARDUNO pled guilty to Counts Four and Seven of the Indictment and the government agreed to dismiss Counts one, Two, Three, Five, Six, Eight and Nine. (DE:114).

On March 19, 2024, GARDUNO was sentenced to 168 months incarceration followed by five years of supervised release. The District Cort recommended that GARDUNO be incarcerated in a facility close to Fort Myers, Florida and that GARDUNO participate in any alcohol programs available. (DE:133;141:28-31). GARDUNO filed a timely Notice of Appeal on March 22, 2024 and is confined. (DE:135).

On August 27, 2024, the Eleventh Circuit affirmed the District Court's sentence of GARDUNO. GARDUNO timely filed his Petition for Rehearing and Petition for Rehearing *en banc*. On October 15, 2024, the Eleventh Circuit denied GARDUNO'S his Petition for Rehearing and Petition for Rehearing *en banc*.

2. Statement of the Facts.

a. The Offense Conduct.

In October 2021, law enforcement in Lee County, Florida, learned from a confidential informant (CI) that a person known as "Smokey," a documented SUR-13 gang member, who was later identified as Jonathan GARDUNO, was distributing large quantities of methamphetamine and other drugs in Southwest Florida. (PSI:19) During law enforcement's investigation that continued through April 2022, it was

established that GARDUNO often travelled to California or Colorado to drop off bulk cash and arrange for narcotics to be sent to Lee County via shipping services. The CI occasionally was able to provide shipment information for packages being sent to GARDUNO, which were corroborated throughout the investigation by the postal inspector. Sometimes, associates of GARDUNO drove a load of controlled substances to Florida in a rented car. Law enforcement determined that GARDUNO had associates at different addresses around Lee County who purchased from Garduno or received packages of narcotics on his behalf. To assist in the investigation into GARDUNO, law enforcement utilized a CI for controlled narcotics purchases, various surveillance techniques, travel records, and audio and video recording equipment. (PSI:20)

On October 5, 2021, the CI arranged to purchase $500 worth of methamphetamine from GARDUNO at his residence located at 3913 21st Street SW, in Lehigh Acres, Florida. (PSI:21)

October 13, 2021, the CI informed law enforcement that he could purchase additional methamphetamine from GARDUNO. At law enforcement's direction, the CI communicated with GARDUNO and the two agreed to exchange methamphetamine for $500 at Garduno's residence. For this transaction, law enforcement accompanied the CI in an undercover capacity (UC) with the intention

for the CI to introduce the UC to GARDUNO for additional purchases in the future. (PSI:22)

The CI arranged for a third transaction with GARDUNO, which took place on November 5, 2021. For this transaction, the CI travelled to GARDUNO'S residence. GARDUNO met the CI in the garage, and the two exchanged a bag of methamphetamine for the $500 in investigative funds the CI had been provided by law enforcement. Laboratory analysis later confirmed the package contained 27.99 grams of methamp27hetamine of 99% purity, which yields 27.71 grams of actual methamphetamine. (PSI:23)

On December 10, 2021, the CI was provided with $1,600 of investigative funds which the CI used to purchase methamphetamine from GARDUNO after GARDUNO returned from California. The CI met GARDUNO in the garage, where the CI observed GARDUNO count out $1,020 of cash for the purchase before handing the CI the narcotics. (PSI:25).

GARDUNO agreed to meet the CI again on January 6, 2022, to sell a quantity of cocaine.. (PSI:27)

In January 2022, the CI provided law enforcement information that Haywood was awaiting the arrival of a narcotics shipment on behalf of GARDUNO, so the package was intercepted. Two large bags of methamphetamine were seized from the box and turned over to a DEA laboratory for analysis. One bag was determined to

contain 892.7 grams of 91% pure methamphetamine, which yielded 812.3 grams of pure substance. The other bag contained 891.9 grams of 99% pure methamphetamine which yielded 882.9 grams pure substance. A fingerprint obtained from the package was matched to GARDUNO. (PSI:28)

On February 1, 2022, GARDUNO met with the CI to discuss the CI travelling with GARDUNO to California to pick up a car containing methamphetamine and drive it back to Florida. Garduno told the CI that he had to move out of his Lehigh Acres residence, and he needed a new place to conduct his business. For the time being, GARDUNO had reportedly moved in with family members residing in Bonita Springs, Florida. (PSI: 30)

On April 27, 2022, a CI arranged to purchase cocaine from GARDUNO. In preparation for the controlled purchase, the CI was provided with $160 of investigative funds. The CI told law enforcement GARDUNO was operating a new trap house located at 338 Oasis Park Road in Fort Myers, and that was where the sale would take place. When the CI arrived at the residence, the CI went inside with GARDUNO, where they exchanged a bag of cocaine for cash. GARDUNO counted the cash in front of the CI before the CI departed the location. The CI later surrendered the drugs to law enforcement. Laboratory analysis later contained 3.5 grams of cocaine.(PSI:32).

On August 31, 2022, GARDUNO was arrested pursuant to a federal arrest warrant for the instant case. Post-Miranda, GARDUNO declined to provide a statement to law enforcement. (PSI:33).

b. GARDUNO'S Change of Plea Hearing

GARDUNO'S change of plea was held on September 14, 2023 before the Honorable Nicholas P. Mizell. (DE:140)

GARDUNO testified he was 33 years old and that he believed he completed 11th grade. GARDUNO testified that he has not been treated recently for any mental illness or drug addiction and that he currently is not under the influence of any drug or medicine or anything else that might impair his ability to understand what was happening. (DE:140:4-5).

GARDUNO testified that he received and reviewed a copy of the written charges and that he reviewed same with his lawyer and that he was satisfied with the advice given by counsel. GARDUNO testified that it was his signature on page 21 of the plea agreement and that he signed it on August 16, 2023. (DE:140:5).

The District Court asked GARDUNO if he understood the terms of the plea agreement and GARDUNO was unsure what that meant and counsel had to explain it to him. (DE:140:6).

The District Court advised GARDUNO that he was pleading guilty to Counts four and seven and that the rest of the counts would be dismissed. (DE:140:7). The

District Court advised GARDUNO that each are punishable by a mandatory minimum term of imprisonment of ten years up to life, a fine up to 10 million, a term of supervised release of at least five years and a special assessment of $100.00 and a possible forfeiture and restitution. (DE:140:7-8).

The District Court then advised GARDUNO of the right to go to trial and that if the plea is accepted he waives that right. (DE:140:8-9). GARDUNO answered the questions regarding the waiver of this right with a "yes". GARDUNO also testified that he discussed sentencing with his lawyer. (DE:140:9-10).

The District Court then turned to page 16 of the plea agreement and asked "[y]ou understand that, other than the four exceptions that are set out in your plea agreement on page 16, you're waiving your right to an appeal." There was a "pause" and then GARDUNO answered "yes". (DE:140:10).

The District Court then asked GARDUNO if the facts as stated were true and correct and if he was pleading guilty to Counts four and seven and GARDUNO said yes. (DE:140:10-13). Based upon the testimony of GARDUNO, the Magistrate recommended that the District Court accept GARDUNO'S plea of guilty to those two counts. (DE:140:13).

c. Facts Pertaining to GARDUNO'S Sentence.

The probation officer who prepared GARDUNO' PSI set his base offense level at 36, pursuant to U.S.S.G. §2D1.1(a)(5). (PSI: 40) The probation office gave

GARDUNO a two level enhancement pursuant to U.S.S.G. §2D1.1(b)(12) for maintaining a premises for the purpose of manufacturing or distributing a controlled substance. (PSI:41) bringing GARDUNO'S adjusted offense level to 38. (PSI:38). The probation office gave GARDUNO 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: 47-48) Accordingly, the probation officer set GARDUNO'S total offense level at 35. (PSI:49)

The probation office found that GARDUNO had a total offense level of 35 and a criminal history category of II. As such, the guideline imprisonment range was 188 to 235 months. (PSI:98).

d. GARDUNO'S Sentencing Hearing

GARDUNO'S sentencing hearing was held on March 18 2024. (DE:141).

GARDUNO argued that he had objections to some of the facts alleged in the presentence investigation. (DE:141:9-10)

GARDUNO then argued that paragraph 58 and 59 of the presentence investigation relates to convictions that occurred in 2012 and therefore are more than ten years prior and therefore said convictions should not be given any criminal history points. (DE:141:11). And, based upon said argument he is entitled to a downward departure since his criminal history category overrepresents the seriousness of his prior criminal history. (DE:141:11).

GARDUNO, through counsel, further argued that there is a sentencing disparity between his sentence and that of his co-conspirator who plead guilty and was sentenced to 48 months. Said disparity is approximately 140 month difference. (DE:141:11-12).

GARDUNO then testified about a prior offer of 120 months and why he rejected it at the time. (DE:13). GARDUNO then testified that once he received the discovery that he then contacted his then lawyer and told him he was ready to accept the offer and "I thought that's what I was signing when I signed the plea agreement." (DE:141:14).

Counsel then advised the District Court that GARDUNO also objected to the facts as stated in paragraphs 29 and 30. (DE:141:16). Counsel advised that GARDUNO went to the storage unit because he had items there. (DE:141:17).

The District Court then stated that said statements were made by the CI and that it wasn't GARDUNO making said statement and that "it's very clear that that was who reported it to law enforcement, so the Court is going to overrule that objection because I know what it says, that the CI is the person who reported it to law enforcement." (DE:141:18).

The District Court then ruled as to the objection to paragraph 20 and had probation remove "bulk" from paragraph 20. (DE:141:19).

The District Court then addressed GARDUNO'S objection to paragraphs 58 and 59. GARDUNO'S objection that a "2012 conviction is remote in time enough so that it should not have scored two points in paragraph 58 and one point in paragraph 59." (DE:141:20). Probation argued that said convictions were within the 10 years because law enforcement began their investigation of GARDUNO in October of 2021. "So that would be the date that probation uses to control the applicable time period for criminal history." (DE:141:20). The District Court overruled both objections. (DE:141:21). Therefore, the District Court found GARDUNO'S total offense level to be 35 and his criminal history category to be a category II and the advisory guideline range to be 188 to 235 months of incarceration followed by five years of supervised release. (DE:141:22).

GARDUNO'S Counsel then argued that GARDUNO is indigent and cannot afford to pay a fine and that he will need time to pay the special assessment. (DE:141:22-23). Counsel argued that the agreement with the government was that GARDUNO would be sentenced at the low end of the guidelines which would be 188 months and that "I would ask the Court to take into consideration the issue of sentencing disparity, the fact that Ms. Haywood, who is a codefendant in this case, received a 48 month sentence, which is 140 month difference, which is fairly significant, and she was active in participating with Mr. Garduno in this case and played a significant role with Mr. Garduno in his conspiratorial conduct. And I

would ask the Court to sentence Mr. Garduno to no more than 120 months to remedy somewhat sentencing disparity." (DE:141:23).

The District Court found that GARDUNO'S criminal history is overrepresented and therefore the District Court reduced GARDUNO'S criminal history category to a category I. The District Court then held that "although there was a difference between the sentence that was given to the other individual in this case – it was 48 months—there was a very large difference and significant difference in what that individual did versus what Mr. Garduno did and the Court is not looking at that as a significant disparity under those circumstances." (DE:141:27). The District Court did not find, based upon the involvement of GARDUNO, that there was a disparity. (DE:141:28).

The District Court then sentenced GARDUNO to 168 months on both counts to run concurrently. The District found that said sentence was the "low end of the guidelines for criminal history category of I with an offense level of 35." (DE:141:28). The District Court further ordered that upon GARDUNO'S release he will "serve five years of supervised release as to each count" to run concurrently. (DE:141:28). The District Court also agreed to recommend him for the 500-hour drug program, if he qualifies and the District Court also recommended that GARDUNO be placed in a facility close to Fort Myers and the District Court waived the imposition of any fine. (DE:141:28-30).

A. The Eleventh Circuit Erred In Dismissing Garduno's Appeal Due To Garduno's Waiver Of His Appeal Rights Was Not Knowing And Voluntary.

In the case at hand, GARDUNO'S appeal should be allowed to proceed because the sentence being imposed by the District Court is a manifest miscarriage of justice due to the District Court's failure to assure that said waiver was in fact knowing and voluntary, the fact that GARDUNO has a drug problem due to his childhood and the fact that GARDUNO entered into a plea agreement and therefore accepted responsibility for his actions.

B. The Eleventh Circuit Erred In Affirming The District Court's Denial of GARDUNO'S Objection Regarding the Disparity of Sentences.

The affirming of the District Court's denial of GARDUNO'S objection regarding the disparity of sentences was clearly in error and not supported by the evidence. GARDUNO'S sentence should have been reduced due to the disparity between GARDUNO'S sentence and that of his co-conspirator's sentence.

C. GARDUNO'S Sentence Should not Have been Affirmed by the Eleventh Circuit where GARDUNO'S Sentence was Not Substantively Reasonable Considering the Factors Enumerated pursuant to 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.

GARDUNO'S sentence was unreasonable in light of the sentencing factors listed in 18 U.S.C. §3553(a)-(f) and the totality of the circumstances; more particularly, GARDUNO'S childhood and the fact that his father was an alcoholic and abusive and that GARDUNO clearly has a drug problem. Also, the fact that GARDUNO accepted responsibility for his actions and entered a plea agreement. (DE:114). And, the fact that GARDUNO was entitled to a safety valve reduction, but due to threats to his life, he chose not to be debriefed. (DE:141:24-25). It is quite clear that the Eleventh Circuit was more influenced by the charges against GARDUNO, then the actual facts of this case and the factors of 18 U.S.C. §3553(a). (DE:585:43,56)

Moreover, the sentence was not minimally sufficient or "appropriate" as the Eleventh Circuit alluded to, but greater than necessary to comply with the purposes of sentencing under 18 U.S.C. §3553(a). *United States v. Butler*, 39 F.4th 1349 (11th Cir. 2022). In reviewing the totality of the circumstance, GARDUNO'S sentence was far too severe and therefore his Petition for Writ of Certiorari must be granted.

REASONS FOR GRANTING THE PETITION

I.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN DISMISSING GARDUNO'S APPEAL.

In upholding a waiver, the appellate Court must be assured that upholding or enforcing the waiver will not result in a "miscarriage of justice". *Warren v. United States*, 2011 WL 5593183 (M.D. Ala., Oct. 26, 2011); *see also, Gourdine v. United States*, 2012 WL 32446 (S.D. Ga., Jan. 5, 2012). In reviewing the totality of the circumstances, the issue of whether GARDUNO understood what was being asked of him is questionable. Although the record makes clear that the District Court specifically questioned GARDUNO about the waiver, the issue of whether he understood what was being asked of him is questionable, especially considering his drug abuse and his past personal history.

The upholding of GARDUNO'S appeal waiver, based on the fact that he lacked the understanding of what he was waiving due to his drug was a "miscarriage of justice" and a violation of GARDUNO'S due process rights. *United States v. Nguyen*, 618 F.3d 72 (1st Cir. 2010). Therefore, to ensure no miscarriage of justice occurred, the Eleventh Circuit should have found that the waiver was not voluntary and should not have dismissed the appeal. If GARDUNO'S constitutional rights were not protected, then the waiver is in violation of GARDUNO'S due process rights and should not have been upheld by the Eleventh Circuit.

Case law is clear that this Court has discretion not to enforce the plea and waiver if it would result in a "miscarriage of justice". *Warren v. United States*, 2011 WL 5593183 (M.D. Ala., Oct. 26, 2011); *see also, Gourdine v. United States*, 2012

WL 32446 (S.D. Ga., Jan. 5, 2012). Whether GARDUNO has knowingly and voluntarily waived his right to appeal his sentence is a question of law over which this Court exercises plenary review. *United States v. Benitez-Zapata*, 131 F.3d 1444 (11th Cir. 1997). Again, just because GARDUNO affirmatively responded to the District Court's inquiry during the plea colloquy regarding his waiver of his right to appeal does not mean that he understood what he was responding to; therefore, this would be the relinquishment of an "unknown" right. *See, United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993). The Eleventh Circuit should have found that because of GARDUNO drug addiction, GARDUNO'S appeal waiver were not voluntary and therefore dismissing the appeal was in fact a "miscarriage of justice" and a violation of GARDUNO'S due process rights. *United States v. Nguyen*, 618 F.3d 72 (1st Cir. 2010). As such, GARDUNO'S Petition for Writ of Certiorari must be granted.

II.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF GARDUNO'S OBJECTION REGARDING THE DISPARITY OF SENTENCES BY DISMISSING GARDUNO'S APPEAL.

Pursuant to 18 U.S.C. § 3553(a)(6), the Court shall consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. The United States Sentencing Commission has designated the Judiciary Sentencing Information (JSIN) platform, which is a sentencing resource for the Federal Judiciary that provides sentencing data. JSIN provides five years of sentencing data for defendants sentenced under the same primary guideline, and with the same Final Offense Level and Criminal History category. *See United States v. Willis*, 139 F.3d 811, 812 (11th Cir.1998).

One of the purposes of the Sentencing Commission, and by extension the Sentencing Guidelines, is to "establish sentencing policies and practices for the *Federal* criminal justice system that ... provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct ...." 28 U.S.C. § 991(b)(1)(B).

In the case at hand, GARDUNO should have been sentenced to the statutory mandatory minimum of 120 months due to the disparity between his sentence and that of his co-defendant even though they were not found guilty of similar criminal conduct. After all, GARDUNO did have a minor criminal history and was eligible for a safety valve reduction. (DE:141:24-25). Therefore, due to the fact that the Guidelines sought to avoid the unwarranted disparities that existed in the federal

criminal justice system, the District Court erred in not finding that there was no disparity between GARDUNO'S sentence and that of his co-defendant. Based upon the above policy arguments, the Eleventh Circuit should have reversed GARDUNO'S sentence, not affirm it; and because it did not, GARDUNO'S Petition for Writ of Certiorari must be granted.

III.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING GARDUNO'S SENTENCE WHERE GARDUNO'S 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 BY DISMISSING GARDUNO'S APPEAL.

The Sentencing Reform Act requires the Court to consider the "history and characteristics" of the defendant. GARDUNO'S personal characteristics, i.e., his own drug use and addiction and his childhood warranted a reduction in his sentence. "The findings of fact of the sentencing court may be based on evidence heard during trial, facts admitted by a defendant's plea of guilty, undisputed statements in the presentence report, or evidence presented at the sentencing hearing." *United States*

v. Saunders, 318 F.3d 1257, 1271 n. 22 (11th Cir.2003). In reviewing GARDUNO'S 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). GARDUNO 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.

The Eleventh Circuit failed to acknowledge the facts enumerated by GARDUNO that warranted a lesser sentence. The Eleventh Circuit just as the District Court did, failed to consider and/or give the proper weight to the fact that GARDUNO'S father was an alcoholic and physically abusive towards GARDUNO and his mother. The abuse reportedly continued throughout GARDUNO'S entire childhood. Furthermore, GARDUNO was raised in the low-income "Tice" area of East Fort Myers and his family relied on assistance in the form of "food stamps" to provide for the family's basic needs. (PSI:70).

Also, the fact that GARDUNO accepted responsibility and entered into a plea agreement. Clearly, acceptance of responsibility sheds a positive light on his "history and characteristics". It also reflects positively on his character. *See, United States*

v. Fernandez, 443 F.3d 19 (2nd Cir. 2006). Furthermore, GARDUNO did have a minor criminal history and was eligible for a safety valve reduction "had he debriefed with the government. (DE:141:24-25). However, GARDUNO chose not to be debriefed because GARDUNO "was told by individuals in his cell that he would be shanked if, in fact, he gave a safety valve statement or cooperated with the government, therefore, he couldn't do any of those things." (DE:141:25). Based on the above and GARDUNO'S disparity argument herein, GARDUNO should have been sentenced to the requested 120 months, which was the mandatory statutory minimum. (PSI:97). But because

The District Courts have institutional advantages in applying and weighing the factors enumerated in 18 U.S.C. §3553(a) in individual cases. *United States v. Pugh,* 515 F.3d 1179, 1190–91 (11th Cir.2008). But the District Courts' discretion is not unbridled; "[l]ooking at sentencing decisions through the prism of discretion is not the same thing as turning a blind eye to unreasonable ones." *United States v. Irey,* 612 F.3d 1160, 1191 (11th Cir.2010). The Supreme Court has made it abundantly clear that, in reviewing sentences, the appellate courts are obliged to remand for resentencing if left with the definite and firm conviction that the district court arrived at a sentence falling outside the range of reasonable sentences. *See Gall v. United States,* 552 U.S. 38, 46, 128 S.Ct. 586 (2007); *see also Irey,* 612 F.3d at 1188. 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. And, because it was not, GARDUNO'S Petition for Writ of Certiorari must be granted.

Further evidence that the sentence imposed was unreasonable is if it was grounded solely on one factor, relied on improper factors, or ignores relevant factors. *Pugh,* 515 F.3d at 1194. Here, after balancing the factors, this Court must be left with the definite and firm conviction that the District Court's sentence was and is unreasonable and in imposing said sentence, the District Court abused its considerable discretion. Again, said sentence should not have been affirmed; but reversed. And, because it was not, GARDUNO'S Petition for Writ of Certiorari must be granted.

Considering the above facts and the sentence that GARDUNO 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 GARDUNO'S 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).

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 18 U.S.C. §3553(a) factors". *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008). Accordingly, the Eleventh Circuit should have reversed the sentence and because it did not, GARDUNO'S Petition for Writ of Certiorari must be granted.

CONCLUSION

The Eleventh Circuit is required to vacate a sentence 'if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the 18 U.S.C. §3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *United States v. Shaw,* 560 F.3d 1230 (11th Cir. 2009); *See also, United States v. Bonilla*, 579 F.3d 1233 (11th Cir. 2009).

In the case at hand, reviewing the totality of circumstances, said sentence lies outside the range of what the facts of this case dictate as being a reasonable sentence and is vastly disproportionate to the crime. *United States v. Shaw*, 560 F.3d 1230 (11th Cir. 2009). In other words, the sentence should reflect the gravity of the GARDUNO'S conduct. GARDUNO'S sentence should be of a type and length that will adequately reflect, among other things, the harm done or threatened by the offense, and the public interest in preventing a recurrence of the offense. Because the District Court and the Eleventh Circuit failed to assure that GARDUNO'S

sentence was reasonable, GARDUNO'S Petition for Writ of Certiorari must be granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 6th day of January, 2025, to the SOLICITOR GENERAL OF THE UNITED STATES, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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