

IN THE
SUPREME COURT OF THE UNITED STATES

BENJAMIN P. FOREMAN,
Petitioner,

v.

Case No. 17-6588

J.A. TERRIS, WARDEN,
Respondent.

PETITION TO GRANT REHEARING

COMES NOW, Benjamin P. Foreman, proceeding pro se Petitioner, moving this Honorable U.S. Supreme Court pursuant to Sup. Ct. R. 44; and respectfully requesting that this Honorable Court GRANT Foreman's Petition To Grant Rehearing based upon the foregoing:

Statement of Facts

On October 29, 2015, U.S. District Court Judge John Corbett O'Meara Summarily Dismissed Foreman's Writ of Habeas Corpus 2241 Petition; and on December 21, 2016, the Sixth Circuit Court of Appeals denied Foreman's 2241 appeal, thereafter on March 17, 2017, Petitioner Foreman's pro se Writ of Certiorari was filed and placed on the docket November 1, 2017. Petitioner Foreman, asserts that on December 4, 2017, the Supreme Court denied his petition for a writ of certiorari and Benjamin Preston Foreman now moves this Honorable U.S. Supreme Court to GRANT his Petition

To Grant Rehearing as from the time Foreman's petition of writ of certiorari was filed and from the time it was denied this Court handed down the Hicks decision and Petitioner Foreman presents substantial grounds not previously presented that constitutes a legal error coupled with a compelling claim of **actual-innocence of a noncapital sentence** which involves an erroneous Chapter Four Career Offender Designation which substantially increased Foreman's sentence by 10 'extra' years in federal prison, thus as the result of there being no factual basis for Benjamin Preston Foreman's Career Offender enhancement as one of two predicate offenses utilized has been **DISMISSED** and **EXPUNGED** from his criminal record, therefore he is "actually innocent" of being a Chapter Four Career Offender it follows that Foreman's due process of law rights have been violated and Foreman is a victim of a miscarriage of justice he should be entitled to relief by this Honorable Court even under the plain error standard of review, see Hicks, *supra* and Haley, *supra*. (emphasis added).

Thus, Petitioner Foreman, asserts that this Honorable Supreme Court should not turn a blind eye at Benjamin Preston Foreman's plea for **JUSTICE** and as the result of federal law requiring that Foreman have at least two prior convictions of a "crime of violence" or "controlled substance offense" to be designated as a Career Offender and as the result of him simply not having the two requisite predicate offenses, thus this Honorable Supreme Court **CORRECT** an **INJUSTICE** that results in Foreman still lingering in federal prison beyond his authorized sentence of 130-147 months in which he completed on September 12, 2016.

Reasons That Justify Granting Rehearing

Rule 44. Rehearing

2. Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial and shall comply with all the form and filing requirements of paragraph 1 of this Rule, including the payment of the filing fee if required, but the grounds be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. The time for filing a petition for a writ of certiorari or extraordinary writ will not be extended.

Actual-Innocence Of Noncapital Sentence

Petitioner Foreman, asserts that he will demonstrate below there is no question that he is "actually innocent" of being a Chapter Four Career Offender on the record before the reviewing authority the Honorable U.S. Supreme Court presented herein:

Benjamin Preston Foreman is actually innocent of being a career offender as defined in § 4B1.1 of the Guidelines:

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. (emphasis added)

Petitioner Foreman, contends that he has only one prior felony conviction that is a crime of violence (1993 Assault With Intent To Do Great Bodily Harm L/ Murder, see Exhibit A (A copy of Presentence Investigation Report at page 9, Para. # 42, prepared by USPO Trowbridge, Sr. on August 03, 2006)); and after the DISMISSAL and EXPUNGEMENT of Foreman's Delivery/ Manufacture Of Cocaine Less

Than 50 Grams, thus Petitioner Foreman has **none** that were controlled substance offenses. See Exhibit B (A copy of Presentence Report at page 8-9, Para. # 36 listing two predicate offenses utilized to enhance Foreman's federal sentence and page 11, Para. # 45, listing the Delivery conviction utilized as one of two predicate offenses to designate Foreman as a Chapter Four Career Offender); and Exhibit C (A copy of Sentencing Transcripts before the Honorable Robert Holmes Bell on September 7, 2006, see pages 1, 6, and 9); Exhibit D (A certified copy of Dismissal Order rendering one of two predicate offenses used to enhance Foreman's federal sentence a void judgment on September 12, 2006 signed by 30th Circuit Court Judge Nettles-Nickerson and a copy of Expungement Order signed by 30th Circuit Judge Rosemarie E. Aquilia on December 11, 2013); and Exhibit E (Foreman's complete Criminal History listed within Presentence Investigation Report prepared by USPO Mark A. Trowbridge, Sr. on August 03, 2006, see pages 9-11).

Petitioner Foreman, argues firmly that he is **"actually innocent"** of being a Chapter Four Career Offender just as the Fourth Circuit Court of Appeals held that Maybeck was "actually innocent" in which is somewhat similar to Foreman's circumstances, however his facts are more **compelling** as Benjamin P. Foreman's one of two predicate offenses utilized to designate him as a Career Offender the Delivery conviction was **DISMISSED** just 5 days after his federal sentencing hearing and **EXPUNGED** on December 11, 2013, thus such Delivery is an complete **NULLITY**, as there is "no factual basis" that can ever exist to justify Foreman's continued **unauthorized** incarceration in federal prison until his release date of **November 15, 2027**, see United States v. Maybeck, 23 F.3d

888, 892-93 (4th Cir. 1994) (Thus, as Maybeck holds, if one of the predicate offenses which was used to support the sentencing enhancement was not a crime of violence or a controlled substance offense, then the petitioner would be actually innocent of the Career Offender enhancement). (emphasis added).

On November 15, 2010, Asst. Federal Public Defender Richard D. Stroba brought to the Honorable Robert H. Bell's attention during 3582 (c) (2) Response To Foreman's Sentencing Modification Report that Foreman was "actually innocent" of being a Chapter Four Career Offender, see Exhibit F (A copy of Defendant's Response To Sentence Modification Report at page 1, 3, 4, and Exhibit A), on March 20, 2014, the Honorable Robert H. Bell denied Foreman's 3582 motion and held Dillion prohibited the court from a comprehensive resentencing.

Thus, Petitioner Foreman, argues firmly that the U.S. Supreme Court has held in habeas corpus context in Boumediene, 553 U.S. at 779 (2008) ("The privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law."). Therefore, Petitioner Foreman, argues that his Petition To Grant Rehearing should be GRANTED to avoid a clear miscarriage of justice in the matter herein, see Dretke, 541 U.S. at 398 (Stevens, J., dissenting on other grounds) (noting that when a prisoner's sentence is enhanced without a valid "factual basis," yet he remains incarcerated to that sentence "it follows inexorably" that he "is a 'victim of a miscarriage of justice,'" (quoting Wainwright, 433 U.S. at 91)).

Plain Error Analysis

(1) discern an error,

Petitioner Foreman, states that his Career Offender enhancement is erroneous and constitutes an error as Foreman does not have the requisite two predicate offenses to qualify as a Career Offender, thus Chapter Four Career Offender enhancement is in error, see U.S.S.G. § 4B1.1 (a) (3) and 28 U.S.C. § 994 (h) (2), therefore his erroneous Career Offender designation violates federal law and is an error in the case herein.

(2) that error must be plain,

Petitioner Foreman, asserts that this is a plain legal error as the result at Foreman's original sentencing on September 7, 2006, the District Court relied on the PSR alone was clearly and obviously erroneous, as doing so conflicted with both Taylor, 495 U.S. 575 (1990); and Shepard, 544 U.S. 13 (2005) as well as the underlying themes of the categorical approach. See *United States v. Bonilla-Mungia*, 422 F.3d 316, 320 (5th Cir. 2005) (specifically directing courts to analyze the statutory definition of an offense when determining whether it is a crime of violence); and the categorical approach also applies to "controlled substance offense", see *United States v. Butler*, 207 F.3d 839, 843 (6th Cir. 2000).

Thus, Petitioner Foreman, asserts that it was clear and obvious error for the District Court to rely on presentence report's characterization of defendant's convictions as crimes of violence without independent analysis, see *United States v. Ochoa-Cruz*, 442 F.3d 865, 867 (5th Cir. 2006); and *United States v. Kovac*, 367 F.3d 1116, 1120-1121 (9th Cir. 2004). (emphasis added).

(3) affect the defendant's substantial rights,

To show that the error affected his substantial rights, Foreman must show a reasonable probability that, but for the error, he would have received a lesser sentence. Villegas, 404 F.3d 355, 364 (5th Cir. 2005).

Petitioner Foreman, bears the burden of proving that the error affected his substantial rights, see *United States v. Olano*, 507 U.S. 725 (1993).

Benjamin P. Foreman, contends that the District Court failed altogether to employ the categorical approach at his original sentencing hearing on September 7, 2006, however relied solely upon the PSR alone without independent analysis and as the result of the PSR examiner relying it's factual averments upon a **prior state presentence report** for the 1993 Great Bodily Harm L/ Murder and Delivery/ Manufacture drug convictions, thus there is no Shepard-approved documents within the existing record to support Career Offender enhancement as Michigan Delivery drug statute is **divisible**, see *United States v. House*, 2017 U.S. App. LEXIS 11496 (6th Cir. 2017); and *United States v. Solomon*, 592 Fed. Appx. 359, 361 (6th Cir. 2014) (Mich. Comp. Laws § 333.7401 prohibits "manufactur[ing], creat[ing], deliver[ing], or possess[ing] with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form." Therefore, it is possible for § 333.7401 to be violated in a way that constitutes a controlled substance offense for purposes of § 4B1.2 (b) of the Sentencing Guidelines (manufacturing, creating, or delivering a controlled substance, or possessing a controlled substance with intent to do any of those), and it is possible for § 333.7401 to be violated in a way that does not constitute a controlled

substance offense for purposes of § 4B1.2 (b) of the Sentencing Guidelines (manufacturing, creating, delivering, or possessing a prescription form or counterfeit prescription form). In such a situation, courts use the "modified categorical approach" to determine under which element of the statute the defendant was actually convicted. Denson, 728 F.3d at 608).

Thus, Petitioner Foreman, argues firmly that as the result of one of two predicate offenses being DISMISSED and EXPUNGED he simply does not qualify as a Chapter Four Career Offender, thus as the result of federal law (28 U.S.C. § 994 (h) (2)), requiring two qualifying prior convictions and Mr. Foreman merely has one qualifying prior conviction an "incorrect" guideline range has been applied in which affects Foreman's substantial rights, see Molina-Martinez, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016); and absent such legal error his offense level was increased from 29 to 37 and Criminal History Category IV increased to VI, thus resulting in a 10-year sentence increase that is wrongly applied contrary to federal law in the matter herein. If Benjamin Preston Foreman was re-sentenced he now receive the benefit of the Fair Sentencing Act of 2010, thus his 100 to 1 ratio 10-year mandatory minimum as to his Count One conviction would be lower to 5 year mandatory minimum and would yield a new "advisory" guideline range of 130-147 months of imprisonment because Benjamin Preston Foreman has already served 12 YEARS of imprisonment (144 MONTHS), as of January 11, 2018, thus Foreman was subject to release minus good-time credits on September 12, 2016, thus there can be no doubt that Foreman's "incorrect" guideline range affects his substantial rights, see Molina-Martinez, 136 S. Ct. 1338, 194 L.

Ed. 2d 444 (2016). (emphasis added).

(4) implicate the fairness, integrity, or public reputation of judicial proceedings.

Petitioner Foreman, contends that erroneous legal error of Foreman's Chapter Four Career Offender substantially increased his sentence by more than 10 years, thus "seriously affects the fairness, integrity, or public reputation of judicial proceedings," see Olano, 507 U.S. 725, 732 (1993).

The federal Circuit Courts have recognized that when the "correct application of the sentencing laws would likely significantly reduce the length of the sentence," circuit courts have almost uniformly held the error to implicate fundamental fairness issues. See *United States v. Brown*, 316 F.3d 1151, 1161 (10th Cir. 2003) ("[F]airness is undermined where a court's error impose[s] a longer sentence than might have been imposed had the court not plainly erred."); *United States v. Syme*, 276 F.3d 131, 157-58 (3d Cir. 2002) (when the erroneously applied offense level was 21 (37-46 months) and the correct level was 19 (30-37 months), concluding that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings"); *United States v. Portilla-Mendoza*, 273 F.3d 1224, 1228 (9th Cir. 2001) (in exercising its discretion under Olano, stating that "fairness is undermined where a court's error imposes a longer sentence than might have been imposed had the court not plainly erred."); *United States v. Williamson*, 183 F.3d 458, 464 (5th Cir. 1999) ("Leaving [the defendant] incarcerated for 30 years when he should have been sentenced to no more than 15 years under existing precedent... seriously would affect the fairness, integrity

and public reputation of judicial proceedings by undermining the rule of law."); *United States v. Ford*, 88 F.3d 1350, 1356 (4th Cir. 1996) ("If we do not correct this error, [the defendant] will serve a term of imprisonment three years longer than required by the sentencing guidelines); and *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1349 (2016) (In the ordinary case the Guidelines accomplish their purpose. They serve as the starting point for the district court's decision and anchor the court's discretion in selecting an appropriate sentence. It follows, then, that in most cases the Guidelines range will affect the sentence. When that is so, a defendant sentenced under an incorrect Guidelines range should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range. That probability is all that is needed to establish an effect on substantial rights for purposes of obtaining relief under under Rule 52 (b)). (emphasis added).

Petitioner Foreman, argues firmly that he has established the all prongs of the plain error analysis and this Honorable U.S. Supreme Court GRANT relief to Benjamin Preston Foreman as this Court's Ruling in Hicks demands such a result, see Hicks, 137 S. Ct. 2000 (2017) (Mr. Hicks's substantial rights are, indeed, implicated. *Molina-Martinez v. United States*, 578 U.S. ____ (2016)). When it comes to the fourth prong of plain error review, it's clear Mr. Hicks also enjoys a reasonable probability of success. For who wouldn't hold a rightly diminished view of our courts if we allowed individuals to linger longer in prison that the law requires only because we were unwilling to correct our own mista-

kes ? United States v. Sabillon-Umana, 772 F.3d 1328, 1333 (CA10 2014).

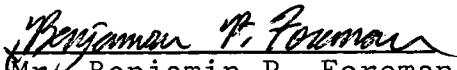
Indeed, the lone peril in the present case seems to me the possibility that we might permit the government to deny someone his liberty longer than the law permits only because we refuse to correct an obvious judicial error.). (emphasis added).

CONCLUSION

In conclusion, Petitioner Foreman, concludes that this Honorable U.S. Supreme Court should VACATE the Sixth Circuit's Judgment and REMAND back to the Sixth Circuit with instructions to vacate his sentence and re-sentence Benjamin P. Foreman without consideration of erroneous Career Offender designation, thus GRANTING Petition Rehearing in the interests of JUSTICE in the matter herein.

Date: 12/25/17

Respectfully Submitted,


Mr. Benjamin P. Foreman
#12658-040
FCI-Milan
P.O. Box 1000
Milan, MI. 48160-0190

NOTE: See Attachment A (Petitioner Foreman's Sworn Affidavit that certifies that his Petition To Grant Rehearing is brought in good faith and not for delay).

Affidavit of Benjamin P. Foreman

I, Benjamin P. Foreman, swear and declare under penalties of perjury that my sworn statements below herein are true to the best of my knowledge, information and belief.

This sworn affidavit is being submitted to certify that my Petition For Rehearing is presented in **good faith** and not for delay.

1. I, Benjamin P. Foreman, Writ of Certiorari was denied by this Honorable U.S. Supreme Court on December 4, 2017.

2. Thus, my Petition To Grant Rehearing is based upon how this Honorable U.S. Supreme Court **GRANTED** relief to Marcus D. Hicks after the filing of my Writ of Certiorari and this Honorable Court did not consider my colorable claim of actual innocence of my Career Offender enhancement, thus this forms the basis of my Petition For Rehearing in which should entitle me to relief as I'am lingering in federal prison based upon an Career Offender enhancement I'm "actually innocent" upon in the case herein.

3. Therefore, I, Benjamin P. Foreman, certify that my Petition for Rehearing is presented in **good faith and not for delay**, thus this Honorable U.S. Supreme Court should exercise it's discretion by considering the merits of my Petition To Grant Rehearing in the case herein.

I, Benjamin P. Foreman, declare and certify under penalty of perjury under the laws of the United States of America pursuant to 28 U.S.C. § 1746, that the foregoing above is true and correct.

Executed on December, 25th, 2017.

Respectfully Submitted,

Mr. Benjamin P. Foreman
#12658-040
FCI-Milan
P.O. Box 1000
Milan, MI. 48160-0190

EXHIBIT A (A copy of Presentence Investigation Report at page 9,
Para. # 42, prepared by USPO Trowbridge, Sr. on August 03, 2006).