

N THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

SAMUEL DAVID ALVARADO,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

ISSUE 1: In deciding whether to apply USSG §2D1.1 - the increase of +2 levels from level 30 to 32 for additional extrapolated controlled substances - the District Court committed factual and legal errors, any or all of which are reversible.

ISSUE 2: In deciding whether to apply USSG § U.S.S.G. 2D1.1(b)(1) - the +2 level increase for the possession of a firearm - the District Court committed factual and legal errors, any or all of which are reversible.

ISSUE 3: In deciding whether to apply USSG § 3B1.1(a) - the +4 level increase for leadership role in the indicted conspiracy - the District Court committed factual and legal errors, any or all of which are reversible.

ISSUE 4: In deciding whether to apply USSG §3B1.2 - the +2 level increase the fleeing and eluding in a motor vehicle - the District Court committed factual and legal errors, any or all of which are reversible.

- Prefix-

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The Petitioner, SAMUEL DAVID ALVARADO, respectfully
prays that a writ of certiorari issue to review the
judgment/order of the United States Court of Appeals for
the Eleventh Circuit entered on October 18, 2017.

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OPINION BELOW

On October 18, 2017 the Eleventh Circuit Court of Appeals entered its opinion-order affirming Petitioner's convictions and sentence. A copy of the opinion is attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has been deprived of his liberty without due process of law as guaranteed by the Sixth and Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was the defendant in the district court and will be referred to by name or as the Petitioner. The respondent, the United States of America will be referred to as the government. The record will be noted by reference to the volume number, docket entry number of the Record on Appeal as prescribed by the rules of this Court. References to the transcripts will be referred to by the docket entry number and the page of the transcript.

The Petitioner is incarcerated and is serving his sentence in the Bureau of Prisons at the time of this writing.

Course of the Proceedings and Disposition in the Court

Below

Petitioner's case originates from felony convictions and sentences imposed in the Southern District of Florida.

On October 18, 2017 the Eleventh Circuit Court of Appeals affirmed Petitioners conviction and sentences.

This Petition ensues from that opinion.

Statement of the Facts

The facts on appeal arise from the record of the change of plea and sentencing proceedings. The evidence of Petitioner's offense was as follows: In 2013, law enforcement initiated and investigation into a drug trafficking organization that operated in and around Lake Worth, Palm Beach County, Southern District of Florida. Specifically, agents received information from multiple sources that Samuel Alvarado was responsible for distributing large amounts of narcotics. Based upon various investigative techniques, the use of multiple pole cameras, and intercepted jail calls occurring between October 18, 2013 and January 13, 2014 when Petitioner was in custody at the Palm Beach County jail serving a sentence for fleeing and eluding police, on May 14, 2014, United

States District Court Judge Donald M. Middlebrooks signed the first of numerous orders authorizing the interception of wire and electronic communications on phones utilized by Alvarado, Todd Reynolds. Alexander Webster, Sam Henricy, and Omar Veloz. Interceptions began in May 2014 and continued through September 2014. Agents intercepted a total of 11,746 pertinent communications, 8,000 of which allegedly involved Alvarado, as detailed below. Samuel Petitioner conspired with over 30 other individuals to distribute 280 grams or more Petitioner acquired cocaine from various sources, a large majority of which he (Petitioner) then converted into crack cocaine for distribution. Petitioner also sold cocaine, which he knew would be converted into crack cocaine. Petitioner acquired crack cocaine and heroin from others, all of which Petitioner then redistributed. During the course of the conspiracy, Petitioner directed the activities of multiple coconspirators, including Eliezet Velazquez, and Pedro Mejia. From October 18, 2013 to January 13, 2014. Petitioner was in custody at the Palm Beach County jail serving a state sentence for fleeing and eluding. Agents monitored Petitioner's jail phone calls. Agents listened to numerous phone calls wherein Petitioner spoke about narcotics related sales activity and used coded language

and street slang to discuss narcotics activity. While Petitioner was in jail, his drug trafficking organization continued to make narcotics sales. The following is a representative sample of the jail calls made by Petitioner:

On October 21, 2013, Petitioner placed a jail phone call to his girlfriend, E.B. the phone to Eliezet Andres Velazquez. Petitioner asked Velazquez about the money Velazquez advised Petitioner that they owed "Tuk" (Sam Henricy) "32" Velazquez advised that Velazquez got "half" yesterday from "Tuk," and "Todd brought it up to 15." During this call, Velazquez stated that Velazquez bought a half ounce of cocaine powder from Sam Henricy, and Todd John Reynolds cooked the half ounce (14 grams) of powder cocaine into 15 grams of crack cocaine. Petitioner spoke to E.B. and told her that everyone had to work together like on a fishing boat" while he was in jail. E.B. then handed the phone to Sam Henricy. who had just arrived at the house. Petitioner and Henricy spoke about the "ticket" (price for the cocaine). Henricy advised everything would be alright after Henricy got with Henricy's people. On October 21, 2013 at 1906 hours, Petitioner placed a phone call to his girlfriend E.B. She handed the phone to Velazquez, who advised Petitioner that he "got half from Tukan and (was) going to get the other half." Velazquez

advised Petitioner that Velazquez had been working the phone and "got rid of two whole things yesterday.'" Agents believe that Velazquez referred to having sold two ounces of crack cocaine. Petitioner told Velazquez to call "Riko on the 305 number,'" and instructed Velazquez to deal with "Riko'" (Bobby Elkin Tejada). On October 25, 2013 at 1813 hours, Petitioner placed a phone call to his girlfriend, E.B. this conversation, she advised Petitioner that "Todd" was doing things behind their backs and messing up things with "Tukan'". E.B. then handed the phone to Velazquez, who advised Petitioner that he (Velazquez) was waiting for the "old man'" to bring "some money and some work.'" Agents believe the term "work'" referred to crack cocaine and "old man'" referred to co-defendant Todd Reynolds. Velazquez advised Petitioner that "Todd'" did not pay "Tukan'" for the "whole thing" and that "Todd'" told "Tukan'" that what he (Todd) was getting was for Petitioner. Petitioner stated that he (Petitioner) told "Tuk'" not to deal with "Todd',' but only to deal with Velazquez. Agents believe this conversation referred to Todd John Reynolds getting cocaine fronted to him by Sam Henricy on Petitioner's behalf, but that Petitioner was responsible for payment. Petitioner then instructed Velazquez to go to "Todd'" and to "take everything from him.'" Velazquez further stated that

"Bobby" charged him "\$600" for a half. Agents recognize this is to be the approximate cost for a half ounce of cocaine. Petitioner then instructed Velazquez to deal with "Slim" and "Primo". Velazquez advised that "Primo" came over and told him (Velazquez) to call when Velazquez had \$550. Agents recognize this to be the approximate cost for a half ounce of cocaine. Petitioner instructed Velazquez to offer to help Sanchez (a.k.a. "Primo") "make money". Petitioner and Velazquez talked about "Todd" going to "Tuk" and "Bobby" and "messaging everything up". Petitioner again instructed Velazquez to take everything from "Todd" even if he had to "search him". Agents believe that Petitioner ordered Velazquez to take the cocaine from Todd John Reynolds that Reynolds had obtained on Petitioner's behalf. On October 28, 2013 at 2033 hours. Petitioner placed a phone call to his girlfriend, E.B.. Petitioner spoke to C.O., who was at Petitioner's house. Petitioner advised C.O. that "little bro needs help." C.O. wanted to know "what [was] really going on," and advised that she thought Petitioner had it "organized" before Petitioner went to jail. Petitioner advised C.O. of the issues that Petitioner was having: Velazquez not following instructions, Reynolds putting them "behind," Leal working against him, and the possibility that

Reynolds was using drugs again. C.O. then asked Petitioner what Petitioner needed C.O. to do, and Petitioner advised that they needed to be a "team". Petitioner stated that Petitioner had to call "X" for help, and C.O. advised that she also had to call "X" because "it's been bad." C.O. talked about "him" not wanting to buy a "half" and then coming up with a "quarter brick". Petitioner advised "Oh, my god" and hung up the phone. Agents believe that this conversation was in reference to the purchase of a quarter kilogram of cocaine. Agents believe Petitioner hung up the phone because he was upset with C.O. for talking so freely about narcotics on a recorded phone line. On October 28, 2013 at 2033 hours, Petitioner placed a phone call to E.B., and C.O. answered the phone. Petitioner advised C.O. to not "talk crazy". Agents believe Petitioner referred to the previous phone call wherein Petitioner hung up because C.O. spoke so freely about narcotics. C.O. advised Petitioner that she was not lying about the "thirty G 's.'" and Petitioner told C.O. to trust him (Petitioner). C.O. spoke about the boys "cooking with the bigger pot and getting a hundred and fifty pieces." Petitioner stopped C.O. by making a noise to cover her, and C.O. stated that she was "sorry". On January 06, 2014 at 1 829 hours, Petitioner placed a call to Bobby Elkin Tejada (a.k.a. King Riko

Dinero'''), who wished Petitioner a Happy King's Day.''

Petitioner replied ''A.D.R. brother.'' Agents know that comment was in reference to January 6 being a special day for Latin Kings. Petitioner asked Tejada, "how much he owes on the ticket?'' Tejada advised "33, your girl owes 250, and 1 150 for the kid.'' Petitioner advised that he (Petitioner) would be home soon and would have "at least half". Agents believe this conversation was in reference to money that was owed to Tejada for cocaine. Petitioner advised Tejada that he had a lot of new players for the baseball team, some new and some old players. Tejada stated that he (Tejada) needed to clean house. Agents believe these comments were in reference to Petitioner recruiting new members into the Latin Kings, and re-connecting with some old Latin Kings members while he (Petitioner) was in custody. Petitioner spoke to Tejada about having some problems with some of Petitioner's people, and that he (Petitioner) may need outside help to mediate since he (Petitioner) was too close to the situation. Tejada advised that everyone needed to sit down and work it out, because "Palm Beach is a powerhouse''. Agents believe that this conversation was in reference to Petitioner and Tejada maintaining order within the Latin Kings organization, and that Petitioner's Palm Beach County Tribe was very strong.

Petitioner advised Tejada, "Amor De Rey, Palm Beach County sends their love.'" The following is a representative sample of the 8,000 pertinent intercepted calls involving Petitioner:

On May 26, 2014, co-defendant Vincent Rannallo called Petitioner and asked, "Are we good for the night, or no?'" Petitioner responded, "'Probably not, I don't know what's going on man, Todd (Reynolds) said the dude was ready, but (expletive) won't answer the phone.'" Rannallo said that his (Rannallo's) phone was "ringing off the hook'" with calls from his customers. Petitioner agreed and said, "I know, mine (expletive) is too, I got a couple halves, but I can't do nothing till the (expletive), I gave (expletive) fifteen hundred. Rannallo replied, "Alright, if you hear anything give me a holler, bro.'"

On May 28, 2014, co-defendant Joseph O 'Connor called Petitioner and asked if Petitioner had one good piece?'" Petitioner responded, "It's all good.'" O'Connor replied, "I'm gonna need like four., (84 grams) you got them right now?'" Petitioner said, "let me make a phone call and I'll get them, right now.'" Five hours later, O'Connor called Petitioner and complained that "this shit ain't doing nothing, dog... it's not locking up on me, nothing dog." O'Connor complained that the people to whom he provided

some of the cocaine were also complaining about the quality. Petitioner told O'Connor to call Petitioner in the morning. During these calls, O'Connor complained to Petitioner that the four ounces (84 grams) of powder cocaine that O'Connor purchased from Petitioner was not easily converting to crack cocaine.

On May 29, 2014, Petitioner called O'Connor. O'Connor said, "I'm a grab everything from my Moyo right now and I'm a be over.'" Petitioner responded, "Now listen dog, I only fix it, I can't give no money back, I don't have no money to give.'" O'Connor replied, "He said he don't want the sugar (powder cocaine), he ain't do the sugar, dog. He said he only drop one half, you feel me? He said he don't want none of the sugar.'" Petitioner said, I'll take the sugar back. but I can't, I'm saying I can't give no money back,'" O'Connor replied, "He want his money back." Petitioner answered, "Bro, you feel what I'm saying, the dude fronted it to me, I already done gave the dude the money, I don't have no money to give.'" O'Connor asked, "So what you trying to say, you got a different batch that's better?'" O'Connor clarified that O'Connor's customer wanted to cook "the shit" himself. Petitioner responded, "But I cook the same way he cook, same thing he could do. I could do.'" O'Connor agreed to bring O'Connor's customer to

Petitioner's house. During this call, it was made clear that Petitioner was "fronted" poor quality cocaine, which Petitioner sold to O'Connor, and which O'Connor sold to another customer. When O'Connor's customer cooked the cocaine into crack cocaine, the customer realized that the cocaine was poor quality. O'Connor's customer wanted to return the remaining cocaine to Petitioner, but Petitioner indicated that he (Petitioner) had no money with which to reimburse O'Connor's customer.

On May 30, 2014, Petitioner called co-defendant Omar Veloz, his heroin source of supply, and said, "Drop me off a seven." During this call, Petitioner ordered 7 grams of heroin for redistribution purposes. Also on May 30, 2014, Petitioner called Henricy. Petitioner said, "I got a rack, actually, I got eleven (\$ 1 1 00)." Thereafter, Henricy sold 14 grams of cocaine to Petitioner. During a follow-up call, Henricy called Petitioner and asked about the quality of the cocaine that Henricy had just sold to Petitioner saying, "What that bitch did for you. . . Dai Dai (co-defendant David Vilmont) said it did double." Petitioner agreed and said, "That bitch straight, man." Based on these calls, Petitioner bought a half ounce (14 grams) of cocaine from Henricy, but then doubled it in the cooking process, yielding 28 grams of crack cocaine.

On June 2, 2014, Petitioner called Veloz and said, "...bring the seven, though...bring me a good one, bro" During this call, Petitioner ordered 7 grams of heroin for redistribution purposes.

On June 9, 2014, Petitioner called O'Connor and asked, "If I got like three and a half racks, what's that gonna do me?" O'Connor responded, "I'm gonna throw you one a half but I, I could throw you one and a half on top of that cause we only got a little bit left, dog." O'Connor added, "I'm gonna get another one right now." Petitioner asked if O'Connor was bringing "five," to which O'Connor agreed. During this call, O'Connor agreed to deliver to Petitioner 5 ounces of cocaine, which Petitioner intended to convert to crack cocaine.

On June 10, 2014, Petitioner called Veloz and said, "I need like a seven...they blowing me up, bro." During this call, Petitioner ordered 7 grams of heroin for redistribution purposes.

On June 11, 2014, Petitioner called O'Connor and asked, "Hey, what I owe you, twenty-three (\$2300)?" O'Connor responded, "Let me see. two and a half (2.5 ounces of cocaine), uh, yeah twenty-three (\$2300)." Petitioner then ordered "5" for Petitioner's "boy" and "1" for himself. During a follow-up call, Petitioner changed this

order to 4 ounces of cocaine. O'Connor agreed. It should be noted that this 4 ounces of cocaine was later seized by law enforcement from Petitioner's "boy," Bobby Tejada.

On June 12, 2014. Ranallo called Petitioner and said, "Hey. I'm leaving Boca now. I'm stopping by my house, pick the gun up and I'm coming over.'" Ranallo added, "We got money to buy a few tonight. . .so make a call, we need a few good ones...I will be there within the hour.'"

On June 19, 2014. Veloz called Petitioner . Petitioner said, "I'm gonna need another one.'" During this call, Petitioner ordered 7 gram s of heroin for redistribution purposes.

On June 20, 2014, Petitioner called O'Connor and asked, "You still good?'" O'Conner affirmed and said, "You know this shit going good now...it's flying, you know you don't even got to use that milk. ..you know I dropped it without the milk, it came back good.'" Petitioner responded, "I dropped it without the milk too...m y boy supposed to be coming to holler, I think he wants, l think he want a couple, he want about five.'" O'Connor replied, "I'll give you what l got left. ..that's probably like five.'" During a follow-up call, Petitioner asked, "You say you only got five (5) left? Let me get my three (3), man. I

got the money for you right now, bring me three (3 ounces of powder cocaine).

On June 30, 2014. Petitioner called Velazquez and said, "Take two. take him, take the thickest one though, the thickest one...take him three of them, three moons, and keep one more, keep one on you. ..go over there to the fucking Haitian's house and give him three of those. I'm a call Miss Vicky and see if she wants the other one.'" Velazquez agreed. During this call, Petitioner directed Velazquez to deliver "three moons'" (21 grams of crack cocaine to Sam Henricy, and "one moon'" (7 grams of crack cocaine) to co-defendant Victoria McGinnis.

On July 1, 2014. Petitioner called Veloz and said, "'You wanna do the same thing?'" Veloz agreed. During this call, Petitioner ordered 7 grams of heroin for redistribution purposes.

On July 8, 2014, Veloz called Petitioner and said. "I'm coming through right now...I'm gonna let you know , you might get a few complaints.'" Veloz then asked, "Seven? You want at least a seven so you can just keep, you know what I'm saying, keep the same rotating?" Petitioner agreed. During this call, Petitioner ordered 7 grams of heroin for redistribution purposes.

On August 03, 2014, Alvarado called Mejia. Petitioner asked Mejia for "two''. Mejia asked Petitioner if he (Petitioner) wanted to "test on a half First'', Mejia told Petitioner that he (Mejia) was unsure if "he'' (unknown subject) had that much. Petitioner told Mejia to bring as much as "he'' had. Agents recognized the term "test on a half'' to mean the cooking process of converting cocaine powder to crack cocaine and only using a smaller amount of cocaine to test the quality/purity. Based on this call, Petitioner intended to obtain powder cocaine from Mejia that he (Petitioner) would then convert to crack cocaine.

On August 14, 2014, Petitioner called Mejia. Mejia said, "Hey, I just got done, bro. You, how many you want me to get?'' Petitioner answered, "Just uh get a whole one for right now until Jake gets here.'' Mejia asked, ''Get one right now till bro gets there?'' Petitioner said, "Yes, until Jake gets here. ..He wants two.'' Mejia responded "Alright...I did a half just to check it out. You feel me? I just put it in the corner to see if it work, but that bitch came out seventeen (17 grams of crack cocaine).'' Petitioner replied, "that's beautiful." Mejia asked Petitioner if Petitioner wanted a half at that moment, and Petitioner responded, bring that half...I got it sold right now. I just did my, I just did it all, I just did it all.''

Mejia clarified, "It's done up (cooked into crack cocaine)..

On September 11, 2014. Ranallo called Petitioner and asked for "that thing you got in the shed (referring to a firearm).'" Ranallo indicated that he was driving to Petitioner's house to pick "it'" up. During a follow-up call, Petitioner directed Ranallo to "a three piece speaker box'" inside Petitioner's shed. Petitioner added, "it needs some gumballs (bullets).'" Ranallo asked, "what size'" to which Petitioner responded ".22'". During this call, Petitioner agreed to let Ranallo borrow Petitioner's .22 handgun, which Petitioner stored in a shed behind his home. Prior to his arrest in this case, Petitioner fled the area. Petitioner was finally arrested by U.S. Marshals while he (Petitioner) was visiting his father in an Arkansas hospital. Immediately after his arrest, Petitioner said to the arresting agents, "You got me. I knew this day would come for some time.'" Petitioner said that he (Petitioner)

knew that he was "going away for a long time," and asked if he (Petitioner) could see his father in the ICU unit of the hospital. The agents agreed. Petitioner said to his father, "Dad, they got me." Petitioner told the arresting agent that he (Petitioner) knew that all of his co-defendants had gotten between 8-10 years in federal prison.

On September 23, 2015, while being transported to his initial appearance proceeding in Arkansas, Petitioner stated that he (Petitioner) would not fight this case because "they have too much on me from wiretaps," and that he was just praying that he would get 10 to 15 years in prison. Petitioner also stated that he (Petitioner) wanted to make it to the Mexican border, but with the escape of drug lord El Chapo, he was afraid that the authorities had tightened up the border, and that it would be too risky.

DE 1153-1-7 The foregoing facts are quoted from the signed stipulated Factual Basis for Change of Plea filed in the District Court.

Petitioner changed his plea to guilty to the following counts of the Superseding Indictment: Count One charges the defendant with conspiracy to possess with intent to distribute 280 grams or more of a mixture and substance containing a detectable amount of cocaine base, commonly

known as crack cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and 846. Count Two charges the defendant with conspiracy to possess with intent to distribute 100 gram s of more of a mixture and substance containing a detectable amount of heroin, in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

Count Three charges the defendant with conspiracy to possess with intent to distribute 500 gram s or more of a mixture and substance containing a detectable amount of cocaine hydrochloride, in violation of Title 21, United States Code, Sections 841(a)(1) and 846. DE 1152-1. The potential penalties were stated as follows in the Plea Agreement: The defendant also understands and acknowledges that, pursuant to Title 21, United States Code, Section 851, as to Count One, the Court must impose a statutory minimum term of twenty (20) years imprisonment up to a statutory maximum term of life imprisonment, followed by a term of supervised release of at least ten (10) years up to life. In addition to a term of imprisonment and supervised release, as to Count One, the Court may impose a fine of up to \$20 million dollars. As to each of Counts Two and Three, the Court must impose a statutory minimum term of ten (10) years imprisonment up to a statutory maximum term of life imprisonment, followed by a term of supervised release of

at least eight (8) years up to life. In addition to a term of imprisonment and supervised release, the Court may impose a fine of up to \$8 million dollars. The Plea Agreement contained the following stipulation of the parties: Although not binding on the probation office or the Court, the parties agree to jointly recommend that the defendant receive the statutory minimum-mandatory sentence of 240 months in prison, even if such sentence constitutes a variance from the advisory guideline range. DE 1152-3.

At sentencing Petitioner filed numerous objections to his Presentence Investigation Report regarding factors that increased his guideline range. In paragraph 453, the Petitioner objected that Petitioner's base offense level should be 30 as opposed to 32, as Petitioner did not agree with the amount of cocaine base and objected that it was too high and in excess of the stipulated facts noted above pursuant to U.S.S.G. 2D1.1. In paragraph 453, the Petitioner argued that his base offense level should be 30 as opposed to 32. Petitioner again did not agree with the amount of cocaine base and noted that the extrapolated weight was too high based upon the stipulated facts. Petitioner also opposed the enhancement for the firearm as the firearm referenced was stored in a shed and was never used or carried or possessed in furtherance of the indicted

conspiracy pursuant to U.S.S.G. 2D1.1(b) (1). Petitioner objected to the four level enhancement for his role for leader in paragraph 456. Petitioner noted the he was his own boss, and he purchased and resold the drugs for his own personal gain pursuant to U.S.S.G. 3B1.1(a). Petitioner objected to paragraph 457, arguing that the act of fleeing or eluding police in a vehicle where the police refuse as a matter of policy to give chase is insufficient to warrant this adjustment pursuant to U.S.S.G. 3B1.2. The Government replied to the objections disagreeing and arguing that the increases were proper. The District Court heard brief argument and thereafter overruled Petitioner's objections and sentenced him to the 240 month sentence which is the subject of this appeal. The following exchange occurred relating to the objections at sentencing:

Petitioner Counsel: Well, Judge, there is a basis within the PSI to support the objections. The real gravamen of the case is the fact that this is a drug trafficking case, and there were just a fraction of drugs actually seized. So everything was based upon the telephone calls and the surveillance that was performed by the officers in this particular case. As to the first objection, which was to paragraph 453, while the defense would agree that the telephone calls in the presentence report could be

interpreted to add up to the sufficient amount to support a level 32, it's the defense position that not as to the cocaine powder or the heroin, but as to the cocaine base, that it's just a little bit too high extrapolated based upon the telephone calls. I understand the Government's position.

The Court: You are talking about whether it was a CC or a moon or a triangle or something?

Petitioner Counsel: Exactly. But there were a lot of calls. There were literally hundreds and hundreds and hundreds of calls. We can't possibly go through them all. But the defense position is just it kind of, on a global scale, that a level 30 accurately reflects the amount. The Government wants a level 32, which is basically more ounces of crack, and that's where we were on that. But we would agree that there are calls in the presentence report, absolutely.

The Court: All right. Well, I think under the circumstances I'll overrule your objections. Although the Eleventh Circuit and law requires that I try to define the guideline, since the guideline starts at 292, and the agreed upon sentence is 240, it seems to me like futility to go through and try to break out every transaction. There's no question that there were a number of them.

DE 1185-6-7.

Government Counsel: Thank you, Your Honor. Your Honor, just as a housekeeping matter before I begin, is the Court finding that the base offense level in this case is a level 32, and that all of the enhancements mentioned in paragraphs 454, 456 and 457 apply based upon the facts contained both in the PSI and the PSI addendum?

The Court: I'm finding that, yes.

Government Counsel: Thank you.

DE 1185-13-14.

At the conclusion of the sentencing hearing Petitioner renewed his previous objections. DE 1185-18.

REASONS FOR GRANTING THE WRIT

ISSUE 1: In deciding whether to apply USSG §2D1.1 - the increase of +2 levels from level 30 to 32 for additional extrapolated controlled substances - the District Court committed factual and legal errors, any or all of which are reversible.

Petitioner objected to the Presentence Report conclusions regarding the base offense level computation as follows: Paragraph 453: Objection: The Base Offense Level should be 30 rather than 32 reflecting drug conversions of cocaine, cocaine base and heroin to 1000 to 3000 kilograms

of marijuana in that while the cocaine and heroin conversions are accurate the cocaine base amount of 2 kilograms too high based upon the stipulated facts which reflecting a lower total amount. Further, the various Defendants all had separate drug transactions with each other, some of which never involved Defendant (Petitioner) at any level. DE 1157-1. The total weight of all controlled substances actually seized during the investigation was measured in grams and ounces. The additional amounts included in the base offense level computation are based upon intercepted telephone conversations which were interpreted by the Government agents as involving controlled substance transactions. While Petitioner has no argument with the extrapolated weights of the heroin and cocaine applied toward the base offense level, he does object to the weight of the cocaine base. The Government filed two responses to Petitioner's objections referencing numerous intercepted telephone conversations. Petitioner agreed with many of the telephone conversation interpretations, however he objected to several others as either being incorrect as to the weight or incorrect as to the substance. The District Court acknowledged this discrepancy at sentencing regarding

the language cited above as "moons" and "triangles". DE 1185-6-7.

In Petitioner's Reply to Government's Response to the Objections, Petitioner pointed out that; Paragraph 62 involves powder cocaine as there is no reference to "circles" or "CD's" or "Cookies" which represent crack cocaine in the amount of 14 grams or ½ ounce. A "moon" is half a circle or 7 grams. A "triangle" is half a moon or 3.5 grams. The nomenclature is clearly present and used by the Defendants in various other calls and generally the amounts of crack cocaine bought and sold was always referenced in this manner. DE 1165-1. Petitioner makes it clear that the Government agents had misunderstood the terms used in the recorded conversations and therefore the weight of the cocaine base was extrapolated too high in this case resulting in a +2 level increase in the base offense level from 30 to 32.

Petitioner contends that the district court erred by attributing at least 150 kilograms of cocaine to him at sentencing. The Court will review for clear error a district court's determination of drug quantity. United States v. Almedina, 686 F.3d 1312, 1315 (11th Cir. 2012). The government is required establish drug quantity by a preponderance of the evidence. Id. When the amount of the

drugs seized does not reflect the scale of the offense, the district court must approximate the drug quantity attributable to the defendant. Id.; see United States v. Frazier, 89 F.3d 1501, 1506 (11th Cir. 1996). In estimating the quantity, the trial court may rely on evidence demonstrating the average frequency and amount of a defendant's drug sales over a given period of time. Id., 89 F.3d at 1506. "This determination may be based on fair, accurate, and **conservative** estimates of the drug quantity attributable to a defendant, but it cannot be based on calculations of drug quantities that are merely speculative." Almedina, 686 F.3d at 1316 (quoting United States v. Zapata, 139 F.3d 1355, 1359 (11th Cir. 1998) (per curiam)). The foundation for the district court's calculation of drugs at sentencing in this case can only be described as either "vague" or "uncertain." United States v. Simpson, 228 F.3d 1294, 1301 (2000) While Petitioner did agree with and accept the majority of the Government's proffered telephone conversations, there was clearly an issue with regard to many others which reduced the weight of the cocaine base included in the base offense level computation. As the only evidence of the weight comes from the intercepted telephone calls (there were only very small actual seizures), it was error to accept the disputed

interpretations regarding the weight of the cocaine base requiring the granting of a writ of certiorari.

ISSUE 2: In deciding whether to apply USSG § U.S.S.G. 2D1.1(b)(1) - the +2 level increase for the possession of a firearm - the District Court committed factual and legal errors, any or all of which are reversible.

Pursuant to U.S.S.G. § 2D1.1, the offense level for a drug offense is increased by two levels if "a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1). This firearm enhancement applies "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1 cmt. n.3. The government has the burden of showing "by a preponderance of the evidence that the firearm was present at the site of the charged conduct or prove that the defendant possessed a firearm during conduct associated with the offense of conviction." United States v. Stallings, 463 F.3d 1218, 1220 (11th Cir. 2006). Once the government "has shown by a preponderance of the evidence that the firearm was present at the site of the charged conduct, the evidentiary burden shifts to the defendant to show that a connection between the firearm and the offense is clearly improbable." United States v. Hall, 46 F.3d 62,

63 (11th Cir. 1995). Where a defendant has been charged with conspiracy, the § 2D1.1(b)(1) offense-level increase may be applied "if the firearm is found in a place where acts in furtherance of the conspiracy took place." United States v. Pham, 463 F.3d 1239, 1246 (11th Cir. 2006). For example, the two-level increase would be properly applied where an accused possessed the firearm at his residence and also engaged in conspiratorial conversations at the residence. See United States v. Hansley, 54 F.3d 709, 716 (11th Cir. 1995). In Hansley, this Court affirmed an application of the two-level increase where the government produced evidence that agents found a firearm and drug paraphernalia at a residence that was the site of conspiratorial conversations. Id. at 716. The evidence in the case before the court is substantially distinct from the Hansley facts and required reversal on direct appeal. No firearm was ever seized from Petitioner. The location of the firearm as discussed in the recorded conversations inside a speaker box located inside a shed structure. As there was no firearm actually recovered from the shed and none of the recorded conversations or surveillance activities involved the shed, the possibility that there was a firearm within a speaker box located in the shed where no criminal activity occurred cannot trigger the +2

level increase for possession of a dangerous weapon requiring the granting of a writ of certiorari.

ISSUE 3: In deciding whether to apply USSG § 3B1.1(a) - the +4 level increase for leadership role in the indicted conspiracy - the District Court committed factual and legal errors, any or all of which are reversible.

To apply a role enhancement under § 3B1.1(c), "the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." U.S.S.G. § 3B1.1 cmt. n.2. A "participant" need not be convicted of the offense, but is criminally responsible for its commission. *Id.* § 3B1.1 cmt. n.1. This court should consider the following factors in evaluating Petitioner's role in the offense: the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. *Id.* § 3B1.1 cmt. n.4. However, not all factors need suggest a lead role in order to find the enhancement applicable. United States v. Ramirez, 426 F.3d 1344, 1356 (11th Cir.

2005). The District Court clearly erred in applying a two-level enhancement for Petitioner's role in this offense under § 3B1.1(c). During Petitioner's participation in the indicted conspiracy, he purchased and re-sold the controlled substances himself. While there were numerous Co-Defendants in the case, none were employed by or worked for Petitioner. Each Defendant was his own boss with his own customers who engaged in the many buyer-seller transactions mentioned in the recorded telephone calls. There was never any type of supervision of any other Defendant by Petitioner. There were no lookouts, or couriers, or stash houses, or drivers, or servers. Petitioner engaged in the transactions directly on his individual account. There is no evidence of any money pooling or dividing or any other indicia of any partnership. The +4 level increase for role in the offense was reversible error. The District Court did clearly erred in finding Petitioner to be a leader or organizer under § 3B1.1(c). United States v. Jennings, 599 F.3d 1241, 1254 (11th Cir. 2010) This finding should have properly been reversed on appeal requiring the granting of a writ of certiorari.

ISSUE 4: In deciding whether to apply USSG §3B1.2 - the +2 level increase the fleeing and eluding in a motor vehicle - the District Court committed factual and legal errors, any or all of which are reversible.

The District Court increased Petitioner's base offense levels by two levels because he had "recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer ..." U.S.S.G. § 3C1.2. The Petitioner argues that there was no evidence to support the District Court's factual finding as to this enhancement. The facts from the Presentence Investigation Report that the vehicle accelerated away from the police vehicles and that police abandoned any pursuit. This was due to police policy and thus there was never and risk of death or serious bodily injury to another person as a result of the fleeing and alluding allegation. This case is distinct from other cases decided by this Court finding the increase appropriate. Section 3C1.2 of the Sentencing Guidelines imposes a two-level enhancement "if the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." U.S.S.G. § 3C1.2. The term "Reckless" refers to "a situation in which the defendant

was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation." United States v. Wilson, 392 F.3d 1243, 1247 (11th Cir. 2004) The terms "In the course of fleeing" or "during flight" includes "conduct . . . in the course of resisting arrest." United States v. Dougherty, 754 F.3d 1353, 1359 (11th Cir. 2014). "Flight alone is insufficient to warrant an enhancement under Section 3C1.2." Wilson, 392 F.3d at 1247. The flight must be accompanied by a "substantial risk of death or serious bodily injury to others," and the defendant must "recklessly create" that risk. Id. The record before the Court can no trigger the U.S.S.G. § 3C1.2 increase where there was never any "chase" and never would be a chase due to the policy of the officers and departments involve. In fact, law enforcement in this case did not chase Petitioner high speed or otherwise and the District Court's application of the enhancement was reversible error. This finding should have properly been reversed on appeal requiring the granting of a writ of certiorari.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petitioner for writ of certiorari should be granted.

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Respectfully submitted,

/s/ A. Wallace

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APPENDIX "A"