

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JUAN TOLENTINO — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JUAN TOLENTINO
(Your Name)

MVCC
(Address)

555 Geo DR, Philipsburg, PA 16866
(City, State, Zip Code)

None
(Phone Number)

QUESTION PRESENTED

DID THE DISTRICT COURT REASONABLY RELIE ON THE SAME FACTORS IT CONSIDERED AT THE ORIGINAL SENTENCING PROCEEDING—THE QUANTITIES OF DRUGS TRAFFICKED, THE HARM TO THE COMMUNITY, AND THE SOPHISTICATION AND SERIOUSNESS OF THE OFFENSE—IN DENYING PETITIONER'S § 3582(c)(2) MOTION?

LIST OF PARTIES

- [☒] All parties appear in the caption of the case on the cover page.
- [☐] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
CONCLUSION.....	11

INDEX TO APPENDICES

APPENDIX A USCA'S DECISION DENYING PETITIONER'S APPEAL.

APPENDIX B USDC'S ORDER DENYING PETITIONER'S MOTION PURSUANT TO SECTION 3582(C)(2).

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Dillon v. United States, 560 U.S. 817 (2010).....	8
United States v. Borden, 564 F.3d 100, 104 (2nd Cir. 2009).....	5,8,9
United States v. Winston, 2015 U.S. Dist. LEXIS; Crim. 3:11cr1(JBA)(District of Connecticut).....	9,10
United States v. Singh, No. 16-111-cr (Dec. 12, 2017).....	10

STATUTES AND RULES

18 U.S.C. § 3582(c)(2).....	i,3,5,8,10
18 U.S.C. § 3553(a).....	4,6
28 U.S.C. § 1254(1).....	2

OTHER

Supreme Court Rule 10.....	7
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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

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

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☒ is unpublished.

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

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

☐ For cases from **state courts**:

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

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

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

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

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December 12, 2017.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

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

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

☐ For cases from **state courts**:

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Under 18 U.S.C. § 3582(c)(2), a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission may move for a reduction in his sentence. 18 U.S.C. § 3582(c)(2).

STATEMENT OF THE CASE

On January 7, 2004, a Grand Jury returned a multi-defendant indictment for case number S3 13 Cr. 164 (KBF). The one count indictment alleges that Juan Tolentino (hereinafter "Petitioner" or "Tolentino"), and other co-defendants had conspired to distribute 5 kilograms or more of cocaine, and 100 grams or more of heroin, in violation of Title 21, United States Code, Section 846, 841(b)(1)(A) and 841(b)(1)(B).

Tolentino entered a guilty plea to the only count of the indictment on February 7, 2014. The parties reached a plea agreement and executed a written factual basis for the plea which was filed by the Government within the district court.

Using the 2014 edition of the Guidelines Manual, the Probation Office calculated Tolentino's sentence as follows: A Base Offense Level 32 under § 2D1.1(c)(4), which after applying a downward adjustment pursuant to § 3E1.1(a)&(b), yields a Total Base Offense Level of 29. Based on a level of 29 and a Criminal History Category of I, the guideline range for imprisonment was 87 to 108 months.

The Sentencing Court adopted the Presentence Investigation Report and sentenced Tolentino to 87 months' imprisonment. In doing so, the court discussed all the factors under 18 U.S.C. § 3553(a), in particular, the seriousness of the offense, which—according to the government's version of the facts—involved Petitioner's role in a conspiracy that brought "a lot of really bad drugs" into the community.

In light of Amendment 782 to the United States Sentencing Guidelines that lowered the sentencing range for offenses involving all drug types, Petitioner filed a petition under § 3582(c)(2) requesting his sentence to be reduced to 70 months' imprisonment. See § 3582(c)(2) Petition at page 3. Petitioner requested also from the district court to consider his post-sentencing behavior when deciding his § 3582(c)(2) motion.

Under the now-amended Guidelines, Petitioner claims, the amount of drugs attributable to him leads to a Base Offense Level of 30, which after applying the three level acceptance of responsibility downward adjustment yields a Total Base Offense Level of 27. Base Offense Level of 27 and Petitioner's CHC of I yields a Guidelines range of 70 to 87 months.

However, although the district court found that Petitioner is legally eligible for a reduction pursuant to § 3582(c)(2) and Amendment 782 and 788 to the Sentencing Guidelines, the district court nevertheless denied the petition:

"having re-reviewed the information relating to this Defendant, the Court finds that the same factors that supported the original sentence remain relevant and lead to the same finding that the 87 months sentence of imprisonment is sufficient but not greater than necessary to achieve the purposes set out in 18 U.S.C. § 3553 (a). See Court's Order at page 5.

The district court cited United States v. Borden, 564 F.3d 100, 104-05 (2nd Cir. 2009)—a case where the defendant has eleven convictions,—and the court was very concerned about recidivism,—in support.¹

1. Petitioner is a first-time offender.

In his appeal, Petitioner claims that the district court abused its discretion by considering factors known and considered by the court in imposing his original sentence, and by failing to adequately consider the § 3553(a) factors.

However, the Second Circuit Court of Appeals affirmed the district court's decision holding that:

"The district court reasonably relied on the same factors it considered at the original sentencing proceeding, including the sophistication and seriousness of the offense, the quantities of drugs trafficked, and the harm to the community, in reaching its conclusion." See Exhibit A.

Tolentino has demonstrated within that this Honorable Court should grant his petition for writ of certiorari because the Court of Appeals for the Second Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE PETITION

- 1.) THIS COURT SHOULD GRANT TELENTINO'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE SECOND CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10

CONSIDERATION GOVERNING REVIEW ON WRIT OF CERTIORARI

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons thereof. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision... Id.

Supreme Court Rule 10(a).

1A.) THE DISTRICT COURT DID NOT REASONABLY RELIE ON THE SAME FACTORS IT CONSIDERED AT THE ORIGINAL SENTENCING PROCEEDING—THE QUANTITIES OF DRUGS TRAFICKED, THE HARM TO THE COMMUNITY, AND THE SOPHISTICATION AND SERIOUSNESS OF THE OFFENSE—IN DENYING TOLENTINO'S § 3582(c)(2) MOTION.

Under Dillon v. U.S., 560 U.S. 817 (2010), "a district court must engage in a 'two step approach'". "At step one, the court 'must consider whether the defendant is eligible for a reduction by calculating the Guidelines range that would have been applicable had the amended Guidelines been in place at the time the defendant originally was sentenced.'" *Id.* The Court should leave also all other guideline application decisions unaffected. USSG § 1B1.10(b)(1).

At step two, "§ 3582(c)(2) instructs a court to consider any applicable § 3582(a) factors and determine whether, in its discretion, the reduction is warranted in whole or in part under the particular circumstances of the case" *Id.* (quoting Dillon; 560 U.S. at 827).

As per step one, the district court and the government agree that applying Amendment 782 and 788 to Tolentino yields an amended sentencing range of 70 to 87 months' imprisonment.

As per step two, while Tolentino claims that his post-sentencing behavior warrants a reduction of his sentence, the district court found that the same factors that supported the original sentence remain relevant and lead to the same finding that the 87 months sentence of imprisonment is sufficient but not greater than necessary to achieve the purpose set out in 18 U.S.C. § 3553(a). The district court cited United States v. Borden, 564 F.3d 100, 104 (2nd Cir. 2009), for that proposition.

The Second Circuit affirmed the order of the district court concluding that the district court did not abused its discretion by determining that a reduction was not warranted. The lower court held that the district court "reasonably relied on the same factors it considered at the original sentencing proceeding..."

The Second Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Second Circuit's reliance in Borden is problematic. In Borden the defendant was convicted of conspiracy and possess with intent to distribute crack cocaine. At the sentencing hearing, the district court noted Borden's eleven convictions from adolescence through the entire of his adult life before sentencing to a term of ninety-six months, which was the upper end of the range provided for the USSG. The district court then stated that it was imposing such a sentence "because of [its] concern about recidivism and the need to protect the public." *Id.* at 47. On direct appeal the Second Circuit affirmed Borden's conviction and sentence. United States v. Hepburn (Borden), 86 Fed. App'x 475 (2nd Cir. 2004).

Petitioner's case is different. Petitioner is a first-time offender and his criminal history contains no violence or behavior constituting assault. Tolentino did not possess a weapon during the alleged criminal activity, and his post-sentencing conduct is extremely relevant here.

Thus, contrary to the lower court's decision, the district court consideration of the same factors that supported the original sentence amount to an impermissible reconsideration of an original sentencing determination, and Borden is misplaced. See United States v. Winston, 2015 U.S. Dist. LEXIS 7923; Crim. 3:11cr1(JBA)(District of Connecticut).

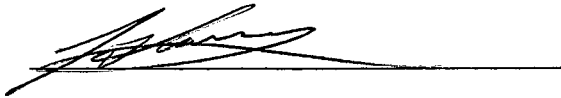
In Winston, although the government noted that Mr. Winston's conviction involved firearms possession, in granting Winston's Section 3582(c)(2) petition, the district court found that factor was known and considered by the court in imposing Mr. Winston's original sentence.

Hence, this Honorable Court should grant Tolentino's petition for a writ of certiorari. The presiding judge, Honorable Catherine Forrest, abused its discretion by taking into consideration factors known and considered by the court in imposing Petitioner's original sentence, and did not show any understanding of the "diverse frailties of humankind, neither compassion and a generosity of spirit" when she rendered her decision in Tolentino's § 3582(c)(2) motion, see United States v. Singh, No. 16-111-cr (Dec. 12, 2017), and the Second Circuit departed from the accepted and usual course of judicial proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "J. B. ...", is written over a horizontal line.

Date: January 30, 2018