

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

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

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CHARLES LLEWLYN,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

This case presents important issues concerning the proper application of 18 U.S.C. § 3582(c)(2), which empowers a sentencing court to reduce a term of imprisonment when the United States Sentencing Commission has retroactively applied a reduction of the sentencing guideline range. In this case, the district court ruled that it lacked the authority under § 3582(c)(2) to reduce the defendant's sentence because he had already served the term of imprisonment imposed by the court and was now serving a consecutive sentence imposed by a second court. The Eleventh Circuit upheld the ruling, citing precedent in the First, Fifth, Seventh, and Eighth Circuits. In doing so, the court rejected contrary authority from the Seventh Circuit<sup>1</sup> and numerous district courts.

The question presented is:

Whether, as in the First, Fifth, Seventh, Eighth and Eleventh Circuits, a sentencing court does not have the authority to reduce a sentence under § 3582(c)(2) because the sentence has already been nominally completed and the defendant is now serving a sentence imposed by another court to run consecutively, or whether, as in the Seventh Circuit and several district courts, a sentencing court can reduce a nominally completed sentence because a defendant's consecutive federal sentences constitute an aggregate sentence subject to reduction until completed in their entirety.

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<sup>1</sup> The Seventh Circuit has conflicting opinions. See *United States v. Parker*, 472 F. App'x 415 (7th Cir. 2012) (defendant not eligible for reduction) and *United States v. Clarke*, 499 F. App'x 579 (7th Cir. 2012) (defendant eligible for reduction).

## **INTERESTED PARTIES**

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

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Charles Llewlyn respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number No. 16-10803 in that court on January 24, 2018, which affirmed the order denying the motion for reconsideration of the order denying a sentence reduction in the United States District Court for the Southern District of Florida.

## OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the appendix (A-1).

## STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on January 24, 2018. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts. This petition is timely filed under SUP. CT. R. 13.1.

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

### 18 U.S.C. § 3742(a), (f)

**(a) Appeal by a defendant.** – A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

...

(2) was imposed as a result of an incorrect application of the sentencing guidelines ...

**(f) Decision and Disposition.** - If the court of appeals determines that –

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate ...

## STATEMENT OF THE CASE

Petitioner Charles Llewlyn pled guilty to a single count charging him with possessing cocaine with the intent to distribute. (DE 96). On September 28, 2000, Mr. Llewlyn was sentenced to 110 months of imprisonment to be followed by three years of supervised release. (DE 168).

At the time he was charged in this case, Mr. Llewlyn was also pending federal charges in *United States v. Owen Odman*, Case No. 4:96-Cr-00053-MR in the Western District of North Carolina (WDNC). On August 6, 2001, after his sentencing in this case, Mr. Llewlyn was sentenced in North Carolina to 360 months to run consecutive to “any previous state or federal offense.” WDNC Case No. 4:96-Cr-00053 MR, (DE 469. On August 8, 2012, the North Carolina sentence was reduced under 18 U.S.C. § 3582(c)(2) to 292 months. WDNC Case No. 4:96-Cr-00053 MR, (DE 686).

On November 4, 2014, Mr. Llewlyn filed a *pro se* motion to reduce his sentence in this case under 18 U.S.C. § 3582(c)(2). (DE 314). On February 9, 2016, the district court denied the motion on the basis that it lacked authority because Mr. Llewlyn had already served his sentence in this case.

Mr. Llewlyn appealed the decision and his appeal was denied by the Eleventh Circuit in a published opinion. *United States v. Llewlyn*, 879 F.3d 1291 (11th Cir. 2018).

## The Eleventh Circuit's Opinion

Mr. Llewlyn appealed his sentence to the United States Court of Appeals for the Eleventh Circuit. He raised the single issue of whether the district court had the authority under § 3582(c)(2) to reduce a defendant's sentence after he has served a period of incarceration longer than that sentence, but remains incarcerated due to a later imposed consecutive federal sentence.

The Eleventh Circuit affirmed the district court's ruling. *United States v. Llewlyn*, 879 F.3d 1291 (11th Cir. 2018). The court determined that Mr. Llewlyn had already completed his Florida federal sentence and was now serving his consecutive North Carolina federal sentence. It reasoned that because he had already finished his Florida sentence, the district court was without authority to make a reduction. Addressing the petitioner's contentions, it ruled: 1) a reduction would be inconsistent with U.S.S.G. § 1B1.10, which bars a court from making a reduction below "the term of imprisonment the defendant has already served;" 2) 18 U.S.C. § 3584(c), which provides that "multiple terms of imprisonment shall be treated for administrative purposes as a single aggregate term of imprisonment" does not apply to a § 3582(c)(2) resentencing, but only to Bureau of Prisons administrative issues; 3) this Court's decisions in *Peyton v. Rowe* 391 U.S. 54, 88 S.Ct. 1549 (1968) (prisoner may challenge prospective sentence in *habeas* proceeding) and *Garlotte v. Fordice*, 515 U.S. 39, 115 S.Ct. 1948 (1995) (prisoner serving consecutive sentences may challenge a nominally completed sentence in *habeas* proceeding) do not apply in the context of a § 3582(c)(2) proceeding; and 4) in

a case in which the subject consecutive sentences were imposed by separate courts for distinct crimes, the district court could determine the order of the sentences for § 3582(c)(2) purposes. The court accepted the reasoning of the First, Fifth, Seventh and Eighth Circuits. *United States v. Chapple*, 847 F.3d 227 (5th Cir. 2017); *United States v. Vaughn*, 806 F.3d 640 (1st Cir. 2015); *United States v. Parker*, 472 Fed. App'x 415 (7th Cir. 2012); and *United States v. Gamble*, 572 F.3d 472 (8th Cir. 2009). It declined to follow, and distinguished, contrary decisions from the Seventh Circuit and numerous district courts. *United States v. Clarke*, 499 Fed. App'x. 579 (7th Cir. 2012); *United States v. Bolin*, 2008 WL 928397 (S.D. Ohio 2008); *United States v. Kaman*, Case No. 3:09-CR-141, 2015 WL 2226213 (E.D. Tenn. 2015); *United States v. Brown*, Case No. 2:04-CR-00088, 2013 WL 1819795 (2013); *United States v. Wilkerson*, Case No. 00-CR-10426, 2010 WL 5437225 (D. Mass. 2010); *United States v. Martin*, 602 F. Supp. 2d. 611 (E.D. Pa. 2009).

This petition follows.

## REASONS FOR GRANTING THE WRIT

**I. This Court's *certiorari* review is needed to resolve a split of authority regarding the proper application of 18 U.S.C. § 3582(c)(2).**

The First, Fifth, Seventh, Eighth and Eleventh Circuits have concluded that a district court, for the purposes of a § 3582(c)(2) proceeding, may determine the order in which a defendant serves his consecutive federal sentences. In doing so, those courts have disagreed with the Seventh Circuit and numerous district courts which have found that a district court has no authority to make such a determination

The district court ruled that the petitioner was not eligible for a § 3582 reduction because his sentence would have expired “by, at the latest, November 28, 2009.” (DE 326:9). “Although I am inclined to grant a reduction in the defendant’s case, under U.S.S.G. § 1B1.10(b)(2)(c), I cannot reduce his sentence below the amount already served. Here, there is no question that the First Term began running in 2000 and has been fully served. Defendant may not receive a reduction below that amount.” *Id.*

In denying the appeal, the Eleventh Circuit placed great weight on the fact that Mr. Llewlyn’s consecutive sentences were imposed at different times and in different cases, rather than at the same time and in the same case. The petitioner respectfully suggests that, not only is this an immaterial distinction, it contradicts the clear intent of Congress and this Court.

Initially, 18 U.S.C. § 3582(c)(2) is a remedial statute and should therefore be construed liberally. *Freeman v. United States*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2685, 2695

180 L.Ed.2d 519 (2011)("Congress enacted § 3582(c)(2) to remedy systemic injustice. . ."); *Peyton v. Rowe*, 391 U.S. 54, 65, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968) ("This approach to the statute is consistent with the canon of construction that remedial statutes should be liberally construed."); *see also United States v. Goines*, 357 F.3d 469 (4th Cir. 2004) (§ 3582(c)(2) is construed broadly to effectuate Congress' intent)

Under federal law, Mr. Llewlyn is presently serving a single 402 month aggregate sentence for his drug trafficking conviction in this district and for a consecutive drug trafficking conviction in the Western District of North Carolina (*U.S. v. Owen Odman, a/k/a Charles Llewelyn*, Case No. 4:96-Cr-0053). Although imposed separately, the sentences are now aggregated. Congress has declared that "[m]ultiple terms of imprisonment ordered to run consecutively . . . shall be treated for administrative purposes as a single, aggregate term of imprisonment." 18 U.S.C. § 3584(c). Additionally, it is solely within the power of the Attorney General, specifically the Bureau of Prisons, to determine the order and manner that the sentence is to be served. *United States v. Wilson*, 503 U.S. 329, 112 S.Ct. 1351 (1992).

Relying on the wording and effect of 18 U.S.C. § 3584(c), in *United States v. Clarke*, 499 Fed. App'x. 579 (7th Cir. 2012), the Seventh Circuit found that the defendant was still eligible for § 3582(c)(2) relief even though the original sentence in question had expired. Mr. Clarke was serving a 211 month sentence based on four convictions with consecutive sentences. He had already served time in excess of the initial drug trafficking sentence. Citing § 3584(c), the court found that

Clarke's consecutive sentences were now a "single, aggregate term." "If he succeeds on the merits of his § 3582(c) motion, his sentence will be reduced and he will get out of prison earlier." *Id.* at 582.

In *United States v. Bolin*, 2008 WL 928397 (S.D. Ohio 2008), a district court came to a similar conclusion. *Bolin* was sentenced to 78 months on a drug conspiracy conviction and to 60 months consecutive on a firearm conviction. He subsequently filed a § 3582(c)(2) motion. The government objected, contending that Bolin had completed his drug conviction sentence and was now serving the consecutive firearm sentence. Rejecting the government's position, the court found that it had no authority to determine which sentence, or what portion of the consecutive sentences, had been served. That decision was the responsibility of the Bureau of Prisons (BOP) and 18 U.S.C. § 3584(c) required BOP to treat consecutive sentences as a "single aggregate term of imprisonment." Thus, Mr. Bolin was eligible for reduction of his sentence. *See also, United States v. Kaman*, Case No. 3:09-CR-141, 2015 WL 2226213 (E.D. Tenn. 2015)(30 month drug sentence reduced under § 3582(c)(2) despite defendant having nominally completed sentence); *United States v. Brown*, Case No. 2:04-CR-00088, 2013 WL 1819795 (2013)(same); *United States v. Wilkerson*, Case No. 00-CR-10426, 2010 WL 5437225 (D. Mass. 2010)(same); *United States v. Martin*, 602 F.Supp.2d. 611 (E.D. Pa. 2009)(same).

In two structurally similar contexts, circuit courts have determined that consecutive sentences become a single aggregate sentence subject to amendment until completed in their entirety.

In *United States v. Smith*, 115 F.3d 241(4th Cir. 1997) the defendant successfully challenged an 18 U.S.C. § 924(c) conviction through a habeas petition, the sentence for which ran consecutive to his drug trafficking sentence. On remand, the government moved to reopen the drug trafficking sentence to include a two level increase under U.S.S.G. § 2D1.1(b)(1) for possession the firearm from the vacated § 924(c) conviction. Smith objected to reopening the drug trafficking sentencing, in part because he argued he had already completed that sentence. The Fourth Circuit disagreed and found that the consecutive sentences were not separate, but were an aggregate sentence that had not been fully served and were all subject to revision on remand. "[O]nce a component of the sentence is altered . . . the whole sentence must be revisited . . . until action is taken in regard to the whole sentence, the defendant did not have an expectation of finality with regard to his sentence." 115 F.3d, at 246 (quoting *United States v. Smith*, 103 F.3d 531 (7th Cir. 1996)); see also *United States v. Thayer*, 134 F.3d 373 (6th Cir. 1997) (consecutive sentences were "inextricably intertwined" and were all subject to resentencing because defendants had not completed service of the entire prison sentence).

Where, as here, the consecutive sentence was discretionary, the later sentencing court was required to consider the earlier sentence and the need, or lack of need, to impose a consecutive sentence under 18 U.S.C. § 3553(a). United States Sentencing Commission, *Guidelines Manual*, § 5G1.3(c), (Nov. 2000). Thus, the earlier sentence cannot be viewed as a discrete term, but rather is part of the cumulative or aggregate total sentence.

Considering the scope of challenges under 28 U.S.C. § 2254, this Court has long held that, "we view consecutive sentences in the aggregate, not as discrete segments." *Garlotte v. Fordice*, 515 U.S. 39, 115 S.Ct. 1948 (1995). In *Garlotte*, the defendant sought to challenge his marijuana conviction after he had nominally completed that sentence and begun to serve consecutive murder sentences. The state of Mississippi objected on the basis that *Garlotte* had already served his sentence and was no longer "in custody" on that conviction. Rejecting the state's position, the Court relied on its decision in *Peyton v. Rowe*, 391 U.S. 54, 88 S.Ct. 1549 (1968), which held that a habeas petitioner could challenge a consecutive sentence to be served in the future because consecutive sentences should be viewed in the aggregate and "a prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of the habeas statute." 391 U.S., at 67.

The *Garlotte* Court extended *Peyton* to permit habeas challenges to consecutive sentences that had already been nominally completed. "Having construed the statutory term 'in custody' to require that consecutive sentences be viewed in the aggregate, we will not now adopt a different construction simply because the sentence imposed under the challenged conviction lies in the past rather than in the future." 515 U.S., at 46.

The petitioner respectfully urges this Court to follow the reasoning of *Clarke*, *Smith* and *Garlotte*. Section 3582(c)(2) is a remedial statute enacted to right significant wrongs in the sentencing process. It should be liberally construed in the same fashion as § 2254 in *Peyton* and *Garlotte*. There is no significant distinction.

Moreover, 18 U.S.C. § 3584(c) shows that Congress intended consecutive sentences to be considered as an aggregate, not separately.

The Eleventh Circuit's formalistic and reflexive rejection flies in the face of liberal construction, Supreme Court precedent, and Congress' intent. By Congress' 2010 amendment of 21 U.S.C. § 841, et seq. and the Sentencing Commission's retroactive Amendment 782, it is clear that defendants, like Mr. Llewlyn, were sentenced to more time than they deserved. Simply put, unless § 3553 factors prevent it, those sentences should be reduced.

Considering the § 3553(a) factors, Mr. Llewlyn is deserving of the reduction. In the instant case he was determined to be a broker of the deal, not an actual purchaser. There were no firearms involved and no violence or threats of violence. He entered a guilty plea and accepted responsibility for his actions. His guidelines were 97-121 months and he received a sentence of 110 months. Nothing in his case warranted a denial of the statutory reduction. In fact, the lower court noted in its order denying relief that it was "inclined to grant a reduction" if it had the authority. (DE 326:9).

Below, the government argued, and the circuit court agreed, that the determinative factor was that the petitioner's consecutive sentences were imposed at different times and in different cases, rather than at the same time in the same case. In doing so, the Eleventh Circuit relied on *United States v. Chapple*, 847 F.3d 227 (5th Cir. 2017); *United States v. Vaughn*, 806 F.3d 640 (1st Cir. 2015); *United States v. Parker*, 472 Fed. App'x 415 (7th Cir. 2012) (§ 3582 reduction of defendant's already

served sentence not authorized by U.S.S.G. § 1B1.10(b)(2)(c)); and *United States v. Gamble*, 572 F.3d 472 (8th Cir. 2012) (same).

Both *Parker* and *Gamble* contain analysis that is perfunctory at best. Both defendant's appear to have raised nothing more than the language of 18 U.S.C. § 3584(c) in support of their claims. Counsel for defendant Parker filed an "Anders brief," apparently resulting in the Seventh Circuit raising the issue *sua sponte*. In neither case did the courts consider the issue in the context of this Court's decisions in *Garlotte* and *Peyton*.

Admittedly, in *Vaughn* and *Chapple*, the First and Fifth Circuits did consider the issue in light of *Garlotte* and *Peyton*. However, the petitioner respectfully suggests that the analyses were incorrect and failed to give sufficient weight to this Court's decisions.

The *Vaughn* court attempted to parse the holding in *Garlotte* by stating that it wasn't clear whether *Garlotte* applied to consecutive sentences that were not imposed simultaneously and that the *Garlotte* rule was *sui generis* because the habeas "in custody" requirement has always been liberally interpreted. Both premises are incorrect.

First, *Garlotte* was in no way equivocal: "Under *Peyton* we view consecutive sentences in the aggregate, not as discrete segments. "515 U.S. at 47. There was no limitation or differentiation between types of consecutive sentences or the circumstances under which they were imposed.

Indeed, the Eleventh Circuit and at least two others have expressly concluded that *Garlotte* applies to consecutive sentences imposed at different times, as long as the relief would shorten the defendant's overall term of incarceration. *Diaz v. State of Florida*, 683 F.3d 1261, 1265 (11th Cir. 2012); *DeFoy v. McCullough*, 393 F.3d 439, 442 (3rd Cir. 2005); *Foster v. Booher*, 296 F.3d 947, 950 (10th Cir. 2002).

It should also be noted that this Court in *Maleng v. Cook*, 490 U.S. 488, 109 S.Ct. 1923 (1989); *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 487-89, 93 S.Ct. 1123 (1973); and *Peyton v. Rowe*, 391 U.S. 54, 55-56, 88 S.Ct. 1549 (1968) permitted defendants to challenge consecutive sentences imposed at different times. These cases, in combination with *Diaz*, *DeFoy* and *Foster*, strongly indicate that the *Vaughn* court's concern about whether *Garlotte* applied only to simultaneously imposed consecutive sentences was misplaced. That the sentences were imposed at different times is a distinction without a difference.

Also questionable is the *Vaughn* court's conclusion that construction of the term "in custody," for *habeas* purposes, is *sui generis*. The *Vaughn* court arrived at that conclusion because, "federal habeas is a unique context and the 'in custody' requirement has traditionally received a liberal construction that may be fairly viewed as *sui generis*." But, as noted earlier herein, 18 U.S.C. § 3582(c)(2) is also liberally and broadly construed. See *Freeman*, 131 S.Ct. at 2695; *Goines*, 357 F.3d at 474-80. Both § 3582(c)(2) and § 2254 are "remedial" statutes which *must* be construed broadly and liberally.

Thus, the distinction drawn by the Eleventh Circuit, *i.e.* that Mr. Llewlyn's consecutive sentences were imposed at different times rather than simultaneously, is a distinction without a meaningful difference. Llewlyn remains in the custody of the same sovereign that imposed his original nominally expired sentence. A reduction of that unjust sentence would accelerate his release from federal confinement. Under the principles announced in *Peyton*, *Garlotte* and *Freeman*, § 3582(c)(2) must be construed liberally to permit the district court to reduce Mr. Llewlyn's sentence as intended by the Sentencing Commission's remedial and retroactive Amendment 782.

## CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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