No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

RORY ALLEN MEEKS,
Petitioner,
- vs -
UNITED STATES OF AMERICA,
Respondent.

_____

On Petitioner for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

_____

PETITIONER FOR WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED FOR REVIEW

In this case disposed of by jury trial as in many drug cases under 21 U.S.C. § 841(a)(1), the court constructively amended the indictment, changing it from indicted charges of 21 U.S.C. §§ 841(A)(1), 841(b)(1)(B) and 846 to 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846 through the jury charge and sentencing committing structural error.

In **McCoy v. Louisiana**, 584 U.S. ___ (2018), decided after Meeks had filed his appeal requesting COA, the Court recognized Meeks autonomy under the Sixth Amendment. Here Meeks, because of the denial of his applicaion for COA has not been allowed to present his **McCoy** issues to the Eighth Circuit, and requests remand to do so.

This Court has held in **Slack v. McDaniel**, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) that before we grant a certificate of appealability, the habeas petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

Meeks may make a substantial showing as required by 18 U.S.C. § 2553(c)(2) by showing "... that reasonable jurists could debate, or even agree, that the petition should have been resolved in a different manner or that issues presented were adequate to deserve encouragement to proceed further." See, **Miller-El v. Cockrell**, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

QUESTION I:

Whether reasonable jurists might debate the following three questions:

A: In light of **Alleyne v. United States, 135 S. Ct. and Apprendi v. New Jersy, 530 U.S. 466, 490 (2000),** does the "knowing and intentionally" mens rea contained in 21 U.S.C. § 841(a) apply to the offense elements of drug type and quantity found in 21 u.S.C. § 841(b)? Does a constructive amendment alleviate that burden?

B: Do jury instructions that leave out the definition of what constitutes a marijuana plant for sentencing under 21 U.S.C. § 841(b) lessen the burden of proof required by **Alleyne v. United States, 135 S. Ct. 2151 (2013)** and **Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)** in violation of the Sixth Amendment.

C: Does the refusal by counsel in trial, or on direct appeal, to argue a defense based on the defendant's proffered defense objectives relative to Supreme Court substantive decisions constitute a Sixth Amendment violation of a Defendant's autonomy rights?

QUESTION II:

Whether the trial court and Eighth Circuit should consider **McCoy** applicability in the first instance, and whether reasonable jurists could debate over its applicability?

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OPINIONS BELOW

The Judgment in a Criminal Case (Case No. CR-12-91-1-LRR), imposed on Petitioner by the United States District Court, Northern District of Iowa, Cedar Rapids Division, is set forth in Appendix (Appx) 1, dated May 29, 2013.

Petitioner timely filed a Direct Appeal, and on July 1, 2014, the United States Court of Appeals for the Eighth Circuit AFFIRMED Petitioner's conviction and sentence (See, Appx. 2).

On June 20, 2017, the United States District Court Judge, Hon. Linda R. Reade issues a Final Judgment, adopting (over Objections) the Magistrate Judge's Report and Recommendation and Dismissing Petitioner's 28 U.S.C. § 2255 Motion as untimely (Appx. 3, hereto).

On February 21, 2018, the Eighth Circuit DENIED Petitioner's requested Certificate of Appealabiilty (COA) issues (Appx. 4, hereto).

On May 10, 2018, the Eighth Circuit DENIED Petitioner's timely filed Motion for Rehearing/Rehearing En Banc.

The Petition for Writ of Certiorari is due no later than August 8, 2018 (See, Appx. 5).

STATEMENT OF JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 and 28 U.S.C. § 2106, and Supreme Court Rule 33.1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in time of War or public danger; nor shall any person be subject for the same offense to be put in jeopardy of life or limb; nor a witness against himself, nor deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him, or another would be an offense against the United States, is punishable as a principal.

21 U.S.C. § 841 provides in part:

Prohibited acts

(a) **Unlawful acts.** Except as authorized by this title, it shall be unlawful for a person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or ...

(b) **Penalties.** Except as otherwise provided in section 409, 418, 419, 420 [21 USCS §§ 849, 859, 860, or 869], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving —

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of —

(I) cocoa leaves, except coco leaves and extracts of coca leaves from which cocaine, ecgonine, and their derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers; ...

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; ...

21 U.S.C. § 841(b)(1)(B) provides in part:

(B) In the case of a violation of subsection (a) of this section involving —

(vii) ..., or 100 or more marijuana plants regardless of weight; ...

... such person shall be sentenced to a term of imprisonment which may not be less than 5 years nor more than 40 years, ...

21 U.S.C. § 846 provides:

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 851 provides:

§ 851. Proceedings to establish previous convictions

(a) **Information filed by United States Attorney.** (1) No person who stands convicted of an offense under this part [21 USCS §§ 841 et seq.] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous conviction to be relied upon.

28 U.S.C. § 1254(1) provides:

Cases in the court of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any part to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 2106 provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remend the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances.

Rory Allen Meeks (Petitioner) requests that a Writ of Certiorari be Granted to review judgment of the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

Relevant Procedural History

1. Petitioner was indicted on November 27, 2012, in a two (2) count indictment, charging as follows:

> Count 1: Violation of 21 U.S.C. § 841(a)(1), § 841(b)(1)(B), and § 846; that is conspiracy to manufacture 100 or more marijuana plants; and
>
> Count 2: violation of 21 U.S.C. § 841(a)(1), § 841(b)(1)(B), and § 846, and 18 U.S.C. § 2 aiding and abetting, that is manufacturing and attempting to manufacture marijuana.

2. At the conclusion of trial the jury returned a verdict of Guilty on Count 1 and Not Guilty on Count 2. (See, Appx. 1— Petitioner's Judgment in a Criminal Case.) Petitioner was sentenced to 240 months imprisonment, then (10) years supervised release and a $100 special assessment. (See, Appx. 1).

3. Petitioner timely gave Notice of Appeal, and the Petitioner's Appellant Brief was filed with the United States Court of Appeals for the Eighth Circuit. After all briefing, the Eighth Circuit, on July 1, 2014, Affirmed the Petitioner's judgment of conviction and sentence. Petitioner filed a Request for Rehearing En Banc (direct appeal), which was Denied on August 7, 2014. Petitioner did not file a Petition for Writ of Certiorari.

PETITIONER'S 28 U.S.C. § 2255 MOTION

4. Petitioner's 28 U.S.C. § 2255 Motion (hereinafter § 2255 Motion) was timely filed and raised four (4) grounds for

relief. The Petition was denied by the district court. Trevor Hook (Atty. Hook) and William Kutmus (Atty. Kutmus) as well as Petitioner's Attorney, S.P. DeVolder (Atty. DeVolder) on Direct Appeal were ineffective because under a statutory sentencing scheme, the number of marijuana plants is an element of the offense and must be defined in the jury charge. Subsequent to the district court's denial of Petitioner's § 2255 Motion, Petitioner filed an Application for a Certificate of Appealability (COA). That appeal was denied. This petition for Certiorari follows.

5. **COA ISSUE I:**

(i) whether "reasonable jurist[s] could debate, or even agree, that petition should have been resolved in a different manner, or that issues presented were adequate to deserve encouragement to proceed further." See, **Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).**

(ii) Counsel's failure to object to jury instruction 19 (Appx. 7). The Eighth Circuit precedent, and the United States Sentencing Guidelines require that marijuana plant organisms must have a readily observable root formation to be counted as a marijuana plant under 21 U.S.C. § 841(B)(1)(A) or § 841(B)(1)(B) and;
Because the number of plants is an element that the jury must decide under **Alleyne** and **Apprendi**; "marijuana plant" must be defined in the jury instructions.

(iii) Counsel's failure to include, in a Rule 29 Motion for Acquittal the lack of a proper definition of a marijuana plant.

(iv) Counsel's failure to offer a proposed jury instruction setting forth a correct statement of the law regarding the definition of a marijuana plant as defined in the United States Guidelines.

6. **COA ISSUE II:**

Petitioner's counsel on appeal was made aware of the **Alleyne** error, but refused to raise the issue. Under

this Court's and Eighth Circuit precedent, cited herein, refusing to appeal Petitioner's **Alleyne** error is "structural error" under the Court's recent holding in **McCoy v. Louisiana**, 584 U.S. ___. ___ (2018), decided on May 14, 2018.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The Court should Grant certiorari to address the important question, that is, whether, in light of **Flores-Figueroa v. United States, 566 U.S. 646 (2009)**, does the "knowing and intentionally" mens rea contained in 21 U.S.C. § 841(a) apply to the drug type and quantity in § 841(b)? Does a constructive amendment alleviate this burden?

In this Petition the question presented for review involves violation of this Court's substantive rules, violations of the Fifth Amendment Notice requirements, Sixth Amendment Due Process and a defendant's Sixth Amendment autonomy rights.

ARGUMENT AND AUTHORITIES IN SUPPORT OF QUESTIONS A AND B

QUESTION A:

In light of **Alleyne v. United States, 135 S. Ct. 2151 (2013)**, and **Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)**, does the "knowing and intentionally" mens rea contained in 21 U.S.C. § 841(a) apply to the offense elements of drug type and quantity found in 21 U.S.C. § 841(b)? Does a constructive amendment alleviate this burden?

QUESTION B:

Do jury instructions that leave out the definition of what constitutes a marijuana plant for sentencing under § 841(b), lessen the burden of proof required by **Alleyne v. United States, 135 S. Ct. 2151 (2013)** and **Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)** in violation of the Sixth Amendment?

7. At the close of Petitioner's trial, the district court issued its written "Final Jury Instructions" (See, Appx. 7). Trial counsel rendered ineffective assistance of counsel when they failed to challenge the district court's jury instruction to go to the jury, when such instructions lessened the burden of proof on the government. The Court has long held:

> An accused's right, under the Federal Constitution's Sixth Amendment, to a jury trial in a criminal prosecution includes, as the right's most important element, the right to have the jury, rather than the judge, reach the requisite finding of guilty; what a factfinder must determine in order to return a verdict of guilty in a criminal case is prescribed by the Constitution's due process clause, pursuant to which the prosecution (1) bears the burden of proving all elements of the offense charged, and (2) must persuade the factfinder beyond a reasonable doubt of all the facts necessary to establish each of those elements; the Constitution's requirement of proof beyond a reasonable doubt and the Sixth Amendment's requirement of a jury verdict are interrelated, because the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt, as it would not satisfy the Sixth Amendment (1) to have a jury determine that an accused is probably guilty, and (2) then, to leave it up to a judge to determine whether the accused is guilty beyond a reasonable doubt...

(See, **Sullivan v. Lousiana, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993).**)

8. In Petitioner's case the district court's "Final Jury Instructions" numbered 1 - 26; "Final Jury Instruction" No. 11 defined reasonable doubt; "Final Jury Instruction No. 15 defined elements of the crime of manufacturing marijuana; and "Final Jury Instruction" No. 19 concerns the elements that the government must prove beyond a reasonable doubt, that is:

> (i) The government need only prove beyond a reasonable doubt that there was a detectable amount of

marijuana [but see 21 U.S.C. § 841(b)(1)(B) "... or 100 or more marijuana plants regardless of weight ..." in the disjunctive].

9. Under this Court's decision in **Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)**, the drug type and drug quantity under 21 U.S.C. § 841(b) are clearly elements of aggravated § 841 offenses that must be charged in the indictment and proven to a jury beyond a reasonable doubt. **Apprendi** overruled the Fifth Circuit's jurisprudence that treated drug quantity as a sentencing factor rather than an element of the offense under § 841. Further, this Court's decision in **Alleyne v. United STates, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)** held: "Any facts that, by law, increases the penalty for a crime is an 'element' that must be found by the jury and found beyond a reasonable doubt ..."

Apprendi dealt with increases in the statutory maximum sentence and **Alleyne** dealt with increases in the mandatory minimum under § 841(b). Further, **Alleyne** was decided during the time in which Petitioner's direct appeal was pending. "Elements are the constituent parts of a crime's legal definition, which must be proved beyond a reasonable doubt to sustain a conviction; they are distinct from 'fact,' which are mere real-world things—extranous to the crime;" **Mathis v. United States, 579 U.S. ___, ___ 195 L. Ed. 2d 604, 246 LEXIS 4060 (2016).**

10. Because the indictment (appx. 6) charged in Count 1 "marijuana plants' and a violation of § 841(b)(1)(B), the government was required to prove beyond a reasonable doubt that Petitioner conspired to manufacture marijuana "plants" and at

least 100 or more marijuana plants (§ 841(b)(1)(B)(iii)). The Statute separate the elemental nature disjunctively with "or". The sentencing factor is therefore either "... kilograms or more of a mixture or substance containing a detectable amount of marijuana or 100 or more marijuana plants ..." Here the Court conflated the two. Evidence of some mixture ... containing a detectable amount of marijuana and 100 or more marijuana plants—but marijuana plants are not defined in the jury instruction with the Eighth Circuit standard or the Guidelines standard. Eighth Circuit precedent, as well as, all other circuits and the United States Sentencing Guidelines (U.S.S.G.) defined a marijuana "plant" to be an organism with a readily identifiable root formations. (See, U.S.S.G. § 2D1.1(c) cmt.no.17; U.S.S.G. Amendment 518 (2012); See also, **United States v. Raines, 243 F.3d 419 (8th Cir. 2001)**: See also, the following collection of cases:

> the appellate courts generally have held that the term "plan" should be defined by "its plain and ordinary dictionary meaning ... [A] marjuana 'plant' includes those cuttings accompanied by root balls." **United States v. Edge, 9898 F.2d 871, 878 (6th Cir. 1993)** (quoting **United States v. Eves, 932 F.2d 856, 860 (10th Cir. 1991)**, appeal after remand, **30 F.3d 134 (6th Cir. 1994)**). See also **United States v. Malbrough, 922 F.2d 458, 465 (8th cir. 1990)** (acquiescing in the district court's apparent determination that certain marijuana cuttings that did not have their own "root system" should not be counted as plant), cert. denied, **501 S. Ct. 1258 (1991)**; **United States v. Carlisle, 907 F.2d 94, 96 (9th Cir. 1990)** (finding that cuttings were plants where each cutting had previous degrees of root formation not clearly erroneous).

Sullivan v. Lousisana, 508 U.S. 275, 124 L. Ed. 2d , 113 S. Ct. 2078 (1993) holds: "A constitutionally deficient reasonable-doubt instruction cannot be harmless error."

Without a clear and concise jury instruction regarding what

constitutes a marijuana plant, prejudice occurs. An inadequate or no jury instruction ensures that prejudice occurs and the rule in **Sullivan** is violated.

11. The district court's jury instructions No. 15 and 19 lessened the burden of proof on the government to find beyond a reasonable doubt the "element" of enhanced sentencing under § 841(b) of a quantity of maijuana "plants" with readily observable root formations. Under the jury instructions given, the jury could have and apparently found marijuana organisms without readily observable root formations to be qualified "plants" to reach a special verdict of 1000 or more plants. The jury instructions as given, constitute "structural" error that affects the framework in which the trial proceeded (See, **Sullivan**). This Court's substantive rule in **Appprendi** and **Alleyne** require that the jury be instructed that finding an element regarding the type of controlled substance that is charged in the indictment, whether, "marijuana plant," and/or quantity of "marijuana plants," there is a requirement to satisfy Fifth Amendment and Sixth Amendment due process clauses. Such a finding of fact must be in accord with the lawful definition of what constitues a marijuana plant. And that is defined by circuit precedent and U.S.S.G. 2D1.1(c) cmt.no.17; U.S.S.G. Amendment 518 (2012).

By leaving out the definition of a marijuana plant, the governmetn's burden of proof, to prove beyond a reasonable doubt the number of marijuana plants in the conspiracy, was unconstitutionally lessened. This is so because in Petitioner's

case there was no proof, either physical, photographic, or testimonial by law enforcement officers of any quantifiable number of marijuana organisms with a readily observable root formation. Under **Sullivan** the jury verdict was in error for Sixth Amendment purposes, and this error is structural as it affected the framework in which the trial proceeded.

ARGUMENT AND AUTHORITIES IN SUPPORT OF QUESTION C

QUESTION C:

> The refusal by counsel in trial or on direct appeal to argue the objective of the defendant's proffered defense constitutes a Sixth Amendment violation of a defendant's autonomy rights?

12. Petitioner provided a letter to his Attorney on direct appeal and stated the following:

> [paraphrasing]—
> The district court denied Petitioner's Fifth Amendment and Sixth Amendment rights by failing to give an instruction as to the definition of a marijuana plant, and requiring proof beyond a reasonable doubt of readily observable root formations before any marijuana organism could be counted as a "plant."

Further, Petitioner provided to his attorney on direct appeal the U.S.S.G. definition of a marijuana plant and several court of appeals case citations as to what the government must prove beyond a reasonable doubt to a jury to convict for an indicted case of marijuana plants, as well as Petitioner's understanding of how **Apprendi** and **Alleyne** affected his case (see, Appx. 8) Petitioner's efforts were to no avail as counsel on direct appeal did not include the defenses and issues that Petitioenr chose to protect his liberty interests. Attorneys

Seven Paul DeVolder and William Kutmus raised the following issues on direct appeal:

(1) Insufficiency of the evidence to support the jury's general verdict; (the lawyers did not raise the marijuana "plant" definition issue regarding quantity of plants);

(2) Evidentiary issue regarding out of court statements by witnesses;

(3) A conspiracy issue; and

(4) An Eighth Amendment sentencing issue.

(See, Appx. 2).

15. Recently, this Court, in **McCoy** held:

> The Court's ineffecitve assistance of counsel jurisprudence, See **Strickland v. Washington, 466 U.S. 668**, does not apply here, where the client's autonomy not counsel's competence is in issue. To gain redress for attorney error, a defendant ordinarily must show prejudice. See, **id** at **692**. But here, the violation of McCoy's protected autonomy right was complete when the Court allowed counsel to usurp control of an issue within McCoy's sole perogative. Violation of a defendant's Sixth Amendment secured autonomy has been ranked "structural" error; when present, such an error is not subject to harmles serror review (citations omitted) ... An error is structural if it is not designed to protect defendants from erroneous conviction, but instead protects some other interest, such as, "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty."

Petitioner's lawyers refusal to follow the defendant's trial objectives on direct appeal is a structual error that precluded Petitioner's right to make fundamental choices about his defense in this case.

The **McCoy** argument was not raised below at either the Eighth Circuit or trial court as Meeks petition and appeal to the Eighth Circuit had been filed prior to this Court's decision in **McCoy** during May 2018.

In the alternative, Meeks would assert that COA should be granted in view of **McCoy** to permit Meeks to address **McCoy** initially at the trial and/or Eighth Circuit prior to raising it here in the first instance.

CONCLUSION

Based on the foregoing authorities and argument Petitioner prays that this Court Grant the Petition for Writ of Certiorari, and in that regard Vacate Petitioner's Judgment and Sentence, and Remand to the Eighth Circuit—with instructions—consistent with this Court's authority.

Dated: 8-2-2018

Respectfully submitted,

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