IN THE SUPREME COURT OF THE UNITED STATES

Case No. _____

Maurice T. Smith, AKA, Maurice Smith,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition for WRIT OF CERTIORARI

Maurice T. Smith
Reg. No. 15758-035
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QUESTIONS PRESENTED

In *United States v. Taylor* Infra and its progeny, the Supreme Court articulated a categorical analysis to instill due process and comity in application of recidivist clauses found in federal law. A analysis that is used universally throughout federal law, except in determining whether a prior offense is a "felony drug offense" under federal law as defined in 21 U.S.C. § 841 and 21 U.S.C. § 802 (44). This court's decision in **Burgess Infra** which was to distinguish § 802 (13) from § 802 (44) has been misapplied resulting in misinterpretation of the law of congress and most importantly, the misapplication of the recidivist enhancement of § 841. This court is needed to answer the following question to correct a nationwide injustice contrary to the intent of congress. In short the Court is needed to answer the following questions:

The Questions Presented Are:

1). Whether it was the intent of congress to restrict the application of § 841 recidivist enhancement to previous drug trafficking crimes which are testament to "felony drug offense" under federal law. i.e., was it the intent of congress when it used the term "felony drug offense" to instruct that a previous crime must be the equivalent of "felony drug offense" under federal law to support the recidivist enchantment of 21 U.S.C § 841.

2). Whether defendants charged under 21 U.S.C § 841 entitled to the due process protection of having their prior offenses subjected to the elements versus elements categorical analysis of *Taylor Infra* to determine if they are "felony drug offense" as defined under federal law.

3). Whether 21 U.S.C § 802(44) standing alone is unconstitutionally vague. i.e., does it provide sufficient notice and information to complete a proper categorical analysis and does it convey the true elements of a "felony drug offense" under federal law.

Parties to the proceeding

The caption contains the names of all parties to proceeding below

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The proceedings below

Maurice T. Smith, the petitioner [hereafter the petitioner] was convicted by a jury seated in the Western District of Louisiana of conspiracy to possess with intent to distribute Methamphetamine in violation of 21 U.S.C § 841(a)(1) and 21 U.S.C § 846. He was sentenced to mandatory life pursuant to § 841(b)(1)(A) because he had two prior conviction for felony drug offense. Specifically, one prior conviction for mere possession of cocaine and possession of cocaine with intent to deliver. - Both convictions under Louisiana State Law--. Relevant here is Smith filed a motion pursuant to 28 U.S.C § 2255 claiming that his prior drug offense were "felony drug offense" under federal law base on the categorical approach, that congress intended the offenses relied on to attach § 841(b)(1)(A) so called recidivist clause to have corresponding elements as a felony drug offense under - Title 21. Furthermore "felony drug offense" was a short hand term for "drug trafficking crime". The district court denied the § 2255. Smith, filed a timely appeal and move the 5th Cir. Court of Appeals for a Certificate of Appealability. The 5th Cir denied the request for a COA. (See Appendix) After extension, Smith filed a timely motion for rehearing, rehearing enbanc. Which was denied on 9/25/2018. Smith come here moving this court for review to answer the following questions

Jurisdiction

The decision of the court of appeals for the sixth circuit was issued see attached . The court of appeals denied a timely petition for rehearing and rehearing en banc on See attached. The petition for writ of certiorari was timely filed on. 10/23/18 This count has jurisdiction under 28 U.S.C § 1254(1).

Constitutional And Statutory Provision Involved

The relevant constitutional and statutory provisions are reprinted in the appendix of this brief.

Statement

When congress enacted the controlled substance act [CSA] in 1970, the prior convictions that triggered enhanced punishment for repeat offenders were limited to convictions for federal drug offense, namely. "felony" drug conviction (i.e. conviction for manufacturing or distribution of trafficking controlled substance) to communicate this intent congress relied on the term "felony drug offense" because in short a "felony drug offense" under federal law has the elements of a manufacturing of trafficking controlled substances. Thus, "felony drug offense" was and is a short hand term for "felony drug crime". In 1984 congress amended the language to include prior state and foreign felony drug convictions. In this amendment, congress intended to include prior state drug offenses that require the

same elements as a "felony drug offense" under federal law. However, and emphasis added the congressman again relied on the term "felony Drug offense" to communicate "drug trafficking Crime".

In 1988 Congress for the time added the term "felony drug offense" to 21 U.S.C & 841 presumably to communicate it's intentions that the crime have matching elements of a "felony" under title 21 defining it as " an offense that is a felony under any provision of this title or any other federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a state or a foreign country that prohibits or restricts conduct relating to narcotic drugs marihuana, or depressant or stimulant substance." Again the emphasis was placed on felony to communicate matching elements of a "felony" under Title 21 in relation to the named substances.

In short, congress intended to target crimes with the elements of a "felony" under title 21 which involved the substances that were having a determinate effect on the health and welfare of the American people.

Finally, in 1990 congress placed the definition of "felony drug offense" in the definition section of the CSA were it remain today 21 U.S.C § 802(44)

However, § 802(44) and 21 U.S.C § 802(13) were conflicting, therefore this court was needed to determine which definition controlled a "felony drug offense" §802(13) or § 802(44). See **Burgess v. United States, 553 U.S. 14(2008)** the court

in ***Burgess*** stated § 802(44) alone controlled the definition of a "felony drug offense". However, that language has since been used to misapply the recidivist enhancements found in 21 U.S.C § 841. This is because, it was the intent of congress to restrict the application of the recidivist enhancements of § 841 to prior crimes with the elements of a "felony drug offense" elements which are articulated in §841(a) Thus, equal punishment as class E felony "more than one year" in relation to the substance named in §802(44) defined individually under 21 U.S.C § 802 , but the language of this court "§ 802(44) alone defines a "felony drug offense" seemingly instructed the lower courts that the elements of the crime need not be identified or furthermore, found to be a categorical match to a "felony drug offense" under federal law.

The misapplication of the recidivist provision of 21 U.S.C § 841 has became apparent more so with the birth of the categorical approach formulated by this court in ***Taylor v United States***, 495 U.S 575 and it's off springs ***Descamps Infra*** and ***Mathis Infra***, because as this approach, that was instilled in federal sentencing to provide conformity and due process cannot be applied to a "felony drug offense" because (emphasis added) 21 U.S.C §802(44) does not provide the proper notice of required elements.

Thus, rather than admit this misapplication of the recidivist provision, the courts below have merely determined that a defendant convicted of a **non-violent** drug

offense is not entitle to the same equal protection of the due process right, violent criminals are provided, and other drug offenders under other statues are provided i.e., the categorical approach to determine if their prior offense are categorically the offense congress intended to support the recidivist provision of § 841. Accordingly, this court should grant the petitioner review, to instruct the courts below. Furthermore, to instill equal protection of the law and due process in federal sentencing universally by including defendants sentence under 21 U.S.C §841 and the recidivist provisions there in.

A.) The Recidivist Provision Of Title 21

In 1970 Congress enacted the controlled substance act. See ***Comprehensive drug prevention and control act of 1970***, Pub L. No. 91- 513, & 401, 84 Stat, 1236, 1261 (1970). Congress declared in CSA that the illegal importation manufacture distribution, thus possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the America people, 21 U.S.C & § 801(2), and found that federal control over domestic and foreign traffic of controlled substances is essential & and required to protect the general public form ready available 'illegal' controlled substances. See 21 U.S.C. 801(5), (7).

To discourage the trafficking and manufacturing of these controlled substances congress made a crime involving the elements of a drug trafficking

crime a "felony" under federal law, therefore punishable by in the very least more than a year. To provide more deterrent, congress also implemented a so called recidivist provision in 21 U.S.C § 841. E.g., at relevant part if a person had been previously convicted of "felony drug offense" [drug trafficking crime] it would double the mandatory minimum at relevant part form 10 years to 20 years if a person had been previously convicted of 2 prior felony drug offenses it raised the mandatory minimum to life. These recidivist provision were to target drug trafficker who were making the controlled substances that were having a detrimental effect on the health and general welfare of the American public ready available. In short, congress intended to slow the traffic of drugs to combat drug abuse. However, it was not the intent to imprison the victims of drug abuse, who amassed simple controlled substance crimes as a result of drug addiction.

In 1984 , congress expanded the scope of the recidivist provision to include the equivalent of "felony drug offense" under federal law committed under state and foreign country's laws. However, it was not the intent of congress to expand the type of offense i.e., congress still sought to apply the recidivist enhancement to person who continued to traffic drugs, even after caught and convicted under state laws. However, this expansion created conflict and unambiguous application because under state laws often simple drugs crimes were punishable as felonies and this fact resulted in misapplication of the recidivist enhancements of title 21.

So, 1998, congress added the term "felony drug offense" to 21 U.S.C § 841. In doing so congress was communicating a drug trafficking crime, because all felony drug offenses under federal law has the elements of drug trafficking.

However, this did not resolve the ambiguity, thus congress, created the current definition of "felony drug offense" in 21 U.S.C § 802(44), which communicated that: (1) the prior offense must be punishable by more than a year, thus equal to a class E felony under federal law irregardless of whether the relevant jurisdiction named it a felon or not. (2) it must be a violation of laws that restrict the conduct in relation to the enumerated substances, thus in relation to substances restricted and controlled under federal law. However, 21 U.S.C §802(44) standing alone does not provide any indication of the true elements of a intended drug crime, i.e., no actus reaus or mens reaus. However, it stands for reason that if congress wanted the punishment to be equal to a felony under federal law, and the substances targeted to be controlled and defined under federal law that congress also wanted the elements of the drug offense to match the elements of a "felony" under federal law in particular Title 21 hence the term "felony drug offense". However, yet another ambiguity emerged, because §802(44) conflicted, with §802(13) which defined "felony" in the relevant jurisdiction. In light of this conflict this court granted review of [insert burgess]. In doing so, instructed the courts that 21 U.S.C § 802(44) alone defined "felony drug offense" that language

in ***Burgess***, although set apart § 802(13) and 802(44) it created even more confusion, because if § 802(44) standing alone defined "felony drug offense" it rendered § 802(44) to vague because it provided no proper notice provided no actus reaus or mens reaus (emphasis added) "conduct restricted" as provided in §802(44) does not provide sufficient notice due process demands. However, if congress intent and meaning it's properly applied. i.e., a crime punishable as a felony under the relevant jurisdiction with corresponding elements of a "felony" "drug offense" under federal law. Then to settle on the "elements" of a "felony drug offense" one would cross reference "felonies" under titles 21.

This is supported by when the plain language of the statue does not unambiguously reveal it's meaning, we turn to the legislative history. See ***Blum v Stneson***, 465 U.S 886, 896 (1984). When, that does not provided certainty, the supreme courts had indicated reference to other statues may be appropriate as well See, e.g., ***United Sates v American Trucking Ass'ns***, 310 U.S 534-44 (1940), the court interpreted the motor carrier act of 1935 in light of the hours of service act, the law governing the civil aeronautic authority and subsequent enacted fair labor standard act significantly, the court in American trucking was "especially hesitant" to interpret the clause in question in a way that would deviate from the meaning of their related statues because it was adopted as a floor amendment. See 310 U.S at 546-47. In ***Dickerson***, the court likewise turned to related federal statues and their

legislative history. See 4600 U.S at 117-19. Accordingly, other authorities support an interpretation of § 802(44) that is information by the related statues requiring the elements of a drug trafficking crime, elements are settled on in the statue of origin for a drug trafficking crime §841(a). Furthermore, theses authorities support an interpretation of § 802(44) that is informed by the legislative intent of title 21 and 21 U.S.C § 841 to target drug traffickers, thus it stands to reason, the recidivist enhancements were intended to target repeat drug traffickers. Moreover, to determine if a person is a repeat drug trafficker he is entitle to the due process protection of the categorical approach to determine if his prior offense is categorically a "felony drug offense"/ "drug trafficking crime under federal law.

B.) The Categorical Approach.

However, the misinterpretation and misapplication of § 802(44) has effectively denied petitioner equal protection of the law and due process of law.

In order to instill equality comity and due process of law into application of the many recidivist enhancements found in federal law, the supreme court formulated a categorical methology. E.g., ***Taylor v United States***, 495 U.S 575 (1990), which in short required an elements versus elements approach. This approach created uniformity and certainty of meeting congress intent for recidivist provision of federal law. Moreover, it implemented due process of law to application of these recidivist provision to account for the various title and

description of state offense which although meet the description of the crimes in "title" lacked the required elements of crimes congress referenced under federal law. In short, the categorical approach of **Taylor**, provided due process in application of federal recidivist enhancements. A protection, that was later fine tuned by the court in ***Descamps v United States***, 133 S. Ct. 2276 (2013) and again in ***Mathis v United States***, 136 S. Ct 2243 (2016). However, remains the key to ensuring procedural due process in sentencing under federal law.

Furthermore, all defendants subjected to recidivist enhancements under federal law be it under statutory law, the United States Sentencing Guidelines or immigration law are provided this due process protection, e.g., ***United States v Lopez-Solis***, 447 F.3d 1201 (9th Cir 2006) § 924(e) ACCA) ' ***United Sates v Hinkle***, 201632 F.3d 569 (5th Cir 2016) ("Controlled Substance offense" USSG); ***Moncrieffe v Holder***, 569 U.S 184 (2013) (immigration law); and ***Cintron v Atty. Gen***, 2018 U.S App. Lexis 3989 (Fed 2018 11th Cir. ("Drug trafficking crime of §924(c)). However, and most importantly, the defendants subjected to the most crippling recidivist enhancement under federal law. i.e., **Mandatory life** are not provided this protection. This is because 21 U.S.C §802(44) standing alone is too vague to provide the information to apply this due process protection unless of course §841 is cross referenced and/or the prior offense is required to categorically math a "felony drug offense" under federal law.

C. Petitioner Sentence Was Enhanced Under § 841 Without Due Process And Equal Protection

Under the facts of this case petitioner was denied due process and equal protection of the law. For instance. The district court misinterpreted congress intent to have § 841's recidivist enhancement restricted to the prior offenses of drug trafficking crimes which is tantamount to a "felony drug offense" under federal law. Inconsequence applied the enhancement based on a simple possession which was clearly not the intent of congress under the correct canon of statutory interpretation. Moreover, the courts below have determined that a defendant is punishable under § 841's recidivist enhancement are not entitle to have their prior offense subjected to the categorical analysis articulated by this court in **Taylor Supra** .This prejudice petitioner because the state laws governing his prior offenses allow for alternate means that are broader than the federal definition of "felony drug offense under federal law. Most importantly under the correct interpretation of the laws of congress and the correct application of the categorical approach to petitioner's prior offense he was erroneously sentence to mandatory life. Petitioner places emphasis on the fact he is not asking the court to make a fact based determination only properly determine the questions presented which have nation wide significance. However, the questions should be answered in favor of petitioner. Therefore, the court should sent this case back for further review

D.) The Court Below

The appeals count below, denied petitioner the equal protection of the categorical approach that provides due process to application of recidivist enhancement to federal sentences. It stands to reason, the court denied the protection because it is virtually impossible to apply the categorical approach to define "felony drug offense" relying on § 802(44) alone because it's to vague.

Furthermore, the other courts across this nation are struggling for proper application of the recidivist enhancement of §841 and in doing so attempting to utilize this court instruction inreguard to the categorical approach. However, with conflicting and various results . See ***Unites States v. Elder***, 840 F.3d 455, 461-62 (7th Cir 2016); ***United States v Brown***, 598 F.d 1013, 1015-18 (8th Cir 2010) ***United States v Grayson***, 731 F.3d 605, 606-08 (6th Cir 2013); ***United States v Sole***, 8, Fed. App'x. 535, 541 (6th Cir 2001). All cases denying defendants the due process protection of the categorical approach to apply and/or uphold the recidivist enhancement of 21 U.S.C § 841

However, see ***United States v Ocampo-Estrada***, 873 F.3d 661-69 (9th Cir 2017); ***United States v Brown***, 500 F.3d 48, 59 (1st Cir 2007); ***United States v Nelson***, 484 F.3d 257, 261 N.3 (4th Cir 2007); ***United States v Curry***, 404 F.3d 316, 320 (5th Cir. 2005). All attempting to rely on the categorical approach to some extent. However, never reaching the true intended elements of a "felony drug

offense" because §802(44) does not provide them and "restricted conduct" is unconstitutionally vague. Accordingly, the courts below are needlessly struggling to settle on the proper approach to in some cases sentence people to mandatory life in prison which is tantamount to a death sentence.

Summary Of The Argument

This court is needed to properly define the intent of congress, locate the true elements of a "felony drug offense" that will support the most crippling enhancements of federal law. This is because the courts below are struggling and in conflict to say the least courts i.e., are struggling and splitting on how to define a "felony drug offense".

As provided below, congress intended the recidivist enhancements to be restricted to prior offense with; (1) equal punishment of felony under federal law; (2) equal or narrower elements of a felony under title 21; and (3) in relation to the substances defined under 21 U.S.C § 802 and controlled under federal laws.

Furthermore, to determine if a defendants prior offense is a "felony drug offense" as intended by congress, the defendant is entitle to the due process protection of the categorical approach under equal protection of law. In consequence this court should remand this case back for further proceeding to make a proper determination if the defendants prior offense is a "felony drug offense" under federal law . thus will support the federal recidivist enhancement.

ARGUMENT

(I)

IT WAS THE INTENT OF CONGRESS TO RESTRICT THE APPLICATION OF 841'S RECIDIVIST CLAUSE TO DRUG TRAFFICING CRIMES

The intent of Congress in enacting title 21 and the controlled substance Act was to combat the unlawful flow of street drugs that were detrimental to the health and welfare of the American public. i.e., To deter drug trafficking. Congress incorporated into the statues governing the illegal trafficking of drugs so called recidivist provisions to target repeat drug traffickers, thus offer highly motivating deterrents for repeat offenses. As provided below to communicate "Drug Trafficking Crime." Congress relied on the short hand term "Felony Drug Offense" this is because to be classified and punished as a " Felony Drug Offense" under federal law the drug offense must have as an element of conduct involving the trafficking of drugs not merely possession of drugs. In particular, these clauses mandated a increase in the mandatory minimum sentences if a defendant had been previously convicted of a "Felony Drug Offense" a short hand term for "Drug Trafficking Crimes" Such a contention is supported by the legislative history of the CSA. Furthermore, to conclude otherwise is to insult common sense. Finally to allow *§ 802(44)* to stand alone in defining

a "Felony Drug Offense" would run a foul of due process of law because it lacks adequate notice and raises serious equal protection concerns.

A.) The Legislative History Of The CSA Supports Restricted Application Of The Recidivist Enhancement To Drug Trafficking Crimes By Using The Short Hand Term "Felony Drug Offense"

As a starting point to determine and interpret Congress' intention for the devastating sentencing enhancement found in 21 *U.S.C § 841* one must look toward the history of the Controlled Substance Act ("CSA"). It doing so, one must consider that the enhancement is found is a statue created to target the trafficking of illegal drugs[1]. Secondly, it must be considered that the overall purpose of the CSA was to stop the illegal importation, manufacture, distribution, of the illegal street drugs resulting in nation wide drug addiction which was having substantial and detrimental effect on the health and general welfare of the American people. See *21 U.S.C.S § 801(2).* To meet this agenda congress determined that federal control over domestic and foreign traffic of controlled substance was essential. See *21 U.S.C § 801(5)(7).* Also relevant is the fact: while the CSA penalizes offense involving counterfeit substance i.e., actual *Controlled Substances* that bear an unauthorized trademark, see *§ 802(7)* never has congress regulated, simulated or look a like controlled substances. In short, irregardless of the title placed

[1] **Although the term "felony drug offense" is also found in statutes governing the illegal importation of those targeted drugs, the material factor is the enhancements at bar are found only in drug trafficking statutes and "felony drug offense" is a mere shorthand term for "drug trafficking offense"**

on the substance it must be a substance controlled and restricted under federal law. Thus, considering this intent, it stands to reason, a reasonable legislator contemplating a sentence enhancement based on prior offenses in a statue directed exclusively to regulation of the trafficking of illegal drugs, would have restricted the application of the enhancement to the class of offenses which involved the trafficking of actual drugs (controlled substances), thus target the person responsible for trafficking of the drugs. It also stands to reason that it would not have been congress' intent to target the victims of the ready available drugs, with the enhancement directed at drug traffickers i.e., individuals whom became addicted to drugs and amassed conviction resulting from substance abuse issues.[2] Accordingly it was the intent of congress to target drug traffickers with the recidivist enhancements not individuals addicted to the drugs who graduated to drug trafficking to support their substance abuse issues. (Emphasis added) to identify these targeted crimes congress relied on the shorthand term "Felony Drug Offenses" because a felony under Federal Law requires some element of distributing or trafficking drugs. Also important is that: these drug trafficking crimes are universally identified by relying on the elements articulated in *21 U.S.C. § 841.*

[2] **A common occurrence resulting from substance abuse addiction were convictions for possession of illegal drugs. Therefore, to target mere possession of drug convictions would be to target the victim not the criminals i.e. The drug traffickers.**

Such a conclusion is supported by the history and language of the statue at bar. Most importantly supports that this statue has been misinterpreted and misapplied under the facts of this case. When the CSA was enacted in 1970 the prior convictions that triggered enhanced punishment for repeat offenders were limited to conviction for federal drug offense, namely "Conviction...punishable under this paragraph i.e., convictions for manufacturing or trafficking a controlled substance "Felonies" "under any other provision of this title [citation omitted] or other law of the United States relating to narcotic drugs marihuana, or depressant or stimulant substances."[3] See ***Comprehensive drug prevention and Control Act of 1970,*** Pub C. No 91- 513, § 401, 84 Stat, 1326, 1261 (1920). In short the title of the CSA "Drug Abuse Prevention" speaks of meaning to stop drug abuse, as substance abuse has been viewed as a disease (as cancer).— The target was the traffickers of the actual drugs not victims of the drugs in a context of a recidivist enhancement in a drug trafficking statute with the goal to stop drug abuse— see also ***United States v.Gates***, 807 F.2d 1075, 1082, 257 U.S App. (D.C Cir 1986); ***United States v.Johnson***, 506 F.2d 305, 307 (7th Cir 1974) These offenses all involved trafficking of actual narcotic drugs. In short, the legislator of 1970 intended to fight drug abuse by targeting repeat

[3] Simple possession of illegal drugs under federal law is not a "Felony" thus, would not constitute a "Felony Drug Offense" Thus, providing great logic that the term "Felony Drug Offense" was a mere shorthand term for "Drug Trafficking Offense."

traffickers of actual drugs being abused and consequently undermining the health and welfare of the American public. Moreover, it cannot be concluded that it was congress intent to imprison the affected population under harsh penalties if one could not control the addiction. However, (emphasis added) the enhancement was to provide deterrent for repeat drug traffickers who were making those drugs available.

In 1984, Congress stepped up the "War on Drugs." In doing so amended the language of § 841 to include prior state and foreign Felony drug convictions, therefore, expanding the scope of the enhancement provisions to net repeat drug traffickers who had previously been convicted of drug trafficking under state and foreign countries laws—.[however to identify these crimes congressman of 1984 relied on the shorthand term "felony Drug Offense" thus incorporating elements of a drug trafficking crime] — See *Crime Control Act of 1984 Pub L. NO 98-473, § 502, 98 Stat, 1837, 2068 (1984)* (emphasis added). This relevant legislative history explain that under pre – 1984 law, the sentence enhancement was "available only in the case of prior federal felony drug convictions." i.e., one with the elements of trafficking of actual drugs. However, in 1984 Congress "would permit prior state and foreign drug trafficking crimes — [Crime with equal punishment, equal elements, of a "felony drug offense" under federal law "in relation"

to the actual named substances] — to be used for this purpose as well". S. Rep. NO. 98-925 at 258-59 (1984). One must conclude the more natural instance for a reasonable legislator in 1984 is that the amendment expanded the enhancement to include state and foreign convictions of the same type as those previously covered under federal law. Namely, conviction for offenses involving trafficking of actual Controlled Substance. However, to communicate "Drug Trafficking Offense" the legislator relied on "Felony Drug Offense" because they were one and the same under federal law which ultimately resulted in the misinterpretation of the law and misapplication of the enhancement provision of federal law.

In 1988, Congress for the first time added the term "Felony Drug Offense" *to 21 U.S.C § 841(b)(1)(a)* defining it as "an offense that is a felony [drug trafficking] under any provision of this title of any other federal law that prohibits or restricts conduct relating to narcotic drugs, Marihuana, or depressant or stimulant substances or a felony [Drug Trafficking] under any law of a state or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana or depressant or stimulant substances" see Pub. L. NO. 100-690 §6452(a)(2), 102 Stat, 418 l, 4371 (1988). There is no indication that this change altered the intent of congress to target mere controlled substance abuse crimes or expanded the

scope of the enhancement provision; if anything the plain meaning of the defined term "Felony Drug Offense" implies the involvement of the required elements of a "Felony" under federal law and involved "actual drugs". This is supported by the fact federal statues must be interpreted by reliance on federal law. Cf. ***Johnson v. United States***, 130 S. Ct. 1265, at *6 (U.S. 2010) (holding that in context at a statutory definition of "violent felony," the phrase 'physical force' mean violent force."). In response, to the categorical approach" In 1994, Congress placed the current definition of "Felony Drug Offense" in the "definitions" section of the CSA, 21 U.S.C §802, where it remains today.[4] See. *Pub L. 103-322*, §90105(d), 108 Stat. 1796, 1987-88 (1994). In particular, See 21 U.S.C. § 802(44), the only significant change made was the term "felony" was replaced with "punishable by more than a year" which is tantamount to a Class E Felony under federal law.— this change was made to distinguish § 802(44) from § 802(13).— In short, a state offense must have the elements as a Felony Drug Offense under federal law, carry equal punishment of a felony under federal law, and finally, be in relation to "Actual" narcotic drugs, Marihuana, or depressant or stimulant.

[4] **One must also consider that "Felony Drug Offense was created in light of 21 U.S.C § 803(13) which contained "Felony" congress created the term "Felony Drug Offense to place emphasis that regardless of what the relevant jurisdiction classified a crime as if the crime was punishable by more than a year it was a felony "under federal Law", such action uphold the reasoning the state crimes elements must also match the federal definition of a "Felony Drug Offense" under the categorical approach equal punishment, matching elements.**

substances as defined under federal law. Although the legislator used the shorthand term "Felony Drug Offense" which in mind set conveyed a drug trafficking crime (emphasis added) this intent has been misconstrued and the enhancement provision being applied to non-drug trafficking crimes i.e., simple possession and misapplied relying on statues with broader included substances i.e., stimulated substances. Furthermore the incorrect application raises serious equal protection of the law concerns, to say the least. As provided below. Accordingly, the legislative history of the CSA support misapplication of § 841 enhancement provision under the facts of this case.

(B). 21 U.S.C § 802(44) Standing Alone Is Unconstitutionally Vague

Similarly, if one considers the end result was 21 U.S.C.§ 802(44) standing alone governs the application of this enhancement provision one can only conclude § 802(44) is unconstitutionally vague. 21 U.S.C. § 802(44) provides at relevant part.

> **44) The term "Felony Drug Offense means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or Foreign Country that prohibits of restricts conduct relation to narcotic drugs, marihuana, anabolic steroid, or depression or stimulant substance.**

This resulting statutory definition informs us that a "Felony Drug Offense" is defined as an offence that is punishable by imprisonment by more than one year — the equivalent to a Class E Felony under Federal Law to negate any application of §802(13) or any contrary classification or labeling of the offense in a state Jurisdiction — (if it is punishable by more than a year it is a "felony" under Federal Law). Next the text informs one that the offense must be in relation to "narcotic, drugs marihuana, anabolic steroid, or depressant or stimulant substance as defined under Federal Law — which meets Congress ' intent to target the substance which were detrimental to the American public.— Moreover, placed emphasis on the fact that if must be in relation to actual drugs.[5] Thus in short, the statue provides irregardless of the classification of the offense in the relevant jurisdiction it must be a "Felony" under Federal Law in relation to actual drugs. However, most importantly is what this statutory definition does not provide: (emphasis added) This statue lacks proper notification of the required elements of the offense, i.e.., it does not provide ***mens rea or actus rea.*** In short it does not provide sufficient notice as required under due process of

[5] **See *United States v. Elder*, 840 F.3d 455, 461-62 (7th Cir 2016)(Finding that an Arizona conviction was not a felony drug offense within the meaning of section 841 because the conviction was capped at one year). See also, *United States v. Brown*, 598 F. 3d 1013, 1015-18 (1st Cir. 2010) (concluding that Iowa conviction, for Delivery of Simulated Controlled Substances were not felony drug offenses by analyzing the meaning of the phrase "relating to" in section 802(44) in connection with section 801(2); regulation to controlled substances.**

Law.[6] Thus, Standing alone *§ 802(44)* is unconstitutionally vague. However this problem can be negated if the elements of *§ 841* are relied on to identify required elements, as all other enhancements under federal law rely on Concerning drug offenses. As supported by the history and the categorical approach as well as common sense as provided below, it stands to reason that one settles on the elements of such an offense if the offense is a categorical match to an offense punishable as "Felony" under title 21. Thus, equal punishment, equal and matching "actual drugs" and most importantly **matching or narrow elements** of a "Felony Drug Offense" under Federal Law. (Emphasis added) the use of the short hand term "Felony Drug Offense" as opposed to "Drug trafficking Offense" supports this conclusion. Accordingly, without cross referencing and matching a prior state offense

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[6] A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or require. *See Connelly v. General Constr. Co.* 267 U.S. 385, 391,(1926)([A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law); Papachristou V. Jacksonville, 405 U.S. 156 (1972)(Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the state commands or forbids' (quoting *Lanzetta v. New Jersey, 3016 U.S. 451,453(1939).* This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the fifth Amendment. See United States v. Williams, 533U.S. 285, 304 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standard less that it authorizes or encourages seriously discriminatory enforcement. Ibid. As the supreme Court explained , a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See id., at 306.

with a crime punishable as a "Felony" under Federal Law. (Emphasis added) *21 U.S.C. §802(44)* is unconstitutionally vague[7]

C.) Common Sense, Related Statutes, As Well As The History Of The CSA Supports The Application Of § 842's Recidivist Clause Was Restricted To Drug Trafficking Crimes.

In order to completely determine and settle on the intentions of Congress it would be helpful to explore the content of terms used in similar statues. For instance, in *18 U.S.C 924(c).* Congress abandon the shorthand term "Felony Drug Offense" and turned to the long version "Drug Trafficking Crime" but yet defined "Drug Trafficking Crime" to mean "any felony" punishable under the controlled substance import and export act *(21 U.S.C 951 et esq.)*, or Chapter 705 of title 46 *[46 U.S.C §70501 et. Esq.*]. In other words a Drug Trafficking crime is a "felony Drug offense" under Federal law. One must also consider that § 924(c) was enacted after president Kennedy and Martin Luther King were killed which happened a few years later after the enactment of the CSA Thus, it may be the case that Congress realized the confusion the reliance on "Felony Drug Offense" was causing. Similarly, in *18 U.S.C 924(e)* Congress relied on "Serious Drug Offense" to communicate the crime must have requirement of punishment of 10 years. However, and most importantly the offense must have the elements of a "Felony Drug

[7] **One must keep in mind that throughout the statutes of congress and the USSG all enhancement provisions are restricted to crimes with the elements articulated in 21 U.S.C 841. unlawful acts. In short to manufacture, distribute, or dispense a controlled substance or counterfeit substance.**

Offense" under Federal Law which is interchangeable with the term "Drug Trafficking Crime" likewise "serious drug offense" communicated if a defendant was previously convicted of a crime with equal or narrow elements articulated in *21 U.S.C. §841(a)* and punishable by more than 10 years only then is the defendant subjected to enhanced penalties, thus excluding simple drug offense from application of federal enhancement provision. It should also be noted all enhancement provisions found in the USSG based on drug crimes require the predicate offense have matching elements of a crime under § 841 i.e., **manufacturing distributing, or dispensing** of drugs See **U.S.S.G. § 4B1.2** thus, excluding simple drug crimes relating to abuse and addiction. Furthermore relying on the categorical approach to make this determination. Also of no less importance one must also rely on common sense to come to the conclusion congress intended to require the elements of a drug trafficking crime to impose enhanced penalties under *21 U.S.C § 841.* This is because if one concludes that congress mandated drug trafficking crimes to application of enhancement provision under *§924(e), §924(c)* but abandon this requirement under *§ 841* is to conclude congress intended to be more favorable to armed criminals as opposed to (emphasis added) individuals with substance abuse problems who graduated to selling drugs to support the addiction. Furthermore, equal protection as well as

common sense supports this contention. For example, consider the fact that simple possession under federal law is not a felony because it has no trafficking element — thus would not support the enhancement of *§ 841.*— However, a same crime under state law would support the enhancement. To conclude this was the intent of congress would be to conclude congress wanted to target simple possession crimes under state law and not federal law, however this effectively defies logic and violates equal protection of the law. Unless of course one conclude congress intended to encourage drug abuse in federal jurisdiction.[8] Accordingly, legislative history, other statues equal protection of the law and finally common sense reports the restricted application of the enhancement provision to drug trafficking crimes under 841. Furthermore, supports *§ 802(44)* has been misinterpreted and the enhancement provision misapplied in the case or else is to be declared unconstitutional because it does not give proper notice.

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[8] For example, if a individual, addicted to drugs used and abused drugs in a federal park resulting in simple felony drug convictions. A later conviction under - § 841 would not be subjected to enhance provision. However, the same individual across the street same crime, same conviction would be subjected to the enhanced penalties this conclusion would communicate a safe haven for substance abuse in federal jurisdiction. This defies common sense

(II)

IN ORDER TO DETERMINE IF A PRIOR OFFENSE IS A "FELONY DRUG OFFENSE" THE TAYLOR CATEGORICAL APPROACH MUST BE EMPLOYED.

Having determined congress' intentions when using the shorthand term "felony Drug Offense" was to communicate a "Drug trafficking Crime." (a crime with corresponding elements of a felony under Title 21). As equal protection of the Law is applicable, it stand to reason that a prior offense must be a categorical match to a "federal" "Felony Drug Offense." Moreover, equal protection would mandate to make this determination the court must use the elements versus elements approach articulated in Taylor i.e., is it not unequal treatment to provide a defendant accused of a prior "Violent Crime" this protection, but yet deny a defendant the same accused of a predicate drug offense. Moreover a nonviolent drug offense.

In support of the application of the categorical approach here, see ***United States v. Ocampo***, 873 F.3d 661, 667-69 (9th Cir) applying the categorical approach in deciding whether a California conviction qualified as a "Felony Drug Offense". See also ***United States v. Brown***, *500 F.3d 48, 59 (8th Cir 2007)* (analyzing section 802(44) by eschewing an examination of the particular facts of the putative predicate crime and instead reading the term "Felony Drug Offense" Categorically under Taylor and ***Shepard v. United***

***States**, 544 U.S 13 (2005)*; ***United States v. Nelson**, 484 F.3d 257, 261 N.3 (4th Cir 2007)* (applying both the section 802(44) definition and Shepard in determining whether a conviction under 18 U.S.C 924(c)(1) is a felony drug offense for purpose of the recidivist enhancement*)*; ***United States v. Curry**, 404 F.3d 316, 320 (5th Cir 2005)* (Using the statutory definition of felony drug offense along with *Shepard* in determining whether a prior conviction fits the recidivist enhancement provision). Most importantly the Supreme Court has characterized section *802(44)* as providing the "Exclusive definition of "Felony Drug Offense" which has the benefit of bringing "Felony Drug Offense" "a measure of uniformity to application of *§ 841(b)(1)(a)* by eliminating disparities based on divergent State classification of the offense." *Burgess. 553 U.S at 134.*— which the statement in Burgess was misused at best because the court in *Burgess* was explaining that *§ 802(44)* standing alone governed "felony Drug offense" to resolve the complication of the definition in *§ 802(13)*, however, the court in *Burgess* did not negate the requirement to categorically determine if the state offense was a match to the intended crime of congress.— Accordingly it stand to reason that a "Felony Drug Offense" as defined under *§ 802(44)* must be equal in all relevant parts to a "Felony Drug Offense" under federal statutory law and to make a determination the categorical approved of Taylor must be used.

(III)

APPLYING THE CORRECT CATEGORICAL APPROACH TO THE FACTS OF PETITIONER OFFENSE SUPPORTS THE MISAPPLICATION OF THE ENHANCMENTS

Now turning to the facts of Petitioner; case and applying the correct categorical approach supports the misapplication of the enhancement provision.

A.) The Categorical Approach

Title *21 U.S.C § 841* provides that in short a defendants' mandatory minimum must be enhanced if the defendant had been previously convicted of a "Felony Drug Offense" which as provided above is interchangeable with "Drug Trafficking Crime"— which is further supported by federal immigration statutes See *INA § 24OA(a)(3).*, defining "aggravated felony" to include "illicit trafficking" is a controlled substance...including a drug trafficking crime: as defined in *18 U.S.C §924(c)* which requires elements defined under *21 U.S.C § 841(a)(1)*— yet again Congress places emphasis on the fact "Drug Trafficking Crime" is interchangeable with "Felony Drug Offense".

As provided above when the government alleges that state conviction qualified as an "Felony Drug Offense" under § 841, Courts must apply a categorical approach to an offense listed in federal law as a "Felony Drug Offense" see ***Moncrieffe v. Holder***, 569 U.S 184 (2013)— Moncriffe focuses

on an aggravated felony under the INA. However, the rationale applies with equal force to a situation of a predicate of § 841 both are federal statue, to do otherwise denies due process of law. Not to mention equal protection of law— The Court in Moncrieffe provided ("under the categorical approach Court's look not to the facts of the case, but instead to whether the state statue defining the crime of conviction categorically fits within the generic federal; definition of a corresponding ["Felony Drug Offense"]. Id (internal quotation marks omitted). "[A] state offense is categorical match with a generic federal offense only if a conviction of the state offense necessarily involved facts equating to the generic federal [Felony Drug Offense]. (internal quotation marks alteration omitted). "Because we examine what the state conviction necessarily involved, not the facts underlying the conviction, then one, must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." ID at 190-91 (internal quotation marks and alteration omitted.) If the state "list multiple, alternative elements, and so effectively creates several different crime.' Then the statue is "divisible," and we employ the "modified categorical approach...to determine which alternative formed the basis of the [defendant's] prior-conviction." ***Descamps v. United States*** *570 U.S 254, (2013)* (internal

quotation marks omitted). Under the modified categorical approach are look "to a limited class of documents (for example, the indictment, jury instruction, or plea agreement and colloquy) to determine what crime, with what elements, a [defendant] was convicted of " ***Mathis v. United States***. *136 S. Ct. 2243, 2249.(2106)*

B.) The Elements of a "Felony Drug Offense"

First one must settle on the required elements of a "Felony Drug Offense" under federal law as supported above through out the statues of congress and the United States sentencing Guidelines in regards to application to enhancement provision based on previous drug crimes is consistent. The universal elements of a "Drug Trafficking Crime" (Which is interchangeable with the term "Felony Drug Offense" are in gist provided under *28 U.S.C. § 841(a)*, ironically the same statue of conviction at bar. At relevant part *§ 841(a)* provided:

(a) Unlawful Acts, except as authorized by this title, if shall be unlawful to any person knowingly or intentionally, (mens rea)- (1) to manufacture, distribute, or dispense, or posses with intent to manufacture, distribute, or dispense a controlled substance; or (2) to create distribute, or dispense posses with intent to disprove, a counterfeit substance.

Accordingly, to qualify as a "Felony Drug Offense" the prior offense must have corresponding elements to a Federal "Felony Drug Offense" — which are found in § 841 — be punishable by "more than a year" (which is equal to a class E felony under federal law) for conduct "in relation" to actual drugs defined under title *21 U.S.C. § 802.*

C.) Applying the Categorical Approach to Petitioners Convictions

Turning to the petitioner's prior offense and applying this approach finds him incorrectly sentenced to die in federal prison through and by the incorrect application of federal law. Furthermore by denying the due process protection to determine whether a prior offense matches the intent of congress for the enhancement that drove this punishment. Most importantly a law that removed any discretion from the sentencing court. Therefore this court should answer the questions at bar and remand this case back for further review.

Conclusion

For the above reason, this court should accept this case for review and finally and completely define the intent of congress § 802(44), "felony drug offense" and the proper application of the recidivist enhancement of 21 U.S.C § 841.