No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

CARLTON WILLIAMS
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

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QUESTION PRESENTED

Is a sentencing court limited to applying a categorical approach when determining whether a conviction for violating the Federal Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. § 1962(c), constitutes a predicate crime under the career offender guideline? Or, because of the unique structure of RICO, may a sentencing court make this determination based on the facts underlying the "pattern of racketeering activity" element of a RICO conviction?

PARTIES TO THE PROCEEDING

The caption of this case in this Court contains the names of all parties, namely, petitioner Carlton Williams and respondent United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Carlton Williams, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit at Docket No. 16-3547 entered on August 1, 2018. Mr. Williams' petition for rehearing *en banc* and petition for rehearing by the panel were denied on October 29, 2018.

OPINION BELOW

The court of appeals' precedential opinion (Appendix A) is reported at *United States v. Williams*, 898 F.3d 323 (3d Cir. 2018). The court of appeals' order denying rehearing and rehearing *en banc* (Appendix B) is unreported.

JURISIDICTION

The District Court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. That court issued its precedential opinion and judgment on August 1, 2018. Mr. Williams filed a timely petition for rehearing before the original panel and the court *en banc,* which was denied by Order dated October 29, 2018. This petition is timely filed pursuant to Rule 13.3.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1), which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the court of appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. § 1651(a), which grants the United States Supreme Court jurisdiction to issue all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law.

STATUTORY AND UNITED STATES SENTENCING GUIDELINES PROVISIONS INVOLVED

Section 1961(1)(D) of Title 18, United States Code, provides:

> "racketeering activity" means … any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States[.]

Section 1962(c) of Title 18, United States Code, provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 4B1.1(a) of the United States Sentencing Guidelines provides:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Section 4B1.2(b) of the United States Sentencing Guidelines provides:

> The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

STATEMENT OF THE CASE

At issue is whether this Court's precedent requiring sentencing courts to apply a categorical approach when determining whether a defendant's prior conviction satisfies the federal definition of a predicate crime, resulting in an enhanced penalty, applies when the prior conviction is for violating subsection (c) of the Federal Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. § 1962 ("RICO"). The dispute in this case was whether Mr. Williams' prior conviction for violating RICO was his second prior "controlled substance offense" triggering the enhanced penalties of the career offender guideline.

The sentencing court found Mr. Williams' prior conviction for violating 18 U.S.C. § 1962(c) to be a "controlled substance offense" as defined by the career offender guideline, resulting in an increase in his advisory guidelines range from 33 to 41 months imprisonment to 210 to 262 months imprisonment.[1] In a precedential opinion, a panel of the Third Circuit affirmed application of the career offender guideline, but did so by way of conflicting analyses as to whether, and if so how, the categorical approach is to be applied when determining whether a RICO conviction is or is not a predicate offense. *See United States v.Williams*, 898 F.3d 323, 332-337 (3d Cir. 2018) (attached as Exhibit A).

Here, Mr. Williams pled guilty in district court to a one-count indictment charging him with possession with intent to distribute a detectable amount of heroin in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). The career offender

[1] The sentencing court varied downward to impose a sentence of 160 months, a sentence nearly four times the top of the non-career offender range.

provision of the United States Sentencing Guidelines subject a person who has been convicted, as here, of a controlled substance offense to enhanced punishment if the individual was, among other things, previously convicted of "at least two prior felony convictions for a crime of violence or controlled substance offense." U.S.S.G. §4B1.1(a). A "controlled substance offense" is defined as:

> an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b). *See also* U.S.S.G. § 4B1.1(a).

Mr. Williams' RICO conviction was the result of his pleading guilty to Count 160 at the Superseding Indictment filed in Criminal No. 96-185 in the United States District Court for the Western District of Pennsylvania. That Count alleged:

> The allegations of set forth in Paragraphs One through Six and Paragraphs Eight through Forty-One of Count One are hereby realleged and incorporated as if fully set forth herein.
>
> From in or about July 1991, through on or about November 12, 1996, in the Western District of Pennsylvania, the defendants, ….. CARLTON WILLIAMS, a/k/a Colt … together with other persons known and unknown to the Grand Jury, being persons employed by and associated with the enterprise as set forth in Paragraphs One through Six, which enterprise was engaged in, and the activities of which affected, interstate and foreign commerce, knowingly, intentionally and unlawfully conducted and participated, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity, as that term is defined by 18 U.S.C. § 1961(1) and (5). The pattern of racketeering activity through which the defendants conducted and participated in the conduct of the affairs of the enterprise consisted of the acts set forth in Paragraphs Eight through Forty-One, above, which are incorporated by reference as if fully set forth herein.

In violation of Title 18, United States Code, Section 1962(c).

(S. App. 69-70).

Of the paragraphs identified in Count 160 as the "pattern of racketeering activity," several alleged Mr. Williams violated 21 U.S.C. § 841(a)(1) and 841(b) or 21 U.S.C. § 846. (S. App. 19, 22, 24, 25). However, Mr. Williams was not convicted of violating any of these statutes. Mr. Williams pled guilty to only one crime in the 1996 case: 18 U.S.C. § 1962(c), which states:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Mr. Williams argued that, under its plain language, section 1962(c) does not prohibit the manufacture, import, export, distribution, or dispensing of a controlled or counterfeit substance, or the possession of a controlled or a counterfeit substance with intent to manufacture, import, export, distribute, or dispense. Rather, he contended, because 18 U.S.C. § 1962(c) punishes the direct or indirect participation in the activities of an enterprise through "racketeering activity" or "collection of unlawful debt" and is therefore categorically overly broad and cannot constitute a "controlled substance offense."

When a criminal indictment alleging a violation of 18 U.S.C. § 1962(c) is based on a "pattern of racketeering activity," the government must prove "at least two acts of racketeering activity…" 18 U.S.C. § 1961(5). RICO defines "racketeering activity" in 18 U.S.C. § 1961(1) as a plethora of acts and offenses set forth in seven

subsections identified as "A" through "G." Some forms of "racketeering activity" involve controlled substances while others do not. As is relevant here, 18 U.S.C. § 1961(1)(D) defines "racketeering activity" as including:

> any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States[.]

18 U.S.C. § 1961(1)(D).

The district court found Mr. Williams' conviction for violating RICO, 18 U.S.C. § 1962(c), to be a controlled substance offense as defined by the career offender guideline. (App. 25-27). Noting the distinction between "elements" and "means" as described in *Mathis v. United States*, ___ U.S. ___. 136 S.Ct. 2243, 2248 (2016), the district court reasoned that "a controlled substance offense was an 'element' of Williams' RICO conviction." (App. 25-26).

On appeal, the panel agreed that Mr. Williams' RICO conviction constituted a controlled substance offense" under the career offender guideline. The judges disagreed, however, as to whether the sentencing court was limited to consideration of the statute under a "categorical approach" or whether it could look to the facts underlying the racketeering activity.

Although Mr. Williams pled guilty to violating only the Federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c), and was not convicted of violating any federal drug crimes codified at 21 U.S.C. §§ 841 or 846,

the two judge majority stated that the 1998 superseding indictment and the 1998 plea colloquy "[r]eveal that Williams pleaded guilty to a RICO violation under Section 1962(c) and five underlying predicate acts." *Williams*, 898 F.3d at 334 (citing App. 324). Based on this determination, the majority stated "we now know that Williams's prior RICO conviction necessarily implicated only a portion of 18 U.S.C. § 1961(1)(D), namely, only the 'felonious manufacture," or 'recei[pt],' or 'buying, selling, or otherwise dealing in a controlled substance.'" *Id*. at 334.

Judge Hardiman, in his concurring opinion, recognized that the definition of racketeering activity set forth in 18 U.S.C. § 1961(1)(D), at its most arguably divisible level and as cited by the two-judge majority, "encompasses conduct that § 4B1.2(b) does not cover, such as 'receiving, concealment, buying … or otherwise dealing in a controlled substance.'" *Williams*, 898 F.3d at 335 (Hardiman, J., concurring) (quoting 18 U.S.C. § 1961(1)(D)). He concluded that a proper "application of the modified categorical approach will thus generate the same nonsensical answer – that a RICO conviction based on controlled substance offenses is not a 'controlled substance offense' – every time." *Id*. at 336; *see also id.* (applying the modified categorical approach, "in every such case the 'element' that *Taylor* and *Mathis* require us to compare to USSG § 4B1.2(b) will be the same: 18 U.S.C. § 1961(1)(D).").

In this case, Judge Hardiman recognized that "because [Mr. Williams' RICO conviction] 'sweeps more broadly than the generic crime, Williams's RICO conviction *is not* a qualifying offense under the modified categorical approach.'" *Id.*

(citing *Descamps v. United States*, 570 U.S. 254, 261 (2013) (emphasis added)). Unwilling to accept what was an "absurd result," Judge Hardiman stated he "would hold that the approach the [Supreme] Court has articulated in cases like *Taylor*, *Descamps*, and *Mathis* does not apply here." *Id*. at 336.

In a concurring opinion, Judge Roth, who was one of the two-judge majority, agreed with Judge Hardiman, stating that this Court's precedent should not apply where the prior crime is RICO: "[g]iven the unique structure of RICO, we are able to determine easily what predicate offenses led to the RICO conviction." *Williams*, 898 F.3d at 337 (Roth, J., concurring). Thus, she wrote "separately to explain this approach with the hope a future panel may see that there is no need, in the case of a RICO conviction, to engage in the catechism of the modified categorical approach." *Id*.

REASONS FOR GRANTING THE WRIT

This case presents the question of whether there exists an exception from this Court's mandate requiring application of the categorical approach in determining whether a prior offense is a federal predicate crime when the prior offense at issue is a conviction under 18 U.S.C. § 1962(c), the Federal Racketeer Influence and Corrupt Organizations Act (RICO).

This Court has addressed on numerous occasions the method by which sentencing courts are to determine whether a criminal defendant's prior conviction meets the definition of a predicate offense triggering the enhanced penalties of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). In each instance, this Court has held that courts are to use a "categorical approach" to determine whether a defendant's previous state or federal felony convictions sufficiently match the elements of the generic federal offense, while ignoring the particular facts of the case. *See Mathis v. United States*, ___ U.S. ___, 136 S.Ct. 2243, 2247 (2016) (noting that "[f]or more than 25 years, our decisions have held that the prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense."); *see also, e.g.*, *Descamps v. United States*, 570 U.S. 254, 260–61, 133 S.Ct. 2276, 2283 (2013) (*citing Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143 (1990)).

Sentencing courts apply the same analysis with regard to the guidelines' definition of predicate crimes that trigger application of the career offender enhancement. *See, e.g., United States v. Hammond*, ___ F.3d ___, 2019 WL 97362,

*2 (4th Cir. Jan. 4, 2019); *United States v. Burris,* 912 F.3d 386, 392 (6th Cir. Jan. 3, 2019) (en banc); *United States v. Bettcher*, 911 F.3d 1040, 1043 (10th Cir. Dec. 21, 2018); *United States v. Reyes-Rivan*, 909 F.3d 466, 467 (1st Cir. 2018); *United States v. Pereira-Gomez*, 903 F.3d 155, 160 (2d Cir. 2018) (discussing "crime of violence" definition under U.S.S.G. §2L1.2), *petition for cert. filed* (U.S. Dec. 11, 2018) (No. 18-6972); *United States v. Vail-Bailon*, 868 F.3d 1293, 1296 (11th Cir. 2017) (en banc), *cert. denied*, ___ U.S. ___, 138 S.Ct. 2620 (2018); *United States v. Brown*, 765 F.3d 185, 188-89 (3d Cir. 2014).

This Court has repeatedly cautioned that under the categorical approach, a court must "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the] generic [federal definition], while ignoring the particular facts of the case." *Mathis*, 136 S.Ct. at 2248 (*citing Taylor*, 495 U.S. at 600-601, 110 S.Ct. 2143). "[I]f the statute sweeps more broadly than the generic definition" — that is, if some conduct would suffice for a conviction but would not satisfy the definition — then any "conviction under that law cannot count as a[] predicate, eve if the defendant actually committed the offense in its generic form." *Descamps*, 570 U.S. at 261, 133 S.Ct. at 2283; *see also Mathis*, ___ U.S. at ___, 136 S.Ct. at 2251 ("We have often held, and in no uncertain terms, that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense."). This is so even when the defendant's *conduct* leading to the underlying conviction would satisfy the generic federal definition. "[T]he mismatch of elements saves the defendant," *Mathis*, ___ U.S. at ___, 136 S.Ct. at 2251,

because "[t]he key ... is elements, not facts." *Descamps*, 570 U.S. at 261, 133 S.Ct. at 2283.

Where a statute does not set forth a straightforward single (or indivisible) set of elements to define a single crime, but has a more complicated structure that lists elements in the alternative, and thereby defines multiple crimes, a court may apply a "modified" categorical approach. "All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates 'several different ... crimes.'" *Descamps*, 570 U.S. at 263-264, 133 S.Ct. at 2285. Accordingly, the modified categorical approach is also driven by the elements of the offense under consideration. *See Descamps*, 570 U.S. at 263, 133 S.Ct. at 2285 ("It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's."). The modified categorical approach permits courts to look to "a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Mathis*, ___ U.S. at ___, 136 S.Ct. at 2249; *Shepard v. United States*, 544 U.S. 13, 26, 125 S.Ct. 1254, 1263 (2005).

In *Mathis*, this Court recognized the important distinction between "means" and "elements" and held that the modified categorical approach is available only when a statute lists alternative elements. *Mathis*, __ U.S. at ___, 136 S.Ct. at 2253. When the statute of conviction is alternatively phrased, the court must determine

whether the statute lists elements in the alternative and thus creates a separate crime associated with each alternative element, or whether the statute creates only a single crime and "spells out various factual ways" or "means," "of committing some component of the offense." *Mathis*, ___ U.S. at ___, 136 S.Ct. at 2249.

As this Court explained, "[e]lements are the constituent parts of a crime's legal definition – the things the 'prosecution must prove to sustain a conviction.'" *Mathis*, ___ U.S. at ___, 136 S.Ct. at 2248 (quotation omitted). A means "merely specifies diverse means of satisfying a single element of a single crime – or otherwise said, spells out various factual ways of committing some component of the offense – a jury need not find (or a defendant admit) any particular item[.]" *Mathis*, ___ U.S. at ___, 136 S.Ct. at 2249.

In this case, the prior statute of conviction, RICO, is a complex and broadly worded statute which criminalizes a broad swath of conduct. *See* 18 U.S.C. §§ 1962(c) and 1961(1). At its most arguably divisible level, the portion of RICO under which Mr. Williams was convicted makes it unlawful:

> For any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity …. [18 U.S.C. § 1962(c)]
>
> [and]
>
> "racketeering activity" means … the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States. [18 U.S.C. § 1961(1)(D)].

The "generic definition" to which this statute of conviction must be compared is that of "controlled substance offense" as defined by the United States Sentencing Guidelines, specifically:

> The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. §4B1.2(b).

As acknowledged by one of the judges on the Third Circuit panel, the statute under which Mr. Williams was convicted, 18 U.S.C. § 1962(c) with proof of racketeering activity as defined by 18 U.S.C. § 1961(1)(D), is overly broad. *See Williams,* 898 F.3d at 335 (Hardiman, J., concurring). This is so because the type of racketeering activity for which Mr. Williams was convicted includes conduct outside the Guidelines' career offender controlled substance offense definition: "A comparison of the two provisions makes clear that Williams's RICO offense encompasses conduct that § 4B1.2(b) does not cover, such as 'receiving, concealment, buying ... or otherwise dealing in a controlled substance.'" *Id.*

The chart below compares the two provisions with activities included in the definition of "racketeering activity" that are outside the career offender "controlled substance offense" definition in bold:

Definition of controlled substance offense in career offender guideline, U.S.S.G. §4B1.2(b)	Definition of "racketeering activity" in second clause of 18 U.S.C. § 1961(1)(D)
The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.	… the felonious manufacture, importation, **receiving**, **concealment**, **buying**, selling, or **otherwise dealing** in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States,

Judge Hardiman went on to hold, however, that the facts underlying Mr. Williams' conviction "plainly establish[] that [his] RICO conviction is for a controlled substance offense." *Id*. at 336. For this reason, Judge Hardiman posited that this Court would not apply "the approach the [Supreme] Court has articulated in cases like *Taylor*, *Descamps*, and *Mathis*." *Id*. At its core, Judge Hardiman creates an exception from this Court's precedent requiring application of the categorical approach when the prior offense is a RICO conviction and the record reveals predicate racketeering acts that establish a factual basis for the conviction that fits within the generic definition.

In reaching this this conclusion, Judge Hardiman noted the lack of consistency with which federal courts of appeals have adjudicated cases involving the interplay between RICO and the career offender guideline. *See Williams,* 898 F.3d at 335 (Hardiman, J., concurring) (*citing United States v. Scott*, 642 F.3d 791,

801 (9th Cir. 2011) (per curiam) (placing "the focus of the inquiry ... on the conduct for which [the defendant] was convicted" without mentioning the categorical approach or citing *Taylor); United States v. Winter*, 22 F.3d 15, 19–21 (1st Cir. 1994) (courts should "in fidelity to *Taylor* principles ... merely assess the nature and object of the racketeering activity as described in the indictment and fleshed out in the jury instructions); *United States v. Rosquete*, 208 F. App'x 737, 739–41 (11th Cir. 2006) (per curiam) (while professing fealty to *Taylor*, it looked to "the facts to which [the defendant] stipulated" in comparing the conduct underlying the defendant's prior racketeering conviction with the definition of a "controlled substance offense" under U.S.S.G. § 4B1.2(b)).

Judge Roth, who was one of the two-judge majority purporting to apply the modified categorical approach to conclude Mr. Williams' RICO conviction was a controlled substance offense, wrote separately to advocate for the exception espoused by Judge Hardiman: "[g]iven the unique structure of RICO, we are able to determine easily what predicate offenses led to the RICO conviction." *Williams*, 898 F.3d at 337 (Roth, J., concurring). Thus, she wrote "to explain this approach with the hope a future panel may see that there is no need, in the case of a RICO conviction, to engage in the catechism of the modified categorical approach." *Id.*

Further, the two-judge majority here, which professed to apply a modified categorical approach to determine the elements of the statute of conviction, instead looked to the factual basis for the specific type of racketeering activity admitted by Mr. Williams at his change of plea colloquy. The majority held that because

"Section 1962(c) is divisible, we may consult select portions of the record under the modified categorical approach to make that determination." *Williams*, 898 F.3d at 334. It then incorrectly concluded that "the superseding indictment and Williams's 1998 plea colloquy … reveal that Williams pleaded guilty to a RICO violation under Section 1962(c) and five underlying RICO predicate acts." *Id.*

At Mr. Williams' 1998 change of plea hearing, the district court asked the prosecutor to "place on the record the *elements of the offense to which Mr. Williams is pleading*, so that it will be clear to him, and on the record, that he does understand the nature of that offense." (App. 341) (emphasis added). The federal prosecutor identified the elements of the RICO offense as:

> No. 1, that there existed an enterprise affecting interstate commerce.
> No. 2, that the defendant was employed by or somehow associated with that enterprise.
> No. 3. That the defendant participated either directly or indirectly in the conduct of the enterprise's affairs.
> 4. that the defendant participated through a pattern of racketeering activity.
> Those are the elements, Your Honor.

(App. 341-42).

After identifying the elements of the count of conviction, the district court asked the prosecutor "What, in summary, would be the government's *evidence* to support this charge"? (App. 342) (emphasis added). The prosecutor summarized the government's evidence as including, *inter alia*, various sales of controlled substances. (App. 342-45).

Thus, Mr. Williams admitted engaging in racketeering activity that falls within the career offender controlled substance offense definition (violations of 21

U.S.C. § 841 & 846). As this court has recognized, "at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he 'may have good reason not to' – or even be precluded from doing so by the court." *Mathis*, ___ U.S. at ___, 136 S.Ct. at 2253. The *statute* under which Mr. Williams was *convicted* (18 U.S.C. § 1962(c) with racketeering activity as defined in 18 U.S.C. § 1961(1)(D)) criminalizes conduct that falls outside the career offender definition, specifically the felonious receiving, concealment, buying or otherwise dealing in a controlled substance. Mr. Williams' prior conviction under RICO is categorically not a controlled substance offense. The majority wrongly concluded that Mr. Williams was convicted of a controlled substance offense.

The precedential opinion issued in this case purports to create an exception to this Court's precedent as it looks beyond the elements of the offense of conviction to the means by which Mr. Williams committed the pattern of racketeering activity element of RICO, specifically, the "racketeering acts" for which he accepted responsibility. These racketeering acts are not elements of RICO in and of themselves, but are merely a means by which the government may establish RICO's "pattern of racketeering activity" element. The "pattern of racketeering activity" element, even at its most arguably divisible level, sweeps more broadly than the controlled substance offense definition.

Because the Third Circuit's ruling rejects this Court's precedent requiring adherence to a categorical approach, and because it leaves open the invitation for

judge-made exceptions to this precedent depending on the nature of the prior conviction, this Court should grant *certiorari*.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgement of the United States Court of Appeals for the Third Circuit entered in this case.

Dated: January 25, 2019

Respectfully submitted,

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CERTIFICATE OF MEMBERSHIP IN BAR

I, Kimberly R. Brunson, Assistant Federal Public Defender, hereby certify that I am a member of the Bar of the Supreme Court of the United States.

s/ *Kimberly R. Brunson*

KIMBERLY R. BRUNSON
Assistant Federal Public Defender

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

CARLTON WILLIAMS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

DECLARATION PURSUANT TO RULE 29.2
OF THE RULES OF THE SUPREME COURT

I hereby declare on penalty of perjury, as required by Supreme Court Rule 29, that the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari were sent to the Clerk of the United States Supreme Court in Washington, D.C., through the United States Postal Service by first-class mail, postage prepaid, on January 25, 2019, which is timely pursuant to the rules of this Court. The names and addresses of those served in this manner are as follows:

Scott S. Harris, Clerk
Supreme Court of the United States
1 First Street NE
Washington, DC 20543

This filing pursuant to Rule 29.2 was contemporaneous with the electronical filing.

Date: January 25, 2019

s/ *Kimberly R. Brunson*

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