

No. \_\_\_\_\_

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

Tyshawn Simmons — PETITIONER  
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SECOND CIRCUIT COURT OF APPEAL OF UNITED STATES  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Tyshawn Simmons  
(Your Name)

P.O. Box 5000 UNITED STATES PENITENTIARY YAZOO CITY  
(Address)

YAZOO CITY, MS 39194  
(City, State, Zip Code)

NA  
(Phone Number)

QUESTION(S) PRESENTED

- 1.) HOW IS "ENGAGING IN" DEFINED IN TITLE 21 U.S.C 848(e)(1)(A) UNDER PRONG THREE?
- 2.) WHAT NEXUS IS REQUIRED FOR 848(e)(1)(A) PRONG THREE?  
"engaging in" means "participating in" or "being involved in" a conspiracy.  
The nexus required for prong three is that the defendant must have a "substantial" role in the conspiracy.  
The nexus required for prong three is that the defendant must have a "substantial" role in the conspiracy.  
The nexus required for prong three is that the defendant must have a "substantial" role in the conspiracy.
- 3., DOES A GUILTY PLEA WAIVES DEFENDANT RIGHTS TO CHALLENGE A DEFECTIVE INDICTMENT THAT FAILS TO ALLEGE THE IMPLICIT ELEMENT EXPLICITLY, THAT OFFEND BOTH THE FIFTH AND SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

## LIST OF PARTIES

☐ All parties appear in the caption of the case on the cover page.

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

JUDGE RAGGI

JUDGE HALL

JUDGE LIVINGSTON

## TABLE OF CONTENTS

PAGE NO.

TABLES OF AUTHORITIES ..... II, III, IV

CASES ..... II, III

STATUTES ..... III, IV

OTHER AUTHORITIES ..... IV

JURISDICTIONAL STATEMENT ..... 1

ISSUES PRESENTED FOR REVIEW ..... 4, 9, 13

STATEMENT OF THE CASE ..... 1, 2, 3

STATEMENT OF FACTS ..... 3, 4

ARGUMENT ..... 4 - 15

CONCLUSION ..... 15

CERTIFICATE OF SERVICE ..... 16

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

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

**OPINIONS BELOW**

☒ For cases from **federal courts**:

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

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

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

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☐ For cases from **state courts**:

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

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

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

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was OCTOBER 26TH, 2018.

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

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: OCTOBER 26TH 2018, and a copy of the order denying rehearing appears at Appendix B.

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

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

☐ For cases from **state courts**:

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

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

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

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

UNITED STATES OF AMERICA,

PLAINTIFF,

CASE #

v.

TYSHAWN SIMMONS A.K.A. Ty,

PETITIONER

PETITIONER'S PRO-SE PETITION

FOR WRIT OF CERTIORARI

COMES NOW PETITIONER TYSHAWN SIMMONS, A.K.A. TY, PROCEEDING IN THE ABOVE ENTITLED CAUSE UNDER THE STATUS OF PRO-SE, HEREBY RESPECTFULLY PETITION THIS HONORABLE COURT TO GRANT WRIT OF CERTIORARI, TO MAKE A RULING ON TITLE 21 U.S.C 848(C)(1)(A) WHICH VIOLATES A DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS AS WELL DEFENDANT DUE PROCESS RIGHTS BECAUSE THE LANGUAGE IN THE STATUTE IS AMBIGUOUS AND IT FAILS TO ALLEGE A NEXUS BETWEEN THE DRUG CONSPIRACY AND MURDER.

IT HAS BEEN SAID BY THE SECOND CIRCUIT THAT THE 848(C)(1)(A) STATUTE CAN BE BROKEN INTO THREE PRONGS, IT ALSO HAS BEEN SAID BY THE SAME COURT THAT A "SUBSTANTIAL CONNECTION" IS AN ESSENTIAL ELEMENT THAT'S JUDICIALLY IMPLIED SO IT DOES NOT RAISE CONSTITUTIONAL CONCERNS. THE SECOND CIRCUIT HAS NOT MADE A RULING ON WHAT NEXUS IS REQUIRED TO BE CONVICTED UNDER PRONG THREE OF THIS STATUTE, INSTEAD IT ADOPTED THE NEXUS REQUIREMENT FROM PRONG ONE

CASES AND APPLYING THE TO PRONG THREE CASES, WHEN CONGRESS DEFINED "ENGAGING IN" IN PRONG ONE IN A MANNER THAT IS FACIALLY INAPPLICABLE OUTSIDE OF PRONG ONE.

WHEREFORE, IN LIGHT OF THESE ISSUES WHICH RAISE SERIOUS CONSTITUTIONAL CONCERNS I ASK THIS HONORABLE COURT TO GRANT CERTIORARI IN THE INTEREST OF JUSTICE.

A BRIEF AS TO WHY THIS HONORABLE COURT SHOULD GRANT CERTIORARI IS INCORPORATED HEREIN AFTER.

RESPECTFULLY SUBMITTED,

/s/ TS

TYSHAWN SIMMONS

### CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT A TRUE AND CORRECT ORIGINAL AND THE NECESSARY COPIES, WAS SERVED BY U.S. POSTAGE PREPAID AND ADDRESSED TO THE UNITED STATES SUPREME COURT 1 FIRST STREET, N.E. WASHINGTON, DC 20543.

DATED

(28 U.S.C § 1746)

/s/ TS

TYSHAWN SIMMONS

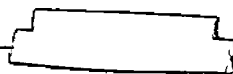
REG NO. 22221-055

P.O. BOX 5000

YAZOO CITY, MS 39194



# TABLE OF AUTHORITIES



## CASES

PAGE NO.

ATL - CLEANERS & DRYERS, INC. V. UNITED STATES, 286 U.S. 427, 433, 52 S. CT. 607, 76 L. ED. 1204 (1932)	5
BARBER V. THOMAS, 560 U.S. 474, 130 S. CT. 2499, 2506, 177 L. ED 2d 1 (2010)	5, 8
BASS, 404 U.S. AT 349	5, 6
CHAPMAN V. UNITED STATES, 500 U.S. 453, 467, 111 S. CT. 1919, 114 L. ED. 2d 524 (1991)	7
CLARK V. MARTINEZ, 543 U.S. 371, 381, 125 S. CT. 716, 160 L. ED 2d 734 (2005)	6
CLASS V. UNITED STATES, 197 L. ED 2d 175 U.S.	14
COHEN V. STATE OF VIRGINIA, 19 U.S. 264, 426, 5 L. ED 257 (1821)	11
CRESPO V. HOLDER, 631 F. 3d 130, 138 (4TH CIR. 2011)	4
GONZALES V. RAICH, 545 U.S. 1, 22, 125 S. CT. 2195, 162 L. ED. 2d 1 (2005)	9
HAMLING V. UNITED STATES, 418 U.S. 87, 117, 41 L. ED. 2d 590, 94 S. CT. 2887 (1974)	14
IN RE AIR CARGO SHIPPING SVCS. ANTITRUST LIT., 697 F. 3d 154, 159 (2d CIR. 2012)	12
IN RE TOTAL MGMT. LLC, 706 F. 3d 245, 251 (4TH CIR. 2013)	4, 5, 11
JEFFERS V. UNITED STATES, 432 U.S. 137, 97 S. CT. 2207, 53 L. ED 2d 168 (1977)	11
JONES V. UNITED STATES, 529 U.S. 848, 858, 120 S. CT. 1904, 146 L. ED. 2d 488 (1971)	5, 6
JONES V. UNITED STATES, 526 U.S. 227, 232, 143 L. ED. 2d 311, 119 S. CT. 1215 (1999)	14
NLRB V. WHEELING ELEC. CO., 444 F. 2d 783, 787 (4TH CIR. 1971)	4
POINT V. CHAPMAN, 362 F. 3d 227, 232 (4TH CIR. 2004)	5
ROBINSON V. SHELL OIL CO., 519 U.S. 337, 343-44, 117 S. CT. 843, 136 L. ED 2d 808 (1997)	12
RUSSELL V. UNITED STATES, 369 U.S. 749, 760-61, 8 L. ED 2d 240, 82 S. CT. 1038 (1962)	14
STERONE V. UNITED STATES, 361 U.S. 212, 80 S. CT., 270, 4 L. ED 2d 252 (1960)	13
UNITED STATES V. AGUILAR, 585 F. 3d 652, 657 (2d CIR. 2009)	6, 7, 13
UNITED STATES V. CARLL, 105 U.S. 611-12, 26 L. ED 1135 (1881)	13
UNITED STATES V. COOPER, 19 F. 3d 1154, 1165 (7TH CIR. 1994)	7

## TABLES OF AUTHORITIES CON'T

### CASES

#### PAGE NO.

<u>UNITED STATES V. DAVIS</u> , 269 F. App'x 318, 319-20 (4TH CIR. 2008) . . . . .	9
<u>UNITED STATES V. DESTINOR</u> , 525 F.3d 193, 202 (2d CIR. 2008) . . . . .	7, 9, 12
<u>UNITED STATES V. EALY</u> , 363 F.3d 292, 295-96 (4TH CIR. 2004) . . . . .	8
<u>UNITED STATES V. GONZALEZ</u> , 686 F.3d 122 (2d CIR. 2012) . . . . .	14
<u>UNITED STATES V. JONES</u> , 101 F.3d 1263, 1267-68 (8TH CIR. 1996) . . . . .	11
<u>UNITED STATES V. McCULLAH</u> , 76 F.3d 1087, 1103 (10TH CIR. 1996) . . . . .	8
<u>UNITED STATES V. MORRISON</u> , 529 U.S. 598, 617, 120 S. CT. 1740, 146 L. Ed 2d 658 (2000) . . . . .	10, 12
<u>UNITED STATES V. PIRRO</u> , 212 F.3d 86 (2d CIR. 2000) . . . . .	14
<u>UNITED STATES V. TIPTON</u> , 90 F.3d 861, 887 n. 13 (4TH CIR. 1996) . . . . .	7
<u>UNITED STATES V. UNIVERSAL C.I.T. CREDIT CORP.</u> , 344 U.S. 218, 221-22, 73 S. CT. 227, 97 L. Ed 260 (1952) . . . . .	6
<u>UNITED STATES V. WHITING</u> , 711 F. Supp. 476 (1ST. CIR. 1991) . . . . .	14
<u>UNITED STATES V. WILLIAMS</u> , 85 F. App'x 341, 344 (4TH CIR. 2004) . . . . .	9

### STATUTES

18 U.S.C. § 2	2
18 U.S.C. § 924(a)(1)(A) . . . . .	2
18 U.S.C. § 924(a)(1)(A)(iii) . . . . .	2
18 U.S.C. § 1512(a)(1)(C) . . . . .	2
18 U.S.C. § 1512(a)(3)(B) . . . . .	2

## TABLES OF AUTHORITIES CON'T

### STATUTES

#### PAGE NO.

18 U.S.C. § 1513(a)(1)(B)	2
18 U.S.C. § 1513(a)(2)(B)	2
21 U.S.C. § 846(a)(1), (b)(1)(A), (b)(1)(B), (b)(1)(C), (b)(1)(D)	1, 2, 8, 11
21 U.S.C. § 841(a)(1), (b)(1)(B)	2
21 U.S.C. § 841(a)(1), (b)(1)(D)	2
21 U.S.C. § 848(c)(1)(A)	2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13/14
21 U.S.C. § 848(c)(2)(A)-(B)	7
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1291	1
28 U.S.C. § 1746	16

### OTHER AUTHORITIES

FED. R. CRIM. P. RULE 7(C)	14
FED. R. CRIM. P. RULE 11	4

## JURISDICTIONAL STATEMENT

THE JURISDICTION OF THE UNITED STATES COURT OF APPEAL, IS  
FOUNDED UNDER 28 U.S.C § 1291. THE SUPREME COURT OF THE UNITED STATES HAS  
JURISDICTION PURSUANT TO 28 U.S.C § 1254(1). THIS PETITION FOLLOWS THE  
ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JULY  
16TH 2018 SEE (APPENDIX A.) AND OCTOBER 26TH 2018 SEE (APPENDIX B). THIS BRIEF  
IS RESPECTFULLY SUBMITTED ON BEHALF OF PETITIONER CONTESTING TO THE ORDERS  
OF THE SECOND CIRCUIT COURT OF APPEALS.

## STATEMENT OF CASE

ON OR ABOUT SEPTEMBER 9, 2014, A GRAND JURY SITTING IN  
THE WESTERN DISTRICT OF NEW YORK, RETURNED A TEN COUNT SUPER SEDING INDICTMENT,  
CHARGING THE PETITIONER UNDER THE FOLLOWING CHARGES: CONSPIRACY TO POSSES  
WITH INTENT TO DISTRIBUTE, 280 GRAMS OR MORE OF A MIXTURE AND SUBSTANCE  
CONTAINING A DETECTABLE AMOUNT OF COCAINE, A SCHEDULE II CONTROLLED SUBSTANCE;  
A QUANTITY OF HEROIN, A SCHEDULE I CONTROLLED SUBSTANCE; AND A QUANTITY OF  
MARIJUANA, A SCHEDULE I CONTROLLED SUBSTANCE, IN VIOLATION OF TITLE 21 U.S.C  
§ 841(a)(1), 841(b)(1)(A), 841(b)(1)(C), AND 841(b)(1)(D). (COUNT ONE).

THE PETITIONER WAS FURTHER CHARGED WITH, POSSESSION OF  
FIREARMS IN FURTHERANCE OF DRUG TRAFFICKING CRIME, IN VIOLATION OF TITLE

18 U.S.C. § 924(c)(1)(A) (COUNT TWO); RETALIATION AGAINST A WITNESS, IN VIOLATION OF TITLE 18 U.S.C. § 1513(a)(1)(B), 1513(a)(2)(B) (COUNT THREE); POSSESSION AND DISCHARGING A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE, IN VIOLATION OF 18 U.S.C. § 924(c)(1)(A)(iii) (COUNT FOUR); WITNESS INTIMIDATION, IN VIOLATION OF 18 U.S.C. § 1512(a)(1)(C), 1512(a)(3)(B) (COUNT FIVE); POSSESSION AND DISCHARGING A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE, IN VIOLATION OF 18 U.S.C. § 924(c)(1)(A)(iii) (COUNT SIX); POSSESSION OF COCAINE BASE WITH INTENT TO DISTRIBUTE, IN VIOLATION OF 21 U.S.C. § 841(a)(1), 841(b)(1)(B) (COUNT SEVEN); POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE, IN VIOLATION OF TITLE 21 U.S.C. § 841(a)(1), 841(b)(1)(D) AND 18 U.S.C. § 2 (COUNT EIGHT); MURDER WHILE ENGAGING IN A DRUG TRAFFICKING CRIME, IN VIOLATION OF 21 U.S.C. § 848(e)(1)(A) AND 18 U.S.C. § 2 (COUNT NINE); POSSESSION AND DISCHARGING A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE AND DRUG TRAFFICKING CRIME, IN VIOLATION OF 18 U.S.C. § 924(c)(1)(A)(iii) (COUNT TEN).

ON DECEMBER 2, 2016 THE PETITIONER PLED GUILTY, PURSUANT TO A WRITTEN PLEA AGREEMENT, TO COUNT 9 OF THE THIRD SUPERSEDING INDICTMENT. ON APRIL 4, 2017 THE PETITIONER APPEARED BEFORE THE HONORABLE CHARLES J. STRAGUSA, FOR THE PURPOSE OF IMPOSITION OF SENTENCING THE PETITIONER TO A TERM OF 330 MONTHS, A NOTICE OF APPEAL WAS FILED ON APRIL 7, 2017, HOWEVER, ON AUGUST 17, 2018, COUNSEL MOVED AND FILED AN ANDERS BRIEF ALLEGING THAT NO NON-FRIVOLOUS ISSUES COULD BE PURSUED ON APPEAL. ON JULY 16, 2018 A PANEL FROM THE SECOND CIRCUIT COURT OF APPEAL ISSUED IT ORDER GRANTING COUNSEL RANDOLPH VOKEL'S PERMISSION TO WITHDRAW AS COUNSEL PURSUANT TO ANDERS V. CALIFORNIA, 386 U.S. 738 (1967) AND GRANTED THE GOVERNMENT'S MOTION TO DISMISS PETITIONER'S APPEAL BASED ON THE WAIVER OF APPELLATE RIGHT AND GRANTED GOVERNMENT MOTION FOR SUMMARY AFFIRMANCE.

ON OR ABOUT AUGUST 7, 2018 PETITIONER FILED MOTION ASKING THE COURT FOR A REHEARING, THE COURT GRANTED PETITIONER PERMISSION TO FILE A PRO-SE MOTION FOR REHEARING, AND ISSUED AN ORDER ON OCTOBER 26, 2018 DENYING THE MOTION.

### STATEMENT OF FACTS

ON DECEMBER 2, 2016, A PLEA HEARING WAS CONDUCTED BEFORE HONORABLE CHARLES J. SIRAGUSA. MOREOVER, DURING THIS ALLEGED PROCEEDING COUNSEL DONALD THOMPSON, ADVISED THE DISTRICT COURT THAT THE PLEA AGREEMENT INCLUDED, AMONG ITS ESSENTIAL ELEMENTS THAT THE KILLING OCCURED BECAUSE OF AND AS PART OF PETITIONER "ENGAGING IN" OR "WORKING IN FURTHERANCE OF" THE DRUG DISTRIBUTION CONSPIRACY. HOWEVER, THE INDICTMENT CHARGED, IN CONFIRMITY WITH THE STATUTORY, THAT THE KILLING OCCURED WHILE PETITIONER WAS "ENGAGING IN" A CONSPIRACY TO DISTRIBUTE COCAINE BASE, ADDITIONALLY, PETITIONER WAS PLEADING TO THE OFFENSE AS ALLEGED IN THE INDICTMENT AS "ENGAGING IN".

FURTHERMORE, DURING THIS ALLEGED PROCEEDING AN EXTENDED DISCUSSION ENSUED REGARDING THE NECESSARY ELEMENTS. THE EXCHANGE FOCUSED ON PARAGRAPHS (D) AND (E) UNDER THE WRITTEN PLEA AGREEMENT SEE (EXHIBIT A), AS IT WAS THE PETITIONERS POSITION THAT WHILE HE WAS "ENGAGING IN" THE CHARGED CONSPIRACY TO DISTRIBUTE 280 GRAMS OF COCAINE BASE, THERE WAS NO SUBSTANTIVE NEXUS ALLEGED IN THE INDICTMENT TO SUPPORT THE GOVERNMENT'S THEORY AS THE PURPOSE OR MOTIVE OF WHY THE VICTIM WAS KILLED. SEE (EXHIBIT B) PETITIONER PLEA TRANSCRIPT. THE PETITIONER ALSO CONTESTED TO THE GOVERNMENT THEORY ON WHY THE VICTIM WAS MURDERED AND NONE OF THE REASONS THE PETITIONER STATED SATIFIES THE ELEMENT OF THE 848(c)(1)(A) STATUTE SEE (EXHIBIT C) PLEA TRANSCRIPT AND (EXHIBIT D) PLEA TRANSCRIPT.

THE JUDGE SHOULD HAVE NEVER ACCEPTED THE PLEA ONCE THE PETITIONER CONTESTED TO THE GOVERNMENT'S THEORY. THE JUDGE VIOLATED THE FED. R. CRIM. P. RULE 11 BECAUSE THE PLEA WAS NOT KNOWING, VOLUNTARILY AND INTELLIGENTLY MADE.

FURTHERMORE, IN REGARDS TO THE WAIVER PROVISION CONTAINED WITHIN THE WRITTEN PLEA AGREEMENT CLEARLY DOES NOT PREVENT ANY CHALLENGES BEING OFFERED TOWARDS THE CONVICTION AS TO COUNT NINE IT WAS SETTLED IN A RECENT SUPREME COURT CASE THAT A GUILTY PLEA DOES NOT PREVENT A DEFENDANT FROM CHALLENGING THE CONSTITUTIONALITY OF THE STATUTE UNDER WHICH HE IS CHARGED.

### ARGUMENT

#### I. HOW IS "ENGAGING IN" DEFINED IN 21 U.S.C. § 848(c)(1)(A) UNDER PRONG THREE OF THE STATUTE?

THE PETITIONER ASK THIS HONORABLE TO ANSWER THE ABOVE STATED QUESTION ON HOW IS "ENGAGING IN" DEFINED IN THE 848(c)(1)(A) STATUTE UNDER THE THIRD PRONG. IN CONSTRUING STATUTES, THE COURT PRIMARY GOAL IS TO GIVE EFFECT TO CONGRESSIONAL INTENT. NLRB V. WHEELING ELEC. CO., 444 F.2d 783, 787 (4TH CIR. 1971) IN ASCERTAINING CONGRESSIONAL INTENT, THE COURTS MUST ALWAYS BEGIN WITH THE STATUTE'S PLAIN LANGUAGE, "GIVING THE TERMS THEIR ORDINARY, CONTEMPORARY, COMMON MEANING ABSENT AN INDICATION CONGRESS INTENDED THE TERMS TO BEAR SOME DIFFERENT IMPORT". CRESPO V. HOLDER, 631 F.3d 130, 133 (4TH CIR. 2011) (INTERNAL QUOTATION MARKS OMITTED). IN SO DOING "THE COURTS NOT ONLY LOOK TO THE LANGUAGE ITSELF, BUT ALSO THE SPECIFIC CONTEXT IN WHICH THAT LANGUAGE IS USED, AND THE BROADER CONTEXT OF THE STATUTE AS A WHOLE" IN RE TOTAL REALTY MGMT., LLC, 706 F.3d 245, 251 (4TH CIR. 2013).

PRINCIPLES OF STATUTORY CONSTRUCTION REQUIRE THAT WHEN IDENTICAL TERMS OR PHRASES ARE USED IN DIFFERENT PARTS OF THE SAME STATUTE, THE COURT SEEK TO INTERPRET THE TERMS OR PHRASES AS HAVING THE SAME MEANING. Id. HOWEVER, THIS PRESUMPTION OF CONSISTENT USAGE "YIELDS READILY TO INDICATIONS THAT THE SAME PHRASE USED IN DIFFERENT PARTS OF THE SAME STATUTE MEANS DIFFERENT THINGS...." BARBERY THOMAS, 560 U.S. 474, 130 S. CT. 2499, 2506, 177 L. Ed. 2d 1 (2010). INDEED, THE SUPREME COURT LONG HAS RECOGNIZED THAT "IT IS NOT UNUSUAL FOR THE SAME WORD TO BE USED WITH DIFFERENT MEANINGS IN THE SAME ACT, AND THERE IS NO RULE OF STATUTORY CONSTRUCTION WHICH PRECLUDES THE COURTS FROM GIVING TO THE WORD MEANING WHICH THE LEGISLATURE INTENDED IT SHOULD HAVE IN EACH INSTANCE." ATL. CLEANERS & DRESS, INC. V. UNITED STATES, 286 U.S. 427, 433, 52 S. CT. 607, 76 L. Ed. 1204 (1932)

SETTLED INTERPRETATIVE PRINCIPLES ALSO REQUIRE THAT THE COURTS CONSTRUCT, TO THE EXTENT POSSIBLE, ALL PARTS OF A STATUTE TO HAVE MEANING. TOTAL REALTY MGMT., 706 F.3d AT 251. CONSEQUENTLY, THE COURTS MUST "REJECT CONSTRUCTIONS THAT RENDER A TERM REDUNDANT" PSTNET V. CHAPMAN, 362 F.3d 227, 232 (4TH CIR. 2004). WHEN A FEDERAL STATUTE REGULATES "TRADITIONALLY LOCAL CRIMINAL CONDUCT," COURTS MUST CONSTRUCT THE FEDERAL STATUTE NARROWLY TO AVOID UNDULY INFRINGING ON THE POLICE POWER RESERVED TO THE STATES. JONES V. UNITED STATES, 529 U.S. 848, 858, 120 S. CT. 1904, 146 L. Ed. 2d 488 (1971). THEREFORE, "UNLESS CONGRESS CONVEYS ITS PURPOSE CLEARLY, IT WILL NOT BE DEEMED TO HAVE SIGNIFICANTLY CHANGED THE FEDERAL-STATE BALANCE" IN THE PROSECUTION OF CRIMES." Id. (QUOTING BASS, 404 U.S. AT 349). IMPORTANTLY, THIS "CLEAR STATEMENT" REQUIREMENT IS NOT GROUNDED IN THE COMMERCE CLAUSE, WHICH ESTABLISHES THE OUTER LIMIT OF CONGRESS'S AUTHORITY TO CRIMINALIZE CONDUCT. RATHER, IT IS GROUNDED IN THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE, THE PRINCIPLE THAT WHEN "CHOOSING BETWEEN COMPETING PLAUSIBLE INTERPRETATIONS OF A STATUTORY TEXT," COURTS SHOULD "PRESUME THAT CONGRESS DID NOT INTEND THE ALTERNATIVE WHICH RAISES



SERIOUS CONSTITUTIONAL DOUBTS." CLARK V. MARTINEZ, 543 U.S. 371, 381, 125 S. CT. 716, 160 L. ED. 2D 734 (2005); JONES, 529 U.S. AT 858 (NOTING THAT THE CLEAR STATEMENT REQUIREMENT IS BASED IN THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE). IN THE CONTEXT OF FEDERAL CRIMINAL LAWS, THIS CLEAR STATEMENT REQUIREMENT ENSURES THAT FEDERAL STATUTES DO NOT CREATE SERIOUS FEDERALISM CONCERNS BY UNNECESSARILY BEING CONSTRUED IN A WAY THAT UNDULY ENCROACHES ON STATES' POWERS. BASS, 404 U.S. AT 349-50. CONSEQUENTLY, ABSENT A CLEAR INDICATION THAT CONGRESS INTENDED TO CRIMINALIZE CERTAIN CONDUCT, COURTS SHOULD NOT READ A STATUTE AS EXTENDING TO THE FULL LIMIT OF CONGRESS'S POWER UNDER THE COMMERCE CLAUSE. Id.; SEE ALSO JOHN S. BAKER, JR., JURISDICTIONAL AND SEPERATION OF POWERS STRATEGIES TO LIMIT THE EXPANSION OF FEDERAL CRIMES, 54 AM. U.L. REV. 545, 564-65 (2005) (NOTING THAT TRADITIONALLY "THE GREAT COMMERCE CLAUSE CASES HAD NOTHING TO DO WITH CRIME" BECAUSE "THE SUPREME COURT OFTEN SEPERATED CRIMINAL CASES BASED ON THE COMMERCE CLAUSE BY USE OF NARROW STATUTORY CONSTRUCTION IN ORDER TO AVOID THE CONSTITUTIONAL ISSUE").

THE CLEAR STATEMENT RULE ALSO IS GROUNDED IN THE RULE OF LENITY, WHICH REQUIRES THAT "WHEN A CHOICE HAS TO BE MADE BETWEEN TWO READINGS OF WHAT CONDUCT CONGRESS HAS MADE A CRIME, IT IS APPROPRIATE, BEFORE THE COURT CHOOSE THE HARSHER ALTERNATIVE, TO REQUIRE THAT CONGRESS SHOULD HAVE SPOKEN IN A LANGUAGE THAT IS CLEAR AND DEFINITE". JONES, 529 U.S. AT 858 (QUOTING UNITED STATES V. UNIVERSAL C.I.T. CREDIT CORP., 344 U.S. 218, 221-22, 73 S. CT. 227, 97 L. ED. 260 (1952)).

THESE INTERPRETATIVE PRINCIPLES GUIDES US TO THE QUESTION OF HOW IS "ENGAGING IN" DEFINED UNDER PRONG THREE. AS ALWAYS THE COURT SHOULD BEGIN WITH SECTION 848(e)(1)(A)'S PLAIN LANGUAGE, WHICH INFORMS THE COURT THAT THE STATUTE CAN BE BROKEN UP INTO THREE PRONGS. UNITED STATES V. ABAILAR, 585 F.3d 652, 657 (2d CIR. 2019).

THE FIRST PRONG COVERS INDIVIDUALS "ENGAGING IN" ... A CCE" § 848(e)(1)(A).

THE STATUTE DEFINES BEING "ENGAGED IN" A CCE" AS "OCCUPYING A POSITION OF ORGANIZER, A SUPERVISORY POSITION, OR ANY OTHER POSITION OF MANAGEMENT" AND OBTAINING SUBSTANTIAL INCOME OR RESOURCES" FROM THE CCE, § 848(c)(2)(A)-(B). THUS, UNDER THE PLAIN LANGUAGE OF THE STATUTE, A "MANAGER" OR "SUPERVISOR" OF A CCE - ESSENTIALLY A "KINGPIN," CHAPMAN V. UNITED STATES, 500 U.S. 453, 467, 111 S. CT. 1919, 114 L. ED. 2d 524 (1991) - IS SUBJECT TO FEDERAL PROSECUTION FOR ANY MURDER HE COMMITTS WHILE IN THAT POSITION REGARDLESS OF HOW CLOSELY IT IS RELATED TO THE CCE.

CONCERNED THAT CCE - KINGPINS WOULD BE SUBJECT TO UNRESTRICTED FEDERAL MURDER LIABILITY REGARDLESS OF HOW CLOSELY CONNECTED A MURDER WAS TO THEIR DRUG ENTERPRISE, AND CONSEQUENTLY, THAT THE STATUTE WOULD RUN AFOUL OF THE COMMERCE CLAUSE, FEDERAL COURTS HAVE READ IN A REQUIREMENT THAT THERE BE A "SUBSTANTIVE CONNECTION" BETWEEN THE MURDER AND THE CCE TO FALL WITHIN THE SCOPE OF THE FIRST PRONG OF SECTION 848(c)(1)(A). SEE, E.G. UNITED STATES V. DESANDOR, 525 F.3d 193 202 (2d. CIR. 2008); UNITED STATES V. TIPTON, 90 F.3d 861, 887 n.13 (4TH CIR. 1996). IMPORTANTLY, THE "SUBSTANTIVE CONNECTION" REQUIREMENT DOES NOT DERIVE FROM AN INTERPRETATION OF THE STATUTORY "ENGAGING IN" LANGUAGE, BUT RATHER HAS BEEN INFERRED BY COURTS TO AVOID CONSTITUTIONAL CONCERNS. AGUILAR, 585 F.3d AT 661 (CHARACTERIZING THE "SUBSTANTIAL CONNECTION" ELEMENT AS "JUDICIALLY IMPLIED"); SEE ALSO TIPTON, 90 F.3d AT 887 n.13 (NOTING THAT THE "SUBSTANTIAL CONNECTION" ELEMENT IS "IMPLIED BY COURTS"). SECTION 848(c)(1)(A)'S SECOND PRONG ENCOMPASSES INDIVIDUALS WHO ARE NOT "KINGPINS" BUT WHO COMMIT MURDERS WHILE "WORKING IN FURTHERANCE OF" A CCE. THUS UNLIKE KINGPINS, MERE PARTICIPATION IN THE CCE IS INSUFFICIENT TO SUPPORT FEDERAL JURISDICTION FOR MURDERS COMMITTED BY A CCE UNDERLING - THE MURDER MUST BE MADE WHILE "WORKING IN FURTHERANCE OF" THE CCE. FOR PURPOSE OF SECTION 848(c)(1)(A), A DEFENDANT IS "WORKING IN FURTHERANCE OF A CCE" IF, AT THE TIME OF THE KILLING, HE IS "WORKING TO PROMOTE OR ADVANCE THE INTEREST OF A CCE". UNITED STATES V. COOPER, 19 F.3d 1154, 1165 (7TH CIR. 1994).

THIS PRONG COVERS PRIMARILY CCE UNDERLINGS, SEE, E.G., UNITED STATES V. EALY, 363 F.3d 292, 295-96 (4TH CIR. 2004), BUT ALSO ENCOMPASSES SITUATIONS IN WHICH A CCE HIRES "HENCHMEN ... WHO COMMIT MURDER TO FURTHER THE DRUG ENTERPRISE IN WHICH THEY MAY NOT OTHERWISE BE INTIMATELY INVOLVED." UNITED STATES V. McCULLAH, 76 F.3d 1087, 1103 (10TH CIR. 1996).

THE THIRD PRONG UNDER WHICH THE PETITIONER PLEAD GUILTY TOO, COVERS INDIVIDUALS "ENGAGING IN" DRUG MANUFACTURING, DISTRIBUTION, OR IMPORTATION CRIMES PUNISHABLE UNDER SECTION 841(b)(1)(A). THE THIRD PRONG POTENTIALLY IMPLICATES A FAR BROADER SWATH OF DEFENDANTS THAN EITHER OF THE FIRST TWO PRONGS BECAUSE IT ENCOMPASSES DRUG DISTRIBUTION ORGANIZATIONS COMPOSED OF LESS THAN FIVE PERSONS - EVEN SINGLE DISTRIBUTORS FALL UNDER ITS LANGUAGE - AND IT DOES NOT REQUIRE THAT THE DEFENDANT HAVE COMMITTED A CONTINUING SERIES OF VIOLATIONS - A SINGLE VIOLATION MAY SUFFICE.

ALTHOUGH LIKE THE FIRST PRONG, THE THIRD PRONG REQUIRES THE ACTUS REUS "ENGAGING IN," UNLIKE THE FIRST PRONG, THE STATUTE DOES NOT EXPLICITLY DEFINE WHAT IT MEANS TO BE "ENGAGING IN" AN OFFENSE PUNISHABLE UNDER SECTION 841(b)(1)(A). SEE § 848. CONGRESS'S DECISION TO EXPLICITLY DEFINE "ENGAGING IN" IN THE FIRST PRONG IN A MANNER THAT IS FACIALLY INAPPLICABLE OUTSIDE OF THE CONTEXT OF CCE'S INDICATES THAT CONGRESS DID NOT INTEND FOR "ENGAGING IN" TO BE INTERPRETED THE SAME WAY IN THE THIRD PRONG. BARBER, 130 S. CT. AT 2506. THUS THE COURT CANNOT TAKE THEIR USUAL APPROACH OF CONSISTENTLY DEFINING "ENGAGING IN" ACROSS BOTH PRONGS. *Id.*

BECAUSE "ENGAGING IN" CANNOT BE INTERPRETED IDENTICALLY ACROSS THE FIRST AND THIRD PRONGS, THE KEY QUESTION THIS COURT IS TASKED WITH ANSWERING IS HOW TO INTERPRET "ENGAGING IN" AS IT IS USED IN THE THIRD PRONG. CLEARLY, ANY INDIVIDUAL COMMITTING A SUBSTANTIVE DRUG OFFENSE AT THE TIME OF A MURDER WOULD BE "ENGAGING IN" THE DRUG OFFENSE

FOR THE PURPOSE OF THE STATUTE. SEE, E.G., UNITED STATES V. DAVIS, 269 F. APP'X 318, 319-20 (4TH CIR. 2008) (REVIEWING CONVICTION UNDER PRONG TWO OF SECTION 848(e)(1)(A) WHEN VICTIM WAS KILLED IN THE COURSE OF AN UNSUCCESSFUL COCAINE EXCHANGE); UNITED STATES V. WILLIAMS, 85 F. APP'X 341, 344 (4TH CIR. 2004) (AFFIRMING PRONG THREE CONVICTION FOR MURDER COMMITTED DURING FAILED CRACK PURCHASE).

THE MORE DIFFICULT QUESTION INVOLVES SITUATIONS LIKE WHICH THE PETITIONER IS ALLEGED TO HAVE COMMITTED INVOLVING DRUG CONSPIRACIES. AS IS THE CASE WITH THE FIRST PRONG, IN THE CASE OF CONSPIRACIES, THE LANGUAGE OF THE STATUTE COULD BE READ AS REQUIRING A TEMPORAL CONNECTION BETWEEN THE MURDER AND DRUG CONSPIRACY I.E. ANY MURDER COMMITTED DURING THE COURSE OF THE CONSPIRACY, REGARDLESS OF THE RELATIONSHIP TO THE CONSPIRACY, WOULD BE SUBJECT TO FEDERAL JURISDICTION. SUCH AN OUTCOME WOULD RAISE THE SAME COMMERCE CLAUSE CONCERNS AS THE FIRST PRONG.

## II. WHAT NEXUS IS REQUIRED FOR PRONG THREE UNDER SECTION 848(e)(1)(A)

BEING THAT CONGRESS DEFINED "ENGAGING IN" IN PRONG ONE THAT IS INAPPLICABLE TO PRONG THREE, THE SUPREME COURT IS TASKED WITH ANSWERING THE QUESTION WHAT IS THE NEXUS REQUIREMENT FOR PRONG THREE UNDER SECTION 848(e)(1)(A).

INTERPRETING THE THIRD PRONG IDENTICALLY TO THE FIRST PRONG, THE SECOND CIRCUIT CONCLUDES THAT CONGRESS' USE OF THE TERM "ENGAGING IN" IN THE THIRD PRONG IMPOSES NO ADDITIONAL NEXUS REQUIREMENT. DESINOR, 525 F.3d AT 202. IN SO HOLDING, THE SECOND CIRCUIT EFFECTIVELY CONCLUDES THAT CONGRESS INTENDED FOR THE THIRD PRONG TO REACH THE FULL

SCOPE OF FEDERAL AUTHORITY UNDER THE COMMERCE CLAUSE. THIS CONCLUSION IS CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE, WELL ESTABLISHED INTERPRETIVE PRINCIPALS AND COMPELLING FEDERALISM CONCERNS.

THE REQUISITE RELATIONSHIP BETWEEN A DRUG OFFENSE AND A MURDER IMPOSED BY THE TERM "ENGAGING IN" IN THE THIRD PRONG IS BEST UNDERSTOOD BY COMPARING IT TO THE NEXUS REQUIREMENT FOR THE SECOND PRONG, INTUITIVELY "ENGAGING IN" REQUIRES A CLOSER CONNECTION BETWEEN THE MURDER AND DRUG OFFENSE THAN THE "IN FURTHERANCE. THIS INTUITION IS BORNE OUT IN THE CONTEMPORARY DEFINITIONS OF THE TWO TERMS. "ENGAGING IN" IS COMMONLY DEFINED AS TO INVOLVE ONESELF OR BECOME OCCUPIED; PARTICIPATE. THE AMERICAN HERITAGE DICTIONARY 591 (5TH ED. 2011); SEE ALSO BLACK'S LAW DICTIONARY 608 (9TH ED. 2009) (DEFINING "ENGAGING IN" AS TO EMPLOY OR INVOLVE ONESELF; TO TAKE PART IN"). BY COMPARISON, "FURTHER" IS DEFINED AS TO HELP THE PROGRESS OF; PROMOTE" AMERICAN HERITAGE DICTIONARY 713. "PARTICIPATION" CONNOTES A MORE ACTIVE, CLOSER RELATIONSHIP THAN "PROMOTION". BY THE THIRD PRONG DEALING WITH THE LEAST CULPABLE DRUG OFFENDERS AND BASED ON THE TREND FROM THE FIRST TWO PRONGS, SHOULD REQUIRE THE CLOSEST CONNECTION BETWEEN THE MURDER AND DRUG CONSPIRACY, BECAUSE CONGRESS GENERALLY LACK AUTHORITY TO "REGULATE NONECONOMIC VIOLENT CRIMINAL CONDUCT"; UNITED STATES V. MORRISON, 529 U.S. 598, 617, 120 S. CT. 1740, 146 L. ED. 2D 658 (2000). CONGRESSIONAL POWER TO PUNISH MURDER UNDER 848(C)(4) IS PREMISED ON A DEFENDANT'S CULPABILITY FOR AN ASSOCIATED DRUG OFFENSE, WHICH CONGRESS CAN REGULATE UNDER THE COMMERCE CLAUSE, GONZALES V. RACH, 545 U.S. 1, 22, 125 S. CT. 2195, 162 L. ED. 2D 1 (2005). CONSEQUENTLY CONGRESS'S AUTHORITY TO PUNISH DRUG-RELATED MURDERS STEM FROM THE MURDERS IMPACT ON THE INTERSTATE DRUG TRADE, NOT THE VIOLENT CONDUCT ITSELF.

ADDITIONALLY, WHEN CONSIDERED IN THE CONTEXT OF THE STATUTE

THE SECOND CIRCUIT CONSTRUCTION OF THE NEXUS REQUIREMENT FOR THE THIRD PRONG VIOLATES THE PRECEPT THAT THE COURTS MUST SEEK TO GIVE ELEMENTS OF A STATUTE MEANING. BY DEFINITION ALL CCE'S CONSTITUTE CONSPIRACIES PUNISHABLE UNDER 841(b)(1)(A), BECAUSE THEY INVOLVE INDIVIDUALS THAT COMMIT A SERIES OF FEDERAL DRUG LAW VIOLATIONS. SEE, E.G. UNITED STATES V. JONES, 101 F.3d 1263, 1267-68 (8TH CIR. 1996) (FINDING INDIVIDUALS PARTICIPATING IN A CCE WAS ALSO ENGAGED IN CONSPIRACY TO DISTRIBUTE DRUGS).

INDEED THE SUPREME COURT HAS HELD THAT A CONSPIRACY UNDER SECTION 841(b)(1)(A) IS A LESS INCLUDED OFFENSE OF A CCE. JEFFERS V. UNITED STATES, 432 U.S. 137, 97 S. CT. 2207, 53 L. ED. 2d 168 (1977). BY INTERPRETING THE THIRD PRONG AS MERELY REQUIRING A "SUBSTANTIVE CONNECTION" THE SECOND CIRCUIT RENDERS THE FIRST PRONG MEANINGLESS. RULES OF STATUTORY CONSTRUCTION REQUIRES THAT THE COURTS REJECT SUCH AN INTERPRETATION. TOTAL REALTY MGMT., 706 F.3d AT 251.

FINALLY, INTERPRETING THE THIRD PRONG OF SECTION 848(e)(1)(A) NARROWLY AND THUS REQUIRING A CLOSER CONNECTION THAN THE FIRST TWO PRONG, AVOIDS UNDUY INFRINGING ON POLICE POWERS RESERVED TO THE STATES. INDEED, THE CONSTITUTION EXPLICITLY AUTHORIZES CONGRESS TO PUNISH CRIMES IN ONLY LIMITED CIRCUMSTANCES. SEE U.S. CONST. ART. I § 8, CLS. 7 AND 11, ART. III, § 3. THOUGH CONGRESS HAS AUTHORITY TO ESTABLISH ADDITIONAL FEDERAL CRIMES UNDER THE COMMERCE CLAUSE, U.S. CONST. ART. I, § 8 CL. 3, IT HAS BEEN LONG RECOGNIZED THAT THE PUNISHMENT OF VIOLENT CRIMES AND MURDER IN PARTICULAR LIES AT THE CORE OF STATES' POLICE POWER. COHEN V. STATE OF VIRGINIA, 19 U.S. 264, 426, S. L. ED. 257 (1821) (MARSHALL, C. J.) (NOTING THAT CONGRESS HAS "NO GENERAL RIGHT TO PUNISH MURDER COMMITTED WITHIN ANY OF THE STATES"); THE FEDERALIST NO. 17, (ALEXANDER HAMILTON) (NOTING THE CONSTITUTION RESERVED TO THE STATES THE ADMINISTRATION OF CRIMINAL AND CIVIL JUSTICE").

THE SUPREME COURT REAFFIRMED THIS PRINCIPLE: "WE CAN THINK OF NO BETTER EXAMPLE OF THE POLICE POWER, WHICH THE FOUNDERS DENIED THE NATIONAL GOVERNMENT AND REPOSED IN THE STATES, THAN THE SUPPRESSION OF VIOLENT CRIME..."

UNITED STATES V. MORRISON, 529 U.S. 598, 618, 120 S. CT. 1740, 146 L. ED. 2D 658 (2000).

FURTHERMORE, THE REASONS CITED IN THE SECOND CIRCUIT FOR ITS EXPANSIVE CONSTRUCTION OF THE THIRD PRONG ARE UNPERSUASIVE. THE SECOND CIRCUIT STATES THAT THE PLAIN LANGUAGE OF THE STATUTE "UNAMBIGUOUSLY STATES THE 'ONE ... WHO INTENTIONALLY KILLS SOMEONE WHILE 'ENGAGED IN' A DRUG CONSPIRACY CAN BE CHARGE UNDER 848(e)(1)(A)..." THE MEANING OF "ENGAGING IN" IN PRONG THREE MAKES THE STATUTE AMBIGUOUS, BECAUSE CONGRESS EXPLICITLY DEFINED "ENGAGED IN" IN THE [ ] FIRST PRONG THAT IS [ ] INAPPLICABLE OUTSIDE THE CONTEXT OF CCE'S, WHILE LEAVING "ENGAGING IN" THE THIRD PRONG UNDEFINED - RENDERS IT AMBIGUOUS, BECAUSE IT REQUIRES THAT THE TERM TO BE INTERPRETED TWO DIFFERENT WAYS. SEE IN RE AIR CARGO SHIPPING SVCS. ANTI TRUST LIT., 697 F.3d 154, 159 (2d CIR. 2012) (EXPLAINING THAT ONCE IT HAS BEEN ESTABLISHED THAT A STATUTORY DEFINED TERM HAS DIFFERENT MEANINGS IN DIFFERENT SECTIONS THE TERM STANDING ALONE IS NECESSARILY AND EACH SECTION MUST BE ANALYZED TO DETERMINE WHETHER THE CONTEXT GIVES THE TERM A FURTHER MEANING THAT WOULD RESOLVE THE ISSUE IN DISPUTE") (QUOTATION MARKS OMITTED); SEE ALSO ROBINSON V. SHELL OIL CO., 519 U.S. 337 343-44, 117 S. CT. 843, 136 L. ED. 2D 808 (1997).

FINALLY, THE SECOND CIRCUIT EARLIER DECISION IN AGUILAR IN WHICH IT RELIES ON WAS LEGALLY FLAWED. THE "SUBSTANTIVE CONNECTION" REQUIREMENT IN AGUILAR IS CONTROLLED BY A EARLIER DECISION IN DESIMOR, IN WHICH THE COURTS ADOPTED THE "SUBSTANTIVE CONNECTION" TEST FROM AN EIGHTH CIRCUIT PRONG ONE CASE AND MADE NO ATTEMPT TO INTERPRET "ENGAGING IN" IN THE THIRD PRONG INDEPENDENTLY. UNITED STATES V. DESIMOR, 525 F.3d 193, 202 (2d CIR. 2008) (CITING) JONES 101 F.3d AT 1267.

IN SUM, IN CASES CHARGED UNDER PRONG IN WHICH THE GOVERNMENT PROSECUTES A DEFENDANT UNDER THE THIRD PRONG OF 848(X)(A), ALLEGING THAT A MURDER OCCURED WHILE A DEFENDANT WAS "ENGAGING IN" A DRUG CONSPIRACY THAT VIOLATE FEDERAL DRUG LAWS, THE GOVERNMENT SHOULD BE REQUIRED TO SHOW THAT THE DEFENDANT PREDOMINANT AND PRIMARY PURPOSE IN COMMITTING THE MURDER WAS TO PROMOTE, ADVANCE OR FURTHERED THE DRUG CONSPIRACY.

### III. DOES A GUILTY PLEA WAIVE DEFENDANT RIGHT TO APPEAL AN DEFECTIVE INDICTMENT THAT VIOLATE BOTH THE FIFTH AND SIXTH AMENDMENT.

COUNT NINE OF THE THIRD SUPERSEDING INDICTMENT IS DEFECTIVE BECAUSE THE 848(X)(A) STATUTE DOES NOT ALLEGE ALL THE ESSENTIAL ELEMENTS, NAMINGLY THE NEXUS BETWEEN THE ALLEGED DRUG CONSPIRACY AND THE MURDER. IN AGUILAR 585 F.3d AT 658, THE SECOND CIRCUIT ACKNOWLEDGE THAT A NEXUS IS AN ESSENTIAL ELEMENT OF THE 848(X)(A) STATUTE, BUT SAYS IT'S IMPLIED BY THE COURTS SO IT DOES NOT RAISE CONSTITUTIONAL CONCERNS. BY THE COURTS IMPLYING THE ESSENTIAL ELEMENT IT UPSETS THE VERY DECISION THAT THIS HONORABLE COURT MADE IN STIRONE V. UNITED STATES, 361 U.S. 212, 80 S. CT. 270, 4 L. ED. 2d 252 (1960). IT IS AXIOMATIC, HOWEVER THAT AN INDICTMENT MUST CLEARLY STATE EVERY ELEMENT OF THE CRIME CHARGED AND MAY NOT BE AMENDED OR AMPLIFIED BY EITHER THE EVIDENCE ADDUCED AT TRIAL OR THE JUDGE'S INSTRUCTIONS TO THE JURY. THIS CASE IS PRECISELY DESCRIBED IN THE LANGUAGE USED BY THE SUPREME COURT IN UNITED STATES V. CARLL, 105 U.S. 611-12, 26 L. ED. 1135 (1881) IN AN INDICTMENT UPON A STATUTE, IT IS NOT SUFFICIENT TO SET FORTH THE OFFENSE IN THE WORDS OF THE STATUTE, UNLESS THOSE WORDS OF THEMSELVES FULLY, DIRECTLY AND EXPRESSLY WITHOUT ANY UNCERTAINTY OR AMBIGUITY SET FORTH ALL THE ELEMENTS NECESSARY TO CONSTITUTE THE OFFENCE INTENDED TO BE PUNISHED;



AND THE FACT THAT THE STATUTE IN QUESTION, READ IN THE LIGHT OF THE COMMON LAW, AND OF OTHER STATUTES ON THE LIKE MATTER, ENABLES THE COURT TO INFER THE INTENT OF THE LEGISLATURE, DOES NOT DISPENSE WITH THE NECESSITY OF ALLEGING IN THE INDICTMENT ALL THE FACTS NECESSARY TO BRING THE CASE WITHIN THAT INTENT. (EMPHASIS SUPPLIED.) THIS ANCIENT CASE HAS BEEN CITED WITH APPROVAL BY COURTS AS RECENTLY AS 1974, HAMLING V. UNITED STATES, 418 U.S. 87, 17, 41 L. Ed. 2d 590, 94 S. CT. 2887 (1974). A CRIMINAL DEFENDANT IS ENTITLED TO AN INDICTMENT THAT STATES ALL THE ESSENTIAL ELEMENTS OF THE CHARGES AGAINST HIM. SEE JONES V. UNITED STATES, 526 U.S. 227, 232, 143 L. Ed. 2d 311, 119 S. CT. 1215 (1999). AN INDICTMENT THAT FAILS TO ALLEGE THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED OFFENDS BOTH THE FIFTH AND SIXTH AMENDMENTS AS WELL AS RULE 7(C) OF THE FED. R. CRIM. P. SEE RUSSELL V. UNITED STATES, 369 U.S. 749, 760-61, 81 L. Ed. 2d 240, 82 S. CT. 1038 (1962); UNITED STATES V. PIRRO, 212 F.3d 86 (2d CIR. 2000); UNITED STATES V. GONZALEZ, 686 F.3d 122 (2d CIR. 2012). THIS VERY ISSUE WAS PERTAINING TO A VALID INDICTMENT CHARGING A DEFENDANT WAS ADDRESSED IN THE FIRST CIRCUIT, IN WHICH THE DISTRICT COURT JUDGE DISMISSED BECAUSE THE INDICTMENT DID NOT ALLEGE A "DIRECT CONNECTION" BETWEEN THE MURDER AND CCE. SEE UNITED STATES V. WHITING, 771 F. SUPP. 476 (1ST CIR. 1991). ON APPEAL THE PETITIONER CHALLENGED THE INDICTMENT FOR BEING DEFECTIVE AND VIOLATING HIS FIFTH AND SIXTH AMENDMENT RIGHT, THE VERY RIGHTS THAT GIVE THE GOVERNMENT POWER TO PROSECUTE A DEFENDANT, THE SECOND CIRCUIT COURT OF APPEALS GRANTED THE GOVERNMENT MOTION TO DISMISS PETITIONER MOTION AND GRANTED A MOTION FOR SUMMARY AFFIRMANCE BASED ON THE WAIVER OF APPELLATE RIGHTS IN PLEA AGREEMENT. BY THE SECOND CIRCUIT COURT OF APPEALS GRANTING THESE MOTIONS IN FAVOR OF THE GOVERNMENT, IT GOES AGAINST THE SUPREME COURT MOST RECENT DECISION IN RODNEY CLASS V. UNITED STATES, 197 L. Ed. 2d 175 U.S. (2018) WHERE THIS VERY COURT SAY A DEFENDANT DOES NOT WAIVE HIS RIGHTS CHALLENGING THE CONSTITUTIONALITY OF A STATUTE OF CONVICTION ON DIRECT APPEAL

Simply By Pleading Guilty. A DEFECTIVE INDICTMENT LIES AT THE CORE OF THESE CONSTITUTIONAL CHALLENGES BECAUSE WITHOUT AN INDICTMENT THE GOVERNMENT HAS NO POWER TO PROSECUTE.

### CONCLUSION

THEREFORE, IN LIGHT OF THE ABOVE ARGUMENTS AND FACTS PRESENTED IT IS THE PETITIONER'S POSITION TO ASK THIS HONORABLE COURT TO LOOK AT ON THE FACTS AND ARGUMENT AND GRANT CERTIORARI TO RESOLVE THESE ISSUES IN DESPITE. THERE ARE A LOT OF PEOPLE BEING PROSECUTED UNDER THE TITLE 21 U.S.C. § 848(c)(1)(A) STATUTE, UNDER A STATUTE THAT HAS AMBIGUOUS LANGUAGE AND FAILS TO STATE OFFENSE. I ASK THAT THIS HONOR COURT USE ITS POWER TO RECTIFY THIS MATTER. HAD THE SECOND CIRCUIT COURT OF APPEALS LOOKED MORE CAREFULLY INTO THIS MATTER THEN THE PETITIONER WOULD NOT HAVE TO BRING THIS TO THE SUPREME COURT.