18-9069

No. 17-3736

IN THE

Supreme Court of the United States

HECTOR RENGIFO,

Petitioner, Pro Se

V.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether two United States Court of Appeals has entered a decision in conflict with relevant decision of this Court.

2. Whether Pennsylvania's statute for Delivery, Manufacture or Possession with the intent to deliver a controlled substance is broader than the U.S.S.G. definition of a "controlled substance offense."

3. Whether counsel was ineffective under the Sixth Amendment for failing to raise a legal question of law.

4. Whether the Court of Appeals ignored Petitioner's Addendum in the light of United States v. Winstead to deny a Certificate of Appealability.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties appearing here and below are: (1) Hector Rengifo, the Petitioner named in the caption; and (2) the United States. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hector Rengifo ("Mr. Rengifo") respectfully petitions for a Writ of Certiorari to review the denial of a COA of the United States Court of Appeals for the Third Cicuit.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Pennsylvania is reported at **2017 U.S. Dist. LEXIS 172173** and reprinted in the appendix, **Pet. App. 1a - 1-G.** The order of the Court of Appeals for the Third Circuit denying COA application is at **Doc. 3113049662 pg.2** and reprinted in the appendix, **Pet. App. 2a.** The Court of Appeals for the Third Circuit reliance on denial is reported at **United States v. Glass, 2018 WL 442889, at * 3-4 (3d cir. Aug. 22, 2018).**

JURISDICTION

The Court of Appeals entered it's order denying COA on October 2, 2018. **Pet. App. at 2a.** Mr. Rengifo timely sought rehearing en banc, which was denied on January 22, 2019. **Pet. App. at 3a - 3b.** This Court has jurisdiction under **28 U.S.C. § 1254(1).**

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S.S.G. § 4B1.1(a) provides, in relevant part: 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..

U.S.S.G. § 4B1.2(b) provides, in relevant part: 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.

United States Constitution, Amendment V provides:

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

(emphasis added)

United States Constitution, Amendment VI provides:

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

(emphasis added)

STATEMENT OF THE CASE

This Court held in **Stinson v. United States** that the commentary should "be treated as an agency's interpretation of it's ownlegislative rule." 508 U.S. at 44-45 (citing **Bowles V. Seminole Rock & Sand C.**, 325 U.S. 410, 414, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945)). Thus, under this Seminole Rock deference, "commentary in the Guidelines Manual that interprets or explains a guidline is authoritative unless it violates the Constitution or a Federal Statute, or is inconsistant with, or a plainly erroneous reading of, that guidleine." Id. at 38. If the two are inconsistent, "the Sentencing Reform Act itself commands compliance with the guideline." Id. at 43 (citing 18U.S.C. § 3553 (a)(4), (b)).

This Court has also held in **Mathis V. United States** that a sentencing court must apply the categorical approach when a statute has a single, indivisible set of elements, but enumerates various factual means of committing a single element." Id. at 2249. The application of the categorical approach used by the courts are to determine whether an offense qualifies as a predicate offense under the Armed Career Criminal Act. Recently the same rational has been applied in analyzing conviction for prior alleged "controlled substance offense." See **United States v.Hinkle**, To determine whether a defendant's prior convictions is a qualifying "controlled substance offense" as that term is defined by U.S.S.G. § 4B1.2 (b) it must first pass the Mathis analysis to apply a statutory penalty enhancement under § 4B1.1.

This Court also held in **Miller-El v. Cockrell** that Appellant only need to "demonstrate that his petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragment to proceed further." Id. at 330.

This Court has also held in **Strickland v. Washington** an Appellant must show that the errors were serious enough and also that there is, at least, a reasonable probabilty that the result of proceeding would have been different," Id. at 687.

The Court of Appeals have opinioned on these issues in different ways. The D.C. Circuit interprets the supporting Commentary note 1 to § 4B1.2(b) as inconsistent, thus, non-authoritative. **United States v. Winstead**, U.S. App. LEXIS 13864 at * 8. The Third Circuit has interpreted the same commentary as authoritative therefore, "making § 780-113(a)(30) (Pennsylvania Statute) and § 4B1.2 equally broad." **United States v. Glass**, 2018 U.S. App. LEXIS 23571 at * 6. Petitioner ("Mr. Rengifo") in a Pro Se

capacity filed for a Certificate of Appealability ("COA") after district court's denial of his **28 U.S.C. § 2255** claims.

Mr. Rengifo also filed for "leave to exceed the page limit" and was granted. **Pet. App. 2a.** On July 9, 2018 Petitioner submits an addendum to his reply in support of his COA application claiming he has found another "jurists of reason." **Pet. App. 4a - 4e.** On October 2, 2018 the Clerk's "ORDER" states "[r]easonable jurists could not debate the District Court's denial...See **Miller-El v. Cockrell**...To the extent that Appellant purports to rely **[only]** on **United States v. Glass**... and/or **United States v. Hinkle**...reasonable jurist would not debate the conclusion that those cases do not help him here in light of our recent **[non]** precedential decision in **United States v.Glass**..." **Pet. App. 2a.** On December 21, 2018 Mr. Rengifo filed for Panel rehearing and suggestion for rehearing by en banc court claiming that the reviewing court ignored the addendum regarding another "jurist of reason." **Pet. App. 5a - 5k.** On January 22, 2019 the motion was denied. **Pet. App. at 3a - 3b.**

This Court should grant review in order to clarify the different views or interpretations of these Supreme Court's precedents and to strike National uniformity amongnst the Court of Appeals.

BACKGROUND OF THE CASE

A. Factual Background

In 2013 the government charged petitioner Hector Rengifo ("Mr. Rengifo") with one count of distribution **21 U.S.C. § 841(a)(1)**. Petitioner pled guilty to that single count. The probation office classified Mr. Rengifo as a Career Offender. Objections were filed. At sentencing Mr. Rengifo's attorney argued that Mr. Rengifo was not a Career Offender because one of his priors did not exceed thirteen (13) month threshold for a "term of imprisonment" for it to count under the applicable time period under **U.S.S.G. § 4A1.2(e)**. The government with the probation officer concluded that Mr.Rengifo was a Career Offender due to his revocation under **U.S.S.G. § 4A1.2(k)**. The court overruled Mr. Rengifo's objection and sentenced him to a term of imprisonment of 120 months with three (3) years of supervised release. Mr. Rengifo filed a direct appeal. **Rengifo v. United States, 832 F.3d 220, 2016 U.S. App. LEXIS 14399 (no cert. filed).** On June 19, 2017 Mr. Rengifo filed a 2255 Motion. **Pet. App. 1a - 1g.** On October 18, 2017 the petition & COA was denied. **Pet. App. at 7a.** On December 15, 2017 Petitioner filed for a COA pursuant to title 28 U.S.C. § 2253(c)(1). On April 6, 2018 the court ordered the government to file a response to the petition for a COA within 21 days. The court directed

the government to address specifically **United States v. Glass, 701 F. App'x 108, 112-113 (3d cir. 2017). Pet. App. at 6a.** that concerns whether Pennsylvania's Statute 35 P. S. § 780-113(a)(30) is categorically broader than the career offender's definition of a "controlled substance offense" **U.S.S.G. § 4B1.2(b).** On July 1, 2018 Mr. Rengifo requested for leave to exceed the page limit governing his application for a COA. The court granted leave. **Pet. App. at 2a.** On July 9, 2018 Petitioner filed an "addendum to his reply in support of his COA." **Pet. App. at 2a.** The Court of Appeals denied Petitioner a COA on October 2, 2018. **Pet. App. 2a.** On December 21, 2018 Petitioner filed for Panel rehearing and suggestion for rehearing by en banc court. Id. On January 22, 2019 the motion was denied **Pet. App. at 3a - 3b.**

B. District Court Sentencing

At sentencing, the district court considered whether Mr. Rengifo was twice previously convicted of "a controlled substance offense" which, if true, would permit a career offender sentencing enhancement. **U.S.S.G. § 4B1.1.** During sentencing the court "adopt[ed] the reasoning set forth in the pre-sentencing report as outlined by the probation officer and stated by the Assistant U.S. Attorney." **Sentencing Transcript (STS) at * 8.** Reprinted at **Pet. App. at 8a.** Rather than analyzing whether the priors could be used for the sentencing enhancement using the "modified categorical" or "categorical approach" the court relied on the government's reliance on the probation officer's findings in Mr. Rengifo's Presentence Investigstion Report ("PSR") to argue for a career offender enhancement. **PSR ¶¶ 21** (submitted under seal). Specifically the probation office posited that two of Mr. Rengifo's prior convictions -- a 1999 drug conviction and another 2007 drug conviction -- were, in fact, predicate offenses that qualified Mr. Rengifo for a career offender enhancement.

Mr. Rengifo's trial attorney objected to the enhancement arguing that one of his priors can not be counted because 1) he had a determinate sentence of no more than 12 months thus, the revocation provision **U.S.S.G. § 4A1.2(k)** can not apply. 2) that the conviction occurred more than ten (10) years prior to the instant offense. **U.S.S.G. § 4A1.2(e)** the threshold needed for the prior to court for points after ten (10) years that has not exceed in a "sentence of imprisonment" of more than one year and one month (13 months) **U.S.S.G. § 4B1.2** and Application Note 2. See **United States v. Rengifo, Id.** With the modifications of the career offender enhancement, the total offense level properly calculated is 32, and the criminal history is 6 with a resulting guideline range of 151-188 months. However, the court believed that the career offender

label overstated Mr. Rengifo's criminal record and after having considered the factors set forth in 18 U.S.C. § 3553(a) the court imposed a sentence for count one (1) for 120 months along with 3 years of supervised release. This was based upon the defendant's career offender status, which the court found is not only technically correct, but appropriate in this case. Without the career offender enhancement, Mr. Rengifo's sentence according to guideline would have been 10 months with acceptance of responsibility and additional 2-levels for the 782 amendment of 2014.

C. Court of Appeals Proceedings

After district court's denial of Petitioner's 2255 Mr. Rengifo files NOA along with a COA in the Court of Appeals for the Third Circuit. Mr. Rengifo argued that his Attorney was ineffective for not challenging the most powerful argument which was a textual one regarding using the "categorical approach" or "modified categorical approach." Furthermore, that the Pennsylvania Statute 35 Pa. Stat. § 780-113(a)(30) was overly broad **Descamps v. United States, 570 U.S. 254, 133 S.Ct. 2276, 2283, 186 L. Ed. 2d 438 (2013)** via **Mathis v. United States, 136 S.Ct. 2243, 195 L. Ed 2d 604 (2016).**

On May 25, 2018 the Court of Appeals for the D.C. Circuit published **United States v. Winstead, 2018 U.S. App. LEXIS 13864 (D.C. cir. 2018).** On July 1, 2018 Mr. Rengifo files a request for leave to exceed the page limit governing his application for a Certificate of Appealability ("COA") it was granted **at Id.** On July 9, 2018 Petitioner files an addendum to his reply in support of his COA claiming he has found another "jurist of reason" **at Id.** On October 2, 2018 the Clerk's "ORDER" states "[r]easonable jurists could not debate the District Court's denial...See **Miller-El v. Cockrell...**To the extent that Appellant purports to rely [only] on **United States v. Glass...**and/or **United States v. Hinkle...**reasonable jurist would not debate the conclusion that those cases do not help him here in light of our recent [non] precedential decision in **United States v. Glass..." at Id.** On December 21, 2018 Mr. Rengifo filed for Panel rehearing and suggestion for rehearing by en banc court claiming that the reviewing court ignored the addendum regarding another "jurist of reason." **at Id.** On January 22, 2019 the motion was denied. **at Id.**

REASONS FOR GRANTING CERTIORARI

I. CERTIORARI SHOULD BE GRANTED DUE TO THE APPARENT CONFLICT AMONG LOWER COURT'S RELATED TO LEGAL ISSUES INVOLVED AND THE CONFLICT BETWEEN THE THIRD CIRCUIT'S DECISION AND ESTABLISHED SUPREME COURT AUTHORITY.

Conflicts between decisions of the Federal Court of Appeals and lower federal courts has long been considered a compelling factor in this Court's determination whether to grant writ of certiorari in a particular case. **Altria Group, inc. v. Good**, 555 U.S.____ (2008) (writ of certiorari grsnted to resolve an apparent conflict among federal circuits); **Martin v. Franklin Capital Group**, 546 U.S. 132 (2005) (certiorari granted because of a conflict among the cicuits); **Whitefeild v. United States**, 543 U.S. 209, 210-11 (2005) ("we grant certiorari to resolve the conflict among the circuits on the question presented"), **Marks v. United States**, 430 U.S. 188, 190-92 (1977) (certiorari granted "to resolve conflict among the circuits on the appealability issue"). Also see **Supreme Court Practice**, Seventh Ed. (2000) Stern, Gressman, Shaprio & Geller **at pgs. 168-74; Rule 10(a)**, Supreme Court Rules.

Petitioner Mr. Rengifo contends that the Third Circuit's denial of his COA is affirming his conviction and sentence which conflicts with another Circuit's opinion related to a similar question of law. Specifically, Petitioner will argue that the Third Circuit's denial of Petitioner's COA was based on a jurist of reason (Glass panel) who are in odds with D.C. Circuit and also with this Court's prior Precedents applying different standards of review. Finally, Petitioner will argue that the trial attorney was ineffective under the Sixth Amendment of the Constitution of the United States of America. This hinders his "Life [and] Liberty" under the Fifth Amendment.

A direct conflict between the Court of Appeals for which review is being sought and a decision of this Court is one of the most compelling grounds for securing the issuance of a writ of certiorari. See **Lambert v. Wicklund**, 520 U.S. 292, 294-96 (1977) ("because the Ninth Circuit's holding is in direct conflict with our precedence, we grant the petition for writ of certiorari and reverse); **Dolan v. City of Tigard**, 512 U.S. 374, 383 (1980) (observing that writ of certiorari granted because the Oregon Supreme court had misapplied Supreme Court precedent); **Henderson v. Kibbe**, 431 U.S. 145, 152-53 (1977) (Court of Appeals decision below "appeared to conflict with this [Supreme] Court's prior holdings"); **Supreme Court practice**, supra, "Factors Motivating Exercise of Certiorari Jurisdiction" Ch. 4.5; **Rule 10(d)**, Supreme Court Rules; **Federal Habeas Corpus Practice**, Fifth Ed. (2006) Liebman & Hertz, § 39.2d, pg. 1870.

This Court has granted certiorari in numerous cases that presented conflicts among lower Federal Courts of Appeals. e.g. **Watson v. United States**, 128 S. Ct. 579 (2007) (certiorari granted to resolve conflict in lower Courts of Appeals); **Lopez v. Gonzalez**, 549 U.S. 47 (2006) (same); **McEroy v. United States**, 455 U.S. 642, 643 (1982); **Shapiro v. United States**, 335 U.S. 1, 4 (1948)(same).

Petitioner will argue herein that the Third Circuit's opinion below is not only in conflict with another Federal Court Of Appeals decision but also appears to be inconsistant with this Court's authority related to such questions of law. As set forth above, a conflict between a lower court's decision and this Court's prior holdings is a powerful ground for issuance of a writ of certiorari allowing parties to submit more fuller arguments on issues presented. **S.E.C. v. Otis & Company**, 338 U.S. 843, 846-47 (1949(; **McCandles v. Furland**, 296 U.S. 140, 141-42 (1935).

II. CERTIORARI SHOULD BE GRANTED BECAUSE OF THE IMPORTANCE OF QUESTIONS PRESENTED AND BECAUSE THE THIRD CIRCUIT'S DENIAL OF COA IS CLEARLY ERRONEOUS AND AFFECTS PETITIONER'S FUNDAMENTAL CONSTITUTIONAL RIGHTS.

Even though it has been stated numerous occasions that this Court is not primarily concerned with the correction of errors committed by lower courts, the erroneousness of a Circuit court's opinion remains a factor in deciding whether to grant certiorari. **Ross v. Moffitt**, 417 U.S. 600 (1974); **Skidmore v. Swift & Company**, 323 U.S. 134 (1963). **Williams v. Lee**, 358 U.S. 217 (1959). Although the erroneousness of the Third Circuit's decision to deny Petitioner's COA may not be the determinative factor for granting a writ of certiorari in this case, it should be a factor meriting weight in the Court's decisional process. **Skidmore**, 323 U.S. at 136-138.

A further basis for granting certiorari in this particular case would be that the lower court's erroneous decision represents a substantial and severe hardship and fundamental miscarriage of justice. cf. **Schlup v. Delo**, 513 U.S. 298, 301 (1995) (granting certiorari to "protect against miscarriage of justice"); **Salvage v. Collins**, 494 U.S. 108 (1990)(same); **Montana v. Kennedy**, 366 U.S. 308, 309 (1961) (certiorari granted "in view of the apparent harshness of the result entailed [by lower court's decision]"); **Washington v. United States**, 357 U.S. 348 (1958). Despite this Court's general reluctance to grant

certiorari to correct an erroneous decision by a Circuit Court of Appeals, the Court does often grant review simply to correct an error committed by a lower court as a reflection of this Court's error-correction function in exercising its supervisory powers over the federal judiciary system. See Massachusetts v Sheppard, 468 U.S. 981, 988 (1984); Florida v. Rodririquez, 469 U.S. 1, 12 (1984) (granting certiorari "To undertake de novo review of the factual findings of a [lower court] that misapprehended controlling principals of [14th Amendment] law"); Dolan, 512 U.S. at 383.

Finally, the fact that there are many more reversals than affirmations following this Court's grant of certiorari further indicates that the Court is more likely to grant certiorari when it believes the lower court's decision may be erroneous. Estelle v. Gamble, 429 U.S. 97, 115 (1976) ("the Court seldom takes a case to merely reaffirm the law"). Moreover, in conjunction with Petitioner's other grounds for granting certiorari (i.e., conflict between lower court's judgment and Supreme Court law, conflict among circuit courts, and errooneous of lower court's decision) the importance of questions presented serves to further enhance cause for granting writ of certiorari. See Sanchez-Llames v. Oregon, 548 U.S. 331, 334-35 (2006) ("we granted the petition for certiorari in significant part because of the importance of questions presented"); Rumsfled v. Padilla, 542 U.S. 426, 455 (2004) (certiorari should be granted due to the "profound importance [of questions] to the Nation"); Elk Grove Unified School Dist. v. Newton, 542 U.S. 1, 5 (2004) ("In light of the obvious importance of decision we granted certiorari"). As this Honorable Court will see from the facts of this case, the questions presented are substantial import and justify certiorari being granted accordingly.

ARGUMENTS

1. Two Circuits Apply Varied Standards of Review to Stinson v. United States, 508 U.S. 36, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993).

The D.C Circuit has applied Stinson to U.S.S.G § 4B1.2 Commentary Note 1 in United States v. Winstead, Id at *7 The D.C. Circuit concluded that the commentary is inconsistant to the guideline of § 4B1.2 which defines a "controlled substance offense." The Third Circuit has concluded

contray to the commentary note in question as authoritive thus, consistent therefore not broader. See United States v. Glass No. 16-2906, 2018 WL 4443889 (3d Cir. 2018).

The Third Circuit has created a circuit split as to whether commentary is authoritive, ignoring Stinson when challenging the broadness of Pennsylvania's Statute 35 Pa. Stat. § 780-113(a)(30) under Mathis v. United States, 136, S. Ct. 2243; 195 L.Ed.2d 604; 2016 U.S. LEXIS 4060. See also United States v. Glass supra Id at * 6.

The D.C. Circuit reasoned that "[a]ttempted distribution' is not 'distribution' anymore than 'attempted burglary' is 'burglary.'" The analogy to James v. United States, 550 U.S. 192, 127 S. Ct. 1586, 167 L. Ed.2d 532 (2007), which this court held that the Armed Criminal Career Act's definition of "Violent Felony" did not encompass attempted burglary. The D.C. Circuit's rationale was that "Section 4B1.2(b), presents a very detailed "definition" of controlled substance offense that clearly excludes inchoate offenses Expressio unius est excludes alterius.' Id at * 7.

The Winstead's Panel opinion is persuasive, analogously to Petitioner's contentions that "attempted offenses" when analyzed were not included under U.S.S.G. 4B1.2 (b) thus, not authoritive, because "under th[e] Seminole Rock deference, 'Commentary in the Guidelines Manual that interprets or explains a guideline is authoritive unless it violates the Constitution or a Federal Statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.' Id at * 38. If the two are inconsistent, 'the Sentencing Reform Act itself commands compliance with the guideline.' Id at * 43 (citing 18 U.S.C. § 3553(4)(4), (b)). Id at * 7.

The Third Circuit is not in uniformity with the D.C. Circuit regarding the same textual issue placing contravention of this courts Precedents causing a split of circuit authority and ultimately denying Petitioner's COA.

II. Mr. Rengifo Prior Pennsylvania Conviction For Delivery, Manufacture Or Possession With The Intent To Deliver A Controlled Substance Is Broader Than the U.S.S.G. Definition Of "A Controlled Substance Offense" And Cannot Serve As A Career Offender Predicate.

The career offender guideline requires an enhanced sentence for defendants convicted of a "crime of violence" or a "controlled substance offense" and who have at least two prior felony convictions for similar offenses. See U.S.S.G. § 4B1.1.

To determine whether a prior conviction is a "controlled substance offense" for career offender purposes, the courts apply either a "categorical approach" or "modified categorical approach." **Descamps v. United states**, ___ U.S. ___, 133 S. Ct. 2276 (2013). When applying the "categorical approach," the court considers only the statutory elements of the prior conviction. See **Taylor v. United States, 495 U.S. 575 (1990).** However, because many statutes that may appear on their face to be a "crime of violence" or "controlled substance offense" can actually be committed in ways that are non-violent or do not involve trafficking, the **Taylor** court held that a "modified categorical" approach can be used. **Id.** Thus, a "modified categorical approach"can be used when a person can violate a statute in more than one way and supportive documents are necessary to determine whether the manner in which the person violated the statute constitutes a "crime of violence" or "controlled substance offense." **Descamps, ___ U.S. ___, 133 S. Ct. 2276.** This approach permits a court to consult a limited class of documents, including the indictment and jury instructions, to determine whether the prior conviction was based upon conduct that was actually a "crime of violence" or a "controlled substance offense." **Id.** The choice of approach depends on whether a statute is "divisible." A statute is "divisible" when it "sets out one or more elements of the offense in the alternative - - for example, stating that burglary involves entry into a building or an automobile." **Id. at 2281.**

Subsequently, this Court in **Mathis v. United States, ___U.S. ___, 136 S. Ct. 2243 (2016)** explained how a court detirmines whether a statute is divisible and clarified the application of the categorical and modified categorical approach used by the courts to determine whether an offense qualifies as a predicate offense under the Armed Career Criminal Act. **Mathis** held that when a statute defines one crime

with one set of elements, but lists alternative means by which a defendant can satisfy those elements, a sentencing court cannot use the modified categorical approach to determine whether a defendant's conduct qualifies as a violent felony. Id. at 2249-2258. Thus, an offense cannot qualify as a violent felony if its elements are broader than the elements of generic offense. Id. at 2251. Recently, the same rationale has been applied in analyzing convictions for prior alleged "controlled substance offenses." See United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016).

Applying these principles, Mr. Rengifo's prior state court drug conviction under 35 Pa. C.S.A. § 780-113(a)(30) is not a "controlled substance offense" under the career offender guidelines.

Here, Mr. Rengifo was determined to be a career offender based upon his prior Pennsylvania state court convictions for **Manufacture, Delivery, or Possession with Intent to Deliver** pursuant to 35 Pa. C.S.A. § 780-113(a)(30) (the "Pennsylvania Statute"). That statute prohibits:

> **The manufacture, delivery, or possession with intent to manufacture or deliver**, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 Pa. C.S.A. § 780-113(a)(30).

By contrast, the United States Sentencing Guidelines defines a "controlled substance offense" as follows:

> [a]n 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 counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b).

The Pennsylvania Statute is **not** divisible and it is overbroad in several ways. First, the Pennsylyania Statute provides several

ways to violate the statute, namely, **"the manufacture, delivery, or possession with intent to manufacture or deliver."** 35 Pa. C.S.A. § 780-113(a)(30). The statute is overbroad because one of the means to commit the offense - "deliver" - is broader than the Guidelines' generic definition, which does not include "attempted transfer" or in other words attempted distribution, only "the manufacture, import, export, **distribution**, or dispensing" of a controlled substance. See U.S.S.G. § 4B1.2(b).

Second, the Pennsylvania definition of "delivery" is broader than the definition of a controlled substance offense under § 4B1.2. Pennsylvania defines the terms as follows:

> **"Deliver or delivery"** or **"attempted transfer"** from one person to another of a controlled substance, other drug, device or cosmetic whether or not there is an agency relationship.

35 Pa. C.S.A. § 780-102.

In **Hinkle**, the Fifth Circuit held that the Texas drug statute was not a controlled substance where the delivery element swept more broadly than the Guidelines' definition of a controlled substance by including "offers to sell." The court also concluded that the statute was indivisible because the methods used to deliver were alternative means, not elements. **Hinkle**, 832 F.3d at 576. Thus, like the Texas statute in **Hinkle**, for which delivery could be satisfied by an "offer to sell." Pursuant to 35 Pa. C.S.A. § 780-102, an **"attempted transfer"** can satisfy the statute as well as an actual transfer. Thus, the methods used to deliver--attempted offenses--are alternative means, **not** elements. Consequently, the Pennsylvania delivery element criminalizes a "greater swath of conduct than the elements of the relevant [Guidelines] offense." **Mathis**, 136 S. Ct. at 2251.

There is a legal distinction in the words "delivery" and "distribution." The words are not interchangable. Providing further indicia, the definition section of 35 Pa. C.S.A. § 780-102 makes dramatically clear the distinction between "delivery" and "distribution." The Pennsylvania legislature deliberately separated those terms out and defined those terms differently. Specifically, "delivery" "means

III. Counsel Was Ineffective For Failing To Raise A Legal Question Of Law. A Violation Under The Sixth Amendment Of The Constitution Of The United States.

Counsel's failure to raise the textual issue regarding Petitioner's prior predicates was a violation to his Constitutional rights under the Sixth Amendment particularly once trial counsel was informed that his client was in jeopardy of the career offender enhancement under U.S.S.G. § 4B1.1(a). An Attorney's "golden rule" is once informed of a potential enhancement (e.g. the career offender enhancement) is being applied - counsel's obligation was to analyze the prior statutes to see whether the elements of the State crime and generic offense, make the requisite match. Had counsel practiced professional due diligence, especially considering the outcome he would have discovered under **Taylor v. United States, 495 U.S. 575, 600-601, 110 S. Ct. 2143, 109 L. Ed. 2d 607. (1990)**, that the prior statute's elements did not match and thus, erroneous for application of § 4B1.1(a)(3).

Petitioner's counsel did object that the career offender over stated his criminal history but counsel's primary objection was that his prior marijuana conviction did not exceed over a "term of imprisonment" of one year and one month, the threshhold for it to count for the enhancement. However, the most powerful argument was that the textual argument before us - **"attempted transfer"** presents conduct that is not included in the guideline definition of a controlled substance offense under **U.S.S.G. § 4B1.2(b)**. Bearing in mind the erroneous difference in Petitioner's potential term of imprisonment if sentenced as a career criminal (over ten years), it is hard to see how this issue should not have appeared as a crucial one to effective counsel. To make out a claim of ineffective assistance of counsel under **Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)**, Petitioner must show both that the errors were serious-which should be obvious in this case-and also that there is, at least, a reasonable probability that the result of the proceeding would have been different. **Id. at 687.**

Petitioner recognizes that the guidelines are only discretionary. However, this court "has made clear that the guidelines are to be the sentencing court's starting point and...initial benchmark.

"Molina-Martinez v. United States, 136 S. Ct. 1338, 1345, 194 L. Ed. 2d 444 (2016) (quoting Gall v. United States, 522 U.S. 38, 49, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). "The guidelines inform and instruct the district court's determination of an appropriate sentence. In the usual case, then, the systemic function of the selected guidelines range will affect the sentence." Id. at 1346. Petitioner's "initial benchmark" without the career offender enhancement would have been at 6 to 12 months (compared to 151-188) where the district court's "initial benchmark" should have started. Therefore, in the absence or the objection-that counsel should have made-Petitioner's 10-year sentence was calculated pursuant to United States Sentencing Guideline § 4B1.1(a)(3) based on a determination that he is a career offender. That guideline confers career offender status on persons with two prior felony convictions of "either a crime of violence or a controlled substance offense. "U.S.S.G. § 4B1.1(a)(3). Thus, Petitioner asserts that it was a mistake for counsel not to raise this issue—a serious mistake—under Strickland—because it would have changed the result of the proceeding—specifically sentencing the Petitioner to a 9 year additional prison sentence.

IV. The Third Circuit Ignored Petitioner's Addendum In The Light of United States v. Winstead, No.12-3036, 2018 U.S. App. LEXIS 13864.

The court erred in denying a COA based on the primise regarding **United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016); United States v. Glass, 701 F. App'x 108 (3d Cir. 2016) (non-precedential opinion).** The Court denied the COA application because "Appellant purports to rely on" the above cases and that "reasonable jurists would not debate the conclusion that thase cases do not help him here in light of our recent [non-] precedential decision in United States v. Glass, No.16-2906, 2018 WL 443889, at * 3-4 (3d Cir. Aug. 22, 2018) (distinguishing Section 780-113(a)(30) from the Texas Statute at issue in **Hinkle,** and holding that a conviction under Section 780-113(a)(30) qualifies as career offender predicate)."

On July 9, 2018 Petitioner filed an addendum to his reply in support of his COA application which the Third Circuit "granted...

leave to exceed..." See "ORDER" at Pet. App. 2a. In Appelant's supplemental/addendum -in support of his argument Appellant cites a recent precedential decision in **United States v. Winstead, No.12-3036, 2018 U.S. App. LEXIS 13864** that was decided on May 25, 2018, more than 90 days prior to the Glass decision. Either the Court overlooked Appellant's addendum or ignored the Motion. The **Winstead's** Panel opinion is persuasive, analogously to Petitioner's contentions that "attempted offenses" when analyzed were not included under U.S.S.G. § 4B1.2(b) thus, not authoritive, because "under th[e] Seminole Rock deference, 'Commentary in the Guidelines Manual that interprets or explains a guideline is authoritive unless it violates the Constitution or a Federal Statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.' Id at 38. If the two are inconsistent, 'the Sentencing Reform Act itself commands compliance with the guideline.' Id at * 43 (citing 18 U.S.C. § 3553(a)(4), (b). Id at * 7.

The **Winstead's** Court also concluded that "Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses. Expressio unius est exclusio alterius." Further explaining "that venerable canon applies doubly here: the Commission showed within § 4B1.2 itself that it knows how to include attempted offenses when it intends to do so. See U.S.S.G. § 4B1.2(a)(1) (defining a 'crime of violence' as an offense that 'has as an element the use, attempted use, or threatened use of physical force . . . ."). 12

It might be argued that other federal laws do include "attempted transfer" in defining drug distribution offenses - and that we should read the guidelines in pari materia with these other statutes in order to better discern their meaning. See, e.g., 21 U.S.C. § 802(8), (11). However, in **Burgess v. United States, 553 U.s. 124, 128 S. Ct. 1572, 170 L. Ed. 2d 478 (2008)**, the Supreme Court made clear that "[a]s a rule, [a] definition which declares what a term 'means'... excludes any meaning that is not stated, " **id. at 130** (citation omitted), and that the statute in that case "defines the precise phrase used" in determining whether to apply a sentencing enhancement. **Id. at 129.** Moreover, we interpret the specific inclusion of attempt

offenses elsewhere in federal drug law just as we do the inclusion of attempt in § 4B1.2's definition of "crime of vioence": when enumerating a list of specific offenses that qualify to support career offender status, the drafters declined to include attempt despite its presence elsewhere." Id. at * 7-8.

The definition of "[d]eliver or delivery" 35 Pa. Stat. Ann § 780 780-102, allows one to be convicted for conduct analogous to what the D.C. panel found troubling - that in their precedent opinion was not included in the guideline of U.S.S.G. § 4B1.2(b). The Appellant only need show that "jurist of reason could disagree with the district court's resolution.... For a COA to be granted under Miller-El v. Cockrell, 537 U.S. 322, 327, 154L. Ed. 2d 931, 123 S. Ct. 1029 (2003).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted on this 18th day of April, 2019.

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Petitioner, Pro Se