

19-6005 ORIGINAL
No.

Supreme Court of the United States

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SUPREME COURT, U.S.

ROBERT L. MALONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Robert L. Malone
Petitioner
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QUESTIONS PRESENTED

Petitioner Robert Malone was convicted after a jury trial for violation of 21 U.S.C. § 846 (conspiracy “to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine”) (Count ss1); 21 U.S.C. § 841(a)(1) (possession “with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine”) (Count ss2). While there was an ostensible ‘quantity’ finding by the jury in a special verdict form, the District Court omitted critical instruction on how the jury was to actually determine the quantity. At sentencing both the prosecutor and the court focused almost exclusively on Mr. Malone’s Criminal History to determine that he was not entitled to the mandatory minimum.

- 1.) Did the lower courts err when they imposed and affirmed Mr. Malone’s sentence based on overreliance on his Criminal History?
- 2.) Is Mr. Malone’s judgment void because the District Court removed the element of drug quantity from the jury by failing to instruct on the meaning of “mixture or substance containing a detectable amount of methamphetamine”?
- 3.) Where multiple additional errors affected petitioner’s conviction and/or sentence in the courts below, should this Court exercise it’s supervisory power to vacate his conviction and sentence?

PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit.

More specifically, the Petitioner Robert L. Malone and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR A WRIT OF CERTIORARI

Robert L. Malone, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on 5-16-19.

OPINIONS BELOW

The 5-16-19 opinion of the Court of Appeals for the Seventh Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision reported at 770 Fed. Appx. 281; 2019 U.S. App. LEXIS 14528 and is reprinted in the separate Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Southern District of Indiana, was entered on 1-2-18, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior order of the United States District Court for the Southern District of Indiana in re filing of the 21 U.S.C. § 851 Information was entered on 6-30-17, is an unpublished decision, and is reprinted in the separate Appendix C to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 5-16-19. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offence 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 ... *Id.*

The Sixth Amendment to the Constitution of the United States 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 his favor, and to have the Assistance of Counsel for his defense. *Id.*

21 U.S.C. § 841 provides in relevant part:

- (a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--
 - (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
 - (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.
- (b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:
 - (1) (A) In the case of a violation of subsection (a) of this section involving--
 - (i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
 - (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--
 - (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
 - (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
 - (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$ 10,000,000 if the defendant is an individual or \$ 50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$ 20,000,000 if the defendant is an individual or \$ 75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861] after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

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

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

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(v) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(vi) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$ 5,000,000 if the defendant is an individual or \$ 25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$ 8,000,000 if the defendant is an individual or \$ 50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of

such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999 [21 USCS § 812 note]), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$ 1,000,000 if the defendant is an individual or \$ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$ 2,000,000 if the defendant is an individual or \$ 10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$ 250,000 if the defendant is an individual or \$ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United

States Code, or \$ 500,000 if the defendant is an individual or \$ 2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(E) (i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$ 500,000 if the defendant is an individual or \$ 2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$ 1,000,000 if the defendant is an individual or \$ 5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$ 250,000 if the defendant is an individual or \$ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$ 500,000 if the defendant is an individual or \$ 2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18,

United States Code, or \$ 100,000 if the defendant is an individual or \$ 250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$ 200,000 if the defendant is an individual or \$ 500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 404 [21 USCS § 844] and section 3607 of title 18, United States Code.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

- (A) the amount authorized in accordance with this section;
- (B) the amount authorized in accordance with the provisions of title 18, United States Code;
- (C) \$ 500,000 if the defendant is an individual; or
- (D) \$ 1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

- (A) creates a serious hazard to humans, wildlife, or domestic animals,
- (B) degrades or harms the environment or natural resources, or
- (C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution.

(A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

(B) Definition. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals. Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this title;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 310 [21 USCS § 830], or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with title 18, United States Code, or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined.

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under title 18, United States Code, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under title 18, United States Code, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty. In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals.

(1) Whoever knowingly distributes a listed chemical in violation of this title (other than in violation of a recordkeeping or reporting requirement of section 310 [21 USCS § 830]) shall, except to the extent that paragraph (12), (13), or (14) of section 402(a) [21 USCS § 842(a)] applies, be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 310 [21 USCS § 830] have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18, United States Code, or imprisoned not more than one year, or both.

(g) Internet sales of date rape drugs.

(1) Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that--

(A) the drug would be used in the commission of criminal sexual conduct; or

(B) the person is not an authorized purchaser;

shall be fined under this title or imprisoned not more than 20 years, or both.

(2) As used in this subsection:

(A) The term "date rape drug" means--

(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol;

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of title 5, United States Code [5 USCS § 553], to be used in committing rape or sexual assault.

The Attorney General is authorized to remove any substance from the list of date rape drugs pursuant to the same rulemaking authority.

(B) The term "authorized purchaser" means any of the following persons, provided such person has acquired the controlled substance in accordance with this Act:

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by the Attorney General. A "qualifying medical relationship" means a medical relationship that exists when the practitioner has conducted at least 1 medical evaluation with the authorized purchaser in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other health [health] professionals. The preceding sentence shall not be construed to imply that 1 medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(ii) Any practitioner or other registrant who is otherwise authorized by their registration to dispense, procure, purchase, manufacture, transfer, distribute, import, or export the substance under this Act.

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate purpose for using any "date rape drug" for which a prescription is not required.

(3) The Attorney General is authorized to promulgate regulations for record-keeping and reporting by persons handling 1,4-butanediol in order to implement and enforce the provisions of this section. Any record or report required by such regulations shall be considered a record or report required under this Act.

(h) Offenses involving dispensing of controlled substances by means of the Internet.

(1) In general. It shall be unlawful for any person to knowingly or intentionally--

(A) deliver, distribute, or dispense a controlled substance by means of the Internet, except as authorized by this title; or

(B) aid or abet (as such terms are used in section 2 of title 18, United States Code) any activity described in subparagraph (A) that is not authorized by this title.

(2) Examples. Examples of activities that violate paragraph (1) include, but are not limited to, knowingly or intentionally--

(A) delivering, distributing, or dispensing a controlled substance by means of the Internet by an online pharmacy that is not validly registered with a modification authorizing such activity as required by section 303(f) [21 USCS § 823(f)] (unless exempt from such registration);

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or dispensation by means of the Internet in violation of section 309(e) [21 USCS § 829(e)];

(C) serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance in a manner not authorized by sections [section] 303(f) or 309(e) [21 USCS § 823(f) or 829(e)];

(D) offering to fill a prescription for a controlled substance based solely on a consumer's completion of an online medical questionnaire; and

(E) making a material false, fictitious, or fraudulent statement or representation in a notification or declaration under subsection (d) or (e), respectively, of section 311 [21 USCS § 831].

(3) Inapplicability.

(A) This subsection does not apply to--

(i) the delivery, distribution, or dispensation of controlled substances by nonpractitioners to the extent authorized by their registration under this title;

(ii) the placement on the Internet of material that merely advocates the use of a controlled substance or includes pricing information without attempting to propose or facilitate an actual transaction involving a controlled substance; or

(iii) except as provided in subparagraph (B), any activity that is limited to--

(I) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of the Communications Act of 1934 [47 USCS § 231]); or

(II) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of the Communications Act of 1934 [47 USCS § 230(c)] shall not constitute such selection or alteration of the content of the communication.

(B) The exceptions under subclauses (I) and (II) of subparagraph (A)(iii) shall not apply to a person acting in concert with a person who violates paragraph (1).

(4) **Knowing or intentional violation.** Any person who knowingly or intentionally violates this subsection shall be sentenced in accordance with subsection (b).

(21 U.S.C. § 841 (As amended Aug. 3, 2010, P.L. 111-220, §§ 2(a), 4(a), 124 Stat. 2372.))

21 U.S.C. § 846 provides:

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy. *Id.* 21 U.S.C. § 846

18 U.S.C. § 3553(a) provides:

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be

incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense. *Id.*

Fed. R. Crim. P. 52 provides:

Rule 52. Harmless Error and Plain Error.

(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. *Id.* (As amended Dec. 26, 1944, eff. March 21, 1946.)

STATEMENT OF THE CASE

On or about 5-4-16, in a 1st superseding indictment Robert L. Malone was charged with violation of 21 U.S.C. § 846 (conspiracy “to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine”) (Count s1); 21 U.S.C. § 841(a)(1) (possession “with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine”) (Count s3).

On or about 6-8-16 he waived arraignment and a plea of not guilty to the charged violations was entered.

On or about 2-28-17, in a 2d superseding indictment, Robert L. Malone was charged with violation of 21 U.S.C. § 846 (conspiracy “to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine”) (Count ss1); 21 U.S.C. § 841(a)(1) (possession “with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine”) (Count ss2). Notably, the indictment also charged enhancement for a prior conviction. This was accepted by the District Court in lieu of a separate “Information” for 21 U.S.C. § 851. (Appendix C)

On or about 3-16-17, he again waived arraignment and a not guilty was entered to the charged violations.

No motion to suppress was filed or litigated.

On or about 7-18-17 Mr. Malone proceeded to trial. (Appendix B)

On 7-25-17, Mr. Malone was found guilty by the jury as to violation of 21 U.S.C. § 846 (conspiracy “to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine”) (Count ss1); 21 U.S.C. § 841(a)(1) (possession “with intent to

distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine") (Count ss2).

While the jury ostensibly 'found' the drug quantities alleged in the indictment, the jury was never instructed on the meaning of "mixture or substance containing a detectable amount of methamphetamine". (USDC Docket 1:14-cr-50-PLM-1, Entry #519, Exhibit #1)

When the Presentence Report was prepared, the Probation Officer recommended finding a Total Offense Level 40 and a Criminal History of III which resulted in a guideline sentencing range of 360 months to life with a statutory mandatory minimum of 240 months or 20 years. (Presentence Report, ¶¶69-70)

On 12-27-17, Mr. Malone appeared for sentencing. At sentencing, the District Court sustained Mr. Malone's objection to 2 points enhancement under U.S.S.G. § 2D1.1(h)(12) for maintaining his residence as a 'stash house'. The court found that whatever drugs passed thru the residence were simply incidental to him living there. (Transcript of sentencing 12-27-17, pages 11-12). This reduced Mr. Malone's Total Offense Level to 38 which, in turn, reduced his guideline sentencing range from 360-life to 292-365 months incarceration. *Id.*

Unfortunately, along the way, both the government and the District Court overemphasized Mr. Malone's relatively minor Criminal History. This is best demonstrated by appellate counsel's argument to the Seventh Circuit, where the attorney pointed out:

It is respectfully submitted that Judge Magnus-Stinson after properly calculating the advisory guideline range failed to properly consider the mandatory 3553(a) factors and as a result the sentence she imposed is unreasonable and greater than necessary to meet 3553's goals of sentencing.

Specifically, what is at issue is Judge Magnus-Stinson's: A. Undue reliance upon Robert Malone's criminal history; B. Failure to account for the unwarranted disparity in sentences between Robert L. Malone and other co-defendants similarly situated, specifically Julius Weldon; and C. Failure to adequately explain why a sentence of the mandatory minimum two hundred forty (240) months was not sufficient and not greater than necessary. A. With respect to

Robert L. Malone's criminal history, it is undisputed that Robert Malone had a prior felony conviction for possession of methamphetamine, for which he received two (2) criminal history points. It is also undisputed that he received an additional two (2) criminal history points because he committed the instant offense while on probation for that possession offense. It is further undisputed that the possession conviction served as the predicate offense for the 21 U.S.C. 851 increase in the mandatory minimum sentence from ten (10) to twenty (20) years. (PSR at 31-34, 69; (Tr. Dec. 27, 2017 at 12).

Despite the offense being possession rather than possession with intent to distribute or distribution, Judge Magnus-Stinson adopted the government's argument that the conviction and being on probation for it at the time of the instant offense, warranted more than what she stated was her initial thought that the mandatory minimum sentence of two hundred forty (240) months was sufficient but not greater than necessary. (Tr. Dec. 27, 2017 at 27-28; App.12-13).

(Malone USCA brief, PDF page 19)

On 12-27-17, Mr. Malone was sentenced to 264 months incarceration for violations of 21 U.S.C. § 846 (conspiracy "to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine") (Count ss1); 21 U.S.C. § 841(a)(1) (possession "with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine") (Count ss2). This sentence represented a downward variance from the guideline sentencing range but still substantially above the mandatory minimum which should have applied under 18 U.S.C. § 3553(a)(6). (Appendix B)

The judgment was entered on 1-2-18.

Mr. Malone demonstrates within that this Court should grant his Petition For Writ Of Certiorari because the court of appeals for the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

- 1.) THIS COURT SHOULD GRANT MR. MALONE'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10. CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

- (a) a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.***

Supreme Court Rule 10(a).

This Court has never hesitated to exercise its power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States*, 318 U.S. 332 (1943).¹ As the Court stated in *McNabb*:

... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies

¹ See also *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960)..

the duty of establishing and maintaining civilized standards of procedure and evidence.

McNabb, 318 U.S. at 340.

1A.) The Lower Courts Erred When They Imposed And Affirmed Mr. Malone's Sentence Based On Overreliance On His Criminal History

In *United States v. Warren*, No. 18-3141; 2019 U.S. App. LEXIS 14005 (6th Cir. 5-10-19), the Sixth Circuit vacated a sentence by finding a violation of 18 U.S.C. § 3553(a)(6) where the District Court focused excessively on the defendant's Criminal History in deciding the appropriate sentence under 18 U.S.C. § 3553(a). *Id.* This holding was consistent with numerous other holdings of the various Courts of Appeals. *United States v. Whitehead*, 532 F.3d 991, 998-99 (9th Cir. 2008); *United States v. Rosales-Miranda*, 755 F.3d 1253, 1256 (10th Cir. 2014); *United States v. Robertson*, 309 F. App'x 918, 918 (6th Cir. 2009). These courts found the sentences substantively unreasonable. *Id.*

In Mr. Malone's case, there is no question but that the excessive over reliance on his Criminal History was the reason that the District Court denied Mr. Malone a downward variance to the mandatory minimum of 240 months.

Based on the foregoing, this Court should find that Mr. Malone's sentence is substantively unreasonable as argued in the Court of Appeals. *Id.*

1B.) Mr. Malone's Judgment Is Void Because The District Court Removed The Element Of Drug Quantity From The Jury By Failing To Instruct On The Meaning Of "Mixture Or Substance Containing A Detectable Amount Of Methamphetamine"

21 U.S.C. § 841(b)(1)(B) and 21 U.S.C. § 841(b)(1)(A) both determine the statutory sentencing range based on the quantity of "a mixture or substance containing a detectable amount" of a controlled substance. *Id.*

While the phrase “mixture or substance” seems at first blush to have a straightforward definition, it is in fact and law a “complicated question” which has prompted many judicial opinions. *United States v. Ochoa-Heredia*, 125 F. Supp. 2d 892, 2001 U.S. Dist. LEXIS 77 (ND IA 2001) (citing *Chapman v. United States*, 500 U.S. 453, 114 L. Ed. 2d 524, 111 S. Ct. 1919 (1991), and *Neal v. United States*, 516 U.S. 284, 133 L. Ed. 2d 709, 116 S. Ct. 763 (1996) and collecting cases).

For example, the Second, Third, Sixth, Seventh, and Eleventh Circuits have embraced the “marketable” approach. *See, e.g., United States v. Acosta*, 963 F.2d 551, 553-54 (2nd Cir. 1992) (in determining defendant’s sentence, exclude weight of unusable creme liqueur portion in creme liqueur and cocaine mixture); *United States v. Rodriguez*, 975 F.2d 999, 1007 (3rd Cir. 1992) (in determining a defendant’s sentence, exclude weight of unusable boric acid portion in boric acid and cocaine mixture); *United States v. Jennings*, 945 F.2d 129, 136-37 (6th Cir. 1991) (in determining a defendant’s sentence under 21 U.S.C. § 841 and U.S.S.G. § 2D1.1, exclude weight of uningestible waste water in waste water and methamphetamine mixture); *United States v. Johnson*, 999 F.2d 1192, 1196-97 (7th Cir. 1993) (in determining a defendant’s sentence, exclude weight of unusable waste water in waste water and cocaine base mixture); *United States v. Rolande-Gabriel*, 938 F.2d 1231, 1237-38 (11th Cir. 1991) (in determining a defendant’s sentence, exclude weight of unusable waste water portion in cocaine and waste water mixture). The Fifth and Ninth Circuits have followed the “marketable” approach in some cases, but adhered to the plain meaning of “mixture or substance” in others, depending upon the controlled substance at issue. *Compare United States v. Sherrod*, 964 F.2d 1501, 1509-10 (5th Cir. 1992) (court should use entire weight of mixture of methamphetamine and waste water to determine defendant’s sentence under § 2D1.1), *cert. denied*, 506 U.S. 1041, 113 S. Ct. 832, 121 L. Ed. 2d

701 (1992), 507 U.S. 953, 113 S. Ct. 1367, 122 L. Ed. 2d 745 (1993) *with United States v. Palacios-Molina*, 7 F.3d 49, 53-54 (5th Cir. 1993) (court should exclude the waste water portion of cocaine and waste water mixture to fix a defendant's guidelines' sentence). *Compare United States v. Beltran-Felix*, 934 F.2d 1075, 1076 (9th Cir. 1991) (court should use entire weight of methamphetamine and waste water mixture to calculate defendant's sentence under 21 U.S.C. § 841), *cert. denied*, 502 U.S. 1065, 112 S. Ct. 955, 117 L. Ed. 2d 123 (1992) *with United States v. Robins*, 967 F.2d 1387, 1389 (9th Cir. 1992) (court should exclude the unusable cornmeal portion of a cocaine and cornmeal mixture in determining defendant's sentence).

In the instant case, no instruction was given to the jury as to the definition of a "mixture or substance" containing a detectable amount of the charged narcotic. (USDC Docket 1:14-cr-50-PLM-1, Entry #519, Exhibit #1) Without this instruction, any ostensible finding by the jury as to drug quantity is irrelevant because there is simply no way to determine whether the jury used the proper standard in making a finding. The failure to instruct the jury as to the meaning of the phrase "a mixture or substance containing a detectable amount", as used in 21 U.S.C. § 841(b)(1)(B) And 21 U.S.C. § 841(b)(1)(A), removed the determination of the element of drug quantity from the jury.

Based on the foregoing, Mr. Malone's judgment and sentence are illegal and violative of the Fifth Amendment and Sixth Amendment to the constitution. *Id.*

1C.) Multiple Errors In The Courts Below Mandate That Mr. Malone's Conviction And/Or Sentence Be Vacated.

First Step Act

Mr. Malone is entitled to retroactive application of the First Step Act, 115 P.L. 391; 132 Stat. 5194; 2018 Enacted S. 756; 115 Enacted S. 756 (12-21-2018) as hereinafter more fully appears.

Applying the First Step Act to non-final criminal cases pending on direct review at the time of enactment is consistent with (1) longstanding authority applying favorable changes to penal laws retroactively to cases pending on appeal when the law changes and (2) the text and remedial purpose of the Act. To the extent the Act is ambiguous, the rule of lenity requires the ambiguity be resolved in the defendant's favor. *United States v. Santos*, 553 U.S. 507, 514 (2008); *United States v. Granderson*, 511 U.S. 39, 54 (1994).

Preliminarily, “a presumption of retroactivity” “is applied to the repeal of punishments.” *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 & n.1 (1990) (Scalia, J., concurring). “[I]t has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute.” *Id.* (quoting *Yeaton v. United States*, 5 *Cranch* 281, 283 (1809)). The common law principle that repeal of a criminal statute abates all prosecutions that have not reached final disposition on appeal applies equally to a statute’s repeal and re-enactment with different penalties and “even when the penalty [is] reduced.” *Bradley v. United States*, 410 U.S. 605, 607-08 (1973).

This Court has long recognized that a petitioner is entitled to application of a positive change in the law that takes place while a case is on direct appeal (as opposed to a change that takes place while a case is on collateral review). *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 710-11 (1974). The Court expressly anchored its holding in *Bradley* on the principle that an appellate court “is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice” or there is “clear legislative direction to the contrary.” *Id.*, 711, 715. It explained that this principle originated with Chief Justice Marshall in

United States v. Schooner Peggy, 1 Cranch 103 (1801): “[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed.” *Id.*, 712 (quoting *Schooner Peggy*, 1 Cranch at 110). Moreover, a change in the law occurring while a case is pending on appeal is to be given effect “even where the intervening law does not explicitly recite that it is to be applied to pending cases....” *Bradley*, 416 U.S. at 715.

Since Mr. Malone’s judgment was not yet “final” on 12-21-18 when the First Step Act was enacted, he is entitled to retroactive application of all relevant portions of the Act. *Id.*

Further Grounds

Mr. Malone’s conviction and sentence are violative of the First, Fourth, Fifth, Sixth, And Eighth Amendments to the constitution. More specifically, Mr. Malone’s conviction and sentence are violative of his right to freedom of speech and to petition and his right to be free of unreasonable search and seizure, his right to due process of law, his rights to counsel, to jury trial, to confrontation of witnesses, to present a defense, and to compulsory process, and his right to be free of cruel and unusual punishment under the constitution.

The evidence was insufficient. The government falsified and withheld material evidence. The District Court unlawfully determined Mr. Malone’s sentence.

These claims in Argument 1C are submitted to preserve Mr. Malone’s right to raise them in a motion pursuant to 28 U.S.C. § 2255 if this Court declines to reach their merits.

Based on the foregoing, the decision by the Court of Appeals for the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s power of supervision. *Id.* *McNabb v. United States*, 318 U.S. 332 (1943); *GACA v. United States*, 411 U.S. 618 (1973);

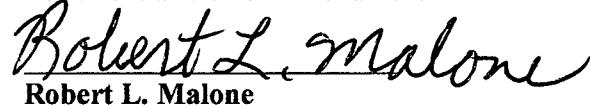
United States v. Jacobs, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Seventh Circuit in Mr. Malone's case.

CONCLUSION

For all of the foregoing reasons, Petitioner Robert L. Malone respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming his direct appeal and **REMAND**² to the court of appeals for reconsideration in light of 18 U.S.C. § 3553(a)(6) and/or the Fifth Amendment and Sixth Amendment.



Robert L. Malone

Petitioner

15253-028

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Date: 8-10-2019

² For authority on “GVR” orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).