No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES RAYMOND STAGNER ,
Petitioner,

v.

UNITED STATES OF AMERICA

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

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

I. Whether the Fifth Amendment Guarantees the Petitioner the Right to a Judgment of Acquittal If the Government Fails to Prove the Petitioner Intended to Distribute Methamphetamine When He Possessed Only Fifteen Grams?

II. Whether Petitioner's Due Process Rights Were Abridged When the Trial Court Admitted Evidence of past Conviction for Conspiracy to Manufacturer Methamphetamine under Fed. R. Evidence 404(b)?

III. Whether a Sentencing Court Should Assess a Two Level Reduction for Acceptance of Responsibility?

IV. Whether a Sentence Is Substantively Unreasonable If it Is Imposed with No Consideration for a Prior Drug Addiction and a Prior Conviction?

II. LIST OF PARTIES AND RULE 29.6 STATEMENT

The caption of the case contains the names of all of the parties to the proceedings before the court of appeals.

The Petitioner is an individual and thus no parent corporations or publicly held corporations are involved in this matter.

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The Petitioner, by and through his undersigned counsel, hereby respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in the herein-referenced matter.

V. OPINION BELOW

The opinion of the court of appeals (App., infra, 1a), dismissing the appeal before it, is found at *United States v. Stagner*, 2019 U.S. App. LEXIS 22278, __ Fed. Appx. __, 2019 WL 3381791 (United States Court of Appeals for the Eleventh Circuit July 26, 2019). The judgment and commitment order of the district court, case no. 1:18CR00039-WS-N, convicting and sentencing Petitioner is also attached hereto. (App., infra, 2a)

VI. STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the district court was entered on October 4, 2018. (App., infra, 2a) A timely notice of appeal was filed by Petitioner on September 25, 2018 and the case was docketed in the court of appeals (Eleventh Cir., No. 18-14239). The court of appeals filed its opinion on July 26, 2019. (App., infra, 1a)

Petitioner hereby files this petition for a writ of certiorari and invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

See Exhibit 3 - App., infra, 3a

VIII. STATEMENT OF THE CASE

Petitioner Charles Raymond Stagner (hereinafter referred to as "Petitioner" or "Mr. Stagner") was named in a two-count indictment by the February 2018 Federal Grand Jury for the Southern District of Alabama, Mobile, Alabama. Count One charged that on or about March 8, 2017, the Petitioner did knowingly and willfully possess with the intent to distribute 0.5 grams of methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C.§841(a)(1) and 18 U.S.C. §2. Count Two charged that on March 16, 2017, the Petitioner did knowingly and intentionally unlawfully possess with the intent to distribute approximately 15 grams of methamphetamine, a Schedule II controlled substance, in violation of of 21 U.S.C.§841(a)(1) and 18 U.S.C. §2.

On April 18, 2018, both the Government and the Petitioner executed a Plea Agreement. However, the Petitioner's guilty plea hearing set for April 25, 2018 was cancelled by the Government and/or

the Court. On June 28, 2018, the Petitioner was found guilty by a jury verdict of the Indictment's Counts One and Two. Petitioner was subsequently sentenced on September 25, 2018 to a term of incarceration of 132 months and a subsequent term of supervised release of eight years. (See, App., infra, 2a)

A timely notice of appeal was filed by Petitioner on September 25, 2018.

Petitioner is currently in the care and custody of the United States Attorney General at the Federal Prison Camp FPC Montgomery, Maxwell Air Force Base, Montgomery, Alabama.

IX. STATEMENT OF FACTS

On March 8, 2017, an investigator for the Saraland, Alabama Police Department (hereinafter referred to as the "SPD") was contacted by an unknown confidential informant who reported that the Petitioner was selling methamphetamine. This unknown informant advised the SPD that he could buy methamphetamine from the Petitioner at his residence in Saraland. The informant met up with investigators of the SPD where both the informant and his vehicle were searched for contraband. None were found.

The informant contacted the Petitioner and confirmed that he was en route to his residence. The investigators provided $40 in pre-recorded U.S. currency to the informant to use to make the anticipated purchase. The informant was also equipped with electronic devices to record the transaction.

The buyer/informant traveled to Petitioner's residence, followed by investigators from SPD, and Petitioner met the informant in an outbuilding behind his residence. The transaction was completed involving a one-half gram of methamphetamine. The buyer left and re-met up with SPD where investigators took possession of the drugs and that electronic equipment.

On March 16, 2017, SPD obtained a search warrant for Petitioner's residence and several investigators and officers executed it the same day. Prior to entering Petitioner's residence, investigators encountered the Petitioner outside and proceeded to search him. Such a personal search found a black pouch. Examination of the pouch indicated about two grams of methamphetamine. (Upon testing by the Alabama Department of Forensic Sciences, the weight was determined to be 1.7 grams.) An investigator advised Petitioner of his rights and

Petitioner agreed to waive his rights and answered questions.

Upon questioning and searching, investigators recovered 12.8 grams of methamphetamine. In addition they found a digital scale and multiple glass pipes. Petitioner advised the officers that he buys methamphetamine from various individuals, not for distribution but only for personal use.

X. ISSUES PRESENTED

I. Whether the Fifth Amendment Guarantees the Petitioner the Right to a Judgment of Acquittal If the Government Fails to Prove the Petitioner Intended to Distribute Methamphetamine When He Possessed Only Fifteen Grams?

II. Whether Petitioner's Due Process Rights Were Abridged When the Trial Court Admitted Evidence of past Conviction for Conspiracy to Manufacturer Methamphetamine under Fed. R. Evidence 404(b)?

III. Whether a Sentencing Court Should Assess a Two Level Reduction for Acceptance of Responsibility.

IV. Whether a Sentence Is Substantively Unreasonable If it Is Imposed with No Consideration for a Prior Drug Addiction and a Prior Conviction.

XI. REASONS FOR GRANTING THE WRIT

I. **Whether the Fifth Amendment Guarantees the Petitioner the Right to a Judgment of Acquittal If the Government Fails to Prove the Petitioner Intended to Distribute**

Methamphetamine When He Possessed Only Fifteen Grams?

On June 26, 2018, Mr. Stagner's counsel proffered an oral motion for judgment of acquittal. (Doc. 40, Oral Motion) One of the primary arguments for such a motion was that the Indictment over-charged the Petitioner in light of the totality of evidence. Specifically, both counts of the Indictment charged the Petitioner with possession with intent to distribute methamphetamine; however, the evidence reflects, and the Petitioner consistently advocated, that all of the narcotics confiscated both on March 8th and 16th, 2017 were obtained by Mr. Stagner for personal use and not with the intent to sell or distribute.

The totality of the evidence reflects possession and not an intent to sell or distribute. First of all, the Petitioner repeatedly maintained that all of his methamphetamine were for personal use. Second, the physical evidence confiscated by law enforcement supported personal use. And third, no direct evidence was introduced by the Government supporting an intent to sell or distribute. As admonished by the Court, the burden of proof is with the Government to prove intent. (See, Transcript of Jury Trial, June 26, 2018, p. 8)

It is established law in the Eleventh Circuit that the conviction of a defendant for the offense of possession with the intent to distribute a controlled substance under 21 U.S.C. §841(a)(1) must be based upon the Government proving knowing possession and an intent to distribute. *United States v. Williams*, 865 F.3d 1328, 1344 (11th Cir. 2017), cert. denied, 138 S.Ct. 1282 (2018). Also see, *Maryland v. Pringle*, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003). Intent to distribute, it is also well-established, can be proven circumstantially from the quantity of drugs and the existence of implements that are commonly used in connection with the distribution of drugs. *United States v. Poole*, 878 F. 2d 1389, 1392 (11th Cir. 1989)

However, if the courts are going to rely on the quantity of drugs to convict an individual to a harsher controlled substance felony than mere possession, a uniform understanding must exist among the circuits as to the standard of what is possession and what is sufficient possession to presume or prove intent to distribute. Such a uniform understanding does not currently exist. Consequently, this writ should be granted in order for this Honorable Court to sustain a standard representing a circumstantial intent to distribute.

Law enforcement, when searching the Petitioner's home, found fifteen grams of methamphetamine. Petitioner consistently maintained that this amount was merely possessed for personal use. The Government insists that these fifteen grams were possessed with the intent to distribute. The Eleventh Circuit, in its opinion below (See, App., infra, 1a), held that fifteen grams were "sufficient for a reasonable juror to find that he was guilty." Unfortunately, prior cases before this Court and before the circuits provide little uniform direction to the lower courts.

In *United States v. Hernandez*, 476 F.3d 791 (9th Cir. 2007), the Ninth Circuit addressed a case where a defendant was arrested as he entered the United States from Mexico at a port of entry after a customs and border protection officer found a cellophane bag containing methamphetamine in defendant's pocket at a secondary inspection station. A test determined that the package contained the equivalent of 111.3 grams of pure methamphetamine.

The defendant was convicted after a jury trial of importation of more than 50 grams of methamphetamine under 21 U.S.C. §952 and §960 and of possession of methamphetamine with intent to distribute

under 21 U.S.C. §841(a)(1) and sentenced to the statutory minimum sentence of 120 months. He sought review of the judgment of conviction and the Ninth Circuit held that the district court refused to instruct the jury on the lesser included offense of simple possession was not harmless and was fatal to the conviction under 21 U.S.C.S. § 841(a)(1). A rational jury could have found that defendant possessed the 111+ grams of methamphetamine for personal use.

Conversely, in the Seventh Circuit case of *United States v. Lopez*, 907 F.3d 537 (7th Cir. 2018), evidence supported the finding that defendant intended to distribute at least 50 grams of methamphetamine; 10 ounces of methamphetamine exceeded the amount an individual would have for personal use, supporting the reasonable inference that he intended to distribute it, rather than use it for himself.

In the Tenth Circuit, the case of *United States v. Juarez*, 607 Fed. Appx. 779, 2015 U.S. App. LEXIS 6108 (10th Cir., April 15, 2015) affirmed the application of intent to distribute. In the Juarez case, the defendant's convictions for drug and conspiracy offenses under 21 U.S.C. §§846, 841(a)(1), and 843(b) were supported by sufficient

evidence that he purchased more methamphetamine than he could personally use, that he had an intent to resell it, and that he repeatedly ordered it over the phone. The defendant typically ordered 1-2 ounces of methamphetamine a week, which equates to 28-56 grams per week.

The Sixth Circuit, in *United States v. Walker*, 399 Fed. Appx. 75, 2010 U.S. App. LEXIS 22413 (6th Cir. October 26, 2010) added to the confusion by sustaining the small amount of 55 grams of methamphetamine as supportive of an intent to distribute.

While various circuit courts have provided some direction as to what amount could be used for personal use, no uniformity has arisen.

In *United States v. Mohamed*, 920 F.3d 94, 2019 U.S. App. LEXIS 9818 (1st Cir. April 3, 2019), uncontroverted testimony was presented regarding the typical usage quantities of methamphetamine. A first time user might use less than a quarter gram at a time, while a person "abusing quite frequently" can use up to a "teener," or 1.75 grams, each time.

A trial court in the Fifth Circuit, in *United States v. Skipper*, 74 F.3d 608, 611 (5th Cir. 1996), took testimony at sentencing that parties consumed up to a half ounce (fourteen grams) of methamphetamine in

a single day.

In addressing intent versus mere possession, the Eighth Circuit, in *United States v. Sanders*, 341 F.3d 809, 2003 U.S. App. LEXIS 18552 (8th Cir. September 9, 2003), was presented with testimony from law enforcement that methamphetamine users use a gram or more a day.

Finally, the Tenth Circuit case of *United States v. Niles*, 708 Fed. Appx. 496, 2017 U.S. App. LEXIS 17678 (10th Cir. September 13, 2017) presented uncontroverted facts that "the average daily drug user consumes 'about a gram [or two]'".

Under Rule 29, a conviction will be upheld if a reasonable jury could conclude that the evidence established guilt beyond a reasonable doubt. *United States v. Browne*, 505 F.3d 1229, 1253 (11th Cir. 2007). With respect to both counts, possession with intent to distribute, the evidence must establish that the defendant knowingly possessed the methamphetamine with the intent to distribute it. *United States v. Sarmiento*, 744 F.2d 755, 761 (11th Cir. 1984). While the Government introduced evidence of possession, it did not present any evidence of any intent to distribute, and it could not for Petitioner did not possess such an intent.

On March 8, 2017, as outlined in Count One of the Indictment, investigators watched as Petitioner possessed a small amount of methamphetamine for personal use. (Transcript of Jury Trial, P. 14) The Government alleged that on that day there was a sale of methamphetamine but despite police, all with body cams, and an alleged confidential informant with video taping equipment, no video exists as to the alleged sale.

In addition to the small amount of methamphetamine found in its search of March 15, 2017, law enforcement investigators only found and confiscated personal use pipes (Transcript of Jury Trial, pp. 60-69)

The Fifth Amendment guarantees the Petitioner the right to a judgment of acquittal if the Government fails to prove the Petitioner intended to distribute methamphetamine when he possessed only fifteen grams. Petitioner proffered such a motion yet it was denied as the courts have not established any uniform guideline for personal use versus larger quantities connoting an intent to distribute. It is time for such a guideline to be established.

II. Whether Petitioner's Due Process Rights Were Abridged When the Trial Court Admitted Evidence of past Conviction for Conspiracy to Manufacturer

Methamphetamine under Fed. R. Evidence 404(b)?

On June 23, 2018, counsel for Petitioner filed a motion (Doc. 37, Motion) to limit the introduction by the Government of 404(b) evidence. A motion in limine is such a motion seeking to prevent the interjection of matters which are irrelevant, inadmissible, or prejudicial.

The subject motion averred that the Government will seek to file proof of prior convictions of the Petitioner for other crimes. (See, Rule 404(b), Fed.R.Evid.) As such information is inadmissible hearsay and an attempt to convict the Petitioner on character evidence, Petitioner made its Motion in Limine. Without this motion sustained and in place, the Government introduced, made reference to, and otherwise left the jury with the impression that the Petitioner had the propensity for criminal conduct, even though such conduct is completely unrelated to the offense at bar.

The district court denied this motion, prejudicing the Petitioner before the jury.

The defense challenged the admissibility of "other crimes" evidence under Rule 404(b) on the grounds the it was not probative of any issue other than character and is too unrelated and too removed in

time to have any evidentiary value. For "other crimes" evidence to be admissible under Rule 404(b), it must be relevant to an issue other than character, there must be sufficient proof to enable a jury to find that the defendant committed the other crime, AND the probative value of the evidence cannot be substantially outweighed by undue prejudice. *United States v. Chavez*, 204 F.3d 1305 (11th Cir. 2000)

The Chavez test was applied in *United States v. Edouard*, 485 F.3d 1324 (11th Cir. 2007). "A defendant who enters a not guilty plea makes intent a material issue which imposes a substantial burden on the government to prove intent, which it may prove by qualifying Rule 404(b) evidence absent affirmative steps by the defendant to remove intent as an issue." Also see, *United States v. Zapata*, 139 F.3d 1355, 1358 (11th Cir. 1998) ("Where the extrinsic offense is offered to prove intent, its relevance is determined by comparing the defendant's state of mind in perpetrating both the extrinsic and charged offenses."); *United States v. Dorsey*, 819 F.2d 1055, 1059 (11th Cir. 1987). Thus, where the state of mind required for the charged and extrinsic offenses is the same, the first prong of the Rule 404(b) test is satisfied. Id.; *United States v. Dickerson*, 248 F.3d 1036, 1047 (11th Cir. 2001).

However, to justify the issue of intent, evidence must be presented to compare the Petitioner's state of mind in perpetrating both the charged offenses and the Rule 404(b) offense. This matter was not addressed by either the Petitioner or the Government. In this case, Petitioner's charged offenses include, inter alia, possession with intent to distribute. By pleading not guilty, Petitioner made his intent a material issue. See *United States v. Zapata*, 139 F.3d at 1358. Nevertheless, no testimony of mental state or intent was presented as to the extrinsic acts. Accordingly, the first prong of the analysis was not satisfied. Evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's character in order to show action in conformity therewith. Fed. R. Evid. 404(b)(1). Such evidence is admissible for other purposes, however, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. Id. 404(b)(2). Courts have said that Rule 404(b) is a rule of "inclusion" that allows evidence of other acts unless the evidence "tends to prove only criminal propensity." *United States v. Cohen*, 888 F.2d 770, 776 (11th Cir. 1989). The Government, in the proceedings below, sought to admit evidence of other crimes only of the Petitioner's criminal propensity.

For evidence of other crimes or acts to be admissible under Rule 404(b): (1) it must be relevant to an issue other than the defendant's character; (2) there must be sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the act in question; and (3) the probative value of the evidence cannot be substantially outweighed by undue prejudice, and the evidence must satisfy Rule 403. *United States v. Chavez*, 204 F.3d 1305, 1317 (11th Cir. 2000). In assessing the probative value of the evidence, one evaluates the government's incremental need for the evidence to prove guilt beyond a reasonable doubt, the similarity of the extrinsic act and the charged offense, and the closeness or remoteness in time of the charged offense to the extrinsic evidence. *United States v. Ellisor*, 522 F.3d 1255, 1268 (11th Cir. 2008).

Finally, some circuits note that temporal remoteness is an important factor to be considered as it "depreciates the probity of the extrinsic offense." *United States v. Beechum*, 582 F.2d 898, 915 (5th Cir. 1978). The importance of this rule's conflicting interpretation cannot be over-stated. This Court should accept this writ to provide direction and interpretation for the lower courts.

III. Whether a Sentencing Court Should Assess a Two Level Reduction for Acceptance of Responsibility.

U.S.S.G. §3E1.1(a) provides that if the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

In the Application Notes of this Guideline, the United States Sentencing Commission outlines that such a reduction in sentencing is applicable to a defendant if the following considerations are present:

> (A) truthfully admitting the conduct comprising the offense(s) of conviction;
>
> (B) voluntary termination or withdrawal from criminal conduct or associations;
>
> (C) voluntary payment of restitution prior to adjudication of guilt;
>
> (D) voluntary surrender to authorities promptly after commission of the offense;
>
> (E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
>
> (F) voluntary resignation from the office or position held during the commission of the offense;
>
> (G) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and
>
> (H) the timeliness of the defendant's conduct in manifesting the

acceptance of responsibility.

A review of Petitioner's actions reflects a resonance with these Guideline circumstances. The transcripts of both the jury trial and sentencing indicate Petitioner truthfully admitting the conduct comprising his possession of methamphetamine. The only reason he did not fulfill the execution of a plea agreement was his refusal to admit guilt of an intent to distribute, an intent which he did not have. He voluntary terminated from criminal conduct or associations; and he voluntary surrendered to authorities promptly after commission of the offense. And finally, he acted timely in manifesting his acceptance of responsibility. He provided the Government every reasonable opportunity to save resources and avoid a trial but it was the Government that refused to agree on a plea agreement. The importance of this situation is paramount. The Government should be restrained from so penalizing a criminal defendant.

Caselaw throughout the circuits have addressed this subparagraph (a) and provides an interpretation to "clearly demonstrating acceptance of responsibility." Even if a defendant takes a matter to trial, a defendant can be entitled to sentencing credit for

acceptance of responsibility. *United States v. Wright*, 133 F.3d 1412 (11th Cir. 1998)

In determining whether a defendant is entitled to an acceptance of responsibility adjustment, a district court may properly consider "the offender's recognition of the wrongfulness of his conduct, his remorse for the harmful consequences of that conduct, and his willingness to turn away from that conduct in the future." *United States v. Scroggins*, 880 F.2d 1204, 1215 (11th Cir.1989).

Although, a "district court may consider the nature of [the defendant's legal challenges to his conviction] along with the other circumstances in the case when determining whether a defendant should receive a sentence reduction for acceptance of responsibility," *United States v. Smith, 127* F.3d 987, 989 (11th Cir.1997) (en banc) ("Smith"), an otherwise deserving defendant cannot be denied a reduction under § 3E1.1 solely because he asserts a legal challenge to his conviction that is unrelated to factual guilt. In Smith, the full appellate panel held that a panel of this court had gone "too far" in concluding that "it is impermissible [for a district court] to consider [a] challenge to the legal propriety of a sentence" in denying a reduction in

offense level for acceptance of responsibility. 127 F.3d at 989 (quoting *United States v. Smith, 106* F.3d 350, 352 (11th Cir.1997) (as amended) ("Smith I")). The original panel had erred, the appeals court concluded in Smith, in deciding that a district court categorically may not consider a defendant's legal challenge to a presentence report.

Similarly to the Smith fact pattern and holding, the Petitioner went to trial to challenge a legal conclusion drawn from the facts, specifically whether the Petitioner maintained intent to sell or distribute. He readily admitted to the guilt of possession. Other circuits have concluded that legal challenges alone cannot form the basis for a denial of a downward adjustment for acceptance of responsibility. See *United States v. Purchess*, 107 F.3d 1261, 1267 (7th Cir.1997) (concluding that "district court should not deny the reduction for acceptance of responsibility because the defendant challenges a legal conclusion drawn from the facts the defendant admits"); *United States v. Fells*, 78 F.3d 168, 172 (5th Cir.) (holding that district court erred in denying reduction for defendant who "freely admitted all the facts but challenged their legal interpretation"), *United States v. Broussard*, 987 F.2d 215, 224 (5th Cir.1993) (holding that district court erred in

denying acceptance of responsibility adjustment when defendant admitted ownership of guns found in home and went to trial only to argue that statute did not apply to uncontested facts), overruled on other grounds by *J.E.B. v. Alabama*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994); see also U.S.S.G. § 3E1.1, comment. (n.2) (stating that defendant who does not plead guilty may nevertheless clearly demonstrate acceptance of responsibility if he goes to trial in order "to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct"); cf. *United States v. Peery*, 977 F.2d 1230, 1234 (8th Cir.1992) (affirming district court's refusal to grant adjustment for acceptance of responsibility because defendant contested factual guilt).

It is of national importance to implement properly the benefits of U.S.S.G. §3E1.1(a). The Petitioner should have received credit for acceptance of responsibility. Throughout the proceedings, he admitted his guilt of possession and only challenged the legal conclusion of intent. It was error, based on the Guidelines and caselaw, for the trial court to refuse to grant the Petitioner the benefits of U.S.S.G. §3E1.1(a). If the Petitioner had received an acceptance of responsibility

credit, his based Guideline calculation would have been 21 or 22, and not 24.

IV. Whether a Sentence Is Substantively Unreasonable under 18 U.S.C. §3553 If it Is Imposed with No Consideration for a Prior Drug Addiction and a Prior Conviction.

The ultimate result of sentencing in the subject matter reflects an injustice to the goals of 18 U.S.C. §3553(a). Such an injustice is of national importance and calls out for a definitive statement of intent and application for the primary sentencing statute in the Federal criminal code.

The goal of this sentencing system, Judge Marvin Frankel explained, was "[s]entencing [that] would be more just. Like cases would tend to be treated alike," because "[t]he most fundamental of our legal principles--'equal justice under law'--demands that this be so." Frankel, Jail Sentence Reform, N.Y. Times, January 15, 1978 at E21; see also *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139, 126 S. Ct. 704, 710, 163 L. Ed. 2d 547 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike."). Frankel and other reformers won the debate, although it took a number of years

to enact the necessary legislation and put a new sentencing system in place.

The legislation was the Sentencing Reform Act of 1984, whose primary purpose was to channel district courts' sentencing discretion and reduce disparity in sentencing. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3586 (1988) and 28 U.S.C. §§ 991-998 (1988)); *Mistretta v. United States*, 488 U.S. 361, 364-69, 109 S. Ct. 647, 651-53, 102 L. Ed. 2d 714 (1989) (discussing background to the Sentencing Reform Act and the guidelines). The Act, which became effective on November 1, 1987, created the Sentencing Commission and gave it the responsibility to develop a system of sentencing guidelines.

The sentencing guidelines were originally binding, and district courts were required to state reasons for imposing a particular sentence. 18 U.S.C. §3553(b)-(c). A court could impose a sentence outside the applicable guidelines range only if it found the existence of an aggravating or mitigating circumstance "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Id. § 3553(b)(1). In making such a

finding, a sentencing court could consider only the guidelines themselves and the policy statements and official commentaries of the Sentencing Commission. Id. As this Court later stated, departures on this basis were rarely available because "[i]n most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible." *United States v. Booker*, 543 U.S. 220, 234, 125 S. Ct. 738, 750, 160 L. Ed. 2d 621 (2005)

In the context of sentencing, the proper factors are set out in 18 U.S.C. §3553(a), and a district court commits a clear error in judgment when it weighs those factors unreasonably, arriving at a sentence that does not "achieve the purposes of sentencing as stated in §3553(a)." In order to determine whether that has occurred, a reviewing court is "required to make the [sentencing] calculus ourselves" and to review each step the district court took in making it. Booker, 543 U.S. at 261 ("Those §3553(a) factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.")

In reviewing the reasonableness of a sentence, a reviewing court must, as this Court has instructed, consider the totality of the facts and

circumstances. *United States v. Pugh*, 515 F.3d at 1192 (unreasonableness of sentence depends "on an examination of the 'totality of the circumstances'". To the extent that the district court has found facts, they should be accepted unless they are clearly erroneous. Id. At the same time, a court can and should consider "additional salient facts that were elicited, and uncontroverted." Id. The difference is between contradicting a factfinding, on the one hand, and ignoring uncontroverted facts that the district court failed to mention on the other. That difference is important because a district court cannot write out of the record undisputed facts by simply ignoring them. The failure to mention facts may well reflect the district court's judgment that those facts are not important, but the importance of facts in light of the §3553(a) factors is not itself a question of fact but instead is an issue of law.

After performing the required analysis, a reviewing court may vacate the sentence if, but only if, it is "left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the §3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case."

United States v. Pugh, 515 F.3d at 1191; *United States v. Crisp*, 454 F.3d 1285, 1290 (11th Cir. 2006) (vacating as "outside the range of reasonableness" a sentence of five hours' imprisonment for bank fraud even though the defendant had provided substantial assistance that was crucial in the prosecution of his co-defendant).

The Factors of §3553(a)

The first listed factor--it is actually two factors in one--that a district court must consider in sentencing, and that a court of appeals must consider in reviewing the sentence for substantive reasonableness, is "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. §3553(a)(1). To a large extent "the nature and circumstances of the offense" component of this factor overlaps with the next listed consideration, which is "the need for the sentence imposed--to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," Id.; 18 U.S.C. §3553(a)(2)(A).

The Illness of Drug Addiction

Much along the same lines that the district court insisted on describing the defendant in *United States v. Irey*, 612 F.3d 1160 (11th

Cir. 2010), the Petitioner presented himself to the sentencing court as one suffering from the "illness" of drug addiction.

The lower court described the addiction on page 16 of the transcript of sentencing hearing, held before Judge Steele on September 25, 2018 as follows:

> And I don't think it's lost on you that that's probably the most dangerous drug [i.e.-methamphetamine] that's ever been manufactured in our history. It's -- I see it every day. I sentence people all the time. I hear evidence about it. I hear comments about it. I hear testimony about it. It's the most dangerous drug that this Court has ever seen. It's addictive. It's destructive. It destroys the individual. It destroys everyone around them. And because of that, Congress has said people who do this deserve severe punishment. That's where you find yourself.

This excerpt is a reaction to Petitioner's counsel's comments to the sentencing court found on page 10 of the transcript of the sentencing hearing:

> Judge, just take into account my client is a --regardless of what he was convicted of, he is a user. He has some issues with -- major issues with methamphetamine use. I would ask that any sentence take that into account. And that as seen by the -- really the amount of pipes around his house and not so much in the garage, but the ones in his bedroom, I would certainly -- would certainly suggest that he is using methamphetamine...

Consequently, the district court found that because he suffered from addiction, he, like the defendant in *United States v. Irey*, supra,

suffered acts that bring him to the court and were not purely volitional. His criminal conduct was due in substantial part to a recognized illness. And while it does not excuse his conduct and he will be held accountable for it, it would be inappropriate to ignore that fact as a §3553(a) factor.

This issue is relevant to the §3553(a)(1) factor concerning "the nature and circumstances of the offense and the history and characteristics of the defendant."

Section 3553(a)(2)(A)

The second factor that a district court must consider in sentencing, and that a court of appeals must consider in reviewing the sentence for substantive reasonableness, is "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S. C. 3553(a)(2)(A). This requirement extends beyond, but also overlaps to some extent with, the "nature and circumstances of the offense" component of 3553(a)(1).

The 3553(a)(2)(A) consideration is the concept, which carries the need for retribution, the need to make the punishment fit the crime,

and the need not just to punish but to punish justly. In *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008) the Court quoted from the Senate Report regarding this provision:

> This purpose--essentially the "just deserts" concept--should be reflected clearly in all sentences; it is another way of saying that the sentence should reflect the gravity of the defendant's conduct. From the public's standpoint, the sentence should be of a type and length that will adequately reflect, among other things, the harm done or threatened by the offense, and the public interest in preventing a recurrence of the offense. From the defendant's standpoint the sentence should not be unreasonably harsh under all the circumstances of the case and should not differ substantially from the sentence given to another similarly situated defendant convicted of a similar offense under similar circumstances.

515 F.3d at 1195 (quoting S. Rep. No. 98-225, at 75-76, 1984 U.S.C.CA.N. 3258-59) .

Section 3553(a)(2)(B)

The third factor that a district court must consider in sentencing, and that a court of appeals must consider in reviewing the sentence for

substantive reasonableness, is "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct." Id.; 3553(a)(2))(B) . The sentencing judge in this case referred to this important sentencing purpose as one of the §3553(a) factors that "essentially are subjective in nature." He did say that "a serious sentence is hopefully going to deter others from conducting similar affairs," but then expressed his view that "when we're dealing with an illness like this, I'm not sure that that rationally follows."

Section 3553(a)(2)(C)

The fourth factor that a district court must consider in sentencing, and that a court of appeals must consider in reviewing the sentence for substantive reasonableness, is "the need for the sentence imposed . . . to protect the public from further crimes of the defendant." 18 U.S.C. 3553(a)(2)(C)This is the specific deterrence or incapacitation factor.

Section §3553(a)(4) and (5)

District courts in sentencing, and courts of appeals in reviewing sentences, must also consider the guidelines range and any pertinent policy statements in the guidelines. 18 U.S.C. §3553(a)(4)-(5). Of course,

since Booker the guidelines have been advisory, but they are still to be given respectful consideration. Caselaw has not attempted to specify any particular weight that should be given to the guidelines range. A good discussion of the subject came in *United States v. Hunt*, 459 F.3d 1180 (11th Cir. 2006), where the appellate court rejected "any across-the-board prescription regarding the appropriate deference to give the Guidelines." Id. at 1184.

Section 3553(a)(6)

Section 3553(a) requires that district courts in sentencing, and courts of appeals in reviewing sentences, "consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 19 U.S.C. §3553(a)(6). This factor is a particularly important one when reviewing the substantive reasonableness of a sentence because one of the primary purposes of appellate review of sentences is to iron out differences in order to avoid undue disparity. Booker, 543 U.S. at 264.

At sentencing, the trial court stated that it took into account many factors:

"such as your personal history and characteristics, the nature of

> the offense, criminal history, and the other factors that are outlined in the statute. And then I have to come up with a sentence that's fair and reasonable, sufficient but not more than necessary to accomplish the sentencing objectives which are also outlined in the statute."

Transcript of Sentencing Hearing, p.15

However, the few factors noted by the sentencing court did not include all of the §3553(a) factors and especially did not give proper discussion of Petitioner's drug addiction. Additionally, the court appears to have double-punished the Petitioner, misapplying the statutes and the Guidelines and causing an unfair, unreasonable, undue disparity.

The sentencing court believed it was required to impose the mandatory minimum of 120 months under 21 U.S.C. §841(b)(1)(b) and (C). However, the court then noted, on page 17 of the Transcript, "The mandatory minimum does not account for your criminal history." This understanding is incorrect, unfair, and as it is incorrect it is unreasonable.

The mandatory minimum under 21 U.S.C. §841(b)(1)(b) and (C) is only applicable if a defendant's criminal history is noted and used to trigger the 21 U.S.C. §851 provision. When the sentencing court then

increased Petitioner's base, mandatory minimum sentence of 120 months by an additional year due to his criminal history, the court misapplied the §3553(a) factors by double punishing the Petitioner for his criminal history. By erroneous applying the §3553(a) factors at sentencing, appellate review should require this court to overturn the lower court's sentence and remand for a re-sentencing and a renewed and proper application of the §3553(a) factors.

A review of this matter is not one primarily of error-correction, though as a retrospective, collateral matter it would correct an error, but rather a review would clarify a matter of national importance before all criminal cases throughout the circuits.

XII. CONCLUSION

As this Court noted in Coppedge v. United States, 369 U.S. 438, 449 (1962), "when society acts to deprive one of its members of his life, liberty, or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by

which the quality of our civilization may be judged."

The Petitioner respectfully requests that this Honorable Court issue the requested writ of certiorari.

Respectfully Submitted,

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