19-6774

No.

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

ALBERT ALLEN JR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

ALBERT ALLEN, JR.
Pro se
#M-49908
MENARD CORRECTIONAL
P.O.BOX 1000
MENARD, IL 62259

Office of the Clerk
Supreme Court of the United States
1 First Street N.E
Washington, D.C. 20543
SupremeCtBriefs@USDOJ.gov
(202) 479-3011

QUESTIONS PRESENTED

Whether the Court of Appeals Erred in Denying Petitioner's Application for a Certificate of Appealability to Appeal the District Court's Denial of His Motion to Vacate his 262 months' Sentence Under 28 U.S.C. 2255(a), When Intervening Precedent Establishes that Petitioner's 262 months' Sentence was Imposed in Error.

Whether Trial Counsel Adequately Failed to Argue the Lower Penalty Provisions under the Fair Sentencing Act of 2010 (FSA), Pub. L. No. 111-220, 124 Stat.2372. *Dorsey v. United States*, 32 S. Ct. 2321 (2012); and *Kimbrough v. United States*, 128 S. Ct. 558, 566 (2007); *Gall v. United States*, 552 U.S. 38 (2007) Which Offers Crucial Guidance on the Extent of Sentencing Courts' Discretion to Deviate from the Advisory Sentencing Guideline articulated in 18 U.S.C. § 3553(a).

Whether Title 18 U.S.C. § 924(c)(1)(A)(iii), Establishing a Ten-Year Mandatory Minimum Sentence for a Defendant Who Never Had a Firearm During a Crime of Violence, Requires Proof of M*ens Rea.* The Due Process Clause does not Tolerate Convictions for Conduct that Was Never Criminal. 18 U.S.C. 924(c)(1)(a) *Mens Rea* Requirement Under Title 18 § 924(c)(1)(a) of the United States Code provides That a Person Convicted of Violating the Subsection is Subject to a Minimum Sentence of Five Years if During the Course of the Violation the Individual Carried a Firearm.

Whether the Passage of Time Between the Offense and Allen Sentencing is More than Thirteen Years Which Violates Allen's Due Process.

Whether Title 21 U.S.C. § 851 (a) Requires the Government to File Notice "Before Trial" If It Intends to Seek an Enhanced Punishment for a Drug Offense Based On the Defendant's Prior Criminal Conviction. In this Case, the Government Did Not Provide Notice 'Before Sentence" But Provided It after Sentence.

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Albert Allen Jr. and Respondent United States of America. The petitioner is not a corporation. All parties appear in the caption of the case on the cover page.

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No.

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UNITED STATES OF AMERICA, RESPONDENT

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

Petitioner Albert Allen Jr., prays a writ of certiorari is grant to review the judgment of the United States Court of Appeals for the Eighth Circuit issued on August 05, 2019. The decision reproduced in [Appendix A].

OPINIONS BELOW

On June 21, 2019, the United States Court of Appeals for the Eighth Circuit denied Allen a COA; the court of appeals did not issue a written opinion, the decision reproduced in [Appendix G]. On August 05, 2019, the United States Court of Appeals for the Eighth Circuit denied petitioner's timely Rehearing or Rehearing En Banc. The court of appeals did not issue a written opinion, the decision reproduced in [Appendix A]. On August 15, 2019, United States Court of Appeal formal mandate issued, the decision reproduced in [Appendix A-1]. Granting certiorari in this case would address the injustices. This petition been timely filed within 90 days of the order. SUP. CT. R. 13.1 The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

JURISDICTION[1]

On August 21, 2013, a grand jury issued an indictment against Allen for one count of conspiracy to distribute 280 grams or more of crack cocaine. The indictment was based on perjured testimony, knowingly used by the State authorities to obtain a conviction, no factual evidence of control substance presented (R. at 2.). The events leading to the prosecution of Albert Allen began when informant Richard Allen aka "Big Daddy Rich" was facing serious drug charges. Seeking to carry favor with the government, Richard offered his statement, then, falsely accusing Albert Allen of being a major drug trafficker. During 2002-2011, Richard Allen allegedly saw Albert Allen sale controlled substance in public. Richard Allen joined forces with prosecutors to assassinate Albert Allen's character. Officials had no surveillance on Albert Allen that revealed the presence of any drugs during this encounter. The initial police report, based on the original debriefing of Richard Allen given during 2002-2011 did not reflect any statements by Richard Allen or other witness concerning Albert Allen and the presence of drugs during this transaction. Based on the alleged statements by Richard Allen and other witnesses stating Albert Allen was a "drug dealer" during 2002-2011, there weren't any surveillance, search warrant, drugs, money, vehicles, real estate, firearm, drug paraphernalia or any other property seized, absolutely no evidence that leads to Albert Allen as the "drug dealer". As stated, the initial police report, which reflected the initial debriefing of Richard Allen, did not indicate the presence of drugs during 2002-2011. Prosecutors and magistrate judge inappropriately relied upon unproven conduct, essentially condemning Allen on conjecture and hearsay. Following the review on alleged statements, Albert Allen charged with one count of conspiracy to distribute "crack cocaine" through hearsay. Additional changes later added such as (a) "leader role" in connection with drug trafficking crime and (b) possessing a "firearm" through an alleged "recorded conversation" and witness statements. On this particular note, on February 25, 2015, 13 years later acting upon the indictment, United States Marshals pulled Albert Allen out of Statesville correctional center located in Illinois, to charge him with conspiracy to distribute "crack cocaine" during 2002-2011. Allen's Fourth Amendment rights were violated, Allen was wrongful arrested and detention, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Magistrate judge did not conduct an evidentiary hearing to conclude the alleged statements by Richard Allen and other witnesses stating Albert Allen was a "drug dealer" during 2002-2011. As stated above, there weren't any surveillance, search warrant, drugs, money, vehicles, real estate, firearm, drug paraphernalia or any other property seized, absolutely no evidence that leads to Albert Allen as the "drug dealer" selling controlled substance in public during 2002-2011.

On September 29, 2015, the United States District Court Northern District of Iowa, Cedar Rapids Division sentence Allen to two hundred six-two months in prison based on hearsay statements (R. at 51). On October 15, 2015, Allen appeals to the United States Court of Appeals for the Eighth Circuit (R. at 57). On April 20, 2016, the United States Court of Appeals for the Eighth Circuit affirmed Allen's sentence with an opinion (R. at 64), the decision reproduced in [Appendix B]. On May 09, 2016, Allen filed a motion to

1 Citations to Allen's criminal case (13 CR 66) are referred to as "R" followed by the docket number. Citations to Allen's civil case (16 CV 88) are referred to as "Dkt. No." followed by the docket number.

vacate, set aside, or correct his sentence or conviction under 28 U.S.C. § 2255 (Dkt. No. #1). On September 15, 2016, Allen filed a motion to reduce sentence pursuant to 18 U.S.C § 3582(C)(2) while pending his motion to vacate, set aside, or correct sentence or conviction under 28.U.S.C. § 2255 (R. at 66). On October 04, 2016, the United States District Court Northern District of Iowa, Cedar Rapids Division, denied Allen motion to reduce sentence (R. at 67), the decision reproduced in [Appendix C]. On October 25, 2016, Allen filed a motion to reconsider his reduce sentence pursuant to 18 U.S.C § 3582(C)(2), the United States District Court Northern District of Iowa, Cedar Rapids Division, denied Allen's motion for reconsideration (R. at 69), the decision reproduced in [Appendix D]. On December 18, 2018, the District Court Northern District of Iowa, Cedar Rapids Division, denied Allen's motion to vacate, set aside, or correct his sentence or conviction under 28.U.S.C. § 2255 (Dkt. No. #11), the decision reproduced in [Appendix E]. On January 14, 2019, Allen appealed to the United States Courts of Appeals for the Eighth Circuit requesting a COA, the decision reproduced in [Appendix F] and [Appendix F-1]. On June 21, 2019, the United States Court of Appeals for the Eighth Circuit denied Allen a COA, the decision reproduced in [Appendix G]. On August 05, 2019, a timely petition for Rehearing or Rehearing En Banc filed, the United States Court of Appeals for the Eighth Circuit affirmed Allen's conviction and sentence, the decision reproduced in [Appendix A]. Allen argued his sentence exceeded the applicable Guideline range; Mr. Allen should have been subject to a statutory penalty of less than 10 years rather than 22 years' imprisonment. Courts recognized this factor at the original sentencing hearing. If the Fair Sentencing Act of 2010 (FSA), Pub. L. No. 111-220, 124 Stat.2372 had been properly applied at sentencing, Allen would have faced a penalty under 21 U.S.C § 841(b)(1)(B), and a statutory minimum 262 months' sentence would not have applied. Allen should be sentence according to the lower penalty provisions under the FSA *Dorsey v. United States*, 132 S. Ct.2321, at 2330-31, 183 L. Ed. 2D 250 (2012). Petitioner argues that the 262 months' imprisonment had been erroneously impose; the court denied Allen Section 2255 motion and his motion to reduce sentence pursuant to 18 U.S.C § 3582(C)(2) and denied petitioner's motion to reconsider his reduce sentence pursuant to 18 U.S.C § 3582(C)(2). The Courts also denied Allen's application for a certificate of appealability (COA). Petitioner sought a COA from the court of appeals claiming that 21 U.S.C. §§ 846 and 841(a)(1), are unconstitutional and he was subject to a vindictive prosecution which led to a 262 months' sentence was imposed in error.

The court believed that it had "applied the procedural rules correctly," it declined to issue a COA on petitioners. Petitioner requested a COA from the court of appeals "with respect to four issues," namely: (a) the passage of time between the offense and Allen sentencing is more than thirteen years which violates Allen's Due Process; (b) reasonable Jurists could conclude that Allen's claim is meritorious, petitioner was subjected to an erroneous mandatory minimum sentence resulting 22 years' imprisonment violates petitioner's Constitutional Right to Due Process; (c) the firearm count § 924(c)(1)(a) required proof of *mens rea.* the Due Process Clause, does not tolerate convictions for conduct that was never criminal, and (d) a new trial would produce an acquittal if an effective defense to contest key 841 and 846 count was properly prepared and exculpatory evidence was investigated. Allen made a sufficient showing of Constitutional deprivation. Petitioner 262 months' imprisonment been erroneously imposed.

A timely petition for Rehearing En banc denied on August 05, 2019, the Eighth Circuit affirmed Allen's conviction and sentence. The court of appeals did not issue a written opinion, the decision reproduced in [Appendix A]. The court of appeals declined to issue a COA. Ibid. The court of appeals reasoned that, it had carefully reviewed the original file of the district court and denied petitioner a COA, without addressing whether petitioner had shown that he had a debatable constitutional claim. The court of appeals concluded that a COA denied, the decision reproduced in [Appendix G].

PRELIMINARY STATEMENT

This case presents five important issues: Whether petitioner's sentence exceeded the applicable guideline range, as the prior conviction used 21 U.S.C. § 841(a)(1)(b)(1)(a) should not be applied. If the FSA had been properly applied at sentencing, Allen would have faced a penalty under 21 U.S.C § 841(b)(1)(B), and a statutory minimum 262 months' sentence would not have applied. Allen was sentence under 21 U.S.C. 846 and 841(a)(1), increasing his statutory penalty; had the court not applied the 21 U.S.C. § 841(a)(1), the statutory minimum would be 10 years, in addition, had Allen not received the erroneous "career offender" role enhancements, the statutory minimum would less than 10 years.

Second, whether trial counsel adequately failed to argue the lower penalty provisions under the Fair Sentencing Act of 2010 (FSA), Pub. L. No. 111-220, 124 Stat.2372. *Dorsey v. United States,* 32 S. Ct. 2321 (2012); and *Kimbrough v. United States,* 128 S. Ct. 558, 566 (2007); *Gall v. United States,* 552 U.S. 38 (2007) which offers crucial guidance on the extent of sentencing courts' discretion to deviate from the Advisory Sentencing Guideline articulated in 18 U.S.C. § 3553(a). Third, whether the firearm count 18 U.S.C. 924 (c)(1)(a) required proof of M*ens Rea.* The Due Process Clause does not tolerate convictions for conduct that was never criminal. 18 U.S.C. 924(c)(1)(a) *Mens Rea* requirement under Title 18 § 924(c)(1)(a) of the United States Code provides that a person convicted of violating the subsection is subject to a minimum sentence of five years if during the course of the violation the Individual carried a firearm. Fourth, whether the passage of time between the offense and Allen sentencing is more than thirteen years, which violates Allen's Due Process. Finally, Title 21 U.S.C. § 851 (a) requires the government to file a notice "before trial" if it intends to seek an enhanced punishment for a drug offense based on the defendant's prior criminal conviction. In this case the government did not provide notice 'before sentence" but provided it after sentence.

On August 21, 2013, a grand jury issued an indictment against Allen for one count of conspiracy to distribute 280 grams or more of crack cocaine based on hearsay. In violation of 21 U.S.C. 846 and 841(a)(1) (R. at 2.) On September 29, 2015, the Court sentenced Allen to two hundred sixty-two months' imprisonment. (R. at 51). On October 15, 2015, Allen appealed his sentence arguing, the district Judge presumption regarding a "manager role" raises a violation in the proper standard of professional conduct, such a finding is insufficient because it fails to identify at least one participant who he supervised or managed, and because it makes no mention of the requirement that, there be five or more participants or criminal activity that could be characterized as "otherwise extensive" (R. at 57). On April 20, 2016, District court affirmed petitioner's sentence with an opinion, the decision reproduced in [Appendix B]. On May 09, 2016, Allen filed a motion to vacate, set

aside, or correct his sentence or conviction under 28 U.S.C. § 2255 (Dkt. No. #1). The Court denied his petition on December 18, 2018, the decision reproduced in [Appendix E] (Dkt. No. #11). Petitioner filed a motion to request a reduction sentence pursuant to 18 U.S.C § 3582(C)(2) (R. at 66), the court denied his petition on October 04, 2016 (R. at 67), the decision reproduced in [Appendix C]. Petitioner filed a motion for reconsideration pursuant to 18 U.S.C § 3582, (R. at 68), the court denied his petition on October 25, 2016 (R. at 69), the decision reproduced in [Appendix D]. Petitioner appealed to the United States Courts of Appeals for the Eighth Circuit, petitioner's COA denied on June 21, 2019, the decision reproduced in [Appendix G]. On August 05 2019, petitioner timely Rehearing En banc denied, and the Eighth Circuit affirmed the District Court. The Eighth Circuit affirmed Allen's sentence and conviction on all issues, the decision reproduced in [Appendix A].

STATEMENT OF THE CASE[2]

A. Background and Investigation

May 09, 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255(a), (Dkt. No. #1). On December 18, 2018, the district court denied petitioner 28 U.S.C. 2255([Dkt. No. #11).

During 2002-2011, government "informant Richard Allen" allegedly saw Albert Allen sale controlled substance in public. On August 21 2013, a federal grand jury indicted petitioner for conspiracy to distribute with intent to distribute 280 gram of cocaine, in violation of 21 U.S.C. 846 and 841(a)(1)(b)(1)(a) based on hearsay. On September 29, 2015 petitioner sentenced to 262 months' imprisonment, using the draconian and racially discriminatory pre- FSA statutory crack cocaine penalties, (R. at 51). *See* 21 U.S.C. 841(a)(1)(b)(1)(a), under that law, a first-time offender convicted of an offense involving the charged drug quantities faced a mandatory minimum sentence of ten years of imprisonment and a maximum sentence of life. Ibid. If the offender's criminal history included "a prior conviction for a felony drug offense," then the offender was subject to a mandatory minimum sentence of 30 years of imprisonment and a maximum sentence of life. And an offender with "two or more prior convictions for a felony drug offense [that] have become final" faced "a mandatory term of life imprisonment without release." Ibid. A "felony drug offense" is defined as a federal, state, or foreign drug offense "that is punishable by imprisonment for more than one year." In 2010, the President signed into law the Fair Sentencing Act of 2010 (hereafter alternatively referred to as "FSA"), which amended the penalty provisions of 21 U.S.C. § 841 of the Controlled Substances Act. Under this amendment, the five-year mandatory minimum for crack cocaine offenses is now triggered by 28 grams of crack cocaine (former provision was 5 grams), while 280 grams triggers a 10 years' mandatory minimum penalty (former provision of 50 grams).

2 All references are to the combined record on appeal as constituted before the Court of Appeals.

See, §§ 841(b) (1) (A) and (b) (1) (B).[3]

The district Judge applied 21 U.S.C. § 851, increasingly his statutory penalty; A leader role, increasingly his statutory penalty and USSG § 4B1.1 career offender, increasing his guideline range of imprisonment, had Allen not received the erroneous criminal history enhancements, the statutory minimum would be less than 10 years. Mr. Allen does not have any prior felony drug offense he should not have received an enhanced penalty to 22 years' imprisonment [Appendix H]. Nor should petitioner be treated as a career offender. These enhanced penalties must be set aside, subjecting Mr. Allen to a lower statutory range and a guideline range now falling above rather than below the mandatory minimum imprisonment term. Mr. Allen should have been subject to a statutory penalty of less than 10 years' imprisonment rather than 22 years. Allen should be sentence according to the lower penalty provisions under the FSA. *Dorsey v. United States*, 132 S. Ct.2321, at 2330-31, 183 L. Ed. 2D 250 (2012).

There wasn't any evidence in the record to support the enhancement, the district court made no findings and did not properly refer to the recommendations in Allen's PSR reports [Appendix G]. When an issue under the guidelines is dispute, the court either must adopt the PSR's recommended findings or make independent findings sufficient to support its conclusion, United States v. Patel, 131 F.3d 1195 (1997). The court did neither in Mr. Allen's case. As such, the enhancements would not count if the conviction was set aside and a new sentence imposed under the current guidelines.[4]

These enhanced penalties must be set aside, subjecting Mr. Allen to a lower statutory range and a guideline range now falling above rather than below the mandatory minimum imprisonment term. The time Allen was sentenced, the law changed so that he is no longer eligible for a statutory minimum sentence of 22 years' imprisonment. Courts recognized this factor at the original sentencing hearing. Mr. Allen should have been subjected to a statutory penalty of less than 10 years' imprisonment rather than 22 years' imprisonment, Allen should be sentence according to the lower penalty provisions under the FSA, Dorsey v. United States, 132 S. Ct.2321, at 2330-31, 183 L. Ed. 2D 250 (2012). *Dorsey* makes clear that these statutory penalties should apply. As such, he is eligible for consideration for a sentencing reduction under the retroactive crack/cocaine amendment.[5]

Mr. Allen is innocent of greater offense for the enhanced statutory penalties provided under 21 U.S.C. § 841(b)(a)(A) and the enhancement guideline provision. This Court should correct petitioner's sentence; it has resulted in a manifest injustice. In

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3 In 2010, the Fair Sentencing Act of 2010 (FSA), Pub. L. No. 111-220, 124 Stat.2372, raised the threshold quantity of cocaine base triggering a ten-year minimum sentence from 50 to 280 grams. Petitioner, however, was sentenced after the FSA's effective date, Dorsey v. United States, 132 S. Ct. 2321 (2012). FSA applies to Allen because he sentenced after the FSA had become law.

4 If the FSA had been properly applied at sentencing, Allen would have faced a penalty under 21 U.S.C § 841(b)(1)(B), and a statutory minimum 262 months' sentence would not have applied. This would lower his criminal history category to I.

5 If the FSA had been properly applied at sentencing, Allen would have faced a penalty under 21 U.S.C § 841(b)(1)(B), and a statutory minimum 262 months' sentence would not have applied.

addition, prosecutors should continue to conduct an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, the charges always should reflect an individualized assessment and fairly represent the defendant's criminal conduct. *Gall* at 596-97 (reiterating that the district courts may not apply a presumption of reasonableness to the Guidelines, but instead "must make an individualized assessment based on the facts presented.")

As noted in Allen's Memorandum of Law in Support of § 2255 16-cv-88 (Dkt. No.#1). Defendant's sentence is unconstitutional and improperly calculated; giving rise to the type of fundamental errors that can be review. The Defendant submits that his claims must be decide upon the merits. Mr. Allen currently incarcerated for a greater offense he did not commit. These considerations outweigh the impact of correcting this error on the government. On the other hand, the government applies fully the policies behind the Fair Sentencing Act; it would recognize that the fair and just result is to punish the offender only to the extent permitted by law, which the law provides that the enhanced penalties should have never applied. Mr. Allen relief in this case sanctions an injustice. There is no greater injustice than undeserved incarceration. This Court should find relief for Mr. Allen or, at minimum, order an evidentiary hearing to assess the gravity of the miscarriage of injustice.

The Fifth Amendment to the United States Constitution states, "[n]o person shall be held to answer for a capital or otherwise infamous crime...nor shall be deprived of life liberty, or property, without due process of law." U.S. Const., amend. V. In evaluating due process claims, this court inquires whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." See *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54, S. Ct. 330, 332, 78 L.Ed. 674 (1934).

As stated by Justice Frankfurter:

> "Due process embodies a system of rights based on moral principles so deeply embed in the traditions and feeling of our people as to be deem fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair, right, and just."

Solesbee v. Balkcom, 339 U.S. 9, 16, 70 S. Ct. 457, 461, 94 L. Ed. 604 (1950).

The Due Process Clause will validate upon actions that "violate those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." See *United States v. Lovasco*, 431 U.S. 783, 790, 97 S. Ct. 2044, 2049, 52 L.Ed.2d 752 (1977). The Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling v. United States*, 493 U.S. At 352-53, 110 S. Ct. at 674 (1990). The "primary guide in determining whether the principle in question is fundamental is, of course historical practice." *Montana v. Egelhoff*, 518 U.S. 37, 41-44, 116 S. Ct. 2013, 2017, 135 L.Ed.2d 31 (1996).

There can be little doubt that the right to be sentence accurately is an ingrained tradition in the American judiciary. The United States Supreme Court has made clear that there is a due process right to be sentence based on accurate information, See *United Stated v. Tucker*, 404 US 443 (1972). In fact, the "sole interest of the defendant in sentencing is the right not to be sentenced on the basis of inaccurate or unreliable information," See *United States v. Lopez*, 898 F2d 1505, 1512 (11th Cir. 1990).

In the instant matter, the Petitioner was not sentence upon accurate information. Specifically, Mr. Allen's sentence under the amended§ 2D1.1 would be even lower than what was originally imposed.

B. *Dorsey v. United States* Requires that Allen be Resentenced According To The Fair Sentencing Act of 2010, Petitioner was subject to a Mandatory Minimum sentence of 22-years Imprisonment based on the Sentencing Court's Conclusion on the 3553 factors. That Conclusion is Erroneous under *Kimbrough v. United States*, 128 S. Ct. 558, 566 (2007); and *Gall v. United States*, 552 U.S. 38 (2007). Both, Kimbrough and Gall reaffirm the Supreme Court's decision

On August 3, 2010, the President signed into law the Fair Sentencing Act of 2010 (hereafter alternatively referred to as "FSA"), which amended the penalty provisions of 21 U.S.C. § 841 of the Controlled Substances Act. Under this amendment, the five-year mandatory minimum for crack cocaine offenses is now triggered by 28 grams of crack cocaine (former provision was 5 grams), while 280 grams triggers a 10 years' mandatory minimum penalty (former provision of 50 grams). See, §§ 841(b)(1)(A) and (b)(1)(B). The purpose of the FSA was to correct the harm and equal protection violations that had occurred as a result of the previous penalties applied to crack cocaine offenses. Allen was sentenced on September 29 2015, after the effective date of the FSA, the FSA applies to Allen because he was sentenced after the FSA had become law. Allen should be sentence according to the lower penalty provisions under the FSA. *Dorsey v. United States*, 132 S. Ct.2321, at 2330-31, 183 L. Ed. 2D 250 (2012), see *United States v. Jones*, 2012 U.S. App. LEXIS 13865 (4th Cir. July 6, 2012) (unpublished). The decision in *Dorsey*, vindicates Allen, who was sentenced after the enactment of the FSA, but was wrongly punished using the draconian and racially discriminatory pre- FSA statutory crack cocaine penalties. See, *Kimbrough v. United States*, 128 S. Ct. 558, 566 (2007) (the old law "fosters disrespect for and lack of confidence in the criminal justice system because of a widely-held perception that it promotes unwarranted disparity based on race".) Applying the FSA to Allen results in his statutory punishment being determined under § 841(b)(1)(B), not § 841(b)(1)(A). This Court recognized this factor at the original sentencing hearing. And, under § 841(b)(1)(B), the possibility of a 262-month mandatory minimum sentence is not possible. Accordingly, this Court should vacate Allen's sentence because of the decision in *Dorsey*, and resentence Allen according to the FSA. Mr. Allen's right to equal protection and due process violated.

Shortly before the Sentencing Commission made the amended USSG § 2D1.1 retroactive, the Supreme Court issued its decisions in *Kimbrough v. United States*, 128 S.

Ct. 558, 566 (2007) and Gall v. United States, 552 U.S. 38 (2007). Both *Kimbrough* and *Gall* reaffirm the Supreme Court's decision. Perhaps more importantly for this case, each decision offers crucial guidance on the extent of sentencing courts' discretion to deviate from the advisory Sentencing Guideline. In *Kimbrough*, The Supreme Court made clear that the 100-to-1 crack/cocaine ratio was, like the rest of the Guidelines, purely advisory. See 128 S. Ct. at 564. The Court then went on to point out that the crack guidelines were less deserving of district court deference because the Commission did not formulate the crack/powder differential through its usual mechanism of conducting empirical research into sentencing outcomes and the calibrating offense levels and criminal history categories to best serve the goals articulated in 18 U.S.C. § 3553(a):

> "The crack/cocaine Guidelines...do not exemplify the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges for crack/cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of empirical data and national experience. Indeed, the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, i.e., sentences for crack/cocaine offenses "greater than necessary" in light of the purposes of sentencing set forth in § 3553(a). Given all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence "greater than necessary" to achieve § 3553(a)'s purposes, even in a mine-run case."

Id. at 575 (internal citations and quotation marks omitted.) Moreover, as the Supreme Court noted, the creation of the crack guidelines in this manner resulted in Sentencing Guidelines that ultimately harm the goals of sentencing. See *Id.* at 568.

> "Approving the Commission's analysis that the crack/powder differential overstates both the relative harmfulness of crack cocaine and the seriousness of most crack offenses...is inconsistent with the 1986 Act's goal of punishing major drug traffickers more severely than low level dealers.... [and] fosters disrespect for and lack of confidence in the criminal justice system." (internal quotation marks omitted).

The Supreme Court grounded this ruling in the research and recommendations of the United States Sentencing Commission itself, which has acknowledged repeatedly that the crack/powder disparity in the Guidelines is flawed. *Id.* At 568 (citing Commission's conclusion in its 2002 report to Congress that the disparity "fails to meet the sentencing objectives set forth by congress in both the Sentencing Reform Act and the 1986 [Anit-Drug Abuse] Act.")[6] Indeed, based on its research, the Commission has recommended at

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6 Among the flaws identified by the Commission are: (1) "the assumptions about the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution;" "the 'anomalous' result that 'retail crack dealers get longer sentences that the wholesale drug distributors who supply them the powder cocaine form which their crack is produced" and "the severe sentences .... imposed primarily upon black offenders." *Id.* at 568.

different times that Congress reduce the disparity to 20 to 1, 5 to 1, and as low as 1 to 1. *Id.* At 569. (citing Commission's 1995, 1997, and 2002 reports). Most recently, when it submitted its proposed two-level reduction in the crack Guideline, it recommended that Congress further "substantially" reduce the ratio. *Id.* at 569 (citing Commission's 2007 report). *Kimbrough* also characterizes this amendment to § 2D1.1 as "modest," noting that it "now advances a crack/powder ratio that varies (at different offense levels) between 25 to 1 and 80 to 1", well above the Commission's recommended ratios. *Id.* at 573. It is, the Court said, 'only...a partial remedy' for the problems generated by the crack/powder disparity." *Id.* At 569 (citing Commission's 2007). Thus, the Court found, "[t]he amended Guidelines still produce sentencing ranges keyed to the mandatory minimums in the 1986 Act," which it identified as the source of the unwarranted disparity between the crack and powder cocaine Guidelines to begin with. *Id.* at 569, n.10.The Supreme Court consequently ruled that sentencing courts not only may deviate from the crack/powder differential for policy reason alone, see *id* at 570 (endorsing the government's concession that "courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with Guidelines.") (insertion in original) (internal quotation marks and citations omitted) but must deviate from the Guidelines where the guidelines disserve the goals of sentencing. The Court emphasized that the parsimony provision of § 3553(a)---its requirement that sentences be "sufficient, but not greater than necessary" to achieve the goals of sentencing---is the "overarching instruction" of the sentencing statute, and that sentencing courts must vary from the advisory Guidelines as they believe is necessary to follow its ultimate command. See *Id.* at 576. Accord *Gall* at 596-97 (reiterating that the district courts may not apply a presumption of reasonableness to the Guidelines, but instead "must make an individualized assessment based on the facts presented.")

C. **18 U.S.C. § 924(c)(1)(A)(iii), Establishing a Ten-Year Mandatory Minimum Sentence for a Defendant who Never Had A Firearm during a crime of violence Requires Proof of *Mens Rea.* The Due Process Clause, does not Tolerate Convictions for Conduct That was Never Criminal. 18 U.S.C. 924(c)(1)(a) *Mens Rea* Requirement Under Title 18 § 924(c)(1)(a) of the United States Code provides That a Person Convicted of Violating the Subsection is Subject to a Minimum Sentence of Five Years if During the Course of the Violation the Individual Carried a Firearm.**

Title 18 U.S.C. § 924(c)(1)(A)(iii), establishing a ten-year mandatory minimum sentence for a defendant who never had a firearm during a crime of violence, requires proof of M*ens Rea.* The Due Process Clause does not tolerate convictions for Conduct that was never criminal. 18 U.S.C. 924(c)(1)(a) *Mens Rea* requirement under Title 18 § 924(c)(1)(a) of the United States code provides that a person convicted of violating the Subsection is subject to a minimum sentence of five years if during the course of the violation the individual carried a firearm. The text of § 924(c)(1)(A):

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence:

(i) be sentenced to a term of imprisonment of not less than 5 years;
(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

As the text makes clear, the minimum penalty doesn't kick in anytime a gun is present on the scene of one of the specified crimes; instead the firearm must be used or carried "during and in relation to" the crime, or possessed "in furtherance of" the crime. See *Muscarello v. United States*, 524 U.S. 125, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998) (interpreting "carry" provision); *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995) (interpreting "use" provision); *United States v. Gaston*, 357 F.3d 77, 82-83 (2004) (interpreting "possession in furtherance of"); also see *United States v. Wahl*, 290 F.3d 370, 375-77 (D.C.Cir.2002) (same). In this case, the prosecutors assumed Allen had a firearm, there was no firearm obtainable. Title 18 U.S.C.§924(c)(1)(A) statute authorizes heightened criminal penalties for using or carrying a firearm "during and in relation to," or possessing a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime," §924(c)(1)(A). 18 U.S.C § 924 convictions are unconstitutional under *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). In *United States v. O'Brien*, 560 U.S. 218 (2010), the Supreme Court held that in a prosecution under 18 U.S.C. § 924 (c)(1)(a), proof that the weapon is an element of the offense, not a mere sentencing enhancement, and must be proved beyond a reasonable doubt. In *United States v. Brown*, 449 F.3d 154 (D.C. Cir. 2006) (holding that it is necessary to prove intent to discharge to apply the sentencing enhancement), namely, whether the accidental discharge of a gun requires the application of a ten-year sentencing enhancement. The court found that the statute requires the defendant to have acted with general intent in order for the sentencing enhancement to apply. The Supreme Court decided *United States v. Davis*, 139 S. Ct. 2319 (2019), which held that the residual clause of § 924(c) is unconstitutionally vague. See also *Descamps v. United States*, 570 U. S. 254, 269–270 (2013), the government has to prove to a jury that the defendant committed all the acts necessary to punish him for the underlying crime of violence or drug trafficking crime. In this particular case, prosecutor assumed petitioner had a firearm, in a "safe". *Dean v. United States*, 581 U.S. (2017) this court held:

> "District court judges within the circuit court's jurisdiction are unable to examine felony convictions separately from convictions under 924(C) for the purposes of sentencing under the federal sentencing guidelines."

Dean v. United States, 581 U.S. (2017), this Court cited 18 U.S.C. 3553(a), which directs district courts to "impose a sentence sufficient, but not greater than necessary, to

comply with" the four goals of criminal sentencing — just punishment, deterrence, protection of the public, and rehabilitation. Courts should require proof of intent for provisions that require sentencing enhancements, DEAN *Id.* at 1858 (Stevens, J., dissenting). Chief Justice wrote:

> "This durable tradition remains, even as federal laws have required sentencing courts to evaluate certain factors when exercising their discretion", "§ 924(c)(1)(A)(iii) only applies when a gun is intentionally fired because the statute increases the penalty for more culpable conduct. lesser sentencing enhancements for carrying and brandishing in subsection (i) and (ii) require proof of intent, thus the natural reading of subsection (iii) would be to require proof of intent because it provides additional punishment for a more culpable act."

The result of the circuit courts on the interpretation of § 924(c)(1)(A)(iii) is serious disparity in the sentences of some similarly situated defendants. In United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008) (holding that, under Begay v. United States, 553 U.S. 137 (2008) carrying a concealed weapon is not a "crime of violence" under the career offender guideline). While Mr. Allen sentenced in the Eighth Circuit (prosecutor assumed Allen had a firearm, in a "safe") will be subject to a ten-year term. This result is not only contrary to congressional intent, see S. Rep. No. 98-225, at 65 (1983) (noting that the purpose of the Sentencing Reform Act was to eliminate "shameful disparity in criminal sentences" among jurisdictions); see also 18 U.S.C. § 3553(a)(6) (requiring consideration of "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); United States v. Booker, 543 U.S. 220, 252-54 (2005) (same), but is also fundamentally unfair and implicates constitutional due process and equal protection concerns, see Salsburg v. Maryland, 346 U.S. 545, 550-53 (1954) (noting that territorial discrepancies in criminal procedure may raise such concerns). The disparity is evident in this case. Mr. Allen convicted of having a firearm in a safe, in which he never had. As a result, he was sentenced to a mandatory minimum ten-year term of imprisonment under § 924(c)(1)(A)(iii). A similarly defendant, United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008) defendant was carrying a concealed weapon. Archer was likewise not convicted of carrying a concealed weapon, (holding that, under Begay v. United States, 553 U.S. 137 (2008), carrying a concealed weapon is not a "crime of violence" under the career offender guideline), yet, petitioner Allen was subject to ten-year mandatory term of imprisonment under § 924(c)(1)(A)(iii). *Id.* The sole reason for the difference in the sentences imposed in this case and in *Archer* is the differing interpretations of § 924(c)(1)(A)(iii) adopted by the Eighth Circuits and Eleventh Circuits. In short, Mr. Allen is facing ten more years in prison based on nothing more than the assumption of the prosecutor stating petitioner had a firearm in a "safe". Petitioner subject to § 924(c)(1)(A) invariably receive the applicable mandatory minimum sentence. *Harris*, 536 U.S. at 578 (Thomas, J., dissenting) ("almost all persons sentenced for violations of 18 U.S.C. § 924(c)(1)(A) are sentenced to 5, 7, or 10 years' imprisonment"). In most instances, therefore, the mandatory minimum functions effectively as the final sentence. *Id.* The conflict among the circuits concerning the interpretation of § 924(c)(1)(A) thus has the direct effect of producing sentencing disparities among similarly situated defendants. This result is contrary to the purpose of the Sentencing Reform Act and to the

notion of a fair and uniform national sentencing system. Review by this Court is necessary to address these fundamental discrepancies and to ensure that the constitutional rights of defendants are preserved.

In the instant matter, Prosecutors assumed petitioner had a firearm in a safe.

D. **21 U.S.C. § 851 (a) Requires the Government to File a Notice "Before Trial" if it Intends to Seek an Enhanced Punishment for a Drug Offense Based on the Defendant's Prior Criminal Conviction. In this Case the Government Did Not Provide Notice but Provided It After Sentence.**

Federal law permits the government to request the imposition of an enhanced sentence for "repeat offenders" in certain drug cases by providing notice of its intent to reply upon a prior conviction to the court and the defendant "before trial", 21 U.S.C.§ 851(a)(1). Judge of the Fourth Circuit recognize "every court of appeals had addressed [the issue] in published opinion concluded before trial [in § 851] means before jury selection begins (which is obviously before the jury is sworn)", *United States v Johnson*, 944 F.2d 396 (1991). The court explained that reading, "before trial" to mean what it says "allows the defendant ample time to determine whether he should enter a plea or go to trial, and to plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." *Id.* Furthermore, enforcing § 851(a)(1) according to its terms would not overly burden the government because § 851(a)(1) allows government to seek a postponement of a trial if it encounters difficulty discovering a defendant's prior convictions. *Id.*

In this case, petitioner's sentence exceeded the applicable guideline range, as the prior conviction used to enhance the defendant's sentence Under 21 U.S.C. § 841(a)(1)(b)(1)(a) and§ 851 did not qualify as a felony drug conviction, in violation of defendant's right to due process under the fifth amendment to the United States Constitution and Petitioner's right to be free from cruel and unusual punishment as protected by the Eight Amendment to the United States Constitution. The time Allen was sentenced, the law changed so that he is no longer eligible for a statutory minimum sentence of 22 years' imprisonment. At the time of sentencing, Allen had no prior drug convictions [Appendix F]. Instead his sentence under 21 U.S.C. § 851, increasingly his statutory penalty; and the court applied the USSG § 4B1.1 career offender enhancement, increasing his guideline range of imprisonment. The Eighth Circuit decision was moreover erroneous. It is beyond question that congress has the power to set the statutory ranges for various criminal offenses. *United States v. Booker*, 543 U.S. 220, 246 (2005) *Bowles v. Russell*, 127 S. Ct. 2360, 2364 (2007). The mandatory provisions of 21 U.S.C. § 851(a)(1) demonstrate Congress's intent to exercise that authority to limit the jurisdiction of the federal courts when enhancing sentences based on prior convictions. The statute provides.

> "No person who stands convicted of an offense under this part [21 U.S.C. § 841 *et seq.*] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a pleas of guilty, the United States attorney files an information with the court (and serves a copy of such information on

the person or counsel for the person) stating in writing the previous convictions to be relied upon."

Strict observance of the requirements of § 851(a)(1) is also required to give effect to Congress's determination that the decision whether to seek an enhancement belongs to the prosecution-subject to procedural protections for the defendant-and not to the courts. Mr. Allen does not have any prior felony drug offense petitioner should not have received an enhanced penalty to mandatory 22 years' imprisonment. Nor should petitioner be treated as a career offender. These enhanced penalties must be set aside, subjecting Mr. Allen to a lower statutory range and a guideline range now falling above rather than below the mandatory minimum imprisonment term. Mr. Allen should be subject to a statutory penalty less than 10 years' imprisonment rather than 22 years' imprisonment, Allen should be sentence according to the lower penalty provisions under the FSA. Dorsey v. United States, 132 S. Ct.2321, at 2330-31, 183 L. Ed. 2D 250 (2012). *Dorsey* makes clear that these statutory penalties should apply. As such, he is eligible for consideration for a sentencing reduction under the retroactive crack amendment. Mr. Allen is innocent of greater offense for the enhanced statutory penalties provided under 21 U.S.C. § 841(b)(a)(A) and the career offender guideline provision. This resulted in a manifest injustice. In addition, prosecutors should continue to conduct an individualized assessment of the extent to which particular charges fit the specific circumstances of the case. The charges always should reflect an individualized assessment and fairly represent the defendant's criminal conduct, *Gall* at 596-97 (reiterating that the district courts may not apply a presumption of reasonableness to the Guidelines, but instead "must make an individualized assessment based on the facts presented.")

As noted in Allen's Memorandum of Law in Support of § 2255 (Pp 11-12) 16-cv-00088 (*Doc #1*). Defendant's sentence is unconstitutional and improperly calculated; giving rise to the type of fundamental errors that can be review. Petitioner submits that his claims must be decide upon the merits.

Absent the § 851 enhancement, the federal sentencing guidelines' recommended sentencing range would have been less than 10 years in prison, with the enhancement under § 841(a)(1)(b)(1)(a), the recommended sentencing range increased to 262 months' imprisonment. Strict observance of the requirements of § 851(a)(1) is also required to give effect to Congress's determination that the decision whether to seek an enhancement belongs to the prosecution-subject to procedural protections for the petitioner-and not to the courts. The extent on strict limits on how the discretion may be exercised demonstrate Congress's intent that executive branch compliance with § 851 (a)(1) be necessary to trigger the jurisdiction of the courts. See United States v. Cespedes, 151 F.3rd at 1333 (11th Cir. 1998). In § 851, Congress struck a balance between the authority of prosecutors to seek enhanced sentences that can dramatically increase a petitioner's punishment-and the need to provide fair notice and procedural protections to petitioners who suddenly find themselves facing a significantly increased sentence. When courts fail to enforce the procedural protections and limitations that Congress prescribed, courts displace the careful balance that Congress struck and, in effect, permit a sentence to impose in a

manner that Congress forbade. Indeed, courts have relied on the fact that § 851 provides only a narrow window in which the government may seek an enhancement to demonstrate that the delegation of legislative authority to the executive branch is constitutional, *Cespedes*, 151 F.3d at 1333. Power to seek an enhancement constitutionally delegated to the executive branch because there are strict conditions. Courts ignore Congress's tent to comply with our system of separated powers when they exercise jurisdiction to enhance sentences when the prosecutor has failed to comply with the commands of the statue, unless the prosecutor files information before trial providing notice of its intent to seek an enhanced sentence, court lacks jurisdiction to enhance the sentence.

This Court has held that the decision to provide notice under § 851(a)(1) is similar to a charging decision. That is, the "discretion [to determine whether a particular defendant will be subject to the enhanced statutory maximum] is an integral feature of the criminal justice system." United States v. LaBonte, 520 U.S. 751, 762 (1997); see also *Cespedes*, 151 F.3d at 1333. A court has no greater jurisdiction to enter an enhanced sentence without proper information from the prosecution than it would hold to enter a judgment of conviction in the absence of a criminal charge. Like charging decisions, the decision to file a § 851(a)(1) notice is within the discretion of the executive branch, and courts cannot exercise jurisdiction to undermine that discretion. The Eighth Circuit court of appeals did not elaborate on its reasoning. It should be highlighted there are no other meritorious grounds to deny petitioner a COA. Petitioner submits that his claims must be decide upon the merits. The petition for a writ of certiorari should be granted.

E. The Passage of Time Between the Offense and Allen Sentencing is More Than Thirteen Years Which Violates Allen's Due Process.

Allen contends that the passage of time between the offense and his Sentencing—more than thirteen years—denied him due process given the loss or weakening of mitigation evidence over this period of time, and being sentence to 22 years to run consecutive with an Illinois case denied due process constitutes cruel and unusual punishment. This claim was not raise in court, thereby making it subject to procedural default. Allen contends that trial counsel was ineffective by failing to raise the claim in court. Such a claim of ineffective assistance of counsel can constitute cause for default if it was pursued in court as an independent Sixth Amendment claim, Edwards v. Carpenter 529 U.S. at 451-52, 120 S.Ct. 1587 (2000). Allen argues that the procedural default of his ineffectiveness claim itself excused by the ineffective assistance of direct appeal counsel for failing to raise the claim. *See Edwards,* 529 U.S. at 453, 120 S.Ct. 1587; defaulted ineffective-assistance-of-counsel claim asserted as cause for default of another claim can "*itself* be excused if [petitioner] can satisfy the cause-and-prejudice standard with respect to *that* claim." (emphasis in *Edwards*).

Also, direct appeal counsel rendered ineffective assistance by failing to raise Allen's underlying claim. Counsel was ineffective for failing to argue during Plea negotiation stages that the inordinate delay between the passage of time of the offense and his conviction—more than thirteen years—denied him due process given the loss or weakening of mitigation evidence over this period of time and the final sentencing

proceeding denied him due process and his right to be free from cruel and unusual punishment. Allen has shown cause for his procedural default of the underlying ineffective assistance claim. Trial counsel was ineffective in their failure to raise the due process/Eighth Amendment claim and that Allen was prejudiced. Allen has shown cause for his failure to raise the underlying due process/Eighth Amendment claim in Federal court. Allen was prejudice by the underlying due process/Eighth Amendment violation. Having shown cause and prejudice for his failure to raise this constitutional claim in Federal court, a determination must be made on the claim's merits. The inordinate passage of time between Allen's conviction and his final sentencing deprived Allen of his constitutional right to present mitigation evidence, thereby rendering his sentencing fundamentally unfair, See *Battenfield v. Gibson*, 236 F.3rd 1215, 1229 (10th Cir. 2001) (finding constitutionally deficient performance based on attorney's failure to effectively investigate potential mitigation evidence) Allen's sentencing was fundamentally unfair before it began. Allen's inability to present mitigation evidence prevented the jury from adequately considering compassionate or mitigating factors that might have warranted clemency.

Mr. Allen imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him, see *Pyle v. Kansas*, 317 U.S. 213, 215—216, 63 S.Ct. 177, 178, 87 L.Ed. 214 (1942). These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791(1935). The Third Circuit in *United States ex rel. Almeida v. Baldi*, 195 F.2d 815, 33 A.L.R.2d 1407 (3d Cir. 1952) construed that statement in *Pyle v. Kansas* to mean that the "suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due process. 195 F.2d, at 820. See also, *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217(1959), the Supreme Court extended the test formulated in *Mooney v. Holohan* (the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.) See *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9(1957); *Wilde v. Wyoming*, 362 U.S. 607, 80 S.Ct. 900, 4 L.Ed.2d 985 (1960). *Cf. Durley v. Mayo*, 351 U.S. 277, 285, 76 S.Ct. 806, 811, 100 L.Ed. 1178 (1956).

In *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791(1935), where the Court ruled on what nondisclosure by a prosecutor violates due process:

> "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

In the absence of such consideration, imposition of a 22 years sentence resulted from perjured testimony violates Allen's right to be free from cruel and unusual punishment. Accordingly, that was an error. Failure to raise the due process/Eighth Amendment claim prejudiced Allen. The Eighth Circuit was inconsistent with Supreme Court precedent in *Edwards v. Carpenter* 529 U.S. at 451-52, 120 S.Ct. 1587 (2000). This Court must vacate the decision.

F. The Combination of Errors in This Case Has Resulted in A Manifest Injustice

Petitioner sentence unequivocally demonstrates the sentence is more than 10 years longer than permitted by law. Applying the holding in *Dorsey* the statutory penalty and guideline range of imprisonment were erroneously inflated by at least 10 years at the time of petitioner sentencing. Correctly applying the Fair Sentencing Act to Mr. Allen results in his statutory punishment being determined under § 841(b)(1)(B), not § 841(b)(1)(A), even the possibility of a mandatory minimum sentence is not possible under § 841(b)(1)(B). Petitioner's statutory punishment under § 841(b)(1)(B) is 5 to 40 years' imprisonment Allen current sentence requires him to languish in prison for two decades longer than required under a correct application of the Guidelines. Accordingly, Allen submits that the Eighth Circuit Court of Appeals failed to correct such obvious errors, which resulted in a manifest injustice and violations of due process and equal protection. Mr. Allen is innocent of the greater offense provided by the enhanced statutory penalties for which he was convicted and sentenced. It is difficult to conceive of an unconscionable result than an innocent man or woman being denied relief and remaining imprisoned simply because of a manifest injustice. Despite the fact that he is actually innocent of the enhanced crime of which he was convicted, this is precisely the type of situation, which equitable result in an injustice. Mr. Allen would be to sanction the conviction and continued incarceration of a man innocent of the enhanced penalties. It would be adherence to a legal rule that threatens the "evils of archaic rigidity." *Holland v. Florida*, 130 S. Ct. at 2563 (2010). (citations omitted).

G. Cumulative Ineffectiveness in Light of the Weakness of the Evidence

The Supreme Court explained in *Strickland* "a court hearing an ineffectiveness claim must consider the totality of the evidence" because certain "error will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." 466 U.S. at 695-96. As detailed above, counsel's numerous and repeated mistakes in failing to effectively assail the belated claims by "informant Richard Allen" and other witnesses about the presence of seeing Albert Allen conspiracy to distribute controlled substance sale 2002-2011 necessarily "had a pervasive effect on the inferences to be drawn from the evidence" and necessarily altered "the entire evidentiary picture". As further explained by the Supreme Court in *Strickland*, "a verdict or conclusion weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id*, at 496. *In Garrett v. U.S.* 211 F.3d 1075 (8th Cir. 2000); the enhanced

sentence Garrett received for distribution of crack cocaine was invalid because the government failed to prove that the drug was crack cocaine. The record shows, as repeatedly stressed above, the decision on the 841 and 846 counts was supported only and entirely by the claims of "informant Richard Allen"; what the record overwhelmingly supports is the fact that Albert Allen's trial counsel performed in an unreasonable manner and his failings allowed the judge to convict on one count leading to 22- years of mandatory prison time for Allen on one 841and 846 counts, that was weakly supported by the suspect assertions of the "informant Richard Allen" apparently willing to say whatever he thought necessary to carry favor with prosecutors.

H. Prosecutorial Vindictiveness

In *United States v. Armstrong*, 517 U.S. 456 (1996), the Supreme Court reiterated that despite of "presumption of regularity" for prosecutorial decisions, a court has the authority and a responsibility to ensure that a "prosecutor's discretion is subject to constitutional constraints." 517 U.S. 456, 465 (1996) (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979) and in *Wayte v. United States* 470 U.S. 598, 105 S. Ct. 1524 (1985), the Court detailed that a decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including *the exercise of protected statutory and constitutional rights.*" 470 U.S. 598, 608-09 (1985) (emphasis added). *In Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the Supreme Court opted not to create a strong presumption of vindictiveness when a prosecutor brings more serious charges through new indictment but the Court emphasized that, in the right factual setting, a defendant could establish a constitutional violation if a prosecutor, through bargaining and charging choices, seemed to "pursue a course of action whose objective is to penalize a person's reliance on his legal rights." *Id.* At 363. To that effect, the Tenth Circuit has recently explained that, in the context of claims of improper exercise of prosecutorial charging and bargaining choices, a defendant can "demonstrate a due process violation by showing either (1) actual vindictiveness, or (2) a realistic likelihood of vindictiveness which gives rise to a presumption of vindictiveness." *United States v. Thomas*, 410 F3rd 1235, 1247, (10th Cir. 2005). In *Cf. State v. Halling*, 672 P.2d 1386 (Or. Ct. App. 1983) (finding that defendant had established actual vindictiveness based on evidence concerning prosecutor's remarks during plea negotiation and evidence that prosecutor's decision to file additional charges was not affected by any new information but only defendant's decision to reject a plea agreement). At this stage of the proceedings, Allen can only present circumstantial evidence to support his claims of vindictiveness and/or other unconstitutional motives by prosecutors. Nevertheless, the basic facts surrounding the prosecutorial behaviors- which involve prosecutors ultimately pursuing claims designed to require the imposition of a sentence of 22 years on an offender based largely on hearsay conspiracy to distribute a controlled substance- provides strong circumstantial evidence that prosecutors in the case were motivated by goals other than achieving justice. Allen maintains that an objective assessment of the following

undisputed facts raises "a realistic likelihood of vindictiveness which gives rise to presumptions of vindictiveness".

- The original indictment charged one drug charge 841 and 846.
- The original indictment likely would have resulted in a maximum possible sentence of less than 10 years of imprisonment.
- District Judge secured enhancements. A court may not impose a recidivism-based statutory enhancement unless the government files information that notifies the defendant of the prior convictions triggering enhancements. The government didn't filed notice indicating its intent to seek an enhanced sentence in the event of a conviction. At the time of petitioner's conviction and sentencing, District Judge order was made without a request by any party to the case to enhance petitioner's sentence. Allen's sentencing exposure, which ***doubled*** in total number of years.

On this factual record, there is good reason to suspect and fear that the government's pursuit of the enhancement with extreme sentencing consequences was motivated, at least in part, to punish Allen because of his decision to go to trial. In addition, Albert Allen has reason to believe that counsels and government's aggressive and oppressive approach was motivated, government lied about the U.S.S.G §5K1 downward departure motion and concealed a conflict problem to the district court. The government intentions were to reduce Mr. Allen sentence if he plea bargain [Appendix J], that reduction did not happened. Attorney F. David Eastman represented petitioner for five months, subsequently rescued himself from the case due to a conflict that arose when it was discovered that while representing Albert Allen, petitioner's counsel was representing an individual who was going to testify against Albert Allen at sentencing. The government was aware of the representation and failed to disclose to the defendant the possibility of a conflict, Derrick Roberts and Elizabeth Snyder[7] were the source of the statement of facts first tendered by the government. One week before Allen's sentencing hearing, Allen received a different trial counsel, Michael Lindeman who gave misguided advice and was unaware and unprepared to handle Allen's case *Toro v. Fairman*, 940 F.2d 1065, 1067-68 (7th Cir. 1991) (finding that misguided advice during pleas stage amounted to deficient performance). It was not until after Mr. Allen enter his plea and accepted the plea agreement terms that he discovered that the government had breached the plea agreement and concealed the conflict problem from the district court. Had Allen's trial counsel performed effectively along these terms, Allen would not have pleaded guilty and would have proceeded to trial. *Hill v. Lockhart* 474 U.S. 52, (1985) (finding there is a reasonable probability for counsel's errors; he would not have pleaded guilty and would have insisted on going to trial.) Courts have held that counsel's performance during plea bargaining stages can be constitutionally deficient for various reasons, such as basing advice to the defendant on incomplete research, *Hoffman v. Arave*, 455 F.3D 926 (9th Cir. 2006), *cert. granted*, 76 U.S.L.W. 3238 (U.S. Nov. 5, 2007). "The Supreme Court long ago stressed that a defendant is entitled to rely upon his counsel...to offer his informed opinion as to what plea should be entered" *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948), and

[7] (R. #15) and (R. #20).

courts of appeal have regularly found counsel's performance deficient when counsel fails to sufficiently explain and advise a client about "the substantial difference between the likely sentencing ranges upon conviction after trial and upon a guilty plea." Cullen v. United States, 194 F. 3D 401, 403-04 (2D Cir.1999): *see also* United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994) (indicating that "an attorney's incompetent advice regarding a plea bargain [can fall] below reasonable standards of professional conduct"): Toro v. Fairman, 940 F.2d 1065, 1067-68 (7th Cir. 1991) (finding that misguided advice during pleas stage amounted to deficient performance); Turner v. Tennessee, 858 F.2d 1201, 1205-06 (6th Cir. 1981) (finding that bad plea advice amounted to ineffective assistance), *vacated on other grounds*, 492 U.S. 902 (1989); Beckham v. Wainwright, 639 F.2d 262,267 (5th Cir. 1981) (finding that incompetent plea advice violated defendant's right to effective assistance of counsel.). Also, Albert Allen believe that "informant Richard Allen" convinced prosecutors that Albert Allen was involved in criminal misconduct. One of the due process rights of a charge is to confront his or her accuser. In this matter, that did not happen. The defendant denied his right to confront his accusers, which is a violation of his due process rights.

I. Allen's Extreme Sentence is Unconstitutional

The imposition of what is effectively a 22- year sentence for an offender like Allen for his alleged offense is unconstitutional. Beyond the ineffective assistance of counsel and due process deprivations suffered by Allen, the imposition of the excessive sentence itself violates the Eighth Amendment as "grossly disproportionate." In addition, the fact that Albert Allen received additional years in prison based on district Judge Presumption regarding a "manager" role raises a violation in the proper standard of professional conduct. District Judge applied USSG § 3B1.1 enhancement, increasing his guideline range of imprisonment [Appendix K]. Allen first argues that the lower court's findings are insufficient to support a four-level enhancement under section 3B1.1(b). That enhancement is appropriate "[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive," U.S.S.G. § 3B1.1 (b). In applying the enhancement here, the district court only explained that Allen clearly was "a manager in the cocaine business." Allen argues that such a finding is insufficient because it fails to identify at least one participant who he supervised or managed, and because it makes no mention of the requirement that there be five or more participants or criminal activity that could be characterized as "otherwise extensive", [Appendix K-1], United States v. Patel, 131 F.3d 1195 (1997). The government responds that the evidence presented at the sentencing hearing was more than adequate to support the four-level enhancement. In that regard, the government identifies various participants who allegedly controlled by Allen as well as the "five or more participants" allegedly involved in the criminal activity [Appendix K-2].

The issue here, however, is not whether the government or this panel could identify evidence in the record to support the enhancement, but whether the district court, in choosing to apply it, made the findings necessary to support its decision. The district judges overruled Allen's objection to the enhancement by finding only that Allen "clearly [was] a manager in the cocaine business." The judge made no further findings to support that conclusion, nor did she reference the recommendations in the PSR. For example, the district court did not identify any other participant in the criminal activity who was

supposedly control by Allen; although the commentary to section 3B1.1 (b) explains, the defendant must have exercised control over at least one other participant for the enhancement to apply, U.S.S.G. § 3B1.1, comment. (n.2) (1995); *United States v. Fones*, 51 F.3d 663, 668 (7th Cir.1995); see also *United States v. Jewel*, 947 F.2d 224, 235-36 (7th Cir.1991) (remanding where district court failed to identify the other participants that each defendant had supervised). The Guideline also requires that the relevant criminal activity involves "five or more participants" or be "otherwise extensive," yet the district judge did not determine whether either or both prongs were applicable here. The PSR suggests that Allen's criminal activity was otherwise extensive "because of the amount of cocaine that was involved" but again the district judge did not reference that recommendation in addressing Allen's' objection. On appeal, the government argues that the criminal activity also involved five or more participants, the PSR focused only on the otherwise extensive prong, and the government did not suggest below that the five or more participants' requirement was met. In any event, after the district court rejected Allen's suggestion that he merely played a minimal role in the offense, the court was silent on the issue of whether Allen's criminal activity involved five or more participants or was otherwise extensive, that is an essential finding for the application of a four-level enhancement under section 3B1.1 (b), it is a finding for the district court, to make. See *United States v. Austin*, 54 F.3d 394, 405 (7th Cir.1995) (refusing to affirm on "otherwise extensive" prong where the exclusive focus at sentencing was the "five or more participants" prong); *United States v. Tai*, 41 F.3d 1170, 1175 (7th Cir.1994) ("this Court [will] not sift through the record to make the factual findings necessary to support the district court's determination."); *United States v. Tai*, 994 F.2d 1204, 1212 (7th Cir.1993) ("it is not this court's role to make the factual findings necessary to support a sentencing calculation; that is a task for the district court."); *United States v. Schweihs*, 971 F.2d 1302, 1318 (7th Cir.1992).

In sum, when an issue under the Guidelines is disputed, as the application of section 3B1.1(b) was here, the district judge either must adopt the PSR's recommended findings or make independent findings sufficient to support its conclusion. The court's comments at sentencing suggest that it did neither with respect to the manager or supervisor enhancement. Government falsified information to add to the enhancement, for example; Elizabeth Synder, Benjamin Owens; Vicki Day-Wernentin, Randall Brooks, Curtis Lewis; Nicholas Williams and Willie Johnson. Petitioner has never heard of such names. The government bears the burden of proving by a preponderance of evidence that the aggravating role enhancement warranted. *United States v. Gaines*, 639 F.3rd 423, 427 (8th Cir. 2011). This court must vacate Allen's sentence and remand for appropriate findings and the imposition of a new sentence.

J. Modern Eighth Amendment Standards

"It is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). In this spirit, the Eighth Amendment "succinctly prohibits 'excessive' sanctions" and the Supreme

Court has "repeatedly applied this proportionality precept" when interpreting the Eighth Amendment. Atkins v. Virginia, 536 U.S. at 311 (2002). Although this proportionality precept robustly applied in death penalty contexts, the Supreme Court long ago clarified that this precept has application in the context of prison terms because, "as a matter of principle, a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Solem v. Helm, 463 U.S. 277, 290 (1983). As the Supreme Court has conceded, its proportionality cases in the wake of *Solem* "exhibit a lack of clarity regarding what factors may indicate gross disproportionality." Lockyer v. Andrade, 538, U.S. 63, 73 (2003). Nevertheless, it has become generally accepted that the Eighth Amendment contains a "narrow proportionality principle" applying to "noncapital sentences," Ewing v. California, 538 U.S. 11, 20 (2003), and that this principle "does not require the crime and the sentence to be strictly proportional." United States v. Gillespie, 452 F.3d 1183, 1190 (10th Cir. 2006) (citing Harmelin v. Michigan, 501 U.S. 957, 996-1001 (1991) (Kennedy, J., concurring). It also settled that the Eighth Amendment does forbid "extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring). Consequently, for purposes of this case, the bottom line is that "through the thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as 'clearly established:' a gross disproportionality principle is applicable to sentences for terms of years." If this principle given any effect at all, the sentence imposed here must be in violation thereof.

K. Statutory Minimum Mandatory Sentence is Unconstitutionally Disproportionate As-Applied to Allen

Eighth Amendment analysis must adapt to reflect the changing values of people who are beginning to understand there are societal and moral consequences to over-confinement. The case of Allen illustrates the dangers inherent with mandatory minimum sentences when irrationally applied to a defendant that simply does not deserve the sentence. The essential safety valve in our constitutional structure to prevent the extreme cases of the excessive exercise of government power from slipping through the cracks is the proportionality review under the Eighth Amendment. *See* Eva Nilsen, Indecent Standards: The Case of U.S. v. Weldon Angelos, 11Roger Williams U. L. Rev. 537, 563 (2006). The long mandatory recidivism sentences to Albert Allen, which resulted in a 22-year sentence for a defendant who allegedly engaged in a conspiracy to distribute controlled substance does not trigger the constitutional safety valve that the framers created through the Eighth Amendment, then proportionality review in noncapital cases is in the state of a *de facto* repeal unauthorized by law.

L. Sentence Imposed Infringes Fifth Amendment Equal Justice Principles and Structural Separation of Powers Principles

The Supreme Court has explained that "concern with assuring equal protection was part of the fabric of our Constitution even before the Fourteenth Amendment expressed it most directly in applying it to the States" and has repeatedly "held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection

of the laws." Vance v. Bradley, 440 U.S. 93, 95 n.1 (1979). In the context of criminal prosecutions, the Court has also explained that a facially valid law can be applied "with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws" because even when "the law itself is fair on its face and impartial in appearance...if it is applied and administered by public authority with an evil eye and unequal hand, practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).

Though Allen continues to struggle to find a true rational basis to support the severe application of recidivist sentencing provisions to a defendant punished for hearsay in this action he suggests that rational basis review is not the proper legal standard for assessing his fundamental claim of unequal and inequitable government treatment. Rather, the real gravamen of Allen's equal protection claims centers upon the inconsistent and oppressive application of severe mandatory minimum sentencing provisions. As explained by the Supreme Court in *Yick Wo*, a facially valid statue that survives rational basis review in general can still be applied "with a mind so unequal and oppressive as to amount to a practical denial by the State of the equal protection of the laws" because even when "the law itself is fair on its face and impartial in appearance...if it is applied and administered by public authority with an evil eye and unequal hand...the denial of equal justice is still within the prohibition of the Constitution." 118 U.S. at 373. Allen understandably believes that his case shows the administration of the law with "an unequal hand." And this view is fully supported by a factual record full of circumstantial evidence of "oppressive" governmental choices ranging from the government's efforts to induce conspiracy to distribute a controlled substance and additional enhancements sentencing exposure that mandate a sentence of 22 years. Even accepting the rational basis supporting the one 841and 846 counts, this case reflects the application and administration of this criminal law "by public authority with an evil eye and an unequal hand" in a manner that the Supreme Court recognized over 130 year ago could be unconstitutional in light of fundamental equal justice principles.

The prosecutors single-mindedly pursued charges that would have statutorily required the imposition of a sentence of 22 years of imprisonment. In light of the facts of this case, Allen submits that because he is hard-pressed to imagine a sound rationale for the government's discretionary charging and bargaining choices, his rights to equal protection and due process under the Fifth Amendment were violated because the prosecutors applied and administered federal law "with an evil eye and unequal hand".

In other settings, the Supreme Court has held that equal protection claims may also involve a "class of one," where an individual can reasonably allege that only he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564, (2000). Though a "class of one" and arbitrary discrimination, the prosecutors' extreme charging and bargaining decisions in this case certainly provides circumstantial

evidence of intentional, irrational, and arbitrary discrimination for a claim base on *Olech* proceed.

Moreover, upon a sentence for Allen it is fair and accurate to say that the federal executive branch made this decision through the prosecutors' extreme charging decisions that functionally determined the sentence that Allen is now serving. The remarkable reality that prosecutors were effectively Allen's sentencing judge raises serious separation of power concerns. This Court should address the injustices in this case to safeguard critically important structural principles that the foundation of the Framers' entire constitutional design. Cf. *Mistretta v. United States*, 488 U.S. 361, 390-91, 391 n. 17 (1989) (stressing, "sentencing has been and should remain primarily a judicial function" serious constitutional questions would be raised if Congress ever functionally "assigned judicial responsibilities to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch").

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Eighth Circuit did not elaborate on its reasoning for denying Mr. Allen's application for a COA, it should be highlight that there are no other meritorious grounds to deny the COA. Under the analysis set forth, Petitioner's sentence exceeded the applicable Guideline range, as the prior conviction used 21 U.S.C. § 841(a)(1)(b)(1)(a) should not be applied. If the FSA had been properly applied at sentencing, Allen would have faced a penalty under 21 U.S.C § 841(b)(1)(B), and a statutory minimum 262 months' sentence would not have applied. Allen was sentence under 21 U.S.C. 846 and 841(a)(1), increasing his statutory penalty; had the court not applied the 21 U.S.C. § 841(a)(1), the statutory minimum would be less than 10 years. Petitioner should not have been subject to a 22-year sentence under Section 841(a)(1). Furthermore, career offender enhancement should not apply. At the time of sentencing, Allen had no prior drug convictions; the decision reproduced in [Appendix H]. Instead petitioner is sentence under 21 U.S.C. § 851, increasingly his statutory penalty; and the court applied the USSG § 4B1.1 career offender enhancement, increasing his guideline range of imprisonment. Had Allen not received the erroneous criminal history enhancements, the statutory minimum would be less than 10 years. Petitioner's Presentence Investigation Report details his criminal history, the decision reproduced in [Appendix I]. Petitioner's police report details petitioner PSR report differently, the decision reproduced in [Appendix H]. The Presentence Investigation Report placed petitioner within Criminal History Category III, for a firearm, which petitioner never had. In *Dean v. United States*, 581 U.S. (2017) (holding that, a sentencing enhancements should not apply when a defendant did not intend the action prohibited by the statute.) Petitioner's Presentence Investigation Report did not subject Mr. Allen to punishment for more than one year as required for a felony under 21U.S.C. § 841 and 851 and the career offender guidelines under U.S.S.G. § 4B1.1. As such, the conviction would not count if the conviction was set aside and a new sentence imposing under the current guidelines.[8] Petitioner does not have any prior felony drug offense he should not have

[8] Notably, the criminal history points would not count if the conviction were set aside and a new sentence were imposed under the current guidelines as the guidelines no longer allow for the additional criminal history points under U.S.S.G. § 4B1.1. this would lower his criminal history category to I.

received an enhanced penalty to mandatory 22 years imprisonment. Petitioner should not be treated as a career offender. These enhanced penalties must be set aside, subjecting Mr. Allen to a lower statutory range and a guideline range now falling above rather than below the mandatory minimum imprisonment term. Mr. Allen should have been subject to a statutory penalty of less than 10 years' imprisonment rather than 22 years' imprisonment; Allen should be sentence according to the lower penalty provisions under the FSA. *Dorsey v. United States*, 132 S. Ct.2321, at 2330-31, 183 L. Ed. 2D 250 (2012). *Dorsey* makes clear that these statutory penalties should apply. As such, he is eligible for consideration for a sentencing reduction under the retroactive crack amendment.[9] Mr. Allen is innocent of greater offense for the enhanced statutory penalties provided under 21 U.S.C. § 841(b)(a)(A) and the career offender guideline provision. This had resulted in a manifest injustice. Petitioner's sentencing is fundamentally unfair, See *United States v. Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993).

The imposition of what is effectively a 22- year sentence for an offender like Allen for his alleged offense is unconstitutional. Beyond the ineffective assistance of counsel and due process deprivations suffered by Allen, the imposition of the excessive sentence itself violates the Eighth Amendment as "grossly disproportionate." The lower court's findings are insufficient to support a four-level career offender enhancement. The district judge either must adopt the PSR's recommended findings or make independent findings sufficient to support its conclusion. This Court should correct petitioner's sentence; it has resulted in a manifest injustice. Allen sentence reflects a culmination of injustices combining ineffective trial counsel, ineffective appellate counsel, vindictive federal prosecutors, rigid federal sentencing doctrines, and the indecency of a criminal justice system, to accustomed extremely long prison terms. Numerous constitutional deprivations contributed to Allen's fate. It is exceptional important, this Court grant a writ of certiorari and reverse the judgment of the Eighth Circuit court of appeals and the case remanded for further proceedings.

RELEVANT STATUTORY PROVISIONS

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

"[I]t shall be unlawful for any person knowingly or intentionally-(1) to manufacture, distributes, or dispense.... a controlled substance."

21 U.S.C. §841(b)(1)(b) provides in relevant part:

In the case of violation of subsection(a) of the section involving...(iii) 5 grams or more of mixture or Substance...which contains cocaine base...such person shall be sentenced to the term of imprisonment which may not be less than 5 years and not more than 40 years...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....

21 U.S.C. § 851(a)(1) provides in relevant part:

[9] If the FSA had been properly applied at sentencing, Allen would have faced a penalty under 21 U.S.C § 841(b)(1)(B), and a statutory minimum 262 months' sentence would not have applied.

"No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United State attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon."

Title 18 § 924(c)(1)(A) provides in relevant part:

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence:

(i) be sentenced to a term of imprisonment of not less than 5 years;
(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years;
(iii) and if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

DISCUSSION

Petitioner contends that the court of appeals erred in denying a COA on his argument that his 262-year sentence of imprisonment erroneously imposed. Plenary review of the court of appeals' denial of a COA not warranted. In the view of the United States, however, the court of appeals erred in denying petitioner's application for a COA. Accordingly, the petition should be granted, the judgment vacated, and the case remanded for further proceedings consistent with the position expressed in this brief.

A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under Section 2255 must obtain a COA. See 28 U.S.C. 2253(c)(1)(B). To obtain such a certificate, the prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Where, as here, a district court denies a claim raised in a Section 2255 motion on procedural grounds, the prisoner must make two threshold showings: "[1] that jurists of reason would find it debatable whether the [Section 2255 motion] states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The lower courts erred in concluding that petitioner could not meet this standard.

Petitioner can make a substantial showing that he was subject to an erroneous mandatory minimum sentence and the resulting 22 years' imprisonment violates his constitutional right to due process. Petitioner was sentenced to a mandatory minimum sentence of 22 years' imprisonment based on 21 U.S.C. § 841(a)(1)(b)(1)(a), which should

not have been applied. If the FSA had been properly applied at sentencing, Allen would have faced a penalty under 21 U.S.C § 841(b)(1)(B), and a statutory minimum 262 months' sentence would not have applied. Allen was sentence under 21 U.S.C. 846 and 841(a)(1), increasing his statutory penalty; had the court not applied the 21 U.S.C. § 841(a)(1), the statutory minimum would be less than 10 years. Petitioner should not have been subject to a 22-year sentence under Section 841(A)(1).

The Fair Sentencing Act of 2010 (hereafter alternatively referred to as "FSA"), which amended the penalty provisions of 21 U.S.C. § 841 of the Controlled Substances Act. Under this amendment, the five-year mandatory minimum for crack cocaine offenses is now triggered by 28 grams of crack cocaine former provision was 5 grams), while 280 grams triggers a 10 years' mandatory minimum penalty (former provision of 50 grams). See, §§ 841(b) (1) (A) and (b) (1) (B). The purpose of the FSA was to correct the harm and equal protection violations that had occurred as a result of the previous penalties applied to crack cocaine offenses. Allen was sentenced on September 29, 2015 after the effective date of the FSA, the FSA applies to Allen because he was sentenced after the FSA had become law. Allen should be sentence according to the lower penalty provisions under the FSA. *Dorsey v. United States*, 132 S. Ct.2321, at 2330-31, 183 L. Ed. 2D 250 (2012), see *United States v. Jones*, 2012 U.S. App. LEXIS 13865 (4th Cir. July 6, 2012) (unpublished). The decision in *Dorsey*, vindicates Allen, who was sentenced after the enactment of the FSA, but was wrongly punished using the draconian and racially discriminatory pre- FSA statutory crack cocaine penalties. See, *Kimbrough v. United States*, 128 S. Ct. 558, 566 (2007) (the old law "fosters disrespect for and lack of confidence in the criminal justice system because of a widely-held perception that it promotes unwarranted disparity based on race".) Applying the FSA to Allen results in his statutory punishment being determined under § 841(b) (1)(B), not § 841(b)(1)(A). This Court recognized this factor at the original sentencing hearing. And, under § 841(b)(1)(B), the possibility of a mandatory minimum sentence is not possible.

Under the analysis set forth Petitioner's convictions were not properly classified, the erroneous imposition of a mandatory minimum sentence is a constitutional error sufficient to support issuance of a COA. See 28 U.S.C. 2253(c)(2). Allen was subject to a mandatory minimum sentence of 22-year imprisonment based on the sentencing court's conclusion on the 3553 factors. That conclusion is erroneous under *Kimbrough v. United States*, 128 Ct. 558, 566 (2007) In *Kimbrough*, the Supreme Court made clear that the 100-to-1 crack/cocaine ratio was, like the rest of the Guidelines, purely advisory. See 128 S. Ct. at 564. The Court then went on to point out that the crack guidelines were less deserving of district court deference because the Commission did not formulate the crack/powder differential through its usual mechanism of conducting empirical research into sentencing outcomes and the calibrating offense levels and criminal history categories to best serve the goals articulated in 18 U.S.C. § 3553(a):

> "The crack cocaine Guidelines...does not exemplify the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of empirical data and national

> experience. Indeed, the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, i.e., sentences for crack cocaine offenses "greater than necessary" in light of the purposes of sentencing set forth in § 3553(a). Given all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence "greater than necessary" to achieve § 3553(a)'s purposes, even in a mine-run case."

Id. at 575 (internal citations and quotation marks omitted.) Moreover, as the Supreme Court noted, the creation of the crack guidelines in this manner resulted in Sentencing Guidelines that ultimately harm the goals of sentencing. See *Id.* at 568. (approving the Commission's analysis that the crack/powder differential "overstates both the relative harmfulness of crack cocaine and the seriousness of most crack offenses...is inconsistent with the 1986 Act's goal of punishing major drug traffickers more severely than low level dealers.... [and] fosters disrespect for and lack of confidence in the criminal justice system.") (internal quotation marks omitted).[10] The Supreme Court grounded this ruling in the research and recommendations of the United States Sentencing Commission itself, which has acknowledged repeatedly that the crack/powder disparity in the Guidelines is flawed. *Id.* At 568 (citing Commission's conclusion in its 2002 report to Congress that the disparity "fails to meet the sentencing objectives set forth by congress in both the Sentencing Reform Act and the 1986 [Anit-Drug Abuse] Act." Indeed, based on its research, the Commission has recommended at different times that Congress reduce the disparity to 20 to 1; 5 to 1, and as low as 1 to 1. *Id.* At 569, (citing Commission's 1995, 1997, and 2002 reports). Most recently, when it submitted its proposed two-level reduction in the crack Guideline, it recommended that Congress further "substantially" reduce the ratio. *Id.* at 569(citing Commission's 2007 report).

Kimbrough also characterizes this amendment to § 2D1.1 as "modest," noting that it "now advances a crack/powder ratio that varies (at different offense levels) between 25 to 1 and 80 to 1", well above the Commission's recommended ratios. *Id.* at 573. It is, the Court said, 'only...a partial remedy' for the problems generated by the crack/powder disparity." *Id.* At 569 (citing Commission's 2007). Thus, the Court found, "[t]he amended Guidelines still produce sentencing ranges keyed to the mandatory minimums in the 1986 Act," which it identified as the source of the unwarranted disparity between the crack and powder cocaine Guidelines to begin with. *Id.* at 569, n.10.

The Supreme Court consequently ruled that sentencing courts not only may deviate from the crack/powder differential for policy reason alone, see *id* at 570 (endorsing the government's concession that "courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with Guidelines") (insertion in original)

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10 Among the flaws identified by the Commission are: (1) "the assumptions about the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution;" "the 'anomalous' result that 'retail crack dealers get longer sentences that the wholesale drug distributors who supply them the powder cocaine form which their crack is produced;" and "the severe sentences .... imposed 'primarily upon black offenders." *Id.* at 568

(internal quotation marks and citations omitted), but must deviate from the Guidelines where the guidelines disserve the goals of sentencing. That conclusion is erroneous under *Kimbrough*, and the error is a substantive one that may be raise on collateral review. The error also produced a due process violation by depriving the sentencing court of discretion to impose a lower sentence (between ten years and life) after considering all of the mitigating and aggravating factors surrounding the offense. This Court has held that a similar error -- the erroneous imposition of a 22-year minimum sentence under state law and the resulting deprivation of sentencing discretion – violated due process. In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), Hicks received a mandatory 40-year sentence that was later shown to be erroneous under state law. *Id.* at 345-346. The state court nevertheless, affirmed Hicks' 40-year sentence on the ground that it was "within the range of punishment that could have been imposed in any event." *Id.* at 345. This Court reversed, holding that the erroneous mandatory minimum violated Hicks' due process rights because Hicks "ha[d] a substantial and legitimate expectation that he [would] be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State."[11] *Id.* at 346 (citation omitted). In light of Hicks, reasonable jurists considering petitioner's mandatory minimum 22-year sentence would find it at least debatable that the sentencing court's erroneous deprivation of all discretion to impose a lesser sentence violated due process.

The district Judge applied an enhancement U.S.S.G. § 3B1.1 "manger" role because she felt it was appropriate. A court may not impose a recidivism-based statutory enhancement unless the government files information that notifies the defendant of the prior convictions triggering the enhancement. U.S.S.G. § 3B1.1. The government did not filed notice under Section 3B1.1 indicating its intent to seek an enhanced sentence in the event of a conviction. At the time of petitioner's conviction and sentencing, district Judge order was made without a request by any party to the case to enhance petitioner's sentence. As such, the three points would not count if the conviction was set aside and a new sentence imposed under the current guidelines.

Petitioner's sentence exceeded the applicable guideline range, as the prior conviction used to enhance the defendant's sentence Under 21 U.S.C. § 841(a)(1)(b)(1)(a) and§ 851 did not qualify as a felony drug conviction, in violation of defendant's right to due process under the fifth amendment to the United States Constitution and Petitioner's right to be free from cruel and unusual punishment as protected by the Eight Amendment to the United States Constitution. The time Allen was sentenced, the law changed so that he is no longer eligible for a statutory minimum sentence of 22 years' imprisonment. At the time of sentencing, Allen had no prior drug convictions [Appendix F]. Instead his sentence under 21 U.S.C. § 851, increasingly his statutory penalty; and the court applied the USSG § 4B1.1 career offender enhancement, increasing his guideline range of imprisonment. The Eighth Circuit decision was moreover erroneous. It is beyond question that congress has the power to set the statutory ranges for various criminal offenses.

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11 Although the sentence that was improperly deprived of all discretion in Hicks was the jury, Hicks "is not, however, limited to imposition of sentences by juries." *Prater v. Maggio*, 686 F.2d 346, 350 n.8 (5th Cir.1982).

United States v. Booker, 543 U.S. 220, 246 (2005); *Bowles v. Russell*, 127 S. Ct. 2360, 2364 (2007). The mandatory provisions of 21 U.S.C. § 851(a)(1) demonstrate Congress's intent to exercise that authority to limit the jurisdiction of the federal courts when enhancing sentences based on prior convictions. The statute provides.

> "No person who stands convicted of an offense under this part [21 U.S.C. § 841 *et seq.*] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a pleas of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon."

A ten-year mandatory minimum sentence for a defendant who "never had a firearm" during a crime of violence, requires proof of M*ens Rea.* The Due Process Clause, does not tolerate convictions for conduct that was never criminal. 18 U.S.C. 924(c)(1)(a) *Mens Rea* requirement Under Title 18 § 924(c)(1)(a) of the United States code provides that a person convicted of violating the subsection is subject to a minimum sentence of five years if during the course of the violation the individual carried a firearm. A firearm must be used or carried "during and in relation to" the crime, or possessed "in furtherance of" the crime. See *Muscarello v. United States*, 524 U.S. 125, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998) (interpreting "carry" provision); *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995) (interpreting "use" provision); *United States v. Gaston*, 357 F.3d 77, 82-83 (2004) (interpreting "possession in furtherance of"); also see *United States v. Wahl*, 290 F.3d 370, 375-77 (D.C.Cir.2002) (same).

The passage of time between the offense and his Sentencing—more than thirteen years—denied him due process given the loss or weakening of mitigation evidence over this period of time, and being sentence to 22 years to run consecutive with an Illinois case denied due process constitutes cruel and unusual punishment. This claim was not raised in court, thereby making it subject to procedural default. Allen contends that trial counsel was ineffective by failing to raise the claim in court. Such a claim of ineffective assistance of counsel can constitute cause for default if it was pursued in court as an independent Sixth Amendment claim, *Edwards v. Carpenter*, 529 U.S. at 451-52, 120 S.Ct. 1587 (2000).

Here the prosecutors had no evidence—apart from the mere word of an informer Richard Allen—that petitioner committed a crime was not evidence of any crime. The prosecutors knew nothing except what they been told by the informer Richard Allen. If they went to a magistrate to get a warrant of arrest and relied solely on the report of the informer Richard Allen, it is not conceivable that one would have been granted. See *Giordenello* v. *United States*, 357 U. S. 480, 486 (1958), (for they could not present to the magistrate any of the facts, which the informer may have had. They could swear only to the fact that the informer had made the accusation. They could swear to no evidence that lay in their own knowledge. They could present, on information and belief, no facts, which the informer disclosed. No magistrate could issue a warrant on the mere word of an informer, without more), See *State v. Gleason*, 32 Kan. 245, 4 P. 363 (2004); also see *State v. Smith*, 262 S. W. 65 (Mo. App. 1984), arising under state constitutions having

provisions comparable to our Fourth Amendment.

In this case, the lower courts did not consider whether Petitioner had made a substantial showing that, his 22-year sentence violates due process because they denied petitioner a COA on procedural grounds. Petitioner can show, however, "that jurists of reason would find it debatable whether" the lower courts were "correct in [their] procedural ruling[s]." *Gonzalez*, 132 S. Ct.at 648. Petitioner can demonstrate that "jurists of reason would find it debatable whether" he has asserted a valid claim of the denial of a constitutional right and whether the district court's procedural rulings were correct, *Gonzalez*, 132 S. Ct. at 648, the court of appeals erred in denying a COA.

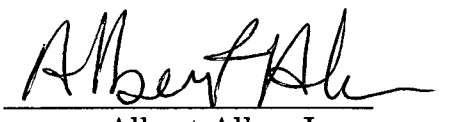
SIXTH AMENDMENT INFFECTIVE ASSISTANCE OF COUNSEL

The Supreme Court has explained that a defendant been deprived of his Sixth Amendment right to ineffective assistance if "counsel's representation fell below an objective standard of reasonableness" and the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984). Above-mentioned, many phases and specific failings reveal the ineffectiveness of Allen's counsel, moreover the fact that an offender sentenced to 22-years imprisonment based on counsel failure. Counsels did not provide reasonable assistance his failing to do so greatly prejudiced Allen. Counsel's performance seems not merely unreasonable but grossly incompetent. Counsel's representation allowed an offender like Allen to receive essentially a 22- year sentence based on hearsay. More tangibly, as detailed above, counsel was constitutionally ineffective at various stages and in various ways when representing Allen.

CONCLUSION

For the foregoing reasons, the petitioner, Albert Allen Jr respectfully prays that this Court grant a writ of certiorari and reverse the judgment of the Eighth Circuit court of appeals and the case remanded for further proceedings in light of the position expressed in this brief.

Respectfully submitted,



Albert Allen Jr.