

ORIGINAL

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PEITION FOR EXTRAORDINARY RELIEF PURSUANT TO THE ATT. WRITS ACT (28 U.S.C. § 1651)
SEEKING HABEAS CORPUS

RELATED CASE: 1:06-CR-00080
SOUTHERN DISTRICT OF NEW YORK
HONORABLE STEPHEN BREYER, ASSOCIATE JUSTICE
HONORABLE JUDGE NAOMI REICE BUCHWALD

IN RE ADRIAN FRANCIS

IN THE
UNITED STATES SUPREME COURT

RECORD No:

19-7420

OFFICE OF THE CLERK

DEC 27 2019

Supreme Court, U.S.
FILED

QUESTIONS PRESENTED

- QUESTION ONE: Whether the continued application of a vacated New York "Youthful Offender" conviction constitutes an illegal sentence and creates separate classes of persons in light of the Second Circuit's decision in *United States v. Sellers*, 784 F.3d 876 (2015) when statute prohibits the use of a vacated conviction?
- QUESTION TWO: Whether a "serious drug crime" requires an active term of imprisonment to serve as a predicate crime for purposes of filing an § 851 enhancement when the underlying predicate utilized only required probation in accord with the New York State Law?
- QUESTION THREE: Whether the utilization of a New York "Youthful Offender" adjudication violates the Full Faith & Credit Clause and a defendant's rights when he relies upon State Sovereignty?

Petitioner Francis seeks habeas corpus relief pursuant to the All Writs Act (28 U.S.C. § 1651) where he asks this Court to consider his claims and arguments as articulated herein. Specifically, Petitioner asks this Court to remand his issues to the Second Circuit Court of Appeals to close the fissure within the District Courts and to promote the demanded application of law regarding the use of a New York State youthful offender adjudication.

LIST OF PARTIES

- 1.) Adrean Francis, a.k.a. Kevin Smith (Case No: 14-CV-2311)
- 2.) United States of America (Case No: 1:06-CR-00080)

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

Petitioner respectfully PRAYS that a writ for extraordinary relief issue to review the judgment below while also performing a de novo review of the record.

OPINIONS BELOW

[x] For cases from federal courts:

The opinion of the United States District Court is attached as Appendix "A."

JURISDICTION

[x] For cases from federal courts:

The date on which the United States District Court decided my Rule 60(b) motion was 5/6/2019.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) & 1651.

TABLE OF APPENDIX

Appendix "A": The District Court's Order of May 6, 2019

Appendix "B": Copy of the underlying Rule 60(b)

Appendix "C": Table of Exhibit's attached

Exhibit "A": State of New York letter regarding youthful offender

Exhibit "B": November 5, 1998 Sentencing transcript for youthful offender

STATEMENT OF THE CASE

Petitioner was convicted of violations of 21 U.S.C. §§ 846, 841(a), 841(b)(1), and 18 U.S.C. § 924(c)(1)(A)(i). The Government filed an information which increased the Count 1 conviction to twenty years as a prior felony offender for a New York State, Class E felony, possession of marijuana in the third degree. The information failed to address the diversionary adjudication of youthful offender for the successful completion of five years probation. Notably, Petitioner did not serve a term of imprisonment for his New York youthful offender.

Petitioner timely appealed his conviction and sentence where the Second Circuit denied his claims for relief on May 3rd, 2012. Accordingly, Petitioner sought collateral relief (28 U.S.C. § 2255 which was also denied on May 13th, 2016. Since that time, Petitioner has sought a certificate of appealability and Rule 60(b) relief which was denied. Most recently, Petitioner asked the District Court to certify the following question:

"Absent Congressional authority to utilize New York youthful offender conviction for purposes of an § 851 enhancement, does the decision to not allow enhancement for the ACCA via *United States v. Sellers*, 784 F.3d 876 (2015) by application of youthful offender, create separate classes of persons subject to arbitrary enforcement when New York State law prohibits the utilization of youthful offender?"

Petitioner also raised a void for vagueness challenge to 18 U.S.C. § 851 as the use of his vacated and replaced conviction violates the statutory provisions of 18 U.S.C. § 921(a)(20) and 21 U.S.C. § 802 (44). The Second Circuit and the District Court refuses to consider the fact that the use of his vacated Class E felony constitutes an illegal sentence and unconstitutional loss of liberty in violation of the Due Process Clause of the Fifth Amendment and the Cruel and Unusual Punishment clause of the Eighth Amendment.

Respectfully, this Court's guidance is needed to cure the resulting manifest injustice.

SUMMARY OF THE ARGUMENT

This case comes before this Court to determine the continued validity of 18 U.S.C. § 921(a) when the District Court utilizes a vacated conviction to file an information via 18 U.S.C. § 851. Petitioner Francis stands at the crossroads of the promises made by the State of New York and Federal Statute and the varying courts interpretations of a vacated youthful offender application. Petitioner also relies upon 21 U.S.C. § 802(44) as the terminology defined within the Controlled Substance Act ("CSA") does not support the use of a New York youthful offender adjudication.

This Petitioner was convicted of a violation of 21 U.S.C. § 841(b), where the Government filed an information via 28 U.S.C. § 851, claiming that his vacated New York youthful offender adjudication is a qualifying conviction in accord with the enhancement provisions of § 841(b). Petitioner's youthful offender adjudication does not meet the terminology of a serious felony drug offense for purposes of enhancement when this Court's pending decision in *Shular v. United States*, 18 - 6662 will clearly demonstrate Petitioner's original and continued claims of an unconstitutional sentence.

To place this matter in its truest perspective, Petitioner's youthful offender adjudication replaced a third degree possession of marijuana charge. Nearly half the States of this Union have now legalized marijuana to some degree, while others are currently contemplating expungment of criminal possession of marijuana indicating the sea change in attitude. This matter hinges upon three main facts related to this Petitioner's youthful offender adjudication. First, Petitioner's Class E felony charge was vacated and "replaced" by a youthful offender designation that does not result in a conviction. Next, Petitioner did not serve an active term of imprisonment and successfully completed a term of probation. Lastly, New York law forbids a youthful offender adjudication being used for purposes of enhancement, where the Full Faith and Credit clause of the Constitution provides a bulwark protection for this Petitioner, as the District Court is without jurisdiction to redefine New York State law.

The law of the Second Circuit is conflicting in that *United States v. Jackson*, 504 F.3d 250, 252, (2007), and *United States v. Sampson*, 385 F.3d 183, (2004), does not square with the law of *United States v. Sellars*, 784 F.3d 876, (2015) in that a youthful offender adjudication did not qualify for purposes of enhancement for Armed Career Criminal Purposes. Allowing some defendants to receive enhancements for a youthful offender adjudication and others to not have their youthful offender adjudications utilized, creates separate classes of persons subject to arbitrary enforcement. Simply stated, there is no statutory language that allows a youthful offender adjudication to be counted for purposes of enhancements. In fact, the statutory language of 18 U.S.C. § 921(a)(20) exempts Petitioner's youthful offender adjudication from being utilized.

The infirmity that results in a miscarriage of justice is that the District Court and the Second Circuit Court of Appeals have refused to consider Petitioner's claims although his present sentence is unconstitutional. Simply stated, 18 U.S.C. § 921(a)(20) clearly exempts the use of Petitioner's New York youthful offender adjudication as a means to increase the penalty for a violation of 21 U.S.C. § 841(b). "[A]ny additional amount of jail-time has Sixth Amendment significance." *Glover v. United States*, 531 U.S. 198 (2001). Additional jail-time also implicates a Due Process protection.

Respectfully, Petitioner seeks this Court's intervention and guidance in accord with the "All Writs Act" (28 U.S.C. § 1651) to correct the manifest injustice that is occurring within the Second Circuit due to the intra district split and the conflict with all Second Circuit case law contrary to 18 U.S.C. § 921(a)(20).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

QUESTION ONE: 18 U.S.C. § 921(a); 21 U.S.C. § 802(44); and 28 U.S.C. § 851

- The Due Process Clause of the Fifth Amendment
- United States Cons., Article IV, § 1

QUESTION TWO: 18 U.S.C. § 921(a); 21 U.S.C. § 802(44); and 28 U.S.C. § 851

QUESTION THREE: The Full Faith & Credit Clause (United States Cons., Article IV, § 1

REASONS FOR GRANTING THE WRIT

This case presents all of the classic reasons for granting relief where primarily the need to avoid disparity or mete out punishment unauthorized by statute is paramount. Petitioner's sentence was enhanced by the filing of an information via 18 U.S.C. § 851 on the grounds of his New York State youthful offender adjudication, although § 851 does not authorize the use of a vacated conviction. Courts must "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23 (1997). Accordingly, Petitioner's punishment is wholly inconsistent with the statute, which undermines the integrity of the judicial system.

At bar, it is the combination and use of 21 U.S.C. § 841(b) and 18 U.S.C. § 851 that forms the basis for the illegal sentencing scheme, inter-alia, the use of Petitioner's youthful offender diversionary adjudication. At the heart of this case is the lack of statutory language authorizing the use of a vacated adjudication for 21 U.S.C. § 841(b) or 18 U.S.C. § 851. "The role of this Court is to apply the statute as it is written—even if we think some other approach might 'accor[d] with good policy.'" *Burrage v. United States*, 134 S.Ct 881 (2014) (quoting *Commissioner v. Lundy*, 516 U.S. 235 (1986)).

Absent Congress' language authorizing enhancement for a vacated adjudication, 18 U.S.C. § 921(a)(20) clearly prohibits the use of a vacated conviction. "Where the statute's language is plain," e.g., § 921(a)(20), "the sole function of the courts is to enforce it according to it's terms. *United States v. DeCristina*, 726 F.3d at 96 (quoting *United States v. Kozeny*, 541 F.3d at 171 (2nd Cir. 2008) "Statutory enactments should, moreover, be read so as 'to give effect, if possible, to every clause and word of a statute.'" *Duncan v. Walker*, 533 U.S. 167 (2001)).

If Congress had intended for vacated adjudications to be utilized for predicate acts, they would have said so. One of the basic canons of interpretation is that statutes should be construed so that

the given effect is inclusive of all words and provisions and not to include what Congress chose to be silent upon. Recently, the Second Circuit determined that 18 U.S.C. § 921(a)(20) prohibited the use of vacated convictions in its decision of *United States v. Sellers*, 784 F.3d 876 (2015).

A.) EXCEPTIONAL CIRCUMSTANCES THAT WARRANT THE COURTS USE OF DISCRETIONARY POWER IN ACCORD WITH 28 U.S.C. § 1651.

The Second Circuit has created separate classes of persons subject to the arbitrary application of a New York youthful offender adjudication by allowing such to be utilized for some convictions but not others. Statute prohibit's the use of vacated convictions, i.e., 18 U.S.C. § 921(a), such as vacated youthful offender adjudications identical to Francis'. Does the application of a vacated youthful offender adjudication violate 18 U.S.C. § 921(a) while contemporaneously violating the Full Faith & Credit Clause?

This question, as a mixed question of law and fact, involves complicated matters due to the change in Second Circuit law and the restrictions of habeas corpus. Petitioner has sought review in the District Court where the court refused to certify his question for a review in the Second Circuit Court of Appeals. The exceptional circumstances in this case relate directly to procedural confines that foreclose constitutional protections, to-wit: the evenhanded application of the law by not creating separate classes of persons, e.g., those who may be punished for a vacated conviction and those who may not. Without this Court's review of this matter, this Petitioner will serve an additional (120) months imprisonment when similarly situated persons have been granted relief.

B.) PETITIONER HAS SOUGHT RELIEF IN THE DISTRICT COURT WHOM DENIED TO CERTIFY HIS CONSTITUTIONAL CONCERNS FOR REVIEW IN THE SECOND CIRCUIT.

The District Court denied Petitioner's request for Rule 60(b) relief on procedural grounds rather consider relief in accord with Rule 60(b)(6) for any other reason that justifies relief. The Circuits

are split on the issue whether a New York youthful offender may be utilized to enhance punishment where without a District Court's authorization to proceed into the Court of Appeals --- this Petitioner is stranded. Petitioner Francis is also foreclosed from seeking authorization to file for permission for the filing of a second or successive § 2255 in accord with *United States v. Sellers*, 748 F.3d 876 (2nd Cir. 2015) as Seller's represents a classification in the law rather than a retroactive change in law.

Accordingly, adequate relief cannot be obtained from the lower courts due to the policies and procedures adopted. Petitioner also relies upon the anticipated protections that this Court will announce when it decides *Schular v. United States*, 18-662 (pending) as the "serious drug offense" will be clarified.

C.) THE GRANTING OF FRANCIS' PETITION WILL ENSURE THE EVENHANDED APPLICATION OF THE LAW FOR THE SIMILARLY SITUATED PERSONS, THUS AIDING APPELLATE JURISDICTION UPON REMAND AS THE SECOND CIRCUIT CAN DECIDE THE ISSUES RAISED HEREIN.

The complexity regarding the utilization of youthful offender applications revolves around Circuit interpretation of State law at a moment in time. When that interpretation evolves over a decade where a defendant/petitioner has utilized the appeals and habeas process, a District Court must open the gateway to address constitutional concerns. But happens when the District Court declines to open the gate when both Fifth and Sixth Amendment protections are implicated.

The Bill of Rights -- a 462 word social compact -- guarantees rights that act as the proverbial key to any gateway claim. This matter at bar involves questions of statutory interpretation (18 U.S.C. § 921(a)); Constitutional concerns (Full Faith & Credit Clause); Statutory definitions (21 U.S.C. § 802(44)); AEIOPA; as well as substantial liberty interest. This case presents a textbook opportunity to clarify 18 U.S.C. § 921(a) to ensure that no individual is deprived of liberty at any stage in the proceedings.

The rule announced in the *Sellers* decision is substantive as it regulates the parties sentencing exposure. The *Sellers* decision is relevant as the reasoning applies to all of those with enhanced sentencing based upon a vacated youthful offender adjudication. Good cause exists to provide a uniform explanation regarding 18 U.S.C. § 921(a) for all defendants enhanced upon a youthful offender adjudication where the Second Circuit can establish the desired uniformity through this Court's guidance.

Specifically, Petitioner requests that this Court remand this issue to the Second Circuit Court of Appeals for further proceedings consistent with the Due Process of Law and in accord with the even-handed application of the law.

ARGUMENT ONE: THE INTRA CIRCUIT FISSURE IN SECOND CIRCUIT CASE LAW HIGHLIGHTS THE SPLIT WITHIN THE SIXTH CIRCUIT REGARDING APPLICATION OF A YOUTHFUL OFFENDER ADJUDICATION, ABSENT CLEAR CONGRESSIONAL AUTHORITY AUTHORIZING APPLICATION OF SUCH FOR PURPOSES OF ENHANCED PUNISHMENT.

The Second Circuit has recognized that the New York youthful offender scheme is complex and the title "youthful offender adjudication" is far from dispositive. *United States v. Driskell*, 277 F.3d 150, 154-57 (2nd Cir. 2002). Here, most of the Circuits have relied upon this determination by finding a youthful offender is first "convicted as an adult and only later may, in the court's discretion, have that conviction vacated and replaced by a youthful offender finding." *Id.*, at 155 (citing *Capital Newspaper Div. of the Hearst Corp. v. Magnihan*, 71 N.Y. 2d 263, 519 N.E. 2d 825, 827, 525 N.Y. S.2d 24 (N.Y. 1988)). The Circuit's have utilized this finding to make a Guideline determination that "the conviction attaches when the defendant's guilt is attached" without consideration of the conflict with 18 U.S.C. § 921(a)(20) and the stated intent of the New York Legislature.

The finding in *Driskell* totally disregards the well accepted meaning of the term vacated. Black's Law defines vacate as "to nullify or cancel; make void; invalidate." [Black's law, 4th pocket edition]. New York's legislative intent to "not stigmatize youths between the ages of 16 and 19 with criminal records triggered by hasty or thoughtless acts which, although crimes may not have been the deeds of hardened criminals." *People v. Drayton*, 39 N.Y. 2d 580, 350 N.G. 2d 377, 385 N.Y. 2d 1 (N.Y. 1976). Pursuant to Section 720.35(1) of New York Criminal Procedure Law, "[a] youthful offender adjudication is not a judgment of conviction for a crime or any other offense" By law, a vacated conviction cannot be utilized as a predicate offense for purposes of attaching recidivism punishment.

In any event, *Driskell* also directs a reviewing Court to both "consider the substance" and "where the defendant was incarcerated." See *Driskell*, 277 F.3d at 151. Here, it is imperative to consider the fact that this Petitioner did not serve a term of imprisonment where his sentence could even be considered under the terms of the Guidelines or statutes. These legal conclusions are believed to be consistent with this Court's anticipated opinion in *Shular*.

A.) THE CIRCUIT'S HAVE REACHED DIFFERENT RESULTS REGARDING NEW YORK'S YOUTHFUL OFFENDER IN VIOLATION OF THE FULL FAITH & CREDIT ACT.

The Fourth Circuit concluded that the career offender guideline under 4B1.1 was inapplicable to the defendant due to one of the predicate acts involved a sentence imposed under a youthful offender status. See *United States v. Mason*, 284 F.3d 555 (4th Cir. 2002) (noting that pursuant to Note 7 of § 4A1.2, the career offender guidelines requires both an adult conviction and an adult sentence). The Third, Seventh, Ninth, and Eleventh Circuits have concluded that a youthful offender sentence may serve as a predicate offense. See *United States v. Gregory*, 591 F.3d 164, 167-69 (3rd Cir. 2004); *United States v. Pinion*, 4 F.3d 941, 943-45 (11th Cir. 1993); *United States v. Carrillo*, 991 F.2d 590, 593-94 (9th Cir. 1993). The Second Circuit agreed with the afore-stated precedents in *United States v. Jones*, 415 F.3d 256, 263-64 (2nd Cir. 2005). However, *Jones* (2nd Cir.) is not in concert with *Sellers* (2nd Cir.) and the First and Fourth Circuits where Petitioner's case is distinguishable.

The First Circuit found in *United States v. Peguero-Martinez*, 771 F. Supp. 2d 137 (1st Cir. 2010) that "it is not entirely clear that a youthful offender adjudication in New York should always count as a predicate conviction for the purposes of sentencing." In fact, the Board of Immigration held that a youthful offender adjudication does not constitute a judgment of conviction for a crime within the meaning of section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A). See *re Devison-Charles*, 22 I & N. Dec 1362, 1373 (BIA 2000). Among other considerations, the Board placed special emphasis on the fact that New York State "specif[ies] that neither a youthful offender adjudication nor a determination of juvenile delinquency constitutes a conviction." *Id.*, at 1367. Without a lawful conviction, there simply is no predicate act to rely upon in Petitioner's case.

The First Circuit discussed the different glosses that can be placed on a youthful offender adjudication where the uncertainty counsels that the rule of lenity should be applied. See *Bifulco v. United*

States, 447 U.S. 381, 387 (1980) (The rule of lenity "applies not only to interpretations of the substantive ambit of criminal prosecutions, but also to the penalties they impose.") In light of immigration, armed career offenders, and others being freed from the stigma of "youthful offender," the rule of lenity must be applied to this Petitioner as he is protected both by the Full Faith & Credit Act and 18 U.S.C. § 921(a)(20) in accord with the principle of statutory construction.

B.) DECISIONS BASED UPON THE DETERMINATIONS OF DRISKELL, JONES, JACKSON, AND SAMPSON HAS RENDERED THE HABEAS PROCESS INEFFECTIVE WHILE EXPOSING AN INHERENT INFIRMITY IN LAW.

The underlying defect within the habeas corpus proceedings related to this Petitioner is that the District Court has been hamstrung with the doctrine of vertical stare decisis as the law of this Circuit regarding application of youthful offender as articulated in *United States v. Jackson*, 504 F.3d 250, 252 (2nd Cir. 2007) and *United States v. Sampson*, 385 F.3d 183 (2nd Cir. 2004). The decisions of the *Jackson* and *Sampson* Court is at direct odds with the decision and reasoned logic of *United States v. Sellers*, 784 F.3d 876 (2nd Cir. 2015). The decision rendered in *United States v. Jones* is also in direct conflict with the *Sellers* Court. 415 F.3d 256, 263-64 (2nd Cir. 2005).

The *Sellers* Court held that "in a youthful offender adjudication under N.Y. Crim. Proc. Law §§ 720.10 (1),(2), 720.20(1) did not qualify as a predicate conviction under the Armed Career Criminal Act (ACCA), 18 U.S.C.S. §§ 922(g)(1), 924(e)(1), because it had been set aside within the meaning of 18 U.S.C.S. § 921(a)(20) and New York Law." 18 U.S.C. § 851 does not contain the identifying statutory language that allows a youthful offender adjudication to be utilized for purposes of enhancement. However, there is clear statutory authority that protects a defendant, absent clearly established Congressional intent. Cf: 18 U.S.C. § 921(a)(20); see also Appendix "A" - Youthful Offender Adjudication.

Under 28 U.S.C. § 1738, a federal court is required to give full faith and credit to the final judgment entered in a state action. *Conopco, Inc. v. Roll Intern.*, 231 F.3d 82 (2nd Cir. 2000). This sta-

tutory protection is born of the United States Constitution Article IV, as the "Full Faith & Credit Clause." As such, by the Supreme Court in *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, (1985): "[T]he Federal Full Faith And Credit statute [28 U.S.C. § 1738] does not allow federal courts to employ their own rules for res judicata in determining the [e]ffect of state judgments."

Here, the federal courts are interfering with the sovereignty of the States by utilizing language meant to undermine the statutory intent of the New York Legislature. In fact, the Full Faith & Credit Clause zealously guards state judiciary meaning that full faith and credit shall be given to the judicial proceedings of every state. Additionally, a decision to utilize a successful youthful diversion undermines Petitioner's right to rely on New York Law as well as the Due Process Clause.

Recently, the Second Circuit reaffirmed and held "the U.S. Court of Appeals for the Second Circuit held in the *Sellers* decision that a youthful offender adjudication under New York State law is not a predicate conviction under the ACCA." Most recently, the Southern District of New York held that a youthful offender adjudication could not serve as a means for enhancement in *United States v. Krug*, 2019 U.S. Dist. LEXIS 17016.

Notably, Judge Arcara determined that the youthful offender designation was part of the design of a diversionary contract and because the originating charge was "replaced," the youthful offender conviction could not be utilized in making a false statement. Further, Ford's statements regarding his youthful offender adjudication "does not involve dishonesty or false statements." See *New York Criminal Procedure Law* 216.05(10). Notably, the key words of vacated; was replaced; and not a conviction are primarily relied upon in this decision. Cf: *United States v. Sampson*, (2nd Cir.), *infra*.

In light of the fact that Mr. Ford's statements (*U.S. v. Krug*) regarding youthful offender did not involve dishonesty; the Fourth Circuit's determination in *Mason*; the First Circuit's determination in

McGee; and other Circuits' determination that youthful offender cannot be utilized for deportation underscores the disparity of what a youthful offender adjudication can be used for. Perhaps Sellers considers why every effort must be made to recognize the value of New York Criminal Procedure Law of § 721.35(1). Emphatically stated, the Sellers Court has utilized careful reasoning while relying on 18 U.S.C. § 921(a)(20), where a continued application against Petitioner violates the Eighth Amendment.

The Sellers Court absolutely agreed with the afore-stated Circuit's rationale, as they stated "it is the court's duty to give effect, if possible, to every clause and word of a statute." Under such advice, it is necessary to look closely at New York Criminal Procedure Law at § 720.35(1), which states:

"(1.) A youthful offender adjudication is not a judgment of conviction for a crime or any other offense, and does not operate as a disqualification of any person so adjudged to hold the public office or public employment or to receive any license granted by public authority . . . "

Giving effect to every clause and word of this statute, the highlight falls upon (1) "is not a judgment of conviction for a crime;" and (2) "does not operate as a disqualification." While these clauses are not ambiguous, the terminology contained in New York CPL § 720.20 is more important, due to the mandate "the court must direct that the conviction is deemed vacated." Any decision to the contrary violates 18 U.S.C. § 921(a)(20) and constitutes an illegal sentencing scheme.

C.) PETITIONERS NEW YORK YOUTHFUL OFFENDER CONVICTION DOES NOT QUALIFY AS A "SERIOUS DRUG FELONY" WHERE THE § 851 ENHANCEMENT CONSTITUTES AN ILLEGAL SENTENCE.

While there has been controversy over what constitutes a "serious drug offense," this Court will provide the much needed guidance when the opinion is issued in *Shular v. United States*, 18-6662(pending). Plainly stated, even if the Full Faith & Credit Act or 18 U.S.C. § 921(a)(20) did not eliminate use of Petitioner's youthful offender adjudication, a youthful offender cannot qualify as a predicate act for

enhancement under 21 U.S.C. § 841(b). As noted earlier, this Petitioner did not serve an active term of imprisonment, but rather served a five year successful probation, while at all times relying on the inherent trust created for substantial reliance upon the New York State Legislature's intent.

The focus upon the term imprison revealed a meaning of: "to confine (a person) in prison." Black's Law 4th pocket edition. The meaning of imprisonment cannot be stretched to mean a term punishable because the legislative intent of the State of New York is clear when it lawfully created its diversionary programs. In fact, Petitioner was sentenced to probation having a meaning of: "A court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of of sending the criminal to jail or prison." Black's Law, 4th pocket edition.

As Petitioner successfully completed "probation," his conviction for a Class E felony, possession in the 3rd degree was vacated and replaced with a youthful offender adjudication. Petitioner did not lose his right to vote, hold office, or otherwise obtain a license as required by law. Petitioner's youthful offender adjudication serves as a true nullity in law.

Absent a federal statute allowing the use of a youthful offender adjudication, or a partial repeal of the Full Faith and Credit Act (28 U.S.C. § 1738), there is not a legal means under federal law to utilize a youthful offender adjudication to enhance this Petitioner. Nothing in 21 U.S.C. § 841(b) nor the definition of "felony drug offense" in 21 U.S.C. § 802(44) includes an otherwise qualifying conviction that has been set aside. If the words "must" and "operate" are to be given their proper effect in law, then their reading in conjunction with Article IV of the Constitution must be a non-negotiable bulwark protection as delineated.

Of equal importance, the benefits of the New York plea bargain, and the reasonable expectation that this Petitioner has of such will be totally undermined by violating the terms of his contract with the State of New York. Other Circuit's have also agreed with Petitioner's stated position. Simply stated,

this Petitioner has a guaranteed Constitutional right to be accorded the full protection of the laws of the State of New York as a citizen of the State as reasonably deduced from the Full Faith & Credit Act.

Petitioner's issue is contesting the use of juvenile conduct to increase a sentence, but for squarely the fact that he had a quid-pro-quo arrangement where kept the terms of his five year (5) probation and did not serve an active term of imprisonment in accord with the law. The Ninth Circuit has ruled that the issue is not whether the conviction has been constructively expunged due to a specific statute restoring civil rights that relieves a party of all penalties and disabilities resulting from a youthful offender adjudication. *United States v. Varela-Cruz*, 568 Fed. Appx. 506 (9th Cir. 2014). See e.g., *United States v. Cardwell*, 967 F.2d 1349, 1350 (9th Cir. 1992); *United States v. Erwin*, 902 F.2d 510, 511 (7th Cir. 1990); and *United States v. Cassidy*, 889 F.2d 543 (6th Cir. 1990).

In sharp contrast, the First Circuit brings a fresh outlook to this inquiry as they have ruled that 21 U.S.C. § 841(b) particularly requires that the predicate felony drug offense must have resulted in a [c]onviction. See *United States v. McGhee*, ___ F.3d ___ (1st Cir. 2011). Here New York State Law § 720.35(1) states in part, "a youthful offender adjudication is not a judgment of conviction."

The Supreme Court of the State of New York ruled in *The People v. Kuey*, 83 N.Y. 2d (N.Y. 1994) that "a felony conviction of a person given youthful offender status may not be used as a predicate for enhanced sentencing." (CPL 720.35; *People v. Lune*, 60 N.Y. 2d 748, 751; *People exrel. Wayburn v. Schupf*, 39 N.Y. 2d 682, 688). The Supreme Court of the State of New York noted that "we first satisfied ourselves that the effect of being adjudicated a youthful offender in California and New York was the same." (The New York and California youthful offender adjudications are a nullity in law).

The Sixth Circuit also agrees that imprisonment (adult) is a deciding factor regarding defendant Nash in discussing *United States v. Wilks*, 464 F.3d at 1243, held, "Wilks assessment of facility in

which he was incarcerated. Cf: *United States v. Driskell*, 277 F.3d 150 (2nd Cir. 2002). However, Nash was otherwise treated as an adult criminal, and was sentenced to a term of imprisonment exceeding one year and one month. *United States v. Nash*, 558 Fed. Appx. (6th Cir. 2014). Petitioner's case is entirely distinguishable from both *Driskell* and *Cuello* in that they both served active terms of imprisonment.

Here, Petitioner did not serve a term of imprisonment where the Nash Court quoted *Green v. State*, 975 So. 2d. 1090, 1112 (FLA. 2008) (distinguished between the New York youthful offender statute and the Florida youthful offender statute and noting "unlike the Florida statute, a youthful offender designation in New York relates to the entire adjudication, not simply the sentence.") *Id.*, 558 Fed. Appx. 604. Stated another way, New York vacates the conviction and states there is not a judgment of conviction.

In a nutshell, the *Sellers* Court has clearly demonstrated the major premise regarding a New York youthful offender as an adjudication that "is not a judgment of conviction for a crime." Further, to preserve the integrity of the New York judicial system, the Constitutional instruction of the "Full Faith and Credit" clause must be given its proper effect. It is because the lack of Congressional intent, vis-a-vis an enacted statute, that Petitioner's adjudication as a youthful offender cannot serve as a predicate enhancement, where a decision to the contrary violates the United States Constitution. Conversely, 18 U.S.C. § 921(a)(20) and 21 U.S.C. § 802(44) both prohibit the use of Petitioners vacated and replaced conviction.

Accordingly and respectfully, this Honorable Court should address the disparity in Circuit law and consider the points of law raised herein and determine in the interest of justice, if the decision in *Sellers* has created arbitrary enforcement regarding New York youthful offender. Petitioner asks this Court to be mindful of the District Court's comments at sentencing that naturally implies a rule of lenity thinking as:

"We looked to see if there is discretion. I don't believe there is. I can state on the record that if I felt free to do so, I would not sentence Mr. Riley to more than mandatory minimum of 15 years."

The split within the Circuits and within Second Circuit case law are at odds with each other and has created the opportunity for this Court to rule in favor of the Constitution, Article IV. If the youthful offender adjudication cannot be utilized for § 4A1.2 & § 4B1.1, or for the purposes of U.S.S.G. § 2K2.1, then the youthful offender adjudication cannot be utilized for § 841(b), consistent with § 921(a)(20) and 21 U.S.C. § 802(44).

Petitioner points to the fact that it will be a fundamental defect to not rule upon these important Constitutional issues and PRAYS that this Honorable Court utilize its plenipotentiary powers to fashion equitable relief in accordance with the "All Writs Act," codified as 28 U.S.C. § 1651.

In a nutshell, allowing a non-qualifying youthful offender adjudication to be utilized in some circumstances and not allowing others is creating separate classes of persons, i.e., those whom receive leniency and those whom receive additional punishment. Respectfully, Petitioner PRAYS that this Honorable Court fully consider the variance in between the Circuit's and Second Circuit case law and more to uphold the validity of the New York States legislative intent. Additionally, Petitioner asks this Court to remand this case for a Constitutional determination of his sentence in light of the protections of 18 U.S.C. § 921(a)(20) and 21 U.S.C. § 802(44).

CONCLUSION

Consistency within the law and fair rulings are the core goal of the judicial system. To allow the use of the New York youthful offender adjudication for certain prosecutions and not others not only undermines the core goals of justice but vitiates the Full Faith & Credit Clause of the Constitution. Due Process is also implicated as this Petitioner --- as well as others --- are suffering from an illegal loss of liberty.

In the event that this Court does not rule on sub arguments A or B, then Petitioner asks this Court to hold this matter in abeyance pending the decision of *Schular v. United States*, (18-6662), June 28th, 2019, in accord with *Nken v. Holder*, 566 U.S. 418 (2009); see also *In re McKenzie*, 180 U.S. 536 (1901). Upon such decision rendered, Petitioner asks that this Court remand these issues back to District Court for a determination consistent with the arguments raised herein. Respectfully, this Court's intervention is needed to bring uniformity within the law.

WHEREAS AND FOR GOOD CAUSE, Petitioner PRAYS that this Court remand this case back to the Second Circuit for further determinations consistent with *Schular v. United States*, 18-6662 while also answering if the decision of *United States v. Sellars*, 784 F.3d 876 (2nd Cir. 2015) conflicts with *United States v. Jackson*, 504 F.3d 250 (2nd Cir. 2007); *United States v. Jones*, 415 F.3d 256 (2nd Cir.

2005); *United States v. Sampson*, 385 F.3d 183 (2nd Cir. 2004); and *United States v. Driskell*, 277 F.3d 150 (2nd Cir. 2002) --- consistent with 18 U.S.C. § 921(a)(20) and 21 U.S.C. §§ 802(44), 841(b), 851.

Dated this the ____ day of December, 2019

Respectfully Submitted,

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