

No. _____

IN THE UNITED STATES
SUPREME COURT

MARVIE CHAPMAN, JR.,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review

How to determine whether a statute is indivisible for purposes of applying *Mathis v. United States* to “controlled substance offense”, “serious drug offense” and Felony drug offense” definition?

Parties and Corporate Disclosure Statement

The caption of this case contains the names of all the parties involved. No corporation is a party to this action, and therefore, under Supreme Court Rule 29.6, there is no parent or publicly held company owning 10% or more of any involved corporation's stock.

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1. The Eighth Circuit interpretation and application of drug statutes as qualifying offenses for career offender status is inconsistent with *Mathis v. United States*, ____ U.S. ____, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), along with other circuit courts which have been applying *Mathis v. United States*.
2. In determining that the Iowa Code § 124.401(1) definition of controlled substance offense is not broader than the United States Sentencing Guideline § 4B1.2(b), the Eighth Circuit has not correctly applied the principles of *Mathis* and is in conflict with other circuits in their application of

Mathis. Contrary to the Eighth Circuit ruling in this and other cases, Iowa Code § 124.401(1) is *indivisible* as to what is a controlled substance and is broader than the United States Sentencing Guideline § 4B1.2’s definition of what is a controlled substance offense for career offender purposes. Iowa Code § 124.401(1) covers “simulated” and “imitation” versions of otherwise described “controlled substances.” Iowa case law clearly indicates there is no need to have unanimity on what version of the substance is required for a conviction under these statutes, and thus these statutes are indivisible for purposes of *Mathis*. See, *State v. Draper*, 457 NW 2d 606 (Iowa 1990).

3. Other circuits have concluded their various state statutes were overbroad in terms of the means of delivery of drugs or offers to sell drugs. See, *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), *United States v. Madkins*, 866 F.3d 1136 (10th Cir. 2017), and *United States v. Savage*, 542 F.3d 959 (2nd Cir. 2008). Those circuits have correctly applied the principles established in *Mathis* for the construction of state statutes in determining whether they comply or correspond with the definitions of controlled substances set forth in the United States Sentencing Guidelines § 4B1.2(b).
4. The error by the United States District Court for the Southern District of Iowa and the Eighth Circuit Court of Appeals results in a much higher calculated United States Sentencing Guideline range (262 to 327 months versus 120 months, statutory mandatory minimum).

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OPINIONS BELOW

The Eighth Circuit Court of Appeals unpublished opinion is attached at Appendix A. The Eighth Circuit Court of Appeals opinion is not reported. *United States v. Marvie Chapman, Jr.*, Judgment in a Criminal Case, United States District Court, Southern District of Iowa is attached at Appendix B. Order Denying Petition for Rehearing and Order Denying Rehearing En Banc is attached as Appendix C.

BASIS OF JURISDICTION

A three-judge panel of the Eighth Circuit Court of Appeals entered a Judgment in this case on November 25, 2019. Petition for Rehearing En Banc was denied on January 3, 2020. The Supreme Court maintains jurisdiction over this case pursuant to 28 U.S.C. 1254(1) and 28 U.S.C. § 2101(c).

FEDERAL STATUTE IN ISSUE

At issue in this Petition for Writ of Certiorari is U.S.S.G. § 4B1.2(b) which provides in applicable part:

§4B1.2. Definitions of Terms Used in Section 4B1.1

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

STATE STATUTE IN ISSUE

The State of Iowa definition contained in § 124.101, Paragraphs 5, 6, 16 and 29:

Paragraph 5: "Controlled substance" means a drug, substance, or immediate precursor in schedules I through V of subchapter II of this chapter.

Paragraph 6: "Counterfeit substance" means a controlled

substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance.

Paragraph 16: “Imitation controlled substance” means a substance which is not a controlled substance but which by color, shape, size, markings, and other aspects of dosage unit appearance, and packaging or other factors, appears to be or resembles a controlled substance. The board may designate a substance as an imitation controlled substance pursuant to the board’s rulemaking authority and in accordance with chapter 17A. “Imitation controlled substance” also means any substance determined to be an imitation controlled substance pursuant to section 124.101B.

Paragraph 29: “Simulated controlled substance” means a substance which is not a controlled substance but which is expressly represented to be a controlled substance, or a substance which is not a controlled substance but which is impliedly represented to be a controlled substance and which because of its nature, packaging, or appearance would lead a reasonable person to believe it to be a controlled substance.

STATEMENT OF FACTS

Defendant is currently 34 years old. *See*, p. 2, Presentence Investigation Report (hereinafter PSIR), Document No. 36 of the District Court Docket. On February 16, 2018 law enforcement conducted surveillance of an apartment building on West 3rd Street in Davenport, Iowa as part of the execution of a search

warrant. As part of the execution of that search warrant, Matthew Serra came out of the subject building and walked to a Chevy Tahoe driven by Marvie Chapman, Jr. Law enforcement officers approached this vehicle, and while approaching observed Mr. Chapman dropping a plastic baggie to the center counsel armrest. Officers ordered him out of his vehicle and transported him to the Scott County, Iowa Sheriff's office jail facility. Mr. Chapman, having been advised of his Miranda rights, agreed to talk with law enforcement officers. Mr. Chapman admitted to distributing heroin to Mr. Serra, and further described his activities involving selling heroin. Mr. Chapman consented to a search of his vehicle which revealed money, a cellular telephone, and additional heroin and digital scales.

Mr. Chapman was subsequently indicted and entered into a plea agreement and tendered his guilty plea. Chief United States District Court Judge for the Southern District of Iowa, John A. Jarvey, sentenced him to 240 months on Count I, along with a term of supervised release of 5 years and a special assessment of \$100.

If the Court had determined that the Defendant was not a career offender under U.S.S.G. § 4B1.1, the calculated sentencing Guideline range would have been a term of 57-71 months, with a statutory minimum of 120 months. Instead, under the career offender guideline, the Defendant's range calculated by the District Court was 262 to 327 months. *See*, Final Presentence Investigation Report Document 36,

HISTORY OF THE CASE

The Defendant, Marvie Chapman, Jr., appeals from the sentence imposed as a result of an Indictment filed in the Southern District of Iowa on March 13, 2018. Count one (1) was a Conspiracy to Distribute 100 Grams of a Mixture or Substance Containing Heroin. Defendant had entered a guilty plea to Counts One (1) of the Indictment on July 20, 2018 before United States Magistrate Judge Stephen B. Jackson, Jr. On August 6, 2018, Chief United States District Court Judge John A. Jarvey formally accepted Defendant's plea. Defendant's plea was pursuant to a plea agreement with the United States Attorney's Office for the Southern District of Iowa. Said plea agreement was offered as an exhibit at the time of the guilty plea proceedings in front of Magistrate Judge Jackson. Said plea agreement was marked as Exhibit 1 as part of that hearing.

As part of the guilty plea proceedings, Defendant did not stipulate to the Career Offender status. Defendant has argued throughout that he is not a career offender under the United States Sentencing Guideline § 4B1.1.

A sentencing hearing was held on November 28, 2018. At that hearing no witnesses were called to testify. The Court determined that the Defendant was a career offender under § 4B1.1 of the United States Sentencing Guidelines. The

Court orally imposed the sentence of 240 months of imprisonment. Written judgment was filed on November 28, 2018.

Defendant timely filed Notice of Appeal on December 5, 2018.

This case was submitted to the Eighth Circuit without oral argument on October 14, 2019. A per curium opinion was issued on November 25, 2019 denying Defendant's relief. Defendant filed a Petition for Rehearing En Banc on December 5, 2019. This petition for rehearing en banc was denied on January 3, 2020.

REASON FOR GRANTING THE PETITION

1. The Eighth Circuit interpretation and application of drug statutes as qualifying offenses for career offender status is inconsistent with *Mathis v. United States*, ____ U.S. ____, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), along with other circuit courts which have been applying *Mathis v. United States*.
2. In determining that the Iowa Code § 124.401(1) definition of controlled substance offense is not broader than the United States Sentencing Guideline § 4B1.2(b), the Eighth Circuit has not correctly applied the principles of *Mathis* and is in conflict with other circuits in their application of *Mathis*. Contrary to the Eighth Circuit ruling in this and other cases, Iowa Code § 124.401(1) is *indivisible* as to what is a controlled substance and is broader than the United States Sentencing Guideline § 4B1.2's definition of what is a controlled substance offense for career offender purposes. Iowa Code § 124.401(1) covers "simulated" and "imitation" versions of otherwise described "controlled substances." Iowa case law clearly indicates there is no need to have unanimity on what version of the substance is required for a conviction under these statutes, and thus these statutes are

indivisible for purposes of *Mathis*. See, *State v. Draper*, 457 NW 2d 606 (Iowa 1990).

3. Other circuits have concluded their various state statutes were overbroad in terms of the means of delivery of drugs or offers to sell drugs. See, *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), *United States v. Madkins*, 866 F.3d 1136 (10th Cir. 2017), and *United States v. Savage*, 542 F.3d 959 (2nd Cir. 2008). Those circuits have correctly applied the principles established in *Mathis* for the construction of state statutes in determining whether they comply or correspond with the definitions of controlled substances set forth in the United States Sentencing Guidelines § 4B1.2(b).
4. The error by the United States District Court for the Southern District of Iowa and the Eighth Circuit Court of Appeals results in a much higher calculated United States Sentencing Guideline range (262 to 327 months versus 120 months, statutory mandatory minimum).

INTRODUCTION

This case presents a matter of first impression as to the particular challenge posed by Petitioner to the Iowa drug statutes. Petitioner argues that the Iowa drug statutes are overly broad for purposes of the United States Sentencing Guideline sections dealing with the definition of “controlled substance offense”. This case would also have application to cases applying the Iowa Statutes for purposes of the Armed Career Criminal Act as a “serious drug offense”, application to whether Iowa convictions are predicates for “felony drug offenses” under the Controlled Substance

Act along with the pending specific application to whether they apply to the United States Sentencing Guideline definitions for “controlled substance offense”. Petitioner has found no circuit court authority dealing with this exact contention regarding the Iowa drug offenses. There is one district court case arising in the Southern District of Illinois that touches upon the argument but which was decided on other habeas corpus grounds, that is, *Goodson v. Werlich*, 2017 W.L. 5972989 (S.D. Ill., November 30, 2017). In this case the petitioner in a writ of habeas corpus proceeding under 28 U.S.C. § 2241 raised the issue of the over inclusion of types of drugs. This case was dismissed for failure to properly invoke the savings clause of 28 U.S.C. § 2255. There was no substantive discussion of the pending argument.

In *United States v. Boleyn*, 929 F.3d 932 (8th Cir. 2019), the Eighth Circuit addressed, in a combined opinion, issues relating to whether Iowa’s drug statutes would be predicates under the “serious drug offense” language of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii), a “felony drug offense” under the Controlled Substance Act (CSA) 21 U.S.C. § 802(44), and whether the Iowa Statute would be predicates for a “controlled substance offense” as defined under the Career Offender provisions of the United States Sentencing Guidelines, U.S.S.G. § 4B1.1(a)(3). In *Boleyn* the argument was whether the Iowa aiding and abetting liability was broader than an aiding and abetting authority under the federal

definitions.

There have been numerous attacks on these predicate offenses for these two statutes and the applicable guideline provision. They have resulted in a mixed bag in terms of the analysis and conclusions taken by courts. The pending case would be a good vehicle for resolution of the differences in analysis and conclusions that have been reached by circuits across this country.

The United States Sentencing Guidelines significantly increase penalties imposed on defendants if the individuals are career offenders. Individuals become career offenders if they have at least two prior felony convictions of crimes or violence or controlled substance. In the current case the question is whether Marvie Chapman, Jr. has two qualifying "controlled substance" offenses.

For purposes of the career offender determination under 4B1.1, there are definitions of the term "controlled substance offense." Section 4B1.2(b) defines the term "controlled substance offense:"

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Thus the definition can be broken down into two concepts. One, the definition of *acts*, manufacture and distribution, etcetera and, two, the *object* of the acts, the controlled substance or counterfeit substance. There is no mention of imitation or simulated controlled substances in this Federal definition.

The United States Code has definitions of the terms controlled substance and counterfeit substances. Title 21 United States Code § 802(6) defines the term controlled substance as follows:

The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

The term counterfeit substance is also defined as:

(7) The term "counterfeit substance" means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser.

The Iowa Code has statutes that penalize acts involving drug offenses. Iowa Code § 124.401 provides in part the following:

Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance.

a. Violation of this subsection, with respect to the following controlled substances, counterfeit substances, simulated controlled substances, or imitation controlled substances, is a class “B” felony, and notwithstanding section 902.9, subsection 1, paragraph “b”, shall be punished by confinement for no more than fifty years and a fine of not more than one million dollars:

Similar language appears in subsections 124.401(b) (additional Class B felonies), Paragraph (c) (setting forth Class C violations) and subsection (d) (defining aggravated misdemeanors). All of these subsections mirror Paragraph (a) in the introductory language describing “controlled substances, counterfeit substances, simulated controlled substances, or imitation controlled substances”.

Iowa Code Section 124.101, Subparagraphs 5, 6, 16, and 29 define the terms controlled substance, counterfeit substance, imitation controlled substance and simulated controlled substance. Those definitions are:

Paragraph 5: “Controlled substance” means a drug, substance, or immediate precursor in schedules I through

V of subchapter II of this chapter.

Paragraph 6: “Counterfeit substance” means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance.

Paragraph 16: “Imitation controlled substance” means a substance which is not a controlled substance but which by color, shape, size, markings, and other aspects of dosage unit appearance, and packaging or other factors, appears to be or resembles a controlled substance. The board may designate a substance as an imitation controlled substance pursuant to the board’s rulemaking authority and in accordance with chapter 17A. “Imitation controlled substance” also means any substance determined to be an imitation controlled substance pursuant to section 124.101B.

Paragraph 29: “Simulated controlled substance” means a substance which is not a controlled substance but which is expressly represented to be a controlled substance, or a substance which is not a controlled substance but which is impliedly represented to be a controlled substance and which because of its nature, packaging, or appearance would lead a reasonable person to believe it to be a controlled substance.

The Iowa statute prohibits conduct involving substances, imitation and simulated, that are not covered by the definition of controlled substance in the United States Sentencing Guideline § 4B1.2(b).

Mr. Chapman had one Federal conviction of a “controlled substance” offense. *See*, Presentence Investigation Report, Paragraph 50. The other potential “controlled substance” offense was an Iowa conviction for Possession with Intent to Deliver Crack Cocaine on March 1, 2004. *See*, Presentence Investigation Report, Paragraph 46. This conviction was under Iowa Code Section 124.401(1)(b)(3), § 124.206(2)(d) and 703.1.

This overly broad Iowa statute is disqualified from being a predicate “controlled substance offense” for purposes of 4B1.1 as it does not fit within the definition of controlled substance offenses under § 4B1.2(b). This is because this is an indivisible statute.

Under *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 2281, 186 L.Ed.2d 438 (2013) and *Mathis v. United States*, ____ U.S. ____, 136 S.Ct. 2243, 195 L.Ed.2d 604, a court determining whether prior offenses qualify as predicates must use a categorical approach. In Mr. Chapman’s case, this involves determining whether the underlying Iowa statutes under which he was convicted are “divisible” or “indivisible.” A statute is “divisible” when it “sets out one or more elements of the offense in the alternative – for example, stating that burglary involves entry into a building or an automobile:”

If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction. *Descamps* at 570 U.S. 257, 133 S.Ct. at 228.

In *Mathis v. United States*, ___ U.S. ___, 136 S.Ct. 2243, 195 L.Ed. 2d 604 (2016), the Supreme Court further detailed how to determine whether a statute was divisible and whether application of the modified categorical approach was appropriate.

In *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) the Supreme Court did allow for examination of various court documents to determine if the necessary elements under the statute correspond to the generic offense. *See, Shepard, Supra.* Subsequently, in *Descamps*, the Court further reviewed the modified categorical approach which allowed for the use of these court documents. The Court again stressed that it is an elements-based categorical approach, as to whether or not the state statute involved constituted “a burglary” as Congress had defined. *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). All of these cases rest on the Sixth Amendment premise underlying the right of a defendant for jury determination, rather than a district

court's determination, of whether an offense constitutes a burglary. Similarly, several courts have now grappled with this analysis in the context of "controlled substance" offenses.

In *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), the court found that the Texas statutes at issue were not divisible, but rather merely different ways to commit the controlled substance offense. Specifically, the definition of delivery in § 481.002(a) under the Texas statute was over-inclusive in regards to the element of the Guideline. The Fifth Circuit applied the analysis in *Mathis* even though *Mathis* applied to the Armed Career Criminal Act, acknowledging that *Mathis*' focus was "the issue of whether statutes were divisible or not."

In accord with the *Hinkle* court's approach, the Tenth Circuit case *United States v. Madkins*, 866 F.3d 1136 (10th Cir. 2017) concluded that the Kansas law for possession with intent to sell cocaine and marijuana did not qualify as "controlled substances offense" under the Guideline. Those statutes were therefore not predicate offenses for purposes of applying the federal career offender enhancement. In *Madkins* the court found that the Kansas statute was divisible. However, the court found that the Kansas statute's elements did not categorically match the elements in § 4B1.2(b) of the United States Sentencing Guidelines

system. This was because the Kansas law included “an offer to sale” in the definition of “sale”. Hence, since an “offer to sell” was broader than the distribution definition in the Guideline, defendant Madkins’ prior offenses were not a qualifying predicate. *Madkins* cited *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016) and also *United States v. Savage*, 542 F.3d 959 (2nd Cir. 2008).

In *United States v. Townsend*, 897 F.3d 66 (2nd Cir. 2018) the New York statutes were not found to be predicate “controlled substance offenses” as defined in § 4B1.2(b) of the United States Sentencing Guidelines. The court found that the definition of the phrase “controlled substance,” that it refers to exclusively drugs set forth in the CSA (Controlled Substance Act), 21 U.S.C. § 802, was similar to the federal definition given in the Eighth Circuit case of the *United States v. Sanchez-Garcia*, 642 F.3d 658, 661-62 (8th Cir. 2011), as well as cases from the Fifth and Ninth Circuits. Applying the analysis under *Mathis* and *Descamps*, the court concluded the New York Public Law § 220.31 was indivisible. That indivisible statute included other controlled substances, including HCG. That substance would support a potential conviction in New York State of conduct that would not be prohibited by the Controlled Substance Act. HCG is not a controlled substance under the Controlled Substance Act and ergo, the state statutes of New

York sweeps more broadly than the federal counterpart. New York's indivisible statute was not a predicate offense under the controlled substance offense enhancement contained in § 2K2.1(a).

In *United States v. Royal*, 731 F.3d 333 (4th Circuit, 2013), the court determined that Maryland's second degree assault statute was a factually indivisible statute.¹ *Royal*, Footnote 1. The court noted that in Maryland juries are not instructed that they must agree "unanimously and beyond a reasonable doubt" as to one of the alternative, and decided that these alternatives were not elements, but rather means of satisfying the single element. In applying the traditional categorical approach, the Court concluded that it did not qualify as a crime of violence. It was not a predicate "violent felony" under 18 U.S.C. § 924(e)(1). This conclusion arises from *Descamps* in which the term "elements" was deemed to mean factual circumstances of the offense that the jury must find "unanimously and beyond a reasonable doubt." *Descamps* at 2288, cited in *Royal* at 341.

In *United States v. Howard*, 742 F.3d 1334 (11th Circuit, 2014) the court

¹ Maryland statute prohibiting a second degree assault provides simply that "a person may not commit an assault." Further, that the term "assault" encompasses "the crimes of assault, battery, and assault and battery," which retain their judicially determined meanings.

determined that Alabama's third degree burglary did not qualify as a predicate offense under the Armed Career Criminal Act. The Court held that, in construing the underlying potential predicate offense, there was a need to follow Alabama Court decisions that define or interpret the statute's substantive elements. The Eleventh Circuit noted that the statutory term "building" includes other locations, such as buildings and water craft, which fall outside the "building or structure" element of a generic burglary. This statute was therefore not a predicate offense. The Court reviewed the divisibility concept of "a single, indivisible set of elements," citing *Descamps* at 2282. It noted that a crime that criminalizes assault "with a weapon" would be an indivisible statute, whereas criminalizing assault "with a gun, a knife or an explosive" would be divisible. If a statute is indivisible, then a court is not to apply the modified categorical approach and the convictions would not qualify as an ACCA predicate regardless of what any *Shepard* documents might otherwise show. The *Howard* court followed state law in determining these substantive elements, finding that the State Courts are the ultimate expositors of State law. *United States v. Howard*, at 1346. The use of Shepard documents is not to allow the court "to discover what the defendant actually did." Rather, the use of the documents is only "to determine which statutory phrase," meaning which

alternative element, “was the basis for the conviction.” *United States v. Howard*, at 1347, citing *Descamps* at 2285. Since the Alabama code defining “building” includes a non-exhaustive list of things that fall under that definition, and since the jury would not be instructed to find a particular structure, the statute definition as to building was to be found to be non-divisible, and broader than the generic definition. They were but the “various means” by which the elements are satisfied.

In *Rendon v. Holder*, 746 F.3d 1077 (9th Circuit, 2014) the Court determined that the modified categorical approach could not be used to determine whether an alien’s state second degree burglary conviction qualified as a federal aggravated felony predicate for which an alien could be removed and that a second degree burglary conviction was not a categorical match to the federal generic crime of attempted theft. Although this case deals with the qualification of an offense as an aggravated felony under 8 U.S.C. § 1101(u)(43)(u), the definitions involved are similar and the analysis is identical. The question posed in that case was whether the statute was divisible in light of the *Descamps* case. In *Rendon*, the Court was reviewing a different portion of the same state statute that the United States Supreme Court encountered in *Descamps*. The Ninth Circuit held that the presence of an “or” in the definition did not in itself render the statute divisible. It held, as

in *Descamps*, that the statute is indivisible as a matter of law and that the modified categorical approach was therefore not permissible. It noted that the proper method for distinguishing divisible statutes from indivisible statutes is that “only divisible statutes contain multiple, alternative *elements* of functionally separate crimes.” *Rendon v. Holder*, at 1085 citing *Descamps* (emphasis in original).²

The Eighth Circuit in the *United States v. Ford*, 888 F.3d 922 (8th Cir. 2018) affirmed District Court Judge Jarvey in concluding that Iowa convictions for manufacturing methamphetamine did constitute predicate offenses. The Eighth Circuit looked to the generic version of Defendant Ford’s crimes and then applied *Descamps* and *Mathis* analysis. The Eighth Circuit concluded that the types

2 This distinction explains why the modified categorical approach is appropriate only for divisible statutes because the modified categorical approach as applied to a divisible statute may reveal which alternative *element* the state charged and the jury or judge found when only some alternative elements matched the federal, generic crime...

While the jury faced with a divisible statute must unanimously agree on the particular offense of which the petitioner has been convicted (and thus, the alternative element), the opposite is true of indivisible statutes; the jury need not so agree. For example, if the statute at issue is indivisible, the jury would not need to agree on the particular substantive crime that the defendant intended as long as all jurors find that the defendant intended to commit at least one of “grand or petite larceny or any felony” *Rendon*, at 1085. This is the often cited distinction between *elements* and *means*.

of controlled substances are elements defining multiple crimes and applied the modified categorical approach. It concluded that his two prior drug convictions constituted “serious drug offenses, along with assault convictions”. Ford was determined to be an Armed Career Criminal. The Eighth Circuit noted that convictions for simulated controlled substances are not predicate offenses. *United States v. Brown*, 598 F.3d 1013, 1018 (8th Cir.). However the Eighth Circuit concluded these alternatives were elements and not means. It concluded “the structure of the statute reveals that it is divisible because different drug types and quantities carry different punishments”. This is a plainly erroneous conclusion by the Eighth Circuit. The introductory portion of the language groups the *acts* before they specify particular drugs, and the particular acts included distribution of the basic drug along with simulated or imitation versions of the basic drug.

Iowa Code Section 124.401 sets forth what is a criminal act, including making reference to controlled substances, counterfeit substances, imitation controlled substances and simulated controlled substances, all terms which are defined in Iowa Code Section 124.101. The introductory portion of Iowa Code Section 124.401 describes criminal acts, including what sort of substances are the subject matter of the statute. These are alternative means of *committing* the crime, i.e., distribution or

possession with intent or manufacturing or conspiracy and involving alternate versions of controlled substances, i.e., the drug itself, counterfeit versions, or simulated or imitation versions.

In *State v. Bratthauer*, 354 N.W.2d 774 (Iowa 1984), the Iowa Supreme Court noted that there is not a requirement of jury unanimity on one of the alternative modes for committing an offense. *Bratthauer* dealt with Iowa's Operating While Intoxicated statutes. In *State v. Draper*, 457 N.W.2d 606 (Iowa 1990) the same principle was applied by the Iowa Supreme Court to then Iowa Code Section 204.401. The statute at that time read as follows:

1. Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance, or to act with, enter into a common scheme or design with or conspire with one or more other persons to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

The Iowa Courts noted that:

“This statute defines a single offense which may be committed by alternative means. *State v. Williams*, 350 N.W.2d 428, 403-32 (Iowa 1981). See *State v. Draper*, *id.* at 608.

Draper noted that there would have been no requirement for the jury to have been unanimous as to the mode of commission of the crime as long as it was

unanimous to the commission of the crime, citing *Bratthauer*. See, *Draper* at 609.

In *State v. Nitcher*, 720 N.W.2d 547 (Iowa 2006) the district court properly instructed the jury that a “taxable substance” is defined as

“a controlled substance, a counterfeit substance, a simulated controlled substance, or marijuana, or a mixture of materials that contains a controlled substance, counterfeit substance, simulated controlled substance or marijuana.”

Reference to state court decisions should be used in determining whether a statute is divisible or indivisible.

Iowa Statute 124.401 is structured in a fashion that includes more conduct than is prescribed by the United States Sentencing Guideline definition of conduct contained in U.S.S.G. 4B1.2. Thus, categorically it does not qualify as a “controlled substance” offense. “Simulated controlled substance” and “imitation controlled substances” are not addressed in U.S.S.G. § 4B1.2. The Iowa statute is overbroad and is not divisible. The Iowa Statutes do not qualify as predicate offenses and it is improper to apply the modified categorical approach or to look at underlying court documents.

CONCLUSION


The District Court and the Eighth Circuit Panel erred in applying the

modified categorical approach to an Iowa Controlled Substance Statute, 124.401, Code of Iowa. That statute is indivisible in its definitions and the District Court and Eighth Circuit Court should not look at the underlying documents to determine “the so called” true nature of the Defendant’s conviction. There would be no way to determine whether the Defendant’s conduct constituted matters within this scope of United States Sentencing Guideline § 4B1.2 Definition of Controlled Substance Offense. The Court’s determination that he was a career offender is erroneous and should be reversed.

For all the foregoing reasons, this Court should grant Petitioner’s Petition for Writ of Certiorari.

Respectfully submitted,

2/6/2020
Date



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United States Court of Appeals
For the Eighth Circuit

No. 18-3631

United States of America

Plaintiff - Appellee

v.

Marvie Chapman, Jr.

Defendant - Appellant

Appeal from United States District Court
for the Southern District of Iowa - Davenport

Submitted: October 14, 2019

Filed: November 25, 2019

[Unpublished]

Before SMITH, Chief Judge, GRUENDER and BENTON, Circuit Judges.

PER CURIAM.

Marvie Chapman, Jr. pled guilty to conspiracy to distribute more than 100 grams of heroin in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846. The

district court¹ sentenced him as a career offender to a below-guidelines sentence of 240 months' imprisonment. He challenges the career offender determination under U.S.S.G. § 4B1.1. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

Under U.S.S.G. § 4B1.1(a), a "defendant is a career offender" if:

(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a). Chapman concedes he has one prior controlled substance offense. However, he argues his 2004 Iowa conviction for possession of a controlled substance with intent to deliver is not a controlled substance offense because Iowa Code § 124.401(1)(b) is divisible and broader than the generic definition of a controlled substance offense. This court reviews a career offender classification de novo. *United States v. Boose*, 739 F.3d 1185, 1186 (8th Cir. 2014).

Determining whether a prior conviction is a controlled substance offense, this court applies the categorical approach, considering "whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding controlled substance offense." *United States v. Maldonado*, 864 F.3d 893, 897 (8th Cir. 2017) (cleaned up). Under the generic definition, a controlled substance offense is "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of

¹The Honorable John A. Jarvey, Chief Judge, United States District Court for the Southern District of Iowa.

a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense.” U.S.S.G. § 4B1.2(b). At the time of his conviction, Iowa Code § 124.401(1) prohibited the “manufacture, deliver[y], or possess[ion] with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, or a simulated controlled substance.” Iowa Code § 124.401(1). As this court held in *Maldonado*, Iowa Code § 124.401(1) “categorically fit[s] within the generic federal definition” of a controlled substance offense. *Maldonado*, 864 F.3d at 901. Although Chapman disagrees with this holding, this panel is bound by it. *See United States v. Nelson*, 589 F.3d 924, 925 (8th Cir. 2009) (“[I]t is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.”).

Chapman has two prior controlled substance offenses. The district court properly found he is a career offender under U.S.S.G. § 4B1.1.

* * * * *

The judgment is affirmed.

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

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November 25, 2019

Mr. Stephen Arthur Swift
KLINGER & ROBINSON
401 Old Marion Road, N.E.
P.O. Box 10020
Cedar Rapids, IA 52410-0020

RE: 18-3631 United States v. Marvie Chapman, Jr.

Dear Counsel:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

LMT

Enclosure(s)

cc: Mr. Marvie Chapman Jr.
Mr. John S. Courter
Mr. Clifford R. Cronk
Mr. Andrew H. Kahl

District Court/Agency Case Number(s): 3:18-cr-00022-JAJ-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA

v.

Marvie Chapman, Jr.

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:18-cr-00022-001

USM Number: 11067-030

Stephen A. Swift
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) One of the Indictment filed on March 13, 2018.☐ pleaded nolo contendere to count(s)
which was accepted by the court.☐ was found guilty on count(s)
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 846, 851	Conspiracy to Distribute at Least 100 Grams of a Mixture or Substance Containing Heroin	02/16/2018	One

☐ See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)☒ Count(s) Two and Three ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

November 28, 2018

Date of Imposition of Judgment

Signature of Judge

John A. Jarvey, Chief U.S. District Judge

Name of Judge

Title of Judge

November 28, 2018

Date

DEFENDANT: Marvie Chapman, Jr.
CASE NUMBER: 3:18-cr-00022-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

240 months as to Count One of the Indictment filed on March 13, 2018, to be served concurrently to the term of imprisonment imposed upon revocation of supervised release in United States District Court for the Southern District of Iowa Docket Number 3:07-cr-00565-001.

☒ The court makes the following recommendations to the Bureau of Prisons:

The court recommends the defendant be designated to the Bureau of Prisons' facility located in Pekin, Illinois, or Milan, Michigan, to be as close to family has possible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before _____ on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Marvie Chapman, Jr.
CASE NUMBER: 3:18-cr-00022-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :
Eight years as to Count One of the Indictment filed on March 13, 2018.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Marvie Chapman, Jr.
CASE NUMBER: 3:18-cr-00022-001

Judgment Page: 4 of 7

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: Marvie Chapman, Jr.
CASE NUMBER: 3:18-cr-00022-001

Judgment Page: 5 of 7

SPECIAL CONDITIONS OF SUPERVISION

You must participate in a program of testing and/or treatment for substance abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Office. At the direction of the probation office, you must receive a substance abuse evaluation and participate in inpatient and/or outpatient treatment, as recommended. Participation may also include compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. You must not use alcohol and/or other intoxicants during the course of supervision.

You must reside, participate, and follow the rules of the residential reentry program, as directed by the U.S. Probation Officer, for up to 120 days. The residential reentry program is authorized to allow up to six hours of pass time per week for good conduct when you become eligible in accordance with the residential reentry program standards.

You will submit to a search of your person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. You must warn any other residents or occupants that the premises and/or vehicle may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

You must participate in a cognitive behavioral treatment program, which may include journaling and other curriculum requirements, as directed by the U.S. Probation Officer.

DEFENDANT: Marvie Chapman, Jr.
CASE NUMBER: 3:18-cr-00022-001

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

- ☐ Pursuant to 18 U.S.C. § 3573, upon the motion of the government, the Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

	<u>Assessment</u>	<u>JYTA Assessment *</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ 0.00	\$ 0.00	\$0.00

- ☐ The determination of restitution is deferred until _____, An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below:

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$0.00	\$0.00	

- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
 ** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Marvie Chapman, Jr.
CASE NUMBER: 3:18-cr-00022-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
☐ not later than _____, or
☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
 All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.
 While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT assessment, and (8) costs, including cost of prosecution and court costs.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No; 18-3631

United States of America

Appellee

v.

Marvie Chapman, Jr.

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Davenport
(3:18-cr-00022-JAJ-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

January 03, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans