No. 19-8312

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Lazaro Candelaria
(Your Name) — PETITIONER

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lazara Candelaria
(Your Name)
F.C.C. Coleman Medium
P.O. BOX 1032
(Address)

Coleman, FL 33521
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1) Whether the First Step Act of U.S. Senate Bill 756, applies to the Petitioner, in his Title 21 U.S.C. § 2255(f)(1) motion.

2) Whether Counsel was ineffective for failing to object to Petitioner's prior convictions as too remote in time to be considered at sentencing.

3) Whether Counsel was ineffective for not requesting Petitioner's Shepard v. United States 544 U.S. 13, 26 (2005), Shepard documentation, and whether the government prejudiced Petitioner for not producing these documents at Petitioner's original sentencing in violation of Canty v. United States 570 F.3d 1251 (11th Cir. 2009).

4) Whether Counsel was ineffective for not challenging Petitioner's prior convictions to the lower courts.

5) Whether Counsel was ineffective for promising the Petitioner a 60 month sentence, but when Petitioner was sentenced, he received 13 years in a federal prison, based on Counsel's breach of plea. Whether Petitioner's plea was involuntary, unintelligent and unknowing.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 8/23/2019.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 9/27/19, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

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

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment of the United States Constitution

Sixth Amendment of the United States Constitution

Eighth Amendment of the United States Constitution

Title 21 U.S.C. § 841

STATEMENT OF THE CASE

On February 27, 2019, Petitioner's 28 U.S.C. § 2255 Motion to vacate, set aside, or correct sentence was denied by the District Court. In April of 2019, Petitioner filed a Motion for Certificate of Appealability for the denial of his 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence. On August 22, 2019, the United States Court of Appeals denied a C.O.A. and Petitioner filed a Motion for Reconsideration to grant a Certificate of Appealability (C.O.A.) on these issues before the Honorable Supreme Court, which all have merit and deserving further encouragement to proceed further were jurst of reason would find the District Court assessment of Petitioner's constitutional claims, debatable. On September 27, 2019 Petitioner was denied his Reconsideration by the United States Court of Appeals and now files this Writ of Certiorari to the Honorable United States Supreme Court.

REASONS FOR GRANTING THE PETITION

Petitioner understands that the Honorable U.S. Supreme Court has discretion, as to whether or not it wants to accept a case in or not. Petitioner request that this Honorable Court accept his Writ of Certiorari because it is of national importance, to the nation, that the lower courts be made to adhear to its own rules, and procedures, and the U.S.S. Guidelines, for which it violated in Petitioner's case in point. Therefore, Petitioner by this Honorable Court, based on constant statute, rules and U.S.S. Guideline violations by the lower courts, so that other defendants in the future will not have to be subjected to the same injustices as Petitioner is being unjustly subjected to.

Petitioner states the following arguments in this writ.

ARGUMENT ONE

Whether the First Step Act of U.S. Senate Bill 756 applies to the Petitioner in his Title 28 U.S.C. § 2255(f)(1).

In December of 2018, the First Step Act Title IV § 401 was enacted by Congress and created new substantial change in law and applies to defendants on collateral review. (See U.S. vs. Pickett no. 17-13476 (11th Cir. 2019)). The Honorable Court deemd that new constitutional law applies to defendants who are pursuing relief under 28 U.S.C. § 2255. Petitioner was still on his 28 U.S.C. § 2255 when this bill was enacted which applies to Petitioner. Title IV 401 states that for a prior conviction to qualify for any enhancement, there must be a sentence of imprisonment of 12 months or more. In Petitioner's case in point at the initial sentencing hearing, throughout Petitioner's 28 U.S.C. § 2255 proceedings, the District Court adopted that Petitioner's two prior convictions for career offender enhancement was "reduced" to 196 days credit time served. (See Appx. "H" page 29-30, see P.S.I. where 196 days "reduced" was adopted at the initial sentencing hearing and by the government on Petitioner's 28 U.S.C. § 2255 reply by the government) becoming the operative sentence. The Honorable Court is required to adopt the reduced 196 days credit time served that was resentenced on August 3, 2004 as the operative sentence that was a adopted at the initial sentencing hearing that is stated on the record and adopted by the government and the Honorable Court throughout Petitioner's sentencing and throughout these proceedings. (See Appx. "I" page 23, line 14-20; page 36 lines 1-6; page 55, lines 24-25). The Petitioner for these two prior convictions in 2003 was sentenced to 18 months state prison. On August 3, 2004 Petitioner was resentenced to 196 days "reduced" credit time served at the initial sentencing hearing that was adopted by the District Court. (See P.S.I. Appx. "H" pg. 29-30) and the government throughout these proceedings in reply briefs. Any other outcome is

inappropriate because it was not presented at the initial sentencing hearing (U.S. v. Canty 570 F.3d 1257 (11th Cir. 2009)). These two prior convictions for Petitioner's Case F#00-10024 and Case #015144CF10A was "reduced" to 196 days credit time served adopted by the Honorable Court at the initial sentencing hearing. On Petitioner's P.S.I., there are other priors that state credit time served for this amount of days (See Appx. "H" page. 29-30). But when it comes to the two prior convictions for career offender enhancement, the P.S.I. states "reduced" to 196 days credit time served. The language plainly states "reduced" meaning the sentence was reduced and resentenced to 196 days. Any other conclusion violates Canty and Petitioner's due process.

Therefore these two prior convictions for case #F00-10024 and case no. 015144CF10A was reduced to 196 days credit time served and these two prior convictions do not qualify for career offender enhancement pursuant to the First Step Act Title IV § 401.

In addition since the two prior convictions were sentenced to 196 days time served adopted by the P.S.I., by the Honorable Court, by the government at the initial sentencing hearing, these prior convictions fall under calculating criminal history 4A1.2(k)(2)(C) which states that when a sentence is under one year and one month, the date of the original sentence should be used for purposes of determining a career offender enhancement when probation has been revoked. For case #F00-10024, Petitioner was sentenced to three years probation and for case #03-1544CF10A Petitioner's original sentence or "reduced" operative sentence is 196 days disqualifying both prior convictions from career offender enhancement. Therefore Petitioner requests remand of his unconstitutional sentence where Petitioner is innocent of his career offender enhancement.

ARGUMENT TWO

Whether Counsel was ineffective for failing to object to Petitioner's prior convictions as too remote in time to be considered at sentencing

Petitioner was career offender enhanced with two state prior convictions. Case #F00-10024 and case #031544CF10A. The first prior conviction, case no. F00-10024 simple robbery, Petitioner was sentenced on September 28, 2000 to 3 years probation. The second prior conviction, case #03-15144CF10A, delivery of phencyclidine, Petitioner was sentenced to 18 months state prison. Petitioner violated probation for case #F00-10024 while Petitioner was incarcerated for case #031544CF10A. Both sentences were run concurrent March of 2004 to an 18 month prison sentence. Prisoner appealed this conviction with a motion to vacate, set aside, correct sentence 3.850 in the state and sentence was reduced to 196 days credit time served for both consolidated sentences. See Appx. "H" P.S.I. page 29-30, where both consolidated sentences were "reduced" to 196 days credit time served on August 3, 2004. The information in the P.S.I. was adopted at the initial sentencing hearing. See Appx. "I" pg. 23 lines 14-20, pg. 35, lines 24-28, by the Honorable Court. This was also adopted by the government in these 2255 proceedings. Therefore for these two prior convictions, the operative sentence is 196 days credit time served in the P.S.I. which was adopted at the initial sentencing hearing. The language states "reduced" to 196 days credit time served. The language in the two consolidate sentences states "reduced" meaning the time was reduced to 196 days, the operative sentence, not the 18 month sentence. It was "reduced" to 196 days credit time served. This information was all adopted at sentencing hearing and this information was available to counsel but for counsel's below the objective standard of reasonableness and lack of performance, counsel did not object to the prior convictions being remote in time. In addition since 196

days credit time served is the operative sentence, then the sentencing guidelines 4A1.2(k)(2)(C) provides that the "date of the original sentence should be used for purposes of determining a career criminal enhancement when probation is revoked. For case #F00-10024, Petitioner was sentenced to 3-years probation falling out of the 10 year time period applicable disqualifying this prior conviction case #F00-10024 from career offender enhancement. Since case # 03-01544CF10A sentence was 196 days, the original sentence is August 3, 2004. The pPetitioner wants the Honorable Court to know that these prior convictions do not qualify under the First Step Act of 2018 Title IV § 401 that applies to Petitioner who was still on collateral review when Congress enacted the First Step Act of 2018. U.S. vs. Pickett No. 17-13476 (11th Cir. 2019). (See Appx. "B" pg. 3 ¶ 2, where the court is in agreement that Petitioner entered the conspiracy in October of 2014, surpassing 10 year time period).

Petitioner entered the conspiracy in October of 2014 adopted by the District Court, and the Eleventh Circuit Court of Appeals pursuant to Amendment 503 which states a defendant cannot be held accountable until he enters a conspiracy. Since Petitioner was resentenced in August 3, 2004, and Petitioner entered this conspiracy October 2014 which everyone is in agreement, Petitioner surpasses the 10 year time period disqualifying both prior convictions for case # F00-10024, case # 031544CF10A from career offender enhancement. In addition the First Step Act of 2018 states that if a prior conviction is not a sentence of more than 12 months and 30 days it cannot qualify for any enhancement. Title IV § 401.

But for counsel's ineffectiveness and below the objective standard of performance prejudiced the Petitioner for not arguing Petitioner's prior convictions at sentencing. but for counsel's ineffectiveness, these proceedings would have been so much different. Strickland v. Washington (supra); Cronic vs. U.S. (supra); Hill vs. Lockhart (supra); Padilla vs. Kentucky (supra); Missouri vs. Frye (supra); Lafleur vs. Cooper (supra);

Florida vs. Nixon (supra); Cuyler vs. Sullivan (supra).

ARGUMENT THREE

Whether Counsel was ineffective for not requesting Petitioner's Shepard v. U.S. 544 U.S. 13, 26 (2005) documentation whether the government prejudiced Petitioner for not producing these documents at Petitioners original sentencing hearing in violation of Canty vs. U.S. 570 F.3d 1251 (11th Cir. (2009))

According to Canty vs. U.S., 570 F.3d 1257 (11th Cir. 2009), both parties are not allowed to introduce any new evidence, facts or conclusion of law becase these conclusions or documents were not presented at the initial sentencingg hearing. U.S. v. Canty (supra). At the initial sentencing hearing for Petitioner, there were no Shepard documents provided by the government at the initial sentencing hearing especially for case # 03-01544CF10A delivery of phencyclidine. (See Appx. "F", the first documents the government introduced as Shepard documents in December of 2015 at the initial sentencing hearing and Petitioner's 28 U.S.C. § 2255 proceedings and seee Appx. "K", pg. 44-45, where magistrate judge concedes there were no Shepard documents for case no. 03-01544CF10A delivery of phencyclidine).

In May of 2018, Petitioner was given an evidentiary hearing of Petitioner's claim that he was promised a 60-month sentence. At the conclusion of the evidentiary hearing, shortly after, the magistrate judge gave an order to address the merits of Petitioner's prior convictions. Then on September 10, 2018, the Magistrate Judge gives an order from the government to "produce" Shepard documents (See Appx. "E" order by the Magistrate to produce Shepard documents for case #03-01544CF10A delivery of phencyclidine) which is forbidden by U.S. v. Canty (supra) and the Eleventh Circuit. Petitioner timely objected and filed a motion objecting to the Judge's order which is coabrated by the report and recommendation (See Appx. "K" pg. 45, ¶ 2). After the Judge's

order to produce Shepard documents in which Petitioner timely objected, the government introduces documents that were not introduced at the initial sentencing hearing violating Canty vs. U.S. (supra). If it was not introduced at the initial sentencing hearing, it is foreclosed. (See Appx. "J", second documents introduced by the government after the initial sentencing hearing) The second so-called Shepard documents were never introduced at the initial sentencing hearing. In Actuality, they were handwritten stated "corrected" just to justify the wrongdoings of the government and the Magistrate Judge. (See Appx. "F" first documents, and "J" second documents that were foreclosed by Canty). In the recently decided Supreme Court case in U.S. vs. Shular, the Solicitor General conceded that the categorical approach is authorized on the Florida State drug statute (See page 2 part (a)). Shepard vs. U.S. 544 U.S. 13, 26 (2005); Descamps v. U.S. 133 S.Ct. 2276 (2013); Mathis v. U.S. 136 S.Ct. 2276 (2016); Taylor vs. U.S. 495 U.S. 575 (1990) states when there are no Shepard documents provided, the least acts criminalized is given which in this case is possession. In this instant case, there were no Shepard documents provided and this is verified by the Magistrate Judge's order to produce Shepard documents (See Appx. "E" and Appx. "K", report and recommendation, page 44-45, ¶ 1, where Magistrate concedes and states there were no Shepard documents for delivery of phencyclidine case #0301544CF10A). The inquiry should have ended there for case #03-01544CF10A. The least acts criminalized is given which is possession or purchase and possession or purchase cannot be used to career offender enhance the Petitioner, U.S. vs. Salinas 126 S.Ct. 1675 (2006). Therefore Petitioner is innocent of his career offender enhancement. The only documents provided in the first documents in Appx. "F" for case # 031544CF10A was an A-form Police report charging Petitioner with S/M/D of MDMA which is not a Shepard document (See Appx. "K" report and recommendation pg. 44-45, ¶ 1 when the Magistrate Judge acknowledges there were no Shepard documents provided at the

initial sentencing hearing for delivery of phencyclidine case #03-01544CF10A). The record is clear if the Honorable Supreme Court refers to the record to examine the documents incorporated in the government's latial response to Petitioner's § 2255 proceedings, these were the documents introduced at the initial sentencing (See Appx. "F") should the Court compare the first document at Petitioner's sentencing and the government's second supplement response after the Magistrate Judge's order to produce Shepard documents in Appx. "F" and "J", it is clear that these documents are different and distinct from the ones used at sentencing and are non-compliant with Canty. According to Shepard v. United States, supra, a sentencing court is not permitted to look at police reports, arrest forms which are complaint applications, nor may they consider a pre-sentencing investigative report to determine the elements of a prior convction (See also U.S. v. Braun, supra, where it states a pre-sentence report is not a Shepard document. The courts are only allowed to look at certain documents to determine the elements of a prior conviction. These documents consist of a written plea agreement, transcript colloquy, and a charging document. The materials provided by the government in its supplemental memorandum were not appropriate Shepard documents. No plea colloquy of Petitioner admitting to any offense has been provided, nor appropriate charging document not foreclosed under Canty, supra. However, the charging document itself is also in question when a statute is divisible statute because there are multiple ways a crime can be committed, therefore the elements cannot be determined by a charging document when a statute is divisible (United States v. Howard, supra; Tingley v. States, supra) Therefore, as there is no transcript colloquy, there is really no way to determine the elements of any of the charged offenses. Facts, means and conduct cannot be used according to Mathis v. United States 136 S.Ct. (2016) and Taylor v. United States 494 U.S. 575 (1990).

The government has argued that Shepard documents consisted of a docket sheet, information filed against Petitioner, a complaint affidavit and a disposition order establish the elements. However in actuality, none of the above stated documents qualify as Shepard documentation, pursuant to Shepard v. U.S., supra.) The government also argued that it entered a judgment and sentence document when it never admitted these documents since the beginning of these proceedings or at the Petitioner's sentencing hearing. See Appx."F". Proven, because the government states that it had to get the CORRECTED judgment and sentence documents in response. This is also proven by the Magistrate's order to produce Shepard documents and the government's filing of new handwritten, corrected documents. Neither were they introduced at sentencing, because the exhibits the government entered at first in these proceedings are the same exhibits that were entered at Petitioner's sentencing hearing. According to Canty v. U.S., supra, the government is entitled to only one opportunity to offer evidence or factual findings from the sentencing court in support of an enhanced sentence. The government is entitled to only one such opportunity and had that opportunity at the initial sentencing hearing where it failed to do so. In addition, these documents that lists Petitioner's name Lazaro Candelaria are not Shepard documents. Therefore, according to Descamps v. U.S. 133 S.Ct. 2276 (2013) the least acts criminalized is a given, making this statute an indivisible statute. According to Moncrieffe v. Holder Jr. 130 S.Ct. 1678 (2011), an indivisible statute cannot be used for CCA enhancement.

The government also proffered from a NCIC record search from a website. This document is not considered a Shepard document and should have been disqualified and should have been stricken from these proceedings. The Court then, in its report and recommendation came to different factual findings and conclusions which were not made at the initial sentencing hearing.

In addition when the NCIC search are compared to the first and second documents, they are different and should have never been allowed to be entered foremore help on the Magistrate's ruling (see report and recommendation Appx. "K".) The government at the sentencing hearing specifically adopted the PSI which stated that Petitioner was resentenced to 196 days on August 3, 2004. This is also found in the Petitioner's § 2255 Motion.

Petitioner for case #031544CF10A was actually sentenced on September 10, 2003 and originally sentenced to 18 months in Florida State prison. Petitioner's original release date was March 2005, but he was resentenced on August 3, 2004 to 196 days time served. (See P.S.I. in Appx. "H" pg. 29-30 which was adopted by the sentencing court at the initial sentencing hearing stating for case #031544CF10A, Petitioner was resentenced to 196 days on August 3, 2004. Also see Appx. "I" pg. 23, line 14-20, pg. 35, line 24-25, pg. 36, line 1-6 of Petitioner's sentencing hearing which adopts all of the P.S.I. findings).

Petitioner's sentence was "reduced" to 196 days credit time served and faulls under the 10 year time applicable range according to the 4A1.2(e). See Appx. "H" pg. 29-30 where Petitioner was re-sentenced/reduced to 196 days credit time served on August 3, 2004 making this sentence the operative sentence for the consolidated sentences for case #F00-10024 and case no. 03-01544CF10A which was adopted at the latial sentencing hearing by the Honorable Court, the government, and used in these § 2255 proceedings. See Appx. "I" pg. 23, lines 14-20, pg. 35, lines 24-25, pg. 36 lines 1-6) After the Magistrate Judge's order to produce the second foreclosed documents that were stated "corrected" and handwritten were used in the Magistrate Judge's decision, violated U.S. vs. Canty. This now becomes an abuse of discretion

and a miscarriage of justice and needs to be corrected by the Honorable Supreme Court. "Ignorance is no excuse of the law." The Magistrate Judge is trying to wrongly justify petitioner's career offender enhancement when Petitioner does not qualify as a career offender. Counsel was ineffective for not objecting to Petitioner's prior convictions after he was instructed by Petitioner and by the government to challenge the Petitioner's state priors. But for counsel's performance fell below the objective standard of reasonableness, the proceedings would have been different. Strickland vs. Washington 466 U.S. 668-687 (1984); Cronic vs. U.S. 466 U.S. 648 (1984); Hill vs. Lockhart 474U.S. 45-52 (1985); Padilla vs. Kentucky 130 S.Ct. 1476 (2010); Missouri vs. Frye 132 S.Ct. 1396 (2012); Lafleur vs. Cooper 132 S.Ct. 1376 (2012); Florida vs. Nixon 543 U.S. 175 (2004); Cuyler vs. Sullivan 446 U.S. 335 (1980).

ARGUMENT FOUR

Whether Counsel was ineffective for not challenging Petition's prior convictions in the lower courts.

On December 25, 2015 Petitioner was sentenced in the District Court to 160 months in a federal prison. There were two prior convictions that were used to career criminal enhance the Petitioner. Petitioner appealed his conviction, but was denied despite the fact that Petitioner advised Counsel to challenge his career offender status which Counsel refused to do. After the denial, Petitioner filed a 28 U.S.C. § 2255 for ineffective assistance of counsel. Petitioner was given an evidentiary hearing in May of 2018 for Petitioner's 28 U.S.C. § 2255.

At Petitioner's initial sentencing hearing, Counsel Rodrick Vereen for the Petitioner, did not argue Petitioner's prior convictions for career offender enhancement despite the fact that the government in an email to Counsel states, "that it appears to the government that counsel had leeway

to argue these prior convictions that should not qualify and that probation will not assess Petitioner as a career offender." (See Appx. "D" e-mail from the government to Counsel for the petitioner.) But for Counsel's ineffectiveness and below the objective standard of reasonableness, these proceedings would have been different if counsel would have argued Petitioner's prior convictions in which he did not. Strickland vs. Washington 466 U.S. 667-687 (1984). At sentencing there was no Shepard v. U.S. 544 U.S. 13, 26 (2005) documents provided at Petitioner's initial sentencing hearing. (See Appx. "F" First documents introduced by the government at the initial sentencing hearing.) This is conceded and coabrated by the Magistrate Judge order after Petitioner's evidentiary hearing in the judge's order to produce Shepard documents after the evidentiary hearing in Appx. "F". (See Appx. "E" order from the Magistrate Judge which is forbidden by U.S. vs. Canty 570 F.3d 1251 (11th Cir. 2019). This is also verified in Appx. "K" pg. 44-45, where the Magistrate Judge concedes there are no Shepard documents for Case No. 03-015144CF10A delivery of phencyclidine. When there are no Shepard documents provided, then the categorical and modified categorical approach is authorized. Descamps vs. U.S. 133 S.Ct. 2276 (2013); Mathis vs. U.S. 136 S.Ct. 2243 (2016); Taylor vs. U.S. 495 U.S. 575-600 (1990), U.S. vs. Shular (supra). When there are no Shepard documents, the least acts criminalized are given which is purchase or possession. Possession or purchase cannot be used for career offender enhancement. U.S. vs. Salinas 126 S.Ct. 1675 (2006) making the statute an indivisible statute. According to Moncrieffe vs. Holder Jr. 130 S.Ct. 1678 (2011), states an indivisible statute cannot be used for career offender enhancement. Therefore Counsel was ineffective for not arguing Shepard vs. U.S. (supra); Descamps vs. U.S. (supra); Taylor vs. U.S. (supra); Mathis vs. U.S. (supra); Moncrieffe v. Holder Jr. (supra); Shannon v. U.S. 631 F.3d 1187 (2015); Johnson v. U.S. 135 S.Ct. 2551 (2015) which all have merits at Petitioner's

sentencing hearing.

Counsel was also ineffective for failing to challenge the Petitioner's prior state convictions and career offender enhancement through the appeal stages on the Petitioner's behalf knowing that Shepard vs. U.S. (supra); Descamps vs. U.S. (supra); Mathis v. U.S. (supra); Moncrieffe v. Holder Jr. (supra); and Johnson vs. U.S. (supra) affected the Petitioner's career offender status even when the Petitioner informed Counsel both before sentencing and throughout the appeal stages to argue Petitioner's prior convictions on Petitioner's behalf. (See Appx. "G" Motions / Letters sent to the Court of Appeals informing the Honorable Court that Counsel refused to argue Petitioner's prior convictions.) But for Counsel's ineffectiveness, the Petitioner would not have been sentenced to 13 years in a federal prison because of his below the standards of representation in allowing the Petitioner to be unconstitutionally declared a career offender.

Moreover in September 10, 2003 Petitioner was never charged with delivering of phencyclidine under Fla. Stat. 893.13. The government failed to provide Shepard documentation and a charging document according to the appendixes for case #03-01544CF10A. The only document that shows a charge of S/M/D of MDMA is an A-form the government provided which is not considered a Shepard document. See U.S. v. Braun 801 F.3d 1301, 1304 (11th Cir. 2015) (Shepard documents include the charging document, a plea agreement of transcript of colloquy between judge and defendant or... some comparable judicial record of this information.) See Gordon vs. U.S. Case No. 16-13846 (11th Cir. 2017). Florida Sat. 893.13 and 893.135 is categorically overbroad. Pursuant to Descamps, Taylor, and Moncrieffe, when the least acts criminalized are counted, the statute cannot be used for a career criminal enhancement. Under U.S.S.G. 4b1.1 and 4b1.2, possession and purchase are not acts for a career criminal enhancement. 21 U.S.C. § 841(b)(1)(b)(1)(C) does not state that delivery is a predicate to use for a career offender enhancement. The

government is trying to say that distributing means delivery in which it does not fit the criteria. In addition, Petitioner did not possess MDMA at any time. Possession / purchase cannot be a career offender enhancement under U.S.S.G. 4b1.1 or 4b1.2 thereby disqualifying the September 10, 2003 charges for career enhancement purposes. (See Mathis vs. U.S. 136 S.Ct. 2243 (2016)). But for counsel's ineffectiveness, and below the standard of representation, the proceedings would have been so much different. See Missouri vs. Frye 566 U.S. 134 (2012), Lafleur v. Cooper 132 S.Ct. 1376 (2012). However Counsel prejudiced the Petitioner when he did not challenge the Petitioner's above stated priors on appeal that Petitioner requested Counsel to do. See Florida vs. Nixon 543 U.S. 175 (2004), and Cuyler v. Sullivan 446 U.S. 335 (1980). Therefore resulting in Petitioner serving 13 years unconstitutionally in a federal prison in violation of all of the above stated reasons. Strickland vs. Washington 466 U.S. 668 (1984); Cronic vs. U.S. 466 U.S. 648 (1984); Hill vs. Lockhart 474 U.S. 42-52 (1985); Padilla vs. Kentucky 130 S.Ct. 1476 (2010); Glover vs. U.S. 531 U.S. 198-204 (2001).

The Petitioner is therefore serving an unconstitutional sentence, especially in violation of Mathis, Shepard, Descamps, Taylor, and Moncrieffe in regards to Petitioner's state priors. Petitioner requests remand for his unconstitutional sentence.

The Petitioner wants the Honorable Court to know there were no Shepard documents provided at the initial sentencing hearing. See Appx. "F". The first documents the government provided at the initial sentencing hearing, any other documents not provided at sentencing were inapprorpriate and is not allowed because both parties had a chance to introduce any evidence to the case at the initial sentencing hearing. (Canty v. U.S. 570 F.3d 1231 (2009)). Any other documents provided after the Magistrate Judge's order to produce Shepard documents after the evidentiary hearing should be stricken. (See Appx. "J" second documents that are foreclosed by Canty). Instead of

ordering Shepard documents in Case No. 03-01544CF10A that were not provided at the initial sentencing hearing, the categorical approach is authorized (see U.S. vs. Shular (supra)). The inquiry should have ended there and the least act criminalized should have been given to the Petitioner according to Descamps and all the precedents by the Honorable Supreme Court. Therefore Case No. 03-1544CF10A can not qualify for career offender enhancement in which Counsel was ineffective for not arguing.

The government also tried to use a prior conviction for trafficking cocaine. For this prior conviction, 0720556CF10A, violation of Fla. Stat. § 893.135 is a divisible statute. There are many elements or ways you can be convicted of this crime. This statute prohibits the act of purchase or possession which is not included as a serious drug offense under § 4B1.1 and 4B1.2 of the Sentencing Guidelines. The government must introduce Shepard documents demonstrating that this conviction was not for the act of purchase in which they failed to do so. Shannon v. U.S. 631 F.3d 1187 (2010) (holding the absence of Shepard documentation clarifying which prohibited act the defendant committed). A conviction under Fla. Stat § 893.135, is categorically overbroad and does not constitute a controlled substance offense under the analogous career offender Guidelines. Mathis v. U.S. 136 S.Ct. 2243 (2016), also states without Shepard documentation the Court refused to allow Judges to determine without a jury which alternative means supported a defendant's prior conviction. Taylor v. U.S., 495 U.S. 575-600 (1990), says conduct alone may not be looked at and the elements must be considered. Furthermore, there is information regarding this prior charge in the government's exhibits regarding Claude Remy and Lazaro Candelaria stating that Lazaro Candelaria was in actual or constructive possession of a controlled substance but does not state a quantity but states possession which cannot be used for a career offender enhancement. See U.S. v. Salinas, 126 S.Ct. 1675 (2006). The exhibits the government have provided are not a Shepard document. Therefore, Fla. Stat § 893.135 is

categorically overbroad and does not meet the criteria of career offender status because possession and purchase does not constitute a serious controlled substance offense under 4B1.1 or 4B1.2. See U.S. v. Salinas, 126 S.Ct. 1675 (2006); U.S. v. Day, 465 F.3d 1265 (11th Cir. 2006); Kenon v. U.S., 2016 U.S. Dist. LEXIS 56433); Taylor v. U.S. 495 U.S. 575-600 (1990); and Shannon v. U.S., 631 F.3d 1187 (2010). Therefore Counsel was ineffective for not pursuing Shepard, Mathis, Descamps, Taylor, Johnson and the information regarding this prior conviction which does not qualify for career offender enhancement.

Counsel was ineffective for not objecting to Petitioner's criminal history points which affected Petitioner's career offender status and the category of Petitioner's sentencing guideline. There was also a prior conviction that was given criminal history points when it should not have been.

Amendment 795 of the Sentencing Guidelines provides for purposes of determining predicate offenses a consolidated sentence is treated as a single sentence. See King v. U.S. 595 F.3d 844, 852 (2010) (held only one prior sentence should be assigned criminal history points in a consolidated sentence. For prior convictions F00-10024 and 03-15144CF10A were consolidated and treated as a single sentence. Therefore, only one prior sentence receives criminal history points. In addition, prior conviction F00-10024 and 03-15144CF10A was so remote in time surpassing the 10 years mark, and neither priors should have been assigned criminal history points pursuant to Amendment 795.

Furthermore, on February 18, 2012 the Petitioner was arrested for DUI and refusual of a breath sobriety test conducted by Miami Dade police. The Movant was subsequently sentenced to court costs. U.S.S.G. § 4A1.1(c) states sentences for prior offenses by whatever name they are known are only counted if a sentence was a term of probation for more than one year or a term of imprisonment of at least 30 days. This prior conviction is not listed as a prior that counts toward criminal history points, therefore disqualifying

this prior from receiving criminal history points and resulting in the petitioner's sentencing guidelines being dramatically lowered, Movant should not be considered a career offender and counsel was ineffective for not arguing or objecting to the criminal history points.

Counsel was ineffective for not arguing the applicable time period for the Petitioner's prior conviction. At the initial sentencing hearing, the Honorable Court adopted from the P.S.I. that Petitioner was re-sentenced for case no. F00-10024 and case no. 03-01544CF10A on August 3, 2004 which was "reduced" to 196 days credit time served. See Appx. "H" pg. 29-30, P.S.I. where the language states "reduced" to 196 days credit time served. In Appx. "H" pg. 29-30, the P.S.I. there are other priors that state credit time served for days that were credited to Petitioner's prior conviction. Therefore the language is plain and precise. "Reduced" means sentence reduced. Credit time served means days credited to one conviction. This was all adopted at the initial sentencing hearing and throughout these 28 U.S.C. § 2255 proceedings by the Honorable Court and the government. Any other findings is inappropriate if it was not presented at the initial sentencing hearing. (See Appx. "I" sentencing hearing, pg. 23 line 14-20; pg. 35, line 24-25; pg. 36 line 1-6: all of these facts were adopted by the Honorable Court at the initial sentencing hearing. The P.S.I. and all its findings were adopted by the Hoonrable Court at sentencing including Petitioner being re-sentenced August 3, 2004 to a reduced sentence of 196 days credit time served. (See Appx. "H" and "I").

In the instant matter, the government is misconstruing the applicable time-period for the Petitioner's prior convictions in order to justify the unwarranted career criminal enhancement. The government points to three offenses, two of which the Petitioner's prior convictions do not qualify as predicate offenses. The three offenses the government attempts to justify for the career criminal enhancement are as follows: a Strongarm robbery

conviction, F00-10024, where the Petitioner was sentenced on September 28, 2000. Petitioner's probation was revoked on June 14, 2004 and ultimately sentenced to 196 days jail with credit for time served, a conviction for delivery of phencyclidine, 030154CF10A, Petitioner was sentenced on March 22, 2004, and trafficking cocaine 07-20556CF10A, where Petitioner pled no contest, and was sentenced on November 20, 2009. The government cites to the U.S.S.G. providing that "a defendant is a career offender if... (3) the defendant has at least two prior convictions of either a crime of violence or a controlled susbtance offense." U.S.S.G. Manual § 4b1.1(a) (U.S. Sentencing Com'n 2016). A crime of violence is defined in the guidelines as any offense under federal or state law **punishable by term of imprisonment over one year** and that (1) has an element of the use of physical force against the person of another, or (2) is a crime that fits into one of the enumerated categories. U.S.S.G. § 4B1.2(a)(1-2). The government states that the applicable time period for the career criminal enhancement is any prior sentence imposed within ten years of the defendant's commencement of the instant offense as defined in § 4A1.2(e)(2) of the Sentencing Guidelines. Amendment 503 to the U.S.S.G. states a defendant is not held responsible for foreseeable acts committed by co-defendants prior to joining the conspiracy. Here, the Petitioner's commencement of the instant offense began in October 2013. The Petitioner entered the conspiracy on October 2014, which was adopted by the District Court and the Appeals Court. Therefore, the two convictions for Strongarm robbery F00-10024 in 2000 and delivery of phencyclidine 03-15144 CF10A both do not qualify as a predicate offense for the career criminal enhancement because both prior convictions surpass the 10-year time-period limitation.

Furthermore on March 22, 2004 the Strongarm robbery and the delivery of phencyclidine sentences were consolidated. U.S.S.C. Amendment 795(A) of the Sentencing Guidelines provides that for purposes of determining predicate

offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independtly would have received criminal history points. Predicate offenses may be used only if they are counted separately from each other, no more than one prior sentence in a given sentence may be used as a predicate offense. Id. Here the Petitioner was sentenced to 196 days, which is under a year and a month. Therefore, in order for the government to justify a career criminal enhancement, the government is only allowed to count prior convictions that go back ten years pursuant o § 4A1.2(e)(2) and not fifteen years pursuant to § 4A1.2(e)(2).

Moreover, the government attempts but fails to justify the enhanced sentence by pointing out the Petitioner was resentenced to a term of imprisonment on the Strongarm robbery on June 14, 2014, sentenced to a term of eighteen months imprisonment for delivering phencyclidine on March 22, 2014, and sentenced to a term of three years' imprisonment on the trafficking cocaine conviction in November 2009. The Petitioner's resentencing for Strongarm robbery on June 14, 2014 should not be counted as falling within the applicable time period since § 4A1.2(k)(2)(C) of the Sentencing Guidelines provides that the **date of the original sentence** should be used for purposes determing career criminal enhancement when probation has been revoked. Reiterated once again, the Petitioner was arrested on September 24, 2000 for Strongarm Robbery which was reduced to a simple robbery, Fla. Stat. § 812.13(2)(c) and was **sentenced to three (3) years' probation** on September 28, 2000. On June 14, 2004, the Petitioner was arrested for other related charges. A probation warrant was served and the defendant was arrested, subsequently his probation was revoked and he was sentenced to 18 months of State Prison for those charges. On August 3, 2004, his prison term was reduced to 196 days jail time, according to the Florida Department of Corrections database. (See PSI Report pg. 29 ¶ 2). For purposes of determining the applicable time-period for the career criminal enhancement, 4A1.2(e) of the Sentencing Guidelines states "Any prior sentence

of imprisonment exceeding one year and one month that was imposed within ten years of the defendant's commencement of the instant offense is counted." The Petitioner was charged with robbery and sentenced on September 28, 2000 to 3 years probation, which is not a sentence of **imprisonment exceeding one year and one month**. This instant federal charge, the Petitioner was sentenced in December 18, 2015, surpassing the ten-year time period. The government states that the Petitioner was re-sentenced in 2004 and therefore this sentence counts within the applicable time period, however the defendant's 2004 sentence cannot count as a predicate offense because the date of the original sentence in 2000 is counted pursuant to § 4A1.2(k)(2)(C). Thus, the Strongarm robbery conviction does not qualify as an underlying predicate offense for the career criminal enhancement since the petitioner was sentenced to probation as opposed to incareceration at the date of the original sentence and the delivery of phencyclidine surpassed the ten-year time period limitation.

Additionally, the Petitioner's counsel produced deficient performance justifying a reversal of conviction or resentencing because counsel failed to object to the Petitioner's prior convictions which clearly were outside the applicable 10-year time period and the Petitioner was prejudiced since the Petitioner received a sentence that was completely unjustified pursuant to the U.S.S.G. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components: First, defendant must show that counsel's performance was deficient, requiring a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and, second, defendant must show that the deficient performance prejudiced the defense by showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. Strickland v. Washington 466 U.S. 668, 678 (1984). Here counsel made errors in regards to applying the rules from the sentencing guidelines to the defendant's prior state convictions since two

prior offenses were outside the applicable time-period.

For this prior conviction, F00-10024, the government failed to produce Shepard documentation and without Shepard documentation using the categorical approch and modified categorical approach, you cannot determine the elements of a crime on a divisible statute. The Supreme Court refuses to allow judges or prosecutors to determine without a jury which alternative means supported a defendant's prior conviction. (Mathis v. U.S. No. 16-6092). A PSI, Police Report does not qualify as Shepard documentation, Taylor v. U.S., 495 U.S. 575-600 (1990), _____ states conduct cannot be determined in the crime but its elements. If there is no Shepard documentation, then Descamps v. U.S. (133 S.Ct. 2276 (2013)), states the Court must look to the elements of the least of the acts criminalized. Pursuant to Moncrieffe v. Holder Jr. when the least acts criminalized are given, it becomes an indivisible statute and an indivisible statute cannot be used for a career criminal enhancement predicate offense. Under Descamps, elements of a Florida Robbery Statute § 812.13 conviction and the CCA elements clause do not match the Florida Robbery Statute and sweeps broader than the elements clause in at least this respect. If Fla. Stat. § 812.13 is indivisible under Descamps the modified categorical approach will never be permissible, therefore, making Fla. Stat. § 812.13 conviction categorically overbroad and a categorically overbroad conviction cannot be a CCA predicate. Therefore, Fla. Stat §812.13 is "non-violent". U.S. v. Allen 302 F.3d 1260 (11th Cir. 2012), finding where defendants were charged with an offense that involved multiple alternative offense elements because jury returned only a general verdict, the Court must find that the defendant has been convicted of the lesser offense. It is also clear from U.S. v. Lockett 810 F.3d 1262 (11th Cir. 2016) that there are only four true elements of a Florida Robbery Statute § 812.13 robbery offense that the second element force, violence, assault or putting in fear was used in the course of the taking is a list of alternative means of committing a single

robbery offense and that jury need not agree unanimously on a "means". Each juror must find either force or violence or assault or putting in fear was used in the course of taking. According to Lockett, the second element of the Fla. Stat. §812.13 offense is therefore, indivisible. Since it is clear from the Florida Case law discussed, supra, that at least one of the listed means of committing robbery by use of force sweeps more broadly than the CCA elements clause. Since quantum of force required for a conviction is not the Johnson level of required force. Therefore, the indivisible second element of Florida Robbery Statute § 812.13 is categorically overbroad and according to Descamps and Lockett, the Court must vacate an enhanced ACCA and career offender sentence.

In addition the government and the magistrate judge violated Canty v. U.S. (supra) and the Supreme Court precedents, Shepard v. U.S.; Mathis v. U.S.; Descamps v. U.S.; Taylor v.s U.S.; Moncrieffe v. Holder Jr. Petitioner was prejudiced and Petitioner's due process was violated when Shepard documents were not produced at the initial sentencing hearing and the magistrate order to produce Shepard documents after the initial sentencing. According to Descamps, Mathis, Taylor, the least acts criminalized should have been given for case no. 03-05144CF10A which is coabroated by the magistrate order to produce Shepard documents in Appx. "E", where the inquiry by Supreme Court law should have ended there, proving, that there were no Shepard documents provided at the initial sentencing hearing, neither in the first documents in Appx. "F". Verified by Appx. "K" pg. 44-45 report and recommendation by the magistrate judge.

Petitioner's rights were violated by the government and the honorable magistrate judge. Petitioner is actually, factually, and legally innocent of his career offender enhancement. Petitioner entered the conspiracy in October of 2014. Petitioner was sentenced August 3, 2004 for his two prior convictions.

These two priors not only surpassed the ten-year time period but do not qualify for career offender enhancement. The Magistrate Judge violated Petitioner's due process, violated Canty, Shepard, Mathis, Descamps, Taylor and violated Petitioner's Fifth, Sixth, and Eighth Amendment Rights. Petitioner requests remand of his unconstitutional career offender enhancement in the interest of justice.

After all of these issues were presented in which the first documents provided by the government did not have any Shepard documents whatsoever for case no. 03-01544CF10A the Eleventh Circuit Court of Appeals uses the foreclosed documents in Appx. "J" to make a decision on Petitioner's denial for a COA that were handwritten stating "corrected" violating Canty v. U.S. (supra). Yet the Appeals Court makes a big error trying to justify wrongly their decision that Counsel was ineffective for failing to challenge Petitioner's career offender status. The Court states in their order in Appx."B", that the record indicates "that Petitioner was convicted for case no. 03-01544CF10A of a second degree felony in violation of Fla. Stat. 893.03(2)(b)(23) and thus was charged with violating Fla. Stat. 893.13(1)(A). Section 893.13(1)(a) does not include purchase as a means of committing the offense. If the first documents and the second supplemented documents are compared, the Honorable Supreme Court will see that the Appeals Court is basing its decision by the foreclosed documents and cannot be permitted pursuant to Canty v. U.S. 570 F.3d 1257 (11th Cir. 2009). Yet! The Appeals Court makes an erroneous decision with this second degree prior conviction.

The Honorable Court states in this order in Appx. "B" that Appellant was convicted of a second degree felony for delivery of phencyclidine, case no. 015144CF10A in violation of Fla. Stat. 893.03(2)(b)(23) and that was charged under Fla. Stat. 893.13(1)(a). But in actuality, a second degree felony is charged under 893.13(2)(a) not the 893.13(1)(a). Fla. Stat.

893.13(2)(a)(b)(6)(a) states for a second degree felony it is unlawful for any person to be in actual or constructive possession of a controlled substance, in which the Petitioner was sentenced to a second degree felony stated by the Honorable Court in this order which does not and cannot fall under Fla. Stat. 893.13(1)(a) because Appellant was not sentenced to a first degree felony, Appellant was sentenced to a second degree felony, which falls under Fla. Stat. 893.13(2)(a) which does include possession. Therefore possession is means of committing this offense. In the first so-called Shepard documents in Appx. "F" produced at the initial sentencing hearing there were no Shepard documents provided for case no. 03-015144CF10A whatsoever but an A-form which is not a Shepard document (See Appx. "F"). Therefore, the Magistrate Judge and the Appeals Court depended on handwritten documents stated "corrected" on top produced by the government, in the order to produce Shepard documents by the Magistrate Judge in (Appx. "J"), when the documents are foreclosed by U.S. vs. Canty 571 F.2d 1251 (11th Cir. 2009). Please see foreclosed documents (Appx. "J"), which differ from the first so-called Shepard documents in Appx. "F". You can tell the difference between the first Shepard documents by the D.E. entry 38's for the first and D.E. 47's for the second foreclosed documents dated 9/11/18, after the order to produce Shepard documents by the Magistrate Judge on 9/10/18 in Appx. "J". In addition Petitioner was sentenced to a second degree felony, not a first degree felony and the correct statute is Fla. Stat. 893.13(2)(a), not 893.13(1)(a), which includes possession. Also proving that these fore-closed documents that were produced were altered and in error and should be stricken. They were handwritten stated "corrected" and was in error just to enhance the petitioner violating his Fifth, Sixth, and Eigth Amendment Rights to the United States Constitution and is a miscarriage of justice. According to U.S. vs. Salinas 126 S.Ct. 1675 (2006), possession cannot be used for career offender enhancement. Therefore, the Eleventh Circuit Court of Appeals is in error because this court is using foreclosed documents to make

this determination which contradicts the District Court's report and recommendation on pg. 43-45 (Appx. "K") proving that there were no Shepard documents in the first documents the government had introduced at sentencing. (Appx. "F") The Court is also in error because a second degree felony falls under 893.13(2)(a) which includes possession. In addition these foreclosed documents do not whatsoever mention a statute of 893.13(1)(a) at all. It only states 893.03(2)(b)(23) second degree felony proving that the lower court as well as the District Court cannot determine the elements and is using foreclosed documents violating Canty vs. U.S. 571 F.2d 1251 (2009). The correct statute for a second degree felony is 893.13(2)(a) which includes possession. Petitioner wants the Honorable Court to know on top of this page of the foreclosed documents is signed CMT which means corrected and are handwritten "corrected". These documents should be foreclosed and stricken. Appx. "J" are not Shepard documents and were altered.

In the order from the Magistrate Judge "to produce Shepard documents" in Appx. "E" at the conclusion of the evidentiary hearing as indicated on the record, reveals that there were no Shepard documents provided at the initial sentencing hearing violating Shepard vs. U.S. 544 U.S. 13, 26 (2005). When there are no Shepard documents the categorical and modified categorical approach is authorized (U.S. vs. Shular , supra; Mathis vs. U.S. 136 S.Ct. 2243 (2016)). According to Descamps vs. U.S. 133 S.Ct. 2276 (2013) when there is no Shepard documents provided, the least acts criminalized are given which is possession for a second degree felony as stated in this order by the Honorable Appeals Court. There were no Shepard documents provided and it is conceded by the Magistrate Judge by ordering to produce Shepard documents. (See Appx. "E", Magistrate order to produce Shepard documents). When the Magistrate Judge gave this order, Appellant objected pursuant to U.S. vs. Canty (supra). (Appx. "E") as the record shows on the report and recommendation

(Appx. "K" pg. 43) which the Magistrate Judge states he used a docket sheet to make his determination which is not a Shepard document, violating Shepard vs. U.S. (supra), Mathis, Descamps, Taylor v. U.S. 405 U.S. 578 (1990)! According to Descamps, the least acts criminalized is given when there is no Shepard documents. Therefore Petitioner does not have two prior convictions that qualify for CCA. Case #03-015144CF10A is disqualified. In addition for this case # 015144CF10A there was no Shepard documents provided at the initial sentencing hearing. (See the first sentencing documents that were presented by the government in Appx. "F"). The inquiry should have ended there because there were no Shepard documents provided, anything introduced after the initial sentencing hearing are foreclosed. Adding new documents for further findings is inappropriate when the issues are before the Court and the parties had an opportunity to introduce relevant evidence before the conclusion of the initial sentencing hearing. U.S v. Canty (supra), U.S. vs. Jones 111 S.Ct. 275 (1990), U.S. vs. Weir 51 F.3d 392, 399 (4th Cir. 2000). Petitioner's Fifth and Sixth Amendment Rights were violated in regards to Shepard, Mathis, Descamps, Taylor vs. U.S. 495 U.S. 575 (1990), Canty. Counsel was ineffective for not arguing Appellant's prior convictions. According to the U.S.S.G. 4b1.2, there is no language that includes delivery as a serious drug offense for career offender enhancement.

Petitioner's state priors for case # F00-10024 and case # 030-15144CF10A delivery of phencyclidine. Possession / purchase / sale / delivery / manufacture of cannabis and docket # 07-20556 for trafficking cocaine all violate Mathis, Descamps, Johnson, Shepard documentation, Lockett, Shannon, U.S. vs. Day, and Salinas (supra). The Petitioner's state priors were therefore inappropriately applied to the Petitioner and unconstitutionally violated the Petitioner's Fifth Amendment Rights to due process of his Shepard documentation, his Sixth Amendment Right to effective assistance of counsel, and his Eighth Amendment Right to cruel and unusual punishment because the Petitioner is serving a portion of his sentence as a career offender status applied to him, based on

counsel's ineffectiveness and below the standard of representation. But for counsel's ineffectiveness and below the standards of representation, the proceedings would have been so much different. Strickland v. Washington (supra); Hill vs. Lockhart (supra); Cronic vs. U.S. (supra); Padilla vs. Kentucky (supra); Lafleur vs. Cooper (supra); Missouri vs. Frye (supra); Florida vs. Nixon (supra); Cuyler vs. Sullivan (supra).

ARGUMENT FIVE

Whether Counsel was ineffective for promising Petitioner a 60 month sentence but when Petitioner was sentenced, he received 13 years in a federal prison based on counsel's breach of plea and whether Petitioner's plea was involuntary, unintelligent and unknowing.

Counsel Rodrick Vereen promised the Petitioner a 60 month sentence if he pled guilty to his instant charges in the District Court. Counsel showed Petitioner an e-mail stating by the government that Petitioner is not a career offender if Counsel argued his prior convictions (See Appx. "D"). Petitioner's guideline range was 18-24 months or 30-37 months at most but Petitioner had a five year minimum mandatory without the career offender enhancement. Petitioner wants the Honorable Court to know that this e-mail was given to Petitioner in bad faith to deliberately deceive the petitioner to sign this plea and not proceed to trial which is prosecutorial misconduct, a violation of Petitioner's due process rights and is forbidden by the Supreme Court where vacation and remand is required. (See Walker vs. Johnson 61 S.Ct. 575; Hoorey vs. Holoham 55 S.Ct. 340; Napue v. Illinois 798 S.Ct. 1173). The only reason that Petitioner pled guilty and signed this plea agreement is because Petitioner was promised five years. Petitioner showed change of plea hearing transcripts where he and his attorney went off the record to discuss the plea where Petitioner's attorney told him that if he did not agree with the judge, that Petitioner would not receive the 60 month sentence that was promised

to Petitioner by Counsel. (See Appx. "L" pg. 4, line 8, change of plea hearing where Petitioner and his attorney had a discussion off the record.) Then the Court asked Petitioner, "Has your attorney done everything you've asked him to do?" Petitioner's response was, "We'll see in the future at sentencing." The Court could not accept that answer and that is when Petitioner's attorney again, told the Petitioner that he had to agree with the judge in order to receive the 60 months that Petitioner was promised by counsel. (See change of plea hearing transcripts, page 9-10, Appx. "L"). In addition, Counsel Rodrick Vereen told Petitioner's mother and sister that Petitioner would receive a 60 month sentence (See Appx. "N" affidavits signed by Rafaela Cruz Leon, Petitioner's mother, and Ana Calderon, Petitioner's sister who also testified at the evidentiary hearing that Counsel promised them that Petitioner would receive a 60 month sentence. The Honorable Court Magistrate Judge claims that two law-abiding citizens were not credible because they are laymans of the law, were nervous, and did not know the difference between a sentencing hearing or a detention hearing, which is totally inaccurate and biased. (See Appx. "K", page 14-16, magistrate report and recommendation). In actuality, the witnesses testified that counsel had promised and told them that Petitioner would receive a five year sentence whether they know the difference between a sentencing hearing or detention hearing is irrevelant because they are laymen of the law.

In the evidentiary hearing, Counsel for the Petitioner that was appointed by the Honorable Court caught Rodrick Vereen in many fabrications and at many points proved Ineffective Assistance of Counsel. One instance was the plea agreement. In the evidentiary hearing, it was proven that Petitioner signed his plea agreement on September 9, 2015, the same day of the change of plea hearing. So there was no way possible that Counsel Vereen discussed anything with Petitioner about the plea agreement. A plea hearing only lasts at the most five minutes, and then it's over. All that was said to Petitioner by

Counsel Rodrick Vereen was that he was going to receive 60 months if he pled guilty and agreed with the judge, making this plea involuntary, unknowing, and unintelligent. (See evidentiary hearing transcripts, in Appx. "M", pg. 134-142).

If Petitioner was a career offender, his guidelines would have been 188-235 months. Yet throughout the sentencing hearing, Counsel Rodrick Vereen asked the Honorable Court to give Petitioner a 60 month sentence that is a 128-month downward variance from the guidelines, which makes absolutely no sense. No reasonable court would depart that far unless the Petitioner cooperated, in which Petitioner certainly did not or Petitioner was promised by counsel a 60-month sentence. No competent counsel would have argued for a 60-month sentence when the guidelines were so high. See Kenon vs. U.S. 772 Fed. Appx. 978 (11th Cir. 2018). Where Counsel fell below the objective standard of reasonableness by proving no competent counsel could have taken the action counsel took. The only reasonable way Counsel Vereen argued for 60-months is because that is what he promised Petitioner. (See Appx. "M" where Petitioner's attorney Alvin Entin makes this point and Attorney Vereen could not answer that he ever saw a court depart that far from the guidelines with a career offender enhancement.

Therefore Counsel was ineffective for promising Petitioner a 60 month sentence cobrated by all of the transcripts. Petitioner's plea was involuntary, unintelligent, and unknowingly due to Petitioner signing his plea on the same day of the plea hearing which is stated on the record. Petitioner's witnesses both testified that Counsel Rodrick Vereen promised them that Petitioner would receive a 60-month sentence proven by the e-mail by the government stating Petitioner is not a career offender if argued which all proves that Petitioner was promised a 60-month sentence by Counsel. In addition, all of the off-the record discussions by Petitioner and Counsel prove that Petitioner

was promised 60 months and on the record, when asked if Petitioner was promised anything, which is when Petitioner and Counsel went off the record to have these discussions. But for Counsel's ineffectiveness and below the objective standard of reasonableness cost the Petitioner 13 years in a federal prison and these proceedings would have been so much different. Strickland v. Washington 466 U.S. 668-678 (1984); Cronic vs. U.S. 466 U.S. 648 (1984); Hill vs. Lockhart 474 U.S. 48-52 (1985); Padilla vs. Kentucky 130 S.Ct. 1476 (2010); Missouri vs. Frye 132 S.Ct. 1396 (2012); Lafleur vs. Cooper 132 S.Ct. 1376 (2012); Florida vs. Nixon 543 U.S. 175 (2004); Cuyler vs. Sullivan 466 U.S. 335 (1980).

Jurists of reason would stipulate that all of these arguments should have proceeded further through the lower courts. Based on violations of the Petitioner's Fifth Amendment Right to due process, and his Sixth Amendment Rights to effective assistance of counsel and the elements to a jury beyond a reasonable doubt. Petitioner has made a substantial showing of a denial of constitutional rights, for which deserves further developtment to proceed further in this case. Slack v. McDaniel 529 U.S. 473-484 (2010); Miller El v. Cockrell 537 U.S. 322-327 (2013); Barefoot v. Estelle 464 U.S. 880-889 (1983); Buck v. Davis 137 S.Ct. 759-774 (2017).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 3/15/20