No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

JOHNATHAN KEEN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

NOEL G. LAWRENCE, ESQUIRE
Counsel for Petitioner
Florida Bar No. 844251
101 East Union Street, Suite 200
Jacksonville, Florida 32202
Telephone: 904-356-9928
Facsimile: 904-356-6762
Email: nglawren@lpnlaw.com

STATEMENT OF THE ISSUE(S)

I. **ISSUE 1**

Whether, as preserved, the District Court erred as a matter of (Constitutional) Law in finding Mr. Keen's prior Florida drug convictions qualified as "felony drug offenses" under 21 U.S.C. 851 because, lacking a *mens rea* element, his prior convictions did not qualify as generic drug offenses.

ISSUE II

Whether Mr. Keen's Sentence was improperly enhanced under 21 U.S.C. 851.

ISSUE III

Whether Mr. Keen's Sentence is procedurally unreasonable because the District Court improperly counted his two prior Felony convictions separately in determining whether the Career Offender designation applied under U.S.S.G. § 4B1.1(a).

LIST OF PARTIES

All parties appear in the caption of the case on the title page.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, **Jonathan Keen,** respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on June 29, 2020.

OPINION BELOW

The Opinion of the Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-7a) is unpublished.

JURISDICTION

This is a Direct Appeal of a Judgment in a Criminal Case and the Sentence imposed by the United States District Court for the Middle District of Florida after an Imprisonment Sentence of 120 Months. The District Court had original jurisdiction in Mr. Keen's Criminal proceedings under 18 U.S.C.§3231. Accordingly, this Court's jurisdiction over this Appeal is predicated upon 18 U.S.C.§3742, and 28 U.S.C.§§ 1254 (1) 1291, 1294.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall be held to answer for a capital, or infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. Fifth Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. Sixth Amendment to the United States Constitution.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Eighth Amendment to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Course of the Proceedings and Dispositions in the Court Below[1]

Charge(s) and Conviction(s)

On September 27, 2017, a Federal Grand Jury in the Middle District of Florida, Orlando Division, returned a Three-Count Indictment naming Jason Williams, Luke Levy, and, Johnathan Scott Keen as Defendants. (Doc.1)

On October 11, 2017, The Federal Grand Jury in the Middle District of Florida, Orlando Division, returned a Four-Count Superseding Indictment naming Jason Williams, Luke Levy, Johnathan Scott Keen, Matthew Wade Tucker, and, Marie Frances Gonyer as Defendants. Mr. Keen was named in Count One of the Superseding Indictment. (Doc. 7)

Count One charged that beginning on February 1, 2016, and continuing through April 27, 2017, Jason Williams, Luke Levy, and, Johnathan Scott Keen, knowingly, willfully, and, intentionally, conspired with each other and other persons, to distribute and possess with intent to distribute a controlled substance, in violation of 21 U.S.C. § 846. With respect to Jason Williams, the violation involved 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, and is therefore punished under 21 U.S.C.§ 841(b)(1)(A). With respect to Luke Levy and Johnathan Scott Keen, the

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Most of the facts were adopted from the PSR unless where defendant objected; the facts were tailored to the issue(s) on Appeal. Additionally, the following facts are supported by the Record on Appeal, but, are not necessarily conceded as true by Mr. Keen. (Docs. 54, 56 and 58)

violation involved 50 or more grams of a mixture and substance containing a detectable amount of Methamphetamine, a Schedule II controlled substance, and is therefore punished under 21 U.S.C. § 841(b)(1)(B). (Id.)

Count Two charges that beginning on December 1, 2016, and continuing through April 27, 2017, Jason Williams, Matthew Wade Tucker and Marie Frances Gonyer knowingly, willfully, and intentionally conspired with each other and other persons to distribute and possess with intent to distribute a controlled substance, which involved 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §§ 841 (b)(1)(A) and 846.

Count Three charges that on April 11, 2017, Jason Williams knowingly and intentionally distributed a controlled substance, which involved 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 841 (b)(1)(A) and 841(a)(1). (Id.)

Count Four charges that on April 26, 2017, Jason Williams knowingly and intentionally distributed a controlled substance, which involved 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C.§§ 841(b)(l)(A) and 841(a)(1). (Id.)

The Superseding Indictment contained a forfeiture provision pursuant to 21 U.S.C. §853 (p). (Id.)

On March 12, 2018, the Government filed Government's Information and

Notice of Prior Conviction, pursuant to 21 U.S.C. § 851, advising Mr. Keen that he was subject to enhanced Statutory Penalties based upon his prior convictions for sale/manufacture/delivery of Methamphetamine, possession of Methamphetamine, sale/manufacture/delivery of Marijuana, and sale/manufacture/ delivery of a controlled substance. (Doc. 146)

On April 12, 2018, Mr. Keen appeared before United States Magistrate Judge Thomas B. Smith and pleaded guilty to Count One of the Superseding Indictment. (Doc. 171) On April 13, 2018, United States District Judge Gregory A. Presnell accepted Mr. Keen's guilty plea and adjudicated Mr. Keen guilty. (Doc. 180).

Pursuant to a written Plea Agreement, the Government agreed to recommend a Three Level reduction for acceptance of responsibility, pursuant to USSG §3E1.1. (Doc.157). This was conditioned upon Mr. Keen clearly demonstrating acceptance of responsibility for the offense, and assisting authorities in the investigation or prosecution of the misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for Trial and permitting the Government and the Court to allocate their resources efficiently. (Doc. 157)

Plea Agreement

The Parties agreed that Mr. Keen would plead guilty to Counts One of the Superseding Indictment. (Doc.157) As to Count 1, Mr. Keen faces a minimum mandatory of Ten (10) years to Life imprisonment, Eight (8) years supervised release, a $8,000,000 fine, and, a $100 special monetary assessment. (Doc. 157)

The Government agreed not to file any further criminal proceedings against Mr. Keen arising out of the same transaction or occurrences to which Mr. Keen had pled. The Parties agreed that the Sentence to be imposed would be left solely to the discretion of the Court which was required to consult the United States Sentencing Guidelines and take them into account when sentencing Mr. Keen. The Parties further understood and agreed that the District Court's discretion in imposing Sentence was limited only by the Statutory Maximum Sentence and any Mandatory Minimum Sentence prescribed by Statute for the offense.

As to the Supplement to the Plea Agreement, the Government agreed that should Mr. Keen's cooperation rise to the level of substantial assistance, a Motion for a reduction of Sentence could be filed. (Doc. 157) The remaining charges would be discussed at Sentencing.

The Offense Conduct

In April 2017, members of the Drug Enforcement Administration (DEA)

Titusville Post of Duty and the Palm Bay Police Department (PBPD) initiated an investigation into the crystal Methamphetamine trafficking related activities of James Arthur Van Meerten in Palm Bay, Brevard County, Florida. During the investigation, Mr. Van Meerten was identified as a key member within the organization. Mr. Van Meerten obtained multiple pound shipments of Crystal Methamphetamine from Arizona to Palm Bay, Florida, where the Crystal Methamphetamine was further distributed. Jason Williams was Mr. Van Meerten's source of supply.

Mr. Van Meerten had several customers that he sold Methamphetamines to in and around the Brevard County, Florida, area. Some of the customers that Mr. Van Meerten sold Methamphetamines to on a regular basis when he received the shipments are listed below:

Luke David Levy- Mr. Levy purchased a quarter pound of Methamphetamine from Mr. Van Meerten every Two to Three days, for approximately Nine Months.

Johnathan Scott Keen- Mr. Keen purchased a quarter pound of Methamphetamine from Mr. Van Meerten every other day for one to one and a half months prior to Mr. Van Meerten's arrest on April 27, 2017.

Marie Frances Gonyer (a/k/a "Mom") - Ms. Gonyer, the girlfriend of Matthew Wade Tucker, purchased between a quarter to a half ounce of

Methamphetamine from Mr. Van Meerten on almost a daily basis, between December 2016 and April 2017. Ms. Gonyer was identified as a user and distributor of Methamphetamine.

Matthew Wade Tucker (a/k/a "Pop") - Mr. Tucker, the boyfriend of Ms. Gonyer, purchased between a quarter to a half ounce of Methamphetamine from Mr. Van Meerten on almost a daily basis, between December 2016 and April 2017. Mr. Tucker was identified as a user and distributor of Methamphetamine.

Mr. Keen would organize the purchase of Methamphetamine from Mr. Van Meerten by communicating with Mr. Van Meerten on two (2) cellular telephones (xxx-xxx-8150 and xxx-xxx-2178) which were both subscribed to Mr. Keen. Mr. Keen would often purchase drugs from Mr. Van Meerten on consignment or pay Mr. Van Meerten with cash, for example, on April 11, 2017, Mr. Keen, using telephone number xxx-xxx-8150, had the following text message conversation with Mr. Van Meerten:

> Mr. Keen: Hey man im kinda in a blind I need a lil help how much cash do I need to bring to get an o and owe you some please you know im good for it. I got pulled and had through out a half o.
>
> Mr. Van Meerten: I'm on limited quantities until tomorrow. How much cash you got
>
> Mr. Keen: Like 500 I think
>
> Mr. Van Meerten: Just get a half, flip it, and grab some after
>
> Mr. Keen: That's a lot of trafficking
>
> Mr. Van Meerten: I'm going to Orlando at 9 then coming back
>
> Mr. Keen: What would you have to have right now the whole and owe a lil

> Mr. Van Meerten: I can't front anything man I gotta send packs out in the a.m.
>
> Mr. Keen: I'll have the whole 8 here in like 30 min.

In addition, Mr. Keen also offered to recover a drug debt from N. T., who owed Mr. Van Meerten for several ounces of Methamphetamine that Mr. Van Meerten provided to N. T. on consignment. Specifically, on April 25, 2017, Mr. Keen, using telephone number xxx-xxx-2178, texted Mr. Van Meerten and stated: "Well I can probably get your money from [N.T.] and you won't have to, see [N.T.] unless you want to Up to you." In another instance, on April 26, after Mr. Van Meerten informed Mr. Keen that he (Mr. Van Meerten) was out of Methamphetamine. Mr. Keen notified Mr. Van Meerten that he (Mr. Keen) could obtain Methamphetamine from a source in Georgia. Specifically, on April 26, 2017, Mr. Keen using telephone number xxx-xxx-2178, texted Mr. Van Meerten the following:

> "Yo we good tomorrow if not I can get the whole one for 5k... well if you want me to make a move or do anything for you let me know that PR is in Georgia."

On April 27, 2017, after receiving a delivery of approximately 885 grams of Methamphetamine with a confirmed substance purity of 99%, Mr. Van Meerten texted Mr. Keen at telephone number xxx-xxx-2178 and stated, "hey back in business." In response, Mr. Keen using telephone number xxx-xxx-2178, had the following text message conversation with Mr. Van Meerten:

Mr. Keen: Can I give you 1100 down on the qp and bring the rest back later I have been chasing my tail for the past couple of days. Need to get money right trying to see kids this weekend. Can you that for me? Please I need it right now, I'm going through it bad man

Mr. Van Meerten: I can't front a single but I can prorate

Mr. Keen: What can you do me on 2

Mr. Van Meerten: 1 time deal 1300, U want?

Mr. Keen: Yeah.

Victim Impact

This is a Title 21 offense and there is no identifiable victim.

Adjustment for Obstruction of Justice

The Probation Officer had no information indicating Mr. Keen impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

Mr. Keen pled guilty to Count One of the Superseding Indictment in a timely manner, pursuant to a written Plea Agreement. Mr. Keen was interviewed by the Probation Officer and agreed that the stipulated facts of the Plea Agreement were an accurate representation of his involvement in the offense. Mr. Keen expressed remorse for his participation in the offense.

Offense Level Computation

Due to *ex post facto* considerations, the 2016 Guidelines Manual, incorporating all guideline amendments, was used to determine Mr. Keen's offense level. USSG §1B1.11.

Count 1: Conspiracy to distribute and possess with intent to distribute 50 Grams or more of a mixture and substance containing a detectable amount of Methamphetamine.

Base Offense Level: The guideline for a violation of 21 U.S.C. § 846 is USSG §2D1.1. Mr. Keen is responsible for at least 1.5 kilograms of Methamphetamine (actual) but less than 4.5 kilograms of Kilograms of Methamphetamine (actual); therefore, the base offense level is 36. USSG §§2D1.1(a)(5) and (c)(2). **36**

Specific Offense Characteristics: NONE **0**

Victim Related Adjustment: NONE **0**

Adjustment for Role in the Offense: NONE **0**

Adjustment for Obstruction of Justice: NONE **0**

Adjusted Offense Level: (Subtotal) **36**

Chapter Four Enhancement: Mr. Keen is a Career Offender as defined in USSG §4B1.1. Mr. Keen was Thirty-one (31) when he committed the offense, one of the offenses of conviction was a controlled substance offense, and, Mr. Keen had at least two (2) prior Felony convictions for a controlled substance offense.

(a) Sell or deliver more than 20 grams of Cannabis, Sell or deliver controlled substance, and possession of a controlled substance with intent to sell or deliver, Columbia County Circuit Court, Case No.: 2011-CF-886, Felony controlled substance offenses, sentenced on **August 12, 2013**, and

(b) Manufacturing of a Controlled Substance, Columbia County Circuit Court, Case No. 2013-CF-421, a Felony controlled substance offense, sentenced on **August 12, 2013.**

Since the Statutory Maximum Penalty is Life, the Total Offense Level becomes 37. **37**

Acceptance of Responsibility : Mr. Keen has clearly demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two levels. USSG §3E1.1(a). **-2**

Acceptance of Responsibility: Mr. Keen has assisted authorities in the investigation or prosecution of the defendant's own misconduct by timely notifying authorities of the intention to enter a plea of guilty. Accordingly, the offense level is decreased by one additional level. USSG §3E1.1(b). **-1**

Total Offense Level: **34**

Doc. 230 (emphasis supplied)

Mr. Keen is currently in the custody of the Bureau of Prisons, (Doc. 235)

Plea Agreement

The Parties agreed that Mr. Keen would plead guilty to Counts One of the Superseding Indictment. (Doc.157) As to Count 1, Mr. Keen faces a minimum mandatory of Ten (10) years to Life imprisonment, Eight (8) years supervised release, a $8,000,000 fine, and, a $100 special monetary assessment. (Doc. 157)

The Government agreed not to file any further criminal proceedings against Mr. Keen arising out of the same transaction or occurrences to which Mr. Keen had pled. The Parties agreed that the Sentence to be imposed would be left solely to the discretion of the Court which was required to consult the United States Sentencing Guidelines and take them into account when sentencing Mr. Keen. The Parties further understood and agreed that the District Court's discretion in imposing Sentence was limited only by the Statutory Maximum Sentence and any Mandatory Minimum Sentence prescribed by Statute for the offense.

As to the Supplement to the Plea Agreement, the Government agreed that should Mr. Keen's cooperation rise to the level of substantial assistance, a Motion for a reduction of Sentence could be filed. (Doc. 157) The remaining charges would be discussed at Sentencing.

REASON(S) FOR GRANTING THE PETITION

I. AS PRESERVED, THE DISTRICT COURT ERRED AS A MATTER OF (CONSTITUTIONAL) LAW, IN FINDING MR. KEEN'S PRIOR FLORIDA DRUG CONVICTIONS QUALIFIED AS "FELONY DRUG OFFENSES" UNDER 21 U.S.C. 851 BECAUSE, LACKING A *MENS REA* ELEMENT, HIS PRIOR CONVICTIONS DID NOT QUALIFY AS GENERIC DRUG OFFENSE[2]

In Smith, the District Court deviated from the established methodology by disavowing an essential feature of the categorical approach - the determination of the elements of the "generic" offense. United States v. Smith, 775 F.3d 1262, 1265 (11th Cir. 2014) held that the District Court "need not search for the elements of [the] 'generic' definition [] of 'Felony drug offense' because the term" is defined by a Federal Statute.

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[2] On or about January 9, 2020, Mr. Keen filed a Motion To Stay The Appellate Proceedings pending a decision in Supreme Court's Case 18-6662, Shular v. United States, 139 S. Ct 2773, Supreme Court (2019), to which the United States opposed and this Court denied relief on January 14, 2020. Generally, an Argument not raised in the Appellant's Opening Brief is deemed abandoned. Timson v. Sampson, 518 F.3d 870, 874 (11th Cir. 2008). The Appellant does not waive any rights by filing this Brief as ordered.

Smith, 775 F.3d at 1267. Smith further held that the plain language of ACCA[3] does not express or imply an element of *mens rea* with respect to the illicit nature of the controlled substance. Id.

Smith departed from Taylor v. United States, 495 U.S. 575 (1990) which teaches that the categorical approach is not a plain language analysis. The categorical approach requires the reviewing Court to compare the prior conviction to the generic crime, but, the generic crime is not determined from the plain language of the Statute. The generic crime is determined from a survey of State and Federal Law, and even the Model Penal Code, to arrive at the commonly understood elements of the crime at issue. The plain language of U.S.C. §851 does not determine the outcome of the inquiry, just as the plain language of ACCA did not control the outcome in Taylor. In other words, the District Court may not profess to apply the categorical approach yet rely on a "plain language" analysis; that is an oxymoron. The District Court's plain language approach violates the requirements of Taylor.

In Smith, the District Court overlooked the point that ACCA's definition of "Serious drug offense" encompasses a list of enumerated drug crimes, just as ACCA's definition of "violent Felony" encompassed a list of enumerated crimes in Taylor. The

[3] Armed Career Criminal Act embodied in 18 U.S.C. 924 (e).

enumerated crimes consist of State crimes punishable by at least ten (10) years in prison and involving "manufacturing, distributing, or, possessing with intent to manufacture or distribute, a controlled substance," and certain Federal drug offenses. 18 U.S.C. § 924(e)(2)(A)(i)and (ii). As noted in Smith, the Florida crimes of manufacturing, distributing, or, possessing with intent to manufacture or distribute a controlled substance, do not have any *mens rea* element. *See* Fla. Stat. § 893.101. The lack of *mens rea* sets the Florida drug offenses apart from the generic drug offenses.

In McFadden v. United States, 135 S. Ct. 2298 (2015), the Supreme Court held that controlled substance offenses under 21 U.S.C. § 841(a) require proof of a *mens rea* element, *i.e.,* the Defendant's knowledge that he or she is dealing with a controlled substance. *Id,* at 2304. Note, also, that every State, with the exception of Florida and Washington, require proof of a *mens rea* element in the prosecution of a controlled substance offense. State v. Adkins, 96 So. 3d 412, 429-30 (Fla. 2012) (Pariente, J., concurring in result). It is fair to say that a survey of Federal and State Law shows that the generic sale of a controlled substance and possession of a controlled substance with intent to sell include a *mens rea* element.

In Smith, the decision works great harm to the clear and consistent application of the categorical approach so deliberately cultivated by The Supreme Court. The

detrimental impact of the Smith decision is felt most directly in the case of Florida predicate drug convictions. Florida drug convictions, in contrast to the generic Federal controlled substance offense, lack a *mens rea* element. *See* Fla. Stat. § 893.101, (eliminating the *mens rea* element of "illicit knowledge of the nature of the substance" from all offenses under Chapter 894). In Smith, the Court recognized that Florida drug offenses lack a *mens rea* element. *Id.* at 1267.

The Court's decision in Smith created a split in authority in the interpretation of the term "involving" in ACCA's description of qualifying State drug offenses, as well as a split of authority on whether the predicate State drug offenses must be no broader than the generic drug offenses. The Circuit Court's generally hold that the term "involves" must mean something more that "has as an element" and must be read expansively. *See* United States v. McKenney, 450 F.3d 39, 43, (1st Cir. 2006) (collecting cases), but, the question of how broadly to interpret the term is a matter of debate. *Id.* at 45.

Most cases hold that the term "involves" applies to expand the scope of the qualifying State controlled substance offenses to include the inchoate crimes, such as conspiracy and attempt. *See* United States v. Tucker, 703 F.3d 205 (3rd Cir. 2012) (conspiracy to sell controlled substance); United States v. King, 325 F.3d 110 (2nd Cir. 2003) (attempted possession with intent to sell cocaine); United States v. Winbush, 407

F.3d 703 (5th Cir. 2005) (attempted possession of Cocaine with intent to sell). In United States v. Bynum, 669 F.3d 880 (8th Cir. 2012), the Court held that the Defendant's prior Minnesota conviction for "offering to sell" a controlled substance offense constituted a "serious drug offense" under the broad interpretation of "involving." *See also*, United States v. Whindleton, 797 F.3d 105 (1st Cir. 2015) (same). The Third Circuit also held that a prior State conviction for wearing body armor in the commission of a Felony constituted a "serious drug offense" under ACCA because the Statute was divisible as to the underlying Felony which was specifically, possession of cocaine with intent to distribute. United States v. Gibbs, 656 F.3d 180 (3rd Cir. 2011).

These Cases construed the term "involve" broadly to encompass additional types of enumerated controlled substance offenses, basically, the inchoate forms of the crimes. The enumerated offenses include manufacturing, distributing, and, possessing with intent to manufacture or distribute a controlled substance. 18 U.S.C. § 924(e)(2)(ii). Theses decisions, however, do not construe ACCA, and consequently, 21 U.S.C. § 851, as broadly as does this Court in Smith, that is, to relieve the Government of the burden to prove that the predicate drug offense included an element essential to every generic enumerated offense, i.e., the Defendant's knowledge that he or she was dealing with a controlled substance. McFadden.

The Third Circuit Court holds, contrary to Smith, that a qualifying State controlled substance offense must be determined in accordance with the typical categorical approach described in Taylor. In other words, the elements of the prior State offense must be "the same as, or narrower than, those of the generic offense." *See* United States v. Henderson, 841 F.3d 623, 627 (3rd Cir. 2016) (quoting Taylor, 495 U. S. at 600); *See* also, United States v. Gibbs, 656 F.3d at 188. In United States v. Brandon, 247 F.3d 186 (4th Cir. 2001), by comparison, the Circuit Court agreed that the term "involves" may be construed so broadly as to bring within the sweep of U.S.C. § 851 a State drug trafficking offense that requires only possession of a specific quantity of a controlled substance and which lacks the "formal element" of intent to manufacture or distribute. *Id.* at 190. Even in Brandon, however, the Court held that in determining "whether the crime 'involves' particular conduct, Courts follow the approach outlined in Taylor and ask whether the proscribed conduct is an inherent part or result of the generic crime of conviction." *Id.* at 191.See, also, United States v. Ocampo-Estrada, 873 F.3d 661, 667-69 (9th Cir. 2017).

II. MR. KEEN'S SENTENCE WAS IMPROPERLY ENHANCED UNDER 21 U.S.C. 851.

The First Step Act amended 21 U.S.C. § 841(b)(1)(A) by changing the types of prior convictions that trigger a mandatory penalty from one or more prior

convictions for "Felony drug offense[s]" to one or more "serious drug offense[s]." *Id.* § 401(a)(1). Additionally, The First Step Act changed the mandatory minimum Sentence for Defendants who had two or more such prior convictions from life imprisonment to 25 years imprisonment. *Id.*

The First Step Act did not alter the definition of "Felony Drug Offense[s]" that serve as qualifying convictions under 21 U.S.C. § 841(b)(1)(C). It did, however, impact 21 U.S.C. § 841(b)(1)(A) & (B), changing qualifying convictions under these Sections from "Felony Drug offense[s] to "Serious Drug Felon[ies] as defined by the First Step Act. Pub. L. No. 115-391, 132 Stat. 5194, § 401(a)(2)(A) &(B); *See* Potter, 927 F.3d at 455 (briefly discussing the impact of The First Step Act on 21 U.S.C. § 841(b)(1). A Felony drug offense, as defined in 21 U.S.C. § 802 (44) is "an offense that is punishable by imprisonment for more than one year under any Law of The United States, or, of a State or Foreign Country that steroids or depressant, or, stimulant substances." A "Serious Drug Felony" under The First Step Act, and, 21 U.S.C. § 802 (57), covers a smaller set of crimes, offenses "described in 18 U.S.C. 924(e)(2) for which – (A) the Offender served a term of imprisonment of more than Twelve (12) Months; and (B) the Offender's release from any term of imprisonment was within 15 years of commencement of the instant offense." Pub. L. No. 115-391, 132 Stat. 5194. § 401(a)(1); 21 U.S.C. § 802 (57).

Because Mr. Keen was convicted under 21 U.S.C. § 841(b)(1)(B), The First Step Act's narrowing of qualifying convictions to Serious Drug Felonies rather than Felony Drug Offenses under those provisions unfairly impacted Mr. Keen.[4]

III. MR. KEEN'S SENTENCE IS PROCEDURALLY UNREASONABLE BECAUSE THE DISTRICT COURT IMPROPERLY COUNTED HIS TWO PRIOR FELONY CONVICTIONS SEPARATELY IN DETERMINING WHETHER THE CAREER OFFENDER DESIGNATION APPLIED UNDER U.S.S.G. § 4B1.1(a).

The Guidelines provide for an Offense Level Enhancement, if a Defendant is a Career Offender. U.S.S.G. § 4B1.1(a). In addition, a Defendant who is a Career Offender automatically has a Criminal History Category of VI. *Id.* To be a Career Offender under the Guidelines: (1) the Defendant must have been at least Eighteen (18) years old at the time of the commission of the instant offense; (2) the instant offense must be a Felony that is either a crime of violence, or, a controlled substance offense; and, (3) the Defendant must have at least two (2) prior Felony convictions of either a crime of violence, or, a controlled substance offense. *Id.* The instructions for computing Criminal History contained in U.S.S.G. § 4A1.2 apply to U.S.S.G. §

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[4] The Statutory Five (5) year challenge period had not expired in Mr. Keen's case. (See Doc. 146). 21 U. S. C. § 851(e).

4B1.1. *See* U.S.S.G. § 4B1.2, cmt. 3.

If the Defendant has multiple prior Sentences, the Sentencing Court must determine whether those Sentences should be counted separately, or, treated as a single Sentence for purposes of making the Career Offender determination under U.S.S.G. § 4B1.1(a). U.S.S.G. § 4A1.2(a)(2). "Prior Sentences are always counted separately if the Sentences were imposed for offenses that were separated by an **intervening arrest** (i.e.), the Defendant is arrested for the first offense prior to committing the second offense)." *Id.* (emphasis supplied) If there is no intervening arrest, however, prior sentences count separately "unless... the sentences were imposed on the same day." *Id.* An intervening arrest is "one that comes in between the commission of the first criminal act and the second." United States v. Wright, 862 F.3d 1265, 1281 (11th Cir. 2017) holding that an intervening arrest occurred when the Defendant committed a second offense after he was arrested for the first offense).

Mr. Keen objected to his characterization as a "Career Offender as defined in U.S.S.G. § 4B1.1," and to any offense level computations contained throughout the PSR resulting from such characterization. Specifically, Mr. Keen objected to the representation that he "has at least two prior Felony convictions for a controlled substance offense." As noted in Paragraph 32 of the PSR, the two predicate Felony convictions listed resulted in Sentences that the Columbia County Circuit Court

imposed as concurrent Sentences on the same day (August 12, 2013). U.S.S.G. § 4A1.2(a)(2) addresses whether prior Sentences are counted separately or treated as a single Sentence, and provides, for example, that prior Sentences are counted separately unless ... the Sentences were imposed on the day.

With respect to the provisions of U.S.S.G. § 4A1.2(a)(2), that prior Sentences always are counted separately if the Sentences were imposed for offenses that were separated by an intervening arrest (i.e., the Defendant is arrested for the first offense prior to committing the second offense), Mr. Keen avers that there was no intervening arrest between the two predicate offenses of conviction.

Mr. Keen was already in custody serving a Florida Department of Corrections (DOC) Prison Sentence in an unrelated case when he was transported to the Columbia County Circuit Court and served with the Warrant in Case Number 2011-CF-886. Paragraph 46 describes the above in-custody transport as Mr. Keen "arrested on February 29, 2012." (Doc. 230) Department Of Corrections released Mr. Keen on July 7, 2012. Nearly One year later, during the execution of a Capias in Case Number 2011-CF-886, Law Enforcement came upon the circumstances leading to the charges listed at Paragraph 47, Columbia County Circuit Court, Case Number 2013-CF-421. (Doc. 230) *See*, for example, United States v. Powell, 798 F.3d 431, 440 (6th Cir. 2015), concluding that:

If the Sentencing Commission had intended for the words "intervening arrest" to encompass other intervening events such as Summons, and, Citations, it could easily have used a different, broader term. At least, the word "arrest" is ambiguous in this context, and, the Rule Of Lenity requires that we resolve that ambiguity in favor of [the Defendant]. Id.

Hence, the Career Offender designation is in error

CONCLUSION

Mr. Keen's Sentence should be vacated and the cause remanded for re-sentencing to a different District Judge with instructions to apply the guidelines Constitutionally and with due regards for the precedent set by the United States Supreme Court and the Eleventh Circuit.

Respectfully Submitted,

/s/ Noel G. Lawrence
Noel G. Lawrence, Esquire
101 Union Street East, Suite 200
Jacksonville, Florida 32202
Telephone: 904-356-9928
Facsimile: 904-356-6762
Email: nglawren@lpnlaw.com
Florida Bar No.: 844251
Attorney for Appellant/Defendant
Johnathan Keen