NO. _____

In The Supreme Court of the United States

CHARLES C. WILLIAMSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE DISTRICT COURT AND CIRCUIT COURT MISINTERPRETED AND MISAPPLIED THE "RELEVANT CONDUCT" PROVISIONS OF UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (U.S.S.G.) § 1B1.3 BY ATTRIBUTING TO THE APPELLANT THE WEIGHT OF DRUGS CONSUMED BY THE PERSONAL USE OF HIS ACCOMPLICE?

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States v. Charles C. Williamson, Case No. 5:18CR00022JPB-JPM-1. United States District Court for the Northern District of West Virginia, at Wheeling. Judgment entered November 8, 2018.

United States v. Charles C. Williamson, Court of Appeals Docket No. 18-4837. United States Court of Appeals for the Fourth Circuit. Opening Date 11/21/2018. Judgment entered April 20, 2020.

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CHARLES WILLIAMSON

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

I. OPINIONS BELOW

The Published Opinion of the United States Court of Appeals for the Fourth Circuit appears in West's National Reporter System at *United States v. Williamson*, 953 F.3d 264 (2020), and at Document #39, Fourth Circuit Court of Appeals, No. 18-4837. (1A, at P. 1a) The case was argued in Richmond, Virginia, before a three-judge panel, consisting of Circuit Judges J. Harvie Wilkinson, III, Paul V. Niemeyer and Diana Gribbon Motz, on January 29, 2020, and it was decided on March 23, 2020. The opinion of the Appeals Court, authored by Judge Wilkinson, affirmed the judgment of the United States District Court for the Northern District of West Virginia, District Judge John Preston Bailey. After a voluntary plea, without a plea agreement, and after a contested sentencing hearing, District Judge Bailey's findings and conclusions about the drug weight attributable to the appellant/defendant were incorporated into the Judgment Order, (1A, P. 18a) which was filed on November 8, 2018.

II. JURISDICTION

This Petition seeks review of an opinion of the United States Court of Appeals for the Fourth Circuit, decided on March 23, 2020, in Case No. 18-4837, *United States v. Charles Williamson*. A Petition for Rehearing was filed on April 6, 2020 and denied on April 20, 2020. This Petition is filed within 150 days of the denial of Williamson's Petition for Rehearing in accordance with Rule 13, Rules of the Supreme Court of the United States, and this Court's March 19, 2020 order extending the 90 day filing deadline to 150 days, in light of the ongoing public health concerns relating to COVID-19. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254.

III. STATUTES AND REGULATIONS INVOLVED

United States Sentencing Commission, Guidelines Manual (U.S.S.G.) § 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were
(i) within the scope of the jointly undertaken criminal activity,
(ii) in furtherance of that criminal activity, and
(iii) reasonably foreseeable in connection with that criminal activity; that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course
of attempting to avoid detection or responsibility for that offense;
(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
(4) any other information specified in the applicable guideline.

*****

18 U.S.C. § 3553(a). Imposition of a sentence

(a) Factors to be considered in imposing a sentence.-- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed--
(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

IV. STATEMENT OF THE CASE

A. Procedural history

1. District Court

A three (3) count indictment, filed June 5, 2018, charged the appellant, Charles Williamson, and his co-defendant and ex-girlfriend, Brea Saeger, with conspiracy to distribute methamphetamine, heroin, cocaine and cocaine base (Count One) and aiding and abetting distribution of methamphetamine (Counts Two and Three). (JA, P. 11) On June 7, 2018, both defendants were arrested. (JA, P. 3) Initial appearances were held and both defendants were released on personal recognizance bonds with standard conditions of supervision. (JA, P. 4) The appellant's bond was later revoked

due to a positive drug screen, and he has been incarcerated continually since August 7, 2018. (JA, P. 8)

On July 16, 2018, the appellant, Charles Williamson, entered a plea of guilty to Count Two of the indictment. (JA, P. 21) He declined to accept the plea deal which was proposed by the government, though never reduced to writing. Although there was no plea agreement, the government later moved for the dismissal of the remaining two (2) counts and for a reduction of the total offense level by three levels. The appellant's co-defendant and ex-girlfriend, Brea Saeger, entered a plea of guilty to the same count of the indictment on July 11, 2018. (JA, P. 8)

The appellant came back before the district court on November 7, 2018 for sentencing. (JA, P. 9, 24 and 58) There was no stipulation regarding drug weight, type or other aspects of his relevant conduct. Testimony was taken and documentary evidence offered by the government and the defendant on that issue.

Based upon the record of the case and the sentencing hearing testimony and other evidence presented at the November 7, 2018 Sentencing Hearing, the district court judge ultimately found that the defendant was responsible for 500 grams of Ice, resulting in a base offense level of 32. (JA, P. 47 and 62) The district court judge added a two (2) level enhancement for obstruction. The government moved for a three (3) level reduction for acceptance of responsibility, which motion was granted. The total offense level was 31. The defendant's criminal history category was II. The defendant was sentenced to the low end of the guidelines range of 121 months, with credit for time served from August 7, 2018. The appellant was designated to FCI

Morgantown where he is serving his sentence. The defendant was also sentenced to three (3) years of supervised release. No fine. No restitution. The special mandatory assessment of $100 was imposed. Forfeiture of $400 was not contested.

The district court's Judgment in a Criminal Case was entered by Honorable John Preston Bailey, Judge, United States District Court for the Northern District of West Virginia, on November 8, 2018, in Case No. 5:18CR22, United States v. Charles C. Williamson. (1A, P. 18a) Therein, the defendant (appellant herein) was adjudicated guilty of Count Two, Aiding and Abetting the Distribution of Methamphetamine, and sentenced to be imprisoned for 121 months. Thereafter, on November 19, 2018, the defendant filed his Notice of Appeal to the Court of Appeals for the Fourth Circuit. Docket #72, USDC NDWV Case #5:18CR22. (JA, Vol. 1, P. 9)

After entering her guilty plea on July 11, 2018 (JA, P. 7), Brea Saeger was accepted into a Drug Court, and she has never been sentenced. In her June 27, 2018, plea agreement letter, the government offered a stipulation of 1 to 2 grams of Ice, resulting in an offense level of 16 before any reduction for acceptance of responsibility. See ¶9, P. 3 of Saeger's Plea Letter. (JA, P. 16)

2. Appeals Court

The matter was docketed in the Fourth Circuit Court of Appeals on November 21, 2018, as No. 18-4837. Briefing was timely submitted and oral argument was held on January 29, 2010. The Fourth Circuit reviewed the district court's method of estimating the drug weight attributable to Williamson as relevant conduct *de novo*, citing *United States v. Layton*, 564 F.3d 330, 334 (4th Cir. 2009) regarding the

standard of review. The appellant's primary contention on appeal was that the district court applied an erroneous legal interpretation of relevant conduct by attributing to Williamson the weight of drugs that his accomplice, Brea Saeger, consumed for personal use. The Fourth Circuit Court of Appeals issued its judgment on March 23, 2020, affirming the judgment of the district judge, upholding the 121 month sentence and the district judge's findings, conclusions and interpretation of the pertinent provisions of the sentencing guidelines. A Petition for Rehearing was filed April 6, 2020, due to the appellant's counsel's belated discovery and identification of an important precedent. The Petition for Rehearing was denied April 20, 2020, and the Fourth Circuit's mandate took effect April 28, 2020.

B. Factual Background

The operative facts of the case were developed exclusively by the testimony of the appellant's co-defendant and ex-girlfriend, Brea Saeger, at Williamson's Sentencing Hearing on November 7, 2018. The appellant and his co-defendant girlfriend lived together for about four (4) years (May 2014 to June 2018). (JA, P. 29) They both admitted that during part of that time they used and distributed meth. Ms. Saeger cooperated with the government and stated that she received a gram of meth from Williamson every day for three (3) years. (¶¶ 9-11, Charles Williamson's PSR. (JA, P. 115) Based on Ms. Saeger's debriefing, the PSR attributed 900 grams of meth as relevant conduct to the appellant, resulting in a base offense level 30.

Under cross-examination, at the appellant's November 7, 2018 Sentencing Hearing, Saeger conceded that her prior statements significantly overstated the quantity of meth she claimed she received from Williamson. She testified that both she and Williamson only began using meth "a couple of months after" the death of a close friend in an auto accident that occurred in June 2016. (JA, P. 29) Taking Ms. Saeger's testimony literally, her meth use could not have begun before August 2016. She testified that she stopped using meth in May 2018. The government did not present a case agent, confidential informant or any other witness, or even proffer any different estimation regarding the time span of the defendants' alleged complicity or the kind or quantity of the drugs involved. So, according to Ms. Saeger's testimony, 22 months was the outside limit of her involvement. However, she also testified that there were separations for as long as three (3) months on at least two (2) occasions during the estimated 22 month time span. (JA, P. 30-31) Subtracting the six (6) month hiatus would net a 16 month time span.

Ms. Saeger's rendition included some peripheral details of her life during this era. For example, she admitted that during the separations from Mr. Williamson, she received drugs from as many as 15 different suppliers. (JA, P. 40) But, when she and the appellant were together, she testified, they were doing meth together. (JA, P. 36) She agreed that they did not have a user-dealer relationship. (JA, P. 17) She used. He used. They used together. She testified that she did expect her cooperation in the case against her ex-boyfriend to result in a sentence reduction for her. (JA, P. 18)

Several hand-written letters were admitted into evidence, based on the foundation of Ms. Saeger's acknowledgement of the authenticity of the letters she wrote and delivered to Mr. Williamson. (JA, P. 14) In the letters, she apologized to him, professed her undying (though tortured) love for him, admitted lying frequently and cheating repeatedly, and detailed her involvement with other men as lovers and drug suppliers. Though she acknowledged writing and delivering the letters to Mr. Williamson, she attempted to deflect the impact of these admissions on her credibility by saying that when she confessed to him about her lying, she was actually lying about her lying, only to satisfy Mr. Williamson's abusive demands. (JA, P. 37) Her debriefing, other out-of-court statements and her in-court testimony were riddled with inconsistencies and admitted fabrications. Ms. Saeger's cross-examination ended with a fitting summary of the degree of concern she demonstrated about the integrity of the truth-seeking process. She was asked, "How do we know when you're telling the truth and when you're lying." Her answer: "Whatever." (JA, P. 42).

Nevertheless, when Judge Bailey articulated his findings from the bench, he estimated 630 grams of meth based on one (1) gram of meth per day for 21 months at 30 days per month. He then reduced that finding, so that it fit neatly into the next lower offense level of 30, U.S.S.G. § 2D1.1(c)(5), to 500 grams or less "[j]ust because there may — there's a little bit of doubt on the periods," (JA, P. 47) meaning, apparently, that he had doubts about the actual time period the defendant and Ms. Saeger were together and allegedly using meth together on a daily basis. A courtesy copy of the appellant's objections to the PSR was emailed to the district court judge,

(JA, P. 67) which laid out the appellant's objection to the proposed attribution of the co-defendant's personal consumption as relevant conduct attributable to the appellant. The judge did not address that objection on the record. In the PSR, a small quantity of meth was attributed to the appellant based on two (2) controlled buys, to which the appellant did not object. However, at the appellant's Sentencing Hearing, Ms. Saeger's testimony about her personal use was the sole basis of the government's proof regarding the appellant's relevant conduct.

The modus operandi of the defendants' meth distribution operation was not fleshed out in great detail, but Ms. Saeger admitted that she was directly and inextricably involved, including dividing, weighing and packaging the product, contacting customers, arranging for drug sales by text, social media messaging and calls, and delivering drugs to customers "every once in a while." (JA, P. 12) She did deny ever obtaining drugs directly from their source of supply. (JA, P. 34) Nevertheless, she conceded that she was "an accomplice in every sense of the word," (JA, P. 35) and there was "[n]o sense in which Charles is more culpable than [she is]." (JA, P. 36) She was asked, "When meth was available were you free to use what you chose to use or what you felt you needed?" She replied, "I guess. I mean we did it together." (JA, P. 36)

Somehow, based on this arrangement, Ms. Saeger's base offense level is 16, while the appellant's is 34. He received a sentence of 121 months and she was accepted to Drug Court, and, in any event, probably would be eligible for probation. An inexplicable goose v. gander dichotomy.

V. REASONS FOR GRANTING THE WRIT

In its published opinion, *United States v. Williamson*, 953 F.3d 264 (2020), the Fourth Circuit Court of Appeals affirmed the judgment and the sentence imposed on the appellant, Charles Williamson, by Judge Bailey. Judge Bailey's findings, regarding "relevant conduct," under United States Sentencing Commission, Guidelines Manual (hereafter "U.S.S.G.") § 1B1.3, consisted of his estimation of the amount of drug weight attributable to the appellant, and, somewhat paradoxically, to a small adjustment up for obstruction and a small adjustment down for acceptance of responsibility. Judge Bailey's estimation of the drug weight attributable to the appellant rested entirely on the weight of methamphetamine, consumed by the personal use of the appellant's ex-girlfriend, co-defendant and admitted accomplice, Brea Saeger. The government chose not to present evidence of controlled buys or other historical drug deals at the November 7, 2019, contested sentencing hearing.

The appellant contends that the weight of the drugs consumed by the personal use of his accomplice was not properly linked to the offense of conviction, aiding and abetting distribution. 21 U.S.C. § 841. In this context, the application of U.S.S.G. § 1B1.3 (relevant conduct) to his conviction for aiding and abetting distribution of a controlled substance hinges on how we define "distribution," and on whether there is a valid distinction between (A) the weight of drugs intended for distribution to third parties by either or both accomplices and (B) the weight of drugs consumed by the personal use of either or both accomplices.

Section II A of Judge Wilkinson's opinion, 953 F.3d 264, at page 268, is a fine essay about the "weight-driven scheme[/design/approach]" for punishing drug offenses. The operative philosophy can be reduced to a short formula, supplied by Judge Wilkinson himself: "The higher the weight, the higher the penalty." *Williamson*, 953 F.3d, at p. 268. He explains that, after the passage of the Anti-Drug Abuse Act (ADAA) by Congress in 1986, the United States Sentencing Commission and the federal courts implemented the foundational assumption that the type and weight of drugs involved should be "the single most important determinant of the drug offender's sentence length." *Williamson*, 953 F.3d at 269 (quoting from U.S. Dep't of Justice, An Analysis of Non-violent Drug Offenders With Minimal Criminal Histories, 15 (1994), as cited in *Williamson*, 953 F3d at 269. As a summary of the relevant legal history, Judge Wilkinson's thesis is unassailable. *See*, *also*, *Kimbrough v. United States*, 552 U.S. 85, 96 S. Ct. 558, 169 L. Ed. 2d 481 (2007). However, this history is ancient history. The ADAA was enacted before the first federal sentencing guidelines became operative. As with *Kimbrough's* review of the 100-to-1 crack/powder cocaine disparity, some of Congress's assumptions are quite dated and ripe for reconsideration.

Moreover, the question posed by this case is not necessarily a challenge to Congress's policy judgment that drug type and weight is "the best metric for evaluating the seriousness of a drug offense." *Williamson*, at p. 268. Rather, this case raises a related question, and one that is eminently more important because the "weight-driven" approach has been baked into the cake for an entire generation of

lawyers and judges. The related question is: generally, how do we decide what drug weight is attributable to a defendant, and, particularly, under what circumstances should the weight of drugs consumed by the personal use of an accomplice be treated the same as the equivalent weight of drugs which were intentionally sourced, packaged, marketed and delivered to third parties, i.e. commercial drug trafficking.

In Section II B, Justice Wilkinson grapples with the issue of "how district judges ordinarily decide the drug quantity attributable to a defendant under the Guidelines." *Williamson*, 953 F.3d, at p. 269. He discusses how the Guidelines Manual faces the question raised by this case with the application of the"relevant conduct" concept, which was codified and textually defined in U.S.S.G. § 1B1.3. Judge Wilkinson offers, as a summary of relevant conduct, that, "very roughly speaking, 'relevant conduct' means a defendant's own behavior generally surrounding the offense of conviction and also, when applicable, the behavior of his accomplices or co-conspirators" (citing *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989)).

Judge Wilkinson fairly frames the proposition put forward by this appellant, that "drugs possessed or consumed for 'personal use' by his accomplice fall outside the ambit of relevant conduct." *Williamson*, 953 F.3d, at p. 270. As the starting point of his disagreement with the appellant, he cites the canon of cases upholding the doctrine that drugs consumed or possessed for "personal use" may be counted as relevant conduct at sentencing for the crime of conspiring-to-distribute a controlled substance," viz. *United States v. Iglesias*, 535 F.3d 150, 160 (3d Cir. 2008); *United States v. Clark*, 389 F.3d 141, 142 (5th Cir. 2004); *United States v. Page*, 232 F.3d

536, 542 (6th Cir. 2000); *United States v. Asch*, 207 F.3d 1238, 1243-44 (10th Cir. 2000); *United States v. Stone*, 139 F.3d 822, 826 (11th Cir. 1998); *United States v. Fregoso*, 60 F.3d 1314, 1328-29 (8th Cir. 1995); *United States v. Snook*, 60 F.3d 394, 396 (7th Cir. 1995); *United States v. Innamorati*, 996 F.2d 456, 492 (1st Cir. 1993). *Williamson*, p. 270. Judge Wilkinson acknowledges that neither the Fourth Circuit or any other circuit has squarely answered whether this rule applies to cases not involving a conspiracy conviction, but merely involving aiding and abetting, which he describes as "conspiracy's close kin" *Williamson*, at p. 271. Although he acknowledges some distinction between conspiracy and aiding-and-abetting, he apparently believes it is a close enough kin that the same rule should apply.

Judge Wilkinson's rhetoric echoes the rationale from the cases in the string cite. He, likewise, barely acknowledges the rationale of dissenting authorities — most notably, *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977). *Swiderski* stands for the proposition that "simple, joint possession" should be treated the same as personal possession and use, *Swiderski*, at p. 548 F.2d. The Second Circuit Court of Appeals adopted the concept of "simple joint possession" of drugs, meaning that "where two (2) individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse-simple joint possession, without any intent to distribute the drug further." *Swiderski*, 548 F.2d at 450. In *Swiderski*, drug sharing — "simple joint possession" — was not necessarily deemed to be drug "distribution," as the Fourth Circuit held in *United States v. Washington*, 41 F.3d 917 (4th Cir. 1994).

In the rare case, like *Washington*, Id., in which *Swiderski* is even mentioned, the discussion only addresses superficially, if at all, the rationale that punishment for drug use/abuse need not, indeed should not, be as harsh as sentencing for profit-making drug trafficking. *Swiderski*:

> Congress' reasoning in providing more severe penalties for commercial trafficking in and distribution of narcotics was that such conduct tends to have the dangerous, unwanted effect of drawing additional participants into the web of drug abuse. For this reason the House Report equated "transactions involving others" and "distribution to others" with the harsher penalties provided by §§ 841 and 848. Where only individual possession and use is concerned, on the other hand, the Act prescribes lesser penalties and emphasizes rehabilitation of the drug abuser. Similarly, where two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse simple joint possession, without any intent to distribute the drug further. Since both acquire possession from the outset and neither intends to distribute the drug to a third person, neither serves as a link in the chain of distribution. For purposes of the Act they must therefore be treated as possessors for personal use rather than for further distribution. Their simple joint possession does not pose any of the evils which Congress sought to deter and punish through the more severe penalties provided for those engaged in a "continuing criminal enterprise" or in drug distribution.

Swiderski, p. 450.

Counsel for the appellant in this case only discovered the *Swiderski* opinion and doctrine after all briefing had already been submitted in the Circuit Court appeal. The government's attorney was apprised and the three-judge panel was informed, with abject apologies, on the morning of oral argument. Because Judge Wilkinson's opinion did not mention *Swiderski*, a motion for re-hearing was filed, but the circuit court declined. Judge Wilkinson can certainly be excused for not addressing this authority due to the belated notice by appellant's counsel, but it is

asserted again here, with great emphasis, that the matter raised by this case can not properly be resolved, one way or the other, without directly addressing this key authority. Appellant's counsel apologizes, again, although utmost diligence was exercised to find any authority that addressed this novel scenario. It is with some embarrassment that I must confess that the one case that introduces a potential paradigm for resolving just such a scenario escaped my attention until the literal eve of oral arguments in the Circuit Court.

Judge Wilkinson believes the appellant's argument fails/falters/misses the mark, because: (A) the "exception" advocated by the appellant is "nowhere in the text of the guidelines," (B) appellant's offense of conviction was "distributional" in nature (he supplied her), not simple possession, and "distribution" is the very antithesis of "personal use," and, (C) even if an accomplice acknowledges that they didn't have a typical "buyer-seller" (user-dealer) relationship, it still involves an "inherently collective enterprise"/"joint criminal activity." *Williamson*, at p. 272.

Response to A: The criticism that the defendant's approach is "atextual" evokes the best-known aphorism of Justice Oliver Wendell Holmes, that "[t]he life of the law has not been logic; it has been experience." The Common Law, Lecture I, Page 1. Codified law, statutory or regulatory, is often expressed in broad, general, and often vague, terms. Drafters apply logic and incorporate language meant to capture a wide spectrum of circumstances. The myriad variation of circumstances can rarely be anticipated. Judging is the art of applying that generality to minutely detailed particular cases. That is as it should be. The modern aspiration — perhaps attended

by some hubris — may be to remove all wiggle room. Thus, our tax code and other statutory schemes that would have required their own wings in the Library of Alexandria. The United States Sentencing Commission, Guidelines Manual, to some extent, is an exercise in such hubris. Still, there will always be failures of imagination, unexplained omissions, obvious oversights, and other reasons why atextual interpretation — aka "judging" — is required. If the "exception" urged by the defendant is not explicitly expressed in the text of the Guidelines Manual, neither is the syllabus of Judge Wilkinson's opinion.

Response to B: Whatever the intention of either or both of two (2) parties regarding the involvement of third parties, in ordinary English the sharing of something by two (2) persons necessarily involves the transfer, delivery and/or distribution from one to another. In that sense, he supplied her, just as she surely supplied him. Physical transfer of an illegal substance from one hand to another — and, perhaps, far more ambiguous action — is enough to constitute transfer, which is enough to constitute delivery, which is enough to constitute distribution.

Response to C: We are back to the textual, definitional, semantic exercise. Aiding and abetting distribution, the crime of conviction, may be an "inherently collective enterprise," but if the "vast bulk" of the drugs that were handled were not deployed in that enterprise but were consumed by personal use of the defendant and/or his accomplice, it is reasonable to distinguish between the commercial trafficking and personal use.

The rationale for *Swiderski's* "joint simple possession," however, is not driven by strict lexical semantics, but by practical considerations based on the underlying assumption that users need not be punished in the same harsh fashion as traffickers. The appellant contends that the weight-driven scheme, as applied in *Williamson*, fails/falters/falls short, when it is applied to "personal use" including "simple, joint possession." The more lopsided the balance of drugs-consumed-by-personal-use versus drugs-delivered-for-third-party-consumption, the harder it is to see how it is reasonable to attribute the entire drug weight as a valid analog for the seriousness of the criminal enterprise. One can readily dream up hypothetical cases to illustrate this, to-wit: Addict #1 purchases and uses a gram of meth every day for a year. Addict #2 does the same, but on one occasion, he sells a gram of meth to a friend, who, coincidentally, has become a confidential informant. Addict #3 pools money with a friend and buys meth, which they share every day for a year. Addict #4 pools money with an intimate partner and buys meth which they share, and on two (2) or three (3) occasions they sell a gram to someone else. Addict #5 and his girlfriend buy meth which they use and/or traffic to third parties about half the time. Addict #6 and his girlfriend buy large quantities of meth, use about 10% and sell 90%. With the obvious exception of Addict #1, is it reasonable to attribute the entire weight of drugs obtained and consumed or possessed by each of these offenders as relevant conduct?

Thus, probing the boundaries of the "weight-driven" rationale adopted by Judge Wilkinson, we could generate more hypothetical scenarios than Bach's Goldberg Variations. The point of this thought experiment is to demonstrate that

when the weight of the drugs "distributed," in the sense of commercial drug trafficking to third parties, is only a tiny fraction of the total weight of the drugs that were obtained and consumed or possessed, whether an exception is mentioned in the guidelines or not, it is easy to see how procedurally and substantively unreasonable it is to calculate the offense level and impose the sentence based on the total weight of the drugs obtained and consumed or possessed. Judge Wilkinson acknowledged that the "vast bulk," *Williamson*, p. 267, of the drug weight in this case was the weight of drugs consumed by the personal use of the appellant's accomplice and on-and-off girlfriend, Brea Saeger. At some tipping point — to employ the popular cliche — it may become reasonable to attribute the entire weight of drugs obtained and consumed as an analog of the seriousness of the criminal conduct, but sorting out the amount "distributed" versus the amount consumed by personal use of the defendant or the defendant's *Swiderski*-esque accomplice would be more reasonable. Offsetting the estimated "relevant conduct" by the weight of drugs consumed by personal use of an individual or simple joint possession of two (2) accomplices is a reasonable method of achieving the objectives of the federal drug laws.

There is a line of cases holding that drug quantities that were intended for defendant's personal use must be excluded from relevant conduct because keeping drugs for oneself is not within the common scheme or plan of selling, giving or distributing them to another, and, therefore, such quantities are not relevant conduct. *See United States v. Fraser*, 243 F.3d 473 (8th Cir. 2001); *United States v. Kipp*, 10 F.3d 1463 (9th Cir. 1993); and *United States v. Wyss*, 147 F.3d (7th Cir.

1998). The logic and rationale underlying these holdings was explained as follows: "it is understood that the Guidelines are designed 'to punish distributors more harshly than consumers of drugs and to make sentence[s] proportional to the amount of harm to society….'" *United States v. Rodriguez-Sanchez*, 23 F.3d 1488, at 1496 (9th Cir. 1994). See also, *United States v. Gill*, 348 F.3d 147 (6th Cir. 2003) (defendant's possession of drugs for personal use could not be considered relevant conduct attributed to defendant for sentencing purposes).

The Eleventh Circuit specifically rejected *Kipp* in *United States v. Antonietti*, 86 F.3d 206 (11th Cir. 1996). There appears to be some disagreement and a split of authority over when and whether to include quantities possessed for personal use as relevant conduct. Some circuits have resolved this riddle by drawing a bright line in the application of the rule to a straightforward case of distribution (or possession with intent to distribute) versus a case of conspiracy. *See*, *for example*, *United States v. Pinkham*, 896 F.3d 133 (1st Cir. 2018). Dale Pinkham was convicted of conspiracy to distribute heroin. In fact, Judge Selya is at pains to stress that Pinkham was the undisputed "ring-leader" of a family business that involved drug-trafficking, burglary, witness intimidation and other bad behavior. In *Pinkham*, the First Circuit held that in a drug-conspiracy conviction, even drug weight that was satisfactorily proven to be for personal use is relevant conduct. "The full amount of drugs that he could reasonably have anticipated would be within the ambit of the conspiracy." Id. at p. 137. On the other hand, Judge Selya interpreted the decisions of other circuits as creating a clear distinction between conspiracy cases and cases of possession-with-

intent-to-distribute, in which the government bears the burden of proving the defendant possessed the drugs for distribution rather than for personal use, *Pinkham*, at p. 138, citing *United States v. Gill*, 348 F.3d 147 (6th Cir. 2003); *United States v. Williams*, 247 F.3d 353 (2d Cir. 2001); *United States v. Wyss*, 147 F.3d 631 (7th Cir. 1998); and *United States v. Polanco*, 634 F.3d 39 (1st Cir. 2011).

This case also raises the question of where aiding and abetting distribution of meth may fall on that continuum. Ordinarily one would expect that when the government drops the conspiracy count, as in this case, drug relevant conduct is limited only to the amount attributable to the defendant and not to amounts attributable to alleged co-conspirators. The government dropped the conspiracy count as to both defendants and made no effort to prove a conspiracy at the appellant's November 7, 2019, Sentencing Hearing. Accordingly, the drug weight should exclude bona fide personal consumption of the appellant, and the subject of this appeal is the appellant's contention that the district court should have also excluded the weight of drugs consumed by the personal use of the charged accomplice.

The *Antonietti* opinion noted that in deciding this issue, the First Circuit held that where there is evidence of a conspiracy to distribute, and the defendant is a member, the "defendant's purchases for personal use are relevant in determining the quantity of drugs that the defendant knew were distributed by the conspiracy." *United States v. Innamorati*, 996 F.2d 456, 492 (1st Cir. 1993), *cert. denied*, 510 U.S. 955, 114 S. Ct. 409, 126 L. Ed. 2d 356 (1993). The First Circuit's view has been followed by the Seventh, Eighth, and Tenth Circuits. *See United States v. Snook*, 60

F.3d 394, 395 (7th Cir. 1995); *United States v. Fregoso*, 60 F.3d 1314, 1328 (8th Cir.), *reh'g and sugg. for reh'g en banc denied* (Oct. 10, 1995); *United States v. Wood*, 57 F.3d 913, 920 (10th Cir. 1995). The *Antonietti* opinion did note, however, that on two occasions, the Ninth Circuit has held that "[d]rugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they are not 'part of the same course of conduct' or 'common scheme' as drugs intended for distribution," citing *Kipp*, supra, and *United States v. Rodriguez-Sanchez*, 23 F.3d 1488, 1494-96 (9th Cir. 1994). For one more case with an interesting discussion about teasing apart evidence of "distributive intent" against a claim of personal use in the sole-defendant, dismissed-conspiracy category, *see*, *United States v. Niles*, 708 F. Appx. 496 (10th Cir. 2017).

Of course, those precedents do not directly answer the question presented herein, regarding the attribution of drug quantities consumed by the personal use of an accomplice, but, following the same logic, drug quantities consumed by personal use of an accomplice are not within the scope of the jointly undertaken criminal activity and not in furtherance of the criminal activity charged, ergo: not relevant conduct. The logic is simple, though the appellant has conceded that the application may create more work for district judges.

The sentencing guidelines commentary to § 1B1.3 sheds further light on the analysis. "<The conduct of others that meets all three criteria set forth in subdivisions (i) through (iii) (i.e., "within the scope," "in furtherance," and "reasonably foreseeable") is relevant conduct under this provision. However, when the conduct of

others does not meet any one of the criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision.>“ U.S.S.G. § 1B1.3, App. Note 3(A). The rationale for the *Fraser*/*Kipp*/*Wyss* holdings is that, though personal consumption is a violation of drug laws, it is not part of the charged conduct of distribution, not grouped with distribution for sentencing purposes, and, therefore, not relevant conduct. Neither the appellant, Charles Williamson, or his accomplice and co-defendant, Brea Saeger, would have been charged with aiding and abetting distribution of methamphetamine if either or both had only acquired drugs to be personally consumed. Although they were both involved in distribution, the weight of drugs consumed by personal use was not attributed to the using defendant. It is no great stretch to determine that the weight of drugs consumed by personal use of the accomplice should not have been attributed to the other defendant either.

Williamson’s case is not a perfect match with *Swiderski*, in that Williamson and his accomplice, Brea Saeger, were distributing to third parties. But, *Swiderski’s* facts don’t match *Swiderski’s* syllabus either. During the controlled buy Swiderski and his girlfriend, Maritza De Los Santos, sampled some cocaine and commented that it was not good enough for their personal use but they had a buyer who would take it. So, the Second Circuit court fudged a little to support the syllabus point it thought answered this “nice little question,” *Swiderski*, at page 447.

There is a final point that needs to be parsed regarding Judge Wilkinson’s analysis. Brea Seager’s admitted involvement and complicity was so complete that it is unreasonable to isolate the one (1) aspect of the operation that really seemed to

matter to Judge Wilkinson. Saeger testified that Williamson solely obtained drugs from the couple's source of supply. She admitted her otherwise *all-in* participation in every aspect of the scheme — handling drugs, packaging drugs, arranging the sale of drugs, delivery of drugs. Justice Wilkinson seized on the one (1) purported distinction in the roles of the admitted accomplices, though conceding that, "from there, the two [Charles and Brea] shared roles." *Williamson*, 953 F.3d at 266. For Judge Wilkinson, the finding that Saeger claimed to have had no contact with their source is dispositive. The appellant must concede that this finding is not contradicted by the record of the sentencing hearing. Practicing court-room attorneys will appreciate the dilemma of allowing their client to be subjected to cross-examination on other issues in order to refute one seemingly minor point. Needless to say, Williamson did not take the stand. Yet, this is a thin reed on which to hang such a weighty conclusion, i.e. that he "distributed" to her, though not vice versa. Would the circuit court's opinion have gone the other way if she admitted occasionally dealing directly with their source of supply? It strains credulity that she had no contact or dealings with the source of supply. The rationale erected by the circuit court relies heavily on this isolated detail. Rather, this point should be treated as simply an outlying datapoint and one more example of how parsing the literal interpretation of "distribution" ("any transfer from one person to another") clashes with the quotidian reality of a drug addict's life. Strict pseudo-textualism is a disservice to the sentencing regime that begins with the parsimony principle wisely embedded in 18 U.S.C. § 3553, Imposition of Sentence, and the mandate to "impose a sentence

sufficient, but not greater than necessary, to comply with the purposes [of sentencing] set forth" in § 3553(a)(2).

VI. CONCLUSION

We don't have to abandon the foundational assumption that the type and weight/quantity of drug involved is "the best metric for evaluating the seriousness of a drug offense," in order to refine our discernment about how to determine the appropriate drug weight attributable to the particular defendant. The concept of joint simple possession adopted in *Swiderski*, *infra*, is reasonable based on the uncontroversial assumption that drug use/abuse need not be punished as severely as drug trafficking, and, though it may create some additional work for the sentencing judge, teasing out bona fide use/sharing from trafficking is not such a heavy lift that it outweighs the parsimony provision.

Accordingly, the appellant asks this Court to grant his request for a writ of certiorari and permit the further development and consideration of the appellant's interpretation of relevant conduct in the context of an accomplice who used/shared a significant proportion of the drug weight obtained, even when part of the drugs were also distributed to third parties.

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