No. 20-5832

IN THE

SUPREME COURT OF THE UNITED STATES

DAMON GRAHAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the United States Court of Appeals for the First Circuit abused it's discretion by improperly denying Petitioner a certificate of appealability on the conclusion that Petitioner has failed to make a substantial showing of the denial of a constitutional right?
2) Whether law enforcement committed an unconstitutional search with a K-9 on a secured storage facility unit before procuring a search warrant and violating Petitioner's expectation of privacy when executing the warrantless search by a K-9?
3) Whether the word "or" in the text of Connecticut General Statute § 21a-277(a) makes the statute disjunctive and automatically subject to the modified categorical approach?
4) Whether Conspiracy, requiring an overt act or not, could be used as a predicate for enhancement purposes when applying the categorical approach and does the United States Sentencing Commission possess the power to add the crime of 'Conspiracy' through commentary?

PARTIES INVOLVED

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

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Statutes

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Damon Graham respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, issued in Case No. 17-1677 on February 26, 2020, denying the issuance of a certificate of appealability.

OPINIONS BELOW

There was no opinion from the United States Court of Appeals for the First Circuit. Judgment was issued on February 26, 2020, and is attached as Appendix A to this petition.

The opinion of the United States District Court for the District of Rhode Island is reported at Damon Graham v. United States, 2017 U.S. Dist. LEXIS 93632 (D.R.I. 2017), was issued on June 19, 2017. (See Appendix E).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution IV Amendment.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a 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 offence 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.

United States Constitution V Amendment.

> 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 wherein 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 defence.

United States Constitution VI Amendment.

STATUTORY PROVISIONS INVOLVED

As used in this title:

(44) the term "felony drug offense" means —

> 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 prohibits or restricts conduct relating to narcotic drugs, marijuana, anabolic steroids, or depressant or stimulant substances.

21 U.S.C. § 802(44) Definitions.

§ 846. Attempt and Conspiracy

Any person who attempts or conspiries to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

§ 851. Proceedings to establish previous convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part [21 U.S.C.S. §§ 841 et esq.] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

OTHER STATUTORY PROVISIONS INVOLVED

§ 4B1.1. Career Offender

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

Commentary Application Note:

1. For purposes of this guideline —

"Crime of violence" and "controlled substance offense" include the offenses of aiding and

abetting, conspiring, and attempting to commit such offenses.

United States Sentencing Guidelines, Commentary Application Note 1

CONNECTICUT STATUTES INVOLVED

Title 21a Consumer Protection

Chapter 420b Dependency-Producing Drugs

Sec. 21a-277. (Formerly Sec. 19-480). Penalty for illegal manufacture, distribution, sale, prescription, dispensing.

> (a) Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives, or administers to another person any controlled substance which is a hallucinogenic substance other than marijuana, or a narcotic substance, except as authorized in this chapter, for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars or be both fined and imprisoned; and for a second offense shall be imprisoned not more than thirty years and may be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for each subsequent offense, shall be imprisoned not more than thirty years and may be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned.

Connecticut General Statute § 21a-277(a).

> (a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

Connecticut General Statute § 53a-48. Conspiracy. Renunciation

(50) "Sale" —

> is any form of delivery, which includes barter, exchange or gift, or offer therefor, and each such transaction made by any person whether as principal, proprietor, agent, servant or employee.

Connecticut General Statute § 21a-240 Definitions.

STATEMENT OF THE CASE

On January 4, 2017, the Petitioner filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255(a) with memorandum in support on several grounds for relief to the United States District Court for the District of Rhode Island.

On June 19, 2017 the district court issued it's memorandum and order denying all claims in Petitioner's § 2255 motion and also denied Petitioner the right to a certificate of appealability.

On July 5, 2017 a notice of appeal was filed by Petitioner to the United States Court of Appeals for the First Circuit seeking a certificate of appealability to review the district court's denial of Petitioner's § 2255 motion.

On July 19, 2017 the First Circuit issued an order stating Petitioner has until August 18, 2017 to file a memorandum why a certificate of appealability should be issued.

On August 17, 2017 Petitioner timely filed a memorandum requesting that a certificate of appealability should be granted because he had made a substantial showing of the denial of a constitutional right.

On February 26, 2020 the First Circuit issued a brief judgment without an opinion denying Petitioner a certificate of appealability stating that the Petitioner failed to make a substantial showing of the denial of a constitutional right.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the court of appeals erroneously denied Petitioner a certificate of appealability (COA) without a limited legal analysis of the law pertaining to the specific facts, reasons and issues with each claim listed in Petitioner's application for issuance of a COA. Congress required that a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." see 28 U.S.C. § 2253(c)(2). The threshold standard for granting a COA before any arguments on the merits is a 'substantial showing' and NOT a 'definite showing.'

This Court has clarified that the COA "standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner,'" Welch v. United States, 136 S. Ct. 1257, 1263 (2016), and there will be situations where "a claim can be debatable even though every jurist of reason might agree, after the certificate of appealability has been granted and the case has received full consideration, that [a] petitioner will not prevail." Buck v. Davis, 197 L.Ed.2d 1,8 (2017).

The First Circuit has sided with the district court's conclusion by deciding that Petitioner had not made a substantial showing of the denial of a constitutional right by issuing a vaguely, boiler-plate one paragraph statement denying Petitioner's claims in his COA but failing to address each claim. Petitioner avers that the district court as well as the First Circuit have

erroneously denied Petitioner the appropiate relief regarding the claim(s) litigated within Petitioner's § 2255 motion and COA respectively, and the denial of each was done arbitrarily, capricious and as an abuse of discretion. Petitioner will show this Court why the judgment of the First Circuit should be reversed and the reason Petitioner should be granted his application for a COA and the proper relief deserved with each claim.

I. Petitioner has Made A Substantial Showing of the Denial of a Constitutional Right by Ineffective Assistance of Counsel for failing to investigate and file a Meritorious Suppression Motion.

(a) Meritorious Motion to Suppress.

The First Circuit has agreed with the district court's conclusion of Petitioner not having made a substantial showing of the denial of a constitutional right by counsel failing to file a meritorious suppression motion on behalf of Petitioner. For the Petitioner to show a successful claim that is debatable on this issue would require a meritorious suppression motion that counsel failed to research and file with the district court and how counsel's irresponsible pretrial incompetence prejudiced the Petitioner.

The premise of Petitioner's claim is that Detective Bousquet along with K-9 Officer Riley and K-9 Goro (NPD drug-detection dog), all of the Narragansett Police Department, executed a warrantless unconstitutional search by using K-9 Goro to sniff the front seam of locker unit number 45 that was rented by the Petitioner at a self-storage facility in Narragansett Rhode Island.

This Court granted certiorari in Florida v. Jardines, limited

to the question of whether the officers' behavior was a search within the meaning of the Fourth Amendment. 133 S. Ct. 1409, 1414 (2013). K-9 Officer Riley stated in his written narrative of the incident during the events prior to the issuance of the search warrant at the storage unit that "he (K-9 Goro) was given the command to "search" for narcotics." (Appendix C). K-9 Officer Riley also admitted in his report that while he was controlling K-9 Goro, he gave the command for K-9 Goro to search several other units in a ascending and descending numercial order leading up to Petitioner's unit.

The occupation of the storage unit and personal possessions of the Petitioner are constitutionally protected by the Fourth Amendment as "papers and effects." The Fourth Amendment "indicates with some precision the places and things encompassed by its protection: persons, houses, papers, and effects." Ibid. Even though the search at issue did not occur at the curtilage to the Petitioner's residence, this Court was clear when it stated in the majority opinion of Jardines "[w]hen the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." Ibid.

Detective Bousquet learned the whereabouts of the storage facility by illegally seizing the innocuous set of keys by mere 'suspicion and surmising' what the keys were used for and not probable cause as the Fourth Amendment mandates, then initiating another investigation into the keys with the hopes that something

incriminating might arise thus creating a 'fishing expedition' during the search of the Graham's residence. After a further look into the keys use and several officers driving around checking a few different storage facilities, Detective Bousquet located Self Storage Center, the storage facility utilized by the Petitioner, requested renter information from the storage facility owner Joseph Victoria who denied relinquishing the information without a subponea. At 1:30 p.m. est. Detective Bousquet returned to the storage facility with the subponea in hand, delivered it to the owner Mr. Victoria who retrieved and gave the information to Detective Bousquet.

Once Detective Bousquet received Petitioners name as the units renter, he then asked to see the unit and was guided to the units location by Mr. Victoria to "observe that the lock was [a] Chateau pad lock." (Appendix B at 2). Once this observation of the lock was finished, that should have ended the matter with Detective Bousquet from any further actions until a search warrant was issued but he chose to radio for the assistance of K-9 Officer Riley and K-9 Goro to assist "with an on-going investgation" (see Appendix C), and once at the Petitioner's unit, K-9 Goro's body language changed and the K-9 begin to scratch at the lock and base of the units sliding metal door which was a positive reaction for the presence of some kind of substance.

Through the normal course of any given day, any citizen could visit a storage facility, talk to the owner and view a storage unit to rent which would occur as normal activity to anyone in

society but introducing a trained narcotics detection dog into the picture with hopes of discovering incriminating evidence creates a different perspective. Jardines, 133 S. Ct. at 1416. Drug detection dogs are highly trained tools of law enforcement, geared to respond in distinctive ways to specific scents so as to convey clear and reliable information to their human partners ... specialized device[s] for discovering objects not in plain view (or plain smell). Id. at 1418 (Kagan, J., concurring opinion).

The action of K-9 Officer Riley using K-9 Goro to sniff the bottom of the storage unit occupied by the Petitioner was a warrantless 'unreasonable search' in violation of the Fourth Amendment. This Court has reiterated on numerous occasions the proper channels law enforcement must pursue before initiating a search where the Court opined that "the mandate of the Fourth Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967).

After viewing that the lock and key at the storage unit were manufactured by the same company, that should have ended the inquiry from Detective Bousquet, but instead of departing from the facility and returning with a valid search warrant, he chose to request for K-9 assistance and initiate a search and caused all officers present to violate Petitioner's expectation of privacy by physically intruding and invading upon the storage unit and

all of the personal contents stored inside.

This Court has been adamant over the past several decades on explaining the bulwark protections of the Fourth Amendment when it pertains to individuals expectation of privacy. For the Petitioner to prevail on a claim that his legitimate expectation of privacy "has been violated by an illegal search or seizure," the [Petitioner] "need prove only that the search or seizure was illegal and that it violated his reasonable expectation of privacy in the item[s] or place at issue. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. United States v. Jacobson, 466 U.S. 109, 113 (1984). An expectation of privacy is reasonable if it has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." Georgia v. Randolph, 547 U.S. 103, 111 (2006)(quoting Rakas v. Illinois, 439 U.S. 128, 144, n. 12 (1978)). Also, regardless of the scope of the instrument (drug-detection K-9) at use, the device is not "in general public use," training it on a [storage unit] violates our "minimal expectation of privacy" -- an expectation "that exist, and that is acknowledged to be reasonable." Kyllo v. United States, 533 U.S. 27, 33-36 (2001).

It is apparent that officers only learned the information they acquired at the storage unit was by the sniff from the K-9, and used that information to bolster their chances of receiving a search warrant for the storage unit because the officers did not

have probable cause as required to justify a judicially issued search warrant. This Court had made clear "that [because] the officers learned what they learned only by physically intruding on [Petitioner's] property to gathers evidence is enough to establish that a search occurred," Jardines, 133 S. Ct. at 1417, and "when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." United States v. Jones, 181 L.Ed.2d 911, 920 (2012). The security of ones privacy against arbitrary intrusion by the police - which is at the core of the Fourth Amendment is basic to a free society. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

By officers using a trained narcotics detection K-9 on the storage unit under Petitioner's control to commit a warrantless search was a clear violation of Petitioner's right to be free from unreasonable searches and a further infringement on Petitioner's right to an expectation of privacy by law enforcement transgressing the Fourth Amendment.

(b) Ineffective Assistance of Counsel

The Sixth Amendment of the United States Constitution provides in relevant part, "in all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." The constitutional guarantee of counsel, however, "cannot be satisfied by mere formal appointment." Kimmelman, 477 U.S. at 377. The basis of an ineffective assistance of counsel claim requires the Petitioner to meet the two-part test first expressed by this Court

in Strickland v. Washington, 466 U.S. 668 (1984). In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness, Id. at 688, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. Id. at 694. Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict (or the results of the proceeding) would have been different absent the excludable evidence in order to demonstrate actual prejudice. Kimmelman, 477 U.S. at 357.

Regarding the 'reasonableness' part of the test with counsel being constitutionally deficient, there was no sound strategy or rational reason for counsel failing to research, file and litigate the meritorious suppression motion during pretrial. Instead, counsel chose to forgo investigating into the legality of the search at the storage unit and decided to seek plea negotations with the prosecutor before committing some degree of necessary effort and due diligence towards researching the obvious Fourth Amendment issue.

The negligence of counsel was not at the level of competency expected of a trained professional in the law. This error shows a lack of willingness from counsel to properly defend Petitioner or counsel total ignorance of the law applicable to the case, thus bearing an affect on "the adversarial testing process [to] not function properly unless defense counsel has done some investiagtion

into the prosecution's case and into various defense strategies. Kimmelman, 477 U.S. at 384. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Ibid.

The second part of the test issued by this Court in Strickland is the prejudice prong which is tied to the constitutional deficiency of counsel and in the case of Petitioner concerning a guilty plea, the criterion to satisfy is that there is a reasonable probability that, but for counsel's errors he would not have plead guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). After a review of the whole record, one could reasonably deduce that the Petitioner would have pursued trial instead of pleading guilty without a formal written plea agreement.

If counsel had sought the meritorious suppression motion during the pretrial stage of the proceedings, it would have changed the dynamics of the charges against the Petitioner and the outcome leading to the guilty plea but also eliminating three counts of the first indictment and one of the additional counts brought forth by the Government in the superseding indictment. The only agreement by the Government to a plea bargain were the dismissal of counts III and VI that were both 18 U.S.C. § 924(c)(1)(A) offenses[1] that did carry a hefty penalty prior to the enactment of the First Step Act, but the Petitioner would hardly consider the agreement with the

1 A viewing of the Judgment and Commitment exhibits the two counts of § 924(c)(1)(A) being dismissed on a motion by the Government in case no. 1:13CR00132-01ML. (ECF No. 123)

Government a plea-bargain as the prosecutor would not agree to dismiss or drop any other counts in the superseding indictment, would not remove the § 851 Information to Establish Prior Convictions enhancement, or to substitute the counts carrying a mandatory minimum penalty.

The obvious and logical reason the Government pursued the additional counts of the § 924(c)(1)(A) charges in the superseding indictment was to tip the scale of bargaining in their favor and covertly force a guilty plea out of the Petitioner but this could have been prevented and never occurred if the suppression motion was granted for the Petitioner, but more importantly, if counsel's incompetent and egregious error had not transpired by the lack of researching and filing the meritorious Fourth Amendment claim.

From reading the above stated facts, reasons and issues pertaining to the ineffective assistance of counsel claim, if not for counsel's lack of due diligence during pretrial preparation and failing to advance the meritorious Fourth Amendment issue, counsel's representation fell below an objectionable standard of reasonableness and there is a reasonable probability that because of counsel's unprofessional error, that this mishap caused prejudice upon the Petitioner by missing a favorable opportunity that would have produced a different result of the proceedings. Jurists of reason could conclude that the Petitioner has made a substantial showing of the denial of a constitutional right and find the issue debatable to deserve further review.

II. Petitioner has Made A Substantial Showing of the Denial of a Constitutional Right to Due Process of Law because Connecticut General Statute § 21a-277 for Sale of Hallucinogen/Narcotic is overly broad and Indivisible which disqualifies the use as a predicate for the career offender enhancement.

(a) Indivisible and Conjunctive statute

There is no dispute among the parties involved that Connecticut General Statute § 21a-277 is overly broad and does not categoically qualify as a 'controlled substance offense' within the meaning of the United States Sentencing Guidelines § 4B1.2(b)[2] and cannot be used as a predicate for the career offender enhancement. The discrepancy is the district court premised the Connecticut drug statute is 'divisible' and applied the modified categorical approach but this action along with the district court's reason for denying the Petitioner the proper relief was seriously flawed. Petitioner will address the error of the district court and explain why jurists of reason will agree that this claim should have been decided in a different manner.

This Court gave the lower courts direction on when to apply the categorical approach or the modified categorical approach, and also, how to discern when a statute in question involves only elements or enumerates various factual means of committing a single element. Mathis v. United States, 136 S. Ct. 2243, 2249 (2016).

2| The Government agreed with the Second Circuit decision of Savage, infra, that Connecticut General Statute § 21a-277(a) is over-broad and the categorical approach fails with this statute. See Government's Opposition Motion, at 12, to Petitioner's § 2255 motion. (ECF No. 154).

The district court also accepted the Second Circuit's analysis of Savage as 'persuasive authority' that the Connecticut drug statute does not categorically qualify as a predicate offense. See district court's Memorandum & Order, at 17 (ECF No. 156).

> The first task for a sentencing court faced with an alternatively phrased statute is ... to determine whether its listed items are elements or means. If they are elements, the court should do what we have previously approved: review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime. But if instead they are means, the courts has no call to decide which of the statutory alternatives was at issue in the earlier prosecution. ... [T]he court may ask only whether the elements of the state crime and generic offense make the requisite match.

Id. at 2256 (internal citation omitted); See generally United States v. Epps, 322 F.Supp.3d 299, 302-03 (D.Conn. 2018). That directive from the Court explained these methods for courts to use inorder "[t]o determine whether a state statute list alternatives elements or alternative means, courts are directed to consider whether: (1) "a state court decision definitely answers the question;" (2) the "statutory alternatives carry different punishments" and therefore must be elements under Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); and (3) the statute itself "identif[ies] which things must be charged (and so are elements) and which need not be (and so are means)." Epps, 322 F.Supp. at 303 (quoting Mathis, 136 S. Ct. at 2256).

Connecticut caselaw is inconclusive as to whether § 21a-277(a) describes elements or means, thus excluding option one as a choice. Option number two however does provide some guidance on how to determine whether § 21a-277(a) is divisible or indivisible. The Connecticut statute at issue reads in part:

> "(a) Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transport with intent to sell or dispense, possesses with intent to sell or dispense, offers, gives, or administers to another person any controlled substance ... for the

> first offense, shall be imprisoned not more than fifteen years ... and for a second offense shall be imprisoned not more than thirty years..."

Conn. Gen. Stat. § 21a-277(a). A rational reviewing of the structure and plain text of the statute, it becomes obvious that the statute is 'indivisible' and "not one that lists multiple elements disjunctively, but instead one that enumerates various factual means of committing a single element." Mathis, 136 S. Ct. at 2249.

What further gives credence to this conclusion is regardless of how a person violates the statute, they are still subjected to a maximum fifteen year sentence for the first offense, whether they "sell, dispense, offer[], give[] or administers" any controlled substance involved, the penalty is the same no matter the substance possessed by the defendant. Harbin v. Sessions, 860 F.3d 58, 65 (2nd Cir: 2017)(reasoning that the fact that a statute carries the same punishment regardless of which controlled substance is used shows "that each controlled substance is a mere 'means' of violating the statute, not a separate alternative element"); Hillocks v. AG United States, 934 F.3d 332, 344 (3rd Cir. 2019)(same).

The penalty is only increased to a maximum of thirty years if the defendant is convicted of a subsequent offense of the same statute, but never is someone enhanced based on the controlled substance charged, nor the amount of the controlled substance involved. cf. 21 U.S.C. § 841(b)(1)(A), (B), (C) or (D). The district court either failed to recognize this Court's directive of utilizing option two to discern whether the Connecticut statute listed elements alternavtively or multiple means and also reflective of the nature of

the statute being divisible or indivisible in the Petitioner's case or just ignored this requirement of the law offered by this Court.

(b) The District Court thought the Connecticut statute to be disjunctive and applied the modified categorical approach because the text of the statute embodies the word 'or'.

The district court also erred when it stated in a footnote of the court's Memorandum and Order[3] denying Petitioner's § 2255 motion that by the Connecticut statute having the disjunctive word "or" in the text, that this formation automatically indicates the statute to list elements in the alternative and thus defining multiple crimes. If this Court had agreed with the assumption of the district court, then the Court would have necessarily reached a different ruling in the decision of Descamps v. United States, 570 U.S. 254 (2013).

This Court has never held that the word 'or' in the text of a statute automatically makes the statute disjunctive, but has actually indicated to the contrary by stating "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes." Schad v. Arizona, 501 U.S. 624, 636 (1991)(plurality opinion).

This Court has been consistently clear about when a prior predicate could qualify for use as an enhancement where the Court opined "[i]f the relevant statute has the same elements as the "generic" crime, then the prior conviction can serve as a [enhancement] predicate; so too if the statute defines the crime more narrowly, because anyone convicted under that law is

[3] In a footnote of the district court's Memorandum & Order at 17, is where the court erroneously addressed that Mathis helps the court decide that the Connecticut statute is disjunctive. 136 S. Ct. at 2249.

"necessarily guilty of all the [generic crime's] elements." (citation omitted)(ellipsis omitted). But if the statute sweeps more broadly than the generic crime, a conviction under the law cannot count as a [] predicate, even if the defendant actually committed the offense in its generic form, Descamps, 570 U.S. at 261, the mismatch of elements saves the defendant from an [enhanced] sentence. Mathis, 136 S. Ct. at 2251.

In Descamps, this Court decided "that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." Id. at 258. "A court may use the modified approach 'only' to determine which alternative element in a divisible statute formed the basis of the defendant's conviction. Id. at 278. [W]e adopted the modified approach to help implement the categorical inquiry, not to undermine it." Id. at 277.

This Court offered three grounds for establishing [the] elements-centric, "formal categorical approach." Taylor v. United States, 495 U.S. 575, 600 (1990). First, it comports with [the Guidelines § 4B1.2] text and history. Second, it avoids the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries. And third, it averts "the practical difficulties and potential unfairness of a factual approach." Id., at 601; Descamps, 570 U.S., at 267.

The district court flouts this Court's rule of law first by applying the modified categorical approach to a indivisible statute, then the second error was the court's continuing inquiry to

determine the factual basis of Petitioner's plea in his prior state conviction by inspecting the plea transcripts[4]. As this Court has stated, th[is] is what we have expressly and repeatedly forbidden. Courts may modify the categorical approach to accommdate alternative "statutory definitions." Id., at 274.

The Epps Court out of the District of Connecticut came to the correct conclusion where it stated the following in the court's opinion:

> While Connecticut state courts do not require that a defendant be charged with a specific actus reus under § 21a-277(a), the actions are only means of triggering liability, not distinct elements of the crime. See State v. Cavanaugh (noting that "the state charged the defendant ... with conspiring to distribute, sell or otherwise dispense a narcotic substance in violation of General Statutes § 21a-277(a)," not specifying one act in particular). Given this language, and applying the rule of lenity, the Court concludes, while recognizing this to be a very close question, that the actions listed in the statute are indivisible and define only a single crime.

Epps, 322 F.Supp.3d, at 305-06.

> (c)This Court has addressed and rejected the exact issue of the word "or" making a statute disjunctive from the Eighth Circuit Court of Appeals.

Several dissenting circuit judges from the Eighth Circuit Court of Appeals had the right thesis in mind when questioning whether the word "or" makes a statute disjunctive and lists alternative elements or various factual means when the judges stated " [t]o observe that the statute is phrased in the disjunctive merely raises the question

4] The Government submitted the Charging Information and Plea-Hearing colloquy from Petitioner's prior Connecticut state conviction during the collateral proceedings as attachments to the Government's Response Opposition to Petitioner's § 2255 motion as Exhibit A and Exhibit B respectively. (ECF Nos. 154-2 and 154-3).

of means versus elements; it does not answer the question ... merely observing that the statute is phrased in the disjunctive is not a sufficient explanation. That task cannot be completed simply by declaring that because the statute is phrased alternatively (i.e., in the disjunctive), the alternatives must be elements." United States v. Sykes, 864 F.3d 842, 843-44 (8th Cir. 2017)(dissenting opinion from the denial of rehearing en banc, Colloton, Circuit Judge, with whom Gruender, Benton and Kelly, Circuit Judges join).

The dissenting jugdes stated the above after this Court granted certiorari, vacated the judgment of the Eighth Circuit, and remanded the case back for further consideration in light of the Court's decision in Mathis. See Trevon Sykes v. United States, 196 L.Ed.2d 6 (No. 15-9716) October 3, 2016.

Even though the Eighth Circuit was right in it's logic after Mathis, the circuit court still missed the mark with it's conclusion in Sykes that Missouri Annotated Statute § 569.170(1) for second-degree burglary was divisible because the statute was phrased disjunctively by the word "or". Sykes, 864 F.3d, at 842; see also United States v. Naylor, 682 Fed. Appx. 511, 512-13 (8th Cir. 2016). The Eighth Circuit later reheard Naylor en banc and reversed course with the court's previous conclusion and decided that § 569.170(1) was "indivisible" by the drafting of the statute and embodies means only and not elements of committing second-degree burglary. United States v. Naylor II, 887 F.3d 397, 407 (8th Cir. 2017)(en banc).

Trevon Sykes petitioned this Court once more after the Eighth Circuit reheard Naylor en banc and was again granted certiorari, this Court vacated the judgment of the Eighth Circuit and remanded back for further consideration this time in light of the Eighth Circuit's own deision in Naylor II. See Sykes v. United States, 200 L.Ed.2d 738 (No. 16-9604) April 16, 2018.

(d) Sale is defined broadly in Connecticut

The district court relied upon a decision from the Second Circuit Court of Appeals as persuasive authority for part of the court's reason for denial, but failed to notice or mention a key point from the circuit court that the definition of "sale" is overly broad in Connecticut. Connecticut defines the word 'sale' in pertinent part as " any form of delivery, which includes barter, exchange or gift, or offer therefor." Conn. Gen. Stat. § 21a-240(50).

The Second Circuit had stated that "we have explained, the Connecticut Statute criminalizes non-predicate conduct by virtue of the broad definition given to "sale" under Connecticut law. Because a "sale" under Connecticut law includes a mere offer to sell drugs, and an offer to sell drugs is not a controlled substance offense, the conviction does not qualify as a controlled substance offense." United States v. Savage, 542 F.3d 959, 967 (2nd Cir. 2008).

With the broad definition pertaining to the word 'sale' in Connecticut, a sale could only be deemed as 'illustrative examples' or ways of accomplishing a potential controlled substance transaction in the State of Connecticut. This Court had determined that "if a statutory list is drafted to offer "illustrative examples," then it

includes only a crime's means of commission[, and] if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution." Mathis, 136 S. Ct., at 2256.

Relevant to todays jurisprudence concerning the categorical approach after the Court's decisions of Descamps and Mathis, it is evident that the Second Circuit misapplied the modified categorical approach in Savage when § 21a-277(a) is a indivisible statute. Epps, 322 F.Supp.3d, at 306. The District Court and the First Circuit failed to recognize that Savage predates both Descamps and Mathis, which both opinions by this Court brought clarity on how lower courts are to use the categorical approach when certain statutes are in question as predicate offenses for enhancement purposes.

After analyzing the structure of § 21a-277(a), it can be deduced that the word 'or' in the text of the statute is a conjunctive connector forming one whole reading by the state legislature, Schad, 501 U.S., at 636, and making the Connecticut drug statute indivisible. Lastly, the broad definition of the word "sale" further verifies this point, exposing the errors of the district court and the circuit court by denying the Petitioner a COA. It is clear that Petitioner has made a substantial showing of the denial of a constitutional right and reasonable jurists would undoubtedly agree this claim was decided wrong.

III. Petitioner has Made A Substantial Showing of the Denial of a Constitutional Right Because 21 U.S.C. § 851 Invites Arbitrary Enforcement In Violation of Due Process of Law.

The mandatory minimum and maximum penalties attached to Title 21 U.S.C. 841(a)(1), via subsection (b), are increased for a defendant when a § 851 enhancement is sought through the use of a prior conviction. Though § 851 puts Petitioner on notice that based on a prior he is subjected to increased punishment, it fails to provide notice that a prior conviction is a felony drug offense predicate for the purpose of 841(b)(1) et seq., and therefore invites arbitrary enforcement. Skilling v. United States, 177 L.Ed. 2d 619, 656 (2010).

Petitioner argues that § 851 is unconstitutionally vague and deprives him of liberty without due process of law. The statute of § 851 provides in relevant part that if the Government files and serves on the person, before trial, an information charging one or more prior conviction, that person is subject to increased punishment. Interestingly though, nowhere in the statute does § 851 define prior conviction, nor does it inform or infer that it increases mandatory minimum or maximum penalties. In fact, a reasonable person, such as this Petitioner, would read § 851 to covertly deprive a person of liberty without due process of law based on two features of the statute that are: (1) failing to define the term prior conviction; and (2) applying convictions rather than "felony drug offense."

In Johnson v. United States, 135 S. Ct. 2551, 2556-57 (2015),

this Court was faced with a similar set of circumstances and decided that "the Government violates due process by taking someones life, liberty, or property under a criminal statute so vague that it fails to gives ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." (citing Kolender v. Lawson, 461 U.S. 352, 357-58 (1983)). Indeed, the prohibition against vagueness is a well recognized requirement, congenial alike with ordinary notions of fair play and established rules of law, and a statute that flouts it violates the first essential of due process. Connally v. General Construction Co., 269 U.S. 385, 398 (1926). These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. United States v. Batchelder, 422 U.S. 114, 123 (1979).

The failure of § 851 to define the term prior conviction as a 'felony drug offense' exposes Petitioner to arbitrary punishment contrary to due process of law and showing a denial of a constitutional right where jurists of reason would find the issue debatable.

IV. Petitioner has Made A Substantial Showing of the Denial of a Constitutional Right to Due Process of Law to a Unlawfully Enhanced Sentence by the use of Unqualified Predicates of Conspiracy Pursuant to § 846 and 53a-48(a).

(a) Categorical approach applies and forbids the use of § 846 conspiracy to qualify as a predicate to enhance a sentence under § 851 and § 4B1.1(a).

The conspiracy statute relevant to Petitioner's case provides that:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy. 21 U.S.C. § 846.

The statute of § 846 conspiracy needs nothing more than an agreement and not the intent to do anything more.

This Court has previously held that this particular conspiracy statute stands on its own without the necessity of an overt act for a conviction. United States v. Shabani, 513 U.S. 10 (1994). The district court agreed with the Petitioner that conspiracy of § 846 does not require the commission of an overt act, court Memorandum and Order at 25, but also believes § 4B1.1 does not because of the commentary listing 'conspiring' as comprising the offenses of a "crime of violence" or "controlled substance offense." See § 4B1.2, cmt. n.1. The district court also premised the term 'felony drug offense,' as read in § 841(b)(1), which acts as a bridge for the application of an § 851 enhancement, is an equivalent term to 'conspiracy.' The district court and the court of appeals failed to see the fallacy in determining such a presumption when denying Petitioner a COA.

This Court has instructed lower courts to employ the categorical approach to determine whether a prior conviction qualifies as a predicate offense. Taylor, 495 U.S., at 600-02. This inquiry involves two steps. The first step requires courts to review a generic definition of the predicate offense. Id., at 598. The second requires courts to determine whether the conviction at issue constitutes a conviction of the generic offense. Id., at 600. If the offense of conviction criminalizes conduct broader than that encompassed by the generic offense, then the conviction does not categorically qualify.

By focusing on the legal question of what a conviction

necessarily established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of [justice]. Mellouli v. Lynch, 135 S. Ct. 1980, 1987 (2015). The offense of conspiracy itself cannot survive the scrutiny of the categorical approach to sustain the use as a predicate for an enhancement pertaining to either the § 851 information charging prior convictions or § 4B1.1(a) career offender of the United States Sentencing Guidelines.

According to the definition section of Title 21, the term "felony drug offense" means:

> 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 prohibits or restricts conduct relating to narcotic drugs, marijuana, anabolic steroids, or depressant or stimulant substances.

21 U.S.C. § 802(44). By analyzing and comparing the text of § 846 conspiracy with the definition of what constitutes a "felony drug offense" by employing the categorical approach, it will become crystal clear that § 846 conspiracy is not a generic match for use with the § 851 enhancement or the career offender enhancement. Also, to throw salt on the wound, because § 846 conspiracy does not require an overt act, Shabani, 513 U.S. at 14, the statute thus criminalizes a broader range of conduct than that covered by generic conspiracy and the guidelines do not define 'conspiracy' under § 4B1.2, so the term of conspiracy is defined by reference to the "generic, comtemporary meaning" of the crime, Taylor, 495 U.S. at 598, but the statute must first pass through the gatekeeper

called the categorical approach to properly apply as a predicate. This Court was clear where it stated "[u]nder the [categorical] approach, we look only to the statute of conviction to determine whether there is a categorical match and "'presume that the conviction rested upon nothing more than the least of the acts criminalized' under the statute."" Mellouli, 135 S. Ct. at 1986 (quoting Moncrieffe v. Holder, 569 U.S. 184, 190-91 (2013)).

Once the statute of § 846 conspiracy is screened through the lens of the categorical approach, it will then be determined that the statute is broader than the generic meaning of conspiracy and structured in a indivisible formation, thus disqualifying its use as a predicate to enhance a sentence.

Under § 4B1.1 of the Guidelines, a defendant is deemed a career offender if the person fits the three criteria listed, with the third criterion pertinent here, which states: (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1(a). Beneath this section are the definitions describing what qualifies as a crime of violence and controlled substance offense, with the definition of a controlled substance offense being relevant here, which is defined as:

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

U.S.S.G. § 4B1.2(b). When applying the categorical approach to compare the elements of § 846 conspiracy to the Guideline definition of a controlled substance offense, there is an obvious mismatch in language between the two, and because of the mismatch existing, the conspiracy statute of § 846 does not qualify as a requisite prior conviction of a controlled substance offense that is necessary to apply the career offender enhancement under § 4B1.1(a).

> (b) Connecticut conspiracy of §53a-48(a) cannot categorically qualify as a predicate offense to enhance a sentence under § 851 and § 4B1.1(a).

The Connecticut conspiracy statute does not fare any better as a predicate to enhance a sentence with § 851 or § 4B1.1(a), even though the statute does require the completion of an overt act in furtherance of the conspiracy by any one of the conspirators. The Connecticut conspiracy statute reads as follows:

> A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more person to engage in or cause the performance of such conduct, and any one of them commits an over act in pursuance of such conspiracy.

Connecticut General Statute § 53a-48(a). Petitioner pled guilty to count 1 of an Information/Complaint in Connecticut for Conspiracy to Commit Sale of Hallucinogen/Narcotic, attached as Appendix D.

After reading the Connecticut statute of conspiracy, a determination of guilt requires the "commission" of the overt act in pursuance of the agreement, but not the elements of the overt act, which in Petitioner's case, the overt act would be § 21a-277(a). Connecticut General Statute § 21a-269 titled "Burden of proof of

exception, excuse, proviso or exemption," it describes the necessity of an overt act, which is emphatically important because in describing the burden of proof required, it states in pertinent part that "[i]f it furthers the purpose of the illegal agreement, it makes no difference that the overt act itself may not be criminal." As read, it is clear that the conduct associated with the conspiracy is insignificant because the conduct furthering the conspiracy could be noncriminal which does not involve elements that are required for a conviction but only "the facts of the overt act" for a finding of guilt in Connecticut.

The Government relied on this conviction as a prior to apply the § 851 prior conviction enhancement and applying the categorical approach to compare the Connecticut conspiracy statute with the definition of a 'felony drug offense' according to § 802(44), it becomes apparent that the prior conviction for conspiracy under 53a-48(a) is a categorical mismatch and prevented from the use as a predicate to enhance the Petitioner's minimum and maximum penalty of the sentence. Alleyne v. United States, 133 S. Ct. 2151 (2013); see also Apprendi, 530 U.S. at 490. The elements of 21a-277(a) are not required for a jury's finding of guilt or admission from a defendant during a plea hearing, all that is necessary are the 'facts' or 'actions' of the overt act from § 21a-277(a) for a conviction of the conspiracy statute in Connecticut, unlike the federal conspiracy statute of § 846. Shabani, 513 U.S. at 14.

Even assuming that for a conviction of conspiracy in Connecticut it required the elements of the overt act, this scenario

would still suffer the same fate when the categorical approach is applied. If the 'conduct' necessary of the overt act was required as elements, the Connecticut drug statute of § 21a-277(a) would be considered the overt act of 53a-48(a) conspiracy, and because the drug statute is over broad by encompassing only alternative ways of committing a single element and phrased in the conjunctive, this eliminates this prior conviction from increasing Petitioner's sentence with any potential enhancement.

Anyone charged in Connecticut with violating § 21a-277(a) can accomplish the illegal task with conduct such as "offers, gives, or administers" regardless of the controlled substances regulated by the State. When applying the categorical approach and comparing the elements of 21a-277(a) with the definition of 'felony drug offense' in § 802(44), it is easily seen that there is a clear difference in elements and definition, which excludes the application of the § 851 sentencing enhancement congruent on a charge of § 841(b)(1)(B). This same logic also prevents the career offender enhancement from applying under § 4B1.2(b) because the definition of a controlled substance offense is not a categorical match and without this prior conviction, Petitioner does not have the required two predicates necessary for the enhancement.

Another fact that prohibits the use of the § 851 sentencing enhancement and the career offender enhancement under § 4B1.1(a) is Connecticut defines the word "sale" over broad and states in part as "any form of delivery, which includes barter, exchange or gift, or offer therefor..." Conn. Gen. Stat. § 21a-240(50);See also Savage,

542 F.3d at 967. The conduct of a 'sale' in Connecticut could be executed in a few different means or ways as defined by the State and are not elements as required by the categorical approach. This Court has stated time and time again from Taylor and through out all its progeny on the demands of the categorical approach when properly utilized on a statute's comparison of elements that [u]nder the categorical approach, the judge looks only to the facts of conviction and the statutory definition of the prior offense. United States v. Davis, 204 L.Ed.2d 757, 787 (2019). The categorical approach in Petitioner's case at bar nullifies the use of the § 851 enhancement and the § 4B1.1(a) career offender enhancement.

(c) The conflict between the circuit courts involve an important question of statutory construction concerning Commentary of the United States Sentencing Guidelines.

Circuit Courts of Appeal have addressed the issue of whether § 846 conspiracy or another conspiracy involved crime qualify as a predicate offense and have reached diverse decisions on the matter, but all of the circuit courts have made a determination regarding Commentary Application Note 1 of § 4B1.2 being able to include conspiracy as an offense.

The Fourth and Tenth Circuits have come to reach similar conclusions and determined that after applying the categorical approach, that because § 846 conspiracy does not require an overt act, § 846 criminalizes a broader range of conduct than that covered by generic conspiracy and commentary application note 1 of § 4B1.2 does not possess the authorized reach to qualify the word 'conspiring'

as a controlled substance offense by simply stating a controlled substance offense includes the offense of conspiring. See United States v. Norman, 935 F.3d 232, 238 (4th Cir. 2019); United States v. Martinez-Cruz, 836 F.3d 1305, 1314 (10th Cir. 2016).

The District of Columbia and Sixth Circuits have also reached similar decisions and have ruled that the detailed "definition" of a controlled substance offense in the Guidelines clearly excludes inchoate offenses. United States v. Winstead, 890 F.3d 1082, 1091 (D.C. Cir. 2018); United States v. Havis, 927 F.3d 382, 387 (6th Cir. 2019).

The First, Second, Third, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits have abandoned the categorical approach altogether and strictly decided to rely upon commentary application note 1 to justify applying a prior conviction of a conspiracy involved crime to enhance a sentence. United States v. Nieves-Borrero, 856 F.3d 5, 9 (1st Cir. 2017); United States v. Jackson, 60 F.3d 128, 133 (2nd Cir. 1995); United States v. Marrero, 743 F.3d 389, 398 (3rd Cir. 2012); United States v. Rodriguez-Escareno, 700 F.3d 751, 753-54 (5th Cir. 2012); United States v. Adams, 934 F.3d 720, 729 (7th Cir. 2019); United States v. Mendoza-Figueroa, 65 F.3d 691, 694 (8th Cir. 1995); United States v. Rivera-Constantino, 798 F.3d 900, 903-04 (9th Cir. 2015); United States v. Lange, 862 F.3d 1290, 1294 (11th Cir. 2017).

The above listed Circuit Courts of Appeal have concluded that commentary application note 1 in reference to § 4B1.2(b) of the guidelines does not conflict with "the Constitution or a federal

statute, is [not] inconsistent with, or a plainly erroneous reading of, that guideline," and is thus authoritative. Stinson v. United States, 508 U.S. 36, 38 (1993).

This is a matter that only this Court can resolve because of the division in the circuit courts on how commentary is to be interpreted when enhancing a sentence with a prior conviction of a controlled substance offense involving the crime of "aiding and abetting, attempting or conspiring." The present question is critically necessary for clarification since it involves a heighten loss of liberty by numerous defendants being sentenced as career offenders or being enhanced from any other upward variant considered by the court as referenced in the PSR.

The career offender enhancement, though the guidelines are only advisory, when applied and a defendant is sentenced as such, the defendant is ineligible from discretionary review of a sentence reduction motion filed pursuant to § 3582(c)(2). Any future guideline amendments proposed by the Sentencing Commission pursuant to 28 U.S.C. § 994(o) and passed by the Senate Judiciary Committee excludes a defendant due to a sentence received under § 4B1.1(a).

This grave error committed by the lower courts implicates a due process concern to a defendant's increased deprivation of liberty by district and circuit courts alike misconstruing commentary application note 1 of § 4B1.2 as a controlled substance offense and choosing not to apply the categorical approach to determine if a conpsiracy crime qualifies as a predicate conviction.

This Court has an obligation ensure that lower courts comply

with the rule of law when decided in previous opinions of the Court. The Petitioner's case presents the Court with an opportune time to rectify this recurring and pressing issue affecting thousands of prisoners once and for all when statutory interpretation is at the root of this problem. Gundy v. United States, 204 L.Ed.2d 522, 532 (2018).

(d) Sentencing Commission exceeds it's authority with § 4B1.2 Commentary Application Note 1.

This Court has explained the intended purpose of the creation of the United States Sentencing Comission, the authority delegated to and retained by the Commission, and the procedures the Commission must abide by when implementing new policies regarding the Guidelines. Mistretta v. United States, 488 U.S. 361 (1989).

Section § 4B1.2 is titled definitions and listed under this section is commentary that states:

> "Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

Commentary Application Note 1. Nowhere in the text of § 4B1.2(b) describing the definition of a controlled substance offense is the word 'conspiracy' listed and only by reference in application note 1 does commentary try to include conspiring as an addition in the text of a controlled substance offense, but by referencing the word conspiring will not suffice. The application notes are interpretations of, not additions to, the Guidelines themselves; an application note has no independent force. Accordingly, the list of qualifying crimes in application note 1 to § 4B1.2 is enforceable only as an interpretation of the definitions of the term "crime of violence"

[and "controlled substance offense"] in the guideline itself. United States v. Rollins, 836 F.3d 737, 742 (8th Cir. 2016). Section 4B1.2 (b) presents a very detailed "definition" of controlled substance offense that clearly excludes inchoate offenses. Expressio unius est exclusio alterius. Indeed, that venerable canon applies doubly here. Winstead, 890 F.3d at 1091. By purporting to add attempted, [aiding and abetting, and 'conspiring'] offenses to the clear textual definition — rather than interpret or explain the ones already there, commentary in Application Note 1 exceeds it authority under Stinson.

It is evident that commentary application note 1 is not an interpretation of a definition but an instruction commanding the expansion to define a controlled substance offense in § 4B1.2(b) by creating a entirely new offense. The Sentencing Commission does not have the power to add conspiracy offenses to the list of offenses in § 4B1.2 through commentary, nor does the text defining a controlled substance offense in the Guidelines mention anything about the word 'conspiring.' Havis, 927 F.3d at 384 (en banc).

Congress created the Commission as an independent body "charged [] with the task of establish[ing] sentencing policies and practices for the Federal criminal justice system. Stinson, 508 U.S. at 40-41. The Commission fulfills its purpose by issuing the Guidelines, which provide direction to judges about the type and length of sentence to impose in a given case. Id. at 41; see generally Havis, 927 F.3d at 385. The Commission thus exercises a sizable piece "of the ultimate government power, short of capital punishment" — the power

to take away someone's liberty. Ibid. (citation omitted). The Commission falls squarely in neither the legislative nor judicial branch; rather, it is "an unusual hybrid in structure and authority," entailing elements of both quasi-legislative and quasi-judicial power. Mistretta, 488 U.S. at 412. Although the Commission is nomially a part of the judicial branch, it remains "fully accountable to Congress," which reviews each guideline before it takes effect. Id. at 393-94; see also 28 U.S.C. § 994(p). The rulemaking of the Commission, moreover, "is subject to the notice and comment requirements of the Administrative Procedure Act." Id. at 394; see also 28 U.S.C. § 994(x). These two constraints — congressional review and notice and comment — stand to safeguard the Commission from uniting legislative and judicial authority in violation of the separation of power. Havis, 927 F.3d at 385-86.

Unlike the Guidelines themselves, however, commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment. Id. at 386. This Court does inform us that because commentary has no independent legal force — it serves only to interpret the Guidelines' text, not to replace or modify it. Stinson, 508 U.S. at 44-46. Commentary binds courts only "if the guideline which the commentary interprets will bear the construction." Id. at 46. The application note has no independent force [and] the list of qualifying crimes in application note 1 of § 4B1.2 is enforceable only as an interpretation of the definition of the term "crime of violence" [and "controlled substance offense"] in the guideline itself. Rollins, 836 F.3d at 742.

By the Commission making the act of 'conspiracy' a part of § 4B1.2, it did not interpret a term in the guideline itself as no term in § 4B1.2 would bear that construction, but attempted to circumvent congressional review and the notice and comment requirements of the Administrative Procedure Act through application note 1 of commentary by adding an offense covertly and modifying the language not listed in the guideline. If that were not so, the institutional constraints that make the Guidelines constitutional in the first place would hold no weight and lose their intended purpose. Havis, 927 F.3d at 386-87. The text of § 4B1.2(b) is definitive in the matter and dictates what constitutes a controlled substance offense and what does not. Jurists of reason would see the errors of both the district and circuit court denying Petitioner relief on his claims when there are constitutional issues involved and would agree that the current matter deserves encouragement to proceed further for full review.

CONCLUSION

Wherefore the above stated reason, the Court should grant the writ of certiorari.

Respectfully submitted,

s/ _____

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