**IN THE**

**SUPREME COURT OF THE UNITED STATES**

JOHNNY ANDRES ASUNCION III

PETITIONER

Vs.

UNITED STATES OF AMERICA

RESPONDENT

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ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The District Court Judge sentenced the Petitioner to life in prison for *Possession with Intent to Distribute Methamphetamine*, 21 U.S.C. Sect. 841(a)(1),(b)(1)(a)(viii)(over 50 grams). At sentencing the District Court found that the Petitioner had at least two prior "felony drug offenses", three of which involved Washington state convictions for possession of Methamphetamine (2 cases), and one involving Cocaine, in violation of Revised Code of Washington (RCW) 69.50.401(d), respectively. In all three cases, the mandatory Washington State sentencing guideline range and sentences were 12 months, or less, since none of the State Judges made required findings to exceed the applicable mandatory range. See, *Judgment in a Criminal Case,* app. 18a-30a.

In *Carachuri-Rosendo v. Holder*, 569 U.S. 184 (2013), and *Moncrieffe v. Holder*, 569 U.S. 184 (2013), this Court held that when considering whether a crime is "punishable" by more than one year, the Court must examine both the elements and the sentencing factors that correspond to the crime of conviction.

In *United States v. Valencia-Mendoza,* 912 F.3d 1215 (9th Cir. 2019), the Ninth Circuit rejected its "earlier precedents that eschewed consideration of mandatory sentencing factors" when determining if a prior state conviction qualified as a felony for purposes of the federal Sentencing Guidelines. *Id*, at

1224. The court concluded, rather, that "the Supreme Court has held that courts must consider both a crime's statutory elements and sentencing factors when determining whether an offense is 'punishable' by a certain term of imprisonment." The Ninth Circuit followed this precedent in *United States v. McAdory,* 935 F.3d 838 (9th Cir. 2019), when it held "we consider McAdory's prior convictions to have been "punishable by imprisonment for a term exceeding one year," such that they would serve as predicates under § 922(g)(1), only if McAdory's convictions actually exposed him to sentences of that length. None of McAdory's prior convictions had standard sentencing ranges exceeding one year, nor were any accompanied by written findings of any of the statutory factors that would justify an upward departure".

**The question presented is**: Whether the Ninth Circuit ruling below is internally inconsistent with prior rulings of the Ninth Circuit, and is in blatant disregard of and ignores the holdings of this Court in *Carachuri-Rosendo v. Holder*, 569 U.S. 184 (2013), and *Moncrieffe v. Holder*, 569 U.S. 184 (2013) when the Court below held that because the then existent Washington sentencing statutes allowed an "open-ended" inquiry with respect to making the findings to allow a judge to exceed the mandatory guideline range that the conviction counted as a predicate, "felony drug offense" pursuant to 21 U.S.C. Sect. 802(44), even though the sentencing judge did not comply with Washington law and never made the

findings of fact and conclusions of law necessary to exceed the mandatory guideline range of 12 months or less in all three cases under review.

## PARTIES TO THE PROCEEDINGS

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

## RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

*United States vs. Asuncion,* No. 17-cr-0215-EFS-1. District Court for the Eastern District of Washington; Judgment entered on June 11th, 2018.

*United States vs. Asuncion*, No. 18-30130. U. S. Court of Appeals for the Ninth Circuit; Judgment entered on September 4th, 2020, rehearing denied on November 23rd, 2020.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

### CASES



### FEDERAL STATUTES

**STATE STATUTES- Revised Code of Washington (RCW)**



**UNITED STATES SENTENCING GUIDELINES**

## APPENDIX- TABLE OF CONTENTS

(contained in a separate volume)

**IN THE SUPREME COURT OF THE UNITED STATES**

JOHNNY ANDRES ASUNCION III,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent,

---

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

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## I. PETITION FOR A WRIT OF CERTIORARI

Petitioner, Johnny Andres Asuncion III, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## II. OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 974 F.3d 929 (9th Cir. 2020) (App 1a-13a). An additional Memorandum decision of the United States Court of Appeals is unpublished (App. 14a-17a). The *Judgment in a Criminal Case*, Sentencing Order of the District Court is unpublished. (App. 18a-30a).

## III. STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on September 4th, 2020. (App. 1a-13a). The Court denied a timely petition for rehearing on November 23rd, 2020. (App. 31a). The Court of Appeals had jurisdiction pursuant to 28 U. S. C. Sect. 1291. This Court has jurisdiction under 28 U.S.C. Sect. 1254 (1).

## IV. STATUTORY AND GUIDELINE PROVISIONS INVOLVED

FEDERAL STATUTES

18 U.S.C. Sect. 922(g)((1)

924(e)(2)(A)(ii)

21 U.S.C. Sect. 802(44)

21 U.S.C. Sect. 841(a)(1),(b)(1)(A)(iii)

21 U.S.C. Sect. 851

STATE STATUTES- Revised Code of Washington (RCW)

RCW 9.94A.120

RCW 9.94A. 345

RCW 9.94A.505(2)(a)(i) (2003)

RCW 9.94A.510

RCW 9.94A.517

RCW 9.94A.533

RCW 9.94A.535

UNITED STATES SENTENCING GUIDELINES

U.S.S.G. Sect. 2L.1.2

U.S.S.G. Sect. 4B1.2(b)

(For text of the salient cited provisions, see Appendix F- U.S. Code provisions; Appendix G-Revised Code of Washington (RCW); and Appendix H- United States Sentencing Guideline provisions)

## V. STATEMENT OF THE CASE

In 2017, a federal jury in the Eastern District of Washington convicted Johnny Andres Asuncion III of possession with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a), (b)(1)(A)(viii). This was not Asuncion's first drug conviction. His record included three possession convictions in Washington state court in 2000 and 2004, and one distribution conviction in federal court in 2007. Under the federal drug laws, these prior convictions would trigger mandatory minimum sentences if the convictions were for "felony drug offenses"—that is, offenses related to certain controlled substances that were "punishable by imprisonment for more than one year." 21 U.S.C. § 802(44) (defining "felony drug offense" for purposes of § 841).

The district court found that all four convictions counted as prior felony drug offenses. The prior federal conviction had resulted in a sentence longer than one

year. The prior state convictions had each resulted in sentences of one year or less, but the Washington statute under which Asuncion was convicted set a maximum penalty of five years. It was thus a simple matter for the district court: under Ninth Circuit law at the time, courts looked to the "maximum statutory sentence for the offense" to determine whether a prior drug offense was punishable by imprisonment for more than one year. *United States v. Murillo*, 422 F.3d 1152, 1154 (9th Cir. 2005). The mandatory minimum sentence for defendants who had previously been convicted of two or more felony drug offenses was life in prison, and the district court sentenced Asuncion accordingly. *See* 21 U.S.C. Sect. 841(b)(1)(A) (2018).

At sentencing, the Court found that the Petitioner had at least two prior "felony drug offenses", one federal conviction and three of which involved convictions for possession of Methamphetamine (2 cases), and one involving Cocaine, in violation of RCW 69.50.401(d), respectively. See, *Judgment in a Criminal Case,* (App. 18a-30a).

On January 28th, 2019, as a result of the ruling in *United States v. Valencia-Mendoza,* 912 F.3d 1215 (9th Cir. 2019), Mr. Asuncion filed a document entitled: *Declaration of Dan B. Johnson in Support of Remand for Resentencing and/or to Supplement the Record Herein.* Docket No. 11-2, (App.

a32-121a). On March 14th, 2019, the Ninth Circuit authorized the record to be supplemented. Docket No. 16 (App. 121a).

The following three Possession of a controlled substance convictions in violation of RCW 69.50.401(d) (1998), are the pertinent convictions under consideration, since the 2007 federal conviction counts as a prior predicate:

1- Possession of a Controlled Substance (Methamphetamine), Yakima County, Washington, May 17, 2004. Sentence- 12 months jail. This crime was alleged to have taken place on March 10th, 2003. The Mandatory guideline range was 4-12 months. Exhibit "C" to: *Declaration of Dan B. Johnson in Support of Remand for Resentencing and/or to Supplement the Record Herein*. (App. 79a-97a).

2- Possession of a Controlled Substance (Methamphetamine), Grant County, Washington, May 9, 2000. Sentence- 20 days jail; The Mandatory guideline range was a maximum of 2 months. Exhibit "A" to: *Declaration of Dan B. Johnson in Support of Remand for Resentencing and/or to Supplement the Record Herein*. (App. 37a-62a).

3- Possession of a Controlled Substance (cocaine), Yakima County, Washington, July 6, 2000. Sentence- 2 months jail; The mandatory guideline range was "2-6 months". Exhibit "B" to: *Declaration of*

*Dan B. Johnson in Support of Remand for Resentencing and/or to Supplement the Record Herein*. (App. 63a-78a).

With respect to the three Washington State drug convictions, the applicable sentencing statute(s), in effect at the time of the 2004 conviction, and 2000 convictions, provided, respectively:

"[u]nless another term of confinement applies, the court shall impose a sentence within the standard sentence range established in §9.94A.510." RCW 9.94A.505(2)(a)(i)(2003). The applicable guidelines' "Departure", provision, RCW 9.94A.535 (2003), provided: "The Court may impose a sentence outside the standard range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. **Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law….**" (Emphasis supplied).

RCW 9.94A.120, which was applicable prior to 2003, and applies to the two convictions in 2000, provided, as follows:

> "When a person is convicted of a felony, the court shall impose punishment as provided in this section.
>
> (1) Except as authorized in subsections (2), (4), (5), (6), and (8) of this section, the court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(3) **Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.** A sentence outside the standard range shall be a determinate sentence." (Emphasis supplied).

RCW 9.94A.345, states: "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed."

Two factors determined the applicable sentencing range: The offense's "[s]eriousness" level and the "[o]ffender [s]core. *Ibid.* Applying the foregoing law, all three of the Washington state drug convictions had mandatory guideline ranges of 12 months, or less, under the facts of each case, thus, not "…punishable by imprisonment for more than one year…".

All three drug possession convictions should not have counted as priors under 21 U.S.C. Sect. 802(44) , and 21 U.S.C. Sect. 841(b)(1)(A) (2018). The Petitioner's life sentence should be reversed for re-sentencing with only one prior predicate.

## VI. REASONS FOR GRANTING THE PETITION

In the words of this Court: "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower

federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375, 102 S. Ct. 703, 706 (1982). "*Stare decisis"* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 827 (1991).

The blatant disregard shown by the Court below with respect to this Court's precedent should not be ignored. This case involves a **life sentence**. The holding below has no basis in the current jurisprudence of this Court. The ruling constitutes a departure from the accepted and usual course of judicial proceedings, including disregarding the Circuit's own jurisprudence, as to call for an exercise of this Court's supervisory power. In addition, this Court should grant Certiorari to settle the important federal question of whether the decision of the Court below conflicts with this Court's decisions. This case is the perfect vehicle for the Court to verify that it meant what it said in *Carachuri-Rosendo v. Holder*, 569 U.S. 184 (2013), and *Moncrieffe v. Holder*, 569 U.S. 184 (2013).

This case presents an issue of clear importance. If the Petitioner is correct that he had only one countable prior (his federal conviction), he would only be facing a mandatory sentence of 15 or 20 years rather than life in prison. Furthermore, this case provides the Court with a perfect vehicle to make it clear

that with respect to the definition of "felony drug offense" courts must consider the maximum term that a specific defendant may receive under a state's sentencing guidelines. "[D]iverse viewpoints exist on this "difficult question". See, *United States v. Recino-Hernandez,* 772 F. App'x 115, 117 (5th Cir. 2019)(per curiam); *United States v. Simmons,* 649 F. 3d 237 (4th Cir. 2011), at 250-58 (Agee, J., dissenting).

The ruling in this case has many other ramifications. Under United States immigration law, certain petty offenses are excluded from the crime of moral turpitude definition. A petty offense is one where "the maximum penalty possible for the crime of which the alien was convicted … did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months." 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

Although the petty offense exception uses the language "maximum penalty possible" instead of "punishable by," 8 U.S.C. § 1182(a)(2)(A)(ii)(II), the two terms are sufficiently similar to raise a question about whether an offense may qualify as a petty offense and, therefore, not qualify as a crime of moral turpitude.

U.S.S.G. 2L1.2 defines a felony as: "Felony" means any federal, state, or local offense punishable for a term exceeding one year."

The issue presented herein also comes under scrutiny with respect to definitions for Career Offender status under U.S.S.G. 4B1.1 where the definitions for countable history provide that a "crime of violence means any offense punishable by imprisonment for a term exceeding one year, that-….", as well as that the term "controlled substance offense means an offense under federal or state law, punishable by imprisonment for a term exceeding one year…"

Under the Armed Career Criminal Act the term "violent felony means any crime punishable by imprisonment for a term exceeding one year…" Clearly, the issue herein is of great importance with respect length of prison sentences and can involve differences of many years in imprisonment depending on the meaning of "punishable".

This Court can use this case to clarify the correct sentencing that law applies to those convicted under the Washington mandatory guidelines scheme which began in 1984**.** *See,* RCW 9.94A.905. One can assume that there are thousands of convictions that could involve the issue herein as to whether they were "punishable" by more than twelve months.

The Ninth Circuit affirmed Mr. Asuncion's conviction and his resulting sentence of mandatory life, rejecting arguments that his sentence should be calculated without consideration of three prior Washington State felony drug

possession convictions. In all three cases, the maximum sentence available to the sentencing judge under mandatory Washington sentencing guidelines was 12 months or less, since the sentencing statute with respect to exceptional sentences was not complied with by any of the three sentencing judges.

As such, none of these convictions meets the definition of a countable felony drug offense under the definition set forth in 21 U.S.C. Sect. 802(44), which provides:

> "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, marihuana, anabolic steroids, or depressant or stimulant substances".

The Ninth Circuit rejected this argument, as well as all others, and affirmed. In a nutshell, the Ninth Circuit ignored the fact that the maximum penalty for each of the possession convictions was 12 months, or less, under the facts of each particular case, not that of a hypothetical case wherein the Court could find a basis to depart from the mandatory guidelines. The Court's ruling below disregards this Court's holdings in *Carachuri-Rosendo v. Holder,* Supra, and *Moncrieffe v. Holder*, *Supra.*

Furthermore, the Ninth Circuit's holding violated the Circuit's own rulings in *United States v. Valencia-Mendoza*, *Supra*, and *United States v. McAdory,* 935 F.3d 838 (9th Cir. 2019), by ignoring the fact that the Circuit previously recognized

that the Supreme Court held that when determining whether an offense is "punishable" by a certain term of imprisonment, courts must consider both a crime's statutory elements and sentencing facts. *Carachuri-Rosendo v. Holder,* and *Moncrieffe v. Holder.* Thus, consideration by the Supreme Court is therefore necessary to secure and maintain uniformity of the court's decisions, and to maintain that the Ninth Circuit is following Supreme Court precedent. The ruling herein cannot be reconciled with the rulings in *United States v. Valencia-Mendoza*, *Supra*, and *United States v. McAdory, Supra*, or the aforesaid Supreme Court cases.

Regarding the instant case, there is a huge hole in the logic used for the ruling by the Court below. The change in Washington's sentencing law only affected who could make the findings of fact necessary to allow the judge to impose a sentence above the standard range. It did not in any way affect the discretion the judge had to impose an exceptional sentence. Absent the required findings, the judge had no discretion to go outside the standard range at sentencing. The Ninth Circuit decision herein ignores this distinction. The Court's reliance on *United States v. Rodriquez*, 553 U.S. 377 (2008), is misplaced, and this Court should use this case to point this out.

Fact finding is not a matter of "discretion." The fact finder, whether judge or jury, is required to find or not find the existence of a particular fact based upon the evidence presented. A fact finder cannot conclude that the

evidence fails to establish a particular fact and yet find that the fact exists or conclude that the evidence establishes the existence of a fact (based on whatever the applicable standard is) and yet find that the fact does not exist. Either way, the fact finder would be acting contrary to law. Finding facts is not a discretionary decision and the ruling below fails to recognize this distinction when it exalts the open ended or broad nature of the prior mandatory sentencing law.

Just because the state sentencing judge(s) had the authority under the previous sentencing law to make findings of fact does not mean that the judge had "broad discretion" to impose an exceptional sentence. Discretion to impose an exceptional sentence would exist only if the judge had actually found facts to support an exceptional sentence. The process of making such findings does not involve any exercise of discretion except what evidence to consider.

Discretion is the ability to choose between competing outcomes based on something other than what the law dictates. That ability does not exist absent the necessary findings of fact to support an exceptional sentence under the prior law. The court below confused discretion as to how to conduct a hearing to determine the existence of such facts with discretion to impose a particular sentence. Just because the court has discretion to inquire into a

"broad range" of factual issues does not mean the judge can simply choose to impose a sentence contrary to law.

Merriam Webster defines discretion as: " the power or right to decide or act according to one's own judgment; freedom of judgment or choice." Even under the prior law, the judge did not have the freedom to impose an exceptional sentence simply based upon his or her own "judgment or choice."

Respectfully, the Ninth Circuit's reliance on the fact that under prior sentencing jurisprudence in Washington a sentencing Judge could use an open - ended inquiry to sentence a Defendant over the applicable guideline range is erroneous and misapplies the teachings of the Supreme Court, and the Ninth Circuit's own rulings, since none of the three Judges made such an inquiry. Each Washington State sentencing Judge simply adopted the mandatory guideline range of 12 months or less, in all three cases, hence, as a matter of law each conviction was not punishable by more than 12 months, therefore not a predicate under the definition in 21 U.S.C. Sect. 802(44), or 21 U.S.C. Sect. 851.

*United States v. Valencia-Mendoza* and *United States v. McAdory,* are applicable to whether any of the three prior Washington State felony drug possession convictions should count for sentence enhancement. All were subject to a maximum term under the Washington State Sentencing Guidelines that was 12

months, or less, but were used as the second countable prior “felony drug” conviction and resulted in a mandatory life sentence. They should not count as a prior under 21 U.S.C. Sect. 851, and the applicable sentencing statute, 21 U.S.C. Sect 841, et seq.

In *Valencia-Mendoza*, the Ninth Circuit reversed a long-standing rule that treated prior state convictions as felonies based on the statutory maximum, not the punishment available under state mandatory guidelines systems. The case involved a Guideline enhancement under U.S.S.G. § 2L1.2, which defined a felony as an offense "punishable by imprisonment for a term exceeding one year." In *Valencia,* the Defendant's prior Washington drug offense was a Class C felony with a statutory maximum of 5 years. But, as the Ninth Circuit noted, the sentencing guidelines in Washington provide an additional mandatory limit on criminal sentences. As in Oregon, Washington law provided that, unless certain aggravating circumstances are found, "the court shall impose a sentence" within the presumptive guideline range. In the *Valencia-Mendoza* case, the "face of the criminal judgment" reflected that neither the court nor the jury had found the existence of an aggravating circumstance. Accordingly, the maximum sentence available was six months, not five years. The Court held that prior drug possession convictions that were sentenced to a maximum available sentence of under 12 months, due to the application of the Washington State mandatory sentencing

guidelines, did not count as "felony" offenses for the definition set forth in U.S.S.G.§ 2L1.2.

In *Valencia-Mendoza* the Court stated at page 1219:

> "We used the same reasoning with respect to Washington's sentencing scheme in *United States v. Murillo* , 422 F.3d 1152 (9th Cir. 2005). The federal inquiry was whether the defendant previously had been convicted of "a crime punishable by imprisonment for a term exceeding one year." *Id.* at 1153 (quoting 18 U.S.C. § 922(g)(1)). The defendant argued that, under Washington law, 'the maximum sentence a court may impose for a crime is defined by the maximum term that may be imposed based solely on the facts established by a guilty verdict. If no aggravating factors are pleaded and proved, then the maximum sentence must be considered the maximum of the range in the state's sentencing guideline grid, not the maximum set by the state's applicable criminal statute.' *Id.* at 1154. We disagreed: "the maximum sentence is the statutory maximum sentence for the offense, not the maximum sentence available in the particular case under the sentencing guidelines." *Id.; see also id.* at 1155 (concluding that the relevant maximum sentence is "the potential maximum sentence defined by the applicable state criminal statute, not the maximum sentence which could have been imposed against the particular defendant for his commission of that crime according to the state's sentencing guidelines"); *see also United States v. Crawford*, 520 F.3d 1072, 1079-80 (9th Cir. 2008) (applying *Murillo*'s holding to the determination under federal Guideline § 4B1.2(b) whether a Washington conviction was for "an offense under federal or state law, punishable by imprisonment for a term exceeding one year")."

In *McAdory,* the Ninth Circuit made it clear that the rationale in *Valencia Mendoza* applied with respect to the definition of the crime in violation of 18 U.S.C 922(g), which provides, in pertinent part, "It shall be unlawful for any

person— (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;"

In the ruling in *McAdory,* the Ninth Circuit stated at page 840:

> "All of McAdory's prior convictions were in Washington, which has a mandatory system of sentencing guidelines. *See* Wash. Rev. Code § 9.94A.505(2)(a). In addition to the statutory maximum provided for each offense, Washington law prescribes a "standard sentence range" based on the offender's "offender score" and the "seriousness level" of the offense. *See id.* §§ 9.94A.505(2)(a)(i), 9.94A.510. The presence of certain aggravating or mitigating factors can alter a defendant's standard sentencing range. *See id.* § 9.94A.533. The sentencing court may depart from the standard sentencing range only if, after consideration of certain statutorily enumerated considerations, the court finds "that there are substantial and compelling reasons justifying an exceptional sentence." *See id.* § 9.94A.535. Should a sentencing court depart from the standard range, it must explain its decision to do so in writing. *See id"*

Current law, RCW 9.94A.505, provides, in pertinent part, as follows:

> (1) When a person is convicted of a felony, the court shall impose punishment as provided in this chapter...
>
> (i) Unless another term of confinement applies, a sentence within the standard sentence range established in RCW 9.94A.510 or 9.94A.517;

RCW 9.94A.535, currently provides:

> The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than

> the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.
>
> Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

According to the Ninth Circuit, the current Washington State sentencing law is different than the prior mandatory sentencing guideline system since it is not an open ended inquiry. However, the operative fact has not changed. That is, without the Court taking additional steps under prior law, the guideline range was mandatory, as it is under the current regime.

If a Washington Judge sentenced a defendant outside the applicable guideline range without making the requisite findings for an exceptional sentence, the case would be reversed and remanded on appeal as a sentence in violation of the mandatory guideline. Clearly, the requirement of "written findings of fact and conclusions of law" is mandated as a sentencing "factor". See, *State vs. Semesh*, 187 Wash. App. 136 (2015), citing *State v. Friedlund*, 182 Wash.2d 388, 395-97, 311 P.3d 280 (2015).

The fact that a jury, and/or a Judge, is now used, post *Blakely v. Washington,* 542 U.S. 296 (2004), for the factual finding, is not critical to the analysis, nor is the fact that the grounds for an exceptional sentence are now spelled out. The critical

issue is what the mandatory guideline range was at the time of sentencing under the then existing State law. In all three cases herein, the guideline ranges were 12 months, or less, no factual finding of exceptional circumstances was made, and none of the three sentencing judges found any legal basis for an exceptional sentence. The result is the same either pre or post, *Blakely.* The "finding" was still required to go outside the mandatory guideline range.

In fact, using the logic of the Ninth Circuit herein, since the sentencing Court *could have* found exceptional circumstances in *Valencia-Mendoza*, or *McAdory*, the rulings in those cases could not stand. Respectfully, this is clearly not the law, however, the ruling herein ignores the distinction.

In *Valencia-Mendoza,* the Court distinguished *United States v. Rodriquez, Supra*, but did not analyze the precise issue herein with respect to Washington sentencing law, pre-*Blakely.* The Ninth Circuit has correctly recognized that the applicable theory has changed. The Supreme Court's current jurisprudence in *Carachuri-Rosendo v. Holder,* and *Moncrieffe v. Holder,* as applied by the court below, led to the ruling in *Valencia-Mendoza,* and *McAdory.* The Supreme Court held that when determining whether an offense is "punishable" by a certain term of imprisonment, courts must consider both a crime's statutory elements and sentencing facts. Absent a judicial finding for the priors in this case, (*sentencing factor*) the guideline range was mandatory. The sentencing factor (exceptional

sentence findings) was not found by any of the sentencing Judge(s), in Washington courts.

In *Valencia-Mendoza,* the Court further stated at page 1224:

> "In sum, the Supreme Court has held that courts must consider *both* a crime's statutory elements *and* sentencing factors when determining whether an offense is "punishable" by a certain term of imprisonment. Here, we are called on to decide whether Defendant's earlier offense was punishable under Washington law by more than one year, and we can no longer follow our earlier precedents that eschewed consideration of mandatory sentencing factors. As noted, Washington statutes prescribe a required sentencing range that binds the sentencing court. The sentencing range can be modified, or rendered inapplicable altogether, if but only if the judge or the jury makes certain factual findings. In this case, no such finding was made, so the court was bound to adhere to the statutory sentencing range. Defendant's offense—as actually prosecuted and adjudicated—was punishable under Washington law by no more than six months in prison. The district court therefore erred by concluding that his offense was punishable by more than one year in prison."

The same analysis holds since even back in 1999, 2000, and 2003, (prior to July 1st, 2004), the Court was bound by the sentencing guideline range unless the Court found a basis to impose an exceptional sentence.

In *Valencia-Mendoza,* the Court stated at page 1223:

> "Two important distinctions make *Rodriquez* irrelevant to our analysis. First, unlike the statutory question at issue there—what is the "maximum term of imprisonment . . .prescribed by law"—the question at issue here is whether Defendant was convicted of an offense "punishable"

> by more than one year. "Punishable" suggests a realistic look at what a particular defendant actually could receive, whereas "maximum term of imprisonment . . . prescribed by law" suggests a mechanistic examination of the highest possible term in the statute."

In the instant case a realistic look at what Mr. Asuncion actually could have received establishes that all three convictions cannot count as a prior. With all due respect, the court below in this case is applying a hypothetical set of facts to conclude that since it was legally possible for any of the three prior Washington Judges' to give an exceptional sentence over 12 months, that this alters the test applied, even though none of them followed the required procedure to avoid the mandatory application of the guideline range.

In *United States v. Rodriquez, Supra*, this Court decided whether a statutory recidivism enhancement should be accounted for in determining, under the ACCA, the "maximum term of imprisonment ... prescribed by law" for a prior offense of conviction. *Id.* at 380-82. The Court held that it could, stating that the "maximum term of imprisonment of ten years or more ... prescribed by law" referred to in § 924(e)(2)(A)(ii) included any recidivist enhancements provided for under state law. *Id* at 393.

The Court was not deciding the precise issue present in the instant case and the comments were obiter dictum. In fact, the issue regarding application of the

Washington guidelines was not central to the case. In *Rodriquez* the Court stated at page 390:

> "Respondent's last argument is that if recidivist enhancements can increase the "maximum term" of imprisonment under ACCA, it must follow that mandatory guidelines systems that cap sentences can decrease the "maximum term" of imprisonment. Brief for Respondent 38. In each situation, respondent argues, the "maximum term" of imprisonment is the term to which the state court could actually have sentenced the defendant. Respondent concedes that he has waived this argument with respect to his own specific state-court convictions. See Brief in Opposition 15, n. 7."

In other words, the argument had been conceded. Because of this concession, the Court's discussion is not pertinent to the issue herein. The foregoing issue was not resolved in a manner that allowed the Court below to go off on a tangent and come up with an exception based on the statutory basis for an exceptional sentence being "broad based", or an "Open ended" inquiry changing the applicable law set forth in *Carachuri-Rosendo v. Holder, Moncrieffe v. Holder,* as applied by the court below, in *Valencia-Mendoza,* and *McAdory.* The ruling below is in direct conflict with the Circuits own reasoning and how it applied the Supreme Court case law.

The issue under consideration in the instant case involves whether any of the three possession convictions was "punishable" by over one year, based on the actual facts of each sentencing decision, not on hypothetical facts.

*Rodriquez* was misinterpreted by some Courts to mean that the maximum possible sentence was always the statutory ceiling for that class of offense. See e.g., *United States v. Brooks*, 751 F.3d 1204, 1210 (10th Cir. 2014).

But in *Valencia-Mendoza* the Court rejected the argument that the top sentence of a mandatory guidelines range such as Washington's was not a relevant consideration, because: [U]nlike the statutory question at issue [in *Rodriquez]*—what is the "maximum term of imprisonment ... prescribed by law"—the question at issue here is whether Defendant was convicted of an offense "punishable" by more than one year. "Punishable" suggests a realistic look at what a particular defendant actually could receive, whereas "maximum term of imprisonment ... prescribed by law" suggests a mechanistic examination of the highest possible term in the statute.

It is plain from the state criminal judgment that the sentencing court did not find any of those circumstances, so the sentencing court was bound by the statutory sentencing range. **In other words, the top sentence of the guidelines range was the maximum possible statutory punishment.** *United States v. Valencia-Mendoza*, at 1223. (emphasis added). But the fact that Mr. Rodriquez's criminal history was in the record, and that it was undisputed that he actually, individually, qualified for the enhanced sentence, meant that when the *Rodriquez* Court said "the phrase 'maximum term of imprisonment ... prescribed by law' for the 'offense'

was not meant to apply to the top sentence in a guidelines range," they meant that Mr. Rodriquez' *specific* sentencing factors exposed him to a *higher*-than-guidelines, statutory range. *Rodriquez,* 553 U.S. at 390.

The differences in the language "maximum term", and "punishable by" mandates the conclusion that *Rodriquez* does not control the result herein. This is especially so when the Court applies the rulings in *Valencia-Mendoza*, and *McAdory*. This Court should recognize that *Rodriquez* has been limited by the rulings in *Carachuri-Rosendo v. Holder* and *Moncrieffe v. Holder.*

Under *Carachuri-Rosendo*, and *Moncrieffe*, followed by the Court below in *Valencia-Mendoza*, and *McAdory*, the Court is obligated to look at the specific conviction involved and the sentence maximum as it is applied to the defendant in THAT case, including mandatory State guideline systems. The Ninth Circuit, in this case, is overlooking this distinction. In both pre and post *Blakely v. Washington* versions of Washington's guidelines system, the calculated guidelines range is mandatory on the Court, unless and until the sentencing statute(s) provisions regarding exceptional sentences is followed by the Court. Whether or not it is an open ended, or broad inquiry, or a more cabined procedure after the *Blakely* fix, there is no substantive difference, since under either version the guideline range was mandatory, unless further factual and legal findings were made by the sentencing judge.

Nothing in the holdings in *Valencia-Mendoza, McAdory, Carachuri-Rosendo* and/or *Moncrieffe*, mandated that the Court below add in the requirement that the guidelines be cabined to an itemization of grounds for an exceptional sentence. Under either version, an exceptional sentence has to be supported by an adequate basis, including the written findings of facts and conclusions of law under the prior guidelines law set forth in RCW 9.94A.120, and RCW 9.94A.535 (2003).

Failure to comply with these requirements means that the guideline range must be followed and was mandatory in nature. Under either version of the sentencing guidelines a hypothetical version of the facts could result in a longer sentence, but this Court must look to what actually took place at the time of sentencing for the drug possession convictions.

It is beyond dispute that all three of the Washington State possession convictions had a mandatory guidelines calculation of 12 months, or less, and the sentencing Judges never took the next step that was required under Washington law to make written findings of fact and conclusions of law in support of an exceptional sentence, in order to avoid the mandatory guideline ranges. In light of this all three of the convictions cannot qualify as being "punishable" by over one year. Respectfully, the Supreme Court in this case should grant the Petition herein and recognize that the holding in *Rodriquez* with respect to application of the Washington Guidelines should not control the outcome herein. The Court below

should not have engaged in the kind of "hypothetical approach" admonished under previous case law and attempt to divine what the judge would or would not have done. See, *Carachuri-Rosendo,* 560 U.S. at 580. The current test to be applied requires the Court to analyze each Washington State possession conviction and sentence on the sentencing facts of each particular case, rather than hypothetical facts and procedures. The Ninth Circuit's attempt to avoid the law in order to give the Petitioner a life sentence should not be countenanced.

## VII. CONCLUSION

As set forth in the forgoing argument, this Court should vacate the judgment and remand for resentencing, and with only one countable prior under 21 U.S.C. Sect. 851, Mr. Asuncion should only face a mandatory minimum of 15 years due to having only one countable predicate conviction.

Respectfully submitted this 9th day of March, 2021.

s/Dan B. Johnson
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## VIII. APPENDIX- TABLE OF CONTENTS

The Appendix is contained in a separate volume.