No._____

IN THE
SUPREME COURT OF THE UNITED STATES

TORRI McCRAY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

Marianne Mariano
Federal Public Defender
Timothy P. Murphy
Assistant Federal Public Defender
Counsel of Record
Federal Public Defender's Office
300 Pearl Street, Suite 200
Buffalo, New York 14202
Telephone: (716) 551-3341

QUESTIONS PRESENTED FOR REVIEW

1. As every Federal Court of Appeals has now taken a position, should this Court resolve the Circuit split as to the proper fact-finding standard for uncharged conduct under the Due Process Clause of the Fifth Amendment when a prison sentence of less than the statutory maximum term is substantially increased?

2. Should this Court intervene and clarify the Second Circuit's misinterpretation of the phrases "fentanyl analogue" in 21 U.S.C. § 802(32) and "analogue of fentanyl" in 21 U.S.C. § 841(b)(1)(B)(vi), as they were interpreted in a way that conflicts with the Due Process Clause of the Fifth Amendment and is contrary to relevant decisions of this Court?

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

U.S.S.G. Policy Statementss

IN THE SUPREME COURT OF THE UNITED STATES

No.

TORRIE McCRAY, Petitioner

v.

UNITED STATES OF AMERICA,

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

PETITION FOR WRIT OF CERTIORARI

Torri McCray respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The published decision of the Second Circuit is available at *United States v. McCray*, 7 F.4th 40, 2021 U.S. App. Lexis 22478, 2021 WL 3196886 (2d Cir. 2021), and attached as pages 1-24 of the appendix to this petition.

JURISDICTION

The judgment of the Second Circuit was entered on July 29, 2021. This petition is filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841(a) provides, in pertinent part:

> Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally— (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance…

21 U.S.C. § 841(b) provides, in pertinent part:

> Except as otherwise provided in section 409, 418, 419, or 420 [21 § USC 849, 859, 860 or 861], any person who violates subsection (a) of this section shall be sentenced as follows: (1) … (B) In the case of a violation of subsection (a) of this section involving— … (vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide [fentanyl]… such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years…

21 U.S.C. § 802(32) provides, in pertinent part:

> **(A)** Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance—
> **(i)** the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II; …
>
> **(C)** Such term does not include—
> **(i)** a controlled substance; …

U.S. SENTENCING GUIDELINES POLICY STATEMENT INVOLVED

U.S.S.G. § 5K2.1 provides:

> If death resulted, the court may increase the sentence above the authorized guideline range. Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury. For example, a substantial increase may be appropriate

> if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

i. District Court proceedings

On August 15, 2017, Mr. McCray was indicted with three counts of possession with intent to distribute, and distribution of, Fentanyl and Butyrylfentanyl. 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(vi) and (b)(1)(C).

On March 16, 2018, Mr. McCray moved to dismiss counts two and three of the indictment for failure to state an offense within the meaning of the Act. On May 28, 2018, the Magistrate Judge recommended the motion be granted. On September 28, 2018, however, the District Court Judge denied the motion.

On February 27, 2019, Mr. McCray pleaded guilty pursuant to a written plea agreement to counts one and two, which contemplated a prison term of no more than 60 months and permitted the government to seek an upward departure. The probation report recommended a range of between 60 and 71 months in prison.

The government sought an upward departure pursuant to U.S.S.G.

§5K2.1 regarding the November 21, 2016 death of an individual who overdosed on Fentanyl purportedly provided by Mr. McCray. On July 19, 2019, an evidentiary hearing was conducted. On January 9, 2020, the court issued a written decision, finding the government established by a preponderance of the evidence that Mr. McCray was responsible for this death. *See*, *United States v. McCray*, 2020 U.S. Dist. Lexis 3799, 2020 WL 10376 (W.D.N.Y. Jan. 9, 2020). A motion to reconsider was denied.

At the July 14, 2020 sentencing, the government argued for a prison term of between 210 and 240 months, based on the court's §5K2.1 finding. Mr. McCray was sentenced to two concurrent terms having an aggregate of 90 months in prison, to be followed by 5 years of supervised release. *See*, Sentencing ("Sent."), p. 11. A timely notice of appeal was filed.

ii. Appellate proceedings

The United States Court of Appeals for the Second Circuit had jurisdiction to entertain this appeal pursuant to 28 U.S.C. § 1291.

On appeal, Mr. McCray argued his Due Process rights were violated by the District Court only applying a preponderance of the evidence standard in finding him responsible for the fatal overdose in question.

The parties agreed the ingestion of Fentanyl was the cause of the uncharged death. Though he was never officially charged with being responsible for the death, and thus not protected under the criminal burden of proof, Mr. McCray's prison sentence was increased two and a half years above the sentencing range agreed to in the plea agreement.

The government's primary §5K2.1 witness, who had a history of larceny and continuously lied to the police during the investigation, presented testimony that was contradictory, illogical and unworthy of belief. Moreover, the District Court found valid the in-court identification of a non-descript sandwich bag of drugs some 3 years after it was recovered by the police. Petitioner also argued this did not constitute relevant conduct, U.S.S.G. §1B1.3(a)(2) (app. note, 5 (B)(ii)), as a significant interruption broke the chain of events, ending whatever pattern existed previously. Indeed, the time period without drug activity was 60 percent as long as the original string of criminal acts.

Mr. McCray also argued on appeal that the District Court erroneously denied his motion to dismiss count two,[1] as

[1] Though the motion to dismiss included count 3, that count was dismissed as part of the plea disposition.

Butyrylfentanyl is not a controlled substance analogue under 21 U.S.C. § 802(32)(C)(i). The statutory text is plain. But if we accept the District Court's interpretation as the Second Circuit did, Mr. McCray was not provided sufficient notice of the prohibited conduct.

Count two of the indictment charged 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(vi), alleging Mr. McCray possessed with intent to distribute "10 grams or more of a mixture and substance containing butyryl fentanyl, a Schedule I substance, and an analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide (fentanyl)." (emphasis added).[2] While § 841(b)(1)(B)(vi) encompasses "any analogue of [fentanyl]," the Act does not define under either § 802 or § 841 the singular word "analogue" or the explicit phrase "any analogue of fentanyl."

Title 21, U.S.C. § 802(32)(C)(i), of the Act indicates that "[a]s used in this subchapter … the term 'controlled substance analogue' . . . does not include . . . a controlled substance." Section 802(32)(C)(i) does not say what

[2] Granting the defense motion would have removed a five-year mandatory minimum under 21 U.S.C. § 841(b)(1)(B), as well as an increase in the lower end of the Guideline range and a longer supervised release term.

a controlled substance analogue is, but rather what it is *not*: it is not a "controlled substance." A "controlled substance" is "a drug or other substance, or immediate precursor" scheduled under the Act. 21 U.S.C. § 802(6). Butyrylfentanyl was temporarily designated as a Schedule I controlled substance on May 12, 2016,[3] and remains one today.[4] As Butyrylfentanyl is a scheduled controlled substance, it may not be deemed an analogue of Fentanyl, as, again, controlled substances are excluded from the definition of "controlled substance analogue" under § 802(32)(C)(i). It violated Due Process to expect a non-attorney like petitioner to understand the statute otherwise.

[3] *See*, Schedules of Controlled Substances: Temporary Placement of Butyrylfentanyl and BetaHydroxythiofentanyl Into Schedule I, 81 Fed. Reg. 29492 (May 12, 2016).

[4] *See*, Schedules of Controlled Substances: Placement of Butyrylfentanyl and U-47700 Into Schedule I, 83 Fed. Reg. 17486 (Apr. 20, 2018) (amending 21 C.F.R. § 1308.11).

REASONS FOR GRANTING THE PETITION

A. The Federal Courts of Appeals are split as to the proper fact-finding standard for uncharged conduct under the Due Process Clause of the Fifth Amendment when a prison sentence of less than the statutory maximum term is substantially increased. This Court's intervention is warranted to secure uniformity among the Circuits.

"The sentencing process… must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding. . . ." *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

Since *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and even before,[5] the Federal Courts of Appeals have struggled with how to approach the standard of proof under the Due Process Clause where a sentence has been significantly increased by uncharged conduct. *See*, *e.g.*, *United States v. Watts*, 519 U.S. 148, 156, n.2 (1997) (acknowledging "[a] divergence of opinion among the Circuits as to

[5] *See*, *e.g.*, *Williams v. New York*, 337 U.S. 241, 245-251 (1949).

whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence").

In *McMillan*, this Court held that a finding of fact related to sentencing should generally be resolved by a preponderance of the evidence standard. 477 U.S. at 92. However, and critical to our discussion, this Court warned of the tail wagging the dog scenario where an uncharged accusation propels a greater sentence without the government having to abide by the constitutional safeguards that protects all criminal defendants in our country. *Id.* at 88. This Court recognized in *McMillan* there may be an exception to the general rule of the preponderance standard satisfying Due Process when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction. 477 U.S. at 87-91.

The District Court in our case expressed concern about this very issue. In response to the government seeking a sentence of between 210 to 240 months, far exceeding the 60-month Guideline range contemplated in the plea agreement (at ¶ 10) and the 60 to 71-month range recommended in the probation report (at ¶¶ 57, 59), the District

Court faced off with the prosecution:

> THE COURT: Now, you say a guideline sentence of 210 to 240. That's what the guidelines would have been had you charged this defendant and he pleaded guilty to a death resulting, right?
>
> [Assistant US Attorney]: You're exactly right, Your Honor. With a criminal history category of III and a total offense level of 35, that would be the guidelines at that point, and that's what we were - -
>
> THE COURT: But you did not charge that?
>
> [Assistant US Attorney]: That's correct.
>
> THE COURT: And he didn't plead guilty to it. And the standard of proof with respect to the death resulting, therefore, changed from beyond a reasonable doubt to a preponderance of the evidence?
>
> [Assistant US Attorney]: Correct.
>
> THE COURT: So tell me, so the actual guidelines range in this case, based on the calculations and your Lawlor obligation, is 60 months. You're asking me to give four times that based on - - based on a finding by a preponderance of the evidence. Tell me why that's not the tail wagging the dog.

(Sentencing ("Sent.") at 12-13; emphasis added).[6]

---

[6] *See also*, Sent. at 13-14, 38 (where the court opined the government was seeking to *have its cake and eat it too* in securing a far longer sentence without having to meet its criminal burden).

As wisely posed by the District Court, why would the government *ever* officially charge a defendant under these circumstances and take on the additional criminal burden? Sent. at 15. Moreover, as the court also observed, Mr. McCray's Guideline range had already taken into account the danger of Fentanyl. Sent. at 18. Indeed, how would such a sentencing increase *not* erode the public's respect for the law under 18 U.S.C. § 3553(a)(2)(A)?

Pre-*Booker*, nearly every Federal Court of Appeals adopted some version of a case-by-case Due Process-based rule where under extraordinary circumstances clear and convincing evidence could potentially apply to evaluating sentencing factors. *See*, *United States v. Booker*, 543 U.S. 220 (2005); *see*, *e.g.*, *United States v. Kikumura*, 918 F.2d 1084, 1100-1102 (3d Cir. 1990); *United States v. Grier*, 475 F.3d 556, 575-582 (3d Cir. 2007) *(en banc)* (Ambro, J., concurring) (explaining other Circuits' reactions to *Kikumura*). While *Kiumura* has been subsequently overruled in the Third Circuit, *United States v. Fisher*, 502 F.3d 293, 299-300 (3d Cir. 2007) (finding *Kikumura* analysis did not survive *Booker*), its principles have lived on in other Circuits.

Half of the Circuit Courts of Appeals at least implicitly still follow

the *McMillan* and (or) *Kikumura* Due Process-based approach. *See*, *United States v. Sandoval*, 6 F.4th 63, 106-107 (1st Cir. 2021), citing *United States v. Lombard*, 72 F.3d 170, 185-187 (1st Dep't 1995) (discussing the tail wagging the dog principle); *United States v. Simpson*, 741 F.3d 539, 558-559 (5th Cir. 2014) (leaving door open for applying clear and convincing evidence standard), citing *United States v. Mergerson*, 4 F.3d 337, 343-344 (5th Cir. 1993); *United States v. Parlor*, 2 F.4th 807, 816-817 (9th Cir. 2021) (affirming clear and convincing evidence as appropriate standard); *United States v. Staten*, 466 F.3d 708, 719-720 (9th Cir. 2006); *United States v. Restrepo*, 946 F.2d 654, 659-661 (9th Cir. 1991) *(en banc)* (full discussion of the *McMillan* tail wagging the dog principle); *United States v. Olsen*, 519 F.3d 1096, 1104-1105 (10th Cir. 2008); *United States v. St. Julian*, 922 F.2d 563, 569 n.1 (10th Cir. 1990) (citing *McMillan* and *Kikimura* and observing that "[i]f the difference between the guideline range and the departure sentence is great, the trial court should consider the implications of that disparity in determining the appropriate standard of proof for the facts considered in sentencing");[7] *United States v. Clay*,

[7] *But see*, *United States v. Washington*, 11 F.3d 1510, 1516 (10th Cir. 1993) (rejecting higher standard of proof at sentencing "in the ordinary case").

483 F.3d 739, 744 (11th Cir. 2007) (accepting *Kikimura* principle but finding it inapplicable at bar); *United States v. Lewis*, 115 F.3d 1531, 1536-1537 (11th Cir. 1997) (same); *United States v. Long*, 328 F.3d 655, 670-671 (D.C. Cir. 2003), citing *United States v. Lam Kwong-Wah*, 966 F.2d 682, 688 (D.C. Cir. 1992) (considering tail wagging the dog principle but not applying it at bar).

In the post-*Booker* era, which focuses on the reasonableness of the sentence, half of the Circuits, including the Second Circuit, outright reject the *McMillan* / *Kikumura* standard. *See*, *United States v. Cordoba-Murgas*, 233 F.3d 704, 710 (2d Cir. 2000); *United States v. Gray*, 943 F.3d 627, 631 (3d Cir. 2019), citing *Fisher*, 502 F.3d at 299-300; *United States v. Grubbs*, 585 F.3d 793, 800-803 (4th Cir. 2009) (finding *McMillan* analysis did not survive *Booker*); *United States v. Brika*, 487 F.3d 450, 460-462 (6th Cir. 2007) (finding *Kikumura* analysis did not survive *Booker*); *United States v. Reuter*, 463 F.3d 792, 793 (7th Cir. 2006) (same); *United States v. Villareal-Amarillas*, 562 F.3d 892, 898 (8th Cir. 2009) (same).

In Mr. McCray's case, the Second Circuit again rejected a case-by-case Due Process standard:

> As we stated in *United States v. Cordoba-Murgas*, the standard of proof for the district court's factual findings at sentencing, including when considering a departure under U.S.S.G. § 5K2.1 based on uncharged conduct, is a preponderance of the evidence. 233 F.3d 704, 710 (2d Cir. 2000). A district court should, however, take into consideration the degree of proof satisfied beyond a preponderance when exercising its discretion to decide whether and how much to depart. *Id.* at 709.
>
> *****
>
> Finally, we reject McCray's argument that due process required the district court to apply a higher standard of proof than a preponderance of the evidence. *Cordoba-Murgas* forecloses this argument and clarifies that the application of a more stringent standard, such as a clear and convincing evidence standard, would in fact constitute error. 233 F.3d at 710.

McCray, 7 F.4th at 47-49.

This Court's intervention is needed to resolve the split in Circuit case law. Moreover, the Second Circuit, like other Courts of Appeals, has been less than consistent in its position on significant sentence increases based on uncharged conduct, observing this in 1996:

> the preponderance standard is no more than a *threshold* basis for adjustments and departures, and the weight of the evidence, at some point along a continuum of sentence severity, should be considered with regard to both upward adjustments and upward departures. With regard to upward adjustments, a sentencing judge should require that

> the weight of the factual record justify a sentence within the adjusted Guidelines range. In doing so, the Court may examine whether the conduct underlying multiple upward adjustments was proven by a standard greater than that of preponderance, such as clear and convincing or even beyond reasonable doubt where appropriate. Where a higher standard, appropriate to a substantially enhanced sentence range, is not met, the court should depart downwardly. Because the risk of factual error in a series of adjustments, each of which involves conduct proven by a bare preponderance, is a circumstance present at least "to a degree" not adequately considered by the Commission, *see* 18 U.S.C. § 3553(b), a downward departure would be warranted.

United States v. Gigante, 94 F.3d 53, 56 (2d Cir. 1996) (italicized emphasis in original; underlined emphasis added); *see also*, *United States v. Shonubi*, 103 F.3d 1085, 1089 (2d Cir. 1997) (recognizing that "[t]hough the Sentencing Commission has favored the preponderance-of-the-evidence standard for resolving all disputed fact issues at sentencing, … we have ruled that a more rigorous standard should be used in determining disputed aspects of relevant conduct where such conduct, if proven, will significantly enhance a sentence" (internal citation omitted), citing *Gigante*, 94 F.3d at 56-57); *but see again*, *Cordoba-Murgas*, 233 F.3d at 708-709 (describing *Shonubi* as only dictum).

This split among the Federal Circuits has brought disarray into

the application of the Due Process Clause at sentencing. Going forward, this important issue will be applied differently by different Courts of Appeals across the country. That is the kind of disorder that only this Court's guidance can remedy.

B. The Second Circuit interpreted the phrases "fentanyl analogue" in 21 U.S.C. § 802(32) and "analogue of fentanyl" in 21 U.S.C. § 841(b)(1)(B)(vi) in a way that conflicts with the Due Process Clause of the Fifth Amendment and is contrary to relevant decisions of this Court.

The stakes couldn't be higher for under-educated individuals like Mr. McCray. Facing a mandatory minimum prison sentence under 21 U.S.C. § 841(b)(1)(B)(vi) for distributing an analogue (Butyrylfentanyl) that is widely accepted as far less potent than Fentanyl itself,[8] Mr.

[8] *See*, Wilde, et al., Frontiers in Pharmacology, *Metabolic Pathways and Potencies of New Fentanyl Analogs*, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6461066/ (Table 1, a "[s]ummary of the reviewed fentanyl analogues and their metabodies and metabolic pathways," indicating that Butyrylfentanyl is only 0.03 to 0.13 percent as potent as Fentanyl itself) (published Apr. 5, 2019; site last visited Oct. 7, 2021); *see also*, Sept. 6, 2019 District Court oral argument, p. 15 (where government understated the situation, describing Butyrylfentanyl as possessing "half the potency of Fentanyl").

McCray was compelled to navigate a statutory maze *only an attorney could love.*

The Second Circuit in our matter acknowledges that "[a] conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited . . . ." *McCray*, 7 F.4th at 47, citing *United States v. Williams*, 553 U.S. 285, 304 (2008). According to the appellate court, however, there was no fair notice or Due Process problem under the Fifth Amendment, as Mr. McCray did not dispute that Butyrylfentanyl meets the "ordinary meaning" of an "analogue." *McCray*, 7 F.4th at 46-47. But finding the purported ordinary meaning here means leaving the contours of the statute under which Mr. McCray was charged.

It is revealing how the District Court rationalized saving the accusations under counts 2 and 3:

> The defendant's argument to the contrary has some intuitive appeal to it. After all, fentanyl is a controlled substance and so the government's argument leads to the conclusion that an analogue of a controlled substance (that is, fentanyl) is not a "controlled substance analogue." That is a conclusion only a lawyer can love. But this Court is convinced that it is the correct one, based on the

> science, based on the dictionary definition of analogue, and based on the fact that "controlled substance analogue" is a term of art under the statute.

(Sept. 28, 2018 Decision and Order, p. 6 (emphasis added)). Mr. McCray is far from having a law degree and could not reasonably be expected to interpret this law as the government argued below.[9]

The Second Circuit opined that as this exact term, "analogue of fentanyl," is not found in either § 841(a)(1) or § 802(32), a dictionary must be utilized to capture the "ordinary meaning" of the singular word, "analogue." *Id*. The court further rejected Mr. McCray's position that looking to the dictionary made § 802(32) superfluous. According to the court, "analogue of fentanyl" was a term of art used in other parts of the Act. Therefore, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *McCray*, 7 F.4th at 46, quoting *Russello v. United*

[9] According to the probation report (at ¶ 81), Mr. McCray possesses only an 11th grade education.

States, 464 U.S. 16, 23 (1983). Though the Second Circuit claimed to not be "nullify[ing]" § 802(32), it is.

The plain text of the statute does not support either the trial or the appellate courts' conclusions, which requires the following road map for interpreting the statute:

(1) Start with Part D of Subchapter I which addresses "Offenses and Penalties": §§ 841(a)(1) and 841(a)(1)(B)(vi) prohibit the possession with intent to distribute "10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide [fentanyl]."

(2) Stay in Part D of Subchapter I where the "Definitions" section is found; § 802(32)(A) indicates that:

> Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance -- (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance" in schedule I or II… (emphasis added)

(3) Turn to § 802(32)(C)(i) as instructed. Then, for some reason, ignore the explicit exclusion of Butyrylfentanyl (as it is a controlled substance) and refer to a common dictionary for the generic definition of "analogue."

(4) Return to § 802(32)(A)(i), which § 802(32)(C)(i) has effectively instructed against, and compare the dictionary and (32)(A)(i) definitions. See if they match.

But how could Mr. McCray, with his scarce education, reasonably have figured this out – and then conformed his behavior accordingly?

This arbitrary method of interpretation requires the reader (including the unsophisticated accused) to disregard an entire clause of the statute, thus violating the canon, *verba cum effectu sunt accipienda*, which presumes each word in the law be given effect. Indeed,

> "[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) (internal citations and quotations omitted); see also Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 26 (2012) ("If possible, every word and every provision is to be given effect (verba cum effectu sunt accipienda) None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence").

United States v. Portillo, Dkt. No. 09-CR-1142, 2019 U.S. Dist. Lexis 69606, at *11, 2019 W.L. 1949861 (S.D.N.Y. Apr. 17, 2019) (footnote omitted).

The Second Circuit in our matter further contravenes this Court's jurisprudence recognizing that all words in a statute have value or Congress would not have included them. *See*, *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there"); *Bostock v. Clayton*, __ U.S. __ , 140 S. Ct. 1731, 1749 (2020) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration").

The Second Circuit's rejection of Mr. McCray's Due Process claim was based on the faulty premise that a dictionary definition of "analogue" was appropriate:

> Where, as here, "a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228… (1993)... Webster's New Collegiate Dictionary defines "analogue" in the relevant chemistry context as "a chemical compound structurally similar to another but differing often by a single element of the same valence and group of the periodic table as the element it replaces." (9th ed. 1985). "McCray does not dispute that butyryl

> fentanyl is an "analogue" of fentanyl under this definition—and indeed, he expressly admitted that butyryl fentanyl is a fentanyl analogue during his guilty plea. Accordingly, we reject his challenge to the application of the enhanced penalty provision at 841(b)(1)(B)(vi)."

McCray, 7 F.4th at 46-47 (underlined emphasis added)

This is a misinterpretation of this Court's jurisprudence. Of course no legislative policy decisions are codified in a dictionary which would make a controlled substance disqualified from being a "controlled substance analogue." The content of the Act's definition was a Congressional decision. Accordingly, § 802(32) was made superfluous and effectively wiped out here. Though the Second Circuit observes that under "this" (cherry-picked) definition, Mr. McCray expressly admitted that Butyrylfentanyl is a Fentanyl analogue during his guilty plea, *McCray*, 7 F.4th at 45-46, in fact he only admitted to *part* of the § 802(32) definition.

What the courts below characterized as "ordinary" does not mesh with the statute with which Mr. McCray was required to comply. As the Second Circuit's interpretation failed to comport with Due Process and this Court's jurisprudence on statutory interpretation, the Court should intervene to correct these errors and clarify the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Marianne Mariano
Federal Public Defender

By: /s/ Timothy P. Murphy
Timothy P. Murphy
Assistant Federal Public Defender
Counsel of Record

Dated: October 21, 2021