No:

23-6790

ORIGINAL

In the

Supreme Court of the United States



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James Hamilton

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURTS OF APPEALS

FOR THE FIFTH CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

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x James Hamilton

James Hamilton

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## QUESTIONS PRESENTED

Was Counsel ineffective in violation of the Sixth Amendment for failing to recognize and address the methamphetamine disparity violation committed by the Government and District Court for the unconstitutional practice of "assuming" a substance can be reduced absent a substantial step taken by the Defendant in reliance on USSG §2D1.1 Notes to Drug Quantity Table "B", and Sentencing a Defendant to a "type" of drug that was "not specified" in the count of conviction in violation of USSG §2D1/.1 application note 5?

Was Counsel ineffective for not arguing that USSG §2D1.1(b)(5)(B)'s, "and" Language, when given its plain meaning requires at minimum a mitigating role consideration under §3B1.2 before the application of the importation enhancement?

Was trial Counsel ineffective for failing to orally address Hamilton's lack of knowledge in relation to the methamphetamine importation enhancement in USSG §2D1.1(b)(5) when there is a circuit split over said "mens rea".

## PARTIES TO THE PROCEEDINGS

## IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Northern District of Texas Fort Worth Division.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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## OPINIONS BELOW

The opinion of The Supreme Court of the United States was entered on Sept. 6, 2023. Petitioner submitted the Writ of Certiorari to the United States Postal Service via correctional staff on Aug. 18, 2023. The Writ was not post marked until Aug. 31, 2023 due to correctional staff. Hamilton v United Sates, USAP5 no. 22-11156. The prisons Mail Box Rule applied, the ruling is reprinted and attached as Appendix A.

The opinion of the Court of Appeals for the Fifth Circuit, Whose judgement is herein sought to be reviewed, was entered on May 22, 2023, United States of America, no. 22-11156, (Fifth Cir. May 22, 2023) is reprinted and attached to the Appendix B.

The opinion of the Northern District of Texas, Forth Worth Division, whose Judgement is herein sought to be reviewed was entered on Aug. 28th, 2022, in an unpublished decision, James Hamilton v United States, no. 4:22-cv-0292-P,(N.D.T. Aug. 28, 2022) is reprinted in a seperate Appendix C to this petition.

The opinion of the Northern District of Texas Fort Worth Division whose judgement is herein sought to be reviewed, was entered on June. 10, 2020 in a unpublished decision in, United States of America v James Hamilton, 4:19-cr-0330(N.D.Tex. June 10, 2020) is reprinted in the seperate Appendix D to this petition

## STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals jurisdiction was invoked from the denial by the United States District Court for the Northern District of Texas under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The Court of Appeals decision was entered on May 22, 20223. The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C.C § 1254(1).

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the Unites States Provides: 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 offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. Fifth Amendment.

This case also involves the failure of counsel to effectively represent his client as guaranteed by the Sixth Amendment when he failed to argue the legal

deficiency with the actual vs mixture methamphetamine disparity in 21 U.S.C. § 841, and the improper interpretation and application of the Guidelines at U.S.S.G. § 2D1.1

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ON PETITIONER FOR WRIT OF CERTIORARI

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**PETITION FOR WRIT OF CERTIORARI**

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James Hamilton Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above- entitled cause.

## STATEMENT OF THE FACTS

In 2019 the DEA and FBI arrested multiple methamphetamine dealers in the Dallas - Fort Worth area who the identified a Juan Quezada as their supplier. The investigation revealed Quezada sold quantities to other dealers. Mr. Hamilton was identified as a courier who delivered drugs to another co-conspirator on behalf of Quezada. On June 12, 2019 Hamilton was arrested leaving a Fort Worth, Texas Motel after meeting Quezada.

## STATEMENT OF CASE

On November 14, 2019 Hamilton was charged in a one count indictment for conspiracy to possess with intent to distribute (50) grams or more of a mixture and substance containing a detectable amount of methamphetamine. (CR NO.3). On December 3, 2019 Hamilton's appointed counsel filed a motion to withdraw and substitute new Counsel. (CR NO 35). On December 5, 2019 the Court denied this motion. (CR NO. 43 at 2).

On December 18, 2019 Mr. Hamilton entered into a plea of guilty to the charges against him. (CR ECF NO. 46) On June 8, 2020 the Court sentenced Mr. Hamilton to a term of imprisonment of (240) months. (CR ECF NO. 133). Mr Hamilton appealed. (CR ECF NO. 132). Appellant's counsel filed a brief pursuant to Anders v California, 386 U.S. 738 (1967). The appeal was dismissed as frivolous. United States v Hamilton, 832 F. Appx 903 (5th Cir. 2021).

Mr. Hamilton timely filed a motion pursuant to 28 U.S.C. § 2255 on April 1, 2022. (CV NO. 1 at 12). The Government recognized Hamilton raised multiple claims in his original § 2255, he claimed that (1) Counsel was ineffective by advising Defendant he would only receive a 121-151 month sentence if he pled guilty. (CV NO.2 at 5,9). Next. Hamilton argued that Counsel was ineffective at

the sentencing stage by failing to: (1) adequately discuss the PSR with Hamilton; (2) file a motion pinpointing the time frame of Hamilton's involvement in the conspiracy; (3) orally readdress PSR objections at sentencing; and (4) challenge misinterpretations or unexpected changes in the PSR (id at 5-12).

The District Court found in relation to Hamilton's first claim that Counsel falsely instructed him he would receive a sentence of 121-151 months, that Hamilton signed the plea agreement and no promises had been made to induce him to plead guilty (CR ECF NO. 44) and that no one had made any promise or assurance to him of any kind to induce him to plead guilty. (CR ECF NO. 154 at 49). The District Court found Counsel was effective in relation to Hamilton's first claim.

The District Court then addressed Hamilton's pre-plea ineffective assistance of Counsel claims that Counsel failed to provide Movant with discovery for review, failure to move for a thorough assessment of the drugs involved in the case and failing to adequately support Hamilton's request to withdraw. (ECF NO. 2 and 5). The Court found the allegations were conclusory and failed to raise any Constitutional issue.

The District Court then turned to Hamilton's ineffective claims at sentencing, mainly that (1) Counsel failed to adequately discuss the PSR; (2) failed to file a motion pinpointing the time frame of his involvement in the conspiracy; (3) failed to press his objections to the PSR at sentencing; and (4) failed to challenge the misinterpretations of Hamiltons base offense level. (ECF NO. 2 at 9-14). The Court found all of the allegations were conclusory and insufficient to state a Constitutional ground, and that Hamilton did not specify the "critical issues", "other questions", or "relevant objections" that he needed to discuss, (ECF NO. 2 at 914).

The Court further found that Hamilton's allegations about the failure to challenge the misinterpretation of the base offense level made no sense; and that Hamilton did not identify what further argument could have been made in relation to the objections made to the PSR at sentencing, and how that would have affected

the outcome. (CR ECF NO. 149). The Court entered Judgement on the 28th of October, 2022, denying a certificate of appealability pursuant to 28 U.S.C. §2253(c).

Hamilton submitted to the Fifth Circuit Appellate Court for a certificate of Appealability pursuant to 28 U.S.C. §2253. Hamilton raised all of his previous claims and sought to address the District Court's finding of his claims being "conclusory" and not specifying the "critical issues", "other questions" or "relevant objections" named in the original §2255, all of which centered around the PSR. The Fifth Circuit entered Judgement of denial to Hamilton's COA on May 22, 2023. This writ follows.

## REASONS FOR GRANTING THIS WRIT

**THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE, SETTLED BY THIS COURT.**

Supreme Court Rule 10 provides relevant parts as follows:

### RULE 10

### CONSIDERATIONS GOVERNING REVIEW[

### ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons, therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a united States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a... United States Court of appeals has decided an important question of federal law which has not been but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decision of this court.

Id. Supreme Court Rule 10.1(a), (c).

I.COUNSEL WAS **INEFFECTIVE IN VIOLATION OF THE SIXTH AMENDMENT FOR FAILING TO RECOGNIZE & ADDRESS THE METHAMPHETAMINE DISPARITY VIOLATION COMMITTED BY THE GOVERNMENT & DISTRICT COURT FOR THE UNCONSTITUTIONAL PRACTICE OF "ASSUMING" A SUBSTANCE-CAN BE REDUCED ABSENT A SUBSTANTIAL STEP TAKEN BY THE DEFENDANT IN RELIANCE ON USSG §2D1.1 "NOTES TO DRUG QUANTITY TABLE "B" AND (2) SENTENCING A DEFENDANT TO A "TYPE" OF DRUG THAT WAS "NOT SPECIFIED" IN THE COUNT OF CONVICTION IN VIOLATION OF USSG §2D1.1 APPLICATION NOTE 5**

Mr. Hamilton pled guilty to a (1) count indictment of conspiracy to posses with intent to distribute (50) grams or more of a mixture or substance containing a detectable amount of methamphetamine in violation of 21 USC §846 and §841(a)(1) and (b)(1)(B). (CR NO. 3). Hamilton's PSR held him accountable for (1.7) kilograms of "ICE". (PSR 35). Hamilton's Counsel filed written objections to the PSR, claiming Hamilton's base offense level should be based off of a "mixture of methamphetamine" rendering a base of (32) as opposed to the Government's proposal of a base of (36) that correlates to methamphetamine "ICE". (CR NO. 100). Counsel cited no precedent, nor adequately addressed the sentencing disparity created by the "actual/pure" methamphetamine vs the "mixture/substance" containing dilemma. The Court overruled the objections and imposed a sentence of (240) months for (1.7) kilograms of "ICE". (CR NO 149 at 7-8,11;133 at 1-2).

Hamilton claimed in his §2255 that Counsel was ineffective for failing to adequately challenge the disparity created by the "ICE" vs "mixture" sentencing scheme. (CV 2 at 5-7,10)

The Government acknowledged the argument in Hamilton's original 28 USC §2255 where Hamilton "challenged the disparity of the drug amount" (DOC 10 at 10 of 11). The District Court found all of Hamilton's allegations were "conclusory and insufficient to state a constitutional ground". Hamilton v United States, no 4:22-CV-0292-P (N.D.T 2022). Hamilton sought to remedy the conclusory allegations and state a constitutional claim in his appeal, raising the same disparity argument. The Fifth Circuit refused to answer his claim, holding the Fifth Circuit lacked Jurisdiction to consider, due to the fact that he was raising his claims for the first time. United States v Hamilton, NO. 22-11156 (5th Cir. 2023).

However, the Appellate Court's conclusion finds no traction in light of the facts. Mr. Hamilton raised disparity at every level of the proceedings. (CV NO. 2 at 5-7). It is, and has been Hamilton's contention that Counsel's mere acknowledgement that the Court should note that "level (32) is more appropriate" as opposed to "level (36)" based on (1.5) kilograms of "ICE", does not amount to effective assistance of Counsel. Counsel argued no precedent, not acknowledged any policy disagreement that arose to a level that fulfills the high bar on the sixth amendment.

Mr. Hamilton asks this honorable Court to consider the "Memorandum Opinion of Sentencing" authored by the Honorable Christine M. Arguello for the United States District Court for the District of Colorado. For brevity and Judicial economy her Honor captures the current methamphetamine dilema;

The current guidelines establish base offense levels for methamphetamine offenses that depend on the drug's purity. [The Guidelines treat methamphetamine greater than (80%) pure as "pure" methamphetamine, or "ICE". USSG §2D1.1(c), n.(C).] For example, a Defendant whose offense involves (15) kilograms of a methamphetamine mixture and another Defendant whose offense involves (1.5) kilograms - ten time less - of actual/pure methamphetamine would both have a base offense level of 36. USSG §2D1.1(c)(2) (2016). The current guidelines treat both those amounts for sentencing purposes as equivalent to (30,000) kilograms of marijuana. Id.

This was not always the case. The 1987 guidelines treated (1.5) kilograms of methamphetamine as equivalent to (600) kilograms of marijuana. SEE USSG §2D1.1 (1987). [The 1987 guidelines treated (1) gram of methamphetamine as equivalent to (2) grams of cocaine of (0.4) grams of heroin. USSG §2D1.1 cmt. 10, Drug Equivalency Tables (1987). Thus, the 1987 guidelines treated (1.5) kilograms of methamphetamine as equivalent to (3) kilograms of cocaine or (600) grams of heroin, which would result in a baser offense level of (28) - the same base offense level for an offense involving (600) kilograms of marijuana.]

The 1987 guideline's Drug Quantity Table did not differentiate actual/pure methamphetamine from methamphetamine mixtures, but provided that "purity of the controlled substance ... may be relevant in the sentencing process because it is probative of the Defendant's rile or position in the chain of distribution." Id. §2D1.1 cmt. 9.

In 1988, Congress establishes mandatory minimum sentences for methamphetamine offenses. Anti-Drug Abuse Act of 1988. Pub, L. NO. 100-690, S.6470(g)-(h), 102 Stat. 4181, 4378 (codified at 21 USC §841(b)(1)). Those mandatory minimums had a 10-to-1 ratio based on purity. An offense involving (100) grams of a methamphetamine mixture or (10) grams of actual/pure methamphetamine had a (5) year mandatory minimum sentence; and an offense involving (1) kilogram of a methamphetamine mixture of (100) grams of actual/pure methamphetamine had a (10) year mandatory minimum sentence.

The following year, in 1989, the United States Sentencing Commission revised the Drug Quantity Table in §2D1.1 by incorporating the statutory penalties and by differentiating between actual/pure methamphetamine and methamphetamine mixture and (1.5) kilograms of actual/pure methamphetamine each as being equivalent to (15,000) kilograms of marijuana. See USSG §2D1.1(c)(4) (1989). A Defendant with a criminal history category of (1) convicted of an offense involving just enough methamphetamine to trigger a statutory mandatory minimum under the Anti-Drug abuse Act of 1988 would have received under the 1989 guidelines a recommended sentence consistent with the statutory mandatory minimum. For example, an offense involving (100) grams of a methamphetamine mixture of (10) grams of actual/pure methamphetamine would have resulted in a (5) year mandatory minimum and yielded a base offense level of (26), yielding a guideline range of 63-78 months of imprisonment. Id. §2D1.1(c)(9); Id. Ch.5, Pt. A. Similarly, an offense involving (1) kilogram of a methamphetamine mixture of (100) grams of actual/pure methamphetamine would have resulted in a (10) year mandatory minimum and an offense level of (32), yielding a guideline range of 121-151 months. Id. §2D1.1(c)(6); Id. Ch 5, Pt. A.

Most recently, in 1998, Congress amended the statutory penalties for methamphetamine offenses by cutting in half the amounts that trigger the respective mandatory minimum sentences. Methamphetamine Trafficking Penalty Enhancement Act of 1998, Div. E. § 2, Pub. L. No. 105-277, 112 Stat. 2681, 2681-759. Shortly thereafter, the Commission again followed Congress's lead and accordingly increased the base offense levels for methamphetamine offenses. USSG §2D1.1(c)(4),(7) (2000). Consequently, today an offense involving (50) grams of a methamphetamine mixture or (5) grams of actual/pure methamphetamine triggers a (5) year mandatory minimum. 21 USC §841(b)(1)(B)(viii). The same offense yields a base offense level of (24), which for a Defendant with a criminal history category of (1) yields a range of 51-63 months imprisonment. USSG §2D1.1(c)(B); Id. Ch.5 Pt. A. And, an offense involving (500) grams of a methamphetamine mixture or (50) grams of actual/pure methamphetamine triggers a (10) year mandatory minimum. 21 USC §841(b)(1)(A)(viii). That offense yields a base offense level of (30), which for a Defendant with a criminal history category of (1) yields a range of 97-121 months imprisonment. USSG §2D1.1(c)(5); Id. Ch. 5, Pt. A.

To summarize, the Commission twice amended the Guidelines for methamphetamine offenses so that the base offense level (for a Defendant with a criminal history category of [1]) would exactly align with the mandatory minimum sentences - and the Commission did so each time right after Congress created or changed the minimum sentences.

In United States v Booker, 543 US 220 (2005), the Supreme Court held that the Sentencing Guidelines are just "one factor among several Courts must consider in determining an appropriate sentence." Kimbrough v United States, 552 US 85, 105 (2007). While the guidelines must serve as the "starting point and the initial benchmark" of this inquiry, the sentencing Court "may not presume that the Guidelines range is reasonable." Gall v United States, 552 US 38, 49-50 (2007). The Court's central task must be to impose a sentence "sufficient, but not greater than necessary," to comply with the purposes set forth in 18 USC §3553(a)(2).

District Courts may impose sentences that vary from the Guidelines based on a policy disagreement with guidelines. Spears v United States, 555 US 261, 267, 129 S. Ct. 840, 172 L. Ed. 2d 596 (2009) (per curiam); Kimbrough v United States, 552 US 85, 101-02, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007); Rita v United States, 551 US 338, 351, 127, S. Ct. 2456, 168 L. Ed. 2d 203 (2007). While each sentencing is an individualized determination, SEE 18 USC §3553(a), a District Court's policy disagreement with the guidelines may justify categorical variances, not just variances based on individualized determinations, Spears, 555 US at 267. "Several [Courts of Appeals] have expressly held that Spears and Kimbrough means that District Courts have broad authority to premise a variance of disagreement with the policy of any guideline." United States v Trejo, 624 F. Appx. 709, 713 (11th Cir. 2015) (collecting cases); SEE United States v Zauner, 688 F.3d 426, 431 (8th Cir. 2012) (Bright, J., Concurring).

"[T]he Commission fills an important institutional role. It has the capacity Court's lack to 'base its determinations on empirical data and National experience, guided by a professional staff with appropriate expertise.'" Kimbrough, 552 US at 108-09 (quoting United States v Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)). "[I]n the ordinary case, the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve §3553(a)'s objectives.'" Id. at 109 (quoting Rita, 551 US at 350). "In light of these discrete institutional strengths, a District Court's decision to vary from the advisory guidelines may attract greatest respect when the sentencing Judge finds a particular case 'outside the "heartland" to which the Commission intends individual Guidelines to apply.'" Id. (quoting Rita, 551 US at 351).

"[T]he Sentencing Commission departed from the empirical approach when setting the guidelines range for drug offense, and chose instead to key the guidelines to the statutory mandatory minimum sentences that Congress established for such crimes." Gall v United States, 552 US 38, 46 n.2, 128 S. Ct. 586, 169 L.

Ed. 2d 445 (2007); See also United States v Diaz, No. 11-821, 2013 US Dist. LEXIS 11386, 2013 WL 322243, at *3-6 (E.D.N.Y. Jan. 28, 2013). In Kimbrough, the Supreme Court held that the guidelines ranges for crack cocaine offenses did "not exemplify the Commission's exercise of its characteristic institutional role,' and instead the Commission "looked to the mandatory minimum sentences ... and did not take account of 'empirical data and national experience.'" 552 US at 109 (quoting Pruitt, 502 F.3d at 1171).

"[N]o United States Circuit Court of appeals has provided guidance to District Court's to reject the methamphetamine Guidelines, presumably because of the District Court's wide discretion to decide the weight of the Guidelines." United States v Nawanna, No. 17-4019, 2018 US Dist. LEXIS 72676, 2018 WL 2021350, at *4 (N.D. Iowa May 1, 2018). But several District Court's have found that "the Commission simply keyed the Guidelines range to the statutory mandatory minimum sentences Congress established for drug crimes, despite the fact that the resulting Guidelines sentences would be 'much more severe than the average sentences previously meted out to drug trafficking offenders.'" United States v Ibarra-Sandoval, 265 F. Supp. 3d 1249, 1253 (D.N.M. 2017) (citation omitted) (quoting Diaz, 2013 US Dist. LEXIS 11386, 2013 WL 322243, at *5). Consequently, those Courts exercising their discretion under Kimbrough and Spears - have granted downward variances in sentencing Defendants convicted of offenses involving actual/pure methamphetamine, in part, because of those Court's policy disagreements with the guidelines ranges for actual/pure methamphetamine offenses.

The fact that no appellate Court has taken up the need to address the disparity that the methamphetamine guidelines created demands that this Court set a standard that all Courts can abide by. District Court's across the United States have such wide discretion that you can find some Court's moving towards "methamphetamine purity no longer being a accurate way to assess culpability, and refraining from using purity as a proxy for culpability moving forward United States v Robinson, No. 3:21-CR-14-CWR FKB-2, 2022 US Dist. LEXIS 231041, 2022 WL

17904534, at *3 and United States v Celestine, No. 21-125 Section "E", 2023 US Dist. LEXIS 25406 "The Court will apply the methamphetamine mixture guidelines to all methamphetamine cases moving forward, regardless of whether the Defendant requests the Court to do so".

While at the same time you can find all things equal, individuals consistently receiving sentences such as Mr. Hamilton who is held accountable for "ICE", despite being charged for a mixture.

In determining the base offense level, there is a 10-to-1 ratio between pure or "actual" methamphetamine and a equivalent weight of methamphetamine mixture. For example, (1.5) grams of pure methamphetamine is treated the same as (15) grams of methamphetamine mixture. The 10-to-1 ration was first introduced in the 1989 Sentencing Guidelines. After a careful review, some Courts determined that there is not any empirical data from the Sentencing Commission or in the academic literature which would justify the ratio disparity. SEE United States v Ferguson, 2018 US Dist. LEXIS 129802 (D. Minn. August 2, 2018). Instead, the distinctions are tiered to a similar 10-to-1 ratio used in the mandatory minimum sentences imposed by Congress. SEE 21 USC §841(b)(1)(A)(viii) and §841(b)(1)(B)(viii). Congress first introduced the methamphetamine purity distinction in the 1988 Anti-Drug Abuse Act, in which the weight quantity of methamphetamine mixture triggering each mandatory minimum was set at ten times the quantity of the pure methamphetamine triggering that same statutory minimum penalty. The Commission responded by amending the guidelines to reflect the 10-to-1 mixture pure substance ratio. SEE United States Sentencing Commission, Methamphetamine: Final Report, at 7 (Nov. 1999). This determination is, by its very nature, a product of political calculation and compromise rather than empirical analysis.

Simply put, the presumed purity of untested methamphetamine should no longer be valid. Mr Hamilton was charged specifically with 21 USC §841(b)(1)(B)(viii) "A conspiracy to possess with intent to distribute (50) grams or more of a mixture or substance containing a detectable amount of methamphetamine". Which carries a

mandatory minimum of 5-40 years. He was not indicted for the alternate 5-40 year "actual" methamphetamine. It was solely in the discretion of the AUSA to charge the correct purity in the indictment from the outset. As noted, the purity drives the offense level. Prosecutors across the US rely on the discretion afforded to them in USSG §2D1.1 notes to drug quantity Table "B" which instructs for an estimation of the weight of the "actual" methamphetamine in the mixture of substance at hand. For example in order for methamphetamine to be considered "ICE", it needs to be (80%) pure. If the beginning weight of the methamphetamine is (10) grams, the mixture would need to contain (8) grams of "actual" methamphetamine or be (80%) pure.

In addition, the guidelines further allows the Government another boon. Application Note 5 provides in "Determining Drug Types and Drug Quantities" that "types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. SEE §1B1.3(a)(2) (relevant conduct) where there is no drug seizure or the amount seized does not reflect the scale of the offense ..."

Both of these practices however fall flat if this Court should consider them in light of other Supreme Court precedent and statutory law.

Notes to Drug Quantity Table "B" has been taken up and considered in this Court in Chapman v United States, 500 US 453 (1991) where the Court found that 21 USC 841(b)(1)(B)(A) was held to require that weight of carrier medium be included when determining appropriate sentence for trafficking in LSD. In that decision the Court considered the usable/unusable doctrine that later developed as a result of its holding. SEE United States v Rolande-Grabriel, 938 F.2d 1231,1232-33 (11th Cir. 1991).

The practice of assuming a drug can be reduced to a certain purity absent a substantial step on the part of the Defendant has not been considered. Chapman merely considered what carrier medium should tally when weighing not only the pure percentage of LSD but also the blotter paper/sugar cube etc. In Chapman the

Defendants had taken the substantial step in adding a controlled substance to a carrier medium.

The question that Hamilton posits here is whether a Defendant should be held accountable for the percentage of pure methamphetamine when he himself has taken no substantial step to actually purify the drug himself. The Government has long simply reduced methamphetamine from whatever mixture weight it totals to the pure percentage. This practice essentially removes mixtures of amphetamine/methamphetamine offense levels from the offense level calculation in their totality.

Methamphetamine mixture weights are tracked up to (45) kilograms or more. There is no doubt that the vast amount could always be reduced to an amount of pure methamphetamine that would trigger the "ICE" offense level. So, either the "notes" to drug quantity table "B" is ambiguous and an afterthought by the commission as a catch all provision in favor of the inflammatory political scene at the time of the enactment of the present methamphetamine provisions, or Congress gave no thought at all when considering the enormous weight totals of methamphetamine mixtures in the body of the drug table itself.

This practice of reducing a controlled substance until it is pure, is in exact opposite to the 10-to-1 sentencing practice of crack cocaine. At least crack underwent an actual substantial step by the Defendant to change powder cocaine through a chemical process to a different substance.

The disparity in methamphetamine is created in part by the Government simply assuming the substantial step "could" take place, even though the Defendant has not taken any step whatsoever to purify the methamphetamine. Generally to purify any drug, it would take a substantial effort. In addition to the knowledge, the equipment and the intent to actually purify any controlled substance. And somehow this provision of the law assumes that without any step on the part of the Defendant that a hypothetical (100) grams of methamphetamine "can" be reduced to (80%) purity (assuming purity level) that it simply will be. Not only is the

disparity unconstitutional, it flies in the face of everything the Constitution guarantees should not happen under due process and has produced an arbitrary array of sentences across the United States, played out in vast disparities of Defendant's cases everyday.

In addition. Hamilton was indicted specifically for a "substance" containing a detectable amount of methamphetamine" under 846 and 841(b)(1)(B)(viii). The Government then proceeded to prepare the PSR. That investigation supposedly yielded "ICE" as the controlled substance to be considered at sentencing.

At this point, knowing the controlled substance was no longer a "substance containing a detectable amount of methamphetamine" the Government did not file to supersede the indictment to allow for the charged crime to match the drug at sentencing, neither did Counsel object to the proceeding.

Application Note 5 to the drug quantity table has up till this point allowed the Government the leeway in conspiracies to refer to and use relevant conduct under 1B1.13(a)(2) in relation to types and quantities. This practice allows a sentencing Court to simply consider purity at sentencing and proceed to sentence a Defendant to "actual" methamphetamine or "ICE" even though he was indicted for a substance containing a detectable amount of methamphetamine, as is the case with Hamilton. However, this practice is in violation of the law.

Application Note 5 in "Determining Drug Types and Drug Quantities" specifically states that the practice of considering purity as relevant conduct can only be done if the type (purity, i.e. actual vs mixture) is "not specified in the count of conviction". Meaning, that if the count of conviction specifically names a type of drug, the Government is shackled by the law to not change a separate type of drug at sentencing, (The Supreme Court has found that Congress clearly distinguished between pure and mixture as different "types" of drugs. Chapman, 500 US 453 at 435 (1991)). Unless the indictment does not specify purity or type.

The sentencing Court is shackled by the law to sentence a Defendant in accordance with the type of drug listed in the indictment. Hamilton's drug was specified in his indictment and the Court was shackled by the statutory provision in §2D1.1 app n.5. It could not consider any other purity or type not listed in the indicment.

The Fifth Amendment provides the Defendant the right to be tried solely on the Grand Jury's allegations. Stirone v United States, 361 US 212 (1960) and substantive amendments to the indictment must be resubmitted to the Grand Jury. United States v Huff, 512 F.2d 66,69 (5th Cir. 1975).

As noted, District Court's ccnsistently extrapolate purity levels after an indictment has been handed down (United States v Rodiriguez, 666 F.3d 944 (5th Cir. 2012), but this practice is in violation of the law in the presence of an indictment that specifically labels a "type" or purity level.

Hamilton consistently argued in his proceeding that he was being sentenced for a crime for which he was not indicted, thus his base offense level was incorrect. (CR NO. 100). Hamilton has consistently raised the issue that Counsel advised him that as a Defendant who was under indictment for "a substance containing a detectable amount of methamphetamine" that he would be sentenced for the less harsh "mixture" methamphetamine as opposed to "ICE" or "actual".(VC NO. 2 at 5, a). Counsel's advice that Hamilton's sentence would be only 120–150 months was based on the assumption that the Government would sentence Hamilton in accordance with the indictment's charge of "a substance containing a detectable amount of methamphetamine as opposed to "actual" or "ICE". Another claim Hamilton has consistently raised. (VC NO 2 at 5. a) (United States v Hamilton, NO. 2211156) (May 22, 2023).

If Hamilton pled guilty to a substance containing a detectable amount of methamphetamine, and later sentenced for "actual" methamphetamine when he took no substantial step to alter the drug and the indictment was specific in regard to the type of drug, then his plea of guilt in invalid. The validity of a guilty plea

is a question of law that is usually reviewed novo, United States v Amaya, 111 F.3d 386 (5th Cir. 1988) and it is only Constitutionally valid when the plea is "voluntary" and "intelligent". Brady v United States, 397 US 740,748 (1970). Because a plea waives the Constitutional right to a trial, it must be entered into with a "sufficient awareness of the relevant circumstances and likely consequences". Id.

A plea qualifies as intelligent when the criminal Defendant enters it after receiving "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process". Bousley, 523 US 618 quoting Smith v Ogrady, 312 US §329 (1941). In determining whether a plea is intelligent "the critical issue is whether the Defendant understood the nature and substance of the charges against him." Taylor v Whittey, 933 F.2d 325,329 (5th Cir. 1991). Rule (11) of the "Federal Rules of Criminal Procedure" requires a Judge to address a Defendant about to enter a plea of the charges against him to ensure that he understands the law of his crime in relation to the facts of his case, as well as his rights as a criminal Defendant. United States v Brown, 535 US 55,62 (2002).

The Court assumed in the context of a conspiracy that it could simply take the substantial step needed with out action on the part of Hamilton to reduce the drug to the needed purity to trigger the "actual" "ICE" sentencing scheme, nor did the Court advise Hamilton it could be done prior to the plea.

In addition, the Court has consistently practiced charging Defendant for "actual" methamphetamine despite the fact that the law in §2D1.1 app.n.5 states a Court can only consider a separate "type/purity" if it is not specified in the indictment. This practice means it is impossible for the District Court to have adequately apprised Hamilton of the law if its own practices were in fact violating the law.

As a result of Hamilton being convicted of "actual" or "ICE", his guideline sentence is incorrect. Molina-Martinez v United States, 578 US 189,201 (2016) has

established that a "Court's" reliance on an incorrect range in most instances will suffice to show an effect on the Defendants substantial rights "and that absent unusual circumstances, he will not be required to show more" Id 201. A Defendant who can make such a showing is entitled to relief unless the Government can show that the error was harmless, United States v Monza, 852 F.3d 1343,1351 (11th Cir. 2017). Hamilton's sentence, based on "ICE" or "actual" methamphetamine has a base offense level of (36), while Hamilton's sentence based on a mixture of methamphetamine has a base offense level of (32). A difference between sentences of 120-150 and 235-293 respectively. A reliance on the "actual" methamphetamine Guidelines is far removed from harmless.

The Sixth Amendment guarantees criminal Defendants effective assistance of Counsel at every stage of the proceedings." That right is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense, Yarbrough v Gentry, 540 US 1,5 (2003). To prevail on a Habeas Corpus claim of ineffective assistance of Counsel, Hamilton would need to show that: (1) Trial Counsel's performance was so deficient that it fell below an objective standard of the customary skill and diligence displayed by a reasonably competent attorney; and (2) That there is a reasonable probability the outcome of the trial would have been different, but for the Counsel's error, he would not have pled guilty, and insisted on going to trial. Hill v Lockhart, 474 US 52 (1985).

Throughout Hamilton's proceedings he has maintained Counsel gave specific instruction and advice "pre-plea" about the length of sentence. Counsel advised a sentence of 121-150 months. A sentence based on the named purity in the indictment. This Court has found that a Counsel's failure to advise a criminal Defendant of the relevant law is "deficient performance" sufficient to satisfy the first prong of the "ineffective assistance" analysis. Hill v Lockhart 474 US 52 (1985).

Counsel was unaware of the Court's violation of §2D1.1 app.n.5 and illegal practice of taking and assuming substantial criminal steps in the absence of any made by the Defendant. Hamilton's indictment labeled a specific "type" (purity) drug. It was not statutorily within the power of the Court to sentence Hamilton to a different "type" (purity) not named in the charging document. Hamilton did not posses a laboratory to purify any drugs, nor the requisite intent and knowledge needed to purify the drugs. The fact that a drug can be reduced to a pure substance cannot signify necessarily that Hamilton had the wherewithal and intent to do so. Counsel was deficient for failing to raise these arguments.

The prejudice prong requires Hamilton to show that "but for" his Counsel's error, he would not have pled guilty and proceeded to trial. Roe v Flores-Ortega, 528 US 470,481 (2000). In other words, he would have rejected the plea agreement and proceeded to trial. Hill v Lockhart, 474 US at 59. In this regard a Court may consider "that a substantial disparity between the penalty offered by the prosecution and the punishment called for by the indictment is sufficient to establish a reasonable probability that a properly informed and advised Defendant would have accepted (or rejected) a plea." United States v Morris, 470 F.3d 596,602 (6th Cir. 2006). In addition, a reasonably competent Counsel will attempt to learn all the facts of the case, make an estimate of a sentence and communicate the result ... when the attorney fails to do so correctly, and it is the decisive factor in the decision to plead guilty, the Sixth Amendment has been violated. United States v Barnes, 83 F.3d 934,939 (7th Cir. 1996).

The disparity of (100) months creates just such a scenario where the decision to plead guilty or go to trial creates prejudice. Mr. Hamilton was robbed of an entire proceeding ... trial that is his Constitutional right. Counsel engaged so little in the pre-plea - PSR preparation - and sentence hearing that a count of (400) words on the part of Counsel is too many. Counsel simply did not engage in the proceedings. He did not review the law. He did not object to the misuse of the law. And he allowed his client's right to be violated in violation of the law. In turn triggering and fulfilling the necessary two-prong standard of Strickland.

II COUNSEL FAILED TO ACT IN A CAPACITY GUARANTEED BY THE SIXTH AMENDMENT FOR FAILING TO ARGUE BEFORE THE DISTRICT COURT THAT THE PLAIN MEANING OF USSG §2D1.1(b)(5)(B) REQUIRES A MITIGATING ROLE ADJUSTMENT CONSIDERATION UNDER §3B1.2 WHEN THE CONJUNCTIVE "AND" MANDATES STATUTORILY THAT THE IMPORTATION ENHANCEMENT CAN ONLY BE GIVEN WHEN "THE DEFENDANT IS NOT SUBJECT TO AN ADJUSTMENT UNDER USSG 3B1.2." THEN AND ONLY THEN CAN THE DISTRICT COURT INCREASE BY (2) LEVELS. THE DISTRICT COURT NEVER MADE THIS CONSIDERATION, NOR DID COUNSEL ARGUE FOR IT.

Hamilton has argued at every level of his proceedings that Counsel failed to press his objections in regard to PSR ¶36 which states in part:

Defendant did not have knowledge of importation from Mexico.

The Defendant's PSR indicates he was a courier only. In Silva-Corona v United States, 2016 US Dist. 176733 (S.D. Tex. Dec 2, 2016) the Court found that a 2-level enhancement for importation was unwarranted because Defendant was merely a courier (Doc. 96 at 2).

Hamilton's Counsel argued nothing further. The District Court denied. Hamilton raised in §2255 that Counsel did not orally address the objections in the PSR. Including the importation enhancement (CV NO. 2 at 5-12). The District Court found Hamilton did not specify the "Critical issues" "other questions" and "relevant objections" he needed to in his §2255 (ECF NO. 2 at 9-14) to make "sense" of his arguments. Thus the Court considered them conclusory. Hamilton appealed and specifically addressed the "critical issues" that were wrong in regard to the PSR, as well as noting specifically all of his allegations so that he could overcome the "conclusory" hurdle. These specific allegations centered around disparity, the importation enhancement and the complete absence of Counsel at all proceedings. United States v Hamilton, NO. 22-11156, at 2(5th Cir. 2023). Hamilton resumes his argument in regard to USSG §2D1.1(b)(5).

USSG §2D1.1(b)(5) Reads:

> If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the Defendant knew were imported unlawfully, and (b) the Defendant is not subject to an

adjustment under §3B1.2 (mitigating role), increase by (2) levels.

At sentencing, the District Court at no point evaluated Mr. Hamilton within the context of the plain reading of USSG §2D1.1(b)(5)(B). In order to apply the importation enhancement the Court would need to at a minimum consider whether "(B) the Defendant is not subject to an adjustment under §3B1.2" before applying the (2) level increase.

The conjunctive "and" connecting §2D1.1(b)(5)(A) with §2D1.1(b)(5)(B) makes it clear that the Court must consider:

> The offense involved the importation of amphetamine or methamphetamine, or ;
>
> The manufacture of amphetamine or methamphetamine from listed chemicals the Defendant knew were imported unlawfully.
>
> "And" The Defendant is not subject to an adjustment under §3B1.2 ([then] emphasis added) increase by (2) levels.

The plain reading of the statute is unambiguous. To ascertain the meaning of a statute we must begin with the statute. Ross v Blake, 578 US 632 (2016) Courts are guided in their interpretation of the text by the ordinary meaning canon, "the most fundamental semantic rile of interpretation." Antonin Scalia and Bryan A. Garner, Reading Law: the interpretation of Legal Texts §6, at 69 (2012) The job or interpretation of the canon is simple: the Court "is to interpret the words consistent with their ordinary meaning at the time Congress enacted the statute", Wis. Cent. LTD v United Stated, 138 S.Ct. 2067 (2018)", unless the context in which the words appear "suggests some other meaning Taniguchi v Kan Pac Saipan, LTD, 566 US 560, 569 (2012). No Court has taken up the issue of whether the plain meaning of "and" in §2D1.1(b)(5)(B) actually means "and".

Hamilton has vehemently argued that Counsel did not orally address whether the importation enhancement could be applied absent a mitigating role

consideration. The Appellate Court is in error. Hamilton raises this argument for the first time. Statutorily the District Court has to this points not considered the plain language of the statute.

"And" means "along with or together with" (And) Websters Third New Intl Dictionary (1993). When "and " is used to connect a list of requirements, the word has a conjunctive sense, meaning all the requirements must be met. United States v Palomar-Santiago, 141 S.Ct. 1615, 1620-21 (2021). For example, if a statute provides that "you must do A, B, and C" it is not enough to only do A, only do B, or only do C. All three things are required to be considered. A together with B, together with C. Here the Court was to consider A and B respectively. The Court could not apply the (2) level importation enhancement (A) unless it had also evaluated the Defendant's status in regard to a mitigating role adjustment (B).

The conjunction "and" is construed by this Court generally to join two distinct issues that must be considered when considering the whole. Such as when a statute provides two forms of relief ... Joined by the conjunction "and" the remedies are "distinct; United States v Ron Pair Enterprises, Inc, 489 US 235, 241-242 (1989) but both must be considered, or when considering elements of a crime, when the conjunction "and" adds an additional element such as "access a computer without authorization "and" exceed authorized access" MOsacchio v United States, 577 US 237 (2016). In both instances the conjunction functioned in such a way that the distinct clauses acted as condition that must be met.

In Mr. Hamilton's case, the Court failed to make this consideration before applying the importation enhancement. The District Court was obligated to consider the mitigating role adjustment, [or §2D1.1(b)(5)(B)].

At sentencing, Counsel spoke a total of (51) words. A majority of which were "yes sir" or "yes your Honor". Counsel made no references to the Court's failure to at least consider the mitigating role adjustment, nor was he aware of the "and" language of §2D1.1(b)(5)(B) despite the fact that it was within his power to do so. "An Attorney's ignorance of a point of law that is fundamental to his case

combined with his failure to perform basic research on that point is a quintessential example of "unreasonable performance", Hinton v Alabama, 571 US 263, 274 (2014). Although the standard for effective assistance is reasonableness, not perfection, one would be hard pressed through the objective benefit of hindsight as to why Counsel simply did not read the statute "and" has always meant "and". General education undergraduates are taught the intricacy of conjunctive, disjunctive, etc. Hamilton merely needs to show Counsel's representation fell below on "objective standard of reasonableness" and that a reasonable probability exists that, but for Counsel's unprofessional conduct, the result of the proceeding would be different" Strickland v Washington, 466 US 668, 687 (1984).

Hamilton also needs to show Counsel was deficient and said deficiency prejudiced his defense. In order to prove deficiency, Hamilton need only to show that "no ccmpetent Counsel would have taken the action that Counsel took" Hall v Thomas, 811 F.3d 1250, 1290 (11th Cir. 2010). Here Counsel took no action in regard to researching the law. It becomes easy to meet the first prong.

Due to Hamilton's plea, the prejudice prong can only be met if there is a reasonable probability that "but for Counsel's errors, he would not have pled guilty and insisted on a trial" Hill v Lockhart, 474 US 52, 59 (1985). The (2) point enhancement increased his Guidelines form (36) to (38). A substantial effect on his Guideline range, or a change in sentence from to . Ordinarily "a Court's reliance on an incorrect range in most instances will suffice to show and effect on the Defendant's substantial rights, (prejudice) and he will not be required to show more" Molina-Martinez v United States, 578 US 189, 201 (2016).

Counsel failed to simply read the statute in order to safeguard his client's rights. The English language leaves little doubt that "and" conjoins and means "together with". Any other reading is ambiguous. §2D1.1(b)(5)(B) is plain when it states "and" the Defendant is not subject to a mitigating role adjustment under §2B1.2 (then) increase by (2) levels.

III. **TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ORALLY ADDRESS HAMILTON'S LACK OF KNOWLEDGE IN RELATION TO THE METHAMPHETAMINE IMPORTATION ENHANCEMENT IN USSG §2D1.1(B)(5) WHEN THERE IS A CIRCUIT SPLIT OVER SAID "MENS REA"**

A primary goal of Counsel is to represent their client in conformity with the Sixth Amendment. Not in conformity with abiding circuit precedent. When an attorney represents a client that has an issue that another circuit supports, then it is the obligation of Counsel to persuade the Court on behalf of their client to consider those circuit splits. Ultimately, that decision is based on what is best for their client.

A Federally indicted Defendant may begin the criminal legal process at a local district Court. But this does not negate the fact that they are a "Federal" Defendant. Not a Fifth Circuit Defendant. Not merely a Middle District of Texas Defendant. But a Federal Defendant. When Counsel is engaged to defend, they are obligated to represent their clients to the full extent of Federal law. To argue and litigate all Federal law that benefits their client. This includes circuit splits.

Hamilton has consistently claimed that Counsel was ineffective for failing to orally argue and address the importation enhancement pursuant to USSG §2D1.1(b)(5) (ECF NO. 2 at 9-14; United States v Hamilton, NO 22-11156 at *3 [5th Cir. 2023]). Prior to sentencing, Counsel noted in:

Objection NO. 4 (PSR 936):

> Defendant did not have knowledge of importation from Mexico
>
> Defandant's PSR indicates that he was a courier only
>
> In Silva v United States, 2016 U.S. Dist. 176733 (S.D. Tex., Dec. 2, 2016) the Court found that a (2) level enhancement for importation was unwarranted because Defendant was merely a courier. (Doc. 96 at 2).

At sentencing the Court made a "tentative" ruling in regard to the "knowledge" of the importation. Counsel added nothing to this argument. Nor the Circuit split. Not even controlling Circuit precedent. United States v Serfass, 684 F.3d 548 (5th Cir. 2012) (Doc. 149 at 7).

The District Court extended to Counsel a decision that was not fully formed, but rather ... "tentative". Counsel replied with silence. Tentative rulings "are not fully worked out or developed" or "hesitant, uncertain" Webster's Collegiate Dictionary, Eleventh Edition 2003. Yet Counsel replied with silence.

One of the primary goals of the Supreme Court is to address Circuit splits. The goal in that rationale is national conformity. Justice. Currently there is a wide divide across the United States in regard to the requisite "mens rea" in the importation enhancement in §2D1.1(b)(5). In the Fifth Circuit the controlling precedent is found in Serfass. United States v Serfass, 684 F.3d 548 (5th Cir. 2012). In that decision the Court concluded "that the plain language of §2D1.1(b)(5) unambiguously limited the qualification, "that the Defendant knew were imported unlawfully." To such contraband that was manufactured from one or more of the listed chemicals; it did not apply to "the importation of amphetamine or methamphetamine." i.e., the end products of such manufacturing. It reached this conclusion by applying the supposed basic ruled of English grammar. In construing the phrase, "that the Defendant knew were imported unlawfully; the drafters of the Guidelines employed the plural verb "were". That plural verb matched the plural noun, "chemicals". The enhancement obviously applied when the offense involved the manufacture of amphetamine or methamphetamine from listed chemicals that the Defendant knew were imported unlawfully. By contrast however, there was no other plural noun in the subject guidelines to which the verb "were" could have applied. In particular, that plural verb cannot apply to the sentence's disjunctive subject, "amphetamine or methamphetamine", because if the subject consisted of two or more singular words that were connected by "or" the subject was singular and required a singular verb.

Although they are of indefinite quantity, the nouns "amphetamine" and "methamphetamine" are singular, just as, for example, are the words "sugar" and "flour". If, hypothetically, the clause had been drafted to read "amphetamine" or "methamphetamine were imported", it would not have been grammatically correct.

Simply put, there the actual phrase, "the Defendant knew were imported unlawfully", cannot apply to "the importation of amphetamine or methamphetamine".

Other Circuit's disagree with this ruling. Before moving to that decision Hamilton would contend a simple English reading would yield a different outcome. USSG §2D1.1(b)(5) reads:

> If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the Defendant knew were imported unlawfully and (B) the Defendant is not subject to an adjustment under §3B1.2 (mitigating role), increase by two levels.

The contention of the Court here is that the rules of grammar apply. Basically that the plural verb "were" matches the plural "noun", "chemicals".

The Court points out that if "the subject consists of two or more singular words that are connected by "or" the subject is singular and requires a singular verb". The Serfass Court then shows how the "nouns" amphetamine or methamphetamine can be of indefinite quantity ... thus singular. Thus the Court reasons the sentences plural verb "were" only matches the plural "noun" "chemicals". Both of which the Court states are plural. But this is bad English. The (5) rules of subect-verb-agreement go as follows;

Rule 1: A singular subject takes a singular verb.

Rule 2 A plural subject takes a plural verb. (The rule by Sefass)

Rule 3 Compound subjects joined by "and" take a plural verb.

Rule 4 Singular subjects joined by "or" or "nor" take a singular verb (rule cited but not applied in Serfass. Singular "amphetamine" "methamphetamine".)

Rule 5 When a singular subject and plural subject are joined by "or", the verb agrees with the subject closest to the verb.

The issue that §2D1.1(b)(5) poses is that of Rule 5. To resolve the issue, all someone needs to do is evaluate the clause after the second "or", which reads:

"the manufacture of amphetamine/methapmphetamine (emilinated "or" with) from listed chemicals that the Defendant knew were imported unlawfully)."

The Serfass Court simply assumed that the plural noun "chemicals" should match the next plural verb. But the rule states whichever verb is closest to the subject dictates whether both clauses are singular or plural. The plural "were" is not the closes verb, which would render serfass's reasoning incorrect. "Knew" is the closest verb, and "knew" is a singular verb.

Ninth Circuit Findings United States v Travis Job, 851 F.3d 889; 871 F.3d 852 (2017)

In Job, a trial provided no evidence that Job was personally unvoled involved in the importation of methamphetamine. At sentencing, the Government asked for the §2D1.1(b)(5) enhancement through relevant conduct related to jointly undertaken criminal activity under §1B1.3(a)(1). Even if Job was not personally involved in the importation, the increase could apply if the importation was within the scope of jointly undertaken criminal activity.

The Government further argued that §2D1.1(b)(5) can be imposed on a strict liability basis so long as the Government can prove that the drugs were imported by someone in the conspiracy. Regardless of the Defendant's intent, knowledge, or lack of knowledge that the drugs were imported. Relying on Untied States v Biao Huang, 687 F.3d 1197 (9th Cir. 2012). The Government argued that it need only prove the drugs were imported by someone, where Biao Huang found that it is enough for the Government to show that the drugs were imported. Id at 1206.

The Ninth Circuit noted that in Biao Huang, whether §2D1.1(b)(5) requires that Defendant to actually know that the the methamphetamine be sold was imported by someone is an open question." Id.

In Job, the Court noted only one circuit has approved the Government's proffered reading of USSG §2D1.1(b)(5). That would dispense with the required "mens rea" that the Defendant actually "know" that the drugs were imported. In

United States v Serfass, the Fifth Circuit stated the conclusion that the increase applies to "a Defendant who possesses methamphetamine that had itself been unlawfully imported" regardless of whether he or she had actual knowledge of the importation. 684 F.3d 548, 553 (5th Cir. 2012). The Ninth Circuit refused to adopt the Fifth Circuit's conclusion.

Presumably the Ninth Circuit was aware of the Fifth Circuit's English grammar conclusion and rejected it. Hamilton asks this Court to come to the same conclusion. Across the United States Appellate Court's disagree about the requisite intent needed (mens rea) in order to apply the (2) point importation enhancement. The Eight Circuit has sided with the ruling Serfass. (SEE United States v Werkmeister, 62 F. 4th 465) (8th Cir 2022) Other Circuits to consider the issue have sided with the Ninth Circuit. United States v Johnson, 738 Fed. Appx. 872 (6th Cir. 2018) where the Court found a Defendant "received a two-point offense level enhancement if the offense "involved the importation" of methamphetamines" that the Defendant knew were imported unlawfully" Id. Other Circuits have failed to "squarely address this scienter requirement issue" United States v Valdez, 723 Fed Appx. 624 (10th Cir.2018).

These varying interpretations of §2D1.1(b)(5) in regard to a scienter requirement have created a wide divide and disparity in sentencing across the Circuits. A (2) point enhancement in some Defendant's cases can render extra years added to the total. In addition, the existence of a possible enhancement pursuant to §2D1.1(b)(5) can shadow an entire proceeding, possibly swaying a Defendant to plead guilty in place of trial. Rule 10 of the Supreme Court's rules indicated that a reason the SCOTUS Court would consider a matter is when:

> Rule 10(a) A United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of appeals on the same important matter;

The scienter requirement of §2D1.1(b)(5) meets the standard necessary for this Court to consider the issue.

Hamilton's Guideline sentence was increased from 121-150 months to 235-293 months. The Guidelines serve as the Sentencing Court's starting point, their benchmark. A Court must begin their analysis with the Guidelines and remain mindful of them throughout the sentencing process. Molina-Martinez, 578 US 189 (2016) when the Court relies on an incorrect range, in most instances will suffice to show an effect on the Defendant's substantial rights. In the ordinary case, a Defendant will satisfy the burden to show prejudice by pointing to the application of an incorrect higher Guideline range and the sentence he received there under Id.

Counsel should have been aware of the potential Circuit split. Hamilton is a Federal Defendant. All to often attorney's represent clients solely within local precedent. Although to some degree this practice has value, Counsel must represent a client with all Federal precedent in mind. This importation enhancement is construed differently throughout the circuits Counsel should have been aware. Every day in prison a Defendant serves is a day lost of his life. Its true Defendant's for the most part are criminally liable. Hamilton admitted to possessing a substance containing a detectable amount of methamphetamine. But justice demands that if USSG §2D1.1(b)(5) requires a scieter requirement as the Ninth, the Sixth and other Circuits are unclear of then Counsel is obligated to seek that justice. In addition Hamilton would ask this Court to consider the disparity between a Defendant arrested in Texas versus California or Michigan. That disparity means life that is lost. The Constitution guaranteed justice. Life, Liberty. Where there is a question of law that results in a disparity that Counsel could have argued and sought, that Counsel was ineffective. All too often these months and years are like pennies in a jar, but they are days and years of life. Life that can never be regained. Hamilton asks the Court to consider the scienter requirement and Counsel's obligation to argue them.

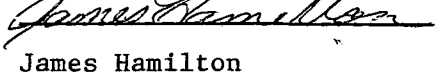
## CONCLUSION

Hamilton was arrested for possession of a detectable amount of methamphetamine. The Court entered into a reduction of that drug to a pure substance absent s substantial step on the part of Hamilton. In addition, the Court sentenced Hamilton in violation of §2D1.1 App.n.5 after the charging document had already named the "type" of drug. Counsel was essentially an absent participant. These practices are in violation of due process and statutory law.

In addition, statutes that mandate an action on the part of the Court before carrying out another are unambiguous. Such is the case with §2D1.1(b)(5). "And" means "and".

Finally, the Circuit split needs to be resolved. Defendant's nationwide are receiving disparate sentences due to the unresolved question about the scienter requitement. Does a Defendant need to know about the importation according to §2D1.1(b)(5)? Is this merely personal knowledge or involvement? Hamilton asks SCOTUS to consider each of these arguments, and whether Counsel was ineffective for not raising them at the District Court level. In addition, the Sefass Court completely ignored the simple rules of grammar. If "chemicals" was the plural subject after "or", then the next verb decided whether both clauses were singular or plural (in conformity with rule 5). Unfortunately to plural "were" was not the first verb after the plural "chemicals". "knew" was the first verb, and it was singular. Serfass is bad law, and bad English.

For all of the foregoing reasons, as well as those set forth in his petition for writ of certiorari, Petitioner James Hamilton respectfully prays that this Court grant certiorari and vacate the order of the District Court.



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