

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

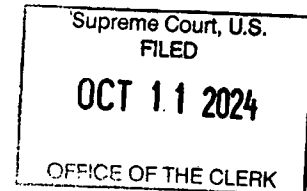
**24-5829**

**ORIGINAL**

RICKY DONNELL ABNER  
Petitioner,

vs.

UNITED STATES OF AMERICA  
Respondent.



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

PETITION FOR WRIT OF CERTIORARI

Pro Se/Pro Per,  
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## QUESTIONS PRESENTED

1. Does the §924(c)(1)(A) 'Possession In furtherance of' offense conduct require geographical location be proved as alleged in indictment, when ONE POSSESSION is specified to have occurred on or about the same date simultaneously in two different states?
2. Can the government indict me for one charge of 'Possession' of a firearm 'In furtherance of' a drug trafficking crime, but theorize its trial case as if it charged me with §924(o) 'Conspiracy to possess a firearm' 'In furtherance of', and/or 'Use and Carry' of a firearm 'During and in relation to' a drug trafficking crime'?
3. Does this court's ruling in United States v. Rodriguez-Moreno, 526 U.S. 275 (1999) Venue ruling, apply to my case, since Rodriguez was charged with 'Use and Carry' of a firearm 'During and In Relation to' a crime of violence, but I was charged with ONE COUNT of 'Possession In furtherance' of a drug conspiracy, alleged to have operated in another state?
4. Can the Congress legislated definition in §924(c)(1)(A)'s "Any Drug Trafficking Offense" content, act as a prophylactic to shield an unqualified 'Conspiracy' predicate, deemed not to meet the Model Penal Code Categorical Approach requirement, and continue to penalize me with 25-years leaving me no Due Process to defend against its application?
5. Is the §924(c) possession 'In furtherance of' offense conduct element Unconstitutionally Vague, and infringing upon my due process, in light of the fact(s) that: there are Circuit wide conflicting standards of proving conduct; Since its enactment it has given jurors a great degree

of guess work and imagined scenarios to determine 'Nexus', and in cases like mine it gave the Government the advantage to mix the 'in furtherance of' conspiracy acts with the 'in furtherance of' firearm possession acts, causing a presumptive guilt in the mind of the jurors?

6. Does the Fourth Circuit's ruling in my case, affirming my conviction based on the WRONG offense conduct constitute a 'Travesty of Justice', calling for a panel rehearing en banc, to re-examine the trial record?

#### List Of Parties

Ricky Donnell Abner is the Petitioner, who was the defendant-appellant below. The United States Of America is the Respondent, who was the Plaintiff-appellee below. Attorney Paul G. Beers, of Glenn. Feldmann, Darby, & Goodlatte represented the Petitioner at trial and on appeal below.

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## Petititon for a Writ of Certiorari

Ricky Donnell Abner respectfully petitions for a writ of certiorari to review my case that includes: 1. a manipulation of the Federal Rules governing venue and jurisdictional prosecution supported by a mis-application of this Court's Rodriguez-Moreno precedent; 2. an abusive use of the grand jury indictment process; 3. a Constructive Amendment of my charges during the trial process by both the trial court and the government; 4. erroneous jury instructions that supported an arbitrary and capricious case theory made by the government, enabling it to expand the scope of its indictment and the 'Possession element of §924(c)(1)(A), which supported a jury finding based on the wrong offense conduct of the §924(c)(1)(A) statute; and, 5. Resulting in the Fourth Cir. Court of Appeals affirming my conviction, in a published opinion below, based on THE WRONG OFFENSE CONDUCT prong, that was not charged in my indictment and for which I thought I was being tried for violating at trial.

## Opinions Below

The opinion of the United States Court Of Appeals for the Fourth Circuit for My Direct Appeal is captioned, as United States v. Ricky Donnell Abner No. 23-4018 (6:21-cr-00001-NKM-5) (4th Cir. Mar 26, 2024). Appendix 1. My petition for rehearing en banc is captioned United States v. Ricky Donnell Abner, No. 23-4018 (6:21-cr-0001-NKM-5) (4th Cir. May 14, 2024). Appendix 2.

### Jurisdiction

The United States Court Of Appeals entered its final judgment on May 14, 2024, when it denied Petitioner's petition for rehearing en banc. Petition filed and was granted a 60-day extension by this court. This petition is timely filed by the date set by this court of October 11, 2024, see U.S. Sup. Ct. R. 13(3), and this Court's jurisdiction is therefore invoked under 28 U.S.C § 1254(1).



## Statement of the Case

I Ricky Abner, was initially charged on January 26, 2021 by the Western District Of Virginia via a criminal complaint alleging a violation of 21 USC §§841(b)(1)(B) 'Conspiracy to Distribute 500 grams or more of cocaine, resulting from a search warrant. Issued by Judge David S. Cayer in the W.D. of N.C., and executed on my North Carolina residence, on January 21, 2021.

During the search of my residence TFO allents recovered drugs and six firearms. After I refused repeatedly to cooperate with the government, I was indictment in a Fourth superceeding indictment in August of 2021, and charged with 2-counts of a 21 count indictment. Count One charged that I violated 21 USC §§ 846 and 841(b)(1)(B) 'Conspiracy to distribute 500 grams or more of cocaine; and Count Fourteen charged me with 18 USC §924(c)(1)(A) 'Possession' of a firearm 'In furtherance of' a drug trafficking offense.

### Trial

I was tried along with an alleged co-defendant whom I barely knew, before a Lynchburg, Virginia jury on August 29-thru-September 2, 2022. At the close of the Government's case. I moved by and through counsel for a judgment of acquittal on Count Fourteen. Pursuant to Rule 29 of the Fed.R.Crim.Pro., because no evidence existed to prove I possessed firearms "On or about January 26,2021, in the Western District Of Virginia, as charged in Count Fourteen of the government's indictment. The trial court repeatedly denied my motions, and after closing arguments, the jury found me guilty on both counts One and Fourteen.

## Sentencing

On January 5, 2023 The District Court sentenced me to 420-months imprisonment. The sentence consists of 120 months for the Conspiracy count one; followed by 300-months on count Fourteen the §924(c) charge, which carried a mandatory minimum pursuant to §924(c)(1)(C)(i) second or successive §924(c).

## Appeal

I timely appealed, arguing by and through counsel. I. 'The District Court erred as a matter of law by denying my second motion to suppress ALL evidence seized. As a result of the government's search warrant' issued for my N.C. residence; and, II. The District Court erred as a matter of law by denying my motion pursuant to Fed.R.Crim.Pro. Rule 29 for judgment of acquittal on Count Fourteen the §924(c) charge. Appendix 3-thru-6

The Government responded to my argument by asserting that my sufficiency of evidence Rule 29 argument was incorrectly styled. Arguing that the context presented 'Variance' of the indictment, and making a on the record 'judicial admission' that the use of the term "elsewhere" means "the language expressly contemplated possession outside of Virginia." Appendix 7 The Government also asserted that it charged me "conjunctively" but intended to prove its case "disjunctively". Appx 7.

The Fourth Circuit Court of Appeals ruled in favor of the government. Asserting unequivocally that, the 'use and carry' and during and in relation to' a drug trafficking crime offense of §924(c) "does not require the Government to prove" 'possession' "at any particular location and ...geographic location alleged in the indictment IS NOT AN ELEMENT of the crime"(emphasis added).

On March 26, 2024 the Fourth Circuit Court of Appeals affirmed my conviction, and I filed a timely motion request for a panel hearing en banc asserting that, 1. The district court overlooked a point of law regarding the denial of my suppression motion. 2. The affidavit for the search warrant on my N.C. home did not provide a substantial basis to conclude the sought after evidence of drug trafficking would be found. 3. TFO Bailey's affidavit was so facially deficient it could not meet the 'Good faith exception' of Leon. 4. The panel overlooked the district court's failure to prove a 'nexus' between the firearms found in my N.C. residence and its Virginia conspiracy. 6. The panel overlooked the denial of my requested jury instructions made by and through counsel that the jury must find that I "Knowingly possessed the firearms 'In furtherance of' the western district of virginia conspiracy, and that I "actually" or "constructively" 'Possessed' firearms in the Western District of Virginia, as alleged in the indictment. 7. That, the panel overlooked the failure of the Government to establish proper venue, and that the government misrepresented its charges to the grand jury.

On May 14, 2024 the Fourth Circuit Court Of Appeals, denied my petition for a panel rehearing en banc.

On September 26, 2024 I filed a motion pursuant to Rule 52(b), of the Fed.R.Crim.Pro. arguing that, the district court erred by constructively amending my indictment; 2. The trial court erred by convicting me to §924(c) based on a non-qualifying predicate drug offense; 3. Magistrate Judge David Cayer erred by failing to recuse himself from my search warrant probable cause hearing; 4. The District

Court erred when it allowed me to be convicted of an unconstitutionally value statute; 5. The District Court erred when it denied my Rule 29 motion to acquit my §924(c) charge; 6. The government committed prosecutorial misconduct when it failed to present a factual probable cause statement to the Grand Jury; and 7. The Fourth Circuit's affirmation of my §924(c) conviction has resulted in a 'Judicial travesty'.

My Rule 52(b) motion is presently pending a ruling from the Fourth Circuit Court of Appeals.

## REASONS FOR GRANTING THE PETITION

### 1. Constructive Amendment Of the Indictment

The District Court committed Plain Error when it "literally Amended Count-14 of the indictment by striking the essential allegation that the government need not prove that "On or about January 26, 2021, "Abner" possessed firearms in the Western District of Virginia in furtherance of its alleged Western District of Virginia Conspiracy."

Although Abner didn't bring this argument before the District Court he now comes before this Honorable Court with a case or controversy that is a cause of injurious harm and thereby "Involves" a "Justifiable Claim" to be adjudicated by this Article III Court. See McGrath v. Kristensen (1950) 340 U.S. 162 L.Ed. 173 71 S.Ct. 224.

Abner therefore contends that under the standards established in Olano the Fifth and Sixth Amendments and the Fed. R. Crim. P. Rules 7(c)(1);(d);(e). The literal Amendment of Count-14 as adjudged by the District Court during his trial was (1) an error (2) that error was plain (3) the error affected Abners substantial rights provided by the Fifth and Sixth Amendments and that the errors "seriously affected the fairness and integrity of the Judicial Proceedings" of his case and resulted in a miscarriage of justice by allowing him to be convicted of a 18 U.S.C. § 924(c) charge which he is 'actually innocent of.'

In his Appeal Brief Abner by and through Counsel argued that the District Court abused its discretion by failing to grant Abner's Rule 29 Motion for Judgment of Acquittal during trial on the section 924(c) offense charged in Count Fourteen. Abner's contention was that on August 25, 2021, the government indicted Abner for: Possessing specified firearms on January 26, 2021, in the Western District of Virginia and elsewhere." <sup>1</sup>Arguing in Sum "The government failed to prove Abner possessed firearms in" The Western District of Virginia.

Though argued as a sufficiency argument the government made several

judicial admissions that (1) Abner's sufficiency argument was incorrectly styled and actually asserted variance "because the location where the firearms were possessed" was not an "Essential Element of the Crime" dismissing Abner's argument as "Suplusage" that amounted to "A factual discrepancy" about where Abner possessed the firearms as irrelevant to his guilt and the jury's consideration of the evidence at trial. See R.O.A. # 2 (Government's Appeal Brief pgs. 35-40).

"A judicial admission is binding on the party making them" and "Like judicial estoppel" the doctrine of judicial admission cannot be used to exclude a party's statement unless it is 'inconsistent with or contrary to its past statement.' See 2022 U.S. Dist. LEXIS 168384 Advance Capital LLC v. Region Constr. Inc.

Abner now gives Judicial Notice that though poorly litigated by his attorney he wished to argue the sufficiency of the evidence. Also, that, since the government gave judicial admissions and the Court agreed its indictment contained "Minor Variance." The government preserved the challenges he now makes to its indictment. His Attorney also argued Constructive Amendment at trial.

The District Court literally Amended the essential allegations as charged in the government's Count-14 by the Grand Jury. "A literal Amendment occurs 'when the trial court' strikes a specific relevant allegation necessary to prove the offense so that the defendant can be convicted without proof of the allegation." Williams v. United States (D.C. Cir. June 2020) (Citing Ingram v. United States 592 A. 2d. 992 105 (D.C. Cir 1991)).

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1. Abner was arrested based on a Criminal Complaint issued by the U.S. District Court for the Western District of Virginia on January 26, 2021, which did not allege any firearms violation.

A. Amendment By Presumption Of Vicarious Liability

At the trial the District Court, over the defense counsel's objections. Permitted the government to offer evidence, to the effect that firearms possessed 'On or about' January 21, 2021. Were knowingly possessed to: support; aid and assist; and help forward Conspiratorial Act[ions] of Alleged Co-Conspirators. In the Western District of Virginia and any "elsewhere". (See Trial Transcripts pgs 909 at lines 1-24)

Under the Court's Judicial oversight and instructions. It guided the jury to find Abner guilty of the above alleged firearm possessed in furtherance of the § 924(c) offense. Although it was totally unsupported by ANY directly factual or circumstantial evidence. The firearms which were found at Abner's Charlotte, North Carolina residence. Ever: Assisted; helped forward; support; or aid and assist, at any time. Acts in furtherance of the Western District of Virginia or elsewhere. By ANY of Abner's alleged co-conspirators. Other than by Judicially altering the government's charges allowing the government and the jurors to find guilt based on a Theory Of Vicarious Liability.

Requiring knowledge of both prongs of the illegality, (i.e. by knowingly 'possessing a firearm' and knowingly possessing the firearm 'in furtherance of' a drug trafficking offense) in a § 924(c) prosecution is allegedly necessary to avoid this kind of vicarious... criminal liability. To permit imposition of the 25-year mandatory minimum under a purely vicarious theory of liability seems to belie the notion that the Court discern the 'evolving standards of decency' Lockett v. Ohio 98 S.Ct. 2954 57 LED 2D 973, 438 US 586 (July 1973) citing Trop v. Dulles, 356 US 86, 101, 2 LED 2d 630, 78 S Ct 590 (1958).

Congressional History as examined by several circuits all conclude, "By requiring the possession of the firearm by 'in furtherance of' the crime, Congress intended a Specific Nexus between the gun and the crime charged" UNITED States v. Mackey 265 F.3d 457 (6th. Cir Sep 2001) citing United States v. Finley

245 F.3d 199, 203 (2d Cir 2001)); see also United States v. Luciano 329 F.3d 1, 6 (1st Cir. 2003); United States v. Celallos-Torres, 218 F. 3d 409, 414-15 (5th Cir. 2000); United States v. Wahl 351 US App D.C. 264, 290 F.3d 370, 375 (D.C. Cir. 2002)(emphasis added).

Merriam Webster's Third New International Dictionary 4th Ed. 2021 defines the word Nexus to mean: knot, ligament, ligature, tie, vinculum, yoke.

As used in § 924(c) the House Judiciary Committee intended that, "the government must clearly show that a firearm was possessed to advance or promote the commission of the underlying offense." H.R. Rep. No. 105-344 (1997) 1997 WL 668339, at \*12 (House Report). Evidence that a defendant merely possessed a firearm at a drug trafficking crime scene. Without proof that the weapon furthered an independent drug trafficking offense is insufficient to support a conviction under § 924(c) see United States v. Lawrence 308 F.3d 623, 629-31 (6th Cir. 2002)(distinguishing firearms possessed 'in furtherance of' drug trafficking from others unused discovered at the scene).

Finally, Congress unedquivocally indicated, an intent to differentiate a defendant who 'possesses a firearm' in 'furtherance of' a crime from one 'uses or carries' a firearm... it appears that Congress structured § 924(c) as it did to assure that someone who possess a gun that has nothing to do with the crime (as charged) does not fall under 924(c) 144 CONG. REC. S 12670 (statement of Sen. DeWine). "In other words this element of § 924(c) turns on the INTENT of the defendant" see United States v. Arriola 467 F. 3d 1153, 155-56 (9th Cir Nov 2008)(analyzing the Congressional Intent to create two different offenses).

"The Definition of Intent" includes three variants generally corresponding to the concepts of 'Purposeful', 'knowing' and 'reckless' conduct under the Model Penal Code." United States v. Voisine 778 F. 3d 176 (1st Cir. Jan 2015). Against this backdrop, 'the conduct constituting the offense' and the ability to bind the defendant in respect to that alleged conduct governed by 18 U.S.C. §



924(c) are tethered to the conduct itself. In keeping with notions of statutes and vicarious liability. Most convincingly a broader reading of § 924(c) begins to afford the government a lesser burden of proof than Due Process affords to defendant" Id.

It is only in this content that Abner's trial counsel spoke about the Intent prong,<sup>3</sup> with concern for "charged conduct of which he must defend himself." United States v. Maury 695 F. 3d 197 (3rd Cir. 2000).

The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute, Liparota, 471 US 424, 435 citing United States v. Hudson, 7 Cranch 32, 3 L.Ed. 259 (1812).

Elements are the 'constituent parts' of a crime's legal definition the things the 'prosecution must prove to sustain a conviction'. Mathis 579 U.S. 500 (June 23, 2016) quoting Black's Law Dictionary 634 (10th ed. 2014).

"With respect to the element at issue in this case (knowingly possessed firearms infurtherance of) Congress has explicitly spelled out the mental state required." Governing Nexus pg. 913 at Lines 15-19 as cited in the congressional records Supra. "Congress certainly intended by use of the word 'knowingly' to require some mental state' (i.e. awareness) with respect to the infurtherance of crime defined in § 924(c)" Id.

Absent the burden to prove those elements which the court judicially altered, Abner was forced to defend the vicarious theory that his firearms furthered the conspiracy, which constructively amended his offense to 18 U.S.C. § 924(c) offense. (See Trial Transcripts pg. 913 at Lines 15-19.

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3. Defense Counsel argued that in light of the government being allowed the permission to try their case, without having to prove the Virginia possession; then the jury should be instructed to find Abner 'Knowingly Possessed' the firearms in his North Carolina residence and that he knowingly possessed them in furtherance of the West Virginia Conspiracy. See Trial Transcript pg. 909 Lines 15-19

B. Constructive Literal Amendment by  
Reframing of Conjunctive Factual Allegations  
In Disjunctive Terms

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The government contends that the phrase "possession of a firearm" is to be read in isolation. Vehemently arguing that in all §924(c) cases, and particularly in Abner's case. Possession in a particular place is unimportant. Stressing that, Abner's possession of firearms at his Charlotte N.C. residence was de minimis to its framed allegations. Incorrectly stating that, as long as it proved Abner to be a part of its alleged Drug Trafficking Conspiracy, then proved possessions of his firearms anywhere could be found to have furthered its conspiracy everywhere, although its count one charged Abner with conspiring IN THE WESTERN DISTRICT OF VIRGINIA and no elsewhere (see jury instructions #42).

Viewing the Possession phrase in isolation the government's narrowed reading is plausible. "But it is a fundamental principle of statutory construction (and indeed of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used" Reno v. Koray 115 S.Ct. 2021, 132 LED 2D 46, 515 US 50 at 54 (citing Deal v. United States, 508 US 129, 132 LED 2d 44, 114 S.Ct. 1913(1993)(emphasis added)(1995) The government's narrowed application is misplaced in Abner's case. Possession and location are intrinsic to burden of presenting facts to prove actual or constructive possession, further intrinsic in factors provided to the jury; in order to conclude possession "furthered, assisted, promoted, supported, help to further the 'Drug Trafficking Offense' as charged.

"It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully set forth ALL the elements necessary to constitute the offense intended to be punished..." Hamling v. United States 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.ED.2d 590(1974).

The government tracked Abner's firearm "possession" and its "in furtherance of a Drug Trafficking Conspiracy", with The Western District Of Virginia. Rule 7(c)(1); Due Process governing Fair Notice and Fair Defense, as well as Supreme Court and this Circuit's precedent. All support Abner's assertions that, the government had/has to prove Abner actually or constructively possessed firearms "In The Western District Of Virginia", FIRST and ELSEWHERE Second. Not disjunctively eliminate the intrinsic possession in furtherance of NEXUS requirement through disjunctive manipulation of its Grand Jury True Bill

indictment's allegations.

"The purpose behind the disjunctive/conjunctive rule is to avoid uncertainty in charging an offense when the statute enumerates several different ways in which an offense may be committed." see United States v. Villalobos, (differentiating cases where indictments tracked the language of statutes that were actually charged in the conjunctive, i.e. 'using and carrying' or 'purchasing dispensing, and distributing, asserting in these cases proof of anyone of those facts are sufficient to establish guilt" see Villalobos,

Although the government and the District Court has proceeded as if Abner was charged with "possession of a firearm in the Western District of Virginia and the Western District of North Carolina (actual place of possession), or that Abner was charged with Use and carrying firearms in the Western District Of Virginia and else where. This was not the case.

Therefore, "what renders this rule inapplicable in the present case is that the indictment did not allege several statutory means of committing §924(c)" (i.e. use and carry) "rather the indictment's allegations of two separate Possessions at different places ON or about the same date January 21, 2021, although listed in a conjunctive fashion, constituted the specific Actus Reas (possession) of the offense," id.

This was not a case of the indictment charging the language of a statute in the conjunctive. The jury therefore had to find both POSSESSIONS (Virginia AND elsewhere) "in furtherance of" beyond a REASONABLE DOUBT in order to [lawfully] convict Abner as charged.

~~Constructive~~ Constructive Amendment of Indictment  
By Broadening The Scope of The Possession Prong  
To Broaden The Scope Of Indictment

"If the specific facts that are alleged fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation the indictment fails to state an offense." United States v. Huet 665 F.3d 588, 595 (3rd Cir. Oct 2011) citing Panarella, 277 F.3d at 685 Sep. 2008).

Abner contends that, the Court's decision to allow the government to try its case, by broadening the scope of the charges. Caused him to be convicted of Conspiracy to use and carry a firearm during the commission of a drug trafficking offense under §924(o).

Standard Of Review:

"A Constructive Amendment occurs 'when the government...or the district court...! broadens the possible basis for the conviction beyond those presented to the grand jury'" 2021 U.S. Dist. LEXIS 242454 Chiles v. United States Dec 20, 2021 (quoting United States v. Moore 810 F.3d 932, 936 (4th Cir. 2016) (quoting United States v. Floresca, 38 F.3d 706, 710 (4th Cir. 1994))).

"Considering the proof necessary to establish a constructive amendment 'It is broadening of the basis for the defendant's conviction that is important' and the 'key inquiry is whether the defendant has been tried on charges other than those made in the indictment against h[im]'" 2024 U.S. Dist. LEXIS 85341 Brown v. United States, May 10, 2024 (quoting United States v. Allmendinger, 706 F.3d 330,339 (4th Cir. 2013))

The government's indictment allegations specifically tracked the "possession in furtherance of" statutory language. By stating, "On or about January 26, 2021"(Time); "In The Western District Of Virginia and elsewhere"(place(s)); "the defendant, Ricky Donnell Abner"(perpetrator); "did KNOWINGLY"(intent) "Possess firearms"(actus reas); "In furtherance of a Drug Trafficking Crime"(mens rea), see attached indictment exhibit.

However as the above indictment stated in general terms that Abner On or about the same date possessed firearms (indicating two possessions) in the Western District of Virginia AND elsewhere (two simultaneous places); was not the charge presented at trial. Because, The government's proof was 'materially different from facts alleged in the indictment'"see Beeler 587 F.2d at 342. This material difference which came in the form of broadening its charges by broadening the elements of the offense as charged.

Although the government knew it had never seized firearms constructively or actually possessed by Abner in any of the 58 or so counties in Virginia, as alleged in its indictment, it argued its case and theorized that, the firearms. Actually possessed by Abner only in the Western District Of N.C. furthered the objectives of the Western District Of Virginia conspiracy as charged.

The government with the support of the trial court accomplished broadening the the scope of its charges by proffering and presenting "trial proofs by 'modifying the essential elements of the offense charge'" United States v. Barrow, 118 F.3d 482 at 118 F.3d 489-90(quoting Hathaway 798 F.2d at 910, and there was "more than a "substantial likelihood" that Abner was convicted of an offense other than "possession of a firearm in furtherance of a drug trafficking CONSPIRACY."id. (emphasis added).

In its opening argument the government asserted that, it did not have to prove its indictment allegations, that Abner's firearms were possessed in the Western District Of Virginia as alleged with "specificity". The government was allowed to merge its venue argument with its elemental proof requirement. By stating that geographical locations of the firearms "possessed" were diminimis

and irrelevant. Actually stating to the jury that it did not have to prove Abner actually or constructively possessed firearms in The Western District Of Virginia

The government the presented its case as follows:

1. It proffered that, the six firearms found in Abner's Charlotte, N.C. residence were present to protect drugs.
2. It proffered that, drugs and cash found in Abner's residence were somehow probably connected to the Conspiracy.
3. It proffered that, a vacuum sealer found in Abner's home was probably used to package drugs.
4. It proffered that, drugs were found in Abner's locked garage inside a vehicle driven by an alleged coconspirator and secreted in a hidden compartment.
5. It proffered that, at the time of his arrest, Abner gave a statement saying that he sometime stored drugs at his home for alleged coconspirator Jermel Storey.
6. It proffered that, circumstantially Jermel Storey visited Abner's residence shortly before and After a controlled drug deal that took place at some other residence with an informant. (although the government didn't present any material evidence of Storey leaving Abner's residence with any drugs or bags, boxes, etc.. or any container's that could have kept drugs.

The above presented is in light most favorable to the government's '§924(c) charge. But, what the government did not present to the Jury. Is how these N.C possessed firearms were tied, linked, or connected to the promoting and advancing of the Western District Of Virginia conspiratorial objectives. As Follows:

1. The government did not present that the drugs, cash, or firearms found were supplied by any members of the conspiracy.
2. It did not present that Abner sold or made ANY drug transactions from his N.C. residence.
3. It did not present that, Abner was ever seen by the nearly 20 or so alleged co-conspirators with ANY firearms at ANY drug transactions, deliveries, deal brokering etc...
4. It did not present that a single firearm found in Abner's N.C. residence was loaded or "readily accessible for use, (i.e. the closest firearm found in an adjacent room was in its protective storage sleeve and unloaded)
5. It did not present that, firearms were found in the vehicle found in Abner's garage, or, anywhere in the garage itself.
6. It did not present that Sotrey was ever seen leaving or entering Abner's residence with a firearm.

Absent any of the above evidence to tie Abner's possession to the Drug Conspiracy predicate charged. Abner's firearms were merely present during the possession of drugs; possible drug proceeds; and a tool probably used for packaging drugs.

"Circuit's have confirmed that the evidence presented would suffice under the the fortress theory (i.e. "firearms used to protect or embolden) when use and carry is the charged offense providing that, "if it reasonably appears that the firearms found on the premises controlled...by defendant and in his actual or constructive possession are to be used to protect the drugs or otherwise facilitate a drug transaction, then such firearms are USED DURING AND IN RELATION TO' a drug trafficking crime. 265 F.3d 462 quoting United States v. Henry 878 F.2d 937,944(6th Cir. 1989). However "in light of Congress' intent that "in furtherance of' be a more stringent requirement than 'during and in relation to', we emphasize that the POSSESSION of a firearm ON THE SAME premises as a drug transaction would not, WITHOUT A SHOWING OF A CONNECTION between the two sustain a §924(c) conviction. see Mackey, 265 F.3d at 457(6th Cir. 2001).

By presenting its case without the required proof and provided with general jury instruction from the court, as asserted earlier in this brief the intrinsic conduct of possession with INTENT to further its drug conspiracy was untethered from the required proof of conduct, and thereby changed to a during and relation to conspiracy charge. see Liparota v. United States 105 S.Ct. 2084, 471 US 424, 85 L.ED2D 434(May 1985)

Although the 4th Circuit has opined that, "the two prongs of §924(c) not only prohibit different types of conduct (use and carry versus possession), but they also diverg in how strong the nexus between the firearm and the predicate drug trafficking crime ...must be a firearm must be used during and in relation to a predicated crime, but a firearm must be possessed "IN FURTHERANCE OF such crime'"Woods 271 Fed. App'x 338 (4th Cir. 2008)(quoting Gambos 439 F.3d 796,810(8th Cir.)), The goverment in Abner's case was still allowed to mix apples and oranges when theorizing its case by braodening both the possession and possession in furtherance elements--to use and carry,by X'ing out location.

The government asserted in support of its trial proof that, geographic location of the firearm is not an elemental proof required under §924(c) possession of in furtherance of. However under the Statutory Provisions of §924 (c) Title 18 §924 'Penalties VI ELEMENTS OF OFFENSE subsection E.2 "Location of Firearm" denotes: 103. 'Immediate reach; 104. On person; 105 'In premises' 106.

Immediate reach or easy access; 107. Proximity of firearm to drugs; 108. Constructive possession; 108. In vehicle; 110. Constructive possession; 111. under seat; 112 In trunk; 113. In glove compartment.

In addition to the above to illustrate location of Possessed firearm is part of elemental proof Petitioner cites the following law: see United States v. Dennis 19 F.4th 656 (Dec 2021) accessibility of the firearm whether the gun is merely present or 'strategically located'; United States v. Lillard, 254 F.3d 1264 (10th Cir. 2001) (reversing conviction where prosecution presented no evidence 'the gun and drugs were ever kept in the same place or that [defendant] ever kept gun accessible where conducting drug transactions'; United States v. Mann 389 F.3d 869 (9th Cir. 2004) (mere illegality of possession of a weapon, while sufficient to support conviction where only possession is required, is insufficient evidence of 'in furtherance of' for purpose of 18 USC §924(c)); United States v. Davis 648 Fed. App'x 295 (May 2016) ("evidence that a defendant has dominion and control over the vehicle where the item is located establishes constructive possession)); see also United States v. Graham 796 F.3d 332 (4th Cir. 2015) (emphasis added).

Allowing the government to theorize and prove its case based on the vicarious liability definition of possession it used and a constructive possession in furtherance definition, "afforded the government a lesser burden of proof than due process afforded Abner" and gave him NO DEFENSE as to the intent prong of the conduct of which he must defend himself" see United States v. Maury 695 F.3d 197 (3rd Cir. 2015).

The trial court's refusal of the Knowing instructions that, defense counsel argued for allowed the possession in furtherance of requirement to be reduced and proved by mere inference, preponderance, or probability, thereby eliminating the NEXUS called for by Congress.

Even considering the government's evidence that a car secreting cocaine in a hidden compartment in Abner's garage; and the government's presentation that Abner admitted to TFO agents he sometimes stored drugs for Storey. Is without proof that Abner knew about the cocaine secreted in the car; or that Abner agreed to Sale drugs for or with Storey from his home. More importantly it doesn't prove any agreement or knowing choice to protect any of the conspiracies drugs, drug transactions, or other objectives of the conspiracy. see Graham 796 F.3d 376,77(quoted Schoneckloth v. Bustamonte 412 US 218,224 93 S.Ct. 2041, 36 L.ED2d 854(1973) (voluntariness cannot be taken literally to mean KNOWING CHOICE)

#### D. Trial Court's Erroneous Instructions

Abner contends that the trial court's erroneous Jury instructions and discretion to allow the government to prove its case with a misplaced theory of evidential proof caused constructive amendment of his §924(c) charge.

"When a constructive amendment claim rests on allegedly erroneous jury instructions, a reviewing court is to consider the totality of the circumstances—including not only the instructions and the indictment but also the arguments of the parties and the evidence presented at trial—to determine whether the jury could have 'reasonably interpreted' the challenged instructions as 'a license to convict' on an unindicted charge. If not..."United States v. Allmendinger 706 F.3d 330,339 (4th Cir. 2013)

During jury instruction deliberations, the trial judge refused to allow Abner to argue that (1). the government needed to prove the Western District Of Virginia firearm possession as alleged in its indictment(see Trial Trns. Exhibit pg914at lines16-25; the governmentmust prove that Abner's N.C. firearms were knowingly possessed in furtherance of its VIrginia drug conspiracy (see Trial Trns. Exhibit pg.910at lines 1-2; He insisted that the trial court provide jury instructions to specifically require findings of the above.(see Trial Trns. Exhibits pgs910,911,913 and 914

Upon refusal of the trial court to provide the requested instructions, defense counsel objected. Based on "Notice" (see Trial Trns pg 915 at lines 18-24, and eventually declared that the government's indictment was being judicially altered in terms of a "Contsructive Amendment"(see Trial Trns. pg 925 at lines 22-26; and pg 926 at lines 1-24.

The jury instructions were fatally defective, in that the trial court refused to charge that in order to convict Abner, the jury must find he actually or constructively possessed firearms in the Virginia AND elsewhere, and they were possessed in furtherance of the Virginia conspiracy which did not allege Abner's "elsewhere" participation. This resulted in "the bulk of the jury instructions' and the parties arguments improperly track[ing] the indictment" Id. quoting United States v. Moore 810 F.3d 932,936 (4th Cir. 2016).

The trial court's actions regarding the jury instructions also, effectively eliminated essential elemental and factual proofs from the jury. "The Constitution forbids a criminal conviction absent proof beyond a reasonable doubt of every fact or element necessary to constitute THE CRIME [as] Charged" Sandstrom v. Montana, 442 U.S. 510,520(1975),"And the the Sixth Amendment Commands such determination be made by the jury and not the Judge" In re Winship 397 US 358,364 (1970).



Abner was prejudiced by the erroneous jury instructions which helped to expand the scope of the factual content of the indictment and the elements of possession so that he was tried for simultaneously possessing firearms in two places at the same time. Changing his offense conduct to conspiracy to possess firearms instead of the standard possession 'In furtherance of' offense he was actually charged with, (i.e. §924(o) to commit §924(c)(1)(A), instead of plain §924(c)(1)(A).

Abner was prejudiced by the Count 14 jury instructions 42 which summarized the §924(c) charge by naming all six firearms and attaching their possession to "The Western District of Virginia" and "elsewhere" simultaneously, but not allowing Abner a defense against the Virginia and any elsewhere vicarious 'Possession(s)', allowing jurors to infer one possession occurred in both places.

Abner was prejudiced by jury instructions that help to amend his charges, and allow the jury to find him guilty based on the 'Use and Carry' During and in relation to prong of §924(c), against which he had no defense, when the trial court directed the jurors to assess based on the Mackey factors, but did not define Nexus, or at least caution them that Abner had to 'Knowingly' possess his firearms 'In furtherance of' the W.D. Virginia drug conspiracy.

Abner was prejudiced by the erroneous Fortress theory EMBOLDEN instruction that could have only been used to find a standard §924(c)(1)(A) or a Conspiracy to possess a firearm charge §924(o), or an additional use and carry charge, which caused Abner to be found guilty based on presumptive preponderance based guilt.

Abner asserts that, had the government not been allowed to frame its indictment charging simultaneous 'possession' in the Western District of Virginia and elsewhere. Instead of specifically stating In the Western District Of Virginia and the Western District Of North Carolina (where they were only 'possessed') the outcome of the proceedings would have been substantially changed.

Also, if the government had been made to prove whether or not Abner actually or constructively possessed firearms in the Western District Of Virginia and some 'elsewhere' besides his N.C. home the outcome of the trial proceedings would have been substantially changed.

If the trial court had properly instructed the jury that, 1) Abner must be found to have 'knowingly possessed firearms in furtherance of the Western District Of Virginia, and in order to prove this the government must present evidence to show Abner Knowingly possessed the firearms in order to further the objectives of the 5-year W.D. of Virginia Conspiracy, and how they furthered such. and 2) directed that Abner's agreement to participate in the Count One

conspiracy, does not mean that he agreed firearms he kept in his home a whole state away would be implemented to further the conspiracy's objectives. The outcome of the trial proceedings would have substantially changed.

Had the trial court correctly directed the jury instructed the "Mackey Factors" in terms of their Nexus requirement and defined Nexus the outcome of the trial proceedings would have been substantially different.

And, If the trial court had Not Used the Emboldened Instructions considering Abner was charged with a Intrastate Conspiracy, but an Interstate 'possession' the outcome of the trial proceedings would have been substantially changed.

The totality of the prejudice and infirmities suffered from the above stated, has denied Abner the substantial rights to Fair Notice of Charges alleged against him; and the right to be charged by a fully informed grandjury and on a True Billed Indictment; and the right to receive Due Process of Law by not being denied an opportunity to defend against the elements of the charged offense; and the right to have the charged indictment amended only by him; and the right to be found guilty by a fair and properly instructed rightly directed jury; and the right to be tried on charges in the proper venue.

The above rights are provided by the United States Constitution's Fifth and Sixth Amendments, and the Federal Rules Of Criminal Procedure Rule 7(c)(1).

The errors of the government's arbitrary and capricious trial tactics, and the trial court's abuse of its Art. III discretionary powers along with its erroneous trial instructions. Are contrary to the fundamental fairness and rights associated with Due Process and Fundamental constitutional provisions provide to defendant's in jury trials and worked to harm Abner in the worst way. Causing him to receive a significantly increased sentence, without the jury being allowed to fairly assess the charges and properly adjudge his guilt. This travesty, questions the integrity of the judicial process in relation to such trials and works to undermine public confidence in the judicial proceedings as they were applied in Abner's case.

In Abner's trial the following Jury Instructions worked to demise any defense Abner had against the government's §924(c) charge, by resulting in the following:

(1) Jury Instructions #'s 1-4 at pgs 3,4, and 9 gave the jury directions to "be governed at ALL TIMES by its instructions" and to specifically "not disregard my instructions ON THE LAW" in how it applied to Abner's charges.

(2) Therefore when the jury was instructed that the six firearms ALL NAMED, and shown to them as exhibits "On or about January 26, 2021 in the Western District of Virginia and elsewhere were Simultaneously POSSESSED IN FURTHERANCE OF its Western District of Virginia conspiracy. It licensed the jury to find two simultaneous possessions or possession and use and carry, although the indictment only charged one possession in furtherance count. (see jury instructions #42).

(3) Then Jury Instruction #32 and #41 licensed the jury to find actual or constructive possession locally, but apply it vicariously and without proof that it was occurred in Virginia, as instructed the jury could conclude in its #42 Jury Instructions.

(4) Then It provided the jury with "Mackey Factors" that are easily proved by a preponderance of evidence standard (i.e. see U.S.S.G. 2B2.1) when instructed without defining or explaining "NEXUS" as Congressionally required. Jury Inst. #41

(5) Then the trial court instructed the jury that, firearms presumptively are "used" by drug dealers to prevent PROBABLE robberies, and to EMBOLDEN them. Giving the jury a license to find Abner guilty of "Use and Carry" "During and In Relation To" a drug trafficking crime. Jury Inst. #41

(6) Then It instructed the Jury again with reasonable doubt on the elements and referred them back to the erroneous preponderance and presumptive guilt #41 instructions which without a NEXUS explanation and use of the EMBOLDEN fortress theory explanation amounts to the "Use and Carry" During and IN relation to" offense. Jury Inst. #44

(7) Then it instructed on Venue which Abner's attorney argued was improper, and charged venue as an "element of the offense" to be found by "preponderance of the evidence", and instructed "The government need not show Abner possessed the firearms within the Western District of Virginia to establish...for Count 14. Jury Inst. #45

The above instructions when combined with the Trial Court's decision allowed the government to theorize its case based on:

- 1). A vicarious liability proof of possession
- 2). Merging its venue elements with its possession in furtherance of elemental proof.

- 3). Expand the scope of its charges to constructive 'possession in furtherance of', thus eliminating its proof of NEXUS.
- 4). Utilize a 'Use and Carry' version of its indictment, which charged possession in two places at the same time, AND
- 5). Be able to convince the Jury to convict Abner, on Conspiracy to possess firearms in furtherance of a drug offense and/or Conspiracy to 'Use and Carry firearms 'During and in relation to' a drug offense. Supported by its overwhelming evidence of Abner's participation in its drug conspiracy.

Because, "jurors are not generally equipped to determine whether a particular theory of conviction is contrary to law, but well equipped to determine whether the theory is supported by facts" Griffin v. United States 112 S.Ct. 466, 116 LED 2D 371, 502 US 46

A reasonable trier of fact could have been convinced, with the support of the Jury Instructions that:

- 1). The government did not have to prove, as its indictment alleged that Abner possessed firearms in W.D. Virginia
- 2). The government's proof of Abner's participation in its conspiracy proved his firearms help further the conspiracy.
- 3). Abner's firearm possession anywhere could be counted as possession in Virginia and could reasonably be concluded to have helped the conspiracy everywhere.
- 4). The fact Abner had drugs and firearms in his N.C. residence also proved an automatic knowing furtherance of its conspiracy.
- 5). The list of factors given to find 'in furtherance, and the fact drug dealers use firearms to EMBOLDEN them and protect them proved Abner's firearms must mean Abner was protecting West Virginia drug objectives.

In summary a juror could have been misled by Instructions; Theory; and evidence presented in support to think that, "the government presented a lot of evidence to support Abner's participation in the conspiracy, and the court instructed that by LAW it doesn't matter where Abner's guns were found, the fact he was proved to be a member of the conspiracy proved those guns found in his house were involved in some way, besides they found drugs and cash, and stuff, and gave instructions of things that proved his guns must have helped in West Virginia, in fact the government's summary of the charges convinced me that technically they were possessed "in the western district of virginia" because Abner agreed to help further the conspiracy in all his criminal act[s]"

The above conclusion, resulted from "the court instructing the jury in a manner that would permit it to return a guilty verdict in count 14 as long as it found him to have participated in the County one conspiracy. Therefore with the Material Fact

removed from the jurors assessment (i.e. 'place of possession not being required'. The jury returned a general verdict "place of possession is not a de minimis abstract requirement as an intrinsic act to the 'in furtherance of end', and the proposed instruction should have been given" see *Yates v. United States*, 77 S Ct 1064, 1 LED 2D 1356, 354 US 298 (June 1957).

Abner contends that, the portions of the trial court's instructions relied upon by the jury under the government's theory are not sufficiently clear or specific to warrant a drawing of the inference that the jury understood IT MUST FIND A NEXUS, to the firearms found in Abner's residence and its Western District Of Virginia Drug Conspiracy (the 'drug trafficking offense AS CHARGED).

"In these circumstances...the proper rule to be applied is that which requires a verdict to be set aside where the verdict is supportable on one ground" (i.e. 924(a) or Use and Carry, both uncharged) "but not another" (possession in furtherance of), "and it is impossible to tell which one the jury selected. *Yates*, citing *Stromberg v. California* 283 US 359, 367, 368, 75 Led 1117, 1122, 51 S Ct 532, (and several others).

The 7th Cir. in *United States v. Pedigo*, 12 F.3d 618, 631 (7th Cir. 1994) citing *United States v. Leichtnam* 948 F.2d 370 (7th Cir. 1991) found (by instructing jury and permitting prosecutor to argue, that conviction on firearms could be based on coconspirator liability, trial court impermissibly broadened the scope of indictment charging defendant with use of a firearm in furtherance of drug trafficking offense) see also *United States v. Hoover*, 467 F.3d 496 (5th Cir. 2006) (trial court constructively amended defendant's indictment where indictment charged defendant with making one false statement...and the jury instructions allowed the jury to convict him for making a different false statement)

The trial court's instructions, that supported expanding the element of possession and location, and eliminated the 'In furtherance of' Knowing and Nexus requirements. Supported the government's theory that its proof Abner possessed firearms in his N.C. home. Proved Abner acted as a Vicar with his firearms to further its W.D. Virginia conspiracy, and misled the jury to find such.

But, "the government is required under 18 USC §924(c) to first establish mens rea with respect to predicated offense, and then to prove that a defendant INTENTIONALLY used, carried, or POSSESSED firearm in course of [charged] crime" *United States v. Burwell* 690 F.3d 500, 402 U.S. App. D.C. 193, 2012 U.S. APP. LEXIS 16094 (D.C. Cir. 2012)...in contrast to the during and in relation to standard, the United States MUST establish more than just THE POTENTIAL of facilitation the drug trafficking offense to satisfy the 'In furtherance of standard' *United States v. Mackey*, 265 F.3d 457 at 462 (quoting *United States v. Flores*, Citation

trafficking offense to satisfy the 'In furtherance of standard' United States v. Mackey, 265 F.3d 457 at 462.

"In a jury trial the primary finders of fact are the jurors who's overriding responsibility is to stand between the accused and a potentially arbitrary or abusive government that is in command of the criminal sanction. For this reason the trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgement in a manner contrary to the interest of the accused" 1992 U.S. App. LEXIS 96 United States v. Davis Jan 7, 1992 (4th Cir.)(quoting United States v. Martin Linen Supply Co. 430 U.S. 564,572-73 (1977)).

"Moreover, whenever the judge gives an instruction preventing 'the jury from considering a 'Material Issue' that instruction is equivalent to a direct verdict on that issue" Davis, U.S. App. LEXIS 96 citing Hoover v. Garfield Heights Mun. Court 802 F.2d 168,177(6th Cir. 1986; see also United States v. Sheldon 544 F.2d 218,221 (5th Cir. 1976); Mims v. United States 375 F.2d 135,148 (5th Cir. 1967).

As stated above, the 'Material Issue' kept from the jury was the necessary element of 'possession location' and its Western District Of Virginia requirement of proof, and the elimination of the intrinsic 'In furtherance Of' elements knowing and NEXUS requirements.

The Fed.R.Crim.Pro (Chpts 600-613) Vol 24 Chpt 607 'The Indictment and Information §607.06 states, the "RIGHT to amend belongs to the defendant, NOT TO the government"

The totality of the above described events worked to allow the government to charge, try, and obtain a guilty verdict without ever meeting its burden of proof required for finding its §924(c)(1)(A) charged offense, but allowed it to try Abner on §924(o) 'Conspiracy to Possess and Use or Carry a firearms' 'In furtherance of' its Drug Conspiracy Count One charges, and based on such arbitrary and capricious theory supported by erroneous Jury Instructions misdirect and license the jury to find Abner guilty of the UNINDICTED CHARGES.

"Rule 30 requires that defendants object to instructions 'before the jury retires to deliberate' or face plain error review under Rule 52(b)" United States v. Robinson, 627 F.3d 941 at 953-54, (4th Cir. 2010).

Under the plain error standard, Abner must establish that the district court erred, that error was plain, and that it 'affect[ed] [his] substantial rights", id. quoting Qlano, 507 U.S. 725,734(1993).

The trial court's errors were plain and plenty. First, it allowed the government to charge Abner with Possession of Firearms in a state without the government having to prove those firearms were EVER possessed in that state. The

Court allowed the government to charge one actus reas in its indictment and theorize its case on such that one actus reas 'possession' could vicariously occur on or about the SAME exact TIME. Then it allowed the government to try a North Carolina Offense 'possession of firearms' in and as if the were assessed some 'elsewhere' in the 58 or so counties in the W.D. of Virginia. It also allowed the government to set forth allegations in its indictment and prove its case on such allegations that NEVER went before the Grand Jury, as required by LAW. The trial Court allowed the goverment to theorize its case, as though it was alleged conjunctively thereby allowing Abner to be convicted of offense conduct i.e. 'conspiracy to possess and use or carry a firearm' in furtherance of' and 'during and in relation to a drug trafficking offense', when it refused to require the location proof and refused to give 'Knowing' instructions as to the 'possession in furthrance of' element. in light of the Offense as charged, and in light the firearms were found in a whole other state from the charged offense'.

The trial court eliminated beyond reasonable doubt standard by allowing the instructions to include Abner's six firearms to be named and summarized as being possessed 'In the Western District Of Virginia and elsewhere on or about Jan 26, 2021'. It plainly erred when it listed 'Mackey Fact[ors], but failed to define NEXUS as required by LAW. In light of the fact that the circumstances under which the firearms were possessed. Found in N.C. but alleged to FURTHER a W.D. Virginia conspiracy.

The trial court erred when it mentioned Venue as an element for prosecution but told the jury to disregard it as an element of Possession in that same District that venue could be prosecuted.

The trial court erred plainly when it summarized 'Possession In Furtheranc Of' can be presumptive if "firearms" had the "probability" of protecting against theft of drugs" and firearms possessed "purposed protected or EMBOLDEN the defendant 'During'[and in relation to] "drug trafficking"

Abner was prejudiced in several ways,(1). Abner was not given 'Fair Notice' of the government's charges against him' as asserted by trial counsel; Abner's charges were judicially altered and constructively amended by the trial court and the government forcing him to have to defend against charges not alleged in his indictment and True Billed by the grandjury.(2). Abner was prejudiced by not being given his Right to Amend his indictment to disclude possession in 'the western district of Virginia'. Abner was prejudice by being tried on firearm charges that were not properly presented to the grandjury to have occured in the W.D. of N.C.

2. The Trial Court committed plain error  
By allowing Abner to be tried, convicted, and sentenced  
to §924(c)(1)(A) based on a nonqualifying Predicate Offense

Because Abner did not bring this argument on direct he argues pursuant to the Fed.R.Crim.Pro. Rule 52(b) and the application standards set forth in *United States v. Olano* 507 U.S. 725 731-32 113 S.Ct. 1770 123 L.Ed.2d 508 (1993), as quoted by *United States v. Knight* 606 F.3d 171,177 (4th Cir. 2010)

In *United States v. Hasson* 26 F.4th 610 (4th Cir. Feb 2012) This Honorable Court pointed out, "When applying the categorical approach, The reviewing court in 'doing so requires assessing the predicate crime' in terms of how the law defines the offense, not how an individual might have committed it on a particular occasion." *id.* citing *Johnson*, 576 U.S. at 596.

In *United States v. Norman* 935 F.3d 232 (4th Cir. Aug 2019), this Court opined "...it is undisputed that 'conspiracy' under 21 U.S.C. § 846 does not require an overt act." (citing *United States v. Shabani* 513 U.S. 10,11, 115 S.Ct. 382, 130 L.Ed. 2d 225(1994)).

Abner has cited the above in terms of the legal ruling not in terms of its textual application to his case. Although he asserts that in accordance with the current application of the Rule of Law and standards of the Categorical Approach, he wishes this Honorable Court review his case *Prima Facie*, and based on his presentation of the following law and fact, expand the scope of its *Norman* ruling in the interest of Justice, Equity, and Fair application of law.

Abner contends that although it has been upheld by this and other circuits, Opining that, "§924(c) contains its own definition of drug trafficking crime, meaning 'any felony punishable under et seq 801 Controlled Substance Act. This definition in itself violates Due Process in two ways. First it definse Conspiracy as noted by this Court as not requiring an overt act. Second it act as a prophylactic to shield defense against its illegal application to Abner as a predicate offense.

The 21 USC 801 qualifying offense enumeration clause is similiar in kind to the §4B1.1 Guideline enumerated commentary application. Which derives its authority from 28 U.S.C. §994, and in its application is Congressionally controlled. Abner places before this Court's jurisprudence that, likewise ANY and ALL drug trafficking offenses enumerated and defined in 21 USC et seq. offense list, Including 'Conspiracy' must meet the Model Penal Codes generic definition, and pass the Federal Rule Of Law's Categorical approach legal standards. see *Mitchell v. United States* 2024 U.S. Dist. LEXIS 74627 April 23, 2024.



Abner contends that, Congress' 21 USC 801 QUALIFYING OFFENSE enumeration statute simply cannot act as a prophylactic to shield his 'Drug Trafficking Conspiracy Offense', in that it stretches his ability to prove his innocence past the breaking point of that which Due Process of Law affords him and its protective limits. "The Constitution is Supreme over statutes, not vice versa." 26 LED2D 60, Allen v. Milligan at 114 citing Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 178, 2 L.Ed. 60.

Abner contends he was greatly prejudiced because he was convicted beyond what the Jurisdiction of the Trial Court allows. Under Art. III a federal court cannot try, convict, or sentence based on an unconstitutional statutory penalty application. see U.S. Const. Art III

Abner also contends that had the trial court used its Art. III discretion and disqualified his §846 as a nonqualifying predicate the outcome of his proceedings would have been different, and he would not have been illegally convicted and sentenced to the §924(c)(1)(A) charges.

The substantially affects on Abner based on the plain error of the district court to allow Abner to be tried, convicted, and sentenced to a Drug Trafficking offense that does not meet the Model Penal Codes Conspiracy Definition, and can't be prophylactically protected by an Arbitrary enumerated offense standard, is a violation of his 5th amendment right to Due Process of Law because, "If an essential element of the charge is omitted from [an offense] the omission is not cured by the bare citation of the charging statute." 2024 U.S. Dist. LEXIS 104875 United States v. Mikinnies, Feb 8, 2024 citing United States v. Zangger 848 F.2d 923, 925 (8th Cir. 1998). Like that which appears in §924(c)'s "any felony punishable..." clause.

The above errors are plain taking into consideration this court's unequivocal statement that, the Congressionally legislated and Federally applied 'Conspiracy' law DOES NOT PASS LEGAL MUSTER as a qualifying predicated under the Categorical Approach. To continue to allow this to be applied to Abner in the effect of a 25-year prison sentence, greatly undermines the integrity of Federal Judicial proceedings, and public reputation and confidence. And the only way to remedy such is to exercise Art. III Judiciary authority and right Congress' wrong, and vacate Abner's §924(c) conviction.

3. The District Court Committed Plain Error  
When it Allowed Abner to be  
tried, convicted, and sentenced to a Vague Statute

Abner asserts that, §924(c)(1)(A)'s Drug trafficking definition is unconstitutionally vague, and that the District Court was without Art. III. jurisdiction to proceed on his charges under the §924(c) statute.

Abner first argues that the 'In furtherance Of Clause' is unconstitutionally vague and allows a reasonable trier of fact to imagine real life outcomes based on supposed hypothetical content and acts that have nothing to do with the facts of the predicated drug trafficking offense.

For example in his case the Jury was instructed under the Mackey factors, which have been labled as an "inexhaustable list of facts" that when instructed to jurors, as in Abner's trial allows them to determine whether or not these factors prove the firearms 'furthered' the charged crime, I

In trials such as Abner's these factors do more harm than good. Simply because the jury has to sort through them, and as this Circuit has declared "is free to consider the numerous ways in which the firearm MIGHT further or advance the conspiracy...in Jeffers we found sufficient evidence to uphold a §924(c) conviction where NO FIREARMS OR DRUGS were seized from the defendant, let alone together" United 452 Fed. App'x 247 quoting United States v. Jeffers 570 F.3d 557,567 (4th Cir. 2009)

Abner argues that, for a statute to contain such vague application it "speaks to the degree of vagueness a law must exhibit to be found facially unconstitutional" see Hoffman Ests. 455 U.S. at 494-495

The House Committee on the Judiciary explained that, "the distinction between the 'in furtherance of' and 'during and in relation to applications MAY PROVE TROUBLESOME for prosecutors" H.R. 424 Version 2 105th Cong. (1997).

Abner experienced the troubled distinction first hand when the trial court provided the jury with instructions that could only be applied if he was charged with 'Use and carry' 'during and in relation to'. The vagueness also caused the government to use a Supreme Court venue ruling which was plainly ment to only apply in a §924(c) 'during and in relation to' offense conduct.

Abner contends that because the thin line of distinction between 'during and in

relation to' and 'possession in furtherance of' a firearm during the commission of Drug Conspiracy is so blurred. It is impossible for the jurors to have found him innocent as charged.

Abner also presents that, because technically 'In furtherance Of' as was defined to his jury. To assist; help forward; assist; advance: etc. denotes some kind of USE or employment, or evidence of use or involvement of the firearms. Therefore the conclusion could easily be made based on the many imagined scenarios made by fact finders in Abner's trial that, the proved agreement that he had with members of the W.D. of Virginia presumptively indicated his firearms were used to help or assist the conspiracy's objectives.

It is evident from the above subcommittee determination that Congress contemplated such travesties as Abner's however it tight roped its constraints and legislative a vague statutory offense one indistinguishable in its application from other offenses named under the statute, but "legislation must be consistent with Constitutional constraints, and we usually look to the Judiciary as th ultimate interpreter of those constraints" 207 LED 2D 18\_\_US--Fin Oversight and MGMT Abner's substantial Due Process rights were violated by this error which was plain, and questions the integrity of the Judicial Process and undermines public confidence in fair proceedings of the Judiciary process.

The District Court erred when it denied Abner's Rule 29 motion to acquit

In reviewing Abner's sufficiency claim, this court must determine wether, construing the evidence in light most favorable to the government, any reasonable trier of fact could have found Abner guilty beyond a REASONABLE DOUBT." United States v. Curry 461 F.3d 452 (4th Cir. 2006)

"We have referenced a 'non-contradiction principle which prohibits the district court from finding facts by a preponderance of the evidence that contravene the jury's finding beyond a reasonable doubt." 2024 US App. LEXIS 9142 at 2024 U.S App. LEXIS 51

"In making this determination, the government is given 'the benefit of all reasonable inferences from the facts proven to those sought to be established" Id. Thus, 'If the record reflects that the government presented substantial evidence from which a reasonable jury could convict, we must uphold the verdict." Id. citing United States v. Goodwin, 272 F.3d 659,666(4th Cir. 2001)

This Court need only consider the facts of its own opinion upholding Abner's case. To determine that the record will reflect Abner was convicted based on the Use and Carry 'During and in relation to' standard the same standard upon which the government obtained Venue to try his charge. Instead of stating its indictment

correctly or allowing Abner to Amend it to reflect Possession In the W.D. of North Carolina, or being made to prove Abner possessed firearms in Virginia or some elsewhere besides his N.C. home, or being made to prove Abner Knowingly possessed his N.C. firearms to further the Virginia conspiracy by proving a NEXUS. Abner would not have been found guilty of offenses not charged.

In addition as asserted in his Constructive Amendment argument, the erroneous jury instructions that supported the government Arbitrary theory supported Abner's indictment on the Use and Carry During and in Relation to Offense conduct, instead of the §924(c)(1)(A) 'possession in furtherance of' offense conduct that he was charged with.

Abner suffered 5th and 6th Amendment violations and the trial verdict questions the integrity of the judicial process and undermines public confidence in the fairness of Judicial proceedings.

#### 4th Circuit Court's Misplaced Affirmation of Abner's Conviction Has resulted in a Judicial travesty

Even under the preponderance standards of the USSG this Honorable Circuit has recognized that, "Although the government need not prove 'precisely concurrent drug trafficking and weapon POSSESSION, United States v. Johnson 943 F.2d 383,386(4th Cir. 1991), it MUST prove 'a temporal and spatial relation' linking 'the weapon, the drug trafficking activity, and the defendant" And "In circumstances where the UNDERLYING offense is CONSPIRACY to distribute drugs, we have held that discovery of a weapon 'in a place where conspiracy was carried out or furthered' is sufficient" United States v. Apple, 962 F.2d 335,338(4th Cir. 1992), AND "If the government meets that burden of proof, a defendant may show that the link is CLEARLY IMPROBABLE 'by presenting circumstantial evidence such as the...weapon's LOCATION" id.(citing Mani||an, 592 F.3d at 629)

Again Congress clearly stated that, the 'Possession In Furtherance Of' prong of §924(c)(1)(A) has a 'higher standard of proof' than use and carry 'during and in relation to', as this Honorable Court affirmed as the proof needed to sustain Abner's §924(c)(1)(A) conviction.(see attached 4th circuit judgment affirming Abner's

Conviction. Based on "use and carry" "during and in relation to" the government's entire §924(c)(1)(A) charge "obscures due process and is" was based on a 'standard of illegality that creates a relatively expansive definition of 'firearm possession' 'in furtherance of a drug trafficking offense'" 110 S Ct 1853, 109 LEd 2D 240-, 495 US 271 California v. American Stores Co.

#### Conclusion

If my Petition receives a review, this COURT will find, as cited below.

"The [district] court attempts to take the stark nakedness of the evidence against me on [the §924(c) charge] and clothe it in 'presumptions' or inferences' authorized by 21 USC §846 and 18 USC §924(c). Apparently the court felt that the Government can be relieved of the constitutional burden of proving the ESSENTIAL [possession] element of its case...Such an idea seems to be totally at variance with what the Constitution requires", and even "Congress cannot under our Constitution even partially remove from the prosecution" as was done in my case "the burden of proving at trial each of the elements" as defined.

My "fundamental right to be presumed innocent [was] swept away to precisely the extent the trial judge and jury relied upon the statutory presumptions of guilt..." based on mis-instructions and misapplications of the §924(c) law, "each tool given to me by the Bill Of Rights to defend my innocence...was nullified to the extent that the government secured its conviction and didn't have to introduce any evidence to support ESSENTIAL ALLEGATIONS of the indictment it has brought...it would be senseless...for the Constitution to take all these precautions to protect me if the Government by a slight-of-hand trick with presumptions make nullities of these precautions."

When Congress defines a crime to include a "particular set of elements...Constitutional Due Process requires the government to prove each element beyond a reasonable doubt before it can convict me as the accused of the crime it deliberately and clearly defined" in my indictment. see Turner v. United States 90 S.Ct. 642, 24 L.Ed.2D 610, 396 US 398 (1970). Respectfully Submitted for Relief.