

No. _____

In The
Supreme Court of the United States

—◆—
In re KEITH ROMAN HENDERSON,
YAHYA AZIM WATSON, and MAJER HAFIZ,

Petitioners.

—◆—
PETITION FOR A WRIT OF HABEAS CORPUS

—◆—
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QUESTIONS PRESENTED

1. Whether Petitioners' judgments of conviction pursuant to the Sentencing Reform Act of 1984, application of United States Sentencing Guidelines §§ 1B1.1(H) and 1B1.3, "offense" as "the offense of conviction and all relevant conduct," amended Petitioners' indictments at sentencing in violation of the Grand Jury Clause of the U.S. Constitution Fifth Amendment.
2. Whether the Judicial Branch transgressed and expanded its jurisdiction when promulgating the United States Sentencing Guidelines §§ 1B1.1(H) and 1B1.3, defining "offense," as "the offense of conviction and all relevant conduct," in which the courts rendered judgments of conviction against Petitioners in violation of the U.S. Constitution Articles I, II, and III, the Fifth and Sixth Amendments, and the Judiciary Act of 1789.
3. Whether Petitioners' judgments of conviction pursuant to the Sentencing Reform Act of 1984, application of the United States Sentencing Guidelines §§ 1B1.3(a)(2) and 2D1.1, contravened the plain language of 21 U.S.C. § 841 that Petitioners' sentences must be based on the mixture or substance containing a "detectable amount" of a controlled substance, and the "detectable amount" of controlled substance is an essential fact constituting the offense that must be specified in the indictment.

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OPINIONS BELOW

The opinion of the *United States v. Keith Henderson*, United States Court of Appeals Fifth Circuit is unpublished and appears at Pet. App. 1a-3a.

The opinion of the *United States v. Yahya Watson*, United States Court of Appeals Fourth Circuit is unpublished and appears at Pet. App. 4a-6a.

The opinion of the *United States v. Maher Hafiz*, United States Court of Appeals Sixth Circuit is unpublished and appears at Pet. App. 7a.

**JURISDICTION**

The jurisdiction of this Court is invoked under 28 U.S.C. § 2241 and 28 U.S.C. § 1652(a).

**STATEMENT PURSUANT TO
RULE 20.4(A) AND 28 U.S.C. § 2242**

Exceptional circumstances warrant the exercise of the Court's discretionary powers, and adequate relief cannot be obtained in any other form or from any other court. Keith Roman Henderson, prisoner ID 12795035, is incarcerated in the Federal Correctional Complex (Low) in Forrest City Arizona, hailing from Western District of Louisiana, Lafayette Division, in the Fifth Circuit. Yahya Azim Watson, prisoner ID 72271083, is incarcerated in the Federal Correctional Institution McKean in Bradford, Pennsylvania, hailing from the

Eastern District of Virginia in the Fourth Circuit. Major Hafiz, prisoner ID 31295074, is incarcerated in the Federal Medical Facility in Lexington, Kentucky, hailing from the Eastern District of Tennessee in the Sixth Circuit. Petitioners are a small representation of prisoners suffering in federal correctional facilities across the United States at the hands of a government that has violated their constitutional rights. In the interest of justice, they lay one petition before this Supreme Court of the United States of America.

Petitioners stand convicted of conspiracy to distribute a controlled substance pursuant to 21 U.S.C. §§ 846 and 841 and they are all innocent of the offense rendered pursuant to the judgments of conviction of the district court. The circuit courts are in need of guidance from this Court, and the writ will be in aid of the Court's appellate jurisdiction. The circuit courts are in disagreement as to whether quantity of a controlled substance is a sentencing factor or an element of the crime. It is neither. 21 U.S.C. § 841(b) sets forth that the "detectable amount" of the controlled substance is an element of the crime. The "detectable amount" is an essential fact constituting one of three offenses pursuant to the statute and must be specified in the indictment. The "detectable amount" of a controlled substance is a matter of science to be determined by an expert forensic chemist to a reasonable degree of scientific certainty.

These three men are an allied force, seeking freedom from an oppressive government. They ask this Court to examine the jurisdiction of the courts whose

judgment of conviction is challenged. *Ex parte Siebold*, 100 U.S. 371, 375 (1879). Petitioners do not challenge the courts' authority to sentence them within the range of punishment ordained by Congress. Thus, a motion pursuant to 28 U.S.C. § 2255 is not relevant to the issue before this Court.

Petitioners' cause is much greater than their own personal battle. They seek to overturn this Court's decision in *Mistretta v. United States*, 488 U.S. 361 (1989), which upheld the constitutionality of the Sentencing Reform Act of 1984. Petitioners challenge the constitutionality of the Sentencing Reform Act of 1984 and its United States Sentencing Guidelines (Guidelines), maintaining that the delegation of the power from the Legislative Branch to Judicial Branch to promulgate the Guidelines permitted the Judicial Branch to transcend and aggrandize its jurisdiction over "relevant conduct," non-cognizable offenses, in violation of the Grand Jury Clause of the Fifth Amendment.

Petitioners' judgments of conviction from the district courts exceeded the court's jurisdiction and contravened the plain language of 21 U.S.C. § 841. These are not cases of mere error, but ones in which the court below transcended its powers. *Ex parte Lange*, 18 Wall. 163, 176 (1873). If it be found that the court exceeded its jurisdiction, or that in its proceedings Petitioners' constitutional rights have been denied, the remedy of *habeas corpus* is available. *Id.*; *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883); *In re Snow*, 120 U.S. 274, 285 (1887); *In re Bonner*, 151 U.S. 242 (1894). Petitioners maintain that the Court's decision will affect hundreds

of thousands of prisoners from every district court and circuit. Thus, adequate relief cannot be obtained in any other form and the questions placed before this Court are ripe for decision.



RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions appear in the appendix at Pet. App. 8a-12a.



STATEMENT OF THE CASE

On October 14, 1982, President Ronald Reagan declared “War on Drugs.” He believed that illicit drugs were a direct threat to the United States’ national security and he vowed to win this “War on Drugs” through a series of legislation, imposing severe sentences on drug dealers. Congress enacted the Sentencing Reform Act of 1984 and created the United States Sentencing Commission (Sentencing Commission) as an agency of the Judicial Branch. The members of this Sentencing Commission were cherry-picked by President Reagan, and its principle purpose was to establish sentencing policies and practices for the Judicial Branch, including new rules to guide the court in the appropriate form and severity of punishment for convicted drug dealers.

In 1987, the Judicial Branch promulgated the Guidelines. However, the delegation of power from the Legislative Branch to the Judicial Branch to write the

Guidelines permitted the Judicial Branch to aggrandize its power over “relevant conduct,” usurping the power of the grand jury and petit jury in violation of Petitioners’ rights pursuant to the Fifth and Sixth Amendments. The “relevant conduct” in each Petitioner’s case involved the distribution of unrecovered drugs.

Not only did the Judicial Branch write the Guidelines, but it also enforces the Guidelines, and adjudicates the Guidelines, upsetting the separation of power of the branches, eliminating the checks and balances at sentencing, and violating Articles I, II, and III, the Fifth and Sixth Amendments, and the Judiciary Act of 1789.

ARGUMENT

“The purpose of a written constitution is to bind up the several branches of government by certain laws, which, when they transgress, their acts shall become nullities,” Thomas Jefferson.

“[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed *within limits fixed by law*” (emphasis added), *Williams v. New York*, 337 U.S. 241, 246 (1949). The exercise of judicial discretion at sentencing cannot contravene the Constitution of the United States of America. The courts

exceeded their jurisdiction when rendering the judgments of conviction against Petitioners, violating Petitioners' rights guaranteed by the Fifth and Sixth Amendments. Petitioners' judgments of conviction are *coram non judice*.

In all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction, and to try the case, and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings, and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its term.

In re Bonner, 151 U.S. 242 at 257 (1894).

Article III of the Constitution enumerates the powers of the Judicial Branch: the federal courts have power to adjudicate actual "cases" and "controversies" in which the United States is a party. Federal courts only have jurisdiction over cognizable offenses against the United States pursuant to the Judiciary Act of 1789. In criminal cases, the "case" and "controversy" requirement defines, with respect to the Judicial Branch, the idea of separation of powers on which the federal government is founded: Legislative Branch's Law, Executive Branch's prosecution of infamous crimes by grand jury indictment, and the adjudication of the Law by the Judicial Branch based on the essential facts specified by the grand jury in the indictment.

The Fifth Amendment 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,” and the Sixth Amendment states: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation.”

This preserves the historic role of the jury as intermediaries between the State and criminal defendants. See *United States v. Gaudin*, 515 U.S. 506, at 510-511 (1995) (“This right was designed ‘to guard against a spirit of oppression and tyranny on the part of rulers,’ and ‘was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties’” (quoting 2 J. Story, *Commentaries on the Constitution of the United States* §§ 1779, 1780, pp. 540-541 (4th ed. 1873)).

The indictment sets forth the “case” and “controversy” establishing the court’s jurisdiction over the offense against the United States. The Grand Jury Clause of the Fifth Amendment requires that an indictment contain some amount of factual particularity in order to ensure that a conviction is not secured “on the basis of facts not found by, and perhaps not even presented to the grand jury” that voted for the indictment. *United States v. Russell*, 369 U.S. 749, at 770 (1962). This principle is enshrined in Fed. R. Crim. P. 7(c), which states: “The indictment . . . shall be a plain,

concise and definite written statement of the essential facts constituting the offense charged.”

It is the legislature, not the court, which is to define an offense, and ordain its punishment. *Ex parte United States*, 242 U.S. 27 (1916). In 1986, Congress passed the Anti-Drug Abuse Act, including 21 U.S.C. § 841 which provides for mandatory minimum sentences for possession of a controlled substance. “Controlled substance” is the core of criminality in 21 U.S.C. § 841, without this element there is no cognizable crime against the United States. However, “controlled substance” is a generic term, and an indictment for this offense must descend to the particulars of the weight and type of drug as specified by Congress in 21 U.S.C. § 841(b). *Russell v. United States*, 369 at 765. “In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.” *United States v. Carll*, 105 U.S. 611, 612 (1881).

Pursuant to the plain language of 21 U.S.C. § 841(b), “controlled substance” is further defined as “the mixture or substance containing a ‘detectable amount’ of a controlled substance.” The “detectable amount” is an essential fact constituting one of three punishments under the statute, and it must be stated in the indictment pursuant to Fed. Rule Crim. P. 7(c). In *Alleyne v. United States*, 570 U.S. 99 (2013), this Court held that any fact that increases the statutory

mandatory minimum sentence is an element of the crime that must be submitted to the jury and found beyond a reasonable doubt. The “detectable amount of a controlled substance” is the only fact that can increase the statutory mandatory minimum sentence under the statute.

Indeed, this Court confirmed, “[C]ongress intended the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found.” *Chapman v. United States*, 500 U.S. 453, 459 (1991). It has long been recognized that there is an important corollary purpose to be served by the requirement that an indictment set out “the specific offence, coming under the general description,” with which the defendant is charged. This purpose, as defined in *United States v. Cruikshank*, 92 U.S. 542 (1875) is “to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.”

The Circuit Courts are in disagreement as to whether quantity of a controlled substance is a sentencing factor or an element of the crime. It is neither. The weight of the drug is the “detectable amount.” The weight of the drug is a matter of science to be determined by an expert forensic chemist to a reasonable degree of scientific certainty. This Court needs to address the division among the Circuit Courts and give them guidance. The “mixture or substance containing a ‘detectable amount’ of a controlled substance” is an element of the crime, and the “detectable amount” is an essential fact establishing one of three offenses under 21 U.S.C. § 841.

Quantity of drugs cannot be a sentencing factor, as the specific weight of the drug is an essential fact to prove the element of the crime. Moreover, it is an error of law for a court at sentencing to find a missing element of a crime by lowering the standard of proof. If the element of the crime is missing, it cannot be found by any degree of evidence. When the “controlled substance” is unrecovered, the element of the crime is missing and there can be no cognizable crime against the United States. If the court finds fact and renders judgment on non-cognizable offenses at sentencing, the court exceeds its jurisdiction.

The Executive Branch prosecuted each Petitioner for conspiracy to possess and distribute a mixture or substance containing a “detectable amount” of controlled substance in violation of 21 U.S.C. §§ 846 and 841, by grand jury indictment. The “detectable amount” of drugs recovered in each Petitioner’s case is not in dispute: in Keith Henderson’s conspiracy investigation, the government recovered 372.6 grams of cocaine base; in Yahya Watson’s conspiracy investigation, the government recovered 6.981 kilograms of cocaine; and in Majer Hafiz’s conspiracy the government recovered 3 kilograms of cocaine. These “detectable amounts” must be specified by the grand jury in each indictment.

Petitioners were all convicted of Count One in the indictment, conspiracy to possess with the intent to distribute a controlled substance, 21 U.S.C. §§ 846 and 841. The underlying offense in each conspiracy count was 21 U.S.C. § 841, the violation of which was the

object of the conspiracy. Pursuant to 21 U.S.C. § 846, “any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.” Although each offense must be alleged in separate counts in the indictment, Congress prescribed Petitioners’ sentence for conspiracy to be based on 21 U.S.C. § 841(b), “the mixture or substance containing a ‘detectable amount’ of a controlled substance.”

“When the juries rendered their verdict, the court has to pronounce the proper judgment upon such verdict, and the law, in prescribing the punishment either as to the extent or the mode or the place of it.” *In Re Bonner*, at 258. As indicated below, the district courts failed to sentence Petitioners pursuant to the sentence ordained by Congress. Nevertheless, this Court held with respect to the controlled substance, “Congress declared that sentences should be based exclusively on the weight of the mixture or substance.” *Chapman v. United States*, 500 U.S. at 459. Petitioners’ sentences were based on an arbitrary quantity of unrecovered/undetectable amounts of an alleged controlled substance, pursuant to the Sentencing Reform Act of 1984.

In enacting the Sentencing Reform Act of 1984, the Legislative Branch delegated its responsibility to make sentencing guidelines to the United States Sentencing Commission, an agency of the Judicial Branch, and it introduced three major changes from prior law: (1) It authorizes the Commission to

promulgate “guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case,” along with policy statements to facilitate implementation of the guidelines, 28 U.S.C. § 994(a) (Supp. IV 1986); (2) it prospectively abolishes parole, *see* Crime Control Act of 1984 § 235(b), 98 Stat. at 2032-33; and (3) it substantially curtailed the availability to prisoners of credits toward their sentence for good time served, 18 U.S.C. § 3624(b) (Supp. IV 1986). In promulgating the Guidelines, the Judicial Branch transgressed and expanded the limited jurisdiction of the federal courts to render judgments of conviction over “relevant conduct,” non-cognizable crimes and disputes that did not present a “case” or “controversy” which could be adjudicated in the federal courts.

The Guidelines gave the federal courts jurisdiction over a range of determinate sentences for categories of offenses and defendants based on “relevant conduct,” thereby amending the indictment at sentencing to include “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant,” Sentencing Guidelines § 1B1.3.¹ The guidelines created a new offense,

¹ Moreover, the Judicial Branch extended the power and jurisdiction of the federal courts in disregard to personal and subject matter jurisdiction of the states. The Guidelines expound: “Consistent with the provisions of § 1B1.3 (Relevant Conduct), such other offense includes conduct that may be a state or local offense and conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place within the territorial or maritime jurisdiction of the United States.”

the “real offense,” but not an offense against the United States. All offenses against the United States must be in the indictment pursuant to Fed. R. Crim. P. 8(a) which states: “[T]he indictment may charge a defendant in separate counts with 2 or more offenses if the offenses charged . . . are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.”

In determining the relevant conduct, sentencing judges are not restricted to information that would be admissible at trial. See 18 U.S.C. § 3661; see also *United States v. Watts*, 117 S. Ct. 633, 635 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court’s consideration of acquitted conduct); *Witte v. United States*, 515 U.S. 389, 399-401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution); *Nichols v. United States*, 511 U.S. 738, 747-48 (1994) (noting that district courts have traditionally considered defendant’s prior criminal conduct even when the conduct did not result in a conviction).

The Guideline’s sentencing range is determined on the basis of the conduct and information specified in the respective guidelines, and not on the Laws of Congress. The Guideline’s “relevant conduct” is alleged in the Judicial Branch’s Presentence Report, and the courts rendered Petitioners’ findings of fact and judgments of conviction based on the Judicial Branch’s

Presentence Report and not on the facts specified in the grand jury indictment and jury conviction, exceeding the court's jurisdiction pursuant to Articles I, II, and III, in violation of the Fifth and Sixth Amendments, and the Judiciary Act of 1789.

In 2005, this Court rendered the Guidelines unconstitutional, holding judicial fact-finding violated the right to a jury trial guaranteed by the Sixth Amendment and affirming that Petitioners are entitled to the protections of the Constitution at sentencing, *United States v. Booker*, 543 U.S. 220 (2005). Yet, the district courts rendered judgments of conviction against Petitioners pursuant to the Sentencing Reform Act of 1984. Petitioners maintain that judicial fact-finding as to "relevant conduct" also violated their right to a grand jury indictment and due process of law guaranteed by the Fifth Amendment. Petitioners' judgments of conviction were rendered in excess of the court's jurisdiction, and Petitioners' judgments of conviction are void.

Keith Roman Henderson:

In July 2005, a Drug Enforcement Administration (DEA) informant was arrested for selling crack cocaine, and he began to cooperate with the DEA. In return, the DEA did not prosecute the informant. The informant told the DEA that he had been buying crack cocaine from Keith Henderson and his brother Lionel Henderson since April 2003. The informant had smoked some of the crack cocaine and/or resold the

rest. The informant claimed that he purchased two or three ounces of crack cocaine from Keith Henderson and Lionel Henderson two or three times a week. None of this crack cocaine was recovered (the court estimated approximately 200 separate sales of two ounces which amounted to 400 ounces, the equivalent of 11.34 kilograms of unrecovered/undetectable crack cocaine).

The informant agreed to buy more crack cocaine from Keith Henderson and Lionel Henderson, under the supervision of the DEA. On March 5, 2005, the informant purchased 128.3 grams of crack cocaine from Keith Henderson, and turned the drugs over to the DEA. On March 17, 2005, Keith Henderson sold the informant 124.9 grams of crack cocaine, and the informant turned the drugs over to the DEA. On July 13, 2005, the informant purchased 46.6 grams of crack cocaine from Lionel Henderson. Lionel Henderson was arrested on the scene, and the DEA recovered the drugs. Keith Henderson was later arrested at his home.

On December 14, 2005, a grand jury in the United States District Court for the Western District of Louisiana indicted Keith Henderson and Lionel Henderson on an eight-count indictment. The indictment appears at Pet. App. 13a-19a.² The case and controversy was resolved by a petit jury, as Keith Henderson was convicted of Counts One, Two, and Three of the indictment, and acquitted of all other counts. Count One

² Petitioners maintain that Keith Henderson's indictment is the proper way to indict violations of 21 U.S.C. §§ 846 and 841.

charged Keith Henderson and Lionel Henderson with conspiracy to distribute 50 grams or more of cocaine base (crack), from an unknown date to July 13, 2005, pursuant to 21 U.S.C. § 846, and the overt acts of the conspiracy were in the offenses alleged in Counts Two through Five of the indictment. Count Two charged Keith Henderson and Lionel Henderson with distribution of 128.3 grams of cocaine base on March 5, 2005, pursuant 21 U.S.C. § 841(a)(1), and Count Three charged Keith Henderson and Lionel Henderson with distribution of 124.9 grams of cocaine base on March 17, 2005, pursuant 21 U.S.C. § 841(a)(1).

On August 6, 2006, Keith Henderson was sentenced. In rendering his judgment of conviction against Keith Henderson, the Honorable Tucker L. Melancon disregarded the plain language of 21 U.S.C. § 841, which only punishes for “detectable amounts” of controlled substance, as well as the grand jury indictment and jury conviction. Judge Melancon relied on the “offense conduct” in the Presentence Report, finding by a preponderance of the evidence that Keith Henderson’s “real offense” was the possession with intent to distribute 11.76 kilograms of cocaine base (the 372.6 grams of cocaine base recovered by the DEA and the unrecovered 11.34 kilograms of crack cocaine smoked or sold by a drug-addicted informant).

Even though Keith Henderson was acquitted of Count Four of the indictment at trial, the court found him guilty of this offense by a preponderance of the evidence and sentenced him for the 46.6 grams of crack cocaine, as relevant conduct. When a jury renders a not

guilty verdict, the “case” and “controversy” is resolved. There is no longer a dispute for the court to resolve, and the court rendered judgment in excess of its jurisdiction.

Moreover, Keith Henderson was held to answer to the infamous crimes of possession with the intent to distribute, on 200 occasions, 11.34 kilograms of cocaine base without a grand jury indictment. Pursuant to the Sentencing Reform Act of 1984, Judge Melancon rendered his judgment of conviction for conspiracy to possess and distribute 11.7 kilograms of cocaine base, sentencing Keith Henderson to 296 months’ incarceration, pursuant to the drug quantity table found in Section 2D1.1 of the Guidelines, and 10 years of supervised release per count to run concurrently. The judgment conviction appears at Pet. App. 20a-30a.

Yahya Azim Watson:

On June 22, 2006, the Montgomery County Maryland Police Department intercepted a suspicious package at the UPS facility in Gaithersburg, Maryland, with a return address to Oakland California and a destination address to a Jennifer Convertibles store in Gaithersburg, Maryland. The package contained 7 white powdered bricks; subsequent lab analysis revealed the package contained 6.981 kilograms of cocaine.

A portion of the cocaine was placed back into the package and delivered to Jennifer Convertibles. A co-conspirator arrived at the store and picked up the

package. A search warrant was obtained for the co-conspirator's home, and the package was recovered from the co-conspirator's truck. The co-conspirator claimed that he picked up the drugs for Yahya Watson and that he had picked up drugs at Jennifer Convertibles for Yahya Watson in the past. UPS provided law enforcement with the weight of the packages sent from Oakland California and addressed to Jennifer Convertibles, claiming the unrecovered package contained unrecovered cocaine. Also, a second co-conspirator stated that he purchased cocaine from Yahya Watson, 2 to 3 kilograms a week from March 2006 to June 2006. A third and fourth co-conspirator stated that they bought cocaine from Yahya Watson, and that he admitted his cocaine came from Oakland California via commercial air carrier. Needless to say, none of these drugs were recovered by law enforcement.

The government's investigation lasted for 15 months, June 2006 to September 2007. During this time, the government did not recover any controlled substance on Yahya Watson. The only controlled substance recovered in this conspiracy investigation was from the cooperating co-conspirator's truck, 6.981 kilograms of cocaine.

By grand jury indictment filed on September 27, 2007, a grand jury in the United States District Court for the Eastern District of Virginia accused Petitioner Yahya Watson in a One Count indictment, 21 U.S.C. § 846, of conspiracy to possess and distribute five kilograms or more of a mixture or substance containing a detectable amount of cocaine, in violation of 21 U.S.C.

§ 841(a)(1). The indictment appears at Pet. App. 31a-35a.³

The indictment did not specify the weight of the drugs recovered but the “detectable amount” of drugs recovered is not in dispute – 6.981 kilograms of cocaine were recovered. On November 16, 2007, the Department of Justice filed its “Notice of Intention to Introduce Expert Testimony.” Susan Cohen, a forensic chemist, would have testified to a reasonable degree of scientific certainty that the controlled substance is 6.981 kilograms of cocaine. The Expert Forensic Report appears at Pet. App. 36a-37a.

On November 27, 2007, Yahya Watson appeared before the court and tendered a plea of guilty to the indictment. In rendering his judgment of conviction against Yahya Watson, the Honorable Claude M. Hilton disregarded the plain language 21 U.S.C. § 841, which only punishes for “detectable amounts” of a controlled substance. Pursuant to the Sentencing Reform Act of 1984, Judge Hilton relied on the “offense conduct” in the Presentence Report, finding by a preponderance of the evidence that Yahya Watson’s “real offense” was the possession with intent to distribute

³ This indictment fails to state an offense and should have been dismissed by the court. Petitioner Yahya Watson was accused of only one count, conspiracy, and an element of conspiracy requires the separate and distinct prosecution for an underlying offense, the violation of which is the object of the conspiracy. The sentence for conspiracy is based on the underlying offense. However, this indictment has no separate and distinct underlying offense of 21 U.S.C. § 841. 21 U.S.C. § 846 and 21 U.S.C. § 841 are two separate and distinct crimes.

50-150 kilograms of cocaine, sentencing Yahya Watson to 360 months to life incarceration, pursuant to the drug quantity table found in Section 2D1.1 of the Guidelines. The Judgment of Conviction appears at Pet. App. 38a-44a.

Majer Hafiz:

In June 2004, law enforcement officers executed a search warrant on the home of a would-be DEA informant. The government recovered records, indicating that the informant owed money to Majer Hafiz for an alleged drug debt. The informant told the DEA that he had purchased approximately 17 kilograms of cocaine from Majer Hafiz from March 2004 to June 2004.

On February 10, 2005, under the supervision of the DEA, the informant agreed to meet with Majer Hafiz to purchase 3 kilograms of cocaine. A co-conspirator brought the drugs in his car and Majer Hafiz took the drugs from the car and brought them into an apartment. Law enforcement entered the apartment and the cocaine was recovered from the freezer. A licensed gun was recovered pursuant to a search of Majer Hafiz's car.

Law enforcement obtained a search warrant for the home of Majer Hafiz and recovered records of alleged drug debts that Majer Hafiz was entitled to collect monies for the distribution of 141 kilograms of cocaine. Guns were also recovered in the home.

By grand jury indictment, dated April 19, 2005, Majer Hafiz, among other crimes, was charged with

conspiracy to possess and distribute five kilograms or more of a mixture or substance containing a “detectable amount” of cocaine in violation of 21 U.S.C. §§ 846 and 841 the indictment appears at Pet. App. 45a-47a.⁴ The indictment did not specify the weight of the drugs found. However, the “detectable amount” of cocaine recovered is not in dispute; 3 kilograms of cocaine were recovered in the Majer Hafiz conspiracy investigation. Expert Forensic Report appears at Pet. App. 48a-49a.

By judgment of conviction dated May 23, 2006, the court found Majer Hafiz guilty of possession with the intent to distribute 20 kilograms of cocaine. The Honorable Leon Jordon disregarded the plain language of 21 U.S.C. § 841 which only punishes “detectable amounts” of controlled substances. Instead, the court combined the 3 kilograms with the 17 kilograms of unrecovered/undetectable drugs sold to the informant. The court rejected the records of the alleged drug debts for the distribution of 141 kilograms of cocaine. Pursuant to the Sentencing Reform Act of 1984, Judge Jordon relied on “offense conduct” in the Presentence Report, finding by a preponderance of the evidence that Majer Hafiz’s “real offense” was the possession with intent to distribute 20 kilograms of cocaine, sentencing Majer Hafiz on Count One to 151 months’ incarceration, pursuant to the drug quantity table found in Section 2D1.1 of the Guidelines and an additional

⁴ The “detectable amount” of cocaine is 3 kilograms. This “detectable amount” of cocaine is insufficient to support the top charge, requiring 5 kilograms. The court should have dismissed the top count.

60 months for knowingly possessing a firearm. The Judgment of Conviction appears at Pet. App. 50a-70a.

In each of Petitioners' cases, the court rendered judgments of conviction on non-cognizable offenses in which the United States was not a party, including the infamous crime of possession with the intent to distribute a controlled substance. Petitioners cannot be held to answer to an infamous crime, a sentencing factor for the crime of conviction, without a grand jury indictment. Petitioners are entitled to due process on the sentencing factors. The accusations of the United States in the indictments only concerned the possession and distribution of mixture or substance containing a "detectable amount" of drugs, cognizable offenses against the United States.

Petitioners' judgments of conviction were rendered without jurisdiction, and in the absence of evidence to support the "relevant conduct." The "relevant conduct" in each case involved the distribution of unrecovered/undetectable amounts of drugs. The "no evidence" doctrine of *Thompson v. Louisville*, 362 U.S. 199 (1960) secures to an accused the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty. "It is plain that such court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction, and when, . . . the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void." *In Re Bonner* at 257.

Not only did the Judicial Branch write the Guidelines increasing the court's power, it also enforces the Guidelines, and adjudicates the Guidelines, upsetting the separation of power of the branches and eliminating the checks and balances at sentencing. The policy behind the Guidelines is repugnant to the Fifth and Sixth Amendments, see the 2016 Sentencing Guidelines p.6:

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing). A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The judicial branch usurped the power of the grand jury and petit jury, holding American citizens responsible for harms that do not amount to offenses against the United States. The Judicial Branch implemented its "real offense" policy by redefining the definition of "offense" in its Guidelines §§ 1B1.1(H) and 1B1.3, as "the offense of conviction and relevant conduct." Relevant conduct consists of "all acts and omissions committed, aided, abetted, counseled,

commanded, induced, procured, or willfully caused by the defendant,” Guidelines § 1B1.3 and it all becomes part of the “real offense,” in violation of the Grand Jury Clause of the Fifth Amendment.

“The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.” *Stirone v. United States*, 361 U.S. 212, 218 (1960).

Ever since *Ex parte Bain*, 121 U.S. 1 was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself.

If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner’s trial for a crime, and without which the Constitution says ‘no person shall be held to answer,’ may be frittered away until its value is almost destroyed.

The Court went on to hold in *Bain* “that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional

provision, at the mercy or control of the court or prosecuting attorney.” Id. at 13.

It is axiomatic that Petitioners’ judgments of conviction based on “relevant conduct,” including the distribution of unrecovered/undetectable drugs, are convictions upon charges not made or upon charges not tried, constituting a denial of due process guaranteed by the Fifth Amendment. *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). The Fifth Amendment holds no person shall “be deprived of life, liberty, or property, without due process of law.” To conform to due process of law, Petitioners were entitled to have their judgments of conviction appraised on consideration of the case as it was indicted and tried. Petitioners have been denied safeguards guaranteed by due process of law – safeguards essential to liberty in a government dedicated to justice under law. Id.

According to express provision of Article III, the judicial power of the United States is limited to “cases” and “controversies.” In implementing this limited grant of power, this Court has refused to issue advisory opinions or to resolve disputes that are not justiciable. See, e.g., *Flast v. Cohen*, 392 U.S. 83 (1968). These doctrines help to ensure the independence of the Judicial Branch by precluding debilitating entanglements between the Judiciary and the two political Branches, and prevent the Judiciary from encroaching into areas reserved for the other Branches by extending judicial power to matters beyond those disputes “traditionally thought to be capable of resolution through the judicial process.” Id. at 97.

The Guidelines have undermined the independence and integrity of the judiciary, permitting judges to encroach on the powers of the Legislative Branch and Executive Branch. An independent and impartial court has no standing to bring allegations of infamous crimes under the guise of sentencing factors. The federal courts have no jurisdiction over any conduct without formal and sufficient accusations brought by the prosecution even if Petitioners voluntarily submitted to the jurisdiction of the court. *Albrecht v. United States*, 273 U.S. 1, 8 (1927).

When the Sentencing Guidelines were first implemented in 1987, there were less than 40,000 federal prisoners, and on March 1, 2018, there were 183,382. The accumulation of all the power is in the hands of the federal judges to render judgments of conviction based on “the offense and all relevant conduct” boarders on tyranny. Under such oppression, 97% of defendants plead guilty before trial to avoid a more severe sentence after trial, a constructive denial of the Sixth Amendment right to a jury trial.

Due to harsh sentences, the Executive Branch no longer follows the Laws of Congress in sentencing predicate felony offenders. In August 2013, Attorney General Eric Holder declared a major change in Justice Department policy, instructing federal prosecutors to avoid mandatory minimum sentences and prior felony enhancements in certain low-level, non-violent drug cases. Mandatory minimums and so-called “851 notices” had created “unduly harsh sentences” and

rising prison costs. Attorney General Eric Holder Memo appears at Pet. App. 60a-66a.

Under a program launched in 2014 known as the Clemency Initiative, the Justice Department encouraged “qualified federal inmates” – as defined by its criteria – to apply to have their prison sentences commuted. Overall, President Obama granted clemency to 1,927 individuals, a figure that includes 1,715 commutations and 212 pardons.

Nevertheless, the Department of Justice has failed the Nation miserably. After all, the Constitution assigns to the Executive Branch, and not to the Judicial Branch, the duty to “take care that the Laws be faithfully executed.” Article II, § 3. The “real offense” is an Executive Branch that failed to live up to its duty to uphold the Constitution for the People of the United States of America, to do the right thing. While President Obama released prisoners pursuant to the Clemency Initiative, he failed, despite his Oath of Office, to protect and defend the Constitution. As head of the Executive Branch and the Department of Justice, President Obama held hands with the court, requesting and defending the courts’ harsh sentences while hundreds of thousands of federal prisoners had their constitutional rights violated.

The Executive Branch’s annual budget for the Justice Department has skyrocketed to \$29 billion; \$9 billion is allocated to the Federal Bureau of Prisons. Meanwhile, the Justice Departments’ indictments, trials, and convictions are all a charade, as the judgments

of conviction pursuant to the Sentencing Reform Act of 1984 are nullities.

In enacting the Sentencing Reform Act of 1984, the Legislative Branch unconstitutionally delegated its responsibility to make sentencing guidelines to President Reagan and his Sentencing Commission, an agency of the Judicial Branch. In 2005, this Court rendered the Guidelines unconstitutional. Yet, this Court continues to safeguard the power of judges, not juries, at the expense of the citizens of this Great Nation. The Legislative Branch must revoke this law but Congress seems more concerned about reelection than stepping forward on behalf of the federal prisoners and revoking the Sentencing Reform Act of 1984. Congress has failed to live up to its Oath of Office. Where are the checks and balances?

Have the Legislative Branch and President Trump accepted the proposition put forward by this Court that if the court has authority to inflict the punishment prescribed, its action is not void though it violates Petitioners' rights granted by the Fifth and Sixth Amendments. Does the end justify the means?

Judicial integrity is so necessary in the true administration of justice, *Mapp v. Ohio*, 367 U.S. 643 (1961). The Supremacy Clause of the United States Constitution (Article VI, Clause 2) establishes that the Constitution, federal laws made pursuant to it, and treaties made under its authority, constitute the supreme law of the land. In *Booker*, 543 U.S. 220, this Court held that the Guidelines violated the Sixth

Amendment right to a jury trial, yet judicial fact-finding as to relevant conduct continues today. “An act of the legislature, repugnant to the constitution, is void.” *Marbury v. Madison*, 5 U.S. 137 (1803).

“The province of the court,” as Chief Justice Marshall said “is, solely, to decide on the rights of individuals.” *Id.* This Court is called upon to decide whether the district courts exceeded their jurisdiction in sentencing Petitioners pursuant to the Guidelines, and in violation of the Fifth Amendment. There are constitutional limits to the powers of an unelected, unrepresentative judiciary in our government. This Supreme Court of the United States of America is sworn to defend the Constitution without reprisal from its citizens, and this Court must render Petitioners’ judgments of conviction nullities. The Sentencing Reform Act of 1984 is void, and all judgments of conviction pursuant to it are also void.



CONCLUSION

Petitioners come before this Court defending all prisoners oppressed by the Sentencing Reform Act of 1984, demanding their rights to a grand jury indictment and due process guaranteed by the Fifth Amendment. “The law of our country takes care, or should take care, that not the weight of a judge’s finger shall fall upon anyone except as specifically authorized. A rigid adherence to this doctrine will give far greater

security and safety to the citizen than permitting the exercise of an unlimited discretion on the part of the courts in the imposition of punishment.” *In Re Bonner* at 258. Thus, the petition for Habeas Corpus should be granted.

Respectfully submitted,
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