Commission's mandates is in order. U.S.S.G. § 4B1.2(b) contains the definition of a "controlled substance offense" that acts as a predicate for treatment under the enhanced penalty provisions contained in U.S.S.G. § 4B1.1. The definition of a controlled substance offense includes convictions under either state or federal law. This provision is a result of the statutory mandate contained in 28 U.S.C. § 994(h), which contains a mandate to "specify a sentence to a term of imprisonment at or near the maximum term authorized" for a defendant who is an adult and who has been convicted of certain types of crimes, including "an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46;" 28 U.S.C. § 994(h)(1)(B). In addition to a current conviction for a qualifying felony, the defendant must have at least two prior convictions for certain types of crimes, which use the exact same definitions contained in § 994(h)(1)(A) and (B). See 28 U.S.C. § 994(h)(2)(A) and (B).

A defendant cannot be convicted of a state court drug felony in federal court, whereas both federal and state crimes can meet a generic definition of a "crime of violence." Despite the identity of language in subsections 994(h)(1)(B) and 994(h)(2)(B), the Commission construed the definition contained in § 994(h)(2)(B) to include state court convictions.

This construction implicates two other statutory directives. The first is the directive contained in 28 U.S.C. § 994(f), which directs the Commission to avoid "unwarranted sentencing disparities." The other is the directive contained in 28

U.S.C. § 994(d), which directs that the Commission "shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."

At the time Mr. Oatman was sentenced, the Eighth Circuit had held, as had all other circuits to reach this issue, that the Commission acted within its discretion when it included state court drug convictions in the definition of a qualifying felony in U.S.S.G. § 4B1.2(b). See *United States v. Consuegra*, 22 F.3d 788, 789 (8th Cir. 1994) *citing United States v. Beasley*, 12 F.3d 280, 282-284 (1st Cir. 1993); *United States v. Rivera*, 996 F.2d 993, 994-996 (9th Cir. 1993); *United States v. Whyte*, 892 F.2d 1170, 1174 (3rd Cir. 1989).[1] *Consuegra* mentioned the "sentencing laws' goal of sentencing uniformity," 22 F.3d at 790, as did the court in denying Mr. Oatman's appeal. See *United States v. Oatman*, No. 16-2753, slip op. at 5, Appx. A ("The Guidelines were intended to reduce disparity, not increase it. *See Mistretta v. United States*, 488 U.S. 361, 365–66 (1989).") Neither *Consuegra* nor any other circuit decision on this issue had the benefit of the Sentencing Commission's Report in which it found that defendants, such as Mr. Oatman, who are convicted of a drug offense and only have drug offenses as predicates, are no more likely to recidivate than those sentenced under the non-Career Offender Guidelines. See Report to the Congress: Career Offender Sentencing Enhancements (Aug. 2016)[RTC] at 44. The

[1] See also *United States v. Brown*, 23 F.3d 839, 841 (4th Cir. 1994)(inclusion of state court drug convictions in Career Offender Guidelines within Commission's discretion); and *United States v. Gonsalves*, 121 F.3d 1416, 1418-1419 (11th Cir. 1997)(same). The Seventh Circuit joined the position of other circuits, but in a decision that does not serve as precedent. See *United States v. Jemine*, No. 12-3857 (7th Cir. 2014)(unpublished opinion).

Eighth Circuit's decision in Petitioner's case did not reference this RTC. See *Oatman*, Appx. A.

Mr. Oatman's challenge of the inclusion of state court drug convictions on appeal centered on the factual premise that black men are convicted in state courts (and particularly in Chicago, Illinois) at rates disproportionate to either their rate of offending or to their presence in the general population. In other words, if you are black and a male and perpetrate a drug felony, you are more likely to be convicted of that drug felony than a person who also commits that same drug felony but belongs to another race. Mr. Oatman relied on research establishing this fact published over a number of years by a number of reputable sources. He also relied on the RTC, published in August, 2016, which confirmed that in Fiscal Year 2014, almost 60% of defendants sentenced as Career Offenders were black males, and that 74.1% of Career Offenders committed drug offenses and, like Mr. Oatman, would have been sentenced pursuant to U.S.S.G. § 2D1.1 but for the Career Offender Guidelines. RTC at 19 and Fig. 2. After considering a number of parameters, the Commission concluded that "The normal operation of Chapter Four's criminal history provisions adequately accounts for likelihood of recidivism and future criminal behavior of those offenders who are currently deemed to be career offenders, but who have not committed an instant or prior offense that is a 'crime of violence.'" RTC at 44.

The Sentencing Commission's report issued after Mr. Oatman's sentencing on June 7, 2016. This and other studies cited on appeal were not cited to the district court, as the issue of the impact of the mandate contained in 28 U.S.C. § 994(d) was not raised in the district court.

In ruling on Mr. Oatman's appeal, the Eighth Circuit succinctly summarized Mr. Oatman's argument: "Oatman challenges § 4B1.2 as inconsistent with the Commission's congressional mandate. He argues that state drug convictions affect black men more than similarly situated white men. Because Congress commanded the Commission to establish guidelines 'entirely neutral as to . . . race', *see* 28 U.S.C. § 994(d), Oatman argues that the Commission exceeded its mandate by including state offenses." *Oatman*, slip op. at 1-2, Appx. A.

The Eighth Circuit never addressed this legal issue. Rather, the Court declined "to find it to be clear or obvious error by the district court to apply the Guidelines consistent with other federal courts when it has done so without Oatman's production of any legal authority to the contrary and without the benefit of any of the evidence presented for the first time on appeal." *Oatman*, slip op. at 5, Appx. A.

REASONS FOR GRANTING THE WRIT

I.

THE EIGHTH CIRCUIT HAS DECIDED IMPORTANT FEDERAL QUESTIONS THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This petition presents two procedural questions and one substantive question. Mr. Oatman recognizes that the substantive question does not meet any of the categories in Rule 10 of the Supreme Court Rules, but the rule indicates it does not limit the questions the Court will consider. It is included because of the odd type of "Catch 22" situation it presents.

A. The Court should review whether the Commission exceeded its statutory mandate as the Circuits have interpreted the Commission's action as discretionary, whereas the Commission has interpreted its action as mandated by the statute

The Commission, in the RTC, indicated that only Congress could effect a change to the Career Offender Guideline by changing the wording of 28 U.S.C. § 994(h) to allow the Commission greater leeway in how to include prior drug convictions in the Career Offender Guidelines. If the Commission had believed itself to have discretion to make changes to the Career Offender Guidelines with respect to prior drug convictions, it would have put out a notice of a proposed amendment rather than the Report to the Congress. Yet, all courts to have considered the inclusion of state court convictions, which form the lion's share of prior drug convictions, have held that the Commission did not do so as part of its mandate, but rather as an exercise of discretion. At that point, courts then defer to the discretion of the Commission under *Chevron U.S.A., Inc. v. Natural Resource Defense Council*, 467 U.S. 837 (1984), see *Oatman,* slip op. at 4 and n.3, Appx. A, without recognizing that the Commission does not believe it has any discretion in the matter. The different interpretation of the statute by the Commission and the courts thus present a circular trap where neither are impelled to address the importance of the identity of the specific language contained in 28 U.S.C. § 994(h)(1)(B) and 994(h)(2)(B) (as opposed to the general language set forth regarding crimes of violence) as well as the limitations contained in 28 U.S.C. § 994(d) and (f).

The problem may be addressed by filing motions in appropriate cases at the district court level. Yet, district courts are bound by the prior construction of § 994(h) given by the circuits,[2] and circuit court panels are bound by prior precedent. Even if appellate courts grant en banc review, deference to the Commission's discretion, even where the Commission does not appear to be exercising discretion, creates an endless loop that can defy resolution even in an en banc setting. Hence, the underlying substantive question may never obtain review even though it has never been addressed. This is a stalemate only this Court can break.

Petitioner understands that the Court may wish to defer this substantive question and allow the lower courts to address it first, or at least to allow the courts to determine whether this is an area in which *Chevron* (still) applies.[3] Even if the Court declines to address the substantive issue as not sufficiently developed in the lower courts, this case does provide an appropriate vehicle to consider the procedural questions.

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[2] See, *e.g.*, *United States v. Nolf*, 30 F.Supp.3d 1200, 1217-1220 (D.N.M. 2014)(construing Tenth Circuit's recognition of Commission's broad discretion with respect to § 994(h) to mean that state drug convictions are properly included as predicates for Career Offender purposes).

[3] Deference to an agency's construction of an ambiguous statute affecting the length of a sentence appears to be inconsistent with the rule of lenity, which mandates that any such ambiguity must be resolved in a defendant's favor. See *Bifulco v. United States*, 447 U.S. 381, 387 (1980)(the touchstone of the rule of lenity is statutory ambiguity).

B. **The circuit refrained from deciding whether error occurred at all, instead proceeding directly to the conclusion that error, if any, would not have been "clear," which then presents the question of what constitutes "clear error": a definitive ruling on a narrow basis or a legal conclusion controlled by prior precedent?**

The Eighth Circuit correctly recited the procedural framework set forth in *United States v. Olano*, 507 U.S. 725 (1993) regarding the scope of plain error review for purposes of F.R.Cr.P. 52(b): 1) a determination as to whether error occurred, 2) whether it was plain or clear at the time error occurred, 3) whether the error affected substantial rights. The question presented here focuses on the first two steps of that analysis and how courts are to determine whether error occurred, and if so, what constitutes "clear" error: prior controlling precedent on the specific issue presented, or prior precedent that controls each step of the issue, such that the outcome is not reasonably disputable?

The issue in *Olano* was a violation of the F.R.Cr.P. 24(c) where alternate jurors were allowed to attend deliberations. In light of this rule-based violation, the Court framed the first step of a Rule 52(b) analysis as determining whether "a legal rule was violated during the district court proceedings… ." *Id.*, 507 U.S. at 733. If so, and "if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." *Id.*

This formulation does not answer the question as to what constitutes "error" where the "error" subject to appeal is not based on a rule, but rather on prior precedent. Must the precedent answer the specific question, such as "the