

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

VENTERIA LEANET REASON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

- (1) In using Application Note 6 of Sentencing Guidelines § 2D1.1 to identify the listed controlled substance “most closely related” to an unlisted substance, by identifying which listed substance is “substantially similar” in structure, effect and potency to the unlisted substance, and where the government has acknowledged that there are more than one listed substances “substantially similar” in chemical structure to the unlisted substance, may a judge select any of the “substantially similar” listed substances to satisfy the chemical structure prong, or does the overriding goal of identifying the “most closely related” substance require the judge to select the closest match among the multiple “substantially similar” substances.

INTERESTED PARTIES

The following individuals not named in the caption of the case were parties to these proceedings in the District Court:

Julius Reason, Co-Defendant

Natashia Thames, Co-Defendant

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW	i
INTERESTED PARTIES.....	ii
TABLE OF AUTHORITIES	vi
PETITION	1
OPINION BELOW	2
STATEMENT OF JURISDICTION	2
STATUTORY AND OTHER PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
A. The Nature of the Case.....	3
B. The Course of Proceedings in the District Court: Ms. Reason’s Arrest, Guilty Plea and Sentencing.....	4
1. Ms. Reason’s Arrest and Guilty Plea.....	4
2. Objections to the Pre-Sentence Investigation Report.....	5
3. The District Court Sentencing Hearings and the Sentence.....	6
C. The Evidence and District Court Ruling on the “Most Closely Related” Listed Controlled Substances to Dibutylone and Ethylone....	7
1. The Evidence and District Court’s Ruling Relating to Scoring Dibutylone.....	8
a. Dibutylone: Evidence in the District Court on Which Listed Substance is “Substantially Similar” in Chemical Structure.....	8
b. The Government, Court and Parties Focused on Dibutylone’s Stimulant Effect.....	12

c.	Ms. Reason’s Arguments and the District Court’s Ruling on Dibutylone.....	12
2.	The Evidence and Ruling Relating to Scoring Ethylone.....	15
a.	Ethylone: Evidence on Which Listed Substance is Substantially Similar in Chemical Structure.....	15
b.	The Government, Court and Parties Focused on Ethylone’s Stimulant Effect.....	16
c.	Ms. Reason’s Arguments and the District Court’s Ruling on Ethylone.....	16
D.	The Selection of MDMA and MDEA to Score Dibutylone and Ethylone Resulted in an Increase in Ms. Reason’s Base Offense Level.....	18
E.	The Decision of the Eleventh Circuit Affirming the Judgment and Sentence.....	18
	REASONS FOR GRANTING THE WRIT.....	20
	CONCLUSION.....	26
	DECLARATION VERIFYING TIMELY FILING.....	27
	DECLARATION VERIFYING COMPLIANCE WITH WORD LIMITATIONS.....	28
	CERTIFICATE OF SERVICE.....	29

APPENDIX

Decision of the U.S. Court of Appeals for the Eleventh Circuit, <i>United States v. Venteria Leanet Reason</i> , Case No. 17-11134 (11 th Cir., January 12, 2018).....	A-1
---	-----

Judgment imposing sentence, <i>United States v. Venteria Leanet Reason</i> , Case No. 16-cr-14002-RLR (S.D. Fla. March 1, 2017) D.E. 259	A-2
---	-----

Excerpt from Transcript of Sentencing Proceedings (Evidentiary Hearing on Ratio Issue), January 31, 2017, *United States v. Venteria Leanet Reason*, Case No. 16-cr-14002-RLR (S.D. Fla.), D.E. 216 A-3

Exhibit 3 to Defendant Venteria Reason’s Post-Hearing Memorandum of Law Addressing Application of Sentencing Guidelines 2D1.1, Application Note Six, to Ethylone and Dibutylone, *United States v. Venteria Leanet Reason*, Case No. 16-cr-14002-RLR (S.D. Fla.), DE 225.....A-4

Order on Objections to Ratio for Dibutylone and Ethylone, *United States v. Venteria Leanet Reason*, Case No. 16-cr-14002-RLR (S.D. Fla., Feb. 24, 2017), D.E. 246 A-5

TABLE OF AUTHORITIES

CASES	PAGES
<i>Davis v. Michigan Dept. of Treasury</i> 489 U.S. 803, 809 (1989).....	20
<i>Johnson v. United States</i> 135 S. Ct. 2551 (2015).....	21
<i>United States v. Brey</i> 627 Fed. Appx. 775 (11 th Cir. 2015).....	16, 22
<i>United States v. Makkar</i> 810 F.3d 1139 (10 th Cir. 2015).....	21, 22
STATUTORY AND OTHER AUTHORITY:	
<u>United States Code</u>	
18 U.S.C. § 3742.....	2
21 U.S.C. § 802(32)(A).....	21
28 U.S.C. § 1254(1).....	2
28 U.S.C. § 1291.....	2
<u>Code of Federal Regulations</u>	
21 C.F.R. § 1308.11(d).....	13
<u>United States Sentencing Commission, Guidelines Manual (2016)</u>	
USSG § 2D.1.1, Application Note 6.....	passim
USSG § 2D1.1, Application Note 8(D).....	13, 18, 24
<u>Federal Register</u>	
Federal Register, Vol. 79, No. 45, March 7, 2014.....	4

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PETITION FOR WRIT OF CERTIORARI

Venteria Leanet Reason respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-11134 in that court on January 12, 2018, *United States v. Venteria Leanet Reason*, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1). A copy of the District Court's judgment imposing sentence, *United States v. Venteria Leanet Reason*, Case No. 16-cr-14002-RLR, D.E. 259 (S.D. Fla. March 1, 2017), is contained in the Appendix (A-2).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on January 12, 2018. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

United States Sentencing Commission, Guidelines Manual, § 2D1.1, Application Note 6 (Nov. 2016).

STATEMENT OF THE CASE

Venteria Leanet Reason seeks certiorari review of the judgment of the United States Court of Appeals for the Eleventh Circuit, which affirmed her 135-month prison sentence. (Appendix A-1). Ms. Reason's sentence was imposed on February 28, 2017 in the United States District Court for the Southern District of Florida. *United States v. Venteria Leanet Reason*, Case No. 16-cr-14002-RLR, D.E. 259 (S.D. Fla. March 1, 2017)(Judgment, Appendix, A-2).¹ Sentencing followed Ms. Reason's guilty plea to the charge of conspiring to import into the United States dibutylone, a controlled substance, in violation of 21 U.S.C. § 952(a) and 963. Ms. Reason is in custody serving the sentence imposed in this case.

A. The Nature of the Case

Venteria Reason is 28 years old. She has no previous convictions. At the time of her arrest and until she was remanded following her guilty plea, she lived with and cared for her three children, ages 9, 6, and 4.

Ms. Reason and her husband, Julius Reason, were charged in a three-count Superseding Indictment returned in the Southern District of Florida. [DE 54]. Count One charged Venteria Reason and Julius Reason with conspiracy to import into the United States dibutylone, a controlled substance, in violation of 21 U.S.C. § 952(a) and 963. Both defendants were charged in counts two and three with

¹ All citations to "D.E." are to the docket in the case of *United States v. Venteria Leanet Reason*, Case No. 16-cr-14002-RLR (S.D. Fla.).

possessing with intent to distribute dibutylone, in violation of 21 U.S.C. § 841(a)(1) and 846. A co-defendant, Natashia Thames, pleaded guilty to the original indictment; she was not named in the Superseding Indictment.

The Superseding Indictment alleged that dibutylone HCI is a controlled substance because it is a “positional isomer” of pentylone. The Deputy Administrator of the Drug Enforcement Administration, pursuant to the temporary scheduling provisions of the Controlled Substances Act, beginning on March 7, 2014, temporarily added to Schedule I pentylone and its “positional isomers.” *See* Federal Register, Vol. 79, No. 45, March 7, 2014 [DE 97:39]. In its “List of Controlled Substances,” the United States Department of Justice Drug Enforcement Administration identified dibutylone as a positional isomer of pentylone, and thus a controlled substance. [DE 104-5:36].

Application of the Sentencing Guidelines to dibutylone was an issue of first impression in the district court.

B. The Course of Proceedings in the District Court: Ms. Reason’s Arrest, Guilty Plea and Sentencing.

1. Ms. Reason’s Arrest and Guilty Plea

Venteria Reason was arrested on March 11, 2016 and released on March 16, 2016 on a personal surety bond with conditions. She remained at liberty until her guilty plea on September 21, 2016 [DE 137]. She has been in custody since then.

On September 21, 2016, Ms. Reason pleaded guilty to Count One of the

Superseding Indictment pursuant to a plea agreement [DE 139]. Except with respect to acceptance of responsibility, the plea agreement does not bind either party to any positions relating to calculation of the advisory Sentencing Guidelines. Nor does the plea agreement contain an appellate waiver.

2. Objections to the Pre-Sentence Investigation Report

The United States Probation Department issued the disclosure version of the Pre-Sentence Investigation Report (“PSR”) on December 15, 2016. [DE 171]. That version of the PSR, and all subsequent versions, attributed to Venteria Reason 10.34 kilograms of dibutylone, and relevant conduct which included 9.98 kilograms of ethylone and 6.96 pounds of marijuana. [DE 171:19]. Neither dibutylone nor ethylone are listed in Sentencing Guidelines § 2D1.1. All versions of the PSR recommended that, under Application Note 6 to Guidelines § 2D1.1, MDMA should be used as the “equivalent” substance to score dibutylone and MDEA should be used as the “equivalent” substance to score ethylone. *Id.* Using these listed substances, and after applying the Guidelines’ marijuana equivalency rules to reach a combined score for multiple substance, the Probation Department arrived at a base offense level of 34. [DE 171:18]. The Probation Department recommended a 2-point enhancement for possession of a firearm, a 3-point enhancement for aggravating role, a 2-point enhancement for having an aggravating role in connection with a drug importation offense, and a 3-point reduction for acceptance of responsibility. These adjustments resulted in a total offense level of 38. Ms. Reason has no prior

convictions. At Offense level 38, Criminal History Category I, the PSR reached an advisory Sentencing Guidelines range of 235-293 months. Since the offense of conviction carries a 20-year maximum sentence, the effective advisory Sentencing Guidelines range was 235-240 months.

Ms. Reason, by counsel, filed written objections to the PSR on December 30, 2016. [DE 177]. Relevant to this appeal is the objection to the selection of Schedule I hallucinogen MDMA as the “equivalent” substance to score dibutylone and Schedule I hallucinogen MDEA as the “equivalent” substance to score ethylone.

3. The District Court Sentencing Hearings and the Sentence

The District Court held an evidentiary hearing on January 31, 2017 [Transcript DE 216] and February 1, 2017 [Transcript DE 217] (hereafter “the Equivalency Hearing”), on the issue under advisory Sentencing Guidelines § 2D1.1, Application Note 6, of what controlled substances referenced in § 2D1.1 are “the most closely related controlled substance[s]” to dibutylone and ethylone. The district court ultimately adopted the PSR’s calculation of the advisory Sentencing Guidelines, which yielded an effective sentence range of 235-240 months.

The district court heard argument on February 28, 2017 on Venteria Reason’s Motion for Downward Variance [DE 280:161-181], and granted the variance motion in part. The Court granted a 100-month downward variance, imposing a sentence of 135 months’ incarceration, followed by three years of supervised release, and a \$100 special assessment. (Appendix A-2, Judgment).

C. The Evidence and District Court Ruling on the “Most Closely Related” Listed Controlled Substances to Dibutylone and Ethylone

Since dibutylone and ethylone are not listed in the advisory Sentencing Guidelines (referred to hereafter as “USSG”), the district court turned to Application Note 6 of USSG § 2D1.1 to score these substances. This Application Note provides the following instructions for courts to use in scoring controlled substances not listed in the Guidelines:

In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the marijuana equivalency of the most closely related controlled substance referenced in this guideline. In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:

(A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.

(B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.

(C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.

The parties offered expert testimony, written expert reports and documentary exhibits on the issue of how the district court should apply Application Note 6 to score dibutylone and ethylone. This evidence and the parties’ post-hearing memoranda [DE 224, 225, 226, 227] comprised the record before the district court

on the equivalency issue.

1. The Evidence and District Court's Ruling Relating to Scoring Dibutylone

As to dibutylone, the government called on the issue of chemical structure expert witness Daniel Willenbring, Ph.D. [DE 216:19-85], a chemist employed by the Drug Enforcement Administration. Ms. Reason called on the issue of chemical structure Gregory Dudley, Ph.D. [DE 216:169-212; DE 217:5-70]. Dr. Dudley is the Chairman of the Department of Chemistry at West Virginia University. The sentencing judge qualified both witnesses to testify as experts in chemical structure.

There was no evidence presented one way or the other on the potency of dibutylone, the third Application Note 6 prong. [DE 246:14-15]. The district court's decision on the "most closely related controlled substance" to dibutylone rested exclusively on the evidence regarding chemical structure and effect. In seeking certiorari review, we urge that the Court of Appeals wrongly approved the district court's erroneous interpretation and application of Application Note 6 with respect to its findings on chemical structure as to both dibutylone and ethylone.

a. Dibutylone: Evidence in the District Court on Which Listed Substance is "Substantially Similar" in Chemical Structure

The first prong under Application Note 6 asks whether the controlled substance not listed in the Guidelines has a chemical structure "substantially similar" to a listed substance. Chemists Willenbring and Dudley testified on this issue.

Government witness Dr. Willenbring acknowledged that the term “substantially similar” is not a scientific term and it is not used in the scientific world, that different competent chemists could disagree on whether two substances are “substantially similar,” and that the Sentencing Guidelines do not define the term. [DE 216:51]. Dr. Willenbring opined that dibutylone was “substantially similar” in chemical structure to MDMA.

Dr. Willenbring testified to a process within the DEA when an unlisted substance is compared to a listed substance, as follows:

Q (AUSA Lineberger): When you do your comparisons of unknown substances or recently discovered substances and substances listed in the Controlled Substances Act, do you work alone? Is your decision the final word on those substances, the new substances?

A (Dr. Willenbring): So the process is – the question may come in with the substance, and I would evaluate it on my own, and all of my colleagues would evaluate in independently.

Following that, we all meet as a group and we discuss our independent evaluations and we come to a consensus, so we have to be in agreement before we move forward with that particular comparison. [DE 216:23]

Dr. Willenbring explained the reason for this collegial process, testifying: “the reason is, when we get assigned cases, it could get assigned to any other chemist in the unit, and we would all have to provide that opinion.” [DE 216:78].

During Dr. Willenbring’s redirect testimony (*see* Transcript excerpt at Appendix A-3), it became clear that this collegial evaluation of comparable substances as it related to dibutylone was result-oriented toward MDMA. Dr.

Willenbring gave the following testimony on redirect:

Q (AUSA Lineberger): [] Why isn't dibutylone substantially similar to methcathinone in your opinion, or is it?

A (Dr. Willenbring): I haven't made that evaluation. I compared it to MDMA, and that is what I went forward with and that is what we discussed. It does have similarities with dibutylone, methcathinone does. [DE 216:82].

Dr. Willenbring testified further:

The Court: Do you want to ask him how he came to evaluate dibutylone to MDMA?

AUSA Lineberger: Yes

The Court: How did you do that?

AUSA Ms. Lineberger: Explain that to the court

A (Dr. Willenbring): The same method I described earlier, looked at the core structure, 3-D structure, literature ---

The Court: Well, I think what I am understanding the discussion to be is that you – for the purpose of what you are presenting you analyzed and compared dibutylone to MDMA, you did not compare it to methcathinone.

The Witness: Correct.

The Court: Why is that?

The Witness: *Well, certainly dibutylone can be substantially similar to more than one thing. For the purpose of this, we compared it to MDMA and that is the consensus we reached in the unit.*] (Emphasis added)(Transcript excerpt attached at Appendix A-3).

Dr. Willenbring did not testify to a reason he and his colleagues evaluated the “substantial similarity” of MDMA to the exclusion of all other “substantially similar” substances. He did not testify that, among the “more than one” substances

dibutylone could be substantially similar to – including methcathinone -- MDMA was the closest or best match. He testified that he and his colleagues at the DEA considered MDMA and only MDMA as a comparator for chemical structure, stating, “for the purpose of this, we compared it [dibutylone] to MDMA and that is the consensus we reached in the unit.”

Defense witness Dr. Dudley testified that in his opinion there are no Schedule I or II substances that are “substantially similar” in structure to dibutylone. [DE 216:208]. He agreed that the term “substantially similar” is unknown in scientific circles. Although he did not find a substance he believed met this unscientific, undefined standard, Dr. Dudley did something Dr. Willenbring did not do: in his expert report [DE 268:27] he looked at a wide variety of substances (not just MDMA) to enable him to state which substances, in his expert opinion, were the closest match to dibutylone. Dr. Dudley testified that in his expert opinion methcathinone and other cathinones are “the most closely related chemical structures” to dibutylone. [DE 216:211]. Dr. Dudley’s testimony that methcathinone and related cathinones are most closely related in structure to dibutylone, and more similar to dibutylone than MDMA, was uncontradicted. The government did not call Dr. Willenbring in rebuttal to respond to Dr. Dudley’s testimony that the cathinones, including methcathinone, are more similar in chemical structure to dibutylone than MDMA.

b. The Government, Court and Parties Focused on Dibutylone's Stimulant Effect

Government pharmacologist Jordan Trecki testified that MDMA, a Schedule I hallucinogen, has a stimulant effect “substantially similar” to the stimulant effect of dibutylone. The district court relied on this testimony in selecting MDMA as a substance “substantially similar” in effect to dibutylone for purpose of Prong Two of Application Note 6.

c. Ms. Reason's Arguments and the District Court's Ruling on Dibutylone

In her post-hearing Memorandum in the district court, Ms. Reason made two arguments relevant to this petition. First, Ms. Reason pointed to government chemist Dr. Willenbring's testimony that MDMA was one of many substances “substantially similar” in chemical structure to dibutylone, and his failure (more accurately, his refusal) to opine that MDMA was the closest match in chemical structure. This compared to Dr. Dudley's testimony (unchallenged in the government's rebuttal case) that the cathinones, including methcathinone, are the closest match structurally to dibutylone, and a closer match than MDMA. We argued that, where the government has conceded as to a prong of Application Note 6 that there are multiple “substantially similar” substances, the court was required to favor the substance which was more or most similar, based on the evidence. We argued that the evidence summarized above established that the cathinones, including methcathinone, were more similar to dibutylone in chemical structure

than MDMA.

Second, we focused on the government's characterization of dibutylone as a stimulant, and objected to the court selecting a substance classified as a hallucinogen to score a stimulant. MDMA is classified in Schedule I and the Sentencing Guidelines Drug Equivalency Table as a hallucinogen. *See* 21 C.F.R. § 1308.11(d)(List of Schedule I hallucinogenic substances); USSG § 2D1.1, Application Note 8(D)(Drug Equivalency Tables). Hallucinogens are punished far more harshly in the Sentencing Guidelines than stimulants. On this issue, we submitted to the district court a data set of all the stimulants and all the hallucinogens for which the Sentencing Guidelines Drug Equivalency Tables provide a marijuana equivalency (Appendix, A-4). The median marijuana equivalency for listed stimulants and listed hallucinogens is highlighted in the exhibit. This data set establishes that the median marijuana equivalency for stimulants is 1:100 and the median marijuana equivalency for hallucinogens is 1:500. We argued that the district court should not use a hallucinogen, which carries a marijuana equivalency of 1:500, to score a substance which the government argued was a stimulant.²

In a written order, the district judge ruled that the listed substance most closely related to dibutylone was MDMA. (Appendix A-5: 13-15). The court

² Ms. Reason also made this argument in support of a downward variance. Although the sentencing judge did grant a downward variance, this ground was not among those cited as a basis for the variance.

evaluated only the chemical structure and effect prongs of Application Note 6, because it found that there was inadequate evidence on potency. (Appendix A-5:15). The Court separately evaluated the chemical structure and effect prongs, and kept score of which substance got the nod for each. As the district court used a score-keeping approach, the judge's finding in favor of MDMA on the issue of chemical structure was essential to its ruling. The district court's order mentioned favorably Dr. Willenbring's testimony that he cannot testify about substantial similarity in chemical structure unless there is a unanimous consensus on the issue among the chemists in his unit. (Appendix A-5:14). The district judge did not acknowledge Dr. Willenbring's testimony that this collegial process, as it related to dibutylone, considered only MDMA, and none of the other "substantially similar" substances, as a chemical structure comparator. The district judge acknowledged Dr. Willenbring's testimony that dibutylone can be substantially similar to more than one substance. (Appendix A-5:5-6). However, and of most importance to this petition, the district judge did not acknowledge Dr. Willenbring's failure to testify that among "substantially similar" substances, MDMA was the one most similar in structure to dibutylone. Nor did the district court address the fact that defense expert Dr. Dudley provided uncontradicted testimony that stimulants in the cathinone family, including methcathinone, are the most similar substances to dibutylone, and more similar to dibutylone in chemical structure than MDMA.

The district court did not respond at all to the argument against selecting a

hallucinogen to score a stimulant.

2. The Evidence and Ruling Relating to Scoring Ethylone

a. Ethylone: Evidence on Which Listed Substance is Substantially Similar in Chemical Structure

The evidence regarding ethylone was similar to that for dibutylone.

Government expert Dr. Willenbring opined in his expert report [DE 266:2:6] and his testimony that ethylone is “substantially similar” in chemical structure to MDEA. As with dibutylone, he did not testify that MDEA was the most similar listed substance or the closest match to ethylone. His opinion was: “that ethylone is substantially similar to MDEA, and MDEA is referenced in the guidelines.” [DE 216:41].

Defense expert Dr. Dudley opined that ethylone, a cathinone, and MDEA, an amphetamine, are not substantially similar. In contrast to Dr. Willenbring’s testimony, Dr. Dudley offered an opinion on the most closely related substance to ethylone. He testified that in his opinion, methcathinone is the listed substance most closely related to ethylone in chemical structure. [DE 216:212]. The government did not elicit testimony from its expert as to which substance was the closest match to ethylone, and did not call Dr. Willenbring to rebut Dr. Dudley’s testimony that methcathinone was the closest match structurally to ethylone and a closer match than MDEA.

b. The Government, Court and Parties Focused on
Ethylone's Stimulant Effect

Government pharmacologist Jordan Trecki testified that MDEA, a Schedule I hallucinogen, had a stimulant effect “substantially similar” to the stimulant effect of ethylone. The district court relied on this testimony in selecting MDEA as a substance “substantially similar” in effect to ethylone for purpose of Prong Two of Application Note 6.

c. Ms. Reason's Arguments and the District Court's Ruling
on Ethylone

The government's evidence in support of selecting MDEA as a comparator for ethylone mirrored its evidence for dibutylone, so Ms. Reason's arguments to the court were similar. We argued that in choosing a “substantially similar” substance in terms of structure, the court should select methcathinone. This was based on Dr. Dudley's uncontradicted testimony that methcathinone was the substance most similar in structure to ethylone. We urged that in applying the prongs of Application Note 6, the court may not select any “substantially similar” substance if the evidence shows that one substance is more similar than the others. We also argued against heading into the substances listed as hallucinogens to score a substance that all parties characterized as a stimulant.

In its Order (Appendix, A-5), the district court selected hallucinogen MDEA as the comparator for ethylone, relying on the Eleventh Circuit's unpublished opinion in *United States v. Brey*, 627 Fed. Appx. 775 (11th Cir. 2015). As to Prong

One (chemical structure), the district court stated, “Dr. Willenbring testified in *Brey* that Ethylone and MDEA are very similar in chemical structure *and that there is no drug in the Sentencing Guidelines that was a better match for Ethylone than MDEA.*” [Appendix, A-5: 12](emphasis added). The district judge went on to state, “Dr. Willenbring has offered the very same testimony in this case[.]” [*Id.*]. This is not correct. Dr. Willenbring did not testify here, as he had in *Brey*, that MDEA is the best match for ethylone. He only testified that the two substances are “substantially similar” in chemical structure. The district court did not acknowledge this important difference between Dr. Willenbring’s testimony in *Brey* and his testimony here. Nor did the district court acknowledge the government’s failure to contradict defense expert Dr. Dudley’s testimony that methcathinone is the listed substance most closely related to ethylone in chemical structure. As with dibutylone, the district court did not respond to the argument against selecting a hallucinogen to score a stimulant.

D. The Selection of MDMA and MDEA to Score Dibutylone and Ethylone Resulted in an Increase in Ms. Reason's Base Offense Level

The district court's error in applying Application Note 6 and selecting MDMA and MDEA as equivalent substances prejudiced Ms. Reason. Application Note 8(D) to Sentencing Guidelines § 2D1.1 provides the marijuana equivalencies for methcathinone, MDMA and MDEA. MDMA and MDEA both have a marijuana equivalency of 1 gram of substance = 500 grams of marijuana. Methcathinone has a marijuana equivalency of 1 gram of substance = 380 grams of marijuana. Using the 1:500 ratio for MDMA and MDEA, the district court assigned Ms. Reason's offense a base offense level of 34, which yielded a sentence range of 235-293 months. Had the district court calculated the offense level using the 1:380 marijuana ratio for methcathinone, Ms. Reason would have had a base offense level of 32, and an advisory Sentencing Guidelines range of 188-235 months. The low end of Ms. Reason's advisory Sentencing Guidelines range went up 47 months as a result of the district court's error.

E. The Decision of the Eleventh Circuit Affirming the Judgment and Sentence

The United States Court of Appeals for the Eleventh Circuit affirmed the judgment and sentence. *United States v. Venteria Leanet Reason*, Case No. 17-11134 (11th Cir., January 12, 2018)(Appendix A-1). The Eleventh Circuit characterized Ms. Reason's arguments as disputes with the district court's fact finding, rather than procedural errors.(Appendix A-1:7). The Court reviewed the

“fact findings” on a “clear error” standard. (*Id.* p. 7-8).

In rejecting Ms. Reason’s argument, the Eleventh Circuit stated, “Application Note 6, moreover, makes clear that finding the “most closely related” comparator substance is holistic, derived from all three factors.” (Appendix A-1:7). In a footnote to this statement, the Court elaborates: “Indeed, under the [Application Note 6] test, it is of no moment if the substance used as a comparator is not the closest structure to the unlisted substance, as long as the other factors favor the comparator substance.” The Eleventh Circuit also rejected the argument that a court should consider favorably selecting a comparator substance that is classified in Schedule I based on the same effect adopted in the Application Note 6 analysis: that is favoring selection of a stimulant to score a stimulant.

REASONS FOR GRANTING THE WRIT

The Court should grant the Petition because the undefined “substantially similar” standard, as applied in this case, cannot reliably achieve Application Note Six’s stated goal of selecting the “most closely related controlled substance” referenced in Guidelines § 2D1.1. When Application Note 6 is applied using a score-keeping method, common sense dictates that identification of the “most closely related” substance will not reliably result unless the district court selects the most similar among “substantially similar” substances for structure, effect and potency. Because of the large volume of federal criminal cases involving unlisted substances, the correct interpretation and application of Application Note 6 has far-reaching importance.

It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). The core problem, requiring review and interpretation by this Court, springs from Application Note 6’s reliance on the fatally deficient “substantially similar” standard. The Application Note’s stated goal of identifying the “most closely related controlled substance” will not reliably be achieved unless the “substantially similar” test requires favoring the most similar comparators.

United States Supreme Court Justice Neil Gorsuch, when he served on the Tenth Circuit, criticized the rudderless “substantially similar” standard in his

opinion in *United States v. Makkar*, 810 F.3d 1139 (10th Cir. 2015). The appellant in *Makkar* challenged the legality of jury instructions given under the Controlled Substance Analogue Enforcement Act (“the Analogue Act”). The Analogue Act makes it a crime to distribute a controlled substance analogue, which is defined as “a substance (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II; (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.” 21 U.S.C. § 802(32)(A). This test, resting on the “substantially similar” standard, is almost identical to Application Note 6’s test for identifying the “most closely related” listed substance to score an unlisted substance.

In the *Makkar* opinion, Justice Gorsuch, then serving on the Tenth Circuit, observed that the Analogue Act’s extension of illegal status to unlisted substances based on ‘substantial similarity’ was reminiscent of the residual clause of the Armed Career Criminal Act, which the Supreme Court had struck down in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The *Makkar* opinion criticized the “substantially similar” test, stating:

It’s an open question, after all, what exactly it means for chemicals to have a “substantially similar” chemical structure – or effect. And whether terms like those will admit of fair application and afford citizens fair notice, or whether we will find ourselves wading incrementally, in one as applied challenge after another, deeper into an analytical swamp much as we did with the ACCA’s

residual litigation.

810 F.3d at 1143. The Tenth Circuit did not have to strike down the Analogue Act in *Makkar* because the appellant prevailed on other grounds. However, the opinion lays bare the deficiency of the “substantially similar” test.

Justice Gorsuch’s criticism of the “substantially similar” test in *Makkar* resonates when you consider the testimony and the outcome in this case. The chemists who testified for the government and the defense agreed that the term “substantially similar” has no accepted definition. Government chemistry expert Dr. Willenbring testified that the term “substantially similar” is not a scientific term, it is not used in the scientific world, that different competent chemists could disagree on whether two substances are “substantially similar,” and that the Sentencing Guidelines do not define the term. [DE 216:51]. Defense expert Dr. Dudley agreed with this assessment.

Government expert Willenbring went on to testify that multiple substances can be “substantially similar” to each other, stating, “[w]ell, certainly dibutylone can be substantially similar to more than one thing.” (Appendix A-3, DE 216:83-84). The government took maximum advantage of the rudderless “substantially similar” standard by acknowledging that multiple substances can qualify as “substantially similar” in structure, but providing no evidence as to which among the similar substances was the best match. *Compare United States v. Brey*, 627 Fed. Appx. 775, 777 (11th Cir. 2015)(“Dr. Willenbring, a chemist, testified that ethylone and MDEA

were very similar in chemical structure and that there was no drug in the guidelines that was a better match”).

The multi-encompassing quality of the “substantially similar” standard does not work in Application Note 6, where the goal is to identify the “most closely related” substance to an unlisted substance. Common sense tells you that, when applying Application Note 6, a sentencing judge has to select the most similar comparators for structure, effect and/or potency when the evidence shows that there are multiple substantially similar substances. Choosing the second or third most similar comparators for structure, effect and potency will inevitably lead the sentencing court to the second or third most similar substance rather than the most similar substance. This is precisely what happened here.

The Eleventh Circuit in its opinion (Appendix A-1) dodged Petitioner’s argument, stating “Application Note 6, moreover, makes clear that finding the ‘most closely related’ comparator substance is holistic, derived from all three factors.” (Appendix A-1, p. 7). The court added in a footnote, “Indeed, under the [Application Note 6] test, it is of no moment if the substance used as a comparator is not the closest structure to the unlisted substance, as long as the other factors favor the comparator substance.” (Appendix A-1, p. 7, n. 4). The district court here did not use a “holistic approach.” The sentencing judge used a scoring approach, and, applying the “substantially similar” standard, scored the win on chemical structure and effect to MDMA and MDEA (there was no evidence regarding potency). Moreover,

since the government conceded that multiple substances can be “substantially similar” to each other, the Eleventh Circuit’s footnote does not explain how a court will select which comparator to “favor” among multiple “substantially similar” substances. Clarification from the Supreme Court is needed to make clear that where the government concedes there are multiple “substantially similar” substances, the sentencing court must favor as to each prong of Application Note 6 the substance shown by the evidence to be most or more similar.

Finally, that Application Note 6 worked poorly in this case is shown by its having led the sentencing judge to select two hallucinogens to score substances which the government’s witnesses consistently described as stimulants. The Court’s use of hallucinogens MDMA and MDEA to score stimulants dibutylone and ethylone resulted in an upward skewing of Ms. Reason’s base offense level. This is because, as a class, the Sentencing Guidelines score hallucinogens more severely than stimulants. Based on the marijuana equivalencies provided in the Drug Quantity Table (Application Note 8(D) to § 2D1.1), the median marijuana equivalency for the listed hallucinogens is 1:500; the median marijuana equivalency for the listed stimulants is 1:100. (*See* Appendix A-4, DE 225:25-28 (data sets establishing median marijuana equivalencies for listed hallucinogens and stimulants)). Methcathinone, a listed stimulant, has a marijuana equivalency ratio of 1:380, significantly less than the median ratio for the hallucinogens and less than the 1:500 ratio for MDMA and MDEA. The deficiency of Application Note 6, driven by

the undefined “substantially similar” standard, is illustrated by it having steered the sentencing judge into the listed hallucinogens to score two stimulants.

In sum, the “substantially similar” standard used in the three prongs of Application Note 6 will only identify the “most closely related” listed controlled substance if the sentencing judge favors the most similar substance as to each prong. As this rule was not followed by the lower courts here, we respectfully ask this Court to grant Ms. Reason’s Petition for Writ of Certiorari, direct that Application Note 6 be interpreted as we have requested, and remand the case to the district court for resentencing.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Dated: April 11, 2018

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Attorney for Petitioner

IN THE
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VENTERIA LEANET REASON,

Petitioner

v.

UNITED STATES OF AMERICA,

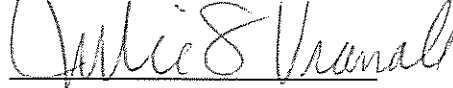
Respondent.

DECLARATION VERIFYING TIMELY FILING

Petitioner, Venteria Leanet Reason, through undersigned counsel and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. §1746, declares that the Petition for Writ of Certiorari filed in the above-styled matter was sent in an envelope via third-party commercial carrier for delivery within three days, addressed to the Clerk of the Supreme Court of the United States, on the 11th day of April, 2018, which is prior to the time the petition for writ of certiorari is due on April 12, 2018.

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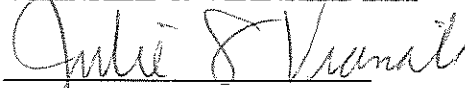
Respondent.

DECLARATION VERIFYING COMPLIANCE WITH WORD LIMITATIONS

Petitioner, Venteria Leanet Reason, through undersigned counsel and pursuant to SUP. CT. R. 33, declares that the Petition for Writ of Certiorari filed in the above-styled matter complies with the word-number limitations of Rule 33. The portions of the Petition counted under Rule 33 contain fewer than 5,500 words, which is within the 9,000 word limit provided for under the Court's Rules.

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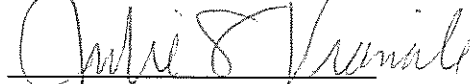
Respondent.

CERTIFICATE OF SERVICE

I certify that on this 11th day of April, 2018, in accordance with SUP. CT. R. 29, copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed *In Forma Pauperis*, (3) Certificate of Service, and (4) Declaration Verifying Timely Filing, were served by third-party commercial carrier for delivery within three days upon the United States Attorney for the Southern District of Florida, 99 N.E. 4th Street, Miami, Florida 33132-2111, and the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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