

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

HECTOR MANUEL AVILA LUNA — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

HECTOR MANUEL AVILA LUNA #09220-030
(Your Name)

UNITED STATES PENITENTIARY
POST OFFICE BOX 3900
(Address)

ADELANTO, CALIFORNIA 92301
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. WHETHER AVILA-LUNA MAY FILE A SECOND-IN-TIME § 2255 PETITION BASED ON EVENTS THAT DO NOT OCCUR UNTIL A FIRST § 2255 IS CONCLUDED?
2. WHETHER A CERTIFICATE OF APPEALABILITY SHOULD HAVE ISSUED WHEN AVILA-LUNA HAS SHOWN A VALID NON-FRIVOLOUS CLAIM OF SELECTIVE PROSECUTION?
3. WHETHER THE GOVERNMENT'S FILING OF § 851 ENHANCEMENT VIOLATES THE ORIGINAL MEANING OF THE CONSTITUTION BY THE REMOVAL OF THE DETERMINATION OF AVILA-LUNA'S PRIOR CONVICTION FROM THE PROVINCE OF THE JURY?
4. WHETHER THE DISTRICT COURT'S SENTENCING OF AVILA-LUNA BEYOND THE STATUTORY MAXIMUM ALLOWABLE UNDER THE FACTS AS FOUND BY THE JURY OR ADMITTED BY THE DEFENDANT VIOLATED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND JURY TRIAL?
5. WHETHER § 851 ENHANCEMENT IS VOID FOR VAGUENESS?

LIST OF PARTIES

- [] All parties appear in the caption of the case on the cover page.
- [X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A - EIGHTH CIRCUIT COURT OF APPEALS JUDGMENT DENYING
CERTIFICATE OF APPEALABILITY

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
United States v. Young, 960 F. Supp. 2d 881 (N.D.Ia. 2013).....	7,15,35,36
Ingram v. United States, 2016 U.S. Dist. LEXIS 15361 (N.D.Ia. 2016)...	8,12
Panetti v. Quarterman, 551 U.S. 930 (2007).....	10,13
Magwood v. Patterson, 561 U.S. 320 (2011).....	10
Ford v. Wainwright, 477 U.S. 399 (1986).....	10
United States v. Buenrostro, 638 F.3d 720 (9th Cir. 2011).....	11
Johnson v. Wynder, 408 F. App'x 616 (3d Cir. 2010).....	11
Thompkins v. Secretary, Dep't of Corr., 557 F. 3d 1257 (11th Cir. 2009).	11
In re Jones, 652 F.3d 603 (6th Cir. 2010).....	11
Cataneda v. Partida, 97 S.Ct. 1272 (1977).....	14
United States v. Hirsh, 360 F.3d 860 (8th Cir. 2004).....	14
United States v. Venable, 666 F.3d 893 (4th Cir. 2012).....	15
Snowden v. Hughes, 64 S.Ct 397 (1944).....	15
Oyler v. Boles, 82 S.Ct. 501 (1962).....	16
McDowen v. Maryland, 366 U.S. 420 (1961).....	16
Batson v. Kentucky, 476 U.S. 79 (1985).....	16
McClesky v. Kemp, 481 U.S. 279 (1987).....	16
International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977).....	16
Bush v. Gore, 531 U.S. 98 (2000).....	17
Furman v. Georgia, 408 U.S. 238 (1972).....	18
Apprendi v. New Jersey, 530 U.S. 466 (2000).....	19,20,21,24,25,28
United States v. Gaudin, 515 U.S. 510 (1995).....	19
In re Winship, 397 U.S. 358 (1970).....	19
Mullaney v. Wilbur, 421 U.S. 684 (1975).....	19-20
Hamling v. United States, 418 U.S. 87 (1974).....	24
Jones v. United States, 526 U.S. 227 (1999).....	19,24

Cases	Page Number
McMillan v. Pennsylvania, 477 U.S. 79 (1986).....	24
Almendarez-Torres v. United States, 523 U.S. 224 (1998).....	24,25,29
Descamps v. United States, 133 S.Ct 2276 (2013).....	25
Blakely v. Washington, 542 U.S. 276 (2004).....	25
Ring v. Arizona, 536 U.S. 584 (2003).....	25
Alleyne v. United States, 133 S.Ct 2151 (2013).....	25
United States v. O'Brien, 560 U.S. 218 (2010).....	26
Harris v. United States, 536 U.S. 545 (2002).....	29
Kolender v. Lawson, 461 U.S. 352 (1983).....	30
Smith v. Goguen, 415 U.S. 566 (1974).....	30
Chicago v. Morales, 527 U.S. 41 (1999).....	30,35
Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999).....	30
United States v. Dotson, 513 F. App'x 221 (3d Cir. 2013).....	33
Gilbert v. United States, 640 F.3d 1293 (6th Cir. 2011).....	33
United States v. Espinal, 634 F.3d 655 (2d Cir. 2011).....	33
United States v. Shaw, 426 F. App'x 810 (11th Cir. 2011).....	33
United States v. Harris, 394 F. App'x 676 (11th Cir. 2010).....	33
United States v. Forrester, 616 F.3d 929 (9th Cir. 2010).....	33
Coleman v. United States, 339 F. App'x 643 (7th Cir. 2009).....	33
United States v. Jenkins, 537 F.3d 1 (1st Cir. 2008).....	34
Vadas v. United States, 527 F.3d 16 (2d Cir. 2007).....	34
United States v. Bell, 08-CR-303 (W.D.Okla. 2009).....	34
United States v. Winston, 07-CR-801 (RMB)(S.D.N.Y.).....	34
Harris v. United States, 149 F.3d 1304 (11th Cir. 1998).....	35
United States v. Lawvary, 211 F.3d 376 (7th Cir. 2000).....	35
Prou v. United States, 199 F.3d 42 (1st Cir. 1999).....	35
United States v. Baucum, 317 U.S. App. D.C. 63 (D.C.Cir. 1996).....	35

STATUTES AND RULES

28 U.S.C. § 2244(b)

28 U.S.C. § 2253(c)

28 U.S.C. § 2255

21 U.S.C. § 841(b)(1)(A)

21 U.S.C. § 841(b)(1)(B)

21 U.S.C. § 851

OTHER

2011 United States Sentencing Commission Report

Recidivist Procedure, 40 N.Y.U.L. Rev. 332 (1965)

The Pleading and Proof of Prior Conviction in Habitual Criminal Prosecution,
33 N.Y.U.L. Rev. 210 (1958)

M. Bassiouni, Substantive Criminal Law 53 (1978)

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 16, 2017.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved a federal criminal defendant's Constitutional right under the Fifth, and Sixth Amendment's.

1. The Fifth Amendment provides in relevant part:

In all criminal actions, no person shall be deprived of life, liberty, or property without Due Process of Law

2. The Sixth Amendment provides in relevant part:

In all prosecutions, the accused shall enjoy a speedy and public trial by an impartial jury

3. This case also involved the Statutory Provisions of 21 U.S.C. §§ 841

(b)(1)(A) and 851.

4. Section 841(b)(1)(A) provides in relevant part:

In the case of a violation of subsection (a) of this section involving...; such person shall be sentenced to a term ... which may not be less than 10 years.... If ...after a prior conviction ... may not be less than 20 years.... If ... after two or more prior convictions ... a mandatory term of LIFE imprisonment without release.

5. Section 851 Enhancement provides in relevant part:

(a) Information filed by United States Attorney

- (1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon....

6. This case also involved the application of 28 USC § 2253(c), which states:

- (1) Unless a circuit justice or judge issues a certificate of appealability, and appeal may not be taken to the court of appeals from --
- (B) the final order in a proceeding under section 2255 [28 USC § 2255],
- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

I.
STATEMENT OF THE CASE

In 2008, Avila-Luna was charged with conspiracy to possess and distribute methamphetamine, in violation of 21 USC §§ 841 and 846.

Avila-Luna's defense counsel informed him that the prosecution was extending a plea agreement which consisted of pleading guilty to the conspiracy charge, and in exchange it would dismiss the remaining counts and recommend a sentence not to exceed 20 years. Case No. 4:07-CR-00238, Dkt. Nos. 81, 113-115.

Avila-Luna pled guilty, pursuant to the plea agreement with the prosecution to one count of conspiracy to distribute marijuana and methamphetamine. Id.

Thereafter, Avila-Luna was informed by defense counsel that the original prosecutor with whom he had entered the verbal/oral plea agreement had become ill and that a new prosecutor had taken over the case. That the new prosecutor was not honoring the plea agreement and that the prior convictions were going to be used for enhancement purpose under §851 and that he faced a possible life sentence.

Petitioner subsequently filed a motion to withdraw his guilty plea, Dkt. No. 89, which the district court denied and the case proceeded to sentencing. Dkt. No. 100.

Avila-Luna was sentenced to life imprisonment, according to the district court, it was the applicable mandatory minimum based on his previous felony drug convictions. Dkt. No. 113-115.

Avila-Luna appealed his conviction and sentence and the Eighth Circuit Court of Appeals affirmed. U.S. v. Avila-Luna, 387 Fed. Appx. 648 (8th Cir. 2010); Dkt. No. 134.

Avila-Luna previously petitioned the district court to vacate, set aside or correct sentence under §2255. See Civil Action No. 4:11-00557,

Dkt. No. 1. This §2255 motion was summarily dismissed on October 24, 2012. Id. Dkt. No. 3.

Avila-Luna also filed a motion to reduce sentence under §3582(c)(2) - USSG Amendment 782, on November 7, 2014. Dkt. No. 138. However, this motion too, was denied on October 15, 2015. Dkt. No. 146.

Avila-Luna then filed a motion for reconsideration of this order, however, this motion for reconsideration was denied on November 3, 2015. Dkt. No. 149.

Avila-Luna filed a second motion for reduction of sentence under §3582(c)(2) - USSG Amendment 782. Dkt. No. 150. However, this motion was treated as a second motion for reconsideration of the order of October 15, 2015. The Court stated that defendant is subject to a mandatory minimum term of life imprisonment, pursuant to 21 USC §841(b)(1)(A), and cannot receive a reduction below the mandatory minimum term, and denied it on April 8, 2016. Dkt. No. 151.

Prior to the instant conviction, Avila-Luna had three prior controlled substance convictions:

- (a) 12/22/89: Possession/Purchase for Sale of Narcotics, Van Nuys Superior Court, Van Nuys, CA., Dkt. No. LA002373.
12/2/91: Adjudication Guilty, 180 days imprisonment, 36 months probation.
- (b) 1/28/98: Manufacturing/Possession/Sale of Controlled Substance, Tulare County Superior Court, Tulare County, CA., Dkt. No. F98000423.
6/5/98: Pled Nolo Contendere, 6 years imprisonment.
- (c) 10/18/06: Transport/Import into State, Sell, or Furnish a Controlled Substance, Victorville Superior Court, Victorville, CA., Dkt. No. FV1025547.
11/20/06: Pled Nolo Contendere, 3 years imprisonment.

Avila-Luna had seven (7) criminal history points based on one of these three prior convictions. (PSR ¶ 55.) At sentencing, Avila-Luna's total base offense level was 38. (PSR ¶ 45.) Based on the sentencing guidelines in effect at the time Avila-Luna was sentenced, Avila-Luna's advisory

guideline range was 324-405 months without the imposition of the §851 enhancement. (PSR ¶'s 45, 55.) Without the imposition of the §851 enhancement, Avila-Luna would have been eligible for the Drug-Minus-Two Reduction under Amendment 782 of the Sentencing Guidelines, and his total base offense level would have been reduced from 38 to 36, with a criminal history category of IV, Avila-Luna's advisory guideline range would have been 262-327 months.

Based on the sentencing guidelines in effect at the time Avila-Luna was sentenced, with the imposition of the §851 enhancement, Avila-Luna's mandatory minimum sentence was life imprisonment. Without the §851 enhancement, Avila-Luna's mandatory minimum would have been 20 years. With the §851 enhancement, Avila-Luna's mandatory minimum sentence increased to life imprisonment.

In 2011 the United States Sentencing Commission published a study of drug offenses and mandatory minimum penalties during the years 2006, 2008 and 2009. (Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Commission's 2011 Report)).

The Commission's 2011 Report "revealed significant variation between judicial districts in the manner in which the [§851] enhancement was applied."

The Commission's 2011 Report revealed that the Southern District of Iowa was one of only six judicial districts where more than 80% of eligible defendants received the §851 enhancement. (Commission's 2011 Report p. 255, 267).

By contrast, in eight districts, NONE of the eligible defendants received the §851 enhancement. (Commission's 2011 Report p. 267). If Avila-Luna had been sentenced in one of these districts, he likely

would not have received the enhancement and received a significantly lower sentence.

The Northern District of Iowa reviewed the raw data upon which the Commission based its conclusion in the Commission's 2011 Report. That district's finding and conclusions were published in a sentencing opinion in the case of *United States v. Young*, 960 F.Supp. 2d 881 (N.D. Ia. 2013).

Simply because he was sentenced in the Southern District of Iowa, Avila-Luna was over 600% more likely to be subject to a §851 enhancement compared to the national median application of the enhancement. *Young*, supra.

Simply because he was sentenced in the Southern District of Iowa, Avila-Luna was 311% more likely to be subject to a §851 enhancement compared to the average eligible defendants nationwide. *Young*, supra.

During the time Avila-Luna was prosecuted and sentenced, there was no policy in the Southern District of Iowa of when or why a defendant would receive a §851 enhancement.

On March 17, 2017, Avila-Luna filed in the district court a Second-In-Time Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 USC §2255. In the petitioner, Avila-Luna raised New Facts that did not arise until after the conclusion of the previous §2255 petition. Appellant relied in his petition on *Panetti v. Quarterman*, 551 U.S. 930 (2007). In *Panetti*, this Court shed light on when a petition or motion that is numerically second should be subject to the special rules for successive filings. This Court held that a petition raising a previously unripe Ford claim is not second or successive to a prior petition and thus not fall within the purview of Section 2244(b). This Court's conclusion in *Panetti* hinged on the

fact that the Ford claim was not yet available when Panetti brought his first federal petition. Id., at 943-47. Avila-Luna also relied on a number of circuit court's that have generalized this logic to apply to other types of second-in-time petitions that were not ripe at the time of the initial petition..

Avila-Luna alleged as New Facts in his Second-In-Time §2255 petition, that in 2011 the United States Sentencing Commission published a study of drug offenses and mandatory minimum penalties during the years 2006, 2008 and 2009. (Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Commision's 2011 report)).

In the instant case, having three prior felony drug convictions - two of which didn't received criminal history points - Avila-Luna's mandatory minimum was life without release sentence based on the imposition of the §851 enhancement. Avila-Luna's conviction and sentence were affirmed by the Eighth Circuit. Avila-Luna previous §2255 motion was summarily dismissed on October 24, 2012.

One year later, the district court for the Northern District of Iowa, revealed a study of the disparate imposition of the §851 enhancement by the Department of Justice, detailed in the sentencing order in United States v. Young, 960 F. Supp. 2d 881 (N.D.Ia. 2013). This study revealed that defendant's such as Avila-Luna had been subjected to the §851 enhancement in a discriminatory and arbitrary manner. Thereafter, the same district court in Ingram v. U.S., 2016 U.S. Dist. LEXIS 15361 (N.D. Ia. 2016), revealed as NEW FACTS the astonishing disparity in the district of Iowa and federal districts. The Ingram case, as Avila-Luna's limited knowledge, was still pending in the district court.

A review of Avila-Luna's claim relating to the constitutionality of §851, because of its disparate application among the federal districts, clearly shows the existence of NEW FACTS that had not arisen at the time of his previous §2255 petition. The Young decision provided an analysis of the "NEW" data about the application of §851 revealed by the Commission's 2011 Report, 960 F.Supp. 2d at 892-902, which was a publication of "NEW" factual comparisons that were specifically relevant in the Ingram's case, and specifically relevant to Avila-Luna's case also.

Avila-Luna alleges that the district court erred by summarily dismissing his properly submitted Second-In-Time §2255 habeas petition without providing reasons for the summary disposition. The district court's order gave no indication whatever as to the manner in which the writ of habeas petition was being dismissed.

Thereafter, Avila-Luna requested the Eighth Circuit Court of Appelas for a Certificate of Appealability, however, the Eighth Circuit without elaborating much stated: "This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed. Appellant's motion for appointment of counsel is denied as moot." Appendix A.

II.

WHETHER AVILA-LUNA MAY FILE A SECOND-IN-TIME §2255 PETITION BASED ON EVENTS THAT DO NOT OCCUR UNTIL A FIRST §2255 IS CONCLUDED

This Court has held repeatedly that not every petition "filed second or successively in time" to a prior petition counts as "second or successive," "even when the later filings address a [] judgment already challenged in a prior §2254 [or §2255] application." *Panetti v. Quarterman*, 551 U.S. 930, 944, 127 S.Ct 2842, 168 L.Ed 2d 662 (2007); see also *Magwood v. Patterson*, 561 U.S. 320, 130 S.Ct 2788, 2796, 177 L.Ed 2d 592 (2011)("[i]t is well settled that the phrase does not simply refe[r] to all §2254 applications filed second or successively in time.")(alterations in original)(internal quotation marks omitted). There is no material difference between motions under Section 2255 and petitions under Section 2254.

This Court in *Panetti* shed light on when a petition or motion that is numerically second should also be subject to the special rules for successive filings. There, a death row inmate who previously had filed a federal habeas corpus petition raising various issues about his trial and sentence sought to bring a second petition in which he asserted that he was mentally incompetent and thus could not be executed under *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct 2595, 91 L. Ed 2d 335 (1986). 551 U.S. at 937-38. Although the state conceded that Ford claims are generally unripe until well after AEDPA's standard one-year limitation period for filing an initial petition has run (because the prisoner cannot raise Ford claim until his execution is imminent), it argued that *Panetti*'s second petition was nevertheless "second or successive" to his first and thus barred by Section 2244(b). *Id.* at 942-43. This Court rejected this reading of the law, holding instead that a petition raising a previously unripe Ford claim is not second or successive to a prior petition and thus not fall within the purview of Section 2244(b). *Id.* at 947. In so holding, this Court noted that the phrase "second or

successive" takes its full meaning from this Court's case law, including decisions predating the enactment of [AEDPA]." Id. at 943-44.

This Court's conclusion in *Panetti* hinged on the fact the Ford claim was not yet available when *Panetti* brought his first federal petition. Id. at 943-47. A number of circuit courts have generalized this logic to apply to other types of second-in-time petitions that were not ripe at the time of the initial petition. See, e.g., *United States v. Buenrostro*, 638 F.3d 720, 725 (9th Cir. 2011) ("Prisoner's may file second-in-time petitions based on events that do not occur until a first petition is concluded....[S]uch claims were not ripe for adjudication at the conclusion of the prisoner's first federal habeas proceeding." (citing cases)); *Johnson v. Wynder*, 408 F. App'x 616, 619 (3d Cir. 2010) ("We see no reason to avoid applying *Panetti* in the context of other types of claims that ripen only after an initial federal habeas petition has been filed."); *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010) (petition raising ex post facto claim based on amendments to state law that occurred after first petition was not second or successive); *leal Garcia v. Quarterman*, 573 F. 3d 214, 222-24, 5th Cir. 2009) ("If, however, the purported defect did not arise, or the claim did not ripen, until after the conclusion of the previous petition, the later petition based on that defect may be non-successive."); *Thompkins v. Secretary, Dep't of Corr.*, 557 F.3d 1257, 1260-61 (11th Cir. 2009) (claim that delay in executing petitioner violated the Eighth Amendment was not second or successive because the delay could not give rise to a constitutional claim until it had occurred).

In the instant case, *Avila-Luna* had three prior felony drug convictions -two of which didn't received criminal history points by U.S. Probation Officer- his mandatory minimum was LIFE without release based on the imposition of the § 851 enhancement. The § 851 enhancement,

which provides in relevant part as follows:

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied uponThe cases and literature sometimes use the phrase "851 enhancement" to describe the same thing.

Avila-Luna's conviction and sentence were affirmed by the Eighth Circuit Court of Appeals. Three years later, the district court for the Northern District of Iowa, revealed a study of the disparate imposition of the § 851 enhancement by the Department of Justice, detailed in the sentencing order in *United States v. Young*, 960 F. Supp. 2d 881 (2013). This study revealed that defendants such as Avila-Luna had been subjected to the § 851 enhancement in a discriminatory and arbitrary manner. Thereafter, the same District Court in *Ingram v. U.S.*, 2016 U.S. Dist. LEXIS 15361 (N.D. Ia. 2016), revealed the astonishing disparity in the imposition of 21 USC § 851 enhancement between this district and other federal districts.

Avila-Luna filed on March 17, 2017, a Second-In-Time Motion to Vacate Sentence under §2255, raising NEW FACTS that did not arise until after the conclusion of his previous §2255 petition. Avila-Luna relied on *Panetti v. Quarterman* and on a number of circuit courts that have generalized [the *Panetti*] this logic to apply to other types of secon-in-time petitions that were not ripe at the time of the initial petition.

Avila-Luna raised as NEW FACTS in his second-in-time §2255 petition, that in 2011 the United States Sentencing Commission published a study of drug offenses and mandatory minimum penalties during the years 2006, 2008 and 2009. (Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Commission's

2011 Report)).

However, on May 22, 2017, the district court dismissed the petition without providing any reason at all for the summary disposition. The district court, despite its contrary ruling to clearly established federal law as defined by this Court in Panetti and followed by other circuit courts, declined to issue a Certificate of Appealability.

Avila-Luna appealed the dismissal and requested a Certificate of Appealability in the Eighth Circuit Court of Appeals. Appeal No. 17-2512. However, the Eighth Circuit declined to issue a Certificate of Appealability, and stated: "The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed."

A review of Avila-Luna's claim relating to the constitutionality of § 851, because of its disparate application among the federal districts, clearly shows the existence of NEW FACTS that had not arisen at the time of his previous §2255 petition. The Young decision provided an analysis of the "NEW DATA" about the application of § 851 revealed by the Commission's 2011 report, 960 F.Supp. 2d at 892-902, which was a publication of "NEW" factual comparisons that were specifically relevant in the Ingram's decision -as New facts for tolling of the one-year time limitation- and specifically relevant to Avila-Luna's case also.

Avila-Luna alleges that the district court erred by summarily dismissing his properly submitted ~~Second-In-Time~~ §2255 habeas petition without providing reasons for the summary disposition. The district court's order gave no indication whatever as to the manner in which the writ of habeas petition was being dismissed. Furthermore, the Eighth Circuit Court of Appeals declined to issue a Certificate of Appealability notwithstanding the fact that Avila-Luna alleged NEW FACTS.

III.

WHETHER A CERTIFICATE OF APPEALABILITY SHOULD HAVE ISSUED WHEN AVILA-LUNA HAS SHOWN A VALID NON-FRIVOLOUS CLAIM OF SELECTIVE PROSECUTION?

Discussion: The Department of Justice's imposition of the §851 enhancement resulted in a mandatory minimum sentence of LIFE that was grossly disproportional and excessive to the gravity of Avila-Luna's offense.

The DOJ's imposition of the §851 enhancement is applied disproportionately to a class of offenders like Avila-Luna, that is, charged in the Southern District of Iowa versus another district.

DOJ's imposition of the §851 enhancement was imposed in a discriminatory and/or arbitrary manner.

The DOJ's disproportional charging and sentencing decisions to seek the §851 enhancement is based on the district in which the prosecution takes place.

A. Avila-Luna was subject to selective prosecution in the imposition
of the §851 enhancement

In *Cataneda v. Partida*, 97 S.Ct 1272 (1977), this Court set out the elements of a selective prosecution claim:

- a) That Avila-Luna is a member of a recognizable, distinct class;
- b) A disproportionate number of this class was selected for possible prosecution;
- c) This selection procedure was subject to abuse and otherwise not neutral. *Id.* at 1280.

Stated another way: "In order to make a prima facie case of selective prosecution, [Avila-Luna] must show (1) people similarly situated to him were not prosecuted; and (2) the decision to prosecute was motivated by a discriminatory purpose." *United States v. Hirsch*, 360 F.3d 860, 864 (8th Cir. 2004) "Defendants are similarly situated when their circumstances present no distinguishable legitimate

prosecutorial factors that might justify making different prosecutorial decisions with respect to them." *United States v. Venable*, 666 F.3d 893, 900-01 (4th Cir. 2012).

Avila-Luna is a member of a recognizable, distinct class. He is one of many defendants prosecuted, convicted and sentenced in the Southern District of Iowa. The court reports, as do all districts, the statistics concerning all of the convictions and sentences, including whether §851 enhancement was applied, to the United States Sentence Commission. The Commission compiles the data and reports the nationwide results. This class of individuals, those convicted and sentenced in the Southern District of Iowa pursuant to an §851 enhancement, are easily identifiable and distinct. Avila-Luna can show the first element of a selective prosecution claim.

As set forth above, Avila-Luna's class, was over 600% more likely to be subject to an §851 enhancement, compared to the national median application of the enhancement and over 300% more likely to be subject to a §851 enhancement compared to average eligible defendants nationwide, that plead guilty and did not receive the §851 enhancement. *Young*, 960 F.Supp. 2d at 897. Avila-Luna can show the second element of a selective prosecution claim.

The procedure for selecting Avila-Luna's class for imposition of the §851 enhancement was subject to abuse and otherwise not neutral.

When official action is taken in pursuit of an otherwise legitimate statute is completed with an intent or purpose to impermissibly discriminate it is a violation of equal protection and due process. *Snowden v. Hughes*, 64 S.Ct. 397 (1944). A prosecutor's discretion on who and what to charge, while considerable, is not boundless. His selection cannot be deliberately based upon an unjustifiable standard

such as race, religion or other arbitrary classification. Oyler v. Boles, 82 S.Ct. 501, 506 (1962).

The government, acting through the prosecutor, may treat one group of citizens differently than others, only if the classification rests upon grounds relevant to the achievement of the state's objective. There must be some state of facts that can be conceived to justify the classification. McDowen v. Maryland, 366 U.S. 420, 425-426 (1961). Geographic location is an arbitrary classification when viewed with the purpose of punishment for violation of a federal drug crime. The violation is the same regardless of the district the crime is committed, and the punishment should be the same. There should be no difference if the violation is committed in the districts located in Iowa, Nebraska, New York, Louisiana or elsewhere.

Discriminatory intent and purpose may be shown by statistics. See Batson v. Kentucky, 476 U.S. 79, 95-97 (1985)(statistics used to challenge racially motivated peremptory strikes during jury selection); McClesky v. Kemp, 481 U.S. 279 (1987)(statistics used in equal protection challenge to the application of the death penalty based on race). Statistics "have served and will continue to serve an important role" in cases where existence of discrimination is an issue. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977).

The statistics set forth in the Commissions Report and the Young Study, reveal the inequity in the application of the §851 enhancement. Other than geographic location, that is, the Southern District of Iowa, there is no other rational explanation for the vast differences in the application of the enhancement. Persons similarly situated to Avila-Luna, in other districts, were not subject to the enhancement. The decision to impose the enhancement can only be said to have been based specifically

on geographic location of prosecution.

Furthermore, at the time of Avila-Luna's prosecution, there was no apparent uniform policy across DOJ district offices regarding the decision to impose the enhancement. If there was a policy, it can not be said to have been followed during the time period in question based upon the differences in application rates across all districts. Avila-Luna can show the third element of a selective prosecution claim.

B. The Selective Prosecution of Avila-Luna Violated Equal Protection

Lack of uniform policy and standards for imposition of the §851 enhancement violates equal protection. As this Court noted in *Bush v. Gore*, 531 U.S. 98 (2000), "there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." There the Court applied equal protection principals to not only the right to vote, but also the process put in place to allow citizens to exercise that fundamental right. *Id.* 104, 109.

Avila-Luna's right to be treated equally and with fundamental fairness was violated by the imposition of the §851 enhancement, not because he didn't technically qualify for it, but rather because the DOJ's policy in enforcement treated him and his class of defendants differently than others, solely based on the geographic location of his prosecution. The DOJ arbitrarily and capriciously imposed the §851 enhancement on Avila-Luna and other defendants facing sentencing in the Southern District of Iowa as compared to defendants similar situated on this and other districts. The Young study, in interviewing local stakeholders and relying on the court's experience at sentencing in that district, reported that the enhancement is not imposed based on a defendant's going to trial or pleading guilty; cooperating or not; or did or did not receive a substantial assistance motion. Young at 888.

Therefore there can be no non-discriminatory, non-arbitrary reasons why defendants who pled guilty or proceed to trial in the Southern District of Iowa suffer the brunt of the enhancement at a rate far greater than the national average.

C. The Selective Imposition of §851 Enhancement is Cruel and Unusual
Punishment

Punishment imposed upon a "capriciously selected random handful upon whom the sentence of death is imposed is unconstitutional, cruel and unusual punishment under the Eighth Amendment requiring penal laws to be evaluated, non-selective, and non-arbitrary." Furman v. Georgia, 408 U.S. 238, 256 (1972)(Douglas J. concurring).

Avila-Luna's Eighth Amendment right to have the penal law, §851, applied evenly and not selectively, was violated. The imposition of the enhancement across the districts, as shown by the Commission statistics and the Yound Study, is done selectively and unevenly. The imposition of the enhancement at Avila-Luna's sentencing is cruel and unusual punishment.

For the foregoing reasons, Avila-Luna's case is extraordinary. At a minimum, reasonable jurists could so conclude, which means a Certificate of Appealability must issue.

IV.

WHETHER THE GOVERNMENT'S FILING OF § 851 VIOLATES THE ORIGINAL MEANING OF THE CONSTITUTION BY THE REMOVAL OF THE DETERMINATION OF AVILA-LUNA'S PRIOR CONVICTION FROM THE PROVINCE OF THE JURY?

In the instant case, Avila-Luna pled guilty in exchange for a sentence not to exceed 20 years, however, before he pled guilty the prosecution filed an § 851 Enhancement Information of Prior Convictions against him to enhance the statutory sentence from 10 years to LIFE, for prior drug offenses.

The government's information of prior conviction to enhance the statutory sentence for a prior drug conviction under 21 USC § 851, is a violation of "the original meaning of the Constitution" by the removal of the determination of Avila-Luna's prior conviction from the province of the jury. U.S. Supreme Court precedent teaches us that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi v. New Jersey*, 530 U.S. 466 (2000)(quoting *Jones*, *supra*, at 252-253, 119 S.Ct 1215, 143 L. Ed 2d 311 (Stevens, J., concurring)).

The Sixth Amendment right to trial "by an impartial jury," in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt. See *United States v. Gaudin*, 515 U.S., at 510 (1995). The government must prove every fact of a crime before a defendant may be convicted of that crime. See *In re Winship*, 397 U.S. 358, 364, 90 S.Ct 1068, 1073, 25 L.Ed 2d 368 (1970)("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); see also *Mullaney v. Wilbur*, 421

U.S. 684, 703-04 (1975)(interpreting the Due Process Clause and Winship as requiring that the prosecution must prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case).

The structure of Title 21 USC § 841 describes "unlawful acts," traditionally viewed only as the elements of the offense, in subsection (a), and "penalties," that traditionally were viewed as sentencing factors, in subsection (b).

However, this Court in *Apprendi v. New Jersey*, 530 U.S. 469 (2000), described the distinction between elements and sentencing factors as "constitutionally novel and elusive." 530 U.S. at 494. In applying *Apprendi*'s constitutional principle to section 841 cases, the principle is violated if a defendant is sentenced to a greater sentence than the statutory maximum based upon the quantity of drugs, if such quantity is determined by the sentencing judge rather than the trial jury. In short, the drug quantity in section 841(b)(1)(A) and section 841(b)(1)(B) cases must be charged in the indictment and proven to a jury beyond a reasonable doubt in light of *Apprendi*, because the amount of drugs "goes precisely to what happened in the commission of the offense." 530 U.S. at 496.

The *Apprendi* Court made an exception to this constitutional principle. It stated: that "any fact 'other than a prior conviction' that increases the maximum penalty for a federal crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* Due to the *Apprendi* exception that "other than a prior conviction," another statute comes into place, that is, Section 851 which provides that, no drug trafficking defendant can face an enhanced mandatory minimum unless certain procedures, including the filing of a prior felony information by the prosecutor, are followed.

Thus the holding of Apprendi therefore "removed the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone or admitted by the defendant."

The structure of Section 841(b) is entitled "Penalties," and it provides that "any person who violates subsection (a) of this section shall be sentenced as follows." "It then provides for penalties based upon factors traditionally determined by the sentencing judge by a preponderance of the evidence -the amounts and types of drugs, along with increased penalties if death or serious bodily injury results, or if the defendant has a prior conviction for a felony drug offense." Under this structure, traditionally only subsection (a) can be violated. Subsection (b) only provided the penalties for a violation of subsection (a).

The penalties in §§ 841(b)(1)(A) and (b)(1)(B) depended on the quantity of each drug involved and if death or serious bodily injury results and prior conviction enhancement. However, under the relevant inquiry set forth in Apprendi, the amount of drugs therefore, "goes precisely to what happened in the commission of the offense," 530 U.S. at 496, and must be stated in the indictment and submitted to a jury, and proved beyond a reasonable doubt. Id. at 490.

Now, if the amounts and types of drugs, which traditionally were viewed as sentencing factors, under Apprendi are now elements of the crime charge because it goes precisely to what happened in the commission of the offense, the death or serious bodily injury and prior conviction enhancement are also elements of the crime charge, because it too, goes precisely to what happened in the commission of the offense.

The text of Section 841 in subsection (b) entitled "Penalties" sets forth elements of the offense. It provides penalties based upon facts that must be determined by a jury beyond a reasonable-doubt -the amounts

and types of drugs, along with increased penalties if death or seriously bodily injury results, or if the defendant has a prior conviction for a felony drug offense. The statute clearly shows that, if the defendant be proceeded against for a second or third offense under the statute, and the sentence prescribed be different from the first, or severer, by reason of its being such second or third offense, the fact thus relied on must be averred in the indictment; for the settled rule is, that the indictment must contain an averment of every fact essential to justify the punishment inflicted.

Therefore, Section 851 Information of Prior Convictions filed minutes before trial or a guilty plea can increase the maximum penalty to which a defendant is exposed, thereby violating the original meaning of the Constitution by the removal of the determination of Avila-Luna's prior conviction from the province of the jury.

V.

WHETHER THE DISTRICT COURT'S SENTENCING OF AVILA-LUNA BEYOND THE STATUTORY MAXIMUM ALLOWABLE UNER THE FACTS AS FOUND BY THE JURY OR ADMITTED BY THE DEFENDANT VIOLATED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND JURY TRIAL?

In the instant case, Avila-Luna was charged with conspiracy to posses and distribute methamphetamine, in violation of 21 USC §§ 841 and 846.

Avila-Luna's defense counsel informed him that the prosecution was extending a plea agreement which consisted of pleading guilty to the conspiracy charge, and in exchange it would dismiss the remaining counts and recommend a sentence not to exceed 20 years.

Avila-Luna pled guilty, pursuant to the plea agreement with the prosecution to one count of conspiracy to distribute marijuana and methamphetamine, on the belief that the most he could receive was 20 years.

Thereafter, Avila-Luna was informed by defense counsel that the original prosecutor with whom he had entered the verbal/oral plea agreement had become ill and that a new prosecutor had taken over the case. That the new prosecutor was not honoring the plea agreement and that the prior convictions were going to be used for enhancement purpose under § 851 and that he faced a possible LIFE sentence.

Avila-Luna subsequently filed a motion to withdraw his guilty plea, which the district court denied and the case proceeded to sentencing.

Avila-Luna had pled guilty to conspiracy to possess and distribute marijuana and methamphetamine, in violation of 21 USC § 841(b)(1)(A) and § 846, that carried a statutory sentence of 10 years. At his sentencing, the judge sentenced him to LIFE imprisonment without release, applying the § 851 enhancement for prior drug offense, finding that the prior convictions enhancement was a traditional sentencing factor, and as such, was not an element of the offense that needed to

be found by a jury beyond a reasonable doubt or admitted by Avila-Luna. This was wrong.

Elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt or admitted by the defendant. *Hamling v. United States*, 418 U.S. 87, 117 (1974); *Jones v. United States*, 526 U.S. 227, 232 (1999). Sentencing factors, on the other hand, can be proved to a judge at sentencing by a preponderance of the evidence. See *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986). Though one exception has been established, see *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998). In other words, while sentencing factors may guide or confine a judge's discretion in sentencing an offender "within the range prescribed by statute," *Apprendi v. New Jersey*, *supra*, at 481, judge found sentencing factors cannot increase the maximum sentence a defendant might otherwise receive based purely on the facts found by the jury,

Subject to this constitutional constraint, whether a given fact is an element of the crime itself or a sentencing factor is a question for Congress. When Congress is not explicit, as is often the case because it seldom directly addresses the distinction between sentencing factors and elements, courts look to the provisions and the framework of the statute to determine whether a fact is an element or a sentencing factor. *Almendarez-Torres*, *supra*, at 228. In examining whether the prior convictions provisions in §841(b)(1)(A) is an element or a sentencing factor, the analysis must begin with the Supreme Court's previous cases bearing upon the issue.

In *Almendarez-Torres*, the Court held that the existence of a prior conviction triggering enhanced penalties for a recidivist was a fact that could be found by a judge, not an element of the crime that must be found by a jury. Two years later, the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum"

is an element of a crime and therefore, "must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, supra, at 489-490. But Apprendi recognized an exception for the "fact of a prior conviction," instead of overruling Almendarez-Torres. See 530 U.S. at 490. However, Supreme Court Justicem J. Thomas, in the concurring judgment in Descamps v. United States, 133 S.Ct 2276 (2013), he express his belief that the exception in Apprendi was wrong, and has urged that Almendarez-Torres be reconsidered.

After Apprendi, the Supreme Court decided Blakely. In Blakely v. Washington, the Supreme Court spoke: When a sentencing system permits a "judge [to] inflict [] punishment that the jury's verdict alone does not allow" it violates a defendant's Sixth Amendment right to trial by jury. Blakely, 542 U.S. 276 (2004). The Blakely Court expressly rejected the view that the "statutory maximum", which could not be exceeded without violating Apprendi, was the sentence authorized by the statute "criminalizing the offense." The Court instead held: "Our precedents make clear ... that the statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected on the jury's verdict or admitted by the defendant." Blakely, 124 S.Ct at 2537 (emphasis in original)(citing Ring v. Arizona, 536 U.S. 584, 602 (2003)).

Thereafter, in Alleyne v. United States, the Supreme Court held that, Apprendi applies with equal force to facts increasing the mandatory minimum, for a fact triggering a mandatory minimum alters the prescribed range of sentence to which a criminal defendant is exposed. 133 S.Ct 2151 (2013). Because the legally prescribed range is the penalty affixed to the crime, it follows then that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the

The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" of the charged offense. *United States v. O'Brien*, 560 U.S. 218 (2010). *Apprendi*'s definition necessarily includes not only facts that increase the ceiling, but also those that increase the floor. At common law, the relationship between crime and punishment was clear. A sentence was prescribed for each offense, leaving judges with little sentencing discretion. If a fact was by law essential to the penalty, it was an element of the offense. There was a well-established practice of including in the indictment, and submitting to the jury, every fact that was the basis for imposing or increasing punishment. And this understanding was reflected in contemporaneous court decisions and treatises. *Alleyne*, at 324-329.

The relevant question for present purposes is not whether prior felony convictions is "typically" used as a sentencing factor, but rather whether, in statutes that provide higher maximum sentences for crimes committed by convicted felons, prior conviction is "typically" treated as a mere sentence enhancement or rather as an element of a separate offense. The answer to that question is the latter. That was the rule at common law, and was the near-uniform practice among the States at the time of the most recent study. See Note, *Recidivist Procedure*, 40 N. Y. U. L. Rev. 332, 333-334 (1965); Note, *The Pleading and Proof of Prior Conviction in Habitual Criminal Prosecutions*, 33 N. Y. U. L. Rev. 210, 215-216 (1958). At common law, the fact of prior convictions had to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime. Federal prosecutors in the Northern District of Iowa, have been adding the prior conviction provision in §841(b)(1)(A), in their charging

document/indictment when seeking enhance sentence based upon prior convictions.

Because Avila-Luna was convicted of a marijuana drug conspiracy after having been convicted of three felony drug offense, the ten year mandatory minimum sentence was increased to life without release. See 21 USC § 841(b)(1)(A). Had he not been convicted of those prior felonies, he would have been subject to the mandatory minimum of 10 years. See 21 USC § 841(b)(1)(A). Now the difficult question this Court must confront is; Whether the Constitution requires a fact which substantially increases the maximum permissible punishment for a crime to be treated as an element of that crime to be charged in the indictment, and found beyond a reasonable doubt by a jury.

The provision involved in the instant case, [21 USC § 841(b)(1)(A)], ratchets up the mandatory minimum for recidivist drug offenders. Specifically, it provides that where a defendant was previously convicted of a felony drug offense, the five-year and ten year mandatory minimum are doubled. For a defendant with two or more prior drug felonies, the ten-year mandatory minimum is increased to mandatory life in prison.

The structure of subsection 841(b) sets forth elements of the offense. Subsection 841(b) provides penalties based upon facts that must be determined by a jury beyond a reasonable doubt--the amounts and types of drugs, along with increased penalties if death or seriously bodily injury results, or if the defendant HAS A PRIOR CONVICTION FOR A FELONY DRUG OFFENSE.

The text of the Statute [§ 841] supports, if it does not indeed demand, the conclusion that subsection (b)(1)(A) in its entirety, is a separate offense that includes the violation described in subsection (a) but adds the additional element of quantity and types of drugs, increased penalties if death or seriously bodily injury results, and

prior felony conviction. 21 USC § 841(b)(1)(A) states, in pertinent part: (A) In the case of a violation of subsection (a) of this section involving--(vii) 1000 kilograms or more..of marijuana; such person shall be sentenced to a term ... which may not be less than 10 years ... If ... after a prior conviction ... may not be less than 20 years If ... after two or more prior convictions ... a mandatory term of life imprisonment without release.

Section 841(b)(1)(A) sets forth separate substantive crimes, the elements of which are to be found in the text of the statute, and every fact [prior conviction] which is legally essential to the punishment to be inflicted must be stated in the indictment and proven to a jury beyond a reasonable doubt. In other words, they are elements. And because "aggravated drug trafficking offenses after a prior conviction(s)" have elements, they are, in fact and in law, separate offenses.

Federal statutes of this sort, that clearly make recidivism an offense element added to another crime, are many such; see, e.g., 15 USC 1264(a) [15 USC § 1264(a)], 18 USC § 924(c), and § 2114(a) [18 USC § 924(c), and § 2114(a)]. In each of these provisions, recidivism is recited in a list of sentence-increasing aggravators, for example, intent to defraud or mislead (15 USC § 1264(a) [15 USC § 1264(a)]), use of a firearm that is a machine gun, or a destructive device, or that is equipped with a silencer (18 USC § 924(c) [18 USC § 924(c)]), and wounding or threatening life with a dangerous weapon (§ 2114(a)). It would do violence to the text to treat recidivism as a mere enhancement while treating the parallel provisions as aggravated offenses, which they obviously are.

In *Apprendi v. New Jersey*, *supra*, this Court noted that, "even though it was arguable that *Almendarez-Torres* had been incorrectly decided-and that a logical application of the reasoning of *Apprendi*

might apply if the recidivist issue were created." In Harris v. United States, Supreme Court Justice J. Thomas noted that: "The parties do not request it here, but in an appropriate case, this Court should consider Almendarez-Torres continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of Almendarez-Torres, despite the fundamental 'imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond a reasonable-doubt requirement.'" Harris, 536 U.S. 545 (2002)(Thomas, J., dissenting).

If the Government seeks enhance penalties based on prior convictions under 841(b)(10(A), the prior convictions must be stated in the indictment and submitted to the fact finder for a finding of proof beyond a reasonable doubt, or admitted by the defendant.

Since the prior convictions were not stated in the instant indictment, nor submitted to the jury for proof beyond a reasonable doubt, nor admitted by the defendant, it constitutes plain error that seriously affected the fairness, integrity, or public reputation of Avila-Luna's judicial proceedings. And furthermore, the filing of § 851 by the Government, violates the original meaning of the Constitution by the removal of the determination of Avila-Luna's prior conviction from the province of the jury, thereby, his sentence must be set-aside, and he should be resentenced to the sentencing range supported by his admission of guilt, that is 10 years. Since Avila-Luna has already served over 10 years, this Court should order for his immediate release.

VI.
WHETHER § 851 ENHANCEMENT IS VOID FOR VAGUENESS

Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression. See generally M. Bassiouni, *Substantive Criminal Law* 53 (1978).

Due Process of Law requires that a penal statute be sufficiently definite to give notice to a person of ordinary intelligence of the prohibited conduct, in order for that person to conform his or her conduct within the proscribed legal confines. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Therefore, one may challenge the constitutionality of a penal statute based upon the argument that the statute is vague, as the "[vagueness] doctrine incorporates notions of fair notice or warning." *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974).

A penal statute maybe void for vagueness "for either of two reasons." *Chicago v. Morales*, 527 u.S. 41, 56 (1999). First, a statute may be unconstitutionally vague if it "fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *Id.* A statute may also be unconstitutionally vague if it "fails to provide explicit standards to prevent arbitrary and discriminatory enforcement by those enforcing the statute." *Karlin v. Foust*, 188 F.3d 446, 458-59 (7th Cir. 1999). As observed by this Court, the requirement that a penal statute provide minimal guidelines in order to discourage arbitrary enforcement is "perhaps the most meaningful aspect of the vagueness doctrine. *Smith*, 415 U.S. at 574. Without these minimal enforcement guidelines provided within a statute, "policemen, prosecutors, and juries [are allowed] to pursue their personal predilections." *Id.* at 575.

Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, this Court has recognized that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement." Id. at 574.

Section 851 of Title 21 of the United States Code, as drafted and as construed by the federal courts, contains no minimal guidelines to govern law enforcement, or in this case the prosecutor. According to § 851(a)(1), "No person...shall be sentenced to increased punishment by reason of one or more prior convictions, unless before...entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon."

Congress enacted § 851 in 1970, conditioning the applicability of any recidivist enhancement to the drug offense mandatory minimums on the filing of a prior felony information. The 1970 legislation thus gave the government the flexibility it requested. However, it was not always this way. Recidivism-based mandatory minimums for drug offenses are not new, and they used to be automatic. These mandatory enhancements had such a dramatic effect on sentences that federal prosecutors found themselves reluctant to bring any charges at all against certain defendants because the automatic mandatory enhancement were simply too severe. As a result, Attorney General John N. Mitchell asked Congress to enact a law affording prosecutors greater flexibility. See *U.S. v. Kupa*, 976 F.Supp. 2d 417 (E.D.N.Y. 2013), *supra*, explaining the history of § 851 and its arbitrary enforcement by prosecutors.

In sum, § 851 which was reserved for the most harsh criminals, reflected the recognition by Congress and DOJ that a prior felony

conviction was not per se evidence that a drug trafficking defendant was the sort of hardened professional criminal who deserves an enhanced mandatory sentence. Congress left it to prosecutors to identify the defendants who truly deserved the enhancement that remained after 1970. Whereas the previous statutory scheme made no distinction among (for example) professional criminals, street-corner dealers, and addicts whose pay for participating in the offense consisted solely of the drugs to support their habits, § 851 trusted prosecutors to take into account such individual circumstances, vesting them with the power to be selective. However, there was no suggestion that Congress enacted § 851 so prosecutors could use their newfound discretion to trigger enhanced punishments as a tool to strong-arm federal defendants into pleading guilty or to punish those who exercise their right to a trial.

When it enacted § 851 in 1970, Congress had in mind the world that the Department of Justice asked it to create, in which federal prosecutors would carefully cull from the large number of defendants with prior felony convictions, the hardened, professional drug traffickers who should face recidivism enhancement upon conviction. But instead federal prosecutors exercise their discretion by reference to a factor that passes in the night with culpability: whether the defendant pleads guilty. To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that no one - not even the prosecutors themselves - thinks are appropriate.

Without the minimal guidelines in order to discourage arbitrary enforcement, section 851 currently confers powers to prosecutors to enhance drug trafficking mandatory minimums for the indefensible purpose of coercing guilty pleas and punishing those who go to trial. See, e.g.,

United States v. Dotson, 513 F. App'x 221, 223 (3rd Cir. 2013)(noting that the government agreed to "withdraw one of the convictions from the [prior felony] information to reduce Dotson's sentencing exposure from a mandatory life sentence to a mandatory sentence of twenty years' imprisonment"); Gilbert v. United States, 640 F.3d 1293, 1298 (6th Cir. 2011) (observing the "non-application of [the prior felony information] obviously was part of the [plea] agreement"); United States v. Espinal, 634 F. 3d 655, 659 (2d Cir. 2011)(describing that, in 2006, the government advised the defendant that, "if he did not plead guilty by September 15, it would file a prior felony information....Filing such an information would, among other things, enhance the applicable mandatory minimum sentence from ten years in prison to twenty."); United States v. Shaw, 426 F. App'x 810, 812 (11th Cir. 2011)(describing how the prosecutor informed the defendant that, "if [he] went forward with the suppression hearing, [the prosecutor] would file the § 851 notice seeking the mandatory-minimum life sentence"); United States v. Harris, 394 F. App'x 676, 679-680 (11th Cir. 2010)(mentioning that the government agreed to withdraw the notice of two prior felonies - thereby taking a mandatory life sentence off the table - only if the defendant pleaded guilty); United States v. Forrester, 616 F. 3d 929 (9th Cir. 2010)(referencing how, five days before trial, the government "extended a plea offer... [and] told [the defendant] that if both he and [his co-defendnat] accepted the 'package deal,' [the defendant] could limit his exposure to 20 years. The government stated that if the plea offer was not accepted by 2:00 pm that same day, it would file a sentence ehancement pursuant to 21 U.S.C. § 851. The offer was not accepted by either [defendant]...and the government filed the § 851 enhancement."); Coleman v. United States, 339 F. App'x 643 (7th Cir. 2009)(denying a 28 USC § 2255 motion for ineffect-

ive of counsel; the attorney had advised the defendant that the government would file a prior felony information unless he pleaded guilty); *United States v. Jenkins*, 537 F.3d 1, 4 (1st Cir. 2008)(no presumption of prosecutorial vindictiveness where government decided to file a prior felony information because the defendant refused to plead guilty); *Vadas v. United States*, 527 F. 3d 16, 19 (2d Cir. 2007)(observing that the written plea agreement with the U.S. Attorney for the District of Connecticut provided that, "[i]n exchange for the plea,...[t]he government also agrees to withdraw the Amended Second Notice Information filed March 15, 2001 pursuant to ... Section 851.")(emphasis in original); It appears, for example, that in the Western District of Oklahoma, it is part of the standard plea that the government will file the prior felony information unless the defendant pleads guilty. See, e.g., Plea Agreement ¶ 15, *United States v. Bell*, 08-CR-303 (W.D. Okla. Jan. 12, 2009), ECF No. 22 ("If defendant enters a plea of guilty as described above and fully meets all obligations under this agreement, then the United States Attorney's Office for the Western District of Oklahoma will not file an information pursuant to Title 21 United States Code, § 851 to establish any prior convictions."); see also Letter from AUSA to Defense Counsel, Nov. 7, 2007, *United States v. Winston*, 07-CR-801 (RMB)(S.D.N.Y.)("In further consideration of the defendant's plea, the government will not file a prior felony information)(letter on file with chambers.").

The enactment of Section 851 enhancement by Congress, which explicitly was intended for kingpins and managers of drug operations - who make up a mere 7% of the federal caseload - went off the rails. Congress delegated § 851 enhancement decisions to federal prosecutors. Thus, (the Sentencing Commission, defendants, their counsel, and federal

district and appellate court judges are powerless to do anything but complain about arbitrary application of § 851 enhancements. See Kupa, supra; also see U.S. Young, 960 F.Supp. 2d 881 (N.D.Ia. 2013).

In sum, section 851 is unconstitutionally vague because it allows for arbitrary enforcement, as "[t]he Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts [in this case the prosecutor] to step inside and say who could be rightfully detained, and who should be set at large.'" Morales, 527 U.S. at 60.

Furthermore, section § 851 not only fails to provide explicit standards to prevent arbitrary and discriminatory enforcement, but also fails to provide adequate notice.

According to 21 USC § 851(a)(1), "No person...shall be sentenced to increased punishment by reason of one or more prior convictions, unless before...entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon."

The notice requirement in § 851 is phrased in mandatory language, nevertheless, courts have described its procedural requirements as jurisdictional. E.g., United States v. Lawuary, 211 F.3d 372 376 n.6 (7th Cir. 2000); Harris v. United States, 149 F.3d 1304, 1306 (11th Cir. 1998). While others have held such requirements are not jurisdictional. Prou v. United States, 199 F.3d at 42-46 (1st Cir. 1999); United States v. Baucum, 317 U.S. App. D.C. 63, 80 F.3d 539, 543-44 (D.C. Cir. 1996).

The notice requirement, according to courts, can be file a day

before jury selection or just before entering a guilty plea, thereby diminishing the opportunity to make an informed and intelligent choice as to whether to plead guilty or take the chances in a trial by jury. And the number of defendants who are eligible for an § 851 enhancement is large and growing. See United States Sentencing Commission, Mandatory minimum Penalties in the Federal Criminal Justice System 255 (2011).

Prior felony information [§ 851] don't just tinker with sentencing outcomes; by doubling mandatory minimum and sometimes mandating life in prison, they produce the sentencing equivalent of a two-by-four to the forehead. Kupa, supra. The governments use of them coerces guilty pleas and produces sentences so excessively severe they take the breath away. Section 851 prior information enhancement have played a key role in helping to place the federal criminal trial on the endangered species list. Id.

In sum, Section 851 prior information enhancement not only fails to provide explicit standards to prevent arbitrary and discriminatory enforcement by those enforcing the statute and the kind of notice that will enable ordinary people to understand what conduct it prohibits - the statute does not provide what type of convictions it is referring to - but also has created a split among the courts as to the notice of service requirements. And furthermore, the Section 851 prior information enhancement further deprives a defendant to challenge the validity of a conviction used for purpose of sentence enhancement if the conviction occurred more than 5 years before date of the information alleging prior conviction. This too, violates Avila-Luna's Due Process rights by subjecting him to increase punishment without any opportunity to challenge the validity of a prior conviction that occurred more than 5 years old. Section 851 subsection (e).

Therefore, for all the foregoing reasons, and all of the above arguments and authorities, Avila-Luna now argues that the "Section 851" prior information enhancement is unconstitutionally vague in that it invites arbitrary enforcement and is a violation of Avila-Lunas' Due Process Rights.

REASONS FOR GRANTING THE PETITION

By any measure Avila-Lunas' LIFE sentence is extraordinary. He entered a plea of guilty to avoid the harsh sentence of life in prison that Section 851 mandates -due to three prior convictions- nevertheless, at sentencing the prosecutor enforced the Section 851 enhancement and the district court didn't had a choice but to sentence Avila-Luna to LIFE without release.

The post-1970 regime, specifically designed by prosecutors to allow them to subject only the truly hardened, professional drug traffickers to harsh recidivist enhancements, was derailed by the sentencing reform movement. Prompted by the U.S. Sentencing Guidelines, Department of Justice created a policy that essentially made the filing of prior felony informations automatic again, with an exception for those who plead guilty.

The reversion to automatic filing of prior felony informations resulted in the past two decades in the entrenched practice of using them to strong-arm guilty pleas and to punish those who refuse to plead guilty;

This practice produced egregiously severe sentences, and judges have uniformly expressed frustration at being required to impose them;

Prior felony informations [§ 851] have helped to create the dramatically reduced trial rate in the federal system, and the disappearance of trials threatens great damage to the court's system.

For these and more other reasons this Petition should be GRANTED.

CONCLUSION

For all the foregoing reasons, Avila-Lunas' case is extraordinary. At a minimum, reasonable jurists could so conclude, which means a Certificate of Appealability must issue. This Court's review is warranted not only to resolve the constitutionality of Section 851, but to maintain public confidence that courts will not permit arbitrary enforcement by the federal prosecutors.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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