RECORD NO. _____

In The
Supreme Court of The United States

RICHARD ANDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

John Meringolo, Esq.,*
Meringolo & Associates, P.C.
11 Evans Street
Brooklyn, NY 11201
(347) 599-0992

**Counsel of Record for Petitioner Richard Anderson*

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

QUESTIONS PRESENTED

Should Mr. Anderson's case be remanded for resentencing without application of the career offender guideline, U.S.S.G. § 4B1.1, because the lower courts' proceedings failed to establish whether the elements of Mr. Anderson's 2004 Connecticut State narcotics conviction were equivalent to the elements of the generic federal offense in contravention of *Mathis v. United States*, 136 S.Ct. 2243 (2016)?

Should this Court resolve the conflict between the Second Circuit's approval of the inadequate factual findings in Mr. Anderson's case and the Third, Fifth, and Tenth Circuits' disapproval of cases with similarly inadequate findings?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Richard Anderson and United States of America.

Defendants-Appellants Vincent Clark, Philip Bryant, and Robert Santos are not parties to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Richard Anderson respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit in *United States v. Clark, et al.*, 14-4656-cr(L), 15-238-cr(CON), is at 664 Fed. Appx. 29 (2d Cir. Oct. 25, 2016) (Summary Order) (Appendix A1-A4). The order denying Anderson's motion for rehearing en banc and for reconsideration was issued on December 20, 2016 and is unreported (A5). The sentencing hearing in this case and the plea and sentencing in the 2004 Connecticut State narcotics conviction are appended hereto at A6-A37 and A38-A45, respectively.

JURISDICTION

The final judgment of the United States Court of Appeals for the Second Circuit denying rehearing en banc and reconsideration was entered on December 20, 2016. This petition is timely filed within the 90-day statutory time limitation. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Title 21 of the United States Code section 841(a) provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Title 21 of the United States Code section 802 defines the terms "deliver," dispense" and "distribute" as:

> (8) The terms "deliver" or "delivery" mean the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship.
>
> (10) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.
>
> (11) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical. The term "distributor" means a person who so delivers a controlled substance or a listed chemical.

Title 21 of the United States Code contains no definition of "sale" as that term relates to controlled substances.

The Connecticut statute under which Mr. Anderson was previously convicted provides in relevant part:

> Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any controlled substance which is a hallucinogenic substance other than marijuana, or a narcotic substance, except as authorized in this chapter, . . . , shall be imprisoned not more than fifteen years . . .

Ct. Gen. Stat. Ann. § 21a-277(a) (West) (entitled "Penalty for illegal manufacture, distribution, sale, prescription, dispensing"). The statute contains no mandatory minimum term of imprisonment.

Connecticut statutes define "deliver," "dispense," distribute," and "sale" as:

> (11) "Deliver or delivery" means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship;
>
> (13) "Dispense" means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling or compounding necessary to prepare the substance for the delivery;
>
> (15) "Distribute" means to deliver other than by administering or dispensing a controlled substance;
>
> (50) "Sale" is any form of delivery which includes barter, exchange or gift, or offer therefor, and each such transaction made by any person whether as principal, proprietor, agent, servant or employee;

Ct. Gen. Stat. Ann. § 21a-240 (West)

The United States Sentencing Guidelines[1] career offender guideline, U.S.S.G. §4B1.1(a) provides:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

The term "controlled substance offense" is defined in U.S.S.G. §4B1.2(b), which provides in relevant part:

> The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance)

[1] Because the Superseding Indictment in this case charged Mr. Anderson with violations of 21 U.S.C. §§ 841 and 846 between January 2011 and January 2012, the 2011 edition of the Guidelines manual applies to his case. The cited provision remains unchanged in later editions.

with intent to manufacture, import, export, distribute, or dispense.

STATEMENT OF THE CASE

Petitioner Richard Anderson respectfully petitions the Court to issue a writ of certiorari to review the holding of the United States Court of Appeals for the Second Circuit that his Connecticut conviction under Ct. Gen. Stat. Ann. § 21a-277(a) constituted a prior narcotics offense within the meaning of the United States Sentencing Guidelines' career offender guideline, U.S.S.G. §§ 4B1.1(a) and 4B1.2(b).

In February 2014, a jury in the District of Connecticut convicted Mr. Anderson of having violated 21 U.S.C. §§ 841 and 846 from in or about January 2011 through January 2012. At sentencing and again on appeal, Mr. Anderson argued that, despite a 2004 Connecticut State narcotics conviction[2] and a 2004 Connecticut robbery conviction, he should not be sentenced as a career offender because the narcotics plea transcript was inadequate to establish the elements of the offense to which he had pled guilty.

In relevant part, the plea transcript of the 2004 Connecticut hearing reads:

> The Clerk: Docket number CR04-27182, under substituted information you're charged with possession of narcotics with intent to sell, 21a-277a, what is your plea, guilty or not guilty.
>
> Mr. Anderson: Guilty.

[2] Anderson's rap sheet lists a conviction for Sale of Hallucinogen/Narcotics but the Connecticut Superior Court records and transcripts describe the conviction as Possession with Intent to Sell. *See* PSR at ¶ 56. The statute of conviction is entitled, "Penalty for illegal manufacture, distribution, sale, prescription, dispensing."

Prosecutor: 2/21/04, field investigation, narcotics investigation, the defendant ran from the police, threw down three plastic bags containing a total of 11.3 grams suspected crack cocaine, tested positive, street value three hundred dollars.

State v. Anderson, CR04-27182 (A39-A40).

The Court: A few minutes ago, the prosecutor told me what happened. Is what the prosecutor told me basically correct?

Mr. Anderson: Yes.

(A41-A42).

The state court then adjudged Mr. Anderson guilty and sentenced him to two and one-half years of imprisonment. (A43). The state court made no explicit factual findings about what had occurred, relying instead on the prosecutor's summary of the police report and Anderson's admission that it was "basically" accurate. The record does not establish whether Anderson was admitting to having run from the police, having possessed "suspected crack cocaine" or actual crack cocaine, that he knew what the substance was, or whether he had in fact intended to distribute the substance (or dispose of it in any manner other than through personal use).

Nonetheless, at sentencing in the instant case, the district court found, without explanation or analysis, that the 2004 Connecticut offense constituted a career offender predicate offense and that Mr. Anderson was, therefore, eligible for a career offender sentencing enhancement. (A33-A34). On appeal, the Second Circuit upheld the district court's finding as "properly determined" and "consistent with" this Court's decision in *Mathis v. United States*, 136 S.Ct. 2243 (2016). (A3).

Mr. Anderson now asks this Court to review the Second Circuit's holding and argues that the district court's inadequate findings and the Second Circuit's approval of the district court's procedures conflict with this Court's instruction in *Mathis* that the sentencing court must clearly establish that the elements of the prior conviction correlate to the generic offense in order to use the prior conviction as a career offender predicate. The erroneous failure to do so affected Mr. Anderson's substantial rights.

Given the district court's departure from the career offender guideline range of 262-327 months based on an analysis of the sentencing factors set forth in 18 U.S.C. § 3553(a), it is probable that the district court would also have departed from the non-career offender guidelines range of 77-96 months (CHC IV level 24) and imposed a sentence at or near the mandatory minimum of 60 months required by 21 U.S.C. § 841(b)(1)(B), had the career offender calculation not provided the initial starting point for the sentencing determination. Under *Molina–Martinez v. United States*, — U.S. —, 136 S.Ct. 1338 (2016), this probability affected Mr. Anderson's substantial rights because "a defendant sentenced under an incorrect Guidelines range should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range" and "[t]hat probability is all that is needed to establish an effect on substantial rights." *Molina-Martinez*, 136 S.Ct at 1349.

For these reasons, and because the Second Circuit's approach conflicts with cases in the Third, Fifth, and Tenth Circuits to have confronted similarly vague state narcotics statutes, the petition for a writ of certiorari should be granted.

Procedural Background

The government charged Anderson in a multi-defendant indictment with a single count of conspiracy to distribute and to possess with intent to distribute narcotics, specifically 28 grams or more of cocaine base ("crack cocaine"), in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B)(iii) "[f]rom approximately January 2011 through approximately January 2012." *United States v. Anderson, et al.*, 12-CR-104 (EBB), Superseding Indictment at ¶¶ 1-2, ¶ 7. Anderson was convicted of that offense on February 6, 2014, after a 12-day jury trial.

The presentence investigation found that Mr. Anderson was eligible for career offender treatment based on a 2004 Connecticut State narcotics conviction and a 2004 Connecticut robbery conviction. PSR at ¶¶ 56, 58, 60. At sentencing, Mr. Anderson argued that he should not be sentenced as a career offender because the narcotics plea transcript was inadequate to establish the elements of the offense to which he had pled guilty. (A8-A10; A25-A27). The district court disagreed, finding the PSR's career offender calculation "adequate" but "excessive under the circumstances" (A28) and affirming with a single "Yes, sir," the prosecutor's query as to whether the district court was "in agreement that under Shepherd [*sic*] modified categorical analysis, that the plea transcript of the controlled substance offense for Mr. Anderson's prior conviction does count as a career offender

predicate." (A33-A34). The district court imposed a below-Guidelines sentence of 96 months, which Mr. Anderson is currently serving.

On appeal, Mr. Anderson argued (as is relevant here) that the Connecticut narcotics plea allocution had been insufficient to establish that the offense of conviction was equivalent, under the *Shepard* modified categorical analysis, to the generic federal offense. Mr. Anderson noted that the Connecticut statute (Ct. Gen. Stat. Ann. § 21(a)-277(a)) criminalizes actions that the federal statute does not, including (for example) the "offer" of a narcotic substance, and is, therefore, broader than the generic federal crime.

Mr. Anderson's appellate brief was filed on January 15, 2016. *United States v. Anderson, et al.*, 15-238-cr at Dkt. No. 106. On June 23, 2016, this Court decided *Mathis*, which instructed that, if the elements of a state statute are broader than the elements of the relevant federal offense, "that undisputed disparity resolves the case," and the violation of the state statute cannot serve as a predicate for a career offender enhancement. *Mathis*, 136 S.Ct. at 2251. Mr. Anderson promptly filed a letter pursuant to Federal Rule of Appellate Procedure 28(j) arguing that *Mathis* mandated a favorable resolution of his career offender argument. *See United States v. Anderson, et al.*, 15-238-cr at Dkt. No. 159.

After oral argument on September 23, 2016, the three-judge panel of the Second Circuit before which the case was heard requested supplemental briefing on the applicability of *Mathis* to Mr. Anderson's case. On September 27, 2016, the Government submitted a supplemental letter arguing that Mr. Anderson's plea

colloquy had been sufficient to establish the elements of the offense of conviction. *See United States v. Anderson, et al.*, 15-238-cr at Dkt. No. 187. On September 30, 2016, Mr. Anderson responded, arguing that the breadth of the Connecticut statute and the vagueness of the plea colloquy mandated reversal. *Id.* at Dkt. No. 190. The Second Circuit denied Mr. Anderson's appeal and upheld his sentence and conviction in all respects. *Id.* at Dkt. No. 195; *see also* A1-A4.

On November 8, 2016, Mr. Anderson moved for reconsideration and for rehearing *en banc*. *United States v. Anderson, et al.*, 15-238-cr at Dkt. No. 201. That motion was denied on December 20, 2016. *Id.* at Dkt. No. 223. This petition is timely filed within 90 days of the denial of reconsideration and rehearing *en banc*.

The Opinion of the Court Below

The Second Circuit's opinion concerning Mr. Anderson's career offender argument reads in its entirety:

> [T]he District Court properly determined, based on facts confirmed by Anderson during his plea colloquy in state court, that his 2004 conviction qualified as a "controlled substance offense" under § 4B1.2(b) of the Sentencing Guidelines. *See United States v. Savage*, 542 F.3d 959, 966 (2d Cir. 2008); *cf. United States v. Moreno*, 821 F.3d 223, 228–29 (2d Cir. 2016). In light of the parties' arguments after briefing, we also conclude that the District Court's determination was consistent with *Mathis v. United States*, 136 S. Ct. 2243 (2016).

(A3).

The motion for reconsideration and for rehearing *en banc* was denied without opinion. (A5).

REASONS FOR GRANTING THE WRIT

Summary of the Argument

This Court should grant the petition for a writ of certiorari because the Second Circuit's decision conflicts with this Court's decisions in *Mathis* and *Molina–Martinez*. Because the elements of the Connecticut state offense to which Anderson pled guilty cannot be clearly established, that offense could not serve as a predicate offense for career offender treatment under *Mathis* and the resulting inaccurate Guidelines calculation, which the district court adopted in full as a starting point for its sentencing calculation presumptively prejudiced Anderson under *Gall v. United States*, 552 U.S. 38 (2007), and its progeny, and under *Molina-Martinez*.

In addition, the Court should consider this case because the Second Circuit's decision conflicts with substantive decisions of the Third, Fifth, and Tenth Circuits, which have addressed the application of *Mathis* to overly broad state narcotics statutes.

Argument

POINT I:
This Court Should Grant Certiorari Because the Second Circuit's Decision Condoned A Significant Procedural Error and Conflicts With Controlling Supreme Court Precedent.

A. Applicable Law

1. An Inaccurately Calculated Guidelines Range Affects a Defendant's Substantial Rights.

This Court has repeatedly instructed that a district court commits procedural error by failing to properly calculate the Guidelines range as a starting point in the

sentencing analysis. *See Gall*, 552 U.S. at 51. *See also Molina-Martinez*, 136 S. Ct. at 1342 (internal citations omitted) (noting that the district court's initial calculation of the applicable Guidelines range is required and that, "Although the district court has discretion to depart from the Guidelines, the court 'must consult those Guidelines and take them into account when sentencing.'"). Because of the importance of an accurately calculated Guidelines level as the "starting point and ... initial benchmark" at sentencing, *Gall*, 552 U.S. at 49, "[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez*, 136 S. Ct. at 1345.

2. Without Specific Factual Findings to Establish the Elements of the Offense of Conviction, A Violation of Ct. Gen. Stat. Ann. § 21a-277(a) Is Too Broad to Serve as a Career Offender Predicate Offense.

In *Mathis*, this Court instructed that whether a prior offense constitutes a career offender predicate for Sentencing Guidelines calculation purposes turns on a determination of the state crime's elements and a comparison of those elements to the elements of the generic federal offense. *Mathis*, 136 U.S. at 2251. A sentencing court may not use a state conviction as a career offender predicate if the elements of the state law crime, that is, "the 'constituent parts' of a crime's legal definition—the things that the 'prosecution must prove to sustain a conviction,'" are broader than the generic federal crime. *Mathis*, 136 S.Ct. at 2248. Neither "the label a State assigns to a crime" nor "the particular facts underlying the prior convictions" matter

to the career offender predicate analysis. *Id.* at 2251 (citations and alterations omitted).

If a state statute contains various means of committing a single offense, an "undisputed disparity" between the elements of that offense and the generic federal offense "resolves the case" and requires remand for re-sentencing without application of the career offender guideline because "a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense. . . ." *Mathis*, 136 S.Ct. at 2251. If, instead, the state statute at issue contains multiple elements under which conviction is possible, the modified categorical approach is applied. *See United States v. Savage*, 542 F.3d 959, 966 (2d Cir. 2008). *See also United States v. Jones*, ---F.3d ---, 2016 WL 3923838 (2d Cir. 2016), at *4 (quoting *Mathis*, 136 S.Ct. at 2249) (the modified categorical approach applies where the state statute at issue is divisible—it "list[s] elements in the alternative, and thereby define[s] multiple crimes.").

Using the modified categorical approach, "the sentencing court may 'go beyond the mere fact of conviction' to determine the nature of the offense." *United States v. Lynch*, 518 F.3d 164, 168 (2d Cir. 2008) (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)). In so doing, the district court may consider "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard v. United States*, 544 U.S. 13, 26 (2005); *see also United States v. Beardsley*,

691 F.3d 252, 259 (2d Cir. 2012). To prove a violation of Ct. Gen. Stat. Ann. § 21a-277(a)'s "possession with intent to sell" offense, Connecticut State law requires proof beyond a reasonable doubt of (1) possession and (2) intent to sell.

Proof of possession requires that the state "prove beyond a reasonable doubt that the defendant had either actual or constructive possession of a narcotic substance." *State v. Billie*, 123 Conn. App. 690, 696–97, 2 A.3d 1034, 1039 (2010). That is, "the state must establish beyond a reasonable doubt that the accused knew of the character of the drug and its presence, and exercised dominion and control over it." *Id.* at 697 (quoting *State v. Cruz,* 28 Conn. App. 575, 579, 611 A.2d 457 (1992)). "To mitigate the possibility that innocent persons might be prosecuted for ... possessory offenses ... it is essential that the state's evidence include more than just a temporal and spatial nexus between the defendant and the contraband." *State v. Brunori*, 22 Conn. App. 431, 436-37, 578 A.2d 139, *cert. denied*, 216 Conn. 814, 580 A.2d 61 (1990).

Possession of a narcotic substance alone does not give rise to an inference of intent to sell. "In order to prove that a defendant is guilty of possession of narcotics with intent to sell under § 21a–277(a), the state must prove beyond a reasonable doubt that the defendant had the intent to sell narcotics." *Billie*, 123 Conn. App. at 704. Possession of a small quantity of a narcotic is probative evidence that the defendant intended the drugs for personal use, not for sale. *See Billie*, 123 Conn. App. at 703-05 (finding that the evidence supported a finding that the defendant possessed a single package of crack cocaine, which was more consistent with

possession for personal use than with intent to sell).

Where the record materials do not "speak plainly," "a sentencing judge will not be able to satisfy '*Taylor*'s demand for certainty' when determining whether a defendant was convicted of a generic offense." *Mathis*, 136 S.Ct. at 2257 (quoting *Shepard*, 544 U.S. at 21). *See also Jones*, ---F.3d ---, 2016 WL 3923838 at *4 ("[W]e are unable to employ the modified categorical approach to determine which of the four subparts of the statute provide the basis for Jones's first-degree robbery conviction because the facts underlying his conviction are not in the record before us.").

Given the lack of evidence of intent to sell (or dispense, or distribute) in the record of this case, use of the Connecticut State narcotics conviction as a predicate offense for career offender status was an error, the prejudicial effect of which on Anderson's substantial rights entitles him to relief. *See Molina-Martinez*, 136 S. Ct. at 1349.

B. Discussion: This Court Should Grant Mr. Anderson's Petition and Remand His Case for Resentencing under *Mathis* Because Ct. Gen. Stat. Ann. § 21a-277(a) Criminalizes Conduct that the Federal Law Does Not and Because His Designation as a Career Offender Based on the Prior Connecticut State Offense Affected His Substantial Rights.

Ct. Gen. Stat. Ann. § 21a-277(a) criminalizes conduct far broader than that prohibited in 21 U.S.C. § 841, including "possess[ing] with the intent to . . . dispense," "offer[ing]," "giv[ing]" or "administer[ing]" controlled substances. And the Connecticut definitions of terms including "sale" ("any form of delivery which includes barter, exchange or gift, or offer therefor, and each such transaction made

by any person . . .") encompass conduct that 21 U.S.C. § 841 does not. The government posits that Ct. Gen. Stat. Ann. § 21a-277(a) describes different offense elements, not means of committing a single offense. *See United States v. Anderson, et al.*, 14-4656, Dkt. No. 302 at p. 3-4 (noting that, under Connecticut law, "intent to sell" and "intent to dispense" are conceptually distinct and require a specific unanimity charge to the jury; referencing *State v. Jackson*, 535 A.2d 1327, 1330 (Conn. App. Ct. 1988)). But no case of which counsel is aware explicitly decides this question.

If Ct. Gen. Stat. Ann. § 21a-277(a) sets forth various means of committing a single offense, the "undisputed disparity" between the Connecticut statute and the generic federal offense resolves the case in Mr. Anderson's favor. *See Mathis*, 136 S.Ct. at 2551. If, instead, the itemized statute sets forth different elements, as the government suggests, analysis using the modified categorical approach is appropriate.

Anderson does not dispute that the Connecticut State plea colloquy was sufficient to establish that he possessed a small quantity of crack cocaine under the modified categorical approach. But the fact that Anderson answered "Guilty" to the preliminary questioning is not sufficient to establish the elements of his offense. *See United States v. Davenport*, 303 Fed. Appx. 42, 44 (2d Cir. 2008) ("Davenport's utterance of the word 'guilty' during the initial portion of the state plea proceeding in response to the prosecutor's mischaracterization of the charge as 'possession with intent to sell' does not indicate that Davenport admitted to predicate conduct.").

The assumption that, because Anderson dropped a small quantity of narcotics (arguably an amount probative of personal use only under *Billie*) as he fled, he possessed those drugs *with the intent to sell* is unsupported by the record. There is no evidence from which intent to sell—either standing alone or in contrast to "intent to dispense," "offer," "give," or "administer," all of which are offenses not included in the generic federal offense—can be inferred. Moreover, simple possession of narcotics is a federal misdemeanor, nor a felony offense. *See* 21 U.S.C. § 844. Thus, it cannot be said with any certainty what the elements of Anderson's Connecticut State crime were, or whether they may be correlated to the generic federal felony offense.

In cases with similar factual ambiguity, courts in the Second Circuit have found it impossible to establish the elements of a qualifying controlled substances offense for career offender purposes. *See United States v. Lopez*, 536 F. Supp. 2d 218, 224 (D. Conn. 2008) (internal citation omitted) ("There is nothing in this record which demonstrates the precise factual basis of Mr. Lopez's plea. Although later in the proceeding Mr. Lopez confirmed that he was familiar with the contents of the police report, *Shepard* specifically rejected the notion that non-judicial documents (such as police reports) are within the scope of an ACCA predicate conviction determination. . . . Thus, there is insufficient record evidence that Mr. Lopez's 1999 conviction qualifies as a serious drug offense."); *United States v. Madera*, 521 F. Supp. 2d 149, 153 (D. Conn. 2007) (holding that the prosecutor's statement at a plea colloquy that the offense involved heroin was insufficient to establish that the

offense was an ACCA predicate because this statement was not confirmed by the defendant and the state court made no explicit finding); *United States v. Rosa*, 507 F.3d 142, 157–59 (2d Cir. 2007) (holding that the defendant's failure to object when the judge at the defendant's state court guilty plea referred to a gun that was involved in the crime did not qualify as an admission by silence that a gun was used and, therefore, did not establish that the crime was a violent felony as defined by the ACCA); *United States v. Cohens*, 2008 WL 3824758, at *5 (D. Conn. Aug. 13, 2008) (finding that the plea colloquy was insufficient to establish that a prior conviction under Ct. Gen. Stat. Ann. § 21(a)-277(a) was a qualifying offense and noting, "That the prosecutor essentially read the police report into the record does not turn it into the sort of evidence that may be relied upon under *Shepard's* modified categorical approach.").

In contravention of *Mathis*' instruction that the district court must establish the elements of the state offense and their correlation to the generic federal offense, the district court here made no findings as to the adequacy of the Connecticut plea until prompted by the government—after the sentence had already been imposed—, at which point the district court answered, "Yes, sir," to the government's inquiry as to whether "Your Honor [is] also in agreement that under Shep[a]rd modified categorical analysis, . . . the plea transcript of the controlled substance offense for Mr. Anderson's prior conviction does count as a career offender predicate." (A33-A34). The district court offered no explanation for this finding and no analysis of the elements of Anderson's Connecticut offense or how those elements equated to

the generic federal offense.[3] The district court said nothing to indicate that it would have imposed the same sentence in the absence of the career offender guidelines. Nonetheless, the Second Circuit found—also without elaboration—that the district court had "properly determined, based on facts confirmed by Anderson during his plea colloquy in state court, that his 2004 conviction qualified as a 'controlled substance offense' under § 4B1.2(b) of the Sentencing Guidelines." (A3).

Under the circumstances, the Second Circuit's decision conflicts with this Court's instruction in *Mathis* that the sentencing court must clearly establish that the elements of the prior conviction correlate to the generic offense in order to use the prior conviction as a career offender predicate. The district court's findings were inadequate and the Second Circuit's decision conflicts with controlling Supreme Court precedent.

Moreover, the error was not harmless. *See* Fed.R.Crim.P. 52(a) (defining "harmless error" as "[a]ny error, defect, irregularity, or variance that does not affect substantial rights . . ").[4] An error in the district court's calculation of the

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[3] The district court appears to have relied on the PSR's summary conclusion that, during the 2004 Connecticut state plea hearing, "Mr. Anderson . . . agreed with the prosecutor's recounting of what had occurred." PSR at ¶ 56. In fact, however, the prosecutor's "recounting" was the summarization of a police field investigation report—precisely the document that this same district court had found to be an unreliable and inadequate basis for a *Shepard* determination in prior cases. *See Carter v. United States*, 731 F. Supp. 2d 262, 274 (D. Conn. 2010) (finding that "the government has not met "the demanding requirement" of showing that Carter's two January 2, 1992 convictions "necessarily involved (or [his prior pleas] necessarily admitted) facts equating to" a predicate crime under the ACCA where the only information available was the statement of conviction in the PSR.).

[4] In fact, the Second Circuit's resolution of this case conflicts with its own precedents. *See*, *e.g.*, *United States v. Mangone*, No. 15-4057, 2016 WL 3391280, at

Guidelines range may only be disregarded as harmless if "the record indicates clearly that the district court would have imposed the same sentence in any event." *United States v. Mandell*, 752 F.3d 544, 553 (2d Cir. 2014), *cert. denied,* 135 S. Ct. 1402, 191 L. Ed. 2d 373 (2015) (quoting *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009)). Thus, where—as here—there is "'at least a reasonable probability that the District Court would have imposed a different sentence' absent the miscalculated Guidelines range when the court 'said nothing to suggest that it would have imposed [the same] sentence regardless of the Guidelines range,'" remand for resentencing is warranted. *Mangone*, 2016 WL 3391280 at *2 (quoting *Molina–Martinez,* 136 S.Ct. at 1348).

The district court's factual findings provide no assurance that the district court "would have imposed the same sentence" even using the correctly calculated Guidelines. *See Mandell*, 752 F.3d at 553; *see also United States v. Anderson, et al.*,

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*1 (2d Cir. June 14, 2016) (Summary Order) (internal citations omitted) (noting that, "We have held that "an incorrect calculation of the applicable Guidelines range will taint not only a Guidelines sentence, if one is imposed, but also a non-Guidelines sentence, which may have been explicitly selected with what was thought to be the applicable Guidelines range as a frame of reference" and applying *Molina-Martinez* to vacate a sentence based on an incorrectly calculated Guidelines range); *United States v. Bennett*, No. 15-0024-CR, 2016 WL 5845687, at *7-8 (2d Cir. Oct. 6, 2016), *as amended* (Oct. 7, 2016) (citing *Molina-Martinez*, 136 S.Ct. at 1346) (remanding for re-sentencing because the district court had plainly erred in its calculation of the Guidelines range, explaining that, "the miscalculated Guidelines range may well have anchored the District Court's thinking as to what an appropriate sentence would be."). In similar circumstances, other Circuits have remanded cases where the district court plainly erred in its Guidelines calculation under *Johnson v. United States*, 135 S.Ct. 2551 (2015), *Mathis*, and *Molina-Martinez*. *See*, *e.g.*, *United States v. Dahl*, 833 F.3d 345, 358–59 (3d Cir. 2016); *United States v. Rojas-Ibarra*, No. 16-40204, 2016 WL 5922609, at *1 (5th Cir. Oct. 11, 2016).

15-238-cr at Dkt. No. 106, at p. 56-59. To the contrary, the record strongly supports the inference that the district court sentenced Anderson to 96 months of incarceration based on the PSR's calculation of the applicable Guidelines range with the inclusion of the career offender enhancement. The district court stated, "The calculation of the guidelines by the probation officer is 262 to 327 months, and I think that the calculation is accurate. However, I also believe that that's excessive under the circumstances, for this particular Defendant." (A28). Taking Anderson's "unfortunate childhood and unfortunate life up to this point" into consideration, the district court then imposed a sentence of 96 months. (A28). In the absence of the career offender designation, it is highly probable that the district court would have departed downward (or varied) from the applicable non-career offender Guidelines range of 77-96 months (CHC IV level 24) and imposed a sentence at or near the mandatory minimum of 60 months of imprisonment.

Importantly, the Second Circuit recently remanded at least one other case for resentencing in which the same district judge made similarly vague findings about the Guidelines range and the appropriate sentence. In *United States v. Thompson*, 808 F.3d 190, 194-96 (2d Cir. 2015), the Second Circuit remanded under *Mandell*, finding that, *inter alia*, the district court's statements that, "I think the PSR accurately has calculated the guideline range," that it had read the parties' sentencing submissions "several times," and that it would adopt the PSR's Guidelines calculations, did not establish that it would have "imposed the same sentence in any event."

The Second Circuit's decision here was contrary to controlling Supreme Court precedent and contrary to the Second Circuit's own prior decisions. Remand for reconsideration and for resentencing in accordance with *Mathis* is warranted.

POINT II:
This Court Should Grant the Petition Because the Second Circuit's Decision Conflicts With Substantive Decisions of the Third, Fifth, and Tenth Circuits.

This Court should grant rehearing because the Panel's decision conflicts with substantive decisions of the Third, Fifth, and Tenth Circuits. In *Chang-Cruz v. Atty. Gen. U.S.*, --- Fed. Appx. ---, 2016 WL 4446063, at *3 (3d Cir. 2016) (non-precedential), the Third Circuit remanded the petitioner's case for further proceedings before the Board of Immigration Appeals, concluding that the record was insufficient to establish whether the New Jersey statute that Chang-Cruz had been convicted of violating (N.J. Stat. Ann. §2C:35-7) was divisible or indivisible and thus, it was impossible to determine with certainty whether Chang-Cruz was convicted of distribution or possession with intent to distribute narcotics or dispensing or possessing with intent to distribute. *Id.* at *4. As the Third Circuit explained:

> [I]f *Mathis* applies (which it does), we cannot conclude that Chang–Cruz was convicted of an aggravated felony because it is not "certain[ ]," see id. whether "distribution" and "dispensing" in § 2C:35–7 constitute alternative elements or alternative means. . . . If they are both elements, we may apply the modified categorical approach to determine the elements of Chang–Cruz's conviction. If they are both means, there is one element satisfied by either distribution or dispensing, in which case § 2C:35–7 sweeps more broadly than § 860, which criminalizes distribution but not dispensing.

Id. at *3. Citing *Mathis*, 136 S. Ct. at 2257, the Third Circuit held that, based on the ambiguous record, "we cannot conclude that [Chang-Cruz] was convicted of a generic federal offense." *Id.*

In *United States v. Hinkle*, 832 F.3d 569, 574–77 (5th Cir. 2016), the Fifth Circuit examined a Texas narcotics statute, Tx. Health & Safety Code §§ 481.112(a), 481.002(8), that contained multiple "listed items" which Texas jurisprudence had previously interpreted as setting forth various "alternative theories" of offense commission. *Id.* at 575-76. The Fifth Circuit found that these "alternative theories" constituted means of offense commission and reversed Hinkle's case for re-sentencing because the Texas statute's criminalization of conduct including "transferring" and "constructively transferring" narcotics "criminalizes a greater swath of conduct than the elements of the relevant Guidelines offense" and the resulting "mismatch of elements" meant that the Texas conviction could not serve as a predicate offense for career offender treatment. *Id.* at 577 (citations and alternations omitted).

In *Zu–Chen Horng v. Lynch*, No. 15-9579, 2016 WL 5416356, at *1–2 (10th Cir. Sept. 27, 2016), the Tenth Circuit remanded a petition to the Board of Immigration Appeals for further analysis of whether the Utah statute that Horng had been convicted of violating, Utah Code Ann. § 58–37–8(2) (1994), which criminalized offenses including "use" of a controlled substance contained alternative elements or alternative means of committing the offense. The Tenth Circuit explained that *Mathis* "made clear that the modified categorical approach can't be

used 'as a technique for discovering whether a defendant's prior conviction, even though for a too-broad crime, rested on facts ... that also could have satisfied the [relevant] elements' of the predicate or disqualifying offense." *Horng*, 2016 WL 5416356, at *2 (citing *Mathis*, 136 S.Ct. at 2254).[5]

In Anderson's case, although the government asserts that the Connecticut statute at issue contains multiple elements rather than multiple means of committing the same element, Connecticut jurisprudence does not speak clearly on the issue. But, as with *Chang-Cruz*, *Hinckle*, and *Horng*, the over-breadth of the Connecticut statute makes the ultimate determination irrelevant to the outcome here. If the statute contains multiple elements and is divisible, the record is insufficient to prove the elements of which Anderson was convicted. If the statute contains multiple means instead, then it sweeps more broadly than the generic federal offense in that it criminalizes "giving," "offering," "administering," and "dispensing," none of which appear in the language of 21 U.S.C. § 841. For these reasons, this Court should grant the petition and remand Anderson's case for re-sentencing.

[5] Analogously, see also *Garcia v. Lynch*, No. 15-9564, 2016 WL 4523895, at *1–2 (10th Cir. Aug. 29, 2016) (remanding under *Mathis* for reconsideration of "whether the alternative mental states contained in Texas Penal Code § 22.01(a)(1) make it a 'divisible' statute for purposes of the modified categorical approach.").

POINT III:
This Case Presents an Ideal Vehicle for the Court to Provide Further Guidance Concerning the Adequacy of a District Court's Sentencing Findings.

Mr. Anderson's petition for a writ of certiorari should be granted because this case presents an ideal opportunity for the Court to clarify that its decision in *Mathis* means exactly what it says—inadequate findings concerning the elements of a prior conviction cannot lead to application of the career offender guideline based on that prior offense. Allowing application of the career offender guideline based on the apparent assumption that a defendant's pro forma plea to having violated a statute, the elements of which are far broader than its generic federal counterpart, necessarily established every element of an offense that could be correlated to an equivalent federal crime, was error. Unless this Court intervenes, such errors are likely to proliferate, causing harm and unreasonably lengthened sentences to numerous defendants in the future.

Mr. Anderson's sentence was three years longer than it would likely have been without application of the career offender guideline. Those three years of his life are years that he will never regain in productive societal membership, whether or not this Court grants his petition. Yet, by granting the petition, this Court would send a message to the lower courts that such errors are not harmless and will not be tolerated.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to consider the questions raised herein.

Dated: New York, NY
March 20, 2017

Respectfully submitted,

Meringolo Law
375 Greenwich Street, 7th Floor
New York, NY 10013
(212) 397-7900
john@meringololaw.com

by:

John Meringolo, Esq.

RECORD NO. _____

In The
Supreme Court of The United States

RICHARD ANDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

John Meringolo, Esq.,*
Meringolo & Associates, P.C.
11 Evans Street
Brooklyn, NY 11201
(347) 599-0992

**Counsel of Record for Petitioner Richard Anderson*

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
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This case was not selected for publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals,
Second Circuit.

United States of America, Appellee,
v.
Vincent Clark, Richard Anderson, Philip Bryant, Robert Santos, Defendants–Appellants.*
No. 14-4656-cr(L), No. 15-238-cr(CON), No. 15-660-cr(CON), No. 15-924-cr(CON)
|
October 25, 2016

* The Clerk of Court is directed to amend the case caption as set forth above.

Synopsis
Background: Defendants were convicted in the United States District Court for the District of Connecticut, Ellen Bree Burns, J., of narcotics offenses, and they appealed.

Holdings: The Court of Appeals held that:

[1] district court's failure to rule on defendant's evidentiary objections did not deprive him of fair trial, and

[2] appeal waiver provision of defendant's plea agreement did not preclude him from challenging $100 mandatory special assessment.

Affirmed.

West Headnotes (2)

[1] **Criminal Law** Evidence in general

District court's failure to rule on defendant's evidentiary objections in narcotics prosecution did not deprive him of fair trial, absent showing of any prejudice resulting from district court's alleged errors.

Cases that cite this headnote

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[2] **Criminal Law** Issues considered

Appeal waiver provision of defendant's plea agreement, in which he agreed not to challenge any sentence that did not exceed 175 months' imprisonment, five-year term of supervised release, and $10 million fine, did not preclude him from challenging $100 mandatory special assessment on appeal.

Cases that cite this headnote

Appeals from judgments of the United States District Court for the District of Connecticut (Ellen Bree Burns, *Judge*).
UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of conviction with respect to defendants-appellants Richard Anderson, Philip Bryant, and Robert Santos are **AFFIRMED**; the Anders motion with respect to defendant-appellant Vincent Clark is **GRANTED**; the Government's motion to dismiss with respect to the appeal of Clark's terms of imprisonment and supervised release is **GRANTED**; and the Government's motion to dismiss with respect to the appeal of Clark's special assessment is construed as a motion for summary affirmance and is **GRANTED**.

Attorneys and Law Firms

FOR DEFENDANTS–APPELLANTS: JOHN MERINGOLO, Meringolo Law, New York, NY, for Defendant–Appellant Richard Anderson;

DAVID A. MORAGHAN, Smith, Keefe, Moraghan & Waterfall, Torrington, CT, for Defendant–Appellant Philip Bryant;

Vito Castignoli, Milford, CT, for Defendant–Appellant Vincent Clark;

RICHARD A. REEVE (Allison M. Near, on the brief), Sheehan, Reeve & Near, New Haven, CT, for Defendant–Appellant Robert Santos.

FOR APPELLEE: MARC H. SILVERMAN (Sandra S. Glover, on the brief), Assistant United States Attorneys, for Deirdre M. Daly, United States Attorney for the District of Connecticut, New Haven, CT.
PRESENT: PIERRE N. LEVAL, RAYMOND J. LOHIER, JR., Circuit Judges, EDWARD R. KORMAN, District Judge.[**]

[**] Judge Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

***31 SUMMARY ORDER**

Defendants Anderson, Bryant, Clark, and Santos appeal judgments of the District Court (Burns, J.) following their convictions of narcotics offenses in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 841(b)(1)(C), and 846. We assume the parties' familiarity with the facts and record of the prior proceedings, to which we refer only as necessary to explain our decision.

[1]First, Anderson challenges the District Court's conduct during trial, alleging among other things that its failure to rule on evidentiary objections deprived him of a fair trial. We disagree because Anderson has not demonstrated any prejudice resulting from the District Court's alleged errors.

Bryant, Anderson, and Santos also challenge evidentiary rulings made by the District Court. None of the rulings were "manifestly erroneous," nor, in any event, did any of the evidence admitted as a result of the challenged rulings "affect[ ] [the defendants'] substantial rights." United States v. Lee, 833 F.3d 56, 73 (2d Cir. 2016) (quotation marks omitted).

Bryant separately contends that the evidence showed multiple conspiracies among Kevin Wilson and the defendants-appellants, not the single conspiracy alleged in the indictment. Bryant's argument lacks merit. A rational jury could find that "each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal." United States v. Sureff, 15 F.3d 225, 229 (2d Cir. 1994) (quoting United States v. Maldonado–Rivera, 922 F.2d 934, 963 (2d Cir. 1990)).

We next address Santos's argument that he never reached a "meeting of the minds" with Wilson regarding narcotics distribution because he intended to rob Wilson all along, and that the District Court should have provided a jury instruction on this defense. The District Court adequately instructed the jury on the meeting-of-the-minds requirement, and Santos was permitted to (and did) make this argument to the jury in any event. See United States v. Rowland, 826 F.3d 100, 115–16 (2d Cir. 2016); United States v. Vasquez, 82 F.3d 574, 577–78 (2d Cir. 1996). For similar reasons, we reject Santos's challenge to the District Court's buyer-seller instruction. See United States v. Coplan, 703 F.3d 46, 87 (2d Cir. 2012).

Anderson, Bryant, and Santos all challenge aspects of their sentences. All of their contentions lack merit. Contrary to Bryant's assertions, the District Court had ample support in the record, including acquitted conduct, to find that Bryant distributed 196 to 280 grams of cocaine base. United States v. Vaughn, 430 F.3d 518, 526 (2d Cir. 2005). Santos's argument that his prior conviction should have been submitted to the jury is foreclosed by Almendarez–Torres v. United States, 523 U.S. 224, 247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). And the District Court properly determined, based on facts confirmed by Anderson during his plea colloquy in state court, that his 2004 conviction qualified as a "controlled substance offense" under § 4B1.2(b) of the Sentencing Guidelines. See United States v. Savage, 542 F.3d 959, 966 (2d Cir. 2008); cf. United States v. Moreno, 821 F.3d 223, 228–29 (2d Cir. 2016). In light of the parties' arguments after briefing, we also conclude that the District Court's determination was consistent with Mathis v. United States, —— U.S. ——, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016).

[2]Finally, we address Clark's appeal. Clark pleaded guilty and agreed not to challenge any sentence that did not exceed 175 months' imprisonment, a five-year term of supervised release, and a $10 million ***32** fine. Clark now appeals his sentence, which fell within the range set forth in the plea agreement, with the addition of a $100 mandatory special assessment. Counsel for Clark has filed an Anders brief and a simultaneous motion to withdraw as counsel, and the Government has filed a motion to dismiss Clark's appeal. Upon due consideration, the Anders motion is granted. See United States v. Gomez–Perez, 215 F.3d 315, 319, 321 (2d Cir. 2000). We also grant the Government's motion to dismiss Clark's appeal with respect to Clark's terms of imprisonment and supervised release. Because the special assessment is not mentioned in the appellate waiver provision of Clark's plea agreement, he is not barred from challenging it on appeal. See, e.g., United States v. Cunningham, 292 F.3d 115, 117 (2d Cir. 2002). Nevertheless, any challenge to the special assessment lacks merit. See 18 U.S.C. § 3013.

We have considered all of the defendants' remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgments of the District Court with respect to Anderson, Bryant, and Santos are **AFFIRMED**; the Anders motion with respect to Clark is **GRANTED**; the Government's motion to dismiss with respect to the appeal of Clark's terms of imprisonment and supervised release is **GRANTED**; and the Government's motion to dismiss with respect to the appeal of Clark's special assessment is construed as a motion for summary affirmance and is **GRANTED**.

All Citations

664 Fed.Appx. 29

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of December, two thousand sixteen.

United States of America,

Appellee,

v.

Vincent Clark, Richard Anderson, Philip Bryant, Robert Santos,

Defendants - Appellants.

ORDER

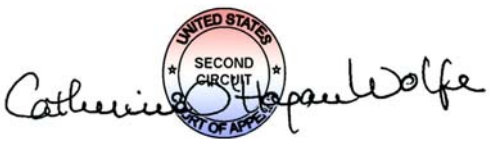
Docket Nos: 14-4656, 15-238, 15-660, 15-924

Appellant, Richard Anderson, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	.	Case No. 3:12-CR-00104 (EBB)
Plaintiff,	.	
	.	New Haven, Connecticut
v.	.	January 14, 2015
	.	
RICHARD ANDERSON,	.	
	.	
Defendant.	.	

. . . . . .

SENTENCING HEARING
BEFORE THE HONORABLE ELLEN BREE BURNS
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff:	Office of the U.S. Attorney By: DAVID VATTI, AUSA MARC H. SILVERMAN, AUSA 157 Church Street New Haven, CT 06510
For the Defendant:	Law Offices By: NEAL PATRICK ROGAN, ESQ. 315 Post Road West Westport, CT 06880
Official Court Reporter:	MR. STEPHEN C. BOWLES

(Proceedings commenced at 10:21 a.m.)

THE COURT: Good morning.

MR. VATTI: Good morning, Your Honor.

MR. ROGAN: Good morning, Your Honor.

THE COURT: Please be seated.

We're here this morning for the sentencing of Mr. Bryant and Mr. Anderson, excuse me.

I believe Mr. Anderson is first, isn't he?

MR. VATTI: Yes, Your Honor.

THE COURT: Yes. Mr. Anderson.

MR. ROGAN: Good morning, Your Honor.

THE COURT: Good morning.

Would you come to the lectern, please, Mr. Anderson and your attorney.

Sir, have you read your presentence report?

THE DEFENDANT: (No response.)

THE COURT: Have you read your presentence report, sir?

MR. ROGAN: Me, Your Honor?

THE COURT: No, the client, Defendant, yes.

THE DEFENDANT: Yes.

THE COURT: You did.

And you discussed it with your attorney?

THE DEFENDANT: Yes.

THE COURT: Did he answer all the questions

you had about it, sir?

THE DEFENDANT: Yes.

THE COURT: Okay.

I'll hear from you, sir.

MR. ROGAN: You would like me to proceed, Your Honor?

THE COURT: Please.

MR. ROGAN: I'm having difficulty hearing you.

THE COURT: I'm sorry. I'm not close enough to the microphone. Okay. All right. Yes.

MR. ROGAN: Your Honor, again, on behalf of Mr. Anderson, Neal Rogan.

What I want to focus on, Your Honor, is several things I brought out in my memorandum in aid of sentencing which was filed on January 7, 2015.

THE COURT: Yes, sir.

MR. ROGAN: I think the most important issue that I would like to bring to the Court's attention is the notion, as articulated in the presentence investigation, PSR, as well as the Government's memorandum in opposition, that I do not believe that Mr. Anderson should be categorized as a career offender, and the basis for that, Your Honor, is the predicate state court conviction.

And I attached to the memorandum in aid of -- of that sentencing memorandum, the actual transcript which occurred here in New Haven back in 2004, and I'd like to bring to the Court's attention to specific areas that I think are important.

You actually wrote a decision in 1988 when discussing the modified categorical approach to these predicate felonies, and you specifically held that one of the important considerations in determining whether an underlying conviction could be used for sentencing purposes, was whether or not, in fact, the defendant pled guilty before any of the predicate facts giving rise to that underlying canvas had occurred, and in point of fact, Your Honor, in this case, when Mr. Anderson was sentenced in front of Judge Esposito at the Superior Court in Stamford, the very first thing he did was to plead guilty. Then it was only after the fact that the state's attorney's office read some predicate facts into the record. That's one specific problem.

Now, it is true in the plea colloquy that later on the Judge says to Mr. Anderson, "Is that basically correct??, however, as you held, that's not really good enough because someone is actually pleading guilty before they know what those predicate facts are.

In addition, Judge Burns, the other issue that presents itself in your decision in Collins, is the fact that --

THE COURT: It all comes back to haunt me. Okay.

MR. ROGAN: Yes, that's right.

And the other thing that's of very critical significance here, is the Judge actually made no explicit factual finding, he just said, "Okay, this is going to be your disposition," and that's the end of it.

So, I think, based upon your decision, and I think what the career offender statute is really intended to cover, that Mr. Anderson cannot be correctly categorized as a career offender for sentencing purposes.

I also want to bring out to the Court's attention that these offenses, the actual offense dates occurred at the time that Mr. Anderson was a minor. The sentencings occurred after he reached the age --

THE COURT: He was 17 when they occurred.

MR. ROGAN: Correct, Your Honor, so the sentencing occurred after he reached the age of majority.

I also think it's important for the Court to

consider, in the totality of the circumstances here also, that while the PSR, with all due respect to the probation office, wants to categorize him as a career offender, those offenses occurred in a very short time frame, when Mr. Anderson was quite young, and his total amount of time that he's actually been incarcerated is, and I think the Government is in agreement with this as well as the probation office, is a total of less than five years, and I think the Court needs to weigh those factors in considering whether a downward departure from the guidelines is appropriate, as I think it is here.

The other issues that I want to bring to the Court's attention are the issues surrounding the trial, in the context of this alone, Judge. One has to look at what Mr. Anderson's alleged role was, verses even his two co-defendants that were tried almost a year ago today, here in this courtroom, Mr. Santos and Bryant, and we objected to the PSR, Your Honor, I think for a number of valid reasons.

There was numerous paragraphs contained in the presentence report that talked about guns and significant quantities of heroin and powder cocaine and crack cocaine. However, as I'm sure Your Honor recalls, during the testimony, none of that, none of

that was related to Mr. Anderson at all. In fact, he was only convicted on one single count of possession of 28 grams or more of crack cocaine. So I think it's extremely prejudicial to include that in the presentence report, or to consider for purposes of sentencing.

I also note that the Government, in their sentencing memorandum, quotes excerpts from the trial, where Mr. Anderson allegedly threatens to hurt someone, but as -- if Your Honor recalls, during the course of this trial almost, as I said, a year ago, it turned out that that was nothing more than puffery and, in fact, the investigating officers went to check out to see if any threats and been carried through and, in point of fact, they had not been.

So, Mr. Anderson, however you look -- you want to characterize him, he doesn't rise to the level where the Court should consider the conduct of the other co-conspirators, except to acknowledge he clearly didn't have a leadership role and, as we tried to point out during the course of the trial, Your Honor, Mr. Anderson is actually a drug user and has a clearly-defined substance problem.

And if you look, Your Honor, I also attached to the memorandum in aid of sentencing, correspondence

from Wyatt Detention Center where Mr. Anderson has been held now for two-plus years, and from the very beginning he has been going to mental health treatment and counseling, and his diagnoses are depressive disorder and arrest, post-traumatic stress disorder, and I'm going to talk to you a little bit about that, and polysubstance dependence.

So that's really what we have here, is we have a 28 year-old man who has a long history of substance abuse and dependence, not someone who is a career offender and has a long and protracted history of that type of behavior.

I also would ask the Court to look at what was developed during the presentence report, and what we know from the presentence report is that from as early as age eight, Mr. Anderson was exposed to the rawest kind of violence. He saw his father shot dead in Jamaica as a young man.

From the age of eight, he was repeatedly, Your Honor, sexually assaulted by the very people charged with acting as his care givers. When he was placed in foster homes, that torment and abuse continued to the point where Mr. Anderson was actually sexually assaulted or raped at the age of 16 and, as I point out in my sentencing memorandum, Your Honor,

given his culture, even though he's a U.S. citizen, as a Jamaican, that brings a tremendous amount of cultural shame to him, and that's something that he has struggled with.

And I provided to the probation office -- There are numerous studies that show that people who are victims of this type of violence and this type of sexual assaults, the long-term consequential effects of that behavior, Your Honor, are overwhelming, and I don't offer that, Your Honor, as an excuse, but as an explanation, and despite what the probation office thinks, I believe that Mr. Anderson can be rehabilitated and can be a productive member of society.

And I also attached, Your Honor, to the memorandum in aid of sentencing, a letter from his very own mother, who talks about the fact that at a very young age she was absent, she struggled with substance abuse, and that Mr. Anderson had physical violence visited upon him again, and I'm not talking about one time incidents, Your Honor, it was repeated, it was systemic, and obviously it's had a long-term deleterious affect on Mr. Anderson.

And what he needs, Your Honor, is rehabilitation and help, and I don't believe that at

age 28, that he’s beyond help and that he's beyond help, and in all due respect to the Government's position regarding the fact that there's no documentation regarding the sexual assaults or the violence, as a matter of common sense, and Your Honor saw him, you know, no one thinks too, at age 8 when they’re carrying a chain, or age 10, or age 16, no one thinks, “Oh, I need to document this if I get in trouble down the road.”

I think it was difficult and emotional for Mr. Anderson to come forward with that information. I will tell you, as an officer of the court, having spent two years with Mr. Anderson, and visited him on numerous occasions, he never came forward with that information until he met with Officer Welks and myself at Wyatt Detention Center, Your Honor, and I think if you look at the guidelines and don't treat Mr. Anderson as a career offender, I think he's in a guideline range of 63 to 78 months, and even the Government agrees in their sentencing memorandum, that obviously, due to the advisory nature of the guidelines, that the advisory guidelines here are far too high, given the totality of Mr. Anderson's life experiences.

I also need to obviously address to Your Honor, the issue of the crack cocaine disparity and the

one-to-one ratio, as articulated in our memorandum of -- in aid of sentencing.

I think, again, if Your Honor steps back and really looks at what happened here, whether we agreed or not with the jury's decision, what the jury found was that Mr. Anderson had barely gone above that 28 grams or more. I think the Government calculates it at 35 grams, and I think despite the Government's position, that a one-to-one ratio would be appropriate here because I understand the Court's need and what the Court wants to do as far as deterrence and rehabilitation.

I don't believe, Judge, that at age 28, anyone, and specifically this man, Richard Anderson, is beyond rehabilitation, and nothing is going to be accomplished by burying this guy in prison for the next 15 or 10 or 20 years. It's going to do nothing. He has more good in him than bad. I know the Court may not agree with that, but if you look at the total of what his life has been to date, it's almost inevitable that we would find ourselves here in this position, and I think you also have to look at how the other co-defendants in this alleged vast conspiracy have been treated, from a sentencing standpoint, and I would ask this Court, based upon everything that's included in my

pre-sentencing memorandum, my arguments that I've made here today, my objections to the PSR, to sentence Mr. Anderson as close to the statutory mandatory minimum as possible, and I believe that that would affect the roles of deterrence, punishment and rehabilitation.

And again, I can't emphasize enough, that this is a gentleman who's already been diagnosed as having post-traumatic stress disorder, clearly from what he went through as a young man, and this is a man who clearly needs treatment for multiple substance issues, as identified in the PSR report.

If I could just have a moment, Your Honor, to confer with my client?

THE COURT: Yes.

(Mr. Rogan and the Defendant confer.)

MR. ROGAN: Your Honor, just briefly, and I know this is within the Court's discretion, but my client would like to have the availability of the 500-hour drug program, and I know that the Court doesn't have complete control but --

THE COURT: No, but I can make recommendations.

MR. ROGAN: Yeah, he would like to be sent to South Carolina for his imprisonment, and --

THE COURT: There again, I can recommend

that, but I can't guarantee it.

MR. ROGAN: I would ask that the Court -- Respectfully, I would ask that the Court recommend both of those things, and I've explained --

THE COURT: South Carolina?

MR. ROGAN: Yeah.

And I've explained to my client that ultimately it's within the control of the Bureau of Prisons but --

THE COURT: Correct.

MR. ROGAN: -- a recommendation would be helpful.

THE COURT: Okay.

MR. ROGAN: Thank you, Your Honor.

THE COURT: Is there anything you'd like to say, sir?

THE DEFENDANT: I would like to say -- I like to thank my attorney for picking up my case and doing a wonderful job representing me.

THE COURT: I can't hear you.

THE DEFENDANT: I would like to thank my attorney --

THE COURT: Yes.

THE DEFENDANT: -- for picking up my case and representing me, and doing a wonderful job during trial

and during all my proceedings during, you know, my whole situation. That would be it.

Thank you.

THE COURT: May I hear from the Government.

MR. VATTI: Good morning, Your Honor.

THE COURT: Good morning.

MR. VATTI: Just for the record, I'm Dave Vatti for the United States, and with me today at counsel table, is Assistant U.S. Attorney Marc Silverman.

I would like to start with the issue of whether or not Mr. Anderson is properly designated as a career offender, and a few minutes ago Your Honor mentioned that the decision in the Collins case has come back to haunt you, and I've read that case and I want to show Your Honor that under the facts of that case, I think Your Honor reached the correct decision.

THE COURT: I hope so.

MR. VATTI: In that case, the defendant had actually entered a plea of guilty, and then on a completely separate day was brought back into court where the prosecutor simply read the police report into evidence as the factual basis for the plea. The Defendant did not thereafter agree to the facts that were set forth in the police report, did not confirm

those facts, did not admit those facts.

So in the Collins case, under those facts, there was not an admission by the Defendant that he was accepting that factual basis and admitting that factual basis, so therefore, that particular offense in that case could not be used as a career offender predicate, but the facts of this particular case, with respect to the plea transcript that was attached to the Defendant's sentencing memorandum regarding the drug conviction that we claim is a career offender predicate, meets all of the requirements of a Shepherd modified categorical analysis.

The Defendant pled guilty. The prosecutor then enunciated the factual basis. The state court judge then turned to of the defendant and asked if those facts were basically correct. The defendant made the admission that they were. That is sufficient under Shepherd modified categorical analysis, for that conviction to count as a controlled substance offense for the purposes of a career offender designation.

So the transcript meets all the requirements, and therefore, based on his prior robbery conviction and based on the narcotics conviction that qualifies as a controlled substance offense, he has the required two predicates, and therefore, he is appropriately

designated a career offender.

Now, Mr. Rogan says that because the Defendant pled guilty first, and then the factual basis was enunciated and he agreed to it, that that somehow changes the analysis. It doesn't. That's simply a matter elevating form over substance. I have read numerous state court plea transcripts over the years, particularly in this context, and it's very often the case in state court, where the Defendant is put to plea and then the prosecutor enunciates the factual basis, and then the Court inquires of a defendant, whether he agrees with that factual basis or not. That is very typically done in state court, and to disregard the career offender designation on that basis, as Attorney Rogan would like you to do, is simply elevating form over substance. It shouldn't matter.

The second point I'd like to address with Your Honor, is the approach to take with this sentencing.

Now, I think what Mr. Rogan and Mr. Anderson would like you to do is focus on the fact that this is about 35 grams of crack, and I would agree that the trial in this case, in terms of what Mr. Anderson was doing with Mr. Wilson and with Mr. Wilson's associate, Jesus Morales, involved 35 grams of crack, and that was appropriately what the trial was about because that's

what we charged, but at sentencing the perspective is very different, and I think what Section 3553(a) requires Your Honor to do, is look at the entire body of work that the Defendant has presented: his history, his background, his characteristics, not just 35 grams of crack. It's what has Richard Anderson's life been about that has brought him here before Your Honor for sentencing. Let's look at that entire picture of what it is.

And the picture that emerges is not one where you can look at it and say that there is something there that would give the Court confidence that Richard Anderson intends, in the future, to be a productive citizen, that he is committed to being a productive member of society. There's nothing in Mr. Anderson's background and the way he has conducted himself that has brought him here today, that would give the Court that confidence. So I say that for the following reasons.

I agree that the two predicate convictions occurred when he was 17 years old, but let's look at what he’s done in the seven years prior to coming to trial in this particular case.

Between the years of 2004, when he first went into jail, and April 2011, that roughly seven-year

period, he spent about five of those years in jail for the robbery conviction, for the drug conviction, and then violated probation. After he got out, he was sent back in for an additional period of incarceration.

So, out of the seven years before the offense conduct in this case occurred, he spent five of those years in jail.

He got out of jail in April of 2011. Within six months of getting out of jail, after spending nearly five years in jail, we're intercepting him in a wiretap where he is telling people that -- telling Kevin Wilson that he has the stuff flying (phonetic) everywhere.

He's telling Kevin Wilson that if he doesn't get his money, he's going to tie up Jesus Morales' girlfriend, that he's going to "fuck up Mr. Morales." I'm quoting here directly from the wiretap call.

That's the mind-set of Richard Anderson after he got out of jail, and having spent nearly five years there.

And between 2006 and 2011, it's pretty clear that Mr. Anderson made his living as a street-level crack dealer.

So this isn't about 35 grams of crack. He himself admitted, in a post-arrest statement, that he

had been selling crack to support his family.

There was no effort at all that we can see from the factual record and the PSR, that he ever made an effort to make an honest living. So when Mr. Rogan stands here and says, you know, there's a possibility that he's going to be a productive member of society, we can only look at the track record that he's already established, and there's nothing from that track record that would give the Court that confidence that he would do that.

That all having been said, the career offender range is 210 to 262 months. There are certainly things that the Government has considered that I think temper our sentencing position. I do feel that that is excessive. Balancing his criminal history, his history and his background, the offense conduct in this case, a true picture of his offense conduct, which is that he has been a career drug dealer, leads us to conclude that a sentence in the range of 12 to 13 years is an appropriate sentence here, and we would ask Your Honor to consider imposing that.

THE COURT: Thank you.

Would you come back to the lectern, please.

MR. ROGAN: Your Honor, if I could just --

I'm sorry, I'm having difficulty --

THE COURT: I just asked you to come back to the lectern.

MR. ROGAN: Okay.

THE COURT: That's all.

And your client, of course.

MR. ROGAN: I just want to briefly address --

THE COURT: Sure.

MR. ROGAN: -- the Government's --

THE COURT: Would he come up here, please.

MR. ROGAN: Sure.

THE COURT: Defendant. Yes. All right.

MR. ROGAN: Respectfully, we take (phonetic) AUSA Vatti's argument regarding his career offender status and how your decision isn't applicable here.

Like Mr. Vatti, I've actually taken numerous pleas at the state court level, and respectfully, Your Honor, it's not a matter of form over substance, okay? And while the facts are somewhat different in the Collins analysis, your legal analysis was correct because in order to find a predicate underlying felony, the Court has to find a specific factual finding, and I would encourage the Court to look at your own decision and determine whether or not the Judge made any specific factual finding as to narcotics for Mr.

Anderson, and the answer is unequivocally "No," and the fact that the guilty plea came first matters because as Your Honor knows from your own experience and years on the bench, defendants do plead guilty, and then they read facts into the record and the judge says, "Are they essentially correct?", not "Do you agree that you were and possession of X, Y or Z?"

So, in a plea colloquy you have a different set of -- situation. So if it were form over substance I wouldn't be making the argument. It matters, and it matters here, from Mr. Anderson's perspective, and I would be remiss if I didn't point out to the Court, that while I respect what the U.S. Attorney's office is trying to do here, do we really believe somebody that at least 28 years old, is beyond all hope and -- because of their limited track record, by the way, Your Honor, as a minor, okay, which led him to incarceration which, given his factual background, which no one really disputes, it's almost inevitable that this man is beyond rehabilitation, and a sentence of 10 to 13 years is appropriate?

I respectfully beg to differ, and while I know that the rules at a sentencing are different from the evidence standard at time of trial, there was no evidence to suggest that in the interim, between Mr.

Anderson's release from incarceration to the time of his arrest, that he was engaged in the business of being a drug dealer, none. So that's an inference that the Government would like you to draw in order to prejudice or bias -- be biased against my client, and I would respectfully suggest to the Court, there at least has to be some measure of that means, and there isn't any until Mr. Anderson is picked up, as Attorney Vatti correctly points out, on the wiretaps.

And again, with that, Your Honor, I have nothing further to add.

THE COURT: All right. Thank you.

Did you want to say anything further, sir?

THE DEFENDANT: No, ma'am.

THE COURT: May I hear from the Government?

MR. VATTI: Your Honor, I will rest on the brief that I submitted, Your Honor.

THE COURT: The calculation of the guidelines by the probation office is 262 to 327 months.

A review of -- Would you come back to the lectern, please. I'm about to sentence you.

MR. ROGAN: Your Honor, we're having great difficulty --

THE COURT: I'm terribly sorry.

MR. ROGAN: It's okay, Your Honor.

THE COURT: It's not picking up my voice.

MR. ROGAN: -- difficulty hearing you. Now we can, Your Honor.

THE COURT: Yes.

The calculation of the guidelines by the probation officer is 262 to 327 months, and I think that the calculation is accurate. However, I also believe that that's excessive under the circumstances, for this particular Defendant.

I'm taking into consideration all of the factors that you have pointed out, sir, and Mr. Anderson has a unfortunate childhood and unfortunate life up to this point. I appreciate that, one can't ignore it, and I think that in deference to that situation, a downward departure is appropriate and I'm going to sentence and I do sentence Mr. Anderson to 96 months of incarceration.

You will be placed on supervised release, sir, for a period of five years. Supervised release begins when you are released from prison, runs for whatever term the Court has set, and if, during that time, you violate any of the conditions of your supervised release, you may be required to return to court to serve a further term.

So you're -- when you are released, your

probation officer will explain to you what the standard conditions of supervised release are, but to those I add the following:

The first is self-evident. You shall not commit another federal, state or local offense;

you shall not unlawfully possess a controlled substance;

you shall refrain from any unlawful use of a controlled substance, and submit to one drug test within 15 days of your release on supervised release, and at least two periodic drug tests thereafter, to determine whether you have reverted to the use of a controlled substance.

It's in your best interest, sir, not to be using a controlled substance; you realize that?

THE DEFENDANT: Yes, ma'am.

THE COURT: I'm not imposing a fine. You're not in a position to pay a fine, but there is a $100 mandatory special assessment which must be paid, and the payment of that assessment is also a condition of your supervised release;

and you shall cooperate in the taking of a DNA sample.

Additionally, sir, you shall participate in a program approved by the probation office, for inpatient

or outpatient substance abuse treatment and testing in the discretion of the probation office, and to the extent that you can pay a portion or all of the cost of that treatment, you shall be required to do so based on your ability to pay, as determined by the probation officer;

you shall not possess a firearm or other dangerous weapon. I caution you, sir, that having been convicted of a felony, the possession of a weapon by you would be another federal crime;

you shall be engaged in an education or vocational training program unless you are able to obtain full-time employment, and you shall participate in a program approved by the probation office for inpatient or outpatient mental-health counseling and treatment.

Given your background, sir, I think that would be very beneficial to you, and to the extent that you could pay a portion or all of the cost of that treatment, again, as determined by the probation office, you shall be required to do so.

I'm not imposing a fine on you, sir, you're not in a position to pay a fine, however, there is a $100 mandatory special assessment which you shall pay.

Now, sir, if you and your attorney believe

that you wish to take an appeal from the Court's sentence, you must file your notice of appeal within 14 days.

You are CJA counsel, are you, sir?

MR. ROGAN: I am, Your Honor.

THE COURT: Well, I'll continue that -- you in that role if you and your client determine to take an appeal from my sentence, okay?

MR. ROGAN: Yes, Your Honor.

THE COURT: Now, you want to have him incarcerated where?

MR. ROGAN: In South Carolina, Your Honor.

THE COURT: Okay.

Now, I want you to understand, Mr. Anderson, that I have no control over what the Bureau of Prisons does. When I make recommendations for particular areas, they tried to accommodate it. For their own reasons, they may not be able to do so, but I do make that recommendation as requested by the Defendant.

MR. ROGAN: Thank you, Your Honor.

THE COURT: Thank you.

MR. ROGAN: And the 500-hour --

THE COURT: Oh, yes, the 500-hour drug program, yes. I want you to participate in that, sir, while you are incarcerated. I think you need it and I

think it will be vastly beneficial to you if you successfully complete that program.

Also, it will serve to reduce your sentence somewhat, okay?

THE DEFENDANT: Okay. Your Honor. Thank you.

THE COURT: I want you to get that problem under control.

THE DEFENDANT: All right.

MR. ROGAN: Your Honor?

THE COURT: Yes.

MR. SILVERMAN: I just wanted to catch your attention. I believe AUSA Vatti has a few housekeeping matters.

MR. VATTI: I do, Your Honor.

THE COURT: Yes, sir?

MR. VATTI: Fortunately, our deputy appeals chief is sitting here so he reminds me of these items.

THE COURT: Yes, he's pretty sharp.

MR. VATTI: He is very sharp, Your Honor. So just a number of housekeeping matters, respectfully.

First of all, I wanted to confirm with Your Honor, that the record at sentencing that you considered, it is the Defendant's memo along with the exhibits that were attached to that memo, --

THE COURT: I certainly --

MR. VATTI: -- the Government memo and the PSR.

THE COURT: Yes, sir.

MR. VATTI: I'm not aware of any other documents that were part of the record at sentencing.

THE COURT: Yes. I considered them all.

MR. VATTI: Secondly, Your Honor, I know that Mr. Rogan had mentioned some objections to various factual assertions in the PSR, that were included. I don't know that it's necessary to resolve all of those objections to factual assertions.

I think the Government made clear that it was not arguing that Mr. Anderson had engaged in any particular violence. Certainly, there was language of threats, but none were carried out.

THE COURT: Yes.

MR. VATTI: We did not attribute any firearms to him, so my suggestion is that we can leave those there. It doesn't seem to have affected Your Honor's imposition of a sentence, and otherwise, I just wanted to confirm that Your Honor is adopting all of the factual statements in the PSR.

THE COURT: I do.

MR. VATTI: And is Your Honor also in

agreement that under Shepherd modified categorical analysis, that the plea transcript of the controlled substance offense for Mr. Anderson's prior conviction does count as a career offender predicate?

THE COURT: Yes, sir.

MR. VATTI: I also wanted to confirm, Your Honor, that in imposing sentence, that Your Honor considered all of the factors set forth in Section 3553(a)?

THE COURT: I hope so. Yes.

MR. VATTI: And lastly, I know that an argument was raised regarding the one-to-one ratio, and I'd just ask Your Honor to confirm that while you considered that argument, you did not believe that the one-to-one ratio was appropriate in this case.

THE COURT: Not in this case.

(Pause.)

MR. VATTI: Your Honor had articulated previously, that this was -- the sentence you imposed, of 96 months, was a downward departure from the --

THE COURT: Yes.

MR. VATTI: -- career offender range.

THE COURT: Yes, it -- the guideline range is 262 to 327 months. That's a significant departure.

MR. VATTI: I wanted to clarify whether Your

Honor intended a downward departure or simply a variance on a non-guideline sentence under 3553, That maybe --

THE COURT: Is that critical --

MR. VATTI: -- on appeal --

THE COURT: All right. It's a variance.

MR. VATTI: Thank you, Your Honor.

Anything else, Gentlemen?

MR. ROGAN: Nothing further, Your Honor.

THE COURT: Did I give the Defendant notice of his right to take an appeal? I believe I did.

MR. ROGAN: You did, Your Honor.

THE COURT: And you're continued in that capacity, sir, if you wish to appeal.

MR. ROGAN: Understood, Your Honor.

THE COURT: Anything else, Gentlemen?

THE CLERK: Did we dismiss the original Indictment?

MR. VATTI: We would move to dismiss the original Indictment, Your Honor.

THE COURT: That's granted. Yes. Okay.

MR. VATTI: Thank you, Your Honor.

THE COURT: Thank you.

Excuse me, may I see you on another matter?

MR. SILVERMAN: Yes, Your Honor.

(Proceedings concluded at 11:55 a.m.)

CERTIFICATE

I hereby certify that the foregoing 31 pages are a complete and accurate transcript of my original stenomask voice notes taken of the excerpt of sentencing hearing in the matter of: THE UNITED STATES OF AMERICA, Plaintiff, versus RICHARD ANDERSON, Defendant, Criminal Action Number 3:12-CR-00104 (EBB), which was held before the Honorable Ellen Bree Burns, United States District Court Judge, 157 Church Street, New Haven, Connecticut, on January 14, 2015.

_____ April 12, 2015

STEPHEN C. BOWLES

Official Court Reporter

NO: N23NCR04-0027182S	:	SUPERIOR COURT
STATE OF CONNECTICUT	:	G.A. #23
v.	:	AT NEW HAVEN, CONNECTICUT
RICHARD ANDERSON	:	OCTOBER 6, 2004

P L E A & S E N T E N C E

BEFORE THE HONORABLE GERARD ESPOSITO, JUDGE

A P P E A R A N C E S :

Representing the State of Connecticut:

ATTORNEY RICHARD PALOMBO & ATTORNEY JOSEPH LAMOTTA
Assistant State's Attorneys
121 Elm St.
New Haven, CT 06510

Representing the Defendant:

ATTORNEY ROBERT ARNOLD
Attorney at Law

Recorded By:
Meghan Gleason

Transcribed By:
Meghan Gleason
Court Recording Monitor
121 Elm St.
New Haven, CT 06510

ATTY. PALOMBO: Richard Anderson, line eleven. Richard Anderson.

THE COURT: He's incarcerated I have, counsel, and I have him represented by Mr. Bunington (phonetic).

ATTY. PALOMBO: Okay. Pass.

(The case is passed and recalled later that day.)

ATTY. LAMOTTA: Richard Anderson, line eleven.

ATTY. ARNOLD: Good afternoon, your Honor. Attorney Robert Arnold representing Richard Anderson who's present at counsel table.

THE COURT: This case goes back to February 21st?

ATTY. LAMOTTA: The State's filing a possession of narcotics with intent to sell, 21a-277a, substitute information. Recommendation is two and a half years to serve concurrent with a sentence the defendant just received in Part A.

THE COURT: Is that your understanding, counsel?

ATTY. ARNOLD: That's my understanding, your Honor.

THE COURT: Put him to plea, please.

THE CLERK: Docket number CR04-27182, under substituted information you're charged with possession of narcotics with intent to sell, 21a-277a, what is your plea, guilty or not guilty?

MR. ANDERSON: Guilty.

ATTY. LAMOTTA: 2/21/04, field investigation, narcotics investigation, the defendant ran from the police, threw down three plastic bags containing a total of 11.3 grams suspected crack cocaine, tested positive, street value three hundred dollars.

THE COURT: Mr. Anderson, I'm going to ask you a series of questions, none of which are designed to trick or embarrass you. If there's anything that I ask that you do not understand, please stop me. Excuse me. Have you taken any drugs, alcohol or prescribed medicine today that would affect your ability to understand what's going on here today?

MR. ANDERSON: No, sir.

THE COURT: Have you had enough time to talk to your attorney about your decision to enter this plea today and has your attorney explained things to you in words and phrases you can understand?

MR. ANDERSON: Yes, sir.

THE COURT: Has your attorney explained to you the elements of possession of narcotics with intent to sell, that is did he tell you what the State would have to prove if this case had gone to trial and the evidence the State claims they have to prove this, did he go over that with you?

MR. ANDERSON: Yes.

THE COURT: Have you done so, counsel?

ATTY. ARNOLD: Yes, I have.

THE COURT: Are you satisfied with the help and advice that your lawyer's given to you?

MR. ANDERSON: Yes.

THE COURT: Now, do you understand that when you enter these pleas today, you give up certain of your rights. do you understand you're giving up your right to plead not guilty or to continue to plead not guilty, your right to remain silent, your right to a trial, your right to force the State to prove these charges at a trial by what's called beyond a reasonable doubt, your right to confront and cross-examine any State's witnesses, present evidence and call witnesses on your own behalf and testify yourself if you wanted to at a trial, do you understand you're giving up all those rights?

MR. ANDERSON: Yes.

THE COURT: Do you understand if I accept your plea today, there's not gonna be a trial and you cannot take it back?

MR. ANDERSON: Yes.

THE COURT: Has anybody threatened you, forced you or promised you anything to enter this plea today?

MR. ANDERSON: No, sir.

THE COURT: A few minutes ago, the prosecutor told me what happened. Is what the prosecutor told me basically correct?

MR. ANDERSON: Yes.

THE COURT: Now, do you understand that the maximum penalty for this offense is seven years of jail time, a -- excuse me, no, fifteen years of jail time, a five thousand dollar fine -- excuse me, seven -- fifteen years of jail time, fifty thousand dollar fine and five years probation. Do you understand that?

MR. ANDERSON: Yes.

THE COURT: Are you presently on probation or parole?

MR. ANDERSON: No.

THE COURT: Do you have any cases pending in this court or in any other court?

MR. ANDERSON: No.

THE COURT: If you are not a citizen of the United States, you are hereby that conviction of this offense may have the consequence of deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States. Do you understand that?

MR. ANDERSON: Yes.

THE COURT: Now, do you understand that because this is a felony, you're going to have to give a DNA sample to the Department of Corrections, you understand that?

MR. ANDERSON: Yes.

THE COURT: Have you understood all the questions I've asked you?

MR. ANDERSON: Yes.

THE COURT: Do you have any questions for me?

MR. ANDERSON: No.

THE COURT: Either counsel know of any reason why the Court should not accept the plea?

ATTY. LAMOTTA: The State does not.

ATTY. ARNOLD: No, your Honor.

THE COURT: Both counsel waiving a PSI?

ATTY. LAMOTTA: The State waives.

ATTY. ARNOLD: Yes, it's waived, your Honor.

THE COURT: The plea is found to be knowingly, intelligently and voluntarily entered with the adequate advice and effective assistance of counsel. There's a factual basis for the plea, the plea is accepted, a finding of guilty may enter. Anything you want -- either counsel want to say before I impose sentence?

ATTY. LAMOTTA: Nothing from the State.

ATTY. ARNOLD: No, your Honor.

THE COURT: Mr. Anderson, is there anything you want to say before I impose the sentence?

MR. ANDERSON: No, sir.

THE COURT: On the substituted information, 21a-277a, I'm going to impose two and a half years to serve concurrent with his recently imposed Part A

sentence. Fees and costs are waived. Nolles are noted on the balance of the charges. You're all set, Mr. Anderson.

ATTY. LAMOTTA: The State would ask that the money go to the state, the drugs be destroyed.

THE COURT: So ordered.

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NO: N23NCR04-0027182S	:	SUPERIOR COURT
STATE OF CONNECTICUT	:	G.A. #23
v.	:	AT NEW HAVEN, CONNECTICUT
RICHARD ANDERSON	:	OCTOBER 6, 2004

C E R T I F I C A T I O N

I hereby certify the foregoing pages are a true and correct transcription of the audio recording of the above-referenced case, heard in Superior Court, G.A. #23, New Haven, Connecticut, before the Honorable Gerard Esposito, Judge, on the 6th day of October, 2004.

Dated this 3rd day of July, 2013 in New Haven, Connecticut.

Meghan Gleason
Court Recording Monitor