No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN DENTON ROUSE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Chapman v. United States*, 500 U.S. 453 (1991), this Court explained that it is proper to include the weight of a cutting agent when determining the total weight of a "mixture or substance containing a detectable amount" of a particular drug. *Id.* at 459-60 (quoting 21 U.S.C. § 841(b)(1)(A)). The results of which "[i]n some cases the concentration of the drug in the mixture [would be] very low," but concluding that Congress intended for the entire mixture or substance to be weighed so "long as it contains a detectable amount" of the drug. *Id.* at 459-61. This Court went on to explain that "Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence." *Id.*

This petition asks the Court to answer the question of whether the government may commingle substances that pose an identifiable danger of misidentification to produce an aggregate mixture or substance containing a detectable amount of a controlled substance that increases the minimum mandatory sentence under 21 U.S.C. § 841.

A split exists between the Eleventh Circuit and the Florida Supreme Court on the issue of a defendant's right to Due Process concerning the drug quantity findings that trigger a statutory minimum mandatory penalty. This Court should resolve the spilt in favor the standard delineated in *Greenwade* because it provides "a concise and simple rule for prosecutors, law enforcement officers, and courts to follow . . . support[ing] and enhance[ing] the clarity, transparency, and credibility of the evidence collection process and the criminal justice system as a whole." *Greenwade*, 124 So. 3d at 228.

LIST OF PARTIES

Petitioner, John Denton Rouse, Jr., was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

TABLE OF CONTENTS

Section *Page*

Question Presented i

List of Parties ii

Table of Contents iii

Table of Authorities v

Petition for a Writ of Certiorari 1

Opinion Below 1

Statement of Jurisdiction 1

Constitutional Provisions Involved 1

Statement of the Case 3

Reasons for Granting the Writ 8

Whether the process of commingling creates an unjustifiable risk to due process, when the government combines substances that pose an identifiable danger of misidentification, where the entire commingled substance will be, under 21 U.S.C. § 841, a mixture or substance containing a detectable amount of cocaine that increases the minimum mandatory sentence 8

A. The Eleventh Circuit's application of its "prior panel precedent rule" conflicts with the approach of other circuits 10

B. The Eleventh Circuit's Application of its "Prior Panel Precedent Rule" Denies Defendants Their Statutory Right to Appeal and Due Process of Law 15

C. Whether the evidence as to the offense of conviction that triggered the statutory minimum mandatory – possession with intent to distribute 500 grams or more of cocaine – was insufficient to establish the requisite offense and violated this Court's ruling in *Alleyne* and *Apprendi* 16

TABLE OF CONTENTS – *cont.*

Section ***Page***

Conclusion 20

Appendix

Decision of the Court of Appeals for the Eleventh Circuit,
United States v. John Denton Rouse, Jr., 16-15857 ..... A-1

Judgment of the United States District Court for the Middle District of Florida,
United States v. John Denton Rouse, Jr., 3:12-cr-105-J-34MCR A-2

TABLE OF AUTHORITIES

Cases ***Page(s)***

Alleyne v. United States, 133 S.Ct. 2151 (2013) ..... *passim*

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... *passim*

Atlantic Thermoplastics Co., Inc., v. Faytex Corp.,
970 F.2d 834, 838 n. 2 (Fed. Cir. 1992) 10

Chapman v. United States, 500 U.S. 453 (1991) 1, 5, 8, 21

Colorado River Water Conservation District v. United States,
424 U.S. 800 (1976) 15

Evitts v. Lucey, 469 U.S. 387 (1985) 16

Greenwade v. State, 124 So. 3d 215 (Fla. 2013) ..... *passim*

In re Arab Bank, PLC Alien Tort Statute Litigation,
808 F.3d 144 (2nd Cir. 2015) 12

McCullough v. World Wrestling Entertainment, Inc.,
838 F.3d 201 (2nd Cir. 2016) 13

Mercado v. Lynch, 823 F.3d 276 (5th Cir. 2016) 14

Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003). 14

Sprint Communications v. Jacobs, 134 S. Ct. 584 (2013) 15

The Northeast Ohio Coalition for the Homeless v. Husted,
831 F.3d 686 (6th Cir. 2016) 10, 13

Troy v. Samson Mfg. Corp., 758 F.3d 1322 (Fed. Cir. 2014) 14

Union of Needletrades, Indus. & Textile Employees v. INS,
336 F.3d 200 (2nd Cir. 2003) 13

United States v. Anderson, 771 F.3d 1064 (8th Cir. 2014) 13

United States v. Baggett, 954 F.2d 674 (11th Cir. 1992) ..... *passim*

Table of Authorities – cont.

Cases ***Page(s)***

United States v. Benally, 843 F.3d 350 (9th Cir. 2016) 14

United States v. Boche-Perez, 755 F.3d 327 (5th Cir. 2014) 14

United States v. Elbe, 774 F.3d 885, 891 (6th Cir. 2014) 13

United States v. Pires, 642 F.3d 1 (1st Cir. 2011) 12

United States v. Reyes-Hernandez, 624 F.3d 405 (7th Cir. 2010) 10

United States v. Rouse, 732 F. App'x 853 (11th Cir. 2018) 1

United States v. Tavares, 843 F.3d 1 (1st Cir. 2016) 12

United States v. Villareal-Amarilzas, 562 F.3d 892 (8th Cir. 2009) 13

United States v. White, 782 F.3d 1118 (10th Cir. 2015) 14

Wilson v. Taylor, 658 F.2d 1021 (5th Cir. Unit B 1981) .....

Wojchowiski v. Daines, 498 F.3d 99 (2nd Cir. 2007) 13

Statutes and Other Authorities

U.S. Const. Amend. V 6

18 U.S.C. § 3231 1

18 U.S.C. § 3742 ..... 1, 6, 15

21 U.S.C. § 841(a)(1) ..... *passim*

21 U.S.C. § 841(b)(1) ..... passim

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1294 1

Supreme Court Rules ***Page(s)***

Sup. Ct. R. 13.1 1

Sup. Ct. R. 14.1(e) 1

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, John Denton Rouse, Jr., respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit. *See United States v. Rouse*, 732 F. App'x 853 (11th Cir. 2018).

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit issued its decision on May 23, 2018. The Eleventh Circuit's opinion is provided in Appendix A-1 (App. A1). The district court judgment is provided in Appendix A-2 (App. A2).

JURISDICTION

The United States District Court, Middle District of Florida, had jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. Mr. Rouse appealed from that court's final judgment to the United States Court of Appeals for the Eleventh Circuit, in accordance with 18 U.S.C. § 3742 and 28 U.S.C. §§ 1291, 1294. The Eleventh Circuit affirmed the lower court judgment.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. R. 14.1(e). This petition is filed timely. *See* Sup. Ct. R. 13.1.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. V.

Section 3742(a) of Title 18 of the U.S. Code provides, in relevant part,

A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
(1) was imposed in violation of law; [or]
(2) was imposed as a result of an incorrect application of the sentencing guidelines . . . .

18 U.S.C. § 3742(a).

Section 841(a) of Title 21 of the U.S. Code provides in relevant part,

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. . . .

21 U.S.C. § 841(a)(1).

Section 841(b)(1) of Title 21 of the U.S. Code provides in relevant part,

Except as otherwise provided . . . of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
(B) In the case of a violation of subsection (a) of this section involving-
(ii) 500 grams or more of a mixture or substance containing a detectable amount of. . .
(II) **cocaine**, its salts, optical and geometric isomers, and salts of isomers . . .
such person shall be sentenced to a term of imprisonment which may **not be less than 5 years and not more than 40 years** . . . .

21 U.S.C. § 841(b)(1)(B)(ii)(II) (emphasis added).

STATEMENT OF THE CASE

On March 29, 2012, a state of Florida search warrant was executed on a structure behind a residence located in Jacksonville, Florida where Mr. Rouse resided. The search revealed several bags and containers of suspected cocaine base, powder cocaine, and white powdery cutting agents and household substances. These bags were then combined into a single large bag. The act of commingling these similar looking substances by law enforcement, inevitably, created the aggregate drug quantity attributable to Mr. Rouse.

A grand jury indicted Mr. Rouse on three counts: (1) possession of at least 500 grams of cocaine with intent to distribute (Count 1); (2) possession of at least 28 grams of cocaine base with intent to distribute (Count 2); and (3) possession of a firearm by a convicted felon (Count 3). The district court dismissed Count 2 following a joint motion by both parties. Mr. Rouse proceeded to a bench trial on Count 1, while stipulating to the facts under Count 3. *See* Appendix A1 at 2.

In order to convict Mr. Rouse of the offense charged in Count 1, the Government was required to prove that: (1) he knowingly and intentionally possessed cocaine, a Schedule II controlled substance; (2) he possessed the cocaine with the intent to distribute it; and (3) the amount of cocaine was 500 grams or more. 21 U.S.C. § 841(a)(1), (b)(1)(B).

As to Count 1, Mr. Rouse stipulated that he knowingly and intentionally possessed cocaine with the intent to distribute it. He disputed only the quantity of

cocaine seized and tested by the Drug Enforcement Administration Laboratory ("DEA Lab"), arguing that law enforcement agents improperly commingled bags of white powder into one container before chemically testing whether the bags contained cocaine or pure filler. Mr. Rouse argued that this mistake increased the overall weight of the seized narcotics, pushing the amount over the 500 gram threshold for the charged offense.

Bench Trial

At the bench trial the Government called detective Robert Cook, who had 14 years of experience as a narcotic detective. Cook testified at trial that upon arriving at the scene of Mr. Rouse's home, he found plastic bags of what appeared to him to be either powder or crack cocaine, ranging from what he thought to be one eighth of an ounce up to one ounce in each bag. Cook also found a box of baking soda, which he did not submit to the lab for testing or combine with any suspected cocaine. App, A1 at 4.

Photographs of the bags were admitted into evidence by the Government and described by Cook at trial. Some of the bags contained powder of "a little bit rougher consistency" with chunks in it, Cook assumed by its appearance to be consistent with that of powder cocaine. Several other bags appeared to Cook to contain crack cocaine based on the substance's color and consistency. Cook separated the bags that appeared to be crack cocaine from those that appeared to be powder cocaine. Cook then combined all of the bags of suspected crack cocaine into one container (195.8 grams) and all of the bags of suspected powder cocaine into another container (859.5

grams). Cook acknowledged that once cocaine was combined with filler he would be unable to discern any difference between cocaine and filler particles. Also, among the bags combined and sent to the lab for testing was a bag labeled "cut-and-dried incense." App. A1 at 5.

Detectives transferred the two containers of suspected cocaine to the DEA Lab. Carolyn Hudson, a forensic chemist for the DEA, tested samples of each container for cocaine purity. Testing revealed that the 195.8 gram container was 28.6 percent pure powder cocaine and the 859.5 gram container was 5.9 percent pure powder cocaine. App. A1 at 6. These results revealed that Detective Cook had misidentified the substances prior to commingling them into larger bags. At the bench trial during cross-examination, Cook admitted that he had mis-identified substances in the past as well. Furthermore, Hudson identified multiple fillers, also known as adulterants, in the 859.5 gram container, including caffeine, hydroxyzine, lidocaine, and nicotinamide, all of which are loose white or off-white powders. She testified that when these fillers are mixed with cocaine, the entire substance would appear to be about the same. On cross-examination, Hudson admitted that she does not and did not test for baking soda because it is a diluent—which has no effect on the body—and not an adulterant—which does have an effect on the body. App. A1 at 7.

The district court found no reason to doubt Cook's testimony that the substances combined to create the 859.5 gram sample were consistent in color and consistency with processed cocaine, and not filler. Along with Cook's testimony, the court relied on its review of the photographic evidence of the substance tested by the

DEA Lab was the chunky, rough consistency of cocaine. The court concluded that this evidence, together with the DEA lab analysis of the actual substance and Hudson's testimony, was sufficient to prove beyond a reasonable doubt that at least 304.2 grams of the 859.5 gram sample was cocaine, thus exceeding—along with the 195.8 gram sample— the 500 gram threshold for the charged offense.

Sentencing

On August 15, 2016, Mr. John Denton Rouse, Jr. was found guilty of possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(ii)(II), and sentenced to 100 months' imprisonment on each count to run concurrently, followed by four years supervised release. App. A2. Mr. Rouse appealed his judgment and sentence.

The Appeal

On appeal, the Eleventh Circuit Panel affirmed the judgment of the district court. The panel rejected the adoption of the bright-line rule from the Florida Supreme Court's opinion in *Greenwade v. State*, requiring law enforcement to chemically test any substance before combining the contents to meet a minimum statutory threshold if there is an identifiable danger of misidentification. *Greenwade v. State*, 124 So. 3d 215, 230-31 (Fla. 2013), because it conflicted with the Eleventh Circuit's prior precedent in *United States v. Baggett*, 954 F.2d 674, 677-78 (11th Cir. 1992). *Baggett*, reinforced this circuit's "expansive view" that controlled substances can be identified by various means of circumstantial evidence.

The Court held that adopting the *Greewade* standard would require chemical testing of certain controlled substances that present an identifiable danger of misidentification, like the substances in Mr. Rouse's case, prior to combining suspected narcotics. However, the Eleventh Circuit's *Baggett* holding allows identification through circumstantial evidence for all controlled substances, and that the "application of the *Greenwade* [standard] would swallow the *Baggett* rule." App. A1 at 10. The court noted that its prior precedent doesn't recognize "misidentification of cocaine to be such an egregious problem as to warrant an exception to the *Baggett* rule." *Id.*

REASONS FOR GRANTING THE WRIT

WHETHER THE PROCESS OF COMMINGLING CREATES AN UNJUSTIFIABLE RISK TO DUE PROCESS, WHEN THE GOVERNMENT COMBINES SUBSTANCES THAT POSE AN IDENTIFIABLE DANGER OF MISIDENTIFICATION, WHERE THE ENTIRE COMMINGLED SUBSTANCE WILL BE, UNDER 21 U.S.C. § 841, A MIXTURE OR SUBSTANCE CONTAINING A DETECTABLE AMOUNT OF COCAINE THAT INCREASES THE MINIMUM MANDATORY SENTENCE.

In *Chapman v. United States,* 500 U.S. 453 (1991), this Court focused on the meaning of the phrase "mixture or substance." Examining the case of defendants who were convicted of selling blotter paper containing LSD, in violation of 21 U.S.C. § 841(a), the Court held that the weight of the blotter paper or drug carrier medium should be included along with the weight of the LSD under the "mixture or substance" language of § 841 and the Sentencing Guidelines. This Court found that "blotter paper customarily used to distribute LSD, is a 'mixture or substance containing a detectable amount' of LSD." *Chapman,* 500 U.S. 453 (quoting 21 U.S.C. § 841). In reaching this determination, this Court looked to the ordinary meaning of the words as "[n]either the statute nor the Sentencing Guidelines define the terms 'mixture' and 'substance,' nor do they have any established common law meaning." *Id.* This Court reasoned that under the plain dictionary meaning of the term "mixture," the weight of the blotter paper must be included, as the LSD could not be "distinguished from the blotter paper, nor easily separated from it." *Id.* 500 U.S. at 462.

The factual situation presented by the commingling of white-like filler substances and cocaine readily distinguishes the instant matter from *Chapman* and the lower court's prior precedent rule in *Baggett* (discussed supra at 6-7). *Chapman*

concerned a true mixture. LSD was "diffused among the fibers of the paper." *Chapman,* 500 U.S. at 463. In contrast, the white-like filler substances and cocaine were initially in separate bags and containers and were then mixed in cocaine to create a "mixture or substance containing a detectable amount" of cocaine. The government's own chemist testified that once combined cocaine and fillers would be indistinguishable on visual inspection because of their similarity in color. Moreover, the chemist testified that the DEA Lab did not test for non-adulterants, such as baking soda or incense. Indeed, the results of the DEA Lab test reflected a very low purity level in the bag the detective hand combined the misidentified substances. A fact that supported the bag contained a higher concentration or quantity of fillers. Furthermore, the detective who handled the evidence misidentified the substances and on cross-examination admitted that on several occasions in the past he had misidentified substances due to their similarity in color and texture.

This petition asks the Court to answer the question of whether the government may commingle substances that pose an identifiable danger of misidentification to produce an aggregate mixture or substance containing a detectable amount of a controlled substance that increases the minimum mandatory sentence under 21 U.S.C. § 841.

A split exists between the Eleventh Circuit and the Florida Supreme Court on the issue of a defendant's right to Due Process concerning the drug quantity findings that trigger a statutory minimum mandatory penalty. This Court should resolve the spilt in favor the standard delineated in *Greenwade* because it provides "a concise

and simple rule for prosecutors, law enforcement officers, and courts to follow . . . support[ing] and enhance[ing] the clarity, transparency, and credibility of the evidence collection process and the criminal justice system as a whole." *Greenwade*, 124 So. 3d at 228.

A. The Eleventh Circuit's application of its "prior panel precedent rule" conflicts with the approach of other circuits

The Eleventh Circuit's blind deference to its prior panel precedent rule conflicts with the approach of most circuits and well-settled principles of stare decisis. *See also, e.g., The Northeast Ohio Coalition for the Homeless v. Husted*, 831 F.3d 686, 720 (6th Cir. 2016) (stating that a panel need not defer to "binding circuit precedent" "in the usual situation where binding circuit precedent overlooked earlier Supreme Court authority'); *Atlantic Thermoplastics Co., Inc., v. Faytex Corp.*, 970 F.2d 834, 838 n. 2 (Fed. Cir. 1992) ("A decision that fails to consider Supreme Court precedent does not control if the court determines the prior panel would have reached a different conclusion if it had considered controlling precedent."); *Wilson v. Taylor*, 658 F.2d 1021, 1035 (5th Cir. Unit B 1981) (in the "unusual and delicate situation" where a prior circuit case did not consider the impact of intervening Supreme Court precedent, the court must apply the Supreme Court decision, not the later-issued circuit case").[1]

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[1] The Seventh Circuit has adopted a more relaxed approach to stare decisis by rule. The Seventh Circuit permits one panel to overrule another so long as the subsequent panel circulates the proposed opinion among the active members of the court "and a majority of them do not vote to rehear *en banc* the issue of whether the position should be adopted." 7th Cir. R. 40(e); *see generally United States v. Reyes-Hernandez*, 624 F.3d 405, 412-413 (7th Cir. 2010).

The Florida Supreme Courts' decision in *Greenwade* demonstrates the conflict for which this Court's intervention is needed to assure that Eleventh Circuit defendants receive the same right to Due Process and the same right to a meaningful appeal that similarly situated defendants consistently receive in the State of Florida. In *Greenwade*, the appellant did not dispute that the State had established the first two elements of trafficking, admitting that he was in possession of cocaine.

Rather, Greenwade contended that the trial court should have granted his motion for judgment of acquittal and entered judgment in his favor on the trafficking charge because the State combined, tested, and weighed the contents of the nine baggies found in his possession together, instead of chemically testing each individual baggie for cocaine before commingling and weighing their total contents in the aggregate. The issue before the Florida Supreme Court was whether the State's failure to independently chemically test each individually wrapped baggies of off-white powder rendered the State's evidence in support of the third element of weight insufficient as a matter of law. *Greenwade*, 124 So. 3d at 220. The court held:

> that to satisfy the burden of proving that the evidence seized meets the statutory threshold for weight in trafficking prosecutions beyond a reasonable doubt, the State must prove through chemical testing that each individually wrapped packet of white powder seized contains at least a mixture of a controlled substance before the State may combine and weigh the commingled substance. However, we note that our holding applies only to the circumstance in which law enforcement officers discover individually wrapped packets of a substance that poses an identifiable danger of misidentification.

Greenwade v. State, 124 So. 3d 215, 230–31 (Fla. 2013)

The Eleventh Circuit, however, even conceding that the *Greenwade* standard would "encourage best police practice[s]" its prior precedent rule "leaves no room for the [standard in *Greenwade*], . . . therefore considering the findings of the district court in light of its precedent [in *Baggett*]. App. A1 at10. *Baggett* allows identification through circumstantial evidence for all controlled substances. *Baggett*, 954 F.2d at 677.

While the other circuits have uniformly recognized an exception to the force of prior circuit precedent for an "intervening" Supreme Court decision, they do "differ in how much the earlier decision must be undermined before it can be overruled." Joseph Mead, *"Stare Decisis in the Inferior Courts of the United States,"* 12 Nev. Law Journal 787 (2012). The First Circuit, notably, does not require that the intervening decision of this Court be "directly controlling;" it need only "offer a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind." *United States v. Tavares*, 843 F.3d 1, 11 (1st Cir. 2016) (citing *United States v. Pires*, 642 F.3d 1, 9 (1st Cir. 2011)).

The Second Circuit likewise does not require that the intervening decision "address the precise issue already decided by [the] court," but simply that the decision of this Court "casts doubt on [the circuit's] controlling precedent" due to some "conflict, incompatibility, or 'inconsisten[cy]' between th[e] Circuit's precedent and the intervening Supreme Court decision." *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144, 154-55 (2nd Cir. 2015). In the Second Circuit, "[t]he effect of intervening precedent may be 'subtle,' but if the impact is nonetheless

'fundamental,' it requires [the court] to conclude that a decision of a panel [] is 'no longer good law.'" *Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200, 201 (2nd Cir. 2003) (citations, and internal quotation marks omitted); *Wojchowiski v. Daines*, 498 F.3d 99, 106 (2nd Cir. 2007). Notably, the Second Circuit also "permits a panel that believes an intervening Supreme Court decision has abrogated a prior decision to present that view to the active judges, and in the absence of objection, disregard the prior decision." *McCullough v. World Wrestling Entertainment, Inc.*, 838 F.3d 201 (2nd Cir. 2016).

The Sixth Circuit does not require the intervening decision of this Court to be "precisely on point, if the legal reasoning is directly applicable," and "requires modification of [a] prior decision." *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014); *The Northeast Ohio Coalition for the Homeless v. Husted*, 831 F.3d 686, 720-721 (6th Cir. 2016) (and cases cited therein).

The Eighth Circuit, like several of the others, requires only that this Court have rendered a decision that "casts into doubt" or "undermines" the prior decision." *United States v. Anderson*, 771 F.3d 1064, 1067 (8th Cir. 2014).

The Ninth Circuit, appears somewhat different in requiring that the intervening decision be "clearly irreconcilable with the reasoning or theory of intervening higher authority." *See, e.g., United States v. Villareal-Amarilzas*, 562 F.3d 892, 898 n. 4 (8th Cir. 2009) ("In the Ninth Circuit, a three-judge panel may reexamine a prior panel decision only if a supervening Supreme Court decision is 'clearly irreconcilable.' By contrast, we may reconsider a prior panel's decision if a

supervening Supreme Court decision 'undermines or casts doubt on the earlier panel decision.'" (citation omitted). But what that means, the Ninth Circuit has clarified, is not that the issues need to be "identical to be controlling;" a prior circuit decision is deemed "effectively overruled" if the intervening decision of this Court has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*); *United States v. Benally*, 843 F.3d 350 (9th Cir. 2016).

The Tenth Circuit's test is simply whether the intervening Supreme Court's decision "invalidates [its] previous analysis." *United States v. White*, 782 F.3d 1118, 1123 n.2 (10th Cir. 2015). And the Federal Circuit, like the Sixth and the Ninth, holds that issues determined by an intervening decision of this Court "need not be identical to be controlling." Rather, the Federal Circuit has clarified—lower courts are "bound not only by the holdings of higher courts' decisions but also by their 'mode of analysis.'" *Troy v. Samson Mfg. Corp.*, 758 F.3d 1322, 1326 (Fed. Cir. 2014).

The Fifth Circuit applies what it terms a "rule of orderliness," pursuant to which the intervening decision of this Court must "be unequivocal" in its overruling of prior precedent, "not a mere 'hint' of how the Court might rule in the future." *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016); *United States v. Boche-Perez*, 755 F.3d 327 (5th Cir. 2014).

Plainly, therefore, the majority of the circuits recognize that an intervening decision of this Court need not be on "all fours" factually or legally to have undermined a prior precedent to the point of abrogation, and relieve a subsequent

panel from following it. Rather, the intervening decision must simply dictate a different "mode of analysis" applicable to the issue before the lower court.

Had Mr. Rouse appealed his sentence in the State of Florida, the courts would have applied the *Greenwade* standard. They would have found the evidentiary standard in *Baggett* to be deficient to support the notion that the Government may eye-ball substances that pose an identifiable danger of misidentification and then commingle them to create an aggregate weight that triggers a statutory minimum mandatory sentence.

B. The Eleventh Circuit's Application of its "Prior Panel Precedent Rule" Denies Defendants Their Statutory Right to Appeal and Due Process of Law

Mr. Rouse had a statutory right to appeal his sentence, and Congress gave the Eleventh Circuit jurisdiction over that appeal. 18 U.S.C. § 3742. The Eleventh Circuit did not have discretion to refuse to exercise that jurisdiction. *See Sprint Communications v. Jacobs*, 134 S. Ct. 584, 588 (2013) ("federal courts are obliged to decide cases within the scope of federal jurisdiction."); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813-17 (1976) (holding that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule" because of "the virtually unflagging obligation to exercise the jurisdiction given them."). While the obligation to exercise jurisdiction entails a duty to consider every argument that has not been waived, the Eleventh Circuit's decision below effectively holds that the defendant in *Baggett* in-effect waived Mr. Rouse's argument for him. And that cannot be the law, because that would deny Mr. Rouse due process.

For Mr. Rouse to truly have a statutory right to appeal his sentence, his appeal must, at a minimum, afford him a meaningful opportunity to formulate arguments and have them considered by a neutral and detached court. That is why the right to an attorney on appeal is guaranteed — to assure a meaningful appeal. *See generally Evitts v. Lucey,* 469 U.S. 387, 396 (1985) ("A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."). Moreover, the statutory right to appeal entails the right to develop and present a complete argument and to have it considered by the appellate court. And that right is hollow if the appellate court may simply refuse to consider the arguments on the authority of a judge-made, overly-rigid iteration of the circuit's "prior panel precedent rule."

C. Whether the evidence as to the offense of conviction that triggered the statutory minimum mandatory – possession with intent to distribute 500 grams or more of cocaine – was insufficient to establish the requisite offense and violated this Court's ruling in *Alleyne* and *Apprendi*

To prove that a criminal defendant committed the crime of possession with intent to distribute, under 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), the government must establish: (1) that the defendant knowingly and intentionally possessed cocaine, a Schedule II controlled substance; (2) that the defendant possessed the cocaine with intent to distribute it; and (3) that the amount of cocaine was more than 500 grams. 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(ii). At the bench trial, Mr. Rouse stipulated that he knowingly and intentionally possessed cocaine, a Schedule II controlled substance; and that he possessed the cocaine with intent to distribute it; however, he disputed

the evidence as to the third element of more than 500 grams of cocaine. First, Mr. Rouse does not dispute that he possessed at least 195 grams of cocaine, however he challenges the governments use of "mixtures or substances" commingled by law enforcement to create the aggregate drug quantity attributable to him.

Mr. Rouse does not allege that law enforcements acted in bad faith, rather, that the process of commingling creates an unjustifiably high risk that noncontrolled substances, such as cutting agents or adulterants, will be inappropriately mixed with controlled substances. As is the case here, multiple packages of individually wrapped powder like substances were commingled before they were chemically tested, irreversibly destroying any possibility of an independent chemical analysis of each individual package. Thus, the government cannot prove beyond a reasonable doubt whether the pre-commingled substances were a controlled substance prior to being placed into one package.

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a minimum mandatory sentence of at least five (5) and up to 40 years imprisonment may be imposed on count one if all three (3) elements are proven beyond a reasonable doubt. *Alleyne v. United States*, 133 S.Ct. 2151 (2013). This Court has not directly addressed whether the process of commingling creates an unjustifiable risk, because upon combining both non-controlled and controlled substances, the entire commingled substance will be, under § 841(b)(1)(B)(ii), a "mixture or substance" containing a *detectable amount of* cocaine. 21 U.S.C. § 841(b)(1)(B)(ii).

The district court in reaching its conclusion that the evidence established the minimum mandatory drug quantity relied upon *United States v. Baggett*, 954 F.2d 674 (11th Cir. 1992). *Baggett* is clearly distinguishable and cannot be relied upon as authority in Mr. Rouse's case. *Baggett* was decided in the context of Eleventh Circuit law prior to *Alleyne* and *Apprendi*, which held that the *amount and type of drug are not elements of an offense* charged under 21 U.S.C. § 841:

> [A] person violates § 841(a) merely by knowingly possessing with intent to distribute a controlled substance. The § 841(a) offense is complete once the person commits the proscribed act and knows that the substance is a controlled substance. [T]he specific amount and type of drugs are not elements of the [§ 841(a)(1)] offense, the government's failure to prove the amount or type charged in the indictment does not merit reversal.

United States v. Sanders, 668 F.3d 1298, 1309 (11th Cir. 2012) (internal quotation marks omitted).

The question in *Baggett* was whether the trial court had committed reversible error in admitting a chemical analysis report that the substance at issue was cocaine when determining whether Baggett was dealing in a controlled substance. In finding the error harmless, this Court held that the circumstantial evidence in the case established beyond a reasonable doubt that the substance was cocaine based on circumstantial evidence, such as: A confidential informant who testified that Baggett said he was in the business of selling cocaine, carried large rolled-up sums of money, and carried a firearm-a common tool of the drug trade. *Baggett*, 954 F.2d at 677. That two officer's with years of experience in the drug division testified that based on

extensive training in the sight identification of drugs, they testified the substance was cocaine. *Id.* at 678.

Other than proving Baggett was dealing in a controlled substance, *Baggett* cannot be read to hold more than that. To extend *Baggett* any further would run afoul of *Alleyne* and *Apprendi* to the point of abrogation. Indeed, Mr. Rouse's case is factually and legally distinguishable. The Court in *Baggett* did not confront the issue that is at the heart of the issue here - the commingling of substances by law enforcement to create a "mixture or substance" that has a detectable amount of cocaine. Indeed, this Court held in *Jackson*, that a defendant transporting approximately one kilogram of sugar which had about ten grams of cocaine on top (which resulted in a "mixture," of 99% sugar and 1% cocaine), should not have been counted as one kilogram of a mixture containing a detectable amount of cocaine. *United States v. Jackson*, 115 F.3d 843 (11th Cir. 1997). During the bench trial, during cross examination, Officer Cook admittedly misidentified various bags of white powder - some of which were clearly labeled as commercially packaged incense.

Officer Cook admitted he had misidentified substances which he believed, based on years of experience, were packages of crack cocaine in this case. Officer Cook testified that on other occasions he had identified, what he believed to be, various drugs including cocaine to be sent to the lab in order to "score them out," only to find out later that the substances were not drugs at all.

To be clear, Officer Cook testified that on other occasions he submitted what he believed to be a mixture or substance containing a detectable amount of a

controlled substance to a lab and was told on more than one occasion that the mixture or substance contained nothing i.e. a filler or adulterant. Officer Cook testified that he placed the majority of the individual packages he had believed to be powder cocaine into a single bag.

On direct examination DEA Chemist Hudson (Agent Hudson) testified that she tested a small sample to determine the components and purity. The results of her tests provided the net weight of 859.5 grams with a purity of 5.9% (50.7 grams of the 859.5 grams). Compare Agent Hudson's findings in the first bag with the contents of a second bag where she testified that the second bag had a net weight of 195.8 grams and a purity of 28.6% (55.99 grams of the 195.8 grams).

Indeed, Mr. Rouse has maintained that law enforcement, inadvertently, commingled cutting agents or adulterants with cocaine creating an aggregate mixture or substance containing a detectable amount of cocaine that law enforcement manufactured not Mr. Rouse. *See United States v. Segura-Baltazar*, 448 F.3d 1281 (11th Cir. 2006) (holding that if the quantitative result of the mixture was less than one percent, the court must still consider the entire weight of the mixture in deciding the applicability of a mandatory minimum sentence). In *Segura-Baltazar* the defendant challenged the district courts use of the weight of methamphetamine mixture rather than the amount of the pure methamphetamine the defendant had created. The issue Mr. Rouse raises here is distinguishable and is not within the mine-run of cases that deal with a marketable mixture or substance containing a detectable amount of a drug for which the defendant had created or knew was market

ready. Rather, separately packaged substances, some containing a detectable amount of a drug market ready and others only containing nothing but cutting agents or diluents, not market ready.

It is not within the plain meaning of 21 U.S.C. § 841 and congressional intent to accept the aggregate weight of a mixture or substance that law enforcement created to meet the threshold weight requirements that would trigger a mandatory minimum penalty, doing so violates Mr. Rouse's right to Due Process of Law.

This Court in *Chapman v. United States*, 500 U.S. 453 (1991), ruled that it is proper to include the weight of a cutting agent when determining the total weight of a "mixture or substance containing a detectable amount" of a particular drug. *Id.* at 459-60 (quoting 21 U.S.C. § 841(b)(1)(A)). Acknowledged that "[i]n some cases, the concentration of the drug in the mixture is very low," but nevertheless determined that Congress intended for the entire mixture or substance to be weighed so "long as it contains a detectable amount" of the drug. *Id.* at 459-61 ("Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence."). Absent from these cases are circumstances analogous to Mr. Rouse and law enforcements commingling of substances.

In *Greenwade*, a case directly on point, the Florida Supreme Court addressed the very issue of the need to chemically prove that each individual package prior to commingling the contents to determine an aggregate weight:

Courts across Florida have almost universally followed the rule delineated in *Ross [v. State*, 528 So.2d 1237 (Fla. 3d DCA 1988)] for decades because it provides a concise and simple rule for prosecutors, law enforcement officers, and courts to follow. *Ross* **supports and enhances the clarity, transparency, and credibility of the evidence collection process and the criminal justice system as a whole.** Further, we find the approach articulated by the Third District in *Ross* to be more **consistent with our statutory scheme and the proper administration of justice.**

* * *

Section 893.135, the statute under which Greenwade was charged and convicted, indicates that the Legislature intended to harshly punish the distribution of controlled substances or mixtures of controlled substances. See § 893.135, Fla. Stat. (2009). **Specifically, the statute punishes offenders for trafficking in cocaine, heroin, and methamphetamine—the three controlled substances referenced by the cases above as resembling a white powdery substance—** by making the crime a first-degree felony that carries a mandatory-minimum sentence ranging from a minimum of three years to life imprisonment, and fines that range from $50,000 to $500,000. *See* § 893.135(1)(b), (c), (f), Fla. Stat. (2009).

* * *

In other words, these statutes reflect a legislative intent to not punish individuals who possess counterfeit or look-alike drugs under the trafficking statute, section 893.135. However, **the process of commingling creates an unjustifiably high risk that noncontrolled substances will be inappropriately mixed with controlled substances.** Once multiple packets of individually wrapped powder are commingled before they are chemically tested, the simple process of commingling irreversibly destroys both the independent chemical composition of each individually wrapped packet and the ability to discern whether the pre-commingled substance was controlled or counterfeit. **In fact, when multiple packets of white powder are commingled before chemical testing, the entire commingled substance will be, according to section 893.135, cocaine or a mixture thereof as long as one of the individual packets discovered in the defendant's possession contains cocaine.**

* * *

The plain language and structure of these statutes demonstrate that the Legislature clearly intended to provide for distinct crimes and substantially different punishments for different types of substances.

> **To effectuate the legislative intent, we hold that to establish beyond a reasonable doubt that individually wrapped packets of white powder meet the statutory threshold for weight in trafficking prosecutions, the State must chemically prove that each individually wrapped packet contains at least a mixture of a controlled substance before it may combine the contents and determine whether those contents meet the statutory threshold for weight.** This rule is consistent with both the legislative intent of these statutes and good policy which demonstrates that the benefits of independent testing substantially outweigh the burden of requiring the State to chemically test each individual packet.
>
> While we hold that the State must chemically test every individually wrapped packet of white powder seized in order to establish the statutory threshold weight for trafficking, **we emphasize that this rule only applies when the substance discovered is one that poses an identifiable danger of misidentification,** such as the white powder discovered in this case. **If the chemical composition of the substance seized does not pose a danger of misidentification, he State is not required to chemically test individually wrapped packets in order to establish the requisite statutory weight for trafficking.**

Greenwade v. State, 124 So. 3d 215, 228-29 (Fla. 2013) (emphasis added).

Greenwade cautions that the rule only applies when the substance is one that poses an identifiable danger of misidentification. Indeed, as discussed earlier Officer Cook misidentified the substances seized at Mr. Rouse's residence, testified that he doesn't go to court without lab verification, and that on more than one occasion he believed he had submitted a mixture or substance containing a detectable amount of drugs and was informed that mixture of substance contained nothing. *See supra* pp. 32-33.

Similarly, this Court in order to effectuate both the statutory and congressional intent behind 21 U.S.C. §§ 841(a) and 841(b), should hold that in order to establish

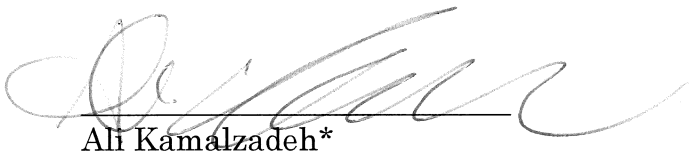
beyond a reasonable doubt that individually wrapped packets meet the statutory threshold for weight in prosecutions, the government must chemically prove that each individually wrapped packet contains at least a detectable amount of mixture of a controlled substance before it may combine the contents and determine whether those contents meet the statutory threshold for weight.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Donna Lee Elm
Federal Defender



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APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit,
United States v. John Denton Rouse, Jr., 16-15857 ..... A-1

Judgment of the United States District Court for the Middle District of Florida,
United States v. John Denton Rouse, Jr., 3:12-cr-105-J-34MCR A-2

APPENDIX A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15857
Non-Argument Calendar

D.C. Docket No. 3:12-cr-00105-MMH-MCR-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN DENTON ROUSE, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(May 23, 2018)

Before JULIE CARNES, JILL PRYOR and FAY, Circuit Judges.

PER CURIAM:

John Denton Rouse, Jr. appeals his conviction for possession of at least 500 grams of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and

(b)(1)(B). The district court found Rouse guilty at a bench trial.[1] On appeal, Rouse contends that the evidence presented at trial was insufficient, as a matter of law, to prove beyond a reasonable doubt that he possessed at least 500 grams of cocaine because the government mixed the substances recovered from the scene prior to sending them for forensic analysis. After careful review, we affirm.

I. BACKGROUND

A. Charges Against Rouse

A grand jury indicted Rouse on three counts: (1) possession of at least 500 grams of cocaine with intent to distribute (Count 1); (2) possession of at least 28 grams of cocaine base with intent to distribute (Count 2); and (3) possession of a firearm by a convicted felon (Count 3). The district court dismissed Count 2 following a joint motion by both parties. Rouse proceeded to a bench trial on Counts 1 and 3. Rouse was convicted of both offenses, but only challenges his conviction of the Count 1 offense on appeal.

As to Count 1, Rouse stipulated that he knowingly and intentionally possessed cocaine with the intent to distribute it. He disputed only the quantity of cocaine seized and tested by the Drug Enforcement Administration Laboratory ("DEA Lab"), arguing that law enforcement agents improperly commingled bags of white powder into one container before chemically testing whether the bags

[1] Rouse waived his right to a jury trial.

contained cocaine or pure filler.[2] He argued that this mistake increased the overall weight of the seized narcotics, pushing the amount over the 500 gram threshold for the charged offense.

Rouse did not dispute the weight of cocaine received and tested by the DEA Lab: 195.8 grams of suspected cocaine base[3] (revealed to be powder cocaine) and 859.5 additional grams of powder cocaine. He did not dispute that the 195.8 gram sample was all cocaine. He disputed only how much of the 859.5 gram sample actually was cocaine rather than pure filler. Put differently, at trial Rouse challenged only whether the government could prove beyond a reasonable doubt that at least 304.2 grams of the 859.5 gram sample was cocaine so that the 500 gram threshold for the charged offense was met.

B. Evidence Presented to the District Court

Leading up to the execution of a search warrant at Rouse's residence, detectives from the Jacksonville Sheriff's Office ("JSO") and the DEA directed a controlled purchase of 84 grams of cocaine from one of Rouse's associates. Further investigation revealed that the associate obtained the cocaine from Rouse. JSO detectives executed a search warrant at Rouse's residence and discovered

[2] In order to convict Rouse of the offense charged in Count 1, the government was required to prove that: (1) he knowingly and intentionally possessed cocaine, a Schedule II controlled substance; (2) he possessed the cocaine with the intent to distribute it; and (3) the amount of cocaine was 500 grams or more. 21 U.S.C. § 841(a)(1), (b)(1)(B). Based on Rouse's stipulations, the only issue at trial and on appeal is the third element of the offense.

[3] Cocaine base is commonly referred to as crack cocaine.

cocaine in a converted garage at the back of the property.[4] Among the detectives was Robert Cook, who had 14 years of experience as a narcotics detective.

Cook testified at trial that, during his years of narcotics experience, he became familiar with certain characteristics of brick cocaine, powder cocaine, crack cocaine, and filler or cutting agents. He described a brick of cocaine as weighing approximately one kilogram, oblong or rectangular in shape, and white or off-white in color. He stated that powder cocaine often appears to have been removed from a block or brick of cocaine, in that it looks "chunked up like it [had been] compressed at some point." Trial Tr., Doc. 171 at 51.[5] Comparatively, Cook testified that crack cocaine is a "darker-color brown" and "a lot of times [its] consistency is going to be a lot harder." *Id.* at 50. He described filler or cutting agent as a very fine white powder and stated that, in his experience, he had never seen it in brick-like form. He testified that he usually sees filler in jars or plastic bags.

At the scene, Cook found plastic bags of what appeared to him to be either powder or crack cocaine, ranging from what he thought to be one eighth of an ounce up to one ounce in each bag. Cook also found a box of baking soda, which he did not submit to the lab for testing or combine with any suspected cocaine.

[4] Rouse's great aunt owned the property; it was undisputed that Rouse had occupied and controlled the structure behind her house for the past year.

[5] Citations to "Doc. #" refer to docket entries in the district court record in this case.

Photographs of the bags were admitted into evidence by the government and described by Cook at trial.

Some of the bags contained powder of "a little bit rougher consistency" with chunks in it, indicating to Cook that it had been compressed at some point; its appearance was therefore consistent with that of powder cocaine. *Id.* at 48. Several other bags appeared to Cook to contain crack cocaine based on the substance's color and consistency. Cook separated the bags that appeared to be crack cocaine from those that appeared to be powder cocaine. He did not knowingly combine any filler with the suspected illicit substances. Cook then combined all of the bags of suspected crack cocaine into one container (195.8 grams) and all of the bags of suspected powder cocaine into another container (859.5 grams). He acknowledged that once cocaine was combined with filler he would be unable to discern any difference between cocaine and filler particles. Also, among the bags combined and sent to the lab for testing was a bag labeled "cut-and-dried incense." *Id.* at 55.

Besides the suspected narcotics, detectives found other drug paraphernalia and contraband at the scene, including multiple gram scales, one of which had visible white powder around the edges. They found approximately $26,600 in U.S. currency and $9,000 in counterfeit currency. Cook testified that a kilogram of cocaine was selling between $25,000 and $30,000 when the cocaine was

recovered. Detectives recovered approximately a dozen cell phones, and Cook testified that, in his experience, individuals dealing in larger amounts of cocaine often used several cell phones in an effort to thwart law enforcement's ability to track them through electronic surveillance.

Detectives transferred the two containers of suspected cocaine to the DEA Lab. Carolyn Hudson, a forensic chemist for the DEA, tested samples of each container for cocaine purity. Testing revealed that the 195.8 gram container was 28.6 percent pure powder cocaine and the 859.5 gram container was 5.9 percent pure powder cocaine. Hudson testified that although highly concentrated bricks of cocaine can be as high as 70 to 80 percent pure, the 5.9 percent result was not surprising, and that even with the 5.9 percent finding, she concluded that the entire bag contained cocaine. Hudson also testified that it did not surprise her that Cook originally suspected the 195.8 grams to be crack cocaine because it was moist and chunky.

Hudson identified multiple fillers, also known as adulterants, in the 859.5 gram container, including caffeine, hydroxyzine, lidocaine, and nicotinamide, all of which are loose white or off-white powders. She testified that when these fillers are mixed with cocaine, the entire substance would appear to be about the same. Hudson did not test for baking soda because it is a diluent—which has no effect on the body—and not an adulterant—which does.

C. Defense's Theory and District Court Findings

On cross-examination of Hudson, and during defense counsel's closing argument, Rouse argued that only 84 grams of the 859.5 gram sample of powder cocaine was present at the scene, and that detectives combined the 84 grams with various fillers before the 859.5 gram sample was sent to the DEA Lab for testing.[6] Rouse previously distributed an 84 gram quantity of powder cocaine (about 3 ounces). Defense counsel posed a hypothetical, assuming the 84 grams of powder cocaine was 70 to 80 percent pure. Under that assumption, when the 84 grams were combined with filler to amount to 859.5 grams, the resulting substance was approximately 6.0 percent pure. Rouse argued that this calculation was consistent with the evidence the government presented because the DEA Lab testing revealed that the 859.5 gram bag was 5.9 percent pure.

The defense declined to put on any evidence, and Rouse moved for judgment of acquittal, arguing the government presented insufficient evidence to establish beyond a reasonable doubt that he possessed over 500 grams of cocaine. The district court denied the motion.

The district court found no reason to doubt Cook's testimony that the substances combined to create the 859.5 gram sample were consistent in color and consistency with processed cocaine, and not simple filler. Along with Cook's

[6] Rouse stated in his sentencing memorandum that he had one bag of cocaine containing 84 grams in a shoebox. Presumably, this is why defense counsel used 84 grams at trial.

testimony, the court relied on its review of the photographic evidence showing that the overwhelming majority of the substance tested by the DEA Lab was the chunky, rough consistency of cocaine. The court concluded that this evidence, together with the DEA lab analysis of the actual substance and Hudson's testimony, was sufficient to prove beyond a reasonable doubt that at least 304.2 grams of the 859.5 gram sample was cocaine, thus exceeding—along with the 195.8 gram sample— the 500 gram threshold for the charged offense.

The district court sentenced Rouse to 100 months' imprisonment. This is his appeal.

II. STANDARDS OF REVIEW

We review *de novo* the denial of a motion for judgment of acquittal based on the sufficiency of the evidence. *United States v. Pirela Pirela*, 809 F.3d 1195, 1198 (11th Cir. 2015). Under this standard, "[w]e will not reverse a conviction for insufficient evidence in a non-jury trial, unless, upon reviewing the evidence in the light most favorable to the government, no reasonable trier of fact could find guilt beyond a reasonable doubt." *Id.* at 1198-99 (internal quotation marks omitted). "[A] district court's bench trial findings of fact are reviewed for clear error." *Id.* at 1199.

III. DISCUSSION

Rouse argues that his conviction should be overturned because the government failed to introduce evidence proving beyond a reasonable doubt that the individual packages of white powder collected at his residence were cocaine before law enforcement commingled the packages into one container. In support, Rouse argues that this Court should adopt a bright-line standard adopted by the Florida Supreme Court in *Greenwade v. State*, requiring law enforcement to chemically test any substance before combining the contents to meet a minimum statutory threshold if there is an identifiable danger of misidentification. *Greenwade v. State*, 124 So. 3d 215, 230-31 (Fla. 2013). Rouse also suggests that Cook's testimony was not credible because Cook had misidentified controlled substances here and in the past. We conclude there was sufficient evidence to support Rouse's conviction.

First, we cannot adopt the bright-line rule from *Greenwade* because it conflicts with our prior precedent in *United States v. Baggett*, 954 F.2d 674, 677-78 (11th Cir. 1992). In *Baggett*, we reinforced this circuit's "expansive view" that controlled substances can be identified by various means of circumstantial evidence, such as "lay experience based on familiarity through prior use, trading, or law enforcement; a high sales price; on-the-scene remarks by a conspirator identifying the substance as a drug; and behavior characteristic of sales and use,

such as testing, weighing, cutting and peculiar ingestion." *Id.* at 677 (internal quotation marks omitted).

An exception under *Greenwade* would require this court to adopt a standard requiring chemical testing of certain controlled substances, those that present an "identifiable danger of misidentification," prior to combining suspected narcotics. *Greenwade*, 124 So. 3d at 231. Because *Baggett* allows identification through circumstantial evidence for all controlled substances, application of the *Greenwade* exception would swallow the *Baggett* rule.[7] *Baggett*, 954 F.2d at 677. Even though the rule in *Greenwade* may encourage best police practice,[8] our prior precedent leaves no room for the exception Rouse urges, and we must therefore consider the findings of the district court in light of this precedent. *Id.*

The district court determined that Cook's uncontested testimony, which was based on his 14 years of narcotics experience, and the photographic evidence showing that the overwhelming majority of the substance tested by the DEA Lab was the chunky, rough consistency of cocaine was sufficient to conclude, beyond a reasonable doubt, that Rouse possessed at least 500 grams of powder cocaine. Cook's testimony and the photographic evidence fall within the acceptable types of

[7] We also note that the substance in question in *Baggett* was cocaine, further supporting the conclusion that this court's prior precedent does not recognize misidentification of cocaine to be such an egregious problem as to warrant an exception to the *Baggett* rule. *See Baggett*, 954 F.2d at 677.

[8] As Detective Cook acknowledged in his testimony, once substances are combined, it is impossible to determine how much pure filler may have been mistakenly added to the substance.

circumstantial evidence that courts may rely upon to determine whether a substance is cocaine. *Id.* In reviewing the district court's finding from this acceptable form of circumstantial evidence, viewed in the light most favorable to the government, we find no clear error. *Pirela Pirela*, 809 F.3d at 1199.

Second, regarding Cook's testimony, the credibility determination was the exclusive province of the district court, and we do not find the testimony incredible as a matter of law. *See United States v. Thompson*, 422 F.3d 1285, 1291-92 (11th Cir. 2005). To be incredible as a matter of law, testimony must be unbelievable on its face, i.e., testimony as to facts that the witness could not have possibly observed or events that could not have occurred under the laws of nature. *Id.* at 1291 (alteration adopted) (internal quotation marks omitted). It is undisputed that Cook was present at the execution of the search warrant, he observed the cocaine samples in person, and his assessment of the samples based on his 14 years of narcotics experience was not incredible as a matter of law.

The evidence, when viewed in the light most favorable to the government, was sufficient to establish that Rouse knowingly and intentionally possessed at least 500 grams of cocaine with the intent to distribute.

IV. CONCLUSION

For the reasons set forth above, we affirm the judgment of the district court.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N W
Atlanta, Georgia 30303

David J Smith
Clerk of Court

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May 23, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 16-15857-FF
Case Style: USA v. John Rouse, Jr.
District Court Docket No: 3:12-cr-00105-MMH-MCR-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Janet K. Mohler, FF at (404) 335-6178.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion

APPENDIX A-2

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v.

JOHN DENTON ROUSE, JR.

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 3:12-cr-105-J-34MCR
USM NUMBER: 57290-018

Defendant's Attorney: William Mallory Kent, Retained

THE DEFENDANT:

✓ was found guilty on Counts One and Three after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)	Possession with Intent to Distribute 500 Grams or More of Cocaine	March 2012	One
18 U.S.C. §§ 922(g) and 924(a)(2)	Possession of Firearms by a Convicted Felon	March 2012	Three

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, as modified by United States v. Booker, and 18 U.S.C. §§ 3551 and 3553.

Count Two of the Indictment was dismissed at trial.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in economic circumstances.

Date of Imposition of Sentence: August 15, 2016

Marcia Morales Howard

MARCIA MORALES HOWARD
UNITED STATES DISTRICT JUDGE

DATE: August 15, 2016

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **ONE HUNDRED (100) MONTHS, consisting of ONE HUNDRED (100) MONTHS as to each Count One and Count Three to run concurrently.**

✓ The court makes the following recommendations to the Bureau of Prisons:

- Incarceration at the facility located in Jesup, Georgia, and if unavailable, then the facility located in Coleman, Florida.
- Defendant enroll in any educational and vocational programs as are available.

✓ The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on 9/2/16 to JESUP

at JESUP, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: TM BUS
Deputy U.S. Marshall

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FOUR (4) YEARS, consisting of FOUR (4) YEARS as to Count One and THREE (3) YEARS as to Count Three to run concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

✓ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

✓ The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

✓ Defendant shall provide the probation officer access to any requested financial information.

✓ Defendant shall undergo a mental health evaluation and participate as directed in a program of mental health treatment if necessary.

✓ Defendant shall submit to a search of his person, residence, place of business, any storage units under his control, or vehicle, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition. Failure to submit to a search may be grounds for revocation.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$200.00	$0.00	$0.00

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

The Special Assessment in the amount of **$200.00** is due in full and immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.