

No. _____

**In the
Supreme Court of the United States**

MARCOS CASTANEDA, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Marcos Castaneda admitted by his plea to the elements of conspiring to distribute 500 grams or more of a mixture or substance containing methamphetamine, a charge that triggered the mandatory minimum sentencing provisions of 21 U.S.C. § 841(b)(1)(A)(viii). In previously sentencing nineteen coconspirators, the district court found their pleas proved that the substance involved was a mixture or substance containing methamphetamine. In sentencing Castaneda, the district court found by a preponderance of the evidence that the substance involved was “ice”, increasing the guideline base offense by four levels.

Castaneda asserts that the district court’s inconsistent drug type finding created procedural error in violation of his constitutional due process and jury trial rights. In *Alleyne v. United States*, 570 U.S. 99, 103, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013), this Court held that any fact which increases the mandatory minimum sentence is an element of the offense that must be proven beyond a reasonable doubt.

Castaneda’s petition presents the following question: whether a district court commits procedural error by basing its sentencing guideline calculation on a discretionary judicial finding by a preponderance of the evidence that is inconsistent with an element admitted by the guilty pleas of a defendant and all coconspirators.

TABLE OF CONTENTS

OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	5
CONCLUSION	9

INDEX TO APPENDICES

- A. Opinion of the Seventh Circuit, *United States v. Castaneda*, 906 F. 3d 691 (7th Cir. October 19, 2017), rehearing and suggestion for rehearing en banc denied November 8, 2018.
- B. Transcript of sentencing hearing (excerpt), *United States v. Castaneda*, Case No. 17-CR-38-JDP (W.D. Wis. February 16, 2018), pp. 76-80.

TABLE OF AUTHORITIES

Cases:

<i>Alleyne v. United States</i> , 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)	5, 6, 8
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)	5
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)	5
<i>Burrage v. United States</i> , 571 U.S. 204, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014)	5
<i>Molina-Martinez v. United States</i> , 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016)	4
<i>Ocasio v. United States</i> , 136 S. Ct. 1423, 194 L. Ed. 2d 520 (2016)	7
<i>Salinas v. United States</i> , 522 U.S. 52, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997)	7
<i>United States v. Abbott</i> , 748 F.3d 154 (3d Cir. 2014)	5
<i>United States v. Austin</i> , 806 F.3d 425 (7 th Cir. 2015)	7
<i>United States v. Barnes</i> , 602 F.3d 790 (7 th Cir.2010)	8
<i>United States v. Bell</i> , 795 F.3d 88 (D.C. Cir. 2015)	7
<i>United States v. Benn</i> , 572 Fed. Appx. 167 (4 th Cir. 2014).	7
<i>United States v. Block</i> , 705 F.3d 755 (7 th Cir. 2013).	8
<i>United States v. Booker</i> , 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)	5
<i>United States v. Cassius</i> , 777 F.3d 1093 (10 th Cir. 2015).	7
<i>United States v. Castaneda</i> , 906 F. 3d 691 (7 th Cir. 2018)	1, 4
<i>United States v. Cooper</i> , 767 F.3d 721 (7 th Cir. 2014).	7
<i>United States v. Curbelo</i> , 726 F.3d 1260 (11 th Cir. 2013)	6
<i>United States v. Dado</i> , 759 F.3d 550 (6 th Cir. 2014).	6
<i>United States v. Daniels</i> , 723 F.3d 562 (5 th Cir. 2013)	6
<i>United States v. Delgado-Marrero</i> , 744 F.3d 167 (1 st Cir. 2014)	5
<i>United States v. Freeman</i> , 763 F.3d 322 (3d Cir. 2014)	7
<i>United States v. Johnson</i> , 732 F.3d 577 (6 th Cir. 2013).	7
<i>United States v. McDuffy</i> , 890 F.3d 796 (9 th Cir. 2018)	6
<i>United States v. Monteiro</i> , 871 F.3d 99 (1 st Cir. 2017)	7
<i>United States v. Paulette</i> , 858 F.3d 1055 (7 th Cir. 2017).	6
<i>United States v. Pimentel-Lopez</i> , 859 F.3d 1134 (9 th Cir. 2017)	6
<i>United States v. Romans</i> , 823 F.3d 299 (5 th Cir. 2016)	7
<i>United States v. Taylor</i> , 600 F.3d 863 (7 th Cir.2010)	8
<i>United States v. Tucker</i> , 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972)	4
<i>United States v. Warneke</i> , 310 F.3d 542 (7 th Cir. 2002)	5

Other Authorities:

U.S. Const. amend. V	2
U.S. Const. amend. VI	2
U.S.S.G. § 2D1.1	3
U.S.S.G. Ch. 5, Part A	3
United States Supreme Court Rule 10(a)	8
United States Supreme Court Rule 13	2

Statutes:

21 U.S.C. § 841(b)	2, 3, 5
21 U.S.C. § 846	3, 5
28 U.S.C. § 1254(1)	2

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Marcos Castaneda, by undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming the sentence imposed in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has been published as *United States v. Castaneda*, 906 F. 3d 691 (7th Cir. October 19, 2018), and appears as Appendix A to the petition.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2018; the petition for rehearing and suggestion for rehearing en banc were denied on November 8, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely filed under United States Supreme Court Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C.A. § 841(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving . . .
(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;
such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life

STATEMENT

Marcos Castaneda pled guilty to an indictment charging him with conspiring to distribute over 500 grams of a mixture or substance containing methamphetamine in violation of 21 U.S.C. § 846. R. 19; R. 50: 24. The government invoked the provisions of 21 U.S.C. § 841(b)(1)(A)(viii) to impose a mandatory minimum sentence of ten years. R. 19: 1; R. 50: 3. At sentencing, Castaneda admitted to transporting six pounds of methamphetamine but made no statement indicating the substance was "ice." R. 51: 23.

In calculating the sentencing guideline range, the district court found by a preponderance of the evidence that the substance involved was "ice." R. 51: 80; App. B: 15a. That finding raised the base offense level from 32 to 36 and, factoring in Castaneda's criminal history category of II, increased the corresponding sentencing range (without further adjustments) from 136-168 months to 210-262 months. *See* U.S.S.G. § 2D1.1(c)(2) & (4); Ch. 5, Part A. The district court imposed a sentence of 240 months. R. 40.

Nineteen coconspirators pled guilty and were sentenced before the government charged Castaneda. R. 27: 5-6. In each of those cases, the district court calculated the

advisory sentencing guideline range after finding the drug type involved was a mixture or substance containing methamphetamine. R. 21: 34. In sentencing Castaneda, the district court relied on no new evidence and supplied no explanation for the discrepancy in its finding of a different drug type. R. 51: 76-80; App. B: 11a-15a.

On appeal, Castaneda argued that the district court improperly deviated from the drug type admitted in the plea and found in sentencing all other coconspirators. *United States v. Castaneda*, 906 F. 3d 691 (7th Cir. 2017). Despite the defense's objection, R. 51: 79; App. B: 14a, the United States Court of Appeals for the Seventh Circuit reviewed for plain error and held "the decision not to treat Castaneda identically with his coconspirators did not plainly make a difference to his sentencing range or impair the fairness or integrity of the proceedings." *Castaneda*, 906 F. 3d at 695; App. A: 7a.

Castaneda asserts his Fifth Amendment due process and Sixth Amendment jury trial rights were violated by the district court's inconsistent finding of the drug type element. He further asserts that his Fifth Amendment due process right to be sentenced on the basis of reliable information was violated by the procedural error resulting from application of that finding to incorrectly calculate his guideline sentencing range. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346, 194 L. Ed. 2d 444 (2016); *United States v. Tucker*, 404 U.S. 443, 447, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972).

REASONS FOR GRANTING THE PETITION

Sentencing in drug conspiracy cases requires an initial determination of the maximum sentence based upon facts found by a jury or admitted by the defendant. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).¹ Any fact which increases the mandatory minimum sentence is an element of the offense that must be charged in the indictment and found by the jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 103, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013). Such facts include the type of drug distributed by a conspiracy. *See, e.g.*, 21 U.S.C. §§841(b)(1)(A)(viii), 846; *Burrage v. United States*, 571 U.S. 204, 210, 134 S. Ct. 881, 887, 187 L. Ed. 2d 715 (2014) (§ 841(b)(1)(C) enhancement is an element under *Alleyne*).

The circuit courts of appeals express the clear language of *Alleyne* in varying fashions. *See, e.g.*, *United States v. Delgado-Marrero*, 744 F.3d 167, 191 (1st Cir. 2014)(drug quantity is an element for purposes of aggravated penalties but not an element necessary for conviction of “core offenses”); *United States v. Abbott*, 748 F.3d 154, 159 (3d Cir.

¹ *See also United States v. Booker*, 543 U.S. 220, 244, 125 S.Ct. 738, 756, 160 L.Ed.2d 621 (2005) (an element may be established when the defendant admits the facts in question through a guilty plea); *United States v. Warneke*, 310 F.3d 542, 550 (7th Cir. 2002) (“An admission is even better than a jury's finding beyond a reasonable doubt; it removes all contest from the case.”)

2014)(drug type is an element when it increases the possible range of penalties); *United States v. Daniels*, 723 F.3d 562, 572 (5th Cir. 2013)(drug quantity and type are not formal elements of a conspiracy offense; functional equivalent view implicitly endorsed); *United States v. Dado*, 759 F.3d 550, 570 (6th Cir. 2014) (drug quantity is an element of the offense in § 841 since its effect is to increase the maximum penalty); *United States v. Paulette*, 858 F.3d 1055, 1059 (7th Cir. 2017)(drug type is not an essential element and need not be proved beyond a reasonable doubt unless the government is seeking enhanced statutory penalties); *United States v. McDuffy*, 890 F.3d 796, 801 (9th Cir. 2018)(drug quantity is not a statutory element but a functional equivalent of an element); *United States v. Curbelo*, 726 F.3d 1260, 1269 (11th Cir. 2013)(drug quantities are elements under *Alleyne*).

The *Alleyne* Court added, “Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.” *Alleyne*, 570 U.S. at 116, 133 S. Ct. at 2163. Left unanswered is the question of whether fact-finding by a jury influences judicial discretion; that is, can a discretionary judicial finding by a preponderance of the evidence trump an element proven beyond a reasonable doubt by a jury finding or a defendant’s admission through a guilty plea?

The Ninth Circuit answered that it can’t: “[T]he jury made an affirmative finding, under the highest standard of proof known to our law that the amount of

methamphetamine attributable to defendant is less than 50 grams. The district court cannot attribute more than that amount to defendant without contradicting the jury on a fact it found as a result of its deliberations. District judges have many powers, but contradicting juries as to findings of facts they have been asked to make is not among them.” *United States v. Pimentel-Lopez*, 859 F.3d 1134, 1140 (9th Cir. 2017).

But decisions of other circuit courts of appeals answered this question differently with respect to drug *amounts*. See *United States v. Monteiro*, 871 F.3d 99, 115-16 (1st Cir. 2017); *United States v. Freeman*, 763 F.3d 322, 335-36 (3d Cir. 2014); *United States v. Benn*, 572 Fed. Appx. 167, 179-180 (4th Cir. 2014); *United States v. Romans*, 823 F.3d 299, 316 (5th Cir. 2016); *United States v. Johnson*, 732 F.3d 577, 584 (6th Cir. 2013); *United States v. Austin*, 806 F.3d 425, 433 (7th Cir. 2015); *United States v. Cassius*, 777 F.3d 1093, 1097-1098 (10th Cir. 2015) (collecting cases); *United States v. Bell*, 795 F.3d 88, 103-04 (D.C. Cir. 2015).

But drug *type* findings in conspiracy cases should concur with the principle that participants in a single conspiracy agree to pursue the same criminal objective. *Ocasio v. United States*, 136 S. Ct. 1423, 1429, 194 L. Ed. 2d 520 (2016); *Salinas v. United States*, 522 U.S. 52, 63, 118 S. Ct. 469, 477, 139 L. Ed. 2d 352 (1997). Supporting the proposition is the Seventh Circuit’s holding that a district court may not attribute different drug quantities to coconspirators on an identical record. *United States v. Cooper*, 767 F.3d 721, 731 (7th Cir.

2014), citing *United States v. Taylor*, 600 F.3d 863, 871–72 (7th Cir. 2010). By direct analogy, a finding of drug type at sentencing for nineteen coconspirators should apply at the sentencing of the twentieth, unless the district court explains the discrepancy or relies on new evidence. See *United States v. Block*, 705 F.3d 755, 761–62 (7th Cir. 2013), citing *United States v. Barnes*, 602 F.3d 790, 796 (7th Cir. 2010).

“Fairness is what justice really is,” Justice Potter Stewart once said. In Castaneda’s and his coconspirators’ cases, the district court found the conspiracy distributed a mixture or substance containing methamphetamine at twenty plea hearings and applied that finding to calculate guideline ranges at nineteen sentencings. But in sentencing Castaneda, the district court deviated from a fact found thirty-nine times beyond a reasonable doubt to substitute a drug type found by a preponderance of the evidence. That appears unfair as well as unjust.

The circuit courts of appeals disagree on the definition of an element under *Alleyne*. The circuits split on how facts found by a reasonable doubt during a case’s guilt stage may be applied at sentencing. None resolve the issue of whether procedural error, through incorrect guideline calculation, occurs through application of inconsistent drug type findings within a conspiracy case.

This Court should grant Castaneda’s petition in order to resolve the split between the federal circuits regarding sentencing procedures after *Alleyne*. U.S. Sup. Ct. R. 10(a).

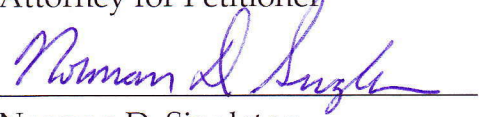
CONCLUSION

For all of the foregoing reasons, petitioner Marcos Castaneda requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted this 4th day of February, 2019.

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