No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Elamin Bashir — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Aopeals for the Third Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Elamin Bashir
(Your Name)

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Ayer, MA 01432
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION PRESENTED

I. WHETHER THE MANDATORY MINIMUM SENTENCE WAS IMPROPERLY IMPOSED FOR DRUG-TRAFFICKING CONSPIRACY, BECAUSE INDIVIDUALIZED JURY FINDING AS TO QUANTITY OF DRUGS ATTRIBUTABLE TO EACH INDIVIDUAL DEFENDANT, RATHER THAN DRUGS ATTRIBUTABLE TO CONSPIRACY AS A WHOLE, IS REQUIRED TO TRIGGER MANDATORY MINIMUM?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

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

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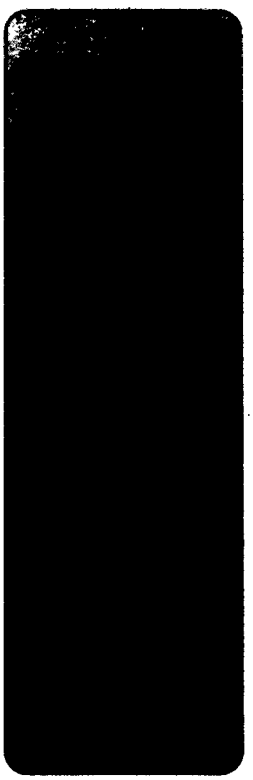

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[✓] For cases from **federal courts:**

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

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[✓] is unpublished.

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

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[✓] is unpublished.

[ ] For cases from **state courts:**

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

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[ ] is unpublished.

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

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

JURISDICTION

[✓] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

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

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

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

[ ] For cases from **state courts:**

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

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

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

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

TABLE OF AUTHORITIES CITED

Appellate Court Case:

United States Supreme Court Case:

REASONS FOR GRANTING THE PETITION

This circuit split as set set out in detail above, presents an error sufficiently grave to be deemed a fundamental defect.

STATEMENT OF THE CASE

Petitioner and four other individuals, Omar Teegle, Reginald Irby, Michael Lewis and Omar Scott, were charged in a single-count indictment with conspiracy to possess five kilograms or more of cocaine with intent to distribute, in violation of 21 U.S.C. § 846. The indictment alleged that between April 2014 and May 30, 2014, Lewis initiated discussions with an informant, later identified as Moises Parra, to purchase 25 Kilograms cocaine; Teagle, Petitioner, Irby and Lewis arranged for the cocaine to be delivered to Philadelphia from Arizona using cell phones and making cash deposits; and, Irby and Scott used vehicles equipped with hidden compartments to transport cash to make partial payment for the cocaine.

On April 8, 2015, Petitioner began trial before then-Cheif Judge Patrese B. Tucker and a jury, which found Petitioner guilty. Six days before trial, the government filed an Information charging prior offense, pursuant to 21 U.S.C. § 851, which had the effect of increasing Petitioner's mandatory minimum sentence exposure from ten years' to 20 years' incarceration. Pre-sentence Report ("PSR") ¶2. Petitioner objected to the imposition of the enhanced mandatory minimum prior to sentencing. The District Court overruled the objection and sentenced Petitioner to 20 years' incarceration on January 6, 2016.

STATEMENT OF FACTS

Moises Parra built high-end cabinets, entertainment centers and wine racks in a warehouse he rented in Tempe, Arizona.[1]

Parra lived a double life apart from his cabinet making business: that of

[1] Was in contruction business.

a drug dealer and law enforcement informant. In this investigation, Parra worked as an informant for the Chandler, Arizona Police Department ("CPD") under the direction of Task Force Officer Samuel Garday. In early 2014, Parra called a former marijuana dealer he knew named Michael Lewis in an effort to convince Lewis to buy marijuana from him. Lewis, according to Parra, asked if Parra was able to sell cocaine in addition to marijuana.

On April 13, 2014, Parra flew from Phoenix to Philadelphia on a flight booked by Lewis. Parra took a taxi to the Renaissance Hotel where he met with Lewis and two other individuals, later identified as Omar Teagle and Tony Davis.

According to Parra, Teagle inquired if Parra was able to provide at least 50 kilograms of cocaine and 1000-2000 pounds of marijuana on a weekly basis. When Parra said he was, Teagle and Parra talked about prices and meeting in Phoenix to check out the product. As the conversation came to an end, there was a knock at the hotel room door which made Parra feerful because he was inside the room with "three black males." Teagle said, according to Parra, that it was his brother at the door. When the door was opened, Parra said Petitioner walked into the room. Because Parra was running late for his return flight to Phoenix, he testified that he quickly recounted to Petitioner what he had previously told Teagle.

Parra told Petitioner that he was in the construction business in Arizona. This was of great interest to Petitioner because he too was in the construction business. Petitioner told Parra that he renovated and flipped houses and inquired about obtaining building materials from Parra. In fact, Petitioner was renovating three properties in Philadelphia. Prior to April 2014, Petitioner obtained his home renovation materials, including lumber, cabinets and plumbing material, at Home Depot and Lowes. In Parra, Petitioner found a potential source of building supplies at more favorable prices. The meeting broke up after Petitioner,

according to Parra, gave Davis a small amount of money at Teagle's request. Lewis then drove Parra to the airport.

On April 16, 2014, three days after this initial meeting, Lewis flew to Phoenix to meet with Parra. Parra drove Lewis to a number of different locations in the Phoenix area while recording the conversations the two men had. Lewis indicated that others coming to Phoenix, who Parra understood to be Teagle and Petitioner, had been delayed. As a result, it was decided that a meeting would take place the next day, April 17th.

The next morning, April 17th, Parra picked up Lewis, Teagle, Petitioner, and an individual later identified as Reginald Irby from the Hyatt Hotel in downtown Phoenix. Parra drove the four men to the warehouse in Tempe where his construction business was located. During the ride, Petitioner, with the exception of referencing the car valet upon leaving the Hyatt, said nothing while Parra talked "nonsense" and described murders, robberies and kidnaping that were occurring in the Phoenix area as a result of the drug trade.

Upon entering the woodworking-area of the warehouse, Parra and Petitioner immediately began talking about construction materials and cabinets Parra fabricated from those materials. Petitioner "... was interested in me shipping him out some lumber, that he was interested in getting a cheaper price out here and me shipping it out there[,]" Parra testified. Parra showed Petitioner photographs of a wine cabinet he had built. Their discussion ended only after it was interrupted by Teagle.

The group, according to Parra, then proceeded to situate themselves around an enormous table that measured 8' x 16'. Parra directed his conversation to Teagle. Parra discussed the price, weight and transport of cocaine and marijuana from notes he made on a piece of paper he had retrieved from an office located in the warehouse.

A short time later, Parra received a phone call from one of his DEA handlers,

exited the warehouse and was given three plastice-wrapped kilograms of cocaine contained in a duffle bag. Parra returned to the warehouse and executed a "surprise flash[2]" of displaying the cocaine to the group. The cocaine was displayed on the same large 8' x 16' table where Parra had earlier discussed numbers with Teagle. Parra opened one packet and Irby opened two packets while Teagle and Parra spoke. Lewis was off to the side; Petitioner just looked. Parra later changed his testimony and claimed that Petitioner assisted Irby in opening one of the packets.

Parra's testimony that Petitioner opened one of the packets was contradicted by Officer Garday, who observed the meeting in real-time via a video camera secreted in the warehouse walls. There was no audio. This video recorder malfunctioned and did not actually record the meeting. Garday observed only Irby open the three packets.

After no more than ten minutes, Parra re-wrapped one of the packets and claimed Irby and Petitioner re-wrapped the other two. Parra then brought the cocaine back outside where he returned it to the DEA Handler. When Parra re-entered the warehouse, he and Petitioner spoke once again about construction materials and Parra's **bona fides** of having a "tax I.D. and tax exempt license." Parra told Petitioner that they could "launder our money through the construction." When the men eventually left the warehouse, they went to a number of stores in an effort to purchase cell phones that Parra and Irby would use to communicate with each other regarding future meetings.

Petitioner argued that he was present at the meeting inside the warehouse to purchase construction materials from Parra and feigned interest in the drug conversations out of fear. Petitioner's fear arose, he argued, from hearing

[2]A "surprise flash" was a term used by Officer Garday to describe Parra showing the cocaine to potential buyers without advanced notice. The cocaine Parra used in the "surprise flash" was cocaine that had been seized by law enforcement in other investigations. The instant case, in effect, was a reverse sting operation where law enforcement and the informants sold, rather than purchased, the cocaine.

Parra describe the murders, kidnapping and robberies that were occurring in the Phoenix area due to the drug trade. Ytana Dudley, a youth advocate for the City of Philadelphia and businesswoman, testified that Petitioner was upset when she picked him up from the airport after his return from Phoenix. Petitioner "kept babbling about people not being right" and telling Ms. Dudley that they would have to resume buying their home renovation supplies from Lowes and Home Depot.

That Petitioner wanted no part of the cocaine scheme was further corroborated by his total absence at any meetings or reference in any texts, phone calls, or other communication after the April 17th "surprise flash." These events included an April 21st telephone conversation between Parra and Irby where Parra introduced Auturo Villegas, posing as the son of Parra's cocaine supplier, to Irby over the phone. On May 12, 2015, Teagle and Irby came to Phoenix to make a $25,000 cash deposit with Parra and Villegas for 25 kilograms of cocaine. The parties stipulated that Villegas and Petitioner had neither contact nor communication with each other at any time. On May 28, Parra called Irby to let Irby know that he would be coming to Philadelphia within days. On May 30th, Irby and an individual named Omar Scott were arrested in a Ruby Teusdays parking lot near the Philadelphia airport in possession of over $200,000 in cash that was to be used to purchase 25 kilograms of cocaine. Officer Garday testified that he had no evidence that Petitioner had communicated with anyone associated with this investigation after the April 17th "surprise flash." In short, as Parra acknowledged, Petitioner was never seen or mentioned at anytime after April 17th.

Parra claimed that Petitioner was involved in some of the drug discussions at the April 13th Renaissance hotel room meeting and at the April 17th meeting inside the warehouse. Parra was the only witness to identify Petitioner's voice on a recording of the April 17th warehouse meeting and the import of what was said at those meetings.

Parra had a financial and legal interest in implicating Petitioner in this conspiracy. Officer Garday testified that unlike the DEA, which "sometimes... will pay for just intelligence," the CPD "strictly paid for results;" i.e., Parra "didn't get paid unless there was an arrest or a seizure." Among other contacts with the criminal justice system, Parra was arrested in 2008 for distribution of marijuana. After deigning to appear in court on a "couple" of occasions, a bench warrant was issued for Parra's arrest after he failed to appear at his final court appearance. Three years later in 2011, Parra "got busted doing a drug deal" by the CPD which resulted in the 2008 arrest and bench warrant coming to light. Faced with significant criminal penalties for his open arrest and failure to appear, Parra decided to turn informant.

Parra's role as a police informant was extensive and included stints working for the CPd, the Gilbert, Arizona Police Department, the Hida, Arizona Sheriff's Department and the DEA. Parra estimated that he worked as an informant on over 50 cases and earned over $240,000. Parra's monetary earnings in Petitioner's prosecution amount to $46,000.

In addition to receiving almost one-quarter of a million dollars in his role as an informant in general, and $46,000 in the prosecution of Petitioner in particular, Parra succeeded in making his 2008 and 2011 drug cases disappear by "working off" his charges. Parra testified that after he orchestrated three cases in his capacity as an informant for the CPD arising from his 2011 arrest, he entered into an agreement with the Phoenix Police Department to orchestrate three additional cases so as to get the charges from his 2008 arrest dismissed. Thus, at the time Parra testified at trial against Petitioner in April 2015, both of Parra's drug cases had been dismissed with only an arrest for DUI resulting in a conviction. More importantly, Lewis' proffer statement indicated that Parra had initiated this investigation by telephoning Lewis, who is African-American, multiple times. Lewis's proffer statement contradicted

allegations in the Indictment and DEA reports that Lewis contacted Parra first and raised the specter of unlawful racial profiling that Petitioner did not have time to investigate.

THE JURY INSTRUCTION

The Indictment charged Petitioner with one-count of conspiracy to possess five kilograms of cocaine or more with intent to distribute. Critical, therefore, to a valid verdict was whether Petitioner had the unity of purpose with at least one other person to "possess" the cocaine with intent to distribute. The District Court instructed the jury that the government needed to prove three elements in order to find Petitioner guilty of conspiracy. The third of the three elements the District Court identified for the jury was that

> "the defendant Bashir joined the agreement or the conspiracy knowing of its objective to possess with the intent to distribute a controlled substance and intended to join together with at least one other conspirator to achieve that objective. That is, defendant Bashir and at least one other alleged conspirator shared a unity of purpose and intent to achieve that objective."

With respect to the element of possession, the District Court further instructed the jury to focus on whether "the defendant and others agreed to possess with the intent to distribute a controlled substance, not whether any such possession with the intent to distribute actually occurred." The District Court went on to define possession for the jury as follows:

> "In order to find the defendant Bashir guilty of possession with the intent to distribute a controlled substance, you must find that the government proved each of the following four elements beyond a reasonable doubt as to defendant Bashir: first, that the defendant Bashir possessed a mixture or a substance containing a controlled substance; second, that he possessed the controlled substance knowingly or intentionally ..."

The District Court went on to state, correctly, that the government need not prove Petitioner have acutal, physical control over the controlled substance, but only that he had the power and intention to exercise control over it.

Furthermore, the District COurt told the jury next regarding consideration

of Petitioner's state of mind regarding his knowledge:

> Your decision whether **the defendant** knew the material **he possessed** with the intent to distribute was a controlled substance again involves a decision about **the defendant's** state of mind.

Petitioner objected to this instruction on the ground that the Court assumed that Petitioner, rather than a generic defendant, possessed the material that ultimately turned out to be cocaine. The District Court overruled the objection.

I. THE MANDATORY MINIMUM SENTENCE WAS IMPROPERLY IMPOSED FOR DRUG-TRAFFICKING CONSPIRACY, BECAUSE INDIDVIDUALIZED JURY FINDING AS TO QUANTITY OF DRUGS ATTRIBUTABLE TO EACH INDIVIDUAL DEFENDANT, RATHER THAN DRUGS ATTRIBUTABLE TO CONSPIRACY AS A WHOLE, IS REQURIED TO TRIGGER MANDATORY MINIMUM SENTENCE.

Petitioner challenges his sentence on the basis that the District Court improperly sentenced him to the mandatory minimum for entering a conspiracy to distribute 5 kilograms or more of cocaine, even though the jury did not make individualized findings as to the amount of cocaine attributable to each defendant. See, United States v. Miller, 645 Fed. App'x 211, 218 (3rd Cir. 2016)(adopting the conspiracy-wide approach). Under the circuit law the jury was required to determine only whether the defendants had conspired to distribute some amount of a substance containing cocaine, and whether the amount of cocaine ultimately distributed in connection with the conspiracy exceeded 5 kilograms.

This issue was presented in Petitioner's Pro-se Supplemental Brief, but never address by the Court of Appeals. The circuits are split on whether an individualized jury finding as to the quantity of drugs attributable to (i.e., foreseeable by) an individual defendant is required to trigger a mandatory minimum, or if it is sufficient for the jury to find that the conspiracy as a whole resulted in distribution of the mandatory-minimum-triggering quantity. The difference is subtle but important.

Based on the facts of this case, the cases and legal principles discussed herein, This Honorable Court should adopt the individualized approach, and vacate Petitioner's sentence, and remand for resentencing without the mandatory minimum.

More importantly, the exculpatory statements of Teage and Lewis demonstrated that Petitioner had no intention of participating in a cocaine consipracy either before, or after, the "surprise flash" sprung by the informant Parra. The Supreme Court in Rosemond v. United States, 134 S. Ct. 1240 (2014), held that foreknowledge is an essential element of criminal behavior.

The Supreme Court has held that a jury must find any facts "that increase the prescribed range of penalties to which a criminal defendant is exposed," Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), and that "[f]acts that increase the mandatory minimum sentence are [] elements and must be submitted to the jury and found beyond a reasonable doubt." Alleyne v. United States, 570 U.S. 99, 108 (2013). A district court thus errs when it applies a mandatory minimum based on a fact that was not found by the jury. Recently, the Supreme Court applied these principles to drug-conspiracy convictions under § 841(b)(1), requiring - before imposing the statutory mandatory minimum triggered when death results from the distributed drug - that a jury find the fact of resultant death that triggers the mandatory minimum. Burrage v. United States, 571 U.S. 204 (2014). "Because the 'death results' enhancement increase[s] the minimum and maximum sentences ..., it is an element that must be submitted to the jury and found beyond a reasonable doubt." Id. at 887; see also id. at 887 n.3 (noting that a drug-conspiracy charge under § 841(a)(1) is "thus a lesser-included offense of the [charged] crime" of drug-conspiracy and resultant death). These principles apply just the same to the fact of a mandatory-minimum drug quantity.

The question remains "whether it is the **individualized** drug quantity that is a fact that increases the mandatory minimum sentence." United States v. Pizarro, 772 F.3d 284, 292 (1st Cir. 2014). Or whether, as the District Court found, the amount of drugs attributable to the conspiracy as a whole can be the fact which triggers the mandatory minimum for an individual defendant.

The Circuits are split on this issue. The First, Fourth, Fifth, and Ninth Circuits have adopted the individualized approach. See United States v. Haines, 803 F.3d 713 (5th Cir. 2015); United States v. Rangel, 781 F.3d 736, 742-43 (4th Cir. 2015)(citing United States v. Collins, 415 F.3d 304 (4th Cir. 2005)); Pizarro, 772 F.3d at 292-94; United States v. Banuelos, 322 F.3d 700, 704-06

(9th Cir. 2003). The Third and Seventh Circuits have explicitly adopted the conspiracy-wide approach. See, e.g., United States v. Phillips, 349 F.3d 138, 1441-43 (3rd Cir. 2003), vacated on other grounds, Barbour v. United states, 543 U.S. 1102, 125 S. Ct. 992, 160 L. Ed. 2d 1012 (2005); United States v. Knight, 342 F.3d 697, 709-12 (7th Cir. 2003).

Although some circuits have used the conspiracy-wide approach, it has been called into question by Alleyne and subsequent cases from those circuits. Notably, the circuits to adopt the conspiracy-wide approach did so before Alleyne was decided in 2013, while all circuits to explicitly address the issue in Alleyne's wake have adopted or followed the individualized approach. The circuits that earlier adopted the conspiracy-wide approach have, at times, failed to grapple with it in subsequent published and unpublished cases decided after Alleyne.

Two circuits that initially adopted the conspiracy-wide approach have recently questioned whether that approach is the correct one in a post-Alleyne world. For example, the Sixth Circuit appeared to adopt the conspriacy-wide approach in United States v. Robinson, 547 F.3d 632 (6th Cir. 2008), but later panels questioned whether it was consistent with earlier Sixth Circuit case law. See United States v. Young, 847 F.3d 328, 366-67 (6th Cir. 2017)(finding that the defendant's sentence could be upheld under either approach, and noting that "there is no need for us to reconcile these [conflicting] cases at this time"); see also United States v. Gibson, No. 15-6122, 2016 U.S. App. LEXIS 21141, 2016 WL 6839156 (6th Cir. Nov. 21, 2016), vacated, 854 F.3d 367 (6th Cir. 2017)(en banc). In Gibson, the panel reluctantly applied Robinson, and the full court took the case **en banc**, ultimately dividing equally, resulting in a reinstatement of the district court's sentence based on the conspiracy-wide approach. United States v. Gibson, 874 F.3d 544 (6th Cir. 2017)(en banc). Similarly, the Tenth Circuit held in United States v. stiger, 413 F.3d 1185 (10th Cir. 2005), that "[t]he jury is not required to make individualized

findings as to each coconspirator because the sentencing judge's findings do not, because they cannot, have the effect of increasing an individual defendant's exposure beyond the statutory maximum justified by the jury's guilty verdict." Id. at 1193 (quotation marks omitted); see also id. at 1192 (recognizing that "the judge lawfully may determine the drug wantity attributable to [each] defendant and sentence him accordingly (so long as the sentence falls within the statutory maximum made applicable by the jury's conspiracy-wide drug quantity determination)")(internal citation and quotation marks omitted)). But recently, the Tenth Circuit called Stiger into question in United States v. Ellis, 868 F.3d 1155, 1170 & n.13 (10th Cir. 2017)("[A] defendant can be held accountable for that drug quantity which was within the scope of the agreement and reasonably foreseeable to him")(quoting United States v. Dewberry, 790 F.3d 1022, 1030 (10th Cir. 2015). The reason is simple: Alleyne undercut the rationale put forth in Stiger for adopting the conspiracy-wide approach because, after Alleyne, it was no longer the case that a judge could "lawfully" determine a fact that would increase a defendant's mandatory-minimum sentence.

Even in the Third and Seventh Circuits, recent cases call into question whether the earlier cases adopting the conspiracy-wide approach are still being followed. see, e.g., United states v. Cruse, 805 F.3d 795, 817-18 (7th Cir. 2015)(holding that the failure to give the jury a Pinkerton instruction as to drug quantity did not affect the defendant's substantial rights, but noting that, if it had, "the remedy for the error would be resentencing under the default drug-conspiracy penalty provision"); United states v. Miller, 645 Fed. App'x 211, 218 (3rd Cir. April 1, 2016)(finding error because "the jury did not determine [a drug quantity] directly attributable" to the individual defendant, but holding that the error was harmless).

The Supreme Court in Burrage offered a new way to think about drug-conspiracy offenses involving an aggravating element that enhances a defendant's

sentence. Conspiring to violate § 841(a)(1) is properly thought of as "a lesser-included offense" of conspiring to violate § 841(a)(1) when death results from the drug distribution. Burrage, 134 S. Ct. at 887 n.3. Alleyne sets up this paradigm because the "death results" element is a fact that triggers a mandatory minimum sentence and thus must be found by a jury. See 570 U.S. at 108. Similarly, conspiring to violate § 841(a)(1) is a "lesser-included offense" of conspiring to violate § 841(a)(1) when the drug quantity meets a threshold that triggers an enhanced sentence.

In United States v. Haines, ___F.3d___ (5th Cir. Oct. 15, 2018), No. 13-31287. The Fifth Circuit reversed for failure to attribute drug quantity to defendants as individuals. The defendants were convicted of conspiracy to possess with intent to distribute heroin. The jury found that the conspiracy involved one kilogram or more of heroin, and the District Court concluded (like in this case) concluded that this finding triggered the statutory minimum of 20 years' imprisonment for two of the defendants, based upon the Government's having filed for prior felony enhancements under 21 U.S.C. § 851 prior felony enhancements. All the defendants challenged the District Court's charged to the jury with the full conspiracy quantity stated in the indictment instead of an individual-specific drug-quantity jury finding. The Fifth Circuit areed that defendants should have been sentenced based on the drug quantity attributable to them as individuals, not the quantity attributable to the entire conspiracy. Holding that for purposes of statutory minimum sentences, the Court must find the quantity attribtable to the individual defendant. Accordingly, the panel vacated the sentences and remanded for re-sentencing.

It is undisputed, here that the District Court charged the jury with attributing the entire conspiracy quantity of 25 kilograms of cocaine to Petitioner for purposes of indictment.

The doctrinal shift at work here emanates from Alleyne v. United States, 133S Ct. 2151, 2160 ("The legally proscribed range is the penalty affixed to [a] crime," a fact that increases either end of the penalty range "produces a new penalty and constitutes an ingredient of the offense"). In otherwords, the core crime and aggravated crime, we know that they are not the same offense but instead constitute two different offenses because the statute provide for different statutory ranges of punishment. This holding in turn exposed the instability of this Court's legal reasoning that conspiracy-wide drugs are individually attributable to all members of the conspiracy. After Alleyne, the Court can nolonger construct a 0-to-life sentencing range by merging 21 U.S.C. § 841(b)(1)(A), (B), (C) or (D), under an sectoin 846 conviction, That is, the district court erroneously based the madnatory minimum in this case on the conspiracy-wide guanity of controlled substance, rather than on the quantities attributable to each of the defendants individuallv. Thus, because it is undisputed that the jury did not make an individualize quantity finding with respect to the defendants, and becasue such findings are necessary to increase the madatory minimum sentence, this Court should vacate the instant sentence and remand for re-sentncing.

Sentencing in a conspiracy case involves two distinct sentencing ranges: The staturory range of punishment and the United States Guidelines range. The statutory tange acts as an outer boundary; a defendant cannot be sentenced below the statutory minimum or above the statutory maximum, even if the Guidelines recommend a term of

imprisonment outside of that statutory range. As the United States Court of Appeals for the Fifth Circuit has explained, 21 U.S.C. § 841 consists of two relevant subsectoins. Section 841(a) makes it unlawful for any person to manufacture or distribute a controlled substance. Section 841(b) defines the applicable penalties for violations of § 841(a) based on the type and quantity of drugs, previous convictions, and whether death or serious bobily injury resulted form use of the drug. The factual determination regarding the quantity of the controlled substance can significantly increase the maximum penalty from 5 years under § 841(b)(1)(D) to life imprisonment under § 841(b)(1)(A), and it can significantly increase the minimum penalty from zero years under § 841(b)(1)(D) to ten years under § 841(b)(1)(A). FActual determinations that increase maximum or minimum sentences, other than prior convictions, must be found by a jury beyond a reasonable doubt. See United States v. Haines, 803 F.3d 713, 739 (5th Cir 2015)

So, if the Government wants a heightened sentence under subsectoin 841(b)(1)(A), it is obliged to allege the crime in the indictment and ensure the jury receives proper jury instructions and a special-verdict form with spaces enabling the jury to find the defendant's individually attributable controlled substance amounts. Haines, 803 F.3d at 740

It is clear, that under the Sentencing Guidelines, a defendant who participates in a drug conspiracy is accountable for the quantity of drugs which is attributable to the conspiracy and "reasonable foreseeable" to him. Reasonable foreseeability does not follow automatically from proof that the defendant was a member of the conspiracy. Reasonable foreseeability requires a finding seperate

from a finding that the defendant was a conspirator.

In sum, the problem here is not with the fact of the prior felony convictions, See Almenderez-Torres v. United States, 523 U.S. 224, 243 (1998)(prior convictions are not facts increasing a sentence that require jury findings), but with the sentencing increase made available by the Alleyne error. See United States v. Ellis, 868 F.3d 1155, 1171 n.15 (2017).

CONCLUSION

For all the reason stated above, this Honorable Court should grant the instant petition for writ of certiorari.

Respectfully Submitted,

El-Amin Bashir, pro-se