No. _____

In The

Supreme Court of the United States

DWIGHT KNOWLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal conspiracy statutes apply extraterritorially when the object of the conspiracy is an extraterritorial offense but there is no clear indication that Congress also intended that the conspiracy offense itself to be extraterritorial.

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Dwight Knowles, through counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the District of Columbia Circuit in this case.

OPINION BELOW

The decision of the D.C. Circuit in this case is at Appendix A and is reported at 921 F.3d 263. The orders denying panel rehearing and rehearing *en banc* are at Appendixes B and C.

JURISDICTION

The D.C. Circuit issued its judgment, accompanied by its written opinion, on April 23, 2019. Orders denying panel rehearing and rehearing were issued on August 20, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Petitioner Dwight Knowles was convicted pursuant to 21 U.S.C. § 963, which reads as follows:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Petitioner Dwight Knowles, a Bahamian citizen who was a resident of Colombia, was charged by a December 2012 indictment with a single offense:

> Conspiracy to Distribute, and Possess with Intent to Distribute, Five Kilograms or More of Cocaine On Board an Aircraft Registered in the United States or Owned by a United States Citizen in violation of Title 21, United States Code, Sections 959(b), 960, and 963, and Title 18, United States Code, Section 2[.][1]

C.A.J.A.[2] 3282. Knowles was extradited from Colombia to the United States in September 2014. *Id.* at 511.

Prior to his trial, Knowles moved to dismiss the indictment on the grounds that the offense he was charged with did not apply extraterritorially. *Id.* at 508-09. The District Court denied the motion. *Id.* at 543.

At trial the government introduced evidence which it argued showed that Knowles and others had conspired to obtain a U.S.-registered aircraft to use for drug trafficking. Much of the evidence focused on a particular U.S.-registered aircraft which was stolen from Nassau, Bahamas by a member of the alleged conspiracy, supposedly for use in trafficking. *See id.* at 2577-80. The aircraft, however, was seized by authorities in Haiti before it could be used for such a purpose. *Id.*

The evidence showed, that, if Knowles was a drug trafficker, he was spectacularly unsuccessful. There was no evidence that he ever trafficked any drugs or successfully obtained any aircraft that could be used for trafficking—at sentencing the trial judge noted that "in the end, either you or your connections

[1] Knowles' codefendant in the District Court proceedings (and Co-Appellant before the D.C. Circuit), George Oral Thompson, was also charged in the same Indictment with a single count of participating in the conspiracy. Thompson is not a Party to this Petition.
[2] Citations in the format "C.A.J.A. [page number]" refer to the Joint Appendix filed by Appellants in the Court of Appeals.

weren't good enough at this and the enterprise failed." *Id.* at 3130. The judge also observed that Knowles "was not the leader and he was not the organizer" of the conspiracy. *Id.* at 3132.

It was undisputed that the entire conspiracy occurred outside the United States and there was no allegation that Knowles or his associates intended to send drugs to the United States or intended their conduct to have any effect in the United States. To the contrary, the evidence accepted by the jury indicated that Knowles sought to use aircraft "to transport cocaine from Venezuela to Central America." *Id.* at 3136 (trial judge at sentencing). Indeed, at the prosecution's request, the jury was instructed that "[i]f the Government proves that the aircraft used was owned by a United States citizen or registered in the United States, that itself is enough. The government is not required to show that any of the alleged criminal acts occurred within the District of Colombia or the United States." *Id.* at 2765.[3]

The jury convicted Knowles on the single count with which he had been charged and he was sentenced to twenty years' incarceration. *Id.* at 2785, 3139.

The D.C. Circuit affirmed. That Court's opinion dealt only briefly with the argument advanced in this Petition—that 21 U.S.C. § 963 did not apply extraterritorially because Congress has not affirmatively indicated that that section is extraterritorial. The Court of Appeals noted that the object of the conspiracy was to violate 21 U.S.C. § 959(c) which criminalizes the use of U.S. owned or registered

[3] There was also no allegation of any violence related to the conspiracy. *See id.* at 3133 (trial judge: "there's no evidence of violent acts committed by you in the past.").

aircraft for drug trafficking and which contains (in § 959(d)) an explicit extraterritoriality provision.[4] App. A at 2-3. It then reasoned that, although, by its terms § 959(d)'s extraterritoriality provision did not apply to § 963, § 963 nevertheless created an extraterritorial offense because "[g]enerally, the extraterritorial reach of [the] ancillary offense ... is coterminous with that of the underlying criminal statute." *Id.*

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to adjudicate whether federal criminal conspiracy statutes apply extraterritorially in cases where the object of the conspiracy is to commit an offense that is itself extraterritorial, but where there is no other indication that Congress intended the conspiracy statute to apply overseas. Conspiracy is a crime separate and independent from any offenses that are the object of the conspiracy. Consequently, this Court's reasoning in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010), and in subsequent cases, indicates that, unless there is unmistakable evidence that Congress intended the applicable conspiracy provision to apply extraterritorially, it does not so apply. But no opinion of this Court has directly addressed this issue, and the jurisprudence in the lower courts is confusing and sometimes inconsistent with *Morrison*.

[4] Section 959's subsections have been renumbered since the time of Knowles' alleged offense, but the substantive language applicable to this case has not been changed. *See* Pub. L. No. 114-154, § 2, 130 Stat. 387 (May 16, 2016) (amending § 959); Pub. L. No. 115-91, § 1012(b), 131 Stat. 1546 (Dec. 12, 2017) (same).

I. KNOWLES' CONDUCT WAS EXTRATERRITORIAL

In this case the applicable conspiracy statute was applied extraterritorially. All of Knowles' and his coconspirators' alleged criminal conduct occurred outside the United States and the prosecution never asserted that any conspirator intended to import drugs into this country or to otherwise cause any effect in this country. Consequently, Knowles' conviction survives only if the offense with which he was charged—conspiracy to distribute and possess with intent to distribute cocaine aboard a U.S. owned or registered aircraft in violation of 21 U.S.C. § 963—reaches extraterritorial conduct.

II. U.S. LAW DOES NOT APPLY EXTRATERRITORIALLY ABSENT CLEAR AND UNMISTAKABLE CONGRESSIONAL INTENT

> It is a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world. This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. The question is not whether we think Congress would have wanted a statute to apply to foreign conduct if it had thought of the situation before the court, but whether Congress has affirmatively and unmistakably instructed that the statute will do so.

RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) (citations and quotations omitted) (citing *Morrison*, 561 U.S. at 255, 261).

The presumption that acts of Congress do not apply extraterritorially unless Congress has "affirmatively and unmistakably" indicated to the contrary is vigorously enforced. It is, for example, "well established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality." *Kiobel v.*

Royal Dutch Petroleum Co., 569 U.S. 108, 118 (2013) (statute's reference to "any civil action" did not encompass civil actions outside the United States); *see also RJR Nabisco*, 136 S. Ct. at 2108 (language creating cause of action for "[a]ny person injured in his business or property" "is insufficient to displace the presumption against extraterritoriality").

III. THE § 963 CONSPIRACY STATUTE IS NOT EXTRATERRITORIAL

Knowles was convicted of violating 21 U.S.C. § 963, which makes it unlawful to conspire "to commit any offense defined in this subchapter." Even if the § 959 substantive offense that was allegedly the object of the conspiracy was an instance in which Congress has opted to apply U.S. criminal law outside of U.S. territory, Congress has not "affirmatively and unmistakably instructed" that § 963 applies extraterritorially. Consequently, it does not apply extraterritorially.

Neither the structure nor the text of the relevant statute indicates a clear intent for the conspiracy provision to apply extraterritorially. Section 963 contains no express extraterritoriality provision. And the statutory structure in which § 963 is located also provides no clear, affirmative indicia of extraterritoriality. Section 963 applies to all offense set out in "this subchapter"—Subchapter II of Chapter 13 of Title 21 of the United States Code. That Subchapter sets out numerous offenses that are not extraterritorial: 21 U.S.C. § 825 (improper labeling and packaging);[5] § 952 (importation of controlled substances); § 953 (exportation of controlled substances); § 955 (possession on board vessels, etc., arriving in or departing from

[5] Although § 825 is in Subchapter I of Chapter 13, importation and exportation in violation of that provision is made an offense under Subchapter II (and thus subject to the § 963 conspiracy provision) by 21 U.S.C. § 960(a)(1).

United States); § 957 (failure to register); § 961 (failure to notify the Attorney General of certain imports or exports).

Furthermore, Congress has explicitly designated other provisions of the Subchapter as applying extraterritorially. For example, § 959—the substantive offense on which the conspiracy charge against Knowles is based—contains an extraterritoriality provision, which, by its terms, applies only to that section, not to the conspiracy provision, which is set out in a separate section. 21 U.S.C. § 959(d) ("*This section* is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States) (emphasis added). Similarly, § 960a, which criminalizes certain drug trafficking conduct associated with "[f]oreign terrorist organizations, terrorist persons and groups," is defined by Congress to reach extraterritorial conduct. Notably, that Section's extraterritoriality provision encompasses not only direct violations of the substantive law, but also "attempts or conspir[acies] that occur outside the United States." As this Court has explained, "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *RJR Nabisco*, 136 S. Ct. at 2102 (quoting *Morrison*, 561 U.S. at 265). The language of § 960a reinforces an obvious point—when Congress wants a conspiracy offense to have extraterritorial reach it can and will clearly say so.[6] Congress' decision to explicitly assert extraterritorial

[6] There are other examples of Congress directly stating that certain conspiracy offenses are extraterritorial. *See, e.g.*, 18 U.S.C. § 2285 (offense of "[o]peration of submersible vessel or semi-submersible vessel without nationality:" "There is extraterritorial Federal jurisdiction over an

jurisdiction over certain conspiracies to violate Subchapter II simply cannot be squared with the view that it also clearly intended another conspiracy provision within that Subchapter to also have extraterritorial reach, but opted not to say so.

The history of what is now Subchapter II of Title 13 is also inconsistent with the view that Congress clearly intended to extraterritorially criminalize conspiracies to violate 21 U.S.C. § 959(c), which targets "[p]ossession, manufacture, or distribution by person on board aircraft." Section 959's extraterritoriality provision—§ 959(c)—was enacted in 1970 as § 1009 of The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. Initially, § 959 only criminalized manufacture or distribution of a controlled substance by persons who acted with the intention or knowledge that the controlled substance would be "unlawfully imported into the United States." Pub. L. No. 91-513 § 1009. Section 1013 of that same 1970 Act enacted 21 U.S.C. § 963, the conspiracy provision that Knowles is charged with violating. But the provision regarding offenses aboard a U.S. owned or registered aircraft—now designated § 959(c)—was not enacted until 1986 in the Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570 § 3161(a)(5)), 100 Stat. 3207. Even if Congress had, in 1970, the unstated desire to have the extraterritoriality provision that would be subsequently designated § 959(c) apply to extraterritorial conspiracies to violate then-existing offenses set out in Subsection II, this would not mean that Congress "affirmatively and

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offense under this section, including … conspiracy to commit such an offense."); 18 U.S.C. § 2339B (offense of "[p]roviding material support or resources to designated foreign terrorist organizations:" liability extends to "[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so").

unmistakably" also intended for that provision to apply to a new offense inserted into the statutory scheme sixteen years later which contained no requirement that the conduct that it criminalized occur in or have any effect in the United States.

Moreover, it does not follow that, because a substantive offense is extraterritorial, conspiracy to commit that offense must also be extraterritorial. Conspiracy is not simply a derivative offense: as this case illustrates, a defendant can be guilty of conspiracy even when no substantive offense occurred. This is because of the long established principle that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton v. United States*, 328 U.S. 640, 643 (1946). The reasoning undergirding this firmly established jurisprudence is that "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts." *Iannelli v. United States*, 420 U.S. 770, 778, (1975) (quoting *Callanan v. United States*, 364 U.S. 587, 593-594 (1961)). Consequently, "[t]he basic rationale of the law of conspiracy is that a conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish." *Iannelli*, 420 U.S. at 779; *see also United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) ("The essence of a conspiracy is an agreement to commit an unlawful act. That agreement is a distinct evil, which may exist and be punished whether or not the substantive crime ensues.") (citations and quotations omitted).

Significantly for purposes of the extraterritoriality analysis, many foreign legal systems do not recognize the American concept of conspiracy. As one

commentator explained, "[t]he concept of conspiracy … in its broad application as historically developed in common law countries, is not known in the traditional civil law system."[7] Conspiracy in Civil Law Countries, Wienczyslaw J. Wagner, 42 J. Crim. Law & Criminology 171, 171 (1951).

The foreign view of the American concept of conspiracy matters because, in addition to the presumption against extraterritoriality, there is a related presumption that, unless it indicates otherwise, when it legislates Congress intends "to avoid conflict with the laws of other nations." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 206 (1993). Criminalizing overseas conduct which is not a crime under the law of the country where the conduct occurred would create a conflict with the law of foreign sovereigns.

Given conspiracy's status as a separate and distinct offense, and given the inconsistency of the American concept of conspiracy liability with the jurisprudence of many foreign states, it is entirely plausible that Congress intended certain substantive offenses, such as 21 U.S.C. § 959(c), to be extraterritorial crimes but did not intend conspiracy to commit those offenses to be an extraterritorial offense. But

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[7] Another commentator observes that

> [t]he Nuremberg [war crimes] trial made obvious that the common law approach to criminal conspiracy was foreign to civil law countries. A crime … always "predominantly mental in composition", does not fit well in the civil law countries' approach to the principle of legality. Traditionally, civil law countries do not recognise the broad concept of common law conspiracy, where conspiracy is a separate crime punishable regardless of its results.

Juliet R. Amenge Okoth, *The Crime of Conspiracy in International Criminal Law* 46 (2014) (footnotes omitted); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 611 (2006) ("conspiracy to violate the law of war" is not offense recognized by international law, noting that "members of the [Nuremberg] Tribunal objected to recognition of conspiracy as a violation of the law of war on the ground that the Anglo-American concept of conspiracy was not part of European legal systems") (alteration and quotations omitted) (plurality portion of opinion).

"[t]he question is not whether … Congress would have wanted a statute to apply to foreign conduct if it had thought of the situation before the court, but whether Congress has affirmatively and unmistakably instructed" that the criminal offense is extraterritorial. *RJR Nabisco*, 136 S. Ct. at 2100. Because Congress has not affirmatively and unmistakably indicated that the § 963 conspiracy offense is extraterritorial, it is not extraterritorial.

IV. THE CONFUSED CIRCUIT COURT JURISPRUDENCE ON EXTRATERRITORIALITY NEEDS CLARIFICATION

The jurisprudence of the Circuits that have addressed this issue is confused and often inconsistent with *Morrison*'s reasoning. Consequently, a decision by this Court on this issue would provide much-needed guidance to the lower courts.

The D.C. Circuit's view is that some conspiracy offenses that Congress has not explicitly stated are extraterritorial reach conduct occurring exclusively overseas and some do not.

In that Circuit's first post-*Morrison* case addressing the issue, *United States v. Ali*, 718 F.3d 929 (D.C. Cir. 2013), which involved conduct entirely outside the United States, the defendant was charged with both piracy and conspiracy to commit piracy. *Ali* held that, because Congress had explicitly indicated its intent to extraterritoriality criminalize piracy, the defendant could be tried in this country for that crime.[8] 718 F.3d at 939-41. It further held, however, that a charge of conspiracy to commit piracy, in violation of 18 U.S.C. § 371, the general conspiracy

[8] The piracy statute applies to "[w]hoever, on the high seas, commits the crime of piracy … and is afterwards brought into or found in the United States." 18 U.S.C. § 1651.

statute, must be dismissed because § 371 was not an extraterritorial offense even though § 371 explicitly criminalizes conspiracies to commit "'any offense against the United States.'" *Id.* at 941-42 (quoting § 371). It explained that, although seemingly broad, this "language of general application" failed to "rebut[] the presumption against extraterritorial effect." *Id.* at 942. Because there was no "concrete evidence" that Congress intended § 371 to apply internationally—and because conspiracy to commit piracy was not a recognized offense against the law of nations—the court held that the conspiracy provision could not be applied extraterritorially. *Id.* at 941-42.

Subsequently, in *United States v. Ballestas*, 795 F.3d 138 (D.C. Cir. 2015), the Circuit held that, unlike § 371, the conspiracy provision of the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. § 70506(b), was applicable extraterritorially. In the Court's view, although no explicit legislative language stated that § 70506(b) was extraterritorial, extraterritoriality was clear from the statutory structure. 295 F.3d at 144-45. Unlike the § 371 conspiracy provision (and the 21 U.S.C. § 963 conspiracy provision at issue in this case), which applies to a wide array of federal offenses, the § 70506(b) conspiracy provision was part and parcel of a single narrowly crafted statute explicitly designed to target extraterritorial drug trafficking activities. *See* 295 F.3d at 145; 46 U.S.C. § 70501 (MDLEA's Congressional declaration of purposes).

In *United States v. Al Kassar*, 660 F.3d 108 (2d Cir. 2011), the Second Circuit upheld the defendants' convictions for conspiring outside the United States to

violate U.S. law. Its reasoning was based on the premise—inconsistent with the D.C. Circuit's reasoning in *Ali*—that "[t]he presumption that ordinary acts of Congress do not apply extraterritorially does not apply to criminal statutes." *Id.* at 1118. Subsequently, however, the Second Circuit acknowledged that this view was "incorrect." *United States v. Vilar*, 729 F.3d 62, 72-73 (2d Cir. 2013). Nevertheless, in *United States v. Hoskins*, 902 F.3d 69, 77 (2d Cir. 2018), the Second Circuit seemed to assume, with no substantive discussion, that the general federal conspiracy statute, 18 U.S.C. § 371, applied overseas in all cases in which the relevant substantive offense was extraterritorial. Inexplicably, *Hoskins* cited *Ali* to support this proposition, 902 F.3d at 96, even though *Ali* held that § 371 *is not* applicable in all cases in which the object of the conspiracy is an extraterritorial offense.

The rule in the Ninth Circuit seems to be that if the substantive offense is extraterritorial, conspiracy to commit that offense is necessarily extraterritorial. *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002) (there is "jurisdiction" to prosecute for conspiracy offenses "to the same extent as the offenses that underlie them"). But *Hill*'s reasoning—the case was based on the premise that a statute can be found to apply extraterritorially if there is "any indication that Congress intended it to apply extraterritorially"—is inconsistent with *Morrison*'s subsequent holding that there is no extraterritoriality unless there is a "clear indication" of Congress' extraterritorial intent. *Morrison*, 561 U.S. at 255.

CONCLUSION

For these reasons Knowles' Petition should be granted.

Dated: October 15, 2019 Respectfully submitted,

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