No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DENZEL CHISHOLM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether a 342-month sentence for a retail-level manager is substantively reasonable where it far exceeds a sentence that properly accounts for Congress's intent under the Anti-Drug Abuse Act of 1986.

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Opinion Below

The Federal Reporter has published the opinion of the court of appeals at 940 F.3d 119 (2019). The text of the opinion is reproduced in the Appendix at 1a–33a.

Jurisdiction

On October 8, 2019, the First Circuit entered its judgment affirming Mr. Chisholm's convictions and sentence out of the U.S. District Court for the District of Massachusetts. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

Statutory and Regulatory Provisions Involved

21 U.S.C. § 841

(a) Unlawful acts

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; * * *

(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-

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin; * * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life * * * . If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment * * * , a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. * * *

(B) In the case of a violation of subsection (a) of this section involving-

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin; * * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years * * * . If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment * * *.

* * *

(C) In the case of a controlled substance in schedule I or II * * *, such person shall be sentenced to a term of imprisonment of not more than 20 years * * * .

> If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years * * *. * * *
>
> * * *

21 U.S.C. § 846

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.

Other Provisions

Other pertinent provisions are reprinted in the appendix to this petition. App. at 34a–121a.

Statement of the Case

I. Overview

This case arises from a sprawling Government investigation over an alleged heroin trafficking conspiracy on Cape Cod.

The investigation focused on three friends—Christopher Wilkins, Christian Chapman, and Denzel Chisholm—who were deemed to have been the "core group of heroin dealers working together."

Starting in late summer of 2015, the Government began collecting information on members of the suspected conspiracy. A core team of more than twenty law enforcement officials—including ATF agents and state and local police officers and detectives—participated in the investigation. The Government commenced wiretaps in October 2015, and over the course of the next six months, intercepted thousands of calls on seventeen different phones. The Government also installed pole cameras, the footage of which they monitored in real time, and GPS trackers to tail suspects' cars. The Government also utilized cooperating witnesses to perform controlled heroin purchases and to inform against other members of the suspected conspiracy. The investigation generated more than 550 reports. It resulted in the indictment of more than seventeen individuals. The investigation culminated with the mass execution of federal search and arrest warrants across Cape Cod in the early hours of April 5, 2016, resulting in the arrest of Mr. Chisholm and others.

Based on its investigation, the Government charged Mr. Chisholm with various counts of heroin distribution and possession, as well as conspiracy to distribute one

kilogram of heroin. The Government also alleged that Mr. Chisholm conspired with others to smuggle suboxone, which he obtained by trading heroin, to a friend serving a prison sentence at MCI-Norfolk and that Mr. Chisholm used a smuggled cell phone to communicate with that friend. The Government also charged Mr. Chisholm with possessing a firearm that was found hidden in a rental car parked on the driveway of his residence on the day of his arrest.

Because the Government's case centered on allegations that Mr. Chisholm violated 21 U.S.C. §§ 841(a)(1), 843(b), 846, and 18 U.S.C. §§ 2, 922(g)(1), 18 U.S.C. § 3231 granted the U.S. district court original subject-matter jurisdiction over the matter.

II. Heroin Seizures Relevant to the Appeal

As extensive as it was, the investigation produced only the following seizures of heroin, whether by controlled purchase or otherwise:

Date	**Seized From**	**Quantity**
May 21, 2015	Richard Serriello	400 grams
November 16, 2015	Brooke Cotell / Shaun Miller	100 grams
February 4, 2016	Oliver Hamilton	6 grams
February 26, 2016	Darren Pelland	10 grams
March 2, 2016	Darren Pelland	51 grams
March 3, 2016	Darren Pelland	201 grams
March 6, 2016	Tyrone Gomes	12 grams
March 8, 2016	Darren Pelland	50 grams

March 24, 2016	Darren Pelland	119 grams
April 5, 2016	Molly London	77 grams
TOTAL		**1026 grams**

Generally, the Government proved these seizures with the testimony of cooperating witnesses testifying pursuant to plea agreements, wiretap or pole camera recordings, the testimony of law enforcement officials who conducted the seizure, the testimony of drug-lab chemists, or some combination of the above.

The Government also argued that another kilogram of heroin transactions were corroborated over the wiretap, even if none of it was seized or tested. The Government argued that even more was testified to as historic transactions by cooperating witnesses.

III. The Trial Proceedings and Theories of Defense

The case proceeded to trial in June 2017. At trial, Mr. Chisholm did not dispute that he sold heroin. Instead, he attacked the claim that he was a member of a large-scale heroin-trafficking conspiracy. He elicited testimony and highlighted evidence showing that much of the powder-like substances in the case were not heroin, and that absent testing, no powder-like substance could be assumed to be heroin. He also highlighted how the evidence was inconsistent with him being the biggest heroin dealer—how he did not own a car or a house, how he had relatively little cash, and how the April 5, 2016 raids turned up no heroin on him or in his home. Finally, he attacked the scope of the conspiracy, pointing out, for example,

that Darren Pelland was not a charged coconspirator, nor was he a member of the Cape Cod community.

IV. Verdict, Sentencing, and Appeal

Ultimately, the jury found Mr. Chisholm guilty of the controlled-substances counts and not guilty of the firearm count. Mr. Chisholm advocated for a 20-year sentence, arguing in part that the guideline range overstated the appropriate sentence because Congress intended defendants like Mr. Chisholm to be sentenced as "managers of the retail level traffic" rather than traffickers "responsible for creating and delivering very large quantities of drugs." The trial court disagreed and imposed a guideline sentence of 360 months, adjusted downward by 18 months to account for the time from Mr. Chisholm's arrest to the imposition of sentence. The trial court based its sentencing decision by finding that Mr. Chisholm was responsible for more than three kilograms of heroin in the aggregate, even if no single transaction exceeded one kilogram. *See* App. at 24a–26a.

Mr. Chisholm filed a timely notice of appeal. The case was docketed in the Court of Appeals for the First Circuit on September 28, 2017. In an October 8, 2019 published opinion, the panel affirmed the judgment of conviction and sentence.

This timely petition follows.

Reasons for Granting the Petition

This Court should resolve the discrepancy between the sentences Congress established with the Anti-Drug Abuse Act of 1986 on the one hand and the guideline sentences of U.S.S.G. § 2D1.1 whereby individuals convicted of drug trafficking receive much harsher sentences than intended.

Precedents from this Court make it clear that the U.S. Sentencing Commission has the authority to promulgate guidelines that fall within Congressionally set statutory maximum and minimum sentences. *See, e.g.*, *Kimbrough v. United States*, 552 U.S. 85, 105 (2007). Yet nothing allows a court to impose a substantively unreasonable sentence. *See Gall v. United States*, 552 U.S. 38, 51 (2007). Where a sentence derived from the Sentencing Guidelines is substantively unreasonable, a reviewing court must vacate it. *See Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., dissenting from denial of certiorari) ("[A] substantively unreasonable penalty is illegal and must be set aside."). Here, the Court should grant the petition for a writ of certiorari because Mr. Chisholm's 342-month sentence far exceeds a sentence that properly accounts for Congress's intent in enacting the governing Anti-Drug Abuse Act of 1986.

An appellate court reviews a challenge to the substantive reasonableness of a trial court's sentencing decision for abuse of discretion, taking into account the totality of the circumstances. *See United States v. Reyes-Rivera*, 812 F.3d 79, 89 (1st Cir. 2016). *Accord Gall v. United States*, 552 U.S. 38, 51 (2007). "[T]he linchpin of a reasonable sentence is a plausible sentencing rationale and a defensible result." *See*

United States v. Martin, 520 F.3d 87, 96 (1st Cir. 2008). Although Mr. Chisholm's sentence reflects an accurate guideline calculation and an award of credit for time served since arrest, the guideline range overstates the penalties that Congress intended for drug-trafficking offenses. *See* 21 U.S.C. § 841; H.R. Rep. No. 99-845, pt. 1, at 11–12 (1986). In ignoring the disparity between the intended range of sentences under the Anti-Drug Abuse Act of 1986 on the one hand and the Sentencing Guidelines on the other, the Court of Appeals improperly affirmed the imposition of a substantively unreasonable sentence. *See* App. at 33a. The Court should grant this petition for a writ of certiorari to resolve the disparity and give direction to sentencing courts that Congressional intent can reveal the boundaries of what constitutes substantively reasonable sentences.

A. The plain language and legislative history of the Anti-Drug Abuse Act of 1986 suggest that the quantities referenced in the statute refer to non-aggregated quantities of controlled substances.

The Sentencing Guidelines substantially overstate the penalty for drug-trafficking offenses because the Sentencing Commission based the drug-quantity tables on a flawed interpretation of the Anti-Drug Abuse Act of 1986. Although the Sentencing Commission created the Guidelines largely from empirical sentencing data, the Commission recognized that certain statutes "required departure [from the data], as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences." *See* USSG ch. 1, pt. A, introductory cmt. 1(3) (2016). *Accord Dorsey v. United States*, 567 U.S. 260, 267–68

(2012) (describing the Commission's process). In other words, the increased mandatory minimum sentences of the Anti-Drug Abuse Act of 1986 led the Sentencing Commission to adjust guideline sentences upward. *Cf.* USSG ch. 1, pt. A, introductory cmt. 1(4)(g) ("Specific legislation, such as the Anti-Drug Abuse Act of 1986 … , required the Commission to promulgate guidelines that will lead to substantial prison population increases."). These types of adjustments are not problematic in and of themselves—if properly done, they allow guideline sentences to match the sentences that Congress intended our courts to impose. *See* USSG ch. 1, pt. A, introductory cmt. 1(3). But in the context of drug offenses involving multiple transactions, the Commission keyed its drug-quantity-based offense levels for aggregate quantities of drugs to the Anti-Drug Abuse Act's drug-quantity tiers, which Congress intended to apply to non-aggregated amounts. This disconnect between the Guidelines and Congressional intent mean that, particularly as applied in this case, the guideline sentence is substantively unreasonable.

The plain language of the Anti-Drug Abuse Act of 1986 provides the basis for non-aggregation. In relevant part, the Act outlaws the "distribut[ion] … or possess[ion] with intent to … distribute … a controlled substance," and "conspir[ing] to commit" the same. 21 U.S.C. §§ 841(a)(1), 846 (2012). The quantity of controlled substances comes into play to define tiers of potential penalties for violations of the Act "involving" (1) one kilogram or more, 100 grams or more, or less than 100 grams of heroin. 21 U.S.C. § 841(b)(1)(A)(i), (B)(i), (C). The unit of prosecution for these tiers is transactional—not aggregation based. *Cf. United States v. Zuleta-Molina*,

840 F.2d 157, 158 (1st Cir. 1988) ("The language of the statute unequivocally indicates that the government may prosecute each individual act of distribution."); *United States v. Elliott*, 849 F.2d 886, 889 (4th Cir. 1988) ("For this reason, several courts have concluded that Congress intended each distinct act of delivery to be a separately punishable offense under § 841(a)(1), even though it may have been only one of several such deliveries made in the course of consummating a single sales transaction."); *United States v. McDonald*, 692 F.2d 376, 378 (5th Cir. 1982) ("These relatively simple and unambiguous statutes indicate that Congress has chosen the unit of prosecution to be an unauthorized distribution or delivery, as those terms are commonly used and understood."). In other words, a suspect's violation should fall within a certain distribution tier based on the size of the transaction or amount possessed at a given moment in time. *See* 21 U.S.C. § 841. *Accord Elliott*, 849 F.2d at 889 (rejecting an aggregation argument in the context of a cumulative-sentencing claim).

The legislative history reveals that Congress intended there not to be aggregation. In the lead-up to passage of the Narcotics Penalties and Enforcement Act of 1986 that established the tiered quantity thresholds for violations of the Controlled Substances Act, members of Congress repeatedly emphasized a "market-oriented approach" to the penalty scheme. *See, e.g.*, H.R. Rep. 99-845, pt. 1, at 12 (1986). *Accord* 132 Cong. Rec. 27,193–94 (Sept. 30, 1986) (statement of Sen. Byrd). *See also Kimbrough v. United States*, 552 U.S. 85, 95 (2007) (discussing how the Anti-Drug Abuse Act "uses the weight of the drugs involved in the offense as the

sole proxy to identify 'major' and 'serious' dealers"). This approach focused on three tiers of quantities. At the highest tier, for the "manufacturers or the heads of organizations," Congress assigned quantities "based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain." H.R. Rep. 99-845, pt. 1, at 12, 17 ("Quantities are based on the amounts that would be possessed by persons operating at the major trafficker level of distribution of the particular drug."). Congress assigned the second tier to correspond with "the managers of the retail level traffic, the person who is filling the bags of heroin … and doing so in substantial street quantities." *Id.* at 12, 17 ("Quantities are based on the amounts that would be possessed by persons operating at the retail supervisory/wholesale level of distribution of the particular drug."). The third and lowest tier is the catchall for everyone below the retail-level managers. *See id.* at 12.

Permitting aggregation—other than perhaps for a series of transactions occurring at the same time, at the same place, and between the same people—would melt away the tiered distinction that Congress created between amounts attributable to street-level dealers, to retail-level managers, and to manufacturers and heads of organizations. *Cf. Elliott*, 849 F.2d at 890 ("Multiple acts of physical delivery which, though technically discrete, occur at essentially the same time, in the same place, and with the involvement of the same participants must be considered a single 'offense' for the purposes of punishment."). In other words, the

weight thresholds, if aggregable, lose their value as "prox[ies] to identify 'major' and 'serious' dealers." *Kimbrough*, 552 U.S. at 95.

These tiers also become nonsensical in the context of conspiracies if simply charging a conspiracy permits the aggregation of individual distribution amounts. A low-level street dealer does not become a manager simply by virtue of agreeing to distribute heroin and succeeding in distributing one hundred grams of it over a period of time. *Cf.* 21 U.S.C. § 841(b)(1)(B)(i). Likewise, a retail-level manager does not become a manufacturer or head of an organization simply by virtue of agreeing to distribute heroin and succeeding in distributing one kilogram of it over a period of time. *Cf.* 21 U.S.C. § 841(b)(1)(A)(i). That retail-level manager is still obtaining heroin from someone higher-up in the drug-trafficking hierarchy, just as how the street-level dealer is still obtaining the heroin from the retail-level manager.

By way of illustration, let's assume that there is a street-level heroin dealer with a single supplier. If that street-level dealer has ten regular customers, to whom he each sells two grams a week,[1] that street-level dealer will cross the kilogram threshold in fifty weeks—less than a year. Although the Government could not aggregate those amounts if they charged each sale independently, see *United States v. Sklar*, 920 F.2d 107, 111 (1st Cir. 1990) ("Isolated acts cannot be conjoined and drug quantities aggregated for sentencing purposes without a rational basis."), the Government could treat the street-level dealer as a member of a conspiracy and

[1] Assuming a price of $500 per 10 grams of heroin, this amounts to gross sales of $1,000. In a 52 week year, that amounts to total sales of $52,000. Taking into account the cost of goods sold and other expenses, the street-level dealer would only earn a portion of that amount in profit.

aggregate the amounts to charge him or her as a high-level trafficker. Although this kind of aggregation has been approved in the past, *see, e.g.*, *United States v. Manjarrez*, 306 F.3d 1175, 1181 (1st Cir. 2002), it results in potentially unreasonable sentences.

B. The Sentencing Guidelines overstate the penalty for drug-trafficking offenses because they map aggregated drug quantities to the non-aggregated mandatory minimum quantities of the Anti-Drug Abuse Act of 1986.

Notably, the Sentencing Guidelines, which requires aggregation, USSG § 2D1.1 cmt. 5, are keyed to the statutory mandatory minimums, which should not permit aggregation. For example, the Sentencing Guidelines assign a base offense level of 30 to an aggregate kilogram of heroin, a level which corresponds to the statutory one kilogram transaction threshold for manufacturers and heads of trafficking organizations. *Compare* USSG § 2D1.1(c)(5) & ch. 5, pt. A (97-121 months for criminal history category I), *with* 21 U.S.C. § 841(b)(1)(A)(i) (mandatory minimum of 10 years for a first offense). Likewise, the Guidelines assign a base offense level of 24 to an aggregate 100 grams of heroin, a level which corresponds to the statutory 100 gram transaction threshold for retail-level managers. *Compare* USSG § 2D1.1(c)(8) & ch. 5, pt. A (51-63 months for criminal history category I), *with* 21 U.S.C. § 841(b)(1)(B)(i) (mandatory minimum of 5 years for a first offense). Such keying creates a substantial risk that a guideline sentence calculated with aggregated drug quantities will be much harsher than Congress intended—in effect

a six-point offense level swing. *See* USSG § 2D1.1(c)(5), (8) (showing a six-point swing in offense level between the 100 gram and one kilogram thresholds).

C. The evidence showed that Mr. Chisholm was no more than a retail-level manager such that the guideline sentence overstates the appropriate punishment.

Here, the risk was realized. The evidence showed that Mr. Chisholm was a retail-level manager, not a manufacturer or kingpin. Mr. Chisholm ordered heroin from someone else and redistributed it to retailers. Even if the amounts Mr. Chisholm distributed could be considered "wholesale" quantities, Congress intended such quantities to fall within the 100 gram – 1 kilogram tier. *See* H.R. Rep. 99-845, pt. 1, at 17 ("Quantities are based on the amounts that would be possessed by persons operating at the retail supervisory / wholesale level of distribution of the particular drug.").

Furthermore, there was no credible evidence that Mr. Chisholm was involved in single transactions of one kilogram or more. The Government never seized or tested a single quantity of heroin that exceeded one kilogram. No conspirator was caught with one kilogram or more of heroin. Never was there a controlled purchase or observed transaction of a kilogram or more of heroin. Over the hundreds of recorded phone calls and text messages, the Government never overheard discussions of a single transaction of one or more kilograms of heroin. In fact, law enforcement testified at sentencing that the largest transactions they observed "on the lines" were "200 grams at time."

The only direct evidence that any conspirator possessed more than a kilogram of heroin at a time was the testimony of Richard Serriello, who claimed that he once received two kilograms of heroin from Mr. Chisholm. No one—including the trial judge—took this testimony seriously. Moments before his testimony about this large alleged transaction, Mr. Serriello had already admitted to lying on the stand the day before. In closing argument, the Government warned the jury to "be very skeptical of what Mr. Serriello had to tell you" and not to "take his word without highly corroborating evidence." The Government declined to mention Mr. Serriello's claimed two kilogram transaction, focusing instead on Mr. Chisholm's purportedly candid admission to Mr. Pelland about the quantities he sold to Mr. Serriello—half a "brick" of heroin per week. The trial court rejected Mr. Serriello's claim.

The Government also attempted to elicit testimony from Ms. Davis about the quantity of heroin that Mr. Chisholm and others packaged at the home she shared with Mr. Sexton. Yet there, Ms. Davis testified that each brick contained just a couple hundred grams of heroin, and that Mr. Chisholm on one occasion prepared five bricks of heroin. The trial court also declined to adopt these quantities.

In other words, Mr. Chisholm's guideline range and resulting sentence assumed that he was a manufacturer or head of an organization instead of the retail-level manager or wholesaler that the evidence showed him to be. The trial court abused its discretion in failing to vary the sentence downwardly to compensate for this Sentencing Guidelines discrepancy. Had the trial court adopted a downward variance to correspond with the six offense level difference between the 100 gram

and one kilogram tiers, it would have focused on the substantively reasonable sentencing range of 210 to 262 months that corresponds to an offense level of 35 (= 41 – 6) and criminal history category III. *See* USSG ch. 5, pt. A. Instead, the trial court imposed a sentence—which the Court of Appeals affirmed—that improperly moored Mr. Chisholm's actual behavior to sentences that Congress did not intend to apply to those similarly situated. Granting this petition for a writ of certiorari will permit the Court to clarify that a sentencing court's failure to consider the context of the Anti-Drug Abuse Act's sentencing scheme can result in substantively unreasonable sentences, and that it did result in a substantively unreasonable sentence for Mr. Chisholm.

D. Prosecution for multiple discrete drug transactions without aggregation of amounts results in a lower guideline sentence.

Under the guidelines, offenses for which "the offense level is determined largely on the basis of ... the quantity of a substance involved" are grouped together and scale in severity based on the quantity of the substances involved. *See* USSG § 3D1.2(d). Non-aggregable offenses are grouped together or scored separately based on whether the offenses involved the same transaction. *See* USSG § 3D1.2(a)–(b). But whereas the quantity levels for drug offenses scale from 6 to 38 (USSG § 2D1.1(c)), non-aggregable grouped offenses are calculated based solely on the most serious of the grouped offenses, *see* USSG § 3D1.3, and non-aggregable, non-grouped offenses can result in at most a five level increase to the offense level of the highest scored group. *See* USSG § 3D1.4.

In practice, aggregating drug quantities–as opposed to the normal grouping method for scoring–typically results in higher offense levels for drug crimes. Take for example a defendant who engages in ten hand-to-hand transactions of four grams of heroin each. Under the aggregation rules of the Sentencing Guidelines, the defendant would be subject to the offense level for the aggregate forty grams of heroin–a base offense level of 18. *See* USSG § 2D1.1(c)(12). But if treated as non-aggregable offenses, the offense level would only be 17: each of the ten transactions of four grams each has an offense level of 12, *see* USSG § 2D1.1(c)(14), but the combined offense level would only be 17. *See* USSG § 3D1.4. The disparity only increases as the number of four-gram transactions increases:

Transactions	Normal Offense Level	Non-Aggregated Level
10	Level 18	Level 17
15	Level 20	Level 17
20	Level 22	Level 17
25	Level 24	Level 17

See USSG § 2D1.1(c); USSG § 3D1.4. The non-aggregated offense levels correspond to Congressional intent on its proposed lower punishment of street-level retailers, while the normal aggregation scheme reflects a defendant's treatment as a "manager[] of the retail level traffic." *See* 21 U.S.C. § 841(b)(1)(B)(i); H.R. Rep. 99-845, pt. 1, 17 (1986). This kind of disparity infects drug sentences like Mr. Chisholm's, and they render a procedurally reasonable sentence into a substantively

unreasonable one. Mr. Chisholm thus asks the Court to grant this petition for a writ of certiorari.

Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit entered in this case.

Respectfully submitted,
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By his attorneys

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