

No. _____

SUPREME COURT OF THE UNITED STATES

David Kendrick,

Petitioner,

vs.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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I. Question Presented

In applying a mandatory sentence in a drug conspiracy case, does Alleyne v. United States, 570 U.S. 99, 133 S.Ct. 2151 186 L.Ed.2d 314 (2013), when read in conjunction with United States v. Rowe, 919 F.3d 752 (3d Cir. 2019), require the government to prove that the defendant conspired to actually possess the threshold amount at a given time, rather than rely upon an aggregation of drug quantities over the course of the conspiracy?

II. Table of Contents

I.	Question Presented	i
II.	Table of Contents	ii
III.	Table of Authorities.....	iii
IV.	Petition for Writ of Certiorari.....	1
V.	Opinions Below.....	1
VI.	Jurisdiction.....	1
VII.	Constitutional Provisions Involved	2
VIII.	Statement of the Case	2
	1. The Indictment and 851 Information	2
	2. Third Circuit Appeal	3
IX.	Reasons for Granting the Writ	5
	A. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER WHEN APPLYING A MANDATORY SENTENCE IN A DRUG CONSPIRACY CASE, THE GOVERNMENT SHOULD PROVE THE DEFENDANT CONSPIRED TO ACTUALLY POSSESS THE THRESHOLD AMOUNT AT A GIVEN TIME, RATHER THAN RELY ON AN AGGREGATED DRUG QUANTITY OVER THE COURSE OF THE CONSPIRACY	5
X.	Conclusion	10
XI.	Appendix A—Court of Appeals’ Order Denying Petition for Rehearing En Banc filed December 9, 2020	1a
XII.	Appendix B—Court of Appeals’ Opinion filed October 15, 2020	2a
XIII.	Appendix C—District Court’s Memorandum Opinion and Order Denying Defendant’s Motion to Withdraw Guilty Plea filed May 17, 2019	7a
XIV.	Appendix D—District Court’s Tentative Findings and Rulings Concerning the Applicable Advisory Guideline Range filed April 12, 2019	13a

III. Table of Authorities

Cases

<u>Alleyne v. United States</u> , 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).....	i, 3, 4, 5, 7, 8
<u>Almendarez-Torres v. United States</u> , 523 U.S. 224, 226-27 (1998)	5
<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	4, 5
<u>United States v. Benjamin</u> , 711 F.3d 371, 376 (3d Cir. 2013).....	7
<u>United States v. Boria</u> , 592 F.3d 476, 481 (3d Cir. 2010).....	8
<u>United States v. Brown</u> , 250 F.3d 811, 815 (3d Cir. 2001)	9
<u>United States v. Gori</u> , 324 F.3d 234, 237 (3d Cir. 2003).....	4, 7
<u>United States v. Jones</u> , 336 F.3d 245, 252 (3d Cir. 2013).....	10
<u>United States v. Rowe</u> , 919 F.3d 752 (3d Cir. 2019).....	i, 2, 3, 4, 6, 8, 9, 10
<u>United States v. Williams, et al.</u> , No. 17-2111, __F.3d__, 2020 WL 5422788 (3d Cir. Sept. 10, 2020).....	5

Statutes

18 U.S.C. § 841	4, 5
21 U.S.C. § 841	5, 6
21 U.S.C. § 846	4, 5, 9
21 U.S.C. § 851	5
28 U.S.C. § 1254(1).....	1

Constitutional Provisions

United States Constitution, Amendment V	2
United States Constitution, Amendment VI.....	2

IV. Petition for Writ of Certiorari

David Kendrick, an inmate currently incarcerated at Federal Correctional Institution Gilmer in Glenville, West Virginia, by and through Michael E. DeMatt, Esquire, and the law firm of Turin & DeMatt, P.C, respectfully petitions this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

V. Opinions Below

The decision of the United States Third Circuit Court of Appeals denying Mr. Kendrick's direct appeal is reported as United States v. Kendrick, No. 19-2282 (3d Cir. Oct. 15, 2020). The United States Third Circuit Court of Appeals denied Mr. Kendrick's Petition for Rehearing *En Banc* on December 9, 2020. That order and the Third Circuit's opinion is attached at Appendix ("App.").

VI. Jurisdiction

Mr. Kendrick's Petition for Rehearing *En Banc* to the United States Court of Appeals for the Third Circuit was denied on December 9, 2020. Mr. Kendrick invokes this Court's jurisdiction under 28 U.S.C. § 1254(1), having timely filed this petition for a writ of certiorari after receiving the Third Circuit's judgment.

VII. Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation

VIII. Statement of Case

1. The Indictment and 851 Information

David Kendrick was charged with a single count of conspiracy to possess with intent to distribute 28 grams or more of crack cocaine, based upon Title III wiretaps in which his conversations with a cocaine supplier were intercepted. In these conversations, Mr. Kendrick can be heard requesting certain amounts of cocaine. Notably, the amounts of crack cocaine he requests is always less than 28 grams.

He subsequently changed his plea to guilty, and a Presentence Investigation Report was prepared, wherein he was determined to be a career offender.

After his guilty plea, but before sentencing, the government filed an Information Charging Prior Offense, commonly referred to as an 851 Information. Following the United States Court of Appeals for the Third Circuit's decision in United States v. Rowe, 919 F.3d 752, 760 (3d Cir. 2019), which held "that possession

of 1000 grams of heroin begins when a defendant has the power and intention to exercise dominion and control over all 1000 grams, and ends when his possession is interrupted by a complete dispossession or by a reduction of that quantity to less than 1000 grams,” Mr. Kendrick filed a Supplemental Objection to the Presentence Investigation Report, which the United States District Court for the Western District of Pennsylvania treated as a motion to withdraw guilty plea.

A sentencing hearing was held, at which time the District Court denied Mr. Kendrick’s objection based on Rowe, and found that the enhanced penalties pursuant to section 851 applied, resulting in Mr. Kendrick being subjected to a 10 year mandatory minimum sentence.

Mr. Kendrick was then sentenced *inter alia* to a term of imprisonment of 130 months.

2. Third Circuit Appeal

Mr. Kendrick appealed his sentencing to the United States Court of Appeals for the Third Circuit, raising that the court’s decision in United States v. Rowe, 919 F.3d 752 (3d Cir. 2019), when read in conjunction with Alleyne v. United States, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), required that for a mandatory minimum to apply in a conspiracy case, the government must plead and prove that the defendant conspired to actually possess the threshold amount at a given time, rather than rely upon an aggregation of drug quantities over the course of the conspiracy. Mr. Kendrick argued that the court’s recent decision in United States v.

Rowe, 919 F.3d 752 (3d Cir. 2019) required the government to prove that the appellant conspired to possess with intent to distribute 28 grams or more of crack cocaine at one time for the mandatory sentence under 18 U.S.C. § 841 to be applicable, rather than aggregating the amount of such substance over the course of the conspiracy alleged in the indictment. In their Opinion, the Third Circuit cited United States v. Gori, 324 F.3d 234, 237 (3d Cir. 2003), in which the Court held that drug quantities from multiple transactions involving the same defendant may be aggregated for sentencing purposes under § 846. As the Third Circuit saw relevancy between Mr. Kendrick's case and Gori, *supra*, the Third Circuit affirmed the District Court's decision in denying Mr. Kendrick's motion to withdraw his guilty plea.

Mr. Kendrick also challenged his sentencing on two grounds. Mr. Kendrick argued that the 851 Information filed by the government did not indicate that he was previously convicted of a "serious drug felony," but rather a "felony drug offense," as described in the pre-First Step Act version of Section 841. Mr. Kendrick also questioned whether an 851 Information is unconstitutional on its face following the enactment of the First Step Act, and facially invalid as presented in his brief. The Third Circuit held that both of Mr. Kendrick's challenges were errors that fell into the category of clerical mistakes, which may be amended at any time prior to sentencing. In addition, Mr. Kendrick asserted that the District Court's 851 Information's application of sentencing enhancements violated constitutional requirements set forth in Alleyne v. United States, 570 U.S. 99, 133 S.Ct. 2151 186 L.Ed.2d 314 (2013) and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147

L.Ed.2d 435 (2000). Mr. Kendrick argued that Section 851(a) requires an information, rather than a grand jury indictment, and that Section 851(c) and (d) require the court to make any fact finding, rather than a jury. As such, the requirements were at odds with the constitutional requirements of Apprendi and Alleyne, which dictated that such facts be determined by a jury, as they are elements of the offense and would alter the applicable minimum and maximum sentences. The Third Circuit cited Almendarez-Torres v. United States, 523 U.S. 224, 226-27 (1998), which held that a prior conviction was not an element of an offense even when it increased a statutory maximum term of imprisonment. The Third Circuit stated that they find the holding of Almendarez-Torres, *supra*, to still be good law. As such, the Third Circuit affirmed the judgment of the District Court.

IX. Reasons for Granting the Writ

The Third Circuit rejected appellant's argument relating to the aggregation of drug quantities in a conspiracy, relying in part on the opinion in United States v. Williams, et al., No. 17-2111, __F.3d__, 2020 WL 5422788 (3d Cir. Sept. 10, 2020).

The plain language of §846 states:

“any person who attempts or conspires to commit [a drug-trafficking crime]; shall be subject to the same penalties as those prescribed for the offense, the commission of which is the object of the attempt or conspiracy.” 21 U.S.C. 846.

Similarly, the plain language of §841(a) provides in relevant part:

“it shall be unlawful for any person knowingly or intentionally --- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance;” 21 U.S.C.

§841(a)(1).

With respect to penalties, in relevant part, the plain language of §841(b)(1)(B) provides:

“upon conviction and in the absence of additional proof regarding the quantity of a particular controlled substance involved, the statutory maximum penalty for drug-trafficking is a term of imprisonment of not more than 20 years.” 21 U.S.C. §841(b)(1)(B).

“In the case of a violation of subsection (a) of this section involving --- (iii) 28 grams or more of a mixture or substance describe in clause (ii) which contains cocaine base; ... such person shall be sentenced to a term of imprisonment which may be not less than 5 years or more than 40 years...” 21 U.S.C. §841(b)(1)(B).¹

The question at issue herein is whether the drug quantities to establish the mandatory minimum can be aggregated over several transactions, or whether such quantities giving rise to a mandatory sentence must be limited to the amount the defendant intended to possess at any one time, which would be consistent with Rowe, *supra*.

In Rowe, the Third Circuit acknowledged that although possession is a continuing offense, it held “that possession of 1000 grams of heroin begins when a defendant has the power and intention to exercise dominion and control over all 1000 grams, and ends when his possession is interrupted by a complete dispossession or by a reduction of that quantity to less than 1000 grams.” *Id.* at 760. In reaching its decision, the Circuit Court relied on an earlier case involving the illegal possession of

¹ As the result of an 851 Information which was filed by the government, this mandatory sentence was doubled to 10 years.

a firearm, noting that “[c]onstructive possession requires ‘the *power and the intention* at a given time to exercise dominion or control over a thing.’” *Id.* at 760 (citing United States v. Benjamin, 711 F.3d 371, 376 (3d Cir. 2013) (emphasis in original)).

Using this same logic, for a mandatory sentence to apply for a conspiracy to possess with intent to distribute, the government must prove that the defendant conspired with another person or persons to possess with intent to distribute an amount of controlled substance above the threshold amount at a given time, rather than to aggregate the amounts that the defendant may have conspired to possess over time.

The District Court below and the Third Circuit Court of Appeals rely on United States v. Gori, 324 F.3d 234 (3d Cir. 2003), which held that multiple drug transactions may be aggregated in connection with conspiracy charges. However, this opinion predates Alleyne v. United States, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), by 10 years, which held that any fact upon which a mandatory minimum sentence is based must be submitted to a jury and proven beyond a reasonable doubt.

This point is important, as post-Alleyne, the quantity of drugs involved in a conspiracy is an element of the offense. At the time Gori was decided, there was no such element that needed to be proven by the government to a jury for the mandatory sentence to apply. As such, part of the rationale behind holding that quantities may be aggregated in a conspiracy is on unsteady ground, given Alleyne’s change in the law.

It is critical to consider what is charged and what must be proven. In the

instant case, the indictment charged Mr. Kendrick with conspiracy to possess with intent to distribute 28 grams or more of crack cocaine. The Third Circuit has stated that the elements of conspiracy are: “(1) a shared unity of purpose, (2) an intent to achieve a common illegal goal, and (3) an agreement to work toward that goal, which [the defendant] knowingly joined.” United States v. Boria, 592 F.3d 476, 481 (3d Cir. 2010) (citations omitted). “These elements incorporate a requirement that [the defendant] had knowledge of the specific illegal objective contemplated by the particular conspiracy . . .” *Id.* Although the government need not prove the object offense, as a conspiracy is an inchoate offense, one must look to that object crime in connection with the elements of conspiracy, as the government must prove that the defendant intended to achieve that common goal. In the within matter, it was the government’s burden to prove that Mr. Kendrick had the intent to possess with intent to distribute 28 grams or more of crack cocaine.

The evidence available to the government indicated that his intent appeared to be to possess with intent to deliver amounts of crack cocaine less than 28 grams. At no time is there any indication that he had requested 28 grams of crack cocaine from his supplier, and therefore lacked the intent to possess an amount of crack cocaine above the threshold amount at any one time.

After Alleyne, the quantity of drugs to be possessed is an element of the offense. As such, possession with intent to distribute a quantity of crack cocaine would be a *different* offense than possession with intent to distribute 28 grams or more of crack cocaine. After Rowe, it is clear that to establish a quantity giving rise to a mandatory

minimum for possession with intent to distribute, one cannot aggregate various quantities, but may only look to what the defendant actually possessed or intended to possess at a given time. By aggregating the quantities, the object crime is changed.

As stated above, Section 846 provides: “Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as this prescribed for the offense, the commission of which was the object of the attempt or conspiracy.” 21 U.S.C. §846. After Rowe, allowing aggregation of the quantities in a conspiracy does not subject a person to the same penalties as the underlying offense which was the object of such conspiracy. Rather, the penalties are actually greater. In the instant case, had Mr. Kendrick been charged with possession of crack cocaine, rather than conspiracy, the government could not have proven that he possessed 28 grams or more of crack cocaine at any one point. Under Rowe, he would therefore not be subject to any mandatory minimum for such possession offense. However, as it stands, with a conspiracy count, he was subjected to a mandatory 10 year sentence (as a result of the 851 Information which was filed).

Under the analysis presented herein, there would have been insufficient evidence to support a conviction of 28 grams or more. “Pursuant to Federal Rule of Criminal Procedure 32(e), a defendant must have a ‘fair and just reason’ for withdrawing a plea of guilty. Fed.R.Cr.P. 32(e); [United States v. Brown, 250 F.3d 811, 815 (3d Cir. 2001)]. A district court must consider three factors when evaluating a motion to withdraw a guilty plea: (1) whether the defendant asserts his innocence; (2) the strength of the defendant’s reasons for withdrawing the plea; and (3) whether

the government would be prejudiced by the withdrawal.” United States v. Jones, 336 F.3d 245, 252 (3d Cir. 2013). The “innocence” being asserted herein is not innocence with respect to possession with intent to distribute, but innocence with respect to the quantity of drugs involved in the conspiracy, for the reasons stated above. Additionally, for the reasons set forth above, there are strong reasons for Mr. Kendrick to withdraw his plea, based upon the Third Circuit’s ruling in Rowe, *supra*. Finally, there would have been no prejudice to the government, as the only dispute is the quantity of drugs, which is based solely on intercepted telephone conversations. As such, the defendant’s motion to withdraw his guilty plea or have his conviction modified to a lesser included offense should have been granted.

X. Conclusion

For the foregoing reasons, Mr. Kendrick respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,
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