IN THE SUPREME COURT OF THE UNITED STATES

No. _____

AMAURY LOPEZ JR., APPLICANT

v.

UNITED STATES OF AMERICA

MOTION TO DIRECT THE CLERK OF THE COURT
TO FILE AN OUT OF TIME
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECORD CIRCUIT

Pursuant to, inter alia, Rules 13.5, 30.2, and 30.4 of this Court, counsel for Amaury Lopez Jr., respectfully requests that this Court direct the Clerk of the Court to file an out of time petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The Court of Appeals entered its judgment on November 19, 2019, App., infra, 1a-13a, and denied Applicant's petition for rehearing on February 20, 2020, id. at 14a. In light of the ongoing public health concerns relating to COVID-19, this Court extended the deadline for filing petitions for certiorari by 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Miscellaneous Order, dated, March 19, 2020 (available at <https://www.supremecourt.gov/orders/courtorders/ 031920zr_d1o3.pdf>). As a result, Applicant's petition for a writ of certiorari was due on July 19, 2020. Because of delays in the mail, a confusion between counsel and Applicant regarding whether the

petition for certiorari should be filed, and Applicant's inability to communicate with counsel until after the filing deadline has passed due to restrictions on access to inmates in the custody of the Bureau of Prisons imposed due to COVID-19, the undersigned only learned on July 24, 2020 that Applicant had approved the filing of the petition for certiorari that the undersigned had sent him for approval in June. The undersigned counsel then immediately filed an out-of-time motion for an extension of time to file a petition for certiorari in this case, which was denied on August 6, 2020, the notice of which was received by counsel on August 11, 2020. As such, and based upon the additional details below, this application is being made so that Applicant's petition for certiorari may be considered by this Court even though it is being filed out of time. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. Applicant was indicted in the Southern District of New York two counts of a four-count Second Superseding Indictment with conspiracy to distribute five kilograms and more of cocaine, in violation of 21 U.S.C. §§ 846, 841(b)(1)(A), and possession with intent to distribute 500 grams and more of cocaine in violation of 21 U.S.C. § 841(b)(1)(B). Prior to trial, the Government filed a Prior Felony Information providing Applicant with notice of its intent to establish that he had been previously convicted of a felony drug offense.

2. After a jury trial, Applicant was convicted of both counts charged against him, with a special verdict listing the jury's additional determination that "***the conspiracy*** charged in Count One involve[d] 5 kilograms or more of mixtures and substances containing cocaine," Verdict Sheet, dated, September 21, 2011, at 2 ¶ 4 (emphasis added), and that the ***substantive offense*** "charged in Count Two involved 500 grams or more of mixtures and substances containing cocaine," id. at 2 ¶ 6. Applicant's special verdict form did not ask the

jury to determine the amount of cocaine attributable – or reasonably foreseeable – to Applicant on Count One.

3. At sentencing, Applicant's Pre-Sentence Report, which was adopted by the District Court, stated that 21 U.S.C. §§ 841(b)(1) and 851 mandated a minimum sentence of 20 years imprisonment on Count One, a minimum sentence of 10 years imprisonment on Count Two, and maximum sentences of life imprisonment on both. The District Court then sentenced Applicant to a term of life imprisonment on both counts, to run concurrently to each other.

4. On direct appeal, Applicant solely challenged his conviction, which was affirmed by the Second Circuit Court of Appeals. A petition for writ of certiorari was likewise denied on April 6, 2015, at which point Applicant's conviction became final.

5. During the pendency of Applicant's direct appeal, this Court issued its opinion in Alleyne v. United States, 570 U.S. 99, 108 (2013), holding that "[f]acts that increase the mandatory minimum sentence are ... elements and must be submitted to the jury and found beyond a reasonable doubt."

6. On April 5, 2016, Applicant filed a timely motion to vacate, set aside, or correct, his conviction and sentence pursuant to 28 U.S.C. § 2255, requesting, inter alia, resentencing in light of Alleyne since "the jury was never asked to determine whether the file kilograms was ***reasonably foreseeable to Lopez*** as part of the conspiracy and proven beyond a reasonable doubt." The District Court denied Applicant's petition without a hearing adopting the Government's argument that the jury's "finding [wa]s sufficient to support the mandatory minimum sentence in which [Applicant was] subject, and complies with Alleyne." Order, dated, April 20, 2017, at 9. Upon Applicant's motion for reconsideration, wherein

Applicant brought to the District Court's attention supplemental authority, the District Court responded with its belief that "Second Circuit law is clear on this issue," relying solely on a non-precedential Summary Order.

7. On November 22, 2017, the Second Circuit granted a Certificate of Appealability. The appeal was ultimately denied on November 19, 2019, and an order denying Applicant's motion for rehearing was denied on February 20, 2020.

8. It is the intent of counsel to raise in Applicant's petition for certiorari the following question: Whether, in light of Alleyne v. United States, 570 U.S. 99 (2013), a criminal defendant should be held liable for the entirety of drugs involved in a narcotics conspiracy or solely the quantity of drugs found by the jury to be attributable – or reasonably foreseeable – to him or her?

9. There is a split in the Circuits on the answer to this question. The First, Fourth, Fifth, Ninth, Tenth, and D.C. Circuits have held that Alleyne and/or its forerunner, Apprendi v. New Jersey, 530 U.S. 466 (2000), require a jury determination beyond a reasonable doubt regarding a defendant's individual sentencing liability, whereas the Second, Third, and Seventh Circuits have reached the opposite conclusion.

10. As stated, Applicant's petition for certiorari was completed on June 9, 2020 and sent to Applicant at USP Lewisburg on that date for review and approval. Applicant had previously stated that he wanted to approve all substantive filings before they were submitted. Despite being mailed by Priority Mail, it was not received by USP Lewisburg until June 24, 2020, and not received by Applicant until sometime after that.

11. Applicant's petition for a writ of certiorari was due on July 19, 2020.

12. On July 24, 2020, I received an email from Applicant confirming his authorization for me to proceed and file his petition. Because the deadline had passed, I was confused why he had not informed me sooner. When further discussing the issue, it became clear that two reasons contributed to his delayed response: (1) he had thought he had already authorized the filing of the brief while I thought he was still considering it; and (2) since the onset of the COVID-19 pandemic, he has been on "lockdown" and eventually "moderate lockdown" at USP Lewisburg, which the undersigned has been informed means that he was not able to access computers or phones to communicate with me until after the filing deadline had passed, which contributed to the misunderstanding.

13. Additionally, because of COVID-19, all Bureau of Prisons facilities, including USP Lewisburg, have been closed to visitors – both legal and social – since approximately mid-March 2020, as a precautionary measure to help stem the spread of COVID-19. As a result, I could not travel to visit Applicant to review the draft of the petition in-person in order to seek his in-person authorization to file.

14. Applicant's petition for a writ of certiorari is complete and will be filed simultaneous to the hard copy of the instant application. It is likewise appended hereto in the event the strength of the petition bears on this Court's consideration of the instant application.

15. Accordingly, counsel for Applicant respectfully requests that this Court direct the Clerk of the Court to file an out of time petition for writ of certiorari in this case.

Dated: August 17, 2020

Respectfully submitted,

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17-2137 (L)
Lopez v. United States

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of November, two thousand nineteen.

PRESENT:

ROBERT D. SACK,
PETER W. HALL,
JOSEPH F. BIANCO,
Circuit Judges.

AMAURY LOPEZ, JR.,

Petitioner-Appellant,

v. 17-2137 (Lead), 17-2264 (Con)

UNITED STATES OF AMERICA,

Respondent-Appellee,

Appearing for *Petitioner-Appellant*: MICHAEL K. BACHRACH, New York, NY.

Appearing for *Respondent-Appellee*: ELIZABETH A. ESPINOSA (Karl Metzner, *on the brief*), *for* Geoffrey S. Berman, United States

Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Crotty, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on March 16, 2018, is **AFFIRMED.**

Petitioner-Appellant Amaury Lopez, Jr. (Lopez) appeals from a judgment of the United States District Court rejecting Lopez's 28 U.S.C. § 2255 motion as well as his motion to amend the Section 2255 motion and his motion for reconsideration. The district court subsequently denied Lopez's request for a certificate of appealability, but on November 22, 2017, we granted one pursuant to 28 U.S.C. § 2253(c) and Federal Rule of Appellate Procedure 22(b).

Lopez and two other defendants were convicted by a jury of a conspiracy to distribute cocaine, and possession with intent to distribute cocaine. Their convictions and sentences were affirmed on appeal. *United States v. Lopez*, 572 F. App'x 1 (2d Cir. 2014). Lopez's application for a certificate of appealability argued that (a) his due process rights were violated at sentencing because of the lack of an independent finding of drug quantities attributable to Lopez as required by the holding in *Alleyne v. United States*, 133 S. Ct. 2151 (2013); (b) the district court improperly rejected his ineffective assistance of counsel claims when it determined they were procedurally barred; and (c) his trial

counsel Ivan Fisher's ongoing disciplinary proceedings presented an actual conflict of interest that he did not knowingly waive at his *Curcio* hearing. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, which include a variety of arguments, some of which are presented for the first time.

We will not address a claim not included in the certificate of appealability. *Armienti v. United States*, 234 F.3d 820, 824 (2d Cir. 2000). However, as Lopez filed his certificate of appealability pro se, we also must read his papers liberally and construe them to raise the strongest arguments they suggest. *E.g., McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 156 (2d Cir. 2017).

I.

Many of the instances where Lopez claims counsel erred are tied to merits issues that were fully litigated on his direct appeal.[1] Now represented by counsel once again, Lopez pursues a slightly different argument than the one advanced in his certificate of appealability. He argues principally that his trial counsel's conflicts of interest denied

[1] Lopez and codefendant Morel argued on appeal that (1) admitting evidence of an uncharged murder which was tied to Morel and Lopez was improper, and (2) admitting recorded conversations (and transcripts thereof) between the defendants and a cooperating witness violated the Sixth Amendment Confrontation Clause. Lopez also argued that (3) the district court improperly failed to hold an evidentiary hearing to examine potential prejudice to Lopez; and (4) government disclosures related to the uncharged murder were made in an untimely fashion, denying him the opportunity for a fair trial. *Lopez*, 572 F. App'x at 3-4. All four arguments were expressly rejected. *Id.*

him his Sixth Amendment right to the effective assistance of counsel and that the trial issues he lists are examples of lapses in representation due to those conflicts.

A petition for relief under Section 2255 shall only be granted for a constitutional error when the sentencing court lacked jurisdiction or when a miscarriage of justice arises due to an error of law or fact which created a fundamental defect. *Graziano v. United States*, 83 F.3d 587, 590 (2d Cir. 1996) (per curiam). The Sixth Amendment provides defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish a violation of that right, Lopez must show that counsel's performance fell below an objective standard of reasonableness outside of professional norms and that but for counsel's errors, the result of the proceeding would have been different. *Id.* at 688, 694. We review de novo whether defendant's counsel rendered ineffective assistance. *Pham v. United States*, 317 F.3d 178, 182 (2d Cir. 2003). Findings of fact with respect to that determination are reviewed for clear error. *Hemstreet v. Greiner*, 491 F.3d 84, 89 (2d Cir. 2007).

The Sixth Amendment right to counsel includes a right to conflict-free representation. *See Wood v. Georgia*, 450 U.S. 261, 271 (1981); *United States v. Blount*, 291 F.3d 201, 211 (2d Cir. 2002). This Court "group[s] attorney conflicts of interest into three general categories" – per se, actual, and potential. *United States v. Williams*, 372 F.3d 96, 102 (2d Cir. 2004). A per se conflict occurs only where "trial counsel is not authorized to practice law and where trial counsel is implicated in the same or closely related criminal

conduct for which the defendant is on trial." *Id.* at 103. An actual conflict occurs when "the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action." *United States v. Schwarz*, 283 F.3d 76, 91 (2d Cir. 2002). To prevail on such a claim, a defendant "must also show that the actual conflict adversely affected [counsel's] performance by demonstrating that a lapse in representation resulted from the conflict." *Id.* at 92. A potential conflict occurs when "the interests of the defendant may place the attorney under inconsistent duties at some time in the future." *Williams*, 372 F.3d at 102. If a defendant can show only a potential conflict, he must show both that it had an adverse effect upon his attorney's representation and that the conflict resulted in prejudice. *See id.* This amounts to the showing required by the ordinary ineffective assistance of counsel test from *Strickland*. *United States v. Fulton*, 5 F.3d 605, 609 (2d Cir. 1993).

As an initial matter, Lopez is correct (and the government concedes) that the district court improperly found his claims of ineffective assistance of counsel to be procedurally barred. *See Massaro v. United States*, 538 U.S. 500, 503 (2003) ("[C]laims of ineffective assistance of counsel need not be raised on direct appeal, whether or not there is new counsel and whether or not the basis for the claim is apparent from the trial record."). The district court's opinion and order, however, also reached the merits of Lopez's claims, finding that Lopez did not show his trial counsel's representation fell below objective standards of reasonableness and that his *Alleyne* argument was meritless.

We "may affirm [a district court decision] on any grounds for which there is a record sufficient to permit conclusions of law, including grounds not relied upon by the district court." *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 157 (2d Cir. 2015) (internal quotation marks and citation omitted).

In his pursuit of relief for ineffective assistance, Lopez attempts to argue that (a) trial counsel's purchase of evidence constitutes a per se conflict; (b) that trial counsel's undisclosed disciplinary proceedings constituted an actual conflict of interest. Neither claim is persuasive.

Lopez cannot argue now for the first time that trial counsel's purchase of evidence from the confidential source and his related decision to retain counsel of his own constituted a conflict of interest. *See Green v. United States*, 13 F.3d 577, 586 (2d Cir. 1994). Lopez argues that he presented this argument in his pro-se petition for a certificate of appealability, but even liberally construing his petition does not save this argument. Lopez, who was represented throughout the pendency of his Section 2255 briefing in the district court, cannot present an argument on appeal that was not presented below. Presenting one in the certificate of appealability is an invalid basis to introduce a new claim.

The disciplinary proceeding that Attorney Fisher was embroiled in, which Lopez did argue below, did not create an actual conflict of interest. *See Waterhouse v. Rodriguez*, 848 F.2d 375, 383 (2d Cir. 1988). Lopez alleges in a conclusory fashion that

the district court and the government were aware of the proceedings. When the trial court reasonably knows or should have known that a reasonable conflict could exist, it must inquire into the potential conflict, but failure to do so does not require automatic reversal. *United States v. Blount*, 291 F.3d 201, 211 (2d Cir. 2000). Instead, the question is whether trial counsel's alleged conflict hampered the representation, "not . . . whether the trial judge should have been more assiduous in taking prophylactic measures." *Id.* at 212 (quoting *Mickens v. Taylor*, 535 U.S. 162, 179 (2002) (Kennedy, J., concurring)). There is nothing in the record to indicate that either the government or the trial court had any knowledge of what are typically confidential proceedings. *See* N.Y. Jud. Law § 90(10) (McKinney 2013); Southern District of New York Local Rule 1.5(d)(3). But even if they did, the proceedings did not hamper Fisher's representation of Lopez. *See Blount*, 291 F.3d at 211; *Waterhouse*, 848 F.2d at 383 (counsel's unrelated disciplinary hearings did not create a conflict when attorney ceased representation immediately upon disbarment). An unrelated disciplinary proceeding running parallel to Fisher's representation of Lopez may have in fact "provided an incentive for the vigorous efforts [Fisher] appears to have expended." *Waterhouse*, 848 F.2d at 383. Fisher was licensed throughout the duration of Lopez's trial, and he was removed as Lopez's counsel shortly after being suspended. His proceedings did not affect his representation of Lopez.

At best, the disciplinary hearings created a potential conflict; Lopez argues that potential sanctions against Fisher created a financial incentive to keep the case going and prevent Lopez from pleading guilty. Lopez must therefore show that Fisher's actions fell below an objective standard of reasonableness and that but for counsel's errors, the result would have been different. *Fulton*, 5 F.3d at 609. Lopez here fails. He has not shown that but for his lawyer's financial incentive to go to trial, he would have pled guilty. In *Raysor v. United States*, 647 F.3d 491 (2d Cir. 2011), this Court held that a petitioner's statement that they would have accepted a plea agreement must be accompanied by objective evidence such as a significant sentencing disparity. *Id.* at 495. Here, not only was Lopez not offered a plea deal (making any benefit of pleading guilty minimal in terms of offense level calculations), but he maintained his innocence through sentencing. In making this determination, we have considered Lopez's arguments that he was given an unreasonable estimate of his chances of success and that he was not adequately advised of his true sentencing exposure. The district court did not commit clear error in determining that Lopez's assertions were not credible, and he cannot now show that but for Fisher's potential conflict or deficiencies, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see also United States v. Carlton*, 442 F.3d 802, 811 (2d Cir. 2006) (giving "strong deference" to district court's credibility determinations).

Lopez suggests that a variety of other deficiencies support his argument that Fisher provided ineffective assistance. Lopez cannot, and does not attempt to, offer any new facts showing that actual prejudice resulted or that the result of the proceeding would have been different if his trial counsel had done any of the things he now argues should have been done. *See Strickland*, 466 U.S. at 694. In fact, his arguments here consist solely of single-sentence citations to his arguments below. The potential continuance requests that Lopez now identifies relate to litigated, underlying issues that were affirmed on appeal. His arguments referencing Fisher's failure to request a trial continuance when it was revealed Lopez was being investigated for witness tampering and Fisher's failure to request a continuance after learning of the uncharged murder evidence are without merit. Lopez cannot show he was prejudiced by Fisher's trial decisions or that the result of the proceedings would have been different. *Id.*

Three alleged deficiencies remain: Fisher's failure to object to the jury's access to transcripts of recorded phone calls; his failure to call the confidential source as a witness; and the failure to challenge the introduction of recorded calls between co-conspirators as a violation of the Confrontation Clause. We take these issues in turn.

First, when a "recorded conversation is conducted in a foreign language, an English language transcript may be submitted to permit the jury to understand and evaluate the evidence." *United States v. Ben-Shimon*, 249 F.3d 98, 101 (2d Cir. 2001). A motion objecting to the transcripts would have been futile in light of *Ben-Shimon*, and a

motion without a solid foundation need not be filed for purposes of effective assistance. *United States v. Neresian*, 824 F.2d 1294, 1322 (2d Cir. 1987). Lopez also fails to allege that anything in the transcripts was inaccurate or offer any prejudicial reason why they should not have been introduced, so there is no basis for an ineffective assistance claim.

Second, "[c]ourts applying *Strickland* are especially deferential to defense attorneys' decisions concerning which witnesses to put before the jury." *Greiner v. Wells*, 417 F.3d 305, 323 (2d Cir. 2005). "[C]ounsel's decision as to whether to call specific witnesses – even ones that might offer exculpatory evidence – is ordinarily not viewed as a lapse in professional representation." *United States v. Best*, 219 F.3d 192, 201 (2d Cir. 2000) (internal quotation marks omitted). Without more than conclusory statements as to the would-be-witness' testimony, Lopez cannot present a plausible claim of ineffective assistance based on Fisher's failure to call the witness to testify.

Third, "there can be no separate Confrontation Clause challenge to the admission of a co-conspirator's out-of-court- statement." *Bourjaily v. United States*, 483 U.S. 171, 183 (1987). As we acknowledged in our prior decision, no valid challenge to the introduction of calls of co-conspirator Lopez Sr. existed, *Lopez*, 572 F. App'x at 3, and therefore the failure of Fisher to make such a challenge was not ineffective assistance.

Finally, Lopez argues in the alternative that he should have at least been granted an evidentiary hearing on his Section 2255 motion. Section 2255(b) provides that "[u]nless the motion and the files and records of the case conclusively show that the

prisoner is entitled to no relief, the court shall ... grant a prompt hearing." 28 U.S.C. § 2255(b). We have interpreted this provision as requiring a hearing in cases where the petitioner has made a "plausible claim" of ineffective assistance of counsel. *Puglisi v. United States*, 586 F.3d 209, 213 (2d Cir. 2009) (internal quotation marks and citation omitted). Review of a district court's denial of a hearing on a Section 2255 motion is for abuse of discretion. *Morales v. United States*, 635 F.3d 39, 45 (2d Cir. 2011) (citing *Chang v. United States*, 250 F.3d 79, 82 (2d Cir. 2001)).

For the reasons set fourth above, the district court did not abuse its discretion in declining to hold a formal hearing. In particular, "when the judge who tried the underlying proceedings also presides over a Section 2255 motion, a full-blown evidentiary hearing may not be necessary." *Raysor*, 647 F.3d at 494.

II.

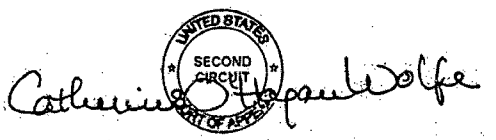
Lopez next claims that he must be re-sentenced because the sentencing court did not make a separate determination of the amount of narcotics that were reasonably foreseeable to Lopez over the duration of the conspiracy. He bases this claim on the Supreme Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013), which was decided prior to the filing of his direct appeal. After initially asserting that *Alleyne* should be applied retroactively, Lopez now concedes that at the time *Alleyne* was decided, his case was not yet final and that appellate counsel failed to raise the issue on appeal. "In failing to do so, petitioner procedurally defaulted the claim he now presses on us."

Bousley v. United States, 523 U.S. 614, 621 (1998). Lopez can only excuse his default if he can establish "cause for the failure to bring a direct appeal and actual prejudice from the alleged violations." *Zhang v. United States*, 506 F.3d 162, 166 (2d Cir. 2007). To show cause, a petitioner must demonstrate that the argument now raised "was so novel that its legal basis was not reasonably available to counsel" at the time of his direct appeal. *United States v. Thorn*, 659 F.3d 227, 233 (2d Cir. 2011). Because *Alleyne* had been decided at the time of his direct appeal, and because Second Circuit precedent already had addressed the type of argument Lopez now attempts to make, *United States v. Adams*, 448 F.3d 492, 499 (2d Cir. 2006), he cannot show cause for his default.

Lopez argues on reply that if he has defaulted on his *Alleyne* argument, then he must be allowed to amend his Section 2255 petition to allege his appellate counsel provided inadequate assistance by failing to raise *Alleyne*. We disagree. The district court expressly held that the jury's specific findings of fact were "sufficient to support the mandatory minimum sentence to which Petitioners were sentenced." A49. Ample evidence in the record indicates that Lopez was the "boss" of the organization. As the leader of the criminal organization, Lopez was responsible for the drug quantities that were distributed by the organization. *See United States v. Chavez*, 549 F.3d 119, 136 (2d Cir. 2008), *abrogation on other grounds recognized by United States v. Brown*, 935 F.3d 43, 45 (2d Cir. 2019). No "manifest injustice" will result from affirming the denial of his motion to amend. *United States v. Babwah*, 972 F.2d 30, 35 (2d Cir. 1992).

We have considered Lopez's remaining arguments and find them to be without merit. The judgment of the district court is **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of February, two thousand twenty.

Amaury Lopez, Jr.,

Petitioner - Appellant,

v.

United States of America,

Respondent - Appellee.

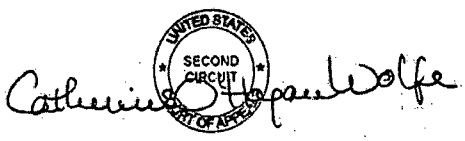
ORDER

Docket Nos: 17-2137 (Lead)
17-2264 (Con)

Appellee, Amaury Lopez, Jr., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



No._____

In The
Supreme Court of the United States

AMAURY LOPEZ JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of Alleyne v. United States, 570 U.S. 99 (2013), a criminal defendant should be held liable for the entirety of drugs involved in a narcotics conspiracy or solely the quantity of drugs found by the jury to be attributable – or reasonably foreseeable – to him or her?

DIRECTLY RELATED PROCEEDINGS

This petition is directly related to:

- United States v. Amaury Lopez, Jr., et al., Docket No. 10 Cr. 798 (PAC), United States District Court for the Southern District of New York. Judgment entered July 20, 2012.

- United States v. Amaury Lopez, Sr. and Amaury Lopez, Jr., Docket Nos. 12-2143-cr, 12-2437-cr, 12-3092-cr, 572 Fed.App'x 1, United States Court of Appeals for the Second Circuit. Opinion entered June 2, 2014. Cert denied, 135 S.Ct. 1750, on April 6, 2015.

- Amaury Lopez, Jr., et al. v. United States, Docket Nos. 16 Cv. 3342 (PAC), 10 Cr. 798 (PAC), 2017 WL 1424328, United States District Court for the Southern District of New York. Opinion entered April 20, 2017.

- Amaury Lopez, Jr. v. United States, Docket Nos. 16 Cv. 3342 (PAC), 10 Cr. 798 (PAC), 2017 WL 2799166, United States District Court for the Southern District of New York. Opinion entered June 27, 2017).

- Amaury Lopez, Jr. v. United States, Docket No. 17-2137 (L), 17-2264 (Con), 792 Fed.App'x 32, United States Court of Appeals for the Second Circuit. Opinion entered November 19, 2019.

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APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES AND OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Amaury Lopez Jr. respectfully submits this petition for a writ of certiorari.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit in Amaury Lopez, Jr. v. United States is available in an unpublished opinion at 792 Fed.Appx. 32 (2d Cir. November 19, 2019), and is reprinted in the Appendix at Pet.App. 1-13. The decision denying Petitioner's motion for rehearing and/or rehearing *en banc* is available in an unpublished order dated, February 20, 2020, and is reprinted in the Appendix at Pet.App. 14. The decision of the United States District Court for the Southern District of New York denying the relief requested is available in an unpublished opinion at Amaury Lopez, Jr. and Fabio Morel v. United States, 2017 WL 1424328 (SDNY April 20, 2017), and is reprinted in the Appendix at Pet.App. 15-36. The decision denying Petitioner's motion for reconsideration in the District Court is available in an unpublished opinion at Amaury Lopez, Jr. and Fabio Morel v. United States, 2017 WL 2799166 (SDNY June 27, 2017), and is reprinted in the Appendix at Pet.App. 37-42.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 2019, and an order denying Petitioner's motion for rehearing and/or rehearing *en banc* was denied on February 20, 2020. This petition is timely filed within the statutory time limitation given that in light of the ongoing public health concerns relating to COVID-19, this Court extended the deadline for filing petitions for certiorari by 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Miscellaneous Order, dated, March 19, 2020 (available at

<https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf>), and thereafter Petitioner sought a 30-day extension of time in which to file the instant petition for a writ of certiorari. The motion was filed out-of-time but was the first extension of time requested by Petitioner. The Clerk of the Court denied the request for an extension of time, citing, Rule 13.5. Thereafter, Petitioner filed a motion to direct the Clerk to file an out-of-time petition; this motion remains pending as of this writing.

This Court has jurisdiction to review the judgment below on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be ... deprived of life, liberty, or property, without due process of law....

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a ... trial ... by an impartial jury....

STATEMENT

In Alleyne v. United States, 570 U.S. 99 (2013), this Court held that the Sixth Amendment right to a jury trial, in conjunction with the Due Process Clause of the Fifth Amendment, requires that each element of a crime be proven to a jury beyond a reasonable doubt. In interpreting Alleyne in the context of narcotics offenses, a substantial conflict has developed among federal courts of appeal regarding whether a criminal defendant may be held liable for the entirety of drugs involved in a narcotics conspiracy or solely the quantity of drugs found by the jury to be attributable – or reasonably foreseeable – to him or her.

In this case, Petitioner was convicted after a jury trial of one count of conspiracy to distribute five kilograms and more of mixtures and substances containing a detectable amount of cocaine in violation of 21 U.S.C. §§ 846, 841(b)(1)(A), and one substantive count related to the same conduct but in violation of 21 U.S.C. § 841(b)(1)(B). Section 841(b)(1)(A) carries a ten-year mandatory minimum sentence, whereas Section 841(b)(1)(B) carries a five-year mandatory minimum sentence.

In a special verdict the jury found that five kilograms and more of mixtures and substances containing a detectable amount of cocaine were attributable *to the conspiracy*, however the jury was not asked whether the same amount of cocaine was attributable – or reasonably foreseeable – to Petitioner, or any other defendant, individually. With respect to the substantive count, the jury found Petitioner guilty merely of possession with intent to distribute *500 grams* of mixtures and substances containing a detectable amount of cocaine in violation of 21 U.S.C. § 841(b)(1)(B), a significantly lesser amount than found with respect to all defendants collectively in the conspiracy. No jury finding was made regarding whether in the context of the conspiracy Petitioner should be held accountable

for all five kilograms of cocaine or only the 500 grams held attributable to him in relation to the substantive count.

Prior to trial, the Government filed a Prior Felony Information, pursuant to 21 U.S.C. § 851, thereby increasing Petitioner's potential mandatory minimum sentences to 20 years under the then-existing version of 21 U.S.C. § 841(b)(1)(A) and 10 years under 21 U.S.C. § 841(b)(1)(B).

At sentencing, Petitioner's Pre-Sentence Report ("PSR") stated conclusively that Petitioner faced a mandatory minimum sentence of 20 years in relation to the conspiracy and 10 years in relation to the substantive offense, thereby holding Petitioner attributable for the entirety of the narcotics found to have existed with respect to the conspiracy (5 kg or more of cocaine) even though the jury had never found Petitioner to be individually accountable for any more than 500 grams. The District Court adopted Petitioner's PSR in its entirety and then sentenced Petitioner to a term of life imprisonment on both counts to run concurrently to each other upon the belief that Petitioner faced a minimum aggregate sentence of 20 years rather than 10.

Petitioner filed a direct appeal solely of his conviction, which was then affirmed. See United States v. Lopez, 572 Fed.App'x 1 (2d Cir. 2014).

While Petitioner's direct appeal was pending before the Second Circuit Court of Appeals, this Court issued its opinion in Alleyne v. United States, supra, 570 U.S. 99, 108 (2013), holding that "[f]acts that increase the mandatory minimum sentence are ... elements and must be submitted to the jury and found beyond a reasonable doubt."

After losing his direct appeal, Petitioner filed a timely motion in District Court to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, arguing that "he

should be resentenced in light of Alleyne" because "the jury was never asked to determine whether the five kilograms [of cocaine] was reasonably foreseeable" to him.[1] The District Court denied Petitioner's motion to vacate his conviction and sentence, see Pet.App. 15-36, as well as his motion for reconsideration of that denial, see Pet.App. 37-42. The Second Circuit granted a certificate of appealability but then affirmed. See Pet.App. 1-13; see also Pet.App. 14 (denying panel reconsideration and denying reconsideration en banc).

Because the Second Circuit's decision deepens the preexisting conflict between the Circuits, and because the Second Circuit's decision is incorrect, the petition for certiorari should be granted.

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[1] Petitioner also moved to vacate or set aside his conviction, raising a separate claim of ineffective assistance of counsel borne out of trial counsel's undisclosed conflicts of interest. That separate claim is not advanced in this petition.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS A CONFLICT AMONG THE FEDERAL COURTS OF APPEAL THAT IMPACTS APPROXIMATELY 30% OF ALL FEDERAL CRIMINAL DEFENDANTS NATIONWIDE AND WARRANTS THE COURT'S REVIEW

The question of whether a criminal defendant should be held liable for the total quantity of narcotics held attributable to all members of the narcotics conspiracy or merely the lesser quantity to which he or she was specifically involved is a recurring question that arises in all multi-defendant narcotics cases prosecuted in federal court nationwide.

The question is an important one for criminal defendants because the answer determines whether the defendant faces no mandatory minimum sentence, or mandatory minimum sentences of 5 or 10 years (or, as here, 10, 15, or 20 years, depending upon the time of the offense and whether a Section 851 enhancement also applies). This Court has made clear that "any amount of actual jail time has Sixth Amendment significance," Glover v. United States, 531 U.S. 198, 203 (2001), and certainly that is the case when then difference is measured in years rather than days.

In the past this issue was often resolved by the trial court, and trial courts were permitted to determine by a preponderance of the evidence whether a criminal defendant should be held liable for the entirety of drugs involved in a narcotics conspiracy or solely the quantity of drugs found by the jury to be attributable – or reasonably foreseeable – to him or her. See, e.g., United States v. Martinez, 987 F.2d 920, 926 (2d Cir. 1993). That judicial discretion, however, is no longer clear.

In Alleyne this Court held that the Sixth Amendment right to a jury trial, in conjunction with the Due Process Clause of the Fifth Amendment, requires that each element of a crime be proven to a jury beyond a reasonable doubt. In the context of a

narcotics offense, the Circuits are split on whether, in light of Alleyne, trial courts can still make the foreseeability determination or whether that determination must now be made by the jury. This results in vastly different mandatory minimum sentences being imposed based upon the Circuit in which the offense occurred.

The following Circuits have held that Alleyne and/or its forerunner, Apprendi v. New Jersey, 530 U.S. 466 (2000), require a jury determination beyond a reasonable doubt regarding a defendant's individual sentencing liability:

- **First Circuit:** United States v. Pizarro, 772 F.3d 284, 292-94 (1st Cir. 2014) (finding that Alleyne forbids applying a mandatory minimum sentence to an individual co-conspirator without an individualized finding by a jury "that the triggering amount was attributable to, or foreseeable by, him") (internal quotation omitted);

- **Fourth Circuit:** United States v. Foster, 507 F.3d 233, 250-51 (4th Cir. 2007) (finding that Apprendi requires a jury to "determine that the threshold drug amount was reasonably foreseeable to the individual defendant" before the statutory sentencing maximums and mandatory minimums of § 841[b][1] can apply in a drug conspiracy case);

- **Fifth Circuit:** United States v. Haines, 803 F.3d 713, 739 (5th Cir. 2015) (holding in light of Alleyne that defendant must be "sentenced based on the drug quantity attributable to them as individuals, not the quantity attributable to the entire conspiracy")

- **Ninth Circuit:** United States v. Banuelos, 322 F.3d 700, 705-07 (9th Cir. 2003) (holding that Apprendi requires a District Court, as the factfinder after a guilty plea, to find beyond a reasonable doubt the amount of drugs attributable to a defendant convicted of participating in a drug conspiracy, when the drug quantity admittedly attributable to the conspiracy increases the statutory maximum penalty);

- **Tenth Circuit:** United States v. Ellis, 868 F.3d 1155 (10th Cir. 2017) (holding in light of Alleyne that trial court violated Sixth Amendment by increasing mandatory minimum sentence based upon conspiracy count without a jury finding on the defendant's individually attributable amount of cocaine); and

- **D.C. Circuit:** United States v. Stoddard, 892 F.3d 1203, 1218-22 (D.C. Cir. 2018) (recognizing the split in the Circuits while adopting the individually attributable approach).

On the other hand, other Circuits have reached the opposite conclusion:

- **Second Circuit:** United States v. Jimenez, 586 Fed.App'x 50, 56 (2d Cir. 2014) (holding that a jury finding that a conspiracy involved a quantity of narcotics that triggers a mandatory minimum sentence is sufficient under Alleyne to trigger the same mandatory minimum sentence for each co-conspirator);

- **Third Circuit:** United States v. Phillips, 349 F.3d 138, 141-43 (3rd Cir. 2003) (holding that Apprendi is satisfied when the jury finds the drug amounts for the conspiracy as a whole, rejecting the argument that the jury must find the drug amounts attributable to an individual conspirator), judgment vacated on other grounds sub nom., Barbour v. U.S., 543 U.S. 1102 (2005);

- **Seventh Circuit:** United States v. Knight, 342 F.3d 697, 709-10 (7th Cir. 2003) (holding that Apprendi did not require defendant-specific findings of drug type and quantity in drug-conspiracy cases); United States v. Saunders, 826 F.3d 363, 373 (7th Cir. 2016) (concluding, notwithstanding majority opinion in Alleyne, that "the sentencing court was permitted to find a higher drug quantity by a preponderance of the evidence"), citing, inter alia, Alleyne, 133 S.Ct. at 2169 (Roberts, C.J., dissenting) ("the judge was free to consider any relevant facts ... including facts not found by the jury beyond a reasonable doubt").

Thus, of the nine Circuits to have weighed in on the issue, there exists a clear split on whether, in light of Alleyne, a jury finding beyond a reasonable doubt is now required to establish not merely the total weight attributable to a conspiracy but also the weight attributable – or reasonably foreseeable – to each individual defendant.

Petitioner urges this Court to grant certiorari in order to resolve this split between the Circuits, as defendants in at least the Second, Third, and Seventh Circuits are not receiving the Fifth and Sixth Amendment constitutional protections recognized by this Court in Alleyne.

Notably, the resolution of this Circuit split will impact a substantial portion of all federal criminal defendants nationwide. According to data maintained by the United States Sentencing Commission, there were 76,538 federal offenders in 2019. See United States Sentencing Commission, Interactive Data Analyzer (available at <https://ida.ussc.gov/analytics/saw.dll?Dashboard>). Of that total, 20,393 (27%) were charged with drug offenses (trafficking and/or possession). Id. Indeed, over the five-year period of 2015-2019, there were 351,705 federal offenders, 105,182 (30%) of which were charged with drug offenses (trafficking and/or possession). Id.

Because the determination of the quantity of drugs to be held attributable to a criminal defendant is a question that must be resolved for all federal defendants convicted of a drug offense, the question of whether the quantity is calculated by the total attributable to the entire conspiracy or only the quantity specifically attributable to each individual defendant, is a matter of grave importance to a substantial portion of all criminal defendants nationwide, not merely the parties involved in the present case.

II. THE DECISION BELOW IS ERRONEOUS

The Second Circuit resolved this issue by claiming that Petitioner had defaulted his claim by failing to challenge his sentencing in his direct appeal, and by raising Allenye in his 2255 petition in the context of a change in the law rather than ineffective assistance of appellate counsel. Citing United States v. Adams, 448 F.3d 492, 499 (2d Cir. 2006), the Second Circuit concluded that Petitioner could not show cause for his default because the court "had already addressed the type of argument [Petitioner] now attempts to make." Pet.App. 12. Such a conclusion, however, is erroneous.

First, the Second Circuit did not address in Adams whether *a jury* is required to make foreseeability findings beyond a reasonable doubt. Indeed, Adams was a plea appeal vacating a guilty plea due to the inadequacies of the allocution, specifically that the defendant allocuted to his participation in a marijuana conspiracy but the Government sought to sentence him for his concomitant participation in the cocaine conspiracy. See Adams, 488 F.3d at 499. In vacating the guilty plea, the Second Circuit specifically noted that there was no proof that this drug type and quantity were reasonably foreseeable to him and that as a result "there was not a sufficient factual basis in the record to support the plea at the time the district court accepted it." Id. There was no discussion whatsoever, however, of under what standard or proof the District Court was required to render its foreseeability findings.

Second, while it is correct that Petitioner had not challenged his sentencing on direct appeal, Allenye had not been decided until Petitioner's Judgment was final and his case was already on appeal. Additionally, although Petitioner raised the issue in his 2255 petition in the context of a change in the law, rather than ineffective assistance of appellate

counsel, the Government did not argue default until it did so on appeal of the 2255 petition. Before the District Court the Government argued that Alleyne could not be raised by Petitioner because it did not apply retroactively. Had the Government raised default, rather than non-retroactivity, in the District Court, Petitioner would have had the opportunity to amend his 2255 petition at the time to reframe the issue as one of ineffective assistance of appellate counsel. By raising default – essentially the opposite of what it argued in District Court – only for the first time on appeal, a manifest injustice occurred when the Second Circuit refused to find cause to excuse the default or remand to the District Court to amend the 2255 petition. That manifest injustice can be cured, however, by this Court if the instant petition for certiorari is granted.

Additionally, the Second Circuit's prior precedent on this issue is likewise misplaced. In United States v. Jimenez, supra, 586 Fed.App'x 50, 56 (2d Cir. 2014), the only prior case in which the Second Circuit addressed foreseeability in the context of Alleyne, the Second Circuit erroneously held that a jury finding that *a conspiracy* involved a quantity of narcotics is sufficient under Alleyne to trigger the same mandatory minimum sentence for each individual co-conspirator. Such a conclusion is in friction with the Second Circuit's pre-Alleyne precedent that when a defendant is charged in a narcotics conspiracy, one co-conspirator cannot be held liable for the conduct of another co-conspirator unless the conduct is reasonably foreseeable. See United States v. Martinez, supra, 987 F.2d 920, 926 (2d Cir. 1993) (holding that a defendant convicted of conspiracy to distribute cocaine could not be sentenced under mandatory minimum drug offense statute for four sales of cocaine made by co-conspirator alone unless a *preponderance of evidence* established that

defendant knew or reasonably should have known about quantities of cocaine that co-conspirator sold).

In Alleyne this Court held that "[f]acts that increase the mandatory minimum sentence ... must be submitted to the jury and found *beyond a reasonable doubt.*" Alleyne, 570 U.S. at 108 (emphasis added). Thus, applying Alleyne to the Second Circuit's longstanding precedent from Martinez, a defendant charged in a narcotics conspiracy cannot be held liable for the conduct of another co-conspirator unless the conduct is reasonably foreseeable to him and that determination of foreseeability is "submitted to the jury and found beyond a reasonable doubt."

The Second Circuit's decision in Jimenez did not address Martinez; indeed, Petitioner submits that Jimenez was wrongly decided. In Jimenez the Second Circuit stated that "Alleyne does not require that a jury find drug quantities relied on by the court in selecting a sentence within the statutory bounds, as the Sixth Amendment does not apply to 'factfinding used to guide judicial discretion in selecting a punishment *within limits fixed by law.*' " Jimenez, 586 F. App'x at 56 (emphasis added). The Second Circuit was correct that Alleyne does not apply to "factfinding used to guide judicial discretion in selecting a punishment *within limits fixed by law,*" but that only means that a jury determination is not required *once* the "limits" (i.e., the mandatory minimum and maximum sentences) have been set. A jury determination is required under Alleyne to determine which limits apply. Stated another way, Alleyne requires the jury to determine the quantity of drugs applicable

to the offense, which determines the sentencing limits of 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(B), (b)(1)(C), (b)(1)(D), and (b)(1)(E).[2]

Since Martinez prohibits a trial court from sentencing a defendant for quantities of drugs that were not reasonably foreseeable to that specific defendant, see Martinez, 987 F.2d at 926, applying Alleyne's jury requirement to Martinez's reasonable foreseeability requirement clearly means that a jury must now find, beyond a reasonable doubt, the quantity of drugs attributed – or reasonably foreseeable – to each specific defendant; such determination may no longer be made by a judge based upon a preponderance of the evidence.

As explained by the First Circuit, "Under Alleyne, the operative question for a drug conspiracy is whether it is the *individualized* drug quantity that is a 'fact that increases the mandatory minimum' sentence," Pizarro, 772 F.3d at 292, quoting, Alleyne, 133 S.Ct. at 2155. Akin to this Court's opinion in Martinez, the First Circuit had likewise previously held that where "a mandatory minimum 'is made *potentially* available by a finding that the conspiracy as a whole handled (or at least contemplated) the necessary triggering amount,' ... a mandatory minimum 'cannot be applied in [a particular coconspirator's] case without an individualized finding that the triggering amount was attributable to, or foreseeable by, him.' " Pizarro, 772 F.3d at 292 (brackets in original and footnote omitted), quoting, United States v. Colón-Solís, 354 F.3d 101, 103 (1st Cir. 2004); see also United States v. Casas, 425 F.3d 23, 57-58 (1st Cir. 2005) ("In the absence of such an individualized finding, the drug

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[2] A jury finding might also be required before applying a § 851 enhancement when a valid Prior Felony Information has been filed. But cf. Alleyne, 133 S.Ct. at 2160 n.1 (declining to revisit Almendarez-Torres v. United States, 523 U.S. 224 [1998], because "the parties d[id] not contest that decision's vitality").

quantity attributable to the conspiracy as a whole cannot automatically be shifted to the defendant."), quoting, Colón-Solís, 354 F.3d at 103.

The First Circuit went on to point out that since Colón-Solís, like Martinez, was decided prior to Alleyne, "after Colón-Solís, [just like after Martinez] that individualized finding was made by the sentencing judge." Pizarro, 772 F.3d at 292. However, just as Petitioner urges herein, the First Circuit determined, based upon the above reasoning, that "following the Supreme Court's decision in Alleyne, the drug quantity that triggers the mandatory minimum for a 21 U.S.C. § 846 conspiracy, like the drug quantity that triggers the statutory maximum under Apprendi, must now be found by a jury beyond a reasonable doubt." Pizarro, 772 F.3d at 292 (footnote omitted). See also Foster, 507 F.3d at 250-51 (finding error in jury's failure to determine the individualized quantity of crack attributable to each defendant, holding that such is necessary for ascertaining the sentencing limits of 21 U.S.C. § 841(b)(1) in a prosecution for narcotics conspiracy under 21 U.S.C. § 846).

Accordingly, for all of these reasons, Petitioner submits that the Second Circuit's precedent in Jimenez is erroneous, as was the Second Circuit's reliance on Adams herein.

* * *

In sum, the Second Circuit's refusal to revisit its erroneous decision in Jimenez deepens an entrenched and widely recognized conflict in the lower courts and is inconsistent with Alleyne itself. This Court should grant review on this important question of Fifth Amendment and Sixth Amendment law; reject the view adopted by the Second, Third, and Seventh Circuits; and affirm the view adopted by the First, Fourth, Fifth, Ninth, Tenth, and D.C. Circuits.

CONCLUSION

For all of these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2020