No. 21-143

In The Supreme Court of the United States

RAYMOND RODRÍGUEZ-RIVERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICUS CURIAE PUERTO RICO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Puerto Rico Association of Criminal Defense Attorneys, Inc. ("PRACDL") is a voluntary non-profit association of attorneys defending men and women accused of criminal offenses in Puerto Rico, predominantly in the United States District Court for the District of Puerto Rico. Founded in 1991, it currently has 106 members, and is an affiliate of the National Association of Criminal Defense Lawyers ("NACDL"). Our mission includes the defense and protection of individual rights and the promotion of the fair administration of the justice system, as well as improving the quality of representation of the accused.[1]

PRACDL's members depend upon clear sentencing rules to accurately counsel our clients about penalties that may deprive them of years of freedom, and their communities of their contributions. The Petition raises a recurring and troubling issue: the application of an enhancement pursuant to the commentary to U.S.S.G. § 4B1.2(b)—Application Note 1—that has an

[1] Both parties received timely notice and have provided written consent to the filing of this Brief to counsel pursuant to Rule 37.2 of the Rules of this Court. Under Rule 37.6, *amicus* states that no counsel for a party authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

enormous impact upon sentences, potentially increasing the sentencing range up to life in prison.

The text of § 4B1.2(b) makes no reference to any inchoate offenses. Application Note 1, however, adds a list of generic inchoate offenses, including "the offense[] of . . . conspiring" to commit a controlled substance offense, to the list enumerated in the text of § 4B1.2(b). The narrow question of whether that includes an atypical conspiracy requiring no overt act weighs heavily in our advice and our clients' decisions about whether to assert their right to trial, as well as upon plea negotiations.

Because of the high number of prosecutions under 21 U.S.C. § 846, PRACDL is concerned about the implications of this issue for criminal justice practitioners, our clients, their communities, and our society. In our district alone, 5,460 people were charged with this offense between 2006 and 2016, accounting for 34.48% of all defendants during that period.[2] Nearly 75% (98

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[2] The District of Puerto Rico figures cited herein were obtained from a review of the District's ECF docket for all criminal cases filed for the period 2006-2016. After total numbers of cases and defendants were recorded, Indictments charging violations of 21 U.S.C. § 846 were separately reviewed to determine the number of defendants and location alleged in each. Those Indictments charging 10 or more defendants were separately tabulated. Each location's GPS data was used to match the geographical coordinates with the corresponding in the 2016 *American Community Survey and Puerto Rico Survey* by The Institute for the Quantitative Study of Inclusion, Diversity and Equity ("QSIDE"), a social research organization applying mathematics to social justice research. The full report: *Persons Charged with Violations of 21 U.S.C. § 846: Poverty, Unemployment, Education*

of 131) of these cases took place in the impoverished neighborhoods where our clients lived.[3]

PRACDL urges this Court to grant the Petition because it represents part of an important national debate about the criminalization of poverty,[4] racial and ethnic discrimination in our criminal justice system,[5]

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and Sentences ("QSIDE Report") is published at: https://www.pracdl.org/qside-report/.

[3] As defined by the U.S. Census Bureau, *American Community Survey and Puerto Rico Community Survey: 2019 Definitions*, pp. 110-13, available at https://www2.census.gov/programs-surveys/acs/tech_docs/subject_definitions/2019_ACSSubjectDefinitions.pdf (last viewed 8/23/2021).

[4] *See*, *e.g.*, Harvard Criminal Justice Policy Program and Human Rights Watch Submission to the UN Special Rapporteur on extreme poverty and human rights, *Criminalization of Poverty as a Driver of Poverty in the United States*, available at https://www.hrw.org/news/2017/10/04/criminalization-poverty-driver-poverty-united-states (last viewed 8/20/2021).

[5] *See*, *e.g.*, *United States v. Chambers*, 956 F.3d 667, 674 (4th Cir. 2020) ("Under the First Step Act, Congress authorized the courts to provide a remedy for certain defendants who bore the brunt of a racially disparate sentencing scheme."); U.S. Sentencing Comm'n, *Demographic Differences in Sentencing: An Update on the 2012 Booker Report*, p. 2 (noting that sentences for Black males were, on average, 19.1% higher than those of similarly situated White males for fiscal years 2012-2016), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf (last viewed 8/20/2021).

and unsustainable prison populations[6] unprepared for geriatric needs.[7]

SUMMARY OF THE ARGUMENT

This Court should grant the petition to resolve a conflict among the Courts of Appeals regarding the interpretation of U.S.S.G. § 4B1.2(b) and the commentary in Application Note 1. The question of whether the Guideline should be interpreted to extend the severe consequences attached to the "Career Offender" label to atypical inchoate offenses such as that defined in 21 U.S.C. § 846 has produced a split that is clear, entrenched, and of exceptional significance.

The question presented may be abstract, but interpretations of the Sentencing Guidelines have

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[6] *See*, *e.g.*, Congressional Research Service, *The First Step Act of 2018: An Overview* (March 4, 2019), p. 1 (describing P. L. 115-391 as "the culmination of several years of congressional debate about what Congress might do to reduce the size of the federal prison population"), available at https://crsreports.congress.gov/product/pdf/R/R45558 (last viewed 8/21/2021). Notably, 47% of the convicted population in federal prisons are serving time for drug offenses. Tara O'Neill Hayes, Margaret Barnhorst, *Incarceration and Poverty in the United States*, available at https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states (last viewed 8/20/2020).

[7] *See*, *e.g.*, Office of the Inspector General, Evaluations and Inspections Division, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, revised February 2016, available at https://oig.justice.gov/reports/2015/e1505.pdf.

concrete impact on lives and our society. For those facing the application of the Career Offender Guideline, and for their counsel, the question has tremendous practical significance. *Cf. United States v. Winstead*, 890 F.3d 1082, 1089 (D.C. Cir. 2018) (noting the "enormous difference" in potential sentence depending upon the interpretation of Note 1). *See also Chambers*, 956 F.3d at 668, 675 (ordering a Guideline recalculation and reduction from 262-327 months to 57-71 months).

The social impact is also exceptionally broad since the interpretation of the Guideline and the commentary implicates sentences for people convicted of the three most frequently charged types of federal offenses. The United States Sentencing Commission reports that convictions for charges involving controlled substances, immigration violations, and firearms accounted for over 78.8% of all federal sentences reported for Fiscal Year 2020.[8] And, as already noted, in the District of Puerto Rico between 2006 and 2016, prosecutions under 21 U.S.C. § 846 alone accounted for over a third of all defendants.

Sentencing is a yardstick by which we measure our values. Nationally, 21 U.S.C. § 846 has been cited as one of the most used federal statutes authorizing

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[8] U.S. Sentencing Comm'n, *Quarterly Data Report, Fiscal Year 2020*, Table 1, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2020_Quarterly_Report_Final.pdf.

life in prison,[9] a penalty that falls disproportionately among people classified as either "Black" or "Hispanic."[10] In Puerto Rico, the defendants are overwhelmingly both "Hispanic" and poor. Indeed, in Puerto Rico, 27% of all persons accused between 2006-2016 were charged in "mega-indictments" charging from 10 to over 100 defendants with conspiring, with neighbors and family members, in conspiracies alleged as taking place in public housing projects or other poor neighborhoods. [11] For example, one circuit opinion on appeal from this district opens with a description of "110 defendants charged in a two-count indictment with drug and firearms offenses arising from a massive drug ring operating in public housing projects." *United States v. Reyes-Santiago*, 804 F.3d 453, 456 (1st Cir. 2015). Another describes a "vast drug trafficking organization [o]perating primarily" out of a public housing project and implicating three generations of a family among the 55 defendants. *United States v. Maldonado Pena*, 4 F.4th 1, 13-14 (1st Cir. 2021). In this and other ways, § 846 conspiracy charges contribute to "racial disparities, excessively harsh sentencing, and drug and immigration policies" resulting

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[9] U.S. Sentencing Comm'n, *Life Sentences in the Federal System* (Feb. 2015), pp. 1, 20, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf (last viewed 8/27/2021).

[10] *Id.* at 7.

[11] QSIDE Report, p. 3, Table A, Columns 3 and 9.

in "the largest reported prison population in the world."[12]

What sentence is imposed should not depend on accidents of geography. Different interpretations of Application Note 1 to § 4B1.2 in different circuits threaten primary objectives of the Guidelines and sentencing itself: to avoid unwarranted sentencing disparities among defendants with similar records found guilty of similar conduct. 18 U.S.C. § 3553(a)(6). Granting the Petition will also serve to further respect for individual and collective life and liberty, and the reputation of our criminal justice system for fairness.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS.

Lower courts cannot resolve the abstract question presented by the Petition: whether the word "conspiracy" used in Application Note 1, which adds "conspiracy" to the list of six specific types of "offenses . . . that prohibit" dealing in controlled substances set out in U.S.S.G. § 4B1.2(b) refers to an "offense," or to "conduct."[13] Application Note 1 adds that controlled

[12] Human Rights Watch, *Criminal Justice*, available at https://www.hrw.org/united-states/criminal-justice (last viewed on 8/24/21).

[13] § 4B1.2(b) provides the following definition: "The term 'controlled substance offense' means an offense . . . that prohibits

substance offenses "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." Both provisions determine whether the "Career Offender" Guideline operates to enhance a sentence.

If Application Note 1 refers to "offenses," *Taylor v. United States*, 495 U.S. 575 (1990) requires matching the elements of 21 U.S.C. § 846 with those of generic conspiracy. If it means "conduct," under *Shular v. United States*, ___ U.S. ___, 140 S.Ct. 779, 783 (2020), elements are irrelevant, and the question requires asking whether the conduct necessarily involves a specific listed offense.

This Court determined in *United States v. Shabani*, 513 U.S. 10, 15 (1994), that the offense of conspiracy to commit a controlled substance offense defined in 21 U.S.C. § 846,[14] requires no overt act. Under *Taylor* and its progeny, then: (1) it is not a categorical match for the federal general conspiracy statute, 18 U.S.C. § 371[15] or that of "40 of 54 federal

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the manufacture, import, export, distribution, or dispensing of a controlled substance," or possession with intent to do so.

[14] "Any person who attempts or conspires to commit any offense defined in this title 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."

[15] "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."

jurisdictions" *United States v. Garcia-Santana*, 774 F.3d 528, 534-35 (9th Cir. 2014); and (2) § 846 does not serve as a basis for the sentencing enhancement contemplated by U.S.S.G. § 4B1.2.

In the decision below, *United States v. Rodriguez-Rivera*, 989 F.3d 183, 185 (1st Cir. 2021), the appellate court first and foremost noted the pre-existing circuit split. The First Circuit joined the Second, Ninth, Sixth and Fifth in holding that there is no need to compare the elements of 21 U.S.C. § 846 with generic conspiracy. The Ninth, Sixth and Fifth Circuits did so in the context of identical language in commentary to U.S.S.G. § 2L1.2(b), enhancing much lower offense levels for immigration offenses. *United States v. Rivera-Constantino*, 798 F.3d 900, 903 (9th Cir. 2015); *United States v. Sanbria-Bueno*, 549 Fed.Appx. 434, 438-39 (6th Cir. 2013) (unpublished, collecting cases); and *United States v. Rodriguez-Escareno*, 700 F.3d 751, 754 (5th Cir. 2012). The Second Circuit held that Application Note 1 properly encompassed convictions under § 846 on three grounds, including its interpretation of the Commission's intent. *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020) (there, in the context of successive convictions under § 846). After the First Circuit issued its opinion, the Seventh Circuit applied the Note, but characterized the split as one about "whether courts are to defer to Application Note 1," *citing United States v. Winstead*, 890 F.3d 1082, 1091-92 (D.C. Cir. 2018), and asking, but not answering "whether § 4B1.2's Application Note 1 encompasses § 846 conspiracy under the categorical approach."

United States v. Smith, 989 F.3d 575, 585-86 (7th Cir. 2021).

On the other side of the split, the Fourth and the Tenth Circuits have explicitly ruled that the lack of an overt act requirement creates a categorical mismatch under *Taylor*. *United States v. Norman*, 935 F.3d 232, 237 (4th Cir. 2019) ("[b]ecause the Guidelines do not define 'conspiracy' under § 4B1.2, the term is defined by reference to the 'generic, contemporary meaning' of the crime," there, a state offense). In support of its determination, the Fourth Circuit cited *Taylor* and its own precedent: *United States v. McCollum*, 885 F.3d 300, 308 (4th Cir. 2018). Likewise, in the immigration context, the Tenth Circuit cited its controlling precedent requiring application of *Taylor* to exclude "attempts" to commit a drug offense. *United States v. Martínez-Cruz*, 836 F.3d 1305, 1310-14 (10th Cir. 2016).

The conflict among the circuits involves the important choice between using the method prescribed by this Court in *Taylor* for matching elements of offenses or discerning the Sentencing Commission's intent regarding "conduct" as in *Shular*. This is an either/or question, with no room for further percolation. The decision below is the perfect vehicle because it squarely presents the head-on conflict with two diametric alternatives chosen by reasonable jurists. Considering the clear split on a narrow question, nothing is to be gained from permitting it to persist—or fester—further.

II. ABSTRACT QUESTIONS ABOUT SENTENCING HAVE CONCRETE IMPACT ON INDIVIDUAL LIVES AND OUR SOCIETY.

For accused persons and their counsel, the question is not at all abstract. As Judge Rakoff noted dryly in *Tabb*, "the career offender enhancement often dwarfs all other Guidelines calculations and recommends the imposition of severe, even Draconian, penalties." 949 F.3d at 83, n.2. Likewise, the concurring judges in *United States v. Lewis*, 963 F.3d 16, 28 (1st Cir. 2020) warned that a broad interpretation of Note 1 "may well lead judges to sentence many people to prison for longer than they would otherwise deem necessary."

The Career Offender Guideline, U.S.S.G. § 4B1.1, may increase a sentence in two cumulative ways. First, it mandates the use of the higher of two offense levels—either the level prescribed by the offense, or, if the one it establishes is higher, that one. And under either scenario, it provides that: "A career offender's criminal history category in every case under this subsection shall be Category VI." U.S.S.G. § 4B1.1(b). The career offender enhancement may triple or quadruple the un-enhanced sentence and convert a term of years to a terminal sentence of life in prison.

The District of Columbia Circuit has remarked on the "enormous difference" (in that case, 10 years) in potential sentence depending upon the interpretation of Application Note 1. *Winstead*, 890 F.3d at 1089. The difference is also clearly illustrated in *Chambers*. Mr. Chambers qualified for review under two recent laws

designed to reduce prison overcrowding, the result of unduly harsh and discriminatory sentencing: the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 and the Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372. Under Fourth Circuit precedent rejecting § 846 as the basis for an enhancement under U.S.S.G. § 4B1.2(b), the original Guidelines Sentencing Range of 262-327 months was erroneous. It should have been 57-71 months. *Chambers*, 956 F.3d at 668.

The profound impact of this question on individual lives is matched by its exceptionally broad social impact. The enhancement for conspiracy to commit one of the offenses enumerated in § 4B1.2(b) has been applied to cases involving three of the most frequently charged types of federal offenses: those involving controlled substances, immigration violations, and firearms. Together, they account for over 78.8% of all federal sentences reported for Fiscal Year 2020.[16] According to this U.S. Sentencing Commission data, the controlled substance and firearms offenses alone account for close to 40% all of reported sentences. *Id*. Nationally, 21 U.S.C. § 846 is the most commonly used federal statute authorizing life in prison,[17] a penalty

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[16] U.S. Sentencing Comm'n, *Quarterly Data Report, Fiscal Year 2020*, Table 1, p. 1.

[17] U.S. Sentencing Commission, *Life Sentences in the Federal System* (Feb. 2015), p. 1. Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf (last viewed 8/18/2021).

that falls disproportionately among people classified as either "Black" or "Hispanic."[18]

Statistics from the District of Puerto Rico, where prosecutions under § 846 alone accounted for 34.8% of all defendants charged between 2006-2016, confirm the practical importance of resolving the question presented.[19] These people are overwhelmingly both "Hispanic" and poor. Indeed, 27% of all accused in this District between 2006-2016 were charged in indictments involving one or more identified public housing projects or low-income barrios.[20]

While the 2016 mean poverty rate throughout Puerto Rico was 46%, in the neighborhoods identified in those indictments, it was 56%. QSIDE Report, p. 6. The mean unemployment rate among men aged 16-34 in the census tracts identified in the indictments was 3% higher than in Puerto Rico generally. But the high school completion rate among those men was 6% lower than among men in all census tracts, relegating those who did work to the lowest paid jobs. *Id*. In its study of tax measures designed to improve employment among the formerly incarcerated, the Brookings Institution found that their "labor market struggles" start before

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[18] *Id*. at 7.

[19] QSIDE Report, p. 3, Table A, columns 3 (all defendants) and 7 (all defendants charged under § 846).

[20] QSIDE Report, Table A, columns 3 (15,835=all defendants) and 9 (4,353=charged in mass indictments correlated with low-income census tracts).

incarceration, with high rates of joblessness and "with most prisoners growing up in deep poverty."[21]

Sentences in these cases vary, but they typically involve at least 60 months in prison. Based upon an average cost of incarceration per inmate of just $99.45 per day in 2018, the cost of incarcerating just one defendant for the lowest sentence would be over $150,000.00.[22] To add some perspective to this sum, a review of sentences imposed in the District of Puerto Rico between 2006 and 2016 reflects 17 life sentences imposed in indictments charging violations of § 846 and the average length of sentence for the 2,337 men and women sentenced in these large-scale indictment during the relevant period was 86.3 months. QSIDE Report, p. 7, Table B, column 5.

III. THE SENTENCE IMPOSED SHOULD NOT BE DETERMINED BY ACCIDENTS OF GEOGRAPHY.

As things stand, the answer to the anxious question to counsel—"What sentence am I facing?"—will

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[21] Adam Looney and Nicholas Turner, *Work and Opportunity before and after Incarceration*, published by The Brookings Institution, March 2018. Available at https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf.

[22] The U.S. Bureau of Prisons, *Annual Determination of Cost of Incarceration*, Federal Register, Vol. 83, No. 83, Monday, April 30, 2018, establishes a cost of $99.45 per day per inmate. Assuming 51 months actual incarceration and using only 30 days per month, 99.45 x 51 x 30=$152,158.50—a conservative cost estimate.

depend upon *where* the accused will be sentenced. In New York, the answer for Mr. Tabb was a Guidelines range of 151-188 months in prison, because in the Second Circuit, the categorical approach did not apply. *Tabb*, 949 F.3d at 83. In Maryland or Colorado, it would have been 33-41 months, because in the Fourth and Tenth it does.

Petitioner asks this Court to resolve a question that sharply divides lower courts, as illustrated not just in his case, but by numerous others as well. It is a specific, narrow question of interpretation of the reference to conspiracy in Application Note 1. Years hang in the balance, weighing upon the choice to plead or go to trial, as well as upon the potential sentences.

The different interpretations, leading to sentences much higher in jurisdictions of one circuit than in another, defeats one of the primary goals of the Guidelines and, indeed, our sentencing regime. 18 U.S.C. § 3553(a)(6) requires courts to consider: "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." As these cases illustrate, when it is time to decide whether Application Note 1 to U.S.S.G. § 4B1.2 applies in relation to a sentence for violation of at least one very frequently used statute, it is neither conduct, nor record that determines the sentence, but geography.

CONCLUSION

PRACDL urges this Court to accept the Petition to resolve a question about which the Courts of Appeals are hopelessly fractured. It is one where life and liberty hang in the balance. And its resolution is essential to broader issues of importance to the integrity and public reputation for fairness of our criminal justice system.

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Respectfully submitted,

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