

CASE NO. \_\_\_\_  
IN THE SUPREME COURT OF THE UNITED STATES

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ROOSEVELT RICO DAHDA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI

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### QUESTION PRESENTED

In *Alleyne v. United States*, 570 U.S. 99 (2013), this Court ruled any fact that increases a *mandatory minimum* sentence constitutes an “element” of the offense that must be submitted to a jury and proved beyond a reasonable doubt under the Sixth Amendment. The Tenth Circuit has joined the majority of circuits in holding that, where a finding on the issue of drug quantity increases the mandatory minimum sentence, a jury must make an individualized determination of the amount of drugs attributable to a defendant. The question presented is:

1. Whether a finding on the issue of drug quantity that increases the *statutory maximum* sentence requires the jury to make an individualized determination of the amount of drugs attributable to a defendant because under such circumstances, drug quantity constitutes an “element” of the offense for purposes of the Sixth Amendment.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Roosevelt Rico Dahda seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Dahda*, \_\_\_ Fed.Appx. \_\_\_, 2021 WL 1712570 (10<sup>th</sup> Cir. April 30, 2021) (unpublished).

## OPINIONS BELOW

The Tenth Circuit's opinion in *United States v. Dahda*, cited immediately above, is included in the Appendix at App. A. The United States District Court for the District of Kansas' December 16, 2019 memorandum and order rejecting Mr. Dahda's sentencing argument concerning the need for an individualized determination of drug quantity is appended as App. B.

## JURISDICTION

The Tenth Circuit issued its opinion affirming Mr. Dahda's sentence on April 30, 2021. *See* App. A. No petition for rehearing was filed. In view of this Court's Order of March 19, 2020, extending the deadline to file any petition for a writ of certiorari to 150 days from the entry of the lower court judgment, Mr. Dahda's petition for certiorari is due on September 27, 2021.

The United States District Court for the District of Kansas had jurisdiction under 18 U.S.C. §3231. The Tenth Circuit Court of Appeals had jurisdiction under 28 U.S.C. §1291. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

### CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . . .” U.S. Const. Amend. VI.

### STATEMENT OF THE CASE

Roosevelt Dahda and 42 others were charged in connection with a marijuana distribution network centered in Kansas. He was convicted on, *inter alia*, Count 1, which charged him with conspiring to possess with intent to distribute and to distribute 1,000 kilograms or more of marijuana in violation of 21 U.S.C. §841(a), and sentenced to 201 months' imprisonment on that count. He also received a 201-month sentence on Count 56, which carried an enhanced sentence due to Dahda's prior felony conviction.

On appeal, the Tenth Circuit affirmed Dahda's convictions but concluded that, for purposes of Count 1, the district court erred in attributing 1,600 pounds of marijuana to him when calculating his base offense level under the advisory sentencing guidelines. Separately, the circuit court rejected Dahda's argument

that the district court erred in sentencing him under 21 U.S.C. §841(b)(1)(C), which carries a maximum sentence of 20 years, rather than under Section 841(b)(1)(D), which carries a maximum sentence of 5 years and is, under the law of the Tenth Circuit, the “default” sentencing provision when there is no jury finding about the specific amount of marijuana involved in a Section 841(a) violation. According to the court, because the elemental instructions and verdict form both “required the jury to find that the conspiracy involved 1,000 kilograms or more of marijuana,” sentencing Dahda under Section 841(b)(1)(C) “did not constitute error, much less plain error.”

On remand, the district court sentenced Dahda to 141 months’ imprisonment on Count 1 after attributing 1,113 pounds (505 kilograms) of marijuana to him. In doing so, the district court rejected Dahda’s argument that because of a significant change in Tenth Circuit law between the time of his initial appeal and the time of his resentencing, he could only be sentenced under Section 841(b)(1)(D), with its 5-year maximum term of incarceration. Instead, the court said it was “going to proceed on the assumption that that issue [was] decided” by [the Tenth Circuit] in its April 4, 2017 opinion,” and it sentenced him under the enhanced penalty provisions of Section 841(b)(1)(C). The court also imposed a 141-month sentence on Count 56.

Dahda again appealed arguing, among other things, that by the time of his resentencing, Tenth Circuit precedent required a jury's individualized determination of the drug quantity attributable to a defendant when drug quantity is used as the basis for applying a mandatory minimum sentence. Dahda argued that the same precedent should have applied to Count 1 at resentencing, because under this Court's precedent, there is no basis for distinguishing between a fact that increases the mandatory minimum sentence and a fact that increases the statutory maximum sentence – in either circumstance, the fact in question constitutes an element of the offense that must be found by a jury.

Although the issue was – and remains – squarely presented by this case, the Tenth Circuit declined to address it under the “concurrent-sentence doctrine.” App. A at 6. The court did so on the basis that, because it was affirming Dahda's 144-month sentence on Count 56, “he suffers no prejudice as a result of the sentence imposed on Count 1.” *Ibid.*



## REASONS FOR GRANTING THE PETITION

### **I. This Court's Precedent Makes Clear That Any Fact That Increases The Mandatory Minimum Sentence Is An Element Of The Offense That Must Be Found By A Jury. The Court Should Use This Case To Make Clear That The Same Principle Applies To Any Fact That Increases The Statutory Maximum Sentence.**

The penalty for violating 21 U.S.C. §841(a) depends on the quantity of drugs involved in the offense. 21 U.S.C. §841(b)(1)(D) allows for five years' imprisonment for violations involving less than 50 kilograms of marijuana. Under Tenth Circuit precedent, "Section 841(b)(1)(D) defines [the] maximum sentence exposure" in cases where a defendant is "neither indicted nor convicted of possessing more than fifty kilograms of marijuana." *United States v. Cernobyl*, 255 F.3d 1215, 1220 (10<sup>th</sup> Cir. 2001) (citing *United States v. Nordby*, 225 F.3d 1053, 1059 (9<sup>th</sup> Cir. 2000) ("[U]nder *Apprendi*, the 'prescribed statutory maximum' for a single conviction under for an undetermined amount of marijuana is five years.")).

In Dahda's first appeal, the Tenth Circuit rejected the argument that he had to be sentenced under Section 841(b)(1)(D) because the verdict form did not require the jury to make a specific determination of marijuana quantity. More specifically, the court agreed that "if the jury had not found marijuana quantity beyond a reasonable doubt, the Constitution would have limited the maximum sentence to five years under §841(b)(1)(D)." *United States v. Los Dahda*, 853 F.3d

1101, 1117 (10<sup>th</sup> Cir. 2017); *United States v. Roosevelt Dahda*, 852 F.3d 1282, 1292 (10<sup>th</sup> Cir. 2017) (adopting the analysis of *Los Dahda*). But the Tenth Circuit concluded that “no constitutional violation took place” because the jury found that the conspiracy charged in Count 1 “involved 1,000 or more kilograms of marijuana.” *Los Dahda*, 853 F.3d at 1117 (discussing Instruction 19 and its requirement that the government prove beyond a reasonable doubt that “*the overall scope of the agreement involved more than 1,000 kilograms of marijuana*”) (emphasis added).

While the Tenth Circuit’s analysis of the issue may have been correct in April 2017 when the decisions in *Roosevelt Dahda* and *Los Dahda* were handed down, that was no longer true at the time of Dahda’s resentencing in December 2019. Rather, in *United States v. Ellis*, 868 F.3d 1155 (10<sup>th</sup> Cir. Aug. 24, 2017), the Tenth Circuit joined the majority of circuit courts in holding that a jury finding as to the quantity of drugs attributable to (*i.e.*, foreseeable by) an *individual defendant* is required when imposing an enhanced sentence triggered by drug quantity, as opposed to requiring only that the jury find that the conspiracy as a whole resulted in distribution of the sentence-enhancing quantity. *Id.* at 1169-74. *See also United States v. Stoddard*, 892 F.3d 1203, 1220-21 (2<sup>nd</sup> Cir. 2018) (joining the First, Fourth, Fifth, and Ninth Circuits in “adopt[ing] the individualized approach to drug-quantity determinations”).

Because the jury instructions in this case did not require the government to prove that more than 1,000 kilograms of marijuana were individually attributable to Dahda – the instructions only required the government to prove that the 40-plus member conspiracy in general involved more than 1,000 kilograms – he argued *Ellis* required sentencing under the default sentencing provisions of Section 841(b)(1)(D), with its five-year cap. Indeed, the revised presentence investigation report prepared on remand noted that Dahda originally “was sentenced under 21 U.S.C. §841(b)(1)(C)” but that “[i]t now appears, the applicable statute is 21 U.S.C. §841(b)(1)(D).”

The district court disagreed. While it recognized its “inherent discretionary power to expand the scope of the resentencing beyond the issue that resulted in the reversal and vacation of sentence,” it concluded that such discretion should be exercised only in “exceptional circumstances,” such as where “a dramatic change in controlling legal authority” has occurred. The court went on to conclude that *Ellis* did not constitute a dramatic change in controlling legal authority because it “addressed the necessary jury findings to impose a statutory minimum sentence,” whereas drug quantity in Dahda’s case impacted the statutory maximum sentence he could receive.

In *Alleyne v. United States*, 570 U.S. 99 (2013), this Court held that “any fact that increases the mandatory minimum [sentence] is an ‘element’ that must be

submitted to a jury.” *Id.* at 103. Furthermore, this Court has recognized that “there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum.” *Id.* at 116. As such, “drug quantity” is not a fact that somehow differs in nature depending on whether that fact is used to impose a mandatory minimum sentence rather than to increase a statutory maximum sentence. Drug quantity is drug quantity, and *Ellis* establishes that drug quantity must be based on individual attribution. Thus, while *Ellis* dealt with mandatory minimums, whereas this case concerns statutory maximums, this Court should make clear that the two cases are indistinguishable in terms of what must be proven, and what a jury must find beyond a reasonable doubt, for purposes of imposing an enhanced, drug-quantity based sentence under Section 841(b).<sup>1</sup>

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<sup>1</sup> The district court also refused to sentence Dahda under Section 841(b)(1)(D) on grounds that it was “bound to follow the Tenth Circuit’s published opinions in Los Dahda and Roosevelt Dahda which directly address the issue whether a jury finding on the scope of the conspiratorial agreement is sufficient to apply the statutory range of zero to 20 years under subsection (C) of Section 841(b)(1) instead of the statutory range of zero to five years under subsection (D).” The court went on to observe that the “panel decision in Ellis, which involved a challenge to a statutory minimum, did not and could not overrule the prior panel decisions in Los Dahda and Roosevelt Dahda.” (1/743 (citing *United States v. Elliott*, 937 F.3d 1310, 1316 n. 5 (10<sup>th</sup> Cir. 2019) (one panel cannot depart from prior holdings absent en banc reconsideration or superseding contrary decision by Supreme Court)). Neither observation furnishes support of ignoring the holding of *Ellis*.

By sentencing Dahda under Section 841(b)(1)(C) without a jury finding on the quantity of marijuana individually attributable to him, the district court committed constitutional error and decided this case in a manner that is inconsistent with this Court's precedent. Dahda's sentence should be vacated and this case remanded for resentencing under Section 841(b)(1)(D).

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The question before the Court in *Roosevelt Dahda* and *Los Dahda* was whether each defendant "should have been sentenced under (b)(1)(D) because the verdict form had not included a specific finding on the marijuana quantity." *Roosevelt Dahda*, 852 F.3d at 1291. See also *Los Dahda*, 853 F.3d at 1116 (rejecting argument that Los should have been sentenced under (b)(1)(D) "because the verdict form did not require a specific determination of the marijuana quantity"). In both cases, the Court ruled that a special verdict on drug quantity was not required because the elemental instruction on Count 1 "required the jury to find that the conspiracy involved 1,000 kilograms or more of marijuana." *Roosevelt Dahda*, 852 F.3d at 1292.

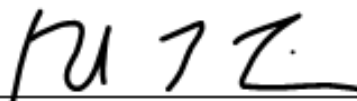
In short, the question in Dahda's prior appeal was whether a special verdict on drug quantity was required. The question was not whether a finding of drug quantity had to be based on the amount of drugs attributable to Dahda individually, or whether it was sufficient to rely on the conspiracy-wide amount of marijuana in question, and the Court said nothing about that question in either *Dahda* opinion. As such, the holdings in *Roosevelt Dahda* and *Los Dahda* did not "directly address" the individual attribution issue decided in *Ellis*. And because the opinions address different issues, the district court's observation that *Ellis* did not and could not overrule the *Dahda* decisions is irrelevant.

## CONCLUSION

For the reasons set forth above, Petitioner Roosevelt Rico Dahda respectfully asks this Court to grant his petition for a writ of *certiorari*.

DATED this 29<sup>TH</sup> day of July, 2021.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'R T Fishman', written over a horizontal line.

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