

No.

IN THE SUPREME COURT OF THE UNITED STATES

JOSE CESAR SANCHEZ,
GISELLE CASADO,
JOSE MANUEL DORADO, and
TANNOUS FAZAH

Petitioners,
vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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I. QUESTION PRESENTED FOR REVIEW

A. Like most other circuits, the Ninth Circuit has long held that an individual coconspirator convicted under 21 U.S.C. § 846 is liable only for the type and quantity of drugs that was reasonably foreseeable to her, not for the entire amount involved in the full conspiracy. Recently, the Ninth Circuit reversed course and eliminated the individual requirement of foreseeability. Now, contrary to the rule in eight other circuits, it holds that the government is not required to prove any degree of *scienter* on the part of an individual defendant with respect to drug type or quantity before holding them personally liable at sentencing for conspiracy-wide quantities. The rule of individual foreseeability, as recognized by these other circuits, is required by this Court's decisions in *Alleyne* and *Rehaif*. Should this Court grant certiorari to resolve this significant circuit split and to address the Ninth Circuit's failure to follow binding precedent from this Court?

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II. OPINION BELOW

The Ninth Circuit, in an unpublished memorandum, affirmed petitioners' convictions and sentences for RICO conspiracy and conspiracy to distribute controlled substances. *See* 18 U.S.C. § 1962(d); 21 U.S.C. §§ 841(a)(1) & 846. (Appendix A.)

III. JURISDICTION

The Ninth Circuit affirmed petitioners' convictions and sentences on March 15, 2021, and denied the petitions for rehearing on June 22, 2021. (App. A & Appendix B.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment, U.S. Const., states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;

nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The Sixth Amend., U.S. Const., states: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

Title 21 U.S.C. § 841 (b)(1)(A)&(B) provides:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

[. . .]

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

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

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

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii)

which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not

to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior

conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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

- (i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;
- (ii) 500 grams or more of a mixture or substance containing a detectable amount of--
 - (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
 - (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
 - (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
 - (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury

results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$5,000,000 if the defendant is an individual or \$25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$8,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not

place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

Title 21 U.S.C. § 846 provides: “Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”

V. STATEMENT OF THE CASE

The four petitioners were charged with, *inter alia*, conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846. All four were convicted at trial, and all four received enhanced sentences for specific drug types and quantities under 21 U.S.C. § 841(b).

All four petitioners were charged under 21 U.S.C. § 846 with a conspiracy to (a) distribute at least 50 grams of methamphetamine and (b) possess with intent to distribute at least 50 grams of methamphetamine, as well as additional specific amounts of marijuana, heroin, and cocaine. 21 U.S.C. § 846 provides that “[a]ny person who attempts or conspires to commit any offense defined in this subchapter

shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.” The pertinent offense is 21 U.S.C. § 841(a)(1), and the penalties are set forth in 21 U.S.C. § 841(b)(1)(A)–(B). Because the specific type and quantity of drugs determines the applicable mandatory minimum sentence as required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013), §§ 841(a)(1) and 841(b) are relevant to determining the elements of petitioners’ § 846 conspiracy convictions.

The jury instructions directed the jury to determine *not* whether the government had proven beyond a reasonable doubt that petitioners “conspired and agreed with each other to knowingly and intentionally commit” an offense involving the listed type and quantity amounts, but rather whether they had proven *only* that the *entire conspiracy* “involved” a specific drug type and quantity. Absolutely no individual knowledge or intent as to the type and/or quantity of drugs in the conspiracy was required by the jury instructions and verdict forms. This omission prejudiced petitioners because the evidence did not establish that any of them personally possessed or personally distributed the amount of

methamphetamine that subjected them to the enhanced penalties. Importantly, no evidence was introduced that any of them could reasonably have foreseen the conduct of other coconspirators who distributed methamphetamine and other drugs for their own purposes.

Petitioners challenged this instruction on appeal. As noted at oral argument by the Ninth Circuit panel that heard this case, that instruction was plain error at the time it was given. *See United States v. Becerra*, 992 F.2d 960, 966 (9th Cir. 1993).

While the case was pending, the Ninth Circuit issued its sharply divided *en banc* decision in *United States v. Collazo*, which narrowly reversed prior circuit authority and established a new rule:

[T]he government may establish that the defendant is subject to [enhanced penalties under § 841(b)] by proving beyond a reasonable doubt that the [] offense involved the drug type and quantity set forth in the [] penalty provisions. The government is not required to prove that the defendant knew (or had an intent) with respect to the drug

type and quantity set forth in [the] penalty provisions in order for them to apply.

United States v. Collazo, 984 F.3d 1308, 1315 (9th Cir. 2021) (en banc).¹ With this decision, the Ninth Circuit became an outlier amongst the other circuits on these issues.

Relying upon the bare-majority opinion in *Collazo*, the panel here affirmed petitioners' convictions and sentences in a memorandum on March 15, 2021, and denied their petitions for rehearing *en banc* on June 22, 2021. This petition for a writ of *certiorari* follows.

¹ The Ninth Circuit subsequently denied the *Collazo* appellants' petition for rehearing by the full court. The three-judge panel opinion in *Collazo* is still pending.

VI. REASONS FOR GRANTING THE WRIT

A. **The Ninth Circuit’s *en banc* opinion in *Collazo*, which held that there is no level of individual *scienter* required in order to impose enhanced penalties based on drug type and quantity in a drug conspiracy case, is at odds with the position of eight other circuits and misapplies or ignores binding precedent from this Court.**

This Court should grant this petition because “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter” and “has decided an important . . . federal question in a way that conflicts with relevant decisions of this Court.” S. Ct. R. 10(a)&(c). The Ninth Circuit’s recent decision in *United States v. Collazo*, 984 F.3d 1308, applied in this case, does both of these things.

Imposing group liability for both the crime of drug conspiracy *and* the severity of punishment, the *Collazo* majority held that “in order to obtain a particular sentence [under the federal drug statutes], the government must prove beyond a reasonable doubt the type and quantity of the substance involved in the

offense, but not the defendant’s knowledge of (or intent) with respect to that type and quantity.” *Collazo*, 984 F.3d at 1329.

In so holding, the majority expressly “note[d] [its] departure from the other circuits, which have largely made errors that echo our own.” *Id.* at 1335. In other words, the majority recognized that its holding was inconsistent with at least *nine* other circuits, all of which have held that drug type and quantity must be *at least* reasonably foreseeable to a coconspirator under § 846. *See id.* at 1335 n.29 (citing *United States v. Pizarro*, 772 F.3d 284 (1st Cir. 2014); *United States v. Martinez*, 987 F.2d 920 (2d Cir. 1993); *United States v. Phillips*, 349 F.3d 138 (3d Cir. 2003), vacated on other grounds, *Barbour v. United States*, 543 U.S. 1102 (2005); *United States v. Collins*, 415 F.3d 305 (4th Cir. 2005); *United States v. Haines*, 803 F.3d 713 (5th Cir. 2015); *United States v. Seymour*, 519 F.3d 700 (7th Cir. 2008); *United States v. Littrell*, 439 F.3d 875 (8th Cir. 2006); *United States v. Ellis*, 868 F.3d 1155 (10th Cir. 2017); *United States v. Stoddard*, 892 F.3d 1203 (D.C. Cir. 2018)).

Indeed, other than the Sixth and Eleventh Circuits, every federal court of appeals considering the identical issue has arrived at a contrary result.

And it is clear that the Ninth Circuit is on the wrong side of the split.

The elements of the charged conspiracy are an agreement to commit an unlawful act, in this case, possession with intent to distribute a specific quantity of methamphetamine and other drugs. But the Ninth Circuit held that there is no knowledge or intent required with respect to the type or quantity of the drugs at issue.

Relying on this Court’s decision in *Dean v. United States*, 556 U.S. 568 (2009), the court evaluated the type/quantity issues as one of interpretation of non-contiguous phrases. *Collazo*, 984 F.3d at 1322. Because this Court in *Dean* found that the “knowingly” in 18 U.S.C. § 924(a)(2) did not apply to the enhancement for “discharging” a firearm, the court concluded a *mens rea*-free element for type/quantity was also acceptable under 21 U.S.C. § 846.

The court then seized on the language in this Court’s recent decision, *Rehaif v. United States*, 139 S. Ct. 2129 (2019), regarding “otherwise innocent conduct.” *Collazo*, 984 F.3d at 1324. Because involvement in a drug conspiracy is not “otherwise innocent,” the court concluded the strictures of *Rehaif* were not relevant. The court then mixed this faulty logic with a pre-*Apprendi/Alleyne* analysis of whether, as written in 1986, § 841(b)(1) requires proof that the

defendant knew about the drug type and quantity. Because § 841(b)(6) included the language “knowingly or intentionally using a poison . . . on Federal land,” the court erroneously concluded that the prior sections lacked a *mens rea* requirement. *Collazo*, 984 F.3d at 1326.

Rehaif should not be read as narrowly as the Ninth Circuit read it. This Court’s strong presumption that Congress intends a culpable *mens rea* as to every element is not applicable *only* when necessary to separate completely innocent from wrongful conduct. However, the circuit concluded that no individual *mens rea* was required as to drug type and quantity since any agreement to distribute any amount of illegal drugs is, by definition, wrongful.

Ignoring the applicability of this strong presumption puts the Ninth Circuit in conflict with this Court’s authority. Citing the Model Penal Code, this Court stated in *Rehaif* that this presumption applies to *all* “material elements” of the offense. 139 S. Ct. at 2195. And because they do not relate to matters such as jurisdiction, venue, or statute of limitations, drug type and quantity are “material elements.” See MPC § 1.13(10) (defining “material element of an offense”). The *scienter* with respect to those material elements must be sufficient to impose the enhanced

liability that attends a conviction for a specific, increased, amount of illicit drugs.

The Ninth Circuit's *Collazo* is inconsistent with this rule, and deepens the existing circuit split on this issue.

The split is discussed in *United States v. Stoddard*, 892 F.3d 1203 (D.C. Cir. 2018). The *Stoddard* court described the issue as one of individualized liability versus conspiracy-as-a-whole liability for the drug type and quantity. *Stoddard*, 892 F.3d at 1219. The court noted that the conspiracy-wide approach has been called into question by this Court's decision in *Alleyne*. *Stoddard*, 892 F.3d at 1220. Relying on *Pinkerton v. United States*, the *Stoddard* court stated:

We adopt the individualized approach to drug-quantity determinations that trigger an individual defendant's mandatory minimum sentence.

It is a core principle of conspiratorial liability that a co-conspirator may be held liable for acts committed by co-conspirators during the course of the conspiracy only when those acts are "in furtherance of the conspiracy" and "reasonably foreseeable" to the defendant.

Pinkerton v. United States, 328 U.S. 640, 647-48, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946); *see also United States v. McGill*, 815 F.3d 846, 917

(D.C. Cir. 2016). “Reasonable foreseeability” shapes the outer bounds of co-conspirator liability, and it applies to drug quantities that trigger enhanced penalties just the same as it applies to other acts committed by co-conspirators. *Cf. Burrage [v. United States*, 571 U.S. 204], 134 S.Ct. [881] at 887 [(2014)].

Stoddard, 892 F.3d at 1221.

The D.C. Circuit is correct that *Alleyne* requires proof of individual intent or knowledge with respect to type and quantity. In *Collazo*, the Ninth Circuit sidestepped the conflict with *Alleyne* by stating that since *Alleyne* only treated the drug type/quantity element as one that had to be proved beyond a reasonable doubt in order “to protect a defendant’s Sixth and Fifth Amendment rights,” the drug type/quantity were elements *only* for those narrow purposes. *Collazo*, 984 F.3d at 1322. Those “narrow” purposes did not include the imposition of an enhanced sentence.

The D. C. Circuit’s analysis is the correct one under binding precedent of this Court, and it is the position of eight other circuit courts. The Ninth Circuit’s analysis flies in the face of this Court’s precedent, despite its attempts to

distinguish those cases away. This Court should grant certiorari to address this circuit split and the Ninth Circuit’s failure to apply binding precedent from this Court.

VII. CONCLUSION

The bare-majority opinion in *Collazo* reversed three decades of Ninth Circuit precedent, furthered an inter-circuit conflict with *nine* other federal circuits regarding coconspirator liability for drug type and quantity, and conflicts with the clear teaching of this Court’s recent decision in *Rehaif v. United States* and its earlier decision in *Alleyne v. United States*. This Court should grant the petition to address these issues.

Respectfully submitted,

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DATED: August 23, 2021

s/ Gail Ivens

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