No. 21-5511

IN THE SUPREME COURT OF THE UNITED STATES

JOSE CESAR SANCHEZ,
GISELLE CASADO, and
JOSE MANUEL DORADO

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

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In the Brief in Opposition, the government expresses its comfort with the Ninth Circuit's circular reasoning in the *Collazo* en banc decision, the basis for the ruling challenged here. The Ninth Circuit's *Collazo* opinion allows for greatly enhanced penalties in drug conspiracy cases on the basis that there is no requirement that an individual defendant have any knowledge or intent with respect to the type or quantity of drugs involved in the conspiracy. This means that the evidence to support enhanced penalties for an individual defendant is sufficient as long as some member of the conspiracy sold or intended to sell the requisite quantity. *United States v. Collazo*, 984 F.3d 1308, 1336 (9th Cir. 2021). The Ninth Circuit's ruling, which sets it apart from the other circuit courts, essentially does away with individual criminal liability.

In the face of this troubling ruling, the government argues that "the plain-error posture of this case would make it a poor vehicle for additional consideration." Brief in Opp. at 10. But this Court does not have any rule against considering an issue solely because it is presented under the plain error doctrine. Just recently, the Court issued an opinion in a case subject to

the plain error doctrine. *Greer v. United States*, 141 S.Ct. 2090, 2096 (2021) ("The question for this Court is whether Greer and Gary are entitled to plain-error relief for their unpreserved *Rehaif* claims."). The plain-error posture of this case does not provide a basis for denying review.

The government also posits that the court of appeals holding that the jury's drug quantity findings based on erroneous instructions were nonetheless supported by sufficient evidence because "[w]hen the government proves that a defendant had a knowing connection with an extensive enterprise (such as a drug trafficking organization) and had reason to know of its scope, a fact-finder may infer that the defendant agreed to the entire unlawful scheme." Brief in Opp. at 9—10, citing *Sanchez*, *quoting* *Collazo*, 984 F.3d at 1319. But this sidesteps the error in this case: whether the factfinder *could* make such a finding based on the evidence does not equate wither whether they *would have* made such a finding if they had been properly instructed with respect to individual foreseeability.

Although it acknowledges this circuit split on the issue of individual foreseeability with respect to drug type and quantity, the government

dismisses this concern by pointing to a new national charging policy for drug conspiracy cases, that was implemented after the indictment was returned in this case. Brief in Opp. at 17. But that new policy on charging did not impact the jury instructions actually given in this case, well after the policy was implemented. And a charging policy cannot substitute for binding case law.

The government then argues that petitioners "cannot demonstrate that such an error affected their substantial rights" because their sentences were well above the statutory-minimum sentence associated with the drug offenses; they received enhancements that would have applied regardless of the drug quantity; and they received concurrent sentences for RICO conspiracy identical in length to their sentences for violating section 846. Brief in Opp. at 14—16. The government's argument is speculative. A properly-instructed jury may well have rejected the drug-quantity findings.

On the question of what quantity of drugs was reasonably foreseeable to Dorado, for example, the government introduced evidence of the drugs he attempted to smuggle into the jail for Ulloa and the drugs found at his residence. The drugs were seized and analyzed. They contained 4.3 grams of

actual methamphetamine and 25 grams of a mixture or substance containing a detectable amount of heroin. (PSR ¶ 44.) The small amounts of cocaine and methamphetamine found at his residence included .63 net grams of cocaine and .22 grams of methamphetamine. (PSR ¶ 45.b.) He was specifically convicted in Count 5 with possession of approximately 25 grams of heroin with intent to distribute it. Although the PSR ¶ 27 says that Dorado, along with others, provided F13 members with controlled substances, no amounts were listed.

There was also discussion about his statements regarding prior smuggling attempts. There was no evidence of additional drug sales by Dorado. As noted in the PSR, "[t]he Government did not provide discovery or test results regarding drug quantities/purity levels attributable to Dorado." (PSR ¶ 47.) If the jury had been correctly instructed the jury may well have found that the reasonably foreseeable amount that he jointly agreed to was less than the 50 grams of methamphetamine set forth in the special verdict.

With respect to Sanchez, the government proved that on November 1, 2020, Sanchez sat in a living room of a Casita where in the kitchen 2.2 grams of methamphetamine lay hidden in five gambling machines, that on November 19, 2010, police arrested him with .2 grams of methamphetamine in his jeans pocket, and that of February 8, 2012, he was present at a home where police found .18 grams of methamphetamine in a back shed. The government never performed a purity analysis of this total of 2.58 grams. Although a cooperator testified generally that Sanchez sold methamphetamine at the Casita, the government offered no evidence of any specific sale. Instead, the government relied on controlled purchases its agents made, but none of those purchases involved Sanchez and the government failed to prove he knew or should have known about those specific sales.

A correctly instructed jury thus would likely have found the 50-gram allegation not true against Sanchez. This would have resulted in lower advisory guidelines from the Probation Department, and a less harsh sentence from the trial court.

Finally, the government argues that the case is not a good vehicle for review because Dorado's sentence on one of his counts of conviction was remanded for resentencing. As the Government itself has emphasized in other cases, this Court often "reviews interlocutory decisions that turn on the resolution of important legal issues." Gov't Cert. Reply Br. 5, *Azar v. Garza*, 138 S. Ct. 1790 (2018) (No. 17-654). In *Smith v. United States*, 568 U.S. 106 (2013), for example, the court of appeals affirmed the defendant's conspiracy convictions and vacated other convictions. *Id.* at 108–09 & n.1. The Court granted certiorari to consider the validity of the former convictions, explaining that the only "relevant" aspect of the case's procedural history was that "the Court of Appeals affirmed Smith's conspiracy convictions." *Id.* at 109. *See also Van Buren v. United States*, 141 S. Ct. 1648, 1653 (2021) (granting certiorari after the Eleventh Circuit affirmed one conviction but vacated and remanded a second conviction for a new trial). A remand for resentencing is not a basis to deny review.

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 case is an appropriate vehicle to review that issue, and the Court should grant the petition to address these issues.

Respectfully submitted,

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