

No. _____

In the Supreme Court of the United States

BALTAZAR AGUIRRE-RIVERA, *PETITIONERS*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

MAUREEN SCOTT FRANCO
Federal Public Defender

KRISTIN L. DAVIDSON
Assistant Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206-1205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

The Sixth Amendment right to trial “by an impartial jury,” in conjunction with the Fifth Amendment’s Due Process Clause, requires that each element of a crime with which a defendant is charged be proved to the jury beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506, 510–11 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993).

This Court has held that any fact that, by law, increases the penalty for a crime is an “element” that must be submitted to the jury and found beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 108 (2013); *Apprendi v. United States*, 530 U.S. 466, 483 & n.10, 490 (2000). That is because the “core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime.” *Alleyne*, 570 U.S. at 113.

The question presented is:

When a jury’s answer to a special interrogatory negates an element of the charged offense, must a district court enter a judgment of acquittal when the negated element is the fact triggering the mandatory minimum sentence, contrary the Fifth Circuit’s holding?

No. _____

In the Supreme Court of the United States

BALTAZAR AGUIRRE-RIVERA, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT**

Petitioner Baltazar Aguirre-Rivera asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on August 10, 2021.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

All proceedings directly related to the case are as follows:

- *United States v. Aguirre-Rivera*, EP:19-CR-00926 (W.D. Tex. July 23, 2020) (judgment of conviction)

- *United States v. Aguirre-Rivera*, No. 20-50609 (5th Cir. Aug. 10, 2021) (affirming conviction and vacating sentence)
- *United States v. Aguirre-Rivera*, EP:19-CR-00926-FM (W.D. Tex. Oct. 29, 2021) (amended judgment of conviction on remand resentencing Aguirre-Rivera to 27 months' imprisonment and three years' supervised release)

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	ii
PARTIES TO THE PROCEEDING	iii
RELATED PROCEEDINGS.....	iii
TABLE OF AUTHORITIES	vi
OPINION BELOW.....	1
JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE WRIT	7
A. The Fifth Circuit, by distinguishing between “formal” and “sentencing” elements of a charged offense, creates a standard contrary to decisions by this Court.	7
B. The Fifth Circuit’s standard conflicts with other courts of appeals.	15
C. This case is an ideal vehicle for deciding an important issue.....	17
CONCLUSION.....	20
APPENDIX <i>United States v. Aguirre-Rivera</i> , 20-50609 (5th Cir. Aug. 10, 2021)	

TABLE OF AUTHORITIES

Cases

<i>Alleyne v. United States</i> , 570 U.S. 99 (2013)	<i>passim</i>
<i>Apprendi v. United States</i> , 530 U.S. 466 (2000)	<i>passim</i>
<i>Gallick v. Baltimore & Ohio R. Co.</i> , 372 U.S. 108 (1963)	10
<i>Harris v. United States</i> , 536 U.S. 545 (2002)	12
<i>In re Winship</i> , 397 U.S. 358 (1970)	8
<i>Keeble v. United States</i> , 412 U.S. 205 (1973)	14
<i>McMillian v. Pennsylvania</i> , 477 U.S. 79 (1986)	12
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993)	ii
<i>United States v. Aguirre-Rivera</i> , 8 F.4th 405 (5th Cir. 2021)	<i>passim</i>
<i>United States v. Barret</i> , 848 F.3d 524 (2d Cir. 2017)	9
<i>United States v. Carnahan</i> , 684 F.3d 732 (8th Cir. 2012)	9
<i>United States v. Collazo</i> , 984 F.3d 1308 (9th Cir. 2021) (en banc)	9, 13
<i>United States v. Colston</i> , 4 F.4th 1179 (11th Cir. 2021)	9

<i>United States v. Dado</i> , 759 F.3d 550 (6th Cir. 2014)	9
<i>United States v. Daniels</i> , 723 F.3d 562 (5th Cir.), <i>modified in part on reh’g</i> , 729 F.3d 496 (5th Cir. 2013)	10, 11
<i>United States v. Gaudin</i> , 515 U.S. 506 (1995)	ii, 8
<i>United States v. Gonzales</i> , 841 F.3d 339 (5th Cir. 2016)	9
<i>United States v. Haines</i> , 803 F.3d 713 (5th Cir. 2015)	3, 13
<i>United States v. Johnson</i> , 878 F.3d 925 (10th Cir. 2017)	9
<i>United States v. Michaelis</i> , 860 Fed. App'x 350 (5th Cir. 2021) (per curiam)	19
<i>United States v. Michaelis</i> , No. 7:19-cr-00245 (W.D. Tex. Mar. 4, 2020)	19
<i>United States v. Paulette</i> , 858 F.3d 1055 (7th Cir. 2017)	9
<i>United States v. Phillips</i> , 349 F.3d 138 (3d Cir. 2003)	9
<i>United States v. Pierce</i> , 940 F.3d 817 (2d Cir. 2019)	16, 17
<i>United States v. Pizarro</i> , 772 F.3d 284 (1st Cir. 2014)	9
<i>United States v. Powell</i> , 469 U.S. 57 (1984)	14, 15
<i>United States v. Promise</i> , 255 F.3d 150 (4th Cir. 2001) (en banc)	9

United States v. Randolph,
794 F.3d 602 (6th Cir. 2015) 15, 16

United States v. Shippley,
690 F.3d 1192 (10th Cir. 2012)..... 13, 14

United States v. Stoddard,
892 F.3d 1203 (D.C. Cir. 2018)..... 9

Constitutional Provisions

U.S. Const. amend. V.....1, 7, 11, 14

U.S. Const. amend. VI*passim*

Statutes

18 U.S.C. § 3553(a) 5

21 U.S.C. § 841(a)(1).....*passim*

21 U.S.C. § 841(b)*passim*

21 U.S.C. § 841(b)(1) 8, 13, 18, 19

21 U.S.C. § 841(b)(1)(A) 2, 8, 12, 19

21 U.S.C. § 841(b)(1)(B) 4, 5, 6

21 U.S.C. § 846.....*passim*

28 U.S.C. § 1254(1) 1

Rules

Fed. R. Crim. P. 31 14

Sup. Ct. R. 13.1 1

Other Authorities

Fifth Circuit’s Pattern Jury Instructions (Criminal Cases), § 2.97 (ed. 2019).....	3
U.S.S.C, FY2016 through FY2020 Datafiles, Quick Facts— Mandatory Minimum Penalties (May 2021), https://www.ussc.gov/research/quick-facts/mandatory- minimum-penalties	18
U.S.S.C., Statistical Information Packet, Fiscal Year 2020, Fifth Circuit, https://www.ussc.gov/sites/default/files/pdf/research- and-publications/federal-sentencing-statistics/state-district- circuit/2020/5c20.pdf	18
Wayne LaFave, et al., 6 Crim. Proc. § 24.10(a) (4th ed. 2015)	9

OPINION BELOW

A copy of the published opinion of the court of appeals, *United States v. Aguirre-Rivera*, 8 F.4th 405 (5th Cir. 2021), is reproduced at Pet. App. 1a–10a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on August 10, 2021. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: “No person shall be ... deprived of life, liberty, or property, without due process of law.”

The Sixth Amendment to the U.S. Constitution provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to be informed of the nature and cause of the accusation.”

STATEMENT

1. In May 2017, Baltazar Aguirre-Rivera delivered a sealed DVD player to Kate Smith¹ outside a Ross Dress For Less in El Paso, Texas. The DVD player contained 3.4 kilograms of heroin. As a result, Aguirre-Rivera was indicted on a single count of conspiracy to possess with intent to distribute more than 1 kilogram of heroin, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846.

2. At trial, Smith—who had been a major player in a drug conspiracy prior to getting caught and becoming a confidential informant—testified that, in May 2017, Hector Cordova² told her that she would be receiving a delivery of drugs. Cordova told Smith to call Aguirre-Rivera. Smith and Aguirre-Rivera met in the parking lot of a store in El Paso, Texas. Aguirre-Rivera gave Smith a sealed DVD player with 3.4 kilograms of heroin secreted inside.

After the evidence was presented, the district court instructed the jury that, to find Aguirre-Rivera guilty of the charged conspiracy, it must find all the following facts:

¹ “Kate Smith” is an alias.

² Hector Cordova was indicted as a co-defendant but killed before trial.

First: that two or more persons, directly or indirectly, reached an agreement to possess heroin with intent to distribute the same;

Second: that the defendant knew of the unlawful purpose of the agreement;

Third: that the defendant joined in the agreement willfully, that is, with the intent to further its unlawful purpose;

Fourth: that the overall scope of the conspiracy involved at least one kilogram or more of a mixture of substance containing a detectable amount of heroin; and

Fifth: that the defendant knew or reasonably should have known that the scope of the conspiracy involved at least one kilogram or more of a mixture of substance containing a detectable amount of heroin.³

The verdict form asked the jury to answer three questions. The first question asked the jury whether Aguirre-Rivera was guilty or not guilty of the charged offense. The jury answered “guilty.” The second question repeated the fourth element of the offense: whether the conspiracy involved at least one kilogram of heroin.

³ The charge was consistent with the Fifth Circuit’s Pattern Jury Instructions (Criminal Cases), § 2.97 (ed. 2019) for an aggravated drug conspiracy. *See also United States v. Haines*, 803 F.3d 713, 741–42 (5th Cir. 2015) (*Apprendi* and *Alleyne* require the jury, rather than the court, to determine the amount each defendant knew or should have known was involved in the conspiracy). Neither party objected to the elements. Neither party requested, nor was the jury instructed, on a lesser included offense.

The jury answered “yes.” The third question repeated the fifth element of the offense verbatim: whether Aguirre-Rivera “knew or reasonably should have known that the scope of the conspiracy involved at least one kilogram or more of a mixture of substance containing a detectable amount of heroin.” The jury answered “no.”

Aguirre-Rivera moved for a judgment of acquittal and argued that the jury’s answer to the second special interrogatory negated its general verdict of guilty. The district court denied the motion, reasoning that a defendant’s knowledge of drug type and amount is not an “essential element” of a drug conspiracy.

After the trial, a probation officer prepared a presentence report that said Aguirre-Rivera was guilty of conspiring to possess at least 100 grams of heroin with the intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846, which carries a penalty range of five to 40 years’ imprisonment and a minimum supervised release term of four years. The officer held Aguirre-Rivera accountable for 3.4 kilograms of heroin and assigned base offense level 32. Combined with a criminal history category III, the advisory Guidelines range was 151 to 188 months.

At sentencing and over Aguirre-Rivera’s objection, the district court stated that, “as a result of [the jury’s] verdict,” Aguirre-Rivera was “convicted of the offense of conspiracy to possess heroin

with the intent to distribute, the weight of which was 100 grams or more.” The court also overruled Aguirre-Rivera’s objection to the base offense level and adopted a base offense level of 32, and a Guidelines range of 97 to 121 months. After allocution by the parties and an evaluation of the 18 U.S.C. § 3553(a) factors, the court varied downwardly to impose a 60-month sentence of imprisonment, to be followed by three years’ supervised release. The judgment listed the statutes of conviction as “21 USC 846, 21 USC 841(a)(1), & 21 USC 841(b)(1)(B) Conspiracy To Possess W/Intent To Distribute A Controlled Substance, To-Wit: 100 Grams Or More Of Heroin.”

4. On appeal, Aguirre-Rivera challenged his conviction and sentence. First, he argued that, because a fact that increases punishment necessarily forms a constituent part of a new offense and must be submitted to the jury, the district court erred when it denied his motion for acquittal. The jury’s answer to the second special interrogatory—an element of the charged crime—contradicted the jury’s general finding of guilt and undermined the verdict. Second, and alternatively, Aguirre-Rivera challenged the constitutionality of his sentence because the district court improperly subjected him to a mandatory minimum sentence under § 841(b)(1)(B) that was unsupported by the facts found by the jury.

The Fifth Circuit rejected Aguirre-Rivera's first argument and affirmed the conviction. It acknowledged that "[i]f the jury's answer to the second special interrogatory did undermine an essential element of the charged offense, then the district court should have granted Aguirre-Rivera's motion for judgment of acquittal." *Aguirre-Rivera*, 8 F.4th at 409; Pet. App. 4a. It also thought Aguirre-Rivera's reliance on *Alleyne* had "some intuitive force." *Id.* at 410; Pet. App. 6a. But it held that the jury's finding as to the relevant drug quantity "is not a formal element of the conspiracy offense." *Id.* at 411; Pet. App. 7a. The jury's answer to the second special interrogatory, therefore, did not negate the conspiracy offense as charged, because it was "only the sentencing enhancement under § 841(b)." *Id.*

On the second issue, the Fifth Circuit reversed. Because the jury's answer to the second special interrogatory negated the sentencing enhancements under § 841(b), Aguirre-Rivera could not be subjected to a mandatory minimum sentence under § 841(b)(1)(B). *Id.* at 411–12; Pet. App. 9a–10a. The sentencing error was not

harmless and the court vacated Aguirre-Rivera's sentence and remanded for resentencing.⁴ *Id.* at 412–13; Pet. App. 10a.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals held that, if a jury rejects an element of the charged offense, a court can enter a judgment of conviction on an uninstructed, lesser-included offense if the rejected element is only a “sentencing enhancement.” This erodes protections guaranteed by the Fifth and Sixth Amendments, is contrary to decisions by this Court, and conflicts with other courts of appeals. This Court should grant certiorari to further clarify that a fact necessary to enhance punishment becomes “an element of a distinct and aggravated crime,” *Alleyne*, 570 U.S. at 116, and the failure of a jury to find that element beyond reasonable doubt necessitates acquittal.

A. The Fifth Circuit, by distinguishing between “formal” and “sentencing” elements of a charged offense, creates a standard contrary to decisions by this Court.

The Sixth Amendment provides that those accused of a crime have the right to a trial by an impartial jury. *Alleyne*, 570 U.S. at

⁴ At resentencing, the district court imposed a term of 27 months' imprisonment, followed by three years' supervised release.

104. “This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt.” *Id.* (citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *In re Winship*, 397 U.S. 358, 364 (1970)). In *Alleyne*, the Court clarified that the “essential point” of the Sixth Amendment inquiry is that when an “aggravating fact produce[s] a higher [punishment] range, ... [it] conclusively indicates that the fact is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt.” 570 U.S. at 116.

The Fifth Circuit, along with every other circuit, has held that the facts necessary to convict a defendant of a drug conspiracy with enhanced penalties under 21 U.S.C. § 841(b)(1)⁵ are elements that must be submitted to and found by a jury. *Aguirre-Rivera*, 8 F.4th at 409; Pet. App. 6a (“[W]hen the government seeks an enhanced

⁵ Section 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.” 21 U.S.C. § 846. The relevant offense in this case is set forth in 21 U.S.C. § 841(a)(1), and the penalties prescribed for the charged offense are set forth in § 841(b)(1)(A).

sentence based on § 841(b), the drug quantity must be stated in the indictment and submitted to the fact finder for a finding of proof beyond a reasonable doubt.”) (cleaned up).⁶ It also acknowledged that “[c]ourts consistently vacate convictions when the answers to special interrogatories undermine a finding of guilt the jury made on a general question.” *Id.* at 409; Pet. App. 4a (quoting *United States v. Gonzales*, 841 F.3d 339, 348 (5th Cir. 2016) (citing Wayne LaFave, et al., 6 Crim. Proc. § 24.10(a) (4th ed. 2015) (“A jury’s special verdict finding may also negate an essential element of an offense of which the jury returned a general verdict. Unlike the situation where a verdict on one count is inconsistent with a verdict on another count, a special finding negating an element of

⁶ See also *United States v. Pizarro*, 772 F.3d 284, 292–94 (1st Cir. 2014); *United States v. Barret*, 848 F.3d 524, 534 (2d Cir. 2017); *United States v. Phillips*, 349 F.3d 138, 141 (3d Cir. 2003); *United States v. Promise*, 255 F.3d 150, 156–57 (4th Cir. 2001) (en banc); *United States v. Dado*, 759 F.3d 550, 570 (6th Cir. 2014); *United States v. Paulette*, 858 F.3d 1055, 1059 (7th Cir. 2017); *United States v. Carnahan*, 684 F.3d 732, 737 (8th Cir. 2012); *United States v. Collazo*, 984 F.3d 1308, 1322 (9th Cir. 2021) (en banc); *United States v. Johnson*, 878 F.3d 925, 928 n.1 (10th Cir. 2017); *United States v. Colston*, 4 F.4th 1179, 1188 (11th Cir. 2021); *United States v. Stoddard*, 892 F.3d 1203, 1221–22 (D.C. Cir. 2018).

a single count will be treated as an acquittal of that count, not as an inconsistent verdict.”)); *cf. Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 119 (1963) (“it is the duty of the courts to attempt to harmonize the [jury’s] answers, if it is possible under a fair reading of them.”) (cleaned up).

The Fifth Circuit recognized that if these principles were put into practice in this case, Aguirre-Rivera should have been acquitted of the charged offense: “[i]f the jury’s answer to the second special interrogatory did undermine an essential element of the charged offense, then the district court should have granted Aguirre-Rivera’s motion for judgment of acquittal.” *Aguirre-Rivera*, 8 F.4th at 409; Pet. App. 4a–5a.

But the Fifth Circuit, while quoting *Alleyne*, applied a standard overruled by this Court—that “drug quantity is not a formal element of the conspiracy offense” because it goes only to sentencing and is not necessary for a conviction of the charged conspiracy offense. *Aguirre-Rivera*, 8 F.4th at 410–411; Pet. App. 6a–7a.

This distinction between “formal” elements from “sentencing” elements, comes from a case decided shortly after *Alleyne*: *United States v. Daniels*, 723 F.3d 562, 572 (5th Cir.), *modified in part on reh’g*, 729 F.3d 496 (5th Cir. 2013). *Aguirre-Rivera*, 8 F.4th at 410–11; Pet. App. 6a–7a. There, defendants challenged the sufficiency

of evidence supporting an enhanced drug conspiracy conviction, arguing that the government had failed to prove the relevant drug quantity. *Daniels*, 723 F.3d at 571. The Fifth Circuit agreed that the government failed to prove the relevant drug quantity, contrary to the jury’s finding, but reasoned that that failure did not undermine the conviction because the relevant drug quantity is “not a formal element of the conspiracy offense.” *Id.* at 573. The court further explained that it was “mindful” of *Alleyne* and did not run afoul of its holding because the jury had, in fact, convicted the defendants of the aggravated offense, for which the evidence of drug quantity was insufficient. *Id.* at 574.

But Aguirre-Rivera was not challenging whether the insufficiency of evidence undermined a jury’s conviction of the charged offense. Rather, he argued there was no jury conviction in the first place, because the jury’s finding on a special interrogatory negated an element and rendered a logical impossibility in its verdict, necessitating acquittal. *See Aguirre-Rivera*, 8 F.4th at 410; Pet. App. 6a. By relying on *Daniels* to affirm Aguirre-Rivera’s conviction despite the inconsistent verdict, the Fifth Circuit’s distinction between “formal” and “sentencing” elements directly conflicts with *Alleyne* and *Apprendi* and undermines the safeguards of the Fifth and Sixth Amendments.

Before *Alleyne*, the Court upheld the distinction between “elements” and “sentencing factors.” See *McMillian v. Pennsylvania*, 477 U.S. 79 (1986); see also *Harris v. United States*, 536 U.S. 545 (2002). But the Court overruled those decisions and held that “the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum” as it does to facts increasing the statutory maximum penalty. *Alleyne*, 570 U.S. at 112. Both the “floor” and “ceiling” of a sentencing range “define the legally prescribed penalty.” *Id.* And under our Constitution, when “a finding of fact alters the legally prescribed punishment so as to aggravate it” that finding must be made by a jury of the defendant’s peers beyond a reasonable doubt. *Id.* at 114. “This reality demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.” *Id.* at 113.

Aguirre-Rivera was charged with a “new, aggravated crime,” under 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846, and the jury was correctly instructed on the elements necessary for convicting

Aguirre-Rivera of the charged crime.⁷ When asked for a general verdict, the jury answered, “guilty.” But when asked whether the government met its burden of proof on the fifth element of the charged offense in a special interrogatory, the jury answered, “no.” This created a fatal inconsistency in the jury verdict that a court cannot harmonize: “[t]o enter an acquittal, the district court should have needed to disregard the fact that the jury expressly found [the defendant] guilty. To enter a guilty verdict, the court would have needed to overlook the special verdict findings” that negated an element of the charged offense. *United States v. Shippley*, 690 F.3d 1192, 1195 (10th Cir. 2012). Then-Judge Gorsuch described such a

⁷ While the circuits uniformly acknowledge that *Apprendi* and *Alleyne* apply to the facts necessary for a finding under § 841(b)(1), a conflict exists as to whether there is a mens rea requirement related to drug type and quantity under § 841(b)(1). The Fifth Circuit, along with a majority of circuits, requires such a finding. *Compare Haines*, 803 F.3d at 738–39, *with Collazo*, 984 F.3d at 1335–36 (describing circuit split). Resolving this mens rea dispute is not necessary for the Court to resolve the question presented in this case. The Fifth Circuit broadly held that the relevant drug quantity under § 841(b), regardless of how the government must prove these facts, “is not a formal element of the conspiracy offense.” *Aguirre-Rivera*, 8 F.4th at 411; Pet. App.7.

jury verdict as “metaphysically impossible.” *Id.* “To enter any verdict ... the district court would have to choose to ‘gore’ one side or the other—just what *Powell* suggests courts should *not* do.” *Id.* at 1196 (emphasis in original) (citing *United States v. Powell*, 469 U.S. 57, 65 (1984)).

To give meaning to the jury’s general finding of guilty at the expense of its finding on the second special interrogatory (a verbatim restatement of an element of the charged offense), the Fifth Circuit did not only “gore” Aguirre-Rivera, but the constitutional protections of the Fifth and Sixth Amendments. By redefining the penalties of § 841(b) as only “sentencing enhancements” of the charged crime, the Fifth Circuit affirmed a conviction on a lesser-included offense on which the jury was not instructed, contrary to law and procedure. *See* Fed. R. Crim. P. 31; *Keeble v. United States*, 412 U.S. 205, 208, 213 (1973) (“if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal”). The Fifth Circuit also conflated the review of whether the jury’s logically inconsistent findings undermine a finding of guilty in the first place with a sufficiency-of-the-evidence review, which allows a court’s assessment of whether the evidence admitted at trial could

support any rational determination of guilt beyond a reasonable doubt. *See Powell*, 469 U.S. at 67 (noting that the different inquiries should be independent of each other). When a jury is instructed that to find a defendant guilty it must find the government proved its burden on *all* the instructed elements and it finds that the government failed to prove one of those elements, acquittal is the necessary outcome to uphold a defendant's Sixth Amendment rights and "preserve[] the historic role of the jury as an intermediary between the State and criminal defendants." *Alleyne*, 570 U.S. at 113–14.

B. The Fifth Circuit's standard conflicts with other courts of appeals.

The Fifth Circuit's revival of the distinction between formal elements and sentencing elements of a charged offense conflicts with other circuits that have properly resolved the inconsistent jury verdicts in favor of the defendants. In *United States v. Randolph*, 794 F.3d 602, 612–13 (6th Cir. 2015), for example, the Sixth Circuit vacated the defendant's conviction because of an inconsistent verdict like the one in Aguirre-Rivera's case. Like Aguirre-Rivera, Randolph was charged with a drug trafficking conspiracy. 794 F.3d at 608. And like Aguirre-Rivera's jury, Randolph's jury returned a general verdict logically inconsistent with its answer to a special

interrogatory about drug type and amount. The jury found Randolph guilty of the charged conspiracy but answered “none” to the special interrogatory. *Id.* at 609. Due to this “internal inconsistency in the same count,” the Sixth Circuit held that Randolph was entitled to a judgment of acquittal. *Id.* at 611–12. The court also rejected the argument that he should be retried, as that would violate the Double Jeopardy Clause. *Id.* at 612. The “unanimous finding negates an essential element of the charged drug conspiracy and is only susceptible to one interpretation: the government failed to prove Randolph guilty of the charged drug conspiracy beyond a reasonable doubt.” *Id.*

Likewise, in *United States v. Pierce*, 940 F.3d 817, 824 (2d Cir. 2019), the court held that “[w]here a jury’s special verdict finding negates an essential element of the offense, the defendant must be acquitted and cannot be retried on that offense.” *Id.* There the defendant was charged with conspiracy to possess with intent to distribute and conspiracy to distribute cocaine, cocaine base, heroin, and marijuana. *Id.* at 818. The jury found the defendant guilty of this charge. *Id.* at 819. The verdict form also asked two special interrogatories as to the weight of each substance. *Id.* On each interrogatory, the jury answered that the government had “not proven”

that the defendant “conspired to possess with intent to distribute” or “conspired to distribute” the specific substance. *Id.* The Second Circuit concluded that the guilty verdict and the “not proven” interrogatory answers were “metaphysically impossible” to reconcile. *Id.* at 824.

C. This case is an ideal vehicle for deciding an important issue.

This is a compelling case for the Court to review. First, there was a miscarriage of justice because Aguirre-Rivera was deprived of the right to have each element of the charged offense proved beyond a reasonable doubt. Second, the decision below presents a purely legal question about whether a jury must find the facts under 21 U.S.C. § 841(b), if charged, to sustain a conviction. Third, the question here is outcome determinative. When faced with a similar, metaphysically impossible jury verdict in other circuits, defendants have been acquitted, and Aguirre-Rivera would also prevail.

Finally, resolution of the question presented prevents inconsistent application of the law. Drug trafficking cases make up more than 75% of the federal criminal cases that involve a mandatory

minimum penalty.⁸ In fiscal year 2020, approximately 17% of the federal drug trafficking offenses occurred in the Fifth Circuit.⁹ The Court should address the conflict created by the Fifth Circuit about whether the penalties set for in § 841(b)(1), if charged, are elements of an aggravated drug conspiracy that must be found by a jury in order to convict a defendant of the charged offense. Without resolution, defendants prosecuted in the Fifth Circuit suffer from diminished rights. Prosecutors in the Fifth Circuit can charge the most aggravated drug conspiracy, without care to whether they can

⁸ U.S.S.C, FY2016 through FY2020 Datafiles, Quick Facts—Mandatory Minimum Penalties (May 2021), <https://www.ussc.gov/research/quick-facts/mandatory-minimum-penalties>.

⁹ See U.S.S.C., Statistical Information Packet, Fiscal Year 2020, Fifth Circuit, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2020/5c20.pdf> (2,799 of the total 16,390 drug trafficking offenses occurred in the Fifth Circuit).

prove the facts under § 841(b)(1) to obtain conviction.¹⁰ Because the Fifth Circuit’s distinction between formal elements and sentencing enhancements for an aggravated drug conspiracy conflicts with decisions by this Court and other courts of appeals, this Court should grant certiorari.

¹⁰ Such a practice already exists. In *United States v. Michaelis*, for example, the defendant was charged with one offense—conspiracy to possess with intent to distribute 50 grams or more of actual methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. 860 Fed. App’x 350 (5th Cir. 2021) (per curiam). The jury was instructed that, to find Michaelis guilty of the charged crime, it had to find the same five elements the jury was instructed on in Aguirre-Rivera’s case. See Court’s Instructions to the Jury 8–9, *United States v. Michaelis*, No. 7:19-cr-00245 (W.D. Tex. Mar. 4, 2020), ECF No. 44. The jury was not instructed on a lesser included offense. At trial, the government presented no evidence regarding the purity or concentration of the substance it seized. *Michaelis*, 860 Fed. App’x at 353. The jury entered a general verdict of guilty. See Verdict, *United States v. Michaelis*, No. 7:19-cr-00245 (W.D. Tex. Mar. 4, 2020), ECF No. 45. The Fifth Circuit affirmed, holding that, *inter alia*, “the Government’s failure to prove the particular drug type and quantity does not undermine Michaelis’s conviction” because “drug quantity and type are not ‘formal’ elements of a conspiracy.” *Michaelis*, 860 Fed. App’x at 353.

CONCLUSION

FOR THESE REASONS, the Court should grant certiorari to resolve this important question.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
Tel.: (210) 472-6700
Fax: (210) 472-4454

s/ Kristin L. Davidson
KRISTIN L. DAVIDSON
Assistant Federal Public Defender

DATED: November 8, 2021