No. 21 - _____

IN THE SUPREME COURT OF THE UNITED STATES

TANNOUS FAZAH,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In August 2013, petitioner was indicted in federal court, in part, on charges of conspiring to distribute controlled substances. Petitioner was alleged to have suffered two prior felony drug convictions in California within the meaning of Title 21 U.S.C. §841(b)(1)(A)(viii), exposing him to a mandatory minimum life sentence.

In November 2014, the California voters passed Proposition 47, which enacted Penal Code section 1170.18. Under this section, individuals convicted of certain felony drug offenses could petition to have their convictions reclassified as misdemeanors for "all purposes."

In January and March 2016, petitioner's prior felony convictions were reclassified as misdemeanors in state court.

In July 2016, petitioner was convicted of drug conspiracy. He argued that his prior state convictions should not subject him to a sentence enhancement under section 841(b)(1)(A)(viii) now that his prior felonies had been "recalled and resentenced" as misdemeanors for "all purposes."

The district court found that it was bound to impose the enhancement under *United States v. Diaz*, 838 F.3d 968 (9th Cir. 2016), irrespective of the retroactive change in classification of the state priors. The court of appeals affirmed on appeal.

This case therefore presents the following issue:

Whether the sentence enhancements for prior felony drug convictions apply to state felony convictions that have been recalled and resentenced as misdemeanors prior to federal sentencing.

II. Whether an individual co-conspirator convicted under 21 U.S.C. §846 is liable only for the type and quantity of drugs that was reasonably foreseeable to him, and not for the entire amount involved in the full conspiracy

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

JOSE CESAR SANCHEZ	Petitioner;
JAMES BISNOW 117 E. Colorado Blvd. #600 Pasadena, CA 91101	Counsel for Petitioner Sanchez;
JOSE MANUEL DORADO	Petitioner;
GAIL IVENS P.O. Box 664 King City, CA 93930	Counsel for Petitioner Dorado;
GISELLE COSADO	Petitioner;
JOHN LEMON 1350 Columbia St. # 600 San Diego, CA 92101	Counsel for Petitioner Casado.

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Petitioner, Tannous Fazah, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The court of appeals affirmed the judgment of the United States District Court for the Central District of California, convicting petitioner of racketeering conspiracy in violation of Title 18 U.S.C. §1962(d); VICAR assault conspiracy in violation of 18 U.S.C. §1959(a)(6); drug conspiracy in violation of 21 U.S.C. §846; possession of methamphetamine in violation of 21 U.S.C. §841(a)(1); and being a felon in possession of firearms or ammunition in violation of 18 U.S.C. §922(g)(1).

OPINION BELOW

The memorandum opinion of the court of appeals is attached as Appendix A.

JURISDICTION

The court of appeals entered its memorandum opinion on March 15, 2021. Appendix A. The court denied rehearing on June 22, 2021. Appendix C. This petition is timely.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions, which "are lengthy," are set out in Appendix D. Sup. Ct. R. 14.1(f); *see also* U.S. Const. Amends. V, VI; 21 U.S.C. §§841, 846; *and* Cal. Pen. Code §1170.18.

STATEMENT OF THE CASE

A. Trial

On August 1, 2013, an indictment was filed charging petitioner, in relevant part, with conspiracy to distribute methamphetamine and other controlled substances (21 U.S.C. §846). United States v. Fazah, C.D. Cal. Case No. 2:13-cr-00537-RHW-14 , Docket Entry (Doc) #1. On March 24, 2016, a second superseding indictment was filed charging, in part, the same offense. Doc #931. The district court had jurisdiction under Title 28 U.S.C. §3231.

The jury instructions directed the jury to determine only whether the government had proven that the entire conspiracy "involved" a specific drug type and quantity. 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.

On July 5, 2016, the jury found petitioner guilty of all charges, including conspiracy to distribute methamphetamine and other controlled substances (21 U.S.C. § 846). Doc #1049. The jury found that "the conspiracy in which [petitioner] participated involved . . . at least 50 grams of methamphetamine[.]"

B. Prior State Charges

On October 13, 2009, petitioner was convicted of possession of a controlled substance in violation of California Health and Safety Code section 11350(a), then a felony. People v. Fazah, Los Angeles County Case No. VA107994.

On March 2, 2010, petitioner was convicted of possession of methamphetamine in violation of California Health and Safety Code section 11377,

then a felony. People v. Fazah, Los Angeles County Case No. BA358538.

On January 27 and March 21, 2016, petitioner's convictions in case numbers BA358538 and VA107994 were reduced to misdemeanors pursuant to California Penal Code section 1170.18.

C. Sentence

On February 20, 2017, petitioner filed a sentencing memorandum arguing that his prior convictions did not subject him to a mandatory minimum life sentence because they had been recalled and resentenced as misdemeanors. Doc #1256.

On June 5, 2017, the district court rejected petitioner's argument and sentenced him to a "statutory mandatory, mandatory minimum of life imprisonment" pursuant to 21 U.S.C. §841(b)(1)(A)(viii) based on his prior state convictions. Appendix B at 40; Judgment and Commitment Order, Doc #1283. The court found that it was compelled to do so by the Ninth Circuit's opinion in *United States v. Diaz*, 838 F.3d 968 (9th Cir. 2016). *Id.*

D. Appeal

On June 7, 2017, petitioner filed the notice of appeal. Doc #1285.

On December 3, 2019, petitioner and co-defendants Jose Cesar Sanchez, Giselle Cosado, and Jose Manuel Dorado filed a joint opening brief on appeal. United States v. Fazah, 9th Cir. Case No. 17-50213, Docket Entry ("Circuit-Doc") #21. In relevant part, the brief raise the following issue: "Whether the District Court's Failure to Properly Instruct the Jury on the Standard for Finding Drug Quantities Agreed to as Part of a Conspiracy Requires Retrial." *Id.* at 64–67; *see*

also Circuit-Doc #21 (Sanchez's Individual Supplemental Brief, which petitioner joined) (arguing: "The government presented insufficient evidence as to Count 3 that Jose Sanchez conspired to possess with intent to distribute or distributed more than 50 grams of methamphetamine or that he participated in a conspiracy that involved that amount."); *and* Circuit-Doc #31 (Cosado's Individual Supplemental Brief, which petitioner joined) (arguing: "The district court committed plain error by failing to instruct the jury that Casado could be held accountable only for drug quantities that were either reasonably foreseeable to her or within the scope of her agreement.").

On January 25, 2019, petitioner and co-defendant Jose Dorado filed a supplemental joint opening brief on appeal. Circuit-Doc #52. In relevant part, the supplemental brief raised the following issue: "The 851 Enhancements Should Not Have Been Applied Because the Priors were Reduced to Misdemeanors." *Id.* at 19–26.

On January 30, 2020, the government filed the answering brief, which responded to both opening briefs. Circuit-Doc #83. On August 28, 2020, petitioner and all co-defendants filed a joint reply brief, which addressed the drug quantity and prior conviction issues. Circuit-Doc #101.

On March 15, 2021, the court of appeals affirmed the judgment. Appendix A (citing *Diaz*, 838 F.3d at 974–975).

On May 25, 2021, petitioner filed a petition for rehearing. Circuit Doc #136. In relevant part, the petition argued: "This Court Should Rehear the Case en Banc

to Settle the Important Question of Whether *United States v. Diaz* Was Wrongly Decided" *Id.* at 7–11.

On June 22, 2021, the court denied rehearing. Appendix C.

On August 24, 2021, petitioner and all co-defendants filed a joint petition for writ of certiorari raising the drug quantity issue. Sanchez *et al.* v. United States, U.S. Case No. 21-5511. On November 5, 2021, petitioner filed a stipulation to dismiss himself from the case. On November 8, 2021, petitioner was dismissed from Case No. 21-5511 in order to file this petition.

REASONS FOR GRANTING THE WRIT

A. The Writ Should Be Granted to Ensure that Life-Without-Parole Enhancements Designed for Prior Felony Convictions Are Not Imposed on Individuals With Prior Misdemeanor Convictions.

1. Whether A Prior State Felony Conviction That Is Retroactively Reduced to a Misdemeanor "For All Purposes" Prior to Sentencing Satisfies the Prior Conviction Element of 21 U.S.C. §841(b)(1)(A)(viii) Is an Important Question.

State laws that provide retroactive sentencing relief to individuals convicted of non-violent drug offenses are increasingly common in the United States. *See, e.g.*, Cal. Pen. Code §1170.18 (providing for retroactive resentencing); N.Y. Pen. Law §70.70 (same); N.H. Rev. Stat. Ann. § 651:5-b (providing for annulment of convictions for drug possession); Md. Code Crim. Pro. §10-110 (providing for expungement of past drug offenses); Okla. Stat. Ann. tit. 22, §18 (providing for expungement of past drug offenses).[1] Many states and localities are actively

[1] *See also* Press Release, Washington Governor Jay Inslee, *Inslee Announces Initiative to Pardon Marijuana Misdemeanors* (Jan. 4, 2018), https://bit.ly/2XnJhyf

considering measures to provide retroactive sentencing relief. Deborah Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. Crim. Law and Criminology 379, 409–410 & nn. 142–149 (2020).

This Court has explicitly left open an important question about what effect these state-law changes have on federal recidivism enhancements. *McNeil v. United States*, 563 U.S. 816 (2011). The Court in *McNeil* addressed whether a non-retroactive reduction in a state's maximum sentence for a drug crime invalidated a federal sentencing enhancement predicated on the earlier, harsher state sentence. *Id.* at 818. However, the Court noted that "this case does not concern a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." *Id.* at 2224 n.1. Accordingly, the Court did not "address whether or under what circumstances a federal court could consider the effect of that state action." *Id.*

This case provides the Court an opportunity to answer the question left open in *McNeil*. With states adopting retroactive resentencing statutes, this Court should grant certiorari to settle whether these state-law changes in classification affect federal sentencing law.

(last accessed November 8, 2021); Andrew Kenney, *Denver Will Help Expunge Marijuana Convictions for 10,000-plus People*, Denver Post (Dec. 4, 2018), https://dpo.st/3tRfRER (last accessed November 8, 2021); *and* Gene Johnson, *Seattle Clears Pot Convictions, Following San Francisco Lead*, AP News (Feb. 8, 2018), https://bit.ly/3hu1mBR (last accessed November 8, 2021).

2. The Decision Below Conflicts with This Court's Cases.

The decision below relied on *United States v. Diaz* to find that petitioner's prior convictions qualified as prior felony convictions for the purposes of 21 U.S.C. §841 despite the fact that they had been "recalled and resentenced" as misdemeanors in state court "for all purposes[.]" Appendix A at 13 ("Defendants' convictions retain federal significance despite state-court recharacterizations of the convictions.") (citing *Diaz*, 838 F.3d at 974–75). The opinion in *Diaz* conflicted with this Court's opinions and was wrongly decided.

First, *Diaz* relies heavily on *McNeil* to find that section 841 is "backward-looking" and therefore is not affected by recall and resentencing of offenses under state law. *Diaz*, 838 F.3d at 973–974. But *McNeil* is not on point.

As noted, *McNeil* addressed only a *non*-retroactive reduction in a state's sentence for drug crimes. *McNeil*, 563 U.S. at 818. California Penal Code section 1170.18 is markedly different, as it explicitly applies retroactively and operates to "erase" the prior felony convictions. *See People v. Tidwell*, 246 Cal. App. 4th 212, 220 (2016); *accord People v. Buycks*, 5 Cal. 5th 857, 889 (2018) ("'for all purposes,' it can only be said that the defendant was previously convicted of a misdemeanor.").

Indeed, in its briefing in *McNeil*, the government itself acknowledged that a State's retroactive reduction of a felony to a misdemeanor would undermine a federal sentence enhancement predicated on the state felony:

> Of course, if a State subsequently lowered the maximum penalty and made that reduction available to defendants previously sentenced as of the same date as the defendant now at issue, the defendant could plausibly look to that reduced maximum as stating the law applicable

> to his previous conviction. For example, if such a defendant had taken advantage of state sentence-modification proceedings to lower his sentence in accordance with a reduced maximum . . . that reduced maximum could apply to his conviction for [sentence enhancement] purposes.

Br. of the United States, *McNeil*, 2011 WL 1294503 at *18 n.5. The government has made more explicit concessions in other cases. *See, e.g.*, *Saxon v. United States*, No. 12-cr-00320-ER, 2016 WL 3766388 at *6 (S.D.N.Y. Jul. 8, 2016) ("The Government does not dispute that in those cases where offenders have applied for and received relief under [retroactive resentencing statutes], the [federal sentence] enhancement is not available.").

Footnote 5 in *McNeil* suggests that this Court would have decided the case differently if the change in North Carolina's law had been retroactive. Yet the Court in *Diaz* neither cited nor acknowledged the footnote in *McNeil*. Thus, the reasoning in *Diaz* was incomplete and erroneous.

Second, *Diaz* compared the retroactive operation of section 1170.18 to California's "expungement" statute. *Diaz*, 838 F.3d at 974. The court went so far as to hold that expungement is "a more drastic change than merely reclassifying [an offense] as a misdemeanor[.]" *Diaz*, 838 F.3d at 974. The Court in *Diaz* had it backwards.

Like the federal court in *Diaz*, the state court in *Tidwell* distinguished relief under section 1170.18 from relief under California's expungement scheme. *Tidwell*, 246 Cal. App. 4th at 219–220. But the state court found that section 1170.18, and not expungement, was the more significant measure: "[A] conviction which has been

expunged still exists for limited purposes" whereas section 1170.18 "erase[s] the [felony] conviction[.]" *Tidwell*, 246 Cal. App. 4th at 219–220; *People v. Frawley*, 82 Cal. App. 4th 784, 790 (2000) (explaining that the legal limitations on expungement or dismissal under California law "are numerous and substantial."). Thus, *Diaz* is flawed because it relied on the erroneous premise that expungement is "more drastic" than recall and resentencing under section 1170.18.

Third, *Diaz* held that section 1170.18 "does not change the historical fact that Vasquez violated §841 'after two or more prior convictions for a felony drug offense [had] become final.'" *Diaz*, 838 F.3d at 971 (quoting §841(b)(1)(A)). This argument conflicts directly with this Court's precedent holding that "a defendant who successfully attack[s] his state conviction in state court . . . c[an] then apply for reopening of any federal sentence enhanced by the state sentences." *Johnson v. United States*, 544 U.S. 295, 303 (2005) (quotation omitted); *accord Custis v. United States*, 511 U.S. 485, 597 (1994) (same). As with recall and resentencing under section 1170.18, the overturning of a conviction on collateral review does not change "the historical fact" that another crime was committed after a prior offense became final. Accordingly, under *Johnson* and *Custis*, the "historical fact" argument fails to justify treating prior convictions that have been recalled and resentenced as if they were still felonies.

Finally, *Diaz* did not address the Eighth Amendment and equal protection concerns created by applying recidivism statutes to crimes that the State no longer considers felonies. *See Clay v. United States*, No. 05-cr-00948-VBF, 2018 WL

6333671 at *4 (C.D. Cal. May 14, 2018) ("*Diaz* did not decide any constitutional issues."). A punishment is unconstitutional if the 'evolving standards of decency that mark the progress of a maturing society' soundly reject it." *Harris v. Wright*, 93 F.3d 581, 583 (9th Cir. 1996) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

Here, the California voters "soundly rejected" enhanced punishment for non-violent drug crimes by making section 1170.18 apply retroactively "for all purposes." Cal. Pen. Code §§1170.18(f)–(h), (k); *see also* Cal. Sec'y of State, Statement of Vote, November 4, 2014, General Election at 93 (recording that proposition enacting section 1170.18 passed by 19.4 percentage points). Ignoring the people of California's sound rejection of harsh punishments for prior drug offenses would undermine the core rationale and constitutional underpinning for recidivist sentencing schemes. *Ewing v. California*, 538 U.S. 11, 28 (2003).

Failure to treat recalled and resentenced prior offenses as misdemeanors also crosses equal protection values: "[T]here is no reason for [a defendant] to be punished more harshly because he was sentenced prior to the [change in law], as compared to an identical defendant who committed precisely the same crime, but was sentenced after the [new law's] enactment or one who remained incarcerated and therefore was eligible to apply for resentencing . . . ." *United States v. Jackson*, No. 13-cr-00142-PAC, 2013 WL 4744828 at *6 (S.D.N.Y. Sep. 4, 2013).

In the end, the question whether *Diaz* was wrongly decided is important. The application of section 841 enhancements can be, and has been, the difference between a life sentence and a chance at release. Given the multitude of errors and

shortcomings in the *Diaz* opinion, this Court should grant certiorari to settle the question left unanswered in *McNeil*.

3. The Lower Courts Are Divided Over the Question Whether a State Felony That Is Retroactively Recalled and Resentenced as a Misdemeanor Qualifies to Enhance a Sentence under 21 U.S.C. §841.

The Third, Seventh, Eighth, and Tenth Circuits are in accord with *Diaz*. *United States v. Santillan*, 944 F.3d 731, 733 (8th Cir. 2019); *United States v. McGee*, 760 Fed.Appx. 610, 612–616 (10th Cir. 2019); *United States v. London*, 747 Fed.Appx. 80, 84–85 (3d Cir. 2018); *United States v. Sanders*, 909 F.3d 895, 899–904 (7th Cir. 2018).

The Eleventh Circuit, on the other hand, has found that a New York law that retroactively reduced state drug sentences to misdemeanors would preclude the use of such convictions for the purposes of recividism enhancements under the Armed Career Criminal Act (ACCA). *Cortes-Morales v. Hastings*, 827 F.3d 1009, 1014 (11th Cir. 2016); 18 U.S.C. §924(e). Mr. Cortes–Morales received an enhanced sentence under the ACCA based on prior New York drug convictions. *Id.* at 1011–1012. After his federal conviction was final, he applied for resentencing under New York's Drug Law Reform Act, which provided sentencing relief to certain drug defendants. *Id.* at 1013; N.Y. Pen. Law §70.70. He was ultimately denied resentencing in state court. *Id.*

Because Cortes-Morales did not receive resentencing in state court, the Eleventh Circuit found that he was not entitled to relief from his enhancement under section 924(e). *Cortes-Morales*, 827 F.3d at 1016. However, the court also

reasoned that Cortes-Morales could "succeed on the merits of his claim only if the New York sentencing reductions apply retroactively." *Id.* at 1013–1014 (citing *McNeil*, 563 U.S. at 2224 n.1). While this reasoning was only *dicta* under the facts of the case, it demonstrates a lack of cohesion in the federal courts that is further reflected in district court decisions. *See, e.g.*, *United States v. Cabello*, 401 F.Supp.3d 362, 366 (E.D.N.Y. 2019) ("New York has unequivocally chosen to punish first-time class-B-felony drug offenses like Cabello's, whether committed today or in the past, with less than 10 years' imprisonment. Such convictions are therefore not serious drug offenses for the purpose of the ACCA enhancement.").[2]

While the majority of courts to consider whether retroactive changes to state law regarding how drug offenses should be punished have decided that such changes do not affect federal sentencing, these decisions are in conflict with this Court's prior decisions. This Court should grant certiorari to end the split below and settle that a retroactive reduction in the punishment for a state law offense affects how that offense should be treated for the purpose of federal recidivism statutes.

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[2] Citing *Jackson*, 2013 WL 4744828 at *5 ("Where the state law's sentencing modifications apply retroactively, th[e] logic [of *McNeil*] strongly suggests that the ACCA's application should be dependent on the revised state sentencing provisions . . . ."); and *United States v. Calix*, No. 13-cr-00582, 2014 WL 2084098 at *15 (S.D.N.Y. May 13, 2014) ("In interpreting the ACCA here, there is no reason for Calix to be punished more harshly because he was sentenced under the Rockefeller drug laws prior to the 2009 DLRA, as compared to an identical defendant who committed precisely the same crime, but was sentenced after the 2009 DLRA's enactment[.]")

B. The Writ Should Be Granted to Resolve the Circuit Split Created by the Ninth Circuit's Erroneous *En Banc* Holding That There Is No Level of Individual *Scienter* Required to Impose Enhanced Penalties Based on Drug Type and Quantity in a Drug Conspiracy Case.

1. Foreword

Like most other circuits, the Ninth Circuit had 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 him, 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 v. United States*, 570 U.S. 99 (2013) and *Rehaif v. United States*, 588 U.S. ___, 139 S. Ct. 2191 (2019). This Court should grant certiorari to resolve this significant circuit split and to address the Ninth Circuit's failure to follow binding precedent from this Court. Sup. Ct. R. 10.

2. There Is a Circuit Split Regarding the Intent Element Necessary in Calculating Drug Quantity for the Purposes of 21 U.S.C. §841.

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." For cases, like petitioner's, charging conspiracy to distribute drugs, the pertinent offense is set forth in 21 U.S.C. § 841(a)(1). The penalties prescribed for the offense are set forth in 21 U.S.C. § 841(b)(1)(A)–(B). The prescribed penalties vary based on the quantity of the drug at issue.

Recently, the Ninth Circuit, sitting *en banc*, over-ruled its own precedent and held:

> After a defendant is convicted of conspiracy under § 846 to distribute controlled substances in violation of § 841(a)(1), the government may establish that the defendant is subject to the penalties in § 841(b)(1)(A)(viii) and § 841(b)(1)(B)(i) by proving beyond a reasonable doubt that the § 841(a)(1) offense involved the drug type and quantity set forth in the two 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 those penalty provisions in order for them to apply.

United States v. Collazo, 984 F.3d 1315 (9th Cir. 2021) (emphasis added).

By removing the requirement that the government prove the defendant knew about the quantity of drugs involved in a drug conspiracy in order to be subject to a sentence enhancement based on that conspiracy, the Ninth Circuit deepened a split in the circuits on the *mens rea* element of conspiracy to distribute drugs. The majority expressly "note[d] [its] departure from the other circuits, which have largely made errors that echo our own." *Collazo*, 984 F.3d at 1335.

As the majority recognized, 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 co-conspirator to support a sentence enhancement under

sections 841 and 846. *Id.* at 1335 n.29 (citing contrary circuit opinions).[3] Only the Sixth Circuit appears to agree with the Ninth Circuit on this issue. *See United States v. Mahaffey*, 983 F.3d 238, 239 (6th Cir. 2020) ("For nearly twenty years, our circuit has held that a drug-trafficking conviction under 21 U.S.C. § 841 does not require proof that the defendant knew the type or quantity of controlled substance involved in the offense.").

In light of the circuit split described above, this Court should grant certiorari: "[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[.]" Sup. Ct. R. 10(a).

3. The Ninth Circuit's Opinion in *Collazo* Conflicts with This Court's Precedent.

The court in *Collazo* noted that section 841 "makes it unlawful for anyone to 'knowingly or intentionally' commit the offense of distributing a controlled substance." *Collazo*, 984 F.3d at 1322. The court framed the pertinent analysis as a textual one: "We must therefore decide how far down the text of the statute the word 'knowingly' is intended to travel." *Id.* (quotation omitted).

In conducting its textual analysis, the court in *Collazo* relied heavily on this

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[3] *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 in 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)).

Court's opinion in *Dean v. United States*, 556 U.S. 568 (2009). *Collazo*, 984 F.3d at 1322–1328. The Court in *Dean* addressed whether the firearm discharge enhancement of 18 U.S.C. §924(c)(1)(A)(iii) required proof that the defendant intended to discharge the firearm. *Dean*, 566 U.S. at 571. The relevant statue provides:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. §924(c)(1)(A) (2009).

The Court found that no intent element was required. *Dean*, 566 U.S. at 577. In reaching its holding, the Court looked to the text of the statute, observing that it did not contain an explicit intent requirement, and was written in the passive voice: "The text . . . provides that a defendant shall [receive the enhancement] 'if the firearm is discharged.' It does not require that the discharge be done knowingly or intentionally, or otherwise contain words of limitation. . . . Congress's use of the passive voice further indicates that subsection (iii) does not require proof of intent." *Id.* at 572.

Dean argued, however, that Congress included an intent element "in the

opening paragraph of § 924(c)(1)(A)," through the use of the phrase "in relation to," and that this intent element "extends to the sentencing enhancements." *Dean*, 556 U.S. at 573. The Court rejected this argument:

> The most natural reading of the statute, however, is that "in relation to" modifies only the nearby verbs "uses" and "carries." The next verb—"possesses"—is modified by its own adverbial clause, "in furtherance of." The last two verbs—"is brandished" and "is discharged"—appear in separate subsections and are in a different voice than the verbs in the principal paragraph. There is no basis for reading "in relation to" to extend all the way down to modify "is discharged." The better reading of the statute is that the adverbial phrases in the opening paragraph—"in relation to" and "in furtherance of"—modify their respective nearby verbs, and that neither phrase extends to the sentencing factors.

Id. at 573–574.

The Ninth Circuit drew an analogy between the structure of section 924(c)(1)(A) and section 841. *Collazo*, 984 F.3d at 1323–1324. The Court found that the intent language contained in subsection (a) did not extend to the descriptions of the drug quantities in subsection (b). But the court ignored a critical textual link between the intent language in subsection (a) and the quantities in subsection (b)—a link not contained in section 924(c). The drug quantities in section 841 are all prefaced by the following language: "[A]ny person *who violates subsection (a) of this section* shall be sentenced as follows . . . [i]n the case of a *violation of subsection (a)* of this section involving . . . ." §841(b) (emphasis added).

By explicitly invoking "subsection (a)" in defining the drug quantities, Congress intended for the "knowingly or intentionally" language contained in subsection (a) to apply to the drug quantities. The drug quantity descriptions in

subsection (b) simply stand in for the phrase "controlled substance" in subsection (a). For example, in the case of heroin, the statute can be read as stating: "[I]t shall be unlawful for any person knowingly or intentionally—to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, . . . 1 kilogram or more of a mixture or substance containing a detectable amount of heroin[.]" §841(a)–(b)(1)(A)(I). Read with this structure in mind, it is clear that the "knowingly or intentionally" language extends to the drug quantities involved.

The Court in *Dean* also looked to the structure of section 924(c), noting that Congress had explicitly incorporated an intent element into subsection (ii) "by defining 'brandish' to mean 'to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person.'" *Dean*, 556 U.S. at 572 (citing 18 U.S.C. §924(c)(4)). Because Congress had not defined "discharge" in subsection (iii) in the same manner, the Court reasoned that Congress intended the two subsections to have different intent elements: "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Id.* at 573 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

The court in *Collazo* noted that section 841 also contains a subsection with a clearly defined intent element: "In § 841(b)(6), another provision in the same statute, Congress expressly provided that those who violate § 841(a) and 'knowingly or intentionally use a poison . . . on Federal land,' thus causing specified harms, are

subject to certain penalties." *Collazo*, 984 F.3d at 1326. But, again, *Collazo* overlooked a critical difference between the structure of section 924(c) and section 841.

The full text of subsection 841(b)(6) states: "Any person who violates subsection (a), or attempts to do so, *and* knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, . . . shall be fined in accordance with title 18 or imprisoned not more than five years, or both." (emphasis added). The use of the word "and" shows that the "knowingly or intentionally" language was an *additional* element required to trigger the added fine/prison time. The earlier portions of subsection (b) do not contain additional elements—they simply describe the "controlled substance" element contained in subsection (a). Subsection (b)(6) is therefore not analogous to subsections (b)(1) and (b)(2) such that Congress's use of intent language in (b)(6) creates a structural inference that no intent element is contained in (b)(1) or (b)(2).

Elsewhere, the court in *Collazo* acknowledged this Court's holding in *Rehaif v. United States*, 588 U.S. ___, 139 S. Ct. 2191 (2019), that "'Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct.'" *Collazo*, 984 F.3d at 1324 (quoting *Rehaif*, 139 S. Ct. at 2195). However, the court in *Collazo* tried to distinguish *Rehaif*, finding that involvement in a drug conspiracy is not "otherwise innocent," and therefore *Rehaif* was irrelevant. *Collazo*, 984 F.3d at 1324. *Rehaif* should not be read as narrowly as the Ninth Circuit read it.

This Court in *Rehaif* emphasized the strong presumption that Congress intends a culpable *mens rea* as to every element. Citing the Model Penal Code, the Court stated that the presumption in favor of a culpable *mens rea* applies to all "material elements" of the offense. *Rehaif*, 139 S. Ct. at 2195. An element is material when it does not relate to matters such as jurisdiction, venue, or statute of limitations. *See* MPC §1.13(10) (defining "material element of an offense"). The drug quantity involved in a conspiracy does not relate to any of these matters, and is therefore a material element. Accordingly, the drug quantity requires a culpable *mens rea*.

The opinion in *Collazo* further conflicts with this Court's opinion in *Pinkerton v. United States*, 328 U.S. 640 (1946). *See, e.g.*, *United States v. Stoddard*, 892 F.3d 1203 (D.C. Cir. 2018). The court in *Stoddard* framed the drug-quantity intent issue as one of individualized liability versus conspiracy-as-a-whole liability, *i.e.*, a conspirator can only be held liable for the reasonably foreseeable acts of his co-conspirators, and that foreseeability requirement must extend to the drug quantities involved. *Stoddard*, 892 F.3d at 1219. Relying on *Pinkerton*, the court held:

> 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 foresee[able]" to the defendant. *Pinkerton v. United States*, 328 U.S. 640, 647–48 (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 court in *Stoddard* found further support for its holding in this Court's opinions in *Alleyne* and *Burrage v. United States*, 571 U.S. 204 (2014). *Stoddard*, 892 F.3d at 1220–1222 ("The principle . . . that a defendant convicted of conspiracy to deal drugs . . . must be sentenced, under § 841(b), for the quantity of drugs the jury attributes to him as a reasonably foreseeable part of the conspiracy, along with the *Alleyne*/*Burrage* paradigm supports our conclusion that the individualized approach to determining a mandatory-minimum-triggering drug quantity is correct."). 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 finding that *Alleyne* was limited to the Fifth and Sixth Amendment context, and that drug type and quantity are only elements of the crime to the extent necessary to comply with those amendments. *Collazo*, 984 F.3d at 1322. The court found that the Fifth- and Sixth-amendment reasoning of *Alleyne* did not extend so far as to require a *mens rea* element to attach to drug type and quantity. *Id.* ("Because . . . *Alleyne* did not rewrite § 841(b) to add a new *mens rea* requirement, [it] do[es] not assist us in determining the requisite *mens rea* necessary for the imposition of penalties under § 841(b)(1)(A)–(B)[.]") (quotation omitted). But 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.

In sum, 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 the circuit split, and because the Ninth Circuit has "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

CONCLUSION

Review of the decision below is necessary to prevent the improper application of severe sentencing enhancements to the increasing population of federal defendants whose prior felony state drug convictions have been reclassified as misdemeanors. The court of appeals below relied on reasoning contrary to decisions of this Court to hold that retroactive changes in state law do not affect federal recidivism enhancements.

Review is further necessary to resolve a circuit split over the *mens rea* element that attaches to the drug quantity determination in conspiracy cases under 21 U.S.C. §§841 and 846.

Accordingly, petitioner respectfully requests that the Petition for Writ of Certiorari be granted. Sup. Ct. R. 10.

DATED: November 8, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

PURSUANT TO Sup. Ct. R. 33.2(b)

Case No. 21 - _____

I certify that the foregoing petition for writ of certiorari is proportionally spaced, has a typeface of 12 points, is in Century font, is double-spaced, and is 22 pages long.

JAMES S. THOMSON