

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROY LEE JONES, JR. — PETITIONER

VS.

UNITED STATES — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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DEFENDANT/APPELLANT/PETITIONER

QUESTION PRESENTED

In addressing Roy Lee Jones, Jr.'s claim that the evidence in this methamphetamine prosecution supported only a conviction for conspiracy to possess with intent to distribute marijuana, the United States Fifth Circuit Court of Appeals erred. Specifically the Fifth Circuit wrongly found that “[t]he relevant statute prohibits trafficking in any ‘controlled substance.’ 21 U.S.C. § 841(a)(1). The specific kind of controlled substance is ‘not a formal element of the conspiracy offense.’ *See United States v. Daniels*, 723 F.3d 562, 573 (5th Cir. 2013). Therefore, the defendants cannot challenge their convictions on these grounds, but merely their sentences. *Id.*”

In *United States v. Aguirre-Rivera*, 8 F.4th 405, 410 (5th Cir. 2021), Mr. Baltazar Aguirre-Rivera argued that “[t]he amount of drugs involved in a conspiracy affects the statutory range of punishment. *See* 21 U.S.C. § 841(b). So, the drug quantity must ‘necessarily form[] a constituent part’ of the offense with which Aguirre-Rivera was charged—conspiracy to possess with intent to distribute one kilogram or more of heroin. *Alleyne*, 570 U.S. at 114. If the government failed to prove the amount of heroin involved, then it failed to prove an essential element of the offense as charged.” (all but first alteration in original)¹

In *Aguirre-Rivera*, the Fifth Circuit recognized that, “[a]lthough this argument has some intuitive force, we are bound by our post-*Alleyne* precedent holding

¹ Quoting *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

otherwise in this context.” 8 F.4th at 410. This Court is not bound by such precedent, which now potentially allows the Government to “convict” a defendant of a drug offense involving a different controlled substance than charged in the indictment or than presented to the jury.

That is, under the Fifth Circuit’s ruling, the Government’s failure to prove a charged element of an offense beyond a reasonable doubt has been relegated to a “sentencing” issue weighed by a trial court applying a preponderance of the evidence burden of proof. Did the Fifth Circuit err when it “re-branded” a failure to prove an essential element of the Government’s methamphetamine case against Mr. Jones beyond a reasonable doubt to be no more than a “sentencing” issue to be resolved by the District Court based on a preponderance of the evidence burden of proof?

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:

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RELATED CASES

United States v. Jones, 20-cr-156-2 (W.D. La. Nov. 11, 2021) (unpublished)

United States v. Jones, 20-cr-156-2 (W.D. La. Jan. 4, 2022) (unpublished)

United States v. Johnson, 2023 U.S. App. LEXIS 5432, 2023 WL 2388358
(5th Cir. Mar. 7, 2023) (per curiam) (unpublished)

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IN THE
SUPREME COURT
OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals appears at Appendix C to the petition and is reported at *United States v. Johnson*, 2023 U.S. App. LEXIS 5432, 2023 WL 2388358 (5th Cir. Mar. 7, 2023) (*per curiam*) (unpublished).

The oral ruling denying the Federal Rules of Criminal Procedure Rule 29 motion for judgment of acquittal appears at Appendix A and is unpublished.

The amended memorandum order denying the Federal Rules of Criminal Procedure Rule 29 motion for judgment of acquittal appears at Appendix B and is unpublished.

JURISDICTION

The United States Court of Appeals decided the case on March 7, 2023. No petition for rehearing was filed timely in the case. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841(a)(1)

(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[.]

21 U.S.C. § 841(b)(1)

(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—

* * * * *

- (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.

21 U.S.C. § 846

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.

STATEMENT OF THE CASE

A. Relevant Facts

The Government alleged Mr. Jones received methamphetamine from Delewis Johnson, IV. *See, e.g.*, ROA. 1144, 1214. The Government further asserted Mr. Jones supplied methamphetamine to Willie Todd Harris, Jr., who stored some of his supply at Rodney Ceasar's and Adriene Denise Ceasar's home. The Government further contended Mr. Harris distributed methamphetamine to lower-level dealers including Curavious Omarion Deshun Harrell and Justin Randall Goss. *See, e.g.*, ROA. 1001-03 (which referenced Gov't Exhibit G-2, which was admitted for identification purposes only, which set forth the alleged hierarchy in this conspiracy, and which had a line drawn by the Government that separated Mr. and Mrs. Ceasar, Mr. Harrell, and Mr. Goss from the other members of the alleged conspiracy, Mr. Harris, Mr. Jones, and Mr. Johnson, who were above the line), 1015-17, 1023, 1077, 1183, 1214, 1260 (referencing the line the prosecution drew across G-2, separating Mr. and Mrs. Ceasar, Mr. Harrell, and Mr. Goss from Mr. Harris, Mr. Jones, and Mr. Johnson), 1144, 1183.

A Johnson-Jones-Harris-Ceasar-Ceasar-Harrell-Goss conspiracy was charged in Count 1 of the indictment. ROA. 1964-65. Acts allegedly in furtherance of this conspiracy were charged in Counts 2 and 3 and arose from controlled buys involving Mr. Harrell and/or Mr. Harris. ROA. 1965. There was no evidence Mr. Jones and/or methamphetamine Mr. Jones allegedly supplied were involved in these controlled buys. ROA. 622-24, 690-93, 730-31, 933-48, 1204. Count 4 involved transactions between Mr. Johnson and James Cockerham, one of three alleged methamphetamine distributors for Mr. Johnson; Mr. Cockerham died before this trial. Count 4 arose from a series of transactions that did not involve Mr. Jones and that occurred after the

investigation into Mr. Jones effectively had ended, *i.e.*, there was no evidence Mr. Jones participated in or had knowledge of this alleged part of the charged conspiracy. ROA. 622, 1208-09. Count 5 arose from Mr. and Mrs. Ceasars' use of their home to store cocaine, methamphetamine, and crack cocaine for Mr. Harris. ROA. 1966.

Mr. Jones was named only in Count One. No controlled buys were made or attempted from Mr. Jones. No search warrants were executed on Mr. Jones, his home, his places of work, his vehicles, or any of his property, despite the issuance of Title III wiretaps on two of his phones and pole camera surveillance near his home. No car stops were attempted on Mr. Jones, even when actively-monitored phone calls indicated Mr. Jones was returning by car from California and likely possessed distribution amounts of marijuana. Mr. Jones was never approached to be a confidential informant. Mr. Jones was not seen engaging in any allegedly narcotics-related activity with any codefendant in any pole camera footage, footage recorded and stored on terabytes of computer data. *See, e.g.*, ROA. 1203, 1208-16.

That is, the case against Mr. Jones rested on (1) ambiguous intercepted phone calls, which arguably referred to marijuana but could have referred to methamphetamine, cocaine, crack cocaine, or some other controlled substance; and (2) incredible testimony from Mr. Ceasar and Mr. Harrell. ROA. 694, 696-98, 728-30, 754-57, 763,770-73, 778. The Government's expert in narcotics trafficking investigations, Louisiana State Police Trooper Timothy Ledet, Jr., testified Mr. Ceasar and Mr. Harrell would not have interacted with Mr. Jones. ROA. 1239, 1260 (which referenced Gov't Exhibit G-2 which separated Mr. and Mrs. Ceasar, Mr. Goss, and Mr. Harrell from Mr. Harris, Mr. Jones, and Mr. Johnson). Mr. Harris and Mr. Johnson did not testify and did not make any statements explicitly implicating Mr. Jones in the charged

methamphetamine conspiracy in any of the thousands of intercepted calls. ROA. 607-08. (Admittedly, many calls would appear to relate to transactions involving controlled substances; however, there is nothing that proves beyond a reasonable doubt whether these calls concerned methamphetamine, cocaine, crack cocaine, or more likely than not marijuana and several of Mr. Jones' calls clearly related to high-grade marijuana from California. ROA. 1173-85.)

B. Action before the District Court

On July 22, 2020, Mr. Jones was indicted in a 5-count indictment. ROA. 1948, 1964-69. The Government charged that, "no later than on or about February 10, 2019, and continuing until December 31, 2019, in the Western District of Louisiana and elsewhere, the defendants, **Delewis Johnson, IV, a.k.a. "D"**; **Roy Lee Jones, Jr., a.k.a. "Bug"**; **Willie Todd Harris, Jr., a.k.a. "Bone"**; **Curavious Omarion Deshun Harrell, a.k.a. "Boo" and "Gotti"**; **Rodney Ceasar; Adriene Denise Ceasar; Justin Randall Goss**; and other persons known and unknown to the Grand Jury, did knowingly and intentionally conspire and agree together to possess with the intent to distribute fifty (50) grams or more of methamphetamine and five hundred (500) grams or more of a mixture and substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, all in violation of Title 21, United States Code, Sections 841(a)(1) and 846." ROA. 1964-65. The Government also filed substantive counts against all defendants except Mr. Jones and Mr. Goss. R. 1965-66. Mr. Jones entered a plea of not guilty on October 7, 2020. ROA. 1950, 1983-84.

On October 20, 2020, after a contested detention hearing, Mr. Jones was released on bond. ROA. 1951, 2013-18. Mr. Jones remained on bond until he was convicted. ROA. 1373, 2387.

On November 2, 2021, joint stipulations to evidence including lab reports were filed. ROA. 1957, 2222-26.

On November 8, 2021, jury selection occurred. ROA. 1402-1531, 1957. From November 8, to November 12, 2021, a jury trial occurred. ROA. 387-1381, 1957-59, 2227-32. On November 12, 2021, the jury found Mr. Jones guilty as charged. ROA. 14, 372, 839-42.

Mr. Jones made timely oral and written motions for judgment of acquittal, after the Government's case-in-chief, after the defenses rested, and after the jury returned the verdict. ROA. 1273-78, 1289-90, 1292, 1958-59, 2234-44. The Government opposed the motions, and the District Court denied to motions. ROA. 1278, 1292, 1958-60, 2247-54, 2280-88.

The PSI, as amended, determined Mr. Jones' total offense level was 37 and his criminal history category was I. ROA. 2360-61, 2378, 2456-58, 2461. Mr. Jones' guideline sentencing range was 210 to 262 months of imprisonment, with a mandatory minimum of 120 months of imprisonment. ROA. 2362, 2378-79, 2461.

On March 8, 2022, the District Court sentenced Mr. Jones to 210 months of imprisonment. ROA. 1961, 2356-83. Notices of appeal were filed timely from the March 8, 2022, judgment on March 10, 2022, ROA. 1961, 2291-98, and from the March 10, 2022, amended judgment on March 19, 2022. ROA. 1961, 2299-2306.

On March 7, 2023, the United States Fifth Circuit Court of Appeals affirmed Mr. Jones' conviction and sentence. This timely petition follows.

REASONS FOR GRANTING THE PETITION

No methamphetamine was recovered from Mr. Jones. The Government's case rested on (1) ambiguous phone calls, which could have referred to marijuana, methamphetamine, cocaine, crack cocaine, or any other controlled substance; and (2) incredible testimony from Mr. Ceasar and Mr. Harrell, whom the Government's expert testified would not have interacted with Mr. Jones. Thus, did the Government fail to prove beyond a reasonable doubt that Mr. Jones was guilty of conspiracy to possess with the intent to distribute fifty (50) grams or more of methamphetamine and five hundred (500) grams or more of a mixture and substance containing a detectable amount of methamphetamine?

The Government failed to prove beyond a reasonable doubt that any specific quantity of methamphetamine was attributable to Mr. Jones in this alleged conspiracy. The Government and Mr. Jones stipulated to admissibility and to the weight of methamphetamine recovered on several dates: (1) Seizure 1 – April 29, 2019, 13.8 grams (Joint Stipulation #3); (2) Seizure 2 – May 7, 2019, 27.6 grams (Joint Stipulation #3); (3) Seizure 3 – July 30, 2020, 321.3 grams (Joint Stipulation #4); and (4) Seizure 4 - October 4, 2019, 7.434 grams, October 7, 2019, 28.029 grams, December 13, 2019, 56.739 grams, and December 19, 2019, 427.8 grams (Joint Stipulation #5). *See* ROA. 2222-23.

Seizure 1

The April 29, 2019, methamphetamine was sold by Mr. Harris to a CI. ROA. 933-45. Mr. Harris and his family flew to Los Angeles on July 19, 2019. ROA.

1170. In the past, Mr. Harris had flown to Los Angles with Curvavious Harrell or Dillard Baines. ROA. 1168-71. Mr. Baines was identified as a methamphetamine supplier for Mr. Harris. ROA. 634-35, 1168, 1187-88.

On May 28, 2019, Meshach Conley, a methamphetamine distributor, and Mr. Baines were observed with Mr. Harris at the barber shop where Mr. Harris conducted his methamphetamine operation. Mr. Baines and Mr. Harris were observed a second time at the barber shop during the alleged conspiracy at issue herein. ROA. 1189-90.

Put simply, the Government cannot prove beyond a reasonable doubt whether the methamphetamine involved in Seizure 1 was bought in Los Angeles by Mr. Harris, was supplied by Mr. Baines, was supplied by Mr. Conley, or was supplied by Mr. Jones. Accordingly, no reasonable finder of fact could have found beyond a reasonable doubt that this methamphetamine was attributable to Mr. Jones or to any alleged conspiracy involving Mr. Jones.

Seizure 2

The May 7, 2019, methamphetamine was sold by Curavious Harrell to a CI. ROA. 932-33, 945-48. Mr. Harrell testified that he bought his methamphetamine from a source in Los Angeles and that he sold his methamphetamine to the CI on May 7, 2019. This methamphetamine was not part of any conspiracy involving Mr. Jones. Accordingly, no reasonable finder of fact could have found beyond a reasonable doubt that this methamphetamine was attributable to Mr. Jones or to any alleged conspiracy involving Mr. Jones. ROA. 675-83, 690-93, 726-27, 731-32.

Seizure 3

The July 30, 2020, methamphetamine was seized from the Ceasars' home. ROA. 757-62, 786-94. At the time of the seizure, there was no evidence that Mr. Jones was involved in the conspiracy. The Government had long since abandoned its investigation of Mr. Jones, had failed to extend its Title III warrant on Mr. Jones' cell phones, and had moved its investigation to James Cockerham. ROA. 575-76, 622, 1194, 1208-09, 1221.

Indeed, FBI Special Agent Jeffery Goins testified that he "didn't put much weight on -- on that," the reference to "June Bug" in the call between Mr. Cockerham and Mr. Johnson, "as tying Mr. Jones into the drugs in December that were sent at the request of Mr. Cockerham." ROA. 622. He did not associate the methamphetamine seized in relation to Count 4/Seizure 4 (which occurred in 2019) with Mr. Jones. ROA. 622.

Even the PSR concluded that Mr. Johnson quit sending Mr. Jones methamphetamine in July 2019. ROA. 2389 (PSR, ¶ 22). Mr. Jones denies that he ever received any methamphetamine from Mr. Johnson; however, the PSR's conclusion is consistent with the fact that Mr. Jones was not responsible for the methamphetamine recovered in Seizure 3. Accordingly, no reasonable finder of fact could have found beyond a reasonable doubt that this methamphetamine seized on July 30, 2020, was attributable to Mr. Jones or to any alleged conspiracy involving Mr. Jones. ROA. 757-62, 786-94.

Seizure 4

The October 4, October 7, December 13, and December 19, 2019, methamphetamine, was seized when Mr. Cockerham sold methamphetamine to a CI or after Mr. Johnson allegedly shipped methamphetamine to Mr. Cockerham.

Again, at this time, there was no evidence that Mr. Jones was involved in the conspiracy. The Government had long since abandoned its investigation of Mr. Jones, had failed to extend its Title III warrant on Mr. Jones' cell phones, and had moved its investigation to James Cockerham. ROA. 575-76, 622, 1194, 1208-09, 1221.

As noted above, FBI Special Agent Goins did not associate the methamphetamine seized in relation to Count 4/Seizure 4 with Mr. Jones. ROA. 622. Even the PSR concluded that Mr. Johnson quit sending Mr. Jones methamphetamine in July 2019. ROA. 2389 (PSR, ¶ 22). Mr. Jones denies that he ever received any methamphetamine from Mr. Johnson; however, the PSR's conclusion is consistent with the fact that Mr. Jones was not responsible for the methamphetamine recovered in Seizure 4. Accordingly, no reasonable finder of fact could have found beyond a reasonable doubt that this methamphetamine was attributable to Mr. Jones or to any alleged conspiracy involving Mr. Jones. ROA. 575-76, 622, 1194, 1208-09, 1221.

Other evidence

The Government's only other evidence linking Mr. Jones to methamphetamine was a series of phone calls and testimony from Mr. Ceasar and Mr. Harrell that they had seen Mr. Jones with or around methamphetamine. No methamphetamine was recovered in relation to the series of calls. Thus, from the phone calls, this Court cannot "surmise the quantity of the . . . [methamphetamine] obtained" as they "are cryptic, vague phone calls" and "in many instances there is no credible evidence to verify a transfer of drugs following each telephone conversation or the actual amount transferred." *United States v. Daniels*, 723 F.3d 562, 572 (5th Cir. 2013).

The testimony of Mr. Ceasar and Mr. Harrell similarly is too cryptic and vague to establish quantity beyond a reasonable doubt. ROA. 694, 696-98, 728-30, 754-57, 763, 770-73, 778. Moreover, on direct examination from the Government, the Government's own expert testified that individuals at the level of Mr. Ceasar and Mr. Harrell would never has known of or seen Mr. Jones' involvement in an alleged methamphetamine conspiracy. ROA. 1239, 1260.

Accordingly, no reasonable finder of fact could have found beyond a reasonable doubt any specific amount of methamphetamine that allegedly was attributable to Mr. Jones in relation to this conspiracy. The Government also failed to prove beyond a reasonable doubt that Mr. Jones was a member of the charged methamphetamine conspiracy.

The Government attempted to link Mr. Jones to the charged methamphetamine conspiracy by introducing a series of phone calls and testimony from Mr. Ceasar and Mr. Harrell that they had seen Mr. Jones with or around methamphetamine. No methamphetamine was recovered in relation to the series of calls. Moreover, from the phone calls, this Court cannot “surmise the quantity of the . . . [methamphetamine] obtained” as they “are cryptic, vague phone calls” and “in many instances there is no credible evidence to verify a transfer of drugs following each telephone conversation or the actual amount transferred.” *United States v. Daniels*, 723 F.3d 562, 572 (5th Cir. 2013).

Further, as testimony from Louisiana State Police Trooper/Investigator Patrick Deshautelle, the case agent, established, phone calls intercepted showed that Mr. Jones was discussing a large amount of high-grade/boutique marijuana on July 24, 2019. ROA. 1173-85. This evidence and the Government’s failure to recover methamphetamine in relation to any of the calls made by or concerning Mr. Jones prevented the Government from proving beyond a reasonable doubt that Mr. Jones was involved in the charged methamphetamine conspiracy, rather than in a high-grade/boutique marijuana business.

Moreover, Mr. Jones, through cross examination, established reasonable doubt as to the source of the methamphetamine the Government did recover. Mr. Jones established a reasonable theory of his innocence, that Mr. Harris’ methamphetamine was supplied by Mr. Harris’ conduct independent of Mr. Jones. That is, there is a reasonable theory that Mr. Harris purchased the

methamphetamine he distributed in relation to this alleged conspiracy from dealers in Los Angeles, from Mr. Baines, or from Mr. Conley. ROA. 634-35, 1168, 1168-71, 1187-90.

The testimony of Mr. Ceasar and Mr. Harrell that they saw Mr. Jones with methamphetamine simply was too cryptic and vague to establish Mr. Jones' guilt beyond a reasonable doubt. Moreover, as noted above, on direct examination from the Government, the Government's own expert testified that individuals at the level of Mr. Ceasar and Mr. Harrell would never have known of or seen Mr. Jones' involvement in an alleged methamphetamine conspiracy. ROA. 1239, 1260.

For these reasons, Mr. Jones respectfully submits the evidence was insufficient to sustain his conviction. Alternatively, Mr. Jones respectfully submits the evidence was insufficient to establish that any specific weight of methamphetamine was attributable to him and he is entitled to a judgment of acquittal on the charge he conspired to possess with intent to distribute 50 grams or more of methamphetamine and 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine. Instead, in the alternative, Mr. Jones should be found guilty of only the lesser included offense of conspiracy to possess with intent to distribute methamphetamine.

Accordingly, Mr. Jones' conviction must be reversed, his sentence vacated, and a judgment of acquittal entered. Alternatively, Mr. Jones' conviction must be reversed, his sentence vacated, a judgment of guilty entered on the lesser included

offense of conspiracy to possess with intent to distribute methamphetamine, and this matter remanded for resentencing.

CONCLUSION

The petition for a writ of certiorari should be granted. In addressing Mr. Jones' claim that the evidence in this methamphetamine prosecution supported only a conviction for conspiracy to possess with intent to distribute marijuana, the United States Fifth Circuit Court of Appeals erred. Specifically the Fifth Circuit wrongly found that “[t]he relevant statute prohibits trafficking in any ‘controlled substance.’ 21 U.S.C. § 841(a)(1). The specific kind of controlled substance is ‘not a formal element of the conspiracy offense.’ *See United States v. Daniels*, 723 F.3d 562, 573 (5th Cir. 2013). Therefore, the defendants cannot challenge their convictions on these grounds, but merely their sentences. *Id.*”

In *Aguirre-Rivera*, Mr. Aguirre-Rivera argued that “[t]he amount of drugs involved in a conspiracy affects the statutory range of punishment. *See* 21 U.S.C. § 841(b). So, the drug quantity must ‘necessarily form[] a constituent part’ of the offense with which Aguirre-Rivera was charged—conspiracy to possess with intent to distribute one kilogram or more of heroin. *Alleyne*, 570 U.S. at 114. If the government failed to prove the amount of heroin involved, then it failed to prove an essential element of the offense as charged.” 8 F.4th at 410 (all but first alteration in original)

In *Aguirre-Rivera*, the Fifth Circuit recognized that, “[a]lthough this argument has some intuitive force, we are bound by our post-*Alleyne* precedent holding otherwise in this context.” 8 F.4th at 410. This Court is not bound by such precedent, which now potentially allows the Government to “convict” a defendant of

a drug offense involving a different controlled substance than charged in the indictment or than presented to the jury.

That is, under the Fifth Circuit's ruling, the Government's failure to prove a charged element of an offense beyond a reasonable doubt has been relegated to a "sentencing" issue weighed by a trial court applying a preponderance of the evidence burden of proof. The Fifth Circuit err when it "re-branded" a failure to prove an essential element of the Government's methamphetamine case against Mr. Jones beyond a reasonable doubt to be no more than a "sentencing" issue to be resolved by the District Court based on a preponderance of the evidence burden of proof. This error will continue until and unless this Court addresses this issue.

Respectfully submitted,
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