

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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ADELFO RODRIGUEZ-MENDEZ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for  
the Third Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether attributing drugs, post-conviction, in an amount greater than what is charged in an indictment and greater than what the jury found is in violation of *Alleyne v. United States*, 570 U.S. 99 (2013)?
2. Whether attributing drugs post-conviction, in an amount greater than what is charged in an indictment and greater than what the jury found is in violation of the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution?
3. Whether surreptitiously obtained audio recordings made by a confidential informant at the direction of the police for the purpose of gathering incriminating evidence that will be used in trial are testimonial in nature, and thus, under the Sixth Amendment to the United States Constitution, cannot be admitted into evidence without the confidential informant's presence in court?
4. Whether an unsigned arrest warrant violates Federal Rule of Criminal Procedure 9 and constitutes a substantial violation of the Fourth Amendment of the United States Constitution's right to be free of unlawful seizures?

## **PARTIES TO THE PROCEEDING**

The Petitioner is Adelfo Rodriguez-Mendez, an individual. The Respondent is the United States of America. There is no party with an interest to disclose pursuant to Rule 29(6).

## **OPINIONS BELOW**

The judgment of the United States Court of Appeals for the Third Circuit, entered on May 11, 2023 with a Non Precedential Opinion at case number 22-1422, affirmed the judgment of the District Court. (Appendix, pages 1-20). The judgment of the United States District Court for the Western District of Pennsylvania, entered on March 2, 2022 (Appendix, pages 45-52), sentenced Mr. Rodriguez-Mendez to 17 years' incarceration.

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## OPINIONS BELOW

1. ***United States v. Rodriguez-Mendez***, No. 22-1422, 2023 WL 3378005 (3d Cir. May 11, 2023).
2. ***United States v. Rodriguez-Mendez***, No. CR 1:17-15-1, 2021 WL 3025898 (W.D. Pa. July 16, 2021), aff'd, No. 22-1422, 2023 WL 3378005 (3d Cir. May 11, 2023).

## JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1), which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the courts of appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. §1651(a), which grants the United States Supreme Court jurisdiction to issue all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law.

The time for filing a Petition for Writ of Certiorari began to run on June 6, 2023, when the United States Court of Appeals for the Third Circuit denied Petitioner's Petition for Rehearing and Rehearing *En Banc*. The time for filing a Petition for Writ of Certiorari expires after September 5, 2023.<sup>1</sup>

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<sup>1</sup> The actual calculated time is September 4, 2023, but, under Rule 30, the date is September 5, 2023 because Monday is a federal holiday.

## CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

### U.S. CONST. AMEND. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### U.S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### U.S. CONST. AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## U.S. CONST. AMEND. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **CONCISE STATEMENT OF THE CASE**

This is an appeal raising several constitutional violations that occurred during the trial and sentencing of Adelfo Rodriguez-Mendez in the District Court for the Western District of Pennsylvania. Mr. Rodriguez-Mendez alleges that the District Court made several errors including (a) sentencing him to 17 years of incarceration based on a drug weight that far exceeded what was charged in the Indictment and what the jury convicted beyond a reasonable doubt, (b) admitting a secretly recorded conversation into evidence without the testimony of any individual who participated in the conversation, or was present in the conversation, and (c) upholding his arrest despite the fact that he was arrested with an unsigned arrest warrant. The Third Circuit Court of Appeals upheld the District Court's decisions and Mr. Rodriguez-Mendez now appeals.

Following a jury trial, Mr. Rodriguez-Mendez was convicted of Count I of the Superseding Indictment for Conspiracy to Traffic in Less Than 500 grams of cocaine.

On April 3, 2022, the District Court sentenced Mr. Rodriguez-Mendez to 210 months incarceration and supervised release (Appendix, pages 45-52). This sentence

was based on the District Court's decision to attribute 5 kilograms, but less than 15 kilograms of cocaine, to Mr. Rodriguez-Mendez. Mr. Rodriguez-Mendez appealed the conviction and judgment of sentence to the United States Court of Appeals for the Third Circuit. On May 11, 2023, the Third Circuit Court of Appeals affirmed the judgment. Mr. Rodriguez-Mendez filed a Petition for Re-Hearing and for Re-Hearing *En Banc* which was denied on June 6, 2023.

## **REASONS FOR GRANTING THE PETITION**

1. Attributing an amount of drugs greater than that which is charged in the indictment and of which the defendant is convicted of at trial violates the holding of *Alleyne v. United States*, 570 U.S. 99 (2013) because a jury must decide these facts, not the judge. This is an important question of federal law that should be decided by this Court and there is a circuit split on this issue.
2. At least one jurisdiction has held that a police-initiated, surreptitiously recorded conversation gathered for the purpose of presenting later at trial is testimonial in nature and thus subject to the confrontation clause. The Third Circuit Court of Appeals has held the opposite. Thus, this is an important question of federal law that should be decided by this Court.
3. The practice of filing an unsigned arrest warrant and then arresting a defendant on an unsigned arrest warrant is a violation of the Federal Rules of Criminal Procedure and a violation of the Fifth Amendment right to be free of unreasonable searches and seizures. Thus, this is an important federal question that should be decided by this Court.

## **I. ATTRIBUTING AN AMOUNT OF DRUGS GREATER THAN THAT WHICH IS CHARGED IN THE INDICTMENT AND OF WHICH THE JURY CONVICTED OF AT TRIAL VIOLATES THE HOLDING *ALLEYNE V. UNITED STATES*, 570 U.S. 99 (2013) BECAUSE A JURY MUST DECIDE THESE FACTS, NOT THE JUDGE.**

This Court must decide whether its decisions in *Alleyne v. United States*, 570 U.S. 99 (2013) and *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) require juries to decide facts that dramatically increase the defendant's guideline range. In *Alleyne v. United States*, 570 U.S. 99 (2013), this Court held “[a]ny 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.” *Id.* at 103 (emphasis added). With this reasoning in mind, this Court held “[f]acts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.” *Id.* at 108 (emphasis added). This Honorable Court has indicated mandatory compliance in submitting such facts to a jury through the use of the word “must.” This Court further reasoned:

“While *Harris* declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi* ‘s definition of ‘elements’ necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment.” *Id.*

Further, “[e]levating the **low-end of a sentencing range** heightens the loss of liberty associated with the crime...” *Id.* at 113 (emphasis added).

In contrast, the Third Circuit Court of Appeals has defined “element” as follows, “[t]he facts constituting the elements of a crime are those that increase the maximum punishment to which the defendant is exposed under governing law.”

***United States v. Grier***, 449 F.3d 558, 564 (3d Cir. 2006). Using this reasoning, the Third Circuit Court of Appeals upheld Appellant's sentence even though the sentencing guidelines, and the sentence, were based on facts not submitted to the jury that dramatically increased the Petitioner's guideline range.

This Court's holding in ***Alleyne v. United States***, 570 U.S. 99 (2013) and ***Apprendi v. New Jersey***, 530 U.S. 466, 490 (2000) require juries, not judges, to decide facts that dramatically increase the guideline range of a sentence. This Court has already decided that facts which increase mandatory minimums and statutory maximums are within the sole discretion of a jury determination under the Sixth Amendment right to a jury trial. The next logical step is to require facts that increase the sentencing guideline range, must also be submitted to a jury in order to preserve and protect the right to a jury trial.

The resolution of this critical question has resulted in a circuit split. The Ninth Circuit Court Appeals has held "where a severe sentencing enhancement is imposed on the basis of uncharged or acquitted conduct, due process may require clear and convincing evidence of that conduct." ***United States v. Treadwell***, 593 F.3d 990, 1000 (9th Cir. 2010), overruled on unrelated grounds by ***United States v. Miller***, 953 F.3d 1095 (9th Cir. 2020). The Third Circuit has held that all facts that do not increase a mandatory minimum or a statutory maximum are decided by a preponderance of evidence. ***United States v. Grier***, 475 F.3d 556, 568 (3d Cir. 2007) (*en banc*); *See also United States v. Rodriguez-Mendez*, No. 22-1422, 2023 WL 3378005, (3d Cir. May 11, 2023) ("Only facts that increase a statutory minimum or a maximum sentence must be submitted to a jury and found beyond a reasonable

doubt...”). Petitioner will argue that neither standard is appropriate because these issues must be decided by a jury. Nevertheless, this Court must decide which standard of proof applies during sentencing and when these standards apply in order to preserve and protect Sixth Amendment rights.

This Court must also decide whether the Fifth, Sixth, and Fourteenth Amendments forbid sentencing courts from imposing a sentence for a crime that was not charged in the Indictment and was not the basis for the jury’s conviction. The Fifth and Sixth Amendment of the United States Constitution require that a defendant is given appropriate notice of the criminal charges pending against him/her so he/she can defend against those charges. *See* F.R.Crim.P. 7, note to Subdivision (a); *see also Hamling v. United States*, 418 U.S. 87, 117 (1974). That notice, for a felony offense, comes through an indictment. Thus, a defendant cannot be tried for a crime that did not come through an indictment approved by a grand jury. *See United States v. Miller*, 471 U.S. 130, 140 (1985).

However, the concept of “relevant conduct” allows sentencing courts to completely ignore these constitutional requirements because a sentencing court may consider “conduct that is not formally charged or is not an element of the offense of conviction” in “the determination of the applicable guideline sentencing range.” *See United States v. Booker*, 543 U.S. 220, 251-52 (2005) (quoting U.S.S.G. § 1B1.3, comment). Relevant conduct, in short, serves as a workaround for the Government in avoidance of their burden of charging, prosecuting, and receiving a conviction on an entirely separate and far more serious charge.

Here, the Appellant was charged with trafficking in less than 500 grams of cocaine, convicted of the same, and then sentenced for trafficking in 5 to 15 kilograms of cocaine. Meaning, the Appellant was sentenced for a crime for which he was not charged, for which he was deprived the judgement of a jury of his peers, and for which he was not convicted. In other words, he was convicted of a crime that was not part of the indictment. This Court must decide if such a process was a violation of Petitioner's Fifth and Sixth Amendment right to be notified of the charges against him through an indictment.

Further, under the due process clause of the Fourteenth Amendment, the criminal justice process must be fundamentally fair. *See Lassiter v. Dep't of Soc. Servs. of Durham Cty., N. C.*, 452 U.S. 18, 24 (1981). It is fundamentally unfair for an individual to be indicted, tried, and convicted for one crime and then to be sentenced for a different crime. Doing so eliminates the requirement for the Government to prove criminal charges beyond a reasonable doubt and undermines the protections of a jury trial. This Court must decide whether fundamental fairness will rule the criminal justice system or whether the Government will be able to shirk its burden of proof at trial and simply present evidence (at a lower burden of proof) at sentencing for a much more serious crime than what was charged and what was secured through the conviction of a jury.

**II. THERE IS DISAGREEMENT OVER WHETHER SURREPTITIOUSLY RECORDED CONVERSATIONS ARE TESTIMONIAL IN NATURE AND THUS SUBJECT TO THE CONFRONATION CLAUSE OF THE SIXTH AMENDMENT. THIS IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE DECIDED BY THIS COURT.**

In this case, the District Court allowed the Government to submit surreptitiously recorded conversations between a confidential informant and the Petitioner into evidence over the objection of the Petitioner. Neither the confidential informant nor the Petitioner testified during the trial. This Court must decide whether surreptitiously recorded conversations are testimonial in nature and thus fall under the Sixth Amendment right to confront one's accuser. "The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'" *Crawford v. Washington*, 541 U.S. 36, 42 (2004). "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59. "[Statements] are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

In *United States v. Hendricks*, 395 F.3d 173, 183 (3rd. Cir. 2005), the Third Circuit Court of Appeals concluded that conversations of defendants that are surreptitiously recorded by confidential informants are non-testimonial in nature and are not subject to *Crawford*. Further, statements of the confidential informant

needed to place the defendant's statements into context are non-testimonial and are not subject to *Crawford. Id.*

The fundamental premise of ***Hendricks*** is flawed and it should be overruled by this Court because admitting surreptitiously recorded statements made by a defendant to a non-testifying witness violates the Sixth Amendment right to confrontation. The purpose of a confidential informant wearing a body wire during a controlled buy is to capture statements that will be used later in the prosecution of the case. While the unsuspecting defendant was not anticipating later prosecution when he made the statement, the confidential informant was anticipating that the defendant's statements would be used later during trial and acted accordingly to capture the statements. This desire to capture statements for the government to use in later prosecution is the sole purpose why the confidential informant is wearing a wire and performing a controlled buy. In other words, but for that prosecutorial motive, the statements of a defendant would have never been captured. Meaning, a surreptitiously recorded conversation made by a confidential informant for the purpose of investigating a crime is testimonial in nature and should be subject to Sixth Amendment protections.

At least one jurisdiction agrees with this reasoning. In ***State v. Williams***, 306 Kan. 175, 199, (2017), the Kansas Supreme Court held that the statements of a confidential informant could not be admitted into evidence without the presence of the confidential informant. The court in ***Williams*** determined that these types of statements were testimonial in nature because “the statements were made during a

controlled drug buy set up for the express purpose of creating evidence for use at a future prosecution.” *Id.*

This Court needs to decide whether the Kansas Supreme Court or the Third Circuit Court of Appeals is correct on this issue. If these statements are testimonial in nature, then they are subject to *Crawford* and thus cannot be admitted into evidence without the presence of the confidential informant without violating the Sixth Amendment right to be confronted by one’s accusers and witnesses. If that is the case, then the Appellant’s Sixth Amendment rights were violated here and his case must be remanded for a new trial.

### **III. ARRESTING A DEFENDANT ON AN UNSIGNED ARREST WARRANT IS A VIOLATION OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE FIFTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES.**

Evidence submitted during a pre-trial hearing showed that the Appellant was arrested with an unsigned arrest warrant in violation of his Fourth Amendment right to be free of unlawful searches and seizures. Under Federal Rule of Criminal Procedure 9, a warrant issued due to an indictment “must conform” to Federal Rule of Criminal Procedure (4)(b)(1), “...except that it must be signed by the clerk and must describe the offense charged in the indictment or information.” (emphasis added).

Cases deciding this issue hinge on whether the clerk actually signed the warrant. *See United States v. Nelson*, No. 04-20048-01-JWL, 2008 WL 4216118, at \*5 (D. Kan. Sept. 12, 2008)(denying a request to dismiss the indictment because the warrant complied with Rule 9 and was signed by a clerk). *See also United States v.*

*McLain*, 559 F. Supp. 2d 983, 992 (D. 8 Minn. 2008)(denying a request to dismiss an indictment because the warrant complied with Rule 9 and was signed by a clerk).

In the instant case, the clerk admitted that standard practice was to place an unsigned warrant on the docket, sign the warrant at a later date, and then place the signed warrant on the docket after it is served. Such a practice is a clear violation of the Federal Rules of Criminal Procedure and must be stopped by this Court using its supervisory authority. Furthermore, failing to stop the practice will place more and more criminal defendants in jeopardy of arrest without a signed search warrant.

## CONCLUSION

For the reasons stated above, the petition for certiorari should be granted so that this Court can decide important questions of federal law and preserve the Fourth, Fifth, Sixth and Fourteenth Amendment rights and protections for every criminal defendant.

Respectfully submitted,

/s/ D. Robert Marion Jr.

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