NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

ISAAC CARDONA,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

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

Jane Elizabeth Lee
44 Exchange Street
Suite 201
Portland, Maine 04101
(207) 871-0310
Attorney for Petitioner

February 14, 2024

QUESTIONS PRESENTED FOR REVIEW

I. Whether the promotional money laundering provision of Money Laundering Control Act of 1986, 18 U.S.C.A. § 1956 (a)(1)(A)(i), violates the due process guarantee against vague criminal laws. The vagueness of the phrase "with intent to promote the carrying on" of a specified unlawful activity frequently results in a merger problem whereby proving the underlying specified unlawful activity automatically proves the promotional money laundering charge. This is tantamount to double jeopardy. During the statute's almost thirty-seven-year history courts have persistently failed to craft an interpretation of the statute's language which avoids the merger problem. Courts' repeated failure to craft a principled and objective standard to avoid merger "confirms its [the phrases'] hopeless indeterminacy" which denies defendants fair notice and invites arbitrary enforcement by judges and prosecutors. In the present case, the same acts which proved the specified unlawful activity automatically proved the money laundering offense merging the two offenses. Courts repeated failure to solve the merger problem means the provision is void for vagueness.

II. Whether the evidence was insufficient to convict Petitioner of money laundering. The government failed to prove that the Petitioner's specific intent in agreeing to purchase heroin was "to promote the carrying on" of heroin distribution. Petitioner's specific intent in conspiring to purchase heroin was to pay back the money he lost during a botched cocaine sale. While the transaction contemplated in the heroin conspiracy may have had the 'effect' of promoting the carrying on of the distribution of heroin, that was not Petitioner's intent in entering into conspiracy. Strict adherence to the specific intent requirement in the statute is vital so that crimes that "Congress duly considered and appropriately punished elsewhere in the criminal code" do not increase a sentence for that crime. In the present case the money laundering counts increase Petitioner's sentence by two points.

III. Whether the district court committed plain error when it instructed the jury on the incorrect scienter requirement for conspiracy to commit money laundering, as well as failing to instruct the jury as to which drug conspiracy the prosecution alleged Petitioner intended to promote.

IV. Whether Fed. R. Crim. P. 12, as amended in 2014, precludes appellate review of a multiplicity claim raised for the first time on appeal, absent a showing of good cause. And whether Appellant's conviction on Counts One and Two, both charging him under 21 U.S.C. § 846 with conspiracy to possess with intent to distribute controlled substances, constitutes multiple punishment for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

Treatise and Statutes and other sources

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

ISAAC CARDONA,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

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

The Petitioner, Isaac Cardona, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on December 7, 2023.

OPINION BELOW

On December 7, 2023, the Court of Appeals entered its Opinion affirming the Petitioner's sentence and conviction. Judgment is attached at Appendix 1. The Petition for Rehearing was denied on January 23, 2024 and is attached at Appendix 2.

JURISDICTION

On December 7, 2023, the United States Court of Appeals for the First Circuit entered its Opinion affirming Petitioner's conviction and sentence. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment V:

No person shall…be deprived of life, liberty, or property without due process of law…

[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb…

Promotional Money Laundering, 18 U.C.C. § 1956 (a)(1)(A)(i)

The defendant conducted or attempted to conduct a financial transaction; the transaction involved the proceeds of a statutorily specified illegal activity; the defendant knew the transaction involved the proceeds of the illegal activity; the defendant conducted the transaction with the intent to promote the carrying on of specified unlawful activity.

STATEMENT OF THE CASE

Offense Conduct

Introduction

On March 21, 2018, Petitioner was arrested pursuant to Indictment. PSR at 4, para.4). Petitioner was indicted along with four other individuals, one of whom was his father, for trafficking in heroin and cocaine. (Presentence Investigation Report, 5/9/2022, [hereinafter PSR] at 5, para. 7, Appendix at 5).

The Indictment.

The indictment in this case was returned on November 2, 2017. The indictment charged Petitioner with Conspiracy to Commit Money Laundering. The government charged Petitioner under the promotional provision of the Money Laundering Statute. 18 U.S.C. § 1956 (a)(1)(A)(i). (D.E. at No. 23 at p.3, Appendix at 3). The indictment did not charge Petitioner with concealment money laundering.

Trial

At trial the government alleged Petitioner was involved in two overlapping conspiracies, one to distribute cocaine and one to distribute heroin. (PSR at 6, para 11, Sealed Appendix at 6). According to the testimony of government's cooperating co-defendant, David Cruz (aka Perry), Cruz who lived in the Westfield Massachusetts, obtained cocaine from a cartel based in Mexico and with the participation of Petitioner's father, Rafael Cardona, sold one and half kilos of cocaine to Petitioner. According to Cruz, Petitioner paid Cruz up front for a half a kilogram of cocaine and was given the remaining cocaine on credit. (PRS at 7, Para 22, Sealed Appendix at 7). Petitioner

promptly had one kilogram of the cocaine stolen from him when he was swindled by a buyer from New Hampshire. (PSR at 8, para 25, 26, Sealed Appendix at 8).

Cruz testified that to recoup the money Petitioner owed him for the stolen cocaine Cruz devised a plan to buy heroin in California and have Petitioner sell the heroin and pay back his cocaine debt to Cruz. According to Cruz, Petitioner agreed to drive to California with another co-defendant, Juan Martinez (aka Gemelo) with money from Cruz, pick up heroin Cruz arranged to purchase from a different cartel based in Mexico, and drive the heroin back to Massachusetts. (PSR at 8, para 24-26, Sealed Appendix at 8).

However, when Petitioner arrived in California Petitioner did not buy any heroin and he left the car (a Juke with a hidden compartment) and the money in a parking lot at the San Diego airport and flew home to Massachusetts. (PSR at 10-11, para. 37-40, Sealed Appendix at 10-11). Cruz testified he subsequently flew to California and completed the heroin sale and arranged for the Juke, containing what Cruz believed to be heroin[1], to be transported back to Massachusetts on a commercial car carrier. (PSR at 11, para. 43-44, Sealed Appendix at 11).

The DEA, however, intercepted the car carrier and later arrested Cruz in Massachusetts. Cruz immediately began to cooperate with law enforcement. (PSR at 12, para. 47, Sealed Appendix at 12). After Cruz's arrest Petitioner and his father attempted to locate the Juke because Cruz had given the Mexican cartel, from whom Cruz had purchased the heroin, Petitioner and Petitioner's father's home address and telephone

[1] According to Cruz, he believed he was buying heroin. The drug sold to Cruz was in fact fentanyl. (PSR at 11, n. 7, Sealed Appendix at 11).

numbers and the cartel was calling Petitioner's father and Petitioner and demanding information about Cruz and the heroin. (PSR at 13, para. 49, Sealed Appendix at 13).

At no time did any witness for the government testify that Petitioner acted or agreed to act with the intention "to promote the carrying on of a heroin conspiracy". The government's evidence showed that Petitioner's sole intent was to repay his debt incurred when the cocaine was stolen. (Trial Day 8, at p. 85, 89,90,95, Appendix at 45, 47, 48, 49, 50)

Jury Instructions

The district court instructed the jury on the Conspiracy to Commit Money laundering count. Petitioner's father and co-defendant, although charged in both the cocaine and heroin conspiracy counts, was not charged with Conspiracy to Commit Money Laundering. The court instructed the jury.

> First, the defendant – - that you must find that the defendant agreed with one or more persons to : A, knowingly conduct a financial transaction; B, involving funds that the defendant knew to be the proceeds of some form of unlawful activity; and, C, that were , in fact, the proceeds of a conspiracy to distribute and possess with intent to distribute a controlled substance; and, D, that the defendant knew the transaction to be either designed in whole or in part to promote the carrying on of a conspiracy to distribute and possess with intent to distribute a controlled substance.
>
> The second element that the defendant - - that the government must prove beyond a reasonable doubt is that the defendant willfully joined in the agreement. (Trial Day 8 at 165-66, Appendix at 52, 53).

Although the court's instruction was incorrect, neither party objected to the court's money laundering instruction. (Trial Day 8 at 167, Appendix at 54). The court's instruction in section D "that the defendant knew the transaction to be either designed in whole or in part to promote the carrying on of a conspiracy to distribute and possess with

intent to distribute a controlled substance" was incorrect because it was a combination of the concealment and the promotional provision of the statute. The promotional provision of the money laundering statute reads "with the intent to promote the carrying on of specified unlawful activity". 18 U.S.C. § 1956 (a)(1)(A)(i). The concealment provision of the statute reads "knowing the transaction is designed in whole or in part – to conceal or disguise the nature, the location, the source, the ownership, or control of the proceeds of specified unlawful activity" 18 U.S.C. § 1956 (a)(1)(B)(i). Moreover, the court's instruction did not specify, as the indictment did, which "specified unlawful activity" the government alleged the funds stemmed from or which "specified unlawful activity" Petitioner was alleged to intend to promote.[2]

The Verdict

As to Petitioner, the jury returned a verdict of guilty on all counts.

Sentencing

Probation calculated Petitioner's guideline range grouping the counts of conviction for sentencing in a single count, Conspiracy to Commit Money Laundering. (PSR at 14, para. 55, 56, Sealed Appendix at 14).[3] The base offense level for the grouped count was calculated by using the total offense level from the underlying offenses, which in this instance was Conspiracy to Distribute and Possess with Intent to Distribute Cocaine and Conspiracy to Distribute and Possess with Intent to Distribute Heroin. (PSR at 14, para 56, Sealed Appendix at 14). Probation found Petitioner accountable for a total of 1,500 kilograms of Converted drug weight resulting a base offense level of 30. Two

[2] The jury had a copy of the indictment in the jury room to use during their deliberations. (Trial Day 8 at 139, Appendix at 51)

[3] The court instructed the jury on conspiracy to commit promotional money laundering. (Jury Trial Day 8, 10/15/21 at 165-166).

points were added because a dangerous weapon was possessed making Petitioner's base offense for the Grouped Counts level 32. (PSR at 14, para. 56, Sealed Appendix at 14).

Two points were added to the base offense level because Petitioner was convicted of Money Laundering, 18 U.S.C. § 1956. (PSR at 15, para 57, Sealed Appendix at 15). The total offense level for the Group counts was 34. PRS at 15, para 64 Sealed Appendix at 15). With a criminal history category of IV the guideline imprisonment range was 210 to 262 months. (PSR at 23, para. 102, Sealed Appendix at 23)

Following the argument, the court found a total offense level of 34 and Criminal History Category of III, resulting in a guideline sentencing range of 188 months to 235 months (Sentencing at 9, Appendix at 58). The court imposed concurrent terms of imprisonment of 146 months, on Counts One, Two and Five. The court imposed a five-year term of supervised release. (Sentencing at 17, Appendix at 61).

Court of Appeals

On appeal, Petitioner argued for the first time that the Promotional Money Laundering statute was void for vagueness. Petitioner also argued there was insufficient evidence to support his conviction for money laundering. Petitioner argued that the district court committed plain error when it instructed the jury on an incorrect scienter requirement. The Petitioner joined the co-defendant's argument that the inclusion of two separate conspiracy charges in the Indictment was plain error.

The Court of Appeals held that Petitioner waived as opposed to forfeited the constitutional argument that the money laundering statute was void for vagueness because under Fed. R. Crim. P. 12 (b) (3) and (c)(3) because a claim that a statute is unconstitutional must be raised in the district court or it is waived absent a showing of good cause. United States v.

Cardona, nos. 22-1415, 22-1416, at 17 (1st Cir. December 7, 2023). The district court also held that there was sufficient evidence to support the money laundering conviction. Id at 21. Additionally, the Court of Appeals held that any error in the jury instruction concerning the intent requirement of the money laundering charge was harmless. Id. at 24.

Petitioner joined his co-defendant, Raphael Cardona's argument that the two conspiracies, of which both defendants were convicted, were multiplicitous. The Court of Appeals held that the multiplicity argument was waived, as opposed to forfeited, because under Fed. R. Crim. P. 12 (c) (3) multiplicity issues must be raised before trial or they are waived absent good cause. Id. at 13-14.

REASON FOR GRANTING THE WRIT

I. The promotional money laundering provision of Money Laundering Control Act of 1986, 18 U.S.C.A. § 1956 (a)(1)(A)(i), violates the due process guarantee against vague criminal laws. The vagueness of the phrase "with intent to promote the carrying on" of a specified unlawful activity frequently results in a merger problem whereby proving the underlying specified unlawful activity automatically proves the promotional money laundering charge. In the present case, the same acts which proved the specified unlawful activity automatically proved the money laundering offense merging the two offenses. The courts' repeated failure to solve the merger problem means the provision is void for vagueness.

Argument

Standard of Review

Petitioner challenges the constitutionality of 18 U.S.C.A. § 1956 (a)(1)(A)(i) under the void for vagueness doctrine. The Supreme Court stated that a constitutional claim not raised in district court is reviewed under Fed. R. Crim. P. 52 (b). A constitutional claim not raised is reviewed under the plain error standard. United States v. Olano, 507 U.S. 725, 731 (1993). Nonetheless, the First Circuit Court of Appeals below held that a claim that a statute is unconstitutional may not be reviewed under a plain error standard but rather is extinguished by a defendant's failure to raise a constitutional claim in a pretrial motion. United States v. Cardona, Nos. 22-1415, 22-1416, at 14 (a claim that the indictment fails to state an offense. Under Rule 12 (b)(3) and (c)(3) these claims must be made before trial or are waived). Rule 12 case law and commentaries to the contrary, there is nothing in Rule 12 (c) that negates Rule 52(b) jurisdiction over unpreserved constitutional claims or indeed limits appellate review. After the 2014 amendments Rule 12 (c)(3) merely states "If a party does not meet a deadline for making a Rule 12(b)(3) motion, the motion is untimely." Fed. R. Crim. P. 12 (c)(3). It says nothing about the

extinguishment of appellate rights under Rule 52 (b). Moreover, this Court has made it clear that Rule 52 (b) applies to constitutional claims. Johnson v. Zerbst, "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights, Green v. United States, 355 U.S. 184, 191 (1975), Schneckloth v. Bustamonte, 412 U.S. 218, 236-38 (1975), Menna v. New York, 423 U.S. 61, 62(1975).[4] Even the First Circuit has stated that cases holding that a constitutional right may be waive by simply failing to plead that right in the district court fail to address important principle that a waiver of constitutional rights must be "voluntary, knowing [and] intelligent" United States v. Rivera, 872 F.2d 507, 50 (1989) (where the assertion of a constitutional right would be an absolute defense, plain error is clearly applicable). Thus, Petitioner's claim should be reviewed under the plain error standard.

Appellant has met the four-part standard for plain error review; (1) an error occurred, Appellant was convicted of an offense which merged with the underlying criminal offense; (2) the error was plain and has been plain since Congress passed the Money Laundering Control Act of 1986 and became clearer after the Supreme Court's decision in Santos, when all nine judges of the Supreme Court stated that the merger problem in the money laundering statute violated the constitution; (3) the error affected Petitioner's substantial rights by increasing his guideline

[4] Indeed, the First Circuit had gone to great lengths to preserve the right to review unpreserved constitutional claims de novo. Prior to the 2014 amendments to Rule 12, a claim that a statute was unconstitutional was reviewed de novo under a theory that a claim that a statute was unconstitutional was a claim that an indictment "fail[s] to state an offense" and under the old Rule 12, such claims could be raised at any time while the case was pending. Rule 12 (b)(3)(B). United States v. Disantos,86 f.3d 1238, 1244 (1st Cir. 1996), United States v. Suess, 474 F.2d 385, 387 n.2 (1st 1973). After the 2014 amendments to Rule 12, the claim that the indictment "fail[s] to state an offense" is no longer included in issues that may be raised at any time and the rules support de novo review is no longer valid.

sentencing range by two levels. (4) the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. United States v. Olano, 507 U.S. 725, 732-36 (1993)

For 37 years courts have sentenced defendants to additional years in prison (as much as 20 additional years), for crimes of drug dealing, gambling, and fraud in which the money laundering acts were identical to those constituting the underlying offense., United States v. Santos, 553 U.S. 507, 518 (2008) (Congress would not have wanted "a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence of the crime"). Therefore, plain error review Petitioner prevails.

Argument

In United States v. Santos, this Court identified a merger problem which has been endemic to the promotional money laundering statute since its inception, whereby the statute is used to punish a defendant twice for the same acts. 553 U.S. 507, 514 (2008), United States v. Edgmon, 952 F.2d 1206 (10th Cir. 1991), United States v. Stravroulakis, 952 F.2d 686 (2nd Cir. 1992), United States v. Heap, 39 F.3d 479, 485 (4th Cir. 1994). A criminal defendant can receive up to twenty more years in prison where a merger problem exists. Santos, 553 U.S. at 514. This Court's solution to the merger problem was to define the term "proceeds" in the statute to mean profits and not receipts. Santos, 553 U.S. at 518. ("Interpreting "proceeds" to mean ''profits" eliminates the merger problem").

However, within a year, Congress, while acknowledging that merger was a serious problem, effectively overruled Santos by defining "proceeds" to "include gross receipts". Fraud Enforcement Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009)

(FERA). FERA resurrected the merger problem Santos had attempted to solve. See Leslie A. Dickinson, Revisiting the "Merger Problem" in Money Laundering Prosecutions Post-Santos and the Fraud Enforcement and Recovery Act of 2009, 28 Notre Dame J.L. Ethics & Pub. Pol'y 579. (2014). A review of the various circuit court decisions before and after Santos reveals that courts are unable to determine a principled and objective standard to combat the merger problem inherent in promotional money laundering.

The repeated attempts and repeated failures of the this Court and the circuit courts to establish a workable standard to address the merger problem makes the promotional money laundering statute void for vagueness. Johnson v. United States, 576 U.S. 591, 598 (2015), United States v. L. Cohen Grocery Co., 255 U.S. 81, 91 (1921). The indeterminacy of the wide-ranging inquiry required by the promotional money laundering statute "both denies fair notice to defendants and invites arbitrary enforcement" by prosecutors and judges. Johnson, 576 U.S. at 597. The indeterminacy of the statute revolves around the Court's repeated attempts to apply the statutory phrase "with intent to promote the carrying on" of "specified unlawful activity" in a manner that avoids the merger problem.

In the present case, the vague language of the promotional money laundering statute resulted in a merging of the money laundering offense and the heroin distribution offense. Proving the conspiracy to distribute heroin automatically proves the conspiracy to launder money for the same acts. Petitioner is punished twice for the same acts. In this case, Petitioner received a four-year increase in his guideline sentencing range for the

same acts for which he was also punished under the conspiracy to distribute heroin offense. (PSR at p. 14, para 56, Sealed Appendix at 14).

History of the Merger Problem

From its inception, a "merger problem" has plagued both the concealment and promotional provisions of the money laundering statute.[5] The "merger problem" is where a defendant is punished twice for the same conduct. In other words, the same acts prove money laundering and the underlying specified unlawful activity. Santos, 553 U.S. at 514, Dickinson, 28 Notre Dame J.L. Ethics & Pub. Pol'y at 579. In cases emerging almost immediately after the passage of the Act, defendants argued prosecutors used the money laundering statute to additionally punish them for a crime for which they had been already appropriately punished. United States v. LeBlanc, 24 F.3d 340, 346 (1st Cir. 1994) (legislative history indicates that Congress designed the statute to "fill the gap in the criminal law" and intended money laundering to be a separate crime distinct from the underlying offense), United States v. Edgmon, 952 F.2d 1206,1213 (10th Cir. 1991) (Congress intended to add a new criminal offense to punish activity that was not previously punished criminally not afford an alternate means of punishing the prior "specified unlawful activity"), United States v. Stavroulakis, 952 F.2d 686 (2nd Cir. 1991) (Legislative history is "scant" but it is clear Congress intended to create a new federal crime rather than to further penalize the underlying criminal conduct), United States v. Conely, 37 F.3d 970 (3rd Cir. 1994), United States v. Heaps, 39 F.3d 479 (4th Cir. 1994) (Defendant's only crime was the sale of ecstasy, for which he was charged and convicted. Understood this way § 1956 would have such reach that it would criminalize the very same conduct already criminalized by the drug laws).

These cases and their holdings did little to prevent prosecutors from continuing to charge, and courts continuing to uphold, money laundering convictions that were the same acts as the underlying "specified unlawful activity". See Generally, John K. Villa, Banking Crimes: Fraud, Money Laundering and Embezzlement, 1 Banking Crimes § 8:23 at 3, n. 19, 20 (While some courts concurred with the view expressed by the Fourth Circuit in Heaps, most courts were not swayed by such arguments). United States v. Morris, 46 F.3d 410 (5th Cir. 1995) (delivering the proceeds of cocaine sales to the supplier supports promotional money laundering conviction).

In 2008, the Supreme Court in United States v. Santos, formally identified the "merger problem", whereby when the government proved the specified unlawful activity, they proved the money laundering offense. Santos, 553 U.S. at 518. Santos was the plurality opinion and there was no majority consensus on how to solve the merger problem. The plurality's solution to the merger problem was to define the term "proceeds" as "profits". Id. The dissent would have solved the merger problem by an amendment to the Sentencing Guidelines or limiting the government's "broad application of the 'promotion' prong of the money laundering statute" Id.at 518.

Nonetheless, the entire Court expressed the view that "merger" was a serious due process problem. Justice Scalia writing the for the plurality stated, "The Government suggests no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime." Id. Justice Stevens, concurred with that statement and went further, "Allowing the Government to treat the mere payment of expenses of operating an illegal gambling business as a separate offense

is tantamount to double jeopardy". Congress "could not have intended [this] "perverse result" Id. at 528. Emphasis added. Justice Breyer, who filed a dissenting opinion agreed that the money laundering statute resulted in a "merger problem". Breyer stated that Congress did not intend the money laundering statute to "cover financial transactions that constitute an essential part of a different underlying crime" and that the money laundering act should not be used as "a means of punishing the prior 'specified unlawful activity'". Id. at 529. Most interestingly, Justice Alito writing the dissent acknowledged that the merger of money laundering and the specified unlawful activity was a problem, "I agree that if a defendant is convicted of money laundering for doing no more than is required for a violation of [the specified unlawful activity] defendant's sentence should be no higher than it would have been if defendant only violated the latter provision." Id. at 546. Thus, while the Justices could not agree on the solution to the merger problem all nine acknowledged that merger was unjust and could not have been intended by Congress.

However, within a year of the Santos' decision, Congress effectively reversed the Santos pluralities solution to the merger problem. In the Fraud Enforcement and Recovery Act of 2009, (FERA) Congress stated that "proceeds" means "gross receipts" and not profits. 18 U.S.C. § 1956 (c)(9). FERA revived the "merger problem" the Supreme Court had attempted to solve. Congress did, however, recognize that merger remained a problem. Congress added a provision entitled "Sense of Congress" to FERA. Congress' solution to the due process merger problem was to ask the government, the entity responsible for the merger problem, to police itself.[6]. Smith v. Goguen, 415 U. S.

[6] (1) SENSE OF CONGRESS.-It is the sense of the Congress that no prosecution of an offense under section 1956 or 1957 of title 18, United States Code, should be undertaken

566, 575 (Legislatures may not abdicate to prosecutors their responsibilities for setting the standards of the criminal law). Unsurprisingly, this provision was unsuccessful in solving the merger problem. Dickinson, 28 Notre Dame J.L. Ethics & Pub. Pol'y at 582.

In the thirty-seven years since Congress passed the Money Laundering Control Act, the Supreme Court and Circuit Courts have repeatedly tried and repeatedly failed to come up with a principled and objective standard to apply to the promotional money laundering statute when a merger problem arises. Nowhere is this more evident than in promotional money laundering cases. Dickinson, 28 Notre Dame J.L. Ethics & Pub. Pol'y at 581 (merger problem applies mostly to promotional money laundering cases). Courts have consistently failed to craft an interpretation of the phrase "with the intent to promote the carrying on" of specified unlawful activity that prevents merger of the underlying unlawful conduct and the money laundering charge. Edgmon, 952 F.2d at 1213); United States v. Brown, 186 F.3d 661,669 (5th Cir. 1999); Santos, 553 U.S. at 518, 547; United States v. Jolivet, 224 F.3d 902, 909 (8th Cir. 2000); See also, Justice Manual § 9-105.330.

Of course, both before and after Santos circuit courts routinely ignored the merger problem and held transactions that were a necessary part of the underlying criminal activity were also promotional money laundering. United States v. Montoya, 945 F.2d 1068 (10th Cir.2011); United States v. Williamson, 339 F.3d 1295 (11th Cir. 2003);

---

in combination with the prosecution of any other offense, without prior approval of the Attorney General, the Deputy Attorney General, the Assistant Attorney General in charge of the Criminal Division , a Deputy Assistant attorney General in the Criminal Division or the relevant United States Attorney, if the conduct to be charged as "specified unlawful activity" in connection with the offense under section 1956 or 1957 is so closely connected with the conduct to be charged as the other offense that there is no clear delineation between the two offenses. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2, 123 Stat. 1617,1618 (2009).

United States v. Morris, 46 F.3d 410 (5th Cir. 1995); United States v. King, 169 F.3d 1035 (6th Cir.1999); United States v. Murray, 154 F. Appx. 740 (11th Cir. 2005); United States v. Iacaboni, 363 F.3d 1, 6 (1st Cir. 2004);

After Santos, this rationale is not defensible. In Santos, all nine Supreme Court judges acknowledged that merger was a serious due process issue. United States v. Halstead, 634 F.3d 270, 279 (4th Cir. 2011) ("What does remain clear from Santos is that when a merger problem arises, a judicial solution mut be found to eliminate its unfairness"). Congress also clarified that the statute should be interpreted to avoid the merger problem. FERA Pub. L. No. 111-21, §2, 123 Stat. 1617, 1618.

The Supreme Court has held that repeated attempts and repeated failures "to craft a principled and objective standard", to apply in interpreting a statute, makes a provision void for vagueness. L. Cohen Grocery Co., 255 U.S. at 91; Johnson, 576 U.S. at 2558. The Courts' failure to establish a workable standard violates due process and makes a provision unconstitutionally vague because it fails to establish minimal standards to govern law enforcement. Hoffman Estates v. Flipside, Hoffman Estates Inc., 445 U.S. 489, 494 (1982); (Kolender v. Lawson, 103 S.Ct. 1855, 1858 (1983), Smith v. Goguen, 94 S.Ct. 1242 (1974).

In the present case, Petitioner was charged with promotional money laundering and the charges against Petitioner result in a merger problem. Petitioner's convictions for Conspiracy to Distribute Heroin and Conspiracy to Distribute Cocaine automatically establish criminal liability for his money laundering offense. The money laundering conspiracy is the same act, committed in the same period as the conspiracy to distribute heroin. The two conspiracies entail identical conduct. Santos, 553 U.S. at 518 (Congress

did not intend that a transaction which is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime). After Santos, money laundering cannot merge with the underlying crime. Id. But this Court lacks an objective standard for applying the phrase "to promote the carrying on" in a manner that does not punish a defendant twice for the same conduct. Santos, Id. at 527.. The persistent failure of courts to develop a principled, objective standard to prevent the merger problem has produced "more unpredictability and arbitrariness than the Due Process Clause tolerates". Smith, 415 U.S. at 578; Johnson, 576 U.S. at 598[7].

Moreover, not only is a defendant in danger of being punished twice for the same conduct, but the provision is also void for vagueness because its nebulousness results in arbitrary enforcement. In the present case, Petitioner was charged with money laundering, but his co-defendant was not, even though their conduct in entering the heroin conspiracy was identical[8]. Kolender, 461 U.S. at 358 (where a legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep that allows prosecutors to pursue their personal predilections").

Nor does the "Sense of Congress" provision of FERA save the provision from vagueness, "Our concern for minimal guidelines finds its roots as far back as our decision in United States v. Reese, 92 U.S. 214, 221 (1876):

---

[7] It is true that there are some promotional money laundering crimes that are separate and distinct from the underlying charges. But that does not save the statute from unconstitutional vagueness. Johnson, 576 U.S. at 602 (a vague provision is not constitutional merely because there is some conduct that clearly falls within the provisions grasp).

[8] Petitioner's conduct differed from his co-defendants in that the government offered evidence Petitioner drove cash across the country. But that act was not necessary for the

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts [and the prosecutors] to step inside and say who could be rightfully detained and who should be set at large. Kolender, 461 U.S. at 361 (internal quotations omitted).
>
> The concern of our citizens for curbing criminal activity is a matter requiring attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity. Kolender, 461 U.S. at 360, n. 7

The scienter requirement of a statute does not insulates the promotional provisions from vagueness. United States v. Hussein, 351 F3d. 9, 14 (1st Cir.2003). The specific intent requirement cannot save the provision because courts continually disagree about the meaning of the phrase, "to promote the carrying on" of unlawful activity. Even the Supreme Court disagreed as to the meaning of the phrase. See Santos, at 517 (disagreeing with dissent as to the meaning of "promote the carrying on").

In its 37-year history, the phrase "to promote the carrying on" of specified unlawful activity has "created numerous splits among the lower federal courts" where is has proved "nearly impossible to apply consistently." Johnson, 576 U.S. at 601 (the residual clause has created numerous splits among lower courts and proved impossible to apply consistently). Increasing a defendant's sentence under this law denies due process. It is past time to declare the promotional money laundering provision void for vagueness. "Invoking so shapeless a provision to condemn someone to prison" for up to 20 years "does not comport with the Constitution's guarantee of due process." Id. at 602. Petitioner's conviction should be vacated, and the case remanded for resentencing.

---

conspiracy to launder money or the conspiracy to distribute heroin as both offenses were completed upon the agreement of the parties.

II. **The evidence was insufficient to convict Petitioner of money laundering. The government failed to prove that the Petitioner's specific intent in agreeing to purchase heroin was "to promote the carrying on" of heroin distribution. Petitioner's specific intent in conspiring to purchase heroin was to pay back the money he lost during a botched cocaine sale. Strict adherence to the specific intent requirement in the statute is vital so that crimes that "Congress duly considered and appropriately punished elsewhere in the criminal code" do not increase a sentence for that crime. In the present case the money laundering counts increased Petitioner's guideline sentencing range by two points.**

Argument

Standard of Review

Petitioner raises a claim of insufficiency of the evidence to support Petitioner's money laundering conviction. This Court reviews sufficiency challenges de novo. United State v. Celaya-Valenzuela, 849 F.3d 477, 487 (1st Cir. 2017). In undertaking such review this Court considers evidence in the record in the light most favorable to the verdict. United States v. Cadden, 965 F.3d 1, 10 (2020).

Argument

The promotional money laundering crime criminalizes knowingly conducting a financial transaction with the proceeds of "specified unlawful activity" with the specific intent to "promote the carrying on" of specified unlawful activity. 18 U.S.C. § 1956 (a)(1)(A)(i). The criminalized conduct must be separate and distinct from the "specified unlawful activity" that generated the money or that defendant promoted. Santos, 553 U.S. at 518 Edgmon, 952 F.2d at 1213-14, Heaps, 39 F.3d at 486, Stravroulakis, 952 F2d at 691, FERA, "Sense of Congress, Pub. L. no. 111-21, § 2, 123 Stat. 1617, 1618, Merger Issues in Money Laundering Cases, 67 DOJ J. Fed. L. & Prac. 253,259 (2019). To ensure that the underlying activity does not merge with the money laundering charge, the intent

requirement must be strictly construed. Santos, 553 U.S. 546, United States v. Brown, 186 F.3d 661, 670 (5th Cir. 1999), United States v. Miles 360 F.3d 472, 477 (5th Cir. 2004).

Strict adherence to the intent requirement means that it is not sufficient to show that the transaction has the effect of promoting the carrying on the activity, it must be the purpose of the transaction. United States v. Trejo, 610 F.3d 308, 314 (5th Cir. 2010), See Cuellar v. United States, 553 U.S. 550, 567 (2008) (the statutory text makes clear that a conviction under this provision requires proof that the purpose -- not merely effect – of the transportation was to conceal or disguise a listed attribute).

In the present case, the government's evidence showed Petitioner's purpose in agreeing to help purchase heroin was to pay back the debt Petitioner owed to Cruz for the stolen cocaine. No evidence supports the conclusion that Petitioner intended to promote the carrying on of heroin trafficking. Therefore, there was insufficient evidence to support the jury's verdict.

At the outset it is important to understand how exactly the government charged the money laundering count. The government charged that Petitioner committed a money laundering conspiracy by agreeing to knowingly using money from the sale of cocaine to purchase heroin with the intent of promoting the carrying of heroin trafficking. (D.E. at 3, No. 23, p. 14-15, Appendix at 3). The government did not charge that Petitioner agreed to purchase heroin to promote the carrying on of *cocaine trafficking*. Therefore, the government had to prove that not only did Petitioner agree to purchase heroin with funds from cocaine sales but that Petitioner's intent or purpose in agreeing to

purchase the heroin was to "promote the carrying on" of heroin trafficking. The government's own evidence clearly shows that this was not the Petitioner's intent.

None of the government's evidence supports the government's charge that Petitioner intended to promote the carrying on of heroin trafficking. All the government's evidence was aimed at showing that Petitioner agreed to purchase heroin to pay back his debt to Cruz for the stolen cocaine. (Trial Day 5 at 77, Appendix at 41), (Trial Day 5, at 83, Appendix at 42).

In fact, the government offered evidence that Petitioner's original plan to repay the debt for the stolen cocaine was to go to New Hampshire and find the people that had stolen the cocaine. (Trial Day 5 at 75-76, Appendix at 39, 40). The prosecutor, in his closing, repeatedly argued that Petitioner's intent in agreeing to the heroin distribution was to pay his debt. (Trial Day 8 at 76, 85, 89,90, 95, Appendix at 45, 47, 48, 49, 50).[9]

Strict adherence to the specific intent requirement of the promotional money laundering statute safeguards against merger. In the present case the specific intent requirement of the promotional money laundering statute requires that the government prove Petitioner agreed to conduct a financial transaction "with the intent to promote the carrying on" of heroin distribution. United States v. Trejo, 610 F.3d at 314 (it is not enough to show that a money launderer's actions resulted in promoting the carrying on of specified unlawful activity, there must be evidence of intentional promotion), United States v. Brown, 186 F.3d at 670, ("This element is not satisfied by mere evidence of

[9] The government offered evidence to show that Cruz' intent in purchasing the heroin was partly to carry on his cocaine distribution and partly to avoid getting killed by the Mexican cartel. (Trial Day 5 at 72, Appendix at 38). At most this evidence shows that Cruz's intent to carry on cocaine distribution, but it does not prove that Petitioner's purpose in agreeing to purchase heroin intent to "promote the carrying on" of heroin trafficking.

promotion, or even knowing promotion, but requires evidence of intentional promotion."), United States v. Miles 360 F.3d at 477 (To satisfy this scienter requirement, the government must present direct proof of intent to promote the carrying on of the specified unlawful activity). The government must prove that Petitioner's purpose in agreeing to purchase heroin was to promote the carrying on of heroin trafficking. In the present case, the government did not present any evidence, much less direct proof, that Petitioner agreed to purchase the heroin with the purpose or "with the intent" of promoting the carrying on of heroin trafficking. See Cuellar, 553 U.S. at 565 ("Congress intended courts to apply the familiar criminal law concepts of purpose and intent" to the money laundering statute). The government's proof showed that Petitioner's intent in agreeing to the conspiracy was to repay his cocaine debt. (Trial day 5, at 77, 83, 86, Appendix at 41, 42, 43). The government's proof shows that Petitioner "did not engage in it [purchasing heroin] *with the intent* to further the progress of" heroin distribution. Trejo, 610 F.3d at 314. [10]

The First Circuit held that Petitioner agreed to use the proceeds of cocaine sales to purchase and sell heroin, and this is sufficient to prove Petitioner intended "to promote the carrying on" of heroin trafficking. Cardona, Nos 22-1415, 14-16 at 18-19. But this is the very definition of the "merger problem" identified in Santos, whereby the underlying crimes and the money laundering crime merge, and a conspiracy to distribute heroin becomes a money laundering conspiracy without any additional conduct. "The Government suggests no explanation for why Congress would have wanted a transaction

[10] The Supreme Court has, likewise, strictly interpreted the mens rea requirement of the concealment provision of the money laundering statute, The Court interpreted "knowing such transportation is designed" to "require proof that the purpose—not merely effect—

that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime." Santos 553 U.S. at 518.[11]

Strict adherence to the specific intent requirement ensures "that the money laundering will punish conduct that is really distinct from the underlying specified unlawful activity and will not simply provide overzealous prosecutor with a means of imposing additional criminal liability". Brown, 186 F.3d at 670. In the present case, Petitioner was duly punished for both the conspiracy to distribute cocaine and the conspiracy to distribute heroin. There was absolutely no evidence from which the jury could infer that Petitioner's aim, intent or purpose in agreeing to purchase heroin was to promote continued heroin trafficking. United States v. Adam, 625 F.3d 371 (7th Cir. 2010) (no evidence that defendant appreciated that the purpose of his act was to promote the continued marijuana trafficking).

---

of the transportation was to conceal or disguise a listed attribute". (emphasis added) Cuellar, 553 U.S. at 567.

[11] Even prior to Santos some courts held that the first purchase of drugs could not be financial transaction which promoted the carrying on of that drug distribution. "Were the payment for drugs itself held to be a transaction that promoted the unlawful activity of that same transaction virtually every sale of drugs would be an automatic money laundering violation as soon as money changed hands." Heaps, 39 F.3d at 484.

III. The district court committed plain error when it instructed the jury on the incorrect scienter requirement for conspiracy to commit money laundering, as well as failing to instruct the jury as to which drug conspiracy the prosecution alleged Petitioner intend to promote.

Standard of Review

Petitioner alleges that the court gave an erroneous instruction on the scienter requirement for conspiracy to commit money laundering. Trial counsel did not object to the instruction, so this Court reviews the claim for plain error. United States v. Baldyga, 233 F.3d 647,681 (1st Cir. 2000). To justify relief under this standard there must be 1) error 2) the error must be plain 3) it must affect substantial rights and 4) seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings. United States v. Olano, 507 U.S. 725, 732 (1993).

Argument

The promotional and concealment provisions of money laundering statute require different mens rea. Compare 18 U.S.C. § 1956 (a)(1)(A)(i) with 18 U.S.C. § 1956 ((a)(1)(B)(i). The district court, when instructing the jury on promotional money laundering, erroneously combined the two statutory provisions. The court instructed the jury on a lower mens rea requirement for concealment money laundering rather than the higher mens rea required for promotional money laundering. United States v. Bailey, 444 U.S. 394, 405-06 (1980). This was prejudicial because if the jury had been correctly instructed on the higher mens rea they might not have convicted Petitioner of money laundering. United States v. Baldyga, 233 F.3d 674, 682 (1st Cir. 2000). Moreover, the prosecution exacerbated the prejudicial jury instruction by appearing to argue in his opening and closing that Petitioner committed concealment money laundering.

The money laundering statute sets out among other provisions, a promotional and a concealment money laundering crime. Both provisions begin by stating:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of a specified unlawful activity—

However, the promotional money laundering provision requires that a defendant conduct or attempt to conduct the financial transaction:

> (A)(i) with the intent to promote the carrying on of specified unlawful activity.

The concealment provisions requires that a defendant conduct or attempt to conduct the financial transaction:

> (B) knowing that the transaction is designed in whole or in part-
> (i) to conceal or disguise the nature, the location, the source, the ownership, of the control of the proceeds of specified unlawful activity.

In the present case, the court, in instructing the jury, combined the two provisions. The court stated that the jury could convict Petitioner if they found "that the defendant knew the transaction to be either designed in whole or in part to promote the carrying on of a conspiracy to distribute and possess with intent to distribute a controlled substance." (Trial Day 8 at p. 166, Appendix at 53). This was error. It was an incorrect jury instruction on an element of the offense. Baldyga, 233 F.3d at 682. (Omitting an element of the offense is error). It was plain because the statute requires greater scienter for promotional money laundering than for concealment money laundering. United States v. Olano, 507 U.S. 734. (An error is plain when it is clear or obvious.), United States v. Morosco, 822 F.3d 1, 19-20 (1st Cir. 2016) (So important is this concept that we will usually read criminal statutes as implicitly requiring proof of mens rea even when they do not have an explicit mens rea component written into them).

The error was prejudicial. Baldyga, 233 F.3d at 682 (An error is prejudicial when it could have affected the outcome of the trial). Here the court's jury instruction required the jury to find a lower level of mens rea than the statute demanded. Bailey, 444 U.S. at 405-06 ("purpose" corresponds with the common-law concept of specific intent, while "knowledge" corresponds with the concept of general intent), Trejo, 610 F.3d at 314 ("the government may not rest on proof that the defendant engaged in "knowing promotion" of unlawful activity".) The statute demanded that Petitioner conduct[12] a financial transaction with the intent to promote the carrying on of the heroin distribution. Here the court instructed the jury that Petitioner was guilty of money laundering if he knew the transaction was designed in whole or in part to promote the carrying on the heroin conspiracy. This lower mens rea level was the difference between guilt and innocence. Ruan v. United States, 142 S.Ct. 2370, 2377 (2022) (mens rea separates wrongful conduct from otherwise innocent conduct). The jury could have easily convicted Petitioner without making the proper factual finding that Petitioner agreed to conduct a financial transaction with the intent to promote the carrying on of heroin trafficking. Here the record was replete with evidence that Petitioner agreed to conduct a financial transaction with the intent to pay back his debt for the cocaine that was stolen and not with the intent to promote the carrying on of heroin trafficking. Baldyga, 233 F.3d at 682 (where the record contains evidence that could rationally lead to a contrary finding the defendant has met his burden of proof.), Brown, 186 F.3d at 670 (strict

[12] Petitioner was charged with conspiracy to commit money laundering. The government had to prove he agreed to conduct a financial transaction, not that he conducted or attempted to conduct a financial transaction. (D.E. at 3, No. 23 Appendix at 3)

adherence to the specific intent requirement is necessary to ensure that money laundering does not merge with the underlying crimes).[13]

Moreover, the court's error in instructing the jury seriously affects the fairness, integrity, or public reputation of judicial proceedings. Olano, 507 U.S. at 732. The court's erroneous instruction, using a lower level mens rea than the statute required, almost certainly led the jury to convict Petitioner of a crime he did not commit. Ruan, 142 S.Ct at 2377 (when court interprets criminal statutes, the court "start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state). Therefore, the district court plainly erred in instructing the jury and defendant's conviction should be vacated and the case should be remanded for resentencing. United States v. Delgado-Marrero, 744 F.3d 167, 188–89 (1st Cir. 2014).

[13] The court's instructional error is compounded by the government's opening and closing arguments which also confused concealment money laundering with promotional money laundering. The government argued that the act of driving cash to California in a concealed compartment was money laundering. (Trial Day 2 at 10, Trial Day 8 at 76, Appendix at 45). This argument is error on multiple levels. Petitioner was not charged with concealment money laundering. Moreover, driving cash in a concealed compartment is not concealment money laundering. Cuellar, 553 U.S. at 568 (concealment provision of the money laundering statute "cannot be satisfied solely by evidence that a defendant concealed the funds during their transportation."), United States v. King, 169 F.3d 1035,140 (6th Cir.1999) (merely transporting cash does not meet the definition of 'financial transaction' for the purpose of the money laundering statute), United States v. Puig-Infante, 19 F.3d 929, 938 (5th Cir. 1994) (mere subsequent transportation of proceeds by car does not constitute a "financial transaction" within the meaning of the statute).

IV. Whether Appellant's conviction on Counts One and Two, both charging him under 21 U.S.C. § 846 with conspiracy to possess with intent to distribute controlled substances, constitutes multiple punishment for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

Argument

In the Court of Appeals Petitioner joined his co-defendant's multiplicity issue. United States v. Lara, 970 F.3d 68, 74 (1st Cir. 2020) (a defendant may join a co-defendant's issue by raising it in his reply brief). In this petition, Petitioner reproduces and adopts the co-defendant's Raphael Cardona's arguments.

Standard of Review

This Court should conclude, consistent with its prior decisions, that the failure to raise such issues results in forfeiture, not waiver, and that Petitioner is entitled to plain error review.

The Court of Appeals concluded that the issue of multiplicity was waived, because "a legal argument that is untimely under Rule 12(b)(3) and (c)(3) 'cannot be raised on appeal absent a showing of good cause'". Cardona, slip op. p. 10.[14]

This Court has said that the error in a multiplicitious conviction affects the defendant's substantial rights, such that it meets the plain error standard. See Rutledge v. United States, 517 U.S. 292, 302 (1996); Ball v. United States, 470 U.S. 856 (1985). Rule 12, contrary to the First Circuit's decision, as presently written, says nothing about the extinguishment of appellate right to review. Rule 12 states that a pretrial motion is

[14] Prior to 2014, Fed. R. Crim. P. Rule 12 (e) provided: "Any party waives any Rule 12 (b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12 (c) or by any extension the court provides. For good cause, the court may grant relief from the waiver." After the amendments, Rule 12(c)(3) provides: If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion in untimely. But a court may consider the defense, objection, or request if the party shows good cause."

untimely if it does not meet the deadline set by the district court. It says nothing about usurping or altering, Rule 52(b)'s standard of review. This Court in Olano, clearly stated that "Federal Rule of Criminal Procedure 52 (b), which governs on appeal from criminal proceedings, provides a court of appeals a limited power to correct errors that were forfeited because *not timely raised* in district court". Olano, 507 U.S. at 731 (emphasis added). Olano also explained the difference between an error that had been forfeited and one that had been waived. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right.". Olano, 507 U.S. at 733. Petitioner forfeited his multiplicity issue by failing to raise it in district court. This unpreserved error is reviewable for plain error.

Argument

Petitioner's conviction on counts one and two were multiplicitous in violation of the Double Jeopardy clause of the Fifth Amendment.

The Petitioner adopts his co-defendant's point raised below.

The Double Jeopardy clause of the Fifth Amendment prohibits the government from charging a single offense in two separate counts. An indictment containing such charges is multiplicitous, leading to more than one conviction for the same crime. See, United States v. King, 554 F.3d 177 (1st Cir. 2009); United States v. Ansaldi, 372 F.3d 118 (2d. Cir.2004). Here, the government split the overarching drug conspiracy in two, charging Petitioner with cocaine conspiracy in count one and heroin conspiracy in Count Two. One must be vacated.

Under the plain error standard, the Petitioner must show four things: "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the

defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." United States v. Duarte, 246 F.3d 56 (1st Cir. 2001). The error here is plain and obvious, based on the charges in the Indictment and the evidence presented to the jury at trial, for the reasons explained below. This Court has recognized that multiplicitous convictions meet the third and fourth prongs of the plain error standard even when the defendant is ordered to serve consecutive sentences on multiplicitous counts of conviction. King, 554 F.3d at 181, citing, Rutledge v. United States, 517 U.S. 292 (1996); Ball v. United States, 470 U.S. 856 (1985). That is because the additional $100 mandatory special assessment and the additional count of conviction, with the collateral consequences it brings, establish prejudice to the defendant and a miscarriage of justice.

The central element of the crime of conspiracy is the existence of an unlawful agreement. A single conspiracy to commit multiple offenses is properly charged in one count, because "the conspiracy is the crime, and that is one, however diverse its objects." Braverman v. United States, 317 U.S. 49 (1942), quoting, Frohwerk v. United States, 249 U.S. 204, 210 (1919). Drug conspiracy charges brought under 21 U.S.C. § 846 require a more detailed analysis of the evidence than in other conspiracy cases, because § 846 does not require proof of an overt act. Marable, 578 F.3d 151, 153- 154 (5th Cir. 1978).

The involvement of two or more controlled substances in a single drug conspiracy does not establish the existence of two separate conspiracies. Marable, supra (reversing cocaine conspiracy conviction because earlier heroin conspiracy conviction was based on single agreement). Indeed, dual-object and multiple-object drug conspiracies are common. See, e.g., United States v. Cruz-Rodriguez, 541 F.3d 19 (1st Cir. 2008); United

States v. Pierre, 484 F.3d 75 (1st Cir. 2007) (conspiracy to distribute cocaine and crack cocaine); United States v. Reed, 7 F.4th 105 (2d Cir. 2021); United States v. Taylor, 982 F.3d 1295 (11th Cir. 2020).

The question that must be answered is whether there was one single conspiracy to distribute drugs, or multiple distinct and separate agreements: one to distribute cocaine and the other to distribute heroin. Five factors guide this Court's analysis in answering that question: (1) the time during which the activities occurred; (2) the persons involved; (3) the places involved; and (4) whether the same evidence was used to prove the two conspiracies; and (5) whether the same statutory provision was involved in both conspiracies. See, United States v. Laguna-Estela, 394 F.3d 54 (1st Cir. 2005). In this case, all five factors support a finding of a single conspiracy.

Timeframe: August - September, 2016

While Cruz's cocaine sales dated back to 2015, the majority of the evidence was about events that occurred between August and September, 2016. 8 See, Marable, at 152 (major events proven at heroin trial were also central to government's case at cocaine conspiracy trial). This is not a situation where there were two distinct conspiracies that began on different dates and ended on different dates with a relatively brief overlap. See, e.g., United State v. Perez, 967 F.3d 53 (1st Cir. 2020) (six-month overlap at most over a fourteen year period); United States v. Collazo-Aponte, 216 F.3d 163 (1st Cir. 2000) (drug conspiracy from 1988-1993 was separate from drug conspiracy from 1992-1995, with different large groups of participants).

The initial cocaine sale to Petitioner from Cruz's third shipment was on August 2. Approximately two weeks later, Petitioner agreed to Cruz's plan to buy heroin in

California. Petitioner's trip to California for the planned purchase of heroin took place between August 20 and August 23.[15] Rafael's subsequent agreement to purchase a kilo of cocaine at a later time (when Cruz was able to sell it cheaply), occurred on August 24. Cruz's own trip to California to buy heroin followed. Finally, Rafael and Petitioner discussed efforts to track down the Juke occurred in September after Cruz's arrest.

Cruz testified to only one overt act outside of the August – September, 2016 timeframe, which was that Rafael had vouched for Cruz's ability to sell drugs during a conversation with the Doctor and Jesse.

Common Participants Indicate One Overarching Conspiracy

Cruz testified that he had brought both cocaine and heroin into Massachusetts. The charges against Rafael and Petitioner related to both substances. While there were three other defendants charged in one count or the other, the vast majority of the evidence presented to jury focused on Cruz, Petitioner, and Rafael. Compare, United States v. Diaz-Rosado, 857 F.3d 89 (1st Cir. 2018) (defendant properly charged in two separate drug conspiracies based on two 1,000+ kilo shipments of cocaine one month apart, where there were no high-level common participants in both cases).

The Same Places and Modus Operandi Were Involved in Counts One and Two

Cruz was brining cocaine and heroin to Massachusetts from Mexico, by way of California, using the Juke to transport both substances. The conspiracy to distribute both substances involved the same locations. Though Cruz testified that he had one set of

[15] The cocaine conspiracy charged in Count One was alleged to have begun "at a time unknown. . . but "at least in or about 2015." but the evidence did not specify at what point in 2015 it had begun. The conspiracy charged in Count Two was alleged to have begun "from a time unknown. . . but" "at least in August 2016). Cruz testified that before the meeting at Ori's house, he had trafficked in heroin twice, but his testimony provided no clue as to the timeframe for his earlier heroin transactions.

suppliers for heroin and another for cocaine, he also testified that he had arranged with Jose, his heroin supplier, for the sale of kilos of cocaine to Jemelo.

Both Conspiracies Were Charged Under the Same Statute

Counts One and Two both charged the defendants with conspiracy, under 21 U.S.C. § 846, to violate 21 U.S.C. § 841(a). Though Count One specified that cocaine was the controlled substance and Count Two specified that heroin was the controlled substance, the specific nature of the controlled substance is not generally an element of the offense of conspiracy.

The Evidence Regarding Cocaine and Heroin Was Inextricably Intertwined

The agreements to distribute cocaine and heroin were inextricably tied together in this case: heroin was to be purchased for sale to recover money lost in a cocaine sale. The testimony of David Cruz was critical to establishing Petitioner's agreement to be part of his drug conspiracy, both regarding the kilo of cocaine that Petitioner purchased on August 2nd and regarding the California heroin plan. When co-defendant Rafael claimed that his request for a kilo was "separate" from Petitioner's dealings, Cruz explained why they were not separate: because Petitioner's debt had to be recovered (through the heroin purchase) before Cruz could sell kilo quantities of cocaine again.

Cruz's testimony regarding the meeting at Ori's house provides further support for the conclusion that there was a single, overarching agreement. He testified that Rafael's agreement was important to him, but that Rafael did not say anything at that meeting. This supports the conclusion of a single conspiracy to distribute drugs; Rafael did not need to say anything, because the California plan was part of an ongoing conspiracy.

The government's law enforcement witnesses also offered testimony regarding both heroin and cocaine. The government's first witness, Westfield Police Detective Carey McKenzie testified about drug pricing and code language, pertaining to both heroin and cocaine. Scott Smith, the government's second witness, testified regarding the August 2, 2016, surveillance of the Juke and Cruz's cocaine sale to Petitioner. He also testified regarding the many recorded calls between and among Rafael, Petitioner and David Cruz, about Cruz's arrest on September 12, which was based on both the cocaine and heroin discussions.

Viewing the evidence presented to the jury on Counts One and Two as a whole, in light of the Laguna-Estela factors, the evidence supported the existence of one conspiracy to distribute drugs, including both cocaine and heroin. Petitioner's conviction on two counts was multiplicitous, and one count of conviction must be vacated.

CONCLUSION

For the above reasons, this Court should grant the Petition for a Writ of Certiorari.

Dated at Portland, Maine this 14th day of February 2024.

___/s/Jane E. Lee____

Attorney for Petitioner
Jane Elizabeth Lee
44 Exchange Street
Suite 201
Portland, Maine 04101