IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 2023

DAVID MARTINS,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

Whether, in a 21 U.S.C. § 841(a)(1) prosecution, the knowingly mens rea contained in section 841(a)(1) also requires the government to prove that the defendant knew the drug type and quantity named in the indictment when drug type and quantity provides the basis for a USSG § 5K2.1 "death resulting" upward departure.

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Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 31, 2024.

JURISDICTION AND CITATION OF OPINION BELOW

On July 31, 2024, the Ninth Circuit affirmed Petitioner's conviction in an unpublished memorandum opinion, attached as Exhibit "A" in the Appendix to this petition. This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISION

Title 21 U.S.C. § 841 is included as Exhibit "B" in the Appendix.

STATEMENT OF THE CASE

In June 2019, Petitioner was at the gym working out with N.A.R., a close friend of his and a fellow veteran. While at the gym, Petitioner exchanged text messages with his off-and-on girlfriend, Karla Rodriguez. Ms. Rodriguez, who was in Mexico at the time, asked Petitioner if he wanted her to get him some "blue pills," meaning M-30 oxycodone pills. Petitioner responded in the affirmative. Petitioner told N.A.R. about what was happening, and N.A.R. requested that Petitioner give him a few of the pills to address a back injury.

A few hours later, Ms. Rodriguez came to a motel room which Petitioner had rented with 48 oxycodone pills. She gave Petitioner ten of the pills, and Petitioner texted a photo of the pills to N.A.R. N.A.R. responded that he wanted three. Subsequently, N.A.R. drove to the motel and Petitioner gave him three pills.

No money was exchanged or expected to be paid at a later time, Petitioner simply gave him the pills.

The following morning, N.A.R. was found deceased inside his room at a San Diego VA center. Police found two of the three blue pills in his room. The subsequent investigation revealed that the pills which Ms. Rodriguez had provided to Petitioner, and which he in turn gave to N.A.R., contained fentanyl. The medical examiner opined that N.A.R.'s death had been accidental, with the primary cause of death being the toxic effects of fentanyl, and with hypertensive cardiovascular disease as an independent contributing cause.

In an indictment returned in November 2019, Petitioner and Ms. Rodriguez were each charged with distribution of a substance containing a detectable amount of fentanyl, in violation of 21 U.S.C. § 841(a)(1). [ER 3].[1] The government did not charge either defendant with the "death results" enhancement under section 841(b)(1)(C). Id.

In lieu of a jury trial, both defendants and the government elected to proceed by way of a stipulated facts bench trial on the distribution charges. At that proceeding, the following stipulation was read into the record as the facts to be

[1] "ER" refers to Appellant's excerpts of record filed in the Ninth Circuit Court of Appeals.

considered by the district court in rendering its verdict:

> One, on June 21st, 2019, Defendant Karla Patricia Rodriguez drove to a motel located at 710 E Street in Chula Vista, California – hereinafter – the motel – within the Southern District of California.
>
> At the time Rodriguez arrived at the motel, she knowingly possessed approximately 48 blue pills that were stamped with an M – the letter M, inside a box on one side; and the number 30 – three, zero – on the other side. Hereinafter, the blue pills.
>
> Two, Rodriguez met Defendant David Elias Martins when she arrived at the motel. After meeting Martins, Rodriguez knowingly delivered ten of the blue pills in her possession to Martins. At the time she delivered the pills to Martins, Rodriguez knew the blue pills contained a federally controlled substance.
>
> Three, upon receiving the ten – ten of the blue pills from Rodriguez, Martins took a photograph of the ten blue pills and texted them to [the victim], identified by his initials in the stipulation, N.A.R.
>
> In addition to the photograph, Martins offered [N.A.R.] some of the blue pills. Martins provided [N.A.R.] the address of the motel via text message, so that [N.A.R.] could come pick up three of the blue pills from Martins.
>
> [N.A.R.] arrived at the motel at approximately 9:00 p.m. on June 21st, 2019. Martins knowingly delivered three of the blue pills to [N.A.R] , after [N.A.R.] arrived at the motel. At the time . . . Martins, excuse me, delivered three of the blue pills to [N.A.R.], Martins knew the blue pills contained a federally controlled substance.

> The 48 blue pills possessed by Rodriguez on June 21st, 2019 – including both the ten blue pills that Rodriguez delivered to Martins and the three pills that Martins subsequently delivered to [N.A.R.] – each contained a substance commonly known as fentanyl.
>
> So stipulated and agreed.

[ER 21-22].

At the conclusion of the bench trial, Petitioner presented a Fed. R. Crim. Pro. 29 motion for a judgment of acquittal on the ground that the government failed to prove that he knew the pills contained a detectable amount of fentanyl, the drug type and quantity named in the indictment. [ER 23-24]. Finding that knowledge of drug type and quantity were not elements of the offense, the district court denied this motion and entered guilty verdicts as to each defendant. Id.

At sentencing, the government did not argue that Petitioner knew that the three oxycodone pills which he gave to N.A.R. contained fentanyl. Instead, the government asserted that it was foreseeable that the pills could be poisoned with another substance which could prove to be fatal, and that the district court should account for the death with a 25-level upward departure pursuant to USSG § 5K2.1 on that basis. The district court departed upward 25 levels as recommended, and ultimately sentenced Petitioner to 72 months in custody.

On appeal, Petitioner raised, among other claims, the argument that the

government was required to prove that Petitioner was aware of the drug type and quantity involved in the offense. Petitioner also acknowledged, however, that the Ninth Circuit's en banc decision in United States v. Collazo, 984 F.3d 1308 (9th Cir. 2021) (en banc), foreclosed the argument that the district court erred in ruling that Petitioner's knowledge of drug type and quantity was not an element of the offense required to be proven at trial. The Ninth Circuit denied relief on all claims. [Appx. Ex. "A"].

ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER THE GOVERNMENT MUST PROVE A DEFENDANT'S KNOWLEDGE OF DRUG TYPE AND QUANTITY IN A 21 U.S.C. § 841(a)(1) PROSECUTION WHEN THE DRUG TYPE AND QUANTITY PROVIDES THE BASIS FOR A USSG § 5K2.1 GUIDELINES ENHANCEMENT

21 U.S.C. § 841(a)(1) criminalizes conduct with respect to various controlled substances and quantities, with section 841(b)(1) providing the corresponding penalties. Specifically, subsection 841(a)(1) provides that "it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance." For cases charged only under section 841(a)(1), the maximum penalty for offenses involving Schedule I and II substances is up to twenty years in prison, and no mandatory minimum penalty is attached. See 21 U.S.C. § 841(b)(1)(C). When a section 841(a)(1) offense for a schedule I or II substance also is charged under sections 841(b)(1)(A)-(C), mandatory minimum or higher maximum sentences apply. See 21 U.S.C. §§ 841(b)(1)(A)-(C).

In the 1980s, the Court drew a distinction between "elements" and "sentencing factors," finding that the former defined the crime. See McMillan v. Pennsylvania, 477 U.S. 79, 85-86 (1986) (examining crime of visibly possessing a firearm). Under McMillan, section 841's drug type and quantity provisions were

considered sentencing factors, not elements. See, e.g., United States v. Gibbs, 813 F.2d 596, 599 (3d Cir. 1987); United States v. Powell, 886 F.2d 81, 85 (4th Cir. 1989); United States v. Wood, 834 F.2d 1382, 1390 (8th Cir. 1987).

Beginning with Apprendi v. New Jersey, 530 U.S. 466 (2000), however, the Court changed its view by holding that all facts which increase the maximum penalty in an offense must be proved to a jury beyond a reasonable doubt. Apprendi, 530 U.S. at 490. The Court expanded that holding in Alleyne v. United States, 570 U.S. 99 (2013), concluding that "[a]ny fact that, by law, increases the penalty for a crime is an 'element'" subject to Sixth Amendment protections. Alleyne, 570 U.S. at 103. Under Apprendi and Alleyne, therefore, the facts set forth in section 841(b) are elements of an aggravated drug offense. See Burrage v. United States, 571 U.S. 204, 209-10 (2014) (holding that section 841(b)(1)(C) "death results" enhancement is an element).

Following Apprendi and Alleyne, in the context of section 841(a)(1), some court of appeals judges concluded that a "knowing" mens rea should attach to those elements. Sixth and Ninth Circuit panels divided on the issue, leading to separate opinions. See United States v. Jefferson, 791 F.3d 1013, 1019 (9th Cir. 2015) (Fletcher, J., concurring); United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014) (Merritt, J., dissenting). Several courts of appeals, however, deemed Apprendi

and Alleyne "inapposite" to the mens rea question. See, e.g., United States v. Gamez-Gonzalez, 319 F.3d 695, 700 (5th Cir. 2003); see also United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003) (collecting cases). These circuits either joined or reaffirmed the "reasoning of pre-*Apprendi* federal appellate authority." United States v. Barbosa, 271 F.3d 438, 459 (3d Cir. 2001).

This mens rea issue resurfaced following the Court's decision in Rehaif v. United States, 588 U.S. 225 (2019). Rehaif found that almost every court of appeals in the nation had misapplied the presumption of mens rea to a statute prohibiting certain persons from possessing firearms. Using the correct application, the Court held that the "knowingly" mens rea in 18 U.S.C. § 924(a)(2) extended to the prohibited status elements in 18 U.S.C. § 922(g). Id. at 2195-99. Like the drug type and quantity cases, Rehaif concerned whether "knowingly" applied to elements in two separate provisions, even though only one included an express mens rea. Id. at 2194.

It was within this framework that the Ninth Circuit addressed the instant question, en banc, in United States v. Collazo, 984 F.3d 1308 (9th Cir. 2021) (en banc). The Collazo majority found that mens rea presumptively applies only to "the statutory elements that criminalize otherwise innocent conduct." Id. at 1324 (quoting Rehaif, 588 U.S. at 232). Furthermore, in the majority's view, the presumption of

mens rea applies less forcefully when the "element" was only recognized as such "to save the statute from unconstitutionality." Id. at 1322 (simplified). The majority believed that drug type and quantity should be "treat[ed] ... as elements under section 841(b)(l) only for these constitutional purposes," but not when applying the presumption of mens rea. Id. at 1322 (emphasis added). "[W]here a statute includes a[n] [express] mens rea requirement," as § 841(a) does, the interpreting court need not assess "whether Congress intended to dispense with a mens rea requirement entirely." Id. at 1324. Rather, "the only question is 'how far into the statute' the express mens rea 'extends.'" Id.; Collazo, 984 F.3d at 1324 & n.17. The majority in Collazo declined to extend the mens rea to section 841(b)(1), holding that no intent requirement applies to drug types and quantities under section 841 and the government must prove beyond a reasonable doubt only the specific type and the quantity of substance "involved in the offense." Id. at 1329.

In a dissent by Judge Fletcher joined by four other judges, Judge Fletcher wrote that "[t]his should be an easy case. The structure of § 841 is clear and straightforward." Id. at 1341. The dissent opined that a plain reading alone "indicates that Congress intended to require the government to prove knowledge or intent with respect to the controlled substances and quantities specified [in section 841(b)]," and that the application of the presumption applies with "particular force,

given the severity of the penalties." Id. Among other criticisms of the majority reasoning, the dissent argued that the Court "has never held that the presumption of mens rea protects only the entirely innocent." Id. at 1343.

A. The Government Was Required to Prove Petitioner's Knowledge of the Charged Drug Type and Quantity For the District Court to Utilize Those Facts at Sentencing

When interpreting criminal statutes, courts "begin with a general presumption that the specified mens rea applies to all the elements of an offense." Flores-Figueroa v. United States, 556 U.S. 646, 660 (2009) (Alito, J., concurring). The Court illustrated this presumption in interpreting 18 U.S.C. § 922(g), which prohibits "knowing[ ]" firearms possession by certain classes of people. See Rehaif, 588 U.S. at 231-32. Finding no reason to believe that "Congress sought to depart from the normal presumption in favor of scienter," id. at 232, the Court in Rehaif applied the "knowingly" mens rea to section 922(g)'s unlawful status element, in addition to its firearms possession element. Id. at 232-37.

Similar to section 922(g), the distribution statute under which Petitioner was convicted prohibits "knowingly or intentionally" distributing a controlled substance. 21 U.S.C. § 841(a)(1). Because the punishment for the offense varies based on the type and quantity of the "controlled substance" involved, see 21 U.S.C.

§ 841(b)(1), drug type and quantity under section 841(a)(1) therefore is an element of the offense that the government must prove to a jury beyond a reasonable doubt. See Apprendi, 530 U.S. at 490 (holding that all facts increasing the maximum penalty must be proved to a jury beyond a reasonable doubt).

In declining to find that the government must prove beyond a reasonable doubt that a defendant also knew the type and quantity of drugs involved in an offense, the Ninth Circuit erred in multiple respects. First, Collazo improperly attempts to determine congressional intent from the court-created distinction between elements and sentencing factors. As the Ninth Circuit recognized in upholding section 841 following Apprendi, there is no evidence – textual or historical – that Congress intended section 841(b) to contain "sentencing factors" in the meaning of the Supreme Court's pre-Apprendi case law. See United States v. Buckland, 289 F.3d 558, 565–67 (9th Cir. 2002). Even if the penalty provisions of sections 841(b) are "elements" only due to Apprendi, at least three justices of the Court have cast doubt on the notion that Apprendi elements should be treated differently from any other element. See United States v. Burwell, 690 F.3d 500, 540 n.13 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting); United States v. O'Brien, 560 U.S. 218, 241 (2010) (Thomas, J., concurring); Dean v. United States, 556 U.S. 568, 580–82 (2009) (Stevens, J., dissenting).

Second, the Ninth Circuit erred in limiting the presumption of scienter to applications that distinguish blameworthy from "entirely innocent" conduct. Collazo, 984 F.3d at 1327 (quoting Rehaif, 588 U.S. at 232). Though scienter performed that function on the particular facts of Rehaif, the Court elsewhere described the presumption of scienter in broader terms. See, e.g., Rehaif, 588 U.S. at 229 (describing the presumption as requiring "the degree of knowledge sufficient to 'mak[e] a person legally responsible for the consequences of his or her act or omission'"). In particular, the Court quoted with approval the Model Penal Code provision stating that where Congress specifies an offense's mens rea, that mens rea should presumptively apply to "all the material elements of the offense," which would include drug type and quantity in sections 841(b). Id. (quoting ALI, Model Penal Code § 2.02(4) (1985)).

In Flores-Figueroa, 556 U.S. at 646-48, the Court considered whether an aggravated form of identity theft required knowledge that a fake identification belonged to a real person. The government argued that no mens rea should apply, as anyone using a fake ID could hardly be considered innocent. The Court disagreed, concluding that section 1028(A) requires the government to show that the defendant knew that the means of identification at issue belonged to another person. Flores-Figueroa therefore reveals that the Collazo majority's view was based on a

mistaken interpretation of the Court's precedent. While the Court certainly has considered that the presumption helps distinguish culpable from innocent conduct, it has never limited the presumption only to that application. Then-Judge Kavanaugh's dissent from Burwell helps explain the Collazo majority's error.

Like the Collazo majority, the majority in Burwell believed that the presumption applies only to elements that distinguish innocent from culpable conduct. Id. at 506-07. It held that defendants are strictly liable for the facts supporting a machinegun enhancement under 18 U.S.C. § 924(c). Id. at 503-04. Then-Judge Kavanaugh disagreed, id. at 528 (Kavanaugh, J., dissenting), asserting that the presumption extends "both when necessary to avoid criminalizing apparently innocent conduct (when the defendant would be innocent if the facts were as the defendant believed) and when necessary to avoid convicting the defendant of a more serious offense for apparently less serious criminal conduct (that is, when the defendant would receive a less serious criminal sanction if the facts were as the defendant believed)." Id. at 529. On that view, aggravated offense elements—like the machine gun enhancement in § 924(c) and the drug type and quantity elements in section 841(b) —are presumed to carry some mens rea.

For both the Collazo dissent and the Burwell dissent, the enhancements' severe consequences reinforce that interpretation. Collazo, 984 F.3d at 1338

(Fletcher, J., dissenting); Burwell, 690 F.3d at 547-48 (Kavanaugh, J., dissenting). The harsh penalties contained in section 841 favor applying "normal scienter principles" to different portions of the statute. Ruan v. United States, 142 S. Ct. 2370, 2380 (2022). And the penalties need not be extreme to trigger a presumption of mens rea, as the Court has deemed statutory maximums between one and ten years to disrupt any inference of strict liability. See Staples v. United States, 511 U.S. 600, 616 (1994); United States v. U.S. Gypsum Co., 438 U.S. 422, 442 n.18 (1978); Morissette v. United States, 342 U.S. 246, 248 n.2 & 260 (1952). Nonetheless, the penalty difference between degrees of aggravation can be far more dramatic, like the mandatory minimum sentences at issue in Collazo and Burwell. 18 U.S.C. § 924(c); 21 U.S.C. § 841(b). "[I]t would be illogical in the extreme to apply the presumption of mens rea to an element of the offense that would, say, increase the defendant's punishment from no prison time to a term of 2 years in prison, but not to apply the presumption of mens rea to an element of the offense that would aggravate the defendant's crime and increase the punishment from 10 years to 30 years." Burwell, 690 F.3d at 529 (Kavanaugh, J., dissenting).

The Court also has distinguished the Controlled Substances Act from "criminal" statutes, noting that it is a "quintessentially economic" statutory scheme and that "most" of the substances covered "have a useful and legitimate medical

purpose and are necessary to maintain the health and general welfare of the American people." Gonzalez v. Raich, 545 U.S. 1, 23–24 (2005). For that reason, the Act touches conduct that is not inherently blameworthy. Innocent mistakes concerning whether a substance is scheduled, or understandable confusion arising from state-level legalization of substances like marijuana, can give rise to liability under section 841(a)(1). In short, conduct related to a controlled substance is no less "innocent" than taking another's bomb casings, see Morissette, 342 U.S. at 346, possessing an unregistered machine gun, see Staples, 511 U.S. at 616, committing a federal felony with a false identification, see Flores-Figueroa, 556 U.S. 646, or sending a threatening communication. See Elonis v. United States, 575 U.S. 723 (2015).

Third, facts that increase punishment are bona fide elements. "A long line of essentially uniform authority addressing accusations, and stretching from the earliest reported cases after the founding until well into the 20th century, ... establishes that a 'crime' includes every fact that is by law a basis for imposing or increasing punishment." Apprendi, 530 U.S. at 501 (Thomas, J., concurring). And "[n]umerous high courts agreed that this formulation accurately captured the common-law understanding of what facts are elements of a crime." Alleyne, 570 U.S at 109 (Thomas, J., plurality opinion). Apprendi and Alleyne therefore have their

roots in "common-law and early American" conceptions of what an element essentially is. Id. at 111. The presumption of mens rea, with its equally established common law pedigree, should be interpreted in tandem with this historic understanding. Morissette, 342 U.S. at 250-63.

In fact, the Court, while examining the same criminal statute at issue here, observed that some statutory requirements are "sufficiently like an element" to trigger the same presumption of mens rea unless there is evidence that "Congress intended to do away with, or weaken, ordinary and longstanding scienter requirements." Ruan, 597 U.S. at 464. Thus, even if the drug types and quantities were lesser elements as the Ninth Circuit held in Collazo, it would not resolve the question of whether the presumption of mens rea applies.

Finally, the presumption of mens rea does not go away when a statute includes an express mens rea. To the contrary, "the presumption applies with equal or greater force when Congress includes a general scienter provision in the statute itself." Rehaif, 588 U.S. at 232. To hold otherwise would have the effect of extending greater mens rea protections when a statute's literal terms impose strict liability. Instead of adopting such an odd rule, the Court should take a uniform approach, "requir[ing] the Government to prove the defendant's mens rea with respect to each element of a federal offense, unless Congress plainly provides otherwise."

Wooden v. United States, 595 U.S. 360, 142 S. Ct. 1063, 1076 (2022) (Kavanaugh, J., concurring) (citing Rehaif); see also Flores-Figueroa, 556 U.S. at 660 (Alito, J., concurring).

B. The Fact That This Case Was Not Charged Under Section 841(b)(1)(C) Does Not Change This Outcome

Pursuant to USSG § 2D1.1, this case had a base offense level of 12 because it involved less than 4 grams of fentanyl, and Petitioner's resulting guideline range was just 6-12 months. This case was not charged under section 841(b)(1)(C), meaning that Petitioner was not subject to the 20-year mandatory minimum sentence, or life maximum sentence, contained in that subsection when death or serious bodily injury results from the use of the substance. See 21 U.S.C. § 841(b)(1)(C). Despite the fact that Petitioner was not subject to this mandatory-minimum or enhanced maximum sentence from section 841(b)(1), the government still was required to prove mens rea as to drug type and quantity in this case.

The district court applied a 25-level "death resulting" upward departure under USSG § 5K2.1 because the toxicological evidence in this case demonstrated that the fentanyl contained in the pill which Petitioner provided to N.A.R. caused his death. While this sentencing increase derived from a different source than section 841(b)(1), it remained a draconian sentencing enhancement which was based upon

a mens rea which all parties in the case agreed Petitioner never possessed. The government never argued at any point in this case that Petitioner knew that the three pills he gave to N.A.R. contained fentanyl, the substance that killed him. But despite this complete lack of knowledge by Petitioner as to the drug type and quantity he actually distributed, he did not "receive a less serious criminal sanction [given] the facts . . . the defendant believed." Burwell, 690 F.3d at 529 (Kavanaugh, J., dissenting). For the aforementioned reasons, the Court should review this case to decide whether the knowingly mens rea contained in section 841(a)(1) applies to the drug type and quantity named in the indictment not just when the type and quantity result in mandatory-minimum or higher maximum sentences under section 841(b)(1), but when the type and quantity result in a section 5K2.1 "death resulting" upward departure which in this case had a similarly profound sentencing effect.

CONCLUSION

For the above reasons, Petitioner respectfully requests that the Court grant the instant petition to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: September 13, 2024

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