No.

IN THE SUPREME COURT OF THE UNITED STATES

RAFAEL MUNOZ GONZALEZ,
CESAR MUNOZ GONZALEZ,
ABRAHAM ALDANA, AND
MICHAEL ANTHONY TORRES

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Whether the mandatory life imprisonment provision in 21 U.S.C. § 841(b)(1)(A) for defendants with two prior felony drug offenses applies to conspiracy convictions under 21 U.S.C. § 846.

2. Whether this Court should overrule the prior conviction exception to the constitutional rule that any fact that determines a statutory minimum and maximum sentence must be alleged in the indictment and found by the jury, *see Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and, if not overruled, whether the *Almendarez-Torres* exception applies to the *timing* of the alleged prior conviction; alternatively, whether a conviction for conduct alleged as an overt act in a conspiracy charge under 21 U.S.C. §§ 841 and 846 can constitute a *prior* conviction as a matter of statutory construction.

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The Ninth Circuit issued both a published opinion, *United States v. Torres*, 869 F.3d 1089 (9th Cir. 2017), and an unpublished memorandum that can be found at *United States v. Torres*, ___ Fed. Appx. ___, 2017 WL 3888024 (9th Cir. Sep. 6, 2017).

JURISDICTION

The court of appeals filed its published opinion and memorandum on September 6, 2017 and denied rehearing and rehearing *en banc* on December 12, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Title 21 U.S.C. § 841(b)(1)(A) provides: "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment . . . . If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence."

Title 21 U.S.C. § 846 provides: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

The Fifth Amendment states: "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 offence 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."

The Sixth Amendment states: "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 defence."

STATEMENT OF THE CASE

In 2010, a federal grand jury in the Central District of California returned a mutli-count indictment alleging that petitioners were "key figures" in the Puente-13 street gang based in La Puente, California. *Torres*, 869 F.3d at 1092. Count 7 charged a conspiracy to possess 50 grams of pure and 500 grams of a mixture of methamphetamine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846. The count alleged that the conspiracy began "on a date unknown." The listed overt acts started in 1998 and specifically alleged that petitioners Rafael Munoz Gonzalez and Cesar Munoz Gonzalez possessed 81 grams of methamphetamine on January 26, 2000.

Before trial, the government filed an information pursuant to 21 U.S.C. § 851 against each petitioner alleging that they had sustained prior felony drug convictions. With respect to petitioners Rafael Munoz Gonzalez and Cesar Munoz Gonzalez, the information charged that "prior to committing the offense[] alleged" in Count 7, they had been convicted of two felony drug offenses. One of the prior felony drug offenses alleged against them was a 2000 conviction for possession for sale of methamphetamine in violation of California Health & Safety Code Section 11378 based on the January 26, 2000 incident alleged as an overt act in the conspiracy.

At trial, the government presented evidence that petitioners Rafael Munoz Gonzalez and Cesar Munoz Gonzalez were arrested for possessing methamphetamine on January 26, 2000 (the conduct underlying the § 11378 conviction alleged in the § 851 information). The government argued that this offense was part of the conspiracy alleged in Count 7. The jury returned a guilty verdict on Count 7 but did not render any specific findings as to the date of the § 846 conspiracy. Over multiple objections, the district court sentenced petitioners under §§ 841(b)(1)(A) and 851, imposing mandatory terms of life imprisonment on petitioners Rafael Munoz Gonzalez and Cesar Munoz Gonzalez and mandatory terms of 20 years on petitioners Aldana and Torres.[1]

On appeal, petitioners continued to challenge their sentences on several grounds. As relevant here, petitioners contended that the mandatory life imprisonment provision in § 841(b)(1)(A) does not apply to § 846 convictions. The Ninth Circuit rejected the claim, explaining: "Notwithstanding the omission of § 846 from the triggering offenses enumerated in 21 U.S.C. § 841(b)(1)(A), we have held that 'a person who conspires to distribute a controlled substance is subject to the sentence enhancements provided by' 21 U.S.C. § 841(b)(1)(A)."

[1] Petitioner Torres received a total sentence of 300 months because the 20-year minimum was combined with another 5-year minimum sentence, and petitioner Aldana received a total sentence of 324 months.

Torres, 2017 WL 3888024, at *1 (quoting *United States v. O'Brien*, 52 F.3d 277, 278 (9th Cir. 1995)).

Petitioners additionally claimed that the district court erred, as a matter of statutory construction and under the Fifth and Sixth Amendments, *see Alleyne v. United States*, 568 U.S. 6 (2013); *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by determining that they had committed the instant conspiratorial offense *after* sustaining their alleged prior felony drug convictions. The Ninth Circuit also rejected this contention. As a matter of statutory construction, the Ninth Circuit reasoned that an alleged prior conviction can be used to enhance a sentence as long as the conspiracy extended past the date of the alleged prior conviction, and it found that the verdict "necessarily" made that determination in this case. *Torres*, 869 F.3d at 1103. As a constitutional matter, the Ninth Circuit held: "By permitting a court to find 'the fact of a *prior* conviction,' the Supreme Court empowered a court to determine that the conviction was prior to the case before the court." *Id*. at 1104 (citation omitted).

ARGUMENT

This Court should grant this petition because "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, [and] has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). This petition presents two important questions concerning federal sentencing law that have not been but should be settled by this Court, and the decisions of the lower courts on these questions are inconsistent with this Court's precedent. The issues are important because what is at stake are significant mandatory minimum sentences, including mandatory life imprisonment, the most harsh penalty in our criminal justice system short of death.

The first important question is whether the mandatory life imprisonment provision in 21 U.S.C. § 841(b)(1)(A) for a defendant with two prior felony drug offenses applies to conspiracy convictions under 21 U.S.C. § 846. *See Bifulco v. United States*, 447 U.S. 381, 385 (1980) (describing similar issue as "important"). The Ninth Circuit below and other lower courts have incorrectly interpreted the statutes in contravention of their plain language and established principles of statutory construction. The plain language of § 841(b)(1)(A) states that the mandatory life provision applies to convictions under several statutes, but § 846 is not included in that list. Congress used specific language, which differs from the more general language used in the drug statutes' other enhancement provisions, making it clear that the mandatory life provision only applies to the listed statutes and is not triggered by a § 846 conviction. Congress likely excluded § 846 convictions because a mandatory life sentence for an inchoate offense, such as attempt or conspiracy, is inconsistent with the common law, and this Court reached a similar interpretation in *Bifulco*.

Second, the so-called "prior conviction" exception set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) should be overruled or at least clarified in the context of §§ 841 and 846. While the validity of the *Almendarez-Torres* exception has been questioned and should be overruled, this Court should at least clarify that, under the Fifth and Sixth Amendments, a jury must make the determination that a defendant committed the charged conspiracy offense *after* he sustained the alleged prior conviction. The Ninth Circuit's refusal to place such a limitation on the *Almendarez-Torres* exception is inconsistent with this Court's recent decision in *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016). Alternatively, as a matter of statutory construction, this Court should hold that a conviction that is alleged as an overt act in a § 846 conspiracy charge cannot be considered a "prior" conviction for purposes of § 841(b).

I. The Ninth Circuit and other lower courts have incorrectly held that the mandatory life imprisonment provision in 21 U.S.C. § 841(b)(1)(A) applies to conspiracy convictions under 21 U.S.C. § 846 in contravention of the plain language of the statutes and this Court's guiding principles of statutory interpretation.

Under § 846, "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or the conspiracy." 21 U.S.C. § 846. In *Bifulco*, 447 U.S. 381, however, this Court held that the penalties for a § 846 violation are not necessarily identical to the penalties for an underlying § 841 offense. Although Congress amended the statutes after *Bifulco*, the amendment did not address the issue presented, and the difference in the applicable penalties is even more clear in this context.

The Ninth Circuit affirmed mandatory life sentences for petitioners under § 841(b)(1)(A), which provides: "If any person commits a violation of *this subparagraph or of section 849, 859, 860, or 861* of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release . . . ." 21 U.S.C. § 841(b)(1)(A) (emphasis added). By listing several statutes and omitting § 846, the plain language makes clear that this provision does not apply to § 846 convictions.

Importantly, the other statutes listed work the same way that § 846 does. In other words, § 849 (distributing at truck stops and rest areas), § 859 (to minors), § 860 (at schools), and § 861 (employing minors to distribute) depend on the penalties for the underlying offense, typically a § 841 violation. The specific and plain language in § 841(b)(1)(A) governs over the general language in § 846. *See Bloate v. United States*, 559 U.S. 196, 207 (2010); *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991).

Furthermore, the other subparagraphs of § 841(b) contain provisions that enhance sentences for a single qualifying prior conviction but do not contain provisions for two or more prior qualifying convictions. *See* 21 U.S.C. §§ 841(b)(1)(B)(C)(D) and (E). Similarly, the drug importation statute also contains single enhancement provisions but not a provision for two or more prior convictions. *See* 21 U.S.C. § 960(b). These single enhancement provisions are worded: "If any person commits *such a violation* after a prior conviction for a felony drug offense has become final, such person shall be sentenced to . . . ." 21 U.S.C. § 841(b) (emphasis added). If Congress intended the mandatory life provision to apply to statutes other than the ones listed, such as § 846, it would have at least used the more general "such a violation" language rather than listing specific statutes. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States*, 556 U.S. 568, 573 (2009) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

There is a good reason why Congress excluded § 846, which proscribes inchoate offenses including attempts, from the mandatory life provision. An attempt was only a misdemeanor at common law, *see* 2 Wayne R. LaFave, Substantive Criminal Law § 11.2(a), 206 (2d ed. 2003); *see also Tison v. Arizona*, 481 U.S. 137, 159 n.2 (1987) (Brennan, J., dissenting), and Congress likely thought that a mandatory life sentence for a § 846 violation was excessive. *See Bifulco*, 447 U.S. at 399. Even if there were doubt, the rule of lenity requires the statutory scheme to be interpreted in petitioners' favor. *Id*. at 387, 400; *Burrage v. United States*, 134 S. Ct. 881, 891 (2014).

The Ninth Circuit relied on its 1995 decision in *O'Brien*, 52 F.3d 277, and other courts have similarly held that the mandatory life provision applies to § 846 convictions. *See United States v. Walker*, 228 F.3d 1276, 1277-78 (11th Cir. 2000); *United States v. Gaviria*, 116 F.3d 1498, 1534-35 (D.C. Cir. 1997); *United States v. Wessels*, 12 F.3d 746, 752 (8th Cir. 1993). But the Eighth Circuit's opinion in *Wessels*, which stands as the foundation for these decisions, is inapposite, as the defendant was not sentenced under the mandatory life provision but instead under the differently worded 20-year minimum provision for having one prior drug conviction. *Id.* at 748. Similarly, the defendant in *O'Brien* received 20 years, and the Ninth Circuit relied on *Wessels*, which, as explained, is not on point. *O'Brien*, 52 F.3d at 278-79. The D.C. Circuit then simply cited *Wessels* and *O'Brien* in *Gaviria*, 116 F.3d at 1535, and the Eleventh Circuit added *Gaviria* in *Walker*, 228 F.3d at 1277, essentially completing a house of cards.

Finally, these cases were generally decided before *Almendarez-Torres*, *Apprendi*, and *Alleyne*. The § 841 "offense" that was the object of the § 846 conspiracy was the distribution of a certain type and quantity of drugs. *See United States v. Cotton*, 535 U.S. 625, 632 (2002). Prior convictions are not part of the "offense" and are merely sentencing factors under *Almendarez-Torres*. *See* 21 U.S.C. § 851; *Alleyne*, 570 U.S. at 104-12. Thus, when § 846 states that the penalties are the same as for the underlying *offense*, it does not mean that the defendant is subject to the narrowly tailored mandatory life provision based on the sentencing factor of two prior qualifying convictions. This Court should grant this petition because the Ninth Circuit and other lower courts have erroneously decided an important question of federal sentencing law in a way that conflicts with relevant decisions of this Court and the plain language of the governing statutes.

II. The Court should grant this petition to overrule *Almendarez-Torres* or at least clarify that the *Almendarez-Torres* exception does not apply to the *timing* of the alleged prior conviction; alternatively, the Court should clarify that a conviction for conduct alleged as an overt act in a conspiracy charge under 21 U.S.C. §§ 841 and 846 cannot constitute a *prior* conviction as a matter of statutory construction.

A. This Court should overrule or clarify *Almendarez-Torres*

Under § 841(b)(1)(A), "[i]f any person *commits* a violation of this subparagraph . . . *after* two or more *prior* convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release . . . ." 21 U.S.C. § 841(b)(1)(A) (emphases added). In this case, the jury did not determine that petitioners committed the § 846 conspiracy after the convictions alleged in the separate § 851 information became final. Instead, the judge made the findings under § 851 at sentencing.

Under *Apprendi* and *Alleyne*, a defendant has a Fifth and Sixth Amendment right to have any fact that triggers an enhanced maximum sentence or a mandatory minimum sentence to be alleged in the indictment and proven to the jury beyond a reasonable doubt. There is a "limited" exception to this rule, created in *Almendarez-Torres*, which allows a court at the time of sentencing to enhance a defendant's sentence based on the fact of a prior conviction. *See Alleyne*, 570 U.S. at 111 n.1.

On multiple occasions, members of this Court have suggested that

Almendarez-Torres was wrongly decided and should be overruled. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243, 2258-59 (2016) (Thomas, J., concurring); *Rangel-Reyes v. United States*, 126 S. Ct. 2873, 2874-75 (2006) (statements of Stevens and Thomas, JJ., respecting denial of *certiorari*). Consistent with these views, this Court should grant this petition to overrule *Almendarez-Torres*. This case is an excellent vehicle to do so because the severe nature of the mandatory minimum penalty at issue (mandatory life imprisonment) should entitle a defendant to the most robust constitutional protections, whereas *Almendarez-Torres* only involved an increase in the statutory maximum to 20 years.

At the very least, this Court should clarify and limit the applicability of *Almendarez-Torres*. In *Mathis*, this Court recently emphasized that, under *Apprendi* and its progeny, a judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis*, 136 S. Ct. at 2252. Thus, a court can determine the elements of the alleged prior conviction and whether it constitutes a qualifying offense under a categorical approach. Under the Sixth Amendment, however, a judge cannot determine that the defendant committed the instant offense after the alleged prior conviction.

This proposed limitation on *Almendarez-Torres* was violated in this case because the jury did not make a *specific* finding that the alleged prior convictions became final before each petitioner committed the § 846 conspiracy. Without citing any authority, the Ninth Circuit stated that the verdicts demonstrated an *implied* finding that petitioners committed the § 846 conspiracy after their prior convictions. *See Torres*, 869 F.3d at 1103. However, the date range alleged in a § 846 indictment is not an element of the offense, and therefore the jury's general verdict did not establish that petitioners committed the § 846 conspiracy after they sustained their alleged prior convictions. *See, e.g.*, *United States v. Paulette*, 858 F.3d 1055, 1059 (7th Cir. 2017); *United States v. Harrison-Philpot*, 978 F.2d 1520, 1526 (9th Cir. 1992).

Furthermore, the jury never made a finding that each petitioner participated in drug trafficking activity after his prior convictions such that his conspiratorial conduct constituted a separate criminal episode. Whether each petitioner actually participated throughout the alleged long-running conspiracy was heavily disputed. For example, petitioner Rafael Munoz Gonzalez was in prison for most of the decade following his 2000 conviction. In sum, this case is an excellent vehicle for this Court to consider the scope and continued validity of *Almendarez-Torres*. Accordingly, the Court should grant this petition to resolve this important constitutional question.

B. The Ninth Circuit erroneously interpreted the statute

The constitutional question set forth above can also be avoided through statutory construction. *See, e.g.*, *Jones v. United States*, 526 U.S. 227, 239 (1999). As mentioned, § 841(b)(1)(A) provides: "If any person *commits* a violation of this subparagraph . . . *after* two or more *prior* convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release . . . ." 21 U.S.C. § 841(b)(1)(A) (emphases added). This Court should hold that, as a matter of statutory construction, a conviction alleged as an overt act in a § 846 conspiracy cannot be used to enhance a sentence under § 841(b).

This Court has repeatedly looked to the Sentencing Guidelines in interpreting the federal drug statutes. *See Dorsey v. United States*, 567 U.S. 260, 264-67 (2012); *Richardson v. United States*, 526 U.S. 813, 822 (1999). In *Dorsey*, this Court interpreted § 841(b) so as not to "undermine basic Federal Sentencing Guidelines objectives such as uniformity and proportionality in sentencing[,]" and rested its statutory construction of § 841(b) "upon an analysis of the Guidelines-based sentencing system Congress has established [and] how the Guidelines interact with federal statutes setting forth specific terms of imprisonment." *Dorsey*, 567 U.S. at 264-65.

In determining a defendant's criminal history points, the Sentencing Guidelines define the analogous concept of a "prior sentence" as follows: "The term 'prior sentence' means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct *not* part of the instant offense." U.S.S.G. § 4A1.2(a)(1) (emphasis added). The commentary to the Guidelines provides further explanation: "'Prior sentence' means a sentence imposed prior to sentencing on the instant offense, *other than a sentence for conduct that is part of the instant offense*. A sentence imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct *other than conduct that was part of the instant offense*. Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of § 1B1.3 (Relevant Conduct)." U.S.S.G. § 4A1.2 comment. (n.1) (emphasis added) (citation omitted).

Under the § 4A1.2 definition, petitioners' prior offenses alleged as overt acts in the § 846 conspiracy should not have been used as prior conviction enhancements under § 841(b). The definition provided in § 4A1.2 covers the "core" cases where Congress desired the enhancement to apply, and therefore it serves as an appropriate limiting construction of a criminal statute that is potentially void for vagueness. *See Skilling v. United States*, 561 U.S. 358, 405-08 (2010); *see also Johnson v. United States*, 135 S. Ct. 2551 (2015); *United States v. Batchelder*, 442 U.S. 114, 123 (1979). Similarly, the rule of lenity, which is a traditional tool for interpreting unclear criminal statutes and sentencing provisions, *see, e.g.*, *Burrage*, 134 S. Ct. at 891; *Bifulco*, 447 U.S. at 387, 400. supports the more narrow definition of a "prior sentence" set forth in § 4A1.2.

Furthermore, this proposed construction of the statutory scheme does not unreasonably constrain federal prosecutors in their efforts to obtain lengthy sentences for serious drug trafficking crimes. Putting aside that, even without enhancements, the federal drugs statutes carry heavy penalties, this rule allows prosecutors a choice in structuring their charges. If a prosecutor desires to use a prior conviction as an enhancement, he can choose to narrow the scope of the charged conspiracy so it is clear that the defendant committed the conspiracy offense after the prior conviction. A prosecutor who chooses, however, to charge a more wide-ranging conspiracy that includes a prior conviction as part of the charged conduct foregoes the enhancement. This construction of the statutory scheme provides prosecutors with adequate flexibility in making their charging decisions while respecting basic principles of fairness by avoiding double jeopardy or at least double-punishment for the same conduct.

In sum, while this case is an excellent vehicle for this Court to consider the constitutional limitations and validity of the *Almendarez-Torres* exception, it also provides this Court with an opportunity to interpret important provisions of the federal drug statutes, statutes that are charged in thousands of federal cases each year and can result in individual defendants spending decades, and even life, in prison.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of *certiorari*.

Dated: March 12, 2018

Respectfully submitted,

s/Benjamin L. Coleman

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