

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

MICHAEL STEVEN WRIGHT

Petitioner

- vs -

UNITED STATES OF AMERICA

Respondent

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

PETITIONER’S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

&

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petitioner's sentence for possessing with intent to distribute a controlled substance was based on 1.3 kilograms of methamphetamine, even though the parcel he briefly possessed with the intent to distribute to another contained only 0.84 grams of methamphetamine when he possessed it, and even though the government made the unusual concession that his mens rea and agreement with his confederate embraced only an unspecified amount of marijuana, not the methamphetamine someone else packed into the parcel without the petitioner's knowledge or foresight. These facts, and the government's startling concession, make this case an ideal vehicle for this Court to answer definitively these questions:

1. a. Does mens rea attach to the drug type and quantity thresholds specified in 21 U.S.C. §841(b), or are those thresholds strict liability elements of the offenses §§841(a) and (b) define?

b. Does *Apprendi v. New Jersey*, 530 U.S. 466 (2000), apply to knowledge of §841's drug type and quantity thresholds?

2. Does the relevant conduct guideline, USSG §1B1.3(a)(1), impose strict liability for a confederate's conduct that falls outside the scope of the criminal activity the defendant agreed to jointly undertake?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Steven Wright respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's unpublished panel decision is included in the Appendix at A2 and, albeit unreported, nonetheless can be found at 692 Fed.Appx. 873, 2017 WL 2813927. The Ninth Circuit's unreasoned order denying rehearing and rehearing en banc is included in the Appendix at A1. The district court's oral guideline calculations are included in the Appendix at A3. And the district court's written order granting bail and a stay of mittimus pending appeal is included in the Appendix at A17.

JURISDICTION

The Ninth Circuit filed its memorandum decision on June 28, 2017 (App. at A2), and denied the petitioner's timely motion for rehearing and rehearing en banc on March 13, 2018 (App. at A1). This petition is timely under this Court's Rule 13.3, having been filed within 90 days of the Ninth Circuit's order denying rehearing and rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINE PROVISIONS INVOLVED

U.S. Const. amend. V:

No person shall ... be deprived of life, liberty, or property, without due process of law[.]

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to ... trial, by ... jury[.]

21 U.S.C. §841:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

....

(b) Penalties

Except as provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(C) In the case of a controlled substance in schedule I or II, ... such person shall be sentenced to a term of imprisonment of not more than 20 years[.]

(D) In the case of less than 50 kilograms of marihuana, ... such person shall ... be sentenced to a term of imprisonment of not more than 5 years[.]

USSG §1B1.3:

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense[.]

USSG §1B1.3, comment. (n. 3):

(B) Scope.—... [T]he scope of the “jointly undertaken criminal activity” is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant’s accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant’s agreement). In doing so, the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others. Accordingly, the accountability of the defendant for the acts of others

is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).

CASE STATEMENT

An unusual government concession makes this otherwise typical drug case an ideal vehicle for addressing the questions presented. In 2014, government agents interdicted a parcel containing 1.3 kilograms of methamphetamine, replaced all but a nominal amount of the contraband with a non-contraband substance, and effected a controlled delivery of the parcel, now containing less than a gram (0.84 grams, to be precise) of methamphetamine. The petitioner picked up the parcel and was arrested while taking it to the confederate who had asked him to do so. The government, however, has conceded throughout this matter that the petitioner's agreement with his confederate was to courier a parcel of marijuana and that he did not know the parcel contained methamphetamine. So unusual was that concession, the district court engaged in a colloquy during the change-of-plea hearing *with the government* to make sure that the government indeed conceded that the petitioner's mens rea embraced only marijuana and did not attach to the methamphetamine the parcel, unwittingly to him, in fact contained. The district court thereafter accepted the petitioner's guilty plea on the petitioner's admissions that the parcel contained

methamphetamine, but that his mens rea embraced only knowingly possessing, with the intent to distribute, marijuana.

At sentencing, the government contended that the petitioner's lack of knowledge about the methamphetamine made no difference. The government accordingly urged the district court to calculate the petitioner's guideline range on the basis of the full, 1.3 kilograms of methamphetamine the parcel had originally contained before it was interdicted and before the petitioner ever possessed it. The petitioner argued that *Apprendi* limited the court to the admissions he made when pleading guilty. The petitioner accordingly argued that *Apprendi* precluded using methamphetamine and required using marijuana to calculate his guideline range. The district court agreed with the government and sentenced the petitioner to two years' imprisonment. Yet, again noting the government's unusual mens rea concession, the district court not only stayed mittimus, but emphasized that if the petitioner prevailed on appeal, then the court would impose a significantly lower imprisonment sentence, if not probation, when resentencing him on remand (App. at A21–A22).

On appeal, the petitioner augmented his *Apprendi* claim with a pure Guidelines claim. His Guidelines claim was that the relevant conduct guideline's jointly-undertaken-criminal-activity provision—section §1B1.3(a)(1)(B)—required using a drug-type of marijuana to calculate his guideline range, because a

confederate acted outside the scope of his agreement to courier a parcel containing marijuana when that confederate packed the parcel with methamphetamine. The Ninth Circuit side-stepped the presented guideline issue, holding that the relevant conduct guideline’s *principal* liability provision—section 1B1.3(a)(1)(A)—applied to the petitioner, because the petitioner “personally possessed with intent to distribute the package containing methamphetamine, and therefore the district court’s use of methamphetamine to set [his] guideline range merely held him responsible for his own conduct” (App. at A3). In his rehearing motion, the petitioner pointed out that the parcel he “personally possessed” only contained 0.84 grams of methamphetamine, not the full 1.3 kilograms attributed to him at sentencing, albeit to no avail. On the *Apprendi* issue, the Ninth Circuit relied on circuit precedent, drawing a line between drug type and quantity and *knowledge of* drug type quantity, to hold that the latter mens rea facts need not be admitted or proven to a jury beyond a reasonable doubt (App. at A3). As noted, the Ninth Circuit denied rehearing and rehearing en banc on both issues in an unreasoned written order (App. at A1).

REASONS FOR GRANTING THE WRIT

- 1. The circuits have made a mess of applying *Apprendi*’s bright-line rule to §841.**

The rights to due process and jury trial “require[] that each element of a crime be proved to a jury beyond a reasonable doubt” or, in the context of a guilty

plea, admitted by the defendant. *Hurst v. Florida*, 136 S.Ct. 616, 621 (2016) (citing *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (citing *United States v. Gaudin*, 515 U.S. 506 (1995), and *In re Winship*, 397 U.S. 358, 364 (1970))). In *Apprendi*, this Court “held that a fact is by definition an element of the offense and must be submitted to the jury (or admitted by the defendant) if it increases the punishment above what is otherwise legally prescribed.” *Alleyne*, 570 U.S. at 107 (parsing *Apprendi*, 530 U.S. at 430, n. 10). “*Apprendi*’s definition of ‘elements,’” moreover, “necessarily includes not only facts that increase the ceiling, but also those that increase the floor,” because “[b]oth kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment.” *Alleyne*, 570 U.S. at 108 (citing *Apprendi*, 530 U.S. at 483, n. 10), and *Harris v. United States*, 536 U.S. 545, 579 (2002) (Thomas, J., dissenting)). A fact that “aggravate[s] the punishment,” this Court reaffirmed in *Alleyne*, “forms an essential ingredient of the offense” and that “reality demonstrates that the core crime and the fact triggering [an aggravated punishment] together constitute a new, aggravated crime, each element of which must be submitted to the jury.” *Alleyne*, 570 U.S. at 113–114.

At common law, “the requirement of some mens rea for a crime is firmly embedded,” so much so that “[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of [our] criminal jurisprudence.” *Staples v.*

United States, 511 U.S. 600, 605 (1994) (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978)). Thus, “offenses that require no mens rea generally are disfavored” and “some indication of congressional intent, express or implied, is required to dispense with mens rea as an element of a crime.” *Staples*, 511 U.S. at 606 (citing *Liparota v. United States*, 471 U.S. 419, 426 (1985), *Gypsum*, 438 U.S. at 438, and *Morissette v. United States*, 342 U.S. 246, 263 (1952)). Because mens rea “is an element of a crime,” *Apprendi* requires an admission or jury finding as to mens rea, both as to a “core” crime, like that defined by §§841(a) and (b)’s least culpable crime, as well as each of the greater, aggravated crimes that §§841(a) and (b) define. There simply isn’t room in the foregoing, well-settled principles for the notion that a lesser, “core” crime’s mens rea dispenses with the need for mens rea as to an aggravated, greater offense.

But when it comes to §841, the circuits have made a mess of what should be rote in order to avoid requiring that the government prove or that the defendant admit knowledge as to drug type and quantity. As the government charged it here, section 841(a) prohibits knowingly possessing “a controlled substance” with the intent to distribute that substance. Subsection (a), however, does not specify any particular punishment. A separate subsection, section 841(b), is where the statute lists various “penalties” for purposes of §841(a), all triggered by various drug type and quantity thresholds, while some are aggravated further because of other things

(recidivism, resulting death). As it pertains here, for example, subsection 841(b)(1)(C) sets a 20-year imprisonment maximum (but not any minimum) when the controlled substance is an unspecified amount of a schedule I or II substance, but, when the substance is less than 50 kilograms of marijuana (a schedule I controlled substance), subsection 841(b)(1)(D) sets the maximum imprisonment at just five years (again with no minimum). Other subsections tie other mandatory minimums and maximums to various drug type and quantity thresholds.

Everyone agrees, albeit some with more convoluted semantics than others, that §841(b)'s threshold drug types and quantities trigger the need for jury findings or defendant admissions as to type and quantity, lest the defendant's constitutional rights to jury trial and due process be violated. The First, Fourth, Fifth, Sixth, and Ninth Circuits hold that §841(b)'s drug type and quantity thresholds are not “formal elements” necessary for a “generic” conviction under §841(a), but nonetheless must be charged and either admitted, or found by a jury beyond a reasonable doubt, as “functional equivalents of formal elements” of an §841(a) drug offense. *United States v. Delgado-Marrero*, 744 F.3d 167, 191 (1st Cir. 2014) (following *United States v. Collins*, 415 F.3d 304, 314 (4th Cir. 2005), and *United States v. Toliver*, 351 F.3d 423, 430 (9th Cir. 2003), overruled on other grounds by *Blakely v. Washington*, 542 U.S. 296 (2004)); *United States v. Daniels*, 723 F.3d 562, 573, modified in part on rehearing 729 F.3d 496 (5th Cir. 2013); *United States*

v. Zidell, 323 F.3d 412, 430 (6th Cir. 2003). The Seventh Circuit seems to be of this ilk too, as it continues to speak of drug type and quantity as “sentencing factor[s],” until they are used to trigger a higher mandatory minimum or maximum sentence, in which case they “must be treated as if” they were “element[s] of the offense to be determined by a jury beyond a reasonable doubt.” *United States v. Sanders*, 149 Fed. Appx. 527, 528–529 (7th Cir. Oct. 5, 2005) (collecting Seventh Circuit cases). Other circuits—the Eighth, Tenth, Eleventh, and D.C. Circuits—are much more straightforward about it, accepting the simple fact that drug type and quantity are §841 offense elements, pure and simple. *United States v. Thomas*, 274 F.3d 655, 273 (2d Cir. 2001) (“[a]fter *Apprendi*, drug type and quantity are elements of the offense under 21 U.S.C. §841 that must be charged in the indictment and submitted to the jury for its finding beyond a reasonable doubt”); *United States v. Sheppard*, 219 F.3d 766, 768–769 (8th Cir. 2000); *United States v. Cernobyl*, 255 F.3d 1215, 1218 (10th Cir. 2001); *United States v. Curbelo*, 726 F.3d 1260, 1269 (11th Cir. 2013); *United States v. Gibson*, 353 F.3d 21, 29 (D.C. Cir. 2003). While the Third Circuit doesn’t seem all that clear on its rationale, it nonetheless holds that *Apprendi* applies to drug type and quantity thresholds in §841 prosecutions. *United States v. Phillips*, 349 F.3d 138, 141 (3d Cir. 2003) (“[i]t is clear, however, that while, after *Apprendi*, drug type and quantity remain sentencing issues, both the burden of proof and the fact-finding have changed”

(citing *United States v. Vazquez*, 271 F.3d 93 (3rd Cir. 2001))), vacated on other grounds for reconsideration in light of *United States v. Booker*, 543 U.S. 220 (2005).

The circuits, however, refuse to attach any mens rea to the element of drug type and quantity, be it for the least culpable or any of the greater offenses §§841(a) and (b) define. *United States v. Collazo-Aponte*, 281 F.3d 320, 326 (1st Cir. 2002); *United States v. King*, 345 F.3d 149, 151–153 (2d Cir. 2003); *United States v. Barbosa*, 271 F.3d 438, 458 (3d Cir. 2001); *United States v. Brower*, 336 F.3d 274, 276–277 (4th Cir. 2003); *United States v. Gamez-Gonzalez*, 319 F.3d 695, 700 (5th Cir. 2003); *United States v. Villarce*, 323 F.3d 435, 439 (6th Cir. 2003); *United States v. Carrera*, 259 F.3d 818, 830 (7th Cir. 2001) (§846); *United States v. Sheppard*, 219 F.3d 766, 768 n. 2 (8th Cir. 2000); *United States v. Carranza*, 289 F.3d 634, 644 (9th Cir. 2002); *United States v. Briseno*, 163 Fed.Appx. 658, 665–667, 2006 WL 1222448 at **7 (10th Cir. Jan. 18, 2006); *United States v. Sanders*, 668 F.3d 1298, 1309–1311 (11th Cir. 2012); *United States v. Branham*, 515 F.3d 1268, 1276 (D.C. Cir. 2008). Some circuits reason that by using the word “involve,” subsection 841(b) signals strict liability as to drug type and quantity (even though the statute doesn’t consistently use the word in §841(b)’s subprovisions); these circuits thus conclude that the only thing the government must prove as to mens rea is that the defendant knew she possessed

and intended to distribute some controlled substance, rather than the specific substance and quantity charged. See *Branham*, 515 F.3d at 1276. Others rely on §§841(a) and (b)’s diptych structure, segregating a free-standing subsection (a) “core” offense that has a mens rea element from subsection (b)’s “penalties,” which do not, even though subsection (a), left standing alone, carries no punishment and is not, therefore, a complete definition of a crime at all. See *King*, 345 F.3d at 152–153; but see *Alleyne*, 570 U.S. at 108 (explaining a crime consists of both facts *and* the punishment that attaches to those facts to make them culpable ones).

The lower courts also rely on §§841(a)’s and (b)’s language and structure to distinguish the line of mens rea precedent flowing from *United States v. X-Citement Video*, 513 U.S. 64 (1994). See *King*, 345 F.3d at 153. But that rationale is untenable. That subsection (a) broadly prohibits “knowingly or intentionally” manufacturing, distributing, or dispensing—or possessing with the intent to do any of those three things—“a controlled substance,” while subsection (b) dictates how the defendant “shall be sentenced ... [i]n the case of a violation of subsection (a) of this section involving” various drug type and quantity thresholds, does not suffice to distinguish *X-Citement Video*. Not only is the word “involve” not used consistently to set off §841(b)’s greater offenses from whatever “core” offense these courts perceive §841(a) defining. But, too, the child pornography

statute at issue in *X-Citement Video*, 18 U.S.C. §2252, is linguistically and structurally much the same as the drug statute at issue here and is not so readily distinguishable.

Section 2252(a), in the version quoted in *X-Citement Video* (which isn't all that different from its wording today), provided: "(a) Any person who—(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—(A) the producing of such visual depictions involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct; ... shall be punished as provided in subsection (b) of this section." *X-Citement Video*, 513 U.S. at 68 (this Court's analysis also covered subsection (a)(2), but for simplicity only (a)(1) is discussed here). The statute prohibits knowingly transporting or shipping a visual depiction, then separately identifies the circumstances (depiction of a minor doing something sexual) that make the visual depiction contraband. This Court readily agreed that the "most natural grammatical" reading of the statute's language would limit the word "knowingly" to modifying only the verbs that immediately follow it (transporting, shipping), rather than the noun (depiction) or its attendant circumstances (minority, sex) that are grammatically attenuated from the required mens rea. *X-Citement Video*, 513 U.S. at 68. This Court nonetheless rejected that natural reading, not only because it produced some absurd results that ended up

criminalizing being involved with child pornography unwittingly, but because it ran against the presumption against imposing strict criminal liability as to any of a crime's elements. *X-Citement Video*, 513 U.S. at 68–71.

The structure and language of §§841(a) and (b) are cut from the same cloth. Subsection 841(a) prohibits knowingly possessing with the intent to distribute “a controlled substance,” then subsection (b) separately identifies the particular circumstances (the substance's type and quantity, among other things) that makes that conduct punishable. Section 2252, like some subprovisions of subsection 841(b), uses the verb “involve” to signal what elements make the conduct punishable, so *X-Citement Video* demonstrates that the verb “involve” does not carry the talismanic significance the lower courts have given it in the §841 context. And the presumption in favor of carrying down scienter and against construing a criminal statute to impose strict liability are just as strong and persuasive in both contexts. As the present matter attests, there is something fundamentally wrong with holding a defendant strictly liable for delivering methamphetamine when, on the government's own concession, he steadfastly thought he was delivering only marijuana. Being unwittingly duped by a confederate should be no more punishable under §841 than it is under §2252.

A simple hypothetical helps drive home the similarity of the *X-Citement Video* statute and the statute at issue here. Imagine a statute that prohibited the

knowing possession of a mailed parcel in subsection (a). Subsection (b) of that statute then laid out various punishments based on what was in the parcel. Child pornography would get you twenty years. Methamphetamine, ten. Marijuana, one. No court, especially in light of the legal history recited in *Alleyne* and *X-Citement Video*, would hold that knowing parcel possession would suffice to prove up a free-standing crime and that knowledge of the parcel's content wasn't necessary to secure conviction. And that remains so even though mailing a parcel is "controlled" by various federal laws and regulations and isn't something that is per se legal no matter what's in it. This hypothetical statute is no different than the statute at issue in *X-Citement Video*, which broadly prohibited transporting and shipping a visual depiction in one provision and left to another provision the task of sorting out what made doing so culpable. Nor is it any different that the statute at issue here, which prohibits possessing a controlled substance in one provision, while leaving it to another provision to specify what makes possessing that substance criminally culpable (after all, not every instance of possessing a controlled substance is per se illegal). The drug statute is not an outlier and should not be subject to a construction that imposes strict liability as to the specific facts that trigger criminal culpability for engaging in the generically described conduct.

All that said, the petitioner acknowledges that this Court appears to have signed off on the circuits' construction of §841 as requiring only generic

knowledge that the defendant “is dealing with some unspecified substance listed on the federal drug schedules.” *McFadden v. United States*, 135 S.Ct. 2298, 2304 (2015). This Court’s remarks in that regard, however, were made tangentially, as this Court went on to hold that, when it comes to analogue substances, knowledge of what makes the substance a controlled substance analogue was required. *McFadden*, 135 S.Ct. at 2305. A more in depth look at the issue, however, especially in the context the present case provides, would demonstrate that the circuits have it wrong and that *McFadden*’s casual remarks about the mens rea §841 requires should be revisited.

With all due respect to the courts, including this one, that have passed on the issue, the most “natural reading” of §841—especially against the historical backdrop this Court described in *Alleyne* and *X-Citement Video*—does not impose strict liability as to §841(b)’s drug type and quantity thresholds. Subsection (a)(1), as applied here (to make it simple), makes it “unlawful for any person knowingly or intentionally ... to ... possess with intent to ... distribute ... a controlled substance” Subsection (b)(1)(C) then provides that “any person who violates subsection (a) of this section shall be sentenced as follows: ... [i]n the case of a controlled substance in schedule I or II, ... such person shall be sentenced to a term of imprisonment of not more than 20 years,” while subsection (b)(1)(D) provides that, “[i]n the case of less than 50 kilograms of marihuana, ... such person shall ...

be sentenced to a term of imprisonment of not more than 5 years[.]” The question isn’t so much whether the knowing mens rea set forth in subsection (a) carries *down* to facts listed in subsection (b). The question is whether the particular substance “in the case” carries *up* to provide specificity to subsection (a)’s generic use of the phrase “a controlled substance.”

The question shifts because it is only by plugging in—it is only by replacing subsection (a)’s generic “controlled substance” with—*some* drug type and quantity specified in subsection (b) that the so-called “core” facts generically described in subsection (a) fully define a crime. *Alleyne*, 570 U.S. at 108–109. There is, that is, no way to apply subsection (a) apart from subsection (b). Or, said a bit differently, subsection (a) simply is a not self-executing or free-standing, but depends on being supplemented with part of subsection (b) to fully define a crime.

The petitioner thus submits that the most natural reading of the statute, as it ought to have been applied to him, would have required the government to charge (and him to admit) one of two things on the facts this case presents. Either he knowingly possessed with intent to distribute a schedule II substance, to wit, methamphetamine (a class C felony that the government conceded he was innocent of committing). Or he knowingly possessed with intent to distribute less than 50 kilograms of marijuana (a class D felony that, on the government’s concessions

and the petitioner's admissions here, could only have been charged as an attempt or conspiracy under 21 U.S.C. §846).

A final word is perhaps due to dispel a natural objection to the petitioner's claim: if he's right, if §§841(a) and (b) require proof of or admissions to knowledge of drug type and quantity, won't the statute be rendered unworkable, as defendants avoid its reach simply by asserting they lacked such knowledge? Defendants already routinely make such claims, of course, but they are rarely found credible, turning, as they invariably tend to do, solely on the defendant's self-serving and uncorroborated assertions. And until the present matter, it was unheard of for the government to actually *concede* the veracity of such an assertion. As the vast majority of the "blind mule" cases on the books attest, such a defense rarely succeeds. See *United States v. Potenciano*, 2018 WL 1406658 (9th Cir. Mar. 21, 2018); *United States v. Corrales-Felix*, 668 Fed.Appx. 231 (9th Cir. Aug. 8, 2016); *United States v. Rubio-Garcia*, 636 Fed.Appx. 717 (9th Cir. Feb. 25, 2016); *United States v. Torres*, 794 F.3d 1053 (9th Cir. 2015); the list of cases in which defendants were convicted despite claiming to be blind mules could go on and on. Construing §§841(a) and (b) to require knowledge of drug type and quantity will not open a flood gate to wholesale acquittals in drug cases.

This Court should grant certiorari in this matter to take a closer look at whether §841(a)'s stated mens rea applies to the particular drug type and quantity

involved in the case at hand, and whether *Apprendi* accordingly requires a jury finding or defendant admission as to knowledge of the drug type and quantity thresholds that define *all* of §§841(a) and (b)'s offenses.

2. The Ninth Circuit's afactual application of the relevant conduct guideline, so as to effectively impose strict liability on the petitioner, should not be allowed to stand.

The government convicted the petitioner of possessing with the intent to distribute a controlled substance; not *attempted* possession, nor *conspiracy* to possess. His conviction rests on an interdicted parcel—which the petitioner briefly possessed with an intent to pass it along to a confederate before being arrested en route—from which agents had replaced all but 0.84 grams of the methamphetamine with a non-contraband pseudo-substance. At sentencing, the district court held the petitioner accountable for possessing the 1.3 kilograms of methamphetamine the parcel originally obtained, even though the petitioner never intended to possess, much less distribute, methamphetamine, and even though the parcel only contained 0.84 grams of methamphetamine by the time the petitioner came into possession of it. Instead, as he admitted, as the government conceded, and as the district court accepted and found, the petitioner intended to be and agreed to be involved only with an unspecified amount of marijuana, a much less culpable drug under the guidelines.¹

¹ On the basis of 1.3 kilograms of methamphetamine, the petitioner's total offense level (after significant mitigating reductions, such as safety valve,

The Ninth Circuit affirmed the district court’s guideline calculations on the ground that the relevant conduct guideline captured all 1.3 kilograms of methamphetamine. The Ninth Circuit reasoned that the petitioner “personally possessed with intent to distribute the package containing methamphetamine, and therefore the district court’s use of methamphetamine to set [his] guideline range merely held him responsible for his own conduct” (App. at A3). That holding cannot be squared with the facts of this matter or the plain language of the relevant conduct guideline.

The part of the relevant conduct guideline that captures the defendant’s “own conduct” allows a sentencing court to look at “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant[.]” USSG §1B1.3(a)(1)(A). The act that the defendant committed consisted of picking up and transporting a parcel that contained only 0.84 grams, not 1.3 kilograms, of methamphetamine. The petitioner, moreover, was (as the government conceded) nothing more than a duped courier. He thus did

mitigating role, and his utter lack of any prior arrests or convictions for any crime at all, among other things) was 22 and his range was 41-51 months’ imprisonment. Additional mitigating circumstances led the district court to depart down from that range to 24 months, stay mittimus, and grant bail for the pendency of direct review on appeal. Using an unspecified amount of marijuana would result in a range of 0–6 months’ imprisonment (as would, for that matter, using just the 0.84 gram of methamphetamine actually in the parcel when the petitioner possessed it), which the district court remarked would provide a starting point from which it would likely impose far less imprisonment, if not probation (App. at A21).

not aide, abet, counsel, command, induce, procure, or willfully cause the parcel to be packed with 1.3 kilograms of methamphetamine in lieu of the unspecified amount of marijuana with which he had agreed to be involved. The Ninth Circuit's affirmance rests on an afactual assertion that the record flatly and irrefutably disproves.

Nor does the portion of the relevant conduct guideline that captures the "real offense" conduct of the petitioner's confederates save the district court's guideline calculations. That part of the relevant conduct guideline allows the district court, "in the case of jointly undertaken criminal activity," to rely on "all acts and omissions of others that were," among other things, "within the scope of the jointly undertaken criminal activity[.]" USSG §1B1.3(a)(1)(B)(i). An application note elaborates that this "scope" requirement limits the defendant's accountability for the conduct of his confederates to what was within the scope of the criminal activity he agreed to join them in undertaking: "the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B)." USSG §1B1.3, comment. (n. 3(B)). The government concedes that the petitioner agreed to act as a courier of a parcel containing marijuana. Another's act of

packing that parcel with methamphetamine was not within the scope of that agreement. So subsection (a)(1)(B) does not pick up the 1.3 kilograms of methamphetamine either.

The petitioner acknowledges that the Ninth Circuit's and the district court's misapplication of the guidelines may seem too pedestrian to garner this Court's attention. But the injustice of applying the guidelines to impose strict liability on a petitioner whom *the government concedes* harbored no intent to distribute methamphetamine and whom *the government concedes* harbored only an intention to be involved with marijuana is a grave one that this Court should grant certiorari to remedy. This Court has said that a single erroneously-served day of prison is prejudicial and an intolerable injustice. *Glover v. United States*, 531 U.S. 198, 203 (2001) (erroneously served jail time has constitutional significance); *United States v. Johnson*, 529 U.S. 53, 60 (2000) ("equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term"); *Robinson v. California*, 370 U.S. 660, 667 (1962) ("[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having the common cold"). The petitioner here is looking at 730 days of prison that, absent the plainly erroneous application of the guidelines, the district court has said would not be imposed on remand if he prevails here (App. at A21).

3. This case provides an ideal vehicle for addressing the questions presented.

The circuits’ misconstruction of 21 U.S.C. §841, so as to impose strict liability as to drug type and quantity, is solidly entrenched in every circuit; thus, only this Court can correct how §841 should be construed. That the circuits’ misconstruction of §841 violates *Apprendi* and, too, involves one of the most, if not *the* most, frequently charged federal crimes demonstrates the importance of getting the construction of §841 and its *Apprendi* consequences correct. And the government’s unusual concession in this matter—that the petitioner’s mens rea was limited to marijuana, a controlled substance carrying far less severe sentencing consequences under both §841 and the relevant conduct guideline than 1.3 kilograms of methamphetamine—makes this case an ideal, and uniquely clean, vehicle for clarifying how §841(a)’s mens rea element and §841(b)’s drug type and quantity threshold elements interact to define a continuum of greater and lesser offenses, for clarifying *Apprendi*’s application to the crimes §§841(a) and (b) define, and for clarifying that the relevant conduct guideline, broad as its “real conduct” reach may be, does not reach so far as to impose strict liability on a defendant for conduct he did not agree to jointly undertake.

CONCLUSION

This Court should grant Wright’s petition to clarify that the relevant conduct guideline does not impose strict liability for a drug type or quantity that was

different from the drug and amount with which the defendant agreed to be involved. This Court should also grant Wright's petition to clarify that *Apprendi* applies to the mens rea of an offense as much as it applies to an offense's actus rea and that, under 21 U.S.C. §841, mens rea attaches to drug type and quantity.

DATED: Honolulu, Hawaii, June 6, 2018.

A handwritten signature in blue ink, reading "P.C. Wolff, Jr.", is written over a horizontal line.

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